First published in, and republished with the permission of the California Employment Law Letter by HR Hero, a publication of BLR.

THE PUBLIC SECTOR

EEO trumps Google employee's free expression

by Jeff Sloan and Tori Anthony
Renne Sloan Holtzman Sakai LLP

In early August, Google seized national headlines by firing software engineer James Damore for publishing an internal memo in which he argued that women are inherently worse at technology jobs than men for "biological" reasons. In addition to the important societal issues Google's action implicates, it raises interesting labor and employment law questions about how far employees can go in speaking their minds to oppose workplace diversity.

Memo stirs up a hornet's nest

Historically, Google has promoted a workplace culture of openness and encouraged the free exchange of views. However, that policy didn't insulate Damore from the consequences of speaking out against diversity by internally publishing a lengthy memo ("Google's Ideological Echo Chamber: How Bias Clouds Our Thinking About Diversity and Inclusion") in which he argued that the disproportionately high percentage of men in technology jobs isn't the result of bias, but rather is attributable to "biological causes" that predispose women to be far less likely to successfully work in tech or hold leadership positions.

Damore also alleged that Google squelches conservative ideas and promotes diversity with "discriminatory" employment practices like restricting programs and classes by gender or race. The memo suggested that Google "de-moralize diversity," "have an open and honest discussion about the costs and benefits of our diversity programs," "be open about the science of human nature," and "reconsider making Unconscious Bias training mandatory."

Damore's memo presented a puzzle for Google managers. On the one hand, doing nothing would cast doubt on Google's commitment to diversity and could be seen as condoning Damore's views. How different is his argument from an alt-right piece asserting that members of racial minority groups are less qualified than whites to be programmers? On the other hand, taking action against Damore would arguably conflict with Google's established policy encouraging openness to diverse viewpoints. In the end, commitment to gender and racial diversity easily trumped freedom of expression: Damore, an at-will employee, was terminated.

Danielle Brown (Google's newly appointed vice president of diversity, integrity, and governance) issued an internal response. While affirming Google's support for diversity, inclusion, and healthy debate, Brown explained that the company's continued commitment to free discourse "needs to work alongside the principles of equal employment found in our Code of Conduct, policies, and anti-discrimination laws."

Unfazed by Google's status as a preeminent world power, Damore lashed out publicly—garnering the support of Breitbart and other conservative news outlets—and filed an unfair labor practice charge with the National Labor Relations Board (NLRB). He was seen wearing a T-shirt emblazoned with a "Goolag" logo (alluding to Soviet labor camps for political dissidents).

Google convened an all-hands "town hall" meeting on the issues and allowed Googlers to presubmit questions or topics. Some of the comments from Google employees who supported the termination were leaked, resulting in Breitbart publishing their names and personal information. Google CEO Sundar Pichai canceled the town hall because of worries over safety and employees' ability to feel comfortable speaking out.

Was memo 'protected' by the NLRA?

In a previous article (see "Talia Jane's lament: Internet rants as protected concerted activity" on pg. 6 of our issue dated April 11, 2016), we noted that Internet posts by tech employees about their working conditions could be viewed as "concerted activity" protected by the National Labor Relations Act (NLRA). We also observed that a terminated tech employee might hesitate to file NLRB charges because of potential blackballing. In this case, however, Damore was unswayed, instead doubling down on his contention that Google's diversity measures are ill-conceived.

Damore's NLRB case is at the investigative stage. The core question is whether employee speech opposing diversity/EEO policies and complaining about their impact on workers is "protected" under the NLRA. Google will contend that it had the right to terminate Damore because his memo violated its EEO policy and contributed toward a hostile work environment. Damore, on the other hand, will contend that the memo challenged Google's discriminatory employment practices and reflected concerns held by

other employees about the unfairness of prodiversity policies and practices.

If this case ends up before the NLRB in Washington, D.C., it will present an intriguing political quandary. Any NLRB member appointed by Donald Trump surely won't want to broaden the rights of employees to engage in "protected activity," but given the Trump administration's aversion to diversity, his appointees are also likely to be sympathetic to an employee challenging diversity efforts. That could paradoxically result in conservative members of the NLRB expanding the NLRA's employee protections.

Added protections in the public sector

As we often note, public-sector managers face far greater challenges than their private-sector counterparts. That's because public-sector workers are largely unionized and enjoy "for-cause" job protection. Moreover, unlike private-sector employees, public-sector workers' speech on matters of public concern is shielded by the First Amendment to the U.S. Constitution. In most states, their right to speak out about workplace issues is protected by a nonfederal NLRB equivalent (like California's left-leaning Public Employment Relations Board, or PERB).

In the public employment context, free-speech principles could very well prevail if a public-sector employer tried to terminate an employee for writing a memo like Damore's. While PERB would be loath to appear to support attacks on workplace diversity, it's unlikely that it would narrow the definition of protected activity under state statutes on that basis.

Bottom line

This case stands for the principle that "free speech" is ordinarily not guaranteed in private-sector employment. Things would potentially be different if Damore was employed by a public agency rather than Google.

Google was caught in a conflict between competing commitments to encouraging free expression and ensuring that diversity is valued and protected. It ultimately chose diversity. Unlike most public-sector and other private-sector employers, its litigation coffers are boundless, and concern about the legal risk of terminating Damore likely wasn't a significant factor in its decision. Given its lack of gender diversity, Google needed to strongly condemn Damore's contention that innate "biological causes" predispose women not to be engineers. It had good reason to believe that keeping him in the workplace would be seen as tolerating gender hostility.

The tragic events in Charlottesville, Virginia, reignited the national debate over diversity, EEO policies, and racism. President Trump's depiction of those events further fed the flames. Google's termination of Damore was joined to the post-Charlottesville debate when the alt-right scheduled national protests against Google's action. Damore—a self-described "classic liberal"—has become a poster child for conservative anti-diversity forces.

The authors can be reached at Renne Sloan Holtzman Sakai LLP, jsloan@publiclawgroup.com and tanthony@publiclawgroup.com. ✤