No. 06-

IN THE

Supreme Court of the United States

SPRINT/UNITED MANAGEMENT CO.,

Petitioner,

v.

ELLEN MENDELSOHN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a recurring question of proof in employment discrimination cases: whether a district court 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.

The Tenth Circuit panel majority held that a court commits reversible error by excluding "me, too" evidence. This decision conflicts with those of other circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have held that "me, too" evidence may be excluded under Federal Rule of Evidence 403. Granting certiorari will resolve the conflict between the circuit courts of appeals on this important question of law.

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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PETITION FOR A WRIT OF CERTIORARI

Sprint respectfully prays that a writ of *certiorari* issue to review a final judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS 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 ("Pet. App.") 1a-23a. Sprint petitioned for rehearing and rehearing *en banc* on November 15, 2006. The court of appeals' order denying Sprint's petition is reproduced at Pet. App. 25a-26a. The district court's earlier minute order granting Sprint's motion *in limine* is reproduced at Pet. App. 24a.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals panel issued its opinion on November 1, 2006. Sprint timely petitioned for rehearing and rehearing *en banc* on November 15, 2006. The panel denied rehearing, and the full court denied rehearing *en banc* on January 16, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act ("ADEA") is codified at 29 U.S.C. §§ 621-634. 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

1. Respondent Ellen Mendelsohn worked for Sprint from 1989 until November 2002, most recently in Sprint's Business Development Strategy Group. She was laid off then in a reduction in force, as the Business Development Strategy Group undertook to downsize from 75 to 57 persons. Mendelsohn's immediate supervisor rated Mendelsohn as the weakest performer in his unit. Vice President Paul Reddick therefore decided to include Mendelsohn in the layoff.

2. Other Sprint units over a period of months and years also downsized, as Sprint sought to cope with the telecommunications industry's recession. Decisions as to specific affected individuals were made by the supervisors and managers responsible for each downsizing department or other business unit. Over a period of about 18 months, about 15,000 employees were released.

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

4. In August 2003, Mendelsohn sued under the ADEA in the U.S. District Court for the District of Kansas. She alleged disparate treatment based on age (not adverse impact), and by the time of the Pretrial Conference Order she abandoned any allegation of a pattern or practice of age discrimination.

5. Before trial, Sprint moved *in limine* to exclude testimony from five witnesses. 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 sometimes are known as "me, too" witnesses, *e.g.*, Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 30 (3d ed.).) The district court (Vratil, J.) granted Sprint's motion *in limine*, 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.[1]

6. Applying those criteria, the district court excluded testimony from the five former employees that Mendelsohn identified. Reddick did not supervise (directly or indirectly) any of them. The five persons had been 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 group, and neither Reddick nor anyone in his chain of

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[1] The district court's order provided, in relevant part:

> Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for purposes of this ruling, requires proof that (1) Paul R[e]ddick was the decision-maker in any adverse action; and (2) [there was] temporal proximity [in the layoff decisions].

Pet. App. 24a.

management had anything to do with their layoffs. Three of the five "me, too" witnesses sought to testify that they had either heard or been subjected to discriminatory ageist remarks by their various supervisors. Neither Reddick nor anyone else in the Business Development group 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 from a supervisor (not Reddick), to whom she did not report, suggesting that age was one of the criteria that particular supervisor may have considered in making layoff decisions. There is no comparable evidence for Mendelsohn or anyone else in the Business Development group. A fourth employee sought to testify that he had information that he had been given a false 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 Reddick or the Business Development group. The fifth employee sought to testify that he had been replaced by a younger person who had no relevant experience, and that his repeated post-RIF job applications all were turned down. None of this had anything to do with Reddick or the Business Development group.

7. The jury returned a verdict for Sprint, finding that Sprint did not discriminate against Mendelsohn based on age.

8. Mendelsohn appealed. A panel of the Tenth Circuit (per Baldock, J.) reversed in a 2-1 decision. The majority held that "me, too" testimony from the five ex-employees was relevant even though none of the five witnesses reported to or was laid off by Reddick, and even though none worked in the Business Development group with Mendelsohn. Pet. App. 9a-10a. The proffered "me, too" evidence

nevertheless was said to be probative of an alleged company-wide discriminatory scheme; according to the majority, "me, too" evidence is admissible if there is evidence of a common scheme or plan, and a common scheme or plan can be inferred from the "me, too" evidence. *See id.* 10a-11a. The panel majority also held that the district judge lacked the discretion under Federal Rule of Evidence 403 to exclude the "me, too" evidence. *Id.* 15a-16a.

9. 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." *Id.* 22a. The evidence here did not establish that Reddick 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." *Id.* 23a.

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

REASONS FOR GRANTING THE PETITION

This case presents an important question, one that recurs in most employment discrimination cases. The question closely divided the Tenth Circuit, and the panel decision conflicts with decisions of other circuits. Specifically, four circuits have held "me, too" evidence wholly irrelevant. Five circuits have held that such evidence, even if perhaps peripherally relevant, may be excluded under Federal Rule

of Evidence 403. Departing from the rule in these cases, the Tenth Circuit panel majority held that a district court not only *may* admit "me, too" evidence, but that it *commits reversible error* by excluding it. Only decisions of the Eighth Circuit arguably are consistent with that of the Tenth Circuit here. This Court should grant *certiorari* to resolve the conflict in the court of appeals cases on this important and "controversial" question of law, Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 30 & nn.115-117 (3d ed.) (noting the conflict in the circuits).

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF AT LEAST FOUR OTHER CIRCUITS IN HOLDING "ME, TOO" EVIDENCE RELEVANT IN A DISPARATE TREATMENT CASE

A. This Court's Cases Teach That Discrimination Is Proven (Or Not) Based On The Mindset Of The Decisionmaking Supervisor Or Manager.

A discrimination trial by its nature tests the "[decisionmaking] employee's state of mind" in acting on the employer's behalf. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 520 (1993). This Court's cases therefore 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.

Where the decisionmaker is shown to be biased, liability can result. *E.g.*, *Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (reversing summary judgment based on potentially discriminatory remarks by the decisionmaker); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 152, 151 (2000) (relying on evidence that one "Chesnut was

the actual decisionmaker," and the "evidence that Chesnut was motivated by age-based animus"); *see United States Postal Service v. Aikens*, 460 U.S. 711, 713 n.2 (1983) (noting 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").

By contrast, where the decisionmaker is *not* shown to be biased, no discrimination liability exists. *See Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003) ("[I]t [cannot] 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."); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (discriminatory remarks by someone are not probative if they are "unrelated to the decisional process itself").

As shown below, the Tenth Circuit majority departed from these established principles of discrimination analysis and proof.

B. The Tenth Circuit's Decision Conflicts With Settled Law From Other Circuits.

Discrimination plaintiffs often seek to buttress their cases with testimony of nonparty witnesses. Such testimony of course is properly admissible if the nonparty witnesses have something relevant to say (such as reporting biased statements, or setting forth relevant comparative evidence) that sheds light on the thought processes of the person(s) who were decisionmaker(s) with respect to the actual plaintiff. But such evidence is not admissible if the nonparty

witnesses simply would assail different decisionmakers who lack nexus to the plaintiff.

1. Four circuits have squarely held that "me, too" evidence is not relevant.

Typical is the Second Circuit's oft-cited 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, 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).[2]

The Fifth Circuit held similarly in *Goff v. Continental Oil Co.*, 678 F.2d 593 (5th Cir. 1982), *overruled on other grounds, 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 "me, too" 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

[2] The Second Circuit restated its holding in *Haskell* shortly thereafter. *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).

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.

Goff, 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 v. Federal Reserve Bank*, 467 U.S. 867, 875 (1984)). "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 determining 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. The proffered evidence was of "no relevance" because it involved a different position, requiring different qualifications, and the hiring decisionmakers were different persons. The evidence had "no apparent connection" to plaintiff's application for employment, and therefore was properly excluded. *Id.* at 1130.

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 "me, too" witnesses 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 "me, too" witnesses' testimony was irrelevant. The person who decided on plaintiff's layoff was not the same person who decided on the layoffs of the "me, toos"; all persons worked in different geographical areas, 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.*

One 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 decision. 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 court declared. *Id.* at 392.

2. The Tenth Circuit, by contrast, now has held "me, too" evidence to be relevant.

The Tenth Circuit majority's decision in this case conflicts with these cases. There was no logical nexus between Mendelsohn and the five "me, toos." The five worked at different sites, in different business units, and reported through different supervisory chains. Evidence concerning employees other than a plaintiff of course may be relevant where their circumstances are sufficiently similar to those of the plaintiff to provide insight into what happened to the plaintiff. Typically this means that the "me, too" witness must report to the same decisionmaker as the plaintiff, because employment decisions — discriminatory and nondiscriminatory ones alike — are effectuated by the individual supervisors who make them. A witness who can testify about a particular decisionmaker often can shine light on whether that person's decision about the plaintiff is discriminatory. On the other hand, where (as here) the proffered "me, too" witness reported to a different supervisor or worked in a different location or business unit, the requisite similarity of circumstances — and thus relevance — is lacking, as the array of decisions from the other circuits teaches.

The panel majority held, however, that the evidence was relevant here because a common discriminatory scheme might have infected decisions as to a group of employees who otherwise would lack a common link to each other. Pet. App. 9a-10a.[3] But there was no evidence of such a

[3] The panel majority seemed troubled that, without the "me, toos," a reduction-in-force plaintiff who worked in a unit without other layoffs would lack evidence with which to prove a case. (Pet. App. 9a.) The majority's concern is groundless. Any discrimination (Cont'd)

discriminatory scheme. (Indeed, Mendelsohn abandoned in the Pretrial Conference Order any allegation of a pattern or practice of discrimination.) As dissenting Judge Tymkovich demonstrated, the majority's reasoning was entirely circular:

(Cont'd)

plaintiff (whether laid off in a RIF or otherwise, or made subject to some other cognizable adverse employment action) always has access to the traditional forms of discrimination proof:

- discriminatory remarks by decisionmakers, *e.g., Ash v. Tyson Foods, Inc.*, 126 S. Ct. 1195, 1197 (2006) (citing discriminatory remarks by decisionmakers);
- comparative evidence, showing more favorable treatment of younger persons similarly situated in relevant respects, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973) ("Especially relevant to [a showing of pretext] would be evidence that [other] employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained or rehired.");
- statistical evidence, from which an inference of discrimination sometimes can be drawn, *see id.* at 805 ("[S]tatistics as to [defendant's] employment policy and practice may be helpful to a determination of whether [defendant's] [adverse action] conformed to a general pattern of discrimination . . . ."); and
- proof under the doctrine of *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 133, 147-48 (2000) (permitting an inference of discrimination where the employer's proffered nondiscriminatory reason is judged to be mendacious).

Mendelsohn's problem was not that the district court deprived her of the conventional forms of proof, but that the jury heard her evidence and found it wanting.

"Me, too" evidence is admissible if there exists a common scheme or plan, and (according to the panel majority) a common scheme or plan exists if there are "me, too" witnesses. *See id.* 20a-21a.

In sum, the Tenth Circuit majority's analysis of relevance squarely conflicts with holdings of the Second, Third, Fifth and Sixth circuits, and clear dictum from the Fourth.[4] Only the Eighth Circuit's decisions arguably can be reconciled with the Tenth Circuit majority's decision here.[5] This Court should grant *certiorari* to resolve the conflict.[6]

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[4] *Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (the court's proper focus is the plaintiff's personal experience rather than the plaintiff's co-workers' experiences) (citing *Schrand*, 851 F.2d at 156, and *Haskell*, 743 F.2d at 121-22).

[5] *See Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (reversing a defense verdict where the trial judge had excluded from evidence proof that there were "other age discrimination lawsuits filed against [the employer]"); *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988) (reversing a defense verdict where the plaintiff had not been permitted to show "an employer's background of discrimination"). *But cf. Callanan v. Runyun*, 75 F.3d 1293, 1298 (8th Cir. 1996) (affirming defense verdict where the trial judge had excluded the testimony of certain witnesses; "the witnesses did not complain that [plaintiff's] own supervisors had engaged in any behavior that we could correctly characterize as improper").

[6] This Court already has granted *certiorari* in a different case from the Tenth Circuit, presenting the related question of when the bias of one decisionmaker taints a decision made in part by another. *EEOC v. Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, No. 06-341, 127 S. Ct. 852 (January 5, 2007). That case will not be dispositive of this one because the plaintiff in that case presented evidence that a biased employee played a role in the factfinding that led to the plaintiff's dismissal. 450 F.3d at 491. There

(Cont'd)

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF AT LEAST FIVE OTHER CIRCUITS IN HOLDING THAT A DISTRICT COURT ABUSES ITS DISCRETION UNDER FED. R. EVID. 403 IN EXCLUDING "ME, TOO" EVIDENCE

The panel majority's decision conflicts with those of other circuits for a wholly separate reason. As shown in Section I, most circuits hold that "me, too" evidence *never may be admitted*, as it is irrelevant. The Tenth Circuit has held, however, that such evidence *never may be excluded*, even under Federal Rule Evidence 403.[7] The Tenth Circuit announced a per se rule of law that a district judge lacks the authority to declare (for example) that unfair prejudice outweighs any relevance under Rule 403. The Tenth Circuit's decision contradicts the plain terms of Rule 403 and a host of court of appeals decisions construing it, as shown below.

(Cont'd)

is no such claim in this case; it is undisputed that the decisionmakers with respect to each of the "me, too" witnesses here had nothing to do with Mendelsohn's layoff. Thus, while the Court may wish to consider hearing the instant case in tandem with that one — both present important and different issues of discrimination proof — the disposition of the *Coca-Cola Bottling* case will not shed meaningful light on the proper disposition of this one.

[7] Rule 403, reproduced in full at Pet. App. 29a, provides that district courts should exclude 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."

A. The Tenth Circuit Decision Conflicts With Those Of Other Circuits Excluding Evidence Based On "Considerations Of Undue Delay [And] Waste Of Time."

The admission of this kind of evidence needlessly burdens the courts, because this case ("an eight-day trial," the Tenth Circuit majority reported, Pet. App. 4a) surely would become a four-, five- or six-*week* trial if the district court must permit trials-within-a-trial on the circumstances of the five "me, toos." For every piece of "me, too" evidence the plaintiff presented as to each of the five witnesses, Sprint would be entitled to counter with what might be called "not you, either" evidence, to rebut their claims. Thus, for example, Sprint could present, for each of the "me, toos," testimonial and documentary evidence of performance shortcomings or skills limitations, whatever led the decisionmaker to put that individual on the layoff list. Sprint 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 would 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, each, in essence, would have presented a prima facie case of age discrimination. 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).

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).

The Tenth Circuit decision here conflicts with all of these cases.[8]

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[8] The panel majority misapprehended Sprint's argument on the Rule 403 issue. The majority characterized Sprint's argument to be "that the admission of evidence about other alleged episodes . . . would inconvenience Sprint." (Pet. App. 15a.) Sprint's actual argument focused not on inconvenience to *itself*, but on the burden on *the trial court and jury*, considerations of simple fairness, and on the other considerations that Rule 403 expressly makes relevant.

B. The Tenth Circuit Decision Conflicts With Those Of Other Circuits Excluding Evidence Based On The Risk Of "Confusion Of The Issues, Or Misleading The Jury."

The admission of the disputed evidence 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 in other circuits. *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 152 ("In addition to creating prejudice that substantially outweighed its probative value, the testimony tended to confuse the issue . . . . [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."); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1423 (7th Cir. 1986) ("me, too" evidence "will often flunk Rule 403 because the acts are remote in time or place") (citing *Moorhouse*, 501 F. Supp. at 392-94); *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 Tenth Circuit Decision Conflicts With Those Of Other Circuits Excluding Evidence Based On "Unfair Prejudice."

The disputed evidence risks unfair prejudice to the defendant employer, particularly in a reduction-in-force case. The essence of a reduction in force 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 overwhelming proof of an employee's incompetence or misconduct; if the employee were unfit for the job, he or she would have been discharged long before. *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.").

It logically follows that 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. Perhaps (he or she would argue) the company should have placed more (or less) weight on length of service. Perhaps the company should have placed more (or less) weight on the most-recent performance evaluation. Perhaps the company should have placed more (or less) weight on *prior*

performance evaluations. The possibility of second-guessing is endless. As a result, in any RIF axiomatically there will be 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. Here, as noted, Sprint laid off more than 15,000 employees in a series of RIFs over more than 18 months. 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.

Juror sympathy to the individuals is inevitable, which is why Rule 403 exists. 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.[9]

[9] *Accord, e.g., Grayson v. K Mart Corp.*, 849 F. Supp. 785, 792 (N.D. Ga. 1994) (citing *Moorhouse*, 501 F. Supp at 392, in support of severing plaintiffs' individual ADEA claims; "[T]he 'prejudice resulting from permitting each witness, who is the plaintiff in his (Cont'd)

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, whatever its marginal probative value, 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 Tenth Circuit majority accorded the district court no evidentiary deference on this issue. Instead, the Tenth Circuit has required this judge, and all district judges in other cases, to admit all proffered "me, too" evidence regardless of the countervailing considerations set forth in Rule 403. That holding sharply departs from settled law elsewhere.

(Cont'd)
own lawsuit, to testify about the circumstances of his [demotion, would] substantially outweigh[] the probative value of the testimony,' under Rule 403.") (bracketed material in original).

CONCLUSION

The Tenth Circuit decision conflicts with decisions from at least five other circuits. Only the Eighth Circuit arguably agrees with the Tenth Circuit in holding relevant, and admissible notwithstanding Rule 403, "me, too" claims by persons lacking a nexus to the instant plaintiff. *Certiorari* should be granted to resolve that conflict.

Dated: March 5, 2007

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED NOVEMBER 1, 2006

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

No. 05-3150.

Nov. 1, 2006.

Ellen MENDELSOHN,

Plaintiff-Appellant,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant-Appellee.

Before BRISCOE, BALDOCK, and TYMKOVICH, Circuit Judges.

BALDOCK, Circuit Judge.

Plaintiff Ellen Mendelsohn sued her former employer Defendant Sprint/United Management Company (Sprint), alleging Sprint unlawfully discriminated against her on the basis of age in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. Mendelsohn alleged she was selected for termination on account of her age during a company-wide reduction in force (RIF). After a trial on the merits, a jury returned a verdict for

Sprint. At issue in this appeal is whether the district court erred in excluding testimonial evidence from former Sprint employees who alleged similar discrimination during the same RIF. We have jurisdiction under 28 U.S.C. § 1291. Because the evidentiary exclusion deprived Mendelsohn of a full opportunity to present her case to the jury, we conclude the district court abused its discretion in excluding the evidence. We reverse and remand for a new trial.

I.

Mendelsohn worked for Sprint from 1989 until November 2002, when Sprint terminated her as part of an ongoing company-wide RIF. At the time, Mendelsohn was fifty-one years old and the oldest manager in her unit. Mendelsohn brought her claim under the ADEA alleging Sprint selected her for the RIF based on her age. As evidence of Sprint's alleged discriminatory animus toward older employees, Mendelsohn sought to introduce evidence that Sprint terminated five other employees over the age of forty as part of the same RIF. These employees apparently believed they too were victims of age discrimination. Through their testimony as well as her own, Mendelsohn sought to introduce evidence of a pervasive atmosphere of age discrimination at Sprint.

Prior to trial, Sprint filed a motion in limine seeking to exclude, among other things, any evidence of Sprint's alleged discriminatory treatment of other employees. Relying exclusively on *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997), Sprint argued any reference to alleged discrimination by any supervisor other than Paul Reddick,

Mendelsohn's supervisor, was irrelevant to the issue in this case—i.e. whether Mendelsohn's age motivated Sprint to terminate her. Apparently persuaded by Sprint's argument, the district court granted the motion in part without much explanation, and limited Mendelsohn's evidence to "Sprint employees who are similarly situated to her."[1] To prove the employees were "similarly situated," the district court required Mendelsohn to show Reddick supervised the employees and Sprint terminated them in close temporal

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1. The district court, without the benefit of a proffer or a hearing, decided the motion by minute entry on the docket sheet. The entry reads:

> Paragraph 1 is SUSTAINED as to evidence that Sprint has a pattern and practice, culture or history of age discrimination. . . . Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for purposes of this ruling, requires proof that (1) Paul Ruddick [sic] was the decision-maker in any adverse employment action; and (2) temporal proximity.

We believe this approach lacking. As we previously have explained, district courts must be sufficiently detailed in their rulings so as to provide us with an understanding of the process the court used to reach its decision. Otherwise, we have difficulty reviewing the trial court's decision, in particular when our review is for an abuse of discretion. *See United States v. Roberts*, 88 F.3d 872, 882 (10th Cir. 1996) ("As an appellate court, we are in no position to speculate about the possible considerations which might have informed the district court's judgment. Instead, we require an on the record decision by the court explaining its reasoning in detail.").

proximity to Mendelsohn's termination. Because Reddick did not supervise any of the other employees Mendelsohn sought to place on the stand, the district court excluded their testimony at trial. Following the court's in limine ruling, Mendelsohn submitted in writing a proper offer of proof.

Following an eight-day trial, the jury returned a verdict for Sprint finding Sprint did not discriminate against Mendelsohn on the basis of age. Mendelsohn then filed a motion for a new trial renewing her objections to the district court's in limine ruling. *See* Fed. R. Civ. P. 50(b). The district court denied the motion, and Mendelsohn timely appealed.

II.

Mendelsohn argues the district court committed reversible error by requiring her to show she and the other employees shared a supervisor as a precondition for admissibility of their testimony. According to Mendelsohn, the testimony of other employees in the protected age group who were subject to substantially similar RIF terminations was relevant and admissible as reflecting on Sprint's discriminatory intent in selecting Mendelsohn to the RIF. Sprint, on the other hand, maintains any evidence of its treatment toward other employees is not relevant to the determination of this action because the evidence does not make it more likely that Sprint discriminated against Mendelsohn.

We review the district court's ruling to exclude evidence for an abuse of discretion. *See Whittington v. Nordam Group Inc.*, 429 F.3d 986, 1000 (10th Cir. 2005). Applying this

standard, we will reverse the district court only if it "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Bryant v. Farmers Ins. Exchange*, 432 F.3d 1114, 1122 (10th Cir. 2005) (citation omitted). An "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ." Fed. R. Evid. 103(a). Applying these standards, we agree with Mendelsohn that the evidence she sought to introduce is relevant to Sprint's discriminatory animus toward older workers, and the exclusion of such evidence unfairly inhibited Mendelsohn from presenting her case to the jury. *See, e.g., Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998) (identifying as a theory of pretext in RIF cases evidence of an employer's general policy of using a RIF to terminate older employees in favor of younger employees).

A.

To prevail on a discriminatory discharge claim under the ADEA, a plaintiff bears the burden of proving age was the motivating factor for the employer's decision to terminate her. *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). As part of her proof, the plaintiff must persuade the jury that the employer's proffered reason for its conduct is unworthy of belief. *See Pippin v. Burlington Resources Oil And Gas Co.*, 440 F.3d 1186, 1193 (10th Cir. 2006). Because direct testimony as to the employer's mental processes seldom exits, *see Reeves*, 530 U.S. at 141, evidence of the employer's general discriminatory propensities may be relevant and admissible to prove discrimination.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-805, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) ("Other evidence that may be relevant to any showing of pretext includes ... [the employer's] general policy and practice with respect to minority employment."); *see also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713-14 n. 2, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

We have previously recognized the testimony of employees, other than the plaintiff, concerning how the employer treated them as relevant to the employer's discriminatory intent. *See Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990). For example, in *Greene v. Safeway Stores, Inc.*, 98 F.3d 554 (10th Cir. 1996), and *Bingman v. Natkin & Company*, 937 F.2d 553 (10th Cir. 1991), we recognized evidence the employer had terminated other older employees was relevant as evidence of a pattern of dismissal based on age. Similarly, in *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 776 (10th Cir. 1999), we found testimony of other employees regarding how defendant treated them relevant to the defendant's discriminatory intent where "testimony establishes a pattern of retaliatory behavior or tends to discredit the employer's assertion of legitimate motive."[2]

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2. Sprint points out Mendelsohn's proffered evidence resembles "pattern and practice" but she does not allege a claim for a pattern and practice of discrimination. Yet we have allowed evidence of a pattern and practice in individual cases of discrimination as circumstantial evidence of a defendant's discriminatory animus. *See, e.g., Greene*, 98 F.3d at 561; *Bingman*, 937 F.2d at 556-57; *see also Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University*, 245 F.3d 1172, 1177-78 (10th Cir. 2001).

Appendix A

Sprint would have us extend the "same supervisor" rule announced in *Aramburu* to this case. In *Aramburu*, we held *in the context of a discriminatory discipline action* that plaintiffs seeking to present testimony of other employees who were treated more favorably for violating the same work rule (or another of comparable seriousness) as evidence of discriminatory intent, must show they shared the same supervisor with the proffered witnesses. As we have observed elsewhere: "The 'same supervisor' test has been found to be relevant in cases involving allegations of discriminatory *disciplinary* actions." *Equal Employment Opportunity Comm'n v. Horizon/CMS Healthcare*, 220 F.3d 1184, 1198 n. 10 (10th Cir. 2000). In discussing *Aramburu*, we explained comparison of a supervisor's disciplinary action with other disciplinary action of the same supervisor is relevant to show the bias of the supervisor. For example:

> If X fires A, an Hispanic, for particular misconduct, but gives only a warning to B, a non-Hispanic, for identical misconduct, one might infer that something beyond the misconduct (such as a bias by X against Hispanics) motivated the disciplinary action. But if it was Y, not X, who decided not to impose a harsher sanction against B, one cannot infer that X's decision to fire A must have been motivated by something other than A's misconduct. X may simply have a less tolerant view toward misconduct than Y does. *Cf. Kendrick*, 220 F.3d at 1233 ("Different supervisors will inevitably react differently to employee insubordination.").

Rivera v. City and County of Denver, 365 F.3d 912, 922 (10th Cir. 2004). This case, on the other hand, is not about individual conduct but about a company-wide policy of which all Sprint's supervisors were allegedly aware. Accordingly, we decline to extend the "same supervisor" rule beyond the context of disciplinary cases.

Since deciding *Aramburu*, we have only applied the "same supervisor" rule in the context of alleged discriminatory discipline. *See, e.g., MacKenzie v. City and County of Denver*, 414 F.3d 1266, 1277 (10th Cir. 2005); *Rivera*, 365 F.3d at 922; *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000). For example, in *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston University*, 245 F.3d 1172 (10th Cir. 2001), a gender discrimination case, we declined to extend the application of the "same supervisor" rule beyond its original context. There we noted that while "in the context of allegations of discriminatory discipline, this court has looked to whether the plaintiff and others with whom he seeks to compare himself worked under the same supervisor," in the context of a faculty-wide policy, "the failure of the plaintiff and [the other witnesses] to share the same supervisor does not preclude the consideration of that evidence. . . ." 245 F.3d at 1177-78. Similarly, in *Horizon/CMS Healthcare*, a pregnancy discrimination case, we explained the "same supervisor" rule was not legally relevant to the inquiry of whether a plaintiff has been the victim of an allegedly discriminatory company-wide policy. 220 F.3d at 1198 n.10. Thus, the fact that plaintiff and the affiants did not share the same supervisor in that case did not preclude consideration of affiants' evidence.

Aramburu has no application where, as here, plaintiff claims to be a victim of a *company-wide* discriminatory RIF. Applying *Aramburu*'s "same supervisor" rule in the context of an alleged discriminatory company-wide RIF would, in many circumstances, make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination based on circumstantial evidence. Conceivably, a plaintiff might be the only employee selected for a RIF supervised by a particular supervisor. Meanwhile, scores of other employees within the protected group also selected for the RIF might work for different supervisors. In such cases, the constraints of *Aramburu* would preclude a plaintiff from introducing testimony from those other employees. Applying *Aramburu* to cases of discrimination based on an alleged company-wide discriminatory RIF would create an unwarranted disparity between those cases where the plaintiff is fortunate enough to have other RIF'd employees in the protected class working for her supervisor, and those cases where the plaintiff is not so fortunate. We do not think such disparity should exist.

B.

The testimony of the other employees concerning Sprint's alleged discriminatory treatment and similar RIF terminations is "logically or reasonably" tied to the decision to terminate Mendelsohn. *Spulak*, 894 F.2d at 1156 n.2 (upholding a district court's decision to allow former employees in the protected age group to testify about the circumstances surrounding their employment departure). In this case, the other employees' testimony is logically tied to Sprint's alleged motive in selecting Mendelsohn to the RIF. Although Mendelsohn and the other employees worked

under different supervisors, Sprint terminated all of them within a year as part of an ongoing company-wide RIF. All the employees were in the protected age group, and their selection to the RIF was based on similar criteria. Accordingly, testimony concerning the other employees' circumstances was relevant to Sprint's discriminatory intent.

According to the dissent, the evidence Mendelsohn proffered need not be admitted because it is "devoid of independent evidence showing that Sprint had company-wide discriminatory policies." Dissent at 1233. The dissent, however, does not explain what this independent evidence might be. In *Gossett*, we noted that evidence regarding the discriminatory application of an enterprise-wide policy by other supervisors was admissible when the plaintiff has "other evidence of that policy[.]" 245 F.3d at 1177. Thus, we required a plaintiff to proffer evidence, *other than her own testimony*, concerning the alleged application of said policy. In *Gossett*, the plaintiff satisfied this requirement by introducing an affidavit from a former student and professor concerning the application of the policy. *Id.* at 1177, 1179 n. 2.

Similarly, Mendelsohn in this case proffered independent evidence in the form of testimony from other Sprint employees who were similarly terminated during the RIF. The dissent mistakenly reads *Gossett* to require independent evidence apart from that evidence which Mendelsohn has proffered. Reading *Gossett* in such a manner may place an insurmountable evidentiary burden upon a claimant entitled to prove her case of age discrimination by circumstantial evidence. *See Merrick v. Northern Natural Gas Co., Div. of*

Enron Corp., 911 F.2d 426, 429 (10th Cir. 1990) (noting the ADEA does not require an employee to produce direct evidence of discriminatory intent; rather the employee only need show the employer's proffered justification is unworthy of belief). We respectfully disagree with the dissent's interpretation of *Gossett.*

Moreover, the dissent claims "the district court did not apply a narrow interpretation of admissibility to the evidence of company-wide discrimination," because the district court admitted into evidence exhibits 3 and 4. Dissent at 1231-32. Those exhibits are a compilation of documents Sprint used during the RIF process that includes spreadsheets containing, among other data, the names and age of Sprint employees who were being considered for termination. In addition, the court permitted Jo Renda, Director of Human Resources, to testify concerning the use of these documents during the RIF process. With the exception of Mendelsohn, however, none of the employees identified in the spreadsheets testified at trial. The dissent fails to recognize the limited purpose for which the district court admitted this evidence as well as the distinct characteristic of the evidence the district court excluded in its ruling on the motion in limine.

Of particular relevance to the case was whether Sprint followed its own procedures when it selected Mendelsohn for the RIF. In fact, the district court denied Sprint's motion for summary judgment on this very issue. The district court made quite clear that exhibits 3 and 4 as well as Renda's testimony was allowed to come in for the purpose of determining Sprint's compliance with its procedures:

> [T]he reason I overruled your motion for summary judgment was because there was, I thought, sufficient evidence in the record that Sprint didn't follow its own procedures. I think that makes the whole process, you know, fair game, what was the procedure and was it followed? And if this spreadsheet was used as part of the implementation of the RIF and it has ages on it, then I think that it's fair game for the jury.
>
> * * *
>
> It was never my intention to preclude Plaintiff from putting on evidence about the RIF, how it worked, whether Sprint followed its own RIF procedures, et. cetera.

Aplt's Supp. Appx. at 88, 92-93. In response to Sprint's concerns regarding the improper use of this evidence the district court reiterated that its in limine ruling was aimed at excluding "other employees . . . from coming in and saying, I was RIF'd, it was because of my age" and that the ruling applied to this evidence. *Id.* at 93-94. The court made clear Mendelsohn's use of this evidence would have to conform to the in limine ruling. *See id.* at 55-56. Therefore, these exhibits were not offered for the purpose of showing pretext under the theory Sprint had a policy of favoring younger employees. Instead, the district court admitted this evidence under a different theory of pretext by showing Sprint did not follow its own RIF criteria. In addition, Jo Renda was able to use this evidence to find examples of older employees whom Sprint had retained, even though they were not

supervised by Reddick. Thus, the district court's in limine ruling disadvantaged Mendelsohn further because Sprint was allowed to portray itself as retaining older employees, aside from Mendelsohn, even though these employees were not all supervised by Reddick.

Admission of exhibits 3 and 4 did not remedy the error the district court made in excluding evidence concerning Sprint's alleged treatment of other employees and the circumstances surrounding their RIF termination. The nature of the evidence Mendelsohn proffered is vastly different from the evidence the jury considered—merely names and dates of birth. Evidence of an employer's alleged prior discriminatory conduct toward other employees in the protected class has long been admissible to show an employer's state of mind or attitude toward members of the protected class. *See, e.g., McDonnell Douglas Corp.*, 411 U.S. at 804; *Aikens*, 460 U.S. at 713-14 n.2; *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102-03 (8th Cir. 1988); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1423-24 (7th Cir. 1986). These other employees should have been allowed to take the stand and testify subject, of course, to any district court ruling regarding the proper use and limitations of such testimony.[3]

Generally, a court's evidentiary ruling is entitled to deference. *See Shugart v. Central Rural Elec. Co-op.*, 110

3. We do not disagree with the dissent that statistical evidence to support an inference of an company-wide policy is useful, and perhaps quite convincing. *See* Dissent at 1232-33. But while "[s]tatisitical evidence may, in certain circumstances, be relevant to this purpose[,]" we have never required it. *Beaird*, 145 F.3d at 1168.

F.3d 1501, 1508 (10th Cir. 1997). But the court's discretion over evidentiary matters should not unfairly prevent a plaintiff a full opportunity to present her case. *See Gossett*, 245 F.3d at 1178. Blanket pretrial evidentiary exclusions, in particular, "can be especially damaging in employment cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990) (citation omitted). The evidence which Mendelsohn seeks to present, "is certainly not conclusive evidence of age discrimination itself, but it is surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, and proceed to assess the employer's explanation" for its motive in terminating Mendelsohn. *Greene*, 98 F.3d at 561. Age as a motivation for Sprint's selection of Mendelsohn to the RIF becomes more probable when the fact-finder is allowed to consider evidence of (1) an atmosphere of age discrimination, and (2) Sprint's selection of other older employees to the RIF.[4]

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4. The dissent characterizes the question of admissibility as a classic judgment call and readily acknowledges that had the district court admitted the evidence it would have acted within its discretion. The dissent, however, overlooks our established rule that a district court necessarily abuses its discretion "when it commits an error of law," *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252 (10th Cir. 2006), or "fails to consider the applicable legal standard. . . ." *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997). For instance, in *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1105-08 (10th Cir. 2002), we held the district court abused its discretion in decertifying a class of plaintiffs because the court failed to consider the "pattern and practice" legal framework applicable to the plaintiffs' claim of discrimination. In the same manner, the district (Cont'd)

C.

Finally, Sprint argues the testimony should be excluded under Fed. R. Evid. 403. Rule 403 allows a district court to exclude relevant evidence when concerns over unfair prejudice, confusion, or waste of time substantially outweigh the probative value of the evidence. Sprint argues that allowing the evidence would prejudice Sprint because it would result in Sprint having to defend multiple claims of discrimination. To be sure, the district court retains its power to limit cumulative and marginally relevant testimony. But otherwise, we disagree. Excluding otherwise admissible evidence under Rule 403 "is an extraordinary remedy [that] should be used sparingly." *United States v. Roberts*, 88 F.3d 872, 880 (10th Cir. 1996). "In performing the 403 balancing, the court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1274 (10th Cir. 2000) (internal quotations omitted). Little doubt exists that the admission of evidence about other alleged episodes of discrimination would inconvenience Sprint. But the fact Sprint would have to rebut this testimony is not in itself enough to outweigh the probative value of Mendelsohn's proffered evidence. *See Bingman*, 937 F.2d at

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(Cont'd)
court here abused its discretion when it excluded the testimonial evidence based upon its erroneous conclusion that *Aramburu* controlled the fate of the evidence in this case. *See also Floyd v. Ortiz*, 300 F.3d 1223, 1227 (10th Cir. 2002) (holding the district court abused its discretion in denying the plaintiff's request for rehearing because the district court relied on an erroneous legal premise to do so).

557. Based on the record before us, we cannot say the evidence is unduly prejudicial.[5]

Accordingly, for the reasons stated above the district court's order denying Mendelsohn's motion for a new trial is reversed. We remand to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.[6]

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5. Sprint lastly argues any error the district court might have made was harmless because Ms. Mendelsohn did not have a submissible case of age discrimination. Based on the record before us, and in light of the evidence the district court excluded, we conclude Ms. Mendelsohn has a submissible case to present to the jury.

6. Nothing in our ruling is intended to limit the district court's discretion during trial to issue limiting instructions or rulings concerning the proper purpose for which Mendelsohn's evidence may be introduced.

Appendix A

TYMKOVICH, Circuit Judge, dissenting.

I respectfully dissent because I do not believe the district court abused its discretion in its evidentiary rulings excluding testimony. At the outset, I agree that the district court's ruling is difficult to decipher, especially looking solely at the minute order. In the context of the trial, however, I think the court's ruling is clear enough—the proffered testimony from other employees failed to satisfy the relevancy and prejudice requirements of Rule 403. Moreover, I believe the majority makes a mistake in holding that testimony from other employees not similarly situated is admissible even where the plaintiff has made no independent showing of a company-wide policy of discrimination.

A.

A brief review of the evidence the court admitted will place its ruling in perspective. First, despite its pre-trial ruling regarding the witness testimony, the court admitted Exhibits 3 and 4, voluminous documents from Sprint's "succession planning" file, including notes on employees slated for termination pursuant to the company-wide RIF. Both exhibits show that Sprint kept information on the gender, ethnicity and age of employees alongside other information on their performance and perceived "potential." Significantly, Exhibit 4 also contains notes indicating that other workers over 40, who did not report to Reddick, were terminated as part of the RIF.

Second, the court also allowed testimony regarding the RIF dismissal of Marc Elster, one of Reddick's peers who

was 51 at the time of his termination. In addition, Jo Renda, a Sprint executive, was called as an adverse witness at trial and examined about the policies behind the RIF and the employees identified in Exhibit 4. She testified regarding fired employees who did not report to Reddick.

This evidence shows that the district court did not apply a narrow interpretation of admissibility to the evidence of company-wide discrimination proffered by Mendelsohn. As the court explained in response to Sprint's objection to the admission of Exhibit 4,

> I'm afraid that you don't really comprehend what I was saying in the motion in limine—or on the motion in limine. It was never my intent to preclude plaintiff from putting on evidence about the RIF, how it worked whether Sprint followed its own RIF procedures, et cetera. I think because of the factual background of plaintiff's claim, we have to get into what happened to other employees.
>
> * * *
>
> [Defense counsel] wanted the court [via its order in limine] to prohibit other employees . . . from coming in and saying, I was RIF'd, it was because of my age and that sort of thing. So that's where I was targeting my ruling. And I stand by that ruling. I don't want that kind of evidence to come in. But I think that's a totally different question from the question whether the RIF, which is your stated

> nondiscriminatory reason, is a pretext for age discrimination.

(Tr. at 93-94.)

Finally, in addition to admitting actual evidence of pretext, the district court rejected a jury instruction proffered by Sprint, which would have instructed jurors to consider only evidence about employees similarly situated to Mendelsohn. The court explained that evidence outside of Reddick's chain of command had been allowed to come in as relevant to the question of pretext: "The reason I said plaintiff could offer that sort of evidence was because it might yield an inference that the so-called legitimate nondiscriminatory reasons were pretextual." (Tr. at 1228.) Indeed, the court included an instruction that reminded the jury that it could, on the basis of all evidence presented at trial, reject Sprint's reasons for firing Mendelsohn and "conclude that plaintiff's age was a determining factor in [Sprint's] decision to terminate her employment." (Jury Instr. 12.)

In sum, it appears to me that the plaintiff had an adequate opportunity to introduce relevant evidence of Sprint's corporate policies and practices surrounding the RIF and argue that the RIF was itself a pretext for age discrimination. I am further convinced of this after studying the proposed testimony of the five witnesses proffered by Mendelsohn and excluded by the district court. Their proposed testimony seems a mixture of hearsay and speculation that would be marginally admissible in any event. I cannot say that the court erred in excluding such testimony under the standards of Rule 403.

To be sure, the testimony may have helped Mendelsohn's case. But this is not the question here. We are properly concerned with whether the court abused its discretion in excluding the testimony. I think not. This seems a classic judgment call. I readily admit that the court would not have erred in admitting the evidence, *see, e.g., Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990), but I am equally confident that the court did not abuse its discretion in choosing to exclude it.

B.

The larger problem with the majority's position is it suggests that anecdotal evidence from employees throughout a large organization will be *per se admissible* when offered in the context of alleged discrimination in a RIF. This appeal illustrates the hazard of such an approach for several reasons.

The first reason is the lack of any statistical or other direct evidence that supports an inference of enterprise-wide discrimination. Given the size of Sprint, the fact that Mendelsohn found five former employees who believed they were victims of age discrimination is not meaningful until a specific evidentiary foundation has been laid. The proffer of evidence here is devoid of independent evidence showing that Sprint had company-wide discriminatory policies. Even taking as true Mendelsohn's assertion that these witnesses would provide credible evidence that managers other than Reddick were motivated by discriminatory animus, this does not in and of itself support the conclusion that Reddick was

so motivated.[1] Nor does it establish that the RIF's "subjective criteria" was a pretext for age discrimination. While Sprint may well have had policies designed to discriminate against older employees, without more, the excluded testimony does nothing to establish that fact, nor does it directly support an inference that Mendelsohn's termination was wrongfully motivated. *See Carpenter v. Boeing Co.*, 456 F.3d 1183 (10th Cir. 2006) (discussing use of statistical evidence to support claim of disparate treatment). The evidence must tend to show that the company had a policy to discriminate, not merely a policy applied in a discriminatory manner by an individual supervisor or supervisors.[2]

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1. Of the five proffered witnesses, one was fired a full year before Mendelsohn and another was *hired* at age 52. The others had grievances related to their supervisors that are too general to credit on this record.

2. This is not to suggest that some of the proffered evidence *might* be relevant. But having said this, the evidence must still satisfy the rules of evidence. It is not enough for a former employee to claim discrimination. We have always required a nexus between the testimony and the allegation, either through personal knowledge or statistical support. Without more foundation, in my view Mendelsohn has not demonstrated a Sprint-wide policy of discrimination embodied in the RIF. And none of the excluded evidence ties the policy to the decision to terminate her.

The majority relies on *Gossett v. Board of Regents*, 245 F.3d 1172 (10th Cir. 2001). But *Gossett* cannot be read broadly to suggest that any proffer of evidence is automatically admissible, without meeting the requirements of Rules 401 or 701. In that case, the court concluded the witnesses (at the summary judgment stage) claimed personal knowledge of the discriminatory policy and its application.

The second and more important hazard of the majority's approach is the narrow reading it gives to *Aramburu*. The so-called "same supervisor" rule articulated in that case recognizes that where an employee has putatively been fired for the violation of a workplace rule, an inference of discrimination is more likely where the same supervisor disciplines similarly situated employees differently. *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1403 (10th Cir. 1997).

But it is equally plausible that an employer could have a *company-wide* policy of using disciplinary actions as a pretext for unlawful discrimination. In such a case, I suspect we would modify the applicable relevancy standard in order to account for and allow evidence of a company-wide policy.

I would do the same in the RIF context and apply the *Aramburu* rule in cases like this one unless "independent evidence of specific enterprise-wide policy" has been developed. *Rivera v. City and County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004). Since Mendelsohn did not establish a foundation that the proffered evidence would support such a finding, and since she otherwise had the opportunity to present evidence to the jury of other older employees subject to the RIF, the district court did not abuse its discretion in excluding the additional witness testimony. [3]

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3. The majority alternatively suggests that our "established rule that a district court necessarily abuses its discretion when it commits an error of law . . . or fails to consider the applicable legal standard" forces reversal here. Majority Op. at 12 n. 4 (internal quotations and citations omitted). Assuming, for the sake of argument, that this rule

(Cont'd)

Our holding to the contrary creates a rule that suggests even the most tangentially relevant and prejudicial testimony by former employees is per se admissible. Such a rule runs counter to our traditional deference to district courts as the primary arbiters of admissibility.

(Cont'd)
applies in the context of an evidentiary ruling and that the legal error in Mendelsohn's case was not harmless, all the rule would require is reversal and remand for application of the proper rule. The majority has not done this, but has instead insisted on finding Mendelsohn's proffered evidence to be per se admissible despite the evidentiary infirmities. The majority's note on the operation of our law regarding legal error is therefore logically incongruent with its holding that Mendelson's evidence must be admitted at a new trial.

APPENDIX B — MINUTE ORDER DATED JANUARY 3, 2005 OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (KANSAS CITY) ENTERED ON CIVIL DOCKET NO. 2:03-cv-02429-KHV

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS (KANSAS CITY)

Civil Docket No. 2:03-cv-02429-KHV

Mendelsohn v. Sprint/United Management Company
Assigned to: District Judge Kathryn H. Vratil

ORDER sustaining in part and denying in part *78* Motion in Limine, and *84* Motion in Limine. . . . Paragraph 1 is SUSTAINED as to evidence that Sprint has a pattern and practice, culture or history of age discrimination (including through the Alpha rating or staff associate program); age discrimination litigation; and discrimination against employees not similarly situated to plaintiff. Paragraph 1 is otherwise OVERRULED. Plaintiff may offer evidence of discrimination against Sprint employees who are similarly situated to her. "Similarly situated employees," for the purpose of this ruling, requires proof that (1) Paul Ruddick was the decision-maker in any adverse employment action; and (2) temporal proximity. . . .

(Entered: 01/03/2005)

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JANUARY 16, 2007

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 05-3150
(D. Kan.)
(D.C. No. 03-CV-2429-KHV)

ELLEN J. MENDELSOHN,

Plaintiff-Appellant,

v.

SPRINT/UNITED MANAGEMENT COMPANY,

Defendant-Appellee.

ORDER
Filed January 16, 2007

Before **TACHA**, Chief Judge, **BALDOCK**, **KELLY**, **HENRY**, **BRISCOE**, **LUCERO**, **MURPHY**, **HARTZ**, **O'BRIEN**, **McCONNELL**, **TYMKOVICH**, **GORSUCH**, and **HOLMES**, Circuit Judges.

Defendant Sprint/United Management Company (Sprint) has filed a petition for rehearing and rehearing en banc. A majority of the original panel has voted to deny Sprint's petition for rehearing. Judge Tymkovich would grant panel rehearing. A judge in regular active service called for a poll

on whether the case should be reheard en banc. Fed. R. App. P. 35(a). Voting has now been completed on that poll and only five of the twelve judges of this Circuit in regular active service (Circuit Judges Tacha, Hartz, Tymkovich, O'Brien, and Gorsuch) voted to rehear the case en banc. Accordingly, Sprint's petition for rehearing and rehearing en banc is DENIED.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

By s/ [illegible]
Deputy Clerk

APPENDIX D — STATUTE AND RULES INVOLVED

29 U.S.C.A. § 623

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 14—AGE DISCRIMINATION
IN EMPLOYMENT

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * * *

Appendix D

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

* * * *

(3) to discharge or otherwise discipline an individual for good cause. . . .

Appendix D

UNITED STATES CODE ANNOTATED
RULES OF EVIDENCE FOR UNITED STATES COURTS
AND MAGISTRATES
ARTICLE IV. RELEVANCY AND ITS LIMITS

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means 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.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded 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.