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August 6, 2010

California Supreme Court Significantly Limits Use of "Stray Remarks" Rule in Summary Judgment Motions

By Daniel Westman

On August 5, 2010 the California Supreme Court issued its unanimous opinion in *Reid v. Google, Inc.*[1] The Court's ruling placed limits on the use of the "stray remarks" doctrine—a rule recognized by many federal courts that allows trial courts considering summary judgment motions to deem certain remarks allegedly reflecting bias as insufficient to create a triable issue of fact. The opinion significantly undermines what has been a potent weapon used by defense counsel in employment discrimination cases. The ruling also suggests that employers should train their employees and managers to avoid any remarks suggestive of age bias—as well as other forms of bias—in today's multi-generational workforce.

The Supreme Court viewed the facts in the light most favorable to the plaintiff, which were as follows. Brian Reid, a Ph.D. in computer science and former associate professor of electrical engineering at Stanford University, was hired by Google at the age of 52 as a director of operations. After two years his employment was terminated, allegedly by his younger managers, because he was not a "cultural fit." Reid sued for age discrimination in violation of the California Fair Employment and Housing Act, among other theories. As support for his claim, Reid claimed he was referred to as "slow," "fuzzy," and "sluggish" by his 38-year-old manager, who also said that his ideas were "obsolete" and "too old to matter." Reid alleged that he was referred to by co-employees an "old man" and an "old fuddy-duddy." Also, Reid alleged that his 38-year-old manager, and the co-founders of Google—Sergey Brin (then age 29) and Larry Page (then age 28)—decided together to deny Reid any bonus compensation for the year 2003. In addition to evidence regarding these remarks, Reid offered the testimony of a statistical expert who opined that his statistical analysis showed that older workers fared worse than younger workers in several respects.

The trial court entered summary judgment in favor of Google, ruling that the age-related comments were "stray remarks" that were insufficient to create a triable issue of fact for summary judgment purposes. The Court of Appeal reversed, holding that Reid had presented sufficient evidence of age discrimination to justify a trial on the merits.[2] In particular, the Court of Appeal took issue with the use of the "stray remarks" rule in the summary judgment context. The Court of Appeal reasoned that "stray remarks" rule improperly allowed the court to weigh the evidentiary value to be given to such remarks. The Court of Appeal opined that weighing evidence was the province of the jury at trial, not the court in the summary judgment context. The Court of Appeal also ruled that Google had preserved its evidentiary objections by submitting them to the trial court in writing, even though the trial court did not rule upon the written objections.

The Supreme Court affirmed the Court of Appeal's ruling on both issues. With respect to the "stray remarks" issue, the Supreme Court noted that "strict application of the stray remarks doctrine, as urged by Google, would result in a court's

[1] No. S158965 (August 5, 2010), available at: http://www.courtinfo.ca.gov/opinions/documents/S158965.PDF

[2] 155 Cal.App.4th 1342 (2007).

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." The Supreme Court also agreed with the Court of Appeal that "a court should not categorically discount the evidence if relevant; it should be left to the fact finder to assess its probative value." The Court stated that "strict application of the stray remarks doctrine would be contrary to the procedural rules codified by statute and adopted in our cases," which require that the courts "shall consider all of the evidence set forth in the papers. . . and all inferences reasonably deducible from the evidence."[3]

However, the Court did not prohibit altogether use of the "stray remarks" rule. The Court agreed with Google that "[a] stray remark alone may not create a triable issue of age discrimination. [Citations omitted.] But when combined with other evidence of pretext, an otherwise stray remark may create an 'ensemble [that] is sufficient to defeat summary judgment.'" [Citations omitted.] The Court noted that Reid had offered not only evidence of the age-related remarks, but also statistical evidence supporting an inference of age discrimination. The Court stated several other reasons for its ruling, including that "federal circuit courts have diverged in determining what constitutes a stray remark." The Court concluded that "the Court of Appeal properly considered evidence of alleged discriminatory comments made by the decision makers and coworkers along will all other evidence in the record."

With respect to the issue of preservation of evidentiary objections, the Supreme Court agreed "that the trial court's failure to rule expressly on any of Google's evidentiary objections did not waive them on appeal." The Court noted that the summary judgment statute was ambiguous, and reviewed the statute's purpose and legislative history to support its conclusion. The Court also took the occasion to admonish practicing lawyers as follows: "We recognize that it has become common practice for litigants to flood the trial courts with inconsequential written evidentiary objections, without focusing on those that are critical. . . . [L]itigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices."

Beyond its procedural significance, this case suggests that employers should take steps to train their employees to avoid multi-generational tension in the workplace. Reid's ideas about technology allegedly were called "obsolete" and "too old to matter" by persons younger than Reid, which was used as evidence of alleged age discrimination. Reid's supervisor wrote a performance review stating "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." These comments probably would not be well-received by younger or older employees. Companies should consider expanding their employee training to address multi-generational issues, including avoiding comments in the workplace that contribute to tension between employees of different generations.

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[3] California Code of Civil Procedure Section 437c(c).

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