IN THE SUPREME COURT OF MISSOURI

CASE NO. SC97721

DWIGHT TUTTLE,

Appellant,

v.

DOBBS TIRE & AUTO CENTERS, INC.,
DAVID W. DOBBS AND DUSTIN W. DOBBS,

Respondents.

Appeal from the Circuit Court of St. Louis County

Honorable Michael Jamison
Circuit Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

Jerome J. Dobson, #32099
Amanda D. Anthony, #57834
DOBSON, GOLDBERG, BERNS & RICH, LLP
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366
jdobson@dobsongoldberg.com
manthony@dobsongoldberg.com

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTRODUCTION 6

ARGUMENT 7

A. The presumption against extraterritorial application does not bar Plaintiff's claims under the MHRA in this matter. 7

1. Under step one of the U.S. Supreme Court's recommended framework, the statutory text of the MHRA provides a clear indication of allowable extraterritorial application. 9

2. Under step two of the U.S. Supreme Court's recommended framework, Appellant's case involves a permissible domestic application of the MHRA. 14

a. Appellant sufficiently plead the locations of the occurrences to the best of his knowledge at the time and such pleading meets the requirements of Missouri Rule of Civil Procedure 55.05. 17

3. Dobbs Tire's argument for a strict extraterritorial presumption in this case is not persuasive and unsupported by law. 18

CONCLUSION 23

CERTIFICATE OF COMPLIANCE 24

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases

Arnold v. Cargill, 2002 U.S. Dist. LEXIS 13045 (D. Minn. July 15, 2002) 20

Bigham v. McCall Service Stations Inc., 637 S.W.2d 227 (Mo. App. W.D. 1982) 6, 7

Campbell v. Arco Marine, Inc. 42 Cal. App. 4th 1850 (Cal. Ct. App. 1996)..... 21

City of Wellston v. SBC Communications, Inc., 203 S.W.3d 189 (Mo. banc 2006) 10

Danforth v. David, 517 S.W.2d 56 (Mo. 1974)..... 12

Doe v. St. Louis Cmty. Coll., 526 S.W.3d 329 (Mo. App. E.D. 2017)..... 10

E.E.O.C. v. Arabian Am. Oil Co., 449 U.S. 244 (1991)..... 7

Einhaus v. O. Ames Co., 547 S.W.2d 821 (Mo. App. E.D. 1976) 18

Executive Sandwich Shoppe, Inc. v. Carry Realty Corp., 749 A.2d 724 (D.C. 2000)..... 22

Holt v. Burlington Northern R. Co., 685 S.W.2d 851 (Mo. App. 1984)..... 11, 12

Horstman v. Gen. Elec. Co., 438 S.W.2d 18 (Mo. App. 1969)..... 18, 19, 20

Howard v. City of Kansas City, 332 S.W.3d 772 (Mo. banc 2011) 12, 13, 15, 19

Igoe v. Dep't of Labor and Indus. Relations of Missouri, 152 S.W.3d 284 (Mo. banc 2005)..... 16

Jahnke v. Deer & Company, 912 N.W.2d 136 (Iowa 2018) 20

Keeney v. Hereford Concrete Prods., 911 S.W.2d 622 (Mo. 1995) 10

Kingsley v. Burack, 536 S.W.2d 7 (Mo. banc 1976)..... 9

Klee v. Mo. Comm'n on Human Rights, 516 S.W.3d 917 (Mo. App. W.D. 2017)..... 12, 13

Lampley v. Mo. Comm'n on Human Rights, 570 S.W.3d 16 (Mo. 2019)..... 8

Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc., 991 S.W.2d 161 (Mo. App. W.D. 1999) 15

Monteilh v. AFSCME, 982 A.2d 301 (D.C. 2009) 21, 22

Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010) 9, 10

Nelson v. Hall, 684 S.W.2d 350 (Mo. App. W.D. 1984) 6, 7

Planned Parenthood of Kansas v. Nixon, 220 S.W.3d 732 10

RJR Nabisco, Inc. v. European Community, 136 S.Ct. 2090 (2016) 8, 9

State ex rel. Evans v. Brown Builders Electric, Co., 254 S.W.3d 31 (Mo. banc. 2008) ... 10

State ex rel. Hollins v. Pritchett, 395 S.W.3d 600 (Mo. App. S.D. 2013) 16

Taylor v. Eastern Connection Operating, Inc., 465 Mass. 191 (2013) 7

Union Underwear Co. v. Barnhart 50 S.W.3d 188 (Ky. 2001) 20

WesternGeco LLC v. ION Geophysical Corp., 138 S. Ct. 2129 (2019) 8, 14

Wilson v. CFMOTO Powersports, Inc., 2016 U.S. Dist. LEXIS 28975 (D. Minn. Mar. 7, 2016) 21

Wormington v. City of Monett, 204 S.W.2d 264 (Mo. banc 1947) 11

Statutes

Mo. Rev. Stat. § 213.010(15) 11

Mo. Rev. Stat. § 213.010(7) 10

Mo. Rev. Stat. § 213.055(1) 11

Mo. Rev. Stat. § 213.101 14

Mo. Rev. Stat. § 213.101 (2, 4-5), (Supp. 2017) 12

Mo. Rev. Stat. § 213.111(1) 15

Mo. Rev. Stat. 213.065 11

Mo. S.B. 43, 2017 12

Other Authorities

(Mo. Bar 3rd. ed. 2007)(cmt. E) 18

Black's Law Dictionary (10th ed. 2014) 7

WEBSTER'S THIRD INTERNATIONAL DICTIONARY 743 (1993) 13

INTRODUCTION

The central issue in this case is whether the Missouri Human Rights Act ("MHRA") provides a remedy to Appellant Dwight Tuttle ("Appellant") for unlawful conduct that Appellant, an Illinois resident, alleges occurred in the State of Missouri. Appellant contends that the MHRA, by its terms, protects him from the acts of discrimination and retaliation taken against him by his Missouri employers, i.e., Respondents Dobbs Tire, David Dobbs, and Dustin Dobbs (collectively referred to herein as "Dobbs Tire") in Missouri. Appellant alleged in his First Amended Petition against Dobbs Tire that "one or more" of certain unlawful decisions or actions by Dobbs Tire occurred in Missouri. Dobbs Tire's main argument is that the MHRA does not apply to Appellant because he is an out-of-state resident and because there is an allegedly insuperable presumption against extraterritorial application of the MHRA to out-of-state residents. For the reasons set forth below, Dobbs Tire's argument should be rejected. For purposes of this Reply Brief, Appellant will assume that Missouri courts recognize a presumption against extraterritorial application of Missouri state laws.[1]

[1] Appellant disagrees that such a presumption is as well-established and insuperable as Dobbs Tire claims. In order to supports its contention that the presumption exists in Missouri, Dobbs Tire relies heavily on cases from state appellate courts in other jurisdictions. Dobbs Tire relies upon only three Missouri cases to supports its conclusion that Missouri courts initially "presume" that a state statute does not apply extraterritorially. In two of those cases, *Nelson v. Hall*, 684 S.W.2d 350 (Mo. App. W.D. 1984) and *Bigham v. McCall Service Stations Inc.*, 637 S.W.2d 227 (Mo. App. W.D. 1982), the Missouri Court of Appeals for the Western District recognized a "general principle" against extraterritorial application of certain statutes under certain circumstances but did not apply the presumption. *Nelson*, 684 S.W.2d at 358; *Bigham*, 637 S.W.2d at 231. Instead, those courts applied a conflict of law analysis to determine

ARGUMENT

A. The presumption against extraterritorial application does not bar Plaintiff's claims under the MHRA in this matter.

Extraterritorial jurisdiction is defined as "a court's ability to exercise power beyond its territorial limits." Black's Law Dictionary (10th ed. 2014). "The starting point for a discussion of the issues presented must be the legal proposition that the statute of a state does not ordinarily have any extra-territorial effect." *Bigham*, 637 S.W.2d at 229. The presumption against extraterritorial application of statutes began as a statutory canon of interpretation used by federal courts in determining whether federal legislation should apply beyond the borders of the United States. The purpose of the presumption was "to protect against unintended clashes between our laws and those of other nations which could result in international discord." *E.E.O.C. v. Arabian Am. Oil Co.*, 449 U.S. 244, 248 (1991). In such instances, the federal courts "look to see whether 'language in the [the relevant act] gives any indication of a Congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control.'" *Id.* Some state courts have refused to apply the presumption in determining whether a state statute applies outside of its own state because the justification for such presumption, i.e., preventing international discord is inapposite in the interstate context. *See Taylor v. Eastern Connection Operating, Inc.*, 465 Mass. 191, 198 n.9 (2013) (finding no presumption against application of Massachusetts statutes to

---

alleged issues of extraterritoriality. *Id.* In particular, the Court of Appeals in *Nelson* recognized that cases could exist where the general principal of extraterritoriality would be supervened if the "contacts between the party and the forum state were so predominant." *Nelson*, 684 S.W.2d at 358.

conduct occurring outside Massachusetts but within the United States). Other state courts, however, apply the presumption. Dobbs Tire relies heavily on decisions from some of those state courts to support its argument that the presumption applies in Missouri. The state court decisions relied upon by Dobbs Tire generally begin with the same premise, a recognition of the general principal against extraterritorial application, but the courts' standards or methods for determining whether the plaintiff overcomes the presumption are not consistent.

The United States Supreme Court recently reiterated its "two-step framework" for deciding issues of extraterritorial application that this Court can and should utilize in determining whether Appellant's claims against Dobbs Tire are barred by the presumption. *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2019) (relying upon *RJR Nabisco, Inc. v. European Community*, 136 S.Ct. 2090 (2016)): The Supreme Court explained that:

> **The first step asks 'whether the presumption against extraterritoriality has been rebutted. It can be rebutted only if the text provides a 'clear indication of an extraterritorial application. If the presumption against extraterritoriality has not been rebutted, the second step of [the] framework asks 'whether the case involves a domestic application of the statute. . .. While 'it will usually be preferable' to begin at step one, courts have the discretion to begin at step two 'in appropriate cases.'**

Id. (internal citations omitted).

Missouri courts have previously relied upon federal precedent in determining questions of state law. *See e.g. Lampley v. Mo. Comm'n on Human Rights*, 570 S.W.3d 16, 23 (Mo. 2019) ("When reviewing cases under the [MHRA], appellate courts are

guided by both Missouri law and any federal employment discrimination (i.e., Title VII) case law that is consistent with Missouri law."); and *Kingsley v. Burack*, 536 S.W.2d 7, 11 (Mo. banc 1976) (holding it was appropriate to use federal precedent as a guide to the application of a Missouri rule when the Missouri rule is "practically the same" as a federal rule.") It is appropriate for this Court to use the U.S. Supreme Court's recommended two-step framework as a guide in deciding the issues presented in this matter. *See e.g. id.*

1. Under step one of the U.S. Supreme Court's recommended framework, the statutory text of the MHRA provides a clear indication of allowable extraterritorial application.

Dobbs Tire argues that in order for Appellant to successfully rebut a presumption against extraterritorial application he must identify "explicit language" in the MHRA that expresses an intent by the Missouri legislature that the statute be applied extraterritorially. (*See* Resp. Brief at p. 22-23). This approach would require this Court to take the MHRA out of its statutory context and ignore the clear purpose and plain language of the law. The U.S. Supreme Court rejected a similar argument. *See RJR Nabisco*, 136 S. Ct. at 2102 (U.S. 2016). In *RJR Nabisco*, the U.S. Supreme Court made clear that "an express statement of extraterritoriality is not essential." *Id.*; *see also Morrison v. Nat'l Austl. Bank, Ltd.*, 561 U.S. 247, 265 (2010) ("We do not say . . . that the presumption against extraterritoriality is a 'clear statement rule.', [], if by that is meant a requirement that a statute say 'this law applies abroad.'). Rather, the U.S. Supreme Court considered and relied upon statutory definitions, the purpose of the statute at issue, and other provisions of the relevant law at issue. *RJR Nabisco*, 136 S. Ct. at

2102. "Assuredly," the U.S. Supreme Court stated, the statute's "context can be consulted as well." *Id.* (quoting *Morrison,* 561 U.S. at 265); *see also State ex rel. Evans v. Brown Builders Electric, Co.*, 254 S.W.3d 31, 35 (Mo. banc. 2008) ("In determining the intent and meaning of statutory language, the words must be considered in context of the statute and sections of the statute in pari materia, as well as cognate sections, must be considered in order to arrive at the true meaning and scope of the words.")

Appellant maintains, as he argued in his Substitute Brief, that the plain language of the MHRA, including the relevant definitions, makes clear that the prohibition against discrimination and retaliation apply to "any" employee of a Missouri employer. The MHRA, like any other Missouri statute, must be enforced at it was written by the legislature. *City of Wellston v. SBC Communications, Inc.*, 203 S.W.3d 189, 192 (Mo. banc 2006); and *Keeney v. Hereford Concrete Prods.*, 911 S.W.2d 622, 624 (Mo. 1995).

While "[i]t is beyond Missouri' authority to regulate conduct that occurs *wholly outside of Missouri*," it is certainly within the legislature's authority to regulate the conduct of its citizens, including its corporate citizens, for conduct that occurs within the state that subsequently causes harm in another state. *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 742 (emphasis added); *see also Doe v. St. Louis Cmty. Coll.*, 526 S.W.3d 329, 346 (Mo. App. E.D. 2017) (recognizing that states can regulate areas of state concern that may impact non-residents). The Missouri legislature chose to regulate the conduct of Missouri employers when it enacted the MHRA. The legislature chose to define and limit the scope of "employers" subject to the MHRA by their location and size. Mo. Rev. Stat. § 213.010(7) (defining "employer" as any person employing "six or

more persons within the state")[2]. But the legislature did not impose any such restrictions on the persons or individuals who could bring a claim against an employer. Rather, the legislature specifically used the term "any" when describing the individuals who are protected by the MHRA. Mo. Rev. Stat. § 213.055(1) (stating that it is an unlawful employment practice "[f]or an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of *any* individual" to refuse to hire or discharge "any individual" because of his membership in a protected class") From the time of MHRA's creation in 1961 and throughout its subsequent amendments, the legislature was presumably well aware of the well-recognized cannon of statutory interpretation that this Court adopts in regards to the term "any" in statutory text. *See e.g. Holt v. Burlington Northern R. Co.*, 685 S.W.2d 851, 857 (Mo. App. 1984) (finding that intent of a legislature may be ascertained by its amendments); and *Wormington v. City of Monett*, 204 S.W.2d 264, 267 (Mo. banc 1947) (finding that the word "any" is "all comprehensive" and is "the equivalent of 'every' and 'all.'") "In construing a statute, a fundamental precept is that the legislature acted with knowledge of the subject matter and

[2] Dobbs Tire contends that the definition of "employer" as well as the general purpose of the MHRA's prohibition against discrimination in the use and enjoyment of public accommodations "within the state" at section 213.065 of the MHRA shows an intent by the legislature that the MHRA was intended only to protect individuals and employees within the State of Missouri. (*See* Resp.'s Br. at pp. 25-27). Such argument is not persuasive and does not overcome the actual language used by the legislature to define who is protected by the MHRA. Section 213.065 is limited to discrimination in "places of public accommodation." Mo. Rev. Stat. 213.065. A "place of public accommodation" refers to a physical location and the state of Missouri does not have authority to regulate conduct that occurs in physical locations outside of Missouri. Mo. Rev. Stat. § 213.010(15). But it does have authority to regulate discriminatory and retaliatory conduct by Missouri employers when that conduct occurs in Missouri, which is what Appellant alleged in his First Amended Petition.

the existing law." *Holt*, 685 S.W.2d at 857. This indicates an intent by the legislature that the MHRA is applicable to an out-of-state resident against a Missouri employer.

Most recently, the legislature drafted and enacted sweeping amendments to the MHRA (hereinafter referred to as the "2017 amendments"). *See* Mo. S.B. 43, 2017; *see also Danforth v. David*, 517 S.W.2d 56 (Mo. 1974) (holding that amendatory legislation may be considered in the interpretation of the original statute). Although Appellant's case falls under the version of the MHRA preceding the 2017 amendments, the legislature's significant efforts in 2017 to narrow the scope of who may be liable for violating the MHRA is very relevant. As part of those amendments, the legislature eliminated individual liability. Before the 2017 amendments, a plaintiff could name individuals such as supervisors or other decisionmakers as defendants under the MHRA pursuant to the definition of "employer." But the legislature did not change the language "an individual employed by an employer" from the definition of employer. Simply stated, if the legislature intended to include persons who worked and/or lived outside of Missouri from the protections of the MHRA, it would have done so in its amendments. It did not.

The legislature also expressly abrogated one decision by this Court and three decisions by the Court of Appeals as part of the 2017 amendments. Mo. Rev. Stat. § 213.101 (2, 4-5), (Supp. 2017). Despite having an opportunity to do so, the legislature did not add a definition for "employee" or abrogate any of the recent cases, such as *Howard v. City of Kansas City*, 332 S.W.3d 772 (Mo. banc 2011), and *Klee v. Mo. Comm'n on Human Rights*, 516 S.W.3d 917 (Mo. App. W.D. 2017), in which the courts

clearly articulated their intent to recognize that term very broadly. Most recently, the Court of Appeals in *Klee* rejected an argument by a state facility that the legislature intended to limit the definition of an "employee" by referencing definitions in the Missouri Minimum Wage Law. *Klee*, 516 S.W.3d at 921. The Court of Appeals rejected that argument, noting that this Court made it clear in *Howard* that the "employee" under the MHRA is not statutorily defined, and the plain and ordinary meaning of the term must be found utilizing the dictionary. *Id.*; *Howard*, 332 S.W.3d at 780. In *Howard*, this Court specifically defined employee for purposes of the MHRA as "one employed by another, usually in a position below the executive level and usually for wages," as well as "*any* worker who is under wages or salary to an employer and who is not excluded by agreement from consideration as such a worker." *Howard*, 332 S.W.3d at 780 (quoting WEBSTER'S THIRD INTERNATIONAL DICTIONARY 743 (1993)) (emphasis added). The legislature could have abrogated the *Howard* and *Klee* decisions and provided a definition for "employees" that were eligible for protection under the MHRA. It did not.

Based on the recent 2017 amendments, it is clear that the legislature intended to limit the scope of who may be found liable as an "employer" under the MHRA. Notably, the legislature did not take this opportunity to narrow the definition of "employee" under the MHRA or impose any statutory limitation on the geographic scope of employees who could bring a claim under the MHRA. Thus, it is clear from the statutory text and the legislative history surrounding that text that the legislature intended and continues to intend that the MHRA be applied to cover "any" individuals who are discriminated or

retaliated against by Missouri employers, as that term is defined, based on their membership in a protected class.

2. Under step two of the U.S. Supreme Court's recommended framework, Appellant's case involves a permissible domestic application of the MHRA.

At step two of the framework, the Court must initially identify the focus of the relevant statute. *WesternGeco*, 138 S. Ct. at 2137. The U.S. Supreme Court articulated how it believed courts should identify and analyze the focus of a statute.

> The focus of a statute is 'the object[t] of [its] solicitude,' which can include the conduct it 'seeks to regulate,' as well as the parties and interests it 'seeks to protect[t]' or vindicate. 'If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application' of the statute, 'even if other conduct occurred abroad.' But if the relevant conduct occurred in another country, 'then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.' **When determining the focus of a statute, we do not analyze the provision at issue in a vacuum. If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those provisions.**

Id. (internal citations omitted) (emphasis added).

Applying those principles, this Court can conclude that the conduct relevant to the focus of the MHRA in Appellant's case occurred in Missouri and is not an extraterritorial application of the statute. First, the focus of the MHRA or the object of its solicitude is evidenced by the legislature's purpose in enacting the statute. The legislature specifically stated in section 213.101 of the MHRA that its provisions "shall be construed to accomplish the purposes thereof." Mo. Rev. Stat. § 213.101. The purpose of the MHRA is to eradicate and discourage all discrimination and retaliation by Missouri employers, as that term "employer" is defined. Missouri courts have consistently recognized this broad

and remedial purpose as a guiding principle in determining issues of applicability. *See Howard*, 332 S.W.3d at 779 (recognizing the MHRA's "remedial prohibition against discrimination in the employment context."); s*ee also Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 166-167 (Mo. App. W.D. 1999) ("[T]his court must bear in mind that 'remedial statutes should be construed liberally to include those cases that are within the spirit of the law and all reasonable doubts should be construed in favor of applicability of the case . . . Because the general purpose of the MHRA evidences a legislative intent to prohibit <u>all</u> discrimination based on disability and the language of the statute does not preclude a cause of action for associational discrimination . . . we find that the legislature intended to state a cause of action for [such] discrimination . . .") Accordingly, the conduct of Missouri employers is plainly the focus of the MHRA.

It is therefore appropriate to next determine where such "conduct" occurs for purposes of the MHRA. The Missouri legislature set forth specific requirements for how persons aggrieved by a Missouri employer's decision could seek relief under the MHRA in the MHRA's venue provision at section 213.111. Mo. Rev. Stat. § 213.111(1). This tandem provision must be assessed in concert with other provisions of the MHRA. The legislature stated in section 213.111 that any person claiming to be aggrieved could request a right to sue letter from the MCHR. *Id.* Then, within ninety days of receiving such letter, the person may bring a civil lawsuit "in *any* circuit court in *any* county in which the unlawful discriminatory practice is alleged to have occurred, ..." *Id.* (emphasis added)

This Court has previously addressed where unlawful discriminatory conduct "occurs" for purposes of the MHRA. *Igoe v. Dep't of Labor and Indus. Relations of Missouri*, 152 S.W.3d 284 (Mo. banc 2005). In *Igoe*, the plaintiff alleged that a state government office failed to hire him as an administrative law judge for discriminatory and retaliatory reasons in violation of the MHRA. *Igoe*, 152 S.W.3d at 285-287. The Circuit Court of the City of St. Louis denied the state's motion to transfer venue to Cole County, and the case was tried in the City of St. Louis. *Id.* At 286. On appeal, this Court held that venue was proper in Cole County instead of the City of St. Louis under the MHRA's venue provision because the alleged discriminatory practices, i.e., acts related to the decision making, occurred in Cole County. *Id.* at 288. After *Igoe*, the Missouri Court of Appeals found that the alleged discriminatory practice occurred for purposes of the MHRA, at least in part, in St. Louis, if even only one of numerous discussions related to the decision to not hire plaintiff at a facility in Poplar Bluff occurred while the manager was in St. Louis. *State ex rel. Hollins v. Pritchett*, 395 S.W.3d 600, 602 (Mo. App. S.D. 2013).

Thus, under both *Igoe* and *Hollins*, it is clear that discriminatory practices can occur in more than one location and occur where the discriminatory decisions are made. The location where the discriminatory practice or decision(s) occurs can be different than where the impact or harm from those decisions is felt. There is nothing in *Igoe* or *Hollins* that indicates unlawful discriminatory conduct "occurs" where the plaintiff feels the impact of his employer's discriminatory conduct. Nor has Dobbs Tire cited to any such authority. The focus of the MHRA is clearly on the Missouri employer's conduct.

Appellant alleged in his First Amended Petition that Dobbs Tire's discriminatory and retaliatory conduct occurred in Missouri. He alleged that Dobbs Tire made discriminatory or retaliatory decisions in Missouri regarding his employment. Specifically, Appellant alleged that Dobbs Tire is a Missouri corporation with its head office in Missouri, and that Chief Executive Officer ("CEO") David Dobbs and Director of Retail Operations ("Director") Dustin Dobbs are both Missouri residents. (D73, at ¶¶ 2-4). It is reasonable to infer that David Dobbs and Dustin Dobbs, as CEO and Director, work out of the corporate head office in Missouri. *See id.* Appellant further alleged that "on information and belief, one or more" of a number of discriminatory decisions and/or actions occurred in Missouri. (*Id.* at ¶ 7). The discriminatory decisions include: the decision to never give Appellant another raise; the decision to transfer expenses to Appellant's store (which diminished Appellant's profitability); the decision refusing to remove those transferred expenses; and the decision to transfer Appellant to a poor performing store. (*Id.* at ¶¶ 13-19). It is reasonable to infer that such decisions emanated from the head office. Therefore, Appellant is seeking a domestic application of the MHRA under step two of the U.S. Supreme Court's framework because he seeks relief for conduct that occurred in Missouri. As such, he successfully rebuts any alleged presumption of extraterritorial application.

a. Appellant sufficiently plead the locations of the occurrences to the best of his knowledge at the time and such pleading meets the requirements of Missouri Rule of Civil Procedure 55.05.

Dobbs Tire argues in its Brief that the aforementioned facts, which were plead "on information and belief," were insufficient under Rule 55.05's fact-pleading requirement.

(Resp.'s Br. at p. 35). Appellant, like any other plaintiff, does not have the benefit of discovery at the initial pleading stage. This is why courts in Missouri have recognized that "from a practical standpoint, the facts pleaded must provide the opponent with sufficient information to know the character of the evidence to be introduced at trial and the issues to be tried." (Mo. Bar 3rd. ed. 2007)(cmt. E) (citing *Einhaus v. O. Ames Co.*, 547 S.W.2d 821, 825 (Mo. App. E.D. 1976). Clearly, in this case, Appellant was not privy to all of the information regarding Dobbs Tire's alleged discriminatory conduct. But he does have a reasonable belief based on facts known to him (e.g., the location of his supervisors and/or the decisionmakers at Dobbs Tire's Missouri office that it occurred in Missouri. Appellant's First Amended Petition meets the fact pleading requirements because Dobbs Tire has sufficient information to know that Appellant plans to seek and introduce evidence at trial about identifiable decisions by Dobbs Tire that were made in Missouri.

3. Dobbs Tire's argument for a strict extraterritorial presumption in this case is not persuasive and unsupported by law.

Dobbs Tire's argument in favor of a strict extraterritorial presumption is not persuasive. Dobbs Tire cites to federal case law but does not address the two-step framework articulated by the U.S. Supreme Court. Dobbs Tire relies primarily upon *Horstman v. Gen. Elec. Co.*, 438 S.W.2d 18 (Mo. App. 1969) in support of its argument for strict extraterritorial presumption. The decision, much like the decisions from other state courts regarding other state's discrimination laws, has limited precedential value. Each case must be analyzed on its own set of facts. Appellant's case involves a

completely different statute than the one at issue in *Horstman* and the facts are readily distinguishable. See *Horstman*, 438 S.W.2d at 20. In *Horstman*, the Missouri Court of Appeals for the Western District found that *Horstman*, a Missouri resident who was terminated from his job in Kansas by a New York corporation, could not bring a claim against that foreign employer in Missouri under the Missouri Service Letter Statute. *Id.* at 19-20. The Court found that the Service Letter Statute was a "penal statute" that "should be strictly construed in favor of the employer." *Id.*[3] Dobbs Tire argues that the Missouri Court of Appeals applied the presumption against extraterritoriality to dismiss *Horstman's* service letter claim because he failed to identify explicit language that the Missouri legislature intended the statute to apply to extra-territorially. (Resp.'s Br. at pp. 13-14). But that is not at all what the Court of Appeals held in *Horstman*. The Court of Appeals in *Horstman* did not hold that the service letter statute did not apply to *Horstman* because he failed to identify explicit language in the statute that it was intended to apply to extraterritorially or to non-Missouri residents. Rather, the Court of Appeals examined the entire context of the statute, including the legislative history, in determining that the statute did not apply to a Kansas resident. *Id.* at 20. The Court of Appeals pointed to language in the service letter statute which stated: "*Whenever any employee of any corporation doing business in this state* shall be discharged or voluntarily quit the services of such corporation, it shall be the duty of the superintendent or manager of said corporation, . . . to issue such a employee a [service] letter . . . ." *Id.* The Court of

[3] In this case, the Court is being asked to consider the legislative intent and construction of the MHRA, which is recognized as a "remedial" statute to be intended with broad applicability. *Howard*, 332 S.W.3d at 779.

Appeals found that the above-emphasized language meant an employee working in Missouri for a corporation doing business in Missouri was what the legislature intended in terms of application of the penal statute. *Id.*

> Considering the legislative intent and construction of the statute by the courts of Missouri, it is clear that [*Horstman*] is not entitled to a service letter under the Missouri service letter statute because [he] was not hired in Missouri, did not work in Missouri, was not discharged in Missouri, did not request a service letter from an office of respondent in Missouri, received no letters from respondent's office in the State of Missouri, and because there were no contacts between [him] and the State of Missouri insofar as his employment or discharge by respondent was concerned. Appellant's employment contract was a Kansas contract, since that is where he was hired and where he worked.
>
> *Id.*

As stated earlier, Dobbs Tire cites to number of cases from other state courts in an attempt to supports it claim that the MHRA does not protect Appellant. Those cases are easily distinguishable and have no persuasive value in this case. *See Jahnke v. Deer & Company*, 912 N.W.2d 136, 145-147 (Iowa 2018) (holding that the Iowa Civil Rights Act did not apply where the crux of the employment relationship was in China and employee failed to show that any discriminatory acts occurred in Iowa); *Union Underwear Co. v. Barnhart* 50 S.W.3d 188, 189 (Ky. 2001) (holding that Kentucky Civil Rights Act was not applicable where plaintiff's only connection to Kentucky was that his employer was headquartered there and any discrimination against plaintiff occurred in South Carolina or Alabama); *Arnold v. Cargill*, 2002 U.S. Dist. LEXIS 13045 (D. Minn. July 15, 2002) (finding that the Minnesota Human Rights Act was not applicable based solely on the fact that the defendant's headquarters was located in Minnesota); *Campbell v. Arco Marine*,

Inc. 42 Cal. App. 4th 1850 (Cal. Ct. App. 1996) (finding that the California Fair Employment and Housing Act could not be applied to conduct that occurred outside of California, to a plaintiff who was not a resident of California, and which involved no participation in or ratification of conduct by any employees at California headquarters). In those cases, the alleged unlawful conduct occurred outside the state whose law the plaintiffs were seeking to apply. For the reasons stated above, that is not the case here as Appellant is seeking to apply the MHRA to unlawful conduct by Dobbs Tire that occurred in Missouri.

Lastly, it must be noted that other state courts have also chosen to apply their state anti-discrimination laws to non-residents who also worked outside of the state based on the location of where the unlawful conduct occurred and/or the non-residents' contacts with the forum. *See Monteilh v. AFSCME*, 982 A.2d 301 (D.C. 2009); and *Wilson v. CFMOTO Powersports, Inc.*, 2016 U.S. Dist. LEXIS 28975 (D. Minn. Mar. 7, 2016) For example, in *Monteilh v. AFSCME*, a field representative for his employer, filed an action against the employer under the District of Columbia Human Rights Act ("DCHRA") alleging both disability and retaliation. *Monteilh*, 982 A.2d at 301-302. The employer's headquarters was located in the District of Columbia ("D.C.") but the field representative did not live or work inside D.C. *Id.* The headquarters, however, had oversight of the field offices for which the field representative worked. *Id.* In his petition, the field representative alleged that multiple discriminatory and retaliatory actions were directed at him from the employer's headquarters in D.C. *Id.*

Much like the MHRA, the DCHRA prohibited discrimination and retaliation against "any individual." *Id.* at 304. Recognizing the DCHRA's broad prohibition against discrimination, the District Court of Appeals held that claims could be brought under the DCHRA when an "employer has made a discriminatory decision in [D.C.] although the effects have been felt elsewhere." *Id.* The field representative's residence or location of his job at the time of the alleged discriminatory and retaliatory conduct were not relevant considerations in the Court of Appeals' analysis. According to the Court of Appeals, interpreting the statute to apply only to discriminatory acts "whose effects an employee has experienced inside the District" would be contrary to "the injunction that the DCHRA, as 'a remedial civil rights statute,' 'must be generously construed.'" *Id.* (quoting *Executive Sandwich Shoppe, Inc. v. Carry Realty Corp.*, 749 A.2d 724, 731 (D.C. 2000).

CONCLUSION

In summary, Dobbs Tire does not provide any support for its proposition that Missouri courts recognize a strict presumption against extraterritorial application that can only be overcome by a showing of explicit language demonstrating the Missouri legislature's intent that a statute be applied extraterritorially. Regardless, Appellant has overcome any alleged presumption against extraterritorial application especially under the U.S. Supreme Court's two-step framework. The language and focus of the MHRA indicate a clear intention on the part of the legislature that the statute can be applied to protect non-residents from unlawful conduct of Missouri employers, even if that conduct occurs outside of the State. Further, Appellant's First Amended Petition alleged sufficient facts to establish a cause of action under the MHRA under Missouri's fact pleading requirements. Accordingly, the holding of the Court of Appeals should be reversed and remanded.

DOBSON, GOLDBERG, BERNS & RICH, LLP

By: /s/ Amanda D. Anthony
Jerome J. Dobson, #32099
Amanda D. Anthony, #57834
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366
jdobson@dobsongoldberg.com
manthony@dobsongoldberg.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that Appellant's Reply Brief complies with the limitations set forth in Special Rule 360. According to the word count function of Microsoft Word, the foregoing brief, from the Jurisdictional Statement through the Conclusion, contains 5,744 words.

DOBSON, GOLDBERG, BERNS & RICH, LLP

By: /s/ Amanda D. Anthony
Jerome J. Dobson, #32099
Amanda D. Anthony, #57834
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366
jobson@dobsongoldberg.com
manthony@dobsongoldberg.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on August 16, 2019, the foregoing document was served through the electronic filing system upon:

Mr. Robert D. Younger
Mr. Dean S. Kpere-Daibo
MCMAHON BERGER PC
2730 N. Ballas Rd., Suite 200
St. Louis, MO 63131

/s/ Amanda D. Anthony