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Plaintiffs sometimes seek to prove employment discrimination by relying on evidence from other employees who claim that they too were the victims of discrimination. In *Sprint/United Management Co. v. Mendelsohn* the U.S. Supreme Court recently held that such "me too" evidence is neither per se admissible nor per se inadmissible. Instead, the Court instructed that admissibility of such evidence "depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."

Supreme Court Holds "Me Too" Evidence May Be Admissible to Prove Discrimination

By Gregory B. Reilly

The U.S. Supreme Court recently issued its unanimous opinion in *Sprint/United Management Co. v. Mendelsohn*, No. 06-1221 (Feb. 26, 2008) concerning whether a plaintiff alleging discrimination can rely on alleged evidence of discrimination from employees not supervised by plaintiff's supervisor or manager. The Supreme Court unanimously held that such "me too" evidence could be admissible depending upon the circumstances.

Trial Court Excludes "Me Too" Evidence, and Plaintiff Loses at Trial

In 1989 Sprint/United Management (Sprint) hired the plaintiff, Ellen Mendelsohn. Sprint terminated Mendelsohn's employment in 2002 as part of an ongoing company-wide reduction in force (RIF) that affected almost 15,000 employees. Thereafter, Mendelsohn sued Sprint alleging her termination was discriminatory in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA).

To support her claim, Mendelsohn sought to introduce trial testimony of five other former Sprint employees who claimed that their managers had discriminated against them on the basis of age. Some of these witnesses had allegedly heard derogatory age-based comments from managers; another claimed that the company's internship program was a mechanism for age discrimination; another claimed that he was given an unwarranted negative evaluation and "banned" from working at Sprint because of his age; another claimed he had witnessed age-based harassment; and another claimed that Sprint required him to get permission before hiring anyone over age 40. None of these five former employees worked in the same department as Mendelsohn, and none of them worked under the supervisors or managers within Mendelsohn's chain of command.

Sprint argued to the trial court that the coworkers' proposed testimony was irrelevant to the central issue in the case: Whether Mendelsohn's supervisor terminated her employment on the basis of age. Sprint asserted that the testimony was irrelevant because the coworkers were not "similarly situated" as they had different supervisors. Sprint also argued that the probative value of the coworker's evidence would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury and undue delay.

The trial court agreed with Sprint. In a brief pre-trial Order, the trial court precluded Mendelsohn from seeking to admit evidence of "discrimination against employees not similarly situated to plaintiff." The lower court defined "similarly situated" employees as those having the same supervisor as Mendelsohn whose alleged evidence of discrimination had "temporal proximity" to the alleged discrimination Mendelsohn suffered. On the basis of this ruling, the jury was not

permitted to hear the testimony of the five employees. The jury subsequently decided in Sprint's favor finding that Mendelsohn was not the victim of age discrimination.

Tenth Circuit Grants Mendelsohn Another Bite at the Apple

On appeal, the Tenth Circuit Court of Appeals reversed the trial court's ruling excluding the five employees' evidence. The Tenth Circuit held that the trial court abused its discretion by implementing a *per se* rule precluding evidence of discrimination from employees who were not supervised by plaintiff's supervisor. In reversing the lower court the Tenth Circuit suggested that while a "similarly situated" exclusion was appropriate in a discriminatory discipline case, it was not per se grounds for exclusion of evidence if there was a company-wide policy of discrimination. The Tenth Circuit then reviewed and determined that Mendelsohn's proprosed "me too" evidence was relevant, so it reversed the trial court and remanded the case for a new trial with instructions to admit the challenged testimony.

The Supreme Court Rules: The District Court Should Make the Decision of Whether Mendelsohn's "Me Too" Evidence Is Admissible

Rather than proceeding with a new trial, Sprint appealed to the U.S. Supreme Court to review the Tenth Circuit's decision. Upon review, the Court found the Tenth Circuit in error because it should have remanded the case to the trial court for a further explanation of its findings and, absent an abuse of discretion, deferred to the trial court's judgment respecting the evidentiary issues.

The Supreme Court stated that "[w]e conclude that such [me too] evidence is neither *per se* admissible nor *per se* inadmissible." Because the trial court was not entirely clear whether it was applying a per se rule, the Supreme Court remanded the case back to the trial court for a further explanation of its decision. The Court elaborated 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."

What Does the Supreme Court's Decision Mean for Employers?

The Court has essentially put employers on notice that the fact that a coworker is not "similarly situated" will not necessarily preclude a court from admitting alleged "me too" evidence of discrimination.

This is not a good result. The Court's decision (which will likely apply to other discrimination cases, not just age-related claims), essentially means that trial courts may permit plaintiffs to introduce additional evidence at trial – some of which may be of questionable relevance. This could make pre-trial discovery longer (and more expensive) and will likely make trials longer (and more expensive). Such evidence may be confusing to juries and prejudicial to employers.

The admission of "me too" evidence at trial from employees who are not similarly situated could, in some cases, help tip a weak case in the plaintiff's favor. Under the Supreme Court's reasoning, it is arguable that any one among the 15,000 employees subject to Sprint's RIF could have testified to aid plaintiff's case. After the Court's *Mendelsohn* opinion employers will have to be even more vigilant in preventing discrimination and harassment in the workplace to avoid potential "me too" evidence.

Gregory B. Reilly is a shareholder in Littler's New York and Newark offices. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Reilly at greilly@littler.com.