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Viewpoint: Assessing the Legacy of 'Pao v. Kleiner Perkins'

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"Landmark sex discrimination case."

Within moments of the jury's verdict that found Kleiner, Perkins, Caufield & Byers did not engage in gender discrimination or retaliation against Ellen Pao, this is how the media has labeled the case.

Is this characterization appropriate? Yes, for a number of reasons. However, despite this label there are also reasons to conclude Pao's lawsuit may well mean one step forward and two steps back for women's equality, generally and in Silicon Valley industries.

It seems Pao refused a settlement that likely would have included a confidentiality clause, prohibiting her from speaking about the settlement itself as well as the facts she believed supported her claims. Most insiders agree that many of these cases are settled, hiding the true breadth and depth of the gender inequality problem in America.

As the Pao trial illustrated, a public adversarial trial exposes many flaws and lapses in judgment by both sides. While the trial exposed disturbing details about the venture capital and tech industries, it also called into question Pao's motives for filing a lawsuit and for seeking damages for lost wages far beyond the imagining of most jurors, and most people.

In addition, many cases are resolved by summary judgment, by which a judge determines that there are no triable issues of fact and the record does not include facts supporting a finding of discrimination or retaliation as a matter of law. This case is very notable for the fact that it was not decided by a judge on summary judgment. However, this does not necessarily support affording Pao's case "landmark" status.

Certainly, most sex discrimination cases do not involve enormous sums of money—$16 million claimed by Pao—and therefore, do not receive the extensive media attention Pao's lawsuit attracted. This may contribute to why people consider this a "landmark" lawsuit, but money and media attention are not enough.

Lasting Effects

Whether it is a landmark case depends on what the Pao case means for gender equality, and what it means for the culture of Silicon Valley. Some commentators claim that, despite the jury finding against Pao, her lawsuit was a courageous act that will eventually advance gender equality in Silicon Valley. They point to the lawsuits recently filed against Facebook and Twitter alleging sex discrimination. They also point to some of the lurid details that came out in the Pao trial as indicative of a much broader "boys' club" culture. However, the fact that the jury nonetheless found against Pao despite these details should give employment lawyers some pause before filing other lawsuits against companies in the tech industry. For example, plaintiffs' lawyers will likely want to determine the extent to which companies have set out standards for promotion, the extent to which a plaintiff can document her performance.

The bigger challenge in Pao's trial revealed that, at least at Kleiner Perkins, the standards for promotion are very vague, and the environment in the tech industry similarly appears to rely more on gut and instinct in all facets of their operations. This amorphous problem is far and apart from what is truly considered the landmark gender equality case, *Price Waterhouse v. Hopkins* from 1989, brought by plaintiff Ann Hopkins. Pao's trial did not reveal blatant sex stereotyping as the basis for denying her promotions, as was the case in *Price Waterhouse*, in which the plaintiff was told she should walk and talk in a more feminine manner and wear makeup. Yet, there was testimony that the right "chemistry" did not exist with Pao. Thus, there was no smoking gun demonstrating discrimination.

There was ample evidence that Ann Hopkins had out-performed her co-workers and was clearly qualified for partnership. There was objective evidence of Hopkins' success. Yet, Kleiner Perkins does not seem to have clear standards for achieving partnership at the venture capital firm, making it difficult for Pao to demonstrate she satisfied that criteria. Indeed, Pao's claims that she had urged investing in Twitter lacked any paper trail. As several commentators have indicated, it is likely that junior partners will begin documenting their ideas and suggestions to be able to demonstrate their performance more objectively.

Although Kleiner Perkins prevailed in the lawsuit, investors in the venture capital firm may well demand the firm take steps to reduce the risk of future discrimination lawsuits by publicizing anti-discrimination policies, establishing written criteria for promotion and mechanisms for ensuring employees receive appropriate credit for their work. Certainly, these types of policies to manage risk come within the due diligence engaged in by anyone making significant investments in companies. In any event, there is no question this lawsuit has many in the VC and tech industries engaged in reflection and soul-searching about how the details revealed mesh with the industry's culture.

A better comparison to Ellen Pao's case may be the impact of Anita Hill's testimony during the confirmation hearings of U.S. Supreme Court Justice Clarence Thomas in 1991. Although Justice Thomas was ultimately confirmed, despite Hill's testimony about the sexual harassment she claimed to have endured by him, nearly a quarter of a century later commentators point to Hill's testimony as the point when genuine efforts to address and prevent sexual harassment in the workplace began to gain traction and results.

It may well be that years and decades from now we look back on the Pao lawsuit as the turning point for gender equality in Silicon Valley. Whether the lawsuit against Kleiner Perkins is truly landmark remains to be seen.

The Recorder *welcomes submissions to Viewpoint. Contact James Cronin at jcronin@alm.com.*

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