

# Don't Sweat It: 8th Circuit Affirms Dismissal of Deodorant Class Action

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The Eighth Circuit recently affirmed the dismissal of a class action alleging that Unilever's differential pricing of men's and women's antiperspirants violated the Missouri Merchandising Practices Act (MMPA). In doing so, the Court found plaintiff's claims wrongly equated marketing targeted to women with point-of-sale price discrimination by gender (*i.e.* charging a different price for the same product based on the gender of the purchaser, at the time and place where the retail transaction is completed). [\*Schulte v. Conopco\*, Case No. 20-2696 \(8<sup>th</sup> Cir. May 18, 2021\)](#).

Dove "Men + Care" is an antiperspirant line primarily marketed to men, with five different scents. A differently branded product, Dove "Advanced Care," is marketed primarily to women. Dove Advanced Care is offered in a range of fifteen different scents – all of which are different from the scents available with the Men + Care product. The two lines have distinct packaging and labels, and are often priced differently. Plaintiff alleged she purchased an Advanced Care antiperspirant stick from each of the six defendant retailers, and paid a premium of up to \$1.00 per stick. According to plaintiff, this price differential constituted a "pink tax," which she claimed violated the MMPA's prohibition on "unfair practices."

The district court dismissed the complaint, noting “[w]omen are able to purchase any of the Dove antiperspirants for the same price as men regardless of the scent or variety.” [2020 U.S. Dist. LEXIS 126194 \(E.D. Mo. 2020\)](#). On appeal, the Eighth Circuit affirmed. Without reaching the question of whether the MMPA does, in fact, prohibit gender discrimination in pricing, the Eighth Circuit found plaintiff incorrectly equated gender-based marketing with gender discrimination. According to the Court, to plausibly allege gender discrimination, plaintiff needed to plausibly allege that the *only* difference between “Men + Care” and “Advanced Care” was the gender of the consumer. Noting the various other differences between the two lines (including differences in scents, packaging, and labels), the Court found plaintiff failed to do so. Instead, the Court determined these various differences make the different products potentially attractive to different customers with different preferences.

The Eighth Circuit also emphasized the difference between marketing a product to appeal to a specific gender, and actually charging different point-of-sale pricing according to the consumer’s gender. The Court found plaintiff’s position incorrectly assumes that women *must* purchase products marketed to their gender, due to (in plaintiff’s words) “social conditioning and societal expectations regarding what is ‘feminine’ and ‘masculine.’” The Court noted that if plaintiff’s primary concern was price, she was free to purchase the cheaper “Men + Care” antiperspirant line. Plaintiff chose not to because, as stated in her brief, she did not want to “smell like a man.” Thus, the court concluded, plaintiff’s grievance was that she did not want to pay extra for her preference. But preference-based pricing, the Court said, was not in and of itself “unfair.”

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