HOW I WON THE CASE

Historic Win for Female Athletes

An equal pay victory for the U.S. Women's Soccer Team

BY NICOLE A. SAHARSKY

How I Won the Case *gives you the inside scoop on big verdicts and trial tactics.*

Nicole A. Saharsky

For the past two years, I served as lead appellate counsel for the players on the U.S. Women's National Soccer Team in their equal-pay case against the U.S. Soccer Federation. The players sued because U.S. Soccer had refused to pay them equally to the players on the U.S. Men's National Soccer Team—even though the women were more successful and more popular than the men, and the women brought in greater revenues than the men. The district court granted summary judgment against the women, and I was hired to lead the charge on appeal.

In late February, just two weeks before oral argument, we settled the case for $24 million in back pay and equal pay going forward for all games and tournaments.

So you are probably wondering: How did we get from losing summary judgment and being entitled to $0, to getting $24 million and a guarantee of equal pay for the women's and men's national teams?

Our strategy

First, we recognized that this appeal was the ultimate team effort. When the players decided to sue, they hired experienced trial lawyers at Winston & Strawn to bring the case. Those folks have deep expertise on sports law issues, and they did a terrific job of painstakingly building the case for equal pay. The players also are represented by lawyers in collective bargaining—a talented team from Bredhoff & Kaiser. And an outstanding communications firm, the Levinson Group, handled all of the players' media on the lawsuit. In all, this was a group of advisers that the players knew and trusted, and that made it is easy for us to join the team on appeal.

My team could rely on the trial lawyers for their deep knowledge of the record; on the union lawyers to help us understand the collective bargaining aspect of the case; and on the communications team to publicize our arguments and gain public support for the players.

Second, we prepared clear and persuasive appellate briefs for the U.S. Court of Appeals for the 9th Circuit. Our strategy was to make the issues seem as simple as possible. For example, one reason the district court ruled against the women is that they made more total compensation than the men over the five-year period covered by the lawsuit. Thus, the court reasoned, the women could not say their pay was unequal. That sounds simple, but it is flatly wrong. The women played more games than the men and won more games than the men, and this is a job for which the women and men get paid both for playing in games (appearance fees) and winning games (performance bonuses). As a matter of federal law, it is not equal pay to make a woman work more than a man or perform better than a man to receive the same about of money. If it were, an employer could pay a woman $5 per hour and a man $10 per hour and just tell the woman to work more hours to make up the difference. We made simple points like that one to explain how the district court erred as a matter of law.

Third, we recruited supporters to file persuasive amicus briefs on our side. Here, we thought it was important to

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show that the women have widespread support and to have our supporters amplify our legal arguments. We urged the U.S. government—specifically, the Equal Employment Opportunity Commission—to file a brief on our side because of the importance of the legal issues in the case. The EEOC did file a brief, saying that the district court was absolutely wrong in its approach to the law. The U.S. Men's National Soccer Team also filed a powerful brief in support of the women. They said that U.S. Soccer has never paid the women and men equally, and that U.S. Soccer has no valid justification for refusing to provide equal pay. In all, six amicus briefs were filed on our side, and each of them provided critical support for our position.

Client engagement matters

Finally, we had full engagement from our clients—the players. Despite their busy schedules, including playing in the Olympics, they were involved in every step of the appellate process. They provided critical input that helped us shape our legal arguments and present their story. They also spoke publicly about the case to ensure the media, U.S. Soccer's sponsors, and members of Congress kept continued pressure on U.S. Soccer to do the right thing. Their tireless work was critical to our success.

Through all of these efforts, we were able to achieve a landmark settlement, one that sets an important precedent for equal pay. I am hopeful that this case will inspire others across the nation and the world to continue to fight for equality.

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This column reflects the opinions of the author and not necessarily the views of the ABA Journal*—or the ABA.*

BOOKS

Rein It In, or Let It Flow?

New book explores the spread and hazards of 'bad speech' on the internet and its risk to democracy

BY LIANE JACKSON

With the ubiquity of hate speech, disinformation campaigns, incitement to violence and other "bad speech" across the internet, some argue that, left unchecked, the very existence of democracy is at risk.

In their upcoming book, *Social Media, Freedom of Speech and the Future of our Democracy* (August; Oxford University Press), two of America's leading First Amendment scholars tap a high-profile cast of contributors to explore whether there is anything we can—or should—do about the proliferation of problematic speech online. We asked Columbia University President Lee C. Bollinger and his co-author, University of Chicago Professor Geoffrey R. Stone, about some of the findings, ideas and solutions from their book.

What options are out there currently for victims of "bad speech," and have platforms done enough to protect individuals and the public?

Section 230 of the Federal Communications Act provides that—unlike newspapers, magazines, radio and television stations and cable providers—social media platforms generally cannot be held liable for unlawful or otherwise actionable material on their sites. Thus, if someone posts material on a social media platform that defames a person or threatens a person or invades a person's privacy, the individual who made the post can be held liable, but Facebook, Twitter or other social media platforms cannot be held liable. Although various platforms have taken a range of measures to remove various forms of "bad" speech from their platforms, there is a general consensus that this has offered a relatively selective and inadequate means to protect the victims of such speech. Moreover, the use of algorithms by social media platforms to send information to users that reaffirms their own views is not actionable under existing law, even though this practice, although in the company's financial interest, poses a serious danger of polarizing the American people even further over time.

Although you gathered a variety of perspectives on the issue, was there any consensus on the fact that something needs to be done, and that the government, not courts, should take the lead? Or should this be self-regulated by the private sector?

A broad range of experts contributed to our effort to explore these issues, ranging from government officials such as Hillary Clinton and Amy Klobuchar to journalists such as Marty Baron and Emily Bazelon. We have social media experts, including Katherine Adams and Kate Starbird; and constitutional scholars, such as Cass Sunstein and Erwin Chemerinsky. Predictably, they often had very different perspectives on the best ways to address this challenge.

There was substantial agreement, though, on the need to reform Section 230 immunity for social media platforms. Specifically, there was a general consensus that Congress should make Section 230 immunity contingent on the notice-and-takedown of unlawful content and the limitation of Section 230