Google memo drama really is about free speech

Federal law has been pushing corporations to be intolerant of disagreement about sex for decades.

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Because Google and Silicon Valley are cutting-edge workplaces, there's a tendency to assume that the premise of the Google memo furor — "Your erroneous opinions are making my work environment hostile" — is somehow new as well.

But it isn't the least bit new. The application of hostile work environment law to workplace speech — including basically political or ideological discussions, not just vulgar jokes or unwanted personal talk — goes back decades.

I had a chapter on it 21 years ago in my book on employment law, "The Excuse Factory." Others wrote about it then and earlier.

Jonathan Rauch, for example, in the New Republic in 1997, wrote that "quietly, gradually, the workplace has become an exception" to the general rule that in America the law does not seek to restrain wrongful opinion and expression.

And Rauch explained the indirect mechanism by which this has come to pass: "What the government cannot do directly, it now requires employers to do in its stead: police 'discriminatory' speech."

Now, as then, government pressure on employers to ban speech consists less of direct you-must-ban mandates and more of litigation incentives whose contours are not explicitly announced.

Legal or HR departments will counsel an employer that allowing certain instances or categories of bad speech to go undisciplined might be an offense under Title VII anti-discrimination law, or evidence of one.

Some enforcement of these laws is done directly by federal agencies, but most of it takes the form of civil lawsuits by disgruntled workers or class action lawyers.

Litigation is costly and hazardous to employers. Companies will expend significant effort to avoid it or to reduce its risk.

Taking steps against tasteless cartoons, or loose talk, such as the discussion of whether there are any psychological or behavioral differences between the sexes in the now famous Google memo, is perceived as cheaper and safer than facing a lawsuit later.

Now, just as two decades ago, many outsiders look at a firing-over-speech and say it's just a private firm's decision. No public policy or First Amendment implications, right?

And it's true that sometimes an employer's decision to fire would have been made even with no legal thumb on the scale. The disruption caused by an instance of speech, or co-workers' or managers' dislike for it, would have been enough. Other times legal considerations did make the difference. Hard to tell the two cases apart!

So as a way of evading responsibility system-wide it's kind of brilliant. Those who write laws can blame private actors' decisions. The private actors in turn can feel as if their hands were tied given the legal reality they might face.

All of this has been well sifted through by legal scholars. Law professors David Bernstein, Eugene Volokh and others have written in depth about how hostile-environment law works in practice — and its tension with the First Amendment.

But I'll stop to make just one point: hostile-environment law is not content-neutral. It plays favorites on topics and it takes sides in debates.

By 1997, when I wrote my book, there were already dozens of reported cases in which liability claims cited anti-feminist statements, such as generalizations, stereotypes and loaded language about females.

The speech of this sort that got employers into legal hot water was "frequently not at all obscene but often highly political and analytic in content."

Meanwhile, a search then found not a single case in which the reverse type of statement — generalizations, stereotypes, or loaded language unfriendly toward males — had been ruled to contribute to a hostile environment.

In the outside culture, debate continues about the extent to which women's under-representation in tech jobs is owing to discrimination, and how much to individual women's own educational and career decisions. Within a given company like Google, there is a real legal hazard in letting Side B in this debate express its opinion, but no corresponding legal hazard in letting Side A speak as forcefully as it likes.

Google is currently being sued on sex discrimination claims, which means lawyerly caution would be at a zenith on whether to let its corporate culture be portrayed in a future courtroom as tolerant of sexist argumentation.

To sum up: don't assume Google acted unusually. Under current legal incentives, what just happened counts as normal.

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