PERSPECTIVES

Summer 2008

A periodic newsletter from the Labor & Employment Practice Group of Dickinson Mackaman Tyler & Hagen, P.C.

Mendelsohn's Admissibility of "Me, Too" Evidence in Disparate Treatment Discrimination Cases: No *Per Se* Rule, But Little Other Guidance

by JILL R. JENSEN-WELCH

Earlier this year, the United States Supreme Court duffed an opportunity to provide substantive guidance on the admissibility of "me, too" evidence in employment discrimination cases. The Court declined to adopt a *per se* rule and held that district court judges have discretion to admit or exclude "me, too" evidence. *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 170 L. Ed. 2d 1 (Feb. 26, 2008). But the Court provided scant assistance to judges for these important evidentiary decisions.

What exactly is "me, too" evidence? Frankly, the words "me, too" are found nowhere within the Supreme Court's opinion in *Mendelsohn*. Nonetheless, the shorthand phrase is a good descriptor and has become the common moniker for the case. "Me, too" evidence is testimony from nonparty witnesses who believe they were discriminated against by the same employer, but not necessarily by the same supervisors the plaintiff is accusing of discrimination. As you might imagine, employers want to exclude "me, too" evidence while employees want it admitted.

The facts of *Mendelsohn* further illustrate what "me, too" evidence is. Ellen Mendelsohn was terminated from Sprint in an on-going, company-wide reduction in force in 2002. Mendelsohn claimed she was terminated because of her age. To support her claim, Mendelsohn wanted to introduce testimony from former Sprint employees, who did not work in her business unit, regarding age discrimination by supervisors who were not in her chain of command, as follows:

- Several who claimed they heard various managers make derogatory remarks about older workers.
- One who claimed she saw a spreadsheet suggesting a supervisor considered age when making RIF decisions.
- One who claimed he had been "banned" from working at Sprint because of his age and claimed he had seen an employee (not Mendelsohn) harassed because of her age.
- One who claimed he was required to get permission before hiring anyone over 40 and who, after his termination, was replaced by a younger employee.

Before trial, Sprint asked the district judge to exclude this "me, too" testimony. Sprint argued this evidence was not relevant to whether Mendelsohn was terminated due to her age because these former employees were not similarly situated to her. In addition, Sprint argued that admission of this "me, too" evidence would unfairly prejudice, confuse, and mislead the jury. The judge agreed and excluded the evidence. At trial, the judge clarified that "me, too" evidence was not admissible to show that Sprint treated other older workers unfairly due to age, but it might be admissible to show that Sprint's explanation for Mendelsohn's termination (i.e., a RIF) might be pretext for age discrimination. The jury returned

Me, Too, Cont'd on p. 2

In This Issue

DICKINSON MACKAMAN TYLER & HAGEN PC
ATTORNEYS & COUNSELORS

699 Walnut Street, Suite 1600, Des Moines, IA 50309 Phone: 515.244.2600 Fax: 515.246.4550

www.dickinsonlaw.com

Me, Too, Cont'd from p. 1

a verdict in favor of Sprint. Mendelsohn appealed the ruling excluding the "me, too" evidence and sought a new trial where she would be allowed to present that evidence.

The Tenth Circuit Court of Appeals believed the district court judge had applied a *per se* rule making "me, too" evidence never admissible. Finding that was an abuse of discretion, the appeals court reversed and remanded the case to be retried with the "me, too" evidence admitted. Sprint asked the U.S. Supreme Court to review the case.

In a unanimous opinion delivered by Justice Thomas, the Supreme Court held that there is no *per se* rule on the admissibility of "me too" evidence in employment discrimination cases. Rather, admission of "me, too" evidence depends on the facts and circumstances of each case. Unfortunately, the Supreme Court provided little guidance to district courts on how to make such evidentiary determinations in the future. It said only: "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." The case was remanded for the district court to clarify the basis of its exclusion of the evidence, with only these few precious words for guidance. The district court has not yet issued that clarifying ruling.

The *Mendelsohn* ruling cuts two ways. If a plaintiff can introduce evidence of alleged discrimination by supervisors who were not involved in her adverse employment action to prove her claim of disparate treatment, then an employer should be able to introduce evidence of nondiscriminatory conduct by uninvolved supervisors in its defense. Given the lack of specific guidance in *Mendelsohn*, we expect an increasing amount of litigation over the admissibility of "me, too" evidence in employment discrimination cases. *Mendelsohn* certainly maintains pressure on employers to properly train supervisors, and to closely monitor employment decisions, because a few bad apples can spoil a whole bunch more.

What's a "Charge" of Discrimination? We Still Don't Really Know

by MEGAN J. ERICKSON

The Age Discrimination in Employment Act (ADEA) mandates that no private lawsuit may commence until 60 days after a charge has been filed; it also requires that the charge be filed within a specific timeframe after the alleged discriminatory act. The statute, however, does not define the term "charge." In *Federal Express Corporation v. Holowecki*, 128 S. Ct. 1147 (2008), the Supreme Court attempted to provide some parameters on the question of what constitutes a "charge" under the ADEA.

In this attempted class action suit, fourteen current and former FedEx employees sued, contending that the company implemented performance evaluation programs to "weed out" older employees. The Court in *Holowecki* addressed the timeliness of a suit filed by one of the plaintiffs, Patricia Kennedy. Kennedy never filed a formal "Charge of Discrimination" form with the EEOC. She *did* file an "intake questionnaire" and she attached an affidavit to the form.

Under the ADEA, when an employee files a charge of discrimination with the EEOC, the agency has a duty to both notify the charged party (i.e., the employer) and initiate informal dispute resolution processes between the parties. Because Kennedy did not file a formal charging document, the EEOC did not notify FedEx of Kennedy's complaint as called for by the statute. FedEx moved to dismiss the lawsuit, arguing Kennedy failed to satisfy the precondition to suit – timely filing of a charge of discrimination. The company insisted that whether a particular filing rose to the level of a charge must be determined by looking to the EEOC's response: Did the agency fulfill its mandatory duties to notify and initiate a conciliation process? FedEx essentially argued that: (1) the EEOC is bound to act upon receiving a charge, (2) the EEOC failed to act upon receiving Kennedy's filing, and (3) therefore, Kennedy's preliminary intake filing could not be a charge.

The district court granted FedEx's motion to dismiss, agreeing that the filing of the questionnaire and affidavit was not a charge of discrimination. The appellate court reversed, and the United States Supreme Court affirmed the Second Circuit. According to the Supreme Court's majority opinion, the determination of whether a filing constitutes a "charge" must be based on agency regulations; if those regulations are unclear, the definition hinges upon agency interpretations of its regulations.

According to the EEOC's regulations, a charge is "a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged in or is about to engage in actions in violation of the Act." Section 1626.8(a) of the regulations lists five elements a charge "should contain": (1)-(2) the name, address, and phone number of the charging person and of the person charged, (3) a statement of facts describing the alleged discriminatory practices, (4) the number of employees of the charged employer, and (5) a statement indicating whether the charging party has initiated state proceedings. However, the following subsection, §1626.8(b), somewhat minimizes these requirements by stating that a charge is "sufficient" if it

Discrimination, Cont'd on p. 5

Iowa Wage Payment Collection Act: Changed Again!

by JILL R. JENSEN-WELCH

For the fourth year in a row, the Iowa legislature has amended Iowa Code Chapter 91A, the Iowa Wage Payment Collection Act, impacting how employers pay wages. This year there are two changes, as described below, which are effective on July 1, 2008:

- Manner of Wage Payments. Wages can no longer be sent to employees by mail, unless the employee makes a written request that his/her wages be sent by mail. If such a request is made, the employer must maintain a copy of it for as long as it is effective and at least two years thereafter. Now, wages can be distributed to employees only (1) at their normal place of employment during normal employment hours, (2) at another place and time mutually agreed upon, (3) by direct deposit into a financial institution at the employee's election (the employer can require direct deposit for employees hired after July 1, 2005), or (4) by mail, if the employee makes a written request for such.
- Liability for Overdrafts. Employers are now liable for overdraft charges in employee financial accounts when the overdraft is created by the employer's failure to pay wages by the regular payday, no matter which manner of payment is used. In addition, employers may be liable for a claimed violation of Chapter 91A, and other damages available for such claims, due to delayed payment of wages.

Use of Off-Hours Cell Phones and E-Mail May Result in Overtime Pay Obligations

by REBECCA BOYD DUBLINSKE

In the not-so-distant past, most non-exempt employees who worked overtime were physically at the office. Today, almost everyone uses a smartphone, a network-connected personal digital assistant (PDA) or a more traditional cell phone, and these devices are sometimes provided by employers. Everyone who has carried a PDA knows that it is almost impossible to not check in to see what is going on at the office, whether or not the employer requires its employees to do so. The rapid increase in the use of these devices has led to questions about whether the use of PDAs outside normal working hours could lead to an increase in claims for overtime pay. Employees who are not exempt from the application of the overtime provisions of the federal Fair Labor Standards Act (FLSA) must be paid one and one-half times their hourly rate of pay for all hours worked over 40 hours per week. Time spent reading and answering e-mails and cell phone calls may be considered as hours worked for purposes of computing overtime pay.

If your employees use PDAs, home computers or cell phones to check and return work e-mails and voicemails, your company should review and amend policies to clarify the company's position on the use of these devices by non-exempt employees. For example, your company should consider whether to prohibit non-exempt employees from using or checking e-mails and voicemails after hours unless they are specifically instructed by a manager to do so. In addition, supervisors and managers should be trained that merely allowing employees to do work by using these devices during their usual non-working hours may be equivalent to having the employee physically at the office and should be considered hours worked. Whether the employee voluntarily wants to do this is not the issue —the company can be liable for overtime pay if the employees are expected to do work or are known to be doing work by using these devices during usual non-working hours.

HIRE PERSPECTIVES

Summer 2008

A newsletter for the clients and friends of Dickinson Mackaman Tyler & Hagen, P.C.

HIRE PERSPECTIVES is published periodically by Dickinson Mackaman Tyler & Hagen, P.C.,
699 Walnut Street, Suite 1600
Des Moines, Iowa 50309.

Phone: 515.244.2600
Fax: 515.246.4550
www.dickinsonlaw.com
Email: Info@dickinsonlaw.com

The Iowa Smokefree Air Act

by L. ALLYN DIXON, JR.

The Iowa Smokefree Air Act, which becomes effective July 1, 2008, bans smoking in public places, enclosed areas within places of employment and certain outdoor areas. "Public place" means an enclosed area (the space between floor and ceiling and walls and windows, exclusive of doorways) where the public is invited or permitted to be. Examples include public buildings and vehicles owned, leased, or operated by the state or any political subdivision; retail businesses, malls, banks, restaurants, bars and more. "Place of employment" means an area under the control of an employer, and includes all areas that an employee frequents during the course of employment (e.g., work areas, conference rooms, lounges, cafeterias, bathrooms, hallways, stairways, elevators), except that the Act does not regulate smoking in outdoor places of employment other than the grounds of most public buildings and other places such as open arenas and stadiums, restaurant patios, school grounds and public transport facilities.

The Act also imposes a number of burdens upon employers. For example, Iowa employers must communicate the Act's prohibitions to current employees and prospective employees, and post "No-Smoking" signs that meet certain requirements at premises entrances and exits and inside company vehicles. Also, employers must eliminate smoking lounges unless they provide a smoking cessation program. Employers must also remove ashtrays from the premises, subject to the smoking lounge exception.

Employers should also be aware that there are penalties under the Act for terminating or refusing to hire someone because they register a complaint or attempt to prosecute a claim under the Act. These range from $2,000 to $10,000 for each violation, and there are also provisions allowing for suspension or revocation of business permits or licenses for violations. Owners, managers, or operators of places where smoking is banned face penalties for smoking violations ranging from $100 for the first offense in a rolling year to $500 after two offenses. Each day a violation continues is considered a separate violation.

For now, the Department of Public Health, which is charged with enforcing the Act, has indicated in some of its statements that it initially is more concerned with facilitating compliance through educational efforts than by focusing upon enforcement remedies. Given the uncertainty created by some of the ambiguities within the Act, this is a welcomed posture for the agency to have assumed.

Despite the legislature's well-publicized efforts to enact a statute that could be readily understood and interpreted, the Act's plain language does not provide answers to all questions arising under the new law. However, the forthcoming rules, which the Department issued in draft form on June 2, 2008, provide additional guidance for employers. The draft rules will be considered for approval on June 11, 2008. The rules can be found at www. IowaSmokefreeAir.gov, along with a list of "Frequently Asked Questions" and samples of signs that Iowa businesses will need to display beginning July 1. We note that comments on the rules may be submitted by completing an online form available on the Web site until August 6.

The safest course of action for employers presently is to begin to prepare for implementing a broad prohibition against smoking in areas under a company's control by, among other things, determining how the company plans to educate employees as to the Act's provisions, evaluating where compliant signs will need to be posted (signs must be posted at entrances and exits to premises and inside company-provided vehicles), removing ashtrays, and amending the company's employment application to advise prospective employees as to the Act's applicability to the company's premises and vehicles.

The Firm will continue to follow developments regarding the rules promulgation, as well as subsequent changes to the rules. Please feel free to contact us with any particular questions you or your client may have concerning the Act's applicability to a particular situation or set of circumstances.

* * * * * *

MARK YOUR CALENDARS:

Dickinson, Mackaman, Tyler & Hagen, P.C.'s
2008 Employment Law Seminar
October 16, 2008

Stoney Creek Inn, Johnston

* * * * * *

Discrimination, Cont'd from p. 2

meets the requirements of 29 C.F.R. § 1626.6. Section 1626.6 requires that the charge: (1) be in writing, (2) name the prospective defendants, and (3) generally allege the discriminatory acts.

Kennedy argued that to meet the statutory requirement that a "charge" be filed as a precondition of suit, the document need only satisfy the three requirements under § 1626.6. According to the EEOC in a "friend of the court" brief filed with the Supreme Court, the cited interpreting rules only identified the *procedures* for filing a charge, but did not identify all the required *elements* of a charge. The EEOC declared that something more is needed: "[t]he test for determining whether the filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights."

The Court determined the "request-to-act" requirement was a reasonable construction of the statute, and was consistent with the statutory framework. The Court concluded that to be a charge under the ADEA, the filing must contain the information required by the EEOC regulations *and* be reasonably construed as requesting the agency to take remedial action to protect the employee's rights or resolve a dispute between the employer and employee.

The Supreme Court next considered whether Kennedy's intake questionnaire amounted to a "charge" under the clarified standard. The Court determined Kennedy's preliminary filing contained all the information listed under § 1626.8. Although the form itself did not necessarily request action by the agency, the verified affidavit filed with her questionnaire concluded by asking the EEOC to "please force Federal Express to end their age discrimination plan so we can finish out our careers absent the unfairness and hostile work environment . . ." The Court found this statement, taken from an objective observer's standpoint, and by a reasonable construction of its terms, would be properly construed as a request for the agency to act (even though the local EEOC office that received the filing apparently did not so construe it).

The *Holowecki* case presents a potentially difficult situation for employers. Congress, in passing the legislation, clearly meant to establish a procedure for the agency to provide potential defendant employers notice before any lawsuit, and at least a theoretical opportunity for informal resolution. Here, FedEx knew nothing about the complaints until it was sued. The Court acknowledged "[t]he employer's interests, in particular, were given short shrift" — but the Court believed that result was "unavoidable." The Court concluded its opinion by calling on the EEOC to clarify its regulations in this area.

While *Holowecki* dealt with the ADEA, other statutes enforced by the EEOC have similar enforcement mechanisms and waiting periods that require the filing of a charge with the EEOC before filing a suit. Although the Court noted these statutes do not necessarily have uniform requirements, the EEOC will presumably maintain a consistent position: that the filing of almost *any* document may trigger a right to sue if, when viewed retrospectively, the document could be "reasonably construed as a request for the agency to take action."