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STRIKING JURORS BASED ON SEXUAL ORIENTATION IS DISCRIMINATORY

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A recent decision from the Ninth Circuit Court of Appeals holds, for the first time, that the Equal Protection Clause of the Constitution prohibits a litigant from exercising peremptory strikes based on sexual orientation.

In *SmithKline Beecham Corp. v. Abbott Laboratories*,¹ an antitrust, contracts, and business tort case revolving around the cost of an HIV medication, Abbott’s lawyer used his client’s first peremptory challenge to strike an openly-gay juror. SmithKline’s (SK) lawyer opposed the peremptory challenge, citing the U.S. Supreme Court’s decision in *Batson v. Kentucky*,² for the proposition that striking a juror based on sexual orientation is unconstitutional.

The appeals court was presented with a novel legal issue: does the *Batson* decision prohibit an attorney from using a peremptory strike against a juror based on their sexual orientation?

In *Batson*, the Court held that the Equal Protection Clause precludes the use of peremptory challenges to strike prospective jurors based on their race.³ The case has evolved over time to prevent gender discrimination in the jury selection process.⁴

In *SmithKline*, the court, applying *Batson*, had to determine (1) whether SK established a *prima facie* case of intentional discrimination; (2) whether Abbott could offer a nondiscriminatory reason for the strike; and (3) whether SK showed purposeful discrimination.⁵

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¹. 740 F.3d 471 (9th Cir. 2014).
³. *Id.* at 97–99.
⁵. See *Batson*, 476 U.S. at 85–86, 94.
I. THE PRIMA FACIE CASE FOR DISCRIMINATORY PEREMPTORY STRIKE

To establish a prima facie case under Batson, SK had to produce evidence that (1) the prospective juror is a member of a cognizable group; (2) counsel used a peremptory strike against the individual; and 3) the totality of the circumstances raises an inference that the strike was motivated by the characteristic in question.6

1. Was the prospective juror a member of a cognizable group?

The Ninth Circuit determined that the juror was indeed a member of a cognizable group, i.e., homosexual. Though the juror did not actually disclose his sexual orientation during voir dire, the court noted that counsel could adduce the same from the juror’s responses to the court’s questions about his spouse, whom he referred to using masculine pronouns.

2. Counsel used a peremptory strike against the individual.

Abbott’s counsel exercised his peremptory strike against the juror, prompting an objection by opposing counsel. Though Abbott’s counsel claimed he did not have actual knowledge that the juror was gay, the court disagreed, reasoning that the information made available during voir dire was enough to raise the specter of his status as a sexual minority.

3. Was the peremptory strike motivated by juror’s sexual orientation?

The court determined that there was evidence of Abbott’s discriminatory intent when he struck the juror. In making this finding, the court took into consideration the subject matter of the litigation, and facts the jurors were to decide.7 The court, citing J.E.B. for the proposition that the potential for an impermissible strike based on sex increases substantially when the gender of the juror coincides with the subject matter of the case, found that the potential for relying on impermissible stereotypes in the process of selecting jurors was “particularly acute” in this case because the litigation involved the increase in price of HIV-AIDS medication.8

The court relied on counsel’s argument that the subject matter of the litigation raised suspicions regarding the impermissible purpose of the strike: “The problem here . . . is the litigation involves AIDS medications. The incidents [sic] of AIDS in the homosexual community is well-known, particularly gay men.”9

6. Id. at 96.
7. SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471, 476 (9th Cir. 2014) (citing J.E.B., 511 U.S. at 140).
8. Id. at 477 (quoting J.E.B., 511 U.S. at 140).
9. Id.
II. EVEN IF THE STRIKE WAS DISCRIMINATORY, DOES BATSON PROHIBIT PEREMPTORY STRIKES BASED ON A JUROR’S SEXUAL ORIENTATION?

The general rule is that attorneys are permitted to “exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to ‘rational basis’ review.”\(^\text{10}\) Accordingly, the court had to determine which level of review would apply to sexual minorities; if rational basis applied, Abbott’s strike would not require reversal. However, if the court applied heightened or strict scrutiny, then Abbott’s strike would be unlawful, requiring reversal and a new trial.

The timing of this case came on the heels of the U.S. Supreme Court’s landmark decision on rights of sexual minorities in *United States v. Windsor*,\(^\text{11}\) which held that restricting federal interpretation of the terms “marriage” and “spouse,” as required by Section 3 of the Defense of Marriage Act (DOMA), to apply only to heterosexual couples, is unconstitutional under the Due Process Clause of the Fifth Amendment.\(^\text{12}\) In *SmithKline*, the court relied on *Windsor* for the holding that sexual orientation classification is subject to heightened scrutiny, not rational basis.\(^\text{13}\)

Relying also on *Windsor*’s admonition that “[r]esponsibilities, as well as rights, enhance the dignity and integrity of the person,”\(^\text{14}\) the Ninth Circuit explained that the decision “reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation.”\(^\text{15}\) The court emphasized that “[j]ury service is one of the most important responsibilities of an American citizen.”\(^\text{16}\) The court further asserted “[f]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.”\(^\text{17}\) It added that jury service “gives gay and lesbian individuals a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others.”\(^\text{18}\) Therefore, the court reasoned that to allow peremptory strikes because of assumptions based on sexual orientation is to “revoke this civic responsibility, demeaning the dignity of the individual and threatening the impartiality of the judicial system.”\(^\text{19}\)

\(^{10}\) J.E.B., 511 U.S. at 143.
\(^{11}\) 133 S. Ct. 2675 (2013).
\(^{12}\) Id. at 2695–96.
\(^{13}\) *SmithKline*, 740 F.3d at 481.
\(^{14}\) *Windsor*, 133 S. Ct. at 2694.
\(^{15}\) *SmithKline*, 740 F.3d at 485.
\(^{16}\) Id.
\(^{17}\) Id. (citing Powers v. Ohio, 499 U.S. 400, 407 (1991)).
\(^{18}\) Id.
\(^{19}\) Id.
III. *Batson* Extended Once Again to Protect the Integrity of the Jury Trial Process

The Ninth Circuit’s decision reminds practitioners that even where a juror’s classification is not completely disclosed, as with the case of the gay juror, a *Batson* challenge is cognizable once the prospective juror’s status or classification is established, voluntarily and on the record. *Voir dire* operates differently in every court, but overall, the litigators learn quite a lot of personal information about a juror, including information about race, ethnicity, national origin, gender, disability, and in this case, sexual orientation. While a prospective juror need not “out” themselves, a *Batson* challenge may be raised where the constellation of information from juror questionnaires and *voir dire* permits the parties to adduce the juror’s classification.

*SmithKline* is the first circuit-level decision to apply the holding in *Windsor* to secure the rights of LGBT\(^{20}\) citizens against discrimination and hopefully it is not the last. Indeed, the Ninth Circuit’s reasoning may be used to defeat discriminatory legislation, such as Arizona’s recently vetoed bill that would have permitted businesses to refuse service to LGBT patrons.\(^{21}\) The *SmithKline* case is a watershed moment for both LGBT citizens and the integrity of our jury trial system. The decision sets forth new boundaries within which practitioners must confine their peremptory strikes, and by doing so, it opens the jury trial system to gay and lesbian citizens.

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