Double Entendre under the MHRA: When a Transgender Teenager Pleads Discrimination on the Grounds of Sex but It Does Not Satisfy Claims of Sex Discrimination [R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist., No. WD 80005, 2017 WL 3026757 (Mo. Ct. App. July 18, 2017), *cause ordered transferred to Mo. S. Ct.* (Jan. 23, 2018)]

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The Missouri Court of Appeals for the Western District affirmed the district court's dismissal of a transgender male teen's claims of discrimination under the Missouri Human Rights Act. The teen alleged discrimination on the grounds of sex when his school district denied him access to the boys' locker rooms and restrooms. The court erred when it analyzed legislative history and looked beyond the four corners of the petition to determine what "on the grounds . . . of sex" meant, when R.M.A.'s claim, on its face, alleged sex discrimination. Like Title VII, the MHRA is a remedial statute which must be construed broadly; the court's dismissal goes against the notion that human rights violations should be heard on the merits and decided by a jury.

I. INTRODUCTION

One hardship faced by transgender individuals is something many of us take for granted—which restroom to use. This is especially burdensome when an individual's state-issued birth certificate does not reflect his or her gender identity. But, an individual who presents himself as male, identifies as male, and legally amended his birth certificate to reflect the same should have remedied all potential bathroom conflicts. Not according to one Missouri school district. R.M.A., a female-to-male transgender teenager, participated in boys' sports and boys' health, but was prevented by his school district from using the boys' restrooms and locker rooms because he is "alleged to have female genitalia."[1] In *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.* (*R.M.A. II*), he asserted a claim of discrimination on the grounds of sex by Blue Springs R-IV School District and Blue Springs School District Board of Education (collectively, "the Defendants" or "School District") under the Missouri Human Rights Act ("MHRA").[2] His

1. R.M.A. *ex rel.* Appleberry v. Blue Springs R-IV Sch. Dist. (*R.M.A. II*), No. WD 80005, 2017 WL 3026757, at *1 (Mo. Ct. App. July 18, 2017), *cause ordered transferred to Mo. S. Ct.* (Jan. 23, 2018).

2. *R.M.A. II*, 2017 WL 3026757, at *1.

complaint was dismissed without explanation which the Missouri Court of Appeals affirmed, finding R.M.A.'s status as a transgender teenager did not fall within the category of "sex" under the protection of the MHRA.[3]

This begs the question—what else could R.M.A. have done to fall within MHRA's protections? He was legally recognized as a male and treated as one by the School District in all other respects. The School District even conceded its actions were because of R.M.A.'s genitalia, but asserted its actions were lawful.[4] These facts, in and of themselves, should sufficiently state a claim of discrimination on the grounds of sex. Thus, the Court of Appeals erred in affirming the dismissal of R.M.A.'s claim. Moreover, the MHRA is a remedial statute meant to be construed broadly; dismissal at such an early stage prevents claims from being heard on their merits. This decision runs counter to the policy behind remedial statutes—both the MHRA and its comparable federal counterpart, Title VII.

II. BACKGROUND

A. Case Description

R.M.A., a female-to-male transgender teenager, has been living as a boy since he was nine years old.[5] In 2010, when R.M.A. was ten, he legally changed his name to a traditionally male name; this change was reflected in his school records.[6] School District employees referred to R.M.A. by his preferred name, but their records "identif[ied] R.M.A. as female based upon the birth certificate his parents presented the School District upon enrollment."[7] In December 2014, the Jackson County Circuit Court of Missouri entered an order which mandated that the Bureau of Vital Statistics in the Missouri Department of Health and Senior Services "amend R.M.A.'s birth certificate to reflect his present legal name and amend his gender from female to male."[8]

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3. *See id.* at *8–9.

4. *Id.* at *9 (Gabbert, P.J., dissenting).

5. *Id.* at *1.

6. *Id.* Division 30 of the Jackson County Circuit Court legally changed R.M.A.'s name to a more traditional male name in Case No. 1016-FC-04921. Brief of Appellant at 1, R.M.A. v. Blue Springs R-IV Sch. Dist., 477 S.W.3d 185 (Mo. Ct. App. Aug. 24, 2015) (No. WD 78535), 2015 WL 5312725, at *1 [hereinafter Brief of Appellant, *R.M.A. I*] (citing the Corrected Legal File, not publicly available).

7. Brief of Appellant, *R.M.A. I*, *supra* note 6, at 2.

8. *Id.* The state registrar has authority to amend a birth certificate "[u]pon receipt of a certified copy of an order of a court of competent jurisdiction indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed." MO. REV. STAT. § 193.215.9 (2014). Although the statute seems to require surgery as a prerequisite for amending one's birth certificate, at least one Missouri circuit court held this step is unnecessary. *See In re* Jamie Miranda Glistenburg, No. 13AR-CV00240 (Adair Cty. Cir. Ct., Mo., May 20, 2013) (recognizing Jamie's gender change pursuant to the statute without requiring completion of surgical procedures).

In July 2014, R.M.A. requested the Jackson County Circuit Court to compel R.M.A.'s School District "to grant [R.M.A.] and all other transgendered students of [the School District] full and equal access to the appropriate restroom, locker room, and any other facilities segregated by sex as is consistent with their gender identity."[9] The trial court denied R.M.A.'s request, holding he had "no existing, clear, unconditional legal rights."[10] Additionally, it held the request through a writ of mandamus was inappropriate because R.M.A. still had administrative remedies available.[11] The Missouri Court of Appeals affirmed the dismissal.[12]

At about the same time he filed the petition for a writ of mandamus, R.M.A. also filed a discrimination charge against the same Defendants with the Missouri Commission on Human Rights ("MCHR").[13] In July 2015, the MCHR terminated its administrative proceedings and issued to R.M.A. a "right to sue" letter.[14] R.M.A. filed a civil suit against the Defendants asserting a violation of the MHRA; specifically, he alleged discrimination in the use of a public accommodation "on the grounds of his sex."[15]

R.M.A. contended the discrimination began when he participated in boys' football, boys' track, and boys' Physical Education classes.[16] He was prohibited from using the boys' locker room or bathroom "based on [his] sex and gender identity."[17] Specifically, R.M.A. argued the Defendants denied him access because he "is transgender and is alleged to have female genitalia."[18]

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9. R.M.A. v. Blue Springs R-IV Sch. Dist. (*R.M.A. I*), 477 S.W.3d 185, 186 (Mo. Ct. App. Aug. 24, 2015).

10. *Id.* at 187.

11. *Id.* Specifically, the appropriate procedural step after denial of a writ is to file the petition in a higher court; an appeal is only appropriate when the trial court has entered a final judgment. *Id.* at 187–88.

12. *Id.* at 188. The court held R.M.A had no right to appeal the denial of the writ of mandamus, because the trial court had not entered a preliminary order. *Id.*

13. *R.M.A. II*, 2017 WL 3026757, at *1. R.M.A. filed a charge of discrimination with the Missouri Commission on Human Rights ("MCHR") in October 2014. *Id.* The MHRA requires an exhaustion of administrative remedies before initiating a civil lawsuit. Alhalabi v. Mo. Dep't of Nat. Res., 300 S.W.3d 518, 524 (Mo. Ct. App. 2009); MO. REV. STAT. § 213.075 (2017). A claimant must file with the MCHR, "a verified complaint in writing, within one hundred eighty days of the alleged act of discrimination." § 213.075. Additionally, the MCHR and the Equal Employment Opportunity Commission ("EEOC") have a work-sharing agreement that provides a timely filed complaint to either agency is deemed to have been filed with the other agency at the same time. *See id.*; 8 C.S.R. 60-2.025(4). Once a complaint is filed, the MCHR has 180 days to complete its investigation, or it must issue a right to sue letter to the claimant if he or she requests it in writing. MO. REV. STAT. § 213.111.1 (2017).

14. *R.M.A. II*, 2017 WL 3026757, at *1. The MCHR followed the administrative procedures outlined in the MHRA. *See* § 213.111.1. Right to sue letters inform the claimant that he or she has complied with the mandatory administrative proceedings and further require that any civil suit based on the MCHR charge is brought within ninety days of the letter's receipt. § 213.111.1; *see* Farrow v. Saint Francis Med. Ctr., 407 S.W.3d 579, 586 (Mo. banc 2013) (discussing and comparing the administrative remedies pursuant to the MCHR and the EEOC).

15. *R.M.A. II*, 2017 WL 3026757, at *1.

16. Brief of Appellant, *R.M.A. I*, *supra* note 6, at 2–3.

17. *R.M.A. II*, 2017 WL 3026757, at *1.

18. *Id.* at *2.

In response, the Defendants moved to dismiss R.M.A.'s complaint because: (1) the School District and School Board are not "persons" capable of being sued under the MHRA; and (2) "the Missouri Human Rights Act does not extend its protection to claims based on gender identity."[19] The trial court dismissed the action without prejudice, but it did not explain the basis for its ruling.[20]

The Missouri Court of Appeals affirmed the district court's dismissal that R.M.A. failed to "state[] a claim for which relief can be granted, in that the Missouri Human Rights Act prohibits sex discrimination in public accommodation, including discrimination on the basis of gender-related traits."[21] The appellate court's affirmation of the district court's dismissal of the discrimination claim is the focus of this Comment.[22]

B. Legal Background

The MHRA was enacted in 1986.[23] Relevant to R.M.A.'s case is Section 213.065, which makes it unlawful to deny access to public accommodations because of sex.[24] This section "was enacted in the interest of public welfare and is conducive to the public good."[25] It ensures "full and equal use and enjoyment of public accommodations in [Missouri] without discrimination."[26] Thus, as a remedial statute, it "must be interpreted liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability."[27]

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19. *Id.* at *2. The Defendants later added collateral estoppel as a third ground for dismissal in a supplemental brief. *Id.* They argued R.M.A.'s mandamus action already determined the MHRA does not provide protection to gender identity claims; therefore, R.M.A. was collaterally estopped from bringing his claim of discrimination in a subsequent civil suit. *Id.*

20. *Id.*

21. *Id.* at *4, *9

22. *See infra* Part IV.

23. Missouri Human Rights Act, L. 1986 S.B. 513, codified at MO. REV. STAT. § 213.010 (1986). The MHRA was preceded by the Fair Employment Practices Act of 1961, which was amended in 1965 to prohibit discrimination based on sex. MO. REV. STAT. § 296.020 (1967).

24. MO. REV. STAT. § 213.065. The statute applies to all persons and provides in relevant part:

> [It is unlawful, whether,] directly or indirectly, to refuse . . . or to attempt to refuse . . . any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation . . . or to segregate or discriminate against any such person in the use thereof because of race, color, religion, national origin, sex, ancestry, or disability.

Id.

25. Doe *ex rel.* Subia v. Kansas City, Mo. Sch. Dist., 372 S.W.3d 43, 48 (Mo. Ct. App. 2012).

26. *Id.*

27. State *ex rel.* Wash. Univ. v. Richardson, 396 S.W.3d 387, 392–93 (Mo. Ct. App. 2013) (internal quotations omitted); *see* McCoy v. The Hershewe Law Firm, P.C., 366 S.W.3d 586, 596 (Mo. Ct. App. 2012) (citing Abrams v. Ohio Pacific Express, 819 S.W.2d 338, 341 (Mo. banc 1991)) (remarking that cases arising under remedial statutes "should be heard and decided on their merits").

The MHRA is similar to its federal counterpart, Title VII of the Civil Rights Act of 1964.[28] The laws are "coextensive, but not identical."[29] Neither statute explicitly prohibits discrimination based on sexual orientation or gender identity.[30] However, plaintiffs who wish to allege discrimination based on sexual orientation have successfully brought sex discrimination claims under Title VII using the sex-stereotyping theory.[31]

Many state courts interpreting their human rights laws have adopted the *Price Waterhouse v. Hopkins*[32] sex-stereotyping analysis that is traditionally applicable in federal Title VII employment sex discrimination claims.[33] In *Price Waterhouse*, Hopkins, a female employee, was a candidate for partnership at an accounting firm.[34] All 662 other partners at the firm reviewed her, only seven of whom were women.[35] Hopkins was denied the promotion after several male partners negatively reviewed her interpersonal skills.[36] She subsequently filed a lawsuit which alleged discrimination because of sex under Title VII.[37] The U.S. Supreme Court ultimately held a plaintiff may use evidence of sex-stereotypes to prove gender played a role in the employer's decision and support a case of sex discrimination.[38]

The *Price Waterhouse* plurality opinion allows evidence of discrimination based on nonconformity with gender norms (feminine and masculine stereotypes), to support claims of discrimination based on sex.[39]

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28. *See* Hammond v. Mun. Corr. Inst., 117 S.W.3d 130, 136 (Mo. Ct. App. 2003).

29. *Id.* at 136.

30. *Compare* Mo. REV. STAT. § 213.065 (2000), *with* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012) (stating in pertinent part, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

31. *See* Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 744–48 (analyzing 117 cases where plaintiffs, using the sex-stereotyping theory, brought Title VII and Title IX claims).

32. 490 U.S. 228 (1989).

33. *See, e.g.*, Lampley v. Missouri Comm'n on Human Rights, No. WD 80288, 2017 WL 4779447, at *2 (Mo. Ct. App. Oct. 24, 2017), *reh'g and/or transfer denied* (Nov. 16, 2017) (citing Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 71–72 (Iowa 2013); Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001); Behrmann v. Phototron Corp., 795 P.2d 1015, 1017–18 (N.M. 1990); Arcuri v. Kirkland, 113 A.D.3d 912, 914–15 (N.Y. App. Div. 2014); Graff v. Eaton, 598 A.2d 1383, 1385 (Vt. 1991); Gray v. Morgan Stanley DW, Inc., No. 54347-4-1, 2005 WL 3462783, at *3 (Wash. Ct. App. 2005)).

34. *Price Waterhouse*, 490 U.S. at 233.

35. *Id.*

36. *Id.* at 235. The partners' reviews included things like: describing Hopkins as "macho," stating she "overcompensated for being a woman," advising her to take "a course at charm school," and to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

37. *Id.* at 232.

38. *Id.* at 294. The Court stressed, however, that Title VII does not create an independent cause of action for claims of sex-stereotyping. *Id.*

39. Soucek, *supra* note 31, at 724. Gender is "whether a person has qualities that society considers masculine or feminine." Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 394 (2001).

Additionally, the opinion has also been used to support employees' Title VII claims of sex discrimination due to sexual orientation.[40] In reference to its applicability, Justice Brennan stated, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[41] To be clear, a claim of sex discrimination because of sexual orientation is *not* the same as sex discrimination because of gender identity, but neither type of discrimination is explicitly listed or prohibited under either Title VII or the MHRA.[42]

In its analysis of a Title VII claim in *Baldwin v. Foxx*,[43], the Equal Employment Opportunity Commission ("EEOC") addressed many courts' attempts to differentiate between claims of discrimination based on sex and claims of discrimination based on sexual orientation.[44] The EEOC determined "sexual orientation is inseparable from and inescapably linked to sex and, therefore . . . allegations of sexual orientation discrimination involve sex-based considerations."[45] It is essentially inconsequential that Title VII does not explicitly list sexual orientation as a basis by which employers cannot discriminate.[46] Therefore, the EEOC concluded, "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex."[47]

In support of its determination in *Baldwin*, the EEOC cited *Price Waterhouse* and *Deffenbaugh-Williams v. Wal-Mart Stores*.[48] These cases "simply applied [the] existing Title VII principles on race, sex, and religious discrimination to these [types of] situations," rather than creating a new

40. Soucek, *supra* note 31, at 724.

41. *Id.* (quoting *Price Waterhouse*, 490 U.S. at 251).

42. *See* Mo. REV. STAT. § 213.065 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012). Sexual orientation and gender identity are not defined within the statutes. *See* Mo. REV. STAT. § 213.065 (2000); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2012). Sexual orientation refers to one's natural, emotional, and romantic attractions and preferences in one's sexual partners. *Sexual Orientation and Homosexuality*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/topics/lgbt/orientation.aspx [https://perma.cc/SD7U-BLMF]. The terms typically used to identify one's sexual orientation include, but are not limited to, heterosexuality, homosexuality, and bisexuality. *Id.* Gender identity is "the consistency and persistency of one's individuality as male, female, or androgynous;" that is, how one identifies and presents one's gender. *Gender Identity*, STEDMAN'S MEDICAL DICTIONARY (2014).

43. EEOC DOC 0120133080, 2015 WL 4397641, at *1 (July 16, 2015); *Baldwin*, 2015 WL 4397641, at *1.

44. *Baldwin*, 2015 WL 4397641, at *8. Some courts attempted to distinguish between the two types of discrimination, because Congress in 1964 did not explicitly or implicitly include sexual orientation as a protected class under Title VII. *Id.* The EEOC articulated that in determining whether an employment action violates Title VII, "the question is . . . whether the agency has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action." *Id.* at *4 (quoting *Price Waterhouse*, 490 U.S. 228, 242 (1989))

45. *Id.* at *5. The EEOC stated, "'[s]exual orientation' as a concept *cannot* be defined or understood without reference to sex." *Id.* (emphasis added).

46. *See id.* at *4.

47. *See Baldwin*, 2015 WL 4397641, at *10.

48. *Id.* at *9; Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588–89 (5th Cir. 1998), *reinstated in relevant part*, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999).

category of persons under Title VII.[49] Quoting the Supreme Court, the EEOC noted "statutory prohibitions often go beyond the principal evil [they were passed to combat] 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."[50]

While Title VII prohibits discriminatory employment practices, Title IX prohibits discrimination in education.[51] Similarly to Title VII, the term "sex" is not defined within Title IX.[52] Like state courts have done when interpreting human rights laws, the Seventh Circuit, in 1984, looked to Title VII to analyze a Title IX claim and stated in dicta that "sex" should be "given a narrow, traditional interpretation, which would also exclude transsexuals."[53] However, in 2017 that very same court held the previous interpretation cannot and does not foreclose "transgender students from bringing sex-discrimination claims based upon a theory of sex-stereotyping as articulated [in 1989] by the Supreme Court" in *Price Waterhouse*.[54] That is, the Supreme Court, both in *Price Waterhouse* and *Oncale v. Sundowner Offshore Services, Inc.*,[55] has embraced a more expansive view of Title VII, which includes sex-stereotyping.[56]

Missouri is not without precedent to aid in MHRA interpretation and application. Prior to *R.M.A. II* the Missouri Court of Appeals reviewed *Pittman v. Cook Paper Recycling Corp.*.[57] Pittman, a homosexual male, alleged his employer "caused the workplace to be an objectively hostile and abusive environment based on [Pittman's] sexual preference."[58] On appeal from his suit's dismissal, Pittman asserted his hostile and abusive workplace allegations adequately stated and supported a claim of sex discrimination

49. *Baldwin*, 2015 WL 4397641, at *9. The EEOC mentioned *Price Waterhouse*, which did not create a new protected class of "masculine women," but afforded women protection under the principles already in place. *Id.* Similarly, it mentions *Deffenbaugh-Williams*, which utilized Title VII race discrimination protections without necessarily creating a new protected class of "people in interracial relationships." *Id.*

50. *Id.* at *4 (quoting Oncale v. Sundowner Offshore Servs., Inc, 523 U.S. 75, 79–80 (1998)) (holding that same-sex harassment is actionable under Title VII) (bracketed language in original).

51. 20 U.S.C. § 1681 (1986). Title IX of the United States Education Amendments of 1972 states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a).

52. *See id.* § 1681.

53. Ulane v. Eastern Airlines, 742 F.2d 1081, 1085–86 (7th Cir. 1984). The Seventh Circuit has frequently looked to Title VII when construing Title IX. *See, e.g.*, Whitaker *ex rel*. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Ed., 858 F.3d 1034, 1047 (7th Cir. 2017); Smith v. Metro. Sch. Dist. Perry Twp., 128 F.3d 1014, 1023 (7th Cir. 1997) (determining that "it is helpful to look to Title VII to determine whether the alleged sexual harassment is severe and pervasive enough to constitute illegal discrimination on the basis of sex for purposes of Title IX.").

54. *Whitaker*, 858 F.3d at 1047.

55. 523 U.S. 75 (1998).

56. *Whitaker*, 858 F.3d at 1048.

57. 478 S.W.3d 479 (Mo. Ct. App. 2015).

58. *Id.* at 480.

under the MHRA.[59] In affirming the trial court's dismissal, the appellate court held Pittman's petition did not truly allege discrimination on the basis of sex; rather, the petition's language alleged a hostile and abusive work environment "based on sexual preference," which is not prohibited by the MHRA.[60]

In an opinion issued after both *R.M.A. II* and *Pittman*, the Missouri Court of Appeals, in *Lampley v. Missouri Commission on Human Rights*[61] held "evidence of sex stereotyping can support a reasonable inference of sex discrimination."[62] Lampley, a gay employee, alleged his employer discriminated against him based on his sex, because he failed to conform to gender stereotypes of "maleness."[63] The trial court cited *Pittman* for support and granted summary judgment in favor of the employer.[64] Although Missouri courts had not previously held sex-stereotyping falls under the MHRA, the appellate court cited to the sex-stereotyping theory articulated by *Price Waterhouse* and noted its use in "thousands of cases" in both federal and state courts.[65] The court determined the sex-stereotyping analysis does not create a new suspect class, "but simply recognizes the manifold ways sex discrimination manifests itself."[66] The appellate court held Lampley "should have been allowed to demonstrate how sex stereotyping motivated the alleged discriminatory conduct."[67] It therefore reversed and remanded the trial court's decision with instructions to issue right to sue letters.[68]

59. *Id.* at 482.

60. *Id.* at 483 (emphasis omitted).

61. No. WD 80288, 2017 WL 4779447, at *1 (Mo. Ct. App. Oct. 24, 2017), *reh'g and/or transfer denied* (Nov. 16, 2017).

62. *Id.* This case was brought under Section 213.055 of the MHRA which provides, in relevant part, it is an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex." MO. REV. STAT. § 213.055(1)(a) (2017).

63. *Lampley*, 2017 WL 4779447 at *1.

64. *Id.* at *2. Lampley originally filed a complaint of discrimination based on sex supported by the sex-stereotyping theory. *Id.* at *1. The MCHR terminated the EEOC's investigation and determined it did not have jurisdiction over claims based on sexual orientation. *Id.* Lampley petitioned the trial court for administrative review or, in the alternative, mandamus to issue right to sue letters. *Id.*

65. *Id.* at *2.

66. *Id.* at *5. The court addressed the MCHR's concerns that sex-stereotyping would become a "mere pretext" under which gay and lesbian employees will assert claims of sex discrimination instead of claims of discrimination based on sexual orientation. *Id.* The court determined "[w]hether the claim is [a] mere pretext is a question for the trier of fact." *Id.*

67. *Id.* at *5.

68. *Id.* at *5.

III. COURT'S DECISION

A. Parties' Arguments

R.M.A. appealed the dismissal of his discrimination lawsuit to the Missouri Court of Appeals, Western District.[69] He argued the district court erred when it dismissed his case because: (1) his petition alleging sex discrimination stated a claim for which relief can be granted, because sex discrimination includes gender-related traits; (2) both the School District and Board of Education are "persons" under the MHRA; and (3) issue preclusion did not apply to the case.[70] Under Point One, R.M.A. asserted the Defendants denied him access to the boys' restroom and locker rooms because of R.M.A.'s sex and alleged female genitalia, both of which are gender-related traits.[71] He argued that because courts use the terms "sex" and "gender" interchangeably, discrimination based on gender-related traits is necessarily sex discrimination.[72] Therefore, the Defendants' denying a public accommodation to R.M.A. because of a gender-based trait was sex discrimination under the MHRA.[73]

In response, Defendants argued: (1) R.M.A. failed to state a claim on which relief could be granted because the MHRA does not protect individuals based on gender identity/transgender status; (2) the School District and Board of Education are not "persons" capable of being sued under the MHRA; and (3) R.M.A.'s claims are barred by collateral estoppel.[74] Under the first point, the Defendants noted "transgender" and "gender identity" are "noticeably absent from the [MHRA]."[75] They emphasized the Missouri legislature only intended for the MHRA to prevent discrimination on the basis of one's biological sex, not on the basis of sexual identity.[76]

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69. Brief of Appellant at 1, R.M.A. *ex rel.* Appleberry v. Blue Springs R-IV Sch. Dist., No. WD 80005 (Mo. Ct. App. Nov. 25, 2016), 2016 WL 7339748, at *1. [hereinafter Brief of Appellant, *R.M.A. II*].

70. *Id.* at *6, *16, *24.

71. *Id.* at *7.

72. *Id.* at *7–8. "The sexual harassment and sexual assaults occurred on the basis of his gender and constituted sex discrimination." *Id.*, at *7–8 (quoting Doe *ex rel.* Subia v. Kansas City Missouri Sch. Dist., 372 S.W.3d 43, 56 (Mo. Ct. App. 2012)).

73. *Id.* at *17.

74. Respondent's Brief at 8, 27, 39, R.M.A. v. Blue Springs R-IV Sch. Dist., No. WD 80005 (Mo. Ct. App. Jan. 26, 2017), 2017 WL 529725, at *8, *27, *39. Collateral estoppel, also known as issue preclusion, legally prevents the same parties (or parties in privity) from relitigating issues that were previously litigated and necessarily resulted in a final judgment on the merits. Hangley v. American Family, 872 S.W.2d 544, 547 (Mo. App. 1994).

75. Respondent's Brief, *supra* note 74 at *10.

76. *See id.* at *22–23.

B. Majority Opinion

In a 2-1 split, the Missouri Court of Appeals, Western District affirmed the trial court's dismissal of R.M.A.'s case on Point One.[77] It held R.M.A. failed to state a claim of discrimination in public accommodation on the grounds of sex, determining the Missouri legislature did not intend the MHRA to include protections for individuals transitioning from female to male or vice versa.[78] The court did not analyze the other two arguments.[79]

The court's analysis of Point One addressed arguments regarding statutory language, gender-related traits, and sex-stereotypes.[80] The court sought to ascertain the legislative intent behind the phrase "discriminate . . . on the grounds of . . . sex" at the time of the MHRA's enactment.[81] It first looked to the MHRA's predecessor, the Fair Employment Practices Act, and its federal counterpart, Title VII, because both prohibit employment practices that discriminate "on the basis of sex."[82] These prohibitions also include practices which "rely on a trait unique to one sex, since the unavoidable effect is to differentiate on the basis of sex."[83] With this in mind, the court concluded the Missouri legislature meant sex discrimination is "depriving one sex of a public accommodation afforded the other sex, including a deprivation based on a trait unique to one sex."[84] The court held R.M.A.'s "status as a transitioning transgender teenager is not unique to one sex," and therefore does not fall within the "narrow scope" of cases analyzing gender-related traits.[85]

The court compared the legislative intent behind the MHRA and its application in R.M.A.'s case to *Pittman*, wherein the Missouri Court of Appeals dismissed a petition for a failure to state a claim when the facts alleged discrimination due to sexual orientation.[86] Although the court conceded R.M.A's theory of discrimination differed from *Pittman*, the

77. *R.M.A. II*, No. WD 80005, 2017 WL 3026757, at *9 (Mo. Ct. App. July 18, 2017).

78. *Id.*

79. *Id.* Whether or how either of these points could have impacted the outcome of the case will not be discussed in this Comment.

80. *Id.* at *3–4.

81. *Id.* at *4. At this point, the majority addressed the dissenting opinion, stating it too narrowly focused only on the word "sex" and not enough on the statutory phrase "discrimination . . . on the grounds . . . of sex." *Id.*

82. *Id.* at *6. The MHRA was preceded by the Fair Employment Practices Act of 1961, which "was amended to prohibit discrimination on the basis of sex in 1965." *Id.* at *6 (citing MO. STAT. ANN. § 296.020 (1967)).

83. *R.M.A. II*, 2017 WL 3026757, at *6.

84. *Id.* The court noted, however, that Section 213.065 of the MHRA does not prohibit discrimination based on "gender related traits." *Id.* at *4. Although R.M.A.'s petition alleged discrimination on the grounds of sex, he also provided a gender-related trait theory of sex discrimination on appeal. *Id.*

85. *Id.* at *8. The two cases R.M.A. primarily relied on for the gender-related argument were *Midstate Oil Co.* and *Price Waterhouse*. *Id.* (citing Midstate Oil Co. v. Missouri Com'n on Human Rights, 679 S.W.2d 842, 846 (Mo. banc 1984); Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989)).

86. *Id.* at *6.

Pittman court's determination that "sexual orientation was not intended by the legislature to be a protected category under the MHRA is nonetheless relevant to [R.M.A.'s] case."[87]

Finally, the court briefly discussed R.M.A.'s reliance on *Price Waterhouse* on appeal.[88] It emphasized R.M.A. did not implicate sexual stereotyping in his petition or oral argument.[89] The court emphasized that regardless, *Price Waterhouse* was not a watershed case, and no court had yet held the MHRA prohibits sexual stereotyping.[90] In sum, the court determined the legislature did not intend the MHRA to prevent deprivation of a public accommodation "because a person is transitioning from female to male."[91]

C. Dissenting Opinion

Presiding Judge Rex Gabbert dissented, stating it was "premature to dispose of RMA's case through a Motion to Dismiss."[92] He had two primary points of contention.[93] First, the Defendants' concession that their alleged discriminatory conduct was based on R.M.A.'s sexual anatomy was dispositive that R.M.A. sufficiently stated a claim of discrimination based on sex.[94] Second, the majority unnecessarily consulted legislative history and subsequently "misapplied" it.[95]

Judge Gabbert emphasized that the dispositive issue in the case—whether R.M.A. was unlawfully discriminated against—was not the subject of a motion to dismiss; rather, the only inquiry was whether R.M.A. sufficiently stated a claim.[96] To determine if R.M.A. sufficiently pled a claim for sex discrimination, Judge Gabbert used the Defendants' definition of sex, which is "either of the two major forms of individuals . . . that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures."[97] He emphasized that R.M.A. was denied public accommodations "because he has female reproductive organs and structures," thus, "*but for* RMA's sexual anatomy, the alleged

87. *Id.*at *5 n.6.
88. *Id.* at *8.
89. *R.M.A. II*, 2017 WL 3026757, at *8.
90. *Id.*
91. *Id.* at *9
92. *R.M.A. II*, 2017 WL 3026757, at *9 (Gabbert, P.J., dissenting).
93. *Id.* at *9
94. *Id.* at *10.
95. *Id.*
96. *Id.*
97. *Id.* at *9. Like the *Pittman* court, the Defendants cited a dictionary in providing their definition of sex. *Compare id.* (citing Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/sex), *with Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. App. W. Dist. 2015) (citing Webster's Third New International Dictionary 2081 (Unabridged 1993)) (determining sex is "one of the two divisions of human beings respectively designated male or female").

discrimination would not have occurred."[98] Therefore, R.M.A. sufficiently stated a claim of discrimination based on sex.[99]

Judge Gabbert then reviewed the majority's consultation and analysis of legislative history.[100] He highlighted that Section 213.065 applies to "[a]ll persons," and if strictly interpreted, includes transgender persons.[101] Moreover, even if legislators did not anticipate protection for transgendered individuals, the Supreme Court "has repeatedly affirmed that statutory effects can transcend legislative intent."[102] Moreover, "a strict interpretation of sex is blind to all distinctions, including gender identity."[103] Judge Gabbert believed there was no statutory basis to deny one person the right to address discrimination based on sex, while allowing another that right, simply because the former is transgender.[104]

IV. COMMENTARY

The Missouri Court of Appeals for the Western District erred in its review, analysis, and affirmation of the dismissal of R.M.A's claim of sex discrimination. First, the majority unnecessarily delved into legislative history rather than viewing the plain language of the statute in light of *Pittman's* conclusion.[105] Second, the court incorrectly applied *Pittman* and *Price Waterhouse* in determining R.M.A. failed to state a claim. Finally, the court's holding stands in opposition to the intent behind remedial statutes, including the MHRA and Title VII, which should be broadly interpreted to permit claims to be heard on the merits.

The appellate court erred in its plain language analysis when it determined R.M.A. did not plead facts to support a claim for which relief can be granted. The Defendants admitted their conduct was wholly because of R.M.A.'s genitalia—a defining sex characteristic.[106] To R.M.A.'s knowledge, the School District never attempted to "speculate, inspect, or otherwise inquire as to the genitalia of other male students."[107] Simply put,

98. *R.M.A. II*, 2017 WL 3026757 at *9 (emphasis in original).
99. *Id.*
100. *Id.* at *10. Beginning his second point, Judge Gabbert determined that "[t]he majority's offer of legislative history is unnecessary and I respectfully submit, misapplied." *Id.*
101. *Id.*
102. *Id.* Justice Scalia stated "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 concern of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (holding that original legislative intent did not receive controlling weight in Title VII interpretations).
103. *R.M.A. II*, 2017 WL 3026757 at *11.
104. *Id.* at *10; *see* MO. REV. STAT. § 213.065 (2017).
105. *See Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479, 482 (Mo. App. 2015) (noting that "[c]ourts lack authority 'to read into a statute a legislative intent contrary to the intent made evident by the plain language'").
106. *R.M.A. II*, 2017 WL 3026757, at *9 (Gabbert, P.J., dissenting).
107. Brief of Appellant, *R.M.A. II*, *supra* note 69, at 9.

R.M.A. legally changed his name and birth certificate to reflect that he is a boy; he participated in boys' sports, and was treated as a boy by the School District *except* for access to the restrooms and locker rooms.[108] But for a defining sex characteristic, his genitalia, R.M.A. would not have suffered discrimination.[109]

The court's application of *Pittman* was flawed. *Pittman* requires a strict interpretation of sex, which is "blind to all distinctions, including gender-identity, and it protects all persons who allege discrimination based on sex."[110] Without affording it significant weight, the court acknowledged R.M.A. alleged discrimination on the grounds of sex, not sexual orientation.[111] This distinction from *Pittman* is crucial to the plain language analysis; while sexual orientation is not plainly listed under the MHRA, sex is.[112]

Despite the *Pittman* court's prior holding that "the plain language of the [MHRA] is clear and unambiguous," the majority attempted to "divine legislative intent" to determine what discrimination on the grounds of sex meant at the statute's enactment.[113] The majority held that under the MHRA, "discriminat[ion] . . . on the grounds of . . . sex" means the deprivation of a public accommodation to one sex that is afforded to the other sex.[114] Put simply, this means letting males have access to something females do not, or vice versa. Despite this simplified analysis, Section 213.065 explicitly applies to "[a]ll persons"; nowhere does it exclude a person from bringing a claim of discrimination because of sex if he or she happens to be transgender.[115] Moreover, although R.M.A.'s petition alleges he is a male deprived of accommodations afforded other males, R.M.A. was truly deprived of a public accommodation both sexes deserve.[116] Although its legal significance is not addressed, R.M.A.'s relegation to a single-stall restroom was a deprivation of the public accommodations afforded to both men and women.[117]

Even beyond R.M.A.'s transgender identity, neither the Defendants nor the court gave weight to the fact that R.M.A. statutorily amended his

108. *R.M.A. II*, 2017 WL 3026757 at *1.

109. *See Pittman*, 478 S.W. 3d at 482 (holding "sex discrimination occurs when a plaintiff's sex is a contributing factor in an employer's employment decision").

110. *R.M.A. II*, 2017 WL 3026757, at *11 (Gabbert, P.J., dissenting). The *Pittman* court determined "[t]he plain language of the [MHRA] is clear and unambiguous"; and "sex" clearly refers to "one of the two divisions of human beings respectively designated male or female." *Pittman*,478 S.W.3d at 482.

111. *R.M.A. II*, 2017 WL 3026757, at *4.

112. *See* MO. REV. STAT. § 213.065.

113. *See R.M.A. II*, 2017 WL 3026757 at *9–10 (Gabbert, P.J., dissenting); *Pittman*, 478 S.W.3d at 482.

114. *R.M.A. II*, 2017 WL 3026757 at *7.

115. *Id.* at *10 (Gabbert, P.J., dissenting)

116. *See id.* at *1.

117. *See id.*

birth certificate and is legally recognized as a male in Missouri.[118] The Court of Appeals quoted the Jackson County Circuit Court's order, which required the Bureau of Vital Records to "prepare a new birth certificate . . . to correct [R.M.A.'s] gender from 'female' to 'male.'"[119] The court attempted to dismiss the correction on the birth certificate as only a change in gender and not a change of sex; however, a Missouri birth certificate does not include one's "gender"—it lists one's "sex."[120] Thus, although the Jackson County Circuit Court order used the term "gender," the effect was the same—the only identifier on R.M.A.'s birth certificate was changed from "female" to "male."[121] Despite this determination, the appellate court highlighted R.M.A.'s "status as a transitioning transgender teenager," because the Jackson County Circuit Court order did not contain a finding that R.M.A. had his sex changed by surgical procedure, which is required by Section 193.215.9.[122] Although a surgical sex change procedure is a statutorily mandated requirement, this requirement has not been uniformly applied in at least one similar recent Missouri case.[123]

The MHRA was unquestionably enacted to provide protection against discrimination because of immutable characteristics by which individuals have historically been targeted.[124] R.M.A. alleged discrimination on the grounds of *sex*—which is plainly covered by the MHRA.[125] Indeed, the Supreme Court has stated that statutes often "cover reasonably comparable evils."[126] Transgender youth certainly suffer "comparable evils" to those the MHRA was designed to prohibit.[127] Precluding R.M.A.'s discrimination claim from being heard on its merits essentially forces him

118. *See id.*

119. *Id.* at *1 n.3 (quoting the Circuit Court of Jackson County's Order, not publicly available for review).

120. MO. REV. STAT. § 193.215.9 (2017).

121. *R.M.A. II*, 2017 WL 3026757, at *1.

122. *Id.* at *1 n.3.

123. *See In re* Jamie Miranda Glistenburg, No. 13AR-CV00240 (Adair Cty. Cir. Ct., Mo., May 20, 2013). The judgment affirming and recognizing Glistenburg as a female held:

> [T]he court understands that select circumstances, such as this case, require judicial intervention in order to prevent discrimination. Moreover, the explicit requirement of surgical procedures or medications that may be deemed unsuitable, dangerous, or unnecessary to [the transgender Petitioner seeking birth certificate amendment] by medical assertion shall be given relief not withstanding Mo. Ann. Stat. § 193.215.9.

Id. at 2.

124. *See* MO. REV. STAT. § 213.030(1) (2017).

125. *R.M.A. II*, 2017 WL 3026757, at *10 (Gabbert, P.J., dissenting).

126. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 79 (1998).

127. *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1725 (2014). In school, more than half of transgender students endure physical harassment, at times rising to the level of assault. *Id.* at 1725–26. Transgender youth are also five times more likely to attempt suicide than their cisgender peers. *Id.* "Cisgender" denotes a person whose sense of personal and gender identity corresponds with the sex they were assigned at birth. MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/cisgender.

into the unisex single-stall bathroom—a "solution" which further marginalizes transgender youth.[128]

The appellate court in R.M.A.'s case did not have the gift of foresight; however, the opinion since issued by the *Lampley* court illustrates that atypical claims of sex discrimination can and should still be heard on their merits.[129] Although the MCHR feared sex-stereotyping theories would expand the MHRA's scope of prohibited practices beyond the legislature's intent, the *Lampley* court emphasized "[t]he prohibition against sex discrimination extends to all employees, regardless of gender identity or sexual orientation."[130] The court's determination that R.M.A.'s "status as a transitioning transgender teenager is not unique to one sex" and is thus not protected is inaccurate.[131] Under Missouri law, by his legal birth certificate, R.M.A. is a male.[132] He participated in boys' physical education, yet is prohibited from using the boys' restrooms and locker rooms solely because he is "transgender and is alleged to have female genitalia."[133]

V. CONCLUSION

Courts have an unquestionable role as gatekeepers to prevent lawsuits that simply have no basis in law from reaching juries. However, in cases of alleged discrimination brought under remedial statutes, the facts alleged should be viewed in the broadest light to permit such claims to be heard on their merits. When an individual is prevented from using public, state-funded facilities appropriate with his or her legally recognized sex, that individual has no other legal form of redress other than filing suit for discrimination on the grounds of sex. Here, R.M.A. was prevented from using the male facilities even though he was legally recognized by Missouri as a male. The reason for the prevention, conceded by the School District, was solely based on R.M.A.'s genitalia. The court plainly erred by refusing to allow R.M.A.'s claim, brought under a remedial statute, to be heard on its merits.

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128. Jill D. Weinberg, *Transgender Bathroom Usage: A Privileging of Biology and Physical Difference in the Law*, 18 BUFF. J. GENDER, L. & SOC. POL'Y 147, 152 (2010). This article compares transgender bathroom usage laws to Jim Crow laws, specifically, "the relegation of a transgender individual to a [single] bathroom is akin to forcing blacks to a separate restroom facility." *Id.*

129. *See* Lampley v. Missouri Comm'n on Human Rights, No. WD 80288, 2017 WL 4779447, at *3 (Mo. Ct. App. Oct. 24, 2017). This opinion was the first time a Missouri court held a *Price Waterhouse* theory of sex-stereotyping could sufficiently state a claim of discrimination on the grounds of sex under the MHRA. *Id.*

130. *Id.*

131. *See R.M.A. II*, 2017 WL 3026757, at *8.

132. Brief of Appellant, *R.M.A. I*, *supra* note 6, at 2.

133. *See R.M.A. II*, 2017 WL 3026757, at *1.