

Is “Me-Too” Evidence Permissible in Employment Discrimination Cases? It Depends.

As was reported in McKenna Long & Aldridge LLP’s Employer Spotlight article several weeks ago, the United States Supreme Court heard argument on December 3, 2007, in *Sprint/United Management Co. v. Mendelsohn*, a federal age discrimination lawsuit. The issue in *Mendelsohn* was whether trial courts in age discrimination cases should permit the plaintiff to present evidence and/or testimony regarding the circumstances of other witnesses who will claim that they were also discriminated against by the employer. The Supreme Court issued its opinion in late February and, unfortunately, provides very little certainty on what types of “me too” evidence will be permitted in future age discrimination cases.

In *Mendelsohn*, the trial court precluded the evidence of five other employees terminated by Sprint as part of a reduction in force on the basis that they were not “similarly situated” to the plaintiff. Specifically, the trial court held that similarly situated employees had to: (1) share the same supervisor as the plaintiff; and (2) been terminated around the same time as the plaintiff.

The Tenth Circuit Court of Appeal disagreed with the imposition of the “similarly situated” standard and held that the exclusion of this highly probative evidence was an abuse of discretion. The appellate court reversed the trial court’s order denying plaintiff’s motion for a new trial and remanded the case for a new trial allowing plaintiff “a full opportunity to present her case to the jury.” When the U.S. Supreme Court granted review, it was hoped that the Court would resolve the inconsistencies between the federal circuits in considering such evidence.

The Supreme Court, in a unanimous opinion authored by Justice Clarence Thomas (former chairman of the Equal Employment Opportunity Commission), did not provide the sort of “bright line” guidance that some had hoped for. Rather, the Court ruled that the trial courts should make a case-by-case determination when deciding whether “me too” evidence is admissible evidence of age discrimination. “We conclude that such evidence is neither *per se* admissible nor *per se* inadmissible”, wrote Justice Thomas. The Court held that the relevance and probative value of such testimony must be viewed in light of the facts of the particular case in which it is offered, and that it was within the trial court’s discretion to consider these factors “on the spot”. “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.” Justice Thomas also indicated that it was not the Court of Appeals’ role to assess whether the proffered evidence was relevant and not unduly prejudicial, but only to determine whether or not the trial court had abused its discretion in making its decision regarding the admissibility of such evidence.

In jury trials in employment discrimination cases this “me-too” evidence can be very influential. Plaintiff’s attorneys argue that this evidence is critical to providing the jury a complete picture of the employer’s past practices and is significant circumstantial evidence of the employer’s discriminatory motive that the jury must consider. Indeed, the Court of Appeals in the *Mendelsohn* case stated that plaintiff’s allegations involved a company-wide policy of which all Sprint’s supervisors were allegedly aware. On that basis, the Court of Appeals declined to extend the “same supervisor” rule imposed by the trial court. Defense attorneys counter that

such evidence is highly prejudicial and necessarily requires extended discovery and “mini-trials” to address the issues involved in each of the individual witnesses’ termination.

Plaintiff’s counsel, defense counsel, and employers were all watching the Supreme Court’s decision in this case. Pre-Mendelsohn, there was no clear guidance on this issue, and no direction to the courts on what factors should be considered in weighing the admissibility of this evidence. Post-Mendelsohn the only clarification is that there is no *per se* rule admitting or excluding such evidence. Whether a plaintiff in an age discrimination case is permitted to offer evidence of other employees who allege similar discriminatory practices (albeit by a different supervisor, or in a different department) will depend on all of the facts and circumstances of the case. Unfortunately, a decision by the trial court on such issues will usually always occur towards the end of a case on the eve of trial, through pretrial motions. Thus, an employer still faces the situation of not knowing whether such evidence will be allowed until immediately before trial, after the expense of discovery related to this evidence.

For more information, please contact Robert Cocchia at (619) 595-8007 or rcocchia@mckennalong.com