

THE MANY *MENDELSON* “ME TOO” MISSTEPS: AN ALLITERATIVE RESPONSE TO PROFESSOR RUBINSTEIN

By Paul M. Secunda*

INTRODUCTION

Although one might have the impression that the missteps referred to in the title of this paper indicate a criticism of the U.S. Supreme Court’s ADEA¹ decision of *Sprint/United Management Co. v. Mendelsohn*,² it does not. I believe the unanimous Court opinion is correct: “Me too” evidence should be admissible in certain instances based on evidentiary principles and based on the overriding importance of context in such cases, as further discussed in Professor Mitchell Rubinstein’s *Colloquy* Essay.³

Rather, the missteps I have in mind are: (1) my own misstep for writing in a previous Workplace Prof Blog post, before the decision, that a per se rule against this type of evidence would be adopted by the usual conservative Supreme Court Justice suspects;⁴ (2) the misstep made by the Supreme Court for granting certiorari in this rather mundane (legally speaking) employment discrimination case; and (3) the misstep of Professor Rubinstein in suggesting that the decision in *Mendelsohn* will provide “important medicine” for employment discrimination plaintiffs⁵ and in concluding

* Associate Professor, Marquette University Law School; Immediate Past Chair, Employment Discrimination Section, Association of American Law Schools; Co-editor, Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog (link). I would like to thank Charlie Craver, Joel Friedman, Jeff Hirsch, Nancy Levit, Marcia McCormick, Paul Mollica, Mike Selmi, Charlie Sullivan, and Mike Zimmer, for helpful comments on drafts of this paper.

¹ Age Discrimination in Employment Act of 1967, 29 U.S.C. § 631(a)–(b) (2000) (link).

² 128 S. Ct. 1140 (2008) (link).

³ 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> (link).

⁴ Posting of Paul M. Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2007/06/supremes_take_m.html (June 11, 2007) [hereinafter Posting of Paul M. Secunda (June 11, 2007)] (link).

⁵ Rubinstein, *supra* note 3, at 273.

ing that this “me too” issue may again raise its narcissistic head before the Court.⁶

Before considering these missteps, it is first important to briefly observe that *Mendelsohn* does present a common recurring question of proof in employment discrimination cases: whether a district court should admit “me too” evidence offered by either plaintiff or defendant.⁷ “Me too” evidence is testimony by non-parties alleging discrimination at the hands of persons who played little to no role in the adverse employment decision being challenged by the plaintiff.⁸ A split panel of the Tenth Circuit in *Mendelsohn* held that a court commits reversible error by adopting a blanket rule to always exclude “me too” evidence.⁹

I. MEA CULPA ON ME TOO

Initially, the *Mendelsohn* decision appeared significant for future employment-discrimination litigation because it promised to tilt the balance in the evidentiary fray between plaintiffs and defendants, either potentially establishing a blanket rule of admitting (favoring plaintiffs) or barring (favoring defendants) such evidence.¹⁰ Indeed, this was my misstep in believing that this common reduction-in-force (RIF) case, involving a claim that an employer used workforce reductions to weed out older employees in violation of the ADEA, would have momentous implications.¹¹

The Tenth Circuit majority maintained that since Sprint terminated Mendelsohn under a company-wide RIF, it should not matter whether she was terminated by the same supervisor who made the inculpatory statement at issue because such testimony helped to establish a discriminatory atmosphere.¹² In this vein, the majority opinion concluded that “[a]ge as a motivation for Sprint’s selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint’s selection of other older employees to the RIF.”¹³

⁶ *See id.* at 275 (“[B]ecause 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 *See Mendelsohn*, 128 S. Ct. at 1143.

⁸ *See id.*

⁹ *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1229–30 (10th Cir. 2006).

¹⁰ Marcia Coyle, *Supreme Court Takes On “Me, Too” Age Bias*, NAT’L L.J., Nov. 26, 2007, at 1 (quoting this author as stating, “There is potentially a big impact” because “[t]he decision may apply equally to the Americans With Disabilities Act, Title VII of the Civil Rights Act of 1964; race discrimination claims under 42 U.S.C. 1981; and certain parts of the Family and Medical Leave Act.”).

¹¹ *See* Posting of Paul M. Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2007/12/oral-argument-t.html (Dec. 3, 2007) [hereinafter Posting of Paul M. Secunda (Dec. 3, 2007)] (“[A] lot is at stake in this ADEA case.”) (link); *see also* Posting of Paul M. Secunda (June 11, 2007), *supra* note 4 (“The Supreme Court has decided to weigh in on another important issue under employment discrimination law.”).

¹² *Mendelsohn*, 466 F.3d at 1230.

¹³ *Id.*

Professor Rubinstein’s Essay expresses a continued belief that *Mendelsohn* will be an important case going forward for employment discrimination plaintiffs. I, on the other hand, have now come to see the error of my way: My mistake was in viewing this case not as one of employment discrimination law, but as one of evidentiary law.¹⁴ My early impression, based on an alternative theory offered by Judge Tymkovich’s dissent, was that a conservative majority of Supreme Court justices would find that “testimony from other employees not similarly situated is [not] admissible . . . where the plaintiff has made no independent showing of a company-wide policy of discrimination.”¹⁵ I wrongly believed that the Supreme Court majority would focus on the phrase “independent showing” in this language and require employment discrimination plaintiffs going forward to make a showing of a discriminatory employment atmosphere not only beyond the testimony of the plaintiff but even beyond the proposed evidence from co-workers that a plaintiff sought to have admitted into evidence. But I missed the forest for the trees.

The forest in *Mendelsohn* is the underlying principle that it is for the trial court, absent unusual circumstances, to decide basic evidentiary issues of relevancy and probative value.¹⁶ In fact, I agree wholeheartedly with Professor Rubinstein that context is everything in these cases.¹⁷ The importance of context explains why a bright-line rule was never to be adopted regarding “me too” evidence and why it is also highly unlikely that “me too” evidence will again visit the Supreme Court.¹⁸

In all, I focused on the right judge on the Tenth Circuit, but on the wrong theory advanced by that judge. Before even discussing the idea of an “independent showing” in his dissent, Judge Tymkovich came to an even more sensible threshold conclusion: “I do not believe the district court abused its discretion in its evidentiary rulings excluding testimony.”¹⁹ Fed-

¹⁴ Interestingly, unlike other employment discrimination/evidence cases like *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), *Mendelsohn* does not include any meaningful discussion of the employment discrimination context.

¹⁵ *Mendelsohn*, 466 F.3d at 1231 (Tymkovich, J., dissenting).

¹⁶ “An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading, particularly when the applicable standard of review is deferential.” *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1146 (2008). The trees in my metaphor refer to arguments surrounding whether “me too” evidence should be admitted in employment discrimination cases.

¹⁷ See Rubinstein, *supra* note 3, at 266 & n.12 (citing *Ash v. Tyson Foods*, 546 U.S. 454, 455 (2006) (per curiam) for the proposition that, “context almost always matters when interpreting witness statements”).

¹⁸ *Mendelsohn*, 128 S. Ct. at 1145 (“A district court is accorded a wide discretion in determining the admissibility of evidence under the Federal Rules. Assessing the probative value of [the proffered evidence], and weighing any factors counseling against admissibility is a matter first for the district court’s sound judgment under Rules 401 and 403”) (quoting *United States v. Abel*, 469 U.S. 45, 54 (1984)).

¹⁹ *Mendelsohn*, 466 F.3d at 1231 (Tymkovich, J., dissenting).

eral Rule of Evidence (F.R.E.) 403 directs federal courts to exclude otherwise relevant evidence under F.R.E. 401,²⁰ “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”²¹ Significantly, decisions to exclude evidence on this basis by trial courts are traditionally given great deference by reviewing appellate courts, and *Mendelsohn* upheld that principle.²² Perhaps more importantly, by its very nature, Rule 403 requires the balancing of relevancy and prejudice by a judge and is therefore not susceptible to bright-line rules being hoisted upon it.²³

II. MENDING *MENDELSON*

If Judge Tymkovich could have found, perhaps on a differently constituted panel, a colleague who would have voted with him, or had there been a successful petition for rehearing en banc, the evidentiary ruling of the trial court might have been affirmed and that would have ended the case. But, of course, the Tenth Circuit majority instead decided to, in essence, weigh the probative value and prejudice effect of the “me too” evidence itself, and for the reasons already described, concluded that the evidence should be admitted.²⁴ Although rank speculation, the best guess for the reason the case was granted certiorari was that the lack of deference to the evidentiary rulings of the trial court got the attention of at least four Supreme Court Justices.²⁵

This, of course, brings us to the second *Mendelsohn* misstep: why did the Supreme Court believe this rather ordinary evidentiary ruling required high court review? I guess it is conceivable that the Court was so flabber-

²⁰ FED. R. EVID. § 401.

²¹ FED. R. EVID. § 403.

²² *Mendelsohn*, 128 S. Ct. at 1145 (noting that there is broad discretion granted to a district court’s evidentiary rulings); see also *Reyna v. City of Portland*, No. 05-36063, 2008 WL 755497, at *1 (9th Cir. Mar. 20, 2008) (“The Supreme Court has directed that we afford broad discretion to a district court’s evidentiary rulings.”) (citing *Mendelsohn* 128 S. Ct. at 1144–45). But see *Weisgram v. Marley Co.*, 528 U.S. 440 (2000) (upholding direction of verdict of appellate court after holding plaintiff’s expert testimony inadmissible and finding the properly admitted evidence insufficient to support the verdict.). It is unlikely, however, that a single piece of wrongly admitted “me too” evidence would decisively change a verdict. See *id.* at 452–53 n.9 (“Many rulings on evidence, of course, do not bear dispositively on the adequacy of the proof to support a verdict. For example, . . . the evidence may abundantly support a jury’s verdict, but one or another item may have been unduly prejudicial to the verdict loser and excludable on that account.”) (citing FED. R. EVID. 403).

²³ See, e.g., Kenneth R. Kreiling, *Scientific Evidence: Toward Providing the Lay Trier with the Comprehensible and Reliable Evidence Necessary to Meet the Goals of the Rules of Evidence*, 32 ARIZ. L. REV. 915, 925 (1990) (“Rule 403 is a broad rule which recognizes the large discretionary role of the judge in controlling the introduction of evidence. Tailoring such a broad rule to a specific form of evidence creates problems.”) (citing J. WEINSTEIN & M. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 403[01], at 403–09 (1990)).

²⁴ *Mendelsohn v. Sprint/United Mgmt. Co.*, 466 F.3d 1223, 1230 (10th Cir. 2006).

²⁵ Alternatively, other possible reason for granting review include establishing a bar for “me too” evidence in future employment discrimination cases or addressing concerns of judicial management.

gasted by the Tenth Circuit’s decision that it had to right the wrong and place evidentiary discretion back where it belonged. But this is a Court that does not lightly grant certiorari.²⁶ My guess is that a group of conservative justices thought *Mendelsohn* might provide an opportunity to set up a bright-line rule that “me too” evidence is per se irrelevant under Rule 401 and that they could once and for all rid the employment discrimination world, for the benefit of employers, of a difficult evidentiary thicket.²⁷

This is why I believe the Supreme Court oral argument is very important for discerning how the case eventually came to be decided.²⁸ In reviewing the transcript of the oral argument,²⁹ I noted in a contemporaneous blog post the tenor of Justice Scalia’s questions, and those of Justice Alito, and how they seemed to indicate that they were in favor of excluding such evidence as per se irrelevant under Rule 401.³⁰ Yet the United States, supporting Sprint, took the contextual approach to the issue and attacked the admission of the “me too” evidence instead under Rule 403.³¹ Eventually, Justices Scalia and Alito, along with Justices Breyer and Souter,³² came around and seemed satisfied with taking the “proper standard of review”

²⁶ Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, NY TIMES, Dec 7, 2006 at A1. The Court could have issued its ruling in an unsigned order. See, e.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454 (2006) (link); *Clark County School Dist. v. Breeden*, 532 U.S. 268 (2001) (link).

²⁷ Coyle, *supra* note 10 (“Employers predict juror confusion and prejudice, minitrials within trials, and lengthy and costly discovery,” if “me too” evidence is admissible in these cases); see also Michael Selmi, *The Supreme Court’s 2006–2007 Term Employment Law Cases: A Quiet But Revealing Term*, 11 EMP. RTS. & EMP. POL’Y J. 219, 247 (2007) (stating, in reference to *Davenport v. Washington Education Association*, 127 S. Ct. 2372 (2007), and *Beck v. Pace International Union*, 127 S. Ct. 2310 (2007), that, “[g]iven the limited importance of these two cases, and the absence of any direct conflicts, it appears the Court may have taken the cases simply to correct erroneous lower court decisions, and thereby to deprive the unions of their victories.”).

²⁸ I am not the first to recognize that the reading transcripts of Supreme Court arguments is an exercise tantamount to reading tea leaves, but the comments made in the *Mendelsohn* oral argument were particularly telling in hindsight.

²⁹ Transcript of Oral Argument, *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008) (No. 06–1221), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1221.pdf (link).

³⁰ See Posting of Paul M. Secunda (Dec. 3, 2007), *supra* note 11 (“Justice Scalia . . . [thinks that] this type of evidence should be absolutely banned under 401, or the Court should rule that it would have been an abuse of discretion for the trial court to have allowed this type of evidence in under 403. Justice Alito appears to concur in this point . . . Justice Scalia clearly wants this to be an open and shut 401 case, not dependent on 403: ‘[Referring to the facts of this case] It is hard to see what wouldn’t be marginally relevant if you think that’s marginally relevant.’”).

³¹ *Id.* (“The United States, supporting Sprint, takes the position that although this evidence is not always non-admissible, it was properly not admitted in this case. Although marginally relevant under 401, the government attacks the case under 403.”).

³² *Id.* (“The otherwise Mendelsohn-supportive justices [Breyer and Souter] appear to believe that Scalia’s best point is that we should defer to the trial court absent an abuse of discretion.”).

approach.³³ So, although the Supreme Court may have taken on the case with some justices hoping to banish “me too” evidence to the dustbin of employment-discrimination-law history, that oral argument led enough Justices to a consensus revolving around easily-applied and accepted standard of review principles championed by the Solicitor General.

III. MENDELSON'S MEDICINE

All of this finally leads me to the final misstep—the one that Professor Rubinstein made in interpreting this case to bode well for employment discrimination plaintiffs in the future. To be clear, I think he is right in his belief that, at the very least, plaintiffs can use language from the opinion to say that such evidence is not completely barred from consideration.³⁴ I also agree with him that, “the use of ‘me too’ evidence is likely to significantly increase as a result of the notoriety of the *Mendelsohn* decision and the increasing importance of comparative-type evidence to employment discrimination litigation.”³⁵

But we part ways when he argues that the holding of the Court may allow facts as attenuated as *Mendelsohn* to be admitted under Rule 403³⁶ and that the decision in the case will likely lead to more employment discrimination plaintiffs to win their cases.³⁷ In this vein, Professor Rubinstein offers this metaphor: “[T]his bit of dicta [about “me too” evidence not being per se inadmissible] provides plaintiffs with a shot of adrenalin that may, in some cases, cure the disease of employment discrimination.”³⁸

I think it is much more likely that on remand the Tenth Circuit in *Mendelsohn* will remand and “suggest” that the district court actually explain itself, keeping in mind the Supreme Court’s admonition. Moreover, I do not

³³ *Id.* (“Justice Scalia seems to suggest that this case should be about the appropriate standard of review for the appellate court: ‘If there’s any basis on which the district court’s decision would have been correct, the district court’s decision is upheld.’ Justice Alito follows this line later, implying that, if the Court found that the district court had not abused its discretion under F.R.E. 403, then the Court would uphold the district court’s refusal to admit the ‘me too’ evidence in question.”).

³⁴ See Rubinstein, *supra* note 3, at 267; *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (“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.”).

³⁵ Rubinstein, *supra* note 3, at 267.

³⁶ See *id.* at 273.

³⁷ See *id.* at 274 (“This Essay asserts . . . 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.”).

³⁸ See *id.* at 272–74. (“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 because many employment discrimination plaintiffs operate in an environment where so little medicine in the form of evidentiary proof is available.”).

think the trial court in this case is unusual in employing Rule 403 to exclude “me too” evidence from the record. The future for this type of evidence is not entirely clear, but given the number of Reagan, Bush I, and Bush II nominees serving on the federal bench, it is more likely in the short-term that the exercise of their discretion under Rule 403 will lead to the exclusion of “me too” evidence in many more cases than where it is let in. Employing Professor Rubinstein’s metaphor again, this all seems more like a sedative for employment discrimination plaintiffs suffering chronic pain than it does a shot of adrenaline.

CONCLUSION

In the title of his *Colloquy* Essay, Professor Rubinstein makes reference to a claim that I previously made that *Mendelsohn* represents a “judicial punt.”³⁹ I still believe that.⁴⁰ But to modify my point a tad, rather than this being a typical judicial punt to avoid having to deal with more difficult legal issues, this was an appropriate punt because somewhere along the line the Court recognized its misstep in granting certiorari in the first place. It had to punt because such contextualized evidentiary rulings are almost always left to trial courts.

As to whether *Mendelsohn* will go down as an important case, I do believe Professor Rubinstein is correct that plaintiffs and their attorneys will use the case for the proposition that such evidence cannot be absolutely barred. That being said, I am less confident than Professor Rubinstein in believing that these resulting 403 balancings will, by and large, favor employees. Because of the conservative nature of the present federal judiciary, I suspect that we will continue to see much of the same types of balancing we saw before *Mendelsohn* to exclude potentially relevant employment discrimination evidence.⁴¹

³⁹ Posting of Paul M. Secunda to Workplace Prof Blog, http://lawprofessors.typepad.com/laborprof_blog/2008/02/me-too-adea-evi.html (Feb. 26, 2008) (“So the Supreme Court seems [to have] . . . punted somewhat on the more difficult evidentiary issues discussed here and decided this case on the easiest possible basis: a lack of proper deferral by the 10th Circuit to the district court’s ambiguous conclusion.”) (link).

⁴⁰ One of my colleagues has described it as perhaps being more like a situation when the referee picks up a flag after realizing there was actually no penalty.

⁴¹ Indeed, Professor Rubinstein already notes lower court cases since *Mendelsohn* that have balanced plaintiff “me too” evidence right out of the case. See Rubinstein, *supra* note 3, at 274 n.55 (citing *Sgro v. Bloomberg*, Civ. No. 05-731, 2008 U.S. Dist. Lexis 27175 (D. N.J. Mar. 31, 2008); *Opatnik v. Norfolk Southern Corp.*, Civ. No. 06-81, 2008 U.S. Dist. Lexis 26727 (W.D. Pa. Mar. 20, 2008)). Professor Rubinstein cites *Elion v. Jackson*, Civ. No. 05-0992, 2008 U.S. Dist. Lexis 27520 (D.D.C. Apr. 7, 2008), for a “me too” case where evidence was admitted, but it supported the employer’s claims. *Id.* *Elion* gives further support to my view that conservative judges tend to come to employer-friendly outcomes as a result of the discretion they are given under Rule 403.

NORTHWESTERN UNIVERSITY LAW REVIEW COLLOQUY

Finally, I disagree with Professor Rubinstein that we should desire clear legal rules in this area of the law⁴² or that the Supreme Court will seek to promulgate such rules in a future case.⁴³ Leaving the last word to the *Mendelsohn* Court: “Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case, and thus are generally not amenable to broad per se rules.”⁴⁴

⁴² See Rubinstein, *supra* note 3, at 269 (“Unfortunately, the Court decided the case on procedural grounds, and as a result, the Court did not promulgate any clear legal rules.”).

⁴³ See *supra* note 7 and accompanying text.

⁴⁴ *Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008).