

Outside Counsel

Expert Analysis

Pay and Promotion Equity for Women On Wall Street: Does Litigation Help?

On Sept. 6, court papers announced that Bank of America had agreed to pay \$39 million to settle *Calibuso v. Bank of America*, a nationwide gender discrimination class action on behalf of female stockbrokers. No. 10 Civ. 1413, Docket No. 1 (EDNY filed March 30, 2010) (The authors' firm was counsel of record for the plaintiffs). In the lawsuit, filed in 2010, the plaintiffs alleged that the bank paid them less than male stockbrokers and gave them fewer opportunities to build their books of business. While the settlement is a great "win" for the plaintiffs, it raises an important question: Do lawsuits really help remove barriers to women getting ahead on Wall Street?

Since Title VII was enacted in 1964, women have been struggling to find pay and promotion equity across every industry in the United States. In no other industry is this struggle more palpable and obvious than in high finance. Over the decades, relatively few women have taken on the tremendous professional risk entailed by suing a Wall Street firm for gender discrimination. Those lawsuits that women have filed, however, show how this struggle has evolved.

As more and more women have infiltrated the financial services industry, their legal claims are less often about outright animus against women, and more often about subtler forms of discrimination. Now perhaps more than ever, both individual and class action litigation play a critical role in combating these forms of discrimination, and in bringing discriminatory behavior to light in an oftentimes secretive industry.

Individual Litigation

Historically, individual litigation has played a major role in combating gender discrimination. In the 1980s, several watershed individual cases transformed the legal (and social) landscape by

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giving names to some of the most blatant forms of sex discrimination, and proclaiming them to be illegal discrimination. *Meritor Savings Bank v. Vinson* affirmed that sexual harassment, a concept that did not even have a name 10 years earlier, is a form of illegal gender discrimination. 477 U.S. 57 (1986). *Price Waterhouse v. Hopkins* recognized that sex stereotyping is also illegal gender discrimination. 490 U.S. 228 (1989). In more recent years, women filing individual lawsuits have continued to push back against barriers to advancement in the financial services industry.

In 2002, plaintiff Laura Zubulake filed a lawsuit against UBS Warburg, where she had worked as a director and senior salesperson in its equity sales division, alleging among other adverse actions that UBS passed her over for promotion in favor of a male, and that her male manager discriminated against her by ridiculing and excluding her from outings.¹

Zubulake also alleged that UBS retaliated against her by firing her after she filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Her case is notable as it was one of few cases to go to trial. After a jury trial in April 2005, Zubulake won a jury verdict awarding her more than \$29 million—\$9.1 million in compensatory damages, and \$20.1 million in punitive damages.²

More often, however, the few lawsuits that are brought by women in financial services end up getting resolved in confidential settlements, in which the plaintiff's future silence is one of the key terms of the agreement. For example, in 2010, plaintiff Charlotte Hanna sued Goldman

Sachs, claiming that the firm pushed her onto the "mommy-track" after she became pregnant, and then demoted and ultimately fired her after she chose to work part-time.³ The case initially made headlines when it was filed, but Hanna later reached a confidential settlement with Goldman and the case has not attracted public attention since.⁴

An exception to the trend of most lawsuits being settled: Recently, in *Cohen v. Bank of New York Mellon*, a veteran portfolio officer alleged that Bank of New York Mellon paid her less than younger, male employees. No. 11 Civ. 456, Docket No. 1 (SDNY filed Jan. 21, 2011). However, in August of this year, a jury found in the bank's favor, concluding that Cohen's gender was not the reason that she was laid off.

Now perhaps more than ever, both individual and class action litigation play a critical role in combating these forms of discrimination.

There are still a number of high-profile gender discrimination cases pending against financial services companies. The most publicized of these is Ellen Pao's case against Kleiner Perkins, one of Silicon Valley's oldest and most revered venture capital firms.⁵ Although the notion that gender discrimination occurs in venture capital firms should not be surprising, the case generated significant buzz because it was the first to expose allegations of gender discrimination at a well-known venture firm. In her complaint, Pao alleged that she was the victim of sexual harassment, and that Kleiner also prevented her and other women from advancing to higher-paying positions that were reserved for men.⁶

Other notable cases pending against Wall Street firms include: *Bartoletti v. Citigroup*, in which a group of women laid-off from Citigroup's public finance division have alleged that Citi disproportionately targeted women for downsizing,

No. 10 Civ. 7820, Docket No. (SDNY filed Oct. 13, 2010); *Hazan-Amir v. Citigroup*, in which an associate in Citigroup's asset finance division alleges that she received lower pay than male colleagues, endured sexist remarks by her male peers and superiors, and was demoted after returning from maternity leave, No. 11 Civ. 721, Docket No. 1 (SDNY filed Feb. 1, 2011); and *Voelker v. Deutsche Bank AG*, in which a former vice president in the bank's securities lending division alleges that the bank "mommy-tracked" her into a reduced role after she returned from maternity leave, No. 11 Civ. 6362, Docket No. 1 (SDNY filed Sept. 12, 2011).

Class Action Litigation

Class actions have been a powerful tool in forcing the financial services industry to change its treatment of women. Whereas individual gender discrimination lawsuits often fail to make significant headlines, class action lawsuits attract the public's attention and make gender equality a topic of everyday conversation—at least, for a time. They can also force companies to divulge otherwise secret compensation data, which would provide hard evidence of gender gaps in pay and promotions. Furthermore, class actions can bring about change through broad-based injunctive relief, or through consent decrees in which companies agree to change their practices company-wide.

In the 1990s and early 2000s, three notable gender discrimination class actions against Wall Street firms made waves in the industry. In *Martens v. Smith Barney* and *Cremin v. Merrill, Lynch, Pierce, Fenner & Smith*, female stockbrokers brought class action claims alleging widespread discrimination in business opportunities and pay, as well as sexual harassment. No. 96 Civ. 3779, Docket No. 1 (SDNY May 20, 1996); No. 96 Civ. 3773, Docket No. 1 (N.D. Ill. June 21, 1996). Both Smith Barney and Merrill Lynch ultimately paid over \$100 million each to settle the claims of class members. In a third case, *EEOC v. Morgan Stanley*,⁷ a female professional, Allison Schiefelin, brought class action claims alleging that Morgan Stanley discriminated against her and other women in the firm's institutional division. No. 01 Civ. 8421, Docket No. 1 (SDNY filed Sept. 10, 2001). The parties reached an agreement to settle the case on the eve of trial, for \$54 million.

As part of the settlements in these cases, Smith Barney, Merrill Lynch, and Morgan Stanley agreed to adopt diversity initiatives and training, and improved complaint handling procedures. More significantly, the public outcry that erupted after salacious details from the cases came to light forced the entire industry to change its practices. One example is strip club outings—a couple of decades ago, going to strip clubs was a common and acceptable way for men on Wall Street to socialize with colleagues and clients. In the wake of these class

action lawsuits, most Wall Street firms adopted policies strictly forbidding employees from organizing company outings to strip clubs.

The major gender discrimination lawsuits of the 2000s focused on challenging subtler, but still systematic, forms of discrimination against women in finance. In *Kosen v. American Express Financial Advisors*, No. 02 Civ. 82 (D.D.C. Feb. 19, 2002), female financial advisors alleged sex and age discrimination consisting of denial of equal pay and promotions. The case settled in 2002 for \$31 million. In *Amochaev v. Citigroup Global Markets*,⁸ female stockbrokers sued Smith Barney for gender discrimination again, alleging that discretionary account distribution practices allowed mostly male managers to give the best accounts to favored male brokers, and less desirable accounts to women. No. 05 Civ. 1298, Docket No. 1 (N.D. Cal. filed March 31, 2005). The case resulted in a \$33 million settlement and an agreement to implement formal account distribution policies that aimed to remove discretion from the account distribution process. Morgan Stanley settled a similar gender discrimination class action on behalf of female stockbrokers for \$46 million. *Augst-Johnson v. Morgan Stanley*, No. 06 Civ. 1142 (D.D.C. filed 2006).

The main impact of 'Dukes' on gender discrimination class action lawsuits in the finance sector has been to shift the focus from challenging disparate treatment—where plaintiffs must show an intent to discriminate—to challenging policies that have a disparate impact on women.

In 2011, the U.S. Supreme Court's watershed decision in *Wal-Mart Stores v. Dukes*, 131 S. Ct. 2541 (2011), changed the landscape of gender discrimination lawsuits. In *Dukes*, female store employees brought nationwide class action claims on behalf of millions of women, alleging that Wal-Mart had discriminated against them in pay and promotions. At the heart of their allegations was the theory that allowing Wal-Mart store managers to exercise excessive subjectivity in setting pay and awarding promotions permitted managers to discriminate against female employees. The Supreme Court rejected this theory as a basis for class certification, holding that the plaintiffs could not show the required commonality for class certification when there was no "glue" holding together the way in which Wal-Mart managers exercised their discretion.

The main impact of *Dukes* on gender discrimination class action lawsuits in the finance sector has been to shift the focus from challenging disparate treatment—where plaintiffs must show an intent to discriminate—to challenging policies that have a disparate impact on women—policies that appear neutral on their face but in practice disproportionately hurt women. Since *Dukes*, at least one U.S. Circuit Court of Appeal has endorsed class action status in a disparate impact case, involving race, which also recently settled. See *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (7th Cir. 2012). In the *Calibuso* case, the plaintiffs had alleged that Bank of America's and Merrill Lynch's account distribution, teaming, and compensation policies had the effect of boosting men's performance and pay, and handicapping women's, even though the policies appeared neutral on their face.

Conclusion

Even today, litigation in the financial services industry, both class actions and individual cases, continue to provide shocking and undeniable evidence that women continue to face discrimination on Wall Street because of their gender and the realities that encompass their lives and careers as women leaders and caregivers. The overwhelming evidence of their lack of promotion and pay equity can no longer be ignored.

Women are leaving the industry in droves, at a time when it sorely needs their proven—and different—effective governance and leadership. For an industry that has recently sustained its worst financial crisis since the Great Depression, amidst greed and mismanagement, this exodus of women may be its greatest loss yet as their presence may be fundamental to its full recovery.

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1. No. 02 Civ. 1243, Docket No. 1 (SDNY filed Feb. 15, 2002).

2. Eduardo Porter, "UBS Ordered to Pay \$29 Million in Sex Bias Lawsuit," N.Y. TIMES, April 7, 2005; available at <http://www.nytimes.com/2005/04/07/business/07bias.html>.

3. *Hanna v. Goldman Sachs*, No. 10 Civ. 2637, Docket No. 1 (SDNY filed March 24, 2010).

4. Bob Van Voris, "Goldman Settles Lawsuit Over Pregnancy Bias With Former Vice President," BLOOMBERG, Nov. 5, 2010, available at <http://www.bloomberg.com/news/2010-11-05/goldman-settles-lawsuit-over-pregnancy-bias-with-former-vice-president.html>.

5. Romio Geron, "Ellen Pao Says Kleiner Perkins Fired Her" (Updated), available at <http://www.forbes.com/sites/tomio-geron/2012/10/03/ellen-pao-says-kleiner-perkins-has-fired-her/> (last visited Feb. 22, 2013).

6. Paul Elias, "Ellen Pao Lawsuit: Sexual Harassment Case Roils Silicon Valley," available at http://www.huffingtonpost.com/2012/07/19/ellen-pao-lawsuit_n_1688208.html (last visited Feb. 22, 2013); CGC-12-520719 (Cal. Super. Ct. filed May 10, 2012).

7. The authors' firm was counsel of record for the plaintiffs in *EEOC v. Morgan Stanley*.

8. The authors' firm was counsel of record for the plaintiffs in *Amochaev v. Citigroup Global Markets*.