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Tort Law "to Make Law"

by Ivan G. Osorio and Elizabeth Jones

A recent little-noticed *New York Times* story says a great deal about America's current legal climate: The lawsuit culture is not only taking a toll on American business—it poses a serious threat to representative government.

The July 28 *Times* article profiled Elizabeth Grossman, the Equal Employment Opportunity Commission (EEOC) lawyer who handled the case of Allison Schieffelin, a former Morgan Stanley bond trader who sued the brokerage firm for sex discrimination.

On July 12, just before going to trial, Morgan Stanley and the EEOC reached a $54 million settlement to end the suit. Schieffelin accused the firm of passing her over for promotions and tolerating inappropriate behavior by male employees.

Morgan Stanley said that Schieffelin was denied promotions because she didn't deserve them and that it has "at all times treated its women employees fairly and equitably." But by settling rather than fighting, the firm essentially legitimized Schieffelin's claims, which seem questionable, to put it mildly.

The firm fired Schieffelin in 2000, citing "an abusive confrontation" with her boss—the woman who got the job over which Schieffelin sued. As *Forbes* magazine's Dan Ackman notes, the position Schieffelin sought, managing director, "is reserved for the top 2 percent at a firm like Morgan Stanley." She also cited as sex discrimination her not being included in client outings that involved such female-friendly activities as visiting strip clubs and playing golf. (Had she been invited, it may have led to hostile work environment charges.)

Schieffelin may well have felt frustrated at not advancing as she wanted, and felt truly uncomfortable with her male colleagues' alleged boorish behavior. But since when is law supposed to guard anyone against unsuccessful or even unpleasant career experiences? Rather, this seems like a case of blatant activism.

Now, back to Elizabeth Grossman. *Times* reporter Jan

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Hoffman describes her as someone who has "a zealot's passion" for her work, yet "chooses not to flex her well-exercised muscle before a reporter." "I got far more credit for [the] Morgan Stanley [case] than I deserve," says Grossman, while praising a team of investigators and lawyers who spent five years on the case—that's five years of spending *your* tax dollars on a case brought by someone who made over $1 million the last full year before she was fired!

As the story points out, Grossman, a government lawyer, does not earn commissions—but then again, zealots are not motivated by money. "Feeling like you're doing the right thing *100 percent of the time* is great," Grossman told the *Times* [emphasis added]. "I'm never working on something that I don't believe in."

This seeming belief that she is always right probably helps Grossman to convince others that she is. As Hoffman reports: "Ms. Grossman uses the kind of oratory that often gushes from lawyers who work for banner-waving advocacy groups, representing this or that noble cause." She might be able to teach John Edwards a thing or two about courtroom populism.

For feminist activist-lawyers like Grossman, cases like Schieffelin's allow them to further their goal of having it both ways: Open up any and all career options to women that were once closed to them, but treat them as a protected class under the law. And the courts are the way to get there.

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Grossman is refreshingly candid in her contempt for the legislative process. "The challenge is to try *to make law*, and to expand the system to serve employees who are protected by laws," she told the *Times*. "*The law is a way of achieving social change*, and there are many ways to use it, either from inside the system or outside." [Emphases added.]

This is not the first time lawyers have used the courts to implement policy, circumventing lawmakers, and will definitely not be the last. Indeed, Morgan Stanley's refusal to stand its ground will only encourage disgruntled employees everywhere to sue in the hope of reaping windfall settlements from companies worried about a costly trial. Schieffelin gets nearly one-fourth of the $54 million settlement—$12 million—in addition to free legal representation from Uncle Sam.

Many private lawyers would have been happy to take a case with that potential payout; and, judging from what she earned at Morgan Stanley, Schieffelin could well afford one.

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But government, unlike private plaintiffs, can go on suing without consideration for cost—a consideration that may have influenced Morgan Stanley's decision to settle.

Grossman, meanwhile, gets a big push for her agenda: Of the settlement, $40 million becomes available to 340 women from Schieffelin's section of Morgan Stanley who can convince an arbitrator that they were discriminated against (don't expect the bar to be set too high), and $2 million toward in-house gender diversity programs at Morgan Stanley.

Did Allison Schieffelin's claims have any merit? From what we know, they seem not to—but we will never really know for certain, since the case never made it to trial. Yet whatever the merits of this case, the law does not—and should not—guarantee against unsuccessful work experiences. Suing over outcomes will lead to exactly what activist zealots like Grossman want, "to make law" in the courtroom.

That prospect, so well articulated by Grossman, should alarm anyone who cares about the democratic process. And it should give Congress the incentive it needs to enact tort reform: to preserve its own authority.

Ivan Osorio (iosorio@cei.org) is Editorial Director and Elizabeth Jones (ljones@cei.org) is Assistant Editorial Director at CEI. Versions of this article appeared in Tech Central Station *and* Central New York Business Journal.