SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Document Scanning Lead Sheet

Dec-04-2017 3:05 pm

Case Number: CGC-17-561299

Filing Date: Dec-04-2017 3:04

Filed by: SEAN KANE

Image: 06129014

ORDER

KELLY ELLIS ET AL VS. GOOGLE, INC

001C06129014

Instructions:

Please place this sheet on top of the document to be scanned.

FILED
Superior Court of California
County of San Francisco
DEC 04 2017
CLERK OF THE COURT
BY: Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

KELLY ELLIS, HOLLY PEASE, and KELLI WISURI, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE, INC.,

Defendant.

Case No. CGC-17-561299

ORDER SUSTAINING DEFENDANT GOOGLE INC.'S DEMURRER TO PLAINTIFFS' CLASS ACTION COMPLAINT WITH LEAVE TO AMEND

Defendant Google Inc. ("Google") demurred to Plaintiffs Kelly Ellis, Holly Pease, and Kelly Wisuri's ("Plaintiffs") Class Action Complaint ("Complaint") pursuant to Code of Civil Procedure sections 430.10(e) and (f). The demurrer came on for hearing on December 1, 2017, and appearances are as noted in the record. Having considered the materials submitted in support and opposition and the oral argument of counsel, the Court concludes, for the reasons stated below, that the demurrer should be sustained in its entirety with leave to amend.

INTRODUCTION

Plaintiffs Kelly Ellis, Holly Pease, and Kelli Wisuri are former female employees of Google who worked as a software engineer, business systems manager, and sales specialist, respectively. Complaint ¶¶ 8-10. They filed this action on behalf of themselves and a class consisting of "all women employed by

Google in California," alleging that Google violated California's Equal Pay Act by paying female employees lower compensation than Google pays to male employees performing substantially similar work. *Id.* ¶¶ 2, 21. The Complaint alleges that Google has maintained throughout California a "centrally determined and uniformly applied policy and/or practice of paying its female employees less than male employees for substantially equal or similar work." *Id.* ¶ 17. Paragraph 3 of plaintiffs' Complaint highlights three distinct theories of liability: (1) "by paying female employees less than male employees with similar skills, experience, and duties;" (2) "by assigning and keeping women in job ladders and levels with lower compensation ceilings and advancement opportunities than those to which men with similar skills, experience, and duties are assigned and kept;" and (3) "by promoting fewer women and promoting women more slowly than it has promoted similarly-qualified men." *Id.* ¶ 3. The Complaint also alleges how Google violated the Equal Pay Act with respect to each of the named plaintiffs specifically. *See id.* ¶¶ 28-36 (Ellis); ¶¶ 37-44 (Pease); ¶¶ 45-49 (Wisuri). The Complaint also references an analysis performed by the United States Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"), which allegedly found that with regard to Google's Mountain View office for the year 2015, there were "systematic compensation disparities against women pretty much across the entire workforce." *Id.* ¶13. Based on these allegations, the Complaint asserts the following causes of action: (1) Violation of the California Equal Pay Act (on behalf of Plaintiffs Pease and Wisuri, and the putative class); (2) Violation of Labor Code §§ 201-203 (on behalf of Plaintiffs Pease and Wisuri, and the putative class) (3) Violation of Business and Professions Code §17200 *et seq.* (on behalf of all plaintiffs and the putative class); and (4) declaratory judgment (on behalf of all plaintiffs and the putative class).

Google now demurs to plaintiffs' class allegations on the ground that plaintiffs failed to adequately allege a well-defined community of interest. Google also demurs to Plaintiffs Ellis and Wisuri's individual claims on the ground that the "substantially similar" legal standard was made effective after Plaintiffs Ellis and Wisuri terminated their employment with Google, and they failed to adequately state a claim under the standard in effect at the time of their employment. As discussed further below, the Court sustains the demurrer in its entirety with leave to amend.

LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action."

Code Civ. Proc., § 430.10, subd. (e). The plaintiff "must set forth factual allegations that sufficiently state all required elements of [a] cause of action ... and, [a]llegations must be factual and specific, not vague or conclusory." *Rakestraw v. Cal. Physicians' Serv.* (2000) 81 Cal.App.4th 39, 43, citation omitted. In general, "material facts alleged in the complaint are treated as true for the purpose of ruling on the demurrer." *C&H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal.App.3d 1055, 1062. Finally, allegations in a pleading must be liberally construed, with a view to substantial justice between the parties. Code Civ. Proc., § 452

More specifically, a demurrer to class allegations may be sustained where, "assuming the truth of the *factual allegations* in the complaint, there is no reasonable possibility that the requirements for class certification will be satisfied." *Schermer v. Tatum* (2016) 245 Cal.App.4th 912, 923 (emphasis in original). Courts are authorized to dispose of class action suits prior to certification on demurrer or pretrial motion. *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 440; *Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 221-25, *Silva v. Block* (1996) 49 Cal.App.4th 345, 352.

However, just as there is a policy in favor of determining class suitability at the pleading stage, there is also a policy that the "candidate complaint for class action consideration, if at all possible, be allowed to survive the pleading stage of litigation." *Gutierrez v. California Commerce Club, Inc.* (2010) 187 Cal.App.4th 969, 976-79 citing *Tarkington v. California Unemployment Insurance Appeals Board* (2009) 172 Cal.App.4th 1494, 1510-11; *Beckstead v. Sup. Ct.* (1971) 21 Cal.App.3d 780, 783. Indeed, courts have declined to determine class sufficiency at the pleading stage where it appears from the face of the complaint that all liability issues can be determined on a class-wide basis. *See e.g., Gutierrez, supra,* 187 Cal.App.4th at 979.

Thus, when class certification is challenged by demurrer, the task of the trial court is to determine, whether there is a "reasonable possibility" plaintiffs can plead a prima facie case for class certification. *Tucker, supra,* 208 Cal.App.4th at 215.

ANALYSIS

I. The Demurrer to Plaintiffs' Class Allegations is Sustained with Leave to Amend

Google demurs to plaintiffs' class allegations on the ground that plaintiffs failed to allege sufficient facts in support of a class consisting of "all women employed by Google in California." The

requirements for a class action are as follows: a) an ascertainable and sufficiently numerous class; b) a well-defined community of interest; and c) substantial benefits from certification that render proceeding as a class superior to the alternatives. Code Civ. Proc. § 382. In turn, the community of interest requirement embodies three factors: a) predominant common questions of law or fact; b) class representatives with claims or defenses typical of the class; and c) class representatives who can adequately represent the class." *Brinker Restaurant Corp. v. Sup. Ct.* (2012) 53 Cal.4th 1004, 1021. As discussed below, the Court agrees with Google that plaintiffs failed to adequately plead all the requirements for proceeding as a class action.

First, the Court finds that, plaintiffs failed to allege sufficient facts demonstrating an ascertainable class. Courts have recognized 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 v. Diva Limousine, Ltd.* (2008) 169 Cal.App.4th 1524, 1533, fn. 8. Here, plaintiffs' proposed class is defined as "all women employed by Google in California." This class definition does not purport to distinguish between female employees who may have valid claims against Google based upon its alleged conduct from those who do not, and is therefore overbroad.

Plaintiffs rely upon their allegation that Google implemented a uniform policy of paying *all* female employees less than male employees for substantially equal or similar work. *See* Complaint ¶ 17. They also rely on the Complaint's reference to an OFCCP "statistical regression analysis" of the compensation data for all Google employees at the Mountain View office for the year 2015, in relation to which the OFCCP Regional Director testified at an administrative hearing that the OFCCP allegedly "found systemic compensation disparities against women pretty much across the entire workforce." *See* Complaint ¶ 13. These allegations, however, are conclusory, and insufficient to state class claims for purposes of demurrer. The allegations relating to the OFCCP study are further vague in that the Complaint does not specify, for example, the specific job classifications it pertains to, or whether the comparison was made against men who perform substantially similar work under similar working conditions. As such, the Court finds that plaintiffs failed to allege an ascertainable class because the class definition is overbroad and not supported by facts alleged in the complaint.

Second, the plaintiffs must plead a "community of interest" sufficient to support class claims. The "community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Brinker*, *supra*, 53 Cal.4th at 1021. The Court finds that plaintiffs failed to allege sufficient facts demonstrating common questions of law or fact predominate over individualized issues with respect to plaintiffs' proposed class. "Commonality as a general rule depends on whether the defendant's liability can be determined by issues common to all class members." *Knapp v. AT & T Wireless Services, Inc.* (2011) 195 Cal.App.4th 932, 941. Given plaintiffs' overbroad class, it does not appear on the face of the complaint that Google's liability can be determined by issues common to all members.

Finally, the Court also finds that plaintiffs failed to demonstrate how their claims are typical of the entire class. The "test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Martinez v. Joe's Crab Shack Holdings* (2014) 231 Cal.App.4th 362, 375. However, as discussed further below, none of the named plaintiffs have adequately stated Equal Pay Act claims, and therefore plaintiffs cannot satisfy the typicality requirement.

Based on the foregoing, plaintiffs failed to adequately allege all of the requirements for proceeding as a class action. Accordingly, Google's demurrer to plaintiffs' class allegations is sustained with leave to amend.

II. The Demurrers to Plaintiffs Ellis and Wisuri's Individual Claims Are Sustained with Leave to Amend

Google demurred to Plaintiffs Ellis and Wisuri's individual claims on the grounds that (1) the "substantially similar" standard came into effect after their employment with Google was terminated; (2) they failed to state a claim under the Act's prior "equal work" standard; and (3) their Second, Third, and Fourth causes of action are derivative of their Equal Pay Act claim and must also fail.[1] For the reasons stated below, the demurrers to Plaintiffs Ellis and Wisuri's individual claims are sustained in their entirety

[1] Plaintiff Ellis does not assert a separate claim under the Equal Pay Act or a claim for Failure to Pay Wages Due. Nevertheless, she claims that Google's alleged violation of the Equal Pay Act serves as a predicate for her UCL claim. *See* Opp. at p. 6, fn. 1.

with leave to amend.

First, the Court finds that Plaintiffs Ellis and Wisuri did not adequately state an Equal Pay Act claim under the standard in effect during their employment with Google because they failed to allege they performed "equal work" as their male counterparts. The Court agrees with plaintiffs that alleging the jobs in question are "substantially equal" is sufficient to meet the Act's "equal work" standard. *See Stanley v. University of Southern California* (9th Cir. 1999) 178 F.3d 1069, 1074 (interpreting the federal Equal Pay Act); *see also Green v. Par Pools Inc.* (2003) 111 Cal.App.4th 620, 623 (holding it was appropriate to rely on federal authorities construing the federal Equal Pay Act when interpreting California's section 1197.5 which then included the "equal work" language). However, Plaintiffs Ellis and Wisuri's allegations that they "perform[ed] work that was substantially equal or similar work to that performed by her male counterparts" is conclusory, and thus insufficient to state a claim. *See* Complaint ¶¶ 36, 47-48.

Second, with respect to Plaintiff Ellis only, the Court finds that plaintiff's more specific allegations are also insufficient to state an Equal Pay Act violation. In order to state an Equal Pay Act violation, plaintiff must allege that the *jobs* in question are "equal" (or "substantially similar" under the current standard). *See* Labor Code § 1197.5. Plaintiff Ellis alleges that Google hired her as a "frontend Software Engineer" on "Level 3" despite having had "four years' experience working in backend software engineering." Complaint ¶¶ 28-29. She also alleges that Google shortly thereafter hired a male engineer and placed him in the "higher-paying Level 4 on the Software Engineering Ladder." *Id.* ¶ 30. She alleges that Google places and promotes male software engineers with "*qualifications* equal to or less than" Plaintiff Ellis's qualifications into Level 4 or higher-paying levels. *Id.* (emphasis added). In addition, Plaintiff Ellis alleges that Google pays backend engineers more than frontend engineers notwithstanding the "*skills* required to perform these jobs are equal or substantially similar." *Id.* ¶ 33 (emphasis added). Plaintiff Ellis failed to provide sufficient factual allegations demonstrating she performed work that was "equal" to those performed by her male counterparts. Her allegations that *the qualifications* and *skills* required to perform the jobs in question are equal or substantially similar are irrelevant to whether

Plaintiff has stated an Equal Pay Act violation.[2]

For the foregoing reasons, the Court sustains the demurrer with leave to amend as to Plaintiff Wisuri's First Cause of Action under the Equal Pay Act. Because Google argues that plaintiffs' Second, Third, and Fourth causes of action are entirely derivative of their Equal Pay Act claims, and plaintiffs did not argue to the contrary, the Court similarly sustains with leave to amend the demurrers to Plaintiff Wisuri's Second Cause of Action, and Plaintiffs Ellis and Wisuri's Third and Fourth Causes of Action.

CONCLUSION

Google's demurrer is sustained in its entirety with leave to amend. Plaintiffs have thirty (30) days from the date of this Order to file an amended pleading.

IT IS SO ORDERED.

Dated: December 4, 2017

Mary E. Wiss
Judge of the Superior Court

[2] As with Plaintiff Ellis, the Court finds that Plaintiff Pease failed to state an Equal Pay Act violation. Plaintiff Pease alleges Google wrongfully placed her in the "non-technical Business Systems ladder" as opposed to the "technical" ladders. However, Plaintiff Pease does not allege sufficient facts demonstrating how the "non-technical" and "technical" ladders involve equal or substantially similar work. Absent such allegations, Plaintiff Pease cannot state an Equal Pay Act violation.

Superior Court of California
County of San Francisco

KELLY ELLIS, HOLLY PEASE, and KELLI WISURI, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

GOOGLE, INC,

Defendants.

Case Number: CGC-17-561299

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, T. Michael Yuen, Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On December 4, 2017, I electronically served the ORDER SUSTAINING DEFENDANT GOOGLE, INC.'S DEMURRER TO PLAINTIFFS' CLASS ACTION COMPLAINT WITH LEAVE TO AMEND via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: December 4, 2017

T. MICHAEL YUEN, Clerk

By: _____
Sean Kane, Deputy Clerk