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**U. S. Supreme Court Rules in Two Employment Cases:
“Me, Too” Evidence Admissible in Trial Court’s Discretion and
EEOC Intake Questionnaire is Charge**

The U. S. Supreme Court announced two decisions last week that will be the first of several important labor and employment law decisions to be issued by the Court in 2008.

Sprint/United Management Co. v. Mendelsohn. On February 26, 2008, the U. S. Supreme Court issued a much anticipated ruling in the case of Sprint/United Management Co. v. Mendelsohn, No. 06-1221, 2008 U.S. LEXIS 2195 (Feb. 26, 2008), in which it was asked to decide whether so-called “me, too” evidence is admissible in an age discrimination case. “Me, too” evidence is testimony by co-workers alleging similar discrimination by the employer, although by *different* supervisors or decision-makers who played *no role* in the adverse employment decision at issue in the litigation. In a unanimous decision, the Court refused to bar such evidence as a matter of law on the grounds that such evidence is always legally irrelevant or too prejudicial. Instead, the Court held that such “me, too” evidence may be permitted in discrimination cases at the discretion of the trial courts.

The Mendelsohn decision is significant to employers because many lower courts have found, as a rule, that such “me, too” evidence by alleged other victims of discrimination is wholly irrelevant to the plaintiff’s individual case and overly prejudicial to the employer. By refusing to issue a *per se* rule that “me, too” evidence is not admissible, the Court has opened the door to the admissibility of such evidence in courts where it had previously been rejected and barred.

Key Facts and Points of Law

Ellen Mendelsohn was terminated by Sprint as part of a reduction-in-force. Mendelsohn filed a lawsuit in the U. S. District Court for the District of Kansas, alleging age discrimination under the Age Discrimination in Employment Act (“ADEA”).

At trial, Mendelsohn sought to introduce, as evidence of age discrimination toward her, the testimony of five former Sprint employees (non-parties to the lawsuit) who claimed that their supervisors also had discriminated against them based on age. The District Court granted Sprint’s motion to bar the testimony as irrelevant and overly prejudicial, and limited the testimony at trial to those employees who had the same supervisor as Mendelsohn and had been terminated in the same time period. With much of Mendelsohn’s proffered testimony barred, the jury found for Sprint.

On appeal, the Tenth Circuit Court of Appeals overturned the District Court, holding that it improperly applied a *per se* blanket exclusion of all “me, too” evidence, and remanded the case for a new trial with an order to admit the excluded testimony.

The U. S. Supreme Court reversed the Tenth Circuit and ruled that trial courts need to make case-by-case determinations on whether to admit “me, too” evidence of discrimination by other alleged victims of discrimination. Accordingly, the Court “conclude[d] that such evidence is neither *per se* admissible nor *per se* inadmissible,” and remanded the case back to the District Court to conduct a case-specific inquiry as to whether the probative value of the evidence outweighed prejudice and delay to the employer. *Id.* at *3. In so doing, the Court provided very little guidance to the District Court on how to exercise its discretion, other than to reinforce that it should conduct a fact based analysis of the evidence, “including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” *Id.* at *15. Lower courts allowing “me, too” evidence have previously relied upon factors such as: (i) whether the proffered evidence involves the same location or division where plaintiff worked; (ii) relatedness to an employer’s overall atmosphere or culture; (iii) position held by the alleged wrongdoer; (iv) similarity of the employment decision involved; and (v) closeness in time.

Implications for Employers

- Employers avoided a serious blow when the Court refused to endorse a blanket rule that “me, too” evidence is always *per se* admissible. However, employers in all circuits now will have to confront the possible admission of such testimony on a discretionary case-by-case basis.
- The decision may have the biggest impact in the Second, Fifth and Sixth Circuits, which have previously barred “me, too” evidence as irrelevant and prejudicial. Without barring “me, too” evidence altogether, the Seventh Circuit recently rejected such evidence in a reduction-in-force case, finding that evidence must involve similarly situated employees and common supervisors, or otherwise have a factual nexus to be meaningful.
- The Court’s ruling does not limit the application of “me, too” evidence to age or reduction-in-force cases, and plaintiffs certainly will seek to introduce such evidence in all types of employment discrimination litigation. For instance, the Third and Eighth Circuits have previously permitted “me, too” evidence in sexual harassment cases under Title VII.

Federal Express Corp. v. Holowecki. The day after issuing the above decision, the U. S. Supreme Court announced its ruling in Federal Express Corp. v. Holowecki, No. 06-1322, 2008 U.S. LEXIS 2196 (Feb. 27, 2008), on the issue of what constitutes a “charge” under the Age Discrimination in Employment Act (“ADEA”), and specifically, whether an EEOC intake questionnaire constitutes a charge for purposes of fulfilling the statutory precondition of filing a charge with an administrative agency prior to court litigation.

In a 7-2 decision, the Court held that for an EEOC filing to constitute a charge under the ADEA, it “must be reasonably construed as a request for the agency to take remedial action to protect the employee’s rights or otherwise settle a dispute between the employer and the employee” – even if the submission does not trigger the EEOC to actually take action. *Id.* at *23. The Court found in this case that the plaintiff’s “intake questionnaire” and 6-page affidavit submitted to the EEOC met the criteria for a charge, because it could be construed as a request for the EEOC to act.

Key Facts and Points of Law

The undisputed facts in Holowecki were that the EEOC did not treat plaintiff's submission as a charge, the employer did not receive notice of plaintiff's submission, and the EEOC did not conduct an investigation or take any action. Notwithstanding these facts, the Court refused to prejudice the plaintiff for the EEOC's inaction and embraced an expansive interpretation of ADEA charge-filing requirements prior to court litigation.

Implications for Employers

- The ruling is consistent with holdings from several circuits, including the Second, Third, Seventh, Ninth and Eleventh Circuits, which have all squarely held that an intake questionnaire may suffice as a charge as long as it manifests a desire to have the EEOC commence its investigatory and conciliatory processes.
- The Court cautions that EEOC enforcement mechanisms for the ADEA differ from those under other statutes, such as Title VII or the Americans with Disabilities Act ("ADA"). Therefore, this ruling on what constitutes a charge under the ADEA does not necessarily apply to Title VII or the ADA.

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