A Timely Analysis of Legal Developments

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In *Velez v. Novartis*, a New York jury recently rendered one of the largest gender discrimination verdicts ever. The case has provided a chilling example of the inherent risks of defending against a "policy and practice" discrimination class action fueled by anecdotal examples of isolated, inappropriate conduct. This ASAP summarizes some key elements of the case and outlines steps that employers should think about, to avoid a similar result.

One of Largest Jury Verdicts in Gender Discrimination Class Action Awarded – What Lessons Can Be Learned

By Barbara E. Hoey

As has been well-publicized, a jury in New York recently awarded $3.4 million in compensatory damages and $250 million in punitive damages in a gender discrimination class action against Novartis – one of the largest gender discrimination verdicts ever.[1] This case has provided a chilling example of the inherent risks of defending against a "policy and practice" discrimination class action fueled by anecdotal examples of isolated, inappropriate conduct. The litigation is not yet over, as the remaining roughly 5600 women in the class now have the right to seek their own individual compensatory damages through an arbitration process, which could take another year to conclude. The plaintiff's counsel estimated that additional back pay awards could reach $1 billion or more. The judge can also order equitable relief, such as changes in Novartis' policies and procedures. Novartis continues to dispute the verdict and vows to appeal, and it is very possible that the verdict could be reduced through post trial motions or overturned at the appellate level.

For 10 years Novartis has been named one of the top places to work by *Working Mother* magazine. Clearly, the company has invested a great deal of time and effort in trying to do the right things for its female employees. Having done all of this, how then did the company find itself in this situation? What should companies consider to reduce the risk of finding themselves in a similar situation? The answer reveals a great deal about the class action process and the risks it poses for employers.

Factual Background

The Novartis litigation began in July 2003, when Amy Velez, the lead plaintiff, filed a charge of discrimination with the federal Equal Employment Opportunity Commission (EEOC), claiming that Novartis engaged in a "continuing pattern and practice of discrimination against female employees" by, among other things, subjecting women to a sexually hostile work environment, and denying women their leave rights under the federal Family and Medical Leave Act (FMLA) (by denying woman equal treatment after pregnancy or maternity leaves). A second

charge filed that year by another female employee, Michele Williams, made the same claims and added the additional allegation that the company also engaged in a pattern and practice of "denying females promotional opportunities in favor of less qualified male employees."

Litigation commenced in 2004. Novartis denied the plaintiffs' claims and fought the case aggressively from the outset. There were years of discovery and several motions filed before the class was certified in July 2007. The class included 19 lead plaintiffs, with the broader class defined as "all women who held sales related jobs with Novartis, from 2002 though the present." In support of their allegations of class-wide discrimination, the plaintiffs had relied on two experts. One expert had analyzed the company's performance management and compensation systems, and opined that they were "subjective" and vulnerable to bias against women. The plaintiffs' second expert had analyzed salary data, and opined that the company's compensation systems had a disparate impact on female employees, resulting in statistically lower performance scores for females than males, and a disparity (of $74.82 per month) between the average earnings of male versus female employees. Finally, the plaintiffs relied on affidavits from current and former employees – "anecdotal evidence" – recounting their negative experiences working upon returning from pregnancy or maternity leaves.

Among this "anecdotal" evidence was an affidavit from one female employee recounting that her manager told her he preferred not to hire young females because "[f]irst comes love, then comes marriage, then comes flex time and a baby carriage." Another woman claimed she was told by a manager to get an abortion and a third alleged that a trainer speaking at a training session that she was attending (when she was five months pregnant) told the group to avoid getting pregnant early in their employment. Looking at the affiant, the trainer quipped, "Oops, too late."

Based on these anecdotes, the court found that the plaintiffs had presented sufficient evidence of common issues to certify a class. The court acknowledged that it must be "wary of a claim that the true color of a forest is better revealed by reptiles hidden in the leaves than by the foliage of countless free-standing trees." Nevertheless, the court concluded, "plaintiffs have produced enough foliage to raise questions about the forest's color. Whether or not the declarations are ultimately convincing to a fact-finder, they are numerous enough and detailed enough to establish that a common question exists."

Two years later, and after the close of extensive discovery, the company moved for summary judgment on a number of the claims. In a short and terse two-page decision, the motion was denied by the newly assigned District Judge Colleen McMahon.[2] Judge McMahon concluded that the plaintiffs had presented sufficient evidence of class-wide discrimination to satisfy the "minimal" burden of getting the claims to a jury – and that "Plaintiffs have demanded a jury, and a jury they shall have."

The Trial and Verdict

The trial began on April 8, 2010, and ended with the jury's verdict on May 19, 2010. In those six weeks, the jury heard evidence from a number of female witnesses who recounted stories of allegedly unfair pay practices, and being passed over for promotions or denied salary increases because they became pregnant or took maternity leave. Two women gave testimony that garnered press attention. One female sales representative claimed she was raped by a doctor at a company-sponsored social event, then criticized by her manager and an HR executive and "blamed" for the rape incident. Another woman recounted the story of the manager who recited the "baby carriage" poem discussed above.

Novartis argued that such anecdotal evidence does not prove class-wide discrimination or a pattern or practice of discrimination. Indeed, the plaintiffs presented testimony from only a handful of women among thousands of female employees who had these negative experiences. To counter this, Novartis presented testimony from a number of women who had great careers working for the company. The jury was not convinced by these arguments.

One of the messages for employers from this verdict is that the impact of even isolated "bad acts" on a jury cannot be discounted. Indeed, it is likely it was the "anecdotal evidence" of the women who testified before that jury in Manhattan that resonated most with the jury and contributed greatly to the large verdict.

What Lessons Can Be Learned?

Employers should take this verdict as a reminder that they must continue to monitor, train and manage their workforce in an ongoing effort to prevent gender discrimination and harassment. The verdict provides several messages that all employers, particularly larger ones, may want to consider.

- Claims of gender discrimination are not a thing of the past, and with the Lilly Ledbetter Act in place,[3] companies need to *look now* at their pay plans and performance evaluation systems to determine what impact they have on women or others in classifications covered under federal or state discrimination laws. The plaintiffs in this case pointed to a number of practices they claimed had a disparate impact on women – such as the company's "subjective" review system, that review scores were put on a forced "curve" and that there was no effective means to "appeal" a negative review because the manager who gave the bad review was usually the same person who decided the appeal. While such practices may not be discriminatory on their face, they may lead to class action challenges resulting in years of litigation and even an adverse result in a jury trial.
- Employers also should review other policies and practices, such as leave policies, to determine whether they might adversely impact women, and, if so, whether there is a sufficiently strong business justification for the policies.
- Sexual harassment is not "old hat" and all employers need to be vigilant in preventing it, and dealing with it when it happens. Many employers may feel that if they have done harassment training once, they are safe. But once may not be enough for some managers. Moreover, there are people inside every company who – despite all the training in the world – will at times exercise poor judgment and behave badly. The employer simply cannot prevent every bad thing from happening. The real test for every company is how it responds to and deals with those situations. Are they swept under the rug? Does the conduct continue? Or, are steps taken to address the behavior and punish those who are responsible? Employers who do not respond appropriately to bad behavior in their workplace, who let the "harassers" go with a slap on the wrist, or who do not otherwise deal with a bad actor may find themselves having to explain what happened to an angry jury.
- Having the right policies may not be enough, however. It all comes down to the people who administer the company's polices – *i.e.*, frontline managers. Having legally compliant policies may not be worth much if the individual managers and supervisors charged with implementing them do not really believe in and support these polices. In this case, even though Novartis had generous policies that exceeded the legal requirements, there was damaging testimony about managers who undermined the company's intentions and who were openly hostile toward women who took advantage of those policies.

We are at a critical juncture today in the world of employment law with the convergence of new laws strengthening those that have been in place for decades. Women today make up more than 50% of the workforce, and gender discrimination has been against the law since 1964. Sexual harassment has been against the law since the Supreme Court's decision in Meritor in 1981. New statutes have made corporations more vulnerable to discrimination class actions. The Lilly Ledbetter Fair Pay Act has made it easier for plaintiffs to assert a claim of pay discrimination by removing some of the time bars to these claims. If Congress passes the "Paycheck Fairness Act,"[4] claims under the Equal Pay Act will be even easier to prove.

The impact of *Velez* and other recent gender discrimination class action decisions cannot be discounted. First, the publicity generated by cases like this tend to bring potential plaintiffs out of hiding, and into the arms of plaintiffs lawyers, if for no other reason than they see litigation as a lottery ticket. Coupled with this, during the recession of the past two years, many employers cut their training and compliance budgets and have not been investing time and money in harassment training, management training, review of performance and pay systems, and other activities that do not directly impact the bottom line.

In sum, the *Velez* verdict should be taken seriously by employers, as it will certainly be taken seriously by plaintiffs' lawyers. Companies should take a look at what steps they need to take now to address possible gender issues in their workforce.

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[1] No. 04-CIV-09194 (S.D.N.Y. May 19, 2010).

[2] The original Judge, Gerald Lynch, had been appointed to the Second Circuit Court of Appeals.

[3] The Lilly Ledbetter Fair Pay Act enacted in February 2009, amended Title VII to provide that a charge of salary discrimination could be filed within 300 days of the employee's receipt of her paycheck – effectively "re-starting" the statute of limitations each payroll period.

[4] The Paycheck Fairness Act introduced in January 2009 will expand available damages under the Equal Pay Act and make the plaintiff's burden of proof for EPA claims significantly easier.