SLAYING THE 'MINI-TRIALS' BOGEYMAN: Reexamining Other-Acts Evidence and Its Relevance in Employment Discrimination

By Robin B. Wagner

It is settled law that discrimination by supervisors other than the plaintiff's own, or against similarly situated employees, and comments expressing bias can be evidence of the "existence of a discriminatory atmosphere" that "in turn may serve as circumstantial evidence of individualized discrimination directed at the plaintiff."[1] This "other acts" evidence[2] can be used to illuminate a corporate state of mind such as a hostile work environment,[3] the propensity of the employer to discriminate generally[4] or of a specific decisionmaker to discriminate,[5] the discriminatory intent behind an adverse action,[6] or the impact of such conditions on the plaintiff.[7]

Nonetheless, defendant employers consistently seek to exclude this evidence — and even block its discovery — by invoking the bogeyman of "mini-trials" that will supposedly be necessary to evaluate this evidence and thereby derail the litigation. This article reviews the case law on this important category of evidence and demonstrates how to dispel these exaggerated fears.

PATTERN-OR-PRACTICE EVIDENCE CAN BE USED IN SINGLE-PLAINTIFF CASES

When individual plaintiffs bring claims of employment discrimination, they are prohibited from using the "pattern-or-practice method of proving discrimination ... [because] a pattern-or-practice claim is focused on establishing a policy of discrimination" and not considered applicable to individual hiring or firing decisions.[8] "However, pattern-or-practice evidence *may be relevant* to proving an otherwise-viable individual claim for disparate treatment under the McDonnell Douglas framework."[9] Particularly when the defense has not demonstrated that producing "#MeToo" or other-acts evidence[10] would be burdensome or otherwise outside the generous considerations for the scope and limits of discovery under Fed. R. Civ. P. 26(b), it is discoverable.

Of course, just because evidence is discoverable does not mean that it will be admissible.[11] The question of admissibility for other-acts evidence centers on a non-exhaustive factor test arising from some common considerations arising in employment litigation:

1. whether the same actors are involved in each decision;
2. the temporal and geographical proximity of the other acts to the plaintiff's circumstances;
3. whether the various decisionmakers knew of the other decisions;
4. whether the employees were similarly situated in relevant respects; or
5. the nature of each employee's allegations of retaliation.[12]

The balancing of these factors follows the classic evidentiary weighting of relevance addressed by Rule 401, relative to the issues of prejudice, confusion, and waste of time addressed in Rule 403. The Supreme Court has ruled that there is no *per se* rule on the admissibility of other-acts evidence; therefore, courts must consider such factors in determining admissibility.[13]

It is crucial to remember that these balancing factors relate to admissibility at trial, not discovery. It should go without saying, but sometimes defendants and courts need to be reminded, that the other-acts evidence is absolutely discoverable under the generous scope of discovery rules: Such evidence was of course available in discovery for its admissibility to become a subject of trial evidentiary rulings. After all, "[w]hat may appear to be a legitimate justification for a single incident of alleged harassment may look pretextual when viewed in the context of several other related incidents."[14]

WHEN AND HOW OTHER-ACTS EVIDENCE CAN BE USED

An essential reason why courts open the door to other-acts evidence is that it can be extremely difficult to prove the intent to discriminate; therefore, any evidence of prior statements or conduct can have "heighten[ed] probative value."[15] Defendants may try to brush them away as "stray remarks," but prior statements and conduct can and do illuminate a decisionmaker's bias or a hostile workplace.[16] For instance, one court ordered the production of personnel files involving five supervisors at a defendant employer who had been charged with race bias because such evidence "may be admissible at trial to show discriminatory intent in disciplining plaintiff."[17]

THE CORPORATE STATE OF MIND

Other-acts evidence can demonstrate a "corporate state of mind" of discriminatory animus, even when the evidence does not "coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment."[18] Similarly, it can establish a workplace culture of hostility and animus against a protected category. For instance, evidence that managers "dine[d] only with certain Caucasian male employees" to the exclusion of women and minorities created a valid inference that these managers did indeed influence the assignment of office privileges like overtime, including to individuals who were not their direct reports.[19] In another lawsuit against the same defendant, a nonparty employee's description of the general "air" in the office of a "stereotype that women wouldn't typically be there" was considered "circumstantial evidence suggesting the existence of a discriminatory atmosphere" even though the court described the testimony as "vague, conclusory, and apparently not based on observed discriminatory acts, such as inappropriate statements."[20]

BIAS DEMONSTRATED BY OTHER SUPERVISORS AND NON-DECISIONMAKERS

It is unremarkable that a decisionmaker's prior discriminatory treatment of others similarly situated to a plaintiff is relevant and compelling evidence of bias in the plaintiff's case.[21] But evidence that other supervisors and non-decisionmakers harbored animus can also be used to support the individual plaintiff's claim that their adverse employment experience was motivated by a similar bias. For instance, the hostility of supervising officers in the Royal Oak Police Department toward promoting women supported an individual plaintiff's claim that she was denied promotions because of her sex.[22] And evidence of a county employer's general hostility toward employees taking Family and Medical Leave Act (FMLA) benefits was found in the anti-FMLA statements of non-decisionmakers.[23]

SUBJECTIVE PERCEPTIONS CAN ILLUSTRATE OBJECTIVELY HOSTILE CONDITIONS

That another employee subjectively felt harassed or perceived hostility can be used both to support a finding that the workplace was objectively hostile and to corroborate a plaintiff's own subjective experience of discriminatory animus.[24] First of all, another employee's testimony of their own experience is not improper opinion testimony because it is based on "firsthand perceptions" and "personal knowledge"; therefore, it can assist the jury in evaluating the sufficiency of the evidence that a discriminatory environment existed, and it is not scientific, technical, or specialized.[25] Second, a plaintiff's awareness of colleagues' experiences of discrimination similar to their own can support a finding of a hostile work environment.[26] But even more important, a discriminatory environment can be established through the experiences of these other colleagues even if the plaintiff was unaware of these other acts.[27] Third, a decisionmaker's involvement in other acts of bias testified to by nonparties can be used to reflect that decisionmaker's bias in the plaintiff's situation.[28] One should keep in mind that this line of testimony — plaintiffs discussing what others told them — would be admissible as a hearsay exception because it would

illustrate the impact those statements had on the plaintiff, and if the statements hit an obstacle to admissibility, it might still be allowed under Rule 803(3) as a "then-existing state of mind" exception to hearsay.[29]

EVIDENCE OF PRETEXT AND AN INTENT OR MOTIVE TO DISCRIMINATE

Evidence of other acts can also illustrate pretext, an essential element of most employment discrimination proofs, particularly when there is a pattern of the company's failures to follow its own internal policies.[30] Furthermore, under Rule 404(b)(2), this evidence of other discriminatory statements and conduct, whether by the supervisor or the employer generally, is admissible to prove motive and intent to discriminate.[31] It may also illustrate "the credibility of the decisionmaker, which is relevant in a retaliatory discharge case."[32] Importantly, this evidence is not to be swatted away as "stray remarks": As one court relying on 404(b) ruled, "Johnson may introduce evidence that Bupp used racial slurs on certain occasions to show that he had a discriminatory motive for treating Pooler more favorably than Johnson."[33]

THE 'MINI-TRIAL' BOGEYMAN: REAL OR MYTH?

For all the compelling and persuasive uses of other-acts evidence, there are trip wires. However, the obstacles to using this evidence are not as insurmountable as a defense attorney might insist.

The main reason for excluding this evidence comes from seeking to use it to prove the facts of a plaintiff's claims about what happened to them, rather than to illuminate a culture of discrimination, the propensity of a supervisor or even the employer as an entity to discriminate, or the extent of the hostility in a workplace.[34] A plaintiff's assurance that the other-acts evidence will not be used for such a purpose can be helpful in gaining admission of the evidence for the purposes outlined above.[35]

As long as the facts of the other-acts evidence are not being used to support the plaintiff's own experience of an adverse employment act, the fear of time-wasting "mini-trials" is not real. As one circuit court explained:

> The district court also placed too much emphasis on its concern with "mini-trials." While this concern "is legitimate," accommodating it in every case "would tend to exclude any 'other acts' evidence, regardless of how closely related it is to the plaintiff's circumstances." *Griffin*, 689 F3d at 600. Rather, a court should analyze whether the probative value of the other employee evidence outweighs the potential for distraction.[36]

Several courts have taken this reasoning a step further and explained that there are already tools at trial to evaluate other-acts evidence without any fear of mini-trials. For instance, defendants should be using discovery to evaluate the supposed #MeToo witnesses and their testimony so that proper arguments can be developed that address the weight of this evidence.[37] Furthermore, cross-examination is the ultimate tool for assessing the truthfulness of a witness's testimony.[38] The Fourth Circuit Court of Appeals, in determining that the trial court had abused its discretion by not admitting the testimony from three nonparty older employees who had been replaced by younger employees and who claimed that the same defendant

supervisor had made age-related comments to them, reasoned that the defendant could have simply denied making these statements and let the jury evaluate his credibility in relation to the other witnesses, rather than excluding this important evidence.[39]

CONCLUSION

The rules of evidence, particularly Rules 401 and 403, combined with the *Griffin* factors and the tools of discovery and trial, provide a thorough framework for evaluating #Me-Too and other-acts evidence. Therefore, any arm flailing about the fear of "mini-trials" is merely an attempt to circumvent the explicit mandate by the Supreme Court in *Sprint/United Management Co.* that there can be no *per se* rule on the admissibility or inadmissibility of this category of evidence. Don't let this bogeyman keep you from making your case.

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Footnotes:

1. *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F3d 344, 356 (CA 6, 1998); c.f. *Sprint/United Mgmt. Co. v. Mendelsohn,* 552 US 379, 388 (2008).
2. *Griffin v. Finkbeiner et al.*, 689 F3d 584, 598 (CA 6, 2012).
3. See, e.g., *Jackson v. Quanex Corp.*, 191 F3d 647, 661 (CA 6, 1999).
4. See, e.g., *Free v. Fed. Express Corp.*, No. 2:15-CV-02404-SHM-tmp, 2019 WL 332810, at *3 (W.D. Tenn., January 25, 2019).
5. See, e.g., *Haley v. Kundu*, No. 1:11-CV-265, 2013 WL 12030021, at *4 (E.D. Tenn., April 11, 2013).
6. See, e.g., *Miller v. Fed. Express Corp.*, 186 FRD 376, 384-85 (W.D. Tenn., 1999).
7. See, e.g., *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2806928, at *3 (E.D. Ark., September 25, 2007).
8. *Bacon v. Honda of Am. Mfg., Inc.*, 370 F3d 565, 575 (CA 6, 2004).
9. *Id.* (emphasis added). See also *Palmer v. CSC Covansys Corp.*, No. 17-10309, 2018 WL 4608474, at *7 (E.D. Mich., September 25, 2018) ("'[I]f a plaintiff has presented a viable claim of disparate treatment, a pattern or practice of discrimination may constitute additional, relevant evidence.' [] Thus, evidence of a pattern-or-practice of discrimination can be offered to prove pretext.") (internal citations omitted); *Berry v. Town of Front Royal, Virginia*, No. 5:21-CV-00001, 2021 WL 4895204, at *3 (W.D. Va., October 20, 2021) ("In discrimination cases, courts have generally allowed discovery of other actions or proceedings against a defendant because 'evidence of general patterns of discrimination by an employer is clearly relevant in an individual disparate treatment case, and is therefore discoverable pursuant to Fed. R. Civ. P. 26(b)(1).'") (quoting *Kelly v. FedEx Ground Package Sys.*, 2011 U.S. Dist. LEXIS 45180, *16 [S.D. W. Va., April 26, 2011]).
10. See *Griffin*, 689 F3d at 597. ("This challenge requires us to enter the unsettled evidentiary terrain of 'other acts' or 'me too' evidence.")
11. Fed. R. Civ. P. 26(b)(1). ("Information within this scope of discovery need not be admissible in evidence to be discoverable.")
12. *Griffin*, 689 F3d at 598-99 (citing cases).
13. *Sprint/United Mgmt. Co.*, 552 US at 388.
14. *Jackson v. Quanex Corp.*, 191 F3d 647, 661 (CA 6, 1999), quoting *Vance v. Southern Bell Tel. and Tel. Co.*, 863 F2d 1503, 1510 (CA 11, 1989).
15. *Vandiver v. Little Rock Sch. Dist.*, No. 4:03-CV-00834 GTE, 2007 WL 2806928, at *3 (E.D. Ark., September 25, 2007) (citing cases).
16. *Id.*
17. *Miller v. Fed. Express Corp.*, 186 FRD 376, 385 (W.D. Tenn., 1999).
18. *Conway v. Electro Switch Corp.*, 825 F2d 593, 597 (CA 1, 1987).
19. *Johnson v. Fed. Express Corp.*, No. 1:12-CV-444, 2014 WL 805995, at *11 (M.D. Pa., February 28, 2014).
20. *Free v. Fed. Express Corp.*, No. 2:15-CV-02404-SHM-tmp, 2019 WL 332810, at *4 (W.D. Tenn., January 25, 2019).
21. See, e.g., *Figgins v. Advance Am. Cash Advance Centers of Michigan, Inc.*, 482 F Supp 2d 861, 866 (E.D. Mich., 2007) (testimony from other employees that the same supervisor who made derogatory remarks to plaintiff treated them similarly made the fact of that supervisor's discriminatory animus more likely).
22. *Risch v. Royal Oak Police Dept.*, 581 F3d 383, 393 (CA 6, 2009).
23. *Mikulan v. Allegheny Cty.*, No. CV15-1007, 2017 WL 2374430, at *7 (W.D. Pa., May 31, 2017).
24. *Jackson v. Quanex Corp.*, 191 F3d 647, 661 (CA 6, 1999).
25. *Free*, 2019 WL 332810 at *4; see also *Johnson*, 2014 WL 805995 at *10.
26. *Vandiver*, 2007 WL 2806928 at *3.
27. *Id.*
28. *Robinson v. Runyon*, 149 F3d 507, 512-13 (CA 6, 1998).
29. *Maes v. Leprino Foods Co., Inc.*, No. 15-CV-0022-WJM-MEH, 2017 WL 1077638, at *4 (D. Colo., March 22, 2017).
30. *Free*, 2019 WL 332810 at *5 (citing *Coburn v. Rockwell Automation, Inc.*, 238 FAppx 112, 126 (CA 6, 2007); *Deboer v. Musashi Auto Parts, Inc.*, 124 FAppx 387, 394 (CA 6, 2005).
31. *Haley v. Kundu*, No. 1:11-CV-265, 2013 WL 12030021, at *4 (E.D. Tenn., April 11, 2013).
32. *Id.*
33. *Johnson*, 2014 WL 805995 at *9 (citing, inter alia, *Ansell v. Green Acres Contracting Co.*, 347 F3d 515, 521 [CA 3, 2003]).
34. See, e.g., *Hathaway v. Idaho Pac. Corp.*, No. 4:15-CV-00086-DCN, 2017 WL 6268515, at *5 (D. Idaho, December 8, 2017).
35. See, e.g., *Free*, 2019 WL 332810 at *3.
36. *Calobrisi v. Booz Allen Hamilton, Inc.*, 660 Fed Appx 207, 209-10 (CA 4, 2016).
37. *Maes*, 2017 WL 1077638.
38. *Id.*
39. *Kozlowski v. Hampton Sch. Bd.*, 77 Fed Appx 133, 149 (CA 4, 2003).