Know Your Criminal and Employment Law CLE: Common Issues Facing the LGBTQ Community

A CLE Program Presented by LeGaL as part of the LGBTQ Brooklyn Legal Assistance Project, a partnership of LeGaL, the Brooklyn Community Pride Center and Brooklyn Law School OUTLaws

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the lgbt bar association of greater new york

January 30, 2013
6:00 p.m. – 8:00 p.m.
Brooklyn Law School
250 Joralemon Street, Room 602
Brooklyn, NY

The LGBTQ Brooklyn Legal Assistance Project is made possible with the generous support of The New York Community Trust and the New York Bar Foundation.

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LEGAL Know Your Criminal and Employment Law CLE:
Common Issues Facing the LGBTQ Community

Wednesday, January 30, 2013, 6:00 p.m. to 8:00 p.m.
Brooklyn Law School, 250 Joralemon Street, Room 602

AGENDA

I. Introductions and Overview of Training, 6:00 – 6:05

Employment Law

II. Laws protecting against sexual orientation discrimination in the workplace, 6:05–6:15

III. Case intake and evaluation, 6:15 – 6:25

IV. Demand letters, 6:25 – 6:35

V. Litigating a sexual orientation discrimination claim, 6:35 – 6:45

VI. Q&A, 6:45-7:00

Criminal Law

VII. Basic Know Your Rights, 7:00 – 7:15

VIII. Structure of NYC Court System, 7:15 – 7:20

IX. Basic Outline of Offenses & Penalties, 7:20 – 7:25

X. What is a Summons, DAT & Warrant, 7:25 – 7:30

XI. What to Expect at a First Court Date, 7:30 – 7:35

XII. Common Resolutions of Criminal Cases, 7:35 – 7:40

XIII. Collateral Consequences, 7:40 – 7:42

XIV. Concerns for Non-citizens, 7:42 – 7:50

XV. Q&A, 7:50 – 8:00

Faculty Bios

LeGaL Know Your Criminal and Employment Law CLE:
Common Issues Facing the LGBTQ Community
January 30, 2013

Lee Bantle

Lee Bantle is a prominent employment law attorney and regularly speaks at conferences about cases involving sexual orientation discrimination, religious discrimination and the Americans with Disabilities Act.

He graduated Order of the Coif from New York Law School in 1983 and was a member of Law Review. Lee was then a Law Clerk to the Hon. Edward R. Korman, U.S. District Court Judge in the Eastern District of New York. He was associated with the law firm of Debevoise & Plimpton from 1983 to 1986. Lee was associated with, and then member of, the law firm of Beldock Levine & Hoffman LLP from 1987 to 1999. In January 2000, he opened Bantle & Levy LLP.

Mr. Bantle has published numerous articles on the subject of employment law. Additionally, his children's novel, *Diving for the Moon* (Simon & Schuster 1995), deals with the impact of HIV infection on a 12-year old hemophiliac boy. His young adult novel, *David Inside Out* (Henry Holt 2009), deals with a 16-year old boy coming to terms with his sexual identity.

Lee is formerly a member of the Board of Directors of the New York chapter of the National Employment Lawyers Association and is currently the chair of its Judiciary Committee. He has served on the Association of the Bar of the City of New York's Committee on AIDS and its Committee on Federal Legislation and has been a cooperating attorney for the Lambda Legal Defense and Education Fund.

Meghan Maurus

Meghan Maurus is an attorney practicing in New York City. Meghan is co-founder of the New York Law Collective, which assists in creating tools for dialogue and advocacy for communities in New York City. The most recent project of the New York Law Collective is the Just Info Hotline, which provides information to criminal defendants and their loved ones in order to educate and provide resources to people who come into contact with the criminal justice system in New York City.

While in law school, Meghan interned at the Center for Constitutional Rights, the United Nations High Commission for Refugees, the International Rescue Committee, Make the Road New York, Queers for Economic Justice, the Cardozo Human Rights and Genocide Clinic, and the New Jersey Office of the Public Defender. Following graduation, Meghan worked at the New Jersey Office of the Public Defender in Essex County, and then at the Palestinian Centre for Human Rights in Ramallah and Gaza City.

After returning to New York in fall of 2011, Meghan worked as a Mass Defense Coordinator for the New York City Chapter of the National Lawyers Guild, defending hundreds of protesters and coordinating the Chapter's mass defense work. Meghan is admitted to practice in the State of New York and New Jersey. Meghan is a member of the National Association of Criminal Defense Lawyers and the New York City Bar Association. Meghan was honored by the National Lawyers Guild for working to defend those arrested in the course of peaceful assembly and protest, and also received the Samuel Belkin Award in 2008.

Criminal Law: Common Issues Facing LGBTQ Communities

Meghan DuPuis Maurus, Esq.
Attorney, Maurus Law/Co-Founder New York Law Collective

Sponsored by: The LGBT Bar Association of Greater New York - LeGal
Wednesday, Jan. 30, 2013 6-8pm
Brooklyn Law School

LGBTQ Criminal Law
What We Will Cover Tonight?

- Basic KYR that is helpful with LGBTQ clients;
- Structure of Criminal Court;
- Basic outline of offenses and penalties;
- What is a summons, DAT, warrant?;
- What to expect at a first court date;
- Concerns for non-citizens;
- Collateral consequences;
- How to protect your client.

General Tips

- Always do a basic know your rights (KYR) even if it is post arrest.
  - (Harm reduction for next time).

- Immigration Status – Always Ask, Never Presume.

- Always ask Preferred Gender Pronouns (PGP).

Anti-Oppression

- Criminalization of identity.
  - Be sensitive to gender variant clients talking to you about their experience dealing with police.
  - Important to realize that police engage in gender policing. People become a target irrespective of any behavior.
  - Policing of sex and gender both bolsters and reinforces racial and gender inequalities.
  - In order to engage in this type of policing, police will aggravate or taunt people. Police go for the most vulnerable of a group, such as those perceived to be undocumented, gender nonconforming, etc., and people with intersecting identities.

Basic Know Your Rights (KYR)

- If the police start to question you, or just start a conversation, ask, "**Am I free to go?**" If they answer "YES," you may say nothing and walk away. If they answer "NO," you are being detained. You have to stay but you do not have to talk. Say, "I wish to remain silent. I want to talk to a lawyer." If the police say you are free to go, then leave!
- **SILENCE** You always have the right to remain silent, and must actually remain silent. "I am going to remain silent, I want to speak to my lawyer," nothing more. Or just say, "My lawyer says I shouldn't talk to you without him/her here. I want a lawyer." If you say anything, the police may use it against you.
- **SEARCHES**: You should not consent or agree to any searches. If the police want to search you, say loudly and clearly, "I do not consent to this search." If the police search anyway, continue to say, "I do not consent to a search." If you do not object to the search, the police may claim you consented by your silence. If you consent, anything the police find can be used against you in court. Do not resist the search physically.
- Do not believe everything the police tell you. The police can lawfully lie to you to encourage you to talk. But— don't lie to a police officer. It can be a crime. At a minimum it will greatly impeach your credibility.

Basic KYR, Cont.

- Do not struggle or physically touch the police or you risk arrest, and injury. If you physically resist an arrest or run to avoid arrest, you risk additional criminal charges.
- Indelible right to counsel (NY Specific)
  - If you are already represented in NY and if the police know you already have a lawyer, they cannot question you about either the older or newer case. If you already have a lawyer then you cannot waive your right to a lawyer except in open court.
- Surveillance:
  - Profiling of activists, weakest links/the most vulnerable community members, and Muslim communities.
    - Informant (generally not salaried or trained).
    - Undercover – often pulled out of police academy pre-training.
    - Secondary – hang out and get hearsay info and get updated on student activities etc.
    - Technological – ex. TV set gifted to an individual who placed it inside his home; other ex. Fake Time Warner cable person put in a plant.

Basic KYR, Cont.

- Methods of Mitigation:
  - Choose your words and behaviors.
  - Always keep your hands in full view of the police—do not reach into any pockets unless directed by the police, and then move slowly.
- You are your own best ally/advocate:
  - Remember officers' names, badge numbers, and car numbers.
  - Get witnesses' names and phone numbers.
  - Record and document any injuries.
  - You have the right to film the police "from a reasonable distance." If you get in between a police officer and someone they are trying to arrest, you risk arrest yourself.
  - Narrate your movements. (i.e., I'm going to get my wallet).

Basic KYR, Cont.

- New York recognizes four levels of police interaction. *People v. DeBour*, 40 N.Y.2.d 210 (1976).
  - **Level One**: Permits a police officer to request information from an individual and merely requires that the request be supported by an objective, credible reason, not necessarily indicative of criminality;
    - Am I being detained?; Am I free to go? (People v. DeBour, *supra).*
  - **Level Two**: Common law right of inquiry. "There must exist a founded suspicion that criminal activity is afoot." Permits a somewhat greater intrusion. Officer can interfere with a citizen to the extent necessary to gain explanatory information, but short of forcible seizure. *(People v Cantor,* 36 NY2d 106, 114 (1975); *People v Rosemond,* 26 NY2d 101 (1970); *People v Rivera,* 14 NY2d 441, 446 (1964), and authorities cited therein).
    - Am I being detained? I wish to remain silent.
  - **Level Three**: Authorizes an officer to forcibly stop and detain an individual, and requires a reasonable suspicion that the particular individual was involved in a felony or misdemeanor; (CPL 140.50(1)); *see Terry v Ohio,* 392 US 1 (1968); *People v Cantor, supra).* A corollary of the statutory right to temporarily detain for questioning is the authority to frisk if the officer reasonably suspects that he is in danger of physical injury by virtue of the detainee being armed (CPL 140.50(3)).
    - (Stop and Frisk.) I do not consent to this search.
  - **Level Four**: Arrest, requires probable cause to believe that the person to be arrested has committed a crime. Police may arrest (take into custody) a person when they have probable cause to believe that person has committed a crime, or has committed an offense in his presence (CPL 140.10).
    - I wish to remain silent. I want a lawyer.

LGBT Specific KYR

- Do I have to give my legal name to law enforcement?
  - Ex. I am trans/GNC. I use the name Michael, but I haven't legally changed my name. My legal name is Meghan. Which name do I have to give if I am in a position to give it to the police?
    - » * There is no right answer to this question.
  - NY:
    - Advice generally given is that it is probably consistent with the law for people to use their preferred name that they use in everyday life and interactions. But it is certainly possible that if that is not the name on their identification, they may end up with a charge for false personation. Some people have received this charge in Nassau and Suffolk counties. If a client does receive a charge for false personation for using the name consistent with their gender identity, even if that name does not appear on their ID, they should be able to later fight that charge.

LGBT Specific, KYR

- New York does not have a stop and identify statute. *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004). *Hiibel* held that statutes requiring suspects to disclose their names during police investigations did not violate the 4th or 5th Amendment. Because NY does not have a stop and identify statute, under NY law the police may not require you to produce ID if they do not suspect that you may be involved in criminal activity. Use your judgment in responding to a request for ID.
- NY PL § 190.23 False personation.
    - A person is guilty of false personation when after being informed of the consequences of such act, he or she knowingly misrepresents his or her actual name, date of birth or address to a police officer or peace officer with intent to prevent such police officer or peace officer from ascertaining such information. False Personation is a Class B misdemeanor.
- Federal:
  - It is a federal crime to lie to federal officials.
- Note: This is legal information in a classroom; life is more complicated. People always need to assess their own safety.

LGBT Specific, KYR

- **Interactions with Law Enforcement: The NYPD Patrol Guide Now:**
  - Prohibits the use of discourteous or disrespectful remarks regarding a person's sexual orientation or gender identity/expression.
  - Instructs police officers to refer to transgender New Yorkers by names, honorifics and pronouns that reflect their gender identity (even if it does not match the information on their ID documents) and amends forms so that people's "preferred name" can be recorded and used while they are in police custody.
  - Prohibits police officers from conducting any search for the purpose of assigning a person a gender. This also applies to school safety officers, NYPD personnel assigned to the City's public schools.
  - Requires that individuals in NYPD custody be searched by an officer of the gender they request. If their request is not honored, the reasons will be noted in the command log.
  - Defines "gender" to include gender identity and expression, consistent with New York City's Human Rights Law. This means that when the NYPD considers someone's gender, it is their gender identity that matters, if even if their gender identity differs from their sex assigned at birth.

LGBT Specific, KYR

- **In Police Custody:**
  - Individuals in NYPD custody will be held in sex-segregated police facilities according to their gender identity, even if it differs from the sex they were assigned at birth, unless there is a concern for the person's safety, in which case they will be considered "special category prisoners" and placed accordingly.
  - "Special category prisoners," including transgender people, will not be cuffed to rails, bars or chairs for unreasonable periods of time.
  - It may be helpful to have any documentation of a legal name change at hand for a loved one to bring to the precinct.
  - The ADA covers HIV-positive individuals, and those who are discriminated against because they are thought to be HIV-positive. Those in custody must be given access to life-saving medications.
  - Strip Searches are only to be conducted on those charged with a felony.
- Condoms as Evidence.

KYR Resources

- National Lawyers Guild:
  - http://www.nlg.org/resource/know-your-rights
- Center for Constitutional Rights “If an agent knocks”:
  - http://ccrjustice.org/ifanagentknocks
- Mutant Legal:
  - http://www.disarmy.org/content/legal
- Sex Worker’s Project:
  - http://sexworkersproject.org/downloads/2012/2012-know-your-rights.pdf
- Midnight Special Law Collective:
  - www.**midnightspecial**.net/ (Older resource).

Structure of the NYC Court System

- Criminal Term of the NYS Supreme Court
  - General Jurisdiction (See, NY Const Art VI, Sec. 15 and CPL 1.20)
    - Note: no jurisdiction over violations.
- (County) Criminal Court
  - Limited Jurisdiction (See, NY Const Art VI, Sec. 15 and CPL 1.20)
    - Exclusive jurisdiction over all petty offenses and preliminary jurisdiction over all misdemeanors and felonies. Trial jurisdiction over misdemeanors and petty offenses.

What are the Classification of Offenses

- Felonies PL 55.05(1)/ 55.10(1)
  - A-E
- Misdemeanors PL 55.05(2)/55.10(2)
  - A & B
- Unclassified Misdemeanors PL 55.10(2)(c)
  - Statute doesn't classify it and the sentence is b/w 15 day-1yr
- Violations PL 55.10(3)
- Non-Penal Law Violations PL 55.10(3)
  - Sentence not in excess of 15 days or fines only.
- Vehicle and Traffic Law (VTL)
- Health Code Violations

Statutes/Practices Used to Profile/ Police Gender/Sexuality

- Prostitution
  - PL Art. 230
- Loitering for the purposes of engaging in a prostitution offense
  - PL 240.37
- Loitering
  - PL 240.35 & 240.36
- Stop and Frisk
  - Being in disguise
  - Dressed unusually
    - These lead to numerous types of summons, etc.

Arrest

- Most people coming into the clinic with criminal law questions are going to begin with a story involving someone being arrested.
- Arrest:
  - Once a person is arrested they will be brought to a police station, and processed. Processed means a variety of things.
    - Held over: means they will be fully "processed" and "put through" or "held over." (See Chart B in Handouts).
    - A person can also be released with a Summons or Desk Appearance Ticket.

“Held Over” for Arraignment

- People are held over for a number of reasons.
  - E.g., No ID, warrant, many misd & felony charges.
- If a person is held over they will be at the station for between 6-14 hrs, fingerprinted, asked for ID, and eventually transported to central booking.
- Eventually, between 24-30 hours after arrest, they will be taken to a holding cell behind the courtroom.
- They will meet briefly with a lawyer. If not private, then institutional defender.
- At some point, usually between 24-30 hrs., a person will be arraigned.
  - Translators are available (in court).

What is a summons? (CPL 130)

- A summons is given out for minor criminal matters. A summons requires a person to appear in court at a date and time listed for arraignment.
- Not a formal arrest. NYPD/agency writes up the ticket. DA's office not involved at all.
  - Numerous agencies can issues summonses.
- Most commonly issued form of tickets.
  - Drinking in public, disorderly conduct, taxi and limousine, operating vehicle recklessly, reckless operation of a bike, trespass, health code – public urination, NYC park rules and regulations, NYC administrative code – littering liquids, unlawfully in a park after posted hours.
- Pink piece of paper. Looks like a ticket. It is the accusatory instrument.
  - Must be sufficient on its face. Factual allegations will be on the back- you won't see them until the arraignment.

Summons, Cont.

- Manhattan and Brooklyn Summons are returnable at 346 Broadway in Manhattan.
  - A person enters at Leonard Street. You go through metal detectors and security.
  - They check in on the first floor and are directed to a room down the hall.
  - Judicial Hearing Officers (JHO).
    - Consent to Adjudicate Form (Yellow Paper)
- When a person is issued a summons they are theoretically sent to the Summons Clerk's Office where they are reviewed by a judge to determine whether they are sufficient on their face. If not, a letter is theoretically sent to tell the person not to appear.

What is a Desk Appearance Ticket?

- Desk Appearance Ticket [DAT] (CPL 150)
  - A DAT is given *in lieu* of putting a criminal defendant through the entirety of the formal arrest process.
  - Only minimally processed, given a date to appear in court, and released.
  - Not formally charged with anything until your arraignment.
  - White Slip of Paper .
- Criteria
  - Must have proper form of ID.
  - No Warrants.
  - CPL – criteria:
    - Violations, Misdemeanors, and some E Felonies.
    - Unlikely for DV-related charges

What to expect at your (first) court date?/Arraignment Basics

- Arraignment is a person's first appearance before a judge.
- DAT/Put through system:
  - At this time a person is formally presented with charges against you.
- A person will get a lawyer.
- A person must personally appear before a judge.*
  - NOT showing up to court = bail issues and warrant.
- It is NOT a trial.
- DAT
  - A person brings their white sheet. Place it in a basket in the front of court. They call the defendants' names in order. Can take a while.
- Bail a possibility.

- * there is one exception.

LGBT Specific Courtroom Issues

- True for everyone, but company is helpful! Lawyers forget, but court can be really scary!!!
- Courtroom concerns:
  - Always:
    - To be respected, understood, to understand the proceedings. We are also concerned about adequate accommodations for non -English speakers, respect of cultural differences, and elimination of racial and economic bias. In addition to these concerns, transgender litigants may also have some relatively unique concerns based on gender identity. While individual members of our community will undoubtedly have additional concerns, issues of concern that have been reported to our organizations include preservation of privacy, use of correct name and pronoun, elimination of gender - identity bias, and protection of transgender criminal defendants.
  - Trans Specific
    - Privacy.
    - Use of Correct Name and Pronoun.
      - Go through judge. It will not happen often. Especially when the initial reading out of the charges. And, call for court appearance.
    - Elimination of Gender Identity Bias.
    - Safety of Criminal Defendants.

Common Resolutions of Criminal Cases

- Violation
  - Often get an offer of a violation, often disorderly conduct.
    - Max 15 days jail, $250 fine.
    - Automatic $120 surcharge.
    - Community Service is often part of the offer.
      - Or some other thing contingent.

Common Resolutions of Criminal Cases, Cont.

- Adjournment in Contemplation of Dismissal (ACD) - PL 170.55
  - An ACD is not an admission of guilt, nor is it an affirmation of innocence. It means essentially that if you don't get arrested for six months, the District Attorney will dismiss the charges against you, and the case record will then be sealed. Bear in mind, however, that while sealed records are supposed to stay sealed, in certain instances courts have re-opened them anyway.
- Also important: if you get arrested again within six months, the case may be re-opened and the charges will come back. You should take into consideration your ability to stay out of any further trouble for the duration of the adjournment period.
- Be aware that the D.A.'s office has complete discretion in offering you an ACD.

Common Resolutions of Criminal Cases, Cont.

- Benefits of taking an ACD:
  - 1. If you take an ACD at arraignment you will not need to make any further court appearances. If you live out of state or have a particularly demanding schedule making it difficult to return for the possible hearing and trial, it may be in your best interest to accept the ACD.
  - 2. You are not pleading guilty. After you complete your six-month adjournment period, the case is dismissed, your arrest and prosecution will be deemed a nullity and you will be in the same exact position you were in before your arrest and prosecution.
- Potential problems with accepting an ACD:
  - 1. For many people, rejecting the ACD and pleading not guilty so they may fight the charges against them is an important part of standing up to the police. Should you choose to take an ACD your case is finished and you will give up your right to contest the charges against you.
  - 2. Taking an ACD also limits your options in terms of affirmative litigation against the city. For example, if you want to sue the city for malicious prosecution, you cannot do so if you take an ACD.
  - 3. Importantly, an ACD can have serious consequences for your immigration status. If you have or anticipate having citizenship issues, you should consult with an immigration attorney.
  - 4. If you are arrested again in the future, accepting an ACD now may affect your ability to secure a favorable plea bargain in a future case.
  - 5. If you are currently on parole or probation, taking an ACD may trigger adverse collateral consequences.
- Marijuana ACD - PL 170.55

- Usually not an issue, but don't forget to tell people to always think about immigration.

Warrants

- Warrants are issued because a person failed to appear when they were told to come. CPL 150.50.
- These are bad:
  - They can be used against a person at a later court date when asking for bail;
  - They may increase the offer;
  - Can result in getting arrested and automatically held over.

Warrants

- How to Clear a Warrant:
  - Contact a lawyer if the person has $. Can contact Legal Aid too.
  - Get there early – 9:30-10am.
  - Go to the Clerk's Office and tell them you have a warrant. Ask if you need directions.
  - Someone will tell the person where to go. They will go to a courtroom and wait to be called. It can take a while.
  - Encourage people to do this!

Collateral Consequences

- Full Database:
  - Reentry.net/ny/help
  - http://ccnmtl.columbia.edu/portfolio/law/collateral_consequen.html
- Employment
  - NY State - new york state occupational licensing survey - Legal Action Center
  - Federal - INTERNAL EXILE - American Bar Association
- Education
  - http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf
- Immigration
- DNA Swab
  - Misdemeanor & Felonies
- Housing
- In New York, there aren't really any consequences for a misdemeanor conviction for public benefits, familial relationships, voting, or jury service.

Juveniles

- If the person is under 19 you may be eligible for Youthful Offender treatment.
- Minors have rights. They have generally the same due process rights as adults.
  - To be represented at proceedings, to see charges and confront witnesses against them, to testify or choose not to testify in their own defense...
- There are a number of differences in how children are handled in the system, however, and children are subject to different penalties and different kinds of proceedings than adults go through. The Family Court Act regulates most of the proceedings in which minors can be involved.
- Particular rights/rules around fingerprinting.
- Children cannot be questioned without the parents being advised of their rights.
- Resources:
  - Children's Law Center - www.clcny.org.
  - Youth Represent - http://www.youthrepresent.org.

Diversion Options

- A number of diversion options for courts.
  - E.g.:
    - Manhattan Diversion Court (drugs)
    - Manhattan Arraignment Diversion Program (MAP) – mental illness.
    - Prostitution diversion programs.
- Let folks know that these may be an option, and to speak to their lawyer.
- If you are under 19 you may be eligible for Youthful Offender treatment.
- C.A.S.E.S. - http://www.cases.org/
- Community Courts

Particular Concerns for Non-Citizens

- S-Comm
  - What:
    - In NYC, if a person gets arrested for any reason, the police will send their fingerprints to ICE. If ICE thinks they are deportable, it may ask the jail to issue a "detainer" to send the person to immigration detention after the criminal case is over.
  - Bail.
- If you are asked your status by the police or anyone in the jail, say "I would like to remain silent."
- DO NOT give false documents or statements.

Particular Concerns for Non-Citizens, Cont.

- DO NOT sign anything without your lawyer there.
- Tell your lawyer your status. What you tell them is confidential.
- If bail is set on your case, ask your attorney if an immigration detainer has been issued already. If there is no detainer, try to have someone pay bail right away before you are sent to Riker's Island, so that ICE doesn't have a chance to put a detainer on you.
- Make an Arrest Plan.
- Always Screen for Trafficking!
- Immigrant Defense Project: http://immigrantdefenseproject.org/
- Sex Worker's Project (LGBTQ).

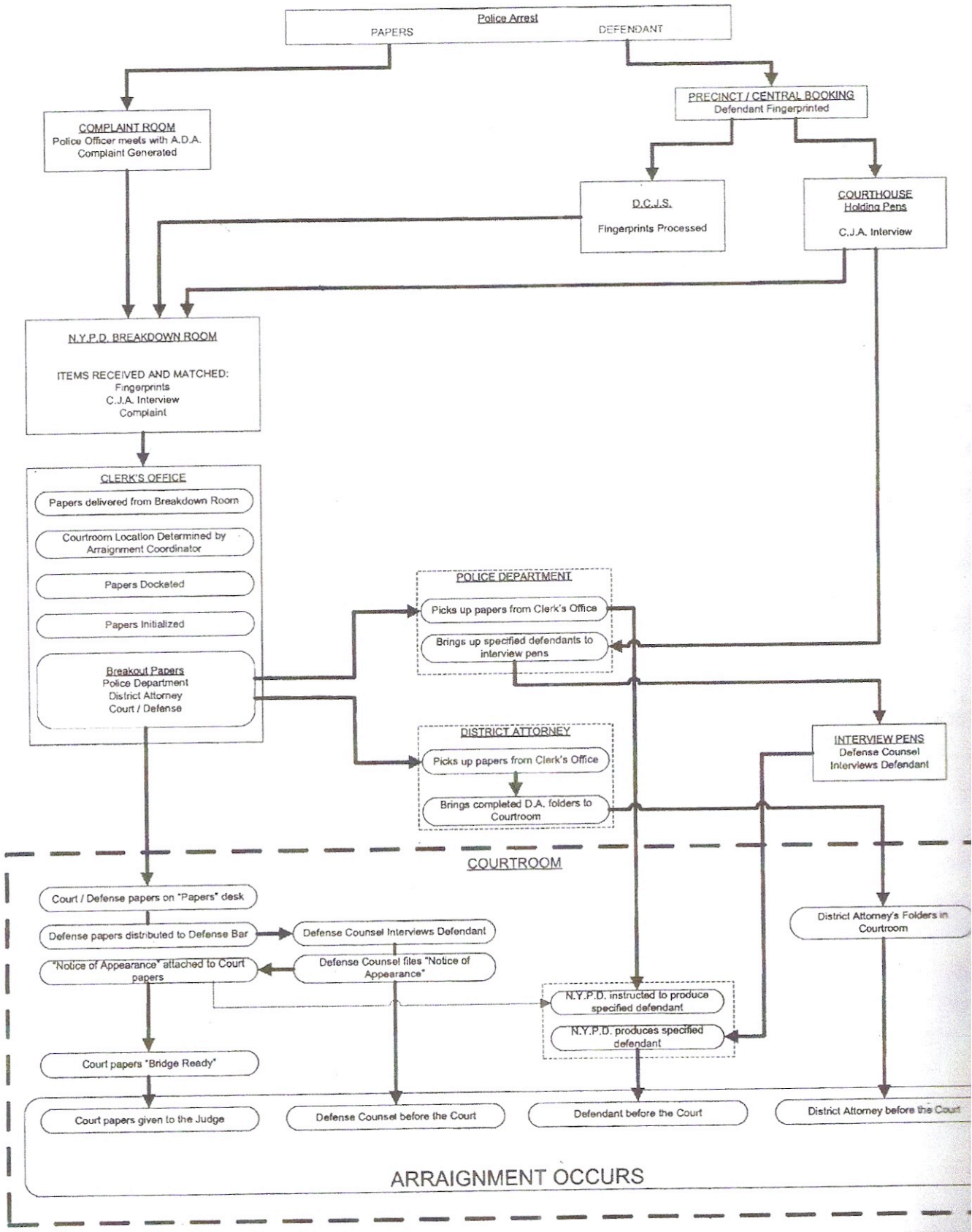
Jail Mitigation Strategies for Trans/ GNC

- Have an emergency plan.
  - Call my work and tell them I'm sick, etc.
  - Pick up my kid
- You have to be your own best advocate.
- What if people don't disclose?
- What it means to be HIV+
  - Must ask right at arrest
  - Keep doses in socks, if possible.
  - Exposure to pathogens. Jails are not clean. Violence is super possible.
- Mental Health
- Protective Custody (PC)
- No Genital Searches

Resources

- Just Info (A Project of the New York Law Collective):
  - 1-85-JSTCNYC (Spanish)
  - 1-85-JUSTINF0
- WebCrims:
  - http://iapps.courts.state.ny.us/webcivil/ecourtsMain

ARREST TO ARRAIGNMENT FLOWCHART



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APPENDIX B

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Phone: (718) 579-3158
Fax: (718) 588-2611

The Legal Aid Society
(Kings County)
111 Livingston Street
Brooklyn, NY 11201
Phone: (718) 237-2000
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The Legal Aid Society
(New York County)
Criminal Defense Division
49 Thomas Street
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The Legal Aid Society
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Criminal Defense Division
120-46 Queens Boulevard
Kew Gardens, NY 11415
Phone: (718)286-2000
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Neighborhood Defender Service of Harlem (Upper New York County)
55 West 125th Street
New York, NY 10027
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URL: http://www.ndsny.org

NY County Defender Services
225 Broadway, Suite 1100
New York, NY 10007
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Fax: (212) 571-6035
E-mail: Mcoleman@nycds.org

Office of the Appellate Defender
45 West 45th Street
New York, NY 10036
Phone: (212) 719-0766
Fax: (212) 764-0236
E-mail: RMGreen@ix.netcom.com

New York Law Collective
299 Broadway, Suite 806
New York, NY 10007
Ph: 212.227.2303

Arrest Plan Worksheet

I do not plan to engage in criminal conduct, but in the event that I am arrested, the information below will help to minimize disruption to my life and family. I have memorized the number of my lawyer and my emergency contact person. I know my rights. My arrest support contact has a key to my house, and a copy of this document in a sealed envelope.

1. The number of the lawyer I would like you to contact is:_____

2. In jail, they may only allow one call. If this is the case, give your emergency contact person's phone number to the lawyer's secretary when you call and ask if they will notify her. If you meet with your lawyer prior to arrest, you can also put this information on file.
Arrest support person: _____
Phone: _____ Email:_____

3. Find attached a schedule regarding when and where children are to be picked up and dropped off, and details of pet care, along with the names and numbers of the child-care providers and pet-sitters.

5. Phone calls: Do and Don't
EXAMPLE: Call work at 222-555-1111, tell them I am very ill and will not be in today.

Name_____ Relation_____ Number_____
What to tell them_____
Name_____ Relation_____ Number_____
What to tell them_____

This is who you SHOULD NOT CALL:
Name_____ Relation_____ Reason_____
Name_____ Relation_____ Reason_____

6. If I have put aside money for bail and a lawyer, it can be found _____.

Otherwise, call these people for money:
Name_____ Relation_____ Number_____
Name_____ Relation_____ Number_____

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.

The New York City Law, which has now been on the books for more than ten years, is codified at New York City Administrative Code § 8-101 *et. seq.* A body of case law has now developed interpreting the statute in the context of cases alleging sexual orientation discrimination in employment. Recently decided employment cases under that statute include: *Jonas v. Solow Mgmt. Co.*, 2005 U.S. Dist. LEXIS 798 (S.D.N.Y. 2005) (denying motion to dismiss sexual orientation-based hostile work environment claims for failure to state a claim); *Lane v. Collins & Aikman Floorcoverings, Inc.*, 89 Fair Empl Prac. Cas. 1470, 2002 WL 1870283 (S.D.N.Y. 2002) (denying defendants' post-trial motion for judgment as a matter of law on a sexual orientation discriminatory discharge claim); *Lane v. Collins & Aikman Floorcoverings, Inc.*, 87 Fair Empl. Prac. Cas. 449, 2001 WL 1338918 (S.D.N.Y. 2001) (denying defendants' motion for summary judgment); *Taylor v. New York University Medical Center*, 2002 N.Y. Slip. Op. 50060U (1st Dep't, Feb. 7, 2002) (denying summary judgment, "considering the limp-wrist gestures…attributed to… employees of defendant medical center," on sexual orientation discriminatory discharge claim) *Morrison v. Command Security Corp.*, 275 A.D. 2d 221, 711 N.Y.S. 2d 887, 2000 N.Y. Slip Op. 07311 (1st Dep't , Aug. 3, 2000) (unpub. op.) (affirming refusal to dismiss gay male's hostile work environment claim); *Arthur v. Standard & Poor's Corp.*, 800 N.Y.S.2d 342 (Sup. Ct. N.Y. Cty. 2005) (denying defendants' summary judgment motion on sexual orientation hostile work environment and discriminatory discharge claims); *Bell v. Helmsley*, 2003 N.Y. Misc. LEXIS 192 (Sup. Ct. N.Y. Cty. 2003) (vacating award of compensatory damages and reducing $10 million award of punitive damages to $500,000);.

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. 228 (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).

PRACTICAL ISSUES IN LITIGATING SEXUAL ORIENTATION DISCRIMINATION CASES

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National Employment Lawyers Association
2010 National Convention
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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 diabled, 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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HOW ***NOT*** TO SETTLE EMPLOYMENT DISCRIMINATION SUITS

BY LEE F. BANTLE

Note: This article was published in the New York Law Journal in the Outside Counsel column.

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.[1] 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.[2]

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.3 (In states where there is no state or local agency to handle discrimination claims, the charge must be filed within 180 days.4) 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.5

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.6 Once the right to sue letter has been issued, a federal action must be commenced within 90 days.7

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.8 The administrative filing must be done within one year of the act of discrimination9 while a suit in state court must be brought within three years.10

Under New York City human rights law, employees similarly must choose between filing with the New York City Human Rights Commission within one year11 or suing in state court within three years.12 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.

1. *Murphy v. American Home Products Corp.,* 58 NY2d 293, 305, 461 NYS2d 232, 237 (1983).

2. *St. Mary's Honor Center v. Hicks,* 125 L.Ed.2d 407, 418, 113 S.Ct. 2742 (1993).

3. 42 USCA §§2000e-5(e)(1).

4. 42 USCA §§2000e-5(e)(1).

5. 42 USCA §§2000e-5(f)(1)

6. Compare Henschke *v. New York Hospital-Cornell Medical Center,* 821 F.Supp. 166 (S.D.N.Y. 1993) and *Saulsbury v. Wismer & Becker, Inc.,* 644 F2d 1251 (9th cir. 1980).

7. 42 USCA §§2000e-5(f)(1).

8. N.Y. Exec. L. §§297(9).

9. N.Y. Exec. L. §§297(5).

10. *Murphy v. Home Products Corp.,* 58 NY2d 293, 307, 461 NYS2d 232, 239 (1983).

11. N.Y.C. Admin. Code §§8-109(e).

12. N.Y.C. Admin. Code §§8-502(d).