Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2018 Issue

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"Me too" and "not me too" evidence in employment litigation

PROVING THAT AN EMPLOYEE HARASSED OR THE EMPLOYER DISCRIMINATED AGAINST SIMILARLY SITUATED INDIVIDUALS OTHER THAN THE PLAINTIFF

The term "me too" has been significant for employment lawyers for decades, long before the #MeToo movement had its resurgence in 2017. But "me too" evidence and the movement with the same hashtag have been born of similar principles: there is strength in numbers because evidence of a perpetrator's prior acts of discrimination, harassment and retaliation tend to show discriminatory/retaliatory intent and bolster the credibility of each individual victim.

For plaintiffs' employment lawyers, "me too" evidence can be a powerful tool. To prove discrimination under the Fair Employment and Housing Act ("FEHA") or Title VII, an employee must show that the employer had a discriminatory motive when it acted against the employee. (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [disparate treatment claims require a showing that an employer intentionally treated an employee less favorably because of the employee's protected status]; *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610 ["In a disparate treatment case, liability depends on whether the protected trait… actually motivated the employer's decision"].)

Because plaintiffs cannot reach into the minds of employers to prove animus, in the absence of direct evidence of discriminatory animus, plaintiffs must use circumstantial evidence. "Me too" evidence is some of the most persuasive circumstantial evidence of discriminatory intent.

What is "me too" evidence?

"Me too" evidence is evidence that shows an employer discriminated against similarly situated individuals other than the plaintiff. It shows a pattern or practice of discrimination against persons in plaintiff's protected class. (*Spulak v. K Mart Corp.* (10th Cir. 1990) 894 F.2d 1150, 1156 [stating that "[a]s 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"].) The employer's treatment of similarly situated employees may be relevant to show a "discriminatory atmosphere" or corporate mindset against persons in a protected category. (*Hawkins v. Hennepin Technical Ctr.* (8th Cir. 1990) 900 F.2d 153, 155 [employer's hostile treatment of other women admissible to prove plaintiff's claims of gender discrimination and retaliatory discharge].)

In California, Evidence Code section 352 does not result in exclusion of "me too" evidence for the same reasons established by federal courts. (*Johnson v. United Cerebral Palsy/Spastic Children's Found. of Los Angeles & Ventura Counties* (2009) 173 Cal.App.4th 740, 767 [in pregnancy discrimination action, declarations by other women employees that they had been fired due to their pregnancies were relevant to show employer's reason for plaintiff's termination was pretextual]; *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 109-111, 114 [in action alleging discrimination and harassment, "me too" evidence was relevant to prove gender bias and to rebut defense evidence that employer had a policy of not tolerating harassment and a practice of not directing profanity at individual employees].)

Similarly, in harassment cases, "me too" evidence can be utilized to show a pattern and practice of harassment by the same perpetrator. (See *Horn v. Duke Homes* (7th Cir. 1985) 755 F.2d 599 [testimony of former employee regarding perpetrator's use of power to sexually exploit female employees allowed]; *Jones v. Lyng* (D.D.C. 1986) 669 F.Supp. 1108, 115 [employee permitted to testify that perpetrator had a reputation for making unwanted sexual advances and was a "womanizer"]; *Priest v. Rotary* (N.D. Cal. 1986) 634 F.Supp. 571 [testimony of other women that defendant fondled them, made sexual remarks about their breasts, and circulated an obscene photograph admitted].)

Evidence that an employer retaliated against employees other than plaintiff for engaging in the same protected activity is also relevant because intent is an essential element of a retaliation claim. (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 297.)

Additionally, "me too" evidence may be admissible to adjudicate the credibility of witnesses and impeach an employer's assertion that its policies prohibit unlawful discrimination, harassment and retaliation. In *Pantoja,* the court made it clear that evidence of other complaints ("me too" evidence) is admissible (and is therefore clearly discoverable) for the purpose of proving intent, to adjudicate the credibility of witnesses and to impeach a defendant's assertion that its policies prohibit unlawful harassment, discrimination and retaliation. (*Id.*, 198 Cal.App.4th at 87, 109-111, 114.)

Moreover, "me too" evidence may be used to prove that an employer failed to prevent discrimination, harassment, and/or retaliation. In the seminal California sexual harassment case of *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, the Court of Appeal affirmed a trial court's admission of evidence showing the law firm knew full

See Harrison, Phillips & Olszewska, Next

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2018 Issue

well the harasser had a "propensity to engage in harassing conduct," and that it was "common knowledge that [he] harassed female employees," yet it failed to take any, let alone appropriate, corrective action. (*Id.* at 1159-1160.) The court held that this evidence was admissible to show Baker & McKenzie "failed to take all reasonable steps to prevent ... sexual harassment," as required by Government Code § 12940(k). (*Id.* at 1160.)

The limits of "me too" evidence

Same protected class as plaintiff

Defendants often object to the production of and/or admissibility of "me too" evidence regarding employees who are not in the plaintiff's protected class. Employers argue that the evidence of complaints by or action against employees in protected classes other than the plaintiff's is unrelated and irrelevant to the claim brought by the plaintiff. Some courts agree that the evidence sought must relate specifically to plaintiff's protected class. (See *McCoy, supra,* 216 Cal.App.4th at 295-298 [holding that exclusion of evidence of racially derogatory remarks, sexual harassment and discrimination was proper because it was irrelevant to employee's retaliation claim]; *Hatai v. Department of Transp.* (2013) 214 Cal.App.4th 1287, 1296-1297, overruled on other grounds by *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97 [holding that the trial court properly excluded evidence of supervisor's animus towards employees outside of plaintiff's protected class].)

But, there are at least two other arguments for obtaining and using evidence of treatment of employees in different protected classes than that of the plaintiff. First, one way we establish discrimination and harassment is by pointing to different treatment of employees other than the plaintiff. For example, if an Asian female plaintiff was fired based on one alleged mistake at work, one way we prove differential treatment is by comparison to other employees who also committed the same mistake but were not fired as a result. In this scenario, the employees who were retained despite making the same mistake made by the plaintiff likely will not be in plaintiff's protected class. This is comparator evidence and cannot be limited to plaintiff's protected class. (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 744 [employee was able to present evidence that other employees were treated less harshly than plaintiff]; see also *Damon v. Fleming Supermarkets of Florida, Inc.* (11th Cir. 1999) 196 F.3d 1354, 1363 [a plaintiff can prove that a defendant's reason for firing him/her was pretextual if plaintiff shows that other employees outside of plaintiff's protected category were not fired for the same violations].)

Second, plaintiffs may bring favoritism claims, e.g., that white male employees are treated more favorably as a group than the group of plaintiff's protected class employees. Here, the plaintiff would offer evidence of discriminatory intent by providing evidence that individuals with jobs that are similar to plaintiffs were treated more favorably than those individuals belonging to plaintiff's protected class. (See *Hawn v. Executive Jet Mgmt., Inc.* (9th Cir. 2010) 615 F.3d 1151, 1155-1157. ["Whether two employees are similarly situated is ordinarily a question of fact. The employees' roles need not be identical; they must only be similar in all material respects. Materiality will depend on context and the facts of the case."]; see also *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 641.)

But note that in *Hatai, supra*, 214 Cal.App.4th at 1298, the court held that a plaintiff must plead a favoritism claim alleging that a perpetrator discriminated against all employees not of the same national origin as the perpetrator to introduce evidence of complaints by members outside of plaintiff's protected category. Thus, if a plaintiff only pleads that an employer discriminated against or harassed him/her because of animus towards the plaintiff's membership in a protected category, the plaintiff will be barred from introducing evidence that the perpetrator displayed animus against anyone who was not a member of the perpetrator's class.

Same decision maker

Defendants also argue, and some courts have held, that "me too" evidence must be excluded where the decision maker who took action against the plaintiff was not the same decision maker who took action against the "me too" witnesses. (*Schrand v. Federal Pac. Elec. Co.* (6th Cir. 1988) 851 F.2d 152, 156; *Day v. Sears Holdings Corp.* (C.D. Cal. 2013) 930 F.Supp.2d 1146, 1184.)

However, the U.S. Supreme Court has held that "me too" evidence may be admissible regardless of whether the decision makers are the same in plaintiff's case. (*Sprint/United Mgmt. Co. v. Mendelsohn* (2008) 552 U.S. 379, 380-381.) Evidence of discriminatory, harassing, and retaliatory conduct by different decision makers is not per se inadmissible. In fact, the Court expressly stated that applying a per se rule excluding such evidence is an abuse of discretion. (*Id.* at 387.)

Instead, an inquiry about the admissibility of such evidence requires an analysis of the specific facts and considers several factors. "The question whether 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." (*Id.* at 388.)

Thus, when seeking "me too" evidence, the plaintiff should not necessarily be limited only to discovery or presentation of evidence of harassment, discrimination, and retaliation by the same bad actor who targeted the plaintiff.

How to obtain "me too" evidence

Informal interviews

"Me too" evidence may be obtained by inquiries and interviews of prior victims conducted by plaintiff's attorneys. Your plaintiff likely has heard about or maintained contact with prior employee-victims and may be able to connect you with these individuals. As a matter of practice, it is a good idea to get a list of prior victims as early in the case as possible and conduct interviews before defense attorneys become aware of these potential witnesses. If an employee-victim is still employed by the defendant-

See Harrison, Phillips & Olszewska, Next

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2018 Issue

employer, make sure that you have reviewed the California Rules of Professional Conduct to make sure that you are able to interview the particular witness you seek to contact. When conducting interviews, it is important to get the employee-victim's full account and obtain a detailed declaration if the witness is willing to give one. Additionally, it is a good idea to ask these witnesses whether they are aware of any other potential victims.

DFEH public records request

You may also obtain complaints against the defendant-employer through a public record request directly from the DFEH. "DFEH records are available to the public, except for cases that are still under investigation. The Custodian of Records holds complaint records for three years" and will make them available upon request. (See https://www.dfeh.ca.gov/news-and-public-records/.)

Discovery

Discovery is the main mechanism by which "me too" evidence is normally obtained. Because "me too" evidence is so powerful, it is critical that plaintiff's attorneys aggressively pursue its discovery.

Important requests for production of documents are similar complaints against the employer and requests for the personnel files of the perpetrator. Also, interrogatories seeing the identification of all persons who lodged similar complaints and a deposition of the employer's person most knowledgeable regarding such complaints are equally important.

Sample "me too" evidence requests for production

ALL DOCUMENTS constituting any complaint of [*type of*] discrimination/[*type of*] harassment/retaliation/wrongful termination/etc. made to or against YOU relating to YOUR employees from [*insert date*] to the present.

ALL DOCUMENTS constituting, referring to or PERTAINING TO any investigation YOU conducted because of any complaint of discrimination/harassment/retaliation/wrongful termination/etc. made to or against YOU relating to any of YOUR employees from [*insert date*] to the present.

The entire PERSONNEL FILE for [*insert bad actor(s)*].

ALL personnel DOCUMENTS referring or PERTAINING TO [*insert bad actor(s)*], including but not limited to ALL performance reviews, memorandums, complaints, criticisms, letters of warning, disciplinary actions, communications received or authored by YOU RELATING TO [*insert bad actor(s)*], statements obtained by YOU from any PERSON RELATING TO [*insert bad actor(s)*], records of any changes in job position(s), awards, bonuses and commendations.

ALL DOCUMENTS that constitute, refer to or reflect any and all complaints ever received by YOU about [*insert bad actor*(*s*)].

ALL DOCUMENTS that constitute, refer to or reflect any and all investigations conducted by YOU arising out of or relating to any complaint ever received by YOU about [*insert bad actor*(*s*)].

ALL DOCUMENTS that constitute, refer to or reflect any and all action taken by YOU arising out of or relating to any complaint ever received by YOU about [*insert bad actor*(*s*)].

Personnel files of the perpetrator

One way to establish a perpetrator's prior harassment, discrimination or retaliation, and the employer's failure to prevent the same in the workplace, is if an employer documented the earlier harassment in the perpetrator's personnel file. Thus, California law permits a plaintiff to obtain the personnel file of an alleged perpetrator of harassment, discrimination or retaliation. (See *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, overruled on other grounds in *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 664 [harasser's personnel files admissible at trial]; and *Ragge v. MCA/Universal Studios* (C.D. Cal. 1995) 165 F.R.D. 601, 605 [supervisor's right of privacy outweighed by the plaintiff's need to discover supervisor's performance documents in sexual harassment and retaliation case].)

In *Bihun*, the defendant employer failed to produce the harasser's personnel file at trial pursuant to a California Code of Civil Procedure section 1987 demand. As a result, the trial court instructed the jury on willful suppression of evidence. The Court of Appeal affirmed this instruction, in part, because "it was reasonably probable [the harasser's] performance evaluations and any complaints of sexual harassment would be in his personnel file" and, thus, those documents were admissible. (*Id.* at 994.) If a personnel file is admissible at trial, by definition it is discoverable because it is "reasonably calculated" to lead to the discovery of admissible evidence.

Whether documents and information in a perpetrator's personnel file or other records reflect criticism, *or no criticism*, of their treatment of plaintiff (and other employees generally) is central to the issue of whether the employer failed to prevent the harassment, discrimination and retaliation to which plaintiff was subjected.

Privacy interests, if any, are outweighed by public policy goals

A common argument advanced by defendants when plaintiffs attempt to obtain a perpetrator's personnel file or similar complaints of discrimination, harassment and retaliation is that the right to privacy protects such information. However, this argument is unavailing and contrary to public policy.

Employees cannot reasonably expect privacy protections concerning their participation in workplace harassment, discrimination or retaliation investigations (or regarding discipline flowing therefrom) because the employer is legally required to investigate and remedy those allegations. That very process necessarily requires sharing the results of the investigation with others (including the complainant). This fact defeats any claim of a reasonable expectation of privacy.

See Harrison, Phillips & Olszewska, Next

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2018 Issue

Both the Society for Human Resource Management ("SHRM") and the Equal Employment Opportunity Commission stress that the results of a harassment investigation are not private but must be shared with appropriate individuals (including the complainant). According to the SHRM, investigating a harassment complaint, "[a] determination must be made [as to its validity] and the results communicated to the complainant, to the alleged harasser and, as appropriate, to all others directly concerned" and that "[t]he employer must all communicate to the complainant that action has been taken to stop the harassment from recurring" if the employer takes such action. SHRM, "What are an employer's obligations under California law with regard to sexual harassment prevention?"(https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/californiasexualharassmentprevention.aspx.)

Similarly, the Equal Employment Opportunity Commission, in creating guidelines for investigating internal harassment complaints, specifically noted that the employer cannot guarantee confidentiality in workplace investigations because, by definition, an investigation requires sharing information with others beyond merely the accused: "An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses." (*Equal Employment Opportunity Commission Enforcement Guidance on Vicarious Liability for Unlawful Harassment by Supervisors* (June 16, 1999, EEOC Notice 915.002).) The EEOC also specifically notes that if the employer decides that discipline is necessary, "[m]anagement should inform both parties [complainant and accused] about these measures." (*Ibid*.)

In any event, once a party seeking information shows the direct relevance of private information and that the means of seeking the information is not overly intrusive, a court must balance competing private and public interests. (*Valley Bank v. Superior Court* (1975) 15 Cal.3d 652, 657.) Two significant interests warrant the disclosure of the personnel records of perpetrators, which would include complaints against them and resulting disciplinary action, relating to harassment, discrimination, retaliation or similar allegations (whether made by plaintiff or others): (1) the fundamental goal of eradicating harassment, discrimination and retaliation, in the workplace; and (2) the ascertainment of truth in legal proceedings.

The interest in enforcing state and federal anti-discrimination laws is enormous. As the California Supreme Court has noted, "There is no question that the statutory rights established by the FEHA are 'for a public reason.'" (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 100, quoting *Rojo v. Kliger* (1990) 52 Cal.3d 65, 72-73.) The California Legislature has similarly emphasized the importance of this right:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status. It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.

(Govt. Code § 12920.)

In contrast to the significant interest in protecting victims of harassment, discrimination and retaliation, a perpetrator of those things – one who violates the public policy at stake – has no cognizable interest in shielding evidence proving he violated the law. Thus, "the necessity in judicial proceedings for ascertaining the truth is sufficiently compelling to justify disclosure of constitutionally protected information when narrowly limited to information directly relevant to the issues and when good cause and materiality to the action establish the need for disclosure outweighs the right to privacy.

(*Cutter v. Brownbridge* (1986) 183 Cal.App.3d 836, 843.0)

Ragge, supra, 165 F.R.D. at 605, held that that the disclosure of information and documents in an alleged harasser's personnel file is warranted when a plaintiff narrows the request to certain relevant information and documents. The *Ragge* Court concluded that a wide spectrum of information found within the alleged harasser's personnel file (in addition to "documents relating to complaints by Plaintiffs") is discoverable and relevant. More specifically, the *Ragge* Court held:

> Documents pertaining to promotions or demotions, disciplinary proceedings, work performance reviews and evaluations, and complaints, are relevant, among other things, to *the employer's knowledge of a hostile work environment*. Such documents also pertain to the credibility of witnesses, including the named defendants, and provide a means to compare statements made during depositions to documents maintained by the employer. Resumes and employment applications in the personnel files of named defendants are relevant to employer's knowledge of a harasser's prior history of harassment and, thus, relate to the claim against defendant [], as it pertains to defendants [], the alleged harassers.

(*Ibid,* emphasis added.)

If a discovery battle arises regarding the production of personnel files, plaintiff's attorneys may consider limiting the request to the categories of testimony to those enumerated by the *Ragge* Court: (1) promotions, (2) demotions, (3) discipline, (4) work performance reviews and evaluations, (5) complaints and investigations, (6) resumes, and (7) employment applications.

See Harrison, Phillips & Olszewska, Next

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2018 Issue

Establishing relevance of "me too" evidence

The ability to use "me too" evidence in any employment case depends on establishing its relevance to your case. Whenever possible, analyze relevance of "me too" evidence early in discovery. Employers often raise relevance and privacy objections to "me too" discovery. If you carefully narrow your discovery requests to similarly situated employees, you will increase the likelihood of obtaining substantive responses and documents and winning a motion to compel.

Most importantly, to use the evidence in litigation, make sure you can articulate how the employment situation of the "me too" witness is similar to your case and your plaintiff's circumstances. The more articulate you are about the similarities between the two, the more likely the court will find it relevant, probative, and admissible. Some examples of similarities to consider are whether the "me too" witness and your plaintiff:

- worked at the same location;
- worked in the same department;
- reports to the same supervisor;
- worked during the same time period;
- held the same job title or performed similar duties and responsibilities;
- witnessed similar conduct or shared similar experiences or events;
- are in the same protected class;
- experienced similar or the same discrimination, harassment, or retaliation; or
- made the same reports or claims.

When defense counsel objects because your plaintiff did not witness or know about the "me too" witness's similar experience, point to *Pantoja* which established that a foundation of knowledge by your plaintiff is not required. (*Pantoja,* 198 Cal.App.4th at 115 ["the evidence was admissible to prove [defendant's] intent or motive even if the conduct did not take place in Pantoja's presence and was unknown to her."].)

Using "me too" evidence to oppose summary judgment

"Me too" evidence can be very useful in opposing summary judgment. Providing declarations from similarly situated employees testifying that they were also victims of differential treatment because of their membership in the plaintiff's protected class will likely be more than enough to raise a genuine issue of material fact as to the employer's discriminatory intent. (See *Johnson*, *supra,* 173 Cal.App.4th at 759 ["me too" declarations constituted substantial evidence sufficient to raise a triable issue of fact as to the motive for firing plaintiff].)

Additionally, as discussed above, plaintiffs may introduce evidence that employees similarly situated to plaintiff were treated more favorably than members of plaintiff's protected category. At the summary judgment stage, this evidence is used to show that defendant's purported legitimate business reason for taking action against plaintiff is pretextual in the *McDonnell Douglas* burden-shifting analysis. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 804; see also *Damon v. Fleming Supermarkets of Florida, Inc.* (11th Cir. 1999) 196 F.3d 1354, 1363 [a plaintiff can prove that a defendant's reason for firing him/her was pretextual if plaintiff shows that other employees outside of plaintiff's protected category were not fired for the same violations].)

Using "me too" to obtain punitive damages

"Me too" evidence can also support your argument for awarding and assessing punitive damages. Under California Civil Code section 3294, subdivision (b), punitive damages against an employer may be awarded if the employer: (a) had advance knowledge of an employee's unfitness and employed them with a conscious disregard of the rights and safety of others; (b) ratified the wrongful conduct for which damages are awarded or (c) personally acted with malice, fraud or oppression. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 621 ["ratification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging the employee."]; see also *Bihun, supra,* 13 Cal.App.4th at 988-989 ["me too" evidence was admissible as "operative facts" since "the issue of knowledge is relevant to the award of punitive damages."].)

While the knowledge or conduct must be on the part of an officer, director, or managing agent for a corporate defendant (*White v. Ultramar, Inc.* (1992) 21 Cal.4th 563), repeated corporate misconduct may be used to justify large punitive damages. (See also *Roby v. McKesson Corp*. (2009) 47 Cal.4th 686, 713, 715-716 [court reduced a $15 million punitive damages award to $2 million, in part, because the plaintiff presented no evidence that the supervisor's unlawful harassment was "the product of a corporate culture that encouraged similar supervisor misconduct."].) Thus, if your "me too" evidence is excluded, ensure that you argue on the record that the defense has waived any argument requesting limitation of the punitive damage award because of an absence of evidence related to defendant's repeated corporate misconduct or its pattern or practice.

Defense counterpart: "Not me too" evidence

The defense's counterpart to "me too" evidence is "not me too" evidence, which is offered to rebut plaintiff's claims by showing that an employer treated other members of plaintiff's protected class favorably and rebut plaintiff's showing that the employer possessed discriminatory animus against him/her. (*Ansell v. Green Acres Contracting Co., Inc.* (3rd Cir. 2003) 347 F.3d 515, 524 ["While not conclusive, an employer's favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent."]; *Johnson, supra,* 173 Cal.App.4th at 767 [in pregnancy discrimination action, employer submitted declarations related to other female employees who took pregnancy leave and returned to work shortly thereafter]; *Pantoja*, *supra,* 198 Cal.App.4th at 109-111, 114 [in action alleging discrimination and harassment, the trial court allowed the defendant to

See Harrison, Phillips & Olszewska, Next

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
October 2018 Issue

admit evidence of his general course of conduct].)

Beware that trial courts can tend to more liberally admit "not me too" evidence than "me too" evidence. This disparity is shown in *Johnson*. There, the trial court held that plaintiff's "me too" evidence regarding five former employees alleging that they too were terminated because of their pregnancies was inadmissible. (*Id.* at 759.) But, the court admitted the employer's evidence including a declaration of an employee that she worked for defendant during her pregnancy, took pregnancy leave, and returned to work shortly thereafter. The human resources director also submitted a declaration stating that the employer has over 500 employees – the majority are women – and frequently received requests for pregnancy leave and routinely grants the leave.

Although the Court of Appeal reversed and held that the plaintiff's "me too" evidence was per se admissible, it is important to be vigilant about this type of inappropriate ruling. Thus, be prepared to make your record at the trial level, articulate the substantial similarities and probative value of the evidence of your "me too" evidence, argue to exclude the "not me too" evidence because fairness to a class of employees as a whole does not justify unfairness to the individual, and point to Evidence Code section 352. (See *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978) [Title VII's "focus on the individual is unambiguous"]; *Strickland v. United Parcel Serv., Inc.*, 555 F.3d 1224, 1230 (10th Cir. 2009) ["A sex discrimination claim does not fail simply because an employer does not discriminate against every member of the plaintiff's sex."].)

Conclusion

As you can see, "me too" evidence is incredibly valuable to plaintiffs. Thus, plaintiff's attorneys must vigorously pursue the discovery and demand the admission of such evidence. It is vital that plaintiff's attorneys pursue both formal and informal discovery of similarly situated employees with similar complaints, and of employees treated more favorably than plaintiff outside of plaintiff's protected category. When faced with resistance from defendants, plaintiffs should not hesitate to cite the long history of the admissibility of "me too" evidence in any meet and confer effort and move to compel if necessary. As we have recently witnessed with the #MeToo movement, the more victims that come forward to support each other, the more likely they are to be believed and vindicated.

Genie Harrison is the principal of the Genie Harrison Law Firm*, where she focuses her practice on plaintiff's employment, civil rights and wage and hour matters. In 2014, Ms. Harrison was elected as a Fellow of the College of Labor & Employment Lawyers, which is a nomination-only group of attorneys in practice for at least 20 years who have demonstrated the highest level of character, integrity, professional expertise and leadership. Ms. Harrison was also inducted as a Fellow of the Litigation Counsel of America, another honorary society made up of less than one-half of one percent of American attorneys. Ms. Harrison has been a member of CAALA's Board of Governors since 2008, served as the 2015 Chair of CAALA's Education Committee and is the current CAALA Treasurer. In 2013, Ms. Harrison received CAALA's Presidential Award and was previously nominated for the organization's prestigious Trial Lawyer of the Year Award. Finally, Ms. Harrison was a finalist for CAOC's Consumer Attorney of the Year Award and has been nominated for its Woman Trial Lawyer of the Year Award.*

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