Ex-Fox News Anchor’s Suit Puts Media Sexism In Spotlight — For Now

By Vin Gurrieri | July 15, 2016, 6:33 PM ET

Former Fox News anchor Gretchen Carlson and Reena Ninan of CBS News speak at a June panel on female empowerment in the media at the 2016 Greenwich International Film Festival in Greenwich, Connecticut. (Credit: Getty)

When former Fox News anchor Gretchen Carlson sued her ex-boss, Roger Ailes, her lawsuit outlined what employment attorneys call an all-too-familiar tale of sexual harassment: comments about her legs, instructions to wear certain types of clothing, even an overt sexual proposition.

But there was one key difference. The suit didn’t name her employer, but rather just the Fox News chairman himself, leaving the network out of the fray. It’s this omission that could make the difference between whether the case — which has garnered significant media attention since its filing July 6 — continues to play out in a public forum or is swept behind closed doors in private arbitration proceedings.
Carlson sued Ailes in a bombshell complaint claiming, among other things, that he suggested in a meeting that they “should have had a sexual relationship a long time ago.” Ailes immediately denied the allegations, and the suit has been making headlines since as each side accuses the other of litigating in the press.

Ailes has sought to compel arbitration of Carlson’s claims, citing a provision in her contract with Fox. But Carlson says he can’t invoke the agreement because he’s not party to it. Ailes, in turn, has claimed that the decision to leave her employer out of the suit is a calculated move to avoid arbitration, a claim her attorney denies.

On Friday, Ailes filed a petition to arbitrate the case in New York rather than New Jersey, where it was filed, saying Carlson's contract requires it. The move prompted claims from Carlson’s attorneys that he was attempting to “judge shop.”

The disposition of the venue dispute will have a major impact on whether the suit proceeds as a high-profile case study on sexual harassment in the media industry or goes the route of many harassment suits, with a quiet settlement between the parties and an agreement to go their separate ways.

“I don’t know if the lawsuit will have an effect on the entertainment industry,” said William Archer, co-chair of Lewis Brisbois Bisgaard & Smith LLP’s entertainment, media and sports practice. “But it certainly has a far better chance of having one than confidential private arbitration proceedings would have had.”

**Litigating in the Press**

As soon as Carlson lodged her complaint, a torrent of publicity followed, with the story getting airtime on nearly every news network and garnering space in scores of online and print publications.

“This case has touched a nerve with the way women are treated in media,” said Nancy Erika Smith of Smith Mullin PC, counsel for Carlson. “The fact that the lawsuit started a national conversation is a pleasant surprise.”

Ailes, who is known for issuing harsh public rebukes to critics, responded hours after the allegations were made against him by painting Carlson as a bitter former employee who filed the lawsuit in anger after she was fired for low ratings.

“This defamatory lawsuit is not only offensive, it is wholly without merit and will be defended vigorously,” Ailes said in a statement issued the day the lawsuit was filed.

In a July 8 federal court filing, Ailes expounded on this point, saying Carlson deliberately tried to avoid arbitration so that her attorneys “could tar Mr. Ailes’ reputation publicly, try this case in the media press, and coerce him to settle.”

“Plaintiff’s counsel has been on a non-stop tour of major media outlets ever since, making one false and defamatory statement after another,” Ailes said in his motion. Carlson made no good-faith attempt to reach out to him prior to filing suit and instead went straight to the media when it was filed, he said.
Smith, in turn, told Law360 that Ailes is the one who has chosen to litigate the case in the press.

“In an open courtroom in front of a jury — that is where we plan to try the case,” Smith said in a July 11 interview, adding that the Ailes camp hadn’t yet approached Carlson with any settlement offers.

**A Ubiquitous Clause**

In seeking to curtail Carlson’s suit by enforcing the arbitration agreement in her employment contract, Ailes contended that the claims against him arise from Carlson’s employment at Fox News, meaning that he is a party to the agreement because of his role as chairman and CEO of the network. Carlson, he said, can’t get around the arbitration agreement simply by naming him as an individual.

“Courts take a dim view of the tactical strategy employed here by [Carlson] — attempting to evade the [employment] agreement’s arbitration provision because only Fox News signed the agreement — and courts uniformly reject it,” Ailes said in his motion before a New Jersey federal judge.

Leaving the network out as a defendant is an unusual step in a case like Carlson’s, said Kate Gold, a partner at Drinker Biddle & Reath LLP.

“It is definitely more typical to include both the alleged harasser and the employer in a complaint of this type, especially since a significant part of her claim is that her contract of employment was not renewed by Fox News due to retaliation for her reports of harassment,” she said.

Arbitration agreements in general have become increasingly popular and more widely used by employers over the past decade, with courts nationwide frequently grappling with their scope and reach.

The U.S. Supreme Court has generally expressed a preference for enforcing arbitration agreements, with one of the most seminal rulings on the matter coming in the 2011 case of AT&T Mobility v. Concepcion, in which a five-member majority led by the late Justice Antonin Scalia affirmed the use of arbitration in the consumer context.

Appellate courts, however, have had mixed opinions on the National Labor Relations Board’s stance that employees cannot be made to sign away their rights to pursue class action claims as part of arbitration agreements.

But none of these particular legal issues necessarily affects Carlson’s case, according to her attorney, because any arbitration pact she has is with Fox News’ parent company and Ailes is not a party to any such agreement.

The arbitration agreement in Carlson’s case, Smith said, had been added as an addendum to her most recent contract “with no notice that [the company] stuck in an arbitration agreement,” and the former news anchor had never had such a clause in any of her previous contracts with the network.

Barry Asen of Epstein Becker Green PC, an attorney for Ailes, said in a statement provided to Law360 that arbitration provides a cheaper and less costly alternative to litigation and that Carlson voluntarily entered into an agreement with Fox to arbitrate all claims related to her employment.

“She did not object to the arbitration clause when she signed her lucrative employment contract three years ago. The first time that she objected was last week in the media,” Asen said.
Thomas F. Doherty, a Newark, New Jersey-based partner at McCarter & English LLP who has litigated cases against Carlson’s attorneys, said the decision to litigate the case in the Garden State even though all of Ailes’ alleged conduct occurred in New York may stem from the differences in the two states’ approaches to arbitration.

New Jersey state courts in recent years have become increasingly hostile toward arbitration and found multiple ways to invalidate arbitration agreements, Doherty said, whereas federal court could be a friendlier place for Ailes to litigate the issue.

Smith said the reason Carlson declined to name Fox News was that her grievance is with Ailes personally and that she wants to hold him to account for his bad behavior.

“Gretchen really wanted to hold the person who made her life hell personally responsible,” Smith said. “She believes she should hold him personally responsible for his decisions because she holds him personally responsible for those decisions.”

**An Industry on Trial?**

About four years ago, former Reddit CEO Ellen Pao brought a suit against venture capital firm Kleiner Perkins Caufield & Byers LLC, alleging she was denied advancement opportunities because she spurned sexual advances from a partner at the firm and later complained.

Last year, Pao dropped her $100 million suit after a 12-person jury sided with Kleiner Perkins, a company that serves as a major source of funding for Silicon Valley companies. In that case, the jury found that gender wasn’t a factor in Kleiner Perkins’ decision not to promote Pao, nor did Pao’s internal discussions or complaints keep her from moving up the ladder.

Orrick Herrington & Sutcliffe LLP partner Mike Delikat, who chairs the global employment practice that represented Kleiner Perkins in Pao’s lawsuit, says potential fallout from publicity means high-profile harassment cases often end either in settlements or on motions for summary judgment — if they ever see the light of day in the first place.

“This case can’t do Ailes any good even if he beats it,” Delikat said. “There’s no real win for him.”

As Pao’s case played out, it yielded plenty of tabloid fodder and became a flashpoint trial regarding the issue of gender discrimination in both the venture capital and technology industries. Media reports throughout that case portrayed it as a referendum on whether women in those industries had fair opportunities for advancement.

The Carlson case could similarly create a broader impetus for media companies to review their own practices.

“The accepted practice of sexualizing images of women in the entertainment industries combined with the reality that so many people so desperately want to be on TV or in a film or get a recording contract creates an environment that is particularly conducive to quid pro quo sexual harassment,” said Archer of Lewis Brisbois.

Carlson, the former co-host of “Fox & Friends,” claims in her lawsuit that she was sexually harassed by Ailes and ultimately fired on June 23, the same day her contract expired, in retaliation for rejecting his advances and pushing back against sexism she purportedly had to endure in the newsroom by some of her male colleagues.
She also claims her termination occurred even though her subsequent program, “The Real Story with Gretchen Carlson,” was the highest rated cable news show in its afternoon time slot.

Carlson alleges that during a meeting last September in which she complained about ongoing discriminatory and retaliatory treatment, Ailes told 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,” adding that “sometimes problems are easier to solve” that way. Carlson spurned Ailes’ advances at that meeting, the complaint said.

The former anchor also claimed that Ailes retaliated against her for reporting condescending and sexist behavior by her former “Fox & Friends” co-host Steve Doocy, who she said belittled her and generally viewed her merely as “a blond female prop.”

Ailes’ response to the incidents was to mock Carlson for thinking that “it only rains on women” and to tell her to stop worrying about equal treatment and being “offended so God damned easy,” according to the complaint.

Hours after Carlson launched her action, Fox News’ parent company, 21st Century Fox, issued a cautiously worded statement that gave Ailes a vote of confidence but also declared that the company would be opening an internal review of Carlson’s allegations. Fox News declined comment and 21st Century Fox did not respond to a request for comment.

In the aftermath of Carlson’s lawsuit, Ailes has come under fire from numerous other women who have publicly assailed the Fox News chairman with claims that he sexually harassed them. Those claims, which have appeared in New York Magazine and other news outlets, include recent employees as well as women who worked for Ailes decades ago.

“There is some examination going on that is long overdue,” Smith said. “This case happens to be shining a light on the media [industry’s] treatment of women, and I’m proud of it.”

But not every Fox employee to come forward has sided with Carlson. Elisabeth Hasselbeck, who replaced Carlson as a “Fox & Friends” co-host, came out in support of Ailes this week, telling one media outlet that she was treated with nothing but respect during her time at the network. Other on-air personalities like Greta Van Susteren and Maria Bartiromo have expressed similar sentiments supporting Ailes.

Whatever the ultimate outcome of the case, a drawn out public trial would bring days or weeks of similar back-and-forth, played out in media outlets across the country — a scenario the network and its chairman likely wish to avoid — leading experts to predict that a public Fox News trial is unlikely.

“Filed cases are a dime a dozen, but cases that go to trial are few and far between,” Delikat said, noting that lawyers often try to avoid reputational damage, risks and costs that accompany drawn-out cases. “It would be incredibly shortsighted if [Carlson’s] case ever went in that direction, but you never know.”