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WHOSE CASE IS THIS ANYWAY? DEFENDING EMPLOYMENT CLAIMS WITH "ME TOO" EVIDENCE

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On many occasions counsel find themselves defending not only the claim of Plaintiff but also the charges and accusations from non-party employees. Plaintiffs often seek to establish a pattern of conduct through the anecdotal testimony of one or more fellow employees. In argument form, it is comparator evidence – for example, an employer who has discriminated against other employees is more likely to have discriminated against Plaintiff. The question is not so much whether this is true, but whether the jury gets to hear the evidence and decide for itself. Defending employment cases becomes extremely complicated and costly when a Plaintiff offers the testimony of non-party employees claiming that they, too, were subjected to the same or similar conduct - "me too" evidence.

In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379, 128 S.Ct. 1140, 170 L.Ed.2d 1 (2008), the United States Supreme Court granted *certiorari* purportedly to resolve a split among the Circuits regarding the admissibility of certain "me too" evidence. *Sprint* actually did little to resolve the issue. The Court's decision merely confirmed that there is no *per se* rule for inclusion or exclusion of this type of evidence. Instead, the Court held that whether "me too" evidence is admissible 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." *Id*. at 388. So, how do courts balance Plaintiff's ability to prove discrimination with an employer's right to have irrelevant and potentially inflammatory evidence excluded? Of equal significance, if what is good for the goose is good for the gander, how can defense counsel use its own comparator evidence or "not me too" evidence to establish non-discrimination and non-retaliatory behavior? And finally, how do courts treat admissibility when both types of evidence are present in the same case?

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I. Applicable Rules of Evidence

The analysis of admissibility or exclusion of "me too" evidence is premised on Rules 401 through 404 of the Federal Rules of Evidence, but also can implicate Federal Rules of Evidence 405 and 406.

A. Federal Rules of Evidence 401 and 402

Rule 401, Fed. R. Evid., defines relevant evidence as evidence having 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. Rule 402, Fed. R. Evid., provides that relevant evidence is generally admissible, but irrelevant evidence is not. In the context of employment cases, evidence from other employees is relevant if it has a tendency to make it more or less likely that the employer acted in the same manner -- i.e. if others were subjected to harassment, it is more likely that Plaintiff was subjected to harassment.

Based on the generous definition of relevance, Rules 401 and 402 obviously set a fairly low bar which almost all "me too" evidence will clear.

Whether any fact is "of consequence" is judged by the substantive law within the pleadings. A fact is not "of consequence" if its existence has no bearing on the resolution of the case. "Having a tendency to make" means only that the occurrence is "more or less" probable. Based on the generous definition of relevance, Rules 401 and 402 obviously set a fairly low bar which almost all "me too" evidence will clear.

B. Federal Rule of Evidence 403

But, of course, the inquiry does not end here. Rule 403, Fed. R. Evid., provides for exclusion of even relevant evidence on various grounds, as follows:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting of time, or needlessly presenting cumulative evidence.

Id. The Advisory Committee Notes to Rule 403 explain that "unfair prejudice" means "an undue tendency to suggest decision on an improper basis," and that a decision on an "improper basis" is "commonly, though not necessarily, an emotional one." *Id.*, Advisory Committee Notes.

Rule 403 allows for the exclusion of evidence "only when *unfair* prejudice *substantially* outweighs probative value." *Aycock v. R.J. Reynolds Tobacco Co.*, 769 F.3d 1063, 1069 (11th Cir. 2014)(emphasis in original); *Terry v. McNeil-PPC, Inc.*, 2016 U.S.Dist.LEXIS 72774, at *3 (E.D. Pa. 2016). The use of the term "substantially" clearly favors admissibility, and it is not enough for the probative value to simply outweigh the danger of prejudice. Additionally, whatever prejudice exists must also be unfair.

The exclusion of evidence under Rule 403, Fed. R. Evid., has been called "an extraordinary remedy." *Aycock*, 769 F.3d at 1069. The district judge's position and ability to consider the admissibility of the evidence and rule on objections – to be disturbed or overruled only for abuse of discretion by a "highly deferential" appellate court – has also been termed "superior." *See Ultegra LLC v. Mystic Fire Dist.*, 2017 U.S.App. LEXIS 1009 at *3 (2nd Cir. 2017); *United States v. Coppola*, 671 F.3d 220, 244 (2d Cir. 2012).

With such a clear standard and so much deference to a trial court, the key is Defendant's knowledge. "Me too" evidence is allowed more often in cases involving claims of hostile work environment or discriminatory reductions in force because the "me too" evidence suggests the employer's indifference to pervasive discrimination. In claims of individual discrimination, however, "me too" evidence simply shows that another employee in the company allegedly suffered the same treatment. In the latter scenario, such evidence may be deemed unfairly prejudicial.

C. Federal Rule of Evidence 404

Rule 404(b), Fed. R. Evid., prohibits admission of "bad acts" evidence simply "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, the very same Rule permits such evidence to be admitted for other purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). Evidence of a hostile work environment may indicate an employer's intent to discriminate or permit discrimination. It also may show an employer's failure to correct harassing behavior.

The primary concern underlying Rule 404(b)(1) is *not* that character evidence is always actually irrelevant; to the contrary, character sometimes does have a tendency to make more probable that a person acted in a certain way. *Young v. City of Harvey*, 2016 U.S.Dist.LEXIS 102932 (N.D.Ill. 2016); Fed. R. Evid. 404(b), 2006 Advisory Committee Note. Instead, the concern is the serious risk of prejudice, confusion, and delay. More specifically, the concern is that juries will rely too heavily on character evidence to decide the disputed issue -- either because the jury will place an outsized emphasis on the character evidence; the jury will get confused over what actually is the specific issue on trial; or the jury will simply decide the case based mostly on a character contest out of a desire to punish a bad character or to reward a good character.

Evidence otherwise admissible pursuant to Rule 404(b), Fed. R. Evid., is still subject to the balancing of probative value against prejudicial effect otherwise required by Rule 403, Fed. R. Evid. *See United States v. Cherer,* 513 F.3d 1150, 1157 (9th Cir. 2008) ("If evidence satisfies Rule 404(b), `the court must then decide whether the probative value is substantially outweighed by the prejudicial impact under Rule 403.'" (quoting *United States v. Romero,* 282 F.3d 683, 688 (9th Cir.2002)); *United States v. Holler,* 411 F.3d 1061, 1067 (9th Cir. 2005); *United States v. Curtin,* 489 F.3d 935, 943-44 (9th Cir. 2007) (*en banc*).

D. Federal Rules of Evidence 405 and 406

Rule 405 of the Federal Rules of Evidence allows for methods of proving character. Character evidence may be admissible under Fed. R. Evid. 405(b) in cases in which "a person's character or character trait is an essential element of a charge, claim, or defense." Proof may be made by relevant specific instances of the person's conduct. *Id.*

A significant consideration to admissibility is whether Plaintiff and the non-party witnesses share the same decision-maker or supervisor.

Courts have considered "me too" evidence as relevant to an employer's habit or routine practice under Fed. R. Evid. 406. Rule 406 provides that "[e]vidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice…."

II. Factors Considered in Admissibility

Courts must perform "fact intensive, content-specific" inquiries to determine admissibility of "me too" evidence. *See Henry v. Wyeth Pharms., Inc.*, 616 F.3d 134, 151-52 (2d Cir. 2010). Generally, factors courts consider when determining the admissibility of "me too" evidence include "(1) whether the evidence is logically or reasonably tied to the decision made with respect to the plaintiff; (2) whether the same 'bad actors' were involved in the 'other' conduct and in the challenged conduct; (3) whether the other acts and the challenged conduct were in close temporal and geographic proximity; (4) whether decision makers within the organization knew of the decisions of others; (5) whether the other affected employees and the plaintiff were similarly situated; and (6) the nature of the employees' allegations." *Schneider v. Regency Heights of Windham, LLC*, 2016 U.S.Dist.LEXIS 173410 at *38 (D. Conn. 2016); *see also Hayes v. Sebelius,* 806 F.Supp.2d 141, 144-145 (D.D.C. 2011).

A. Same Decision Makers or "Bad Actors"

A significant consideration to admissibility is whether Plaintiff and the non-party witnesses share the same decision-maker or supervisor. In *Schneider,* an age discrimination case, Plaintiff sought to introduce evidence of management's treatment of two other employees to prove discriminatory motive. The nonparty witnesses alleged discrimination at the hands of a supervisor who did not play the same role in the adverse employment decision challenged by Plaintiff. *Schneider*, 2016 U.S.Dist.LEXIS 173410 at *39-40. Plaintiff Schneider argued that the "me too" evidence was relevant because it concerned an allegedly key player in the decision to terminate Schneider. Noting that *Sprint, supra,* involved "testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff," the Court nonetheless noted it was inclined to exclude the "me too" evidence at trial. *Id.* (quoting *Sprint*, 552 U.S. at 383). Most of the material that the parties describe as "me too" evidence concerns Mr. Vera. While Mr. Vera played a role in Plaintiff's termination, Mr. Vera played a greater role in supervising the other non-party employees. As a result, Mr. Schneider was not similarly situated to Mr. Hooker and Ms. Flight with respect to Mr. Vera, making the evidence of their treatment less relevant to Plaintiff's case. *Id.* at 39-40. Although not inclined to admit the "me too" evidence, the Court acknowledged its inability to make a proper admissibility determination (in the context of considering Defendant's summary judgment motion) and willingness to review the issue, if presented in the context of trial. *Id.*

In *Glynn v. City of Stockton*, 2016 U.S.Dist.LEXIS 172317 (E.D.Ca. 2016), the "me too" evidence was testimony from a former employee terminated by a different decision-maker. Although there was no overlap in decision-makers, Plaintiff argued there was overlap in the decision making chain. The Court allowed the testimony, noting that "[i]t is clear that an employer's conduct tending to demonstrate hostility towards a certain group is both relevant and admissible where the employer's general hostility towards that group is the true reason behind firing an employee who is a member of that group." *Id.* at *2 (quoting *Heyne v. Caruso*, 69 F.3d 1475, 1479 (9th Cir. 1995)). Groups can be defined in a number of ways, including by race, sex, and national origin. *Id.* (citations omitted). Notably, the testimony in *Sprint* that the court determined may be admissible involved supervisors "who played no role in the adverse employment decision challenged by the plaintiff." *Id.* at *3 (citing *Sprint*, 552 U.S. at 383). Because of the similarity of the allegations of Plaintiff and the former employee, the relevance of the former employee's "me too" evidence outweighed any prejudice. *Id.* at *5.

"Recognizing that `there will seldom be eyewitness testimony as to the employer's mental processes,' . . . evidence of the employer's discriminatory attitude *in general* is relevant and admissible to prove . . . discrimination." *Id.* at *3 (emphasis in original, internal citations omitted); *see also Metoyer v. Chassman,* 504 F.3d 919, 937 (9th Cir. 2007) (Court acknowledged prior decisions holding "that bigoted remarks by a member of senior management may tend to show discrimination, even if directed at someone other than the plaintiff," and "even if several years old."). Plaintiff specifically contended that the "me too" testimony would show that others were fired because they "made legally protected complaints," and therefore it was relevant because the alleged retaliation against Plaintiff arose as a result of her making similar complaints. *Glynn*, 2016 U.S.Dist. LEXIS 172317 at *4.

Further, while "[d]etailed evidence of discrimination against other employees may aid in a finding of discrimination in a given case, …a hodgepodge of unproven allegations of discrimination against others does not create an inference that [the plaintiff herself] was discriminated against…."

In *Crosby v. Gregory,* 2014 U.S.Dist.LEXIS 127456 (S.D.Ga. 2014), Plaintiff attempted to demonstrate a pattern of pregnancy discrimination with past acts of pregnancy discrimination by the same decision maker. The Court held that the circumstantial evidence which Plaintiff offered failed to raise a reasonable inference of intentional discrimination, and was therefore inadequate. In its admissibility analysis, the Court noted: "courts are reluctant to consider 'prior bad acts' in this [employment discrimination] context where those acts do not relate directly to the plaintiffs." *Id.* at *24.(quoting *Denney v. City of Albany,* 247 F.3d 1172, 1189 (11th Cir. 2001)). Further, while "[d]etailed evidence of discrimination against other employees may aid in a finding of discrimination in a given case, …a hodgepodge of unproven allegations of discrimination against others does not create an inference that [the plaintiff herself] was discriminated against…." *Id.* at *25 (quoting *Hughes v. City of Lake City,* 2014 WL 1293525, at *5 (M.D.Fla. 2014) (citations omitted)); *see also Holifield v. Reno,* 115 F.3d 1555, 1563-64 (11th Cir. 1997)(Court recognized that "[t]he basis of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case."(internal citations omitted)).

Where the evidence pertains to a different decision-maker, courts are more inclined to exclude it. In *Jackson v. UPS, Inc.,* 593 Fed.Appx. 871 (11th Cir. 2014), a race and gender discrimination and retaliation case, Plaintiff argued that the trial court should have considered other evidence of discrimination and retaliation aimed at her co-workers ("me too" evidence) as proof of Defendant's intent to discriminate. Most of the "me too" evidence presented related to claims of discrimination and harassment by a different decision maker. The Circuit Court affirmed the district court's exclusion of the evidence on the grounds that the evidence was not likely to show intent of decision maker whose conduct was being challenged and at issue in the lawsuit, and therefore, the evidence was not relevant to Plaintiff's discrimination claims. *Id.*; *see also King v. CVS Caremark Corp.,* 2 F.Supp.3d 1252 (N.D.Ala. 2014). Ruling on Defendant's motion to strike certain evidence submitted in opposition to Defendant's summary judgment motion, the court held that "me too" evidence of ageist comments by the relevant decision maker about Plaintiff were relevant to pretext and admissible under Rule 404(b), Fed. R. Evid. . *Id.* (quoting and citing, with approval, *Goldsmith v. Bagby Elevator Co., Inc.,* 513 F.3d 1261, 1286 (11th Cir. 2008)).

B. Timing of Events

Temporal proximity remains an important factor in the admissibility analysis. There is no bright line test as to remoteness. Historically, incidents beyond three years were considered too remote. *Hill v. SEPTA*, 2012 U.S.Dist.LEXIS 25974 (E.D.Pa. 2012)(Supervisor's comments made within one year and seven months after Plaintiff's termination was not so far removed as to be irrelevant.); *Swiatek v. Bemis Co*., 2011 U.S.Dist.LEXIS 115946 (D.N.J. 2011)(Court concluded prior acts of discrimination directed at other employees that occurred three and one-half years before the alleged discrimination at issue was too remote to be relevant to question of discriminatory intent). But this line continues to move.

For instance, in *Glynn v. City of Stockton*, 2016 U.S.Dist.LEXIS 172317 (E.D.Ca. 2016), the fact that the prior events and the events at issue in the lawsuit occurred approximately six years apart did not trouble the Court given that Plaintiff alleged a pattern of unlawful conduct that spanned at least as many years and the similarity of the allegations. In *Dindinger v. Allsteel, Inc.,* 2015 U.S.Dist.LEXIS 179631 at *8 (S.D. Iowa 2015) the Court found "me too" evidence admissible even though the claims were separated by seven years. S*ee also Quigley v. Winter,* 598 F.3d 938, 951 (8th Cir. 2010) (The appellate court affirmed the district court's exclusion of "me too" testimony in a housing discrimination case where witness had last rented from Defendant twelve years before Plaintiff filed her lawsuit. The Court held the "me too" testimony was too remote.).

In *Tennison v. Circus Circus Enters, Inc.,* 244 F.3d 684 (9th Cir. 2001), the court considered the admissibility of "me too" evidence of alleged sexual harassment of others five years before the alleged harassment of Plaintiffs. *Id.* at 689. The Court

recognized that the evidence had probative value with respect to the employer's alleged notice of the improper conduct and failure to take adequate remedial measures prior to Plaintiffs' complaints. Although remote in time, the prior complaints involved the same alleged harasser and gave the employer at least constructive notice of misconduct. Even so, the Court, in its discretion, excluded the evidence because it might have resulted in a "mini trial" concerning the disputed "me too" evidence. *Id.* at 689-90. Specifically, the court held that "the trial court could reasonably conclude that admitting [this "me too" evidence], along with Defendants' rebuttal evidence, would create a significant danger that the jury would base its assessment of liability on remote events involving other employees, instead of recent events concerning Plaintiffs," such that the risk of unfair prejudice outweighed its probative value. *Id.* at 690.

C. Motive and Intent

Because of the inherent difficulty of proving state of mind, "me too" evidence is often considered probative in discrimination cases. In *Connearney v. Main Line Hosps., Inc.,* 2016 U.S.Dist.LEXIS 153745 (E.D.Pa. 2016), Connearney sought to introduce "me too" evidence from other nurses who, like Connearney, were within the protected age group, worked under supervisor Hogan, and contend that Hogan took unwarranted and/or heavy-handed disciplinary action against them under circumstances that did not justify such discipline because of their ages.

> "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct."

"To prove that an invidious discriminatory reason was more likely than not the motivating factor for the adverse action against the plaintiff, the Third Circuit has stated that a plaintiff may point to evidence that the employer has previously discriminated against the plaintiff, that the employer has previously discriminated against others in the plaintiff's protected class or that the employer has treated more favorably similarly situated persons not within the protected class. *Simpson v. Kay Jewelers,* 142 F.3d 639, 645 (3d Cir. 1998). Evidence of an employer's past discriminatory or retaliatory behavior toward other employees in the plaintiff's protected class — so-called "me too" testimony — may, depending on the circumstances, be relevant to whether an employer discriminated or retaliated against the plaintiff. *See Mandel v. M & Q Packaging Corp.,* 706 F.3d 157, 167 (3d Cir. 2013); *Barnett v. PA Consulting Grp., Inc.,* 35 F.Supp.3d 11, 22 (D.D.C. 2014)." *Connearney* at *8-9 (citations in original). Here, the court held that the "me too" evidence was substantially closely-related to Plaintiff's circumstances and theory of the case so as to render it relevant under Rule 401, Fed. R. Evid.

In *Young v. City of Harvey,* 2016 U.S.Dist.LEXIS 102932 (N.D. Ill. 2016), the Court allowed discovery of other accusations and claims of retaliation under Rule 404(b), Fed. R. Evid. The issue presented in this employment discrimination case was the *motive* for Young's firing. For state of mind issues such as motive, the United States Supreme Court has recognized that other-acts evidence might be needed to prove a mental state: "Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct." Id. at *14 (quoting *Huddleston v. United States*, 485 U.S.681, 685, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988)). In *Young*, other acts of retaliation would not be introduced to solve a whodunit; they would be introduced to show the supervisor's state of mind—*why* he fired Young. In allowing discovery of other claims and accusations, the Court limited the scope to the five (5) year period preceding Plaintiff's termination on the grounds that retaliatory acts occurring more than five (5) years before Plaintiff's termination faced an uphill climb with regard to admissibility. The Court reserved the right to expand scope and postponed any decision regarding admissibility. *Id.*

In *Furcron*, the United States Court of Appeals for the Eleventh Circuit reversed the lower court's exclusion of the testimony of Plaintiff's co-worker concerning observations of the employer's conduct. More specifically, the court held that the district court abused its discretion because its decision to exclude the "me too" evidence failed to provide justification. *Furcron v. Mail Ctrs. Plus, LLC,* 843 F.3d 1295 (11th Cir. 2016). In its decision, the court noted that whether Furcron complained about sexual harassment to her superiors and, more importantly, whether the harassment alleged was "based on sex," were facts made more probable by the inclusion of her fellow employee's statements. *Id.* at 1308; *see also Moniz v. City of Delano,* 2014 U.S.Dist.LEXIS 107623 (E.D.Cal. 2014) (In sexual harassment retaliation case, Defendant moved to exclude "me too" evidence submitted by Plaintiff in opposition to Defendant's motion for summary judgment. The district court overruled Defendant's objection because evidence of other employees who suffered sexual harassment by the defendant was probative of the defendant's motive and, therefore, admissible under Fed. R. Evid. 404(b). *Id.(*citing *Goldsmith v. Bagby Elevator Co., Inc.,* 513 F.3d 1261, 1286 (11th Cir. 2008); *Heyne v. Carruso,* 69 F.3d 1475, 1481 (9th [Cir.] 1995)).

In *United States EEOC v. SunTrust Bank*, 2014 U.S.Dist. LEXIS 62466 (M.D.Fla. 2014), a sexual harassment case, the Court held considered the admissibility of "me too" evidence regarding alleged harassment that other SunTrust employees experienced during their employment. The "me too" evidence involved claims that overlapped temporally with Plaintiff's complaints of harassment and retaliation and involved the same supervisor. Defendant SunTrust asserted a *Faragher/Ellerth* affirmative defense, which raised the issue of whether Defendant's anti-discrimination and anti-retaliation policies were effective. The Court held the "me too" evidence, was admissible under Rule 404(b), Fed. R. Evid., to prove Defendant's motive, intent, or plan to discriminate and retaliate against victims of sexual harassment. *Id.* (citing *Walters v. Cent. Fla. Invs. Inc.,* 2006 U.S.Dist.LEXIS 21197, at *8 (M.D.Fla. 2006)("Evidence of McGriff's harassment of other women who worked under him may be admitted to show plan, motive, opportunity, intent, and pattern. Defendants' handling of Lawver's complaint also is relevant to the effectiveness of Defendants' anti-harassment policy and the Defendants' affirmative defense raised under *Faragher/Ellerth*.")). In *EEOC v. SunTrust*, the Court also rejected Defendant's Fed. R. Evid. 403 argument that evidence would result in a "mini-trial" or cause juror confusion: "The court is in a position to effectively and efficiently manage the testimony in this case to prevent needlessly lengthy questioning of non-parties or the "mini-trial" effect. In addition, counsel can avoid confusion as to the identities of the Plaintiffs during closing arguments by explaining that [the co-worker] seeks no relief in this case." *Id.* at *13-14.

Thus, courts are more likely to admit "me too" evidence when plaintiffs and non-party employees shared the same decision-makers or supervisors, were both members of the same protected class, engaged in similar on-the-job conduct, or suffered adverse employment actions in the same time period.

Evidence of other discrimination complaints may be discoverable to demonstrate motive. In *Goold v. Hilton Worldwide, Inc.,* 2014 U.S.Dist.LEXIS 48652 (E.D.Cal. 2014), Plaintiff claimed he was fired after complaining about sexual harassment suffered by a former employee. On a motion to compel Defendants to produce information about complaints made to or about four individuals and adverse employment actions suffered by the complainants, the Court recognized there is no *per se* prohibition on the introduction of this type of "me too" evidence. *Id.* (citing *Sprint/United Mgmt. Co. v. Mendelsohn, supra.)*. Admissibility of "me too" evidence at trial depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Evidence of other acts or wrongs generally may be admitted to demonstrate motive under Rule 404(b), Fed. R. Evid. Given that the issue presented is whether other employees made discrimination complaints and, as a result, Defendants retaliated against them, the requested "me too" evidence is discoverable. *Id*. at *14.

D. Whether Plaintiff and Non-Party Witnesses Are Similarly Situated.

The closer a non-party employee's evidence is to a plaintiff's circumstances, the greater the probative nature of that evidence. Thus, courts are more likely to admit "me too" evidence when plaintiffs and non-party employees shared the same decision-makers or supervisors, were both members of the same protected class, engaged in similar on-the-job conduct, or suffered adverse employment actions in the same time period. *See Nuskey v. Hochberg*, 723 F.Supp.2d 229, 233 (D.D.C. 2010)("Me too" evidence excluded where witness had a different title, different job responsibilities and reported to different supervisor, and therefore not similarly situated as Plaintiff. Additionally, the purported discrimination events were separated by ten (10) years, and therefore not close in time.); *Mandel v. M& Q Packaging Corp*., 706 F.3d 157, 168 (3d Cir. 2013)(Court properly excluded the so-called "me too" evidence, which consisted of the deposition testimony of two former employees of M & Q Plastic Products, Inc., because the two employees were not employed by defendant M & Q Packaging but by defendant's parent corporation).

In *Wyvill v. United Cos. Life Ins. Co*., 212 F.3d 296 (5th Cir. 2000), the United States Court of Appeals for the Fifth Circuit found that "me too" evidence from non-plaintiff employees working "in other branches of the company who held different positions under different supervisors and were terminated at different times" did not involve similarly situated employees. *Id.* at 298. The court held that Plaintiffs' "…parade of anecdotal witnesses, each recounting his own, entirely unrelated contention of age discrimination at the hands of the defendant, substantially prejudiced [the defendant] and [t]his evidence should have been excluded." *Id.* at 304.

Evidence of sexual harassment was not allowed in a race discrimination case in *Price v. Grasonville Volunteer Fire Dep't*, 2016 U.S.Dist.LEXIS 148749 (D.Md 2016), where Plaintiff sought to introduce evidence that female firefighter was sexually harassed while working in the same Department Fire Station. The Court held that evidence of sexual harassment of other firefighters was far afield from plaintiff's claim of race-based discrimination. *Id.* at *19 (citing *Chan v. Montgomery Cnty. Md.,* U.S.Dist.LEXIS 58449 (D.Md. 2013) in which court noted that "evidence of discrimination against employees

based on *the same protected trait* (i.e., `me too' evidence)" "may be probative of unlawful discrimination." (emphasis added)). The Court also recognized that even if the sexual harassment evidence were relevant, the probative value would be outweighed by the prejudice. *Id.*

In *Johnson v. United Cerebral Palsy/Spastic Children's Foundation*, 173 Cal.App.4th 740 (Cal. Ct.App. 2009), the California Court of Appeals reversed the lower court's grant of summary judgment in favor of Defendant employer on the grounds that the "me too" evidence was substantial evidence sufficient to raise a triable issue of material fact. Johnson claimed she was fired because she was pregnant. In remanding the case for further proceedings, the Court held that Plaintiff's "me too" evidence -- the declarations of five former employees who claimed they were also fired after telling the same employer they were pregnant – set out factual scenarios what were sufficiently similar to Plaintiff's scenario. The Court held that the "me too" evidence was *per se* admissible under the relevance standard and the probative value outweighed any potential prejudice *Id.; see also Pantoja v. Anton*, 198 Cal.App.4th 87 (Cal.Ct.App. 2011) (Court held that "me-too" evidence of harassing activity against other female employees, which occurred outside of the plaintiff's presence and when the plaintiff was not even employed, was admissible as relevant evidence tending to show a discriminatory or biased intent or motive).

Citing *Sprint, supra,* the Court held that "…evidence of an employer's past non-discriminatory and non- retaliatory behavior [toward other employees] may be relevant as well, because 'an employer's favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent.'"

III. "Not Me Too" Evidence

Importantly, evidence from other employees is not the exclusive province of Plaintiffs. Employers may seek to introduce testimony of non-party witnesses to prove that Plaintiffs were not subjected to disparate treatment or discrimination. Conceptually, this is called "not me too" evidence, and it too is "comparator" evidence. In the spirit of "what is good for the goose is good for the gander," courts historically have allowed this evidence for the proper purpose of negating discriminatory intent. In *Ansell v. Green Acres Contr., Co.*, 347 F.3d 515 (3d Cir. 2003), Plaintiff filed an age discrimination suit and offered evidence that Green Acres hired a number of persons under the age of forty (40) years after Plaintiff's termination. Green Acres rebutted this by offering testimony of its hiring of another employee over forty (40) years of age. The Third Circuit affirmed the admissibility of this evidence, holding that the employer's subsequent good act was relevant to its non-discriminatory intent. *Id.* at 524.

The factors for admissibility of "not me too" evidence are identical to those for "me too" evidence. *Elion v. Jackson*, 544 F.Supp.2d 1 (D.D.C. 2008). In *Elion*, Defendant United States Department of Housing and Urban Development ("HUD") sought to introduce testimony from Ms. Hobbs' co-worker, who was a subordinate of Plaintiff, regarding HUD's favorable treatment of her. The Court allowed Ms. Hobbs' "me too" testimony to negate the inference that HUD harbored discriminatory or retaliatory intent with respect to Plaintiff. The Court noted that Ms. Hobbs, like Plaintiff, is a woman. Ms. Hobbs was promoted within the same time period (March 2003 to April 2004) in which Plaintiff alleges HUD engaged in various discriminatory and retaliatory acts against her. Ms. Hobbs was also given additional oversight responsibility at roughly the same time that Ms. Elion's former division was disbanded. Thus, under the circumstances, Ms. Hobbs' testimony may have some probative value with respect to whether HUD harbored discriminatory intent toward Plaintiff on the basis of her gender. Citing *Sprint*, *supra*, the Court held that "…evidence of an employer's past *non*-discriminatory and *non*- retaliatory behavior [toward other employees] may be relevant as well, because 'an employer's favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent.'" *Id.* at 8 (internal citations omitted).

In *Watson v. Pennsylvania, Dep't of Public Welfare*, 2009 U.S.Dist.LEXIS 40049 (M.D. Pa. 2009), the Court allowed testimony from other female employees in Plaintiff's gender discrimination lawsuit. Plaintiff contended that the evidence should be excluded because the other employees were "not in comparable positions to the plaintiff, and the absence of discrimination against other employees [does] not disprove the actions of which [p]laintiff complains." *Id.* at *3. According to Plaintiff, these differences in circumstances rendered the "me too" testimony irrelevant. Defendant, on the other hand, contended that "all of the testimony in question is directed at refuting plaintiff's argument that she was not promoted because there is a general attitude among the men, including management, … that men are better suited for certain positions and therefore receive more favorable treatment than women." *Id*. Moreover, Defendant argued that the testimony in question was relevant, despite the employees holding different positions because all of the positions fell under the same management hierarchy, thereby permitting these proposed witnesses to assess the existence (or lack thereof) of the allegedly discriminatory management scheme and the treatment of female employees in relation to male employees. *Id.* at *4.

In finding the proposed evidence to be admissible, the Court stated that the outcome of the case would largely turn on whether the jury believes the legitimate reason advanced by Defendant was the true reason for not promoting Plaintiff, or whether that reason was simply a pretext for unlawful discrimination. *Id.* at *5. In analogous cases, evidence of an employer's conduct towards other employees is relevant and admissible to show that an employer's proffered justification is or is not pretext. *Id.* "Consequently, because plaintiff's case relies, in part, on whether the management … has advanced a general discriminatory agenda, defendant may offer other act evidence negating discriminatory intent." *Id.* at *5-6. "This evidence may include testimony of … [the] other female employees because, although they may not hold the same position as the plaintiff, they were subordinate to the same management that plaintiff alleges treats men more favorably than women. Therefore, their perspectives are similar enough to the plaintiff's to enable them to provide evidence regarding the alleged existence of a discriminatory plan and the allegation that management intends to treat men more favorably and promote only men…." *Id.* at *6.

Given the liberal treatment of an employer's offer of comparator evidence, some courts are beginning to level the playing field when cases involve both "me too" and "not me too" evidence.

Employers also may argue that evidence of prior employment, and specifically evidence of claims of discrimination in response to performance criticism in prior employment, is admissible pursuant to Rule 404(b) to show the employee's vindictive intent or motive. *Cf. United States v. Blitz,* 151 F.3d 1002, 1007-09 (9th Cir. 1998) (evidence of a criminal defendant's prior employment with another fraudulent telemarketing company was properly admitted at trial pursuant to Rule 403 and 404(b), Fed. R. Evid., to show the defendant's knowledge of and involvement in fraudulent telemarketing activity). This type of "other acts" evidence might tend to show that a sexual harassment plaintiff was not subjectively offended by the conduct at issue, but instead claimed harassment as a defense to performance criticism.

If prior claims are sufficiently similar to the circumstances at issue in Plaintiff's present claim, it may be sufficient to show that the plaintiff previously made pre-textual or vindictive claims of discrimination, and therefore presents a pattern of fraudulent conduct. *See Gastineau v. Fleet Mortg. Corp.,* 137 F.3d 490, 496 (7th Cir.1998) (Applying the four-factor analysis to purported Rule 404(b) evidence of an employee's history of lawsuits against prior employers, the Court held "prior acts" evidence was properly admitted because (1) the evidence was relevant to show a *modus operandi* of creating fraudulent claims, (2) the other lawsuits were sufficiently similar and close enough in time, (3) the prior lawsuits were evidenced by the pleadings and a jury could reasonably find the prior events occurred, and (4) unfair prejudice did not outweigh the probative value, where the evidence was not merely "propensity" evidence, but showed the employee's vindictive state of mind.)

In *Tisdale v. Federal Express Corp.,* 415 F.3d 516, 536-37 (6th Cir. 2005), the Court concluded that the district court's exclusion of evidence regarding an employee's post-termination employment history was not an abuse of discretion. Defendant argued the evidence was offered to show that Plaintiff was disciplined for acceptable conduct issues like misappropriation of company property and failure to report to work. However, the Court determined that evidence was more unfairly prejudicial than probative under Fed. R. Evid. 403 and was offered to show a propensity for bad acts which is impermissible under Fed. R. Evid. Rule 404(b).

IV. When "Me Too" Evidence Combines with "Not Me Too" Evidence

Given the liberal treatment of an employer's offer of comparator evidence, some courts are beginning to level the playing field when cases involve both "me too" and "not me too" evidence. *Pantonja v. Anton*, 198 Cal.App.4th 87 (2011) is one such example. Although the case involved alleged violations of the California Fair Employment Housing Act, there are significant similarities between this state statute and with Title VII of the Civil Rights Act of 1964. Plaintiff in *Pantonja* alleged hostile work environment based on alleged racial discrimination and sexual harassment. The "me too" evidence related to harassing activity that occurred outside Plaintiff's presence and at times other than when Plaintiff was employed. The trial court excluded this evidence. At the same time, the trial court allowed the defendant employer to offer evidence of four witnesses without regard to timing, all of whom testified that Anton was an "equal opportunity" abuser and did not direct his profanity or remarks to Plaintiff. *Id*. at 105-107.

On appeal, the Court of Appeal noted the double standard in how the trial court treated the evidence. It found the trial court's ruling against Plaintiff mistakenly disregarded the possibility that Plaintiff's "me too" evidence could be relevant to prove Anton's intent and gender bias. Evidence that Anton harassed other women outside Pantoja's presence may have assisted the jury -- not by showing that Anton had a propensity to harass women sexually, but by showing that he harbored a discriminatory intent or bias based on gender. Additionally, the "me too" evidence may have enabled the jury to evaluate the

credibility of Defendant's testimony and his other witnesses' assertions that, although Defendant yelled profanities in the office, he did not use the words Pantoja claimed; he did not direct profanities at Pantoja; and he did not have a discriminatory intent. Accordingly, the Court held that the "me too" evidence was admissible to show Anton's intent, to impeach Anton's credibility as a witness, and to rebut the factual claims made by defense witnesses. The Court also noted that, in the event the case is retried, parties need to have an opportunity to present their evidence in an even-handed matter.

The Court's expansion of the scope of admissible "me too" evidence relevant to prove gender bias and rebut defense evidence that Defendant did not tolerate harassment or direct profanity at individuals is obviously significant. After *Pantonja*, a plaintiff need not have worked with the "me too" witness or even have firsthand knowledge of the "me too" evidence. The decision also suggests that "me too" evidence may be probative with regard to defendant's mental state even when the witness suffered a different type of discrimination than the plaintiff. *Id.* at 115. *Pantonja* may be an anomaly limited to California law, but it also may be a harbinger for all defense practitioners.