

Discrimination Based on Sexual Orientation Unlawful, Michigan High Court Holds, Overruling Precedent

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August 1, 2022

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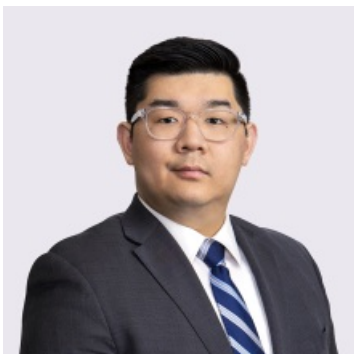
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Michigan's Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, prohibition of sex-based discrimination also prohibits discrimination based on sexual orientation, the Michigan Supreme Court has held. *Rouch World, LLC et al. v. Department of Civil Rights et al.*, No. 162482 (July 28, 2022).

This opinion, with two justices dissenting, comes approximately two years after the U.S. Supreme Court ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sexual orientation and gender identity. The ELCRA applies to Michigan employers of all sizes, as well as to housing, education facilities, and places of public accommodation and service.

Background

Enacted in 1976, the ELCRA prohibits discrimination based on religion, race, color, national origin, age, sex, height, weight, familial status, or marital status in employment, housing, education, and places of public accommodation and service.

Rouch World arises out of two investigations by the Michigan Department of Civil Rights (MDCR), the agency charged with enforcing the ELCRA, related to complaints made against plaintiffs Rouch World, LLC and Uprooted Electrolysis, LLC.

In the first investigation, Natalie Johnson and Megan Oswalt approached Rouch World in April 2019 to host their same-sex wedding. Rouch World declined, claiming that hosting a same-sex wedding ceremony would violate its owners' religious beliefs regarding marriage. In the second investigation, Marissa Wolfe, a transgender woman, sought hair-removal services at Uprooted Electrolysis in May 2019. Like Rouch World, Uprooted Electrolysis denied services to Wolfe, claiming her request would violate the owner's religious beliefs pertaining to sex identity, because Wolfe's request was perceived as "centrally connected" to her transgender identity.

After being denied their respective services, Johnson/Oswalt and Wolfe filed separate complaints with the MDCR, alleging the denials constituted sex discrimination under the ELCRA. The MDCR's investigation was stayed when Rouch World and Uprooted Electrolysis sued the MDCR and its then-director in the Michigan Court of Claims, seeking a declaratory judgment that sexual orientation and gender identity are not encompassed in the ELCRA's prohibition against sex discrimination.

Relying on *Barbour v. Department of Social Services*, 198 Mich. App. 183 (1993), the Michigan Court of Claims granted Rouch World's motion for summary disposition, holding the ELCRA's prohibition of sex-based discrimination did not encompass sexual

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orientation. However, the Court of Claims held the ELCRA, in fact, prohibited sex-based discrimination based on gender identity.

The Michigan Supreme Court granted the MDCR defendants' application to address "whether the prohibition on discrimination 'because of ... sex' in the [ELCRA] applies to discrimination based on sexual orientation." The MDCR defendants did not appeal the ruling that the ELCRA prohibited sex-based discrimination on the basis of gender identity.

Michigan Supreme Court Decision

The Michigan Supreme Court began its analysis by looking to Michigan Court of Appeals precedent. Although the Michigan Court of Appeals had held in *Barbour* that the ELCRA did not prohibit discrimination based on sexual orientation, the Court noted *Barbour* looked only to federal circuit decisions regarding Congress' intent in enacting Title VII, rather than analyzing the issue under the ELCRA. Importantly, the Court noted that many of the federal cases relied upon by *Barbour* were overturned in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Accordingly, the Michigan Supreme Court overruled *Barbour*.

The Michigan Supreme Court relied upon the U.S. Supreme Court's analysis of Title VII in *Bostock*, particularly that: (1) "sex" referred only to biological distinctions between male and female; (2) "because of" established a broad, "but-for" causation standard; and (3) the relevant inquiry is whether a specific employee was treated differently, not whether the employer treats different groups of persons differently.

Ultimately, the Michigan Supreme Court adopted the reasoning in *Bostock*. The Court held that sexual orientation is "inextricably bound up with sex" because a person's sexual orientation is determined by reference to their own sex. Further, it held discrimination based on sexual orientation also requires the discriminator to intentionally treat individuals differently because of their sex. Accordingly, the Court held that, because discrimination on the basis of sexual orientation inherently involves discrimination on the basis of sex, the prohibition of discrimination "because of ... sex" under the ELCRA includes sexual orientation.

Significantly, the Court stated that its decision does not alter any of the steps in a discrimination analysis under the ELCRA, and its opinion did not address constitutional religious liberty protections. Accordingly, the practical effect of *Rouch World* is simply to include a prohibition against discrimination on the basis of sexual orientation under the ELCRA's prohibition of sex-based discrimination.

The Takeaway

Michigan employers should review their policies and ensure they reflect protections against sexual orientation and gender identity discrimination.

Jackson Lewis attorneys can assist with amending policies and providing management training. If you have questions about the decision, please reach out to the Jackson Lewis attorney with whom you regularly work.

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