

Lessons for Employers in the Case of a Former Google Software Engineer Fired for Violating Company Anti-Discrimination Policies

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Earlier this week, an NLRB attorney issued an [advice memo](#) concluding that software giant Google did not violate Section 7 of the National Labor Relations Act (“NLRA”), when the company terminated software engineer James Damore, who penned a controversial memo criticizing Google’s diversity initiatives. The memo, and Google’s swift reaction, were widely covered in the press and speculation followed questioning whether Google’s response was appropriate or whether it would face a challenge.

A challenge did follow in the form of a Section 7 charge before the National Labor Relations Board (NLRB). Section 7 guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Under the Obama Administration, employers began to see an increased use of the NLRA and its Section 7 rights by employees as a means of challenging employment decisions, including terminations premised on policy violations. These challenges were often successful. Though the Google case (and the many other examples of employer action in the face of controversial employee social media posts) demonstrate the need for employers to exercise caution in determining whether and how they control those rights, this memo certainly gives employers more latitude in enforcing legitimate employment policies.

Let’s begin with a brief refresher. While employed by Google, Damore, a white, male engineer, began to express concerns about Google’s policies and initiatives on workplace diversity. He penned a memo in which he argued women were less likely to succeed as software engineers because they were “prone to neuroticism,” had a lower ability to handle stress, and were less intelligent than men, among other sentiments. Damore’s memo was widely disseminated through Google’s chatroom platform. Colleagues complained about sexism and discrimination and reportedly two candidates for employment who learned of the memorandum withdrew their candidacy for

employment because of it. Google viewed his actions contrary to its policy of providing an environment free from discrimination and harassment, placing Google in the position of having to respect Damore's potential Section 7 right to engage coworkers about the diversity policy, while at the same time enforcing its policies on discrimination and anti-harassment. Google terminated Damore, on the basis that his words violated the company's policy against discrimination and harassment, while steering clear of other arguably protected comments the engineer had made. The termination drew Damore's NLRB charge.

The case illustrates the challenge for employers when it comes to respecting an employee's Section 7 rights while also effectuating workplace policies. In the view of the NLRB, which was responding to a complaint filed by Damore, Google appropriately balanced Damore's Section 7 rights with its legitimate workplace rules and management prerogatives. While Section 7 did entitle Damore to question Google's diversity plan to boost minority employment, the company was also entitled to enforce its anti-discrimination and anti-harassment policies, as required under Title VII. Specifically, the NLRB attorney concluded that "[e]mployers must be permitted to 'nip in the bud' the kinds of employee conduct that could lead to a 'hostile workplace,' rather than waiting until an actionable hostile workplace has been created before taking action." The core of Damore's message did not promote the general or common good of the workforce. Nor did it speak to Google's workplace diversity initiatives. In Section 7 parlance, he was not seeking to provide or contribute to the mutual aid or protection of his fellow employees.

There are two important lessons that employers can take away from the Google case.

First, an employer must use care when disciplining an employee based on speech that it does not like. An employer cannot terminate an employee because he or she complained about a company policy, benefits, compensation and the like. Communications between employees that address mutual concerns about the workplace are typically protected speech. Employers must assess which side of the Section 7 line the speech in question falls before taking any action against the employee. That is why an employer must take care when drawing up social media and electronic communication policies. That same care must be taken if discipline is considered for employee speech.

Second, an employer must be alert to its workforce and concerns that raise questions of potential discrimination and harassment in violation of its own policies. When presented with facts that suggest there is an underlying problem (here, sexual stereotyping and broadcasting of same, among others), the company should investigate and take action to address violations of its EEO and anti-harassment policies.

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Topics

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