Discriminatory "Stray Remarks" can Lead to Employer Liability

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In a decision that will make it easier for plaintiffs to prevail in employment discrimination cases, the California Supreme Court has ruled in Reid v. Google that so-called "stray remarks" of a discriminatory nature can support an employee's discrimination case, even though they may not relate directly to the adverse employment decision at issue.

Brian Reid, a manager at Google, was informed that his employment was terminated due to position elimination and poor performance. Reid, who was in his 50s, filed an age discrimination suit, alleging that his employment was terminated because of his age. Google moved for summary judgment, seeking dismissal of the age discrimination claim. In support of his claim, Reid offered statistical evidence of discrimination, as well as evidence of remarks by co-workers and decision makers that made disparaging reference to his age. These included a vice president's references to Reid as "obsolete," "too old to matter," and "lack[ing] energy." Co-workers called Reid an "old man" and "old fuddy-duddy," and made other age-related jokes at his expense.

The trial court granted Google's summary judgment motion, but the Court of Appeal reversed, and the Supreme Court agreed that summary judgment should not have been granted. The key issue in the case was whether the age-related remarks could properly be considered in ruling on Reid's claim. Google argued that the comments should be disregarded as "stray remarks," under a rule applied by federal courts, because they were either made by co-workers who had no role in the decision to terminate Reid's employment, or were uttered by decision-makers in a context completely removed from the termination decision.

Writing for the Court, Justice Ming Chin decided that because of significant disagreement among courts over how to apply the "stray remarks" doctrine, it is better to consider such remarks in the context of all of the circumstances of the case, and that such remarks may well be relevant and admissible, even if they

were made by co-workers who had nothing to do with the decision to fire Reid.

This decision will make it significantly harder for employers to dispose of employment discrimination cases on summary judgment, which is already an uphill battle. Now, even casual jokes by individuals who have no authority over an employee may later be used to support the employee's discrimination claim.

What should employers do?

- It is more important than ever to train all employees, and particularly supervisors, regarding diversity awareness and the need to avoid careless and insensitive remarks, even those that may be intended as harmless jokes;
- Employees should be advised to be particularly cautious about e-mail communications, which can often be misunderstood or taken out of context;
- Employers should confirm that their employee handbooks include appropriate anti-discrimination language, and that they specifically provide employees with information on how to raise concerns; and
- Complaints of discrimination or harassment, no matter how minor they may seem, should be thoroughly investigated, and appropriate corrective actions taken.