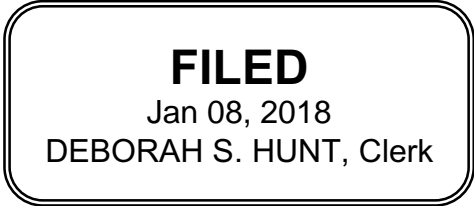


No. 17-0312

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



In re: MARIETTA MEMORIAL HOSPITAL;)
 MARIETTA HEALTH CARE, INC.; SELBY)
 GENERAL HOSPITAL,)
)
 Petitioners.)

ORDER

Before: ROGERS, SUTTON, and BUSH, Circuit Judges.

Defendants Marietta Memorial Hospital, Marietta Health Care, Inc., and Selby General Hospital (“Marietta”) petition for permission to appeal the district court’s certification of a class action in this collective action under the Fair Labor Standards Act. Plaintiffs oppose the petition.

We may, in our discretion, permit an appeal from an order granting class certification. Fed. R. Civ. P. 23(f). This “unfettered” discretion is akin to the discretion of the Supreme Court in considering whether to grant *certiorari*; thus, we may consider any relevant factor we find persuasive. *See* Fed. R. Civ. P. 23, advisory committee’s note (1998 amendment); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (per curiam). Typically, however, we consider (1) whether the petitioner is likely to succeed on appeal under a deferential abuse-of-discretion standard; (2) whether the cost of continuing the litigation for either the plaintiff or the defendant presents such a barrier that subsequent review is hampered; (3) whether the case presents a novel or unsettled question of law; and (4) the procedural posture of the case before the district court. *In re Delta Air Lines*, 310 F.3d at 960. None of these factors supports immediate review in this case.

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Provided that the district court applied the correct “legal framework” for evaluating a class-action claim, we review the grant of certification for an abuse of discretion. *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 946 (6th Cir. 2011). The district court here set out the applicable law governing certification and the applicable law governing the cause of action below before it found factual evidence in the record supporting certification. Critically, at the certification stage the district court considers only whether there are common questions subject to common proof, not whether the plaintiffs will ultimately prevail on the merits. *See In re Delta AirLines*, 310 F.3d at 960. Accordingly, we cannot say that Marietta is likely to succeed on the merits of this appeal under an abuse-of-discretion standard.

The novelty of a claim “weigh[s] more heavily in favor of review when the question is of relevance not only in the litigation before the court, but also to class litigation in general.” *In re Delta Air Lines*, 310 F.3d at 960. In support of this factor, however, Marietta has not identified any novel legal question raised by the petition.

The “death-knell” factor recognizes that “the costs of continuing litigation for either a plaintiff or a defendant may present such a barrier that later review is hampered.” *In re Delta Air Lines*, 310 F.3d at 960. To satisfy this factor, the defendant should provide insight into the potential expenses and liabilities. *Id.* “If the class certification decision essentially tells the tale of the litigation, there is strong support for interlocutory review.” *Id.* Marietta’s mere “general assertion[s]” that certification is dispositive of the litigation do not meet this threshold. *Id.*

Finally, if a district court might reexamine its certification decision, interlocutory review of the decision is less warranted. *Id.* Marietta did not address this factor in its petition. But the district court recognized that this was the first of several certification motions. There is a pending motion to amend the class definition before the district court, which will necessitate its reexamining its certification decision. Both parties have filed dispositive motions. Thus, the

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procedural posture of the case also weighs against interlocutory review.

The petition is **DENIED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Re: Case No. 17-312, *In re: Marietta Memorial Hospital, et al*
Originating Case No. : 2:15-cv-02956

Dear Counsel:

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Patricia J. Elder, Senior Case Manager
for Leon Korotko, Case Manager
Direct Dial No. 513-564-7014

cc: Mr. Richard W. Nagel

Enclosure

No mandate to issue