

**Summary of SC96828, *Harold Lampley and Rene Frost v. The Missouri Commission on Human Rights and Alisa Warren***

Appeal from the Cole County circuit court, Judge Patricia S. Joyce

Argued and submitted April 25, 2018; opinion issued February 26, 2019

**Attorneys:** Lampley and Frost were represented by Jill A. Silverstein, D. Eric Sowers, Ferne P. Wolfe and Joshua M. Pierson of Sowers & Wolf LLC in St. Louis, (314) 744-4010. The commission and its executive director were represented by State Solicitor D. John Sauer and Deputy Solicitor Julie M. Blake of the attorney general's office in Jefferson City, (573) 751-3321; and Bruce Farmer and Bart A. Matanic of the state's department of labor and industrial relations in Jefferson City, (573) 751-3844.

The American Civil Liberties Union of Missouri and a number of other organizations, which filed a brief as friends of the Court, were represented by Anthony E. Rothert of the ACLU of Missouri in St. Louis, (314) 652-3114.

*This summary is not part of the opinion of the Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** Two employees appeal the circuit court's judgment granting summary judgment (judgment on the pleadings, without a trial) in favor of the state's commission on human rights. In a decision written by Judge George W. Draper III and joined by two judges, the Supreme Court of Missouri reverses the judgment and orders the case remanded (sent back) to the commission. Judge Paul C. Wilson concurs in an opinion joined by one judge. In additional separate opinions, Chief Justice Zel M. Fischer concurs in part and dissents in part, and Judge W. Brent Powell dissents.

All seven judges agree this was a noncontested case. Five judges agree this Court should exercise its discretion to consider the appeal, even though the mandamus procedure was not followed properly; two would hold the Court should not exercise its discretion to consider the appeal because the employees failed to comply with the rules governing mandamus actions; and one would hold, even if the Court exercised its discretion, it cannot use mandamus to compel a different discretionary decision. Five judges agree the circuit court's judgment should be reversed and the case remanded. Five judges agree the employees sufficiently stated a claim for sex discrimination under the state's human rights act. Three agree the claims here were based on sex stereotyping rather than sexual orientation; two believe the Court should not have considered whether sex discrimination can be proved by evidence of sex stereotyping. Six judges agree it is unnecessary to reach the issue of whether the state's act covers claims of discrimination based on sexual orientation; one would hold the act does not extend to discrimination based on sexual orientation.

**Facts:** Harold Lampley and Rene Frost each filed charges of sex discrimination and retaliation against their employer, the state's department of social services child support division. Lampley indicated he was discriminated against based on "sex" and "retaliation." He alleged he is a gay man who does not exhibit stereotypical attributes of how a male should appear and behave; was subjected to harassment at work; and was retaliated against because of his complaints. Frost indicated she was discriminated against due to "retaliation" and "other." She alleged she was

discriminated against because of her close friendship with Lampley, whom she noted had non-stereotypical attributes of how a male should appear and behave; and was retaliated against after she complained. The commission on human rights investigated their complaints but terminated its proceedings in both matters after finding Lampley's and Frost's complaints did not involve discrimination covered by the state's human rights act. Lampley and Frost filed petitions for administrative review or, alternatively, a writ of mandamus, asking the circuit court to direct the commission to issue them right-to-sue letters. The circuit court consolidated their petitions and ultimately granted summary judgment to the commission, finding Lampley's and Frost's claims failed to state a claim. Lampley and Frost appeal.

## **REVERSED AND REMANDED.**

**Court en banc holds:** The circuit court incorrectly granted summary judgment in favor of the commission, which erred in terminating its inquiry after unreasonably assuming there was no possible sex discrimination claim other than one for sexual orientation. The commission should have allowed Lampley and Frost to demonstrate whether the sexual stereotyping they alleged motivated their employer's alleged discriminatory conduct. The circuit court's judgment is reversed, and the case is remanded for the circuit court to instruct the commission to issue right-to-sue letters to Lampley and Frost.

(1) Because there was no hearing before the commission, this is a noncontested case. Under section 536.150, RSMo, a noncontested case may be reviewed in a number of ways, including but not limited to a suit for mandamus. While this Court is not required to exercise discretion to consider a case when the mandamus procedure was not followed properly, it is not foreclosed from doing so. While litigants should strive to follow the proper procedure in any litigation, it is clear the participants in this case believed they were acting properly, and the Court will not penalize them for failing to follow precedent not established at the time.

(2) The circuit court misplaced its reliance on the 2015 appellate decision in *Pittman v. Cook Paper Recycling Corporation* to justify the commission's termination of Lampley's and Frost's claims. *Pittman* involved a claim for sex discrimination based on sexual orientation and declined to address whether such a claim based on sex stereotyping was covered under the act. Lampley and Frost, however, claim sexual discrimination because Lampley did not conform to generally held sex stereotypes. As such, his sexual orientation was merely incidental to the complaints.

(3) An employee may demonstrate sex discrimination prohibited by the act through evidence of sexual stereotyping. Section 213.055.1(1)(a) prohibits employment discrimination because of sex. To establish a submissible case of workplace sex discrimination, an employee must demonstrate the employee was a member of a protected class, was qualified to perform the job, suffered an adverse employment action, and was treated differently from other similarly situated employees of the opposite sex. Sex stereotyping may give rise to an inference of unlawful discrimination on a member of a protected class under the United States Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*. Federal courts since have held *Price Waterhouse*'s sex stereotyping analysis applies to homosexual people who allege discrimination based on failure to conform to sex stereotypes. Because a Missouri regulation characterizes sexual stereotyping as an unlawful hiring practice, it follows that sexual stereotyping during employment is an unlawful

employment practice. This opinion does not determine whether discrimination based on sexual orientation is covered under the act because such a determination is not at issue in this case.

**Concurring opinion by Judge Wilson:** The author joins the principal opinion in its conclusion the circuit court's judgment should be reversed and the case remanded for further proceedings.

(1) This is an uncontested case, and a petition for writ of mandamus is not the only means of seeking judicial review of a noncontested case. Missourians have a state constitutional right to seek review of administrative decisions, whether resulting from a contested or noncontested case. This Court should not frustrate that right by injecting procedural hurdles to such review that the parties did not raise and the circuit court did not reach.

(2) The commission erred in determining it lacked authority over Lampley's and Frost's claims, and the circuit court erred in failing to grant them relief. For purposes of determining whether the charges filed with the commission were sufficient to state a claim under the state's human rights act, the allegations must be taken as true. Lampley and Frost are not claiming Lampley was discriminated against on the basis of his sexual orientation. Instead, they pleaded sufficient facts to state sex discrimination claims under the state's human rights act, which is all that is required.

(3) The author believes it was premature for the Court to opine whether sex discrimination can be proved by evidence of sex stereotyping.

**Opinion concurring in part and dissenting in part by Chief Justice Fischer:** The author concurs with the principal opinion to the extent it holds this administrative action properly is reviewed as a noncontested case and to the extent it holds discrimination based on sexual orientation is not covered by the state's human rights act. The author would hold the Court should not exercise its discretion to consider Lampley and Frost's case because they failed to comply with Rule 94 governing mandamus actions in seeking a summons rather than a preliminary order in the circuit court.

**Dissenting opinion by Judge Powell:** The author would affirm the circuit court's judgment.

(1) The author agrees this is a noncontested case because the commission did not hold a hearing. Rather, the commission's executive director administratively closed the complaints, prior to a hearing, finding the commission lacked authority. To the extent Lampley and Frost sought contested case review, the summary judgment against them must be affirmed because the circuit court lacked authority to conduct contested case review for a noncontested case.

(2) To the extent Lampley and Frost sought noncontested case review via a writ of mandamus in the circuit court, their appeal should be dismissed because the circuit court did not issue a preliminary writ before denying relief. Just because this Court can exercise its discretion does not mean it is required to do so. The failure to follow Rule 94 governing mandamus actions prejudices both the parties and the courts. Lampley and Frost failed to satisfy even the most basic requirements of Rule 94 – it is generous even to credit their petitions with substantively seeking mandamus relief.

(3) If this Court nonetheless exercises its discretion to entertain the appeal, the circuit court's decision should be affirmed because mandamus cannot be used to control an administrative agency's discretionary determination. Mandamus is appropriate only to require the performance of a ministerial duty one charged with the duty has refused to perform. But Lampley and Frost do not suggest the executive director failed to follow mandatory procedures in reaching her determination, instead challenging her discretionary determination that their complaints alleged discrimination based on sexual orientation rather than sex stereotyping. This Court cannot compel her to exercise her discretion to reach a particular result. Even if her determination were subject to review for abuse of discretion, considering the particulars alleged in the complaints, her determination was not an abuse of discretion.