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"ME TOO" or NOT TO: THAT IS THE QUESTION STILL

The question whether "me too" evidence will be admissible in discrimination cases has long been a thorny one. The Supreme Court recently took up the question, but the Court's decision did not give the hoped for clarity. Rather, the Court's decision avoids drawing a bright line and leaves the determination to the discretion of the trial court on a case by case basis.

In *Mendelsohn v. Sprint/United Management Co.*, 128 S. Ct. 1140 (2008), the 51-year-old plaintiff laid off in a company-wide reduction in force sued Sprint claiming age discrimination under the Age Discrimination in Employment Act ("ADEA"). She sought to introduce testimony at trial by five other former Sprint employees who claimed their supervisors discriminated against them on the basis of age. However, none of the witnesses worked in the same department as the plaintiff. Neither had they worked under, or heard any discriminatory remarks by, any of the supervisors in the plaintiff's chain of command. Sprint sought to exclude this "me too" evidence, arguing that it was not relevant to the plaintiff's claim because the witnesses did not have the same supervisors as the plaintiff, and thus were not similarly situated to the plaintiff.

The Supreme Court held that courts may not apply a "per se" rule excluding "me too" evidence, but rather, must determine whether the evidence is relevant and not unduly prejudicial. The Court went on to say that the question whether evidence of discrimination by other supervisors is relevant in any particular case is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and the theory of the case." The determination whether the evidence is prejudicial is also fact based, said the Court, requiring a "fact-intensive, context specific inquiry." The Court reasoned that determination whether to admit "me too" evidence is part and parcel of the trial court's duty to assess the probative value of evidence and to weigh any factors counseling against admissibility. Therefore, according to the Court, the trial court should make this fact based determination, and the trial court's determination should not be reversed unless it was an abuse of discretion.

With this decision, the Supreme Court has given trial courts a large responsibility without providing much guidance. To the extent that "me too" evidence is admitted, trials will increase in length and complexity. If the plaintiff is allowed to introduce "me too" evidence, the defendant then has the right to try to impeach the "me too" witnesses, and the defendant may feel the need to put on its own evidence, at least in statistical form, to demonstrate that it does not discriminate. So what begins as a trial of an individual discrimination case could become a series of mini-trials as to the employer's actions with respect to several other employees, which would increase the cost of litigation for all parties and also increase the burden on the court system.

The practical effect of the Supreme Court's decision in *Mendelsohn* is yet to be seen. However, the answer to the question whether "me too" evidence will be admissible in any case is less predictable than ever.

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