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CALIFORNIA EMPLOYMENT LAW UPDATE

AUGUST 2010

The California Supreme Court Permits Older Worker to Pursue Age Claim Against Google

In *Reid v. Google, Inc.*, the California Supreme Court decided two questions, one procedural and one substantive, which will have a substantial impact on an employer's ability to defeat employment litigation via use of a summary judgment motion. First, the Supreme Court found that the trial court's failure to rule expressly on evidentiary objections did not waive those objections on appeal. Second, the Supreme Court rejected the stray remarks doctrine's categorical exclusion of evidence after determining that application of the doctrine is unnecessary and that such categorical exclusion of evidence might lead to unfair results.

Background

Before his termination, Plaintiff Reid, age 52, had been a director of operations and director of engineering at Google, Inc. Following his termination, Reid sued Google alleging twelve causes of action, including claims for age discrimination under the California Fair Employment and Housing Act (FEHA) and California's unfair competition law (UCL); wrongful termination in violation of public policy; failure to prevent discrimination; and both negligent and intentional infliction of emotional distress. Reid alleged that various employees made derogatory age-related remarks to him while he was employed at Google, including that his 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." He claimed other co-workers called him an "old man," an "old guy," and an "old fuddy-duddy," told him his knowledge was ancient, and joked that his compact disc jewel case office placard should be an "LP" instead of a "CD."

Google filed a motion for summary judgment as to Reid's causes of action based on claims of age discrimination. Although Google filed written objections to evidence Reid submitted, the trial court did not rule specifically on those objections. Instead, it stated it was relying only "on competent and admissible evidence." Specifically, Google argued that the alleged derogatory statements were irrelevant and inadmissible under the "stray remarks doctrine." Under this doctrine, which is recognized by federal courts, statements made by non-decision makers or outside of the decision making process are not relevant and cannot be used by a plaintiff to avoid summary judgment.

The trial court granted Google's summary judgment motion. It found that Google's evidence, while "not sufficient to prove that Plaintiff cannot establish a prima facie case of age discrimination," "is sufficient to prove that [Google] had legitimate nondiscriminatory reasons for . . . terminating [plaintiff's] employment in February 2004." The court further found that Reid's evidence was "not sufficient to raise a permissible inference that in fact, [Google] considered Plaintiff's age as a

motivating factor in . . . terminating his employment.” The trial court noted that, because Reid had failed to raise a triable issue of material fact as to whether Google’s reasons were pretextual, his age discrimination claims should be dismissed.

The Court of Appeal reversed the trial court’s granting of Google’s summary judgment motion relating to Reid’s causes of action for age discrimination under FEHA and the UCL, wrongful termination, failure to prevent discrimination, and both negligent and intentional infliction of emotional distress. The Court of Appeal found that evidence Reid had presented raised a triable issue of material fact. Reid offered statistical evidence of discrimination at Google, discriminatory comments that co-workers and decision makers made, and evidence that Google demoted Reid to a nonviable position before terminating him and advanced changing rationales for his termination.

Although Google filed written objections to Reid’s evidence and raised its objections at the hearing, the trial court did not expressly rule on them. The Court of Appeal held that the trial court’s failure to rule on the objections did not waive them on appeal. The Court of Appeal considered and rejected Google’s challenges to the methodology Reid’s statistical expert used and Google’s argument that alleged ageist comments by Google decision makers and Reid’s co-workers were stray remarks and therefore insufficient proof of pretext. The court explained that judgments regarding such discriminatory comments “must be made on a case-by-case basis in light of the entire record.” The court concluded that, because Reid’s evidence and inferences of discrimination raised a triable issue of fact as to the existence of pretext, the trial court erred in granting the summary judgment motion.

Supreme Court Decision

The Supreme Court granted review and ultimately agreed with the Court of Appeal on both issues and remanded to the lower courts for further proceedings. The Supreme Court determined that the trial court’s failure to rule expressly on any of Google’s evidentiary objections did not waive them on appeal. The Supreme Court found that written evidentiary objections made before the hearing, as well as oral objections made at the hearing, are deemed made “at the hearing” under Civil Code of Procedure section 437c, subdivisions (b)(5) and (d), so that either method of objection avoids waiver. If the trial court fails to rule expressly on specific evidentiary objections, the appellate court should presume that the objections were overruled, that the trial court considered the evidence in ruling on the merits of the summary judgment motion, and that the objections are preserved on appeal.

With regard to the evidence Google sought to exclude under the stray remarks doctrine, the Supreme Court concluded for several reasons that such evidence should be considered, in combination with all the other evidence in the record, in deciding whether summary judgment was appropriate. The Court reasoned that strict application of the stray remarks doctrine would result in a court’s categorical exclusion of evidence even if the evidence was relevant. The Court also concluded that strict application of the stray remarks doctrine would be contrary to the procedural rules codified in Code of Civil Procedure section 473c, subdivision (c), which directs that, at the summary judgment stage, courts “shall consider all of the evidence set forth in the papers. . . and all inferences reasonably deducible from the evidence.”

Practical Implications for Employers

The *Reid* decision reinforces the need to properly train employees regarding not making offensive and inappropriate comments in the workplace. Even “stray” comments intended as playful can be used by a plaintiff to support a claim for wrongful termination. Further, while most California employees are familiar with policies against sexual harassment, this case illustrates that discriminatory comments related to any protected category -- including age -- are not permissible and can have significant legal consequences.

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