Employees with Controversial Views or Noxious Political Affiliations: What to Do?

Last week Google fired a software engineer named James Damore for internally publishing a ten-page memorandum called "Google's Ideological Echo Chamber." Google's chief executive, Sundar Pichai, said portions of the memo violated Google's code of conduct "by advancing harmful gender stereotypes in our workplace."

Meanwhile, some individuals who participated in the Charlottesville protests are being "outed" and fired from their employment because of their association with white supremacists.

The First Amendment of the United States Constitution Does Not Constrain Private Sector Employers.

As a reminder, the First Amendment of the United States Constitution protects an individual's right to free speech and free association from being infringed by local, state, or federal governments. If a private employer wants to discipline an employee for a controversial statement or writing, that employer is generally within its right to do so. Similarly, if an employer objects to an employee's association with certain controversial groups such as neo-Nazis, white supremacists, or even the Southern Poverty Legal Center, an employer is generally within its right to discipline or even terminate that employee's employment based on her association with that group.

Do Not Forget About the National Labor Relations Act!

Although the First Amendment does not protect private sector employees, the National Labor Relations Act ("NLRA") does. Shortly after James Damore was fired, he said, "[I wrote] the document, "to express my concerns about the terms and conditions of my working environment, and to bring up potentially illegal behavior." Section 7 of the NLRA gives all private sector employees, including non-union employees, the right to engage in "concerted activities." Generally, an employee's communications to her fellow employees and to her employer are considered "concerted activities" if they relate to wages, hours or terms

and conditions of employment. Damore's manifesto may have been a protected concerted activity and we expect Google to eventually settle with him.

Enforcement of Section 7 Under the NLRA Exploded Ten Years Ago.

As a result of the renewed enforcement of Section 7 under the NLRA we customarily remind our clients that they need to be wary of taking disciplinary measures against an employee as a result of oral or written communications disseminated to or among other employees. For example:

- Rules prohibiting the discussion among employees of their wages, hours, terms and conditions of employment are a flat violation of Section 7 and should be rescinded and removed from handbooks.
- Rules governing what an employee can and cannot say on social media about a company should be reviewed by a competent employment lawyer.
- Obnoxious communications by an employee to the entire company via e-mail or social media should be reviewed by a competent employment lawyer before an employer takes disciplinary action against an employee.

Indeed, even a communication as innocuous as a "like" on Facebook has been found to be protected concerted activity under Section 7 of the NLRA.

Oregon Enacts the First State Scheduling Law.

No body of law evolves as quickly as employment law and it moves from the West and East coasts to the Mid-West and finally to the South. This has been true of protections for sexual orientation, mandated pay leave, and a host of other topics. Oregon recently enacted a law effective July 1, 2018, which applies only to employers of 500 employees or more, that will constrain and regulate how certain employers schedule their non-exempt employees. Aimed primarily at fast food restaurants, hotels, and motels, we expect this legislative trend to eventually make its way to Illinois as it is related to the $15.00 an hour minimum wage movement.

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

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