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August 6, 2010

In a Blow to Employers, the California Supreme Court Refuses to Apply the "Stray Remarks Doctrine" in Discrimination Cases

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On August 5, 2010, the California Supreme Court issued the much-awaited opinion in *Reid v. Google, Inc*. (No. S158965, 8/5/10), addressing, among other issues, whether the "stray remarks doctrine" can be used by employers to categorically exclude statements offered by employees to support claims of employment discrimination that are made by non-decision makers, or by decision makers outside the decisional process of the challenged employment practice.

In a unanimous opinion, authored by Justice Ming W. Chin, the California Supreme Court rejected a strict application of the stray remarks doctrine, and held that alleged discriminatory comments made by non-decision makers or by decision makers unrelated to the decisional process are appropriately considered on summary judgment.

In 2004, Brian Reid ("Reid"), a former director of operations and engineering for Google, Inc., filed this age-discrimination lawsuit against Google, Inc. ("Google") after his employment was terminated. In addition to other evidence to support his age discrimination claim, Reid offered various alleged derogatory comments from his coworkers and a supervisor, including that he was an "old man," an "old guy," an "old fuddy-duddy," that his ideas were "obsolete," he was "too old to matter," and that he was "slow," "fuzzy," "lethargic," and "sluggish." All of these statements were either made by individuals not involved in the decision to terminate Reid or made outside the context of that decision.

Google moved for summary judgment in the trial court,

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challenging Reid's claims for age discrimination. The trial court granted Google's motion for summary judgment, holding that Google had legitimate, nondiscriminatory reasons for terminating Reid, and that Reid's evidence was insufficient to raise a permissible inference that Reid's age was a motivating factor in the termination decision.

The California Court of Appeal reversed. The Court of Appeal held that Reid presented sufficient evidence to raise a triable issue of fact that Google's stated reason for terminating him was pretextual. The Court of Appeal expressly relied on the above derogatory comments made by coworkers and a supervisor in reaching this decision, and rejected Google's efforts to exclude the comments based on the stray remarks doctrine. The Court of Appeal explained that judgments regarding such discriminatory comments "must be made on a case-by-case basis in light of the entire record."

The Supreme Court held that the Court of Appeal in this case correctly rejected the stray remarks doctrine's categorical exclusion of evidence. The Supreme Court reasoned that:

"strict application of the stray remarks doctrine . . . would result in a court's categorical exclusion of evidence even if the evidence was relevant. An age-based remark not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant circumstantial evidence of discrimination."

In reaching this conclusion, the Supreme Court highlighted the difficulties faced by the federal courts in attempting to uniformly define a "stray remark" as necessary to apply the doctrine. The Supreme Court noted that "the only consistency to the federal stray remarks cases is that the probative value of the challenged remarks turns on the facts of the case."

The impact of the decision will certainly make it more difficult for employers to obtain summary judgment on an employee's discrimination claim when stray remarks are involved. But it may not be the death knell that a first read of the opinion might suggest. While holding that stray remarks cannot categorically be excluded, the Supreme Court did acknowledge that "[a] stray remark alone may not create a triable issue of age discrimination." Citing a federal court opinion by the Seventh Circuit Court of Appeals, the Supreme Court reasoned that only "when coupled with other evidence of pretext, an otherwise stray

remark may create an 'ensemble that is sufficient to defeat summary judgment.'" So while stray remarks are not categorically excluded, the trial court still must "base its summary judgment determination on the totality of evidence in the record . . . ," thus leaving the trial court authority to grant summary judgment for employers when the totality of the evidence is insufficient to create an inference of pretext, even when stray remarks are in play.

A full copy of the opinion can be found here.

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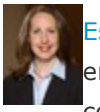

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