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## EMPLOYMENT LAW LETTER

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### CLASS ACTIONS

## Food City employees win certification for pay scale claim

by Dinita L. James

*In our August 2011 issue, we reported on the U.S. Supreme Court's decision in *Wal-Mart Stores v. Dukes*, a landmark case spelling out the ground rules for employees who seek to file class action discrimination claims against their employer. Bashas' Inc., one of Arizona's largest employers (14th, according to the Arizona Republic's 2013 tally, with 8,533 full-time equivalent workers), has been fighting certification of a class action for more than a decade. On May 31, 2013, a federal court in Phoenix granted class action status for some of the claims against the company. The case is a good reminder that certain types of claims still carry class action risks, even after the *Wal-Mart* decision.*

### **National origin bias alleged**

Bashas' Inc. operates three grocery store chains in Arizona, each with different names and brand identities: A.J.'s Fine Foods, Bashas', and Food City. The case was filed in 2002 by Food City employees who claimed that because they and their coworkers are predominantly Hispanic, they are paid less and required to work in worse conditions than employees at Bashas' and A.J.'s Fine Foods, who are predominantly Caucasian.

It took three years for the Arizona federal court to decide whether the Food City employees could pursue a class action, but in 2005, the court said the working conditions claim could be pursued on a class basis, but the pay scale claim couldn't. By then, Bashas' had merged the pay scales, and they were identical.

The case was appealed to the U.S. 9th Circuit Court of Appeals (whose rulings apply to Arizona employers). In 2008, the 9th Circuit said the lower court was wrong to look only at the current pay scales and sent the case back to Arizona. The lower court was directed to consider whether the claim that the old Food City pay scales

discriminated against Hispanic employees before 2000 was suitable for class action litigation.

The case was in what the court describes as a "state of legal limbo" for five years while Bashas' filed for and emerged from bankruptcy and the Arizona court awaited the Supreme Court's ruling in the *Wal-Mart* case.

### **Turnabout on fair pay**

In light of the *Wal-Mart* decision, the Food City employees made some changes to the class action they were seeking. They dropped any claim that individual hiring managers at Food City discriminated against them on the basis of where they were placed on the pay scales when they were hired or moved to a new job. Instead, the employees staked their claim solely on the fact that before 2000, Bashas' had adopted a lower wage scale for the predominantly Hispanic Food City employees doing the same work as their white counterparts at Bashas' and A.J.'s stores.

The Arizona federal court's latest ruling states that the pay scale claims can proceed as a class action. The court's decision hinged on three significant concessions that Bashas' made much earlier in the case:

- (1) Food City stores have a higher percentage of Hispanic employees compared to Bashas' or A.J.'s stores.
- (2) The pay scales at Bashas' and A.J.'s were higher than those at Food City from 1998 to 2000.
- (3) Hispanic employees' hourly rates were lower than white employees' wages in similar jobs.

Those three concessions provided the "glue" to hold the claims of the individual employees together in a way that was lacking in the *Wal-Mart* case, the Arizona court ruled. Because examination of all the Food City employees' claims together will produce a common answer to

the crucial question of why they were disfavored, they should be able to pursue their claims as a class, the court held.

### ***Reversal of fortune***

The Food City employees also claimed they were subjected to working conditions that were less safe and less hygienic than the conditions at A.J.'s and Bashas'. Remember, the Arizona federal court determined back in 2005 that those claims could proceed as a class action. That decision was not disturbed on appeal, so the claim has been designated for class treatment for many years.

The Arizona federal court's latest word on the working conditions claim, however, is that it no longer meets the *Wal-Mart* test. A key flaw in the workers' claims about their job conditions was the insufficiency of their anecdotal evidence, according to the court.

In the *Wal-Mart* case, the female employees had accumulated 120 sworn statements from other female workers claiming discriminatory experiences, which amounted to about one for every 12,500 class members they were trying to represent. The U.S. Supreme Court found that relatively small number of anecdotes couldn't demonstrate that the entire company operated under a general policy of discrimination.

The Food City employees had a similarly small set of sworn statements. In 2004, when the employees' testimony was submitted, Food City had 58 stores. The employees seeking a class action submitted only 11 sworn statements that described reportedly substandard working conditions at nine of the 58 stores, representing only 15.5 percent of the stores. As of 2013, four of those nine stores were closed.

By contrast, Bashas' submitted more than 80 sworn statements from Food City employees, many of them Hispanic, from at least 33 different stores, challenging the claim that there was any difference in the cleanliness and safety of their workplaces compared to Bashas' and A.J.'s. The Arizona court determined that there wasn't enough common evidence for the working conditions claim to go forward as a class action.

### ***Bottom line***

While the *Wal-Mart* decision was welcomed by employers across the country, the *Bashas'* case serves as a good reminder that a risk of class action claims still remains. Winning class action status for their pay scale claims doesn't guarantee the Hispanic Food City employees an ultimate victory, but it means they can continue to pursue their claims together. Likewise, Bashas' ultimately may succeed in proving that it didn't discriminate on the basis of national origin, but any victory will come at the steep price of legal expenses, bad publicity, and distraction from everyday business affairs due to many years of class action litigation.

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