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What Is "Me Too" Evidence and Why Should You Care?

by Stephen L. Knowles

May witnesses not "similarly situated" to the plaintiff in an employment discrimination case testify that the employer had also discriminated against them? Maybe. In *Sprint/United Management Co. v. Mendelsohn*, the U.S. Supreme Court recently held that the admissibility of such "me too" evidence must be determined on a case-by-case basis. The *Sprint* decision illustrates the importance of keeping the workplace free of remarks or actions that might potentially constitute such "me too" evidence.

Background of the *Sprint* Case

The plaintiff in the *Sprint* case was 51 years of age and had lost her job in a company-wide reduction in force. She sued under the Age Discrimination in Employment Act, alleging that her employment had been terminated due to her age.

In support of her claim, the plaintiff sought to introduce testimony from other former employees who thought Sprint had also discriminated against them because of age:

- Three of the potential witnesses claimed to have heard Sprint managers or supervisors make comments denigrating older employees.
- One potential witness alleged that Sprint's intern program was a means for age discrimination and that she was aware of a spreadsheet suggesting that a supervisor had considered age in making layoff decisions.
- An additional witness would have testified that he had received a negative performance evaluation because of his age.
- This same witness claimed he had been barred from employment at Sprint because of his age and that he had seen another employee harassed because of her age.
- A final witness would have testified that he had been required to obtain permission before hiring anyone over the age of 40, that he had been replaced by a younger employee after being fired, and that his attempts to re-join Sprint's workforce had been rejected.

Significantly, these potential witnesses were not "similarly situated" to the plaintiff. In other words, none of the witnesses had worked in the plaintiff's department and none had worked for the plaintiff's supervisors. Nor would any of the witnesses have testified that they had heard the plaintiff's supervisors make discriminatory remarks about age.

The federal district court considering the case refused to allow the "me too" evidence. Without fully explaining its ruling, the district court ruled that evidence of discrimination against former employees who had not been similarly situated to the plaintiff would not be allowed. The trial proceeded without this evidence, and the jury returned a verdict in favor of Sprint.

On appeal, the Court Appeals for the Tenth Circuit reversed. The court of appeals concluded that the district

court had improperly determined that testimony from employees with different supervisors was automatically irrelevant to proving age discrimination. The court of appeals thought the excluded evidence was relevant to the plaintiff's allegations of company-wide age discrimination in the reduction in force and that the value of the testimony was not outweighed by the danger of undue prejudice to Sprint's defense. Sprint petitioned the Supreme Court to consider the case.

The Supreme Court reversed the court of appeals. The Supreme Court held that "me too" evidence was neither *per se* admissible nor *per se* inadmissible. The Court ruled that the district court had not applied a blanket rule against the admission of the proffered evidence. But the Court concluded that the district court's rationale for its evidentiary ruling was ambiguous and that the court of appeals should have remanded the case to obtain an explanation instead of reversing the district court's judgment.

Implications of the Supreme Court's Decision for Employers

Without discussing the evidentiary issues involved, it is worth noting that the Supreme Court emphasized the factual intensity of age discrimination cases. The admissibility of evidence, the Court said, "depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case." Whether particular evidence is admitted therefore requires a "fact-intensive, context specific inquiry." These observations, of course, would not be limited to age discrimination cases, but would apply to all employment discrimination cases.

A plaintiff-employee who believes there is a company-wide animus toward a particular group of employees may attempt to use individuals from the group to show that any adverse decisions affecting them were based on illegal criteria rather than legitimate, non-discriminatory reasons. Such "me too" evidence must be reviewed in the context of the specific facts and could potentially be admitted by the court where the case is pending.

Employers might therefore be called upon to justify not only decisions made about a particular plaintiff, but also decisions made about other employees, even employees in different departments. Employers that fail to control the

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work environment could be at a disadvantage in the context of such an analysis. Evidence of a work environment permitting inappropriate comments based on age, race, or sex or other protected criteria could potentially be admitted as part of a plaintiff's claim. The same would be true for decisions or actions where the legitimate reasons were not obvious or well documented.

Decisions or actions in employment cases may be misunderstood. For example, one potential witness in the *Sprint* case thought a spreadsheet indicated that age had been used to make layoff decisions. However, the spreadsheet could easily have been a management tool designed to ensure the layoff did not have a disparate impact on older employees. Similarly, the negative evaluation of another employee's job performance could have been based on poor performance. A company may be called on to document employment-related decisions to avoid any misunderstanding that the decisions did not have a proper basis.

Every case must be analyzed based on its own facts. The potential danger for employers is that the analysis will include facts that might suggest a toleration for illegal discrimination. Inappropriate comments or inappropriate behavior based on age, sex, race, or other protected criteria could become "me too" evidence offered to show that these criteria influenced the decision affecting a particular plaintiff. Even if individual situations may be insufficient in themselves to support liability, an aggressive plaintiff may be able to make a case by weaving together the individual complaints of other employees about inappropriate comments or behavior. The *Sprint* decision indicates that employers cannot afford to tolerate such comments or behavior in any situation.

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