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California Supreme Court Rejects Stray Remarks Doctrine, Heightens Employer Risk in Discrimination Claims

Article By:

Sheryl Jaffee Halpern

In *Reid v. Google, Inc.*, the California Supreme Court delivered a blow to employers by rejecting the application of the so-called "stray remarks doctrine" for cases brought under the California Fair Employment and Housing Act. According to the stray remarks doctrine (a rule created by federal courts applying Title VII, the Americans with Disabilities Act and other federal discrimination laws), the court will deem irrelevant any remarks made by non-decision-making coworkers or by non-decision-making supervisors outside of the decision-making process. The rule further establishes that such remarks are insufficient to avoid summary judgment. In rejecting the stray remarks doctrine, the California Supreme Court held that such remarks cannot be viewed in isolation, but must be considered together with all the evidence in the record. The court also noted that a 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.

Understanding *Reid*

Decided in August 2010, the *Reid* case involved an age discrimination claim by Brian Reid, a former Google director of engineering, who worked at the company from 2002 to 2004. Reid, who was 52 at the time he was hired, held a Ph.D. in computer science and had taught at Stanford University.

A review of Reid's first-year job performance was very positive, but contained the following language:

> 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.

According to Reid, a 38-year-old vice president (to whom he sometimes reported) described him as "slow," "fuzzy," "sluggish" and "lethargic" and called his opinions "obsolete" and "too old to matter." Reid also accused the VP of saying that he failed to "display a sense of urgency" and "lack[ed] energy." In addition, he claimed that certain coworkers called him an "old man," "old guy" and "old fuddy-duddy," while another joked that Reid's office placard, which included a picture of a compact disc, should instead show an LP record.

Shortly after his first review, Reid was terminated. Google said it informed Reid that his job was eliminated because the company decided not to pursue the graduate degree program to which he was assigned. Reid, however, claimed he was told only that there was not a "cultural fit."

Implications to Employers

In California, obtaining summary judgment in a discrimination case is already difficult. This case will make it even harder, particularly since the state Supreme Court did a poor job of instructing the trial courts how to weigh stray remarks, merely stating that they should be viewed "in the totality" of the case and with all ambiguity resolved in favor of the employee. Moreover, the case demonstrates how otherwise innocuous comments—the type made in many workplaces—can be used to support a discrimination claim. For example, is it really a problem to say that an employee age 40 or over did not "display a sense of urgency"?

Even employers without a presence in California, however, should take note of the *Reid* decision. In rejecting the stray remarks doctrine, the state Supreme Court cited dozens of federal circuit cases and pointed out just how inconsistently the courts had applied the rule, "because there is no precise definition of who is a decision-maker or what constitutes remarks made outside of the decisional process in the employment context."

For example, some courts have stated that, in order to escape exclusion under the stray remarks doctrine, the individual making the comments must be the final decision-maker. At the same time, others have permitted remarks made by subordinates that implicate decision-makers. As another example, some courts have allowed evidence of comments made years before the adverse employment decision, while others have excluded remarks made just months prior to the decision. Most striking, however, is the fact that federal courts have treated identical remarks inconsistently. For instance, some have found employer statements about the need for "new blood" or "young blood" to be ageist remarks that cannot be excluded under the stray remarks doctrine, while others have not. Still other federal courts have treated references to "grey hair" in opposite manners under the doctrine.

What is the bottom line for employers, even those outside California? The *Reid* decision shoots down the childhood adage that says, "Sticks and stones may break my bones, but words will never hurt me." As a result, employers should do the following to minimize the likelihood of employment discrimination lawsuits:

- Take all reasonable steps to clamp down on "politically incorrect" statements made by employees in the workplace;
- Adequately document each employee's poor performance concerns so that those concerns provide a documented reason for any adverse employment decisions that were made; and
- Provide attainable expectations and goals to employees in order to offset any later argument in court that an unfavorable employment decision was related in any way to some "stray" remark.

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