

The Missouri Supreme Court Takes Its First Steps to Increase Protections for LGBTQ Individuals Under the Missouri Human Rights Act

By Jennifer Chierek Znosko and Rebecca Christensen

Over the past several years, the law with respect to discrimination on the basis of sexual orientation and gender identity has been evolving and changing, especially with respect to discrimination in the employment context. As to the federal law, there is a split in the federal circuit courts regarding whether discrimination based on sexual orientation or gender identity is a type of sex discrimination under Title VII, and the United States Supreme Court has yet to resolve the circuit split. Further, state and local laws all over the United States differ as to whether they recognize sexual orientation or gender identity as protected categories. Yet, on the state and local level, states and municipalities continue to add these protected categories to their anti-discrimination laws either through legislation or judicial opinions.

The Missouri Supreme Court recently weighed in on these issues for the first time in two important cases alleging claims under the Missouri Human Rights Act (“MHRA”), *Lampley v. Missouri Commission on Human Rights*,ⁱ and *R.M.A. ex rel. Appleberry v. Blue Springs R-IV School District*.ⁱⁱ In these cases, the Court recognized causes of action for sex discrimination under the MHRA that expand the protections for LGBTQ individuals.ⁱⁱⁱ While the Court did not explicitly recognize sexual orientation or gender identity as protected categories under the MHRA, the *Lampley* and *R.M.A.* cases will likely lead to increased judicial recognition of these types of MHRA claims by courts in Missouri, including trial courts and intermediate appellate courts.

Sexual Orientation and Gender Identity Discrimination in the United States

Many of the developments in this area of the law started in 2015 with the Equal Employment Opportunity Commission (“EEOC”). In 2015, the EEOC rejected a long line of cases holding that Title VII did not protect discrimination based on sexual orientation.^{iv} The EEOC held that “sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”^v The EEOC further reasoned that sexual orientation discrimination was premised on “sex-based preferences, assumptions, expectations, stereotypes, or norms.”^{vi}

Even though the EEOC recognized sexual orientation discrimination as a form of sex discrimination, most circuit courts continued to hold that discrimination based upon sexual orientation is **not** protected under Title VII. However, in some circuits, courts have reached the same conclusion as the EEOC. For example, in 2017, the Seventh Circuit held that discrimination on the basis of sexual orientation is a form of sex discrimination.^{vii} Thereafter, in March 2018, the Sixth Circuit held that Title VII protected a transgender worker who was fired from a funeral home after telling her employer she was going to begin her transition.^{viii} The Second Circuit has also held that discrimination based on sexual orientation is prohibited.^{ix} The Department of Justice and the Trump Administration has taken the opposite position as the EEOC by maintaining that discrimination based on sexual orientation and gender identity is not prohibited by Title VII.^x

Due to the split in the circuits, in August 2018, sixteen states, including Nebraska, Kansas, and Arkansas, filed a petition for certiorari with the United Supreme Court asking it to resolve the split and determine whether Title VII prohibits discrimination on the basis of sexual orientation and gender identity.^{xi} The United Supreme Court has not yet determined whether it will take up the issue. Therefore, as of now, the split in the federal circuit courts regarding the viability of these claims under Title VII remains.

States and municipalities across the United States also differ on the issue of whether sexual orientation and gender identity are protected categories under workplace anti-discrimination laws. To date, twenty-one states and the District of Columbia explicitly prohibit discrimination based on sexual orientation as part of their state anti-discrimination law.^{xii} An additional three states interpret “sex discrimination” to include discrimination based on sexual orientation.^{xiii} The remaining states do not prohibit discrimination on this basis in any manner. Furthermore, many municipalities explicitly prohibit discrimination based on sexual orientation and gender identity. For example, in Missouri, the cities of St. Louis and Kansas City prohibit discrimination based on sexual orientation and gender identity.^{xiv}

The Two Recent Decisions from the Missouri Supreme Court Increasing Protections for LGBTQ Individuals

Lampley v. Missouri Commission on Human Rights

In the *Lampley* case, Lampley, a gay male, filed a Charge of Discrimination with the Missouri Commission on Human Rights against his employer alleging that his employer discriminated against him based on sex. Specifically, he alleged that he was discriminated against because his behavior and appearance did not confirm to the “maleness” stereotype held by his employer. He further alleged that his employer treated him differently than his co-workers who were not gay and exhibited stereotypical male or female attributes.^{xv}

The MCHR dismissed Lampley’s Charge, stating that it lacked jurisdiction because his claims were based on sexual orientation.^{xvi} Because it dismissed the Charge, the MCHR never issued a Right to Sue letter as to Lampley’s Charge. As a result, he sought administrative review against the MCHR in the circuit court, which then granted summary judgment in favor of the MCHR.^{xvii}

The Missouri Supreme Court reversed the circuit court’s Order granting summary judgment in favor of the MCHR and denying Lampley the right to proceed with his claims. In reaching its decision, the Court held that:

[A]n employee who suffers an adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee’s sex should act can support an inference of sex discrimination. Sexual orientation is incidental and irrelevant to sex stereotyping.^{xviii}

The Court also recognized that, while sex stereotyping has not been previously recognized under the MHRA as a basis for sex discrimination, courts in other jurisdictions have held that this type of stereotyping can create an inference of discrimination.^{xix} The Court also noted that the United States Supreme Court first recognized sex stereotyping as a form of sex discrimination in *Price Waterhouse v. Hopkins*.^{xx} The Court also stated that the MCHR’s regulations provide that sex-based stereotyping is a prohibited employment practice.^{xxi} The Court remanded this case to compel the MCHR to issue a Right to Sue letter to Lampley to allow him to pursue his claim through the courts.^{xxii}

Based on the *Lampley* case, it is clear that sex stereotyping can support a sex discrimination claim under the MHRA regardless of the sexual orientation of the individual bringing the claim. As a result, employers should expect that current and former employees with sexual orientation discrimination claims may frame their claims in terms of “non-conforming” attributes instead of focusing on sexual orientation.

R.M.A. ex rel. Appleberry v. Blue Springs R-IV School District

In the *R.M.A.* case, the Missouri Supreme Court addressed the viability of a sex discrimination claim under the public accommodation provisions of the MHRA.^{xxiii} The plaintiff, R.M.A., was a high school student transitioning from female to male, who was allowed to participate in boys’ athletic activities, but was not permitted to use the boys’ locker room or restrooms. In his lawsuit against the school district, he alleged that the school district discriminated against him “on the grounds of sex” in denying him accessing to these public facilities.^{xxiv}

The Missouri Supreme Court reversed the trial court’s order dismissing the lawsuit.^{xxv} It reasoned that, in viewing the pleadings in the light most favorable to the plaintiff, R.M.A. alleged sufficient facts to demonstrate the elements of a sex discrimination claim.^{xxvi} Specifically, R.M.A. alleged that his legal sex was male, and thus he was part of a protected class. He further alleged that the school district denied him full and equal use of the boys’ locker room and restrooms, and his sex was a contributing factor in that denial. Finally, R.M.A. alleged that he had been damaged by the school district’s conduct.^{xxvii}

In its opinion, the Missouri Supreme Court never specifically recognized gender identity as a protected category under the MHRA. Yet, its opinion makes it clear that an individual who is transgender may be able to state a claim for sex discrimination under the MHRA to the extent the alleged discrimination is based on the individual’s sex. While this case arose in the context of the public accommodation section of the MHRA, trial and intermediate appellate courts in Missouri may apply the same reasoning to claims under the employment provisions of the MHRA.

Practical Tips for Employers

As with many areas of employment law, the law in this area continues to rapidly develop and change. The *Lampley* and *R.M.A.* decisions from the Missouri Supreme Court will likely lead to further developments and changes here in Missouri. For all employers, it is imperative for employers to take proactive steps in this area:

- Employers should continue to monitor case law and legislative developments as to these types of discrimination in geographic areas in which employees are located.
- If employers have not already done so, they should verify that their policies and procedures prohibit discrimination on the basis of sexual orientation and gender identity where prohibited by federal, state, or local law in the geographic areas in which employees are located.
- Even if these categories are not explicitly protected under the applicable federal, state or local law, employers should evaluate whether to include these categories as part of their anti-discrimination policies to promote a workplace that is inclusive and welcoming to all individuals, as well as to eliminate potential exposure to these types of discrimination claims.
- Employers should clearly communicate their policies on discrimination based on sexual orientation and gender identity to all employees as part of their new hire orientation and throughout their employment.
- Employers should provide training to individuals, especially supervisors and the Legal and Human Resources Departments, on how to identify this type of discrimination and enforce policies prohibiting it.

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- ⁱ *Lampley v. Missouri Comm'n on Human Rights*, No. SC 96828, 2019 WL 925557, at *2 (Mo. banc Feb. 26, 2019).
- ⁱⁱ *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, No. SC 96683, 2019 WL 925511, at *3 (Mo. banc Feb. 26, 2019).
- ⁱⁱⁱ In contrast, back in 2015, the Missouri Court of Appeals for the Western District of Missouri held that the MHRA does not prohibit discrimination based on sexual orientation. See *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. App. W.D. 2015).
- ^{iv} *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015).
- ^v *Id.* at 7.
- ^{vi} *Id.* at 6.
- ^{vii} *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 351-52 (7th Cir. 2017) (holding that “a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes”).
- ^{viii} *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566 (6th Cir. 2018).
- ^{ix} *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).
- ^x See Brief for the Federal Respondent in Opposition, on Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, et al.*, No. 18-107.
- ^{xi} See Brief for the States of Nebraska, Alabama, Arkansas, Kansas, Louisiana, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wyoming, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin, Paul LePage, Governor of Maine, and Governor Phil Bryant of the State of Mississippi, as *Amici Curiae* in Support of Petitioner, on Petition for A Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, *R.G. & G.R. Harris Funeral Homes, Inc. v Equal Employment Opportunity Commission, et al.*, No. 18-107.
- ^{xii} These states include California, Colorado, New York, Vermont, Washington, Illinois, Oregon, Nevada, Utah, New Mexico, Minnesota, Iowa, New Hampshire, Maine, Massachusetts, Rhode Island, Hawaii, Connecticut, Delaware, Maryland, Washington, D.C., and New Jersey.
- ^{xiii} These states include Michigan, Pennsylvania, and Wisconsin.
- ^{xiv} See St. Louis, Mo. Code of Ordinances §§ 3.44.010 and 3.44.080; Kansas City, Mo. City Code §§ 38-1 and 38-103.
- ^{xv} *Lampley*, 2019 WL 925557, at *1.
- ^{xvi} *Lampley's* co-worker also filed a Charge alleging retaliation based on her association with *Lampley*. Her Charge was dismissed simultaneously with *Lampley's* Charge, and she joined *Lampley* in this appeal to the Missouri Supreme Court. *Id.*
- ^{xvii} *Id.* at *8.
- ^{xviii} *Id.* at *7.
- ^{xix} *Id.* at *6.
- ^{xx} *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). In the *Price Waterhouse* case, the female plaintiff was denied partnership after other partners referred to her as “macho” and needing a “course in charm school.” *Price Waterhouse*, 490 U.S. at 250. It was also noted by the Court in the *Lampley* case that the female plaintiff in the *Price Waterhouse* case was told that she needed to wear makeup and talk more femininely. *Lampley*, 2019 WL 925557, at *6.
- ^{xxi} *Id.* at *7; see also, 8 C.S.R. § 60-3.040.
- ^{xxii} *Id.*
- ^{xxiii} The public accommodation provision of the MHRA is located at Mo. Rev. Stat. § 213.065.2.
- ^{xxiv} *R.M.A.*, 2019 WL 925511, at *1.
- ^{xxv} *Id.* at *6.
- ^{xxvi} *Id.* at **5-6.
- ^{xxvii} *Id.*