GREAT LAKES JUSTICE CENTER

ISSUE BRIEF
AUGUST 15, 2017

RESPONSE TO EQUALITY MICHIGAN'S REQUEST FOR INTERPRETIVE STATEMENT

INTRODUCTION

The News Release and legal memo submitted by Equality Michigan (EM) to the Michigan Civil Rights Commission (MCRC) on July 24, 2017 is legally incorrect and misleading. It exposes a transparent attempt by the authors to circumvent politically accountable, elected legislators who hold the constitutional authority to enact and amend laws in our state. The Great Lakes Justice Center offers this response on behalf of the legislators named below.

EM requests the MCRC to "issue an interpretative (sic) statement" to expand the categories prohibiting discrimination contained in the Elliott-Larsen Civil Rights Act (hereinafter ELCRA)(MCL 37.2101 et seq.).[1] EM requests that "gender identity and sexual orientation" be added to the protected categories. EM falsely claims the MCRC has the authority to add the new categories through an interpretative (sic) statement pursuant to MCL 37.2601, MCL 24.201 et seq., and Rule 37.23 of the Michigan Administrative Code. EM's news release further claims that the MCRC should issue this statement because the Michigan Legislature has declined to amend ELCRA to add these new categories numerous times over the past thirty years and because Federal Law requires such an interpretation. Its news release further claims that such an interpretative statement would change the law in Michigan to add the new LGBT classifications and thereby provide special protection and "remedies" for those claiming to fall within the new categories.

A simple review of the cited law demonstrates that the above claims are incorrect and misleading.

I. MICHIGAN LAW

Although the MCRC holds some authority to issue an interpretive statement on issues under its purview (R37.23 of the Michigan Administrative Code), the Commission does not have the authority to change a statute or amend ELCRA. Article IV, Section 1 of the Michigan Constitution provides that "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives," not the MCRC. EM admits that the Legislature has declined to add these categories numerous times over the past thirty years. The MCRC is not the Legislature and is not politically accountable to the people.

An interpretive statement is not binding law. It would not, therefore, make LGBT discrimination "unlawful in Michigan," would not be legally binding on employers and individuals in our state, and would not give any legal remedies to alleged victims of discrimination. The following review and analysis of the statutes negates EM's claims.

First, contrary to the claims in EM's news release, MCL 37.2601 says nothing about the authority of the MCRC to enact legislation or interpretive statements that carry the force of law. In fact, it clearly states the opposite. **The MCRC can only make**

[1] The term "interpretative statement" is found nowhere in the cited statutes. The proper term is "interpretive statement."

"recommendations" to the Governor "for legislative or other action necessary to effectuate" its constitutional mandate (MCL 37.2601(1)(e)). It holds no independent power or authority to enforce its recommendations in any way. Since the MCRC can only make recommendations to the Governor for legislation, it clearly does not have the right to amend statutes and enact new legislation on its own authority.

Second, EM misleadingly cites the Administrative Procedures Act (APA) as a source of authority for the requested interpretive statement (MCL 24.201 et seq.). The phrase "interpretive statement" is only used in two sections of the APA.

MCL 24.207 defines "Rules" which are binding law on businesses and individuals. MCL 24.207(h) states that **an "interpretive statement . . . in itself <u>does not have the force and effect of law</u>** but is merely explanatory." (emphasis added). This refutes EM's claim that an interpretive statement passed by the MCRC to add the new categories would make such actions "unlawful," or that businesses and individuals would be legally responsible to comply with such a statement, or that the statement would provide new legal remedies to anyone. This claim is simply not true.

MCL 24.232(5) also directly refutes EM's claims. This section of the APA states that **an "interpretive statement . . . <u>is not enforceable by an agency, is considered merely advisory</u>, and <u>shall not be given the force and effect of law</u>. . . . A court <u>shall not</u> rely upon a(n) . . . interpretive statement . . . to uphold an agency decision** to act or refuse to act." (emphasis added). Once again, this demonstrates that EM's claim of the binding authority of an interpretive statement is clearly incorrect.

Nothing in Michigan law supports EM's broad claim that an interpretive statement would be legally binding and enforceable against Michigan businesses and citizens if passed by the MCRC. Any attempt to enact and enforce such legislation under the guise of an interpretive statement will be rejected as unlawful by our courts.

II. Federal Law

EM's claim that Title VII case law interpretations by federal courts around the country are binding and controlling law in Michigan is not accurate and is very misleading. None of the federal cases cited by EM deal with ELCRA and are not binding in Michigan. Its claim that these federal cases and interpretations are "equally applicable to Michigan's" Elliott-Larsen Act is also false.

EM argues that Title VII, a federal statute that covers only employment discrimination in a business with 15 or more employees (see 42 U.S.C. 2000e-2), is similar enough to ELCRA that the MCRC should disregard the differences and pretend they are the same law. Nothing in Title VII has anything to do with public accommodations or housing. The sexual harassment sections of ELCRA are different than Title VII. EM claims that since some federal courts have re-defined Title VII's definition of the word "sex" as applied to employment discrimination, that this new court-created definition must apply to Michigan's ELCRA as well. EM thereafter improperly concludes that these federal court opinions require enacting an interpretive statement adding the new categories.

The cited federal court decisions do not control the interpretation of Michigan statutes. Indeed, the cases EM cites come from other states or from non-binding federal jurisdictions interpreting other state or federal statutes relating only to employment discrimination. Further, the Equal Employment Opportunity Commission (EEOC) recommendations and decisions cited by EM explicitly pertain to employer/employee relationships, not housing or public accommodations. To claim

that everything a federal agency recommends is always true, lawful, and in the best interest of society ignores our nation's history and negates any need for judicial review.

In fact, the federal Department of Justice (DOJ) is currently arguing in *Zarda v. Altitude Express*, an appeal being heard at the 2nd U.S. Circuit Court of Appeals, that Title VII does not include sexual orientation or gender identity. The DOJ brief states: "Moreover, whatever this court would say about the question were it writing on a blank slate, Congress has made clear through its actions and inactions in this area that Title VII's prohibition of sex discrimination does not encompass sexual orientation discrimination. . . . The question presented is not whether, as a matter of policy, sexual orientation discrimination should be prohibited by statute, regulations, or employer action. . . . The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. . . . Judges in the past, in fact, have decided that in common, ordinary usage in 1964 – and now, for that matter – the word 'sex' means biologically *male* or *female*."

The DOJ further argues in its brief that "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade. The theories advanced by the EEOC and the Seventh Circuit lack merit, and these theories are inconsistent with Congress's clear ratification of the overwhelming judicial consensus that Title VII does not prohibit sexual orientation discrimination." DOJ also notes pointedly that "every subsequent Congress since 1991 … has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation." Congress has consistently declined to amend Title VII despite having been repeatedly presented with opportunities to do so.

EM cannot rely upon inapplicable out-of-state cases, federal cases, or EEOC recommendations to override the clear parameters of ELCRA. Moreover, EM has failed to cite mandatory United States and Michigan Supreme Court precedent which control this issue.

The United States Supreme Court "repeatedly has held that state courts are the ultimate expositors of state law, see, e.g., *Murdock v. City of Memphis*, 20 Wall. 590 (1875) …." *Mullaney v Wilbur*, 421 U.S. 684, 691 (1975). Further, the Court has held that "Congress has explicitly disclaimed any intent categorically to preempt state law or to 'occupy the field' of employment discrimination law. See 42 U.S.C. §§ 2000e-7 and 2000h-4." *California Federal Savings & Loan Assn v Guerra*, 479 U.S. 272, 281 (1987).

42 U.S.C. 2000e-7 (Title VII, Section 708, Effect on State Laws) states:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Congress implemented Title VII with the explicit intent to not limit state law.

The Michigan Supreme Court has ruled multiple times on the issue of interpreting ELCRA in light of federal interpretations of Title VII. In *Chambers v Trettco, Inc*, 463 Mich 297 (2000), the Michigan Supreme Court reversed the Michigan Court of

Appeals when it relied on federal interpretations of ELCRA. The Michigan Supreme Court stated:

> *We hold that the principles stated in the federal cases relied on by the Court of Appeals* ***do not apply*** *to claims brought under Michigan's Civil Rights Act. Instead,* ***we adhere to prior Michigan precedent and the specific language of the Michigan statute.***

Id. at 303 (emphasis added). The opinion further held that although the Court can sometimes look at federal interpretations, Michigan courts are not compelled to do so.

> *However, we have generally been careful to make it clear that we are* ***not compelled to follow those federal interpretations.*** *See, e.g., Radtke, supra at 381-382, 501 N.W.2d 155. Instead,* ***our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature,*** *... 'as gathered from the act itself.' " McJunkin v. Cellasto Plastic Corp., 461 Mich. 590, 598, 608 N.W.2d 57 (2000). . . . [W]****e cannot defer to federal interpretations if doing so would nullify a portion of the Legislature's enactment.***

Id. at 313-314 (emphasis added).

In *Haynie v State*, 468 Mich 302 (2003), the dissenting opinion made a nearly identical argument as EM claims here. The dissent made the same comparisons and cited many of the same cases EM cites. The dissent stated that "[b]ecause Michigan's employment-discrimination statute so closely mirrors federal law, we often rely on federal precedent for guidance." *Id*. at 325. The majority opinion explicitly rejected the dissent's arguments when it held:

> *Even if, as the dissent states, the Michigan Legislature relied heavily on the federal civil rights act in drafting Michigan's Civil Rights Act, the Michigan Legislature was clearly not bound by the federal civil rights act.* ***That is, the Michigan Legislature was free to adopt a civil rights act that differed from the federal civil rights act, and although, as the dissent points out, there are many similarities between the two acts, the Michigan Legislature did, in fact, choose to adopt an act that is different from the federal act. Despite the dissent's determination not to allow them to do so, the Michigan Legislature is allowed to determine for itself the extent to which it wishes to track the language of the federal law.*** *In particular, Michigan's Civil Rights Act is different from the federal civil rights act with regard to its treatment of sexual harassment.* ***The dissent fails to respect this difference and, instead, concludes that because these acts are nearly identical they must be construed to mean exactly the same thing. We cannot agree that any time the Michigan Legislature creates a law that is "similar" to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing.***

Id. at 319-320 (emphasis added).

Michigan courts are not bound by federal interpretations that might be analogously applied to ELCRA but are instead bound to comply with the Michigan Legislature's intent when it enacted ELCRA. It is for the Michigan Legislature to establish public policy for Michigan, not other state or federal court interpretations of a different statute.

In its strained attempt to tie federal Title VII to ELCRA, EM argues that the federal courts' re-definition of the word "sex" must

be imposed on Michigan law. It appears that EM is arguing that the Michigan Legislature actually intended that those additional classifications (i.e. sex stereotypes, gender identity, sexual orientation, etc.) must now be protected under ELCRA. However, in *Bush v Shabahang*, 484 Mich 156, 173 (2009), the Supreme Court held:

> *"Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to authorize what the Legislature explicitly rejected."*

The Michigan Legislature has considered legislation *eleven times* since 1999 to add additional classifications to ELCRA such as gender identity, sexual orientation, etc. All eleven times, those bills have been rejected by our legislature. See Michigan Legislature HB 5959 (2014), HB 5804 (2014), SB 1053 (2014), SB 1063 (2012), HB 4192 (2009), HB 4160 (2007), SB 0787 (2005), HB 4956 (2005), SB 0609 (2003), HB 4850 (2003), and HB 5107 (1999). As EM admits, our legislature has clearly refused to add to ELCRA the additional classifications that EM now suggests the MCRC should sneak in through the back door as an alleged interpretation of the Legislature's intent. The MCRC must reject EM's invitation to "interpret" ELCRA to mean things our legislature has explicitly rejected. Despite how other state or federal courts may re-define the word "sex" for other statutes, our legislature has made its intent clear. Michigan courts, and the MCRC, are bound to enforce that intent. Even if the MCRC agrees with EM's request, the MCRC has the constitutional duty to enforce the laws passed by the legislature, not make up its own laws. Having repeatedly failed to persuade the Legislature to amend ELCRA, EM should not be permitted to do an end run around the Legislature by improperly asking the MCRC to implement the requested amendments.

III. Other Considerations

Beyond the clear legal principles delineated above that argue against the MCRC passing the requested interpretive statement, there are other public policy reasons to oppose expanding the categories currently protected under ELCRA. See the attached Issue Brief from the Great Lakes Justice Center, Citizens for Traditional Values and the Michigan Family Forum.

Conclusion

For all the above reasons, we respectfully urge the Michigan Civil Rights Commission to not act outside its constitutional and statutory authority by enacting the requested interpretive statement. This issue is solely within the constitutional authority of the Michigan Legislature, not this Commission.

Legislators:

Senator Patrick Colbeck
Senator Judy Emmons
Senator Michael Green
Senator David Robertson
Senator Michael Shirkey
Representative Thomas Barrett
Representative Lee Chatfield
Representative Ben Frederick
Representative Gary Glenn
Representative Jeff Noble
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