IN THE SUPREME COURT OF MISSOURI

No. SC97845

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

Relator,

vs.

THE HONORABLE JOAN L. MORIARTY,
CIRCUIT JUDGE FOR THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI,

Respondent.

Writ Proceeding from the Circuit Court of the City of St. Louis, Missouri
Honorable Joan L. Moriarty, Circuit Judge
Case No. 1722-CC01275

BRIEF OF RESPONDENT

Gregory A. Rich, #45825
DOBSON, GOLDBERG, BERNS & RICH, LLP
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366
Email: grich@dobsongoldberg.com

Attorneys for Respondent and
Plaintiff John Esser

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF FACTS

John Esser's Employment with Anheuser-Busch

Anheuser-Busch, LLC ("A-B") is a limited liability company organized under the laws of the state of Missouri and conducts business in the City of St. Louis, Missouri. Exhibit 3 to Relator's Petition for Writ of Prohibition ("Ex. 3"), p. A17, ¶ 3. John Esser ("Esser") has been employed by A-B or its predecessor company since 1983. Ex. 3, p. A17, ¶¶ 6-7. During the early years of his employment with A-B, Esser worked in a number of different jobs that were located in Missouri. Ex. 3, p. A18, ¶ 9. In 1989, Esser transitioned into a sales role with A-B and all of the jobs that he has held with A-B since that time have involved sales. Ex. 3, p. A18, ¶ 10.

In 1995, Esser became a Key Account Manager for A-B. Ex. 3, p. A18, ¶ 11. In that job, Esser was responsible for a sales territory that included Missouri, Kansas, Iowa, Nebraska, Minnesota, North Dakota, and South Dakota. Ex. 3, p. A18, ¶ 11. In 2007, A-B promoted Esser to the position of Retail Sales Director. Ex. 3, p. A18, ¶ 12. Esser's sales territory as a Retail Sales Director included Iowa, Minnesota, Nebraska, North Dakota, and South Dakota. Ex. 3, p. A18, ¶ 13.

During the time that he worked as a Key Account Manager and Retail Sales Director, Esser lived in Iowa. Ex. 3, p. A17, ¶ 1; p. A18, ¶ 11. A-B, however, does not have any physical plants or sales offices in Iowa and, therefore, when Esser was not traveling throughout his sales territory, he worked out of his home. Ex. 3, p. A17, ¶ 1; p. A19, ¶ 18.

During the majority of the time that Esser has worked in sales for A-B, he has reported to a regional sales office in St. Louis, Missouri. Ex. 3, p. A18, ¶ 14. From 2010 to 2016, during which time Esser was working as a Retail Sales Director, Esser's job was based out of the Midwest Region sales office in St. Louis. Ex. 3, p. A18, ¶ 16. Esser's immediate supervisor, secretary, and other support staff, as well as the human resources department for Esser's region, were located in St. Louis. Ex. 3, p. A18, ¶¶ 16-17; p. A20, ¶¶ 29-35; p. A23, ¶ 53. In addition, as a Retail Sales Director, Esser visited the Midwest Region sales office in St. Louis at least monthly for different types of meetings, including meetings called by his supervisor, as well as trainings and employee reviews. Ex. 3, p. A19, ¶ 19.

Esser's Allegations of Discrimination and Retaliation

In approximately February 2012, Esser began reporting to Tom Doyle ("Doyle"), who was the Vice President of Sales for the Midwest Region. Ex. 3, p. A20, ¶ 34. During the time that Esser reported to Doyle, Doyle worked at the Midwest Region sales office in St. Louis. Ex. 3, p. A20, ¶ 35. In late 2012, while Esser and Doyle were both in St. Louis, Doyle informed Esser that he was going to receive a rating of 3B on his annual performance review, which was a lower rating than Esser had received in the immediately preceding year. Ex. 3, p. A21, ¶ 37. A rating of 3B indicates that an employee is performing at the right level for now and could move laterally. Ex. 3, p. A21, ¶ 37. On his 2011 performance review, Esser had received a higher rating of 4B, which indicates that an employee should be developed for promotion within one to two years. Ex. 3, p. A21, ¶ 38. At the time of

Esser's performance evaluation in 2012, Doyle also told Esser that he would not receive a pay increase in 2013 and would not receive any stock options, which Esser had received in prior years. Ex. 3, p. A21, ¶ 39.

Doyle told Esser that he had initially recommended a rating of 3A on Esser's 2012 performance review, which meant this his potential for a future promotion was likely, but David Almeida ("Almeida"), A-B's Vice President of Sales who worked in St. Louis, did not approve the rating because Almeida wanted to enhance the salary and incentives of employees who had a "long term future" with the company. Ex. 3, p. A20, ¶¶ 31-32; p. A21, ¶ 41. Esser was 51 years old at the time. Ex. 3, p. A21, ¶ 41.

In August 2013, all of A-B's Sales Directors and Vice Presidents, including Esser, attended a meeting in St. Louis with Almeida. Ex. 3, p. A21, ¶ 42. During the meeting, Almeida presented a slide of all the Sales Management Trainees (younger employees with bachelor's degrees) and Graduate Management Trainees (younger employees with graduate degrees) and told everyone at the meeting to not be afraid to let "experienced" employees go because the company had a "full bench of young people." Ex. 3, p. A21, ¶ 43. Almeida also encouraged the Vice Presidents to look for "mature" people in the company and find a way to move them on. Ex. 3, p. A22, ¶ 44.

In September 2013, soon after the meeting with Almeida in St. Louis, Doyle told Esser that he was downgrading him to a rating of 1A on his annual performance review. Ex. 3, p. A22, ¶ 45. A rating of 1A indicates that an employee needs to improve his results, and also meant that Esser would not receive any stock options. Ex. 3, p. A22, ¶ 45. In

September 2013, Doyle also gave Esser an "Expectations Letter" which stated that if his performance did not improve over the next 90 days, additional disciplinary action may be taken against him, including termination of employment. Ex. 3, p. A22, ¶ 47. Esser was one of several Sales Directors and Managers around 50 years old who were given lower performance ratings and placed on Performance Improvement Plans in 2013. Ex. 3, p. A22, ¶ 49.

Upon receiving the downgraded performance review and "Expectations Letter" in September 2013, Esser complained to Doyle and John Exline ("Exline"), Senior Director of Human Resources, that he believed he was being subjected to age discrimination and that the company was targeting him because of his age. Ex. 3, p. A22, ¶ 51. This complaint occurred via telephone while Doyle and Exline were in St. Louis. Ex. 3, p. A22, ¶ 51. Esser subsequently put his complaints in writing in a letter to Doyle dated September 19, 2013. Ex. 3, p. A23, ¶ 52. Specifically, Esser stated that he had "some grave concerns in regards to the appearance of being systematically targeted as an older employee." Ex. 3, p. A23, ¶ 52.

In or about April 2014, A-B created a new job in Esser's region called Senior Retail Sales Director and gave that position to Doug Croghan ("Croghan"). Ex. 3, p. A23, ¶ 53. Esser began reporting directly to Croghan, who worked at the Midwest Region sales office in St. Louis, and Croghan reported directly to Doyle. Ex. 3, p. A23, ¶ 53.

In 2014, during a meeting in St. Louis, Doyle gave Esser a rating of 3B on his annual performance review. Ex. 3, p. A23, ¶ 54. Esser also 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, p. A23, ¶ 54.

In or about December 2014, Marcelo Abud ("Abud") replaced Doyle as the Vice President of Sales for the Midwest Region. Ex. 3, p. A23, ¶ 56. Abud worked at the Midwest Region sales office in St. Louis. Ex. 3, p. A23, ¶ 56.

In July 2015, Esser had a discussion with Croghan about his annual performance review. Ex. 3, p. A23, ¶ 57. Croghan told Esser during the discussion that Abud was pleased with Esser's performance, but they had some options that they needed to discuss with Esser regarding his future with the company. Ex. 3, p. A23, ¶ 58. Soon thereafter, in August 2015, Croghan asked Esser whether he would be interested in a non-equity job in the region. Ex. 3, p. A23, ¶ 59. Croghan initially referred to the non-equity job as a Director-level job, but upon additional questioning from Esser, Croghan was vague about whether the job was at the Director level or Manager level. Ex. 3, p. A24, ¶ 60. Esser told Croghan that the job level mattered to him because he was looking for a promotion, not a demotion. Ex. 3, p. A24, ¶ 61. Esser sent a follow-up email to Croghan in August 2015 in which he stated that he would be interested in the non-equity job only if it was at the Director level. Ex. 3, p. A24, ¶ 62. During the conversation in August 2015, Croghan stated to Esser that the company was "looking to replace positions with younger people." Ex. 3, p. A24, ¶ 63.

In October 2015, Croghan told Esser that he was again being downgraded to a rating of 1A on his annual performance review. Ex. 3, p. A24, ¶ 64. This conversation occurred

via telephone while Croghan was in St. Louis. Ex. 3, p. A24, ¶ 64. Esser did not receive a pay increase in 2015. Ex. 3, p. A24, ¶ 67.

In December 2015, Esser had a telephone call with Croghan and two other 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. Ex. 3, p. A25, ¶ 69. Croghan and one of the Directors were in St. Louis at the time of the telephone call. Ex. 3, p. A25, ¶ 69. Esser stated during the telephone call that if the new job was not at the Director level, he would prefer to remain in his current job as a Retail Sales Director. Ex. 3, p. A25, ¶ 70. Esser was told that he could not keep his current job and that he was lucky to have a job. Ex. 3, p. A25, ¶ 70.

On or about February 25, 2016, Abud sent a memo from his office in St. Louis to all employees in Esser's region stating that, effective immediately, Esser would be moving to a Non-Equity Market Manager job. Ex. 3, p. A25, ¶ 73. Because Esser previously held a Director-level job, the Non-Equity Market Manager job was a demotion for Esser. Ex. 3, p. A25, ¶ 74.

Esser's Charge of Discrimination and Lawsuit Against A-B

On August 26, 2016, Esser filed a charge of discrimination against A-B with the Missouri Commission on Human Rights ("MCHR") in which he alleged age discrimination and retaliation by A-B. Ex. 3, p. A26, ¶ 77. On May 9, 2017, after receiving a Notice of Right to Sue from the MCHR, Esser filed a lawsuit against A-B pursuant to the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.010 *et seq*. Exhibit 1 to Relator's

Petition for Writ of Prohibition ("Ex. 1"), pp. A1-A9. Esser alleged in his lawsuit that A-B discriminated against him because of his age and retaliated against him for complaining about age discrimination. *Id.*

A-B's Motion to Dismiss

After Esser filed his lawsuit, A-B filed a motion to dismiss Esser's claims or, in the alternative, to compel arbitration. Exhibit 2 to Relator's Petition for Writ of Prohibition ("Ex. 2"), pp. A10-A16. As grounds for its motion to dismiss, A-B argued that because Esser lives and works in Iowa, he is not protected by the MHRA and cannot state a claim for relief under that statute. *Id*. Shortly thereafter, Esser filed a First Amended Petition to include additional details regarding his job's connections to Missouri and specific allegations regarding discriminatory and retaliatory practices that occurred in Missouri. Ex. 3, pp. A17-A28. A-B then refiled its motion to dismiss Esser's claims. Exhibit 4 to Relator's Petition for Writ of Prohibition ("Ex. 4"), pp. A29-A32.

In an order dated March 5, 2018, the Honorable Joan L. Moriarty ("Respondent") denied A-B's motion to dismiss and its motion to compel arbitration. Exhibit 8 to Relator's Petition for Writ of Prohibition ("Ex. 8"), pp. A59-A63. In her Order, Respondent found that dismissal of Esser's claims was not appropriate because "the acts alleged did not occur wholly outside Missouri," and, therefore, Esser has stated a claim under the MHRA. Ex. 8, p. A61.

ARGUMENT

I. A Writ of Prohibition Is Not Appropriate in This Case Because There Is Nothing Extraordinary about the Trial Court's Denial of A-B's Motion to Dismiss and A-B Has a Remedy by Way of Appeal.

A writ of prohibition is "an extraordinary remedy" that "is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. 1991). "Prohibition is a discretionary writ, and there is no right to have the writ issued." *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 856-57 (Mo. 2001). Furthermore, "[a] remedial writ is not an appropriate remedy to resolve issues which may be addressed through appeal," *State ex rel. K-Mart Corp. v. Hollinger*, 986 S.W.2d 165, 169 (Mo. 1999), "nor is it intended as the cure for all legal ills." *State ex rel. Riederer v. Mason*, 810 S.W.2d 541, 543 (Mo. App. W.D. 1991).

This Court has held that a "writ or prohibition is appropriate: (1) to prevent the usurpation of judicial power when a lower court lacks authority or jurisdiction; (2) to remedy an excess of authority, jurisdiction or abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not granted." *State ex rel. Strauser v. Martinez*, 416 S.W.3d 798, 801 (Mo. 2014). "[P]rohibition will not be granted except when usurpation of jurisdiction or an act in excess of jurisdiction is clearly evident." *State ex rel. Tarrasch v. Crow*, 622 S.W.2d 928, 937 (Mo. 1981). "The relator has the burden of establishing the circuit court acted in excess of its authority." *State ex rel. Cullen v. Harrell*, 567 S.W.3d 633, 637 (Mo. 2019).

A writ of prohibition is not appropriate in this case because A-B has an adequate remedy by way of appeal. Although A-B cannot *immediately* appeal Respondent's denial of its motion to dismiss, the law is clear that "'[a]n order denying a motion to dismiss . . . can be considered as part of the appeal from a final judgment.'" *Halverson v. Halverson*, 362 S.W.3d 443, 448 n.7 (Mo. App. S.D. 2012) (quoting *Raskas Foods, Inc. v. Southwest Whey, Inc.*, 978 S.W.2d 46, 48 n.3 (Mo. App. E.D. 1998)). In addition, "[t]he routine procedure when a trial court overrules a motion to dismiss is for the defendant to file a motion for summary judgment on completion of the discovery phase." *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 334 (Mo. 2009) (Fischer, J., dissenting).

Although Esser believes that the facts alleged in his First Amended Petition state a claim for relief under the MHRA, discovery in Esser's lawsuit will likely provide additional facts that the trial court can consider in determining whether Esser's claims are covered by the MHRA in the event that A-B decides to file a motion for summary judgment. As the discussion below makes clear, there are no definitive rules that dictate whether a person who lives or works outside a particular state's borders is protected by that state's civil rights statute and each case must be decided based upon its own facts. Given the other remedies that are available to A-B at both the trial and appellate court levels, there are no extraordinary circumstances that would justify the issuance of a writ of prohibition in this case. Accordingly, A-B's petition for a writ of prohibition should be denied.

II. A-B Is Not Entitled to a Writ of Prohibition Because the Trial Court Correctly Found That Esser's Claims May Proceed under the MHRA in That Esser's Job Is Based out of Missouri and His Claims Involve Discriminatory and Retaliatory Conduct that Occurred in Missouri (Relator's Point I).

A. Missouri Law Demonstrates that Esser's Allegations Involve Discriminatory and Retaliatory Conduct that Occurred in Missouri.

In considering whether Esser has stated a claim against A-B on which relief can be granted, this Court "must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader." *Bromwell v. Nixon*, 361 S.W.3d 393, 398 (Mo. 2012). "The Court does not weigh the factual allegations to determine whether they are credible or persuasive." *Id.* Rather, "[t]he petition is reviewed in an almost academic manner to determine if the plaintiff has alleged facts that meet the elements of a recognized cause of action or of a cause that might be adopted in that case." *Conway v. Citimortgage, Inc.*, 438 S.W.3d 410, 414 (Mo. 2014).

Esser has brought claims against A-B under the MHRA, which, among other things, makes it an unlawful employment practice for an employer "[t]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . age . . ." Mo. Rev. Stat. § 213.055(1)(a).[1] The MHRA further makes it an unlawful discriminatory practice "[t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter."

[1]All references to the MHRA are to the version of the statute that was in effect immediately prior to the amendments of August 28, 2017.

Mo. Rev. Stat. § 213.070(1). As this Court has recognized, the MHRA is a remedial statute and, as such, "'should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case.'" *Lampley v. Missouri Comm'n on Human Rights*, 570 S.W.3d 16, 23 (Mo. 2019) (quoting *Missouri Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999)). *See also* Mo. Rev. Stat. § 213.101 (stating that the provisions of the MHRA "shall be construed to accomplish the purposes thereof").

A-B has spent a significant portion of its brief arguing that the MHRA does not apply extraterritorially and has cited a number of cases recognizing the proposition that state statutes generally do not apply outside the state's boundaries. In one of those cases, *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732 (Mo. 2007), this Court noted that "[i]t is beyond Missouri's authority to regulate conduct that occurs *wholly outside of Missouri*." 220 S.W.3d at 742 (emphasis added). Esser does not quarrel with that proposition. However, whether or not the MHRA can be applied extraterritorially is not pertinent to Esser's lawsuit because Esser's job was based out of a regional sales office in Missouri and his allegations involve discriminatory and retaliatory conduct that occurred in Missouri. Therefore, Esser's claims fall squarely within the scope of protections provided by the MHRA.

This Court's decision in *Igoe v. Department of Labor and Industrial Relations*, 152 S.W.3d 284 (Mo. 2005), provides support for Esser's argument that the unlawful conduct that he alleged in his First Amended Petition occurred in Missouri. In *Igoe*, the plaintiff

alleged that the defendant failed to hire him as an administrative law judge because of his age and sex, and in retaliation for a previous complaint of discrimination that he had filed. 152 S.W.3d at 285. The Circuit Court of the City of St. Louis denied the defendant's motion to transfer venue to Cole County, and the case was subsequently 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 because of the MHRA's specific venue provision, which states that "an action may be brought in any circuit court in any county in which the unlawful discriminatory practice is alleged to have occurred." *Id.* at 288. As the Court found, "all of the acts—the receipt and review of applications, the interviews, and the decision making—all occurred in Cole County," and the plaintiff did not allege that "any 'discriminatory practice' occurred, in whole or part, in St. Louis." *Id.*

The Missouri Court of Appeals' decision in *State ex rel. Hollins v. Pritchett*, 395 S.W.3d 600 (Mo. App. S.D. 2013), provides further support for Esser's argument that he has alleged discriminatory and retaliatory conduct that occurred in Missouri and that is prohibited by the MHRA. In *Hollins*, the plaintiff alleged that the defendant failed to hire her for a job at its facility in Poplar Bluff, Missouri, because of her race. 395 S.W.3d at 601. The plaintiff also alleged that the manager who made the decision not to hire her was located in St. Louis and that, while he was in St. Louis, he directed his subordinate in Poplar Bluff not to hire her. *Id.* at 602. Therefore, according to the plaintiff, the discriminatory practice occurred "in part" in St. Louis, which made venue in St. Louis proper. *Id.* at 604. The Court of Appeals agreed, finding that if even one of the numerous discussions about

whether to hire the plaintiff occurred while the manager was in St. Louis, then the discriminatory practice occurred, at least in part, in St. Louis. *Id.*

Although *Igoe* and *Hollins* involved issues relating to venue, the analyses in those cases are instructive because they help determine where an "unlawful discriminatory practice" occurred, which, in turn, helps determine whether the MHRA provides a remedy for that unlawful conduct. *Igoe* and *Hollins* make it clear that under the MHRA, an "unlawful discriminatory practice" occurs where the relevant acts, *including the decision making*, take place. There is nothing in those decisions that indicates that an unlawful discriminatory practice occurs where the plaintiff feels the impact of that discriminatory practice. If that were the case, then venue in *Igoe* would have been proper in the City of St. Louis and venue in *Hollins* would have been proper in Butler County.

In Esser's lawsuit against A-B, he alleged that his immediate supervisors and other individuals who were involved in the discriminatory and retaliatory decisions were located in St. Louis. Ex. 3, pp. A20-A25, ¶¶ 32, 34-50, 53-56, 64, 67-69, 71-74. Esser further alleged that several of the discriminatory and retaliatory acts occurred and were communicated to Esser while he was in St. Louis. Ex. 3, pp. A21-A22, ¶¶ 36-44. Based on *Igoe* and *Hollins*, there is no question that numerous "unlawful discriminatory practices" took place in Missouri and that the MHRA provides Esser with a remedy for those unlawful practices.[2]

[2]A-B attempts to distinguish *Igoe* and *Hollins* on the ground that they involved failure-to-hire claims and that with those types of claims, because there was no existing or

A-B has cited a handful of cases from Missouri courts that it contends supports its position that the MHRA does not apply to Esser's claims, but a close look at the facts of those cases shows that they are easily distinguishable from the present case. In *Jones v. Kansas City Southern Railway Company*, No. 1016-CV16357 (Circuit Court of Jackson County, Missouri, Dec. 17, 2010), the plaintiff filed an action under the MHRA in the Circuit Court of Jackson County after she was terminated from her job in Shreveport, Louisiana. Exhibit 9 to Relator's Petition for Writ of Prohibition ("Ex. 9"), p. A64. In that case, the plaintiff was hired in Louisiana, performed her job duties in Louisiana, resided in Louisiana, and was terminated from her employment in Louisiana. Ex. 9, p. A68. There is nothing in the court's decision indicating that the plaintiff ever visited Missouri as part of her job.

As the court noted in its decision, "the basic rule is that the State 'whose law is chosen to control a case must have a substantial factual contact with the parties or the transaction giving rise to the litigation.'" Ex. 9, p. A67 (quoting *McCluney v. Joseph Schliltz Brewing Co.*, 649 F.2d 578, 581 (8th Cir. 1981)). In *Jones*, the *only* contact that Missouri had with the transaction giving rise to the plaintiff's claims was that the decision to fire the plaintiff was allegedly made in Missouri, although that decision was executed in

---

continuing employer-employee relationship, the final decision not to hire an applicant, by itself, adversely impacts the applicant. This argument, however, squarely contradicts A-B's contention that the location of a discriminatory act should be where the plaintiff experiences the impact of the decision. In a failure-to-hire case, regardless of whether there was a pre-existing employment relationship, the plaintiff feels the impact of the decision, *i.e.*, a loss of potential income, where he or she resides, not where the decision was made.

Louisiana. Ex. 9, p. A68. The court concluded that because of the minimal connection between Missouri and the facts of that case, Missouri did not have a legitimate interest in the outcome of the litigation. Ex. 9, pp. A67-A68.

Similarly, in *Mimmovich v. Garney Companies, Inc.*, No. 10CY-CV11361 (Circuit Court of Clay County, Missouri, June 21, 2011), the plaintiff, while working in South Carolina, applied for, and was denied, a job in Georgia. Exhibit 10 to Relator's Petition for Writ of Prohibition ("Ex. 10"), p. A70. None of the alleged actions about which the plaintiff complained in that case occurred in Missouri. Ex. 10, p. A71. The Circuit Court, in ruling on the defendant's motion to dismiss, declined "to expand the application of the MHRA to instances where the plaintiff is located outside Missouri *and* the alleged discriminatory acts took place in a state other than Missouri." Ex. 10, p. A73.

Unlike *Jones* and *Mimmovich*, there are numerous connections between the allegations in Esser's lawsuit and the state of Missouri, and Esser is not seeking to hold A-B liable for acts that occurred wholly outside Missouri. In addition to the fact that the unlawful employment practices alleged in Esser's First Amended Petition occurred in Missouri, Esser's job is based out of the Midwest Region sales office in St. Louis and Esser routinely visits Missouri as part of his job. Ex. 3, pp. A18-A19, ¶¶ 16, 19. Furthermore, Esser's supervisors, secretary, and other support staff, as well as the human resources department for his region, are all located in St. Louis. Ex. 3, p. A18, ¶¶ 16-17; p. A20, ¶¶ 29-30, 34-35; p. A23, ¶ 53. A-B appears to be arguing that Esser should have filed this lawsuit in Iowa, but other than the fact that Esser lives in Iowa and Iowa was one of five

states in Esser's sales territory, Iowa has a very minimal connection to the allegations in Esser's lawsuit. A-B does not have any physical plants or sales offices in Iowa and Esser does not report to anyone in Iowa. Ex. 3, p. A18, ¶ 16; p. A19, ¶ 18.

A-B also relies upon *Horstman v. General Electric Company*, 438 S.W.2d 18 (Mo. App. 1969), to support its argument, but that case fares no better than the other cases cited by A-B. In *Horstman*, the plaintiff, who worked in Kansas, filed a claim against his employer in Missouri alleging a violation of the Missouri service letter statute. 438 S.W.2d at 18-19. As the Court of Appeals noted, there were *no* connections in that case between the plaintiff's allegations and the state of Missouri:

> "Appellant admittedly was hired in and was discharged in the State of Kansas. It is also undisputed that appellant addressed his request for a service letter to respondent's district manager at its office in the State of Kansas and that the letter sent by respondent's district manager to appellant was prepared and sent from respondent's office in the State of Kansas. There were no contacts between appellant and the State of Missouri insofar as his employment by respondent, discharge or request for a service letter were concerned."

Id. at 19-20. Given the numerous connections between Esser's allegations in the present case and the state of Missouri, the distinction between *Horstman* and the present case is self-evident.

B. Cases from Other Jurisdictions Demonstrate That the MHRA Is Applicable to Esser's Claims.

Courts from other jurisdictions have found state discrimination statutes to be applicable in factual situations similar to the present case. For example, in *Monteilh v. AFSCME*, 982 A.2d 301 (D.C. 2009), the plaintiff, who worked for the defendant as a

union organizer and field representative, filed an action against the defendant under the District of Columbia Human Rights Act ("DCHRA") alleging discrimination and retaliation. 982 A.2d at 301-302. Although the defendant's headquarters was located in the District of Columbia, the plaintiff did not live or work in the District of Columbia and had never applied for any position with the defendant in the District of Columbia. *Id*. at 302. The defendant's headquarters, however, had oversight of the regional offices for which the plaintiff worked. *Id*. In his lawsuit, the plaintiff alleged that multiple discriminatory and retaliatory actions were directed at him from the defendant's headquarters in the District of Columbia. *Id*.

Recognizing the DCHRA's broad prohibition of discrimination against "any individual," the court in *Monteilh* held that actions could be brought under the DCHRA when an "employer has made a discriminatory decision in the District of Columbia, although the effects have been felt elsewhere." *Id*. at 304. According to the court, 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)). The court held that "[e]ither the decision must be made, or its effects must be felt, or both must have occurred, in the District of Columbia." *Id*. at 305. The specific location of the employee's job at the time that the alleged discriminatory act occurred was not a relevant consideration in the court's analysis.

Similarly, in *Wilson v. CFMOTO Powersports, Inc.*, 2016 U.S. Dist. LEXIS 28975 (D. Minn. Mar. 7, 2016), the United States District Court for the District of Minnesota found that the plaintiff, who lived in Kentucky and worked for the defendant as a regional sales manager in Kentucky, had alleged sufficient facts to establish that he "worked" in Minnesota for purposes of establishing a claim under the Minnesota Human Rights Act. 2016 U.S. Dist. LEXIS 28975, at *2-3. As part of his job, the plaintiff regularly reported to and interacted with executive level employees at the company's headquarters in Minnesota and was required to attend training and other meetings in Minnesota. *Id*. at *3-4. Furthermore, during his employment, the plaintiff "communicated almost daily by phone or email with employees and supervisors at [the defendant's] Minnesota office regarding potential sales leads, status updates, instructions, tasks, and other information pertaining to his job." *Id*. at *4. Less than three months after hiring the plaintiff, the defendant terminated his employment after learning that he was black. *Id*. at *1, 3, 6.

Similar to the present case, the defendant in *Wilson* argued that the plaintiff could not state a plausible claim for relief under the Minnesota Human Rights Act because he did not allege that he resided or worked in Minnesota. *Id*. at *17. Unlike the MHRA, the Minnesota Human Rights Act defines the term "employee" as an individual "who resides or works in this state." *Id*. at *18. Even with that restrictive language, the district court held that because the statute "specifically provides that it 'shall be construed liberally for the accomplishment of the purposes thereof," it was "entirely reasonable that the Minnesota legislature intended for the [Minnesota Human Rights Act] to protect an individual like

Wilson, who, despite not working in Minnesota full-time, physically spent time in the state, was expected to return to the state for future trainings and meetings, reported to and communicated with Minnesota supervisors, and was discriminated against in the state." *Id.* at *19-20. The district court expressly noted that unlike the situation in *Arnold v. Cargill*, upon which A-B relies in this case, the plaintiff in *Wilson* alleged "a clear physical presence in Minnesota as well as other direct, ongoing, and non-trivial connections to the state." *Id.* at *20. The facts of *Wilson* are remarkably similar to the facts of the present case and provide a compelling argument as to why the MHRA is applicable to Esser's claims.

Although A-B has cited decisions from other jurisdictions in an attempt to bolster its argument that the MHRA is not applicable to Esser's claims, none of those decisions are factually analogous to this case. For example, A-B contends that a recent decision from the Supreme Court of Iowa, *Jahnke v. Deere & Co.*, 912 N.W.2d 136 (Iowa 2018), supports its entitlement to a writ of prohibition in this case. The facts of *Jahnke*, however, are nothing like those involved in Esser's lawsuit against A-B and, in fact, support Esser's argument that the MHRA is applicable to his claims. In *Jahnke*, the plaintiff, while working for the defendant in Iowa, accepted a temporary work assignment in China that involved working for a Chinese subsidiary of the defendant. 912 N.W.2d at 138. As a result of the plaintiff having engaged in unreported sexual relationships with two female, Chinese employees during his temporary assignment, the defendant transferred him back to the United States and assigned him to a position in Iowa that was of lesser authority and lower pay than the position that he held in China. *Id.* at 139-140. The investigation that resulted

in the plaintiff's removal from China was conducted by a compliance committee in China, and the only other employees of the defendant who were involved in any decisions or actions relating to the plaintiff's removal from China worked at the defendant's headquarters in Illinois. *Id.*

After his transfer back to the United States, the plaintiff filed an action against the defendant under the Iowa Civil Rights Act ("ICRA") alleging discrimination based upon his age, sex, and national origin. *Id.* at 138. After the denial of its motion for summary judgment, the defendant applied for an interlocutory appeal to the Supreme Court of Iowa, arguing that the ICRA does not apply extraterritorially and that the alleged discriminatory acts in that case occurred entirely outside Iowa. *Id.* at 140-141. The plaintiff, by contrast, asserted that the ICRA was applicable as long as the case involves citizens of Iowa or a cause of action or rights that arose in Iowa, even if some of the conduct at issue occurred outside Iowa. *Id.* at 145.

In its decision, the Supreme Court of Iowa stated that "[i]n making the determination of where the employment relationship is located, the location of the employee at the time of the alleged civil rights violation is an important, *but not necessarily determinative*, factor," especially "when the employer making the decisions related to the alleged unlawful conduct is located in Iowa." *Id.* at 145 (emphasis added). In that particular case, however, the court found that "the crux of the employment relationship between Jahnke and Deere was rooted in China, and perhaps Illinois, rather than Iowa." *Id.* As the court noted, the plaintiff lived and worked in China at the time of the alleged discriminatory employment

actions, no one in Iowa was involved in the decision to remove the plaintiff from his position in China, and the plaintiff failed to point to any employment decisions that were made from Iowa. *Id.* at 145-147. Because none of the alleged discriminatory actions or the decisions to take those actions occurred in Iowa, the court concluded that the ICRA did not apply to the plaintiff's claims. *Id.* at 148.[3] *Accord EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 46204, at *52-62 (N.D. Iowa 2009) (dismissing sexual harassment claims of two plaintiff-intervenors under the ICRA because neither resided in Iowa and all of the alleged sexual harassment occurred *entirely* outside Iowa). Based upon the foregoing facts, *Jahnke* is clearly distinguishable from the present case because Esser has identified several discriminatory and retaliatory acts that occurred in Missouri.

A-B also relies upon *Taylor v. Rodale, Inc.*, 2004 U.S. Dist. LEXIS 10078 (E.D. Pa. May 27, 2004), to support its contention that the MHRA is not applicable to Esser's claims. In *Taylor*, the plaintiff, who lived in Georgia, filed a lawsuit under the Pennsylvania Human Relations Act ("PHRA") alleging that his supervisor, who worked in Pennsylvania, harassed him and terminated his employment because of his age. 2004 U.S. Dist. LEXIS 10078, at *1-2. In determining whether the plaintiff's claims were covered by the PHRA, the court noted that under the federal Age Discrimination in Employment Act ("ADEA"), the site of the workplace determines the applicability of the ADEA. *Id.* 8. The court decided

[3]As part of its analysis to determine where the alleged discriminatory acts occurred, the Supreme Court of Iowa reviewed the portion of the ICRA that governs venue, which provides further support for Esser's argument that the decisions in *Igoe* and *Hollins* are relevant to this Court's analysis in the present case.

to apply the PHRA in a similar manner and found that because the plaintiff did not allege any facts supporting an inference that he was employed in Pennsylvania, he could not show that his termination or any other discriminatory actions occurred there. *Id.* at *10. *See also Blackman v. Lincoln Nat'l Corp.*, 2012 U.S. Dist. LEXIS 175021, at *9 (E.D. Pa. Dec. 10, 2012) (noting that the PHRA, unlike the MHRA, expressly states that the "purpose and intent of the PHRA was to protect 'the inhabitants of' and 'the people of the Commonwealth'").

There are two significant reasons why *Taylor* should not be treated as persuasive authority by this Court. First, the court's holding in *Taylor* that the location where the employment decisions were made is not relevant to determining the location of the discriminatory acts is directly contrary to this Court's decision in *Igoe* and the Court of Appeals' decision in *Hollins*, which found that the location where the decision making takes place *is* relevant to determining where an unlawful discriminatory act occurs. Second, unlike the present case, there was nothing in the *Taylor* decision indicating that the plaintiff spent *any* time in Pennsylvania as part of his job or that his job had any connections to Pennsylvania other than the fact that his supervisor worked there. There were no facts in *Taylor* to suggest that Pennsylvania could have been considered the site of the plaintiff's workplace.

By contrast, in his lawsuit against A-B, Esser has alleged facts which would support a finding that St. Louis, Missouri, is the site of his workplace, even though he lives in Iowa. As a sales employee who works out of his home, Esser does not have a traditional

workplace like an employee who reports to work at a factory or an office building. Rather, the central "hub" of his job is the regional sales office in St. Louis to which he reports, where his supervisor and support staff are located and where decisions relating to his employment are made. Esser is not required to live in Iowa as part of his job. He could just as easily live in Illinois or Wisconsin, but that does not mean that those states would be considered the site of his workplace. The most logical choice for the location of Esser's workplace, and one that is unlikely to change, is the location of his regional office.[4]

While not directly applicable to this case, the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, provides helpful guidance in determining the location of an employee's worksite when that employee does not work at a traditional, fixed location. To be eligible for leave under the FMLA, an employee must work for an employer with at least 50 employees and must work at a location where the employer has at least 50 employees within 75 miles of the employee's worksite. *See* 29 U.S.C. § 2611(2)(B)(ii). The regulations implemented by the United States Department of Labor state that "[f]or

[4]A-B asserts that "chaos" would ensue if the determination of where a lawsuit can be filed depends upon where the decision maker was located during the decision-making process. While the place where the decision was made is an important consideration, Respondent does not contend that it is the sole consideration. If, for example, one of Esser's supervisors had been on vacation in Hawaii at the time he made a decision relating to Esser's employment, that would not necessarily mean that Esser could bring his claims against A-B under Hawaii law unless there was some evidence that Hawaii had other connections to Esser's claims. In Esser's lawsuit, however, where the allegations are that the discriminatory and retaliatory acts were taken by the decision makers at their normal place of employment in Missouri, and there is evidence of other connections between Esser's claims and the state of Missouri, no "chaos" would result from allowing Esser to bring his claims against A-B under the MHRA.

employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the 'worksite' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report." 29 C.F.R. § 825.111(a)(2). The regulations state further that "[a]n employee's personal residence is not a worksite in the case of employees, such as salespersons, who travel a sales territory and who generally leave to work and return from work to their personal residence . . ." *Id.* "Rather, their worksite is the office to which they report and from which assignments are made." *Id.* In the present case, Esser's "home base" is St. Louis, Missouri, because that is the location from which his work is assigned and to which he reports. The fact that he resides in Iowa is not the determining factor in deciding which state's laws apply.

In *Dow v. Casale*, 989 N.E.2d 909 (Mass. App. Ct. 2013), the Appeals Court of Massachusetts analyzed a similar factual scenario when deciding whether a Florida resident, who worked as a salesperson for a Massachusetts company, could pursue a claim against the defendant for unpaid sales commissions under the Massachusetts Wage Act. 989 N.E.2d at 751. The defendant argued that the plaintiff could not file a claim under that law because he did not reside in Massachusetts and did not perform his work "primarily" in Massachusetts. *Id.* at 752. In making its decision, the court rejected the defendant's argument that "the physical place where work is performed trumps all other considerations." *Id.* at 755. Rather, the court analyzed the facts using choice-of-law principles and found that Massachusetts had a significant relationship to both the

defendant, who was a citizen of Massachusetts, and the plaintiff's employment relationship. *Id.* at 757. As the court noted, the company's headquarters and all of its physical facilities were located in Massachusetts. *Id.* Moreover, the plaintiff went to Massachusetts several times each year and communicated with his supervisor in Massachusetts several times each week by email and telephone. *Id.*

In finding that the plaintiff could pursue him claim under Massachusetts law, the court found it significant that the plaintiff, who worked out of his home in Florida but served customers in at least thirty states, was "essentially a mobile employee, untethered to any particular workplace," and that his duties required him to travel through the United States on the company's behalf "irrespective of where he lived." *Id.* at 758. "In that sense, his work sensibly may be viewed as having 'occurred' in Massachusetts where it benefited [the company], no matter where he physically was located from day to day." *Id.* Ultimately, the court concluded that because Massachusetts had "such a close connection to the parties and their employment relationship," it was "entirely reasonable" to apply Massachusetts law to the plaintiff's claims. *Id.* at 758.

The same analysis should apply to Esser's lawsuit because the work that he performed throughout his sales territory benefited A-B's regional sales office in Missouri regardless of where he was physically located while performing his job or where he chose to live. There are clearly significant connections between Esser's employment and the state of Missouri, and allowing Esser to pursue his discrimination and retaliation claims under the MHRA would be consistent with the purposes of the statute.

The remaining cases that A-B has cited from other jurisdictions to support its argument simply do not involve the same number and types of contacts with the forum state that exist in the present case. Therefore, those cases are easily distinguishable and do not constitute persuasive authority. *See Albert v. DRS Techs., Inc.*, 2011 U.S. Dist. LEXIS 55320, at *5-6 (D.N.J. May 23, 2011) (dismissing plaintiff's claims under the New Jersey Law Against Discrimination where she did not perform any work in New Jersey); *Esposito v. VIP Auto, Inc.*, 2008 Me. Super. LEXIS 258, at *5-6 (Me. Super. May 6, 2008) (finding that plaintiff, who did not reside in Maine and whose place of employment was in Massachusetts, could not bring discrimination claim under Maine statute where she "had only incidental contact with Maine"); *Judkins v. St. Joseph's College of Maine*, 483 F. Supp. 2d 60 (D. Me. 2007) (holding that Maine Human Rights Act was not applicable where defendant was located in Maine, but plaintiff lived and worked in the Cayman Islands and the events upon which plaintiff's complaint was based occurred in the Cayman Islands); *Arnold v. Cargill*, 2002 U.S. Dist. LEXIS 13045 (D. Minn. July 15, 2002) (finding that Minnesota Human Rights Act was not applicable based solely on the fact that defendant's headquarters was located in and the contested company-wide policies emanated from Minnesota, when none of the plaintiffs had ever lived or worked in Minnesota); *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); *Campbell v. Arco Marine, Inc.*, 42 Cal.

App. 4th 1850 (Cal. Ct. App. 1996) (finding that California Fair Employment and Housing Act could not be applied to conduct that occurred outside California, to a plaintiff who was a non-resident of California, and which involved no participation in or ratification of conduct by any employees at defendant's California headquarters).

One of the cases cited by A-B in support of its argument, *Hoffman v. Parade Publications*, 933 N.E.2d 744 (N.Y. 2010), did involve discriminatory conduct that occurred in the forum state, but that case is distinguishable from the present case based upon the language of the particular statutes involved. In *Hoffman*, the plaintiff was a resident of Georgia and worked out of the defendants' office in Atlanta. *Id.* In October 2007, the defendants' president called the plaintiff from the defendants' headquarters in New York City and informed him that the Atlanta office would be closing and that his employment was being terminated. *Id.* The plaintiff then filed an age discrimination action against the defendants in New York under the New York City Human Rights Law and the New York State Human Rights Law. 933 N.E.2d at 745. He argued that he was protected by those statutes because he attended quarterly meetings in New York City, the division of the company for which he worked was managed from New York City, and the defendants' decision to terminate him was made and executed in New York City. *Id.* Upon motion by the defendants, the trial court dismissed the plaintiff's claims on the ground that "neither the City nor State Human Rights Law applied to a plaintiff who does not reside in New York because the 'impact' of defendants' alleged discriminatory conduct was not felt within those boundaries." *Id.*

On appeal, after reviewing the language of the City and State Human Rights Laws, the Court of Appeals of New York found that those statutes applied only to persons who lived within the boundaries of the state of New York or New York City. With regard to the New York City Human Rights Law, the court noted that "it is clear from the statute's language that its protections are afforded only to those who inhabit or are 'persons in' the City of New York." *Id.* at 746. Similarly, with regard to the New York State Human Rights Law, the court found that "[t]he obvious intent of the State Human Rights Law is to protect 'inhabitants' and persons 'within' the state, meaning that those who work in New York fall within the class of persons who may bring discrimination claims in New York." *Id.* at 747.

Unlike the statutes involved in *Hoffman*, there is no language in the MHRA that indicates an intent by the state legislature to limit the scope of the statute to employees who live or work within Missouri's borders. The term "employer" under the MHRA is defined as "the state, or any political or civil subdivision thereof, or any person employing six or more persons within the state, and any person directly acting in the interest of an employer." Mo. Rev. Stat. § 213.010(8). Furthermore, the statute broadly prohibits employers from discriminating against "any individual" and from retaliating against "any other person." Mo. Rev. Stat. §§ 213.055.1(1)(a) and 213.070(2). The only requirement of persons being "within the state" is found in the definition of "employer." There is nothing in the MHRA that requires an employee to live or work "within the state" to be entitled to the protections of the statute. Accordingly, *Hoffman* does not support A-B's argument.

C. Esser Has Alleged Unlawful Employment Practices That Occurred in Missouri.

A-B also contends that even if some of the discriminatory and retaliatory acts that Esser alleged in his First Amended Petition were taken by individuals who were physically present in Missouri, those acts do not constitute unlawful employment practices within the meaning of the MHRA because Esser felt the effects of those acts in Iowa. A-B's interpretation of the language of the MHRA is not supported by existing case law and ignores the significance of the acts that A-B took against Esser.

In his First Amended Petition, Esser expressly alleged that certain discriminatory and retaliatory acts were taken against him by individuals who were physically present in Missouri, including the following: (1) in 2012, while Esser and Doyle were in St. Louis, Doyle told Esser that he was going to receive a rating of 3B on his annual performance review; (2) in 2014, during a meeting in St. Louis, Esser's supervisor gave him a rating of 3B on his annual performance review; (3) in 2015, during a telephone conversation when Croghan was in St. Louis, Croghan told Esser that he was being downgraded to a rating of 1A on his annual performance review; (4) in December 2015, during a telephone call when Croghan and one other Director were in St. Louis, Croghan told Esser that he was being demoted from a Director-level job to a Manager-level job; and (5) in February 2016, Abud sent a memo from his office in St. Louis to all employees in Esser's region stating that,

effective immediately, Esser would be moving to a Non-Equity Market Manager job.[5] Ex. 3, p. A21, ¶ 36; p. A23, ¶ 54; p. A24, ¶ 64; p. A25, ¶¶ 69, 73.

Citing this Court's recent decision in *Kader v. Board of Regents of Harris-Stowe State University*, 565 S.W.3d 182 (Mo. 2019), A-B asserts that the negative performance reviews that Esser received do not, by themselves, constitute "unlawful employment practices" within the meaning of the MHRA because they did not have an adverse impact on Esser's compensation, terms, conditions, or privileges of employment. In *Kader*, the plaintiff, an Egyptian national who was authorized to work in the United States pursuant to a J-1 visa, alleged, in part, that the defendant discriminated and retaliated against her when it failed to appeal the denial of an O-1 "extraordinary person" visa that would have allowed the plaintiff to remain in the United States after her J-1 visa expired. 565 S.W.3d at 184-85. This Court held that the trial court erred in allowing the jury to consider the defendant's failure to appeal the denial of the O-1 visa as an act of discrimination or

[5]Although some of these acts occurred prior to the applicable limitations period, Esser has alleged a series of related acts that began in 2012 and continued into the limitations period. He has also alleged that A-B has engaged in a pattern and practice of discrimination against employees over the age of 40. Ex. 3, p. A26, ¶ 76. As this Court has recognized, a plaintiff may recover for acts of discrimination that occurred prior to the limitations period "if the discrimination is a series of interrelated events." *Wallingsford v. City of Maplewood*, 287 S.W.3d 682, 685 (Mo. 2009). *See also Plengemeier v. Thermadyne Indus.*, 409 S.W.3d 395, 401 (Mo. App. 2013) ("Under the continuing violation theory, a victim of discrimination may pursue a claim for an act occurring prior to the statutory period, if she can demonstrate the act is part of an ongoing practice or pattern of discrimination by her employer.").

retaliation. *Id.* at 189-89. As the Court noted, because the plaintiff failed to demonstrate that she would have been eligible to receive an O-1 visa even if the defendant had appealed the denial, there was no evidence that the failure to appeal the denial had any adverse impact on the plaintiff's employment. *Id.* at 188, 190.

A-B's reliance upon *Kader* is misplaced. As an initial matter, the allegations in Esser's First Amended Petition demonstrate that the negative performance reviews that he received from A-B had an immediate adverse impact on his potential for additional compensation and future promotions. In 2011, Esser received a rating of 4B on his performance review, which meant that he should be developed for promotion within one to two years. Ex. 3, p. A21, ¶ 38. In each subsequent performance review, including the reviews from 2012, 2014, and 2015 noted above, Esser received a rating of either 3B, which meant that he could possibly move laterally, or 1A, which meant that he needed to improve his results and would not receive any stock options. Ex. 3, p. A21, ¶ 38; p. A22, ¶ 46. In *Cunningham v. Kansas City Star Company*¸ 995 F. Supp. 1010 (W.D. Mo. 1998), which this Court cited in the *Kader* decision, the court found that there was "sufficient evidence in the record to support the finding that disciplinary 'write-ups' adversely affected plaintiffs' working conditions in that write-ups affected plaintiffs' opportunities for promotions." 995 F. Supp. at 1025. Esser's case is no different. At a minimum, the lower performance ratings that Esser received delayed his opportunities to be promoted and prevented him from receiving additional compensation in the form of stock options. Therefore, the negative performance reviews, at least two of which were given to Esser in

St. Louis, adversely impacted the terms, conditions, and privileges of his employment and can be considered "unlawful employment practices" within the meaning of the MHRA.

In addition, Esser alleged in his First Amended Petition that at or near the time that he received each of the foregoing performance reviews, he learned that he would not receive a pay increase, which clearly had an adverse impact on Esser's compensation. Ex. 3, p. A21, ¶ 39; p. A23, ¶ 54; p. A24, ¶ 67. Despite what A-B contends, *Kader* does not stand for the proposition that a negative performance review cannot constitute an unlawful employment practice. *See* Brief of Relator in Support of Writ of Prohibition, p. 36 (stating that "any potential 'unlawful employment practice' is not the ratings or reviews themselves"). *Kader* simply recognizes that a particular employment action must have an accompanying consequence that adversely affects the plaintiff's compensation, terms, conditions, or privileges of employment before the MHRA will provide a remedy for that action. Because Esser has alleged a loss of pay as a result of the negative performance reviews that he received, the reviews themselves are actionable as unlawful employment practices. *See, e.g.*, *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 402-03 (6th Cir. 2008) (finding that downgraded performance evaluation constituted an adverse employment action where plaintiff did not receive as high of a pay increase as he would have otherwise received); *Gillis v. Georgia Dep't of Corrections*, 400 F.3d 883, 888 (11th Cir. 2005) (holding that "an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action"); *Bivins v. Gonzales*, 2005 U.S. Dist. LEXIS 26114, at *9 (D. Md. Oct. 26, 2005) (finding that negative performance evaluation, leading

to the denial of a pay increase, constituted an adverse action). Therefore, contrary to A-B's argument, Esser's First Amended Petition shows that "unlawful employment practices" *did* occur in Missouri.

Surprisingly, A-B also argues that Esser's demotion from Retail Sales Director to Non-Equity Market Manager occurred in Iowa rather than Missouri. As Esser alleged in his First Amended Petition, Abud stated in the memo that he prepared regarding the change to Esser's job, which he sent from his office in St. Louis, that the change would take place "effective immediately." Ex. 3, p. A25, ¶ 73. A-B has stated in its brief that the act of discrimination was the *execution* of the decision to demote Esser. The memo from Abud clearly demonstrates that the *execution* of the demotion decision occurred in St. Louis at the time Abud sent the memo to the other employees in Esser's region. There is simply no basis for A-B's argument that the change to Esser's employment status occurred in Iowa. Rather, as Esser's allegations demonstrate, the change occurred at the regional sales office in St. Louis where his supervisors and the human resources department for Esser's region were located. Ex. 3, p. A18, ¶ 17.

Based upon the foregoing discussion, it is clear that Esser has alleged that unlawful employment practices occurred in Missouri and that his claims fall within the scope of the MHRA.

D. Allowing Esser's Claims to Proceed under the MHRA Will Not Raise Any Conflict-of-Law or Commerce Clause Issues.

A-B's final arguments in support of its entitlement to a writ of prohibition are that applying the MHRA to Esser's claims could potentially raise conflict-of-law and Commerce Clause issues. There is no merit to these arguments. The United States Supreme Court has held that the Commerce Clause "precludes the application of a state statute to commerce that takes place *wholly outside of the State's borders*, whether or not the commerce has effects within the State." *Edgar v. Mite Corp.*, 457 U.S. 624, 642-43 (1982) (emphasis added). As noted above, Esser is alleging that A-B engaged in discriminatory and retaliatory conduct *in Missouri*. Therefore, the Commerce Clause is not implicated in this case.

A-B's argument regarding conflict-of-law issues is similarly baseless. As an initial matter, the United States Supreme Court has recognized that "a set of facts giving rise to a lawsuit, or a particular issue within a lawsuit, may justify, in constitutional terms, application of the law of more than one jurisdiction." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981). Hence, even if Esser might have been able to bring his claims against A-B in Iowa, he is not precluded from bringing those same claims in Missouri. Furthermore, as the Supreme Court stated in *Hague*, "[i]n deciding constitutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litigation." *Id.* at 308. "In

order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Id.* (internal citation omitted). Clearly, as reflected in Esser's First Amended Petition, Missouri has significant contact or significant aggregation of contacts with the facts and occurrences alleged in Esser's lawsuit. Therefore, no constitutional issues would arise by applying the MHRA to Esser's claims.

CONCLUSION

As the foregoing discussion demonstrates, A-B has failed to meet its burden of establishing that Respondent acted in excess of her jurisdiction or authority by denying A-B's motion to dismiss Esser's claims. Not only has A-B failed to demonstrate that this case presents any "extraordinary" circumstances that would justify the issuance of a writ of prohibition, but A-B has also failed to correctly analyze the applicable law. Accordingly, Respondent respectfully requests that this Court deny A-B's petition for a writ of prohibition, quash this Court's preliminary writ of prohibition, and allow Esser's claims to proceed in the Circuit Court of the City of St. Louis, Missouri.

DOBSON, GOLDBERG, BERNS & RICH, LLP

By: /s/ Gregory A. Rich

Gregory A. Rich, #45825
5017 Washington Place, Third Floor
St. Louis, MO 63108
Tel: (314) 621-8363
Fax: (314) 621-8366
Email: grich@dobsongoldberg.com

Attorneys for Respondent and Plaintiff John Esser

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the limitations set forth in Rule 84.06(b). According to the word count function of Microsoft Word, the foregoing brief, from the Table of Contents through the Conclusion, contains 10,924 words.

/s/ Gregory A. Rich

CERTIFICATE OF SERVICE

The undersigned certifies that on August 27, 2019, the foregoing document was served through the Court's electronic filing system upon the following attorneys of record:

James F. Bennett
Elizabeth C. Carver
Michelle D. Nasser
DOWD BENNETT LLP
7733 Forsyth Blvd., Ste. 1900
St. Louis, MO 63105

/s/ Gregory A. Rich