

IN THE  
**Supreme Court of the United States**

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SPRINT/UNITED MANAGEMENT CO.,  
*Petitioner,*

v.

ELLEN MENDELSON,  
*Respondent.*

---

**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Tenth Circuit**

---

**MOTION FOR LEAVE TO FILE BRIEF *AMICI  
CURIAE* AND BRIEF *AMICI CURIAE* OF THE  
EQUAL EMPLOYMENT ADVISORY COUNCIL  
AND THE SOCIETY FOR HUMAN RESOURCE  
MANAGEMENT IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE BRIEF  
*AMICI CURIAE* OF THE EQUAL EMPLOYMENT  
ADVISORY COUNCIL AND THE SOCIETY FOR  
HUMAN RESOURCE MANAGEMENT  
IN SUPPORT OF PETITIONER**

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To the Honorable, the Chief Justice and the Associate  
Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council (EEAC) and the Society for Human Resource Management (SHRM) hereby respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the position of the petitioner in this case. The written consent of the attorney for the petitioner has been filed with the Clerk of the Court. The consent of the attorney for the respondent was requested and received for EEAC and has been filed with the Clerk of the

Court. The consent of the attorney for the respondent was requested but refused for SHRM.

In support of their motion, EEAC and SHRM submit the following:

1. The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.
2. The Society for Human Resource Management (SHRM or the Society) is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.
3. Their experience in these matters make EEAC and SHRM well-situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

4. All of EEAC's members are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other employment-related statutes and regulations. Likewise, many of SHRM's members represent companies subject to the Act. EEAC and SHRM are extremely concerned by the Tenth Circuit's decision in this case. Over a strong dissent, the panel ruled that the district court below abused its discretion in excluding testimony of allegedly discriminatory treatment of other employees who were not similarly situated to the plaintiff. The panel majority's decision, as the dissenting judge pointed out, strongly implies that such testimony is *per se* admissible any time discrimination is alleged in the context of an individual disparate treatment case. Such a rule unfairly prejudices employers defending against claims of discrimination.

WHEREFORE, for the reasons stated, the Equal Employment Advisory Council and the Society for Human Resource Management respectfully request that the Court grant them leave to file the accompanying brief *amici curiae*.

Respectfully submitted,

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**BRIEF AMICI CURIAE OF THE EQUAL  
EMPLOYMENT ADVISORY COUNCIL AND THE  
SOCIETY FOR HUMAN RESOURCE MANAGEMENT  
IN SUPPORT OF PETITIONER**

The Equal Employment Advisory Council (EEAC) and the Society for Human Resource Management (SHRM) respectfully submit this brief *amici curiae*, contingent upon the granting of the accompanying motion for leave. The brief supports the petition for a writ of certiorari.<sup>1</sup>

**INTEREST OF THE AMICI CURIAE**

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to

<sup>1</sup> Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Society for Human Resource Management (SHRM or the Society) is the world's largest association devoted to human resource management. Representing more than 210,000 individual members, the Society's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society's mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters within the United States and members in more than 100 countries.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and other employment-related statutes and regulations. Likewise, many of SHRM's members represent companies subject to the Act. *Amici's* members are extremely concerned by the Tenth Circuit's decision in this case. Over a strong dissent, the panel ruled that the district court below abused its discretion in excluding testimony regarding allegedly discriminatory treatment of other employees who were not similarly situated to the plaintiff. The panel majority's decision, as the dissenting judge points out, strongly implies that such testimony is *per se* admissible any time discrimination is alleged in the context of an individual

disparate treatment case. Such a rule unfairly prejudices employers defending against claims of discrimination.

*Amici* have an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of their significant experience in these matters, they are uniquely situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

#### STATEMENT OF THE CASE

Ellen Mendelsohn lost her job with Sprint at age 51 in a company-wide reduction in force (RIF). Pet. App. 2a. She then filed a lawsuit under the ADEA, claiming that she was laid off because of her age. *Id.* In an effort to bolster her case, Mendelsohn sought to introduce the testimony of five former Sprint employees, all over the age of 40, who believed their terminations also were due to age. *Id.* at 3a-4a. The district court refused her request, concluding that because the proposed witnesses all had worked in different locations for different supervisors and had been laid off at different times (some as many as nine months before Mendelsohn), they were not "similarly situated" and, therefore, their testimony should be excluded from the case. *Id.* The jury ultimately ruled for Sprint. *Id.* at 4a.

On Mendelsohn's appeal, a three-judge panel ruled 2-1 that the lower court erred in refusing to permit the other former Sprint employees to testify in Mendelsohn's favor. *Id.* at 16a. Even though Mendelsohn produced no evidence to show that Sprint had engaged in a "pattern or practice" of age discrimination, the panel found that it was enough that she *claimed* that the company-wide RIF was discriminatory. *Id.* at 9a. Because the other former employees were part of the same RIF, the panel majority said they could testify. *Id.* Dissenting Judge Tymkovich called the testimony "a mixture of hearsay and speculation," which should only be ad-

mitted where the plaintiff offers independent evidence of a company-wide discriminatory policy or practice — a showing that Mendelsohn failed to make. *Id.* at 19a (Tymkovich, J. dissenting). Sprint petitioned the panel for rehearing, which it denied. *Id.* at 25a-26a. In a close 7-5 vote, the full court denied rehearing *en banc*. *Id.* The company filed the instant Petition for a Writ of Certiorari on March 5, 2007.

#### SUMMARY OF REASONS FOR GRANTING THE WRIT

This Court should grant review of the decision below to address a conflict among the federal circuit courts of appeals concerning the admissibility of “me, too” testimony — *i.e.*, the testimony of a nonparty witness who also claims discrimination, but who is not similarly situated to the plaintiff. A divided panel of the Tenth Circuit ruled that a district court commits reversible error when it excludes such testimony, even in an individual disparate treatment case where the plaintiff and witnesses worked in entirely different business units, for different supervisors, and where there is no apparent connection between the decision to discharge the plaintiff and the other witnesses.

This ruling directly contravenes the position taken by a number of other federal appeals courts, which have taken the exact opposite view. See *Wyvill v. United Cos. Life Ins. Co.*, 212 F.3d 296 (5th Cir. 2000); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152 (6th Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984); *Moorhouse v. Boeing Co.*, 501 F. Supp. 390 (E.D. Pa.), *aff’d mem.*, 639 F.2d 774 (3d Cir. 1980). These courts have ruled in cases involving similar facts that “me, too” testimony is irrelevant and prejudicial and, therefore, a district court commits reversible error by *admitting such testimony*.

As dissenting Judge Tymkovich observed, the panel majority’s ruling below suggests that “even the most tangentially

relevant and prejudicial testimony by former employees is *per se* admissible.” Pet. App. 23a (Tymkovich, J., dissenting). This ruling, if allowed to stand, will result in more and longer trials of employment discrimination cases. It also will unfairly prejudice employers defending such cases, as they will be forced to justify the circumstances of every termination decision or other adverse employment action against every employee who is allowed to testify for the plaintiff, regardless of whether the witnesses are parties to the case.

#### REASONS FOR GRANTING THE WRIT

##### I. THIS COURT SHOULD GRANT REVIEW OF THE DECISION BELOW TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE IMPORTANT, RECURRING QUESTION OF WHEN “ME, TOO” EVIDENCE IS ADMISSIBLE IN AN INDIVIDUAL DISPARATE TREATMENT CASE

##### A. The Circuit Courts Are Deeply Divided On Whether A District Court Must Admit “Me, Too” Testimony Concerning The Alleged Discriminatory Treatment Of Other Employees In An Individual Disparate Treatment Case

The dispute in this case centers on the authority of a district court to exclude the testimony of a nonparty witness who is not similarly situated to the plaintiff, but who seeks to bolster the plaintiff’s discrimination claim by alleging he or she also was subjected to unlawful discrimination (so-called “me, too” testimony). The Tenth Circuit below effectively held that “me, too” evidence is *per se* admissible in virtually all employment discrimination cases. The Tenth Circuit’s ruling directly conflicts with the position taken by other circuits, which have excluded “me, too” evidence in cases like this one on grounds that such evidence lacks relevance and likely will cause unfair prejudice to the employer. Pet. at 8.

Relevant evidence is defined in Rule 401 of the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Evidence that is not relevant is inadmissible. Fed. R. Evid. 402. Rule 403 authorizes a district court to exclude even relevant evidence when unfair prejudice, confusion or waste of time substantially outweigh whatever probative value the evidence may have. Fed. R. Evid. 403.

Four of the federal circuit courts of appeals have found "me, too" evidence inadmissible under both these rules. In *Schrand v. Federal Pacific Electric Co.*, 851 F.2d 152 (6th Cir. 1988), for example, the Sixth Circuit ruled that an age discrimination plaintiff terminated as part of a reduction-in-force should not have been permitted to introduce the testimony of two other employees laid off from different job sites that same year because "there was no evidence from which the alleged statements of the witnesses could logically or reasonably be tied to the decision to terminate [the plaintiff]." *Id.* at 156.

According to the court, the fact that two other employees "of a national concern, working in places far from the plaintiff's place of employment, under different supervisors, were allegedly told that they were being terminated because they were too old" simply was not relevant to the plaintiff's case. *Id.* Moreover, even if the "me, too" testimony were relevant, the court concluded that the danger of unfair prejudice would have far outweighed its probative value, as the testimony would have introduced "an emotional element that was otherwise lacking as a basis for a verdict in [the plaintiff's] favor." *Id.* See also *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997) (witness' testimony about employer's failure to hire him had no relevance to plaintiff's case where witness possessed different qualifi-

cations, applied for a different position than plaintiff six years prior, and had no explanation for why he was not hired "beyond rank speculation").

Likewise, in *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), the Second Circuit reversed a district court ruling permitting an age discrimination plaintiff to introduce the testimony of six former employees of the company who also claimed they were terminated because of age. *Id.* at 121-22. According to the court, the testimony was not relevant to the question of whether the plaintiff had been discharged because of age and would expose the company to "the danger of unfair prejudice." *Id.* at 122. A case affirmed by the Third Circuit raised similar concerns, ruling that the "me, too" testimony of five former employees concerning their own allegedly age-discriminatory layoffs would have forced the company to "try all six cases together with the attendant confusion and prejudice inherent in that situation." *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 (E.D. Pa.), *aff'd mem.*, 639 F.2d 774 (3d Cir. 1980).

More recently, in *Wyvill v. United Companies Life Insurance Co.*, 212 F.3d 296 (5th Cir. 2000), the Fifth Circuit arrived at the same conclusion in a case where the district court had permitted the plaintiff to introduce "anecdotal accounts of discrimination" by other former employees of the company. *Id.* at 302. Reversing that decision and granting the employer a new trial, the Fifth Circuit reasoned that "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.* See also *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (plaintiff "makes much of the treatment of other Booz Allen employees, but we focus on [his] personal experience").

The Tenth Circuit's ruling in this case, which mandates the admission of "me, too" evidence in every instance without regard to relevance or prejudicial effect, stands in stark contrast to the decisions of the Second, Third, Fifth and Sixth Circuits. Here, Mendelsohn sought to introduce the testimony of five former Sprint employees who worked in different business units, for different supervisors, and who were laid off at different times with no connection to her own discharge other than that they, too, happened to be let go as part of a RIF. Moreover, while the introduction of "me, too" evidence might be appropriate in certain cases where a "pattern or practice" of discrimination is alleged, Mendelsohn elected not to pursue such a case, offered no independent evidence in support of one, and herself attributed her termination to purely "subjective" decision-making by supervisors who had no relationship whatsoever to the "me, too" witnesses. Brief of Appellant Mendelsohn to the Tenth Circuit, at 21.

Under the decisions reached by the Second, Third, Fifth and Sixth Circuits, the introduction of such irrelevant and prejudicial testimony would constitute reversible error. Yet in the Tenth Circuit, a district court commits reversible error by *failing* to admit it. As the Petition points out, the Tenth Circuit's position rests on purely circular reasoning — *i.e.*, that "me, too" evidence should be admitted where an enterprise-wide policy of discrimination exists and also may be admitted to *establish* the existence of an "enterprise-wide policy" of discrimination. Pet. at 13-14. Only the Eighth Circuit has signaled a similar approach. See *e.g.*, *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (reversing trial court that excluded evidence of other age discrimination suits against the same employer); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (plaintiff should have been permitted to show an employer's "background of discrimination").

Conflict in the courts of appeals, only deepened by the decision below, regarding the admissibility of "me, too" testimony in individual disparate treatment cases merits this Court's review. Accordingly, the Petition should be granted.

**B. Because The Decision Below Unfairly Prejudices Their Ability To Defend Against Claims Of Discrimination And Will Result In Protracted Litigation, This Court's Review Of This Case Is Of Exceptional Importance To Employers**

No matter how extensive a company's efforts to foster a happy and productive workplace, there always will be employees who, for reasons of their own, are dissatisfied. Particularly in the difficult circumstances where business losses or reconfiguration lead to workforce reductions, employees whose jobs are eliminated are likely to be displeased. While based on legitimate business concerns, workforce reductions are never easy, in that they lead to the termination of employees, sometimes long-service employees. As a result, these employees may feel slighted and unappreciated. They may even choose to disbelieve the legitimate business reason for their dismissal and think some other nefarious reason exists.

Consequently, a plaintiff bringing a discrimination lawsuit against an employer, particularly a large employer, likely will have little difficulty finding at least a few other people who are willing to testify, "me, too." The Tenth Circuit's decision below effectively means that a trial court must permit these individuals to testify without any showing that they are "similarly situated" to the plaintiff other than that they are in the same protected class, worked for the same company, and lost their jobs under the same general circumstances. In a company with tens or hundreds of thousands of employees, the odds of some individuals meeting these vague criteria are

very, very high. Accordingly, under the Tenth Circuit's decision, the entire group of individuals terminated as part of the RIF could be permitted to testify.

Although the trial court properly excluded the testimony of witnesses such as these, the reasoning behind the Tenth Circuit's reversal suggests that "me, too" testimony is *per se* admissible. Going forward, the testimony that Judge Tymkovich appropriately describes in his dissent as "a mixture of hearsay and speculation" is precisely the type that will be offered by practically every plaintiff in every employment discrimination case in the Tenth Circuit if the decision is permitted to stand. Pet. App. 19a (Tymkovich, J., dissenting).

As Judge Tymkovich correctly recognized, the testimony of other people about what happened to them elsewhere in the company is highly inappropriate absent proper proof that the employer engaged in an 'enterprise-wide policy' of discrimination. Pet. App. 22a. (Tymkovich, J., dissenting) (quoting *Rivera v. City and County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004)). In the tort context, it is tantamount to allowing testimony by someone involved in a collision with a company truck in April in Massachusetts in a suit by someone else involved in a collision with a different company truck in December in Denver, with no allegation, much less proof, that the company had a pattern or practice of inadequately maintaining its trucks. In both cases, the testimony is utterly irrelevant and highly prejudicial.

The panel majority's ruling, if allowed to stand, likely will significantly alter the litigation of employment discrimination cases in the Tenth Circuit (and other jurisdictions within the Court's influence), particularly cases involving large employers. For one thing, as noted above, many plaintiffs will be able to produce one or more individuals in the same protected class who worked for the same employer, were terminated, and are unhappy enough about it that they are willing to

testify that they think they were the victims of discrimination. In such cases, the employer would be forced to defend against the claims not only of the individual plaintiff, but of two, five (as in this case), or more other people as well. In every such case, the employer would be forced to litigate not only the decision being challenged, but also the circumstances of every termination or other adverse employment action taken against every "me, too" witness who is allowed to testify.

In addition, if district courts within the Tenth Circuit's jurisdiction are required to admit testimony of the sort at issue in this case, it will be extremely difficult for them to grant summary judgment in favor of a defendant employer, even in cases in which, by all standards, summary judgment would be eminently proper and even though employers litigating in the Second, Third, Fifth and Sixth Circuits (and elsewhere) might easily obtain summary judgment in cases involving the same facts. The inevitable result will be more protracted litigation, longer trials, and more frequent appeals — at a tremendous cost to employers and the court system. In addition to requiring companies to spend more time and resources defending, these suits also disrupt business operations and negatively impact employee morale and productivity.

A ruling from this Court, therefore, is needed to resolve this conflict and restore the authority of trial courts to exclude "me, too" evidence in cases where such evidence is not relevant and will cause unfair prejudice to the employer.

**CONCLUSION**

Accordingly, the *amici curiae* Equal Employment Advisory Council and the Society for Human Resource Management respectfully request the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

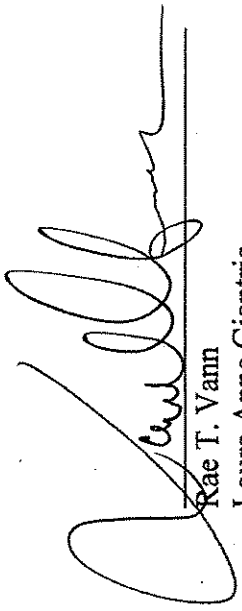
Pursuant to Supreme Court Rule 29.5(b), I, Laura Anne Giantris, a member of the Bar of this Court, hereby certify that on March 27, 2007 three (3) copies of the MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF PETITIONER were mailed first-class, postage prepaid to

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