Labor & Employment Law Workshop

2018

PERKINSCOIE

COUNSEL TO GREAT COMPANIES

Implicit Bias: What Every Employment Lawyer Needs to Know

June 20, 2018 – Bellevue, Washington

Presented by:

Theresa Cropper, Chief Diversity Officer

Agenda

1:05 p.m.— 2:05 p.m.	**Spring Employment Law Update** Linda Walton, Perkins Coie Javier Garcia, Perkins Coie *60 Minutes of General CLE Credit*
2:05 p.m. — 2:20 p.m.	**Break**
2:20 p.m. — 2:50 p.m.	**Restrictions on Employee "Political" Conduct** Ben Stafford, Perkins Coie *30 Minutes of General CLE Credit*
2:55 p.m. — 3:40 p.m.	**Workplace Harassment in the Era of the #MeToo Movement** Chelsea Petersen, Perkins Coie Ann Marie Painter, Perkins Coie *45 Minutes of General CLE Credit*
3:45 p.m. — 4:30 p.m.	**Paid Sick Leave in Washington –What You Don't Know *Can* Hurt You** Bruce Cross, Perkins Coie Julie Lucht, Perkins Coie *45 Minutes of General CLE Credit*
4:30 p.m.	**Wrap-Up and Thank You** Linda Walton, Perkins Coie

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Labor & Employment Law Workshop: Update

June 20, 2018 – Bellevue, Washington

Presented by:

Linda Walton, Partner

Javier Garcia, Partner

Agenda

Federal Law Updates

- New DOL Unpaid Intern Test
- Effects of the New Tax Act

State and Local Law Updates

- Washington's Fair Chance Act (Ban the Box)
- Amendments to Washington's Domestic Violence Leave Law
- Washington Discrimination and Harassment Statutes
  - Nondisclosure Pertaining to Sexual Harassment Law
  - Right to Publicly Pursue Discrimination Claims
  - Equal Pay Act Update

Agenda (contd.)

U.S. Supreme Court Cases

- Supreme Court upholds employment agreements requiring arbitration

Federal Court Decisions

- Ninth Circuit holds that employers cannot use prior salary to justify pay gaps

Agenda (contd.)

Washington Supreme Court Decisions

- Piece-rate workers must be paid by the hour for activities outside piece-rate picking work

Other State Court Decisions

- California court adopts “ABC” test to distinguish between employees and independent contractors

NLRB Updates

- Board Unravels Obama-Era Decisions
- Status of the Joint Employer Test

Other

- GDPR Update

DOL Embraces Economic Realities in New Unpaid Intern Test

- On January 5, 2018, the DOL revised its test for determining whether interns can be unpaid under the FLSA. The new test focuses on the economic realities of the relationship:
  1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
  2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
  3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
  4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
  5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
  6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
  7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship

Fact Sheet # 71, Internship Programs Under The Fair Labor Standards Act

New Tax Act Rewards Paid Leave, Discourages Harassment NDAs

- Congress passed the Tax Cuts and Jobs Act in December 2017. Important for employers, the TCJA:
  1. Creates a tax credit for employer-paid family and medical leave, up 25% of wages paid while on leave
  2. Removes deductions for settlements or payments made for claims of sexual harassment or abuse
  3. Narrows deductions available for top executives' pay, closing loopholes and imposing new 25% tax on exec comp over $1M
  4. Eliminates deductions for business-related entertainment expenses, but retains deduction for business-related meals.

Washington Fair Chance Act

The Washington Legislature recently enacted a ban-the-box law:

- Employers may not inquire about a job applicant's arrest or conviction history until after they determine that the applicant is otherwise qualified for the position.
- Once an employer has determined that an applicant is otherwise qualified, it may obtain that information.
- Employers may not advertise employment openings in a way that excludes people with criminal records from applying.
- Ads that state "no felons" or "no criminal background" or otherwise convey similar messages are prohibited.

Have you ever been convicted?

Amendments to Washington's Domestic Violence Leave Act

Employers should be aware of the following recent amendments:

- Employers must provide **"reasonable safety accommodations"** for employees who are victims of domestic violence, sexual assault, or stalking, or who have family members who are victims, absent significant difficulty or expense to the employer;
- **"Reasonable safety accommodations"** may include changing the employee's work phone number, email address, or work station; transfer; reassignment; and implementation of locks or safety procedures;
- Employers may request verification of the need for a safety accommodation;
- Job applicants may bring a claim for damages against a prospective employer; and
- Employers may not refuse to hire an otherwise qualified individual because the individual is an actual or perceived victim of domestic violence, sexual assault, or stalking.

Washington Discrimination and Harassment Statutes

Nondisclosure Pertaining to Sexual Harassment Law

- Employers are prohibited from requiring employees, as a condition of employment, to sign nondisclosure agreements that prevent them from disclosing sexual harassment or sexual assault in the workplace, or at work-related events coordinated through the employer, between employees, or between an employer and an employee off the employment premises.

Right to Publicly Pursue Discrimination Claims

- Prohibits employment agreements that require employees to resolve discrimination complaints via private, confidential arbitration. Mandatory arbitration clauses are allowed, however, if there is not an accompanying confidentiality requirement.

Equal Pay Act Update

- Prohibits gender-based pay discrepancies between employees of the same employer who are "similarly employed"—that is, they perform jobs requiring similar skill, effort, and responsibility under similar working conditions.
- Employers cannot rely on an employee's previous wage or salary to justify a pay discrepancy between genders.

Supreme Court Upholds Employment Agreements Requiring Arbitration

In *Epic Systems Corp. v. Lewis*, a 5-4 split court decided that arbitration agreements must be enforced pursuant to the Federal Arbitration Act (FAA). Neither the FAA's savings clause nor the National Labor Relation Act (NLRA) restricts enforcement of arbitration agreements.

> "The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written."

Epic Sys. Corp. v. Lewis, Nos. 16-285, 16-300, 16-307, __ S. Ct. __, 2018 WL 2292444 (May 21, 2018)

Ninth Circuit Says Employers Cannot Use Prior Salary to Justify Pay Gap

The Ninth Circuit ruled en banc to overturn its 1982 decision in *Kouba v. Allstate Insurance Co.* which permitted employers to use prior salary—a "factor other than sex" —to justify pay gaps between men and women under the federal Equal Pay Act. In its ruling, the court sought to clarify the law and held that "prior salary alone or in combination with other factors cannot justify a wage differential."

> "[A] pay structure based exclusively on prior wages is so inherently fraught with the risk—indeed, here, the virtual certainty—that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand."

Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018)

Piece-rate Workers Must Be Paid by the Hour for Activities Outside Piece-rate Picking Work

In *Carranza v. Dovex*, the Washington Supreme Court held that under Washington law, agricultural employers who pay their workers on a "piece rate" basis for what they pick must also pay their pieceworkers for time spent performing activities outside of piece-rate picking work.

- Employers are required to pay their workers at a rate of no less than the minimum wage per hour.
- Workweek averaging does not comply with the state minimum wage act.
- The rate of pay for non-piece-rate picking activities must be at least the state minimum wage or the agreed upon rate, whichever is higher.

Carranza v. Dovex, 416 P.3d 1205 (Wash. 2018)

California Supreme Court Sets New Test for Independent Contractors vs. Employees

Dynamex Operations West, Inc. v. Superior Court sets a new standard for distinguishing between employees and independent contractors under California's Industrial Welfare Commission Wage Orders. The hiring entity must establish that the worker is an independent contractor by proving that the worker:

(A) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of such work and in fact;

(B) performs work that is outside the usual course of the hiring entity's business; and

(C) is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018)

NLRB Unravels Obama-Era Policies

Beginning in December 2017, the Board has reversed a number of notable Obama-era decisions, including:

- *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017)
  - Overturned Lutheran-Heritage, replacing a three-part test for determining the legality of workplace policies with a simpler balancing test
- *PCC Structurals, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017)
  - Overturned Specialty Healthcare, reinstating the traditional community of interest test for determining the appropriateness of a proposed bargaining unit
- *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017)
  - Overturned USPS, permitting reasonable settlements to be accepted over objections by the NLRB General Counsel or the charging party

A memo from NLRB General Counsel indicates that more reversals are likely to come, including the definition of independent contractors and a statutory right for employees to use employer email for organizing activities.

Status Update on the Ongoing Joint Employer Debate

Browning-Ferris "subjected countless entities to unprecedented new joint bargaining obligations that most may not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity."

Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156, at *2 (Dec. 14, 2017).

"Whether one business is the joint employer of another business's employees is one of the most critical issues in labor law today."

Press Release, NLRB, NLRB Considering Rulemaking to Address Joint-Employer Standard (May 9, 2018).

GDPR and HR Compliance

What is the GDPR?

The General Data Protection Regulation is an EU regulation intended to provided greater protection of personal data of individuals located in the EU that went into effect on May 25, 2018.

The Intersection of GDPR and HR Compliance:

HR professionals may encounter the GDPR through whistleblower employees, compliance hotline complaints, and business partner or customer requests regarding compliance.

A few steps employers should consider to ensure compliance:

- develop new privacy notices for EU-based employees;
- review employee termination, hiring, and recruiting policies and processes to reflect new requirements; and
- provide training on new data security requirements to employees at onboarding and on a recurring basis.

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Restrictions on Employee Political Conduct in the Workplace

June 20, 2018 – Bellevue, Washington

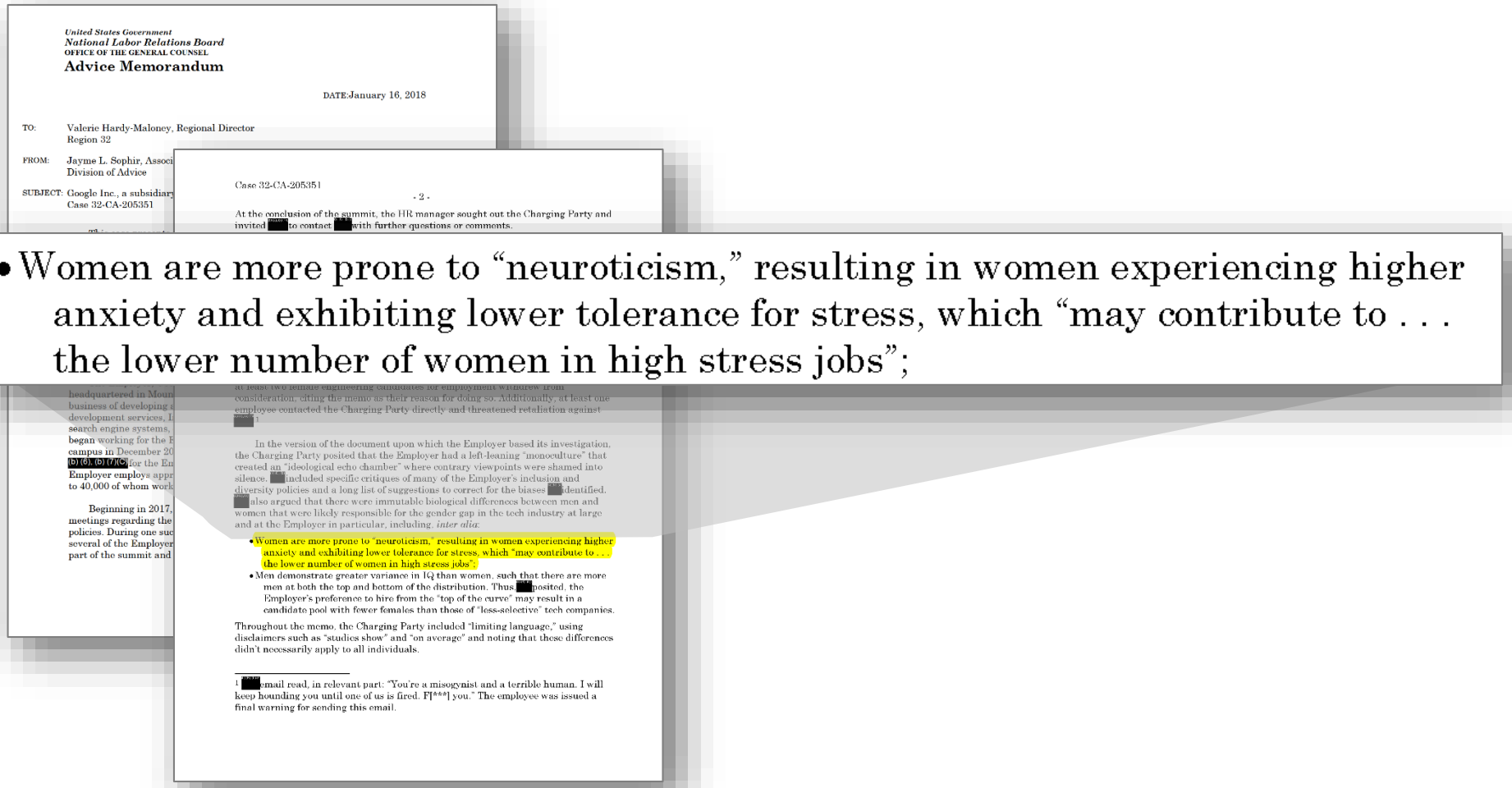
Presented by:

Ben Stafford, Partner

Three Major Topics to Cover

- Free Speech and Off-Duty Conduct

Free Speech



United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: January 16, 2018

TO: Valerie Hardy-Maloney, Regional Director
Region 32

FROM: Jayme L. Sophir, Associ
Division of Advice

SUBJECT: Google Inc., a subsidiary
Case 32-CA-205351

Case 32-CA-205351
- 2 -

At the conclusion of the summit, the HR manager sought out the Charging Party and invited [redacted] to contact [redacted] with further questions or comments.

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at least two female engineering candidates for employment withdrew from consideration, citing the memo as their reason for doing so. Additionally, at least one employee contacted the Charging Party directly and threatened retaliation against [redacted].[1]

In the version of the document upon which the Employer based its investigation, the Charging Party posited that the Employer had a left-leaning "monoculture" that created an "ideological echo chamber" where contrary viewpoints were shamed into silence. [redacted] included specific critiques of many of the Employer's inclusion and diversity policies and a long list of suggestions to correct for the biases [redacted] identified. [redacted] also argued that there were immutable biological differences between men and women that were likely responsible for the gender gap in the tech industry at large and at the Employer in particular, including, *inter alia*:

- Women are more prone to "neuroticism," resulting in women experiencing higher anxiety and exhibiting lower tolerance for stress, which "may contribute to . . . the lower number of women in high stress jobs";
- Men demonstrate greater variance in IQ than women, such that there are more men at both the top and bottom of the distribution. Thus [redacted] posited, the Employer's preference to hire from the "top of the curve" may result in a candidate pool with fewer females than those of "less-selective" tech companies.

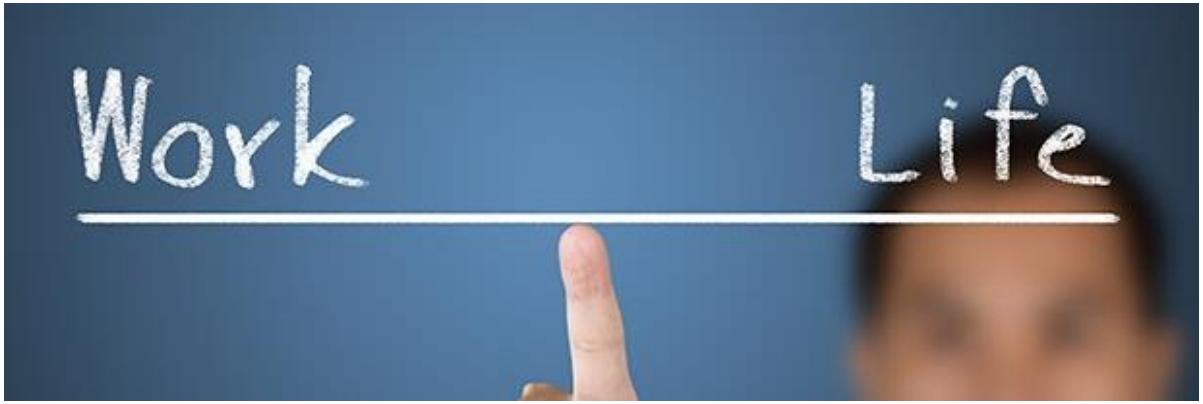
Throughout the memo, the Charging Party included "limiting language," using disclaimers such as "studies show" and "on average" and noting that these differences didn't necessarily apply to all individuals.

1 [redacted] e-mail read, in relevant part: "You're a misogynist and a terrible human. I will keep hounding you until one of us is fired. F[***] you." The employee was issued a final warning for sending this email.

- Women are more prone to "neuroticism," resulting in women experiencing higher anxiety and exhibiting lower tolerance for stress, which "may contribute to . . . the lower number of women in high stress jobs";

Free Speech and Off Duty Conduct

- **The Challenge:** The collapsing boundaries between work and personal and reputational concerns in the viral age.
- Different regimes for private and public employers—but the same basic framework applies as a practical matter.



Off Duty Conduct

Man, fired from job, makes no apology for carrying torch in Charlottesville

USA TODAY NETWORK April McCullum and Adam Silverman, The Burlington (Vt.) Free Press Published 7:38 a.m. ET Aug. 16, 2017

https://www.usatoday.com/story/news/nation-now/2017/08/16/charlottesville-vermont-man-fired-job-no-apology/571707001/

Free Speech — Public Employers

"Today it is clearly established that a State may not discharge or otherwise discipline an employee on a basis that infringes upon that employee's constitutionally protected interest in freedom of speech."

White v. State, 131 Wn. 2d 1, 10, 929 P.2d 396 (1997)

Free Speech-Public Employers

- **Burden-Shifting Test**
  - Employee must prove (a) speech is protected and (b) speech was a substantial or motivating factor in adverse action.
  - Employer must prove it would have made the same decision in the absence of protected conduct.

When is Speech Protected

Topics of public concern include current matters of political or social concern to the community, speech relating to public education, suspected abuse and proper care of nursing home patients, speech concerning the proper functioning of government, and public safety.

Sprague v. Spokane Valley Fire Dep't, 409 P.3d 160, 174–75 (Wash. 2018)

When is Speech Not Protected

Not matters of personal interest, such as personal grievances against employers.

Sprague, 409 P.3d at 174–75

A Recent Illustration

- Sprague v. Spokane Valley Fire Dep't, 409 P.3d 160 (Wash. 2018)
- Fire Captain fired after "persistently including religious comments in e-mails that he sent through the SVFD computer systems and items he posted on the SVFD electronic bulletin board."
- **Held:** Some communications protected, others were not.

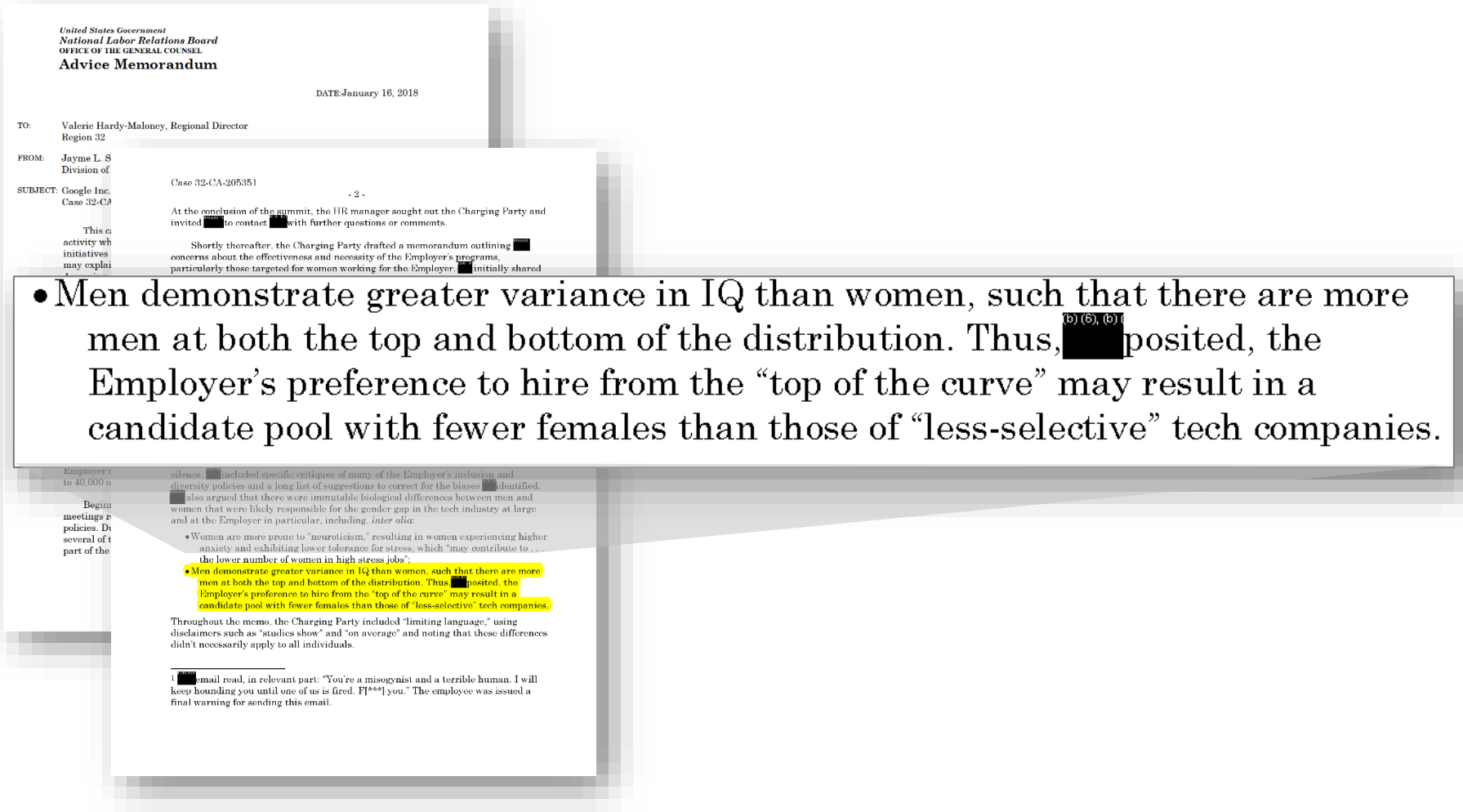
Free Speech — Private Employer

- No First Amendment Rights
- So alternative theories are needed.
  - Federal protections under the National Labor Relations Act.
  - Wrongful termination claims.
  - State and local protections for political speech.

Damore v. Google

- A case from California illustrating these threads.
- Employee circulated a memorandum in opposition to a private employer's diversity initiatives.

Damore v. Google—the Employee's Memo



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FROM: Jayme L. S
Division of

SUBJECT: Google Inc.
Case 32-CA

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Case 32-CA-205351
- 2 -

At the conclusion of the summit, the HR manager sought out the Charging Party and invited [redacted] to contact [redacted] with further questions or comments.

Shortly thereafter, the Charging Party drafted a memorandum outlining [redacted] concerns about the effectiveness and necessity of the Employer's programs, particularly those targeted for women working for the Employer. [redacted] initially shared

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Throughout the memo, the Charging Party included "limiting language," using disclaimers such as "studies show" and "on average" and noting that these differences didn't necessarily apply to all individuals.

1 [redacted] email read, in relevant part: "You're a misogynist and a terrible human. I will keep hounding you until one of us is fired. F[^**] you." The employee was issued a final warning for sending this email.

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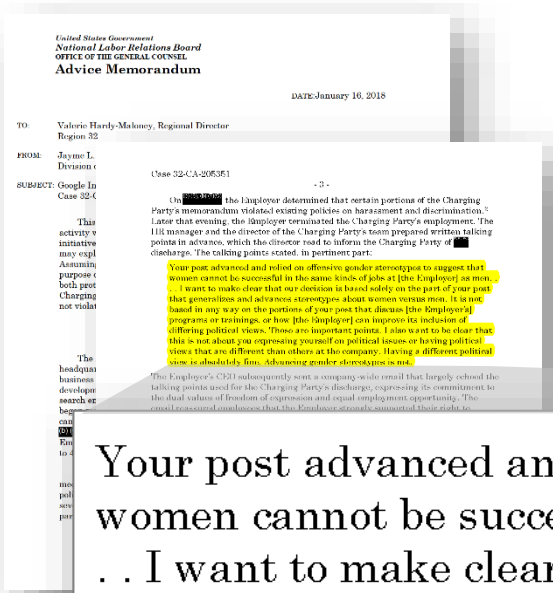
Damore v. Google: Google's Response

- Google determined that certain portions of the memorandum violated its policies on harassment and discrimination.
- Google fired the employee.

Damore v. Google: Google's Response



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- 2 -

On [redacted], the Employer determined that certain portions of the Charging Party's memorandum violated existing policies on harassment and discrimination.[3] Later that evening, the Employer terminated the Charging Party's employment. The HR manager and the director of the Charging Party's team prepared written talking points in advance, which the director read to inform the Charging Party of [redacted] discharge. The talking points stated, in pertinent part:

> Your post advanced and relied on offensive gender stereotypes to suggest that women cannot be successful in the same kinds of jobs at [the Employer] as men. . . . I want to make clear that our decision is based solely on the part of your post that generalizes and advances stereotypes about women versus men. It is not based in any way on the portions of your post that discuss [the Employer's] programs or trainings, or how [the Employer] can improve its inclusion of differing political views. Those are important points. I also want to be clear that this is not about you expressing yourself on political issues or having political views that are different than others at the company. Having a different political view is absolutely fine. Advancing gender stereotypes is not.

The Employer's CEO subsequently sent a company-wide email that largely echoed the talking points used for the Charging Party's discharge, expressing its commitment to the dual values of freedom of expression and equal employment opportunity. The email reasserted conclusions that the Employer strongly supported their right to

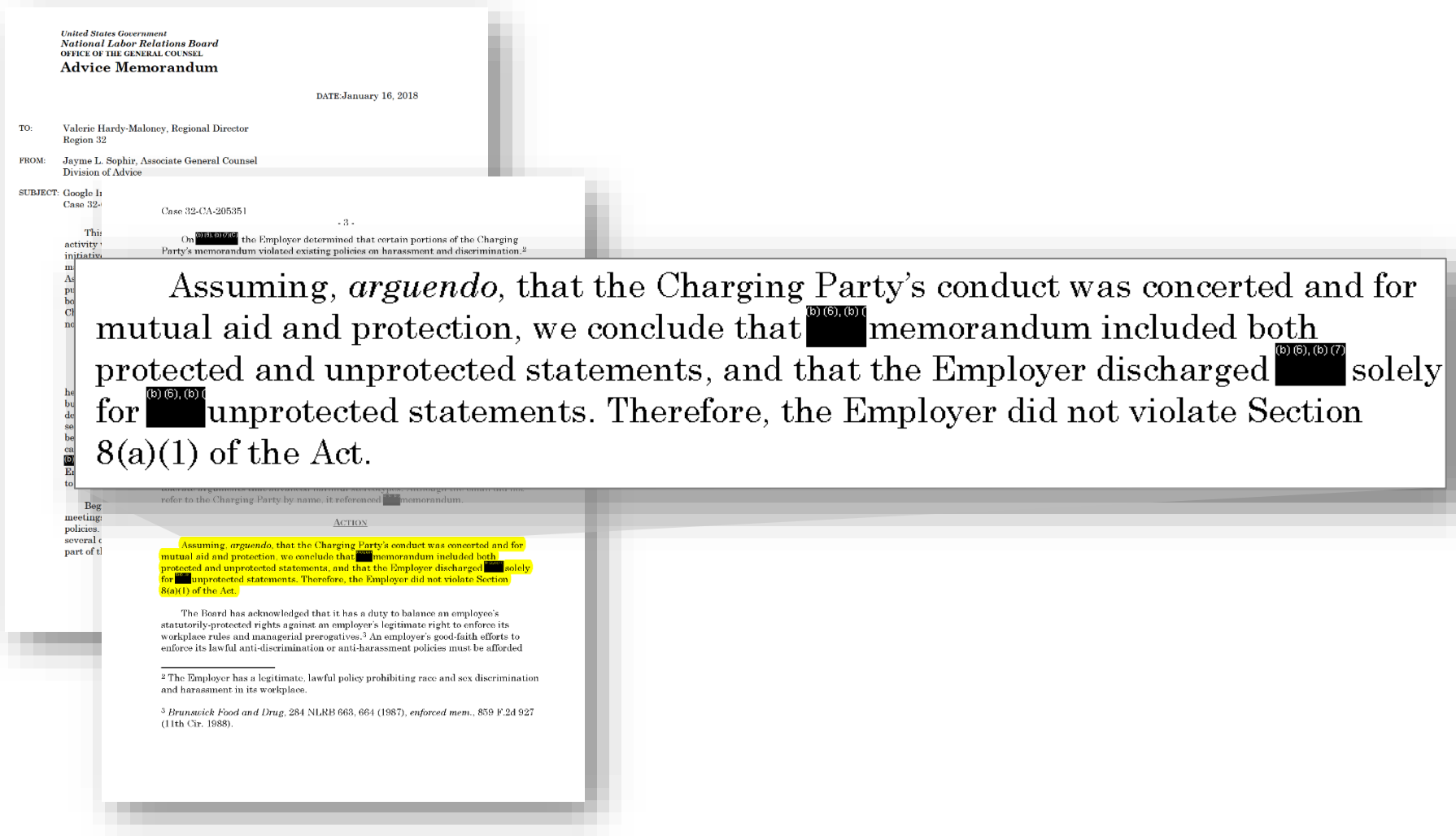
> Your post advanced and relied on offensive gender stereotypes to suggest that women cannot be successful in the same kinds of jobs at [the Employer] as men. . . . I want to make clear that our decision is based solely on the part of your post that generalizes and advances stereotypes about women versus men. It is not based in any way on the portions of your post that discuss [the Employer's] programs or trainings, or how [the Employer] can improve its inclusion of differing political views. Those are important points. I also want to be clear that this is not about you expressing yourself on political issues or having political views that are different than others at the company. Having a different political view is absolutely fine. Advancing gender stereotypes is not.

Free Speech—Concerted Protected Activity

- Under Section 7 of the National Labor Relations Act, most employees have the right to engage in "concerted protected activity."

- For example, an employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

Damore v. Google: The NLRB's Finding



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Case 32-CA-205351

- 3 -

On [redacted] the Employer determined that certain portions of the Charging Party's memorandum violated existing policies on harassment and discrimination.[2]

refer to the Charging Party by name, it referenced [redacted] memorandum.

ACTION

Assuming, *arguendo*, that the Charging Party's conduct was concerted and for mutual aid and protection, we conclude that [redacted] memorandum included both protected and unprotected statements, and that the Employer discharged [redacted] solely for [redacted] unprotected statements. Therefore, the Employer did not violate Section 8(a)(1) of the Act.

The Board has acknowledged that it has a duty to balance an employee's statutorily-protected rights against an employer's legitimate right to enforce its workplace rules and managerial prerogatives.[3] An employer's good-faith efforts to enforce its lawful anti-discrimination or anti-harassment policies must be afforded

[2] The Employer has a legitimate, lawful policy prohibiting race and sex discrimination and harassment in its workplace.

[3] *Brunswick Food and Drug*, 284 NLRB 663, 664 (1987), *enforced mem.*, 859 F.2d 927 (11th Cir. 1988).

Assuming, *arguendo*, that the Charging Party's conduct was concerted and for mutual aid and protection, we conclude that [redacted] memorandum included both protected and unprotected statements, and that the Employer discharged [redacted] solely for [redacted] unprotected statements. Therefore, the Employer did not violate Section 8(a)(1) of the Act.

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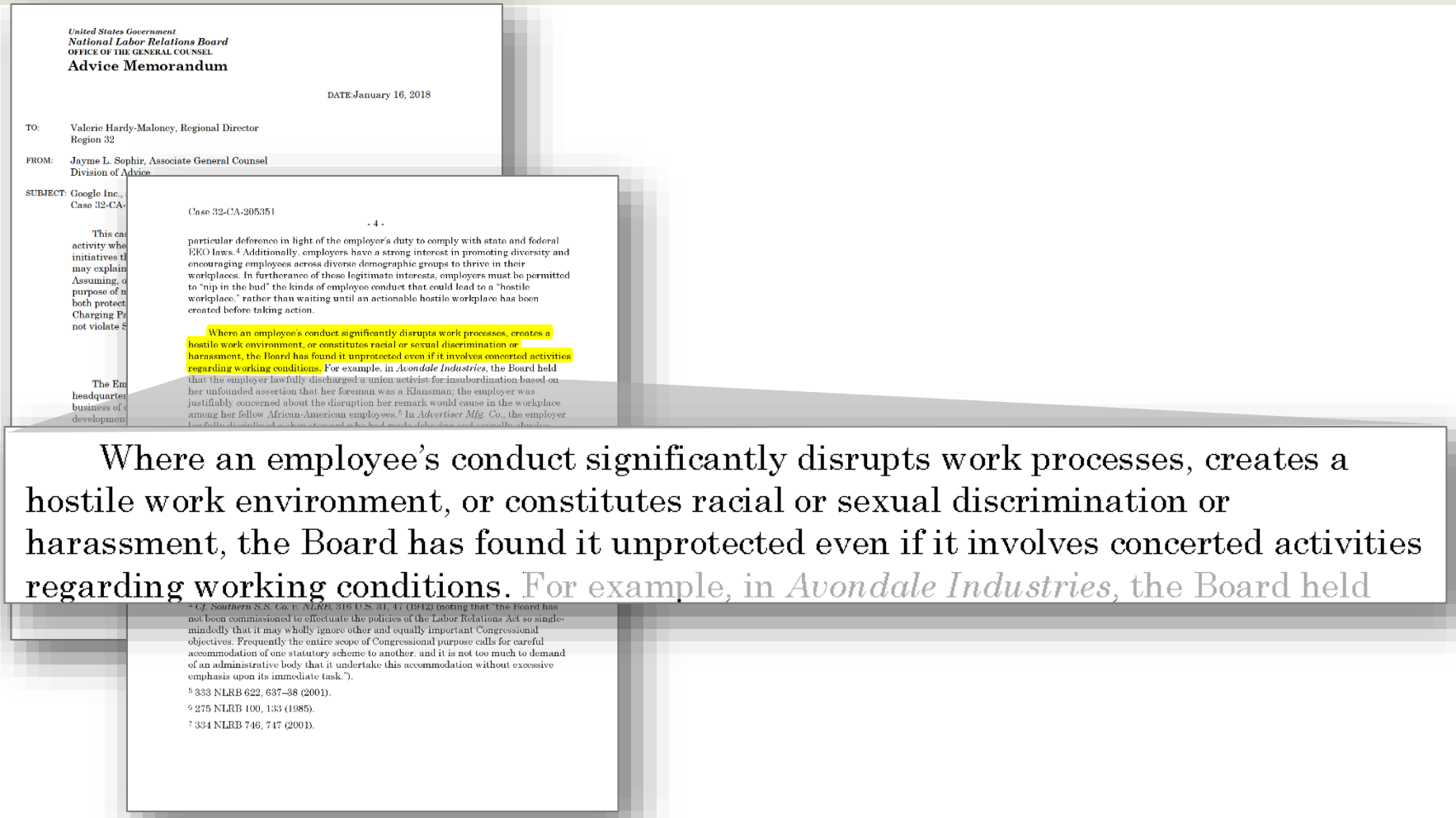
Damore v. Google: The NLRB's Finding



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Case 32-CA-205351
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particular deference in light of the employer's duty to comply with state and federal EEO laws.[4] Additionally, employers have a strong interest in promoting diversity and encouraging employees across diverse demographic groups to thrive in their workplaces. In furtherance of these legitimate interests, employers 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.

Where an employee's conduct significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment, the Board has found it unprotected even if it involves concerted activities regarding working conditions. For example, in *Avondale Industries*, the Board held that the employer lawfully discharged a union activist for insubordination based on her unfounded assertion that her foreman was a Klansman; the employer was justifiably concerned about the disruption her remark would cause in the workplace among her fellow African-American employees.[5] In *Advertiser Mfg. Co.*, the employer

[4] *C.J. Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) (noting that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.").

[5] 333 NLRB 622, 637–38 (2001).

[6] 275 NLRB 100, 133 (1985).

[7] 334 NLRB 746, 747 (2001).

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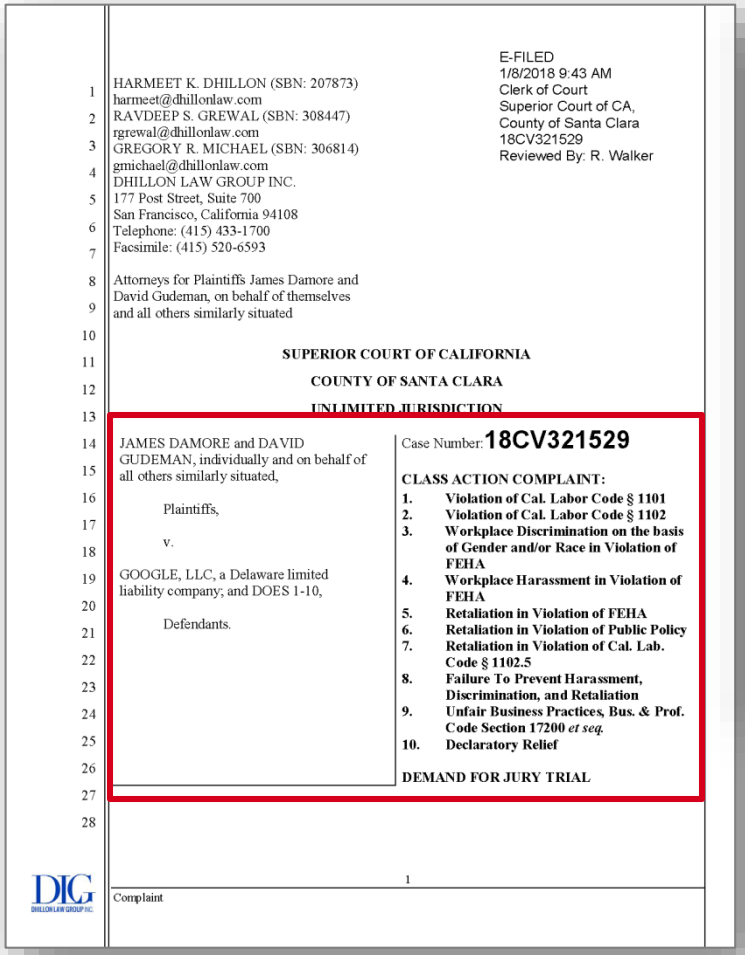
Damore Files a Class Action Lawsuit



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Attorneys for Plaintiffs James Damore and David Gudeman, on behalf of themselves and all others similarly situated

E-FILED
1/8/2018 9:43 AM
Clerk of Court
Superior Court of CA,
County of Santa Clara
18CV321529
Reviewed By: R. Walker

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

UNLIMITED JURISDICTION

JAMES DAMORE and DAVID GUDEMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE, LLC, a Delaware limited liability company; and DOES 1-10,

Defendants.

Case Number: **18CV321529**

CLASS ACTION COMPLAINT:

1. **Violation of Cal. Labor Code § 1101**
2. **Violation of Cal. Labor Code § 1102**
3. **Workplace Discrimination on the basis of Gender and/or Race in Violation of FEHA**
4. **Workplace Harassment in Violation of FEHA**
5. **Retaliation in Violation of FEHA**
6. **Retaliation in Violation of Public Policy**
7. **Retaliation in Violation of Cal. Lab. Code § 1102.5**
8. **Failure To Prevent Harassment, Discrimination, and Retaliation**
9. **Unfair Business Practices, Bus. & Prof. Code Section 17200 *et seq.***
10. **Declaratory Relief**

DEMAND FOR JURY TRIAL

1

Complaint

JAMES DAMORE and DAVID GUDEMAN, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GOOGLE, LLC, a Delaware limited liability company; and DOES 1-10,

Defendants.

Case Number: **18CV321529**

CLASS ACTION COMPLAINT:

1. **Violation of Cal. Labor Code § 1101**
2. **Violation of Cal. Labor Code § 1102**
3. **Workplace Discrimination on the basis of Gender and/or Race in Violation of FEHA**
4. **Workplace Harassment in Violation of FEHA**
5. **Retaliation in Violation of FEHA**
6. **Retaliation in Violation of Public Policy**
7. **Retaliation in Violation of Cal. Lab. Code § 1102.5**
8. **Failure To Prevent Harassment, Discrimination, and Retaliation**
9. **Unfair Business Practices, Bus. & Prof. Code Section 17200 *et seq.***
10. **Declaratory Relief**

DEMAND FOR JURY TRIAL

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Wrongful Termination

"Needless to say, the exercise of fundamental constitutional rights is a matter of clear public policy. . . . Where, as here, the employee is claiming she was terminated on a basis that violated her First Amendment rights, she must first establish that her speech is protected by the First Amendment, and then show that her exercise of that right was a substantial or motivating factor in her termination."

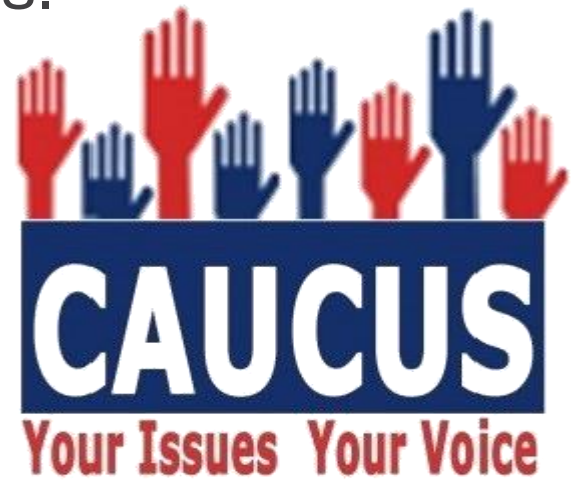
Riddle v. Town of Maches, 87 Wn. App. 1082 (1997)

Wrongful Termination

- Has arisen only in claims against government entities, with minor exceptions.

Off Duty Conduct

- No general prohibition in Washington State on adverse employment actions.
- Compare to other states (e.g., California).
- **Exception:** Certain political activities.



Off Duty Conduct—State Law

No employer…may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.

RCW 42.17A.495(2)

Off Duty Conduct—Local Law

- **Seattle Ordinance:** Unlawful to discriminate on the basis of political ideology. SMC 14.04.030.F.
- **"Political ideology"** means any idea or belief, or coordinated body of ideas or beliefs, relating to the purpose, conduct, organization, function, or basis of government and related institutions and activities, whether or not characteristic of any political party or group. This term includes membership in a political party or group and includes conduct, reasonably related to political ideology, which does not interfere with job performance.

Burke v. City of Montesano, 198 Wn. App. 1078 (Feb. 22, 2017)

- Public Works Lead terminated after failing to participate in interview into potential theft of paint.
- Employee claims he was terminated in violation of RCW 42.17A.495.
- Court analyzes under 1st Amendment retaliation framework.
- Employee failed to demonstrate pretext.

Private Employers

"We find that RCW 42.17[A.495] does prohibit this employer from discriminating against an employee on the basis of the employee's refusal to remain politically abstinent. However, we conclude the statute cannot constitutionally apply to McClatchy Newspapers or *The News Tribune* (TNT) under the free press clause of the First Amendment to the United States Constitution."

Nelson v. McClatchy Newspapers, Inc., 131 Wn.2d 523, 526, 936 P.2d 1123, 1124 (1997).

PERKINS COIE

COUNSEL TO GREAT COMPANIES

Workplace Harassment in the Era of the #MeToo Movement

June 20, 2018

Presented by:

Chelsea Peterson, Partner

Ann Marie Painter, Partner

PERKINSCOIE

COUNSEL TO GREAT COMPANIES

Paid Sick Leave in Washington – What You Don't Know *Can* Hurt You

June 20, 2018 – Bellevue, Washington

Presented by:

Bruce Cross, Partner

Julie Lucht, Partner

Scene 1

Notification

Notification

Initial Notice:

- Notice to employees was required by March 1st
- Provide notice to newly hired employees on or before the first day of work
- Notice may be provided in written or electronic form, but readily available to all employees

Must State:

- Entitlement to paid sick and safe time
- Rate of accrual
- Authorized purposes for use
- That retaliation for use of leave is prohibited

Notification

Ongoing Notice:

- Must provide notice of accrued leave balance at least monthly
- Best practice: show accrued leave balance on paystubs

Must State:

- Amount of leave accrued since the last notice
- Amount of leave used since the last notice
- Amount of leave currently available for use

Scene 2

Covered Employees

Covered Employees

Covered:

- All employees covered by Minimum Wage Act
- Full-time
- Part-time
- Seasonal, Temporary, and Casual
- All employers in Washington, even those with one employee

NOT Covered:

- Exempt employees who meet the “white collar” exemptions (executive, administrative, professional, and outside sales employees)

Scene 3

Accrual and Availability

Accrual and Availability

Timing for Accrual and Use:

- No waiting period for accrual; employees begin accruing on their first day of work
- Employees may use accrued leave beginning on the 90th calendar day after the start of employment

Rate of Accrual and Carryover:

- 1 hour for ever 40 hours worked
- No limit on annual accrual
- Unused leave of 40 hours or less must be carried over to the following year

Accrual and Availability

Accrual Year:

- Employers can choose what “year” to use (e.g., employee anniversary, calendar, fiscal, etc.)
- Best practices: use the same “year” that is used for other benefits purposes

End of Employment:

- Payout of accrued leave on termination is not required
- Must restore accrued amount on rehire if rehired within 12 months

Scene 4

Use of Leave

Use of Leave

Permitted Reasons for Use:

- The employee's own medical needs
- To care for a "family" member—defined broadly to include grandparents, grandchildren, and siblings
- When the workplace or the employee's child's school or daycare has been closed by order of a public official for a health-related issue
- For leave under the state's domestic violence leave act

Use of Leave

Other Use Requirements:

- May use leave in smallest increment the employer uses for timekeeping and payroll, but no larger than an hour
- Leave must be paid to employees at their normal hourly compensation
- Cannot require verification of the reason for use unless employee has been absent more than 3 days
- Use of leave may not be counted as an occurrence under a “no-fault” attendance program

Leave Policies

Must create written leave policy if choose to:

- Require reasonable notice for the use of leave
- Request verification for absences exceeding 3 days
- Implement a shared leave program
- Frontload paid sick leave
- Use an accrual year other than calendar
- Create a paid time off (PTO) program for employees

Seattle, Tacoma, City of SeaTac

- Apply the provisions that are more favorable to employees

Questions

Labor & Employment Law Workshop

2018