

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



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June 18, 2019

Alma Wheeler Smith, Chair
Laura Reyes Kopack, Secretary
Michigan Civil Rights Commission
Capital Tower Building
110 West Michigan Ave., Ste. 800
Lansing, MI 48933

Dear Members of the Michigan Civil Rights Commission:

You have requested an opinion regarding the viability of the Commission's May 21, 2018 Interpretive Statement 2018-1 in light of OAG, 2017-2018, No. 7305 (July 20, 2018). In that opinion, former Attorney General Bill Schuette opined that the prohibition in the Elliott-Larsen Civil Rights Act against discrimination "because of sex" does not include discrimination based on sexual orientation or gender identity. You have also asked for clarification regarding a number of other matters, including the manner in which this office provides representation to the Civil Rights Commission.

It is well understood that the Commission is authorized to interpret the Elliott-Larsen Civil Rights Act ("ELCRA"), and its interpretation is entitled to respectful consideration. *Clonlara, Inc v State Bd of Education*, 442 Mich 230, 240 (1993), *In re Rovas Complaint*, 482 Mich 90, 93 (2008). Nevertheless, the Michigan Supreme Court has also recognized that while "an opinion of the Attorney General is not a binding interpretation of law which courts must follow, it does command the allegiance of state agencies." *Traverse City School Dist v Attorney General*, 384 Mich 390, 410 n2 (1971).

As it relates to Interpretive Statement 2018-1, it must first be acknowledged that whether gender-identity discrimination falls within the ambit of the ELCRA is a question that has yet to be answered by Michigan appellate courts. While OAG No. 7305 found it likely that Michigan courts would not find gender-identity discrimination actionable under the ELCRA, that opinion acknowledged, but found unpersuasive, recent precedent from the Sixth Circuit ruling gender-identity discrimination is actionable under Title VII's analogous prohibition against discrimination based on "sex." See *Equal Employment Opportunity Comm v RG &*

GR Harris Funeral Homes, Inc, 884 F3d 560, 574–75 (CA 6, 2018). Subsequent to the Sixth Circuit's issuance of that opinion, and the consideration of its rationale as reflected in OAG No. 7305, the United States Supreme Court has now granted certiorari to consider that issue. *RG & GR Harris Funeral Homes, Inc v Equal Employment Opportunity Comm*, 139 S Ct 1599 (2019).

Additionally, the question of whether sexual-orientation discrimination is covered by the ELCRA is also affected by the uncertainty in analogous federal law. For example, while the Michigan Court of Appeals assumed that the ELCRA did not cover sexual-orientation discrimination in *Barbour v Depart of Social Services*, 198 Mich App 183 (1993), the court's analysis was based on analogous (and contemporaneous) federal law, and the United States Supreme Court has also granted certiorari to address that issue as well. *Altitude Express, Inc v Zarda*, 139 S Ct 1599 (2019), *Bostock v. Clayton County, Ga*, 139 S Ct 1599 (2019).

Consequently, while I would like to be helpful to the commission, we are unable to provide the opinion you request. It is a longstanding policy of this office to decline to provide an opinion with respect to issues that are pending in, or likely to become the subject of, litigation or an administrative proceeding. It does not appear that a date for argument has yet been set in *Harris, Zarda, and Bostock*, see <https://www.scotusblog.com/case-files/terms/ot2019>, but certiorari has been granted and it is expected that the United States Supreme Court will issue a decision by the end of the October 2019 term. Accordingly, we must respectfully decline to issue the opinion you have requested.

Nevertheless, given the United States Supreme Court's intervening decision to consider whether Title VII's prohibition of discrimination based on sex does indeed cover gender-identity and sexual-orientation discrimination, and this raises a question of federal law which was contemplated in OAG No. 7305 and Michigan courts in considering the issue, these specific circumstances warrant this office's conclusion that the Commission is not bound by OAG No. 7305, and the Commission may presently follow Interpretive Statement 2018-1. This advice will be noted on the publicly available version of OAG No. 7305 as it appears on our website.

You also have asked about the nature of representation that this office will provide to the Commission. In that regard, Michigan courts have recognized for many years that it is the Attorney General and her staff that represent the state and its agencies and public officials. See *Babcock v Hanselman*, 56 Mich 27 (1885). Thus, you can rest assured that this office will provide the Commission with appropriate legal support and representation.

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I trust that with these clarifications, the Civil Rights Commission can continue with its important mission to investigate allegations of unlawful discrimination and to “secure the equal protection of such civil rights without such discrimination.” Const 1963, art 5, § 29. As distinguished jurists such as the late civil rights champion Judge Damon Keith have recognized, “[the] basic concept of equality permeates the Michigan Constitution.” *Berry v School Dist of City of Benton Harbor*, 467 F Supp 695, 706 (WD Mich 1978). And indeed, it is equality and justice which are, and should be, woven into the very fabric of our laws. I look forward to working together with the commission to secure those rights—so deserved by all the people in our great state.

Sincerely,

A handwritten signature in black ink, reading "Suzanne D. Sonneborn". The signature is written in a cursive style with a prominent flourish at the end.

Suzanne D. Sonneborn
Chief Legal Counsel
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