

Is Misogyny Protected Activity?

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The blogs and networks have been buzzing over the past few days with news that a senior software engineer at Google – James Damore – had taken it upon himself to write and post on an internal Google mailing list a ten page memo, explaining his theory on why Google’s efforts to diversify its workforce were not working. In his words, Google’s “politically correct mononculture” had reached the point where efforts to create diversity by hiring and promoting more women (and other under-represented groups) was actually hurting the company. Implicit in his criticism was what seemed like an undercurrent that men were somehow better suited than women for many tech jobs, and that Google was hiring or promoting women over men, even when the woman might not be the best person for the role.

In the course of this memo, Damore made a number of openly sexist and stereotypical comments about women, which many employees of both sexes took great offense to. Most disturbing was his core view, that the reason women did not succeed in tech jobs was “biological”.

For instance, he opined:

- that women were more apt to have a stronger interest in “people rather than things” and that tech was an industry which focused on things
- that women had a higher level of “agreeableness”, which is why they had a harder time negotiating salary
- that women had “higher anxiety/lower stress tolerance”

Finally, he theorized that the reason there were not more women in leadership roles at tech companies was because they did not have the same “drive for status” or to succeed as men did.

Damore also was very critical and dismissive of Google’s diversity programs, training, and other company initiatives aimed at helping women and diverse employees advance.

The memo of course went viral, and was soon circulating outside of Google and all over the world.

Putting aside the fact that Damore’s views were perpetuating stereotypes and that any dialogue with a woman who has risen to a leadership role or managed large projects at work, while also managing a home and family will tell him – a woman’s ability to multi-task, handle stress, and desire for success knows no bounds. However, the immediate question that Google’s senior management had to confront was how to react to this memo. Many employees, male and female, were greatly offended by the memo and felt that it did not accurately reflect the opinions and culture of most people at the company. More fundamentally, many felt that this memo was openly hostile to, and advanced stereotypical views of, women at Google. It also perpetuated the myths and challenges

that tech companies like Google face, as they work on bringing more women into senior positions. Moreover, as many who follow this area know, the Department of Labor is currently suing Google for salary discrimination, and there have been rumors of class actions looming against companies in this industry. [See Anita Hill, Class Actions Could Fight Discrimination in Tech, THE NEW YORK TIMES \(Aug. 8, 2017\)](#). Given this backdrop, the company needed a strong response.

It did not take long for Google to respond – CEO Sundar Pichai announced that Damore was being terminated. He explained that the idea that women were “less biologically suited” to work at Google was “contrary to our basic values and Code of Conduct”.

However, the drama has not ended, as Damore has filed a charge with the National Labor Relations Board and stated that he was “exploring all possible legal remedies” against Google.

- **What are Damore’s remedies and did Google do anything illegal?**

I do not believe Google violated the law - A company has a right to take steps to prevent such openly destructive and offensive communications in its workplace.

First, terminating Damore was the right thing to do. If there is any debate about that, would anyone question the firing of an employee who sent out a memo saying that employees of one race were “biologically inferior” to those of another race? Is there any question that such a racist document would not be tolerated, and that author would be fired?

Second, the law recognizes that, while an employee has the right to speak out and protest, there are certain types of speech which the law does not protect.

- **What is the law?**

This is not a free speech or First Amendment issue. Google is a private employer and there are generally no free speech rights within a private company.

Damore may claim that the memo was “protected concerted activity” under the National Labor Relations Act. The answer here is not 100% clear, but I think this would be a challenge for Damore. In an e-mail exchange with *The New York Times*, Damore stated “As far as I know, I have a legal right to express **my** concerns about the terms and conditions of **my** working environment and to bring up potentially illegal behavior, which is what my document does.” Given this statement, it appears Damore will argue that his memo is protected under the Act since it discusses terms and conditions of employment. However, in order to be protected Damore also has to be engaging in “concerted” activity or speaking out on behalf of or for a group of employees. A personal gripe, which his reference to “my concerns” indicates, may not be enough to support an NLRB charge.

While the NLRB is certainly a pro-employee agency and often takes an expansive view of what kind of speech is protected under the Act, it is not clear that Damore’s memo was raising any issues on behalf of a group of employees. If anything, he talks more about his opinion of certain programs – but does not identify any specific event or practice (like a salary program) that he believes is illegal. His primary criticism is that some of the programs were not good for the company, not that they violated the rights of certain employees.

Similarly, it is not clear that Damore’s memo was protected activity under Title VII of the Civil Rights Act.

Title VII prohibits retaliation against an employee for raising a legitimate concern about

discrimination. But, the employee must make that complaint in a reasonable way. Title VII does not, in other words, protect all speech and does not protect racist or sexist speech.

The EEOC (the agency that enforces Title VII) has issued guidance concerning retaliation and what constitutes protected activity. Specifically, the EEOC has stated that an employee must oppose unlawful conduct in a reasonable manner in order for the opposition to be considered protected activity. If the employee doesn't act in a reasonable manner, he or she may lose the protection of Title VII. While publicly disclosing a complaint is not *per se* unreasonable under the EEOC's guidance, if the public disclosure is done "in so disruptive or excessive a manner as to be unreasonable," then the employee may lose statutory protection.

Courts have utilized a long-standing balancing test to determine whether an employee's manner of opposition is reasonable. In doing so, the courts balance the purpose of Title VII in protecting individual rights against the employer's legitimate demands for loyalty, cooperation, and a productive work environment. By use of the balancing test, courts have held that when an employee makes frequent "spurious" discrimination complaints, those complaints are no longer reasonable and lose protection under Title VII's anti-retaliation provisions. *See Rollins v. Florida Dep't of Law Enforcement*, 868 F.2d 397, 399, 401 (11th Cir. 1989). Likewise, courts have refused protection for employees who make constant complaints of discriminatory practices when those complaints are made at inappropriate times and settings and the complaints damage team morale. *See Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 234 (1st Cir. 1976). It is also possible that Damore's memo will not be considered protected activity if the act of drafting and disseminating the memo, along with the contents of the memo, violated a legitimate company rule, in this case Google's Code of Conduct. *See Unt v. Aerospace Corp.*, 765 F.2d 1440, 1446 (9th Cir. 1985).

If Damore proceeds with his charge at the NLRB, or also files with the EEOC, I believe that the company will be successful. As the CEO stated, while I am sure that Google values open communication among its employees, that does not give employees free rein to make offensive and discriminatory comments. If there is any doubt of that, ask yourself whether any company would tolerate a memo like that about Asian or black employees? Clearly the answer is no.

The bottom line is that, while Damore may have a right to have this opinion, he did not have the right to express his opinion the way he did, to the entire company, thereby denigrating and insulting half of the workforce.

I wish Google all the best in defending his charge.