

The NLRB Regulating Social Media: Are Profanity and Other Offensive Statements Protected?

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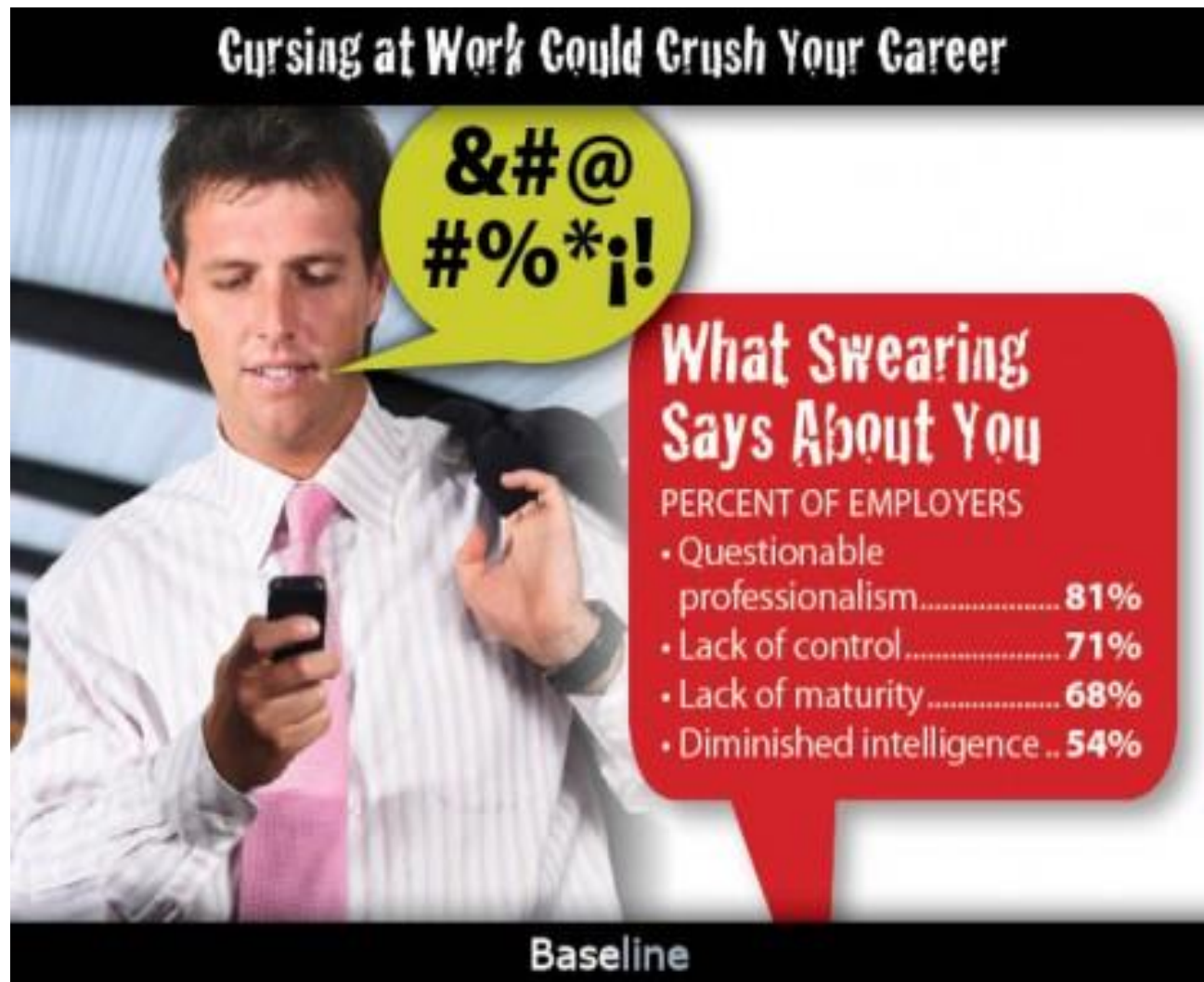
Who Cares About Swears?

- Why do people swear so much?
- Becoming more normative;
- A current cultural phenomenon;
- Apparent in sports, politics, entertainment.
- Displays insensitivity as offensive to some.
- Should employers be able to limit it in workplace and social media?

It is jarring when people swear



Cursing at Work



Swearing at Work

Dear Employees:

It has been brought to management's attention that some individuals throughout the company have been using foul language during the course of normal conversation with their colleagues.

Due to complaints received from some employees who may be easily offended, this type of language will no longer be tolerated.

We do, however, realise the critical importance of being able to accurately express your feelings when communicating with colleagues.

Therefore, a list of 13 New and Innovative 'TRY SAYING' phrases have been provided so that proper exchange of ideas and information can continue in an effective manner.

1.	Try Saying:	I think you could do with more training	Instead Of:	You don't have a f***ing clue, do you?
2.	Try Saying:	She's an aggressive go-getter.	Instead Of:	She's a f***ing power-crazy b*tch
3.	Try Saying:	Perhaps I can work late	Instead Of:	And when the f*** do you expect me to do this?
4.	Try Saying:	I'm certain that isn't feasible	Instead Of:	F*** off a*se-hole
5.	Try Saying:	Really?	Instead Of:	Well f*** me backwards with a telegraph pole
6.	Try Saying:	Perhaps you should check with...	Instead Of:	Tell someone who gives a f***.
7.	Try Saying:	I wasn't involved in the project.	Instead Of:	Not my f***ing problem, mate.
8.	Try Saying:	That's interesting.	Instead Of:	What the f***?
9.	Try Saying:	I'm not sure this can be implemented within the given timescale.	Instead Of:	No f***ing chance mate.
10.	Try Saying:	It will be tight, but I'll try to schedule it in	Instead Of:	Why the f*** didn't you tell me that yesterday?
11.	Try Saying:	He's not familiar with the issues	Instead Of:	He's got his head up his f***ing a*se.
12.	Try Saying:	Excuse me, sir?	Instead Of:	Oi, f*** face.
13.	Try	Of course. I was only going to be at	Instead	Yeah, who needs f***ing



Posting Offensive Material on Social Media



- Why is the NLRB involved regulating social media?
- Isn't the National Labor Relations Act about the workplace?
- The NLRA protects employee rights to engage in protected concerted activity and this may include activity on social media.



Can employees successfully assert
that cursing is
Protected Concerted Activity?
and thereby trigger protections of
the National Labor Relations Act?

National Labor Relations Act § 7

Employee Protected Concerted Activities



- Employees have “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*, and shall also have the right to refrain from any or all of such activities.”
- Union membership is irrelevant. NLRA covers employee communications regardless of whether employees are represented by a union



National Labor Relations Act

§ 8 Employer Obligations

- Employers are prohibited from engaging in unfair labor practices (ULPs)
- It is an ULP to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7.

The New York Times

Fired for Cursing on the Job, Testing the Limits of Labor Law



Hooters

**SCORE BIG
ALL MARCH LONG**
CATCH THE GAMES AT HOOTERS

#STOPBRACKETSADNESS



Get the Details





Bikini contest- employees

- Profanity alleged as basis for waitress's discharge
- ALJ found she didn't swear, and was engaged in Protected Concerted Activity (PCA) after taking part in a rigged bikini contest.
- Entitled to reinstatement , back pay; case settled.
- Case appealed to 9th Cir on its mandatory arbitration agreement- *D.R. Horton* issue.

Triple Play Sports Bar & Grille case

- Facebook 'like' of co-worker's disparaging/profane post criticizing manager's ability to manage paycheck tax matter;
- NLRB ruled social media posted was PCA under Section 7 of NLRA & the Second Circuit affirmed the decision





Pier Sixty case

facebook.

- Largest waterfront venue in Manhattan;
- Servers told to keep apart, not speak to each other;
- Union election pending;
- NLRB held the server's profane post on Facebook was protected;
- Second Circuit upheld the NLRB.



Tech Engineer

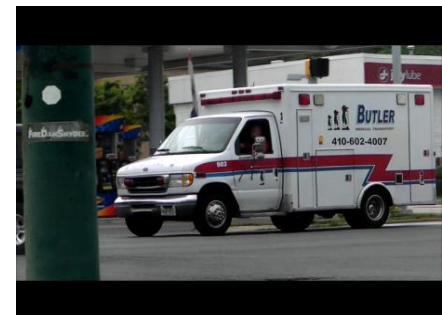
Posted manifesto objecting to Google's diversity efforts saying gender inequality in software engineering was down to biological differences

- James Damore was fired because he violated Google's Code of Conduct and advanced harmful gender stereotypes in his memo
- Filed charge at NLRB that employer threatened and discharged him because his assertions related to working conditions and were protected concerted activity

Butler Medical Transport



- Recent divided NLRB Decision ordered one employee reinstated who was fired for posting advice on Facebook to former employee that he ought to get a lawyer and take the company to court and contact the labor board.
- Other employee's termination upheld- he made profane malicious false statements on Facebook disparaging lack of maintenance of the ambulances.



Cooper Tire & Rubber case

- NLRB found that employee's picket line comments regarding diet of those crossing the picket line (fried chicken and watermelon) did not lose protection even though they reflected stereotypes based upon race.
- The Eighth Circuit upheld the NLRB's ruling.



NLRB Tests Employer Workplace Rules Including Social Media Policies

**Does the Employer rule explicitly restrict
Section 7 activities? And even if not...**

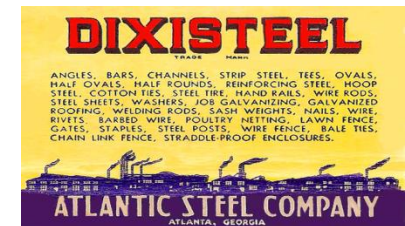
- Would an employee reasonably construe the rule as prohibiting Section 7 activity?
- Was the rule a response to union activity?
- Has the rule been applied to restrict Section 7 activity?

Employees May Lose Protection – NLRB Weighs The Context of Egregious Misconduct

Atlantic Steel (NLRB 1979)

4 Part Inquiry Regarding the Protection of Egregious Conduct

- (1) the place of the discussion,
- (2) the subject matter of the discussion,
- (3) the nature of the employee's outburst,
and
- (4) whether the outburst was, in any way,
provoked by the employer's unfair
labor practices.



NLRB What is New on Social Media

- The test for face to face conduct (Atlantic Steel four part analysis) is somewhat different than that for social media posting
- This is so because the social media conduct is **not** occurring in the workplace so the first component, i.e., place of discussion, doesn't work well so the NLRB says use the standard from *Jefferson Standard* instead...

When concerted activities are 'disloyal' to employers – *Jefferson Standard* U.S. S.Ct. 1953

Some employee conduct may be so disloyal to the employer that it loses statutory protection.

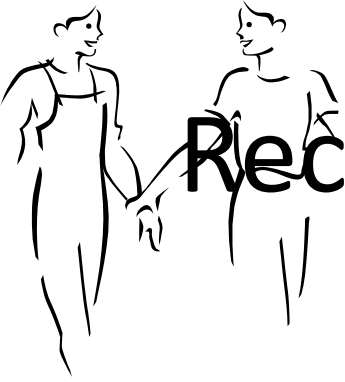


US Supreme Court found that employees may be discharged where they distributed handbills that made a “sharp, public, disparaging attack on the quality of the company’s product and its business policies” and that withheld mention of labor dispute. Such acts are not protected from discharge by the NLRA.

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Recommendations for Employees



- Friends may become foes

- Be careful what you post



Even if the content is Protected & Concerted



- Don't put anything online that you would not want your current or potential boss to read

Recommendations for Employers

- Write company policies in light of labor law rules;
- Beware of interfering with employees' rights to discuss wages, hours and working conditions with each other;
- Consider timing of instituting new policies, and take care to not react to employees' Section 7 activities in ways that violate the NLRA.





**KEEP
CALM
AND
DON'T SAY
BAD WORDS**



Take-away



- Important for employers and employees to understand NLRA regulation of social media
- Many employees are already active and savvy social media users (Facebook, Twitter, Instagram, etc.). However, the use of profane language may result in problems if the conduct is too egregious and not within protected concerted activity.



Thank you

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