In the
Missouri Court of Appeals
Western District

R.M.A. (A MINOR CHILD), BY HIS NEXT FRIEND: RACHELLE APPLEBERRY,	)	**WD80005**
Appellant,	)	**OPINION FILED: July 18, 2017**
v.	)	
BLUE SPRINGS R-IV SCHOOL DISTRICT AND BLUE SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION,	)	
Respondents.	)	

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Marco Roldan, Judge

Before Division Three: Anthony Rex Gabbert, Presiding Judge, Victor C. Howard, Judge and Cynthia L. Martin, Judge

R.M.A., a minor child, by his next friend, appeals from a judgment dismissing with prejudice his petition against the Blue Springs R-IV School District ("School District") and the Blue Springs School District Board of Education ("School Board") which alleged discrimination in public accommodation, specifically, the boys' locker rooms and restrooms, based on sex. We affirm.

Factual and Procedural History[1]

On October 24, 2014, R.M.A. filed a charge of discrimination with the Missouri Commission on Human Rights ("MCHR"). R.M.A.'s charge alleged discrimination in public accommodation based on sex. The MCHR charge alleged that R.M.A. was a female to male transgender teenager attending school in the School District as a high school freshman. R.M.A. alleged that he lives as a male, has changed his legal name to a traditionally male name, and presents himself as male to all faculty, staff and other students in the School District. R.M.A. alleged that the School District had permitted him to participate in boys' physical education class, boys' football, and boys' track, but that he had not been permitted to use the boys' locker room or bathroom "based on my sex and gender identity for the entire school year of 2013-2014."

On July 8, 2015, the MCHR issued a notice of right to sue, terminating its administrative proceedings. On October 2, 2015, R.M.A. filed suit against the School District and the School Board (collectively "Defendants") alleging discrimination in the use of a public accommodation in violation of section 213.010 *et seq*.[2] "on the grounds of his sex." Specifically, R.M.A.'s petition alleged that Defendants' exclusion of him from the boys' restrooms and locker rooms subjected him "to different requirements for accessing the services of the school because of his sex." R.M.A.'s petition alleged that he

[1]Because we are reviewing the grant of a motion to dismiss, the factual background is drawn solely from R.M.A.'s petition and the exhibits attached thereto, which facts are taken as true for purposes of this appeal. *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008) ("When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs.").

[2]All statutory references are to R.S.Mo. 2000, as supplemented through the date of R.M.A's petition, unless otherwise noted.

is a female to male transgender teenager who transitioned to living as a male in September 2009. R.M.A.'s petition alleged that his name was legally changed in 2010 to a name traditionally given males, that his School District records reflect his name as changed, and that he received a court order authorizing the amendment of his birth certificate to amend his gender from female to male in December 2014.[3] R.M.A.'s petition alleged that access to the same locker rooms and restrooms as other boys who participate in physical education and athletics has been denied because R.M.A. "is transgender and is alleged to have female genitalia."

The Defendants filed a motion to dismiss R.M.A.'s lawsuit for failure to state a claim upon which relief could be granted. The motion asserted two grounds for dismissal: (i) that the School District and School Board are not "persons" within the scope of section 213.010(14) and 213.065.2; and (ii) that "the Missouri Human Rights Act does not extend its protection to claims based on gender identity." In later filed supplemental suggestions, the Defendants added a third ground for dismissal, arguing that R.M.A. was collaterally estopped to assert his claim of discrimination by the determination made in R.M.A.'s separately filed mandamus action that the Missouri Humans Rights Act does not extend its protection to claims based on gender identity.

[3]Section 193.215.9 authorizes the state registrar to amend a certificate of birth "[u]pon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed." R.M.A. secured an order dated July 8, 2010 from the Circuit Court of Jackson County, Missouri directing the Missouri Department of Vital Statistics to amend R.M.A.'s birth certificate to reflect his change of name. R.M.A. secured a judgment and order dated December 11, 2014 from the Jackson County Circuit Court directing the Missouri Department of Health and Senior Services, Bureau of Vital Records to "prepare a new birth certificate . . . to correct [R.M.A.'s] gender from 'female' to 'male.'" The judgment and order does not include a finding that the sex of R.M.A. has been changed by surgical procedure. Regardless, R.M.A. has not argued, and agreed during oral argument that he is not arguing, that his reissued birth certificate is determinative of his claim of discrimination.

The trial court entered an order of dismissal and entry of judgment ("Judgment") on June 28, 2016, granting the Defendants' motion to dismiss with prejudice. The Judgment did not explain the basis for the trial court's ruling. R.M.A. filed a motion to reconsider and to amend the Judgment, repeating the arguments expressed in R.M.A's pleadings filed in opposition to the motion to dismiss.[4] The motion to reconsider was denied on August 18, 2016. R.M.A. filed this appeal on August 25, 2016.

Timeliness of Appeal

Before reaching the merits of R.M.A's appeal, we are obligated to address the timeliness of the appeal. "Timely filing of a notice of appeal is jurisdictional." *Spicer v. Donald N. Spicer Revocable Living Tr.*, 336 S.W.3d 466, 471 (Mo. banc 2011) (quoting *Berger v. Cameron Mut. Ins. Co*. 173 S.W.3d 639, 640 (Mo. banc 2005)). "If a notice of appeal is untimely, the appellate court is without jurisdiction and must dismiss the appeal." *Id*. at 471-72 (quoting *Popular Leasing USA, Inc. v. Universal Art Corp. of New York*, 57 S.W.3d 875, 877 (Mo. App. E.D. 2001)). We have "a duty to determine *sua sponte* whether we have jurisdiction to review an appeal." *Rocking H Trucking, LLC v. H.B.I.C., LLC*, 427 S.W.3d 891, 895 (Mo. App. W.D. 2014) (quoting *Gerken v. Mo. Dep't of Soc. Servs.*, 415 S.W.3d 734, 737 (Mo. App. W.D. 2013)).

[4]The motion to reconsider attached discovery responses from the Defendants. Because a motion to dismiss for failure to state a claim permits review of only the facts alleged in the petition to determine their sufficiency to state a claim, the discovery responses were irrelevant to the trial court's determination of the motion to reconsider. "[N]either the trial court nor the appellate court on *de novo* review may consider matters outside the pleadings when adjudging a motion to dismiss." *Naylor Senior Citizens Hous., LP v. Side Constr. Co*., 423 S.W.3d 238, 241 n.1 (Mo. banc 2014).

"No . . . appeal shall be effective unless the notice of appeal shall be filed not later than ten days after the judgment or order appealed from becomes final." Section 512.050; Rule 81.04(a). Here, the Judgment was a Rule 74.01(a) judgment, and was thus subject to Rules 75.01 and 81.05(a)(1), which combine to provide that a judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed.

After the Judgment was entered, R.M.A. filed a motion for reconsideration. "[A] motion for reconsideration is not recognized by . . . Missouri rules." *Mayes v. Saint Luke's Hosp. of Kansas City*, 430 S.W.3d 260, 264 n.7 (Mo. banc 2014) (citing *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011)). A motion for reconsideration is not, therefore, an authorized after-trial motion. An authorized after-trial motion is one which seeks relief expressly provided by Rule 75.01, which authorizes a trial court during the thirty-day period after the entry of a judgment to "vacate, reopen, correct, amend, or modify its judgment."

Though R.M.A.'s motion to reconsider is not recognized by Missouri rules, "[t]he legal character of a pleading is determined by its subject matter and not its designation to the extent that courts ignore the denomination of a pleading and look to its substance to determine its nature." *Hague v. Trs. of Highlands of Chesterfield*, 431 S.W.3d 504, 510 (Mo. App. W.D. 2014) (quoting *Weber v. Weber*, 908 S.W.2d 356, 359 (Mo. banc 1995)). The motion for reconsideration asked the trial court to deny the Defendants' motion to dismiss, and thus effectively asked that the Judgment be vacated. We therefore disregard R.M.A's denomination of his after-trial motion, and deem it to be a Rule 75.01 motion to vacate. See *Mayes*, 430 S.W.3d at 264 n.7 (holding that a motion to reconsider filed after

an order of dismissal, and which asked the trial court to vacate its dismissal order, would be viewed as a Rule 75.01 motion to vacate).

The trial court denied R.M.A's motion to reconsider (vacate) on August 18, 2016. The Judgment became final on that date. Rule 81.05(a)(2)(B). R.M.A.'s notice of appeal was filed on August 25, 2016, and was therefore timely pursuant to Rule 81.04(a).

Standard of Review

We review the grant of a motion to dismiss with prejudice *de novo*. *Ambers-Phillips v. SSM DePaul Health Ctr*., 459 S.W.3d 901, 905 (Mo. banc 2015). "When this Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008) (citing *Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman*, 66 S.W.3d 6, 11 (Mo. banc 2002)). "If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim." *Id*. (citing *Ste. Genevieve Sch. Dist. R-II*, 66 S.W.3d at 11). A "petition states a cause of action if 'its averments invoke principles of substantive law [that] may entitle the plaintiff to relief.'" *Id*. (quoting *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 597 (Mo. banc 1990)). We will affirm the trial court's dismissal of a petition for failure to state a claim "if it can be sustained on any ground supported by the motion to dismiss." *Beck v. Fleming*, 165 S.W.3d 156, 158 (Mo. banc 2005). Where "a trial court fails to state a basis for its dismissal, this Court presumes the dismissal was based on the grounds stated in the motion to dismiss." *Lueckenotte v. Lueckenotte*, 34 S.W.3d 387, 391 (Mo. banc 2001).

Analysis

R.M.A. raises three points on appeal, each claiming error in the grant of Defendants' motion to dismiss. The first point alleges error because the "petition stated a claim for which relief can be granted, in that the Missouri Human Rights Act prohibits sex discrimination in public accommodation, including discrimination on the basis of gender-related traits." The second point alleges error because the "petition stated a claim for which relief can be granted against each [D]efendant, in that both school districts and boards of education are 'persons' under the Missouri Human Rights Act." The third point alleges error because "the doctrine of collateral estoppel does not apply to interpretations of law and . . . was not properly raised." R.M.A.'s points on appeal appropriately address each basis for dismissal argued in the Defendants' motion to dismiss as supplemented, and thus each basis on which the trial court's Judgment could have been entered. However, we need not address all three points on appeal if our resolution of any one point requires us to affirm the trial court's Judgment.

Point One

R.M.A. alleges it was error to dismiss his petition for failure to state a claim because the "petition stated a claim for which relief can be granted, in that the Missouri Human Rights Act prohibits sex discrimination in public accommodation, including discrimination on the basis of gender-related traits." To succeed on this point, R.M.A. must demonstrate that his petition includes "averments [which] invoke principles of substantive law [that] may entitle [R.M.A.] to relief." *Lynch*, 260 S.W.3d at 836 (quoting *Asaro*, 799 S.W.2d at 597).

The Missouri Human Rights Act, section 213.010 *et seq*., ("MHRA") describes the prohibitions against discriminatory conduct recognized by our General Assembly. Relevant to this case, section 213.065 addresses discrimination in public accommodation, as follows:

> 1. All persons within the jurisdiction of the state of Missouri are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or disability.
>
> 2. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate against any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry, or disability.

Schools are "places of public accommodation" as that term is defined in section 213.010(15). *State ex rel. Washington University v. Richardson*, 396 S.W.3d 387, 396 (Mo. App. W.D. 2013) (holding that a private school was nonetheless a "public accommodation" for purposes of section 213.065 on the facts of the case); *Doe ex rel. Subia v. Kansas City, Missouri Sch. Dist.*, 372 S.W.3d 43, 48-50 (Mo. App. W.D. 2012) (holding a public school is a public accommodation for purposes of section 213.065).

Contrary to R.M.A.'s assertion on appeal, Section 213.065 does not prohibit discrimination in public accommodation on the basis of "gender-related traits." Instead, section 213.065.2 prohibits discrimination in public accommodation "on the grounds of . . . sex." In fact, R.M.A.'s petition did not allege that he was discriminated against in public

accommodation on the basis of a "gender-related trait." R.M.A's petition alleges only that he was discriminated against in public accommodation on the basis of "sex." Thus, the question we are required to resolve in reviewing R.M.A.'s first point on appeal is whether the petition alleges facts which invoke principles of substantive law that may entitle R.M.A. to relief because he was denied use of a public accommodation--the boys' locker room and restrooms--on the grounds of sex. Resolution of this question is a matter of statutory construction requiring us to determine what the General Assembly intended by the phrase "discriminate . . . on the grounds of . . . sex" as used in section 213.065.[5]

"The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Pittman v. Cook Paper Recycling Corp*., 478 S.W.3d 479, 482 (Mo. App. W.D. 2015) (quoting *Crawford v. Div. of Emp't Sec*., 376 S.W.3d 658, 664 (Mo. banc 2012)). "Courts lack authority to read into a statute a legislative intent contrary to the intent made evident by the plain language." *Id*. (quoting *Keeney v. Hereford Concrete Prods., Inc*. 911 S.W.2d 622, 624 (Mo. banc 1995) (additional quotation and citation omitted)). "No room exists for construction 'even when the court may prefer a policy different from that enunciated by the legislature.'" *Id*.

[5]The dissenting opinion focuses only on the word "sex," and not on the operative phrase "discrimination . . . on the grounds . . . of sex," to argue that dismissal of R.M.A.'s petition at this point is premature. The dissenting opinion ignores, however, that to state a claim for relief pursuant to section 213.065, a plaintiff must allege facts that, taken as true, would entitled the plaintiff to relief. Central to that question is what is meant by the phrase "discrimination on the grounds of sex," an issue of legislative intent. As we explain, to discriminate on the grounds of sex is to deprive one sex of a right or privilege afforded the other sex, with "sex" intended by the legislature to mean male or female. Simply alleging facts in a petition that implicate "sex" without alleging facts that could establish discrimination on the grounds of sex (i.e. that one was deprived because of his sex of a right or privilege afforded the other sex) is not sufficient, as a matter of law, to state a claim for relief pursuant to section 213.065. We disagree, therefore, that disposition of R.M.A.'s case at this procedural stage is premature. It is noteworthy on this point that R.M.A. does not argue that dismissal of his case was premature. Instead, he agrees that the propriety of dismissal of his case turns on a question of law--statutory construction of the intended meaning of the phrase "discrimination on the grounds of sex."

(quoting *Keeney,* 911 S.W.2d at 624 (additional quotation and citation omitted)). "We cannot usurp the function of the General Assembly, or by construction, rewrite its acts." *Id.* at 483 (quoting *Marshall v. Marshall Farms, Inc*., 332 S.W.3d 121, 128 (Mo. App. S.D. 2010)). '"To substitute for the concept of the [G]eneral [A]ssembly our view of what might be the more salutary public policy would be for us to legislate rather than to adjudge.'" *Id*. (quoting *Lemasters v. Willman*, 281 S.W.2d 580, 590 (Mo. App. St. L. Dist. 1955)).

Employing these principles, *Pittman* affirmed the dismissal of a petition for failure to state a claim where the facts alleged in the petition complained of discrimination on the basis of sexual orientation. *Id*. at 485.[6] Indeed, the result in *Pittman* is aligned with legislative intent as derived from the circumstances and conditions at the time of enactment of the MHRA.

[6] *Pittman's* author addressed the intended meaning of the word "sex" for purposes of a claim of employment discrimination pursuant to section 213.055.1(1)(a) of the MHRA. 478 S.W.3d at 482-83 (Welsh, P.J., with one judge concurring in result). *Pittman's* author observed that "the first definition of 'sex' provided by Webster's Third New International Dictionary is 'one of the two divisions of human beings respectively designated male or female[.]'" *Id*. at 482 (per Welsh, P.J., with one judge concurring in result) (quoting *Webster's Third New International Dictionary* 2081) (Unabridged 1993)). *Pittman's* author concluded that "[t]he clear meaning prohibiting discrimination based upon 'sex' under the Missouri Human Rights Act intended by the Missouri legislature concerns discrimination based upon a person's gender and has nothing to do with sexual orientation." *Id*. (Welsh, P.J., with one judge concurring in result). *Pittman's* author thus concluded that "[o]nce legislative intent has been determined . . . there can be no unintended consequences of legislation by judicial interpretation." *Id*. (Welsh, P.J., with one judge concurring in result).

In a separate concurring opinion, Judge Clayton concurred "with respect to the result only" in *Pittman*. *Id*. (Clayton, J., concurring). And Judge Gabbert dissented, challenging the majority opinion's attribution of a narrow meaning to the term "sex." *Id*. at 486 (Gabbert, J., dissenting). The result in *Pittman* has been cited as authoritative. *Moore v. Lift for Life Academy, Inc.*, 489 S.W.3d 843, 847 n. 1 (Mo. App. E.D. 2016) (citing *Pittman* for the proposition that "[i]t bears mention that sexual orientation is not a protected category under the Missouri Human Rights Act.").

R.M.A. argues that the holding in *Pittman* is irrelevant to this case, as it dealt with whether sexual orientation is a protected classification, and not with whether denial of access to a public accommodation for a transitioning transgender person is discrimination on the grounds of sex under the MHRA. Though we agree that the theory of discrimination alleged in *Pittman* is different from that alleged in this case, the core holding in *Pittman* that sexual orientation was not intended by the legislature to be a protected category under the MHRA is nonetheless relevant to the instant case.

Legislative intent must be discerned as of the time of a statute's enactment. *Sermchief v. Gonzales*, 660 S.W.2d 683, 688-89 (Mo. banc 1983) (holding that legislative intent can be derived from identifying the problem sought to be remedied and the circumstances and conditions at the time of enactment). Legislative intent is not susceptible to variance by subsequent evolving social sensitivities. *Winston v. Reorganized Sch. Dist. R-2*, 636 S.W.2d 324, 327 (Mo. banc 1982) ("It is not our province to question the . . . social desirability . . . underlying a statute as [that is a] matter[] for the legislature's determination.").

The MHRA was enacted in 1986. It was preceded by the Fair Employment Practices Act enacted in 1961. *Self v. Midwest Orthopedics Foot & Ankle, P.C.*, 272 S.W.3d 364, 368 (Mo. App. W.D. 2008). The Fair Employment Practices Act "was amended to prohibit discrimination on the basis of sex in 1965." *Id*. (citing section 296.020, RSMo 1967).

During the early years of the Fair Employment Practices Act, its federal counterpart, Title VII,[7] was routinely construed to prohibit the practice of depriving one sex of a right or privilege afforded the other sex. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (holding statute which required female service members to prove husband's dependency to secure housing benefits when no such burden was placed on male service members to be discriminatory); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that "dissimilar treatment for men and women who are . . . similarly situated" discriminated on the basis of sex). In fact, this narrow construction of the meaning of discrimination "on the

[7]42 U.S.C. section 2000e-2.

basis of sex" was relied on by the United States Supreme Court to conclude that it was ***not*** a discriminatory practice to exclude coverage for pregnancy from employer offered disability benefits, because "[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *General Electric v. Gilbert,* 429 U.S. 125, 134-35 (1976) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974)).

In response to *Gilbert*, the definitional section of Title VII was amended in 1978 to provide that the terms "because of sex" or "on the basis of sex" include "women affected by pregnancy, childbirth, or related medical conditions," abrogating the result reached in the United States Supreme Court's decision in *Gilbert*. 42 U.S.C. section 2000e(k). The House Report adopted the view of Justice Stevens's dissent in *Gilbert*, "and specifically cite[d] to Justice Stevens's statement that excluding pregnancy-based disabilities from coverage is sexually discriminatory because 'it is the capacity to become pregnant which primarily differentiates the female from the male.'" *Midstate Oil Co. v. Missouri Com'n on Human Rights,* 679 S.W.2d 842, 847 n.1 (Mo. banc 1984) (Blackmar, J., dissenting) (quoting H.R. Rep. No. 948, 95th Cong., 2d Sess. 2-3, reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4750). The amendment to Title VII thus made clear that discrimination "on the basis of sex" includes employment practices that rely on a trait unique to one sex, since the unavoidable effect is to differentiate on the basis of sex, that is, on the basis of whether one is female or male.

As it happens, this intended meaning of the phrase "discrimination on the basis of sex" under Title VII as amended in 1978 aligned with the meaning Missouri already

afforded the phrase under the Fair Employment Practices Act.[8] To implement the Fair Employment Practices Act, the MCHR adopted regulations, including 4 C.S.R. 180-3.040, effective November 10, 1973, entitled "Employment Practices Related to Men and Women." The title of the regulation signaled that "sex" meant male or female. The content of the regulation reinforced this point by describing "discrimination on the basis of sex" as practices that favored men to the exclusion or disadvantage of women, or vice versa. For example, 4 C.S.R. 180-3.040(8) provided that "[e]mployees of both sexes shall have an equal opportunity to any available job that ***he or she*** is qualified to perform unless sex is a bona fide occupational qualification." (Emphasis added). And the regulations made clear that "[a] written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of chapter 296 RSMo (1969) and may be justified only upon showing of business necessity." 4 C.S.R. 180-3.040(16) (effective November 10, 1973).

Missouri thus viewed "discrimination on the basis of sex" pursuant to the Fair Employment Practices Act to mean depriving one sex of a right or privilege afforded the other sex, including a deprivation based on a trait unique to one sex. Our Supreme Court so recognized in *Midstate Oil Co.*, a case which addressed the deprivation of an employment right or privilege based on pregnancy. 679 S.W.2d 842. In *Midstate Oil Co.*, the Supreme Court characterized pregnancy--a trait plainly unique to one sex--as a "gender-related trait." *Id*. at 846 (holding that the MCHR "reasonably could have determined that

[8]The MHRA (and its predecessor, the Fair Employment Practices Act) "and Title VII are coextensive, but not identical, acts." *Brady v. Curators of Univ. of Mo*., 213 S.W.3d 101, 112 (Mo. App. E.D. 2006).

sufficient evidence was adduced to establish a prima facie case of discrimination" because "[t]here was evidence that . . . a gender-related trait--pregnancy--was a factor in [employer's] decision to discharge [employee]").[9]

The General Assembly recodified the Fair Employment Practices Act as the Missouri Human Rights Act in 1986. When it did so, it was presumptively aware that duly enacted regulations and case law viewed "discrimination based on sex" to mean a practice that deprives one sex of a right or privilege afforded the other sex, including where the deprivation is based on a trait unique to one sex. *Scruggs v. Scruggs*, 161 S.W.3d 383, 391 (Mo. App. W.D. 2005) ("The legislature is presumed to know the existing case law when it enacts a statute."). We have held, in fact, that "despite th[e] 1986 recodification, . . . the adoption of the MHRA . . . does not appear to have effected any material substantive change in Missouri law with respect to . . . discrimination based on sex." *Self*, 272 S.W.3d at 368.

As we have already explained, legislative intent is to be discerned at the time of a statute's enactment. *Sermchief*, 660 S.W.2d at 688-89. Given this guidance, we must conclude that the phrase "discriminate . . . on the grounds of . . . sex" as used in section 213.065 was intended by the legislature to mean depriving one sex of a public accommodation afforded the other sex, including a deprivation based on a trait unique to one sex.

[9]However, the Court also found that "an impartial evaluation of the evidence shows that [employer] dismissed [employee] after concluding she was unable to perform the various tasks expected of [her position]," and thus found that the discharged employee had not been discriminated against. *Midstate Oil Co. v. Missouri Com'n on Human Rights*, 679 S.W.2d 842, 847 (Mo. banc 1984).

The facts alleged in R.M.A.'s petition must be measured against this intended meaning. In his petition, R.M.A. alleges he is a female to male transgender teenager, and that he has been living as a male since 2009. R.M.A. asserts that he changed his name to a traditionally male name; that he amended his birth certificate to reflect his gender as male; that his School District records reflect his changed name. He alleges that the Defendants have permitted him to participate in boys' physical education and athletic activities in the School District, but have not permitted him use the boys' locker room and restrooms because R.M.A. still has female genitalia. R.M.A's petition alleges that these facts demonstrate that although he identifies as a boy, he has been "singled out . . . for disparate treatment from other boys based on his sex." R.M.A.'s petition alleges that the "Defendants[’] reasons for denying . . . R.M.A. access to the same accommodations as other boys is that . . . R.M.A. is transgender and is alleged to have female genitalia." R.M.A. confirmed during oral argument that the theory of his claim of discrimination is that he identifies as male and is being denied access to public accommodations available to other males.

The facts alleged in R.M.A.'s petition do not "invoke principles of substantive law [that] may entitle [R.M.A.] to relief." *Lynch*, 260 S.W.3d at 836 (quoting *Asaro*, 799 S.W.2d at 597). R.M.A. asserts that he is being deprived of a public accommodation because he is transitioning from one sex to the other. R.M.A. does not assert that as a member of one sex, he is being deprived of a public accommodation given to the other sex. R.M.A. does not allege that he possesses a trait unique to one sex that has been relied on by the Defendants to deny him a public accommodation afforded to the other sex.

On appeal, R.M.A. attempts to shoehorn the facts alleged in his petition into the holding in *Midstate Oil Co.* by characterizing his transitioning transgender status as a "gender-related trait." We reject R.M.A.'s reading of *Midstate Oil Co*. The Supreme Court coined the phrase "gender-related trait" to describe pregnancy, a trait that is inherently unique to one sex and that is thus susceptible to misuse to deprive women from a right or privilege afforded to men. *Midstate Oil Co.*, 679 S.W.2d at 846. R.M.A.'s status as a transitioning transgender teenager is not unique to one sex, and is thus not susceptible to use as a means of depriving one sex of a right or privilege afforded to the other sex. To interpret *Midstate Oil Co.*'s use of the phrase "gender-related trait" as urged by R.M.A. would require us to disregard the narrow, historical context of the decision, and would afford the phrase "discriminate . . . on the grounds of . . . sex" a meaning that extends well beyond that intended by the General Assembly when the MHRA was enacted. "We cannot usurp the function of the General Assembly, or by construction, rewrite its acts." *Pittman*, 478 S.W.3d at 483 (quoting *Marshall*, 332 S.W.3d at 128).

On appeal R.M.A. also relies heavily on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). However, that decision is demonstrative of the narrow scope of the phrase "gender-related trait." In *Price Waterhouse*, the evidence supported an inference that a woman was refused admission as a partner in an accounting firm because she was "macho," used "foul language," and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*. at 235. *Price Waterhouse* characterized the attributes criticized about Hopkins as sex stereotyping, and reinforced that in forbidding discrimination based on sex, "Congress intended to strike at

the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id*. at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). *Price Waterhouse* was not a watershed case, but simply confirmed that "discrimination on the basis of sex" means the deprivation of one sex of a right or privilege afforded the other sex, including a deprivation based on a trait unique to one sex, or a deprivation based on traits perceived as unique to one sex. *Id*. (describing sexual stereotyping as making a decision based on sex "by assuming or insisting that [the person] matched the stereotype associated with their group").

R.M.A. did not allege facts in his petition that implicate sexual stereotyping--that is a deprivation of public accommodation because he does not match stereotypes perceived associated with a particular sex. R.M.A. agreed during oral argument that he is not claiming that he was subjected to sexual stereotyping. Regardless, no Missouri case has yet concluded that sexual stereotyping falls within the intended scope of the MHRA. *Pittman*, 478 S.W.3d at 484 (noting that "[w]e need not decide . . . whether or not the Missouri Human Rights Act prohibits sex discrimination based upon gender stereotyping because Pittman did not raise a gender stereotyping claim in his petition"). And to date, only a single federal appellate circuit has concluded that "on the basis of sex" as used in Title IX[10] likely includes transgender students within its ambit on a theory of sexual stereotyping.[11] *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*,

[10]20 U.S.C. section 1681(a) provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

[11]In 2015, the EEOC determined in *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5, *10 (July 15, 2015), that "sexual orientation is inherently a 'sex-based consideration' and an allegation of

No. 16-3522, 2017 WL 2331751, at *8-11 (7th Cir. May 30, 2017) (holding in a preliminary injunction proceeding that a transgender student demonstrated substantial likelihood of success on the merits in a Title IX action where transgender student was denied access to boys' restrooms).

The trial court did not err in dismissing R.M.A.'s petition for failure to state a claim of discrimination in public accommodation on the grounds of sex. In enacting the MHRA, the General Assembly did not intend "discrimination on the grounds of sex" to include the deprivation of a public accommodation--the boys' restroom and locker room--because a person is transitioning from female to male. Our judicial role does not permit us to vary settled legislative intent based on evolving social sensitivities. Instead, we are bound by

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discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." Historically, the United States Supreme Court has been critical of EEOC decisions that purport to expand Title VII's reach beyond that determined by the courts, and in a manner that is inconsistent with earlier, conflicting agency action. *See, e.g., General Elec. Co. v. Gilbert*, 429 U.S. 125, 140-145 (2015).

EEOC determinations like that in *Baldwin* were influenced by an unpublished guidance document issued by the Department of Education in 2014, and by a related opinion letter issued by the Department of Education in January 2015, which announced that Title IX's prohibition of sex discrimination includes gender identity. The Fourth Circuit afforded the Department's guidance document and opinion letter controlling deference under the doctrine of *Auer v. Robbins*, 519 U.S. 452 (1997), in *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), and found in favor of a fully-transitioned transgender student who claimed Title IX discrimination after being denied access to the boys' restroom. The United State Supreme Court granted certiorari in the case on October 28, 2016, limited to the questions of whether, if the *Auer* doctrine is retained, an unpublished agency letter should be afforded deference, and whether, regardless deference, the Department's interpretation of Title IX should be given effect. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S.Ct. 369, 369 (2016). Prior to oral argument, the United States Supreme Court vacated the Fourth Circuit's ruling and remanded the case after the Department of Education and the Department of Justice withdrew the guidance document on February 22, 2017. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S.Ct. 1239, 1239 (2017).

There is no settled or prevailing view among federal circuits regarding the inclusion of sexual orientation, gender identity, or similar classifications within the intended ambit of the protections afforded by Title VII or Title IX. *Compare, e.g., Hively v. Ivy Tech Cmty. Coll. Of Ind*., 853 F.3d 339, 351-52 (7th Cir. banc 2017) (holding that a person who alleges discrimination on the basis of sexual orientation has alleged a claim under Title VII), with *Tumminello v. Father Ryan High Sch., Inc*., No. 16-5165, 2017 WL 395106, at *3 (6th Cir. Jan. 30, 2017) (holding that affording relief under Title VII or Title IX for discrimination based on sexual orientation "'would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis of discrimination'") (quoting *Vickers v. Fairfield Med. Ctr*., 453 F.3d 757, 764 (6th Cir. 2006)). In so holding, the Sixth Circuit in *Tumminello* acknowledged the then pending *en banc* rehearing scheduled in the Seventh Circuit in *Hively*, but observed that "neither the Supreme Court nor any circuit has as yet determined that discrimination based on sexual orientation is prohibited by Title VII." *Id*. at *3 n.1.

the state of the law as it currently exists.[12] "To substitute for the concept of the [G]eneral [A]ssembly our view of what might be the more salutary public policy would be for us to legislate rather than to adjudge." *Pittman*, 478 S.W.3d at 483 (quoting *Lemasters*, 281 S.W.2d at 590).

Point One on appeal is denied.

Points Two and Three

Because the trial court's Judgment dismissing R.M.A.'s petition can be affirmed on the basis addressed in connection with R.M.A.'s first point on appeal, we need not address whether the Judgment could also be affirmed on the bases addressed in R.M.A.'s second and third points on appeal. Points Two and Three on appeal are denied as moot.

Conclusion

The trial court's Judgment is affirmed.

Cynthia L. Martin, Judge

Howard, Judge, joins in the majority opinion
Gabbert, Presiding Judge, dissents in separate opinion

[12]Our construction of legislative intent is not inconsistent with literature addressing efforts to secure amendments to the MHRA. *See, e.g.*, Alex Edelman, *Show-Me No Discrimination: The Missouri Non-Discrimination Act Expanding Civil Rights Protections to Sexual Orientation or Gender Identity*; 79 UMKC L. REV. 741, 741, 743 (Spring 2011) (addressing the "proposed Missouri Non-Discrimination Act ('MONA') [which would] expand[] the coverage of Missouri's human rights statutes to cover sexual orientation and gender identity" by adding those categories "as newly protected traits").

In the
Missouri Court of Appeals
Western District

R.M.A. (A MINOR CHILD), BY HIS NEXT FRIEND: RACHELLE APPLEBERRY,	)	**WD80005**
Appellant,	)	**OPINION FILED:**
v.	)	**JULY 18, 2017**
BLUE SPRINGS R-IV SCHOOL DISTRICT AND BLUE SPRINGS SCHOOL DISTRICT BOARD OF EDUCATION,	)	
Respondents.	)	

DISSENTING OPINION

It is premature to dispose of RMA's case through a Motion to Dismiss. Thus, I respectfully dissent. In *Pittman*, the majority concluded that "[t]he plain language of the Missouri Human Rights Act is clear and unambiguous" and that "sex" plainly refers to "one of the two divisions of human beings respectively designated male or female[.]" *Id.* at 482 (citing *Webster's Third New International Dictionary* (Unabridged 1993)). If that is the case, the majority's extra-textual investigations into legislative history here are unwarranted. We should let *Pittman* control and abide by the statute's unambiguous plain meaning. We should also resist

exceeding the scope of our review. At this stage in litigation, we need not address collateral concerns, such as privacy or security. Neither do we review whether RMA suffered discrimination. Those are later determinations. Our duty is to consider whether RMA has pleaded a cause of action, when all alleged facts are accepted as true and construed in a light most favorable to RMA. Construed in this way, the alleged facts support the conclusion that RMA's claim of discrimination was based on his sexual anatomy. Discrimination based on sexual anatomy is clearly discrimination based on sex, and one's gender identity cannot erode unequivocal statutory protections.

I.

Respondents' definition of sex is congruent with *Pittman*. Citing *Merriam-Webster,* Respondents define sex as "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures." Respondents' own definition, therefore, suffices to provide a basis for RMA's claim of discrimination.

Respondents denied RMA access to restrooms and locker rooms because he has female reproductive organs and structures. Thus, *but for* RMA's sexual anatomy, the alleged discrimination would not have occurred. When asked, "If RMA was denied access to public accommodations based on his sexual anatomy, how is that not discrimination based on sex?" *Respondents conceded that the conduct was based on sex* but countered that "it's not unlawful." However, unlawfulness addresses whether there was discrimination, i.e., an unfair practice, not whether the alleged discrimination was based on sex. In short, Respondents conflate conduct with motivation.

The question of discrimination is premature and irrelevant to the Motion to Dismiss,

whose main query is whether RMA pled facts sufficient to state a claim of discrimination based on sex. The fact that RMA's sexual anatomy was the basis for discriminatory conduct is sufficient for RMA's claim to survive a Motion to Dismiss. By admitting that Respondents' conduct was based on sex, Respondents concede that RMA has stated a claim for which relief could be granted. This concession alone should be dispositive.

II.

The majority's offer of legislative history is unnecessary and, I respectfully submit, misapplied. Since *Pittman* established that the plain meaning of "sex" in the MHRA is clear, there is no reason to consult or reconstruct legislative history. In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the majority concluded that, "[b]ecause [the statute] is not ambiguous, this Court need not examine other interpretive tools, including legislative history. Even were it appropriate to do so, the Court would not give the legislative history significant weight." 545 U.S. 546, 548 (2005). Nor should we assume a continuity of intention between succeeding legislatures, for "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Marvin M. Brandt Revocable Trust v. U.S.*, 134 S.Ct. 1257, 1258 (2014) (internal citation and quotes omitted). Nevertheless, the majority relies on legislative history to divine legislative intent, concluding that "discrimination based on sex" was intended by the legislature "to mean a practice that deprives one sex of a right or privilege afforded the other sex, including where the deprivation is based on a trait unique to one sex."

The majority's historical reconstruction is misapplied, because it speaks more to discrimination than sex. Or, at a minimum, the relevant portion of the analysis only confirms that sex involves the physical distinctions that characterize male and female. Like Respondents, the majority conflates conduct with motivation. But now is not the time for this Court to decide

whether Respondents' conduct rose to the level of discrimination. Our concern is Respondents' motivation, whether the basis of their conduct was sex. To the extent the majority's historical analysis of discrimination obfuscates the clear meaning of sex, we should avoid its application and not allow "ambiguous legislative history to muddy clear statutory language." *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011).

Nowhere does the statutory language articulate exclusions within the category of sex. The statute is neutral and all-inclusive. Section 213.065 specifically states the provision applies to "All persons." Similarly, the U.S. Supreme Court found Section 1981's application to "All persons" supported a prohibition of racial discrimination against white, as well as nonwhite, persons. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976). If Section 213.065 is strictly interpreted, all persons, including transgender persons, who experience discrimination in public accommodations because of their sex, can bring a claim of discrimination.

True, this strict interpretation might recognize protections for groups unanticipated by legislators, but our Supreme Court has repeatedly affirmed that statutory effects can transcend legislative intent. In *Oncale v. Sundowner Offshore Service, Inc.*, Justice Scalia (writing for the majority) presciently recognized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed." 523 U.S. 75, 79 (1998) (holding that original legislative intent does not receive controlling weight in Title VII interpretations), *cited by DePierre v. U.S.*, 564 U.S. 70, 85 (2011); *Lewis v. City of Chicago*, 560 U.S. 205, 216 (2010); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 159 (2004); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000); see also *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 186 (1978) ("It is not for us to speculate,

much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated"). If transgender persons and non-transgender persons suffer discrimination based on sex, they suffer comparable evils, and there is no statutory basis for excluding the former from due process while the latter receive their day in court.

Conclusion

Pittman's narrow construction binds us. A strict interpretation of sex is blind to all distinctions, including gender-identity, and it protects all persons who allege discrimination based on sex. RMA satisfies the statutory requirement for stating a claim of discrimination. If *Pittman* is controlling law, this Court should reverse the granting of the Motion to Dismiss. Only then will the parties have equal opportunity to address the question of discrimination and any uncertainty regarding privacy or security.

Anthony Rex Gabbert, Judge