



## WASHTENAW COUNTY

### OFFICE OF THE PROSECUTING ATTORNEY

ELI SAVIT  
PROSECUTING ATTORNEY

VICTORIA BURTON-HARRIS  
CHIEF ASSISTANT PROSECUTING ATTORNEY

#### LEGAL GUIDANCE 2021-01: HATE CRIMES BASED ON SEXUAL ORIENTATION/GENDER IDENTITY

Hate crimes perpetuated on the basis of sexual orientation and gender identity are at “unacceptably high levels”—and rising.<sup>1</sup> In 2020, the Federal Bureau of Investigation (FBI) reported that hate crimes based on sexual orientation represent “16.7% of hate crimes, the third largest category after race and religion.”<sup>2</sup> That same report also showed “an uptick in gender identity based hate crimes,” which rose from 2.2% of all hate crimes to 2.7% of all hate crimes.<sup>3</sup>

Lamentably, however, Michigan’s laws regarding hate crimes do not expressly prohibit crimes based on a person’s sexual orientation or gender identity. MCL 750.147b, the “Ethnic Intimidation” law, provides that a person is “guilty of ethnic intimidation” if—for certain categories of crimes—that person acted “because of [the crime victim’s] race, color, religion, gender, or national origin.”<sup>4</sup> Sexual orientation and gender identity are not listed as protected categories.

In recent years, however, courts have ruled that similar provisions prohibiting discrimination “because of sex” also prohibit discrimination on the basis of sexual orientation and gender identity. Most recently, in *Bostock v. Clayton County*<sup>5</sup>, the United States Supreme Court held that the Civil Rights Act’s prohibition on discrimination “because of sex” necessarily prohibits discrimination on the basis of sexual orientation and gender identity. That is “because it is impossible to discriminate against a person” on the basis of sexual orientation or gender identity “without discriminating against that individual based on sex.”<sup>6</sup> As the Court explained in the sexual-orientation context:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer

---

<sup>1</sup> Wyatt Ronan, *New FBI Hate Crimes Report Shows Increases in Anti-LGBTQ Attacks*, Human Rights Campaign (Nov. 17, 2020), available at <https://www.hrc.org/press-releases/new-fbi-hate-crimes-report-shows-increases-in-anti-lgbtq-attacks>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> MCL 750.147b(1).

<sup>5</sup> 140 S. Ct. 1731 (2020).

<sup>6</sup> *Id.* at 1741.

intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.<sup>7</sup>

The same is true for gender identity. Again, in the words of the United States Supreme Court:

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.<sup>8</sup>

In short, the Supreme Court has held that discrimination on the basis of sexual orientation or gender identity is necessarily discrimination “because of sex.”

The *Bostock* decision has obvious ramifications for Michigan’s ethnic intimidation law. Recall that Michigan’s ethnic intimidation law makes it illegal for people to commit certain conduct “because of . . . gender.”<sup>9</sup> Regardless of whether “gender” is interpreted to be synonymous with “sex,” *Bostock* suggests that a crime that is based on a victim’s sexual orientation or gender identity is ineluctably “because of gender.”

The analysis is straightforward if the word “gender” is synonymous with “sex.” *Bostock* held that discrimination “because of sex” necessarily encompasses discrimination on the basis of sexual orientation and gender identity. If “gender” and “sex” are synonymous, *Bostock*’s reasoning suggests that the ethnic intimidation law’s prohibition on acts perpetrated “because of gender” includes those perpetrated based on sexual orientation and gender identity.

Alternatively, the term “gender” in Michigan’s ethnic intimidation law might mean “gender identity.” If that is the case, a crime based on a person’s gender identity is *definitionally* covered by the law. So, too is a crime based on a person’s sexual orientation. After all, if a male-identifying person was targeted by a criminal act because he is attracted to men, but a female-identifying person attracted to men would not have been targeted by such an act, the act was necessarily “because of” that person’s gender—and thus prohibited by the ethnic intimidation law.

These issues are still being sorted out by the Michigan courts. But all signs point to the courts ultimately concluding that Michigan’s ethnic intimidation law covers acts based on sexual orientation and gender identity. In 2020, the Michigan Court of Appeals ruled in *People v. Rogers* that Michigan’s ethnic intimidation law does not prohibit crimes that were motivated on the basis of a person’s gender identity.<sup>10</sup> Following the United States Supreme Court’s decision in *Bostock*, however, the Michigan Supreme Court vacated and remanded the Court of Appeals’

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1741-42.

<sup>9</sup> MCL 750.147b

<sup>10</sup> See *People v. Rogers*, 331 Mich. App. 12, 21, 951 N.W.2d 50, 55, vacated and remanded, 950 N.W.2d 48 (Mich. 2020).

judgment “for reconsideration in light of *Bostock*.”<sup>11</sup>

*Rogers* has not yet been decided on remand. Separately, though, the Michigan Supreme Court may be prepared to interpret Michigan law in a manner similar to the federal law at issue in *Bostock*. Late last year, the Michigan Court of Claims ruled that the Elliott-Larsen Civil Rights Act’s prohibition on discrimination “because of sex” (1) prohibits discrimination on the basis of gender identity, but (2) does not prohibit discrimination on the basis of sexual orientation.<sup>12</sup> The Court of Claims’ ruling on the sexual-orientation point, however, was based on what it deemed binding, pre-*Bostock* precedent from the Court of Appeals.<sup>13</sup> The court’s decision has already been appealed to the Michigan Supreme Court.

Given that federal law is “highly persuasive” when determining the contours of Elliott-Larsen,<sup>14</sup> it seems probable that the Michigan Supreme Court will take the case, and will interpret Michigan law in line with the Supreme Court’s ruling in *Bostock*. If so, the end result will be that Elliott-Larsen’s prohibition on discrimination “because of sex” encompasses discrimination on the basis of sexual orientation and gender identity.

To be sure, Elliott-Larsen is a different statute than Michigan’s ethnic intimidation law. But the ramifications for Michigan’s ethnic intimidation law are clear. It is nearly impossible to conceive of a scenario in which (1) discrimination “because of sex” in Elliott-Larsen encompasses sexual orientation and gender identity, but (2) acts “because of gender” in the ethnic intimidation law do not.

In light of these recent legal developments—and the statute’s plain text—it is the view of the Prosecutor’s Office that Michigan’s ethnic intimidation law is best read to encompass acts committed because of a person’s sexual orientation or gender identity. There is no binding precedent which precludes that outcome. And *Bostock*’s logic (which, again, is ‘highly persuasive’)<sup>15</sup> inescapably applies to Michigan’s ethnic intimidation law.

Thus, effective immediately, **this Office will construe MCL 750.147b, Michigan’s ethnic intimidation law, to encompass crimes that target victims based on sexual orientation or gender identity.** Assistant Prosecuting Attorneys (APAs) should thus file charges under Michigan’s ethnic intimidation law wherever:

- (1) the evidence demonstrates that the victim was targeted because of sexual orientation or gender identity,
- (2) the evidence demonstrates that the other elements of MCL 750.147b are satisfied;<sup>16</sup>

<sup>11</sup> *People v. Rogers*, 950 N.W.2d 48 (Mich. 2020).

<sup>12</sup> *Rouch World LLC v. Michigan Department of Civil Rights*, No. 20-000145-MZ (Mich. Ct. Claims Dec. 7, 2020).

<sup>13</sup> *See id.* at 4 (discussing *Barbour v Dep’t of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993)).

<sup>14</sup> *Northville Pub. Sch. v. Michigan Civil Rights Comm’n*, 118 Mich. App. 573, 576 (1982).

<sup>15</sup> *Id.*

<sup>16</sup> Specifically, MCL 750.147b provides:

(1) A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

and

(3) a charge under MCL 750.147b is in the interests of justice.

In the event a charge under MCL 750.147b is dismissed based on these statutory issues, an APA should inform the Appellate Division Chief to coordinate an appeal.

This Guidance will remain in effect until and unless expressly rescinded by the Prosecuting Attorney. This Guidance will be rescinded by this administration only if a binding, final decision to the contrary is issued by an appellate court.<sup>17</sup>



---

Eli Savit  
Prosecuting Attorney, Washtenaw County

February 12, 2021

- 
- (a) Causes physical contact with another person.
  - (b) Damages, destroys, or defaces any real or personal property of another person.
  - (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

<sup>17</sup> This Guidance will not, for example, be rescinded simply because the Court of Appeals rules in *Rogers* that Michigan's ethnic intimidation law does not encompass acts based on the victim's sexual orientation or gender identity. In such a circumstance, this Guidance will be rescinded only if that case is not appealed to the Michigan Supreme Court, if the Michigan Supreme Court denies leave to appeal, or if the Michigan Supreme Court affirms the hypothetical ruling that is contrary to this Guidance.