

Winter 2019

## Wielding the Constitutional Sword: Lampley's Expansion on Evidencing Sexual Discrimination

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### Recommended Citation

Jane Rose, *Wielding the Constitutional Sword: Lampley's Expansion on Evidencing Sexual Discrimination*, 84 MO. L. REV. (2019)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol84/iss1/12>

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## NOTE

# Wielding the Constitutional Sword: *Lampley*'s Expansion on Evidencing Sexual Discrimination

*Lampley v. Mo. Comm'n on Human Rights*, No. SC 96828, 2019 WL 925557  
(Mo. Feb. 26, 2019) (en banc)

*Jane Rose*\*

### I. INTRODUCTION

“The constitutional sword necessarily has two edges: Fair and equal treatment for women means fair and equal treatment for members of [all genders].”  
– Ruth Bader Ginsburg, 1972<sup>1</sup>

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1. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Discrimination Law*, 85 N.Y.U L. REV. 83, (2010) (quoting Brief for Petitioner-Appellant at 20, *Moritz v. Comm'r*, 469 F.2d 466 (10th Cir. 1971) (No. 71-1127) (on file with the Library of Congress, Manuscript Division, Ruth Bader Ginsburg Papers, Container 5, Folder: *Moritz v. Comm'r* [1971])).

In 2013, fourth-wave feminism<sup>2</sup> crashed through the United States and pushed for the political, social, and economic equality of all genders.<sup>3</sup> As it has moved predominately through social media, it focuses on intersectional identities<sup>4</sup> that create social inequalities.<sup>5</sup> Promoting intersectional identities is not a novel movement, but this is the first time it has been at the forefront of the feminist movement. In the last decade, the United States legal system has made strides towards equality for the LGBTQ+ community, as gender and intersectional issues have been advanced through repeals of problematic policies and judicial interpretation of Title VII of the Civil Rights Act of 1964 (“Title VII”). Since 2010, “Don’t Ask, Don’t Tell” was repealed,<sup>6</sup> the Defense of Marriage Act was struck down,<sup>7</sup> the ban on same-sex marriage was deemed

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2. The modern feminist movement is typically divided in four different phases or “waves.” Martha Rampton, *Four Waves of Feminism*, PAC. UNIV. OR. (Oct. 25, 2015), <https://www.pacificu.edu/about/media/four-waves-feminism>. The first wave occurred in the late nineteenth and early twentieth century, with a focus on women’s suffrage. *Id.* The second wave started in the 1960s and lasted into the 1990s, focusing on the civil rights movements and “growing self-consciousness of a variety of minority groups.” *Id.* In the mid-1990s, third wave feminism “tend[ed] to be global, multicultural, and it shun[ned] simple answers or artificial categories of identity, gender, and sexuality.” *Id.* However, most third-wavers pushed back against the first two waves by rejecting the term “feminism” and refusing to acknowledge a collective movement. *Id.* Instead, they identified individual struggles. *Id.* The fourth wave emerged to challenge systematic disadvantages to not only the genders but also to intersectional identities. *Id.* The fourth wave is the most inclusive in that it breaks the binary and calls for gender equality rather than focusing solely on the struggles of women. *Id.*

3. *Id.*; see Kira Cochrane, *The Fourth Wave of Feminism: Meet the Rebel Women*, GUARDIAN (Dec. 10, 2013), <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women>.

4. The term “intersectionality” was first coined by Kimberlé Crenshaw in 1989. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracial Politics*, 1989 U. CHI. LEGAL F. 139 (1989). In her work, Crenshaw argued against a “single-axis framework” in analyzing the experiences of those subjected to discrimination for multiple aspects of their identity – namely, Black women. *Id.* at 139–40. Crenshaw noted that focusing on a “single axis” – race or sex – left Black women’s interests in the margins of feminist and civil rights movements. *Id.* at 152. For the purpose of this Note, intersectionality is defined as “the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups.” *Intersectionality*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intersectionality> (last visited Mar. 12, 2019).

5. Cochrane, *supra* note 3.

6. See Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

7. See generally *United States v. Windsor*, 570 U.S. 744 (2013) (striking down the Defense of Marriage Act).

unconstitutional,<sup>8</sup> and the U.S. Courts of Appeal for the Second<sup>9</sup> and Seventh Circuits held Title VII prohibits workplace discrimination against LGBTQ+ employees.<sup>10</sup> Further, a number of states have passed legislation expressly forbidding discrimination on the basis of gender identity or sexual orientation.<sup>11</sup> As of 2017, several states have legally expanded their definition of gender by passing laws to recognize genders outside of the binary spectrum on birth certificates and driver's licenses.<sup>12</sup> This progression has come with backlash.<sup>13</sup>

Missouri has not been noticeably affected by the push for social reform, as evidenced by its repeated failure to adopt sexual orientation or gender identity as protected characteristics within the Missouri Human Rights Act ("MHRA").<sup>14</sup> In 2015, the Missouri Court of Appeals for the Western District

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8. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that marriage is a fundamental right of which same-sex couples may not be deprived).

9. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) ("In the context of Title VII, the statutory prohibition extends to all discrimination 'because of . . . sex' and sexual orientation discrimination is an actionable subset of sex discrimination").

10. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) ("[A] person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.").

11. *LGBT Rights Milestones Fast Facts*, CNN, <https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html> (last updated Feb. 18, 2019).

12. See *id.*

13. The Trump presidential administration has taken positions contrary to the progression of LGBTQ+ rights – in particular rights of transgender individuals. This includes banning transgender individuals "to serve in any capacity in the US Military." Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM EDT), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM EDT), <https://twitter.com/realDonaldTrump/status/890196164313833472>; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM EDT), <https://twitter.com/realDonaldTrump/status/890197095151546369>. Three federal judges have stunted the implementation of the transgender restriction. See *Government Returns to Supreme Court on Military Transgender Ban*, SCOTUSBLOG (Dec. 13, 2018), <http://www.scotusblog.com/2018/12/government-returns-to-supreme-court-on-military-transgender-ban/>. However, on January 22, 2019, the United States Supreme Court held that the Trump administration is allowed to continue on with its ban while policy challenges move through the court system. Adam Liptak, *Supreme Court Revives Transgender Ban for Military Service*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/us/politics/transgender-ban-military-supreme-court.html>. Additionally, the DOJ has adopted the interpretation that the Civil Rights Act does not cover transgender workers from employment discrimination in all "pending and future matters." *LGBT Rights Milestones Fast Facts*, *supra* note 11.

14. See MO. REV. STAT. § 213.010.6 (2016) (defining discrimination for the purposes of the MHRA but failing to include sexual orientation or gender identity as protected classes).

interpreted the MHRA not to include sexual orientation<sup>15</sup> and, in 2017, interpreted the MHRA not to include gender identity.<sup>16</sup> However, in early 2019, the Missouri Supreme Court, in reviewing a motion for summary judgment decision in *Lampley v. Missouri Commission on Human Rights*,<sup>17</sup> held sexual discrimination may be evidenced by sex stereotyping.<sup>18</sup> This decision may be the key to protecting gender identities and potentially even sexual orientation in Missouri.

The *Lampley* holding encourages Missouri to create more gender-inclusive workplaces by prohibiting discrimination against individuals for not conforming to expected gender roles and moving towards erasing the distinct expectations and boundaries between genders. By doing this, Missouri takes a step towards gender equality through gender inclusivity: There cannot be equality for one gender without advancing equality for all genders. Sex stereotyping may be an indirect way to shield discrimination in the absence of expressly prohibiting discrimination against gender identity and sexual orientation.

Part II of this Note begins by analyzing the surrounding circumstances in which the Missouri Supreme Court's landmark holding in *Lampley v. Missouri Commission on Human Rights* occurred. Next, this Note explains the relevant state and federal legal background to the court's decision in Part III before examining its reasoning in Part IV. This Note discusses the potential outcomes of recognizing sex stereotyping as a manifestation of sexual discrimination in Missouri, including the effect such recognition would have on the LGBTQ+ community, in Part V and concludes in Part VI.

## II. FACTS AND HOLDING

Harold Lampley ("Lampley"), an employee of the Missouri Department of Social Services Child Support Enforcement Division, filed two complaints with the Missouri Commission on Human Rights ("MCHR") – and with the Equal Employment Opportunity Commission ("EEOC") per their work share

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15. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482–83 (Mo. Ct. App. 2015) ("Missouri has not enacted legislation prohibiting discrimination against homosexuals by adding sexual orientation as a protected status in the [MHRA].").

16. *R.M.A. v. Blue Springs R-IV Sch. Dist.*, No. WD 80005, 2017 WL 3026757 (Mo. Ct. App. July 18, 2017) ("In enacting the MHRA, the General Assembly did not intend 'discrimination on the grounds of sex' to include the deprivation of a public accommodation . . . because a person is transitioning from female to male."), *rev'd on other grounds* No. SC 96683, 2019 WL925511 (Mo. Feb. 26, 2019) (en banc).

17. No. SC 96828, 2019 WL 925557 (Mo. 2019) (en banc).

18. *See id.* at \*6–7.

agreement<sup>19</sup> – against his employer in 2014.<sup>20</sup> Lampley alleged he was discriminated against on the basis of his sex<sup>21</sup> and that his employer violated sections 213.055(1)<sup>22</sup> and 213.070(2)<sup>23</sup> of the MHRA.<sup>24</sup> Lampley’s employer allegedly discriminated against him because Lampley’s comportment and appearance did not coincide with his manager’s and employer’s views of stereotypical masculinity.<sup>25</sup> Originally Lampley’s complaint provided no specific discriminatory conduct, but he later amended his charge.<sup>26</sup> Further, Lampley

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19. The MCHR and the EEOC have a work-share agreement to cooperate with each other in the claims filing process. Robert L. Ortals, Jr., *Missouri Supreme Court Allows Employees to Proceed with Discrimination Lawsuits Based on Untimely Filed Charges of Discrimination*, LITTEr (Sept. 5, 2013), <https://www.littler.com/missouri-supreme-court-allows-employees-proceed-discrimination-lawsuits-based-untimely-filed-charges>. The agency that the individual files the complaint with will retain the complaint for investigation but will also file the complaint with the other agency. *Fair Employment Practices Agencies and Dual Filing*, EEOC, <https://www.eeoc.gov/employees/feпа.cfm> (last visited Mar. 12, 2019) [hereinafter EEOC, *Dual Filing*]. Typically, these types of arrangements dictate each agency will abide by the findings of the investigating agency. See, e.g., Wilson Elser, *The Impact of Federal-State “Work-Sharing Agreements”*, LEXOLOGY (June 14, 2013), <https://www.lexology.com/library/detail.aspx?g=130c6649-afd3-4852-942c-fbaec8c4fb6a>.

20. *Lampley v. Mo. Comm’n on Human Rights*, No. WD 80288, 2017 WL 4779447, at \*1 (Mo. Ct. App. Oct. 24, 2017), *aff’d*, No. SC 96828, 2019 WL 925557 (Mo. Feb. 26, 2019) (en banc).

21. *Id.*

22. According to section 213.055 of the Missouri Revised Statutes,

It shall be an unlawful employment practice:

(1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:

(a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, national origin, sex, ancestry, age or disability;

(b) To limit, segregate, or classify his employees or his employment applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, national origin, sex, ancestry, age or disability [ . . . ]

MO. REV. STAT. § 213.055 (2016).

23. It is unlawful “[t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint.” MO. REV. STAT. § 213.072 (2016).

24. *Lampley*, 2017 WL 4779447, at \*1.

25. *Id.*

26. See *Lampley v. Mo. Comm’n on Human Rights*, No. SC 96828, 2019 WL 925557, at \*10–11 (Mo. Feb. 26, 2019) (en banc) (Wilson, J., concurring).

alleged retaliation because his employer severely underscored him on a performance evaluation after he filed his complaint.<sup>27</sup> Months later, Rene Frost (“Frost”), a co-worker of Lampley, filed discrimination charges against her employer under section 213.070(4),<sup>28</sup> alleging her employer retaliated against her because of her close relationship with Lampley.<sup>29</sup>

After an examination of the complaint, the MCHR ended its investigation into Lampley and Frost’s claims.<sup>30</sup> The MCHR refused to proceed further with an investigation because it believed the discrimination alleged was based on sexual orientation – not on the basis of sex – over which it does not have jurisdiction.<sup>31</sup> Lampley’s petition insisted the discrimination was based on his sex and not his sexual orientation.<sup>32</sup> Lampley filed his claim explicitly for discrimination on the basis of sex – a fact the court ignored.<sup>33</sup> The MCHR also closed Frost’s investigation because discrimination and retaliation against an employee due to her association with someone who is in the LGBTQ+ community is not prohibited by the MHRA.<sup>34</sup> Lampley and Frost both petitioned the court for an administrative review of the termination of the investigations and, alternatively, a mandamus for a right-to-sue letter.<sup>35</sup> The Honorable Patricia S. Joyce of the Circuit Court of Cole County presided over the petitions.<sup>36</sup> It was at this point Lampley and Frost’s claims were consolidated.<sup>37</sup> The MCHR and Lampley filed cross-motions for summary judgment.<sup>38</sup>

27. *Id.*

28. “It shall be an unlawful discriminatory practice for an employer, employment agency, labor organization, or place of public accommodation: . . . [t]o discriminate in any manner against any other person because of such person’s association with any person protected by this chapter.” MO. REV. STAT. § 213.070(4) (2016).

29. *Lampley*, 2017 WL 4779447, at \*1.

30. *See id.* This subsequently ended the EEOC’s involvement with the investigation as well. The MCHR and the EEOC have contracted a “work-sharing agreement,” which means that the organization that the individual files the complaint with will retain the complaint for processing but also files the charge with the other organization. EEOC, *Dual Filing*, *supra* note 19. It seems as though Lampley filed his complaint with the MCHR, which led the processing procedures and filed the complaint with the EEOC. *See Lampley*, 2017 WL 4779447, at \*1. When the MCHR ended its investigation, a charging party has fifteen days to appeal to the EEOC. EEOC, *Dual Filing*, *supra* note 19. There is no indication that Lampley appealed the MCHR’s decision to the EEOC.

31. *Lampley*, 2017 WL 4779447, at \*1.

32. *Id.*

33. *Id.*

34. Brief of Respondents at 4, *Lampley*, No. WD80288, 2017 WL 4779447 (Mo. Ct. App. Oct. 24, 2017), 2017 WL 2874293, at \*4.

35. *Lampley*, 2017 WL 4779447, at \*1.

36. *Id.*

37. Brief of Respondents, *supra* note 34, at 4.

38. Appellants’ Amended Brief Submitted by Petitioners/Appellants Harold Lampley and Rene Frost at 5, *Lampley v. Mo. Comm’n on Human Rights*, No. WD80288, 2017 WL 4779447 (Mo. Ct. App. Oct. 24, 2017), 2017 WL 1374156, at \*5 [hereinafter Appellants’ Amended Brief].

Lampley and Frost insisted their claims were valid sexual discrimination claims under a sex stereotyping theory.<sup>39</sup> Specifically, the employer's stereotypical perceptions led Lampley's employer to interact with and treat him differently than it would treat other employees who fit inside its stereotypical norms.<sup>40</sup> Lampley did not cite any specific conduct in the summary judgment appeal nor in his appellate brief that illustrated his or the employer's behavior.<sup>41</sup> Lampley acknowledged Missouri had not yet recognized sex stereotyping as a viable manifestation of sex discrimination but insisted Missouri should look to the federal system because the MHRA and Title VII have nearly identical language and the United States Supreme Court has found sex stereotyping as a valid basis for sex discrimination claims.<sup>42</sup>

The MCHR countered that the United States Supreme Court had never supported the assertion of sex stereotyping as evidence of sex-based discrimination, and it remained a minority view amongst federal courts.<sup>43</sup> The MCHR also argued the MHRA "is not merely a reiteration of Title VII" but rather is distinctly situated.<sup>44</sup> The MCHR concluded sex stereotyping would be used as a way to "bootstrap" sexual orientation claims into the MHRA's protection and explained it contradicts Missouri's legislative intent, as the MHRA is clear and unambiguous as to what it prohibits.<sup>45</sup>

The trial court ruled in favor of the MCHR and found the complaint alleged discrimination on the basis of sexual orientation, which is not prohibited under Missouri law.<sup>46</sup> However, on appeal, the Western District found Lampley's sexual orientation coincidental to the claim – not the basis of the discrimination – because nothing in his complaint suggested the complaint was for discrimination against Lampley on the basis of his sexual orientation.<sup>47</sup> Ultimately, it held sex stereotyping *is* a valid theory of sexual discrimination that can satisfy the fourth element of prima facie sex discrimination under Missouri law.<sup>48</sup> The court overturned the grant of summary judgment, remanded the case, and directed the trial court to issue right-to-sue letters.<sup>49</sup>

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39. *Id.* at 7.

40. *Lampley*, 2017 WL 4779447, at \*1.

41. *Id.*; see Appellants' Amended Brief, *supra* note 38, at 19–20.

42. Appellants' Amended Brief, *supra* note 38, at 8–11.

43. Brief of Respondents, *supra* note 34, at 32–36.

44. *Id.* at \*25–26.

45. *Id.* at \*26–27.

46. *Lampley v. Mo. Comm'n on Human Rights*, No. WD 80288, 2017 WL 4779447, at \*1 (Mo. Ct. App. Oct. 24, 2017), *aff'd*, No. SC 96828, 2019 WL 925557 (Mo. Feb. 26, 2019) (en banc).

47. *Id.* at \*2.

48. *Id.*

49. *Id.* at \*5.

Around six months after the Western District's opinion was released, the Missouri Supreme Court granted MCHR's motion for transfer.<sup>50</sup> Oral arguments commenced on April 25, 2018, but it was not until almost one year later that the Missouri Supreme Court handed down its opinion.<sup>51</sup> Ultimately, the Missouri Supreme Court reached the same conclusion as the Western District – reversing, remanding, and instructing the trial court that Lampley and Frost should be issued right-to-sue letters – but the court did not do so unified.<sup>52</sup> Four opinions were filed: a principal, a concurrence, a partial concurrence and partial dissent, and a dissent.<sup>53</sup> The principal reached the same conclusion as the Western District: Sex stereotyping may satisfy the fourth element of a *prima facie* case of sex discrimination.<sup>54</sup> However, the concurrence did not believe the analysis should reach that question because the ultimate facts were already sufficient to satisfy a sex discrimination claim.<sup>55</sup>

### III. LEGAL BACKGROUND

Sex stereotyping is not a new theory in discrimination law, although it is a fresh concept in Missouri precedent. Before discussing the history of sex discrimination and *Lampley*'s effect, it is important to establish relevant LGBTQ+ terminology to help frame the following discussion. This terminology framework is found in Section A. To better understand future effects of *Lampley*, Section B traces the history of sex-based discrimination, including the MHRA's sex-based discrimination elements and manifestations, and then analyzes federal precedent of sex stereotyping. The Note then shifts towards an LGBTQ+ focus by analyzing current protections for the LGBTQ+ community against discrimination in Section C, focusing on protections at both the federal and state levels. Finally, this Part concludes with a brief overview of the relationship between feminism and the LGBTQ+ community in Section D before transitioning to discuss *Lampley*'s promotion of feminist ideals by encouraging erasure of gender barriers in Part IV.

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50. *Lampley v. Mo. Comm'n on Human Rights*, No. SC 96828, 2019 WL 925557 (Mo. Feb. 26, 2019) (en banc); *Case Summaries for April 25, 2018*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=123145> (last visited Mar. 31, 2019).

51. *Id.* The Missouri Supreme Court also accepted a transfer of *R.M.A. v. Blue Springs R-IV Sch. Dist.*, No. SC 96683, 2019 WL 925511 (Mo. Feb. 26, 2019) (en banc) and even heard oral arguments on the same day as *Lampley*.

52. *See generally id.*

53. *Id.* at \*7.

54. *Id.* at \*6–7.

55. *Id.* at \*8 (Wilson, J., concurring).

### A. Terminology

Before discussing sex-based discrimination and the LGBTQ+<sup>56</sup> community, this Section provides a brief overview of relevant terms vital to understanding further discourse. These terms are by no means exclusive definitions but rather are short summaries of widely accepted definitions.

In modern colloquialism, sex and gender are often viewed as synonymous.<sup>57</sup> Even the United States Supreme Court has used the terms interchangeably.<sup>58</sup> These terms are related but distinct.<sup>59</sup> Sex is often described as a “biological category” of sex designations of male, female, or intersex<sup>60</sup> and based on a range of criteria.<sup>61</sup> Gender is societally imposed attitudes, feelings, and expectations of masculine and feminine roles. When an individual’s gender is “compatible” with society’s expectations, they<sup>62</sup> are considered “gender-normative.” Gender identity is an individual’s internal sense of their gender not

56. LGBTQ+ is used to denote a collection of sexual orientations and gender identities outside of the heterosexual/ gender normative realm. Anjali Sareen Nowakowski, *What Does The + In LGBTQ+ Stand For?*, ELITE DAILY (June 8, 2017), <https://www.elitedaily.com/life/culture/what-is-plus-in-lgbtq/1986910>. It stands for lesbian, gay, bisexual, transgender, and queer. ‘+’ is used to include all other identities whose acronym has not been expressly listed. *Id.* “[T]he extended acronym LGBTQ+ stands for Lesbian, Gay, Bisexual, Trans, Queer, Questioning, Intersex, Asexual, Pansexual, and Two-Spirit.” *LGBTQ+ Terminology*, FLA. CMTY. HEALTH WORKER COAL., <http://floridachw.org/wp-content/uploads/2018/10/lgbtq-terminology.pdf> (last visited Mar. 12, 2019).

57. See Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 L. & SEXUALITY 605, 612 (2004).

58. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (examining the constitutionality of using preemptory challenges to strike jurors based on gender). *But see id.* at 156–57 & n.1 (Scalia, J., dissenting) (“I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.”).

59. Skylar Davidson, *Gender Inequality: Nonbinary Transgender People in the Work Place 4* (2016) (unpublished M.A. thesis, University of Massachusetts Amherst), [https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1331&context=masters\\_theses\\_2](https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1331&context=masters_theses_2).

60. See Farrell, *supra* note 57, at 614. “Biologist Anne Fausto-Sterling has argued for the recognition of five sexes, the three ‘intermediate’ ones being drawn from the classification of persons with some mixture of male and female characteristics that we refer to as ‘intersexed.’” *Id.*

61. Davidson, *supra* note 59, at 4. Some of the factors include, but are not limited to, “chromosomes, hormones, and genitalia.” *Id.*

62. The author has made a conscious decision to utilize the third person singular neutral “they” instead of using gendered terms in this Note. To learn more about gender inclusive language, see *Gender-Inclusive Language*, THE WRITING CTR., <https://writingcenter.unc.edu/tips-and-tools/gender-inclusive-language/> (last visited Mar. 12,

visible to others,<sup>63</sup> while gender expression is the external manifestation of gender, including pronouns, clothing, and behaviors that society categorizes as more masculine or feminine.<sup>64</sup>

Like sex,<sup>65</sup> gender is often conceptualized by western societies as only having two categories, male and female; this is known as the gender binary.<sup>66</sup> There are many terms individuals who do not fall within the binary use to describe themselves – and each have distinct and separate meanings – but for the purpose of this Note, the term non-binary will be used, as it is one of the most common self-described terms.<sup>67</sup> Non-binary individuals have lived in the United States since the formation of the nation. Around the world, there are a number of cultures that recognize more genders than the binary.<sup>68</sup> However, it has not been until recently that some states have begun to legally recognize the rights of non-binary genders.<sup>69</sup> As of 2017, several states have legally expanded their definition of gender to recognize genders outside of the binary spectrum by passing laws to recognize non-binary genders on birth certificates and driver’s licenses.<sup>70</sup>

Non-binary gender identities tend to – but do not always – fall within the larger umbrella term of transgender, which refers to people whose gender identity does not correspond with the gender they were assigned at birth.<sup>71</sup> Often transgender individuals seek to align their gender expression – how they look – with their gender identity – who they really are – rather than the gender they

2019); *see also* Corinne Werder, *6 Easy Ways to be Gender Inclusive with Your Language*, GOMAG (Feb. 13, 2019), <http://gomag.com/article/6-easy-ways-gender-inclusive-language/>.

63. *Glossary of Terms – Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Mar. 12, 2019).

64. “External manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture.” *Id.*

65. Sex is often portrayed as a binary; however, many scientific scholars understand sex as a spectrum – not a binary – because various gene expressions, “chance events in development,” genetic variation, and other factors leave individuals outside of the binary categories. Claire Ainsworth, *Sex Redefined*, NATURE (Feb. 18, 2015), <https://www.nature.com/news/sex-redefined-1.16943#/spectrum>. It is estimated that as many as one in 100 individuals does not fit within the sex binary. *See id.* However, further discussion on this matter is beyond the scope of this Note.

66. “The idea that there are only two genders is sometimes called a ‘gender binary’ because binary means ‘having two parts’ (male and female).” NAT’L CTR. FOR TRANSGENDER EQUAL., UNDERSTANDING NON-BINARY PEOPLE: HOW TO BE RESPECTFUL AND SUPPORTIVE, [https://transequality.org/sites/default/files/docs/resources/Understanding-Non-Binary-July-2016\\_1.pdf](https://transequality.org/sites/default/files/docs/resources/Understanding-Non-Binary-July-2016_1.pdf) (last visited Mar. 13, 2019).

67. *Id.*

68. *See id.*

69. *LGBT Rights Milestones Fast Facts*, *supra* note 11.

70. *Id.*

71. *Glossary of Terms – Transgender*, *supra* note 63; *see also* Davidson, *supra* note 59, at 4.

were assigned at birth.<sup>72</sup> “Cisgender” is the term used to describe individuals whose gender identity matches their gender assigned at birth.<sup>73</sup> It is important to note “transgender” and “cisgender” are both adjectives – not nouns.

Gender identity is not indicative of a person’s sexual orientation. “Sexual orientation” is the “pattern of a person’s attraction to others.”<sup>74</sup> Both transgender individuals and cisgender individuals may identify as any sexual orientation.<sup>75</sup> Over time, lesbian women and gay men have been assumed to fall into certain stereotypes.<sup>76</sup> Lesbian women are often depicted and associated with masculine qualities,<sup>77</sup> while gay men are often depicted as more feminine.<sup>78</sup>

### B. Sex-Based Discrimination

Missourians are protected from employment discrimination at the state level by the MHRA and at the federal level by Title VII. The MHRA was codified in 1959 to create the MCHR and provisions to protect Missourians from discrimination.<sup>79</sup> The mission of the MCHR is to “develop, recommend, and implement ways to prevent and eliminate discrimination . . . through enforcement of the [MHRA].”<sup>80</sup> Originally, the MHRA only prohibited discrimination on the basis of race, but in 1978, an amendment to the MHRA prohibited sex-based discrimination at the state level.<sup>81</sup> During the lack of state coverage, Missourians were protected at the federal level by Title VII.<sup>82</sup>

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72. *Glossary of Terms – Transgender*, *supra* note 63.

73. Davidson, *supra* note 59, at 3.

74. *Id.* at 4.

75. *Id.*

76. Farrell, *supra* note 57, at 618.

77. More masculine gender identities/expression are often referred to as “butch.” Sam Killerman, *Comprehensive\* List of LGBTQ+ Vocabulary Definitions*, ITS PRONOUNCED METRO SEXUAL (Jan. 7, 2013), <https://www.itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/#> (last updated Mar. 13, 2019).

78. A more feminine gender expression/identity is also known as “femme.” *Id.*

79. Ellen Henrion, Note, *What’s Missing? Addressing the Inadequate LGBT Protections in the Missouri Human Rights Act*, 81 MO. L. REV. 1173, 1176 (2016).

80. *About the Human Rights Commission*, DEP’T LABOR & INDUS. RELATIONS, <https://labor.mo.gov/MOHUMANRIGHTS> (last visited Mar. 12, 2019).

81. MO. REV. STAT. § 213.010 (1959); *id.* § 213.010 (1978).

82. Seven years later, the United States Congress enacted the Civil Rights Acts of 1964, which included Title VII, a provision that expanded on the guarantees in the Fourteenth Amendment to provide protection against employment discrimination “because of . . . race, color, religion, sex, or national origin.” 42 U.S.C. § 2000-e (2012).

Currently, Missouri courts generally find that the MHRA and Title VII are “coextensive, but not identical,” despite being created fairly contemporaneously and having similar – if not identical – language.<sup>83</sup> In spite of this, Missouri courts utilize Title VII cases to interpret analogous MHRA statutes; however, if the court finds the language of the MHRA statute clear and unambiguous, the court need not rely on contrary Title VII case law.<sup>84</sup>

This Section first analyzes sex-based discrimination in Missouri under the MHRA. Because of the non-existent precedent of sex stereotyping in sex discrimination cases in Missouri prior to *Lampley*, this Section then focuses on the sex stereotyping precedent in federal cases.

### 1. Missouri

Missouri recognizes several actions as manifestations of sex-based discrimination, including pregnancy-based discrimination, compensation-based discrimination, and sexual harassment.<sup>85</sup> Missouri courts have found that all of these manifestations can satisfy the elements of sex-based discrimination, which are “1) the employee belonged to a protected class; 2) . . . was qualified to perform his or her job; 3) . . . suffered an adverse employment action; and 4) . . . was treated differently from similarly situated member of the opposite sex.”<sup>86</sup> The fourth element may also be satisfied if an employee provides evidence that can give rise to an inference of unlawful discrimination.<sup>87</sup> Once the elements of prima facie sex-based discrimination have been satisfied, the burden shifts to the employer “to articulate a legitimate, non-discriminatory reason for [its] action.”<sup>88</sup>

Before *Lampley*, stereotyping had never been used successfully in Missouri sex-based discrimination cases.<sup>89</sup> However, stereotyping has been held as a permissible way to evidence age discrimination by the Missouri Court of

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83. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 485 (Mo. Ct. App. 2015) (quoting *Brady v. Curators of Univ. of Mo.*, 213 S.W.3d 101, 112 (Mo. Ct. App. 2006)).

84. Brief of Respondents, *supra* note 34, at 26.

85. *Sex Discrimination & Harassment*, DEP’T LABOR & INDUS. RELATIONS, <https://labor.mo.gov/mohumanrights/Discrimination/sex> (last visited Mar. 12, 2019).

86. *Lampley v. Mo. Comm’n on Human Rights*, No. WD 80288, 2017 WL 4779447, at \*3 (Mo. Ct. App. Oct. 24, 2017), *aff’d*, No. SC 96828, 2019 WL 925557 (Mo. Feb. 26, 2019) (en banc).

87. *Id.* (quoting *Buchheit, Inc. v. Mo. Comm’n on Human Rights*, 215 S.W.3d 268, 277 (Mo. Ct. App. 2007)).

88. *Buchheit, Inc.*, 215 S.W.3d at 277 (quoting *Valle Ambulance Dist. v. Mo. Comm’n on Human Rights*, 748 S.W.3d 710, 711 (Mo. Ct. App. 1988)).

89. *See Midstate Oil Co. v. Mo. Comm’n on Human Rights*, 679 S.W.2d 842, 847 (Mo. 1984) (en banc). “Neither the statute setting forth our scope of review . . . nor our case law require us to defer to the Commission’s gratuitous commentary regarding what is deemed to be respondent’s ‘obsolete and stereotyped ideas.’” *Id.*

Appeals for the Western District in *Ferguson v. Curators of Lincoln University*.<sup>90</sup>

## 2. Stereotyping as Evidence of Discrimination in Federal Court Precedent

As there is no use of sex stereotyping in Missouri, this Note traces the application of sex stereotyping claims in sex discrimination cases in the federal sphere. First, this Note examines early uses of sex stereotyping in equal protection claims before discussing the landmark case *Price Waterhouse v. Hopkins* that brought stereotyping to employment discrimination at the federal level.<sup>91</sup> This Section concludes with an overview of *Price Waterhouse*'s legacy and its effect on the LGBTQ+ community.

### a. Sex Stereotyping in Equal Protection Claims

The sex stereotyping theory in the United States did not appear overnight but rather was the culmination of several efforts to bring gender equality to the legal system.<sup>92</sup> The Honorable Ruth Bader Ginsburg and other legal feminists<sup>93</sup> began challenging the constitutionality of sex-based discrimination in the early 1970s.<sup>94</sup> Before then, the United States Supreme Court narrowly interpreted discrimination and typically found unlawful discrimination only in the context of race.<sup>95</sup>

Before she was a Justice, Ginsburg took up the sex stereotyping principle in the 1970s when she first challenged the constitutionality of sex-based discrimination in *Moritz v. Commissioner of Internal Revenue*.<sup>96</sup> Controversially, Ginsburg used a male plaintiff to push feminist ideals.<sup>97</sup> This was not a blunder but rather a strategic move to expand sex discrimination by creating a new approach to promote equal protection.<sup>98</sup> She articulated in the *Moritz* brief that “the constitutional sword necessarily has two edges. Fair and equal treatment

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90. 498 S.W.3d 481, 492 (Mo. Ct. App. 2016) (holding that when an employer acted on an age-based stereotype in making its decision, it is enough for a jury to infer that the employer acted on the basis of the employee's age).

91. 490 U.S. 228 (1989).

92. See Franklin, *supra* note 1, at 120.

93. One of the notable feminists is Pauli Murray, the pioneer who first used anti-stereotyping arguments to develop an equal protection approach to sex discrimination. *Id.* at 119. She began asserting in the mid-1960s that not all sex-based action necessarily created a constitutional issue – just when it “perpetuated stereotypes that forced the sexes into separate spheres.” *Id.* at 120.

94. *Id.* at 119.

95. *Id.*

96. 469 F.2d 466 (10th Cir. 1971); Franklin, *supra* note 1, at 121.

97. Franklin, *supra* note 1, at 91.

98. *Id.* at 92.

for women means fair and equal treatment for members of [all genders].”<sup>99</sup> Justice Ginsburg departed from more radical feminists using this theory, as her goal was not to “annihilate sex roles” nor “eliminat[e] . . . sex distinction itself” but rather to cease the enforcement of those roles by the states.<sup>100</sup>

By the late 1970s, the sex stereotyping theory had firm roots in the Court’s understanding and interpretation of equal protection.<sup>101</sup> However, the feminist movement was in retreat as the Equal Rights Amendment (“ERA”) was under attack.<sup>102</sup> Those who opposed the ERA asserted the sex stereotyping theory would be used to find sexual orientation as a manifestation of sex discrimination, which would destroy traditional sex and family roles.<sup>103</sup> The ERA opposers and others at the time believed it would be a travesty to grant equality to the LGBTQ+ community.<sup>104</sup>

Rather than defending the LGBTQ+ community and push for equality for all, the majority of the feminist movement abandoned the sex stereotyping theory and denied equality or protection to the LGBTQ+ community.<sup>105</sup> This internal conflict between the women’s movement, plus the enclosing opposition to gender equality, contributed to the sex stereotyping movement fizzling out.<sup>106</sup> The theory expanded no further than challenging the male bread winning model.<sup>107</sup> However, in 1989, the sex stereotyping model transcended to employment law and Title VII with *Price Waterhouse v. Hopkins*.<sup>108</sup>

#### b. *Price Waterhouse v. Hopkins*

The sex stereotyping method to prove sex-based discrimination seeped into Title VII in the 1989 United States Supreme Court decision of *Price Waterhouse v. Hopkins*.<sup>109</sup> The plaintiff in the case was Ann Hopkins, an employee at a nationwide professional accounting partnership, Price Waterhouse.<sup>110</sup> Ann worked in the Price Waterhouse Office of Government Services in Washington, D.C., for five years before the partners in her office proposed her as a candidate for partnership to the entirety of Price Waterhouse partners.<sup>111</sup> At the time, there were 662 partners, only seven of whom were

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99. *Id.*

100. Franklin, *supra* note 1, at 121.

101. *Id.* at 138.

102. *Id.* at 139–40.

103. *Id.* at 140.

104. *See id.*

105. *Id.*

106. *See id.* at 141.

107. *Id.* at 141–42.

108. 490 U.S. 228 (1989), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized by* *Burrage v. United States*, 571 U.S. 204 (2014).

109. *Id.*

110. *Id.* at 222–23.

111. *Id.* at 233.

women.<sup>112</sup> There were eighty-eight candidates, and Ann was the only woman.<sup>113</sup> The partners in Ann's office prepared a statement supporting her candidacy and praising her performance, accomplishments, and character.<sup>114</sup>

During the proposal process, the partners were allowed to comment on each candidate, and those comments were then submitted to the firm's Admissions Committee.<sup>115</sup> The Admissions Committee then made a recommendation to accept the candidate for partnership, place the candidate on hold, or deny the candidate the partnership.<sup>116</sup> During Ann's review, thirteen partners supported her bid, three recommended a hold, and eight stated they did not know enough to make an opinion.<sup>117</sup> Despite her above-average performance, eight partners recommended a denial of partnership.<sup>118</sup> Ultimately, the Admissions Committee recommended that Ann's candidacy for partnership be placed on hold.<sup>119</sup>

There were obvious signs that some of the partners reacted poorly to Ann's personality because she was a woman: Had she been a man, she might have been praised for similar behavior.<sup>120</sup> The reviews called her "macho"; mentioned she "overcompensated for being a woman"; advised her she needed "a course at charm school"; criticized her because she used profanities, which was uncouth "because it's a lady using foul language"; and more.<sup>121</sup> When Ann asked why she was placed on hold, the Policy Board's representative told her that in order to improve her chances at partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."<sup>122</sup> Despite being called "an outstanding professional" with a "strong character, independence and integrity," Ann was faulted for not fitting a stereotype of how she should behave.<sup>123</sup> Ann then brought suit for discrimination on the basis of sex.<sup>124</sup>

At the trial court level, the court held Price Waterhouse had unlawfully discriminated against Ann on the basis of her sex "by consciously giving credence and effect to partners' comments that resulted from sex stereotyping."<sup>125</sup> The court of appeals affirmed this conclusion.<sup>126</sup> The United States Supreme Court granted certiorari.<sup>127</sup>

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112. *Id.*

113. *Id.*

114. *Id.* at 233–34.

115. *Id.* at 232.

116. *Id.*

117. *Id.* at 233.

118. *Id.*

119. *Id.*

120. *Id.* at 235.

121. *Id.*

122. *Id.*

123. *Id.* at 234–35.

124. *Id.* at 231–32.

125. *Id.* at 237.

126. *Id.*

127. *Id.* at 232.

In evaluating the claim, the Court used the statutory language of Title VII to determine that it was Congress' intent that "gender must be irrelevant to employment decisions."<sup>128</sup> Later, it showcased that employers acting on a sex stereotyping belief have in fact acted on the basis of the individual's gender.<sup>129</sup> To succeed in a sex discrimination claim, the plaintiff must prove the employer relied on gender while making a decision.<sup>130</sup> Showing stereotypical remarks alone are not enough; rather, the plaintiff must show gender played a part in the action.<sup>131</sup> Ann demonstrated some of the evaluations from the firm's partners were made based on sex stereotyping.<sup>132</sup> Because there was evidence the firm relied on the comments in those evaluations to make its decision, it could be used to illustrate it played a motivating part in an employment decision.<sup>133</sup> Thus, it could be used to show unlawful discrimination on the basis of sex.<sup>134</sup> The Court held stereotyping on the basis of sex is sex discrimination.<sup>135</sup>

c. *Post-Price Waterhouse v. Hopkins*

*Price Waterhouse's* holding expanded the accepted manifestations to prove unlawful Title VII sex discrimination to include sex stereotyping. However, it did not gain traction quickly. A decade after *Price Waterhouse*, the United States Supreme Court once again expanded sex discrimination in *Oncale v. Sundowner Offshore Services*<sup>136</sup> and found that same-sex harassment is sex discrimination under Title VII.<sup>137</sup> Justice Antonin G. Scalia, who wrote the majority opinion, noted,

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions *often go beyond the principal evil* to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of *any kind* that meets the statutory requirements.<sup>138</sup>

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128. *Id.* at 240.

129. *Id.* at 250.

130. *Id.* at 251.

131. *Id.*

132. *Id.* at 256.

133. *Id.*

134. *Id.*

135. *Id.*

136. 523 U.S. 75 (1998).

137. *Id.* at 82.

138. *Id.* at 79–80 (emphasis added).

Justice Scalia's expansion coupled with the sex stereotyping theory kicked sex discrimination cases into action. Since the turn of the millennium, multiple major cases have advanced LGBTQ+ rights throughout the federal circuit courts.

Only a year after *Oncale*, the U.S. Court of Appeals for the Ninth Circuit became the first circuit court to rule that Title VII extended to gender identity discrimination through a sex stereotyping theory in *Schwenk v. Hartford*<sup>139</sup> and that any precedent holding otherwise was overruled by *Price Waterhouse v. Hopkins*.<sup>140</sup> In 2000, the U.S. Court of Appeals for the First Circuit, in *Rosa v. Park West Bank & Trust Co.*, found that a transgender woman who was denied a credit application because the establishment acted upon the belief Rosa's attire did not match what the establishment thought her gender should be to have a valid claim under the Equal Credit Opportunity Act by citing Title VII case law.<sup>141</sup>

The U.S. Court of Appeals for the Sixth Circuit recognized gender identity may be protected by Title VII in *Smith v. City of Salem* in 2004, as Title VII prohibits discrimination against a transgender individual based on stereotyping.<sup>142</sup> Within the next decade, the U.S. Court of Appeals for the Eleventh Circuit followed suit in *Glenn v. Brumbly*<sup>143</sup> and affirmed its position that sex discrimination under Title VII "includes discrimination against a transgender person for gender nonconformity" in *Chavez v. Credit Nation Auto Sales*.<sup>144</sup> As of April 2019, discrimination based on gender identity has only been protected from sex-based discrimination under Title VII by failing to conform to gender stereotypes.

Since 2013, judicial recognition of discrimination on the basis of sexual orientation as a manifestation of sex-based discrimination has expanded significantly. In 2014, the U.S. District Court for the District of Columbia Circuit found that Title VII does not explicitly protect discrimination on the basis of sexual orientation but that a claim could be brought with a sex stereotyping theory under a sex-based discrimination claim because the plaintiff's sexual orientation did not conform to stereotypical gender roles.<sup>145</sup> In 2017, the U.S. Court of Appeals for the Second Circuit found in *Christiansen v. Omnicom Group, Inc.* that "gay, lesbian, and bisexual individuals do not have less protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals" and allowed a gay man to utilize a sex stereotyping theory in a sex discrimination claim.<sup>146</sup> Also in 2017, the U.S.

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139. 204 F.3d 1187, 1202 (9th Cir. 2000).

140. *Id.* at 1201–02.

141. 214 F.3d 213, 215–16 (1st Cir. 2000).

142. 378 F.3d 566, 575 (6th Cir. 2004).

143. 663 F.3d 1312 (11th Cir. 2011).

144. *Id.* at 1316–17; *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 884 (11th Cir. 2016) (citation omitted).

145. *See Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014).

146. 852 F.3d 195, 200–01 (2d. Cir. 2017) (alterations in original).

Court of Appeals for the Seventh Circuit in *Hively v. Ivy-Tech Community College of Indiana*<sup>147</sup> and the Second Circuit in *Zarda v. Altitude Express Inc.*<sup>148</sup> each held that discrimination on the basis of sexual orientation is a form of sex discrimination. The rationale is summarized best by *Zarda*, which found any non-heterosexual orientation “represents the ultimate case of failure to conform to gender stereotypes.”<sup>149</sup>

*Hively* and *Zarda* created a circuit split with the Eleventh Circuit’s decision in *Evans v. Georgia Regional*, which held “[d]ischarge for homosexuality is not prohibited by Title VII” in early 2017.<sup>150</sup> The United States Supreme Court has denied certiorari in *Evans*, while *Hively* and *Zarda* have not petitioned the Court for certiorari.<sup>151</sup>

### C. LGBTQ+ Discrimination Protections in Place

Both federal and state governments have had neither a protective nor positive relationship with the LGBTQ+ community. Rather, the government has often persecuted individuals for belonging to the LGBTQ+ community. From its inception, the federal government stigmatized the existence of LGBTQ+ individuals and relationships.<sup>152</sup> State governments have been equally, if not more, heinous, going so far as to criminalize same-sex sexual acts and disparage LGBTQ+ relationships.<sup>153</sup> Many states explicitly prohibited marriage between individuals of the same sex, which placed same-sex relationships on a lower tier than heterosexual relationships.<sup>154</sup> Out of all of the three branches of the federal government, the judiciary has progressed LGBTQ+ rights the most through its interpretation of Title VII, especially in the early twenty-first century.<sup>155</sup>

There is a range of protection for LGBTQ+ individuals at the federal and state levels. This Section looks at current federal enactments and laws that protect LGBTQ+ individuals from discrimination before analyzing Missouri’s enacted protections. Federal protections are examined first because there has

147. 853 F.3d 339 (7th Cir. 2017).

148. 883 F.3d 100 (2d Cir. 2018).

149. *Id.* at 121.

150. 850 F.3d 1248, 1255 (11th Cir. 2017).

151. See Julie Moreu, *Federal Court Ruling Hailed ‘Huge Victory’ for Gay Workers*, NBC NEWS (Feb. 27, 2018), <https://www.nbcnews.com/feature/nbc-out/federal-court-ruling-hailed-huge-victory-gay-workers-n851681>.

152. For example, President Dwight D. Eisenhower issued an executive order banning LGBTQ+ individuals from working in the federal government because they were a security risk. *LGBT Rights Milestones Fast Facts*, *supra* note 11. President Clinton signed “Don’t Ask, Don’t Tell,” the military policy directive that prohibited openly LGBTQ+ members from serving in the military, and the Defense of Marriage Act, which excluded same-sex couples from marriage before any state prohibited it. *Id.*

153. *Id.*

154. See *id.*

155. See *id.*

been action by the United States Supreme Court that invalidated some of Missouri's LGBTQ+ laws.

### 1. Federal Protections

At the federal level, both the legislative and executive branches have made little to no progress in protecting the LGBTQ+ community. The Equality Act of 1974,<sup>156</sup> the first sexual orientation rights bill to address discrimination based on sexual orientation, and its later progenies, the Employment Non-Discrimination Act<sup>157</sup> and the Equality Act,<sup>158</sup> have all been unsuccessful. As of April 2019, no federally-enacted law explicitly prohibits discrimination on the basis of gender identity or sexual orientation.

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156. H.R. 14752, 93d Cong. (1974). This bill, known as the Equality Act of 1974, made it to the Judiciary Committee but ultimately was never brought up for consideration. See Catherine Y. Kim, *Presidential Legitimacy Through the Anti-Discrimination Lens*, 91 CHI.-KENT L. REV. 207, 213 (2016). It did not include protections for transgender individuals. See *id.* Several other similar bills were introduced but none succeeded. See *id.*; Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>.

157. The Employment Non-Discrimination Act ("ENDA") was first introduced in 1994 and had a limited scope to protect individuals from discrimination, focusing solely on employment discrimination. Hunt, *supra* note 156. ENDA was repeatedly reintroduced at almost every congressional session from 1994 until 2015 but never came up for a Senate vote after 1996. Dana Beyer, *EDNA (Employment Non-Discrimination Act) Redux: Its History and Importance for All of Us*, HUFFINGTON POST (May 1, 2013), [https://www.huffingtonpost.com/dana-beyer/employment-non-discrimination-act-transgender\\_b\\_3186793.html](https://www.huffingtonpost.com/dana-beyer/employment-non-discrimination-act-transgender_b_3186793.html). It first started out by providing protection from discrimination on the basis of sexual orientation, but in 2007, it expanded to include gender identity as well. Hunt, *supra* note 156.

158. In 2017, the Equality Act replaced ENDA. *The Equality Act*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/the-equality-act> (last visited Mar. 12, 2019). Its introduction widened the scope to prohibit all discrimination – not just employment – on the basis of sexual orientation or gender identity. *Id.* If passed, the Equality Act will amend the Civil Rights Act of 1964 and other civil rights laws by adding sexual orientation and gender identity as protected characteristics of sex. *Id.* The bill not only seeks to add gender identity and sexual orientation to its definition of sex but also includes "sex stereotype." *Id.* Despite skepticism, the Equality Act has the best legislative chance so far as it has the greatest total numbers of co-sponsors of any other equality act. See *id.*

The executive branch has fared a little better over the years, waning back and forth on executive orders,<sup>159</sup> EEOC policies,<sup>160</sup> and Department of Justice (“DOJ”) policies<sup>161</sup> that provided various levels of protection against discrimination. There is currently discord in the executive branch in this area, as various policies are at odds.<sup>162</sup>

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159. Presidents Bill Clinton and Barrack Obama passed executive acts to provide some protection for federal employees. President Clinton amended Executive Order 11478 to prohibit discrimination on the basis of sexual orientation in the federal civilian work force in 1998. *Statement by the President*, OFF. OF PRESS SEC’Y (May 28, 1998), <https://clintonwhitehouse6.archives.gov/1998/05/1998-05-28-statement-on-amendment-to-eeo-executive-order.html>. President Clinton was explicit that this did not grant the right to proceed before the EEOC. *Id.* In 2014, President Barack Obama issued Executive Order 13672 to amend 11478 to also prohibit discrimination on the basis of gender identity. Exec. Order No. 13672, 79 C.F.R. 42791 (2014).

160. Courts are not bound by the EEOC’s recognitions, and the EEOC cannot force a private employer to stop discrimination; however, in cases of discrimination by the federal government to federal employees, the EEOC can issue legally binding decisions. The Phoenix, *The Implications of Macy v. Holder, SUSAN’S PLACE TRANSGENDER RES.* (Mar. 3, 2015), <https://www.susans.org/2015/03/03/the-meaning-of-macy-v-holder/>.

161. During the Obama administration, then-Attorney General Eric Holder announced that the DOJ would interpret “sex” to include gender identity, expressly including transgender status, under prohibited discrimination under Title VII. Eric Holder, *Attorney General Holder Directs Department to Include Gender Identity Under Sex Discrimination Employment Claims*, U.S. DEP’T OF JUSTICE (Dec. 18, 2014) <https://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination>. This was undone by the Trump administration’s former Attorney General Jeff Sessions, who sent out a memo stating that “Title VII does not prohibit discrimination based on gender identity per se” and that the DOJ would no longer interpret Title VII as such. Memorandum from the Attorney General, to United States Attorneys Heads of Department Components (Oct. 4, 2017) (*italics omitted*), <https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf>. The memo was released the same week that President Trump tweeted that transgender individuals would no longer be able to serve in the U.S. military. *See* Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55AM EST), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM EST), <https://twitter.com/realDonaldTrump/status/890196164313833472>; Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:08 AM EST), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

162. The DOJ under President Donald Trump’s administration has been in conflict with the EEOC regarding sexual orientation as discrimination on the basis of sex. The DOJ filed an amicus brief in *Zarda v. Altitude Express Inc.*, arguing that discrimination on the basis of sexual orientation is not discrimination on the basis of sex under Title VII. *See* Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, 2017 WL 3277292 (2d Cir. 2017). This brief’s arguments directly conflicted with arguments in the EEOC’s amicus brief. *See* Alison Frankel, *2nd Circuit Demolishes Key DOJ Argument Against Workplace Protection for Gays*, REUTERS (Feb. 26, 2018),

Similar to the legislative and executive branches, judicial interpretations have varied on accepting sexual orientation and gender identity within Title VII's protection. Despite the limbo, there has been a steady stream of progress in promoting LGBTQ+ rights. In 2003, the United States Supreme Court invalidated state laws criminalizing same-sex sexual conduct in *Lawrence v. Texas*.<sup>163</sup> The Court noted that although individuals were not often – if ever – prosecuted under these laws, the laws still had a negative effect on the LGBTQ+ community: “When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and private sphere.”<sup>164</sup>

Less than two decades after decriminalizing same-sex sex, the United States Supreme Court once again progressed the nation forward when it held in *Obergefell v. Hodges*<sup>165</sup> that same-sex couples are entitled to the right to marry.<sup>166</sup> Subsequently, any state law holding otherwise is invalid. The Court also considered that by *not* recognizing same-sex couples, the law created a hierarchy of relationships, essentially creating a stigma that same-sex couples are lesser than their heterosexual counterparts, which is impermissible.<sup>167</sup> Further, as mentioned in Part III, several circuits are on the same wavelength and have prohibited discrimination on the basis of sexual orientation and gender identity using a sex stereotyping theory.<sup>168</sup>

Notwithstanding the ground-breaking progression towards LGBTQ+ equality by the judiciary, the federal and state legislatures have not kept up. After criminalizing LGBTQ+ relations for thirty plus years, Congress still declines to put any protective measures in place to counteract years of criminalized status. Congress has also vehemently refused to protect the LGBTQ+ community from the discrimination it has helped foster through its stigmatization of LGBTQ+ individuals and relationships. As of 2019, the executive branch is no ally to the LGBTQ+ community;<sup>169</sup> however, the judicial branch is moving past the DOJ's lack of recognition, and courts are implementing protections from discrimination.<sup>170</sup> While the progress has been slow, both the legislature and the executive branch need to enact comprehensive policies and

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<https://www.reuters.com/article/legal-us-otc-titlevii/2nd-circuit-demolishes-key-doj-argument-against-workplace-protection-for-gays-idUSKCN1GA2OY>.

163. 539 U.S. 558 (2003).

164. *Id.* at 575.

165. 135 S. Ct. 2584 (2015).

166. *Id.* at 2608.

167. *Id.* at 2590.

168. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (“We now conclude that sexual orientation is motivated, at least in part, by sex and is thus a subset of sex discrimination.”); *Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (“We hold . . . that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes.”).

169. *See supra* notes 13, 161–62.

170. *See LGBT Rights Milestones Fast Facts*, *supra* note 11.

reforms to provide protection to the LGBTQ+ community. Currently, the judiciary is the best branch to continue promoting LGBTQ+ rights in light of the political strife in the legislative and executive branches.

## 2. Missouri Protections

There is currently no express protection at the state level for any of the 160,000+ self-identifying LGBTQ+ Missourians from employment discrimination – or any discrimination – on the basis of their actual or perceived sexual orientation or gender identity.<sup>171</sup> In this gap, Missouri municipalities have stepped up to the plate. As of 2013, eighteen municipalities have enacted ordinances prohibiting discrimination based on gender identity or sexual orientation.<sup>172</sup> These municipalities, located within Columbia, Kansas City, and St. Louis, only account for twenty-seven percent of the state’s workforce<sup>173</sup> and do not provide coverage to as many individuals as a state law would provide.<sup>174</sup>

Protective bills have been introduced in both the House of Representatives and the Senate in Missouri in every session since 2001, but the legislature has failed to capitalize on multiple attempts to include the LGBTQ+ community expressly within the MHRA.<sup>175</sup> The most promising piece of legislation introduced is the Missouri Non-Discrimination Act (“MONA”), which was first introduced in 1998.<sup>176</sup> In 2013, MONA passed the Senate with bipartisan support but died in the House because the representatives refused to take it up for a vote.<sup>177</sup> Once again, in 2016, similar House and Senate bills were introduced, proposing additions to include gender identity and sexual orientation protections to the MHRA, but they ultimately failed.<sup>178</sup>

The lack of comprehensive state-level protections is one of the reasons why Missouri’s capital, Jefferson City, received a zero out of one-hundred in the Municipality Equality Index compiled by the Human Rights Campaign in

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171. *Missouri’s Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality\\_maps/profile\\_state/MO](http://www.lgbtmap.org/equality_maps/profile_state/MO) (last visited Mar. 12, 2019); *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws/employment](http://www.lgbtmap.org/equality-maps/non_discrimination_laws/employment) (last visited Mar. 12, 2019).

172. Henrion, *supra* note 79, at 1177.

173. *Id.*

174. Christy Mallory, Sarah Liebowitz & Amira Hasenbush, *Employment, Housing, and Public Accommodations Discrimination Based on Sexual Orientation and Gender Identity in Missouri*, WILLIAMS INST. 1 (Sept. 2013), <https://williamsinstitute.law.ucla.edu/research/discrimination/mo-discrim-report-nov-2013/> (click link for full report).

175. *Id.* at 5.

176. Henrion, *supra* note 79, at 1177.

177. *Id.*

178. *Id.* at 1177–78.

October 2017.<sup>179</sup> The scoring of over 500 cities across the United States compared city law and policies to measure inequality the LGBTQ+ community faces nationwide.<sup>180</sup> Jefferson City is one of eleven cities not to score a single point.<sup>181</sup>

Missouri's executive branch, like the legislature, has made little impact on the progress of LGBTQ+ rights. In 2010, then-Governor Jay Nixon issued an executive order forbidding state executive agencies to discriminate on the basis of sexual orientation, but it did not include gender identity.<sup>182</sup> In 2018, the executive branch administration made no affirmative moves to protect or limit LGBTQ+ rights. Former Governor Eric Greitens made it known he opposed legislation that extends discrimination law to protect against sexual orientation or gender identity because it would increase discrimination litigation.<sup>183</sup> Governor Mike Parson has asserted he does not support the LGBTQ+ community<sup>184</sup> and blocked MONA as a Missouri State Senator in 2016.<sup>185</sup>

Judicially, LGBTQ+ rights have not fared much better in Missouri primarily because courts have given large deference to legislative intent. In 2015, sexual orientation was held not to be a cognizable claim under the MHRA in *Pittman v. Cook Paper Recycling Corp.*<sup>186</sup> In 2017, gender identity followed the same demise in the appellate opinion of *R.M.A. v. Blue Springs R-IV School District*.<sup>187</sup>

In *Pittman*, an employee, James Pittman, brought suit against his former employer, alleging his sexual orientation was a contributing factor in his termination in violation of the MHRA's prohibition of sex discrimination.<sup>188</sup> The trial court found Pittman brought a claim based on sexual orientation, not discrimination on the basis of sex, and subsequently dismissed the claim.<sup>189</sup> On

179. HUMAN RIGHTS CAMPAIGN, MUNICIPAL EQUALITY INDEX 55, <http://assets2.hrc.org/files/assets/resources/MEI-2017-FullReport.pdf> (last visited Mar. 12, 2019).

180. *Id.* at 10.

181. *Id.* at 12.

182. Mallory, Liebowitz & Hasenbush, *supra* note 174, at 5.

183. Jason Hancock, *Breaking Down the Missouri Governor's Race on Key Issues*, KANSAS CITY STAR (Nov. 4, 2016), <http://www.kansascity.com/news/politics-government/article112525852.html>.

184. Opinion, *'I Don't Support Them': Gov. Parson's Views on 'The Homosexual Issue' Are Cause for Concern*, KAN. CITY STAR (June 5, 2018), <https://www.kansascity.com/opinion/editorials/article212610554.html>.

185. Sean Mandell, *Missouri LGBT Non-Discrimination Act Faces 'A Lot of Opposition', Says GOP Lawmaker*, TOWLEROAD (Feb. 2, 2016), <http://www.towleroad.com/2016/02/301400/>. His opposition to MONA seems to stem from the belief that providing discrimination protection to LGBTQ+ individuals would in fact infringe on Christian's rights. *Id.*

186. 478 S.W.3d 479, 485 (Mo. Ct. App. 2015).

187. *See* 477 S.W.3d 185, 190 (Mo. Ct. App. 2015), *rev'd on other grounds* No. SC 96683, 2019 WL 925511 (Mo. Feb. 26, 2019) (en banc).

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

189. *Id.* at 481.

appeal, the Missouri Court of Appeals for the Western District held the MHRA's prohibition on sex-based discrimination did not extend to sexual orientation.<sup>190</sup> It found the language of the MHRA statute "clear and unambiguous."<sup>191</sup> It also looked to legislative intent, determining that if the Missouri legislature wanted sexual orientation discrimination prohibited, it had the opportunity to do so.<sup>192</sup> Because at the time *Pittman* was decided the Missouri legislature had not prohibited discrimination based on sexual orientation, the court followed suit.<sup>193</sup> The Missouri Supreme Court declined to review the judgment.<sup>194</sup>

Shortly after, gender identity was also found not to be within the MHRA's protection; however, this fact is in limbo after a rehearing of *R.M.A.* in 2019. In 2017, the Western District held in *R.M.A.* that discrimination based on an individual's gender identity, in particular a "transitioning status," is not protected under the MHRA, as it is not unique to one gender.<sup>195</sup> *R.M.A.* was a high school male who was denied access to the boy's locker room because he was "alleged to have female genitalia."<sup>196</sup> *R.M.A.* was a transgender male who aligned his gender identity with his true identity rather than the one assigned to him at birth.<sup>197</sup> The court held the Missouri legislature did not intend sex-based discrimination to prohibit denial to public accommodations because of an individual's transitioning status and affirmed the trial court's dismissal.<sup>198</sup>

*R.M.A.* was originally denied transfer to the Missouri Supreme Court, but the court changed its mind; *R.M.A.* was transferred on January 23, 2018, and reversed on different grounds.<sup>199</sup> The court did not reach the issue of gender identity under the MHRA, rather it analyzed if ultimate facts were alleged to satisfy a claim.<sup>200</sup> It created an example verdict director of how the ultimate facts would be presented to a jury, then it applied the facts alleged to the director.<sup>201</sup> Concluding that all of the elements of the verdict director were alleged, it found the trial court should not have dismissed the case because "at this stage of the proceedings, that is all that is required."<sup>202</sup> While the court's finding

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190. *Id.* at 483.

191. *Id.* at 482.

192. *Id.* at 483.

193. *Id.*

194. *See generally id.*

195. *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 2017 WL 3026757, at \*8–9 (Mo. Ct. App. July 18, 2017), *rev'd on other grounds* No. SC 96683, 2019 WL 925511 (Mo. Feb. 26, 2019) (en banc).

196. *Id.* at \*7.

197. *Id.*

198. *Id.* at \*9.

199. *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 2019 WL 925511, at \*1 (Mo. Feb. 26, 2019) (en banc).

200. *Id.* at \*3.

201. *Id.* at \*2–3.

202. *Id.* at \*5.

does overturn the Western District's opinion, it leaves the LGBTQ+ community back at square one with no express protection.

Besides both *Pittman* and *R.M.A.* resulting in unfortunate losses for the LGBTQ+ community, both cases foreshadowed *Lampley*'s holding. *Pittman* relied on several federal cases that utilized sex stereotyping to bring sex discrimination claims.<sup>203</sup> However, *Pittman* himself did not raise a sex stereotyping claim in his petition.<sup>204</sup> Subsequently, the court discussed sex stereotyping claims, but it declined to rule whether the MHRA prohibits discrimination on the basis of sex under a sex stereotyping theory.<sup>205</sup> Similarly, *R.M.A.* did not utilize a sex stereotyping theory at trial but tried to assert it on appeal.<sup>206</sup>

#### *D. Gender Equality in the Law – Fourth Wave Feminist Approach*

Historically, the feminist movement has not been supportive of any identities outside of cisgender white women.<sup>207</sup> During its first push for equality, white women sacrificed the rights of women of color to gain the right to vote. When the Equality Rights Amendment was facing opposition, feminist movements abandoned women in the LGBTQ+ community, deeming them “political liabilities,” in order to advance other agendas.<sup>208</sup> Feminist movements have stepped on the backs of transgender individuals to promote progression for people who identify as cisgender, which has translated to modern feminism.<sup>209</sup> Currently, there is still heavy pushback from subgroups of radical feminism,<sup>210</sup>

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203. See Appellant's Reply Brief at 6, *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo. Ct. App. 2015) (No. WD77973), 2015 WL 1867551, at \*6.

204. *Pittman*, 478 S.W.3d at 484.

205. *Id.*

206. *R.M.A.*, 2017 WL 3026757 at \*8.

207. Feminism has historically been white-centered, focusing and emphasizing issues that are pertinent to White women, while ignoring intersectional identities that affect minority women. For example, a commonly used illustration of gender inequality is the pay wage gap. The common assertion is that a woman makes seventy-seven cents to each dollar a man makes; however, this is only true for White women. *The Simple Truth About the Gender Pay Gap*, AM. ASS'N UNIV. WOMEN, <https://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/> (last visited Mar. 13, 2019). Black women make sixty-one cents, while Latinx women make fifty-three cents. *Id.*

208. Franklin, *supra* note 1, at 118. Even Ginsburg disavowed the connection between sex equality and LGBTQ+ rights in 1979 in an attempt to revive the ERA from defeat. *Id.* at 140.

209. Kelsie Brynn Jones, *Trans-Exclusionary Radical Feminism: What Exactly Is It, And Why Does It Hurt?*, HUFFINGTON POST, [https://www.huffingtonpost.com/kelsie-brynn-jones/trans-exclusionary-radical-terf\\_b\\_5632332.html](https://www.huffingtonpost.com/kelsie-brynn-jones/trans-exclusionary-radical-terf_b_5632332.html) (last updated Feb. 2, 2016).

210. Many feminists do not consider TERFs as fellow feminists. See, e.g., Linda Yang, *Raquel Willis: TERFs Don't Deserve to Define Themselves as Feminists*, BROADLY (Mar. 9, 2018), [https://broadly.vice.com/en\\_us/article/wj4mn5/raquel-willis-terfs-dont-deserve-to-define-themselves-as-feminists](https://broadly.vice.com/en_us/article/wj4mn5/raquel-willis-terfs-dont-deserve-to-define-themselves-as-feminists).

such as groups considered Trans-Exclusive Radical Feminists – commonly known as TERFs<sup>211</sup> – who wish to reinforce the gender binary and erase transgender individuals from the equality narrative.<sup>212</sup> Nationally, there is still a lack of transgender inclusivity into large-scale movements and demonstrations.<sup>213</sup>

Applied feminism and feminist movements have not been entirely supportive of the rest of the LGBTQ+ community and other intersecting identities outside of the cisgender white heterosexual female perspective. Despite these egregious missteps, feminists can move forward in the fourth wave to include *all* women and genders in their narrative for equality, not just for those who fit the cisgender white heterosexual categories, by accounting for intersectional identities when pushing for policy movement. Each person is made up of a variety of identities and advancing only one identity at the expense of the others will never lead to true equality. Recently, strides have been made in the federal system and in Missouri with the *Lampley* decision to protect vulnerable identities by prohibiting discrimination against individuals for not fitting stereotypical gender conformities.

#### IV. INSTANT DECISION

In *Lampley*, as a matter of first impression, the Missouri Supreme Court ultimately held in favor of *Lampley*.<sup>214</sup> However, the *Lampley* opinion itself reflects that serious discord existed among the judges in reaching a holding. Four opinions were filed: a principal, a concurrence, a partial concurrence and partial dissent,<sup>215</sup> and a dissent.<sup>216</sup> Five judges found for *Lampley* but

211. The name TERF itself is controversial. The majority find the description fitting, while some consider it a slur. See Colleen Flaherty, *‘Terf’ War*, INSIDE HIGHER ED (Aug. 29, 2018), <https://www.insidehighered.com/news/2018/08/29/philosophers-object-journals-publication-terf-reference-some-feminists-it-really>.

212. See Jones, *supra* note 209.

213. This includes the Women’s March. See Meredith Talusan, *We’ve Always Been Nasty*, THEM (Jan. 21, 2018), <https://www.them.us/story/weve-always-been-nasty>; Katelyn Burns, *The Women’s March Movement is Trying – But Still Struggling – to Center Trans Voices*, ESTABLISHMENT (Nov. 3, 2017), <https://theestablishment.co/the-womens-march-movement-is-trying-but-still-struggling-to-center-trans-voices-3094667c9f24>.

214. *Lampley v. Mo. Comm’n on Human Rights*, No. SC 96828, 2019 WL 925557 (Mo. Feb. 26, 2019) (en banc).

215. Chief Justice Zel M. Fischer wrote a brief opinion concurring in part and dissenting in part. *Id.* at \*13 (Fischer, C.J., concurring in part and dissenting in part). He concurred on three points: (1) discrimination on the basis of sexual orientation is not covered by the MHRA; (2) an administrative action should be reviewed as a non-contested case; (3) and *Lampley* and *Frost* failed to comply with Rule 94. *Id.* Then, he expressed where he diverged from the principal: “The failure to follow Rule 94 is where the resolution of this case should begin and end.” *Id.*

216. Judge W. Brent Powell wrote the sole dissent. *Id.* at \*14 (Powell, J., dissenting). He found the case must be dismissed because the trial court did not follow Rule

reached this determination in two factions. The principal opinion, authored by Judge George W. Draper III and concurred in by Judge Patricia Breckenridge and Judge Laura Denvir Stith, focused on federal precedent and sex stereotyping as a method to evidence sex discrimination.<sup>217</sup> The concurrence, authored by Judge Paul C. Wilson and concurred in by Judge Mary R. Russell, emphasized the sufficiency of the ultimate facts to satisfy the pleading requirements for sex discrimination claims.<sup>218</sup> In reaching their conclusions, both majority opinions provided several nuances in their analyses that will shape future sex discrimination litigation. This Section analyzes the *Lampley* decision in two main parts: This Section first reviews the principal and then examines the concurrence.

### A. Majority

The principal concluded that MCHR erred when it dismissed Lampley's claim for lack of jurisdiction and then reversed the trial court decision and remanded the case with instructions to grant right-to-sue letters.<sup>219</sup> It reached its conclusion by first addressing a procedural issue on appeal before flushing out the sex discrimination claim using a two-prong approach. The first prong examined the applicability of *Pittman*. The second prong laid the foundation for sex stereotyping as a way to evidence sex discrimination.

Before addressing the crux of the case, the principal addressed a procedural issue that arose on appeal.<sup>220</sup> MCHR argued on appeal that the case was "procedurally deficient"<sup>221</sup> because Lampley and Frost failed to follow strict adherence to proper writ procedure for judicial review.<sup>222</sup> The principal did not find this persuasive. Because neither party – nor the trial court – questioned the procedure posture, the relevant precedent had not yet been established when Lampley filed.<sup>223</sup> Because the court noted that "addressing

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14 and "issue a preliminary writ before denying mandamus relief." *Id.* However, even if the case is allowed to proceed, the trial court's decision should still be affirmed because (1) "a court cannot compel the executive director [of the MCHR] to exercise her discretion so as to reach a particular result"; (2) the particulars of the complaint suggest discrimination because he was gay; and (3) the trial court did not abuse its discretion. *Id.* at 20 (emphasis omitted).

217. *Id.* at \*1–7.

218. *Id.* at \*8–13.

219. *Id.* at \*7.

220. *See id.* at \*3.

221. *Id.*

222. *Id.* at \*2–3. The main accusation was that Lampley and Frost failed to follow Rule 94. *Id.* In the review of an administrative procedure, the role of the judiciary is limited based on whether the administrative procedure was contested or non-contested. *Id.* at \*2. Lampley and Frost sought a mandamus review of a non-contested case. *Id.*

223. The principal analyzed two cases, *Tivol Plaza Inc. v. Missouri Commission on Human Rights*, 527 S.W.3d 837 (Mo. 2017) (en banc) and *Bartlett v. Missouri Depart-*

charges of sex discrimination based upon sexual stereotyping evidence [wa]s an important issue [it] ha[d] not addressed,” the court used its discretion to allow the matter to proceed despite any procedural deficiencies.<sup>224</sup>

The principal then examined the “important issue” in front of the court: the sex discrimination claim. It noted that appellate courts “are guided by both Missouri law and by federal employment discrimination (i.e., Title VII) case law that is consistent with Missouri law” when reviewing a case under the MHRA.<sup>225</sup> Further, it stated that the MHRA “should be construed liberally to include those cases [that] are within the spirit of the law.”<sup>226</sup> Immediately thereafter it began its two-prong approach and addressed the trial court’s reliance on *Pittman*. *Pittman* found that “[the MHRA] does not prohibit discrimination on the basis of sexual orientation.”<sup>227</sup> The trial court interpreted and extended *Pittman*’s rationale to exclude discrimination claims based on sex stereotyping because – like sexual orientation – sex stereotyping is not explicitly covered in the MHRA.<sup>228</sup> However, the principal found *Pittman* “provide[d] no support for the [MCHR’s] decision” and the *Pittman* court declined to address sex stereotyping because it was not at issue.<sup>229</sup> Regardless, “Lampley and Frost[’s claims] specifically stated they were discriminated against on the basis of sex because Lampley did not conform to generally sexual stereotypes” and did not state that they were discriminated against on the basis of sexual orientation.<sup>230</sup> Lampley’s sexual orientation was incidental to the complaints filed – it did not form the basis of those complaints. For that reason, the principal held that the trial court’s reliance on and interpretation of *Pittman* was erroneous.<sup>231</sup>

Next, the principal reiterated that Lampley and Frost both alleged sex decimation based on Lampley’s non-stereotypical attributes and that Lampley’s sexual orientation was “incidental to the basis for discrimination”<sup>232</sup> before relaying relevant law and precedent.<sup>233</sup> After laying out the elements of a

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*ment of Insurance*, 528 S.W.3d 911 (Mo. 2017) (en banc), about failure to follow appropriate writ procedure. *Id.* Both cases were handed down on the same day in 2017. *Id.* at \*3. Lampley and Frost sought their petition in 2015. *Id.* at \*4. Because the guidance of the court was not yet available when they filed, the court decided it would “not penalize them for failing to follow precedent not established at the time.” *Id.*

224. *Id.*

225. *Id.* (quoting *Diaz v. Autozoners, L.L.C.*, 484 S.W.3d 64,76 (Mo. Ct. App. 2015)).

226. *Id.*

227. *Id.* (citing *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 485 (Mo. Ct. App. 2015)).

228. *Id.* at \*5.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at \*5–6.

prima facie case of discrimination, it noted that the fourth prong<sup>234</sup> may be satisfied by “some other evidence that would give rise to an interference of unlawful discrimination” and that sex stereotyping can give rise to that inference.<sup>235</sup> *Price Waterhouse* was then highlighted.<sup>236</sup>

The principal found the holdings of *Price Waterhouse* and its federal circuit court successors to be evident: Sex stereotyping can be utilized to evidence sex discrimination by individuals with non-stereotypical attributes, like feminine men.<sup>237</sup> It recognized that when employers make decision based on a sex stereotypes, “it is clear” that employer “is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex.”<sup>238</sup> In fact, the principal found that because “[the MCHR]’s promulgated rules already characterize sexual stereotyping as an unlawful hiring practice, it follows that sexual stereotyping during employment is an unlawful employment practice.”<sup>239</sup>

Thereafter, it quoted federal precedent, which states that “gay, lesbian, and bisexual individuals do not have less protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals,” but these characteristics alone are not enough to support a sex stereotyping claim.<sup>240</sup> The principal reasoned that federal courts have found a distinction between discrimination based on sexual orientation and sex discrimination as evidenced by sex stereotyping and further reasoned that the same standard that applies to heterosexual individuals must also apply to homosexual individuals “who allege discrimination based upon their failure to conform to sex-stereotypes.”<sup>241</sup> It concluded that “[s]exual orientation is incidental and irrelevant to sex stereotyping. Sex discrimination is discrimination, it is prohibited by the [MHRA], and an employee may demonstrate this discrimination through evidence of sexual stereotyping.”<sup>242</sup>

After its analysis, the principal found that the MCHR “unreasonably and erroneously assumed that because Lampley was homosexual, there was no possible sex discrimination claim other than one for sexual orientation” and further found that the MCHR prematurely concluded its investigation.<sup>243</sup> The trial court’s conclusion was also incorrect, thus the court reversed and remanded with instructions to issue right-to-sue-letters.<sup>244</sup>

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234. *Id.* at \*5.

235. *Id.* at \*5–6.

236. *Id.* at \*6.

237. *See id.*

238. *Id.* (alterations in original) (citations omitted).

239. *Id.* at \*7.

240. *Id.* at \*6 (alteration in original) (quoting *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 200–01 (2d. Cir. 2017)).

241. *Id.*

242. *Id.* at \*7 (emphasis added).

243. *Id.*

244. *Id.* The MCHR is limited to 180 days to process a filed complaint, and once that limitation is expired, the MCHR must issue a right-to-sue letter. *Id.* Because more

*B. Concurrence*

While reaching the same conclusion, the concurrence traversed the issue in a completely different manner. Instead of discussing sex stereotyping, the concurrence determined “[t]h[e] case should be analyzed and disposed of entirely on the basis of whether the facts alleged by claimants assert sex discrimination claims covered by the MHRA.”<sup>245</sup> During its analysis, the concurrence relied on *R.M.A. v. Blue Springs R-IV School District*, which was handed down on the same day as *Lamley*.<sup>246</sup> The concurrence used the language in *R.M.A.* to make the distinction that there are no “types” of sex discrimination under the MHRA, but there are different ways to prove a claim.<sup>247</sup> In *Lamley*, the concurrence declined to determine if sex stereotyping is one of those ways because, in its view, the ultimate facts alleged were sufficient to prove sex discrimination under the MHRA.<sup>248</sup>

The concurrence found the true question at issue was “whether [Lamley and Frost] . . . pleaded sufficient ultimate (not merely evidentiary) facts to state claims under the MHRA.”<sup>249</sup> Once again relying on *R.M.A.*, the concurrence determined that allegations of ultimate facts are the only facts required.<sup>250</sup> After reciting the applicable statute,<sup>251</sup> the concurrence looked to a “reliable place” – the corresponding verdict director that would be given if the matter went to a jury – to determine the ultimate fact at issue.<sup>252</sup> Based off its determination that Missouri Approved Instruction 38.01(a) would be the appropriate verdict director, the concurrence created an example verdict director to evaluate the validity of Lamley’s claims.<sup>253</sup> From there the concurrence

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than 180 days had passed by the time the instant opinion was handed down, the appropriate remedy was the issuance of a right-to-sue letter. *Id.*

245. *Id.* at \*8 (Wilson, J., concurring).

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.* at \*9.

250. *Id.* at \*10.

251. *Id.* (quoting MO. REV. STAT. § 213.055 (2016)).

252. *Id.*

253. *Id.* The example the concurrence created is as follows:

Your verdict must be for plaintiff [Lamley] if you believe:

First, defendant [Employer] discriminated against plaintiff with respect to his compensation, terms, conditions, or privileges of employment, and

Second, plaintiff’s male sex was a contributing factor in such discrimination, and

Third, as a direct result of such conduct, plaintiff sustained damage.

*Id.* (citation omitted).

used a “simple and straightforward analysis.”<sup>254</sup> It determined the four ultimate facts required for this matter: “(1) [Lampley] suffered an act of discrimination prohibited by 213.55; (2) he is member of a protected class, i.e., male; (3) causation, i.e., his male sex was a contributing factor (or motivating factor) in that discrimination and (4) damages.”<sup>255</sup>

It found that all four elements were satisfied by statements in Lampley’s amended charge.<sup>256</sup> The first ultimate fact was satisfied by specific allegations of discriminatory treatment.<sup>257</sup> The second was satisfied when Lampley stated, “I am a male . . . .”<sup>258</sup> The third was satisfied when he alleged the hostile work environment was created on the basis of his sex, and the fourth was satisfied with specific allegations of fiscal and emotional damage.<sup>259</sup> Because all four of the elements were alleged by sufficient ultimate facts, the concurrence concluded that the MCHR and the trial court erred.<sup>260</sup> It then followed a similar analysis for Frost’s claims, and held that she, too, could satisfy all of the elements required because she sufficiently alleged ultimate facts.<sup>261</sup>

Before concluding, the concurrence made it known that the analysis of sex discrimination should stop there because the issue at hand “c[ould] be disposed of entirely as a routine application of pleading standards.”<sup>262</sup> For that reason, the concurrence maintained that the principal should have ended its determination before considering “other issues such as whether *Pittman* . . . was wrongly decided and whether discrimination can be proved by evidence of ‘sex stereotyping.’”<sup>263</sup> But ultimately, it joined the principal in its conclusion and agreed “that the judgment of the [trial] court must be reversed and the case remanded for further proceedings.”<sup>264</sup>

## V. COMMENT

In *Lampley v. Missouri Commission on Human Rights*, the Missouri Supreme Court made a positive contribution to the LGBTQ+ rights movement when it held that the discrimination on the basis of stereotypes is a manifestation of sex-based discrimination.<sup>265</sup> If wielded correctly, Missourians can utilize the sex stereotyping theory to protect themselves from discrimination on the basis of gender identity or sexual orientation if either their identity, orientation, or both do not conform to typically held gender stereotypes. Until

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254. *Id.* at \*13.

255. *Id.* at \*10.

256. *Id.*

257. *Id.*

258. *Id.* at \*11.

259. *Id.*

260. *Id.*

261. *Id.* at \*12.

262. *Id.* at \*11.

263. *Id.*

264. *Id.* at \*13.

265. *Id.* at \*5.

*Lampley*, protections for the LGBTQ+ community at the state level seemed bleak, as the Missouri government has not been the most favorable to the community.

Both majority findings in *Lampley* are a step towards advancing legal protections to ensure gender equality in the workplace. The concurrence's simple and straightforward approach may provide protection because, more likely than not, if an individual is being discriminated against because of her sexual orientation or gender identity, the claim can boil down to the individual being discriminated against on the basis of sex. However, this has not been successful thus far. The more impactful of the two will probably be the principal's sex stereotyping approach.

For example, the plaintiff in *Price Waterhouse v. Hopkins*, Ann Hopkins, defied stereotypes. Ann was a strong, aggressive, intelligent woman seeking a leadership position at work.<sup>266</sup> She was discriminated against because her gender did not fit the stereotypical norm of what her employers thought it should be.<sup>267</sup> Ann could have been transgender, cisgender, lesbian, pansexual, heterosexual, or any combination of a gender identity and a sexual orientation and still looked and acted the exact same. The United States Supreme Court has expressed it does not want to create special rights for the LGBTQ+ community, but it does not want them to be excluded from anything.<sup>268</sup> If Ann was granted protection as a heterosexual woman,<sup>269</sup> so should a transgender Ann, a lesbian Ann, or any other Ann.

Although it was originally used to dispel traditional notions regarding men and women, it is not a stretch for *Lampley* to also protect the LGBTQ+ community. As Justice Scalia stated, “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”<sup>270</sup> The statutory principle, as interpreted by *Price Waterhouse* and *Lampley*, aims to prohibit discrimination against an individual for not conforming to gender norms.<sup>271</sup> Discrimination against the LGBTQ+ community is a comparable evil that sex discrimination can cover using a sex stereotyping principal.

Recognizing sex stereotyping as evidence of sexual discrimination will positively increase protection to Missourians in the workplace by eliminating the boundaries between genders and protecting individuals for having traits typically associated with one gender. Section A of this Part analyzes *Lampley*'s expansion of sexual discrimination claims by protecting *all* gender identities. Section B looks at the potential effects of the sex stereotyping principle

266. 490 U.S. 228, 234–35 (1989), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized by* *Burrage v. United States*, 571 U.S. 204 (2014).

267. *Id.* at 235.

268. *See Romer v. Evans*, 517 U.S. 620, 631 (1996).

269. Ann Hopkins, *Price Waterhouse v. Hopkins: A Personal Account of a Sexual Discrimination Plaintiff*, 22 HOFSTRA LAB. & EMP. L. J. 357, 359 (2005), <https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=1024&context=hlej>.

270. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

271. *Price Waterhouse*, 490 U.S. at 251; *Lampley*, 2019 WL 925557, at \*6.

to protect the identity of sexual orientation in future Missouri discrimination cases.

### *A. Advancing Gender Equality Through Gender Inclusivity*

Feminism is the theory of the social, political, and economic equality of the genders.<sup>272</sup> Unfortunately, it is often misconstrued as the advancement of women at the expense of men without even thinking about those falling outside of the binary spectrum.<sup>273</sup> However, by its definition, that is doctrinally defective. At its core, feminism is about advancing the equality of *all* genders, not the defeat and hatred of one gender for others to prevail: It is about putting them on a level base. Justice Ginsburg recognized this notion decades ago, noting one gender cannot be liberated without the liberation of the others.<sup>274</sup> For this reason, she brought a series of sexual discrimination cases with male plaintiffs to challenge the idea that men, too, are punished for not conforming with societal expectations.<sup>275</sup>

At the time, and throughout her tenure, Justice Ginsburg uses gender and sex interchangeably.<sup>276</sup> However, it is important to reiterate that gender and sex are two distinctive identities, as discussed earlier in this Note.<sup>277</sup> Gender and sex are two of the many intersecting identities that make up who an individual is. In order to reach true equality amongst individuals, one identity must not be advanced at the expense of the others. So, Justice Ginsburg's statement – "Fair and equal treatment for women means fair and equal treatment for members of [all genders]"<sup>278</sup> – should be amended to state, "Fair and equal treatment [for one identity] means fair and equal treatment for members of [all identities]."

*Lamplsey's* effect will not be limited to providing protection to one gender but will rather serve as the stereotyping vehicle that provides protection against discrimination to *any* individual who does not conform to an employer's expectation as to how an employee should act based on their sex assigned at birth. This may extend Missouri sex discrimination law to criminalize discrimination against transgender individuals. This means more than 25,000 Missourians<sup>279</sup> may be protected from "epithets, slurs, and negative stereotyping," and other

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272. *See supra* Part I.

273. *See supra* Section III.D.

274. Franklin, *supra* note 1, at 123.

275. *Id.* at 84.

276. Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender: Supreme Court's Newest Member Speaks at Her Old Law School and Brings Down the House with Her History Lesson About Fighting Bias*, L.A. TIMES (Nov. 21, 1993), [http://articles.latimes.com/1993-11-21/news/mn-59217\\_1\\_supreme-court](http://articles.latimes.com/1993-11-21/news/mn-59217_1_supreme-court).

277. *See supra* Section III.A.

278. Franklin, *supra* note 1, at 92.

279. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

forms of harassment for not “satisfying” an employer’s views of what their gender is and how they should represent it.<sup>280</sup>

Currently in Missouri, it is not explicitly illegal to discriminate against a person based on gender identity, and recently the Missouri Supreme Court failed to address this issue head on.<sup>281</sup> Before *Lampley*, there was no mechanism for over 25,000 people to bring a claim if they were discriminated against based on their gender identity.<sup>282</sup> So, a transgender individual could be refused service at a restaurant, denied housing, or fired because of their gender identity, and there would be no legal ramification to the adverse actor in Missouri. However, sex stereotyping opens this door because the fourth element of sexual discrimination – being treated differently from similarly situated individuals outside of a protected class – could be satisfied by showing a member outside of the protected class would not have been treated differently for either being effeminate or masculine. This is similar to the line of rationale the Sixth Circuit used to hold an individual’s gender identity could evidence sexual discrimination in Title VII cases in *Smith v. City of Salem*.<sup>283</sup>

Sex stereotyping could provide protections to people who transcend the gender nonconforming individuals. Non-binary is a gender identity that does not fall within the binary spectrum of gender.<sup>284</sup> Logically, sex stereotyping should protect non-binary individuals from sex discrimination because they do not fit into the gender binaries and, consequently, their actions may not conform to expectations of how an employer believes they should behave. Therefore, sex stereotyping may be a way to show they were discriminated against. For example, Quinn is a non-binary individual, whose pronouns are they/them. At work, their employer believes Quinn should behave in a stereotypically feminine manner because their gender assigned at birth – and not their true gender – is female. Quinn does not perform how their employer expects them to, whether that is because of their pronouns, gender expressions, or behavior, and is discriminated against on this basis. Therefore, Quinn is being treated differently than another similarly situated individual whose gender was assigned female at birth because they do not conform to their employer’s expectation.

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280. *Sex Discrimination & Harassment*, *supra* note 85.

281. See *R.M.A. v. Blue Springs R-IV Sch. Dist.*, 2019 WL 925511, at \*1 (Mo. Feb. 26, 2019) (en banc).

282. Although Kansas City, St. Louis, and Columbia have passed local ordinances that prohibit discrimination on the basis of gender identity, they “carry little consequence if violated.” MO. PRAC. SERIES: EMP. L. & PRAC. § 4:10 n.9, West (database updated Nov. 2018).

283. 378 F.3d 566, 570, 575 (6th Cir. 2004) (holding the fourth element of prima facie discrimination was satisfied because the individual “would not have been treated differently, on account of his non-masculine behavior and [Gender Dysphoria], had he been a woman instead of a man”).

284. QMUNITY, QUEER TERMINOLOGY – FROM A TO Q 14 (2015), [http://qmunity.ca/wp-content/uploads/2015/03/Queer\\_Terminology\\_Web\\_Version\\_Sept\\_2013\\_Cover\\_and\\_pages\\_.pdf](http://qmunity.ca/wp-content/uploads/2015/03/Queer_Terminology_Web_Version_Sept_2013_Cover_and_pages_.pdf).

Other individuals, such as transgender men and women may use a similar argument to satisfy the fourth element of prima facie discrimination.

The main issue with bringing claims of discrimination on the basis of sex using sex stereotyping to show gender identity discrimination against non-binary individuals is that few states recognize genders outside the binary, and Missouri is not one of them.<sup>285</sup> However, the sex stereotyping vehicle allows plaintiffs to bring claims against an employer for discriminating against them because they do not meet the employer's expectations. Consequently, even if the state does not recognize non-binary genders, individuals can still argue they do not fit an employer's stereotypical belief of how the individual should behave. This is a way to provide protection until Missouri expands its definition of gender.

This newly recognized manifestation of sexual discrimination creates a vehicle for 25,000 Missourians to potentially bring discrimination claims. While not explicitly doing so, this holding may have delegatized discrimination against transgender and non-binary individuals by allowing individuals to show they have been adversely acted against because they do not behave in accordance with the stereotype of a particular gender. This brings Missouri up to speed with twenty-one other states<sup>286</sup> and three federal circuit courts.<sup>287</sup> Sex stereotyping is allowing gender inclusivity by eliminating adverse actions based on perceived notions of what each gender should be. It allows freedom and protection for individuals to transcend gender barriers. It protects differences rather than promotes conformity. Because of this, it allows individuals who have traditionally been unprotected by the MHRA to potentially bring suit. Further, it allows cisgender individuals who do not meet stereotypes to bring claims. By permitting all genders protection and erasing the barriers between

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285. As of January 25, 2019, California, Maine, Oregon, Washington, District of Columbia, and New York recognize genders outside of the binary. Josh Magness, *Third Gender Coming to Birth Certificates in New York City*, MIAMI HERALD (Oct. 9, 2018), <https://www.miamiherald.com/news/nation-world/national/article219731440.html>. However, several countries, including Canada, Germany, Pakistan, Bangladesh, and Australia, recognize non-binary or third gender options. Linley Sanders, *What Is Gender X? New Identity Is Accepted in These States, and Washington and Vermont Could Be Next*, NEWSWEEK (Jan. 1, 2018), <http://www.newsweek.com/gender-x-new-identity-states-washington-vermont-775221>.

286. "California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, [and] Washington" have statutes that protect against employment discrimination based on sexual orientation and gender identity. *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/employment> (last updated Jan. 28, 2019).

287. The Sixth, Ninth, and Eleventh Circuits have found some type of protection in the Civil Rights Act. See *Glenn v. Brumby*, 663 F.3d 1312, 1318–19 (11th Cir. 2011); *Smith*, 378 F.3d at 575; *Roberts v. Clark Cty. Sch. Dist.*, 315 F. Supp. 3d (D. Nev. 2016).

them, Missouri is taking a step towards gender equality through gender inclusivity.

### *B. Intersectional Issues Benefiting from Sex Stereotyping Recognition*

Intersectionality is the interlocking social identities – such as race, gender, national origin, sexual orientation, age, and ability – that operate together form “complex social inequalities.”<sup>288</sup> Gender identity is not the only intersectional issue that may benefit from recognizing sex stereotyping as a manifestation of discrimination on the basis of sex. This vehicle established in *Lampley* has the potential to be used to protect against not yet illegal discrimination based on intersectional categories, like sexual orientation.

The MHRA does not prohibit discrimination on the basis of sexual orientation.<sup>289</sup> This was established via judicial interpretation in *Pittman*, and the court in *Lampley* believed that “sexual orientation is irrelevant” to a sexual discrimination claim.<sup>290</sup> However, there is the potential for gay, lesbian, bisexual, and other individuals to be protected against discrimination by using sex stereotyping to evidence discrimination on the basis of sex.

Like the American Civil Liberties Union (“ACLU”) amicus brief in *Lampley* argues, any sexual orientation that is *not* heterosexual tends to defy gender stereotypes, as it is “motivated by the gender stereotype that men and women should act a certain way, more specifically, that men should only form intimate with women and women should form such relationship with men.”<sup>291</sup> However, in *Lampley*, the court held sexual orientation is “immaterial and irrelevant” when an employee is being mistreated because he is insufficiently masculine or she is insufficiently feminine.<sup>292</sup> The court provided analogous cases to illustrate that federal courts, like the Second Circuit in *Christiansen v. Omnicom Group, Inc.*, have held that sexual orientation can be used to evidence sex stereotype claims.<sup>293</sup> This already suggests the willingness for Missouri courts to accept sexual orientation as a way to evidence sex discrimination, although this may not be enough on its own.

Since 1998, MONA – which would amend the MHRA to include gender identity and sexual orientation as protected classes – has been in and out of the

288. Patricia Hill Collins, *Intersectionality’s Definitional Dilemmas*, 41 ANN. REV. SOC. 2 (Mar. 23, 2015), <https://www.annualreviews.org/doi/pdf/10.1146/annurev-soc-073014-112142>.

289. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 483 (Mo. Ct. App. 2015).

290. *Id.* at \*7 (emphasis added).

291. Brief of American Civil Liberties Union of Missouri Foundation as Amicus Curiae in Support of Appellants Filed with Consent at 18, *Lampley v. Missouri Comm’n on Human Rights*, 2017 WL 4779447 (Mo. Ct. App. Oct. 24, 2017) (No. WD 80288), 2017 WL 1374157, at \*18.

292. *Lampley v. Mo. Comm’n on Human Rights*, No. SC 96828, 2019 WL 925557 (Mo. Feb. 26, 2019) (en banc).

293. *Id.*

Missouri legislature; however, it continually fails to pass.<sup>294</sup> The last attempt was in 2016.<sup>295</sup> In the meantime, reliance on the sex stereotyping theory may be one way to provide protection against adverse actions because of an individual's sexuality and gender identity if the claimant can show their discrimination was on the basis of their nonconformity.

## VI. CONCLUSION

Despite starting off slow, Missouri is beginning to enact more protection for some of its most vulnerable citizens. By recognizing sex stereotyping as a manifestation of sexual discrimination, Missouri is beginning to eliminate some of its gender barriers in the workplace. *Lampley* has unsheathed the sword to provide protection for all genders from stereotypical conformist restrictions. It slices through discrimination to ensure the equality of the genders through advancing gender inclusivity. Further, *Lampley*'s holding may be the sword for transgender individuals and potentially 160,000+ Missourians in the LGBTQ+ community to defend themselves from discriminatory conduct they were once defenseless against.<sup>296</sup> Finally, *Lampley*'s landmark holding places Missouri in line with other states to better protect its citizens and places it on the right track to achieve the MCHR's goal to protect Missourians from discrimination.

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294. Henrion, *supra* note 79, at 1777–78.

295. *Id.*

296. See *Missouri's Equality Profile*, *supra* note 171.