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### California Supreme Court Expands Plaintiffs' Use Of "Stray Remarks" In Employment Cases

In *Reid v. Google, Inc.*, the California Supreme Court recently expanded the ability of plaintiffs to use so-called "stray remarks" in employment discrimination cases brought under California law.

Under the "stray remarks" doctrine, employers have been able to defeat discrimination claims where plaintiffs have attempted to prove discrimination based on alleged discriminatory comments that are not tied to a specific employment decision. Typically, comments that were not made by the person who made the employment decision or were too remote in nature were deemed "stray" and thus insufficient to prove that an employer acted with a discriminatory intent.

In *Reid*, the plaintiff was a 52-year-old who was hired by Google as the Director of Operations and Director of Engineering. He claimed that despite receiving a good first-year performance review, he was soon removed from his position as Director of Operations and ultimately terminated based on his age. Although Google claimed that it terminated the plaintiff because it was eliminating his position, the plaintiff claimed that he was told he was being terminated due to a lack of "cultural fit."

After he was terminated, the plaintiff sued Google for age discrimination under the California Fair Employment and Housing Act (FEHA). As evidence of discrimination, the plaintiff claimed that he was replaced as Director of Operations by an employee who was 15 years his junior, and that other duties previously assigned to him were given to another employee who was 20 years younger than him. Also, the plaintiff alleged that he was essentially

set up to fail when he was asked to implement certain education and a budget or staff to accomplish those tasks.

In addition to these allegations, the plaintiff claimed that numerous ageist remarks were made to or about him during his employment. The plaintiff argued that these comments proved that Google discriminated against him.

Many of the comments were allegedly made by a high-level manager who said the plaintiff's opinions and ideas were "obsolete" and "too old to matter;" he was "slow," "fuzzy," "sluggish," and "lethargic;" he did not "display a sense of urgency;" and he "lacked energy." The plaintiff also claimed that co-workers joked about his age and referred to him as an "old man" and an "old fuddy-duddy." It is unclear from the *Reid* opinion, however, which of these alleged comments, if any, were tied to the termination decision or any other

decision that the plaintiff claimed was discriminatory.

The trial court rejected the plaintiff's discrimination claims and granted Google's motion for summary judgment. The trial court found Google's evidence sufficient to establish that the company had a legitimate, non-discriminatory reason for terminating the plaintiff. Interestingly, the *Reid* decision does not discuss whether the trial court utilized the "stray remarks" doctrine in reaching its decision or otherwise considered any of the alleged discriminatory comments.

The Court of Appeal reversed the trial court's decision and found that the plaintiff presented enough evidence to warrant a trial on the issue of whether Google harbored a discriminatory intent. Specifically, the Court of Appeal noted that the plaintiff presented statistical evidence and evidence that the company offered changing rationales for the termination decision. The appellate court also considered the allegedly discriminatory comments offered by the plaintiff to show discriminatory intent. Addressing the "stray remarks" doctrine, the Court of Appeal stated that judgments regarding use of such comments to prove discrimination must be made on a case-by-case basis in light of the entire record.

The California Supreme Court confirmed the Court of Appeal's ruling. In its decision, the Court discussed the use of the "stray remarks" doctrine at length and recounted the history of the doctrine in prior case law. According to the Court, prior cases do not support wholesale exclusion of allegedly discriminatory remarks that might be deemed "stray." Instead, the Court reasoned that allegedly discriminatory comments should be considered along with the totality of evidence in the record. The Court also stated that a strict application of the "stray remarks" doctrine would be contrary

to the summary judgment statute that requires the court to consider all evidence presented and all inferences reasonably deducible from the evidence. Applying these principles to the *Reid* case, the Court found that the plaintiff provided sufficient evidence of alleged discrimination to warrant a trial on his age discrimination claims.

Although *Reid* limits use of the "stray remarks" doctrine, it does not appear to completely foreclose its use in California courts. Notably, the *Reid* Court observed, "a stray remark alone may not create a triable issue of age discrimination." Thus, it appears that plaintiffs cannot avoid dismissal of their claims simply by relying on "stray remarks" to challenge the employer's evidence that an employment decision was made for legitimate, non-discriminatory reasons. Instead, plaintiffs must still bring forth other evidence to show that the employer's reasons were a pretext and the employer, in fact, made its decision based on impermissible discriminatory criteria.

## California Supreme Court Declares No Private Right To Sue Under Labor Code Section 351 For Tip-Pooling Violations

The California Supreme Court struck a blow to wage and hour class action lawsuits by holding that Labor Code Section 351, which prohibits California employers from taking gratuities left for employees, does not provide a private cause of action allowing employees to sue their employers.

In *Lu v. Hawaiian Gardens Casino, Inc.*, a card dealer brought a class action suit against his casino employer, challenging the casino's written policy requiring dealers to pool 15-20% of their tips and share them with other designated employees. The plaintiff alleged that this was an illegal

misappropriation of his tips by the employer in violation of Section 351. The trial court dismissed the Section 351 cause of action, however, declaring that the statute did not provide the plaintiff with a private right to sue. The Court of Appeal affirmed the trial court's ruling, a holding which was expressly contradicted two months later by another appellate court in *Grodensky v. Artichoke Joe's Casino*.

Because of the conflict between the appellate courts, the Supreme Court granted review in *Lu* to resolve the issue of whether Section 351 confers a private right of action. The Court, however, specifically stated that it was not expressing an opinion as to the permissibility of tip pooling under Section 351.

In its decision, the *Lu* Court initially noted that a violation of a state statute does not necessarily give rise to a private cause of action and that a party's ability to sue depends on the intent of the Legislature. The Court concluded that neither the language of Section 351 nor the legislative history of the statute reveals an intent to create a private right for employees to sue their employers. Rather, the responsibility of enforcement of Section 351 is vested with the Department of Industrial Relations.

## Employer Subject To Wrongful Termination Suit For Terminating Employee Based On Non-Compete Agreement With Prior Employer

According to the Court of Appeal's decision in *Silguero v. Creteguard, Inc.*, employers must not only be wary regarding the use of non-competes with their own employees but also in taking action based on such agreements with a prior employer. In *Silguero*, the Court of

Appeal held that when an employer terminates an employee based on a non-compete agreement with a prior employer, the employer may be subject to a claim for wrongful termination in violation of public policy.

The plaintiff in *Silguero* was a sales person employed by Creteguard, which was contacted by the plaintiff's former employer. The former employer claimed that the plaintiff was subject to a non-compete agreement and requested Creteguard's cooperation in enforcing the agreement. Despite not believing in the enforceability of the agreement, Creteguard nevertheless terminated the plaintiff because it wished to "keep the same respect and understanding with colleagues in the same industry." Based on her termination, the plaintiff sued Creteguard, asserting various claims including wrongful termination in violation of public policy.

In reaching its decision, the *Silguero* court observed that the non-compete agreement in question was not enforceable under California law. The agreement violated California's public policy supporting the individual's right to pursue lawful employment of his or her choice, and it did not otherwise fall within any statutory exception to this rule, such as an agreement reached in conjunction with the sale of a business. The court also deemed that any alleged "understanding" between Creteguard and the previous employer was tantamount to a no-hire agreement, which would be void and unenforceable under California law because it unfairly limits the mobility of an employee. As a result, the court reasoned that upholding the termination would allow the previous employer to accomplish indirectly – the enforcement of an otherwise void non-compete agreement – that which it could not accomplish directly.

## Employee Entitled To Jury Trial On Slander Claim Against Employer For Statements Made By A Co-Worker

A California federal district court in *Duste v. Chevron Products Company* held that a plaintiff was entitled to a jury trial on his slander claim against his former employer for alleged false and defamatory comments made about him by a co-worker.

In *Duste*, the plaintiff was an at-will sales manager at Chevron responsible for, among other things, entertaining executives within the oil industry and reviewing and approving the expense reports for such entertainment. Chevron terminated the plaintiff's employment after an internal investigation revealed that he had approved numerous fraudulent or inappropriate expense reports.

While the termination itself was not alleged to have been improper, the plaintiff claimed to have learned during the internal investigation that a co-worker had falsely informed Chevron investigators that the plaintiff had frequented brothels and strip clubs while entertaining clients. That same employee also allegedly told a Chevron client that the plaintiff was terminated because of these visits to brothels and strip clubs, which was also untrue.

Based on these statements by the co-worker, the plaintiff filed suit against Chevron, attempting to hold the company liable for the detrimental impact of the co-worker's alleged statements on his professional reputation. Although the court dismissed several causes of action brought by the plaintiff, it nonetheless held that he was entitled to a jury trial on his claim for slander.

The *Duste* court found that the slander claim was appropriate for a jury trial because questions of fact existed as to whether the employer could be liable for the co-worker's statements and whether the plaintiff was injured in his profession and trade.

## Court Finds Triable Issues Exist As To Employee's Disability And Age Discrimination Claims

The Court of Appeal in *Sandell v. Taylor-Lustig* concluded that a plaintiff presented sufficient evidence to proceed to trial on his disability and age discrimination claims under California law.

Under the facts of *Sandell*, the plaintiff was hired as the Vice-President of Sales but suffered a stroke approximately six months later. Although the plaintiff returned to work, he walked with a cane and his speech was noticeably slower. Approximately four years later, and a few days after the plaintiff's 60th birthday, the employer terminated the plaintiff citing performance-related issues, including a decrease in company sales.

After his termination, the plaintiff sued his employer for disability and age discrimination. On the issue of whether the plaintiff was disabled within the meaning of California law, the court stated, "evidence that an individual requires a cane in order to walk is clearly sufficient to establish that a person is physically disabled under California law." In addition, the plaintiff presented evidence that he had difficulty speaking, which also constituted a disability because it limited a major life activity.

The court also found there was a conflict in the evidence concerning

the grounds for the plaintiff's termination. Although the employer cited sales data showing that sales decreased for the first time in 20 years during the plaintiff's first year of employment, the plaintiff presented evidence that the company's market share had increased in a number of key markets. Similarly, although the plaintiff received a "must improve" rating on a performance review, there was conflicting evidence as to why that was the case and the court observed it could have been due to conditions beyond the plaintiff's control.

The court also stated that there was sufficient evidence supporting the plaintiff's age discrimination claim. The employer argued there was a "strong inference" that it did not discriminate because the same employee hired and terminated the plaintiff within five years. The court nonetheless found that the passage of time and the plaintiff's stroke were intervening events that could have caused the plaintiff's age to factor into the termination decision.

## Court Upholds Termination Of Employee For Egregious Drunken Behavior

The uncontested facts in *Anthony v. Cellco Partnership dba Verizon, Wireless*, recount what must have been a very memorable company dinner.

According to the facts recited in the case, the plaintiff, who was employed by Verizon as an Operations Manager, drank two beers before attending a company-sponsored dinner. During the event, the plaintiff continued drinking martinis until he was cut off after becoming intoxicated. Thereafter, the plaintiff took food out of his mouth and threw it at other people, including the pregnant spouse of a supervisor; he made

inappropriate noises and comments, including barking and growling; he inappropriately touched his supervisor; he leaned toward his supervisor and fell out of his chair; he became unconscious at the table; and he "urinated in the public parking lot and ... on a Verizon Wireless supervisor."

The following day, the plaintiff went to the doctor complaining of "fatigue" and a blood test revealed THC in his system. He was diagnosed with alcohol and marijuana consumption and, not surprisingly, a "hangover."

When the plaintiff returned to work the following Monday, he tried to limit the damage. He sent an e-mail apologizing for his behavior, claiming he "may have ingested something." He also apologized in person for throwing food at his supervisor's pregnant wife and for inappropriately touching a second supervisor.

In response to the incident, Verizon's human resources personnel conducted an investigation. Approximately three weeks later, the employee delivered a doctor's note to Verizon stating he must participate "in a modified work program" for six months. Verizon terminated the plaintiff five days later.

The plaintiff sued Verizon alleging disability discrimination and failure to accommodate in violation of the California Fair Employment and Housing Act (FEHA), violation of the California Family Rights Act (CFRA), wrongful termination, and retaliation. The plaintiff alleged that he suffered from anxiety, depression and bipolar disorder, and that he was drugged with marijuana, which might have triggered his symptoms and led to his egregious behavior.

The trial court rejected all of the plaintiff's claims and granted summary judgment to the employer. According to the court, the plaintiff failed to prove that he was disabled within the

meaning of the law, or even that he was drugged or that marijuana consumption was capable of triggering his symptoms. He also failed to produce any evidence that he was diagnosed with bipolar disorder, as alleged. The court also noted that the plaintiff did not controvert the employer's evidence that his deplorable conduct at the company dinner was the result of alcohol consumption.

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If you have any questions about these issues or any other labor matters, please contact any member of the Labor & Employment Department at Hill, Farrer & Burrill LLP.

**Jonathan M. Brandler**  
**James A. Bowles**  
**Michael S. Turner**  
**Raymond W. Thomas**  
**Richard S. Zuniga**  
**E. Sean McLoughlin**  
**Warren J. Higgins**  
**Casey L. Morris**

**Of Counsel**  
**Kyle D. Brown**  
**Suzanne J. Holland**

**Management News** is published periodically by the law firm of Hill, Farrer & Burrill LLP, 300 South Grand Avenue, 37th Floor, Los Angeles, CA 90071-3147 (213) 620-0460 Fax (213) 624-4840 <http://www.hillfarrer.com>

Warren J. Higgins, Editor  
 James A. Bowles and Jonathan M. Brandler, Department Chairs

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Each publication summarizes recent developments in state and federal law affecting employers, but should not be relied upon as an opinion or advice of the Firm regarding any specific matter.

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