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THE MISSOURI SUPREME COURT TAKES STEPS TO PROTECT LGBTQ RIGHTS.

In a pair of recent cases, the Missouri Supreme Court took steps to protect the rights of gay employees and transgender students. The two cases are *Lamley v. Mo. Comm'n on Human Rights*, 2019 Mo. LEXIS 52 (Mo banc Feb. 26, 2019) and *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 2019 Mo. LEXIS 54 (Mo. banc Feb. 26, 2019). The Court was sharply divided and did not have the power to expand the statutory limits of the Missouri Human Rights Act. Yet I consider the *Lamley* and *R.M.A.* decisions, taken together, to be a major development in the protection of LGBTQ rights under Missouri law. This article summarizes some of the different opinions of the judges in the two cases.

Lamley v. Mo. Comm'n on Human Rights

The Missouri Human Rights Act does not explicitly protect employees who are discriminated against on the basis of sexual orientation. Harold Lamley, a gay employee, filed charges of sex discrimination and retaliation against the Missouri Department of Social Services Child Support Enforcement Division. *Lamley v. Mo. Comm'n on Human Rights*, 2019 Mo. LEXIS 52, *2 (Mo banc Feb. 26, 2019). In essence, Lamley alleged that he was discriminated against because he did not “exhibit the stereotypical attributes of how a male should appear and behave.” *Id.* * 2-3. Renee Frost, a co-employee, claimed similar discrimination stemming from her friendship with Lamley. *Id.* *3-4. The Missouri Human Rights Commission terminated its investigation and refused to issue right-to-sue letters. The Commission did so on the theory that the Act does not protect against discrimination based on sexual orientation. *Id.* *4. Lamley and Frost filed petitions for administrative review, or alternatively, a writ of mandamus to force the Commission to issue right-to-sue letters. *Id.* The trial court granted summary judgment in favor of the Commission. Lamley and Frost appealed. *Id.* *5.

Judge George W. Draper, III, writing for the Court, ruled that the Commission had statutory authority to investigate the Lampley and Frost claims that they were discriminated against because Lampley does “not exhibit the stereotypical attributes of how a male should appear and behave.” See, *Id.* *13-14, 18. Judge Draper thus distinguished a claim of discrimination based on sexual orientation from sex discrimination as evidenced by sexual stereotyping. *Id.* *16. Judge Draper declared this distinction was consistent with the position taken by federal courts and with the Commission’s own regulation on sexual stereotyping. *Id.* *16-17, citing 8 CSR 60-3.040(2)(A)2. Because the Commission had the statutory authority to investigate the Lampley and Frost claims, the Court reversed the summary judgment. The Court directed the trial court to remand to the Commission with instructions to issue right-to-sue letters. *Id.* *18-19. Judges Breckenridge and Stith concurred with Judge Draper’s principal opinion. *Id.* *20. Judges Wilson and Russell agreed with the conclusion that the claimants alleged sufficient facts to state proper claims of sex discrimination. But these two concurring judges did not believe the Court should have reached the question of sexual stereotyping. *Id.* *21, 28 (Wilson, J., concurring).

A third set of judges disagreed and would have dismissed the appeal on procedural grounds. Judge Powell contended the only remedy for review of this noncontested case was by writ of mandamus. *Id.* * 39 (Powell, J., dissenting). And Judges Powell and Fischer both pointed out that Lampley and Frost proceeded with their administrative review actions by summons and not by a preliminary order in mandamus. *Id.**40; see also, *Id.* *33 (Fischer, C.J., concurring in part and dissenting in part). Because of this procedural deficiency, Chief Judge Fischer declared: “The failure to follow Rule 94 is where the resolution of this case should begin and end.” *Id.* *34 (citing Judge Fischer’s own concurring opinion in *U.S. Dept. of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 365 (Mo. banc 2013) (Fischer, J. concurring). Even if the Court were to exercise its discretion to consider the appeal, Judge Powell opined that the executive director of the Commission did not abuse her discretion in determining the complaints alleged discrimination based on sexual orientation and not sex. *Id.**53 (Powell, J., dissenting).

In the principal opinion, Judge Draper disagreed with Judge Powell’s assertion that mandamus was the only avenue for review of an uncontested administrative case under §536.150 RSMo. (2000). *Id.* *6. And Judge Draper did not consider Judge Fischer’s concurring opinion in *Boresi* to be controlling. *Id.* *6-7. Nor could Lampley and Frost be charged with knowledge of any procedural flaws revealed by more recent decisions issued after their

suit was filed. *Id.* *9.¹ In the end, Judge Draper thought the importance of the sexual stereotyping issue justified an exercise of discretion to consider the case. *Id.* *8-9.

If the procedural objections of Judges Fischer and Powell had carried the day, the Court could have dodged the substantive question of whether Lampley and Frost were entitled to right-to-sue letters under the Missouri Human Rights Act. But by confronting the issue, the Court gave gay employees in Missouri a plausible theory of relief for sexual stereotyping.

R.M.A. v. Blue Springs R-IV Sch. Dist.

From a procedural standpoint, the *R.M.A.* transgender student case was more straightforward than *Lampley*. Unlike in *Lampley*, the Commission issued a right-to-sue letter to R.M.A. R.M.A. filed suit against the Blue Springs R-IV School District and the Blue Springs School District Board of Education. R.M.A. alleged in his petition that he “is a female to male transgender teenager who was born as a female child and transitioned to living as male.” *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 2019 Mo. LEXIS 54, *9, n. 7 (Mo. banc Feb. 26, 2019). R.M.A. alleged that his “legal sex is male” and that the School District and the School Board denied him “access to the boys’ restrooms and locker rooms.” *Id.* * 3. R.M.A. contended the defendants discriminated against him in the use of a public accommodation “on the grounds of his sex” in violation of §213.065.2 RSMo (2000). *Id.* The defendants moved to dismiss on two grounds: (1) that the Missouri Human Rights Act does not cover claims based on gender identity; and (2) that the defendants were not “persons” as defined in the Act. *Id.* *3-4. The trial court sustained the motion to dismiss with prejudice, but without explanation. R.M.A. appealed. *Id.* *4.

Judge Paul C. Wilson, writing for the Court, vacated the judgment of dismissal and remanded for further proceedings. *Id.* 13. Judges Draper, Russell, Breckenridge and Stith concurred. Once again, Chief Judge Fischer and Judge Powell dissented. (*Id.**13-14.)

Consistent with his concurring opinion in *Lampley*, Judge Wilson did not want to get into what he considered to be a side issue of proof over sexual stereotyping. *Id.* *6, at n. 4. Judge Wilson focused instead on R.M.A.’s claim of sex discrimination. Judge Wilson also criticized the dissenting opinion for devoting unnecessary time and energy in trying to construe the definition of

¹ See, *State ex rel. Tivol Plaza, Inc. v. Mo. Common on Human Rights*, 527 S.W.3d 837 (Mo. banc 2017) and *Bartlett v. Mo. Dept. of Ins.*, 528 S.W.3d 911 (Mo. banc 2017).

“sex” under the Act. Judge Wilson was especially critical of Chief Judge Fischer for claiming, with great confidence, “[t]he MHRA prohibits discrimination on grounds of biological sex,” not legal sex. *Id.* *9, at n. 8. Judge Wilson observed that the MHRA makes no mention of “biological” or “legal” sex. The Act “simply uses the word ‘sex,’ wholly unqualified.” *Id.*, citing §213.065. Finally, Judge Wilson refused to be drawn into an argument over whether the Missouri Human Rights Act covers transgender status. Judge Wilson declared: “R.M.A. does not claim protection under the MHRA based on his transgender status, but, rather, based on his sex.” *Id.* *9, at n. 9.

By avoiding these side issues, Judge Wilson characterized the analysis necessary to resolve R.M.A.’s appeal as “simple and straightforward.” *Id.* *6. Looking to the three elements necessary to prove his claim, Judge Wilson ruled that R.M.A. alleged all the elements necessary to withstand a motion to dismiss. First, R.M.A. alleged that the defendants denied R.M.A. “full and equal use and enjoyment” of a public accommodation by denying him access to the boys’ locker room and restrooms. *Id.* *7-8. Second, R.M.A. properly alleged that he was a member of a protected class by claiming that his “legal sex is male.” *Id.* *9. And finally, R.M.A. alleged that his sex was a contributing (or motivating) factor in the denial of his use of the public accommodation. *Id.* *9. Because R.M.A. alleged all the elements required under §213.065, Judge Wilson concluded that the trial court should have overruled the motion to dismiss. Judge Wilson also rejected the argument that neither the School District nor the Board was a “person” under the Act.

In his dissent, Chief Judge Fischer declared that the “simple and straightforward” analysis in the principal opinion was “also incorrect.” *Id.** 14 (C.J., Fischer, dissenting). Judge Fischer insisted R.M.A. was alleging that he is a biological female whose legal sex was male. *Id.* *14. And Judge Fischer characterized R.M.A.’s claim as being, in essence, that he was barred from the boys’ locker room and restrooms because he “is transgender and is alleged to have female genitalia.” *Id.* Based on his own characterization of the case, Judge Fischer concluded that the MHRA prohibits sex discrimination and does not bar discrimination based on transgender status. *Id.* *9. Under his theory, Judge Fischer opined that the dismissal of the lawsuit should have been affirmed.

Conclusion

In sum, the *Lamley* and *R.M.A.* cases exposed sharp divisions within the Court. And neither *Lamley* nor *R.M.A.* explicitly expanded the scope of the Missouri Human Rights Act to cover sexual orientation or transgender status. The language of the Act, of course, would not allow the Court to rewrite the

law to insert such protections. But by issuing these two decisions on the same day, the Court opened the door to possible relief for gay employees and transgender students. And I think it's fair to say that this is a significant development for LGBTQ rights under Missouri law.

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