News from our Employment & Labor Group

Stray Remarks May Be Considered Evidence of Discrimination in California

The California Supreme Court recently issued a unanimous decision that could make it more difficult for employers to win summary judgment in certain discrimination cases involving potentially discriminatory comments. In *Reid v. Google, Inc.*, the Court declined to adopt the "stray remarks doctrine," under which some courts have deemed irrelevant and insufficient to defeat summary judgment, "stray" potentially discriminatory remarks made either (a) by non-decision making employees, or (b) by decision-making supervisors outside of the decisional process.

Under *Reid,* California courts must evaluate such stray remarks together with all other admissible evidence to determine whether there is sufficient evidence of discrimination for a case to proceed to a jury trial. This decision reaffirms that employers must do more than maintain policies preventing discrimination and harassment. Employers must take steps, including training of supervisors and non-supervisors alike, to ensure all employees are aware of such policies and the risk of liability posed by potentially discriminatory comments in any context.

Reid also decided an important procedural issue for summary judgment motions in California, which had previously been unclear based on prior California appellate court rulings. The Court ruled that evidentiary objections timely made in connection with a summary judgment motion, either by written objection or orally at the hearing, are preserved on appeal, even if the trial court fails to rule on the specific objections.

Per *Reid's* description of the facts of the case on summary judgment, Google hired Brian Reid as director of operations and director of engineering when he was 52. In Reid's only performance review, Google noted his achievements and capabilities, but recommended that "[a]dapting to the Google culture is the primary task for the first year here.... Google is simply different." Reid made allegations that during his Google employment the company's vice president of engineering operations and other Google employees made disparaging comments to Reid about his age. The alleged comments included that Reid was "slow," "fuzzy,", "sluggish" and "lethargic." Employees also allegedly called Reid an "old man," "old guy" and an "old fuddy duddy," and stated that Reid's ideas were "obsolete" and "too old to matter" and that his knowledge was ancient. They also allegedly joked that Reid's office placard should be in the shape of an "LP" (i.e. a vinyl record) rather than the customary (then current music format) "CD."

In October 2003, Google's vice president of engineering removed Reid from his director of operations position, and relieved Reid of his responsibilities (but not his title) as director of engineering. Two younger individuals assumed Reid's role and duties. Google then tasked Reid with developing the company's Graduate Degree Program and Google Scholar Program to train and recruit engineers. In February 2004, Google informed Reid that its Engineering Department no longer had a position for him. No other department offered Reid a position and he left Google on February 27, 2004.

Reid sued Google, alleging various causes of action, including age discrimination under the California Fair Employment and Housing Act. The trial court granted

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Google's motion for summary judgment on Reid's age discrimination claims. The court determined that Reid had failed to raise a triable issue of material fact as to whether Google's assertedly legitimate non-discriminatory reasons for terminating Reid were pretextual. The California Court of Appeal reversed the trial court. The Court of Appeal considered Reid's evidence of discrimination, including statistical evidence, the alleged stray remarks quoted above, and evidence about Reid's demotion and termination. Although Google had filed written objections prior to the summary judgment hearing on the statistical evidence and stray remarks, the trial court had not ruled on them, and the Court of Appeal determined that the objections were not waived.

The California Supreme Court affirmed the Court of Appeal in a unanimous opinion. The Court stated that adoption of the "stray remarks" doctrine "would result in a court's categorical exclusion of evidence even if the evidence was relevant." Such remarks could be circumstantial evidence of discrimination, even if not made in the context of an employment decision or uttered by a non-decision-maker. The *Reid* Court stated that trial courts must base summary judgment rulings on the totality of evidence in the record, "including any relevant discriminatory remarks," although the Court does not elaborate on what criteria courts should apply to determine which potentially discriminatory remarks are "relevant."

In reaching its decision, the Supreme Court reiterated that "weak" cases of discrimination may still be resolved on summary judgment. Yet, by permitting trial courts to consider stray comments in ruling on summary judgment motions, the *Reid* Court has given employers another hurdle to mount in discrimination cases involving evidence of such comments.

It is important to note that the *Reid* decision was based on the summary judgment standard. Thus, the Court did not find that discrimination by Google actually occurred. Rather, it found that the question of whether or not discrimination occurred needs to be decided by a jury rather than the trial court on summary judgment.

What *Reid* means for employers

The *Reid* decision suggests that it may be more difficult for employers to obtain summary judgment in certain discrimination cases, and reaffirms the importance of employers following best practices to prevent and remedy workplace discrimination and harassment. Following *Reid*, employers should: (1) confirm, or update as necessary, policies prohibiting discrimination and harassment to ensure such policies prohibit potentially discriminatory/harassing comments by all employees; (2) conduct training sessions for *all employees* on such policies, and emphasize that "stray comments" may lead to company liability; and (3) take appropriate and timely disciplinary action against employees who violate company policy by making inappropriate and potentially discriminatory/harassing comments, among other prohibited conduct.

Our attorneys have extensive counseling and litigation experience regarding these issues and, if you would like to discuss them further or have questions about this *Alert*, please contact one of the attorneys listed above.