A Timely Analysis of Legal Developments

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The California Supreme Court eliminates use of the "stray remarks" doctrine in defending State employment discrimination claims, although the court's holding suggests the doctrine's underlying principles may still be applied on a case by case basis.

The "Stray Remarks" Doctrine Finds No Shelter in California

By Dominic J. Messiha and Matthew J. Sharbaugh

"Useless old lady." "Old fogey." "This is 1994, haven't you ever heard of a fax before?" These are just a few examples of comments that have been deemed "stray remarks" by courts in the context of employment discrimination cases. Since the term was coined by Justice Sandra Day O'Connor in *Price Waterhouse v. Hopkins*,[1] the "stray remarks" doctrine has been developed through the federal circuit courts over the past several decades.

In essence, the "stray remarks" doctrine provides that comments made by non-decisionmaking supervisors or coworkers—and that are unrelated to the challenged employment decision—are irrelevant to the question of discriminatory motive or animus, and, thus, insufficient to defeat summary judgment. Although a few California courts have implicitly recognized the doctrine, none had squarely addressed its application to employment discrimination cases under California's Fair Employment and Housing Law until the California Supreme Court's decision in *Reid v. Google*.[2]

Factual Background

In *Reid v. Google*, the employer was granted summary judgment in the trial court, in large part, due to the court's exclusion of a variety of ageist comments deemed "stray remarks," including: (1) statements that the plaintiff was "slow," "fuzzy," "lethargic," did not "display a sense of urgency," and "lacked energy;" (2) a statement at or around his termination that he was not a "cultural fit;" and (3) comments by coworkers calling the plaintiff an "old man" and "old fuddy-duddy" and joking that his office placard should be an "LP" instead of a "CD." The trial court disregarded these comments based on its finding that they were made by "non-decisionmakers," were "ambiguous" and were "unrelated to the adverse employment decision."

The Court of Appeal's Decision

On appeal, however, the California Court of Appeal rejected the notion that the "stray remarks" doctrine should operate to categorically exclude these remarks, and instead considered the comments in combination with all of the other evidence advanced by the plaintiff. The plaintiff introduced evidence of e-mail messages between senior executives discussing strategies to "get [the plaintiff] out," e-mail messages fearing the possibility of a "judge concluding [it] acted too harshly," the plaintiff's demotion to a non-viable position just prior to his termination, changed rationales for the plaintiff's termination over the course of time, and more. Evaluating the listed "stray remarks" in combination with the plaintiff's additional evidence of discriminatory animus, the Court of Appeal found that summary judgment should be reversed. The court also pointed out there was some question as to whether the comments even qualified as so-called "stray remarks" in the first instance, as plaintiff presented evidence that the speakers supervised him and were involved in the termination decision.

The California Supreme Court's Decision

On appeal, the California Supreme Court affirmed the Court of Appeal's decision in full, rejecting a rigid application of the "stray remarks" doctrine to discrimination cases in California. The court reasoned that a categorical exclusion of "stray remarks" resulted in courts impermissibly "weighing" evidence at the summary judgment stage, rendering otherwise relevant evidence inadmissible. Although the court recognized that a trial court is tasked with assessing the relative strength of all the evidence at summary judgment, it instructed that the practice of viewing "stray remarks" in isolation, and, thus, disregarding any and all comments made by "nondecisionmakers" or "decisionmakers unrelated to the decisional process," goes too far.

Notwithstanding *Reid's* ultimate holding, the court did not completely foreclose the practice of evaluating "stray remarks" in the proper context. The court reiterated that "a slur, in and of itself, does not prove actionable discrimination." It emphasized that "[a] stray remark alone may not create a triable issue of age discrimination," but clarified that, in conjunction with other evidence of pretext, a "stray remark" could be part of a broader showing sufficient to defeat summary judgment. While "stray remarks" may not be automatically disregarded, characteristics inherent to "stray remarks" remain pivotal in assessing the significance to be afforded to any such comments. As the court stated, "who made the comments, when they were made in relation to the adverse employment action, and in what context they were made are all factors that should be considered." Thus, although the "stray remarks" doctrine may no longer exist in name in California, in practice, its framework remains viable such that courts can, and should, evaluate the significance of comments on a case-by-case basis.

The survival of the "stray remarks" framework is evident in the court's analysis of the few California Court of Appeal cases that previously evaluated "stray remarks" and ultimately granted summary judgment to the defendant employer. In each of those cases, the "stray remarks" doctrine was not explicitly applied to exclude the questionable remarks, but rather, the comments were considered in totality with the other evidence offered by the plaintiff. In *Gibbs v. Consolidated Services*,[3] a supervisor's comment that the plaintiff was "getting too old" was insufficient to overcome the employer's evidence that the plaintiff lacked computer and management skills necessary for the company's reorganization. In *Slatkin v. University of Redlands*,[4] the plaintiff's religious discrimination claim failed because the allegation of anti-Semitic animus rested entirely on an "isolated remark by someone removed from the adverse employment decision." Finally, in *Horn v. Cushman and Wakefield*,[5] the employer secured dismissal because the plaintiff's only evidence of ageist animus was a non-decisionmaking manager's remark, "haven't you ever heard of a fax before?" These decisions remain examples of correct application of the "stray remark" principle.

Thus, although "stray remarks" are no longer *per se* irrelevant in assessing the existence of a triable issue of fact at the summary judgment stage in employment discrimination cases, a plaintiff still will have difficultly pointing to isolated comments as a means of defeating summary judgment. The California Supreme Court noted:

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> There are certainly cases that in the context of the evidence as a whole, the remarks at issue provide such weak evidence that a verdict resting on them cannot be sustained. But such judgments must be made on a case-by-case basis in light of the entire record, and on summary judgment the sole question is whether they support an inference that the employer's action was motivated by discriminatory animus.

Impact of the Decision

While at first blush this decision may appear to have a significant impact on the ability of employers to succeed in obtaining summary judgment in discrimination cases, on balance, it is important not to elevate form over substance. Although the California Supreme Court rejected a rigid, intractable use of the "stray remarks" doctrine in every case, *Reid's* holding suggests the doctrine's underlying principles remain intact, and a plaintiff cannot rely solely upon isolated comments unrelated to the termination decision to demonstrate discriminatory animus.

During litigation, employers can still seek to minimize the significance and impact of purportedly discriminatory comments by showing they were made, if at all, completely outside of the context of the challenged termination (or other adverse employment action). Employers can also still try to undercut the impact of remarks that were made by individuals with no supervisory responsibility over the plaintiff and/or played no role in the adverse employment decision. However, of course, the best approach is to eliminate such remarks in the first instance through the development and implementation of strong anti-discrimination and anti-harassment policies, consistent and prompt enforcement of those policies, and comprehensive training of both managers and employees alike on these issues.

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[1] 490 U.S. 288, 276 (1989).

[2] *Reid v. Google*, Case No. S158965 (Aug. 5, 2010).

[3] 111 Cal. App. 4th 794 (2003).

[4] 88 Cal. App. 4th 1147 (2001).

[5] 72 Cal. App. 4th 798 (1999).

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