No. WD80288

IN THE
MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Harold Lampley and Rene Frost
Petitioners-Appellants

v.

Missouri Commission on Human Rights
And
Alisa Warren, Executive Director
Respondents-Appellees

Appeal from the Circuit Court of Cole County, Missouri
Case No. 15AC-CC00296

Brief of American Civil Liberties Union of Missouri Foundation as *Amicus Curiae* in Support of Appellants Filed with Consent

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Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Appellants' brief.

Interests of Amicus Curiae

The American Civil Liberties Union (ACLU) is a nonprofit, nonpartisan membership organization founded in 1920 to protect and advance civil liberties throughout the United States. The ACLU has more than 1.2 million members nationwide. The ACLU of Missouri Foundation is an affiliate of the national ACLU. The ACLU of Missouri has more than 15,000 members in the state.

The ACLU and the ACLU of Missouri strive to strengthen and defend employment protections and ensure that lesbian, gay, bisexual, and transgender people have equal opportunity to participate fully in civil society. The ACLU has been involved in numerous cases seeking to ensure that the rights of lesbian, gay, bisexual, and transgender people are protected, including: *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded by Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, -- S. Ct. --, 2017 WL 855755 (Mem.) (Mar. 6, 2017); *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015); *U.S. v. Windsor,* 135 S. Ct. 2675 (2013); *Carcaño, et al. v. McCrory, et al.*, 203 F. Supp. 3d 615 (M.D. N.C. 2016); *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014); *Finkle v. Howard Cnty., Md.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Lawson v. Kelly*, 58 F. Supp. 3d 923 (W.D. Mo. 2014); *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.C. 2007); *Glossip v. Mo. Dept. of Transp. and Highway Emps. Ret. Sys.*, 411 S.W.3d 796 (Mo. banc 2013); *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist. et al.*, WD80005 (Mo. App. W.D. 2017) (pending on appeal); *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d (Mo. App. W.D. 2015); *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Co. Ct. App. 2015); and *Barrier v. Vasterling*, No. 1416-

CV03892, 2014 WL 4966467 (Jackson Cnty. Cir. Ct. Oct. 3, 2014), *as amended*, 2014 WL 5469888 (Oct. 27, 2014).

Statement of Facts

Amicus adopt the statement of facts as set forth in Appellants' brief.

Argument

All employees should be protected under the Missouri Human Rights Act (MHRA) from unlawful sex discrimination,[1] including those who are lesbian, gay, or bisexual and fail to comport with gender-based stereotypes, such as Petitioner-Appellant Harold Lampley. Those who associate with lesbians, gay males, bisexuals and those who fail to comport with gender-based stereotypes, such as Petitioner-Appellant Rene Frost, should similarly be protected. Persons who are lesbian, gay, or bisexual can raise charges of discrimination based on gender-based stereotypes just as someone who is heterosexual could raise them. A person's protections in the workplace should not be fewer simply because they are lesbian, gay, or bisexual when they allege a claim of discrimination that extends to *all* employees, regardless of sexual orientation. Lampley alleged that he faced discrimination and harassment because his behavior and appearance do not comport with his employer's and supervisors' stereotypes regarding how a male should appear and behave. (LF 10-11, 13-17, 71-74). Other similarly situated co-workers who were not gay and who looked and acted consistently with gender stereotypes were not subjected to the discrimination and harassment Lampley alleged that he experienced. (LF 10-11, 13-17, 71-74). Frost alleged that she also faced discrimination and harassment because of her association with Lampley. (LF 75-79).[2]

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[1] All statutory references are to Missouri Revised Statutes (2000), as updated, unless otherwise noted.

[2] All record citations are to the legal file submitted by the appellants.

This case involves the Missouri Commission on Human Rights' refusal to investigate Appellants' charges of discrimination. Following the parties' cross motions for summary judgment, the circuit court granted summary judgment to Respondents, finding that neither sexual orientation discrimination nor gender stereotyping is actionable under the MHRA. (LF 171-80).

The trial court erred. Their allegations make out a sufficient case of sex discrimination. Missouri courts are guided by federal Title VII case law when interpreting language from the MHRA that is similar to Title VII, and federal courts and the U.S. Equal Employment Opportunity Commission (EEOC) have concluded in cases under Title VII that discrimination against lesbians and gay men may constitute sex discrimination. Applying the reasoning of those decisions to the facts in Lampley's cause of action shows the circuit court's error in granting summary judgment to Respondents. Similarly, Frost's claim of discrimination for associating with Lampley states an actionable claim. Accordingly, this Court should reverse and remand these consolidated cases for further proceedings.

This appeal presents the issue of whether employers are free to discriminate through the imposition of gender stereotypes without running afoul of the MHRA. In *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. App. W.D. 2015), this Court concluded that the MHRA does not protect one from discrimination based on sexual orientation. However, it left open the question "whether or not the [MHRA] prohibits sex discrimination based upon gender stereotyping because Pittman did not raise a gender stereotyping claim in his petition." *Id.* at 484 (emphasis added). In *Pittman*,

this Court concluded that Petitioner had failed to allege a sex stereotyping claim. Here, in contrast, Lampley has adequately alleged a claim of sex stereotyping. Accordingly, this Court should reverse the finding of the circuit court that gender stereotyping claims are not covered by the MHRA's prohibition against discrimination "because of sex."

I. The MHRA should be interpreted liberally to address all forms of sex discrimination.

Because the MHRA is a remedial statute, Missouri courts have repeatedly given it a liberal construction "in order to accomplish the greatest public good." *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 167 (Mo. App. W.D. 1999) (quoting *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998)). Accordingly, in *Red Dragon*, this Court concluded that the MHRA must be read to include associational discrimination, even if such discrimination is not explicitly addressed in the statute. *Id.* Similarly, in *Doe ex rel. Subia v. Kansas City, Missouri School District*, 372 S.W.3d 43, 47-48 (Mo. App. W.D. 2012), this Court concluded that the MHRA's definition of public accommodation must be interpreted broadly to include schools, even though the requirement that such a public accommodation be "open to the public" could be read narrowly "to mean accessible by *all* members of the populace," rather than access to a "subset of the general population." *Id.* at 50; *see also State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 396 (Mo. App. W.D. 2013) (finding that a narrow "interpretation of 'open to the public'" to exclude private, selective universities would "circumvent[ ] the legislature's purpose").

Missouri courts have applied the sex discrimination provision of the MHRA broadly to a range of gender-based discrimination, and, in certain instances, provided even greater protection than the MHRA's federal counterparts. *See, e.g.*, *Doe ex rel. Subia*, 372 S.W.3d at 52 (holding that a failure to take prompt and effective remedial action to stop student-on-student sexual harassment may violate the MHRA); *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984) (holding that pregnancy discrimination is sex discrimination); *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 521 n. 8 (Mo. banc 2009) (finding that MHRA prohibits same-sex harassment).

A finding by this Court that discrimination against individuals—including persons who are lesbian, gay, or bisexual—on the basis of gender stereotypes is sex discrimination under the MHRA is consistent with the Missouri courts' emphasis of reading the MHRA liberally to achieve the legislature's goal of preventing discrimination.

II. This Court should look to federal case law as a guide for how to interpret the MHRA.

Missouri courts often rely on federal decisions interpreting federal non-discrimination laws as authority for how to decide cases under the MHRA. This is because the MHRA "is modeled after federal anti-discrimination laws," and federal decisions may supply "strong persuasive authority" for purposes of deciding certain issues. *Pollock v. Wetterau Food Distrib. Grp.*, 11 S.W.3d 754, 771 (Mo. App. E.D. 1999) (following federal precedent in interpreting MHRA to provide for an award of pre-

judgment interest); *see also Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) ("In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination case[]law that is consistent with Missouri law.").

Where the language of the MHRA is similar to federal discrimination statutes, Missouri courts have often adopted the interpretations of federal courts interpreting the analogous federal law provisions. *See Daugherty*, 231 S.W.3d at 821-22 (relying on federal disability case law to interpret the MHRA); *id.* at 818 (citing other Missouri cases applying federal precedents to interpret the MHRA); *Swyers v. Thermal Sci., Inc.*, 887 S.W.2d 655, 656 (Mo. App. E.D. 1994) (applying federal case law regarding Title VII in construing the "after-acquired evidence" defense to an MHRA claim).

In contrast, where the wording of the MHRA is different from analogous federal discrimination statutes, Missouri courts will follow the plain meaning of the MHRA. *Hammond v. Mun. Corr. Inst.*, 117 S.W.3d 130, 137 (Mo. App. W.D. 2003), *opinion adopted and reinstated after retransfer* (Nov. 6, 2003) (applying shorter statute of limitation found in MHRA); *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 244 (Mo. App. E.D. 2006) (finding in contrast to Title VII that the MHRA imposes individual liability for discriminatory conduct since "the wording of the definition of 'employer' within the MHRA is more analogous to the [federal Family Medical Leave Act] definition of 'employer' rather than the Title VII definition of 'employer.'"); *Doe ex rel. Subia*, 372 S.W.3d at 52-54 (concluding that Title IX's actual knowledge standard was not applicable to the MHRA, since "[u]nlike Title IX, the MHRA creates an express

cause of action for damages for sex discrimination that is not contingent upon the receipt of federal or state funds.").

The MHRA sex discrimination provisions applicable to employment is analogous to the applicable federal non-discrimination laws. *Compare*. § 213.055.1(1) ("unlawful employment practice … [f]or an employer … to discriminate against any individual … **because of such individual's** … **sex**") *and* 42 U.S.C. § 2000e-2(a)(1) ("unlawful employment practice for an employer … to discriminate against any individual …, **because of such individual's** … **sex**").

Relying on federal precedent is particularly important here, where the question of whether the discriminatory enforcement of gender stereotypes against lesbians, bisexuals, and gay men can constitute sex discrimination has not yet been decided by Missouri's appellate courts. Thus, this Court should follow well-reasoned federal authority in finding that discrimination against lesbian, gay, and bisexual employees may constitute sex discrimination under the MHRA.

III. Courts have interpreted Title VII to prohibit discrimination against individuals who allege discrimination on the basis of gender stereotypes, including lesbians, gay men, and bisexuals.

Both Title VII and the MHRA clearly and unambiguously forbid an employer to discriminate against its employees "because of such individual's . . . sex[.]" 42 U.S.C. § 2000e-2(a)(1); § 213.055.1(1). The overwhelming majority of federal courts to consider the issue have concluded that intentional discrimination against lesbians and gay men can constitute discrimination because of sex when it is founded on gender stereotypes. Some

of these courts have concluded that discrimination against lesbians and gay men constitutes sex discrimination because it is motivated by the gender stereotype that men and women should act a certain way, more specifically, that men should only form intimate relationships with women and women should only form such relationships with men.

In *Price Waterhouse v. Hopkins*, the United States Supreme Court found that, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (quoting *L.A. Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Accordingly, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Id.* at 250. In *Price Waterhouse*, the Court considered the Title VII claim of Ann Hopkins, who was denied promotion to partner in a major accounting firm—despite having brought in the most business of the eighty-seven other (male) candidates—because she was deemed "macho." *Id.* at 235. To be fit for promotion, Hopkins was told, she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id. Price Waterhouse* therefore clarified that sex discrimination comprises not only disparate treatment of women as compared to men, or vice versa, but also gender-

based discrimination.[3] Thus, *Price Waterhouse* confirms that employees who fail to conform to all manner of sex stereotypes are protected by Title VII and MHRA's sex provision, and the stereotype concerning to whom men and women "should" be romantically attracted is encompassed within this principle.

Sexual orientation and gender are closely related because a person's sexual orientation is determined based on his or her emotional, romantic, and sexual attraction to persons of the same or different sex.[4] Moreover, the abuse, harassment, and discrimination that gay employees are subjected to is often directly related to the gender-based stereotypes and preferences of their employers. These stereotypes and preferences can motivate the disparate treatment of lesbians, gay men, and bisexuals because they

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[3] "[T]he term 'gender' is one 'borrowed from grammar to designate the sexes as viewed as social rather than biological classes.'" *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (quoting RICHARD A. POSNER, SEX AND REASON, 24-25 (1992)). Thus, "[t]he Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination: 'In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.'" *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

[4] *See* American Psychological Association, "Answers to Your Questions For a Better Understanding of Sexual Orientation & Homosexuality," *available at* http://www.apa.org/topics/lgbt/orientation.aspx.

form intimate relationships with persons of the same sex, *see, e.g., Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass 2002) ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."), and may otherwise be perceived as appearing or behaving in ways that violate an employer's gender-based preferences (e.g., the stereotype that gay men are effeminate while lesbians are masculine). *E.g., Doe v. City of Belleville, Ill.*, 119 F.3d 563, 593 n.27 (7th Cir. 1997), *cert. granted and judgment vacated*, 523 U.S. 1001 (1998), *abrogated by Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) ("[A] homophobic epithet like 'fag,' for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation."). MHRA protects *all* individuals from differential treatment because of their sex. This includes lesbians, gay men, and bisexuals.

A. Impermissible gender stereotypes include the belief that gay men are insufficiently masculine and lesbians insufficiently feminine.

Sex discrimination claims by employees whose appearance or behavior failed to comport with their employer's gender stereotypes have been widely recognized by federal courts. For example, in *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1042 (8th Cir. 2010), the Eighth Circuit held that evidence that an employer did not like a female employee's "'tomboyish' appearance" and "Ellen DeGeneres kind of look" was sufficient to make out a case of sex discrimination. *See also EEOC v. Boh Bros. Const. Co., L.L.C.*, 731 F.3d 444, 457-59 (5th Cir. 2013) (finding that "sex-based epithets in the workplace such as 'fa—ot,' 'pu—y,' and 'princess,'" could be viewed by a jury "as

an attempt to denigrate [the employee] because—at least in [his employer's] view—[he] fell outside of [his employer's] manly-man stereotype"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (finding that "a man can ground a [Title VII] claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity"); *Prowel v. Wise Bus. Forums, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (finding that gay man harassed for speaking with a high voice and walking and sitting in an effeminate manner pled a cognizable claim of gender stereotyping); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004) (noting that "employers who discriminate against men because they . . . act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex"); *Doe*, 119 F.3d at 580-81 (finding that "a man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex'"); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (finding that harassment of a gay employee "based upon the perception that [he] is effeminate" is harassment because of sex); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *15 (W.D.N.Y. Sept. 30, 2004) (finding that harassment because employee wore an earring, refused to take part in discussions regarding sex with women and "was subjected to taunts disparaging his masculinity, such as 'fag,' 'fudgepacker,' 'homo' and 'queer'" sufficient to support "gender stereotype theory of sex discrimination"); *Ianetta v. Putnam Invs., Inc.*, 142 F. Supp. 2d 131, 133-34 (D. Mass. 2002) (finding that an allegation that supervisor called

employee "faggot" and otherwise discriminated against him on the basis of gender stereotypes made out case of sex discrimination).

B. Impermissible gender stereotypes, a form of sex discrimination, include the belief that men should only form intimate relationships with women and women should only form intimate relationships with men.

Lesbians and gay men are often victims of gender-based discrimination directed at them because they form intimate relationships with persons of the same sex. A male employee who is gay or perceived to be gay, for example, whether effeminate or not, can allege sex discrimination "due to his failure to conform with sexual stereotypes about what 'real' men do or don't do" because in the minds of some employers "'real men don't date men.'" *Centola*, 183 F. Supp. 2d at 410.

Koren v. Ohio Bell Telephone Co., 894 F. Supp. 2d 1032, 1037-38 (N.D. Ohio 2012), is an example of such a case. Jason Koren alleged that, after marrying a man and taking his husband's last name—"a 'traditionally' feminine practice"—his superior showed ill will towards him by refusing to use his married name, which encouraged his superior to reject Koren's requests for excused absences, resulting in his termination. *Id.* The district court found this evidence sufficient to make out a case of gender stereotyping and denied the employer summary judgment. *Id.* at 1038. Similarly, in *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1217 (D. Or. 2002), a lesbian cook alleged that she was subjected to severe harassment and termination after her supervisor "became increasingly obsessed with the fact that Heller was having an

intimate relationship with a woman." The harassment included insulting and abusive comments related to her sex life and personal relationship. *Id.* at 1217-18. The district court found the evidence sufficient to support a claim under Title VII, since it showed that Heller failed to conform to her employer's "stereotype of how a woman ought to behave," since "Heller is attracted to and dates other women, whereas [her employer] believes that a woman should be attracted to and date only men." *Id.* at 1224.

C. Neither the legislative history at the time the MHRA was passed, nor subsequent efforts to amend it, provide a reason to deny Appellants' claims.

It is inconsequential that the legislative history surrounding the passage of the MHRA fails to reveal a particularized intent to proscribe discrimination on the basis of sexual orientation or gender stereotyping, since "a court must enforce the law according to its terms, not by what may have been intended by the enactment." *Mo. Nat'l Educ. Ass'n v. Mo. State Bd. of Educ.*, 34 S.W.3d 266, 279 (Mo. App. W.D. 2000)) (*citing Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983); *Missourians for Honest Elections v. Mo. Elections Comm'n*, 536 S.W.2d 766, 775 (Mo. Ct. App. 1976) (en banc)); *cf. Oncale*, 523 U.S. at 79 (Title VII coverage not limited to specific forms of discrimination contemplated by Congress); *see also Doe*, 119 F.3d at 572 (Title VII's coverage not limited "'to the specific problem that motivated its enactment'"

(quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 (1983))).[5]

Similarly, the failure of subsequent efforts to amend the MHRA to explicitly prohibit discrimination against transgender individuals is not a valid reason for courts to artificially constrict the scope of the MHRA's existing prohibition on sex discrimination to avoid protecting transgender people from illegal gender discrimination. *Cf. Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (explaining that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" and that "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." (internal quotation marks omitted)); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016) ("The fact that the Connecticut legislature added [language explicitly protecting gender identity] does not require the conclusion that gender identity was not already protected by the plain language of the statute [prohibiting sex discrimination],

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[5] While the *Pittman* court relied on one portion of a dictionary definition to support its conclusion that sex discrimination does not include sexual orientation discrimination, 478 S.W.3d at 482, the dissent correctly pointed out that the same dictionary includes a broader range of meanings that show that sex is properly defined more broadly to include discrimination on the basis of both sex and gender. 478 S.W.3d at 486 (Gabbert, J., dissenting).

because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.").

In *Red Dragon,* 991 S.W.2d at 161, this Court addressed a similar question—whether the amendment of the MHRA to explicitly address associational discrimination meant that the MHRA should be interpreted to exclude such claims prior to its amendment. In rejecting this argument, this Court found that "[w]hile it is presumed that in enacting a new statute or amending an existing one, the legislature intended to effect some change in the existing law, 'it is also true that the purpose of a change in the statute can be clarification.'" *Id.* at 167 (quoting *Mid-America Television Co. v. State Tax Com'n of Missouri,* 652 S.W.2d 674, 679 (Mo. banc 1983)). The same is true here. The failure of the Missouri legislature to explicitly address discrimination on the basis of sexual orientation or gender stereotyping is not a basis for finding that discrimination against transgender individuals is not already addressed by the MHRA's prohibition on sex discrimination.

D. Contrary court decisions finding that discrimination against lesbians and gay men based on sex-based stereotypes is not sex discrimination are outdated, abrogated by *Price Waterhouse*, or wrongly decided.

The circuit court's rejection of Lampley's allegations of sex discrimination and Frost's allegations of discrimination based on her association with Lampley because "[t]he statute says nothing about gender stereotyping claims" (LF 178) is founded on a narrow and discredited interpretation of sex discrimination.

The U.S. Supreme Court's decision in *Price Waterhouse* and Eighth Circuit's decision in *Lewis* show the error in the circuit court's analysis. The *Lewis* court reversed a federal district court's dismissal of a Title VII case brought by a woman who was fired because her slightly masculine "tomboyish" appearance, which her immediate boss "characterized … as 'an Ellen DeGeneres kind of look,'" failed to fulfill the Operations Managers' requirement that female front desk employees have a stereotypically feminine appearance. 591 F.3d at 1036. The court of appeals found the evidence sufficient to make out a case of gender stereotyping under *Price Waterhouse*. *Id.* at 1041. It also found that the district court's dismissal of the case because of its narrow interpretation of sex as limited to proof that one sex is treated less favorably than another was error. *Id.* at 1039. It reasoned that "*Oncale* illustrates how an employee may prove an adverse employment action because of sex without evidence that employees of the opposite sex were treated differently[,]" finding that "'comparative evidence about how [an] alleged harasser treated members of both sexes" is only one 'evidentiary route' to prove discrimination." *Id.* at 1040 (quoting *Oncale*, 523 U.S. at 80-81).

And, while it is true that earlier decisions found that Title VII's prohibition on sex discrimination only covered discrimination against "women because they are women and men because they are men," *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Marketing*, 667 F.2d 748, 750 (8th Cir. 1982) (limiting interpretation of "sex" to "biological sex"), and that discrimination on the basis of sexual orientation and gender stereotypes was, therefore, unaddressed by Title VII, *see, e.g.*, *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30, 332 (9th Cir.1979) (finding

that Title VII fails to prohibit discrimination on the basis of sexual orientation or "discrimination because of effeminacy"), *abrogated by Nichols*, 256 F.3d at 875; *Ulane*, 742 F.2d at 1084 (finding no Title VII coverage for "homosexuals"); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (same) (citing *Sommers* and *DeSantis*), *Price Waterhouse, Oncale*, and many other federal court decisions have left the continuing authority of these older decisions in serious doubt. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (stating that "since the decision in *Price Waterhouse*, federal courts have recognized with near-total unanimity" that the approach in cases such as *Ulane* and *Sommers* "'has been eviscerated' by *Price Waterhouse*'s holding" (quoting *Smith*, 378 F.3d at 573)).

IV. Petitioners stated valid claims of sex discrimination based on disparate treatment and gender stereotyping and the circuit court erred in granting summary judgment to Respondents.

The circuit court erred in granting summary judgment to Respondents here, where the court applied an overly restrictive interpretation of the MHRA in finding that discrimination based on gender stereotyping is not actionable under the MHRA. (LF 170-79). As the discussion, *supra*, demonstrates, several federal courts and the EEOC have recognized that disparate workplace treatment motivated by the employee's failure to behave according to the employer's beliefs regarding the "proper" roles of men or women, *see, e.g.*, *Heller*, 195 F. Supp. 2d at 1224; *Koren*, 894 F. Supp. 2d at 1037-38; *Culp v. Napolitano*, EEOC DOC 0720130012, 2013 WL 2146756, at *4 (EEOC May 7,

2013), can constitute sex discrimination. These decisions are applicable to all employees, including those who are lesbian, gay, or bisexual.

The circuit court did not, and could not have due to the posture of the case, made any credibility or factual determinations. Instead, the circuit court simply and erroneously ruled that the MHRA did not apply to the allegations set forth in the charges of discrimination.

The fact that an employee, such as Lampley, is gay does not license an employer to engage in gender stereotyping. "Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior." *Smith,* 378 F.3d at 575. In *Smith*, the Sixth Circuit reversed the district court's dismissal of a transgender plaintiff's claims of gender stereotyping, because the district court incorrectly viewed those allegations as confirmation of the plaintiff's status as transgender, which "precluded Smith from Title VII protection[,]" instead of considering "Smith's well-pleaded claims concerning his contra-gender behavior[.]" *Id.* at 574. In reversing the district court's decision, the Sixth Circuit concluded that "a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity." *Id.* at 575. Moreover, as recently as yesterday, another federal circuit court found that a gay man's "gender stereotyping allegations … are cognizable under *Price Waterhouse*." *Christiansen v. Omnicom Group, Inc.*, No. 16-748, 2017 WL 1130183, at *4 (2d Cir., Mar. 27, 2017). The Second Circuit further noted that allegations of gender stereotyping must be

independently evaluated as a complaint may also include claims of sexual orientation discrimination. *Id.* at n.2.

As discussed, *supra*, disparate treatment of lesbians, gay men, and bisexuals may constitute sex discrimination under the MHRA. To find, in contrast, that sex discrimination suffered by employees is somehow different or permissible simply because the victim of the discrimination is a lesbian, gay man, or is bisexual undermines the protections provided for in the MHRA and Title VII—laws that were enacted to protect *all* individuals, including all employees, from sex discrimination.

Conclusion

In his charge of discrimination filed with the Missouri Commission on Human Rights, Lampley sufficiently alleged that he was discriminated against by his employer and supervisors because of sex, under a theory of sex stereotyping, and Frost pled similar allegations because of her association with Lampley in her charge of discrimination. The circuit court erred in refusing to recognize that Appellants charges of discrimination should be investigated based on an extremely narrow and incorrect interpretation of the MHRA. This Court should reverse the trial court's dismissal of Lampley and Frost's employment discrimination charges and order that the charges be investigated by the Missouri Commission on Human Rights.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on March 28, 2017, the foregoing amicus brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06 and Local Rule XLI; (3) contains 4,985 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert