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Client Alert

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U.S. Supreme Court Rules That "Me, Too" Evidence Is Neither *Per Se* Admissible Nor *Per* Se Inadmissible

On February 26, 2008, the United States Supreme Court issued a unanimous decision on the hotly contested topic of "me, too" evidence, which usually surfaces in the form of non-party testimony alleging discrimination by supervisors who played no role in the adverse employment action challenged by the plaintiff. In *Sprint/United Management Co. v. Mendelsohn*, No. 06-1221, 2008 U.S. 2195 (2008), the Supreme Court ruled that such evidence is not subject to a *per se* rule of admissibility or inadmissibility. Rather, such determinations must be made by district courts on a case-by-case basis.

Factual and Procedural Background

During a company-wide reduction in force ("RIF"), Sprint/United Management Company ("Sprint") terminated Ellen Mendelsohn (age 51) who was the oldest manager in Sprint's Business Development Strategy Group. Mendelsohn reported to James Fee; Fee reported to Paul Reddick, who was the decisionmaker in Mendelsohn's termination; and Reddick reported to Bill Blessing, the head of the Business Development Strategy Group.

Mendelsohn filed an EEOC Charge in April 2003 alleging age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). After the EEOC dismissed the charge, Mendelsohn filed an ADEA suit in the United States District Court for the District of Kansas.

Before trial, Sprint filed a motion *in limine* to exclude the testimony of five witnesses whom Mendelsohn had identified as trial witnesses. None of the five witnesses were employed in the same department as Mendelsohn, nor were they supervised by anyone in Mendelsohn's chain of command (*i.e.*, Fee, Reddick or Blessing). Three of the five witnesses intended to testify that they had heard or been subject to discriminatory ageist remarks by their various supervisors. Yet neither the witnesses nor Mendelsohn alleged that anyone in the Business Development Strategy Group made ageist remarks.

The District court ruled that only persons "similarly situated" to Mendelsohn would be permitted to testify as to their own personal circumstances regarding the discrimination at Sprint. Specifically, the court held that only those former employees laid off by Reddick in close temporal proximity to Mendelsohn were similarly situated and could testify as to their circumstances. Therefore, the court excluded the testimony of Mendelsohn's other five employee witnesses because none shared the same supervisor as Mendelsohn.

On appeal, the Tenth Circuit panel held in a 2-1 decision that the trial court committed reversible error by excluding the "me, too" evidence. 466 F.3d 1223. Specifically, the Court of Appeals treated the District Court's order as applying a *per se* rule that evidence from employees of other supervisors is irrelevant in age discrimination cases, and concluded that the District Court's ruling to exclude evidence was an abuse of discretion. The Court went on to determine that the evidence was relevant and not unduly prejudicial and remanded for a new trial. The Supreme Court granted *certiorari*.

The Supreme Court's Decision

The Supreme Court reversed, holding that the Tenth Circuit erred in concluding that the District Court applied a *per se* rule of inadmissibility and thus 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. *Sprint/United Management Co. v. Mendelsohn*, 2008 U.S. Dist. LEXIS 2195, at *3. The Court ruled that the District Court had simply failed to state an adequate basis for its decision not to allow the "me too" evidence. *Id.* at *13-14. The Court admonished that:

> [H]ad the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. Relevance and prejudice under Rule 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. *See* Advisory Committee's Notes on Fed. Rul. Evid. 401, 28 U.S.C. App., p. 864 ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case").

Accordingly, the Court held that the Tenth Circuit should have remanded the case to the District Court with instructions to clarify the basis for its evidentiary ruling. *Id*. at *15.

What Does it Mean for Employers?

The Supreme Court's decision in *Sprint* is discouraging to those employers which had been hoping for a clear, *per se* rule that "me, too" evidence was inadmissible. Employers must thus continue strategizing and budgeting for the trials within trials that can result from such testimony. To help limit or control the monumental costs associated with these "me, too" mini trials, employers would be well advised to position their litigations early in the discovery process against broad fishing expeditions that seek discovery of potential "me, too" witnesses. For example, employers should challenge or attempt to limit discovery that seeks information concerning employees who (1) reported to different supervisors than the plaintiff; (2) advanced different types of claims than the plaintiff; (3) held different positions than the plaintiff; (4) challenged different adverse employment actions than the plaintiff; and (5) were adversely treated at points that were not close in time to the treatment complained of by the plaintiff. While the standards governing the scope of discovery are broader than those governing the admissibility of evidence, early efforts to limit the scope of discovery could prove particularly advantageous over the course of a lengthy litigation. Indeed, if an employer can sensitize a judge to these issues during the course of discovery, then it may work to the employer's advantage when the judge exercises his or her discretion concerning the relevance and prejudicial impact of such evidence during the *in limine* process.

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