

## Michigan Supreme Court: Discrimination Based on Sexual Orientation Prohibited Under State Civil Rights Act

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The Michigan Supreme Court has ruled that discrimination on the basis of sexual orientation and gender identity is discrimination because of sex prohibited by the Michigan Elliott-Larsen Civil Rights Act ("ELCRA"). The 5-2 decision was issued on July 28, 2022, in the case of *Rouch World, LLC, v. Department of Civil Rights*.

The ELCRA recognizes as a civil right "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status . . ." MCL 37.2102(1).

### Background

In 2018, the Michigan Civil Rights Commission ("MCRC") issued Interpretive Statement 2018-1 as non-binding guidance to the public, opining that sex, as used in the ELCRA, included protections for individuals on the basis of sexual orientation and gender identity. This interpretation prompted the Michigan Department of Civil Rights ("MDCR") to begin processing complaints of discrimination based on sexual orientation and gender identity. In 2020, Rouch World, a venue that refused to host the wedding of a same-sex couple, and Uprooted Electrolysis, a business that declined to provide hair-removal services to a transgender woman, both citing religious beliefs, jointly sued the MDCR in the Court of Claims, challenging the MDCR's adherence to Interpretive Statement 2018-1. The Court of Claims ultimately sided with the MCRC and determined that the ELCRA protects against discrimination on the basis of gender. Sexual orientation, however, was not deemed protected by the Court, which cited a 1993 Court of Appeals ruling in *Barbour v Department of Social Services*, which held that sexual orientation does not fall within the meaning of sex under the ELCRA.

Defendants filed an interlocutory application for leave to appeal in the Court of Appeals, and, thereafter, filed a bypass application with the Michigan Supreme Court. The Supreme Court agreed to hear the case.

### Michigan Supreme Court Opinion

In reversing the Court of Claims' decision in part, the Supreme Court concluded that discrimination on the basis of sexual orientation constitutes discrimination because of sex. The *Rouch World* majority relied on both the ELCRA's plain language and the rationale of the U.S. Supreme Court in *Bostock v Clayton Co*, 590 US \_\_\_, \_\_\_; 140 S Ct 1731 (2020). *Bostock* held that discrimination based on sexual orientation or gender identity is necessarily encompassed within discrimination because of sex under Title VII of the Civil Rights Act of 1964, the statute on which the ELCRA was based. In so holding, *Bostock* overruled lower federal court precedent that had previously ruled to the contrary, including *DeSantis*, *Williamson*, and *DeCintio*—the cases on which the *Barbour* court relied.

Citing *Bostock*, the Michigan Supreme Court reasoned that sexual orientation is "inextricably bound up with sex" because a person's sexual orientation is generally determined by reference to their own sex. Further, in emphasizing the unambiguousness of the ELCRA's language, the Court stated that it is "bound by the language that the Legislature has enacted, not what the parties or amici believe the Legislature should have enacted or what any individual representative believed was enacted."

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## Key Takeaways

- The denial of “the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service” on the basis of sexual orientation constitutes discrimination “because of . . . sex” and, therefore, violates the ELCRA under MCL 37.2302(a).
- Employers with 15 or more employees were already prohibited by federal law from discriminating on the basis of gender identity or sexual orientation under Title VII pursuant to the *Bostock*. However, smaller employers were not bound by the same restrictions. Accordingly, those employers should take measures to (a) train management on the law’s new requirements to avoid future liability, and (b) ensure that their handbooks and policies reflect the new interpretation of the law. Larger employers should update their policies as well to make certain that they reflect the scope of these protections under both state and federal law.

*To further discuss how this ruling could affect your organization, please contact the authors or your Miller Canfield attorney.*

*This information is based on the facts and guidance available at the time of publication and may change.*