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Equal Protection

crimination. Since the United States Supreme Court, in subsequent decisions, has not explicitly decided whether *Batson* applies to the criminal defendant's exercise of race based peremptory challenges,[410] the New York State Constitution and more specifically, under the civil rights clause, provides the unfairly excluded black prospective juror additional protection from instances of racial discrimination. Furthermore, aside from race, the civil rights clause also explicitly mentions color, creed and religion as impermissible classifications. Therefore any peremptory challenges exercised for such reasons should be prohibited as well. The court of appeals did not, however, discuss whether classifications not mentioned in the civil rights clause, such as gender, could be protected under this provision.

Forti v. New York State Ethics Commission[411]
(decided April 5, 1990)

Plaintiffs, all of whom are attorneys and former members of the executive branch, claimed that the implementation of the 1987 Ethics in Government Act[412] violated their equal protection and due process rights under the state[413] and federal[414] constitutions, as well as the state's separation of powers doctrine.[415] Plaintiffs based their equal protection claim on the fact that section 2 of the Ethics in Government Act[416] treated legisla-

410. In Edmonson v. Leesville Concrete Co., the United States Supreme Court held that a private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race. 111 S. Ct. 2077, 2080 (1991). Furthermore, the Court stated that "the race-based exclusion violates the equal protection rights of the challenged jurors." *Id.*

411. 75 N.Y.2d 596, 554 N.E.2d 876, 555 N.Y.S.2d 235 (1990).

412. Ethics in Government Act, ch. 813, 1987 N.Y. Laws 1404 (McKinney).

413. N.Y. CONST. art. I, §§ 6, 11.

414. U.S. CONST. amend. XIV, § 1.

415. The separation of powers doctrine is not found in any explicit clause of the federal or state constitutions. Rather it is a doctrine derived from the enumeration of powers to the three separate branches of government found in both Constitutions. *See* J. NOWAK & R. ROTUNDA, CONSTITUTIONAL LAW § 3.5, at 126-28 (4th ed. 1991).

416. Ethics in Government Act, ch. 813, § 2, 1987 N.Y. Laws 1404, 1404

tive and executive branch employees, who were in similar situations, differently. Their due process claims were based on the premise that section 78(8) interferes with their vested right to practice law. Finally, plaintiffs argued that the legislation violates the separation of powers doctrine because only the judiciary may regulate the practice of law.[417] The court upheld the statute, rejecting plaintiff's equal protection, due process and separation of powers claims.[418]

In 1987, the Ethics in Government Act (Act) was signed into law by Governor Cuomo. Section 73(8) of the Act, the "revolving door" provision, prevented former legislative branch employees from "engaging in lobbying, for compensation, on matters in which they were directly involved during their tenure with the legislature . . . only for the remainder of the legislative term in which the employee's service to the Legislature was terminated."[419] On the other hand, the statute bans former executive branch employees "from appearing or practicing before their former agencies 'in relation to *any* case, proceeding or application or other matter'"[420] for a two year period subsequent to the termination of their employment. In addition, there is a life time ban with regard to a case which a former executive employee was involved with. The objective of this statute was to prevent former government employees from exerting influence over former co-workers resulting in an unfair advantage based upon knowledge gained and contacts made during their course of employment for the government. In turn, this was aimed at enhancing "public trust and confidence in our governmental institutions."[421] The court held:

> [T]hat the more favorable treatment afforded under the statute to

(codified at N.Y. PUB. OFF LAW § 73(8) (McKinney 1988 & Supp. 1991)).

417. *Forti*, 75 N.Y.2d at 607, 554 N.E.2d at 880, 555 N.Y.S.2d at 239.

418. *Id.* at 604, 554 N.E.2d at 878, 555 N.Y.S.2d at 237.

419. *Id.* at 606, 554 N.E.2d at 879, 555 N.Y.S.2d at 238 (citing N.Y. PUB. OFF. LAW § 73(8) (McKinney 1988 & Supp. 1991)).

420. *Id.* (quoting N.Y. PUB. OFF. LAW § 73(8) (McKinney 1988 & Supp. 1991)) (emphasis in original).

421. *Id.* at 603, 554 N.E.2d at 877, 555 N.Y.S.2d at 236 (quoting Governor's Program Bill Mem. Bill Jacket, L. 1987, ch. 813).

> former legislators and legislative employees does not violate plaintiffs' constitutional right to equal protection of the law . . . [and] . . . do[es] not constitute violations of their due process rights or the rights afforded by the Ex Post Facto Clause of the United States Constitution.[422]

The court rejected plaintiffs' equal protection claim because plaintiffs failed to demonstrate the "absence of a rational basis for the disparities of which they complain[ed]."[423] A rational basis analysis was used because the plaintiffs did not prove that "the statute burdens any identifiable 'suspect' class . . . [and they] have [not] shown that they have a fundamental right to engage in the unrestricted practice of their profession."[424] Although attorneys have a due process right to practice law, this right is subject to reasonable restrictions that are to be scrutinized under the lowest standard of review.[425]

The court found that the disparate treatment between the two classes of employees was justified because the possibility of undue influence is greater in the executive branch than in the legislative branch. Support for this finding was based upon the belief that a single person's influence in any matter in the legislative branch is diluted because checks and balances exist. For example, a bill must pass through two legislative houses to become a law; legislators must answer to their constituencies; and every two years there is "an attendant change in membership, political orientation and priorities."[426] On the other hand, matters coming

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422. *Id.* at 617, 554 N.E.2d at 886, 555 N.Y.S.2d at 245 (citing U.S. CONST. art. I, § 10, cl. 1).

423. *Id.* at 612, 554 N.E.2d at 882, 555 N.Y.S.2d at 241. (citing Maresca v. Cuomo, 64 N.Y.2d 242, 475 N.E.2d 95, 485 N.Y.S.2d 724 (1984)).

424. *Id.*

425. *Id.* (citing Willner v. Committee on Character, 373 U.S. 96 (1963) (attorneys have a due process right to practice law). *See* Edelstein v. Wilentz, 812 F.2d 128 (3d Cir. 1987)); Nordgen v. Hafter, 789 F.2d 338 n.2 (5th Cir.) *cert. denied,* 479 U.S. 850 (1986); Lupert v. California State Bar, 761 F.2d 1325, 1327 n.2 (9th Cir.), *appeal dismissed,* 474 U.S. 916 (1985); *cf. In re* Gordon, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (the right is subject to reasonable restrictions which may be reviewed under the least exacting "rational basis" standard).

426. *Forti,* 75 N.Y.2d at 613, 554 N.E.2d at 883, 555 N.Y.S.2d at 242.

before administrative agencies, part of the executive branch, are resolved by a small number of officials who have broad and discretionary authority. "Further, the tenure of administrative agency officials does not depend upon the approval of the electorate, many are protected by civil service laws and the myriad of routine decisions these officials make rarely draw the attention of the news media."[427] Therefore, the disparity in treatment is not irrational and passes the rational basis test.

The court also rejected plaintiffs' due process claim that the legislation prevents them from pursuing their professional careers; section 78(8) simply does not interfere with plaintiffs ability to practice law, even if it hinders their marketability. "Such restriction, which is reasonably related to the legislative goal of restoring public confidence in government, does not violate any protected property or liberty interest . . . ."[428] Furthermore, the court found that section 78(8) does not alter a term or condition of plaintiffs' state employment by employing more restrictive rules concerning their post-state employment opportunities than they bargained for because plaintiffs had no contractual agreement with the government restraining the state legislature from altering post-employment rules.[429]

Finally, the court held that section 78(8) does not violate the separation of powers doctrine because the legislature does "regulate many aspects of the practice of law in this State."[430] As a matter of fact, the judiciary derives its regulatory power over the profession from the legislature. Furthermore, the statute

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427. *Id.*

428. *Id.* at 614, 554 N.E.2d at 884, 555 N.Y.S.2d at 243 (citing Hasenbein v. Siebert, 56 N.Y.2d 853, 438 N.E.2d 877, 453 N.Y.S.2d 171 (1982)). In *Hasenbein*, the court held that section 397 of New York State Banking Law, which precluded the spouse of a niece of a director of a savings and loan association from being appointed director of the same institution was, "a rational exercise of the state's police power, reasonably calculated to achieve its goal of eliminating nepotism in the savings and loan industry." *Hasenbein*, 56 N.Y.2d at 854, 438 N.E.2d at 878, 453 N.Y.S.2d at 172 (citations omitted).

429 *Forti*, 75 N.Y.2d at 614-15, 554 N.E.2d at 844, 555 N.Y.S.2d at 243.

430. *Id.* at 615, 554 N.E.2d at 885, 555 N.Y.S.2d at 244.

effects all former executive employees, not just attorneys. "Its effect on the practice of law is, thus, merely incidental."[431]

The court did find that the statutory provision, section 73(14), which allowed prosecution for a violation of section 73(8) to be initiated "*only* upon referral by the Ethics Commission [to be] highly troublesome."[432] First, it encroaches upon the "power of the executive branch . . . to 'ensure that the laws are faithfully executed.'"[433] Second, section 73(14) seems to be inconsistent with article I, section 6 of the New York State Constitution,[434] which requires that a grand jury investigate the wilful conduct of public officers and deliver up indictments when appropriate. The court of appeals did not address these two issues because they were not included in the narrow question brought on this non-final appellate division appeal.

In its holding that section 73(8) did not violate the plaintiff's rights under the equal protection or due process clauses, the court did not state whether its determination was based on the federal or state constitution. The court cited to both federal and state cases for its determination, apparently reaching the same result under both.

The use of the rational basis standard to scrutinize equal protections claims concerning public employment follows the standard used by the United States Supreme Court. For example, in *Massachusetts Board of Retirement v. Murgia*,[435] the Court upheld a Massachusetts statute requiring state police officers to retire at age fifty. The Court wrote that strict scrutiny was only to be applied when a "classification impermissibly interferes with

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431. *Id.*

432. *Id.* at 616, 554 N.E.2d at 885, 555 N.Y.S.2d at 244 (emphasis in original).

433. *Id.* (quoting N.Y. Const. art. IV, § 3 which states: "The Governor shall . . . expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed.").

434. *Id.* at 616-17, 554 N.E.2d at 885, 555 N.Y.S.2d at 244 (quoting N.Y. Const. art. I, § 6, which states: "[T]he power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.").

435. 427 U.S. 307 (1976).

the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class."[436] The Court concluded that neither situation was present in this case. The Court then referred to its decision in *Dandridge v. Williams*,[437] where the Court "expressly stated that a standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.'"[438]

More recently, in *Gregory v. Ashcroft*,[439] the Supreme Court upheld a similar provision of the Missouri State Constitution requiring state judges, other than municipal judges, to retire at age seventy.[440] Using a rational relation standard, the Court upheld the Missouri constitutional provision because it "reflect[ed] both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it."[441] The Court cited to its 1979 decision in *Vance v. Bradly*[442] and stated that it was not prepared to "overturn a state constitutional provision unless varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that it can only be concluded that the legislature's actions were irrational."[443]

The New York Court of Appeals, therefore, parallels the federal trend by reviewing equal protection claims concerning laws that affect public employment under a rational relation standard. In addition, the *Forti* court, although not clearly distinguishing the New York State and United States Constitutions in its analysis, upheld the revolving door statute under both constitutions using a rational relation standard.

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436. *Id.* at 312.

437. 397 U.S. 471 (1970).

438. *Murgia*, 427 U.S. at 313 (quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

439. 111 S. Ct. 2395 (1991).

440. MO. CONST. art. V, § 26 (providing that "[a]ll judges other than municipal judges shall retire at the age of seventy years . . . .").

441. *Ashcroft*, 111 S. Ct. at 2406 (citations omitted).

442. 440 U.S. 93, 97 (1979).

443. *Ashcroft*, 111 S. Ct. at 2397.