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LEGAL ALERT



## Legal Alert: Supreme Court Rules on “Me Too” Evidence of Discrimination

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The U.S. Supreme Court has held that testimony by non-parties to a lawsuit claiming they were subject to discrimination by individuals other than those accused in the lawsuit is neither *per se* admissible nor *per se* inadmissible. See *Sprint/United Management Co. v. Mendelsohn* (February 26, 2008). In *Sprint*, the Court held that the relevance and prejudice of this evidence must be determined in the context of the facts and arguments in a particular case.

In this case, Mendelsohn claimed she was chosen for discharge during a reduction in force (RIF) because of her age in violation of the Age Discrimination in Employment Act (ADEA). At trial, she sought to introduce the testimony of other former employees who claimed they were subjected to age discrimination while they were employed by Sprint. However, none of these employees worked in the same business unit as Mendelsohn and none claimed to have been subjected to discrimination by any of the supervisors in Mendelsohn’s chain of command, including the individual who made the decision to discharge her.

The trial court granted Sprint’s motion to exclude this evidence, holding that Mendelsohn could only offer evidence of discrimination against Sprint employees who were “similarly situated” to her. For the purposes of the court’s ruling, “similarly situated” required proof that the person who made the decision to fire Mendelsohn “was the decision-maker in any adverse employment action; and [] temporal proximity.” As the trial proceeded, the judge verbally clarified that the order was meant to exclude testimony that Sprint treated other people unfairly based on age; it was not meant to bar testimony addressing whether the reduction in force, “which is [Sprint’s] stated nondiscriminatory reason, is a pretext for age discrimination.”

The Tenth Circuit held that the trial court abused its discretion in ordering this testimony excluded, treating the trial court’s order as a *per se* rule that evidence from employees with other supervisors is irrelevant to proving discrimination in an ADEA case. The Tenth Circuit then determined that the evidence was relevant and not unduly prejudicial, and reversed and remanded the case for a new trial.

The Supreme Court held that the Tenth Circuit erred in finding that the trial court applied a *per se* rule excluding the testimony of the other employees. The Supreme Court found that the trial court’s order was unclear. Thus, the Tenth Circuit should have remanded the case for clarification rather than weighing the evidence and determining that it was relevant and not unduly prejudicial.

Additionally, the Supreme Court held that a *per se* rule excluding the evidence is improper because relevance and prejudice must be determined in the context of the facts and arguments in a particular case. The Court held that “[t]he question [of] 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.” Similarly, determining whether evidence is prejudicial also requires a fact-intensive, context-specific inquiry.

**Employers’ Bottom Line:**

The Court’s decision may make it more difficult for employers to limit the scope of discovery in many cases, based on the potential admissibility of “me too” evidence. Additionally, although the Court’s decision clarifies that this type of evidence is not always admissible, or always inadmissible, it leaves a number of issues unaddressed and does not provide specific guidance on what factors should be considered in determining whether the evidence should be admitted.

If you have any questions regarding this case or the ADEA in general, please contact the Ford & Harrison attorney with whom you usually work.