

LEGAL UPDATES

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# Missouri Supreme Court Opines on Scope of Sex Discrimination Prohibited Under Missouri State Law

In *R.M.A. (Minor Child) by His Next Friend, Rachele Appleberry v. Blue Springs R-IV School District et al*, the court held plaintiff, a transgender student who was denied access to a male restroom and locker rooms at a Blue Springs school, sufficiently pled a claim of sex discrimination under the MHRA to avoid a motion to dismiss. In *Harold Lampley & Rene Frost v. The Missouri Commission on Human Rights*, a plurality of the court determined that a claim of sex stereotyping is evidence of sex discrimination prohibited by the MHRA and that gay, lesbian and bisexual individuals have the same protection against sex stereotyping as heterosexual individuals.

## **R.M.A. (Minor Child) by His Next Friend, Rachele Appleberry v. Blue Springs R-IV School District and the Blue Springs School District Board of Education**

### **Claim of Sex Discrimination**

Plaintiff, a minor, appealed a circuit court decision dismissing his petition for failure to state a claim which alleged that he was denied access to a public accommodation on the basis of his sex. Plaintiff is a female to male transgender teenager who was born as a female child and transitioned to living as male. The Blue Springs middle school that he attended allegedly denied him access to the male restroom and male locker rooms for physical education and athletic events. The appellate court upheld the dismissal by the circuit court.

### **Pleading Membership in a Protected Class of Males Is Sufficient to Avoid Dismissal**

The majority reversed the dismissal on the grounds that:

Plaintiff's petition sufficiently pled a cause of action under §213.065 RsMo, by stating that he was denied full and equal access to the male restroom and locker rooms by defendants and that his membership in the "male protected class" was a contributing factor in the denial.

The state and its subdivisions are construed as "persons" under the applicable Missouri statutes.

The majority emphasized that plaintiff did not base his claim of discrimination on his status as a transgender individual, but on his status in the protected class of males. Consequently, the court stated that "at this stage of the proceedings," plaintiff's allegations that he was a member of a protected class, was denied use of a public accommodation because of his membership in a protected class, and sustained damages is all that Missouri requires to sufficiently plead a cause of action under §213.065 of the MHRA. The majority characterized as premature an evaluation of plaintiff's proof of the claim of sex discrimination.

The dissent rested its opinion on the proposition that the MHRA does not bar discrimination on transgender status -- only on "biological sex."

## **Harold Lampley & Rene Frost v. The Missouri Commission on Human Rights**

### **Claim of Sex Discrimination**

Plaintiffs Harold Lampley, male, and Rene Frost, female, worked for the Missouri Department of Social Services, and each filed a Charge of Discrimination.

Lampley's Charge of Discrimination alleged retaliation and discrimination based on sex. He also alleged that:

He was a gay man.

He did not exhibit the stereotypical attributes and behaviors of a male.

His similarly situated co-workers who were not gay and exhibited stereotypical male and female characteristics consistent with their gender were treated differently.

His employer retaliated against him by giving him low performance evaluations.

Frost alleged in her Charge of Discrimination that she suffered retaliation and discrimination as a result of her friendship and association with Lampley who exhibited non-stereotypical attributes for a male. She further alleged that her employer retaliated against her by:

Requiring her to move her desk away from Lampley and her co-workers.

Prohibiting her from eating lunch with Lampley.

Docking her vacation time for time spent with union representatives.

Subjecting her to other harassment such as verbal abuse and threats relating to her job evaluation.

The Missouri Commission on Human Rights (MCHR) found Lampley's and Frost's charges were based on claims of sexual orientation and thus not covered by the MHRA. As a result, the MCHR terminated its investigation and administratively closed the cases. Plaintiffs appealed the administrative decision to the circuit court. The circuit court consolidated the cases and granted defendants' motion for summary judgment on the basis that sex stereotyping, like sexual orientation, is not a protected characteristic under the MHRA (and as such plaintiffs' petitions did not state a claim for relief under the Act). The Western District Appellate Court reversed the circuit court's ruling, and the MCHR appealed.

## **Sex Stereotyping Is Evidence of Sex Discrimination**

Writing for the plurality, Judge Draper III reversed and remanded the circuit court's decision directing it to order the MCHR to issue right to sue letters to the plaintiffs.

In reaching this decision, the court held that plaintiffs' petitions stated a cause of action for sex discrimination. To state a claim of employment discrimination under the Act, facts must be alleged that demonstrate the employee:

Is a member of a protected class,

Is qualified to perform the job,

Suffered an adverse employment action, and

Was treated differently than other similarly situated employees of the opposite sex or provided some other evidence that would give rise to an inference of unlawful discrimination.

Based on the 1989 U.S. Supreme Court decision *Price Waterhouse v. Hopkins* and its progeny, a plurality of the Missouri Supreme Court determined:

Sex stereotyping gives rise to an inference of unlawful discrimination based on sex under the MHRA because the stereotyping would not occur but for the gender of the target of discrimination.

Males and females, including individuals who are gay, lesbian and bisexual, are protected against discrimination based on stereotyping.

Citing the MCHR regulation at Section 8 CSR 60-3.040, the plurality determined that both federal law and MCHR regulations protect against discrimination based on "stereotyped characterization of the sexes." The MCHR and the circuit court had failed to distinguish between discrimination based on

sexual orientation and on sex stereotyping. In a case of sex stereotyping, the sexual orientation of the individual is “incidental and irrelevant” to a claim of sex stereotyping.

Judges Wilson and Russell concurred that plaintiffs sufficiently pled a cause of action simply because they alleged Lampley was a male. At the same time, they criticized the extent to which the principal decision went beyond that determination, including its consideration of the lower court’s decision in *Pittman v. Cook Paper Recycling Corp.*

Judge Fischer also concurred on the procedural issue that the administrative action constitutes a non-contested case and that a claim of sexual orientation is not covered by the MHRA. He dissented, however, on the basis that plaintiffs’ claims should be dismissed for failure to comply with procedural rule 94 by seeking a summons rather than a preliminary order.

Finally, in his dissent, Judge Powell argued that plaintiffs’ appeal should have been denied and the circuit court decision affirmed. Powell’s dissent focused on procedural issues.

### **What This Means to You**

Together, these two cases raise new questions about the scope of Missouri law regarding claims of sex discrimination.

Neither case expressly expands the protections of the MHRA to include sexual orientation or gender identity as recognized forms of sex discrimination. However, these cases open the door to claims of sex discrimination by individuals who are lesbian, gay, bisexual, queer or transgender framed as sex stereotyping. Federal precedent already exists to support sex stereotyping claims.

Kansas City, St. Louis, and other municipalities in Missouri prohibit sexual orientation and/or gender identity discrimination under local ordinance. For now, whether sexual orientation or gender identity are recognized forms of sex discrimination under state law remains unclear until the Missouri legislature or the Missouri Supreme Court resolves the issue.

### **Contact Us**

If you have a question as to the implications of these cases or any related matter, please contact Jenna Brofsky, Paul Pautler or your Husch Blackwell attorney.

*Tracey Oakes O'Brien was a contributing author of this content.*