UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-against-

UNITED HEALTH PROGRAMS OF AMERICA, INC. and COST CONTAINMENT GROUP, INC.,

Defendants.

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ELIZABETH ONTANEDA, FRANCINE PENNISI, and FAITH PABON,

Plaintiffs-Intervenors,

-against-

UNITED HEALTH PROGRAMS OF AMERICA, INC. and COST CONTAINMENT GROUP, INC.,

Defendants.

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MEMORANDUM & ORDER
14-CV-3673 (KAM)(JO)

MATSUMOTO, United States District Judge:

The Equal Employment Opportunity Commission ("EEOC") brings this action on behalf of a group of former employees ("plaintiffs") of United Health Programs of America, Inc. ("UHP") and Cost Containment Group, Inc. ("CCG") (collectively, "defendants"), who claim that they were subjected to, *inter alia*, religious discrimination, reverse religious discrimination, and retaliation in their workplace in violation of Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Supervisors in defendants' workplace purportedly imposed certain practices and beliefs, referred to as "Onionhead" and "Harnessing Happiness," on plaintiffs.[1] On September 30, 2016, the court, *inter alia*, denied defendants' motion for summary judgment on plaintiffs' reverse religious discrimination claims and hostile work environment claims premised on reverse religious discrimination, and concluded that Onionhead/Harnessing Happiness qualifies as a religion for the purposes of Title VII. *EEOC v. United Health Programs of Am., Inc.*, --- F. Supp. 3d ----, 2016 WL 6477050, at *7-15 (E.D.N.Y. Sept. 30, 2016) ("*Onionhead I*"). On December 8, 2016, defendants moved for certification of two questions on interlocutory appeal pursuant to 28 U.S.C. § 1292(b): "(1) What factors should be considered in determining whether a set of nontraditional activities, beliefs, or practices constitutes a religion in a Title VII reverse religious discrimination case?; and (2) If the two factors identified in *Patrick v. LeFevre*, 745 F.2d 153 (2d Cir. 1984) are the only factors to consider, what is the burden on a plaintiff to establish that an employer's beliefs are sincerely held?" (ECF No. 100, Memorandum of Law in Support of Defendants' Motion to Certify Order for Interlocutory Appeal Under 28 U.S.C.

[1] The events underlying this action involve both Onionhead and Harnessing Happiness. The court refers to the programs collectively as Onionhead or Onionhead/Harnessing Happiness, except where the distinction is relevant.

§ 1292(b) ("Defs. Mot.") at 2.) For the reasons set forth below, the motion is DENIED.

Discussion

I. Background

The court presumes familiarity with the factual and legal background of this matter as recited in its summary judgment Memorandum and Order, and provides background only as necessary to resolve defendants' current motion. *See generally Onionhead I*, 2016 WL 6477050.

In their cross motions for summary judgment, the parties disputed whether Onionhead/Harnessing Happiness qualified as a religion for the purposes of Title VII. *Onionhead I*, 2016 WL 6477050, at *7. In concluding that, for summary judgment, Onionhead/Harnessing Happiness qualified as a religion for the purposes of Title VII, the court considered existing authority regarding the determination of whether a non-traditional belief system qualified as a religion in the context of a reverse discrimination Title VII claim, and also examined a voluminous record of documents and deposition testimony. *Id.* at *7-15.

Noting that neither the Supreme Court nor the Second Circuit has addressed how to define religion for the purposes of a Title VII action, the court relied on the principles espoused by the Second Circuit in the context of the First Amendment, and applied the Second Circuit's expansive concept of religious

belief. *Id.* at *7-8, 10. This court also noted the EEOC's expansive definition of religion and religious observance and practices, based on two Supreme Court decisions. *Id.* at *7. This court rejected defendants' contention that a narrower test should be applied and noted that "the Second Circuit . . . has rejected the 'narrow definition of religious belief promulgated by the Third Circuit.'" *Id.* at *10 (quoting *Patrick v. LeFevre*, 745 F.2d 153, 156 (2d Cir. 1984)). This court looked to the First Amendment's Free Exercise Clause jurisprudence for guidance in assessing non-traditional religions, religious views, and practices, and identified the following two factors: "(1) whether the beliefs are sincerely held and (2) 'whether they are, in [the believer's] own scheme of things, religious.'" *Id.* at *8 (quoting *Patrick*, 745 F.2d at 157) (other citations omitted) (alteration in original).

This court also questioned whether a plaintiff in a reverse religious discrimination case under Title VII must establish that an employer's beliefs, as opposed to a plaintiff in a Free Exercise Clause case, are sincerely held. In Free Exercise Clause First Amendment cases, it is the claimant's sincerely held belief that is at issue and thus the claimant has the burden to establish the sincerity of his or her own religious belief. Even so, the Second Circuit has acknowledged that the "exceedingly amorphous" analysis requiring delving "into the claimant's most veiled motivations" must separate the issue of sincerity from the

factfinder's perception of the religious nature of the claimant's beliefs. *Id.* at *9. "This need to dissever is most acute where unorthodox beliefs are implicated." *Id.* at *9 (quoting *Patrick*, 745 F.2d at 157). Consequently, this court noted that in the *sui generis* circumstances of this case, this court had doubts whether the plaintiffs must prove that an employer's beliefs are "sincerely held" in order to qualify as religious for purposes of a reverse religious discrimination claim under Title VII. This court noted that placing a burden on a plaintiff to prove that an employer's belief, as opposed to his or her own, is "sincerely held" may "erect an unnecessarily high barrier to relief for plaintiffs seeking to establish reverse religious discrimination claims when the employer's purported religion is nontraditional and the employer denies that its beliefs and practices are religious." *Id.* at *9 n.13, 13.[2]

Applying the two-part test and principles from *Patrick*, the court concluded that Onionhead/Harnessing Happiness qualifies as a religion for the purposes of Title VII because: (1) to the

[2] In contrast to a Free Exercise Clause First Amendment Claim, the plaintiff in an Establishment Clause claim need not prove the state actor's religious belief or the sincerity of that belief. *See Onionhead I*, 2016 WL 6477050, at *9 ("That an individual or entity purportedly holding the beliefs rejects the characterization of the beliefs as religious is not dispositive."); *Warner v. Orange Cty. Dep't of Prob.*, 115 F.3d 1068, 1075 (2d Cir. 1996) (Second Circuit found that an Alcoholics Anonymous program that a convict was required to attend as a condition of his probation was religious in nature without considering whether prison officials considered it religious); *see also U.S. v. Allen*, 760 F.2d 447, 450 (2d Cir. 1985) ("[W]e must acknowledge that 'religion' can have a different meaning depending on which religion clause of the First Amendment is at issue.").

extent that establishing an employer's beliefs are sincerely held is a requirement for purposes of a reverse discrimination claim under Title VII, a reasonable jury could find that defendants' actions in bringing the Onionhead/Harnessing Happiness beliefs, practices and materials into the workplace demonstrates the sincerity of defendants' religious beliefs; and (2) the beliefs were religious as a matter of law. *Id.* at *12-15.

The court next considers defendants' motion for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on the questions of: "(1) What factors should be considered in determining whether a set of nontraditional activities, beliefs, or practices constitutes a religion in a Title VII reverse religious discrimination case?; and (2) If the two factors identified in *Patrick v. LeFevre*, 745 F.2d 153 (2d Cir. 1984) are the only factors to consider, what is the burden on a plaintiff to establish that an employer's beliefs are sincerely held?" (ECF No. 100, Defs. Mot. at 2.)

II. Standard for Certification of an Interlocutory Appeal

A district court may certify an interlocutory appeal if three conditions are satisfied: (1) where the order appealed from "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). All three

requirements set forth in § 1292(b) must be met for the court to grant leave to appeal. *In re Coudert Bros. LLP Law Firm Adversary Proceedings*, 447 B.R. 706, 711 (S.D.N.Y. 2011); *see also Casey v. Long Island R.R. Co.*, 406 F.3d 142, 146 (2d. Cir 2005) (requiring that "all of the substantive § 1292(b) criteria" be met). District judges have discretion to deny certification of an order for interlocutory appeal even when a party has demonstrated that the three criteria of 28 U.S.C. § 1292(b) are met. *See In re Facebook, Inc., IPO Secs. and Deriv. Litig.*, 986 F. Supp. 2d 524, 530 (S.D.N.Y. 2014).

The Second Circuit has made clear that the use of § 1292(b) is "a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996). The Second Circuit has "repeatedly cautioned . . . use of this certification procedure should be strictly limited because 'only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990)) (additional quotation marks omitted). Certification of interlocutory appeal is "strongly disfavored in federal practice," and § 1292(b) is therefore "strictly construed." *See In re Facebook*, 986 F. Supp. 2d at 530.

III. Application

The first prong of § 1292(b) requires that the question presented on appeal be a "'pure' question of law that the reviewing court 'could decide quickly and cleanly without having to study the record.'" *In re Worldcom, Inc.*, No. M-47 HB, 2003 WL 21498904, at *10 (S.D.N.Y. June 30, 2003) (citing *Ahrenholz v. Bd. of Trs. of Univ. of Illinois*, 219 F.3d 674, 676-77 (7th Cir. 2000)). The first prong also requires that the question be controlling, in that "reversal of the district court's order would terminate the action," *Klinghoffer*, 921 F.2d at 24, or, "reversal of the district court's opinion, even though not resulting in dismissal, could significantly affect the conduct of the action," *In re Facebook*, 986 F. Supp. 2d at 536.

Here, defendants' issues for appeal do not satisfy the first prong because they do not present pure questions of controlling law, but would instead require the appellate court to engage in an extensive study of the record. Even if the Second Circuit identified a different test to determine whether Onionhead/Harnessing Happiness is a religion, or determined that the plaintiffs must prove that an employer's religious beliefs are sincerely held, the issue of whether Onionhead/Harnessing Happiness would qualify as a religion would still turn on a review of the teachings, beliefs, and practices of the Onionhead/Harnessing Happiness system. Moreover, reversal of the

district court's order would not terminate this action. A final determination would still require an analysis of the factors prescribed by the Circuit Court to the factual record before the court and as developed at trial. Although a review of the summary judgment decision "would certainly affect the conduct of the action, it would not result in dismissal of the action . . . [and] would create the type of piecemeal litigation that weighs against § 1292(b) certification." *Segedie v. The Hain Celestial Grp., Inc.*, No. 14-cv-5029, 2015 WL 5916002, at *3 (S.D.N.Y. Oct. 7, 2015). For the forgoing reasons, grant of a certificate of appealability is denied based on defendants' failure to satisfy the first requirement of § 1292(b). *See Santiago v. Pinello*, 647 F. Supp. 2d 239, 243 (E.D.N.Y. 2009) (denying certificate of appeal where resolution of the proposed issue would still "require the Circuit Court to study the record extensively").

Even assuming, *arguendo*, that defendants had satisfied the first prong, it is doubtful that they have satisfied the second prong of § 1292(b), that there is a "substantial ground for a difference of opinion." The second prong requires that there be a "genuine doubt as to the correct applicable legal standard that was relied on in the order." *In re Worldcom, Inc.*, 2003 WL 21498904, at *10. The second prong "is met when '(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second

Circuit.'" *Capitol Records, LLC v. Vimeo, LLC*, 972 F. Supp. 2d 537, 551 (S.D.N.Y. 2013) (quoting *In re Enron Corp.*, No. 06-cv-7828, 2007 WL 2780394, at *1 (S.D.N.Y. Sept. 24, 2007)). However, "the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *In re Flor*, 79 F.3d at 284.

Defendants argue that the second prong is satisfied because there is no controlling Supreme Court or Second Circuit precedent on point and because the issues are "plainly difficult." (*See* ECF No. 100, Defs. Mot. at 9-10.) Defendants have not demonstrated that there is conflicting authority or genuine doubt, much less any doubt, that the correct legal standard was applied. *See Segedie*, 2015 WL 5916002, at *4 (where defendant only cited to a single federal case with a diverging opinion, it was not sufficient to find *substantial doubt* in the court's analysis). The court recognized in its Memorandum and Order that neither the Supreme Court nor the Second Circuit has addressed how to define religion for purposes of a Title VII reverse discrimination action, and that there is uncertainty over whether plaintiffs bear a burden to prove that the defendants' beliefs were "sincerely held"; but this "standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *In re Flor*, 79 F.3d at 284.

The third prong of § 1292(b) requires that "immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" Certification under § 1292(b) "is reserved for those cases where an immediate appeal may avoid protracted litigation." *Koehler*, 101 F.3d at 865-66 (citing *Milbert v. Bison Labs.*, 260 F.2d 431, 433-35 (3d Cir. 1958)). "Great care in making a § 1292(b) certification" is necessary where it is not clear that the appellate court's "disposition of [the] issues will materially advance the ultimate determination of this case." *Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Distr. Corp.*, 964 F.2d 85, 88-89 (2d Cir. 1992). Courts place "particular weight" on this third factor. *See Transp. Workers Union of Am. v. N.Y.C. Transit Auth.*, 358 F. Supp. 2d 347, 350 (S.D.N.Y. 2005).

Defendants have not convinced the court that an interlocutory appeal will materially advance the ultimate termination of the litigation. As discussed above, even if a novel test is ultimately prescribed by the Second Circuit, the court will still be required to resort to the record to determine whether Onionhead/Harnessing Happiness is a religion. Permitting this matter to proceed to trial will provide a more developed record for the appellate court to review. *See Mills v. Everest Reinsurance Co.*, 771 F. Supp. 2d 270, 275 (S.D.N.Y. 2009) ("Courts have frowned upon allowing an interlocutory appeal of a denial of

summary judgment. Instead, courts prefer to let the trial resolve the outstanding issues.").

An interlocutory appeal will not materially advance the ultimate termination of this litigation and the issues raised do not involve controlling questions of law. Therefore, that the defendants' questions to be certified by the court are questions of first impression is insufficient to warrant a § 1292(b) appeal. *In re Facebook*, 986 F. Supp. 2d at 544 (a substantial ground for difference of opinion, without the other two factors, is insufficient to warrant certification of a § 1292(b) appeal).

Conclusion

Based on the conclusions set forth above, defendants' motion for interlocutory appeal is denied. Accordingly, the parties are expected to comply with the court's Pretrial Order. (ECF No. 97, Pretrial Scheduling Order, as amended on February 3, 2017.)

SO ORDERED.

Date: April 14, 2017
Brooklyn, N.Y.

/s/
Kiyo A. Matsumoto
United States District Judge