

## *Sprint/United Management Co. v. Mendelsohn*: Tenth Circuit Employment Law Remains in “Me Too” Limbo

### *I. Introduction*

The Supreme Court’s recent decision in *Sprint/United Management Co. v. Mendelsohn*<sup>1</sup> left Tenth Circuit litigants in disparate treatment employment discrimination suits seeking clarification on the admissibility requirements for “me too” evidence—evidence of similar complaints of discrimination by a plaintiff’s co-workers offered “as proof of an employer’s discriminatory motives and intent.”<sup>2</sup> The *Mendelsohn* Court held that “me too” evidence can be admitted to prove age discrimination so long as it satisfies the requirements of Federal Rules of Evidence (FRE) Rules 401 and 403: it must be relevant, and its potentially prejudicial effect must not substantially outweigh its probative value.<sup>3</sup> Ultimately, the Court determined, “me too” evidence is neither per se admissible nor per se inadmissible.<sup>4</sup>

The Court’s plain-language interpretation and application of the FRE answered the issue presented on appeal, but some lingering questions concerning the relevance of “me too” evidence remain. For example, confusion still exists regarding whether the “same supervisor” rule extends to cases involving a company-wide reduction in force (RIF) and thus which definition of “similarly situated” trial courts should apply.<sup>5</sup> As a result, though the the Supreme Court likely intended its ruling in *Mendelsohn* to streamline the admissibility of “me too” evidence at the trial level, the ruling appears to be having precisely the opposite effect.<sup>6</sup> Because trial courts may no longer consider such evidence as per se relevant or irrelevant, many cases will now require the court to engage in a lengthy Rule 403 analysis, whereas no such analysis was required when the relevance issue was predetermined.

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1. 552 U.S. 379 (2008).

2. J. Ray Poole, *Limiting the Use of “Me Too” Evidence in Employment Discrimination Cases*, FLA. B.J., June 2001, at 81, 81.

3. *See Mendelsohn*, 552 U.S. at 386-88.

4. *Id.* at 388.

5. Courts applying the “same supervisor” rule exclude “me too” evidence if the witness and the plaintiff had different supervisors, worked in different areas of the company, or were terminated at different times. *See, e.g., Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000). Courts imposing “similarly situated” requirements consider surrounding circumstances when determining whether there is a sufficient nexus between the situation of the witness and the plaintiff that makes the “me too” evidence relevant and therefore admissible. *See, e.g., Mendelsohn*, 552 U.S. at 382 (discussing the *Mendelsohn* trial court’s stated reasoning).

6. *See* discussion *infra* Part V.C.

Primarily examining the issues in the context of the Age Discrimination in Employment Act<sup>7</sup> (ADEA), this note discusses how the federal courts have historically analyzed the relevance of “me too” evidence in the past and identifies how that analysis is changing in light of the *Mendelsohn* decision.<sup>8</sup> Part II introduces the ADEA and describes the role of “me too” evidence within the framework of an ADEA action. Part III presents an overview of how various circuits across the country addressed the relevance of “me too” evidence before *Mendelsohn*, with an emphasis on Tenth Circuit precedent. Part IV discusses the Tenth Circuit’s decision in the case at length to provide sufficient background information before addressing the Supreme Court’s *Mendelsohn* ruling and explaining how the Court reached its conclusion regarding the relevance of “me too” evidence. Part V recounts initial reactions and responses as scholars and courts alike attempt to reconcile well-settled precedent with *Mendelsohn* and apply its principles to future litigation. Part V also analyzes the significance of the Court’s evidentiary ruling in the context of employment law and identifies the various roles *Mendelsohn* will play in subsequent “me too” admissibility rulings. Part VI concludes this note.

## II. “Me Too” Evidence in ADEA Litigation

In response to an aging American work force, Congress enacted the Age Discrimination in Employment Act in 1967 “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.”<sup>9</sup> The ADEA prohibits an employer from terminating an employee purely on the basis of age,<sup>10</sup> enabling a discharged employee forty years of age or older to file a claim against his employer for “disparate treatment,”<sup>11</sup> which occurs

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7. U.S.C. §§ 621-634 (2006) (originally enacted as Pub. L. No. 90-202, 81 Stat. 602 (1967)).

8. Some of the cases cited in this note are non-ADEA cases that involve allegations of discrimination arising under Title VII and other statutory anti-discrimination regimes. “Since disparate treatment cases under the ADEA are proven in the same fashion as Title VII cases, the same types of proof of intentional discrimination which apply to Title VII cases also apply to ADEA cases.” 8 EMPL. COORDINATOR *Employment Practices* § 107:59 (2010) (citations omitted).

9. 29 U.S.C. § 621(b).

10. *Id.* § 623(a)(1).

11. *See id.* § 631(a); *see also* *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (finding the “disparate treatment” theory of employment discrimination available under the plain language of the ADEA).

when an employer treats some employees less favorably than others based on their age.<sup>12</sup>

A presumption of discriminatory intent does not arise when an employer terminates an older employee and replaces her with a younger employee, absent other evidence establishing a pattern of age discrimination, because older individuals invariably leave the work force in larger numbers at any given time than younger individuals.<sup>13</sup> To prevail under the ADEA on a discriminatory termination claim, a plaintiff must prove that age was a “determining factor” in the challenged employment decision.<sup>14</sup> Age need not have been the *only* factor influencing the employer’s decision, but the plaintiff must establish that it played an influential role.<sup>15</sup>

In a typical ADEA case, a plaintiff may satisfy her burden of proof in one of two ways. She may either present direct or circumstantial evidence that age played a determinative role in her termination or set forth a prima facie case of age discrimination in accordance with the *McDonnell Douglas Corp. v. Green* framework.<sup>16</sup> In addition to these standard alternatives, the Supreme Court has determined that a plaintiff may also establish a prima facie case under the ADEA by presenting statistical evidence that demonstrates a pattern or policy of discriminatory conduct by the employer.<sup>17</sup> In contrast to a disparate treatment claim, which focuses on the individual employee filing suit and a specific instance of alleged discrimination, cases involving discriminatory pattern or practice claims tend to be much broader in scope and involve allegations that all employees in a protected group were treated unfavorably.<sup>18</sup> Many courts refuse to admit pattern or practice evidence in disparate treatment cases to prevent trials within trials from arising that distract

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12. *Hazen Paper*, 507 U.S. at 609.

13. See 45C AM. JUR. 2D *Job Discrimination* § 2465 (2002) (recognizing that “[s]ince the progression of age is a universal human process, employees leaving the workforce will more often than not be replaced by younger employees”).

14. *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1400 (10th Cir. 1988) (quoting *EEOC v. Sperry Corp.*, 852 F.2d 503, 507 (10th Cir. 1988)).

15. *Sperry*, 852 F.2d at 507 (citing *EEOC v. Prudential Fed. Sav. & Loan Ass’n*, 763 F.2d 1166, 1170 (10th Cir. 1985)).

16. *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557-58 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (specifying the elements required to establish a prima facie case of race discrimination under Title VII)). Courts regularly apply a customized model of the *McDonnell Douglas* framework to individual disparate treatment claims under the ADEA. *Sperry*, 852 F.2d at 507.

17. See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (finding statistical proof admissible to establish race discrimination, but noting that “[s]tatistics are equally competent in proving employment discrimination”).

18. See 45C AM. JUR. 2D *Job Discrimination* § 2434 (2002).

the jury and shift its focus away from the specific circumstances surrounding the plaintiff's claim.<sup>19</sup>

Under the disparate treatment version of the *McDonnell Douglas* framework, a plaintiff alleging age discrimination must prove the following elements: (1) she was a member of the protected age group; (2) she was performing satisfactory work; (3) she was terminated despite her adequate performance; and (4) she was replaced by a younger employee.<sup>20</sup> Given the special circumstances of a RIF case, courts have modified the fourth element and only require plaintiffs to "produc[e] evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue."<sup>21</sup> Circumstantial evidence indicating that the plaintiff received less favorable treatment than younger employees during the RIF can satisfy this tailored element.<sup>22</sup>

Plaintiffs typically rely heavily on circumstantial evidence to prove age discrimination "[b]ecause direct testimony as to the employer's mental processes seldom exists."<sup>23</sup> Where relevant and sufficiently probative, some courts admit evidence regarding similar complaints of discrimination by the plaintiff's former co-workers.<sup>24</sup> A plaintiff generally offers such "me too" evidence to establish the employer's discriminatory intent and motives,<sup>25</sup> but employers have also been known to offer comparative evidence if it positively relates to their motives in employment discrimination cases.<sup>26</sup> Employers frequently challenge "me too" evidence offered by a plaintiff as unfairly prejudicial and therefore inadmissible under FRE Rule 403, because such evidence is often inflammatory and threatens to create minitrials within a trial on issues tangential to the plaintiff's claims.<sup>27</sup> In short, employers argue, "me too" evidence improperly influences the jury's decision.

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19. See, e.g., *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 (E.D. Pa. 1980), *aff'd*, 639 F.2d 774 (3d Cir. 1980).

20. *Sperry*, 852 F.2d at 507 (citing *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir. 1986)).

21. *Branson v. Price River Coal Co.*, 853 F.2d 768, 771 (10th Cir. 1988) (alteration in original) (quoting *Williams v. Gen. Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981)).

22. *Id.*; see also *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1165-68 (10th Cir. 1998) (identifying three ways a plaintiff can demonstrate that a RIF was purely pretextual).

23. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1226 (10th Cir. 2006), *vacated*, 552 U.S. 379 (2008); see also Poole, *supra* note 2, at 81.

24. See Poole, *supra* note 2, at 81-82.

25. See *id.*

26. 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, 274-75 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/prior-colloquies/mendelsohn.html>.

27. See Poole, *supra* note 2, at 82.

When a plaintiff seeks to introduce “me too” evidence, the FRE—specifically Rules 401, 402, and 403—function as evidentiary safeguards to ensure that the proffered testimony will not unduly disadvantage the employer. Just as all evidence must be shown somehow relevant to the determinative issues in the case before it can be admitted, “me too” evidence must first prove relevant to the employer’s alleged discriminatory intent under Rule 401 to be admissible.<sup>28</sup> Whether “me too” evidence ultimately makes it more or less probable that the employer acted with discriminatory animus—in other words, whether such evidence overcomes the low threshold for relevance under Rule 401—largely depends on the additional rules imposed by the specific jurisdiction.<sup>29</sup> Nonetheless, relevant “me too” evidence can be excluded under Rule 403 “if its probative value is substantially outweighed by the danger of unfair prejudice” or another of the contemplated evidentiary dangers.<sup>30</sup> However, courts generally recognize Rule 403 as an “extraordinary remedy to be used sparingly” to exclude otherwise admissible evidence.<sup>31</sup>

Determining relevance and probative value demands relational, fact-sensitive inquiries best conducted by trial courts.<sup>32</sup> Given the nature of these

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28. Evidence qualifies as relevant under Rule 401 when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” FED. R. EVID. 401; *see also* 8 EMPL. COORDINATOR *Employment Practices* § 106:2 (2010) (“[A]s is the case in almost all federal civil proceedings, admissibility [of] and weight [assigned to evidence] in job discrimination cases are governed by the Federal Rules of Evidence (FRE) and the discretion of the court.” (footnotes omitted)).

29. *See, e.g.,* Schrand v. Fed. Pac. Elec. Co., 851 F.2d 152, 156 (6th Cir. 1988) (finding “me too” testimony irrelevant to the plaintiff’s claim of age discrimination because the witnesses did not work in geographical proximity to the plaintiff and were not terminated by the plaintiff’s supervisor); Goff v. Cont’l Oil Co., 678 F.2d 593, 596-97 (5th Cir. 1982) (requiring that “me too” witnesses demonstrate knowledge of plaintiff’s circumstances or employer’s underlying motive, intent, or purpose in the challenged employment decision for their testimony to be admissible), *overruled on other grounds by* Carter v. S. Cent. Bell, 912 F.2d 832 (5th Cir. 1990); *see also* Wyvill v. United Cos. Life Ins. Co., 212 F.3d 296, 302 (5th Cir. 2000) (applying a “similarly situated” test, which operates to exclude “me too” evidence if the witness and the plaintiff had different supervisors, worked in different areas of the company, or were terminated at different times).

30. FED. R. EVID. 403. In addition to exclusion on the basis of unfair prejudice, Rule 403 excludes relevant evidence where “its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” *Id.*

31. Wheeler v. John Deer Co., 862 F.2d 1404, 1408 (10th Cir. 1988) (quoting Romine v. Parman, 831 F.2d 944, 945 (10th Cir. 1987)) (affirming the admission of testimony of other individuals injured in similar accidents despite its potentially prejudicial effect because first-hand accounts represent the preferred method of introducing evidence).

32. *See* Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008).

inquiries, “[b]lanket pretrial evidentiary exclusions”<sup>33</sup>—per se bans—are unfair and impracticable in employment discrimination cases.<sup>34</sup> In appellate litigation, courts adhere to the principle that a trial court’s evidentiary rulings typically merit deference.<sup>35</sup> A district court’s decision should only be overturned for abuse of discretion—that is, “when [the court] commits an error of law or makes clearly erroneous factual findings.”<sup>36</sup>

This abuse of discretion standard lies at the heart of the “me too” dispute presented to the Supreme Court for review in *Mendelsohn*. On writ of certiorari, the Court reviewed the Tenth Circuit’s finding that the district court had applied a per se evidentiary rule against “me too” evidence and thereby abused its discretion.<sup>37</sup> The *Mendelsohn* Court determined that the district court had not actually applied such a per se rule in the first instance and vacated the Tenth Circuit’s ruling accordingly.<sup>38</sup> Notwithstanding this apparent rebuke of the Tenth Circuit, the Court’s highly anticipated *Mendelsohn* decision dispelled the notion, embraced in several *other* circuits,<sup>39</sup> that “me too” evidence is necessarily irrelevant and therefore always inadmissible to establish an employer’s discriminatory conduct or intent in an individual ADEA case.<sup>40</sup>

Unfortunately, the Court left many essential issues regarding “me too” evidence admissibility unresolved, especially within the Tenth Circuit, which has a history of treating this form of circumstantial evidence more favorably than its fellow circuits.<sup>41</sup> These enduring questions raise concerns within the legal community that the number of ADEA suits and the cost of litigation will increase dramatically. Some fear that overly cautious judges will entertain evidentiary disputes more frequently and prolong admissibility assessments of “me too” evidence in response to the Supreme Court’s admonition against per se exclusions.<sup>42</sup> What is certain is that each individual circuit must now align

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

34. *See Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988), *abrogated on other grounds by Foster v. Univ. of Ark.*, 938 F.2d 111, 115 (8th Cir. 1991).

35. *See, e.g., Mendelsohn*, 466 F.3d at 1230.

36. *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006).

37. *See Mendelsohn*, 552 U.S. at 384-85.

38. *See id.* at 385-88.

39. Petition for a Writ of Certiorari at 5, *Mendelsohn*, 552 U.S. 379 (No. 06-1221), 2007 WL 738928, at \*5 (contending that “four circuits have held ‘me, too’ evidence wholly irrelevant”).

40. *See Mendelsohn*, 552 U.S. at 387-88.

41. For illustrative opinions, see cases cited *infra* note 45.

42. *See* David L. Gregory, *Sprint/United Management Company v. Mendelsohn and Case-By-Case Adjudication of “Me Too” Evidence of Discrimination*, 102 NW. U. L. COLLOQUY 382, 384-86 (2008), <http://www.law.northwestern.edu/lawreview/colloquy/prior-colloquies/mendel>

its decisions with the Court's holding in *Mendelsohn* by not excluding "me too" evidence automatically.

### *III. The Relevance of "Me Too" Evidence Before Sprint/United Management Co. v. Mendelsohn*

One scholar describes the pre-*Mendelsohn* law governing "me too" evidence as being in a "state of disarray."<sup>43</sup> Before the Supreme Court's *Mendelsohn* decision, many circuit courts routinely restricted or denied admissibility of "me too" evidence on the grounds that this type of evidence lacked relevance altogether.<sup>44</sup> The Tenth Circuit differed from these other circuits, frequently finding "me too" evidence relevant to the issue of an employer's discriminatory intent.<sup>45</sup> The Tenth Circuit's opinion in *Mendelsohn* fell squarely within this line of precedent.<sup>46</sup>

#### *A. The Relevance of "Me Too" Evidence in the Tenth Circuit*

Applying the general admissibility framework outlined in Part II of this paper, the Tenth Circuit frequently found "me too" evidence relevant—and oftentimes admissible under Rule 403—in discrimination cases before *Mendelsohn*.<sup>47</sup> To support a relevance finding where discriminatory intent was

sohn.html; Michael J. Newman & Shane Crase, *The Supreme Court Rejects Per Se Admissibility of "Me Too" Evidence*, FED. LAW., June 2008, at 16, 17; Rubinstein, *supra* note 26, at 275.

43. Rubinstein, *supra* note 26, at 267.

44. *See, e.g.*, *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000); *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985).

45. *See Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990) (upholding the district court's decision to admit "me too" testimony of two former employees with a different manager than plaintiff as evidence relevant to employer's discriminatory intent); *see also Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1177-80 (10th Cir. 2001) (finding pattern or practice evidence relevant to employer's discriminatory animus); *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 561 (10th Cir. 1996) (finding evidence that employer terminated other older employees relevant to establish a pattern of dismissal based on age discrimination); *Bingman v. Natkin & Co.*, 937 F.2d 553, 557 (10th Cir. 1991) (finding that testimony regarding other employees' subsequent RIF terminations was sufficiently close in time to plaintiff's termination to render the testimony relevant to employer's policies and practices).

46. *See Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1226 (10th Cir. 2006), *vacated*, 552 U.S. 379 (2008).

47. *See Spulak*, 894 F.2d at 1156; *see also Gossett*, 245 F.3d at 1177-80; *Bingman*, 937 F.2d at 557. *But see Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999) (upholding the exclusion of "me too" testimony regarding events that occurred after plaintiff was terminated due to the diminished relevance of such testimony); *Curtis v. Okla. City Pub. Sch. Bd. of Educ.*, 147 F.3d 1200, 1217-18 (10th Cir. 1998) (finding no abuse of discretion

at issue, the Tenth Circuit required that the testimony of the “me too” witness either establish a pattern of discriminatory behavior by the employer or “discredit the employer’s assertion of legitimate motives.”<sup>48</sup> The Tenth Circuit adopted the Sixth Circuit’s “me too” admissibility approach in the context of retaliatory termination, requiring the plaintiff to establish a logical or reasonable connection between the testifying employee’s circumstances and the employer’s motivation in terminating the plaintiff.<sup>49</sup> In the disparate treatment claim context, however, the court admitted pattern or practice evidence of discrimination “as circumstantial evidence of a defendant’s discriminatory animus,” regardless of whether the plaintiff raised a pattern or practice allegation.<sup>50</sup>

*Spulak v. K Mart Corp.*, which followed these guiding principles, provides a helpful illustration of the Tenth Circuit’s standard admissibility analysis of “me too” evidence.<sup>51</sup> The plaintiff in *Spulak* worked as a department manager in the auto service department at K Mart.<sup>52</sup> Following a corporate restructuring, Spulak felt that his position was being jeopardized by the actions of both his new manager and a mechanic under Spulak’s supervision.<sup>53</sup> Spulak, who was fifty-eight at the time,<sup>54</sup> inquired about the effect early retirement would have on his benefits package.<sup>55</sup> Following this inquiry, Spulak’s manager ordered an investigation of Spulak, which resulted in accusations that Spulak violated company policy on several different occasions.<sup>56</sup> Spulak’s manager presented him with the ultimatum that he either retire early or be fired, at which point Spulak decided to retire to avoid losing his benefits.<sup>57</sup> He was then replaced by a younger employee.<sup>58</sup> Spulak sued K Mart under the ADEA, alleging constructive discharge on the basis of age.<sup>59</sup>

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where district court excluded “me too” testimony for lack of relevance and insufficient probative value under Rule 403).

48. *Coletti*, 165 F.3d at 776 (citing *Spulak*, 894 F.2d at 1156) (discussing the Tenth Circuit’s standard of proof for plaintiffs alleging discriminatory intent in employee discharge cases).

49. *Id.* at 777 (citing *Curtis*, 147 F.3d at 1217; *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988)).

50. *Mendelsohn*, 466 F.3d at 1227 n.2 (citing *Greene*, 98 F.3d at 561; *Bingman*, 937 F.2d at 556-57; *Gossett*, 245 F.3d at 1177-78).

51. *See* 894 F.2d 1150.

52. *Id.* at 1152.

53. *Id.* at 1152-53.

54. *Id.* at 1154.

55. *Id.* at 1153.

56. *Id.*

57. *Id.*

58. *Id.* at 1154.

59. *Id.* at 1152.



Although *Spulak* did not involve a RIF, the facts are analogous to the facts presented in *Mendelsohn* because Spulak alleged that K Mart did not enforce company rules uniformly, which suggested that the rules were nothing more than “a pretext to mask age discrimination.”<sup>60</sup>

At trial, Spulak presented testimony from two former K Mart employees that were in the same protected age group—both employees worked at a different store location, but one held the same position as Spulak.<sup>61</sup> The “me too” witnesses claimed that they received similar discriminatory treatment before being terminated and replaced by younger workers.<sup>62</sup> The district court admitted the testimony as “logically or reasonably” tied to Spulak’s termination based on findings of geographical and temporal proximity—the “me too” witnesses worked in the same state and were fired shortly after Spulak left his job.<sup>63</sup> Additionally, a K Mart manager mentioned Spulak’s “early retirement” to one of the witnesses when encouraging him to “retire” as well, further supporting the probative value of the similar circumstances.<sup>64</sup> On appeal, the Tenth Circuit affirmed the admissibility of this “me too” testimony and recognized that testimony by former employees recounting treatment they received from their employer is relevant, “[a]s a general rule, . . . to the issue of the employer’s discriminatory intent.”<sup>65</sup>

Applying the same relevance standard used in *Spulak*, the Tenth Circuit found “me too” evidence admissible in *Mendelsohn* and reversed the district court’s decision to exclude the proffered evidence.<sup>66</sup> The panel took great pains to distinguish the case at bar from an earlier case, *Aramburu v. Boeing Co.*,<sup>67</sup> which set forth the “same supervisor” rule in an employer-employee

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60. *Id.* at 1155 (quoting *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988)). The district court in *Mendelsohn* precluded the plaintiff from using Sprint’s statistical RIF spreadsheets to support a theory that Sprint favored younger employees, but admitted the evidence as support for the theory that Sprint neglected to follow proper RIF procedure and that Sprint’s purported adherence to procedure was therefore a pretext for discrimination. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1229 (10th Cir. 2006), *vacated*, 552 U.S. 379 (2008).

61. *Spulak*, 894 F.2d at 1156.

62. *See id.*

63. *Id.* at 1156 n.2 (distinguishing the facts of the case before it from Second and Sixth Circuit precedent).

64. *Id.* at 1156.

65. *Id.* The Tenth Circuit cited cases from the Fifth, Seventh, Eleventh, and D.C. Circuits as demonstrating the existence of this “general rule.” *See id.*

66. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1228 (10th Cir. 2006) (citing *Spulak*, 894 F.2d at 1156 n.2) (“The testimony of the other employees concerning Sprint’s alleged discriminatory treatment and similar RIF terminations is ‘logically or reasonably’ tied to the decision to terminate Mendelsohn.”), *vacated*, 552 U.S. 379 (2008).

67. 112 F.3d 1398 (10th Cir. 1997).

discriminatory discipline context.<sup>68</sup> In *Aramburu*, the Tenth Circuit conditioned the admissibility of “me too” evidence on a showing that the “me too” witness was “similarly situated” to the plaintiff—meaning that he or she dealt with the same supervisor and was subject to the same performance evaluation and discipline standards.<sup>69</sup> Emphasizing that it was addressing an instance of alleged discriminatory RIF, the *Mendelsohn* panel narrowly confined the scope of *Aramburu* by drawing a distinction between discriminatory employee discipline and discriminatory RIFs on the basis that the former is individual in nature, whereas the scope of the latter tends to be company-wide.<sup>70</sup>

The *Mendelsohn* court noted that the Tenth Circuit has consistently applied the *Aramburu* “same supervisor” rule only in cases involving alleged discriminatory discipline.<sup>71</sup> For instance, the Tenth Circuit explicitly refused to extend the application of the “same supervisor” rule in *Gossett v. Oklahoma ex rel. Board of Regents for Langston University*,<sup>72</sup> a gender discrimination action involving allegations of program-wide discrimination at a nursing school.<sup>73</sup> *Gossett*, a male student, alleged that the school discriminated against male students in its application of a policy allowing instructors to provide failing students with additional time to improve their grades.<sup>74</sup> The *Gossett* court concluded that the lower court erred in refusing to admit the affidavit of a female nursing student, who received a higher grade under the school-wide policy, simply because she was “enrolled in a different course taught by a different instructor.”<sup>75</sup> Relying on *Gossett*, the Tenth Circuit in *Mendelsohn* refused to apply the “same supervisor” rule to cases involving allegations of a discriminatory company-wide RIF, recognizing that without “me too” evidence, plaintiffs would find it difficult, if not impossible, to prove discrimination where direct evidence was unavailable.<sup>76</sup>

Prior to *Mendelsohn*, the Tenth Circuit demonstrated a willingness to assess “me too” evidence without allowing preconceived notions of the general relevance of this type of evidence to impact its admissibility determinations.

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68. *See Mendelsohn*, 466 F.3d at 1227-28.

69. *Aramburu*, 112 F.3d at 1404.

70. *Mendelsohn*, 466 F.3d at 1227-28.

71. *Id.* at 1227.

72. 245 F.3d 1172 (10th Cir. 2001).

73. *Id.* at 1177-78 (citing, inter alia, *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1198 & n.10 (10th Cir. 2000) (finding the “same supervisor” rule legally inapplicable to the issue of admissibility of “me too” evidence that was introduced to establish the existence of a discriminatory company-wide policy in a pregnancy discrimination suit)).

74. *Id.* at 1177.

75. *Id.*

76. *Mendelsohn*, 466 F.3d at 1228.

In *Mendelsohn*, the Tenth Circuit adhered to this trend and refrained from tacking any per se restrictions onto the relevance standard set forth in FRE Rule 401. The *Mendelsohn* court's refusal to apply the "same supervisor" rule in a RIF context thus represents a natural outgrowth of the court's history of finding "me too" evidence relevant and illustrates its reluctance to establish standards that unnecessarily preclude admissibility of such evidence.

### *B. The Relevance of "Me Too" Evidence in Other Circuits*

Before the Supreme Court's *Mendelsohn* ruling, the circuits were split over the admissibility of "me too" evidence. In its petition for certiorari, Sprint highlighted the conflict between the Tenth Circuit's relevance analysis, as applied in *Mendelsohn*, and the manner in which other circuits treated "me too" evidence in disparate treatment cases.<sup>77</sup> According to Sprint, at least four circuits found "me too" evidence "wholly irrelevant" in age discrimination cases.<sup>78</sup> These circuits adhered to the general relevance framework discussed in Part II, but imposed additional standards that substantially decreased the likelihood that "me too" evidence would be found relevant, probative, and thus ultimately admissible. From all appearances, the Eighth Circuit was the only circuit that stood squarely with the Tenth Circuit in favoring the admissibility of "me too" evidence.<sup>79</sup>

#### *1. Circuits Disfavoring Admissibility*

Rigid standards in many circuits led to the exclusion of most "me too" evidence for lack of relevance. For instance, the Second Circuit required that the evidence bear some "nexus to the challenged employment decision" to be relevant.<sup>80</sup> The Fifth Circuit demanded that a "me too" witness proffered in an

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77. See Petition for a Writ of Certiorari, *supra* note 39, at 6-14.

78. *Id.* at 5-6; see also *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000); *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997); *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984); *Goff v. Cont'l Oil Co.*, 678 F.2d 593, 596-97 (5th Cir. 1982), *overruled on other grounds* by *Carter v. S. Cent. Bell*, 912 F.2d 832 (5th Cir. 1990); *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa. 1980), *aff'd*, 639 F.2d 774 (3d Cir. 1980).

79. See *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (quoting *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (concluding that "background evidence" of other age discrimination lawsuits filed against an employer "may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive"), *abrogated on other grounds* by *Foster v. Univ. of Ark.*, 938 F.2d 111, 115 (8th Cir. 1991)); *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 154 (8th Cir. 1990) (reversing the district court's decision because "the evidentiary exclusions were erroneous and deprived [the plaintiff] of a full opportunity to present her case to the jury").

80. See Petition for a Writ of Certiorari, *supra* note 39, at 8 n.2 (interpreting the holding

individual discrimination case demonstrate some knowledge of either the plaintiff's circumstances or the employer's underlying motive, intent, or purpose in the challenged employment decision.<sup>81</sup> These circuit-specific criteria essentially raised the threshold established by FRE Rule 401 by introducing additional guidelines into the relevance analysis.<sup>82</sup> Laying the admissibility foundation for "me too" evidence in these circuits was no easy burden for plaintiffs to bear.<sup>83</sup>

At first glance, many of the additional criteria established in these jurisdictions appeared to accommodate the admissibility of "me too" evidence; however, the rules often barred the introduction of "me too" evidence in practice. For instance, Second Circuit authority allowed statistical pattern or practice evidence to be introduced if it supported "an inference of age discrimination."<sup>84</sup> Alternatively, if a plaintiff lacked direct evidence or statistical proof, the Second Circuit admitted circumstantial evidence suggesting that the employer preferred younger workers, provided the evidence was logically related to age discrimination and supported an inference that age played a determinative role in the plaintiff's termination.<sup>85</sup>

Despite the flexible language of the Second Circuit's pre-*Mendelsohn* standards, *Haskell v. Kaman Corp.* illustrates the difficulties that arose in their application.<sup>86</sup> The plaintiff in *Haskell* sued his employer for terminating him on the basis of age and introduced "me too" testimony at trial.<sup>87</sup> The Second Circuit reviewed the district court's admission of several different pieces of evidence and determined that six former Kaman officers should not have been allowed to testify at trial regarding the circumstances surrounding their own terminations or the terminations of other former officers.<sup>88</sup> The *Haskell* court deemed this evidence statistically insignificant and thus concluded that the "me too" testimony provided "no basis for an inference of discrimination."<sup>89</sup> The court explained that for "me too" testimony involving statistical evidence

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in *Martin v. Citibank, N.A.*, 762 F.2d 212, 217 (2d Cir. 1985)).

81. See *Goff*, 678 F.2d at 596-97 (involving race discrimination).

82. Cf. FED. R. EVID. 401.

83. See, e.g., *Wyvill*, 212 F.3d at 302 (finding "me too" testimony inadmissible when the witness and the plaintiff had different supervisors, worked in different departments, or were not terminated in close temporal proximity); *Goff*, 678 F.2d at 596-97 (holding "me too" testimony irrelevant when none of the other witnesses had worked in plaintiff's department).

84. *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 (2d Cir. 1984) (citing *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 921 (2d Cir. 1981)).

85. *Stanojev*, 643 F.2d at 921.

86. See 743 F.2d 113.

87. See *id.* at 118.

88. *Id.* at 121.

89. *Id.* (quoting *Pace v. S. Ry. Sys.*, 701 F.2d 1383, 1392 n.8 (11th Cir. 1983)).

to be probative, “the sample must be large enough to permit an inference that age was a determinative factor in the employer’s decision.”<sup>90</sup> The court cited several cases from other circuits involving insufficient sample sizes but did not mention or define a situation involving a sufficiently large sample.<sup>91</sup>

The rules governing “me too” admissibility in the Sixth Circuit were equally as stringent as the Second Circuit’s approach to “me too” relevance. For instance, the plaintiff in *Schrand v. Federal Pacific Electric Co.* claimed age discrimination and presented testimony at trial from two other former employees who were allegedly informed that they were being fired on account of their age.<sup>92</sup> Applying a “same supervisor” rule, the Sixth Circuit found the “me too” testimony inadmissible because the witnesses worked in a different location and under different supervisors than the plaintiff.<sup>93</sup> The *Schrand* court viewed the testimony from the former employees as entirely irrelevant because, despite the fact that the “me too” witnesses were explicitly told they were terminated because of their age, their testimony failed to create a logical relationship to the *plaintiff’s* termination.<sup>94</sup> The Sixth Circuit’s opinion in *Schrand* thus suggests that it did not admit pattern or practice evidence of discrimination in disparate treatment cases in an effort to ensure the exclusion of “me too” testimony.<sup>95</sup>

The major distinction between the circuits in the “me too” admissibility context centered on the applicability of the “same supervisor” rule, which the Tenth Circuit refused to apply in *Mendelsohn*,<sup>96</sup> and its influence on the “similarly situated” requirement. Following the Sixth Circuit’s lead, several other circuits incorporated the “same supervisor” rule into their “me too” admissibility framework. For example, to qualify as “similarly situated” in the Fifth Circuit, a “me too” witness and the plaintiff must have shared the same supervisors, worked in the same department within the company, and been

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90. *Id.*

91. *See id.*

92. *See* 851 F.2d 152, 156 (6th Cir. 1988).

93. *Id.*

94. *Id.* (finding influential the fact that the plaintiff did not intend to establish a pattern or practice of discrimination).

95. *See id.*; *see also* *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997) (applying the *Schrand* rationale to pattern or practice evidence in the context of an allegation of race discrimination). This essentially per se ban on pattern or practice evidence stands in stark contrast to the Tenth Circuit’s approach toward such evidence in disparate treatment cases. *See Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1227 n.2 (10th Cir. 2006), *vacated*, 522 U.S. 379 (2008) (“[W]e have allowed evidence of a pattern and practice in individual cases of discrimination as circumstantial evidence of a defendant’s discriminatory animus.”).

96. *See* 466 F.3d at 1228; *see also supra* text accompanying note 76.

terminated within close temporal proximity to each other.<sup>97</sup> The Third and Fourth Circuits adopted similar approaches.<sup>98</sup> Not all circuits followed this trend, however.

*2. The Tenth Circuit's Ally: The Eighth Circuit's Approach Favoring Admissibility*

In contrast to the weight of authority across the circuits, Eighth Circuit authority regarding the relevance of “me too” evidence generally ran parallel to Tenth Circuit precedent. The Eighth Circuit commonly admitted “me too” evidence based on the rationale that it provides “background evidence [that] may be critical for the jury’s assessment of whether a given employer was more likely than not to have acted from an unlawful motive.”<sup>99</sup> In assessing the admissibility of “me too” evidence, the Eighth Circuit explicitly eschewed “crabbed notions of relevance [and] excessive mistrust of juries” and thus distinguished itself from many of the other circuits.<sup>100</sup> Yet the Eighth Circuit did not merely take a position directly opposite that of the other circuits; it recognized the danger of *both* blanket pretrial evidentiary exclusions and blanket admissions of “me too” evidence at trial more than a decade before the Supreme Court reached this same conclusion in *Mendelsohn*.<sup>101</sup> Accordingly, “me too” evidence was admissible in a disparate treatment case in the Eighth Circuit, but only if it helped to establish a reasonable inference of discrimination.<sup>102</sup>

The decision in *Phillip v. ANR Freight Systems, Inc.* exemplifies the Eighth Circuit’s “me too” admissibility approach.<sup>103</sup> Relying on Eighth Circuit precedent, the *Phillip* court reversed the district court’s decision to exclude, on grounds of insufficient similarity, the plaintiff’s proffered evidence that other

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97. *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302 (5th Cir. 2000) (concluding that anecdotal pattern or practice testimony of discrimination should have been excluded).

98. *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (citing, *inter alia*, *Schrand*, 851 F.2d at 156) (choosing to focus on the plaintiff’s “personal experience,” rather than experiences of the plaintiff’s co-workers); *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa. 1980) (upholding the exclusion of “me too” testimony from other employees who had filed separate age discrimination suits on the basis that “to the extent testimony of each witness was about his own lay off, it was not relevant to [the plaintiff’s] lay off”), *aff’d*, 639 F.2d 774 (3d Cir. 1980).

99. *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988), *abrogated on other grounds by Foster v. Univ. of Ark.*, 938 F.2d 111, 115 (8th Cir. 1991); *see also supra* note 79.

100. *See Estes*, 856 F.2d at 1103 (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697-98 (7th Cir. 1987)).

101. *See Callanan v. Runyun*, 75 F.3d 1293, 1298 (8th Cir. 1996) (citing *Estes*, 856 F.2d at 1103).

102. *See Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1419 (8th Cir. 1995).

103. *See* 945 F.2d 1054 (8th Cir. 1991).

age discrimination lawsuits had been filed against his employer.<sup>104</sup> The Eighth Circuit expressed concern that excluding the evidence deprived the plaintiff of his right to present his case to the jury and also reemphasized its opinion that “me too” evidence is usually relevant and therefore “should normally be freely admitted at trial.”<sup>105</sup> The divergence of this approach to “me too” evidence from that of many of the other circuits created the divide that set the stage for the Supreme Court’s grant of certiorari in *Mendelsohn*.

#### IV. Sprint/United Management Co. v. Mendelsohn

##### A. Facts and Procedural History

In 2002, “as part of an ongoing company-wide RIF,” Sprint/United Management Company (Sprint) terminated fifty-one-year-old Ellen Mendelsohn (Mendelsohn) from the business development strategy group, where she had worked since 1989.<sup>106</sup> At the time, Mendelsohn was her unit’s oldest manager.<sup>107</sup> Mendelsohn subsequently filed an ADEA claim against Sprint, alleging disparate treatment on the basis of age.<sup>108</sup> At trial, Mendelsohn attempted to introduce testimony from five other former Sprint employees over the age of forty who claimed that they had experienced similar age discrimination by Sprint supervisors and had ultimately been terminated as a result of their age during the same RIF.<sup>109</sup> Mendelsohn intended to use this evidence to establish that a “pervasive atmosphere of age discrimination” existed within the company.<sup>110</sup>

Three of the witnesses allegedly heard one or more Sprint supervisors make derogatory comments about older workers.<sup>111</sup> One witness claimed to have “seen a spreadsheet suggesting that a supervisor considered age in making layoff decisions.”<sup>112</sup> Another witness asserted that he received an undeserved negative evaluation, was “banned” from working at Sprint based on his age, and witnessed age-related harassment of another employee.<sup>113</sup> The last witness claimed that Sprint required him to obtain permission before hiring an

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104. *Id.* at 1056 (finding applicable the reasoning in *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990), and *Estes*, 856 F.2d 1097).

105. *See id.* (quoting *Hawkins*, 900 F.2d at 155-56).

106. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 381 (2008); *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1225 (10th Cir. 2006), *vacated*, 552 U.S. 379.

107. *Mendelsohn*, 466 F.3d at 1225.

108. *Id.*

109. *Id.* at 1224-25.

110. *Id.* at 1225.

111. *Mendelsohn*, 552 U.S. at 381.

112. *Id.*

113. *Id.*

individual over age forty; he also claimed that a younger employee replaced him following his termination and that Sprint “rejected his subsequent employment applications.”<sup>114</sup> The five witnesses had neither worked in the same department as Mendelsohn nor worked under any of her supervisors or ever reported hearing her supervisors make discriminatory remarks.<sup>115</sup>

Sprint filed a motion in limine to exclude “any evidence of Sprint’s alleged discriminatory treatment of other employees,” specifically the testimony of the five witnesses identified above, arguing that it was irrelevant to the central issue of whether Sprint terminated Mendelsohn because of her age.<sup>116</sup> Sprint argued that the testimony would only be relevant if presented by employees “similarly situated” to Mendelsohn—meaning employees who shared her supervisors.<sup>117</sup> Sprint further alleged that the dangers of unfair prejudice, issue confusion, misleading the jury, and undue delay contemplated by Rule 403 substantially outweighed any possible probative value of the evidence.<sup>118</sup>

The district court granted the motion in a minute order and excluded testimony of discrimination presented by employees not “similarly situated” to Mendelsohn, a status which the court defined as requiring proof that (1) Mendelsohn’s direct supervisor acted as “the decision-maker in any adverse employment action” taken against the testifying employee and (2) Sprint terminated the employee in close “temporal proximity” to Mendelsohn’s termination.<sup>119</sup> Consequently, Mendelsohn’s five “me too” witnesses could not testify because they worked under different supervisors than did Mendelsohn.<sup>120</sup> Aside from the minute order, the district court provided no written rationale for its ruling.<sup>121</sup> The judge did, however, orally specify during the course of trial that the minute order only excluded testimony “that Sprint treated other people unfairly on the basis of age,” not testimony seeking to prove that Sprint’s RIF was “a pretext for age discrimination.”<sup>122</sup> Ultimately, the jury found in Sprint’s favor.<sup>123</sup>

On appeal, the Tenth Circuit considered whether the district court erred in excluding the “me too” evidence proffered by Mendelsohn.<sup>124</sup> The court

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114. *Id.*

115. *Id.* at 382.

116. *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1225 (10th Cir. 2006), *vacated*, 552 U.S. 379.

117. *Id.*

118. *Id.* at 1230.

119. *Id.* at 1225 n.1.

120. *Id.* at 1225.

121. *See Mendelsohn*, 552 U.S. at 382-83.

122. *Id.*

123. *Mendelsohn*, 466 F.3d at 1225.

124. *Id.* at 1224.



interpreted the district court's minute order as applying a "blanket pretrial evidentiary exclusion"<sup>125</sup> and found that the district court had abused its discretion by mistakenly relying on the "same supervisor" rule set forth in *Aramburu v. Boeing Co.* and thereby depriving Mendelsohn of a fair opportunity to present her full case to the jury.<sup>126</sup> The court distinguished *Aramburu*, finding it inapplicable to the case at bar because it involved "discriminatory discipline" as opposed to a company-wide policy of discrimination.<sup>127</sup> The *Mendelsohn* court concluded that the exclusion of Mendelsohn's circumstantial evidence of discriminatory animus "unfairly inhibited [her] from presenting her case to the jury."<sup>128</sup> The Tenth Circuit reversed and remanded the case for a new trial after finding that the evidence was relevant and that its probative value outweighed any undue prejudice.<sup>129</sup> Sprint then filed a petition for a writ of certiorari in the United States Supreme Court.<sup>130</sup>

### B. Issue

The Supreme Court granted certiorari to determine whether the FRE require the admission of nonparty testimony detailing the discriminatory actions of supervisors not involved in the adverse employment decision challenged by the plaintiff.<sup>131</sup> The Supreme Court considered the question in light of the fact that the "me too" witnesses were not supervised by the same individuals involved in Mendelsohn's termination and did not work in the same department within the company as did Mendelsohn.<sup>132</sup> Although the Supreme Court did not couch the issue in terms of the applicability of the *Aramburu* "same supervisor" rule, its decision does suggest a limitation on the scope of this rule, thus leaving open the possibility that the kind of "me too" evidence proffered in *Mendelsohn* may be relevant and therefore admissible.

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125. *Id.* at 1230. The Supreme Court later reproached the Tenth Circuit for too hastily characterizing the district court's ruling as indicative of a "*per se* rule that evidence from employees with other supervisors is always irrelevant to proving discrimination in an ADEA case." *Mendelsohn*, 552 U.S. at 383; *see also infra* text accompanying note 133.

126. *See Mendelsohn*, 466 F.3d at 1225-28.

127. *Id.* at 1227-28; *see also supra* text accompanying notes 67-70.

128. *Mendelsohn*, 466 F.3d at 1226 (citing *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998) (endorsing the introduction of an employer's general policy of using a RIF to "terminate older employees in favor of younger employees" as legitimate evidence of pretext in RIF employment discrimination cases)).

129. *See id.* at 1230-31.

130. *See* Petition for a Writ of Certiorari, *supra* note 39.

131. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 380-81 (2008).

132. *See id.* at 382.

### C. Holding

The Supreme Court determined that the Tenth Circuit should not have assumed that the district court improperly applied a *per se* rule and likewise should not have engaged in its own 403 balancing of the probative value of the evidence against its possible prejudicial effect.<sup>133</sup> The Court held that “whether evidence of discrimination by other supervisors is relevant [and sufficiently probative] in an individual ADEA case” is a factual question that “depends on many factors . . . [and] requires a fact-intensive, context-specific inquiry.”<sup>134</sup> Based on this conclusion, the Supreme Court vacated the Tenth Circuit’s ruling and remanded the case back to the district court for clarification and the balancing that should have been explicitly performed on the record in the initial proceedings.<sup>135</sup> Ultimately, the Supreme Court held that “me too” evidence is neither *per se* admissible nor *per se* inadmissible.<sup>136</sup>

### D. The Supreme Court’s Reasoning

The Supreme Court took exception to the Tenth Circuit’s interpretation of the district court’s ruling, specifically its determination that the district court adopted *Aramburu* as controlling authority.<sup>137</sup> Analyzing the district court proceedings, the Court found no evidence to support the conclusion that the district court relied on *Aramburu*.<sup>138</sup> The Court noted that the district court did not cite *Aramburu* in its decision or indicate reliance on the case in any other way.<sup>139</sup> The Supreme Court cautioned appellate courts against assuming that lower courts relied on a case or adopted a legal position merely because a party to the litigation cited the authority or supported the position in its brief or argument.<sup>140</sup>

Applying a plain-language interpretation of the FRE, the Supreme Court reached its conclusion that Rules 401 and 403 are “generally not amenable to broad *per se* rules.”<sup>141</sup> Finding that the district court’s decision was not afforded due deference by the Tenth Circuit, the *Mendelsohn* Court ordered that the case be remanded to the district court to “clarify the basis for [that court’s] evidentiary ruling under the applicable rules.”<sup>142</sup> The Court did not

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133. *See id.* at 387-88.

134. *Id.* at 388.

135. *Id.*

136. *Id.*

137. *See id.* at 384-86.

138. *Id.* at 385.

139. *Id.*

140. *Id.* at 385 n.2 (citing *Lawrence v. Chater*, 516 U.S. 163, 183 (1996) (Scalia, J., dissenting)).

141. *Id.* at 387.

142. *Id.* at 388.

reach the issue of whether the *Aramburu* “same supervisor” rule extends to cases involving a discriminatory company-wide RIF.

### V. Analysis

The *Mendelsohn* Court correctly concluded that Rules 401 and 403 do not lend themselves to per se admissibility rules; however, the Supreme Court’s decision runs contrary to part of the explicit purpose of Rule 403—to prevent “undue delay, waste of time, or needless presentation of cumulative evidence.”<sup>143</sup> Because the Court neglected to address the applicability of *Aramburu*’s “same supervisor” rule, this ruling has the potential to generate lengthier trials, increase the expense of litigation, and reduce the overall efficiency of the legal system. The *Mendelsohn* Court reiterated the general principle that trial courts maintain the authority, absent abuse of discretion, to conduct evidentiary admissibility determinations.<sup>144</sup> This principle is premised on the notion that trial courts stand in the best position to assess the relevance and probative value of evidence—including “me too” evidence—within the specific context of any given case.<sup>145</sup> Nevertheless, just as Rules 401 and 403 provide the courts with guidance, identifying employment discrimination situations in which certain “me too” admissibility standards apply would assist courts in following a similar analysis in each case to ensure fairness, avoid unjustifiable expense and delay, ascertain the truth, and promote justice.<sup>146</sup>

#### A. Initial Reactions to *Sprint/United Management Co. v. Mendelsohn*

Some scholars suggest that the Supreme Court will eventually be forced to address the questions the *Mendelsohn* Court left unanswered, such as *Aramburu*’s applicability, because additional disputes will inevitably arise given the confusion still surrounding this controversial area.<sup>147</sup> In his recent analysis of the *Mendelsohn* decision, Professor Mitchell Rubinstein recognizes

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143. FED. R. EVID. 403.

144. *Mendelsohn*, 552 U.S. at 384.

145. *See id.*

146. *See* FED. R. EVID. 102.

147. *See, e.g.*, Rubinstein, *supra* note 26, at 275; *see also* Mitchell H. Rubinstein, *The Significance of Sprint/United Management Company v. Mendelsohn: A Reply to Professors Gregory and Secunda*, 102 NW. U. L. REV. COLLOQUY 387, 389 (2008) (“[T]he Court should have supplied a set of criteria to be considered by lower courts when making determinations on the admissibility of ‘me too’ evidence.”), <http://www.law.northwestern.edu/lawreview/colloquy/prior-colloquies/mendelsohn.html>. *But see* Paul M. Secunda, *The Many Mendelsohn “Me Too” Missteps: An Alliterative Response to Professor Rubinstein*, 102 NW. U. L. REV. COLLOQUY 374, 381 (2008) (arguing that a clear set of rules is not desirable), <http://www.law.northwestern.edu/lawreview/colloquy/prior-colloquies/mendelsohn.html>.

that the circumstances under which “me too” evidence can be admitted when witnesses had different supervisors remains an unresolved and controversial question because the Supreme Court did not promulgate any clear legal rules.<sup>148</sup> Professor Rubinstein predicts that more “me too” testimony will be admitted into evidence following *Mendelsohn*, which might result in lengthier trials and additional litigation until these remaining issues are resolved.<sup>149</sup> Given the recent notoriety of *Mendelsohn*, managing “me too” evidence will undoubtedly become a more common part of trial preparation for all parties involved.<sup>150</sup>

In response to Professor Rubinstein’s article, Professor Paul Secunda opines that the Supreme Court granted certiorari in *Mendelsohn* under the mistaken belief that its decision would have a much more pronounced impact on the realm of “me too” evidence and employment law.<sup>151</sup> In his paper, Professor Secunda agrees that the Supreme Court reached the correct conclusion, but asserts that certiorari should never have been granted for such a contextualized evidentiary ruling.<sup>152</sup> Recognizing the importance of context in evidentiary issues, Professor Secunda concludes that it is “highly unlikely” the Supreme Court will create a bright-line rule to govern “me too” evidence.<sup>153</sup>

#### *B. Defining the Scope of Per Se Rules in the “Me Too” Context*

Although it might appear that the holding in *Mendelsohn*—that “me too” evidence is neither per se admissible nor per se inadmissible—only addresses a relatively minor point of law, courts across the country needed clarification and guidance to reconcile the “me too” admissibility split between the circuits. While bright-line, per se rules are inappropriate in evidentiary determinations governed by Rules 401 and 403, standards and guidelines for applying the FRE are necessary. In the “me too” evidentiary context, it remains unclear which standards and guidelines are included in the *Mendelsohn* Court’s notion of per se rules—rules that automatically determine the admissibility of “me too” evidence without regard for the surrounding facts and context of the case.<sup>154</sup> For instance, courts commonly imposed geographical, temporal, and

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148. See Rubinstein, *supra* note 26, at 272-73.

149. *Id.* at 275. Admitting “me too” evidence more frequently poses the threat of inundating courts with testimony from an unmanageable number of witnesses, which will reduce judicial efficiency unless the lower courts can develop a highly efficient method for determining admissibility. See Gregory, *supra* note 42, at 384.

150. See Gregory, *supra* note 42, at 385-86.

151. See Secunda, *supra* note 147, at 377-78.

152. See *id.* at 380.

153. *Id.* at 376.

154. See BLACK’S LAW DICTIONARY 1257 (9th ed. 2009) (defining “per se” as “[o]f, in, or by itself; standing alone, without reference to additional facts”).

contextual proximity requirements on “me too” evidence in employment discrimination cases before *Mendelsohn*.<sup>155</sup> These limitations and guidelines have proven beneficial because they limit the amount of “me too” evidence the courts must substantively consider, thereby increasing the efficiency of litigation. Without guidelines of some sort, “me too” evidence would overshadow the trial and the facts of the case at hand. *Mendelsohn* does not appear to have identified these kinds of considerations as per se rules of admissibility or inadmissibility.<sup>156</sup> By contrast, while the “same supervisor” rule represents a similar guideline that courts follow, its applicability remains in question.<sup>157</sup>

The *Mendelsohn* Court concluded that the district court did not apply a per se rule excluding “me too” evidence because “the [d]istrict [c]ourt’s discussion of the evidence neither cited *Aramburu* nor gave any other indication that its decision relied on that case.”<sup>158</sup> This language—coupled with the Court’s observation that the application of a per se rule would have justified the Tenth Circuit’s abuse of discretion reversal<sup>159</sup>—suggests that the Supreme Court would define the “same supervisor” rule as a per se rule. The *Mendelsohn* Court did not, however, explicitly state that *Aramburu* violates the prohibition on per se rules.<sup>160</sup> Although the *Mendelsohn* Court clearly articulated the proposition that *Aramburu* cannot be applied as a per se rule in “me too” admissibility decisions, it did not prohibit courts from considering whether the “me too” witness and the plaintiff shared the same supervisor as a factor in the admissibility analysis.<sup>161</sup>

Additionally, the *Mendelsohn* Court offered no instruction on the appropriate definition of “similarly situated,” despite the fact that the parties used different definitions throughout the preceding litigation.<sup>162</sup> In short, the Court did not clarify whether having the same supervisor is a legitimate factor

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155. See cases cited *supra* note 29.

156. See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008).

157. See Rubinstein, *supra* note 26, at 272-73; see also *supra* text accompanying note 148.

158. *Mendelsohn*, 552 U.S. at 385.

159. *Id.* at 387.

160. See *id.*

161. See Angelina LaPenotiere & Marcus D. Brown, *Admissibility of “Me Too” Evidence in the Post-Mendelsohn Era*, PRAC. LITIGATOR, Jan. 2009, at 57, 62.

162. Sprint urged a narrow definition of “similarly situated” requiring common supervisors. *Mendelsohn*, 552 U.S. at 382. The district court required that the “me too” witness be terminated by the same supervisor and imposed the additional requirement that the terminations occur in close temporal proximity. *Id.* *Aramburu* held that “similarly situated” employees “deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.” *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997), cited in *Mendelsohn*, 552 U.S. at 383; see also *supra* text accompanying note 69.

in determining the relevance of “me too” evidence in cases of alleged company-wide discrimination. Yet notwithstanding the Court’s silence on this issue, it appears internally inconsistent for the definition of “similarly situated” to contain a “same supervisor” requirement if *Aramburu* does not apply to the particular employment discrimination context at issue—namely, an allegedly discriminatory RIF or other company-wide policy or practice.<sup>163</sup> Despite this internal inconsistency, however, the district court on remand applied its original minute order definition of “similarly situated,” which included the “same supervisor” requirement.<sup>164</sup> This time, the Tenth Circuit affirmed.<sup>165</sup>

### *C. Mendelsohn’s Impact on Future “Me Too” Evidentiary Disputes*

Although the Supreme Court overruled the Tenth Circuit’s original *Mendelsohn* decision, its holding is more consistent with Tenth Circuit precedent than with the established authority of many of the other circuits. The Tenth and Eighth Circuits do not treat “me too” evidence as per se admissible—they perform the proper analysis under Rules 401 and 403 and “freely admit” this evidence upon finding it both relevant and sufficiently probative.<sup>166</sup> By contrast, other circuits approach “me too” evidence with a predisposition for excluding such evidence.<sup>167</sup> *Mendelsohn*’s conclusion that “Rules 401 and 403 . . . are generally not amenable to broad *per se* rules”<sup>168</sup> suggests that many of the circuits need to reevaluate their view that “me too” evidence is generally irrelevant. The circuits need to analyze the various relevance requirements they have imposed on their admissibility frameworks and consider abandoning their gloss on Rule 401, if the additional requirements they have imposed qualify as per se rules to automatically exclude “me too” testimony under *Mendelsohn*.

The Administrative Office of the U.S. Courts reports that cases that proceed to trial average more than twenty-three months to reach completion, whereas those that do not are typically disposed of within fifteen months or less.<sup>169</sup>

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163. See *supra* text accompanying notes 71-76.

164. See *Mendelsohn v. Sprint/United Mgmt. Co.*, 587 F. Supp. 2d 1201, 1207-09 (D. Kan. 2008).

165. See No. 08-3334, 2010 WL 4540310 (10th Cir. Nov. 12, 2010).

166. *Contra* Newman & Crase, *supra* note 42, at 16-17 (concluding that the Tenth Circuit found “me too” evidence per se admissible in *Mendelsohn*); see also discussion *supra* Part III.A, B.2.

167. See discussion *supra* Part III.B.1.

168. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387 (2008).

169. See STATISTICS DIV., ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 172-74 tbl. C-5 (2010), <http://www.uscourts.gov/statistics/JudicialBusiness/JudicialBusiness2009.aspx> (follow “Table C-5” hyperlink).

These statistics support the argument that courts should definitively resolve “me too” evidentiary disputes during the pretrial phase when possible to conserve resources. Nonetheless, some of the courts that have had the opportunity to apply *Mendelsohn* and interpret its holding have chosen to reserve “me too” evidentiary admissibility determinations for trial to allow the court to consider the evidence within its full factual context.<sup>170</sup>

*Miller v. Love’s Travel Stops & Country Stores, Inc.*, a recent employment discrimination case filed under the ADEA in the Western District of Oklahoma, illustrates the net effect of *Mendelsohn*.<sup>171</sup> The case did not involve a RIF; nevertheless, much like the plaintiff in *Mendelsohn*, the plaintiff alleged that his employer terminated older workers as part of a company-wide discriminatory practice.<sup>172</sup> In its first motion in limine, the defendant sought to exclude classic “me too” evidence as both irrelevant under FRE Rule 401 and unduly prejudicial under Rule 403.<sup>173</sup> The defendant argued that testimony by certain former employees should be excluded because the plaintiff was not “similarly situated” to these witnesses in terms of context, geography, and time.<sup>174</sup>

In its order on that motion, the court concluded from the Supreme Court’s holding in *Mendelsohn* that “there are no *per se* rules regarding the admissibility in individual ADEA cases of testimony by other employees who claim to be victims of age discrimination by the employer.”<sup>175</sup> Nonetheless, the *Miller* court did not express concern over the defendant’s incorporation of *Aramburu* in its “similarly situated” definition,<sup>176</sup> which suggests that the court

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170. See, e.g., *Ross v. Baldwin County Bd. of Educ.*, No. 06-0275-WS-B, 2008 WL 2020470, at \*2 (S.D. Ala. May 9, 2008). In *Ross*, the defendants filed motions in limine to exclude testimony by employees other than the plaintiff recounting alleged retaliatory actions taken against them. *Id.* The court granted various sections of the defendants’ motions but denied other portions because the “cursory nature of [the m]otions preclude[d] the Court from conducting the requisite fact-specific, context-specific inquiry to weigh the admissibility of alleged acts of retaliation.” *Id.*; see also *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103-05 (8th Cir. 1988) (acknowledging the concern that courts can rarely, if ever, accurately assess the probative value of “me too” evidence during the pretrial phase, but should reserve their admissibility determinations until trial), *abrogated on other grounds by Foster v. Univ. of Ark.*, 938 F.2d 111, 115 (8th Cir. 1991).

171. See *Miller v. Love’s Travel Stops & Country Stores, Inc.*, No. CIV-06-1008-D, 2008 WL 2079961 (W.D. Okla. May 9, 2008).

172. *Id.* at \*1.

173. *Id.*

174. *Id.*

175. *Id.*

176. See *id.*; Defendant’s First Motion *In Limine* and Brief in Support at 4, *Miller v. Love’s Travel Stops & Country Stores, Inc.*, 2008 WL 2218819 (W.D. Okla. Apr. 17, 2008) (No. CIV-06-1008-D).

did not interpret *Mendelsohn* as precluding plaintiffs from relying on *Aramburu* when alleging company-wide discrimination. Ultimately, the court denied the defendant's motion in limine on the basis that the court lacked sufficient information about the proposed testimonial evidence to make a reasoned decision regarding its admissibility.<sup>177</sup> The court refused to make a pretrial evidentiary ruling and decided instead to conduct an inquiry at trial, outside the jury's presence, each time the plaintiff called a former employee to testify about his alleged discriminatory termination by the defendant.<sup>178</sup>

The *Miller* court's caution in addressing this motion represents a predictable response in light of the Supreme Court's recent *Mendelsohn* decision. The judge distinguished *Miller*, which involved no RIF, from *Mendelsohn* and declined to conduct 403 balancing in a vacuum—that is, without reference to other evidence that would be available at trial.<sup>179</sup> Unfortunately, this decision represents an inefficient and expensive approach to adjudication of employment discrimination cases. If courts consistently follow the same approach taken by the *Miller* court when making pretrial admissibility decisions, offers of “me too” evidence will lengthen employment discrimination trials because the courts will essentially be conducting numerous trials within trials.<sup>180</sup>

## VI. Conclusion

Although the Supreme Court addressed the admissibility of “me too” evidence in *Mendelsohn*, it failed to articulate clear standards to help lower courts determine when this type of evidence should be admissible in employment discrimination cases. The *Mendelsohn* Court recognized that blanket evidentiary exclusions can be just as damaging as blanket evidentiary admissions. Nonetheless, prolonged evidentiary admissibility decisions, whether they occur before or during trial, can also adversely impact both parties.<sup>181</sup> Defined rules that guide the courts in making these decisions would benefit both plaintiffs and defendants because courts must simultaneously balance the goals of seeking fairness, truth, and justice with the need to reduce

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177. *Miller*, 2008 WL 2079961, at \*2.

178. *Id.*

179. *Id.* (“[T]he parties have provided insufficient information about the proposed evidence and the alleged circumstances to enable the Court to make a reasoned decision.”).

180. See Petition for a Writ of Certiorari, *supra* note 39, at 16-17 (citing *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 (E.D. Pa. 1980), *aff'd*, 639 F.2d 774 (3d Cir. 1980)).

181. A recent article published by the American Law Institute offers litigators tips for applying the Court's holding in *Mendelsohn* that might help reduce unnecessary delays created by “me too” evidentiary admissibility disputes. See LaPenotiere & Brown, *supra* note 161 (identifying seven lessons to guide parties dealing with “me too” evidence).



unnecessary expense and delay.<sup>182</sup> Without defined guidelines in different types of employment discrimination lawsuits, trial courts will struggle to achieve the goals set forth by the FRE. Until the Supreme Court sets out more specific standards, however, courts assessing the admissibility of “me too” evidence post-*Mendelsohn* must carefully avoid allowing “crabbed notions of relevance or excessive mistrust of juries” to guide their decisions.<sup>183</sup>

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182. See FED. R. EVID. 102.

183. *Riordan v. Kempiners*, 831 F.2d 690, 698 (7th Cir. 1987).