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THE UNITED STATES SUPREME COURT RULES THAT THE ADMISSIBILITY OF "ME TOO" EVIDENCE REQUIRES A FACT-INTENSIVE ANALYSIS

by M. Trevor Lyons

On Feb. 26, 2008, the United States Supreme Court issued its unanimous opinion in *Sprint/United Management Co. v. Mendelsohn*,[1] addressing the issue of whether a plaintiff alleging employment discrimination can rely on alleged evidence of discrimination from other employees who were not supervised by the plaintiff's supervisor or manager. The Court held that the admissibility of such "me too" evidence requires "a fact-intensive, context specific inquiry," and is therefore not "*per se* admissible or *per se* inadmissible." In so holding, the Supreme Court essentially dictated that the admission of such evidence will continue to be made on a case-by-case basis by federal trial judges, and rejected the application of any broad-based or bright-line rules regarding the admissibility of such evidence in federal employment law cases.

The Record Below

Ellen Mendelsohn, a 51-year-old manager for Sprint, was fired as part of company-wide layoffs in 2002, and subsequently sued Sprint, claiming age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA).[2] Before the trial began, Mendelsohn indicated that she planned to offer the testimony of five other former Sprint employees about additional alleged acts of age discrimination. Importantly, none of these five employees worked in Mendelsohn's department or under the same chain of command as Mendelsohn, and it was undisputed that their proffered testimony did not involve allegations against Mendelsohn's supervisors. Specifically, their proposed testimony was only that they had heard other Sprint supervisors or managers making denigrating remarks about older workers, and other anecdotal evidence of alleged discrimination involving other decision makers at Sprint.

Sprint moved *in limine* to exclude the testimony of these five former employees. Sprint argued that any alleged discrimination by supervisors who had no role in the employment decision challenged by Mendelsohn was simply irrelevant under Federal Rules of Evidence 401 and 402. Sprint also argued that such testimony should be excluded under Federal Rule of Evidence 403, because the probative value of the 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 minute pre-trial order, the trial court precluded Mendelsohn from seeking to admit evidence of "discrimination against employees not similarly situated to plaintiff." The district court defined "similarly situated" employees as those having the same supervisor as Mendelsohn, and whose alleged evidence of discrimination had "temporal proximity" to the purported discrimination Mendelsohn allegedly suffered.

As the trial proceeded, the judge orally clarified that the minute order was meant to exclude only testimony "that Sprint treated other people unfairly on the basis of age," and would not bar testimony going to the "totally different" question "whether the [reduction in force], which is [Sprint's] stated nondiscriminatory reason, is a pretext for age discrimination." 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.

The court of appeals for the Tenth Circuit treated the district court's minute order as the application of a *per se* rule that evidence relating to or coming from employees with other supervisors was irrelevant as a matter of law to Mendelsohn's efforts to prove discrimination. Specifically, the Tenth Circuit concluded that the district court abused its discretion by relying on *Aramburu v. Boeing Co.*[3]

In *Aramburu*, the Tenth Circuit had held that "[s]imilarly

situated employees," for the purpose of showing disparate treatment in a discriminatory discipline case, "are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline."[4] The court of appeals viewed the *Aramburu* case as inapposite to the facts raised by Mendelsohn, because that case addressed discriminatory discipline, not an alleged company-wide policy of discrimination. Remarkably, after finding that the district court had abused its discretion in applying a *per se* bar to Mendelsohn's "me too" evidence, the Tenth Circuit went on to actually assess the relevance of the evidence itself. Specifically, the court of appeals conducted its own balancing of the probative value and potential prejudicial effect of the proffered "me too" evidence, and determined that it was actually relevant, and not unduly prejudicial. The court of appeals, therefore, reversed, and remanded to the district court for a new trial consistent with its holding.

The Supreme Court's Decision

The Supreme Court reversed the Tenth Circuit's decision essentially holding that because a district court is more familiar with the details of a given case, and has greater experience in evidentiary matters, the courts of appeals should have afforded broad discretion to the district court's evidentiary rulings.

Justice Clarence Thomas, writing for the unanimous court, found that the Tenth Circuit had failed to give the district court's minute order proper deference, and had erroneously found that the district court had applied a *per se* rule of inadmissibility under *Aramburu.* Justice Thomas explained that the district court's "discussion of the evidence neither cited *Aramburu* nor gave any other indication that its decision relied on that case." He further found that "[e]ven if Sprint had argued that *Aramburu* requires a *per se* rule excluding such evidence, it would be inappropriate for the reviewing court to assume, absent indication in the District Court's opinion, that the lower court adopted a party's incorrect argument." Therefore, "[r]ather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record..."

As a result, Justice Thomas held that the Tenth Circuit should have remanded the matter and directed the district court to clarify the basis of its order rather than deciding the issue of admissibility itself.

More importantly, however, Justice Thomas' opinion soundly rejected the idea that the admissibility of "me too" evidence in federal employment law cases should be subject to a broad-based or bright-line test:

> ...had 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 Rules 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.

Justice Thomas further explained that the question of whether evidence of discrimination by other supervisors is relevant in an individual case is always a highly fact-based, context-laden inquiry, one which depends on numerous factors, including how closely related the evidence is to the plaintiff's particular circumstances and theory of the case. Therefore, he concluded that such evidence is never *per se* admissible or *per se* inadmissible, but rather is always "within the province of the District Court in the first instance."

While essentially maintaining the *status quo*, the Supreme Court's recent decision is important in two respects. First, by rejecting the concept of *per se* admissibility or inadmissibility, the Supreme Court clearly sought to forestall the development of any broad-based or bright-line test regarding the admissibility of such evidence. In this regard, the Supreme Court's decision is actually consistent with several other decisions in which the Court has voiced heightened concerns about judicial, particularly appellate court, policy making, and sought to preserve the historical role of trial courts.[5]

Equally important, however, is the Supreme Court's renewed emphasis on the importance of a trial court's obligation to make a detailed review of the purpose for which any proffered "me too" evidence is offered, and to directly correlate that use to a necessary element in the underlying case. While this requirement is not new, the Supreme Court's recent decision emphasizing that a district court must consider how closely related the evidence is to the plaintiff's particular circumstances and theory of the case should breathe new life into this analysis. ■

Endnotes

1. No. 06-1221 (Feb. 26, 2008).
2. 29 U.S.C. Sec. 621 *et seq.*
3. 112 F. 3d 1398 (10th Cir. 1997).
4. 112 F.3d. at 1404 (internal quotation marks omitted).
5. *See e.g. Martin v. Franklin Capital Corp.*, 546 U.S. 132, 126 S. Ct. 704 (2005) (use of the word "may" in the federal removal statute that authorizes an award of costs and attorney's fees when a case is remanded to state court because removal was jurisdictionally improper requires that a district court employ discretion in awarding such fees and actually determine that the removing party lacked an objectively reasonable basis for seeking removal). Also at his confirmation hearings, Chief Justice Roberts suggested that he would try to move the Court toward a policy of judicial restraint. This effort appears to be reflected in several of his recent opinions, and he appears to have been at least partially successful in moving the Court in this direction. *See* Diane S. Sykes, Of a Judiciary Nature: Observations on Chief Justice's First Opinions, 34 *Pepp. L. Rev.* 1027, 1042 (2007).

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