

# Oregon Court Lets Class Run With Pay Equity Complaint in Nike Case

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In May, a federal judge in Oregon adopted a Magistrate Judge's February report and recommendation, which concluded that a class action complaint alleging systemic violations of federal and state equal pay laws contained sufficient allegations to survive a motion to dismiss. In the case, *Cabill v. Nike, Inc.*, Case No. 3:18-cv-1477-JR (D. Or.), the named Plaintiffs alleged that Nike failed to pay or promote female employees in line with their male counterparts.

The complaint, filed in August 2018, also alleged that Nike maintained policies that perpetuated the disparity, including that employees' pay and promotions were controlled by upper-level management, most of whom were male, and some of whom engaged in harassing, hostile, and misogynistic behavior in the office. Further, the Plaintiffs alleged that Nike routinely provided a lower budget for pay raises to its departments in which higher percentages of females worked. Several of the Plaintiffs alleged specific instances of similarly situated male counterparts receiving higher salaries, including one who was paid less than her less educated and experienced male trainee. The named Plaintiffs are seeking to represent a class of all salaried Nike employees working at its Oregon headquarters.

In her February report and recommendation, the Judge concluded that it was "not plain from the face of the pleadings that the proposed class [of female Nike employees] cannot satisfy the requirements of" a class or collective action. Under the applicable standard, therefore, the Judge permitted the complaint to proceed through the initial pleading stage on a class and collective basis.

For purposes of the motion at issue, Nike did not dispute that the Plaintiffs adequately pleaded individual equal pay violation claims. Rather, Nike argued that the allegations in the complaint were not sufficient to proceed on a class or collective basis. Several of Nike's arguments generally challenged the propriety of resolving pay disparity claims on a class basis. The Judge's ruling on Nike's arguments could significantly impact future class-based claims for pay disparity and contains some important takeaway lessons for companies seeking to avoid expensive class litigation.

First, Nike argued that equal pay claims such as those advanced in *Cabill* could not be resolved on a class basis because, under the applicable statutes, each Plaintiff had to show a comparator making more money for equal work. The Judge, noting that most of the named and opt-in Plaintiffs alleged such a comparator, concluded that the

allegations of company-wide policies that intentionally created a pay disparity across all departments in the company were sufficient to proceed to class discovery.

Nike next argued that class resolution was inappropriate in a pay disparity case because each individual claim of pay disparity could be met with a factually specific affirmative defense. The Judge concluded that such an argument was speculative. The Judge also rejected the contention that the possibility of numerous defenses defeated the plausibility of a collective action. Again, the court relied on the allegations of company-wide discriminatory policies to reject the argument that each member's claim would be too individualized for class resolution.

Nike's third argument regarding the pay disparity claims was that it was implausible for a small number of named Plaintiffs to represent thousands of salaried employees. The Judge, however, concluded that, at an early stage of the proceedings, the allegations in the complaint were sufficient to show that all female employees were similarly situated. Again, the Judge relied on the allegations of systemic policies in reaching her conclusion.

Nike also made similar arguments that the Plaintiffs' Title VII intentional discrimination claim was not amenable to class resolution. The Judge ruled that because Plaintiffs alleged a company-wide policy of discrimination against all female employees, the standard for evaluating an individual disparate treatment claim did not apply. Rather, the allegations that the company's "standard operating procedure" was to maintain discriminatory practices and that the named Plaintiffs suffered harm from those policies were sufficient to state a pattern-or-practice claim.

Neither party objected to the Magistrate Judge's report and recommendation, and, on May 16, the Court adopted the Judge's report in full.

It is important to note the limits of the Court's order. The Court did not certify a class or even find that class certification is likely appropriate. Rather, the court only concluded that the complaint, on its face, made plausible allegations that the claims could be resolved on a class or collective basis. Nike's arguments may ultimately prove successful later in this case. Even if Nike may eventually secure dismissal or judgment in this case, however, Nike will have to engage in discovery and further motion practice, both of which can be expensive.

For companies seeking to avoid being in Nike's shoes (or, as the case may be, sneakers) the proceedings in the *Cabill* case provide several takeaways. The first important takeaway is to routinely review your company's salary information to ensure that you are not, even inadvertently, paying certain classes of employees more than others.

For smaller companies, the review process can be as simple as comparing the salaries of individual employees with similar levels of experience and performance. For larger companies, even those far smaller than Nike, having your human resources department or outside counsel engage in regular statistical review of salaries is a good idea. Not only does such a practice ensure fair payment of all employees, but it provides good evidence that the Company does not have a practice of discriminating against certain employees. Of course, if the statistical review demonstrates that there is pay inequity, the Company must be prepared to further explore the findings, including possibly taking remedial action. Failure to remedy a known pay disparity, even if the disparity was unintentional at the outset, could be used as evidence of the company's discrimination.

Another glaring takeaway from the Judge's conclusions in *Cabill* is that the main reason that the class claims survived dismissal on the pleadings was that the complaint was able to allege specific company-wide discriminatory policies. Without the allegations concerning those policies, Nike's motion may have proved successful. Accordingly, it is important to regularly review your company's handbook and other policies—with the help of human resources and employment counsel—to ensure that there are no structural issues that could lead to pay disparity.

In *Cabill*, one of the key allegations was that most decisions were made by male-dominated groups. Further, the few practice areas that were better represented by females were alleged to have received lower budgets, further frustrating female advancement within the company. In addition to reviewing policies, therefore, it is helpful to advanced equality of gender representation across all departments and at all levels of the company.

Additionally, in *Cabill*, the Plaintiffs pointed to allegations that some male decision makers had engaged in conduct that was inappropriate, harassing towards women, and may have led to a hostile work environment. The complaint also alleged that Nike failed to act on complaints of such conduct for some time. On the surface, inappropriate comments may appear to be a separate issue from pay disparity. However, faced with allegations of intentional gender-based pay disparity, allegations of sexual harassment by decision makers can bolster claims of intentionality. On the other hand, (in addition to being the right thing to do) being able to demonstrate that a company takes sexual harassment claims seriously may help undercut a claim of intentional discrimination.

Even a company that engages in best practices may be confronted with a complaint that alleges that best practices have not been used and that pay disparity resulted. Regularly reviewing company policies to ensure that best practices are being used, however, will both ensure that your company is treating all of its employees fairly and make it easier to defend any claim that is nevertheless made.

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