

## Lessons for Employers from *Ellen Pao v. Kleiner Perkins*

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The ***Pao v. Kleiner Perkins*** case, which garnered national attention for its salacious allegations and high-profile players, reached an end following weeks of testimony and days of deliberation. The jury found Ellen Pao was not discriminated against by her former employer because of her gender or because of her complaints of discrimination. With as much as \$100 million in potential damages, this was a tremendous victory for Kleiner Perkins. Even in this victory, it is important for employers to consider how this situation (and its significant costs of defense) arose as similar lawsuits have already been filed by women against Twitter and Facebook.

*Pao v. Kleiner Perkins* was a sexual discrimination case brought by a former junior partner at the venture capitalist firm of Kleiner Perkins Caulfield & Byers LLC. Among other things, Pao alleged she was discriminated against on the basis of her gender when the firm failed to promote her to general partner status (a promotion that could have increased her income as much as sixfold if she was ultimately elevated to managing member status where she would collect a fee based on the success of the firm's investments). To support her claim, Pao pointed to the promotion of several of her male colleagues. One such colleague, with whom Pao had a relationship, allegedly subjected her to retaliation following the conclusion of their consensual sexual relationship. The same colleague was also accused of sexually harassing another female junior partner.

Pao blamed her lack of promotion on the allegedly rampant sex discrimination throughout the firm, which allegedly included holding all-male dinner parties and ski trips, asking female partners to take notes during meetings, placing male partners on significant accounts and boards in lieu of women, and excused sexual harassment from male partners. In contrast, Kleiner Perkins attributed Pao's lack of advancement to her not having the "genetic makeup" of a venture capitalist, citing her seeing the world in black and white instead of appreciating the gray as the industry requires; her poor interpersonal skills, particularly her ability to work well with other partners; and her poor leadership skills. Kleiner Perkins stressed it was the opinion of the partnership that Pao could have been successful in an operations role, but she fell far short in terms of the skills required for a successful investor.

While the case was pending in California state court and exclusively involves questions of California law, it provided important lessons to all employers, particularly those in client services industries. Below are some lessons to take away from the *Pao* case:

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## **Promptly investigate employee complaints, even when the employee seems inclined to just forget about it and move on.**

Pao sought to strengthen her case by introducing evidence about the experiences of her female colleagues. In particular, she pointed to the fact the man with whom she had a sexual relationship was accused of sexually harassing another female junior partner such accusation having been reported to a senior partner. However, the senior partner admitted the complaint went unaddressed until a subsequent letter was sent to several partners about the conduct. At that point it was investigated, substantiated, and the accused harasser left the firm. At the trial, the senior partner acknowledged it was an error not to have investigated the sexual harassment complaint immediately but explained he did so to protect the employee's privacy, as she was married.

Often, employers will not act on employee complaints if the employer feels that the employee just wants to forget it and move on, either because the employee has explicitly voiced reservations or because the employer thinks the employee seems conflicted. While sometimes stemming from good intentions, such a course of action leaves employers open to liability if the alleged accuser continues to harass others after the company has been placed on notice of the behavior. Bottom line: all complaints need to be investigated, particularly as investigation can help curtail an employer's liability in certain circumstances under federal law.

## **Be aware of potential Cat's Paw liability.**

Many employers are unaware an employee does not need to be the final decision maker for their motives to come into the analysis of whether discrimination has occurred. Indeed, if a biased individual has contributed information to the decision maker, and the decision maker relies on that information, the other individual's bias can be imputed to the decision maker. In fact, one of the key contention points in the *Pao* trial was whether the colleague with whom Pao had the consensual relationship had in fact contributed to negative comments contained in her performance reviews following the end of their relationship. The case underscores the importance of employers carefully documenting how employment decisions are reached, noting who contributes information, and making sure all involved are impartial.

## **Have updated harassment and discrimination policies, distribute them to employees, and have a committed point-person (if not a full-time HR person) for human resources matters.**

One of Pao's statements during trial was she felt a lawsuit was her only recourse because Kleiner Perkins wasn't going to change, noting that from her perspective the firm did not have policies and procedures to address her complaints. Indeed, like many smaller service industry employers, Kleiner Perkins had no human resources department, and the Chief Financial Officer was put in charge of the anti-discrimination policy. Evidence was presented at trial that the policy was rarely updated, was not disseminated (except upon hire), and employees had to specifically ask the CFO to see the policy. Further, evidence was presented that this practice was not changed until 2012 (following Pao's and another colleague's complaints), at which point a new policy was drafted. Not only should employers make it a priority to have updated equal employment and anti-harassment policies, but they must be readily available to employees so employees are aware of their rights and the channels available for reporting discrimination and harassment. This is a key component for rooting out discrimination and harassment and also strengthens an employer's defense.

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**Consider diversity efforts.**

A major focus and theme of the trial was on the lack of women in venture capitalism in general. Indeed, one of the jurors posed the question to a Kleiner Perkins managing member, who happened to be regarded as Pao's mentor and "surrogate father": were women simply not interested in becoming V.C.s, "or did the venture capital world fight them off"? He responded by agreeing that the percentage of women venture capitalists was poor. He contrasted this with Pao, however, when he staunchly defended Kleiner Perkins' own track record with women and made it clear Pao's experience at Kleiner Perkins had nothing to do with her gender. Employers, particularly those in fields where women are in fact or perceived to be underrepresented, should consider whether new or additional diversity efforts can be implemented to encourage the hiring and retention of women.

While Kleiner Perkins proved ultimately able to defend its track record with Ellen Pao, it was not without great expense. By instituting proactive measures with respect to harassment, investigations, recruiting, retention and promotion, cases such as these may be avoided altogether.

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