



If At First You Don't Succeed, Try, Try Again:

Revived Class Action Lawsuit Against Google Demands A Second Look At Pay Equity

By RACHEL A. ZISEK

Issues surrounding gender inequality are not novel or new to employers. However, inequalities in the workplace have recently risen to prominence in the public eye, particularly with respect to the pay gap in Hollywood. For example, Michelle Williams and Mark Wahlberg co-starred in the film “All The Money In the World” in 2017. However, in early 2018, it became apparent that Williams was not making all the money in the world. She was paid an \$80 per diem amount totaling less than \$1,000 for reshoots while Wahlberg received an additional \$1.5 million to reshoot scenes in the movie. The recent #MeToo and #TimesUp movements further emphasized issues concerning sexual harassment and pay inequity that have persisted for decades. The intensified media attention on gender issues in Hollywood has led to an increase in employment litigation generally as employees across the country seek to address these issues.

Companies of all sizes have been affected by the increased scrutiny placed on gender and pay equality. Recently, female employees of technology giant Google filed a class action lawsuit alleging pay and advancement inequities in a number of different departments. While the lawsuit was initially dismissed on the basis that the potential class of represented employees was too broad, a California court allowed an amended lawsuit to continue forward on behalf of roughly 5,000 female employees. The case serves as a cautionary tale for large employers and a reminder of the need for internal reviews of company pay policies for any disparities between male and female employees.

Google: The First Attempt Falls Short

On September 14, 2017, three female Google employees (a software engineer, a business systems manager, and a sales specialist) filed a class action complaint in California state court (*Kelly Ellis, Holly Pease, and Kelli Wisuri, et al. v. Google Inc.*, Case No. CGC-17-561299, Superior Court of California, County of San Francisco). The case was brought on behalf of “all women employed by Google in California.” The Complaint’s central allegation concerned California’s Equal Pay Act. Specifically, the plaintiffs alleged that Google maintained a centralized, uniform policy of pay inequity in three distinct ways: (1) by paying female employees less than male employees for similar work; (2) by assigning women to job levels with lower pay ceilings and less opportunities for advancement; and (3) by promoting fewer women and, where women were promoted, promoting them at a slower rate than men at similar levels. The plaintiffs also stated that the Complaint was prompted by the results of an investigation performed by the United States Department of Labor’s Office of Federal Contract Compliance (OFCCP) at Google’s headquarters. The OFCCP’s findings demonstrated that women were systematically compensated at a lower level than men across the majority of the workforce.

Soon after the lawsuit was filed, Google moved to dismiss the Complaint. The Company challenged the Complaint by arguing that the plaintiffs’ attempt to create a class on behalf of “all women employed by Google in California” was overly broad. Google further argued that the plaintiffs could not show that every female employee employed by Google in California shared common claims concerning pay, job levels, and promotion opportunities. The Court agreed with Google, stating that the potential class did not distinguish between female employees with valid claims against the Company based on alleged illegal conduct and the female employees without such claims. The Court also felt that the plaintiffs’ reliance on the OFCCP’s findings at Google’s headquarters were vague and did not specify the particular job classifications to which the findings related. As such, the Court dismissed the Complaint. However, the Court gave the plaintiffs the opportunity to amend the Complaint to specify a more specific class of female employees impacted by Google’s allegedly inequitable pay practices.

A Second Chance at Redemption

The plaintiffs were not deterred by the Court’s decision to dismiss their initial claim and took advantage of the ability to amend their Complaint. On January 3, 2018, an amended Complaint was filed which narrowed the class of employees they sought to represent through the class action to approximately 5,000 employees. While the plaintiffs still sought to represent women employed by Google in California, they specifically sought to represent individuals who held a specified “Covered Position” within Google. The Covered Positions included in the Complaint were defined to include 30 distinct positions, which were grouped into six categories: (1) software engineer; (2) software manager; (3) engineer; (4) program manager; (5) sales; and (6) early childhood education. In the amended Complaint, the plaintiffs reiterated the three mechanisms Google employed to pay female employees less than male employees. The plaintiffs also added a new allegation stating that Google maintained a company-wide policy of considering an employee’s previous salary in assigning starting salaries to new employees. They argued that this practice continued to perpetuate the historical pay gap between men and women.

Once again, Google moved to dismiss the Complaint on the grounds that the class was too broad. Specifically, Google argued that the plaintiffs did not sufficiently demonstrate an overlap in the duties, experiences, or skillsets required of the different Covered Positions. Google also argued that plaintiffs only had firsthand knowledge of the pay practices within their own specific job groups and did not have sufficient knowledge of the other job categories where they were not employed. Finally, Google took issue with the allegations that the Company considered previous salaries in assigning starting salaries, stating that the plaintiffs made this claim based on their own individual experience and did not represent a Company-wide practice or policy.

The Court disagreed with Google and found that plaintiffs had sufficiently pled a class action on behalf of the approximately 5,000 female employee class. The Court stated that the plaintiffs had successfully narrowed their class, as the designation of the Covered Positions in the amended Complaint created a clearly identifiable and ascertainable class. The Court also focused its opinion on the plaintiffs' new allegation concerning the consideration of past salaries, finding that the allegation of this impermissible policy was enough to allow the lawsuit to continue forward. According to the Court, if prior salary figures were considered, women could receive lower starting salaries or job levels as men. Google will certainly continue to challenge the case as the litigation continues. However, the plaintiffs were successful in amending their Complaint and moving forward with their claims on behalf of a large range of female employees.

Final Recommendations

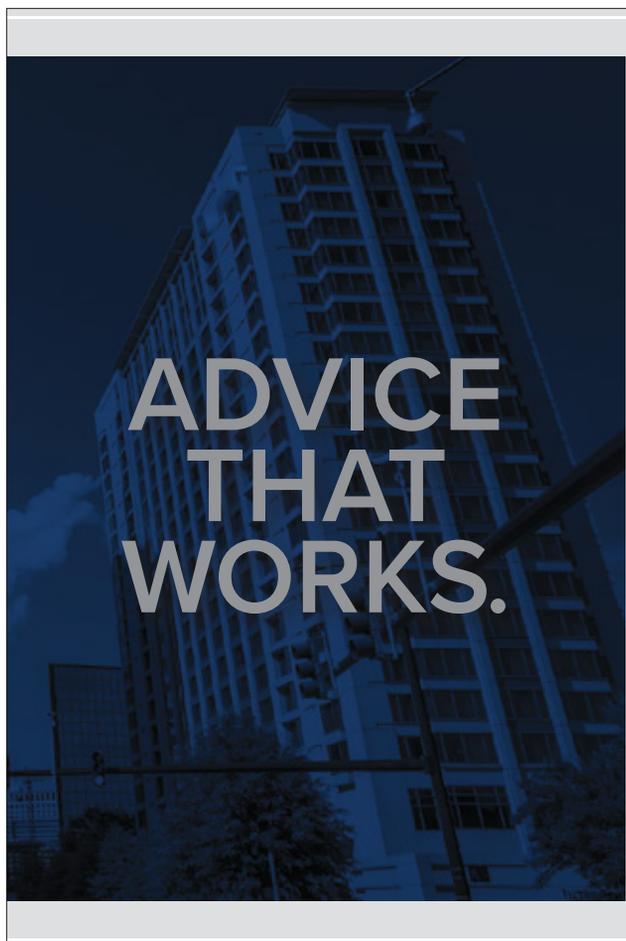
The fall and rise of the Google pay equity class action sheds light on our court system's response to equal pay concerns, particularly in the class action context. While the plaintiffs narrowed the scope of their desired class in their amended Complaint, they still were able to represent a large number of employees working in substantially different functions within Google's hierarchy, ranging from software engineers to early childhood educators. The Court allowed the class to continue forward even though the named plaintiffs did not have personal experience or knowledge of discrimination. Savvy, aggrieved employees could take notice of the Google class action and seek to bring company-wide class actions of their own. Employers should be on notice that courts are more willing to see commonality between employees in different job functions and divisions. Previous defenses to

the commonality of potential class members are coming under increased scrutiny by courts and could result in larger groups of employees that may be eligible to join a class action regarding pay practices.

To avoid potential litigation, employers should be proactive about reviewing their own pay structure to ensure legal compliance through the use of internal audits. Specifically, employers should review job duties, responsibilities, and compensation packages to make sure female and male employees with similar qualifications are treated in the same fashion. If differences arise, employers must be prepared to explain disparities in pay. These factors can include education, merits, certifications, and a host of other factors. Given the wide range of employees covered by the Google class action, employers may need to compare these factors across departments to ensure equality is company-wide.

Employers are also encouraged to revise their employee handbooks and other existing policies to prevent future disparities in pay. Finally, any discussions of equal pay complaints must be documented and properly investigated. If employers take these steps to avoid pay inequality in the workplace, employees will not feel empowered to try, try again and seek judicial relief through the court system.

Rachel A. Zisek, Attorney
Martenson Hasbrouck & Simon LLP
rzisek@martensonlaw.com
www.martensonlaw.com



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Contact Marty Martenson
at (404) 909-8100

3379 Peachtree Road, NE
Suite 400
Atlanta, GA 30326
martensonlaw.com