Recent developments in gender-discrimination class actions

Gender inequity is still rampant, but plaintiffs are making encouraging progress as demonstrated in these early 2020 cases

By Bill Jhaveri-Weeks

The first half of 2020 has seen accomplishments and setbacks for attorneys representing plaintiffs in gender discrimination class actions. This article touches on two high-profile pay equity decisions (*Oracle and US Women's Soccer*), two successful pregnancy discrimination settlements (*Walmart and Raleys*), and two other noteworthy decisions (*Microsoft and Goldman Sachs*) from recent months. Extreme gender disparities persist in various industries, but these cases show progress being made and possibilities for where gender class litigation is heading.

Pay equity efforts – Mixed success

Oracle

A San Mateo Superior Court judge recently certified a class of 4,100 female Oracle employees in an equal pay case. (See *Jewett, et al. v. Oracle America Inc.*, 17CIV02669 (San Mateo Super. Ct., Swope, J.) [class certification granted April 20, 2020].) Under the California Equal Pay Act, "[a]n employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as composite of skill, effort, and responsibility, and performed under similar working conditions," unless the employer establishes certain specified defenses. (Lab. Code, § 1197.5.) Unlike in a disparate treatment discrimination case, an equal pay plaintiff need not prove intent to pay less based on gender.

The case came in the wake of an administrative enforcement proceeding against Oracle by the Office of Federal Contract Compliance ("OFCCP"), which audited Oracle and found significant pay disparities between male and female employees. In *Jewett*, the plaintiffs offered evidence that the pay discrepancy partly resulted from the fact that when Oracle acquired another company, it based the new employees' pay on their previous pay, perpetuating an existing gender disparity.

The *Jewett* class is defined as "all women employed by Oracle in California in its Product Development, Information Technology, and Support job functions, excluding campus hires," from June 16, 2013 forward. The central issue on class certification was whether common questions predominated in light of the class covering approximately 200 different job codes.

The judge concluded that it was up to the jury to decide whether the positions are substantially similar for purposes of finding liability. In part, the judge reached this answer because centralized decisionmakers at Oracle had systematically organized its workers into groups that shared the same basic skills, knowledge, and abilities, and similar levels of responsibility and impact.

In response to Oracle's argument that it would have individualized defenses with respect to why certain class members were paid less than male comparators, the Court was persuaded that plaintiffs' expert statistical evidence would allow class-wide findings. Plaintiffs' labor economist expert offered statistical evidence that women working in the same job codes as men received less base pay, fewer bonuses, and less stock. The judge pointed out that defendants do not have a due process right to litigate their affirmative defenses against every class member. The case is one to watch.

US Women's National Soccer Team

A pay equity case brought by members of the U.S. Women's National Soccer team (USWNT) attracted popular attention beyond normal legal circles. Advocates for pay equity and gender equality were cheering on these American sports heroes in asserting their legal rights to be paid equally with the U.S. Men's National Team. Those advocates were disappointed in May when a district judge in L.A. granted summary judgment against the players.

The case was filed as a proposed class and collective action in the Central District of California in March 2019. The Defendant is the U.S. Soccer Federation (USSF). The players asserted two claims: a federal Equal Pay Act (EPA) claim (29 U.S.C. § 206), and a Title VII gender discrimination claim. The EPA prohibits employers from "paying wages to employees [of one sex]… at a rate less than the rate at which he pays wages to employees of the opposite sex … for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," with certain affirmative defenses available, including that the differential was based on "a factor other than sex." The EPA uses the same "opt-in"-type collective action process as Fair Labor Standards Act cases – i.e., each individual employee must opt in as a plaintiff in order to participate in the case. According to the docket, 28 USWNT players have joined the case. The Title VII claim alleges intentional discrimination based on (a) less favorable

pay to the women's national team and (b) less favorable working conditions, including inferior field services, travel accommodations, and support services. The district certified a Rule 23 class for the Title VII claims.

On May 1, 2020, the Court (Klausner, J.) granted summary judgment against the 28 Plaintiffs on the EPA claim and against the class on its Title VII pay discrimination claims. The Court denied summary judgment on the Title VII claim with respect to less favorable working conditions. The decision recited in excruciating detail the history of the collective bargaining negotiations and agreements between the USWNT and the USSF, and also recounted how much each team had earned.

The Court drew a few key factual conclusions: First, the USWNT had intentionally bargained for a different pay system than the men's team – for example, agreeing to lower bonus payments in order to obtain a guaranteed minimum salary. Second, the USWNT actually was paid more during the class period – both on an absolute basis and per game – than the men's team during the class period (the women played 111 games and the team averaged about $221,000 per game; the men played 87 games and averaged about $213,000 per game). Of course, this had much to do with the fact that the pay for both teams is largely based on winning, and the USWNT has consistently been the best in the world, while the men's team is far from the top level – a fact that was not emphasized in the Court's opinion.

The Plaintiffs offered expert evidence that if they had been compensated under the men's contract, they would have earned more than they did. But the Court also noted that if the men's team had been compensated under the women's agreement during the class period, based on its poor record, it too would have earned more than it earned under its own contract.

The Court held that, as a matter of law, no reasonable jury could find that the USWNT was paid at a lower "rate" than the men's team. Because the Court found that this element of the EPA showing could not be met, the Court did not reach the other elements. The Court relied heavily on the fact that the total compensation to women during the class period had been greater. The Court also relied heavily on the difficulty of comparing the two teams' "rates" of pay when those rates were made up of differing components – e.g., a guaranteed minimum salary for the women's team but not for the men's team.

The district court's decision seems vulnerable. Reliance on total compensation seems flawed because it fails to account for the drastic difference in success between the two teams. Likewise, that the USWNT bargained for their contract raises interesting questions, but obviously, a female employee cannot consent to work for less and thereby waive her EPA claim. Could not a reasonable jury have decided that, even though the women bargained for a different payment arrangement, they were effectively paid at a lower rate than the men? Also not fully explored in the District Court's opinion is the relevance, if any, of the fact that FIFA – the organizer of the World Cup – pays out $400 million in prize money for the men's tournament participants and $30 million to the women (according to the New York Times). The Plaintiffs have asked the district court to permit an immediate appeal of the ruling. Perhaps the Ninth Circuit will analyze the claim differently.

The case is a fascinating one. Although it is rare to find a context in which groups of male and female employees bargain for different pay along gender lines, the case carries weight not only for these elite athletes, but as a symbol of pay equity in America. It could also have implications throughout professional sports, Hollywood, and other contexts.

Ground-breaking class settlements in pregnancy discrimination cases

Walmart

A six-year battle with Walmart, challenging a pregnancy accommodation policy, culminated in a settlement granted final approval in April 2020. The case began with an EEOC charge asserting that Walmart had a written, systemic policy singling out pregnant women as ineligible for accommodations such as light duty and temporary alternative duty, even though such accommodations were available to non-pregnant workers with disabilities. Plaintiffs alleged that this violated the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), which states, among other things, that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work." According to the plaintiffs, several months after the charge was filed, Walmart altered its written policy, and thus the class period ended on March 5, 2014, covering approximately one year.

After proceeding for three years with the EEOC, the plaintiffs filed suit. (*Borders et al. v. Wal-Mart Stores, Inc*., 17-cv-506 (S.D. Ill.).) The suit pleaded intentional and disparate impact pregnancy discrimination claims, as well as individual retaliation claims. The plaintiffs had prepared and were ready to file their class certification motion when the case went into settlement negotiations. By fall 2019, the parties reached a settlement for $14 million on behalf of an estimated 11,000 class members. The settlement is non-reversionary, and if half of the class files a claim, the estimated average class member payment will be over $1,600. According to the preliminary approval papers, the case was "one of the first, if not the first, in the nation in which private plaintiffs brought claims of pregnancy discrimination on behalf of a class of women who were denied workplace accommodations because of pregnancy." (Prelim. Appr. Mot. at 3.)

The definition of the class shows the nuances that were required in crafting a nationwide settlement. Two separate classes were certified for settlement purposes – one consisting of workers whose

accommodation requests were processed by a centralized Wal-Mart Accommodation Service Center (limited to 39 states, in which the allegedly discriminatory policy was applied, and excluding 11 states in which a compliant state-specific policy was applied), and one consisting of workers whose requests were not processed through the centralized center. The case is a major accomplishment in the large-scale enforcement of the Pregnancy Discrimination Act.

Raley's

Here in California, women denied pregnancy accommodations recently achieved a similarly impressive result against the Raley's supermarket chain. (*Barrego et al. v. Raley's*, 34-2015-00177687 (Sacramento Super. Ct.).) The policy at issue permitted workers who were injured on the job – but not pregnant workers – to be automatically assigned to temporary light duties, with efforts made to prevent a reduction in work hours. In addition, the labor costs of such light duty were not counted against stores for purposes of tracking their profitability, eliminating an incentive for store managers to avoid providing such accommodations. In contrast, the eleven plaintiffs in the case all testified that they were denied accommodations for pregnancy-related restrictions. Plaintiffs alleged that the policy violated the Fair Employment and Housing Act ("FEHA"), Government Code section 12940, which prohibits discrimination with respect to terms and conditions of employment on the basis of pregnancy, as well as California's Pregnancy Disability Law, Government Code section 12945 and its regulations, which require that employees receive effective notice of their pregnancy-related rights.

Shortly after the case was filed, and shortly after the Supreme Court issued its decision in *Young v. United Parcel Service, Inc*. (2015) 575 U.S. 276 (discussing the analysis of claims under the federal Pregnancy Discrimination Act in the context of an employer providing special benefits for workers injured on the job but not for pregnant workers), Raley's revised its policy to include pregnant workers.

After extensive discovery and after the plaintiffs' motion for class certification was fully briefed, the case settled for $2.8 million. Under the non-reversionary settlement, approximately 325-350 women will be eligible to submit claims, and if all participate, the average payment is expected to be between $4,400 and $4,739. The settlement includes an unusually thoughtful settlement allocation, which could serve as a model in similar future cases – its formula takes into account how prematurely a given class member was forced to go on leave as a result of the Raley's policy. Final approval is pending.

Other decisions of note

The long-running (filed in 2010) certified class action asserting gender discrimination claims against Goldman Sachs in New York took a turn recently when a magistrate judge issued a recommendation that over half of the 3000-plus members of the certified class could be compelled to arbitration. (See *Chen-Oster v. Goldman, Sachs & Co.*, __ F.Supp. 3d__ , 2020 WL 1467182 (S.D.N.Y. Mar. 26, 2020).) A decision by the district judge on whether to adopt the magistrate's recommendation may be issued at any time.

The Ninth Circuit recently affirmed denial of class certification in a case against Microsoft on behalf of female employees in technical and engineering roles asserting discrimination in pay and promotion. (*Moussouris et al. v. Microsoft Corp.*, 799 F. App'x 459 (9th Cir. 2019).) In a terse decision relying on *Dukes v. Wal-Mart*, the Ninth Circuit explained: "The allegedly discriminatory pay and promotion decisions in the instant case do not present common questions because the proposed class consists of more than 8,600 women, who held more than 8,000 different positions in facilities throughout the United States. Further, Appellants failed to identify a common mode of discretion throughout Microsoft because the individual managers had broad discretion over how to conduct the Calibration Meetings/People Discussions, as well as over the decisions that they made at those meetings."

Conclusion

Gender inequity is still rampant in part of the US economy, from all-male boards, to hedge fund analyst ranks, to large law firm partnerships, but courageous plaintiffs and their advocates are making encouraging progress.


Jhaveri-Weeks

Bill Jhaveri-Weeks, is the founder of Jhaveri-Weeks Law, *a San Francisco-based law office representing organizations and individuals in civil litigation, including class actions, employment claims, commercial disputes, and appeals. Mr. Jhaveri-Weeks frequently speaks and writes on developing issues in litigation, particularly in the areas of class actions and employment law. He clerked for a U.S. Court of Appeals judge, and graduated from Yale College and New York University School of Law. www.jhaveriweeks.com.*