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THE SIGNIFICANCE OF *SPRINT/UNITED MANAGEMENT COMPANY V. MENDELSOHN*: A REPLY TO PROFESSORS GREGORY AND SECUNDA

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Professors Gregory and Secunda and I are all interested to see what impact *Sprint/United Management Company v. Mendelsohn*[1] will have on the admissibility of "me too" evidence in employment discrimination litigation, and in particular, comparative evidence from another employee of the defendant-employer who did not share the plaintiff's supervisor, but was affected by a similar type of adverse employment action—such as the reduction in force (and accompanying layoffs) at issue in *Sprint*. Professor Gregory and I predict that *Sprint* will result in much more litigation over this issue of admissibility,[2] while Professor Secunda remains skeptical that *Sprint* will have much of an impact at all.[3]

Professor Gregory's essay highlights the central problem in employment discrimination jurisprudence today—proving or disproving claims of harassment with only circumstantial evidence. Discussing sexual harassment cases, Professor Gregory states that many cases boil down to nothing

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In my principle essay, 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 (2008), I neglected to thank Professor Paul M. Secunda for his helpful comments on an earlier draft of that paper and Professor David L. Gregory for the wonderful assistance and guidance he has provided to me over the years.

As before, my comments in this Essay are my own and should not be attributed to any organization with which I am affiliated.

[1] 128 S.Ct. 1140 (2008) (link).

[2] *See* 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 (2008) (link); 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 (2008) (link).

[3] *See* Paul M. Secunda, *The Many* Mendelsohn *"Me Too" Missteps: An Alliterative Response To Professor Rubinstein*, 102 NW. U. L. REV. COLLOQUY 374, 379–80 (2008) (link).

more than "'he said, she said' debate[s]."[4] He goes on to compare "he said, she said" with "me too" cases and postulates that while the admission of "me too" evidence will provide more support for claims of harassment, one result of *Sprint* may be that litigants will attempt to present an endless line of "me too" witnesses.[5] Professor Gregory does not opine on what *Sprint* means with regard to the actual admissibility of "me too" evidence; instead he simply concludes that this will be left "to the pragmatic wisdom of trial court judges."[6]

Professor Secunda, however, disagrees with my assessment that *Sprint* will significantly impact employment discrimination jurisprudence. As I explained in my principle essay, while Professor Secunda and others view the Supreme Court's decision as a "judicial punt" because the Court remanded the issue of the admissibility of "me too" evidence, the reality is that the Court did more than just punt.[7] I argued that by refusing to hold that the remote evidence presented in *Sprint* was inadmissible, the Court implied that it may be admissible. Given the remoteness of the evidence in question, *Sprint* may have set the bar for the admission of "me too" evidence very low.[8]

Professor Secunda opines that the Court had to punt because evidentiary determinations are for lower courts to make.[9] He goes on to claim that clear rules are not desirable in this area of law, reasoning that "relevance" and "prejudice" under the Federal Rules of Evidence (FRE) 401 and 403 are not amenable to broad *per se* rules.[10]

Professor Secunda is mistaken on both counts. The Court was under no obligation to punt, and I strongly disagree with Professor Secunda's statement about the lack of a need for clear rules in this area of law. Clear evidentiary rules are desirable in employment discrimination (and, for that matter, in all other areas of law). Unclear evidentiary rules foster hostility and breed litigation.[11] Yet I do agree with Professor Secunda that *per se*

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[4] Gregory, *supra* note 2, at 383.

[5] *See id.* at 383–85.

[6] *Id.* at 386.

[7] *See* Rubinstein, *supra* note 2, at 266–67 & n.18.

[8] *See* Rubinstein, *supra* note 2, at 272–73. *But see* Tristin K. Green, *Insular Individualism: Employment Discrimination After* Ledbetter v. Goodyear, 43 HARV. C.R.-C.L. L. REV. 353, 365–68 (2008) (arguing that the Court's limited holding in *Sprint* "leaves plenty of room" for lower courts to refuse to admit "me too" evidence when the proffered witness did not work under the same supervisor as the plaintiff) (link).

[9] Secunda, *supra* note 3, at 376–77.

[10] *Id.* at 381 ("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 amendable to broad per se rules.").

[11] The Supreme Court has repeatedly recognized that there is a need for clarity in the law. *See, e.g.*, Delaware v. New York, 507 U.S. 490, 510 (1993) (stating that creating different rules for novel facts would generate uncertainty and expensive litigation) (citing Texas v. New Jersey, 379 U.S. 674, 679 (1965) (link); *cf.* Upjohn v. United States., 449 U.S. 383, 393 (1981) (in discussing law of attorney-

rules regarding admissibility of evidence are not appropriate given the importance of context in determining relevance and prejudice under FRE 401 and 403. My contention is merely that the Court should have supplied a set of criteria to be considered by lower courts when making determinations on the admissibility of "me too" evidence.

Professor Secunda's view that the Court incorrectly granted certiorari is also unfounded.[12] I do not find any support for his argument that the Court made a mistake, and I believe that he reads too much into what he admits are oral argument tea leaves.[13] As I demonstrated in my principle essay, the state of the law was in complete disarray prior to *Sprint* being granted review.[14] For this reason, the Supreme Court was well advised to review this important issue.

Unfortunately, the Court did not take advantage of this chance to decisively settle the issue. My primary disappointment with the *Sprint* decision is its failure to set forth *any* criteria to guide the lower courts in making future determinations. The Court could have instructed lower courts to consider a specific set of criteria selected from a variety of potentially relevant factors, including the size of the company; whether different work locations were involved; whether the comparative witness interacted with either the plaintiff or the defendant-decisionmaker; the respective time frames of the comparative witness's observations and the adverse employment action alleged by the plaintiff; whether the purported "me too" evidence is the only evidence presented; whether the defendant-decisionmaker had any input into decisions affecting the comparative witness; and the background, education and experience of the comparative witness compared to that of the plaintiff.[15] The list need not be exhaustive.[16]

The Court, however, was correct in issuing a remand.[17] Evidentiary

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client privilege the Court states that an uncertain privilege is little better than no privilege) (link).

[12] Secunda, *supra* note 3, at 380 ("[T]his was an appropriate punt because somewhere along the line the Court recognized its misstep in granting certiorari in the first place.").

[13] *See id.* at 378 n.28.

[14] Rubinstein, *supra* note 2, at 265, 267–69 (discussing the state of the law leading up to the *Sprint* decision).

[15] Indeed, courts hearing employment discrimination cases have already recognized the relevance of many of the criteria proposed above. *See, e.g.*, Elion v. Jackson, 544 F. Supp. 2d 1, 8 (D.D.C. 2008) (admitting testimony from a "me too" witness in support of the defendant-employer because the witness was of the same sex as the plaintiff and was promoted and given additional responsibilities during the time of the alleged discrimination); Mendelsohn v. Sprint/United Mgmt. Co., 466 F.3d 1223, 1228 (10th Cir. 2006), *vacated*, 128 S. Ct. 1140 (2008) (stating that termination of older workers within one year as part of an ongoing company-wide reduction in force was logically tied to the decision to terminate plaintiff and, therefore, "me too" evidence was relevant and admissible); Ansell v. Green Acres Contracting Co. Inc., 347 F.3d 515, 524–25 (3d Cir. 2003) (in permitting the introduction of employer evidence of favorable treatment of other employees the court examines the time frame involved and whether different circumstances were involved).

[16] *See* Chavez v. Ill. State Police, 251 F.3d 612, 636 (7th Cir. 2001) (stating that there is no "magic formula for determining whether someone is similarly situated").

[17] While I recognize that if the Court had established criteria to review in "me too" cases, it might

determinations are indeed for lower courts to make in the first instance. However, that should not have prevented the Court from offering at least some guidance on the admissibility of "me too" evidence.[18]

As Professor Gregory and I both noted, post-*Sprint* lower courts are already divided over how to treat "me too" evidence.[19] The Court must take up this issue again—preferably soon—if it is to prevent a morass of unnecessary litigation.

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be considered "dicta," the reality is that many courts would find such dicta quite persuasive. *See* McCoy v. MIT, 950 F.2d 13, 19 (1st Cir. 1991) (citing Nichol v. Pullman Standard, Inc., 889 F.2d 115, 120 n.8 (7th Cir. 1989) (appellate courts "should respect considered Supreme Court dicta")).

[18] In other contexts, the Supreme Court has, of course, provided lower courts with guidance in interpreting the law. *See, e.g.*, Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 100 (1978) (setting forth factors that are relevant for determining what process is due under the Fourteenth Amendment); Cort v. Ash, 422 U.S. 66, 78 (1975) (noting several relevant factors courts should consider in determining whether a private remedy is implicit in a statute which does not expressly provide for one) (link).

[19] Gregory, *supra* note 2, at 382–83; Rubinstein, *supra* note 2, at 274 n.55.