“Me Too” Evidence in Employment Litigation: Pursuing Admission or Exclusion of Propensity Evidence

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“ME TOO” EVIDENCE
IN EMPLOYMENT LITIGATION

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“ME TOO”?
“ME TOO” EVIDENCE ROADMAP

- Applicability of FRE 401, 403, and 404 to “me too” evidence
- Factors courts consider in determining admissibility of “me too” evidence
- Strategies for pursuing exclusion of “me too” evidence
• What is “Me Too” evidence?
  – Testimony or evidence that the employer has treated other employees in the same allegedly discriminatory way as the plaintiff.

• Where is it most likely to be an issue?
  – Employment discrimination cases – especially hostile working environment cases.

- “[W]hether evidence of discrimination by other supervisors is relevant in an individual ADEA case is **fact based** and depends on **many factors**, including **how closely related the evidence is to the plaintiff’s circumstances and theory of the case**.”
FEDERAL RULES OF EVIDENCE

- FRE 401 - Relevancy
- FRE 403 – Exclusions
  - Prejudice, Confusion, Waste of Time, or Other Reasons
- 404 – Character Evidence
  - Other Wrongs or Acts
• Relevant evidence is admissible if:
  – it has any tendency to make a fact more or less probable than it would be without the evidence; and
  – the fact is of consequence in determining the action.
Court may exclude relevant evidence if its probative value is substantially outweighed by danger of one or more of: *unfair prejudice*, *confusing the issues*, *misleading the jury*, *undue delay*, *wasting time*, or needlessly presenting *cumulative evidence*. 
• “Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry.”  *Sprint*, 552 U.S. at 388.
“Me Too” evidence frequently objected to by employers under FRE 404(b) as character evidence

— “Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.”
However, evidence of a wrong or other bad acts may be admissible for:

- “proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”

**Conscious Intention**

![Diagram of Conscious Intention with choices leading to intended outcome](image)
DETERMINING ADMISSIBILITY OF “ME TOO” EVIDENCE
FACTORS COURTS CONSIDER
• How closely related the “me too” evidence is to the plaintiff’s circumstances and theory of the case. *Sprint, supra.*

• Behavior toward or comments directed at other employees in the protected group. *Beyda v. City of LA, 76 Cal. Rptr. 2d 547 (1998)*
• Whether same decisionmaker(s) involved
• Whether same type of adverse action
• Temporal and geographical proximity
• Whether employees similarly situated in other relevant respects
  – *Griffin v. Finkbeiner*, 689 F.3d 584 (6th Cir. 2012);
“ME TOO” EVIDENCE
Strategies arguing for exclusion
Interview employer’s own witnesses to identify any prior allegations of discriminatory conduct.

Object to discovery of “me too” employees on privacy and relevance.

Send discovery requests to plaintiff requesting information about any individuals they will call upon to offer “me-too” testimony.

Depositions of “me-too” witnesses.

Use motions in limine!

– Attack relevancy of context within which plaintiff seeks to introduce such evidence.
Proposed “me too” evidence is from employees not “similarly situated” to plaintiff.

- *Reed v. Freedom Mortgage Corp.*, 869 F.3d 543 (7th Cir. 2017) (“similarly situated” means directly comparable in all material respects);


“objective is to eliminate other possible explanatory variables such as differing roles, performance histories, or decision-making personnel, in order to isolate the critical independent variable of discriminatory animus.” *Reed*. 
• Emphasize that decisions made by different supervisor(s) than plaintiff’s is irrelevant to discriminatory intent. *Mourning v. Ternes Packaging*, 868 F.3d 568 (7th Cir. 2017)(not same decisionmaker)

• Is the “me-too” evidence very remote in time or geographic proximity? Or, did plaintiff not learn of the “me-too” evidence until after the alleged discriminatory action occurred? Argue unfair prejudice and confusion.

• Is there a logical connection between the “me-too” evidence and plaintiff’s theory of recovery (undue prejudice and confusion)?
• Consider using “not-me” evidence. See *e.g.*, *Johnson v. Big Lots Stores, Inc.*, 235 FRD 381, 386-387 (E.D. La. May 7, 2008).
  
  – *Sprint* says to look at plaintiff’s “theory of the case” to determine relevance of particular evidence
  
  – If plaintiff’s theory is **existence of a corporate policy and practice that applies broadly**, then evidence from similarly situated employees subject to the alleged policy who were NOT discriminated against/harassed/retaliated against may be relevant
• If plaintiff does not witness other incidents or know they occurred, those incidents cannot affect plaintiff’s perception of hostility of work environment.

• Objective severity of harassment must be judged from perspective of reasonable person in plaintiff's position. *Adams v. Austal*, 754 F.3d 1240 (11th Cir. 2014)(environment not objectively hostile if plaintiff unaware of “me too” conduct)

• A reasonable person would not perceive a work environment to be objectively hostile or abusive based on conduct toward others of which he/she is unaware.
Harassment cases holding me-too evidence irrelevant if plaintiff unaware of it:

- *Burnett v. Tyco Corp.*, 203 F.3d 980, 981 (6th Cir. 2000)
- *Pryor v. Seyfarth, Shaw*, 212 F.3d 976, 978 (7th Cir. 2000)
- *Cottrill v. MFA, Inc.*, 443 F.3d 629, 637 (8th Cir. 2006)
- *Brooks v. City of San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000)
- *Hirase-Doi v. U.S.W. Communications*, 61 F.3d 777, 782 (10th Cir. 1995)
- *Adams v. Austal*, 754 F.3d 1240 (11th Cir. 2014)
• Mere workplace gossip is no substitute for proof.
  – Evidence of harassment of others, and of a plaintiff's awareness of it, is subject to hearsay exclusion.
  – It is not a substitute for direct testimony by the alleged victims of those acts, or by witnesses to them.
• “Me-too” doctrine does not entitle plaintiff to present evidence of discrimination against employees *outside of plaintiff’s protected class* to show discrimination or harassment against plaintiff.

• “Me-too” doctrine does not entitle plaintiff to present evidence of *different type of claim* not at issue. *McCoy v. Pacific Maritime Ass’n*, 156 Cal. Rptr. 3d 851, 863 (Cal. App. 2013)(sexual comments about other women excluded because “leaves the impression that this is a sexual harassment case”)
• Argue undue time consumption/distraction/relevance – i.e., mini-trials -- to determine if “me too” individuals actually subjected to unlawful conduct

STRATEGIES FOR EXCLUSION

• *Warrilow v. Qualcomm, Inc.*, 268 F.Appx 561 (2008) (excluding testimony of other employees who also claimed age discrimination; unfair prejudice and distract jury from real issues)
Practical Considerations, Legal Authority and Strategies to Obtain and Present “Me Too” Evidence

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The strongest pieces of evidence Plaintiffs alleging discrimination/harassment have in support of their claims are often statements from other current and former employees who were likewise victims of the same co-worker/supervisor or merely experienced similar discrimination at the same employer. This is known as anecdotal evidence, other victims evidence or “Me Too” evidence.

Given that the accused co-worker or supervisor will nearly always deny having discriminated or harassed (and rarely will there be actual direct evidence of this, the “smarter bigots” problem), evidence that other employees were also discrimination/harassment victims is extremely probative as to the issue of whether the Plaintiff’s claims are credible and whether the employer failed to act properly in its efforts to prevent or remedy the unlawful conduct.
Defendants’ counsel will vigorously oppose and seek to exclude any such evidence obtained in discovery. Proof that the harasser has targeted others will weigh heavily in a jury’s mind and likely lead to the conclusion that the instant Plaintiff was similarly harassed and the employer should have, but failed to, act to prevent it from happening, thus establishing liability of both corporate and individual Defendants.

Moreover, evidence that the employer knew the harasser engaged in such conduct in the past yet did nothing to stop it provides a strong foundation for punitive damages. The prospects for a Plaintiff’s verdict and the value of the case can be greatly multiplied by proper use of relevant authorities regarding the admissibility of “me too” evidence.
Initial Intake Phase

- Ask potential client whether others at the workplace have suffered similar discrimination or harassment. This is important information that can provide strong support as to both liability and damages.

- One key factor to keep in mind is to inquire about similar types of discrimination and/or harassment even if perpetrated by someone other than the supervisor or co-worker who targeted the potential client. Even discrimination or harassment that was not directed at this client, or that he or she was completely unaware of, can be important to issues of both liability and damages.

- We tend to pass over reports of discrimination other employees suffered by a co-worker or supervisor the potential client did not interact with. We need to retrain ourselves to scrutinize these scenarios and follow up on them early.
Initial Intake Phase

- We are already thinking about what evidence there will be to overcome a summary judgment motion. Obviously the client’s truthful testimony can be sufficient but the case to beat an MSJ is much stronger if it doesn’t just rely on the testimony of a Plaintiff, which could be characterized as self-serving or speculative, but also benefits from testimony of third parties, who have no stake in the case, revealing they too suffered the same type of discrimination.

- Even at this stage you have to think about trial. How persuasive will the evidence be if you get to that step? Powerful supporting third party witnesses will make your case very strong, easily win over a jury and ultimately this evidence greatly enhances the settlement value of the case you plan to file.
Informal Discovery

- Even before ever filing a lawsuit it's time to get working on discovery that can provide strong support for the discrimination and/or harassment causes of action you plan to file.

- Informal discovery is probably the best means to gather great “me too” evidence because the employer, unaware the lawsuit is coming, has not yet clamped down on current or former employees to try to dissuade them from aiding your new client or speaking to you.
Informal Discovery

- Bear in mind the ethical rules allowing contact with employees of the Defendant corporation so long as they are not "represented parties" (CA Rules of Professional Conduct 2-100) which includes officers, directors or managing agents of the company, persons whose words can bind the company or someone whose own conduct could trigger the company's liability to your client.

- Long-term employees who worked there longer than your client may well know a great deal about other claims or instances of discrimination or harassment, and how they were handled, about which your client is unaware.
In order to take full advantage of “me too” evidence you want to be sure your claims and allegations in the complaint open the door to admit such evidence. So beyond merely alleging your discrimination or harassment claims you want to allege a cause of action for failure to take appropriate steps to prevent discrimination or harassment from occurring.


E.E.O.C. v. Hacienda Hotel (9th Cir.1989) 881 F.2d 1504, 1515-16 (“[E]mployers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.”)
Alleging the failure to prevent cause of action provides a solid basis to discover and admit “me too” evidence because such evidence, beyond supporting the Plaintiff’s subjective experiences, shows that other employees experienced similar discrimination and yet the employer failed to take the proper steps to correct the problem and prevent its recurrence.

See Weeks v. Baker and McKenize (1998) 63 Cal. App. 4th 1146, 1160-63 (evidence of harasser’s conduct toward other employees before Plaintiff was hired relevant to claims for failure to prevent harassment and punitive damages).
Retaliation claims and claims for Negligent Supervision/Negligent Retention. Also factually detailed claims for Punitive Damages, not just conclusory statements.

These claims too raise issues of how the employer responds to discrimination claims in the workplace or how it has addressed complaints against a particular bad employee in the past.

The goal is to make “me too” evidence clearly discoverable and admissible, over Defendants’ relevancy and character evidence objections, based on the claims and allegations of the Complaint.
Types of “Me Too” Evidence Automatically Admissible in California


- This case holds that “me too” evidence from other employees with claims against the same supervisor are per se admissible to show pretext or discriminatory intent and motive in a discrimination case.

- The Plaintiff had notified her supervisor of her pregnancy and she was terminated based on accusations of time card fraud the day she returned from her pregnancy leave of absence. During the litigation she obtained five supporting declarations from co-workers who alleging discrimination by the same supervisor following employee announcements of being pregnant.

- The court went on to hold “me too” evidence by employees working in other worksites under other supervisors is possibly admissible as well to the individual Plaintiff's claim.
The U.S. Supreme Court has held that “me too” evidence in discrimination cases is not per se inadmissible merely because it involves employees working under different supervisors than the Plaintiff’s. Applying Federal Rule of Evidence 403 to determine prejudicial impact of offered evidence is fact-intensive and requires a context specific analysis. See Sprint/United Management Co. v. Mendelsohn, (2008) 552 U.S. 379.

Spulak v. K Mart Corp. (10th Cir. 1990) 894 F. 2d 1150, 1156 (“As a general rule, the testimony of other employees about their treatment by the defendant is relevant to the issue of the employer’s discriminatory intent.”).
Federal Cases Admitting "Me Too" Evidence as to Discrimination Claims

- **Obrey v. Johnson** (9th Cir. 2005) 400 F.3d 691, 698 (holding in a case involving a claim of discriminatory pattern of practice "the combination of convincing anecdotal and statistical evidence is potent").

- **Heyne v. Caruso** (9th Cir. 1995) 69 F.3d 1475, 1479-1480 (testimony of other female employees that employer sexually harassed them admissible to support plaintiff's claim of quid pro quo sexual harassment; evidence can prove discriminatory motivation and intent to discharge plaintiff because it tends . . . to show defendant’s “general attitude of disrespect toward his female employees and his sexual objectification of them").

- **Estes v. Dick Smith Ford, Inc.** (8th Cir. 1988) 856 F.2d 1097, 1104 (evidence of race discrimination in hiring and in treatment of customers admissible to show climate of bias, supporting plaintiff's claim he was fired because of race).
Federal Cases Admitting “Me Too” Evidence as to Discrimination Claims


- *Aman v. Cort Furniture Rental Corp.* (3d Cir. 1996) 85 F.3d 1074, 1086 (evidence of discrimination against other employees or of a hostile work environment is relevant to “whether one of the principal non-discriminatory reasons asserted by [an employer] for its actions was in fact a pretext for discrimination.” (citation omitted).

- These cases show that “me too” evidence is admissible to show motive, intent and opportunity and thereby not excluded by the ban on character evidence.
Sexually harassing conduct that is directed at other employees, of which Plaintiff is aware, is relevant to Plaintiff’s claim that harassment permeated her work environment. See *Beyda v. City of Los Angeles* (1998) 65 Cal. App. 4th 511, 519 (“We also believe that a reasonable person may be affected by knowledge that other workers are being sexually harassed in the workplace, even if he or she does not personally witness that conduct.”).

Caution, the *Beyda* decision held that only harassment Plaintiff witnesses or is aware of is relevant to a hostile work environment claim. But this limitation overlooks the fact that even harassment the plaintiff was not aware of can be relevant to the harasser’s motive or intent as opposed to being evidence of the harasser’s character or propensity to harass women.
Admitting “Me Too” Evidence of Which the Plaintiff Was Unaware

Also, the objective element of a harassment claim is buttressed by the fact that other women found the harasser’s actions offensive enough to complain about them, revealing the pervasiveness of the harassment. Beyda was limited to the context of a hostile work environment harassment claim but it does not consider the applicability of “me too” evidence to a broader claim of failure to prevent harassment.

Further, the fact that another employee filed a lawsuit over conduct similar to that endured by Plaintiff is arguably germane to Plaintiff’s harassment case since the hostile work environment claim has both an objective and subjective element.

The fact that someone else found the same environment to be hostile supports Plaintiff’s claim that the employer’s place of business was an objectively hostile work environment.
California law holds that a Plaintiff who is the target of some acts of sexual harassment can support the claim with evidence of harassment suffered by others, even if the Plaintiff was not a target of these other incidents, to show the overall hostile work environment.

“‘Evidence of the general work atmosphere, involving employees other than the plaintiff, is relevant to the issue of whether there existed an atmosphere of hostile work environment. ...’ [ ] Therefore, one who is personally subjected to offensive remarks and touchings can establish a hostile work environment by showing that harassment existed in the place of employment.” Fisher v. San Pedro Peninsula Hospital, (1989) 214 Cal. App. 3d 590, 610-11 (citation omitted).
Admitting “Me Too” Evidence of Which the Plaintiff Was Unaware

Even if the other harassment allegations or complaints occurred before Plaintiff was hired or involved a different harasser it may still be relevant. Such evidence can be relevant to other causes of action against the employer (such as failure to take all steps to prevent harassment, retaliation or negligent supervision) or a demand for punitive damages, even if not clearly part of the hostile work environment to which Plaintiff was subjected.
Key Case: Weeks v. Baker & McKenzie

- The employer's prior knowledge that a particular high-ranking or valuable employee was harassing female employees and conscious disregard of the rights and safety of the lower level female employees was the basis for a substantial punitive damages award (over $3.5 Million) in Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1159-60.

- Here a law firm partner named Greenstein had harassed five female secretaries, a temporary female receptionist and a female associate of the firm in the past before perpetrating some appalling and outrageous acts of sexual harassment against Plaintiff Weeks.
This man was clearly a sexual predator roaming the workplace and far too many female employees were his victims and the firm reprehensibly failed to address the workplace safety concerns that were raised about Greenstein. One of the secretaries who complained about him, and threatened to file an administrative claim, was retaliated against by being given a less desirable reassignment.

The experiences of all of these women were reported to management or witnessed by other attorneys at the firm.
Key Case: Weeks v. Baker & McKenzie

- Plaintiff Weeks came to the firm in 1991 and very quickly was subjected to sexual advances from Greenstein that included unwelcome physical touching of her breasts and buttocks. He also was hostile toward her in the office when she attempted to avoid him.

- The Court expressly held that the extensive “me too” evidence was admissible in Weeks; case as it was probative of her claim for punitive damages.

- “The majority of the evidence at issue was relevant not only to the question of Baker & McKenzie's liability for compensatory damages under Government Code section 12940, subdivision (i), but also to the question of its liability for punitive damages under Civil Code section 3294, subdivision (b)…”
“[T]here is substantial evidence that at the time Weeks was hired, Baker & McKenzie and its relevant managing agents were well aware that Greenstein was likely to create a hostile work environment for women, and that Baker & McKenzie consistently failed to take measures reasonably designed to protect women from Greenstein's abuse. The failure to place reports of Greenstein's misconduct in his own personnel file so as to warn future supervisors of that conduct in and of itself demonstrates a conscious disregard for the rights and safety of other employees. The evidence suggests that Weeks was a highly foreseeable target of Greenstein's misconduct, but that no steps were taken to prevent that misconduct, to warn her that it might occur or to inform her of her rights and options if it did occur. The evidence thus supports the jury's conclusion that Baker & McKenzie itself engaged in conduct justifying an award of punitive damages against the firm.” Weeks at 1160.
Key Federal Case re “Me Too” Evidence


- This is one of those cases that keeps on giving for Plaintiffs’ counsel seeking to admit “me too” evidence. This case holds that the testimony of other victims of harassment, even those the Plaintiff knew nothing about, is admissible to show (1) employer’s reasons for taking adverse action against the Plaintiff were a pretext for discrimination, (2) employer’s motive to discriminate, (3) the employer knew or should have known its anti-harassment policies were ineffective, and (4) to generally support retaliation, hostile work environment, quid pro quo harassment and disparate treatment claims.
“This kind of evidence is particularly important given the ACPD's main defenses at trial, which were that the incidents of abuse Hurley suffered were trivial horseplay to which both men and women were subjected and that its written sexual harassment policy was sufficient to insulate it from liability. Contrary to the ACPD's position, it is implausible in the extreme that Hurley was somehow immune from the pervasive sexism at the ACPD, as it was described by both female and male officers. See Hurley, 933 F. Supp. at 411; see also Josey v. John R. Hollingsworth Corp., 996 F.2d 632 (3d Cir. 1993) (holding that employees' remarks and racially derogatory notes sent by unidentified people were circumstantial evidence that management permitted an atmosphere of prejudice to infect the workplace).”
“Aside from its relevance to the issue of whether the ACPD is liable for the hostile environment Hurley encountered, the evidence is also relevant to her intentional sex discrimination, quid pro quo, and retaliation claims. The general atmosphere of sexism reflected by the challenged evidence is quite probative of whether decisionmakers at the ACPD felt free to take sex into account when making employment decisions, when deciding whether to abuse their positions by asking for sexual favors, and when responding to sexual harassment complaints.”

The Court specifically held “In this case, because of its high probative value, there was no abuse of discretion in admitting the challenged testimony from other officers. Any putative prejudice was not unfair, and at all events was outweighed by the probative value. Nor are any of the other Rule 403 factors present to counsel exclusion.”
“Me Too” Evidence Plaintiff Unaware of Relevant to Failure to Prevent Claims and Punitive Damages

- *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal. App. 4th 976, 988-91 (disapproved on other grounds by *Lakin v. Watkins Associated Industries* (1993) 6 Cal. 4th 644, 664) (harasser's conduct with other employees was admissible to prove employer's knowledge or opportunity to learn of harasser's misconduct and “the employer's knowledge and failure to act are relevant to the award of punitive damages”).

- *J. R. Norton Co. v. General Teamsters Warehousemen & Helpers Union, Local 890* (1989) 208 Cal.App.3d 430, 445 (“If an employer, after knowledge or opportunity to learn of his agent's misconduct, retains the wrongdoer in service, the employer may be liable in punitive damages for the misconduct.”)
“Me Too” Evidence Plaintiff Unaware of Relevant to Failure to Prevent Claims and Punitive Damages

- E.E.O.C. v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1515-16 ("[E]mployers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known.")

- Obrey v. Johnson (9th Cir. 2005) 400 F.3d 691, 698 ("[A]ncedotal evidence of past discrimination can be used to establish a general discriminatory pattern.")

- Goldsmith v. Bagby Elevator Co., (11th Cir. 2008) 513 F.3d 1261, 1285 (admitting evidence of employer’s racially discriminatory conduct toward other employees to show motive and intent to discriminate, to support hostile work environment claim and as rebuttal evidence).
“Me Too” Evidence Plaintiff Unaware of Relevant to Failure to Prevent Claims and Punitive Damages

- Lewis v. Triborough Bridge & Tunnel Auth. (SD NY 1999) 77 F. Supp. 2d 376, 384 (involving evidence of improper conduct by a supervisor in investigating a sexual harassment complaint which is probative as to employer's failure to take appropriate action to end harassment in the workplace).

- Even the adverse decision reducing punitive damages in Roby v. McKesson Corp., (2009) 47 Cal. 4th 686 supports discovery into corporate wide “me too” evidence because the California Supreme Court ruled an individual punitive damages award of $15 Million was excessive where there was no evidence of repeated wrongdoing due to a corporate culture encouraging discriminatory and harassing conduct like that suffered by the Plaintiff in Roby. To show there is a corporate culture of discrimination as opposed to isolated acts by one supervisor necessitates discovery of broad “me too” evidence across multiple locations and departments.
“Me Too” Evidence Relevant to Faragher/Ellerth Defense

- This defense, stemming from companion U.S. Supreme Court cases addressing employer liability for supervisor sexual harassment back in 1998 (Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)) can negate liability where the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm (for example, by not taking advantage of reporting procedures outlined in an anti-harassment policy).

- It applies to intangible harms such as the creation of a hostile work environment as opposed to tangible injuries such as job loss, demotion, failure to promote etc.

- Also called the Avoidable Consequences doctrine under California law (where it is not a complete defense but instead limits damages that could have been avoided had the employee availed himself or herself of the internal complaint procedure).
Evidence that other employees complained of discrimination or harassment but their complaints were not taken seriously or investigated tends to show that this affirmative defense should not apply to a particular case.

Even a failure to complain about the harassment at all will not necessarily establish the defense. The U.S. District Court of New Jersey in *Mancuso v. City of Atlantic City* (D.N.J. 2002), 193 F. Supp. 2d 789, held that the employee's failure to complain of the specific conduct at issue could be excused by a jury because she had previously observed on several occasions her employer's failure to take seriously previous harassment complaints.
Getting “Me Too” Evidence In at trial

- Motions in Limine - Be prepared, if you have incriminating and salacious “me too” evidence the Defendant’s counsel WILL file motions in limine seeking to keep the evidence out. Be ready with authorities regarding admitting such evidence to show the objective component of a harassment claim for example as well as to prove claims of retaliation, failure to prevent discrimination/harassment, punitive damages and to refute a Faragher/Ellerth or avoidable consequences defense.

- The cases cited herein provide substantial authority for getting “me too” evidence in, even if the evidence relates to conduct involving a different harasser or perpetrator or it was evidence that the Plaintiff never knew of because it predated his or her employment.
It is extremely important to have your briefing done thoroughly citing the cases on this issue demonstrating the admissibility of “me too” evidence. All too often we Plaintiff’s attorneys have something of an uphill battle here because Defense counsel will vigorously argue any “me too” evidence is:

1. irrelevant since it relates to discrimination not suffered or witnessed by the Plaintiff,
2. unfairly prejudicial in large part due to creating hostility toward the alleged perpetrator of the discrimination or harassment,
3. resulting in undue consumption of time (the “trial within the trial” argument), misleading/confusing the jury, or
4. that it seeks to admit improper character evidence.
The issue of relevance has been thoroughly addressed above in cases holding probative value outweighs any alleged unfair prejudice. Evidence of the Defendant's discriminatory treatment toward other similarly situated employees is not inadmissible character evidence when offered to prove some fact other than his or her predisposition to commit such an act, such as motive, opportunity, intent or plan, or to show pretext.

Recent case law clearly explains why “me too” evidence is relevant to an individual discrimination claim (in so far as discriminatory intent and for rebuttal and impeachment purposes) even if Plaintiff was not aware of the evidence during her employment.
Educating Your Judge


- “[E]vidence that Anton harassed other women outside Pantoja’s presence could have assisted the jury not by showing that Anton had a propensity to harass women sexually, but by showing that he harbored a discriminatory intent or bias based on gender. It would have enabled the jury to evaluate the credibility of his and his other witnesses’ assertions that, although he yelled profanities in the office, he did not use the words Pantoja claimed; he did not direct profanities at Pantoja; and he did not have a discriminatory intent. We conclude the evidence was admissible to show intent under Evidence Code section 1101, subdivision (b), to impeach Anton’s credibility as a witness, and to rebut factual claims made by defense witnesses.”
Moreover, there is case law addressing the balancing concerns under Federal Rule of Evidence 403 and its California state law counterpart Section 352 of the California Evidence Code regarding undue prejudice and waste of time:

In *Obrey*, the Ninth Circuit squarely rejected the claim that “other victim” evidence should be excluded under 403 noting that “this is not the sort of undue delay and waste of time that the Rules contemplate.” *Obrey*, 400 F.3d at 699. In doing so it rejected a defense argument that admitting evidence of other employee claims would require the jury to assess each of those claims on their merits and thereby have several mini-trials. *Id.* at 698.

In *Johnson v. United Cerebral Palsy*, the California appellate court similarly reasoned that this type of evidence is “per se admissible under both relevance and Evidence Code section 352 standards.” *Johnson*, 173 Cal.App.4th at 767.
A colleague of mine several years back had a sexual harassment trial in Los Angeles (the promised land for Plaintiff’s attorneys given the number of seven figure employment law verdicts that have come out of that jurisdiction).

During argument on pre-trial motions Defendant convinced the Judge to exclude any evidence or argument regarding sexual harassment experienced by persons other than the Plaintiff. At the time my friend was simply not aware of the abundance of case law on this subject and did not include these important cases in his briefing so the Judge rather quickly decided to exclude the evidence. My friend was disappointed given that other women had complained about the harasser but felt he had a solid case as to liability and damages, including punitive damages, even without the “me too” evidence.
Then it got worse for him. Shortly thereafter the Court *sua sponte* decided to strike his claim for punitive damages because the Judge decided since he had excluded testimony from other sexual harassment victims there was no other evidence Plaintiff had to support punitive damages, so he struck those from the case.

Now despite these setbacks my colleague obtained a very favorable verdict in the $200,000 range but imagine how much greater the result could have been for that Plaintiff had her counsel briefed and argued cases allowing the admission of “me too” evidence and thereby been able to pursue a punitive damages award.
Looking Beyond Discrimination Claims

- The analysis in *Pantoja v. Anton* (2011) 198 Cal. App. 4th 87 regarding admissibility of other persons’ testimony for rebuttal or impeachment would arguably mean that in cases of wrongful termination or whistleblower retaliation (based on similar protected activities or underlying legal violations) that there is grounds for admitting such evidence.

- Additional support for this extension can be found in *Morris v. Washington Metropolitan Area Transit Authority* (D.C. Cir. 1983) 702 F. 2d 1037, 1046 (allowing “me too” evidence regarding employer retaliation based on exercise of First Amendment rights, “evidence showing that the employer followed a broad practice of retaliation and responded to any criticism with disciplinary action has some probative value on the issue of the employer's likely motivation here.”).

- Authority for admitting “me too” evidence, even outside of discrimination context, being admitted to show motive, intent, preparation or pan to retaliate under Federal Rule of Evidence 404(b) and/or California Evidence Code Section 1101.
Key Points to Consider

- In summary, the main strategies for obtaining discovery of “me too” evidence and getting that evidence admitted at trial are:
  - Include causes of action such as failure to prevent discrimination or harassment, retaliation and/or negligent supervision that implicate the employer’s policies and practices in investigating and responding to internal complaints.
  - Argue authorities regarding “me too” evidence Plaintiff was aware of as relevant to hostile work environment, quid pro quo and disparate treatment claims.
  - Argue authorities re “me too” evidence Plaintiff was not aware of still relevant to issues of motive, intent, plan, employer’s repeated practice, pretext, impeachment, rebuttal and punitive damages. Also to objective element of a hostile work environment claim.
  - Argue per se admissibility where applicable (prior complaints against same bad actor).
  - Be ready with authorities to counter general FRE 403 (CA Evidence Code 352) admissibility arguments and FRE 404 (CA Evidence Code 1101) character evidence arguments.
  - Argue evidence is relevant to Faragher/Ellerth or avoidable consequences defenses.
Perils and Pitfalls of Social Media and Me-Too Evidence

Presented By

David A. Garcia

Workplace Legal Issues
Harvey Weinstein and “Me Too” Harassment

• Twitter message by Alyssa Milano: “You’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.”

• This led tens of thousands to step forward and tell their stories now-called the #MeToo movement—a campaign started approximately 10 years ago by activist Tarana Burke.
Potential Use of “Me Too” evidence in Social Media Harassment cases

• 2018 Statistics: Facebook eclipsed the 2-billion-user mark, now counting nearly one-third of the planet among its user base

• Is an employer responsible to investigate Me-Too Complaints on Social Media Sites?
Me-Too Social Media Postings: Duty to Investigate

CA State
– “Take all reasonable steps to prevent discrimination and harassment from occurring.”
Gov. Code § 12940(k)

Title VII “Take all steps necessary to prevent harassment from occurring.”
29 C.F.R. Section 1604.11(f).

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999).
EEOC Press Release: Social Media

EEOC Press Release: Social Media Is Part of Today’s Workplace but its Use May Raise Employment Discrimination Concerns. (March 12, 2014)

Panelist at the EEOC meeting: An employer may be liable for a hostile work environment if it was aware of the postings, or if the harassing employee was using employer-owned devices or accounts.
Harassment “Me Too” Evidence


A jury found an employer liable to an employee for disability harassment where his coworkers had posted offensive social media blogs about his “claw” hand (a birth defect by which he had only two fingers).
Espinoza v. Cnty. of Orange: Liability

On appeal, the employer argued that it did not maintain the blog site and that it could not determine that the postings (which were made anonymously) actually came from its employees.

As revealed by defendant’s own investigation, employees accessed the blog on workplace computers.
Debord v. Mercy Health Sys. of Kansas, Inc.

An employer discharged a female employee for making Facebook posts via her cell phone during work hours. Debord v. Mercy, 737 F.3d 642 (2013).

Facebook Postings: Employer should have been aware of the harassment by virtue of her posting statements about it on Facebook.

Disposition of a harassment suit can depend on whether an employer consistently monitors its employees’ social media activity. Here, the employer consistently did not, which ultimately meant it could not be held liable for having notice of an employee’s complaints of harassment via social media.
Caution: States Protect Social Media Sites

Over a dozen states have enacted laws protecting employees’ social media account information from their employers—

- Bar employers from requiring or requesting that applicants and employees disclose their personal social media account usernames or passwords.
Lessons

• Was the harassing employee using employer-owned devices or accounts?

• Employer may be liable for a hostile work environment if it was aware

• Review Policies to prohibit access to Social Media Sites on Workplace Computer

  • Once Aware of Social Media Me-Too Postings, Implement Appropriate Investigation
TIME FOR QUESTIONS
Perils of Social Media and the Me-Too Evidence in the Workplace

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