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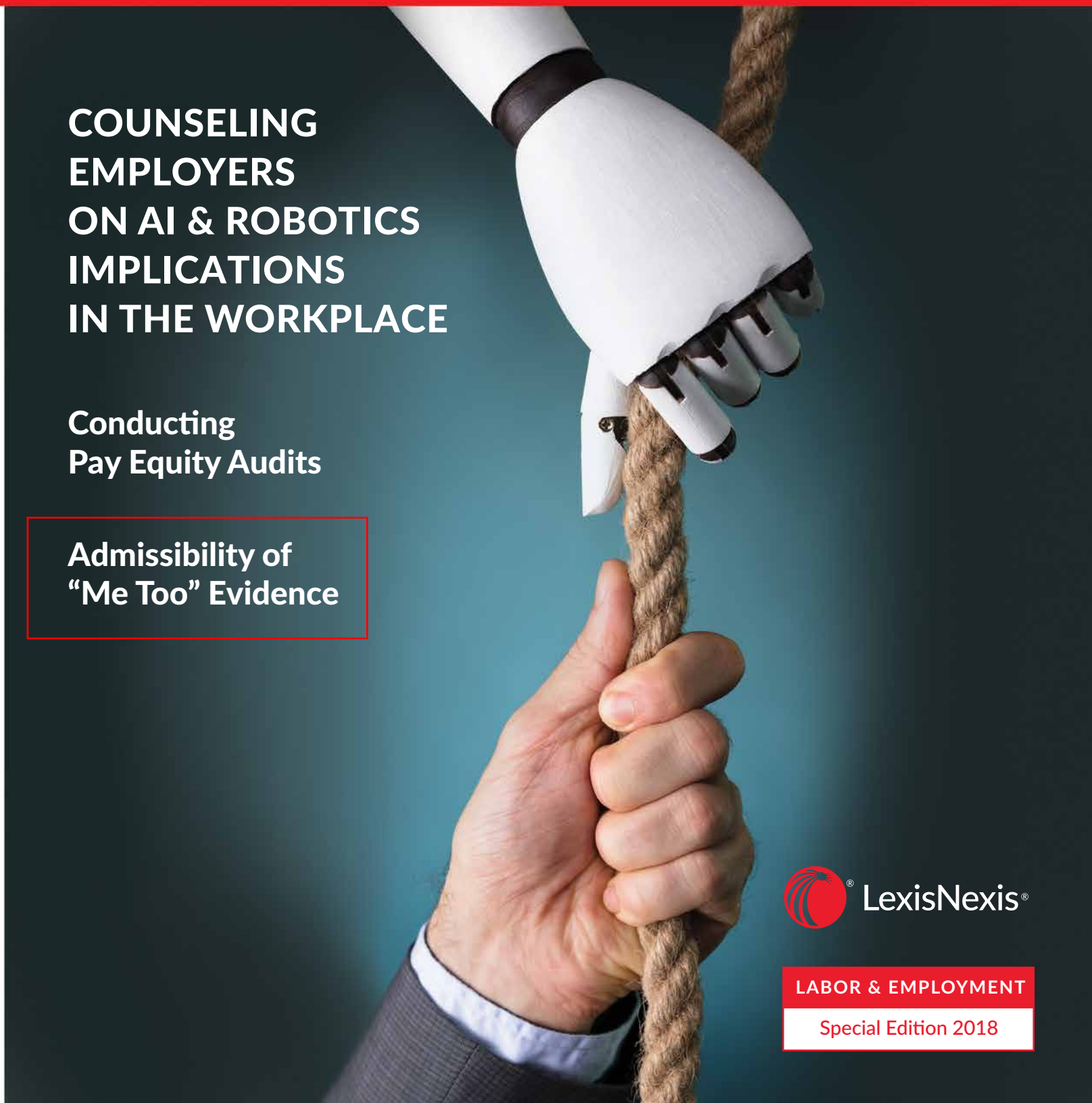

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Contents

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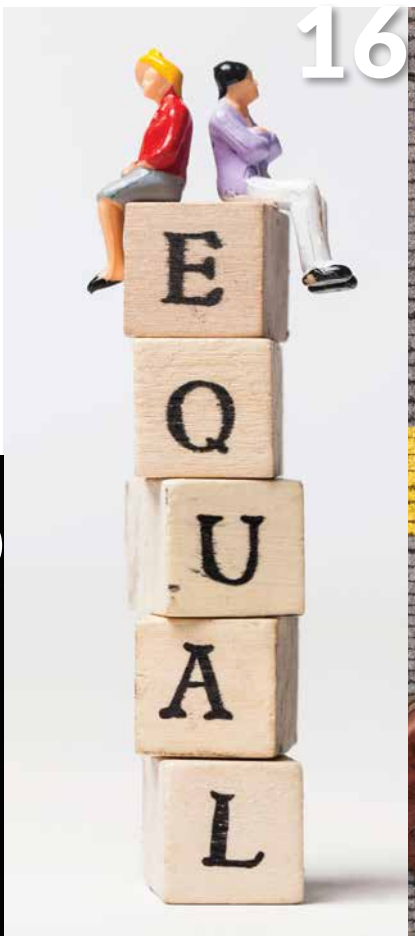

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Admissibility of "Me Too" Evidence

Introduction

In early Fall 2017, the #MeToo campaign exploded into a movement across social media demonstrating the prevalence of sexual assault and harassment in the workplace. Countless public revelations of sexual misconduct allegations against Hollywood producer Harvey Weinstein and other well-known powerful men ignited the movement, exposing the cover-up and tolerance of sexual harassment, and even assault, in some workplaces as a longstanding cultural norm that must be addressed and changed. In the present social, political, and legal climate, the phrase "me too" has more powerful cultural and personal resonance than ever before. While the phrase holds cultural significance in today's society, it has long held legal significance in the litigation of discrimination and harassment claims. "Me too" evidence is often used in civil litigation to show that others have experienced the same actions and claims as those alleged by a plaintiff. Finding such evidence, establishing its admissibility, and using it effectively confounds both plaintiff and defendant employment lawyers. But it can be an effective litigation tool—for either party.

Admissibility of "Me Too" Evidence in Federal Courts

Most sexual harassment and discrimination claims rely on circumstantial evidence. Direct evidence can be elusive in such cases, where eyewitnesses and incriminating documents are rare. For these reasons, "me too" evidence—other instances of discrimination or harassment against other employees by the alleged harasser or the same employer—may be proffered by the plaintiff in an effort to show a pattern or practice of misconduct to prove, or at least bolster, discrimination or harassment claims.

Whether such "me too" evidence is admissible or even relevant to the claims brought by a plaintiff turns on many factors, including the very facts of the discrimination and harassment.

The admission of "me too" evidence in federal courts also depends on where it falls under the Federal Rules of Evidence. Fed. R. Evid. 404(b)(2) provides that evidence of a crime, wrong, or other act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Because motive, intent, and state of mind are directly at issue in employment discrimination claims, "me too" or propensity evidence may be properly admitted under Fed. R. Evid. 404(b)(2) under certain circumstances. Other relevant parts of the Federal Rules of Evidence with respect to "me too" or propensity evidence include Fed. R. Evid. 401 (Test for Relevant Evidence) and Fed. R. Evid. 403 (Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons).

Despite the Federal Rules of Evidence, the federal courts, including the U.S. Supreme Court, offer little guidance as to when "me too" evidence is admissible. In *Sprint/United*

Management Co. v. Mendelsohn,[1] the plaintiff, Ellen Mendelsohn, was terminated from her employment as part of a reduction in force. Mendelsohn sued her employer, Sprint/United Management Co. (hereinafter Sprint), alleging that she was selected for layoff because she was over 40 years old. In support of her age discrimination claim, Mendelsohn sought to admit testimony from five other employees who claimed they were subject to discrimination and harassment based on their ages—over 40. In seeking to exclude the evidence, Sprint argued that the witnesses were not similarly situated to the plaintiff. They did not share the same supervisor, and the alleged discriminatory conduct against the five witnesses was remote in time from Mendelsohn's termination. For these reasons, the trial court refused to admit the evidence. The U.S. Court of Appeals for the Tenth Circuit reversed, holding that while a "similarly situated" limitation on admissibility was appropriate in a discriminatory discipline case, it was not per se grounds for exclusion of evidence if there was a company-wide policy of discrimination.

The Tenth Circuit then reviewed and determined that Mendelsohn's proposed "me too" evidence was relevant. As a result, the appellate court reversed the trial court and remanded the case for a new trial with instructions to admit the challenged testimony. The U.S. Supreme Court disagreed. The Court found that the Tenth Circuit should have remanded the case to the trial court for a further explanation of its findings and, absent an abuse of discretion, deferred to the trial court's judgment respecting the evidentiary issues. In so finding, the Court stated: "We conclude that such ['me too'] evidence is neither *per se* admissible nor *per se* inadmissible."[2] In other words, whether evidence of discrimination (or harassment) by other supervisors is relevant and admissible in an individual case is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."[3]

Following *Mendelsohn*, one district court delineated a four-factor test to use when considering the admission of "me too" evidence.[4] The test considers (1) whether past discriminatory or retaliatory behavior is close in time to the events at issue in the case, (2) whether the same decision-maker was involved, (3) whether the witness and the plaintiff were treated in the same manner, and (4) whether the witness and plaintiff were otherwise similarly situated.[5] Similarly, a few years later in *Griffin v. Finkbeiner*,[6] the U.S. Court of Appeals for the Sixth Circuit outlined factors to consider in determining the admissibility of "me too" evidence, mirroring the *Hayes'* court's test.

OTHER FEDERAL COURTS HAVE ALSO FOUND THAT "ME TOO" EVIDENCE MAY BE RELEVANT IN CERTAIN CIRCUMSTANCES, BASED ON THE FACTS AND THEORY OF THE CASE.

Other federal courts have also found that "me too" evidence may be relevant in certain circumstances, based on the facts and theory of the case. For example, in *Goldsmith v. Bagby Elevator Co.*, the U.S. Court of Appeals for the Eleventh Circuit rejected the defendant-employer's argument that the district court abused its discretion in admitting evidence of discrimination and retaliation against the plaintiff-employee's coworkers.[7] The court found this "me too" evidence was admissible to prove the coworkers' intent to discriminate, relevant to a claim of hostile work environment, and "probative of several issues raised by [the defendant] either on cross-examination or as an affirmative defense."[8]

In *Quigley v. Winter*,[9] the defendant-landlord in a sexual harassment case argued that the district court erred in admitting the testimony of the defendant's former tenants that the defendant also subjected them to sexual harassment. The defendant claimed the testimony of the three tenants was irrelevant because there was no evidence the plaintiff-tenant knew the women or observed any of the events to which they testified.[10] In reaching its decision, the U.S. Court of Appeals for the Eighth Circuit reviewed the Supreme Court's guidance in *Mendelsohn* that the admissibility of "me too" evidence "is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."[11] The Eighth Circuit rejected the defendant's argument, finding that the trial court "properly performed its gatekeeping function" by carefully analyzing the admissibility of the testimony and excluding other witnesses whose testimony was more remote in time.[12]

Recently, a Virginia district court denied an employer's motion in limine to exclude "me too" evidence, finding that "there is no rule that would exclude evidence of other employees simply because the plaintiff has not proven that they qualify as comparators under *McDonnell Douglas*.[13] The court also observed that "[r]elevance 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]

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1. 552 U.S. 379 (2008). **2.** 552 U.S. at 381. **3.** 552 U.S. at 388. **4.** Hayes v. Sebelius, 806 F. Supp. 2d 141 (D.D.C. 2011). **5.** 806 F. Supp. 2d at 144–45. **6.** 689 F.3d 584 (6th Cir. 2012). **7.** 513 F.3d 1261, 1285 (11th Cir. 2008). **8.** 513 F.3d at 1285–87. **9.** 598 F.3d 938, 951 (8th Cir. 2010). **10.** 598 F.3d at 951. **11.** 598 F.3d at 951 (quoting *Mendelsohn*, 552 U.S. at 388). **12.** 598 F.3d at 951. **13.** Emami v. Bolden, 241 F. Supp. 3d 673, 688 (E.D. Va. 2017); *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). **14.** 241 F. Supp. 3d at 688.

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For a sample complaint that alleges claims of sexual harassment, see

> SEXUAL HARASSMENT AND EMOTIONAL DISTRESS COMPLAINT (WITH JURY DEMAND)

RESEARCH PATH: *Labor & Employment > Employment Litigation > Discrimination and Retaliation > Forms*

Admissibility of "Me Too" Evidence in California

In California, the admissibility of "me too" evidence can be more expansive. In *Pantoja v. Anton*,[15] the plaintiff, Lorraine Pantoja, worked as a legal secretary for attorney Thomas J. Anton and his firm, Thomas Anton & Associates. Following her employment termination, Pantoja sued for race and sex discrimination, as well as sexual harassment. Pantoja claimed her supervisor inappropriately touched and slapped her, referred to his employees as "my Mexicans," and, among other things, asked for a back massage. At trial, Pantoja attempted to introduce the testimony of witnesses who had experienced the same and similar behavior from the supervisor. But the trial court excluded the evidence since Pantoja had not personally witnessed the other alleged acts of harassment and discrimination. After the jury found for the employer, the plaintiff appealed. The California Court of Appeal reversed and held evidence that the supervisor had harassed other employees outside the plaintiff's presence could have shown the supervisor harbored a discriminatory intent based on gender and would allow the jury to evaluate the credibility of the defendant and his witnesses who denied the discrimination and harassment.

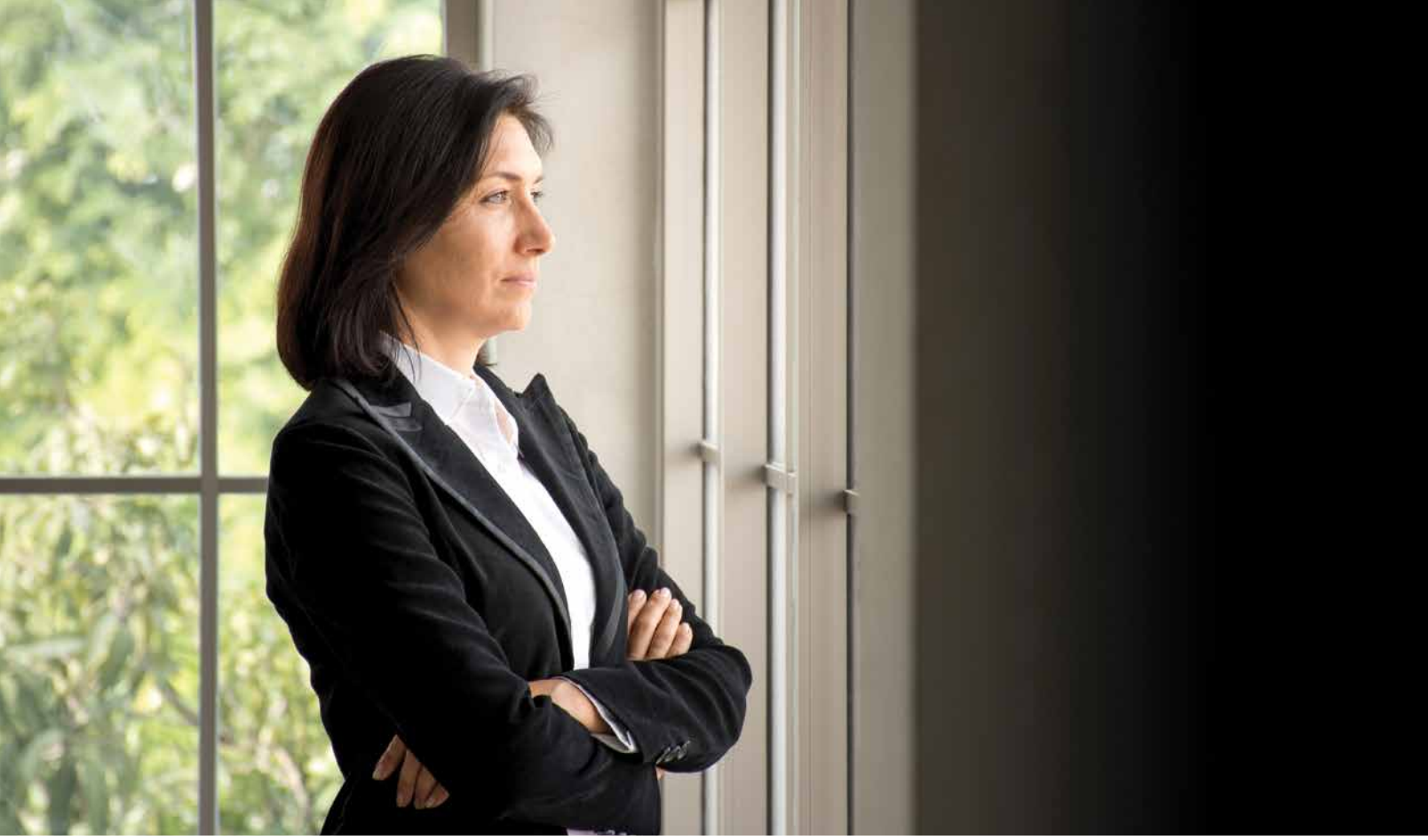
While the *Pantoja* court expanded the admissibility of "me too" evidence, the California Court of Appeal in *Hatai v. Department of Transportation*[16] held that such evidence is subject to some limits. In *Hatai*, the plaintiff, Kenneth Hatai, initially alleged that he was discriminated against by his supervisor because of his Asian race and Japanese national origin. At the time of trial, Hatai sought to expand his claims by arguing that his supervisor, an Arab, discriminated against all employees who were not of Arab descent. The Department of Transportation moved in limine to exclude any evidence that the supervisor had discriminated against non-Asians, arguing that the discrimination against employees of non-Arab descent was not the claim Hatai had pled. The trial court agreed, and limited the "me too" evidence to employees subject to alleged anti-Asian discrimination. The appeals court agreed, holding that the evidence of anti-Arab discrimination or harassment was not sufficiently related to Hatai's anti-Asian and anti-Japanese claims. The court distinguished its prior ruling in *Pantoja* because the "me-too" evidence in *Pantoja* came from individuals who were within the same protected classes alleged by the plaintiff. However, the court also observed that evidence of discrimination against protected classes different from the plaintiff's may be admissible in other contexts, such as where favoritism of one protected class has an adverse effect on other protected classes.

Conclusion

"Me too" evidence can significantly impact either party's likelihood of prevailing in employment discrimination and harassment actions. As employment discrimination and harassment cases increase, especially in today's political and social climates, "me too" evidence must be considered by both plaintiffs' and defense counsel:

- Keep in mind the basics of admissibility of any evidence. "Me too" evidence is relevant if it has a tendency to make it more or less likely that an employer acted with discriminatory intent. If other employees claim they suffered from discrimination and harassment, is it more likely than not that the plaintiff did as well? Does the relevance of such evidence outweigh the danger of undue prejudice to the defendant? Be prepared to offer a careful step-by-step analysis on the admissibility or inadmissibility of the evidence.

15. 198 Cal. App. 4th 87 (2011). **16.** 214 Cal. App. 4th 1287 (2013), overruled on other grounds, Williams v. Chino Valley Independent Fire Dist., 61 Cal. 4th 97 (2015).



- Be specific on the evidence you want admitted or excluded. An attempt to admit or exclude broadly defined evidence is not compatible with *Mendelsohn* or the cases that followed.
- Use laser-focused discovery to learn specific facts and expected witnesses.
- Look at pattern and practice issues. These can raise "me too" evidence.
- Defendants can look at "not me too" evidence. Defendant can rebut plaintiffs' "me too" evidence by showing the plaintiff was the only one to complain or allege discrimination and harassment, and such policies and behavior did not pervade the workplace.
- Defendants need to consider the undue prejudice and confusion arguments. Admitted "me too" evidence of other employees could confuse the jury and result in a trial within a trial where the defendant is forced to defend or produce evidence regarding someone other than the plaintiff.

Of course, whether a trial court will consider, or how it will rule on, "me too" evidence is still unsettled. With the #MeToo movement in full force, expect "me too" evidence to be raised in the future.

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