

## CONTEXT MATTERS: EXAMINING THE ADMISSIBILITY OF “OTHER EMPLOYEE/SUPERVISOR” EVIDENCE IN FEHA DISCRIMINATION CASES

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Employment discrimination cases are rarely straightforward or simple---they tend to be subtle, complicated, and highly contextualized. Employees seldom have direct evidence of discrimination, and they often have to depend upon circumstantial evidence. Frequently, evidentiary disputes focus on whether evidence of similar acts of discrimination directed at non-parties constitutes admissible circumstantial evidence, or whether this type of evidence is simply inadmissible and/or unduly prejudicial.

This article will discuss federal and state judicial approaches to evaluating the admissibility of evidence of acts of discrimination against other employees or by “other” supervisors, (often called “me too” evidence). A recent California decision, *Johnson v United Cerebral Palsy/Spastic Children's Foundation of Los Angeles* (2009) 173 CA4<sup>th</sup> 740, provides analytical guideposts for practitioners and judges and will be discussed at length below. The Second District Court of Appeal directed trial courts to admit such evidence where the “factual scenarios related by former [or presumably current] employees of the defendant ... are sufficiently similar to the one presented by the plaintiff concerning her own discharge by defendant.”

The *Johnson* decision clarifies the trial judge’s role in admitting such evidence at both the summary judgment stage and during trial. In its precedent-setting directive, the *Johnson* court provides a comprehensive framework of analysis which should help avoid inconsistent trial court rulings on these critical issues of admissibility. In order to understand how the *Johnson* court reached its conclusions, it is helpful to revisit the evidentiary burdens in a discrimination case.

### **Proving Discrimination Under FEHA**

In the first two stages of the familiar *McDonnell Douglas* burden-shifting analysis, the plaintiff is commonly able to establish a prima facie case, and the defendant is often able to counter by presenting evidence of a legitimate non-discriminatory explanation for the challenged employment action. In order to prevail on summary judgment, the plaintiff’s task is then to offer evidence that the justification presented by the employer is a pretext for discrimination. If there is reason to disbelieve the defendant’s justification, a triable issue of material fact has been raised sufficient to show that the plaintiff’s protected status was a “motivating reason” for the adverse employment action.<sup>1</sup>

Although the ultimate burden of persuasion on the issue of discrimination remains with the plaintiff, the weight of evidence necessary to prevail at the summary judgment stage and at trial are significantly different.<sup>2</sup> In order to prevail on summary judgment, “[t]he defendant must show that under no possible hypothesis within the reasonable purview of the allegations of the complaint is there a material question of fact which requires examination by trial.”<sup>3</sup> On the other hand, to avoid summary judgment, a plaintiff needs to only raise a triable issue of fact.<sup>4</sup> Thus, if the plaintiff can show one single material fact in dispute, the motion must be denied.<sup>5</sup>

At trial, the employee must prove by a preponderance of the evidence that there is a causal connection between her protected status and the adverse employment decision.<sup>6</sup> The question put to the jury however, is not whether the illegal motivation was the *sole* reason for the adverse employment action, but whether the plaintiff's protected class status was a "motivating reason."<sup>7</sup>

Since the crux of a discrimination case involves the employer's state of mind, and because employers of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it, an employee rarely has "smoking gun" direct evidence. Accordingly, whether at summary judgment or at trial, justice requires an employee the opportunity to attack an employer's proffered reasons as pretext, or to offer any other evidence of discriminatory intent or motive.

### **Federal Cases**

Federal courts have understood for some time that employment discrimination cases present difficult problems of proof because courts and juries cannot peer into the minds of decision makers to determine their true motivations.<sup>8</sup> For this reason, federal courts have consistently agreed that "me too" evidence is admissible depending on its context.<sup>9</sup>

In *Obrey v Johnson*,<sup>10</sup> the plaintiff alleged that his employer had engaged in a pattern and practice of racial discrimination in promotions to senior management positions. The Ninth Circuit reversed a judgment following a jury verdict for the employer, holding that the trial court had erred in excluding relevant evidence in the form of a statistical report showing a correlation between race and promotion, and the anecdotal testimony of three naval shipyard employees who believed that they too had suffered racial discrimination when they were passed over for supervisory positions. The Court also found relevant and admissible the testimony of a co-worker who recalled the defendant making discriminatory statements against people of the plaintiff's race.<sup>11</sup>

In *Estes v Dick Smith Ford Inc.*,<sup>12</sup> the Eighth Circuit reversed a judgment against the employee, holding that the trial court had erred in excluding the plaintiff's evidence that "tended to show a climate of race and age bias [...]"<sup>13</sup> The Court explained that "[e]vidence of prior acts of discrimination is relevant to an employer's motive in discharging a plaintiff, even where this evidence is not extensive enough to establish discriminatory animus by itself."<sup>14</sup> The court stated that while the plaintiff had to prove the unlawfulness of his termination, ". . . it is hard to see how evidence which suggests that [the employer] discriminated against blacks in hiring would be irrelevant to the question of whether it fired a black employee because of his race."<sup>15</sup>

The United States Supreme Court has increasingly made clear that the determination of admissibility must not be made in a vacuum, but only after a thorough review of the facts and context. This principle was reinforced by the Court in its recent decision in *Sprint/United Management Co. v Mendelsohn*.<sup>16</sup> The Supreme Court rejected any *per se* rule of inadmissibility in connection with testimony by other employees alleging discrimination at the hands of company supervisors who played no role in the adverse employment action taken against the

plaintiff. Instead, courts must analyze the context in which the evidence is sought to be admitted,<sup>17</sup> and where the discrimination involved similarly situated employees, the evidence is presumptively admissible.<sup>18</sup>

Because there is no single general theory of relevance that applies to all “other employee” or “other supervisor” evidence in all cases, in arguing for admissibility under the reasoning of *Sprint* it is important to focus upon and articulate a specific theory of relevance that fits the particular case. For example: (1) the “other” supervisor may have engaged in overt, rather than disguised, discrimination against another employee, suggesting his or her belief that the employer would tolerate or even condone such behavior; (2) the “other” supervisor may have used a **similar** pretextual explanation as the plaintiff’s supervisor, or may have engineered an adverse action against another employee in the same **or similar** way; (3) the “other” supervisor may have applied a standard in justification of an employment action against another employee that was inconsistent with the standard purportedly applied by the plaintiff’s supervisor; (4) the defense may itself have used “other supervisor” evidence, for example by offering evidence of non-discriminatory hiring statistics; and (5) discrimination by the “other supervisor” may be of evidentiary significance because of such factors as the number of incidents, their proximity in time, or the fact that they were all part of some coordinated process.

### **California Cases**

California courts have been less ready to issue decisions explicitly holding that “me too” evidence is admissible to show an employer’s motive or state of mind. In *Clark v Claremont University Center and Graduate School* (1992) 6 CA4th 639, 8 CR3d 151, the Second District held that the jury’s verdict in favor of the race discrimination plaintiff was supported by substantial statistical evidence showing that the University had never granted tenure to a minority professor. The decision does not deal directly with standard evidence of co-worker discrimination involving other similarly situated employees. Rather, it holds that the statistical evidence was properly admitted because it showed a discriminatory mind-set: by inference, this could be considered evidence of other employee discrimination.

In another California state court case, *Bihun v AT&T Info Systems*,<sup>19</sup> the Court of Appeal provided a more detailed analysis of “other employee” evidence in the standard sense, in the context of sexual harassment allegations. The Court held that evidence of the harassing supervisor’s sexual misconduct with female employees other than the plaintiff was not inadmissible hearsay, unduly prejudicial, or irrelevant. It was relevant, the court held, to the employer’s knowledge of the harassment and failure to act.<sup>20</sup>

### ***Johnson v United Cerebral Palsy/Spastic Children’s Foundation***

*Johnson*, filed on April 30, 2009, [see **CELA Bulletin**, May 09, p.4], was the first published California state court decision to explicitly make clear that “me too” evidence is admissible in an employment discrimination case. The Second District, reversing summary judgment, held that the trial court had improperly disregarded circumstantial evidence in the form of declarations by five of the plaintiff’s co-workers.

The plaintiff, who worked as an in-home care giver for cerebral palsy patients through UCP, informed her supervisor that she was pregnant and that her doctor had prescribed eight days of bed rest requiring her to miss work. She was terminated the day that she returned to work following her leave, being told that UCP did not feel she was capable of handling the job. Although UCP later claimed that plaintiff had been terminated for falsifying her time records, the plaintiff presented evidence that UCP had failed to conduct a good faith investigation of the alleged timecard violation. And there was also evidence that the plaintiff's supervisor had admitted having concerns about the ability of pregnant employees to care for clients.<sup>21</sup>

Concerning "me too" evidence, the Court of Appeal held that the trial judge had improperly disregarded evidence regarding five other employees who variously declared: (1) they too had been fired shortly after informing UCP of their pregnancies; (2) they knew of people who were fired after UCP learned they were pregnant; (3) they had resigned because the same supervisor who had fired the plaintiff made their work stressful after learning that they were trying to become pregnant; or (4) they knew of occasions when employees cited for dishonesty were not fired by UCP. These five employees all worked at the same facility as the plaintiff; three of the five had the same direct supervisor as the plaintiff; and all five worked under the higher level supervisor who had approved the plaintiff's discharge.<sup>22</sup>

Taken together, and in the context of the plaintiff's case, the *Johnson* court held that the co-workers' declarations constituted circumstantial evidence sufficient to raise a triable issue of material fact as to the reason for the plaintiff's termination.<sup>23</sup> "[W]e can say as a matter of law," the court wrote, "that the 'me too' evidence ... is per se admissible under both relevance and Evidence Code section 352 standards." Similarly, the court held, evidence of comments by the plaintiff's supervisor criticizing an employee for wanting to become pregnant were not mere "stray remarks" because, in context, the trier of fact could conclude that the remarks were relevant on the question of motive.<sup>24</sup> The court distinguished the oft-cited case of *Beyda v City of Los Angeles* (1998) 65 CA4th 511, emphasizing that *Beyda* did not address whether "me too" evidence could be admitted under Evidence Code Section 1101 "to show intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action, and thereby creating a triable issue of material fact ..."<sup>25</sup>

### **The Implications of *Johnson* for Both Employees and Employers**

In reversing summary judgment, the *Johnson* decision gave great weight to the fact that plaintiff did not seek to rely *solely* on the circumstantial evidence provided by the co-workers' declarations, emphasizing that such circumstantial evidence was presented as part of a larger context.

There are lessons to be learned from *Johnson* for both sides. Frequently-used arguments that "me-too" evidence is simply inadmissible as hearsay, irrelevant, or unduly prejudicial, should no longer hold water: it should be clear that an employee may rely on such circumstantial evidence to raise a triable issue as to pretext or discriminatory motive and to defeat summary judgment. Nonetheless, employers will have an opportunity to attack the relevancy of the context itself within which the employee seeks to introduce that evidence. And the trial judge should make

explicit findings on the record explaining his or her reasoning for admitting or excluding any such evidence, keeping in mind the full context of the case.

Plaintiffs attorneys should spend the necessary time to investigate other possible “me too” witnesses early on, and to obtain comprehensive declarations detailing how the third-party witnesses’ discrimination is relevant in the context of their client’s case. The sooner this occurs, the more thoroughly the employee can pursue relevant evidence through discovery. For example, pleading a theory of “pattern and practice” discrimination early on in the case will increase the likelihood that the employer will be required to produce statistical evidence addressing this issue during the discovery process. These initial steps are vital to having the requisite “me too” evidence available at the summary judgment stage. In fact, failure to do this leg work could result in devastating consequences for the employee.

### **Conclusion**

Trial judges may be tempted to use expediency as a rationale for curtailing the use of “me too” evidence of discrimination. However, to do so would be to improperly remove an essential ingredient from the body of evidence a plaintiff is entitled to submit in order to prove pretext. When circumstantial evidence is presented as part of a larger context, courts have determined that it matters. The *Johnson* case provides valuable guidance to trial judges and parties litigating FEHA discrimination cases and should make the admissibility of such evidence more predictable in the future.

### **NOTES:**

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1. *Reeves v Sanders* (2000) 120 S Ct 1096, 2108: A “motivating reason” is a reason that contributed to the decision to take certain action, even though other reasons also may have contributed to the decision. CACI 2507.

2. *Guz v Bechtel National, Inc.* (2000) 24 C4th 317 at 354-356.

3. *Murillo v Rite Stuff Foods, Inc.* (1998) 65 CA4th 833, 840 (1998).

4. *Mamou v Trendwest Resorts, Inc.* (2008) 165 CA4th 686, 722 (2008).

5. Weil & Brown, *Civil Procedure Before Trial*, §10:253 (TRG 2007).

6. *Clark v Claremont University Center and Graduate School* (1992) 6 CA4th 639;

*Mixon v Fair Employment & Housing Com.* (1987) 192 CA3d 1306, 1319.

7. CACI 2507.

8. *Coghlan v Am. Seafoods Co. LLC* (9<sup>th</sup> Cir 2005) 413 F.3d 1090, 1100.

9. See e.g. *Estes v Dick Smith Ford, Inc.* (8<sup>th</sup> Cir 1998) 856 F2d 1097 (implicitly overruled on other grounds by *Price Waterhouse v Hopkins* (1989) 490 US 228, 237, 242, 244, 259; *Riordan v Kempiners* (7<sup>th</sup> Cir 1987) 831 F2d 690; *Shattuck v Kinetic Concepts, Inc.* (5<sup>th</sup> Cir 1995) 49 F3d 1106, 1109-1110; *Heyne v Caruso* (9<sup>th</sup> Cir 1995) 69 F3d 1475, 1480 (evidence of other workers who had been sexually harassed was not admissible to prove conduct on particular occasion or as

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character evidence, but was admissible to prove employer's motive or intent in discharging plaintiff).

10. *Obrey v Johnson* (9<sup>th</sup> Cir 2005) 400 F3d 691.

11. *Id.* at 697.

12. *Estes*, 856 F2d 1097.

13. *Id.* at 1102.

14. *Id.* at 1104.

15. *Id.* at 1103.

16. *Sprint/United Management Co. v. Mendelsohn* (2008) 128 S Ct 1140. In *Sprint*, the U.S. Supreme Court framed the issue on appeal as follows: “[W]hether, in an employment discrimination action, the Federal Rules of Evidence require admission of testimony by nonparties alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.” *Id.* at 1144. The Court responded that admissibility “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.” *Id.* at 1147.

17. *Id.* at 1146-1147.

18. *See id.*

19. *Bihun v AT&T Info Systems Inc.* (1993)13 CA4th 976 (1993).

20. *Id.* at 987-991.

21. *See Johnson, supra.*, 173 CA4th 748-753.

22. *Id.* at 759

23. *Id.* at 758-59.

24. *Id.* at 759, fn. 12

25. *Id.* at 760