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

REPLY BRIEF OF RELATOR IN SUPPORT OF WRIT OF PROHIBITION

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INTRODUCTION

Relator Anheuser-Busch, Inc. ("A-B") explained in its opening brief ("Br.") that under Missouri's long-standing presumption against extraterritorial application of its laws, the Missouri Human Rights Act (MHRA) should not be applied to regulate the employment relationship between A-B and Plaintiff John Esser, who has worked for A-B in Iowa since 1995. In his brief for the Respondent Circuit Judge ("RespBr."), Plaintiff insists that he has sufficient "contacts" and "connections" with Missouri to bring a claim under the MHRA even though he lives and works in Iowa, but does not suggest what number and type of contacts suffice. He offers the Court no workable standard for determining when an out-of-state employee can invoke the statute, but instead maintains that "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" (RespBr. 15).

Plaintiff's standardless position that "there are no rules" and "each case must be decided based upon its own facts" ignores the great weight of authority cited by A-B holding that state antidiscrimination statutes, including the MHRA, cannot be applied extraterritorially to protect out-of-state employees (Br. 23-29). Plaintiff's stance also invites the very sort of chaos that A-B warned of in its opening brief (Br. 10, 40). Employees in and outside Missouri need clarity and certainty as to where they may properly bring discrimination claims *before* they file their administrative charges of

discrimination, particularly since §213.075[1] provides that the filing of a complaint with the MCHR is a jurisdictional prerequisite to filing suit (Apdx-A18). Employers, too, should not be required to bear the expense and other burdens of discovery and summary judgment proceedings in cases brought by plaintiffs who are not entitled to invoke the MHRA. And trial courts need guidance so they can properly and efficiently rule on dispositive motions in cases involving an out-of-state employment relationship.

By making its writ permanent, this Court will not only join the "overwhelming majority of courts" that "have rejected extraterritorial application of state civil rights statutes such as the MHRA," *Mimmovich v. Garney Cos., Inc.*, No. 10CY-CV11361(Clay Cnty. Cir. Ct. June 21, 2011) (Ex. 10 at 4, ¶8); *see also Blackman v. Lincoln National Corp.*, 2012 WL 6151732, *6 (E.D. Pa. Dec. 10, 2012), but will also provide the clarity and guidance needed by litigants and trial judges alike.

[1]As in A-B's opening brief, all statutory references are to Revised Statutes of Missouri unless otherwise noted.

I. THE COURT SHOULD MAKE ABSOLUTE ITS PRELIMINARY WRIT OF PROHIBITION AND DIRECT RESPONDENT TO DISMISS PLAINTIFF'S FIRST AMENDED PETITION BECAUSE HE CANNOT STATE A CLAIM UNDER THE MHRA.

A. A Writ Is An Appropriate Remedy Here.

Plaintiff urges the Court to deny A-B's writ petition because "A-B has an adequate remedy by way of appeal" (RespBr. 15). As the Court implicitly recognized in issuing its preliminary writ in this case, the discretionary writ of prohibition is appropriate here. The Court recently reaffirmed that "'prohibition will lie if plaintiff's petition does not state a viable theory of recovery,'" *State ex rel. Church & Dwight Co. v. Collins*, 543 S.W.3d 22, 26 (Mo. banc 2018) (quoting *State ex rel. Union Elec. Co. v. Dolan*, 256 S.W.3d 77, 81 (Mo. banc 2008)), because, when a complaint is "insufficient to justify court action, it is 'fundamentally unjust to force another to suffer the considerable expense and inconvenience of litigation' in addition to being 'a waste of judicial resources and taxpayer money.'" *Id.* (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 330 (Mo. 2009)).

A-B does not have an adequate remedy by way of an appeal in this matter because denial of a motion to dismiss is not a final judgment and is not ordinarily appealable. *See In re Halverson ex rel. Sumners*, 362 S.W.3d 443, 448 n.7 (Mo. App. S.D. 2012). Plaintiff suggests that proceeding through discovery would "likely provide additional facts" (RespBr. 15) to bolster his claim that he is entitled to invoke the MHRA, although it is unclear what information he believes could be pertinent that he does not already know. In any event, no amount of discovery will change the critical fact that at all times relevant to his claims, "when Esser was not traveling throughout his sales territory" (which included

Iowa but not Missouri), "he worked out of his home" in Iowa (RespBr. 7). It would be "fundamentally unjust" to require A-B to bear the expense and other burdens of discovery, another round of dispositive motions, and potentially a trial in this case when Plaintiff, who is an Iowa resident who works in Iowa, is not entitled to relief under the MHRA.

B. The Presumption Against Extraterritorial Application of Missouri Law Applies Here.

As A-B argued in its opening brief (Br. 19-31), under the well-established presumption against extraterritorial application of Missouri statutes, the MHRA cannot be applied to extend protections to individuals, including Plaintiff, who work outside Missouri. A-B contrasted the MHRA, which lacks any language indicating a legislative intent to extend beyond Missouri, with §287.110.2 of the Missouri Workers' Compensation Law (MWCL) (Apdx-A27), which explicitly provides for extraterritorial effect in specific limited circumstances (Br. 22). And A-B noted two circuit court decisions specifically holding that the MHRA's reach does not extend to an employment relationship outside the state (Br. 23-25), as well as a string of cases from federal and state courts outside Missouri holding that the forum state's antidiscrimination statute could not be applied extraterritorially to an employee living and working in another state (Br. 25-29).

In response, Plaintiff ignores the contrast between the MHRA's silence on extraterritorial reach and the MWCL's express coverage of certain employee injuries sustained outside Missouri.[2] Referring to the broad definition of "employer" in the MHRA,

[2]Judge Gabbert specifically noted that distinction in holding that the MHRA could not be applied extraterritorially (*Mimmovich v. Garney Cos.*, No. 10CY-CV11361 (Clay Cnty. Cir. Ct. June 21, 2011) (Ex. 10 at 4, ¶¶6-7) (discussed at Br. 24). A number of cases from

he argues that "[t]here 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" (RespBr. 34, citing §§213.010(8)). But the MWCL's definitions of "employee" ("every person in the service of any employer, as defined in this chapter …") and "employer" ("[e]very person, partnership, association, corporation… using the service of another for pay; the state, county municipal corporation…") are similarly broad. *See* §§287.020.1, 287.030. And still the General Assembly chose to expressly provide in §287.110.2 for extraterritorial coverage of certain injuries incurred outside of Missouri. The General Assembly did so because it understood that explicit provision was necessary to overcome the presumption against extraterritorial application. *See, e.g., Union Underwear Co.*, 50 S.W.3d at 191 (noting that under the presumption, "the use of the terms "any' or 'all' to persons covered by the legislation does *not* imply that the enacting legislature intended that the legislation be applied extraterritorially.") (emphasis original); *Judkins v. Saint Joseph's College of Maine*, 483 F. Supp. 2d 60, 66 (D. Me. 2007) (the use of "broad and general terms" in a statute "is insufficient to overcome the presumption against extraterritorial application").

Plaintiff maintains that whether "the MHRA may be applied extraterritorially is not pertinent" here because his job "was based out of a regional sales office in Missouri and

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other jurisdictions have likewise noted, in declining to apply the forum state's antidiscrimination statute to an out-of-state employee, that the presence of an extraterritorial provision in the state's worker's compensation statute indicates that the omission of such a provision in the antidiscrimination statute is intentional. *See, e.g., Jahnke v. Deere & Co.*, 912 N.W.2d 136, 142-43 (Iowa 2018); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001); *Taylor v. Rodale, Inc.*, 2004 WL 1196145, *2, n.2 (E.D. Pa. 2004); *Blackman*, 2012 WL 6151732, *4 & n.7.

his allegations involve discriminatory and retaliatory conduct that occurred in Missouri" (RespBr. 17; *see also* RespBr. 21). By his frequent references to his job being 'based out of" St. Louis, Plaintiff appears to mean that his immediate supervisor and support staff are located there. He attempts to distinguish the abundant caselaw cited by A-B on the basis that he therefore had greater "connections" and "contacts" with Missouri than the out-of-state plaintiffs in those cases had with their chosen forum (RespBr. 21, 32).[3] However, A-B's cases show that such facts – where the allegedly discriminatory decision was made in the forum state, or the supervisors who made it are located there – are not sufficient to overcome the presumption against extraterritorial application of Missouri statutes.

In fact, in most of the cases A-B cited, the courts declined to apply the forum state's antidiscrimination law to an out-of-state employee *even though* the decision or policy complained of was made in or "emanated from" the forum state. *See* Br. 29 (listing cases in which court denied out-of-state employee's attempt to seek protection under forum state's civil rights law even though the employee alleged that the policy or decision at issue had been made in the forum state); *see also Jones v. Kansas City Southern Railway*, No.1016-CV16357 (Jackson Cnty. Cir. Ct. Dec. 17, 2010) (Ex. 9 at 5) (decision to fire plaintiff was allegedly made in Missouri but executed in Louisiana, where she worked); *Blackman*, 2012 WL 6151732, *7 (denying plaintiff's motion to amend her complaint because proposed allegation that "the decision to demote Plaintiff," who worked for defendant in Illinois, "was made at Defendant's headquarters in Pennsylvania is of no

[3]A-B will not repeat its discussion of those cases but notes that Plaintiff's claim that they "are easily distinguishable" (RespBr. 32) depends on leaving out pertinent facts.

consequence"). Plaintiff effectively concedes that allegations that discriminatory decisions were made in Missouri are not enough to get across his undefined threshold for MHRA coverage, as he describes the employee's allegation in *Jones* that the decision to fire her had been made in Missouri as only a "minimal connection" with Missouri (RespBr. 20-21).

The Court can infer that because the decision or policy at issue in those cases was made in the forum state, the plaintiff-employees' supervisors were located in the forum state as well. Indeed, in many of those cases, the court so noted, but this was insufficient to warrant extraterritorial application. In *Union Underwear Co.*, for example, the dissent observed that the plaintiff "reported directly to the company headquarters in Bowling Green and the decision to demote [him] because of his age was made and approved" there.[4] 50 S.W.3d at 193 n.1. *See also Ferrer v. MedaSTAT USA, LLC*, 145 F. App'x 116, 117 & n.1 (6th Cir. 2005) (plaintiff, who was hired as regional sales manager for Florida, Alabama, and Mississippi, alleged that her former supervisors, who were located in Kentucky, retaliated against her in violation of the Kentucky Civil Rights Act for reporting

[4] Given that "every decision that [gave] rise to Barnhart's claim occurred at corporate headquarters" in Kentucky, 50 S.W.3d at 193 n.1, the majority's statement that "[a]ny discrimination against Barnhart occurred in South Carolina, or … Alabama," *id.* at 190, where he lived and worked during periods relevant to his complaint, is consistent with A-B's argument that employment discrimination occurs in the employee's workplace. *See also Judkins*, 483 F. Supp. 2d at 65 (even though "decisions were made in Maine regarding Plaintiff's employment," "[a]ny discrimination against Plaintiff occurred in the Cayman Islands," where she worked); *Taylor*, 2004 WL 1196145, *3 (plaintiff, who worked in Georgia and was supervised by an employee in Pennsylvania, did not "allege[] any facts supporting an inference that he was employed in Pennsylvania and therefore that the termination and other discriminatory actions occurred there.").

that another employee had sexually harassed her in Florida); *Taylor*, 2004 WL 1196145, *1, 2 (although plaintiff lived and worked for defendant in Georgia, he "contend[ed] that extraterritorial application is not required because the alleged discriminatory practices occurred in Pennsylvania, where his supervising vice president … was located"; court determined that "[t]he relevant location" with regard to the Pennsylvania statute "is the location of Plaintiff's workplace, not [his supervisor's] location")).

Plaintiff also claims that his "at least monthly" "visits" to St. Louis (RespBr. 8, 21) set him apart from the employees in the cases A-B cited. In effect, Plaintiff contends that his alleged presence in Missouri for as few as 12 days a year – for meetings, trainings, and employee reviews (Ex. 3, p. 3, ¶19), not his day-to-day sales efforts – entitles him to the protections of the MHRA. He cites only one case, *Wilson v. CFMOTO Powersports, Inc.*, 2016 WL 912182 (D. Minn. March 7, 2016) (RespBr. 24-25), that allowed an out-of-state employee's claim under the forum state's civil rights law to survive a motion to dismiss based in part on the employee's travel to the forum state. A-B distinguished *Wilson* in its opening brief, and noted that if occasional travel to Missouri does not suffice for the explicit extraterritorial application of the MWCL, occasional work trips to Missouri cannot justify out-of-state application of the MHRA, which has no comparable extraterritorial provision (Br. 30-31, citing *Mimmovich*, Ex. 10, at 4, ¶6).

Other courts have rejected an out-of-state employee's claim that occasional work travel to the forum state entitled the employee to relief under that state's antidiscrimination law. In *Blackman*, 2012 WL 6151732, for example, the court rejected the Illinois plaintiff's claim that amending her complaint to allege that she attended quarterly meetings at the

defendant's Pennsylvania office and interacted daily with employees in that office would save her claim under the Pennsylvania Human Rights Act. *Id.* at *7. *See also Esposito v. VIP Auto*, 2008 WL 4106432 (Me. Super. 2008) (holding that employee who worked for Maine company in Massachusetts could not bring claim under Maine Human Rights Act, even though "she sometimes had contact in Maine with company officials").

Plaintiff admits that at all relevant times "when [he] was not traveling throughout his sales territory [of Iowa, Minnesota, Nebraska, North Dakota, and South Dakota], he worked out of his home" in Iowa (RespBr. 7). His home was, in effect, A-B's sales office in Iowa. Nonetheless, he maintains that he has "alleged facts which would support a finding that St. Louis, Missouri, is the site of his workplace" (RespBr. 28). Those "facts" are that he works from his Iowa home rather than a "traditional workplace," such as "a factory or an office building,"' and that he "is not required to live in Iowa" and could "just as easily live in Illinois or Wisconsin" (RespBr. 28-29). He proposes that "[t]he most logical choice for the location of Esser's workplace … is the location of his regional office," where, he says, "his supervisor and support staff are located and where decisions relating to his employment are made" (RespBr. 29).[5]

In support of his fanciful theory that his workplace should be deemed to be somewhere other than the place where he actually works, Plaintiff cites a Family and Medical Leave Act (FMLA) regulation providing that for "employees with no fixed worksite," such as construction workers, truck drivers, and salespersons, "the 'worksite' is

[5] Plaintiff's First Amended Petition does not in fact allege that "decisions relating to his employment" are made in St. Louis.

the site to which they are assigned as their home base, from which they are assigned, or to which they report" (RespBr. 29-30, citing 29 C.F.R. §825.111(a)(2)). But FMLA and its regulations represent distinct policy considerations from the MHRA and are plainly inapposite here. Congress intended through FMLA "to balance the demands of the workplace with the needs of families," and "to entitle employees to take reasonable leave" for personal or family medical issues or child care "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. §2601(b)(1)-(3). The CFR section Plaintiff relies on reflects the Department of Labor's attempt to maintain the same balance between an employee's need to take leave and the employer's interest in meeting its staffing requirements. The regulation allows more "employees with no fixed worksite" to be eligible for FMLA leave while ensuring their employers have sufficient capacity in their workforce to redirect work that the on-leave employees would have otherwise been assigned.

No such policy consideration warrants treating Plaintiff differently than Iowa employees who report for work at "a factory or an office building." Regardless of whether they perform their work in a factory, office building, or at their own dining room table, most employees would prefer to bring suit in their home state. *See Esposito*, 2008 WL 4106432 (noting that "[i]f 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"). Plaintiff's self-serving declaration that "Iowa has a very minimal connection to the allegations in Esser's lawsuit" (RespBr. 21-22) is simply contrary to fact. As a resident

of Iowa who works and sustained any adverse consequences of the alleged discrimination and retaliation there, Plaintiff could have brought his age discrimination and retaliation claims in Iowa under the Iowa Civil Rights Act and/or the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq*. No reason exists to consume judicial and taxpayer resources simply to provide him an alternative forum for relief in this state.

C. Plaintiff Has Not Alleged that Any Discriminatory Acts that Adversely Affected Him Occurred in Missouri.

A-B's opening brief argued that even assuming an out-of-state employee is entitled in some circumstances to invoke the protections of the MHRA, at a minimum the employee must allege that an "unlawful discriminatory practice," as defined in §213.010(20) of the MHRA, that adversely impacted the employee occurred in Missouri (Br. 32-41). Plaintiff has no response to A-B's argument, based on the text of the statute, that the MHRA covers only *acts* of discrimination – not the decision to demote or to deny a bonus, but the *execution of the decision* – and that only acts that have "some adverse impact on the plaintiff" are actionable (Br. 34-37, quoting *Kader v. Board of Regents of Harris-Stowe State University*, 565 S.W.3d 182, 189 (Mo. banc 2019) and discussing §213.010(20)). Instead he relies on two opinions addressing venue under the MHRA (RespBr. 17-19). A-B explained in its opening brief why Plaintiff's reliance on those venue opinions, neither of which considered what constitutes an "unlawful discriminatory practice" under the MHRA, is misplaced (Br. 37-39).

Plaintiff takes issue with A-B's assertion that the performance reviews he complains of are not "unlawful employment practices" under the MHRA because the reviews

themselves did not adversely impact him (RespBr. 36-39, responding to Br. 36). Rather, any adverse impact came from the alleged resulting deprivation of pay increases and stock options. Plaintiff argues that the reviews "had an immediate adverse impact on his potential for additional compensation" and "prevented him from receiving additional compensation in the form of stock options," and that "at or near the time that he received … the … reviews, he learned that he would not receive a pay increase" (RespBr. 37-38). But his argument proves A-B's point. Any adverse impact resulting from the reviews, including lost pay increases and stock options, occurred in Iowa, where he would have received them.[6]

The same is true of Plaintiff's alleged demotion. Before the demotion, Plaintiff was a Regional Sales Director for A-B, working in Iowa and responsible for a territory that included Iowa and not Missouri. When the alleged demotion took effect, he was still working for A-B in Iowa, but as a Non-Equity Market Manager. The change in Plaintiff's position and title occurred in Iowa, not where the decision to demote was made, and not where the regional announcement originated from.

[6]Although Plaintiff also claims "his potential for … future promotions" was affected by these long-ago reviews (RespBr. 37), he does not identify a single promotion for which he would have been eligible.

D. Declining to Apply the MHRA to Non-Residents Working Outside of Missouri Avoids Potential Commerce Clause and Conflict-of-Law Issues.

A-B cited a number of cases holding that potential conflict-of-law and Commerce Clause issues militate against extraterritorial application of a state antidiscrimination statute (Br. 41-42). Plaintiff dismisses the concerns of those state and federal courts because, according to him, *his* claims do not implicate any such constitutional issues (RespBr. 40). But as those courts observed, applying the well-settled presumption against extraterritorial application of state laws allows courts to avoid knotty constitutional questions, including determinations of whether a particular employer-employee relationship has sufficient contacts with the forum to apply its law even though the employee works in a different state. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-13 (1981) (for forum law to apply, the forum state "must have significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."). As the Sixth Circuit explained, the Kentucky Supreme Court's decision in *Union Underwear Co.* indicates that it "made a policy decision, based on a combination of interstate comity and a desire to avoid choice-of-law difficulties, not to apply the KCRA to employment situations that might arguably create a conflict with the laws of other states." *Ferrer*, 145 F. App'x at 120.

The Kentucky Supreme Court recognized that the "difficult choice of law questions" that could result from extraterritorial application of one state's age-discrimination legislation "would delay rather than expedite the disposition of age-based discrimination cases." *Union Underwear Co.*, 50 S.W.3d at 193. Adherence to the presumption against

extraterritorial application provides the certainty and clarity that employees, employers, and trial courts need to determine whether a discrimination or retaliation complaint is properly brought under the MHRA, and will lead to more efficient and timelier resolution of claims.

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: September 6, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Reply 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 4,076 words, excluding the cover, this certificate, and the signature block, as determined by the Microsoft Word 2010 Word-counting system.

/s/ *James F. Bennett*

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2019, pursuant to Supreme Court Rule 103.08, I electronically filed the foregoing Reply 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*
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