Swearing in the Workplace: *Swearing as Harm to Another*

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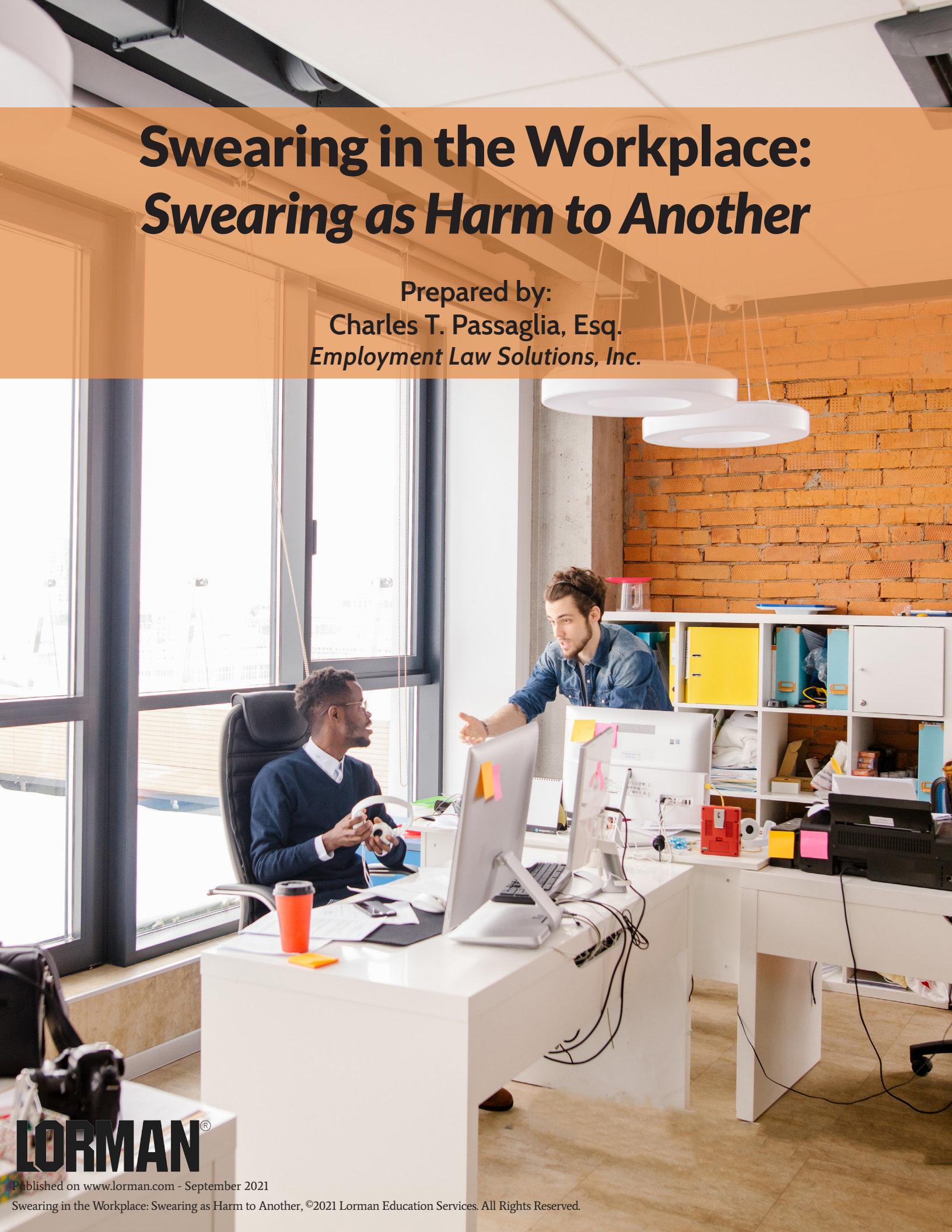

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Watch Your Mouth: Swearing in the Workplace

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Swearing as Harm to Another

A. Swearing and the Law of Harassment

1. Sexual harassment.

a. The use of vulgar and profane language in the workplace may invite claims of unlawful sexual harassment under federal and state law. In particular, courts have consistently held that the repeated use of gender-based epithets – including "dumb fucking broad," the "[c-word],"[1] and "fucking [c-word]" – in reference to women will establish a prima facie case of hostile environment sexual harassment. *Steiner v. Showboat Operating Co*., 25 F.3d 1459 (9th Cir. 1994); see also *Forrest v. Brinker International Payroll Co*., 511 F.3d 225, 229-30 (1st Cir.2007), citing *Winsor v. Hinckley Dodge, Inc*., 79 F.3d 996, 1000-01 (10th Cir.1996) (finding it " beyond dispute" that plaintiff subjected to "vulgar and offensive epithets" such as "whore," " bitch," and "curb side [c-word]" could establish a Title VII sexual harassment claim even though abuse may have been motivated by gender-neutral reasons); *Burns v. McGregor Electrical Industries*, 989 F.2d 959, 964-65 (8th Cir.1993) (reversing summary judgment in favor of employer and noting that "a female worker need not be propositioned, touched offensively, or harassed by sexual innuendo" to establish a sexual harassment claim, and holding that terms such as "bitch," "slut," and "[c-word]" directed to a female employee amounted to harassment based on her sex); *Andrews v. City of*

[1] Although the subject matter of this outline and accompanying presentation involves the use of swear words and foul language, the author will use the "c-word" and "n-word," instead of the actual words, as a matter of personal preference since the actual words are particularly distasteful to the presenter.

Philadelphia, 895 F.2d 1469, 1485 (3d Cir.1990) ("[T]he pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.").

b. However, swearing or using foul language toward another employee, regardless of gender, may not necessarily be sexist. The context in which offensive language occurs is relevant for assessing a claim of unlawful harassment. For example, considerable jurisprudence surrounds the use of "bitch" in the workplace." The use of a "pejorative term that is more likely to be directed toward a female than a male does not alone establish unwelcome sexual conduct." *Galloway v. General Motors Service Parts Operations*, 78 F.3d 1164 (7th Cir. 1996) (male co-worker's repeated use of "bitch" and "sick bitch" toward former girlfriend/co-worker was not based on her sex but, instead, personal animosity arising out of their earlier failed sexual relationship). Compare *Passananti v. Cook County*, 689 F.3d 655 (7th Cir. 2012) (Distinguishing *Galloway*, a supervisor's repeated use of "bitch," "stupid bitch," "fucking bitch," and "lying bitch" toward a female employee was used to demean the employee on the basis of her sex, and degraded women in general, supporting a claim of sexual harassment). Therefore, *Galloway* reinforces that ambiguous words like "bitch" may be used in many different contexts, including by men and women to discuss the faults a particular person may possess, to describe a male who is passive or servile, or to describe a woman as unreasonably aggressive, insensitive or careerist. *Passananti* reminds us that that use of "bitch" has become "all too common in American society" and is often gender-derogatory.

Other jurisdictions agree. *Reeves v. C.H. Robinson Worldwide, Inc*., 594 F.3d 798, 810 (11th Cir.2010) is particularly instructive on the legal risk of offensive swearing. Ingrid Reeves worked as a transportation sales representative in the Birmingham, Alabama, branch of shipping company C.H. Robinson Worldwide. In a male-dominated company, Reeves was subjected to a daily torrent of vulgar language, including "fuck," "fucker," "asshole," "Jesus fucking Christ," "fucking asshole," "fucking jerk," and "fucking idiot." In

addition, Reeves was further subjected to "a substantial corpus of gender-derogatory language addressed specifically to women as a group in the workplace," including "bitch," "fucking bitch," "fucking whore," "crack whore," and "[c-word]." Reeves complained repeatedly to her immediate supervisor and senior managers, but her complaints were ignored. She resigned and brought a complaint of sexual harassment under Title VII. The district court granted summary judgment in favor of C.H. Robinson Worldwide finding that the widespread offensive language in the office afforded men and women similar treatment; therefore, Ms. Reeves was not singled out for adverse treatment because of her sex. Reversing the lower court and remanding the decision, the Eleventh Circuit Court of Appeals dissected the lower court's ruling and provided four invaluable principles for guidance in the workplace:

i. General vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable. Title VII does not prohibit profanity alone, however profane. Title VII does not prohibit harassment alone, however severe and pervasive. Instead, Title VII prohibits unlawful discrimination, including harassment that discriminates based on a protected category such as sex.

ii. Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well.

iii. The context of offending words or conduct is essential to the Title VII analysis. Even gender-specific terms cannot give rise to a cognizable Title VII claim if used in a context that plainly has no reference to gender. Thus, for example, were a frustrated sales representative to shout "Son-of-a-bitch! They lost that truck," the

term would bear no reference to gender. In contrast, when a co-worker calls a female employee a "bitch," the word is gender-derogatory. Calling a female colleague a "bitch" is firmly rooted in gender. It is humiliating and degrading based on sex.

iv. Words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff. It is enough to hear co-workers on a daily basis refer to female colleagues as "bitches," "whores" and "[c-words]," to understand that they view women negatively, and in a humiliating or degrading way. The harasser need not close the circle with reference to the plaintiff specifically: "and you are a "bitch," too. Similarly, words or conduct with sexual content that disparately expose members of one sex to disadvantageous terms or conditions of employment also may support a claim under Title VII.

Finally, the court in *Reeves* addressed two other important issues related to the use of foul language at work. First, the employer argued that Reeves' co-workers used the terms "bitch" and "whore" to refer to both men and women and, therefore, these terms were not gender-specific. The court found as follows:

> Even accepting that Reeves's co-workers sometimes used the terms "bitch" and "whore" to refer to men, this usage may not make the epithets any the less offensive to women on account of gender. It is undeniable that the terms 'bitch' and 'whore' have gender-specific meanings. Calling a man a 'bitch' belittles him precisely because it belittles women. It implies that the male object of ridicule is a lesser man and feminine, and may not belong in the workplace. Indeed, it insults the man by comparing him to a woman, and, thereby, could be taken as humiliating to women as a group as well.

Second, in a footnote, the court considered whether use of an "extremely vulgar, gender-neutral term such as 'fucking' would contribute to a hostile work environment." The court concluded that

context matters. "'Fucking' can be used as an intensifying adjective before gender-specific epithets such as 'bitch.' In that context, 'fucking' is used to strengthen the attack on women, and is therefore relevant to the Title VII analysis. However, the obscene word does not itself afford a gender-specific meaning. Thus, when used in context without reference to gender, 'fuck' and 'fucking' fall more aptly under the rubric of general vulgarity that Title VII does not regulate."[2]

2. Racial and ethnic harassment. A racially or ethnically hostile work environment can include the following conduct: offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. *EEOC Compliance Manual*, Section 15 Race and Color Discrimination (April 19, 2006); *EEOC Enforcement Guidance on National Origin Discrimination* (November 18, 2016).[3] The conduct need not be explicitly racial or ethnic in nature to violate Title VII's prohibition against discrimination, but race or national origin must be a reason that the work environment is hostile. Courts distinguish simple teasing, boorish remarks and isolated incidents, unless extremely serious, from actionable harassment. See, e.g., *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). The EEOC maintains that four types of race-based conduct are sufficiently serious, even if occurring just one time, to create a hostile work environment based on race: an actual or depicted noose or burning cross (or any other manifestation of an actual or threatened racially motivated physical assault); a favorable reference to the Ku Klux Klan; an unambiguous racial epithet such as the "n-word;" and a racial comparison to an animal. *EEOC Compliance Manual*, § 15, para. VII.A.2. See also *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001) ("Far more than a mere offensive utterance," the n-word is "pure anathema to African Americans. Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the

[2] A good overview of the legal implications of use of "fuck" in the workplace is Fairman, Christopher M., "Fuck," *Ohio State Public Law Working Paper No. 59*, Center for Interdisciplinary Law and Policy Studies Working Paper Series No. 39 (March 2006), available at SSRN: https://ssrn.com/abstract=896790.

[3] EEOC references are found at https://www.eeoc.gov/.

use of an unambiguously racial epithet such as ‘n-----’ by a supervisor in the presence of his subordinates.”).

> Unique Problem: How does an employer respond to an employee who asks why some employees are “allowed” to use the n-word at work while others are not? The n-word is an offensive term and an employer can always prohibit its use, or the use of other offensive race-based epithets, at work regardless of the race of the speaker. Employees do not necessarily “get a pass” because social norms may allow the use of race-based language in different contexts. For example, denying an employer’s motion for summary judgment, thereby permitting a white employee who was fired for using the n-word when his black co-workers were not fired for use of the same word to proceed to trial, a federal district court stated, “To conclude that the [employer] may act in accordance with the social norm that it is permissible for African Americans to use the word but not whites would require a determination that this is a "good" race-based social norm that justifies a departure from the text of Title VII. Neither the text of Title VII, the legislative history, nor the caselaw permits such a departure from Title VII's command that employers refrain from "discriminat[ing] against any individual ... because of such individual's race." *Burlington v. News Corp*., 759 F.Supp.2d 580, 597 (E.D.Pa.2010) (quoting 42 U.S.C. § 2000e-2(a)(1).

> Unique Problem: What can employers do when employees swear in a language other than English? Generally, employers can regulate and prohibit the use of profanity in the workplace, even if the use of curse words is in a language other than English. Many workers speak a language other than English as their primary language and may swear in their first language at work. In addressing offensive speech, though, employers must be cautious about implicating so-called “English-only” rules that curb

the use of other languages. According to the EEOC, any rule requiring employees to speak only English *at all times* in the workplace is presumed to violate Title VII. See 29 C.F.R. §1606.7(a) (Speak-English-only rules) According to the EEOC's regulations, an English-only rule is valid under Title VII if applied only at certain times, where the employer can show the rule is justified by business necessity, and the employer notifies its employees of the general circumstances when speaking only English is required and of the consequences of violating the rule. *Id*. At § (b)-(c). Therefore, employers should be careful they do not unwittingly create a *de facto* English-only policy. This could occur if a supervisor, attempting to counsel or discipline an employee for cursing in a language other than English, tells the employee to speak only English even though the employer has no policy requiring English. See *Martinez v. Labelmaster*, No. 96 C 4189, 1998 WL 786391 (N.D. Ill. Nov. 6, 1998) (holding a supervisor "informally imposed an 'English only' rule which required non-English speaking employees to speak English while at their work stations"); *Tran v. Standard Motor Prod., Inc*., 10 F. Supp. 2d 1199, 1202 (D. Kan. 1998) (holding a supervisor created an English-only policy when he told team members to speak English during team meetings and "while working").

3. Religious harassment and use of the Lord's name in vain. Kellymarie Griffin, a devout Christian, was subjected to repeated verbal assaults on her religious beliefs by a co-worker who called Ms. Griffin a "wacko" for being Christian, was tired of her "Christian shit all over the place," and, amidst a great deal of profanity in general, co-workers used God's and Jesus Christ's names as curse words. Ms. Griffin brought a lawsuit alleging religious harassment under Title VII and Oregon law. Denying the employer's motion for summary judgment, and distinguishing "simple expletives" from "profanity that expressly implicated religious ideas," the district court ruled that it was a question for a jury whether the use of God's name in vain was

"because of" Ms. Griffin's religion. The court added, though, that it can be difficult to attribute the use of "God" or "Jesus" in the presence of others to conduct made "because of" another's religion. *Griffin v. City of Portland*, No. 3:12-cv-01591-MO (D. Ore., October 25, 2013). Nonetheless, a federal court jury subsequently found the city liable for permitting a hostile work environment based upon religion and awarded Ms. Griffin damages in the amount of $14,080 and attorney's fees in the amount of $81,628.80.

Compare *Bentley v. Allbritton Communications Company*, Civil Action No. 1:07-CV-0889 (M.D. Pa. November 17, 2008), rejecting an employee's claim of religious harassment because she could not establish her co-workers' frequent use of "God," Goddamn it," or "Jesus Christ" – identified by the alleged victim as "blasphemous" toward a Christian – were used "because of" her religion rather than general expressions.

4. Sexual orientation and gender identity harassment. The use of foul language that includes offensive epithets – such as "faggot," "queer," "homo," "tranny," and "fairy" -- based on a person's sexual orientation or gender identity/expression will support claims of unlawful harassment. Twenty-one states – including California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, Oregon, New Jersey, New Mexico, New York and Washington -- specifically include protection on the basis of sexual orientation and gender identity within their state anti-discrimination laws. [Citations omitted.] Some states have adopted regulations prohibiting sexual orientation harassment. See, e.g., Code of Colorado Regulations, 3 CCR 708-1, Rule 81.6 (prohibiting "[u]sing offensive names or terminology regarding an individual's sexual orientation). Further, a number of courts have expanded protection "based on sex" under Title VII to include sexual orientation and gender identity. See *Hively v. Ivy Technical Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017); *Zarda v. Altitude Express, Inc*., 883 F.3d 100, 131-32 (2d Cir. 2018); *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (6th Cir. 2018) (gender identity). Most importantly, in June 2020, the U.S. Supreme Court

expanded protection on the basis of sex to encompass sexual orientation and gender identity. In *Bostock v. Clayton County*, 590 U.S. __, 140 S. Ct. 1731, 207 L.Ed.2d 218 (2020), the Court determined that when an employer fires an employee because of gender identity or sexual orientation, the employer is effectively firing the person for traits and qualities that would not have been an issue if they were members of the opposite sex. Thus, the majority held that discrimination on the basis of sexual orientation or gender identity is discrimination "because of sex" under Title VII. Surely, the use of offensive language based on sexual orientation or gender identity will likewise support sexual harassment claims under Title VII.

B. Swearing as an Assault or other Tort Claim

1. The use of profanity, alone, will usually not support a claim for intentional infliction of emotional distress or another tort. "[I]t is generally held that there can be no recovery for mere profanity, obscenity, or abuse, without circumstances of aggravation, or for insults, indignities or threats which are considered to amount to nothing more than mere annoyances." *Yurick v. Superior Court*, 209 Cal.App.3d 1116, 1128, 257 Cal.Rptr. 665 (1989). States recognize claims for intentional infliction of emotional distress, but a plaintiff must show a defendant's conduct was extreme and outrageous, that is, conduct which exceeds the bounds of decency tolerated by a decent society and calculated to cause emotional distress. See, e.g., *Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) Insults, indignities, threats, annoyances, petty oppressions, or other trivialities are not sufficient for liability based upon a cause of action for intentional infliction of emotional distress. *Delfino v. Agilent Technologies, Inc*., 145 Cal.App.4th 790, 809, 52 Cal.Rptr.3d 376 (2006) (citing Restatement 2d Torts, § 46, comment d.).

2. However, viable intentional infliction of emotional distress claims and other tort claims often accompany extreme cases of racial or gender-based harassment. See, e.g., *Middlebrooks v. Hillcrest Foods, Inc*. 256 F.3d 1241(11th Cir. 2001) (Appellate court

affirmed judgment against Waffle House on a claims for racial discrimination under 42 U.S.C § 1981 and intentional infliction of emotional distress brought by Black adult chaperone and Black high school band members in Georgia who were repeatedly called "n-word" and "motherfuckers" by cook who was white. After his verbal tirade, the cook called the police demanding the Black students be removed, locked the door behind them, only to reopen minutes later for other customers while the Black students stood in the parking lot.).

C. Swearing as Workplace Violence

1. As discussed above, swearing that escalates to intimidating or assaultive behavior can certainly give rise to harassment and tort claims. The behavior could conceivably violate safety standards as well. Workplace violence is defined by the Occupational Safety and Health Administration ("OSHA") as "any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site." See U.S. Department of Labor (DOL), OSHA, Workplace Violence, found at https://www.osha.gov/workplace-violence. Therefore, swearing in the form of threats and verbal abuse can constitute workplace violence. There are currently no specific OSHA standards for workplace violence. Section 5(a)(1) of the Occupational Safety and Health Act of 1970, known as the general duty clause, states that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely
to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The DOL has the authority to issue citations and fines against employers who fail to comply. For example, in March 2019, the Occupational Safety and Health Review Commission (OSHRC) found that Integra Health Management violated the general duty clause by failing to address adequately "a workplace violence hazard, specifically, the risk of Integra's employees being physically assaulted by a client with a history of violent behavior." See *Secretary of Labor v. Integra Health Management, Inc*., OSHRC Docket Number 13-1124 (March 4, 2019). *Integra* involved a tragic circumstance in which a

schizophrenic male client stabbed a female Integra employee to death during an in-home visit in 2012. The employee had documented and reported that the client made her feel uncomfortable and exhibited delusional behavior during her visits. Integra took no action in response to the employee's concerns. The OSHRC specifically rejected Integra's argument that the risk of criminal assault on employees is not encompassed by the general duty clause. On the contrary, meeting face-to-face with mental health patients, some of whom had a criminal record and history of violence, was a recognized hazard for which workplace violence could be foreseeable.