Section of
Litigation Employment & Labor Relations

Piling On: Admission of "Me Too" Evidence

By Kevin J. O'Connor – September 25, 2012

When an employer is sued for employment discrimination and is facing trial, a common issue is whether the employee will be permitted to introduce evidence at trial of other instances of discrimination or harassment against co-employees (i.e., "me too" evidence). The threat of such evidence being admitted requires careful attention during the discovery phase and the use of pretrial motions to attempt to exclude such evidence wherever possible. The very threat of such claims coming into evidence and uncertainty over what will come into evidence can even stand in the way of resolving the case before trial.

The issue of admissibility will turn on the nature of the employee's claims as compared to those of the potential witnesses. Use of the evidence will likely require that such evidence be sanitized, and accompanied by a limiting instruction, so as not to unduly prejudice the employer.

In the federal courts, the starting point for any analysis of this issue is Federal Rule of Evidence (FRE) 404(b):

> (1) **Prohibited Uses**. 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.
>
> (2) **Permitted Uses; Notice in a Criminal Case**. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. . . .

In *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140, 552 U.S. 379 (2008), the U.S. Supreme Court discussed the general admissibility of other acts of harassment (age discrimination) in the workplace when an age-discrimination claim was made and where the employee sought to introduce testimony by other former employees who claimed to have been similarly fired in violation of the law. The district court precluded the evidence with little discussion. On appeal, the Tenth Circuit ruled that the district court had improperly excluded the evidence and remanded for a new trial. The Supreme Court vacated the order of the court of appeals and remanded the case to the district court for it to undertake a careful balancing test under FRE 403.

In *Sprint*, the employee was ultimately unsuccessful in trying to introduce evidence of discriminatory actions allegedly taken against other employees in the same protected class by a supervisor *different* from the one who made the decision to terminate the plaintiff-employee. The Court remanded for a determination of whether the claims of the other employees could be admitted at trial:

> 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 [FRE 403] to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry. Because [FRE 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. *Id.* at 1147, 552 U.S. at 388.

On remand, the district court held firm, providing a detailed analysis of why the allegedly discriminatory actions taken against other co-employees (which the court characterized as "anecdotal, subjective claims of age discrimination . . . [and] discrimination on the basis of age, sex and disability") was not admissible. *Mendelsohn v. Sprint/United Mgt. Co.*, 587 F. Supp.2d 1201, 1218 (D. Kan. 2008).

It is not uncommon for employees to seek to introduce "me too" evidence in any number of scenarios, and the issue has spawned many reported decisions. The case where a victim of sexual harassment seeks to introduce evidence of other women victimized in the same manner, and by the same wrongdoer, presents a simple and straightforward analysis, and the evidence will likely come in, subject to being sanitized and with a limiting instruction. *See, e.g., Lehmann v. Toys R. Us, Inc.*, 132 N.J. 587, 611 (1993) ("plaintiff may use evidence that other women in the workplace were sexually harassed" where that female employee is pursuing a hostile-work-environment claim based on gender).

The difficulty arises where an employee is arguably muddying the waters by focusing attention on the claims of other employees whose connection to his or her own case is tenuous. There, the question is not just relevance, but also whether the introduction of such evidence would have a prejudicial impact as compared to its probative value, and the potential for waste of time and jury confusion.

Unless an employee is able to show some logical connection between the "me too" evidence and his or her theory of recovery, an employer has a strong argument that it would be unduly prejudicial to permit the employee to parade a series of disgruntled employees before the jury to talk about their unproven allegations of wrongdoing. Permitting that evidence would create a need for mini-trials as to each claim, which would undoubtedly confuse the jury and prejudice the employer.

In *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 521–22 (3d Cir. 2003), the court made clear that other acts of discrimination can only come in when it is relevant to an issue in dispute and involves members of the same protected class. Interestingly enough, in that age-discrimination case, the court permitted the employer to introduce evidence of hiring individuals under the age of 40 after termination of the plaintiff-employee, under the intent exception of FRE 404(b).

Even where the other claims evidence pertains to persons in the same protected class, this is not a guarantee that the evidence will be admitted. In *Moorehouse v. Boeing Co.*, 501 F. Supp. 390 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980), for instance, a plaintiff in an age-discrimination case sought to introduce testimony from five other employees who claimed to have been subjected to similar age discrimination, during different time periods and each under different circumstances. The court refused to entertain the testimony:

> To have pursued the former option [admitting the testimony], defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation. . . . In the Court's view, each of the factors set forth in [Rule 403], danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, and needless presentation of cumulative evidence, would have resulted had each plaintiff in the other cases testified about his lay off. *Id.* at 393; *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 263–64 (3d Cir. 1999) (recognizing that such evidence is admissible only when the claims are of persons who are similarly situated and in the "same protected class.").

In *Hayes v. Sebelius*, 806 F. Supp.2d 141, 145 (D. D.C. 2011), the district court provided an excellent summary of the law since *Sprint* on the admission of "me too" evidence. The court described a four-factor test to be applied in the federal courts when considering whether to admit such evidence:

> (1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case
> (2) whether the same decision maker was involved
> (3) whether the witness and the plaintiff were treated in the same manner
> (4) whether the witness and plaintiff were otherwise similarly situated

There, the district court excluded from evidence the testimony of two former co-employees in that Title VII case where the plaintiff-employee could not satisfy the four-part test and stretched to show any logical connection between their alleged experiences with harassment and the claims by the employee.

The "motive," "opportunity," or "intent" exceptions therefore play a critical rule in these evidence disputes, as does the need to show that the plaintiff-employee is similarly situated with (i.e., in the same protected class) as the proposed witness. *See Allen v. Magic Media, Inc.*, 2011 WL 903959, *3–4 (D. Kan. 2011) (in context of a sex- and age-discrimination case, holding that evidence of general discriminatory practices by a supervisor over other similarly situated employees could be admissible). The court will need to closely examine the time frame in which the conduct was alleged to have occurred, and "stray racial comments should typically not be admitted unless the plaintiff can link them to personnel decisions or the individuals making those decisions." *Heno v. Sprint/United Mgt. Co.*, 208 F.3d 847, 856 (10th Cir. 2000); *compare Fuentes v. Perskie*, 32 F.3d 759, 765 (3d Cir. 1994) (holding that a plaintiff alleging employment discrimination may challenge the employer's proffered explanation by showing "that the employer treated other, similarly situated persons out of his protected class more favorably, or that the employer has discriminated against other members of his protected class or other protected categories of persons"); *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776–77 (10th Cir. 1999) (evidence can be used to establish or negate discriminatory intent); *Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir. 1995).

As shown by *Sprint* and the cases that have followed, the courts must closely scrutinize this evidence and, where admitted, sanitize the evidence and use a limiting instruction. Employers are well advised to take full discovery on any potential "me too" testimony and use in limine motions to limit the jury's exposure to such testimony at trial.

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