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Supreme Court Rules on "Me Too" Evidence in Employment Discrimination Cases

By Barry H. Uhrman

On February 26, 2008, the United States Supreme Court issued its decision in *Sprint/United Management Co. v. Mendelsohn*, 128 S.Ct. 1140 (2008), a case brought under the Age Discrimination in Employment Act (ADEA) by an employee who was laid off pursuant to a reduction-in-force. Employers had hoped that the Supreme Court would decide a critical issue in the case - whether so-called "me too" evidence can be introduced in employment discrimination litigation. The Court did not directly answer this question, instead deferring to district courts to evaluate whether the probative value of such evidence outweighs its prejudicial effect.

Ellen Mendelsohn was employed by Sprint in the Business Development Strategy Group in Overland Park, Kansas, from 1989 until 2002, when Sprint terminated her as a part of an ongoing company-wide reduction in force. At the time, Ms. Mendelsohn was 51 years old and the oldest manager in her unit. Her supervisor stated that she was the weakest performer in his unit. Sprint laid off approximately 14,000 employees during this reduction-in-force.

Ms. Mendelsohn brought a discrimination suit against Sprint under the ADEA, alleging disparate treatment based on her age. In support of her claim, Ms. Mendelsohn sought to introduce "me too" testimony from five other former Sprint employees who claimed that their supervisors had also discriminated against them because of age. Three of the witnesses alleged that they heard one or more Sprint supervisors or managers make remarks denigrating older workers. One claimed that Sprint's intern program was a mechanism for age discrimination and that she had seen a spreadsheet suggesting that a supervisor considered age in making layoff decisions. Another witness was to testify that he had been given an unwarranted negative evaluation and "banned" from working at Sprint because of his age, and that he had witnessed another employee being harassed because of her age.

None of the five witnesses who would have testified were laid off by Ms. Mendelsohn's supervisor and none worked in her business development group. Furthermore, none of them claimed to have heard anyone who supervised Ms. Mendelsohn make any discriminatory remarks. The five former employees were laid off as many as nine months before Ms. Mendelsohn and as many as three months after.

The trial court excluded the testimony as unduly prejudicial and not relevant to how Ms. Mendelsohn was treated by her supervisor. Specifically, the trial judge limited testimony regarding Sprint's alleged discriminatory treatment to "employees who are similarly situated" to Ms. Mendelsohn, which was defined as those who had the same supervisor and who were terminated around the same time. At trial, Sprint prevailed on Ms. Mendelsohn's age discrimination claim.

The Tenth Circuit Court of Appeals reversed the trial court's decision, ruling that the judge made a "per se" determination that "me too" evidence would never be admissible. The Circuit Court held that evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination. The Court further held that the "me too" evidence Ms. Mendelsohn sought to introduce was relevant to Sprint's discriminatory animus toward older workers, and the exclusion of this evidence unfairly inhibited Ms. Mendelsohn from presenting her case to the jury.

In a unanimous ruling, the Supreme Court held that there is no hard and fast rule about "me too" evidence and that this evidence should not be excluded on a *per se* basis. Each trial court has to evaluate the admissibility of proposed evidence by looking at it in light of the evidentiary rules. This requires an individual determination and consideration of undue prejudice, relevance, and the other factors that go into deciding whether to admit evidence in trial.

The Supreme Court concluded that the question of whether evidence of discrimination by other supervisors is relevant in an individual ADEA case 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. By declining to delineate under what circumstances "me too" evidence is admissible, however, the Court failed to explain or provide guidance to trial courts regarding the meaning of the phrase "similarly situated." Plaintiffs will argue that testimony from other employees who allege discriminatory treatment will be relevant and probative, which can result in a series of mini-trials regarding these collateral issues, increasing the cost of defending employment discrimination claims. Employers will have to demonstrate that these additional claims are not probative and are highly prejudicial, or offer testimony from other employees who claim they were not subjected to discrimination.

In a mild victory for employers, however, the high court did take the opportunity to explain what appellate courts are supposed to do, which is to pay proper respect to a trial court's discretionary evidentiary determinations. Given that district courts have significant discretion in determining the admissibility of evidence, the focus of the Tenth Circuit should have been on whether this discretion had been abused as opposed to whether the probative value outweighed its prejudicial effect. ◆

About The Author

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Mr. Uhrman joined the firm in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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