Supreme Court Copy

S158965

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIAN REID
Plaintiff and Appellant

v.

GOOGLE INC.
Defendant and Respondent

After a Decision of the Court of Appeal
Sixth Appellate District
Civil No. H029602

Santa Clara County Superior Court Case No. Cv023646
Honorable William J. Elfving, Judge

REPLY BRIEF ON THE MERITS

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I. INTRODUCTION

This Court, like all of the federal circuit courts and several California Courts of Appeal, should adopt and apply the stray remarks doctrine, recognizing, as the trial court did below, that all of the remarks offered by Reid are simply not probative of an allegedly discriminatory decision to terminate him. With no other relevant evidence, the trial court properly granted summary judgment because Reid could not establish that Google's legitimate reasons for terminating him were a pretext for age discrimination.

California trial courts and litigants would also benefit from predictable rules defining the parameters of the appellate evidentiary record after a trial court's summary judgment ruling. Google submits that the following principles should be included in those rules: (1) trial courts should expressly rule on evidentiary objections; and (2) if a *Biljac* ruling[1] is used by a trial court in granting a summary judgment ruling, the prevailing party's objections should be found sustained, thus precisely defining the scope of the evidentiary record. The Court of Appeal's ruling, presuming that all objected-to evidence was admitted, provides no such certainty, contradicts trial courts' actual rulings, and was prejudicially applied *ex post facto* to Google in this case.

II. ARGUMENT

Issue No. 1

A. This Court Should Join All Federal Circuit Courts, And Affirm Several California Courts Of Appeal, In Adopting The Stray Remarks Doctrine.

Every federal circuit court that has considered the stray remarks doctrine has adopted it. (OB14-17, fns. 3-6.) Reid's cited authority rebuts his suggestion

[1] "*Biljac* ruling" is defined in Google's Opening Brief ("OB") at 3.

that the stray remarks doctrine has been limited by *Reeves v. Sanderson Plumbing Products, Inc.* (2000) 530 U.S. 133 (*Reeves*). (Reid's Answer Brief ("AB") at 20-23; L. Reinsmith, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine after Reeves v. Sanderson Plumbing Products* (2002) 55 Vand. L.Rev. 219, 252 ["Most circuit courts have continued to apply the Stray Remarks Doctrine ... in much the same way that they did prior to the *Reeves* decision."].) In fact, *Reeves* (authored by Justice O'Connor, who first coined the phrase "stray remarks" in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (*Price Waterhouse*)) makes no mention of stray remarks, but simply articulates the standard for summary judgment. (*Reeves*, *supra*, at pp. 148-49.)

Reid further mischaracterizes the import of California appellate decisions that have invoked the stray remarks doctrine, claiming that none of them "explicitly describes the analysis as a 'doctrine' or 'rule.'" (AB24.) The particular nomenclature has no bearing on the courts' use of stray remarks principles to determine whether specific remarks were probative of discriminatory intent. (See, e.g., *Sada v. Robert F. Kennedy Med. Ctr.* (1997) 56 Cal.App.4th 138, 154, fn. 15 [remark during interview probative of hiring decision] and *Kelly v. Stamps.com, Inc.* (2005) 135 Cal.App.4th 1088, 1101 [remark regarding plaintiff's pregnancy not stray because made during discussion of whether to retain plaintiff], cited at AB24.)

Moreover, Reid's emphasis on examining remarks in context is exactly Google's point. (See, e.g., AB16, 23.) The remarks Reid relies upon occurred in one of three contexts. They were: (a) made by nondecisionmakers, (b) general comments that did not reference age, or (c) made by an alleged decisionmaker unrelated to the actual decision. (See OB25-29, AB26-29.) Remarks made in those contexts are not probative of whether the decision to terminate Reid was

based on his age. This is precisely the concept that Justice O'Connor recognized, and that the Court of Appeal rejected. (*Price Waterhouse, supra,* 490 U.S. at pp. 276-77; Opn. p. 20 ["We do not agree with suggestions that a 'single, isolated discriminatory comment' [citation] or comments that are 'unrelated to the decisional process' are 'stray' and therefore, insufficient to avoid summary judgment."].)

B. The Stray Remarks Upon Which Reid Relies Are Not Probative Of Whether His Termination Was Based On His Age.

1. Reid's Reliance on "Cultural Fit" as a Proxy for Age Underscores His Lack of Probative Evidence of Discrimination.

Reid mistakenly relies on his understanding that being told he was "not a cultural fit"[2] meant that he was "too old." (AB5, 19.) There is nothing about the term "cultural fit" that relates to age.[3] Indeed, the only admissible evidence about Google's culture comes from Wayne Rosing, who explained that Google's culture has nothing to do with age, and is instead "a value system of: Question everything. Find the best answer. Don't take the easy way. Do the right way. And if it's the hard way, and it's the right way, do it the hard way and get better results." (App795, cited at OB27, fn. 9.) Rosing also described Google's culture in Reid's review in entirely nondiscriminatory terms: "Adapting to the Google culture is the primary task for the first year here… Younger contributors, inexperienced first line managers, and the super fast pace are just a few examples of the environment." (App1579, quoted at AB5.)

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[2] Reid did not testify that Rosing told him he was not a "cultural fit," but that Reid's understanding was that he "was no longer considered a cultural fit." (App1516, cited at OB26-27, fn. 8.)

[3] The only "evidence" Reid cites for this alleged meaning is the hearsay declaration—to which Google objected —of someone who never worked at Google and never testified that she knew any of the alleged decisionmakers, much less heard them say that "not a cultural fit" was code for age discrimination. (AB5; App1786-90, 2159-65, 2788-96.)

Indeed, if "cultural fit" somehow equated to youth, why was Rosing, a man three years older than Reid, a high-ranking leader of Google and its culture? Moreover, if Reid's understanding from his February 13, 2004 conversation with Rosing was that he "was no longer considered a cultural fit," this presumes that Reid had at some point been a cultural fit. (App1516, emphasis added.) If "cultural fit" equated to youth, Reid would never have been a cultural fit at Google, since he was hired at age 52. (App619.) Cavalierly tossing the "cultural fit" phrase into Reid's brief is no substitute for evidence of age discrimination – especially when the older Rosing defined it twice in nondiscriminatory terms.

Further, implicit in Reid's argument that neutral comments demonstrated age discrimination (including Hoelzle commenting about Reid's ideas as "obsolete" and "too old to matter," and referring to Reid as "slow," "fuzzy," "sluggish," and "lethargic") is that younger people cannot, at times, possess these characteristics—an absurd contention that parents of most teenagers would dispute. Indeed, were this Court to countenance Reid's argument about the ageist nature of these comments, it would provide the Court's imprimatur to the very stereotypes about older people that discrimination laws seek to prevent.[4]

This Court should not allow a plaintiff to survive summary judgment simply because he believes that some facially appropriate comments are proxies for discriminatory animus. Workplace discussions concerning the currency of ideas, or the urgency with which employees tackle problems, would become easy fodder for summary judgment oppositions. Tortured interpretations of comments that are neutral on their face are no substitute for evidence.[5] The clear purpose of

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[4] The comments in *Price Waterhouse* that the plaintiff should behave "more femininely" obviously concerned the plaintiff's sex, making any comparison to the age-neutral comments Reid relies on unavailing. (AB28-29.)

[5] Reid claims that other courts with "nearly identical fact patterns" have found a triable issue of fact as to pretext, but those cases involved markedly different

the stray remarks doctrine is to winnow out cases "too weak to raise a rational inference that discrimination occurred." (*Guz v. Bechtel Nat'l Inc.* (2000) 24 Cal.4th 317, 362 (*Guz*).) This Court should reject Reid's invitation to disable this useful judicial mechanism, and affirm that plaintiffs may not survive summary judgment by ascribing stereotypical meanings to neutral comments, especially when they are made outside of the decisionmaking context or by nondecisionmakers.[6]

2. As Rosing Was the Sole Decisionmaker, Remarks by Others, Made Outside the Context of the Termination Decision, are Not Probative of Whether Age Was a Factor in Reid's Termination.

Reid did not produce any substantial evidence that anyone other than Rosing made the decision to terminate him.[7] Indeed, Reid's Answer quotes from

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scenarios. (AB14-15, citing *Torre v. Casio, Inc.* (3d Cir. 1994) 42 F.3d 825, 834 [e.g., plaintiff's manager said, "**Did you forget or are you getting too old, you senile bastard?**" and that he did not want to replace plaintiff with anyone over 35], emphasis added, and *Stratton v. Handy Button Machine Co.* (N.D.Ill. 1986) 639 F.Supp. 425, 428, 432 [e.g., supervisor told plaintiff that he was being transferred because company wanted a "younger man" to do the job and suggested that plaintiff "go to EEOC for age discrimination"].)

[6] Reid argues that the nature of Hoelzle's and Rosing's remarks as "ambiguous" and "open to interpretation" suggests there are triable issues raised by competing interpretations of the remarks. (AB27.) This argument violates the basic principle that admissible evidence probative of the allegedly discriminatory decision, not speculation about the meaning of comments, must be presented to survive summary judgment. Even if the ambiguity of the comments could create a triable issue, their lack of connection to the allegedly discriminatory decision and their utterance by nondecisionmakers renders them immaterial. (Cf. *Strauch v. American College of Surgeons* (N.D.Ill. 2004) 301 F.Supp.2d 839, 846 [summary judgment reversed due to strong circumstantial evidence and inference of causal relationship between decisionmaker's "ambiguously age-oriented" explanations of reasons for reorganization and plaintiff's resulting termination] and *Shager v. Upjohn Co.* (7th Cir. 1990) 913 F.2d 398, 400 [reversing summary judgment where young decisionmaker made "frequent comments to the effect that 'the old guys know how to get around things'" and exhibited hostility toward older workers], cited at AB27.)

[7] Reid's Answer cites his opposition to the undisputed fact that Rosing made the termination decision. (AB18, citing App1409-10.) His opposition, however, relies on evidence that has nothing to do with the undisputed fact. (RApp84-86.)

Rosing's emails, underscoring that Rosing was the person who made the key employment decisions about Reid, including the termination decision. (AB7-8 ["**I** will be moving Brian Reid to a new role..."; "**I** am having second thoughts about the full zero out of [Reid's] $14K bonus..."; "**I** think we just eliminate [Reid's] assignment..."], emphases added.) Even if Reid could show that Rosing was not the sole decisionmaker, Reid has presented no evidence that any other decisionmaker made ageist comments relating to the allegedly discriminatory termination, let alone provided the substantial evidence required to create a triable issue of fact.

C. Reid's Other Cited Evidence Does Not Meet His Burden Of Providing Substantial Evidence Of Pretext And Discriminatory Motive.

Reid concedes that "the central question on appeal of the summary judgment [is] whether [he] produced sufficient evidence that Google's purported reasons for terminating him were pretextual or untrue, and that Google acted with discriminatory motive..." (AB12-13, emphasis added.) Reid argues that, even if the stray remarks are "to be discarded," the collective nature of the evidence he offers satisfies this burden. (AB2.) Reid's argument is based on: (a) statistical correlations regarding bonuses and performance reviews, but not terminations; (b) his transfer to his final position with Google that makes no mention of age; and (c)

For example, Stacy Sullivan's email advising Shona Brown (who was responsible for Google's HR function) to communicate to Reid that there was no other option for him at Google ten days after Rosing had advised him of his termination, casts no doubt on Rosing's responsibility for the termination decision. (App3138-39; RApp132-33.)

Reid also selectively quotes Ms. Sullivan's email to claim that Google created a suspiciously different reason for his termination that evidences pretext. (AB1, 9-10.) The full quote, however, is, "We'll all agree on the job elimination angle or whatever spin he [Reid] wants us to put on it in terms of his leaving." (App3139, emphases added.) Ms. Sullivan's email is about accommodating Reid, not about conspiring to disguise the true reason for Reid's termination.

allegedly changing rationales for his termination that have absolutely nothing to do with age. Of course, none of these categories have any innate connection to whether Reid was terminated because of his age. Simply put, without Reid's stray remarks, he has no evidence of intentional age discrimination.[8]

As this Court has recognized, Reid's burden is to provide substantial evidence of pretext whereby "an inference of intentional discrimination cannot be drawn solely from evidence, if any, that the company lied about its reasons... [T]here must be evidence supporting a rational inference that *intentional discrimination ... was the true cause* of the employer's actions." (*Guz*, *supra*, 24 Cal.4th at pp. 361-62; *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 806.) Reid cannot simply cobble together separately irrelevant and non-probative events to meet his burden. This collection of events "raise[s], at best, only a weak suspicion" of discrimination, which is insufficient to withstand summary judgment. (*Guz*, *supra*, at p. 369.)

Issue No. 2

A. Google's Meritorious Summary Judgment Should Not Be Subject To An *Ex Post Facto* Presumed Admitted Rule.

Reid's Answer ignores the unique scenario faced by Google in this case. Google is the first prevailing party on summary judgment that dutifully pursued its evidentiary objections, only to confront an appellate court that reversed summary judgment by interpreting a trial court's *Biljac* ruling as a blanket admission of all

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[8] In contrast, each case Reid cites to support his argument about the collective nature of his evidence is distinguishable by (a) the existence of at least one explicitly discriminatory comment by a decisionmaker and/or (b) the employer's replacement of older workers with younger workers. (See, e.g., cases cited at AB28, fn. 10, *Bevan v. Honeywell, Inc.* (8th Cir. 1997) 118 F.3d 603, 607 [in explaining reorganization, decisionmaker stated that plaintiff "would not be able to report to or support the younger [vice president] because of [plaintiff's] experience and age"], and *Hayes v. Compass Group USA, Inc.* (D.Conn. 2004) 343 F.Supp.2d 112, 116-17 [employer terminated nine other employees aged 40 or older while demoting rather than firing two employees under age 40].)

objected-to evidence. More likely, those objections were considered and found meritorious by the trial court in granting summary judgment.

Consequently, Google was blind-sided by the approach adopted by the Court of Appeal. No case prior to that court's Opinion interpreted a *Biljac* ruling as a presumption that the trial court "*overruled* [the objections] and *admitted the challenged matter* into evidence" (the "Presumed Admitted Rule"), certainly not where the objecting party pursued rulings on its objections from the trial court and prevailed on the merits of the motion. (Opn. p. 15.) Thus, Google had no notice that its objections were in jeopardy until the Opinion.[9]

Notably, Reid cites no authority for his claim that Google was required to object at the summary judgment hearing, repeatedly request that the trial court rule on those objections, and then take the additional step of further briefing and pounding on the table at the appellate level to preserve its objections – in a case in which it had prevailed below.[10] (AB34, 40.) To the contrary, Google had no reason to pursue its objections before the Court of Appeal, because (1) it had every

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[9] By no means did the Court of Appeal consider Google's objections, nor assume the obligation to establish any limits of the evidentiary record. (Opn. p. 12-19.) Instead, the Court of Appeal made no mention of Google's objections to stray remarks evidence and accepted Reid's irrelevant statistics wholesale. (*Id.*)

[10] Reid cites to inapposite authorities – including a case where the objecting party lost summary judgment – for the specious proposition that Google's references to its objections in its appellate briefings failed to preserve them. (See Google's Appellate Brief at pp. 28-29, fns. 4-5; AB34; *Soukup v. Law Offices of Hafif* (2006) 39 Cal.4th 260, 291, 295, fns. 17, 20 [holding that incorporating previous legal arguments, not evidentiary objections, into appellate briefs by reference is improper]; *Hoover Community Hotel Development Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1133-34 [holding that the losing party failed to appeal evidentiary rulings against it].) Of course, as the prevailing party, Google did not have any adverse evidentiary rulings against it prior to the Opinion, and thus had no reason to challenge any such ruling. This is particularly true because Google timely objected and pursued rulings on its objections from the trial court. (App2774-805; App2124-68 [Response to Reid's Additional Fact Nos. 8, 14, 26, 49, 66-71]; Reporter's Transcript ("RT") at 45:23-46:9, 48:25-49:2, and 85:20-87:9; *City of Long Beach v. Farmers & Merchants Bank of Long Beach* (2000) 81 Cal.App.4th 780, 782, 784-85 (*Long Beach*).)

reason to believe that the Court of Appeal would follow the principle that trial court rulings, even if potentially ambiguous, are construed in favor of affirming the lower court's order, and (2) it had already taken the steps necessary to preserve its objections for review. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 [because judgments of the lower court are "*presumed correct*[,] [a]ll intendments and presumptions are indulged" where ambiguities or gaps exist]; *Long Beach, supra,* at pp. 782, 784-85 ["written evidentiary objections have been preserved for appellate review" when party filed its objections and sought rulings on the objections before the trial court]; Cal. Rules of Court, rules 343, 345; Evid. Code, § 353; Code Civ. Proc., § 437c, subd. (b)(5).)

B. Google Properly Objected To Matloff's Declaration And Reid's Stray Remarks Evidence.

In its Opening Brief, Google complained about the Court of Appeal's reliance upon stray remarks and irrelevant statistical evidence, and for good reason.[11] Without Reid's irrelevant statistics or stray remarks, he has no evidence relating to age discrimination, as the trial court no doubt found.

The Court of Appeal noted that Reid asserted statistics for the purpose of "creat[ing] a triable issue of material fact that Google's stated reason of job elimination for his termination was pretextual." (Opn. p. 12, emphasis added.) Paradoxically, the Court of Appeal noted that "Matloff [Reid's expert] did not analyze termination practices within [his data set] because, according to Reid, there was only a small number of employees who were involuntarily terminated to date." (*Ibid.*) Yet, it nevertheless considered statistics about performance ratings

[11] Reid inaccurately claims that Google relies on a "blanket rule" disregarding all statistical evidence. (AB37, 38, fn. 19.) Instead, Google correctly noted that statistics like those Reid proffered, which are subject to objections and clearly irrelevant, should be disregarded. (OB39.)

and bonuses admissible to create a triable fact about Reid's termination.[12] (*Id.* at 12-13, 17-19.) Because Matloff did not have sufficient information about terminations to make any statistical conclusions, he provided statistical correlations of other events in a vain attempt to prove the very point that he did not have enough data to prove, i.e., that Reid's termination was caused by age discrimination.[13] This illogical conclusion is no substitute for proof.

Indeed, Matloff's circular logic was subject to Google's objections based on relevancy and foundation. (OB40.) These objections apply to all of the statistics in the Opinion, as Matloff had no basis for analyzing any termination practices at Google related to age. (App2796-804; Opn. p.p. 12-13, 17-19.)

Similarly, Google specifically identified the relevant stray remarks testimony and its evidentiary objections in its Opening Brief.[14] (OB25-28, 37-40, fns. 8-11.) Google objected to Hoelzle's alleged statements based on relevance, citing California Evidence Code Sections 210 and 350. (App2129-30.) Google

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[12] Reid claims that his statistical evidence is relevant to his "discrimination in performance reviews," but he made no such claim, alleging only that he did not receive a performance review. (AB38; App41.) Reid asserts disparate impact as a basis for the statistics, though Reid's age claim does not mention disparate impact. (App40-42.) Finally, the Opinion clearly relates the statistics to Reid's termination, and does not analyze Reid's demand for any bonus. (Opn. p. 12.)

[13] Even when statistics actually apply to the adverse employment action, any correlation shown by those statistics does not constitute proof of causation. (See *Muñoz v. Orr* (7th Cir. 2000) 200 F.3d 291, 301.) For example, the high correlation between firetrucks appearing in front of burning buildings is hardly proof that the firetruck caused the fire.

[14] At the time Google filed for summary judgment, the applicable rules required only that Google object to inadmissible evidence in writing prior to the hearing or verbally during the hearing. (Cal. Rules of Court, rules 343, 345; Evid. Code, § 353; Code Civ. Proc., § 437c, subd. (b)(5).) Google did both, and thus its objections were proper, including those raised in the separate statement. (See *Salazar v. Interland, Inc.* (2007) 152 Cal.App.4th 1031, 1038, fn. 3 [finding that party's evidentiary objections in its separate statement opposing summary judgment were proper]; App2774-805; App2124-68 [Response to Reid's Additional Fact Nos. 8, 14, 26, 49, 66-71]; RT at 45:23-46:9, 48:25-49:2, and 85:20-87:9.)

objected to the LaBelle Declaration, the sole source of evidence that the term "cultural fit" had anything to do with age, because it constituted inadmissible hearsay and lacked foundation. (App2145-46, 2163-64.) Google further objected to Reid's descriptions of foosball, hockey, and skiing, on the grounds of relevancy and undue prejudice. (App2781.)

To the extent this Court seeks to independently analyze Google's objections, rather than sending this case back to the trial or appellate court for such determinations, Google submits that Reid's stray remarks and statistics should be excluded based on its sound evidentiary objections and the common sense demonstrated by the trial court below.

C. Section 437c(c) Does Not Prohibit Application Of Google's Proposed Presumed Sustained Rule.

Reid's Section 437c(c) argument engages in the creative fiction that the trial court did not rule on Google's objections, when, in fact, the court adjudicated the objections in a *Biljac* ruling. Reid's reliance on *Ann M.* and *Sharon P.* is thus misplaced, because this Court never addressed the meaning of a *Biljac* ruling in either case. This Court focused instead on the trial court's failure to rule on objections entirely. (See *Ann M. v. Pacific Plaza Shopping Ctr.* (1993) 6 Cal.4th 666, 670, fn. 1; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1186, fn. 1; and corresponding trial court orders submitted with Google's Request for Judicial Notice, filed herewith.)

Reid also presumes that by enacting Section 437c(c) the legislature intended an absurd result, namely, that a party should be punished because of the acts (or omissions) of the judiciary, rather than due to any intentional acts of its own. (See *Henderson v. Drake* (1953) 42 Cal.2d 1, 5 [waiver is defined as the "*intentional* relinquishment of a known right"].) This Court is certainly empowered to interpret a trial court's grant of summary judgment based on

"competent and admissible evidence" as that court sustaining the prevailing party's objections in accordance with Section 437c(c). (See, e.g., *McNabb v. DMV* (1993) 20 Cal.App.4th 832, 837 ["[I]f a statute is susceptible to more than one interpretation, we must adopt the reasonable meaning and reject that which would lead to an unjust and absurd result"], citation omitted.) This is particularly true where Reid's interpretation of Section 437c(c) conflicts directly with Section 437c(b)(5), providing that a party waives objections only when it fails to raise them at the summary judgment hearing. (*Id.*; Code Civ. Proc., § 437c, subd. (b)(5).) Accordingly, this Court would inject reason and certainty into the *Biljac* conundrum by establishing the Presumed Sustained Rule (OB41-43), thus avoiding reversals of trial courts' rulings based on evidence that those courts likely excluded as inadmissible.

D. Trial Courts, Not Appellate Courts, Should Analyze Evidentiary Objections On Summary Judgment.

To the extent Reid's proclamation that Courts of Appeal "address the merits of evidentiary objections all the time," is correct, he underscores the problem. (AB42.) This function is better-suited for the trial courts. (OB33-36; 43-49.)

Reid further announces that "[i]t is consistent with California public policy and longstanding practice for trial courts to have the discretion to consider motions for summary judgment without ruling specifically on evidentiary objections." (AB32.) Reid's claim is misleading, and flies in the face of numerous California authorities. (See *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 235 ["Trial courts have a duty to rule on evidentiary objections."], citation omitted; *Vineyard Springs Estates, LLC v. Wyatt* (2004) 120 Cal.App.4th 633, 642 ["It is imperative that a trial court rule on evidentiary objections regardless of whether the motion is denied or granted."]; Code Civ. Proc., § 170 ["A judge has a duty to

decide any proceeding in which he or she is not disqualified."].) Questions of the admissibility of evidence, including any objections to that evidence on summary judgment, are indisputably matters submitted to trial courts for decision.[15] (Code Civ. Proc., § 473c, subds. (b), (d); Cal. Rules of Court, rules 343, 345.)

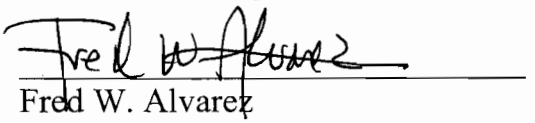
III. CONCLUSION

When all is said and done, Reid simply presents no triable issue of age discrimination. Stray remarks and irrelevant statistics are not evidence of age discrimination. It was precisely this evidence that was erroneously relied upon by the Court of Appeals. It was also precisely this evidence that the Superior Court properly disregarded in granting summary judgment for Google.

DATED: June 16, 2008

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation



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[15] Nevertheless, the Superior Court indeed followed long-standing judicial practice in rendering its *Biljac* ruling.

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 4,198 words (including footnotes), as counted by the Microsoft Word 2003 word-processing program used to generate it.

Respectfully submitted,

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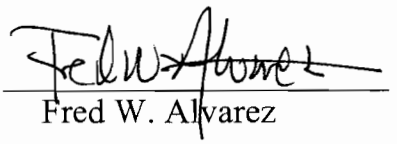
By: 
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CERTIFICATE OF SERVICE

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.

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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 June 16, 2008.

Jo Ann Hylton