

*SPRINT/UNITED MANAGEMENT COMPANY V.
MENDELSON AND CASE-BY-CASE
ADJUDICATION OF “ME TOO” EVIDENCE OF
DISCRIMINATION*

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INTRODUCTION

In the essay that started this discussion, Professor Mitchell Rubinstein provides a clear analysis of the Supreme Court’s decision in *Sprint/United Management Company v. Mendelsohn*¹ and points out the lack of consistency in post-*Sprint* decisions.² Professor Rubinstein correctly concludes that, on balance, plaintiff-employees in employment discrimination cases ultimately stand to benefit more than defendant-employers from the *Sprint* decision.³ And, equally important, he predicts “that *Sprint* is going to result in much more ‘me too’ evidence being admitted, [which may result in] more expansive plaintiff discovery requests seeking out comparative employees and where such evidence is found, lengthier trials.”⁴

Sprint is a substantially practical decision. Accordingly, Professor Rubinstein does not attempt to impose an abstract theoretical framework onto the *Sprint* decision.⁵ Indeed, “me too” cases will continue to be decided on a case-by-case basis, without reference to a larger theoretical picture. An analogy to the proverbial “forest and the trees” is tempting, with the trees being various employment discrimination decisions and the forest the jurisprudence underlying employment discrimination cases.

Yet, perhaps it is more helpful to think instead of an already dense, and now dramatically proliferating underbrush composed of employment discrimination cases turning on the admission of “me too” evidence and testi-

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¹ 128 S. Ct. 1140 (2008).

² See Mitchell H. Rubinstein, *Sprint/United Management Co. v. Mendelsohn: The Supreme Court Appears to Have Punted on the Admissibility of “Me Too” Evidence of Discrimination. But Did It?*, 102 NW. U. L. REV. COLLOQUY 264 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/2008/11/LRColl2008n11Rubinstein.pdf>.

³ *Id.* at 275.

⁴ *Id.*

⁵ See generally *id.*

mony.⁶ Whether the courts clear out, set fire to, or fertilize this underbrush, is the open question with which Professor Rubinstein concludes his essay: “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.”⁷ Hence, litigators and particular parties seem destined, at least for now, to continue trudging through the underbrush of “me too” evidence and employment discrimination law. But, if we ever make it through the post-*Sprint* underbrush, where, exactly, will we be?

I. THE “HE SAID, SHE SAID” ANALOGUE

Conflicting “he said, she said” testimony often frustrates plaintiff-employees in employment discrimination cases, especially in the context of sexual harassment.⁸ Predictably, most harassers are careful enough to avoid providing any “smoking gun” evidence to third party witnesses; they instead take care to ensure that no witnesses are present when they perpetrate unlawful conduct.⁹ As a result, in most situations, direct evidence, unequivocally attested to by a third-party witness, simply does not exist.¹⁰ Plaintiffs, thus, must attempt to marshal sufficient circumstantial and indirect evidence to overcome the stories told by their harassers in order to convince jurors of their version of the events. In simplest terms, if there is no evidence beyond the “he said, she said” debate, harassers, unfortunately, tend to win evidentiary ties.¹¹

⁶ See, e.g., *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1285–87 (11th Cir. 2008) (affirming the lower court’s admission of “me too” testimony to establish the existence of a hostile work environment as well as the employer’s intent to discriminate); *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988) (holding that the district court committed reversible error by admitting the “me too” testimony of two former employees because the “me too” testimony was “arguably . . . the strongest evidence in plaintiff’s favor at trial”) (quoting *Mitroff v. Xomox Corp.*, 797 F.2d 271, 277 (6th Cir. 1986)).

⁷ Rubinstein, *supra* note 2, at 275.

⁸ See, e.g., *Casiano v. AT&T Corp.*, 213 F.3d 278, 282 (5th Cir. 2000) (“Not surprisingly, there were no third-party witnesses to Valenzuela’s alleged propositioning of Casiano, only his accusations and her denials.”); *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co.*, 336 F. Supp. 2d 610, 620 (D. S.C. 2004) (“Virtually all of the alleged sexual harassment occurred while Belson and a female employee were alone in an office together. In other words, no third party witnessed the alleged harassment. . . . Consequently, all claims . . . turned largely on who was telling the truth in a ‘he said, she said’ swearing contest.”).

⁹ See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 834–35 (1991) (“As in many rape cases, there are rarely witnesses, leaving the factfinder to weigh one person’s word against another’s.”); Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 YALE J. L. & FEMINISM 299, 315 (1991) (arguing that harassment victims should not have to fight against a legal system that presumes their claims are not well-grounded, and that “this is especially critical because sexual harassment often takes place in the absence of third-party witnesses”).

¹⁰ Amy D. Ronner, *The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in Jones v. Clinton*, 31 U.C. DAVIS L. REV. 123, 130 (1997) (“Because ‘sexual advances’ and ‘requests for sexual favors’ tend to occur in the corridors of privacy, there are often no third-party witnesses.”).

¹¹ See, e.g., *In re Tompkins*, 290 B.R. 194, 201 (Bankr. W.D.N.Y. 2003) (concluding that there was not a hostile work environment partly based on the fact that “although the [alleged harasser] may have

The issue of “me too” evidence presents a different, but related, evidentiary dilemma. In both “he said, she said” and “me too” cases, plaintiffs must rely mainly on circumstantial evidence. However, whereas “he said, she said” plaintiffs are generally limited to just their own testimony, “me too” plaintiffs can point to the testimony of others claiming to have been similarly mistreated to buttress their claims. This will likely improve a plaintiff’s chances of successfully alleging abuse, but admitting “me too” evidence will create a challenge for efficient judicial administration as well.

Unlike the barren testimonial desert of “he said, she said” cases, the prospect of admitting “me too” evidence after *Sprint* potentially poses the problem of hearing an unmanageable number of witnesses. Employment discrimination litigation may thus be transformed into something akin to the Jarndyce litigation of Dickens’s *Bleak House*—decades without end and an infinite procession of character witnesses, each raising the ante for the opposition.¹² Even the most reprehensible have friends willing to testify on their behalf. After *Sprint*, each party will be clamoring to enhance their list of witnesses supporting their particular side of the debate.

One suspects that the endless parade of witnesses to which *Sprint* has potentially opened the door will displease the courts, and the courts will therefore endeavor to pare this parade down to a manageable maximum number of “me too” witnesses (likely to be seen by the parties, of course, as the minimum).¹³ The lower courts will have to develop an efficient method for assessing the relevance of each potential “me too” witness’s prospective testimony in order to separate the prejudicial from the probative.

This proliferation of case-by-case adjudication will further contribute to the dense underbrush of employment discrimination cases whose results

done or said some of the things that [the alleged victim] testified to, her testimony as to his words, conduct and actions appeared considerably exaggerated . . .”); see also Kim Lane Scheppelle, *Just the Facts Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 123 (1992) (discussing how testimony of cases of sexualized violence, including sexual harassment, “evolve into a ‘he said, she said’ battle of competing narratives in which . . . the defendant . . . wins by default simply because the evidence is contested”).

¹² See CHARLES DICKENS, *BLEAK HOUSE* (Oxford University Press 1989) (1853). The Jarndyce litigation involved a dispute over a will and carried on for generations. As decades passed, litigation costs drained the contested estate, virtually no one from the inception of the litigation remained alive, and virtually no one could remember what the original contested issues had been.

Admitting “me too” witnesses in support of one side of a dispute will create incentives for the opposing side to produce similar testimony on its behalf, which will, in turn, create an incentive for the first side to produce additional “me too” witnesses in an effort to outdo the opposing side. Unless trial judges strictly control the amount of “me too” testimony, the simplest employment discrimination litigation has the potential to, like the Jarndyce litigation, drag on endlessly at a substantial cost to everyone involved.

¹³ See, e.g., *Wagoner v. Pfizer, Inc.*, No. 07-1229-JTM, 2008 WL 821952, at *5 (D. Kan. Mar. 26, 2008) (recognizing that *Sprint* requires a fact-based analysis of whether evidence of discrimination by other supervisors is relevant, but finding that a discovery request by the plaintiffs intended to “bolster their claims . . . by showing discriminatory treatment of other employees . . . [was] overly broad and not reasonably tailored to the claims in [the] case”).

depend on whether “me too” evidence will be admitted. As the United States District Court for the District of Columbia summarized in *Elion v. Jackson*,¹⁴ the most recent post-*Sprint* decision, “me too” “testimony is neither per se admissible nor per se inadmissible; the question whether such testimony is relevant and sufficiently more probative than unfairly prejudicial in a particular 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.’”¹⁵

II. THE SIGNIFICANCE OF “ME TOO” EVIDENCE

The potential admission of “me too” evidence has high stakes for both plaintiff-employees and defendant-employers. Indeed, just as plaintiffs might cite such evidence to support claims of discrimination, “an employer’s favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent.”¹⁶ “Me too” evidence of nondiscriminatory and nonretaliatory behavior by an employer can be used to disprove claims of discrimination or retaliatory practices.

Yet, though persuasive, it should be remembered that “me too” evidence will not and should not itself be dispositive. Production of, for example, favorable overall statistics showing that the employer promotes more women and minorities than are proportionally represented in the population or in the work force at large, will not insulate an employer from liability for individual acts of deliberate unlawful discrimination.¹⁷

CONCLUSION

While *Sprint* does not establish a theoretical framework for lower courts to apply in deciding whether to admit “me too” evidence of employment discrimination, the Supreme Court’s refusal to categorically deny such evidence will have significant practical implications for both plaintiff-employees and defendant-employers. Namely, collecting “me too” witnesses and statistics will become a regular part of trial preparation for both parties, and one can imagine a resulting situation in which parties to employment discrimination disputes try to outdo each other by presenting larger numbers of “me too” witnesses than their counterparts.

As plaintiffs and defendants begin assembling armies of “me too” witnesses, courts will have to establish some parameters for admitting such evidence. In this way, *Sprint*’s legacy will likely be the increased prolifera-

¹⁴ Civ. No. 05-0992, 2008 U.S. Dist. Lexis 27520 (D.D.C. Apr. 7, 2008).

¹⁵ *Id.* at *18 (D.D.C. Apr. 7, 2008) (quoting *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008)).

¹⁶ *Id.* at *19.

¹⁷ See *Connecticut v. Teal*, 457 U.S. 440, 442, 453–56 (1982) (recognizing that such statistics might be used to rebut the inference of an action’s discriminatory intent but do not give employers license to discriminate against individual employees).

tion of the underbrush composed of “me too” employment-discrimination cases. At the end of the day, the practical solution will probably be left, as it usually is, to the pragmatic wisdom of trial court judges, who cannot permit either party to parade litanies of fungible witnesses through the courts.¹⁸ From the bench, the trial court judges will eventually have to find a more habitable jurisprudential territory, somewhere between the desert of “he said, she said” and the dense underbrush of “me too.”

¹⁸ Cf. Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573 (2000) (discussing “the pragmatic judge, who wants to decide cases in the way that will best promote, within the constraints of the judicial role, the goals of society”).