Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiff's bar

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In-depth summaries

Reid v. Google, Inc.

__ Cal.4th __, 2010 WL 3034803 (Cal. Supreme)

Who needs to know about this case: (1) Lawyers litigating summary judgments in California; (2) employment-discrimination lawyers

Why it's important: (1) holds that parties who file timely written evidentiary objections before summary-judgment hearing preserve issue for appeal, regardless of whether trial court rules on objections at hearing, disapproving prior cases to contrary; (2) "stray remarks" doctrine used in federal system is not the rule in California courts.

Synopsis: Reid filed an age-discrimination lawsuit against his former employer, Google. Google moved for summary judgment. Before the hearing, Google filed 31 pages of evidentiary objections to the evidence Reid submitted in opposition to Google's motion. The trial court did not rule on Google's objections but granted the motion. The Court of Appeal reversed, finding that Reid has raised triable issues of fact on whether the reasons given for his termination were pretextual. Reid had offered statistical evidence, as well as evidence of discriminatory comments about Reid's age made by both Reid's supervisors and co-workers. Google argued that these comments were stray remarks, and did not provide admissible evidence of pretext. The Supreme Court granted review, and affirmed.

Waiver.

In *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, and in *Sharon P. v. Arman, Ltd*. (1999) 21 Cal.4th 1181, 1186-1187, footnote 1, the Supreme Court held that a party's failure to obtain rulings from the trial court on its evidentiary objections resulted in a waiver of those objections on appeal. Several Court of Appeal decisions relied on this rule. In *Reid*, the court disapproved those cases, holding that a party who files proper evidentiary objections before the summary-judgment hearing, or who makes proper objections orally at the hearing as permitted by the California Rules of Court, preserves the objections for appeal, regardless of whether or not the trial court rules on the objections. Trial courts are required to make a ruling, however. And parties are encouraged not to flood the court with inconsequential evidentiary objections: "[L]itigants should focus on the objections that really count. Otherwise, they may face informal reprimands or formal sanctions for engaging in abusive practices."

Stray remarks doctrine

Under the so-called "stray remarks doctrine," federal circuit courts deem irrelevant any remarks made by non-decision-making coworkers or remarks made by decision-making supervisors outside of the decisional process, and such stray remarks are insufficient to withstand summary judgment. (See, e.g., *Hill v. Lockheed Martin Logistics Mgmt., Inc.* (4th Cir.2004) 354 F.3d 277, 283, 295-296 (in bank) [coworker's comments that plaintiff was a "'useless old lady' who needed to retire," was a "'troubled old lady,'" and was a "'damn woman'"] did not influence the decisional process and, therefore, were not relevant.) Moreover, federal circuit courts have treated ambiguous comments as stray remarks because they do not sufficiently indicate discriminatory animus. (See, e.g., *Fortier v. Ameritech Mobile Comm., Inc.* (7th Cir.1998) 161 F.3d 1106, 1108, 1113 [supervisor's comments that she wanted "new blood," a "quick study," and someone with "a lot of energy"] did not reflect age bias.)

The Court rejected Google's suggestion that it adopt the stray-remarks doctrine, finding that it would allow a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by "nondecision-makers or [made] by decision-makers unrelated to the decisional process. This is contrary to the trial court's proper role in deciding summary-judgment motions, where it does not weigh the evidence; and improperly allows the trial court to perform a role reserved for the jury. Strict application of the stray-remarks doctrine would also violate California procedural rules, which require the trial court to consider all the evidence set forth in the papers, as well as all the inferences that can be drawn from the evidence. Nor is there any uniformity in the federal courts concerning who is a "decision maker," how much separation must exist between the remark and an adverse employment decision for the remark to be considered "stray", and even on what

might constitute a "stray" remark. The Court of Appeal accordingly considered all the evidence submitted by Reid in opposition to Google's motion.

County of Santa Clara v. Superior Court

__ Cal.4th __, 2010 WL 2890318 (Cal. Supreme)

Who needs to know about this case: Lawyers who take cases on contingency

Why it's important: Holds that public entities are not categorically barred from retaining counsel on a contingent-fee basis.

Synopsis: A group of public entities composed of various California counties and cities initiated prosecution of a public nuisance action against lead-paint manufacturers. The public entities were represented by their own government attorneys and by several private law firms, which were retained on a contingency-fee basis. Defendants moved to bar the public entities from compensating their privately-retained counsel by means of contingent fees. The superior court, relying on *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, ordered the public entities barred from compensating their private counsel by means of any contingent-fee agreement, reasoning that under *Clancy*, all attorneys prosecuting public-nuisance actions must be "absolutely neutral." The superior court concluded that *Clancy* precluded any arrangement in which private counsel has a financial stake in the outcome of a case brought on behalf of the public. The public entities petitioned for a writ of mandate, which was granted. The Court of Appeal held that *Clancy* does not bar *all* contingent-fee agreements with private counsel in public-nuisance abatement actions, but only those in which private attorneys appear in place of, rather than with and under the supervision of, government attorneys. Affirmed. The Supreme Court reexamined and narrowed its opinion in *Clancy*, in recognition of both (1) the wide array of public-nuisance actions (and the corresponding diversity in the types of interests implicated by various prosecutions), and (2) the different means by which prosecutorial duties may be delegated to private attorneys without compromising either the integrity of the prosecution or the public's faith in the judicial process. Public entities are not categorically barred from relying on private attorneys, but "all critical discretionary decisions ultimately must be made by the public entities' government attorneys rather than by private counsel."

People ex re City of Santa Monica v. Gabriel

__ Cal.App.4th __, 2010 WL 2764765 (2d Dist. Div. 1.)

Who needs to know about this case: Lawyers who bring UCL claims

Why it's important: Holds that sexual harassment can be a "business practice" that violates the UCL, and that notwithstanding a "Practice Pointer" in Rutter treatise, attorney's fees in UCL actions are not available, even if the claim is based on violation of a statute that permits an award of fees.

Synopsis: City brought action against landlord under the unfair competition laws, alleging that landlord sexually harassed a tenant, entered units without permission, and rented uninhabitable living space. The Superior Court, awarded injunctive relief, a civil penalty, and attorney's fees, and landlord appealed. The Court of Appeal affirmed, except with respect to the fee award. The court rejected the landlord's argument that sexual harassment cannot be a business practice. It held that his harassment of his tenant was made possible by the parties' commercial relationship and occurred only during business-related encounters. It had an integral connection with commercial activity and constituted business conduct.

The court reversed the fee award, however, because the UCL does not authorize an award of attorney's fees. Its remedies are restitution and injunctive relief. Quoting a treatise published by The Rutter Group, the City argued that "[a]ttorney fees are recoverable where a borrowed statute, upon which a UCL claim is based, permits such recovery." Here, the City's municipal code allowed for recovery of attorney's fees upon proof of a violation of the code. But here, the City sued only under the UCL. The UCL does not authorize an award of attorney fees. No exception exists for UCL actions predicated on a statute that authorizes such an award. The UCL may borrow from underlying statutes as a predicate for liability, but it does not borrow their remedies.

In Brief

Brief summaries of cases that may be of interest, but which cannot be fully discussed because of space constraints

• **Appellate procedure; post-judgment stay of cost awards**; *Chapala Management Corp. v. Stanton*, __ Cal.App.4th __, 2010 WL 2954443 (Fourth Dist. Div. 1.) The Stantons replaced two windows in their condominium with "sandtone" colored windows after the condo association had denied their application to do so because the windows were not an approved color. The association obtained an injunction forcing them to change the windows, and was awarded attorney's fees. The trial court ordered the Stantons to post a bond staying collection of the fee award pending appeal. The Stanton's sought a writ of supersedeas staying enforcement of the fee award pending resolution of the appeal. The Court of Appeal stayed the order requiring the posting of a bond, and heard the petition with the appeal. It held that a bond was not required because California law does not require the posting of bond to stay enforcement of a cost award that includes attorney's fees, which is issued in conjunction with

an award of injunctive relief. (Code Civ. Proc. § 917.1, subd. (a)(1).)

• **Attorney disqualification; standing;** *Great Lakes Construction, Inc. v. Burman* __ Cal.App.4th __, 2010 WL 2910077 (2d Dist. Div. 3.). In a dispute between a contractor and a homeowner, both the contractor and the subcontractor were represented by the same attorney. The homeowner moved to disqualify defense counsel on the ground that he had a conflict of interest because the interests of his clients were adverse. Held: because the homeowner was not the attorney's client, he had no standing to seek disqualification of defense counsel. Homeowner could not be harmed by the alleged conflict – only the attorney's clients could. The trial court therefore erred in granting the motion for disqualification.

• **ADA; restaurants;** *Antoninetti v. Chipotle Mexican Grill,* __ F.3d __, 2010 WL 2891005 (9th Cir. 2010). Chipotle fast-food Mexican restaurants are arranged so that customers walk along a line that is next to a long counter containing the different foods that are available and on which the customers' individual orders are prepared. In some restaurants the customers' walking line is separated from this "food preparation counter" by a separator wall rising 45 inches above the floor. As customers proceed through the line, they see the different foods available by looking over the wall, and they tell the food service employees behind the food preparation counter what they want. There are many kinds of foods available – such as salsa, guacamole, cheese, and lettuce – and each ingredient is described on written menus in the restaurant as well as on large menu boards above the food preparation counter. The employees then assemble the customer's order-customizing the burrito, taco, or other Mexican food selected-while the customer watches.

At the end of the food preparation area is a 4-foot long, 34-inch high counter containing the cash register and a 2-3-foot long empty space. This counter, called the "transaction station," is 34 inches high, and is where the customer pays for and receives the order. The wall ends where this counter begins.

Chipotle, claims that it "strives to offer a unique experience consisting of the architecture, décor, and music of its restaurants, the aroma of the food, the appearance of a customer's entrée, friendly staff, a tradition of excellent customer service, [the] ability to customize one's entrée, and ... the taste of the food." It describes this as the "Chipotle experience." Because customers who use wheelchairs are unable to see over the wall to see the ingredients or the food being prepared, they are deprived of this experience and Chipotle violated the ADA. Chipotle's attempts to accommodate these customers by either holding up the various ingredients with tongs, using sample cups, or preparing the food at the "transaction station" is merely a substitute experience that lacks the customer's personal participation in the selection and preparation of the food that the full "Chipotle experience" furnishes. The district court was required by the ADA in this circumstance to grant injunctive relief.

• **FEHA; reasonable accommodation; employee's duties**; *Milan v. City of Holtville* (2010) __ Cal.App.4th__, 2010 WL 2524578 (4th Dist., Div. 1.) Employee injured on job who accepted rehabilitation benefits and retraining for 18 months without indicating to the employer that she wished to retain her job could not pursue discrimination claim under the FEHA based on the employer's failure to accommodate her. Where the employee failed to express any meaningful or definitive interest in retaining her job the FEHA did not require that the employer discuss with or offer her accommodations for her disability.


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