

Swearing in the Workplace: *Do Employees Have the Right to Swear?*



Prepared by:
Charles T. Passaglia, Esq.
Employment Law Solutions, Inc.

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Watch Your Mouth: Swearing in the Workplace

Charles T. Passaglia
Employment Law Solutions, Inc.
(303) 915-6334
cpassaglia@defendwork.com
www.defendwork.com

I. Do Employees Have a Right to Swear?

A. The Scope of the Problem

1. There is no employment law that requires people to be polite or kind. There is no general civility code for the American workplace. See *Oncale v. Sundowner Offshore Services, Inc.* 523 U.S. 75 (1998).

2. Swearing is a difficult problem to grasp let alone attempt to defeat. Profanity is pervasive in our society and can take many forms, such as using expletives to vent one's stress or frustration, cursing as a motivator or to express one's passion or zeal, making unspoken, obscene gestures, posting profane social media content, texting emojis with coded sexual or racial meanings, and even parroting the provocative lyrics of popular music. Ironically, U.S. Supreme Court Justice John Marshall Harlan once stated that "one man's vulgarity is another's lyric." *Cohen v. California*, 403 U.S. 15, 25 (1971). This has literally become true and is a reminder that popular culture reinforces the use of profanity in our society.

3. The potential negative effects of swearing at work are well-known, yet usually go unaddressed. There is considerable subjectivity surrounding swearing often based on the particular work environment, cultural norms and industry. In some workplaces, swearing is not only tolerated, but encouraged, as part of the organization's culture. "Rough" language that is unacceptable in one work environment may be common and welcome in another domain. Nonetheless, it is clear that cursing can damage an individual's and, by extension, his or her employer's reputation, can reduce employees' morale, intimidate others, disrupt a team, and decrease productivity. For many, the use of foul language remains unacceptable as it can adversely affect relationships with co-workers, customers, clients and visitors.

4. Is profanity even a problem? Many experts believe the benefits of swearing outweigh its potential harms. Researchers have found that swearing can be a valuable release in high-stress situations. Swearing is said to elevate endorphin levels and help people withstand pain. People who swear are reportedly smarter, happier, lie less

frequently and have higher integrity.¹ Therefore, some insist there is a welcome place for swearing at work. Age and gender may influence attitudes and behaviors regarding swearing. Studies consistently show that younger persons are more accepting of cursing at work; men swear more in public than women, but women are swearing more and feel more comfortable swearing in the company of other women rather than in mixed-gender groups; and “Type A” personalities are more likely to swear. Swearing is frequently associated with dominant behavior. Certain swear words may be a unique part of an organization and can reinforce trust and teamwork or create closer connections. A 2004 study in the *Journal of Pragmatics* demonstrated that swearing can increase camaraderie in the workplace and create bonding among employees.² Cursing can also bring urgency or importance to a subject, especially if the cursing party is a supervisor or executive.

5. Many people swear . . . a lot . . . at everyone. Therefore, it is difficult to say one is being treated differently, even if badly. Some courts have permitted employers to raise a limited “equal opportunity harasser” defense to harassment claims brought under Title VII of the Civil Rights Act of 1964 (Title VII). Essentially, if employees are treated the same, that is, equally badly, then an alleged victim of harassment cannot establish he or she was singled out “because of” a protected category. See, e.g., *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000) (Married co-workers were subjected to offensive physical contact, requests for sexual favors and sexual comments by male supervisor; appellate court affirmed lower court’s dismissal of sexual harassment claims based on equal opportunity harasser defense). Practitioners should be aware that the equal opportunity harasser defense may have been effectively neutered by the U.S. Supreme Court’s recent decision in *Bostock v. Clayton County*, 590 U.S. ___, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020). In *Bostock*, the majority held that “Title VII’s plain terms and our precedents don’t care if an employer treats men and women comparably as groups;” therefore, a victim of sexual harassment can bring a Title VII claim even if offensive behavior is aimed at more than one gender.

B. Profanity, the First Amendment and Public Sector Workplaces

1. As a general principle, under the First Amendment of the U.S. Constitution, profanity cannot be banned by a government, but can be regulated in certain situations. For example, the U.S. Supreme Court ruled that “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words” may be punishable. *Chaplinsky v. New*

¹ Natalie O’Neill, Smarter People Are More Likely to Use Curse Words, N.Y. Post (Aug. 28, 2017, 4:51 p.m.), <https://nypost.com/2017/08/28/smarter-people-are-more-likely-to-use-curse-words/>; Lindsay Holmes, People Who Swear May Be Happier, Healthier and More Honest, Huffington Post, (Feb. 14, 2018, 2:17 p.m.), https://www.huffingtonpost.com/entry/health-benefits-ofswearing_us_5a5e44a8e4b0106b7f65b3a6; Simon Worrall, Swearing Is Good For You—And Chimps Do It, Too, Nat. Geo. (Jan. 27, 2018), <https://news.nationalgeographic.com/2018/01/science-swearingprofanity-curse-emma-byrne/>. Brooke Nelson, Swearing at Work Is Scientifically Proven to Be Good for You—Seriously!, Reader’s Digest (Aug. 8, 2017), <https://www.rd.com/article/curse-words-at-work-survey/>

² N. Daly, J. Holmes, J. Newton, M. Stubbe, “Expletives as solidarity signals in FTAs on the factory floor,” *Journal of Pragmatics*, Volume 36, Issue 5, pp. 945-964 (May 2004). The researchers focused on the “complex socio-pragmatic functions of ~~fta~~ and its role as an indicator of membership in a specific community of practice.”

Hampshire, 315 U.S. 568 (1942) (upholding arrest of man who referred to town marshal as "a God-damned racketeer" and "a damned Fascist"); *Cohen v. California*, 403 U.S. 15 (1971) (jacket bearing "Fxxk the Draft" worn in courthouse protected by First Amendment); *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978) (indecent speech -- George Carlin's "Filthy Words" routine -- on broadcast media can be restricted); *Bethel School District No. 403 v. Fraser* (1986) (public school could punish student for student body speech rife with sexual innuendos).

2. The First Amendment protects a *public employee's* right, in certain circumstances, to speak as a private citizen on matters of public concern. Courts employ a balancing test to determine whether a public employee's speech as a private citizen interfered with the public employer's interests in ensuring public services are performed effectively and efficiently. See *Pickering v. Board of Education*, 391 U.S. 347 (1976); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (school teacher fired after calling local radio station to complain about school district's new dress code and giving "the finger" to two students at school); *Connick v. Myers*, 461 U.S. 138 (1983).

3. However, public employees' speech or expression pursuant to "official duties" may be restricted. "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Accordingly, a public employer may regulate and punish a public employee's use of foul or profane language in the course of the employee's official duties.

4. A public employee's profane speech when "off-duty" requires First Amendment analysis to determine whether the employee is speaking as a private citizen on a matter of public concern. This could include off-duty speech which relies on foul or offensive language. See, e.g., *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017)(rejecting First Amendment claim of fire department battalion chief who "liked" racially-offensive posts of co-workers, court held that employee's "like" of an image depicting an elderly woman raising her middle finger with the caption "I'LL POST WHATEVER THE FxxK I WANT" and addressed "for you [Fire] Chief" amounted to an employee grievance not protected by the First Amendment.) But see *Marquardt v. Carlton*, No. 19-4223 (6th Cir., August 19, 2020). In *Marquardt*, the Sixth Circuit recently reversed a lower court ruling that the City of Cleveland had not violated the First Amendment rights of a former employee when it fired Jamie Marquardt, a captain with Cleveland Emergency Medical Services, for posting on social media an inflammatory comment about the police shooting of Tamir Rice in 2014. The shooting drew considerable nationwide attention. Cleveland police officers responded to a call that a male was pointing a pistol at people at a Cleveland recreation center and park. The officers shot and killed the suspect, who turned out to be a 12-year-old boy playing with a toy pistol. More than 14 months after the shooting, the following comment was posted on Captain Marquardt's Facebook page, "Let me be the first on record to have the balls to say Tamir Rice should have been shot and I am glad he is dead. I wish I was in the park that day as he terrorized innocent

patrons by pointing a gun at them walking around acting bad I am upset I did not get the chance to kill the criminal fxxker.” The Sixth Circuit held that Marquardt was acting in his capacity as a private citizen speaking on a matter of social concern – the justification for police use of force – and remanded the case to the lower court to address the *Pickering/Connick* balancing test. The Sixth Circuit did clarify that the airing of “personal grievances,” as opposed to matters of public concern, are not protected by the First Amendment.

5. In addition to the free speech rights of public employees, it is important to recognize that some states have enacted statutes protecting both public and private employees from being fired for their off-duty conduct, including provocative speech. The breadth of this protection varies by state. For example, five states -- California, Colorado, Montana, New York, and North Dakota -- prohibit employers from punishing employees for legal off-duty activities that do not conflict with the employer’s business-related interests.³

C. Swearing as a Disability under the Americans with Disabilities Act

1. Some persons may curse involuntarily. Tourette Syndrome is a neurological disorder characterized by repetitive, involuntary movements and vocalizations called tics. Vocal tics may be expressed as coprolalia (the involuntary use of obscene words or socially inappropriate words and phrases) or copropraxia (obscene gestures). According to the Tourette Association of America about ten percent of persons diagnosed with Tourette Syndrome have coprolalia. (Source: <https://tourette.org/about-tourette/overview/faqs/>)

2. Tourette Syndrome and the ADA. There are few federal court decisions discussing coprolalia in the workplace. In 2003, a federal court in Georgia ruled in favor of Kroger Company after it fired a grocery clerk with Tourette Syndrome for blurting racial epithets toward co-workers and customers. *Ray v. Kroger Co.*, 264 F. Supp. 2d 1221 (S.D. Ga. 2003), *aff’d*, 90 Fed. Appx. 384 (11th Cir. 2003). The court found that the employee was substantially limited in his major life activity of communicating with others over an extended period of time due to his uncontrollable daily outbursts of vocal tics, including profanity, vulgar words and racial slurs. However, the court determined the employee was not qualified to do his job because he was in a position that required frequent contact with customers, co-workers and independent contractors and, further, there was no alternative job for which he was qualified which would not require such contact. See *Petzold v. Borman's, Inc.*, 241 Mich.App. 707, 617 N.W.2d 394 (Mich.App. 2000) (similar facts and outcome). But see *Fox v. Costco Wholesale Corporation*, 918 F.3d 65 (2nd Cir. 2019) (mocking an employee with Tourette Syndrome raises a question of fact whether

³ See Eugene Volokh, Private Employees’ Speech and Political Activity: Statutory Protection Against Employer Retaliation, 16 Tex. Rev. L. & Pol. 295 (2012); Jeannette Cox, A Chill Around the Water Cooler: First Amendment in the Workplace, 15 Insights on L. & Pol. (2015), https://www.americanbar.org/publications/insights_on_law_and_society/15/winter-2015/chill-around-the-water-cooler.html.

the frequency and severity of the mockery rises to the level of an objectively hostile work environment under the ADA).

3. Employers are reminded that if Tourette Syndrome substantially limits one or more major life activities, as in *Ray v. Kroger Co.* above, an employer may be required to attempt to accommodate reasonably an employee with Tourette Syndrome. The Job Accommodation Network (JAN) is the leading source of free, expert, and confidential guidance on workplace accommodations and disability employment issues. JAN is funded by the U.S. Department of Labor, Office of Disability Employment Policy (ODEP). JAN has published *Accommodation and Compliance Series: Employees with Tourette Syndrome* (July 24, 2018) discussing the many potential accommodations for persons with Tourette Syndrome. The guidance is helpful in that it provides the following “situations and solutions:”

A library employee who had several fairly severe motor tics very rarely had vocal ones because of Tourette Syndrome.

After demonstrating one of his rare outbursts, his employer requested medical documentation in order to ascertain the nature of the outbursts and whether they would be an issue in the future. The employer was able to determine that the outbursts were rare indeed, that there really was no accommodation to help reduce them, and that they could handle the outbursts as outlined by the employee’s doctor.

A parks and recreation worker with Tourette Syndrome worked for a city and had difficulty controlling his vocal tics when he was under the stress and chaos of working with a crew of more than three people.

He asked for the accommodation of allowing him to work alone, or with just one other co-worker. Although transportation became a little tricky to organize, his employer found no hardship in providing the accommodation for a trial period to see how effective it could be.

An insurance salesman, working in a call center, had Tourette Syndrome that was getting more severe.

No longer able to control his vocal outbursts, it became impossible for him and his coworkers to complete calls. When it was brought to his attention, he shirked it off as his co-workers being too difficult to get along with. He refused to take part in the accommodation process, and refused the move to a more private area with frequent breaks to help him manage the stress that he stated was exacerbating his condition. With no assistance from medical documentation as he refused to cooperate, the employer determined that he was no longer qualified for the position as he was unable to complete the essential functions of his position.

An employer who had just hired a new employee with Tourette Syndrome was shocked when he discovered that the employee was making sexually

offensive comments to female coworkers as well as passing around lewd pictures he had drawn.

Meeting immediately with the employee and his job coach, the employer discovered that the employee had Tourette syndrome, had experienced the same issues in previous positions, and was unable to refrain from the comments and the drawings due to his Tourette's. Since no accommodation had previously been found to be effective, the employer terminated this employee.

Due to Tourette Syndrome an office employee had vocalizations that disturbed his co-workers.

He asked for a stress-free environment in order to reduce the vocalizations. In order for his employer to reduce or eliminate stress, he had to know specifics. The employee was able to explain the day-to-day issues that caused his stress to escalate so the employer could work with him to help reduce it. Effective accommodations included projects with detailed instructions, noise-canceling earbuds to help eliminate conversations/distractions around him, and the ability to take short flexible breaks.

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