

Admissibility Of “Me Too” Evidence In The Post-*Mendelsohn* Era



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WHEN THE *Sprint/United Management Co. v. Mendelsohn* case was appealed to the United States Supreme Court, lawyers stood poised for a definitive answer to a pressing question: Can a party in a discrimination lawsuit offer the testimony of non-plaintiff employees claiming that they, too, were victims of discrimination (“me too” evidence)? Defendants had long contended that a per se rule that “me too” evidence was admissible would make employment discrimination litigation significantly more complicated and costly as defendants would essentially be forced to defend against the claims of both the plaintiff and non-plaintiffs. Plaintiffs, on the other hand, argued a per se rule barring “me too” evidence would make it even more difficult to establish a circumstantial case of discrimination.

Perhaps not surprisingly, the Supreme Court did not offer any per se rule whatsoever. Instead, it took the opportunity to remind litigants that, just like any other evidence, the admissibility of “me too” evidence is determined under the basic principles of Federal Rules of Evidence 401 and 403. And, just like any other evidence, the Supreme Court noted, the relevance and undue prej-

udice inquiries are not amenable to per se rules. Instead of a definitive answer, we were reminded that there are few definitive answers in litigation.

Mendelsohn teaches us that neither plaintiffs nor defendants can rely on abstract legal arguments about why “me too” evidence should be included or excluded. Instead, they must discover and address specific factors showing the similarity of the circumstances between the plaintiff and the third-party witness and how the testimony relates to the specific theory of the case. Practically speaking, how will this affect employment litigation going forward?

MENDELSON AND ITS LESSONS • *Mendelsohn* was an age discrimination case. As the case was preparing to go to trial, Sprint moved in limine to exclude the testimony of former employees alleging discrimination by supervisors who had no role in the employment decision *Mendelsohn* challenged. Sprint argued that such evidence was irrelevant to the case’s central issue and was unduly prejudicial pursuant to Federal Rules of Evidence 401, 402, and 403. Without a hearing or proffer, the District Court ruled that *Mendelsohn* could not present “me too” evidence unless it involved individuals who were “similarly situated” to the plaintiff—and the court defined “similarly situated” as those individuals who were terminated by the same supervisor in the same timeframe. After an eight-day trial, the jury entered a verdict for Sprint, finding no age discrimination.

On appeal, the Tenth Circuit found that the District Court had erred in barring the “me too” evidence and remanded the matter for a new trial, finding that the exclusion was not harmless. Finding little explanation for the District Court’s decision in its Order, the Tenth Circuit treated the Order as applying a per se rule that evidence from employees supervised by someone other than the plaintiff’s supervisor should be barred.

The United States Supreme Court held that the Tenth Circuit erred in concluding that the District Court applied a per se rule and thus, the Tenth Circuit improperly engaged in its own analysis of the relevant factors under Federal Rules of Evidence 401 and 403, rather than remanding the case for the District Court to clarify its ruling. The Supreme Court noted that, in deference to a district court’s familiarity with a case’s details and its greater experience in evidentiary matters, courts of appeals should uphold Rule 403 rulings unless the district court has abused its discretion. The Supreme Court noted that the District Court’s two-sentence discussion of the evidence never suggested that the court applied a per se rule of inadmissibility. Moreover, the nature of Sprint’s argument was not that the particular evidence was never admissible, but only that such evidence lacked sufficient probative value in this case to be relevant or outweigh prejudice and delay. The Court also stated that “[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules.” *Mendelsohn*, 128 S. Ct. 1140, 1147 (2008). Whether “me too” evidence 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.” *Id.*

Lesson 1: Get Back To Basics

Determining the admissibility of any evidence (including “me too” evidence) starts with the basic language of Federal Rules 401 and 403. First, evidence is relevant if it tends to make the occurrence of a fact more or less likely. Second, all relevant evidence is admissible, unless its probative value is substantially outweighed by the risk of undue prejudice.

Translated into the context of “me too” evidence, such evidence is relevant if it has a tendency to make it more or less likely that the employer

acted with discriminatory intent—that is, because discrimination occurred against other employees, it is more likely than not that it happened to this plaintiff. Even if the evidence is relevant, however, it might still be barred if the employer can show that the relevance is substantially outweighed by the danger of unfair prejudice. Both plaintiffs and defendants will need to carefully articulate a step-by-step analysis for the Court, presenting facts showing why the evidence is or is not relevant to the issue of the employer's discriminatory intent in the present case, and then weighing the potential relevance against the risk of undue prejudice.

Lesson 2: Specificity Counts

Mendelsohn does not stand for the proposition that "me too" evidence is always admissible. The Court merely stated that the evidence might be admissible. The relevance of "me too" evidence is a fact-intensive, context-specific inquiry, and admissibility of such evidence depends on many factors, including how closely related the evidence is to the circumstances and the theory of the case. Although the threshold for establishing relevance is generally a low one, the burden is still on the party offering the evidence to show some logical or reasonable connection between its allegations and the proposed testimony. In short, plaintiffs attempting to offer "me too" evidence are going to have to go beyond simply stating what evidence they intend to offer, followed by a general citation to *Mendelsohn*. Likewise, defendants seeking to exclude "me too" evidence must make a specific showing as to why such evidence is irrelevant or unduly prejudicial.

For example, in *Miller v. Love's Travel Stops & Country Stores, Inc.*, 2008 WL 2079961 (W.D. Okla. May 9, 2008), the defendant filed its motion in limine, seeking to exclude evidence and argument regarding other former employees' allegations of unlawful discrimination. The defendant broadly stated that: the other former employees were not similarly situated to the plaintiff; the employees had

no personal knowledge of the circumstances surrounding the plaintiff's termination; and such evidence and argument would be unduly prejudicial. The defendant asserted that for such testimony to be relevant, the plaintiff would have to show that the other employees and the plaintiff were similarly situated "contextually, geographically, and temporally." *Id.* at *1. The plaintiff opposed the motion in limine, arguing that other discriminatory terminations were relevant to establishing that the defendant had a company-wide discriminatory practice, regardless of whether the other employees were similarly situated to the plaintiff, so long as a "logical relationship" was shown. The plaintiff made no argument that he was similarly situated to the other former employees, and apparently made no demonstration of a "logical relationship." Likewise, however, the defendant failed to point to any specific facts demonstrating that the individuals were not similarly situated or that an otherwise "logical relationship" did not exist. As a result, the court concluded that it needed to know more about the circumstances of the other former employees' terminations in order to determine whether there was a logical or reasonable relationship to the plaintiff's allegations.

Broad arguments regarding the admissibility of "me too" evidence in the post-*Mendelsohn* era have not had much success. For example, if a defendant seeking to exclude testimony from other employees files a motion in limine, but fails to provide precise facts to illustrate that the testimony is not relevant to the plaintiff's claims or that it would be unduly prejudicial, the court will not be able to perform proper Rule 401 and Rule 403 analyses as required by *Mendelsohn*. At that point, the court will have little choice but to deny the motion or require an evidentiary presentation to assist it in making its determination. In fact, since the *Mendelsohn* decision, courts have frequently denied motions in limine, in favor of requiring an evidentiary inquiry outside the presence of the jury at trial to

determine the existence of “a particularized showing as to the relevance of the witness’s proposed testimony,” followed by the parties’ presentation of arguments regarding Rule 403 considerations. *Miller*, supra; see also, *Ross v. Baldwin Cty. Bd. of Ed.*, 2008 WL 2020470 (S.D. Ala. May 9, 2008) (defendant failed to “identify the employees allegedly involved or the nature, form, scope, or temporal dimensions of those alleged retaliatory acts” and such vagueness was “fatal to defendants’ request”); *Jones v. United Parcel Serv., Inc.*, 2008 WL 833480 (D. Kan. Mar. 27, 2008). This result is less than ideal because it can prolong trials. Additionally, neither party will be aware of whether such testimony will be admitted until the trial has already begun. This uncertainty will make it more difficult to evaluate the likelihood of success at trial or the reasonableness of a settlement offer. Ultimately, failing to be specific in a motion in limine may not only ensure that the motion is denied, it may actually lead to additional complications during the trial.

Lesson 3: Learn The Specifics Through Discovery

With broad arguments deemed insufficient, there is only one way to obtain the information necessary to offer more specific arguments: discovery. Practically speaking, parties should expect significantly more discovery around the issue of potential fact witnesses on “me too” evidence. While defendants generally object to discovery about employees other than the plaintiff, plaintiffs may be able to use the *Mendelsohn* decision to offer support to compel such discovery. And if such discovery is permitted, defendants will need to do their own discovery to ensure they have all the facts necessary about the other employees so that they can state specifically why such evidence is not admissible. By way of example only, plaintiffs will want to send discovery requests regarding past allegations of discrimination to determine if there is the potential for “me too” evidence. Defendants, on the other hand, will need

to interview their own witnesses to identify any prior allegations of discriminatory conduct, as well as send discovery requests to the plaintiff requesting information about every individual they will likely call upon to offer “me too” testimony, including the specific details of their situations. Parties may even need to take additional depositions on these issues to be prepared to offer specific, fact-based reasons why such evidence should—or should not—be admitted.

Of course, that is not to say that all discovery of “me too” evidence will always be appropriate, and in no way does *Mendelsohn* stand for the proposition that a party cannot defeat motions to compel such discovery. To do so, however, the party will need to ensure it has engaged in sufficient internal discovery, whether formal or informal, to be able to respond to such motions with specific facts rather than broad categorizations. Specifically, parties will need to be prepared to offer specific reasons why the persons claiming “me too” are neither “similarly situated” nor otherwise “logically related.”

Lesson 4: Pleadings Matter

Post-*Mendelsohn*, the plaintiff’s theory of the case has emerged as one of the most important factors in determining admissibility. Not surprisingly, in cases involving claims of a hostile work environment, a “pattern or practice” of discrimination, or a company-wide policy that violated employment laws, “me too” evidence is more likely to be admitted. By their very nature, these types of cases involve allegations of a series of events over a period of time that pervaded the workplace. Testimony from other employees about the work environment during that period of time can provide additional context and provide the trier of fact with a more complete understanding of the plaintiff’s work environment. Accordingly, courts tend to be more likely to find “me too” evidence relevant in cases involving continuing or pervasive patterns of unlawful behavior than in cases alleging a discrete act

of discrimination. *See, e.g., King v. McMillan*, 2008 WL 957877 (W.D. Va. Apr. 8, 2008) (admitting testimony of other women working for defendant in plaintiff’s gender-based hostile work environment claim because the testimony reflected the “totality of the circumstances of King’s work”). As a result, litigators could see an increased trend of complaints drafted in the context of “pattern or practice” or hostile work environment cases.

Lesson 5: “Me Too” Evidence Can Come In The Form Of “Not Me” Evidence

Although “me too” evidence is traditionally viewed as being offered by plaintiffs, defendants’ cases can also benefit from such evidence, especially in the context of pattern or practice or hostile work environment cases. Although plaintiffs will seek admission of testimony of individuals contending they suffered discrimination, defendants can similarly seek admission of individuals contending they did not suffer discrimination and were not subjected to discriminatory conduct—essentially, “not me” evidence. In a number of post-*Mendelsohn* cases, courts have recognized and permitted defendants to utilize this approach. *Johnson v. Big Lots Stores, Inc.*, 2008 WL 2191357 (E.D. La. May 7, 2008); *see also, Elion v. Jackson*, 544 F. Supp. 2d 1 (D. D.C. 2008); *Howard v. District of Columbia Public Schools*, 561 F. Supp. 2d 53, (D.D.C. 2008). Indeed, if the plaintiff’s argument is that these practices and behaviors pervaded the workplace, it is perfectly legitimate for the defendant to rebut that accusation by showing that, to the contrary, the plaintiff is the only one to claim such an experience, demonstrating that such policies and behaviors did not pervade the workplace.

The Eastern District of Louisiana provided a detailed analysis of why defendants should be able to offer evidence of non-plaintiff employees to rebut an inference of improper employment practices. *Johnson*, *supra*. Although the case involved claims under the Fair Labor Standards Act rather than federal anti-discrimination laws, the argument

should logically apply equally in discrimination cases. In *Johnson v. Big Lots Stores, Inc.*, the plaintiffs filed a collective action against Big Lots under the Fair Labor Standards Act (“FLSA”), claiming that defendant Big Lots maintained a corporate policy and practice of misclassifying assistant store managers (“ASMs”) as exempt employees, and that this policy violated the FLSA. Specifically, the plaintiffs claimed that they were all subject to a uniform job description and that the company’s policies stripped them of genuine management duties and executive authority. The defendants planned to introduce evidence from ASMs who did not opt-in to the collective action lawsuit about their experiences as ASMs at Big Lots to contradict the plaintiffs’ theory. The court noted that *Mendelsohn* did not articulate a substantive standard to be applied to this kind of evidence, but stated that it was a fact-intensive inquiry depending on many factors including how closely related the evidence is to the plaintiff’s circumstances and theory of the case. *Id.* at *4. Thus, the job experiences of other ASMs were relevant to Big Lots’ defense that it properly classified ASMs and that there was no company-wide policy to misclassify them. In effect, because the plaintiffs claimed there was a company-wide policy affecting all employees, the defendant was permitted to call on similarly situated employees who would testify “not me,” which could create an inference that no such policy existed.

Logically, it follows that defendants may also be successful introducing “not me” evidence in cases involving claims of disparate treatment when the evidence may have a tendency to show that the decision-maker being accused of discriminatory conduct acted in a non-discriminatory manner in prior similar circumstances. For example, when an African-American woman alleges race and gender discrimination and retaliation, allowing another African-American individual to testify about her favorable treatment by the same manager during the same timeframe could have probative value—

and be very compelling—because “an employer’s favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent.” *Elion v. Jackson*, supra, 544 F. Supp. 2d at 8 (D. D.C. 2008); see also *Howard*, supra (in a race discrimination case, the employer presented evidence that its manager, who was alleged to have failed to promote an African-American woman, first offered the position in question to another African-American woman, and that the latter turned down the job).

Lesson 6: There Is No “Same Supervisor” Rule

Before the *Mendelsohn* decision, many argued that “me too” evidence should be barred unless the witness who is testifying shared the same supervisor or decision-maker as the plaintiff. Post-*Mendelsohn*, it is clear that there is no per se “same supervisor” rule requiring the exclusion—or permitting the admission—of “me too” evidence when the witness and the plaintiff did not have the same supervisor. Courts do, however, still consider this an important factor in determining whether “me too” evidence has any probative value. In post-*Mendelsohn* cases involving different supervisors or decision-makers, courts so far have had a tendency to exclude “me too” evidence on the grounds that the witness’s situation is not sufficiently similar to that of the plaintiff. *Sgro v. Bloomberg L.P.*, Mar. 2008 WL 918491 (D. N.J. Mar. 31, 2008); *Opsatnik v. Norfolk Southern Corp.*, 2008 WL 763745 (W.D. Pa. March 20, 2008). Evidence relating to decisions made by a supervisor other than the plaintiff’s supervisor are less likely to have any bearing on whether the decision-makers at issue acted with any discriminatory intent on that particular occasion, and thus are less likely to be relevant and admissible.

Even if the plaintiff and the witness whose testimony is being offered had the same supervisor, however, it is possible that the testimony could be excluded if the supervisor did not play a role

in both decisions. For example, in a case in which a plaintiff complained of discriminatory transfers, the court excluded testimony from a former employee regarding the prior alleged discriminatory practices of the person in charge of approving transfers. *Sgro*, supra. One of the reasons for the exclusion was that the plaintiffs failed to establish that the person who was in charge was actually involved in any of the transfer decisions regarding the plaintiffs. In that case, the plaintiffs forgot Lesson 2—they failed to make specific arguments tying the testimony to the employment decision in question.

Lesson 7: Do Not Forget About Undue Prejudice And Confusion

Although research has not revealed any post-*Mendelsohn* decisions providing substantive analysis regarding the undue prejudice that can arise from the admission of “me too” evidence, some decisions regarding the admissibility of such evidence have recognized the possibility of undue prejudice. Accordingly, defendants should still argue that the admission of “me too” evidence would be unfairly prejudicial and create confusion among the members of the jury. This argument is often made on the grounds that the admission of such evidence would lead to “mini-trials” or “trials within a trial,” in which the defendant would be forced to present evidence to disprove every allegation of discrimination made by each of the witnesses. See Def’s Mot. in Limine to Exclude “Me Too” and Other Evidence, *Cavender v. Electronic Data Sys. Corp.*, 2008 WL 2384147 (E.D. Tex. Mar. 25, 2008); see also, Def’s Mot. in Limine to Exclude Evidence of Improper Alleged Comparators, and Evidence of Alleged Discrimination Against Other Employees, *Newton v. United Parcel Serv., Inc.*, 2008 WL 2426306 (N.D. Fla. Apr. 8, 2008).

One of the leading cases on this issue is *Wyvill v. United Companies Life Co.*, 212 F.3d 296 (5th Cir. 2000), cert. denied, 531 U.S. 1145 (2001). In *Wyvill*,

the Fifth Circuit Court of Appeals found that the experiences of the witnesses were not relevant to the claims presented by the plaintiffs. The court went on to say that the witnesses made their cases so well that it detracted from the fact that they had little to say about the plaintiffs’ claims. In such circumstances, admitting “me too” evidence creates a real risk that the jury may find the defendant liable based on the witnesses’ cases, rather than the plaintiff’s case.

CONCLUSION • Although *Mendelsohn* may not have lived up to the hype, it provides some lessons for arguing for the inclusion or exclusion of “me too” evidence in employment discrimination cases. Both plaintiffs and defendants must follow the basic

Rule 401 and Rule 403 analyses, making specific arguments regarding the evidence at issue. Both parties need to ensure they have discovered all relevant facts so that they can make those specific arguments. Such arguments should focus on the theory of the case and whether the plaintiff and the non-plaintiff employee are similarly situated or “logically related” in some other way. Finally, plaintiffs and defendants must still address whether admitting the evidence will create undue prejudice or confusion among the jurors. In short, *Mendelsohn* forces us to engage in a substantive analysis regarding the relevance of particular evidence, rather than relying on artificial, prophylactic rules.

PRACTICE CHECKLIST

Admissibility of “Me Too” Evidence In The Post-*Mendelsohn* Era

The *Mendelsohn* case didn’t establish a per se rule about “me too” evidence in discrimination cases—to the contrary, one of the lessons of the case was that the usual Federal Rules of Evidence analyses under Rules 401 and 403 made a per se rule unworkable. But there are other lessons from *Mendelsohn* that can help guide both plaintiffs and defendants alike in making use of this evidence.

- Lesson 1: Get back to basics. If the “me too” evidence has a tendency to make it more or less likely that the employer acted with discriminatory intent—that is, because discrimination occurred against other employees, it is more likely than not that it happened to this plaintiff—it could be relevant. Even if the evidence is relevant, however, it might still be barred if the employer can show that the relevance is substantially outweighed by the danger of unfair prejudice.
- Lesson 2: Specificity counts. The relevance of “me too” evidence is a fact-intensive, context-specific inquiry, and admissibility of such evidence depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and the theory of the case. The burden is still on the party seeking to introduce the evidence to show some logical or reasonable connection between the party’s allegations and the proposed testimony.
- Lesson 3: Learn the specifics through discovery. Parties should expect to engage in significantly more discovery around the issue of potential fact witnesses on “me too” evidence. Specifically, defendants will need to be prepared to offer specific reasons why the persons claiming “me too” are neither “similarly situated” nor otherwise “logically related.”

- Lesson 4: Pleadings matter. Post-*Mendelsohn*, the plaintiff's theory of the case has emerged as one of the most important factors in determining admissibility. Courts tend to be more likely to find "me too" evidence relevant in cases involving continuing or pervasive patterns of unlawful behavior than in cases alleging a discrete act of discrimination.
- Lesson 5: "Me too" evidence can come in the form of "not me." Defendants can seek admission of evidence of individuals contending that they did not suffer discrimination and were not subjected to discriminatory conduct—essentially, "not me" evidence. In a number of post-*Mendelsohn* cases, courts have recognized and permitted defendants to utilize this approach.
- Lesson 6: There is no "same supervisor" rule. Post-*Mendelsohn*, it is clear that there is no per se "same supervisor" rule requiring the exclusion—or permitting the admission—of "me too" evidence when the witness and the plaintiff did not have the same supervisor. Courts do, however, still consider this an important factor in determining whether "me too" evidence has any probative value.
- Lesson 7: Do not forget about undue prejudice and confusion. Although research has not revealed any post-*Mendelsohn* decisions providing substantive analysis regarding the undue prejudice that can arise from the admission of "me too" evidence, some decisions regarding the admissibility of such evidence have recognized the possibility of undue prejudice. Accordingly, defendants should still argue that the admission of "me too" evidence would be unfairly prejudicial and create confusion among the members of the jury.

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