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MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

<p>SARA BERNDT and BRYAN BERNDT, on behalf of their child, M.B.,</p> <p>Plaintiffs/Petitioners,</p> <p>vs.</p> <p>THE MONTANA HUMAN RIGHTS COMMISSION; THE MONTANA DEPARTMENT OF JUSTICE, MOTOR VEHICLE DIVISION, DRIVER SERVICES BUREAU; REBECCA CONNORS, individually and in her capacity as the Bureau Chief of the Montana Motor Vehicle Division; and LAURIE BAKRI, individually and in her capacity as Administrator of the Montana Motor Vehicle Division; AMY L.N.U., individually and in her capacity as an employee of the Missoula Branch of the Montana Motor Vehicles Division; MARK L.N.U., individually and in his capacity as the supervisor of the Missoula Branch of the Montana Motor Vehicles Division,</p> <p>Defendants/Respondents.</p>	<p>Cause No. _____</p> <p>Judge: _____</p> <p>PETITION FOR JUDICIAL REVEIW</p>
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INTRODUCTION

1. Discrimination on the basis of gender identity is, by definition and as a matter of law, sex discrimination. This was the inevitable conclusion reached by the U.S. Supreme Court in *Bostock v. Clayton County, Ga*, 590 U.S. 644 (2020), and which has faithfully been applied by courts across the nation.

2. This was also the conclusion reached by a Hearing Officer in Montana, who determined that an insurance policy that prevented transgender employees from obtaining medically necessary gender affirming care constituted discrimination on the basis of sex. *Maloney v. Yellowstone County, et al.*, Cause No. 1570–2019 & 1572–2019 (Department of Labor and Industry, August 14, 2020).

3. A recent decision by the Montana Human Rights Commission (MHRC), however, is jarringly out of step with historical and contemporary understandings of sex discrimination. In *Berndt et al. v. Montana Department of Justice et al.* the MHRC held that “[t]he term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity.” Cause no. 220498 (June 13, 2024) at 6.

4. M.B. is the child of Sara and Bryan Berndt (collectively, “Petitioners”). M.B. is non-binary and was a minor at the inception of this action. M.B. possesses a Montana-issued birth certificated correctly identifying their sex as non-binary. In 2022, however, the Montana Motor Vehicle Division denied M.B.’s application for a driver’s license because M.B. could not identify their sex as one of the two options provided in the application – male or female.

5. The State’s denial of M.B.’s driver’s license was based exclusively on M.B.’s gender. This is discrimination on the basis of sex. The MHRC’s decision must be overruled.

JURISDICTION AND VENUE

6. This action is brought pursuant to the Montana Human Rights Act, § 49-2-101, MCA et seq., and the Montana Administrative Procedure Act, § 2-4-101, MCA et seq. This Court has jurisdiction over plaintiffs' claims pursuant to § 3-5-302(1)(b), MCA (providing state district court jurisdiction over all civil matters); § 2-4-702, MCA (providing for judicial review of contested cases); and § 49-2-505(9), MCA (providing for judicial review of Commission decisions).

7. Because the MHRC has issued a "final agency decision in writing," Plaintiffs have exhausted their administrative remedies. § 2-4-702(1)(a), MCA (providing for judicial review of contested cases after exhaustion of available administrative remedies); § 49-2-505(9), MCA (Within 30 days after the commission issues a final agency decision in writing under subsection (5), a party may petition a district court for judicial review of the final agency decision as provided in 2-4-702).

8. Venue is proper in this District under § 2-4-702, MCA because the Plaintiffs reside in Missoula County.

PARTIES

9. Sara and Bryan Berndt are the parents of M.B. This family resides in Missoula, Montana. M.B. is an individual whose sex is non-binary, as confirmed by their Montana Certificate of Live Birth. M.B. uses the pronouns "they" and "them."

10. The Montana Department of Justice, Motor Vehicle Division, Driver Services Bureau is a state agency that oversees applications for and issuance of Montana driver's licenses.

11. Rebecca Connors is the Bureau Chief of the Montana Motor Vehicle Division. Ms. Connors is being sued in her official capacity.

12. Laurie Bakri is the Administrator of the Montana Motor Vehicle Division. Ms. Bakri is being sued in her official capacity.

13. Amy L.N.U. is an employee at the Missoula branch of the Montana Motor Vehicle Division. She is being sued in her official capacity.

14. Mark L.N.U. is an employee and supervisor of the Missoula branch of the Montana Motor Vehicle Division. He is being sued in his official capacity.

15. The Montana Human Rights Commission (MHRC) is a statutorily created “quasi-judicial board” consisting of five members appointed by the governor and confirmed by the senate. § 2-15-1706, MCA. “The commission is allocated to the department of labor and industry for administrative purposes only as provided in 2-15-121.” § 2-15-1706(4), MCA. These “administrative purposes” include exercising quasi-judicial, quasi-legislative, licensing and policy-making functions. § 2-15-121(a)(i), MCA. Quasi-judicial function involves an exercise of judgment and discretion in making determinations in controversies. § 2-15-102(10), MCA.

FACTS AND PROCEDURAL HISTORY

16. On or about March 25, 2021, Petitioners Bryan and Sara Bernt completed the State’s Gender Designation Form in accordance with A.R.M. 37.8.311.

17. Petitioners sought to correct the sex listed on M.B.’s Montana birth certificate along with the name change granted by the Fourth Judicial District Court in an unrelated proceeding.

18. The State’s own form was entitled “Gender Designation Form,” and the State used that form to change the sex on M.B.’s Montana birth certificate, and likely that of other individuals pursuant to A.R.M. 37.8.311.

19. On or about April 22, 2022, M.B. appeared for a scheduled appointment with the Motor Vehicles Division (MVD) in Missoula to take the practical driving test. Prior to that, M.B.

had taken and passed an approved Montana Traffic Education Course through Missoula Public Schools and was issued a Montana Learner License.

20. After passing the practical driving test at MVD, M.B. presented proof of completion of the Montana Traffic Education Court, had a photograph taken by an MVD employee, and attempted to complete the full application and provide the required payment necessary to obtain a Montana Driver's License with full driving privileges.

21. The electronic portion of the application was completed by an MVD employee, while Petitioners completed the written portion of the application duly writing in M.B.'s sex as "NB," meaning non-binary.

22. The application form presented M.B. with only two options: male or female, neither of which corresponds to the actual sex listed on M.B.'s Montana birth certificate or M.B.'s United States passport.

23. MVD refused to provide M.B. with a driver's license.

24. On April 27, 2022, Petitioners contacted MVD Bureau Chief Rebecca Connors who informed Petitioners that no Montana driver's license had ever been issued to a non-binary person.

25. In May of 2022, Ms. Connors or another MVD employee inquired about the option of changing the application process to allow licenses to be issued to non-binary individuals.

26. Although MVD learned that the computer program they use to issue licenses could be changed so that non-binary individuals could be issued licenses, no action to effect such change was taken. *Id.*

27. Petitioners filed their Verified Complaint with the Montana Human Right Bureau in July of 2022. Following an investigation, on January 17, 2023, the Bureau found reasonable cause to believe unlawful discrimination occurred as alleged in the Charging Parties' Complaint.

28. The Complaint was then certified to the Office of Administrative Hearings (OAH) on February 13, 2023. There, the parties each filed summary judgment motions, and the Hearing Officer issued a Summary Judgment Order in favor of Charging Parties on June 14, 2023.

29. Arguments regarding damages were held on July 19, 2023.

30. At the July 19, 2023, hearing on damages, Respondents asserted a mixed-motive defense that had not been argued prior to issuance of the Summary Judgement Order.

31. At that hearing, Motor Vehicles Department Bureau Chief Rebecca Connors testified that it was possible for Respondents to change their computer system (IDEMIA) to process license applications from individuals whose sex was other than male or female.

32. Ms. Connors further testified that in May of 2022 and again just two weeks prior to the hearing, Respondents had inquired about changing their system to process license applications from individuals whose sex was other than male or female. Ms. Connors further testified that although Respondents had learned that their system could be changed to process applications from individuals whose sex was other than male or female, "we are basically replicating what's in our current system . . . so it would not be an option at this moment."

33. The Hearing Officer issued a Decision on December 26, 2023, and awarded Petitioners affirmative relief in the form of requiring Respondents to issue M.B. a driver's license with a non-binary sex designation.

34. On December 28, 2023, Respondents appealed the Hearing Officer's decisions to the Montana Human Rights Commission.

35. The Commission considered the matter on March 21, 2024.

36. On June 13, 2024, the MHRC issued a final written decision reversing the Hearing Officer's findings. The MHRC made the following erroneous legal conclusions:

- Basic dictionary definitions of the word “sex” clearly define the word in terms of anatomical biology to the exclusion of references to gender identity;
- Finally, the hearing officer's reliance on a single United States Supreme Court Case to support his conclusion while failing to distinguish multiple Montana cases on the subject was similarly in error;
- By expanding the term “sex” in Mont. Code Ann. § 49-2- 308 to include “gender identity,” the hearing officer inserts what has been omitted from the statute in derogation of the fundamental principles of statutory construction. See Fox, ¶ 18. To do so was therefore in error and warrants reversal of the hearing officer's Order. (Citing *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898).
- The term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity.
- M.B. is not a member of a protected class within the meaning of the 2021 version of the Montana Human Rights Act on the basis of sex.

37. The MHRC Final Agency Decision is attached hereto as Exhibit A.

38. During the hearing's public deliberations, Commissioners engaged in multiple colloquies demonstrating a desire to reach a predetermined outcome without regard to applicable facts or the law. For example: Commissioner Almy: “I just went to the conclusions of law on that page—our page 54, and I'm going, wrong, wrong, wrong, wrong, all the way down, and I mean I'm just—I couldn't disagree more with the conclusions of law. I mean maybe—and there

is probably a couple of the findings of fact I'm in disagreement, but the conclusions of law, are just wrong. And that's not very lawyer of me, but it—he's wrong."

39. Senate Bill 458, which purported to define "sex" based exclusively on an individual's reproductive organs and capacity, was recently struck down as unconstitutional by a Montana District Court. *Reagor v. State of Montana*, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist. Court, Missoula Cty.) (June 24, 2024).

STANDARD OF REVIEW

40. § 2-4-704, MCA provides, in relevant part:

"(1) The review must be conducted by the court without a jury and must be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof of the irregularities may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.

(2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:

(a) the administrative findings, inferences, conclusions, or decisions are:

(i) in violation of constitutional or statutory provisions;

(ii) in excess of the statutory authority of the agency;

(iii) made upon unlawful procedure;

(iv) affected by other error of law;

(v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;

(vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

LEGAL CLAIMS

MHRA, § 49-2-101 et seq, MONTANA CONSTITUTION, art. II, § 4, MAPA, § 2-4-704

41. Petitioners incorporate by reference all prior allegations.
42. The MHRC's decision reversing the Hearing Officer's Orders violated the MHRA and the constitution, and specifically Mont. Const. art. II, § 4 (Dignity, Equal Protection).
43. The Montana Human Rights Act prohibits discrimination on the basis of – among other things – sex. § 49-1-102, MCA (“The right to be free from discrimination because of race, creed, religion, color, sex, as defined in 1-1-201, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to: (a) the right to obtain and hold employment without discrimination; and (b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.”); § 49-2-304 (“Discrimination in public accommodations. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation: (a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin.”)
44. Gender identity is “palpably sex-based” because “the defining criteria of [this] class is plainly and simply sex[.]” *Snetsinger v. Montana University System*, 2004 MT 390, ¶¶ 82-83, 325 Mont. 148, ¶¶ 82-83, 104 P.3d 445, 462, ¶¶ 82-83 (Nelson, J., concurring). A non-cisgender individual is a person whose gender identity is different from the sex they were

assigned at birth, which in turn is necessarily “inseparable from transgender identity.” *Toomey*, 2019 WL at *5.

45. The Supreme Court ruled in *Bostock* that “it is impossible to discriminate against a person for being... transgender without discriminating against that individual based on sex.” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020). By definition, a transgender or nonbinary person is an individual whose gender identity differs from the sex they were assigned at birth. The Court in *Bostock* reasoned that an employer who fires an employer for being transgender necessarily takes into consideration the sex they were assigned at birth and punishes them for failing to identify with that sex.

46. In the years since *Bostock* was decided, “[m]any courts . . . have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes.” *Hecox v. Little*, 104 F.4th 1061, 1076 (9th Cir. 2023) (quoting *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020)); *see also Fowler v. Stitt*, 104 F.4th 770, 793 (10th Cir. 2024) (“[A]pplying *Bostock*’s reasoning, we conclude that because the Policy [that prohibits transgender people from amending the sex marker on their birth certificate] intends to discriminate based on transgender status, it necessarily intends to discriminate based in part on sex.”); *Kadel v. Folwell*, 100 F.4th 122, 153–54 (4th Cir. 2024) (en banc) (applying *Bostock*’s reasoning to equal protection context); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017), *abrogated on other grounds*, *Illinois Republican Party v. Pritzker*, 972 F.3d 760 (7th Cir. 2020) (same); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670–71 & n.4 (8th Cir. 2022) (applying heightened scrutiny to affirm a preliminary injunction against a law that

prohibited “gender transition procedures” because the law discriminated on the basis of sex); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) (reaffirming *Whitaker* as “follow[ing]” the same “approach” as *Bostock*), petition for cert. filed, No. 23-392 (Oct. 11, 2023).

47. The Montana Supreme Court has also found that MHRA must be interpreted broadly enough to incorporate the protections guaranteed by the Declaration of Rights of the Montana Constitution. *See Edwards v. Cascade County Sheriff’s Dep’t*, 2009 MT 451, ¶ 73, 354 Mont. 307, ¶ 73, 223 P.3d 893, ¶ 73.

48. The MHRA implements the anti-discrimination rights enumerated in Article II, Section 4 of the Montana Constitution, which provides that “[t]he dignity of the human being is inviolable[.]” guarantees equal protection under the law, and forbids government-imposed discrimination against any person on account of sex. *Edwards*, ¶ 73; *Snetsinger*, ¶ 15.

49. The Montana Supreme Court interprets the protections of Article II, Section 4 broadly in furtherance of its purpose of ensuring, “that every individual in the State of Montana, as a citizen of this state, may pursue his inalienable rights without having any shadows cast upon his dignity through unwarranted discrimination.” *Snetsinger*, ¶ 78 (Nelson, J. concurring) (quoting Delegate Wade Dahood, chair of the Committee, Montana Constitutional Convention, Verbatim Transcript, March 7, 1972, p. 1643).

50. The protections of individual rights under the Montana Constitution are in fact more expansive than those afforded by the federal constitution. *Snetsinger*, ¶ 15 (“Article II, Section 4 of the Montana Constitution provides even more individual protection than the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution”); *Gryczan v. State* (1997), 283 Mont. 433, 448, 942 P.2d 112, 121 (“...Montana's Constitution affords citizens

broader protection of their right to privacy than does the federal constitution”). In *Gryczan*, for example, the Montana Supreme Court held that a statute that criminalized private, sexual conduct between consenting adults of the same sex violated the Montana Constitution despite the fact that the U.S. Supreme Court had previously held that an identical statute did not violate the federal constitution. 283 Mont. at 449, 942 P.2d at 122. (“Since the right to privacy is explicit in the Declaration of Rights in Montana’s Constitution, it is a fundamental right and any legislation regulating the exercise of a fundamental right must be reviewed under a strict-scrutiny analysis.”).

51. The MHRC’s decision exceeded the statutory authority of the agency in violation of § 2-4-704, MCA. The agency does not have jurisdiction to make a determination that discrimination on the basis of sex does not include gender identity.

52. Courts must “determine independently the meaning of constitutional terms, and [are] not bound by the interpretation of another branch of government.” *League of Women Voters of Mich. v. Sec’y of State*, 333 Mich. App. 1, 37 (Mich. 2020).

53. “Although the Legislature can clarify constitutional amendments of doubtful or obscure meaning, it cannot transcend the meaning intended by the constitutional framers.” *Nunes Turfgrass, Inc. v. County of Kern*, 111 Cal. App. 3d 855, 863, 168 Cal. Rptr. 842, 846-47 (1980). “[T]o recognize such an expansive legislative power to redefine constitutional terms is inconsistent with the constitution’s supremacy over statutes.” *Wpw Acquisition Co. v. City of Troy*, 466 Mich 117, 124–25, 643 N.W.2d 564, 568 (2002) (citing *Marbury*, 5 U.S. 137).

54. It is Montana’s judiciary that the Constitution vests with the “power to pass upon constitutional questions,” not Montana’s legislative branch. *McDonald v. Jacobsen*, 2022 MT 160, ¶ 17, 409 Mont. 405, 415 P.3d 777, 784.

55. “Constitutional guarantees are not mere vessels to be left empty or filled at the whim of the legislative branch.” *State v. Guillaume*, 1999 MT 29, ¶ 14, 293 Mont. 224, 230, 975 P.2d 312, 316. If the legislature desires to amend the constitution to define the constitutional term “sex” there is a constitutional path to do so.

56. In fact, with SB 458 the Legislature did attempt to redefine the term “sex” based on reproductive capability (demonstrating that, prior to its enactment, the term “sex” was interpreted broadly to include gender identity). Among multiple other statutes, SB 458 was intended to amend the Montana Human Rights Act. SB 458 was recently struck down as unconstitutional. *Reagor v. State of Montana*, Cause No: DV-23-1245 (Mont. Fourth Jud. Dist. Court, Missoula Cty.) (June 24, 2024).

57. The MHRC’s attempt to write “gender” out of MHRA, *inter alia*, defining the constitutional term “sex” in a manner that erases the existence of transgender, intersex, non-binary, and gender non-conforming individuals from the Montana Code, is an exercise of “a power properly belonging” to the judicial branch, and violates Article III, § 1 of Montana’s Constitution.

58. The MHRC’s decision was affected by errors of law in violation of § 2-4-704, MCA. Discrimination on the basis of sex – by definition and as a matter of law – includes discrimination on the basis of gender identity.

59. The MHRC’s decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record in violation of § 2-4-704, MCA. The evidence demonstrates that M.B. was denied a driver’s license that accurately identified M.B.’s gender for one reason: M.B. is nonbinary.

60. The MHRC's decision was arbitrary and capricious and was clearly an unwarranted exercise of discretion in violation of § 2-4-704, MCA. The transcript of the MHRC hearing demonstrates that the Commission was arbitrarily focused on an outcome that would result in a denial of M.B.'s claims, in stark contrast to the Hearing Officer's fair weighing of the record evidence and legal arguments of the parties.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that the Commission's decision exceeded the statutory authority of the agency, was affected by errors of law, was clearly erroneous, arbitrary, unlawful, and unreasonable;
2. Set aside the challenged aspects of the Commission's decision and reinstate the Hearing Officer's Order of Affirmative Relief;
3. Declare that discrimination against individuals on the basis of gender identity is a form of sex discrimination that is prohibited by the Montana Human Rights Act and Governmental Code of Fair Practices;
4. Permanently enjoin the MHRC from dismissing sex discrimination claims solely on the basis that they are advanced on the basis of gender identity;
5. Award Plaintiffs their reasonable fees, costs, and expenses, including attorneys' fees, associated with this litigation; and
6. Grant Plaintiffs such additional relief as the Court may deem just and proper.

DATED THIS 12th Day of July, 2024,

/s/ Alex Rate

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Attorneys for Plaintiffs

EXHIBIT A

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF MONTANA

SARA BERNDT & BRYAN BERNDT, OBO
MINOR CHILD, M.B.,
Charging Party/Appellee,

HRB CASE NO.0220498

FINAL AGENCY DECISION

-v-

MONTANA DEPARTMENT OF JUSTICE,
MOTOR VEHICLE DIVISION, DRIVER
SERVICES BUREAU, ET AL.,
Respondent/Appellant.

M.B. is the minor child of Bryan and Sara Berndt. M.B. identifies as non-binary. In 2022, M.B. sought to obtain a Montana driver’s license. The Montana Code governing applications for driver’s licenses requires an applicant to provide a sex designation of either male or female. MCA § 61-5-107(2). On the application, M.B. listed sex as “NB” to mean “non-binary.” Respondent then denied M.B.’s application for a driver’s license for failure to identify M.B.’s sex as one of the two options provided in the application and as required by § 61-5-107(2).

Charging Party then filed a complaint with the Department of Labor & Industry (Department), which alleged unlawful discrimination in governmental services on the basis of sex. Following an informal investigation, the Department determined that reasonable cause supported the Berndts’ allegations. Before the case went before the Office of Administrative Hearings of the Department of Labor & Industry, the parties filed cross-motions for summary judgment on their respective claims and defenses to liability. The hearing officer granted the Charging Party’s motion for summary judgment, finding that discrimination did occur, and denied the Respondent’s motion on June 14, 2023.

The case then proceeded to a contested case hearing on damages, pursuant to Mont. Code Ann. § 49-2-505. The hearing officer issued a Decision on December 26, 2023 and awarded

Charging Party affirmative relief in the form of requiring Respondent to issue Charging Party a driver's license with a non-binary sex designation.

Respondent then filed an appeal with the Montana Human Rights Commission (Commission), challenging the hearing officer's summary judgment ruling and damage award. The Commission considered the matter on March 21, 2024. Misty D. Gaubatz, attorney, appeared and presented oral argument on behalf of Berndt. Alwyn Lansing, attorney, appeared and presented oral argument on behalf of Montana Department of Justice, Motor Vehicle Division, Driver Services Bureau, et al. (DOJ).

STANDARD OF REVIEW

The Commission may reject or modify the conclusions of law and interpretations of administrative rules in the hearing officer's decision but may not reject or modify the findings of fact unless the Commission first reviews the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. Mont. Code Ann. § 2-4-621(3). The commission reviews conclusions of law for correctness and to determine whether the hearing officer misapplied the law to the facts of the case. The commission reviews findings of fact to determine whether substantial evidence exists to support the particular finding. Admin. R. Mont. 24.9.123(4)(b); *Schmidt v. Cook*, 2005 MT 53, ¶ 31, 326 Mont. 202, 108 P.3d 511. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more than a mere scintilla of evidence but may be less than a preponderance." *State Pers. Div. v. DPHHS*, 2002 MT 46, ¶ 19, 308 Mont. 365, 43 P.3d 305.

DISCUSSION

Before the Commission, Appellant DOJ argues that the hearing officer misapplied case law, erroneously conflated gender and sex, and erred in determining MB was unable to complete the application for a driver's license. Berndt counters by arguing the hearing officer's decision is

correct and should be affirmed. After careful consideration of the complete record and the argument presented by the parties, the Commission determined the hearing officer erred as a matter of law by failing to conduct a proper analysis of the statutory meaning of the term “sex” within the Montana Human Rights Act (MHRA) and improperly expanding the term to include “gender identity.”

The MHRA makes it “an unlawful discriminatory practice for the state or any of its political subdivisions to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of . . . sex. . . .” Mont. Code Ann. § 49-2-308(1)(a). As of 2022, when the underlying circumstances giving rise to this matter occurred, neither the MHRA nor the Montana Code Annotated defined the term “sex.”¹ Thus, the hearing officer was required to follow Montana law governing interpretation of undefined statutory terms but failed to properly do so.

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.” *City of Missoula v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. “When the legislature has not defined a statutory term, [courts] consider the term to have its plain and ordinary meaning.” *Giacomelli v. Scottsdale Ins. Co.*, 2009 MT 418, ¶ 18, 354 Mont. 15, 221 P.3d 666. If the language of the statute is clear and unambiguous, the courts are not to interpret the statute any further. *Mont. Sports Shooting Ass'n v. State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. To determine the plain meaning of a statutorily undefined term, courts routinely consider dictionary definitions, prior case law, and the larger statutory scheme in which the term appears. *Giacomelli*, ¶ 18 (internal citations omitted). “If after reviewing the plain

¹ The Montana Legislature has since enacted S.B. 458, 68th Leg., (Mont. 2023), that unequivocally excluded “gender identity” from the definition of “sex” into dozens of parts of state code. However, because that bill was enacted and signed into law after the events giving rise to this matter occurred and contains no retroactive provision, it does not apply to this case.

words, however, confusion or ambiguity exists, [courts] turn to the legislative history for guidance.” *State v. Gregori*, 2014 MT 169, ¶ 13, 375 Mont. 367, 328 P.3d 1128.

Here, instead of conducting a plain meaning analysis of the term “sex” as used in the MHRA, the hearing officer proceeded directly to examine the legislative history. (Order on Parties’ Cross Mots. for Summ. J. (“Order”), at 4-5.) This was error. Basic dictionary definitions of the word “sex” clearly define the word in terms of anatomical biology to the exclusion of references to gender identity. *See, e.g., Sex*, Merriam-Webster’s Dictionary, [available at https://www.merriam-webster.com/dictionary/sex](https://www.merriam-webster.com/dictionary/sex) (last visited May 15, 2024) (defining “sex” as “either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures.”); *Sex*, STEDMAN’S MEDICAL DICTIONARY (28th Ed. 2006) (“The biologic character or quality that distinguishes male and female from one another as expressed by analysis of the person’s gonadal, morphologic (internal and external), chromosomal, and hormonal characteristics.”). Thus, for the hearing officer to circumvent the plain meaning of the term “sex” as defined by various dictionaries and proceed to analyze legislative history was in error.

Even the hearing officer’s assessment of the legislative history was incorrect. The goal of statutory interpretation is to give effect to the legislature’s intent. *Giacomelli*, ¶ 18. Here, the hearing officer failed to examine *any* legislative history of the subject statute, Mont. Code Ann. § 49-2-308. Rather, the hearing officer took a holistic approach to the Legislature’s past and present actions in how it has treated the term “sex” to guide his analysis. *See* Order, at 5. Importantly, the hearing officer acknowledged that the Montana Legislature, prior to 2022, had historically rejected multiple efforts to define the term “sex” to include gender identity. *Id.* This acknowledgment, in and of itself, should have sufficed to suggest that the Legislature likely never intended to include gender identity within the ambit of the term “sex.” Yet, the hearing officer argued that since the 2023 Legislature recently enacted SB 458 that expressly defined “sex” as male or female, the “conflicting attempts by the Legislatures establishes that the term

‘sex’ was undefined and capable of varying definitions **for the time period applicable to this case.**” *Id.* (emphasis added). In other words, the hearing officer erroneously interpreted legislative acts occurring *after* the subject event in 2022 – and long after the initial enactment of Mont. Code Ann. § 49-2-308 – as legislative “history” and instructive as to how the Legislature has interpreted and treated the term “sex.” The hearing officer’s analysis of Mont. Code Ann. § 49-2-308’s legislative history was therefore incorrect and in error.

Finally, the hearing officer’s reliance on a single United States Supreme Court Case to support his conclusion while failing to distinguish multiple Montana cases on the subject was similarly in error. Order, at 5-6 (citing *Bostock v. Clayton Cty. Ga.*, 590 U.S. 140 (2020)). As a preliminary matter, the *Bostock* Court did not interpret the term “sex” within the context of Mont. Code Ann. § 49-2-308 but instead analyzed Congress’ intent in its use of the word in Title VII of the Civil Rights Act of 1964. *Bostock*, 140 S. Ct. at 1753 (expressly limiting the scope of the Court’s ruling to the instant matter and refusing to address any other state or federal discrimination law). Although federal law may be instructive when interpreting provisions of the MHRA, *see* Order, at 5, to turn to and rely exclusively upon federal law while neglecting germane state law is erroneous. Indeed, there are multiple Montana cases that appear to suggest its jurisprudence recognizes “sex” to mean only male or female. *See, e.g., Mont. State Univ.-Northern v. Bachmeier*, 2021 MT 26, ¶ 28, 403 Mont. 136, 480, P.3d 233 (recognizing that a claimant in a discrimination case “first must establish membership in a protected class, either male or female”); *Campbell v. Garden City Plumbing & Heating, Inc.*, 2004 MT 231, ¶ 16, 322 Mont. 434, 97 P.3d 546 (recognizing that in sexual harassment claims, plaintiff must first show membership in a protected class and that “only two classes are possible, male and female”); *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, ¶¶ 62, 325 Mont. 148, 104 P.3d 445 (Nelson, J., concurring) (“As with federal case law, this Court’s jurisprudence has never acknowledged gender orientation as a suspect class.”); *Mtn. States Tel. & Tel. Co. v. Comm’r. Of Labor and Indus.*, 187 Mont. 22, 38–39, 608 P.2d 1047, 1056 (1979) (“Pregnancy is a condition unique to

women, and the ability to become pregnant is a primary characteristic of the female sex. Thus, any classification which relies on pregnancy as the determinative criterion is a distinction based on sex.”). However, the hearing officer neglected to analyze or distinguish any of these Montana cases and relied solely upon *Bostock*. By expanding the term “sex” in Mont. Code Ann. § 49-2-308 to include “gender identity,” the hearing officer inserts what has been omitted from the statute in derogation of the fundamental principles of statutory construction. *See Fox*, ¶ 18. To do so was therefore in error and warrants reversal of the hearing officer’s Order.

ORDER

IT IS HEREBY ORDERED that the hearing officer decision is MODIFIED as follows:

Findings of Fact:

19. M.B. was informed, by ~~two~~ one Department employees, that the Department was in the process of updating its forms to include an option for non-binary individuals, but that the update would not be completed for approximately a year.

20. MVD refused to issue a driver’s license to M.B. because M.B.’s application form ~~could~~ was not ~~be~~ completed and entered into the IDEMIA system.

Conclusions of Law

1. The Department of Labor and Industry has jurisdiction over this case.
Mont. Code Ann. § 49-2-505.

2. The term sex within the meaning of the 2021 version of the Montana Human Rights Act does not include gender identity.

3. M.B. is not a member of a protected class within the meaning of the 2021 version of the Montana Human Rights Act on the basis of sex. ~~as the 2021 version of that term included non-binary gender identity. See e.g. Bostock v. Clayton County, Georgia, 590 U.S. 140, 140 S. Ct. 1731 (2020).~~

~~3. The MHRA prohibits discrimination in governmental services based upon sex, including gender identity under the 2021 version of the statute. Mont. Code Ann. § 49-2-308 (2021).~~

~~4. Charging Parties proved, as a matter of law that the Department violated the MHRA and discriminated against M.B. when it refused to issue M.B. a driver's license due to M.B.'s inability to accurately state M.B.'s sex on the Department's driver's license application form. Mont. Code Ann. § 49-2-308(1) (2021).~~

~~5. A mixed motive defense was not timely raised and does not apply to the facts of this matter.~~

~~6. M.B. is entitled to be issued a driver's license.~~

~~7.4. For purposes of Mont. Code Ann. § 49-2-505(8), Charging Parties Respondent is are the prevailing parties in this matter.~~

Either party may petition the district court for judicial review of the Final Agency Decision. Mont. Code Ann. §§ 2-4-702 and 49-2-505. This review must be requested within 30 days of the date of this order. A party must promptly serve copies of a petition for judicial review upon the Human Rights Commission and all parties of record. Mont. Code Ann. § 2-4-702(2).

DATED this 13th day of June, 2024.



Peter M. Damrow, Chair
Human Rights Commission

CERTIFICATE OF SERVICE

The undersigned secretary for the Human Rights Commission certifies that a true and correct copy of the foregoing ORDER was mailed to the following by U.S. Mail, postage prepaid, on this 13th day of June 2024.

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