"Me Too" Evidence: Probative or Prejudicial?[1]

by E. Phileda Tennant

I. Issue

When can the plaintiff or defendant introduce evidence that another person besides the plaintiff has or has not been discriminated against, retaliated against or harassed? How has the #MeToo movement affected the answer to this question?

II. What is "Me too" Evidence?

Long before the #MeToo campaign went viral on Twitter, there was "Me too" evidence in the courtroom. Just in case you live under a rock: #MeToo is a hashtag protesting sexual harassment and assault that went "viral" after its use in October 2017 by the actress Alyssa Milano on Twitter. Use of the hashtag actually dates back to 2006, when it was created by social activist Tarana Burke and used on MySpace.

"Me too" evidence, by contrast to the #MeToo movement, is evidence – typically offered by the plaintiff – of instances of discrimination, harassment or retaliation against other people. The evidence is often in the form of the testimony of nonparty former employees. "Me too" evidence is typically criticized by defendants as prejudicial, creating "trials within a trial." Perhaps confusingly, courts also call evidence offered by the defendant, showing the defendant's non-discriminatory intent – often in the form of testimony of employees – "Me too" evidence.

"Me too" evidence is distinct from (although similar to) the evidence of "similarly situated employees" admitted to show disparate treatment. *See, e.g., Wallace v. Methodist Hosp. System*, 271 F.3d 212, 221 (5th Cir. 2001) ("in order for a plaintiff to show disparate treatment, she must

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demonstrate 'that the misconduct for which she was discharged was nearly identical to that engaged in by a[n] employee [not within her protected class] whom [the company] retained.'").

III. Legal Standards

The admissibility of "Me too" evidence is a classic law school exam question: the Federal Rules of Evidence and legal jurisprudence have much to say on evidence of prior bad acts.

A. Federal Rules of Evidence

The relevant federal rules provide:

a. **FRE 401**: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

b. **FRE 403**: Although relevant, evidence may be excluded "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

c. **FRE 404(b)(1): "**Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."

d. **FRE 404(b)(2)**: Evidence of a crime, wrong, or other act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."

B. The U.S. Supreme Court Weighs In: the *Mendelsohn* Decision

The on-point decision from the U.S. Supreme Court is *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 388 (2008). *Mendelsohn* is a single-plaintiff age discrimination case in which the plaintiff sought to admit testimony from "five other former Sprint employees who claimed that their supervisors had discriminated against them because of age." *Id.* at 381. Three employees alleged they heard a Sprint supervisor make remarks "denigrating older workers," one witness claimed to have seen a spreadsheet suggesting use of age in making layoff decisions, (among other things), one witness was to testify that he had been "banned" from working at Sprint

because of his age (among other things), and one claimed Sprint had required him to get permission before hiring anyone over age 40 (among other things). *Id.* The trial court refused to admit the foregoing evidence because the employees did not share the same supervisor, and the conduct was "remote in time." *Id.* at 382.

The case went to the Supreme Court following the Tenth Circuit's reversal and remand, which instructed the district court to retry the case and admit the evidence. *See id.* at 383. The Supreme Court concluded that the district court's "basis for its evidentiary ruling" was not clear, reversed the Tenth Circuit, and remanded for clearer instructions from the district court. *Id.* at 388. However, in so holding, the Supreme Court stated:

> The question 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. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because Rules 401 and 403 do not make such evidence *per se* admissible or *per se* inadmissible, and because the inquiry required by those Rules is within the province of the District Court in the first instance, we vacate the judgment of the Court of Appeals and remand the case with instructions to have the District Court clarify the basis for its evidentiary ruling under the applicable Rules. (emphasis added)

Id.

C. Factors Flush Out *Mendelsohn*

After the *Mendelsohn* decision, courts in other circuits distilled the decision into factors to use when determining the admissibility of "Me too" evidence. The D.C. Circuit held, for example:

> Factors that courts consider in the inquiry include (1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case, (2) whether the same decisionmaker was involved, (3) whether the witness and plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated.

Hayes v. Sebelius, 806 F. Supp. 2d 141, 144-45 (D. D.C. 2011) (excluding "me too" evidence, including testimony, from plaintiff's coworker who previously filed a discrimination suit, in a race discrimination and retaliation case).

D. Fifth Circuit Law

Although the Fifth Circuit has cited the *Mendelsohn* decision, it has not clearly cited the case for the purpose of applying its holding regarding "me too" evidence. Relevant case law on the "me too" evidentiary issue includes *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000).

In *Wyvill*, two employees brought an age discrimination claim under a "pattern and practice" theory, and attempted to introduce anecdotes from other employees that worked under different supervisors, in different parts of the company, and who were fired at different times from the plaintiffs. 212 F.3d at 302. In holding that the other employees were not "similarly situated" to the plaintiffs, and therefore the "me too" evidence was incorrectly admitted, the Fifth Circuit described the standards for analysis:

> Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff. [. . .] This court and others have held that testimony from former employees who had <u>different supervisors</u> than the plaintiff, who worked in <u>different parts of the employer's company</u>, or <u>whose terminations were removed in time</u> from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge. (emphases added) (internal citation omitted)

Id. at 302. The Fifth Circuit wrote that "[b]y admitting this evidence, the district court substantially prejudiced United Companies, forcing it to respond to each witness's claims, and creating, in effect, several 'trials within a trial.'" *Id.* at 303.

Cases within the Fifth Circuit have applied the *Mendelsohn* decision in the context of analyzing the admissibility of "me too" evidence, including for the proposition that "the plaintiff's

circumstances and theory of the case," are determinative of the relevance of such evidence. *Diloreto v. Towers Perrin Forster & Crosby, Inc.*, 2010 WL 11619087, *3 (N.D. Tex. 2010) ("the relevance of co-workers' discrimination complaints is a fact-based determination and not susceptible to a per se admissibility test"). *See also Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 386 (E.D. La. 2008) (citing *Mendelsohn*, 552 U.S. 379 at 388).

IV. Lessons

A. The Plaintiff's "Theory of the Case" is Important

"Me too" evidence is not probative in every case relating to discrimination, retaliation or harassment. As the Supreme Court instructed in *Mendelsohn*, the plaintiff's theory of the case, along with the similarity of the circumstances, is determinative of the probative nature of the evidence. 552 U.S. 379 at 388.

First, if the facts align, "me too" evidence may be relevant to a pattern and practice theory. *See, e.g., Johnson*, 253 F.R.D. at 386. Second, "me too" evidence may, under specifically similar factual circumstances, be probative of an employer's intent. *See, e.g., Hitt v. Connell*, 301 F.3d 240, 249-50 (5th Cir. 2002) (evidence of discriminatory firing of third parties was admissible as proof of motive in plaintiff's firing); *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285-87 (11th Cir. 2008) (testimony of plaintiff's coworkers not admissible to show habit, pattern or practice); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988) (the trial court erred in excluding evidence that "tended to show a climate of race and age bias" at the company).

Third, "me too" evidence may be relevant in a hostile work environment case to show an employer's knowledge of harassment, and respondeat superior liability. *See, e.g., Donaldson v. Lensbouer*, 2017 WL 5634130, *9 (W.D. Penn. 2017); *King v. McMillan*, 594 F.3d 301, 310-11 (4th Cir. 2010). Pursuant to Federal Rule of Evidence 404(b)(1), such evidence is not admissible to "form the basis of liability." *Donaldson*, 2017 WL 5634130, at *9.

B. The Facts Matter: Apply the Rules of Evidence

Holdings or dicta on this topic is necessarily fact specific, pursuant to the Supreme Court's instruction that "Me too" evidence is neither "per se admissible or per se inadmissible." *Mendelsohn*, 552 U.S. 379, 388. *See, e.g., Oinonen v. TRX, Inc.*, 2010 WL 2217870, *3 (N.D. Tex. 2010) ("The Sprint Court thus envisions a fact-driven analysis in determining the relevance of one employee's termination to another employee's claim of discrimination.").

When faced with the question of admissibility of "me too" evidence (or not-me evidence, discussed below), practitioners should focus on the facts and apply the rules of evidence. Indeed, in *Alaniz v. Zamora-Quezada*, the Fifth Circuit cited to little more than the Federal Rules and *Hitt*, 301 F.3d at 249-50, for the proposition that, where the plaintiffs' theory involved a claim of "systemic pattern of discrimination at the [doctor's] clinics," "testimony of … two non-party employees … is admissible" to demonstrate a doctor/supervisor's discriminatory "plan, motive, or absence of mistake," in his making of "sexual overtures to female subordinates." 591 F.3d 761, 775 (5th Cir. 2009).

On the flip side of the coin, the facts underlying "me too" evidence may warrant its exclusion for failure to be "closely related the evidence is to the plaintiff's circumstances and theory of the case." *See Mendelsohn*, 552 U.S. 379, 388. *See, e.g., Quigley v Winter.*, 598 F.3d 938, 951 (8th Cir. 2010).

C. Not-Me Evidence is Relevant Where "Me too" Evidence is Relevant

The corollary of "me too" evidence is evidence of non-discriminatory or retaliatory treatment offered by the defendant. Such evidence may come from employees of the defendant. Courts refer to this testimony as "me too" testimony, and are likely to apply the same standards—the Federal Rules. *See, e.g.*, *Elion v. Jackson*, 544 F. Supp. 2d 1, 9 (D. D.C. 2008). In *Elion*, the district court concluded that testimony from an African American employee regarding the

Department of Housing and Urban Development's favorable treatment of her was admissible "to negate the inference that defendant harbored discriminatory or retaliatory intent." *Id.* The district court's opinion in the FLSA class action suit *Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 386 (E.D. La. 2008), is also instructive, even though it is not a discrimination case. The district court applied the decision in the context of plaintiffs' motion *in limine*. *Id.* The district court stated that the plaintiffs' theory of the case – that Big Lots had a "corporate policy and practice misclassification" – made the experience of non-opt-ins relevant to the case and admissible. *Id.*

V. #MeToo in "Me too"?

To date, the impact of the #MeToo movement has been felt largely in criminal court. One widely publicized "me Too" evidentiary issue arose in the prosecution of Bill Cosby by the Commonwealth of Pennsylvania. In the second trial of Cosby, the Commonwealth successfully admitted new "me too" testimony from five women who said that Cosby drugged and assaulted them. Despite Federal Rule 404(b)(1), the judge allowed the evidence for the purpose of showing a common plan or scheme, or intent by Cosby. Cosby's motion to exclude such evidence can be found online at https://www.montcopa.org/2312/Commonwealth-v-William-Henry-Cosby-Jr, last accessed Aug. 19, 2018.