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, Associate General Counsel
Division of Advice

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

This case presents the issue of whether an employee was engaged in protected activity when [redacted] circulated a memorandum in opposition to the Employer's diversity initiatives that argued, *inter alia*, that innate differences between men and women may explain the lack of equal representation of the sexes in tech and leadership. Assuming, *arguendo*, that the Charging Party's conduct was concerned and for the purpose of mutual aid and protection, we conclude that the memorandum included both protected and unprotected statements, and that the Employer discharged the Charging Party solely for [redacted] unprotected statements. Therefore, the Employer did not violate Section 8(a)(1) of the Act.

FACTS

The Employer, Google, is a subsidiary of Alphabet, Inc., a technology company headquartered in Mountain View, California. The Employer is engaged in the business of developing and providing IT programs for customers, including web development services, Internet-related services, online advertising technologies, search engine systems, cloud computing, and related software. The Charging Party began working for the Employer as [redacted] at the Mountain View, CA campus in December 2013, one of [redacted] employees working on [redacted] for the Employer's [redacted] The Employer employs approximately 80,000 employees worldwide, approximately 30,000 to 40,000 of whom work out of the Employer's Mountain View campus.

Beginning in 2017, the Charging Party attended various summits, trainings, and meetings regarding the Employer's extensive diversity and inclusion programs and policies. During one such summit in late June 2017, [redacted] expressed [redacted] opposition to several of the Employer's diversity initiatives, both in breakout sessions that were part of the summit and in informal conversation with an HR manager for [redacted] division.

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 the document with the organizers of the June summit through a feedback form they had provided. On July 2, [redacted] posted [redacted] memorandum in an internal Employer-provided discussion group called "coffeebeans," the purpose of which is to discuss the Employer's diversity and inclusion programs. From July 2 through August 3, the Charging Party shared [redacted] memorandum with other employees, often incorporating their suggestions into [redacted] memorandum. On August 3, [redacted] posted the memorandum to another Employer-provided discussion group called "skeptics," a larger forum that provided [redacted] document with more potential readers. Around that same time, numerous employees complained to HR about the Charging Party's memorandum and 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.

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[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.

On (b) (6), (b) (7)(C) the Employer determined that certain portions of the Charging Party's memorandum violated existing policies on harassment and discrimination.[2] 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 (b) (6), (b) 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 reassured employees that the Employer strongly supported their right to express dissenting viewpoints and critique the Employer's programs, but would not tolerate arguments that advanced harmful stereotypes. Although the email did not refer to the Charging Party by name, it referenced (b) (6), (b) (memorandum.

ACTION

Assuming, *arguendo*, that the Charging Party's conduct was concerted and for mutual aid and protection, we conclude that (b) (6), (b) memorandum included both protected and unprotected statements, and that the Employer discharged (b) (6), (b) (7) solely for (b) (6), (b) 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

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[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).

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 lawfully disciplined a shop steward who had made debasing and sexually abusive remarks to a female employee who had crossed a picket line months earlier.[6] And, in *Honda of America Mfg.*, the employer lawfully disciplined an employee for distributing a newsletter in which he directed one named employee to "come out of the closet" and used the phrase "bone us" to critique the employer's bonus program.[7] The Board concluded that such language was unprotected because of its highly offensive nature and quoted approvingly an earlier decision:

> In view of the controversial nature of the language used and its admitted susceptibility to derisive and profane construction, [the employer] could legitimately ban the use of the provocative [language] as a reasonable precaution

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[4] *Cf. 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).

against discord and bitterness between employees and management, as well as to assure decorum and discipline in the plant.[8]

The Charging Party's use of stereotypes based on purported biological differences between women and men should not be treated differently than the types of conduct the Board found unprotected in these cases. [redacted] statements about immutable traits linked to sex—such as women's heightened neuroticism and men's prevalence at the top of the IQ distribution—were discriminatory and constituted sexual harassment, notwithstanding [redacted] effort to cloak [redacted] comments with "scientific" references and analysis, and notwithstanding [redacted] "not all women" disclaimers. Moreover, those statements were likely to cause serious dissension and disruption in the workplace. Indeed, the memorandum did cause extreme discord, which the Charging Party exacerbated by deliberately expanding its audience. Numerous employees complained to the Employer that the memorandum was discriminatory against women, deeply offensive, and made them feel unsafe at work. Moreover, the Charging Party reasonably should have known that the memorandum would likely be disseminated further, even beyond the workplace. Once the memorandum was shared publicly, at least two female engineering candidates withdrew from consideration and explicitly named the memo as their reason for doing so. Thus, while much of the Charging Party's memorandum was likely protected, the statements regarding biological differences between the sexes were so harmful, discriminatory, and disruptive as to be unprotected.

The Employer demonstrated that the Charging Party was discharged only because of [redacted] unprotected discriminatory statements and not for expressing a dissenting view on matters affecting working conditions or offering critical feedback of its policies and programs, which were likely protected. The Employer carefully tailored the message it used in discharging the Charging Party, as well as its follow-up message to all employees, to affirm their right to engage in protected speech while prohibiting discrimination or harassment. In fact, the Employer disciplined another

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[8] *Id.* at 749 (quoting *Southwestern Bell*, 200 NLRB 667, 670 (1972)). *See also Veterans Administration*, 26 FLRA 114, 116 (1987) (finding racial stereotyping unprotected and upholding employer's discipline of union president for calling a manager the "spook who sat by the door" and an "Uncle Tom" in union newsletter advocating his removal), *aff'd sub nom. AFGE v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989); *Detroit Medical Center*, Case 07-CA-06682, Advice Memorandum dated Jan 10, 2012 (white employee at majority-black facility who, after having been demoted due to coworker complaints, made Facebook post about "jealous ass ghetto people that I work with" and complained that the union was protecting "generations of bad lazy piece of shit workers," was not engaged in protected activity; while the employee's complaints implicated Section 7 concerns, his use of racial stereotypes and slurs were opprobrious and led to a serious disruption at work and to an increase in racial tensions).

employee for sending the Charging Party a threatening email in response to the views [redacted] expressed in [redacted] memo. Because the Employer discharged the Charging Party only for [redacted] unprotected conduct while it explicitly affirmed [redacted] right to engage in protected conduct, [redacted] discharge did not violate the Act.

Accordingly, the Region should dismiss this charge, absent withdrawal.

/s/
J.L.S.

ADV.32-CA-205351.Response.Google [redacted]