OUTSMARTING THE FOX: GRETCHEN CARLSON, SEXUAL HARASSMENT, AND A PRE-SUIT ARBITRATION CLAUSE

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When Fox News confirmed in June 2017 that it had dropped "Fair and Balanced" as its mainstay slogan (Grynbaum, 2017), it signaled the ignominious end of the Roger Ailes era at Fox News. That era outlived Mr. Ailes, who had died a few weeks earlier at the age of 77, after falling in his bathroom (Haberman, 2017). Ailes was Fox News's co-Founder and president since the cable channel's 1996 birth, until he resigned in July 2016 (Stelter & Byers, 2016). His abrupt resignation was an initial consequence of the tsunami caused by the sexual harassment lawsuit that former Fox News anchor Gretchen Carlson filed against him two weeks earlier (Carlson Complaint, 2016). During the interim, Fox News hired a law firm to investigate multiple allegations of sexual harassment levied against Ailes. Some of the accusations had been made by women who felt emboldened to come forward after it was reported that Megyn Kelly, Fox's first-tier star (and former lawyer), claimed that Ailes had also sexually harassed her (Sherman, 2016). Fox News settled with Carlson a few weeks later and gave her $20 million plus a formal apology (Grynbaum & Koblin, 2016). Not only was the payout huge, but it was also noteworthy that Carlson had never actually sued Fox News. She had only sued Roger Ailes. Why she sued only him, and how, is not only informative about the nature of her employment contract and its binding arbitration clause, but says much about the difficulty many women have combatting sexual harassment in a work setting.

Fox and "Friends": The Corporate Culture

In August 2017, Fox reported in its own SEC filings that it had spent $50 million during the prior 12 months for settlements related to harassment allegations (21st Century Fox, 2017). Some of that money included the $20 million paid to Gretchen Carlson. Yet, Ms. Carlson had praised Ailes in her autobiography, *Getting Real*. In her book, Ms. Carlson called Mr. Ailes "brilliant," and "the most accessible boss I've ever worked for," and someone who "saw Fox as a big family." (Roig-Franzia, Farhi, and Thompson, 2016) Likewise, Megyn Kelly, who was thought to have played a significant role in Ailes's departure by alleging to Fox News' investigators that Ailes had repeatedly sexually harassed her, had publicly praised him. By the time Ms. Carlson's allegations reached their tipping point, Ms. Kelly acknowledged her own run-ins with Ailes. She claimed he had attempted to grab and kiss her on multiple occasions early in her career at Fox News, and added those allegations to her soon-to-be released memoir *Settle for More* (Churcher, 2016). Yet, earlier in 2016, she had told Variety magazine: "I really like working for Roger Ailes." (Setoodeh, 2016)

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A common initial defense made by Fox News and various defendants accused of sexual harassment (including Fox News Anchor Bill O'Reilly) was that none of these women had ever contacted Fox's Human Resources department, or its anonymous complaint line, about being mistreated (Chaitlin, 2017). Carlson claimed she did not report between 6 and 10 encounters with Ailes in which he talked about her body, used demeaning language and harassed her because Ailes' power, combined with the culture of 'Fox and Friends,' was intimidating to her (Byers, 2016). Interestingly, that would fit with what Ailes's own lawyer, Susan Estrich, a noted feminist legal scholar who had spoken and written about what she termed America's "rape culture," wrote about why victimized women might not file harassment claims. She had stated in an academic article published in Stanford Law Review in 1991:

> *"It should be obvious that the system already contains serious disincentives to women filing sexual harassment complaints. Start with embarrassment, loss of privacy, and sometimes shame. If the woman remains employed, she faces the prospect that her harasser and others will make her life impossible. If she has quit or been fired . . . the danger is that she will be branded a troublemaker, and find it difficult to find another job."* (Estrich, 1991).

In her lawsuit, Carlson alleged that, as a result of her continued refusal to submit to Ailes's overtures for sexual favors, she was subjected to retaliation. That retaliation took the form of being moved from "Fox and Friends" and put on a show with a smaller profile and being removed as a guest commentator on other Fox News shows. Additionally, she was shunned, ostracized, and denied the public relations and social media support that other hosts received. Finally, Fox News took the step of "decreeing that her contract not be renewed on June 23, 2016." (Carlson Complaint, 2016)

Sexual Harassment and the Law

Sexual harassment was being committed against women at work long before federal law recognized it as a liability-causing action. But in 1986, the U.S. Supreme Court ruled in *Meritor Savings Bank, FSB v. Vinson* that sexual harassment violated the Civil Rights Act of 1964. According to the Equal Employment Opportunity Commission (EEOC), sexual harassment includes conduct of unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature (EEOC, 2017). Traditional workplace sexual harassment occurs when a superior or other person with decision-making authority makes a hiring, promotion, or other workplace judgment about an employee conditioned on the employee submitting to sexual demands. Such behavior is also known as *quid pro quo* harassment, from the Latin phrase meaning "something for something."

A second form of sexual harassment is what has been called "hostile work environment" harassment. This occurs when—as the Supreme Court stated in *Harris v. Forklift Systems, Inc.* (1993)—"the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment." Examples of hostile work environment harassment include the telling of lewd jokes or displaying

pornography, discussing an employee's physical appearance, or even touching an employee without her or his consent. However, in a Supreme Court case where same-sex harassment also was found to be actionable (*Oncale v. Sundowner Offshore Services, Inc.*, 1998), the court said sexual harassment law is not intended to expand "into a general civility code," nor to prohibit the "innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex." In other words, this line of decisions does not impose absolute political correctness or antiseptic interactions in a workplace. Rather, courts focus on whether a reasonable person would find the work environment to be intimidating, hostile, or abusive (EEOC, 2017).

Hostile work environment harassment must first be objectively severe (judged by the "reasonable person" standard), and then be subjectively perceived by the victim as abusive (*Harris v. Forklift Systems, Inc.,* 1993). Context is important in sexual harassment cases, and as put wittily by Justice Antonin Scalia in *Oncale*, a professional football coach hasn't committed sexual harassment by patting his player on the buttocks as the player heads onto the field, even though the coach has if committing the same act on his secretary. Courts must determine on a case-by-case basis whether a work environment is sufficiently hostile or abusive by examining all the circumstances, including whether the conduct; 1) is physically threatening or humiliating, as opposed to a mere offensive statement; 2) unreasonably interferes with an employee's work performance; and 3) effects the employee's psychological well-being (*Faragher v. City of Boca Raton*, 1998).

Employers are vicariously liable for their supervising employees' quid pro quo sexual harassment. (Of course, employees who commit sexual harassment are always liable.) But even if no tangible work action was taken against a harassed employee (such as losing a promotion for a refusal to submit to the sexual demands), the employer can still be liable, because the Supreme Court has ruled that the distinction between quid pro quo and hostile work environment are less significant for employer liability than whether a supervising employee has in fact discriminated against the employee (*Burlington Industries, Inc. v. Ellerth*, 1998). However, the Court in *Burlington Industries v. Ellerth* (1998) stated that if no tangible employment action occurred, an employer is able to raise a two-part affirmative defense against liability: 1) that the employer reasonably tried to prevent and immediately correct any behavior that could be considered sexual harassment; and 2) that the employee unreasonably failed to avoid harm by taking advantage of the remedies provided by the employer to the harassed employee, such as failing to report the conduct.

The Difficulty of Documenting Harassment

Since sexual harassment rarely occurs in the presence of witnesses who could (or would) confirm the offending actions, a harasser is often able to say, "I never said or did that" or "there's no proof I ever said or did that." Carlson prepared for that eventuality by using her iPhone to secretly record her interactions with Ailes since 2014 (Sherman, 2016). According to Carlson's account, she had been preparing to sue Ailes for about nine months prior to filing the complaint – the legal filing, or "pleading" as it is formally known – that officially starts a lawsuit (Roig-Franzia, Farhi, and Thompson, 2016). According to Carlson and her lawyer Nancy Erika Smith,

their secretive strategy was necessary because if Ailes had gotten wind of any impending legal action against, he might have struck first against Carlson, threatening her. In fact, according to the 2004 sexual harassment suit that former "O'Reilly Factor" producer Andrea Mackris brought against Bill O'Reilly, O'Reilly threatened Mackris by saying, "If you cross Fox News Channel, it's not just me, it's Roger Ailes who will go after you. I'm the street guy out front making loud noises about the issues, but Ailes operates behind the scenes…so that one day BAM! The person gets what's coming to them but never sees it coming." ("O'Reilly Hit," 2004)

Although the strategy was to file suit in September 2016, that plan was scrapped when on June 23 Carlson's contract was not renewed and she was fired by Fox News Vice President Bill Shine (Sherman, 2016). Less than a year later, Bill Shine—who became Fox News co-president after Ailes's ouster—was shown the door (Byers & Stelter, 2017). Considering Fox's ratings didn't slide during his co-presidency, many speculated that his "resignation" was continued fallout from the sexual harassment scandals and the belief that Shine enabled the harassment by looking the other way or covering up for Ailes (Grynbaum & Steel, 2017).

Carlson filed her sexual harassment suit against Roger Ailes on July 6, 2016 in New Jersey (where Ailes was a resident), seeking unspecified compensatory and punitive damages for harming her reputation and career, and causing her pain and mental anguish (Carlson Complaint, 2016). In the complaint, she described multiple allegations of Ailes's and others' mistreatment of her, occurring throughout her years at Fox News, which she said created a "discriminatory, hostile and harassing work environment" (Carlson Complaint, 2016). She also alleged that Ailes had demanded "sexual favors" of her and then retaliated against her for refusing and objecting to them (Carlson Complaint, 2016).

According to Carlson's complaint against Ailes, it was Steve Doocy, her former co-host from her popular morning show "Fox and Friends" who initiated the harassment by creating a "hostile work environment by regularly treating her in a sexist and condescending way, including putting his hand on her and pulling down her arm to shush her during a live telecast."(Carlson Complaint, 2016) Doocy's efforts at "mocking her during commercial breaks, shunning her off air, refusing to engage with her on air" and "belittling her contributions to the show" led her to complain to her supervisor in September 2009. When Ailes learned of that, he called Carlson a "man hater" and a "killer" and told her she needed to "get along with the boys," and then retaliated against her by reducing her influence on "Fox and Friends" and removing her from her weekly appearances on "The O'Reilly Factor." (Carlson Complaint, 2016) Later, Carlson was fired from "Fox and Friends" in 2013 and reassigned to anchor a daily news show from 2:00 p.m. to 3:00 p.m.

As to the sexual harassment claims, Carlson didn't allege when Ailes's wrongful actions began, but her claims were specific. They included a claim that Ailes ogled her in his office, "asking her to turn around so he could view her posterior." That same allegation was made later in the year by another woman, Lidia Curanj, who said Ailes asked her—during her job interview—to turn around so he could see her from behind (Steel, 2016). Also, former Fox News star, Andrea Tantaros, sued Ailes for sexual harassment in April, 2017, and included in her allegations was

the familiar refrain that at a 2014 meeting with Ailes, asked her to turn around so he could he could "get a good look at you." (Gregorian & Brown, 2017)

Carlson alleged that Ailes talked about what outfits enhanced her figure and urged her to wear those every day, that he talked with her about her legs, and that he complained about how boring and hard being married was (Carlson Complaint, 2016). Carlson also accused Ailes of "making sexual advances by various means," including that he told her she was the one person he would choose "to be stranded with on a desert island." He once asked her how she felt about him, following up the question with: "Do you understand what I'm saying to you?" She alleged Ailes once said to others while in her presence that he had slept with three former Miss Americas but not her. (Carlson was the 1989 Miss America.) Ailes told her she was "sexy," but that she was "too much hard work." When Carlson met with Ailes in September 2015 at his office to discuss his retaliatory and discriminatory treatment of her, Ailes said to her: "I think you and I should have had a sexual relationship a long time ago and then you'd be good and better and I'd be good and better," concluding with "sometimes problems are easier to solve" in such a manner (Carlson Complaint, 2016).

How Gretchen Carlson Got Around a Mandatory Arbitration Clause

Carlson faced an additional obstacle in her case - an arbitration clause in her employment contract. Arbitration clauses are contractually agreed-to terms in a contract (often found in employment contracts) that mandate conflict resolution outside a court of law. It is considered an advantage for employers to arbitrate employment matters because it cuts down on class action lawsuits, limits discovery, and yields quicker and less costly results as compared to verdicts rendered in a court of law. Notably, there are also no juries present during an arbitration. The arbitrator serves as both the trier of fact and law. The arbitration clause in Carlson's contract meant that Carlson could not file her complaint against Fox News in a court of law. In fact, the arbitration clause read as follows (Ailes, 2016):

> *Any controversy, claim or dispute arising out of or relating to this Agreement or Performer's [Plaintiff's] employment shall be brought before a mutually selected three-member arbitration panel and held in New York City in accordance with the rules of the American Arbitration Association ["AAA"] then in effect. ... Such arbitration, all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence.*

Therefore, under this arbitration clause, there would be no jury to evaluate Carlson's case, and she would be bound by an arbitrator's decision. In order to avoid this, Carlson chose not to file her case against Fox. Instead, she sued Ailes personally (Luscombe, 2016).

Rather than bringing her lawsuit under federal or state anti-harassment or discrimination statutes, Carlson's complaint was grounded in what she said were violations of New York City law: §8-107 of the Administrative Code of New York City's Commission on Human Rights. Specifically, New York City's Administrative Code §8-107 prohibits an "employer or an

employee or agent" from engaging in various forms of sex or sexual orientation-based discrimination or retaliation. Yet, despite §8-107's reference to an employee or agent of the "employer," which in this case would be Fox News, Carlson not only sued Ailes without also suing Fox News, but she also untethered Ailes's actions from his employer by stating in her complaint (2016) that: "Ailes undertook these discriminatory and retaliatory actions in his individual capacity and for personal and unlawful purposes. His retaliation against Carlson was outside the scope of his authority, employment and agency at Fox News…."

Roger Ailes's strategy was to attempt to force Carlson to arbitrate her claims, rather than sue in court. Despite the language in Carlson's complaint that Ailes's harassment was outside the scope of his employment at Fox News, Ailes argued in his July 8, 2016 motion to compel arbitration. He claimed that Carlson was disingenuously suing him in his individual capacity, while referring to him as her former boss and Chairman and CEO of Fox News in her lawsuit (Ailes, 2016). Also, he noted, Carlson's lawsuit concerned him in his capacity as her former boss (Ailes, 2016). Carlson's suit, Ailes argued, was actually a breach of her employment contract.

Ailes filed this motion in federal court in New Jersey, rather than the New Jersey state court where Carlson filed her suit, as part of his attempt to get the case moved to federal court and then forced into arbitration. He cited federal case law supporting his argument that an employee can't avoid employment contract-based arbitration by only suing an agent of the employer—who didn't sign the employment contract—and not suing the employer (*Pritzker v. Merril Lynch, Pierce Fenner & Smith, Inc.*, 1993; *Tracinda Corp. v. DaimlerChrysler AG*, 2007). His motion also cited New Jersey and New York state cases holding that a plaintiff can't sue a corporate officer exclusively as a means to subvert a corporation-required arbitration clause, had the corporation been sued (*Bleumer v. Parkway Ins. Co.*, 1994; *Hirschfield Productions, Inc. v. Mirvish*, 1996). Ailes also found a case similar Carlson's, where a female plaintiff sued, alleging violations of New York City's Human Rights Law, but the case was moved to arbitration because of an applicable arbitration agreement she had previously signed with her employer (*Thomas v. Public Storage*, 2013). Fox News settled its case with Carlson days after Mr. Ailes filed his motion to compel her lawsuit to arbitration, resulting in Carlson dropping her suit against Ailes.

Arbitration: A Quicker, Cheaper, and Private Alternative to Litigation

Arbitration is an out-of-court, alternative mechanism used to resolve legal disputes. Essentially, parties who would otherwise be litigants in court agree to have an arbitrator or panel of arbitrators hold a hearing on their dispute and then issue a decision. In a way, arbitration is litigation-light, in that parties in arbitration are still opposing each other and seeking to have a fact-finder render a decision. But arbitration is quicker and cheaper (and therefore, more efficient) because the evidence gathering and presentation is less formal than what happens when litigants must operate within the rules of trial procedure and evidence. Rather than presenting evidence in a trial run by a judge, the evidence is presented in an arbitration hearing run by an arbitrator or panel of arbitrators, who also render the decision, formally called the "award."

Arbitration is a creature of contract, in that arbitrations occur because parties agree by some form of a contract to submit their dispute to arbitration. While it is possible for parties who are in a legal dispute to then agree to arbitrate, the majority of arbitrations are the result of pre-suit arbitration clauses being inserted in contracts, like those for consumer services (cable TV or Internet service providers), financial services (credit card companies) or employment. These pre-suit arbitration clauses lock in the process for dispute resolution before any actual dispute takes place. Besides being contractually arranged, another critical distinction between litigation and arbitration is that arbitration is a private mechanism. Not only does the process occur outside the purview of the public or media, but also the decision is meant only for the involved parties and not for public consumption, like what occurs in litigation and in appellate court actions.

Very few statutes in American history have been as influential as the Federal Arbitration Act (FAA) of 1925. Time after time the U.S. Supreme Court has approvingly invoked the FAA's provisions, which, summarily, are to make written arbitration agreements, "valid, irrevocable, and enforceable…." (9 U.S.C. § 2) The Supreme Court has even held that the FAA preempts state statutes granting parties more rights in arbitration than provided by the FAA (*AT&T Mobility LLC v. Concepcion*, 2011). While arbitration and other forms of alternative dispute resolution (such as mediation) are relatively new, compared to the extensive history of the judicial system, that does not mean arbitration originated in the 20th century. For example, George Washington's will had an arbitration provision in it, giving "three impartial and intelligent men" the power to resolve any dispute related to his will with a binding enforceability "as if it had been given to the Supreme Court of the United States." (Mount Vernon, 1799) This presidentially created arbitration panel, as it were, was to be chosen in a manner fitting of today's arbitration methodology: each disputant would choose an arbitrator and those two would choose the third.

Arbitration can be either binding or non-binding, but most are binding, meaning that an arbitrator's decision is final. What does "final" mean, though? In the legal system, trial verdicts can be appealed, and appellate court decisions can be appealed. But it is nearly impossible to appeal the binding decision of an arbitrator. Section 10(a) of the Federal Arbitration Act provides only four grounds upon which a court can set aside an arbitrator's award:

1) where the award was procured by corruption, fraud, or undue means;
2) where there was evident partiality or corruption in the arbitrators, or either of them;
3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Notice that not included in the above listings are "the arbitrator's decision was wrong," or "the arbitrator applied the wrong legal standard." Attempting to set aside an arbitrator's award is so difficult that in an Indiana case applying the same standards from Indiana's arbitration statutes (Ind. Code § 34-57-2-1 et seq.), the Court of Appeals refused to set aside an arbitration award even though one of the three arbitrators fell asleep during part of the hearing (*Fort Wayne Community Schools v. Fort Wayne Education Association, Inc.*, 1986).

Early in the FAA's history, the U.S. Supreme Court expressed reticence to the FAA and its lack of a jury trial and decisions being made by those who it said lack the "benefit of judicial instruction on the law." (*Bernhardt v. Polygraphic Co. of Am.*, 1956) Eventually, though, the Court acknowledged that Congress's primary purpose in enacting the FAA was to overcome the "old [judicial] hostility toward arbitration." (*Southland Corp. v. Keating*, 1984)

Pre-Suit Arbitration Clauses in Employment: What do the courts say about them?

It is logical to think that alternative dispute resolution (ADR) mechanisms would take place in private settings, since privacy is one of the advantages for using ADR. It also makes sense that arbitration would be "chosen" before parties are in a legal dispute, by inserting arbitration clauses in contracts. However, arbitration clauses aren't always announced to the other side or made readily identifiable in contracts. Yet, they are binding on those who sign such contracts. Even students have been required to arbitrate claims against their colleges, where the arbitration clauses were included in admissions and matriculation agreements (*Ferguson v. Corinthian Colleges*, 2011; *Brumley v. Commonwealth Business Educ. Corp.*, 2011).

Is it legally fair to require an employee to be bound by an arbitration agreement that an employee signs at the start of the employment relationship? The U.S. Supreme Court seemed to answer that question in 1991 in *Gilmer v. Interstate/Johnson Lane Corp.* There, the Court ruled that the arbitration agreement a financial services company employee signed prior to being hired was applicable and exclusive to him when, after being fired, he attempted to sue for age discrimination. Despite filing a claim with the Equal Opportunity Commission (EEOC) and despite wanting to sue under the federal Age Discrimination in Employment Act (ADEA) of 1967, the court majority concluded that his discrimination claim was subject to the compulsory arbitration clause in his employment contract, in light of the language and purpose of the FAA.

The Supreme Court reaffirmed the *Gilmer* view in 2009, in *14 Penn Plaza LLC v. Pyett*, when it ruled by a 5-4 vote that employees who believed they were the victims of age discrimination were unable to sue under the Age Discrimination Act of 1967 because the employees were bound by the arbitration provision in their union's collective bargaining agreement with its employer. Even though the employee in *Gilmer* signed his own arbitration-included employment contract, whereas in the *Penn Plaza* case the employees did not because a singular collective bargaining agreement applied to them, the Court concluded there was no legal distinction between individual mandatory arbitration agreements (which are governed by the Federal Arbitration Act) and mandatory arbitration agreements in union contracts (which are governed by the National Labor Relations Act (NLRA). And in 2011 in another 5-4 decision, the Court ruled in *AT&T Mobility v. Concepcion* that states could not preempt the Federal Arbitration Act by prohibiting consumer services contracts from disallowing consumers to join together in class-action arbitrations, thereby requiring that all arbitrations be sought individually. Similarly, in May 2018, the Court ruled in *Epic Systems Corp. v. Lewis* that employers can enforce arbitration clauses in employment contracts that prevent employees from joining class-action arbitrations against their employer.

Checks and Balances for Pre-Suit Arbitration Clauses in Employment?

Even thought the Court has made their position clear, whether it is fair that employees should be bound by arbitration agreements they might not have any opportunity to negotiate prior to being hired (thus giving up their rights to sue), remains a difficult question. It is especially so if an employee who is prevented from suing her or his employer wants to bring a discrimination or harassment suit. Fairness is often an ambiguous concept and alleging that employer-mandated arbitration clauses in employment contracts are unfair to employees can be difficult to prove, especially since arbitrations are, as a matter of course, private. But a Cornell University professor published a study in 2011 (Colvin) that seemed to establish that employment arbitrations favor employers. The research of California employment arbitration data, as reported to the American Arbitration Association (AAA), showed, among other things, that employees won 21.4% of the time, which is a significantly lower rate than in similar California trials. And the median amount awarded to employees was considerably lower than reported in similar California court awards. Such inequity is just one of the reasons why Carlson chose to creatively circumvent the mandatory arbitration clause in her case and ultimately "outsmart the Fox."

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