

Cases before Missouri Supreme Court test claims for out-of-state workers

By: Nicholas Phillips October 31, 2019

Does the Missouri Human Rights Act protect an employee from discrimination by a Missouri company if he or she lives and works outside of the state?

It is a question of first impression for the Missouri Supreme Court that animated two separate oral arguments held Oct. 23.

The first case involved Dobbs Tire & Auto, which is headquartered in High Ridge but has locations across the river in Illinois. An Illinois employee, Dwight Tuttle, alleged that Dobbs and its representatives, David and Dustin Dobbs, constructively discharged him because of his age and in retaliation for his involvement in an MHRA investigation.

The second case involved St. Louis-based brewer Anheuser-Busch, which was sued by a salesman who lived in Iowa and worked in a sales territory that did not include Missouri. The salesman, John Esser, alleged age discrimination and retaliation for complaining about it.

In both cases, the defense argued there is a presumption against extraterritorial application of the MHRA, while the plaintiffs argued that the claims weren't extraterritorial at all because the companies took the actionable conduct in Missouri.

Judge Laura Denvir Stith, who asked the plurality of questions in both hearings, asked Dobbs' attorney, Robert Younger of McMahon Berger in St. Louis, whether "extraterritorial" describes the employer's conduct or the impact on the employee.

Younger replied, "I want to know where the employee works and where did the discriminatory conduct actually occur, not the decision-making process or the thoughts [of the employer]. We're not the thought police."

Yet under that theory, argued Tuttle's attorney, Jerome Dobson of Dobson, Goldberg, Berns & Rich in St. Louis, "a Missouri corporation that employs a person outside of Missouri would be free to discriminate at will against those employees who live or work outside of Missouri."

Judge Zel M. Fischer pushed back, saying such a person would have remedies in federal court or in the state where they lived.

Dobson responded by saying that if the question was whether the legislature meant to protect employees of Missouri firms outside the state, the answer is yes: In 2017, the General Assembly overhauled the MHRA and "had a golden opportunity to restrict who was covered by the MHRA, and at no time did they take advantage of that."

Fischer said he was "intrigued and interested" in that argument, because if legislators had been aware of the general presumption in Missouri law against extraterritorial application, then they wouldn't have felt any motivation to clarify whether the MHRA applied to out-of-state employees.

During the Anheuser-Busch argument, the judges revisited the exact elements of discrimination. The brewer's attorney, Jim Bennett of Dowd Bennett in St. Louis, argued that under the language of the statute, it's an "unlawful employment practice for an employer to discriminate."

"The statute text doesn't say 'decide to discriminate,'" Bennett said. "It says 'to discriminate.'" Bennett argued that it was impractical to have causes of action such as these turn on where the decision-makers happen to be located during decision-making processes, which might entail "a phone call with six people in six different states."

The plaintiff's attorney, Gregory A. Rich, also of Dobson, Goldberg, Berns & Rich, said he drew a different conclusion from the text of the statute: that a major purpose of the law was to regulate Missouri employers' conduct, so the focus is where their conduct occurred.

Judge W. Brent Powell asked whether an employer signaling to a colleague in an email the intention to take an adverse action against an employee for a discriminatory purpose would violate the law even if the adverse action never occurs. Rich said he wouldn't go that far.

Judge Paul C. Wilson tried to clarify with a series of questions, asking if what's really necessary is both a decision by the employer *and* a corresponding adverse action.

Rich said the adverse action is "what makes it actionable under the statute."

Judge Mary R. Russell noted Rich's claim that another major purpose of the statute is to protect Missouri citizens. Was there any evidence in the record, she asked, that the Iowa-residing plaintiff was also a Missouri citizen?

Rich replied that the plaintiff did, in fact, own a home in the Lake of the Ozarks.

"I guess your home is where your heart is?" Russell responded. Laughter filled the courtroom.

The cases are *State of Missouri ex. rel. Anheuser-Busch LLC v. Moriarty*, SC97845, and *Tuttle v. Dobbs Tire & Auto Centers Inc.*, SC97721.

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