Google Decision Highlights- and Increases- Danger of "Stray Remarks"

August 11, 2010

Illegal discrimination occurs when a manager bases a personnel decision upon an employee's membership in some legally protected class. As such, employees in discrimination cases are required to prove that the decision in question was motivated by their membership in a legally protected class. Direct evidence of discriminatory intent is relatively rare, however. A manager will seldom state, for example, "I fired Bob because I think he's too old for the job." As a result, employees often use circumstantial evidence to attempt to prove that a decision was motivated by unlawful factors.

So-called "stray remarks"- comments made by persons other than the manager accused of discrimination, or comments made by a manager that don't relate to the decision in question- are often cited as evidence of a discriminatory attitude. An employee asserting a claim of age discrimination may seek to support his claim by testifying that his manager expressed a desire to bring "young blood" into the organization, for instance, or that others in the company referred to him derisively as "Gramps" or "the old fart." Employers typically argue that stray remarks should not be considered by the court because they do not reflect the state of mind of the decision-maker when he or she was making the decision in question. The ultimate outcome of a lawsuit can be influenced substantially by whether stray remarks can be considered by the court.

Many federal courts have declined to consider stray remarks as evidence of discrimination, but the significance of stray remarks in California state courts has been unresolved until the California Supreme Court issued its decision last week in *Reid v. Google*. While recognizing that "a slur, in and of itself, does not prove actionable discrimination," the Supreme Court ruled in the *Reid* case that stray remarks may be significant when considered together with other facts, and therefore should not be automatically excluded from evidence.

The *Reid* decision is significant not because it creates new obligations for employers, but because it increases the risk that results from comments that are already known to be inappropriate for the workplace, but which may be very difficult to eliminate. Many stray remarks result from inadvertent slips of the tongue or momentary lapses in judgment, and some employees who may use bigoted or otherwise inappropriate language on occasion may be resistant to training. Employers have sometimes been able to avoid serious consequences for stray remarks in the past, but they are less likely to be able to do so in the future. The Reid decision may prompt an increase in discrimination claims if employee attorneys are encouraged to file suits by the prospect that they will be able to use stray remarks as circumstantial evidence.

In the wake of the *Reid* decision, employers should consider whether they would benefit from taking one or more of the following measures to reduce their risk of liability for stray remarks:

- Strengthen training of managers- Since stray remarks will be admissible to prove discrimination in most instances, employers can no longer rely on technical legal rules to protect them from liability for such comments. Instead, employers must exercise greater care to assure that bigoted comments, slurs, epithets and other forms of unprofessional expression are not present in the workplace. In organizations where such expressions are common, further training of management personnel may be warranted.
- Increase diligence in investigating complaints and imposing discipline as appropriate- When an employer learns that bigoted comments, slurs, epithets or other inappropriate expressions are being used in the workplace, or that an employee has alleged that such language is being used in the workplace, it should investigate the matter as described in its anti-discrimination policy and impose corrective action as appropriate. If the employer does not act diligently to prevent and correct the use of inappropriate expressions, a judge or jury may regard it as not genuinely concerned with preventing discrimination and assess punitive damages.

The *Reid* case is certain to draw attention from many commentators and should serve as a warning to employers who have been less than diligent in their efforts to prevent or correct discrimination in the workplace. If you have any questions about discrimination issues, or other issues relating to employment or human resources management, please contact one of our attorneys:

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