HEINONLINE

Citation: 21 Woman Advoc. 18 2015
Provided by:
BerkeleyLaw Library

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Mon Feb 22 18:46:43 2016

-- Your use of this HeinOnline PDF indicates your acceptance
of HeinOnline's Terms and Conditions of the license
agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from
uncorrected OCR text.

-- To obtain permission to use this article beyond the scope
of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=1934-4481
For All Their Advances, Tech Companies Have Yet to Solve the Gender Gap

By Cristin Kent Aragon and Denise L. Ashbaugh – November 17, 2015

Despite decades of legislative and business efforts, the technology industry continues to struggle with gender equality. Over 50 years ago, Congress recognized and attempted to address gender discrimination in the workplace with the enactment of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the federal Equal Pay Act of 1963, 29 U.S.C. § 206(d). These laws prohibit discrimination on the basis of gender and were drafted, in part, to level the playing field between men and women in the workplace. Despite the fact that gender equity in the workplace has improved since 1963, women continue to face a long road for true equality, especially in the field of technology.

The technology industry, like many other industries, recognizes that gender diversity is good for business. Studies show that gender-diverse groups produce better results, create more collaborative work environments, and have more profitability than groups that lack diversity. These results are enhanced when women have leadership and decision-making roles.

And yet the technology industry exemplifies how federal laws and rational economic forces have not leveled the playing field for women in any substantial way. At its most basic level, the industry remains mostly male. In terms of technical staff, women represent well below 10 percent of all employees. Women are also dramatically underrepresented in leadership roles and on the boards of directors of tech companies. Indeed, nearly half of all publicly traded tech businesses have no women on their boards. In terms of pay, the picture is also bleak: men in Silicon Valley earn 61 percent more than women. This means the average woman would have to work almost five extra months each year to earn as much as a man doing the same job.

Such disparities start even before women officially enter the job market. Yale University researchers found in 2012 that science professors at American universities widely regarded female students as less competent than their male counterparts, even when they had the same accomplishments and skills. Professors were less likely to offer jobs to female students and less likely to mentor them. Moreover, when professors did offer jobs to female students, they paid female students less money than male students.

Unsurprisingly, these differences impact long-term career success for women. Women who receive smaller lab spaces, less access to mentoring, and lower salaries are at a disadvantage in the race for grants, publications, patents, tenure, and promotions when they officially enter the workforce. In effect, women must have more education than their male counterparts in order to be considered for the same job opportunities. Given these issues, it is unsurprising that when they begin their careers, women are not treated on par with comparable men.

In some important respects, the tech industry is attempting to combat its diversity problem. A number of high-profile companies, including Netflix, Microsoft, Adobe, Facebook, Apple,
Yahoo, and Google, have substantially increased the paid leave they provide to working mothers. These leave policies are undoubtedly generous by U.S. standards, where only 12 percent of employees have access to paid parental leave. Many tech companies have also made other changes, such as opening up job sharing, allowing flex schedules and telecommuting, and providing childcare consultations. Others have made commitments to mentoring programs and to ensuring more career opportunities are open to women.

But these policies address only a piece of the problem. The workplace culture in many tech companies is notoriously inhospitable to women. In fact, more women cite culture-related issues than family-leave issues as the reason they leave (or never officially enter) the technology workforce. And in the startup world, where founders are usually friends first and business associates second, the lines between “personal” and “business” are fuzzy, making it more difficult to address workplace culture issues. Companies that lack human resources departments and other elements of traditional bureaucracy make it even more difficult for women (and all employees) to try to address any issues they experience in the workplace. Even when there is a place to report, unwritten biases and corrosive culture are often hard to identify, much less change. Women then are left with a decision to leave these companies, put up with the culture, or fight back.

**Gender Discrimination Litigation in the Tech World**

Women have started to fight inequality in the tech industry through additional legislation, and more recently, litigation. The federal [Lilly Ledbetter Fair Pay Act](https://en.wikipedia.org/wiki/Lilly_Ledbetter_Fair_Pay_Act) is a recent example of legislative efforts to address pay inequities, as is [California’s Fair Pay Act](https://en.wikipedia.org/wiki/Fair_Pay_Act). Other states also have laws that include some of the protections of California’s Fair Pay Act, although none goes as far as California’s statute, which allows employees to talk openly about pay and advocate for compensation and prohibits retaliation when employees exercise those rights.

Litigation against tech companies alleging gender discrimination is also on the rise. Given the legislative recognition that women still face discrimination in the workplace, and the paucy diversity statistics in the tech industry, one might expect such lawsuits to succeed regularly. This does not appear to be the case. For example, 70 percent of employment discrimination cases—including cases against tech companies and nontech companies—are dismissed on summary judgment in federal courts.

Cases that make it to trial do not necessarily fare better. One example is Ellen Pao’s high-profile gender discrimination and retaliation lawsuit against her former employer, which resulted in a complete defense verdict earlier this year. Pao claimed that after she ended an intimate relationship with a male partner and rejected the advances of another, her employer retaliated against her in various ways. Specifically, Pao alleged that she was denied promotions, increases in salary, board of director seats, and opportunities to contribute to fund management on the basis of her gender and in retaliation for her complaints. See First Amended Complaint for Damages, *Pao v. Kleiner Perkins Caufield & Byers LLC*, No. CGC-12-520719 (Cal. Super. Ct. Oct. 16, 2013), ECF No. 79. Yet what garnered the most attention from the case were Pao’s
allegations that women as a whole were not advancing within the company on the same scale as men, and her claim that she and other women received less compensation for equal work. This aspect of the case was covered by the national media and elicited broad comment. The trial, lasting 24 days, resulted in a favorable verdict for the employer, yet reportedly a juror still wanted to see it “punished” for its culture.

Pao’s lack of success at trial has not dissuaded other women in the tech industry from filing discrimination lawsuits. Earlier this year, Tina Huang filed a gender discrimination suit against Twitter, and Chia Hong filed a sexual and racial discrimination lawsuit against Facebook. See Class Action Complaint for Damages, Huang v. Twitter, Inc., No. CGC-15-544813 (Cal. Super. Ct. Mar. 19, 2015), ECF No. 1; Complaint for Damages, Hong v. Facebook, Inc., No. CIV 532943 (Cal. Super. Ct. Mar. 16, 2015). More recently, a class action complaint was filed against Microsoft Corporation, alleging a “continuing policy, pattern and practice of sex discrimination against female employees in technical and engineering roles . . . with respect to performance evaluations, pay, promotions, and other terms and conditions of employment.” Class Action Complaint at 1, Moussouris v. Microsoft Corp., No. 2:15-cv-01483 (W.D. Wash. Sept. 16, 2015), ECF No. 1. It remains to be seen whether any of these lawsuits can succeed.

Employers continue to create “woman-friendly” policies that, at least on paper, prohibit gender and other discrimination and strive to create an inclusive culture, and subtle sexism and implicit bias can be very difficult to prove in a court of law. Implicit bias refers to the generally unconscious judgments and prejudices people hold against traditionally stigmatized or marginalized groups. As gender discrimination lawsuits become more nuanced and rely less on overt expressions of discrimination, implicit bias becomes more important and may make it more difficult for plaintiffs to succeed. Jurors and judges alike all have implicit biases that affect how they view the evidence and the law. For example, jurors may find it hard to believe that an employer has engaged in illegal discrimination by choosing not to promote a woman if her (male) superiors believed her to be overly assertive or aggressive. This is true even if the “traits” supporting the conclusion that the woman was too assertive or aggressive are themselves a reflection of gender stereotyping—that is, women should behave a certain way and not be “too pushy.” This sort of implicit bias about how a woman should act inevitably affects how judges and juries view gender discrimination claims.

Ways Tech Companies Can Promote Gender Equality and Lessen Litigation
Tech companies can take some simple steps to promote gender equality and lessen the risk of litigation.

Step 1: Provide training on gender equality that educates managers on both obvious and subtle discrimination in the workplace and on the role that implicit bias can play. Teach them how to identify and address it.

Step 2: Revise recruitment policies to target and attract qualified female candidates. Review job-post descriptions and announcements. Gendered wording attracts or repels
candidates. Invest in women’s tech communities and recruiters who are successful in building diverse workplaces. Track application ratios as well as hires.

**Step 3:** Set up gender-neutral policies, and evaluate those policies’ impact on the workplace. Make certain men and women are compensated equally for performing the same work and that both genders are treated equally in recruitment, training, hiring, and promotion. Additionally, establish policies that allow both men and women to balance their work lives with their personal lives.

**Step 4:** Identify women who have the potential to be rising stars. Support and encourage these women, including by promoting them to leadership positions and board of directors opportunities.

**Step 5:** Showcase your company’s successful women—whether they hold management positions or are “rank and file” employees.

**Step 6:** Publicize your efforts to promote gender equality. Become a role model for the industry.

These simple steps will not only decrease the risk of litigation, but they will also promote a better workplace culture for all employees, which is good for business.

**Keywords:** litigation, woman advocate, gender equality, gender discrimination, diversity, workplace culture, tech industry

Cristin Kent Aragon and Denise L. Ashbaugh are attorneys at Yarmuth Wilsdon PLLC in Seattle, Washington.