IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MARVIN PROCHASKA,

Plaintiff,

v.

MENARD, INC.,

Defendant.

ORDER

10-cv-686-bbc

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Defendant Menard, Inc. has filed a motion for leave to file an interlocutory appeal of the order denying its motion for summary judgment on plaintiff Marvin Prochaska's claim of age discrimination. In the alternative, defendant asks to stay the case while it seeks leave from the Court of Appeals for the Seventh Circuit. Both motions will be denied.

Under 28 U.S.C. § 1292(b), a district court may certify an interlocutory appeal of an order if it "involves a controlling question of law as to which there is substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." Neither of these factors is present in this case.

To begin with, an interlocutory appeal rarely will be appropriate in the context of a discrimination case in which the sole question relates to the defendant's intent, which is

necessarily a fact-intensive inquiry. Defendant attempts to avoid this problem by focusing on this court's articulation of plaintiff's prima facie case under the "indirect method" of proof. However, defendant is wrong to characterize that as a "controlling question of law." The ultimate question is simply whether a reasonable jury could find that defendant discriminated against plaintiff because of his age; the indirect method is simply one way to do that. Simple v. Walgreen Co., 511 F.3d 668, 670-671 (7th Cir. 2007) ("Despite the minutiae of the various proof schemes . . . the straightforward question to be answered in discrimination cases is whether the plaintiff has successfully demonstrated that she was the victim of . . . discrimination on the part of the employer.") (internal quotations omitted). Thus, even if defendant is correct that the indirect method required plaintiff to show that similarly situated, younger employees received more favorable treatment, this would not mean necessarily that defendant would be entitled to summary judgment in light of plaintiff's evidence of pretext and the alleged discriminatory comments made by John Menard. Dewitt v. Proctor Hospital, 517 F.3d 944, 950-51 (7th Cir. 2008) (Posner, J. concurring) (plaintiff in discrimination case may prove claim with any combination of evidence sufficient to permit reasonable jury to find discrimination, "even if the proof does not fit into a set of pigeonholes"). In any event, I used the formulation of the prima facie case that the Supreme Court used in Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000), and O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 313

(1996), so it is difficult for defendant to argue that it was error to apply the standard that I did.

Finally, I note that trial is now less than two months away and will be resolved long before any appeal filed by defendant. Under these circumstances, defendant cannot argue successfully that "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

ORDER

IT IS ORDERED that defendant Menard, Inc's motion to certify an interlocutory appeal, or, in the alternative to stay proceedings pending appeal, dkt. #199, is DENIED.

Entered this 30th day of December, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge