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CALIFORNIA SUPREME COURT HOLDS THAT STRAY REMARKS MAY BE CONSIDERED IN EMPLOYMENT DISCRIMINATION CASES

The California Supreme Court recently held that an employee may introduce statements made by non-decision-makers, or statements made by decision-makers outside of the decisional process, as evidence to support a claim of discrimination against the employer. In Reid v. Google, Inc. (August 5, 2010) ___ Cal.App.4th ____, the Supreme Court held that a trial court should have considered allegedly discriminatory remarks made by the plaintiff's supervisors and coworkers in deciding whether to grant the employers' motion for summary judgment.

Brian Reid worked at Google, Inc. ("Google") between June 2002 and February 2004. Google's vice-president of engineering, Wayne Rosing, hired Mr. Reid (then age 52) as director of operations and engineering. In Mr. Reid's first-year performance review, Mr. Rosing said that Mr. Reid "consistently (met) expectations" and described Mr. Reid as "very intelligent," "creative," and "a terrific problem solver." Mr. Reid received bonuses from February 2003 to February 2004.

In September 2003, Google cofounder Sergey Brin sent an e-mail to several executives, commenting, "We should avoid the tendency towards bloat here particularly with highly paid individuals." Mr. Rosing responded, "Excellent memo . . . . We are looking for a senior Director (note I did not capitalize Sr.) or VP level person to run this operation. . . .". In October 2003, Mr. Rosing relieved Mr. Reid of his responsibilities as director of operations and engineering. Two other employees, 15 and 20 years younger than Mr. Reid, took over his duties. In his new capacity, Mr. Reid was asked to develop and implement an in-house graduate degree program, but he was given no budget or staff to support it.

In February 2004, Mr. Rosing told Mr. Reid that because of a lack of "cultural fit," the engineering department no longer had a place for him. Mr. Rosing encouraged Mr. Reid to apply for positions with other departments. However, the various department heads circulated e-mails agreeing that no one would hire Mr. Reid, referring to "The Company Decision." Two department heads told Mr. Reid that no positions were available for him, and Mr. Reid left the company.

In July 2004, Mr. Reid sued Google. Mr. Reid's complaint alleged age discrimination in violation of the California Fair Employment and Housing Act and California's unfair competition law. In addition to providing evidence of the events described above, Mr. Reid alleged that while working at Google, other employees made derogatory age-related comments to him. Mr. Reid said that every few weeks, one coworker made remarks that Mr. Reid's opinions and ideas were "obsolete" and "too

old to matter," that he was "slow," "fuzzy," "sluggish," and "lethargic," and that he did not "display a sense of urgency" and "lack(ed) energy." Mr. Reid said that other coworkers called him an "old man," an "old guy," and an "old fuddy-duddy."

The trial court granted Google's motion for summary judgment and dismissed Mr. Reid's discrimination claims, holding that Reid had failed to raise a triable issue as to whether Google's legitimate reasons for terminating his employment were a pretext for discrimination. An appellate court disagreed and held that all the evidence in the record, including the discriminatory comments made by supervisors and coworkers, was sufficient to raise a triable issue as to pretext. The court of appeal rejected Google's argument that the alleged ageist comments by supervisors and coworkers were stray remarks and therefore insufficient proof of pretext.

The Supreme Court affirmed the Court of Appeal's holding and its rejection of the "stray remarks" doctrine. As the Supreme Court explained, a trial court must base its summary judgment decision on the totality of evidence in the record, including relevant stray remarks. While stray remarks alone may not reliably indicate discriminatory intent, they may corroborate direct evidence of discrimination or gain significance when viewed with other circumstantial evidence. Factors that should be considered are who made the stray comments, how close they were made to the adverse employment decision, and in what context they were made.

For employers, this decision underscores the importance of cultivating and maintaining a workplace free of discrimination at all levels of employment, not just management. While an employee probably would not prevail on a claim of discrimination against an employer if the employee's only evidence of discrimination consisted of stray remarks made by supervisors and/or coworkers, an employee could use discriminatory stray remarks to strengthen an already viable claim of discrimination.

If you have any questions regarding this decision, please do not hesitate to contact any of our seven offices located statewide, or consult our website.

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