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So long, stray remarks doctrine

The California Supreme Court in 'Reid' rejects a federal doctrine, making summary judgment a challenge for employers

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On Aug. 5, the California Supreme Court in *Reid v. Google*, 10 C.D.O.S. 10019, declined to adopt the federal "stray remarks" doctrine, endorsed by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Historically, California employers have relied heavily (and successfully) on this doctrine in pursuing summary judgment in employment discrimination cases. While the doctrine had been applied to varying degrees in California courts, the state Supreme Court had yet to weigh in.

The doctrine deems workplace statements unrelated to the allegedly discriminatory employment decision categorically irrelevant and insufficient to defeat summary judgment. In other words, general workplace comments by co-workers — that may on their face seem offensive — are excluded from consideration unless they can be directly tied to the challenged employment decision. The *Reid* decision may mark the death of the federal stray remarks doctrine in California employment law. In the long run, however, weak employment discrimination claims will remain vulnerable to summary judgment even considering attenuated workplace remarks.

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REID'S EMPLOYMENT AT GOOGLE

Brian Reid was hired by Google as director of operations and director of engineering in 2002 at age 52. He worked at Google for less than two years before being terminated. In his first and only performance review, given by the decision maker who hired him, Reid received praise. The review, however, also contained the following comment: "Adapting to the 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."

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Another decision maker allegedly told Reid every few weeks that his opinions and ideas were "obsolete" and "too old to matter," and he was "slow," "fuzzy," "sluggish," "lethargic," did not "display a sense of urgency," and "lack[ed] energy." Additionally, Reid contended that colleagues called him "old man," "old guy" and "old fuddy-duddy," referred to his knowledge as "ancient," and joked that his CD jewel-case office placard should be an "LP" instead of a "CD."

THE LAWSUIT

Reid sued Google for age discrimination under the California Fair Employment and Housing Act, claiming he was let go because of his age. The trial court granted Google's motion for summary judgment

on Reid's discrimination claim, in part because Reid's evidence in opposition to summary judgment consisted primarily of stray remarks.

The court of appeal reversed, finding that Reid raised a triable issue of fact as to whether his termination was pretextual. In doing so, the court of appeal — unlike the trial court — considered stray remarks.

THE SUPREME COURT'S RULING

The California Supreme Court affirmed the court of appeal decision and declined to adopt the stray remarks doctrine for multiple reasons. The court noted that strict application of the doctrine could result in "categorical exclusion" of some relevant circumstantial evidence and preclude the trial court from reviewing the "totality of evidence." It reasoned that weighing and assessing the merits of stray remarks — based on who made the statement or when — is inappropriate at summary judgment.

The court also questioned the necessity of the doctrine — noting that stray remarks cases merely demonstrate the "common sense proposition" that a slur, in and of itself, does not prove actionable discrimination. The court also pointed to the doctrine's lack of precision: Courts applying the doctrine have not agreed on who constituted a decision maker, what constituted the decisional process, or how much time must pass for the remark to be considered "stray." The court ultimately decided not to adopt a federal doctrine that, strictly applied, could preclude consideration of relevant — though weak — evidence at summary judgment.

The approach in *Reid* is reminiscent of the 2003 *McGinnis* decision, rejecting the federal *Ellerth/Faragher* defense. In *McGinnis*, the court rejected the more robust *Ellerth/Faragher* defense, which precludes liability if the employee has failed to pursue reasonable employer-provided means to correct harassment. Instead, the court applied the "avoidable consequences" doctrine, which may reduce damages based on the employee's pre-litigation conduct, but which does not act as a complete defense to employer liability. *Reid* presents another instance where the California Supreme Court declined to adopt a more employer-oriented federal standard.

'REID'S' IMPACT ON EMPLOYERS

Conventional wisdom suggests two consequences: (1) summary judgment will become more difficult for employers, and (2) employers must step up efforts to prevent offensive comments in the workplace. Regarding the first point, it is hard to argue that the shadow of disfavor cast upon these federal cases will make summary judgment any easier for employers — at least in the short run. As discussed below, however, summary judgment will remain appropriate in weak cases. But as a practical short-term result, more employment discrimination cases may see a jury, and there will be more pressure to settle those cases. For cases that go to trial, attenuated workplace comments may be more likely to come into evidence.

Regarding the second point, presumably employers are already taking steps to prevent (or at least remediate) offensive workplace comments. Employers, however, face real-world limits in controlling employee speech and conduct in all places, at all times — especially large employers. After *Reid*, employers are more likely to be on the hook for ill-advised comments by less-enlightened co-workers. Perhaps all the more reason for employers to monitor and enforce workplace nondiscrimination and harassment policies, and take immediate and appropriate action when "stray remarks" become known.

THE AFTERMATH

In *Reid*, the court made a point of noting that the stray remarks doctrine may not have added much anyway. Stray remarks will still in many cases be insufficient to establish pretext — they just will not be categorically excluded from consideration. As the court specifically pointed out, the "doctrine" does not change the common-sense notion that a single offensive remark typically cannot support an entire case. In the long run, weak employment discrimination claims will remain vulnerable to summary judgment, but judges may now consider a broader range of employee comments in reaching that determination.

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