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SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIAN REID
Plaintiff and Appellant

v.

GOOGLE INC.
Defendant and Respondent

SUPREME COURT
FILED

DEC 11 2007

Frederick K. Ohlrich Clerk

Deputy

AFTER DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CIVIL NO. H029602

APPEAL FROM THE SUPERIOR COURT OF THE
COUNTY OF SANTA CLARA
THE HONORABLE WILLIAM J. ELFVING, JUDGE
CIVIL CASE NO. CV023646

GOOGLE INC.'S PETITION FOR REVIEW

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STATUTES

To the Honorable Chief Justice of the California Supreme Court and the Honorable Associate Justices of the California Supreme Court:

Defendant and Respondent Google Inc. ("Google") respectfully petitions for review of the published decision of the Court of Appeal, Sixth Appellate District, filed on October 4, 2007, as modified on November 1, 2007 (the "Opinion," attached hereto as Appendix A). Review is necessary to secure uniformity of decision and to settle important issues of law related to summary judgments in discrimination cases specifically and in evidentiary rulings made on all summary judgment motions.

I.

ISSUES PRESENTED FOR REVIEW

1. Should California courts continue to apply the well-established "stray remarks" doctrine, thereby avoiding jury trials in employment discrimination cases based primarily on anonymous comments by co-workers and ambiguous comments unrelated to the alleged unlawful motivation in question or to the adverse employment decision at issue?

2. When a moving party properly files objections to evidence opposing a successful summary judgment and pursues rulings from the trial court, yet does not receive them, should Courts of Appeal be permitted to reverse the trial court's grant of summary judgment, overrule all of the successful party's objections, and presume that all evidence provided by the non-moving party is admissible, no matter how irrelevant or flawed?

II.

REASONS FOR GRANTING REVIEW

This Court should grant this Petition because the Sixth District Court of Appeal, in explicitly rejecting the use of the well-established "stray remarks" doctrine, has done what no other appellate court in this state, and indeed no federal appellate court in the land, has done. In addressing motions for summary judgment in employment discrimination cases, trial courts have been able to disregard discriminatory comments by co-workers or nondecisionmakers or by comments unrelated to the employment decision in question by relying on the judicially created "stray remarks" doctrine to ensure that cases principally supported by such remarks are disposed of before trial.

The "stray remarks" doctrine is built upon well-founded principles of relevance and reliability in the assessment of motives of decisionmakers, as opposed to "stray" comments bearing no actual or analytic connection to the decisionmaker, the decision in question, or the motives behind it. Yet, in this case, the Sixth District squarely and explicitly rejected this useful doctrine utilized by other Districts in the state and in the federal circuits around the country. This rejection led the Court to reverse summary judgment in an age discrimination case by direct reference to (1) the "recreational atmosphere" of the employer's workplace, (2) anonymous and unreported age-based comments by co-workers, and (3) management comments relating only to ideas and performance of the plaintiff. Application of the "stray remarks" doctrine would have found none of these comments probative of whether age discrimination motivated the

termination decision, and would have thus affirmed the Superior Court's grant of summary judgment on these facts.

At stake is whether employers and courts will be burdened with jury trials in age discrimination cases based on evidence once considered inadmissible or non-probative "stray remarks." More specifically, the question raised in this case is whether the trial courts must order age discrimination jury trials where the employer permits "recreational" activities by its employees, some of whom make unreported age-related comments, coupled with the circumstance where a member of management makes no reference to age but comments negatively on the ideas and speed of performance of an employee over forty?

Compounding this drastic limitation on an important tool available to trial courts at the summary judgment stage is the Sixth District's "presumption" that the trial court, in granting summary judgment, considered all the evidence submitted in opposition to the motion, despite the moving party's repeated objections to the evidence and requests for rulings on them. Here, in granting summary judgment, the trial court did not expressly rule on the objections, but merely based its ruling on "admissible and competent evidence."

In creating this "presumption," the Court of Appeal not only considered all the evidence otherwise excludable under the "stray remarks" doctrine for purpose of its analysis, it also considered fatally flawed "statistical evidence" that did not even relate to terminations—the principal employment decision at issue in this case. By "presuming" that all of this evidence was considered, and then using this "presumption" to overrule the

trial court, Google has been grievously denied its opportunity to have its objections considered and ruled upon. Indeed, the more logical "presumption" would have been that in granting Google's dispositive motion, the Superior Court more obviously sustained Google's objections and excluded this flawed evidence. In reversing the grant of summary judgment, the Court of Appeal turned logic and fairness on their heads, leaving Google with no avenue of relief except with this Court.

In both aspects of its ruling, the Opinion must be reviewed by this Court because critical aspects of the summary judgment process are at stake, not only in age discrimination cases, but in all summary judgment cases in the state of California.

III.

BACKGROUND

In June 2002, at the age of 52, Plaintiff Brian Reid ("Reid") was recruited by Google and hired by Wayne Rosing, himself 55 years old at the time. Mr. Rosing terminated Reid less than two years after hiring him when Reid's position at Google was eliminated.

On July 23, 2004, Reid filed a lawsuit against Google, asserting age discrimination, among other claims. Google filed its Motion for Summary Judgment on May 27, 2005. After consideration of the parties' briefs and oral argument, the Honorable William J. Elfving of the Santa Clara Superior Court granted Google's Motion by Order dated September 21, 2005, and dismissed Reid's case. With respect to the age discrimination claim, the Superior Court held that Reid's cited evidence was not sufficient

to raise a permissible inference that "Defendant considered [Reid]'s age as a motivating factor" in either of the two alleged adverse actions, namely, Reid's termination and denial of the full amount of his 2003 annual bonus. Google timely filed its written objections to evidence and, during oral argument, requested that the trial court consider its evidentiary objections. The Superior Court declined to render formal rulings on Google's objections to Reid's evidence, instead stating that in reaching its determination, "the Court relied only on competent and admissible evidence pursuant to *Biljac Assoc. v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419-1429."

Reid appealed and Google requested that the Court of Appeal similarly "disregard all inadmissible evidence," in part because, "Google's counsel repeatedly referred the court to its evidentiary objections during the oral argument and asked the court twice to review those objections, [thus] Google's objections are preserved on appeal." (Reporters Transcript ("RT") at 45:23-46:9, 48:25-49:2; see also RT at 85:20-87:9.) On October 4, 2007, the Court of Appeal issued an Order reversing the Superior Court's grant of summary judgment. Despite Google's efforts to pursue its objections to evidence, the Sixth District reversed the Superior Court's ruling without remanding the case to the Superior Court for a clarification of the record, including the admissible evidence considered. Instead, in an unprecedented move, the Sixth District held that if a trial court issued a *Biljac* ruling, declining to expressly rule on a party's evidentiary objection, then "it is presumed to have *overruled* it and *admitted the challenged matter* into evidence." (Opinion at p. 1357, emphasis in original.) As a

result, Google's objections to evidence were never considered, yet all of Reid's evidence was considered by the Court of Appeal, regardless of its patent inadmissibility and complete lack of probative value. The Opinion did not consider the substantive grounds of Google's evidentiary objections in reaching its decision to reverse the Superior Court's Order.

In reversing the Superior Court's Order, the Court of Appeal did, however, specifically cite (a) "a general 'youthful' atmosphere at Google, including employees participating in recreational activities like hockey, football and skiing," (b) statements by supervisors that explicitly related only to Reid's ideas, the speed of his work performance, and a vague reference to "cultural fit," and (c) anonymous age-based comments made by co-workers that were not attributed to any decisionmakers. The Court considered this evidence sufficient to raise a triable issue of material fact, even though none of this evidence has any connection to whether Google's decision to terminate Reid was based on his age, and all were subject to Google's vigorous objections to evidence. Similarly, the Court of Appeal determined that a statistical analysis by Reid's expert of Google employees' bonuses and performance ratings, not terminations, was probative on the issue of whether Reid's termination was discriminatory. The Sixth District further determined that, to the extent the foregoing "evidence" constituted "stray remarks," it was unwilling to follow the "stray remarks" doctrine that such remarks are irrelevant and inapplicable to whether improper bias motivated the decisionmaker(s). Rejecting the application of the well-established stray remarks doctrine, the Sixth District specifically recognized that it disagreed with the First District's adoption of the doctrine

in *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798 (*Horn*). Because the stray remarks doctrine has been adopted in all other published California appellate cases regarding the stray remarks doctrine, and nearly all federal circuits, this panel of the Sixth District is squarely at odds with the overwhelming weight of authority that has adopted the doctrine. Indeed, Google has not been able to find a single other published opinion in California or in any federal circuit rejecting the doctrine on its face. Because rejection of the stray remarks doctrine was central to the Sixth District's published opinion, Google's only avenue of relief lies with this Court.

This Petition for Review is timely filed, pursuant to California Rule of Court (CRC) 8.500(e)(1), after the Court of Appeal's November 1, 2007 Order modifying the opinion and changing the judgment, for which Google did not seek a petition for rehearing.

IV.
LEGAL ANALYSIS

A. The Court Should Grant Review To Establish Uniformity Of Decision, As The Opinion Expressly Rejects The Well-Established Stray Remarks Doctrine And Thus Conflicts With Prior California Supreme Court and Court of Appeal Decisions.

Review is necessary because the Opinion conflicts with other Court of Appeal decisions, guidance from this Court, and the overwhelming weight of persuasive federal authority. The Opinion rejected the stray remarks doctrine disdainfully, labeling it the "so-called stray remarks rule" and dismissing it wholesale, stating that "we do not agree with suggestions that a 'single isolated discriminatory comment' or comments that are 'unrelated to the decisional process' are 'stray' and therefore, insufficient to

avoid summary judgment." (Opinion at p. 1360, citations omitted.) The Opinion further refused to adopt this widely accepted doctrine because, in its characterization, the stray remarks doctrine was "the assumption by the court of a factfinding role." (*Id.*).

The practical and alarming result of the Court of Appeal's radical departure from the stray remarks doctrine is that trial courts in the Sixth District considering summary judgment motions in employment discrimination cases may no longer disregard (1) anonymous remarks made by nondecisionmakers, (2) ambiguous remarks unrelated to a protected class and not providing any indication of discriminatory animus, and (3) remarks that are unrelated to the decision in question. The logical result of the Opinion is that Sixth District trial courts must allow plaintiffs to survive summary judgment based on "evidence" that the overwhelming majority of courts exclude as "stray remarks," inevitably resulting in a significant decrease in successful motions for summary judgment, and an increase in the number of cases that proceed to trial based on evidence once disregarded as legally insignificant.

The Sixth District's refusal to filter out stray remarks now results in this case surviving to a jury trial based in part on statements made by unidentified co-workers and vague comments that are simply unrelated to age, including:

- Statements made by Urs Hoelzle, a co-worker who did not participate in the termination decision, telling Reid that he was "slow," "fuzzy," "sluggish," and "lethargic". (*Id.*).

- Statements made by Hoelzle that Reid's ideas were "obsolete" and "too old to matter". (*Id.*).

- Statements made by anonymous co-workers referring to Reid as an "old man" and an "old fuddy-duddy" and joking that "his office placard should be an 'LP' instead of a 'CD'". (*Id.*).

- Wayne Rosing's statement to Reid on two occasions at or around the time of his termination that he was not a "cultural fit." (*Id.*).

All of the foregoing statements identified by the Sixth District fall solidly within the framework of the stray remarks doctrine. Ambiguous comments—open to interpretation and unrelated to age—do not constitute evidence of discriminatory animus.[1] Anonymous remarks are generally

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[1] Ambiguous remarks not clearly related to age or any other protected class fall into the stray remarks category. (*Nesbit v. Pepsico, Inc.* (9th Cir. 1993) 994 F.2d 703, 705 [affirming summary judgment where supervisor's comment that "we don't necessarily like grey hair" was "uttered in an ambivalent manner" and "not tied directly to" plaintiff's termination]; *Nidds v. Schindler Elevator Corp.* (9th Cir. 1996) 113 F.3d 912, 915, 919 [affirming summary judgment where supervisor stated that he wanted to "get rid of all the 'old timers' because they would not 'kiss my ass,'" finding that the comment was ambiguous because it "could refer as well to longtime employees or to employees who failed to follow directions as to employees over 40"]; *Standard v. A.B.E.L. Serv., Inc.* (11th Cir. 1998) 161 F.3d 1318, 1329 [affirming summary judgment where overheard comment that "older people have more go wrong" was "too vague to prove even generalized discriminatory animus" and lacked a "nexus to employment issues"]; *Gonzalez v. El Dia, Inc.* (1st Cir. 2002) 304 F.3d 63, 66, 70 [affirming summary judgment where ambiguous remarks, referring to plaintiff as "out of style," "colorless," "mom," and expressing surprise that plaintiff was still working, were insufficient to establish discriminatory animus]; *Fortier v. Ameritech Mobile Comm., Inc.* (7th Cir. 1998) 161 F.3d 1106, 1113 [affirming summary judgment where supervisor's comments that she wanted "new blood," a "quick study," and someone with "a lot of

deemed irrelevant to a discrimination claim (or to any claim). Further, neither speed and efficiency nor an individual employee's ideas are protected by the Fair Employment and Housing Act, nor do they serve as a reasonable basis for an age discrimination claim.

First, the Sixth Circuit, in rejecting the well-established stray remarks doctrine, directly contradicts this Court's guidance in *Guz v. Bechtel Nat'l. Inc.* (2000) 24 Cal.4th 317 (*Guz*), another age discrimination case, where this Court found that trial courts should winnow out cases "too weak to raise a rational inference that discrimination occurred" at the summary judgment stage. (*Id.* at p. 362.) Quoting the U.S. Supreme Court's decision in *Reeves v. Sanderson Plumbing Prod. Co.* (2000) 530 U.S. 133 (*Reeves*), the *Guz* opinion recognized that trial courts must engage in some limited consideration of the evidence at summary judgment, such as evaluating "the strength of the plaintiff's prima facie case" and assessing "the probative value of the proof [plaintiff offers to demonstrate] that the employer's explanation is false." (*Guz, supra,* 24 Cal.App.4th at 362; quoting *Reeves*, *supra,* 530 U.S. at pp. 148-149.) To date, the stray remarks doctrine has served a significant role in this winnowing process, because it

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energy" did not necessarily relate to age]; *Bickerstaff v. Vassar College* (2d Cir. 1999) 196 F.3d 435, 456 [comment that "[w]e can ill afford to tenure as associate professor yet another black faculty member who seems destined to be stuck in that rank forever" not relevant, as the comment likely did not refer to plaintiff]; *Cone v. Longmont United Hosp. Assoc.* (10th Cir. 1994) 14 F.3d 526, 531 (*Cone*) [affirming summary judgment of ADEA case, where comment by decisionmaker that "long-term employees have a diminishing return" were stray remarks because the "statement could apply equally to employees under age forty"].)

allows trial courts to identify and dismiss statements lacking probative value of discriminatory animus, even assuming that such facts are true.

Second, by rejecting the stray remarks doctrine, the Sixth District has created a clear conflict with the First, Second, and Fourth Districts, which have each expressly adopted the stray remarks doctrine. (*Horn supra*, (1st Dist. 1999) 72 Cal.App.4th at pp. 798, 809 (review denied) [affirming summary judgment for employer, finding that remark to plaintiff, "[T]his is 1994, haven't you ever heard of a fax before?" was "at most, a 'stray' ageist remark" by a nondecisionmaker and was "entitled to virtually no weight in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus."][2]; *Gibbs v. Consol Serv.* (2d Dist. 2003) 72 Cal.App.4th, 798, 801 (review denied) [affirming summary judgment, finding that supervisor's comment that plaintiff was "getting too old" to transfer to a driver position and that plaintiff should "let the younger guys do it" were stray remarks because they "played no role in the decision to terminate him" and accordingly "do not establish discrimination"]; *Sada v. Robert F. Kennedy Med. Ctr.* (2d Dist. 1997) 56 Cal.App.4th 138, 154 (review denied and certified for partial publication) [reversing summary judgment, distinguishing stray remarks

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[2] The Opinion cited disapprovingly to *Horn* as an illustration of what the Sixth District chidingly characterizes as an impermissible form of "factfinding" by trial courts at the summary judgment stage. (*Reid, supra,* 155 Cal.App.4th at p. 1360, fn. 5 citations omitted.) Ironically, however, this Court *approvingly* cited *Horn* in its discussion of the proper approach of a trial court evaluating summary judgment motions in employment discrimination cases. (*Guz, supra*, 24 Cal.App.4th at p. 361.)

from decisionmaker's derogatory remarks towards Mexicans during job interview]; *Slatkin v. Univ. of Redlands* (4th Dist. 2001) 88 Cal.App.4th 1147, 1160 [affirming summary judgment, holding that "an isolated remark by a person not involved in the adverse employment decision 'is entitled to virtually no weight in considering whether the firing was pretextual . . .'"].)

Finally, the Sixth District's rejection of the stray remarks doctrine conflicts significantly with the reasoning of almost all of the federal circuit courts, as eleven of the federal circuits have adopted the doctrine. The Opinion also conflicts with the guidance of the United States Supreme Court, which has approved of the logical underpinnings of the doctrine. (*Price Waterhouse v. Hopkins* (1988) 490 U.S. 228, 241 (*Price Waterhouse*).) In the *Price Waterhouse* plurality decision, Justice O'Connor's controlling fifth-vote concurrence discussed the parameters of evidence that should be considered sufficient to meet plaintiff's evidentiary burden in employment discrimination cases, including her view that stray remarks do not satisfy the requirements. (*Id.* at p. 277 ["stray remarks" consisting of "statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process" are insufficient meet plaintiff's burden in the summary judgment framework]; see also *Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610 [stating that, under the ADEA, "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in [the decisionmaking] process and had a determinative influence on the outcome"], *Ash v. Tyson Foods, Inc.* (2006) 546 U.S. 454, 457 [noting that supervisor's use of the word "boy"

with reference to African American employees could be relevant as evidence of discriminatory animus depending largely on context].)

Consistent with O'Connor's language in *Price Waterhouse*, federal circuits have routinely deemed evidence of remarks made by nondecisionmakers insufficient to withstand summary judgment. (*Hill v. Lockheed Martin Logistics Mgt. Inc.* (4th Cir. 2004) 354 F.3d 277, 283, 292 (en banc) [affirming summary judgment where repeated comments by employee that plaintiff was a "useless old lady who needed to be retired," a "troubled old lady," and "damn woman" were not relevant absent evidence that employee was a decisionmaker]; *Sandstad v. CB Richard Ellis, Inc.* (5th Cir. 2002) 309 F.3d 893, 900-901 (*Sandstad*) [affirming summary judgment where comments by nondecisionmakers regarding "grey hair" and "generation skipping" were not reasonably linked to the decision to terminate]; *Smith v. Leggett Wire Co.* (6th Cir. 1999) 220 F.3d 752, 757-758 [racially insensitive comment deemed stray when they were remote in time and not made by decisionmakers]; *Hemsworth v. Quotesmith.com, Inc.* (7th Cir. 2007) 476 F.3d 487, 489 (*Hemsworth*) [affirming summary judgment, where a comment from a nondecisionmaker manager that plaintiff "looked old and tired" was deemed stray]; *Chiramonte v. Fashion Bed Group, Inc.* (7th Cir. 1997) 129 F.3d 391, 402 [affirming summary judgment where CEO uninvolved in the decisionmaking process told plaintiff "age had to be a factor [in the termination] . . . but I don't know"]; *Bright v. Standard Register Co.* (8th Cir. 1995) 66 F.3d 171, 172-173 [affirming summary judgment where stray remarks by union president that he "thought that the company planned to get rid of the older people" were

deemed "lacking in apparent probative value"]; *Sprenger v. Fed. Home Loan Bank of Des Moines* (8th Cir. 2001) 253 F.3d 1106, 1113 [affirming summary judgment where presenter made reference to plaintiff in the context of "teaching old dogs new tricks" in reference to the "difficulty bankers over fifty have in keeping up with new technology"]; *Cone, supra,* 14 F.3d at p. 531 [affirming summary judgment of ADEA case, where comment by CEO that two employees over 40 years old were terminated because "the hospital needs some new blood" were stray remarks where CEO was not decisionmaker and was not referring to plaintiff]; *Mauter v. Hardy* (11th Cir. 1987) 825 F.2d 1554, 1558 [affirming summary judgment where a comment by a nondecisionmaker that the Company "was going to weed out the old ones" was "too attenuated to present a genuine issue of material fact" as to defendant's discriminatory intent].)

Remarks made by decisionmakers outside of the decisionmaking context have also been deemed stray. (*Wallace v. O.C. Tanner Recognition Co.* (1st Cir. 2002) 299 F.3d 96, 100 [affirming summary judgment where occasional inquiries about plaintiff's retirement and a reference to plaintiff's membership in a protected age category during a termination meeting were deemed "brief, stray remarks unrelated to the termination decisional process"]; *Glanzman v. Metro. Mgmt. Corp.* (3d Cir. 2004) 391 F.3d 506, 513 [finding supervisor's inquiries about age and retirement to be stray remarks, but supervisor's comment that he wanted to fire plaintiff and replace her with a younger women not stray]; *Sandstad, supra,* 309 F.3d at pp. 900-901 [affirming summary judgment where comment by decisionmaker that "You old guys don't always get it right" was not

discriminatory in context]; *Waggoner v. City of Garland, Texas* (5th Cir. 1993) 987 F.2d 1160, 1163, 1166 [affirming summary judgment where evidence that supervisor called plaintiff an "old fart" and told him that a younger person could do faster work was deemed "a mere 'stray remark'. . . insufficient to establish age discrimination"]; *Mathews v. Trilogy Comm. Inc.* (8th Cir. 1998) 143 F.3d 1160, 1166 [affirming summary judgment where supervisor's comment during his deposition that plaintiff viewed himself as a "diabetic poster boy" deemed unrelated to the decisional process and therefore stray]; *Coleman v. Quaker Oats Co.* (9th Cir. 2000) 232 F.3d 1271, 1285 [affirming summary judgment deeming evidence that a manager used the words "young and promotable" insufficient to raise a question of fact on pretext].)

Accordingly, all other California appellate courts and the overwhelming weight of federal authority recognize that the extraneous comments Reid contends support his theory that he was terminated because of age discrimination are irrelevant to his claim, and are insufficient to defeat Google's motion for summary judgment. The Sixth District's unprecedented departure from the well-established stray remarks doctrine requires this Court to resolve the conflict that the Opinion has now created.

B. As The Courts of Appeal Are Greatly Divided, This Court Should Grant Review To Provide Clarity And Establish Uniformity Concerning A Party's Burden To Obtain Rulings On Objectionable Evidence And The Effect of Such Evidence On Summary Judgment.

Over one million civil lawsuits are filed in California state courts each year. Summary judgment is a critical tool in winnowing out those cases that are fatally flawed, and thus simply should not go to trial due to

the lack of admissible evidence. The respective judicial functions of the trial courts and Courts of Appeal to establish the admissible evidence in the record for each of the numerous summary judgments that are filed every year is critically important, yet currently subject to significant confusion and discord. Given that the Courts of Appeal have interpreted the impact of trial courts' rulings - or lack thereof – on evidentiary objections in many different ways, this Court should intervene to provide necessary guidance.[3]

The Opinion is the appropriate vehicle to do so, because it presumed that the Superior Court, which issued a *Biljac* ruling and relied "only on competent and admissible evidence," overruled each and every one of Google's objections to evidence, despite Google's efforts to secure rulings on the objections.[4] Operating on that presumption, the Sixth District considered all evidence in the appellate record, no matter how patently

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[3] Several petitions for review have been filed with this Court seeking guidance regarding *Biljac* and *Ann M.*, including a petition from the Third District in *West v. Sundown Little League of Stockton, Inc.*(2002) 96 Cal.App.4th 351, petition for review filed on April 3, 2002, and the Second District, *Sav-On Drug Stores, Inc. v. Superior Court* (2002) 125 Cal.Rptr.2d 439, petition for review filed on May 14, 2002, petition for review granted and judgment reversed by this Court in *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. Although review was granted in *Sav-On*, this Court did not address plaintiffs' *Biljac* issue. See *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319. Until this long-standing procedural morass is resolved, litigants in California, including those in the Second, Third, and Sixth Districts, will have no option but to continue to seek guidance from this Court.

[4] *Biljac* was explained and cited at length by this Court regarding substantive, but not procedural, issues in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 839-42, 860, 865.

inadmissible, rather than remanding to the trial court for a ruling on Google's objections to evidence.

The end result is that, even though Google raised its objections to evidence at every reasonable opportunity and sought rulings on those objections, both in written form and again in oral argument, its evidentiary objections were simply never ruled upon. When presented with these unadjudicated objections, the Court of Appeal conducted no analysis of Google's many substantive objections to Reid's expert's non-probative statistical "evidence," including that it was irrelevant, hearsay, unduly prejudicial, and misleading, in reaching its decision to reverse the Superior Court's Order granting summary judgment. The prejudice to Google caused by this legal fiction is obvious: while this case was once over, the parties are now headed for trial.

Under the California Code of Civil Procedure, to preserve its evidentiary objections at the summary judgment stage, a party must raise its objections to evidence at the hearing or they "shall be deemed waived." (Cal. Civ. Proc. Code § 437c(b)(5).) When a party objects to evidence and the trial court expressly sustains those objections, the Court of Appeal cannot consider the objected-to evidence. (*Guz*, *supra*, 24 Cal.4th at p. 334.) The corollary is also true; if a party either fails to object or objects and the trial court expressly overrules the objection, then such evidence is admissible and must be considered by the Court of Appeal. (*Ibid.*) Here, the focus of inquiry is the nebulous and all-too-common middle ground, where a party raises its evidentiary objections and the trial court, rather than issuing express rulings on those objections, instead states in its opinion that

it disregarded all inadmissible or incompetent evidence. This type of ruling has been commonly referred to as a *Biljac* ruling, based on the First District's decision in *Biljac Assocs. v. First Interstate Bank of Oregon* (1990) 218 Cal.App.3d 1410, 1421 (*Biljac*) (overruled by *Demps v. San Francisco Housing Auth.* (2007) 149 Cal.App.4th 564, 566). *Biljac* and this Court's decisions in *Ann M. v. Pacific Plaza Shopping Ctr.* (1993) 6 Cal.4th 666 (*Ann M.*) and *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181 (*Sharon P.*) have been widely cited for a myriad of judicial solutions to the dilemma caused by a trial court's virtual silence in the face of a party's valid and timely raised evidentiary objections. Far from uniform, California courts' interpretations have resulted in wildly varying effects for litigants, depending on the judicial district in which they bring their claims.

As a brief overview, although no Court of Appeal faced with a trial court's *Biljac* ruling on summary judgment has reversed summary judgment in a published case where the party made efforts to secure rulings on its objections, other than the Sixth District, there is no uniformity of decision among the Courts of Appeal. In fact, varying interpretations are espoused even within several of the Courts of Appeal, including the Sixth District. Though consistently affirming summary judgment when parties have made efforts to secure their evidentiary objections, Courts of Appeal otherwise vary widely in their basic approaches to *Biljac* rulings[5] on summary judgment:

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[5] The term "*Biljac* rulings" refers to both Court of Appeal decisions that specifically referenced *Biljac* by name and those where the trial court's

- **First District.** ***Demps v. San Francisco Housing Auth.*** **(2007) 149 Cal.App.4th 564, 579.** Affirming summary judgment, the Court considered all evidence as though the objections had been waived, but noted that "various courts have recognized exceptions to this general rule of waiver where counsel has expressly requested a ruling on the objections and the trial court has failed to rule," citing to the Third District in *Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642 (*Vineyard*) and the Second District in *City of Long Beach v. Farmers and Merchs. Bank of Long Beach* (2000) 81 Cal.App.4th 780, 782 (*Long Beach*). Exercising judicial restraint, the First District panel refused to opine on such an exception to the waiver rule since it found the moving party continued to be entitled to summary judgment even with all proffered evidence deemed admitted.

- **Second District.** ***City of Long Beach v. Farmers and Merchs. Bank of Long Beach*** **(2000) 81 Cal.App.4th 780, 784.** Affirming summary judgment, the Court concluded that the party's written evidentiary objections were preserved for appellate review and were not waived where defense counsel filed written objections and twice requested rulings, because "there was nothing further defense counsel could be expected to do in terms of seeking rulings on the previously filed evidentiary objections beyond personally raising the issue on two separate occasions in the

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summary judgment opinion noted generally that the court only considered admissible evidence, with no further express rulings.

presence of the trial court. It has been held that issues are preserved for review when it would be fruitless or an idle act for an attorney to object."

- **Third District.** ***Vineyard Springs Estates, LLC v. Superior Court*** **(2004) 120 Cal.App.4th 633, 642-643.** On writ of mandate, the Court held that that "a trial court cannot decide whether a motion should be denied or granted until it has first determined what admissible evidence is in play on the motion" and that by not ruling on evidentiary objections prior to denying summary judgment the "trial court failed in its duty." To correct this inequity, the Court issued a writ "commanding the trial court to vacate its order denying summary judgment, to rule on evidentiary objections, and to reconsider the summary judgment motion in light of its rulings on the evidentiary objections." In a separate and conflicting decision, also affirming summary judgment, the Third District has determined not only that a *Biljac* ruling overrules objections, but that the Court of Appeal cannot consider a party's renewed evidentiary objections on appeal. (See *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736.)

- **Fourth District.** ***Sambrano v. City of San Diego, et al.*** **(2001) 94 Cal.App.4th 225, 235, 241.** Affirming summary judgment for defendant, the Fourth District noted that following the *Ann M.* "waiver" rule would result in admitting evidence that would likely cause reversal of summary judgment for defendant. Instead, "if the *Biljac* theory is accepted, the evidence was not admitted, and summary judgment should be upheld." (*Ibid.*) The Fourth District criticized the *Biljac* approach, in part because it fosters a "legal fiction" that detracts from the trial courts' duty to rule on objections and "[b]ecause it is not the function of an appellate court to

make such evidentiary rulings in the first instance." (Id. at pp. 234-235) Nevertheless, the result of the Fourth District's ruling was that the key evidence at issue was found inadmissible at both the trial court level and on appeal.

- **Fifth District. *Alexander v. Codemasters Group Ltd.* (2002) 104 Cal.App.4th 129, 134.** Reversing summary judgment where counsel for the moving party "did not orally request specific rulings on the [written] evidentiary objections," and the court did not rule on them. The Fifth District approach viewed the trial court's *Biljac* statement as "an implied overruling of any objection not specifically sustained." In short, unless the trial court specifically sustained an objection, the Fifth District assumed the trial court overruled the objection and considered the evidence.

- **Sixth District. *Reid v. Google, Inc.* (2007) 155 Cal.App.4th 1342.** The Sixth District bears the dubious distinction of issuing the only published appellate opinion that has reversed a grant of summary judgment, overruled the moving party's objections, and presumed all evidence admissible, even though the party pursued and requested rulings on its objections. Ironically, the Sixth District has also reached the opposite conclusion, affirming summary judgment and disregarding "incompetent evidence" based on the trial court's *Biljac* ruling, noting simply, "it is presumed on appeal [from a summary judgment] that a judge has not relied on irrelevant or incompetent evidence." (See *Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 864, citation omitted.)

The foregoing brief survey demonstrates the complete lack of uniformity among the appellate districts on this issue, because, faced with

the same scenario of a trial court's failure to issue express rulings and/or reliance on *Biljac*, every District has applied a different standard and has often reached different results.

The lack of clarity and uniformity highlighted by the brief overview above is particularly troubling because of the important role summary judgment serves in litigation, as recognized by this Court. (See *Guz, supra*, 24 Cal.App.4th at p. 383.) The purpose of summary judgment is to dispose of substantively meritless claims and defenses, thus avoiding the significant expenditures of time and resources required for trial for both the court and the party entitled to judgment. (See *Blair v. Pitchess* (1971) 5 Cal.3d 258, 284.) This Court has declared that "the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz, supra*, 24 Cal.4th at p. 383.) This Court further noted that, based on the strength of an employer's showing of legitimate nondiscriminatory reasons for its adverse employment decision, summary judgment may be appropriate where a plaintiff's evidence is "too weak to raise a rational inference that discrimination occurred." (*Id.* at p. 362.)

Evidence is clearly "too weak" when it is inadmissible and thus subject to the opposing party's evidentiary objections. This is particularly true because evidence submitted in opposition to a summary judgment motion "must be decided on admissible evidence." (See *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119; Cal. Civ. Proc. Code § 437c

(c)(d).) Simply put, a trial court "cannot decide whether a [summary judgment] motion should be denied or granted until it has first determined what admissible evidence is in play on the motion." (See *Vineyard, supra,* 120 Cal.App.4th at 642.) For this reason, objections to evidence "are an integral part of the summary judgment process" and "[p]art of the judicial function in assessing the merits of a summary judgment or adjudication motion involves a determination as to what evidence is admissible and that which is not." (See *Long Beach, supra,* 81 Cal.App.4th at 782, 784.)

The Court of Appeal reviews a trial court's ruling on summary judgment de novo. (See *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 235 (*Sambrano*) (citing *Long Beach*, *supra*, 81 Cal.App.4th at pp. 784).) However, de novo review is based on the assumption that the Court of Appeal will receive an undisputed and complete evidentiary record from the trial court, as "[t]rial courts have a duty to rule on evidentiary objections." (*Ibid.*) As the Fourth District noted, "[t]he vice of the *Biljac* approach is that it does not assist [the Court of Appeal] in determining what record below was established, so that we as an appellate court may draw correct legal conclusions from the undisputed record." (*Sambrano, supra,* 94 Cal.App.4th at p. 238.)

In *Biljac*, the First District heard an appeal of a summary judgment decision where "voluminous" evidentiary objections had been filed with the trial court. (See *Biljac, supra,* 218 Cal.App.3d at p. 1421.) In granting summary judgment for defendants, the trial court disregarded "all those portions of the evidence that [he] consider[ed] to be incompetent and inadmissible." (*Id.* at p. 1419, fn. 3.) Affirming the trial court's approach

to evidentiary objections and summary judgment for defendant, the First District held that "being able to identify particular flaws in the lower court's reasoning has no value because . . . summary judgment must be upheld if correct on any ground – regardless of wrong 'reasons' which may have guided the court." (*Ibid.*, citations omitted.)

Biljac has recently been overruled by the First District in *Demps v. San Francisco Housing Auth.* (2007) 149 Cal.App.4th 564 (*Demps*), in which the Court wrote to "'own' that the procedure we approved in *Biljac* . . . was wrong." (*Id.* at p. 566.) *Demps* rejected *Biljac* and held "instead, as dictated by two California Supreme Court cases and consistent with all published, post-*Biljac* Court of Appeal opinions, that a trial judge's failure to rule on properly presented objections results in their being impliedly overruled, the effect of which is that the objected-to evidence is in the record for purposes of appellate review." (*Ibid.*) The *Demps* Court affirmed summary judgment for the defendant in a discrimination and retaliation case, and, in reaching its decision, specifically avoided ruling on the exceptions to this "general rule of waiver," including those based on *Vineyard* and *Long Beach*, described in more detail below. (*Id.* at p. 579.)

Demps based its ruling on its interpretation of two decisions by this Court, *Ann M., supra,* 6 Cal. 4th 666, and *Sharon P., supra,* 21 Cal.4th 1181. Notably, this Court's complete discussion of evidentiary objections and their impact on parties in the summary judgment context in both *Ann M.* and *Sharon P.* is confined to a footnote in each case. Nevertheless, like the face of Helen of Troy that launched a thousand ships, the California Supreme Court's dicta in mere footnotes in *Ann. M.* and *Sharon P.* has

launched countless California court decisions with varying interpretations, none so prejudicial to the moving party as the Sixth District's decision here.

In *Ann M.*, a case in which this Court affirmed summary judgment for the defendant, the discussion relating to treatment of rulings on evidentiary objections was contained in footnote 1, stating in its entirety, "In the trial court, defendants made a series of objections to evidence submitted by Ann M. in opposition to the summary judgment motion. The trial court did not rule on the objections. Because counsel failed to obtain rulings, the objections are waived and are not preserved for appeal." (*Ann M., supra,* 6 Cal.4th at p. 670, fn. 1, citations omitted.) Several years later, *Sharon P.* followed, a case that substantively followed the holding of *Ann M.* and procedurally noted, again in a footnote, that defendant filed objections, but the record contained no rulings on those objections from the trial courts, thus, "[w]e therefore deem the objections waived and view plaintiff's evidence as having been admitted in evidence as part of the record for purposes of the appeal." (*Sharon P., supra,* 21 Cal.4th at p. 1186, fn. 1, citations omitted.) *Ann M.* and *Sharon P.* have been interpreted to mean that the trial court is obligated to rule expressly on all evidentiary objections and, if the court fails to do so, the court's silence on the issue effects a "waiver" of objections, so that the party's objections are not preserved for appellate review. (See e.g. *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, 623-4, fn. 7).

Though *Ann M.* and *Sharon P.* nowhere mention the party's efforts to secure objections, as discussed above, several California Courts of Appeal have blindly applied the "waiver" principle without consideration

of the varying circumstances before them, either waiving or over-ruling objections as a result. (See e.g., id.) *Ann M.* and *Sharon P.* are readily distinguishable from the present case because, as noted by the Second District in *Long Beach,* "[i]n *Sharon P.* and *Ann M.*, there was no indication that any effort was made [by the party] to secure a ruling on the evidentiary objections posited in the trial court." (*Long Beach, supra,* 81 Cal.App.4th at p. 784.)

Waiver is defined as the "*intentional* relinquishment of a known right." (*Henderson v. Drake* (1953) 42 Cal.2d 1, 5, emphasis in original.) A party that has properly filed its objections and made every effort to secure rulings on those objections has not knowingly waived any right. Moreover, *Ann M.* and *Sharon P.* are "merely the application of the trial rule concerning waiver of evidentiary objections in the law and motion context." (*Long Beach, supra*, 81 Cal.App.4th at p. 784.) The Courts of Appeal finding "waiver" under these circumstances also fail to take into account the different procedural considerations at trial versus at the summary judgment stage. During trial, any objections made by a party are made in the presence of the judge, during live testimony. Once a party objects, the questioning of the witness typically stops until the court either sustains or overrules the objection. In the immediacy of the live courtroom environment, waiver of an objection based on the trial court's silence may have some support. In the context of summary judgment, as opposed to live trial testimony, a party can do no more than state its objections, in written or oral form, and request that the court rule on them. In short, to

prejudice an objecting party by finding waiver on summary judgment based on inactions of the court that a party cannot control, is simply unjust.[6]

The Second District supports this view. In *Long Beach*, the Court affirmed summary judgment for the plaintiff. Defense counsel filed written objections and requested that the trial court rule on the objections on two separate occasions before the trial court. (*Long Beach, supra,* 81 Cal.App.4th at p. 782.) The Court discussed the waiver rule established by *Ann M.* and *Sharon P.*, noting that "[b]eginning in 1872 . . . , the California Supreme Court has consistently held that when a judge fails to rule on evidentiary objections during a trial, they are deemed waived." (*Id.* at p. 784.) The Court distinguished the situation before it, however, because "[i]n *Sharon P.* and *Ann M.*, there was no indication that any effort was made to secure a ruling on the evidentiary objections posited in the trial court." (*Ibid.*) Rather than consider the objections waived and admit all

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[6] As one Court of Appeal jurist has lamented: "When objections are made to evidence offered in support of or in opposition to a motion for summary judgment, the objector must yell and scream and stamp his feet, or do whatever else it takes to force the trial court to rule on those objections. If he doesn't, his objections are waived . . . I dissent . . . based on my belief that lawyers ought not to be put in the position of haranguing the very judges whose favorable rulings they seek. Judges know they are supposed to rule on evidentiary objections, and those who fail to do so may frown upon the lawyer who presumes to tell the court how to do its job, placing the lawyer in the unenviable position known in chess as 'Zugzwang,' where a player is obliged to move but cannot do so without disadvantage." (*Gallant v. City of Carson* (2005) 128 Cal.App.4th 705, 714-715 (J. Vogel dissenting).)

evidence, the Court instead focused on the party's efforts in securing a ruling on objections:

> Frankly, in this case, there was nothing further defense counsel could be expected to do in terms of seeking rulings on the previously filed evidentiary objections beyond personally raising the issue on two separate occasions in the presence of the trial court. It has been held that issues are preserved for review when it would be fruitless or an idle act for an attorney to object.
>
> (*Id.* at p. 784, citations omitted.)

The Court concluded that "the written evidentiary objections have been preserved for appellate review" in their entirety. (*Id.*)

In *Sambrano*, the Fourth District affirmed summary judgment for defendant, who objected to the admission of a key piece of evidence on the basis that it was hearsay, irrelevant, and lacked foundation. In granting summary judgment to defendant, the trial court declined to rule on defendant's evidentiary objections, relying instead on *Biljac* and stating that it relied on competent and admissible evidence. The Court of Appeal carefully considered the impact of the *Biljac* ruling, stating, in part:

> . . . [T]he Record does not indicate whether any consideration was given to either the evidence or the objection. Under the *Biljac, supra,* 218 Cal.App.3d 1410 approach, we would deem a proper ruling was made, but what was it? Under *Ann M. v. Pacific Shopping Center, supra*, 6 Cal.4th 666, we would consider the evidence to be deemed admitted to the record on appeal, absent a ruling otherwise on the objections. Under *Long Beach, supra*, 81 Cal.App.4th 780, we could consider the objection preserved for appellate review, if it was pursued energetically enough (although it was not here).

(*Sambrano, supra,* 94 Cal.App.4th at p. 237.)

The Fourth District noted that following *Ann M.* would result in admitting the evidence and likely reversal of summary judgment for defendant. (*Id.* at p. 241.) However, "if the *Biljac* theory is accepted, the

evidence was not admitted, and summary judgment should be upheld. We believe that is the only appropriate approach on this record." (*Ibid.*, emphasis added.) Thus, while criticizing the *Biljac* approach as fostering an inappropriate "legal fiction" and placing evidentiary duties on the Courts of Appeal better left to the trial courts, the *Sambrano* Court specifically disregarded evidence based on its inadmissibility, although the trial court relied entirely on *Biljac* and stated only that it relied on admissible evidence in reaching its determination. (*Id.* at p. 234, 241.)

Finally, in *Vineyard*, defense counsel filed written objections to evidence and objected orally at the hearing. The court failed to provide express rulings on the objections. The Court noted that, "[W]hen a trial court fails to rule on summary judgment evidentiary objections, the objections are ordinarily deemed waived on appeal, and the appellate court will consider the objected to evidence in reviewing the ruling on the motion." (*Id.* at pp. 642-643.) The Court characterized this result as "a bitter pill for a party who has tendered valid objections." (*Id.* at p 643.) On a writ of mandate, the Court found that defendant had "no plain speedy and adequate remedy; it is headed for trial." Accordingly, the Court issued "a writ commanding the trial court to vacate its order denying summary judgment, to rule on all evidentiary objections, and to reconsider the summary judgment motion in light of its rulings on the evidentiary objections." (*Ibid.*)

Given the foregoing, the lack of uniformity among the Courts of Appeal on this important procedural question is manifest. The reality is that trial courts have not consistently performed the critical judicial

function of expressly ruling on evidentiary objections, leaving Courts of Appeal without proper guidance and parties without appropriate remedy. Culling the lessons of these cases to their essence the question Google urges this Court to consider is the appropriate treatment of a party's objections to evidence, including the admissibility of that evidence, when the party vigorously pursues its objections, but the "judicial function" of assessing the admissibility of the evidence and ruling on the party's objections is not fulfilled. Under this scenario, the Sixth District stands alone in its published reversal of a trial court's order of summary judgment and creation of a presumption of admissibility, where Google made every effort to secure rulings on the objections.

The Sixth District admits that "[w]hile it is true that a trial court enjoys varying amounts of discretion in making some types of evidentiary rulings, many such rulings are not discretionary in the slightest. No court has discretion to admit hearsay evidence, or expert opinion by unqualified witness, or testimony manifestly lacking any foundation in personal knowledge, over proper objection." (Opinion at p. 1358.) Ironically, despite the Sixth District's recognition of these fundamental evidentiary principles, the panel considered evidence consisting entirely of stray remarks and non-probative statistical evidence, despite the fact that the Superior Court already considered the admissibility of that evidence in reaching its determination to grant Google's motion and dismiss the case.

The panel premised its decision, in part, on its unique view that, "all reasonable doubts about the admissibility of evidence, like doubts on other aspects of the motion, must be resolved in favor of the party opposing

summary judgment." (*Id.* at p. 1358.) Such a pronouncement confuses a critical analytical requirement of summary judgment —the marshalling of all *admissible* evidence—with the general principle that the existence of disputed facts may preclude a finding of summary judgment. (See *Dina v. People ex rel Dep't of Transp.* (2007) 151 Cal.App.4th 1029, 1048 ["Thus, while we must view the evidence in the light most favorable to appellants, we must necessarily limit our review to only the admissible evidence offered by appellants."] (citation omitted); *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 159 [affirming summary judgment and holding that "[i]n determining whether the parties have met their respective burdens, the court considers all admissible evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motion."].) The ramifications of the Court's alteration of the summary judgment process cannot be underestimated. Contrary to the Sixth Circuit's attempted creation of a rule of "reasonable doubt", evidence is either admissible or it is not, under the well-established rules of evidence. Courts should be permitted to continue to rule on summary judgment motions based on admissible evidence alone, not on a new gray area of "doubt" as described in the Opinion.

Furthermore, the Court of Appeal characterized Google's arguments regarding Reid's expert (Matloff) declaration as follows: "Google challenges the statistical evidence offered by Reid on numerous grounds, including Matloff's methodology and sample sizes analyzed." (*Reid, supra*, 155 Cal.App.4th at p. 1355.) The Court thus barely references Google's eight pages of written objections specifically objecting to each of the relevant portions of Matloff's declaration, on the grounds that his "evidence" presented was inadmissible because it was irrelevant, hearsay, not the best evidence, unduly prejudicial, misleading and impermissibly vague, conclusory, lacked foundation, and was improper opinion testimony.

Nevertheless, rather than consider the Superior Court's determinations of Google's objections, the Court of Appeal simply leapt to the conclusion that because it found that no "waiver" existed and preserved Google's objections for appellate review, "we may consider the issue of the admissibility of the statistical evidence on appeal." (*Reid, supra,* 155 Cal.App.4th at p. 1358.) The sum total of this admissibility "analysis" falls within the next immediate sentence, "Statistical evidence is clearly admissible in this case." (*Id.* at p. 1358.) In so finding, the Court of Appeal simply ignores Google's valid objections to Matloff's declaration, which contain the non-probative statistical regression analyses at issue.

In fact, the Court of Appeal makes light of Google's substantive arguments, relating to the statistical evidence, claiming that "Google does

little more than lob attacks at the evidence with nothing to substantiate its assertions." (*Id.* at p. 1359.) The Court went on to state, "[i]mportantly, *Google does not offer conflicting expert testimony to dispute Reid's statistical findings*; rather, Google's counsel offers arguments about why the findings are not sound." (*Id.* at pp. 1358-1359.) Such a comment is troubling given that, before Google can be faulted for not offering its own expert opinion to counter Reid's, the courts must be required to fulfill their assigned duties and evaluate whether any admissible expert testimony is left for Google to counter. Ironically, offering conflicting expert testimony is more likely to create material issues of disputed facts.

Thus, under *Reid*, the penalty to litigants for failing to hire an expert to rebut expert testimony on statistics of dubious evidentiary admissibility may be reversal of the trial court's grant of summary judgment. Given that summary judgment cannot be granted when disputed issues of material fact exist, and the time-honored principle that opposing parties' experts generally reach opposite conclusions about the material facts at issue, the logical result of the Court of Appeal's decision for litigants in the Sixth District is that summary judgment will rarely, if ever, be granted in a case where expert statistical testimony is involved.

Given the Sixth District's after-the-fact "presumption" that <u>all</u> evidence was considered in this case, and given that Google was nonetheless successful in its dispositive motion, the Court of Appeals deprived Google of its opportunity to squarely appeal issues of admissibility. The Sixth District's decision has far-reaching implications for all civil lawsuits filed in California state courts because of its impact on

fundamental principles of summary judgment and essential concepts of the rules of evidence. This erroneous and precedential decision has further significant effects in fundamentally altering the landscape for the use of statistics in employment discrimination cases, as the Opinion's broad-brush ruling and low threshold for the admissibility of statistics may result in a significant number of additional cases going to trial. To provide clarity and uniformity to the Courts of Appeal, Google respectfully urges this Court to grant review and resolve these important questions.

V.

CONCLUSION

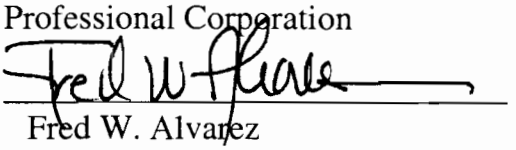
For the reasons set forth above, Google respectfully requests that this Court grant its Petition for Review and that the verdict of the Superior Court be affirmed or, in the alternative, that the case be remanded to the

Superior Court for express rulings on Google's objections to evidence and on Google's motion for summary judgment.

DATED: December 11, 2007

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation



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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court Rule 8.504(d)(1)

The text of this brief consists of 8,307 words (including footnotes), as counted by the Microsoft Word 2003 word-processing program used to generate it.

Respectfully submitted,

Dated: December 11, 2007

By: _____
Fred W. Alvarez

APPENDIX A

HReid v. Google, Inc.
Cal.App. 6 Dist.,2007.

Court of Appeal, Sixth District, California.
Brian **REID**, Plaintiff and Appellant,
v.
GOOGLE, INC., Defendant and Respondent.
No. H029602.

Oct. 4, 2007.
As Modified Nov. 1, 2007.

Background: Employee who was terminated at age 54 brought action against employer alleging unfair business practices under California's Unfair Competition Law (UCL) based on discriminatory hiring practices, disparate treatment under California's Fair Employment and Housing Act (FEHA), wrongful termination, failure to prevent discrimination, and emotional distress. The Superior Court, Santa Clara County, No. CV023646,William J. Elfving, J., struck employee's UCL claims and granted employer summary judgment on other claims. Employee appealed.

Holdings: The Court of Appeal, Rushing, P.J., held that:

(1) UCL standing provision applied retroactively to bar employee's UCL claims;

(2) employee had no ownership interest in unvested stock options that allowed him to seek restitution under UCL;

(3) fact issue remained, precluding summary judgment, whether employer's stated nondiscriminatory reason for termination was pretext;

(4) failure to obtain express ruling did not constitute forfeiture of evidentiary objections; and

(5) employer was not entitled to inference against discrimination.

Affirmed in part and reversed in part.
West Headnotes
[1] Antitrust and Trade Regulation 29T ⚿130

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk126 Constitutional and Statutory Provisions
29Tk130 k. Retroactive Operation. Most Cited Cases
Proposition 64, which changed Unfair Competition Law (UCL) provisions to prohibit attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact by alleged practice, applied retroactively to bar UCL claims of employer's alleged discriminatory hiring and promotional practices by terminated employee who was hired only time he applied, who never applied for promotion, and who spoke of securing another position only when he was terminated. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[2] Antitrust and Trade Regulation 29T ⚿389(2)

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages
29Tk389 Grounds and Subjects
29Tk389(2) k. Particular Cases. Most Cited Cases
Terminated employee had no ownership interest in unvested stock options that allowed him to seek restitution from employer under unfair competition law (UCL); employee had at most expectancy interest. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[3] Antitrust and Trade Regulation 29T ⚿389(1)

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages

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29Tk389 Grounds and Subjects
29Tk389(1) k. In General. Most Cited Cases
While restitution is available under the unfair competition law (UCL) without individualized proof of the impact, the UCL does not contemplate recovery for individuals who were not in some way deprived of money or property by means of defendant's unfair competition. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[4] Antitrust and Trade Regulation 29T 389(1)

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages
29Tk389 Grounds and Subjects
29Tk389(1) k. In General. Most Cited Cases
Under the unfair competition law (UCL), a defendant may be compelled to return money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

[5] Civil Rights 78 1744

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1744 k. Employment Practices. Most Cited Cases
Courts employ three-prong test to resolve employment discrimination claims, including age discrimination: first, employee must establish prima facie case of discrimination, once employee satisfies this burden there is presumption of discrimination and burden shifts to employer to show that its action was motivated by legitimate nondiscriminatory reasons, and if employer meets this burden, employee must show that employer's reasons are pretexts for discrimination or produce other evidence of intentional discrimination. West's Ann.Cal.Gov.Code § 12940.

[6] Civil Rights 78 1118

78 Civil Rights
78II Employment Practices
78k1118 k. Practices Prohibited or Required in General; Elements. Most Cited Cases
To establish prima facie case of employment discrimination, employee must establish: (1) he was a member of protected class, (2) he was qualified for position he sought or was performing competently in position he held, (3) he suffered adverse employment action, such as termination, demotion, or denial of available job, and (4) some other circumstance suggests discriminatory motive. West's Ann.Cal.Gov.Code § 12940.

[7] Civil Rights 78 1118

78 Civil Rights
78II Employment Practices
78k1118 k. Practices Prohibited or Required in General; Elements. Most Cited Cases
An employer's reason for its allegedly discriminatory conduct is "legitimate," so as to rebut an employee's prima facie case of discrimination, if it is facially unrelated to a prohibited bias, and which if true, would preclude a finding of discrimination. West's Ann.Cal.Gov.Code § 12940.

[8] Civil Rights 78 1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases
In the employment discrimination context, a finding of the employer's discriminatory motive may be reached without ever finding that the cited employer's reason for its conduct was "pretextual," because the ultimate issue is what really happened, not whether one of the parties is lying about it. West's Ann.Cal.Gov.Code § 12940.

[9] Judgment 228 185.3(13)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) k. Labor and Employment. Most Cited Cases
When an employer brings a motion for summary judgment in an age discrimination case, and the

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employer presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment, unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing. West's Ann.Cal.Gov.Code § 12940.

[10] Judgment 228 185.3(13)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) k. Labor and Employment. Most Cited Cases
Once the employer in an employment discrimination case meets its burden in the summary judgment motion by showing a legitimate reason for its conduct, the employee must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action. West's Ann.Cal.Gov.Code § 12940.

[11] Judgment 228 185.3(13)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) k. Labor and Employment. Most Cited Cases
Fact issue remained, precluding summary judgment in 54-year-old terminated employee's age discrimination action, whether employer's stated nondiscriminatory reason for termination, elimination of employee's program, was pretext; employee introduced statistical evidence showing correlation between increased age and negative performance reviews that was not contradicted by conflicting evidence, evidence of ageist remarks directed at him and employer's overall youthful atmosphere, evidence of his demotion to head of program that was eliminated shortly thereafter, and evidence that employer changed rationales for termination of employee. West's Ann.Cal.Gov.Code § 12940.
See 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 932 et seq.; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2006) ¶ 8:215 et seq. (CAEMPL Ch. 8-A); Cal. Jur. 3d, Labor, § 68; Cal. Civil Practice (Thomson/West 2003) Employment Litigation, § 2;37 et seq.

[12] Civil Rights 78 1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases
In employment discrimination cases, the issue of pretext for the employer's stated justification for its conduct does not address the correctness or desirability of reasons offered for employment decisions; rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. West's Ann.Cal.Gov.Code § 12940.

[13] Civil Rights 78 1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases
In employment discrimination actions, employee's obligation to rebut employer's stated legitimate reasons for its conduct with showing that reasons are pretexts for discrimination is not satisfied where employee simply shows employer's decision was wrong, mistaken, or unwise. West's Ann.Cal.Gov.Code § 12940.

[14] Civil Rights 78 1137

78 Civil Rights
78II Employment Practices
78k1137 k. Motive or Intent; Pretext. Most Cited Cases
To rebut employer's stated legitimate reasons for its conduct with showing that reasons are pretexts for discrimination, employee must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in employer's proffered legitimate reasons for its action that reasonable factfinder could rationally find them unworthy of credence, and hence infer that employer did not act for asserted nondiscriminatory reasons.

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West's Ann.Cal.Gov.Code § 12940.

[15] Appeal and Error 30 ⚿242(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
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30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k934 Judgment
30k934(1) k. In General. Most Cited Cases
In the absence of express rulings by the trial court on objections to evidence in the summary judgment context, the reviewing court presumes either that the trial court ruled correctly on evidentiary objections, or that the court overruled all objections it did not expressly sustain. West's Ann.Cal.C.C.P. § 437c.

[16] Appeal and Error 30 ⚿242(2)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k242 Necessity of Ruling on Objection or Motion
30k242(2) k. Rulings on Motions. Most Cited Cases
A party objecting to evidence in the context of a summary judgment motion need not obtain an express ruling from the trial court to preserve the issue for appeal. West's Ann.Cal.C.C.P. § 437c.

[17] Judgment 228 ⚿185.3(13)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) k. Labor and Employment. Most Cited Cases
Employee's statistical evidence regarding employer's practices was admissible, in hearing on employer's summary judgment motion in employee's age discrimination suit, to show that the employer's challenged action was consistent with a pattern of discrimination; such evidence was relevant if it demonstrated disparity in treatment and could eliminate any nondiscriminatory explanations for disparity. West's Ann.Cal.Gov.Code § 12940.

[18] Judgment 228 ⚿185.3(13)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) k. Labor and Employment. Most Cited Cases
In employment discrimination cases, a single, isolated discriminatory comment or comments that are unrelated to the decisional process are not necessarily insufficient to avoid summary judgment in favor of the employer; such judgments must be made on a case-by-case basis in light of the entire record. West's Ann.Cal.Gov.Code § 12940.

[19] Judgment 228 ⚿185.3(13)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(13) k. Labor and Employment. Most Cited Cases
Evidence that an employer's reasons for terminating an employee have altered over time provides strong grounds for opposing summary judgment in favor of the employer in the employee's discrimination action. West's Ann.Cal.Gov.Code § 12940.

[20] Civil Rights 78 ⚿1744

78 Civil Rights
78V State and Local Remedies
78k1742 Evidence
78k1744 k. Employment Practices. Most Cited Cases
Conflicting evidence whether engineering vice

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president, who was over 50, was solely responsible for termination of 54-year-old employee precluded employer's entitlement to inference against age discrimination. West's Ann.Cal.Gov.Code § 12940.

****747**Duane Morris, Barry L. Bunshoft, Ray L. Wong, Paul J. Killion, Lorraine P. Ocheltree, Eden Anderson, San Francisco, for Plaintiff and Appellant Brian Reid.
Wilson Sonsini Goodrich & Rosati, Fred W. Alvarez, Marina C. Tstalis, Gary M. Gansle, Marvin Dunson III, Palo Alto, Attorneys for Defendant and Respondent Google, Inc.
RUSHING, P.J.
***1346** Plaintiff Brian Reid was employed by defendant Google, Inc. (Google) from June ****748** 2002 until April 2004 when Reid was terminated. Reid was 54 at the time. Following his termination, Reid filed a lawsuit against Google for unfair business practices under California's Unfair Competition Law (UCL) (Bus. & Prof.Code, § 17200 et seq.), based on Google's alleged discriminatory hiring practices. Reid also asserts causes of action for disparate treatment under California's Fair Employment and Housing Act (FEHA) (Gov.Code, § 12900 et seq.), wrongful termination, failure to prevent discrimination, and emotional distress.

On Google's motion, the trial court struck Reid's UCL claims based on the provisions of Proposition 64. In addition, the court granted Google's motion for summary judgment as to the remaining claims.

On appeal, Reid asserts the trial court erred in striking his allegations of unlawful hiring and promotion claims from his complaint, and in granting Google's motion for summary judgment as to the remaining causes of action in his complaint.

STATEMENT OF THE FACTS AND CASE

Reid, age 52 at the time, was hired by Google in June 2002 as Director of Operations and Director of Engineering. Reid is a PhD. in Computer Science and a former Associate Professor in Electrical Engineering at Stanford University.

The other high level employees with whom Reid dealt while at Google were CEO (Chief Executive Officer) Eric Schmidt, age 47, Vice President of Engineering Wayne Rosing, age 55, Urs Hoelzle, age 38, and founders Sergey Brin, age 28, and Larry Page, age 29. Rosing made the decision to hire Reid, and Reid reported to Rosing, and Hoelzle at times throughout his employment at Google.

In Reid's only written performance review while employed at Google, Rosing described Reid as having "an extraordinarily broad range of knowledge concerning Operations, Engineering in general and an aptitude and orientation towards operational and IT issues," he "project[s] confidence when dealing with fast changing situations,""has an excellent attitude about what 'OPS' and 'Support' mean," is "very intelligent," "creative," "a problem solver," and that the "vast majority of Ops run great." Reid was given a performance rating indicating he "consistently [met] expectations." From February 2003 to February 2004, Reid received bonuses including 12,750 stock options.

***1347** Reid's performance review also contained the following statement by Rosing: "Adapting to the Google culture is the primary task for the first year here.... [¶] ... [¶] Right or wrong, Google is simply different: Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." When Reid was later terminated, he was told by Rosing that he was not a "cultural fit."

While Reid was employed at Google, he was subject to age-related derogatory comments by employees. For example, Hoelzle told Reid his opinions and ideas were "obsolete," and "too old to matter." Hoelzle told Reid he was "slow," "fuzzy," "sluggish," "lethargic," did not "display a sense of urgency," and "lack[ed] energy." Hoelzle made age related comments to Reid "every few weeks...."

Reid was also subject to derogatory comments from colleagues within the organization, who referred to Reid as an "old man," an "old guy," an "old fuddy-duddy." They told him his knowledge was ancient, and joked that the CD jewel case office placard should be an "LP" instead of a "CD."

On October 13, 2004, Rosing removed Reid from the Director of Operations position****749** and removed his responsibilities and reports as Director of Engineering. Rosing's decision to move Reid into the position and remove the Director of Operations was instigated by Hoelzle. Although Reid was permitted

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to retain his title as Director of Engineering, Reid was moved into a new role at Google to develop and implement a new program aimed at retaining engineers by enabling them to obtain a Master's Degree in Engineering by attending courses taught by Carnegie Melon University Professors at Google. CEO Schmidt assured Reid that the graduate degree program was important and that the work on it would require another five years. Reid was not given a budget or a staff to support the graduate program.

When Reid was moved into the graduate program, Hoelzle, 15 years younger than Reid, took over his responsibilities as Director of Operations, and Douglas Merrill, 20 years younger than Reid, assumed Reid's other duties.

In January 2004, Brin, Page, Rosing and Hoelzle made a collective decision to pay Reid a zero bonus for his work done in 2003. Meanwhile, Schmidt sent an e-mail to Rosing asking for "a proposal from [him] ... on getting [Reid] out...." In Rosing's response to Schmidt, Rosing expressed concern about the group's decision regarding Reid's bonus, stating he was "having second thoughts about the full zero out of the $14K bonus [versus] treating it consistent with all similarly situated performers." Rosing instead determined ***1348** that Reid should receive a bonus of $11,300, in addition to some other suggested terms of a severance agreement, to avoid a "judge concluding we acted harshly...."

On February 13, 2004, Rosing met with Reid and told him he was not a "cultural fit," and there was no longer a place for him in the Engineering Department. Reid asked Rosing who made the decision to terminate him, and specifically asked if Larry Page made the decision and Rosing nodded in a manner indicating a "yes." Rosing encouraged Reid to apply for positions with other departments. Google maintains that Rosing told Reid that the in-house graduate program was being eliminated, and that was the reason for his termination. However, Reid disputes this, and maintains that he was not told any reason for his termination other than lack of "cultural fit," and he believed the graduate program would continue.

E-mails among various employees of Google show that there was no intention of hiring Reid in another department after he was removed from engineering. Shona Brown, Vice President of Business Operations wrote: "you should make sure I am appropriately prepped. My line at the moment is that there is no role for him in the HR organization." She later wrote: "we should probably get me clear on this before tomorrow." HR Director Sullivan sent an email to Rosing and Brown stating, "Seems [Reid's] first interest is to continue his work on the college programs he's been working on. He'll explore that option first with both of you." Sullivan continued: "I propose [Brown] ... meets with [Reid] this Tues. and lets him know there's no role [for him] in her org ... I've talked with [Chief Financial Officer (CFO) George] Reyes live, he will not have an option for Brian ... this is The Company Decision." Sullivan also wrote: "We'll all agree on the job elimination angle...."

Ten days after he was terminated from engineering, Reid met with CFO George Reyes, who told him there was no position in his department. Reid then met with Brown, who also stated there were no positions for him in her department, and told him there were no openings for Reid ***750** because he was not a "cultural fit" at Google.

Reid turned in his access card on February 27, 2004, and no longer returned to Google. Pursuant to a severance package, Reid was paid salary and health benefits, and his stock options continued to vest until April 20, 2004.

Reid filed suit against Google on July 24, 2004. The original complaint alleged 10 causes of action. Reid subsequently filed an amended complaint alleging two additional causes of action. The causes of action were (1) UCL ***1349** violations related to Google's discrimination based on age; (2) age discrimination under FEHA; (3) disability discrimination under FEHA; (4) wrongful termination in violation of public policy; (5) failure to prevent discrimination; (6) negligent infliction of emotional distress; (7) intentional infliction of emotional distress; (8) fraud in the inducement; (9) violation of California Labor Code section 201; (10) violation of the California Labor Code section 203; (11) breach of an implied contract for long term employment and payment of a guaranteed bonus amount; and (12) breach of the implied covenant of good faith and fair dealing. Reid sought injunctive relief, disgorgement of profits, restitution of lost stock options, and attorney fees and costs.

Google demurred to Reid's sixth, eighth, eleventh and twelfth causes of action, and filed a motion to strike

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certain allegations related to Reid's UCL and breach of implied contract claims. The trial court sustained the demurrer to Reid's eighth causes of action for fraud in the inducement. The court granted Google's motion to strike the allegations regarding implied contract for long term employment, and the allegations regarding Google's discriminatory hiring and promotion practices. The court also struck Reid's prayer for relief to recover lost stock options as restitution under the UCL.

Google then filed a motion for summary judgment as to the remaining claims, and the trial court granted the motion. Judgment was entered, and Reid filed a timely notice of appeal.

With regard to the summary judgment, Reid appeals the order granting judgment as to the UCL claims in the first cause of action; disparate treatment and impact claims in the second cause of action; wrongful termination in violation of public policy in the fourth cause of action; failure to prevent discrimination in the fifth cause of action; negligent infliction of emotional distress in the sixth cause of action; and intentional infliction of emotional distress in the seventh cause of action.

DISCUSSION

Reid appeals (1) the order striking the unlawful and unfair hiring and promotion practices allegations from his UCL claim in the fist cause of action, and this UCL prayer for restitution of lost stock options; (2) the trial court's order denying discovery of Google applicant data; and (3) the order granting summary judgment as to the first, second, fourth, fifth, sixth, and seventh causes of action.

Motion to Strike Reid's UCL Claims Related to Hiring and Promotion

[1] On appeal, Reid asserts the trial court erred by applying the provisions of Proposition 64 retroactively, and striking the UCL claims related to unfair hiring and promotion from his complaint.

***1350** Proposition 64 was passed by the voters of California in 2004, and changed the UCL provisions to prohibit attorneys "from filing lawsuits for unfair competition where they have no client who has been injured in fact" by the alleged practice.

****751** Reid's lawsuit in this case was filed before Proposition 64 was passed. Google filed a motion to strike the UCL provisions of Reid's complaint using Proposition 64 as support, and asserting the Reid was not harmed by Google's hiring practices, because he was never hired and did not seek a promotion by Google. The trial court granted the motion, and struck the unfair hiring and promotion claims under the UCL from Reid's complaint.

At the time this case was filed in our court, the California Supreme Court was considering the issue of whether Proposition 64 could be applied to cases currently pending. On July 24, 2006, the Supreme Court answered that question in the affirmative. (See *Californians for Disability Rights v. Mervyn's, LLC*, (2006) 39 Cal.4th 223, 46 Cal.Rptr.3d 57, 138 P.3d 207.)

We review the trial court's grant of Google's motion to strike under the deferential abuse of discretion standard. (*Tostevin v. Douglas* (1958) 160 Cal.App.2d 321, 331, 325 P.2d 130.) Here, Reid suffered no injury by Google's hiring and promotion practices. By Reid's own admission, he was hired by Google the only time he ever applied for employment. The basis of his claim, that Reid spoke with some Vice Presidents at Google about securing another position at Google when he was terminated does not qualify as a rejected application for employment. (See, e.g., *Ibarbia v. Regents of University of California* (1987) 191 Cal.App.3d 1318, 1328, 237 Cal.Rptr. 92.) In addition, Reid never applied for a promotion at Google. We find the trial court did not abuse its discretion in granting Google's motion to strike the unfair hiring and promotion claims under the UCL in Reid's complaint.

Because Reid did not suffer any injury as a result of Google's hiring or promotion practices, he lacks standing to assert these claims under the UCL. As such, the trial court did not abuse its discretion in granting Google's motion to strike the UCL claims related to hiring and promotion.[FN1]

> FN1. Because we deem the motion to strike the hiring and promotion allegations in Reid's UCL claim properly granted in this case, we need not consider Reid's additional arguments that the trial court erred by denying his motion to compel discovery of Google's hiring practice data. (See Reid's opening brief at page 20: "If this Court

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reverses the trial court's motion to strike Reid's UCL claim, Reid raises an additional claim of error relating to discovery.")

**1351 Motion to Strike Prayer for Restitution Under the UCL*

[2] Reid asserts the trial court erred in striking his prayer for restitution under the UCL, and specifically asserts he should have the right to seek the unvested stock options that he had at the time of his termination from Google.

[3][4] As to the causes of action under the unfair competition law, while restitution is available under the UCL without individualized proof of the impact, the law does not contemplate recovery for individuals who were not in some way deprived of money or property by means of defendant's unfair competition. (See *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1148, 131 Cal.Rptr.2d 29, 63 P.3d 937(*Korea Supply Co.*);*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 126-127, 96 Cal.Rptr.2d 485, 999 P.2d 718(*Kraus*).) Specifically, a defendant may be compelled to return "money obtained through an unfair business practice to those persons in interest from whom the property was taken, that is, to persons who had an ownership interest in the property...."(*Kraus, supra,* 23 Cal.4th at pp. 126-127, 96 Cal.Rptr.2d 485, 999 P.2d 718.)

****752** Reid seeks return of unvested stock options from the time he was terminated. However, unvested stock options are not owned by the option holder. In *In re Marriage of Walker* (1989) 216 Cal.App.3d 644, 647, 265 Cal.Rptr. 32, the court noted that when an at-will employee (like Reid) is terminated prior to vesting, his stock options are subject to forfeiture, because the options are only earned after they have vested.

Here, Reid's stock options were not earned at the time of his termination, because they had not yet vested. Reid at most had an expectancy interest in the options, however, such interest does not constitute ownership for the purpose of restitution. (See, e.g., *Korea Supply Co., supra,* 29 Cal.4th at pp. 1149-1150, 131 Cal.Rptr.2d 29, 63 P.3d 937.)

We are not persuaded by Reid's reliance on *In re Marriage of Hug* (1984) 154 Cal.App.3d 780, 201 Cal.Rptr. 676(*Hug*) for the premise that in some circumstances unvested stock options are owned by the optionee. *Hug* is inapplicable here, because its holding was specifically limited to marital dissolution actions in which a spouse had unvested stock options at the time of dissolution. The *Hug* court held that because some of the time needed to vest the options passed during the marriage, and the husband was still employed with the company and had an expectation of vesting at the time of dissolution, fairness required that the wife share in the interest of the options. (*Id.* at p. 790, 201 Cal.Rptr. 676.)

***1352** Because an ownership interest is required in order to seek restitution under the UCL, and Reid had no ownership interest in his unvested stock options, the trial court was correct in striking the claim for restitution under the UCL.

Age Discrimination Claims

[5][6][7] The FEHA prohibits an employer from discriminating on the basis of age. (Gov.Code, § 12940.) In California, courts employ the three-prong test that was established in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668(*McDonnell Douglas*) to resolve discrimination claims, including age discrimination. (*Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 354, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) First, the employee must establish a prima facie case of discrimination. (*Id.* at p. 354, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) The employee " ' "must at least show actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion.' " ' " (*Id.* at p. 355, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) Thus the employee must establish: "(1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (*Ibid.*) Once the employee satisfies this burden, there is a presumption of discrimination, and the burden then shifts to the employer to show that its action was motivated by legitimate, nondiscriminatory reasons. (*Id.* at pp. 355-356, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) A reason is " 'legitimate' " if it is "*facially unrelated to a prohibited bias,* and which if true, would preclude a finding of *discrimination.*" (*Id.* at p. 358, 100 Cal.Rptr.2d 352, 8 P.3d 1089.) If the

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employer meets this burden, the employee then must show that the employer's reasons are pretexts for discrimination, or produce other evidence of intentional discrimination. (*Id.* at p. 356, 100 Cal.Rptr.2d 352, 8 P.3d 1089.)

****753** Although the three part test for pretext stated above appears to be the law in discrimination cases, as we said in *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 16 Cal.Rptr.3d 717(*Reeves*), the "frequent misconstruction" of the *McDonnell Douglas* decision has "led too many courts to replace basic principles of procedure, evidence, and logic with elaborate and essentially arbitrary obstacles to relief." (*Id.* at p. 111, fn. 11, 16 Cal.Rptr.3d 717.) "Foremost among these is the notion, which pervades innumerable decisions, that on summary judgment in a case of this kind, the 'ultimate issue' is 'pretext.' " (*Ibid.*, quoting *Hugley v. Art Institute of Chicago* (N.D.Ill.1998) 3 F.Supp.2d 900, 906, fn. 7.)

[8]***1353** In the employment context, a finding of discriminatory motive may be reached without ever finding that the cited reason was " pretextual," because the "ultimate issue" is *what really happened,* not whether one of the parties is lying about it. If an employer offers an innocent reason for his actions and there is no evidence to the contrary, then he is entitled to summary judgment. But if there *is* evidence to the contrary, the question of pretext is at best incidental; the issue is whether his conduct was in fact motivated entirely by the stated reason or whether discriminatory animus was a but-for cause of that conduct.

Summary Judgment in Age Discrimination Cases

[9][10] When an employer brings a motion for summary judgment in an age discrimination case, and the employer "presents admissible evidence either that one or more of plaintiff's prima facie elements is lacking, or that the adverse employment action was based on legitimate, nondiscriminatory factors, the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203, 48 Cal.Rptr.2d 448.) Once the employer meets its burden in the summary judgment motion, "the employee must demonstrate a triable issue by producing substantial evidence that the employer's stated reasons were untrue or pretextual, or that the employer acted with a discriminatory *animus,* such that a reasonable trier of fact could conclude that the employer engaged in intentional discrimination or other unlawful action." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1038, 128 Cal.Rptr.2d 660(*Cucuzza*).)

"Appellate review of a ruling on a summary judgment or summary adjudication motion is de novo." (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 210, 77 Cal.Rptr.2d 660.)

[11] In this case, the trial court granted defendant's summary judgment motion as to all remaining causes of action, finding that Google's evidence while "not sufficient to prove that Plaintiff cannot establish a prima facie case of age discrimination,""it is sufficient to prove that [Google] had a legitimate nondiscriminatory reasons for ... terminating [plaintiff's] employment in February 2004." The court went on to find Reid's evidence was "not sufficient to raise a permissible inference that in fact, [Google] considered Plaintiff's age as a motivating factor in ... terminating his employment." The court noted that because Reid had failed to raise a triable issue of material fact as to pretext, his other attendant claims should be dismissed.

***1354** Reid challenges the trial court's dismissal of his first, second, fourth, sixth and ****754** seventh causes of action.[FN2]

> FN2. Reid does not challenge the dismissal of his third, ninth, tenth, eleventh, and twelfth causes of action on appeal.

We note that there is undisputed evidence to support both a prima facie case of age discrimination, as well as a legitimate basis for Reid's termination. Specifically, Reid was a member of a protected class, in that he was 54 years old at the time of his termination; he was performing competently in the position he held, both in the Operations and Engineering Departments, and as head of the newly created graduate program; he suffered an adverse employment action of termination; and other circumstance suggests age discrimination as a motive in Google's action. Google establishes a legitimate, nondiscriminatory reason for the termination as elimination of the graduate program, and therefore, job elimination.

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[12][13][14] In his appeal, Reid attempts to raise a triable issue of material fact as to pretext in his termination. "[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. [Citation.]" (*McCoy v. WGN Continental Broadcasting Co.* (7th Cir.1992) 957 F.2d 368, 373.) The employee's rebuttal obligation is not satisfied where "the employee simply show[s] the employer's decision was wrong, mistaken, or unwise." (*Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 807, 85 Cal.Rptr.2d 459(*Horn*).) "[T]he employee ' " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them unworthy of credence,' [citation], and hence infer "that the employer did not act for the [... asserted] nondiscriminatory reasons." ' " ' " (*Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 75, 105 Cal.Rptr.2d 652.)

Here, Reid asserts a combination of evidence serves to create a triable issue of material fact that Google's stated reason of job elimination for his termination was pretextual, such that a rational finder of fact could find the reason unworthy of credence. Reid offers statistical evidence of discrimination at Google, discriminatory comments made by coworkers as well as decision makers, Reid's demotion to a non-viable position before his termination, and Google's changed rationales for Reid's termination.

**1355 Statistical Evidence of Discrimination*

Reid presented statistical evidence of Google's practices through the declaration of Professor Norman Matloff, a statistician with 30 years experience in the field. Matloff evaluated data for 1,718 employees in Google's Operations and Engineering Departments, focusing on dates of birth, quarterly and yearly numerical performance ratings, bonus amounts, job position, educational degrees and salary. Matloff did not analyze termination practices within this group because, according to Reid, there was only a small number of employees who were involuntarily terminated to date, because Google was such a new company at the time.

As part of his analysis, Matloff performed a series of multiple regression analyses to determine whether there was any relationship between the age of Google employees, the performance ratings they were assigned, and the bonus amounts ****755** they received.[FN3] Matloff looked for disparity in performance ratings, as well as bonus amount that could be traced to age, as opposed to any other variable.

> FN3. Reid describes multiple regression analysis as a measurement of the influence of independent variables such as salary, performance ratings, age, etc., on a dependent variable such as bonus amount.

Matloff analyzed director-level employees in the Operations and Engineering Department, and reported that he observed a statistically significant negative correlation between age and performance rating. Specifically, for every 10 year increase in age, there was a corresponding decrease in performance rating. The sample size for this finding was 23.

In addition to limiting the analysis to director-level employees, Matloff also analyzed the effect of age on performance ratings for all 1,718 employees of the Operations and Engineering Department. For this group, Matloff found a highly statistically significant negative correlation between age and performance rating.

With regard to an employee's bonus amount, Matloff performed a regression analysis of director-level employees, finding a statistically significant negative correlation between age and bonus. Matloff found a 29 percent decrease in bonus amount related to every 10 year increase in age. The sample size for this analysis was 18.[FN4]

> FN4. Reid submits that the reason the sample size is smaller than in the performance rating analysis is that Google did not provide full bonus data for all the Director-level employees.

Google challenges the statistical evidence offered by Reid on numerous grounds, including Matloff's methodology, and sample sizes analyzed. In its ***1356** order, the trial court issued a ruling pursuant to *Biljac Assoc. v. First Interstate* Bank (1990) 218 Cal.App.3d 1410, 1419-1429, 267 Cal.Rptr. 819 (*Biljac*), declining to rule on the specific evidentiary

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objections, instead opting to rely only on "competent and admissible evidence." (*Ibid.*)

With regard to the trial court's duty when presented with objections to evidence in the summary judgment context, the weight of current authority is contrary to the holding in *Biljac*, and seems to agree that (1) the trial court is obligated to rule *expressly* on all objections, and (2) the court's failure to do so may effect a "waiver" of objections, so that they are not preserved for appellate review. This view appears to have grown out of the statutory command that the trial court "consider all of the evidence set forth in the papers, except that to which objections have been made *and sustained by the court....*" (Code Civ. Proc., § 437c, subd. (c), italics added.)

[15] However, we believe the *Biljac* decision was substantially correct, and was surely more nearly correct than its critics have been. Indeed, based on *Biljac*, in the absence of express rulings by the trial court, as in the present case, we presume either that the trial court ruled correctly on evidentiary objections, or that the court *overruled* all objections it did not expressly sustain.

[16] Contrary to the assumption indulged by a number of courts, the language of Code Civil Procedure section 437c, subdivision (c) does not mandate *express* rulings. Rather, it reinforces the requirement of express *objections* by directing the court to consider *all* evidence, objectionable or not, unless it finds that a meritorious objection has in fact been made. But nowhere is the court commanded to issue an explicit ruling. Moreover,****756** even if the statute could be read to impose such a requirement, it does not mandate that in the absence of express rulings the underlying objections are forfeited on appeal. The fact is that when a party properly brings an objection to the trial court's attention-i.e., when he files it in proper form-he has done everything he can or should be required to do to bring about a ruling. The fact that a trial court does not expressly rule on such objection should not be interpreted as a waiver of the party's objection.

The analysis of waiver of evidentiary objections becomes clearer when viewed in the context of appellate review of evidentiary objections asserted *during trial.* When an objection is made *during the examination of a witness,* the examination of the witness cannot proceed until the trial court acts on the objection. The most common action is for the trial court to say "sustained" or "overruled," which of course constitutes a clear ruling and preserves the issue for appeal. But if the court fails to make that express statement, *we would still consider the issue preserved on appeal.* This follows directly from ***1357**Evidence Code section 353, which provides that an objection is preserved for appeal if it is sufficient in form; there is no requirement that the objection be expressly ruled upon.

Moreover, the lack of an express ruling on an objection in the trial context does not necessitate our finding that no ruling was actually made. For example, if the court permitted the witness to answer, we would find the court impliedly *overruled* the objection. We would infer the opposite-that the court sustained the objection-if the court instructed the witness not to answer, told the questioner to proceed to his next question, or struck any answer the witness had already given. We would not deem the lack of an express ruling on an objection as a forfeiture of the objection on appeal.

The trial practice circumstance most nearly analogous to the court's procedure in a summary judgment motion is that in which the court permits a party to adduce evidence over his opponent's objection, while *reserving a ruling* on the admissibility of the evidence. In such a case, if the court neglects to expressly rule on the objection, it is presumed to have *overruled* it and *admitted the challenged matter* into evidence. (*Clopton v. Clopton* (1912) 162 Cal. 27, 32, 121 P. 720; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 387, p. 480; see *People v. Flores* (1979) 92 Cal.App.3d 461, 466, 154 Cal.Rptr. 851;*People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1651, 241 Cal.Rptr. 550.)

In our view, this is the simplest and soundest approach in the present context. If a party lodges otherwise proper objections to evidence, and the court does not rule on those objections at the hearing, the court should be viewed as having reserved a ruling on the objections. Its later failure to issue an express ruling effects an implied overruling of all objections, which are therefore preserved for appeal. The entire record is thus presumptively before the appellate court, and the burden is on the objecting party to show that evidence presumptively considered by the trial court should instead be disregarded in determining the propriety of the order on the merits.

We are not persuaded by the notion that we must

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have evidentiary rulings so that we know what evidence was actually taken into account by the trial court. It does not matter what evidence was taken into account. What matters is what evidence *should* have been taken into account, and whether the order under review-granting or denying summary judgment-can be ****757** sustained in light of that evidence, coupled with the governing substantive law.

In addition, we do not believe that express rulings are necessary to enable the reviewing court to adequately respect the deferential standard of review governing discretionary rulings. While it is true that a trial court enjoys ***1358** varying amounts of discretion in making some types of evidentiary rulings, many such rulings are not discretionary in the slightest. No court has discretion to admit hearsay evidence, or expert opinion by an unqualified witness, or testimony manifestly lacking any foundation in personal knowledge, over proper objection. Even where an objection is of a type usually invoking the trial court's discretionary powers, the deferential standards of review should have limited scope as applied in the present context. Because summary judgment is decided entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on questions of evidence. Nor is the trial court often, if ever, in a better position than a reviewing court to weigh the discretionary factors. In our view, all reasonable doubts about the admissibility of evidence, like doubts on other aspects of the motion, *must* be resolved in favor of the party opposing summary judgment.

Express trial court rulings on a summary judgment motion would not necessarily make the appellate process any surer, fairer, or more efficient. Insofar as an evidentiary issue is potentially dispositive of a party's right to summary judgment, that issue is virtually certain to be reexamined on appeal under an independent judgment standard. This means that we will analyze the issue in exactly the same way, and reach exactly the same result, no matter what the trial court did.

Here, Google filed proper objections to the statistical evidence offered by Reid that the trial court did not expressly rule upon. We infer from the lack of an express ruling on the objections that the trial court impliedly overruled them, and considered the evidence when ruling on the summary judgment. And, we may consider the issue of the admissibility of the statistical evidence on appeal because we do not find the lack of a ruling creates waiver.

[17] Statistical evidence is clearly admissible in the present case. An employee such as Reid may produce statistical evidence regarding an employer's practices to show that the challenged action is consistent with a pattern of discrimination. (*McDonnell Douglas, supra,* 411 U.S. at pp. 804-805, 93 S.Ct. 1817.) Statistical evidence is relevant if it demonstrates a disparity in treatment and can eliminate any nondiscriminatory explanations for the disparity, such as legitimate selection criteria or chance. (*Barnes v. GenCorp., Inc.* (6th Cir.1990) 896 F.2d 1457, 1466.)

Here, based on our inference from the lack of an express ruling, we find the trial court was correct in considering the statistical evidence when deciding the motion for summary judgment. Despite considering the statistical evidence, however, the court clearly erred when it determined that there was no triable issue of material fact arising from that evidence. Importantly, ***1359** *Google does not offer conflicting expert testimony to dispute Reid's statistical findings;* rather, Google's counsel offers arguments about why the findings are not sound. Such argument goes to the *weight* of the statistical evidence, a task reserved for a jury, not a court on summary judgment.

In a similar case, the court reversed a grant of summary judgment because the statistical evidence presented a triable issue of material fact. In ****758***Maitland v. Univ. of Minn.* (8th Cir.1998) 155 F.3d 1013, 1017, the parties disputed whether there was inequity in salaries among men and women employed by the university. On summary judgment, the defendant argued the plaintiff had not included enough variables in its statistical regression analysis to sufficiently demonstrate salary disparity. On appeal, the court reversed the grant of summary judgment in favor of defendant, holding that the probative value of the statistical evidence and whether sufficient variables were used in the regression analysis was a jury question. The court stated: "[I]f a regression analysis omits variables, it is for the finder of fact to consider the variables that have been left out of an analysis, and the reasons given for the omissions, and then to determine the weight to accord the study's results...."(*Ibid.*)

Similarly, while Google makes numerous arguments

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about why Reid's statistical evidence does not demonstrate age discrimination, it does not offer contrary evidence to dispute the statistics. In other words, although Google argues the sample sizes were too small in this case, for example, it does not offer a contrary expert opinion of why the small size would affect the results. Moreover, Matloff attested to the fact that his findings were both "highly statistically significant" with regard to performance evaluations as related to age, as well as "statistically significant" with regard to bonus amounts related to age. As such, Google's argument that the sample sizes are too small does not refute Reid's evidence; rather it demonstrates the existence of a triable issue of fact on the weight that should be given to the statistical data. (See *Barnes v. GenCorp, Inc., supra,* 896 F.2d at p. 1467 [in which the court stated: "plaintiffs' expert has asserted that the statistical pool is sufficient in size to render the results statistically reliable. At best the defendants' unsubstantiated assertion [that the sample size was too small] raises a question that cannot be resolved on this record"].)

Similarly, any question about the validity of the statistical evidence in this case, and what it suggests, is clearly a question of the weight of the evidence and is the province of the jury. Google does little more than lob attacks at the evidence with nothing to substantiate its assertions. (See, e.g., *Capaci v. Katz Besthoff, Inc.* (5th Cir.1983) 711 F.2d 647, 653-654["[t]he defendant must do more than raise theoretical objections to the data or statistical approach taken; instead, the defendant should demonstrate how the errors affect the results"].)

***1360** *Discriminatory Atmosphere at Google*

Reid asserts that a general "youthful" atmosphere at Google, including employees participating in recreational activities like hockey, football and skiing demonstrate the environment was biased toward older workers.

In addition, Reid asserts that certain ageist comments were made both by key decision makers, as well as coworkers, that demonstrate discrimination.

Reid provides examples of statements made regarding his age, such as Hoelzle telling Reid he was "slow," "fuzzy," "sluggish," and "lethargic." Hoelzle also told Reid his ideas were "obsolete," and "too old to matter." Reid asserts Hoelzle instigated his removal from operations and participated in the termination decision.

In addition, Reid offers statements made by coworkers referring to him as an "old man" and an "old fuddy-duddy," and joked that his office placard should be as "LP" instead of a "CD."

****759** When Reid was terminated from employment, he was told twice by Rosing that he was not a "cultural fit" at Google.

Google argues at length that the comments Reid offers were stray remarks that do not raise a triable issue of fact as to pretext. The so-called "stray remarks" rule allows courts to deem racist or sexist remarks insufficient to support denial of summary judgment if the remarks are considered "stray." We cannot view such a rule as anything other than the assumption by the court of a factfinding role.[FN5]

> FN5. The point is illustrated in *Horn, supra* 72 Cal.App.4th 798, 809, 85 Cal.Rptr.2d 459, where the court wrote that an isolated and ambiguous comment "was at most a 'stray' ageist remark and is *entitled to virtually no weight* in considering whether the firing was pretextual or whether the decisionmaker harbored discriminatory animus." (Italics added.) This statement is all the more remarkable because the opinion elsewhere acknowledges that on summary judgment, "weighing of the evidence" is "prohibited." (*Id.* at p. 807, 85 Cal.Rptr.2d 459.)

[18] We do not agree with suggestions that a "single, isolated discriminatory comment" (*Gagne v. Northwestern Nat. Ins. Co.* (6th Cir.1989) 881 F.2d 309, 314-316), or comments that are "unrelated to the decisional process" are "stray" and therefore, insufficient to avoid summary judgment. (*Smith v. Firestone Tire and Rubber Co.* (7th Cir.1989) 875 F.2d 1325, 1330.) There are certainly cases that in the context of the evidence as a whole, the remarks at issue provide such weak evidence that a verdict resting on them cannot be sustained. But 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 ***1361** they support an inference that the employer's action was motivated by discriminatory animus. Their "weight" as evidence

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cannot enter into the question.

Here, in addition to providing evidence of ageist remarks directed towards him, Reid also provides statistical evidence of discrimination (discussed above). In cases with similar evidence, federal courts have determined a triable issue of fact of pretext exists. For example, in *Greene v. Safeway Stores, Inc.* (10th Cir.1996) 98 F.3d 554, 561, the court held that a supervisor's comment that the employee " 'didn't fit in with the new culture,' " coupled with the employee's statistical evidence that older workers were being replaced with younger ones, was sufficient to raise a triable issue of fact. Similarly, in *Hayes v. Compass Group USA, Inc.* (D.Conn.2004) 343 F.Supp.2d 112, 120, the court found a triable issue where the employee produced evidence that his supervisor said he was " 'old school,' " and commented that the managerial style of another over-40 manager was " 'very slow to change,' " and the manager needed to " 'move into the nineties.' " The *Hayes* court concluded that the remarks coupled with the other indicia of discrimination demonstrated by statistical evidence was sufficient to raise a triable issue of fact.

Reid's Change of Position within Google

In addition to the statistical evidence and comments of coworkers and supervisors as evidence of pretext, Reid also asserts his demotion from Director of Operations and Director of Engineering, to head of Google's graduate program that was eliminated shortly thereafter is also evidence of pretext.

Reid offers evidence that his new position of head of the graduate program had no title and no job description. Reid was not given a budget or staff. Four months after Reid was placed in the position, Google terminated the program.

****760** Reid asserts that his change in position at Google and the abrupt termination of the program, coupled with his statistical evidence and evidence of agesist comments creates a triable issue of fact as to pretext.

In a case with similar facts, the Federal Court of Appeal for the Third Circuit reversed a grant of summary judgment. In *Torre v. Casio, Inc.* (3rd Cir.1994) 42 F.3d 825(*Torre*), the plaintiff was hired by Casio when he was over 50 as a regional sales manager. Casio then moved him to a newly created position of " 'product marketing manager,' " and abruptly eliminated the position one month later. (*Id.* at p. 827.) Torre asserted the termination was pretext for Casio's true motive, which was to replace him with a younger ***1362** worker. Torre offered evidence of the change in position subsequent elimination, as well as ageist comments to demonstrate pretext. In addition, Torre demonstrated that when he was moved into the new position, two younger employees, aged 41 and 28 took over his responsibilities of the former position, while when he was terminated from the new position, no one filled the position. (*Id.* at p. 831.)

The facts of *Torre* are strikingly similar to the current case. Here, like Torre, Reid was hired when he was in his 50's for a certain position. After serving in that position, Reid, like Torre, was moved into a newly created position, and was terminated shortly thereafter. When Reid was moved into the new position, he, like Torre was replaced by two younger workers, Urs Hoelzle, age 38 and Douglas Merrill, age 33, who assumed the duties of Director of Operations. Finally, when Reid was terminated from his position as head of the graduate program, he, like Torre, was not replaced.

In *Torre,* the court reversed the district court's grant of summary judgment in favor of Casio on its assessment that judgment as a matter of law was improper, because "the district court ... resolved a host of material fact issues in concluding that Torre had failed to rebut Casio's proffered explanations for the transfer and termination." The court further concluded: "[t]he district court essentially accepted Casio's explanations in their entirety and failed to address a significant amount of the evidence presented by Torre." (*Torre, supra,* 42 F.3d at p. 833.)

Here, we see little difference between the district court in *Torre* and the trial court in this case. In granting summary judgment in favor of Google, the trial court resolved a number of factual issues in dispute, such as the weight and value of Reid's statistical evidence, the validity and weight of the ageist comments made by decision makers in Reid's demotion and termination, and whether the newly created position of head of Google's graduate program was in fact a way-station for Reid's ultimate termination. These evidentiary evaluations are clearly the purview of the jury, and not the decision of the

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trial court on summary judgment.

Google's Changed Rationales for Reid's Termination

Finally, Reid offers evidence that Google changed its rationales for terminating him, further demonstrating pretext.

[19] When there is evidence that an employer's reasons for termination have altered over time, there is "strong grounds" for opposing summary judgment. (*Washington v. Garrett* (9th Cir.1994) 10 F.3d 1421, 1434; see also ***1363***Santiago-Ramos v. Centennial P.R. Wireless Corp.* (1st Cir.2000) 217 F.3d 46, 56 [the court reversed a grant of summary judgment on the ground that the employee was not told of the reason for her termination when it occurred, but the company sited performance****761** deficiencies after the fact when it became concerned the employee might file suit].)

Here, Reid asserts there is evidence that Google changed its stated reasons for his termination sufficient to create a triable issue of fact as to pretext. For example, Reid offers evidence that when he was terminated on February 13, 2004, he was not told the graduate program was being discontinued. Rather, Reid was told that he was being discharged because he lacked "cultural fit" with Google, and was assured the graduate program was being continued and his termination was not performance based. Reid asserts Google raised performance issues as a basis for Reid's termination for the first time in its motion for summary judgment. In addition, Google also added job elimination as a basis for the termination on its assertion that Rosing told Reid at their February 13, 2004 meeting that the graduate degree program was being eliminated.

By our evaluation, the question of whether Google changed its position on the reasons for Reid's termination is clearly disputed. Most notable is the distinct difference in Reid's version of the February meeting, during which he asserts he was told he was not a cultural fit, but that the graduate program would continue, and Rosing's version of the meeting, in which he asserts he told Reid the program was being eliminated.

In addition, Google's claim that Reid was terminated for poor performance is also disputed. Reid asserts that at the time he was terminated, he was never informed that it was based on poor performance. Moreover, Google admitted in discovery that Reid's termination was "not performance related." Reid asserts that he was told by Schmidt at the time he was terminated that it was not performance based.

The conflicting evidence that Google's stated reasons for Reid's termination changed after Reid was terminated, coupled with Reid's statistical evidence, evidence of agesist comments, and demotion create a triable issue of fact as to pretext.

Inference Against Discrimination

[20] Google argues it is entitled to an inference against discrimination, because the evidence shows that the only person responsible for Reid's termination was Rosing, who was over 50 at the time. (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 117 Cal.Rptr.2d 647.) Specifically, Google asserts that because Rosing was responsible for both hiring and firing Reid within a short ***1364** period of time, and therefore, there is a "strong inference" that there was no discriminatory motive. (*Id.* at pp. 980-81, 117 Cal.Rptr.2d 647.) We take Google's invitation to be no more than an attempt to use persuasive evidence as a guise for undisputed evidence. The argument that Rosing, over 50 years of age, would not discriminate against another person over 50 years old may prove effective (or not) in closing argument before a jury, but it is not an inference we will make on summary judgment.

Although Google is correct in its assertion regarding *Bechtel*, and the inference against discrimination, it is incorrect in asserting that there is undisputed evidence that Rosing was solely responsible for Reid's hiring and termination. Reid provides significant evidence that others in the company, including Page, Hoelzle and Schmidt were involved in the decisions.

For example, Reid offers evidence that Rosing represented to him that Larry Page made the decision that he should be removed from the Engineering Department. Reid also offers evidence that Hoelzle acted as Reid's direct supervisor for a ****762** period of time, evaluating his job performance, and with Page, participated in the decision to pay Reid a zero bonus in February 2004. In addition, Reid provides evidence that Schmidt sent an e-mail to Rosing

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CERTIFICATE OF SERVICE

I, Jo Ann Hylton, declare:

I am employed in Santa Clara County, State of California. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, 650 Page Mill Road, Palo Alto, California 94304-1050.

On this date, I served:

GOOGLE INC.'S PETITION FOR REVIEW

☒ **BY OVERNIGHT COURIER:** I caused such envelope(s) to be delivered to an overnight courier service for overnight delivery to the office(s) of the addressee(s). Overnight mail placed by me within the office for collection by an overnight courier would normally be deposited with the overnight courier that day in the ordinary course of business. The envelope(s) bearing the address(es) above were sealed and placed for collection and mailing on the date below following our ordinary business practices.

Barry L. Bunshoft Ray L. Wong Paul K. Killion Lorraine P. Ocheltree Duane Morris LLP One Market, Spear Tower, Suite 2000 San Francisco, CA 94105-1104	*Attorneys for Plaintiff & Appellant Brian Reid* 1 Copy
Clerk of the Court California Court of Appeal Sixth Appellate District 333 West Santa Clara Street, #1060 San Jose, CA 95113	1 Copy

The Honorable William J. Elfving 1 Copy
Judge of the Superior Court
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Palo Alto, California on December 11, 2007.

Jo Ann Hylton