

Litigators of the Week: This Defense Dream Team Is on a Roll Fighting for Employers

By Jenna Greene
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There may never have been a worse moment to be a corporate defendant battling a gender discrimination suit.

First came the spotlight on the Silicon Valley gender gap. Then Harvey Weinstein and the #MeToo movement inspired a corporate reckoning that has led to high-profile firings and lawsuits.

But even in a climate of outrage, **Orrick, Herrington & Sutcliffe** partners **Lynne Hermle** and **Jessica Perry** defeated class actions against Microsoft Corp. and Twitter Inc. that alleged the companies pay and promotion practices penalized women.

For that we recognize the Orrick team as our litigators of the week.

In the span of less than two weeks, separate judges in California and Washington denied motions to certify classes in the suits against both Microsoft and Twitter, essentially extinguishing cases that had been seen as a barometer for gender bias litigation in the tech industry. The Microsoft lawsuit sought to certify a class of more than 8,600 women and the Twitter case 130. Ultimately, the judges were not convinced that a common hiring practice or standard led to unequal promotion or pay among female workers at the company.

“Class certification is a big event in a case like this. It’s the most important one. You are constantly thinking of evidence and what it’s showing along the way,” Perry said in an interview Thursday. “As we got into the cases, it became clear that the theories they were pursuing weren’t born out through in the evidence.”

Hermle agreed. “At the end of the day, the facts and the law clearly showed neither case should be certified,”



Jessica Perry and Lynne Hermle, Orrick, Herrington & Sutcliffe

Hermle said. “After so many years of litigation, we were pleased to see the judges dig into the voluminous record and thoughtfully analyze the issues to get to the right result.”

Hermle, an employment litigator whose stature rose after her 2015 trial win for Silicon Valley venture capital firm Kleiner Perkins Caufield Byers, argued against class certification. Perry, a Menlo Park, California-based employment partner and co-leader of the firm’s litigation practices worldwide, was second chair. Both have taken on cases defending major clients in the tech sector.

Hermle, who’s also based in Menlo Park, has said she planned to become a plaintiffs-side employment lawyer after graduating from law school but got a nudge into defense-side work and “never looked back.”

“I work with amazing clients, most of whom have great in-house counsel. I’m able to push for settlements and change when needed,” Hermle said in a 2015 interview with *The Recorder*, a Litigation Daily affiliate. “I lead a

team of 10 tough women and serve on the management committee at Orrick, a firm with three women partners on the board.” (That team, according to an Orrick representative, now includes 12 women.)

In the lawsuit against Microsoft, a class of more than 8,600 former and current female employees sought to join together, claiming the company’s pay and promotion practices favored men. The workers are represented by a team from **Outten & Golden** and **Lieff Cabraser Heimann & Bernstein**.

U.S. District Judge James L. Robart in Washington federal court in Seattle denied class certification on June 25, ruling a uniform policy for pay and promotion did not tie the women together.

The case against Twitter centered around only promotion practices, and attorneys argued for a class of about 130 female engineers to join the lawsuit, which claimed that a “boys club” culture enabled an unfair promotion system.

Jason Lohr of San Francisco’s **Lohr Ripamonti & Segarich** represents the employees. Ruling July 3, San Francisco Superior Court Judge Mary Wiss denied class certification on grounds that there was not enough commonality or a uniform reason for a disparity.

Perry said the cases, both filed in 2015, had similarities and overlapping themes. Both cases ultimately collapsed under the weight of *Walmart v. Dukes*, because plaintiffs were unable to tie an alleged gender disparity to specific or uniform policies at the companies.

During oral argument in the Microsoft case, Robart telegraphed a likely win for the Orrick attorneys. Lieff Cabraser partner **Kelly Dermody** told the judge that Microsoft managers weren’t following uniform guidance in their decisions to promote or pay employees. The judge said that admission drove “a wooden stake through the heart” of her argument.

In addition to the Microsoft and Twitter cases, lawsuits targeting gender bias are ongoing against other tech giants, including Google and Oracle. A lawsuit against Uber Technologies recently settled. Hermle said she

expects plaintiffs will continue to press cases targeting pay and promotion practices.

She said the Twitter and Microsoft cases could be instructive for the discrimination litigation landscape moving forward.

“I think the courts recognize that class actions simply are not an appropriate vehicle for highly individualized discrimination claims. There are some situations where a disparate impact theory may be the appropriate vehicle, like if there is a testing requirement that screens out certain candidates—a height or weight requirement for example, but it isn’t the right vehicle when you are dealing with individual managers evaluating job performance in light of unique roles and different contributions.”

Hermle said her background defending other major companies in Silicon Valley helped shape her approach to defending Microsoft and Twitter. She said understanding the pace of innovation and type of work done by engineers, for example, gave her team a leg up in explaining the companies’ performance management systems and how decisions are actually made.

She added that with litigation on these issues, she has seen a concerted effort by clients to enhance policies and practices to promote recruitment, retention and advancement of women—despite the challenges in the pipeline.

“So, I think there’s real change happening,” Hermle said. “But it’s not happening through meritless suits.”

