

## Supreme Court Refuses to Bar Co-Workers' "Me, Too" Testimony in Discrimination Cases

On February 26, 2008, the United States Supreme Court issued its long-awaited decision in *Sprint/United Management Co. v. Ellen Mendelsohn*, No. 06-1221. Employers had hoped that the case would provide a categorical rule barring so-called "me, too" testimony—that is, testimony offered by a plaintiff's co-workers who are not parties to the suit, claiming discrimination by different supervisors who had no role in the challenged employment decision. Instead, the Supreme Court held that trial court judges have discretion to admit or exclude such testimony, depending on the particular facts of the case. The Court's decision is problematic for employers, because it leaves open the door to inflammatory, hard-to-refute testimony by disgruntled co-workers in employment discrimination cases.

Ellen Mendelsohn was laid off as part of a reduction-in-force at Sprint's headquarters in Overland Park, Kansas. She sued Sprint under the Age Discrimination in Employment Act (ADEA), claiming that she was released because of her age. Just before trial, Mendelsohn indicated that she planned to offer the testimony of five other employees about alleged age discrimination at Sprint. None of the five worked in Mendelsohn's group, and none of their proffered testimony concerned the supervisors who allegedly discriminated against Mendelsohn. Sprint moved to exclude the testimony, arguing that it was irrelevant and would be unduly prejudicial to the jury.

The trial court agreed with Sprint and excluded the employees' testimony. The court of appeals disagreed, and held that the testimony was relevant and admissible. The Supreme Court then heard the case, but it took no position on whether the five employees could testify. Instead, it held that the trial court had discretion to admit or exclude the testimony, but had to provide a better explanation of its ruling, based on the Federal Rules of Evidence. The Supreme Court returned the case to the trial court for such an explanation.

As a practical matter, the Supreme Court's decision likely means that the employer won the day. In this particular case, the co-workers' "me, too" testimony likely will be excluded. But in the long run, the decision represents a victory for plaintiffs in employment discrimination suits. The Supreme Court rejected a categorical rule excluding testimony by co-workers describing alleged discrimination by different supervisors. Even more troublingly, the Court provided no guidance to trial courts as to how they should weigh the probative value of "me, too" testimony against the prejudice it may create against the employer. Thus, a trial judge may permit disgruntled

co-workers to take the stand and testify about unrelated incidents of alleged discrimination. The only check on such a decision is an appeal under the very demanding "abuse of discretion" standard.

It is difficult to predict precisely how the *Mendelsohn* decision will affect employment litigation. Certainly, it will make some jury trials much more complicated. It may also be harder for employers to prevail on summary judgment, meaning that more discrimination cases will actually make it to trial. In any event, the looming possibility of testimony by disaffected co-workers is one more wrinkle that employers and counsel must consider at every stage of an employment discrimination lawsuit.

Should you have any questions concerning this article, contact Brett Harvey at [brett.harvey@phelps.com](mailto:brett.harvey@phelps.com) or 601-360-9721.

## eLABORate

Inquiries concerning topics addressed in the *eLABORate* may be directed to any of our Employment Law attorneys:

### Jackson, Mississippi

Joseph L. Adams	<a href="mailto:adamsjo@phelps.com">adamsjo@phelps.com</a>	(601) 360-9708
Deborah Shelby Dees	<a href="mailto:deesd@phelps.com">deesd@phelps.com</a>	(601) 360-9334
Gary E. Friedman	<a href="mailto:friedmag@phelps.com">friedmag@phelps.com</a>	(601) 360-9355
Paul O. Miller, III	<a href="mailto:millerp@phelps.com">millerp@phelps.com</a>	(601) 360-9350
W. Thomas Siler, Jr.	<a href="mailto:silert@phelps.com">silert@phelps.com</a>	(601) 360-9357
Mark Fijman	<a href="mailto:fijmanm@phelps.com">fijmanm@phelps.com</a>	(601) 360-9716
Kenneth G. Fairly	<a href="mailto:fairlyk@phelps.com">fairlyk@phelps.com</a>	(601) 360-9705
W. Brett Harvey*	<a href="mailto:brett.harvey@phelps.com">brett.harvey@phelps.com</a>	(601) 360-9721
LaToya C. Merritt	<a href="mailto:merrittl@phelps.com">merrittl@phelps.com</a>	(601) 360-9749
Seale Pylate	<a href="mailto:pylates@phelps.com">pylates@phelps.com</a>	(601) 360-9342
Sandra Brown Strong	<a href="mailto:browns@phelps.com">browns@phelps.com</a>	(601) 360-9729
Tori L. Winfield	<a href="mailto:winfietl@phelps.com">winfietl@phelps.com</a>	(601) 360-9366

### Baton Rouge, Louisiana

Susan W. Furr	<a href="mailto:furrs@phelps.com">furrs@phelps.com</a>	(225) 376-0230
Karleen J. Green	<a href="mailto:greenk@phelps.com">greenk@phelps.com</a>	(225) 376-0244
Thomas H. Kiggans	<a href="mailto:kigganst@phelps.com">kigganst@phelps.com</a>	(225) 376-0247
Jessica Coco	<a href="mailto:jessica.coco@phelps.com">jessica.coco@phelps.com</a>	(225) 376-7954
Mimi Flowers Plauché	<a href="mailto:plauchem@phelps.com">plauchem@phelps.com</a>	(225) 376-0279
Betty Burke Uzee	<a href="mailto:betty.uzee@phelps.com">betty.uzee@phelps.com</a>	(225) 376-0235

### New Orleans, Louisiana

M. Nan Alessandra	<a href="mailto:alessann@phelps.com">alessann@phelps.com</a>	(504) 584-9297
Jane E. Armstrong	<a href="mailto:armstroj@phelps.com">armstroj@phelps.com</a>	(504) 584-9244
Kim M. Boyle	<a href="mailto:boylek@phelps.com">boylek@phelps.com</a>	(504) 679-5790
David M. Korn	<a href="mailto:kornd@phelps.com">kornd@phelps.com</a>	(504) 584-9374
Brandon Davis	<a href="mailto:brandon.davis@phelps.com">brandon.davis@phelps.com</a>	(504) 584-9312
Taryn Southon Nunes	<a href="mailto:nunest@phelps.com">nunest@phelps.com</a>	(504) 584-9383
Maryjo Roberts	<a href="mailto:maryjo.roberts@phelps.com">maryjo.roberts@phelps.com</a>	(504) 584-9262

### Tampa, Florida

Jolee Land	<a href="mailto:jolee.land@phelps.com">jolee.land@phelps.com</a>	(813) 472-7857
Dennis M. McClelland	<a href="mailto:dennis.mcclelland@phelps.com">dennis.mcclelland@phelps.com</a>	(813) 472-7865
John David Mullen	<a href="mailto:john.mullen@phelps.com">john.mullen@phelps.com</a>	(813) 472-7867
John E. Phillips	<a href="mailto:john.phillips@phelps.com">john.phillips@phelps.com</a>	(813) 472-7863
Miguel B. Bouzas	<a href="mailto:miguel.bouzas@phelps.com">miguel.bouzas@phelps.com</a>	(813) 472-7752

\*Contributing Author

All rights reserved. Phelps Dunbar LLP *eLABORate* is published as a service to clients and friends of Phelps Dunbar LLP and should not be construed as legal or professional advice or as opinion on specific fact.