

Could this be the end of “me too” evidence? Employers hold their breath for a potential landmark ruling!



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Several U.S. Supreme Court justices recently expressed their concern that allowing “me too” evidence in support of a claim of discrimination could unduly lengthen and complicate trials, confuse the jury and prejudice employers. Employers, management groups and defense attorneys are hopeful that this could lead to a landmark ruling limiting and curtailing (and possibly even completely prohibiting) the admissibility of “me too” evidence.

“Me too” evidence of discrimination is evidence presented by employees other than the plaintiff, who claim that they too were the victim of discrimination. Generally, in order for “me too” evidence to be admissible at trial, the employee offering the “me too” evidence must be “similarly situated” to the plaintiff in all respects; in particular, the employee offering the “me too” evidence must have suffered the same type of discrimination by the same supervisor and/or decision maker that is the subject of the plaintiff’s lawsuit in close temporal proximity. “Me too” evidence is considered circumstantial or background evidence of discrimination, as it does not directly prove that the employer engaged in discriminatory conduct, but instead insinuates or suggests that because another employee complains the same type of discrimination, it is more probable that the plaintiff also was the victim of discrimination. When “me too” evidence is admitted at trial, the employer is forced to defend other employment decisions that are unrelated to plaintiff’s claim, thus causing “mini trials” within the overall trial.

The case before the U.S. Supreme Court is *Mendelsohn v. Sprint/ United Management Co.*, 127 S.Ct. 2937, 168 L.Ed.2d 261 (2007). The plaintiff, Ellen Mendelsohn, was laid off from Sprint in 2002, as a part of a reduction in force. Ms. Mendelsohn was 51 years old at the time, and sued Sprint claiming that the reason she was chosen for the lay off was her age, in violation of the Age Discrimination in Employment Act (ADEA). In support of her claim, Ms. Mendelsohn wanted to present testimony from five other employees of Sprint who were also terminated as a result of the reduction in force and who were over the age of 40. Ms. Mendelsohn asserted that these five employees, who also believed that they were discriminated against because of their age, could offer testimony to establish a “culture of age bias at Sprint.”

The trial court excluded the testimony of the five other employees and did not allow them to testify at Ms. Mendelsohn’s trial. The trial presumably relied upon Rules 401 and 403 of the Federal Rules of Evidence, finding that the proposed testimony by the five employees was irrelevant. In particular, the five employees did not have the same supervisor as Ms. Mendelsohn; in other words, Ms. Mendelsohn’s supervisor chose her for the reduction in force, but this was not the same supervisor who chose the five other employees for the reduction in force. Thus, the five employees’ “me too” evidence was regarding their treatment by other supervisors. There simply was no connectivity between Ms. Mendelsohn and the five employees who were to offer “me too” evidence. Ultimately, without the “me too” evidence, the jury found in favor of Sprint, finding that Ms. Mendelsohn’s discharge was not motivated by illegal age animus.

On appeal to the Tenth Circuit Court of Appeals, Ms. Mendelsohn argued that the trial court erred in refusing to allow the testimony of the five employees. In a 2-1 decision, the Tenth Circuit agreed with Ms. Mendelsohn, reversing the jury verdict. The appellate court held that the trial court erred in categorically excluding the “other supervisor” evidence from the five other RIF’d employees, finding that it “may be relevant and admissible” to show “the employer’s general discriminatory propensities.” See *Mendelsohn v. Sprint/ United Management Co.*, 466 F.3d 1223 (10th Cir. 2006).

Thus, the issue directly and squarely before the justices was the admissibility of “me too” evidence. During oral argument, Justices Scalia, Roberts, Souter and Breyer seemed skeptical of admitting “me too” evidence in this case. Specifically, Justice Scalia stated that “it’s hard to see” that the “me too” evidence at issue was at least “marginally relevant” to Ms. Mendelsohn’s claim of age discrimination. Further, Justice Scalia stated he was “worried” about other –supervisor evidence creating “mini trials” with the overall trial. Justice Souter expressed concern that if the other–supervisor evidence was admitted and Sprint would have present counter–evidence, it would have lengthened the trial, possibly confused the jury and prejudiced the company. Justice Breyer commented that he was “worried” that allowing other–supervisor evidence would “muck up trial.” He observed that admission of such evidence could make trials last “forever” and that trial

judges should have the discretion to exclude testimony that would amount to a waste of time.

The oral argument in this case was heard on December 3, 2007, and a decision by the Supreme Court is expected in the first half of 2008.