

*SPRINT/UNITED MANAGEMENT CO. V.  
MENDELSON: THE SUPREME COURT  
APPEARS TO HAVE PUNTED ON THE  
ADMISSIBILITY OF “ME TOO” EVIDENCE OF  
DISCRIMINATION. BUT DID IT?*

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INTRODUCTION AND BACKGROUND

Employment discrimination continues to infect many employers.<sup>1</sup> However, finding the source of the infection has never been easy.<sup>2</sup> This Es-

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Professor Rubinstein welcomes comments. He can be reached at New York State United Teachers, 52 Broadway, 9th Floor, New York, NY, 10004, 212-533-6300, [professorrubinstein@gmail.com](mailto:professorrubinstein@gmail.com). The views expressed in this article are entirely the author’s and may not necessarily represent the views of any organization that he is affiliated with.

<sup>1</sup> As Professor Charles A. Sullivan recently stated, there is “widespread scholarly consensus that discrimination remains prevalent in the American workplace.” Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 59 ALA. L. REV. (Forthcoming 2009) (manuscript at 16–17), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1099595](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099595) (link). Professor Sullivan explains that the continuing prevalence of discrimination has been documented in the legal literature in three main forms: statistical, pervasive implicit bias such as stereotyping, and field experiments which demonstrate that employer’s actually discriminate. He then cites to a number of academic articles supporting each of these propositions. *Id.* at 17 n.83.

<sup>2</sup> See *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987) (noting that employment discrimination is often subtle and insidious); *Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85 (2d Cir. 1980) (noting that employers rarely leave a paper trail or smoking gun attesting to a discriminatory intent); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986) (noting that most employers will deny discrimination and point to an alleged deficiency in order to plausibly blame the employee for the discipline imposed).

Plaintiffs alleging discrimination in the workplace fare worse at trial than plaintiffs in just about any other type of litigation. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEG. STUDIES 429, 443–44 (2004). In cases where employment discrimination plaintiffs manage to prevail, they face a higher reversal rate as compared with other forms of civil actions. *Id.* at 449–452; see also Sullivan, *supra* note 1, at 16 & n.82 (stating that few employment discrimination cases result in plaintiff verdicts and collecting scholarly literature

say discusses the use of “me too” evidence where parties, usually plaintiffs, seek to buttress their case by pointing to other employees who assert that they were infected by the same disease of discrimination. Even before the Supreme Court’s first decision discussing this critically important issue, *Sprint/United Management Co. v. Mendelsohn*,<sup>3</sup> the use of “me too” evidence was controversial.<sup>4</sup> It is important to analyze this case because employment discrimination cases often turn on whether the plaintiff has been able to come up with an appropriate “comparator” who was treated differently than he or she was.<sup>5</sup>

In examining the significance of *Sprint*, it is also important to be aware of the general evidentiary environment that governs federal court litigation. Under Rule 401 of the Federal Rules of Evidence (FRE), there is a low threshold for the admissibility of evidence: the evidence in question has to “only slightly affect[] the trier’s assessment of the probability of the matter to be proved.”<sup>6</sup> Additionally, as the Seventh Circuit explicitly stated, Rule 403 “tilts in favor of admissibility.”<sup>7</sup> Because the search for truth is imperiled by the exclusion of what would otherwise be relevant evidence, courts are required to exclude evidence under 403 only “sparingly.”<sup>8</sup> Thus, under this standard, courts are required to give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value.<sup>9</sup>

Another significant evidentiary doctrine is that the law of evidence distinguishes between the admissibility of evidence and the weight that such evidence is too be afforded.<sup>10</sup> Stated somewhat differently, anecdotal evidence need not be dispositive to be relevant and therefore admissible.<sup>11</sup>

supporting same); 2 MERRICK T. ROSSEIN, *EMPLOYMENT DISCRIMINATION LAW AND LITIGATION* § 2:1 (2007) (disparate treatment cases of employment discrimination are often difficult to prove).

<sup>3</sup> 128 S.Ct. 1140 (2008) (link).

<sup>4</sup> See 1 BARBARA T. LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 72–73 (4th ed. 2007) (defining “me too” evidence as “[e]vidence concerning other alleged discriminates.”).

<sup>5</sup> Sullivan, *supra* note 1, at 1.

<sup>6</sup> 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S FEDERAL EVIDENCE*, § 401.04[2][c][ii] (Joseph M. McLaughlin, ed., 2d ed. 1997).

<sup>7</sup> *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006).

<sup>8</sup> 2 WEINSTEIN & BERGER, *supra* note 6, at § 403.02[2][a].

<sup>9</sup> See *id.*

<sup>10</sup> See *Barefoot v. Estelle*, 463 U.S. 880, 898 (1983) (link) (stating that the weight given to admissible evidence is left to the finder of facts); see also 1 LINDEMANN & GROSSMAN, *supra* note 4, at 72 (weight of remarks alleged to be discriminatory is “fact-sensitive and not reducible to a precise formula”); *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (link) (“The trier of fact should consider all the evidence giving it whatever weight and credence it deserves.”).

<sup>11</sup> See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 580 (1978) (link) (noting that evidence sufficient to establish a prima facie case of discrimination, while admissible, may not itself conclusively establish that the actions in question were motivated by discrimination); see also *Dechman v. Stahl Specialty Co.*, No. 06-00288-CV-W-HFS, 2008 U.S. Dist. Lexis 20042 (D. Mo. March 13, 2008). In *Dechman*, an age discrimination case, the court gave virtually no weight to a statement by a nondecisionmaker concerning older employees in general. See *id.* at \*27–28. While the court did not expressly

It is also clear that the context of the “me too” evidence will also matter. This is because context almost always matters when interpreting witness statements.<sup>12</sup> Therefore, it may not even be possible for the Court to ultimately lay down a specific rule applicable to all cases.<sup>13</sup> One thing that is clear, however, is that these general evidentiary principles tend to support the introduction of evidence. But these principles only provide a rough framework for analyzing whether “me too” evidence should be admissible.

There are several easy categories of “me too” cases. Those categories include attempts to prove the presence of a culture or atmosphere of discrimination,<sup>14</sup> attempts to establish the existence of a hostile work environment,<sup>15</sup> and attempts to show a pattern or practice of discrimination<sup>16</sup> where the “me too” evidence concerns the same decisionmaker as the plaintiff.<sup>17</sup> However, the answer to the question of whether such evidence can be admitted where, as in *Sprint*, different supervisors are involved is not easy.

Though scholars have characterized the *Sprint* decision as a “judicial punt” because of its remand on procedural grounds,<sup>18</sup> this Essay asserts that

rule on the admissibility of this evidence, it is apparent that it found such evidence admissible because it referred to it in its opinion granting the employer summary judgment. *See id.* at \*27–30.

<sup>12</sup> *See, e.g.*, *Ash v. Tyson Foods*, 546 U.S. 454, 455 (2006) (per curiam) (link) (holding that the use of the word “boy” in the workplace may not always be evidence of racial animus because its meaning may vary depending upon the statement’s context—including tone of voice, local custom, and historical usage); *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 771 (7th Cir. 2006) (noting that “stray remarks” by nondecisionmakers may be admissible depending upon the circumstances as well as the context).

<sup>13</sup> Indeed, in the first appellate decision to cite *Sprint*, the Tenth Circuit merely stated that “me too evidence was admissible in certain instances” without giving any indication what those instances are. *Goodson v. Nat’l Assoc. of Letter Carriers*, No. 07-1187, 2008 U.S. App. Lexis 5387, \*4 n.2 (10th Cir. March 13, 2008).

<sup>14</sup> *See e.g.*, *Velazquez-Garcia v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 18–19 (1st Cir. 1979); *Asmo v. Keane, Inc.*, 471 F.3d 588, 595 (6th Cir. 2006); *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 770 (7th Cir. 2006).

<sup>15</sup> *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285–87 (11th Cir. 2008) (finding that “me too” evidence was admissible to prove an intent to retaliate against any black employee who complained about racial slurs, a hostile work environment due to the repeated use of racial slurs, and an atmosphere of discrimination in the workplace).

<sup>16</sup> *See e.g.*, *Int’l. Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977) (link). Pattern or practice cases involve claims that the alleged discriminatory conduct is part of the employer’s standard operating procedure, and such cases are often brought as class actions. 1 LINDEMANN & GROSSMAN, *supra* note 4, at 104. Under this theory of employment discrimination, to establish liability much more than mere isolated or sporadic remarks must be shown. ROSSEIN, *supra* note 2, at § 2:28.

By contrast, disparate treatment involves allegations of discrimination directed against an individual plaintiff. 1 LINDEMANN & GROSSMAN, *supra* note 4, at 104. *See also* *Bacon v. Honda of America Mfg.*, 370 F.3d 565, 575–76 (6th Cir. 2004), *cert. denied*, 543 U.S. 1151 (2005) (distinguishing between pattern and practice cases and individual disparate treatment cases).

<sup>17</sup> *See, e.g.*, *Goldsmith*, 513 F.3d at 1286.

<sup>18</sup> *See* Sullivan, *supra* note 1 at 5; Paul M. Secunda, “Me Too” ADEA Evidence Decision Unanimously Reversed and Remanded on Deference Grounds, Workplace Prof Blog (Feb. 26, 2008), [http://lawprofessors.typepad.com/laborprof\\_blog/2008/02/me-too-adea-evi.html](http://lawprofessors.typepad.com/laborprof_blog/2008/02/me-too-adea-evi.html) (link).

*Sprint* will turn out to be significant to the developing employment discrimination jurisprudence. This is principally because of dicta in Justice Thomas' unanimous opinion, which implicitly approves of the use of such evidence. While it may be difficult to precisely define the line between admissible and inadmissible "me too" evidence, it is clear that the Court rejected any type of rule that would flatly prohibit the introduction of "me too" evidence simply because the putative witnesses did not share the same supervisor as the plaintiff.

This Essay asserts that the use of "me too" evidence is likely to significantly increase as a result of the notoriety of the *Sprint* decision and the increasing importance of comparative-type evidence to employment discrimination litigation.<sup>19</sup> Part I of this Essay discusses the state of affairs involving "me too" cases leading up to the *Sprint* decision. Part II then discusses the *Sprint* decision itself and explains why the Supreme Court decision is significant.<sup>20</sup> This Essay concludes by postulating how both employers and employees may try to make use of the *Sprint* decision in future employment discrimination litigation.

## I. THE USE OF "ME TOO" EVIDENCE IN FEDERAL COURTS PRIOR TO *SPRINT*

Prior to *Sprint*, the law on "me too" evidence was in a state of disarray.<sup>21</sup> Three circuits had held that such evidence was irrelevant under FRE 401.<sup>22</sup> Those cases all focused on the employment decisionmaker. In

<sup>19</sup> Indeed, in the *Sprint* Supreme Court case, the Chamber of Commerce of the United States, appearing as *amicus curiae* in support of Sprint, asserted that "it is routine for individual plaintiffs to try to buttress their cases by proffering the testimony of other employees who allege that they, too, were the victims of discrimination." Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Petitioner, 2007 WL 2401705 at \*4 (Aug. 20, 2007); see also Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 828 (1999) (stating that in employment discrimination litigation testimony from coworkers is frequently offered).

<sup>20</sup> Indeed, a well known management-side employment law firm in its "Client Alert" newsletter characterized the *Sprint* case as "discouraging" and not what employers had been hoping for. *U.S. Supreme Court Rules That "Me Too" Evidence Is Neither Per Se Admissible Nor Per Se Inadmissible*, Client Alert at 2 (Proskauer Rose LLP March 2008), [http://www.proskauer.com/news\\_publications/client\\_alerts/content/2008\\_03\\_05\\_b/\\_res/id=sa\\_PDF/15895-030508-Supreme-Court%20Rules%20That%20Me%20Too-v2.pdf](http://www.proskauer.com/news_publications/client_alerts/content/2008_03_05_b/_res/id=sa_PDF/15895-030508-Supreme-Court%20Rules%20That%20Me%20Too-v2.pdf) (link).

<sup>21</sup> The leading employment discrimination treatise described the state of the law with respect to "me too" evidence as follows:

Some courts find it inadmissible in an individual disparate treatment case, either as irrelevant or because it would needlessly consume time or confuse the jury with trials-within-a-trial. Some other courts, though have allowed such evidence in individual cases. And such evidence is highly relevant in representative actions because, by definition, the plaintiffs must prove discrimination affecting a group.

1 LINDEMANN & GROSSMAN, *supra* note 4, at 72–73.

<sup>22</sup> See *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984); *Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985); *Wyvill v. United Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000); Wil-

*Haskell*, for example, the Second Circuit reversed a jury verdict in favor of the plaintiff, reasoning that the testimony of six other employees “provided no basis for an inference of discrimination” because the circumstances of those six employees bore no logical relationship to the plaintiff.<sup>23</sup>

Additionally, two of those circuits concluded that even if such evidence were admissible under FRE 401, it should be excluded under FRE 403 as prejudicial.<sup>24</sup> Reflective of this reasoning is the Sixth Circuit’s decision in *Schrand v. Federal Pacific Electric Co.*,<sup>25</sup> where the court stated:

[T]he impact of the two former employees’ testimony would be great. Thus, even if that evidence were relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no direct bearing on the issue to be decided—whether [the plaintiff] was discharged because of his age—this testimony embellished the circumstantial evidence directed to that issue . . . [with] an emotional element that was otherwise lacking as a basis for a verdict in [the plaintiff’s] favor.<sup>26</sup>

On the other hand, three circuits have held that it is a reversible error not to admit such evidence—at least under the facts presented in the individual cases under review.<sup>27</sup> Thus, in *Spulak v. K Mart Corp.*,<sup>28</sup> the Tenth Circuit affirmed the decision of the lower court to admit anecdotal evidence involving an official other than the plaintiff’s supervisor because the similarity of the circumstances under which the plaintiff and the witness were fired outweighed the fact that separate supervision was involved.<sup>29</sup> Indeed, in the Tenth Circuit decision in *Sprint*, the court followed this logic by concluding that “me too” evidence from other employees with different supervisors, who experienced that same reduction in force, was admissible.<sup>30</sup>

Judge Posner aptly summarized the law in this area as follows:

Given the difficulty of proving employment discrimination—the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the workers’ troubles—a flat rule that evidence of other discriminatory acts by . . . the employer can never be admitted without violat-

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liams v. Nashville Network, 132 F.3d 1123, 1130 (6th Cir. 1997); see also *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa. 1980), *aff’d*, 639 F.2d 774 (table) (3d Cir. 1980).

<sup>23</sup> *Haskell*, 743 F. 2d at 121.

<sup>24</sup> See *Wyvill*, 213 F.3d at 303; *Williams*, 132 F.3d at 1130; *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152, 155–56 (6th Cir. 1988); see also *Moorhouse*, 501 F. Supp. at 393, *aff’d*, 639 F.2d 774 (table) (3d Cir. 1980).

<sup>25</sup> 851 F.2d 152 (6th Cir. 1988).

<sup>26</sup> *Id.* at 156.

<sup>27</sup> *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986); *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 n.2 (10th Cir. 1990).

<sup>28</sup> 894 F.2d 1150 (10th Cir. 1990).

<sup>29</sup> *Id.* at 1156.

<sup>30</sup> *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1230 (10th Cir. 2006).

ing Rule 403 would be unjustified. Such evidence will often flunk Rule 403 because the acts are remote in time or place . . . but not in all cases, and not in this one.<sup>31</sup>

Judge Posner, writing for the Seventh Circuit, ultimately held that the proffered “me too” evidence was admissible and relevant to the claim that the employer condoned racial harassment and in rebutting the employer’s asserted defense that it fired the plaintiff for cause.<sup>32</sup>

Thus, both sides of the issue have some good arguments. There is certainly some merit to the argument that testimony of other employees who do not share the same supervisor should not be admitted because the circumstances are simply different. Additional support for this can be found by examining precedent, which has focused on the decisionmaker’s state of mind because to find liability, intentional discrimination must be established.<sup>33</sup> There is also some reason to be concerned with prejudice under FRE 403 and with the notion that the admission of such evidence may create trials within trials.

On the other hand, if the employer actually has discriminated against the plaintiff, it stands to reason that the employer may have taken adverse action against others for discriminatory reasons as well. Therefore, this type of evidence has at least some probative value.

This Part of the Essay demonstrated the uncertainty in “me too” cases, which the Supreme Court had the opportunity to clarify in *Sprint*. Unfortunately, the Court decided the case on procedural grounds, and as a result, the Court did not promulgate any clear legal rules.

## II. THE SUPREME COURT’S DECISION, OR LACK THEREOF, IN *SPRINT*

The *Sprint* decision immediately stands out as very unusual. First, it is relatively short, spanning less than nine slip opinion pages. Second, it concerns a Tenth Circuit decision in review of a “minute order”; the District Court did not even issue an opinion.<sup>34</sup> Additionally, the case was decided largely on procedural grounds. Therefore, it is not surprising that the reach of this decision may turn out to be controversial.

The case started out rather unremarkably. *Sprint* terminated the plaintiff, a fifty-one year old woman with thirteen years of seniority, as part of a

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<sup>31</sup> *Hunter*, 797 F.2d at 1423.

<sup>32</sup> *Id.* Judge Posner also rejected the employer’s attempt to exclude this type of evidence under FRE 404(b) as a prior bad act. This was because he interpreted this rule as allowing admission of bad acts to prove motive, intent, preparation, plan, and knowledge. *Id.* at 1424.

<sup>33</sup> *Raytheon v. Hernandez*, 540 U.S. 44, 55 (2003) (link).

<sup>34</sup> To my knowledge, this is one of the few times that an issue contained solely in a “minute order” made its way to the Supreme Court. The Tenth Circuit below described this minute order simply as an entry on the docket sheet. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223 & n.1 (10th Cir. 2006).

reduction in force.<sup>35</sup> She sued Sprint and asserted a disparate treatment theory of discrimination under the Age Discrimination in Employment Act.<sup>36</sup> The plaintiff sought to introduce testimony from five other Sprint employees who also claimed that their supervisor discriminated against them because of their age. Three of these witnesses asserted that they heard denigrating remarks about older workers. One of these three claimed to have seen a spreadsheet suggesting that a supervisor considered age in making the layoffs. Another asserted that he was banned from working at Sprint because of his age, and that he witnessed Sprint harass another employee because of her age. The last witness alleged that Sprint had to get permission before hiring anyone over the age of forty, and that after he was terminated, he was replaced by a younger employee. If these allegations were true, it is readily apparent how a jury might be influenced by such testimony.

However, none of these “me too” witnesses worked in the same department as the plaintiff; none of these witnesses worked under the various supervisors who supervised the plaintiff; and none of these witnesses reported hearing discriminatory remarks by any of the plaintiff’s supervisors. At the District Court, Sprint moved to exclude testimony by the other employees by claiming that it was irrelevant under FRE 401 because different supervisors were involved. Sprint also argued that any probative value to this testimony was outweighed by the danger of unfair prejudice under FRE 403.

Remarkably, the District Court did not issue a full written opinion or indeed any opinion. Instead, it issued a minute order that stated: “Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. ‘Similarly situated employees,’ for the purpose of this ruling, requires proof that (1) Paul Ruddick [sic] was the decision-maker in any adverse employment action; and (2) temporal proximity.”<sup>37</sup>

On appeal, the Tenth Circuit, interpreted the district court’s minute order as a per se rule that evidence from employees with different supervisors was inadmissible.<sup>38</sup> The Tenth Circuit reversed this holding and undertook

<sup>35</sup> The Supreme Court did not specifically refer to the plaintiff’s age. However, the Tenth Circuit stated that the plaintiff was age fifty-one. *Id.* at n. 1224. The specific age of the plaintiff was not relevant in this case as she was over age forty—the threshold for protection under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631(a), (b) (2000) (link).

<sup>36</sup> *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S.Ct. 1140, 1143 (2008). There are two principal theories of employment discrimination: disparate treatment and disparate impact, also known as adverse impact. ROSSEIN, *supra* note 2, § 2:1. Disparate treatment involves treating employees differently because of a protected classification such as a person’s sex. The focus is on the employer’s motive. *Id.* § 2:2. By contrast, disparate impact cases involve facially neutral selection devices or criteria disproportionately affecting employees of a protected group. Proof discriminatory intent is not required. *Id.* § 2:30.

<sup>37</sup> *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S.Ct. 1140, 1145 (2008) (quoting Appendix to Petition for Writ of Certiorari at 24a, *Sprint/United Mgmt. Co.*, 128 S.Ct. 1140 (March 5, 2007)).

<sup>38</sup> See *Mendelsohn*, 466 F.3d at 1225.

its own analysis of this issue, concluding that the evidence in question was relevant<sup>39</sup> and not unduly prejudicial,<sup>40</sup> and therefore remanded the case for a new trial.<sup>41</sup> Certiorari was granted to determine if “me too” evidence would only be admissible if it involved the same individuals who supervised the plaintiff.<sup>42</sup>

Before the Supreme Court, the parties focused on two issues. First, whether the evidence was relevant under Rule 401 and second, even if such evidence were admissible, whether it could be excluded as unduly prejudicial under Rule 403.<sup>43</sup> The Court held, however, that the Tenth Circuit erred in concluding that the district court applied a *per se* rule of inadmissibility. The Supreme Court concluded that there was an unclear basis for the district court’s ruling, and therefore, a remand was necessary.<sup>44</sup>

The Court went on to explain that it is the District Court’s role to weigh the evidence and make a decision in the first instance explicitly and on the record. This was considered particularly important because appellate courts are required to pay deference to lower determinations under Rule 403, since district courts will have heard the proffered evidence and will likely be more familiar with the cases.<sup>45</sup> Thus, the Supreme Court concluded that the Tenth Circuit also erred by deciding this issue in the first instance.<sup>46</sup>

At the end of the opinion, the Court did give some guidance about how it might rule in future cases. Specifically, the Court held that “me too” evidence involving other supervisors is neither *per se* admissible or *per se* inadmissible. The Court reasoned:

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 Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry.<sup>47</sup>

Additionally, in what may become the most significant part of this decision, the Court stated in dicta:

We note that, had the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it abused its discretion. Relevance and prejudice under Rules 401 and 403 are deter-

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<sup>39</sup> *Id.* at 1228

<sup>40</sup> *Id.* at 1230–31.

<sup>41</sup> *Id.* at 1232.

<sup>42</sup> *Sprint/United Mgmt Co. v. Mendelsohn*, 128 S.Ct. 1140, 1143 (2008).

<sup>43</sup> *Id.* at 1144.

<sup>44</sup> *Id.*

<sup>45</sup> *See id.* at 1144–46.

<sup>46</sup> *Id.* at 1146.

<sup>47</sup> *Id.* at 1147.

mined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad *per se* rules . . . . But as we have discussed, there is no basis in the record for concluding that the District Court applied a blanket rule.<sup>48</sup>

To return to our medical metaphor, this bit of dicta provides plaintiffs with a shot of adrenalin that may, in some cases, cure the disease of employment discrimination. While the Supreme Court does not provide clear guidance in *Sprint* with respect to where the line of demarcation is between admissible and inadmissible “me too” evidence, it does endorse the view that such evidence can be admissible in cases not involving supervisors responsible for the adverse job decision claimed to be discriminatory.

The facts of *Sprint* are also significant. As explained by the Tenth Circuit, the only similarities to the plaintiff’s situation were that the “me too” employee-witnesses were terminated within a year of the plaintiff’s termination as part of a company wide reduction in force; all were in the protected age group; and their selection to be included in the reduction in force was based upon similar criteria.<sup>49</sup> As Tenth Circuit Judge Tymkovich noted in a lengthy dissent:

Given the size of Sprint, the fact that Mendelsohn found five former employees who believed they were victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid. The proffer of evidence here is devoid of independent evidence showing that Sprint had a company-wide discriminatory policies.<sup>50</sup>

It is difficult to come up with a more factually remote setting than what occurred in *Sprint*. Reductions in forces usually involve large numbers of employees, but the plaintiff only proffered testimony from a very small percentage of the workers.<sup>51</sup> There was no finding that this reduction in force was part of a pattern and practice of discrimination<sup>52</sup> or part of the employ-

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<sup>48</sup> *Id.* at 1147 (citing Fed. R. Evid. 401 advisory committee’s note (“Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.”)).

<sup>49</sup> *Mendelsohn v. Sprint/United Mgmt Co.*, 466 F.3d 1223, 1228 (10th Cir. 2006). Neither the Supreme Court nor the Tenth Circuit described what those criteria were. See *Sprint/United Mgmt Co.*, 128 S.Ct. at 1143; *Mendelsohn*, 466 F.3d at 1228.

<sup>50</sup> *Mendelsohn*, 466 F.3d at 1232–33 (Tymkovich, J., dissenting).

<sup>51</sup> Unfortunately, neither the court of appeals nor the Supreme Court provided any statistically data about the number of employees employed, the number of employees subject to the reduction in force at issue, or the number of employees who were part of that reduction in force and over the age of forty. See *Sprint/United Mgmt Co.*, 128 S.Ct. at 1143; *Mendelsohn*, 466 F.3d at 1225.

<sup>52</sup> For a discussion of pattern or practice cases of discrimination see *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 362 (1977).

er's standard operating procedure.<sup>53</sup> Additionally, there was no mention of prior discrimination in the record.

The significance of the Supreme Court decision is not that "me too" evidence involving different supervisors may be admitted; it is that even under facts as attenuated as these we know that such evidence is not per se inadmissible. Stated another way, while we do not know if this evidence will ultimately be admissible, we do know that it is not per se inadmissible.

Moreover, in its analysis the Supreme Court noted that the District Court had stated orally that the admissibility of "me too" evidence involving different supervisors is different when the question becomes whether an employer's stated reason is a pretext for discrimination.<sup>54</sup> Unfortunately, the Supreme Court did not explain why pretext cases may be subject to a different rule.

Accordingly, by virtue of the fact that the Supreme Court did not reject the District Court's "oral clarification," it can be argued that the Court implicitly agreed with it. This implies that, at least in "pretext cases," "me too" evidence may be easier to admit. In fairness, however, this oral clarification may have been one of the reasons why the Court concluded that the District Court's order was unclear. This clarification can be construed as conflicting with the minute order which required exclusion if different supervisors were involved.

#### CONCLUSION

Some may argue that *Sprint* did not alter employment discrimination jurisprudence because all the Court actually did was to hold that the admissibility of "me too" evidence must be decided on a case-by-case basis. However, even if *Sprint* is read in such a restrictive fashion, it is probably still going to wind up as important medicine to plaintiffs. This is largely

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<sup>53</sup> See *McDonnell Douglas v. Green*, 411 U.S. 792, 804–05 (1973) (link) (stating that where plaintiff can show a pattern of discrimination that is widespread, such evidence can demonstrate discrimination).

<sup>54</sup> *Sprint/United Mgmt Co.*, 128 S.Ct. at 1144. Pretext is part of the allocation and burden of proof in employment discrimination cases. In a series of Supreme Court decisions, the most recent being *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), the Court established a tripartite standard that courts should follow. First, plaintiff must establish a prima facie case of discrimination; and second, the employer may defend itself by asserting a legitimate nondiscriminatory reason for its actions; and third, in order to prevail, the plaintiff must prove that the articulated legitimate nondiscriminatory reason was a pretext to mask discrimination. See *id.* at 50 n.3 (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000); *McDonnell Douglas*, 411 U.S. at 802; *Pugh v. Attica*, 259 F.3d 619, 626 (7th Cir. 2001)).

The elements of a prima facie case can vary depending upon the circumstances, but usually involve four elements. In a refusal to hire case, for example, those elements are first, that the plaintiff was a member of a protected group; second, that the plaintiff applied for the position and was qualified for it; third, that the plaintiff was rejected; and fourth, that the position remained open and the employer continued to seek applicants. ROSSEIN, *supra* note 2, § 2:4.

because many employment discrimination plaintiffs operate in an environment where so little medicine in the form of evidentiary proof is available.

This Essay asserts, however, that *Sprint* will result in many more “me too” types of comparative witness testimony being admitted into evidence. As noted, this is mainly because, under facts so attenuated, the fact that such “me too” evidence was not inadmissible implies that it might be admissible.<sup>55</sup>

While the plaintiff’s bar may rejoice at the *Sprint* decision, *Sprint* may also open evidentiary opportunities for employers. Though not addressed per se in the *Sprint* decision itself, another body of law may support the notion that “me too” evidence is not just a tool for plaintiffs in employment discrimination litigation. As the Supreme Court stated in *Furnco Construction Corp. v. Waters*:

[T]he employer must be allowed some latitude to introduce evidence which bears on his motive. Proof that his work force was racially balanced or that it contained a disproportionately high percentage of minority employees is not wholly irrelevant on the issue of intent . . . .<sup>56</sup>

Additionally, the Supreme Court later held that the fact that an earlier court decision found that the defendant employer had not engaged in a system-wide pattern and practice of discrimination was admissible and relevant

<sup>55</sup> For examples of pre-*Sprint* cases admitting comparable “me too” evidence involving witnesses who had different supervisors than the plaintiff see *supra* notes 27–33 and accompanying text.

Though this Essay reads *Sprint* as widening the scope of admissible “me too” evidence, I acknowledge that the few post-*Sprint* decisions thus far have been divided in their reading of *Sprint*. Like this Essay, *Elion v. Jackson*, Civ. No. 05-0992, 2008 U.S. Dist. Lexis 27520 (D.D.C. April 7, 2008) interprets the Court’s refusal to establish a per se rule to permit the admission of “me too” evidence in favor of the employer-defendant, notwithstanding the fact that there was no indication that the employee-witnesses had the same supervisor as the plaintiff did. See *id.* at \*17–22. The district court found one employee-witness and the plaintiff similarly situated because they were both women and the employee-witness was promoted and given extra responsibility at roughly the same time that the plaintiff’s division was disbanded. See *id.* at \*17–20. The court found testimony from the other comparator relevant to the plaintiff’s claims of racial discrimination because both she and the plaintiff were African American. *Id.* at 20–22.

On the other hand, *Opsatnik v. Northfolk Southern Corp.*, Civ. No. 06-81, 2008 U.S. Dist. Lexis 26727 (W.D. Pa. March 20, 2008) and *Sgro v. Bloomberg*, Civ. No. 05-731, 2008 U.S. Dist. Lexis 27175 (D. N.J. March 31, 2008) read *Sprint* more restrictively. *Opsatnik* found that the plaintiff and comparators were not “similarly situated” because they worked in different divisions and had different supervisors, and the court therefore refused to admit “me too” evidence. *Opsatnik*, 2008 U.S. Dist. Lexis 26727, at \*19–25. *Sgro*, an age-discrimination case, held that testimony about a nondecisionmaking supervisor was not relevant without a showing that the supervisor in question was involved in employment decisions affecting the plaintiff. *Sgro*, 2008 U.S. Dist. Lexis 27175, at \*31–35.

<sup>56</sup> 438 U.S. 567, 580 (1978) (link). Additionally, the Supreme Court later repeated in *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 513–14 (1993) (link), that “[a] disproportionate minority makeup of [a] company’s work force” could be used by an employer to defend itself against charges of discrimination. More recently, the employer-defender in *Elion v. Jackson*, Civ. No. 05-0992, 2008 U.S. Dist. Lexis 27520 (D.D.C. April 7, 2008) attempted to use “me too” evidence from an African-American woman and a Caucasian woman to contest claims of gender and racial discrimination.

in a later individual disparate treatment case.<sup>57</sup> This type of comparative evidence has some probative similarity to “me too” witness testimony.

Even if employers attempt to use “me too” evidence, as employees surely will, on balance, such evidence will probably benefit employees more than employers. Why? Employers already have access to information and evidence. Additionally, another employee testifying about the discrimination he or she suffered is something that a jury can relate to, and will likely be interpreted by a jury to have more probative weight than, for example, testimony from a minority witness proffered by the employer to state that “he too” never experienced any racial discrimination. An employer offering such evidence runs the risk that it would be interpreted by a jury as a racial cliché, similar to a statement like “some of my best friends are black.”

While the exact probative value of “me too” evidence may be unclear, if this Essay is correct in concluding that *Sprint* is going to result in much more “me too” evidence being admitted, the end result may be more expansive plaintiff discovery requests seeking out comparative employees and where such evidence is found, lengthier trials.<sup>58</sup> Additionally, because the Court did not definitively resolve the issue, there likely will be additional litigation until the Supreme Court resolves it once and for all.

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<sup>57</sup> Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 880 (1984) (link); see also *supra* note 16 and accompanying text (describing pattern and practice cases of discrimination).

<sup>58</sup> Cf. Warner, *supra* note 19, at 829 (arguing that if “me too” evidence were admissible, employers would be faced with the choice of defending each individual claim or leaving the testimony un rebutted).