

What about “Me (Too)”? The Case for Admitting Evidence of Discrimination against Nonparties

Nicholas C. Soltman†

INTRODUCTION

While the continued existence of workplace discrimination is not seriously in dispute,¹ the type of evidence available to employees who bring discrimination suits is. Evidence of policies discriminating against members of a protected class has long been admissible to prove the plaintiff’s own case.² The same is true of evidence of a particular supervisor’s discriminatory attitude toward the plaintiff.³ Yet no such consensus exists with respect to anecdotal evidence of discrimination against nonparties—or, as it is known colloquially, “me too” evidence.⁴

† BA 2006, Amherst College; JD Candidate 2010, The University of Chicago Law School.

¹ According to a recent Department of Justice report, half of all civil rights claims filed in federal district court are employment discrimination suits. See Tracey Kyckelhahn and Thomas H. Cohen, *Civil Rights Complaints in U.S. District Courts, 1990–2006*, Bureau of Justice Statistics Special Report (DOJ 2008), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/crcusdc06.pdf> (visited May 11, 2009). Even if some of these suits are frivolous, many are not, as numerous scholars have demonstrated. For statistical literature showing that women and minorities are less well represented in workplaces than their qualifications would suggest, see, for example, Alfred W. Blumrosen and Ruth G. Blumrosen, *Intentional Job Discrimination—New Tools for Our Oldest Problem*, 37 U Mich J L Reform 681, 687 (2004) (“In 1999, there were at least two million minority and female workers affected by intentional job discrimination.”). For psychological literature identifying cognitive dysfunctions that work to the disadvantage of minorities and women, see, for example, Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal L Rev 997, 1032–33 (2006) (noting that stereotypes are not consciously held beliefs but implicit expectancies that can cause unconscious discrimination against members of a stereotyped group); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan L Rev 1161, 1164–65 (1995) (arguing that stereotyping by race and gender is a function of the necessity for humans to categorize their sensory perceptions to make sense of the world). But see Gregory Mitchell and Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 Ohio St L J 1023, 1030 (2006) (warning that much of the “implicit prejudice scholarship” suffers from major scientific shortcomings). Finally, for anecdotal but persuasive field experiments, see, for example, Marianne Bertrand and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am Econ Rev 991, 992 (2004) (reporting that when identical resumes were sent to employers, those containing non–African American sounding names received more favorable responses).

² See *McDonnell Douglas Corp v Green*, 411 US 792, 804–05 (1973).

³ See, for example, *United States Postal Service Board of Governors v Aikens*, 460 US 711, 713 & n 12, 714 (1983).

⁴ 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 Discrimina-*

“Me too” evidence is most often introduced to prove the presence of a culture or atmosphere of discrimination or of a hostile work environment. Generally, it takes the form of testimony by one of the plaintiff’s former coworkers that she, too, suffered discrimination at the hands of the defendant. Defendants, for their part, attack “me too” evidence on both admissibility prongs.⁵ They argue that “me too” evidence does not meet Federal Rule of Evidence 401’s relevancy threshold because it has no “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.”⁶ They further contend that even if it is relevant under Rule 401, it should be excluded under Rule 403, because “its probative value is *substantially* outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”⁷

In 2008, the Supreme Court granted certiorari in *Mendelsohn v Sprint/United Management Co.*,⁸ an otherwise unremarkable employment discrimination case that hinged on the admissibility of “me too” evidence.⁹ To the dismay of some commentators,¹⁰ however, the Court declined to resolve this issue.¹¹ While it noted in dicta that a per se rule barring the admission of such evidence would be reversible

tion. But Did It?, 102 Nw U L Rev Colloquy 264, 266 (2008) (reviewing the different categories of common “me too” cases).

⁵ To be admissible, evidence must first be relevant. FRE 402 (“Evidence which is not relevant is not admissible.”). Evidence is also inadmissible if inadmissibility is required by the Constitution, an act of Congress, or by the Federal Rules of Evidence. See *id.* One of the most frequent bases for excluding otherwise relevant evidence, along with hearsay, is the danger of unfair prejudice proscribed by Rule 403. See note 7 and accompanying text.

⁶ FRE 401.

⁷ FRE 403 (emphasis added). Indeed, detractors argue that “all three dangers enumerated in Rule 403 are present when evidence of acts directed at third persons is admitted.” See Jennifer D. McCollum, Comment, *Employers’ Greatest Enemy: Second-hand Evidence in Hostile Work Environment Claims*, 59 SMU L Rev 1869, 1877 (2006) (examining the difficulties a jury faces in understanding how to properly incorporate “me too” evidence into its analysis of the case).

⁸ 466 F3d 1223 (10th Cir 2006), vacd and remd as *Sprint/United Management Co v Mendelsohn*, 128 S Ct 1140 (2008).

⁹ See *id.* at 1225.

¹⁰ See, for example, David L. Gregory, *Sprint/United Management Company v. Mendelsohn and Case-by-Case Adjudication of “Me Too” Evidence of Discrimination*, 102 Nw U L Rev Colloquy 382, 382 (2008) (“Indeed, ‘me too’ cases will continue to be decided on a case-by-case basis, without reference to a larger theoretical picture.”).

¹¹ As the Court explained, “When a district court’s language is ambiguous, as it was here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion.” *Mendelsohn*, 128 S Ct at 1146. It therefore vacated the Tenth Circuit’s judgment and remanded the case to the district court to conduct the relevant inquiry under the appropriate standard of review. See *id.* at 1143.

error,¹² it offered little guidance to lower courts tasked with admitting or excluding “me too” evidence.¹³ The admissibility of “me too” evidence thus remains an open question.

It is also an increasingly important one: Between 1990 and 2005, employment discrimination filings in district courts increased by 125 percent, while overall filings increased by just 22 percent.¹⁴ More discrimination cases today turn not on whether the plaintiff has proven her “prima facie case” or established that the “legitimate nondiscriminatory reason” proffered by the employer for her dismissal is pretextual, but rather on whether she has identified a “similarly situated”¹⁵ coworker treated more favorably than she.¹⁶ “Me too” evidence addresses precisely this issue, albeit from the other direction: absent direct testimony of a supervisor’s mental processes,¹⁷ the argument goes, a company that discriminated against other comparators is more likely to have discriminated against the plaintiff than one whose record is otherwise clean. Even if that is not always true, the question for a district court judge is not whether the inference is valid, but whether the jury will get to decide that question for itself.

Part I of this Comment provides background on employment discrimination—distinguishing among individual discrimination, hostile work environment, and reduction in force (RIF) claims—and on the specific evidentiary rules that courts have applied in dealing with the admissibility of “me too” evidence. Part II surveys the muddled state of the law before the Supreme Court’s decision in *Sprint/United Man-*

¹² See *id.* at 1147.

¹³ See *id.* (“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.”).

¹⁴ See Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 *Mo L Rev* 481, 499 (2008).

¹⁵ A common definition of a “similarly situated” employee is someone “directly comparable to [the plaintiff] in all material respects.” See *Patterson v Avery Dennison Corp*, 281 F3d 676, 680 (7th Cir 2002) (considering such factors as whether the employees “dealt with the same supervisor and were subject to the same standards” and whether they had “comparable experience, education and qualifications”).

¹⁶ Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators* *1 (Seton Hall Public Law Research Paper No 1099595, Mar 2008), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1099595 (visited May 11, 2009) (examining the use of “comparator” evidence in discrimination cases, and judicial responses to such evidence).

¹⁷ See, for example, *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133, 141 (2000). The lack of proof regarding discriminatory intent is particularly acute where the discrimination is the result of implicit or unconscious stereotypes. See also generally Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 *Mo L Rev* 83 (2008).

agement *Co v Mendelsohn*,¹⁸ while Part III analyzes *Mendelsohn* and explains why the issue remains unsettled. Finally, Part IV resolves the conundrum by linking the admissibility of “me too” evidence to the underlying claim presented. “Me too” evidence, Part IV.A asserts, will almost always clear the low relevancy bar set by Rule 401, since courts regularly admit similar evidence. But prejudice under Rule 403 is a distinct inquiry. Reasoning that there are significant differences among individual discrimination, hostile work environment, and RIF claims, Part IV.B concludes that evidence of a hostile work environment or discriminatory RIF should withstand the Rule 403 balancing test because each occurs with the company’s knowledge. By contrast, evidence of individual discrimination against another employee—whose link to the plaintiff’s case is by definition attenuated, and knowledge of which cannot necessarily be imputed to the employer—should not withstand Rule 403’s balancing test.

I. EMPLOYMENT DISCRIMINATION LAW AND THE RULES OF EVIDENCE

This Part lays out the relevant background for this Comment. Part I.A.1 provides an example of how a “me too” dispute would unfold in court, while Part I.A.2 turns to the employment discrimination law that most often governs it: Title VII. Part I.B then touches on the Rules of Evidence most directly implicated by “me too” evidence: Rules 401 and 403.

A. Employment Discrimination

1. “Me too” evidence in practice.

“Me too” evidence most typically takes the form of testimony by one of the plaintiff’s coworkers that she, too, suffered discrimination. The plaintiff’s direct supervisor might have discriminated against the plaintiff’s coworker; more likely, however, it was a different supervisor.¹⁹ Assuming that the defendant wants to keep the “me too” evidence away from the jury (which it should), it will file a motion in limine, and the judge will rule on that motion. If the motion is denied,

¹⁸ 128 S Ct 1140 (2008).

¹⁹ This Comment focuses on “me too” evidence as it relates to other supervisors in the same workplace, primarily because prior instances of discrimination by one’s own supervisor are essentially just prior bad acts. See FRE 404(b).

the defendant must renew the objection at trial to preserve the admission of the contested “me too” evidence as grounds for appeal.

2. Title VII and “me too” evidence.

a) *Types of Title VII claims.* Because approximately 70 percent²⁰ of employment discrimination suits arise under Title VII of the Civil Rights Act of 1964,²¹ this Comment focuses on Title VII claims. Broadly speaking, Title VII has two primary purposes: eradicating discrimination and making the victims of employment discrimination whole.²² To that end, it makes unlawful an employer’s failure or refusal “to hire or [decision] to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²³ Most Title VII violations are based on the disparate treatment by an employer of a protected group or the disparate impact of an employer’s policy on such a group.²⁴

A “disparate treatment” claim arises when an employer takes an adverse employment action against an employee because of her race, color, religion, sex, or national origin.²⁵ As the statutory language suggests, disparate treatment breaks down into refusals to hire, discriminatory discharges, or changes involving the terms, conditions, and privileges of employment. A “disparate impact” claim, meanwhile, stems from employment practices, facially neutral or otherwise, which “cannot be justified by business necessity” and impose a harsher burden on employees of a protected class.²⁶ Because most “me too” evidence supports disparate treatment discrimination, disparate impact claims are largely irrelevant to this Comment. This Comment instead focuses on the dis-

²⁰ Reeves, 73 Mo L Rev at 522 (cited in note 14). Lee Reeves claims that talking about employment discrimination jurisprudence writ large is essentially talking about the law of race and sex discrimination. *Id.*

²¹ Civil Rights Act of 1964, Pub L No 88-352, 78 Stat 253 (1964), codified at 42 USC § 2000e et seq.

²² See *Albermarle Paper Co v Moody*, 422 US 405, 417–18 (1975).

²³ 42 USC § 2000e-2(a)(1).

²⁴ See *International Brotherhood of Teamsters v United States*, 431 US 324, 335 & n 15, 336 (1977) (stating that disparate treatment was the “most obvious evil” Congress had in mind when it passed Title VII).

²⁵ See *Burlington Industries, Inc v Ellerth*, 524 US 742, 761, 768 (1998) (defining an adverse (or “tangible”) employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

²⁶ *International Brotherhood*, 431 US at 336 n 15.

criminary discharge subset of disparate treatment cases (former employees comprising the vast majority of plaintiffs in “me too” suits).

b) McDonnell Douglas burden shifting. Title VII claims proceed according to the burden-shifting regime established by *McDonnell Douglas Corp v Green*.²⁷ First, the plaintiff bears the initial burden of establishing, by a preponderance of the evidence, a prima facie case of discrimination.²⁸ While *McDonnell Douglas* addressed discriminatory hiring, the circuits have adapted these same elements to discriminatory discharges. Thus, a former employee must show (1) membership in a statutorily protected class, (2) qualification for the position and satisfaction of its normal requirements, and (3) discharge under (4) circumstances which create an inference of unlawful discrimination.²⁹ In the “me too” arena, a plaintiff typically alleges that her discharge stemmed from individual (one-on-one) discrimination or a discriminatory reduction-in-force (RIF).³⁰ (As explained below, a hostile work environment claim can be, but need not be, and often is not accompanied by an adverse employment action.) In an individual discrimination case, a plaintiff alleges discrimination not by the company, but by an individual within it. In a discriminatory RIF case, the plaintiff alleges that despite performing at a level substantially equivalent to that of the group retained, she—rather than her colleagues belonging to that group—was selected for discharge in a company-wide layoff.³¹ Finally, in a “hostile work environment” case, the plaintiff alleges discrimination so pervasive that any reasonable, non-negligent employer would have been aware of it.³² Even if the plaintiff did not suffer an adverse employment action, Title VII still covers her complaint because a hostile work environment “alter[s] the terms and conditions” of employment.³³

²⁷ 411 US 792 (1973).

²⁸ *Id.* at 802.

²⁹ See, for example, *Williams v Ford Motor Co*, 14 F3d 1305, 1308 (8th Cir 1994) (reviewing the four elements necessary to establish a prima facie case of discrimination); *Chambers v TRM Copy Centers Corp*, 43 F3d 29, 37 (2d Cir 1994) (same).

³⁰ A RIF is a management decision to eliminate positions from the budget due to lack of funding, changes in workload, reduction in services, or elimination of functions and programs—essentially, pure economic layoffs.

³¹ See, for example, *Mitchell v Data General Corp*, 12 F3d 1310, 1315 (4th Cir 1993).

³² See, for example, *Harris v Forklift Systems, Inc*, 510 US 17, 21 (1993) (“When the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.”) (citations omitted).

³³ *Burlington Industries*, 524 US at 768.

If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate some “legitimate, nondiscriminatory reason for the employee’s rejection.”³⁴ If the defendant succeeds, the plaintiff must be afforded a fair opportunity to show that the defendant’s stated reason is pretextual.³⁵

c) *Employer liability under Title VII.* The Supreme Court has interpreted Title VII to make an employer³⁶ vicariously liable for the discriminatory actions of a plaintiff’s supervisor whenever the actions result in a “tangible employment action.”³⁷ When no such action is taken (as in a pure hostile work environment claim), the employer may raise an affirmative defense to liability or damages.³⁸ The employer must prove by a preponderance of the evidence (1) that the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid further harm.³⁹

Two practical matters are worth noting. First, defendants can never avail themselves of this due care defense in RIF cases (termination being the most severe of adverse employment actions), only rarely in individual discrimination suits (most likely harassment), and almost always in hostile work environment claims (unless the plaintiff was demoted, fired, and so on). Second, the extent of employer liability is *the* central issue in employment discrimination law. That has less to do with the circuit split regarding whether Title VII’s “agent” language⁴⁰ permits a plaintiff to sue her supervisor in an individual capacity,⁴¹ and more to do with the fact that most agents are unappealing targets compared to the companies that employ them.⁴² Simply put, any rational plaintiff is al-

³⁴ *McDonnell Douglas*, 411 US at 802.

³⁵ *Id.* at 804.

³⁶ Title VII defines an employer as a “person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person.” 42 USC § 2000e(b).

³⁷ See note 25.

³⁸ *Burlington Industries*, 524 US at 765.

³⁹ *Id.*

⁴⁰ See note 36.

⁴¹ See *Tomka v Seiler Corp.*, 66 F3d 1295, 1313 (2d Cir 1995) (examining conflicting lower court opinions on whether an employer’s agent can be held individually liable in a Title VII case, and holding that individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII, although they can be held personally liable for sexual harassment under New York law).

⁴² Generally, only where the individual *and* the employer are found liable do courts impose joint and several liability, although some have argued that employers are vicariously (and therefore jointly and severally) liable for the discriminatory actions of their agents. See Tracy L. Gonos, *A Policy Analysis of Individual Liability—The Case for Amending Title VII to Hold Individ-*

ways going to sue the party with the deeper pockets; the question is for what actions those employers will be liable.

Judging by a recent survey of the employment discrimination landscape, the answer is not very much: the vast majority—almost 97 percent—of these cases are dismissed, settled, or resolved before trial.⁴³ Indeed, one study found that judges granted over 12.5 percent of defendants' summary judgment motions in employment discrimination suits, compared to only 3 percent in contract cases and 1.7 percent in personal-injury and property-damage suits.⁴⁴ While the few plaintiffs who do make it to trial have reason to be optimistic—plaintiffs won more than a third of the 3,809 employment discrimination trials between 2000 and 2006 (including jury trials, bench trials, and directed verdicts),⁴⁵ receiving a median award of \$158,460⁴⁶—the overall picture is still bleak for plaintiffs. From 1979 through 2006, federal plaintiffs won 15 percent of employment discrimination cases; the win rate in all other civil cases was 51 percent.⁴⁷ Perhaps this is a function of an overwhelming number of frivolous suits. To the extent, however, that it is symptomatic of the difficulties that plaintiffs face in proving discrimination, a question naturally arises: is the judicial gloss on employment discrimination law deterring discrimination by employers—or “baseless” suits by disgruntled employees?

B. Relevance and Prejudice under the Rules of Evidence

To be sure, judicial skepticism of employment discrimination suits is but one hurdle faced by plaintiffs.⁴⁸ There are also specific require-

ually Personally Liable for Their Illegal Discriminatory Actions, 2 NYU J Legis & Pub Policy 265, 276, 293 (1999). In any event, many of the courts purporting to find supervisory agents “individually liable” have actually held them liable only in their official capacities. See, for example, *Miller v Maxwell's International, Inc.*, 991 F2d 583, 587 (9th Cir 1993) (holding that once the defendant settled her claims with her corporate employer, she had no remaining claims against the individual agents of the company who perpetrated the discrimination). Also note that when a plaintiff sues her company, her claims against its agents (in their corporate capacity) will be dismissed as duplicative. See, for example, *Webb v Hyman*, 861 F Supp 1094, 1119 (DDC 1994).

⁴³ Kyckelhahn and Cohen, *Civil Rights Complaints* at *6 table 5 (cited in note 1).

⁴⁴ See Nathan Koppel, *Job-discrimination Suits Tend to Fare Poorly in Federal Court*, Wall St J A16 (Feb 19, 2009) (reporting on recent studies showing that employment discrimination plaintiffs get less time in court and lose at a higher rate in federal court than do other types of plaintiffs).

⁴⁵ Kyckelhahn and Cohen, *Civil Rights Complaints* at *7 table 7 (cited in note 1).

⁴⁶ *Id.* at *7. Damage awards are capped at \$300,000 depending on the size of the employer. See 42 USC § 1981A(b)(3).

⁴⁷ See Koppel, *Job-discrimination Suits*, Wall St J at A16 (cited in note 44).

⁴⁸ For an opinion expressing extreme frustration over frivolous litigation, see *Keegan v Dalton*, 899 F Supp 1503 (ED Va 1995), in which then Judge, now Chief Judge, James Spencer

ments about the nature of the adverse employment action⁴⁹ and trial courts' application of the heightened pleading standard in *Bell Atlantic Corporation v Twombly*⁵⁰ to employment discrimination suits.⁵¹ This Comment, however, identifies and explores a different principal obstacle: the courts' treatment of relevance and prejudice under Rule 401 and Rule 403, respectively. Part IV.B discusses the interaction of these two rules.

Evidence is relevant under Rule 401 if 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."⁵² Nonetheless, otherwise relevant evidence may be excluded under Rule 403 if the prejudicial effect of the evidence "substantially" outweighs its probative value and if that prejudice is "unfair"⁵³—that is, has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."⁵⁴ While prejudice in the employment discrimination arena is often ambiguous,⁵⁵ a simple example shows the Rule 403 balancing test in action: a

granted an employer's motion for summary judgment in a Title VII lawsuit—and noted his disgust with the status quo:

To the case brought before the Court this day, it is enough to say that the plaintiff's claims fail entirely, and that the case will be dismissed. To the genre of cases to which it belongs, however, there is something more. This case is yet another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court's resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop.

Id at 1514–15.

⁴⁹ The challenged action must have led to a decrease in salary or a loss of tangible job benefits. See note 25. Thus, a plaintiff who has experienced a purely lateral transfer, a change in job duties, oral and written reprimands, threats of termination or demotion, or other actions that make her job more difficult, does not have a valid cause of action. Reeves, 73 Mo L Rev at 522–24 (cited in note 14).

⁵⁰ 550 US 544 (2007).

⁵¹ Id at 557 (suggesting that the motion to dismiss bar should be set where the facts alleged make it at least plausible, rather than merely possible, that the plaintiff is entitled to relief). See also Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U Ill L Rev *5 (forthcoming), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1273713 (visited May 11, 2009) (finding that "motions to dismiss decided between six and twelve months after *Twombly* were either partially or completely granted *over 80% of the time*") (emphasis added).

⁵² FRE 401. As noted earlier, only relevant evidence is admissible. See FRE 402.

⁵³ FRE 403.

⁵⁴ FRE 403, Advisory Committee Note to the 1972 Proposed Rules.

⁵⁵ Compare *Coleman v Home Depot, Inc.*, 306 F3d 1333, 1347 (3d Cir 2002) (finding no abuse of discretion where the district court excluded an EEOC determination letter for unfair prejudice, where the EEOC was clearly mistaken in concluding that the employee was "highly experienced") with *Barfield v Orange County*, 911 F2d 644, 651 (11th Cir 1990) (holding that the probative value of an EEOC determination that there was "no reasonable cause" to believe employment discrimination allegations outweighed the danger of unfair prejudice).

photograph of a dead body is obviously prejudicial to any defendant charged with murder—but that prejudice will not usually be “unfair.”⁵⁶

Because the “search for truth is imperiled” by the exclusion of relevant evidence, courts strain to give evidence its “maximum reasonable probative force and its minimum reasonable prejudicial value”—in other words, to “exclude evidence under 403 only sparingly.”⁵⁷ Because the Federal Rules distinguish between the *admissibility* of evidence and the *weight* that courts are to afford it, it is commonly argued that the Rules anticipate judges admitting marginally relevant evidence—and juries attaching comparatively little weight to it.⁵⁸

II. THE SPLIT ON “ME TOO” EVIDENCE

The tripartite split that predated the Court’s decision in *Mendelsohn* illustrates the differing treatment that “me too” evidence has received. Evidentiary issues such as the admission of “me too” evidence are often resolved on the strength of the facts of a particular case. Nonetheless, circuit courts have clearly disagreed on the admissibility of “me too” evidence as a general matter.⁵⁹ Several circuits have held that “me too” evidence is irrelevant under Rule 401 of the Federal Rules of Evidence and that even if it *were* relevant, it should be excluded as more prejudicial than probative. Several other circuits, meanwhile, have held either that it should usually be *admitted* or, at the very least, is not *per se* inadmissible. And still other circuits have admitted the evidence in individual cases without indicating whether their treatment of “me too” evidence would have precedential value for future cases.

A. Courts Excluding “Me Too” Evidence

In a case of first impression, the Second Circuit adopted a seemingly bright-line rule against unscientific “me too” evidence. The

⁵⁶ See, for example, *United States v Sides*, 944 F2d 1554, 1563 (10th Cir 1991) (finding photographs of murder victims “certainly relevant and probative” and not prejudicial, as they related to “the method of murder” and the crime scene).

⁵⁷ Rubinstein, 102 Nw U L Rev Colloquy at 265 (cited in note 4) (quotation marks omitted).

⁵⁸ See, for example, *United States v Leon-Gonzalez*, 24 Fed Appx 689, 692 (9th Cir 2001) (“Although an argument can certainly be made that the testimony may have been remote, that is an issue going to the weight of the testimony, not its admissibility.”). Of course, in many cases, if a piece of evidence is only barely relevant, then it will have minimal probative value. But that does not obviate the need to determine relevancy and *then* admissibility.

⁵⁹ It is also worth noting that while every *case* is different, much “me too” evidence is actually quite similar: testimony by the plaintiff’s coworkers.

plaintiff in *Haskell v Kaman Corp.*,⁶⁰ whose pre-termination performance at the age of fifty-seven was shaky at best, alleged individual discrimination after he was replaced by a fifty-three-year-old, who then hired a twenty-nine-year-old assistant.⁶¹ At his age discrimination trial, the plaintiff presented “me too” evidence in the form of testimony by six former company officers that age had been a factor in their and others’ terminations dating back to 1967, some fifteen years prior.⁶² The Second Circuit ruled that the district court erred in admitting the testimony, asserting that a plaintiff’s “sample must be large enough to permit an inference that age was a determinative factor in the employer’s decision.”⁶³ Because the plaintiff’s evidence—ten firings over eleven years—was not statistically significant in a company of 3,700 employees, the court determined that it was not relevant.⁶⁴

In dicta, the court stated that the evidence was not only irrelevant, but its probative value was “so ‘substantially outweighed by the danger of unfair prejudice’ that it definitely should have been excluded by the district court in accord with [Rule 403].”⁶⁵ Even the “strongest jury instructions,” the court wrote, “could not have dulled the impact of a parade of witnesses, each recounting the contention that defendant had laid him off because of his age.”⁶⁶ While other courts quickly departed from the statistical significance requirement,⁶⁷ the Second Circuit’s mode of analysis—finding “me too” evidence irrelevant under Rule 401 and, in any case, unfairly prejudicial under Rule 403—would repeat itself.

In *Wyvill v United Companies Life Insurance Co.*,⁶⁸ the Fifth Circuit announced its own seemingly bright-line rule against admitting discrete episodes of discrimination by other supervisors. “[T]estimony from former employees who had different supervisors than the plain-

⁶⁰ 743 F2d 113 (2d Cir 1984).

⁶¹ *Id.* at 117–18.

⁶² *Id.* at 118.

⁶³ *Id.* at 121.

⁶⁴ See *Haskell*, 743 F2d at 121 (citing several cases where dozen-person samples of “me too” evidence were excluded). The court’s finding was bolstered, in its view, by the fact that most of the company’s officers had been employed more than ten years and were in the protected forty- to seventy-year-old age group, and that the average age of the company’s officers rose in the decade preceding the plaintiff’s termination. See 29 USC § 631.

⁶⁵ *Haskell*, 743 F2d at 122.

⁶⁶ *Id.*, quoting *Moorhouse v Boeing Co.*, 501 F Supp 390, 393 n 4 (ED Pa 1980).

⁶⁷ See, for example, *Hunter Allis Chambers-Corp, Engine Division*, 797 F2d 1417, 1423 (7th Cir 1986) (finding that a few instances of harassment against other black workers were sufficient to disclose a “strong and persistent pattern of racial hostility”).

⁶⁸ 212 F3d 296 (5th Cir 2000).

tiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination," the court held, "cannot be probative of whether age was a determinative factor in the plaintiff's discharge."⁶⁹ In other words, anecdotes about other employees are irrelevant unless those employees are similarly situated to the plaintiff. Here, although the "me too" witnesses in the plaintiffs' individual discrimination suits were senior managers for the defendant (a company of 2,700 employees), they held different jobs, executed different duties, and were accountable to different supervisors.⁷⁰ As a result, admitting their testimony "substantially prejudiced" the defendant, "creating, in effect, several trials within a trial" and distracting the jury's attention from the fact that the defendant had little to say about the plaintiffs' terminations.⁷¹ In the Fifth Circuit's view, this kind of "me too" evidence was unfairly prejudicial under Rule 403 precisely because it was irrelevant under Rule 401.⁷²

Although the Sixth Circuit has not articulated a per se rule of its own, neither has it ever admitted "me too" evidence. Its de facto rule first appeared in *Schrand v Federal Pacific Electric Co.*,⁷³ another individual discrimination case. There, the plaintiff's "me too" evidence consisted of the testimony of two former employees who were told they were terminated on account of their age.⁷⁴ The Sixth Circuit deemed this "me too" evidence irrelevant, as nothing tied the evidence to the decision to terminate the plaintiff.⁷⁵ The supervisor who made the employment decision was not involved in the decision to terminate the former employees, and neither witness worked in the same division or region as the plaintiff.⁷⁶ The court also concluded that the evidence should have been excluded under Rule 403, explaining that the evidence's probative value was "substantially outweighed by

⁶⁹ Id at 302 (emphasis added), citing *Goff v Continental Oil Co.*, 678 F2d 593, 596-97 (5th Cir 1982) (upholding the exclusion of "me too" testimony by former employees who did not work with the plaintiff and had no personal knowledge of the events surrounding his discharge).

⁷⁰ *Wyvill*, 212 F3d at 303. Because the court did not conduct separate inquiries into relevancy and prejudice, as the *Haskell* court did, the Fifth Circuit has arguably staked out a stronger stance against "me too" evidence, whereby it can *never* be relevant and thus need not be analyzed for prejudice.

⁷¹ Id (quotation marks omitted).

⁷² Id at 303.

⁷³ 851 F2d 152 (6th Cir 1988).

⁷⁴ Id at 155.

⁷⁵ Id at 155-56.

⁷⁶ Id at 156.

the danger of unfair prejudice flowing from its admission.”⁷⁷ *Schrand* has not been undercut in the two decades since the decision.⁷⁸

B. Courts Admitting “Me Too” Evidence

In *Hunter v Allis-Chalmers Corp, Engine Division*,⁷⁹ the Seventh Circuit concluded that “me too” evidence demands case-by-case review. A “flat rule” barring the admission of “me too” evidence was “unjustified” in light of “the difficulty of proving employment discrimination—the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the worker’s troubles.”⁸⁰ Turning to the facts of the plaintiff’s hostile work environment suit, the court noted that the evidence disclosed a pattern of “racial hostility that management could hardly have been unaware of” and increased the probability that the “harsh discipline meted out to him” was a byproduct of management’s irritation with his complaints about racial harassment.⁸¹ This evidence was therefore relevant.⁸²

Notably, the Seventh Circuit did *not* itself propose a per se rule that “me too” evidence be allowed. Rather, as it explained later in the opinion, the probative value of this evidence depends on the nature of the discrimination charged.⁸³ For example, if an African-American plaintiff complained that she had been paid less than her white counterpart for the same work, evidence of discriminatory behavior by her coworkers toward another African-American employee might have no relevance. But where, as here, the plaintiff’s ire was directed toward the harassment that his company failed to stop and indeed condoned, other evidence of harassment was admissible.⁸⁴

⁷⁷ *Schrand*, 851 F2d at 156.

⁷⁸ See, for example, *Reed v National Linen Service*, 1999 WL 407463, *7 (6th Cir) (per curiam) (finding harmless error in admitting potentially prejudicial and not particularly probative “me too” evidence because the defendant’s cross examination of the plaintiff’s witnesses dispelled any undue prejudice); *Williams v Nashville Network*, 132 F3d 1123, 1130 (6th Cir 1997) (per curiam) (holding that testimony of a cameraman who was not interviewed by the defendant was irrelevant where the would-be witness applied for a different position, “with different qualifications and hiring requirements,” six years prior to the plaintiff’s application, and which was reviewed by different people at the defendant company).

⁷⁹ 797 F2d 1417 (7th Cir 1986).

⁸⁰ *Id* at 1423.

⁸¹ *Id* at 1423–24.

⁸² *Id* at 1423.

⁸³ *Hunter*, 797 F2d at 1424.

⁸⁴ See *id*.

The Eighth and Tenth Circuits quickly joined the Seventh, with a significant wrinkle: their opinions counseled a general rule of admissibility. In *Estes v Dick Smith Ford, Inc.*,⁸⁵ the African-American plaintiff alleged that his race and age played a role in his termination, while the defendant claimed that the plaintiff was fired for cause as part of the dealer's RIF.⁸⁶ The district court excluded the plaintiff's "me too" evidence.⁸⁷ The Eighth Circuit reversed, holding that statistical evidence⁸⁸ tending to show that the defendant discriminated against blacks in hiring and promotion, and evidence of prior acts of discrimination and of a manager telling racist jokes, were relevant to proving its motivation in discharging the plaintiff.⁸⁹

Any doubt as to the reach of its holding in *Estes* was quickly dispelled by *Hawkins v Hennepin Technical Center*.⁹⁰ In that case, the court opined that because an employer's "past discriminatory policy and practice may well illustrate that employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial."⁹¹ Although less strongly worded than the Fifth Circuit's opinion in *Wyvill*, this line of cases reveals a strong presumption in favor of admitting "me too" evidence.

The Tenth Circuit was equally clear in *Spulak v K Mart Corp.*⁹² As a "general rule," it held, "the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent."⁹³ The "me too" evidence at issue in this individual discrimination suit was the testimony of two former employees in the protected age group about the circumstances under which they left their employment: the first witness held the same position as the plaintiff at another store in Colorado; the second was a mechanic who worked under the first.⁹⁴ The court distinguished *Haskell* as "a statistics case in which the sample was held to be too small, and in which

⁸⁵ 856 F2d 1097 (8th Cir 1988).

⁸⁶ Id at 1103.

⁸⁷ Id at 1102.

⁸⁸ The statistical evidence that the plaintiff sought to introduce showed that the dealership had not hired a single black person among the 153 employees hired from 1978 to 1983, and that only 4 of the 214 people employed at Dick Smith Ford during this period were black. Id at 1103.

⁸⁹ *Estes*, 856 F2d at 1102-04.

⁹⁰ 900 F2d 153 (8th Cir 1990).

⁹¹ Id at 155-56. See also *Phillip v ANR Freight Systems, Inc.*, 945 F2d 1054, 1056 (8th Cir 1991) (overturning the district court's decision to exclude "me too" evidence and explaining that such evidence is both relevant and particularly critical in discrimination cases).

⁹² 894 F2d 1150 (10th Cir 1990).

⁹³ Id at 1156.

⁹⁴ Id.

most of the testimony did not raise an inference of age discrimination.”⁹⁵ It also distinguished *Schrand* by the fact that the *Spulak* witnesses worked in the same state as the plaintiff and were fired within a short time after the plaintiff left the company; although they worked under a different district manager, that manager referred to the plaintiff’s “early retirement” when encouraging one of the witnesses to consider retiring.⁹⁶

C. Courts Admitting “Me Too” Evidence—under the Facts Presented

Other circuits’ views on “me too” evidence are somewhat harder to discern. In *Heyne v Caruso*,⁹⁷ a quid pro quo sexual harassment case, the Ninth Circuit held that “the sexual harassment of others . . . is relevant and probative of [the defendant’s] general attitude of disrespect toward his female employees, and his sexual objectification of them.”⁹⁸ The court noted that “me too” evidence is especially probative “because of the inherent difficulty of proving state of mind.”⁹⁹ It then recommended that lower courts worried about unfair prejudice to the defendant could give a limiting instruction to the jury.¹⁰⁰

The general applicability of these observations is not crystal clear, however. In an earlier case, the court had remarked that because individuals who engage in sexual harassment may have different motives, it could not establish a per se rule whereby “me too” evidence of sexual discrimination would always be relevant to a plaintiff’s gender discrimination suit.¹⁰¹ The court did, however, suggest that to determine the probative value of “me too” evidence in the many “mixed motive” cases, the finder of fact “*must first have access to the evidence.*”¹⁰² It would thus be surprising if “me too” evidence were not also admissible in “pure” gender (and by extension, race) discrimination cases.

⁹⁵ *Spulak*, 894 F2d at 1156 n 2.

⁹⁶ *Id.*

⁹⁷ 69 F3d 1475 (9th Cir 1995).

⁹⁸ *Id.* at 1480.

⁹⁹ *Id.* (quotation marks and citation omitted).

¹⁰⁰ *Id.* at 1481.

¹⁰¹ In *EEOC v Farmer Bros Co*, 31 F3d 891 (9th Cir 1994), the court noted that the victim of an employer or supervisor—who used his power within the company’s hierarchy to gratify his sexual desires—might “reasonably feel subordinated and belittled even though the harasser’s primary purpose is to seduce her.” *Id.* at 897. This, however, would not be true gender-based discrimination, since the woman’s gender was secondary to her status as an object of sexual desire. *Id.* at 898.

¹⁰² *Id.* (emphasis added).

Three other courts have also admitted “me too” evidence, but with none of the general admonitions of the Eighth and Tenth Circuits. The First Circuit quoted the Seventh Circuit’s opinion in *Hunter*, but declared no rule going forward.¹⁰³ Almost two decades later, the Eleventh Circuit took a similar tack, but advanced new theories under which courts could consider “me too” evidence. The plaintiff in *Goldsmith v Bagby Elevator Co*¹⁰⁴ brought a hostile work environment suit, alleging that his employer retaliated against him for filing a race discrimination charge.¹⁰⁵ The court reasoned that the plaintiff’s “me too” evidence (testimony by his black coworkers about the discrimination that they observed at work, as well as evidence of employees who were fired after they reported racial slurs) did not constitute habitual behavior.¹⁰⁶ Nevertheless, the court noted that the evidence rebutted the supervisor’s denial that there were complaints of racial slurs, and was probative of whether the antidiscrimination and antiretaliation policies enacted by the defendant were effective.¹⁰⁷ More importantly, for present purposes, the court held the evidence admissible under Rule 404(b)¹⁰⁸ “to prove the intent of Bagby Elevator to discriminate and retaliate.”¹⁰⁹ In addition, because this evidence “established the recurrent use of racial slurs by employees of Bagby Elevator” and

¹⁰³ See *Brown v Trustees of Boston University*, 891 F2d 337, 349–50 (1st Cir 1989) (concluding that the jury was “entitled to infer that any discriminatory animus toward women manifested in 1982 and 1983” would have “existed in 1980 and 1981”).

¹⁰⁴ 513 F3d 1261 (11th Cir 2008).

¹⁰⁵ *Id.* at 1272.

¹⁰⁶ *Id.* at 1285. The court was referring to Rule 406, which provides that evidence “of the habit of a person or of the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.” FRE 406. Under Eleventh Circuit precedent, “[C]onduct admitted as evidence of habit must reflect a systematic response to specific situations to avoid the danger of unfair prejudice that ordinarily accompanies the admission of propensity evidence.” *Goldsmith*, 513 F3d at 1285. The plaintiff did not meet that burden. *Id.*

¹⁰⁷ *Goldsmith*, 513 F3d at 1287. See also *Ross v Baldwin County Board of Education*, 2008 WL 2020470, *6 (SD Ala) (concluding that testimony regarding the defendant’s propensity for telling “dirty jokes” in the workplace and the time he printed off an image of the “male anatomy” and showed it to the witness was “certainly relevant and admissible to demonstrate the existence of a sexually hostile work environment at the school”).

¹⁰⁸ FRE 404(b) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It *may*, however, be admissible for other purposes, such as proof of motive [or] intent.”) (emphasis added).

¹⁰⁹ *Goldsmith*, 513 F3d at 1286. But see Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L J 1063, 1076–82 (2005) (arguing that “faithful adherence” to Rule 404 usually precludes the admission of prior conduct evidence). In Marshall’s view, plaintiffs and courts alike often base the admissibility of prior bad acts on the following straightforward but improper logical chain: prior conduct suggests discriminatory propensities, which, in turn, go to intent. *Id.* at 1074–83.

supported Goldsmith's claim that Bagby Elevator "permitted a severe and pervasive atmosphere of racial discrimination on its premises,"¹¹⁰ it was also admissible to prove the plaintiff's hostile work environment claim. Whether the next plaintiff could make such an argument, the court did not say.

The Fourth Circuit also relied on Rule 404(b) in ordering a new trial for a plaintiff who was prohibited from introducing evidence of prior class action litigation against the defendant. Calling the litigation "unquestionably relevant within the meaning of Rule 401," the court held such evidence of other wrongs or acts admissible to prove discriminatory motive and intent under Rule 404(b).¹¹¹ To the extent that the class litigation might confuse the issues, "a limiting instruction could be utilized to caution the jury that the [prior] litigation evidence is to be considered only as evidence of retaliatory animus."¹¹² Like the Eleventh Circuit, however, the court gave no indication as to how it would rule in future retaliation cases.

* * *

To conclude, three circuits—the Second, Fifth, and Sixth—have held that even if "me too" evidence is relevant under Rule 401 (which, in their view, it is not), it should be excluded as more prejudicial than probative under Rule 403. The Seventh Circuit flatly rejected this rule, while the Eighth and Tenth Circuits have held that "me too" evidence *should* usually be admitted. The other four courts to consider the issue have admitted the evidence, but in very fact-specific rulings.

III. THE SUPREME COURT AND "ME TOO" EVIDENCE

Against the backdrop of this circuit split, the Supreme Court granted certiorari in a relatively typical employment discrimination case, *Mendelsohn*.¹¹³ However, the Court's decision raised more questions than it answered. Part III.A examines the Tenth Circuit's 2-1 decision in

¹¹⁰ *Goldsmith*, 513 F3d at 1286.

¹¹¹ *Buckley v Mukasey*, 538 F3d 306, 319 (4th Cir 2008) ("[R]etaliatory claims . . . are inextricably linked to past acts of discrimination . . . [S]uch evidence of prior bad acts speaks directly to the defendant's motive or intent to retaliate [and so] must be admitted if the plaintiff is to have any real chance of proving her retaliation claim.") (quotation marks omitted).

¹¹² *Id.* at 320.

¹¹³ See 128 S Ct at 1144 ("We granted certiorari to determine whether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.") (citation omitted).

Mendelsohn. Part III.B then addresses the Supreme Court's narrow holding and explores the case's dicta. It also touches on how the lower courts have interpreted *Mendelsohn*.

A. The Tenth Circuit's Split Decision in *Mendelsohn*

As part of her age discrimination suit against Sprint, the plaintiff in *Mendelsohn* sought unsuccessfully to introduce the testimony of five employees over the age of forty who were terminated in the same RIF.¹¹⁴ In earlier cases involving *individual* misconduct, the Tenth Circuit had developed what it called the "same supervisor" rule.¹¹⁵ The *Mendelsohn* court, however, reasoned that application of this rule to an "alleged discriminatory company-wide RIF" would in many circumstances "make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence."¹¹⁶ The majority, therefore, declared the "same supervisor" rule inapposite to the present case. Instead, it noted that since all the plaintiff's proposed witnesses were in the protected age group, their dismissal in the RIF was based on similar criteria.¹¹⁷ Because the exclusion of otherwise admissible evidence under Rule 403 is "an extraordinary remedy" to be used only "sparingly," the plaintiff was entitled to a new trial.¹¹⁸

Judge Timothy Tymkovich dissented, arguing that given "the size of Sprint, the fact that Mendelsohn found five former employees who believed they were victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid."¹¹⁹ He suggested that statistical evidence of a company-wide policy would constitute the "specific evidentiary foundation" that he found lacking.¹²⁰

¹¹⁴ The district court had granted the defendant's motion to exclude this evidence, limiting the plaintiff's "me too" evidence to employees "similarly situated" to her—that is, those who shared a supervisor. See *Mendelsohn*, 466 F3d at 1225. As part of Sprint's RIF, 15,000 employees were laid off. See Lyle Denniston, *Job Bias and "Me Too" Evidence*, SCOTUSblog (June 11, 2007), online at <http://www.scotusblog.com/wp/job-bias-and-me-too-evidence> (visited Apr 10, 2009).

¹¹⁵ See *Aramburu v Boeing Co*, 112 F3d 1398, 1404 (10th Cir 1997):

To assert a claim of disparate treatment, the plaintiff must show that he was treated differently than other similarly situated employees who violated work rules of comparable seriousness. Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline.

(citations and quotation marks omitted).

¹¹⁶ 466 F3d at 1228.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1231, quoting *United States v Roberts*, 88 F3d 872, 880 (10th Cir 1996).

¹¹⁹ *Mendelsohn*, 466 F3d at 1232–33 (Tymkovich dissenting).

¹²⁰ *Id.* at 1233. While Judge Tymkovich did not specify what kind of "statistical support" it would take to prove a "nexus between the testimony and the allegation," *id.* at 1233 n 2, he did

B. The Supreme Court Takes up *Mendelsohn*

Although Justice Clarence Thomas's unanimous opinion in *Mendelsohn* implied that the "me too" witnesses may not have been similarly situated,¹²¹ the Court did not reach the substantive issue. Instead, it held that "[w]hen a district court's language is ambiguous, as it was here, it is improper for the court of appeals to presume that the lower court reached an incorrect legal conclusion."¹²² As such, the Court vacated the judgment of the court of appeals, instructing it to remand the case to the district court to conduct the relevant inquiry under the appropriate standard.¹²³ However, it noted in dicta:

[H]ad the District Court applied a *per se* rule excluding the evidence, the Court of Appeals would have been correct to conclude that it had abused its discretion. 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.¹²⁴

Not surprisingly, given the Court's narrow holding, much of the scholarly analysis of *Mendelsohn* centers on the quoted dicta. One interpretation stresses not what the Court did, but what it *did not* do—that is, embrace "any type of rule that would flatly prohibit the introduction of 'me too' evidence simply because the putative witnesses did

cite approvingly the Tenth Circuit's opinion in *Carpenter v Boeing Co*, 456 F3d 1183 (10th Cir 2006). In that case, the court held that statistical analysis cannot establish a plaintiff's prima facie case of discrimination "unless it is based on data restricted to qualified employees, or (1) reliable data with respect to that group are unavailable and (2) the plaintiff establishes that the statistical analysis uses a reliable proxy for qualification." *Carpenter*, 456 F3d at 1197. Unconvinced that the variables in the statistical analysis produced a "reliable surrogate for qualifications for overtime," the court affirmed summary judgment for Boeing. *Id.* at 1199. The plaintiff class's evidence of gender-based disparate impact of overtime assignments was not adequately based on data restricted to persons eligible for those assignments. *Id.* at 1203–04.

¹²¹ See *Mendelsohn*, 128 S Ct at 1143 ("None of the five witnesses worked in the Business Development Strategy Group with Mendelsohn, nor had any of them worked under the supervisors in her chain of command . . . [nor] did any of the proffered witnesses report hearing discriminatory remarks [by the supervisors in the plaintiff's chain of command].").

¹²² *Id.* at 1146. The district court in *Mendelsohn* granted Sprint's motion in limine, excluding, in relevant part, "evidence of 'discrimination against employees not similarly situated to plaintiff.'" *Id.* at 1144 (quoting the cert petition). Aside from defining "similarly situated" employees, the district court provided no explanation for the basis of its ruling. *Id.* The Tenth Circuit treated the minute order as applying a *per se* rule that evidence from employees with other supervisors is irrelevant to proving discrimination in an ADEA case, in erroneous reliance on *Aramburu*. *Id.* See note 115.

¹²³ *Mendelsohn*, 128 S Ct at 1143.

¹²⁴ *Id.* at 1147.

not share the same supervisor as the plaintiff.”¹²⁵ Regardless of whether evidence involving different supervisors is ultimately admissible, one thing is sure: such evidence, “even under facts as attenuated as [those in *Mendelsohn*,] . . . is not per se inadmissible.”¹²⁶ Notably, the only court to address “me too” evidence with the “benefit” of *Mendelsohn* read the Court’s decision to require district courts to analyze whether “me too” evidence is a “relevant component of the ‘mosaic’ of evidence rather than dismiss it as per se irrelevant.”¹²⁷

A more circumspect reading of the opinion, on the other hand, emphasizes that 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.”¹²⁸ But of course not all per se rules are created equal. It is one thing always to admit or exclude evidence; it is something else entirely to devise a rule *forbidding* the per se exclusion of that evidence. The Seventh Circuit’s proscription of per se rules¹²⁹ thus very clearly differs from the Fifth Circuit’s per se rule barring “me too” evidence.¹³⁰ And it is equally clear that the latter is incompatible with the Supreme Court’s language in *Mendelsohn*.¹³¹ Looking forward from *Mendelsohn*, it appears that little has changed at the lower court level: although at least a few districts courts have interpreted

¹²⁵ Rubinstein, 102 Nw U L Rev Colloquy at 267 (cited in note 4).

¹²⁶ *Id.* at 273 (emphasis added). Arguably, barring a per se rule against inadmissibility might have little effect, since district courts could always just apply the 401 and 403 analysis in every case and find that the evidence is not relevant or is too prejudicial. But per se rules are binding on *later* courts; case-by-case analyses are not.

¹²⁷ See *Hasan v Foley & Lardner LLP*, 552 F3d 520, 529 (7th Cir 2008) (holding that Foley’s firing or transferring of all other Muslim associates from its business law department might be relevant to the Muslim plaintiff’s discrimination suit).

¹²⁸ Paul Secunda, *The Many Mendelsohn “Me Too” Missteps: An Alliterative Response to Professor Rubinstein*, 102 Nw U L Rev Colloquy 374, 377 (2008) (arguing that the *Mendelsohn* holding affirms the longstanding principle that trial courts’ decisions on the admissibility of evidence should be afforded great deference by reviewing courts).

¹²⁹ See *Hunter*, 797 F2d at 1423 (“[A] flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating Rule 403 would be unjustified.”).

¹³⁰ See *Wyvill*, 212 F3d at 302 (“[T]estimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer’s company, or whose terminations were removed in time from the plaintiff’s termination, cannot be probative of whether age was a determinative factor in the plaintiff’s discharge.”).

¹³¹ See *Mendelsohn*, 128 S Ct at 1143 (“[S]uch evidence is neither *per se* admissible nor *per se* inadmissible.”).

Justice Thomas's dicta to bar per se rules,¹³² trial courts continue to produce inconsistent opinions on the admissibility of "me too" evidence.¹³³

IV. TREATING "ME TOO" EVIDENCE LIKE A FIRST-CLASS EVIDENTIARY CITIZEN

While "me too" evidence is a recent advent, ultimately, it raises the same questions as any other evidence: first, does it tend to make the plaintiff's allegations of discrimination even slightly¹³⁴ more probable than they would be without the evidence? Second, is its probative value *substantially* outweighed by the danger of unfair prejudice? For their part, courts regularly apply this two-step framework. And while they have not always acknowledged the type of case before them, they have, collectively, dealt with individual discrimination, hostile work environment, and RIF cases. But they have not been systematic in considering how the *type* of claim might affect the admissibility analysis. This Comment suggests that not all employment discrimination claims are created equal—and that the treatment of "me too" evidence should reflect these differences.¹³⁵

¹³² See, for example, *Quigley v Winter*, 584 F Supp 2d 1153, 1159 (ND Iowa 2008) (noting that there is "no per se rule that 'me too' evidence is inadmissible").

¹³³ *Mendelsohn's* second round through the courts is emblematic. On remand, the district court averred that it had not, as the Tenth Circuit claimed, applied a per se rule but had instead seized on how the plaintiff "did not address any specific witnesses or case-specific evidence which Sprint identified in its motion in limine" and did not "pretend to link any evidence from or about the 11 employees to any decision-maker in her case or to any company-wide policy or practice of discrimination." *Mendelsohn v Sprint/United Management Co*, 587 F Supp 2d 1201, 1207–08 (D Kan 2008). It therefore held that "me too" evidence within the plaintiff's supervisory chain of command would be admissible, and evidence outside would not. *Id.* On its face, this holding echoes the "same supervisor" rule—itsself a bright-line rule. See notes 115–18 and accompanying text. For district courts' treatment of "me too" evidence in the aftermath of *Mendelsohn*, see *Quigley*, 584 F Supp 2d at 1159 (excluding one and allowing another "me too" witness whose experiences with the defendant, a landlord accused of sexual discrimination, were less "remote in time" from the plaintiff's); *Tittl v Ohio Department of Mental Health*, 2008 WL 4148511, *2 (ND Ohio) (distinguishing admissible from inadmissible "me too" evidence by whether the would-be witness brought her claims of disparate treatment to the attention of her employer); *Ross v Baldwin County Board of Education*, 2008 WL 2020470, *2 (SD Ala) ("[A]s a general matter, a supervisor's treatment of other employees may be relevant and admissible, not to prove conduct in conformity therewith, but to show that supervisor's state of mind, intent or motive for certain employment-related acts against the plaintiff").

¹³⁴ See *United States v Casares-Cardenas*, 14 F3d 1283, 1287 (8th Cir 1994) ("Relevance is established by any showing, however slight, that makes it more or less likely that the defendant committed the crime in question.") (emphasis added) (citation omitted).

¹³⁵ While the admissibility of "me too" evidence would seem to systematically disadvantage the defendant, "me too" evidence can cut both ways. If the plaintiff is allowed to introduce evidence of others' discrimination, so too may the defendant introduce evidence of its "non-discriminatory and non-retaliatory behavior." *Elion v Jackson*, 544 F Supp 2d 1, 8 (DDC 2008).

Specifically, Part IV.A argues that almost all “me too” evidence is relevant. Not only does Rule 401 set an extremely low bar, but evidence equally (perhaps even less) reliable than “me too” evidence is regularly admitted. Admissibility is a two-step analysis, though, so the inquiry does not end at relevance. Expounding on Judge Richard Posner’s observation that the probative value of “me too” evidence depends on the nature of the discrimination charged,¹³⁶ Part IV.B suggests that “me too” evidence should almost never be found more prejudicial than probative in hostile work environment and RIF cases. The more evidence of discrimination, the more likely a work environment was, in fact, generally hostile—and that a reasonable company would have known of the discrimination. The more employees of a protected class terminated in one RIF, the more likely that their selection was based on improper factors—and that whoever approved the list would have discerned a pattern.

Where, on the other hand, one supervisor targets one employee, it is hard to impute knowledge of that discrimination to the corporate entity, and it is nearly impossible to connect it to a different employee’s later discrimination by a different supervisor. Thus, unless individual discrimination is so pervasive that it resembles a de facto RIF, it *should* usually be excluded on prejudice grounds.

A. The Presumptive Relevance of “Me Too” Evidence

Part IV.A argues that courts should find almost all “me too” evidence relevant. Rule 401, as Part IV.A.1 explains, is exceedingly permissive. Part IV.A.2 finds support for the presumptive relevance of “me too” evidence outside of Rule 401. Intuitively, the more claims of discrimination, the more believable the plaintiff’s allegations of mistreatment. More importantly, courts regularly admit evidence of a similar nature. Part IV.A.3 applies these insights to the three types of claims identified and finds relevance forthcoming in all instances.

1. Rule 401 sets a low bar for relevance.

Rule 401 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.”¹³⁷ One notable feature of the rule is

¹³⁶ See *Hunter*, 797 F2d at 1424.

¹³⁷ FRE 401.

the phrase, “any fact that is of consequence.”¹³⁸ Whether a proposition made by either party is “of consequence” is determined by “the substantive law within the framework of the pleadings.”¹³⁹ Thus, a fact is not “of consequence” if its existence has no bearing on the resolution of the case. Second, “having any tendency to make” is not the same thing as actually “making” the existence of any fact more or less probable.¹⁴⁰ The rule thus allows for some degree of speculation. Third, to be relevant, evidence need only make the occurrence of the action more or less probable—not *much* more or *much* less probable. Because the drafters deliberately eschewed a “more stringent requirement,” which they deemed both “unworkable and unrealistic,”¹⁴¹ a fair reading is that “me too” evidence is relevant if an employer’s discrimination against other employees makes it at all more probable that the plaintiff was discriminated against than if no other employees had been. Indeed, the Tenth Circuit, for example, has held that “even a minimal degree of probability . . . that the asserted fact exists is sufficient to find the proffered evidence relevant.”¹⁴² Simply put, Rule 401’s definition of relevancy is “generous” and “favors broad admissibility.”¹⁴³

2. “Me too” evidence is not only objective but also similar to evidence that courts regularly admit.

a) The more claims of discrimination, the less likely the plaintiff’s alleged mistreatment is coincidental or a figment of her imagination.

¹³⁸ The Advisory Committee’s Note indicates that the drafters of the rule sought to avoid “the loosely used and ambiguous word ‘material.’” FRE 401, Advisory Committee’s Note to the 1972 Proposed Rules.

¹³⁹ Michael H. Graham, 1 *Handbook of Federal Evidence* § 401:1 at 324 (West 6th ed 2006).

¹⁴⁰ For this reason, it makes little sense to require, as the Second Circuit essentially did in *Haskell*, that evidence be statistical in nature. See note 64 and accompanying text. Unless she is suing on behalf of a class, the average plaintiff does not have the wherewithal to commission a survey. Even if she did, it is highly doubtful that her employer would volunteer information relating to hiring and firing, or that current employees would speak freely. Admittedly, a few cases of “me too” evidence are not “statistically significant” in the strictest sense. But employers are free to call their own witnesses to counteract this evidence of a “culture of discrimination.” If, alternatively, the concern stems from the number of witnesses, the trial judge always has the discretion to limit cumulative testimony. See *In re Beverly Hills Fire Litigation*, 695 F2d 207, 218 (6th Cir 1979) (noting that under Rule 403, admission of confusing, misleading, and cumulative evidence is “placed within the sound discretion of the trial court”).

¹⁴¹ FRE 401, Advisory Committee’s Note to the 1972 Proposed Rules.

¹⁴² *United States v McVeigh*, 153 F3d 1166, 1190 (10th Cir 1998).

¹⁴³ Christopher B. Mueller and Laird C. Kirkpatrick, 1 *Federal Evidence* § 82 at 391–92 (Lawyer’s Co-op 2d ed 1994).

“Me too” evidence, like all evidence, varies in its probative value¹⁴⁴ — for example, manifestations of discrimination in adverse employment decisions are probably more probative than “stray remarks,” if only because employment actions are usually documented and far more deliberate than offhand comments. Nonetheless, without documentary evidence cataloguing the employer’s alleged discrimination, “me too” evidence is often the difference between a “he said, she said” and a “he said, *they* said” case. “Me too” evidence may not be decisive, but it contributes something entirely different than plaintiffs’ own theories of why they were sanctioned, and their employers’ contradictory accounts.

b) Courts regularly admit equally (and perhaps less) reliable evidence. Its catchy name notwithstanding, is “me too” evidence so different from other evidence? Take “stray remarks” in the workplace:¹⁴⁵ these comments, while generally disfavored,¹⁴⁶ are not just relevant but admissible.¹⁴⁷ They may not receive great weight,¹⁴⁸ but that determination is properly made at the Rule 403 stage—or later, by a jury. If stray remarks are *admissible* (perhaps to prove a supervisor’s state of mind), it is hard to see why “me too” evidence is not at least *relevant*. After all, “me too” evidence is at least as probative as “stray remarks” (often simply an off-color joke overheard by one of the plaintiff’s coworkers) and is often significantly more probative, providing direct evidence of *actual discrimination*.

Likewise, consider the treatment of “similar incident” evidence in product liability cases. Similar incident evidence can involve any number of situations in which the defect alleged by the plaintiff has mani-

¹⁴⁴ Obviously, where the proffered comments or conduct relate to a different class than the plaintiff (for example, a female plaintiff offering “me too” evidence of discrimination against African-Americans), the offering party will be hard pressed to prove relevancy. See *Smith v AVSC Intern, Inc.*, 148 F Supp 2d 302, 310 (SDNY 2001) (noting that the plaintiff cannot withstand a FRCP 12(b)(6) motion in a hostile work environment suit based on harassing acts against other employees unless she belongs to their protected class). But see *Cruz v Coach Stores, Inc.*, 202 F3d 560, 570 (2d Cir 2000) (finding that gender and race discrimination could each exacerbate the effect of the other).

¹⁴⁵ For an example of a “stray remark,” see *Brown v Trustees of Boston University*, 891 F2d 337, 349 (1st Cir 1989) (“[Y]our husband is a parachute, so why are you worried [about job security?]”).

¹⁴⁶ See, for example, *Abdu-Brisson v Delta Air Lines, Inc.*, 239 F3d 456, 468 (2d Cir 2001) (“[T]he stray remarks of a decision-maker, without more, cannot prove a claim of employment discrimination.”).

¹⁴⁷ See *Dandy v United Parcel Service, Inc.*, 388 F3d 263, 272 (7th Cir 2004) (holding that stray remarks may constitute evidence of discrimination if (1) sufficiently connected to the employment decision at issue, (2) made by the decisionmaker, and (3) made close in time to the adverse employment decision).

¹⁴⁸ See *Ezold v Wolf, Block, Schorr & Solis-Cohen*, 983 F2d 509, 545 (3d Cir 1992) (“Stray remarks by non-decisionmakers or by decisionmakers unrelated to the decision process are rarely given great weight.”).

fested itself on another occasion.¹⁴⁹ For example, a plaintiff injured by an exploding coffee pot might seek to introduce evidence of other exploding coffee pots. For their part, courts have held such evidence relevant to prove the existence of a product defect.¹⁵⁰ Of course, discrimination by individuals, no matter how widespread, differs from defects in mass-produced goods, which are by definition “substantially similar.” But the requirement that products be substantially similar is “relaxed” when the purpose is to prove notice of an existing defect¹⁵¹—which, as shown below, is the crucial feature of “me too” evidence. At the very least, then, it is difficult to maintain that “me too” evidence is immaterial (as it must be to be excluded under Rule 401): even if it sometimes has no bearing on the outcome of the case,¹⁵² it has the potential, when aggregated, to demonstrate disparate treatment of a protected group.

Now compare “me too” evidence to typical comparator evidence. Plaintiffs often point to one valid comparator (usually, a similarly situated employee) who was “allegedly treated more favorably, and completely ignore a significant group of comparators who were treated equally or less favorably.”¹⁵³ Even if this cherry picking is a function of the fact that most discrimination is isolated, the comparison to “me too” evidence is illuminating. The plaintiff proffering the “me too” evidence is also singling out a fellow employee—but in a manner that should be far less troubling. After all, there are plenty of subtle but nondiscriminatory reasons a valid comparator might have been treated more favorably than the plaintiff: the comparator might be sharper, have better interpersonal skills, or have a more unique skillset. But there are no good reasons why any woman in the defendant’s em-

¹⁴⁹ Francis H. Hare, Jr. and Mitchell K. Shelly, *The Admissibility of Other Similar Incident Evidence: A Three-step Approach*, 15 Am J Trial Advoc 541, 542 n 3 (1992).

¹⁵⁰ Id at 545 n 15 (citing eight circuit courts and assorted state courts finding such evidence to be relevant).

¹⁵¹ Mueller and Kirkpatrick, *Federal Evidence* § 86 at 447 (cited in note 143) (citing cases holding that even dissimilar incidents can provide notice to the defendants that the products were not safe or had defects).

¹⁵² There are surprisingly few reported cases on irrelevant evidence, perhaps because trial courts so infrequently find evidence irrelevant (as opposed to inadmissible for another reason). For two examples of evidence found irrelevant, see *Taylor v Ameristeel Corp*, 155 Fed Appx 85, 88 (4th Cir 2005) (unpublished) (finding irrelevant certain coworker testimony that supervisors “had smiles on their faces” when other coworkers mocked plaintiff in the workplace); *Chappell v GTE Products Corp*, 803 F2d 261, 268 (6th Cir 1986) (finding irrelevant certain testimony that supervisor said, “Don’t categorize me in that with you,” when another coworker stated, “[W]e old timers know the procedure as to how things operate within the company”).

¹⁵³ *Simpson v Kay Jewelers*, 142 F3d 639, 646–47 (3d Cir 1998) (analogizing that an African-American plaintiff cannot win by singling out one white employee who was treated better, while ignoring other white persons who were treated less favorably than other African-Americans).

ploy should suffer gender-based discrimination at the hands of the employer; whether she is a “better” or “worse” employee than the plaintiff, so essential to the inquiry when a coworker is treated more favorably, is irrelevant when the coworker is discriminated against.

3. Almost all “me too” evidence will clear Rule 401’s low relevance bar.

a) Hostile work environment and RIF claims. Assuming that only a willfully blind employer could fail to notice a hostile work environment or conduct an RIF without at least vetting the list of terminated employees, hostile work environments and discriminatory RIFs are easy cases as far as the relevance determination is concerned. Both suggest discrimination at the institutional level, and a backdrop of company-wide discrimination (or a failure to address it) increases the likelihood that a plaintiff was, in fact, treated differently. That is not to say that “me too” evidence *always* substantially affects the likelihood that these plaintiffs’ claims are true. Then again, it does not have to: Rule 401 does not require compelling evidence, just evidence that makes a plaintiff’s claims slightly more probably true than without it. And all things being equal, the hostile work environment or discriminatory RIF plaintiff with “me too” evidence has a stronger case than the plaintiff without it.

b) Individual discrimination cases. Individual discrimination presents a much closer case. In sorting through the factors that would bear on the relevance of “me too” evidence, it would seem that the smaller (and more geographically condensed) the company, the more relevant any one allegation of discrimination. Similarly, the more contact between the comparative witness and the parties (and the more similar she is to the plaintiff), the more relevant that witness’s testimony would be. And the more temporally proximate the “me too” evidence (and the less dependent the plaintiff’s case is on it), the more relevant it would be.¹⁵⁴ These are commonsense observations, though, and we should expect most cases to meet some but not all of these criteria. Courts should therefore focus on whether the defendant was involved in or knew of any of the decisions affecting the “me too” witness and on whether the earlier firings arose out of the same company-wide policy.

¹⁵⁴ These factors are taken from 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) (providing a list of potential criteria the Court could have instructed lower courts to use in order to define when “me too” evidence should be admissible).

Focusing on the defendant's knowledge, constructive or actual, of the earlier discrimination is advisable for the simple reason that the doctrines of vicarious and official capacity liability treat supervisors as fingers directed by the corporate brain. The plaintiff is not suing her (judgment-proof) supervisor; she is suing her employer. In order to show that discrimination by another employee's supervisor (call him Andy) is relevant to her supervisor's (Bob) alleged discrimination, she has to connect the two. Certainly, supervisors who gossip about how much they enjoy discriminating against their employees are rare. But it is not as if Andy and Bob have nothing to do with one another; they are, after all, employed by the same central decisionmaking body. And decentralized though their company may be, the company must still police its supervisors.

Thus, the critical question becomes whether Andy's misbehavior put management on constructive or actual notice. If it did, then relevance, while an obstacle, should be a surmountable one. It is not just that relevancy is a low bar (though it most certainly is), but that "where there's smoke, there's fire." It might be the case, in other words, that Andy is a singularly bad employee. Or, it might be that the company has fomented a culture of discrimination. To put it in more legal terms, "me too" evidence is relevant to establishing the conduct for which the employer-company faces liability: its complicity in its agent's Title VII violations. Judges should therefore find relevance satisfied and move on to the second prong of admissibility: prejudice.

B. Prejudice and the Classes of "Me Too" Evidence

"Me too" detractors claim that because "me too" evidence is irrelevant, its probative value is necessarily outweighed by its prejudicial effect.¹⁵⁵ Moreover, critics claim that "me too" evidence (even assuming its relevance) is unfairly prejudicial because it imbues circumstantial evidence with an emotional element otherwise lacking and leaves the defendant in the unenviable position of having to choose whether to defend each situation or leave the testimony un rebutted.¹⁵⁶ While there is some merit to these charges, they do not apply with equal force to each type of employment discrimination.

This Comment suggests that in the "me too" context, relevancy and prejudice are a function of the defendant's central knowledge.

¹⁵⁵ See note 7.

¹⁵⁶ Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U Memphis L Rev 823, 828-29 (1999).

After Part IV.B.1 explains why Rule 403 should not be invoked liberally in this context, Part IV.B.2 argues that “me too” evidence is more probative in hostile work environment and RIF than in individual discrimination cases. Evidence of a hostile work environment suggests a company’s indifference to pervasive discrimination, making any resultant prejudice far from unfair. The same is true of discriminatory RIFs because they necessarily require the company’s participation in the selection of employees to be fired. Evidence of individual discrimination, however, merely speaks to the fact that someone else in the company allegedly suffered discrimination. Because juries are likely to focus unduly on salient episodes, such evidence, while relevant, should generally be excluded as unfairly prejudicial. Finally, Part IV.B.3 compares this solution to other existing approaches.

1. The relationship between relevance and probative value.

Rule 403 provides that evidence, although relevant, “may be excluded 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.”¹⁵⁷ The use of the qualifier “substantially” makes clear that the probative value of a given piece of evidence need not outweigh, or even *equal*, the danger of prejudice or confusion. Rather, evidence is to be excluded only if its probative value is “substantially outweighed” by the specified dangers. Moreover, prejudice alone is insufficient; that prejudice must be unfair. The practical effect of this phrasing—which “tilts, as do the rules as a whole, toward the admission of evidence in close cases”¹⁵⁸—is to restrict the application of Rule 403.¹⁵⁹

2. What makes individual discrimination cases different.

a) Hostile work environments. In the typical hostile work environment suit, that the company knew of the “me too” witness’s dis-

¹⁵⁷ FRE 403.

¹⁵⁸ *United States v Moore*, 732 F2d 983, 989 (DC Cir 1984).

¹⁵⁹ See *United States v Morris*, 79 F3d 409, 412 (5th Cir 1996) (“Because Rule 403 requires the exclusion of relevant evidence, it is an extraordinary measure that should be used sparingly.”); *Blancha v Raymark Industries*, 972 F2d 507, 516 (3d Cir 1992) (“Evidence should be excluded under Rule 403 only sparingly since the evidence excluded is concededly probative.”); *Hendrix v Raybestos-Manhattan, Inc.*, 776 F2d 1492, 1502 (11th Cir 1985) (“Because the rule permits the exclusion of relevant evidence only when its probative value is substantially outweighed by the potential for undue harm, the rule favors admissibility of relevant evidence and should be invoked very sparingly to bar its admission.”).

crimination is almost indisputable because the “me too” evidence proffered by the plaintiff goes to the very existence of the hostility alleged. Put differently, a work environment is hostile only if discrimination there is pervasive. This is where “me too” witnesses come in: they demonstrate that the plaintiff was not ultrasensitive—and, by extension, that any reasonable employer would have or should have observed what the plaintiff experienced.

In *Hunter*, for example, the plaintiff alleged that coworkers hid his tools, sabotaged the engines that he was supposed to test, covered workplace surfaces with racial graffiti, and left racially derogatory notes for him and other black workers.¹⁶⁰ Because the “me too” evidence at issue—testimony about racial slurs uttered by a supervisor and that supervisor’s suspension of an African-American worker for a minor infraction¹⁶¹—strongly supported the plaintiff’s allegation of a hostile workplace, it also supported the inference that his employer turned a blind eye to it. After all, a workplace in which three black employees could experience such overt—and persistent—discrimination is not one whose alleged hostility should surprise management, especially when that discrimination was brought to management’s attention.¹⁶²

The harder question, though, is whether that evidence was unfairly prejudicial—or, more precisely, so unfair as to warrant exclusion. Arguably, “me too” evidence is prejudicial the same way prior bad acts are.¹⁶³ But the defendant’s *employees’* prior bad acts are not the defendant’s prior bad acts (at least not where the defendant is not vicariously liable). Moreover, Rule 404(b) *allows* evidence of bad acts to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”¹⁶⁴ Because evidence of a hostile work environment suggests a company’s “intent” to discriminate (or permit discrimination) at the institutional level,¹⁶⁵ as well as its failure to promptly correct any harassing behavior,¹⁶⁶ whatever prejudice it occasions does not substantially outweigh its probative value.

b) RIFs. Different considerations counsel the same result in a typical RIF case. Take *Mendelsohn*, where five ex-employees, all in the plaintiff’s protected class (the forty-and-over age group), were ready

¹⁶⁰ 797 F2d at 1420.

¹⁶¹ *Id.* at 1423.

¹⁶² *Id.* at 1420 (“Although Hunter complained repeatedly to his supervisors, there is evidence that they failed to take more than half-hearted measures to stop the harassment.”).

¹⁶³ FRE 404(b).

¹⁶⁴ See *Hunter*, 797 F2d at 1424, citing FRE 404(b).

¹⁶⁵ See, for example, *Goldsmith*, 513 F3d at 1286.

¹⁶⁶ See text accompanying notes 38–39.

to testify that they had been victims of the same discrimination as the plaintiff.¹⁶⁷ Ostensibly, the layoffs were triggered by a recession in the telecom industry. And six employees represent an infinitesimal percentage of the 15,000 workers laid off. But the fact that the plaintiff's supervisor had the good sense not to fire five fifty-year-old employees (or did not have five to choose from, or only needed to eliminate three positions) does not mean that the plaintiff herself was not discriminated against. Indeed, the selection of five fifty-year-olds from five different divisions might be mere coincidence.¹⁶⁸ But it might, just as plausibly, evince discrimination at the corporate (as opposed to supervisory) level.¹⁶⁹ Where the employer is alleged not only to have known of the earlier discrimination, but also to have *participated* in it by choosing the employees to be terminated or by approving the selections of its supervisors, the prejudice to the defendant is hardly unfair.¹⁷⁰ Recall that the plaintiff is seeking to hold her employer vicariously liable for the actions of its employees. The more actions it ignored, the more probative each allegation—and the less unfair the resultant prejudice.

c) *Individual discrimination.* That leaves individual discrimination cases. As alluded to above, “me too” evidence in these suits should usually be found relevant—but rarely will its relevance be overwhelming. That is largely because the inference of knowledge is not nearly as automatic. In *Schrand*, for example, the plaintiff and the “me too” witnesses neither shared a supervisor, nor worked in the

¹⁶⁷ 128 S Ct at 1143.

¹⁶⁸ This inference becomes stronger as the relationship among the divisions gets more convoluted. Consider *Wyvill*, 212 F3d at 302 (noting that the plaintiff's employer was a separately incorporated entity with different management than that of the other former employees).

¹⁶⁹ See *Goldsmith*, 513 F3d at 1286 (holding that “me too” evidence is admissible under Rule 404(b) “to prove the intent of [the defendant] to discriminate and retaliate”); *Buckley v Mukasey*, 538 F3d 306, 319 (4th Cir 2008) (interpreting Rule 404(b) to allow “evidence of other wrongs for purposes such as proof of motive and intent”); *Ross v Baldwin County Board of Education*, 2008 WL 2020470, *2 (SD Ala) (noting in dicta that “as a general matter, a supervisor's treatment of other employees may be relevant and admissible . . . to show that supervisor's state of mind, intent or motive for certain employment-related acts against the plaintiff”); *Spulak*, 894 F2d at 1156 (“[T]he testimony of other employees about their treatment by the defendant is relevant to the issue of the employer's discriminatory intent.”).

¹⁷⁰ Professor David Gregory predicts that after *Mendelsohn*, plaintiffs and defendants will “begin assembling armies of ‘me too’ witnesses.” Gregory, 102 Nw U L Rev Colloquy at 385 (cited in note 10). While at least one district court has allowed the defendant to introduce evidence of its *nondiscriminatory* and *nonretaliatory* behavior, see *Elion v Jackson*, 544 F Supp 2d 1, 8 (DDC 2008), it seems likely that juries would discount the defendant's testimony. For one thing, within any organization, there are always going to be more people who are not discriminated against than people who are. For another, the cooperation of current employees is almost inherently suspect, owing to the considerable stick that employers wield over them.

same division or region, nor were terminated in the same RIF.¹⁷¹ They were, rather, three employees who happened to have been fired by one big company. Admitting the plaintiff's evidence when each decision appeared to have been made independently would have posed an impossible choice to the defendant: contest the witness's account (thereby creating a trial within a trial), or ignore it altogether (thereby conceding the earlier discrimination).

Admittedly, though, employers face this very dilemma in RIF and hostile work environment cases, where this Comment contends that any resulting prejudice is not unfair. The difference is that allegedly hostile work environments and discriminatory RIFs create a backdrop of discrimination (or a failure to address it) at an institutional level. "Me too" evidence of discrimination at an *individual* level, if the company is even aware of it, at most speaks to the fact that someone else in another part of the company allegedly suffered discrimination. While the mere chance that the employer knew its supervisors were interpreting company policy illegally may propel "me too" evidence over Rule 401's low relevance bar, the prejudicial effect of this barely relevant evidence substantially outweighs its probative value. In other words, "me too" evidence operates on a sliding scale: the more awareness by the employer, the less unfair the prejudice to it. The prejudicial effect of individual discrimination, like all "me too" evidence, is high—implying, as it does, that *of course* an employer that has discriminated once will discriminate again. And it is also unfair: a company, which may not even have been *aware* of three dots drawn in the span of months (or years), should not be called to account for its failure to connect them, unlike a company that, for example, ignores racial graffiti in the bathroom.

In that sense, individual discrimination presents many of the same problems as similar-incident evidence. In *Kelsay v Consolidated Rail Corp.*,¹⁷² for example, the Seventh Circuit held that the trial court was right to exclude evidence of two railroad crossing accidents because, although relevant, they involved significantly different facts and were therefore confusing, misleading, and potentially unfairly prejudicial to defendants.¹⁷³ Indeed, "me too" evidence in individual discrimination suits is analogous to prior bad acts, which are generally excluded, as in *Kramas v Security Gas & Oil, Inc.*,¹⁷⁴ a Ninth Circuit case holding that

¹⁷¹ 851 F2d at 156.

¹⁷² 749 F2d 437 (7th Cir 1984).

¹⁷³ *Id.* at 444–45.

¹⁷⁴ 672 F2d 766 (9th Cir 1982).

the trial judge in a private securities action did not err in excluding evidence of an earlier SEC consent decree because the evidence had limited probative value and substantial prejudicial impact.¹⁷⁵

Of course, that raises the question, why does “me too” evidence run afoul of Rule 404(b) in this context and not in the hostile work environment context? The key difference, as in the relevance discussion earlier, is what one can infer from the company’s passivity. When a company does not act to remedy pervasive discrimination, its studied indifference is discriminatory. Likewise, when a company approves a list of employees to be terminated in an RIF, a suspicious number of which belong to the same protected class, it is discriminating via a wink and a nod. But when a company fails to reprimand a supervisor in the sales division, it is a stretch to claim that it is intentionally, or even negligently, sanctioning discrimination in the operations division. This is not to say that the prejudicial value of individual discrimination *always* outweighs its probative value. Rather, when evidence of individual discrimination is so pervasive that it starts to look like a de facto RIF (whether that means three, five or some other number of employees is for the court to say), its probative value increases accordingly. Employers may get one free bite, but they should not get a dozen.

3. Advantages of this Comment’s proposed framework.

To date, courts have tended to analyze “me too” evidence through the lens of the “similarly situated” and “pattern or practice” standards. For courts denying the relevance of “me too” evidence, the inquiry centers on whether the plaintiff and the additional employee were similarly situated.¹⁷⁶ In a variation on the Sixth Circuit’s widely accepted test,¹⁷⁷ the Seventh Circuit defines a “similarly situated” employee as someone who is “directly comparable to [the plaintiff] in all

¹⁷⁵ *Id.* at 772.

¹⁷⁶ See *Schrand*, 851 F2d at 156 (“The fact that two employees of a national concern, working in places far from the plaintiff’s place of employment, under different supervisors, were allegedly told they were being terminated because they were too old, is simply not relevant to the issue in this case.”); *Wyvill*, 212 F3d at 302 (“Anecdotes about other employees cannot establish that discrimination was a company’s standard operating procedure unless those employees are similarly situated to the plaintiff.”); *Johnson v Big Lots Stores, Inc.*, 253 FRD 381, 387 (ED La 2008) (allowing the defendant to introduce evidence of similarly situated assistant store managers who declined to opt in to the plaintiffs’ class action).

¹⁷⁷ See *Mitchell v Toledo Hospital*, 964 F2d 577, 583 (6th Cir 1992) (requiring that comparables be similarly situated “*in all respects*”).

material respects.”¹⁷⁸ Just what constitutes “all material respects,” however, is left to the discretion of the trial courts.¹⁷⁹

Courts more favorably inclined toward “me too” evidence sometimes look to whether it establishes a pattern or practice of discrimination.¹⁸⁰ A “pattern or practice” is not a term of art; it is simply “something more than an isolated, sporadic incident.”¹⁸¹ The problem is, to prove a pattern or practice of discrimination, plaintiffs must essentially prove that it is the employer’s standard business practice. If “me too” evidence must be something more than (seemingly) isolated events, then it is no longer “me too” evidence; it is pattern or practice evidence. And that presents a much higher burden.

Assuming that “me too” evidence is almost always admissible in hostile work environment and RIF cases, but not in individual discrimination cases, offers two key advantages over the above approaches. First, it is more predictable than ad hoc judge-by-judge analyses under Rules 401 and 403. Where, for example, the evidentiary inquiry hinges on whether the plaintiff and the would-be witness were similarly situated, it is next to impossible to predict if “me too” evidence will come in. Second, this Comment’s proposed framework is more flexible and thus fairer than a per se rule in either direction. The Fifth Circuit’s rule is undoubtedly underinclusive. By excluding all non-simultaneous “me too” evidence of discrimination,¹⁸² it protects supervisors who habitually discriminate. The Eighth Circuit’s rule, meanwhile, is overinclusive. By admitting seemingly all evidence of “past discriminatory policy and practice,”¹⁸³ it grants an evidentiary windfall to plaintiffs who can scrounge up a terminated employee from their

¹⁷⁸ *Patterson v Avery Dennison Corp.*, 281 F3d 676, 680 (7th Cir 2002) (listing such factors as whether the employees “dealt with the same supervisor and were subject to the same standards” and whether they had “comparable experience, education and qualifications”).

¹⁷⁹ See, for example, *Graham v Long Island Rail Road*, 230 F3d 34, 40 (2d Cir 2000):

What constitutes “all material respects” [] varies somewhat from case to case and . . . must be judged based on (1) whether the plaintiff and those he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness.

¹⁸⁰ See *Hawkins*, 900 F2d at 155–56 (reasoning that an employer’s “past discriminatory policy and practice may well illustrate that employer’s asserted reasons for disparate treatment are a pretext for intentional discrimination”).

¹⁸¹ 110 Cong Rec 14270 (June 18, 1964) (statement of Sen Hubert Humphrey).

¹⁸² See *Wyvill*, 212 F3d at 302 (“[T]estimony from former employees . . . whose terminations were removed in time from the plaintiff’s termination cannot be probative of whether age was a determinative factor in the plaintiff’s discharge.”).

¹⁸³ See *Hawkins*, 900 F2d at 155–56 (reasoning that “me too” evidence may reveal the employer’s asserted reasons for disparate treatment as pretextual).

protected class, no matter how distant the relation. Under this Comment's approach, there would be winners and losers. But there would also be a principled basis for those outcomes.¹⁸⁴

* * *

In sum, this Comment suggests, first, that courts should almost always find "me too" evidence relevant,¹⁸⁵ and second, that the type of discrimination alleged should inform their prejudice analysis. Without proposing per se rules, this Part has argued that evidence of hostile work environments and discriminatory RIFs should not generally be found unfairly prejudicial under Rule 403; evidence of individual discrimination should.

CONCLUSION

Evidentiary hurdles, no less than judicially imposed substantive elements and scornful judges, make it that much harder for potentially meritorious employment discrimination suits to go forward. As the Seventh Circuit has aptly put it:

The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were a different race, sex, religion, or national origin, but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for . . . firing . . . a worker who is not superlative.¹⁸⁶

Given the infrequency of direct evidence of discrimination, it is dangerous indeed to exclude "probative evidence because of crabbed notions of relevance or excessive mistrust of juries."¹⁸⁷

Along these lines, this Comment has argued that because relevance is a purposefully low bar, almost all "me too" evidence should be found relevant. A contrary presumption would not only violate the first principles animating the Rules of Evidence, but also deprive ju-

¹⁸⁴ To be sure, for all *Mendelsohn's* ambiguities, its rejection of broad per se rules in the evidentiary context was clear. But this Comment's presumptions are not nearly as broad as those of the Fifth and Eighth Circuits, for example. It is also true that circuit courts reviewing evidentiary rulings for abuse of discretion will inevitably affirm some bad decisions. That does not mean, however, that we should forego *this* opportunity to mitigate lower courts' eccentricities.

¹⁸⁵ Arguably "me too" evidence regarding a totally different sort of discrimination—such as testimony alleging age bias in a sex discrimination suit—raises legitimate probity questions. See note 144.

¹⁸⁶ *Riordan v Kempiners*, 831 F2d 690, 697–98 (7th Cir 1987).

¹⁸⁷ *Id* at 698.

ries of evidence that may, on the whole, be every bit as reliable as evidence that is regularly admitted.

That said, relevance is not to be conflated with admissibility. Thus, this Comment contends that “me too” evidence is almost never more prejudicial than probative in hostile work environment and RIF cases. The more evidence of discrimination, the more likely that the plaintiff’s work environment was generally hostile and that the company’s failure to address this hostility was symptomatic of employer-wide discrimination. And the more employees of a protected class terminated in one RIF, the more likely that their selection was motivated by discriminatory animus sanctioned (or ignored) by the employer. This logic breaks down, however, where one supervisor targets one employee. Not only was the corporate entity likely unaware of that discrimination, but it is exceedingly difficult to connect it to a different supervisor’s discrimination of a different employee. Barring widespread individual discrimination, then, most evidence of individual discrimination will clear Rule 401, but run afoul of Rule 403.

Such a Solomonic approach would leave neither plaintiffs nor employers completely satisfied. It would, however, render rulings on “me too” evidence more predictable, more fair, and more in line with Title VII.