Employment Law Section

Admissibility of 'Me, Too' Evidence in Employment Discrimination Cases

U.S. Supreme Court Declines to Adopt Rule

By Kimberly Lambert Love and Mary L. Lohrke

The U.S. Supreme Court, in a unanimous opinion reversing the 10th Circuit Court of Appeals, recently declined to adopt a blanket rule for the admissibility of so-called "me, too" evidence in a federal discrimination lawsuit. "Me, too" evidence is testimony by nonparties claiming discrimination which is offered to persuade the jury that the plaintiff's termination from employment was discriminatory. In *Sprint/United Management Company v. Mendelsohn*,[1] an age discrimination case, Justice Thomas delivered the opinion of the court, which held that the admissibility of "me, too" evidence is a fact-based determination which is best made by the trial court and which is not amenable to *per se* rules of admissibility.[2]

The plaintiff, Ellen Mendelsohn, brought suit against her former employer, Sprint/Management Company after her employment was terminated in 2002 as a result of a company-wide reduction in force (RIF) that affected nearly 14,000 employees between 2001 and 2003.[3] Mendelsohn, who was 51 years old at the time of her discharge and the oldest employee in her unit, alleged that her selection for layoff was based on her age in violation of the Age Discrimination in Employment Act (ADEA).[4]

As evidence of Sprint's alleged discriminatory bias against older employees, Mendelsohn sought to introduce the testimony of five other former Sprint employees all over 40 years of age who claimed that their supervisors had discriminated against them because of age. Importantly, none of these five employees worked in the same group as Mendelsohn or reported to the same supervisors as Mendelsohn. Furthermore, none of the witnesses had information regarding the selection decisions of Mendelsohn's supervisor.[5]

Prior to trial, Sprint moved *in limine* to exclude the "me, too" testimony of the five former employees under Fed.R.Evid. 401[6] and 402,[7] arguing that any reference to alleged discrimination by supervisors other than Mendelsohn's supervisor was irrelevant to the issue of whether the selection decision as to Mendelsohn was based on age.[8] Sprint also moved to exclude the evidence under Fed. R.Evid. 403,[9] arguing that the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice and confusion of the issues in forcing Sprint to defend multiple claims of discrimination.[10]

In a minute order, the district court granted Sprint's motion, excluding evidence of discrimination against employees not "similarly situated" to Mendelsohn.[11] The district court defined "similarly situated" employees to include those employees who had been laid off in close temporal proximity to Mendelsohn by the same supervisor as Mendelsohn.[12] The district court provided no additional explanation regarding the basis for its ruling. Because Mendelsohn's supervisor did not supervise

any of the other employees Mendelsohn intended to call to testify, the district court excluded their testimony from trial.[13] After an eight-day trial, the jury returned a verdict for Sprint.[14]

On appeal, the 10th Circuit reversed and remanded the case for a new trial. Justice Tymkovich strongly dissented on the ground that the district court did not abuse its discretion in excluding the "me, too" evidence.[15] The 10th Circuit treated the district court's minute order as applying a *per se* rule that evidence from employees reporting to different supervisors is irrelevant to proving age discrimination in the context of a RIF.[16] The 10th Circuit held that the district court erroneously applied the "same supervisor" rule set forth in *Aramburu v. The Boeing Co.*[17] as a *per se* bar on the admissibility of "me, too" evidence.[18]

In *Aramburu*, a case regarding discriminatory disciplinary action, the 10th Circuit held that dissimilar treatment by a single supervisor can evidence discriminatory motive on the part of the supervisor.[19] The 10th Circuit in *Mendelsohn* distinguished *Aramburu*, finding a major difference between cases involving disciplinary action and cases involving dismissal during a company-wide RIF.[20] In *Mendelsohn,* the 10th Circuit declined to extend the "same supervisor" rule in *Aramburu* to the RIF context, reasoning that such a rule would "make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination."[21] The 10th Circuit then determined that the "me, too" evidence was both relevant and not unduly prejudicial and reversed and remanded the case for a new trial.[22]

The majority of federal circuit courts have held that "me, too" evidence is generally not admissible unless the witness held the same position and reported to the same supervisor as the plaintiff or there is evidence of a "pattern or practice" of discrimination.[23] The 10th Circuit's opinion set the stage for a ruling by the Supreme Court clarifying or setting the standards for the admissibility of "me, too" evidence in individual disparate treatment cases.

However, the Supreme Court declined to resolve the circuit split and adopt a *per se* rule for the admissibility of "me, too" evidence. Rather, the Supreme Court held that the relevance of "me, too" evidence in an individual employment discrimination case under Fed. R.Evid. 401 is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."[24] Likewise, applying Rule 403 to determine if the evidence is prejudicial also requires a "fact-intensive, context-specific inquiry."[25] The Supreme Court emphasized the wide discretion and deference to be given district courts in determining evidentiary issues under Rules 401 and 403 and remanded the case with instructions for the district court to clarify the basis for its evidentiary ruling.[26]

The *Mendelsohn* decision highlights that the admissibility of "me, too" evidence remains for the trial court to determine on a case-by-case basis in the context of the particular facts of the case. Given the Supreme Court's emphasis on the deference owed the trial court in determining evidentiary issues, attorneys seeking to exclude "me, too" evidence at trial should preserve objections to such evidence by filing motions *in limine*, arguing both relevance under Rule 401 and prejudice under Rule 403. Defense counsel will be tasked with showing that the "me, too" evidence lacks any connection to the decision affecting the plaintiff's employment. Plaintiff's counsel, on the other hand, will be challenged to demonstrate a link between the "me, too" evidence and plaintiff's circumstances. Factors to consider by the trial court in determining the admissibility of "me, too" evidence include whether the "me, too" events are too remote in time from the events giving rise to the plaintiff's claims, whether different decision makers are involved and whether the "me, too" events are too dissimilar from those that involve the plaintiff.

1. __ U.S. __, 128 S.Ct. 1140 (2008).
2. *Id*. at 1143.
3. Law.com, *Supreme Court Takes On 'Me, Too' Age Bias*, www.law.com/jsp/article.jsp?id=1195639466549 (last accessed April 15, 2008).
4. 29 U.S.C. § 621, *et seq.*
5. *Mendelsohn*, 128 S.Ct. at 1143.
6. Fed.R.Evid. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."
7. Fed.R.Evid. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."
8. *Mendelsohn*, 128 S.Ct. at 1144.
9. Fed.R.Evid. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."
10. *Mendelsohn*, 128 S.Ct. at 1144.
11. *Id*.
12. *Id*.
13. *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223, 1225 (10th Cir. 2006).
14. *Id*.
15. *Id*. at 1231 (Tymkovich, J. dissenting).

16. *Mendelsohn*, 128 S.Ct. at 1144.
17. 112 F.3d 1398 (10th Cir. 1997).
18. *Mendelsohn*, 466 F.3d at 1227-28; *Mendelsohn*, 128 S.Ct. at 1144.
19. *Aramburu*, 112 F.3d at 1404.
20. *Mendelsohn*, 466 F.3d at 1227.
21. *Id*. at 1228.
22. *Id*. at 1230-31.
23. *See, e.g. Wyvill v. United Companies Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000) (holding admission of "me, too" testimony by witness not reporting to the same supervisor as the plaintiff was erroneous and prejudicial); *Sims v. Mulcahy*, 902 F.2d 524, 530-531 (7th Cir. 1990) (affirming exclusion of "me, too" testimony from witness not reporting to the same supervisor as the plaintiff).
24. *Mendelsohn*, 128 S.Ct. at 1147.
25. *Id*.
26. *See Id*. at 1146-1147.

Authors' Note: The authors would like to thank Shannon Dodd for her assistance in preparing this article. Ms. Dodd was a third-year law student at the University of Tulsa College of Law who joined Titus Hillis Reynolds Love Dickman & McCalmon in May 2008.

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NOTICE OF PUBLIC HEARING

The Physician Advisory Committee to the Workers' Compensation Court will hold a public hearing on **August 22, 2008 at 2:00 PM** in the 2nd Floor Courtroom, at the Oklahoma Workers' Compensation Court, 1915 N. Stiles, Oklahoma City, Oklahoma.

The purpose of the hearing is to obtain public comment regarding adoption or modification of the **6th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment** or the adoption of another method or system to evaluate permanent impairment in place of or in combination with such Guides.

Submission of written comment prior to the hearing is encouraged and may be provided in care of Bill Wiles, Workers' Compensation Court, 1915 N. Stiles, Oklahoma City, OK 73105.

The 6th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment is available for purchase at bookstores carrying medical reference materials and at the American Medical Association's online bookstore. **(https://catalog.ama-assn.org/Catalog/home.jsp)**