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The Supreme Court Rejects Per Se Admissibility of “Me Too” Evidence

In late February 2008, the U.S. Supreme Court clarified its direction in regard to “me too” evidence—that is, other employees’ accounts of discrimination that plaintiffs use to support a discrimination claim. Since the publication of *Mendelsohn v. Sprint/United Management Co.*,¹ both employers and plaintiffs have wondered how the Court’s decision will affect discrimination cases. It seems that the Court may have sidestepped the issue by determining that district courts should determine what constitutes “me too” evidence on a case-by-case basis. Still, the Supreme Court’s decision provides significant guidance to employers about how the Court might rule in future cases as well as a framework for a district court’s analysis.

The plaintiff, Ellen Mendelsohn, worked in the Business Development Strategy Group for Sprint/United Management Company from 1989 until 2002, when Sprint terminated her as a part of a companywide reduction in force. Mendelsohn subsequently sued Sprint in the U.S. District Court for the District of Kansas under the Age Discrimination in Employment Act (ADEA).² Mendelsohn claimed that she received disparate treatment based on her age. To support her claim, Mendelsohn sought to introduce the testimony of five other Sprint employees who claimed that their supervisors had likewise discriminated against them because of their age.

Mendelsohn proffered the testimony of three employees who claimed that they had heard Sprint supervisors make denigrating remarks about other workers. Another employee said that she had seen a spreadsheet suggesting that a supervisor considered age when making decisions about whom to lay off. The fourth employee was prepared to testify that he had received an unwarranted poor evaluation based on his age and that he had witnessed another employee being harassed because of her age. Finally, the last employee alleged that Sprint had required him to get permission before hiring anyone over the age of 40 and then terminated him, replacing him with a younger employee. However, none of these employ-

ee-witnesses worked in the Business Development Strategy Group with Mendelsohn or had the same supervisors as she had.

Sprint filed a motion in limine to exclude the testimony of Mendelsohn’s fellow employees. Sprint argued that such “me too” testimony would be relevant only if it had come from other employees who were situated in a position similar to Mendelsohn’s—that is, that they had the same supervisor as Mendelsohn. To that end, Sprint argued that the testimony of the employees that Mendelsohn planned to call was irrelevant under Federal Rules of Evidence 401 and 402. Sprint also argued that, under Fed. R. Evid. 403, the probative value of the “me too” evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, and undue delay.

The District Court granted Sprint’s motion in limine, and Mendelsohn appealed the order to the Tenth Circuit Court of Appeals. The Tenth Circuit interpreted the District Court’s order as an application of a per se rule: evidence from employees who have other supervisors is inadmissible for proving discrimination in an ADEA case. Rejecting a per se rule of inadmissibility, the Tenth Circuit reviewed the record, engaged in its own weighing of the relevance and prejudice of testimony by the other employees, and ultimately reached a conclusion that was different from the District Court’s ruling. The Tenth Circuit determined that the “me too” evidence of discrimination was relevant and not unduly prejudicial, reversed the ruling, and remanded the case for a new trial.

Sprint appealed the Tenth Circuit’s decision. In its certiorari petition to the Supreme Court, Sprint framed the issue as a question of whether the Federal Rules of Evidence *require* admission of “me too” testimony in a discrimination case related to an employer’s reduction in force. In its argument, Sprint characterized the Tenth Circuit’s decision as having embraced a rule that “me too” testimony must be admitted in a reduction in force case. The Supreme Court granted certiorari.

The question certainly seemed ripe for clarification. Several other circuits had ruled that a plaintiff could introduce “me too” evidence only when the other witnesses and the plaintiff shared a common supervisor.⁴ In fact, the Tenth Circuit had ruled the same way in a case involving employee discipline as opposed to a reduction in force.⁵ But, in *Mendelsohn*, a reduction in force case, the Tenth Circuit veered away from these



employee being harassed because of her age. Finally, the last employee alleged that Sprint had required him to get permission before hiring anyone over the age of 40 and then terminated him, replacing him with a younger employee. However, none of these employ-

authorities, crafting something close to a rule of per se admissibility, as Sprint noted in its certiorari petition. In its decision, however, the Supreme Court determined that the *Mendelsohn* case presented no great opportunity to settle the debate of whether any per se rule exists that requires or prohibits the admission of “me too” testimony.

At oral argument—and, indeed, in the merits briefs—the parties argued the case in terms of admissibility under Fed. R. Evid. 401, as well as the prejudice to Sprint under Rule 403. In fact, the notion that the Tenth Circuit’s ruling was an endorsement of a per se rule occupied less than one page of Sprint’s merits brief. In short, the Supreme Court took on a case in which the issue was not one of a per se rule, but merely a trial court’s determination of an evidentiary issue before it—a decision that was soundly within the discretion of the trial court, and a decision that the Supreme Court held should not have been re-examined by the Tenth Circuit. On this basis, the Court reversed the ruling and remanded the case.

It is important for parties to take note of *Mendelsohn* for several reasons. Post-*Mendelsohn*, there is no prohibition against the use of “me too” testimony. On the other hand, there is no requirement that it be admitted as the Tenth Circuit intimated. There is simply no per se rule either requiring or prohibiting the admission of “me too” testimony. The practitioner is left to proving the facts of each case and demonstrating the admissibility of particular evidence when its relevance is weighed against any prejudice to the employer—a routine exercise in district courts. Another important aspect of *Mendelsohn* is the confirmation that determining admissibility lies with the trial judge; absent an abuse of discretion, the trial judge has the final word on the issue of admissibility.

An unfortunate reality is that this ruling will most likely expand the ambit of many trials. The veracity, bias, and motivation of each witness will have to be tested in discovery, and, if the “me too” testimony is admitted, that veracity, bias, and motivation will need to be tested again and described on the witness stand.

Employers and employees alike should be aware that trial courts will have broad discretion to determine the relevance and potential prejudice of “me too” evidence. Some argue that this ruling may thwart management’s ability to make localized decisions and will create overly centralized management approaches in the workplace.⁶ Others see the decision as an important tool for plaintiffs, allowing them an opportunity to prove their case in large and hard-to-navigate corporate structures.⁷ Over the coming months, the effects of *Mendelsohn* in discrimination cases will be closely watched as the district courts adopt the Supreme Court’s new ruling. **TFL**

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Endnotes

¹128 S. Ct. 1140 (2008).

²81 Stat. 602, as amended, 29 U.S.C. § 621.

³*Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006).

⁴*Rivera v. City and County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992); *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617–18 (7th Cir. 2000).

⁵*Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997).

⁶Brief Amici Curiae of the Equal Employment Advisory Council, National Federation of Independent Business Legal Foundation, and the Society for Human Resource Management in Support of Petitioner, p. 6.

⁷Mitchell H. Rubinstein, *Sprint/United Management Co. v. Mendelsohn: The Supreme Court Appears to Have Punted on the Admission of “Me Too” Evidence of Discrimination. But Did It?* 102 NW. U. L. REV. COLLOQUY 264 (2008).

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