Vinson&Elkins

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"ME TOO" EVIDENCE: PROBATIVE OR PREJUDICIAL?

Presented by: E. Phileda Tennant

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WHAT IS "ME TOO" EVIDENCE?

#METOO AND ME-TOO ARE NOT JUST ABOUT HARASSMENT

"I want all the girls watching here now to know that a new day is on the horizon and when that new day finally dawns, it will be because of a lot of magnificent women . . . and some pretty phenomenal men, fighting hard to make sure that they become the leaders who take us to the time when nobody ever has to say 'me too' again."

Image source: cnn.com

FEDERAL RULES OF EVIDENCE

- Federal Rule 401: "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."
- Federal Rule 404(b)(1): "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."
- Federal Rule 404(b)(2): Evidence of a crime, wrong, or other act "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident;"
- Federal Rule 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

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SPRINT/UNITED MANAGEMENT CO. V. MENDELSOHN
SUPREME COURT PRECEDENT

Admissibility of “Me Too” evidence 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.”

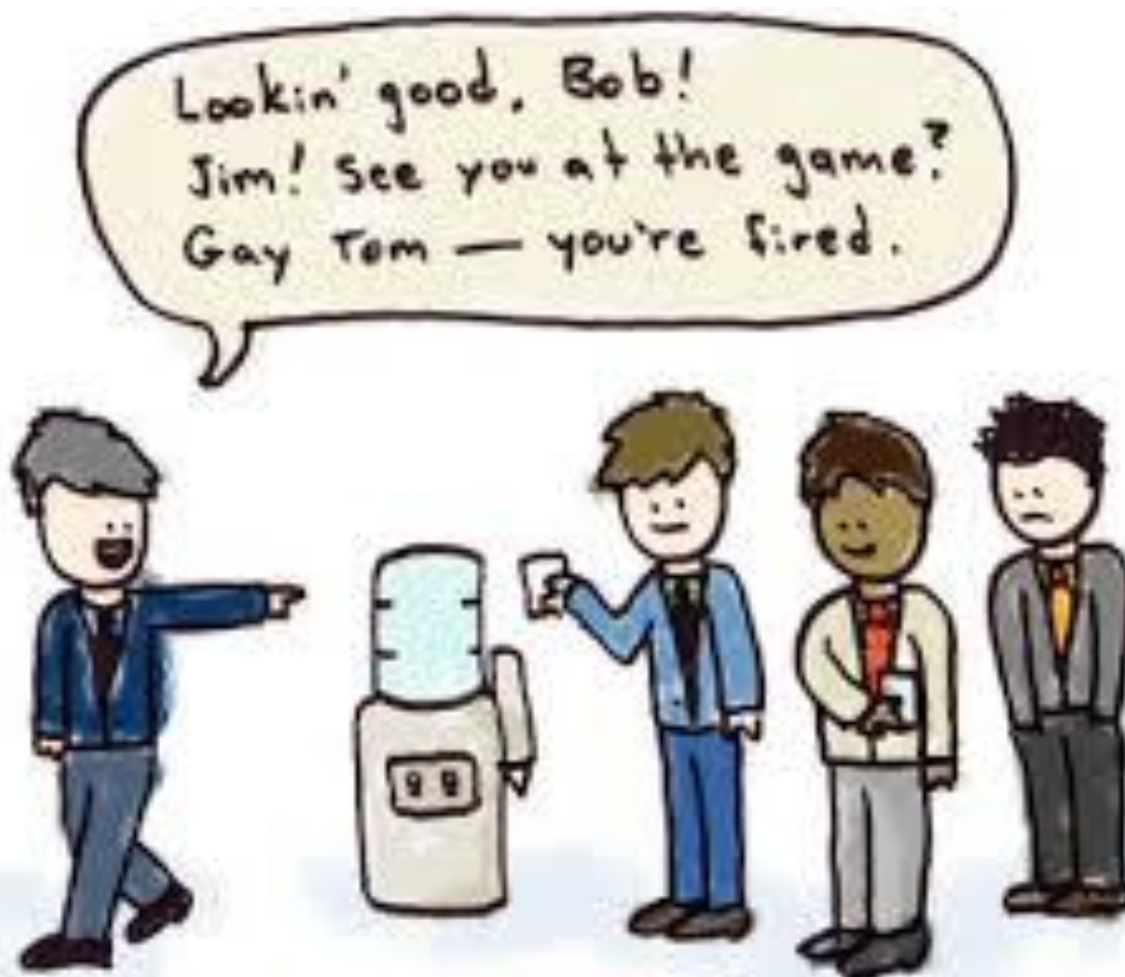
552 U.S. 379, 388 (2008).

FIFTH CIRCUIT

This court and others have held that testimony from former employees who had different supervisors than the plaintiff, who worked in different parts of the employer's company, or whose terminations were removed in time from the plaintiff's termination cannot be probative of whether age was a determinative factor in the plaintiff's discharge.

Wyvill v. United Companies Life Insurance Co., 212 F.3d 296, 302 (5th Cir. 2000).

LESSON #1: THE PLAINTIFF'S "THEORY OF THE CASE" IS IMPORTANT



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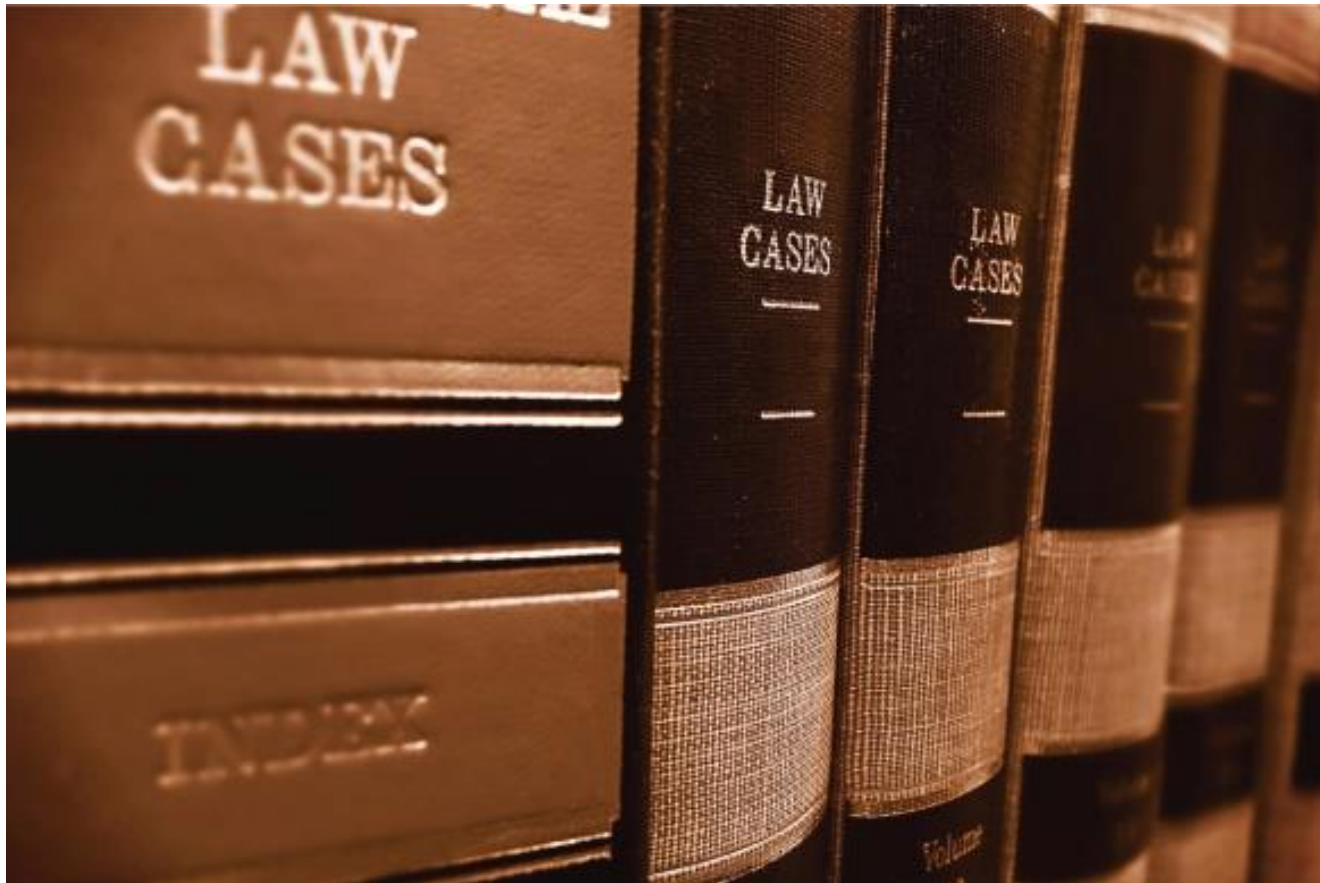
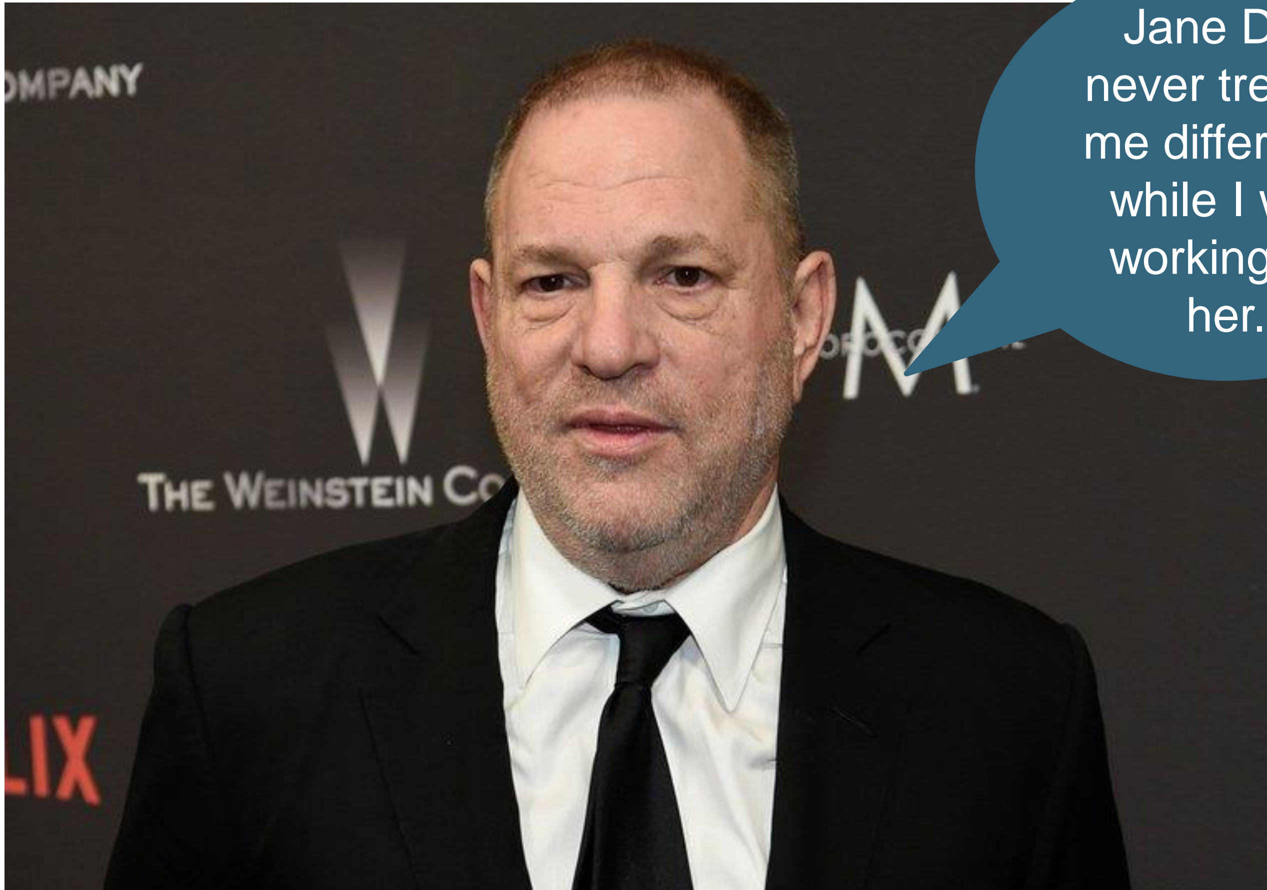
LESSON #2: THE FACTS ARE IT



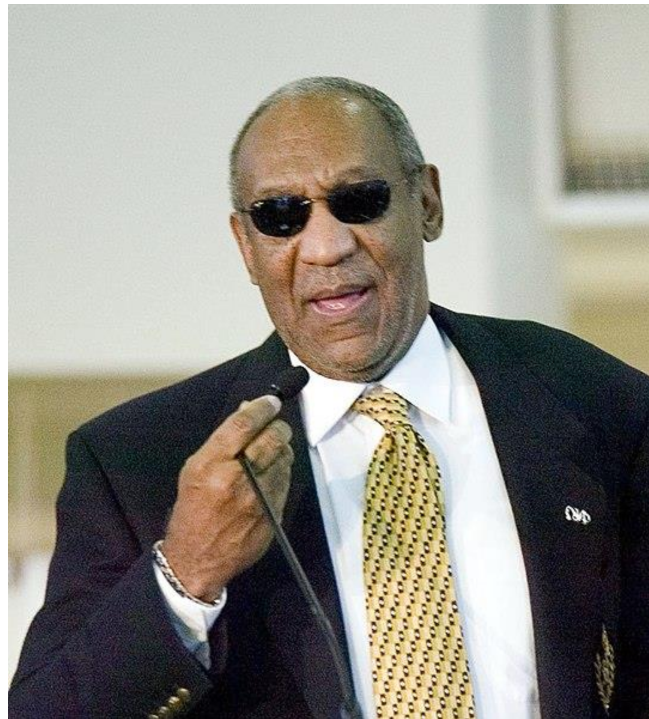
LESSON #3: NOT-ME EVIDENCE IS RELEVANT, TOO



Jane Doe never treated me differently while I was working for her.

(THIS IS A JOKE)

ME TOO EVIDENCE IN BILL COSBY PROSECUTION



For more information, *see* Harvard Law Professer Jeannie Suk Gersen's April 27, 2018, editorial for the *New Yorker*, "Bill Cosby's Crimes and the Impact of #MeToo on the American Legal System"