IN THE COURT OF APPEALS OF IOWA

No. 3-346 / 12-0639
Filed July 24, 2013

IDORENYIN SALAMI,
Plaintiff-Appellant,

vs.

VON MAUR, INC., and
SARA WHITLOCK,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Idorenyin Salami appeals following a jury verdict in favor of defendants in her race discrimination and harassment action. **REVERSED AND REMANDED.**

Brooke Timmer and Whitney Judkins of Fiedler & Timmer, P.L.L.C., Urbandale, for appellant.

Frank Harty and Debra L. Hulett of Nyemaster Goode, P.C., Des Moines, for appellees.

Heard by Potterfield, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Idorenyin Salami appeals following a jury verdict in her race discrimination and harassment action in favor of defendants Von Maur and Sara Whitlock. Salami argues the district court abused its discretion and she was prejudiced when the court refused to admit evidence regarding other complaints of racial discrimination made by other employees and a customer. We conclude the district court properly exercised its discretion in its preliminary ruling. However, we believe the plaintiff was entitled to present at least some limited testimony of complaints by other employees and a customer because it was relevant and probative of Whitlock's allegedly discriminatory motive or intent, in rebuttal to Whitlock's presentation of evidence that she had relatives and relationships with persons of color. We reverse and remand for a new trial.

I. Background Facts and Proceedings.

Idorenyin Salami came to the United States from Nigeria in 2004. She started working at the Valley West Mall Von Maur store in West Des Moines as a sales associate on December 6, 2004. Her store manager at that time was Dawn Kountze. Kountze promoted Salami to department manager in a men's department, Men's Concepts, on September 30, 2007. Salami received high marks on her performance reviews.

Sara Whitlock became store manager at the Valley West Von Maur store in April 2008. Whitlock fired Salami on June 5, 2009, after receiving three customer complaints about Salami over a ten-month period.

Salami filed a complaint with the Iowa Civil Rights Commission on November 30, 2009, and filed this race discrimination and harassment action against Von Maur and Whitlock on June 29, 2010.

Defendants' Motion in Limine.

Salami intended to offer the testimony of two African-American former employees for Von Maur, both of whom also had been supervised by and fired by Whitlock, and a Von Maur customer—all of whom complained of racial discrimination by Whitlock. The defendants filed a motion in limine seeking exclusion of that evidence, which the district court granted. The court reasoned:

> Well, let the record show the Court has considered the filings and the arguments made in regard to paragraph 2 of defendants' first motion in limine. And candidly, this is the one area that I perhaps struggled mostly with since I was aware of the issues being raised.
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> I note on the one side the defendant is arguing that these are simply evidence of allegations made against the defendants, that they are mere allegations, that they're not relevant to the ultimate question before this Court; basically, that is whether or not Ms. Salami was discriminated against.
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> The defendant argues that they are mere complaints and as such they are not probative of that ultimate question. They argue that to try this matter on mere allegations is overly prejudicial within the rules and, as they argue, it would result in a number of mini trials before this Court and before this jury to determine the truth or falsity of those particular matters.
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> On the other hand, the Court acknowledges the case law submitted by the plaintiff that evidence of discrimination against other employees would be relevant to the issue of pretext.
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> Candidly, the Court has reviewed at least the three areas that I think are the subject matter of this particular area, those involving a Ms. Koger, a Ms. Byrd, B-y-r-d, and a Mr. Lopez. The Court in ruling on this matter notes that obviously the Court and the jury is here to try the ultimate issue raised by the defendant—or raised by the plaintiff in this particular case. The case should not be tried on allegations. The Court notes that, as I indicated, in plaintiffs—defendants' argument that mere complaints of

> harassment are not probative of whether harassment occurred, or whether or not there was a hostile work environment.
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> The Court finds that the prejudice to the defendant of the allegations outweighs the probative value of going into each of those instances. The introduction of each of those would in fact create mini trials within a trial itself.
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> And perhaps most importantly, I do acknowledge that the question of whether evidence of other discrimination is relevant is—in an individual case is fact-based on many factors closely related to the plaintiff's circumstances and theory of the case. And in this particular case, the Court is not satisfied that the alleged discriminatory acts regarding Koger and Byrd and Lopez are sufficient to be admissible in this case. They are allegations. The facts are significantly different. The mere allegation is without a showing of similarity sufficient to justify its admission in this case. As I said, it will result in mini trials.
>
> And accordingly, the Court grants paragraph 2 of the defendants' motion in limine. This case will be tried on the issue of whether or not discrimination was committed against this particular defendant and not on allegations regarding other employees.

The court overruled the defendants' motion in limine to exclude Salami's expert witness, Phillip Goff. In response to the motion, the plaintiff had argued,

> While Defendants are correct that Dr. Goff does not opine that discrimination occurred in the case at bar, that certainly does not mean his testimony is of no assistance to the trier of fact. Rather, as Dr. Goff's report indicates, he will explain the concept of implicit racial bias and how the presence of certain factors within an organization may lead to discriminatory decision making—even from well-meaning individuals. . . .
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> . . . .
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> Dr. Goff's conclusions are based on a simple examination of the factors that have long been known to make it more likely for implicit bias to occur and those that make it less likely that implicit bias will occur. It should be noted that the focus of Dr. Goff's proposed testimony is not whether Plaintiff herself was discriminated against. Social science has no way of knowing that. What scientists do know, based on decades of peer-reviewed research, is what factors in an organization and in a decision-making process tend to make it more likely that discrimination will occur. These are essentially "risk factors." Although this knowledge is not within the common experience of most jurors, it is knowledge that responsible employers should have.

(Footnote omitted.) Counsel continued, "Dr. Goff is simply examining the facts of the case at bar and stating that several factors were present which would make it likely that racial bias was present."

The district court found Dr. Goff was qualified to testify in the area of social psychology; he specialized in identity and social justice issues, particularly race and gender; and was not going to

> render an opinion or ultimate opinion on the question . . . whether or not there was, in fact, discrimination against this particular plaintiff, but will be allowed to testify regarding the concept of implicit racial bias and how the presence of certain factors may lead to discriminatory decision-making, even by well-meaning individuals.

Plaintiff's Motion in Limine.

Whitlock proposed to introduce photographic evidence that she had relatives and friendly relationships with African-Americans. Though Salami had filed a pretrial motion to exclude such evidence, the defense argued:

> Defendants are entitled to introduce evidence to rebut Salami's evidence of Whitlock's alleged racial animus. Evidence of Whitlock's positive, loving relationship with African-American friends and relatives demonstrates Whitlock does not harbor a negative attitude towards African-Americans. In other words, this evidence "makes the existence of" Whitlock's alleged race-based animus against Salami "less probable than it would be without the evidence."

The court preliminarily denied Salami's motion in limine to exclude the evidence.

Trial.

At trial, Goff testified regarding a "social framework analysis" of racial discrimination. He discussed six elements[1] that he asserted provide a context for

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[1] The six elements identified in Goff's testimony are:

understanding ways in which racial bias may have influenced the decision-making related to the discipline and termination of Salami, one of which was aversive racism or implicit bias. To the question, "If you were to create a study and in one condition you wanted to kind of stack the deck, facilitate bias in that situation, would it include the six elements we talked about today?", Goff responded, "Absolutely." On cross-examination, Goff testified he "wasn't tasked with figuring out whether or not Sara Whitlock fits a caricature of a bigot. I was tasked with figuring out whether or not the kind of situations that we tend to study as social psychologists were present or absent in this particular case."

Salami was allowed to make an offer of proof in which Goff notes his report was "informed" by complaints made by two other African-American women

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(1) The "psychology of rumor"—perceptions and attributions for behavior are more likely to be consistent with group stereotypes when information is conveyed second or third-hand.

(2) "Aversive racisim," which he explained as: "the vast majority of folks in the United States would like to see ourselves as nonracist. Many of us also feel uncomfortable when crossing racial lines. . . . And that discomfort leads us to avoid certain situations, maybe just avoid the whole point of contact altogether."

(3) A "colorblind" ideology or approach to organizations is likely to produce "increased reliance on stereotyping and increased racial bias" in decision-making.

(4) Two different organizational factors, accountability and subjective versus objective criteria—are not optimal. When decision-makers are not held accountable to meet diversity goals, stigmatized group members tend not to receive rewards. And second, when decision-makers are encouraged to use subjective, as opposed to objective criteria, this tends to increase the degree of racial bias in decision-making processes.

(5) Customer service is a "stereotype relevant domain," that is, a situation where negative stereotypes would more likely occur: for example, black women would more likely be stereotyped as being loud, abrasive, sassy, angry, and rude. So "bias assimilation" would make it more likely that "someone might be willing to accept a stereotype of someone even though they never observed that person act in that manner."

(6) "Contemporary prejudice and the perils thereof." "[I]f you don't do anything to address contemporary forms of bias," racial bias is likely to "creep in" to organization and will affect how people affiliate and evaluate one another.

against Whitlock, and how those other complaints were consistent with the risk elements discussed earlier.

Salami testified as to her employment at Von Maur beginning in 2004 and her promotion to department manager in September 2007. She testified she loved working with people and agreed with Von Maur's philosophy that customer service was very important. Salami testified Sara Whitlock became the store manager in April 2008 and her work situation changed at that time: she stated her floor manager, Leann Gudenkauf, treated her in a less overtly friendly manner; Whitlock avoided Salami's department; Salami felt as if Whitlock was watching her from other departments; nothing Salami did was right; and Salami felt she was treated differently because of her race, "because the way she treated me, she didn't treat the other white employees the same way." Salami testified there was one other black department manager, Anita Rice, and when Salami spoke to Rice, Rice responded that "it wasn't just [Salami], that she felt the same way too, that [Whitlock] ignored her and avoids her and that . . . [Whitlock] seems like she feels very uncomfortable too." She testified as to the three customer complaints made against her, and stated Whitlock was not willing to hear her side of the story.

Dawn Kountze, Salami's first store manager and at the time of trial regional director for Von Maur's central region, testified that managers have discretion and flexibility when deciding whether or not to discipline employees who receive customer complaints.

Salami made offers of proof of other complaints of discrimination made by Koger. Seventeen-year-old Koger testified she was fired by Whitlock after a customer complained that Koger had flirted with her boyfriend. Koger stated that her white co-worker, who laughed at the customer when she complained to Koger about her behavior, was given a written warning, but Koger was fired. Koger's mother also testified about the incident and letters she wrote to Von Maur management, and the response she received. Salami also offered the testimony of Anita Rice in an offer of proof.

Rice testified at trial that she was the alterations supervisor at the Valley West Von Maur and had been there for twenty-two years. She is African-American. Her trial testimony was somewhat different than her deposition testimony: she stated Salami had been rude to her and that someone had complained to her that Salami had been rude to them, but at her deposition she had said "no" to both questions. She also testified that Salami had "lots of compliments" about her performance and customer service. Salami had told her she felt she was being treated differently because of her race. Rice testified she was surprised that Salami had been fired, and she told the "office" she did not want to be involved in the lawsuit.[2]

Salami called Whitlock as an adverse witness. Whitlock testified about the training Von Maur offers on discrimination and testified she

> do[es] not consider anyone's color when I go to write someone up. I look at what the situation is. I look at the facts. I look at what people have said. But the thinking about what someone's race is

[2] Salami made an offer of proof of additional testimony of Rice, but the district court declined to reconsider its ruling on the motion in limine.

> does not come into play when making a decision on when to write someone up.

Whitlock was asked, "Do you understand the concept that racial stereotypes can affect how we view someone of color subconsciously?" She responded, "Well, for myself, I don't view that, no." She also stated she did not use stereotypes. Whitlock testified about the customer complaints Salami received and the decisions to warn and then terminate her.

Defense counsel noted Whitlock "sat through Professor Goff's testimony about aversive racism" and then proceeded to ask her about her family. Whitlock testified her grandfather was preacher who wrote a book called, "Wake Up American, God is Calling," which "included race relations"; her father was a political consultant, who also taught her about race relations; and her mother was a teacher, who invited her diverse students to Whitlock's home. Several photographs of Whitlock's family and extended family were shown, some of the persons depicted were persons of color. The following questions and answers then occurred between defense counsel and Whitlock:

> Q. We talked just a minute about your grandfather and the things that he taught the family, if you will. I want to ask you if you agree or disagree with some of these principles. The only way racial prejudice can ever be greatly diminished is to recognize it as a moral issue requiring moral treatment. A. I do agree with that, yes.
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> Q. Do you believe that it is not the color of one's skin but the nature of their soul that's important? A. Very much so.
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> Q. Do you believe that racial prejudice is a blotch on society? A. Yes.
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> Q. And do you believe that racial prejudice will likely remain a blotch on society, but it can be reduced to a great extent when a majority of the people let God rule their souls and their souls rule their minds, even if all the churchgoers in this nation would accept as soul brothers and sisters persons of all races, it would be a

> major step in conquering racial prejudice in the United States of America? A. I do.

Von Maur floor manager Gudenkauf and a regional director, George LaMark, also testified as to their role in supervising and disciplining Salami in connection with the customer complaints. LaMark testified his stepmother was African-American and that he had a good relationship with her. Both Gudenkauf and LaMark denied that Salami's race had anything to do with termination. Salami made offers of proof as to complaints by Byrd and Lopez via questioning of Whitlock, the Von Maur director of human resources Gayle Haun, and Salami's own testimony.

Salami asked the court to reconsider its ruling barring her from offering complaints of racism against Whitlock by others, arguing that "Defendants have defended this case by claiming that Ms. Whitlock's 'essential philosophy and habitual conduct in life' makes it impossible for her to have ever discriminated on the basis of race"[3] and that in doing so had "waived any protection that rule [Iowa Rule of Evidence] 5.404 may have otherwise afforded them." Salami contended the defendants had opened the door to other acts evidence to rebut the claim that Whitlock "always treated African-Americans with the utmost respect, fairness, and love." The district court again refused to admit the proffered testimony.

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[3] The argument quotes from *United States v. Johnson*, 634 F.2d 735, 737 (4th Cir. 1980), a criminal case in which a medical doctor was charged with tax evasion. The doctor's defense was inadvertence and she introduced evidence of her truthfulness and busy practice. *Johnson*, 634 F.2d at 736. The prosecution was allowed to rebut the character evidence with an auditor who testified as to an investigation of the doctor's billings for Medicaid services four times greater in number than other doctors in the area. *Id*. at 736.

The jury found for the defendants. Salami moved for a new trial based upon the court's rulings on the inadmissibility of the other acts evidence. The trial court confirmed its earlier ruling, writing:

> . . . [T]he Court did not apply a blanket rule regarding the admissibility of these complaints, but rather extensively reviewed the evidence surrounding each to determine whether there was an adequate showing of similarity, relevance, and ultimately whether the probative value of the evidence regarding these allegations was outweighed by the prejudice to the Defendants.
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> As the Court indicated to the parties on the record during its rulings, these decisions were difficult for the Court, at best. As the Court attempted to indicate in its previous rulings, not every "allegation" of discrimination is admissible. The trial court is required to exercise its sound judicial discretion to determine whether there has been an adequate showing of similarity. *See Davis v. L & W Constr. Co.*, 176 N.W.2d 223, 227 (Iowa 1970). While the Court acknowledges there were some similarities, as argued by the Plaintiff, and some differences, as argued by the Defendants, on balance, in exercising its discretion, the Court excluded them. These were, from the Court's perspective, simply "allegations." Admission of such would introduce cumbersome collateral issues and create mini trials, as the Court suggested in its ruling. The Court was reluctant to admit these allegations of discrimination without a stronger showing that they were in fact evidence of discrimination. The Court also had concerns that the jury could be improperly influenced by the mere fact that other "allegations" had been made, and be distracted from the real issue, for their consideration regarding discrimination against the Plaintiff. In its ruling, the Court further attempted to express its concerns that allowing said evidence would cause unnecessary delay by requiring mini trials.
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> As indicated, this Court set forth a number of its reasons on the record at the time; and even though the same may not be the most articulate ruling on the record, the Court still believes the rationale for the rulings was correct.
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> Lastly, the Court notes in Plaintiffs brief, Plaintiff argues that Defendants opened the door to other-acts evidence by their "Whitlock loves black folks" defense. In that regard, the Court does not find the Defendants expanded the scope of the trial ("opened the door") in offering evidence of Ms. Whitlock's relationships with other African-Americans in her past. The evidence was in rebuttal to Plaintiffs expert's testimony regarding aversive racism. Plaintiff's expert, Dr. Goff, suggested that an individual's unconscious beliefs

> and attitudes can influence their decisions regarding other races. The Defendants were well within their right to respond with evidence of Ms. Whitlock's previous and current relationships with African-Americans.

On appeal, Salami argues Iowa law holds that prior acts of discrimination against *other employees* are relevant and admissible, *see Hamer v*. *Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 262-63 (Iowa 1991), and the district court abused its discretion in not admitting her proffered evidence. She also contends the trial court abused its discretion in not allowing evidence of a *customer's* race discrimination complaint against Whitlock

II. Scope and Standards of Review.

"'We review the denial of a motion for new trial based on the grounds asserted in the motion.'" *Fry v*. *Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012) (citation omitted). We are reluctant to interfere with a jury verdict or the district court's consideration of a motion for new trial made in response to the verdict. *Id*. We review a district court's decision to admit or exclude evidence under an abuse of discretion standard. *Hall v*. *Jennie Edmundson Mem'l Hosp*., 812 N.W.2d 681, 685 (Iowa 2012). "An abuse of discretion occurs when a district court rules 'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v*. *Richards*, 809 N.W.2d 80, 89 (Iowa 2012) (citation omitted).

III. Discussion.

Relevant evidence is admissible, while irrelevant evidence is inadmissible. Iowa R. Evid. 5.402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401; *accord* Fed. R. Evid. 401. "The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action." Fed. R. Evid. 401 advisory committee's note; *accord United States v*. *Curtin*, 489 F.3d 935, 943 (9th Cir. 2007) (en banc). Relevance is "determined in the context of the facts and arguments in a particular case, and thus [is] generally not amenable to broad per se rules." *Sprint/United Mgmt*. *Co*. *v*. *Mendelsohn*, 552 U.S. 379, 387 (2008).

The Iowa Civil Rights Act makes it an unfair or discriminatory practice for any person "to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against . . . any employee because of the . . . race . . . of such applicant or employee, unless based upon the nature of the occupation." Iowa Code § 216.6(1)(a) (2007). In *Hamer*, 472 N.W.2d 259 at 262-63, the court wrote:

> Evidence of a discriminatory atmosphere is relevant in considering a discrimination claim, and it "is not rendered irrelevant by its failure to coincide precisely with the particular actors or time frame involved in the specific events that generated a claim of discriminatory treatment." *Conway v*. *Electrol Switch Corp*., 825 F.2d 593, 597 (1st Cir.1987). As the court in *Conway* stated:
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> > While evidence of a discriminatory atmosphere may not be conclusive proof of discrimination against an individual plaintiff, such evidence does tend to add "color" to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff. . . .
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> > . . . .
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> > . . . While this court has recognized that "proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against the individual," it may be one indication that the reasons given for the employment action at issue were

> "implicitly influenced" by the fact that the plaintiff was of a given race, age, sex or religion.
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> *Id*. at 597-98.
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> In a claim of disparate treatment in employment, proof of the employer's motive is critical. *Hy-Vee Food Stores v*. *Civil Rights Comm'n*, 453 N.W.2d 512, 516 (Iowa 1990) (citing *International Bhd*. *of Teamsters v*. *United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396, 415 n.15 (1977)).
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> Of course, a discriminatory motive will rarely be announced or readily apparent. Consequently, evidence concerning the employer's state of mind is relevant in determining what motivated the acts in question.

The *Hamer* case notes other acts evidence (sometimes referred to as "me too" evidence)[4] has been allowed in many federal cases: *Estes v*. *Dick Smith Ford*, 856 F.2d 1097, 1104 (8th Cir. 1988), *abrogated on other grounds by Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding employer's discriminatory treatment of black customers might have some bearing on question of employer's motive in discharging black employee); *Hallquist v*. *Local 276*, *Plumbers & Pipefitters Union*, 843 F.2d 18, 23 (1st Cir. 1988) (finding statements derogatory toward women by foreman is relevant to motive for discharge); *Miles v*. *M*.*N*.*C*. *Corp*., 750 F.2d 867, 876 (11th Cir. 1985) (noting racial slur by assistant superintendent relevant to motive in failure to recall suit); *Brown v*. *Parker-Hannifin Corp*., 746 F.2d 1407, 1412 (10th Cir. 1984) (noting failure to remedy harassment by employees may serve as proof that the employer's proffered nondiscriminatory reason for the discharge was pretextual); *Carter v*. *Duncan-Huggins*, *Ltd*., 727 F.2d 1225, 1236 (D.C. Cir. 1984) (finding the fact supervisor laughed at racist joke could be evidence of discriminatory motive);

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[4] Cases coming after *Mendelsohn* often refer to evidence of other acts of discrimination as "me too" evidence. *See*, *e*.*g*., *Johnson v*. *Big Lots Stores*, *Inc*., 253 F.R.D. 381, 386 (E.D. La. 2008).

Rowe v. Cleveland Pneumatic Co., 690 F.2d 88, 97 (6th Cir. 1982) (noting evidence of racial slurs by supervisor is relevant to plaintiff's prima facie case and to establish pretext).

Such "me too" evidence may be relevant, depending "on many factors, including how closely related the evidence is to the plaintiff's circumstances and the theory of the case." *Sprint*, 552 U.S. at 388.

> As the Supreme Court has explained, such testimony is neither per se admissible nor per se inadmissible; the question whether such testimony is relevant and sufficiently more probative than unfairly prejudicial in a particular 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." *Sprint v. Mendelsohn*, [552 U.S. at 388]. Among the factors to consider are whether such past discriminatory behavior by the employer is close in time to the events at issue in the case, whether the same decisionmakers were involved, whether the witness and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated. *See Coles v. Perry*, 217 F.R.D. 1, 9-10 & n. 5 (D.D.C. 2003); *White v. United States Catholic Conference*, Civil Action No. 97-1253, 1998 WL 429842, at *5 (D.D.C. May 22, 1998).[5]

Elion v. Jackson, 544 F. Supp. 2d 1, 8 (D.D.C. 2008); *accord Nuskey v. Hochberg*, 723 F. Supp. 2d 229, 233 (D.D.C. 2010) (noting same "factors to consider").

In *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F .3d 1261, 1285 (11th Cir. 2008), the court rejected the defendant's complaint that the district court abused its discretion in admitting evidence of discrimination and retaliation against the plaintiff's coworkers. The court found this "me too" evidence was admissible to

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[5] In a footnote, the *Elion* court states, "Such testimony does not run afoul of Rule 404(b) of the Federal Rules of Evidence because that Rule explicitly contemplates the admission of "other acts" evidence to show motive or intent. Fed. R. Evid. 404(b)." 544 F. Supp. 2d at 8 n.10.

prove intent to discriminate, was relevant to a claim of hostile work environment, and was "probative of several issues raised by [defendant] either on cross-examination or as an affirmative defense." *Goldsmith*, 513 F.3d at 1285-87.

In *Quigley v*. *Winter*, 598 F.3d 938, 951 (8th Cir. 2010), the defendant in an sexual harassment case argued that the district court erred in admitting the testimony of Winter's former tenants that Winter also subjected them to sexual harassment. Winter claimed the testimony of these three women was irrelevant because there was no evidence the plaintiff knew the women or observed any of the events to which they testified. *Quigley*, 598 F.3d at 951. The Eighth Circuit Court of Appeals rejected that claim:

> In *Sprint* [ ], 552 U.S. 379 (2008), the Supreme Court considered the admissibility of so-called "me too" evidence in an employment discrimination case. The Court determined such evidence was neither per se admissible nor per se inadmissible. S*ee id*. at 386–88. Rather, "[t]he question whether evidence of discrimination [against other employees] 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. . . .
>
> Our review of the trial transcript reveals the district court carefully analyzed the admissibility of each witness's testimony. The district court refused to permit Mary Davis, another former tenant of Winter, to testify after hearing her proposed testimony outside the presence of the jury. The district court excluded this testimony because Davis had last rented from Winter in 1994, and the district court found her testimony was too remote. Affording the district court broad discretion, we hold the district court properly performed its gatekeeping function and did not abuse its discretion in admitting the evidence of Winter's three former tenants.

Id.

In the case before us, we conclude the district court properly exercised its discretion in its preliminary ruling disallowing Salami's "me too" evidence. None

of the other complaints were sufficiently similar to conclude the district court abused its discretion in excluding it. However, we believe the plaintiff was entitled to present at least some limited testimony of Koger, Byrd, and Lopez as it was relevant and probative of Whitlock's allegedly discriminatory motive or intent, in rebuttal to Whitlock's presentation of evidence that she had relations and relationships with persons of color.

We acknowledge the broad discretion afforded to the district court's evidentiary rulings. *Sprint*, 552 U.S. at 384. We also acknowledge that the court has considerable discretion in admitting rebuttal evidence. *State v. Johnson*, 539 N.W.2d 160, 163 (Iowa 1995). "Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party." *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996). "The trial court's ruling will be disturbed only upon a clear abuse of discretion." *Id*.

Iowa Rule of Evidence 5.404(b) provides that "[e]vidence of other . . . acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith," but "may . . . be admissible for other purposes," such as proof of motive and intent. *See, e.g.*, *Midwest Home Distrib., Inc. v. Domco Indus. Ltd*., 585 N.W.2d 735, 745 (Iowa 1998) (finding "challenged evidence was admissible to prove Domco's motive, intent, plan, and knowledge regarding Domco's scheme to defraud Midwest" and that "testimony was related enough in kind and time to meet the requirements of Iowa Rule of Evidence 403"). As found in *Hamer*, evidence of an employer's state of mind "will rarely be announced or readily apparent." 472 N.W.2d at 263. And evidence of a

discriminatory atmosphere is relevant to provide information as to the "employer's decisionmaking processes." *Id.*

Here, the complaints all involved Whitlock and were neither collateral to the issues nor remote in time from Salami's termination. Moreover, the offers of proof reflect that the testimony would have involved claims of somewhat similar treatment or behavior by Whitlock in relation to a person of color. In light of the court's ruling allowing Whitlock to testify as to her positive relationships with persons of color and to introduce numerous photographs to support her claims of no bias, we disagree with the district court that such testimony did not "expand the scope of the trial."

Plaintiff's expert, Goff, suggested that an individual's unconscious beliefs and attitudes can influence their decisions regarding other races. The district court ruled that Whitlock was allowed to respond "with evidence of Ms. Whitlock's previous and current relationships with African-Americans." While the district court's written ruling stated that Whitlock's evidence of friendly relationships with persons of color was "in rebuttal to Plaintiffs expert's testimony regarding aversive racism," the defendants had argued the evidence "demonstrates Whitlock does not harbor a negative attitude towards African-Americans [and] 'makes the existence of' Whitlock's alleged race-based animus against Salami 'less probable than it would be without the evidence.'" The jury was not instructed the evidence was limited in any manner.

Without some limited rebuttal, Salami was prohibited from controverting Whitlock's testimony that she had a long history with people of color and had

good relations with them. In particular, Whitlock was allowed to introduce evidence to negate any inference that she harbored discriminatory or retaliatory intent. *See Elion*, 554 F. Supp.2d at 8-9 (allowing "me too" evidence offered to negate the inference that defendant harbored discriminatory or retaliatory intent, finding it relevant and admissible, and stating, "'Me too' evidence of an employer's past *non*-discriminatory and *non*-retaliatory behavior may be relevant as well, because "'an employer's favorable treatment of other members of a protected class can create an inference that the employer lacks discriminatory intent.'" (citations omitted)). At that point, the plaintiff should have been allowed to respond with evidence contradicting the Whitlock's testimony.

There is no requirement that the rebuttal evidence be substantially similar to Salami's experience so long as it served to rebut or controvert Whitlock's testimony and claim that she had no bias against persons of color. The district court had the authority to determine what is proper rebuttal evidence and the right to limit rebuttal evidence, but not the authority to take away the opportunity to present proper rebuttal evidence. *See Johnson v. Van Werden*, 125 N.W.2d 782, 785 (Iowa 1964) (noting importance of allowing opportunity to present rebuttal evidence). Moreover, by limiting Salami's rebuttal evidence the court could have avoided the "mini trials," a factor in its preliminary ruling. We further conclude this error was sufficiently prejudicial to constitute reversible error because Whitlock's bias or lack of bias was central to the issues in this action.

In the circumstances presented in this trial, the trial court abused its discretion in excluding the evidence. We therefore reverse and remand for a new trial.

REVERSED AND REMANDED.