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California Court Addresses "Stray Remarks Doctrine" In Employment Discrimination Cases

Last week, the California Supreme Court decided Reid v. Google, Inc. This case is yet another reminder to California employers that it is worth their while to train their employees and supervisors to be cautious about what they say and what they put into writing in emails, memos, and so on. The case also illustrates the critical importance of employers being able to articulate the precise reasons why an employee is being terminated, communicating those exact reasons to the employee, and having documentation to prove all this in the event of litigation.

Mr. Reid worked at Google for 20 months. Google's Vice President of Engineering, Wayne Rosing, (then age 55) hired Reid (then age 52) as Director of Operations and Director of Engineering. In addition to Rosing, Reid also interacted with other high-level employees, including Chief Executive Officer Eric Schmidt (then age 47), Vice President of Engineering Operations Urs Holzle (then age 38), and founders Sergey Brin (then age 28) and Larry Page (then age 29).

In a review of Reid's first year's job performance (his only written performance review while employed at Google), Reid was described in complimentary terms and given a performance rating indicating he "consistently [met] expectations." In Reid's performance review, Rosing commented: "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."

In the lawsuit, Reid alleged that Holzle and other employees had made derogatory age-related remarks to Reid. According to Reid, Holzle told Reid that his opinions and ideas were "obsolete" and "too old to matter," that he was "slow," "fuzzy," "sluggish," and "lethargic," and that he did not "display a sense of urgency" and "lack[ed] energy." Holzle allegedly made age-related comments to Reid "every few weeks." Other coworkers called Reid "an old man," and "old guy," and an "old fuddy-duddy," told him his knowledge was ancient, and joked that Reid's compact disc jewel case office placard should be an "LP" instead of a "CD."

Sixteen months into Reid's employment, Rosing removed Reid from the Director of Operations position, and relieved him of his responsibilities as Director of Engineering, though he was allowed to retain the title. Holzle, 15 years younger than Reid, assumed Reid's position as Director of Operations, and Douglas Merrill, 20 years younger than Reid, took over his other duties. Google asked Reid to develop and implement an in-house Graduate Degree Program and an Undergraduate College Recruitment Program. But Reid was given no budget or staff to

support the Graduate Degree Program.

Later, Brin, Page, Rosing, and Holzle collectively decided not to pay Reid a bonus. After some back and forth, Rosing suggested that Reid should receive a bonus of \$11,300 in addition to a severance package, to avoid "a judge concluding we acted harshly."

A month later, Rosing told Reid the Engineering Department no longer had a place for him. Google asserted Rosing told Reid that the Graduate Degree Program was being eliminated and that it terminated Reid because of job elimination and poor performance. On the other hand, Reid maintained he was given no reason for his termination other than lack of "cultural fit," and he was told the Graduate Degree Program would continue, and his termination was not performance based.

After Reid asked if he could look for a job elsewhere in the company, Rosing encouraged him to apply for positions with other departments. However, emails circulating among various department heads indicated that no other department intended to hire Reid. Accordingly, Reid left Google with a two-month severance package. Months later, Reid sued Google for age discrimination, violation of California's unfair competition law, wrongful termination and violation of public policy, failure to prevent discrimination, and both negligent and intentional infliction of emotional distress.

Based in part on this evidence of references to age in the emails, memos, and alleged comments, the Supreme Court ruled that Reid was entitled to a full trial. While some of these comments may appear to be relatively innocuous, especially in isolation, it was in part due to this type of evidence that Reid was allowed to pursue his claims against Google. This case is, therefore, a reminder that prudent employers must take sufficient time to ensure that the reasons for terminating an employee withstand analysis; that the reasons have been documented and communicated to the employee; that the employer not rely on changing or shifting reasons; and that no employee is subject to derogatory remarks based on age, sex, religion, race, or any other legally protected category.