STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

JayCee Cooper,

Plaintiff,

v.

USA Powerlifting and Powerlifting Minnesota,

Defendants.

Court File No.: 62-CV-21-211
Case Type: Discrimination

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff JayCee Cooper brings motions for partial summary judgment and to preclude the testimony of Defendant USA Powerlifting's proffered experts. USA Powerlifting moves for summary judgment. Cooper was represented by Jess Braverman and Christy Hall of Gender Justice and by David Schlesinger of Nichols Kaster PLLP and Matthew Frank of Premo Frank PLLC. USA Powerlifting was represented by Ansis Viksnins and Mark Carpenter of Monroe Moxness Berg PA.

On January 12, 2021, Cooper filed a complaint stating three counts. Count I alleges a claim of sex and sexual orientation discrimination in public accommodations under the Minnesota Human Rights Act against USAPL and Powerlifting Minnesota. *See* Complaint ¶105-112. Count II alleges a claim of sex and sexual orientation discrimination in business under the MHRA against USAPL and Powerlifting Minnesota. *See* Complaint at ¶113-119. Count III alleges a claim against Powerlifting Minnesota of aiding and abetting sex and sexual orientation discrimination under the MHRA. *See* Complaint at ¶120-125.

On November 18, 2022, USAPL filed a motion for summary judgment and a memorandum and supporting materials, Cooper filed a motion for partial summary judgment on issues of liability with a memorandum and supporting materials, and Cooper filed a motion to exclude USAPL's expert witnesses with a memorandum and supporting materials. On December 2, 2022, USAPL filed a responsive memorandum opposing Cooper's motion for partial summary judgment and a responsive memorandum opposing Cooper's motion to exclude USAPL's experts. On December 2, 2022, Cooper filed a responsive memorandum opposing USAPL's motion for summary judgment. On December 9, 2022, Cooper filed separate memorandum in support of Cooper's partial summary judgment motion and in support of Cooper's motion to preclude USAPL's experts. On December 9, 2022, USAPL filed a reply memorandum in support of USAPL's motion for summary judgment. On December 16, 2022, the Court held a hearing and took the motions under advisement.

BACKGROUND AND UNDISPUTED FACTS

Minnesota Rule of Civil Procedure 56.01 says "A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." "Summary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. State, Dep't of Natural Resources.*, 693 N.W.2d 181, 186 (Minn.2005); Minn. R. Civ. P. 56.03. Summary judgment "is inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.1997). Importantly, "it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 605 (1957).

Nevertheless, "[m]ere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn.1993). To survive a summary judgment motion, the nonmoving party must therefore establish there is a genuine issue of material fact through substantial evidence. *DLH*, 556 N.W.2d at 70.

Cooper was born in Pontiac, Michigan. Cooper's birth certificate identifies her as male. Cooper Dep. at 10, 12. Cooper has been active in sport throughout her life, playing soccer and tee-ball in elementary school, wrestling and track (discus and shot put) in middle school and high school, and curling starting in high school. Cooper Dep. at 23-24. Cooper participated in curling at the U.S. Junior National team level and participated in the World Juniors in 2007. Cooper legally changed her first name from Joel to Jaycee in 2015 or 2016 as part of a process of transitioning to a female identity. Cooper Dep. at 10. In 2016, Cooper became involved in roller derby, being specifically attracted by its trans-inclusive policy. Cooper Dep. at 28. In 2017, Cooper broke her ankle. Cooper Dep. at 30. While recovering, Cooper became involved in powerlifting. Cooper Dep. at 31.

In November of 2018, Cooper purchased an annual membership in USAPL to compete in USAPL sanctioned competitions in Minnesota in 2019. *See* Hall Affidavit Exhibit 9. At the time, USAPL had a policy, dating from at least as early as 2015, that trans women, that is, women who were identified as male a birth, but who identified as female, were not allowed to compete as female. Maile Deposition at 106-107 ("The position of the organization was that trans women couldn't compete in the Women's division."). USAPL's president, Larry Maile, testified the policy existed even though it was not written or stated. *Id.*

On November 9, 2018, Cooper received a confirmatory email from USAPL stating, "JayCee A Cooper, Welcome to USA Powerlifting!" The email contained an identification card containing Cooper's name and address. Hall Affidavit Exhibit 10. The card lists Cooper's age as 31 and her "gender" as "F." Hall Affidavit Exhibit 10. The email says USAPL "is a signatory of WADA." WADA is an acronym for the World Anti-Doping Agency, a drug testing agency affiliated with a number of sport governing bodies, including the International Olympic Committee.[1] The email continues, "[a]s a member you are subject to in and out-of-competition drug testing…Many prescribed medications are also prohibited under the WADA, but you may be able to receive a Therapeutic Use Exemption (TUE) to continue taking the medication." Hall Affidavit Exhibit 9.

In November 2018, Cooper submitted to USAPL, on a form USAPL provided for the purpose, a document entitled Therapeutic Use Exemptions Standard Process. *See* Hall Affidavit Exhibit 14. The form indicates Cooper had been treated by a doctor named in the form for "Gender Dysphoria." *Id.* at 1. The form discloses that Cooper had been prescribed spironolactone for the condition and anticipated taking the drug indefinitely. *Id.* at 2. It is undisputed that gender-affirming care and treatment for transgender women often includes the use of spironolactone, which blocks androgen receptors and lowers the amount of testosterone the body makes. *See* Hunt Dep. at 124; Mayo Clinic website https://www.mayoclinic.org/tests-procedures/femininizng-hormone-therapy/about/pac-20385096.

Dr. Kris Hunt is a medical doctor who is board certified in emergency medicine. Hall Affidavit Exhibit 5; Hunt Dep. at 6-7. Hunt serves in the role of medical director of USAPL and

[1] Although weight lifting is an Olympic sport, powerlifting, as practiced by the USAPL is not. Hunt Dep. at 39-40. USAPL is affiliated with the International Powerlifting Federation. IPF sanctions and is the governing body for certain international powerlifting competitions.

is also the chair of the therapeutic use exemption (TUE) committee. Hunt Dep. at 14-15. Hunt testified that, by the middle of 2018, USAPL had denied certain female to male transgender persons participation in USAPL competition by strictly enforcing a TUE committee prohibition against the use of testosterone as a performance enhancing drug. Hunt Dep. at 113-115.

Hunt reviewed Cooper's request for a TUE and initially recommended approval. Hunt Dep. at 120. Hunt did so because the position and practice of the TUE at the time was to approve the exemption for spironolactone if the person requesting the exemption had a medical condition justifying its use and Cooper was under treatment for gender dysphoria, a recognized medical condition for which spironolactone is an approved treatment. Hunt Dep. at 123-24. Hunt understood spironolactone decreases androgen levels and is therefore not a performance enhancing drug. Hunt Dep. at 125. Hunt said WADA lists spironolactone as a banned substance, requiring TUE, because it can be used as a masking agent for substances that are banned, such as anabolic steroids. Hunt Dep. at 126.[2] Hunt explained that if there is a documented medical prescription and purpose for taking the drug, concerns about masking are ameliorated and the exemption is routinely granted. *Id.*

The TUE had five members: Hunt, Cintineo, Hall, Tan, and Maile. Hunt, Hall and Cintineo voted to approve the request. Tan and Maile did not immediately respond. Hunt Dep. at 122; Hall Affidavit Exhibits 16-19 (Hunt, Hall, and Cintineo approving TUE). Dr. Hunt communicated the TUE committee approval decision to Maile. Hall Affidavit Exhibit 19; Hunt Dep. at 149-150.

[2] Dr. Hunt testified that spironolactone is also prescribed for polycystic ovarian syndrome related acne, liver disease, and as an antihypertensive to control blood pressure. Hunt Dep. at 128. Dr. Hunt could not recall a prior instance in which a non-transgender woman had requested a TUE for spironolactone with an accompanying medical condition and had been denied a TUE.

On November 17, 2018, Cintineo emailed Maile inquiring, "Do we allow male-to-female transgenders to compete as females?" Hall Affidavit Exhibit 19. On November 17, 2018, Maile responded to the entire TUE committee, "No, we do not." Hall Affidavit Exhibit 19; Hunt Dep. at 149. Because the position Maile announced did not comport with the decision to grant Cooper's TUE request, on November 17, 2018, Hunt sent an email to Maile and Cintineo copied to the remainder of the TUE committee (Hall and Tan) inquiring, "this was a decision made at the executive committee level correct?" On November 28, 2018, Hunt followed up with Maile by email saying, "following up since this will be problematic when i send the email – Larry was this decision not to allow male-to-female transgenders made at the EC [executive committee] level?" Hall Affidavit Exhibit 19. On November 29, 2018, Maile responded to Hunt, copying the remainder of the TUE committee, "At the IPF Medical Committee level. We follow it." Hall Affidavit at Exhibit 19.[3]

In his deposition, Maile testified that in late 2014 or early 2015, the Medical Committee of the International Powerlifting Federation, an international governing body with which USAPL was then affiliated, held a series of discussions about transgender participation. Maile Dep. at 108. The committee concluded that participation by trans women in the women's division would represent a fundamental unfairness. Maile Dep. at 108.

On December 6, 2018, Hunt sent an email to Cooper stating:

> The TUE committee has reviewed your request for spironolactone. That request has been denied. Male-to-female transgenders are not allowed to compete as females in our static strength sport as it is a direct competitive advantage. This decision has been made at the IPF level.

Hall Affidavit Exhibit 20.

[3] Hunt testified that in his service on the TUE committee it had issued more than a thousand decisions and that fewer than 10 of those decisions were referred to the USAPL executive committee for a policy decision. Hunt Dep at 117.

On December 5, 2018, December 18, 2018, and January 2, 2019, Cooper emailed Hunt acknowledging Hunt's email denial and suggesting the decision was in conflict with the International Olympic Committee's "Consensus on Sex Reassignment" that IPF had adopted. Hall Exhibit 21. In the January 2, 2019 email, Cooper indicated she wished to appeal USAPL's decision. *Id.*

On December 10, 2018, Cintineo, a member of the TUE committee, emailed Hunt with copies to the rest of the TUE committee. The email included a link to a policy the IPF had adopted in 2017. Hall Exhibit 22. The email indicates that the IPF had adopted the International Olympic Committee's 2015 policy on transgender participation. *Id.* The policy essentially stated that those who transition from male to female are eligible to compete in the female category if they have declared their gender identity is female and have a total testosterone level in serum below 10 nmol/L for at least 12 months prior to first competition. *See* Hall Exhibit 22. Hunt responded to Cintineo stating, "Right so this is actually not the case of what I've told this person which is that male-to-female is not allowed at all, so it sounds like we need to make our own decision." Hall Exhibit 22. Hunt recommended that "we go with the IPF ruling to avoid severe legal and political entanglement." *Id.* Cintineo responded that "I think we should approve if she can provided (sic) the appropriate documentation of serum testosterone levels." Hall Exhibit 23. Harriet Hall, another TUE committee member, responded, "I approve … If you don't offer this probably there will be cries of discrimination." Hall Exhibit 23. Huaiyu Tan, the fourth of the five TUE committee members, responded, "Her attached paperwork actually does follow her serum testosterone, and it … documents to be below the levels. I agree with [Hunt], I think we need to follow the IOC ruling." Hall Exhibit 22.

The set of emails including and following Cintineo's email show that Cooper was denied participation as a female under a blanket USAPL policy prohibiting transgender women from competing in the female category. The emails also contain discussion suggesting that the 2017 IPF policy was not such a blanket ban, but rather allowed transgender women to compete in the female category if they had declared their identity as female and could demonstrate a total testosterone level in serum below 10 nmol/L for at least 12 months prior to first competition. The emails also show that Cooper's TUE contained documentation sufficient to meet the IPF/IOC standard.

On January 2, 2019, Hunt emailed Maile saying, "The TUE committee has voted to allow it." Hall Affidavit Exhibit 24. Hall also inquired of Maile, "[H]as the executive committee been made aware of the newest IPF ruling and what are we going to do about this issue? The TUE committee has voted to allow it." Hall Affidavit Exhibit 24. On January 3, 2019, Maile responded, "Not unless I have been removed from the committee." *Id.*

Hunt testified the USAPL executive committee has the authority to override the TUE committee and did so in Cooper's case. Hunt Dep. at 119, 152. Hunt testified the decision to forbid Cooper from competing in the female category was made at the executive committee level of USAPL and not by the TUE committee. Hunt Dep. at 119. Maile was President of USAPL and a member of the executive committee. Maile testified as follows:

> Q. So just to be clear, had JayCee Cooper been assigned as female at birth, she – you would find her eligible to compete in the Women's category, correct?
> A. Yes.
> Q. And – the only reason that you denied her application for a TUE and – was because she was not assigned to the female sex at birth, correct?
> A. The reason we denied it was because she's not eligible for the category she applied to compete in.
> ***
> Q. The USAPL denied JayCee Cooper's request for a TUE because you concluded that she was not eligible to compete in the Women's category, correct?

A. Yes.
Q. And you concluded that she was not eligible to compete in the Women's category why?
A. Based on her statement that she was a trans woman; our understanding being that would be someone born and who matured as a male and who was the transitioning to being a woman.

Maile Dep. at 89-91.

Cooper's use of spironolactone was not a reason USAPL did not allow her to compete as a female. The TUE committee approved Cooper's use of spironolactone because it was a generally accepted treatment for her medical condition of gender dysphoria and was not performance enhancing. *See* Hunt Dep. at 125-26 (spironolactone accepted treatment for gender dysphoria and is not performance enhancing). Cooper was not allowed to compete as a female because USAPL's policy, since at least 2015 and continuing to this day, as stated in the third sentence of the Hunt's December 6, 2018 email to Cooper, is "Male-to-female transgenders are not allowed to compete as females." Hunt Dep. at 152-53 (executive committee overruled TUE committee because "transgender women are not allowed to compete as females."). The undisputed evidence shows that, per USAPL policy, a person who was assigned male at birth but who identifies as female is not allowed to compete consistent with self-identity. Hunt Dep. at 233.

In addition, the undisputed evidence shows USAPL policy at the time Cooper sought to participate, and continuing through today, was that persons who identify consistent with the gender assigned to them at birth may compete in the category consistent with their self-identification. That is, assigned at birth males who identify as male may compete in the male category and assigned at birth females who identify as female may compete in the female

category. *See* Maile Dep. at 90; Hunt Dep. at 137.[4] It is also undisputed that persons who were assigned female at birth but who identify as male are allowed to compete in the male or female category, as they might choose. Hunt Dep. at 138.[5]

In 2021, more than two years after Cooper was denied participation in the female category, USAPL established an MX category. Hunt Dep. at 144, 147. The MX category is apparently open to cisgender men and women as well as transgender men and women. Hunt Dep. at 169. To date the category has had four participants. Hunt Dep. at 168. A testosterone user would not be allowed to participate in the MX category, although no would-be MX participant has asked for a TUE for any reason. Hunt Dep. at 169; Maile Dep. at 194. The record contains no evidence USAPL conducted any study or survey relating to the relative performance capabilities, advantages, or disadvantages of MX division participants.

CONCLUSIONS

Cooper moves for partial summary judgment as to liability on all of her claims. Minnesota Rule of Civil Procedure 56.01 provides a "party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Partial or complete "[s]ummary judgment is appropriate when the

[4] The record contains no evidence that USAPL has a policy of requiring anybody to produce a copy of their birth certificate or any other process for determining the gender USAPL refers to variously as "assigned at birth" or "biological." In the context of testifying as to the meaning of the term "cisgender," Maile testified that his understanding of "assigned at birth" or "biological" means "the physical sex they were born with" as "in terms of their genetic inheritance, women being double X, men being XY, and following that in the development of the – the hormone and physical development that comes with being either male or female." *Id.* The record contains no evidence that USAPL had any policy or proposed method of identifying its members "genetic inheritance" or the stage of any member's physical development. Cooper was likely identified as having a self-identification different from "assigned at birth" because of her request for a TUE based on her use of spironolactone to treat gender dysphoria.

[5] A person who was assigned female at birth and who identifies as male would not be allowed to compete in either a male or female category if the person is using testosterone, a common drug used in treating gender dysphoria in transitioning to male. *See* Hunt Dep. at 138-39, 143. In fact, most people using testosterone are denied a TUE because the substance is considered performance enhancing. *See* Hunt Deposition at 138-39, 140, 165 ("We don't allow testosterone for any indication."); Maile Dep. at 194.

evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Anderson v. State, Dep't of Natural Resources.*, 693 N.W.2d 181, 186 (Minn.2005); Minn. R. Civ. P. 56.03.

Cooper's complaint states three counts. The first count alleges sex and sexual orientation discrimination in public accommodations in violation of section 363A.11 of the Minnesota Human Rights Act. Complaint ¶105-112. The second count alleges sex and sexual orientation discrimination in business in violation of section 363A.17 of the MHRA. Complaint ¶113-119. The third count alleges the Minnesota chapter of USAPL intentionally aided and abetted violations of the MHRA. Complaint ¶120-125.

I.

As to the first count, section 363A.11 subdivision 1(a)(1) provides in relevant part that it "is an unfair discriminatory practice to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex." As to the second count, it "is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service to refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose." Minn. Stat. §363A.17(3). Both the public accommodation and the business claim allege discriminatory practice based on sexual orientation and on sex. Complaint ¶105-112

(public accommodation claim based on sexual orientation and on sex); Complaint ¶¶113-119 (business claim based on sexual orientation and on sex).

A.

The MHRA specifically defines the term sexual orientation. Section 363A.03 subdivision 44 says sexual orientation "means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." The definition contains two parts.

The first, which is not involved in this case, includes "being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person." *Id.*[6] In this type of sexual orientation discrimination, a person is, or is perceived to be, attracted ("emotional, physical, or sexual attachment") to another "without regard to the sex of that person." The record contains nothing concerning USAPL's perception in this regard and Cooper's complaint does not allege discrimination because of attraction.

The second part of the statute involves "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn.

[6] USAPL says in its Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment that "the Complaint makes no allegation regarding Plaintiff's sexual orientation and no allegation that USAPL has adopted discriminatory practices toward anyone because of their sexual orientation." USAPL Memorandum filed December 2, 2022, at 10. USAPL continues that "This is because USAPL does not have any policies or practices that distinguish or differentiate athletes based on sexual orientation." *Id.* The Court disagrees. In common usage, the phrase sexual orientation may be used to describe only "one's inherent attraction to a sexual partner of a certain gender, or the absence of gender preference in a sexual relationship." *See, e.g.*, Dictionary.com, Sexual orientation Definition & Meaning | Dictionary.com, (last visited 2/2/2023), *see also* Merriam-Webster, Sexual orientation Definition & Meaning - Merriam-Webster, (last visited 2/2/2023)("a person's sexual identity or self-identification as bisexual, straight, gay, pansexual, etc.") But, as used in the MHRA, the phrase is statutorily defined. *See* Minn. Stat. §363A.03 subd. 44. USAPL is correct that Cooper makes no claim under the first part of the statutory definition of sexual orientation but could not be more mistaken in asserting Cooper makes no claim under the second part.

Stat. §363A.03 subd. 44. This clause includes discrimination based on a person being, or being perceived as, what is often referred to as transgender. *See* Merriam-Webster Dictionary, Transgender Definition & Meaning - Merriam-Webster (defining transgender as "of, relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth"); *N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553, 557 (Minn. App. 2020)(person who identifies as male while born female defined as transgender and as within the MHRA definition of sexual orientation); *Scott v. CSL Plasma, Inc.,* 151 F. Supp. 3d 961, 963 (D. Minn. 2015)(male to female transgender woman covered under MHRA stating "Sexual orientation encompasses transgender identity.").

A transgender woman is a person whose identity or self-image is female, but whose identity or self-image is at odds with what some other traditionally associates or ascribes with "biological" maleness. There is no factual dispute that Cooper identifies and, at all times relevant to this matter, USAPL perceived Cooper as identifying, as a woman. There is also no factual dispute someone ascribed or assigned Cooper male at birth. That is, Cooper's self-image or identity was (as was USAPL's perception of it), in the language of section 363A.03 subdivision 44, "not traditionally associated with" Cooper's "biological maleness." Cooper indisputably falls within the second part of the definition of sexual orientation in section 363A.03 subdivision 44.

B.

The MHRA also defines the term sex, saying the term "includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or child birth." Minn. Stat. § 363A.03 subd. 42. More helpfully, case law suggests that sex refers to, at a minimum, the genders of female and male, and requires equal treatment of both. *See, e.g., Minnesota Mining and*

Manufacturing Co. v. State of Minnesota, 289 N.W.2d 396, 399 (Minn. 1979)(MHRA requires equal treatment of men and women). It may be helpful to label this type of prohibited sex discrimination as "unequal treatment." For example, USAPL undisputedly treats those who it identifies as male and those who it identifies as female differently with respect to competition classes. As part of that treatment, those USAPL perceives as female but have a self-image or identity that is male may compete in either the male or female divisions. In contrast, those perceived as male but who have a self-image or identity that is female may compete in the male division but not in the female division.[7] This unequal treatment of gender may be discrimination based upon the protected status of sex in the MHRA.

Alternatively, federal civil rights laws such as Title VII and Title IX prohibit discrimination "on the basis of sex," but, unlike the MHRA, do not explicitly prohibit discrimination on the basis of sexual orientation. *See* Title IX, 20 U.S.C. §1681(a)("prohibiting discrimination 'on the basis of sex' in educational programs or activities receiving federal financial assistance"); Title VII, 42 U.S.C. §2000e-2(a)(1)(prohibiting employment discrimination "because of" sex). Nonetheless, courts interpreting Title VII and Title IX have found policies relating to transgender persons discriminate "on the basis of sex" because the "discriminator is necessarily referring to the individual's sex to determine incongruence between [self-identified] sex and gender." *See Grimm v. Gloucester County School Board*, 972 F.3d 586, 616 (4th Cir. 2020*); see also Bostock v. Clayton County*, 140 S.Ct. 1731, 1741 (2020)("it is impossible to discriminate against a person for being homosexual or transgender without

[7] It is also undisputed that the medication commonly prescribed for gender transition for those who were identified male at birth (spironolactone) would generally be granted a TUE while the medication commonly prescribed for gender transition for those were identified as female at birth (testosterone) would not. The Court's finding that Cooper's spironolactone use had nothing to do with her exclusion from competing as a female, makes it unnecessary to determine whether the differing treatment of the two drugs constitutes sex discrimination.

discriminating against that individual based on sex"). To restate the matter, the discriminator's perception of another's maleness or femaleness, often based on the notion of "biological" sex or what someone responsible for a birth certificate believes they observed, is incongruent with the other's self-image or identity. Relating to this case, the USAPL policy is that "[m]ale-to-female transgenders are not allowed to compete as females." Hall Affidavit Exhibit 20 (Hunt email to Cooper of December 6, 2018). That policy describes an incongruence between USAPL's view of Cooper's sex (based upon some, presumably prior, determination) and Cooper's self-identification.[8] Accepting the former and rejecting the latter would likely constitute sex discrimination under Title VII and Title IX.

The incongruence theory of sex discrimination would look familiar to the drafters of the second part of section 363A.03 subdivision 44 of the MHRA. That is because it is precisely what the second part of sexual orientation describes in the MHRA. *Compare Grimm v. Gloucester County School Board*, 972 F.3d 586, 616 (4th Cir. 2020)("sex discrimination includes discrimination based on incongruence between person's gender self-identification and the discriminator's perception of another's maleness or femaleness") *with* Minn. Stat. § 363A.03 subdivision 44 (sexual orientation discrimination includes "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."). It is unnecessary to determine whether sex discrimination under the MHRA also

[8] In a February 4, 2019 email to fellow USAPL executive committee members, Crystal McGill wrote, "I know this seems ridiculous to many, but transwomen, in the viewpoint of the people we are having these discussions with and are writing this FAQs for, ARE female. When we say, "someone born a female" they find this incredibly insulting because it is their belief that they WERE born female . . . . While it might seem like semantics to us, we can make huge inroads on this issue if we use the right terms and are careful in all our references to not appear to be discriminatory just by our language alone." Hall Affidavit Exhibit 66. In a February 5, 2019 email to the USAPL executive committee, president Maile responded, "I am cautious about going down the road that ends with our acknowledgement that they really are women and that their physical body is immaterial." *Id.* This email exchange highlights that USAPL knew its policy denied some members', including Cooper's, self-identification if it conflicted with what, for example, President Maile, believed they "really are."

includes sex discrimination based on the incongruence theory of sex discrimination outlined in Title VII and Title IX cases because that incongruence is defined in the second part of section 363A.03 subdivision 44 as sexual orientation and constitutes its own protected class under the MHRA.

To the extent *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), might suggest a person whose self-identity is incongruent to the perception of another as to "biological" or "assigned at birth" gender is not a member of the sexual orientation protected class, that holding has been substantially limited. *N.H. v. Anoka-Hennepin School Dist. No. 11*, 950 N.W.2d 553 (Minn. Ct. App. 2020) holds *Goins* is limited to the employment setting and does not apply to the educational setting where the MHRA guarantees a student "*the full utilization of or benefit from any educational institution*, or the services rendered thereby to any person because of ... sexual orientation." 950 N.W.2d at 560 (emphasis in *N.H.*) (citing Minn. Stat. §363A.13 subd. 1). In so limiting *Goins*, the Court of Appeals noted and contrasted the broad language of the educational discrimination protections found in section 363A.13 with the employment protections found in section 363.08 subdivision 2 which simply prohibits adverse employment actions and does not contain guarantees of "full utilization of or benefit from." *See N.H.*, 950 N.W.2d at 650-51.

The language of the public accommodation protection found in section 363A.11 subdivision 1(a)(1) is, if anything, even broader than the language of the educational protections found in section 363A.13 subdivision 1 that *N.H.* held broadly protected an individual's choice of facility in the educational setting based on self-identified gender. *Compare* Minn. Stat. § 363A.13 subd. 1 (prohibiting discrimination interfering with "the full utilization of or benefit from" educational services) *with* Minn. Stat. § 363A.11 subd. 1(a)(1)("prohibiting denial of 'full and equal enjoyment' of public accommodations"). For this reason, even if *Goins* could be read

to suggest sexual orientation discrimination does not preclude an employer from refusing to recognize a person's self-identified gender in preference to the employer's own view as to the person's "biological" or "assigned at birth" or "traditionally associated" gender, *N.H.,* which this Court is also obligated to follow, has limited that aspect of *Goins* to the, apparently narrower, discrimination protections in the employment setting. *N.H.* says prohibition against sexual orientation discrimination applies to the broader protections applicable in the education setting, and, by implication, to the broader protections afforded in the public accommodations setting.[9]

[9] Although this Court is obligated to follow the narrow reading of *Goins* articulated in *N.H*., a more intellectually honest approach would simply refuse to follow *Goins* because it rests, not on any actual language found in the MHRA, but instead on the Court's textually unsupported and irrelevant view that "the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender," and that acceptance of self-identified gender would lead to a "result not intended by the legislature." *Goins*, 635 N.W.2d at 723. First, the plain language of the second part of section 363A.03 subdivision 44 dictates precisely the result the Supreme Court claims was not intended by the legislature. Indeed, it is exceedingly unlikely the legislature intended anything else. Goins does not even attempt to explain what section 363A.03 subdivision 44 might mean, if not that sexual orientation protected class status prohibits discrimination based on a preference of ascribed over self-identified gender. Second, one will search in vain for support for *Goins*'s suggestion that the alleged discriminator's ascribed gender controls, but only if it is concordant with the view of a majority of the Court as to "traditional and accepted" practices. Like a fish in a fishbowl unable to see water, the *Goins* decision searches, without success, for sexual orientation discrimination from the inside of a discriminatory bubble, failing to even consider that a civil rights statute might have as its goal to do away with certain "traditional and accepted" practices.

The sad likelihood is that *Goins* is but another ill-fated instance of the Minnesota Supreme Court ignoring plain legislative directive in the civil rights arena in preference to its view as to just how nice Minnesotans should be required to be. *Rhone v. Loomis*, 77 N.W. 31 (Minn. 1898), for example, involved an action by Rhone, "a colored man," against Loomis, a Duluth saloon keeper, seeking damages for the keeper's refusal to serve him a glass of beer because of his race. *Id.* at 32. The relevant statute, the predecessor to section 363A.11 subd. 1(a)(1), prohibited a person from denying any person because of race, creed, or color, or previous condition of servitude, the full and equal enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, eating house, soda water fountain, ice cream parlor . . . or other place of public refreshment . . . ." Finding the phrase "other place of public refreshment" could be a place where alcohol is served, but did not include a saloon serving beer, and relying on the equivalent of "tradition and accepted practice," Justice Mitchell (whose name graces a Minnesota school of law) wrote, "It is a well-known fact that, owing to an unreasonable race prejudice which still exists to some extent, the promiscuous entertainment of persons of different races in places where intoxicating drinks are sold not infrequently results in personal conflicts, especially when the passions of men are inflamed by liquor. Hence the legislature might have omitted saloons for that reason." *Id.* at 33. The following year, the legislature amended the civil rights act, overruling *Rhone* by adding saloons to the act. *See* 1899 Minn. Laws ch 41 §1[9]. For a more complete history of the Minnesota Human Rights Act and the interplay between the legislature and the Courts, *see* Dr. William Green, *Degrees of Freedom: The Origins of Civil Rights in Minnesota*, 1865-1912 (University of Minn. Press 2015).

To recap, Cooper challenges policies of the USAPL that (1) prohibit any person identified as male (presumably on a birth certificate) who self identifies as female from competing in the female category – consistent with self-identification. The policy implicates sexual orientation discrimination under the MHRA. Cooper also challenges the inequality of USAPL policy between males and females. The policy allows some persons to compete either as males or females while others may only complete as males. The policy implicates the prohibition against sex discrimination under the MHRA.

II.

USAPL's policy constitutes both public accommodation discrimination and discrimination in trade or business.

A.

Minnesota Statutes section 363A.11 defines public accommodation discrimination as denial to "any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation…" Minn. Stat. § 363.11 subd. 1(a)(1). Section 363A.03 subdivision 34 further defines place of public accommodation as "a business, accommodation, refreshment, entertainment, recreation, or transportation facility of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages or accommodations are extended, offered, sold, or otherwise made available to the public."

In *United States Jaycees v. McClure*, 305 N.W.2d 764, 766 (Minn. 1981), the Minnesota Supreme Court addressed whether the Jaycees were a "place of public accommodation" under the MHRA. The Supreme Court noted the term was specially defined in the MHRA and said the definition was "special and unusually broad." *Jaycees*, 305 N.W.2d at 766. The Court noted the term had a history of legislative expansion, at times in response to Court rulings limiting the

then-existing definition. *Id.* *Jaycees* noted that a public accommodation included a "business facility of any kind, whether fixed or mobile." *Id.* *Jaycees* noted that, while earlier versions of the MHRA focused on the sites where discrimination would be prohibited, the MHRA expanded that by focusing on "conduct in which discrimination would be prohibited" and thus speaks not of specific types of locations but instead includes simply "a business … facility of any kind …whose goods … and privileges are offered, sold, or otherwise made available to the public." *Id.* citing Minn. Stat. § 363.0(18)(1967).

Jaycees focused on three questions: (1) is the organization "a business in that it sells goods and extends privileges in exchange for annual membership dues?"; (2) is the organization a public business "in that it solicits and recruits dues paying members but is unselective in admitting them?"; and (3) does the organization continuously recruit and sell memberships at sites within Minnesota? The answer to each of the *Jaycees* questions is affirmative. USAPL offers memberships to the general public in Minnesota. USAPL is a non-profit business, accepting dues, and supporting powerlifting competitions in Minnesota. Cooper purchased an annual USAPL membership in order to participate in USAPL sponsored and hosted competitions in Minnesota. USAPL sent Cooper a membership card and an email welcoming her to the organization, explaining the privileges she had purchased, and outlining how she could go about accessing the privileges she had purchased. In exchange for payment, USAPL offered organizational support through setting the dates and locations of competitions and setting rules and terms of those competitions. USAPL also provided other services as part of a membership such as arranging for facilities for competition and otherwise supporting athletes in the recreational activity of powerlifting. USAPL need not have had a fixed and continuing physical presence in Minnesota in order to qualify as a public accommodation. *See Jaycees*, 305 N.W.2d

at 771-72. In short, the services and facilities USAPL offers constitute public accommodation under the MHRA.

B.

With respect to business discrimination, Minnesota Statutes section 363A.17(3) says it is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service to intentionally "discriminate in the basic terms, conditions, or performance of the contract." The provision requires proof of a contractual relationship between a plaintiff (who was allegedly discriminated against) and a defendant (who allegedly discriminated). *See Krueger v. Zeman Const. Co.,* 781 N.W.2d 858, 865-66 (Minn. 2010). USAPL offered a specific set of services to any member of the public who purchased a membership. Cooper applied for a membership, paid the membership fee, and received a membership card along with instructions as to how to go about using her membership. If an offer to the general public that is not honored on account of the would-be acceptor's protected status can support a business discrimination claim, *see Scott v. CSL Plasma, Inc.*, 151 F. Supp. 3d 961, 970 (D. Minn. 2015), then a similar offer that has been accepted but only partially performed may also support such a claim.

C.

USAPL discriminated against Cooper. Section 363A.03 subdivision 13 defines the term discriminate as including to "segregate or separate." Moreover, as it relates to public accommodation, section 363A.11 subdivision 1(a)(1) says that it is unlawful discrimination to deny a person the "full and equal enjoyment" of the public accommodation (the public accommodation being full participation in USAPL sanctioned or hosted activities). For both the public accommodation and the business claim, segregation and separation are the hallmarks of discrimination.

Separate but equal is unavailing. Discrimination claims are not defeated because separate services, facilities, accommodations were made available. *See N.H.*, 950 N.W.2d at 562-63 (requiring a transgender student to use a different locker-room facility because of his sexual orientation is discrimination and citing numerous federal cases concluding that requiring transgender students to use separate bathrooms or other facilities is discriminatory). It did not matter in *N.H*. that the school district provided N.H. new facilities granting greater privacy: what mattered is that N.H. was singled out and made to use facilities that were incongruent with N.H.'s self-identification.

The evil the MHRA prohibits lies in being seen as something other, in being separated, and in being segregated, either physically or by being treated differently. It may involve economic harm, like a diminished pension or personal leave; it may involve physical inconvenience, like having to walk down the block or across the street to be served. It is unquestionable an affront to personal dignity. In the context of sexual orientation, it is in treating a person as if their self-identity and their self-image is unimportant and less than. Just as it does not matter that one may be able to purchase a beer at a saloon other than one that refuses service to people of color, it does not matter that Cooper could compete somewhere else or as someone else. The harm is in making a person pretend to be something different, the implicit message being that who they are is less than. That is the very essence of separation and segregation and it is what the MHRA prohibits.

Such segregation and separation also involves harm to the community. *See* Minn. Stat. § 363A.02 subd. 1(5b)("discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy"). In this sense, the MHRA does not just adjust rights among individuals or even among organizations. The MHRA

recognizes that we all are diminished when an individual is singled out, disappeared, separated, or segregated.

The undisputed evidence in this case is that "From a psychological perspective, forcing a transgender person to act as their sex assigned at birth is harmful and can increase gender dysphoria… This internal distress is often debilitating and the primary way(s) to reduce gender dysphoria is by affirming one's gender medically and socially." Expert Report of Stephanie Budge dated December 10, 2021, Hall Affidavit Exhibit 12 at p. 9. Dr. Budge's report also notes that exclusion in athletics based on one's transgender identity causes distress, lower participation, and alienation, and "overall distress related to being denied the social, health, and well-being aspects of athletics." *Id.* The report also notes that inclusion in athletics for transgender women has resulted in feelings of belonging and that in one of the "recent studies conducted on this topic, transgender athletes indicated that participation in athletics was an essential component to improving their physical health (for example, countering negative physical side effects of hormone therapy) and that health care professionals strongly encouraged physical activity." *Id.* In other words, separation and segregation of transgender persons in athletics is harmful in the act of exclusion and is also harmful by the failure to include which could greatly benefit those involved. The report concludes that "the actions of USAPL served to marginalize and stigmatize JayCee Cooper. Banning transgender people from participating in sports is harmful for their mental health and, in effect, can also cause harm to their physical health." *Id.*

To be clear, at this summary judgment stage, the Court must not weigh or balance evidence presented by the parties and is not doing so. USAPL, after denying Cooper's participation, expended considerable effort seeking to justify its actions by seeking out expert

opinion that transgender women would have an inherent and immutable strength advantage. The record is completely devoid of any effort USAPL may have made to even understand, much less address, the physical or psychological harms of exclusion or the benefits of inclusion. USAPL attempted to calculate a hypothetical performance advantage, but it refused to even consider the harmful effects of its policy or the potential benefits of a more inclusive policy, to Cooper, to others similarly situated, to its organization, or to the broader community. To the contrary, after learning that some of its members wished the USAPL to reconsider the rule it adopted, USAPL's President, Maile, wrote in an email to the USAPL executive committee:

> During this very short night, I reflected on this. We already answered this NO…Someone did not get beaten enough as a child. These people were children screaming in Walmart and their parents did nothing. Now they are adults and still screaming.

Hall Affidavit Exhibit 64. To say USAPL made no attempt to understand how its policies might segregate or separate, thereby affecting the physical and emotional wellbeing of its members, is a gross understatement. The evidence on harm from separation and segregation is one-sided and uncontroverted.

It is also not relevant whether USAPL would have allowed Cooper to participate in the male category or in a MX category. By denying Cooper the right to participate in the female category, the category consistent with her self-identification, USAPL denied her the full and equal enjoyment of the services, support, and facilities USAPL offered its members. It separated Cooper and segregated her and, in doing so, failed to fully perform the contractual obligations it agreed to when it accepted Cooper's money and issued Cooper a membership card. The undisputed facts establish USAPL discriminated against Cooper both in public accommodation and in performance of the business contract between USAPL and Cooper.

III.

In order to state a claim for either public accommodation or business discrimination under the MHRA, Cooper must not only show discrimination: she must also show a sufficient causal relationship between the discrimination and her protected status. The causation requirement is based on the texts of the relevant statutes. Section 363A.11 subdivision 1(a)(1) says it is an unfair discriminatory practice to deny a person full and equal enjoyment "of a place of public accommodation because of … sexual orientation, or sex…" Similarly, section 363A.17(3) says it is an unfair discriminatory practice "to discriminate in the basic terms, conditions, or performance of the contract because of a person's … sex, [or] sexual orientation …"

In *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), Justice Gorsuch, in writing about the causation required to make out a claim under Title VII, said the phrase "because of" incorporates the traditional "standard of but-for causation." 140 S.Ct. at 1739. Justice Gorsuch continues that the standard is satisfied "whenever a particular outcome would not have happened 'but for' the purported cause." *Id.* Gorsuch counsels, "a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Id.* This but-for standard does not excuse a defendant from liability just because some other factor is also a but-for cause. Liability can be established if the protected status is one (potentially of many) but-for causes. *Id.* Gorsuch also writes of "more parsimonious" standards, such as "solely" or "primarily" in which the factor must be the sole or the primary but-for cause. *Id.* Finally, Gorsuch writes of a "more forgiving" standard in which the plaintiff need not prove but-

for causation but need only prove protected status was a "motivating factor" in the challenged decision. *Id.*[10]

In *LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506 (Minn. 2017), the Minnesota Supreme Court addressed the causation standard in an MHRA failure to hire sex discrimination case involving the question whether a prospective employer's failure to hire was because the plaintiff applicant was pregnant. The Court said the plaintiff is entitled to prevail if she is able to prove her protected status (pregnancy) "actually motivated" the failure to hire. 892 N.W.2d at 513. The Court said plaintiff satisfies this standard if she can demonstrate that the protected status was "a substantial causative factor" in the decision. *Id.* The Court specifically rejected the notion that the protected status must be a "but-for" cause of the failure to hire and said the plaintiff need not prove the employer would have hired her absent unlawful discrimination. *Id.* The Court clarified this last point stating, "proof by the employer that it would have made the same decision absent a discriminatory motive is no defense." *LaPoint* strongly suggests the MHRA adopts something less than the traditional but-for causation standard, requiring only that protected status be a "substantial causative factor."

This case is, however, simplified significantly by the undisputed evidence that USAPL's policy, at all times relevant to this case and continuing to the present, is that male to female transgender persons are not allowed to compete in the female category. USAPL's decision to refuse to allow Cooper to compete in the female category consistent with her self-identification is not the result of multiple factors, some discriminatory and some not. USAPL's decision begins and ends with but one factor – Cooper's protected status as a transgender woman. USAPL's decision had nothing to do with Cooper's use of spironolactone, her application for a

[10] *Bostock* interprets Title VII and is not controlling as the causation standard of the various MHRA provisions. It is helpful, however, to a general understanding of causation requirements.

TUE, or with any other real or perceived characteristic, experience, or relation. USAPL did not find Cooper too big, too small, or too just right. The only consideration in USAPL's policy was Cooper's protected status as a transgender woman. *See* Hall Affidavit Exhibit 31 (USAPL president Maile stating "[w]e do not allow male to female transgender athletes at all. Full stop."). To apply Justice Gorsuch's suggested decisional aid, if one were to change Cooper's status as a transgender woman, one would find no other basis for USAPL's decision. That is because USAPL's policy articulates but a single factor – that factor being Cooper's protected status.

The Minnesota Supreme Court has directed Courts to use an analysis suggested in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as a framework or aid in analyzing MHRA cases in which the alleged discriminator claims a basis for its decision that is unrelated to unlawful discrimination. *See, e.g., Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619, 623 (Minn. 1988). If the claimed basis has nothing to do with the plaintiff's protected status, proof of discrimination will, of necessity, be indirect. *See, e.g., Anderson*, 417 N.W.2d at 621-22 (defendant employer claimed plaintiff fired for performance issues and dishonesty, unrelated to pregnancy). In such a case, the plaintiff must first establish a prima facie case of discrimination. Once the plaintiff has done so, a burden production then falls upon the defendant to articulate one or more legitimate non-discriminatory reasons for the plaintiff's treatment. If the defendant produces such a reason or reasons, the burden shifts back to the plaintiff to show the defendant's asserted reasons are pretextual. *Id.* at 623. Pretextual in this context means that the asserted non-discriminatory reasons are not true or that, even if true, a discriminatory reason remains sufficiently causative to find defendant discriminated based on protected status.

In this case, however, there is but a single reason USAPL prohibited Cooper from competing in the female category. That reason is based entirely on protected status. The only reason USAPL offered, the only reason stated in its policy, and the only reason the record supports, is Cooper's protected status. Cooper was discriminated against because of her sexual orientation and because of her sex. We know that because the only basis for the decision in USAPL's policy is sex and sexual orientation. As USAPL's president wrote, "[w]e do not allow male to female transgender athletes at all. Full stop." Hall Affidavit Exhibit 31; s*ee also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)(*McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination).

McDonnell Douglas cannot apply because it is undisputed USAPL excluded Cooper from competing in the female division because she is a transgender woman. Neither Cooper nor USAPL claims that reason is pretextual or anything but the real (and only) reason. The case does not present issues relating to pretext because USAPL has offered no non-discriminatory reason for its actions and Cooper is not claiming there existed some other reason she was excluded from competing in the female category. Cooper accepts USAPL's word that she was excluded from competing in the female category because she identifies as a woman, but someone else in the world identified her as male in the past.

Confusing the ends USAPL claims it seeks with its actual facially discriminatory policy, USAPL argues Cooper "was not excluded from the women's division because she is transgender. She was excluded because USAPL concluded that Plaintiff would have an unfair competitive advantage, having gone through puberty as a male."[11] *See* Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 17. Whatever USAPL's motives in adopting the

[11] USAPL cites no authority in the record for the proposition that Cooper went through puberty as a male and the Court can find none. Given the Court's resolution of this matter the issue is not material.

policy it did, the actual policy is, on its face, discriminatory on the basis of sex and sexual orientation. *See International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."); *Minnesota Mining and Manufacturing Co. v. State*, 289 N.W.2d 396, 399 (Minn. 1979)(pregnancy related disability coverage exclusion remained impermissibly discriminatory despite neutral goal of saving money). In fact, on its face, USAPL's policy is nothing but discriminatory. The protected status of sex and sexual orientation are the only basis for selection and application. The policy contains no other consideration at all.

It is also unhelpful to USAPL that its policy treats all persons previously designated male the same, regardless of self-identification.[12] First, as a factual matter, as relates to sexual orientation, under the MHRA, USAPL is not free to prefer the gender identity "traditionally associated with one's biological maleness or femaleness" over a person's gender self-image or identity. That is precisely what section 363A.03 subdivision 44 prohibits through its second definition of sexual orientation. Second, the MHRA prohibits sex discrimination as well as sexual orientation discrimination. It did not help 3M when it excluded pregnancy from disability benefits that it treated all male 3M salaried employees the same. *Cf. Minnesota Mining and Manufacturing Co. v. State*, 289 N.W.2d 396, 399 (Minn. 1979). It did not help 3M because it treated females and males unequally. In this case, USAPL's policy allows those it identifies as

[12] USAPL actually argues that it "treats all persons who went through puberty as a male in the same way." *See* Defendants' Memorandum of Law in Support of Motion for Summary Judgment at 17. First, USAPL's policy in effect at the time it excluded Cooper, or even to the present, says nothing about applying only or differently to males who went through puberty. Second, even if it did, there is nothing in the record to suggest Cooper did or did not go through puberty as a male.

assigned at birth females (regardless of puberty status) to compete in either the male or female category while denying assigned at birth males (regardless of puberty status) the same option.[13]

Finally, as a matter of law, the MHRA prohibits individual discrimination. Section 363A.11 says it is an unfair discriminatory practice "to deny *any person* the full and equal enjoyment of …" (emphasis added). Section 363A.17 says it is an unfair discriminatory practice to discriminate in the basic terms, conditions, or performance of the contract because of a person's [protected status]." Section 363A.17 requires identification of a specific contract and a specific person. *Cf. Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 863-64 (Minn. 2010)(section 363A.17 provides a cause of action only to persons who are parties to a specific contract). It is no defense under either section 363A.11 or 363A.17 to say that one treats all members of a suspect class equally. It is, for example, unhelpful for USAPL to say (as it does) that all persons it views as assigned at birth male cannot compete in the female category. It is also unhelpful for USAPL to say (as it does) that all persons it views as assigned at birth female may compete in either the female or male category. Among the reasons why it is unhelpful is that the MHRA prohibits individual discrimination. That is, Cooper may not be separated, segregated, or treated worse "because of" her sexual orientation or sex. As Justice Gorsuch points out in the context of Title VII, discriminating against two or more (or all) on the basis of protected status does not avoid liability: it multiplies it. *Bostock*, 140 S.Ct. at 1741.

In sum, the undisputed facts establish USAPL discriminated against Cooper in public accommodation "because of" her sex and sexual orientation. The undisputed facts also show USAPL discriminated against Cooper in the basic terms, conditions, or performance of the contract between USAPL and Cooper "because of" Cooper's sex and sexual orientation.

[13] USAPL's policy also treats self-identified females and males differently.

IV.

Having established liability for both Cooper's public accommodation and business discrimination claims based upon sex and sexual orientation, it is necessary to consider the applicability of any exemptions from liability.

A.

As to public accommodation, Minnesota Statutes section 363A.24 subdivision 2 provides an exemption from "the provisions of section 363A.11 [the prohibition against discrimination in public accommodation] relating to sex."[14] Subdivision 2 exempts public accommodation discrimination "relating to sex" if "restricting membership on an athletic team or in a program or event to participants of one sex if the restriction is necessary to preserve the unique character of the team, program, or event and it would not substantially reduce comparable athletic opportunities for the other sex." Minn. Stat. § 363A.24 subd. 2. *Dunham See v. Wayzata Country Club*, 2006 WL 2673426 at *5 (Minn. App. 2006), involved a challenge by a female to the Wayzata County Club's refusal to allow her to participate in two male-only golf events. The Court of Appeals denied the claim based on subdivision 2, stating, "gender-specific sporting events that do not 'substantially reduce comparable athletic opportunities for the other sex' and that are 'necessary to preserve the unique character of the team, program, or event' are not actionable examples of gender discrimination." *Id.* Without significant discussion, the Court unsurprisingly found subdivision 2 applies to claims of sex discrimination in public accommodation and that the all-male golf events at issue met both the "preservation of unique

[14] Section 363A.24 subdivision 1 does not apply because Cooper makes no claim concerning use of facilities such as restrooms, locker rooms, and other similar places. Nor does USAPL claim exemption of its employees or volunteers as a nonpublic service organization whose primary function is providing occasional services to minors.

character" and "no substantial reduction in opportunities" requirements necessary for the exemption to apply.

Section 363A.11 subdivision 1(a)(1) prohibits public accommodation discrimination "because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex." The text of subdivision 2 indicates that it only provides an exemption from "the provisions of section 363A.11 relating to sex." A plain language reading of the phrase reveals that it applies to only one of the protected statuses listed in section 363A.11 – discrimination relating to the protected status of sex. This plain language cannot be construed as exempting public accommodation discrimination claims "because of" sexual orientation any more than it would exempt public accommodation claims "because of" race, color, creed, religion, disability, national origin, or marital status. The only protected status subject to the exemption found in subdivision 2 is sex.

In addition, subdivision 2 says that the provisions of section 363A.11 "relating to sex do not apply to restricting membership on an athletic team or in a program or event to participants of one sex" if certain other conditions are met. The exemption from the provisions of section 363A.11 "relating to sex" and the exemption allowing restrictions of membership "to participants of one sex" must be read together and only make sense if the subdivision is limited to claims of sex discrimination. It does not make sense, for example, to somehow ignore the phrase "relating to sex," thereby expanding subdivision 2 to claims of race or religion or national origin discrimination because the remainder of the first sentence would still exempt restriction in membership "to participants of one sex" and not to participants of one race, religion, or national origin. Similarly, the last clause of subdivision 2 limits the exemption to those instances in which the public accommodation sex discriminator can show limiting the team program or event

to participants of one sex would "not substantially reduce comparable athletic opportunities for the other sex." Again, reading the prior language "relating to sex" and "participants of one sex" as somehow including all protected statuses listed in section 363A.11 subdivision 1(a)(1) renders the exemption condition that the public accommodation discrimination "would not substantially reduce comparable athletic opportunities for the other sex" a meaningless jumble. The text of the exemptions mandates the exemption in subdivision 2 be limited to protected status based on sex and sex alone.

As a result, subdivision 2 does not create an exemption for public accommodation discrimination because of sexual orientation. The consequence of the plain language the legislature chose is that a public accommodation sex discriminator who restricts membership on an athletic team or in a program or event to participants of one sex, is exempt from liability under section 363A.11 if the discriminator establishes the restriction is "necessary to preserve the unique character of the team, program, or event" and also establishes that restricting the team, program, or event to participants of one sex "would not substantially reduce comparable athletic opportunities for the other sex." More plainly, one may restrict participation on an athletic team or in an athletic program or event to participants who are of one sex (male or female) provided the two stated conditions are met. What section 363A.24 subdivision 2 does not do is exempt a person from public accommodation sexual orientation discrimination liability for assigning or restricting a participant to a male or female team, program, or event in a manner that is inconsistent with their gender self-image or identity. Just as a person may not be excluded from a competition category because the person is black or catholic, a sponsor of an event may not exclude a person from an competition category (male or female) because of sexual orientation.

In this case, Cooper brings a single public accommodation claim alleging discrimination because of sexual orientation and because of sex. Cooper's claim of public accommodation discrimination because of sexual orientation is not subject to the exemption in 363A.24 subdivision 2. Cooper's claim of public accommodation discrimination because of sex (the claim that she is treated unequally because she was assigned male at birth is subject to the exemption of 363A.24 subdivision 2.

Moreover, in the context of cross-motions for summary judgment, genuine issues of material fact remain as to whether USAPL can meet its burden of showing that restricting Cooper's participation to the male category is "necessary to preserve the unique character" of the programs or events USAPL sanctions or sponsors. Along these lines, USAPL has presented evidence to the effect that powerlifting is unique in that it involves a relatively "pure" test of static strength. As compared to, for example, golf, curling, or even track events, a strength advantage would allegedly be magnified, or at least not as diluted, as in other settings. Such an argument is sufficient to create a genuine issue of fact for a jury to resolve. In addition, genuine issues of material fact also exist as to whether USAPL can meet its burden of showing that restricting Cooper's participation "would not substantially reduce comparable athletic opportunities for the other sex." Along these lines, the record suggests other powerlifting organizations might have been available that would have allowed Cooper to participate in a female category.[15] It would be up to a jury to decide whether those opportunities were such that USAPL's policy did not substantially reduce comparable athletic opportunities available to Cooper.

[15] The MX division was not created until 2021 and only had four participants. The MX division was unavailable to Cooper at the time of the alleged public accommodation sex discrimination in this case. The creation of the MX division is not relevant to this case.

The Court notes USAPL has focused on "fairness." For the most part, the Court understands USAPL to be using fairness to describe what they believe to be competitive advantage. Yet, the USAPL's evidence of competitive advantage does not take into account any competitive disadvantage a transgender athlete might face from, for example, increased risk of depression and suicide, lack of access to coaching and practice facilities, or other performance suppression common to transgender persons.[16] The USAPL also did not consider any unique advantages their sport might convey to transgender athletes including increased fitness, combating the side effects of medication and treatment, and increasing feelings of acceptance and well-being. In other words, the USAPL's evidence thus far has taken an extraordinarily narrow view of "fairness" for an organization allegedly seeking broad membership and promotion of powerlifting as a beneficial activity, including at the non-elite level.

More importantly, the legislature did not create a "fairness" exemption to public accommodation sex discrimination in athletics. For evidence to be admissible on the issue of the two specific factors identified in section 363A.24 subdivision 2, it must relate to the plain language of the subdivision. That is, whether the participation restriction (1) is necessary to preserve the unique character of the sponsored or sanctioned event and (2) whether the restriction would not substantially reduce comparable athletic opportunities for the other sex.[17] The

[16] In comparison, Hunt testified that Adderall, as an amphetamine, is considered performance enhancing, but that a person with ADHD may be granted a TUE because the overall performance detriment of having ADHD would likely outweigh the performance benefit of Adderall. Hall Affidavit Exhibit D, Hunt Dep. at 37-39. The point is that, in this example, the USAPL TUE committee weighs the advantages benefit and detriments involved. There is nothing in the record to show USAPL attempted to calculate the detriments of transgender status on performance. Instead, the experts simply note that the inherent cisgender male advantage over cisgender female to too large, generally speaking, to be overcome by testosterone reduction achieved by spironolactone. That calculus is a narrow measure of fairness.

[17] Section 363A.24 subd. 2 relates solely to a specific program, or event, not to USAPL activities generally or to elite level events only. The relevant events or programs are those Cooper alleges she wished to participate in but was denied. That is, powerlifting competitions in Minnesota in early 2019. It is the unique character of those events, and not of elite or national level powerlifting competitions USAPL might sponsor or organize that are at issue.

legislature could have created a "substantial competitive advantage" or a "fairness" exemption, but it did not.

The plain language of subdivision 2 only applies to claims relating public accommodation discrimination relating to the protected status of sex and not to the protected status of sexual orientation. There is a genuine material factual dispute relating to the application of the exemption found in section 363A.24 subdivision 2 to Cooper's claim of public accommodation sex discrimination.

B.

Minnesota Statutes section 363A.17 subdivision 3 provides an exemption from liability for MHRA business discrimination if the discrimination is "because of a legitimate business purpose." The phrase "legitimate business purpose" is not otherwise defined in the MHRA. Somewhat similarly, the burden shifted onto an employer under the second step of the *McDonnell Douglas* framework has been described as requiring a "legitimate, non-discriminatory reason for the defendant's action." *See, e.g., Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986). For purposes of this case, it is sufficient to draw from this description that discriminatory purposes are not legitimate. As noted above in part III, this case does not present a policy that states only a non-discriminatory purpose or even a discriminatory and non-discriminatory purpose. USAPL did not adopt a policy that, for example, stated athletes deemed to enjoy an unfair competitive advantage may be barred from competing in certain categories. It also did not prohibit persons with lesser percentages of body fat or greater of muscle mass from competing in certain categories.[18] That is not to say any or all of these

[18] It did, apparently, adopt a policy of non-TUE for testosterone, a policy that could be considered to be at least facially nondiscriminatory, but is not relevant to this case. *See* Hall Affidavit Exhibit 31. USAPL also adopts competition categories relating to age and weight. Those categories are not at issue.

facially non-discriminatory policies would withstand pretext review or, to the contrary, that a jury would find protected status discrimination under a facially neutral or a mixed policy. It is to say that such policies could conceivably present genuine issues of disputed fact as to whether USAPL is entitled to the legitimate business purpose exemption.

In this case, however, USAPL's policy was succinctly stated by its president in an email to its executive committee, effectively putting an end to discussion about alternatives that might have included various legitimate non-discriminatory purposes. USAPL's president wrote, "[w]e do not allow male to female transgender athletes at all. Full stop." Hall Affidavit Exhibit 31.[19] USAPL's policy cannot serve a legitimate business purpose because it is all discrimination based on protected status and therefore can serve no legitimate business purpose. When one removes the sex and sexual orientation discrimination from we "do not allow male to female transgender athletes at all. Full Stop.", nothing remains. Even if one were to accept USAPL was seeking to promote some vision or definition of fairness, that vision or definition is not articulated in its policy. *Cf. Minnesota Mining*, 289 N.W.2d at 400 (goal of reducing costs insufficient to save facially discriminatory policy of excluding pregnancy related disabilities from salaried employee disability benefits). USAPL's policy articulates nothing but discrimination based on protected status. The policy has no legitimate business purpose. USAPL is not exempt from business discrimination liability by reason of a legitimate business purpose.

V.

Minnesota Statutes section 363A.14(1) provides that it is an unfair discriminatory practice for any person to "intentionally aid, abet, incite, compel, or coerce a person to engage in

[19] When Cooper wrote to USAPL asking it to reconsider its policy and to adopt a policy including some non-discriminatory bases, Maile, the USAPL president, wrote to Hunt the TUE committee chair, "This person [Cooper] has received [an] answer. It is not a debate. Don't respond." Hall Affidavit Exhibit 31. Maile then added, "I wanted to be Julius Erving too, but not one pro team offered me a contract." Hall Affidavit Exhibit 30.

any of the practices forbidden by [the MHRA, chapter 363A]." Count III of Cooper's complaint alleges defendant USAPL MN aided and abetted USAPL in unfair discriminatory practices. Complaint ⁋122. The Minnesota Court of Appeals has identified two requirements for aiding and abetting in the MHRA context. First, the aider must know the other's conduct constitutes a breach of duty. *See Matthews v. Eichorn Motors, Inc.*, 800 N.W.2d 823, 828 (Minn. App. 2011) citing Restatement (Second) of Torts § 876(b). Second, the aider must give substantial assistance or encouragement to the other to so conduct himself. *See id.* citing *Witzman v. Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999).

The aiding and abetting standard requires proof of the involvement of at least one "other." Cooper's complaint alleges USAPL MN is an "other" because it is the Minnesota state chapter of USAPL and is run by one or more elected chairs who direct and oversee competitions in Minnesota. Complaint ⁋3. Cooper's complaint alleges USAPL MN has no office in Minnesota but runs events at various locations throughout the state. *Id.* Minnesota Statutes section 540.151 says that "when two or more persons associate and act, whether for profit or not, under the common name … they may sue in or be sued by such common name." Yet, section 540.151 is unhelpful to Cooper because the issue Count III presents is not whether an organization that can be sued exists; it does. USAPL is unquestionably an organization or association that can be sued under section 540.151. The issue Count III presents is whether, in addition to USAPL, there is an "other."

USAPL MN is not an organization that had any separate existence or autonomy beyond USAPL. In other words, USAPL at all times remained responsible for its Minnesota actors' conduct. The Minnesota actors were not acting on behalf of an organization separate from USAPL. Co-chair Joe Warpeha and other persons taking actions in Minnesota were not aiding

and abetting USAPL's violations of the MHRA because their actions were those of USAPL and not of a separate entity.

Under these circumstances aiding and abetting liability cannot occur. Count III of the complaint must be dismissed.

VI.

To reiterate, USAPL has engaged in unfair discriminatory practices by denying Cooper the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of sexual orientation and because of sex. Genuine issues of material fact remain whether section 363A.24 subdivision 2 exempts USAPL from liability for public accommodation discrimination under section 363A.11 subdivision 1(a)(1) because of sex. Section 363A.24 does not exempt USAPL for public accommodation discrimination liability because of sexual orientation. USAPL has engaged in an unfair discriminatory practice in a trade or business by discriminating against Cooper in the basic terms, conditions, or performance of the contract existing between USAPL and Cooper because of Cooper's sex and sexual orientation. USAPL is not exempted from liability for such discrimination "because of a legitimate business purpose."

Minnesota Statutes section 363A.33 subdivision 6 directs that "if the court or jury finds that the respondent has engaged in an unfair discriminatory practice, it shall issue an order or verdict directing appropriate relief as provided by section 363A.29, subdivisions 3 to 6." Minnesota Statutes section 363A.29 subdivision 3 directs that, if the Court finds the respondent has engaged in an unfair discriminatory practice, the Court "shall issue an order directing the respondent to cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as … will effectuate the purposes of this chapter." Having found USAPL

has engaged in unfair discriminatory practices by denying Cooper the full and equal enjoyment of public accommodation because of sexual orientation, the Court will enter an Order directing USAPL to cease and desist from the unfair discriminatory practice. Section 363A.29 subdivision 3 also directs this Court "to take such affirmative action" as will "effectuate the purposes" of the MHRA. The Order will direct USAPL to submit a revised policy with respect to transgender participation that will comply with the requirements of section 363A.11 subdivision 1(a)(1) within 14 days from the date of this Order and to comply with the revised policy thereafter.

Similarly, having found USAPL has engaged in unfair discriminatory practices by discriminating against Cooper in the basic terms, conditions, or performance of the contract because of Cooper's sex and sexual orientation, the Court will enter an Order directing USAPL to cease and desist from the unfair discriminatory practice. The Order will also direct USAPL to submit a revised policy with respect to its business practices that will comply with the requirements of section 363A.17 subdivision 3 within 14 days from the date of this Order and to comply with the revised policy thereafter.

Minnesota Statutes section 363A.29 subdivision 4 requires the Court to impose a civil penalty "taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent." The Court may impose the civil penalty section 363A.29 subdivision 4 requires but will do so at the conclusion of the damages phase of the proceedings as more fully described below.

VII.

Cooper has also moved to exclude the testimony of five USAPL expert witnesses. *See* Plaintiff's Memorandum of Law in Support of Motion to Exclude Defendants' Expert Witnesses

filed November 18, 2022. USAPL, as the proponent of the expert evidence, must show that it is admissible. Admissibility means the evidence is relevant and not excluded by the U.S. or Minnesota Constitution, statute, the rules of evidence, and any other rules that might apply. *See* Minn. R. Evid. 402. Cooper brought the motion pursuant to Minnesota Rule of Evidence 702 on four separate grounds: (1) the experts are not qualified; (2) their testimony would be unhelpful to the trier of fact; (3) the opinions lack foundational reliability; and (4) the testimony involves a novel scientific theory that is not generally accepted in the relevant scientific community. *Id.* at 3. The challenged experts have doctorates in biology, sports science, philosophy, and psychology and medicine. *See* Braverman Affidavit Exhibit B (Hilton report); Exhibit D (Lundberg report); Exhibit F (Pike report); Exhibit I (Maile Transcript) Exhibit J (Hunt Transcript).[20]

Although the experts come at the issue in various ways, the core of their testimony is that, in the overall population, persons identified as male at birth tend to be larger and tend to have a greater muscle mass. *See, e.g.,* Braverman Affidavit Exhibit B, Hilton report at ¶4.3 ("[M]ales are, on average, taller with wider shoulders, longer limbs, and longer digits. They have larger and denser muscle mass, reduced fat mass, different distributions of muscle and fat and stiffer connective tissue."). As a result, USAPL experts contend, males enjoy an athletic performance advantage, particularly in strength-dependent sports, that is only modestly diminished by suppression of testosterone post-puberty. *Id.* at ¶2.1-2.5. The experts therefore conclude that USAPL "is justified in the exclusion of transgender women who have acquired male athletic advantage at puberty, regardless of testosterone status in adulthood, from the female category of competition, to preserve both fairness for female athletes and the integrity of female

[20] The Court makes no ruling at this time whether the proposed witnesses are qualified under Rule 702 to testify as experts.

competition." *See, e.g.*, *id.* at ¶2.6 Cooper does not seriously contest that, generally speaking, cisgendered men have size and muscle mass advantage over cisgendered women. Cooper vigorously contests the experts' application of that concept to actual transgender women athletic performance, particularly as it compares with cisgendered women athletic performance.

In light of this Court's rulings, however, the relevance of USAPL's experts would be quite narrow and will not involve the issue as the parties have presented it. As the Court noted, USAPL's policy, on its face, discriminates on the basis of sex and sexual orientation. The policy says nothing about muscle mass, size, weight, or puberty. The policy rests, not on individualized determinations, but on generalizations and stereotypes as to the characteristics that might or might not be possessed by members of a protected class. The MHRA provides no defense to USAPL based on generalizations or stereotypes relating to members of a protected class if the policy is articulated solely on the basis of membership in a protected class. For example, a saloon keeper cannot refuse to serve a beer to person solely because they are black. *See, United States Jaycees v. McClure*, 305 N.W.2d 764, 767 (Minn. 1981) (citing *Rhone v. Loomis*, 77 N.W. 31, 32) (Minn. 1898) (legislatively overruled 1899 Minn. Laws ch. 41 §1). That prohibition remains even if motivated by a desire to promote peace at the saloon and even if the saloon keeper can find an expert who would testify that segregated saloons are more peaceful. *See Rhone v. Loomis*, 77 N.W. 31, 33 (dissent of Chief Justice Start stating that promoting racial harmony is not a reason to deny service because of race or color).

Performance advantage is not a reason recognized under the MHRA to discriminate because of sexual orientation or sex. As a result, with respect to Cooper's claim of public accommodation discrimination because of sexual orientation and with respect to Cooper's claim of business discrimination because of sex and sexual orientation, USAPL's proffered experts

have no relevant testimony to offer. Even if the challenged experts' proffered testimony were accepted as true, the relevant provisions of the MHRA would still define USAPL's policy and conduct as unfair and discriminatory and would still provide USAPL no exemption from the MHRA's requirement not to engage in discrimination against individuals because of protected class status.

Minnesota Statutes section 363A.24 subdivision 2 does provide an exemption from section 363A.11 subdivision 1(a)(1) liability for public accommodation discrimination because of sex. Subdivision 2 allows restriction in a program or event to participants of one sex "if the restriction is necessary to preserve the unique character of the team, program, or event" and if "it would not substantially reduce comparable athletic opportunities for the other sex." Application of section 363A.24 subdivision 2 to Cooper's claim for public accommodation discrimination because of sex presents genuine issues of material fact. Summary judgment on the issue is, therefore, inappropriate at this time. It is possible that one or more of the proffered experts could be found qualified and could have something relevant to add on the narrow issue of the application of section 363A.24 subdivision 2 to the public accommodation sex discrimination claim. The Court, however, reserves ruling on the specific issues at this time.

The Court will reserve ruling on Cooper's motion to exclude expert witnesses until such time as may be necessary and only after trial has been had on the other issues, including damages, remaining in the case. Those issues include damages resulting from the claims on which the Court has granted Cooper partial summary judgment. At the damages trial, a jury will determine the damages, if any, Cooper incurred as a result of USAPL's public accommodation discrimination because of sexual orientation, USAPL's business discrimination because of sex, and USAPL's business discrimination because of sexual orientation. Based upon the allegations

in the complaint, the Court understands those claims arise from the same actions by USAPL and resulted in the same damages as the public accommodation sex discrimination claim. Unless a party identifies acts or damages that are unique to fewer than all of Cooper's claims, the Court intends to submit a single set of damages interrogatories to the jury covering all claims on which partial summary judgment is appropriate.

Following the damages phase of the trial, the Court will accept materials, hear argument, and rule upon the amount, if any, of civil penalty that should be imposed, as well as attorney fees. The Court intends to direct entry of a final judgment as to all claims except Cooper's claim of public accommodation sex discrimination. Once appeals have been exhausted or the time for appeal has run, the Court will take up the section 363A.24 subdivision 2 issue in a separate proceeding, if necessary, and would direct entry of final judgment upon conclusion of that issue. In this manner, the issues will be fairly presented in an efficient and economical manner.

Minnesota Rule of Civil Procedure 42.02 authorizes a court, "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy," to "order a separate trial of one or any number of claims, cross-claims, counterclaims, or third-party claims, or of any separate issues." Exercising its authority under Rule 42.02, the Court is directing a separate and later proceeding on the issues of (1) whether restricting Cooper's participation to the male category was necessary to preserve the unique character of the relevant USAPL programs or events and (2) whether the restriction would not substantially reduce comparable athletic opportunities for Cooper. The separate trial will further the convenience of the parties because it may be ultimately unnecessary and is conducive to expedition and economy for the same reasons.

ORDER

1. Defendant United States Powerlifting Association's motion for summary judgment is GRANTED with respect to Count III of Plaintiff JayCee Cooper's complaint against USAPL MN. Count III is dismissed.
2. Defendant United States Powerlifting Association's motion for summary judgment is DENIED in all other respects.
3. Plaintiff JayCee Cooper's motion for partial summary judgment on Count I of her complaint is GRANTED with respect to liability on her claim of public accommodation discrimination because of sexual orientation.
4. Plaintiff JayCee Cooper's motion for partial summary judgment on Count I of her complaint is GRANTED IN PART. The Court finds Cooper is entitled to summary judgment on the issue whether USAPL committed unfair and discriminatory practices with respect to public accommodation because of sex, but is DENIED IN PART because genuine factual issues remain whether Minnesota Statutes section 363A.24 subdivision 2 exempts USAPL from public accommodation sex discrimination liability.
5. Plaintiff JayCee Cooper's motion for partial summary judgment on Count II of her complaint is GRANTED with respect to liability on her claim of business discrimination because of sexual orientation.
6. Plaintiff JayCee Cooper's motion for partial summary judgment on Count II of her complaint is GRANTED with respect to liability on her claim of business discrimination because of sex.

7. From and after the date of this Order, USAPL shall cease and desist from all unfair discriminatory practices in public accommodation because of sexual orientation described in this Order.
8. USAPL must submit a revised policy that will comply with the requirements of section 363A.11 subdivision 1(a)(1) relating to sexual orientation and with this Order within 14 days from the date of this Order and must comply with the revised policy thereafter.
9. From and after the date of this Order, USAPL shall cease and desist from all unfair discriminatory practices in business because of sexual orientation described in this Order.
10. USAPL must submit a revised policy that will comply with the requirements of section 363A.17(3) relating to sexual orientation and with this Order within 14 days from the date of this Order and must comply with the revised policy thereafter.
11. From and after the date of this Order, USAPL shall cease and desist from all unfair discriminatory practices in business because of sex described in this Order.
12. USAPL must submit a revised policy that will comply with the requirements of section 363A.17(3) relating to sex and with this Order within 14 days from the date of this Order and must comply with the revised policy thereafter.
13. Plaintiff JayCee Cooper's motion to exclude expert witnesses shall be reserved by the Court and shall be reheard at a time to prior to a hearing, if necessary, relating to the two elements USAPL must prove in order to claim exemption from public accommodation sex discrimination liability under Minnesota Statutes section 363A.24 subdivision 2.
14. A trial on damages shall be had on May 1, 2023, the date previously set for trial of this matter.

15. Following the trial on damages, the parties may submit to the Court within 14 days, materials relating to the civil penalty, if any, that should be imposed and attorneys fees.

BY THE COURT:

Dated: _____

Diamond, Patrick (Judge)
Feb 27 2023 3:08 PM

Patrick C. Diamond
Judge of District Court