Case No. SC96828

IN THE SUPREME COURT
OF THE STATE OF MISSOURI

Harold Lampley and Rene Frost,

Appellants,

vs.

The Missouri Commission on Human Rights and
Alisa Warren, Executive Director,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce

Appellants' Substitute Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Missouri

Federal

Regulations

Jury Instructions

Reply to Respondents' Point I

Respondents argue that sexual orientation discrimination is legal under the MHRA. They also insist Lampley alleged only sexual orientation discrimination in his Charge. This Court can resolve the case without deciding whether Missouri tolerates sexual orientation discrimination because Lampley claimed sex discrimination in his Charge. See Reply to Point III, below. That said, if the Court examines whether "sex" under the MHRA includes sexual orientation, the Court should find that it does. Sexual orientation discrimination is sex discrimination.

I. Sexual orientation discrimination is sex discrimination

A. Who a person should love is a sex stereotype

As the lower court held, and as has long been the case in the federal courts, discriminating because of a stereotyped view of the sexes is sex discrimination. See App. Brf., Point I. Sexual orientation discrimination is no different. Both result from preconceived expectations of behavior based on a person's sex: men should only be intimate with women and women should only be intimate with men.

The U.S. Court of Appeals for the Seventh Circuit applied the "tried-and-true comparative method" and isolated "the significance of the plaintiff's sex to the employer's decision." *Hively v. Ivy Tech Cmty. College*, 853 F.3d 339, 345 (7th Cir. 2017)(banc). To do so, the court looked to a hypothetical where all facts but the plaintiff's sex were the same, noting the importance of changing only the plaintiff's sex. The court found, "Any discomfort, disapproval, or job decision based on the fact that the

complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." *Id.* at 347.

B. Discriminating based on sexual orientation is discrimination based on an association with others

Taking an action against an employee because of the sex of those with whom he associates is sex-based discrimination. Respondents agree that an employer cannot discriminate because of the protected characteristic of an employee's associates, writing, "Ms. Frost's case depends on whether she associated with a protected person." Rsp. Brf. 80.

Sexual orientation discrimination is discrimination based on the protected characteristic—sex—of those with whom one associates and forms intimate bonds. As the Seventh Circuit noted about state anti-miscegenation laws:

> Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on "distinctions drawn according to race," which were unjustifiable and racially discriminatory. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex. *Hively,* 853 F.3d at 348-49, citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

II. The Court should not rely on legislative inaction

Respondents argue the Court should construe the General Assembly's failure to amend the MHRA as evidence of legislative intent. The Court should not rely on the General Assembly's inaction for two reasons.

First, the Court analyzes legislative intent only if the statute is unclear. "Where language of a statute is clear, courts must give effect to the language as written." *Kearney*

Special Rd. Dist. v. County of Clay, 863 S.W.2d 841, 842 (Mo. 1993). As discussed above, sexual orientation discrimination is sex discrimination, which the statute prohibits. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

Second, even if the Court decides to analyze legislative intent, legislative inaction is a "weak reed upon which to lean and a poor beacon to follow in construing a statute." *Med. Shoppe Int'l, Inc. v. Dir. of Revenue*, 156 S.W.3d 333, n. 4 (Mo. 2005)(internal quotations omitted). The General Assembly's failure to act "can just as well mean that the forces arrayed in favor of changing the law are matched by the forces against changing it." *Id.* at 334.

Reply to Respondents' Point II

Respondents Point II topic heading is that the Human Rights Act does not prohibit sexual orientation discrimination under a sexual orientation theory of discrimination. Rsp. Brf., 49. That argument assumes that the Executive Director correctly decided that Lampley did not file a sex discrimination charge. Appellants address the charge issue in their Reply to Respondents' Point III.

Appellants address the other Point II Subpoints below.

I. The Human Rights Act prohibits discrimination because of sex

A. The Human Rights Act's text

In Subpoint A, Respondents state "By its plain text, the Act prohibits only treating one sex unfairly compared to the other sex." Rsp. Brf., 50. Respondents neither quote nor cite the plain text to which they are referring. Nor do they cite a case holding supporting their argument. The plain text requires no comparison. Under RSMo 213.055 (2015) it is unlawful to discriminate against any individual "because of…sex." See MAI 38.01A.

B. Stereotyping evidence is evidence of discrimination

In the opening brief, in support of their argument that Missouri courts recognize stereotyping is evidence of discriminatory animus, Appellants cited *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481 (Mo. App. 2016). App. Brf., 11 (Point I, I.A). Respondents claim that Appellants argued that *Ferguson* "created a theory of liability that allowed for damages any time an employer acts because of age stereotypes." Rsp. Brf., 51, citing App. Brf., 11. Appellants cited *Ferguson* as "recognizing that making an employment decision because of a stereotype about an employee's protected trait is proof of discrimination." App. Brf., 11. Respondents offer no authority to the contrary. At best, they point out that in *Ferguson* there was evidence in addition to the stereotyping, from which a trier of fact could infer discriminatory intent. But the court does not weigh the evidence. And neither should the administrative agency when refusing to issue a Notice of Right to Sue. See, Reply to Part III, below. If an employer fires an employee because of the boss's stereotype view about what people of that employee's race, age, sex,

religion, or national origin can do, then the employer fired that person because of his protected trait.

Within Subpoint A, Respondents argue about Lampley's charge allegations. Appellants addressed that argument below, in response to Point III.

II. The Commission recognizes stereotyping in its regulations

In the opening brief, Appellant's stated that the Commission recognizes that the Human Rights Act's prohibition against sex discrimination also prohibits conduct based on sex stereotypes. And cited a regulation dealing with stereotyping in hiring practices. 8 CSR 60-3.040. Appellants stated there was no rational reason for the prohibition against stereotyping to be limited to just hiring. App. Brf., 13. Within Subpoint B, Respondents argue that the regulations do not create liability for sexual-orientation discrimination under a theory of sex stereotyping. If that is Respondents' only argument, then Appellants address the argument in response to Point III.

In the topic heading, however, Respondents argue that the regulations do not apply as to sex stereotyping. Respondents suggest the regulations could conflict with the Human Rights Act, but do not say with what provision of the Act their own regulations conflict. Rsp. Brf., 55. (The Human Rights Act permits sex discrimination in advertising when sex is a bona fide occupational qualification. RSMo 213.055.3. But there are separate regulations to address that statutory exception. See, e.g., 8 CSR 60-3.020(4)(A). The regulation at issue is an interpretation of Employment Practices Relating to Men and Women. 8 CSR 60-3.040.

This view of the regulation makes little sense for two reasons.

First, even if the regulation is addressing an exception allowing employers to hire based on sex where sex was a bona fide occupational qualification, the regulation is telling employers what is unlawful despite the exception. Meaning the exception does not apply when employers base decisions on stereotypes. Instead, the general prohibition against discrimination applies. Which includes stereotyping.

Second, if the Commission views stereotyping in hiring as prohibited, why wouldn't it also view stereotyping in other terms and conditions of employment as unlawful? Both types of conduct are illegal under the same section of the Human Rights Act. RSMo 213.055.1.

III. Missouri courts are guided by federal law where the laws are similar

Appellants argued that federal courts recognize that Title VII's prohibition against sex discrimination covers sex stereotyping. App. Brf., 13. Respondents do not appear to quarrel with this point. Instead, in Subpoint C, Respondents argue that because Missouri law is clear, this court should not borrow from federal precedent. Rsp. Brf., 55.

Respondent argues that this Court looks to federal law only where the Human Rights Act is ambiguous. Rsp. Brf., 56. This is incorrect. In *Daugherty v. City of Maryland Hts.*, 231 S.W.3d 814, 818 (Mo. banc 2007), this Court held that in deciding Human Rights Act cases, courts "are guided by both Missouri and federal employment discrimination caselaw that is consistent with Missouri law."

Thus, in *Hill v. Ford Motor Co.*, 277 S.W.3d 659, 665 (Mo. banc 2009), this Court did not rely on federal authority when looking for the standard for review of summary judgment because the laws were different. But in determining whether Hill could sue

someone she did not name in her Charge of Discrimination, this Court relied on federal authority construing a similar part of Title VII, the federal discrimination law. *Id.* at 669. In contrast, in the case Respondent cite, *Keeney v. Hereford Concrete Prods., Inc.,* 911 S.W. 622 624 (Mo. 2015), the Human Rights Act and Title VII differ. Title VII's retaliation provision is "considerably more limited than the exceedingly broad" Human Rights Act retaliation law. *Id.* So federal caselaw interpreting what was actionable under Title VII did not apply. *Id.*

Thus, as discussed at pages 13-14 of Appellants' opening brief, this Court can be guided by *Price Waterhouse*, 491 U.S. 228 (1989), and its progeny in interpreting the Human Rights Act.

IV. Respondents' argument that federal authority weighs against reading sexual-orientation discrimination into the Human Rights Act

In the title of Subpoint D, Respondents argue that federal authority weighs against reading sexual-orientation discrimination into the Human Rights Act. While Appellants do not believe it is necessary for this Court to reach the issue to resolve this case (see, App. Brf., 15 n. 5), because Respondents devote so much space to the argument, Appellants will briefly address the argument here.

As discussed above in Response to Point II, Part III, Missouri courts can be guided by federal law where the laws are similar. The causal language prohibiting discrimination in both Title VII and the Human Rights Act is essentially the same. Both prohibit discrimination "because of" sex. RSMo 213.055.1; 42 U.S.C. § 2000e-2(a)(1).

Two federal circuits have already held that Title VII's prohibition against sex discrimination includes sexual orientation discrimination. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018)(banc); *Hively,* 853 F.3d 339. Additionally, the U.S. Court of Appeals for the Sixth Circuit recently held that Title VII prohibits discrimination based on gender identity, for much the same reasons as stated in *Hively* and *Zarda*, a review of the text and meaning of the word "sex." *EEOC v. R.G.*, 884 F.3d 560, 575 (6th Cir. 2018)(holding that it was impossible to fire an employee based on employee's status as transgender without being motivated at least in party by employee's sex and because of the implication of sex stereotyping). And a district court within the Fifth Circuit recently found the reasoning of the recent Court of Appeals cases persuasive although dismissed on other grounds, signaling where it might go on another case. *Wittmer v. Phillips 66 Co.*, No. H-17-2188, 2018 U.S. Dist. LEXIS 57316, *15 (S.D. Tex. April 4, 2018). A case pending at the Eighth Circuit addresses the same issue, that is, whether Title VII prohibits sexual orientation discrimination. *Mark Horton v. Midwest Geriatric Management, LLC,* No. 18-1104 (8th Cir. Notice of Appeal filed Jan. 9, 2018). See also, Amicus Brief for American Civil Liberties Union, et al. as Amici Curiae supporting Appellants, Point IV, 37-45.

Reply to Respondents' Point III

Respondents argue the Court should defer to the Executive Director's decision that Lampley claimed only sexual orientation discrimination in his Charge. Respondents' argument is incorrect. The standard of review is set out in RSMo 536.150. The Court

should decide if the Executive Director's decision that Lampley *really* claimed sexual orientation discrimination was arbitrary, capricious, and unreasonable.

I. Respondents urge the Court to apply the wrong standard of review

A. The applicable standard of review

A "no probable cause determination is reviewable under section 536.150 as a noncontested case." *State ex rel. Martin-Erb v. Missouri Comm'n on Human Rts*, 77 S.W.3d 600, 606 (Mo. banc 2002)(quotations omitted). The review is to determine whether the agency's action was unlawful, unreasonable, arbitrary, or capricious, or involved an abuse of discretion. *Id.*

B. Respondents advance inapplicable standards of review

Citing *City of Clayton v. Mo. Comm'n of Human Rights*, 821 S.W. 2d 521, 528 (Mo. App. E.D. 1991), Respondents claim this Court affords the Executive Director's determination deference. *City of Clayton*, however, concerned a regulation interpreting a statutory term. *Id.* This Court is not reviewing a regulation.

Respondents cite other cases supporting a deferential standard of review. None apply. First, *Mercy Hospitals East Communities v. Missouri Health Facilities Review Comm.*, 362 S.W.3d 415, 417 (Mo. banc 2012), addressed an agency rule interpreting a Missouri statute. *Id.* at 417. This Court is not reviewing a rule.

Second, Respondents cite *Bucheit, Inc. v. Missouri Comm'n on Human Rights,* 215 S.W.3d 268, 278 (Mo. App. W.D. 2007), and state that in reviewing an agency's factual determination, the court looks to whether there is substantial evidence to support the

agency's decision. Rsp. Brf., 32-33. *Bucheit* concerned a contested case tried before a Hearing Examiner. This Court is not reviewing a contested case.

Third, Respondents cite *Morton v. Missouri Air Conservation Comm'n*, 944 S.W.2d 231, 236 (Mo. App. S.D. 1997), claiming this Court is "bound by the agency's findings." Rsp. Brf., 33. *Morton* was also a contested case. This case is not.

II. Lampley satisfied any charge-filing requirements

A. Lampley claimed discrimination because of sex and sex-based stereotypes

The Commission did not have to interpret Lampley's Charge to see he alleged sex discrimination. When asked to state the Cause of Discrimination Against him, Lampley checked "Sex." LF 71. And in a blank on the Charge form, in which the Commission did not specify what, if any, information to supply, Lampley wrote his employer discriminated, harassed, and stereotyped him based on his sex. LF 71-72, ¶¶ 5, 7, 9, 16.

B. Sex discrimination is within the scope of the administrative investigation which could reasonably be expected to grow out of Lampley's Charge

Respondents argue that Lampley had to provide the Commission more specific information about his employer's sex stereotyping. Rsp. Brf., 75. But they cite no authority for the level of specificity required at the administrative phase.

Even in determining the scope of a lawsuit, a plaintiff can sue about allegations "as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." *Farrow v. St. Francis Med. Ctr.,* 407 S.W.3d 579, 594 (Mo. banc 2013), citing *Alhalabi v. Missouri Dep't of Natural Resources*, 300 S.W.3d 528, 525 (Mo. App. E.D. 2009)(internal quotation marks

omitted). Thus, in *Alhalabi*, the plaintiff could sue for a hostile work environment when in his Charge he described only discrete acts of discrimination, only alluding to the existence of "previous complaints." *Id.* at 526.

The scope of an administrative investigation which could reasonably be expected to grow out of Lampley's Charge includes sex stereotyping. Lampley checked "Sex" in the box for stating the cause of discrimination and described bad treatment based on sex stereotyping. LF 71, 72. See, e.g., *Anjelino v. New York Times Co.*, 200 F.3d 73, 95 (3d Cir. 1999)(holding that charge alleging "abusive atmosphere" supports sexual harassment claim).

C. Respondents' legal arguments that Lampley had to allege more about sex discrimination

In arguing what a charge must contain, Respondents cite two cases that limited the plaintiffs' lawsuits because of the underlying charges. Neither involved the administrative phase. And both are distinguishable because neither charge described the conduct about which the plaintiff later tried to sue.

First, Respondents cite *Farrow*, 407 S.W.3d 579. There, the court limited Farrow's lawsuit to before her termination, but Farrow had similarly limited her charge. Second, Respondents cite *Reed v. McDonald's,* 363 S.W.3d 134, 143 (Mo. App. E.D. 2012). In *Reed*, the plaintiff sued for a hostile work environment based on sex and constructive discharge. The court limited Reed to the hostile work environment claim because Reed limited her charge to events while she was employed—she didn't even mention in her

charge that she longer worked for the company. *Id.* at 144. Lampley described the conduct at issue. His supervisor harassed him. LF 71.

In other portions of Part III, Respondents cite cases they claim support their specificity argument. But they cite no authority requiring Lampley to have said more in the blank portion of his Charge so that the Commission could refuse to issue a Notice of Right to Sue.

First, after minimizing what Lampley wrote, Respondents state that under "this Court's precedent" the Commission can't credit conclusory allegations without a factual narrative describing an instance of sex discrimination. Rsp. Brf., 79. Yet they cite no Missouri Supreme Court precedent.

Second, Respondents quote from a case that this Court transferred, *R.M.A. v. Blue Springs R-IV Sch. Dist.,* 2017 Mo.App. LEXIS 716, *10 n. 5 (Mo. App. LEXIS 716), transfer granted, 2018 Mo. LEXIS 5 (Mo. Jan. 23, 2018). In the portion of *R.M.A.* that Respondents quote to make a point about Lampley's Charge, the court was discussing the allegations of the R.M.A. petition, not the charge. Rsp. Brf., 79. This case is about the Commission issuing a Notice of Right to Sue, not the adequacy of a petition. And regardless of any problem with the R.M.A. petition, the Commission decided to issue R.M.A. a Notice of Right to Sue. *Id.* at *7.

Third, Respondents cite three federal cases. Rsp. Brf., 79-80. Respondents' citation to federal authority is inconsistent with their claim that the Court looks to federal law only if the Human Rights Act is ambiguous. Rsp. Brf., 56. Respondents do not claim the Human

Rights Act charge-filing section is ambiguous. Thus, under Respondents' theory, the Court should disregard federal caselaw interpreting charge-filing requirements.

That said, the three federal cases are limited to their facts or distinguishable. None was a review of an administrative proceeding in which an agency refused to issue a Notice of Right to Sue. See, *Peyton v. AT & T Svcs*, No. 4:13CV00216 AGF, 2013 U.S. Dist. LEXIS 80996 (E.D. Mo. June 10, 2013)(finding that plaintiff could not sue for other types of discrimination when she checked boxes on charge but mentioned only disability discrimination in body of charge and her EEOC intake questionnaire); *McConnell v. Greenfield R-IV Sch. Dist.*, No. 15-003325-CV-S-JTM, 2015 U.S.Dist. LEXIS 122993 (W.D.Mo. Sept. 28, 2015)(finding that plaintiff could not sue for retaliation when he described no retaliatory acts in a "particulars" section of charge); *Allen v. St Cabrini Nursing Home*, No. 00 CIV 8558, 2001 U.S.Dist. LEXIS 3340 (S.D. N.Y. March 9, 2001)(finding that plaintiff could not sue for discharge based on race when in her charge, she alleged only that she was discharged because of retaliation).

D. Charges are not pleadings

Respondents refer to pleading standards in describing charge-filing requirements. Rsp. Brf., 73 ("Taking liberal pleading standards too far could conflict with the Act's particularity requirement"). Charges are not pleadings. And Respondents cite no authority holding that charges are subject to pleading standards. Compare, *ITT Comm. Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 379 (Mo. banc 1993)(holding that Missouri is a fact pleading state) with *Alhalabi*, 300 S.W.3d at 526. See also, Point II, Part II.B, above.

III. The court in *Pittman* was describing the narrow allegations in Pittman's Petition, not the scope of Pittman's Charge

In arguing Lampley's Charge was insufficiently specific, Respondents quote from *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo.App. W.D. 2015). They claim this case is "no different from *Pittman*." Rsp. Brf., 76. *Pittman* involved one issue: whether the Human Rights Act covers sexual orientation discrimination. The court of appeals said it did not. *Id.* at 485. *Pittman* did not involve the Commission's interpretation of a charge.

In dismissing Pittman's claim, the court said it did not have to decide whether the Human Rights Act prohibits sex discrimination because of gender stereotyping since "Pittman did not raise a gender stereotyping claim in his petition." *Id.* at 484. The court neither analyzed nor commented on Pittman's charge. But Respondents still used part of a sentence in which the court described Pittman's allegations as though the case was precedent for the Commission's interpretation of Lampley's Charge. Rsp. Brf., 76, quoting *Pittman*, 478 S.W.3d at 484. Nothing about those quotes from *Pittman* is precedent for this case.

Contrary to Respondents' claim that this case is no different from *Pittman*, the cases are not at all alike when it comes to the issue here. The court decided *Pittman* on a motion to dismiss. Pittman did not allege sex discrimination or gender stereotyping in his lawsuit. Lampley is here on a review of an administrative dismissal. And Lampley alleged sex discrimination and gender stereotyping in his Charge.

Pittman is relevant here because the court implied that allegations of gender stereotyping could allege sex discrimination. *Id.* at 485.

Reply to Respondents' Point IV

Respondents argue that Frost's claims are not actionable unless based on a valid MHRA claim. They contend that Lampley claimed only sexual orientation discrimination, which they argue the MHRA does not cover. So Respondents argue that Frost's claim isn't covered either. Rsp. Brf., 80-81. Respondents' argument ignores the plain language in the Charges. Lampley's Charge was based on sex, protected under the MHRA. See Reply to Point III.

CONCLUSION

Lampley and Frost alleged sex stereotyping discrimination which violates the MHRA. The Commission, abusing its discretion, ignored those allegations. Thus, this Court should affirm the Appellate Court's decision.

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CERTIFICATE OF SERVICE AND COMPLIANCE

I certify that a true and correct copy of Appellants' Substitute Brief and Appendix were served via the Missouri CaseNet e-filing system on April 17, 2018 to:

Julie Marie Blake, Office of the Attorney General

D. John Sauer, Office of the Attorney General

I further certify that Appellants' Substitute brief complies with the limitations contained in Rule 84.06(b), contains the information required by Rule 55.03, and that the entire brief contains 4,229 words.

/s/ Jill A. Silverstein