

## The Legal Landscape of LGBT Rights in the Courtroom

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The LGBT movement has sometimes been described as this generation's civil rights movement. As societal norms continue to shape the social landscape, so too do the opinions of the courts when it comes to issues affecting the LGBT community. In that vein, there are two recent decisions from federal courts, one locally and one nationally, which are helping to shape the legal landscape.



The first is a decision handed down by the U.S. Court of Appeals for the Ninth Circuit, which covers most of the nation's West Coast, including California, which has been known to render a landmark decision or two. In the matter of *SmithKline Beecham d/b/a GlaxoSmithKline v. Abbott Laboratories*, No. 11-17357, (9th Cir. Jan. 21, 2014), the appellate court in San Francisco held that a gay man was improperly excluded from being a juror in a civil trial because of his sexual orientation. In so holding, the court held that "permitting a strike based on sexual orientation would send the false message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation."

In the underlying case, SmithKline Beecham (hereafter GSK) sued Abbott over a licensing agreement and the pricing of Abbott's HIV medication. A four-week jury trial was held in 2011 in which GSK was awarded close to \$3.5 million in damages. Dissatisfied with the decision, GSK appealed to the Ninth Circuit on the basis that the lower court's decision to allow Abbott to exclude the juror violated the U.S. constitutional prohibition on striking jurors because of sexual orientation, according to the opinion. GSK challenged the strike under the U.S. Supreme Court's landmark decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). The Ninth Circuit took on the novel issue of whether equal protection prohibits discrimination based on sexual orientation in jury selection.

In challenging the use of the preemptory strike, counsel for GSK argued to the district court that the "increase in the price of the HIV drug had led to considerable discussion in the gay community" and that "the subject matter of the litigation raised suspicions regarding the 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.'" In analyzing this component of the argument, the court declared that the potential for relying on impermissible stereotypes in the process of selecting jurors was "particularly acute" in this case.

The court underwent an extensive analysis of whether *Batson* prohibits strikes based on sexual orientation. In doing so, the court cited last year's landmark decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), where the U.S. Supreme Court struck down part of the federal Defense of Marriage Act (DOMA). The *Windsor* decision, according to the court, made it clear that the level of scrutiny applicable to this equal protection challenge was higher than the "rational basis" test and that the application of "heightened scrutiny" was appropriate.

One of the more compelling rationales from the court came in the following excerpt: "Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve."

The other recent development in the LGBT legal landscape came from our own Eastern District of Pennsylvania in the form of a decision in *Roadcloud v. City of Philadelphia*, 2014 U.S. Dist. LEXIS 769 (E.D. Pa. Jan. 6, 2014). The plaintiff, Angelina Roadcloud, "an openly gay female," filed a complaint against her employer, the city of Philadelphia Prison System, alleging discrimination against her on the basis of her sex. Roadcloud alleged that the city violated her rights under Title VII of the Civil Rights Act of 1964, the Pennsylvania Human Relations Act (PHRA) and the Philadelphia Fair Practices Ordinance (PFPO) by discriminating against her on the basis of her gender, sexually harassing her, and creating a hostile work environment, according to the opinion.

At the outset, the district court noted that under Title VII, sexual orientation is not a protected class and cannot be the basis of a cognizable claim. However, the court explained, discrimination on the basis of a plaintiff's failure to conform to expected gender stereotypes can constitute discrimination on the basis of sex. The issue on the defendants' motion to dismiss was whether Roadcloud sufficiently alleged discrimination on the basis of her failure to conform to expected gender stereotypes.

The court examined the jurisprudence in this circuit and declared that "an employer that acts based upon the belief that women should not be aggressive, acts on the basis of gender. *Kay v. Independence Blue Cross*, 142 Fed.Appx. 48, 50 (3d Cir. 2005) (citing *Price Waterhouse [v. Hopkins]*, 490 U.S. at 250). Hostile or paternalistic statements or acts based upon perceptions or expected qualities of womanhood are inherently based on sex or gender. *Brown-Baumbach v. B&B Automotive*, 437 Fed.Appx. 129, 134 (3d Cir. 2011) (quoting *Durham Life Insurance v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999))."

In her second amended complaint, Roadcloud alleged that the harassment she was subjected to focused on her appearance, specifically the signs of sexual conduct she exhibited. The allegation that Roadcloud was harassed because her outward exhibition of sexual conduct did not meet defendants' expectation of how a woman should look in the workplace or act in her private life was sufficient to allege the defendants' discrimination against Roadcloud was on the basis of her sex, the opinion said. Per the opinion, "the mere possibility that defendants' actions were motivated by plaintiff's sexual orientation, instead of her failure to conform with gender stereotypes," did not compel dismissal of the lawsuit.

The district court also considered the defendants' challenge that Roadcloud had not adequately exhausted her administrative remedies when she filed a complaint of discrimination under the PFPO with the Philadelphia Commission on Human Relations because she did not allege sexual orientation in the particulars of her complaint. In disposing of this challenge, the court relied on the longstanding legal principle that a plaintiff's failure to check a specific box on an agency form does not, by itself, resolve the issue of the scope of the investigation.

Here, the court held that Roadcloud's claims of sexual-orientation discrimination under the PFPO were properly within the scope of her original agency complaint. In analyzing whether her claims were within the scope of the agency complaint, the court reviewed the city's own internal investigation into Roadcloud's agency complaint. The city's investigation into Roadcloud's agency complaint included interviews with her co-workers, where a co-worker confirmed comments regarding Roadcloud's sexual preference and Roadcloud's being sexually involved with a female co-worker. As a result, the court held that the city had notice of Roadcloud's claims of sexual-orientation discrimination as early as its own internal investigation, sufficient to place the claims within the scope of the agency investigation.

It is clear from a review of the preceding cases, one from San Francisco and one from Philadelphia, that courts are not quite as antagonistic toward the LGBT community as they once were. As articulated in the *SmithKline* opinion, "gays and lesbians have been systematically excluded from the most important institutions of self-governance." In fact, the court noted, empirical research has begun to show that discriminatory attitudes toward gays and lesbians persist and play a significant role in courtroom dynamics. Nevertheless, the history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group will lead to change, like that spawned by the Ninth Circuit and our own Eastern District of Pennsylvania.

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