STATE OF MICHIGAN

COURT OF CLAIMS

ROUCH WORLD, LLC, a Michigan Limited Liability Co, and UPROOTED ELECTROLYSIS, LLC, a Michigan Limited Liability Co,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, and MARY ENGELMAN, Interim Director of the Michigan Department of Civil Rights,

Defendants.

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OPINION AND ORDER REGARDING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Case No. 20-000145-MZ

Hon. Christopher M. Murray

Before the Court is defendants' September 16, 2020 motion for summary disposition, to which plaintiffs responded on October 14, 2020, and to which defendants replied on October 19, 2020. The Court is dispensing with oral argument because the material facts are undisputed, thus requiring the Court to decide issues of law, which the parties' briefs have adequately covered. LCR 2.119(A)(6).

I. BACKGROUND

Plaintiffs are two Michigan companies that on religious grounds decided not to provide services to potential customers who were either a same-sex couple or an individual who was "transitioning" their identity from one gender to another. Complaints were filed with the Michigan Department of Civil Rights (MDCR), which started to investigate the complaints until this suit was filed. As far as can be discerned, the MDCR has not issued any findings or determinations on the merits of the administrative complaints.

In the instant complaint, plaintiffs ask this Court to declare that the prohibition against discriminating because of one's "sex" under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., which does not include discrimination because of one's sexual orientation or gender identity, and as a result of that conclusion, rule that the MDCR's Interpretative Statement 2018-1 is invalid and the department has no jurisdiction over these administrative complaints. Plaintiffs also allege that to find them responsible for violating the ELCRA would also be inconsistent with the free exercise of religion guaranteed by both the United States and Michigan Constitutions.

Defendants' motion contains two arguments: (1) the term "sex" under the ELCRA includes sexual orientation and gender identity; and (2) that the interpretive statement coming to that conclusion is valid and consistent with the plain meaning of the term "sex" as used in the ELCRA. Defendants do not address plaintiffs asserted religious freedom claim, except in a somewhat conclusory fashion in their reply brief.

II. ANALYSIS

A motion for summary disposition filed under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). "The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted." *Id*. at 129-130. "The motion should be granted if no factual development could possibly justify recovery." *Id*. at 130.

There are two issues raised by the motion and response. One, what is the legal effect of Interpretive Statement 2018-1, as it was not promulgated as a rule under the Administrative Procedures Act, MCL 24.201 *et seq*. Two, to the extent that the MDCR utilizes Interpretive

Statement 2018-1 to address civil rights complaints filed with it, is it a valid interpretation of Michigan law?

A. FORCE OF AN INTERPRETIVE STATEMENT

Initially the Court will address plaintiffs' assertion that the Interpretive Statement does not have the force of law. That is certainly true, see MCL 24.207(h) and *Michigan Farm Bureau v Bureau of Workmen's Compensation*, 408 Mich 141, 149-150; 289 NW2d 699 (1980), but whether defendants are seeking to apply the term "sex" under the ELCRA through an Interpretive Statement or a rule is ultimately not the controlling concern. Instead, whether it is by rule or non-binding statement, the ultimate question is whether defendants' enforcement of the ELCRA is consistent with the law. *Bunce v Secretary of State*, 239 Mich App 204, 216-217; 607 NW2d 372 (1999). As detailed below, in one manner it is, and in another it is not.

B. SEX UNDER THE ELCRA

Relevant to the provision of goods and services, MCL 37.2302(a) provides:

> Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

As it is used in this context, the term "sex" is not defined within the statute, so courts are left to utilize tools of construction to determine the plain meaning intended by the Legislature.[1] See *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008), citing MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007) ("[a]n undefined statutory term must be

[1] The ELCRA does define the term in the context of employment, see MCL 37.2201(d), but there is no argument that that definition applies in the present context.

accorded its plain and ordinary meaning."). "A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning." *Brackett*, 482 Mich at 276.

With respect to whether sexual orientation falls within the meaning of "sex" under the ELCRA, the Court of Appeals has already concluded that it does not. *Barbour v Dep't of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993) ("harassment or discrimination based on a person's sexual orientation is not an activity proscribed by the act."). Being a decision published after November 1, 1990, *Barbour* is binding on this Court under MCR 7.215(A) and must be followed. And, whether *Barbour's* reasoning is no longer valid in light of *Bostock v Clayton Co*, __ US __; 140 S Ct 1731; 207 L Ed 2d 218 (2020), and cases containing similar reasoning, is a matter for the Court of Appeals, not this Court. As the Court of Appeals held in *In re AGD*, 327 Mich App 332, 343; 933 NW2d 751 (2019):

> "An elemental tenet of our jurisprudence, stare decisis, provides that a decision of the majority of justices of [the Supreme] Court is binding upon lower courts." *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987). "The obvious reason for this is the fundamental principle that only [the Supreme] Court has the authority to overrule one of its prior decisions." *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). "Until [it] does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." *Id*. (emphasis added). Accord *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 484; 109 S Ct 1917; 104 L Ed 2d 526 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Under *Barbour*, the Court must hold that sexual orientation does not fall within the term sex under the ELCRA public accommodation provision.

But *Barbour* does not address whether "gender identity" falls within the prohibition of discriminating on the basis of sex, and no other Michigan court has addressed whether "gender identity" falls within the term "sex" under the ELCRA. As is often the case, when no guiding

Michigan decision exists on the meaning of a provision within the ELCRA, courts turn to a consideration of federal decisions applying analogous provisions of Title VII. *Alspaugh v Comm'n on Law Enforcement Standards*, 246 Mich App 547, 556; 634 NW2d 161 (2001) ("With regard to gender discrimination, those federal civil rights cases interpreting title VII of the federal Civil Rights Act of 1964, 42 USC 2000e *et seq.*, and as amended, 42 USC 1983, although not controlling, provide persuasive authority for considering and resolving cases brought pursuant to Michigan's Civil Rights Act.").

Although there are no cases addressing this issue under the ELCRA, there is one recent decision addressing whether the term "gender" as used in the ethnic intimidation statute, MCL 750.147b, covers a transgender person. In *People v Rogers*, 331 Mich App 12; __ NW2d __ (2020), vacated __ Mich __; 950 NW2d 48 (2020), the Court held that as defined in 1988, the year the statute was enacted, "gender" was synonymous with "sex," which did not include transgender people. *Rogers*, 331 Mich App at __, slip op at 6-7. Along with contemporaneous dictionary definitions, the *Rogers* Court relied upon *Barbour*, recognizing that the *Barbour* Court "used the term 'gender' interchangeably with the statutory term 'sex'," and concluded that there was "no indication that the term gender would have been understood to encompass one who is a transgender person when" the ethnic intimidation statute was enacted. *Id.*, slip op at 7. Importantly, however, the Supreme Court vacated that decision, ordering the Court of Appeals to reconsider its decision in light of *Bostock*. *Rogers*, __ Mich __; 950 NW2d 48.

Rogers, having dealt with a different statute and different (though perhaps synonymous) term, is not controlling. But, the Supreme Court's order directing that Court to reconsider its decision in light of *Bostock* sheds at least some light on whether this Court should consider *Bostock* when interpreting the ELCRA. Clearly, both because it is a decision from the Supreme Court of

the United States interpreting the same term under Title VII, and because of the *Rogers* order, it must.

Turning to relevant federal decision, *Bostock* held, amongst other things, that an employer violates Title VII when it treats an employee born male but who now "identifies" as female differently than an employee born female. *Bostock*, 140 S Ct at 1741-1742. That type of dissimilar treatment, the Court held, was discrimination because of sex. In light of that reasoning, the Court did not need to decide what the word "sex" meant at the time Title VII was adopted in 1964. *Id*. at 1739.[2] The *Bostock* Court's rationale for concluding that the differential treatment of a transgender person constitutes discrimination because of "sex" was as follows:

> The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision. [*Bostock*, 140 S Ct at 1741-1742.]

[2] Looking to the meaning an undefined term had when the statute was passed is, of course, the traditional way in which courts discern a term's meaning. See *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 563 n 58; 886 NW2d 113 (2016), and *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005).

The Court's focus was on the individual, and whether the particular decision was based in part on the sex of the plaintiff. If it was, then the conduct was prohibited discrimination because of sex. *Id*.

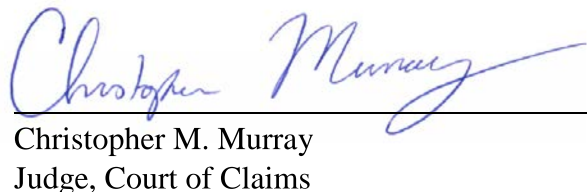
Following the *Bostock* Court's rationale, if defendants determine that a person treated someone who "identifies" with a gender different than the gender that he or she was born as, then that is dissimilar treatment on the basis of sex, and they are entitled to redress that violation through the existing MDCR procedures. Nothing in the ELCRA would preclude that action.

III. CONCLUSION

For these reasons, defendants' motion for summary disposition is GRANTED to the extent that discrimination because of sex under the ELCRA includes discrimination because of an individual's "gender identity," and thus Interpretative Statement 2018-1 is valid to that extent. Defendants' motion is DENIED to the extent that Interpretative Statement 2018-1 is contrary to existing Michigan law, as *Barbour* holds that discrimination because of an individual's "sexual orientation" is not prohibited under the ELCRA. Whether enforcement of Interpretative Statement 2018-1, as modified by this opinion and order, would interfere with plaintiffs' First Amendment rights to the free exercise of religion has not been sufficiently briefed to resolve at this juncture.

This is not a final order as it does not resolve all of the pending issues in this case.

Date: December 7, 2020



Christopher M. Murray
Judge, Court of Claims