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Minimizing the Impact Of Stray Remarks

Keep comments about protected status from being evidence of discriminatory motive

By Eve I. Klein and Sheila Raftery Wiggins

When a decision-maker hears of a co-worker's remark about another employee's protected class status, does it merely "go in one ear and out the other" with no effect on the decision-maker's ability to make neutral employment decisions regarding the affected employee? What if the decision-maker himself makes a remark related to the affected employee's protected status? Do such remarks constitute evidence of the employer's discriminatory motivation?

To establish a disparate treatment claim, a plaintiff must show that a discriminatory animus motivated the employer to make the adverse employment decision. *Hazen Paper Co. v. Briggs*, 507 U.S. 604, 610 (1993). As evidence of discrimination, plaintiffs often offer verbal remarks made by superiors that relate to their protected status.

Not all remarks with discriminatory overtone are probative of whether an employment action was taken as a result of discriminatory animus. Courts have denoted certain discriminatory remarks as "stray" in order "to explain that the more remote and oblique the remarks are in relation to the employer's adverse action, the less they prove that the action was motivated by discrimination." *Tomassi v. Insignia Fin. Group, Inc.*, No. 05-6219, 2007 U.S. App. Lexis 3490, at * 12 (2nd Cir. Feb. 16, 2007). A stray remark is one which, on its own, is inadequate to support an inference of discriminatory motivation. *Grasso v. West N.Y. Bd. of Educ.*, 364 N.J. Super. 109, 118 (App. Div. 2003). By contrast, a remark made by a decision-maker or one who is in a position to influence the decision-maker is generally not deemed stray.

The U.S. Supreme Court discussed the Stray Remarks Doctrine in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), when considering whether a decision-maker's own prior remarks could serve as evidence of intentional discrimination. Reeves alleged that he was terminated at age 57 in violation of the Age Discrimination in Employment Act (ADEA).

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Defendant asserted that Reeves was terminated because of his poor performance. Reeves testified that his supervisor said that Reeves: "was so old [he] must have come over on the Mayflower" and "was too damn old to do [his] job." This supervisor subse-

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quently decided to terminate Reeves.

The Fifth Circuit found that the supervisor's remarks were stray because Reeves failed to demonstrate a causal link between the remarks and the subsequent termination decision. However, the Supreme Court stated that because of "additional evidence that [the supervisor] was motivated by age-based animus and was principally responsible for [Reeves'] firing," there was a sufficient basis to find that the employer had discriminated. Thus, a decision-maker's own prior remarks — even if not made as part of the challenged employment decision — may be given weight when analyzing discriminatory motivation.

New Jersey, along with other jurisdictions, has further developed the analysis for determining whether a remark is stray and, if so, the significance of that remark when considered within the totality of the evidence. See, e.g., *Schreiber v. Worldco, LLC*, 324 F. Supp. 2d 512 (S.D. N.Y. 2004) (identifying factors to determine whether a remark is stray: (1) who made the remark; (2) when it was made in relation to the employment decision; (3) the remark's content; and (4) the remark's context).

The New Jersey Appellate Division addressed whether the stray remark of an employee — who was not the ultimate decision-maker — evidenced discrimination. In *Grasso v. West N.Y. Bd. of Educ.*, 364 N.J. Super. 109, Yvette Grasso was interviewed for the assistant principal position by the assistant superintendent, the superintendent and the principal. She was not hired. Based on the principal's statement that he wanted a "Hispanic male" for this position, the assistant superintendent recommended a Hispanic male to the superintendent. The superintendent then made the same recommendation to the school board, which decided to hire him. Grasso alleged gender discrimination in violation of the New Jersey Law Against Discrimination. At trial, the Board asserted that it hired the most qualified person. On appeal, defendants argued that the principal's remark regarding his preference for a Hispanic male was improperly relied upon by the jury to find gender discrimination.

The Appellate Division concluded that the principal's remark was not stray because he participated in the decision-making process by interviewing Grasso and making recommendations; indeed, "even if they were [stray], they should be admissible as evidence of managerial preference." Further, the Appellate Division noted that an evaluation at any level, if based on discrimination, could allow a jury to find that it influenced the decision-making process and thus show that discrimination played a role in the decision. Here, the board "must have heavily relied" on the superintendent's recommendation, which was influenced on the principal's discriminatory preference. *Grasso* is significant because it found that remarks that were ultimately provided by a lower-level supervisor to a decision-maker are admissible at trial and that stray remarks are admissible as evidence of managerial preference.

Like *Grasso*, the Second Circuit in *Tomassi v. Insignia Fin. Group, Inc.*, No. 05-6219, 2007 U.S. App. Lexis 3490 (Feb, 16, 2007), stated that once a remark is deemed stray, it should not simply be disregarded. The relevance of a remark — even if not offensive — depends on whether it tends to show that the decision-maker was motivated by assumptions or attitudes relating to the employee's protected status. Tomassi asserted an age discrimination claim. The Second Circuit found that her manager's statement — that Tomassi was well suited to work with seniors — was not offensive but had a strong tendency to show that the manager believed that Tomassi was not well suited to work with the younger clients whom the manager sought to attract. Thus, a remark's relevance depends on the totality of the evidence.

Like the courts in *Grasso* and *Tomassi*, the Third Circuit in *Silver v. American Inst. of CPA*, No. 05-4254, 2006 U.S. App. Lexis 30035 (3d Cir. Dec. 6, 2006), analyzed the totality of the evidence to determine the relevance of a supervisor's remarks which concerned age and race. Silver, an African-American male, alleged that he was terminated because of age discrimination in violation of ADEA and racial and sexual discrimination. Defendant asserted that Silver was terminated for his poor work performance. Since 1992, multiple supervisors documented Silver's performance problems. In 1999, Silver was placed on a job improvement plan. Silver failed to improve and was terminated in 2000.

In attempting to show that defendant's termination decision was motivated by discrimination, Silver submitted evidence of his supervisor's prior remarks. Specifically, in 1998, Silver's supervisor referred to Silver as an "old asshole" when speaking to a co-worker. In 1999, Silver's supervisor said that "when black woman [sic] get fat, their husband [sic] stay with them, but white men leaves [sic] their women."

The Third Circuit affirmed the District Court's ruling that Silver failed to show that defendant's termination reason was a pretext. The Third Circuit noted that stray remarks that are unrelated to the decision-making process are given little, if any weight, when they are "temporally remote from the date of the decision" and when other evidence of age, sex or racial discrimination is lacking.

Unlike the analysis presented in *Grasso* and *Tomassi*, Silver did not demonstrate a causal connection linking the remarks with the employer's attitudes or assumptions which motivated the termination decision. Thus, *Silver* exemplifies that even where a plaintiff cites to offensive remarks, he will not prevail without evidence that the remarks evidenced the decision-maker's state of mind, or otherwise were causally linked to the challenged employment decision.

It is clear from these cases that what goes in one ear, is not assumed to go out the other. Therefore, an employer must take special care to ensure that the decision-makers are selected carefully and are mindful about the sources of information relied upon when making employment decisions. What specific steps should an employer take to limit the chances that a decision-maker's employment decisions can be successfully challenged because a supervisor has made or heard an inap-

propriate remark regarding the employee's protected status?

First, employers should ensure that a decision-maker enforces company policies against remarks relating to protected status at the workplace. If violations of these policies are strictly and uniformly enforced against lower-level supervisors and employees, it is more likely that a court will find that the decision-maker was not discriminating when he later made an adverse employment decision affecting a person who had previously been the target of such a remark.

Second, where a decision-maker is aware that an employee was the target of a supervisor's inappropriate remark, the decision-maker should use information from other sources when making employment decisions about the affected employee. This will diminish the likelihood that the employee will be able to successfully claim that the decision-making process was influenced by input from a supervisor who made an inappropriate remark. Similarly, the decision-maker who learned of inappropriate remarks should consider whether he is the most appropriate person to make any later employment decisions about that employee. In such cases, perhaps the employer could appoint another decision-maker or obtain input from the human resources department to ensure the neutrality of the decision-making process.

Third, when an employer becomes aware that a supervisor made a remark about an employee that may suggest discriminatory animus, that supervisor should be removed from the decision-making process relevant to that employee and not have any input into the same. This will help defeat any inference of a causal connection between the inappropriate remark and the challenged employment decision. ■