Reid v. Google, Inc.: California Supreme Court Limits Stray Remarks Doctrine For Employers Seeking Summary Judgment

The California Supreme Court's recent ruling in an age discrimination case, *Reid v. Google, Inc.*, underscores the inaccuracy of the childhood adage "sticks and stones may break my bones, but words will never hurt me." California employers now find they need to pay even more attention to who is saying what to avoid employment discrimination lawsuits.

The Stray Remarks Doctrine was borne of the 1989 U.S. Supreme Court case *Price Waterhouse v. Hopkins*. In her concurring opinion, Justice O'Connor stated that "stray remarks" – "statements by nondecision makers, or statements by decisionmakers unrelated to the decisional process itself" – were insufficient *by themselves* to constitute direct evidence that an employer's decision was based on discriminatory animus. (However, she also explained that stray remarks could be probative of discrimination and, in fact, found Price Waterhouse unlawfully based its decision on gender.) As a result, employers often successfully argued that ambiguous comments were "isolated," "irrelevant," and "unrelated to the employment decision" to seek summary judgment.

Reid v. Google, Inc. affirmatively rejects that line of reasoning. In *Reid*, 54 year old Brian Reid alleged he was terminated from Google because he was told he was not a "cultural fit" at a company described by his supervisor as "simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." Reid alleged one of his supervisors and other employees often made derogatory age-related remarks, calling him an "old man" and a "old fuddy-duddy", saying his knowledge was ancient, and describing his opinions and ideas as "obsolete" and "too old to matter." Reid argued Google was not entitled to summary judgment on his age discrimination claim because the discriminatory comments, along with other circumstantial evidence, raised a triable issue of fact which was for a jury to decide.

The state's highest court agreed. Now, comments made by non-decision making employees may be considered as potentially relevant, circumstantial evidence of discrimination, even if not made directly in the context of the employment decision. The Court explained that by otherwise discounting age-related comments as stray remarks, a court would be weighing evidence (including in finding a remark was weak) which was not permitted on a summary judgment motion. As the Court stated, "Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury."

Although the Court's decision now makes it even more difficult for employers to prevail on summary judgment, it is not a particularly surprising turn of events. Both federal and state courts have inconsistently applied the Stray Remarks Doctrine over the years. There is disagreement as to who constitutes a decision-maker, what constitutes remarks outside the decision making process, and how much time must pass between the discriminatory remark and the unfavorable decision to qualify as "stray." The Court noted there has even been unequal treatment of the same word, with one court finding a statement that older workers are not "promotable" as evidence of discrimination, while another court rejected that interpretation of the same remark. *Reid* attempts to clarify application of the

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doctrine, finding that "the only consistency to the federal stray remarks cases is that the probative value of the challenged remark turns on the facts of each case." And review of the facts of the case is the duty of the trier of fact – the jury – not the court.

Reid does not go so far as to say that a stray remark, by itself, may create a triable issue of age discrimination. Rather, the remarks may corroborate or become more significant when combined with other circumstantial evidence to have stronger probative value.

The end result is that the California courts are not likely to automatically dismiss stray remarks made by employees, even if those employees are not the ultimately responsible for making employment decisions. The cautionary tale to employers is that they make sure they are taking all reasonable steps to clamp down on "politically incorrect" statements made by employees in the workplace, as well as adequately document each employee's poor performance concerns and provide attainable expectations and goals to off-set any argument that an unfavorable employment decision was affected in any way to some "stray" remark.

READ THE FULL TEXT OF THE COURT'S RULING

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