Employment

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# California Supreme Court Rejects Federal Doctrine, Allows 'Stray Remarks' as Evidence of Bias

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*In a long-awaited ruling, the California Supreme Court issued its decision in* Reid v. Google *on August 5. The Court unanimously held that the "stray remarks" doctrine, which has long been an established evidentiary objection in federal court discrimination cases, is "unnecessary" in California court cases, and that its "categorical exclusion" of evidence may lead to "unfair results."*

## Facts and Procedural History

The plaintiff in this case, Brian Reid, was 52 years old when he was hired to be the director of operations and engineering by a man three years his senior (Wayne Rosing) in 2002. Reid had a Ph.D. in computer science and was a former associate professor of electrical engineering at Stanford. During his nearly two years of employment at Google, Reid received one formal performance appraisal in which he was praised for his attitude, confidence, and creativity, and received an overall rating of "consistently meets expectations." He also received bonuses, including stock options, prior to his termination in February 2004.

At the same time, however, during the course of his employment, Reid alleged that the vice president of engineering, a 38-year old executive to whom he reported at times, made routine comments that were allegedly age-based, including that Reid was "slow," "sluggish" and "lethargic;" that his ideas were "too old to matter;" and that he did not display a "sense of urgency." According to Reid, his peers often made similar remarks and jokes. Reid's only formal performance review also contained written commentary to the effect that the Google "culture" emphasized "[y]ounger contributors, inexperienced first line managers, and [a] super fast pace."

In September 2003, one of Google's founders sent an email to Rosing and others instructing that they should avoid "bloat" with highly paid individuals. Shortly thereafter, Rosing removed Reid from his director positions, giving the role instead to two individuals 15 and 20 years younger than Reid. At the same time, he assigned Reid to oversee college recruiting and to implement an in-house graduate degree program, but with no budget or staff. In addition, a decision was made to pay Reid no bonus for 2003, though

Rosing later noted in an email that such treatment might be deemed inconsistent with others similarly situated. In February 2004, Reid was finally told that his employment was being terminated. Google claimed the termination was due to position elimination and poor performance. In contrast, Reid stated that he was told his employment was being terminated due to lack of "cultural fit." Although Reid was told that he could look for other open positions within Google, emails disclosed during discovery suggested no intention to place Reid. The VP of business operations, for example, wrote an email stating that she needed to be "appropriately prepped" to respond to inquiries from Reid, while the response from the director of HR included a comment that "we'll all agree on the job elimination angle…"

Reid brought a lawsuit alleging, among other claims, age discrimination under the Fair Employment and Housing Act. The trial court granted Google's motion for summary judgment, finding that although Reid had established a prima facie case of discrimination, Google had carried its burden of proving on summary judgment that it had legitimate, non-discriminatory reasons for its decision to terminate Reid's employment. The court further held that Reid's evidence of discriminatory animus—including the remarks and comments outlined above—were "insufficient to raise a permissible inference" that age was a motivating factor in the decision, relying on the stray remarks doctrine. That doctrine provides that discriminatory remarks made by non-decisionmakers, or made outside the context of the challenged employment decision, are irrelevant and insufficient to raise a triable issue of material fact on the question of pretext.

The Court of Appeals reversed the trial court, holding that evidence of stray remarks must be considered on a "case by case" basis, in light of the entire evidentiary record.

## The Supreme Court's Decision

The California Supreme Court affirmed the Court of Appeals' ruling. The Court traced the history of the federal stray remarks doctrine from the 1989 U.S. Supreme Court case *Price Waterhouse v. Hopkins*, which held that, while stray remarks may not be "direct evidence" of discrimination standing alone, they could be probative of discriminatory intent where other direct evidence is proffered. The California Supreme Court noted that the federal circuit courts had adopted and "notably expanded" the Price Waterhouse stray remarks analysis, to create a doctrine that deemed such remarks irrelevant, and categorically excluded such evidence from consideration. Although acknowledging that some stray remark evidence might be so weak as to warrant summary judgment for the defense, the California Supreme Court rejected strict application of the doctrine, preferring instead a case-by-case, "totality of the circumstances" analysis that weighs the probative value of the statements at issue. The Court added that discriminatory remarks made by a non-decisionmaker could influence a decisionmaker in a particular employment decision, and thus those remarks would be probative of discriminatory animus.

## Practical Implications

The Reid decision does not eliminate the possibility of summary judgment for the defense in a discrimination case, but it does lessen the chances for success in circumstances where otherwise "stray remarks" are present. Employers should consider explicitly incorporating the facts and holding of Reid into its best practices training for managers, so that the implications of off-hand comments and jokes can be clearly understood in the context of employment claims. Employers would also be well served to review their email and other communications policies, so that cautions are included regarding emails and other casual communications regarding sensitive employee matters. Finally, both managers and non-managers should be sensitized to the potentially explosive interpretation of otherwise innocent comments that could be deemed to have age or other discriminatory overtones.

If you have any questions about this client alert, please contact the author below.

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