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## What's Missing? Addressing the Inadequate LGBT Protections in the Missouri Human Rights Act

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## NOTE

# What's Missing? Addressing the Inadequate LGBT Protections in the Missouri Human Rights Act

*Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. Ct. App. 2015),  
*transfer denied*, No. SC95403, 2016 Mo. LEXIS 23, at \*1 (Mo. Jan. 26, 2016)  
(mem.)

*Ellen Henrion*\*

### I. INTRODUCTION

Most Missourians can move into homes with their partners, put up pictures of their spouses at their workplace desks, or book a hotel room for an overnight stay with a carefree confidence that these actions will not result in harassment or discriminatory repercussions. Unfortunately, this is not true for all of the state's residents. Approximately 160,000 adults in Missouri identify as lesbian, gay, bisexual, and/or transgender ("LGBT").<sup>1</sup> Accordingly, approximately 160,000 adults in Missouri are particularly vulnerable to workplace, housing, and public accommodations discrimination as the Missouri Human Rights Act ("MHRA"), Missouri's general anti-discrimination statute, does not explicitly prohibit discrimination based on sexual orientation or gender identity.<sup>2</sup> In 2015, the Missouri Court of Appeals, Western District, held in *Pittman v. Cook Paper Recycling Corp.* that the MHRA's prohibition on sex-based discrimination does not extend to prohibit sexual orientation-based discrimination.<sup>3</sup> Though many of Missouri's businesses – includ-

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\* B.A., Maryville University, 2014; J.D. Candidate, University of Missouri School of Law, 2017; Lead Articles Editor, *Missouri Law Review*, 2016–2017. I am incredibly grateful to Professor Rafael Gely for his thoughtful insight and guidance throughout the writing process and to the editors of the *Missouri Law Review* for their invaluable feedback and suggestions.

1. Christy Mallory et al., *Employment, Housing, and Public Accommodations Discrimination Based on Sexual Orientation and Gender Identity in Missouri*, WILLIAMS INST. 1 (Sept. 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/MissouriNDReport-Nov-2013.pdf>.

2. See MO. REV STAT. §§ 213.040, 213.055, 213.065 (2000). Sexual orientation is an individual's emotional, physical, or romantic attraction to others. *GLADD Media Reference Guide – Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Oct. 19, 2016). Gender identity is an individual's personal and internal sense of gender. *Id.*

3. 478 S.W.3d 479, 483 (Mo. Ct. App. 2015).

ing some of its largest, such as Ameren, Express Scripts, and Monsanto<sup>4</sup> – have workplace policies that prohibit discrimination based on sexual orientation or gender identity,<sup>5</sup> these protections are insufficient to truly protect Missourians from discrimination. Internal policies do not provide the threat of legal repercussions upon discrimination and, accordingly, may not have the deterrent effect of a law. Furthermore, employment anti-discrimination policies do nothing to protect LGBT Missourians from housing or public accommodations discrimination. Missouri’s anti-discrimination law is simply inadequate or, at the very least, incomplete.

Though great strides in LGBT rights have been made in the United States over the last decades,<sup>6</sup> including the 2015 victory in *Obergefell v. Hodges*,<sup>7</sup> the Missouri General Assembly remains hesitant to expand anti-discrimination protections to all of its constituents.<sup>8</sup> Missouri’s refusal to codify anti-discrimination protections for its LGBT citizens ensures that Missouri will remain playing catch-up to nationwide progress. This Note argues that it is time for Missouri to fully protect its citizens from discrimination. Missouri must amend the MHRA to prohibit discrimination based on sexual orientation and gender identity.

## II. FACTS AND HOLDING

James Pittman, a gay man, worked as a controller at Cook Paper Recycling Corporation from April 2004 until December 2011.<sup>9</sup> Throughout Pittman’s employment, Cook Paper’s President, Joe Jurden, allegedly directed many homophobic remarks towards Pittman.<sup>10</sup> Pittman claimed that Jurden had inquired whether he had AIDS, among other discriminatory comments.<sup>11</sup> Further, Pittman claimed that when he ended a romantic relationship, he was treated “more harshly than a male [coworker] who was getting a

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4. *Employer Database*, HUM. RTS. CAMPAIGN, [http://asp.hrc.org/issues/workplace/search.asp?form=private\\_detailed\\_search.aspx](http://asp.hrc.org/issues/workplace/search.asp?form=private_detailed_search.aspx) (last visited Jan. 11, 2017) (search for Headquarters State: Missouri; Key Policies: Sexual Orientation in Non-discrimination Policy and Gender identity in Non-discrimination Policy).

5. *Id.*

6. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); *see also* *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

7. 135 S. Ct. 2584, 2604–05 (2015).

8. *See infra* Part III.A.1.

9. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 481 (Mo. Ct. App. 2015), No. SC95403, 2016 Mo. LEXIS 23, at \*1 (Mo. Jan. 26, 2016) (mem.).

10. *Id.* Jurden denies these allegations. *See Zack Ford, Gay Man Was Harassed at Work for Being a ‘Cocksucker,’ Court Says It Won’t Do a Thing About It*, THINKPROGRESS (Oct. 30, 2015, 8:00 AM), <http://thinkprogress.org/lgbt/2015/10/30/3717515/missouri-discrimination-ruling/>.

11. *Pittman*, 478 S.W.3d at 481.

divorce from his female wife.”<sup>12</sup> Pittman was terminated by Cook Paper in December 2011.<sup>13</sup> Thereafter, Pittman sued his former employer, alleging that his sexual orientation was a “contributing factor in the decision of [Cook Paper] to terminate his employment”<sup>14</sup> in violation of the MHRA’s prohibition on sex discrimination.<sup>15</sup> Cook Paper filed a motion to dismiss for failure to state a claim.<sup>16</sup>

The trial court granted Cook Paper’s motion and dismissed Pittman’s petition for failure to state a claim.<sup>17</sup> The court determined that Pittman had merely alleged discrimination on the basis of his sexual orientation rather than his sex.<sup>18</sup> Because they found no allegation of sex-based discrimination, the court found no cognizable claim under the MHRA.<sup>19</sup> The court further declined to “create [a] new cause[] of action” by recognizing a claim of “sexual stereotyping.”<sup>20</sup>

On appeal, Pittman argued that, by alleging that he was harassed and terminated on account of his sexual orientation, he had sufficiently stated a claim for sex discrimination under the MHRA.<sup>21</sup> In this case of first impression, the Missouri Court of Appeals, Western District, disagreed, affirming the trial court’s judgment dismissing the petition.<sup>22</sup> Finding the statute’s plain language “clear and unambiguous,”<sup>23</sup> the court held that the MHRA’s prohibition on sex-based discrimination does not extend beyond discrimination based on gender.<sup>24</sup> The Western District also looked to legislative intent and reasoned that if the Missouri legislature had wanted to designate sexual orientation as a protected status under the MHRA, it could have easily done

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12. *Id.*

13. *Id.*

14. Appellant’s Initial Brief at 5, *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. Ct. App. 2015) (No. WD77973), 2015 WL 1265641, at \*5.

15. *Id.* at 4.

16. *Pittman*, 478 S.W.3d at 481.

17. *Id.* Pittman also filed a retaliation claim, which the trial court did not dismiss. *Id.* at 480 n.1. Pittman later voluntarily dismissed the retaliation claim without prejudice. *Id.*

18. *Id.* at 481.

19. *Id.*

20. *Id.*

21. *Id.* at 482.

22. *Id.* at 481–82. The Supreme Court of Missouri denied transfer. *Pittman v. Cook Paper Recycling Corp.*, No. SC95403, 2016 Mo. LEXIS 23, at \*1 (Mo. Jan. 26, 2016) (mem.).

23. *Pittman*, 478 S.W.3d at 482.

24. *Id.*

so explicitly.<sup>25</sup> Missouri law, the court concluded, does not prohibit discrimination based upon sexual orientation.<sup>26</sup>

### III. LEGAL BACKGROUND

Part A focuses on state law anti-discrimination protections in Missouri and neighboring states, discussing the MHRA and providing an overview of state law protections (or lack thereof) for LGBT individuals. Part B similarly surveys comparative federal law and the extent of its protections for individuals from sexual orientation-based discrimination.

#### A. State Protections

##### 1. The Missouri Human Rights Act

State law claims of discrimination of any kind are brought under the MHRA, which was originally codified in 1959.<sup>27</sup> At its inception, the discrimination protections the MHRA provided were limited,<sup>28</sup> prohibiting only “unfair treatment based on race or national ancestry.”<sup>29</sup> Two decades later, the Act was amended to afford individuals much more expansive protections.<sup>30</sup> In its current state, the MHRA protects Missourians from housing discrimination,<sup>31</sup> employment discrimination,<sup>32</sup> and discrimination in public accommodations<sup>33</sup> on the basis of race, color, religion, national origin, sex, ancestry, or disability.<sup>34</sup> Sexual orientation is not currently an explicitly protected status under the MHRA.<sup>35</sup>

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25. *Id.* at 483. As discussed below, the Missouri General Assembly has had numerous opportunities to pass such legislation and has failed to do so. *See infra* Part III.A.1.

26. *Pittman*, 478 S.W.3d at 483.

27. Casey Murray, *Missouri Human Rights Act Anniversary This Month*, SPENCER FANE: HUM. RESOURCE SOLUTIONS (Aug. 21, 2012, 2:20 PM), <http://www.spencerfane.com/hrsolutions/blog.aspx?entry=132>.

28. MO. REV. STAT. § 213.010 (1959) (current version at MO. ANN. STAT. §§ 213.010–213.137 (West 2016)).

29. *Id.*

30. MO. REV. STAT. § 213.010 (1978) (current version at MO. ANN. STAT. §§ 213.010–213.137 (West 2016)). The MHRA was amended to define discrimination as “any unfair treatment based on race, national origin, ancestry, sex, or handicap.” *Id.*

31. MO. REV. STAT. § 213.040 (2000).

32. *Id.* § 213.055.

33. *Id.* § 213.065.

34. *Id.* §§ 213.040, 213.055, 213.065. The MHRA further protects individuals from familial-status-based housing discrimination and age-based employment discrimination. *Id.* §§ 213.040, 213.055.

35. *See id.* §§ 213.040, 213.055, 213.065.

Because the MHRA does not protect an individual from being fired, denied housing, or denied access to places of public accommodation due to his or her sexual orientation, many attempts have been made to solidify such protections into Missouri law. As of 2013, eighteen municipalities had ordinances prohibiting discrimination based on sexual orientation and/or gender identity.<sup>36</sup> However, these eighteen localities account for only 27% of the state's workforce, and none of these municipalities exist outside the Columbia, Kansas City, or St. Louis areas, leaving those in the state's rural areas unprotected.<sup>37</sup> As such, attempts are continually being made to expand protections to all LGBT Missourians. In 2010, then-Governor Jay Nixon issued an executive order banning orientation-based discrimination in Missouri state government.<sup>38</sup> Further, legislators yearly propose legislation attempting to expand such prohibitions to all workers across the state.<sup>39</sup> The most significant piece of legislation proposed to further that goal has been the Missouri Nondiscrimination Act ("MONA").

MONA was first introduced in 1998<sup>40</sup> and has been reintroduced numerous times over the past several years.<sup>41</sup> The proposed legislation would amend the MHRA to include both sexual orientation and gender identity as protected statuses.<sup>42</sup> In 2013, the Missouri Senate passed this legislation with bipartisan support; ten Senate Democrats voted in favor of the bill, while nine of twenty-three Senate Republicans did the same.<sup>43</sup> The bill died in the Missouri House, though, when the House refused to take it up for a vote.<sup>44</sup> Respective House<sup>45</sup> and Senate<sup>46</sup> bills proposing identical additions to the MHRA were introduced in 2016, as was a separate House bill that would revise the Missouri Commission on Human Rights's ("MCHR") complaint

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36. Mallory et al., *supra* note 1, at 5.

37. *See id.*

38. Igor Volsky, *Missouri Governor Issues EO Banning Discrimination Based on Sexual Orientation in Executive Branch*, THINKPROGRESS (July 26, 2010), <http://thinkprogress.org/justice/2010/07/26/176897/missouri-discrimination-executive/>.

39. Mallory et al., *supra* note 1, at 5 ("Efforts have been made to pass such a comprehensive law in each legislative session since 2001."); Piper Salvator, *Keaveny Is Optimistic That the Missouri Nondiscrimination Act Will Pass*, MO. TIMES (Jan. 13, 2015), <http://themissouritimes.com/15867/keaveny-optimistic-missouri-nondiscrimination-act-will-pass/>.

40. Salvator, *supra* note 39.

41. *See* S. 237, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

42. *Id.*; Salvator, *supra* note 39.

43. Jason Hancock, *Missouri Court Rules That Law Doesn't Prohibit Discrimination Against Gays*, KAN. CITY STAR (Oct. 30, 2015, 8:21 PM), <http://www.kansascity.com/news/local/news-columns-blogs/the-buzz/article42018276.html>. Senate Republicans exclusively cast the eleven votes against the bill. *Id.* Three other Senate Republicans did not record a vote. *Id.*

44. *Id.*

45. H.R. 2279, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

46. S. 653, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

process to allow employees to file grievances over discrimination based on sexual orientation or gender identity.<sup>47</sup> None of this legislation passed.<sup>48</sup>

These anti-discrimination protections provided by MONA have support from both Democrats and Republicans,<sup>49</sup> and former Governor Jay Nixon encouraged the passage of MONA in his final State of the State address.<sup>50</sup> Further, hundreds of Missouri-based companies, such as Monsanto and Sprint, have publicly supported MONA.<sup>51</sup> Until the passage of such an

47. H.R. 1924, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016). The MCHR oversees the enforcement of the MHRA and investigates complaints of discrimination in housing, employment, and places of public accommodations. *See Process Once a Complaint Is Filed*, MO. DEP'T LAB. & INDUS. REL., [http://labor.mo.gov/mohumanrights/File\\_Complaint/complaint\\_process](http://labor.mo.gov/mohumanrights/File_Complaint/complaint_process) (last visited Oct. 20, 2016). Currently, the MCHR does not investigate complaints of discrimination due to sexual orientation or gender identity. *See id.*

48. Bill Summary of H.R. 2279: Prohibits Discrimination Based on Sexual Orientation or Gender Identity, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016), <http://house.mo.gov/billsummary.aspx?bill=HB2279&year=2016&code=R>; Bill Summary of S. 653: Bars Discrimination Based on Sexual Orientation or Gender Identity, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016), [http://www.senate.mo.gov/16info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=22246562](http://www.senate.mo.gov/16info/BTS_Web/Bill.aspx?SessionType=R&BillID=22246562); Bill Summary of H.R. 1924: Changes the Laws Regarding Complaints Filed with the Missouri Commission on Human Rights Regarding Discrimination Based Upon a Person's Sexual Orientation or Gender Identity, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016), <http://house.mo.gov/billsummary.aspx?bill=HB1924&year=2016&code=R>.

49. Hancock, *supra* note 43.

50. *Gov. Nixon Delivers 2016 State of the State Address*, OFF. MO. GOVERNOR JAY NIXON (Jan. 20, 2016), <https://governor.mo.gov/news/archive/gov-nixon-delivers-2016-state-state-address> ("I repeat my call for the General Assembly to pass the Missouri Nondiscrimination Act, which would prohibit discrimination against LGBT Missourians in employment, housing and public accommodations.").

51. Colin Murphy, *Fortune 500 Companies Voice Support for Mo. Non-Discrimination Bill*, LGBTQ NATION (Apr. 28, 2014), <http://www.lgbtqnation.com/2014/04/fortune-500-companies-voice-support-for-mo-non-discrimination-bill/>. Other Missouri organizations, however, like the Missouri Chamber of Commerce, oppose MONA until a higher standard of proof of discrimination is required in discrimination cases. Daniela Sirtori, *MONA Back for Another Round in the Senate*, COLUMBIA MISSOURIAN (Feb. 19, 2015), [http://www.columbiamissourian.com/news/state\\_news/mona-back-for-another-round-in-the-senate/article\\_7eb18775-8e1e-504b-b3fa-72d24e5f54a5.html](http://www.columbiamissourian.com/news/state_news/mona-back-for-another-round-in-the-senate/article_7eb18775-8e1e-504b-b3fa-72d24e5f54a5.html). In 2007, the Supreme Court of Missouri held that the MHRA requires that the plaintiff merely allege that the unlawful purpose was a contributing factor, rather than a motivating factor, in discrimination claims. *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 820 (Mo. 2007) (en banc). The Chamber of Commerce general counsel has stated that the organization will not support MONA as long as the contributing factor standard is in place. Sirtori, *supra*.

amendment, however, Missouri plaintiffs alleging discrimination based on sexual orientation will continue to be unsuccessful in Missouri courts.<sup>52</sup>

## 2. Other States' Protections

Missouri's failure to protect its residents from sexual orientation-based discrimination is unfortunately not an outlier. Twenty-seven other states join Missouri in having no statewide employment non-discrimination laws covering sexual orientation.<sup>53</sup> Two of Missouri's neighboring states, Illinois and Kansas, epitomize the country's divergence regarding sexual orientation-based employment protections.

Illinois has been protecting its workers from workplace discrimination based on sexual orientation for over a decade. In 2005, the state legislature amended the Illinois Human Rights Act ("IHRA") to prohibit discrimination based upon an individual's sexual orientation.<sup>54</sup> "Sexual orientation" is defined in the IHRA as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth."<sup>55</sup> By defining sexual orientation to include gender identity as well, the law protects transgender individuals even

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52. Missourians are protected against sexual orientation-based discrimination in employment in just one narrow context – executive branch employment. Jerome Hunt, CTR. FOR AM. PROGRESS ACTION FUND, *A State-by-State Examination of Non-discrimination Laws and Policies: State Nondiscrimination Policies Fill the Void but Federal Protections Are Still Needed* 6 (June 2012) [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf). In 2010, then-Governor Nixon issued an executive order prohibiting Missouri's Executive Branch from engaging in orientation-based employment discrimination. *Id.* at 56. While a small measure of progress, the executive order does not provide employees who have suffered discrimination a private right of action. *Id.* These protections are thus quite minimal.

53. *Non-Discrimination Laws: State by State Information – Map*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Jan. 11, 2017). Nineteen states currently have non-discrimination laws in place that include both sexual orientation and gender identity: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Utah, Vermont, and Washington. *Id.* Washington, D.C., has codified such protections as well. *Id.* Three states – New Hampshire, New York, and Wisconsin – have enacted legislation that protects workers from discrimination on the basis of sexual orientation but not gender identity. *Id.*

54. S. 3186, 93d Gen. Assemb., Reg. Sess. (Ill. 2005).

55. 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West 2016). The statute further provides that the definition of sexual orientation "does not include a physical or sexual attraction to a minor by an adult." *Id.*



though gender identity is not explicitly listed as a prohibited basis for discrimination.<sup>56</sup>

Kansas, meanwhile, has effectively spent the last few years making its residents more vulnerable to the threat of workplace discrimination. In 2015, Governor Sam Brownback issued an executive order that removed existing protections for gay, lesbian, and transgender state employees.<sup>57</sup> The order repealed a 2007 executive order by then-Governor Kathleen Sebelius, which had put in place prohibitions against employment discrimination based on sexual preference and gender identity.<sup>58</sup> Governor Brownback reasoned that the repeal of Governor Sebelius's expansion of workplace protections was appropriate because such an expansion of anti-discrimination policies should come from the legislature, rather than from unilateral executive action.<sup>59</sup>

## B. Federal Law

Title VII of the Civil Rights Act of 1964 is the federal counterpart to the MHRA within the employment realm.<sup>60</sup> The two laws are "coextensive, but not identical, acts."<sup>61</sup> Under Title VII, it is unlawful for an employer<sup>62</sup> to refuse to hire or discharge an individual "because of such individual's race, color, religion, sex, or national origin."<sup>63</sup>

Sex, however, was not originally a protected class under the Civil Rights Act.<sup>64</sup> Rather, an amendment to prohibit sex discrimination was proposed in

56. *Id.* § 1-102(A).

57. Matt Pearce, *Kansas Governor Removes Protections for LGBT Employees*, L.A. TIMES (Feb. 10, 2015, 5:28 PM), <http://www.latimes.com/nation/la-na-kansas-governor-gay-protection-20150210-story.html>.

58. *Id.*

59. *Id.*

60. Compare Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012), with MO. REV. STAT. § 213.055 (2000).

61. *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112 (Mo. Ct. App. 2006) (emphasis omitted) (citing *Hammond v. Mun. Corr. Inst.*, 117 S.W.3d 130, 136 (Mo. Ct. App. 2003)).

62. "Employer" refers to any "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." 42 U.S.C. § 2000e(b).

63. *Id.* § 2000e-2(a)(1).

64. See WILLIAM N. ESKRIDGE JR. ET AL., *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 12 (5th ed. 2014) (noting the addition of "sex" to the impermissible bases for employment discrimination was an amendment to the proposed bill); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate."), *overruled as recognized by Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

a purported attempt to quash the bill altogether.<sup>65</sup> The controversial addition of “sex” to the bill’s language was intended to protect against gender discrimination; sexual orientation was not contemplated by Congress.<sup>66</sup> Though the amendment met opposition from the bill’s own supporters, the amendment passed in the House by a vote of 168-133.<sup>67</sup> The bill eventually passed in the Senate as well, the sex amendment intact.<sup>68</sup> Citizens thereafter had at least some federal law protections from sex-based employment discrimination.

Like the MHRA, Title VII protects against sex discrimination but does not explicitly proscribe discrimination based on sexual preference.<sup>69</sup> As such, a significant number of federal courts have held that plaintiffs do not have a cause of action under Title VII for discrimination on the basis of sexual orientation.<sup>70</sup> The Eighth Circuit, too, has held that Title VII does not prohibit such discrimination.<sup>71</sup> To maneuver around this roadblock, many plaintiffs who have suffered orientation-based discrimination will bring a Title VII claim alleging discrimination based on gender stereotyping.<sup>72</sup> The Supreme Court has held that a plaintiff has a cognizable Title VII claim for sex-based discrimination if he or she properly alleges discrimination based on sex stereotyping.<sup>73</sup> Thus, if plaintiffs can prove that they were discriminated against

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65. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *see also* ESKRIDGE ET AL., *supra* note 64, at 12. Representative Howard Smith, one of the most fervent opponents of the Civil Rights Act, sponsored the amendment. *Id.* at 9, 12. Some have suggested that the amendment was proposed as something of a joke. Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 441 (1966). For example, “Mr. Smith, long-time Chairman of the House Committee on Rules – and not a civil rights enthusiast – offered his amendment in a spirit of satire and ironic cajolery.” *Id.* However, others have asserted that Chairman Smith was a “long-time ally and supporter” of equal rights for women. ESKRIDGE ET AL., *supra* note 64, at 12.

66. *See* ESKRIDGE ET AL., *supra* note 64, at 13.

67. *Id.*

68. *Id.* at 13, 20.

69. *Compare* MO. REV. STAT. § 213.055 (2000), *with* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012).

70. *See* *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Richardson v. BFI Waste Sys. of N. Am., Inc.*, 232 F.3d 207, \*1 (5th Cir. 2000) (*per curiam*); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

71. *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (*per curiam*).

72. *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 744–45 (2014) (analyzing 117 cases where plaintiffs brought Title VII and Title IX cases on the basis of gender stereotyping).

73. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (“We hold that when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving

based on their failure to conform to gender stereotypes, they may be able to survive summary judgment.<sup>74</sup> Missouri law does not currently allow for similar navigation of the sexual orientation/sexual stereotyping impasse.<sup>75</sup>

Much like Missouri, federal law does provide for one narrow context in which individuals are protected from sexual preference-based discrimination. In 2014, President Obama signed an executive order prohibiting federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity.<sup>76</sup> While the order reached roughly 30,000 companies employing twenty-eight million workers,<sup>77</sup> these employers only account for one-fifth of the country's workforce,<sup>78</sup> leaving the rest, such as James Pittman, vulnerable to harassment or termination based on sexual orientation.

#### IV. INSTANT DECISION

##### A. *Majority Opinion*

In *Pittman*, the Missouri Court of Appeals, Western District, held that the MHRA does not prohibit discrimination on the basis of sexual orientation, and thus, the trial court did not err in dismissing Pittman's claim.<sup>79</sup> This case turned almost entirely on the court's interpretation of "sex" under the MHRA.<sup>80</sup> Because "sex" remains undefined in the statute,<sup>81</sup> the court turned to the familiar canons of statutory interpretation.<sup>82</sup> First, it examined the statute's plain meaning.<sup>83</sup> Employing *Webster's Third New International Dic-*

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by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."), *superseded by statute for other reasons as stated in Burrage v. United States*, 134 S. Ct. 881 (2014).

74. *See id.*; *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1036 (8th Cir. 2010) (finding remarks about an employee's "slightly more masculine" "Ellen DeGeneres kind of look" could be sex stereotyping and therefore reversing summary judgment).

75. *See Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 484 (Mo. Ct. App. 2015) (refusing to decide "whether or not the Missouri Human Rights Act prohibits sex discrimination based upon gender stereotyping"), No. SC95403, 2016 Mo. LEXIS 23, at \*1 (Mo. Jan. 26, 2016) (mem.).

76. Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 21, 2014).

77. Jennifer Epstein, *Obama Signs LGBT Executive Order*, POLITICO (July 21, 2014, 11:04 AM), <http://www.politico.com/story/2014/07/obama-signs-lgbt-protection-federal-workers-contractors-109174>.

78. *Id.*

79. *Pittman*, 478 S.W.3d at 483, 485.

80. *See id.* at 482–83.

81. *See* MO. REV. STAT. § 213.010 (2000).

82. *Pittman*, 478 S.W.3d at 482. For a thorough and thoughtful discussion of how Missouri courts interpret statutes, see Matthew Davis, *Statutory Interpretation in Missouri*, 81 MO. L. REV. 1127 (2016) (surveying the various canons invoked by Missouri courts).

83. *Pittman*, 478 S.W.3d at 482.

tionary, the court resolved the definition for “sex” under the MHRA: “one of the two divisions of human beings respectively designated male or female[.]”<sup>84</sup> Thus, the court concluded that for the purposes of the MHRA, “sex” is strictly synonymous with “gender.”<sup>85</sup>

The Western District also focused heavily on legislative intent, which it referred to as “the pole star of statutory interpretation and construction.”<sup>86</sup> It noted the several categories of protected classes under the MHRA<sup>87</sup> and the absence of sexual orientation amongst them.<sup>88</sup> The court concluded that “[i]f the Missouri legislature had desired to include sexual orientation in the [MHRA] protections, it could have done so,”<sup>89</sup> recognizing that attempts to explicitly include sexual orientation as a protected status under the MHRA had repeatedly failed.<sup>90</sup> Until sexual orientation is explicitly included as a protected status in the statute’s text, discrimination on the basis of sexual orientation is not unlawful under the MHRA.<sup>91</sup>

Though Pittman and the American Civil Liberties Union, participating as *amicus curiae*, invoked federal Title VII precedent in arguing that the definition of “sex” encompassed more than just gender, the Western District remained unswayed.<sup>92</sup> First and foremost, the MHRA and Title VII “are coextensive, but not identical, acts.”<sup>93</sup> Therefore, where the language of the MHRA is clear and unambiguous, any contrary federal case law has no binding effect.<sup>94</sup> As established earlier, in the court’s view, the plain, unambiguous meaning of “sex” under the MHRA is equivalent to “gender” and does not include sexual orientation.<sup>95</sup> Thus, any federal precedent relied upon was ultimately unhelpful to Pittman’s claim.

Moreover, many of Pittman’s supporting federal cases involved claims of gender stereotyping, which is a person’s failure to conform “to the employer’s expectation as to how someone of his or her gender should behave.”<sup>96</sup> In *Pittman*, the Western District was eager to note that Pittman did

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84. *Id.* (alteration in original) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2081 (Unabridged 1993)).

85. *Id.*

86. *Id.*

87. *Id.* at 483. The MHRA explicitly provides that discrimination on any of these bases is unlawful: race, color, religion, national origin, sex, ancestry, age, or disability. MO. REV. STAT. § 213.055.1(1) (2000).

88. *Pittman*, 478 S.W.3d at 483.

89. *Id.*

90. *Id.* at 483 n.5.

91. *Id.* at 483.

92. *Id.* at 483–84.

93. *Id.* at 485 (quoting *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112 (Mo. Ct. App. 2006)).

94. *Id.*

95. *Id.* at 482.

96. *Id.* at 484.

not raise a gender-stereotyping claim in his petition.<sup>97</sup> Pittman did not allege that he was harassed or terminated based upon his failure to comply with societal masculine stereotypes<sup>98</sup> but instead explicitly claimed to have been discriminated against based on his sexual preference.<sup>99</sup> Because of this, the court declined to decide whether the MHRA prohibits sex discrimination based upon gender stereotyping.<sup>100</sup>

Upon its examination of the MHRA's plain language, legislative intent (or lack thereof), and Pittman's failure to allege an explicit claim of gender stereotyping, the Western District concluded that the MHRA does not prohibit discrimination on the basis of sexual orientation.<sup>101</sup> In a separate opinion, Judge Robert Clayton, III concurred "reluctantly[,] . . . with respect to the result only."<sup>102</sup> As such, the court affirmed 2-1 the trial court's dismissal of Pittman's petition for failure to state a claim.<sup>103</sup>

### B. Dissenting Opinion

Judge Anthony Rex Gabbert wrote an extensive dissenting opinion, objecting to the majority's conclusions on three main points: (1) the plain meaning of "sex,"<sup>104</sup> (2) the majority's analysis of legislative intent,<sup>105</sup> and (3) the majority's failure to recognize the "spirit" of the MHRA.<sup>106</sup>

The dissent first challenged the majority's limited interpretation of the word "sex."<sup>107</sup> Because there is no requirement that any particular dictionary definition be given preference over another in the absence of a legislative definition, the dissent argued that the majority erred in stopping at the first listed dictionary definition, rather than considering the entirety of the definition in its analysis.<sup>108</sup> The full definition found in *Webster's Third New International Dictionary*, the dissent asserts, provides a more complete picture of the meaning of "sex" that includes "the phenomena of sexual instincts and their manifestations."<sup>109</sup> This definition, if adopted by Missouri courts,

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 485.

102. *Id.* (Clayton, J., concurring).

103. *See generally id.*

104. *Id.* at 486 (Gabbert, J., dissenting).

105. *Id.* at 487.

106. *Id.* at 487–88.

107. *Id.* at 486.

108. *Id.*

109. *Id.* The dissent characterized the full definition as: "(1) one of the two divisions of human beings respectively designated male or female; (2) the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction; (3) the sphere of interpersonal behavior especially between male and female most directly associated with, leading up to, substituting

would expand protections under the MHRA to prohibit discrimination based not just on gender, but on sexual orientation as well.

Next, the dissent questioned the majority opinion's outcome on legislative intent.<sup>110</sup> The dissent contended that the absence of an explicit provision including sexual preference protections within the MHRA is not indicative of legislative intent to exclude such protections.<sup>111</sup> Rather, it found the Missouri General Assembly's failure to exclude sexual orientation from its broad use of "sex" more convincing than its failure to include sexual orientation.<sup>112</sup> Further, the dissent contended that remedial statutes, such as the MHRA, are to be construed liberally to include cases "which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case."<sup>113</sup>

The "spirit of the [MHRA]" was repeatedly invoked within the dissent and was Judge Gabbert's third contention with the majority opinion.<sup>114</sup> On this point, the dissent relied on *Baldwin v. Foxx*,<sup>115</sup> a case in which the EEOC stated that "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex."<sup>116</sup> Because "sexual orientation is inherently a sex-based consideration,"<sup>117</sup> the dissent asserted, a person's sex is "always considered when taking a person's sexual orientation into account."<sup>118</sup> Accordingly, under the spirit of the law, sex discrimination claims founded in sexual orientation discrimination are actionable under the MHRA.<sup>119</sup>

Moreover, the dissent recognized appellate courts' responsibility when reviewing a motion to dismiss to liberally construe pleadings and find facts in the light most favorable to the plaintiff.<sup>120</sup> In so doing, Judge Gabbert found a cognizable claim of gender stereotyping within Pittman's petition.<sup>121</sup> Because Pittman alleged that he was treated differently than a similarly situated heterosexual coworker, the dissent contended, "gender bias was associated

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for, or resulting from genital union; and (4) the phenomena of sexual instincts and their manifestations." *Id.* (footnote omitted) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2081 (1993)).

110. *Id.* at 487.

111. *Id.*

112. *Id.*

113. *Id.* at 487–88 (emphasis omitted) (quoting *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166–67 (Mo. Ct. App. 1999)).

114. *Id.* at 487–89.

115. *Baldwin*, EEOC DOC 0120133080 (2015), 2015 WL 4397641.

116. *Id.* at \*6.

117. *Pittman*, 478 S.W.3d at 489 (Gabbert, J., dissenting) (quoting *Baldwin*, 2015 WL 4397641, at \*6).

118. *Id.* (emphasis omitted).

119. *Id.*

120. *Id.* at 487–88.

121. *Id.* at 488.

with his claims.”<sup>122</sup> For these reasons, the dissent would have found that Pittman sufficiently stated a claim under the MHRA and would allow a jury to determine whether Pittman was indeed the victim of sex-based discrimination.<sup>123</sup>

## V. COMMENT

When the Western District issued its decision in *Pittman*, it confirmed that LGBT Missourians remain vulnerable to sexual orientation-based discrimination in housing, employment, and public accommodations. This Note’s argument is threefold. First, this Part discusses the need for LGBT anti-discrimination protections in Missouri. However, due to the current text of the law, the Western District ultimately did not misapply the MHRA; indeed, the court had little choice but to reach its legal conclusion.<sup>124</sup> Accordingly, this Part next analyzes the *Pittman* dissent and articulates why broadening the definition of “sex” under the MHRA is not the optimal avenue through which to expand necessary protections. Finally, this Part argues that to promote the values of fundamental fairness, respect, and equality, the Missouri General Assembly must act to provide Pittman, along with tens of thousands of other Missourians, a cognizable cause of action with which to challenge LGBT discrimination.

### A. *The Need for Additional Protections*

Despite local ordinances, executive orders, and workplace policies that explicitly prohibit sexual preference-based discrimination, discrimination is still all too common.<sup>125</sup> Numerous incidents highlight the prevalence of LGBT discrimination across the state. For example, in 2007, two kitchen workers were fired for being gay,<sup>126</sup> and in 2008, a schoolteacher’s contract was not renewed due to her sexual orientation.<sup>127</sup> Further, studies show a high prevalence of employment discrimination against LGBT individuals. According to a recent study from the Williams Institute, 15% to 43% of LGBT workers have experienced some sort of employment discrimination

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122. *Id.*

123. *Id.* at 489.

124. See Sarah Rossi, *Pass the Missouri Non-Discrimination Act*, ACLU Mo. (Oct. 27, 2015), <http://www.aclu-mo.org/newsviews/2015/10/27/pass-missouri-non-discrimination-act> (“[In *Pittman*,] the Missouri Court of Appeals made two things very clear: Missourians are being harassed, bullied, and fired from their jobs for being gay, lesbian, or bisexual and they will have no recourse in the courts unless the State Legislature changes the [MHRA] to protect them. . . . The court . . . made clear that their hands were tied by Missouri law.”).

125. See *supra* notes 4, 36–39 and accompanying text.

126. Mallory et al., *supra* note 1, at 4.

127. *Id.*

based on sexual orientation or gender identity.<sup>128</sup> Further, the Department of Housing and Urban Development found that heterosexual couples were favored over same-sex couples by more than 15% in receiving housing inquiry responses.<sup>129</sup> In 2010, 47% of transgender Missourians reported having experienced harassment at work due to their gender identity.<sup>130</sup>

A 2016 survey indicated that 90% of Americans ages eighteen to thirty believed that gay men and women should have equal rights in the workplace.<sup>131</sup> Undeniably, equal rights in the workplace *must* include the right to be free from discrimination. Nevertheless, individuals facing such discrimination in Missouri currently have no legal recourse under state law.<sup>132</sup>

The need for additional legal anti-discrimination protections cannot be understated. Studies consistently show the significant impact that discrimination has on one's mental health and wellbeing.<sup>133</sup> LGBT individuals who fear orientation- or identity-based discrimination are much less likely to be open about their sexual orientation with their coworkers, which results in feelings of isolation and anxiety in the workplace.<sup>134</sup> Even individuals who are open about their LGBT status are more likely to suffer from depression, psychiatric disorders, and low self-esteem.<sup>135</sup> Even more, studies demonstrate that a significant pay gap exists between straight and gay men with identical productivity characteristics.<sup>136</sup> A 2011 survey showed that transgender individuals were unemployed at twice the rate of the general population, and the unemployment for transgender people of color was almost four times the national rate.<sup>137</sup> Discrimination has a significant impact on the lives and live-

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128. Marina Villeneuve, *Gay Rights Activists Cheer Workplace Discrimination Bill*, L.A. TIMES (July 10, 2013), <http://articles.latimes.com/2013/jul/10/nation/la-na-gay-discrimination-20130711>.

129. Amanda Terkel, *Same-Sex Couples Face Significant Housing Discrimination, Historic Government Study Says*, HUFFINGTON POST (June 18, 2013, 1:06 PM), [http://www.huffingtonpost.com/2013/06/18/same-sex-housing-discrimination\\_n\\_3455463.html](http://www.huffingtonpost.com/2013/06/18/same-sex-housing-discrimination_n_3455463.html).

130. Mallory et al., *supra* note 1, at 3.

131. Sarah Grace Taylor & Emily Swanson, *Poll: Young Americans Overwhelmingly Favor LGBT Rights*, ASSOCIATED PRESS (Aug. 9, 2016, 11:17 AM), <http://bigstory.ap.org/article/ea6febc0f5be47c7b2deb67112a2e201/poll-young-americans-favor-lgbt-rights-adoption-more>.

132. Sophia Petenakis, *Transgenders Face Job Challenges in Mid-Mo.*, KOMU (Mar. 28, 2012, 6:30 PM), <http://www.komu.com/news/transgenders-face-job-challenges-in-mid-mo/>.

133. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST. 12 (July 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

134. *Id.* at 12–13, 15–16.

135. *Id.* at 15–16.

136. *Id.* at 14.

137. *Id.*



lihoods of LGBT employees, but due to the Western District's interpretation of the word "sex," these individuals currently have no legal recourse.

### B. "Sex" Under the MHRA

*Pittman* turned on the court's interpretation of the meaning of "sex." As discussed in Part IV, Judge Gabbert authored a thorough dissent in *Pittman* in which he pushed for a broader interpretation of the word "sex"<sup>138</sup> – still the word's plain meaning, he asserted, but including a more encompassing definition in order to better protect Missourians from discrimination.<sup>139</sup> Though Judge Gabbert's dissent is thoughtfully written and rightfully sympathetic to victims of discrimination, stretching the definition of "sex" to encompass sexual orientation does not comport with the statute's text.

#### 1. The MHRA's Plain Language

Under the "ordinary meaning" doctrine of statutory interpretation, courts are to assume that, unless a word is otherwise defined, the legislature intended to give the word its ordinary, common meaning.<sup>140</sup> Interpreters are encouraged to start with the typical meaning of a term in question – not necessarily the dictionary definition, but the connotation that an ordinary or reasonable person would give to the term.<sup>141</sup> Using the "ordinary meaning" maxim, the most straightforward result would be the interpretation the *Pittman* majority adopted; to the ordinary person, sex is synonymous with gender and likely does not encapsulate sexual orientation.

The *Pittman* majority and dissent both relied on dictionary definitions of "sex," each finding a different definition to fit its interpretation.<sup>142</sup> Nevertheless, sex is both commonly understood to mean, and primarily defined in dictionaries to mean, the biological distinction between male and female.<sup>143</sup> Although Judge Gabbert found a definition of "sex" that encompasses sexual orientation, courts should not resort to parsing dictionary definitions in order to find a definition that fits.<sup>144</sup> The plain meaning of "sex" is synonymous

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138. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 486 (Mo. Ct. App. 2015) (Gabbert, J., dissenting), No. SC95403, 2016 Mo. LEXIS 23, at \*1 (Mo. Jan. 26, 2016) (mem.).

139. *See id.*

140. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

141. *ESKRIDGE ET AL.*, *supra* note 64, at 645.

142. *Compare Pittman*, 478 S.W.3d at 482, with *Pittman*, 478 S.W.3d at 486 (Gabbert, J., dissenting).

143. *See, e.g., Sex*, BLACK'S LAW DICTIONARY (10th ed. 2014).

144. *See Note, Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1448 (1994) ("[J]udges can use dictionaries subjectively either to concretize or to blur statutory and constitutional terms, without abandoning the veneer of textual objectivity.").

with gender.<sup>145</sup> Furthermore, though Missouri does not provide much legislative intent guidance because its committee reports are not published, it is unlikely that the Missouri General Assembly in 1959 was looking to prohibit sexual orientation-based discrimination. For these reasons, the court correctly applied the law when it interpreted the MHRA to prohibit only gender-based discrimination.

## 2. Broadening the Definition of “Sex”

Though the language of the MHRA provides a prohibition only on sex-based discrimination, the dissent makes several arguments advocating for an expansion of the definition of “sex.”<sup>146</sup> These arguments have merit, and thus a discussion of the dissent is warranted. The dissent seeks to find within the MHRA a discernable way for Pittman and numerous other individuals to bring claims alleging discrimination based on sexual orientation.<sup>147</sup> To do so, Judge Gabbert argued that the court should adopt a broader definition of “sex,” finding support in past cases in which courts have extended sex beyond the typical gender-based considerations.<sup>148</sup> For example, in *Price Waterhouse*, the Supreme Court held that when an employer insists that an employee conform to stereotypical attributes of his or her gender, the employer “has acted on the basis of gender,”<sup>149</sup> and the employee may bring a cause of action for sex-based discrimination under Title VII.<sup>150</sup> One could reason that Pittman, by dating a man instead of a woman, failed to conform to a stereotypical assumption commonly associated with his gender. A rational argument may be made that if this were the basis of Pittman’s termination, Cook Paper acted on the basis of gender stereotypes in violation of the MHRA.

The argument is made clearer still in *Baldwin*, where the EEOC concluded that “sexual orientation is inherently a ‘sex-based consideration,’”<sup>151</sup> and, accordingly, “discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”<sup>152</sup> The EEOC determined that the question is not whether sexual orientation is an explicitly protected status but whether the sexual orientation claim “is the same as any other Title VII case involving allegations of sex discrimination – whether the [employer] has ‘relied on sex-based considerations’”<sup>153</sup> in its employment action.

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145. *Sex*, BLACK’S LAW DICTIONARY (10th ed. 2014).

146. *Pittman*, 478 S.W.3d at 486–89 (Gabbert, J., dissenting).

147. *See id.*

148. *Id.* at 486–87.

149. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989), *superseded by statute for other reasons as stated in* *Burrage v. United States*, 134 S. Ct. 881 (2014).

150. *Id.*

151. *Baldwin*, EEOC DOC 0120133080 (2015), 2015 WL 4397641, at \*5 n.3.

152. *Id.*

153. *Id.* at \*4.

These cases provide support to the dissent's ultimate argument that "sex" under the MHRA expands beyond gender. However, where the MHRA is clear and unambiguous, neither contrary federal case law nor administrative agency decisions are binding.<sup>154</sup> If the statute were ambiguous, this logic may have swayed the Western District. Perhaps if Pittman had alleged sex stereotyping – that his discrimination had been based on his failure to conform to the sexual stereotype that men, generally, are attracted to women – he may have survived Cook Paper's motion to dismiss under a *Price Waterhouse* theory. Regardless, complainants, including Pittman, should not have to jump through pleading hoops and allege an ill-fitting claim of sexual stereotyping in order to state a claim for discrimination; the law instead should provide a remedy for sexual orientation-based discrimination.

This remedy is not made available by *Pittman*, which extends beyond the instant case and precludes *all* LGBT Missourians from bringing suit alleging orientation-based discrimination. *Pittman* was a close case – a three-judge panel split two to one,<sup>155</sup> with the concurring judge doing so "reluctantly."<sup>156</sup> This reluctance reasonably reflects the fact that the underlying law guiding the Western District is simply flawed. The MHRA was enacted to protect Missourians from discrimination, but its inadequacies prevent it from truly fulfilling its intended function. The law must keep up with social progress. Accordingly, to fulfill the "spirit of the law,"<sup>157</sup> a statutory amendment to the MHRA expanding its protections will likely be the most efficacious way to enact tangible change.

### C. Amending the MHRA

As discussed in Part III, there have been many proposed statutory amendments to the MHRA over the past two decades that would include sexual orientation in the statute's list of protected classes. Because the Western District's disagreement over the definition of "sex" likely reflects society's evolving understanding of the term, and because a court's statutory interpretation will always be vulnerable to subsequent legislative action, the only infallible way to ensure protections for LGBT Missourians is to amend the MHRA to include explicit protections from sexual preference-based discrimination. MONA was first introduced in 1998;<sup>158</sup> now, in 2017, it is time for such a statutory amendment to become law. For the following reasons, Mis-

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154. *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 113 (Mo. Ct. App. 2006).

155. *See generally*, *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. Ct. App. 2015), No. SC95403, 2016 Mo. LEXIS 23, at \*1 (Mo. Jan. 26, 2016) (mem.).

156. *Id.* at 485 (Clayton, J., concurring).

157. *Id.* at 488 (Gabbert, J., dissenting).

158. *Salvator*, *supra* note 39.

souri should adopt statutory protections similar or identical to the IHRA's provision codifying anti-discrimination protections for LGBT individuals.<sup>159</sup>

Pittman's lawsuit was rooted in sexual orientation-based discrimination;<sup>160</sup> he did not allege any discrimination based upon his gender identity, and this Note has exclusively addressed sexual orientation-based discrimination thus far. However, the discussion of sexual orientation oftentimes leads to the discussion of gender identity. Though sexual orientation and gender identity are two distinct matters, they are often addressed simultaneously. All LGBT Missourians, including transgender Missourians, must be free from workplace, housing, and public accommodations discrimination. As such, Missouri must also enact protections for transgender individuals and can do so when it amends the MHRA to include protections from sexual orientation-based discrimination.

Perhaps the simplest way to accomplish the goal of protecting Missourians from discrimination based on sexual orientation or gender identity would be to pass a bill similar to the numerous bills introduced over the past several years, such as SB 653.<sup>161</sup> This bill would have amended section 213.010 by adding sexual orientation and gender identity to its definition of "discrimination."<sup>162</sup> It would have also incorporated the following language in the statute's definition:

Discrimination includes any unfair treatment based on a person's presumed or assumed race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, [or] age as it relates to employment, disability, or familial status as it relates to housing, *whether or not the presumption or assumption as to such characteristics is correct.*<sup>163</sup>

This provision, if added, would include even further protection for Missourians, as employers, landlords, or other entities would be unable to construct a defense that there could have been no discrimination due to some characteristic because the alleged victim does not possess that characteristic.<sup>164</sup> The passage of such a bill and subsequent amendment of the MHRA would have been but a minor change to the statute's text, yet it would have been a significant step in improving anti-discrimination protections in Missouri. Nevertheless, SB 653, like many bills that have come before it, failed to reach even a floor vote in the Senate.<sup>165</sup>

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159. S. 3186, 93d Gen. Assemb., Reg. Sess. (Ill. 2005).

160. See Appellant's Initial Brief, *supra* note 14, at 5.

161. S. 653, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

162. *Id.*

163. *Id.* (emphasis added).

164. *Id.*

165. See Bill Summary of S. 653: Bars Discrimination Based on Sexual Orientation or Gender Identity, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016),

Passing such an amendment, however, may not be so simple. The Missouri General Assembly has recently proposed bills that would restrict the rights of transgender Missourians.<sup>166</sup> Accordingly, a certain reluctance within the legislature to pass an amendment prohibiting gender identity-based discrimination may be presumed. Adopting language identical to the IHRA<sup>167</sup> may therefore be the surest and smoothest path to enacting significant change.

The structure and language of the IHRA should be carefully considered when amending the MHRA. As discussed above, the IHRA explicitly prohibits discrimination based on sexual orientation.<sup>168</sup> While it does not include gender identity in its list of prohibited discrimination bases, it includes gender identity in its definition of “sexual orientation.”<sup>169</sup> Transgender Illinoisans are therefore protected from discrimination under the IHRA.<sup>170</sup> This is the format that Missouri should follow if it wants to create a realistic amendment to protect LGBT Missourians from discrimination.

First, Missouri should amend the MHRA’s relevant provisions<sup>171</sup> to include a prohibition on discrimination based on sexual orientation. The text in each section should prohibit discrimination because of “race, color, religion, national origin, sex, *sexual orientation*, ancestry, or age, as it relates to” employment, housing, or public accommodations access.

Next, the Missouri General Assembly must include an explicit definition of “sexual orientation” in the MHRA’s general definitions section.<sup>172</sup> Missouri should adopt the following definition of “sexual orientation”: “an individual’s actual or perceived<sup>173</sup> heterosexuality, homosexuality, or bisexuality,

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[http://www.senate.mo.gov/16info/BTS\\_Web/Bill.aspx?SessionType=R&BillID=22246562](http://www.senate.mo.gov/16info/BTS_Web/Bill.aspx?SessionType=R&BillID=22246562).

166. See H.R. 1624, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016); S. 720, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (both propose restricting bathroom access based on biological sex).

167. 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2016).

168. *Id.* The Act prohibits “discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.” *Id.*

169. *Id.* § 1-103(O-1). “‘Sexual orientation’ means actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person’s designated sex at birth. ‘Sexual orientation’ does not include a physical or sexual attraction to a minor by an adult.” *Id.*

170. *Id.*

171. MO. REV. STAT. §§ 213.040, 213.055, 213.065 (2000).

172. *Id.* § 213.010.

173. This language tracks the language found in the IHRA and covers the same ground as the proposed provision in SB 653 regarding the presumption or assumption that an individual possesses a certain characteristic. See 775 ILL. COMP. STAT. ANN. 5/1-103(O-1); S. 653, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016).

or an individual's gender identity, regardless of whether or not that identity is the same or different from the individual's sex assigned at birth."<sup>174</sup> With these amendments, Missourians will be able to assert claims of discrimination based upon gender identity or sexual preference, expanding the scope of anti-discrimination protections across the state.

## VI. CONCLUSION

Currently, 160,000 Missourians can legally be discriminated against because of their LGBT status.<sup>175</sup> Missouri should not, and cannot, continue to sit idly by as state after state elects to make social progress in their anti-discrimination laws. Incorporating the above language into the MHRA would be the smoothest path to ensure that all Missourians are protected from discrimination. Missouri cannot continue playing catch-up to progress; it is time for the Missouri General Assembly to protect its constituents and ensure that all Missourians, including LGBT Missourians, are afforded the protections they deserve under the MHRA.

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174. This language is considerably similar to that found in the IHRA. § 1-103(O-1). Because the IHRA is a complete, well-written statute that protects LGBT Illinoisans from discrimination, this Note proposes that Missouri adopt language similar to, or even identical to, the IHRA.

175. Mallory et al., *supra* note 1, at 1.

