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Equal Protection

"[A] governmental classification will not offend the Equal Protection Clauses of the State and Federal Constitutions if it bears a fair and substantial relation to some conceivable and legitimate State interest."[575] Because the state is in control of regulating and disciplining the classes of professionals listed in the statute, allowing only specified professionals to represent clients at state tax hearings promotes the state's interest of ensuring professional competence in representation in state tax disputes. Therefore, the law was rationally related to the state interest promoted and was constitutional.[576]

People v. Blunt[577]
(decided October 22, 1990)

The defendant, convicted of first degree burglary and first degree assault, contended that his right to equal protection guaranteed by the federal[578] and the state constitutions[579] was violated by the prosecution's alleged use of gender based peremptory challenges. Under section 270.25 of the state's Criminal Procedure Law,[580] an attorney can peremptorily challenge a prospective juror without having to state a reason why he or she was excluded. The prosecution countered that the defendant, a male, had no standing to assert an equal protection claim regarding possible discrimination against women. The court determined that the state constitution, under the equal protection clause, prohibits the use of gender based peremptory challenges and held that a *prima facie* case of improper discrimination was established. The appeal was held in abeyance and the case remitted to the county court "to hear and report on the prosecutor's

575. *Id.* at 8, 556 N.Y.S.2d at 910 (citations omitted).

576. *Id.* at 8-9, 556 N.Y.S.2d at 910-11. For a discussion of equal protection doctrine under the federal law, see *supra* notes 454-457 and accompanying text.

577. 162 A.D.2d 86, 561 N.Y.S.2d 90 (2d Dep't 1990), *aff'd on remand*, No. 901-05958, 1991 N.Y. App. Div. LEXIS 12602 (2d Dep't Oct. 7, 1991).

578. U.S. CONST. amend. XIV, § 1.

579. N.Y. CONST. art. I, § 11.

580. N.Y. CRIM. PROC. LAW § 270.25 (McKinney 1982).

exercise of peremptory challenges."[581]

During the jury selection process, the prosecutor peremptorily challenged six women of which two were black. The defense argued that the prosecution was impermissibly excluding blacks from jury selection. The prosecution denied defendant's claim of discrimination, explaining that he was attempting "to insure that there is a balance including sufficient males on this jury."[582] The trial court denied the defendant's assertion because the prosecutor had race neutral reasons for excluding the two black female prospective jurors. The trial court, however, did not ask the prosecution to explain why he excluded the four white female prospective jurors. Subsequently, the prosecutor peremptorily challenged five more women from jury service, resulting in the final jury consisting of eight men and four women.

While the defendant asserted equal protection claims under both state and federal constitutions, the appellate court primarily devoted its analysis to the defendant's rights under the state constitution. The court found that the reasoning in *People v. Kern*,[583] which prohibited race based peremptory challenges under the state constitution, was applicable to instances of gender discrimination. The court determined that "[t]here is no basis in common sense or logic to adopt any other rationale simply because the discriminatory use of peremptory challenges is based on gender rather than race."[584] Addressing the standing to sue issue, the court also found that *Kern* permitted the defendant to sue even though he was not a member of the excluded class of prospective jurors.[585]

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581. *Blunt*, 162 A.D.2d at 90, 561 N.Y.S.2d at 93. On remand, the appellate division concluded that the prosecutor failed to articulate a gender neutral explanation for excluding female prospective jurors. People v. Blunt, No. 91-05958, 1991 N.Y. App. Div. LEXIS 12602 (2d Dep't Oct. 7, 1991).

582. *Id.* at 87, 561 N.Y.S.2d at 91.

583. 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990); see *supra* notes 387-410 and accompanying text for discussion of this case.

584. *Blunt*, 162 A.D.2d at 90, 561 N.Y.S.2d at 93.

585. *Id.* at 89, 561 N.Y.S.2d at 92. In Powers v. Ohio, the United States Supreme Court modified the rule in Batson v. Kentucky, 476 U.S. 79 (1986), by granting the defendant standing to sue despite not being a member in the same group that was excluded by peremptory challenge. 111 S. Ct. 1364, 1373

Turning to the case at bar, the court found that the defendant established a *prima facie* claim of gender discrimination. The court, relying on *People v. Jenkins*,[586] noted that even though four women were present on the jury, a violation of the state constitution was nevertheless present if it was found that one woman was peremptorily challenged solely on the basis of her gender.

Although the *Blunt* court relied upon the state constitution's equal protection provision to prohibit gender based peremptory challenges, presumably the same result would occur under the equivalent provision of the Federal Constitution. This assumption can be made because the state constitution's equal protection provision has been deemed to be the "co-extensive" to that of the counterpart of the Federal Constitution.[587] In fact, in *People v. Irizarry*,[588] the First Department of the Supreme Court, Appellate Division held that gender based peremptory challenges are prohibited under the equal protection clause of the Federal Constitution.[589]

Aside from *Blunt* and *Irizarry*, there is limited guidance for the New York State courts to determine whether *Batson v.*

(1990).

586. 75 N.Y.2d 550, 554 N.E.2d 47, 555 N.Y.S.2d 10 (1990).

In *Jenkins*, the court of appeals, deciding an alleged *Batson* violation under the Federal Constitution, noted that a defendant's equal protection rights are violated even if only one black prospective juror is excluded solely on the basis of race. *Id.* at 559, 554 N.E.2d at 51-52, 555 N.Y.S.2d at 14-15.

587. *See* Esler v. Waters, 56 N.Y.2d 360, 313-14, 437 N.E.2d 1090, 1094, 452 N.Y.S.2d 333, 337 (1982) (holding that the New York State Constitution's equal protection clause offers no greater protection than that of the federal counterpart).

588. 165 A.D.2d 715, 560 N.Y.S.2d 279 (1st Dep't 1990).

589. *Id.* at 574, 560 N.Y.S.2d at 281:

> 'For the purposes of equal protection, the constitutional violation is the exclusion of *any* blacks solely because of their race. If any blacks are so excluded, it is of no moment that the jury nevertheless contains a token number of blacks.' This holding applies equally in the case of the improper exclusion of *any* women.

Id. (quoting People v. Jenkings, 75 N.Y.2d 550, 558-59, 554 N.E.2d 47, 51-52, 555 N.Y.S.2d 10, 14-15 (1990)) (emphasis in original).

Kentucky[590] is applicable to instances of gender based peremptory challenges. Neither the United States Supreme Court, Second Circuit Court of Appeals, nor the New York Court of Appeals have squarely decided the issue.[591]

THIRD DEPARTMENT

Sisario v. Amsterdam Memorial Hospital[592]
(decided March 22, 1990)

Plaintiff claimed that the New York Civil Practice Law and Rules (CPLR) 3012-a,[593] "which requires a complaint in a medical malpractice suit to be accompanied by a certificate of merit"[594] violated the equal protection clauses of the federal[595] and state constitutions[596] because it protects only a certain class of health care providers from frivolous malpractice law suits and excludes other health care providers, as well as other professionals who are subject to frivolous malpractice claims.[597] Plaintiff also claimed that the statute violated the due process clauses of the federal[598] and state constitutions[599] because it denies access to the courts by requiring a certificate of merit

590. 476 U.S. 79 (1986).

591. Two federal circuit courts were split over the applicability of *Batson* to gender based peremptory challenges. *Compare* United States v. DeGross, 913 F.2d 1417 (9th Cir. 1990) (holding *Batson* applicable to gender based peremptory challenges) *with* United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988) (holding *Batson* is not applicable to gender based peremptory challenges), *cert. denied*, 110 S. Ct. 1109 (1990).

592. 159 A.D.2d 843, 552 N.Y.S.2d 989 (3d Dep't), *appeal dismissed*, 76 N.Y.2d 844, 559 N.E.2d 1287, 560 N.Y.S.2d 128 (1990).

593. N.Y. CIV. PRAC. L. & R. 3012-a (McKinney 1991).

594. *Sisario*, 159 A.D.2d at 843, 552 N.Y.S.2d at 990.

595. U.S. CONST. amend. XIV, § 1.

596. N.Y. CONST. art. I, § 11.

597. *Sisario*, 159 A.D.2d at 843, 552 N.Y.S.2d at 990 ("[p]laintiff claims that the statute is discriminatory because it affords protection only to certain health care providers while others who are sued for malpractice, such as attorneys or accountants, are denied similar protection (as are certain other health care providers such as osteopaths and chiropractors)").

598. U.S. CONST. amend. XIV, § 1.

599. N.Y. CONST. art. I, § 6.