Fenwick Employment Brief

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Courts Must Consider "Stray Remarks" In Employment Discrimination Cases

It is often difficult to get a court to dismiss an employment discrimination case prior to trial due to the number of critical facts involved that generally require resolution by a jury, including the employer's motivating reasons for the adverse employment action. In *Reid v. Google*, the California Supreme Court raised this bar even further for employers by requiring courts to consider so-called "stray remarks" in evaluating motions to dismiss employment discrimination claims.

Under federal law, stray remarks – allegedly discriminatory statements by non-decisionmakers or by decisionmakers unrelated to the decisional process – are generally deemed to be irrelevant when evaluating a claim of discrimination prior to trial. In connection with this so-called "stray remarks doctrine," federal courts have concluded that such stray remarks do not make it more likely that the decisionmaker made a decision based on impermissible discriminatory grounds. However, in *Reid*, the California Supreme Court unanimously rejected the federal stray remarks doctrine and held that such remarks must be considered to determine whether a discrimination claim should be dismissed or proceed to trial.

Brian Reid was a 52 year old director-level employee who worked at Google beginning in 2002. According to Reid, another executive told him that his opinions and ideas were "obsolete" and "too old to matter," and that he was "slow," "fuzzy," "sluggish," and "lack[ed] energy." Reid also claimed that coworkers called him an "old man" and an "old fuddy-duddy." In October of 2003, Reid was stripped of his responsibilities as head of engineering and his duties were assumed by two younger employees. In February of 2004, Reid was told that he was not a "cultural fit" for Google and was terminated. He subsequently filed a lawsuit against Google, alleging, among other things, unlawful age discrimination.

Google filed a motion for summary judgment on Reid's age discrimination claim, which was granted by the trial court. The trial court held that Reid's evidence was not sufficient to raise an inference that Google considered his age as a motivating factor in terminating his employment [http://www.fenwick.com/publications/6.5.4.asp?mid=5]. On appeal, a court of appeal reversed the trial court's decision, and held that there was sufficient evidence – including the age-related remarks made by Reid's co-workers – that age played a factor in the termination [http://www.fenwick.com/publications/6.5.4.asp?mid=27]. The California Supreme Court accepted review of the case, in part, to determine "whether California law should adopt the stray remarks doctrine."

In affirming the decision of the court of appeal that the age claim should go to trial, the California Supreme Court firmly rejected the stray remarks doctrine, and said that California courts must consider such remarks together with "all the evidence in the record" to determine whether a case should proceed to trial. The Court stated that "[a]lthough stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence." In Reid's case, the Court held that the stray remarks, when combined with evidence of changed rationales for Reid's termination (Google originally informed Reid that he lacked a "cultural fit" but later stated the termination was because of job elimination and performance issues), Reid's demotion to nonviable position shortly before termination, emails among decisionmakers about "getting [Reid] out," and statistical evidence of age discrimination at Google, was enough to have a jury determine whether Reid was a victim of age discrimination.

The *Reid* decision is a significant new obstacle for employers who seek to dismiss claims of employment discrimination before trial, and is a sobering reminder

to employers that inappropriate remarks in the workplace – even if unrelated to the decision to take action against an employee and made by employees who have no authority in the decisionmaking process – may come back to haunt the company in litigation.

Employer Who Honored Another Employer's Non-Compete Agreement Subject To Liability

Non-compete agreements are generally not enforceable in California, and employers who seek to bind former employees to non-compete covenants risk being subject to legal claims. In *Silguero v. Creteguard, Inc.*, a California court of appeal went one step further and held that employers who choose to honor another employer's non-compete restriction are also subject to potential liability.

Rosemary Silguero was employed as a sales representative with Floor Seal Technology, and her employment agreement (unlawfully) prohibited her from all sales activities for 18 months following her departure. Shortly after Floor Seal terminated Silguero, she found a job with competitor Creteguard. Floor Seal immediately notified Creteguard of the restriction and asked for cooperation in enforcing the agreement. Although Creteguard was aware that non-compete agreements could not be enforced in California, it honored the request and terminated Silguero's employment due to "respect and understanding with colleagues in the same industry." Silguero then filed suit against Creteguard for wrongful termination in violation of public policy (she also sued Floor Seal for intentionally interfering with her contract with Creteguard). Creteguard moved to dismiss the public policy claim for failing to state a cause of action under California law, and the trial court held that the complaint did not plead a viable cause of action. Silguero appealed.

On appeal, the court reversed the trial court and held that Silguero stated a valid claim for wrongful termination in violation of public policy. The court reasoned that allowing employers to terminate (or not hire) employees on the basis of an unlawful non-compete restriction imposed by a prior employer would effectively violate California's strong public policy against non-completes because it "unfairly limit[s] the mobility of an employee" and because an employer should not be "allowed to accomplish by indirection that which it cannot accomplish directly." The court further held that permitting the claim to proceed against Creteguard furthers the interest of employees in their own mobility and betterment, which is "deemed paramount to the competitive interests of the employers, where neither the employee nor his [or her] new employer has committed any illegal act accompanying the employment change."

The *Creteguard* decision reaffirms that California law strongly disfavors any form of direct or indirect restraint on the ability of workers to pursue their chosen occupations. Workers who are either terminated or not hired due to an unlawful non-compete restriction imposed by a prior employer now have the option of pursuing claims against not only the prior employer that subjected them to the non-compete agreement, but also against any employer that decides to honor the restriction.

Wage Statements That Did Not Combine Regular And Overtime Hours Deemed Lawful

In a victory for employers, a California court of appeal in *Morgan v. United Retail Inc.* reached an important (and logical) conclusion that employee wage statements that provided the total number of regular and overtime hours worked – but without separately listing the sum of both – complied with the requirements of Labor Code § 226. Among other things, Labor Code § 226 requires that wage statements for non-exempt employees list the "total hours worked by the employee." Amber Morgan, on behalf of herself and a class of similarly situated current and former employees of United Retail, argued that her employer's failure to list the sum of regular and overtime hours violated this provision.

California law requires that employers provide an accurate itemized statement of wages to assist employees in determining whether they have been compensated properly for all hours worked. For example, employers who list a predetermined amount of hours worked per pay period, without regard to the *actual* amount of hours worked, are not in compliance with the wage statement law because they are not listing the correct amount of hours worked. This

is true even if the practice is designed to benefit employees (*i.e.*, the employee regularly works less than hours recorded on the wage statement). The DLSE has also opined that if employees must laboriously add up the daily hours on timecards to determine the total hours worked during the time period, the requirements of Labor Code § 226 are not met. The *Morgan* case presented an opportunity for a court to clarify whether an employer complies with the statute even if an employee must engage in the simple math of adding together her regular and overtime hours to determine her total hours worked.

During her deposition, Morgan admitted that her total hours worked was indeed "reflected" in her wage statements, but asserted that the failure to include the sum of all hours worked "makes it a little difficult to count how many hours I have been working." The trial court granted United Retail's motion for summary adjudication of the claim, finding the wage statements complied with the statute, that there was no triable issue as to whether the class members suffered any injury, and that there was no triable issue that any alleged violation was knowing and intentional.

The court of appeal agreed with the trial court that the claim should be dismissed. The court concluded that, "[b]ased on the plain and commonsense meaning" of the words of the statute, the wage statements complied with the law by listing the actual number of hours worked by the employee. The court also determined that the employee did not have to refer to time records to add up the total amount of hours, and "could simply add together the total regular hours figure and the total overtime hours figure shown on the wage statement to arrive at the sum of hours worked." The court further noted that the DLSE's own sample wage statement also mirrored the wage statements issued by United Retail. (The DLSE provides a sample wage statement on its website at www.dir.ca.gov/dlse/PayStub.pdf.)

While the *Morgan* decision is an important victory for employers, it also should serve to remind employers that plaintiffs' attorneys are seeking to hold employers accountable for even seemingly innocuous and hypertechnical violations of the wage laws. Wage statements are often overlooked, but should be reviewed thoroughly to ensure complete strict compliance with Labor Code § 226.

NEWS BITES

New Financial Services Reform Law Rewards Whistleblowing And Offers Greater Protection Against Retaliation

Provisions of the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act create private retaliation causes of action as well as monetary awards for individuals who blow the whistle on public companies to the SEC. Under the new law, the SEC is required to pay whistleblowers who provide original information to the SEC which results in monetary sanctions exceeding $1 million between 10-30% of the money recouped. The law also creates a private right of action in federal court for employees who suffer retaliation for providing whistleblowing information to the SEC, assist in an SEC investigation, or make disclosures required or protected under the Sarbanes-Oxley Act ("SOX"), the Securities Exchange Act of 1934, or any other SEC law, rule or regulation. Retaliation claims may be brought without first exhausting administrative remedies, and may be brought up to the sooner of six years after the date on which the retaliation occurred or three years after the employee learned or should have learned of the retaliation.

The law also: (1) broadens the scope of SOX coverage, increases the SOX statute of limitations, exempts SOX whistleblower claims from mandatory arbitration, and clarifies that SOX claims can be tried to a jury; (2) creates a private right of action for employees in the financial services industry who are retaliated against for disclosing information about fraudulent or unlawful conduct relating to the offer or provision of a consumer financial product or service; and (3) broadens the scope of covered employees and the scope of protected conduct under the federal False Claims Act.

Employer May Require Preemptive Fitness For Duty Exam Under ADA, Without Decline In Employee's Job Performance

In *Brownfield v. City of Yakima*, a police officer was terminated for refusing to submit to a fitness for duty exam after being involved in an off-duty accident. Under the ADA, an employer cannot require a medical examination to determine whether an employee is

disabled unless the examination is job related and consistent with business necessity. The plaintiff contended that the business necessity standard could not be met unless his job performance suffered as a result of health problems.

The Ninth Circuit court of appeals (which covers California, Washington and other western states) disagreed. Affirming summary judgment of the ADA claim in favor of the city, the court held that if an employer is faced with significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job, the business necessity standard can be met. In this case, the court determined that the city had an objective, legitimate basis to doubt plaintiff's ability to perform the duties of a police officer because of several highly emotional responses from plaintiff in the past year (including swearing at his superior, having a loud argument with a co-worker, reporting that he was "losing control" during a traffic stop, and his wife calling to report a domestic altercation). However, the court did caution that employers should not use medical examinations to harass employees, and a minor argument between co-workers or isolated instances of lost temper would likely not qualify as business necessities under the ADA.

Private Property Owners May Prohibit Union Picketing

In *Ralphs Grocery Company v. UFCW Union Local 8*, a California court of appeal invalidated two state laws that restricted the ability of property owners to seek judicial relief for conduct relating to labor disputes, and held that a private business owner has the power to enjoin a union from picketing on its property.

In *Ralphs*, the union picketed the entrance of a Ralphs grocery store in an attempt to pressure the store to become unionized. After the store's efforts to limit the union picketing through negotiations with the union and with the intervention of police were unsuccessful, Ralphs filed a lawsuit to prevent the union from picketing on company property. The court determined that the property was not a "public forum" entitling the union to assert free speech rights as a bar to injunctive relief. The court also held that the California statutes restricting the ability of courts to enjoin labor disputes were unconstitutional because they favored speech related to labor disputes over speech concerning other issues.

This decision is helpful for many private property owners who seek to limit the ability of union supporters to demonstrate on their property. However, unions are still allowed to demonstrate in areas which are considered public places – such as shopping malls and sidewalks.

Employment Relationships Defined By California Labor Code And Not By Contract

Employees working in California are entitled to the protections of the California Labor Code regardless of whether their contracts specify the application of another state's law. *Narayan v. EGL, Inc.* recently confirmed that the determination as to whether California-based workers are employees (and thus are entitled to the protections and benefits of the Labor Code) or contractors (who are not) is governed strictly by California law.

In *Narayan*, a Texas transportation and supply chain management company entered into independent contractor agreements for three California-based freight pickup and delivery drivers, which specified that the agreements shall be interpreted by Texas law. The drivers filed a lawsuit against EGL, in which they claimed that they were denied, among other things, overtime and expense reimbursement under the California Labor Code. EGL moved for summary judgment, claiming that the workers were independent contractors as defined by Texas law. The court held that the issue of whether the workers were employees arose under California law – not the agreements – and thus California law applied. The court also held that under California's "multi-faceted test of employment," there were enough indicia of an employment relationship to require a jury to decide the issue of whether an employment relationship existed.

Employer Had No Duty To Accommodate Employee On Prolonged Leave Who Never Requested Accommodation Or Return To Work

In *Milan v. City of Holtville*, a California court of appeal held that an employee on a lengthy workers' compensation leave cannot assert a failure to accommodate disability claim where the employee never requested an accommodation or otherwise indicated she wanted to continue working.

The city informed employee Tanya Milan that its physician determined that she would not be able to return to her regular job. Milan accepted rehabilitation and job retraining benefits offered by the city and did not directly contact the city about her status. More than 18 months after Milan was injured, the city terminated her employment. Under these circumstances, the court held that the burden of initiating discussions of accommodation rested with the employee, and her failure to initiate the interactive process barred her right to recovery under FEHA.

***Barbie vs. Bratz* Provides Key Guidance Regarding Invention Assignment Agreements**

The intellectual property ownership issues in *Mattel v. MGA Entertainment, Inc.* provide important lessons regarding the scope and interpretation of employment invention assignment agreements. At issue in the *Mattel* decision was who owned the popular and successful Bratz doll brand, which was created by a former Barbie fashion designer shortly before he left Mattel to join rival MGA. The Ninth Circuit court of appeals vacated the judgment in favor of Mattel and made several key holdings, two of which concerned the interpretation of the designer's invention assignment agreement. First, the trial court should have considered evidence of agreements with other employees and trade practices to determine whether the invention assignment agreement assigned "ideas," and if ambiguous, the matter should be decided by a jury. Second, the phrase "at any time during my employment by the Company" was ambiguous in that could have referred to only work hours, or could have included nights and weekends, and therefore the interpretation of the phrase should have been decided by a jury. Better worded contract provisions may have avoided the problems the court had with interpreting the designer's invention assignment agreement. (For a fuller analysis of the decision, please see [http://www.fenwick.com/docstore/Publications/Litigation/Litigation_Alert_07-23-10.pdf].)