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"Me Too" Evidence

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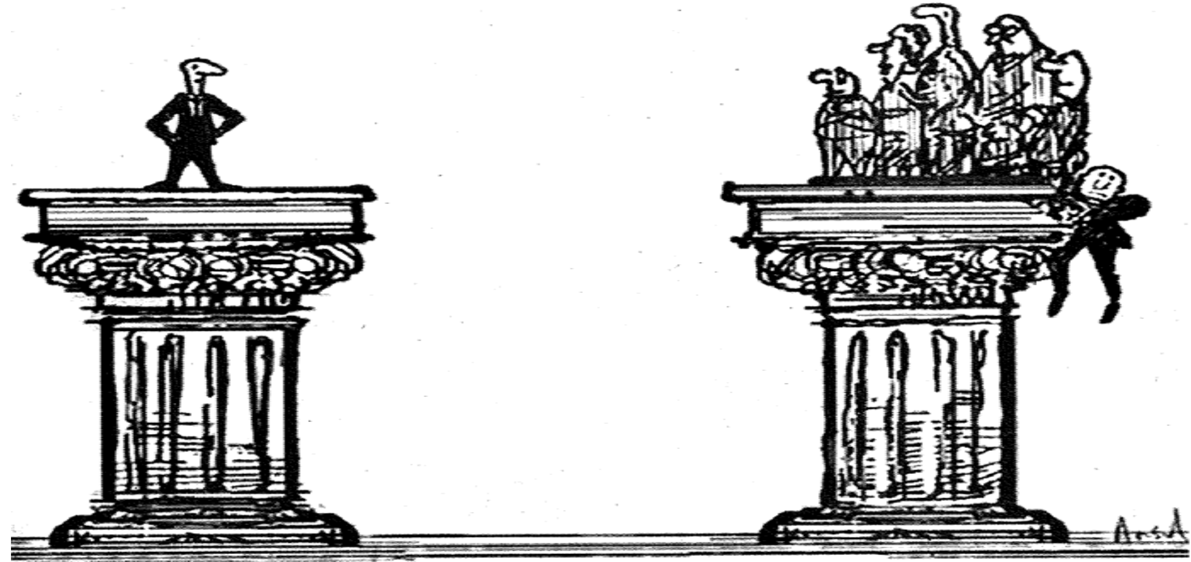

Later this year, the United States Supreme Court will hear arguments regarding a deep division between the circuit courts in regard to so-called "me too" evidence. This trend is the ire of every employer and the desire of every employee plaintiff. The Supreme Court will decide whether testimony from co-workers - often the topic of *in limine* motions at trial - should be excluded to prevent a jury from being prejudiced against an employer.

In *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006), the court declined to follow five other circuits when it allowed testimony from five co-workers in support of a plaintiff claiming age discrimination.

Testimony of Others

Mendelsohn, who had worked for Sprint for 13 years, claimed the company selected her for a layoff because of her age (51) during a company-wide reduction in force and sued under the federal Age Discrimination in Employment Act. Mendelsohn asked the district court to let her introduce the testimony of five co-workers who were part of the same layoff, but who did not report to Mendelsohn's supervisor and were not part of her work group. The five co-workers were not parties to the lawsuit, but believed that the employer had unlawfully discriminated against them, too.

The five co-workers, who were all over 40, believed that they were also the victims of age discrimination. Mendelsohn sought to show disparate treatment based on "a pervasive atmosphere of age discrimination" within the company, regardless of the fact that she had a different supervisor than the other co-workers. Sprint objected to the testimony, and asked the court, *in limine*, to exclude the evidence as irrelevant, noting also that it would confuse the jury and would needlessly consume time under Federal Rule of Evidence 403. After weighing the arguments of both sides, the trial court refused to allow the five co-workers to testify, as all had worked at different locations, for different supervisors and had been laid off at different times. These witnesses were not "similarly situated" to Mendelsohn, the court ruled; their testimony was not admitted and Mendelsohn lost the trial.

On appeal, Mendelsohn claimed that the trial court improperly excluded testimony from the other five Sprint employees, citing the fact that they had experienced similar discrimination during the same reduction in force. The 10th Circuit held that, because this evidence was excluded, Mendelsohn did not have a full opportunity to present her case to the jury. The 10th Circuit thus ordered a new trial. Sprint appealed and the case is now before the Supreme Court.

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The *Mendelsohn* case presents a frequent question of proof in employment discrimination cases: whether a trial court must admit the testimony of co-workers alleging discrimination by individuals who played no role in the adverse employment action challenged by the plaintiff.

The 10th Circuit majority held that a court commits a reversible error by excluding "me too" evidence. The argument put forth by proponents of such evidence is that the testimony of other employees regarding how an employer treated them is relevant to the defendant's discriminatory intent when the testimony establishes a pattern of discriminatory or retaliatory behavior or tends to discredit the employer's assertion of a legitimate business-related motive.

While the 10th Circuit stated that it uses the "same supervisor" rule when considering whether to admit testimony from co-workers in cases of discriminatory discipline (because a plaintiff is often claiming that he or she was treated harsher because of a particular protected classification), it does not apply the same rule when the allegation, as in *Mendelsohn*, was based on an allegation of a company-wide discriminatory policy, or when discriminatory treatment is alleged in the course of a layoff. Hence, the fact that the plaintiff and the other five co-workers did not have the same supervisor was irrelevant to the decision to admit their testimony of discrimination by Sprint.

On the other side of the argument, employers assert that a plaintiff bringing a discrimination lawsuit against an employer, particularly a large employer like Sprint, will have little difficulty finding a few employees who are willing to testify that they too were discriminated against, particularly when employees are angered by being selected for layoff.

According to the current 10th Circuit reasoning, co-workers may testify without showing that they are similarly situated to the plaintiff, other than that they are in the same protected class, worked for the same employer and lost their jobs under the same general circumstances, even absent a claim of a practice or pattern of discrimination.

On the other hand, the 10th Circuit did not say that all anecdotal evidence involving officials other than the plaintiff's supervisor has to be admitted. The testimony is admissible only if the plaintiff can show that the evidence could logically or reasonably be tied to the challenged layoff decision.

Trial Within a Trial

Sprint argues that allowing plaintiffs in discrimination cases to present "me too" testimony from other employees is unfair and costly to employers. The main complaint is that testimony from co-workers would create numerous "mini-trials." For example, each of the witnesses would testify about how they believed that the company had discriminated against them. Next, the employer would have to produce evidence about each of those termination decisions.

Sprint argued that such mini-trials are specifically proscribed by at least four circuits as an irrelevant and undue consumption of time. Citing *Moorhouse v. Boeing Co.* (E.D. Pa. 1980) 501 F.Supp. 390, aff'd. (3rd Cir. 1980) 639 F.2d 774, Sprint argues that when the plaintiff sought to introduce evidence of prior discriminatory acts by the employer, the court excluded such testimony to avoid "trying another lawsuit within the existing lawsuit."

The *Moorhouse* case seems particularly instructive because the plaintiff sought to introduce the testimony of five other people, each of whom complained of their own allegedly discriminatory layoffs. The court recognized that "even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant laid him off because of [unlawful discrimination]." The court went on to conclude that such evidence must be prohibited.

Moorhouse also recognized the undue amount of time that introduction of other acts of discrimination or harassment would consume. The court opined that other bad acts were not admissible due, in part, to the fact that the defendant would be forced to present the justification for the termination of each of the other witnesses. Thus, Sprint argued that because each of the five co-workers worked at different sites and in different business units and reported through different supervisory chains, it would unfairly prejudice the employer to show each of their termination decisions and would needlessly burden the court and jury with a much longer trial.Another oft-cited case is a 2nd Circuit decision in *Haskell v. Kaman Corp.* (2nd Cir. 1984) 743 F.2d 113.

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In *Haskell*, the court held that it was a reversible error to allow the plaintiff to introduce evidence of alleged discrimination against other former employees. The court reasoned that such evidence "was not relevant to the question of whether [plaintiff] was terminated for [impermissible] reasons." On the other hand, the 8th Circuit has held in *Estes v. Dick Smith Ford, Inc.* (8th Cir. 1988) 856 F.2d 1097 that precluding evidence of other age discrimination lawsuits filed against the employer was a reversible error, because the plaintiff was not able to show the "employer's background of discrimination."

The fight over admitting "me too" evidence has continued for well over 20 years, with employers claiming that testimony from co-workers creates confusion and prejudice that substantially outweighs its probative value. Conversely, plaintiffs have claimed that without the evidence, they are hamstrung in their attempt to prove their case and are substantially prejudiced in their attempt to show the discriminatory intent of the employer. Hopefully, the Supreme Court will address the divisions among the circuits in the coming term and provide some much-needed guidance on this important evidentiary issue.

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