

ALI-ABA Teleseminar and Audio Webcast
Employment Law Update: Spring 2009

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Annual Review of Major Developments in Equal Employment Law

By

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EEO DEVELOPMENTS

I. SUPREME COURT ¹

A. Evidentiary Issues

Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140, 102 FEP 1057 (2008). The Tenth Circuit decision holding that “me-too” testimony in a RIF case is per se admissible is reversed. The plaintiff in an individual RIF case wanted to call five other older RIF’d employees who did not report to the same supervisor/decisionmaker. The trial court rejected the testimony. “Rules 401 and 403 do not make such evidence *per se* admissible or per se inadmissible” (128 S. Ct. at 1147) Relevance under Rule 401 “depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.” (*Id.*) Rule 403 “also requires a fact-intensive, context-specific inquiry.” (*Id.*) The case was remanded to the trial court to clarify the basis for its ruling. 587 F. Supp. 2d 1201, 104 FEP 1269 (D. Kan. 2008) The clerk was directed to re-enter judgment for the employer. The lower court concluded that the proffered evidence concerning other employers outside plaintiff’s chain of command was not admissible.

Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006). Two African-American employees were denied promotions in the defendant’s food processing plant that were ultimately awarded to two Caucasians. Among the proof of discrimination they offered was the fact that their supervisor used the term “boy” in referring to them. The Eleventh Circuit held that this term was insufficient to show racial bias. The Supreme Court held that the Eleventh Circuit erred in laying down a *per se* rule that the term “boy” cannot constitute evidence of racial bias. Instead, that term first would have to be understood in the context in which it was used, including its historical usage, its usage in the workplace, the familiarity between the parties, etc. The Eleventh Circuit, applying its prior case law, also held that the plaintiffs had to show that their qualifications were so superior to the successful candidates “as virtually to jump off the page and slap you in the face” to make a showing of pretext. The Supreme Court held that this standard does not properly articulate the plaintiff’s burden for showing pretext on evidence of comparative qualifications. Nevertheless, the Supreme Court offered little insight into the proper standard. On remand, the Eleventh Circuit reached the same result as before, finding that the plaintiffs’ evidence of discriminatory intent remained insufficient as a matter of law. 190 Fed. Appx. 924 (11th Cir. 2006) (*per curiam*), *cert. denied*, 127 S. Ct. 1154 (2007). *See also Higgins v. Tyson Foods, Inc.*, 546 U.S. 1212 (2006), *vacating* 143 Fed. Appx. 300 (11th Cir. 2005), *reaff’d*, 196 Fed. Appx. 781 (2006), *reh’g denied*, 214 Fed. Appx. 972 (Oct. 26, 2006).

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