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HIGH-TECH HARASSMENT: EMPLOYER LIABILITY UNDER TITLE VII FOR EMPLOYEE SOCIAL MEDIA MISCONDUCT

Jeremy Gelms

Abstract: Workplace harassment has traditionally occurred within the "four walls" of the workplace. In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* the U.S. Supreme Court recognized that employers are liable under Title VII of the 1964 Civil Rights Act for harassment that is sufficiently severe or pervasive to alter the employee's work environment. The rise in social media, however, has created a new medium through which harassment occurs. Courts are just beginning to confront the issue of if and when to consider social media harassment as part of the totality of the circumstances of a Title VII hostile work environment claim. This Comment argues that to determine whether social media harassment evidence should be considered as part of the totality of the circumstances, courts should examine whether the employer derived a "substantial benefit" from the social media forum. If the employer derived a "substantial benefit" from the social media forum where the harassment occurred, then a court may logically consider the social media platform to be an extension of the employee's work environment and thus part of the totality of the circumstances. This framework is consistent with the traditional workplace harassment analysis under Title VII, recognizes evolving technology in the modern workplace, and would provide employers with guidance on how to maintain an affirmative defense to harassment allegations in the social media age.

INTRODUCTION

Since 1986, the U.S. Supreme Court has recognized workplace harassment as an actionable claim against an employer under Title VII of the Civil Rights Act of 1964.[1] Traditionally, harassment has occurred through face-to-face verbal and physical acts in the workplace.[2] The traditional notion of the workplace, however, continues to expand with changing technology and flexible schedules, which increasingly allow employees to stay connected to the work environment at numerous locations outside the physical boundaries of the office.[3] In particular, the

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1. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64–67 (1986) (finding that workplace harassment based on an individual's race, color, religion, sex, or national origin is actionable under Title VII of the 1964 Civil Rights Act).

2. *See id.* at 65–66.

3. *See* Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 293 (2003) (commenting that untraditional working arrangements continue to expand and that "the growth in telecommuting appears to be continuing in the new millennium"); *see also* Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment*

rise of social media has given employers and employees new means through which to interact with customers, colleagues, friends, and acquaintances outside the workplace.[4] These same technological developments have also expanded the media through which individuals may perpetrate acts of harassment.[5] With the rise in popularity of social media, harassment has moved beyond the physical walls of the workplace to the virtual workplace.[6]

The broadening conception of the workplace and increasing use of social media in professional settings expands potential employer liability under Title VII.[7] In order for workplace harassment to be actionable under Title VII, courts have traditionally required plaintiffs to show that the harassment was sufficiently "severe or pervasive" under the totality of the circumstances to "alter the conditions of the victim's employment and create an abusive working environment."[8] This is known as a hostile work environment claim. Courts have split over what type of evidence to consider under the totality of the circumstances analysis[9] and they are just beginning to address claims of harassment conducted via social media.[10] However, those courts that have addressed the issue have indicated that evidence of social media harassment should be included as part of the totality of the circumstances.[11]

Relationship: An Analysis of the Cyberspace Workplace, 40 AM. BUS. L.J. 301, 302 (2003) (noting that the number of people working from home continues to grow).

4. Rafael Gely, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 301–03 (2007) (discussing how employees are increasingly turning to the internet, and in particular blogs, to interact with other employees or talk about work); *see also* Nick Clayton, *Business Joins the Party*, WALL ST. J. (May 4, 2011), http://online.wsj.com/article/SB10001424052748703712504576244622146113118.html (discussing social media's rise in popularity among businesses).

5. *See* David K. McGraw, Comment, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 RUTGERS COMPUTER & TECH. L.J. 491, 491–92 (1995) (discussing how the growth of computer networks in the 1980s and 1990s created a new form of communication that allows for widespread sexual harassment).

6. *See id.* at 494–96 (discussing the various means through which online harassment can occur).

7. *See* Douglas R. Garmager, Comment, *Discrimination Outside of the Office: Where to Draw the Walls of the Workplace for a "Hostile Work Environment" Claim Under Title VII*, 85 CHI.-KENT L. REV. 1075, 1092–100 (2010) (arguing that employers should be liable for harassment conducted outside the office). *But see* Alisha Patterson, Comment, *None of Your Business: Barring Evidence of Non-Workplace Harassment for Title VII Hostile Environment Claims*, 10 U.C. DAVIS BUS. L.J. 237, 257–68 (2010) (arguing that employers should not be liable for employee harassment outside the office).

8. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).

9. *See infra* Part II.

10. *See infra* Part IV.A.

11. *Id*.

This Comment argues that courts examining employer liability for harassment via social media should not abandon the traditional totality of the circumstances model but should recognize the changes wrought by evolving technology in the workplace. To determine employer liability, courts should consider whether the employer derived a "substantial benefit" from the social media through which the harassment occurred. If the employer derived a "substantial benefit" from the social media then the court may properly view the harassment as part of the employee's work environment and consider it as part of the totality of the circumstances for purposes of a hostile work environment claim.

This Comment begins by providing background on Title VII workplace harassment law and outlining the traditional basis of employer liability. Part II examines courts' recognition of the expanding concept of the workplace and their acknowledgment that evidence of harassment outside the traditional walls of the workplace should be considered as part of the totality of the circumstances of a hostile work environment claim. Part III discusses the use of social media by individuals and businesses. Part IV addresses an employer's potential liability for harassment that occurs via social media. Finally, Part V provides a framework for courts to examine employer liability for harassment that occurs through social media. It argues that courts should consider evidence of harassment over social media as part of the totality of the circumstances of a hostile work environment claim when the employer derives a substantial benefit from the social media at issue.

I. THE U.S. SUPREME COURT HAS RECOGNIZED EMPLOYER LIABILITY UNDER TITLE VII FOR WORKPLACE HARASSMENT THAT CREATES A HOSTILE WORK ENVIRONMENT

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."[12] Initially, courts held that Title VII's proscription only created a private right of action for disparate treatment claims, such as claims by qualified applicants denied employment because of their race or gender.[13] It was not until 1986, in *Meritor*

12. 42 U.S.C. § 2000e-2(a)(1) (2006).

13. *See, e.g.*, City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 715–18 (1978)

Savings Bank v. Vinson,[14] that the U.S. Supreme Court recognized workplace harassment as an actionable claim under Title VII.[15]

In *Meritor*, the U.S. Supreme Court recognized that workplace harassment is actionable against an employer under Title VII if the harassment is sufficiently "severe or pervasive" to alter the employee's work conditions.[16] This became known as a hostile work environment claim.[17] In *Meritor*, a bank employee alleged that, over a period of four years, the vice president of the bank sexually harassed her on numerous occasions and eventually raped her.[18] Broadly interpreting Title VII, the Court found that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women.'"[19] In other words, the Court held that Title VII was intended to cover not only economic barriers, but psychological and physical injuries as well.[20] On the other hand, Title VII is not "a general civility code" that makes conduct illegal simply because it is uncomfortable or inappropriate.[21] Thus, in order for workplace harassment to be actionable as a hostile work environment claim "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[22] The Court's opinion, while establishing that a hostile work environment is actionable under Title VII, left unanswered what qualifies as "severe or pervasive" harassment giving rise to employer liability.

(holding that requiring women to contribute more money to pension fund than male employees is discrimination because of sex); Sprogis v. United Airlines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (holding that overlooking female applicants because they are married, but imposing no similar marital restriction on men, is discrimination because of sex).

14. 477 U.S. 57 (1986).

15. *Id.* at 67. In 1976, the first federal court recognized sexual harassment as unlawful employment discrimination on the basis of sex within the meaning of Title VII. Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976), *rev'd on other grounds sub nom*. Williams v. Bell, 587 F.2d 1240, 1248 (D.C. Cir. 1978).

16. *Meritor*, 477 U.S. at 67.

17. *Id.* at 65 (coining term "hostile work environment" in sexual discrimination cases).

18. *Id.* at 59–61.

19. *Id.* at 64 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

20. *Id.* at 64.

21. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80–81 (1998).

22. *Meritor*, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)) (acknowledging that the harassment must also be unwelcomed).

A. Harassment in a Hostile Work Environment Claim Must Be "Severe or Pervasive" Under the Totality of the Circumstances

Seven years after *Meritor*, in *Harris v. Forklift Systems, Inc.*,[23] the U.S. Supreme Court defined what constitutes sufficiently "severe or pervasive" harassment to support a hostile work environment claim. Theresa Harris, a manager at Forklift Systems, Inc., claimed that she was repeatedly subjected to unwanted sexual comments and innuendos by the company president, to the point where she was forced to quit her job.[24] In reviewing Harris's hostile work environment claim, the Court first established that, in order to meet the "severe and pervasive" requirement, the plaintiff must show that the work environment is hostile or abusive under both an objective and subjective standard.[25] In other words, the plaintiff must show not only that he or she personally perceived the work environment to be hostile or abusive, but also that a reasonable person in the plaintiff's position would perceive the environment to be hostile.[26]

In lieu of a bright-line test based on a single dispositive factor, the Court stated that the fact-finder must look at the totality of the circumstances to determine whether the conduct was sufficiently "severe or pervasive" as to create a hostile work environment under the objective prong of the analysis.[27] The Court identified several relevant factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, as opposed to a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[28] The more severe the harassment is, the less pervasive it needs to be, and vice versa.[29] Accordingly, a single incident of harassment will generally not create a hostile work environment unless the harassment is quite severe.[30] Notably, the Court made no reference to the location or timing of the discriminatory conduct.

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23. 510 U.S. 17 (1993).

24. *Id.* at 19–20.

25. *Id.* at 21–22.

26. *Id.* at 22.

27. *Id.*

28. *Id.* at 23.

29. *See id.*

30. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("'[S]imple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (quoting Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80–81 (1998))).

B. Agency Principles Govern Employer Liability for a Hostile Work Environment

Although *Meritor* and *Harris* helped clarify how a plaintiff could establish a prima facie case of harassment, these cases left unresolved the contours of employer liability for a hostile work environment under Title VII. While *Meritor* suggested that employer liability should be determined according to common-law agency principles, the Court did not fully address the issue.[31] After *Meritor*, lower courts followed the Court's recommendation and used the *Restatement (Second) of Agency* as a guide.[32] The Restatement, however, suggests several different bases for employer liability.[33] Not surprisingly, lower courts adopted competing agency standards to determine employer liability for supervisor harassment: some imposed vicarious or automatic liability, while others imposed a negligence standard.[34]

Finally, in 1998, in the companion cases *Faragher v. City of Boca Raton*[35] and *Burlington Industries, Inc. v. Ellerth*[36] the U.S. Supreme Court addressed the standard for employer liability for workplace harassment. In *Faragher*, the plaintiff alleged that the City of Boca Raton was liable for creating a hostile work environment because, during her time as a lifeguard for the city, her supervisor repeatedly subjected her to uninvited and offensive touching, lewd remarks, and derogatory gender-based terms.[37] Likewise, in *Ellerth*, the plaintiff

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31. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

32. *See, e.g.*, Fleenor v. Hewitt Soap Co., 81 F.3d 48, 50 (6th Cir. 1996) ("This court . . . has looked to traditional agency principles . . . to determine employer liability under Title VII."); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558 (11th Cir. 1987) ("[I]n determining whether a supervisor was acting as an 'agent' for Title VII purposes, courts must look for guidance to common law agency principles."); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986) (recognizing *Meritor* directed courts to look to common law agency principles for guidance in determining liability for supervisor harassment).

33. *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) (1957) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.").

34. *Compare, e.g.*, Carrero v. N.Y.C. Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (holding that "employer is held strictly liable for its employee's unlawful acts"), *with* Bouton v. BMW of N. Am., Inc., 29 F.3d 103, 107 (3d Cir. 1994) (holding employer liable for sexual harassment only if it "knew or should have known of harassment and failed to take prompt remedial action").

35. 524 U.S. 775 (1998).

36. 524 U.S. 742 (1998).

37. *Faragher*, 524 U.S. at 780.

alleged that her employer was liable for her supervisor's alleged offensive gestures and touching, including the supervisor's threat that he could make the plaintiff's life very difficult at the company if she rebuffed his sexual advances.[38]

In both cases, the Court reiterated that agency principles inform the standard for employer liability[39] and noted that the standard for employer liability depends on whether a supervisor or a non-supervisor employee perpetrated the harassment.[40] The Court ultimately ruled that when a supervisor causes workplace harassment, an employer is strictly liable if the harassment results in a tangible employment action.[41] Even when supervisor harassment does not result in a tangible employment action, however, employers are still presumptively liable if the harassment creates a hostile work environment.[42] On the other hand, when a non-supervisor perpetrates the harassment and creates a hostile work environment, employers are held only to a negligence standard.[43]

1. Employers Are Vicariously Liable for Harassment by Supervisors that Results in a Tangible Employment Action

The Court in *Faragher* and *Ellerth*, after rejecting the scope of employment and apparent authority rationales, settled on the aided-in-agency principle articulated in section 219(2)(d) of the *Restatement (Second) of Agency* as the appropriate starting point for determining employer liability for harassment conducted by supervisors.[44] Under this principle, "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment *unless . . . he was aided in accomplishing the tort by the existence of the agency relation*."[45] The Court reasoned that a tangible employment action, by its very nature, involves an action that the supervisor could not have accomplished without the agency relationship.[46] A tangible employment action is "a significant change in employment status, such as hiring,

38. *Ellerth*, 524 U.S. at 747–48.

39. *Id.* at 754–55; *Faragher*, 524 U.S. at 793–804.

40. *Ellerth*, 524 U.S. at 761–62; *Faragher*, 524 U.S. at 802–04.

41. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

42. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

43. *See Faragher*, 524 U.S. at 799 (noting that federal courts have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard"); *see also infra* Part I.B.3.

44. *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 802.

45. RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957) (emphasis added).

46. *See Ellerth*, 524 U.S. at 761–62 (noting that the actions of the supervisor are often documented on official company records and are typically reviewed by higher level supervisors).

firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[47]

Tangible employment actions are the means through which a harassing supervisor "brings the official power of the enterprise to bear on subordinates" and requires an official act of the employer.[48] Thus, from the employee's perspective, the supervisor and the employer are indistinguishable.[49] According to the Court, "[w]hatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate."[50] Therefore, when a supervisor perpetrates harassment that results in a tangible employment action, the employer is vicariously liable.

2. *Employers Are Presumptively Liable for Harassment by Supervisors that Results in a Hostile Work Environment*

Absent a tangible employment action, the employer is still presumed liable if the supervisor's harassment creates a hostile work environment.[51] The Court reasoned that the aided-in-agency principle is still relevant because in order to create a hostile work environment the supervisor "necessarily draw[s] upon his superior position over the people who report to him."[52] In most instances, because a supervisor has the power to make economic decisions that impact the victim, victims are deterred from reporting harassing conduct.[53] Thus, the supervisor's harassing actions are aided by the power a supervisor holds within the employment relationship.[54] Additionally, the supervisor can be aided via an employer's actions or inactions that facilitate an environment where harassing conduct can occur.[55] Absent a tangible employment action, an employer can refute the presumption of liability by raising an affirmative defense.[56]

To raise the affirmative defense, the employer must show that (1) it

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47. *Id.* at 761.
48. *Id.* at 762.
49. *See id.*
50. *Id.* at 762–63.
51. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.
52. *Faragher*, 524 U.S. at 803.
53. *See id.*
54. *See id.*
55. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 801–03.
56. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

exercised reasonable care to prevent and promptly correct any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.[57] The first prong generally requires an employer to establish, disseminate, and implement an anti-harassment policy and complaint procedure and to take reasonable steps to prevent and correct harassment.[58] However, even the best policy will not constitute reasonable care if the employer failed to implement it effectively.[59] On the other hand, the lack of a formal policy will not necessarily defeat the employer's defense if the employer exercised reasonable care to prevent harassment through other means.[60] The second prong requires the employer to show that the employee failed to utilize the anti-harassment procedures the employer had in place.[61] By providing for a judicially created affirmative defense, the Court limited employers' potential liability and gave employers an incentive to take proactive measures against harassment.[62]

3. *Employers Are Liable for Harassment Conducted by Non-Supervisors Under a Negligence Standard*

The U.S. Supreme Court has never directly addressed employer liability for non-supervisor harassment;[63] however, lower courts have

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57. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

58. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

59. *Compare* Gentry v. Exp. Packaging Co., 238 F.3d 842, 848 (7th Cir. 2001) (finding sexual harassment policy insufficient where policy was not posted and reasonable person would not know how to report harassment), *and* Derijk v. Southland Corp., 313 F. Supp. 2d 1168, 1174–75 (D. Utah 2003) (finding employer did not exercise reasonable care where no employees received training about harassment policy and employer did not follow up on complaints), *with* Jackson v. Cnty. of Racine, 474 F.3d 493, 501 (7th Cir. 2007) (finding county exercised reasonable care to prevent and correct harassing behavior where it had a comprehensive anti-harassment policy, posted it in every department, and had a Human Resources Department that responded promptly to every complaint), *and* Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 34–35 (1st Cir. 2003) (finding employer took reasonable precaution where employer had policy against sexual harassment, subordinate admitted attending orientation on company's sexual harassment policies, conceded she saw posters regarding workplace harassment, and employer immediately began investigation), *and* Montero v. Agco Corp., 192 F.3d 856, 861–62 (9th Cir. 1999) (finding first prong of affirmative defense established where employer had an anti-harassment policy, employee received the policy, and the employer promptly investigated complaint).

60. *See Faragher*, 524 U.S. at 807.

61. *Id.*

62. *See id.* at 805–06 (citing Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)) (discussing that the primary purpose of Title VII is not to provide a remedy but to prevent harm from occurring in the first place).

63. Without issuing a holding on the issue of employer liability for harassment by co-workers, the

recognized that a hostile work environment can be created not only by supervisors, but also by co-workers[64] and third-party non-employees.[65] These decisions acknowledge that a hostile work environment claim need not stem from a power disparity.[66] In situations where a non-supervisor perpetrates the harassment, courts unanimously impose liability for employers under a negligence standard.[67] Under this standard, an employer is liable if the employer "knew, or upon reasonably diligent inquiry should have known, of the harassment and failed to take immediate and appropriate corrective action."[68] The more restrictive scope of employer liability for harassment by non-supervisors demonstrates that courts focus on the extent to which the employment relationship facilitated the harassing conduct when determining whether to impose liability on the employer.

II. COURTS HAVE STRUGGLED TO DETERMINE THE BOUNDARIES OF THE WORKPLACE AND HAVE REACHED DIVERGENT RESULTS REGARDING THE SCOPE OF EMPLOYER LIABILITY FOR HARASSMENT CONDUCTED OFF WORK PREMISES

The text and legislative history of Title VII provide little guidance for determining whether conduct outside the workplace is part of the totality of the circumstances in a hostile work environment suit,[69] and the U.S.

Court in *Faragher* noted that the trend among federal courts is to impose liability under a negligence standard for a hostile work environment created by a nonsupervisory coworker. *See id.* at 799.

64. *See, e.g.*, Sharp v. City of Houston, 164 F.3d 923, 929 (5th Cir. 1999) (noting *Faragher* did not disturb the negligence standard governing employer liability for co-worker harassment); Fleming v. Boeing Co., 120 F.3d 242, 246 (11th Cir. 1997) (holding that an employer can be directly and indirectly liable for the harassment of an employee by another co-worker).

65. *See, e.g.*, Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073–74 (10th Cir. 1998) (holding employer could be held liable for sexual harassment caused by customers under a negligence theory); *see also* Lea B. Vaughn, *The Customer Is Always Right . . . Not! Employer Liability for Third Party Sexual Harassment*, 9 MICH. J. GENDER & L. 1 (2002) (arguing that third party harassment is a prevalent form of harassment that is not adequately and enthusiastically pursued by the legal system).

66. *See* BARBARA LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 158 (1992).

67. *Faragher*, 524 U.S. at 799.

68. *Fleming*, 120 F.3d at 246 (quoting Faragher v. City of Boca Raton, 111 F.3d 1530, 1535 (11th Cir. 1997)); *see also* Folkerson v. Circus Circus Enter., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (holding that an employer is liable where it "either ratifies or acquiesces in the harassment [of a third party] by not taking immediate and/or corrective action when it knew or should have known of the conduct").

69. *See* Garmager, *supra* note 7, at 1077–80 (noting that the unique political and regional battle in

Supreme Court has never confronted the issue.[70] As a result, lower federal courts have struggled to locate the geographical limits of employer liability for harassment of employees.[71] When determining whether a hostile workplace exists, the federal circuit courts are split as to whether the totality of the circumstances test contemplates harassment that occurs after hours or outside the walls of the workplace.[72]

A. *Several Courts Have Considered Evidence of Harassment Outside the Workplace As Part of the Totality of the Circumstances When Reviewing a Hostile Work Environment Claim*

The First,[73] Second,[74] Seventh,[75] and Eighth[76] Circuit Courts of Appeals have expressly indicated that harassment conducted outside the physical walls of the workplace is part of the totality of the circumstances for purposes of a hostile work environment claim. These courts have not clearly defined what harassment beyond the office's "four walls" should be considered; however, they have paid particular attention to whether the harassing conduct can be properly characterized as part of the employee's work environment.[77]

For example, the First Circuit Court of Appeals upheld a district court's consideration of conduct outside the workplace in a hostile work environment claim in *Crowley v. L.L Bean, Inc.*[78] In *Crowley*, the plaintiff claimed that she was improperly touched and stalked by a co-employee.[79] The plaintiff further alleged that the co-employee engaged in a number of harassing actions including grabbing her foot and

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Congress caused the remedial purpose of ending workplace harassment to never fully develop within the legislature).

70. *See id.* at 1083.

71. *See id.* at 1083–91 (outlining current case law in the area of employer liability for conduct outside the workplace).

72. *Id.*

73. Crowley v. L.L. Bean, Inc., 303 F.3d 387, 409–10 (1st Cir. 2002).

74. Ferris v. Delta Airlines, Inc., 277 F.3d 128, 135 (2d Cir. 2001).

75. Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008); Doe v. Oberweis Dairy, 456 F.3d 704, 715 (7th Cir. 2006).

76. Dowd v. United Steelworkers of Am., 253 F.3d 1093, 1102 (8th Cir. 2001).

77. *See, e.g.*, *Lapka*, 517 F.3d at 983 (noting that employer-sponsored training program where employer paid for accommodations and food could qualify as part of the employee's work environment); *Ferris*, 277 F.3d at 135 (examining employer's connection to hotel room where harassment took place to determine whether it can be characterized as part of the employee's work environment).

78. 303 F.3d 387 (1st Cir. 2002).

79. *Id.* at 392.

massaging it against her will at a company-sponsored pool party, continually following her at work, physically blocking her path and thereby forcing her to squeeze by him, giving her gifts designed to let her know that he was watching her, following her home, and even breaking into her home.[80] The defendant claimed that the district court abused its discretion by admitting evidence of this non-workplace conduct.[81] The First Circuit reasoned, however, that the work environment is not limited to the four walls of the office.[82] The court determined that the defendant's conduct outside the workplace walls, including harassment conducted at the company-sponsored pool party and in a non-workplace parking lot, explained why the defendant's "constant presence around [the plaintiff] at work created a hostile environment."[83] The evidence of non-workplace conduct also helped to establish whether the hostility in the workplace was severe and pervasive, as well as to establish that the conduct was motivated by gender.[84]

The Seventh Circuit Court of Appeals also confronted the issue of harassment outside the workplace in *Lapka v. Chertoff*.[85] The hostile work environment claim in *Lapka* stemmed from an alleged rape by a fellow Department of Homeland Security (DHS) employee, which occurred while the plaintiff was attending a mandatory month-long professional training course.[86] According to DHS, the rape was not evidence of workplace harassment because the incident occurred in a private hotel room in the context of after-work socializing.[87] Rejecting this argument, the court noted that conduct supporting a harassment claim does not have to take place exclusively within the physical confines of the workplace.[88] The court further pointed out that the training facility at issue was different from a typical workplace where "employees go home at the close of their normal workday."[89] Although the harassment occurred outside the office, the training was an employer-sponsored function where the employer provided

80. *Id.*
81. *Id.* at 409.
82. *Id.*
83. *Id.* at 409–10.
84. *See id.* at 409.
85. 517 F.3d 974 (7th Cir. 2008).
86. *Id.* at 979.
87. *Id.* at 983.
88. *Id.* (citing Doe v. Oberweis Dairy, 456 F.3d 704, 715–16 (7th Cir. 2006)).
89. *Id.* (quoting Ferris v. Delta Airlines, Inc., 277 F.3d 128, 135 (2d Cir. 2001)).

accommodations and meals.[90] In this type of situation, the employer should know that employees are likely to socialize and interact after formal working hours as a matter of course.[91] Based on these circumstances, the court determined that the alleged harassment occurred in a location constituting a continuation of the workplace environment.[92]

The Second Circuit Court of Appeals in *Ferris v. Delta Airlines, Inc.*[93] also focused on the employer's connection to the site of the harassment in holding that a hotel room could form part of an employee's work environment within the terms of Title VII.[94] In *Ferris*, a female flight attendant brought a hostile work environment action against her employer, Delta Airlines, claiming negligent supervision of a male flight attendant who allegedly raped her during a layover in Rome.[95] The district court determined that the hotel room was not part of the employee's work environment because she voluntarily associated with her co-worker and there was no evidence that Delta affirmatively encouraged employees to visit each other's rooms.[96] The Second Circuit reversed, noting that although the employer did not direct its employees how to spend their off-duty hours, the circumstances of the employment relationship dictated that crew members would most likely band together during layovers to socialize.[97] The court also acknowledged that the airline arranged, funded, and provided ground transportation to the attendants' hotel accommodations.[98] Based on the employer's connection to the hotel room, a jury could properly find that the hotel room was part of the plaintiff's work environment within the terms of Title VII.[99]

Although the Eighth Circuit Court of Appeals has not thoroughly explained why evidence of harassment that occurs outside the workplace can be considered in a hostile work environment claim, several of its cases generally support this proposition. For example, in *Moring v.*

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90. *See id*.

91. *See id*.

92. *See id*. (noting that "Lapka first encountered Garcia on the [training] campus, so the event could be said to have grown out of the workplace environment").

93. 277 F.3d 128.

94. *See id.* at 135.

95. *Id.* at 131–32.

96. *Id.* at 134–35.

97. *Id*.

98. *Id*.

99. *Id*.

Arkansas Department of Correction,[100] employee Sherry Moring filed a § 1983 action against her supervisor, Gary Smith, for sexual harassment.[101] Moring alleged that on an overnight business trip, her supervisor initiated a sexual conversation and later appeared barely clothed at her hotel room door, sat on her bed, touched her thigh, and attempted to kiss her.[102] Although the court did not explicitly discuss the fact that this incident occurred outside the workplace, the court nevertheless found that a reasonable jury could find a hostile work environment.[103] Similarly, in *Dowd v. United Steelworkers of America*,[104] the Eighth Circuit, citing *Moring*, recognized that harassment need not transpire in the workplace to support a hostile work environment claim.[105] The court stated that the harassment at issue was "in physical proximity to the plant [where the plaintiff worked], and, arguably, perpetrated with the intention to intimidate and to affect the working atmosphere inside the plant."[106]

The First, Second, Seventh, and Eighth Circuits have all considered harassment outside the four walls of the workplace as part of a Title VII hostile work environment claim. In so doing, they have focused on the employer's connection to the location where the harassment took place. When the employer places the plaintiff in the extra-office location as part of his or her work or should anticipate that employees will interact socially in that location, the location may qualify as an extension of the employee's work environment.

B. *Several Courts Have Barred Consideration of Harassment Outside the Physical Walls of the Workplace as Part of a Hostile Work Environment Claim*

While many courts consider harassment outside the workplace as part of a Title VII claim, several federal appellate courts have categorically excluded evidence of extra-office harassment in reviewing a hostile work environment claim.[107] In *Sprague v. Thorn Americas, Inc.*,[108] for

100. 243 F.3d 452 (8th Cir. 2001).

101. *Id.* at 454.

102. *Id.* at 456.

103. *See id.* at 456–57.

104. 253 F.3d 1093 (8th Cir. 2001).

105. *Id.* at 1102 (citing Moring v. Ark. Dep't of Corr., 243 F.3d 452 (8th Cir. 2002)).

106. *Id.*

107. *See, e.g.*, Gowesky v. Singing River Hosp. Sys., 321 F.3d 503, 510–11 (5th Cir. 2003), *cert. denied*, 540 U.S. 815 (declining to consider behavior occurring outside of the workplace because "a harassment claim, to be cognizable, must affect a person's working environment"); Sprague v.

example, the Tenth Circuit Court of Appeals considered five separate incidents of alleged harassment by the plaintiff's supervisor over a period of sixteen months.[109] The most serious incident, according to the court, occurred at the plaintiff's wedding reception when the supervisor looked down the plaintiff's shirt and said, "well, you got to get it when you can."[110] The court refused to consider the conduct at the wedding, however, because the harassment "occurred at a private club, not in the workplace."[111] The court did not articulate any reasoning for categorically excluding any conduct occurring outside the office.

Similarly, the Fifth Circuit Court of Appeals has declined to consider evidence of harassment outside the boundaries of the workplace. In *Gowesky v. Singing River Hospital Systems*,[112] the court reviewed a disability harassment claim in which the plaintiff, an emergency room physician, contracted Hepatitis C while treating a patient.[113] According to the plaintiff, the hospital intimidated her when she attempted to return to work and required her to present a full medical release from her physician, take refresher courses, and submit to weekly blood samples as a condition of returning to work.[114] While noting that the alleged harassment was not sufficiently severe or pervasive to alter the plaintiff's work environment, the court emphasized that all of the challenged conduct occurred either over the phone or in writing while the plaintiff was on leave from work.[115] The court further noted it was "not inclined to extend this judicially created harassment action to behavior that occurred when the [plaintiff] was not actually working."[116]

Thus, the circuits are split as to whether conduct that occurs outside the walls of the workplace forms part of the totality of the circumstances in a hostile work environment claim. Those courts that have considered conduct outside the traditional walls of the workplace under the totality of the circumstances have focused on whether the location where the conduct occurred forms an extension of the employee's work environment. In recent years, technological advances have blurred the

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Thorn Ams., Inc., 129 F.3d 1355, 1366 (10th Cir. 1997).

108. 129 F.3d 1355.

109. *Id.* at 1365.

110. *Id*. at 1366.

111. *Id*.

112. 321 F.3d 503 (5th Cir. 2003).

113. *Id.* at 506–07.

114. *Id.*

115. *Id.* at 510–11.

116. *Id.* at 511.

boundaries of the workplace, further complicating the courts' analysis of what constitutes workplace harassment.

III. THE PROLIFERATION OF SOCIAL MEDIA HAS OPENED THE DOOR FOR NEW FORMS OF WORKPLACE HARASSMENT

When social media[117] and the internet first emerged, many dismissed them as a passing fad limited to facilitating gossip.[118] Today, however, few would deny that social media has become a powerful communication tool that has fundamentally shifted the way people communicate.[119] Employers and employees increasingly utilize social media and social networking sites, both at home and in the workplace.[120] Furthermore, when using social media, many users convey intimate and personal details of their daily lives.[121]

A. Social Media Is a Broad Term

Social media is a term that encompasses several different types of communication tools. For example, social media can be further broken down into six distinct categories: collaborative projects,[122] blogs,[123]

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117. For purposes of this Comment, social media will be defined broadly as any internet-based application which allows people to create and exchange user-generated content. Andreas Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010) (defining social media).

118. *See, e.g.*, Joseph Rago, Editorial, *The Blog Mob*, WALL ST. J., Dec. 20, 2006, at A.18 (describing blogs as "written by fools to be read by imbeciles"); Clifford Stoll, Editorial, *The Internet? Bah!*, NEWSWEEK, Feb. 27, 1995, at 41 (arguing that online databases are too clunky to be universally embraced and that computer networks would never change the way government or business operates).

119. *See infra* Part III.B–C.

120. Gely, *supra* note 4, at 301–03 (discussing employees' increasing use of the internet); *see also infra* Part III.B–C.

121. James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149–59 (2009) (noting that a fully filled-out Facebook profile contains about forty different pieces of personal information, including highly sensitive matters like political and religious views, sexual preference, relationship status, and personal pictures); *see also* Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 5 (2007) (describing that a social network profile can consist of a user's name, country, zip code, gender, date of birth, a list of friends, a list of groups with shared interests, pictures, videos, links to internet pages, as well as updates on daily activities).

122. *See* Kaplan & Haenlein, *supra* note 117, at 62 (describing collaborative projects, for example, Wikipedia, as a platform that enables the joint and simultaneous creation of content by many users).

123. *See id.* at 63 (defining blogs as special types of websites that usually display personal date-stamped text entries and allow other users to add additional comments).

content communities,[124] social networking sites,[125] virtual game worlds,[126] and virtual social worlds.[127]

Among the various categories of social media, social networking sites have proved the most popular forum for sexual harassment and have developed a distinct definition. Social scientists Danah Boyd and Nicole Ellison describe social networking sites as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."[128] Broadly speaking, social networking sites allow users to establish relationships with other users based on a unique online identity.[129] Social media allows users to connect with previously established friends and also build new relationships based on common interests,[130] thereby providing an alternative technological platform for standard social communication and interaction.[131]

B. *Social Media, Especially Social Networking Sites, Are Rapidly Proliferating*

Social media is quickly becoming the medium of choice for communication.[132] Three out of four Americans use social media[133] and

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124. *See id.* (describing that the main objective of content communities is to share media content between users, and such communities exist for a wide range of media types, including text (e.g., BookCrossing), photos (e.g., Flickr), videos (e.g., YouTube), and PowerPoint presentations (e.g., Slideshare)).

125. *See id.* at 63–64.

126. *See id.* at 64 (describing virtual worlds as platforms that allow users to create personal avatars and interact with others user created avatars (e.g., World of Warcraft)).

127. *See id.* (describing virtual social worlds as platforms that allow users to live a virtual life with user created avatars similar to their real life (e.g., Second Life)).

128. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007)).

129. Grimmelmann, *supra* note 121, at 1143.

130. John S. Wilson, Comment, *MySpace, Your Space, or Our Space? New Frontiers in Electronic Evidence*, 86 OR. L. REV. 1201, 1220 (2007) (describing how people can connect with friends and expand their friend network by joining social networking groups based on shared interests).

131. *See id.* at 1219–20 (commenting that where members of the community used to gather around the soda fountain to talk about the local news, gossip, and the weather, they are now simply engaging in the same conversations on social networking sites).

132. *See* JOSH BERNOFF, THE GROWTH OF SOCIAL TECHNOLOGY ADOPTION (Forrester Research 2008) (finding increasing growth among individuals joining, commenting, and creating social

millions more are members of social networking sites.[134] The first social networking sites surfaced in the late 1990s, but it was not until the mid-2000s that these sites gained mainstream recognition.[135] The most popular social networking site, Facebook, has over 800 million active users[136] worldwide.[137] These users include roughly sixty percent of the American internet population.[138] In addition to the number of people using social media, the amount of time spent on social media and the amount of information exchanged have also grown exponentially.[139] In 2010, Americans spent nearly a quarter of their time online on social networks and blogs, a roughly forty percent increase from the year before.[140] In fact, the time spent on social networks has surpassed time spent on e-mail communications.[141]

As the number of social media users has increased, the type of users has also changed. While social media originally catered to a younger audience, over time the user population has become older and more diverse.[142] Although social media use has grown dramatically across all age groups, recent growth among older users has been especially noticeable.[143] A recent study found that the number of social media users

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media).

133. *Id.*

134. *See* Jenna Wortham, *Facebook Tops 500 Million Users*, N.Y. TIMES, July 21, 2010, at B8; *see also What is Twitter?*, TWITTER, https://business.twitter.com/basics/what-is-twitter/ (last visited Jan. 7, 2012) (noting that there are over 100 million active Twitter users); *About Us*, LINKEDIN, http://press.linkedin.com/about (last visited Jan. 7, 2012) (noting over 135 million LinkedIn users).

135. *See* Boyd & Ellison, *supra* note 128, at 214–18 (tracing the rise and fall of social networks in the late 1990s until they attained mainstream recognition around 2003).

136. *Factsheet*, FACEBOOK, http://www.facebook.com/help/?faq=204519362916669 (last visited Feb. 13, 2012) (defining "user" as someone who has engaged with, viewed, or consumed content generated on a Facebook page).

137. *See* Wortham, *supra* note 134.

138. Hiroko Tabuchi, *Slow Growth in Japanese Facebook*, N.Y. TIMES, Jan. 10, 2011, at B1.

139. *See Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year over Year*, NIELSENWIRE (Jan. 22, 2010), http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year (noting that global consumers spend an average of five and a half hours a month on social networking sites alone, an increase of eighty-two percent from the same month a year earlier)

140. *What Americans Do Online: Social Media and Games Dominate Activity*, NIELSENWIRE (Aug. 2, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity.

141. Teddy Wayne, *Social Networks Eclipse E-mail*, N.Y. TIMES, May 18, 2009, at B3.

142. *See Social Networking's New Global Footprint*, NIELSENWIRE (Mar. 9, 2009), http://blog.nielsen.com/nielsenwire/global/social-networking-new-global-footprint (noting that the fastest growth among Facebook users in 2007 to 2008 came from adults 35 to 49, not teenagers).

143. Mary Madden, *Older Adults and Social Media*, PEW INTERNET & AM. LIFE PROJECT (Aug. 27, 2010), http://www.pewinternet.org/Reports/2010/Older-Adults-and-Social-

over the age of fifty nearly doubled between 2009 and 2010.[144] Social media use among professional workers has also increased dramatically.[145] A 2010 study found that 86% of financial professionals had a business or personal account on one or more social media platforms, a 13% increase in just one year.[146] Thus, a broader spectrum of society is using social media than ever before.

C. *Employers Are Actively Incorporating Social Media into Their Business Practices*

Companies are responding to the continuing growth in social media.[147] For example, employers are increasingly turning to social media as a means to screen job applicants.[148] Employers have also recognized that the real-time nature of social media provides new avenues for marketing, research and development, knowledge management, and branding.[149] Many companies are now recruiting

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Media/Report/Findings.aspx (finding that while social media use has grown dramatically across all age groups, older users have increasingly embraced social networking tools. Forty-seven percent of internet users age 50 to 64 and 26% of users 65 years and older used social networking sites in 2010).

144. *See id.* (finding social networking use among users 50 years and older increased from 22% to 42%).

145. Laura Kouri & Jennifer Sussman, *Financial Professionals Social Media Adoption Study*, AM. CENTURY INVESTMENTS (Jan. 2011), https://www.americancentury.com/pdf/Financial_Professionals_Social_Media_Adoption_Study.pdf (finding that over half of the financial professionals surveyed used social media several times a week and nearly a quarter used social media daily).

146. *Id.*

147. *See, e.g.*, Clayton, *supra* note 4 (noting that companies have recognized new ways to reach consumers by targeting social networks). For example, while Starbucks gets 1.8 million visitors to its website every month, and Coca-Cola gets 270,000, their Facebook pages get roughly ten times the traffic each month at 19.4 million and 22.5 million, respectively. *Id. See also* Nicola Clark, *Airlines Follow Passengers onto Social Media Sites*, N.Y. TIMES (July 29, 2009), http://www.nytimes.com/2009/07/30/business/global/30tweetair.html (noting that airline companies have targeted social media "as a low-cost public relations and marketing tool, in particular to spread the word about fare sales or to make announcements about new routes or services").

148. *See, e.g.*, Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES, July 21, 2011, at B1 (describing a company that conducts social media background checks for employers and noting that seventy-five percent of recruiters are required by their companies to conduct online research of applicants).

149. *See, e.g.*, Clark, *supra* note 147; Lee Dong-Hun, *Growing Popularity of Social Media and Business Strategy*, 3 SERI Q. 112, 113–16 (stating that companies have turned to social media for marketing and branding purposes because of its speed, durability, diverse users, reduced costs, and its perceived improvement at addressing customer concerns); *see also* Geoffrey Fowler, *Are You Talking to Me?: Yes, Thanks to Social Media. And the Best Companies Are Listening*, WALL ST. J. (Apr. 25, 2011), http://online.wsj.com/article/SB10001424052748704116404576263083970961862.html (noting that

employees specifically to monitor and grow their social media presence.[150] A recent study found that 23% of Fortune 500 companies have blogs, 62% have corporate Twitter accounts, and 58% have corporate Facebook profiles.[151] Social media is even more prominent among the fastest-growing private companies in the United States, which are known as the Inc. 500.[152] Eighty-three percent of Inc. 500 companies utilize at least one form of social media.[153] Fifty percent of them have blogs, 59% have corporate Twitter accounts, and 71% have a corporate Facebook profile.[154] Overall, companies have recognized that a social media presence is an important part of their business and marketing strategy.

Companies have also embraced social media as a low-cost communication channel, which allows employees to interact beyond the boundaries of the traditional work site.[155] The increase in work outside the office, however, has further blurred the boundary between work and home, public and private.[156] With the increased use of social media among individuals and companies, incidents of social media harassment have begun to emerge.[157] Therefore, while companies have turned to

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companies are embracing social media as a two-way communication tool with consumers for marketing and advertising).

150. *See The State of Social Media Jobs 2010 – A Special Report*, SOC. MEDIA INFLUENCE (June 14, 2010), http://socialmediainfluence.com/2010/06/14/the-state-of-social-media-jobs-2010-a-special-report (noting that 59 of the global 100 were "recruiting staff specifically assigned to core social media duties that include customer outreach, PR and marketing support and internal communications").

151. Nora Ganim Barnes & Justina Andonian, *The 2011 Fortune 500 and Social Media Adoption: Have America's Largest Companies Reached a Social Media Plateau?*, U. MASS. DARTMOUTH CENTER FOR MARKETING RES. (Oct. 2011), http://www.umassd.edu/cmr/studiesandresearch/2011fortune500.

152. *See* Nora Ganim Barnes, *The 2010 Inc. 500 Update: Most Blog, Friend and Tweet but Some Industries Still Shun Social Media*, U. MASS. DARTMOUTH CENTER FOR MARKETING RES. (Jan. 2011), http://www.umassd.edu/cmr/studiesandresearch/industriesstillshunsocialmedia (noting the Inc. 500 list is composed of the fastest-growing private companies in the United States, while the Fortune 500 is based on total revenue (not growth) and includes both public and private companies).

153. *Id.*

154. *Id.*

155. *See* Gely, *supra* note 4, at 302.

156. Patricia Findlay & Alan McKinlay, *Surveillance, Electronic Communications Technologies and Regulation*, 34 INDUS. REL. J. 305, 307 (2003) (stating that the changing nature of work, primarily because people are working longer hours and working from home on computers and programs owned by their employer, is blurring the boundary between work and home as well as between public and private life); Rob Pegoraro, *Friend? Not? It's One or the Other*, WASH. POST, July 19, 2007, at D1 (stating the rise in the use of social networking sites by businesses has resulted in workers having difficulty differentiating between private and professional personas).

157. *See* McGraw, *supra* note 5, at 496–503; *see also* Judy Greenwald, *Sexual Harassment*

social media as a way to both increase their business presence and reduce internal communication costs, there has been the consequence of increased social media harassment.

IV. COURTS' EXPANSIVE VIEW OF THE WORKPLACE SUGGESTS THAT EMPLOYERS MAY BE LIABLE FOR HARASSMENT VIA SOCIAL MEDIA

Some federal circuit courts have started to recognize the permeable boundaries of the modern work place, as evidenced by their consideration of harassment outside the four walls of the workplace under the totality of the circumstances test of a hostile work environment claim. Courts have already established that in some instances off-premises events such as meetings, business trips, and employer-sponsored social events can be considered under the totality of the circumstances because these settings can properly be characterized as an extension of the employee's work environment. As social media becomes increasingly entangled with individuals' professional lives, courts may consider certain social media communications part of the totality of the circumstances test for purposes of a Title VII hostile work environment claim.

A. *Courts Confronting Social Media Harassment Have Considered It as Part of the Totality of the Circumstances in a Hostile Work Environment Claim*

Although social media and social networking sites are not new forms of communication, their legal implications are just now coming into focus.[158] While several cases have addressed hostile work environment

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Remains Major Workplace Problem, BUS. INS. (Dec. 11, 2011), http://www.businessinsurance.com/article/20111211/NEWS07/312119984 (explaining that harassment is still prevalent within the workplace and that social media enables people to harass others without even seeing or touching them).

158. *See, e.g.*, Kendall K. Hayden, *The Proof Is in the Posting: How Social Media Is Changing the Law*, 73 TEX. B.J. 188 (2010) (outlining social media's impact in the areas of family law, constitutional law, and criminal law); Brian D. Wright, *Social Media and Marketing: Exploring the Legal Pitfalls of User-Generated Content*, 36 U. DAYTON L. REV. 67 (2010) (examining the legal implications of social media marketing campaigns); *see also* Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010) (examining whether school suspension for creating a social networking site group expressing dislike for a teacher violated the student's First Amendment rights); EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 435–36 (S.D. Ind. 2010) (examining scope of discovery of plaintiff's social networking sites for purposes of determining mental state); Yath v. Fairview Clinic, N.P., 767 N.W.2d 34, 42–45 (Minn. Ct. App. 2009) (examining potential privacy violation for data posted on Facebook that contained information from patient's medical file).

claims stemming from other forms of electronic communication, especially e-mail, there are few addressing claims based on social media communications.[159]

The New Jersey Supreme Court in *Blakey v. Continental Airlines, Inc.*[160] was one of the first courts to consider whether an employer is responsible for preventing employee harassment over social media.[161] In *Blakey*, an airline employee filed a hostile work environment claim arising from allegedly defamatory statements published by co-workers on her employer's electronic bulletin board.[162] The electronic bulletin board, known as the Crew Member Forum, was not maintained by the employer but was accessible to all Continental pilots and crew members.[163] Employees were also required to access the Forum to learn their flight schedules and assignments.[164]

The Court analyzed the case under a traditional hostile work environment framework, concluding that the electronic bulletin board was no different from other social settings in which co-workers might interact.[165] Although the electronic bulletin board was not part of the physical workplace, the employer had a duty to correct harassment occurring there if the employer obtained a sufficient benefit from the electronic forum as to make it part of the "workplace."[166] Accordingly, the court remanded the case for the trial court to determine whether the company "derived a substantial workplace benefit" from the bulletin board and whether the bulletin board "should be considered sufficiently integrated with the workplace to require" the employer to take steps to prevent the offensive conduct.[167] The court made clear that an employer

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159. *See, e.g.*, Ott v. Airtran Holdings. Inc., No. 06-C-0371, 2010 WL 1368778, at *7–8 (E.D. Wis. Mar. 31, 2010) (holding that briefly seeing images of naked women on computer screens is insufficient support of a hostile work environment claim); Hoffman v. Lincoln Life & Annuity Distribs., Inc., 174 F. Supp. 2d 367, 375–76 (D. Md. 2001) (holding that evidence of twelve obscene e-mail messages over a period of seventeen months was not severe or pervasive enough to support a hostile work environment claim); Curtis v. DiMaio, 46 F. Supp. 2d 206, 213 (E.D. N.Y. 1999), *aff'd*, 205 F.3d 1322 (2d Cir. 2000) (holding a single ethnically and racially insensitive e-mail forwarded to a number of colleagues within the workplace was not grounds for an actionable harassment claim).

160. 751 A.2d 538 (N.J. 2000).

161. *See* Michele A. Higgins, Note, Blakey v. Continental Airlines, Inc.*: Sexual Harassment in the New Millennium*, 23 WOMEN'S RTS. L. REP. 155, 159 (2002).

162. *Blakey*, 751 A.2d at 543–44.

163. *Id.* at 544.

164. *Id.*

165. *Id.* at 549.

166. *Id.* at 551.

167. *Id.*

does not have an affirmative duty to monitor the forum, but that liability may nevertheless attach if the company had direct or constructive knowledge of the content posted there.[168] The court therefore limited consideration of social media harassment to situations where the employer derived a benefit from the forum and it could therefore be considered part of the employee's work environment.

The District Court of Puerto Rico in *Amira-Jabbar v. Travel Services, Inc.*,[169] also considered evidence of social media harassment as part of a hostile work environment claim. In *Amira-Jabbar*, the plaintiff alleged that her employer discriminated and retaliated against her because of her race.[170] After a company-approved golf outing, a co-worker uploaded pictures, including one featuring the plaintiff, on Facebook.[171] On the comments section of the social networking site, a co-worker wrote a racially derogatory comment.[172] The plaintiff sued her employer on a hostile work environment theory, claiming that the comments constituted racially motivated harassment that the employer did not adequately remedy.[173]

The *Amira-Jabbar* court found the social media harassment sufficiently work-related to be included under the totality of the circumstances.[174] The court did not explain, however, why these comments were sufficiently work-related. Although the court considered the social media evidence, it found the comments were offhand and isolated and thus insufficient to create a hostile work environment.[175] Moreover, even if the harassment had been severe or pervasive, the court determined that the employer had proven an affirmative defense to liability by immediately blocking access to Facebook on all company computers after the incident occurred.[176] As a result, the plaintiff's hostile work environment claim was dismissed with prejudice.[177] Nevertheless, the court's analysis suggests that evidence of social media harassment can form part of the totality of the circumstances in a hostile

168. *See id.* at 552.
169. 726 F. Supp. 2d 77 (D.P.R. 2010).
170. *Id.* at 82.
171. *Id.* at 81.
172. *Id.*
173. *Id.* at 82.
174. *See id.* at 85–86.
175. *Id.*
176. *Id.* at 86–87.
177. *Id.* at 87.

work environment claim.[178]

Blakey and *Amira-Jabbar* both indicate that courts may consider evidence of harassment over social media as part of the totality of the circumstances of a hostile work environment. However, while the court in *Amira-Jabbar* considered only whether the social media harassment could be characterized as work-related, the *Blakey* court adopted a narrower approach. *Blakey* indicates that courts should conduct a more fact-specific inquiry to determine whether the social media evidence should be considered.[179] *Blakey* specifically focused on the benefits the employer received from the social media forum to determine whether the social media forum could be considered part of the employee's work environment.

V. COURTS SHOULD CONSIDER HARASSMENT OVER SOCIAL MEDIA AS PART OF THE TOTALITY OF THE CIRCUMSTANCES IN A HOSTILE WORK ENVIRONMENT CLAIM IF THE SOCIAL MEDIA WAS INTEGRATED INTO THE EMPLOYER'S BUSINESS

There is currently confusion and a dearth of case law regarding what role evidence of social media harassment should have in a hostile work environment claim. The lack of clear legal boundaries regarding online communications, however, encourages harassers to engage in conduct they might have refrained from within the walls of the workplace.[180] At the same time, the increased integration of social media within our lives makes it likely that courts will be confronting issues of social media with increased frequency.[181]

To determine whether harassment over a social media forum may serve as evidence of a hostile work environment, courts should examine whether the employer derived a substantial benefit from the social media forum utilized by the harasser. If the employer derived a substantial benefit from the social media forum, then the social media is a logical extension of the employee's work environment.[182] In these situations, social media harassment should be considered under the totality of the

178. *See id.* at 85–86.

179. *See supra* notes 166–168 and accompanying text.

180. *See* Azy Barack, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUTER REV. 77, 82–83 (2005) (arguing the lack of clearly defined legal guidelines and visible enforcement mechanisms online fosters an environment that enables harassment that might not take place offline).

181. *See supra* Part III.B–C.

182. *See* Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 551–52 (N.J. 2002).

circumstances of a Title VII hostile work environment claim for purposes of determining employer liability.

A. An Employer Derives a "Substantial Benefit" from Social Media if the Employer Reduces Transaction Costs or Increases Revenue by Using Social Media

To determine whether social media harassment should be considered as part of a hostile work environment claim, courts should determine whether the employer derived a substantial benefit from the social media forum. As the court in *Blakey* noted, looking at whether the employer derived a substantial benefit from the social media forum indicates whether the social media was sufficiently integrated into the employer's business operations to qualify as a logical extension of the workplace.[183] Courts may properly consider social media that is a logical extension of the workplace as part of the totality of the circumstances of a hostile work environment claim.

While the court in *Blakey* did not clearly articulate what constitutes a "substantial benefit," it did provide several examples when social media may provide an employer benefit.[184] First, the court stated that employees' ability to access company information via social media constitutes a benefit because it improves efficiency.[185] Second, employee communication about company business, or working on an employer-sponsored activity, would likewise appear to be a benefit.[186] Communication between employees over social media promotes collaboration, spurs innovation, and reduces costs by streamlining operations.[187] Third, the number of current employees utilizing the social media forum would be relevant in determining the employer's benefit.[188] The greater the number of employees utilizing the social media forum, the more likely it is that the employer is receiving a benefit.[189] All of these social media benefits allow an employer to reduce internal

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183. *See id*.

184. *See id.*

185. *Id.* at 552.

186. *See id.*

187. *See, e.g.*, Casey Hibbard, *How IBM Uses Social Media to Spur Employee Innovation*, SOC. MEDIA EXAMINER (Feb. 2, 2010), http://www.socialmediaexaminer.com/how-ibm-uses-social-media-to-spur-employee-innovation (explaining how IBM utilizes multiple internal social media platforms where employees can work collaboratively, talk about current projects, and exchange ideas for future projects).

188. *See Blakey*, 751 A.2d at 551.

189. *See id.*

transaction costs.[190]

However, there are other benefits that can be derived by the employer that the *Blakey* court did not articulate. Besides the benefits obtained by reducing internal costs, employers also receive social media benefits through advertising and product sales.[191] These types of actions could also indicate that the employer has integrated the social media platform as part of its business model.

Based on the substantial benefits test, an employer could be held liable for postings by supervisors or non-supervisors that occur on a company-sponsored social media forum such as a Facebook group[192] or a company Facebook page.[193] On a company-sponsored Facebook group, the company may benefit by increasing employee communication, spurring product innovation, or otherwise streamlining operations.[194] Similarly, a company's Facebook page may benefit the company through increased advertising or branding.[195] As the court in *Blakey* indicated, when the employer receives a substantial benefit from the social media forum, it is sufficiently integrated into the workplace such that it can be characterized as an extension of the employee's work environment.[196] Because the social media harassment is part of the employee's work environment, evidence of the harassment can be considered under the totality of the circumstances to determine whether there was a hostile work environment.[197]

On the other hand, an employer would most likely not be liable for

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190. *See id.* at 552.

191. *See, e.g.*, TOM FUNK, SOCIAL MEDIA PLAYBOOK FOR BUSINESSES 5 (2011) (stating that Dell Computers has had more than $3 million in sales from its @DellOutlet Twitter account); *see also* Dong-Hun, *supra* note 149, at 115–16 (noting that companies utilize social media as a direct sales channel and to amplify word-of-mouth about products); Amy Martinez, *Retailers Piling into Twitter Nest*, SEATTLE TIMES, Apr. 7, 2010, at A12 (noting that companies are increasingly using social media to advertise about company-sponsored events, new items, limited time deals or coupon codes).

192. Groups are usually used to share information, collaborate, or organize, and they can be either public or private. *See, e.g.*, Rusty Weston, *Facebook: Your Company's Intranet?*, FORBES, Mar. 20, 2009, http://www.forbes.com/2009/03/20/facebook-intranet-serena-entrepreneurs-technology-facebook.html (describing Serena Software's creation of a private Facebook group page that informs employees about company news).

193. *Facebook for Business*, FACEBOOK, http://www.facebook.com/business/pages (last visited Feb. 1, 2012) (noting that Facebook allows companies to make dedicated pages for businesses, products, or brands that can be viewed and commented on by other users); *see, e.g.*, Starbucks Facebook Page, FACEBOOK, http://www.facebook.com/ Starbucks (last visited Feb. 1, 2012).

194. *See supra* notes 149, 186–187 and accompanying text.

195. *See supra* note 149.

196. Blakey v. Cont'l Airlines, Inc., 751 A.2d 538, 551 (N.J. 2002).

197. *See supra* notes 77, 88–92, 97–99 and accompanying text.

any harassing comments posted by a supervisor or non-supervisor on an employee's personal Facebook page. In this situation, the employer is likely not receiving any type of economic or personal benefit from the Facebook page and thus the employer is not deriving a substantial benefit.[198] In this case, the social media forum could not be properly characterized as an extension of the employee's work environment. Conduct that does not relate to an employee's work environment should not be considered under the totality of the circumstances.[199]

VI. THE SUBSTANTIAL BENEFITS FRAMEWORK IS CONSISTENT WITH TRADITIONAL EMPLOYER LIABILITY PRINCIPLES, RECOGNIZES THE CHANGING WORKPLACE, AND PROVIDES EMPLOYERS WITH GUIDANCE ON MAINTAINING AN AFFIRMATIVE DEFENSE TO LIABILITY

A. The Substantial Benefits Framework Is Consistent with Agency Principles

The substantial benefits analysis is consistent with agency principles, which formed the foundation of the U.S. Supreme Court's traditional analysis for employer liability in hostile work environment claims. In *Faragher* and *Ellerth*, the Court imputed liability to employers for harassment by supervisors and non-supervisors under the aided-in-agency theory.[200] The employer is liable under this theory because the agency relationship between the employer and the employee enables the employee's harassment of others in the workplace environment.[201] In other words, without the agency relationship (i.e., the fact that the harasser was employed by the company) the harassing conduct could not have been committed.[202]

Because the substantial benefits framework focuses on whether the social media forum is an extension of the employee's work environment, it is consistent with the aided-in-agency principle. The substantial benefits test looks at the employer's involvement and connection with the social media platform.[203] An employee who utilizes an employer-sponsored social media forum to perpetrate harassment relies on his or

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198. *See supra* notes 77, 88–92, 97–99 and accompanying text.
199. *See supra* notes 77, 88–92, 97–99 and accompanying text.
200. *See supra* notes 44–46, 52–55 and accompanying text.
201. *See supra* notes 44–46, 52–55 and accompanying text.
202. *See supra* notes 44–46, 52–55 and accompanying text.
203. *See supra* Part V.A.

her employment relationship to facilitate the misconduct. Thus, the substantial benefits analysis utilizes agency principles to determine whether the social media forum where the harassment occurred can be properly considered to have been aided by the agency relationship.

B. *The Substantial Benefits Analysis Recognizes the Permeable Boundaries of the Modern Workplace*

The substantial benefits framework recognizes that the work environment is no longer limited to the "four walls" of the workplace.[204] Evolving technology and its acceptance within the workplace has only further blurred these distinctions.[205] The substantial benefits test addresses the increasing role that social media plays within the work environment.

Those courts that have included conduct outside the traditional workplace setting as evidence of a hostile work environment have focused on whether the forum in which the conduct occurred qualifies as an extension of the employee's work environment.[206] For example, the Seventh Circuit Court of Appeals in *Lapka* paid particular attention to the employer's connection to an off-site training program, including the fact that the employer paid for sleeping accommodations and meals, in determining that the harassment that occurred could be properly characterized as an extension of the employee's work environment.[207] Likewise, the Second Circuit Court of Appeals in *Ferris* focused on the employer's role in arranging employees' hotel accommodations in determining that a hotel room was part of an employee's work environment.[208] The fact that the plaintiff's work as an airline stewardess involved frequent stays at hotels, where employees were likely to interact, provided additional support for this conclusion.[209]

The substantial benefits analysis is consistent with those courts that have considered harassment outside the traditional "four walls" context because it focuses on whether the social media platform can be characterized as an extension of the employee's work environment. By focusing on the employer's connection to the social media forum, the substantial benefits analysis does not hinge on the exact location or

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204. *See supra* note 3; Part II–III.
205. *See supra* note 156.
206. *See supra* notes 77, 88–92, 97–99 and accompanying text.
207. *See supra* notes 88–92.
208. *See supra* notes 97–99.
209. *See supra* notes 97–99.

timing of the harassing conduct. In this way, the substantial benefits analysis addresses the fact that technology continues to blur the traditional boundaries of the workplace and that employers are embracing technology as part of their business. At the same time, the substantial benefits analysis recognizes that employers should generally not be held liable for an employee's purely personal social network communications.[210] Such communications are not conducted through a channel that is part of an employer's business[211] and cannot be properly characterized as part of the employment relationship or an extension of the employee's work environment.

C. *The Substantial Benefits Analysis Would Provide Employers with Guidance on How to Maintain an Affirmative Defense to Title VII Claims in a Social Media Age*

The substantial benefits framework would provide guidance to employers on how to shield themselves from Title VII liability for employee harassment over social media. To raise an affirmative defense to liability for a hostile work environment, an employer must show that (1) it exercised reasonable care to prevent and promptly correct the harassment; and (2) the employee unreasonably failed to take advantage of any preventive or remedial measures provided by the employer.[212]

Courts have indicated that a carefully crafted[213] and implemented anti-harassment policy is an employer's best defense against a harassment claim.[214] An anti-harassment policy provides compelling evidence that the employer exercised reasonable care to prevent and promptly correct any harassment.[215] Because courts have failed to

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210. *See, e.g.*, Booker v. GTE.net LLC, 350 F.3d 515, 519–20 (6th Cir. 2003) (finding that employer not vicariously liable for highly offensive e-mail message sent through the employer's computer system where the messages did not advance the interests of the employer).

211. *See id.*

212. *See supra* note 57.

213. *See supra* notes 58–59 (indicating that in order to be carefully crafted, a policy needs to establish what harassment is and where a victim can go to report an instance of harassment).

214. *See id. But see* Donald P. Harris et al., *Sexual Harassment: Limiting the Affirmative Defense in the Digital Workplace*, 39 U. MICH. J.L. REFORM 73, 89–96 (2005) (advocating that affirmative defense to harassment claim should be unavailable or significantly modified if employer fails to utilize available technology to prevent online sexual harassment).

215. *See* White v. BFI Waste Serv., LLC, 375 F.3d 288, 299 (4th Cir. 2004) ("[D]istribution by an employer of an anti-harassment policy provides 'compelling proof . . . [of] reasonable care in preventing and promptly correcting harassment."); Walton v. Johnson & Johnson Serv., Inc., 347 F.3d 1272, 1286 (11th Cir. 2003) (reiterating that promoting and disseminating a harassment policy is "essential to establishing the first prong of a *Faragher* affirmative defense that an employer took reasonable care in preventing sexual harassment"); Caridad v. Metro-North Commuter R.R., 191

articulate whether social media harassment will be considered under the totality of the circumstances of a hostile work environment claim, however, there has been little guidance for employers on how to properly update their anti-harassment policies in the changing workplace. In fact, many large publicly held companies currently maintain vague policies or no policy at all regarding the use of social media.[216]

The substantial benefits framework would encourage employers to examine their existing technology and harassment policies to determine whether they adequately address current technological platforms that could be considered an extension of the employee's work environment. By updating their policies to include social media utilized as part of their business, employers would indicate to courts that they have taken reasonable care to prevent social media harassment from occurring.[217] As a result, the employer would be able to maintain an affirmative defense to liability. The substantial benefits framework provides employers with a basis for updating their anti-harassment policies to acknowledge that harassment is increasingly occurring over new mediums while also enabling them to continue to have an affirmative defense to harassment claims.

CONCLUSION

Workplace harassment, like work itself, is no longer limited to the traditional "four walls" of the workplace. As technology and the boundaries of the workplace have changed, courts have struggled to modernize their framework for assessing hostile work environment claims under Title VII. These problems will only become exacerbated as society continues to embrace social media throughout our daily lives and employers continue to integrate social media into their business practices.

In order to determine whether evidence of social media harassment

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F.3d 283, 295 (2d Cir. 1999) (citing Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998)) (holding that "an anti-harassment policy with complaint procedures is an important consideration in determining whether [an] employer has satisfied" the first prong of an affirmative defense to a Title VII harassment claim); Shaw v. Autozone, Inc., 180 F.3d 806, 811–12 (7th Cir. 1999).

216. Press Release, Proskauer Rose LLP, Survey: Social Networks in the Workplace Around the World (July 14, 2011), *available at* http://www.proskauer.com/news/press-releases/july-14-2011/more-than-75-percent-of-businesses-use-social-media-nearly-half-do-not-have-social-networking-policies (survey finding that forty-five percent of worldwide businesses have no social media policy).

217. *See supra* notes 57–59 and accompanying text.

conducted by supervisors or non-supervisors should be considered in a hostile work environment claim, courts should ask whether the employer derived a substantial benefit from the social media forum in which the harassment took place. If the employer derived a substantial benefit, then the social media can be properly characterized as an extension of the employee's work environment, and the evidence of harassment forms part of the totality of the circumstances. This analysis is consistent with the agency principles that are at the heart of *Faragher* and *Ellerth*, recognizes evolving technology in the modern workplace, and would provide employers with much needed direction for implementing anti-harassment policies that will shield them from vicarious liability.