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Pay Equity Issues & Insights Blog

Recent Pay Equity Cases Show That Such Cases Are Ill-Suited For Class Treatment

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Seyfarth Synopsis: *Over the past few years we have seen groundbreaking changes to equal pay laws across the country and this trend does not seem to be slowing down. Pay equity litigation is also on the rise and we are now seeing more pay equity cases come into the spotlight, including putative class actions brought on behalf of groups of employees. Some recent examples include Ellis v. Google, Inc., No. CGC-17-561299 (Cal. Sup. Ct. Sept. 14, 2017), which we reported on here, and Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C., No. 3:2018-cv-00304 (N.D. Cal. Jan. 12, 2018), which we discuss in this post. An overarching question we have to ask, however, is whether these types of pay equity cases are really appropriate for class treatment given the individualized inquiries that are necessary when analyzing pay differences. We believe they are not.*

The *Knepper* Case

Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C., No. 3:2018-cv-00304 (N.D. Cal. Jan. 12, 2018) is the latest in a wave of putative class actions alleging pay equity claims. In *Knepper*, a non-equity shareholder of the law firm Ogletree, Deakins, Nash, Smoak & Stewart, P.C. ("Ogletree") alleges that "Ogletree's female shareholders face discrimination in pay, promotions, and other unequal opportunities in the terms and conditions of their employment." Complaint ¶ 3. Plaintiff asserts nine causes of action against Ogletree, including discrimination and retaliation claims under Title VII, the federal Equal Pay Act, the California Fair Employment and Housing Act, and the California Equal Pay Act (as amended by the Fair Pay Act), as well as a California Business and Professions Code claim and a claim under the California Private Attorneys General Act. Plaintiff purports to bring these claims on behalf of all similarly situated Ogletree female non-equity shareholders. While the complaint and this type of lawsuit will undoubtedly involve a number of strategic determinations and possible defenses, this post is limited to a general discussion of the appropriateness of class treatment for pay equity claims of this type.

The Requirements for Class Certification

A party seeking class certification "has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members." *Sav-On Drug Stores, Inc. v. Superior Court*, 34 Cal. 4th 319, 326 (2004). "[C]lass members are 'ascertainable' where they may be readily identified without unreasonable expense or time by reference to official records.'" *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1532 (2008) (citing *Lee v. Dynamex, Inc.* 166 Cal. App. 4th 1325, 1334 (2008)). The community of interest requirement has three elements: (1) the predominance of common questions of law or fact; (2) the typicality of claims and defenses of the class representatives; and (3) the adequacy of the class representatives. *Sav-On*, 34 Cal. 4th at 326. The court must also find – based upon the evidence in the record – that a class action is "superior" to an individualized resolution of the issues. *Bascurco v. 21st Century Ins.*, 108 Cal. App. 4th 110, 120 (2003).

The Difficulty of Identifying An Ascertainable Class

Ascertainability is particularly difficult to establish in pay equity cases such as *Knepper* where the class definition includes a broad category of employees, some of whom may have valid claims, but many of whom have suffered no pay disparity, and nothing in the class definition provides any basis for determining which of the class members may have valid claims. Courts recognize that "class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be identified from those who should not be included in the class." *Ghazaryan*, 169 Cal. App. 4th at 1533 n.8. In *Knepper*, similar to the proposed class in *Ellis v. Google*, the class definition does not purport to distinguish between female non-equity shareholders who may have valid claims against Ogletree based upon its alleged conduct from those who do not, and is therefore overbroad. *See Ellis v. Google, Inc.*, No. CGC-17-561299 (Cal. Sup. Ct. Dec. 4, 2017).

The *Knepper* complaint defines the proposed Rule 23 "Nationwide Class" as "all female non-equity shareholders who are, have been, or will be employed by Ogletree in the United States at any time on or after August 18, 2014." Complaint ¶ 113. The complaint further defines a proposed "California Subclass" that includes all "female non-equity shareholders employed by Ogletree in California at any time on or after August 18, 2013." Complaint ¶ 114. These definitions are overly broad in that they do not identify common characteristics sufficient to include only those individuals who were disproportionately paid less than their male comparators. Being a non-equity female shareholder should not be enough. Rather, to be a class member, an individual must be a non-equity female shareholder who is unjustifiably paid less than her comparators. The class definitions do not provide a means by which these individuals can be identified.

Absent something in the class definition that makes it possible to ascertain which individuals may have valid class claims, the parties would likely engage in a regression analysis to determine, considering relevant factors, what the anticipated average pay would be. Inherently, however, when conducting regression analyses, there will likely be outliers in the proposed class who have not suffered an adverse disparity in pay and have in fact been paid more than the expected average. Under the class definitions in *Knepper*, female non-equity shareholders who are paid more than the average would be part of the proposed class, even though they are not disfavored in their pay. The proposed class is thus overbroad.

No Community of Interest Exists In Pay Equity Class Actions

Pay equity cases such as *Knepper* are also ill-suited for class treatment because there is not a well-defined community of interest among class members. Knepper alleges that Ogletree "has subjected female non-equity shareholders to a pattern and practice of systemic unlawful disparate treatment and unlawful disparate impact discrimination" that "stem[s] from the Firm's common employment policies, practices, and procedures, including Ogletree's credit allocation, compensation, job assignment, and promotion policies, practices, and procedures." Complaint ¶¶ 121-122. On its surface, these allegations sound common, but you cannot tell on the basis of the complaint what, if anything, about the existence of common policies, practices and procedures disproportionately disfavors women. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Knepper attempts to make this connection by referencing a "male-dominated system" and the fact that the majority of Ogletree's shareholders are male, as well as the discretionary distribution of credits, job assignments and business development opportunities and the subjective judgment that goes into shareholder compensation decisions. *See* Complaint ¶¶ 22, 23, 27. However, Knepper must identify a common direction made to shareholders that would lead them to exercise their discretion in a common way. Merely alleging a general policy of discrimination and showing an overall sex-based disparity does not suffice. *See Dukes*, 564 U.S. at 356-357.

We also note that any such means of identifying those non-equity female shareholders who were disproportionately paid less than their male comparators would necessarily involve a fact-specific inquiry into the various considerations that influence each individual's pay. This is generally not information that can be easily obtained by referencing employer records alone. Rather, to get the full story, a more in-depth analysis will likely be required.

Knepper may argue that neither a common policy nor any discriminatory intent is necessary or required to sustain a claim under the California Fair Pay Act; but while that is true, it does not change the fact that commonality is necessary for class treatment.

In addition, while Knepper may have, for example, had higher compensation credits and billable hours than her male comparators, as the complaint alleges, that is not necessarily true for every female non-equity shareholder at Ogletree as compared to her male comparators. The existence of some common practices or policies alone will not suffice to determine liability. Instead, an individual liability analysis will be needed to determine which, if any, of the proposed class members were also disfavored in their pay.

Indeed, much of the alleged discriminatory treatment to which Knepper claims she was subject is specific to Knepper and attributed to the managing shareholder of the specific office where Knepper worked, particularly with respect to the alleged denial of business development opportunities. Thus, it is not really a common policy or procedure that has led to the purported pay disparities, but rather certain "bad actors" who may be applying (or ignoring) those policies or procedures in a discriminatory fashion. Of course, each national Ogletree office will have a different managing shareholder who may or may not have engaged in similar discriminatory behavior.

To the extent disparities do exist, an individual analysis is also necessary to determine whether an employer has a lawful reason that explains the pay disparity. Employers are entitled to present evidence to show that a class member's work is in fact dissimilar to the alleged comparators (in terms of skill, effort or responsibility or performed under dissimilar working conditions), and/or that pay differences are the result of lawful factors such as pay differentials that are attributable to an employer's gender-neutral pay policy, or other *bona fide* factors unrelated to gender, such as differences in education, training, performance or experience, that are job-related and consistent with an overriding legitimate business purpose. In that regard, while it is theoretically possible that some formulaic approach to pay determinations may be utilized by an employer that disproportionately disfavors women, the reality is that for most employers, a number of different considerations may influence the determination of any specific employee's pay and that the story of the determination of each person's pay is a bit different. Absent an overarching discriminatory policy or practice, the assessment of liability is almost inherently going to need to be made on a case-by-case basis. *See Dukes*, 564 U.S. at 353. In fact, even on the face of the *Knepper* complaint, compensation decisions are described as being based on several factors including, but not limited to, origination credits, managing credits, responsible credits, working credits, billable hours, efficiency ratings, and dollars collected from clients. Complaint ¶¶ 27, 90. These types of individualized considerations preclude class treatment.

Class Treatment Is An Inferior Approach to Resolving Pay Equity Claims

Finally, it would appear that any pay equity class certification would tend to frustrate, not promote, judicial economy because questions of ultimate liability will require individualized inquiries.

As stated above, because of the disparate factual circumstances of the proposed putative class members, adjudication of the *Knepper* action would be unmanageable and would force the court into hundreds of mini-trials, and a veritable nightmare of trial management. The equal pay class claims would require a case-by-case comparison of the qualifications, performance and actual compensation of individual female and male shareholders to determine whether they were paid differently despite comparable jobs, performance and working conditions. *See* Cal. Lab. Code § 1197.5.

Also, an individualized inquiry would be required because, as also stated above, the employer in pay equity litigation is entitled to rebut the plaintiff's claims through evidence showing that certain positions involved different job duties, skills or working conditions (for example, in *Knepper* there may be differences based on shareholders' industry or practice groups), and the employer could further defend a compensation differential on the basis of differences in employees' performance, seniority, or other *bona fide* factors such as job-related education, training or experience, geographic differences, market rates, or other legitimate factors. *See Khanania v. Chertoff,* 172 Fed. Appx. 710 (9th Cir. 2006) (employer rebutted *prima*

facie case under the EPA through evidence that the differential between employee and her comparators was based on disparate experience and qualifications). It is indeed a matter of due process for employers to be able to present such evidence to rebut gender discrimination as the reason for any particular class member earning less than her male peers. *See e.g., Duran v. U.S. Bank National Association*, 59 Cal. 4th 1, 13 (2014) (explaining that a class action is improper if it prevents the defendant from showing that some class members were not wronged and "entitled to no recovery").

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