IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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PAMELA HERRINGTON,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

WATERSTONE MORTGAGE CORPORATION,

Defendant.

ORDER

11-cv-779-bbc

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In 2011, plaintiff Pamela Herrington filed this proposed class action under the Fair Labor Standards Act and state law, alleging that defendant Waterstone Mortgage Corporation failed to pay its loan officers for overtime work. In an order dated March 16, 2012, dkt. #57, I concluded that plaintiff's claims would have to be resolved through arbitration under an agreement between the parties. However, in accordance with In re D.R. Horton, Inc., 357 NLRB No. 184 (2012), available at 2012 WL 36274, I also concluded that the National Labor Relations Act gave plaintiff the right to join other employees in her case, despite a provision in the arbitration agreement to the contrary. I closed the case administratively to allow the parties to proceed with arbitration.

In an order dated January 28, 2014, dkt. #92, I denied defendant's motion under Fed. R. Civ. P. 60 to vacate the March 16, 2012 order. Now defendant has filed a motion

under 28 U.S.C. § 1292(b) in which it asks the court to reopen the case in order to certify for immediate appeal the March 16, 2012 order, or, in the alternative, the January 28, 2014 order. Dkt. #93.

A motion brought under § 1292(b) "must be filed in the district court within a reasonable time after the order sought to be appealed." Ahrenholz v. Board of Trustees of University of Illinois, 219 F.3d 674, 675 (7th Cir. 2000). In this case, nearly two years have passed since I entered the order defendant is challenging. Although it is true that the order denying defendant's motion for reconsideration is more recent, "the time limits in section 1292(b) may not be circumvented by the facile device of asking for reconsideration of the order sought to be appealed under that section." Weir v. Propst, 915 F.2d 283, 286 (7th Cir. 1990).

Defendant is correct that the meaning of "reasonable time" is sensitive to context and that "the controlling character of the question decided in the order may not emerge until subsequent developments in the litigation." Id. at 286. However, defendant cites no other cases in which a court approved a motion under § 1292(b) after two years. Further, there have not been any relevant "developments" in the case since the March 2012 order. The only developments defendant cites are related to *other* cases that have been decided since the March 2012 order and defendant cites no authority for the proposition that nonbinding case law from other circuits may justify a delay in seeking an appeal under § 1292(b).

Finally, I note that defendant continues to misstate the scope of the issue it is seeking to appeal. Defendant frames the issue as whether "this case [should] include a single

plaintiff or class of over 800." Dft.'s Br., dkt. #95, at 1. However, this court has neither certified a class in this case nor held that plaintiff was entitled to seek class certification. Rather, I concluded that, under the National Labor Relations Act, plaintiff must be allowed to join other employees to her case. Even the arbitrator has not yet decided whether plaintiff will be permitted to proceed as a class. Defendant does itself no favors by mischaracterizing the relevant issue in an attempt to make a more persuasive argument.

ORDER

IT IS ORDERED that defendant Waterstone Mortgage Corporation's motion to reopen the case and certify it for an interlocutory appeal under 28 U.S.C. § 1292(b), dkt. #95, is DENIED.

Entered this 21st day of February, 2014.

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