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California Supreme Court Clarifies the Role of Stray Remarks

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The California Supreme Court's recent decision in *Reid v. Google, Inc.*[1] creates yet another distinction between California and federal employment discrimination law and provides California employers with another reason to convey to employees the potential dangers of casual remarks.

In *Reid*, an age discrimination case, the trial court granted summary judgment in favor of the employer. The court of appeal reversed after considering allegedly discriminatory statements made by the employee's coworkers and supervisors. The Supreme Court granted review to decide whether to adopt the stray remarks doctrine in California and thereby "deem irrelevant any remarks made by non-decisionmaking coworkers or remarks made by decisionmaking supervisors outside of the decisional process."[2] After a thorough analysis of the origin and development of the doctrine, the California Supreme Court chose not to adopt a bright-line rule regarding stray remarks. Instead, the Supreme Court held that "a trial court must review and base its summary judgment determination on the totality of the evidence in the record, including any relevant discriminatory remarks."[3] Nonetheless, the Court also recognized that "a slur, in and of itself, does not prove actionable discrimination."[4]

The Facts

After his separation from Google, Brian Reid, who worked as a director of operations and director of engineering from the time he was 52 until he was 54, alleged age discrimination.

While at Google, Reid reported to several high-level executives, including individuals who were over the age of 40 and individuals who were under the age of 40. The only performance review that Reid received stated that he consistently met expectations, but it noted that:

> Adapting to Google culture is the primary task for the first year here. . . . Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment.[5]

Reid asserted that, after a little more than a year, Google relieved him of most of his duties and told him to focus on developing in-house graduate degree and college recruitment programs. He claimed that Google assured him that the graduate program was important and would last at least five years, but gave him no budget or staff to support it. Reid alleged that a 38-year-old vice president to whom Reid sometimes reported made age-related comments to Reid "every few weeks." Specifically, Reid alleged that the vice president told Reid that his opinions were "obsolete" and "too old to matter" and

described Reid as "slow," "fuzzy," "sluggish," and "lethargic." Reid also claimed that the vice president criticized Reid for failing to "display a sense of urgency" and "lack[ing] energy." Additionally, Reid claimed that other coworkers called him an "old man," "old guy," and "old fuddy-duddy," told him his knowledge was ancient, and joked that Reid's CD jewel case office placard should be an LP.[6]

Google objected to much of the evidence submitted by Reid in opposition to Google's motion for summary judgment. Although the trial court did not rule on Google's objections, it granted summary judgment in favor of Google. The trial court found that Google's evidence demonstrated that Google had legitimate nondiscriminatory reasons for terminating Reid's employment. The court of appeal reversed, finding that Reid had presented a triable issue as to whether his termination was pretextual. In reaching that decision, the court of appeal considered Google's argument that alleged ageist remarks by Google decision makers were stray remarks and, therefore, insufficient evidence of pretext, but it concluded that judgments regarding allegedly discriminatory comments "must be made on a case-by-case basis in light of the entire record."[7]

The Decision

The California Supreme Court affirmed the court of appeal's decision and concluded that the court of appeal properly considered evidence of allegedly discriminatory comments made by decision makers and coworkers along with all other evidence in the record.[8] The Supreme Court, however, did not address the question of whether those comments created a triable issue of material fact as to pretext, asserting that that question was "beyond the scope of review."[9]

The Court rejected Google's argument that stray and ambiguous remarks are always irrelevant, prejudicial, and inadmissible. The Court concluded that strict application of the stray remarks doctrine[10] would violate California Code of Civil Procedure section 437c(c), which obligates courts, at the summary judgment stage, to consider all of the evidence in the papers and all inferences reasonably deducible therefrom.[11]

The Court concluded that, "even if age-related comments can be considered stray remarks because they were not made in the direct context of the decisional process, a court should not categorically discount the evidence if relevant; it should be left to the fact finder to assess its probative value."[12] Importantly, the Court's decision focuses on how stray remarks might interact with other evidence, concluding that they "may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence" and may, in conjunction with other evidence, create an "'ensemble [that] *is* sufficient to defeat summary judgment.'"[13] At the same time, the Court recognized, "[a] stray remark alone may not create a triable issue of [] discrimination."[14]

Accordingly, the California Supreme Court advised that "who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered" in deciding a summary judgment motion. Thus, the Court held that "a trial court must review and base its summary judgment determination on the totality of evidence in the record, including any relevant discriminatory remarks."[15]

Practical Significance

Reid underscores the importance of eliminating potentially discriminatory remarks from the workplace by adopting and enforcing effective antidiscrimination policies and effectively training managers and all levels of employees on these issues. But *Reid* does not re-make the California legal landscape with regard to allegedly discriminatory remarks. Trial courts still may conclude that such remarks are

insufficient to establish discrimination or that they are inadmissible under California Evidence Code section 352 because they are more prejudicial than probative.

Although the California Supreme Court declined to adopt a strict, bright-line interpretation of the stray remarks doctrine, which would have enabled employers to exclude remarks made by non-decision makers or by decision makers outside the termination process, the Supreme Court's analysis suggests that the basic legal tenets related to allegedly discriminatory comments remain the same: a plaintiff cannot survive summary judgment or show discriminatory animus solely by relying upon isolated comments unrelated to the termination decision.

Moreover, the California Supreme Court's opinion does not preclude employers from seeking to exclude specific comments under California Evidence Code section 352. In other words, the fact that "stray remarks" may be admissible under *Reid* does not resolve the question of whether they are sufficiently probative and, if so, whether their probative value outweighs any prejudicial effect that they might have. By focusing on "who made the comments, when they were made . . . and in what context," a trial court may conclude that comments by non-decision makers, or comments that are not linked in time or context to the decision at issue, should be excluded on the grounds that they would confuse the issues, unduly prejudice the defendant, or mislead the jury.

Nonetheless, employers should consider taking steps now to avoid the need to litigate the issue. If, as *Reid* holds, stray remarks are even potentially admissible, employers would be well advised to take all reasonable steps – through vigorous training, monitoring and discipline – to eradicate inappropriate comments from the workplace at every level, from the bottom to the top. Employers may benefit from explaining to employees that even casual comments made in the workplace may someday be scrutinized and used as a means for suggesting discriminatory bias.

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[1] No. S158965, 2010 WL 3034803 (Cal. Aug. 5, 2010).

[2] *Id*. at *16.

[3] *Id*. at *20.

[4] *Id*.

[5] *Id*. at *2.

[6] *Id*.

[7] *Id*. at *4.

[8] The Court also decided that evidentiary objections made in connection with a summary judgment motion will be preserved for appeal if they are raised in writing *or* if they are raised orally at the hearing. Although practitioners may still choose to ask the trial court to rule on their objections, they need not do so to preserve the objections for appeal. Furthermore, the Court held that, if a trial court fails to rule on evidentiary objections, it is presumed that the objections have been overruled and that the trial court considered the evidence in ruling on the merits of the summary judgment motion. In such a scenario, the objections are preserved for appeal. An analysis of this complex procedural issue is beyond the scope of this publication.

[9] *Id*. at *23, n.14.

[10] In describing the stray remarks doctrine, the California Supreme Court wrote, "[u]nder this doctrine, federal circuit courts deem irrelevant *any* remarks made by non-decisionmaking coworkers or remarks made by decisionmaking supervisors outside of the decisional process, and such stray remarks are insufficient to withstand summary judgment." *Id*. at *16 (emphasis added).

[11] *Id*. at *19-20.

[12] *Reid*, 2010 WL 3034803, at *18.

[13] *Id*. at *20 (citation omitted; alteration and emphasis in original).

[14] *Id*.

[15] *Id*.