SECTION OF LITIGATION

The Growing Wave of Gender Discrimination Lawsuits Against Big Law

Carmen D. Caruso – August 22, 2017

On a sleepy news day on the eve of the Fourth of July, the *American Lawyer* reported that the increasing frequency of gender discrimination lawsuits by female lawyers against their law firms may bring a little "bad publicity" but "few serious repercussions" to the defendant law firms.

That observation may change either when these cases reach trial and a plaintiff prevails, individually or representing a class of lawyers at her firm. These days less than 1 percent of civil cases filed in federal court are tried to a jury. These cases belong in that 1 percent.

Lawyer Kerrie Campbell's claims against Chadbourne & Parke LLP are close to trial as she survived Rule 56 summary judgment, where discrimination claims are frequently extinguished. Ms. Campbell is a seasoned litigator who moved laterally to Chadbourne & Parke LLP 17 years into her career, after being a partner at two other law firms. Campbell alleges individual and proposed class claims against Chadbourne, which expelled her from the partnership after she sued. A district court in the Southern District of New York found questions of fact requiring trial on whether Campbell was an employee despite her partner status. How this threshold issue plays out may affect how law firms will be structured and managed, but it stops short of resolving the critical issue of whether the defendant law firm is guilty of gender discrimination on an individual or class basis.

Even if Kerrie Campbell was not an employee, as a partner she will have triable claims for breach of fiduciary duty and breach of contract, including claims based on the implied covenant of good faith and fair dealing, which is so wonderfully described in the Restatement as protecting "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized

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as involving bad faith because they violate community standards of decency, fairness or reasonableness." Woe to any law firm arguing that discrimination against female partners or racial minority partners on either an individual or systematic basis was the law firm's "agreed common purpose" or consistent with anyone's "justified expectations" or "community standards of decency." Woe indeed.

No doubt, settlement prospects have improved for plaintiff Kerrie Campbell, and if she accepts a check, none of us can blame her. But if she and other like plaintiffs settle quietly, the "few serious repercussions" narrative is likely to continue. The essential element of that narrative, as reported by the *American Lawyer*, is that being sued for discrimination is "more or less routine" and "part of the bundle of risks" faced by any business, such that law firms should not be singled out for criticism when sued.

The *American Lawyer* may be correct expressing the current attitude, and perhaps it is not a coincidence these lawsuits are being brought against large law firms that routinely defend their business clients from similar cases, as opposed to being filed against plaintiff law firms that fight injustice or at least aspire to. This may not be the first time someone observed that lawyers tend to resemble their clients. Our often maligned transition from a profession to a business is frequently derided but overstated. Lawyer Abraham Lincoln was astute in the business of running his law practice, as all good lawyers have always tried to be. What has changed is the way modern law firms strive to be more efficient in rewarding high producers at the expense of more lockstep compensation plans that bred more collegial relationships. Loyalty to one's firm has gone the way of loyalty to team or city in professional sports. Free agent lawyers like Kerrie Campbell seek the best platform to develop their business and the highest return for their efforts. Or they start their own firms, taking charge of their destiny.

Which brings us back to Kerrie Campbell, who alleges that after she arrived at Chadbourne, she was victimized by deeply entrenched, gender-based pay and bonus disparities, and that female partners were excluded from decision-making authority in a male-dominated culture and management structure. She challenges the firm's use of a point system to determine terminations, bonuses, raises, and promotions. The points are supposed to be allocated objectively based on all the usual metrics (origination, production, collection), but Ms. Campbell alleges the actual point allocation is anything but objective and is contaminated by discriminatory animus resulting in female partners with better numbers making less money than their male peers do. In addition, assuming none of this was disclosed to her when she came in laterally, she might seek to add a fraud claim.

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Credit Kerrie Campbell for suing in her own name. In a similar lawsuit against Proskauer Rose LLP, a "Jane Doe" female partner alleges her male partners earn up to 65 percent more than she does, even when they are less successful, and this plaintiff also claims to have suffered inappropriate comments about her physical appearance. Being Jane Doe works fine at the pretrial stage, but if her case goes to trial in open court, that veil will be lifted.

Here's hoping Kerrie Campbell, Jane Doe, and all the other female or racial minority plaintiffs out there bring their cases to trial, for only then will their issues see the light of day and only then can the narrative be challenged. These plaintiffs will take plenty of lumps. Look no further than the media's treatment of Ellen Pao, who brought a gender discrimination claim against her venture capital firm to trial and lost. Another professional woman, writing in *Fortune*, penned that Pao deserved to lose because she was "so reticent and obviously insecure" that it was not clear how she could "have advanced so far in fiercely competitive Silicon Valley."

Ouch. It's never easy to be the plaintiff in a case that is transactional in nature, one in which the plaintiff did business with the defendant only to allege she suffered discrimination or was defrauded. These cases invite the defense of putting the plaintiff on trial, to leave the jury believing she was unworthy or opportunistic or, as was so endearingly said of Ellen Pao, "Like whistleblowers, gadflies and other disruptors, plaintiffs are usually people who don't get what they want the way that the rest of us do. So, they sue."

Yes, female lawyers are suing and we will not know where the truth lies until these cases are tried. But we know these claims are plausible as female partners continue to lag male partners in compensation and in making partner. There are rays of hope, but overall these numbers have moved little despite plenty of effort to promote diversity.

The juries in these cases will not likely hear industry-wide data, which would be unduly prejudicial to the law firms on trial. But these juries will hear plenty about the way these firms divvy up their dollars, and their numbers are only the backdrop to what will be high drama about the way lawyers are treated and decisions are made in modern law firms. How is origination determined when more than one lawyer gains the client? How are associates assigned to the partners' cases or matters? How are new business introductions made? Who is invited to meet the clients? And, ever important, who gets to try cases or head up the deal team? These are not facts the law firms will want to discuss in open court, and at a minimum, motions in limine will likely be granted to protect client confidences as the lawyers prepare to duke it out.

Maybe everything at the defendant law firms is fair and square and they will be vindicated. Or maybe, as I have argued in a plaintiff's Title VII case, men have behaved inconsistently toward women

since Adam and Eve, such that it is easy to believe that men who love their mothers, wives, and sisters (and want their daughters to be president someday) have no trouble being unfair to women they work with. There are many reasons this is so, ranging from the proverbial fear she might be a better lawyer than he, to punishment for arousing misplaced romantic feelings, and all sorts of stuff in between called "implicit bias." Cross-examination will be tricky for both sides, and these cases will likely be decided on the jury's perception of who holds up better, the alleged victim or the alleged discriminators.

And this is how it should be, for it is well known and widely believed that "the crucible of cross-examination" is "much more conducive to the clearing up of truth." *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (citing 3 Blackstone, *Commentaries on the Laws of England* 373). Defendants committing pattern and practice discrimination are not likely to fool a jury into thinking otherwise. Win or lose, Kerrie Campbell is a hero for challenging the business as usual narrative and forcing our profession to define what we stand for. Recent ethical proscription of discriminatory conduct by lawyers is welcomed, but as always, the common law will deliver justice on case-by-case basis.

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