
**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' Supplemental Reply Brief

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As discussed in Petitioner's Supplemental Brief, Petitioners adequately challenged Respondents' actions. Petitioners do not revisit those arguments here. Instead, Petitioners reply to Respondents' two new arguments. First, that Respondents challenged the form of Petitioner's action all along. Second, that writ proceedings prevent any relief, an argument that goes beyond what the Court asked the parties to address.

I. Respondents did not challenge the form of Petitioners' action until now

Respondents argue that they have been challenging the form of the action all along. Not so. As in *Tivol*, Respondents litigated on the merits and never complained about the form of Petitioners' action. Instead, Respondents urged a consideration of substantive principles at every turn:

- In their motion to dismiss to the Circuit Court, Respondents argued, "The Petition does not allege any discrimination prohibited by Missouri Law." LF24. They left the issuance of summons and the form of the Petition unaddressed. LF18-25. So too in their reply. LF38-41.
- In their Answer, Respondents never mentioned the petition or raised the form of the proceedings in any denial or affirmative defense. LF46-51.
- At summary judgment, Respondents never raised concerns about the form of Petitioners' action. Not in response to Petitioners' motion. LF90-105. Nor as the basis of their own motion. LF106-126 and 143-150.
- Agreeing with Respondents, the Circuit Court granted summary judgment and wrote "Lampley's claim fails under *Pittman*" and that "[b]ecause neither sexual orientation nor gender stereotyping are protected classes, Frost's associational

claims fail.” A7 and A9. There is no mention of the issuance of summons versus preliminary writs.

- The pattern continued on appeal. In their Court of Appeals brief, Respondents began, “The question presented in this appeal is whether the prohibition on sex discrimination in this Act extends to discrimination on the basis of sexual orientation.” Resp.App.Brief, p.1. Respondents did not mention the issuance of summons versus preliminary writs. Nor did they complain of any failure to seek a later writ.
- So too in this Court. While Respondents twice recounted footnote 3 of the appellate court’s decision (Resp.Brief, pp. 28 and 82), doing so is not the same as asking this Court to dismiss for failure to seek new writs or because the Circuit Court issued summons rather than preliminary writs.

Respondents did not include § 536.150, Rule 94, *Tivol*, or *Bartlett* in their Briefs’ Tables of Authorities either in this Court or at the Court of Appeals. And Rule 94’s “elementary procedures” went unmentioned until page 13 of Respondents’ Supplemental Brief. Resp.Sup.Brief, p.20. While Respondents repeatedly cited various mandamus standards, they never asked any court to dismiss for failure to comply with Rule 94. And even when asserting the standards for mandamus, Respondents missed the mark. As pointed out in Petitioners’ substitute reply brief, Respondents advanced inapplicable standards. See, Appellants’ Reply Brief, pp. 14-15.

Starting in the Circuit Court and continuing through oral argument here, the parties demonstrated a unanimous desire for rulings on the merits.

II. Section III.C. of Respondents' Supplemental Brief goes beyond the questions this Court instructed the parties to answer

Respondents argue for the first time in their supplemental brief that Petitioners cannot establish a new right through writ proceedings. Resp.Sup.Brief, p. 30-31. In support, they cite *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573 (Mo. banc 1994), a case that no one cited before in these proceedings. This argument is beyond the scope of the questions the Court instructed the parties to answer. But Petitioners respond briefly.

Petitioners are not advocating for a change in law. Instead, they ask the Court to read the Act as written. As the Court of Appeals noted, age-based stereotyping can support an inference of age discrimination. *Lampley v. Mo. Comm'n on Human Rights*, 2017 Mo.App.LEXIS 1069, *7-8, citing *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 492 (Mo.App. 2016). Sex should be no different. The Commission's "own employment regulations identify sex-based stereotyping as a prohibited employment practice." *Id.* citing 8 CSR 60-.040(2).

III. Conclusion

For the reasons stated in Petitioners' Supplemental Brief, this Court need not view the case as one in mandamus. But if the Court does, it should review on the merits under *Tivol*. Until responding to this Court's recent questions, all the parties have asked for rulings on the merits, and the questions presented are of general importance.

This Court has the opportunity to clarify a meaningful and important area of the law. It should not refuse to do so over an issue neither party raised.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Appellants' Supplemental Brief was served via the Missouri CaseNet e-filing system on September 27, 2018 to:

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