IN THE SUPREME COURT OF MISSOURI

CASE NO. SC97721

DWIGHT TUTTLE

Appellant,

vs.

DOBBS TIRE & AUTO CENTERS, INC.,
DAVID DOBBS And DUSTIN DOBBS

Respondents.

Appeal from Missouri Court of Appeals, Eastern District

Honorable Michael Jamison
Circuit Judge

RESPONDENTS' SUBSTITUTE BRIEF

Robert D. Younger #42909
Dean Kpere-Daibo #63010
MCMAHON BERGER, PC
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039
(314) 567-7350 – Telephone
(314) 567-5968 – Facsimile
younger@mcmahonberger.com
dkd@mcmahonberger.com

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF FACTS

On or about August 27, 2017, Appellant filed his Original Petition in the Circuit Court of St. Louis County alleging he was constructively discharged based on his age and retaliated against for engaging in protected activity in violation of the Missouri Human Rights Act ("MHRA"). *See* L.F. Doc. No. 73. Specifically, Appellant alleged he was employed by Respondent, Dobbs Tire & Auto ("Dobbs Tire") from March of 1989 to March 14, 2017. L.F. Doc. No. 73, p. 3 ¶ 10. During his employment, Appellant was the Store Manager for Dobbs Tire at its Shiloh, Illinois store until he was transferred to another store on November 14, 2016. L.F. Doc. No. 73, P. 3 ¶ 10. Appellant also alleged that on or about July 2015, Respondent Dustin Dobbs ("Dustin Dobbs") informed him that he would never receive another raise for the remainder of his employment with Dobbs Tire. L.F. Doc. No. 73, p.4 ¶ 13.

Also, Appellant alleged that he suffered an adverse employment action on November 10, 2016, when he was transferred from Dobbs Tire's Shiloh, Illinois store to its Fairview Heights, Illinois store. L.F. Doc. No. 73 pp. 4-5 ¶¶ 15-17. In his First Amended Petition, Appellant alleged the transfer from the Shiloh, Illinois store to the Fairview Heights, Illinois store was a demotion. L.F. Doc. No. 73, p. 5 ¶ 23. Appellant also alleged that he suffered intolerable working conditions by management levying improper expenses to his store, unjustified criticisms of his job performance, and disparate treatment of him compared to younger employees until he tendered his resignation on March 13, 2017. L.F. Doc. No. 73, p. 4-5 ¶¶ 14, 20 and 23.

Moreover, and perhaps most importantly, in his First Amended Petition, Appellant alleged that "upon information or belief, one or more discriminatory decisions and/or actions taken against Plaintiff" took place in St. Louis County. L.F. Doc. No. 73, p. 3 ¶ 7. However, in the very next sentence in his First Amended Petition, Plaintiff contradicts his prior conclusory statement by stating, "to the extent that any of **Plaintiff's injuries may have taken place in Illinois**, venue in this Court is proper pursuant to Mo. Re. Stat §508.010(5)(2). . ." (emphasis added). L.F. Doc. No. 73, p. 3 ¶ 7. Further, Appellant continued to make conclusory statements regarding where the alleged discriminatory conduct occurred by stating, "**some** of the decisions and actions taken against Plaintiff were done in St. Louis County**.**" (emphasis added). L.F. Doc. No. 73, p. 6 ¶ 23. Lastly, Plaintiff alleged he was retaliated against for engaging in protected activity by cooperating with an investigation regarding Respondent David Dobbs ("David Dobbs"). L.F. Doc. No. 73, p. 7-8 ¶¶ 35-37.

LEGAL PROCEEDINGS

Appellant dually filed a Charge of Discrimination with the Equal Employment Opportunity Commission and the Missouri Commission on Human Rights ("MCHR") on April 10, 2017, alleging age discrimination and retaliation in violation of the MHRA. Subsequently, before receiving a Notice of Right to Sue from the MCHR, on August 27, 2017, Appellant filed his Original Petition in St. Louis County Circuit Court alleging age discrimination and retaliation in violation of the MHRA. L.F. Doc. No. 63. While Appellant is correct that David and Dustin Dobbs reside in St. Louis County, Dobbs Tire,

which is a Missouri corporation, is located in Jefferson County. Moreover, while Appellant admits in his Original Petition that he lived in Illinois, was employed in Illinois, and was transferred or allegedly demoted in Illinois, he also insufficiently stated that "some decisions and actions were done in St. Louis County." L.F. Doc. No. 63, p. 5 ¶ 22-23.

Further, Appellant did not receive a Notice of Right to Sue in this proceeding until October 16, 2017. L.F. Doc. No. 74. Subsequently, Appellant filed his First Amended Petition on November 6, 2017. L.F. Doc. No. 73. In Appellant's First Amended Petition, he alleged that "upon information and belief, one or more of the discriminatory decisions and/or actions" alleged in his First Amended Petition took place in St. Louis County. L.F. Doc. No. 73, p. 3 ¶ 7. However, Appellant contradicted his conclusory allegation by alleging the same discriminatory decisions and/or actions alleged in his First Amended Petition ***may*** have occurred in Illinois. L.F. Doc. No. 73, p. 3 ¶ 7.

On November 16, 2017, Dobbs Tire filed its Motion to Dismiss Plaintiff's First Amended Petition for Failure to State a Claim and/or Lack of Jurisdiction, or in the Alternative, Motion for More Definite Statement and Memorandum in Support. L.F. Doc. Nos. 79-80. In Dobbs Tire's Motion to Dismiss, it argued Appellant's First Amended Petition should be dismissed because Plaintiff failed to set forth sufficient facts that demonstrated that the alleged discriminatory acts occurred in Missouri, and therefore, the Circuit Court did not have jurisdiction over said claims. Moreover, Dobbs Tire argued that the MHRA does not apply to Appellant because he lacked sufficient contacts with the State of Missouri because he was an Illinois resident who worked in Illinois. Lastly, Dobbs Tire argued in the alternative that if the Circuit Court was not inclined to dismiss Appellant's

First Amended Petition because of his failure to meet the required fact-pleading standard related to where the alleged discrimination occurred, the Circuit Court should require Appellant to file a More Definite Statement regarding where the alleged acts of discrimination occurred. L.F. Doc. Nos. 79-80.

On December 14, 2017, Dobbs Tire filed a Supplemental Memorandum in Support of its Motion to Dismiss. L.F. Doc. No. 86. In support of its argument that the MHRA did not apply to an employee who was not employed in Missouri, in its Supplemental Memorandum, Dobbs Tire provided the Circuit Court a persuasive decision from the MCHR in an administrative employment discrimination proceeding where the MCHR dismissed a Charge of Discrimination because the complainant was not employed in the State of Missouri. More specifically, in the MCHR's decision, it stated that it "lacks jurisdiction over this matter because Complainant was not employed in the State of Missouri at the time of the alleged discrimination." L.F. Doc. No. 87. Further, in Dobbs Tire's Supplemental Memorandum, it indicated that the MCHR decision involved an Illinois employee who filed a Charge of Discrimination with the MCHR because his employer was headquartered in Missouri, similar to this instant case. Id.

In response, on December 28, 2017, Appellant filed his Opposition to Dobbs Tire's Motion to Dismiss. In his Opposition, Appellant argued that his First Amended Petition pleaded facts showing that he was entitled to relief by pleading that the adverse employment decisions and/or actions occurred in Missouri. More specifically, to refute Dobbs Tire's argument that Appellant failed to plead specific facts relating to where the alleged discriminatory acts occurred, Appellant focused on the alleged discriminatory

"decisions" made by Dobbs Tire, specifically arguing that "all decisions relating to Plaintiff's employment were made in the State of Missouri and one or more of them were made in St. Louis County, Missouri." L.F. Doc. No. 95, P. 3-4.

Further, in his Response in Opposition, Appellant argued that he was protected by the MHRA merely because he was employed by a Missouri employer because the definitions of "employer," "complainant," and "individual" do not require that he live or work in Missouri. L.F. Doc. No. 95, p. 5. Appellant also argued that he had sufficient contacts with the State of Missouri because policies and procedures originated from Missouri, he had the occasional meeting in Missouri, and the decisions regarding his employment came from Dobbs Tire's headquarters in Missouri. L.F. Doc. No. 95, p. 11-12. Lastly, in Section VI of his Opposition, Appellant failed to request leave to amend his First Amended Petition to plead sufficient additional facts related to where the alleged discrimination or "discriminatory decisions" occurred. Instead, Appellant merely indicated that he provided additional facts in Section IV of his Opposition. L.F. Doc. No. 95, p. 14. It is imperative to note, in Appellant's Response in Opposition, he did not request leave to amend his First Amended Petition, and there is no evidence in the record that Appellant ever made such request.

Subsequently, on January 5, 2018, Dobbs Tire filed its Reply to Appellant's Opposition to its Motion to Dismiss. L.F. Doc. No. 96. In its Reply, it argued that Missouri recognizes the well-established presumption against extraterritorial application of Missouri statutes, and therefore, without identification of specific language within the MHRA to overcome said presumption, the MHRA could not be applied extraterritorially to Appellant.

Additionally, on January 5, 2018, David and Dustin Dobbs joined Dobbs Tire's Motion to Dismiss after being properly served with Appellant's First Amended Petition. L.F. Doc. No. 97.

On April 10, 2018, the Circuit Court heard the parties' oral argument. During oral argument, Appellees relied heavily on their argument, and the analysis laid out in Horstman v. Gen. Elec. Co., 438 S.W.2d 18, 20 (Mo. App. 1969), that the Appellant failed to identify any language contained in the MHRA which established the Missouri legislature's intent to overcome the well-established presumption against extraterritorial application of Missouri statutes. Moreover, at no time during oral argument did Appellant's counsel request from the Circuit Court leave to amend Appellant's First Amended Petition to plead additional facts related to where the alleged "discriminatory decisions" were made. At the conclusion of the parties' oral arguments, the Circuit Court entered judgment in favor of the Appellees, granting their Motion and dismissing Appellant's claims with prejudice. L.F. Doc. No. 111.

On appeal in the Missouri Court of Appeals Eastern District, Appellant argued that the Circuit Court erred because Appellant sufficiently alleged that he was "subjected to one or more discriminatory acts where the decisions were made in Missouri." *See* Appendix, p. 23. During oral argument, Appellant's counsel stated the alleged discriminatory conduct that occurred in Missouri were the "decisions" to transfer expenses to Appellant and to transfer Appellant from one Illinois store to another Illinois store, which he argued permits the Appellant to bring this action under MHRA. *See* Appendix, p. 23. During oral argument, Appellant's counsel stated that he did not know all of the facts regarding where

the alleged injury occurred, but that a reasonable person could conclude based on his pleading where the alleged discriminatory decisions were made. *See* Appendix, p. 25.

Also, during oral argument in the Court of Appeals, Appellant's counsel asserted to the Court of Appeals that Appellant, in fact, requested leave from the Circuit Court to amend his First Amended Petition to assert additional facts related to where the alleged discriminatory decisions were made. *See* Appendix, p. 25. However, it must be noted that no such request for leave to amend Appellant's First Amended Petition was made by Appellant's counsel to the Circuit Court. A review of the record establishes that Appellant did not request leave to amend his First Amended Petition and merely inserted additional facts in his Opposition to Respondents' Motion to Dismiss.

STANDARD OF REVIEW

A trial court's grant of a motion to dismiss for failure to state a claim must be reviewed *de novo*. Phelps v. City of Kansas City, 371 S.W.3d 909, 912 (Mo. Ct. App. 2012); City of Lake Saint Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. 2010). "[A] motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition." Id. (*citing* Reynolds v. Diamond Foods & Poultry, Inc., 79 S.W.3d 907, 909 (Mo. 2002)). Appellate Courts will affirm the dismissal if it can be granted on any grounds supported by the motions to dismiss. McBride v. McBride, 288 S.W.3d 748, 750–51 (Mo. Ct. App. 2009) (*citing* Shaver v. Shaver, 913 S.W.2d 443, 444 (Mo. Ct. App. 1996)). If the trial court does not state its grounds for the dismissal, the Court will rely upon the grounds stated in the motion to dismiss. Id.

ARGUMENT

As fully discussed below, the Court should affirm the Circuit Court's dismissal of Appellant's First Amended Petition and the Court of Appeals' decision affirming said Order because the court properly applied Missouri's well-established presumption against extraterritorial application of Missouri statutes to the MHRA. Applying said standard, the Court should hold Appellant has failed to meet his burden of identifying explicit language contained in the MHRA that establishes the Missouri legislature intended for the MHRA to be applied extraterritorially. Hence, the Court should reject Appellant's argument that the broad definitions contained in the MHRA are evidence of the Missouri legislature's intent for the MHRA to apply to "any individual" or "any other person" even if they live and work outside of Missouri.

In addition, the Court should reject Appellant's misguided application of this Court's holding in Igoe v. Dep't of Labor & Indus. Relations of State of Missouri, 152 S.W.3d 284 (Mo. 2005). The Court should reject Appellant's argument that the holding in Igoe is instructive and establishes that the location of the alleged discriminatory decision-making is the determinative factor regarding whether the MHRA can be or should be applied extraterritorially to an employee who lives and works outside the State of Missouri.

Additionally, the Court should affirm the Circuit Court's Order dismissing Appellant's First Amended Petition and the Court of Appeals' decision affirming said Order because while the location of the alleged discriminatory decision is not dispositive regarding the application of the MHRA to an employee employed outside the state,

Appellant failed to plead facts that establish where the alleged discriminatory "decisions and/or acts" occurred inasmuch as he asserted merely blanket conclusions regarding the location of the alleged discriminatory "decisions and/or acts." In light of Missouri's fact-pleading standard in accordance with Rule 55.05, the Court should hold Appellant has failed to satisfy Missouri's fact-pleading requirements regarding whether the alleged conduct occurred in Missouri or Illinois.

Moreover, the Court should reject Appellant's argument that the Circuit Court erred by dismissing his First Amended Petition in lieu of other available remedies including transferring the case to a proper venue or allowing for Appellant to file a more definite statement because there was no motion for transfer of venue filed with the Circuit Court and Appellant failed to ask for leave to Amend his First Amended Petition. Therefore, Appellant is estopped from requesting said remedies from this Court. Lastly, as stated above, the Court should affirm the Circuit Court's Order dismissing the Appellant's First Amended Petition and the Court of Appeal's decision affirming said Order because application of the MHRA to Appellant who lives and worked in Illinois would be an extraterritorial application of the MHRA.

APPELLANT'S POINTS RELIED ON

I. THE COURT SHOULD REJECT POINT I OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S DISMISSAL OF APPELLANT'S FIRST AMENDED PETITION.

II. THE COURT SHOULD REJECT POINT II OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER AND THE COURT OF APPEALS' DECISION BECAUSE THERE IS NO LANGUAGE CONTAINED WITHIN THE MHRA THAT INDICATES THE LEGISLATURE INTENDED TO OVERCOME MISSOURI COURTS' PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF MISSOURI STATUTES AND EXPAND THE PROTECTIONS OF THE MHRA TO INDIVIDUALS EMPLOYED OUTSIDE THE STATE OF MISSOURI.

Horstman v. Gen. Elec. Co., 438 S.W.2d 18 (Mo. App. 1969).

Jahnke v. Deer & Company, 912 N.W.2d 136 (Iowa 2018).

Taylor v. Rodale, Inc., 2004 WL 1196145 (E.D. Pa. 2004).

Mo. Ann. Stat. § 213.010 (West).

III. THE COURT SHOULD REJECT POINT II OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER AND THE COURT OF APPEALS' DECISION BECAUSE APPELLANT FAILED TO PLEAD SUFFICIENT FACTS TO ESTABLISH HE HAD SUFFICIENT CONTACTS WITH THE STATE OF MISSOURI FOR THE MHRA TO APPLY AND FAILED TO SUFFICIENTLY PLEAD WHERE THE ALLEGED DISCRIMINATORY "DECISIONS AND/OR ACTS" OCCURRED.

Mo. R. Civ. P. 55.05.

Wickenhauser v. Edward Jones & Co., 953 F. Supp. 286 (E.D. Mo. 1996).

Gardner v. Bank of America, N.A., 466 S.W.3d 642, 646 (Mo. App. E.D. 2015).

IV. THE COURT SHOULD REJECT POINT III OF THE APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER, AND THE COURT OF APPEALS' DECISION BECAUSE APPELLANT'S ARGUMENT THAT THE CIRCUIT COURT SHOULD HAVE TRANSFERRED VENUE OR ORDERED FOR A MORE DEFINITE STATEMENT IS ERRONEOUS.

Ozark Fruit Growers' Ass'n v. Sullinger, 45 S.W.2d 887, 889 (Mo. Ct. App. 1932).

Mo. R. Civ. P. 51.045.

V. THE COURT SHOULD REJECT POINT IV OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER AND THE COURT OF APPEALS' DECISION BECAUSE APPLICATION OF THE MHRA TO APPELLANT'S FIRST AMENDED PETITION WILL RESULT IN THE IMPROPER EXTRATERRITORIAL APPLICATION OF THE MHRA

Jahnke v. Deer & Company, 912 N.W.2d 136 (Iowa 2018).

Taylor v. Rodale, Inc., 2004 WL 1196145 (E.D. Pa. 2004).

Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 193 (Ky. 2001).

Arnold v. Cargill, Inc., No. CIV.012086(DWF/AJB), 2002 WL 1576141 (D. Minn. July 15, 2002).

THE TRIAL COURT ERRED IN GRANTING DOBBS TIRE'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION UNDER RULE 55(A)(1) BECAUSE THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION OVER APPELLANT'S CASE UNDER ARTICLE V, SECTION 14 OF THE MISSOURI CONSTITUTION IN THAT IT IS A CIVIL CASE.

I. THE COURT SHOULD REJECT POINT I OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S DISMISSAL OF APPELLANT'S FIRST AMENDED PETITION.

This Court should affirm the Circuit Court's dismissal of Appellant's First Amended Petition and reject Point I of Appellant's Brief because Appellant did not present this argument to the trial court in his response brief to Respondents' Motion to Dismiss or orally during the oral arguments. Respondents concede the trial court had subject matter jurisdiction over the claims at hand since this matter is a civil action. However, Respondents do not concede, as will be fully discussed below, that Appellant—an Illinois resident and employee—can bring such claims of age discrimination and retaliation under the MHRA. It is imperative to point out to this Court that whether the trial court has subject matter jurisdiction over Appellant's claims was not the basis for the Court's dismissal and does not address the primary issue at hand: whether the MHRA applies and protects an Illinois resident who is employed solely in Illinois.

THE TRIAL COURT ERRED GRANTING DOBBS TIRE'S MOTION TO DISMISS APPELLANT'S FIRST AMENDED PETITION FOR FAILURE TO STATE A CLAIM FOR RELIEF UNDER RULE 55(A)(6) BECAUSE THE MHRA PROHIBITS UNLAWFUL DISCRIMINATORY AND RETALIATORY PRACTICES BY EMPLOYERS SUCH AS DOBBS TIRE, AGAINST "ANY INDIVIDUAL" OR "ANY PERSON" WHEN DISCRIMINATORY PRACTICES OCCUR IN MISSOURI, AS APPELLANT ALLEGED IN HIS FIRST AMENDED PETITION.

II. THE COURT SHOULD REJECT POINT II OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER AND THE COURT OF APPEALS' DECISION BECAUSE THERE IS NO LANGUAGE CONTAINED WITHIN THE MHRA THAT INDICATES THE LEGISLATURE INTENDED TO OVERCOME MISSOURI COURTS' PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION OF MISSOURI STATUTES AND EXPAND THE PROTECTIONS OF THE MHRA TO INDIVIDUALS EMPLOYED OUTSIDE THE STATE OF MISSOURI.

The Court should affirm the Circuit Court's dismissal of Appellant's First Amended Petition because Appellant has failed to meet his burden of establishing the MHRA contained explicit language that demonstrates the Missouri legislature's intent to overcome the Missouri court's presumption against applying Missouri statutes extraterritorially.

a. Missouri Courts Recognize and Apply the Presumption Against Extraterritorial Application of Missouri Statutes.

In Horstman v. Gen. Elec. Co., 438 S.W.2d 18 (Mo. App. 1969), the Court Appeals recognized Missouri courts' presumption against extraterritorial application of statutes by stating:

> Prima Facie, every statute is confined in its operation to persons, property, rights, or contracts, which are within the territorial jurisdiction of the Legislature which enacted it. **The presumption is always against any intention to attempt giving to the act an extra-territorial operation and effect**. 'No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. Id. at 21 (*citing* Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895)) (emphasis added).

Thus, in Missouri, the courts presume that a state statute does not apply extraterritorially, and a plaintiff must point to specific language contained in the statute to overcome said presumption.

Applying the standard discussed above, in Horstman, 438 S.W.2d at 20, the Court of Appeals held that the Missouri service letter statute could not be applied to a Kansas employee. Id. In Horstman, 438 S.W.2d 18, the plaintiff was a Missouri resident who was employed in Kansas and sued for damages under the Missouri service letter statute. Applying the presumption that Missouri statutes do not apply extraterritorially, the Court held that the employee, who was employed in Kansas, was not entitled to a service letter because the employee was not hired in Missouri, did not work in Missouri, and was not discharged in Missouri. Id. The Court further held that without specific language in the statute from the Missouri legislature indicating the intent for the statute to apply extraterritorially, the Court could not apply the Missouri service letter statute extraterritorially. Id. Thus, the Horstman Court made it clear that in Missouri, laws are not to be applied extraterritorially unless there is explicit language in the statute stating otherwise.

Moreover, the presumption against extraterritorial application of Missouri statutes was again recognized by the Missouri Court Appeals in Bigham v. McCall Serv. Stations, Inc., 637 S.W.2d 227, 229 (Mo. Ct. App. 1982), where the Court specifically began its legal analysis by reiterating the presumption, stating, "the legal proposition that the statute of a state does not ordinarily have any extra-territorial effect." Recognizing the existence

of the well-established presumption against extraterritorial application of statutes, the Court also cited the Court's decision in Horstman. Id.

In Nelson v. Hall, 684 S.W.2d 350 (Mo. Ct. App. 1984), which was cited by Appellant in his Reply brief to the Court of Appeals, the Court began its analysis recognizing the well-established presumption against extraterritorial application of Missouri statutes by stating, "the rule that a statute enjoys no extraterritorial effect beyond the state of enactment remains the principle of our adjudicated decisions." (*citing* Rositzky v. Rositzky, 329 Mo. 662, 46 S.W.2d 591, 594 (1931)). Based on the aforementioned precedent, it is clear that Missouri courts do impose the well-established presumption against extraterritorial application of Missouri statutes, contrary to Appellant's erroneous position.

It must be noted also that numerous appellate courts in other jurisdictions have applied the presumption against extraterritorial application of state statutes and refused to expand the geographical reach of similar employment discrimination laws. The reasoning behind these courts' decisions to apply the presumption against extraterritorial application is recognized by Missouri courts. Recently, in Jahnke v. Deer & Company, 912 N.W.2d 136 (Iowa 2018), the Iowa Supreme Court determined whether the Iowa Civil Rights Act ("ICRA") applied to an Iowa resident who was employed in China. As part of its analysis, the Iowa Supreme Court stated, "[i]t is well-settled presumption that state statutes lack extraterritorial reach unless the legislature clearly expresses otherwise." Id. at 141.

The court further stated that there is a strong public policy in favor of applying the presumption against extraterritoriality of the ICRA because to apply the statute in such a

manner would create "the potential for conflicts of laws of other states and countries" and "to avoid running afoul of the Commerce Clause of the United States Constitution." Id. at 144 (*citing* Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 193 (Ky. 2001)). Further discussing the presumption, the court stated, "[t]hese interstate comity concerns and conflict-of-laws issues have led a majority of courts to decline to extraterritorially apply human rights-related statutes beyond their clear geographic reach." Id. (*citing* E.E.O.C, v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991) (declining to apply a former version of Title VIII extraterritorially); Ferrer v. MedaSTAT USA, LLC, 145 Fed Appx. 116, 120 (6th Cir. 2005) (holding the Kentucky Civil Rights Act did not apply extraterritorially)). Applying the presumption, the Iowa Supreme Court held that it was unwilling to expand the reach of the ICRA to apply extraterritorially because there was no clear language contained in the statute that indicated the legislature intended to do so.

Similarly, in Taylor v. Rodale, Inc., 2004 WL 1196145 (E.D. Pa. 2004), the United States District Court of the Eastern District of Pennsylvania found the Pennsylvania Human Rights Act ("PHRA") was not applicable to a Georgia employee who brought age discrimination claims against his employer. In its decision, the court acknowledged the presumption against extraterritorial application of states' employment discrimination laws to individuals working outside the state. Id. The plaintiff argued, similar to Appellant in matter at hand, that application of the PHRA would not require extraterritorial application because he alleged the discriminatory conduct or discriminatory decision-making occurred in Pennsylvania because the decision-maker was employed and located in Pennsylvania. Id. The court rejected this argument, finding that such a holding would hinder the

application of the PHRA by making it dependent upon the location of the supervisor or decision-maker and not the employee. Id. *3. Such a decision would result in preventing an employee in Pennsylvania from being able to bring a PHRA claim because the supervisor is located in another state. Id. *3. The court found that the relevant location under the PHRA was the location of the employee's workplace. Therefore, because the employee was employed in Georgia, the PHRA was not applicable and plaintiff failed to state a claim upon which relief could be granted. Id. *4.

To further establish the existence of the presumption, in Union Underwear Co. v. Barnhart, 50 S.W.3d 188 (Ky. 2001), the Kentucky Supreme Court considered whether the Kentucky Civil Rights Act ("KCRA") applied to alleged discrimination of an employee who was employed in South Carolina when the plaintiff was a South Carolina and Alabama resident and the defendant employer was headquartered in Kentucky. Id. The court began its analysis by citing the well-established presumption against extraterritorial application of state statutes, specifically stating, "unless a contrary intent appears within the language of the statute, we presume that the statute is meant to apply only within the territorial boundaries of the Commonwealth." Id. at 190. The court looked to Kentucky's Worker's Compensation statute as an example of a statute that overcame the well-established presumption by explicitly indicating the statute applied to workers performing work outside the state. Id. Thus, the court determined that when drafting and adopting the KCRA, the Kentucky General Assembly was aware of the presumption against extraterritorial application and how to overcome it. Id.

Applying the presumption against extraterritorial application standard, the court held that nothing in the KCRA implied that it was intended to operate outside Kentucky. Id. at 190-91. The court rejected the plaintiff's argument that the KCRA's prohibition of discrimination against "any individual" evidenced a legislative intent that the KCRA had extraterritorial application. Id. at 191. In this respect, the court specifically stated, "under the presumption against extraterritorial application, the use of the terms 'any' and 'all' to persons covered by legislation does not imply that the enacted legislature intended that the legislation be applied extraterritorially." Id. (*citing* 73 AM. Jur. 2d, Statutes, §359)(the presumption against extraterritorial application applies even "to a statute using general words, such as 'any' or 'all,' in describing the persons or acts to which the statute applies.")).

The Union Underwear Co. court also rejected the plaintiff's argument that the broad definitions of "employer" and "employee" mandated that the employer must be liable for any discriminatory acts against any employee under the KCRA regardless of whether the employee worked in Kentucky. The court reasoned the broad definitions found in the KCRA did not satisfy the plaintiff's burden of making a positive showing that the state legislature intended for the law to apply outside of Kentucky. Id. To come to this conclusion, the court relied on the United States Supreme Court's holding in E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248–49, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991), wherein the Supreme Court held that Title VII's definitions of "employer" and "employee," while broad enough to cover the parties, did not demonstrate Congress's intent that the law

applied outside the United States. Id. Accordingly, the court held the KCRA did not apply extraterritorially to the plaintiff's discrimination claims. Id.

It must be noted, while the court in Union Underwear Co. did acknowledge there was language in the KCRA that stated, "safeguard all individuals *within the state* from discrimination ....," this language was not determinative regarding whether the law applied extraterritorially. Id. at 192. Again, as the court in Union Underwear Co. stated, it was the plaintiff's burden to demonstrate the KCRA contained language that explicitly indicated the Kentucky General Assembly intended for the law to apply extraterritorially. Id. The plaintiff could not meet the burden inasmuch as no such language existed. Therefore, the court found that the KCRA did not apply outside the State of Kentucky. Id.

Likewise, in Arnold v. Cargill, Inc., No. CIV.012086(DWF/AJB), 2002 WL 1576141 (D. Minn. July 15, 2002), the United States District Court held that the Minnesota Human Rights Act ("the Act") could not be applied extraterritorially to a class of African-American plaintiffs who were past and present managerial and professional salaried employees of various Cargill subsidiaries located in multiple different states. Similar to the court in Union Underwear Co., 50 S.W.3d 188, the court in Arnold applied the well-established presumption against the extraterritorial application of state statutes. Id. The court also stated, "while protecting against the potential conflict of law that could arise if one state's statute were to be applied to persons within the borders of another state, such a presumption also serves 'to avoid running afoul of the Commerce Clause of the United States Constitution.'" Id. (*citing* Union Underwear Co., 50 S.W.3d at 193); Appendix, pp. A12-A20.

Applying this standard, the court stated that in order for the court to apply the Act to employees outside of Minnesota, the plaintiffs were required to identify language contained in the Act evidencing that the Minnesota legislature intended for the statute to apply to persons outside the borders of the state. Id. Again, the court looked to the Minnesota Worker's Compensation statute to demonstrate that Minnesota's legislature overcame the presumption by including explicit language that the state's law applies to workers who are injured outside the state. Id. Finally, the court, upon a review of the Act's statutory language, concluded the plaintiffs could not point to any language within the Act that demonstrated the Minnesota legislature intended to overcome the presumption against extraterritorial application of the statute. Id. In fact, the court further held the language of the statute and definition of "an employee" indicated that the legislature intended for the law to only apply within the boundaries of the state. Id.

The court also found that under a due process analysis, the plaintiffs, who neither lived nor worked in Minnesota, did not have sufficient contacts with the state of Minnesota. Id. The court explicitly stated, "the fact that Cargill headquarters are located in, and the contested company-wide policies emanated from Minnesota is insufficient to justify extraterritorial application, particularly when there is no evidence before the Court that Cargill could not otherwise be held accountable in the courts of other states where the named plaintiffs reside and/or work." Id. Accordingly, the court dismissed the claims for the plaintiffs who neither lived nor worked in Minnesota, finding the Act does not provide for extraterritorial application. Id.

Lastly, in Campbell v. Arco Marine, Inc., 42 Cal. App. 4th 1850, 50 Cal. Rptr. 2d 626 (1996), the California Court of Appeals rejected the extraterritorial application of California's Fair Employment and Housing Act ("FEHA") to a nonresident seeking relief for alleged discrimination. In Campbell, 42 Cal. App. 4th 1850, the plaintiff argued that the legislature intended the FEHA to apply to nonresidents whenever they were employed by a California-based employer. Id. She also argued that application of the FEHA to a nonresident who did not perform work inside the state would not violate the constitutional prohibitions against extraterritorial application of state regulation. Id. The court disagreed, holding, similar to the majority of Missouri courts, there was a need for explicit and unambiguous language to defeat the well-established presumption against extraterritorial application of its state's laws. Explaining this standard, the court stated:

> Read literally, the FEHA imposes no residency requirement on either the employer or the person aggrieved and no limitation based on where the conduct occurred. Since the legislature certainly did not intend to interfere with employment relationships between residents of other states being performed wholly in other states, the broad statutory definitions of "employer" and "person" cannot in themselves be controlling. At some point, a line must be drawn between those situations where the law applies and those where it does not. Appellant would have the law applied to all California-based employers regardless of where the aggrieved employee resides and regardless of where the tortious conduct took place. We reject that view. To paraphrase the Supreme Court, if we were to accept appellant's view, we would have no logical basis for distinguishing between nonresidents working for a California corporation outside the state and a nonresident working for a foreign corporation outside the state. Without clearer evidence of legislative intent to do so that is contained in the language of the FEHA, we are unwilling to ascribe to that body a policy which would raise difficult issues of constitutional law by applying this state's employment-discrimination regime to nonresidents employed outside the state.

Id. at 1859. The court also pointed out that applying the FEHA to an employee who neither lived nor worked in the state raised serious constitutional concerns because the due process clause, commerce clause, and full faith and credit clause are implicated when a state seeks to impose its laws where there are no significant contacts or aggregation of contacts creating state interests. Id. (*citing* Edgar v. MITE Corp., 457 U.S. 624, 642–643, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982); Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–313, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)). Therefore, in light of the plaintiff's failure to point to specific and explicit language contained in the FEHA evidencing that the California legislature intended for the FEHA to apply extraterritorially, the court held the law did not apply to the plaintiff. Id.

In short, acknowledging Missouri courts recognize and apply the well-established presumption against the extraterritorial application of its state laws, this Court must affirm the Circuit Court's dismissal of Appellant's MHRA claims inasmuch as Appellant failed to meet his burden of establishing that the MHRA contains explicit language that demonstrates the Missouri legislature intended to overcome said presumption.

b. Appellant Fails to Meet His Burden of Identifying Explicit Language Contained in the MHRA to Overcome the Well-Established Presumption against Extraterritorial Application of Missouri Statutes because the Terms "Any Other Person" and "Any Individual" Utilized in the MHRA Are Broad Terms that Do Not Demonstrate the Legislature's Explicit Intent to Apply the MHRA Extraterritorially.

The Court should reject Appellant's erroneous argument that the use of the terms "any individual" and "any other person" in its prohibition against discrimination and retaliation establishes the Missouri legislature's intent to overcome the well-established

presumption against extraterritorial application of the MHRA. Further, Appellant erroneously argues that there is no language within the MHRA that indicates an intent by the legislature to limit the scope of the MHRA to just Missouri resident and individuals who physically work within Missouri.

As held in Horstman and the litany of cases cited above, in order for the clear presumption against extraterritoriality to be overcome by the Appellant, he must identify **explicit language contained in the statute to demonstrate that the Missouri legislature's legislative intent was for the MHRA to apply extraterritorially**. If the Missouri legislature intended for the MHRA to be applied extraterritorially, it would have included explicit language of said intent in the statute to overcome the presumption. The Missouri Worker's Compensation statute is a perfect example of the Missouri legislature including language in the statute to explicitly overcome the presumption. Mo. Ann. Stat. § 287.110 (West), states that it covers and protects "all injuries received and occupational **diseases contracted outside of this state under contract of employment made in this state**. . . " *See* Appendix, p. A21 (emphasis added). Thus, the Missouri legislature has made it clear that it intended to overcome the presumption against extraterritorial application of Missouri statutes by explicitly stating the Missouri Worker's Compensation statute applies to injuries outside Missouri. This clearly establishes that if the Missouri legislature intended for the MHRA to apply as Appellant argues, it was fully aware of how to include explicit language in the MHRA to overcome Missouri's presumption against extraterritorial application of our state laws—**yet, it did not do so**.

Appellant argues incorrectly that because the MHRA prohibits discrimination "against any individual" and prohibits retaliation and discrimination "against any other person," such use of the term "any" in these phrases is the Missouri legislature's intent to be all inclusive regarding the statutes applicability and protection, including individuals like Appellant who live and work in Illinois. As the court in Union Underwear Co., held, the legislature's use of the word "any" in the term "any individual" and "any other person" does not imply that the enacting legislature intended for the MHRA to apply extraterritorially to an Illinois resident who was employed solely in Illinois. In fact, the United States Supreme Court instructs and similarly held in Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 118 (2013), that "it is well established that generic terms like "any" or "every" do not rebut the presumption against extraterritoriality."

Respondents agree with Appellant statement on page 10 of Respondent's Brief that courts "must not read into a statute legislative intent contrary to the intent where it does not exist." Frye v. Levy, 440 S.W.3d 405, 424 (Mo. 2014); *see* Appellant's Substitute Brief, p. 10. Yet, this is precisely what Appellant is asking this Court to do. Appellant is asking this Court to read the phrases "any individual" and "any other person" so broadly that they would expand the protections of the MHRA to include persons who neither live nor work in Missouri. The Missouri legislature's use of the word "any" in these phrases in no way can be read to imply the legislature's intent regarding whether the MHRA applies extraterritorially to an employee who lives and works in another state.

Appellant further incorrectly argues that there is no language contained in the MHRA that implies a limit of the protections of the MHRA to employees employed within

Missouri. To the contrary, applying Appellant's analysis of the definitions and plain language of the statute, the definition of "employer" contained in MHRA could be read to establish the legislature's intent for the MHRA to protect only employees within the State of Missouri. The MHRA defines "employer" as those having "six or more employees **within the State of Missouri**." Mo. Ann. Stat. § 213.010 (West) (emphasis added). Considering the plain and ordinary meaning of "employer" as defined by the MHRA, for the MHRA to apply to a company or individual doing business in Missouri and regulate the conduct of said company or individual, the company or individual must have six or more employees who are employed ***within*** the State of Missouri. *See* Mo. Ann. Stat. § 213.010 (West) (emphasis added).

Thus, under this definition, where employees are employed is important. If the company or individual does not employ six employees within Missouri, the MHRA is not applicable. If the legislature intended for the MHRA to be applicable at all times, beyond the boundaries of Missouri and regardless of where a company's employees are located, the MHRA would define "employer" as any company or individual employing "six or more employees." However, this is not the case. The legislature made a point to include the geographical limitation of "***within the State of Missouri.***" The legislature included this plain and unambiguous language in the definition of "employer" to establish the geographical boundaries of the statute.

Moreover, the Appellant points to the MHRA being a remedial statute as justification for its broad and liberal reading of the statute for it to be applicable in this case citing Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc., 991 S.W.2d 161, 167

(Mo. Ct. App. 1999).[1] Not only is Red Dragon distinguishable from the case at hand, but it also does not support Appellant's overall contention that the MHRA should be applied liberally to an Illinois employee. This Court's holding in Red Dragon that the MHRA should be applied liberally to support a claim for associational disability to an individual **within Missouri** does not stand for the proposition that the MHRA should be applied to employees who live and work outside the State of Missouri. The Court explicitly states that based upon the plain reading of the general purpose of the MHRA, the MHRA should be applied liberally to protect individuals within the State of Missouri.

Thus, the liberal application this Court in Red Dragon discusses only relates to the application of the statute to individuals who are within the State of Missouri. Nowhere in Red Dragon does this Court hold liberal application of the MHRA includes the application of the MHRA to individuals outside the state. In fact, this Court held the exact opposite. This Court in Red Dragon held the MHRA should be applied liberally to protect individuals "**within the jurisdiction of the State of Missouri**" or "**anyone in the State of Missouri.**" Id. at 166–67. (emphasis added).

Thus, it must be noted, if one extends the Missouri legislature's general purpose of the MHRA explicitly stated in Section 213.065 to Section 213.055 and Section 213.070,

[1] As argued below, Appellant's argument that the MHRA should be applied extraterritorially in this case because the MHRA is a remedial statute was not properly preserved because Appellant failed to present said argument to the trial court. An issue on appeal is limited to issues and theories heard by the trial judge. "Parties are bound on appeal by the positions they took in the trial court." State Farm Mut. Auto. Ins. Co. v. Esswein, 43 S.W.3d 833 (Mo. Ct. App. 2000), *opinion adopted and reinstated after retransfer* (May 2, 2001) (*citing* Mason v. Mason, 873 S.W.2d 631, 636 (Mo. Ct. App. 1994)). Thus, this argument should be rejected entirely by this Court.

one could only conclude the legislature intended for the MHRA only to protect individuals and employees employed within the State of Missouri. The Missouri legislature's general purpose stated in Section 213.065 and definition of "employer" requiring an "employer" to have six or more employees *within* the state undoubtedly demonstrates the legislature intended for the MHRA to protect individuals and employees *within* the State of Missouri.

The broad use of the term "any" contained in the MHRA does not demonstrate the Missouri legislature's intent to overcome the well-established presumption against extraterritorial application in order for the MHRA to apply to an individual who resides and is employed solely in Illinois. To the contrary, if any statutory language could be used to demonstrate the geographic boundaries of the MHRA, the broad purpose contained within the MHRA and the definition of "employer" could be read to establish the Missouri legislature intended only to protect individuals and employees within the State of Missouri. Consequently, this Court should reject Appellant's argument that the MHRA should be liberally construed to allow extraterritorial application of the MHRA to an Illinois employee.

c. The Court Should Reject Appellant's Application of this Court's Very Narrow Decision in Igoe and the Location of the "Decision" or "Decision-Maker" Analysis to Determine Whether the MHRA is Applicable to An Illinois Employee.

The Appellant erroneously argues this Court's decision in Igoe v. Dept. of Labor & Indust. Relations of Missouri, 152 S.W. 3d 284 (Mo. 2005), is instructive in the matter at hand because it states where the alleged discriminatory practice "occurred" determines the applicability of the MHRA. Appellant accuses Appellees of conflating jurisdiction and

venue in its Motion to Dismiss with the Circuit Court, yet that is exactly what Appellant's argument does before this Court. The Supreme Court's decision in Igoe is a narrow decision limited in scope related to the determination of the proper **venue** in a failure to hire case. Nowhere in the Igoe decision does the Court contemplate the issue at hand regarding the extraterritorial application of the MHRA to an employee who works and lives outside Missouri's borders. Therefore, Appellant's reliance on Igoe for the proposition that the MHRA should be applied extraterritorially because the alleged "discriminatory decisions" to transfer his employment from the one store to the next and assign expenses to his store was allegedly made in St. Louis County is improper.[2]

Appellant continues his erroneous argument by arguing the MHRA should be applied extraterritorially to him because the MHRA states a claim can be filed "in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred." Mo. Ann. Stat. § 213.111 (West). He further argues that because he pleaded a conclusion in his First Amended Petition that "some of the decisions and actions taken against [Appellant] . . . took place in Missouri," the MHRA should apply extraterritorially.[3]

---

[2] In his brief, Appellant also cites State ex. rel. Hollins v. Pritchett, 395 S.W.3d 600, 604-05 (Mo. App. S.D. 2013), for the proposition that his allegation that "upon information and belief" the alleged discrimination occurred in Missouri is sufficient to apply the MHRA extraterritorially. Like the Supreme Court's decision in Igoe, the decision in Hollins is a narrow decision regarding the proper venue of a MHRA failure to hire case. Id. These cases are not applicable to the matter at hand as they do not address the critical question whether the MHRA can be extraterritorially applied an employee who neither worked nor lived in Missouri.

[3] It must be noted that in Appellant's First Amended Petition, he does not sufficiently allege that the "discriminatory decisions and/or actions" occurred in Missouri. *See* L.F. Doc. No. 73, p. 3 ¶7. In fact, Appellant alleges in a conclusory manner "upon information and belief" the discriminatory decisions and/or actions took place in Missouri. Id. However, Appellant

Appellant is requesting this Court to rule the MHRA protects employees all across the country as long as an alleged discriminatory decision is allegedly made in Missouri. Stated another way, Appellant argues that every employee, regardless of the state they reside in, work in, or have contacts with, is protected by the MHRA as long as the plaintiff alleges the decision at issue was made in Missouri.

For example, under this logic, a Bayer employee located in Pittsburg, Pennsylvania would be protected by the MHRA and able to file suit in Missouri for alleged discrimination against Bayer in Missouri if the alleged discriminatory decision is made in Missouri or the alleged decision-maker is located in Missouri. Under such a ruling, employers like Bayer, Anheuser-Busch, and Edward Jones, who are headquartered in Missouri and who have employees all over the country, would be required to defend themselves in Missouri courts against claims brought under the MHRA from employees employed in an array of different states merely because an employee alleges in a conclusory manner that "discriminatory decisions and/or actions" were made or done in Missouri.

---

in the very next sentence contradicts his previous conclusory allegation by alleging the "discriminatory decisions and/or actions" *may* have occurred in Illinois. Id. Appellant's pleadings demonstrate the complication with his discriminatory decision analysis based upon the venue provision contained in the MHRA he would like this Court to adopt. Appellant's First Amended Petition reveals that he does not know where the alleged discriminatory decisions were made. In fact, he asks this Court to infer based upon his conclusory pleading that the alleged discriminatory decisions and/or actions took place in St. Louis County or Jefferson County because the individual Respondents reside in St. Louis County and maintain an office in High Ridge, Missouri. To adopt Appellant's analysis would cause chaos inasmuch as it would result in parties and courts spending significant time and resources litigating employment discrimination cases to identify whether the alleged "discriminatory decisions" were made in Missouri to ultimately determine whether the MHRA applies.

Stated frankly, such a ruling would allow plaintiffs to engage in forum shopping in an attempt to be protected by the MHRA, who some may consider more favorable than the state's employment discrimination law where they are employed. This would flood Missouri courts with employment lawsuits from employees who do not live in Missouri and have never worked in Missouri, like Appellant, depleting our courts' judicial resources where these same claims could have been filed in the courts of the employees' home states.

Appellant's erroneous application of the MHRA to an Illinois employee who worked solely in Illinois creates a great potential for conflicts of laws of other states and countries. The MHRA reflects the public policy of Missouri and imposing those state policy choices on employment practices to other states should be done with great caution to avoid running afoul of the Commerce Clause of the United States Constitution. Thus, applying the MHRA extraterritorially to employees who perform work outside of Missouri creates interstate concerns and conflicts of laws issues.

To illustrate this point, the MHRA does not recognize sexual orientation or gender identity as protected classes while other state employment discrimination statutes do. Also, until August 28, 2017, the MHRA's burden of proof for an employee to establish employment discrimination claims was a "contributing factor" standard, yet most states, including Illinois, apply a "motivating factor" burden of proof, which is a higher burden of proof. Such differences in states' employment discrimination statutes demonstrate the policy choices each state makes regarding the protection they intend to provide individuals employed within their states. This Court would likely run afoul of these complicated

interstate comity concerns that would arise by applying the MHRA too broadly as Appellant requests this Court do.

Moreover, Appellant's reliance on where the alleged discriminatory decision was made is improper because the MHRA does not regulate alleged "decisions" in non-failure to hire cases. The MHRA defines an "unlawful discriminatory practice" as any "act" that is unlawful under the statute. Mo. Ann. Stat. § 213.010. Section § 213.055 of the MHRA does not state the "decision" to allegedly discriminate in a non-failure to hire case is considered an unlawful discriminatory practice because at that time no act has occurred. For example, in the matter at hand, Appellant alleges in his First Amended Petition that the discriminatory practice or act according to the MHRA was the "decision" made in Missouri to transfer him from one Illinois store to another. L.F. Doc. No. 73, pp. 3, 5-6 ¶¶7, 23. However, a decision to take an alleged discriminatory action does not violate the MHRA. It is not until said decision is effectuated by acting, such as firing, hiring, or retaliating because of a protected characteristic that the MHRA is potentially violated. Thus, not only is the "decision" to act not relevant to the *prima facie* case of a non-failure to hire employment discrimination case, where the alleged "decision" is made is wholly irrelevant to whether the MHRA should or should not be applied to an employee who is employed outside of Missouri. Stated plainly, it is irrelevant where the alleged discriminatory decision is made; instead, the appropriate inquiry is whether the plaintiff was employed in Missouri and has sufficient contacts with the State of Missouri for the MHRA to be applicable to his claims.

Moreover, the adoption of Appellant's decision or decision-maker analysis would likely cause extreme unintended consequences in future employment discrimination litigation. As pointed out by the courts in Taylor v. Rodale, Inc., 2004 WL 1196145 (E.D. Pa. 2004) and Esposito v. VIP Auto, 2008 WL 4106432 (Me. Super. 2008), where the alleged discriminatory decision is made is not the dispositive issue. The dispositive issue is the location of the employee's employment because were this Court to accept Appellant's position that the relevant inquiry is where the decision was made or where the decision-maker is located, it would significantly hinder the application of the MHRA. Such a conclusion could cause the protections afforded to Missouri employees to shift depending upon the location of their supervisor or where their supervisor made the alleged discriminatory decision.

Also, if the decision to engage in discriminatory conduct is the relevant inquiry, then this will make it very difficult for future parties in such disputes to determine when the statute of limitations should begin to run. How are the parties to determine when and where the employer's "decision" to engage in specific alleged unlawful behavior was made? If the alleged discriminatory "decision" is the operative fact in determining when the MHRA applies to an employee employed outside of Missouri, it will be nearly impossible for the parties to pinpoint through the discovery process exactly when and where such alleged decisions are made. Such a broad and undefined fact cannot be relied upon to determine the applicability of the MHRA.

Ultimately, Appellant is requesting this Court to take multiple extraordinary actions. Appellant is requesting this Court to overrule precedent of this State, and rule the opposite

of what the majority of state and federal jurisdictions have ruled in similar cases in order to expand the scope of the MHRA. Appellant is further requesting this Court to legislate new language into the MHRA to make alleged "discriminatory decisions" a violation of the Act in non-failure to hire cases. Lastly, Appellant is also requesting this Court to apply the MHRA extraterritorially to employees who work and reside in another state as long as the employee asserts a conclusory statement that the alleged "discriminatory decisions and/or actions" were made in Missouri. Therefore, Appellant's argument should be rejected by this Court.

III. THE COURT SHOULD REJECT POINT II OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER AND THE COURT OF APPEALS' DECISION BECAUSE APPELLANT FAILED TO PLEAD SUFFICIENT FACTS TO ESTABLISH HE HAD SUFFICIENT CONTACTS WITH THE STATE OF MISSOURI FOR THE MHRA TO APPLY AND FAILED TO SUFFICIENTLY PLEAD WHERE THE ALLEGED DISCRIMINATORY "DECISIONS AND/OR ACTS" OCCURRED.

a. Appellant Failed to Plead Sufficient Facts To Establish He Had Sufficient Contacts With the State of Missouri.

Application of the MHRA to the Appellant would violate the well-established presumption against extraterritorial application of Missouri statutes because he is not a Missouri employee and does not have sufficient contacts with the State of Missouri. Missouri courts have often turned to federal case law to interpret analogous discrimination statutes. Midstate Oil Co., Inc. v. Missouri Comm'n on Human Rights, 679 S.W.2d 842, 845–46 (Mo. banc 1984). In light of this, in Wickenhauser v. Edward Jones & Co., 953 F. Supp. 286 (E.D. Mo. 1996), the Eastern District of Missouri held that an Illinois employee lacked sufficient contacts with Missouri for the court to apply the MHRA because the

employee did not reside in Missouri and his place of employment was not in Missouri. As a result, the Court dismissed the employee's MHRA claims, holding his insufficient contacts with Missouri prohibited the application of the MHRA.[4]

Upon review of Appellant's First Amended Petition, it is clear Appellant is an Illinois resident who was employed in Illinois during his tenure with Dobbs Tire. In Appellant's First Amended Petition, Appellant alleged that he was the Store Manager at Dobbs Tire's Shiloh, Illinois store from July of 2003 to November 14, 2016. L.F. Doc. No. 73, p. 3 ¶10. As Store Manager of two of Dobbs Tire's Illinois stores, Appellant was never employed in Missouri, did not pay Missouri taxes and performed no work in Missouri. Ultimately, Appellant ended his employment with Dobbs Tire when he tendered his resignation on March 13, 2017, in Illinois. L.F. Doc. No. 73, p. 4-5 ¶¶ 14, 20, 23. It also must be noted that the primary alleged adverse employment "action" allegedly taken against Appellant was his transfer, which he alleges equated to a demotion, was to another store in Fairview Heights, Illinois. L.F. Doc. No. 73, p. 4 ¶15.

Thus, Appellant lived in Illinois, worked in Illinois, was allegedly illegally transferred and demoted from one Illinois store to another in Illinois, and ultimately ended

[4] Appellant attempts to distinguish Wickenhauser from the matter at hand because he argues he sufficiently alleged in his First Amended Petition that "one or more of the discriminatory decisions and/or acts" took place in Missouri. However, as will be fully argued below, such conclusory statements fail to aver where the alleged discriminatory actions occurred and did not provide sufficient facts to allow the trial court to infer that any unlawful discriminatory practice occurred in Missouri. L.F. Doc. No. 73, p. 2 ¶ 6. This is particularly the case because Appellant also alleged that "**Plaintiff's injuries may have taken place in the State of Illinois.**" L.F. Doc. No. 73, p. 3 ¶7. Thus, Appellant's conclusory and contradictory statements fail to meet Missouri's fact-pleading standard and fail to demonstrate Appellant is entitled to relief under the MHRA.

his employment with Dobbs Tire that was solely in Illinois. While Dobbs Tire is a Missouri corporation with its headquarters in Missouri, it does business and operates stores in Illinois, and therefore is an Illinois employer. Thus, based upon the facts pled, Appellant was not a Missouri employee and does not have sufficient contacts with the State of Missouri.[5] Accordingly, the Court should hold Appellant has failed to plead sufficient facts to establish that he had sufficient contacts with the state of Missouri where he was employed in Illinois, lived in Illinois, and was made aware of the alleged discriminatory act (transfer and/or demotion) in Illinois. Therefore, the MHRA cannot be extraterritorially applied to Appellant's age discrimination and retaliation claims.

b. Appellant Failed to Plead Sufficient Facts to Establish Where the Alleged Discriminatory Decisions and/or Acts Occurred.

As argued *supra*, where the alleged discriminatory decision is made or decision-maker is located is not dispositive to the analysis of whether the MHRA is applicable extraterritorially to Appellant who resides and was employed in Illinois. However, even assuming *arguendo*, without conceding, that where the alleged discriminatory decision is made or decision-maker is located is dispositive, Appellant failed to plead sufficient facts to support his allegation that the alleged unlawful discriminatory decisions occurred in Missouri. Missouri is a fact pleading state, which requires more than mere conclusions that

[5] Appellant never requested leave from the Circuit Court to plead additional facts in his First Amended Petition regarding his alleged contacts with the State of Missouri, and instead attempted to insufficiently assert additional facts in his brief in opposition to Appellees' Motion to Dismiss. However, because Appellant never requested leave to amend his First Amended Petition to assert these additional facts regarding contacts, this Court cannot consider them as they were not properly plead. *See* L.F. No. 95, p. 14.

the pleader alleges without supporting facts. Rule 55.05; In re Transit Casualty Co. v. Transit Casualty Co., 43 S.W. 3d 293, 302 (Mo. banc 2001). "The purpose of fact pleading is to enable a person of common understanding to know what is intended." Gardner v. Bank of America, N.A., 466 S.W.3d 642, 646 (Mo. App. E.D. 2015). Therefore, a petition must contain short and plain statements of facts establishing that the pleader is entitled to relief under the claims alleged. Id. Also, Missouri courts are required to disregard all conclusions in a petition that are not supported by the facts. Adem v. Des Peres Hospital, Inc. 515 S.W.3d 810, 815 (Mo. App. E.D. 2017). Thus, "where a petition contains only conclusions and does not contain the ultimate facts, a motion to dismiss is properly granted." Id.; (*citing* Westphal v. Lake Lotawana Ass'n Inc., 95 S.W.3d 144, 152 (Mo. App. W.D. 2003)).

For example, in Gardner, 466 S.W.3d at 648, the Court of Appeals held that the appellants' allegations did not state a claim against the lenders under the Missouri Merchandising Practice Act ("MMPA") where the appellants failed to plead facts that demonstrated how each defendant used or employed deception, fraud, and a variety of other claims alleged in their petition. The court further held that appellants improperly stated an overall conclusion that the defendants engaged in the unlawful conduct at issue, but failed to allege when, where, or who made the false representations in violation of the MMPA. Id. Ultimately, the court held because the appellants failed to plead the ultimate facts showing they were entitled to relief, dismissal was appropriate. Id.

Here, Appellant incorrectly argues that he pled sufficient facts to state a claim under the MHRA where he pled in his First Amended Petition "on information and belief, one or more of the discriminatory decisions and/or actions taken against plaintiff" identified in his

Petition took place in St. Louis County, and because the individual Dobbs Defendants resided in St. Louis County. Such a statement is a conclusion that fails to aver where the alleged discriminatory actions or "decisions" as alleged in Appellant's First Amended Petition occurred and did not provide sufficient facts to allow the trial court to conclude that any unlawful discriminatory "decisions" or actions occurred in Missouri. L.F. Doc. No. 73, p. 2 ¶ 6.

In his brief, Appellant argues that because he alleged that both David Dobbs and Dustin Dobbs are residents of St. Louis County, it is reasonable to infer that the alleged discriminatory conduct occurred in Missouri, either in St. Louis County or Jefferson County where Dobbs Tire & Auto is headquartered. *See* Appellant's Substitute Brief, P. 14. Appellant is not asking this Court to infer based on actual facts pled in his First Amended Petition, he is requesting this Court to speculate where the alleged discriminatory "decisions" may have occurred to bring his action under the purview of the MHRA. It is not the courts' job to guess or speculate where unlawful conduct may have occurred. Instead, Appellant was required to plead where each alleged act of unlawful conduct took place in his First Amended Petition. Appellant failed to do so and now asks this Court to speculate where the alleged discriminatory "decisions" may have taken place.

Additionally, to further establish that Appellant failed to plead actual facts regarding where the alleged unlawful conduct occurred, Appellant contradicted his own conclusory pleading regarding where the unlawful conduct occurred when he pled, "**further, to the extent that any of Plaintiff's injuries may have taken place in the State of Illinois, venue in this Court is proper** . . ." L.F. Doc. No 73, p. 2 ¶ 7. Thus, not only did Appellant

fail to provide facts instead of an assertion that is a conclusion regarding where the alleged discriminatory "decisions" took place, he then provided a contradictory conclusion asserting that some of the alleged conduct may have occurred in Illinois.

In light of such pleadings, the Circuit Court properly dismissed Appellant's First Amended Petition and the Court of Appeals properly affirmed the Circuit Court's Order because Appellant's conclusory and contradictory statements fail to meet Missouri's fact-pleading standard and fail to demonstrate Appellant is entitled to relief under the MHRA.

THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S FIRST AMENDED PETITION IN LIEU OF OTHER AVAILABLE REMEDIES INCLUDING TRANSFERRING THE CASE TO A VENUE THAT IT DETERMINED WAS PROPER AND/OR GRANTING DOBBS TIRE'S REQUEST FOR APPELLANT TO FILE A MORE DEFINITE STATEMENT REGARDING WHERE THE ALLEGED UNLAWFUL DISCRIMINATORY PRACTICES OCCURED.

IV. THE COURT SHOULD REJECT POINT III OF THE APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER, AND THE COURT OF APPEALS' DECISION BECAUSE APPELLANT'S ARGUMENT THAT THE CIRCUIT COURT SHOULD HAVE TRANSFERRED VENUE OR ORDERED FOR A MORE DEFINITE STATEMENT IS ERRONEOUS.

The Court should reject Appellant's erroneous argument that the Circuit Court erred and abused its discretion by not transferring the venue of the case or ordering Appellant to file a more definite statement in lieu of dismissing Appellant's First Amended Petition. Concerning the transfer of this matter to a new venue, Appellant's argument is erroneous inasmuch as Respondents filed their Motion to Dismiss arguing the MHRA did not apply to Appellant because he was an Illinois employee. While venue was discussed in

Respondents' Motion to Dismiss, Respondents were not ultimately arguing that the venue was improper and requesting a change of venue. Respondents' argument was solely related to the application of the MHRA to an Illinois employee because no venue is proper when the MHRA is not applicable to Appellant. Ultimately, the Circuit Court dismissed Appellant's First Amended Petition because the MHRA does not apply extraterritorially to an Illinois employee. Therefore, no venue within the State of Missouri would have been proper.

It is also imperative to note that, according to Mo. R. Civ. P. 51.045, a party must file a motion for transfer of venue in a timely manner in order for the court to consider transfer of a case to the proper venue. Here, there was no motion for transfer of venue filed with the court and the court could not unilaterally order a change of venue *sua sponte*. Therefore, the Circuit Court did not abuse its discretion when it did not order *sua sponte* a change of venue in lieu of its dismissal of Plaintiff's First Amended Petition.

Moreover, the Circuit Court did not abuse its discretion by not ordering Appellant to file a more definite statement related to where the alleged discriminatory conduct occurred. A trial court's ruling on a motion to make a pleading more specific and definite is one addressed to the sound discretion of the trial court and appellant courts will not interfere with that discretion as long as the trial court's decision is not arbitrary and capricious. Ozark Fruit Growers' Ass'n v. Sullinger, 45 S.W.2d 887, 889 (Mo. Ct. App. 1932). The Circuit Court here dismissed Appellant's First Amended Petition because the MHRA does not apply to an Illinois employee. Based upon Appellant's First Amended Petition, the Circuit Court determined that he had not stated a claim for which relief could

be granted. Consequently, the Circuit Court exercised its discretion and did not act arbitrarily or capriciously when it determined not to order Appellant to file a more definite statement regarding the facts related to his contacts to the State of Missouri or where the alleged discriminatory conduct may have occurred.

It must be noted, in Appellant's Brief in Response to Respondents' Motion to Dismiss, he improperly asserted additional facts related to his contacts with the State of Missouri to supplement his First Amended Petition, and asserted those additional facts were his more definite statement. *See* L.F. No. 94, p. 14. Also, contrary to Appellant's previous representations to the Court of Appeals, Appellant never requested leave to amend his First Amended Petition to assert additional facts related to where the alleged discriminatory conduct occurred. Instead, Appellant merely improperly presented additional facts related to his contacts with the state in his response brief. Therefore, the Circuit Court did not err or abuse its discretion in not ordering Appellant to file a more definite statement in lieu of dismissal.[6]

[6] It is imperative to note this Court has previously held that when exercising its discretion regarding a motion for more definite statement, trial courts must be sensitive to the reasons that Missouri remains a fact pleading state because" "modern litigation is too expensive in time and money to be allowed to proceed upon mere speculation or bluff." State ex rel. Harvey v. Wells, 955 S.W.2d 546, 548 (Mo. 1997). As a result of this expense in time and money of modern litigation, this Court stated that, "unnecessary expense should be eliminated by requiring parties, as early as possible, to abandon claims or defenses that have no basis in fact." Id. Accordingly, the Circuit Court in the matter at hand appropriately dismissed Appellant's First Amended Petition instead of ordering him to file a more definite statement.

THE TRIAL COURT ERRED IN GRANTING DOBBS TIRE'S MOTION TO DISMISS APPELLANT'S FIRST AMENDED PETITION FOR FAILURE TO STATE A CLAIM FOR RELIEF UNDER RULE 55(A)(6) BECAUSE DOBBS TIRE'S ARGUMENT THAT APPLYING THE MHRA TO APPELLANT'S FIRST AMENDED PETITION WOULD RESULT IN AN EXTRATERRITORIAL APPLICATION IS SIMPLY NOT TRUE.

V. THE COURT SHOULD REJECT POINT IV OF APPELLANT'S BRIEF AND AFFIRM THE CIRCUIT COURT'S ORDER AND THE COURT OF APPEALS' DECISION BECAUSE APPLICATION OF THE MHRA TO APPELLANT'S FIRST AMENDED PETITION WILL RESULT IN THE IMPROPER EXTRATERRITORIAL APPLICATION OF THE MHRA.

Appellant's argument that application of the MHRA to Appellant in this matter will not result in extraterritorial application of the MHRA is erroneous and must be rejected by the Court. Appellant argues that no such extraterritorial application would occur because he has alleged that the alleged discriminatory conduct occurred in Missouri. As previously argued *supra*, where the alleged decision is made is not dispositive regarding whether the MHRA is being applied extraterritorially, and Appellant failed to plead sufficient facts that support his allegation that the alleged unlawful discriminatory decisions occurred in Missouri. In addition, in Appellant's First Amended Petition, he does not allege that he resided or worked in Missouri. In Appellant's First Amended Petition, Appellant alleged he was employed by Respondent, Dobbs Tire from March of 1989 to March 14, 2017. L.F. Doc. No. 73, p. 3 ¶ 10. Moreover, Appellant alleged that during his employment, Appellant was the Store Manager for Dobbs Tire at its Shiloh, Illinois store until he was transferred to its store in Fairview Heights, Illinois on November 14, 2016. L.F. Doc. No. 73, P. 3-5 ¶¶ 10, 15-17.

Consequently, Appellant's First Amended Petition is clear that he was an Illinois employee. In fact, throughout this litigation, Appellant has never argued that he was not employed in Illinois. Thus, because Appellant resided in and was employed in Illinois, application of the MHRA to him would be an improper extraterritorial application of a Missouri statute.

As argued *supra* in Section II (a), numerous trial courts and appellate courts in other jurisdictions have applied the presumption against extraterritorial application of state statutes and refused to expand the geographical reach of similar employment discrimination laws regardless of where the alleged discriminatory decision was made. *See* Jahnke, 912 N.W. 2d at 143 (Iowa 2018); Union Underwear Co, 50 S.W.3d 188, 193 (Ky. 2001); E.E.O.C, v. Arabian Am. Oil Co., 499 U.S. 244, 259 (1991); Ferrer v. MedaSTAT USA, LLC ,145 Fed Appx. 116, 120 (6th Cir. 2005); Arnold v. Cargill, Inc., No. CIV.012086 (DWF/AJB), 2002 WL 1576141 (D. Minn. July 15, 2002); Campbell, 42 Cal. App. 4th 1850; Albert v. DRS Technologies, Inc., 2011 WL 2036965 *2 (D.N.J. 2011); Taylor, 2004 WL 1196145 (E.D. Pa. 2004); Esposito, 2008 WL 4106432 (Me. Super. 2008).

To refute the litany of persuasive cases that support Respondents' arguments, Appellant argues that "other jurisdictions" have applied their employment discrimination laws extraterritorially; however, he can only point to two (2) cases to support this proposition. Appellant first cites Wilson v. CFMOTO Powersports, Inc., 2016 WL 912182 (D. Minn. March 7, 2016), as an example of a case where the court applied a state employment discrimination law extraterritorially. This case is considerably distinguishable

from the facts at hand because the court in Wilson found that the plaintiff pled sufficient facts to establish that he was a commissioned employee that worked in Minnesota under very specific language contained in the Minnesota Human Rights Act. Id. Wilson is distinguishable from this case because Appellant is an Illinois resident and was employed solely in Illinois as alleged in his First Amended Petition. There is no language contained the MHRA that allows for such application to an employee who resides and works remotely in another state like the Minnesota Human Rights Act in Wilson. It is also imperative to note that Appellant here did not assert facts in his First Amended Petition to establish that he was employed in Missouri. In fact, at no time in this litigation has Appellant asserted that he was employed in Missouri.

Appellant also cites Monteilh v. AFSCME, AFL-CIO, 982 A.2d 301 (D.C. 2009), as an example of a court that has applied its employment discrimination law extraterritorially. However, this case is also significantly distinguishable from the matter at hand since the District of Columbia Court of Appeals, in contrast to the Missouri courts, does not recognize the well-established presumption against the extraterritorial application of state laws. In light of the court's failure to recognize the presumption and the analysis recognized by a vast majority of courts in other jurisdictions as described above, the court in Monteilh, merely looked to the broad intent of the District of Columbia Council to determine the law was established to protect against any discriminatory act that may have occurred in the District. Id. Again, because this case fails to conduct its analysis under the well-established presumption against the extraterritorial application of state laws as

recognized by Missouri courts, this case does not apply here and should not be considered by the Court.

Appellant further erroneously argues that like in Monteilh, the Court should apply the MHRA broadly to accomplish the greatest public good because the MHRA is a remedial statute, citing Missouri Comm'n on Human Rights v. Red Dragon, 991 S.W.2d at 166-67 (MO. App. W.D. 1999). As argued *supra* in Section II(b) of this brief, the general language contained within the MHRA cannot be applied broadly in the manner Appellant argues merely because the MHRA is a remedial statute. The Missouri legislature's general purpose stated in Section 213.065 and definition of "employer" requiring an "employer" to have "six or more employees *within* the State of Missouri" undoubtedly demonstrates the legislature intended for the MHRA to protect individuals and employees *within* the State of Missouri.

Also, as previously argued, there is no language contained in the MHRA Appellant can identify that demonstrates the Missouri legislature intended to overcome the well-established presumption in order for the MHRA to apply extraterritorially to an individual who resides and works in Illinois. To the contrary, the language contained within the MHRA establishes the Missouri legislature intended only to protect individuals and employees within the State of Missouri. Consequently, this Court should reject Appellant's argument that the MHRA should be liberally construed to allow extraterritorial application of the MHRA to an Illinois employee.

CONCLUSION

The Court should affirm the Circuit Court's Order and the Court of Appeals' decision affirming the dismissal of Appellant's First Amended Petition for failure to state a claim inasmuch as Appellant has failed to meet his burden of demonstrating that the MHRA contains *explicit* language to overcome Missouri's well-established presumption against applying Missouri statutes extraterritorially. The Court should also hold the MHRA contains no explicit language to demonstrate the Missouri legislature's intent to apply the MHRA to employees who live and work outside the State of Missouri. The Missouri legislature has undoubtedly demonstrated in the Missouri Worker's Compensation statute that it is aware of Missouri's well-established presumption against extraterritorial application of our state laws, as the legislature included explicit language in the statute to indicate its intent for the law to be applied extraterritorially. Thus, applying the analysis presented in Horstman, the Court should also hold the MHRA cannot be applied extraterritorially to Appellant.

Furthermore, the Court should reject Appellant's misguided reliance on this Court's holding in Igoe v. Dep't of Labor & Indus. Relations of State of Missouri, 152 S.W.3d 284 (Mo. 2005). Instead, the Court should hold similarly to the courts in Taylor v. Rodale, Inc., 2004 WL 1196145 (E.D. Pa. 2004), and Esposito v. VIP Auto, 2008 WL 4106432 (Me. Super. 2008), that where the employee is employed is the requisite analysis to determine whether the MHRA is being applied extraterritorially, not where the supervisor or decision-maker is located. Moreover, while where the alleged discriminatory decision is not the dispositive issue regarding the applicability of the MHRA to an Illinois employee, even

assuming *arguendo* that it may be, the Court should hold that here the Circuit Court did not err because Appellant failed to plead sufficient facts related to his contacts with the State of Missouri and where the alleged discriminatory decisions were made.

Lastly, the Court should reject Appellant's overall contention that the MHRA should be applied liberally to an Illinois employee because the MHRA is a remedial statute. Instead, the Court should hold the definition of "employer" and Missouri legislature's general purpose of the MHRA explicitly stated in Section 213.065 should be extended to Section 213.055 and Section 213.070, concluding the legislature intended for the MHRA only to be liberally applied to protect individuals and employees employed *within* the State of Missouri.

Respectfully submitted,

McMAHON BERGER, P.C.

/s/Robert D. Younger
Robert D. Younger #42909
Dean Kpere-Daibo #63010
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039
(314) 567-7350 – Telephone
(314) 567-5968 – Facsimile

Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Respondents' Substitute Brief complies with the limitations set forth in Rule 84.06(b). According to the word count function of Microsoft Word, the foregoing brief, from the Statement of Facts through the Conclusion, contains 12743 words.

McMAHON BERGER, P.C.

/s/Robert D. Younger
Robert D. Younger #42909
Dean Kpere-Daibo #63010
2730 North Ballas Road, Suite 200
St. Louis, MO 63131-3039
(314) 567-7350 – Telephone
(314) 567-5968 – Facsimile

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of July, 2019, a true and correct copy of the foregoing was served via the Court's electronic filing system upon:

Jerome J. Dobson
Amanda D. Anthony
Dobson, Goldberg, Berns & Rich, LLP
5017 Washington Place, Third Floor
St. Louis, MO 63108
314-621-8363
jdobson@dobsongoldberg.com

Robert D. Younger