Miller
LAW GROUP

Employment Law Alert

August 6, 2010

California Supreme Court Issues Long Awaited "Stray Remarks" Decision

On August 5, the California Supreme Court filed its much-awaited decision in *Reid v. Google, Inc.*, No. S158965. This unanimous decision resolves two important issues for California employment litigators. First, *Reid* rejects the "stray remarks" rule, which deems irrelevant allegedly discriminatory comments made by non-decision makers or by decision makers outside of the decisional process. Second, in connection with summary judgment procedure, *Reid* cleared up the confusion that existed regarding the effect of the trial court's failure to rule on properly made evidentiary objections. The law now is that when the trial court fails to rule on a party's properly made objections, those objections are deemed overruled but are preserved for appeal.

111 SUTTER STREET
SUITE 700
SAN FRANCISCO
CA 94104
415 464 4300 T
415 464 4336 F

In *Reid*, Google won summary judgment in an age discrimination action filed by a computer engineer, age 52 when hired, who alleged that his supervisors and co-workers had made various age-related comments, referring to him as an "old guy" and criticizing his ideas as being "obsolete" and "too old to matter." In granting summary judgment, the trial court stated that the plaintiff's evidence was insufficient to overcome Google's explanation that it had terminated the plaintiff after his position had been eliminated. Google had filed substantial written objections to the plaintiff's evidence, which the trial court did not rule on, either orally or in its order. The Court of Appeal reversed, holding that Google had not waived its objections to the plaintiff's evidence but rejecting its argument that the age-related comments the plaintiff offered were inadmissible stray remarks.

On the stray remarks question, *Reid* explains that the doctrine's genesis is Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which stated that stray remarks, standing alone, do not satisfy the plaintiff's burden of persuasion, and thus do not shift the burden of proof to the employer to justify its decision. But *Reid* also observes that in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Justice O'Connor, writing for the court, implicitly rejected the view that stray remarks are categorically irrelevant. *Reid* also discusses numerous federal Circuit Court of Appeals' decisions, commenting that they do not consistently recognize the stray remarks doctrine, and that even the circuits that recognize the doctrine sometimes accord different treatment to identical types of evidence. Finally, *Reid* notes that the California decisions that mention the stray remarks doctrine have not explicitly adopted or rejected it.

Against this backdrop, *Reid* agrees that stray remarks, by themselves, may not suffice as proof that discrimination allegedly occurred. Yet, stray remarks may be probative of discriminatory animus when considered with other evidence. In this respect, *Reid* quoted approvingly from the Court of Appeal's decision in the case that "'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. Their 'weight' as evidence cannot enter into the question.'"

On the waiver-of-objections issue, *Reid* was confronted with muddled case law. At one end, earlier Supreme Court cases had observed in footnotes that a party waives for appeal any evidentiary objections that the trial court does not decide. *E.g., Ann M. v. Pacific Plaza Shopping Center*, 6 Cal. 4th 666, 670 n.1 (1993). At the other, the Court of Appeal in *Biljac Associates v. First Interstate Bank*, 218 Cal. App. 3d 1410 (1990), held that a party's objections are preserved for appeal even when the trial court fails expressly to rule on them, so long as the court stated that it relied on competent and admissible evidence.

Reid clears up the confusion among the cases by examining the history and language of Code of Civil Procedure § 437c and the corresponding Rules of Court. Because section 437c states only that objections not made at the summary judgment hearing are deemed waived, *Reid* holds that Rule of Court 3.1352 prescribes the procedure the objecting party must follow to preserve its objections. That rule allows a party to object in writing before the hearing or to object orally at the hearing, provided it has arranged for a court reporter to be present. *Reid* then makes clear that the trial court has a mandatory duty to rule on objections made pursuant to the rule, but that its failure to do so does not affect the objecting party's ability to argue the objections on appeal. The Supreme Court in *Reid*, in short, overruled its decisions, as well as the Court of Appeal decisions, including *Biljac*, that had adopted different procedural requirements. Finally, recognizing that its holding may impose a burden on trial courts faced with voluminous objections, *Reid* admonishes counsel to "focus on objections that really count," and implicitly encourages trial courts to reprimand or sanction counsel for abusive practices.

Reid's implications are straightforward. Its rejection of the stray remarks doctrine creates obstacles for an employer when the plaintiff's direct evidence of alleged discrimination appears insufficient by itself to create issues of fact. An employer may still argue that the

stray remarks, when considered in the context of the entire record, have no probative value. However, trial courts naturally will be more wary of rejecting evidence on that basis, and appellate courts may more closely scrutinize summary judgments based on rejection of stray remarks evidence. Thus, it will be more important than ever for an employer to explain thoroughly all the legitimate reasons supporting the employment decision at issue.

Reid's holding that all properly made objections are preserved for appeal is not a reason for employers' counsel to be lax about obtaining rulings on them, especially when an appeal is likely. Such rulings, in addition to being proof that the trial court carefully considered the evidence submitted, clarify what issues are material on appeal and can reduce the need to argue objections during appellate briefing.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, and appellate law. If you have questions about this new development or your workplace obligations, please contact Michele Ballard Miller (mbm@millerlawgroup.com) or Carolyn Rashby (cr@millerlawgroup.com), or call (415) 464-4300. To learn more about our firm, visit our website at www.millerlawgroup.com.

This Alert is published by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the Alert, and should not be considered legal advice.