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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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José Parra, et al.,)

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Plaintiffs,)

No. CIV 02-0591-PHX-RCB

14

vs.)

O R D E R

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Bashas', Inc.,)

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Defendant.)

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18 **I. Introduction**

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The original complaint in this action was filed by Plaintiffs

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José Parra and Gonzalo Estrada on April 4, 2002. Complt. (doc. 1).

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The Court granted Plaintiffs' motion to amend their complaint, and

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Plaintiffs filed their First Amended Complaint (doc. 116) on March

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11, 2004, adding Aurelia Martinez as a named plaintiff. In their

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pleadings, Plaintiffs alleged that Defendant Bashas', Inc.

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("Bashas'") committed civil rights violations under 42 U.S.C. §

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1981 for intentional discrimination and under Title VII of the

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Civil Rights Act of 1964, 42 U.S.C. §2000(e) *et seq*, for both

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disparate impact and disparate treatment. In September 2004,

1 Plaintiffs filed their motion for appointment of class counsel
2 (doc. 152) and, under seal, filed their motion for class
3 certification in this matter (doc. 159). These motions were fully
4 briefed on November 23, 2004, and the issue of class certification
5 was argued orally on January 24, 2005.

6 On August 31, 2005, the Court issued an order ruling on these
7 motions. Order (doc. 224). In its order, the Court granted in
8 part and denied in part Plaintiffs' motion for class certification.
9 Id. at 52. Specifically, the Court certified a class defined as
10 follows:

11 All Hispanic workers employed by defendant in an
12 hourly position at any Food City retail store
13 since April 4, 1998, who have been or may be
subject to the challenged disparate working
conditions.

14 Id. However, the Court denied Plaintiffs' motion, without
15 prejudice, as to the issues of the challenged pay policies and
16 practices. Id. The Court ruled in such a manner because it
17 concluded that Plaintiffs failed to satisfy the "commonality"
18 requirement of Rule 23(a)(2)¹ in relation to these issues. Id. at
19 39.

20 Plaintiffs present evidence that Defendant's
21 policies governing compensation are similar across
22 all stores due to the fact that all of Defendant's
stores use company-established pay schedules to

23 ¹Rule 23(a) of the Federal Rules of Civil Procedure lists the
24 prerequisites to a class action as:

25 (1) the class is so numerous that joinder of all
26 members is impractical, (2) there are questions of
27 law or fact common to the class, (3) the claims or
28 defenses of the representative parties are typical
of the claims or defenses of the class, and (4) the
representative parties will fairly and adequately
protect the interests of the class.

1 determine rates of pay. Mot. (doc. 159) at 4.
2 Defendant concedes that such pay schedules are
3 used, and that past pay schedules established for
4 Food City stores contained lower pay ranges than
5 those utilized at Bashas' and A.J.'s stores. Resp.
6 (doc. 190) at 11; Exbt. 7 (doc. 190) at ¶10.
7 However, both parties concede that over the past
8 several years the contested pay scales have merged
9 and, for the most part, are now identical. Mot.
10 (doc. 159) at 7; Resp. (doc. 190) at 14-15.
11 Consequently, some class members may now receive
12 pay that is equal to that of their counterparts in
13 Defendant's other stores, while other class
14 members may not. Thus, although Defendant's system
15 for compensating hourly employees is similar
16 across all stores, the Court is not satisfied that
17 the manner in which the system affects the class
18 raises issues that are common to all class
19 members.

20 Id.

21 In response to the Court's order, Plaintiffs filed a motion
22 entitled "Plaintiffs' Supplemental Motion to Redefine and Limit
23 Requested Class and to Reconsider August 31, 2005 Order." Mot. to
24 Reconsider (doc. 225).² Believing that the characterization of
25 this motion as both a "supplemental motion" and a "motion to
26 reconsider" would cause confusion as to whether Defendant could
27 respond, the Court issued an order permitting such a response.
28 Order (doc. 229). Accordingly, Defendant filed its response on
October 5, 2005. Resp. (doc. 230). Thereafter, Plaintiffs filed a
motion requesting leave to file a reply in this matter, and
attached the proposed reply to the motion. Motion for Leave to
File (doc. 233).³

² In its motion for reconsideration, Plaintiffs requested oral
argument on this matter. Mot. to Reconsider (doc. 225). Finding
oral argument unnecessary, the Court shall deny this request.

³ Defendant did not file an objection to Plaintiffs' motion for
leave to file a reply. Therefore, the Court shall grant Plaintiffs'
motion for leave to file their reply and has considered the reply in

1 This Court, having carefully considered the arguments
2 presented by the parties, now rules on these matters.

3 **II. Motion to Reconsider**

4 The decision to grant or deny a motion for reconsideration is
5 left to the sound discretion of the trial court. See School Dist.
6 No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th
7 Cir. 1993). Such motions are disfavored and are only appropriate
8 if a court "(1) is presented with newly discovered evidence; (2)
9 committed clear error or the initial decision was manifestly
10 unjust; or (3) if there is an intervening change in controlling
11 law." Id. A motion for reconsideration is not the place to make new
12 arguments not raised in the original briefs. All Hawaii Tours v.
13 Polynesian Cultural Ctr., 116 F.R.D. 645, 650 (D. Haw. 1987), rev'd
14 on other grounds, 855 F.2d 860 (9th Cir. 1988). Nor is it the time
15 to ask the court to rethink what it has already thought. Above the
16 Belt, Inc. v. Mel Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D.
17 Va. 1983).

18 Here, Plaintiffs do not raise any newly discovered evidence in
19 their motion. In their request for reconsideration, Plaintiffs ask
20 the Court to "certify a more limited class, covering *only* those
21 employees who were actually paid a rate on the disputed pay scales,
22 which was lower than that for comparable Bashas'/A.J.'s Fine Foods
23 workers[.]" Mot. to Reconsider (doc. 225) at 2. Specifically,
24 Plaintiffs ask that the Court certify a class defined as:

25 All Hispanic workers employed by defendant in an
26 hourly position at any Food City retail store
27 since April 4, 1998, who were subject to

28 _____
reaching its decision in this order.

1 defendant's policy of using lower pay schedules
2 for Food City workers than for workers in
3 comparable positions in Bashas' and A.J.'s Fine
4 Food stores. The class excludes any Hispanic Food
5 City employee who was, at all times during his or
6 her employment, paid a rate that was the same as
7 the rate for the equivalent position in Bashas'
8 and A.J.'s Fine Food stores.

9 Id. Plaintiffs do not raise any new evidence in relation to this
10 proposed change but merely argue that it is a clarification that
11 will resolve the Court's prior concerns about the proposed class
12 meeting the Rule 23(a)(2) requirement of "commonality." Reply
13 (doc. 233) at 1. However, in support of this change, Plaintiffs
14 put forth the same assertions that they posed in their initial
15 motion for class certification. Mot. for Reconsideration (doc.
16 225) at 4-16. A motion for reconsideration that merely repeats
17 arguments previously raised is appropriately denied. Taylor v.
18 Knapp, 871 F.2d 803, 805 (9th Cir. 1988).

19 Second, this Court did not commit clear error when it refused
20 to grant Plaintiffs' motion for class certification on the issues
21 of the challenged pay policies and practices. To prove that the
22 Court committed clear error, the movant must demonstrate that the
23 Court's action falls clearly outside the bounds of its authority.
24 McDowell v. Calderdon, 197 F.3d 1253, 1256 (9th Cir. 1999). If the
25 propriety of the Court's judgment is a debatable question, there is
26 no clear error and the motion to reconsider is properly denied.

27 Id. Here, Plaintiffs have made no arguments demonstrating that the
28 Court's order falls outside the bounds of its authority.

Finally, Plaintiffs have not indicated that there has been an
intervening change in controlling law. Therefore, the third basis
for a motion for reconsideration is not met. Consequently,

1 Plaintiffs' motion for reconsideration shall be denied.

2 **III. Motion to Redefine**

3 Plaintiffs also base their motion on Rule 23(c)(1)(C) of the
4 Federal Rules of Civil Procedure. Rule 23(c)(1)(C) provides that
5 "[a]n order under Rule 23(c)(1) may be altered or amended before
6 final judgment." This rule "provides district courts with broad
7 discretion to determine whether a class should be certified, and to
8 revisit that certification throughout the legal proceedings before
9 the court." Armstrong v. Davis, 275 F.3d 849, 871 n.28 (9th Cir.
10 2001).

11 Pursuant to this discretion, Plaintiffs ask the Court to
12 certify the more limited class, covering only those employees who
13 were actually paid a rate on the disputed pay scales. Mot. to
14 Reconsider (doc. 225) at 2.

15 As plaintiffs understand the [Court's prior]
16 ruling, the Court concluded that the class, as
17 proposed, was too broad in that it encompassed
18 Hispanic employees who had been subject to lower
19 pay scales as well as some who, in later years,
20 were paid at the same rate as their counterparts
at Bashas' and A.J.'s Fine Foods when rates for
particular jobs were equalized...This narrower
class definition is expressly tailored to address
the concerns raised by this Court and satisfies
the requirements of Rule 23(a) and 23(b).

21 Id. at 1. Plaintiffs assert that the fact that Defendant
22 eventually merged the contested pay scales "does not deprive
23 victims of their right to seek redress for earlier violations nor
24 moot the issues." Id., citing Gonzales v. Police Dept., City of
25 San Jose, Cal., 901 F.2d 758, 762 (9th Cir. 1990) ("That minority
26 employees were 'promoted just before trial...does not constitute a
27 defense to plaintiffs' charges, nor does it moot the issues...").
28 Plaintiffs argue that evidence demonstrates that substantial

1 differences remained in the 2001 pay scale, indicating that 2,200
2 Hispanic Food City employees held jobs paid based upon the lower
3 pay scale. Id. at 5. In addition, Plaintiffs note that, while a
4 number of pay steps were equalized in 2002 and 2003, more than 700
5 Hispanic workers were still paid based upon lower rates than their
6 Bashas' counterparts in 2003.⁴ Id.

7 In contrast, Defendant asserts that these same arguments were
8 previously raised by Plaintiffs in their original motion for class
9 certification. Resp. (doc. 230) 11-13.

10 The evidence in this case has not changed since
11 the Court's August 31, 2005 Order. The factual
12 information offered by Plaintiffs is not new, it
13 is simply repackaged.

13 Id. at 13. Moreover, Defendant argues that Plaintiffs'
14 "redefinition" of the class is no different from the original
15 definition proposed. Id. at 8. Defendant notes that, although the
16 newly proposed definition explicitly limits itself to those that
17 have suffered a loss, parties who have not suffered an economic
18 loss would not have been entitled to relief under the original
19 definition either. Id. at 8-9. Thus, Defendant maintains that
20 Plaintiffs' motion is merely an effort to rehash law and facts that
21 have already been considered by the Court, and asserts that the
22 motion should be denied. Id. at 14. The Court agrees.

23 The Court sees no real difference between Plaintiffs' newly
24 proposed class definition and that proposed in Plaintiffs' original
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27 ⁴ Plaintiffs note that because discovery was cut off in April
28 2004, they do not have the pay scales for 2004 and 2005 and are thus
unable to determine whether the pay scales are now identical. Mot. to
Reconsider (doc. 225) at 5 n.5.

1 motion for class certification. Consequently, the motion currently
2 before the Court is a motion to reconsider matters that the Court
3 has already reviewed and ruled upon. For the reasons explained
4 above, such a motion must be denied.

5 Therefore,

6 IT IS ORDERED that Plaintiffs' motion for leave to file reply
7 brief (doc. 233) is GRANTED.

8 IT IS FURTHER ORDERED that Plaintiffs' Supplemental Motion to
9 Redefine and Limit Requested Class and to Reconsider August 31,
10 2005 Order (doc. 225) is DENIED.

11 DATED this 29th day of March, 2006.


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Robert C. Broomfield
Senior United States District Judge

17 Copies to counsel of record

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