HOW NOT TO SETTLE EMPLOYMENT DISCRIMINATION SUITS

BY LEE F. BANTLE

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Some attorneys dream about taking their employment discrimination cases all the way to the Supreme Court and winning, trouncing their adversaries and deflating their self-righteous hubris at every step of the way. They want to battle it out in court and emerge victorious, believing settlement is a polite word for surrender.

However, for an attorney representing employers, the cost of litigation is potentially enormous and in many cases will exceed any settlement amount the plaintiff is likely to accept. The liberal discovery rules permit plaintiffs' lawyers to beat a path to the doors of the top-level company officials, and depositions and trial can be very disruptive. The defendant's risk of losing is not only bad public relations, but also entitles the plaintiff to attorneys' fees thus bestowing upon the employer the dubious honor of paying both to prosecute and defend the case.

For attorneys representing employees, the years of litigation may turn into an obsession for the plaintiff where little else in life matters but seeking vindication. The plaintiff's past will be investigated within an inch of his or her life. A jury perceived to be sympathetic may not ultimately decide the case if the employer wins summary judgment, or worse, judgment notwithstanding the verdict.

The attorney may still want to avoid settlement and forge ahead to trial even after considering all of these difficulties. If so, following the simple rules set forth below will achieve this goal.

Under the employment-at-will rule in New York, a private-sector employee without a contract or union membership may generally be fired for any reason so long as it is not an illegal reason. The original federal list of prohibited discriminatory reasons - race, color, religion, sex and national origin have been expanded to include age and disability under federal law and marital status, sexual orientation, and gender identity, among others, under some state and local laws.

Terminations almost always seem unfair to the employee who has lost a job, but it must be explained to the potential client that unfairness alone does not rise to the level of a cause of action. The termination must have been motivated in significant part because the employee was African-American, female, gay or in some other way protected.

Most discriminatory discharge cases will come down to a dispute over whether the employer's stated reasons for termination are pretextual. As the U.S. Supreme Court has explained, while the plaintiff bears the ultimate burden of proving discrimination, "rejection of the defendant's proferred reasons [for termination], will permit the trier of fact to infer the ultimate fact of intentional discrimination."

A plaintiff's attorney screening potential cases must ask the following questions:

1. What does the employee believe was the true reason for termination? (The employee must be pressed for a complete answer on this point or the attorney may face some nasty
surprises down the road.)

2. What evidence exists or is believed to exist that the stated reason was not the true reason?

3. What evidence exists that discharge was motivated by the employee's membership in a protected group?

4. If the termination resulted from a reduction in force, did the layoffs fall disproportionately on members of a protected group?

If the attorney takes the case without satisfactory answers to these questions, it is likely that the case will not settle.

**Demand Letters**

No one likes to be accused of discrimination, especially in public documents filed at the federal or state courthouse. As plaintiff's attorney, one sure way to avoid an early settlement is to start the war without sending a demand letter and providing any opportunity for talks, that might lead to peace.

Some attorneys fear wasting time or revealing too much of their case early by sending a detailed demand letter setting forth the basis for the claim. Yet, the risk may be well worth taking. Reinstatement and substantial settlements for clients may be obtained in response to such letters.

However toughly worded, the demand letter is an invitation to the employer to resolve the case before tens or hundreds of thousands of dollars are spent on litigation. The defense attorney, whether in-house or outside counsel, who eschews settlement should, of course, respond with a "drop dead" letter. A meeting to share information that will be routinely available in discovery anyway (e.g., employee reviews, disciplinary records, reduction in force statistics) is too likely to lead to a dialogue where the case will be resolved out of court.

**Insulting the Adversary**

Insulting the adversary is the most satisfying and creative part of litigation and inevitably ensures that the adversary would rather rot in hell than settle the case. Because the adversary obviously has serious personal deficiencies by virtue of his or her agreement to represent "that side" in the case, there is no need to be friendly with such a person.

What are some effective ways to be insulting? The attorney could offer everyone at the deposition coffee but the adversary; insist in briefs that the adversary's arguments constitute a fraud on the court and run afoul of disciplinary rules; interrupt the adversary repeatedly in oral argument; threaten the adversary with sanctions at the least provocation and add a request for sanctions as boilerplate to all motions; and point out the adversary's ignorance of the law, a particularly effective technique if clients are present.

If the attorney has succumbed to an exploratory settlement meeting, keeping the adversary waiting for at least a half hour in the reception room and sneering derisively when he or she presents the client's position is another effective insult. When communicating in writing, attorneys who loathe settlement could draft and mail letters in the heat of fury at something the adversary has done. Truly skillful practitioners can make every sentence communicate disdain
for the intelligence of their opponents. Letters are best closed by suggesting in so many lawyerly words that the adversary should call after realizing the absurdity of his or her position. This will assure that no return call will be forthcoming and thus the attorney can proceed happily with the case.

**Filing Deadlines**

Probably the easiest way for the plaintiff's attorney to ensure the case does not settle is to miss filing deadlines. In order to bring suit for discrimination under federal law, a charge in New York State must be filed with the EEOC within 300 days of the act giving rise to the claim. If the EEOC has not resolved the case or filed suit on behalf of the charging party within 180 days, it will issue a right to sue letter upon request.

At present, because the EEOC in New York City is backlogged and is unlikely to investigate most charges within 180 days, it will issue the right to sue letter upon request before the passage of 180 days. However, federal courts have differed on whether a suit may be commenced before the statutory 180-day period has run. Once the right to sue letter has been issued, a federal action must be commenced within 90 days.

Under state law, employees must choose between filing administratively with the New York State Division of Human Rights (in which case the claim will be heard by an administrative law judge) or filing a complaint in state court. The administrative filing must be done within one year of the act of discrimination while a suit in state court must be brought within three years.

Under New York City human rights law, employees similarly must choose between filing with the New York City Human Rights Commission within one year or suing in state court within three years. The luxuriously long three-year statute for state court complaints can be a saving grace for plaintiffs' lawyers who decide late in the game they do not want to lose out on a settlement because they missed a filing deadline.

**Remedies**

Another strategy for avoiding settlement is attorney uncertainty about what is necessary to resolve the case. If the attorney has only a vague idea of the client's position on the following items, there is little chance of reaching an agreement to end the case.

1. **Reinstatement.** Is the company willing to take the employee back - perhaps in some different capacity?

2. **Compensation for Release.** What will the company pay in order to obtain a full release of all discrimination claims? The amount selected should take account of what could be proved at trial for back pay (lost wages from date of termination to trial); front pay (lost wages from date of trial forward); pain and suffering and other damages arising from the discrimination; and the potential for an award of punitive damages.

3. **Other compensation.** Leaving aside compensation for the discrimination claim, what is the employee entitled to under company policy for severance pay, unused vacation pay, unused sick leave and prorated bonus payments?
4. Benefits. How long will the company continue paying for the employee's health insurance before the employee must convert to a COBRA plan? Is there a life insurance policy that the employee can assume? Does the employee have a 401-K plan that can be rolled over or a pension that is vested? May the employee exercise stock options or other miscellaneous benefits that may have been promised during the period of employment?

5. Outplacement Services. Will the company pay for outplacement services (i.e., counseling and/or office support) to assist the employee with finding a new job?

6. References and Records. Will the company provide a positive reference or at least promise to give the increasingly popular non-response ("The policy of our company is to provide only dates of employment and position held.") If there are negative records in the personnel file, will the company agree to cleanse the file?

7. Unemployment. Will the company agree not to contest the employee's application for unemployment compensation?

8. Relocation Allowance. If the company moved the employee to the job site, will it provide a moving allowance so the employee can return to his or her former home?

9. Legal Fees. Will the company pay any of the legal costs incurred by the employee in pursing the claim?

10. Confidentiality. The employer may insist that the terms of the settlement agreement remain confidential. However, employees should not be gagged as to the facts that gave rise to the discrimination.

Conclusion

The above guidelines on how to avoid settlement are virtually foolproof. Attorneys will ignore them at their peril. If they carefully screen cases, adhere to filing deadlines, invite a dialogue about the claims before filing suit, treat their adversaries with consideration, and think through what relief they really need for their clients, they run serious risk of striking a compromise that will settle the case long before trial.


5. 42 USCA §§2000e-5(f)(1)

8. N.Y. Exec. L. §§297(9).
Challenging workplace discrimination against LGBT people raises several issues that do not often arise in Title VII litigation. This article addresses these issues from a practical standpoint and discusses how they affected a case which my firm tried to a jury in federal court.

In analyzing a potential case, the first and most fundamental question is whether there is a statute which makes sexual orientation discrimination unlawful in the particular jurisdiction. At the time this article was submitted, prospects were good for the passage of a federal law – the Employment Non-Discrimination Act (“ENDA”) which would prohibit employers from discriminating on the basis of sexual orientation and gender identity. My co-panelists have addressed in their articles varying theories which can be used to pursue sexual orientation and gender identity cases absent a statute making sexual orientation and gender identity a protected category. This article assumes that a protective statute, such as ENDA or the New York City Human Rights Law, is in place. A sample complaint alleging employment discrimination under the New York City law is attached as Appendix A to this article.
PROVING KNOWLEDGE OF THE PLAINTIFF’S SEXUAL ORIENTATION

A suit alleging discrimination based on sexual orientation raises the central problem of proof that any discrimination case raises, namely, establishing at trial that the adverse action was motivated by discriminatory animus. Yet, there is often another hurdle in a sexual orientation case. It must first be established that the decision-makers had knowledge of the plaintiff’s sexual orientation. Ideally, the plaintiff is openly gay at work, has brought his or her life partner to the holiday party, or has otherwise revealed his orientation. But if not, you must consider whether there is a reasonable possibility of proving knowledge at trial.

Discovery, properly conducted, my yield substantial admissible evidence. Has your client’s sexuality been the subject of employee gossip which reached the ears of management? (The hearsay rule should not preclude admission of such evidence because it goes to state of mind, not truth.) Did your client solicit funds for the GMHC AIDS walk? Is your client’s life partner listed as the beneficiary of a life insurance policy? Did your client bristle and walk away when a gay joke was told? Is there a picture of your client’s life partner on his or her desk? All of these types of inquiries, and others which your client may be able to suggest, should be pursued.

Below are sample questions which can be used in cases in which the decision-maker’s knowledge of the plaintiff’s sexual orientation is at issue:

Do you know what P’s sexual orientation is?

When did you learn that he was gay?

Have you ever had communications with anyone about his sexual orientation?

Did you ever suspect that he might be gay before knowing it?
Did anyone tell you that he might be gay?

Did you tell anyone that he might be gay?

Did you know P was gay when you hired him

Do you know whether he has a male life partner/spouse?

When did you learn that?

Do you know who he lived with while he was an employee of D?

Do you know whether he had a commitment ceremony with another man?

How did you learn that?

Anyone in company mention to you his male life partner?

Anyone in company mention to you his commitment ceremony?

You were at P’s deposition where he testified that a colleague brought up the subject of his sexual orientation at an event at the Metropolitan Museum. Do you remember hearing that testimony?

Had you heard anything about that incident prior to the termination of P?

Subsequent to his termination?

Ever heard of Fire Island?

Ever heard that it is a popular destination for gay men?

Know that there are gay communities on Fire Island?

Ever heard of The Pines, Cherry Grove?

Aware that P spent vacation time on Fire Island?

When became aware?

Ever notice awkwardness when P was asked questions about his private life?
Ever make you suspect he was hiding something?

Even in cases where you cannot establish that the decision-maker was aware of the plaintiff’s sexual orientation, you still may be able to prevail if the decision-maker was influenced by someone who did know of the plaintiff’s sexual orientation, under what is known as the “cat’s paw” or “rubber stamp” doctrine.1 See, e.g., Arendale v. City of Memphis, 519 F.3d 587, 604 n. 13 (6th Cir.2008) (“When an adverse [employment] decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a ‘rubber-stamp’ or ‘cat's paw’ theory of liability.”); EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 484 (10th Cir.2006) (noting that the “cat’s paw” and “rubber stamp” theories of subordinate liability have been “overwhelmingly” endorsed, including by the 3rd, 6th, 7th, 8th, 9th, 11th and D.C. Circuits); Roberts v. Principi, 283 Fed.Appx. 325, 333 (6th Cir. 2008) (defining “cat's paw” theory where (1) biased subordinate, not nominal decisionmaker, is driving force behind adverse employment action, (2) decisionmaker does not independently evaluate the employee, and (3) biased subordinate “clearly causes” the adverse employment action); Llampallas v. Mini-

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1 The “cat's paw” doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none for the cat. Today the term “cat's paw” refers to one used by another to accomplish his purposes. The “rubber stamp” doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate. EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 484 (10th Cir.2006) (internal quotation marks and citations omitted); see Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 288 (4th Cir.2004) (discussing "rubber stamp" doctrine).
Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir.1998) ("In effect, the [biased actor] is the
decisionmaker, and the titular ‘decisionmaker’ is a mere conduit for the [biased actor's]
discriminatory animus."); Cobbins v. Tennessee Dept. of Transp., 566 F.3d 582, 587 n.5 (6th Cir.
2009) ("In the employment discrimination context, what is known as the 'cat's paw' theory refers
to a situation in which a biased subordinate, who lacks decisionmaking power, influences the
unbiased decisionmaker to make an adverse [employment] decision, thereby hiding the
subordinate's discriminatory intent."). Courts have found that imposing liability on the employer
in this context is in accord with the agency principles and policies underlying Title VII. See, e.g.,
Roberts v. Principi, 283 Fed.Appx. at 333; BCI Coca-Cola, 450 F.3d at 485-86.

Some courts, notably the Fourth Circuit, interpret the doctrine narrowly, requiring, inter
alia, evidence that the biased actor was principally responsible for the adverse employment
action. See Lockheed Martin, 354 F.3d 277, 291 (4th Cir.2004) (en banc) ("[A]n aggrieved
employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory
motivations of a subordinate employee must come forward with sufficient evidence that the
subordinate employee possessed such authority as to be viewed as the one principally responsible
for the decision or the actual decisionmaker for the employer."). Other courts, such as the Ninth
Circuit have declined to adopt this narrow standard, noting that "many companies separate the
decisionmaking function from the investigation and reporting functions, and that ... bias can taint
any of those functions." Poland v. Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007) (quoting BCI
Coca-Cola, 450 F.3d at 488); see also Lust v. Sealy, Inc., 383 F.3d 580, 584 (7th Cir.2004)
(criticizing the Fourth Circuit's approach as “inconsistent with the normal analysis of causal
issues in tort litigation”). Under the more expansive standard, bias may be imputed to the
employer where the biased subordinate influences the employer’s decision. See Poland, 494 F.3d at 1182 (imputing liability where (1) the biased subordinate "sets in motion a proceeding… that leads to an adverse employment action" and (2) "the plaintiff can prove that the … biased subordinate influenced or was involved in the decision or decisionmaking process."); BCI Coca-Cola, 450 F.3d at 490-93 (denying summary judgment where the decisionmaker relied primarily on facts provided from a biased subordinate). On the other hand, an employer can usually defeat subordinate bias theories where it performs an independent investigation of the allegations against the employee. Id. at 488.

**PROVING BIAS**

While proving knowledge of your client’s sexual orientation is an extra burden, sexual orientation cases will oftentimes yield more comments evidencing bias than Title VII cases. Anti-gay bias is still socially acceptable in some quarters and, indeed, is even sanctioned by some religions. Moreover, there is generally less awareness of the employment protections afforded the LGBT community as compared to persons of color, women, the disabled, etc.

Some people do not shy away from using anti-gay epithets or telling insulting jokes the way they might with respect to gender, race or age. During depositions, you should query every witness on what they have said or heard in this regard. By the time of trial you may have developed quite an arsenal of comments that supports the claim of sexual orientation discrimination. Deposition questions might include any of the following:

*Ever been trained on D’s EEO policy?*

*Do you know whether D prohibits discrimination based on sexual orientation?*
Do you agree with D’s policy prohibiting discrimination on the basis of sexual orientation?

Do you agree with laws which prohibit discrimination in employment based on sexual orientation?

Have you ever heard any employee of D make a negative remark about gays or lesbians?

Ever heard any employee of D use the word fag or faggot or dyke or any other derogatory term for gays or lesbians?

Have you ever heard an employee of D use the term “gay” to describe something that is lame, bad, uncool?

Have you ever heard any employee of D make a joke or remark poking fun at gay men or lesbians?

Have you ever heard an employee of D express his or her opinion on whether or not two men or two women should be able to marry?

Have you ever seen or heard an employee of D effect a:

- lisp
- limp wrist
- Effeminate walk
- Other gesture or impression making fun of gay people?

Have you ever heard anyone at D comment about the remarks or actions of others which were negative about gay people?
THE CRITICAL IMPORTANCE OF JURY SELECTION

As we all know, the jurors who decide an employment case are highly important. But in a sexual orientation discrimination case, the composition of the jury is even more critical. In any voir dire panel there are likely to be some people who are not positively inclined toward members of the LGBT community, have religious qualms, or are just not comfortable with the issue. This may impede identification with the plaintiff which is key to winning cases. It is imperative to ensure questioning of potential jurors on their possible bias.

In some jurisdictions, the lawyers are permitted to question the potential jurors. In others, only the judge may question. In either case, do your best to get to the heart of the matter: whether the prospective juror has any negative views or lack of comfort with gay and lesbian individuals. If the judge is doing the questioning, you need to educate him or her on the importance of screening for gay bias and then submit a long list of questions (see below) in the hopes that at least a few will be asked. If you are doing the questioning, then zero in on the issue with care and sensitivity.

**Semantics**

Using the right language and projecting an aura of comfort is imperative if you are doing the juror questioning. Don’t use the loaded term “homosexual” when referring to the plaintiff. Use “gay” or “lesbian.” You might also say “gay man” or “lesbian woman.” Don’t talk of “gay rights.” This sounds like gays are getting something special that other people don’t get. Talk in terms of “equal rights.” Similarly, if you get into the issue of gay and lesbian people getting married – which you should consider doing since it is Hot Topic Number One right now – talk in terms of “marriage equality,” not “gay marriage.”
Religion

LGBT people are the only protected class who – to my knowledge – are viewed as sinful or immoral by some religions. Obviously, someone who subscribes to these views is not an appropriate juror for a sexual orientation discrimination case. And don’t be fooled by a “hate the sin, but love the sinner” attitude. These people must be screened out.

This may be tricky because asking jurors about their religion may be viewed as an invasion of privacy or, worse, a Batson style violation of the juror’s civil rights. However, inquiring into a juror’s religious views on the specific issue of gay and lesbian relationships should pass muster. In other words, you should be able to ask whether someone has religious views – or has received religious instruction – on the subject of gay and lesbian relationships. Some sample questions are included on the list below.

Nobody wants to appear a bigot

Prospective jurors may not admit their bias in open court for fear of looking bad to you, the judge or other jurors. A stock question, the favorite of judges, does not begin to scratch the surface. “Is there anything about the nature of this case that would render you unable to be a fair and impartial juror?” Very few people will answer yes to this question (unless they want to get out of jury service) for fear of looking bad. Even jurors aware of their biases may say (and even think) that they will not be influenced by such biases in judging the case. You need to go beyond this stock question to uncover juror bias.

One strategy is to question the jurors on their possible bias one by one in private. Many judges will allow this for sensitive questions and, of course, if you are conducting the voir dire unsupervised you can make this choice. This will enable a candid interview where potential
jurors will be more likely to reveal their true attitudes.

**Challenge biased jurors for cause**

If during voir dire you find that a potential juror has biased attitudes, push to have this person removed for cause. Your adversary may try to rehabilitate the juror by asking if he or she could still be fair and impartial despite the biased statement that you elicited. Don’t let that stop you from arguing to the judge that the person must be removed for cause. And make a record for purposes of preserving the issue for appeal.

**The dilemma posed by conventional theories of jury selection**

There are various theories as to who is a *good* or *bad* juror in an employment case. The conventional thinking is that members of racial or ethnic minorities, those with lower incomes, and those with less education tend to be good plaintiff’s jurors in an employment case. They are thought to be more likely to recognize that discrimination occurs and to award substantial sums in the event it is shown. In contrast, those people with higher incomes and more education are thought to be more favorable to the defense in an employment case. The plaintiff’s lawyer in a sexual orientation case faces a dilemma in jury selection in that some of those people generally thought to be good plaintiff’s jurors may be more likely to harbor anti-gay bias than those who are thought to be good defendant’s jurors. This reinforces the need to ensure jurors are screened for bias.

One thing that is clear when looking at demographics is that younger jurors will most likely be better than older jurors. Polling shows that younger people are much more likely than older people to support sexual orientation non-discrimination laws and marriage equality for gay and lesbian people.
Sample Questions

With the caveat that not all of these questions have been tested and some may run into objections from your adversary or the court, here are some suggested questions to help select a panel unbiased on the issue of sexual orientation:

The plaintiff in this case is a gay man. How do you feel about people who are gay?

Does that raise a concern in your own mind about whether you could listen attentively to the evidence or serve as a fair and impartial juror?

Does the fact that plaintiff is a gay man cause you to lean toward the plaintiff, lean toward the defendant or make no difference?

The plaintiff states in this lawsuit that the defendant terminated his employment because he is gay. Do you think employers should or should not be allowed to discharge someone on that basis?

Do you think that gays and lesbians should have the same protection from employment discrimination as African-Americans, Hispanics, Asians and so forth?

Do you personally know any people who are gay or lesbian? Any friends or family members?

How would you feel if a sibling or child told you that he or she is gay or lesbian?

Do you have any religious or moral scruples about gay and lesbian relationships?

Have you received any religious instruction about the morality of gay and lesbian relationships?

Would you be comfortable having a gay man or lesbian woman serving as a teacher in your child’s school?
Do you think two men or two women should be able to get married if they want to or are you opposed to that?

If the Court instructs you that discrimination against someone on the basis of his or her sexual orientation is unlawful, would you be able to follow that instruction in reaching a verdict?

**THE LESSONS FROM ONE TRIAL**

All of the foregoing issues were implicated in a sexual orientation case tried by my firm in the United States district Court in the Southern District of New York. Federal jurisdiction arose by reason of diversity. The Plaintiff was the New York regional sales manager of the defendant, an international carpeting company, for two years until he was discharged allegedly for performance problems. One of the primary performance issues cited was that Plaintiff was not trusted or respected by some members of his sales team. Plaintiff contended any lack of respect accorded him stemmed from his sexual orientation, not his management ability.

We strenuously argued the *cat’s paw or rubber stamp* doctrine in opposing summary judgment. The denial of defendants’ motion for summary judgment on the discriminatory discharge claim is reported at 2001 U.S. Dist. LEXIS 17757, 87 Fair Empl. Prac. Cas. (BNA) 449 (S.D.N.Y. 2001).

The trial ended with a hung jury. Four jurors reported believing Plaintiff’s sexual orientation was a motivating factor in his discharge, while two jurors reported that they thought it was a factor, but not a significant one. The defendants’ post-trial motion for judgment as a matter of law was denied as falling far short of meeting the high burden under Rule 50. 2002 WL 1870283, 89 Fair Empl. Prac. Cas. (BNA) 1470 (S.D.N.Y. 2002). The case settled at
mediation prior to a re-trial.

Discovery in the case yielded significant information concerning the decisionmaker’s knowledge that Plaintiff was gay—even though Plaintiff had been circumspect about this fact at work. In addition to admitting that they knew Plaintiff had a house on Fire Island and that this was a well-known gay destination, the superiors conceded that one of Plaintiff’s subordinates had called them to report that Plaintiff had disclosed that he was gay. A memorandum of the call was made (and turned over in discovery). The fact that Plaintiff was coming out to his sales reps was passed up the management chain to the president of the company.

Discovery also yielded a treasure trove of biased comments and conduct. Two subordinates were reported to have referred to Plaintiff as a “fag” and to have said they did not want to work for him. Various incidents of limp-wristed, lisping role-plays were reported to have occurred at management social events. One decisionmaker was reported to have said that clothes lent to a gay man should be washed in Clorox before being worn again. (The explanation at deposition for this comment made it worse. The declarant explained his concern was prompted by AIDS.) Management also made its case worse at deposition by suggesting that it was improper for Plaintiff to disclose his sexual orientation to subordinates and that this made the subordinates uncomfortable.

Ultimately, the two jurors who sided with the defense said they relied on the objective fact that Plaintiff’s region had missed its budgeted revenue target for the year. They rejected Plaintiff’s explanations for this (employee turnover and the need for more time to rebuild an underperforming region.) Alarmingly, they also contended that as a supervisor, Plaintiff needed to “manage” the negative attitudes his subordinates had about his sexual orientation. Both
defense jurors had post-graduate degrees and one served in management. While hindsight is 20/20, it was probably a mistake to use our peremptories on blue collar jurors in favor of these two who were thought to be more enlightened on the issue of sexual orientation. Unfortunately, the voir dire was controlled entirely by the judge who did little but inquire, after saying the plaintiff was gay, whether the prospective jurors could be fair and impartial.

CONCLUSION

Cases challenging discrimination against LGBT people in the workplace present unique challenges and opportunities. Such cases are likely to become more numerous in the future as more laws are enacted extending workplace protections on this basis. The successful plaintiff’s attorney will be prepared to deal with the legal issues unique to such cases.

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THE EMERGING FIELD OF EQUAL RIGHTS FOR GAY AND LESBIAN EMPLOYEES

BY LEE F. BANTLE

I. Statutes Prohibiting Sexual Orientation Discrimination

A. New York State Human Rights Law

After having been proposed without passage for 31 years, the Sexual Orientation Non-Discrimination Act (S. 720/A. 1971) finally became law in New York State, effective January 16, 2003. The law, known as SONDA, does not create a new statute, but simply amends the New York State Human Rights Law, N.Y. Exec. L. §§ 290 et seq., to insert “sexual orientation” after “national origin” and before “sex” in every place where those terms appear. An effort to amend the legislation prior to passage to explicitly prohibit discrimination based on gender identity was unsuccessful.

Sexual orientation will now be treated as any other protected category in employment litigation under state law. An employee alleging discrimination based on sexual orientation will bear the same burdens and have available the same remedies as an employee alleging discrimination based on any other protected category under the state human rights law.

Prior to the passage of SONDA, the only statewide protection for gay and lesbian employees was found in an executive order issued by Governor Mario Cuomo in 1987 which prohibited such discrimination by state agencies and departments. That executive order was enforced by the State Division of Human Rights. Now all gay and lesbian employees, whether working for public or private employers, will be able to challenge discrimination against them by filing a claim with the State Division of Human Rights or by bringing suit in court.

New York is one of twenty states (California, Colorado, Connecticut, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin), along with the District of Columbia and numerous municipalities, that have adopted such legislation. Federal legislation to prohibit sexual orientation discrimination in employment (“ENDA”) is pending, but is not close to becoming law at present.

SONDA amends the definitions section of the Human Rights Law (N.Y. Exec. L. § 292) to add a new subdivision 27 which reads: "The term 'sexual orientation' means heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law." Beyond prohibiting sexual orientation discrimination in employment, SONDA amends New York State law to prohibit sexual orientation discrimination in training programs, public accommodations, housing, credit and education.

Sexual orientation-based employment discrimination cases decided under the state Human Rights Law since the passage of SONDA include: Feingold v. New York, 366 F.3d 138 (2d Cir. 2004) (vacating district court’s entry of summary judgment against plaintiff asserting sexual orientation-based hostile work environment and discriminatory termination claims); Lederer v. BP Products North America, 99 Fair Empl. Prac. Cas. (BNA) 1103 (S.D.N.Y. 2006) (denying defendant’s summary judgment motion against plaintiff who was terminated not long after his employer discovered he was gay and HIV-positive); Priore v. New York Yankees, 92 Fair Empl. Prac. Cas. (BNA) 59 (N.Y. 2003) (granting summary judgment to Yankees where discrimination against gay, HIV-positive team employee was committed solely by players and not by employer itself).
One intriguing possibility raised by the adoption of SONDA is assertion under the State Human Rights Law of a disparate impact claim seeking employment benefits for an employee’s gay or lesbian life partner and children. As will be discussed below, such claims have already been attempted under the New York City Human Rights Law. However, because of ERISA preemption with regard to private employers, such a theory could only be brought against municipal employers.

Though gender identity was not explicitly added to the New York State Human Rights Law at the time SONDA was passed, a number of courts have granted protection to transgender individuals under the prohibitions against sex discrimination and disability. See, e.g. Rentos v. OCE-Office Systems, 72 Fair Emp. Prac. Cas. 1717, 1996 WL 737215 (S.D.N.Y. 1996); Buffong v. Castle on the Hudson, 12 Misc. 3d 1193A (Sup. Ct. Westchester Cty., 2005) (holding that transsexual employment discrimination plaintiff had stated claim under sex provision of state law); Doe v. Bell, 194 Misc. 2d 774 (Sup Ct. N.Y. Cty., 2003) (granting transgendered teenager reasonable accommodation of wearing female clothes in male-only foster facility under disability provision of state law);

Similarly to New York, the sex discrimination provision in the New Jersey state Law Against Discrimination (LAD) was interpreted to bar discrimination against transsexuals in Enriquez v. West Jersey Health Systems, 342 N.J. Super. 501, 777 A.2d 365 (2001), even before the state legislature passed 2006 amendments to the LAD protecting specifically against discrimination on the basis of gender identity.

B. Municipal Human Rights Laws in New York State

The following cities in New York have sexual orientation non-discrimination laws applicable to all (private as well as public) employers: Albany, Ithaca, New York City, and Syracuse. The following counties have such laws: Albany, Nassau, Onondaga and Westchester. These local statutes may be more favorable to employees than the New York State law. While the New York Human Rights law does not provide for attorneys’ fees or punitive damages, those remedies are available under the New York City Administrative Code Thus, for employees who work in New York City, asserting claims under both statutes will assure the full panoply of remedies available in employment litigation.

As of 2005, the city law now includes one particularly important protection lacking in the state law: Section 8-102(23) of the Administrative Code now defines gender to include "gender identity, self-image, appearance, behavior or expression." Gender is a protected trait throughout the City Human Rights Law. Thus, transgender employees can sue directly on the basis of gender identity discrimination under the City law.

There have been some attempts under the City law to secure equal treatment of the partners and children gay and lesbian plaintiffs using a disparate impact theory. In Levin v. Yeshiva University, 96 N.Y.2d 484, 730 N.Y.S.2d 15 (2001), the New York Court of Appeals considered Yeshiva University's restriction of housing to those with legally recognized family relationships with a student. The restriction, though facially neutral, was found to run afoul of the prohibition against sexual orientation discrimination under the New York City Human Rights law. A similar theory was used to seek benefits in the employment context in Rios v. Metropolitan Transportation Authority, 2004 N.Y. Slip Op. 51738U (Sup. Ct. Richmond Cty., 2004), but failed because the plaintiffs had not alleged the availability of an alternate policy that would satisfy the MTA's significant business reasons for denying coverage.

C. Title VII

While Title VII does not prohibit sexual orientation discrimination, and all attempts to interpret the statute broadly to provide such coverage have failed, a line of cases has emerged that may provide protection to gay or lesbian employees who do not conform to sexual stereotypes.

Following the Supreme Court's decision in Price Waterhouse v. Hopkins, 490 U.S. 222 (1988), a plaintiff who has been subjected to a harassment or an adverse job action based on "failure to conform to sex stereotypes" can seek relief under Title VII's prohibition of discrimination based on sex. Nichols v. Azteca Restaurant Enterprises, 256 F.3d 864, 874 (9th Cir. 2001) (quoting Hopkins). Thus, in Nichols, a waiter who was regularly subjected to verbal harassment, including homophobic slurs, because of his effeminate mannerisms was able to successfully assert a claim under Title VII.

The plaintiff in Centola v. Potter, 183 F.Supp. 2d 403 (D. Mass. 2002) also used a sexual stereotyping theory to seek relief under Title VII for discriminatory treatment, including more severe disciplining by supervisors, and anti-gay harassment. Interestingly, the Centola court articulated the possibility of mixed motive approach under Title VII, where the adverse employment action or harassment suffered can be considered motivated both by the plaintiff's sexual orientation, which is permissible under Title VII, and by the plaintiffs' failure to conform to sexual stereotypes, which is not. The Centola court also noted the possibility of an expansive interpretation of sexual stereotyping noting that because "[s]exual orientation harassment is often . . . motivated by a desire to enforce heterosexually defined gender norms, . . . a plaintiff who is perceived by harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do." Id. at 410.

In Miller v. City of New York, 177 Fed. Appx. 195 (2d Cir. 2006) (unpub. op.), the Second Circuit embraced the reasoning of Nichols and Centola, upholding the Title VII claim of a gay employee who was "subject[ed] to a regimen intended to 'make a man' out of him" in the face of a summary judgment motion. The Western District of New York has applied the same reasoning to a claim of sex discrimination by a transsexual employee: "Transsexuals are not gender-less, they are either male or female and are thus protected under Title VII to the
extent that they are discriminated against on the basis of sex.” Tronetti v. TLC Healthnet Lakeshore Hospital, 2003 U.S. Dist. LEXIS 23757, *13 (W.D.N.Y. 2003).

It is now settled that same-sex sexual harassment is prohibited conduct under Title VII. Oncale v. Sundowner Offshore Servs. Inc. 523 U.S. 75, 118 S. Ct. 998 (1998). In Rene v. MGM Grand Hotel, Inc., 2002 U.S. App. LEXIS 20098. (9th Cir. 2002), the Ninth Circuit, sitting en banc, and relying heavily on Oncale, issued a plurality opinion holding that the harassing sexual touching of a gay man by his presumably non-gay male co-workers gave rise to a claim under Title VII for gender discrimination.

II. Non-Statutory Bases to Challenge Sexual Orientation Discrimination

A. Constitutional Claims

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is increasingly being used with some success to attack "irrational" discrimination against gays and lesbians by state actors. Notably, Justice O’Connor relied on this Equal Protection analysis in her concurrence in Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring), which held Texas's sodomy statute unconstitutional. The majority in Lawrence did not reach the Equal Protection question, relying instead upon the Due Process rights to liberty and privacy. Id. at 564 (majority opinion).

In Quinn v. Nassau County Police Department, 53 F. Supp. 2d 347 (E.D.N.Y. 1999) the plaintiff, a gay male police officer, brought an Equal Protection claim after experiencing significant workplace harassment on the basis of his sexual orientation. In upholding the claim, the Quinn court based its ruling on the Supreme Court's decision in Romer v. Evans, 517 U.S. 620 (1996), which "established that government discrimination against homosexuals, in and of itself, violates the Equal Protection Clause." Quinn at 357.

The Quinn decision was followed in Lovell v. Comsewogue School District, 214 F. Supp. 2d 319 (E.D.N.Y. 2002), where the U.S. District Court for the Eastern District of New York upheld the Equal Protection claim of a lesbian school teacher who was harassed by her students due to her sexual orientation without effective remedial action by the school district. The Lovell court found that the plaintiff's statement that her complaints to the district were taken less seriously than complaints based on racial harassment sufficiently alleged an Equal Protection violation.

Similarly, in Pugliese v. Long Island Rail Road Company, 2006 U.S. Dist. LEXIS 66936 (E.D.N.Y. 2006), the Eastern District refused to grant summary judgment against a gay LIRR employee whose complaints of harassment by co-workers were not investigated as fully as other employees’ complaints of harassment on other bases. And in another 2002 case, Emblen v. Port Authority of New York/New Jersey, 89 Fair Empl. Prac. Cas. (BNA) 233 (S.D.N.Y. 2002), the U.S. District Court for the Southern District of New York applied the same reasoning to reject the defendant's summary judgment motion where the harassment was based on perceived rather than actual sexual orientation.

B. Implied Contract Claims

Many employers have adopted policies prohibiting discrimination based on sexual orientation. Depending on the wording of such policy, and limitations which may be contained in the manual where such a policy is contained, a breach of contract claim may be available. The aggrieved employee would have to allege an express limitation on the employer's right to discharge on grounds of sexual orientation. See, e.g., Weiner v. McGraw-Hill, Inc. 57 N.Y.2d 458 (1982); Murphy v. American Home Products Corp. 58 N.Y.2d 293 (1983); Gorrill v. Icelandaid/Flugleidir, 761 F.2d 847 (2d Cir. 1985).
**Juror De-Selection: Riding the Wild Pony**

Pretext-Plus in the Second Circuit: Where It’s Going Where It’s Been

Part 2

By Stephen Bergstein
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In part one of this article,1 I outlined the history of pretext-plus in the Second Circuit. Pretext-plus is the shorthand courts and lawyers use in describing how the Court of Appeals analyzed cases alleging circumstantial evidence of employment discrimination. The Second Circuit adopted that approach in Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997), an en banc ruling. In 2000, the Supreme Court appeared to reject “pretext plus” in Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000), but later that year, the Court of Appeals explicitly held that Fisher remained good law, and over the next few years the Court continued to search for evidence beyond pretext in reviewing these cases. See, e.g., Scahabel v. Abrams, 232 F.3d 83, 90 (2d Cir. 2000) and James v. New York Racing Ass’n, 233 F.3d 149.

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1 Anyone interested in obtaining a copy of Part I of this article may request it through email, at Steve@tbulaw.com.

Juror De-Selection: Riding the Wild Pony

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"Gays are a mistake of nature!" The young black man quickly stood to make his loud comment, thrust from his seat by the topic. His frank statement, as if providing the first note for the rest of the chorus, encouraged other jury panel members to utter similar sentiments.

"Children are impressionable and need role models," stated the middle aged white scientist. While not quite as blunt, it was clear this woman, with a Master’s degree in economics and married to an attorney, did not approve of a gay man working with children either. Absent her spoken comments, it would have been all but impossible to discern her feelings. Her questionnaire responses provided little insight to her biases.

The retired police lieutenant wrote that he enjoyed ice hockey. A married man, with an accounting degree, he worked in the finance department of a Catholic not-for-profit agency. He eagerly contributed his own anti-gay remarks: "After all, the traditional family structure reflects correct moral behavior. We all know the St. Patrick’s Day parade has a right to exclude gays. So does the Boy Scouts of America."

So began the first day of jury selection in New York County Supreme Court in November of 2006. The civil trial for my client, Robert Sorrenti, a former New York City police sergeant, was underway. Sorrenti was challenging his employer, the New York Police Department, and supervising police Inspector James Hall, for violating the New York City Human Rights law. Hall had denied Sorrenti’s transfer to a career-enhancing position in the Youth Services Section because Hall perceived Sorrenti to be a gay man and, therefore, someone whom - in Hall’s estimation - put children’s safety in jeopardy.

Sorrenti was also challenging several acts of deterrent abuse he had suffered after he complained internally about Hall’s unlawful conduct. Eventually, after filing his lawsuit and subsequent to a prolonged period of harassment that impacted his health and mental well being, Sorrenti retired from the police department. Medically prescribed a regimen of psychotropic medications and psychotherapy, Sorrenti was hereof hope, shattered by the loss of his job and denigrated among his former colleagues by the remarks of a high-ranking police official who depicted him as a child molester.

While the path to trial in the state system was less predictable and efficient than in federal court, the ability to interact more meaningfully with the jury made all the difference. A number of juror innovations were developed under the leadership of former Chief Judge Judith Kaye through different jury projects examining various issues. Although beyond the scope of this article, many of those innovations - such as questioning of witnesses by jurors - happened at this trial. The recommendations provide some valuable insights and are avail-
able at http://www.nyjuryinnovations.org.

Our path to trial in the Sorrentini case began with a stop in the courtroom of retired Judge Ira Gammerman located at 80 Centre Street in Manhattan. Just about every case sent out for trial in New York County Supreme Court is first assessed by Gammerman, a jurist with a reputation for being intolerant of adjournment requests. Gammerman directed us to 80 Thomas Street, after briefly ascertaining the facts of the case and locating a jury panel with a telephone call. Gammerman instructed counsel for both parties to return to his courtroom once a jury has been selected so as to advise us what trial judge was selected.

Upon arriving at 80 Thomas Street, trial counsel met with the jury administrator who briefly described the jury selection process. In a civil case, you are required to select eight jurors, but only six with deliberate the verdict. Pursuant to Part 220.1 of the Uniform Rules for New York State Trial Courts, opposing parties can consent to non-designation of the jurors meaning jurors and alternates are not determined until all the evidence has been presented and the clerk of the court randomly selects those six jurors who shall retire to deliberate the verdict. The remaining two jurors – the alternates – do not deliberate.

Queryed by the jury administrator, prior to selection, whether or not I was designating my jury, I responded that we wished to designate the jurors and the alternates. I wanted to know from the outset those jurors whom I would need to persuade before they deliberated. Many trial attorneys opt otherwise and select to non-designate the jury based on the view that alternates designated at the outset can be less attentive and committed.

In order to screen out those jurors believed to be inappropriate for the case, each party is given the right to “challenge” or eliminate a prospective juror from serving on the panel if there is a justifiable reason why the juror should be eliminated. The process is referred to as a challenge “for cause.” There is no limit to the number of times that this challenge may be exercised.

Typically, lawyers also have a fixed number of challenges for which they need provide no reason for excluding a prospective juror with so-called “peremptory” challenges. As provided by CPLR § 4109, the number of peremptory challenges is limited to three plus one for every two alternate jurors.

The initial panel of thirty-one jurors called upon to decide Sorrentini’s claims was a representative sampling of Manhattan residents, the oldest being 65 years old and the youngest 21, out of sixteen woman and fifteen men. Despite the divergence of age, gender and experiences, there was a common expression of anti-gay bias among many of the prospective jurors. It was apparent that individuals displayed their belief systems on perceived sexual orientation more willingly and openly than on matters of gender or race. While some jurors openly expressed their biased views publicly in the selection room, others did so when questioned privately by counsel.

Having thoroughly strategized prior to the jury selection process, I felt cautiously optimistic that those jurors selected to deliberate could be impartial. I was determined to “ride the wild pony,” a colloquial description of a selection technique provided by Howard Nations, a Houston trial lawyer and ranch owner whose expertise had assisted my pre-trial preparation. For days leading up to the trial, I had listened to lectures presented at an American Trial Lawyers Association conference entitled: “Thinking Inside the Box: Jury Selection and Opening Statement.” In one of the tapes, Nations described his experience with horses, breaking some and having some break him, resulting in an understanding that it is far better to ride a wild pony in the direction it is going during jury selection.

Although a Texas trial lawyer far removed from a New York City legal practice, Nations provided a useful way to think about jury selection. The “wild pony” is the juror whose mind you will not change, cautioned Nations. This person will be the angry juror or the juror with a belief system at odds with the theme of your case. Rather than merely seeking to avoid this juror for fear their sentiments will prejudice the rest of the panel, get in the saddle and take the pony in the direction it is going. In sum, question this juror directly to elicit what is damaging. This “wild pony” provides the invaluable opportunity for counsel to expose other jurors with similar belief systems (those you do not want) and, crucially, delineate those jurors who disagree with the wild pony (those you do want).

This lesson proved invaluable. My strategic focus, therefore, in the voir dire process shifted from one of jury selection to that of de-selection. I found myself seeking those “ponies” ostensibly in opposition to my client’s claims rather than those who appeared to be receptive to his claims. This mental shift to de-selection enabled me to formulate a questioning game plan designed to expose those belief systems which could obstruct a successful verdict. This construct readily identified those jurors we needed to strike for cause or with a peremptory challenge and those we needed to persuade if seated on the jury. By identifying those predisposed not to agree with the case - the more difficult task – you gain the advantage of learning more about those who are not predisposed to agree with your case – and less likely to admit bias - rather than those who are with you from the outset.

With my de-selection strategy in place, I began the process with this question: Does anyone believe that a gay person should not teach children? This inflammatory question triggered the above described chorus of anti-gay sentiment. There were several lessons I learned from these responses. For example, the juror more predisposed to agree with Sorrentini’s theory of the case revealed his or her belief system without

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JUROR DE-SELECTION, from page 4

even speaking, but with body language and facial expressions that conveyed their reactions to the comments of the wild ponies. During juror selection, it was readily apparent to me that three women disagreed with all of the gay-bias- ed comments. Yet they never verbally expressed this disagreement. It was their body language and facial expressions that guided me. When another juror stood and became quite emotional about the biased commentary around her, describing it as “disgusting” and “ignorant and insulting to her gay friends,” each of the three women nodded every so slightly in agreement with the speaker’s impassioned remarks. I knew Sorenti needed these three women to reach a successful verdict. However, I avoided eliciting their verbal agreement with any of the speaker’s comments for fear of exposing their favorable pre-dispositions to defense counsel. I also correctly predicted that defense counsel would strike the speaker because of her expressed favorable pre-disposition for gay people.

Ultimately, the triumvirate of women became the leaders of the jury, one being selected as the foreperson. In the end and without knowing it earlier in the process, I realized we had proven a crucial fact during the selection process. The jurors ultimately selected for the panel had witnessed first hand the very virulent and vocalized misconceptions people held about gay men interacting with children. This was the critical theme of our case and now beyond dispute for those chosen jurors who had witnessed this stereotyped thinking first hand during the selection process.

The questioning process continued for approximately two days and until the attorneys for both parties exhausted all permissible challenges. Despite my efforts to convince the presiding judge to eliminate for cause those jurors who vocalized strong anti-gay bias, he denied all of my requests. While not present during the selection process to witness the offensive statements first hand, I do not believe it would have made any difference to the judge. The mistake I made during the challenge for cause discussion with the judge was not requesting the presence of a court reporter to preserve on the record my objections to the judge’s denials of my challenges. Although no juror that was confronted for cause survived a peremptory challenge, the failure to preserve the objections in a transcript would have been fatal to an appeal. Unlike the federal process, there is generally no court reporter present during the state court voir dire process.

Ultimately, the eight jurors selected, six women and two were men, returned a verdict favorable for Sorenti on all claims and awarded him almost $500,000 in compensatory damages. I believed then, as I do now, the voir dire process afforded within the state court system helped him to achieve this victory. Unlike the federal process, we were able to meaningfully examine - at length - the relevant belief systems of prospective jurors. The ability to actively participate in de-selection facilitated the all important process of persuasion. In the end, the vocalized bias during jury selection made all the difference.