

What Can Employers Do to Address Swearing?

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



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Published on www.lorman.com - October 2021

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What Can Employers Do to Address Swearing?

A. Swearing and the National Labor Relations Act

1. Restrictions or punishment for the use of profanity or offensive speech in a workplace may implicate Section 7 of the National Labor Relations Act (NLRA). 29 U.S.C. § 157 (2018). Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* (italics added) Section 7 protects employees in the private sector whether they are unionized or not. Therefore, employees have right to engage in concerted activities with co-workers to discuss wages, hours and working conditions and activities for their mutual aid or protection.

2. In some instances, cursing or the use of offensive language may be protected activity under the NLRA. For example, an employee fired for writing "whore board" on an overtime sign-up sheet in the midst of a union dispute over overtime was engaging in protected concerted activity. *Constellium Rolled Products, LLC*, 366 N.L.R.B. No. 131 (July 24, 2018), *affirmed* 945 F.3d 546, 550 (D.C. Cir. 2019) [Remanded to NLRB for proceedings consistent with its opinion. *Constellium Rolled Products, LLC v. NLRB*, 2019 U.S. LEXIS 38751 (D.C. Cir. Dec. 31, 2019).] See also *Pier Sixty LLC*, 362 NLRB No. 59 (2015) enforced *NLRB v. Pier Sixty, LLC*, 855 F.#d 115 (2d Cir. 2017) (finding an unfair labor practice for firing an employee who posted the following about his manager on employee's Facebook page two days before union election, "Bob is such a NASTY MOTHER***** don't know how to talk to people!!!!!! F*** his mother and his entire f***** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"). Compare *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979) (employee's use of obscenities referring to supervisor as "mother***** liar" and "lying son of a bitch" in the presence of supervisor and co-workers was not protected concerted activity as it was not in response to any labor practice but, instead, was an unprovoked outburst).

Recently, however, the National Labor Relations Board (NLRB) rejected the standards used in *Atlantic Steel*, above, in its decision in *General Motors LLC*, 369 N.L.R.B. No. 127 (2020). In *General Motors*, a union representative directed a profane outburst at his supervisor, including "Fuck you, and you can shove cross-training up your fuckin' ass," for which the employee was suspended. At a later meeting, the employee played

music on his phone, including Public Enemy's "Straight out of Compton," "Fuck the Police" and "Dope Man," that contained offensive lyrics and words such as "[n-word]" and "Fuck the police" and other profanity viewed as offensive and disruptive by his supervisors. The employee was suspended again and filed unfair labor practices charges against his employer. Dismissing the claims that the employee had been unlawfully suspended for his abusive conduct, the NLRB adopted the *Wright Line* [251 N.L.R.B. 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981)] burden-shifting framework for determining whether an employer has lawfully disciplined or discharged an employee for engaging in abusive conduct (including profane or racially or sexually inappropriate comments) in the context of union or other protected concerted activity. Under this standard, the NLRB concluded that it "will properly find an unfair labor practice for an employer's discipline following abusive conduct committed in the course of Section 7 activity when the General Counsel shows that the Section 7 activity was a motivating factor in the discipline, and the employer fails to show that it would have issued the same discipline even in the absence of the related Section 7 activity." *General Motors* now clearly affords employers greater latitude to address and punish abusive conduct at work.

3. An employer's "civility" rules may be challenged if they explicitly restrict activities protected by the NLRA. However, civility rules have recently been given greater protection by the NLRB thereby encouraging employers to adopt guidelines demanding respectful behavior. See Advice Memorandum, Office of the General Counsel, NLRB, *Shelby County Memorial Hospital Association d/b/a Wilson Health*, Case 09-CA-210124 (June 20, 2018) ("Commitment to My Co-workers" policy requiring "healthy personal relationships" with co-workers is a lawful civility policy); *The Boeing Co.*, 365 N.L.R.B. 154 (2017) (Facially-neutral rules requiring employees to abide by basic standards of civility fall under "Category 1" rules that are lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule). [*Boeing* overruled the more employee-friendly NLRB decision in *Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. 646 (2004) (also referred to as *Lutheran Heritage*) under which many employee handbook provisions were invalidated.]

B. Can an Employer Have a No-Swearing Policy?

1. As a practical matter, a formal "no-swearing" edict would be difficult to develop and enforce. It would be near-impossible to define

clearly what words and, more importantly, in what context such words, would be unacceptable to use on the job. After all, context always matters; therefore, one person's joke could be another person's harassment. Further, it may be hard to prove in some cases how swearing actually impacts work negatively.

2. Instead, employers usually address the use of profanity on a case-by-case basis within policies demanding workplace respect, ethical behavior, professionalism, and civility. In fact, given the employer-friendly decisions in *General Motors* and *Boeing*, above, employers may be emboldened to address profanity and offensive conduct in even more specific policy directives. More commonly, though, rules regarding respectful behavior are made part of an employer's policy against unlawful discrimination and harassment. In the last two decades, considerable attention has been drawn to the problem of workplace bullying. According to the Workplace Bullying Institute (www.workplacebullying.org), workplace bullying is "repeated harmful treatment of an employee by one or more employees; abusive conduct that takes the form of verbal abuse, (physical and nonverbal) behaviors that are threatening, intimidating or humiliating, work interference or sabotage, or in some combination." Bullying is distinguished from unlawful harassment because the abusive behavior may not be based on the target's membership in a protected group under federal or state law. While some states have workplace bullying laws, there is no separate private cause of action for bullying; instead, bullying claims are usually couched as either unlawful harassment or tort claims. Surveys indicate that bullying is more widespread than, and has the same profound negative consequences as, unlawful harassment. Legal and human resources experts have advocated for the inclusion of a standalone workplace bullying policy, or one made part of an anti-harassment policy, in an organization's employee handbook. For example, the Society for Human Resources Management (SHRM) (www.shrm.org) has a sample workplace bullying policy available for its large membership. SHRM's sample policy includes a definition of bullying; a statement about the purpose of the policy; and examples of bullying behavior, such as slandering, ridiculing, or maligning a person or his or her family; persistent name-calling that is hurtful, insulting or humiliating; using a person as the butt of jokes; and abusive and offensive remarks.

C. Practical Advice for Professionals and the Profane

1. Obviously, an employer can choose to ignore or address any problem. Ignoring persistent swearing, particularly language and gestures

that have a damaging effect on the workplace, is short-sighted and risky. Therefore, being proactive is ordinarily the best course of action. As a starting point, an organization should consider and assess: (1) the norms in its own industry, workforce, and culture, and (2) whether there are any actual or perceived problems that might give rise to claims and liability in this area.

2. There are few clear-cut rules – other than prohibiting unlawful discriminatory and harassing conduct – so employers have the flexibility to develop written policy guidelines requiring respectful behavior and to address problem behaviors under a set of common expectations about the proper way to interact with others. Employers drive their own culture. Respectful treatment of others may be a component of an organization's equal employment opportunity and anti-harassment policies, or part of a civility and professionalism standard of behavior, or a consistent public message from senior leadership: We don't tolerate jerks. Look to see if your policies mention the use of profanity. This is often the case in anti-harassment policies. If not, consider amending your policies to include a statement prohibiting the use of foul language or offensive gestures directed toward a co-worker. In some cases, it may not necessarily require a detailed set of rules. The Ritz Carlton hotel chain maintains a one-sentence motto -- "We are Ladies and Gentlemen serving Ladies and Gentlemen." – to describe the high level of service and interaction with its guests expected of employees. Even in an era when the terms "ladies" and "gentlemen" are not as commonly used, the motto conveys a sense of responsibility in the respectful treatment of others and discourages offensive behavior.

3. Rules are the starting point for conforming individuals' behavior but, ultimately, an employer will get the behavior it expects OR the swearing it tolerates. At a minimum, employers must train executives and supervisors about the organization's expectations and how to respond to specific instances of damaging swearing in the workplace. More importantly, one size does not fit all: Leaders must be able to distinguish an isolated outburst of a frustrated employee from a pattern of abusive treatment of others and be able to address each in its own way. Further, it is important to make clear that supervisors are the role models of an organization. Therefore, if supervisors cannot restrain their own use of foul language, then it is clear that swearing will be acceptable regardless of any written policy statement or the words of an organization's leadership.

4. Swearing happens and it is often difficult to gauge its impact on others. Therefore, employers must also be reactive to actual or

constructive notice of employees' concerns in this area. I have advised supervisors that an employee need not say the magic word "harassment" to place an organization on notice of a problem. All anti-harassment policies encourage employees to go to a supervisor or Human Resources representative to discuss a concern even if the underlying problem does not sink to the level of harassment in violation of policy or the law. Supervisors must take all complaints regarding the use of foul language seriously. This is true even if the concern does not seem very serious to the supervisor. In many cases, employees simply want to vent their concern, be heard, and put their employer on notice that they are attempting to deal with it.

5. There is plenty of room for raising one's own awareness and finding personal growth in the area of how we treat others. For the profane, they may need to learn (1) how they sound; (2) how their words impact others, and (3) be told that they are driving others from the organization and exposing their employer and themselves to potential liability for their behavior. Indeed, it may be helpful to remind organizational leaders about possible personal liability for behavior that exceeds the bounds of the law. Before tackling the problem of offensive language at work, affected parties should document the type and frequency of the remarks or gestures as employees can be defensive or simply unaware of the frequency of their use of profanity.

6. Employers appear to take two approaches when addressing the use of inappropriate language at work: "Ready, Fire, Aim" or "The Battle of Stalingrad." "Ready, Fire, Aim" instantly identifies examples of poor behavior in the ranks and metes out swift justice as a warning to others. The "Battle of Stalingrad" relies on small incremental successes in the long, difficult struggle. Before hasty action, it is helpful to provide some advance notice of expectations, train employees how to get there, and give employees a reasonable opportunity to improve. Supervisors should address expectations of polite interactions and discourage swearing informally and often in staff meetings and one-on-one interactions, such as, "We've gotten out of hand with the use of profanity in the office. It's not our culture. It's not what our customers and your co-workers expect. Let's all work together to stop using offensive language. Will you support me in that?"

7. Don't assume "we're good." The greatest threat to organizations is the assumption that if no one has complained, then no one is offended. The law of harassment has made clear that employers have a duty to seek out and eradicate unlawful harassment. The same could be said the

use of offensive language that harms another. Supervisors can lean into the potential problem of swearing, by asking for feedback regularly from their employees. I encourage supervisors to ask the employees under their supervision, at least once a quarter, “Do I and others here treat you with the measure of respect you feel you deserve?” The key is having a relationship with an employee who feels comfortable answering the question honestly.

8. Given the subjectivity surrounding swearing, employees should be encouraged, but not necessarily required, to set their own boundaries regarding offensive language at work. In my experience, employees have developed some humorous ways for dealing with swearing. One such strategy is the witty comeback to offensive comments, such as, “Of all the things I thought you might say, that certainly wasn’t one of them;” “Did you really say that?;” “I usually respond defensively to comments like that, so please give me a moment;” “Do you want to run that by me again in a less insulting way?;” and, my personal favorite, “You’re funny most days, just not today.”¹ In other examples, employees have used a “swear jar,” collecting a small fine every time an employee curses and using the funds for a shared purpose, charity or celebration; others have held contests rewarding the employee who can go the longest period without swearing at work; and one personal acquaintance harnessed the awesome power of guilt to curb swearing. Guilt? The employee approached his profane co-worker with the plea that, every time he heard his co-worker utter foul language in his presence, he felt he had to go to confession or otherwise atone for his co-worker’s sins. The profane co-worker got the message. The most expedient and effective way to address offensive language may be the direct approach: I use the SIRR method. SIRR is a simple acronym to remind employees to: STATE specifically the words or actions that offend you; inform the other person of the IMPACT of the words or actions on you personally (e.g., “it hurts my feelings,” “it distracts me from my job,”); and RESPECTFULLY REQUEST that the other person stop, that is, not employ the words or actions in your presence. Also, I encourage employees to remain calm, not to overreact to the problem, and certainly not to escalate a potential conflict. If the personal approach does not work, it is likely time to elevate the problem to a supervisor or Human Resources.

9. In addition to a policy that encompasses respectful behavior at work, employers should also have a social media policy. Among the many benefits of a social media policy is to share an organization’s expectations regarding employees’ communications online, in particular, the

¹ These responses are credited to Dr. Kathleen Kelley Reardon in her article, “Did You Really Say That?” A Repertoire of Responses Women Need Now,” (November 18, 2017), <http://www.comebacksatwork.com/?p=2217>.

consequences of posting obscene, defamatory, threatening, discriminatory or disparaging content to or about another person or entity.

10. Praise in public, punish in private. If necessary, hammer jerks. If you've reminded a worker of the policy and their behavior hasn't changed, take the employee aside for a private conversation. Simply mention the language and explain why it could be a problem in the positive culture you're trying to create. In some cases, the employee may not even realize how often he's using offensive language. Offer to work with the employee to help break the bad habit. If all else fails, and an employee refuses to refrain from swearing when it is clearly disrupting work, then an employer should discipline the employee. Progressive discipline is not guaranteed in most workplaces. Nonetheless, a supervisor should consider providing verbal and written warnings depending on the severity of the problem. If the problem persists, an employee could be terminated for disrespectful and rude behavior.

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