BURNHAM | BROWN

California Law Update

Allyson Cook and Caitlin Carey **August 2010**

OFF-HAND REMARKS MADE BY ANY EMPLOYEE AT ANY TIME CAN BE CONSIDERED AS EVIDENCE OF EMPLOYMENT DISCRIMINATION

In an important employment law decision issued recently, Brian Reid v. Google, Inc., 2010 Cal. LEXIS 7544 (2010), the California Supreme Court considered whether courts should be allowed to consider, when ruling on summary judgment motions in employment discrimination cases, alleged discriminatory remarks made by non-decision makers or by decision-makers outside of the decision making process. This is referred to as the "stray remarks" doctrine.

As background, federal courts deem "stray remarks" irrelevant and do not allow them to be considered when ruling on summary judgment motions. For instance, under the "stray remarks" doctrine, a federal court cannot consider evidence in an age discrimination claim that a coworker called the plaintiff "a useless old woman" or evidence that her supervisor called her "an old fart" and told her "a younger person could do faster work" when those comments were not made in the decision making process. In contrast, if a decision-maker stated that the plaintiff "should be let go because she is getting too old," that comment would be admissible because it was made in the decision making process that serves as the basis of the lawsuit.

The California Supreme Court, however, rejected the federal approach in Reid, holding that evidence of so-called "stray remarks" may be considered along with other evidence by courts ruling on summary judgment motions. [1]

Facts and Procedural History of the Reid Case

In June 2002, plaintiff Brian Reid (then age 52) was hired by Google, Inc. as director of operations and director of engineering. Reid received a very good first year performance review, and was also given a bonus and stock options. However, Reid claims that during his employment his supervisor called him "slow," "fuzzy," "sluggish," "lethargic," was told he "did not display a sense of urgency and "lack[ed] energy," and that his ideas were "obsolete" and "too old to matter." Reid considered these comments to be evidence of age-based animus.

Mid-way through his second year at Google, Reid was removed from his position as director of operations, and relieved of his duties as director of engineering. Instead, Reid was asked to develop an in-house graduate degree program, and an undergraduate college degree program, all tasks that Reid deemed menial. Soon after, Reid was terminated. Reid claims that at his termination he was told he was not a "cultural fit" with the company.

[1] The court also made a significant procedural ruling, holding that evidentiary objections submitted in writing prior to a summary judgment hearing, or orally at a summary judgment hearing, are preserved on appeal even though the trial court did not rule on the objections. The Reid case will likely be cited for this rule as often as its rejection of the "stray remarks" doctrine.

Reid sued Google for age discrimination. Google moved for summary judgment, and Reid introduced evidence of alleged negative statements about his age made by his supervisors and at the time of his termination. Google argued that these comments were irrelevant "stray remarks" that should be excluded from the court's consideration of the summary judgment motion. The trial court granted summary judgment for Google. The appellate court reversed, and the California Supreme Court affirmed the court of appeal, allowing the case to proceed to trial, disavowing the "stray remarks" doctrine.

Rejection of the Stray Remarks Doctrine

The California Supreme Court rejected a strict application of the "stray remarks" doctrine because it categorically excludes relevant evidence at the summary judgment stage and violates procedural rules that require courts to consider all evidence set forth by the parties. The practice of disregarding all comments made by non-decision makers or decision makers unrelated to the adverse employment action complained of is simply too overbroad. However, the court cautioned that its ultimate holding in Reid does not give added weight to stray remarks because a negative comment or slur alone is insufficient to establish actionable discrimination. A court must consider stray remarks on a case-by-case basis and evaluate factors such as who made the comments, when they were made, and the context in which they were made. Accordingly, though California no longer allows the per se exclusion of "stray remarks" at the summary judgment stage, courts must continue to evaluate them to determine whether the remarks support an inference that the employer's action was motivated by discriminatory animus.

Practical Pointers for Employers in Light of Reid

- Provide ongoing training to your supervisors on harassment and discrimination. Instruct them to eliminate from the workplace all remarks based on stereotypes, bias, or animus

- Have anti-discrimination and harassment policies in place, and distribute them to your employees at least once a year

- Investigate all complaints of discrimination and harassment and ensure that the offending conduct and/or comments are eliminated from your workplace

- Use objective criteria to make employment decisions, including decisions involving hiring, promotions, discipline and terminations

Allyson Cook is a member of Burnham Brown's Employment Law Department and specializes in employment and general litigation and can be reached at 510.835.6816 or acook@burnhambrown.com. Caitlin Carey's practice focuses on employment and general litigation. She can be reached at 510.835.6830 or ccarey@burnhambrown.com.