NO. 08-CI-06125

JEFFERSON CIRCUIT COURT
DIVISION THIRTEEN
JUDGE FREDERIC COWAN

PATRICK JUST — PLAINTIFF

VS.

FERGUSON ENTERPRISES, INC. — DEFENDANT

OPINION AND ORDER
GRANTING SUMMARY JUDGMENT
TO DEFENDANT

This is an employment action filed under the Kentucky Civil Rights Act ("KCRA"), KRS Chapter 34, in which the plaintiff claims the defendant wrongfully terminated him due to a disability or perceived disability. Defendant has moved to dismiss the complaint under CR 12.02(f). The Court, however, will treat it as filed under CR 56 since both parties presented matters outside the pleadings which the Court has considered. *See* CR 12.02.

The basis for defendant's motion is that under the decision of *Union Underwear Co., Inc. v. Barnhart*, 50 S.W.3d 188 (Ky. 2001), the KCRA cannot be applied to this case because the defendant employed the plaintiff exclusively outside Kentucky—specifically, in Florida—at all times during their relationship, and terminated plaintiff's employment outside Kentucky. The parties have filed extensive briefs and the matter is now submitted to the Court for decision.[1] Being sufficiently advised, the Court **GRANTS**

[1] The Court notes that the defendant filed an AOC 280 on May 9, 2009, and the Court is issuing this opinion well beyond its usual 90-day limit for ruling on such submissions. The reason for this delay is the

the motion, believing that there can be no genuine issue of fact for the jury in this action and that defendant is therefore entitled to judgment as a matter of law.

I.

Defendant Ferguson Enterprises, Inc., a Virginia corporation headquartered in Newport News, Virginia, with satellite offices in Kentucky and throughout the United States, is engaged in the wholesale distribution of plumbing supplies, pipes, valves and fittings. Plaintiff Patrick Just initiated contact with Ferguson, seeking employment, after he graduated from college in 2006, and was hired in June of 2006, after sending his resume and participating in a telephonic interview. He began in the Sales Manager Trainee program in Orlando, Florida, which, according to his job offer, was to last "a minimum of 12-18 months. After that timeframe, you may be expected to transfer to another location within the company." Just claims in an affidavit that he wanted to return to Kentucky after he completed training, but there is nothing in the affidavit or other submitted documents that can be construed as evidencing Ferguson's agreement to accommodate this desire.

Just participated in the training program until October 2006, when Ferguson terminated him. Ferguson claims the termination was essentially the result of a bad economy. Just claims the termination was the result of a colon disease that manifested itself in August of 2006. While they disagree over the cause for his termination, the parties agree that Just performed all of his employment duties with Ferguson in Florida and that Ferguson terminated him in Florida.

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clerk's office mistakenly failed to forward the file to this division until September 11, 2009, after the Court had reacted to an inquiry by the Hon. John Minton, Chief Justice of the Kentucky Supreme Court, concerning the status of the pending motion.

II.

Summary judgment is used to terminate litigation when, as a matter of law, it appears impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant. *Steelvest v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480-82 (Ky. 1991); and *Paintsville Hospital Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985). In deciding whether to grant summary judgment, the Court must view the factual record in a light most favorable to the party opposing the motion and all doubts are to be resolved in his favor. *Steelvest* at 480. The movant bears the initial burden of convincing the court by evidence of record that no genuine issue of material fact is in dispute, but then the burden shifts to the party opposing summary judgment to present at least some affirmative evidence showing there is a genuine issue of material fact for trial. *Id.* at 482. The trial court is not required to "search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.,* 886 F.2d 1472, 1479-80 (6th Cir.1989). Rather, "[t]he nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact." *In re Morris,* 260 F.3d 654, 665 (6th Cir.2001).

The trial judge must examine the evidence not to decide any issue of fact but, rather, to discover if a genuine issue exists. *Steelvest* at 480. While the Kentucky Supreme Court in *Steelvest* used the word "impossible" in describing the strict standard for summary judgment, the Court later stated that the word is to be applied "in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992), *citing Paintsville Hospital, supra*, 683 S.W.2d at 256. Summary judgment is appropriate

"if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.*, *citing* CR 56.03. Accordingly, the Court's focus should be on what is of record rather than what might be presented at trial. *Hallahan v. Courier-Journal*, 138 S.W.3d 699, 705 (Ky. App. 2004), *citing Welch v. American Publishing Co. of Kentucky*, 3 S.W.3d 724, 730 (Ky.1999).

III.

Ferguson moves for summary judgment on all of the KCRA claims because the conduct Just claims amounted to discrimination occurred outside the state of Kentucky, arguing that such extraterritorial application of the KCRA is prohibited by *Union Underwear Comp., Inc. v. Barnhart,* supra, 50 S.W.3d at 188. This Court agrees. In *Union Underwear,* the plaintiff brought a claim against his employer, Fruit of the Loom, alleging he had been illegally discharged because of his age in violation of the KCRA. 50 S.W.3d at 189. The defendant employer maintained its headquarters in Bowling Green, Kentucky, the only connection the case had to Kentucky. *Id.* During all of plaintiff's employment he lived and worked outside of Kentucky—in both South Carolina and Alabama. *Id.* at 190. He was employed in South Carolina when dismissed from his job. *Id.* Any discrimination occurred in either South Carolina or Alabama. *Id.* The court held that the KCRA does not have extraterritorial application and that allowing the plaintiff to obtain relief under the KCRA would be an extraterritorial application of the Act. *Id.* at 193.

> We begin our analysis with the well-established presumption against extraterritorial operation of statutes. That is, unless a contrary intent

> appears within the language of the statute, we presume that the statute is meant to apply only within the territorial boundaries of the Commonwealth. 73 Am.Jur.2d, *Statutes,* § 359 (1974). This rule of construction helps to protect against unintended clashes of the laws of the Commonwealth with the laws of our sister states. *See McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10, 20-22, 83 S.Ct. 671, 9 L.Ed.2d 547, 554-55 (1963).
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> The General Assembly is obviously aware of the presumption against extraterritorial application and how to overcome it.
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> * * * *
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> [N]othing in the Act implies that it was intended to operate beyond Kentucky's borders. In fact, the language of the Act indicates otherwise. KRS 344.020(1)(b) provides in pertinent part that the purpose of the Act is to 'safeguard all individuals *within the state* from discrimination. . . .' Thus, we will not infer the extraterritorial reach of the KCRA absent a positive showing by Barnhart that the General Assembly intended that the Act be applied extraterritorially.

50 S.W. 3d at 190, 191 (emphasis in original). In an attempt to overcome Ferguson's showing that application of the KCRA in the instant case would be as improper as it was in *Union Underwear*, Just argues that he was a Kentucky resident throughout his employment with Ferguson, unlike the plaintiff in *Union Underwear*. He also argues, in essence, that Ferguson "lured" him away from Kentucky and that he wanted to return to Kentucky after his training was complete.

While at first glance there may be some appeal to these arguments, the Court ultimately finds them unavailing. The crux of *Union Underwear*, as evidenced by the above quote, is that the General Assembly intended the KCRA to control conduct "within the state" of Kentucky. Just points to nothing in the case law or the Act that convinces the Court that the General Assembly intended to extend the extraterritorial reach of the KCRA to protect Kentucky residents who are employed out-of-state, regardless of whether they were "lured" away and regardless of whether there was a mere possibility

they could return at some point. It is undisputed that the entire employment relationship between Just and Ferguson was performed outside Kentucky and that the alleged discrimination occurred outside Kentucky. Accordingly, the Court must find as a matter of law that the KCRA does not regulate Ferguson's conduct.

* * * *

IT IS THEREFORE ORDERED AND ADJUDGED that Patrick Just's complaint against Ferguson Enterprises, Inc. is **DISMISSED**, with prejudice. This is a final and appealable order, there being no just cause for delay.

FREDERIC J. COWAN, JUDGE

Dated: 9-18-09

cc: Kenneth L. Sales, Esq.
Corey Ann Finn, Esq.
Kathiejane Oehler, Esq.
Justin S. Gilfert, Esq.

ENTERED IN COURT
DAVID L. CLERK
SEP 18 2009
BY DEPUTY CLERK