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Michigan Supreme Court Rules That Sexual Orientation Discrimination Violates the State's Civil Rights Law

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LAW NOTES

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Michigan Supreme Court Rules That State Civil Rights Law Protects LGBTQ+ People

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By Arthur S. Leonard

In *Rouch World, LLC v. Department of Civil Rights*, 2022 WL 3007805, 2022 Mich. LEXIS 1487 (July 28, 2022), the Michigan Supreme Court voted 5-2 to overrule a 1993 court of appeals precedent and hold that the state's Elliott-Larsen Civil Rights Act (ELCRA), which bans discrimination because of sex, covers sexual orientation discrimination claims, thus affirming the position taken by the Department of Civil Rights, which has also found that the sex discrimination ban encompasses gender identity claims – a question not presented to the Supreme Court on this appeal.

Is discrimination because of a person's sexual orientation or gender identity a form of discrimination "because of sex"? For over fifty years, courts interpreting laws banning discrimination because of sex said "No." But in 2020, the Supreme Court said "Yes," in *Bostock v. Clayton County*, 140 S. Ct. 1731, answering the question whether Title VII of the Civil Rights Act of 1964 would apply when employers fire a person because they are gay or trans. Justice Neil Gorsuch, writing for the court, wrote that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." He based his analysis on the plain language of the statute prohibiting discrimination against an individual because of their sex.

The looming question after that ruling was how far it would extend as a binding legal precedent. Would it be limited to employee discharge cases under Title VII? Would it apply to other forms of employment discrimination, including refusals to hire, denial of employee benefits or promotions? Would it apply to bans against discrimination "because of sex" under other federal statutes, such as the Fair Housing Act, the Equal Credit Act, the Affordable Care Act, or the Education Amendments of 1972? (This is a tip-of-the-iceberg list, as Justice Samuel Alito's dissent attached an appendix listing about 300 provisions of federal law that he claimed might be affected by the *Bostock* decision.)

These questions are being contested in numerous courts by opponents of LGBTQ rights, seeking to block the Biden Administration for enforcing memos, guidance documents, and regulations responsive to President Biden's Executive Order from January 20, 2021, directing agencies to apply the *Bostock* decision under their sex discrimination jurisdiction. Many courts have found the *Bostock* reasoning to be broadly applicable, but some have expressed doubts.

Meanwhile, what about state laws? All fifty states have laws banning discrimination because of sex, but fewer than half of the states expressly ban discrimination because of sexual orientation or gender identity. The U.S. Supreme Court has no jurisdiction over the interpretation of state laws, but could the persuasive force of Justice Gorsuch's opinion cause state courts to adopt similar interpretations?

These questions are being answered one case at a time. While the Michigan Supreme Court was not bound by legal precedent to adopt *Bostock*'s reason, and in fact its decision overrules *Barbour v. Dep't of Social Services*, 198 Mich. App. 183, 497 N.W.2d 216 (1993), a long-standing precedent by the state's Court of Appeals, the majority of the Supreme Court found the U.S. Supreme Court's reasoning to be persuasive enough to justify overruling *Barbour*.

This case came up to the Michigan Supreme Court as a result of an "event place" refusing to host a wedding for a lesbian couple in 2019. Natalie Johnson and Megan Oswalt asked Rouch World to host their same-sex wedding, but the owners of the business, Ben and Jamey Rouch, refused to do so because of their "sincerely held religious belief that marriage is a sacred act of worship between one man and one woman." Johnson and Oswalt filed a public accommodations discrimination claim under ELCRA with the Michigan Division of Civil Rights (MDCR), which opened an investigation.

Around the same time, Uprooted Electrolysis refused to provide hair-removal services for Marissa Wolfe, a transgender woman, based in its owner's "sincerely held religious belief that sex is an immutable gift from God" and their understanding that this service was sought as part of Wolfe's gender transition. Wolfe filed a sex discrimination claim with MDCR, which started an investigation.

The two businesses then filed a lawsuit against MDCR in the state's Court of Claims, seeking a judgment that the ban on sex discrimination in ELCRA did not include sexual orientation or gender identity discrimination. That court temporarily blocked the investigations while deciding how to rule. The court of claims judge ultimately agreed with MDCR that gender identity claims could be brought under ELCRA, relying on the *Bostock* reasoning, but found that the 1993 court of appeals decision, a binding precedent, required it to dismiss the sexual orientation claim. Uprooted Electrolysis did not appeal the ruling on gender identity, but MDCR appealed the ruling on sexual orientation, and the Supreme Court agreed to bypass the Court of Appeals and take up directly the question whether ELCRA applies to sexual orientation claims, resulting in the July 28 decision.

Justice Elizabeth Clement's opinion for the court drew heavily on the *Bostock* decision, with extensive quotations expounding Justice Gorsuch's reasoning, and emphasizing that in the past the Michigan Supreme Court has encouraged the state's courts to follow U.S. Supreme Court interpretations of

Title VII because of the similarity in statutory language of ELCRA and the federal statute.

Two members of the court wrote dissents, channeling the arguments that Justice Alito and Justice Brett Kavanaugh made in their dissents in the *Bostock* case.

Like Justice Kavanaugh, Justice Brian Zahra first observed that the court's opinion "is a victory for a good many Michiganders who worked diligently and unyieldingly for sexual-orientation equality under the law since the enactment of [ELCRA] more than 45 years ago. I take no issue with the merits of the policy adopted today by a majority of this court," he continued. "I also harbor no doubt that my colleagues in the majority are acting in good faith, with pure hearts and the best of intentions." But, he argued, what they were doing was what the state constitution authorizes the legislature, not the courts, to do – to make new law – and "this Court's duty is to say what the law is, not what it thinks the law ought to be."

Like Justices Alito and Kavanaugh, he argued that nobody at the time the law was enacted would have thought that the statute banned sexual orientation discrimination. In fact, by 1976 some local governments in the U.S. were already adopting ordinances banning sexual orientation discrimination, and the legislative history of ELCRA would support the argument that the legislature had consciously decided not to include sexual orientation under the statute. "We simply cannot pretend that the ELCRA says something that it does not say," he asserted.

Justice David Viviano's dissent advanced the argument that the statute requires a finding of discriminatory motivation. In the case of sex discrimination, that would be a motivation to discriminate against somebody because they are a man or they are a woman. He found the reasoning of the majority (and of the U.S. Supreme Court) inconsistent with this requirement for discriminatory motivation. In many ways, his dissent sounds like the dissenting opinion by 7th Circuit U.S. Court of Appeals Judge Diane Sykes from *Hively v. Ivy Tech Community College*, in which that court ruled before *Bostock* that Title VII allows sexual orientation discrimination claims.

Still to be decided, of course, would be whether the Michigan courts will recognize a religious free exercise defense in either of these cases on the part of the business owners, which cited their religious beliefs in denying services to the complainants in those cases.

Bills seeking to amend ELCRA to add sexual orientation and gender identity to the list of prohibited reasons for discrimination have repeatedly failed to advance. Under the *Rouch World* ruling, they are no longer necessary. But since this is a case of statutory, not constitutional, interpretation, the legislature could overrule the court by amending the statute. As a result, the task for the state's LGBTQ rights advocates is now to work against potential bad legislation rather than to advance the perennial gay rights bill. ■

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Federal Judge Orders Indianapolis School to Let Transgender Girl Play on Softball Team

By Arthur S. Leonard

The federal trial court in Indianapolis has ordered the Indiana Public Schools to allow a transgender 10-year-old girl, identified in court papers as "A.M.," to play on the girls' softball team, finding she is likely to be able to prove that her federal rights under Title IX take priority over a recent Indiana law which would forbid her to do so. District Judge Jane Magnus-Stinson's order will be immediately appealed to the U.S. Court of Appeals for the 7th Circuit by Indiana Attorney General Todd Rokita, who intervened on behalf of the state to defend its new law. *A.M. v. Indianapolis Public Schools*, 2022 WL 2951430, 2022 U.S. Dist. LEXIS 132356 (S.D. Indiana, July 26, 2022).

Judge Magnus-Stinson's opinion explains that A.M., identified as male at birth, announced to her family when she was four years old that she is a girl, and she has lived as a girl ever since. She was diagnosed with gender dysphoria at age 6, dresses as a girl, and obtained a new birth certificate with her preferred female name and gender marker. Her parents have supported her in all this, and her mother sues on her behalf.

In light of her early female identification, she has always been known to her schoolmates as a girl. Her parents informed her teachers and school administrators that she is a transgender girl, but her identity as such has not been shared with her classmates. Last season while in the fourth grade, she played softball as a girl. Nobody complained and there was no indication that she enjoyed any special advantage because of being born male. If anything, she turned out to be one of the less talented members of her team. At age 10, she is