



**Howard B. Jackson**.....

*"[Google's engineer] says Google has established a rigid culture that silences anyone who does not conform to what he called its ideological echo chamber."*

**CAN WE FIRE HIM FOR SAYING THAT?**  
 THE CURIOUS CASE OF THE GOOGLE ENGINEER

technology leadership, were themselves discriminatory. He argued that some differences between the sexes are biological as well as cultural, and that this should be recognized when considering initiatives designed to address concerns. He included a variety of suggestions at the end, which included ceasing programs aimed only at certain demographic groups as such programs were discriminatory and not particularly helpful.

In response, Google fired Damore. Google CEO Sundar Pichai said that certain parts of the memo violated Google's code of conduct and crossed the line by advancing "harmful gender stereotypes."

Damore has threatened legal action. What laws may protect him?

Section 7 of the National Labor Relations Act provides that employees may engage in concerted activity for mutual protection regarding wages, hours and working conditions. Someone must have told Damore, as it is reported that he has already filed a charge with the National Labor Relations Board ("Board").

His memo clearly addresses working conditions.

Given that it was his sole creation, was it "concerted" activity for "mutual" aid and protection? The Board has ruled in some cases that even when only one person has communicated the activity can be viewed as concerted when the employee is addressing concerns relevant to a larger group. That is certainly the case with Damore's memo as he was addressing the culture of Google as it relates to many employees, particularly those in technology and leadership. Therefore, based on previous Board cases the memo could be viewed as a form of protected activity. That said, given the controversial nature of some of the views expressed in the memo, it will be interesting to see whether the Board decides to pursue the charge.

How about Title VII? Damore is a male and males are protected against sex discrimination under Title VII. This theory seems very unlikely to succeed. It would be difficult to show that Google would not have discharged a female for expressing the same views, and it would certainly be difficult to find a comparator, i.e. a female who had expressed the same or similar views but was treated differently.

Title VII also prohibits retaliation for opposing discrimination. In the memo Damore argued that certain practices were themselves discriminatory. If a court found that his expression of that view was a substantial factor in the discharge decision he might succeed under Title VII. On the other hand, if he was actually discharged because he expressed views that Google considered discriminatory toward females, he would lose. That sounds like a question that would have to be decided by a jury, not a judge on a motion for summary judgment. Is this a matter that Google will want to defend all the way through a trial, given the firestorm it has already sparked on multiple fronts?

Another law may apply. California has a state law that prohibits employers from discharging employees based on their political activities and expressions. This law has

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## Wimberly Lawson Loses A Firm Leader



### *Ron Daves joined Wimberly Lawson in 1986*

Ronald Gordon "Ron" Daves, 74, of Knoxville, Tennessee, passed away on August 9, 2017. Ron was born in Ellenboro, North Carolina, to Roy and Hester Beam Daves. Ron graduated from East Tennessee State University in 1968, and proudly served in the United States Marine Corps from 1962 to 1965. He was an investigator for the Tennessee Human Rights Commission for several years before receiving his Doctor of Jurisprudence degree from the University of Tennessee in Knoxville. Ron was a member of Wimberly Lawson Wright Daves & Jones, PLLC and practiced in the area of labor and employment law since 1986.

Ron is preceded in death by his mother and father, Roy and Hester Daves, step-mother Hazel Daves, and his step daughters Jenny Berg and Kirsten Berg Newman. He is survived by his wife of 33 years, Karen Cottrell Daves; sons, David (Marti) Daves, Scott (Karen) Daves, and Ronald Gordon "Chip" Daves; grandchildren, Meredith, Emily and Chad Daves, and Emily Cottrell Newman; brother, Gerald "Jerry" (Nancy) Daves, and sisters, Connie Daves Cavanaugh and Betty (Giles) Grandy.

Ron was a member of Concord Presbyterian Church. He was known for his caring personality. He enjoyed going above and beyond in helping others. His tender heart and loving character were shown in his relationship with Karen. He and Karen enjoyed going to the movies, playing Scrabble at all hours of the night, and taking scenic drives together. Ron had a love for motorcycles and enjoyed boating, fishing and being outdoors with family and friends.

In lieu of flowers, memorials may be made to the KiMe Fund, c/o East Tennessee Foundation, 520 West Summit Hill Drive, Suite 1101, Knoxville, Tennessee 37902. Click Funeral Home Farragut Chapel, 11915 Kingston Pike is serving the Daves family. [www.clickfh.com](http://www.clickfh.com)

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## EEOC MUST RECONSIDER WELLNESS RULES



**Mary Celeste  
Moffatt** .....

**“The more it is tied to a group health plan and to a particular health-related outcome, the more a wellness program will be subject to regulation.”**

..... In 2016, the EEOC issued Final Regulations regarding wellness plans as they relate to: (1) the GINA; and (2) the ADA. The Final Regulations were applicable to employer-sponsored wellness programs as of the first day of the first plan year that began on or after January 1, 2017.

In October 2016, the American Association of Retired Persons (AARP) filed suit in the United States District Court for the District of Columbia against the EEOC, alleging that portions of the Final Regulations violated the ADA and the GINA. In addition, the AARP’s Complaint asked the Court to vacate portions of the Final Regulations and to issue a preliminary injunction to stay the applicability date of January 1, 2017 until resolution of the pending case.

Without getting too deep into the weeds on this very complex case and subject matter, in December of 2016, the District Court denied AARP’s motion for a preliminary injunction and the Final Regulations became applicable on January 1, 2017. In March of 2017, the EEOC filed a Motion to Dismiss (alleging lack of standing) or in the Alternative for Summary Judgment. Shortly thereafter, the AARP filed a Response in Opposition to the EEOC’s Motions and a Cross Motion for Summary Judgment. In an Order issued on August 22, 2017, the District Court found the AARP has associational standing on behalf of its members and the Court then turned to consideration of the competing Motions for Summary Judgment. But first, a little background....

Readers will recall that wellness plans offered as part of a group health plan are regulated in part by the Health Insurance Portability and Accountability Act (HIPAA) and the Affordable Care Act (ACA), which permit a covered entity to offer a participant premium discounts or rebates

on copayments and/or deductibles in return for the participant’s compliance with a wellness program. 29 U.S.C. Section 1182(b)(2)(B); 26 U.S.C. Section 9802(b); 42 U.S.C. Section 300gg-4(b). A full discussion of the applicable laws and regulations regarding incentive limits and wellness plan compliance is beyond the scope of this article; however, very generally, the ACA allows up to 30% of the cost of coverage as an incentive for the employee’s participation in a health-contingent wellness program. (Note: smoking cessation and tobacco-related plans may be permitted to offer incentives up to 50% of the cost of self-only coverage, depending on the nature of incentive; however, this is not at issue in the *AARP v. EEOC* case.)

Wellness plans, like their human participants, come in a variety of shapes and sizes. For example, a “health-contingent, outcome based wellness program” requires an individual to satisfy a standard related to a health factor in order to obtain a reward. In contrast, a “participatory only wellness program” may either not provide a reward or not include any conditions for obtaining a reward based on an individual satisfying a standard that is related to a health factor. In addition, wellness programs may (but are not required to) be related to a group health plan either by limiting the program only to health plan participants, or relating the reward to the health plan, such as a premium incentive for participation. There are some, but very few restrictions on participation-only programs; for example, such programs must be made available to all similarly situated individuals. In contrast, health-contingent wellness programs are more regulated, and, for example, must comply with the non-discrimination guidelines under applicable regulations. The more it is tied to a group health plan and to a particular health-related outcome, the more a wellness program will be subject to regulation. Sponsors of wellness programs should review the terms with legal counsel to ensure compliance with the applicable statutes and regulations, as well as assessment of whether incentives offered may be taxable.

Both the ADA [42 U.S.C. §12112(d)(4)(B)] and the GINA [42 U.S.C. §2000ff-1(b)] limit the ability of employers to obtain medical and/or genetic information and restrict the employer’s use of such information, but both allow the collection of such information when it is part of an employee health program, benefit plan, or wellness program and (along with other requirements) that the employee’s participation in the program is “voluntary” -- but neither statute defines the term “voluntary.”

In the Final Regulations, the EEOC addressed the permissible amount of the incentive employers could use to encourage employees to participate in a wellness program, concluding that a financial penalty or incentive could not exceed 30% of the cost of self-only coverage in order for the

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plan to be considered “voluntary.” Specifically, the Final Regulations under the ADA provide that an employer’s use of incentives ... in employee wellness programs whether in the form of a reward or penalty, will not render the program involuntary if the maximum allowable incentive available under the program ... does not exceed ... 30% of the total cost of self-only coverage. 29 C.F.R. §1630.14 (d)(3). The Final Regulations under GINA also adopted the 30% maximum inducement for the employee’s spouse to provide information about current or past health status.

The incentive level is only one part of the voluntariness requirement. Among other requirements, the EEOC makes clear that wellness programs must be “reasonably designed to promote health or prevent disease” and if the program exists merely “to shift costs from an employer to employees based on their health” it will not be considered to be reasonably designed.

In its Motion for Summary Judgment, the AARP argued the EEOC failed to explain (1) its departure from previous EEOC policy regarding incentives, (2) its choice of the 30% incentive level, and (3) its exemption of spousal medical history from GINA’s protections. The AARP alleged the 30% level is inconsistent with the term “voluntary” as used in the ADA and GINA because employees will be forced to participate in order to avoid the 30% penalty and, thus, forced to disclose their protected information when they might otherwise choose not to do so. The AARP also asserted that the penalties/incentives would take a “particularly heavy toll” on older workers, who are more likely to have less-visible disabilities and thus are at risk of exposure to discrimination through non-job-related medical inquiries and exams. In response, the EEOC contended that the 30% incentive level (1) was used to “harmonize its regulations with HIPAA,” (2) is consistent with “current insurance rates,” and (3) is based on comment letters submitted to the proposed regulations.

In its Order and 36-page Memorandum Opinion issued on August 22, 2017, the Court thoroughly analyzed but ultimately rejected all of the EEOC’s arguments, concluding that the agencies’ decisions in the Final Regulations were “arbitrary and capricious,” in that the EEOC had failed to provide a “reasoned explanation” for those decisions. The Court did not vacate the Final Regulations in order to avoid “disruptive consequences,” but remanded the Final Regulations to the EEOC for reconsideration. The Court further ordered the EEOC to file a status report regarding its review by September 21, 2017.

On August 30, 2017, the AARP filed a Rule 59(e) Motion to Alter or Amend the Order, which included a request that the Court reconsider its decision against vacating the Final Regulations. On September 11, the EEOC filed a response to the AARP’s Rule 59(e) Motion, arguing that the Final Regulations were relied upon in design of 2018 health plans so that “to pull the rug out ... at this late date would be manifestly unfair.” As of the submission of this article to print, the Court has not ruled on AARP’s Rule 59(e) Motion.

Despite the Court’s August 22 ruling, at present, the Final Regulations are still applicable. However, wellness plan sponsors are advised to stay tuned because of the potential for developments as a result of the Court’s August 22 decision. In the future days, we will be assessing (a) the Court’s decision on the AARP’s pending Rule 59(e) Motion, (b) the EEOC’s status and schedule report to be submitted by September 21, 2017; (c) the results of the EEOC’s reconsideration of its Final Regulations, pursuant to the Court’s remanding of those Regulations to the agency; and (d) of course, whether the EEOC decides to appeal the August 22 decision. (*U.S.D.C., Dist. Columbia, 1:16-cv-02113; AARP v. EEOC*).

been interpreted fairly broadly. It may be that the memo, which in some sections discusses differences between liberal and conservative views of a variety of matters, could be seen as a political expression and given protection under this state law.

How this matter turns out remains to be seen. From the legal perspective these circumstances point out that employers should carefully consider their action when deciding how to respond to an employee’s statements. Some expression is protected, and the protections can come from a variety of federal laws, as well as state laws. Employers should analyze the circumstances thoroughly before discharging an employee for something that the employee has said.

In the broader context, this case highlights considerations related to the type of culture that employers want to create. Damore says Google has established a rigid culture that silences anyone who does not conform to what he called its ideological echo chamber. He called for more open discussion and was discharged. The Company says he was discharged because he crossed a line with some of his comments.

How can employers create a culture that encourages communication, while at the same time seeking to eradicate discrimination? That is a discussion that will certainly go on for some time. But it is one worth having, both for the sake of strong employee relations and organizational success.