

Comments

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The “Not Me Too” Evidence Doctrine in Employment Law: Courts’ Disparate Treatment of “Me Too” Versus “Not Me Too” Evidence in Employment Discrimination Cases

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INTRODUCTION

Employment discrimination claims can present challenging problems of proof. Indeed, it is a rare occurrence when a plaintiff can produce direct evidence of an employer's intent to discriminate.¹ As a result, a plaintiff must rely on circumstantial evidence to show that an employer's proffered reason for an adverse employment action was either false or pretextual. Often, such circumstantial evidence is presented in the form of "me too" evidence. So-called "me too" evidence allows the plaintiff to present testimony of other employees to demonstrate that an employer discriminated against similarly situated individuals. "Me too" evidence has proven to be a powerful tactic for plaintiffs and, consequently, a serious threat to employers.

While "me too" evidence has received significant attention among scholars, the possibility of "not me too" evidence has been continuously overlooked. "Not me too" evidence, that is, evidence that other employees did *not* suffer discrimination, allows an employer to rebut a plaintiff's discrimination claim. Instead, the discussion surrounding "me too" evidence has focused primarily on the threat it poses to employers.² This is certainly a legitimate concern; however, it fails to consider that if an employee may argue "me too," then what is preventing an employer from offering "not me too" evidence? While some scholars and practitioners have caught on, for the most part, the concept of "not me too" evidence has received minimal attention.³ As a result, courts' treatment of these two forms of evidence has also gone unnoticed.

This Comment focuses on the disparate manner in which courts respond to "me too" versus "not me too" evidence. Specifically, this

¹ See, e.g., *Coghlan v. Am. Seafoods Co.*, 413 F.3d 1090, 1100 (9th Cir. 2005) ("Employment discrimination cases inevitably present difficult problems of proof, precisely because we cannot peer into the minds of decisionmakers to determine their true motivations."); see also *Artega v. Brink's, Inc.*, 163 Cal. App. 4th 327, 342 (2008) (noting that plaintiffs rarely produce direct evidence or "smoking gun" evidence of discrimination).

² See generally Emily D. Wilson, *Sprint/United Management Co. v. Mendelsohn: Tenth Circuit Employment Law Remains in "Me Too" Limbo*, 63 OKLA. L. REV. 167, 185 (2010) (discussing how "me too" evidence has the "potential to generate lengthier trials, increase the expense of litigation, and reduce the overall efficiency of the legal system"); see also Mitchell H. Rubinstein, *Sprint/United Management Co. v. Mendelsohn: The Supreme Court Appears to have Punted on the Admissibility of "Me Too" Evidence of Discrimination. But Did It?*, 102 NW. U. L. REV. COLLOQUY 264, 274-75 (2008).

³ See, e.g., Angelina LaPenotiere & Marcus D. Brown, *Admissibility of "Me Too" Evidence in the Post-Mendelsohn Era*, 20 No. 1 PRAC. LITIGATOR 57, 61 (2009); Rubinstein, *supra* note 2, at 274.

Comment describes how courts have been more liberal about admitting “not me too” evidence. Part I of this Comment provides a framework for employment discrimination claims, including an overview of Title VII and the *McDonnell Douglas* burden-shifting test. Part II discusses “me too” evidence prior to the Supreme Court of the United States’ decision regarding its admissibility. Part III examines the Supreme Court’s decision in *Sprint/United Management Co. v. Mendelsohn*. Part IV discusses “me too” and “not me too” evidence in the post-*Sprint* era, including how courts have treated cases that involve both “me too” and “not me too” evidence. Finally, Part V examines why courts might be treating “me too” evidence differently and offers suggestions for how courts can provide similar scrutiny in determining the admissibility for both forms of evidence.

I

OVERVIEW OF “ME TOO” EVIDENCE

“Me too” evidence is a particular type of circumstantial proof. When a plaintiff sets out to prove a disparate treatment discrimination claim under Title VII, a court will apply the traditional *McDonnell Douglas* burden-shifting test.⁴ First, the plaintiff must prove a prima facie case of discrimination.⁵ A plaintiff makes a prima facie case by demonstrating that she was: (1) a member of a statutorily protected class, (2) qualified for the position and satisfied its normal requirements, but (3) was discharged under, (4) circumstances that create an inference of unlawful discrimination.⁶

Second, once the plaintiff has successfully made out a prima facie case of discrimination, the burden then shifts to the defendant employer, who must offer a legitimate, nondiscriminatory reason for the adverse action.⁷ The employer need not “persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the

⁴ See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973). But see *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) (noting that in the context of a Title VII or ADEA case, a plaintiff has the option to show discrimination by using direct or indirect methods of proof).

⁵ *McDonnell Douglas Corp.*, 411 U.S. at 802.

⁶ *Id.* at 802–03.

⁷ *Id.*

defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff.”⁸

Third, after the employer presents a legitimate, nondiscriminatory reason, the burden shifts back to the plaintiff, who must prove by a preponderance of the evidence that the reason proffered by the defendant was merely pretext for discrimination.⁹ The most common ways that plaintiffs prove pretext include comparative data involving similarly situated individuals, statistics that reflect the overall composition of the employer's workforce, or contradictions and inconsistencies in the employer's explanations regarding the plaintiff's circumstances.¹⁰

It is the third stage of the *McDonnell Douglas* framework—the pretext stage—that presents the most problems for plaintiffs.¹¹ As a practical matter, “me too” evidence arises at this stage as a form of pretext to rebut the employer's legitimate nondiscriminatory reason for the adverse action.¹² Conversely, “not me too” evidence may be presented by the employer to rebut a plaintiff's prima facie case of discrimination and support the employer's legitimate nondiscriminatory reason.¹³ In most cases, the opposing party will respond by filing a motion in limine or a motion for summary judgment, arguing that such evidence is inadmissible. And, with a few exceptions, courts will usually exclude the “me too” evidence and allow the “not me too” evidence.¹⁴

II

“ME TOO” EVIDENCE IN THE PRE-*SPRINT* ERA

In the employment context, “me too” evidence has a controversial history that has led to a circuit split among courts in determining its admissibility. “Me too” evidence is a powerful tool for plaintiffs

⁸ *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254–55 (1981) (citation omitted).

⁹ *McDonnell Douglas Corp.*, 411 U.S. at 804.

¹⁰ Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 323 (2010).

¹¹ *Id.* at 323–26.

¹² *See, e.g., Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285 (11th Cir. 2008).

¹³ *See, e.g., Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 523–24 (3d Cir. 2003).

¹⁴ *Compare Jones v. St. Jude Med. S.C.*, 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011) (excluding “me too” evidence as mere opinions and subjective beliefs that are highly irrelevant and prejudicial), *with Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008) (allowing “not me too” evidence of an employer's past nondiscriminatory behavior toward other employees because it may be relevant).

because it allows them to rely on an employer’s motive in a different employment context with a different employee. However, this does not necessarily translate well and can present a number of problems.¹⁵ In an attempt to provide clarity to the evidentiary doctrine of “me too” evidence, this Part will examine the three ways courts have treated this evidence prior to the Supreme Court’s 2008 decision in *Sprint/United Management Co. v. Mendelsohn*.¹⁶

With a few exceptions, the Second, Third, Fifth, and Sixth Circuits strictly excluded “me too” evidence.¹⁷ These courts viewed “me too” evidence as irrelevant under FRE 401.¹⁸ Likewise, even when these courts held that “me too” evidence was relevant, they would find it inadmissible under FRE 403 when its probative value was substantially outweighed by the danger of unfair prejudice.¹⁹ Moreover, “me too” evidence that could confuse the issues or mislead the jury, or cause an undue delay, waste of time, or needless presentation of cumulative evidence was also inadmissible under FRE 403.²⁰ For example, in *Schrand v. Federal Pacific Electric Co.*, an age discrimination suit, a plaintiff attempted to offer testimony of two former employees who were told they were fired because of their

¹⁵ Perhaps most significant, is the concern that plaintiffs would be able to use such evidence to bootstrap their own claims.

¹⁶ See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008).

¹⁷ See, e.g., *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302–04 (5th Cir. 2000) (excluding “me too” evidence where it amounted to a “parade of anecdotal witnesses, each recounting his own, entirely unrelated contention of age discrimination”); *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997); *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2d Cir. 1984); *Goff v. Cont’l Oil Co.*, 678 F.2d 593, 596–97 (5th Cir. 1982) (noting that testimony of former employees did not pertain to plaintiff); *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa. 1980), *aff’d*, 639 F.2d 774 (3d Cir. 1980). *But see* *Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1109–10 (5th Cir. 1995).

¹⁸ FRE 401 provides that evidence is only relevant, 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.” FED. R. EVID. 401; see *Kelly v. Boeing Petroleum Serv., Inc.*, 61 F.3d 350, 357 (5th Cir. 1995).

¹⁹ See, e.g., *Jones v. St. Jude Med. S.C.*, 823 F. Supp. 2d 699, 734–35 (S.D. Ohio 2011) (noting that trial courts regularly prohibit “me too” evidence from or about other employees who claim discriminatory treatment “because it is at best only slightly relevant and is always highly prejudicial to the defendant”); see also *Williams*, 132 F.3d at 1130; *Haskell*, 743 F.2d at 122; *Moorhouse*, 501 F. Supp. at 393.

²⁰ See, e.g., *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Harpring v. Cont’l Oil Co.*, 628 F.2d 406, 410 (5th Cir. 1980); *Moorhouse*, 501 F. Supp. at 394 (excluding “me too” evidence that was cumulative).

age.²¹ The Sixth Circuit held that the “me too” evidence was irrelevant because the alleged statements from the witnesses could not be logically or reasonably tied to the decision to fire the plaintiff.²² In addition, the court held that such evidence was unduly prejudicial because it would tend to confuse the jury on the actual issue of the case.²³

By contrast, the First, Fourth, Ninth, and Eleventh Circuits admitted “me too” evidence, but only under fact-specific circumstances. These circuits focused on whether the “me too” witness and plaintiff were in the same protected class.²⁴ Moreover, when the plaintiff and “me too” witness had the same supervisors, these courts would allow the evidence under FRE 404(b) to demonstrate motive or intent.²⁵

Finally, the Seventh, Eighth and Tenth Circuits admitted “me too” evidence much more liberally.²⁶ Instead of carefully examining the facts and circumstances of a case, these courts would merely reason that, as a general rule, the evidence should be admitted.²⁷ For example, in *Spulak v. K Mart Corp.*, the plaintiff offered “me too” evidence from two former employees who were in the same protected

²¹ *Schrand*, 851 F.2d at 155.

²² *Id.*

²³ *Id.* at 156.

²⁴ *See, e.g.*, *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1286 (11th Cir. 2008); *Obrey v. Johnson*, 400 F.3d 691, 694–99 (9th Cir. 2005); *Cummings v. Standard Register Co.*, 265 F.3d 56, 63 (1st Cir. 2001); *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1014 (9th Cir. 1999); *Kozlowski v. Hampton Sch. Bd.*, 77 Fed. App’x 133, 149 (4th Cir. 2003); *see also Heyne v. Caruso*, 69 F.3d 1475, 1480 (9th Cir. 1995) (admitting “me too” evidence in a quid pro quo sexual harassment case to prove the employer’s alleged sexual harassment of other female employees).

²⁵ *See Goldsmith*, 513 F.3d at 1286; *Phillips v. Smalley Maint. Servs., Inc.*, 711 F.2d 1524, 1532 (11th Cir. 1983).

²⁶ *See, e.g.*, *Minshall v. McGraw Hill Broad. Co.*, 323 F.3d 1273, 1285–86 (10th Cir. 2003) (noting that “me too” evidence is relevant when it can be logically or reasonably tied to the adverse action taken against the plaintiff); *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (finding that “blanket evidentiary exclusions” of other acts of discrimination involving other employees “can be especially damaging in employment discrimination cases”); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423–24 (7th Cir. 1986) (noting that “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”).

²⁷ *Spulak*, 894 F.2d at 1155; *see also Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 156 (8th Cir. 1990) (“me too” evidence “should normally be freely admitted at trial”). *But see Manuel v. City of Chi.*, 335 F.3d 592, 596–97 (7th Cir. 2003) (affirming the district court’s decision to exclude “me too” evidence that had slight probative value and the potential to be highly prejudicial, and cause juror confusion and undue delay).

age group, yet worked at different stores.²⁸ Regardless, the Tenth Circuit held that the “me too” evidence was admissible because the testimony by former employees about the treatment they received from their former employer was relevant to the employer’s discriminatory intent.²⁹

Even where courts admitted “me too” evidence more liberally, they followed some reoccurring themes shared by almost all of the circuits. For instance, several courts observed a “same supervisor” rule.³⁰ Under this rule, testimony of other employees was strictly limited to only those people working under the same supervisor as the plaintiff. Moreover, courts also focused on whether the “me too” event took place during the same time period as the plaintiff’s claim.³¹ If the passage of time between the plaintiff’s claim was too temporally remote from the events of the “me too” evidence, courts generally excluded such evidence.³² Finally, courts considered other relevant factors, including whether the “me too” evidence involved a similar

²⁸ *Spulak*, 894 F.2d at 1155.

²⁹ *Id.* at 1156.

³⁰ This is similar to how courts treat the “stray remark” doctrine. *See* Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 160 (2012) (explaining that courts consider whether the stray remark was made by the same decisionmaker and around the time of the decision); *see also* *McGowan v. City of Eufala*, 472 F.3d 736, 745 (10th Cir. 2006); *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296, 302–03 (5th Cir. 2000); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997).

³¹ *See, e.g.*, *Schrand v. Fed. Pac. Elec. Co.*, 851 F.2d 152, 156 (6th Cir. 1988); *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597 (1st Cir. 1987) (admitting “me too” evidence separated by twenty-two months from the events of plaintiff’s claim); *Stair v. Lehigh Valley Carpenters Local 600*, 813 F. Supp. 1116, 1119 (E.D. Pa. 1993) (excluding evidence of discrimination against employees involving events that occurred four years prior to events involving plaintiff); *see also* *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689–90 (9th Cir. 2001) (excluding “me too” evidence in a sexual harassment case where the alleged harassment of other employees occurred five years before plaintiff’s claim).

³² *See* *Wyvill*, 212 F.3d at 302–03; *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997) (finding a six-year gap between the “me too” witness and the plaintiff’s claim too remote); *Garvey v. Dickinson Coll.*, 763 F. Supp. 799, 801–02 (M.D. Pa. 1991). *But see* *Brillhart v. Philips Elec. N. Am. Corp.*, 938 F. Supp. 742, 748 (D.N.M. 1996) (excluding “me too” evidence separated by only one year from the events of the plaintiff’s claim).

event,³³ the same protected class,³⁴ or the same type of claim.³⁵ Despite these reoccurring themes, courts continued to disagree on the admissibility of “me too” evidence, which resulted in a split of authority.³⁶

III

THE SUPREME COURT WEIGHS IN ON “ME TOO” EVIDENCE

Because there was considerable uncertainty among courts in applying “me too” evidence, in 2008 the Supreme Court of the United States granted certiorari to consider the issue.³⁷ The case was *Sprint/United Management Co. v. Mendelsohn*, and involved Ellen Mendelsohn, a fifty-one-year-old unit manager for Sprint who was terminated during a company-wide reduction in force.³⁸ Mendelsohn filed an action against Sprint for age discrimination³⁹ in violation of the Age Discrimination in Employment Act (ADEA).⁴⁰ To support her claim, she attempted to introduce “me too” evidence from five former employees that also alleged age discrimination.⁴¹ However, these other employees had different supervisors and worked in an entirely different division than Mendelsohn.⁴²

At trial, Sprint filed a motion in limine and argued that the “me too” evidence was irrelevant because the acts were committed by different supervisors. The district court agreed with Sprint and granted the motion.⁴³ On appeal, the Tenth Circuit reversed and reasoned that the district court erred by applying a per se rule of inadmissibility, and thus, remanded the case for a new trial.⁴⁴ The

³³ See, e.g., *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1285–86 (11th Cir. 2008) (reasoning that the “me too” evidence involved a variety of responses based on different situations).

³⁴ See, e.g., *Hurley v. Atlantic City Police Dep’t*, 174 F.3d 95, 110–11 (3d Cir. 1999) (gender); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1104 (8th Cir. 1988) (race).

³⁵ See, e.g., *Rauh v. Coyne*, 744 F. Supp. 1181, 1183 (D.D.C. 1990) (finding a weak correlation between race and gender discrimination).

³⁶ Rubinstein, *supra* note 2, at 267 (commenting on how “me too” evidence was “in a state of disarray”).

³⁷ See *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 381 (2008).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 (2006) (originally enacted as Pub. L. No. 90-202, 81 Stat. 602 (1967)).

⁴¹ *Sprint*, 552 U.S. at 381.

⁴² *Id.* at 382.

⁴³ *Id.*

⁴⁴ *Id.* at 383.

Supreme Court eventually granted certiorari to determine whether “me too” evidence is admissible only when the “same supervisor” is involved.⁴⁵

In a unanimous decision, the Supreme Court held that “me too” evidence offered in discrimination cases is neither per se admissible nor per se inadmissible.⁴⁶ The Court reasoned that whether evidence of discrimination by other supervisors is relevant requires a fact-based inquiry that “depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”⁴⁷ Beyond these principles, the Court remanded the case and declined to create a bright-line rule for this evidentiary doctrine, and therefore, lower courts were given considerable discretion in determining the admissibility of “me too” evidence. Unfortunately, this only led to further inconsistency among courts applying this evidentiary doctrine.

IV

“ME TOO” AND “NOT ME TOO” EVIDENCE POST-*SPRINT*

Given that “me too” evidence involves a fact-intensive inquiry, courts post-*Sprint* have continued to adopt a variety of approaches. However, there is a consistent pattern in how courts approach “me too” and “not me too” evidence in which courts are more liberal about admitting an employer’s “not me too” evidence.⁴⁸ To demonstrate that dichotomy, this Part begins by examining how courts have treated “me too” evidence post-*Sprint*. Then, this Part focuses on courts’ more liberal treatment of “not me too” evidence. Finally, this Part examines decisions where “me too” and “not me too” evidence are both present.

A. “Me Too” Evidence

“Me too” evidence post-*Sprint* has continued to reappear quite often in employment discrimination claims. In part, this is due to the

⁴⁵ *Id.*

⁴⁶ *Id.* at 381.

⁴⁷ *Id.* at 388.

⁴⁸ *See, e.g.*, *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008); *Howard v. D.C. Pub. Sch.*, 561 F. Supp. 2d. 53, 53 (D.D.C. 2008); *Pantoja v. Anton*, 198 Cal. App. 4th 87, 87 (2011); *Johnson v. United Cerebral Palsy/Spastic Children’s Found.*, 173 Cal. App. 4th 740, 759 (2009).

Supreme Court's refusal to adopt a bright-line rule and instead conclude that "me too" evidence is neither per se admissible nor per se inadmissible.⁴⁹ While courts in the pre-*Sprint* era treated "me too" evidence in one of three ways,⁵⁰ this is no longer the case. Interestingly, certain courts that strictly excluded "me too" evidence prior to *Sprint*, now occasionally admit it.⁵¹ Generally, post-*Sprint* courts' analyses include the following factors: (1) temporal and geographic proximity between the other employee and the plaintiff, (2) whether the other employee and the plaintiff were treated in the same manner, (3) whether the same decisionmakers were involved, and (4) whether the other employee and the plaintiff were similarly situated.⁵² Depending on the court, however, some factors are given more weight and relevance than others.

First, temporal proximity remains an important factor for the majority of courts. Generally, events related to "me too" evidence that occurred one year or less before the events related to the plaintiff are sufficiently close in time.⁵³ By contrast, incidents that gave rise to the "me too" witness that occurred ten years before the events at issue in the plaintiff's case are too remote in time.⁵⁴ Although there is no bright line rule for determining when "me too" evidence becomes too remote to be relevant, courts are likely to find a period longer than three years too remote.⁵⁵

Second, when the "me too" witness and the plaintiff received similar treatment, courts are more likely to admit the "me too"

⁴⁹ *Sprint*, 552 U.S. at 381.

⁵⁰ See *supra* notes 17-29 and accompanying text.

⁵¹ See, e.g., *Griffin v. Finkbeiner*, 689 F.3d 584, 584 (6th Cir. 2012); *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 775-76 (5th Cir. 2009); *Cange v. Phila. Parking Auth.*, No. 08-3480, 2010 WL 365468, at *3 (E.D. Pa. Feb. 1, 2010).

⁵² See, e.g., *Bennett v. Nucor Corp.*, 656 F.3d 802, 809-10 (8th Cir. 2011); see also *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008) (noting factors such as whether the witness and plaintiff were treated in a similar manner, the same supervisors were involved, and the past discriminatory behavior by the employer was close in time to the events at issue in the current case).

⁵³ See *Cange*, 2010 WL 365468, at *3 (admitting events related to other employees occurring one year before the events related to plaintiff).

⁵⁴ See, e.g., *Nuskey v. Hochberg*, 723 F. Supp. 2d 229, 233 (D.D.C. 2010).

⁵⁵ See, e.g., *Hill v. Se. Pa. Transp. Auth.*, No. 09-5463, 2012 WL 646002, at *4 (E.D. Pa. Feb. 28, 2012) (finding conduct that took place two years prior to plaintiff's termination recent enough to be relevant); *Swiatek v. Bemis Co.*, No. 08-6081 (TJB), 2011 WL 4753417, at *6 (D.N.J. Oct. 7, 2011) (excluding "me too" evidence that occurred three and a half years prior to the plaintiff's incident); *Hayes v. Sebelius*, 806 F. Supp. 2d 141, 145 (D.D.C. 2011) (holding that a four-year gap was too large to suggest a nexus between the two events).

evidence. As such, the nature of the employee’s allegation is critical. For example, in a decision from the District of Columbia Circuit, the court excluded the evidence because the “me too” witness claimed that he was discriminated against for being *transferred* to another position, while the plaintiff claimed that he was retaliated against by not being *selected* for a vacant position.⁵⁶ This further reiterates that the admissibility of “me too” evidence is a fact-intensive and context-specific inquiry. Accordingly, any plaintiff seeking to offer such evidence post-*Sprint* will have to demonstrate at least a reasonable connection to the theory of the case.

Third, when the same decisionmaker is involved, courts are less likely to exclude “me too” evidence. Unlike decisions prior to *Sprint*, courts no longer apply a per se rule excluding or admitting evidence based on this factor alone.⁵⁷ For instance, the Sixth Circuit has acknowledged that whether the same actors are involved represents only one of the factors in deciding whether to admit “me too” evidence.⁵⁸ Still, several courts continue to place more weight on whether the evidence involved the same decisionmaker.⁵⁹ Indeed, employers can sometimes use this factor to their advantage by proving that it was the “same decisionmaker” who made the decision to hire and fire the alleged victim.⁶⁰

Fourth, when the “me too” witness and the plaintiff are otherwise similarly situated, courts are more likely to allow the “me too”

⁵⁶ See *Hayes*, 806 F. Supp. 2d at 145.

⁵⁷ See, e.g., *Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 529 (7th Cir. 2008) (noting that the court should have determined if the “me too” evidence was a “relevant component of the ‘mosaic’ of evidence”); see also *Griffin v. Finkbeiner*, 689 F.3d 584, 598–99 (6th Cir. 2012).

⁵⁸ See, e.g., *Griffin*, 689 F.3d at 598–99.

⁵⁹ See, e.g., *Hayes*, 806 F. Supp. 2d at 144 (following other courts that found “me too” admissible when there was a “common decisionmaker”); see also *Day v. Sears Holdings Corp.*, No. CV 11-09068 MMM(PJWx), 2013 WL 1010547, at *20 (C.D. Cal. Mar. 13, 2013); *Bell v. Crowne Mgmt., LLC*, 844 F. Supp. 2d 1222, 1236 (S.D. Ala. 2012); *Zelaya v. UNICCO Serv. Co.*, 682 F. Supp. 2d 28, 35 (D.D.C. 2010); *Mugavero v. Arms Acres, Inc.*, No. 03 Civ. 05724(PGG), 2009 WL 1904548, at *9 (S.D.N.Y. July 1, 2009).

⁶⁰ Compare *Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 573 (6th Cir. 2003) (rejecting the notion that whenever the claimant has been hired and fired by the same decisionmaker a strong inference of discrimination exists), with *Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (recognizing that where the same individual was the hirer and firer, and the termination occurred shortly after the hiring, discrimination was most likely not a determining factor).

evidence.⁶¹ The weight of this factor can vary, however, because courts do not uniformly define “similarly situated.”⁶² Nonetheless, recent case law has provided guidance. For example, when the “me too” witness has a different title, different job responsibilities, and reports to different supervisors, courts are unlikely to find the individual similarly situated to the plaintiff.⁶³ Moreover, when the “me too” witness is not employed by the employer, but instead works at the parent corporation or for a different company altogether, courts will exclude the “me too” evidence based on this factor alone.⁶⁴

Beyond these factors, recent case law indicates that courts are equally strict, if not more strict, about admitting “me too” evidence than they were prior to *Sprint*.⁶⁵ Further, “me too” evidence is routinely excluded based on the same reasons as pre-*Sprint* decisions. For instance, courts regularly exclude “me too” evidence where the probative value of such evidence is outweighed by unfair prejudice.⁶⁶ Specifically, courts reason that this form of evidence amounts to subjective personal beliefs and opinions that are highly prejudicial.⁶⁷ Other courts exclude “me too” evidence because of the danger of a “trial within a trial.”⁶⁸ Lastly, courts have continued to exclude “me too” evidence that is irrelevant. For example, when a plaintiff attempts to offer testimony of discrimination experienced by others while working for different companies, courts will find the testimony

⁶¹ See, e.g., *Hardy v. Shell Chem. Co.*, 693 F. Supp. 2d 611, 622-23 (E.D. La. 2010); *McCoy v. Pac. Mar. Ass’n.*, 216 Cal. App. 4th 283, 297-98 (2013).

⁶² Tricia M. Beckles, *Class of One: Are Employment Discrimination Plaintiffs at an Insurmountable Disadvantage if They Have no “Similarly Situated” Comparators?*, 10 U. PA. J. BUS. & EMP. L. 459, 469 (2008) (discussing how “similarly situated” is not uniformly defined across the circuits).

⁶³ See, e.g., *Nuskey v. Hochberg*, 723 F. Supp. 2d 229, 233 (D.D.C. 2010).

⁶⁴ See, e.g., *Mandel v. M & Q Packaging Corp.*, 706 F.3d 157, 168 (3d Cir. 2013); *L’Etoile v. New England Finish Sys., Inc.*, 575 F. Supp. 2d 331, 336 (D.N.H. 2008).

⁶⁵ See, e.g., *Mandel*, 706 F.3d at 168; *Henry v. Wyeth Pharm., Inc.* 616 F.3d 134, 134 (2d Cir. 2010); *Jones v. St. Jude Med. S.C., Inc.*, 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011); *Lawson-Brewster v. River Valley Sch. Dist.*, 617 F. Supp. 2d 589, 589 (W.D. Mich. 2008); *Murphy v. John Peter Smith Hosp.*, No. 4:07-CV-605-A, 2008 WL 4966659, at *6 (N.D. Tex. Nov. 19, 2008); *Hatai v. Dep’t of Transp.*, 214 Cal. App. 4th 1287, 1298 (2013).

⁶⁶ See, e.g., *Johnson v. Interstate Brands Corp.*, 351 F. App’x, 36, 41 (6th Cir. 2009); *Jones*, 823 F. Supp. 2d at 734-35; *Lewis v. City of Chi.*, 563 F. Supp. 2d 905, 922 (N.D. Ill. 2008).

⁶⁷ See, e.g., *Jones*, 823 F. Supp. 2d at 734-35.

⁶⁸ See, e.g., *Lawson-Brewster*, 617 F. Supp. 2d at 595; *Hall v. Mid-State Mach. Prods.*, 895 F. Supp. 2d 243, 272 (D. Me. 2012); *McClendon v. Dougherty*, No. 2:10-CV-1339, 2011 WL 4345901, at *4 (W.D. Pa. Sept. 15, 2011).

irrelevant.⁶⁹ In addition, even though a “me too” witness might have worked at the same company as the plaintiff, certain courts have held that their experience is not necessarily relevant or automatically admissible.⁷⁰

In short, post-*Sprint* cases demonstrate that plaintiffs attempting to offer “me too” evidence have many hurdles to overcome at the lower court level. Plaintiffs will not be able to rely on some tangential connection between the “me too” witness and her own circumstances.⁷¹ Indeed, whether “me too” evidence is admitted may depend entirely on how the original complaint is pled.⁷² Unfortunately, it is less clear what factors courts are likely to give the most emphasis, particularly when one factor is isolated at the expense of other potentially relevant factors.

B. “Not Me Too” Evidence

“Me too” evidence has traditionally been offered exclusively by plaintiffs. However, one concept that has received limited attention among most courts and scholars is the admissibility of the converse form of “me too” evidence. This Comment will refer to it as “not me too” evidence. Like its counterpart, “not me too” evidence allows an employer to rebut a plaintiff’s discrimination claim by introducing testimony of other employees to show that they did *not* suffer discrimination. Even though “not me too” evidence has often been overlooked, the concept is actually not new at all.

Prior to *Sprint*, employers were already relying on “not me too” evidence. One of the first cases to demonstrate the use of such evidence was *Ansell v. Green Acres Contracting Co.*⁷³ In that case, the plaintiff, age forty-five, was discharged by his supervisor and filed

⁶⁹ *L’Etoile*, 575 F. Supp. 2d at 336 (holding that such evidence was irrelevant when it did not “appear to have ever infected [the plaintiff’s] working environment”); *see also* *Davis v. Dunn Constr. Co.*, 872 F. Supp. 2d 1291, 1318 (N.D. Ala. 2012).

⁷⁰ *L’Etoile*, 575 F. Supp. 2d at 337.

⁷¹ *See, e.g., Davis*, 872 F. Supp. 2d at 1318 (describing the other employees’ evidence as a “watered-down version of ‘me too’ evidence”); *Kakkanathu v. Rohn Indus., Inc.*, No. 05-1337, 2008 WL 4330144, at *4 (C.D. Ill. Sept. 17, 2008) (requiring a causal nexus).

⁷² *See, e.g., Hatai v. Dep’t of Transp.*, 214 Cal. App. 4th 1287, 1298 (2013) (holding that the “me too” evidence was properly excluded because the plaintiff’s complaint alleged discrimination based on his race and national origin as Japanese and Asian, but did not allege pro-Arab favoritism).

⁷³ *Ansell v. Green Acres Contracting Co.*, 347 F.3d 515, 518 (3d Cir. 2003).

an age discrimination suit under the ADEA.⁷⁴ The district court allowed the plaintiff to offer evidence that the defendant hired numerous individuals under the age of forty.⁷⁵ The employer rebutted this argument by offering testimony of another employee who was the same age as the plaintiff and was hired several seasons later.⁷⁶

On appeal, the Court of Appeals for the Third Circuit affirmed the district court's decision and held that subsequent good acts by an employer constitute an exception to Rule 404's general exclusion of character evidence because it is relevant to the employer's discriminatory intent.⁷⁷ The court reasoned that subsequent acts by an employer against employees could be less probative of an employer's intent than prior acts.⁷⁸ However, the court added that subsequent acts still have probative value and are therefore relevant to intent.⁷⁹ In addition, the court noted that the relevance of a prior or subsequent act could be affected if it is too remote in time or there were changed circumstances.⁸⁰ Nonetheless, the court reasoned that no bright line rule exists for when evidence is too remote to be relevant.⁸¹ Thus, the court concluded that the employer's hiring and treatment of the subsequent employee made it less likely that he acted with discriminatory intent when he fired the plaintiff.⁸²

As one of the first decisions to apply "not me too" evidence, *Ansell* can help clarify how this form of evidence is applied in practice. To begin with, "not me too" evidence may be admissible under FRE 404(b). Although it is unlike typical FRE 404(b) evidence, which is offered to show prior bad acts in criminal cases, this is irrelevant. Beyond prior bad acts, FRE 404(b) also addresses "other acts," and may be applied equally in criminal and civil cases. Consequently, like in *Ansell*, an employer may argue "not me too" by offering other acts

⁷⁴ *Id.*

⁷⁵ *Id.* at 519.

⁷⁶ *Id.*

⁷⁷ *Id.* at 523. Federal Rule of Evidence 404(b) provides that "[e]vidence of a crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." FED. R. EVID. 404(b)(1). "This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." FED. R. EVID. 404(b)(2).

⁷⁸ *Ansell*, 347 F.3d at 524.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 525.

⁸² *Id.*

as evidence to show a subsequent good act. Of course, such evidence is only admissible in the employment context if offered for the proper purpose.⁸³ For instance, in *Ansell*, the employer’s purpose in offering testimony of another employee was proper because it was used to prove that the employer did not have discriminatory intent against the plaintiff.⁸⁴ Thus, the employer’s “not me too” evidence proved to be an effective tool because it allowed the employer to both rebut a claim of an overarching plan of discrimination and further support the legitimacy of its reason for terminating the plaintiff.

In post-*Sprint* cases, employers continue to rely on “not me too” evidence and, unlike “me too” evidence, courts consistently hold that “not me too” evidence is admissible.⁸⁵ Ironically, the inquiry involves the same factors used to determine the admissibility of “me too” evidence, including temporal proximity, whether the “me too” witness and plaintiff were otherwise similarly situated, and whether the situation involved the same decisionmakers.⁸⁶ Nevertheless, courts apply the standard much more leniently in the context of “not me too” evidence. For example, in *Elion v. Jackson*, the court reasoned that, because the other employees were similarly situated, promoted within the same time period, and promoted by the same two officials accused of discriminating and retaliating against the plaintiff, the “not me too” testimony was relevant and admissible to negate the inference that the defendant harbored discriminatory or retaliatory intent.⁸⁷

In practice, employers rely on “not me too” evidence to rebut plaintiffs’ “me too” evidence and therefore negate discriminatory intent. For example, in the racial discrimination case *Howard v.*

⁸³ See, e.g., *Heyne v. Caruso*, 69 F.3d 1475, 1479–80 (9th Cir. 1995).

⁸⁴ *Ansell*, 347 F.3d at 525.

⁸⁵ See, e.g., *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008); *Howard v. D.C. Pub. Sch.*, 561 F. Supp. 2d 53, 53 (D.D.C. 2008); *Rodriguez v. Chertoff*, No. CIV 05-546-TUC-CKJ, 2008 WL 5087209, at *1 (D. Ariz. Nov. 26, 2008); *Pantoja v. Anton*, 198 Cal. App. 4th 87, 87 (2011); *Johnson v. United Cerebral Palsy/Spastic Children’s Found.*, 173 Cal. App. 4th 740, 759 (2009); see also *Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 381–82 (E.D. La. 2008) (admitting “not me too” evidence in a collective action to demonstrate the employer’s proper employment policies and procedures).

⁸⁶ See, e.g., *Elion*, 544 F. Supp. 2d at 8.

⁸⁷ *Id.* at 9 (noting that the first employee was also a woman, promoted within the same time period, and given additional oversight responsibility all around the same time the plaintiff alleged various discriminatory and retaliatory acts against her. Moreover, the second employee was also an African American woman, promoted to a director’s position within four months of Ms. Elion’s reassignment, and promoted by the same officials accused of discriminating and retaliating against Ms. Elion.).

District of Columbia Public Schools, a plaintiff alleged that the District of Columbia Public Schools (DCPS) acted with discriminatory motive in not selecting her for a dental hygienist position.⁸⁸ To rebut that claim, the defendant employer sought to elicit testimony from a DCPS employee who participated in the interviewing process that led to the plaintiff not being selected.⁸⁹ The purpose was to show that another African American woman was selected for the same position in an earlier round of interviews.⁹⁰ The court reasoned that the evidence was relevant under FRE 401 because evidence that the DCPS employee did not act discriminatorily in the earlier interviewing process was strong evidence from which a jury could infer that he did not act discriminatorily in the second interview.⁹¹ In addition, the court reasoned that based on the facts and circumstances of the case, the testimony would not be unduly prejudicial or confusing under FRE 403.⁹²

Similarly, in *Watson v. Pennsylvania, Department of Public Welfare*, after a plaintiff lost her job and did not receive a promotion to a supervisory position for which she was qualified, she filed suit alleging that the Department of Public Welfare discriminated against her based on gender.⁹³ In response, the defendant employer sought to offer testimony from other female employees that the plaintiff had not suffered discrimination.⁹⁴ The court allowed the defendant employer to offer “not me too” evidence to negate discriminatory intent because the plaintiff’s case relied on whether management advanced a general discriminatory agenda.⁹⁵ In addition, the court concluded that, although other employees may not have held the same position as the plaintiff, their perspectives were “similar enough” to allow the court to admit the evidence.⁹⁶

While courts might not be aware of how they treat both forms of evidence, these cases seem to indicate that courts apply a more lenient standard to “not me too” evidence. That is, rather than conduct a detailed analysis based on several objective factors, courts routinely

⁸⁸ *Howard*, 561 F. Supp. 2d. at 54.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 55.

⁹² *Id.*

⁹³ *Watson v. Pa., Dep’t of Pub. Welfare*, No. 4:07-CV-2048, 2009 WL 1324112, at *1 (M.D. Pa. May 12, 2009).

⁹⁴ *Id.*

⁹⁵ *Id.* at *2.

⁹⁶ *Id.*

admit “not me too” evidence.⁹⁷ It appears that this could be a bit of judicial oversight. In other words, courts might not realize they are applying the standard in a disparate manner.⁹⁸

C. “Me Too” vs. “Not Me Too” Evidence

The disparate treatment of “me too” and “not me too” evidence is most evident when both types of evidence are present in the same case. Although courts tend to liberally admit “not me too” evidence, does this happen when “me too” evidence is also offered? The following cases illustrate this parody.⁹⁹ Interestingly, these cases suggest that trial courts are applying the standard in a disparate manner, but appellate courts appear to have identified the problem and try to correct it on appeal.

The first case to demonstrate this disparate treatment is *Johnson v. United Cerebral Palsy/Spastic Children’s Foundation*.¹⁰⁰ There, a plaintiff sought to introduce “me too” evidence from five former employees that alleged they too were terminated because of their pregnancy.¹⁰¹ Although the trial court held that such evidence was inadmissible, the defendant employer was able to offer “not me too” evidence to demonstrate its past conduct concerning pregnancy and pregnancy leaves.¹⁰² The defendant employer’s evidence included a declaration by an employee that stated she worked for the defendant during her pregnancy, took a pregnancy leave of absence, and returned to work shortly thereafter.¹⁰³ In addition, the director of human resources noted that while the defendant employer had over 500 employees, the majority of whom were women, the employer frequently received requests for pregnancy leaves and routinely

⁹⁷ See, e.g., *McKinnie v. Conley*, No. 04-932, 2006 WL 3702647, at *5 (E.D. Pa. Dec. 8, 2006).

⁹⁸ See, e.g., *Stewart v. Ashcroft*, 352 F.3d 422, 429 (D.C. Cir. 2003) (recognizing that courts defer to employers’ judgment).

⁹⁹ Although these cases were filed under California’s Fair Employment Housing Act, that statute provides protections similar to Title VII, and generally follows the same federal provisions.

¹⁰⁰ *Johnson v. United Cerebral Palsy/Spastic Children’s Found.*, 173 Cal. App. 4th 740, 759 (2009).

¹⁰¹ *Id.*

¹⁰² *Id.* at 762.

¹⁰³ *Id.*

granted them.¹⁰⁴ Nevertheless, the defendant employer's "not me too" evidence was not enough to support a finding for summary judgment.¹⁰⁵

On appeal, the court of appeal reversed and held that the plaintiff's "me too" evidence was per se admissible.¹⁰⁶ The court reasoned that the plaintiff's declarations from the former employees set out factual scenarios sufficiently similar to her because they too were: (1) fired by the defendant after they became pregnant, (2) knew of someone fired by the defendant because of being pregnant, (3) resigned because the supervisor made their work stressful after noticing they were trying to become pregnant, and (4) knew of occasions when employees that were dishonest or cited for dishonesty were not fired by the defendant.¹⁰⁷ The court also found that the former employees were similarly situated to the plaintiff because they worked at the same facility and were supervised by the same people.¹⁰⁸ Therefore, based on all of these similarities, the court held that the probative value of the evidence outweighed any prejudice to the employer.¹⁰⁹

Understanding why the "me too" evidence was more effective in *Johnson* requires a closer look at what was said and by whom. One of the most distinguishing differences is that the "me too" evidence was significantly more compelling than the "not me too" evidence. Indeed, one declaration came from an employee who attended a meeting in which the managers discussed the desire to fire a pregnant employee because she was a potential liability.¹¹⁰ Recognizing that it would be illegal, the managers instead discussed excuses they could use to fire the employee.¹¹¹ Another employee noted that one of these managers fired her and admitted that it was because she was pregnant.¹¹² A third employee told a client that she was pregnant and two days later, the same managers fired her without providing a reason for it.¹¹³ Finally, another employee told these managers that she was trying to become pregnant and, in turn, they accused her of

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 740.

¹⁰⁶ *Id.* at 767.

¹⁰⁷ *Id.* at 759.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 767.

¹¹⁰ *Id.* at 761.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

falsifying her timecards.¹¹⁴ Ironically, these same managers tolerated several other similar incidents of timecard discrepancies from employees who were not pregnant.¹¹⁵ In sum, the plaintiff’s “me too” evidence was unlike typical “me too” evidence; rather, it was more like the rare smoking gun evidence because it essentially amounted to admissions of discrimination.

Although the “me too” evidence in *Johnson* was extreme, this decision still has significant implications for “me too” evidence generally. Most notably, *Johnson* expanded the scope of “me too” evidence by holding that it is per se admissible if offered by other employees who worked under the same supervisor.¹¹⁶ In addition, *Johnson* expanded the scope even further by holding that “me too” evidence from other workplaces and by different supervisors may be admissible.¹¹⁷

“Me too” and “not me too” evidence also received different treatment in *Pantoja v. Anton*.¹¹⁸ In that case, the plaintiff filed suit under the Fair Employment and Housing Act for racial discrimination and sexual harassment and discrimination.¹¹⁹ The plaintiff sought to introduce “me too” evidence that her employer engaged in a pattern of harassment and discrimination against his female employees.¹²⁰ The trial court concluded that the other witnesses could not testify about discriminatory or harassing events unless the plaintiff had personally witnessed the acts, and the acts adversely affected her working environment.¹²¹ Nonetheless, the trial court allowed the defendant employer to admit “not me too” evidence of four witnesses without limiting the time period to when the plaintiff was employed.¹²²

On appeal, the court of appeal reasoned that the trial court created a double standard by allowing the employer to admit evidence supporting his general course of conduct.¹²³ The court held that “me

¹¹⁴ *Id.* at 762.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 767 (citing *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379 (2008)).

¹¹⁸ *Pantoja v. Anton*, 198 Cal. App. 4th 87, 87 (2011).

¹¹⁹ *Id.* at 102.

¹²⁰ *Id.*

¹²¹ *Id.* at 94.

¹²² *Id.* at 105–06.

¹²³ *Id.*

too” evidence that the employer harassed other women outside the presence of the plaintiff and when she was not an employee should have been admissible to prove discriminatory intent or motive.¹²⁴

Pantoja has several implications for “me too” evidence. Most notably, after *Pantoja*, “me too” evidence is admissible, regardless of whether the plaintiff employee worked with the “me too” witness. As such, a plaintiff need not have any firsthand knowledge of the “me too” evidence. While an employer in the past might have claimed that the alleged harasser did not engage in the conduct in front of the plaintiff, after *Pantoja*, this is no longer a good defense. In addition, this decision shows that “me too” evidence may also be used to impeach the alleged harasser’s credibility. For example, in *Pantoja*, such evidence was used to show that the employer had discriminatory intent or bias based on gender to rebut his claim of a zero tolerance policy for sexual harassment.¹²⁵ Finally, after this decision, “me too” evidence may be used to prove different forms of discriminatory conduct. In dicta, the court stated that “evidence of one type of discriminatory conduct can even be probative of a defendant’s mental state in engaging in another type of conduct.”¹²⁶ Thus, this implies that “me too” evidence is admissible regardless of whether the other witness suffered the same type of discrimination as the plaintiff.

On the other hand, because *Pantoja* is such a significant departure from precedent, critics have argued that the “me too” evidence offered in that case was inadmissible character evidence. This argument finds support in the previous decision, *Beyda v. City of Los Angeles*, in which the court held that “me too” evidence of other employees is barred to establish the defendant’s propensity to harass.¹²⁷ Nonetheless, the court of appeal in *Pantoja* distinguished *Beyda* by reasoning that the evidence was relevant to show discriminatory intent or bias.¹²⁸ Although “me too” evidence may be used for this purpose, it is questionable whether this happened in *Pantoja*. Rather, the evidence appears to have been used for the purpose to show that the harasser was a bad person because he mistreated others in a similar way. Thus, the lower court may have been correct in excluding the evidence.

¹²⁴ *Id.* at 110.

¹²⁵ *Id.*

¹²⁶ *Id.* at 115.

¹²⁷ *Beyda v. City of L.A.*, 65 Cal. App. 4th 511, 518 (1998).

¹²⁸ *See Pantoja*, 198 Cal. App. 4th at 114.

As a final note, even though the evidentiary issue in *Pantoja* related to a harassment claim, it can be generalized to discrimination-based claims, because the court used “me too” evidence to prove the intent of the harasser. The court found intent relevant in order for the plaintiff to show that the harasser engaged in conduct *because of her sex*, as opposed to generalized harassment of both genders, which would be lawful. However, intent is generally not required to proving a harassment claim; rather, there is a different standard of proof. The plaintiff must be able to prove that the harassment was so severe and pervasive that the conditions of the individual’s employment were altered.¹²⁹ In other words, while proving discrimination can be challenging, proving harassment is an even higher threshold to overcome.¹³⁰ In *Pantoja*, the court of appeal ignored the fact that intent is generally not relevant to proving harassment. While this decision also involved a discrimination claim based on gender, where intent is relevant, the court should not have been able to treat the two claims as one in determining the admissibility of “me too” evidence.

Because allowing “me too” evidence in this context is a rarity, this raises the issue of whether state courts such as those in California—a leader in employment law—are subtly making a statement to courts at the federal level. Does *Pantoja* serve as a reminder of what can happen when lower courts fail to conduct a case-by-case analysis in determining the admissibility of “me too” evidence?

V

WHY ARE COURTS TREATING “ME TOO” EVIDENCE DIFFERENTLY?

Although the aforementioned cases in Part IV are distinct, they share one common trait: “not me too” evidence was held admissible. This leads to the question of why do courts treat “not me too” evidence differently, when in theory it seems the same as “me too” evidence? Is the discrepancy a result of courts simply not thinking about it? Or, is there a more compelling reason for courts’ disparate treatment?

¹²⁹ See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

¹³⁰ Evan D.H. White, *A Hostile Environment: How the “Severe or Pervasive” Requirement and the Employer’s Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 853 (2006) (discussing the strict “severe or pervasive” standard applied in sexual harassment cases).

Courts are well aware of the controversial nature of “me too” evidence. Indeed, several courts explicitly caution against this evidence and only let it in sparingly.¹³¹ On the other hand, the disparate treatment of “me too” evidence does not appear to rise to the level of judicial hostility.¹³² In fact, “not me too” evidence has rarely been labeled as such, and therefore, courts might be oblivious to the differential treatment given to both forms of evidence. Moreover, because “not me too” evidence is used by employers less often than “me too” evidence, courts could be unaware of the disparity between the two forms of evidence. Nonetheless, more compelling reasons suggest otherwise.

First, there is reason to believe that lower courts are not consistently conducting a fact-based inquiry when confronted with “me too” and “not me too” evidence. Most notably, some of these cases have similar facts, yet lead to different results depending on whether “me too” or “not me too” evidence is present.¹³³ In addition, the mere length dedicated to the analysis in court opinions is indicative of this disparate treatment. Some courts, for example, will dedicate several paragraphs to assessing whether the “me too” evidence is admissible, while other courts will devote a single paragraph to “not me too” evidence.¹³⁴ In short, this suggests that courts are deciding each case based on the result that they want to reach, as opposed to conducting a case-by-case analysis. This type of approach does not work well, particularly in the context of employment discrimination claims, which are highly unique, fact based, and context specific.

¹³¹ See, e.g., *Hall v. Mid-State Mach. Prods.*, 895 F. Supp. 2d 243, 271 (D. Me. 2012) (noting that courts caution against admitting “me too” evidence because it is “‘too attenuated’ to justify admission”); *Bell v. Crowne Mgmt., LLC*, 844 F. Supp. 2d 1222, 1236 (S.D. Ala. 2012) (finding “me too” evidence suspect even when offered to show pretext rather than a prima facie case); *Jones v. St. Jude Med. S.C.*, 823 F. Supp. 2d 699, 734 (S.D. Ohio 2011) (discussing how “me too” evidence is “unwelcome because it is at best only slightly relevant and is always highly prejudicial”); *Johnson v. United Cerebral Palsy/Spastic Children’s Found.*, 173 Cal. App. 4th 740, 760 (2009) (discussing how courts routinely sanction “me too” evidence).

¹³² See Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE U. L. REV. 549, 563 (2009).

¹³³ Compare *Jones*, 823 F. Supp. 2d at 734 (holding that “me too” evidence was not relevant because the other employee’s discrimination occurred before the plaintiff’s alleged racial discrimination), with *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008) (holding that “not me too” evidence was relevant even though it involved the employer’s past nondiscriminatory behavior toward other employees).

¹³⁴ Compare *Nuskey v. Hochberg*, 723 F. Supp. 2d 229, 233 (D.D.C. 2010), with *Howard v. D.C. Pub. Sch.*, 561 F. Supp. 2d 53, 54–55 (D.D.C. 2008).

Another reason for the disparate treatment of “me too” and “not me too” evidence is reflected in the adoption of rigid rules that function to undermine plaintiffs’ proof.¹³⁵ These judicially created rule-like tests provide courts with an efficient method to deal with employment discrimination cases, which are often complex and time consuming. However, the problem with these rules is that judges rely on them to “bypass a reasoned analysis of the totality of the circumstances of a case, in favor of a rote applied label.”¹³⁶ Professor Gertner, a scholar and former federal district judge, has referred to this phenomenon as “Losers’ Rules.”¹³⁷ Essentially, judges use these rules as a blueprint that serves to “justify prodefendant outcomes,”¹³⁸ and in turn, “substantially lighten the employer’s burden of proof and make summary judgment in his or her favor increasingly likely.”¹³⁹ In the employment context, examples of these rules include the “stray remark doctrine,”¹⁴⁰ “honest belief” rule,¹⁴¹ and “same-actor inference.”¹⁴² The evidentiary doctrine of “me too” evidence is no exception.¹⁴³ Over time, these rules have not only functioned to systematically foreclose plaintiffs’ claims, but have also provided

¹³⁵ See Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749, 757–60 (2013) (discussing how courts use defendant friendly “shortcuts” like the same-actor inference and stray remark doctrines to dispose of employment discrimination cases); see also Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 906 (2002) (explaining and analyzing the implications of shortcuts or heuristics used by courts).

¹³⁶ Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 ST. LOUIS U. L.J. 111, 133 (2011).

¹³⁷ Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 110 (2012).

¹³⁸ *Id.*

¹³⁹ *Id.* at 121.

¹⁴⁰ The “stray remark doctrine” allows courts to disregard a discriminatory comment or remark as “stray” when it is isolated or unrelated to the adverse employment action. See Stone, *supra* note 30, at 180–81 (discussing how courts use the stray remark doctrine to isolate one factor at the expense of a holistic assessment of the totality of the circumstances, and thus, bypass the proper summary judgment standard).

¹⁴¹ The “honest belief” rule relieves employers for any actions they take based on a mistake, good faith belief, or poor business judgment. See Martin, *supra* note 10, at 313.

¹⁴² Under the “same-actor inference,” when the same person hires an employee and later fires that employee, a discriminatory motive to fire is irrational and illogical. See Ross B. Goldman, *Putting Pretext in Context: Employment Discrimination, the Same-Actor Inference, and the Proper Role of Judges and Juries*, 93 VA. L. REV. 1533, 1535 (2007).

¹⁴³ See, e.g., *Bell v. Crowne Mgmt., LLC*, 844 F. Supp. 2d 1222, 1236 (S.D. Ala. 2012) (noting that “me too” evidence is highly suspect).

employers with more defensive strategies.¹⁴⁴ Judicial economy and efficiency are legitimate concerns of the court. However, when courts apply a more rigorous standard to “me too” evidence, they create a double standard that prevents both parties from having an equal opportunity to present their case.

Finally, the disparate treatment of “me too” evidence encompasses a larger issue, specifically that courts are misapplying the *McDonnell Douglas* framework during the critical pretext stage. For years, courts and scholars have recognized the pretext stage as a stumbling block for plaintiffs.¹⁴⁵ The Supreme Court attempted to remedy this by establishing the *McDonnell Douglas* framework to provide plaintiffs an opportunity to prove discrimination indirectly.¹⁴⁶ However, because of courts’ convoluted views on the issue of pretext, the framework has made it more difficult for plaintiffs to prevail.¹⁴⁷ According to Professor Natasha Martin, “pretext is in peril.”¹⁴⁸ Plaintiffs may have various methods to prove pretext, yet they have limited guidance on the amount or type of evidence that is required to successfully defeat a motion for summary judgment or motion for judgment as a matter of law.¹⁴⁹ As courts engage in judicial rulemaking, the direct result has been to “chip away” at plaintiffs’ evidence of discrimination.¹⁵⁰

Beyond the reasons why courts are treating “me too” and “not me too” evidence differently is the discrete issue of how this disparity can be resolved. Resolving exactly how courts can provide similar scrutiny to these two forms of evidence is beyond the scope of this Comment. Nonetheless, Professor Gertner provides a suitable framework that is worth noting. First, acknowledge the problem.¹⁵¹

¹⁴⁴ Martin, *supra* note 10, at 345 (explaining how these judicially created rules have equipped employers with a “playbook” full of defenses and loopholes).

¹⁴⁵ See, e.g., *Simpson v. Kay Jewelers, Div. of Sterling, Inc.*, 142 F.3d 639, 646 (3d Cir. 1998) (comparing the prima facie stage “where the inquiry is based on a few generalized factors” with the pretext stage where “the factual inquiry into the alleged discriminatory motives of the employer has risen to a new level of specificity”); see also Martin, *supra* note 10, at 344.

¹⁴⁶ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973).

¹⁴⁷ See *Donald & Pardue*, *supra* note 135, at 754–55 (noting how the Supreme Court has left open avenues for the pretext-plus rule’s continued application); Trina Jones, *Anti-Discrimination Law in Peril?*, 75 MO. L. REV. 423, 424 (2010) (discussing how courts began to require plaintiffs to produce additional evidence, or pretext-plus, to prevail).

¹⁴⁸ Martin, *supra* note 10, at 317.

¹⁴⁹ *Id.* at 344.

¹⁵⁰ *Id.* at 391, 401.

¹⁵¹ Gertner, *supra* note 137, at 123.

This Comment has focused on this step by analyzing how and why courts are responding to these two forms of evidence in a disparate manner. By exposing this issue, hopefully this Comment will promote greater awareness and lead to further discussion among judges, scholars, and practitioners. Second, address the problem directly.¹⁵² Regardless of whether “me too” or “not me too” evidence is offered, courts must engage in a case-by-case, comprehensive, and reasoned analysis.¹⁵³ Instead of isolating one factor at the expense of other factors, courts need to holistically assess the totality of the circumstances when evaluating either form of evidence.¹⁵⁴ Lastly, courts should make an effort to write opinions explaining what qualifies as “me too” or “not me too” evidence, and what does not.¹⁵⁵ By clarifying what facts comprise discrimination, the judiciary can provide guidance to plaintiffs during the pretext stage.

CONCLUSION

Given that plaintiffs have less information to begin with, courts’ leniency towards employers is ironic. In the employment context, plaintiffs are at a substantial disadvantage in comparison to employers because they usually have no direct evidence. Instead, plaintiffs must rely exclusively on circumstantial evidence to establish an employer’s discriminatory intent. Nonetheless, when courts apply stricter scrutiny to plaintiffs, this goes against the very purpose of Title VII.¹⁵⁶ The direct result is that Title VII often fails to combat the prejudicial disparate treatment it was designed to eradicate.¹⁵⁷ As some scholars have recognized, it is precisely “the unfettered discretion of courts that ‘can be the locus of hidden discrimination,’ particularly in light of the abbreviated record at the heart of a court’s pre-trial

¹⁵² *Id.*

¹⁵³ See generally Moss, *supra* note 132, at 551 (arguing that courts are guilty of “judicial modesty” in which they are reluctant to engage in close scrutiny of critically important facts).

¹⁵⁴ Stone, *supra* note 30, at 181–82 (proposing that courts holistically assess the totality of the circumstances when evaluating the probative value of a comment under the stray remark doctrine).

¹⁵⁵ Gertner, *supra* note 137, at 123.

¹⁵⁶ Title VII of the Civil Rights Act of 1964 is intended to irradiate discrimination and make the victim whole again.

¹⁵⁷ Martin, *supra* note 10, at 313.

evaluation.”¹⁵⁸ By applying a restrictive methodology to plaintiffs, courts undermine the protection that antidiscrimination laws were designed to offer.

Recent case law demonstrates that courts have been more liberal about admitting the converse form of “me too” evidence—so-called “not me too” evidence. This Comment has attempted to illustrate this discrepancy and the reasons for it. While there is no one solution to remedy this disparity, courts should be sensitive to the disparate manner in how they respond to “me too” evidence as opposed to “not me too” evidence. Perhaps, with this new perspective, courts will be more thoughtful and apply similar scrutiny to both forms of evidence.

¹⁵⁸ Martin, *supra* note 10, at 384 (quoting Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709 (2007)).