IN THE MISSOURI SUPREME COURT

No. SC 97845

STATE OF MISSOURI EX REL. ANHEUSER-BUSCH, LLC,

Relator,

v.

THE HONORABLE JOAN L. MORIARTY, Circuit Judge, Circuit Court of St. Louis City, Missouri,

Respondent.

Writ Proceeding from the Circuit Court of the City of St. Louis
Hon. Joan L. Moriarty

BRIEF OF RELATOR IN SUPPORT OF WRIT OF PROHIBITION

DOWD BENNETT LLP

James F. Bennett, #46826
Elizabeth C. Carver, #34328
Michelle D. Nasser, #68952
7733 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105
(314) 889-7300 (telephone)
(314) 863-2111 (facsimile)

Attorneys for Relator

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Rules

Other Authorities

JURISDICTIONAL STATEMENT

On April 29, 2019, Relator Anheuser-Busch, LLC ("A-B") filed its Petition for Writ of Prohibition in this Court pursuant to Rules 84.24 and 97.01 *et seq.*,[1] requesting that the Court direct Respondent The Honorable Joan L. Moriarty to vacate her Order denying A-B's motion to dismiss the First Amended Petition of John Esser, the plaintiff in the underlying case, and to dismiss Plaintiff's First Amended Petition with prejudice. This Court issued its Preliminary Writ of Prohibition on June 4, 2019.

This Court has jurisdiction over these proceedings under Mo. Const. Art. V, §4.1, which provides the Court authority to "issue and determine original remedial writs."

[1]All rule references are to the Missouri Supreme Court Rules and cited as "Rule __," unless otherwise noted.

INTRODUCTION

This writ proceeding raises an issue that neither this Court nor any other Missouri appellate court has addressed: whether an employee who lives and works outside of Missouri can invoke the protections of the Missouri Human Rights Act (MHRA). The plaintiff in the underlying case, John Esser, has lived in Iowa and worked for A-B there since at least 1995. From 2007 to February 2016, Plaintiff was a Retail Sales Director for A-B in a territory that included Iowa, Minnesota, Nebraska, South Dakota, and North Dakota, but not Missouri.

Missouri has a long-standing presumption against the extraterritorial application of its state laws. Because the MHRA – in contrast to the Missouri Worker's Compensation Law, Chapter 287, RSMo. – is silent on whether it affords rights to out-of-state employees, the presumption controls. Two Missouri circuit courts have dismissed MHRA claims brought by non-Missouri employees, citing the presumption against extraterritorial application, and a third has dismissed such a claim without opinion. And courts in other jurisdictions have held almost uniformly that the civil rights law of the forum state cannot be applied extraterritorially to an employee working in a different state, even when the employment decisions complained of were made in the forum state. The MHRA cannot be extended to regulate an employment relationship that is centered in Iowa.

Even if the MHRA could, in some circumstances, apply to an employee who does not work in Missouri, the statute should not apply unless the employee has adequately alleged that he or she was injured in Missouri by an "unlawful employment practice," as that term is defined in the statute. Here, Plaintiff has alleged, at most, that one or more

decisions to discriminate against him were made at least in part in Missouri. But those alleged decisions were executed in Iowa, where Plaintiff lived and worked for A-B, and any resulting adverse impact on him, such as a change in job status or loss of raises, bonuses, or other opportunities, was sustained there. Whether Plaintiff – or any other non-Missouri employee – has a cause of action under the MHRA cannot turn on where any decisionmakers happened to be located during the decisionmaking processes at issue, or where the employee might have been when informed of those decisions. On the contrary, because the act of discrimination – the demotion, discipline, reduction of benefits, or other adverse employment action – and the resulting injury to the employee occur in the workplace, any unlawful employment practice occurs in the state where the employee's workplace is situated.

Allowing Plaintiff to proceed with this lawsuit would vastly expand MHRA claims against Missouri employers who have employees in other states. It would subject any employer that has six or more employees in this state to MHRA claims brought by employees from any other state, as long as those employees allege that a decision to discriminate against them was made, at least in part, in Missouri. With operations all over the country but its company headquarters in Missouri, this would mean that A-B could potentially be subject to MHRA claims filed by employees from all 50 states. It would encourage forum-shopping, intrude on the rights of other states to regulate employment relationships within their borders, and inject uncertainty and chaos into determinations that require clarity.

This Court should make its preliminary writ of prohibition permanent and join the three Missouri circuit courts that have rejected MHRA claims brought by out-of-state plaintiffs, as well as federal and state courts throughout the country that have declined to apply a state civil rights statute to an employee living and working in another state.

STATEMENT OF FACTS

A. Plaintiff's Petition.

Plaintiff John Esser filed the underlying lawsuit against A-B in St. Louis City Circuit Court on May 9, 2017, alleging age discrimination and retaliation in violation of the Missouri Human Rights Act ("MHRA"), §§213.010 *et seq.*[2] (the "Petition") (Exhibit to Writ Petition ("Ex.") 1). Plaintiff alleged that he had been discriminated against on the basis of his age in that, beginning in 2012, he received downgraded performance reviews and did not receive pay increases or stock options over a several-year period, and in December 2015, he was informed that he was being demoted from a Director-level job as a Retail Sales Director to a Manager-level position (Ex. 1, ¶¶13-31). His retaliation claim was premised on his allegation that he had been given downgraded performance ratings, denied raises or stock options, and demoted in retaliation for having complained in September 2013 that he was being subjected to age discrimination (Ex. 1, ¶¶20, 33).

Plaintiff, a resident of Urbandale, Iowa, alleged that from 2007 until approximately late February 2016 he worked as a Retail Sales Director for A-B in a sales territory that covered Iowa, Minnesota, Nebraska, North Dakota, and South Dakota, but did not include

[2]All statutory references are to the Revised Statutes of Missouri unless otherwise noted.

Missouri (Ex. 1, ¶¶1, 7, 32). Plaintiff did not allege that he worked in Missouri; in fact, his only allegation that he was present in this state involved a meeting he attended in St. Louis in 2013 (Ex. 1, ¶16).

On June 16, 2017, A-B moved to dismiss Plaintiff's petition, or in the alternative, to compel arbitration (Ex. 2). A-B moved to dismiss on the ground that, as an Iowa resident employed in Iowa, Plaintiff lacked standing to invoke the protections of the MHRA, and therefore had not stated a claim (Ex. 2, pp. 3).

B. Plaintiff's Amended Petition.

In response to A-B's motion to dismiss, Plaintiff filed his First Amended Petition (the "Amended Petition") on July 14, 2017 (Ex. 3). The Amended Petition alleges that A-B transferred Plaintiff to Iowa in 1995 (Ex. 3, ¶11, p. 2). The Amended Petition does not allege that at any time after 1995 Plaintiff has performed his regular work duties in Missouri, that he has been paid in Missouri, that Missouri taxes have been withheld from his salary, or that he has paid income taxes in Missouri. Instead, the Amended Petition includes new allegations pertaining to contacts with Missouri (Ex. 3, pp. 2-9).

Specifically, Plaintiff alleged that "[d]uring the majority of the time that Plaintiff has worked in sales for Defendant, he has reported to a regional sales office in St. Louis, Missouri," and that during his tenure as a Retail Sales Director from 2010 to February 2016, his "job was based out of the Midwest Region sales office in St. Louis" and his "immediate supervisor, secretary, and other support staff were located in St. Louis" (Ex. 3, ¶¶14, 16, 73, pp. 2, 9). Plaintiff alleges that while he was a Retail Sales Director, he

"had five employees reporting directly to him," but does not aver that those employees were located in Missouri (Ex. 3, ¶15, p. 2). In that same time period, according to Plaintiff, he visited the St. Louis office "at least monthly" for meetings, trainings, and employee reviews (Ex. 3, ¶19, p. 3).

Plaintiff alleged that while he was in St. Louis in "late 2012," he was told "he was going to receive a rating of 3B on his annual performance review" – a rating lower than the one he had received in the previous year, but that indicated "that an employee is performing at the right level for now and could move laterally" (Ex. 3, ¶¶36-38, p.5). At least eight months later, in August 2013, according to Plaintiff, he attended a meeting of A-B's "Sales Directors and Vice Presidents" in St. Louis, during which a Vice President of Sales made remarks regarding "experienced" and "mature" employees (Ex. 3, ¶¶31, 42-44, pp. 4-6). Plaintiff alleges that in that same month, during a telephone call with A-B management employees located in St. Louis, he complained he was being subjected to age discrimination (Ex. 3, ¶51, p. 6).

Plaintiff's next allegation pertaining to Missouri describes a 2014 performance review in St. Louis in which he again received a 3B rating indicating that he was "performing at the right level"; "[h]owever, [he] learned that he would not receive a pay increase and that, for the third year in a row, he would not receive any stock options" (Ex. 3, ¶54, p. 7). Plaintiff further alleged that he received a downgraded performance rating of 1A in an October 2015 performance review that took place by telephone conference with his supervisor, who participated from St. Louis (Ex. 3, ¶64, p. 8). Two months later, the Amended Petition alleges, Plaintiff "had a telephone call" with Doug Croghan, the Senior

Retail Sales Director to whom he reported, and two other A-B Directors "in which he was informed that the non-equity job that he discussed with Croghan in August 2015 was a Manager-level job rather than a Director-level job," and that "he could not keep his current job" as a Retail Sales Director (Ex. 3, ¶¶53, 69-70, p. 9). Croghan and one of the Directors "were in St. Louis" during the call, but the Amended Petition does not specify which Director made the alleged statements (Ex. 3, ¶¶69-70, p. 9). The Amended Petition's final Missouri reference is to a memo that, according to Plaintiff, A-B's Vice President of Sales for the Midwest Region sent in February 2016 from St. Louis to region employees announcing that Plaintiff would be moving, effective immediately, to the Non-Equity Market Manager position (Ex. 3, ¶73, p. 9).

C. Proceedings Below on A-B's Motion to Dismiss.

In response to Plaintiff's Amended Petition, A-B again moved to dismiss under Mo. R. Civ. P. 55.27(a)(6) on the basis that Plaintiff had not stated a claim under the MHRA because, "as an Iowa resident employed in Iowa, Mr. Esser is not entitled to the protections of the MHRA" (Ex. 4 at ¶3, p. 2). A-B cited a number of cases holding that Missouri statutes do not have extraterritorial effect, including two circuit court cases specifically holding that the MHRA does not apply to employees working in other states for Missouri-based companies (Ex. 5 at 3-7). A-B also cited cases from outside Missouri holding that the antidiscrimination statutes enacted by other states do not apply extraterritorially (Ex. 5 at 8-9).

Plaintiff opposed A-B's motion to dismiss on the grounds that the alleged "discriminatory and retaliatory actions toward Plaintiff … originated and occurred primarily in Missouri," and that "even though Plaintiff is physically located in Iowa, his job with Defendant is based out of St. Louis and requires him to be present in Missouri multiple times every year" (Ex. 6 at 3). He cited no cases holding that an out-of-state employee can state a cause of action under the MHRA.

After briefing and a hearing, Respondent, the Honorable Joan L. Moriarty, entered an order on March 5, 2018 (the "Order"), denying A-B's motion to compel arbitration and its motion to dismiss the First Amended Petition (Ex. 8, Apdx-A1). In denying A-B's motion to dismiss, Respondent recognized that "'[n]o law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.'" (Ex. 8 at 2, Apdx-A2, quoting *Horstman v. Gen. Elec. Co.*, 438 S.W.2d 18, 20 (Mo. App. 1969)). Respondent further observed that "[t]he MHRA does not affirmatively indicate that it applies to acts committed outside of Missouri, and therefore the presumption against extraterritorial application controls" (Ex. 8 at 2, Apdx-A2). And, Respondent noted that although "there are no controlling appellate decisions on point, several other circuit courts in this state have found that the MHRA does not apply to an employee who works outside of Missouri, even where the employer is headquartered in Missouri and the allegedly discriminatory decisions were made in Missouri" (Ex. 8 at 2-3, Apdx-A2-3).

Despite recognizing the presumption against extraterritorial application and the circuit court precedent holding that the MHRA does not apply to employees outside of Missouri, Respondent concluded as follows:

> Nonetheless, this Court finds that dismissal is not appropriate based on the facts alleged here, because the acts alleged did not occur wholly outside of Missouri. While Plaintiff is generally located in Iowa, he has alleged that he reports to a regional sales office in St. Louis. He alleges that his immediate supervisor, secretary and other support staff are located in St. Louis.[3] Plaintiff alleges that from 2010 to 2016, he visited the St. Louis office at least monthly. At paragraph 36 of the First Amended Petition, Plaintiff alleges that in 2012, Plaintiff's supervisor informed Plaintiff that he was going to receive a rating of 3B on his performance review, while both he and the supervisor were in St. Louis. The Court finds that Plaintiff has stated a claim under the MHRA.

Order, Ex. 8 at 3, Apdx-A3.

Because §435.440 provides for an immediate appeal from an order denying a motion to compel arbitration, A-B timely appealed that aspect of Respondent's Order. The Court of Appeals affirmed Respondent's denial of A-B's motion to compel arbitration, *see Esser v. Anheuser-Busch, LLC*, 567 S.W.3d 644 (Mo. App. E.D. 2018), and the Court of Appeals and this Court denied A-B's applications for transfer on December 3, 2018, and March 5, 2019, respectively.

D. <u>This Writ Proceeding</u>.

On April 25, 2019, A-B filed in the Court of Appeals, Eastern District, a writ petition seeking the relief requested in this proceeding. The Court of Appeals denied A-B's petition the next day, April 26. *See* No. ED107818. A-B then filed its Petition for a Writ of Prohibition in this Court on April 29, and this Court issued its Preliminary Writ of Prohibition on June 4, 2019. Plaintiff filed an Answer to the Petition on July 3, 2019.

[3]Contrary to the Order, Plaintiff's Amended Petition, filed on July 14, 2017, alleges that his "supervisor, secretary, and other support staff were located in St. Louis" while he was a Retail Sales Director from 2010 to February 2016 (Ex. 3, ¶¶16, 73, pp. 2, 9).

POINT RELIED ON

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION WITH REGARD TO THE CLAIMS OF PLAINTIFF JOHN ESSER EXCEPT TO DISMISS PLAINTIFF'S FIRST AMENDED PETITION BECAUSE PLAINTIFF CANNOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER THE MHRA IN THAT (A) THE MHRA CANNOT BE APPLIED EXTRATERRITORIALLY TO EXTEND PROTECTIONS TO INDIVIDUALS, SUCH AS PLAINTIFF, WHO DO NOT WORK IN MISSOURI, AND (B) EVEN IF THE MHRA COULD BE APPLIED EXTRATERRITORIALLY, PLAINTIFF HAS NOT ALLEGED THAT ANY UNLAWFUL EMPLOYMENT PRACTICE OCCURRED IN MISSOURI.

Horstman v. General Electric Co., 438 S.W.2d 18 (Mo. App. W.D. 1969);

Jones v. Kansas City Southern Railway, No. 1016-CV16357 (Jackson Cnty. Cir. Ct. Dec. 17, 2010);

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

Kader v. Board of Regents of Harris-Stowe State University, 565 S.W.3d 182 (Mo. 2019);

Missouri Human Rights Act, §213.010(20);

Missouri Human Rights Act, §213.075;

Missouri Human Rights Act, §213.111.

ARGUMENT

Preservation and Standard of Review.

The question whether Plaintiff's Amended Petition states a cause of action upon which relief can be granted was timely raised and preserved in A-B's motion to dismiss filed July 24, 2017, within the 10 days provided under Rule 55.33(a) to respond to an amended pleading (Exs. 3, 4). *See* Rule 55.27(a) ("A motion making [a defense of failure to state a claim upon which relief can be granted] shall be made … [w]ithin the time allowed for responding to the opposing party's pleading").

Rulings on a motion to dismiss are subject to *de novo* review. *See, e.g.*, *Ward v. West Cnty. Motor Co.*, 403 S.W.3d 82, 84 (Mo. banc 2013) (affirming in part and reversing in part dismissal of plaintiffs' claims). This Court has further explained the standard of review on motions to dismiss as follows:

> A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiffs' averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.
>
> In order to withstand the motion, the petition must invoke substantive principles of law entitling plaintiff to relief and … ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.

State ex rel. Henley v. Bickel, 285 S.W.3d 327, 329 (Mo. banc 2009) (citations and internal quotation marks omitted; ellipsis original). Prohibition is an appropriate remedy "to avoid irreparable harm and prevent unnecessary litigation and expense" that would otherwise

result when "a party cannot state facts sufficient to justify court action or relief." *Id.* at 330.

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM TAKING ANY FURTHER ACTION WITH REGARD TO THE CLAIMS OF PLAINTIFF JOHN ESSER EXCEPT TO DISMISS PLAINTIFF'S FIRST AMENDED PETITION BECAUSE PLAINTIFF CANNOT STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED UNDER THE MHRA IN THAT (A) THE MHRA CANNOT BE APPLIED EXTRATERRITORIALLY TO EXTEND PROTECTIONS TO INDIVIDUALS, SUCH AS PLAINTIFF, WHO DO NOT WORK IN MISSOURI, AND (B) EVEN IF THE MHRA COULD BE APPLIED EXTRATERRITORIALLY, PLAINTIFF HAS NOT ALLEGED THAT ANY UNLAWFUL EMPLOYMENT PRACTICE OCCURRED IN MISSOURI.

A-B moved to dismiss Plaintiff's Amended Petition because, as a resident of Iowa who has worked for A-B there since at least 1995, Plaintiff cannot avail himself of the protections of the MHRA. Plaintiff's belated effort in his Amended Petition to identify contacts with the State of Missouri cannot overcome the presumption against extraterritorial application of the MHRA to an employment relationship that is centered in another state. This Court should make absolute its preliminary writ of prohibition issued June 4, 2019.

A. The Presumption Against Extraterritorial Application of Missouri Statutes Applies Here.

This Court has long recognized that statutes enacted by the Missouri General Assembly do not govern conduct outside of this state's borders. As the Court stated decades ago, "it is well to remember that it is the settled law and almost axiomatic that the statutes of a state or country prescribe the law within its boundaries only, and have no extraterritorial force or effect." *Rositzky v. Rositzky*, 46 S.W.2d 591, 594 (Mo. 1931).

Indeed, "[i]t is very well established that Missouri statutes *should seldom if ever* be given significant extraterritorial effect. All presumptions are against concluding that the General Assembly meant to reach outside the State." *Kansas City Trailer Sales v. Holiday Rambler*, 1994 WL 57400, at *2 (W.D. Mo. Feb. 22, 1994) (emphasis added). *Cf. EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248, 249 (1991) (in addressing "whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States," Court "assume[d] that Congress legislates against the backdrop of the presumption against extraterritoriality" and found that EEOC fell "short of demonstrating the affirmative congressional intent required to extend the protections of Title VII beyond our territorial borders"), *superseded by statute*, 42 U.S.C. §2000e(f) (1991) (extending Title VII protection to U.S. citizens working overseas).

The reason why "all presumptions are against" extraterritorial effect is plain: "[i]t is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri. … Missouri simply does not have the authority to make lawful out-of-state conduct actionable [in Missouri], ***for its laws do not have extraterritorial effect***." *Planned Parenthood of Ks. v. Nixon*, 220 S.W.3d 732, 742 (Mo. banc 2007) (emphasis added); *Nelson v. Hall*, 684 S.W.2d 350, 354 (Mo. App. 1984) (noting the "rule" stated in *Rositzky* "that a statute enjoys no extraterritorial effect beyond the state of enactment remains the principle of our adjudicated decisions," and holding that a statutory "wrongful death cause of action enjoys no extraterritorial effect. Thus it is the law of the place of the fatal injury which determines whether a death action can be maintained"); *Bigham v. McCall Serv.*

Stations, Inc., 637 S.W.2d 227 (Mo. App. W.D. 1982) (noting "the legal proposition that the statute of a state does not ordinarily have any extra-territorial effect" and holding that Kansas statute prohibiting certain wage withholdings could not apply extraterritorially when plaintiff's contract of employment was being performed in Missouri).

Horstman v. General Electric Co., 438 S.W.2d 18 (Mo. App. W.D. 1969), addressed an issue analogous to the one presented here: whether the Missouri service letter statute, §290.140, applied to an employment relationship centered in Kansas. Although the plaintiff was a Missouri resident at the time he requested a service letter and when he filed suit for violation of the statute, he had worked in Kansas during his entire tenure with his former employer, General Electric. *Id.* at 19. In affirming the grant of summary judgment to the defendant, the Court of Appeals stated:

> Certainly the Legislature did not intend the service letter statute to have extra-territorial application, such as appellant seeks in this case. *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 20-21 (emphasis added).

Similarly, the General Assembly did not intend the MHRA – which is the sole source of the right to relief alleged by Plaintiff – to have extraterritorial application. The MHRA is a remedial statute intended to protect Missouri employees from discrimination and other violations of their civil rights in the workplace. *See, e.g., Klee v. Missouri Comm'n on Human Rights*, 516 S.W.3d 917, 924 (Mo. App. W.D. 2017) ("The purpose of

the MHRA … is to protect individuals from discrimination"); *State ex rel. Church & Dwight Co. v. Collins*, 543 S.W.3d 22, 27 (Mo. banc 2018) ("the MHRA provides a fully comprehensive remedial scheme"); *Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 168, 170-72 (Mo. App. W.D. 1999) (comparing MHRA to other civil rights laws and considering proper measure of damages for deprivation of civil rights).

The MHRA is devoid of any language that indicates a legislative intent to extend its remedial scheme to persons outside the General Assembly's "territorial jurisdiction." Missouri has no particular interest in protecting the civil rights of non-residents employed in other states, in determining what conduct constitutes a violation of those rights, or in assessing the appropriate remedy – including damages caps – for infringement of those rights. Certainly any interest Missouri may have in protecting the rights of persons who work in other states is dwarfed by the interests of the states where those employment relationships are centered.

The lack of language even suggesting legislative intent that the MHRA extend extraterritorially is in contrast to the Missouri Workers' Compensation Law, Chapter 287. Under §287.110.2, when an employee's employment contract was not made in Missouri, the Law still covers the employee's injuries sustained outside Missouri if "the employee's employment was principally localized" in Missouri "within thirteen calendar weeks of the injury." Section 287.110.2 demonstrates that the General Assembly knows how to provide for extraterritorial reach. That it chose not to include a comparable provision in the MHRA shows that no such scope was intended.

In the circuit court, neither Plaintiff nor the Respondent's Order cited any case law supporting the extraterritorial application of the MHRA to remedy the alleged violation in Iowa of Plaintiff's rights against age discrimination and retaliation in the workplace. As Respondent conceded in her Order, Missouri courts that have considered the issue have held that the MHRA's protections cannot be extended to an employee, like Plaintiff, who works and lives in another state. In *Jones v. Kansas City Southern Railway Co.*, No. 1016-CV16357 (Jackson Cnty. Cir. Ct. December 17, 2010) (Ex. 9), for example, the plaintiff worked for the defendant railroad in Louisiana but sued under the MHRA in Jackson County Circuit Court, alleging that the decision to terminate her had been made in Missouri. Ex. 9 at 3. The court granted the defendant's motion to dismiss for failure to state a cause of action. Ex. 9 at 5.

Quoting *Horstman* regarding the presumption against extraterritorial application of state statutes, Judge Michael Manners stated, "If this Court presumes that the Missouri legislature did not intend to give extra-territorial effect to the MHRA, then its reach does not extend to discrimination in Louisiana." Ex. 9 at 4. The court concluded:

> In the instant cause Plaintiff was hired in Louisiana, she performed her duties in that State, she resides there, and that is where she was terminated from her employment. The only contact Missouri has with the transaction giving rise to this case is that the decision to fire Plaintiff was allegedly made here, although that decision was executed in Louisiana. That is insufficient to give Missouri a legitimate interest in regulating Plaintiff's employment in another State.[4]

[4] The *Jones* court added in a footnote: "Louisiana substantive law regulates the relationship of employers and employees in that State. L.R.S. § 23:332A(1) prohibits discrimination by employers on the basis of race, color, religion, sex, or national origin." (Ex. 9 at 5 n.4).

Jones, Ex. 9 at 5.

Similarly, in *Mimmovich v. Garney Companies, Inc.*, No. 10CY-CV11361 (Clay Cnty. Cir. Ct. June 21, 2011) (Ex. 10), the Clay County Circuit Court granted the defendant Missouri corporation's motion to dismiss the MHRA lawsuit brought by a South Carolina resident. The plaintiff alleged that while he was working in South Carolina, he learned that the defendant was seeking a heavy equipment operator for a project in Georgia. Ex. 10 at 2, ¶3. He was ultimately told he could not work as an equipment operator because of his history of seizures and seizure medication, and he declined an offer of a non-operator position at the Georgia site. Ex. 10 at 2, ¶¶7-9.

In analyzing the defendant's motion to dismiss, the circuit court noted Missouri courts' consistent recognition of the "presumption against exterritorial operation," and held that the presumption controlled because "[t]he MHRA does not affirmatively indicate that it applies to acts committed outside of Missouri." Ex. 10 at 3, ¶¶2-3 (citing *Horstman* and *Bigham*). Judge A. Rex Gabbert pointed out that in contrast to the MHRA, "[t]he Missouri Workers' Compensation Law demonstrates the kind of clear expression of legislative intent and language necessary to overcome the presumption against extraterritorial operation of state law" because it extends to "'all injuries received and occupational diseases contracted ***outside of this state where the employee's employment was principally localized in this***

Similarly, the Iowa Civil Rights Act, Chapter 216 of the Iowa Code, prohibits age-based discrimination in employment. *See* IA Code §216.6.1.a.

state within thirteen calendar weeks of the injury or diagnosis of the occupational disease.'" Ex. 10 at 4, ¶6 (quoting §287.110, emphasis original).

In addition, the court observed that "[a]n overwhelming majority of courts have rejected extraterritorial application of state civil rights statutes such as the MHRA." Ex. 10 at 4-5, ¶8 (citing cases). It concluded, "With no clear indication that the legislature intended the MHRA to govern discrimination against non-Missouri residents occurring in another state, the Court will not adopt Plaintiff's argument for extraterritorial application under these circumstances."[5] Ex. 10 at 5, ¶10.

B. Courts in Other Jurisdictions Have Held That the Forum State's Civil Rights Statute Cannot Be Applied Extraterritorially to an Employee Who Lives and Works in Another State.

As the court in *Mimmovich* noted, a number of federal and state courts have declined to apply a state civil rights statute to claims arising from an out-of-state employment relationship. Ex. 10 at 4, ¶8. Indeed, since Respondent entered the Order, the Supreme Court of Plaintiff's home state of Iowa concluded that "the Iowa legislature never intended for the [Iowa Civil Rights Act] to apply extraterritorially," particularly in light of the legislature's "explicit[] indicat[ion]" of such an intent in the state's workers' compensation statute and its Tort Claims Act. *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 143 (Iowa 2018). The Iowa court reversed the denial of the defendant's motion for summary judgment on

[5]In *Tuttle v. Dobbs Tire & Auto Centers, Inc.*, the St. Louis County Circuit Court also granted the defendant employer's motion to dismiss the MHRA claims brought by a plaintiff who lived in Illinois and worked for the defendant there. No. 17SL-CC03268 (St. Louis Cnty. Cir. Ct. April 10, 2018). The Court of Appeals affirmed the dismissal in a per curiam memorandum opinion, Case No. ED106615 (December 18, 2018), which was vacated when this Court accepted transfer on April 2, 2019 (Case No. SC97721).

claims brought by an employee who had worked in Iowa before his temporary assignment to China, where his alleged misconduct led to his early reassignment back to Iowa in a lower-grade position. *Id.* at 140.

In doing so, the court stated, "Although our legislature may have a strong interest to enact [employment laws] to protect nonresidents when they cross our border to perform work in Iowa, *it would have no strong interest in protecting nonresidents in those instances where they perform work outside of Iowa*." *Id.* at 149 (internal quotation marks and citation omitted; brackets original). *See also EEOC v. CRST Van Expedited, Inc.*, 2009 WL 1586193, **18-20 (N.D. Iowa 2009) (holding that ICRA could not be applied extraterritorially to sexual harassment claims of plaintiffs who neither worked nor lived in Iowa (*vacated on other grounds and superseded on rehearing*, 679 F.3d 657 (8th Cir. 2012)).

In *Taylor v. Rodale, Inc.*, 2004 WL 1196145 (E.D. Pa. 2004), the district court dismissed a claim brought under the Pennsylvania Human Rights Act ("PHRA") by a Georgia resident who worked in Georgia for the defendant, whose principal place of business was Pennsylvania. The court noted that the case raised an issue "of first impression": whether the PHRA is applicable "to out-of-state employees when the discriminatory practices are directed by supervising employees in Pennsylvania." *Id.* at *2. Like Plaintiff here, the plaintiff in *Taylor* maintained that he was not seeking extraterritorial application of the PHRA, but that the discriminatory conduct had occurred in Pennsylvania. *Id.* The court concluded that "the relevant location here with regard to the PHRA is the location of Plaintiff's workplace," not "where the decision was made or

where the decision-makers were located." *Id.* at *3. Because the plaintiff had alleged no "facts supporting an inference that he was employed in Pennsylvania and therefore that the termination and other discriminatory actions occurred there," the court dismissed the plaintiff's PHRA cause of action for failure to state a claim. *Id.* at *3. *See also Blackman v. Lincoln Nat'l Corp.*, 2012 WL 6151732, **4, 5 & n.7 (E.D. Pa. 2012) (following *Taylor* and dismissing the PHRA claim brought by plaintiff who lived and worked in Illinois; court noted the presumption against "extraterritorial reach" of the PHRA and agreed with the defendant that because the state worker's compensation statute had an extraterritorial provision, "'the omission of a similar provision from the PHRA must have been intentional.'").

And in *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190, 193 n.1 (Ky. 2001), the Kentucky Supreme Court held that the Kentucky Civil Rights Act ("KCRA") did not apply extraterritorially to the claims of the plaintiff, who worked in Alabama and South Carolina, even though his former employer was headquartered in Kentucky and "every decision that [gave] rise to [his claim] occurred" there. *Id.* at 190, 193 n.1. The court noted that the Kentucky legislature "is obviously aware of the presumption against extraterritorial application and how to overcome it" because, like Missouri's workers' compensation act, Kentucky's specifically provided for "[e]xtraterritorial coverage," but "[t]here is no comparable provision for extraterritorial application in the KCRA." *Id.* at 190. *See also Ferrer v. MedaSTAT USA, LLC*, 145 F. App'x 116, 120 (6th Cir. 2005) (dismissing KCRA claim brought by employee who worked for defendant in Florida, noting that *Union Underwear* analysis "suggests that the KCRA is inapplicable to *injuries* that occur outside

of Kentucky's borders, regardless of whether the action causing the relevant injury takes place within Kentucky.").

Similarly, in *Arnold v. Cargill, Inc.*, 2002 WL 1576141 (D. Minn. 2002), the district court held that the Minnesota Human Rights Act could not be applied to permit employees who neither lived nor worked in Minnesota to bring race discrimination claims against a Minnesota-based employer. "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.* at *4 (cited in *Longaker v. Boston Scientific Corp.*, 872 F. Supp. 2d 816, 820 (D. Minn. 2012) (holding that plaintiff lacked standing because the Minnesota statute does not apply extraterritorially and plaintiff had neither lived nor worked in Minnesota)). *See also Albert v. DRS Technologies, Inc.*, 2011 WL 2036956, *2 (D.N.J. 2011) (dismissing claims under New Jersey Law Against Discrimination (NJLAD) brought by former employee, who worked in Florida for defendant, a wholly-owned subsidiary of a New Jersey company, and rejecting her argument that she could assert an NJLAD claim because the decision to terminate her employment had been made in New Jersey); *Judkins v. St. Joseph's College of Maine*, 483 F. Supp. 2d 60, 65, 66 (D. Me. 2007) (dismissing as untimely Title VII and ADEA claims brought by plaintiff professor over her termination from college's Grand Cayman Island campus where "any discrimination against Plaintiff occurred in the Cayman Islands, not Maine," and fact that college was located in Maine and "decisions were made in Maine

regarding Plaintiff's employment … remain[] Plaintiff's only connection to the state"; agreeing with college that Maine was not a deferral state because Maine Human Rights Commission did "not have authority to grant or seek relief from discrimination against non-Maine residents working abroad");[6] *Hoffman v. Parade Publications*, 933 N.E.2d 744,745, 747 (N.Y. Ct. App. 2010) (dismissing claim against New York-based employer under New York State Human Rights Law brought by Georgia employee who alleged, among other things, that he had attended meetings in New York and that "defendants' decision to terminate him was made and executed in New York City"; "a nonresident must plead and prove that the alleged discriminatory conduct had an impact in New York"); *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850, 1852, 1859 (Cal. App. 2d Dist. 1996) (affirming summary judgment in favor of California employer on sexual harassment claim brought by nonresident whose "duties were performed, for the most part, outside of" California).

The courts in all of these cases recognized that extraterritorial application of the forum state's civil rights law to an out-of-state employment relationship is improper. Most – *Jones*, *Union Underwear Co.*, *Arnold*, *Taylor*, *Albert*, *Judkins, Esposito*, and *Hoffman* – so held even though the employee alleged that his or her rights were injured by policies or decisions made in the forum state.

[6] In *Esposito v. VIP Auto*, 2008 WL 4106432 (Me. Super. 2008), the Maine Superior Court cited *Judkins* in granting summary judgment for the employer, concluding that Maine's Human Rights Act "does not have extraterritorial applicability. The attempts to argue that discriminatory decisions were made in Maine fail to confer jurisdiction since the plaintiff's employment was outside of Maine." *Id.*

In contrast to the slew of cases rejecting application of a state antidiscrimination statute to an out-of-state employee, Plaintiff's opposition to A-B's writ petition (filed May 8, 2019) ("Plf's Writ Opp.") cited only *Monteilh v. AFSCME, AFL-CIO*, 982 A.2d 301 (D.C. 2009), and *Wilson v. CFMOTO Powersports, Inc.*, 2016 WL 912182 (D. Minn. March 7, 2016) (Plf's Writ Opp. at 17-19). Neither case supports Plaintiff's effort to invoke the protections of the MHRA. In *Monteilh*, the District of Columbia Court of Appeals examined only whether it had subject matter jurisdiction over the plaintiff's claims under the District of Columbia Human Rights Act (DCHRA), without considering whether the DCHRA could be applied extraterritorially to the plaintiff, who worked for the defendant in California and Georgia. 982 A.2d at 302-04.

In *Wilson*, the federal district court denied a motion to dismiss the plaintiff's claim under the Minnesota Human Rights Act. The court recognized Minnesota's presumption against extraterritorial application of its laws, and observed that the statute defines "employee" as "an individual 'who resides or works **in this state**.'" 2016 WL 912182, *5 (quoting Minn. Stat. §363A.03, subdiv. 15) (emphasis original). In addition, the court stated that it did "not disagree" with the court in *Arnold* that allegations of "discriminatory conduct 'emanat[ing] from Minnesota'" were "insufficient to establish MHRA standing." *Id.* at *6 (quoting *Arnold*, 2002 WL 1576141, at *4). Labeling it "a close call," the court nevertheless concluded, "for the purposes of this motion to dismiss," that the plaintiff had sufficiently alleged he worked in Minnesota by pleading that during his two and one-half month tenure with the defendant, he had attended a one-week training session there and

another lasting approximately two to four days, was expected to return for trainings and meetings, and reported to and communicated with supervisors in Minnesota. *Id.* at **2, 6.

The holding in *Wilson* is contrary to *Longaker* and *Arnold,* and is at odds with cases from other jurisdictions holding that an out-of-state employee's occasional travel to the forum state did not warrant extraterritorial application of the forum state's antidiscrimination statute. *See, e.g., Hoffman v. Parade Publications*, 933 N.E. 2d at 745, 747; *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th at 1852, 1859. As Judge Gabbert noted in *Mimmovich*, "In expressly expanding workers' compensation coverage to out-of-state injuries and diseases, … the Missouri legislature still insisted on the employee having been principally employed within Missouri's borders within thirteen weeks of the onset of the condition." *Mimmovich*, Ex. 10, at 4, ¶6. If occasional travel to Missouri does not suffice for the explicit extraterritorial application of the Workers' Compensation Law, occasional work trips to Missouri cannot justify out-of-state application of the MHRA, which is silent on extraterritorial reach.

This Court should join the "overwhelming majority" of cases prohibiting extraterritorial coverage of state civil rights laws. Consistent with Missouri's long-standing presumption against extending its statutes beyond its borders, and the MHRA's lack of "clear expression of legislative intent and language necessary to overcome the presumption," *Mimmovich*, Ex. 10 at 4, ¶6, this Court should make its preliminary writ permanent and direct Respondent to dismiss the Amended Petition with prejudice.

B. Even if an Employee Working Outside of Missouri Could Avail Himself of the Protections of the MHRA Under Some Circumstances, Respondent Erred in Concluding That Plaintiff Has Stated a Claim Under the MHRA Because the Statute Covers Only Discriminatory Acts that Adversely Affect an Employee, and Plaintiff Does Not Allege that Any Such Acts Occurred in Missouri.

In both his opposition to A-B's motion to dismiss the Amended Petition and his opposition to A-B's writ petition filed in this Court, Plaintiff maintained that he is not seeking extraterritorial application of the MHRA because "the conduct at issue in this case—Defendant's discriminatory and retaliatory actions toward Plaintiff—originated and occurred primarily in Missouri" (Ex. 6, at p. 3; *see also* Plf's Writ Opp. at 4, 8). Respondent agreed, but cited no cases to support her conclusion that Plaintiff had "stated a claim under the MHRA" "because the acts alleged did not occur wholly outside of Missouri." *See* Ex. 8, Apdx-A3.

Even assuming that an out-of-state employee can, in some circumstances, invoke the protections of the MHRA, at a minimum the employee must allege that an "unlawful discriminatory practice" that adversely impacted the emnployee occurred in Missouri. As explained below, Plaintiff has alleged only that he was given three "downgraded" performance ratings either while he was in St. Louis or during a telephone conference in which his supervisor participated from St. Louis, and that he was informed of a job "demotion" in a telephone call with two A-B management employees located in St. Louis and a third who was elsewhere. The deprivation of salary increases, bonuses, stock options, and other opportunities that Plaintiff alleges resulted from the "downgraded" ratings occurred in Iowa, as did the change in his position from Director to Manager. Because he

has not alleged an unlawful employment practice that occurred in Missouri, Plaintiff has not stated a cause of action under the MHRA.

1. Plaintiff's Missouri-based allegations.

Although his original Petition referenced Missouri only in connection with A-B's organization and place of business and a meeting that he attended in St. Louis in 2013 (Ex. 1, at 1, 4, ¶¶2-3, 16), after A-B moved to dismiss, Plaintiff filed the Amended Petition, adding allegations pertaining to contacts with Missouri (*see ante* at 12-14). Several of these new allegations have nothing to do with "discriminatory and retaliatory actions." Plaintiff alleges, for example, certain "connections" with Missouri (Plf's Writ Opp. at 12) – that from 2010 to 2016, (a) his "job was based out of" St. Louis;[7] (b) his "immediate supervisor, secretary, and other support staff" were located here; and (c) he visited the St. Louis office "at least monthly" for meetings, trainings, and reviews (Ex. 3, at 2, 3,¶¶14, 16, 19). None of these benign allegations supports Plaintiff's argument that A-B discriminated and retaliated against him in Missouri.

In addition to these purported Missouri "connections," Plaintiff added to his Amended Petition the following allegations, which presumably constitute the "discriminatory and retaliatory actions toward Plaintiff" that he claims "originated and occurred primarily in Missouri" even though he was living and working in Iowa:

[7]Whatever Plaintiff means by his vague allegation that his "job was based out of" St. Louis from 2010 to February 2016 while he was a Retail Sales Director, his sales territory at that time covered Iowa, Minnesota, Nebraska, North Dakota, and South Dakota – not Missouri (Ex. 3, at 2, 9, ¶¶13, 16, 73). Moreover, he acknowledges that he "is physically located in Iowa." Ex. 6 at 3.

- He received three performance ratings (in 2012, 2014, and 2015) either while he was in St. Louis or during a telephone call with a supervisor who was in St. Louis (Ex. 3, ¶¶36-39, 54, 64);

- He attended a 2013 meeting in St. Louis during which a Vice President of Sales made remarks regarding "experienced" and "mature" employees (Ex. 3, ¶¶31, 42-44);

- In a December 2015 telephone conversation with three A-B Directors, two of whom were participating from St. Louis, Plaintiff was informed that he was being moved from his Director position to a non-equity Manager-level position (Ex. 3, ¶¶59, 69-70); and

- A-B's Vice President of Sales, Midwest Region, sent a memo from St. Louis in February 2016 announcing Plaintiff's move to the Manager position, effective immediately (Ex. 3, ¶73).[8]

2. "Unlawful discriminatory practices" under the MHRA.

Even assuming these allegations are true for purposes of this Court's review of the Order, Plaintiff has not alleged that any employment practice made unlawful under the MHRA occurred in Missouri. Section 213.055 provides, in pertinent part, that "[i]t shall be an unlawful employment practice … [f]or an employer … (a) … to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's … age…." §213.055 (1)(a). As this Court recently recognized, an employment practice must have had "some adverse impact on the plaintiff before it becomes actionable." *Kader v. Board of Regents of Harris-Stowe State*

[8]Plaintiff also alleges that he complained about age discrimination during a phone call in 2013 to A-B management employees located in St. Louis (Ex. 3, ¶51), but that complaint is, of course, not itself an act of discrimination against him.

University, 565 S.W.3d 182, 189 (Mo. banc 2019) (internal quotation marks and citation omitted).

Section 213.075 requires "any person claiming to be aggrieved by an unlawful discriminatory practice" to file a complaint with the Missouri Human Rights Commission (MHRC) within 180 days "of the alleged act of discrimination."[9] Under §213.111, a complainant who has received a right-to-sue letter from the MCHR may bring a civil action "in any circuit court in any county in which the unlawful discriminatory practice is alleged to have been committed."[10] "Unlawful discriminatory practice" is defined as "any act that is unlawful under this chapter." §213.010(20).

Although the timeliness of an MHRC charge and the proper venue for a civil action hinge on when and where, respectively, the alleged "act of discrimination" occurred, the MHRA does not define "act." As this Court routinely directs, "'undefined words are given their plain and ordinary meaning as found in the dictionary to ascertain the intent of lawmakers.'" *Sun Aviation, Inc. v. L-3 Communications Avionics Systems, Inc.*, 533 S.W.3d 720, 723 (Mo. banc 2017) (quoting *Howard v. City of Kansas City*, 332 S.W.3d 772, 780 (Mo. banc 2011)). *Webster's Third New International Dictionary* at 20 (2002)

[9] Section 213.075 was amended effective August 28, 2017, to make the filing of the complaint with the MCHR "a jurisdictional condition precedent to filing a civil action," along with other changes. Both the current version and the immediately preceding one required that the complaint be filed with the Commission within 180 days "of the alleged act of discrimination."

[10] Section 213.111.1 was also amended effective August 28, 2017. The previous version made venue proper "in any county in which the unlawful discriminatory practice is alleged to have occurred."

defines "act" in relevant part as follows: "**1 a:** a thing done or being done: DEED, PERFORMANCE … **b** *law:* an external manifestation of the will: something done by a person pursuant to his volition." *See also State v. Thigpen*, 548 S.W.3d 302, 318 n.14 (Mo. App. E.D. 2017) ("'act' is defined as 'a thing done or being done'"); *Black's Law Dictionary* (5th Ed.) (defining "act" as "Denotes external manifestation of actor's will."). As *A Dictionary of Modern Usage* (1987) describes "act" and "action":

> These are important words in law; yet they are often used indiscriminately. … *Act* is the more concrete, *action* the more abstract word. Generally, *act* denotes the thing done, *action* the doing of it. … [*A*]*ction* suggests a process—the many discrete events that make up a bit of behavior—whereas *act* is unitary.

None of Plaintiff's allegations constitutes an 'unlawful discriminatory practice" that is actionable under the MHRA. The only adverse impact he alleges from his "downgraded" performance ratings is that he did not receive salary raises or stock options (Ex. 3, pp. 5, 7, 8, 9, ¶¶39, 54, 64, 67, 75). Putting aside the question whether allegations regarding performance ratings received well outside the applicable limitations periods were timely raised,[11] any potential "unlawful employment practice" is not the ratings or reviews themselves, but rather the alleged deprivations of pay increases and stock options, which occurred in Iowa, where Plaintiff would have received them. *See Kader*, 565 SW.3d at 190 ("An action is not adverse simply because it is upsetting or disappointing to an employee."). Even assuming the remarks about "mature employees" allegedly made at the

[11] *See* §213.075 (requiring that charge be filed within one hundred eighty days of the alleged act of discrimination); §213.111 (requiring that suit be filed "no later than two years after the alleged cause occurred").

2013 meeting of Sales Directors and Vice Presidents were admissible evidence of a discriminatory intent, the comments themselves did not adversely affect Plaintiff with respect to his compensation or the terms, conditions, or privileges of his employment and are not actionable.

And even assuming Plaintiff's "demotion" to a manager position in February 2016 was based on his age, the "act of discrimination" is not the *decision* to demote him or the subsequent announcement "to all employees in [his] region," but the *execution* of the decision – the demotion itself. *See Theus v. Pioneer Hi-Bred Intern., Inc.*,738 F. Supp. 1252, 1253 (S.D. Iowa 1990) ("A *decision* to discriminate, however, does not create a claim under the civil rights acts—there must be an act."); *Ofori-Tenkorang v. American International Group*, 460 F. 3d 296, 304 (2d Cir. 2006) (quoting *Theus* and agreeing with "those courts that held 'that an individual, whose primary workstation is abroad, cannot characterize otherwise extraterritorial employment as domestic solely because employment decisions were made in the United States'") (citation omitted); *see also Taylor*, 2004 WL 1196145, at *3 (rejecting the plaintiff's argument that the discriminatory act occurs where the decision was made). The demotion – the "thing done" – occurred in Iowa, where Plaintiff's employment status changed from Retail Sales Director to Non-Equity Market Manager, and where he sustained any attendant decrease in salary, bonuses, stock-option eligibility, or other opportunities.

The only support Plaintiff has offered for his position that "discriminatory and retaliatory actions toward [him]" occurred in Missouri is two opinions addressing venue under the MHRA (Ex. 6 at 4; Plf's Writ Opp. at 8-10). In *Igoe v. Department of Labor and*

Industrial Relations, 152 S.W.3d 284 (Mo. 2005), this Court held that under the MHRA's venue provision, §213.111, proper venue for the plaintiff's failure-to-hire claim was in Cole County, where "all of the acts—the receipt and review of applications, the interviews, and the decision making—all occurred." *Id.* at 288.

The second venue case Plaintiff relies on, *State ex rel. Hollins v. Pritchett*, 395 S.W.3d 600 (Mo. App. S.D. 2013), also involved a failure-to-hire claim. There, the Court of Appeals held that the City of St. Louis was a proper venue for the plaintiff's claim because at least one of the discussions about whether to hire the plaintiff for a position in Poplar Bluff (Butler County), Missouri, had taken place in St. Louis. *Id.* at 604-05.

Plaintiff's reliance on *Igoe* and *Hollins* is misplaced. As an initial point, venue cases are inapposite here because venue is a procedural issue that arises only when a court has "authority, or jurisdiction, to hear a case." *State ex rel. Kansas City Southern Ry. Co. v. Nixon*, 282 S.W.3d 363, 365 (Mo. banc 2009). "Venue assumes the existence of jurisdiction and determines, among many courts with jurisdiction, the appropriate forum for the trial." *Id.* "[T]he purpose of the venue statutes … is to 'provide a convenient, logical and orderly forum for the resolution of disputes, not to limit or control the types of parties and actions that appear before Missouri courts.'" *State ex rel. Heartland Title Services, Inc. v. Harrell*, 500 S.W.3d 239, 242-43 (Mo. banc 2016) (quoting *State ex rel. Neville v. Grate*, 443 S.W.3d 688, 693 (Mo. App. 2014)). A legislative decision on where in Missouri a statutory cause of action may be venued does not demonstrate legislative intent that the statute have effect beyond Missouri's borders.

Moreover, *Igoe* and *Hollins* both involve failure-to-hire claims. In such cases, because there is no existing or continuing employer-employee relationship, the final decision not to hire an applicant is "a thing done" and, by itself, adversely impacts him or her. Plaintiff does not expressly allege that any of the allegedly discriminatory decisions to downgrade his ratings and to demote him were made in Missouri, but even if he did, *Igoe* and *Hollins* stand only for the proposition that the county in which a hiring decision was made may be the proper venue for an ensuing failure-to-hire claim under the MHRA. Neither decision supports Plaintiff's contention that he is entitled to the protections of the MHRA even though he is an Iowa resident who worked for A-B in Iowa.

Again, even assuming Plaintiff did allege that the discriminatory and retaliatory decisions he complains of were made in Missouri, it is unclear whether he is arguing that the decision-making process *alone*, or together with the execution of the decision, constitutes the unlawful employment practice.[12] Neither theory squares with the statutory language requiring an "act" or the requirement that an employment practice have an "adverse impact" before it is actionable. Only when those decisions were implemented and Plaintiff suffered the consequent loss of pay increases, bonuses, stock options, or other opportunities could an unlawful employment practice have occurred.

[12]Plaintiff has stated that "*most* of the unlawful employment practices … occurred in Missouri," which suggests he contends that at least some of the discriminatory or retaliatory acts occurred in Iowa (Plf's Writ Opp. at 11, emphasis added). But such a contention seems at odds with his assertion that "Iowa has a very minimal connection to the allegations in this case" (Plf's Writ Opp. at 12).

Because it determines both venue and the timeliness of an MHRC charge, what constitutes an "act" of discrimination must be easily ascertainable with certainty and clarity. If this Court were to accept Plaintiff's argument that the MHRA can have extraterritorial reach when an employer's decision to take an adverse employment action against an out-of-state employee was made – in whole or in part – in Missouri, it is not difficult to foresee the chaos that would ensue. Whether an employee can sue under the MHRA or where that lawsuit can be brought cannot depend on the happenstance of where a decision maker was located during the decision-making process. Decision making can be a dynamic process, taking place over an extended period of time and often involving input from several decision makers, who may participate from offices in multiple states or while traveling. Even when only a single decision maker is responsible, he or she may come to the decision over time and while in various locations.

The employee affected by a final discriminatory decision will likely not have any visibility into where, when, or by whom the decision is reached. If decision making is the discriminatory "act" under the MHRA, an aggrieved employee may in some instances only guess as to whether an unlawful discriminatory practice occurred in Missouri, when the limitations period for filing an MCHR charge begins to run under §213.075, or where, if a right-to-sue letter is issued, venue should lie for a civil action under §213.111. *See, e.g., Taylor v. Rodale*, 2004 WL 1196145, at *3 ("Were we to accept Plaintiff's position that the relevant inquiry [in determining the location of the discriminatory act] is where the decision was made or where the decision-makers were located, it would significantly hinder the applicability of the PHRA. Such a conclusion could cause the protection

afforded to an individual working in Pennsylvania to change during the course of her employment depending on where her supervisors happened to be."); *Esposito*, 2008 WL 4106432 ("If the place where the decision was made, rather than the place of employment, dictated where employment discrimination suits should be brought, Maine residents would potentially suffer by being forced to bring suit in a distant and inconvenient locale.")

Moreover, Plaintiff's theory, if accepted, could lead to splitting of causes of action and forum-shopping. An out-of-state employee may allege discrimination with respect to multiple decisions – for example, a demotion and a discharge – made by different decisionmakers, one in Missouri and another made in the state where the employee works or even a third state. Under Plaintiff's theory, the employee could sue under the MHRA for the decision made in part in Missouri, but presumably would have to sue in another state with respect to any adverse decisions made there. And in a state such as Pennsylvania, where workplace location governs whether the employee is covered by the state civil rights act, *Taylor v. Rodale*, 2004 WL 1196145, at *3, an employee could engage in forum-shopping when the allegedly discriminatory decision was made in Missouri.

Many of the courts declining to apply the civil rights statute enacted by one state to a would-be plaintiff residing and working in another state have noted the potential conflict-of-law and Commerce Clause issues that could arise from such extraterritorial application of a state antidiscrimination statute. *See, e.g., Jahnke*, 912 N.W.2d at 149 ("applying the ICRA to claims involving employees who perform work outside of Iowa simply due to the contacts that the parties have with the State of Iowa would create interstate comity concerns and conflict-of-laws issues."); *Arnold*, 2002 WL 1576141, at *2 (observing that the

"presumption against the extra-territorial application of a state's statutes" not only protects "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, but "also serves 'to avoid running afoul of the Commerce Clause of the United States Constitution.'"); *Judkins*, 483 F. Supp. 2d at 65 (noting that the "presumption guards against possible conflicts with other states' laws and violations of the Commerce Clause"); *Union Underwear Co.*, 50 S.W.3d at 193 ("The extraterritorial application of one state's legislation to prevent age-based discrimination upon the employment practices of another state could result in competing jurisdictions and difficult choice of law questions …. Imposing the policy choice by the Commonwealth on the employment practices of our sister states should be done with great prudence and caution out of respect for the sovereignty of other states, and to avoid running afoul of the Commerce Clause …."); *Campbell*, 42 Cal. App. 4th at 1859 ("Without clearer evidence of legislative intent to do so than is contained in the language of the [California statute], 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.").

Those same considerations counsel against applying the MHRA, and the policy choices it represents, to a nonresident working in Iowa. In contrast to the confusion, complication, and conflict that would arise from adopting Plaintiff's position, holding that an "act" of discrimination occurs where an employment decision is effected – in the workplace, where the employee's compensation, terms, conditions, or privileges of employment sustain injury – provides the necessary concrete and verifiable standard.

Where an unlawful discriminatory practice occurred cannot be a moving (or movable) target.

CONCLUSION

This Court should make permanent the writ of prohibition and direct Respondent to refrain from taking any further action in this matter other than (a) vacating her Order of March 5, 2018, denying Relator Anheuser-Busch, LLC's motion to dismiss Plaintiff's First Amended Petition, and (b) dismissing Plaintiff's First Amended Petition with prejudice for failure to state a claim under the MHRA.

Date: August 2, 2019

Respectfully submitted,

DOWD BENNETT LLP

By: /s/*James F. Bennett*
James F. Bennett, #46826
jbennett@dowdbennett.com
Elizabeth C. Carver, #34328
ecarver@dowdbennett.com
Michelle D. Nasser, #68952
mnasser@dowdbennett.com
7733 Forsyth Blvd., Suite 1900
St. Louis, Missouri 63105
(314) 889-7300 (telephone)
(314) 863-2111 (facsimile)

Attorneys for Relator
Anheuser-Busch, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief for Relator in Support of Prohibition complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 10,565 words, excluding the cover, this certificate, the signature block, and the Appendix, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *James F. Bennett*

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2019, pursuant to Supreme Court Rule 103.08, I electronically filed the foregoing Brief for Relator in Support of Prohibition with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ *James F. Bennett*
Attorney for Relator