Women's Rights in the Courts: Some Gains and Losses

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In earlier columns, we have examined important decisions of the American courts concerning the development of women's rights. The decisions have not always been consistent with each other and judicial attitudes concerning women's rights in areas of health and safety and in employment discrimination have not always been unerringly progressive and encouraging.

In this column, I will review three important recent decisions in this field. The issues involved are at the heart of women's rights examination in the courts: the scope of evidence in cases of employment discrimination; battered women and self defense; and the requirements of resistance to rape assaults.

The first case was Davis v. Califano wherein a woman chemist claimed a violation of the Civil Rights Act of 1964 alleging sex discrimination in hiring and promotion in a federal agency. She offered statistical evidence which showed an aggregate disparity favoring males over females in hiring, promotion, and salary levels. She produced no specific evidence concerning discrimination against herself personally and did not offer detailed data on hiring or promotion review practices in the agency. The trial court dismissed the case for failure to present a prima facie case which the Federal Government would be required to explain or defend against in court.

The Court of Appeals for the District of Columbia reversed the case, holding that statistical evidence of "substantial disparity" between the percentage of women and men in higher grades and salary levels in proportion to their overall ratios in employment in the agency was enough to shift the burden of persuasion to the employer. After the employer has entered evidence supporting their personnel decisions as non-discriminatory, the female employee might then find it necessary to rebut this evidence with further and more detailed data on discrimination on an individual case-by-case basis, since the eventual burden of proof that she was herself discriminated against lies upon her and her attorney.

This case is significant because it is the first case where in a Federal Court of Appeals has held that aggregate statistical evidence of "substantial disparity" is enough to support a prima facie case of individual discrimination. The U.S. Supreme Court has as yet held aggregate statistical evidence adequate for a prima facie case only where the action is a class action suit by many plaintiffs, not an individual. The Davis case is obviously a strong support for affirmative action programs all across the country since the thrust of these programs is essentially statistical in overall goals. The objective has been to increase the total numbers and proportions of women and certain minorities in employment and promotion. When the numbers and percentages in particular agencies are not considered high enough, or if "progress" toward greater parity is not being made, purely on a statistical basis, the affirmative action officers and committees generally wish to throw the burden on the employer agencies to show adequate reasons for their personnel picture at that time. This decision supports this approach. It is perhaps ironic that the defendant agency in the case was the Federal Government itself. We may well expect an appeal and a further examination of this issue in the U.S. Supreme Court.

The second case also involved the use of scientific data in support of a women's rights position. This time the evidence was expert opinion testimony based on scientific studies in the field of violence against women. In this case, a wife was on trial for the murder of her husband. It was undisputed that the husband had repeatedly beaten his wife. The defendant was pregnant at the time of the incidents leading to the shooting. On that day, the husband had beaten the wife, threatened her with a gun, and then left the house. The defendant claimed she shot the husband after he returned and threatened her again. She alleged she was trying to leave the house; the husband threatened violence again, and she shot him in self defense. The prosecutor argued that the marriage was one in which many reconciliations had taken place between incidents of violence. He argued that if the wife thought she was in danger of her life, she would have called the police on the day of the shooting and on earlier occasions, but she never had done so. The jury evidently agreed with the prosecution. The wife was convicted. Her appeal was based on the trial judge's denial of an offer to have a psychologist testify on behalf of the wife. The psychologist had conducted studies of some 110 battered women and had examined the defendant. She, the psychologist, was willing to testify that the defendant’s conduct was consistent with what was commonly found among such women. These women who endure frequent beatings by their husbands typically have low personal esteem, feel powerless, and frequently
have few if any friends. They frequently believe that their husbands will kill them and that there is no escape. The psychologist would have indicated in her testimony that only about 10 per cent of the wives she interviewed had ever called the police. She would have testified that, based on her interview, the defendant was a “classic case” of a battered wife. The psychologist would have testified that in her expert opinion the defendant was in fear of imminent danger to herself from her husband at the time she shot him. The trial judge excluded this offer of testimony on the grounds that it would invade the province of the jury in judging the evidence in the case. He denied that this was an area for expert testimony since the lay jury could decide for itself just as well as any so-called expert on matters of this type.

The Court of Appeals for the District of Columbia remanded the case to the trial court for further consideration, holding that the trial judge should have examined the question of whether this field of inquiry (concerning the behavior of battered women) was a proper subject for expert evaluation and whether the psychologist utilized a scientific methodology generally accepted in her field as professionally sound. If this were the case, then it would be improper to exclude her testimony.

The third case6 did not follow the trend of the two cases reviewed above. A jury in Maryland had convicted the defendant of rape. At the trial, the alleged victim, a 21-year-old unmarried woman, told her story. She and a high school girl friend had met that night at a school reunion. Afterwards, the two girls went out together and visited some bars. In the third bar they met the defendant. After talking to him for a short while, the woman told him she was leaving. The two women each had their own cars. The defendant asked the alleged victim if he could have a ride to his rooming house and she agreed to give him a lift. At the rooming house, the man asked her to come up to his room, but she refused. He grabbed her car keys and refused to return them unless she came up to his room for awhile. She agreed, testifying she was “scared.” She followed the man into the boarding house and to his apartment. After they got there and talked for awhile, he went to the bathroom. She made no attempt to escape; he still had her keys. He came out, pulled her onto the bed and removed her blouse. He asked her to remove her slacks and to help him undress. She did so, testifying she was afraid not to because of “the look in his eyes.” After they got into bed, she pleaded with him that she wanted to leave and he “started to lightly choke her.” She was very afraid, she said, and submitted to intercourse. Afterward, the defendant walked the woman to her car and asked if he could see her again. She answered “yes” and then left. She testified that she had said this just so that she could get away. She drove away, wondered about what had happened, and then drove to an area where she found a policeman. She told him her story and the defendant was arrested and charged with rape.

The Maryland Court of Special Appeals reviewed the evidence as set out above and reversed the conviction, holding that the alleged victim’s own story, even if believed, was inadequate to show that force was used upon her. The majority observed, “Force is an essential element of the crime . . . In all of the victim’s testimony we have been unable to see any resistance on her part to the sex acts and certainly can see no fear as would overcome her attempt to resist or escape . . . Possession of the keys by the accused may have deterred her vehicular escape, but hardly a departure seeking help in the rooming house or the street.” The Appeals Court also did not like her story that she had to “wonder” what would have happened afterward, before she went to the police. The majority of the Court clearly did not believe that the woman’s fear of harm was “reasonable.” In its most telling remarks, the Court reviewed her testimony concerning the choking: Judge Thompson noted that the defense counsel in oral argument had pointed out that “lightly choking” could have been a “heavy caress!” Judge Thompson concluded, “We do not believe that ‘lightly choking’ along with the facts and circumstances of the case were sufficient to cause a reasonable fear which overcame her ability to resist.” There was a vigorous dissent by three members of the Court.

It is patently clear that this Maryland judicial majority has an egregiously narrow view of what is actionable criminal rape. Their stereotype is the stalking, heavy-breathing, heavy-browed prowler in the dark who pounces upon an unknown woman who vigorously resists, is beaten, viciously raped, and often killed as well.

People with this view do not seem to be able to deal with the fact that many, many rapes occur under very different circumstances. Many rapists are known to their victims; some researchers assert that these are the majority of all cases, in fact. Women can be terrified quickly by the superior physical strength and threats of a stronger man. I find the views of this majority completely callous and insensitive to a young woman’s feelings and actions. They would have her “resist” by running off in the night through the corridors or a strange house and into dark, unknown streets without the use of her car, her only safe haven and adequate, available means of escape. She was expected to “know” what kind of “choking” she was getting when she said she pleaded to leave. If she had resisted vigorously the “heavy caresses” or “light choking” and the hands had then turned angrily or accidentally into adequate pressure to choke her to death, what would the majority have said then? Have they never heard the testimony of the rapist who did actually kill his victim and who pathetically explained to all who would listen that he really didn’t mean to choke her; that he was merely “gently pressing” her neck and she had resisted? He often says, “But everything would have been all right if she hadn’t panicked and struggled!”

Reading this majority opinion reminds us that progress in women’s rights still has some way to go in our judicial system.

REFERENCES