In the
Missouri Court of Appeals
Western District

HAROLD LAMPLEY AND RENE FROST;

Appellants,

AMERICAN CIVIL LIBERTIES UNION OF MISSOURI,

Amicus Curiae,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS, AND ALISA WARREN, EXECUTIVE DIRECTOR, MISSOURI COMMISSION ON HUMAN RIGHTS,

Respondents.

WD80288

OPINION FILED:

OCTOBER 24, 2017

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

Before Division Two: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge, Anthony Rex Gabbert, Judge

Harold Lampley and Rene Frost appeal a grant of summary judgment in favor of the Missouri Commission on Human Rights ("MCHR") on their consolidated discrimination and retaliation claims. They raise two points on appeal. Point I contends the trial court erred in finding their claims were based on sexual orientation and not sex. Point II contends the trial court abused

its discretion, because competent substantial evidence did not support the MCHR's conclusion that sexual orientation was the basis of their claims. We reverse and remand.

BACKGROUND

In 2014, Lampley filed charges of sex discrimination and retaliation against his employer, the State of Missouri's Office of Administration Child Support Enforcement Division. The charges were made pursuant to Sections 213.055(1) and 213.070(2) of the Missouri Human Rights Act ("MHRA") and filed with the Equal Employment Opportunity Commission ("EEOC") and the MCHR, per their work-share agreement.[1] Lampley alleges his employer discriminated against him based on sex, because his behavior and appearance contradicted the stereotypes of maleness held by his employer and managers. These stereotypes, Lampley argues, motivated his employer to harass him and treat him differently from similarly situated employees who conformed to gender stereotypes. He further argues he was grossly underscored in a performance evaluation in retaliation for his complaint. Frost, Lampley's close friend and co-worker, filed discrimination charges under Section 213.070(4) later in 2014, alleging retaliation based on her association with Lampley. The EEOC investigated both Appellants' complaints, but the MCHR terminated the proceedings, stating it lacked jurisdiction over claims based on sexual orientation. Though their original petitions acknowledge Lampley is gay, Appellants insist sex, and not sexual orientation, is the basis of their claims. The MCHR did not address Appellants' theory of sex discrimination evidenced by sex stereotyping. Lampley and Frost petitioned the trial court for administrative review (or, alternatively, mandamus to issue Right to Sue notices). The trial court consolidated their petitions and granted summary judgment in favor of the MCHR.

[1]All statutory references are to RSMo 2000 (as supplemented through 2014), unless otherwise specified.

POINT I

In their first point, Appellants argue the trial court erred, because their claim of discrimination was based on sex and not, as the court determined, sexual orientation. We review the trial court's entry of summary judgment "essentially *de novo*," *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Co.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Evidence is viewed in the light most favorable to the nonmoving party, which is given all reasonable inferences from the record in determining whether there is any genuine issue of material fact. *Hale ex rel. Hale v. City of Jefferson*, 6 S.W.3d 187, 195 (Mo. App. 1999). "Summary judgment should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inferences rather than on direct evidence." *Daugherty v. Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) (citation omitted). "Summary judgment should not be granted unless evidence could not support any reasonable inference for the non-movant." *Id.* Because evidence of sex stereotyping can support a reasonable inference of sex discrimination, we conclude there remain genuine issues of material fact precluding summary judgment.

Appellants Have Stated a Claim of Sex Discrimination

The relevant language of Section 213.055 provides it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex[.]" Discrimination because of sexual orientation is not prohibited. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 483 (Mo. App. 2015). Thus, the question before us is whether Appellants have stated a discrimination claim based on sex. We find Appellants have consistently done so.

In his initial complaint to the EEOC and the MCHR, Lampley checked the boxes for "SEX" and "RETALIATION" as the bases for his discrimination claim. He did not check "OTHER." In

his Petition for Administrative Review (or Mandamus), Lampley alleged his employer violated his rights under the MHRA "by discriminating against him based on sex[.]" Frost consistently based her discrimination and retaliation claims on her association with Lampley as a member of the protected class of sex. In their appeal to this court, Appellants again maintain they suffered discrimination based on sex. Appellants have never stated a claim of discrimination based on sexual orientation or another unprotected class. Lampley's sexual orientation is incidental to the underlying claim of sex discrimination, which Appellants contend was evidenced by sex stereotyping.

Stereotyping as Evidence of Discrimination

Sex stereotyping as a theory of sex discrimination was first articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, a female senior manager in an accounting firm was denied partnership in the firm, because partners considered her insufficiently feminine. *Id.* at 235. A plurality of the Supreme Court held that an adverse employment action motivated by such stereotyping was actionable sex discrimination under Title VII, declaring:

> 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 'in 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.'

Id. at 251 (citation omitted). *Price Waterhouse* "confirmed that 'discrimination on the basis of sex' means the deprivation of one sex of a right or privilege afforded the other sex, including a deprivation based on a trait unique to one sex, or a deprivation based on traits *perceived* as unique to one sex." *R.M.A. v. Blue Springs R-IV School Dist.*, No. WD80005, 2017 WL 3026757, at *8 (Mo. App. July 18, 2017) (emphasis added). *Price Waterhouse* has been cited in thousands of cases across all federal circuits, and state courts have also adopted a sex stereotyping analysis when

interpreting their human rights laws. See, e.g., *Nelson v. James H. Knight DDS*, P.C., 834 N.W.2d 64 (Iowa 2013); *Enriquez v. West Jersey Health Systems*, 777 A.2d 365 (N.J. Super. 2001); *Behrmann v. Phototron Corp.*, 795 P.2d 1015 (N.M. 1990); *Arcuri v. Kirkland*, 978 N.Y.S.2d 439 (N.Y. App. Div. 2014); *Graff v. Eaton*, 598 A.2d 1383 (Vt. 1991); *Gray v. Morgan Stanley DW, Inc.*, No. 54347-4-1, at *3 (Wash. Ct. App. 2005).

Though Missouri courts have not formally pronounced "that sexual stereotyping falls within the intended scope of the MHRA," *R.M.A.* at *8, our existing case law provides a framework that readily accommodates a sex stereotyping theory. More specifically, we conclude that sex stereotyping can satisfy the fourth element of a *prima facie* sex discrimination case.

The elements of a *prima facie* discrimination case are: 1) the employee belonged to a protected class; 2) the employee was qualified to perform his or her job; 3) the employee suffered an adverse employment action; and 4) the employee was treated differently from similarly situated members of the opposite sex. *Buchheit, Inc. v. Missouri Comm'n on Human Rights*, 215 S.W.3d 268, 277 (Mo. App. 2007). "The fourth element … also can be met if the employee provides 'some other evidence that would give rise to an inference of unlawful discrimination.'" *Id.* (quotes and citation omitted).

Sex-based stereotyping can give rise to an inference of unlawful discrimination. For example, in *Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights*, 679 S.W.2d 842 (Mo. banc 1984), the MCHR concluded that "Respondent's decision [to dismiss complainant] was not based on [c]omplainant's inability to perform the duties, but rather was based on obsolete and stereotyped ideas about what tasks a pregnant woman should be performing." *Id.* at 846. While our Supreme Court found there was insufficient evidence to support the MCHR's findings, it agreed that "an employment decision that adversely affects a person within a protected class" must

be "rational and nondiscriminatory." *Id.* at 847. As sex-based stereotyping is fundamentally irrational, *Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53, 68 (2001) (defining "stereotype" as "a frame of mind resulting from irrational or uncritical analysis"), it can support an inference of unlawful discrimination.

This court has already recognized that stereotyping can support an inference of age discrimination. In *Ferguson v. Curators of Lincoln Univ.*, 498 S.W.3d 481, 492 (Mo. App. 2016), we stated that "[t]hough mere inquiries into the retirement plans of an employee who is of retirement age do not rise to the level of age discrimination, when (1) the decision to terminate an employee is based upon an age-dependent factor (such as retirement eligibility), (2) the employer offers implausible alternate explanations for the termination, and (3) there is evidence that someone with the ability to influence the decision acted *based on age-based stereotypes*, there is sufficient evidence from which a jury can infer that age was a contributing factor to the termination decision." *Id.* at 492 (citation and quotes omitted) (emphasis added).

Additionally, even the MCHR's own employment regulations identify sex-based stereotyping as a prohibited employment practice. Rule 8 CSR 60-3.040(2), which "sets forth guidelines and interpretations governing . . . the major aspects of employment practices *in relation to sex*," prohibits "[t]he refusal to hire an individual based on *stereotyped characterizations of the sexes*" (emphasis added). If the MCHR already considers stereotyping a discriminatory hiring practice, it follows that stereotyping can also evidence discriminatory conduct during the course of employment. Thus, while the present case is arguably one of first impression, our case law and employment regulations support the conclusion that evidence an employee has suffered an adverse employment decision based on stereotyped ideas of how a member of the employee's sex should act can support an inference of unlawful sex discrimination.

Sex Stereotyping and Sexual Orientation

The MCHR contends a sex stereotyping analysis transforms sexual orientation into a suspect class. We disagree. This analysis simply allows the fact finder to determine whether sex stereotypes motivated disparate treatment. Sexual orientation is incidental and irrelevant to sex stereotyping, a conclusion underscored by *Price Waterhouse*, where the claimant made no reference to sexual orientation. If an employer mistreats a male employee because the employer deems the employee insufficiently masculine, it is immaterial whether the male employee is gay or straight. The prohibition against sex discrimination extends to all employees, regardless of gender identity or sexual orientation.

"In proceedings involving alleged discriminatory employment practices, Missouri courts have adopted federal standards enunciated in suits involving claimed violations of the Civil Rights Act of 1964." *Buchheit,* 215 S.W.3d at 277 (quotes and citation omitted). Federal courts interpreting sex discrimination clauses have applied *Price Waterhouse*'s sex stereotyping analysis to cases involving both gender identity and sexual orientation. They draw a sharp distinction between a discrimination claim's factual basis (evidence of sex stereotyping) and legal basis (sex as a suspect class).

In *Rosa v. Park West*, 214 F.3d 213 (1st Cir. 2000), a bank instructed a cross-dresser to return home and change clothes before applying for a loan. The appellant brought suit under the Equal Credit Opportunity Act's provision barring sex discrimination. Though the bank argued the appellant's claim was based on style of dress or sexual orientation, the First Circuit concluded, "that is not the discrimination alleged." *Id.* at 215. "It is alleged that the Bank's actions were taken, in whole or in part, "on the basis of … [appellant's] sex …" *Id.* In *Rosa*, the appellant's claim survived the bank's motion to dismiss, because he alleged discrimination based on sex.

Clothing or sexual orientation might have been factually relevant to show the Bank was motivated by sexual stereotypes, but they were not the legal basis of the appellant's claim.

In *Christiansen v. Omnicom Group, Inc*. 852 F.3d 195, 196 (2d Cir. 2017), an openly gay man alleged discrimination due to his HIV-positive status and failure to conform to gender stereotypes. In its motion to dismiss, his employer "argued … that Christiansen's claim under Title VII was a sexual orientation discrimination claim … and thus not cognizable" under Second Circuit precedent. *Id.* at 198-99. The Second Circuit rejected this argument, concluding Christiansen's claims were actionable under *Price Waterhouse*'s sex stereotyping analysis, because Christiansen's complaint alleged "multiple instances of gender stereotyping discrimination." *Id.* at 200. The *Christiansen* court further noted that sex stereotyping claims do not bootstrap sexual orientation claims. The court explained that "gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals. [Second Circuit precedents] merely hold that being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable stereotyping claim." *Id.* at 200-01 (emphasis original).

In *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004), the Sixth Circuit recognized that a male diagnosed with Gender Identity Disorder ("GID") was still a member of a protected class, because "Title VII's prohibition of discrimination 'because of … sex' protects men as well as women." *Id.* at 570. The court concluded that the fourth element of a *prima facie* discrimination case (being "treated differently from similarly situated individuals outside his protected class") was satisfied by the allegation that "[appellant] would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man." *Id.* In *Christiansen* and *Smith*, the Second and Sixth Circuits recognized an employee's sexual orientation

or gender identity does not preclude an employee from Title VII protections. Gender-normative heterosexuals are not protected to any greater degree than those not conforming to type.

As the preceding cases demonstrate, a sex stereotyping analysis does not create a new suspect class, but simply recognizes the manifold ways sex discrimination manifests itself. The MCHR seems to fear that gay and lesbian employees will assert sex stereotyping claims in lieu of a sexual orientation claim. That is, the MCHR fears sex stereotyping will be a mere pretext. But the issue before this court is simply whether material issues of fact prevent the entry of judgment as a matter of law. Whether the claim is mere pretext is a question for the trier of fact.

In the present case, Appellants allege Lampley was discriminated against because of his sex, and they offer evidence of sex stereotyping to support their claim. The fact that Lampley is gay neither precludes nor insures his MHRA protections. As a male, he belongs to a protected class. Accordingly, he should have been allowed to demonstrate how sex stereotyping motivated the alleged discriminatory conduct. When the MCHR terminated the EEOC's proceedings, it prevented the investigation of genuine issues of material fact. The trial court's finding of summary judgment was thus inappropriate.

However, the time for further administrative investigation has passed. Section 213.111 provides,

> If, after one hundred eighty days from the filing of a complaint alleging unlawful discriminatory practice pursuant to section 213.055, 213.065 or 213.070 … the commission has not completed its administrative processing and the person aggrieved so requests in writing, the commission shall issue to the person claiming to be aggrieved a letter indicating his or her right to bring a civil action within ninety days of such notice … Upon issuance of this notice, the commission shall terminate all proceedings relating to the complaint.

Lampley and Frost filed their initial charges of discrimination on June 27, 2014 and July 31, 2014, respectively. Since the 180-day statutory period for administrative processing has long passed,

and as Lampley and Frost's pursuit of this case can be fairly construed as a request for right-to-sue notices, the appropriate remedy in light of our ruling is for the MCHR to issue right-to-sue notices. See, *Tivol Plaza, Inc. v. Missouri Commission on Human Rights*, No. SC 95758, 2017 WL 3598211, at *7 (Mo. banc Aug. 22, 2017) (holding Section 213.111 required the MCHR to issue right-to-sue letters, if requested, once 180 days had passed – even when its jurisdiction was undetermined).

Point I is granted. We reverse the judgment and remand to the trial court to remand to the MCHR with instructions to issue right-to-sue letters. [2, 3]

POINT II

As Point I is dispositive and requires remand, we need not address Appellant's second point on appeal.

Anthony Rex Gabbert, Judge

All concur.

[2] *N.B.,* Appellants' retaliation claims proceed independent of their underlying discrimination claims. "In general, as long as a plaintiff had a reasonable, good faith belief that there were grounds for a claim of discrimination or harassment, the success or failure of a retaliation claim is analytically divorced from the merits of the underlying discrimination or harassment claim." *Shore v. Children's Mercy Hospital*, 477 S.W.3d 727, 735 (Mo. App. 2015) (citation and quotes omitted).

[3] We do not consider Appellants' appeal for mandamus. "Generally, when the circuit court denies a petition for writ of mandamus, the petitioner's proper course of action is not to appeal but to file the writ in a higher court." *Stone v. Mo. Dep't of Corrections, Prob. & Parole Bd.*, 313 S.W.3d 158, 160 (Mo. App. 2010). Because Appellants failed to file a new writ with this court, and because issuance of right-to-sue letters provides an adequate remedy, mandamus is inappropriate. *State ex rel. DPH Chesterfield, LLC v. State Tax Comm'n of Missouri*, 398 S.W.3d 529, 532 (Mo. App. 2013) ("Mandamus will not lie if another adequate remedy is available").