No. 06-1221

IN THE
Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a district court in a disparate treatment case must admit "me, too" evidence — testimony, by nonparties, alleging discrimination at the hands of persons who played no role in the adverse employment decision challenged by the plaintiff.

PARTIES TO THE PROCEEDING

Ellen Mendelsohn, the plaintiff in the trial court and the respondent here, formerly was employed by, and later sued, Sprint/United Management Company, now a subsidiary of Sprint Nextel Corporation.

STATEMENT PURSUANT TO RULE 29.6

Sprint/United Management Company is a wholly owned subsidiary of Sprint Nextel Corporation, which issues shares to the public. (The employer for simplicity will be referred to herein as "Sprint.")

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OPINIONS AND ORDERS BELOW

The Tenth Circuit's decision is officially reported, *Mendelsohn v. Sprint/United Management Co.*, 466 F.3d 1223 (10th Cir. 2006), and is reproduced in the appendix to Sprint's petition for a writ of *certiorari* ("Pet. App.") at 1a-23a. The court of appeals' order denying Sprint's rehearing petition is reproduced at Pet. App. 25a-26a. The district court's minute order, granting Sprint's motion *in limine* on the issue presented by this appeal, is reproduced at Pet. App. 24a. The district court's additional remarks on the issue, elaborating on and modifying the *in limine* ruling as the trial progressed, are reproduced in the Joint Appendix ("J.A.") at 279a-297a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The United States Court of Appeals for the Tenth Circuit issued its opinion on November 1, 2006. Sprint timely petitioned for rehearing and rehearing *en banc* on November 15, 2006. The court denied that petition on January 16, 2007. This Court granted *certiorari* on June 11, 2007. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The Age Discrimination in Employment Act is codified at 29 U.S.C. §§ 624-634. The relevant provisions of the Act are reproduced at Pet. App. 27a-28a. Federal Rules of Evidence 401, 402, and 403 are reproduced at Pet. App. 29a.

STATEMENT OF THE CASE

Respondent Ellen Mendelsohn worked for Sprint from 1989 until November 2002, most recently in the Mobile Financial Services unit within Sprint's Business Development Strategy group. J.A. 9a. She was laid off in a reduction-in-force, as the Business Development Strategy group downsized from 75 to 57 persons. J.A. 340a. Mendelsohn's immediate supervisor, Jim Fee, had rated her as the weakest performer in Mobile Financial Services. J.A. 318a-319a. Fee's manager, Sprint Assistant Vice President Paul Reddick, decided to include Mendelsohn in the layoff. J.A. 339a-340a.

Other Sprint units over a period of months and years also downsized, as Sprint sought to cope with the telecommunications industry's recession. Over a period of about 14 months, about 15,000 employees were released, and Mendelsohn never disputed that the layoffs as a whole were grounded in "real" business necessity. *See* J.A. 317a-318a; *Sprint Will Cut Another 2,100 Jobs*, N.Y. TIMES, Dec. 12, 2002, at C3. Decisions about specific affected individuals were made by the supervisors and managers responsible for each downsizing department or other business unit. J.A. 310a-312a, 337a-341a.

Mendelsohn was 51 when she was laid off. J.A. 129a. She filed an administrative charge with the Equal Employment Opportunity Commission in April 2003, alleging age discrimination. J.A. 9a. The EEOC dismissed the charge because it concluded that the evidence failed to establish a violation of law. J.A. 14a.

In August 2003, Mendelsohn sued under the ADEA in the U.S. District Court for the District of Kansas, alleging disparate treatment based on age. J.A. 14a. She first asserted, but then abandoned, a contention of a pattern or practice of age discrimination affecting others. *Compare* J.A. 7a-14a (Complaint) *with* J.A. 127a-154a (Pretrial Order). *See* D. Kan. Rule 16.2(c) ("The pretrial order . . . will control the subsequent course of the action unless modified . . . by an order of the court to prevent manifest injustice.")

Before trial, Sprint moved *in limine* to exclude testimony from five witnesses. J.A. 155a-161a. The five were former Sprint employees who would claim that they themselves had been released based on age, in layoffs conducted in other departments by other managers. (Such persons have been described as "me, too" witnesses, *e.g.*, Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 72-73 (4th ed. 2007).) Specifically, Bonnie Hoopes, Yvonne Wood, and Sharon Miller sought to testify that they had heard ageist remarks by one or more Sprint supervisors or managers. J.A. 343a-346a. Wood also sought to testify that she had seen a spreadsheet suggesting that age was one of the criteria that another supervisor, Dan Kennedy, may have considered in making his own layoff decisions. J.A. 344a-345a. A fourth proffered witness, John Borel, sought to testify that he had been given a false negative evaluation by his direct supervisor, Janet Mathis, at the behest of her own supervisor, Mohammad Hussain. J.A. 346a-347a. Borel also sought to testify that another manager, Jay Cole, had informed Borel that Borel had been banned from working at Sprint, and that Borel had witnessed another employee, Carol Kippes, harassed because of her age. J.A. 347a-348a. The fifth proffered witness, John Hoopes, sought to testify that he had

been replaced by a younger employee, and that his post-reduction-in-force job applications to Sprint had been rejected. J.A. 348a-349a.

None of the proposed testimony concerned Mendelsohn or the Business Development Strategy group. None of the five witnesses worked in that group. None of the five had worked under (i) Mendelsohn's direct supervisor, Fee (who had rated her as the weakest employee in his unit); (ii) Reddick (the Assistant Vice President who was Fee's manager, and who made Mendelsohn's layoff decision); or (iii) Sprint Vice President Bill Blessing (who was Reddick's boss, and who ran the entire Business Development Strategy group). None of the five witnesses alleged hearing ageist remarks by Fee, Reddick or Blessing. And none of the five had anything else relevant to say about plaintiff Mendelsohn. Specifically:

- **Bonnie Hoopes:** She was laid off at about the same time as Mendelsohn, but she did not work in Reddick's or Blessing's chain of command, and Mendelsohn did not contend that Reddick or Blessing played a role in Ms. Hoopes' layoff. Ms. Hoopes admitted that she never even had worked with Reddick. J.A. 353a-354a.

- **Wood:** She was laid off two months after Mendelsohn. Wood, like Ms. Hoopes, did not work in Reddick's or Blessing's chain of command, and neither Reddick nor Blessing played a role in Wood's layoff. Wood admitted that she never had spoken with Mendelsohn and that she had no information about Mendelsohn's employment with or separation from Sprint. J.A. 354a-355a.

- **Miller:** She was laid off at about the same time as Mendelsohn, but — like the others — Miller did not work in Reddick's or Blessing's chain of command, and neither Reddick nor Blessing played a role in her layoff. Miller never had spoken with Mendelsohn and, like Wood, she had no information about Mendelsohn's separation from Sprint. J.A. 355a-356a.

- **Borel:** He was laid off approximately four months after Mendelsohn's separation. Borel worked outside the chain of command of Reddick and Blessing, and Mendelsohn did not contend that Reddick or Blessing played a role in Borel's layoff. He admitted that he did not know Mendelsohn, and that he had no information about Mendelsohn's employment or layoff. J.A. 356a-357a.

- **John Hoopes:** He was laid off over nine months before Mendelsohn. Mr. Hoopes, like the rest, worked outside Reddick's and Blessing's chain of command, and neither Reddick nor Blessing played a role in Mr. Hoopes' layoff. He, too, admitted that he had no information about Mendelsohn's employment with or separation from Sprint. J.A. 357a.

Sprint therefore contended that none of the five witnesses could shed light on Reddick's motives in selecting Mendelsohn for layoff.

The district court (Vratil, J.) granted Sprint's motion *in limine* in part, holding that only persons "similarly situated" to Mendelsohn would be allowed to testify about their personal circumstances. Specifically, the district court ruled that former employees who were laid off by Mendelsohn's ultimate supervisor, Reddick, in close temporal proximity to Mendelsohn's own layoff, were similarly situated to Mendelsohn and could testify about their own claims and circumstances. Pet. App. 24a. As the trial proceeded, the district court gave Mendelsohn more latitude even than that. The court expanded its ruling to permit Mendelsohn also to introduce evidence relating to decisions made by (or under) Blessing, Reddick's boss. J.A. 279a-297a. According to the court, this information was relevant to the issue of whether the RIF — as administered by Reddick and Blessing — was a pretext for age discrimination. J.A. 295a-296a. In admitting the evidence to this extent, the district court considered both relevance and the risk of jury confusion. The court found that, provided the scope of proof was limited to Reddick and Blessing, there was no substantial risk of confusion:

> I believe it's clear to the jury now, [or] if it's not clear now, it certainly will be clear at the end of the case, that they're only called upon to evaluate whether Sprint discriminated against this plaintiff and plaintiff will only be allowed to argue [based on] how other employees . . . who were similarly situated[,] subject[] to the same decision-maker and the same RIF.

J.A. 287a. Because the five former employees Mendelsohn identified did not fall within Reddick and Blessing's chain of command, the district court excluded their testimony. J.A. 295a-297a.

Following an eight-day trial, the jury returned a verdict for Sprint, finding that Sprint did not discriminate against Mendelsohn based on age. J.A. 406a.

Mendelsohn appealed. A panel of the Tenth Circuit (per Baldock, J.) reversed in a 2-1 decision. The majority held that the testimony from the five ex-employees was relevant, even though none of the five witnesses reported to or was laid off by Reddick or Blessing, and even though none worked in the Business Development Strategy group with Mendelsohn. Pet. App. 9a-10a. The majority acknowledged that such "me, too" evidence would be inadmissible in a case alleging discriminatory *discipline*. Pet. App. 7a-8a. In the context of a *reduction-in-force*, however, the majority held that "me, too" evidence must be admitted if there is "independent evidence" of a company-wide policy of discrimination, and that the "me, too" evidence without more comprises that "independent evidence." Pet. App. 10a-11a. The panel majority also held that the district judge lacked the discretion, even under Federal Rule of Evidence 403, to exclude the evidence. Pet. App. 15a-16a.

Judge Tymkovich dissented. He contended that evidence concerning decisions made by persons other than the decisionmaking supervisor should be excluded except where there is "independent evidence of specific enterprise-wide policy." Pet. App. 22a. The evidence here did not establish that Reddick or Blessing harbored discriminatory animus toward Mendelsohn, or that the RIF was a pretext for a company-wide discriminatory policy. Thus, the dissent argued, the majority created an erroneous rule of law that "even the most tangentially relevant and prejudicial testimony by former employees is per se admissible." Pet. App. 23a.

Sprint petitioned for rehearing. The panel (again 2-1) denied rehearing, and the full court voted 7-5 to deny rehearing en banc. Pet. App. 25a-26a.

This Court granted *certiorari*. 127 S. Ct. 2937 (2007).

SUMMARY OF ARGUMENT

A discriminatory employment decision is made by the supervisor or manager — the decisionmaker — exercising delegated authority to act for the employing entity. This Court's employment discrimination cases have found liability, or at least a triable question of it, where the plaintiff has presented substantial evidence of discriminatory intent by a decisionmaker. By contrast, where the decisionmaker is not shown to be biased, no discrimination liability exists. The Court's approach has been the same in analyzing discrimination contentions in diverse contexts, unrelated to employment: A violation depends on the presence or absence of proof (i) of discriminatory intent, (ii) by a decisionmaker.

Here, Reddick in Sprint's Business Development Strategy group made the decision to lay off Mendelsohn. Mendelsohn sought to prove her claim of age discrimination by calling five nonparty witnesses. Each of the five would have testified that he or she believed that he or she was selected for layoff from Sprint based on age. But neither Reddick nor his boss Blessing supervised (directly or indirectly) any of the five witnesses, and Reddick and Blessing had nothing to do with the layoff decisions of any of the five. None of the five witnesses had anything to say about the motivations of Reddick or Blessing, only those of decisionmakers in a handful of *other* Sprint departments. Yet the court of appeals majority held that it was reversible error

to exclude from evidence these discrimination allegations, (i) *by* persons who had no connection with Mendelsohn, (ii) *against* persons who had no connection with Mendelsohn.

The court of appeals majority was incorrect. The evidence was properly excluded, and indeed it would have been reversible error to admit it. Evidence is not probative in a disparate-treatment case unless nexus to the decisionmaker is proven. The better-reasoned court of appeals cases thus exclude from evidence, as irrelevant under Federal Rules of Evidence 401 and 402, the so-called "me, too" evidence at issue here: claims of discrimination by witnesses who would assail the motivations of persons other than the plaintiff's decisionmaker(s). This Court similarly should hold that such evidence is substantively irrelevant. In concluding otherwise, the court of appeals majority engaged in circular reasoning. The majority held that "me, too" evidence becomes admissible if there is a common scheme or plan to discriminate — and a common scheme or plan exists if there are "me, too" witnesses.

The lack of relevance should end the matter, but Federal Rule of Evidence 403 provides an additional ground for reversing the court of appeals. The disputed evidence would have caused undue delay and wasted trial time because admitting the evidence would have led to trials-within-a-trial of the circumstances of the five nonparty witnesses. The evidence also would have created the risk of confusion of the issues or misleading the jury, because it would have distracted the jury from the merits (or lack thereof) of Mendelsohn's own claim. Finally, the evidence would have caused unfair prejudice. Jury trials arising out of economically driven reductions-in-force by their nature present sensitive issues. The essence of a RIF is that an

adequately performing incumbent is released when the employer makes a judgment that it needs to cut back. "Me, too" evidence in a case such as this is unfairly prejudicial. As one often-cited lower court decision put it, "even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age."

For each of these reasons the district court correctly excluded the five disputed witnesses. The court of appeals held otherwise, but this Court should reverse.

ARGUMENT

I. THE DISPUTED EVIDENCE WAS PROPERLY EXCLUDED AS SUBSTANTIVELY IRRELEVANT UNDER FEDERAL RULE OF EVIDENCE 401

The ADEA makes it unlawful "to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). This Court's cases illuminate how "because" is proven.

If a discriminatory employment decision is made, it is made by a supervisor or manager — the decisionmaker — delegated with authority to act on behalf of the employing entity. In an employment discrimination case "the defendant is ordinarily not an individual but a company," *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 520 (1993) (emphasis omitted), which hires supervisors and managers "and then delegates to [them] the task of [maintaining] a competent work force," *Furnco Construction Co. v. Waters*, 438 U.S. 567, 569-70 (1978). *Relevant* evidence therefore sheds light on the thought processes and possible biases of the

decisionmaker. Here, however, the court of appeals majority held it to be reversible error for a district court to exclude from evidence discrimination allegations (i) by persons who had no connection with the plaintiff, (ii) against persons who had no connection with the plaintiff. Because the disputed evidence was irrelevant, the district court properly excluded it, as shown below.

A. This Court's Cases Teach That Discrimination Proof Focuses On The Biases Of The Decisionmaker.

The Court has articulated for decades a tripartite allocation of discrimination proof in cases like this one, alleging disparate treatment. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988), summarized the law as follows:

> In . . . "disparate treatment" cases, which involve "the most easily understood type of discrimination," *Teamsters v. United States*, 431 U.S. 324, 335, n.15, 97 S. Ct. 1843, 1854, n.15, 52 L.Ed.2d 396 (1977), the plaintiff is required to prove that the defendant had a discriminatory intent or motive. In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S., at 255, n.8, 101 S. Ct., at 1094, n.8.

Id. at 986.

The Court summarized the tripartite allocation:

> The burden of proving a prima facie case is "not onerous," *id.*, at 253, 101 S. Ct., at 1094, and the employer in turn may rebut it simply by producing some evidence that it had legitimate, nondiscriminatory reasons for the decision. *Id.*, at 254-255, 101 S. Ct., at 1094. If the defendant carries this burden of production, the plaintiff must prove by a preponderance of all the evidence in the case that the legitimate reasons offered by the defendant were a pretext for discrimination. *Id.*, at 253, 255, n.10, 101 S. Ct., 1093, 1094, n.10.

Id. The proof burden at all times rests with the plaintiff:

> [T]hese shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253, 101 S. Ct., at 1093. See also *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1481, 75 L. Ed. 2d 403 (1983).

Id.[1]

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1. This Court has "never had occasion to decide whether . . . application of the Title VII rule to the ADEA context is correct," *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996), but it assumed that to be so in that case. The Court similarly may do so here, as Sprint can assume that Mendelsohn had a prima facie case. The case therefore turns on proof of the ultimate question of pretext.

This case requires the Court to elaborate on how the last element — pretext for discrimination — is proven. This Court's prior cases reveal the proper approach.

1. This Court's employment cases turn on whether discriminatory intent by a decisionmaker is shown.

A discrimination trial by its nature tests the decisionmaker's state of mind in acting on the employer's behalf. *St. Mary's Honor Ctr.*, 509 U.S. at 520 ("[I]n these [discrimination] cases, the defendant . . . must rely upon the statement of an employee — often a relatively low-level employee — as to the central fact[,] and that central fact is not a physical occurrence, but rather that employee's state of mind.") (emphasis omitted). This Court's cases properly focus on the decisionmaker, rather than on attitudes of or remarks by other persons who played no role in the employment dispute at issue.

In *Reeves v. Sanderson Plumbing Products*, *Inc.*, 530 U.S. 133 (2000), for example, the Court held that the plaintiff had raised a triable question of age discrimination in his discharge. It was undisputed that a particular supervisor, one Chesnut, "was the actual decisionmaker." *Id*. at 152. A triable question arose from "evidence that Chesnut was motivated by age-based animus," including his statement that the plaintiff "was so old [he] must have come over on the Mayflower," and that the plaintiff "was too damn old to do [his] job." *Id*. at 151.

Similarly, in *Ash v. Tyson Foods*, *Inc.*, 546 U.S. 454, 456 (2006) (per curiam), another discharge case, the Court reversed summary judgment, citing potentially discriminatory

remarks by the decisionmaker. In *United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.2 (1983), a case alleging race discrimination in promotions, the Court noted that plaintiff had "introduced testimony that the person responsible for the promotion decisions at issue had made numerous derogatory comments about blacks in general and Aikens in particular." In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute in part on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), the Court set forth at length the evidence of discrimination in that case. It "did not simply consist of stray remarks," but rather discriminatory comments from the defendant's partners upon whom the defendant's Policy Board had relied in denying her partnership. *Id.* at 251, 256 & n.15.

Other cases are to similar effect: substantial evidence of discrimination by a decisionmaker leads to liability, or at least a triable question of it. *E.g.*, *Desert Palace*, *Inc. v. Costa*, 539 U.S. 90, 95-96 (2003) (affirming liability for gender discrimination under a mixed-motive theory; the decisionmakers, plaintiff's supervisors, earlier had stalked plaintiff and "'frequently used or tolerated' sex-based slurs against her"); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 613 (1993) (remanding for the court of appeals to consider whether the proffered evidence of discriminatory intent, including "comments by the Hazen[] [cousins]" who ran the firm and decided to discharge plaintiff, raised a triable question of disparate treatment based on age).

By contrast, where the decisionmaker is *not* shown to be biased, no discrimination liability exists. In *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), for example, plaintiff Hernandez sued for disability discrimination when Hughes Missile Systems refused to rehire him. Hernandez earlier had

worked for Hughes, but he had resigned in lieu of discharge after testing positive for cocaine in a lawful drug test. Hernandez's personnel file did not record the results of the drug test, only that he was discharged for unspecified workplace misconduct.

More than two years elapsed. Hernandez then reapplied to work at Hughes. A human resources department employee, Joanne Bockmiller, reviewed his file and rejected his application, citing Hughes' "policy against rehiring employees who were terminated for workplace misconduct." *Id.* at 47. She testified without contradiction that she did not know that the misconduct in Hernandez's case was drug-related. *Id.*

Hernandez sued, alleging disparate treatment based on the disability of drug addiction. The Court of Appeals for the Ninth Circuit found a triable question of disparate treatment, but this Court unanimously vacated the judgment of the court of appeals. "The Court of Appeals did not explain . . . how it could be said that [the decisionmaker,] Bockmiller[,] was motivated to reject respondent's application because of his disability if Bockmiller was entirely unaware that such a disability existed," the Court noted. *Id.* at 54 n.7. "If Bockmiller were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability," no matter what other persons at Hughes might have known. *Id.*; *accord Clark County School District v. Breeden*, 532 U.S. 268, 272, 273 (2001) (per curiam) (no inference of retaliation could possibly be drawn because the decisionmaker had "not become aware of the lawsuit [and right-to-sue letter that preceded it, before] . . . she proposed" the adverse action at issue); *see also Price Waterhouse*, 490

U.S. at 277 (O'Connor, J., concurring) (discriminatory remarks by someone are not probative if they are "unrelated to the decisional process itself"). Discriminatory remarks or decisions by others of course are unfortunate — any enlightened employer conducts training to eradicate them — but they have no probative significance in a claim of disparate treatment by a plaintiff, alleging discrimination at the hands of someone else.

Proper analysis of a discrimination case therefore focuses at the threshold on (i) what the adverse employment decision is, and (ii) who made it, on the employer's behalf. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), for example, the Court focused on the identity of the decisionmakers: there, the senior faculty who effectively denied tenure to Rosalie Tung, a junior professor at the Wharton School. The narrow question presented was one of discovery — were academic peer-review materials privileged, or discoverable? — but in answering that question the Court necessarily assessed relevance. There relevance was obvious; EEOC sought to obtain "(1) confidential letters written by Tung's evaluators; (2) the department chairman's letter of evaluation; [and] (3) documents reflecting the internal deliberations of faculty committees considering applications for tenure, including the Department Evaluation Report summarizing the deliberations relating to Tung's application for tenure . . . ." *Id*. at 186. Those materials, which focused on Professor Tung's tenure decisionmakers, plainly were relevant; "Indeed, if there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files" containing comments of the persons who effectively controlled the tenure decision. *Id*. at 193; *cf. Delaware State College v. Ricks*, 449 U.S. 250, 257 n.8, 262 n.16 (1980) (noting that a

physical altercation between plaintiff Ricks and his department chair, McLaughlin, could be evidence shedding light on the chairman's intent in denying Ricks academic tenure; "university boards of trustees customarily rely on the professional expertise of the tenured faculty" in making tenure decisions); *NLRB v. Yeshiva University*, 444 U.S. 672, 677 n.5, 686 & n.23 (1980) (university faculty members cannot collectively bargain because they are supervisorial and managerial employees; they are the decisionmakers for the university in matters of hiring, tenure, termination and curriculum).

Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984), recognized that one employee's discrimination proof differs from that of others, even among employees of the same overall entity. In *Cooper*, the EEOC and certain employees of the Richmond Federal Reserve brought a race class action. The district court certified a class but then, on the merits, found no pattern or practice of discrimination. Several individuals later brought their own individual cases. The Federal Reserve contended that *res judicata* barred their claims. This Court disagreed. The failure of a class action against an employer does not mean that there are not valid individual cases to be brought, the Court explained. *Id*. at 878. In *Cooper*, the proof presented by some of the individual plaintiffs — the evidence pertaining to the decisionmakers' biases *vel non* — was sufficiently dissimilar to that at issue in the failed class action, to permit those individuals' cases to be heard on their own particular merits. As this Court put it, "a piece of fruit may well be bruised without being rotten to the core." *Id*. at 880.

Just last Term, in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), the Court unanimously reiterated that the focus of discrimination proof is on the decisionmaker. In *Ledbetter*, the Court considered whether the statute of limitations barred a gender pay-discrimination claim. The Court was closely divided on that issue, but there was no disagreement on the principles of proof that would have governed any trial of plaintiff's claim. "Ledbetter asserted disparate treatment, the central element of which is discriminatory intent," the majority noted. *Id.* at 2167. The issue therefore was whether one or more particular supervisors — "the relevant Goodyear decisionmakers," *id.* — had intentionally discriminated in setting plaintiff's pay. Justice Alito's majority opinion found the claim barred, holding that the allegedly discriminatory pay decisions were made when they were made, *id.* at 2169, and that plaintiff needed to show discriminatory intent by the decisionmaker. Proof of discrimination for dated decisions can be difficult, because "the passage of time may seriously diminish the ability of the parties and the factfinder to reconstruct what actually happened" to the plaintiff at the hands of the decisionmaker(s). *Id.* at 2171. In that case, for example, "Ledbetter's claims . . . turned principally on the misconduct of a single Goodyear supervisor, who . . . by the time of trial . . . had died and therefore could not testify." *Id.* at 2171 n.4. But it was that person's intent that was at issue. A plaintiff may not "rel[y] on the intent associated with other decisions made by other persons at other times," the majority cautioned. *Id.* at 2169.

The dissenting justices would have held differently on the existence of the time bar, because they would have treated "each payment of a wage or salary infected by sex-based discrimination [as a new] unlawful employment practice."

Id. at 2179 (Ginsburg, J., dissenting). The dissenters did not disagree, however, on how discrimination is proven on the merits. "Title VII requires a showing of intent," the dissenters acknowledged, and as a result "Ledbetter carried the burden of persuading the jury that the pay disparity she suffered was attributable to intentional sex discrimination" by the person who set her pay. *Id*. at 2187 (citing specific evidence of discrimination on the part of two of Ledbetter's former supervisors-decisionmakers).

Thus, while the *Ledbetter* Court was divided on the proper application of the statute of limitations, the entire Court agreed on the core substantive principle of disparate treatment proof: (i) discriminatory intent, (ii) by a decisionmaker.

2. In a host of other contexts this Court similarly has evaluated discrimination contentions by focusing on the motivation of the decisionmaker.

Discrimination contentions also arise outside the employment context. This Court's analytical approach has been the same: evaluating whether bias by the decisionmaker is shown. This is true in cases involving alleged discrimination in zoning,[2] discrimination in criminal

2. *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 194, 196-97 (2003) (the court of appeals erred in "ascribing the [discriminatory] motivations of a handful of citizens . . . to the City [officials]" who ultimately decided to call a referendum on a zoning issue; the discrimination plaintiffs needed to produce evidence of discriminatory "statements made by *decisionmakers or referendum sponsors* during deliberation over [the referendum].") (emphasis added); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265, 267 (1977) (where "discriminatory intent or purpose" is at issue, relevant evidence is that which "shed[s] some light on the decisionmaker's purposes").

prosecution,[3] discrimination in political appointments,[4] discrimination in jury selection,[5] and discrimination

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3. *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 126 S. Ct. 1695, 1706 (2006) (relevant inquiry in selective prosecution cases is whether an "unconstitutionally motivated inducement infected the [particular] prosecutor's decision to bring the charge"). *Compare Wright v. Georgia*, 373 U.S. 284, 292 (1963) (petitioners' arrest for breach of the peace violated the Equal Protection Clause because "[i]t was obviously based, *according to the testimony of the arresting officers themselves*, upon their intention to enforce racial discrimination") (emphasis added) *with Chaffin v. Stynchcombe*, 412 U.S. 17, 26-27 (1973) (refusing to impute a retaliatory motive to a criminal defendant's new judge and jury following the vacatur of his initial conviction; the danger of vindictive sentencing is "*de minimis*" where "the second sentence is not meted out by same judicial authority [that] handl[ed] the prior trial").

4. *Mayor of Philadelphia v. Educ. Equality League*, 415 U.S. 605, 619, 621 (1974) (rejecting the argument that the alleged bias of "a city official who did not have final authority over or responsibility for the challenged appointments" could be "imputed" to the official holding the appointment power).

5. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 95, 96 (1986) (focusing on the particular prosecutor's use of peremptory challenges in evaluating an allegation of race-based use of them; the peremptory-challenge system "permits [particular prosecutors] 'to discriminate who are of a mind to discriminate'"; the issue for a particular criminal defendant is whether there was discrimination "in his case," not that of others) (emphasis omitted); *Georgia v. McCollum*, 505 U.S. 42, 47 (1992) ("[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury based *solely* on the prosecutor's exercise of peremptory challenges *at the defendant's trial*.") (emphasis added); *Hernandez v. New York*, 500 U.S. 352, 365 (1991) ("In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. . . . [E]valuation of the [particular] prosecutor's state of mind [is] based on [his or her] demeanor and credibility. . . .").

against interstate commerce.[6]

B. "Me, Too" Evidence Thus Is Relevant Only Where The Proffered Witness Sheds Light On The Motivations Of The Plaintiff's Decisionmaker.

The proper approach to evaluating the disputed evidence in this case follows from the foregoing principles. At issue here are discrimination allegations (i) by persons who had no connection to the plaintiff, (ii) against persons who had no connection to the plaintiff. Third-party witness testimony of course is properly admissible if the nonparty witness' testimony sheds light on the motivation of the plaintiff's decisionmaker(s). But such evidence is not relevant, and therefore not admissible, if the nonparty witnesses simply would assail different decisionmakers who lack nexus to the plaintiff.

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6. *E.g.*, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (order requiring hydroelectric energy produced in New Hampshire to be sold therein violated the Commerce Clause, where the decisionmaker — the New Hampshire Public Utilities Commission — "made clear that its order [was] designed to gain an economic advantage for New Hampshire citizens at the expense of . . . neighboring states"); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 325-28 (1977) (New York statute exempting in-state securities transactions from transfer tax violated the Commerce Clause, where the legislative history and governor's statements confirmed that "the purpose of the new law was to 'provide long-term relief from some of the competitive pressures from outside the State'") (citation omitted); *H. P. Hood & Sons*, *Inc. v. Du Mond*, 336 U.S. 525, 528, 540 (1949) (New York licensing requirement for milk processors violated the Commerce Clause as applied, where the decisionmaker — the Commissioner of Agriculture and Markets — stated that the requirement was intended to curtail competition from out-of-state processors).

The issue regularly arises in the lower-court cases. One of the most cited is the Second Circuit's decision in *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984). In that case the plaintiff alleged that his supervisor discharged him because of age. At trial, the district court permitted the plaintiff to call as witnesses six former employees, all of whom testified that they, too, were discharged because of age. A jury awarded damages to the plaintiff, but the Second Circuit reversed. The district court should have excluded the testimony of the six former employees as both irrelevant and unfairly prejudicial, the court held: "[T]heir testimony, aside from presenting unnecessary collateral issues, provided 'no basis for an inference of discrimination,'" because the circumstances of the six others bore no logical relationship to the plaintiff. *Id.* at 121 (citation omitted); *accord Martin v. Citibank*, *N.A.*, 762 F.2d 212, 217 (2d Cir. 1985) (statements by individuals with no nexus to the challenged employment decision have no bearing on the plaintiff's claim) (citing *Haskell*, 743 F.2d at 121). Thus, the "me, too" evidence was "insufficient to show a pattern and practice of discrimination." *Id.* at 122.

The Fifth Circuit held similarly in *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), *overruled on other grounds by Carter v. South Central Bell*, 912 F.2d 832 (5th Cir. 1990). In that case plaintiff sued for race discrimination. The district court declined to permit plaintiff to present testimony from three witnesses, each of whom wished to contend that he or she also was a race discrimination victim. Defendant won at trial, and plaintiff appealed. The Fifth Circuit affirmed the district court, holding that the proffered "me, too" evidence simply was not relevant because it shed no light on plaintiff's circumstances. Explained the Fifth Circuit:

> To prevail he had to show that Conoco purposefully discriminated against him. The witnesses Goff

> wanted to call could not testify as to Conoco's motive, intent, or purposefulness in failing to promote Goff. None of them had worked with Goff at Conoco, and none had any knowledge of Goff's experience or relationship with the company. All the witnesses could have testified to was their own individualized dealings with Conoco. Because none had worked in Goff's department, their testimony would not have concerned the same supervisors of whom Goff complained. Because this testimony would not have related to the issue of whether Goff suffered discrimination, the court did not err in refusing to admit this testimony.

678 F.2d at 596-97.

The Fifth Circuit more recently elaborated on that rule in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000). In that case two plaintiffs sued for age discrimination. The district court permitted plaintiffs to elicit "testimony pertaining to other employees in other branches of the company who held different positions under different supervisors," all of whom contended that they, too, were discharged based on age. *Id.* at 298. Plaintiffs prevailed at trial and were awarded damages. The Fifth Circuit reversed and granted a new trial because "[s]horn of this . . . irrelevant evidence, the judgment cannot stand." *Id.* Plaintiffs contended that the testimony was relevant because it tended "to show that United Companies, a company of 2700 employees, had 'a pattern or practice' of discriminating against older workers." *Id.* at 302. The court rejected the contention; "A 'pattern or practice' of discrimination does not consist of 'isolated or sporadic discriminatory acts by the employer.'" *Id.* (quoting *Cooper*, 467 U.S. at 875).

"Anecdotes about other employees cannot establish that discrimination was a company's standard operating procedure unless those employees are similarly situated to the plaintiff," the court held. 212 F.3d at 302. That was not the case in *Wyvill*; "testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge." *Id.*

The Sixth Circuit said the same thing in *Williams v. Nashville Network*, 132 F.3d 1123 (6th Cir. 1997). The plaintiff in that case alleged race discrimination in hiring. He sought to buttress his case by calling as a witness another African-American applicant, who also had not been hired. The district court excluded the evidence, and the Sixth Circuit affirmed. Considerations such as whether the plaintiff and witnesses applied for the same position, and whether they did so at the same time, were part of the court's ultimate inquiry as to whether the plaintiff and the disputed witness had the same decisionmaker. *Id.* at 1130. Because the proffered evidence involved a different position, requiring different qualifications, and a different decisionmaker, it had "no apparent connection" to plaintiff's application for employment and thus was properly excluded. *Id.*

In an earlier case from the same court, *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), the court reasoned similarly. The plaintiff was laid off from his job along with others as the business downsized by approximately 33%. *Id.* at 154. Plaintiff sued, alleging age discrimination. At trial, plaintiff sought to buttress his case with testimony from two other older workers who were laid

off from two other sites within approximately a year of plaintiff's own layoff. The two testified that they had heard their own supervisors make discriminatory, ageist comments. The jury ruled for plaintiff and awarded damages. The Sixth Circuit reversed and granted a new trial, holding that the two witnesses' testimony was irrelevant. The court emphasized that the plaintiff and nonparty witnesses did not share the same decisionmaker-supervisor: the "me, too" witnesses worked in different geographical areas than the plaintiff, under different supervisory chains. Thus, the court concluded, "there was no evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision to terminate Schrand." *Id.* at 156. In language equally applicable to the instant case, the court explained: "The fact that two employees of a national concern, working in places far from the plaintiff's place of employment, under different supervisors, were allegedly told they were being terminated because they were too old, is simply not relevant to the issue in this case." *Id.*

Another of the most-cited decisions on the issue is an early district court case summarily affirmed by the Third Circuit, *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 392 (E.D. Pa.), *aff'd*, 639 F.2d 774 (3d Cir. 1980). That case, like the instant one, alleged age discrimination in a layoff. Plaintiff sought to introduce testimony from five other employees laid off at the same time, each alleging that he, too, was laid off based on age. The district court excluded the evidence, and the trial resulted in a defense verdict. The court denied a new trial motion that alleged evidentiary error, and the Third Circuit affirmed; "[T]o the extent testimony of each witness was about his own lay off, it was not relevant to [plaintiff]'s lay off," the district court declared. *Id.* at 392.

These cases fit comfortably within the taxonomy of discrimination proof applied in other contexts. Courts require nexus to the decisionmaker before assigning probative value to discriminatory remarks,[7] comparative evidence,[8] statistical

7. *Hemsworth v. Quotesmith.com*, *Inc.*, 476 F.3d 487, 489, 491 (7th Cir. 2007) (holding not probative discriminatory remarks by persons who played no role in plaintiff's layoff decision, including comments made during a conversation between Quotesmith's general counsel and a human resources official regarding the large number of employees over 40 years old who were being laid off; to "provide an inference of discrimination" a discriminatory remark must be "(1) made by the decision maker, (2) around the time of the decision, and (3) in reference to the adverse employment action"); *Yates v. Rexton*, *Inc.*, 267 F.3d 793, 799 (8th Cir. 2001) (affirming summary judgment in a case alleging age discrimination in layoff; Yates presented "the statements of various [company] managers about him specifically and about age in general," including remarks by a supervisor named Zei; but it was a different decisionmaker, Wright, who made the decision to include Yates in the reduction-in-force, without input from Zei or anyone else, so as a result any bias by Zei or others was not probative); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2003) (affirming summary judgment; plaintiff relied on obviously discriminatory remarks by one of the defendant's senior staff, Berglund; however, "Berglund was not the decisionmaker, and Vasquez has offered no evidence of discriminatory remarks made by [the decisionmaker,] Leeds.").

8. *E.g.*, *Rivera v. City & County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004) ("Comparisons of actions taken by other supervisors would have no probative value regarding the motivation for actions by a particular supervisor. Accordingly, we conclude that the general rule — that employees cannot be considered similarly situated unless they share the same supervisor — applies in this case . . . ."); *Stanback v. Best Diversified Prods.*, *Inc.*, 180 F.3d 903, 910 (8th Cir. 1999) (affirming summary judgment; proffered comparators, who reported to supervisors different from plaintiff's, were not probative of discrimination; "When different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects.") (quoting *Harvey v. Anheuser-Busch*, *Inc.*, 38 F.3d 968, 972 (8th Cir. 1994)).

proof,[9] and supposedly mendacious explanations for adverse employment decisions.[10] In all of those contexts the evidence is probative, or not, based on its nexus to the decisionmaker.

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9. *Balderston v. Fairbanks Morse Engine Div. of Coltec Indust.*, 328 F.3d 309, 320 (7th Cir. 2003), for example, held:

> In order to be considered, the statistics must look at the same part of the company where the plaintiff worked; include only other employees who were similarly situated with respect to performance, qualifications, and conduct; the plaintiff and the other similarly situated employees must have shared a common supervisor; and the treatment of the other employees must have occurred during the same RIF as when the plaintiff was discharged.

Accord Hemsworth, 476 F.3d 487, 492 (7th Cir. 2007) (statistics must be drawn from persons affected by the same supervisor-decisionmaker; "Statistical evidence is only helpful when the plaintiff faithfully compares one apple to another without being clouded by thoughts of Apple Pie ala Mode or Apple iPods.").

10. *E.g.*, *Peters v. Lincoln Electric Co.*, 285 F.3d 456, 474 (6th Cir. 2002) (the defendant's chief financial officer, Elliott, demoted plaintiff based on certain performance-related dissatisfactions; plaintiff sought to prove mendacity with affidavits from and evaluations by the employer's former executives, praising his performance; the court held that, because plaintiff had not proven a shifting articulated nondiscriminatory reason *by Elliott*, the decisionmaker, the evidence was not probative; "It is simply stating the obvious to observe that what may have satisfied one management regime does not necessarily satisfy its successor, and Plaintiff's proffered evidence does not serve to rebut Lincoln's current management's view regarding Peters' insufficient skills to continue performing in the Controller position.") (emphasis omitted); *Krchnavy v. Limagrain Genetics Corp.*, 294 F.3d 871, 876-77 (7th Cir. 2002) (affirming summary judgment; inaccuracies and false and inconsistent statements made by plaintiff's supervisor (Anderson), and the HR manager (Wittig) regarding plaintiff's termination raised no

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C. The Court Of Appeals Here Strayed From These Principles; The Evidence At Issue Was Substantively Irrelevant Because It Bore No Relationship To Mendelsohn's Layoff Decisionmaker.

The district court properly excluded — indeed, it would have been prejudicial error to admit — testimony from the five former employees Mendelsohn proffered as witnesses.

1. The five disputed witnesses could shed no light on Mendelsohn's layoff or Mendelsohn's decisionmaker.

Neither Mendelsohn's supervisor (Fee), the layoff decisionmaker (Reddick), nor Reddick's own boss (Blessing) supervised (directly or indirectly) any of the five disputed witnesses. The five were laid off as many as nine months before Mendelsohn, or as many as three months after. None of the five worked in the Business Development Strategy group, and no one in the Business Development Strategy group had anything to do with their layoffs. Three of the five witnesses sought to testify that they had either heard or been subjected to discriminatory ageist remarks by their various supervisors. Neither Blessing, Reddick nor Fee was alleged to have uttered those or similar remarks, and Mendelsohn never heard any ageist remarks herself. One of the three witnesses sought to testify that she had seen a spreadsheet

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triable question of pretext because neither Anderson nor Wittig participated in the termination decision; "An inference of pretext may be permissible only when *decisionmakers* make false or inconsistent statements about the circumstances of a particular employment decision.") (emphasis in original).

from a supervisor, to whom she did not report, suggesting that age was one of the criteria that particular supervisor may have considered in making layoff decisions. The supervisor in question did not work in the Business Development Strategy group. A fourth employee sought to testify that he had information that he had been given a false negative evaluation; that he had been banned from working at Sprint; and that he had witnessed harassment of another employee because of her age. None of these allegations had anything to do with Blessing, Reddick, Fee, or anyone else in Business Development Strategy. The fifth employee sought to testify that he had been replaced by a younger person, and that his repeated post-RIF job applications all were turned down. None of this pertained to Blessing, Reddick, Fee, or anyone in the Business Development Strategy group.

By contrast, the *relevant* evidence in the case focused on the decisionmaker. That was Reddick but, as noted, the district court eventually permitted both sides also to introduce testimony pertaining to decisions at the time of the layoffs by both Reddick and his boss, Blessing. Thus, for example, the jury heard evidence that Blessing was instructed to cut costs by 30% in Business Development Strategy; that he identified specific jobs as superfluous; that he decided to consolidate two units and make other structural changes within Business Development Strategy; and that an adverse-impact analysis had been conducted to measure the incidence of the RIF within Business Development Strategy. J.A. 319a-324a, 326a-332a, 333a-334a. Each layoff decision under Blessing was open to examination at trial. J.A. 292a-294a. Mendelsohn thus was allowed to introduce a spreadsheet containing the ages of every laid-off employee in Blessing's group, including those who were not under Reddick's supervision. J.A. 279a-297a, 298a-300a, 326a-332a. Her

counsel, relying on the spreadsheet, questioned Sprint witnesses about the layoffs of two protected-age individuals, Doug Reinhardt and Marc Elster. J.A. 300a-305a, 326a-327a. Reddick had played no role in those layoff decisions; Reinhardt and Elster were Reddick's peers. J.A. 332a-333a.

Sprint was accorded similar latitude. Sprint pointed out that older workers within Blessing's Business Development Strategy group were not disfavored; indeed, the oldest person in each job level within Blessing's group survived the RIF. J.A. 335a-336a. The jury also heard evidence that, at about the time of the layoff, Reddick accepted older workers into the Business Development Strategy group or assisted them in finding positions in other units as transfers. J.A. 312a-317a, 336a-337a, 338a-339a. In fact, the number of employees in Reddick's group who were over age 50 actually doubled following the transfers that Reddick accepted during the reorganization within the Business Development Strategy group. J.A. 335a. That of course was relevant because it tended to disprove that Reddick harbored any animus against older workers.

Mendelsohn in the past has contended that the evidentiary focus, limited to decisions within Business Development Strategy, had the effect of portraying Sprint's decisionmaking in a favorable light. That contention demonstrates no vice in the district court's evidentiary ruling, however, but rather that — whatever may have occurred elsewhere — *Reddick and Blessing* simply did not engage in age discrimination.[11]

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11. This is not to say that Sprint entirely agrees with the district court's evidentiary test. Sprint believes that the district court erred by *expanding too much* the scope of the trial, over Sprint's objection.

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2. Mendelsohn failed to lay any foundation of relevance for the testimony of the five disputed witnesses.

If Mendelsohn's proffered evidence — say, the ageist remarks — were accurately reported, Sprint condemns them. It does not follow, however, that such evidence has anything to do with Mendelsohn's own discrimination claim. The defense jury verdict demonstrated that Sprint did not discriminate against Mendelsohn herself. The proffered evidence at the very worst hinted that Sprint's equal-opportunity record might have "bruise[s]" elsewhere, *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 880 (1984), but Mendelsohn failed to lay the evidentiary foundation of nexus between any such bruises and her own particular claim.

a. The proffered evidence was not relevant to any common scheme or plan.

The court of appeals majority thought the evidence relevant because it tended to show a common scheme or plan to discriminate. Pet. App. 5a-6a. It certainly is true that, if there is evidence of a common scheme or plan — say, an

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Reddick was the decisionmaker, and the proper scope of proof should have focused on his decisions only. That is what the district court originally ruled *in limine*. Later, however, the court also allowed about decisions made or approved by Reddick's boss, Blessing. Sprint believes that the district court actually gave Mendelsohn too much evidentiary latitude, but the defense verdict renders moot Sprint's belief that it, rather than Mendelsohn, was the party legitimately aggrieved over the scope of the evidence allowed at trial.

expression of ageist attitudes by senior management,[12] provided that they are accompanied by foundational proof that they likely tainted decisionmaking in the particular plaintiff's case[13] — a district court in an appropriate case could find a link

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12. *E.g.*, *Rivers-Frison v. Southeast Mo. Cmty. Treatment Ctr.*, 133 F.3d 616, 621 (8th Cir. 1998) (reversing summary judgment for defendant based in part on the plaintiff's allegation that the defendant's Acting Director allegedly made a racially discriminatory statement); *Mangold v. Cal. Pub. Util. Comm'n*, 67 F.3d 1470, 1475 (9th Cir. 1995) (affirming jury verdict for plaintiffs where allegedly ageist statements by the company President/Executive Director gave rise to "reasonable inferences" that the plaintiffs were denied promotions based on age); *Ryder v. Westinghouse Elec. Co.*, 128 F.3d 128, 130-34 (3d Cir. 1987) (affirming jury verdict for plaintiff in discharge case alleging age discrimination; ageist statements by the CEO and persons speaking for him were relevant; even though the speakers were not decisionmakers in plaintiff's discharge, a jury could find that they set forth a company policy followed by others); *cf. Slattery v. Swiss Reinsurance Am. Corp*., 248 F.3d 87, 92 (2d Cir. 2001) (affirming summary judgment despite finding that the district court failed to accord sufficient weight to discriminatory statements by the Chief Executive; "When a major company executive speaks, 'everybody listens' in the corporate hierarchy. . . .") (quoting *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989)).

13. *See*, *e.g.*, *Brown v. CSC Logic*, *Inc.*, 82 F.3d 651, 655 (5th Cir. 1996) (affirming summary judgment notwithstanding "age-related remarks allegedly made to [plaintiff] by CEO Kimzey"; the remarks were "vague and remote in time," and hence not probative); *Nitschke v. McDonnell Douglas Corp*., 68 F.3d 249, 251, 252 (8th Cir. 1995) (affirming summary judgment even though the company president years earlier had written a document that among other things outlined a management initiative to hire and retain "the best young people"; plaintiff failed "to prove a causal relationship between [the document] and his layoff"); *Bialas v. Greyhound Lines*, *Inc*., 59 F.3d 759, 763-64 (8th Cir. 1995) (affirming summary judgment in a discharge case alleging age

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between a plaintiff's circumstances and those of others. *Cf*. *Miller-El v. Dretke*, 545 U.S. 231, 253, 263 (2005) (analyzing discrimination in jury selection; the appearance of discrimination drawn from statistical and comparative evidence in this particular case "is confirmed by widely known evidence of the general policy of the Dallas County District Attorney's Office to exclude black venire members from juries").

There was no such evidence in this case, however. This was not a pattern-or-practice case, and Mendelsohn simply failed to lay the proper evidentiary foundation to establish the relevance of the circumstances of the five disputed witnesses. Absent that evidentiary foundation, the circumstances of the five were irrelevant. Sprint respectfully suggests that the court of appeals' reasoning was "completely circular and explain[ed] nothing," *Clackamas Gastroenterology Associates*, *P.C. v. Wells*, 538 U.S. 440, 444 (2003) (citation omitted). According to the court of appeals majority, "me, too" evidence becomes admissible if there is a company-wide scheme or plan — and such a scheme or plan necessarily exists if there are "me, too" witnesses. But proof of a pattern or practice requires "more than the mere occurrence of isolated . . . or sporadic discriminatory acts." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977). The five "me, toos" here, none with any nexus to Mendelsohn or persons who arguably were decisionmakers as to her, thus at worst would allege just those sorts of "isolated" or "sporadic" acts.

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discrimination, even though the CEO had written a memo stating that "people over 45 years of age, including myself, generally have serious difficulty adjusting to change"; the discharge decision was made by another supervisor, and plaintiff failed to prove a link between the memo and the discharge); *Guthrie v. Tifco Indus.*, 941 F.2d 374, 378-79 (5th Cir. 1991) (affirming summary judgment despite arguably discriminatory remarks by the retiring CEO Brown; there was no reason to believe that the successor CEO adhered to the views expressed).

Equally unpersuasive was the majority's effort to reconcile its opinion with prior Tenth Circuit precedent. That court in the past had correctly analyzed relevance based on whether the proffered proof involved the same supervisor-decisionmaker. *E.g.*, *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997). *Aramburu* was inapposite, according to the majority, because that case involved an allegation of discriminatory *discipline*, and this one involves an allegation of discrimination *in layoff*. Pet. App. 7a-9a. That is a distinction without a difference. Both scenarios involve employment decisionmaking by individual supervisors according to their particular assessments of business needs. Thus, both RIF and discipline cases — indeed all cases of alleged disparate treatment — test the decisionmaker's state of mind. The rules of relevance do not vary based on the nature of the adverse employment action at issue. The court of appeals majority seemed to believe that employers in discipline cases make decentralized decisions, but that in layoff cases company-wide master plans are imposed from the top. Certainly one could conceive of such a case, but the layoffs here were not of that sort. Decisionmaking was decentralized (J.A. 310a-312a, 341a), and Mendelsohn therefore failed to lay the foundation necessary to link evidence of one department's supposed biases to decisions made in another.

b. The proffered evidence was not relevant as "background."

Sprint anticipates that Mendelsohn will contend that the circumstances of the five disputed witnesses have some peripheral relevance as "background," relevant to show a "climate" or "atmosphere." But the Federal Rules of Evidence impose more rigor than analytically foggy concepts like these.

Cf. Ash v. Tyson's Foods, *Inc.*, 546 U.S. 454, 457 (2006) (rejecting an "unhelpful and imprecise" standard for evaluating discrimination evidence). Disciplined analysis of facts at a trial can be tainted by injecting inflammatory claims untethered to a plaintiff's particular circumstances. Before such evidence may be admitted, the proponent must lay — not assume — the foundation of relevance. The proponent, using evidence rather than supposition, must link any supposed "background" to the specific act and scene featuring the plaintiff and his or her decisionmaker.

Without that foundational link, the evidence should be excluded. *See*, *e.g.*, *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 360 (7th Cir. 2001) (affirming summary judgment in age discrimination case arising out of a RIF; the claim that plaintiff's employer "had an age-discriminatory 'culture'" was insufficient to establish a prima facie case); *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1010 (10th Cir. 2001) (affirming summary judgment; there was no demonstrated nexus between an alleged "culture of racial hostility" and plaintiff's discharge); *Smith v. Stratus Computer*, *Inc.*, 40 F.3d 11, 18 (1st Cir. 1994) (affirming summary judgment; plaintiff's claim that her supervisor's comment "suggest[ed] a 'men's club' atmosphere" was irrelevant because her supervisor played no role in the termination decision); *EEOC v. U.S. Steel*, 649 F. Supp. 964, 967 (W.D. Pa. 1986) (granting summary judgment in a RIF case; plaintiff's claim of "an age-biased atmosphere" bore no relationship to "the decision-maker's motivation for the [RIF]").[14]

14. Thus, cases like *Cummings v. Standard Register Co.*, 265 F.3d 56, 63 ("atmosphere") (1st Cir. 2001), *Phillip v. ANR Freight Sys.*, *Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) ("background"), and *Estes v. Dick Smith Ford*, *Inc.*, 856 F.2d 1097, 1102 (8th Cir. 1988) ("climate"), *superseded in part on other grounds*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989), should be disapproved.

The court of appeals majority thought the disputed evidence might be enough to cause a jury to "raise an eyebrow" at the circumstances of Mendelsohn's own layoff. Pet. App. 14a. But discrimination proof must be analyzed with precision, not physiognomical allusions, *Ash*, 546 U.S. at 457-58 (disapproving a standard for assessing proof that required evidence "virtually to jump off the page and slap you in the face"). Nor, in any event, was the disputed evidence sufficient to cause anyone to "raise an eyebrow." Sprint laid off more than 15,000 employees in a series of RIFs over more than 14 months during the telecommunications industry's implosion. It is hardly surprising that Mendelsohn could find five other persons — 0.003% of that total — who would claim that Sprint selected them because of their age.

c. Discrimination cases are not exempt from normal rules of foundation and relevance.

Mendelsohn likely will contend that a decisionmaker's state of mind is not easily proven, so she should be given latitude to stray from normal evidentiary principles. This Court's cases provide the two dispositive responses.

First, while it is true that "the question facing triers of fact in discrimination cases is both sensitive and difficult [as] [t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *United States Postal Service v. Aikens*, 460 U.S. 711, 716 (1983). "The law often obliges finders of fact to inquire into a person's state of mind," this Court said, and "The state of a man's mind is as much a fact as the state of his digestion. . . . [I]f it can be ascertained it is as much fact as anything else." *Id.* at 716-17 (citation and internal quotation omitted).

Second, probing a decisionmaker's state of mind is what discovery is for:

> Some will complain that [a] specific causation requirement is unduly burdensome on [discrimination] plaintiffs. But . . . discovery . . . give[s] plaintiffs broad access to employers' records in an effort to document their claims. . . . Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link to a protected-group status such as race or age.

Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657-58 (1989) (adverse impact case), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; *accord Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981) (assigning the plaintiff the burden of proof will not mean that meritorious complaints go unproven; the "discovery rules applicable to any civil suit in federal court are supplemented in a Title VII suit by the plaintiff's access to the Equal Employment Opportunity Commission's investigatory files"); *Univ. of Pa. v. EEOC*, 493 U.S. 182, 193 (1990) (ordering discovery of a university's peer-review files in a tenure dispute, because that is where any evidence of discriminatory intent is likely to be found).

As shown above, a discrimination plaintiff must lay the foundation for a proffered witness by showing a link between that witness and plaintiff's own circumstances and decisionmaker. Here, discovery provided Mendelsohn a full and fair opportunity to establish that link, but she could not do it. The necessary evidentiary foundation therefore did not exist.

Mendelsohn's real purpose in proffering the five disputed witnesses — and the prejudice that would have resulted if, erroneously, they had been permitted to testify — thus becomes clear. Mendelsohn lacked the accepted forms of proof of the *decisionmaker's* motive, so she sought to sully the corporate defendant in the jury's eyes with allegations by others, against others. Whether those other allegations were factually accurate or not is beside the point. They shed no light on Mendelsohn's decisionmaker's motivations in selecting *her* for layoff, and yet if erroneously admitted in a jury trial they would have caused great prejudice. Federal Rule of Evidence 401 provides that relevant evidence must have some tendency in reason to make a "fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The disputed witnesses here had nothing at all to do with the "fact . . . of consequence" — the decisionmaker's motive — and it was irrelevant for that reason.

The rule resulting from this case should be simple and categorical: "me, too" evidence always is inadmissible, absent a demonstrated link between it and the specific decision challenged by the plaintiff and plaintiff's decisionmaker.[15] Because the district court here properly

15. The instant case is an individual disparate treatment case, not a hostile-environment harassment case. Thus, this Court need not decide whether a different rule of relevance applies in that context. *See*, *e.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 61 (1986) (noting, without deciding the issue, that "the District Court did not allow [Vinson] to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief") (internal quotation omitted). And, of course, nothing in this case affects established principles of procedure in

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excluded the proffered evidence, the jury verdict in Sprint's favor should be reinstated.

II. THE DISPUTED EVIDENCE WAS PROPERLY EXCLUDED, GIVEN THE WIDE LATITUDE ACCORDED DISTRICT COURTS UNDER FEDERAL RULE OF EVIDENCE 403

The disputed evidence should have been excluded as irrelevant for the reasons set forth above. The court of appeals held, however, that such evidence not only was admissible, it *never may be excluded*, even under Federal Rule of Evidence 403. But Rule 403 provides that district courts should exclude otherwise-admissible evidence, "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." This Court should not have to reach the Rule 403 issue, but Rule 403 provides a further reason to reverse the court of appeals.

A. The Evidence Would Have Caused Undue Delay And Wasted Trial Time.

This Court regularly has noted the broad discretion district courts have to exclude evidence that will unduly consume trial time, especially where trials-within-a-trial would occur. *E.g.*, *Crane v. Kentucky*, 476 U.S. 683, 689-90

(Cont'd)

bona fide class actions, where it has long been established that anecdotal evidence supplements statistical proof to "[bring] the cold numbers convincingly to life." *Teamsters v. United States*, 431 U.S. 324, 339 (1977). The instant case is not a class action or pattern-or-practice-case, as the Pretrial Order revealed. J.A. 127a-154a.

(1986) (district judges have "wide latitude to exclude evidence that is . . . only marginally relevant or poses an undue risk of . . . prejudice [or] confusion of the issues") (citation and internal quotation omitted).

The admission of the kind of disputed evidence here needlessly would burden the courts. Trials would expand substantially in size if district courts must permit trials-within-a-trial on the circumstances of nonparty witnesses. For every piece of evidence a plaintiff presented as to a "me, too" witness, the employer would be entitled to counter with what might be called "not you, either" evidence, to rebut their claims. The employer would have to be allowed to present, for each of the witnesses, testimonial and documentary evidence of performance shortcomings or skills limitations, whatever led the decisionmaker to put that individual on the layoff list. The employer also would be entitled to introduce proof about other older workers who were *not* laid off, to show that older workers as a group were not disfavored. All this injects into the case witnesses who had no involvement with the plaintiff, and documentary evidence that had no bearing on the plaintiff. Thereafter, the plaintiff in turn could produce additional testimonial and documentary evidence in reply to the various components of the defendant's showing. As the court described in *Moorhouse*, this would compound the case geometrically, by requiring numerous trials-within-a-trial:

> Had the Court permitted each of the proposed witnesses to testify about the circumstances surrounding his own lay off, . . . Defendants then would have been placed in the position of either presenting the justification for each witnesses' lay off, or of allowing the testimony to stand

> unrebutted. This latter alternative, of course, would have had an obvious prejudicial impact on the jury's consideration of [plaintiff's] case. To have pursued the former option, defendants would have been forced, in effect, to try all six cases together with the attendant confusion and prejudice inherent in that situation.

501 F. Supp. at 393 (footnote omitted).[16]

As a result, numerous courts of appeals have held that Rule 403 is a proper basis for excluding "me, too" evidence. *E.g.*, *Wyvill*, 212 F.3d at 303 (trial court's admission of this evidence entitled defendant "to respond to each witness's claims, and creat[ed], in effect, several 'trials within a trial'"; these "mini-trials were not probative on the issue of whether [the plaintiffs] faced discrimination"); *Williams*, 132 F.3d at 1130 (the admission of "me, too" evidence would have required the defendant to present testimony explaining why a nonparty witness had not been hired).

B. The Evidence Would Have Created The Risk Of Confusion Of The Issues, Or Misleading The Jury.

This Court similarly has recognized that district courts have broad discretion to exclude even relevant evidence that could be misleading or confusing. In *United States v. Hale*, 422 U.S. 171 (1975), for example, the introduction of

16. Trials-within-a-trial already occurred to some extent, when the trial judge expanded the scope of evidence beyond Reddick's layoff decisions to the entire Blessing organization. Sprint was forced to go through the entire list of Business Development Strategy group layoffs to demonstrate no age discrimination as to any older worker in that group. *See supra* note 11.

evidence regarding the defendant's silence at the time of his arrest created an intolerably high risk of jury confusion. "The danger," this Court explained, "is that the jury is likely to assign much more weight to the [challenged evidence] than is warranted. And permitting the defendant to explain . . . is unlikely to overcome the strong negative inference that the jury is likely to draw. . . ." *Id.* at 180; *see also Hamling v. United States*, 418 U.S. 87, 127 (1974) (in criminal prosecution of defendants charged with mailing obscene materials, district court did not abuse its discretion in refusing to admit allegedly comparable materials; courts have "considerable latitude" in rejecting or limiting evidence that "would tend to create more confusion than enlightenment in the minds of the jury").

The disputed evidence here risks confusion of the jury, because the proliferation of claims (and claimants) distracts the jury from a proper focus on the circumstances of the plaintiff. Here again the Tenth Circuit majority departed from the rule applied in similar cases. *See Williams*, 132 F.3d at 1130 ("me, too" testimony was both irrelevant and properly excluded under Rule 403 in any event; "[T]he testimony would have led to a confusion of the issues . . . ."); *Schrand*, 851 F.2d at 156 ("[T]he testimony tended to confuse the issue by focusing the jury's attention on two totally unrelated events, a consideration under Rule 403. . . . [T]here was a distinct danger that the jury would assume a connection that was never proven between the terminations of the two witnesses and that of Schrand."); *Wyvill*, 212 F.3d at 303 ("By admitting this evidence, the district court substantially prejudiced [defendant]. . . . [These witnesses] distracted attention from the fact that they had little to say about [plaintiffs'] terminations.").

C. The Evidence Would Have Caused Unfair Prejudice.

Finally, this Court has recognized that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice." *See Clark v. Arizona*, 126 S. Ct. 2709, 2732 (2006); *accord Old Chief v. United States*, 519 U.S. 172, 180 (1997) (adopting the Advisory Committee's statement that evidence should be excluded as unfairly prejudicial if it creates "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

The disputed evidence here would cause unfair prejudice, particularly in a reduction-in-force case like this one. The essence of a RIF is that an adequately performing incumbent is released when the employer makes a judgment that it needs to cut back. Rarely can an employer defend a RIF case with proof of an employee's incompetence or misconduct; if the employee were unfit for the job, he or she already would have been discharged. *See*, *e.g.*, *Wolf v. Buss (Am.)*, *Inc.*, 77 F.3d 914, 924 (7th Cir. 1996) (affirming summary judgment; "These flaws [in performance] were not serious enough to call for [the employee's] immediate dismissal, but when [the company] was faced with [the need to reduce force] these flaws naturally figured into [the company's] decision regarding which service engineer to let go."); *Merillat v. Metal Spinners*, *Inc.*, 470 F.3d 685, 694 (7th Cir. 2006) ("Even if Ms. Merillat's performance was sufficiently acceptable to justify retaining her in better times, that consideration does not establish that Metal Spinners' reasons for terminating her in a RIF situation were pretextual."), *cert. denied*, 127 S. Ct. 2973 (2007).

It logically follows that most any RIF plaintiff can present a plausible argument that he or she could have retained

employment if only the decisionmaker had used other selection criteria or weighed them differently. The possibility of second-guessing is endless. As a result, in any RIF axiomatically there will be personable, sympathetic and attractive persons, not incompetent or unethical, each with a story to tell about how he or she sacrificed for the company, only to be released in an economically motivated cutback. Juror sympathy to these individuals is inevitable, and Rule 403 exists to prevent unfair prejudice to the defendant employer. As the Sixth Circuit explained in *Schrand*:

> [T]he impact of the two former employees' testimony would be great. Thus, even if that evidence were relevant, we believe its probative value was substantially outweighed by the danger of unfair prejudice flowing from its admission. Although it had no direct bearing on the issue to be decided — whether [plaintiff] was discharged because of his age — this testimony embellished the circumstantial evidence directed to that issue. . . . [with] an emotional element that was otherwise lacking as a basis for a verdict in [plaintiff]'s favor.

851 F.2d at 156.

Armed with the plaintiff and a band of "me, toos," plaintiff's counsel in a layoff case will indict the company for committing management. For the trial to be fair, district judges must retain the discretion to declare that such proof is unfairly prejudicial. As the Second Circuit said in a similar case, reversing a jury verdict for plaintiff abetted with "me, too" proof: "'[E]ven the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his contention that defendant had laid him off because of his age.'" *Haskell*, 743 F.2d at 122, *quoting Moorhouse*, 501 F. Supp. at 393 n.4.

The court of appeals was plainly wrong in holding it to be reversible error to exclude the disputed evidence under Rule 403.

CONCLUSION

This Court should reverse the court of appeals and reinstate the jury verdict. The proffered evidence was substantively irrelevant under Rule 401. It was not reversible error to *exclude* such irrelevant evidence; to the contrary, it would have been reversible error to *admit* it. Alternatively, and at a minimum, the district court did not abuse its discretion in excluding the evidence, given the wide latitude accorded trial judges under Rule 403.

Respectfully submitted,

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