

NEW YORK COURT OF APPEALS ROUNDUP:

**EXECUTIVES AS “EMPLOYEES” FOR LABOR LAW, FORFEITURE
OF PEREMPTORIES, AND ATTORNEY’S FEES**

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Last month the Court of Appeals resolved an issue over which federal and state courts had been split, finding that executives are within the definition of “employee” for purposes of Labor Law §§ 190 and 193. In another case, it held that trial courts have the discretion to direct forfeitures of peremptory challenges to remedy a party’s exercise of challenges for discriminatory reasons. The Court determined in another appeal that an action to overturn the denial of Medicaid benefits sought prospective relief, allowing for the award of attorney’s fees if the denial was overturned on federal law grounds. We discuss these decisions below.

Executives Are “Employees”

In [*Pachter v. Bernard Hodes Group, Inc.*](#), the Court answered questions certified to it by the Second Circuit. It held that executives are afforded the protections of Sections 190 and 193 of the Labor Law, commissions are “wages” under the statute, and the determination of when a commission is earned is governed by the common law rule, absent a different agreement by the parties.

Plaintiff was a vice president of Bernard Hodes Group, and arranged media advertisements for its clients. She had been given the option of earning a salary or working on a commission basis. Salaried workers doing similar work earned between \$40,000 and \$75,000 annually, but plaintiff, who elected to work for commissions, earned between \$100,000 and \$200,000 annually. Her commissions were calculated as a percentage of the fees billed to Hodes’ clients for her services, less charges for various items, including one-half of her assistant’s salary and losses attributable to client non-payment of advertising costs for which Hodes had advanced payment.

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Plaintiff worked for Hodes for 11 years and was aware of the charges against her gross commissions. After she left the company's employment, she brought an action in federal court alleging that these charges constituted deductions from wages that were prohibited under the Labor Law. Hodes argued that, as an executive, plaintiff was not within the statute's protections, and that, in any event, the charges against her gross commissions were permissible.

Labor Law § 190(2) defines "employee" as "any person employed for hire by an employer in any employment." Judge Victoria A. Graffeo's opinion for the unanimous Court found that this description "plainly embraces executives." Such statutory interpretation is further supported by the fact that several subsections of the Labor Law explicitly exclude executives from their particular provisions. Finally, the Court observed, if the statute were read as Hodes proposed, employers would be permitted to pay similarly situated executives differently on the basis of gender, a result the Legislature surely did not intend.

Section 193 of that Labor Law permits an employer to make only certain deductions from wages once earned, for example for insurance premiums, and commissions are within the statute's definition of "wages." As a result, if making the charges at issue constituted "deductions" from earned commissions, rather than a method of calculating the commissions plaintiff earned, those charges would have been impermissible.

Because the statute does not define when a commission is earned, the Court first turned to the common law, which treats a commission as earned when the broker or employee presents a "ready, willing and able buyer." Here, however, the parties mutually agreed to depart from the common law rule. Their implied agreement - manifested by plaintiff's acceptance for over a decade of her compensation statements reflecting the charges made - provided for adjustments to be made to plaintiff's gross commissions before they were earned.

Thus, in the end, while plaintiff achieved a victory for executives, she was unable to recover any additional wage payments from Hodes.

Forfeiting Peremptories

In [*Batson v. Kentucky*, 476 U.S. 79 \(1986\)](#), the Supreme Court held that a prosecutor's exercise of peremptory challenges to exclude potential jurors on the basis of race violated the equal protection clause. The Court of Appeals has extended that ruling to defendants, permitting "reverse *Batson*" challenges, as well as *Batson* challenges, when peremptory strikes are exercised on the basis of a prospective juror's status implicating equal protection concerns, such as race or gender. In [*People v. Ruben Luciano*](#), in an opinion by Chief Judge Judith S. Kaye, the Court addressed the remedies for a party's attempt to improperly exercise challenges on a discriminatory basis.

During jury selection in the case, defense counsel exercised eight peremptory challenges, striking all of the five women remaining in the venire and three of the men. The prosecution asserted a *Batson* challenge. A prima facie case of discrimination having been

made, the burden shifted to defense counsel to proffer a gender-neutral reason for striking each woman. The trial court accepted counsel's explanation for three of the strikes, but found that for two of the women the reasons given were pretextual. The court therefore seated the two women. It also prohibited defense counsel from reusing those two peremptories, stating that it was required by law to do so.

The Appellate Division, First Department, reversed. CPL 270.25 states that each party "must" be allowed the number of challenges prescribed by statute. The Appellate Division concluded that, by prohibiting defense counsel from reusing strikes, the trial judge had improperly denied the defense the number of challenges required.

The Court of Appeals disagreed. It described CPL 270.25, which pre-dates *Batson*, as "outdated" because it does not contemplate there being any circumstance in which a party must explain its challenges. In order to comply with *Batson* and its progeny, the Court unanimously construed the statute as permitting forfeiture of peremptories as a remedy for challenges exercised for a discriminatory reason. In doing so, the Court noted that the constitutional protections of this line of cases extend not only to parties, but also to the potential jurors in order to preserve their opportunity to serve.

Whether to impose any remedy for discriminatory challenges and, if so, which remedy, is a matter of discretion that, once exercised, is entitled to "great deference." Although the Court held that forfeiture is an available remedy, it ordered a new trial in *Luciano* because the trial judge, mistakenly believing that he was required to bar reuse of the peremptory challenges, did not exercise any discretion.

Chief Judge Kaye's opinion provided guidance to trial courts faced with improper challenges. Two competing interests must be balanced -- the tradition of free exercise of peremptory challenges, and the potential juror's "right to be free of discrimination." Factors to be considered in fashioning the appropriate remedy are whether the challenged juror is available to be reseated, whether there has been a pattern of discrimination, and the number of peremptories remaining. Because peremptory challenges are such a "venerable trial tool," they should be denied only in "rare circumstances."

Attorney's Fees

The Court held in [*Matter of Giaquinto v. Comm'r of New York State Dep't of Health*](#), that an action against the Commissioner of Health acting in her official capacity and seeking to overturn a decision denying an application for Medicaid benefits is prospective in nature, and that therefore the Eleventh Amendment does not bar an award of attorney's fees.

Petitioner, a resident in an adult care facility, applied to the Montgomery County Department of Social Services ("DDS") for Medicaid benefits for nursing facility services. DDS denied the application on the ground that the household income and resources of petitioner and his wife exceeded the limits for Medicaid eligibility. At an administrative hearing challenging

the decision, petitioner asserted that DDS's denial was based upon a misinterpretation of the Medicaid statute. The Administrative Law Judge ("ALJ") remanded the matter to DDS for calculation of the wife's "community spouse resource allowance" using a new methodology that included the purchase of a single premium immediate life annuity.

Petitioner commenced an Article 78 proceeding against the Commissioner of Health seeking an order overturning the ALJ's decision, determining that he was eligible for benefits retroactive to the date of his application, and finding that his wife could retain all of her resources. The Supreme Court, Albany County, granted the petition. It ruled that the calculation method directed by the ALJ was arbitrary and capricious because it departed from the Department of Health's own precedent, without explanation, and that the Department was without authority to calculate income or resources using an "annuity method" or to direct petitioner to make any particular type of investment. The Supreme Court also awarded petitioner [attorney's fees under 42 U.S.C. §§ 1983](#) and 1988, the only portion of the ruling that respondent pursued on appeal.

The opinion for the Court, by Judge Theodore T. Jones, explained that whether a state official may be sued without contravening the Eleventh Amendment's grant of sovereign immunity turns on whether the relief sought is injunctive and/or prospective, or retrospective. The United States' Supreme Court has established a supremacy exception to the constitutional grant of immunity for states, which applies when a state official's violation of federal law is ongoing and necessitates forward-looking relief to vindicate the federal interest.

Respondent argued that petitioner's action sought to overturn a prior decision and therefore was retrospective, even though petitioner would be entitled to benefits in the future if he prevailed. This argument "elevate[s] the form of the relief sought over its substance," Judge Jones wrote. Petitioner sought both to stop an ongoing violation of federal law and to receive future benefits, and thus the action was held to be prospective. The Court also noted that the Second Circuit recently had allowed an award of attorney's fees in similar circumstances, and a different result in New York state courts would encourage forum shopping.

The 4-2 majority of the Court (Judge Carmen Beauchamp Ciparick took no part in the decision) remitted the case to the Supreme Court for further proceedings. It found that the Supreme Court had not made a determination that a provision of the Medicaid statute had been violated, and thus it was unclear if there was a federal basis for its decision, a prerequisite to an award of attorney's fees under Sections 1983 and 1988. Judge Eugene F. Pigott, Jr. dissented, in an opinion in which Judge Robert S. Smith joined. Judge Pigott argued that, rather than remit the case, the Court itself should resolve whether there was a federal law basis for overturning the ALJ's decision, which was a pure issue of law. The dissenters concluded that the calculation method directed by the ALJ did not violate the Medicaid statute, and thus there was neither a federal law basis for the result in the Supreme Court nor grounds for awarding attorney's fees.