Don't Let "Stray Remarks" in the Workplace Put Your Company at Risk

Since August 2010, employers have been bombarded with red alerts, e-blasts, and newsletters about a California Supreme Court ruling in a case involving Google. The Court found that in a discrimination claim against an employer, courts can consider "stray remarks" -- offensive comments made by employees who are *not* involved in hiring and firing decisions -- as supporting evidence of the employer's motivation for terminating an employee. In a nutshell: Google fired an employee and told him he was not a good "cultural fit." The employee sued for age discrimination. He introduced evidence that some of his co-workers, who were not involved in the decision-making process, had made comments directed at his age, such as calling him an "old fuddy-duddy." The Court said it was appropriate to consider the co-workers' stray remarks in determining Google's discriminatory intent.

Yes, the ruling creates fear and uncertainty for California employers. There is only so much an employer can do to control the conduct of its employees. An employer can train its employees on workplace "respect," can distribute a written policy prohibiting discriminatory conduct, and can discipline those who violate the policy. Employees may continue to make insensitive and harmful comments, though, and often carelessly. So, what more can an employer do?

1. Create a paper trail; and
2. Be specific!

How do you manage or terminate an employee who really isn't a good fit? Employers often do a poor job of explaining to employees why they are being terminated. "You're just not a good cultural fit" is terribly vague. It is hard to blame an employee for jumping conclusions about what he or she feels is the "real" reason for his termination when there was no forewarning, the reason given for the termination was touchy-feely, and the employer failed to provide specific facts and examples to support the decision. Consider the following alternative approach:

- Meet with the employee when you first identify the problem;
- Stress the importance of team work, camaraderie, collaboration, and contribution to the company's success, and provide examples of what happens when a team does not work well together;
- Point to specific, observed examples of the employee failing to work well with his team;
- Summarize the meeting in writing, obtain a signed acknowledgement from the employee, and keep the summary in the employee's personnel file;
- Monitor the situation;
- If the problem persists, follow up with additional specific facts, examples, and consequences of the employee's actions;
- If and when warranted, notify the employee that he is being terminated because the issue has not been corrected; and
- Document the termination discussion, obtain a signed acknowledgement from the employee, and keep the document in the employee's file.

The bottom line is that while courts may *consider* "stray remarks" by co-workers, those remarks may not make much of an impact on the outcome of a lawsuit when the employer articulated to its employee throughout the employment relationship -- and can thus demonstrate in court -- the objective basis for its decision to terminate him. And, an employee may be less inclined to pursue a discrimination claim against an employer at all if he was already on notice of the employer's specific concerns and given a fair opportunity to resolve the problem before he was terminated.
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Sarju Naran is an attorney in Hoge Fenton's Employment Law Group, and is a valuable resource for issues concerning employment termination.

For more advice regarding this or any other employment related question, please contact Sarju Naran at san@hogefenton.com - 408.947.2456 direct.

For more information on Hoge Fenton's employment law practice, please click here.

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