The power of "Me Too" evidence in employment litigation

A powerful tool for defeating MSJ and strengthening the plaintiff's case at trial

By Lisa P. Mak

The groundbreaking #MeToo movement has become a cultural phenomenon, going viral on the internet and sparking increased awareness of the continued prevalence of sexual harassment and assault of women in their personal and professional lives. Women from different industries – from entertainment icons to athletes to farm workers – have stepped forward to share their stories. This year also marked the start of the "Time's Up" call to action, which seeks to address issues that women face in the workplace, including sexual harassment, pay disparity, and lack of representation in leadership. Legal actions in line with the #MeToo movement have received significant publicity.

Aside from being a movement, "me too" also has another legal angle. In lawsuits, plaintiffs can use "me-too evidence" to help establish their claims of employment discrimination, harassment, and retaliation. Such evidence can be useful in litigation to establish an employer's discriminatory intent and its pattern and practice of mistreating employees in the plaintiff's protected class or who have engaged in similar protected activity.

The concept of me-too evidence

For a discrimination claim under the California Fair Employment and Housing Act (FEHA), courts have held that me-too evidence is admissible from other employees who have experienced the same kind of discrimination. For example, in *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties* (2009) 173 Cal.App.4th 740, the plaintiff brought suit alleging that the employer fired her because she was pregnant. The company alleged that the plaintiff had been fired instead for falsifying her time records. In support of her opposition to summary judgment, the plaintiff presented declarations from other women at the company who had also been fired after disclosing they were pregnant. The defendant made evidentiary objections to those declarations, and the trial court granted summary judgment.

On appeal, the court held that the me-too declarations constituted substantial evidence requiring reversal of the grant of summary judgment. These declarations were from former employees of the defendant stating that: (1) they too were fired after they became pregnant; (2) they knew of someone who was fired by the defendant because she was pregnant; (3) they resigned because the plaintiff's supervisor made their work stressful after she knew they were trying to become pregnant; or (4) they knew of occasions when other employees were dishonest but not fired by the company.

The appellate court noted that the declarations came from employees who worked at the same facility as where the plaintiff worked, and were supervised by the same people who supervised the plaintiff. Such me-too evidence was sufficient to raise a triable issue of material fact about the company's intent and why it fired the plaintiff. The appellate court noted that the declarations presented factual scenarios similar to the one presented by the plaintiff, and that any dissimilarities went to the weight of the evidence, not to its admissibility.

Admissible to show intent or motive

In reaching its decision, the appellate court cited to numerous federal employment cases where such me-too evidence was deemed admissible to show "intent or motive, for the purpose of casting doubt on an employer's stated reason for an adverse employment action, and thereby creating a triable issue of material fact as to whether the stated reason was merely a pretext and the actual reason was wrongful under employment law." (*Johnson,* 173 Cal.App.4th at 760.) For example, in *Estes v. Dick Smith Ford, Inc.* (8th Cir. 1988) 856 F.2d 1097, the Eighth Circuit found that the trial court erred in excluding the plaintiff's evidence that "tended to show a climate of race and age bias" at the company. The *Estes* Court stated that while the plaintiff had to ultimately prove that his own termination was unlawful, evidence suggesting that the employer discriminated against blacks in hiring and treated white customers better could be relevant to whether the company fired the plaintiff – a black employee – because of his race. The Court reasoned that a wholesale exclusion of this kind of evidence could be especially damaging in employment discrimination cases, because plaintiffs often have to try to rebut the employer's stated reason for an adverse action and prove the employer's unlawful motives or intent through circumstantial evidence. (See also *Shattuck v. Kinetic Concepts, Inc.* (5th Cir. 1995) 49 F.3d 1106, 1109-1110; *Spulak v. K Mart Corp.* (10th Cir. 1990) 894 F.2d 1150, 1156.)

In *Pantoja v. Anton* (2011) 198 Cal.App.4th 87, the reviewing appellate court addressed the use of me-too evidence in a sexual harassment case. The trial court had barred the jury from hearing me-too evidence from other female employees who had been sexually harassed at the plaintiff's same workplace by the same manager, on the grounds

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that the other harassment occurred outside of the plaintiff's presence and at times when the plaintiff was not employed. The trial court held that such me-too evidence was improper character evidence under Evidence Code section 1101(a) if offered to prove a defendant's propensity to harass.

The appellate court found prejudicial error and reversed, because the me-too evidence of other harassment, while inadmissible as character evidence, could be admissible for another purpose under Evidence Code section 1101(b), such as the defendant's motive or intent. The appellate court held that the me-too evidence was admissible in the case for various purposes, including: (1) to show that defendant had a gender bias that motivated the plaintiff's firing and his behavior towards the plaintiff; (2) to rebut the defendant's evidence, including evidence that the defendant supposedly had a policy of not tolerating harassment; and (3) to impeach the defendant's credibility with respect to his own testimony. The court noted that such evidence was admissible to prove the defendant's intent or motive *even if* the plaintiff did not witness or know about the me-too conduct.

To prove pattern and practice

Courts have also held that me-too evidence is admissible to prove a claim of a "pattern and practice" of discrimination (*Obrey v. Johnson* (9th Cir. 2005) 400 F.3d 691, 694), to establish a hostile work environment (*King v. McMillan* (4th Cir. 2010) 594 F.3d 301, 310-311), or to show a defendant employer's knowledge of the misconduct of its managers (*Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 987-988). The latter evidence may be important to establishing a claim for the failure to prevent or correct known discrimination and harassment. (Cal. Gov. Code, §§ 12940(j)(1), 12940(k).)

Similarly in the retaliation context, courts have held that "[b]ecause intent is an element in an unlawful retaliation claim, evidence that a defendant intentionally retaliated against other employees for the same conduct engaged in by the plaintiff would be relevant." (*McCoy v. Pacific Maritime Ass'n*. (2013) 216 Cal.App.4th 283, 297; see also *Furcron v. Mail Centers Plus, LLC* (11th Cir. 2016) 843 F.3d 1295, 1309.) The court would need to assess whether the retaliation evidence from other employees was sufficiently similar to be relevant evidence for a particular plaintiff's case.

Using me-too evidence in litigation

As exemplified by the caselaw described above, the ability to successfully use me-too evidence in employment litigation depends on establishing its relevancy to your case. The more similar the employment situations of me-too witnesses are to your plaintiff's circumstances and theories of the case, the more likely the court will find such evidence relevant and admissible. (*Johnson*, 173 Cal.App.4th at 767; *Sprint/United Management Co. v. Mendelsohn* (2008) 552 U.S. 379, 388.) Such factors can include whether the plaintiff and the me-too witnesses: (1) worked at the same job site; (2) worked for the same department or supervisor; (3) had similar experiences that were fairly close in time; (4) are in the same protected group; and (5) experienced the same kind of discrimination, harassment, or retaliation. Under the precedent established by *Pantoja*, it is not even necessary to show that the plaintiff witnessed or knew about the experiences of the me-too witnesses at the time. Establishing similar factual circumstances between the plaintiff and the me-too witnesses also improves the weight of such evidence before a jury.

The employer will often raise relevance and privacy objections and try to block discovery into possible me-too evidence and witnesses. Limiting your discovery requests to other similarly situated employees can increase your chances of getting what you need from a motion to compel. A protective order can also address any alleged privacy concerns.

In opposing summary judgment

Me-too witness declarations can be used to oppose an employer's motion for summary judgment, because evidence of the defendant's similar mistreatment of others in the plaintiff's protected group can be sufficient to raise triable issues of material fact about the defendant's intent, motive, and reasons for its treatment of the plaintiff. (*Johnson,* 173 Cal.App.4th at 759.) It can also serve as indirect, circumstantial evidence to rebut the defendant's alleged reasons for terminating the plaintiff, thereby raising a triable issue of material fact as to pretext.

At trial, you should be prepared to argue what the me-too evidence will be used to show – for example, an employer's intent or motive, knowledge of misconduct, a pattern and practice of discrimination, or impeaching the defense's credibility. It is important to establish that the proposed me-too evidence is not being used as inadmissible character evidence, but rather for another admissible purpose. (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 518; *Heyne v. Caruso* (9th Cir. 1995) 69 F.3d 1475, 1480.) The probative value of the me-too evidence would also be weighed against its possible prejudicial effect, under the balancing test of Evidence Code section 352. As with any negative fact about the employer, me-too evidence will likely have some prejudice, but you should focus on the strong probative value of the evidence for the case and the use of a limiting jury instruction to mitigate the risk of prejudice. (*Pantoja,* 198 Cal.App.4th at 118.)

In puntive damages

Me-too evidence can also help for an argument of assessing punitive damages if the jury finds that a defendant engaged in malice, oppression, or fraud. While there is no fixed formula for determining punitive damages, one of the factors that a jury can consider is whether the defendant's conduct involved a pattern and practice. (CACI Jury Instruction 3942.)

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If compelling me-too evidence is presented, the jury may award punitive damages to discourage similar future conduct.

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