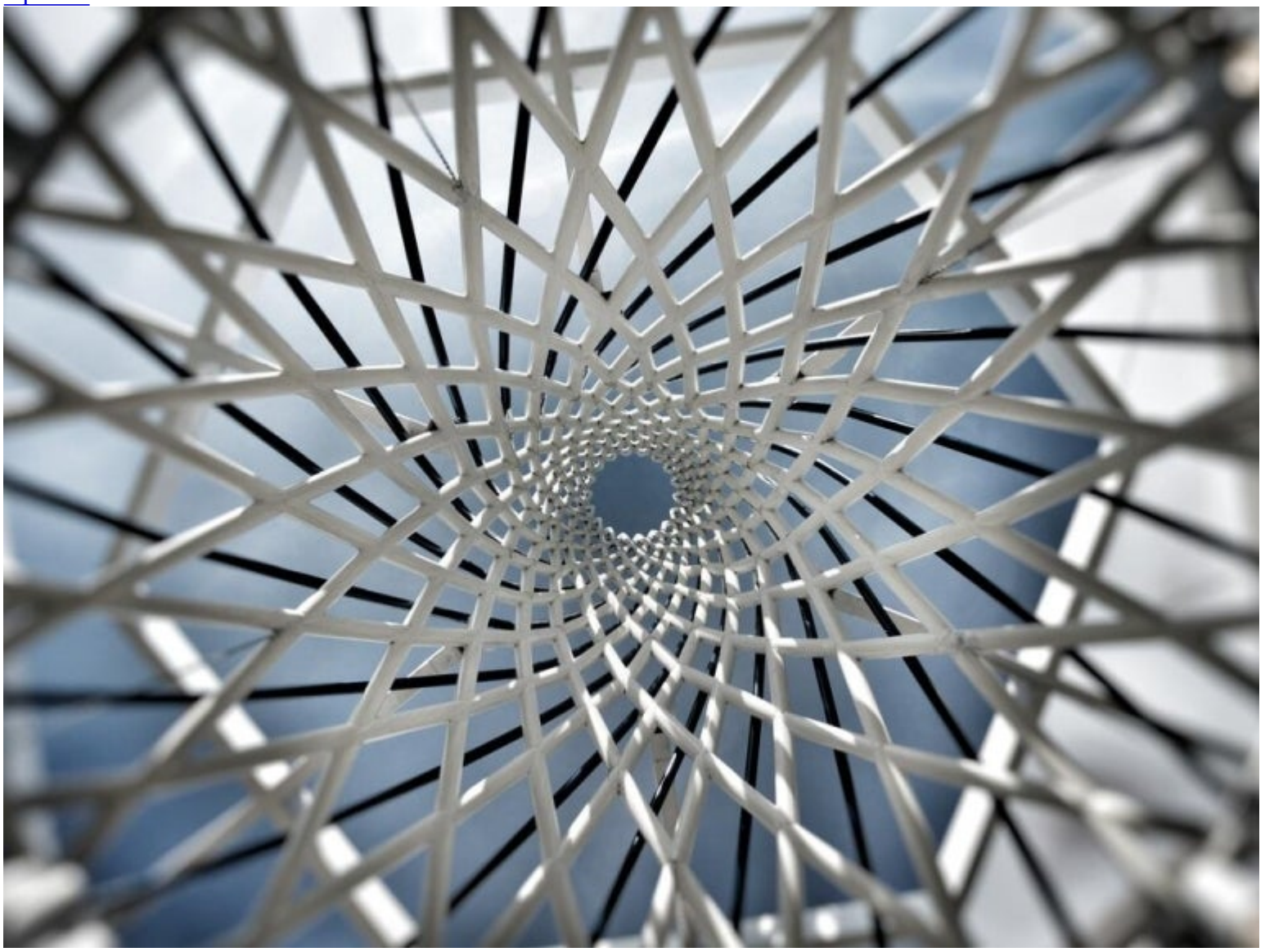
Updates



Employees alleging racism in the workplace received favorable guidance from the National Labor Relations Board (NLRB or the Board) in a recent general counsel memorandum. On February 27, 2023, the NLRB's Office of the General Counsel (the general counsel) released a previously confidential advice memorandum setting forth its position that workplace discussions about racial discrimination are protected as concerted activity under Section 7 of the National Labor Relations Act (NLRA or the Act) and, therefore, employees who engage in such discussions are protected from employer retaliation under the NLRA. The NLRB's position applies not only to union organizing activity but also to a broad range of activities that frequently occur in the workplace. As such, the impact of the general counsel's memorandum has the potential to be far-reaching and intersect with equal employment laws.

The general counsel oversees the NLRB's regional offices and is responsible for investigating and prosecuting unfair labor practice charges. When the facts or issues presented in a charge are novel or complex, the general counsel may issue an advice memorandum to the regional offices, setting forth how the office should proceed with the charge and the reasoning for the recommendation. Although advice memoranda are not official decisions by the Board, they provide detailed and sometimes novel insight into the agency's position on issues and the types of cases that will be prosecuted.

Here, the general counsel issued an advice memo in a case where a clinical physician at a medical school alleged that her teaching privileges were revoked and her contract was not renewed in retaliation against her for: (1) facilitating a discussion with a small group of students and a fellow staff member about institutional racism and racial bias in the medical field, during which she shared her own experiences with racism in the medical field and criticized an email from the school's dean concerning a recent nearby shooting; and (2) tweeting about the classroom discussion, her suspension, and the medical school's investigation into her discussion with students while asking her followers to "retweet and augment [her] voice."

In the advice memorandum (the Advice Memo), the general counsel concluded that both the doctor's in-classroom discussions and her tweets were protected as "concerted activity" under Section 7 of the NLRA and that the medical school violated Section 8(a)(1) of the Act by suspending and eventually terminating her for engaging in these activities.

The general counsel noted that, to be protected under Section 7 of the Act, an employee's conduct must be both "concerted" and "for the purpose of . . . mutual aid or protection." Concerted activity includes statements by a lone employee seeking to initiate, induce, or prepare for group action, as well as statements to management communicating a group complaint. These types of communications are deemed to be for the purpose of mutual aid or protection if they seek to improve conditions for a group of employees and not just the speaker's individual circumstance.

The general counsel first determined that the classroom conversation was a protected activity because it was "inherently concerted." The Advice Memo detailed legally recognized areas of protected activity, including discussion of wages, changes in work schedules, and job security. According to the general counsel, the discussion of racism in the workplace is a "logical and necessary extension" of the protected activity doctrine. The topics of conversation—systemic racism, racial bias in the medical profession, and the criticism of the dean's email—broadly affected the faculty as a whole, and there was at least one other faculty member present for this conversation. Although a faculty member found some comments during the conversation inappropriate, the Advice Memo noted that the faculty member's feelings were "immaterial" because "fellow employees need not agree with the message or join the employee's cause for there to be concert." Second, the conversation was for the "mutual aid and protection" of all employees because working to end systemic racism benefits all employees.

The general counsel similarly determined that the public tweets were also concerted activity because they were a "logical outgrowth" of the classroom discussion insofar as they highlighted issues of racial discrimination in medicine, which was the centerpiece of the classroom discussion. The tweets also discussed the issues of race and racism in medicine, a discussion which, as detailed above, the general counsel found to be an inherently concerted activity. The fact that the doctor also asked viewers to "share" her tweets further implicated her call for group action. Indeed, the Advice Memo noted that the "4,300 likes, over 2,100 retweets and hundreds of replies to the tweet" evidenced the concerted nature of the activity because many of those who interacted with the tweet were "undoubtedly" statutory employees.

Finding the activity protected, the general counsel turned to the adverse action prong and determined that the employer's animus towards the meeting and the tweets, among other factors, established that her discharge

resulted from the protected actions. Accordingly, the general counsel recommended that a complaint should be issued alleging that the medical school unlawfully suspended and discharged the doctor for engaging in protected activity in violation of Section 8(a)(1). The Board itself has not yet ruled on this issue.

Takeaways for Employers

The Advice Memo shows that the NLRB is now wading into areas of the law traditionally governed by Title VII and other equal employment laws. Accordingly, both unionized and nonunionized employers must exercise special consideration and caution before disciplining an employee who has engaged in internal—as well as public—discussions related to discrimination, bias, or inequality. Importantly, the general counsel may consider such conversations to be protected activity even if other employees do not agree with the sentiments expressed during the conversation or find the comments to be inappropriate.

Further, public social media posts accusing employers of racism can be deemed concerted activity and, under the general counsel's view, the popularity of the posts can be seen as evidence of the concerted nature of action even if statutory employees have not joined. Accordingly, employers should speak to experienced counsel before disciplining an employee for engaging in conversations about race or gender discrimination or before implementing any rules that would limit an employee's ability to discuss these topics.

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