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PERSPECTIVE

A significant blow to firms looking to arbitrate discrimination claims

By Gay Crosthwait Grunfeld and Cara Trapani

A California Court of Appeal decision has dealt a significant blow to law firms seeking to force women lawyers to arbitrate claims of gender discrimination. In *Ramos v. Superior Court*, 28 Cal. App. 5th 1042 (2018), cert. denied — U.S. — (2019), the 1st District Court of Appeal held that Winston & Strawn LLP's arbitration agreement with a former female partner was unenforceable, allowing her to proceed with her sex discrimination lawsuit in state court. *Ramos* is the latest in a series of developments that may finally end the enduring gender imbalance that has plagued the private practice of law for decades.

Despite the fact that women have made up approximately 50% of law students for over a quarter century, and have outnumbered men in law school since 2016, women lawyers make up about 30% of non-equity or income partners and account for less than 25% of equity partners in law firms. Only 14% of law firm managing partners are women. Partnerships have historically evaded liability from individual partners' claims of gender discrimination because anti-discrimination statutes — like the Fair Employment and Housing Act and Title VII of the Civil Rights Act of 1964 — afford protections to "employees" not partners. Female partners in California won some measure of protection under workplace anti-discrimination statutes in 2012 in *Fitzsimons v. California Emergency Physicians Medical Group*, 205 Cal. App. 4th 1423 (2012). There, the 1st District Court of Appeal allowed a partner to assert a retaliation claim under FEHA against her partnership for opposing the sexual harassment of an employee. Although Dr. Fitzsimons was technically not an employee of the partnership, she complained about the harassment of the firm's employees and was therefore covered by FEHA.

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Now, with the same Court of Appeal's decision in *Ramos*, female attorneys (potentially including equity partners) may more easily air their gender discrimination and pay equity claims in court. The prominent global law firm Winston & Strawn LLP hired Constance Ramos in May 2014 as an income partner in its intellectual property practice group. On top of her juris doctor, Ramos holds a degree in computer science and a doctorate in biophysics. She already had an established career in intellectual property law, and was the only partner in the firm's Northern California offices with such advanced degrees. Ramos had joined Winston with two of her former male colleagues from Hogan Lovells US LLP.

Ramos alleges she was denied recognition for her work, excluded from opportunities for career advancement, evaluated based on the success of male colleagues, and denied compensation to which she was entitled. She resigned in 2017 and filed suit in San Francisco County Superior Court. The trial court granted Winston's motion to compel arbitration pursuant to the partnership agreement Ramos signed shortly after joining the firm. Ramos filed a petition for writ of mandate, and the 1st District granted the writ, and held that the arbitration clause in the partnership agreement was unconscionable.

In analyzing the enforceability of the arbitration clause, the Court of Appeal found it unnecessary to resolve the question of whether Ramos was an employee of the firm. It concluded that the California Supreme Court's decision in *Armendariz v. Foundation Health Psychcare Services*, Inc., 24 Cal. 4th 83 (2000), governed the dispute. The court decided that *Armendariz* remains good law despite the U.S. Supreme Court's increasing hostility to any restrictions on the enforceability of arbitration agreements.

Armendariz established five mandatory fairness and unconscionability requirements for arbitration agreements: (1) appointment of neutral arbitrators; (2) adequate discovery procedures; (3) a written and well-reasoned arbitration decision; (4) no limitations on the statutory relief that would otherwise

be available in court; and (5) requirement that the employer pay all costs unique to arbitration. The *Ramos* court based its application of *Armendariz* on two rationales. First, Ramos's claims under FEHA and the Equal Pay Act for sex discrimination, retaliation, wrongful termination, and unfair pay practices encompassed the same statutory rights that *Armendariz* held are unwaivable. Second, Winston — a firm of 1,000 attorneys across 16 offices around the world — was in a superior bargaining position visà- vis Ramos, akin to that of an employer- employee relationship. There was no evidence that Ramos had an opportunity to negotiate the arbitration provision.

The court found that several provisions of the arbitration agreement failed to meet the *Armendariz* requirements and were unconscionable. Those provisions required Ramos to pay half the costs of arbitration and her own attorney fees, restricted the ability of the panel of arbitrators to override the decisions of the partnership, and required strict confidentiality concerning "all aspects of the arbitration." The court concluded that it could not sever these unconscionable terms, and invalidated the entire agreement. After the California Supreme Court denied review, Winston & Strawn petitioned for certiorari, which was denied on Oct. 7, 2019. A trial is now set for Oct. 26, 2020.

The U.S. Supreme Court's rejection of the opportunity to review *Ramos* is significant given that court's resistance to limits on arbitration and given that mandatory arbitration clauses are standard in BigLaw employment contracts and partnership agreements. New partners like Ramos have extremely limited, if any, bargaining power to negotiate changes to these agreements, which invariably result in confidential, non-precedential dispute resolution and contribute to the ongoing disparities in the number and compensation of female attorneys.

Alongside *Ramos*, change is in the air. On Oct. 10, 2019, Gov. Gavin Newsom signed a bill that prevents California employers from conditioning employment on signing an arbitration agreement. While that law has been temporarily stayed by a federal district court judge, the American Bar Association has issued a resolution urging legal employers to avoid mandating arbitration for people alleging sexual harassment claims. Student activists at Harvard Law School have boycotted firms requiring employees to sign arbitration agreements. Multiple firms — including McDermott Will & Emery, Munger Tolles & Olson LLP, Orrick Herrington & Sutcliffe LLP, Skadden Arps Slate Meagher & Flom LLP, Kirkland & Ellis LLP, and Sidley Austin LLP — have abandoned mandatory arbitration for associate attorneys.

A generation after women reached parity in law schools, at last pressure is mounting on the legal industry to close the gender gap. Once unheard of, lawsuits by women partners and associates are on the rise in the #MeToo era. Gender discrimination and pay equity claims are currently on file against respected firms such as Jones Day, DLA Piper, and Fox Rothschild. In January 2019, a former female equity partner at Ogletree, Deakins, Nash, Smoak & Stewart P.C. filed a gender bias suit in San Diego County Superior Court under California's Private Attorneys General Act. *See Tracy Warren v. Ogletree, Deakins, Nash, Smoak & Stewart P.C.*, 37- 2019-00004338. Meanwhile, the "mommy track" gender discrimination case filed against Morrison & Foerster is proceeding in the Northern District of California. *See Jane Doe 1 et al. v. Morrison & Foerster LLP*, 3:18-cv-02542. Under *Ramos*, more lawsuits against law firms will see the light of day in court.

If they want to get on board, it is critical that law firms actively conduct pay audits, provide harassment training, promote diversity and inclusion, and be open and willing to take prompt remedial action when gender discrimination is apparent or disclosed. ■

From left: **Gay Grunfeld** *is managing partner and* **Cara Trapani** *is an associate at Rosen Bien Galvan & Grunfeld LLP. RBGG, founded in San Francisco in 1990, focuses its practice on complex litigation. RBGG lawyers have been consistently recognized as some of the top trial and appellate lawyers in California.*