



4-1-2011

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Recommended Citation

Stephanie A. Kevil, *When Your Boss "Friends" You: Social Media and the Hostile Environment Claim*, 1 DePaul J. Women, Gender & L. 41 (2011)
Available at: <https://via.library.depaul.edu/jwgl/vol1/iss1/4>

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When Your Boss "Friends" You: Social Media and the Hostile Environment Claim

Cover Page Footnote

Carin McDonald; Natalie Parsey

WHEN YOUR BOSS “FRIENDS” YOU: SOCIAL MEDIA AND THE HOSTILE ENVIRONMENT CLAIM

INTRODUCTION

Since its advent, social media has played an increasing role in the workplace and in employment related issues.¹ Where networking and recruiting used to be accomplished through phone calls and lunches, they are now accomplished with online profiles and connections. Where Facebook used to be for college students only, companies now set up profiles to market their products. Where employees used to communicate by walking down to the next office or using company e-mail accounts, employees can now tweet their activities and follow their co-workers online posts about work and personal life. Additionally, much of the technology available today, including smart phones and laptops, has blurred the line between work and personal life.² Gone are the days when an employer’s biggest worry about the internet was lost productivity of its employees.³ Now, social media presents a host of new legal issues for employers.⁴

Social networks affect all aspects of employment, including employee recruitment, employee privacy, and electronic discov-

¹ See Michael A. Curley & Debra Morway, *Legal Issues Arising from the Use of Social Networks at Work*, 833 P.L.I. LITIG. & ADMIN. PRACTICE SERIES 539, 542 (2010).

² Anthony J. Oncidi & David Gross, *Blackberrys on the Beach: A Ripening Concern for Employers*, 51 ORANGE COUNTY LAWYER 10, 10 (Jan. 2009) (describing how voicemail, Blackberries, and the internet make it possible to do work anywhere).

³ See Curley, *supra* note 1, at 541-42 (discussing various issues that arise in the employment context because of internet use).

⁴ See *id.*

ery during litigation.⁵ In February 2009, for the first time, consumers spent more time on social networking sites than they did checking their e-mail.⁶ As social media blurs the line between workplace conduct and off-duty conduct, employer liability for sexual harassment through social media becomes an important and complex issue.⁷ As employees use third-party websites to communicate, the issue of employer liability becomes murky.⁸ Time, place, and social context are all important factors in determining employer liability.⁹ If an employee posts a harassing comment to another employee on a third-party website, is the employer liable for that conduct? Did it happen in the workplace or in cyberspace? If there is no verbal harassment in the workplace, but a supervisor continuously posts harassing messages to an employee's Facebook page during work hours, can the employer be held liable?

Employers need to be aware that an employee's online presence could instigate future harassment claims.¹⁰ Posting messages online creates a record of sexual harassment.¹¹ In her study on women's use of employer grievance procedures to ad-

⁵ See *id.* at 539 (2010); Kelly Kichline & Laura Thalacker, *Pitfall Potential: The Risks of Social Media*, NEV. LAW. 16, 16 (Sept. 2010).

⁶ See Curley, *supra* note 1, at 543.

⁷ See Kichline, *supra* note 5 (discussing the difficulty of distinguishing between employee conduct inside and outside the workplace because of social media).

⁸ See Richard A. Paul & Lisa Hird Chung, *Brave New CyberWorld: The Employer's Legal Guide to the Interactive Internet*, 24 LAB. LAW. 109, 118-20 (Summer 2008).

⁹ See *Oncala v. Sundower Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998) (describing how the context and surrounding circumstances of the harassment should be considered by the court in determining liability).

¹⁰ See Kichline, *supra* note 5, at 17-21 (giving examples of co-worker harassment through social media and explaining employer liability).

¹¹ See Nicole D. Galli, Christopher D. Olszyk, Jr., & Jeffrey G. Wilhelm, *Social Media Symposium: Litigation Consideration Involving Social Media*, 81 P.A. BAR ASS'N Q. 59, 61 (2001) (discussing the permanence of postings on social media websites and the fact that items removed from a website may still be retained by a website, such as Facebook). See also *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 600 F. Supp. 2d 1011, 1015-1018 (W.D. Ark. 2009) (where the student-harassers created a Facebook group named "Everyone hates [plaintiff-student]" that established a digital record, including videos, of

dress sexual harassment, associate professor of sociology and law, Anna-Maria Marshall, describes how women tend not to report sexual harassment unless they can document it or provide evidence.¹² Social media provides an instant record of all harassing comments, and this could increase the likelihood that a woman or any harassed individual would report an incident.¹³

Context is also an important factor in Title VII of the Civil Rights Act of 1964 (Title VII) harassment claims.¹⁴ Although the use of social media is not completely ubiquitous, there are millions of users who have come to rely on social media as a way to organize their social life.¹⁵ In addition, social media is integrated into the workplace with many employers using it as a recruiting or marketing tool.¹⁶ If social media is integrated into the workplace culture, the fact that harassing comments or photos are posted on a third-party social networking website may not be enough to insulate the employer from liability.¹⁷

This article focuses on hostile environment claims, examining how both employee and employer's increasing reliance on social media affects the workplace environment and employer liability. There have been some federal district court opinions and a few appellate court decisions dealing with social media and sexual

the physical and verbal sexual-orientation harassment suffered by the plaintiff).

¹² See Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83, 114-115 (2005) (describing how women themselves had narrow definitions of harassment and stating that many feel an incident cannot be categorized as sexual harassment without evidence or documentation to prove that it happened).

¹³ See *id.*

¹⁴ See *Oncale*, 532 U.S. at 81-82.

¹⁵ See, e.g., TWITTER, Twitter.com, <http://twitter.com/about> (last visited Dec. 30, 2010); FACEBOOK, Facebook.com, <http://www.facebook.com/press/info.php?statistics> (last visited Dec. 30, 2010) (statistics on usage). See also Ethan Zelizer, *Ten Rules for A Social Media Policy: Embracing and Controlling Social Media in the Workplace*, 24 CBA REC. 52, 52-57 (Oct. 2010) (describing the pervasiveness of social media in the workplace).

¹⁶ See Curley, *supra* note 1, at 545.

¹⁷ For a description of the pervasiveness of social media in the workplace, see generally *id.*; Kichline, *supra* note 5; Zelizer, *supra* note 15, at 52.

harassment in the workplace.¹⁸ These cases demonstrate that social networking websites can be considered a part of the workplace environment.¹⁹ However, the issue of student harassment via social media has received more media attention and has been fleshed out in the district and circuit courts to a greater extent than employment cases.²⁰ For that reason, this article will also use Title IX of the Education Amendments Act of 1972 (Title IX) cases where students allege sexual or other harassment has taken place through social media.

Part II describes the types of social media available to consumers and how consumers generally use them. Part III discusses sexual harassment claims made under Title VII and identifies the aspects of those claims most likely to be affected by social media.

Part IV examines recent and relevant federal district and circuit court decisions dealing with Title VII claims and instructive decisions dealing with student Title IX claims. This part analyzes how the use of social media affects the scope of employer liability in a hostile environment claim. First, it discusses how social networking activity can create a severe and pervasive hostile work environment. Then, it examines when social networking is imputable to employers. Finally, it switches gears to look at employee privacy and employer efforts at monitoring and

¹⁸ See generally *Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77, 81-82 (Dist. P.R. 2010) (alleging harassment through, among other things, comments on a Facebook page); *Urban v. Capital Fitness d/b/a XSport Fitness*, No. CV08-3858, 2010 U.S. Dist. LEXIS 124307, at *21-25 (E.D.N.Y. Nov. 23, 2010) (alleging harassment through, among other things, sexually suggestive pictures of workers placed on a MySpace page).

¹⁹ See generally *Jabbar*, 726 F. Supp. 2d at 81-82; *Urban*, 2010 U.S. Dist. LEXIS 124307, at *23-27 (In both cases, the courts implicitly concluded that the social networking site at issue could contribute to a hostile workplace environment, though neither court found that the site actually did contribute to the case at hand).

²⁰ For examples of the reasoning behind student-harassment, see generally *R.S. v. Bd. of Educ. of the Hastings-on-Hudson Union Free Sch. Dist.*, 371 Fed. App'x 231, 233-34 (2d Cir. 2010) (student alleged harassment through emails and online chats); *Wolfe*, 600 F. Supp. 2d at 1017 (student provided evidence of harassment through YouTube videos, online postings, and a Facebook page).

preventing harassment through social media before the harassment becomes a litigation matter.

Both the courts and employers should recognize social media as part of the workplace environment. Harassment through social media is still harassment, and the victim may even perceive online harassment as more hurtful than face-to-face harassment.²¹ Employers must fulfill their duty to prevent sexual harassment when possible, and courts should take into consideration the social context in which the harassment occurs.

II. SOCIAL MEDIA HARASSMENT DEFINED

As a relatively new phenomenon, it is important to define and explain social media before beginning a discussion about it.²² When employees first started gaining access to the internet, its main functions were gathering information and making transactions.²³ Employers worried that employee access to the internet would lead to decreased productivity.²⁴ Since then, the internet has undergone dramatic changes. This part first defines social media and describes some of the most common social forms of social media. Then it discusses how social media can be used as a tool for sexual harassment.

A. *Social Media: Types and Definitions*

The World Wide Web, now commonly called Web 2.0, allows users to generate content and interact with each other.²⁵ Web 2.0 allows users to collaborate with one another and create online networks of people.²⁶ There are several different types of

²¹ See generally Jodi K. Biber et. al., *Sexual Harassment in Online Communications: Effects of Gender and Discourse Medium*, CYBER PSYCHOLOGY & BEHAV., Feb. 1, 2002, at 33 (findings revealed that participants thought misogynist comments made online were more offensive than those made in a traditional face-to-face setting).

²² See Curley, *supra* note 1.

²³ See Paul, *supra* note 8.

²⁴ See Curley, *supra* note 1.

²⁵ See Paul, *supra* note 8; Zelizer, *supra* note 15.

²⁶ See Paul, *supra* note 8; Zelizer, *supra* note 15.

online social media tools used by employees.²⁷ The following is not an exhaustive list of social media sites, but it gives examples of the types of social networking opportunities that are available.

Facebook is the most popular social networking site.²⁸ It and MySpace allow users to create their own pages and share content, including photos, links, and blogs.²⁹ Facebook users connect with each other by sending and accepting “friend” requests.³⁰ Similarly, LinkedIn is a business-centered networking site that focuses on users creating a network of business contacts.³¹ While Facebook and MySpace allow their users to make all of their information available to all users, LinkedIn uses a “gated-access” approach, which means users can only contact each other when a pre-existing relationship exists.³² In this way, LinkedIn attempts to appear more exclusive and selective than either Facebook or MySpace because its goal is not solely to keep you in contact with people but to leverage your contacts in the job market.³³

Blogs, or weblogs, as they were originally called, are sites on which an author can write on any given topic.³⁴ An author may choose to write about any subject, including providing commentary on developments in a certain industry or making entries in a personal journal.³⁵ The most important feature of blogs is that readers can leave commentary and interact with the author.³⁶ Unlike traditional blogs, Twitter is a site that allows micro-blogging.³⁷ Instead of making long posts on a subject, users are lim-

²⁷ See Zelizer, *supra* note 15, at 53.

²⁸ See FACEBOOK, *supra* note 15.

²⁹ See Zelizer, *supra* note 15.

³⁰ See Curley, *supra* note 1, at 543.

³¹ See *id.* at 544.

³² See Zelizer, *supra* note 15, at 53.

³³ See *id.*

³⁴ See Paul, *supra* note 8, at 110.

³⁵ See *id.*

³⁶ See *id.* See also Zelizer, *supra* note 15, at 52-53 (discussing the origins of the phrase “Web 2.0”).

³⁷ See Zelizer, *supra* note 15, at 53-54.

ited to 140 characters.³⁸ These posts are known as "tweets," and like a blog, the author will have subscribers, known as "followers," who comment on the author's tweets.³⁹

Facebook has more than 500 million users worldwide.⁴⁰ Two hundred million of those users access Facebook through their mobile device and are twice as active as the users who do not use mobile devices.⁴¹ Twitter has 175 million registered users who post 95 million tweets per day, with the most activity occurring between 10:00 a.m. and 2:00 p.m. Central Standard Time (CST).⁴² During work hours, 50% of social media updates are made on mobile devices.⁴³ Given the number of users and the amount of time those users spend on social networking sites, it is inevitable that employees will interact over social media both during work and after work.⁴⁴

B. Social Media Use and Harassment

Social networking sites and forums are effective ways of communicating, but like any form of communication, they also have the potential to expose users to harassment.⁴⁵ The fact that the content is all user-created and posted, without any intervention or editing by a third-party, makes it easy for offensive and even defamatory content to proliferate on these sites.⁴⁶ While much of the research discussing online harassment focuses on the use of social networking sites by teens and youths, adult participa-

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ FACEBOOK, *supra* note 15.

⁴¹ *Id.*

⁴² TWITTER, *supra* note 15; *See Zelizer, supra* note 15, at 53.

⁴³ *See Zelizer, supra* note 15, at 53.

⁴⁴ *See id.* at 52-53.

⁴⁵ *See* Joshua N. Azriel, *Social Networking as a Communications Weapon to Harm Victims: Facebook, MySpace and Twitter Demonstrate a Need to Amend Section 230 of the Communications Decency Act*, 26 J. MARSHALL J. OF COMPUTER & INFO L. 415, 415 (2009).

⁴⁶ *See id.*

tion in social networking and social media is increasing rapidly.⁴⁷ In fact, a 2007 study found that the median age of those who frequently go online to connect with people, manage digital content, work with online community groups, and pursue hobbies was thirty-eight years of age.⁴⁸ Social media use is pervasive in every age group; the Pew Center reported in December 2009 that “every generation 45 and older more than doubled their participation” in social networking activity.⁴⁹

With such a variety of social networking options comes a variety of ways that a victim can be harassed through social media by co-workers or supervisors, which may create a hostile work environment.⁵⁰ Harassers may post discriminatory comments directed at a victim either on the victim’s personal website or on a public website.⁵¹ Harassers could go one step further and create an online community or forum where members disparage the victim and perhaps post pictures and videos of the victim.⁵² It has been found that harassment could even be as simple as sending a Facebook “friend” request.⁵³

⁴⁷ See Paul, *supra* note 8; Teddy Wayne, *Age Gap Narrows on Social Networking*, N.Y. TIMES, Dec. 29, 2010, available at http://www.nytimes.com/2010/12/27/business/media/27drill.html?_r=1&scp=1&sq=social%20networking&st=cse.

⁴⁸ See Paul, *supra* note 8, at 109-110 (citing John B. Harrigan, *A Typology Of Information and Communication Technology Users*, PEW INTERNET & AMERICAN LIFE PROJECT 14 (2007)).

⁴⁹ See Wayne, *supra* note 47.

⁵⁰ See Jabbar, 726 F. Supp. 2d at 81-82 (plaintiff claimed that a hostile environment was created when a co-worker posted racially charged remarks to a photo of the plaintiff on a Facebook page); Wolfe, 600 F. Supp. 2d at 1017 (students physically and verbally harassed plaintiff and posted videos of the harassment on a Facebook page where other students commented).

⁵¹ See Azriel, *supra* note 45, at 118-20.

⁵² See Wolfe, 600 F. Supp. 2d at 1017.

⁵³ See Zelizer, *supra* note 15, at 55-56. See 42 U.S.C. § 2000e-2(a)(1) (2010) (prohibiting discrimination because of race, color, religion, sex or national origin).

III. SEXUAL HARASSMENT AS DEFINED IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII prohibits discrimination on the basis of race, color, religion, sex or national origin.⁵⁴ Congress gave the Equal Employment Opportunity Commission (EEOC) the power to define discrimination on the basis of sex under Title VII, and the EEOC included sexual harassment in its definition of discrimination on the basis of sex.⁵⁵ Although it was not until 1986 that the United States Supreme Court first addressed a claim of sexual harassment under Title VII, there is still a large body of law interpreting Title VII and the EEOC's regulations.⁵⁶ This part discusses the evolution of the hostile environment claim under Title VII and explains its general requirements. Then, it examines the aspects of a hostile environment claim which are most affected by social media, including the severe and pervasive requirement and the employer liability requirement. Finally, it concludes by discussing affirmative defenses available to employers.

A. *History and General Requirements*

Title VII has an anti-discrimination clause and an anti-retaliation clause.⁵⁷ The anti-discrimination clause protects employees against discrimination based on their race, color, religion, gender, or national origin.⁵⁸ The anti-retaliation clause protects employees against retaliation for opposition to discrimination on

⁵⁴ See 42 U.S.C. § 2000e-2(a)(1).

⁵⁵ See Equal Employment Opportunity Commission, 29 C.F.R. § 1604.11 (2010); Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986) (discussing sexual harassment claims).

⁵⁶ See Diane Avery, *Overview of the Law of Sexual Harassment and Related Claims*, in LITIGATING THE SEXUAL HARASSMENT CASE 2, 3 (Matthew Schiff & Linda C. Kramer, eds., 2d ed. 2000); Meritor Savings Bank, 477 U.S. at 64-65.

⁵⁷ See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (protecting workers from retaliation).

⁵⁸ See 42 U.S.C. § 2000e-2(a)(1).

those bases.⁵⁹ Another important distinction between these clauses is that the anti-retaliation clause explicitly allows courts to consider off-duty behavior of the employee,⁶⁰ while the anti-discrimination clause does not have any such wording.⁶¹ This article will focus solely on hostile environment claims under the anti-discrimination clause of Title VII.

Congress gave the EEOC the power to define sexual discrimination.⁶² In 1980, the EEOC published its regulations stating that there are two forms of sexual discrimination: (i) *quid pro quo*, when submission to or acquiescence in harassing conduct is made a condition of the victim's employment,⁶³ and (ii) hostile environment, when the victim is subject to unwelcome sexual harassment which affects the terms and conditions of his or her employment.⁶⁴ In 1986, the United States Supreme Court, in *Meritor Savings Bank v. Vinson*, affirmed the EEOC's regulation, stating the hostile environment claim was a form of sex discrimination prohibited under Title VII.⁶⁵ This article focuses on how social networking activities by employees affect the workplace environment and may give rise to hostile work environment claims.

To prevail in a hostile work environment claim, the victim must establish a *prima facie* case by proving four elements.⁶⁶ First, the victim must belong to a protected class and have been "subjected to unwelcome sexual harassment," which includes

⁵⁹ See 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a).

⁶⁰ See Patterson, Article, *None of Your Business: Barring Evidence of Non-Workplace Harassment for Title VII Hostile Environment Claims*, 10 U. C. DAVIS BUS. L.J. 237, 242-244 (2010) (discussing the differences between anti-discrimination and anti-retaliation litigation).

⁶¹ See *id.*

⁶² See *Meritor Savings Bank*, 477 U.S. at 65 (discussing EEOC guidelines and the weight of authority the guidelines receive).

⁶³ See Equal Employment Opportunity Commission, 29 C.F.R. §§ 1604.11(a)(1)-(2) (2010).

⁶⁴ See 29 CFR § 1604.11(a)(3); Avery, *supra* note 56 (describing the differences and evolution of *quid pro quo* and hostile environment claims).

⁶⁵ See *Meritor Savings Bank*, 477 U.S. at 65; Avery, *supra* note 56.

⁶⁶ See Avery, *supra* note 56, at 5.

verbal or physical conduct of a sexual nature.⁶⁷ Second, the harassment must have been based on sex.⁶⁸ Third, the harassment must have affected some "term, condition or privilege of employment."⁶⁹ Finally, "the doctrine of respondeat superior applies,"⁷⁰ and the employer is vicariously liable for the conduct.⁷¹

Inherent in these four elements are several obstacles for the victim that prevent the majority of hostile environment claims from surviving summary judgment.⁷² First, in order to show the harassment affected the terms, conditions, or privileges of employment,⁷³ the victim must prove the harassment was severe and pervasive in the work environment.⁷⁴ Next, the victim must prove the employer was liable for the harassment.⁷⁵ Finally, the victim must overcome any affirmative defenses the employer presents.⁷⁶

B. Severe and Pervasive Requirement

The severe and pervasive requirement measures the seriousness of the conduct.⁷⁷ Conduct that is less severe requires more repetition in order to meet the severe and pervasive requirement, while conduct that is more severe and damaging requires

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ Respondeat superior is "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." BLACK'S LAW DICTIONARY (9th ed. 2009).

⁷¹ See Avery, *supra* note 56, at 5-7, 8-19.

⁷² See Patterson, *supra* note 60, at 245.

⁷³ See Avery, *supra* note 56, at 6.

⁷⁴ See *id.*

⁷⁵ See *Burlington Indus. v. Ellerth*, 524 U.S. 742, 750-56 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 802-804 (1998); Patterson, *supra* note 60, at 245-47.

⁷⁶ See *Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846, 852 (2009).

⁷⁷ See Avery, *supra* note 56, at 6.

less repetition to meet the requirement.⁷⁸ If the conduct involves one instance of sexual harassment, unless the instance constitutes sexual assault, it would not satisfy the severe and pervasive requirement, and the employer would not be liable.⁷⁹

The severe and pervasive requirement has both an objective component and a subjective component.⁸⁰ The victim must prove the harassment creates an “objectively hostile or abusive work environment” where the victim “subjectively perceives the environment to be abusive.”⁸¹ The United States Supreme Court has emphasized the perspective of the victim and the surrounding social context of the workplace to determine whether or not the conduct in question is severe or pervasive enough to create an objectively hostile work environment.⁸² In *Oncale v. Sundowner Offshore Services, Inc.*, the Court stated, “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”⁸³ In light of this focus on the context of the harassment, the sex of the victim and harasser does not matter as long as the harassment was based on sex.⁸⁴

C. Employer Liability

After establishing severe and pervasive harassment, the victim must prove the employer is liable for the hostile work environment through agency principles.⁸⁵ Employers are held vicariously liable for hostile work environments created by su-

⁷⁸ See *Ferris v Delta Airlines, Inc.*, 277 F.3d 128, 135-36 (2d Cir. 2001) (describing how one act of harassment can meet the severe and pervasive requirement if it is egregious).

⁷⁹ See *id.*

⁸⁰ See *Avery*, *supra* note 56, at 6.

⁸¹ See *id.* at 7.

⁸² See *Oncale*, 523 U.S. 75, 81-82 (discussing the reasonable person standard used in these cases).

⁸³ See *id.* at 81.

⁸⁴ See *id.* at 81-82.

⁸⁵ See *Burlington*, 524 U.S. at 754-55 (1998); *Patterson*, *supra* note 60, at 248-52.

pervisors with authority over the harassed employee or victim.⁸⁶ Employers can be held liable for harassment by co-employees (who have no supervisory authority) only when the employer is negligent.⁸⁷ An employer is found negligent in two instances: when an employer fails to set up a process to handle complaints, thereby denying the employee any opportunity to complain, or when an employer has a process to handle complaints, but does not utilize such process once it receives a complaint.⁸⁸

While the issue of vicarious liability for workplace conduct is fairly straightforward, the issue of employer liability for employee off-duty conduct is quite murky because the Circuit Courts have taken different approaches to admissibility of, and liability for, off-duty conduct.⁸⁹ For example, the Sixth Circuit generally does not admit evidence of off-duty conduct to support a hostile work environment claim, while the First and Seventh Circuits generally do admit such evidence.⁹⁰ Furthermore, in *Ferris v Delta Airlines, Inc.*, the Second Circuit Court of Appeals held that if the employer has notice of alleged sexual harassment, it can be liable for egregious off-duty conduct, such as rape, when it leads to a hostile working environment.⁹¹ However, the court noted that in light of the reasonable care standards at play, off-duty incidents of behavior, such as flirtation or crude talk, would be less likely to lead to liability for the employer.⁹² Thus, an employer's liability for off-duty conduct, including off-duty postings to social media networking sites, arises in less predictable ways than liability for workplace conduct and depends heavily on the particular Circuit Court's approach.

⁸⁶ See Crawford, 129 S. Ct. at 852.

⁸⁷ See Ferris, 277 F.3d at 136; Faragher, 524 U.S. at 799.

⁸⁸ See Ferris, 277 F.3d at 136; Faragher, 524 U.S. at 799.

⁸⁹ See generally Patterson, *supra* note 60, at 52-57 (discussing the circuit split on the use of off-duty conduct to prove a hostile work environment).

⁹⁰ See *id.* (comparing the Sixth Circuit's limited approach with the more permissive approaches in the First and Seventh Circuits).

⁹¹ See Ferris, 277 F.3d at 137.

⁹² See *id.*

D. *Affirmative Defenses*

Even if the victim overcomes the hurdles inherent in establishing a *prima facie* case of sexual harassment, the employer may still be able to avoid liability by raising an affirmative defense.⁹³ Affirmative defenses, however, are not always available to employers.⁹⁴ If the victim alleges that his or her employer, through its employees, had taken a “tangible employment action” against the victim in a hostile environment case, then the employer has no affirmative defense available.⁹⁵ A “tangible employment action” is when a supervisor makes an economic decision affecting the employees under his or her control.⁹⁶ The decision must cause a “significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁹⁷ However, if the employer did not take a “tangible employment action” against the victim, the employer can demonstrate that it exercised reasonable care to stop or prevent the discriminatory conduct.⁹⁸ Therefore, when an employee does not allege a “tangible employment action,” the employer is able to assert an affirmative defense.⁹⁹

The employer’s affirmative defense has two elements: first, the employer must exercise “reasonable care to prevent and correct promptly any sexually harassing behavior,” and second, the employee-victim must have “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”¹⁰⁰ The EEOC’s regulations encourage employers to be proactive in preventing sexual harassment by implementing effective anti-harassment

⁹³ See Patterson, *supra* note 60, at 249-250.

⁹⁴ See Crawford, 129 S. Ct. at 852.

⁹⁵ See *id.*

⁹⁶ See Burlington, 524 U.S. at 765, 762.

⁹⁷ See *id.* at 761.

⁹⁸ See Crawford, 129 S. Ct. at 852.

⁹⁹ See *id.*

¹⁰⁰ See Burlington, 524 U.S. at 765.

policies and by training its supervisors.¹⁰¹ In an effort to avoid litigation, many employers do adopt broad policies.¹⁰² However, these policies can be overly harsh on employees because, in the employer's effort to avoid liability, it implements blanket prohibitions of conduct instead of specifically prohibiting sexual harassment.¹⁰³

As previously discussed, establishing a *prima facie* case of sexual harassment is a multi-step process, which can prove to be difficult for a victim, especially when the employer asserts affirmative defenses. The employee must prove the harassment was unwelcome, the harassment affected the terms and conditions of his or her employment, and the employer was liable for the harassment.¹⁰⁴ Additionally, the employee must overcome any affirmative defenses asserted by the employer.¹⁰⁵ These obstacles can become even more difficult for the victim when the harassment is perpetrated over social media.¹⁰⁶ As the next part discusses, the use of social media to sexually harass an employee can present novel problems for the victim in overcoming each of the above obstacles.

¹⁰¹ See Equal Employment Opportunity Commission, 42 C.F.R. § 1604.11(f) (2010); *Harris v. Forklift Systems*, 510 U.S. 17, 21-22 (1993); *Avery*, *supra* note 56, at 19.

¹⁰² See *Patterson*, *supra* note 60, at 250-252.

¹⁰³ *Id.* (describing how employer policies are often focused on avoiding litigation rather than preventing sexual harassment).

¹⁰⁴ See *Avery*, *supra* note 56, at 5.

¹⁰⁵ See *Patterson*, *supra* note 60, at 249-50.

¹⁰⁶ Although offensive remarks and pictures were posted to an online social forum, the plaintiffs in the following cases had to face additional burdens to prove the harassment was unwelcome and was imputable to the employer: *Compare* *Jabbar*, 726 F. Supp. 2d at 91-93 (racially charged comments on a Facebook page dedicated to the company's photos was not imputable to the employer because the employer itself did not know about the website) and *Urban*, 2010 U.S. Dist. LEXIS 124307, at *27-28 (no harassment where sexually suggestive photos of workers were placed on a MySpace page because, although the employee's MySpace page was offensive, employees had to go out of their way to see it.) *with* *Gallagher v. C.H. Robinson Worldwide, Inc.*, 567 F.3d 263, 273 (2009) (finding the harassment was severe and pervasive because the victim could escape neither the open pornographic materials left on co-workers' desks nor the co-workers' sharing of pornographic photos of their girlfriends).

IV. THE EFFECT OF SOCIAL MEDIA ON SEXUAL HARASSMENT CLAIMS

There are four main issues to explore in the context of Title VII harassment through social media. The first issue is whether comments on a third-party online networking site create a hostile working environment. How does an employee prove these comments were unwelcome? The second issue is the liability of the employer. Is the employer liable for networking activity occurring at the office or off-site? Does it matter if the social networking site was set up or supported by the employer?¹⁰⁷ Do employer internet usage or anti-harassment policies play a role in liability? The third issue concerns the privacy rights of employees in relation to online networking sites. Are interactions on social networking sites admissible in court? What affect do employer internet usage policies have on privacy rights? This part focuses on these questions as it describes the added difficulty social media presents for victims trying to establish a *prima facie* case of sexual harassment.

A. *Severe & Pervasive: Does Activity on a Third-Party Website Really Create a Hostile Work Environment?*

If an employee posts pictures of female workers in sexually suggestive poses in his cubicle or office, and writes his comments next to each picture, such action is likely to establish a hostile work environment claim because the photos are a physical part of the work environment.¹⁰⁸ In this situation, the victim cannot “escape” the harassment because she cannot avoid seeing the photos.¹⁰⁹ If an employee posts those same photos on a third-

¹⁰⁷ For an example of an employer who uses social media for their current and former employees, see SODEXO, <http://www.sodexoalumni.com/networking.htm> (last visited Mar. 10, 2011).

¹⁰⁸ See Gallagher, 567 F.3d at 271-72 (finding the harassment was severe and pervasive because the victim could not escape the co-workers harassing actions, such as leaving open pornographic materials on their desks and sharing pornographic photos of their girlfriends).

¹⁰⁹ See *id.*

party website, which his co-workers frequently visit, this would be much less likely to establish a hostile work environment.¹¹⁰ The rationale is that social networks are more easily avoided than hard copy photos on an office wall.¹¹¹ Social networks are not a physical part of the work environment and employees' use of these networks is less likely to be obvious in the workplace.¹¹² However, courts have not yet addressed the increasing role social media plays in the employment context, and the distinction between online and hard copy photos may become obsolete as employees depend more on social media sites to interact with each other.¹¹³

In addition, the frequency of instances of harassment affects the determination of a hostile work environment.¹¹⁴ As the severity of the harassment increases, the required amount of frequency declines.¹¹⁵ For example, "[c]ourts have recognized that 'even a single episode of harassment, if severe enough, can establish a hostile work environment.'"¹¹⁶

Therefore, federal courts have put more weight on evidence of face-to-face harassment than they do on evidence of online harassment.¹¹⁷ Courts have found that if sexually suggestive pic-

¹¹⁰ See Urban, 2010 U.S. Dist. LEXIS 124307 at *9.

¹¹¹ See *id.* (stating that however offensive an employee's MySpace page was, it did not create a hostile environment because the employees had to go out of their way to see it.).

¹¹² Compare Gallagher, 567 F.3d at 271-72 with Urban, 2010 U.S. Dist. LEXIS 124307 at *9.

¹¹³ See Zelizer, *supra* note 15, at 52 (describing the prevalence of social media in the workplace). See also Oncale, 532 U.S. at 81-82 (stating that the social context of an office needs to be considered in deciding whether or not harassment is severe and pervasive).

¹¹⁴ See *supra* Part III.C.; Ferris, 277 F.3d at 137; Jabbar, 726 F. Supp. 2d at 85-86 (stating that the court could not find employer liability for a mere three instances of potentially harassing conduct spread out over time).

¹¹⁵ Ferris, 277 F.3d at 136-37.

¹¹⁶ See Jeffery S. Klein and Nicholas J. Pappas, "Jones v. Clinton": An Emerging Trend in Title VII Law, N.Y. L.J., June 1, 1998, at 3 (quoting Torres v. Pisano, 116 F.3d 625, 630-31 (2d Cir. 1997)). See also Ferris, 277 F.3d at 136.

¹¹⁷ Compare R.S. v. Bd. of Educ., 371 Fed. App'x. at 233-234 (granting summary judgment for defendants because three emails, multiple alleged online chats, and one five minute face-to-face conversation occurring over a three

tures are posted on a website, they are not forced upon the employees in the workplace and are, therefore, less likely to be pervasive in the workplace.¹¹⁸ The reasoning provided is an employee has to go out of his or her way to visit the social networking site and may, therefore, avoid the hostile environment created by it.¹¹⁹ This reasoning neglects the reality that most employees communicate and socialize with one another through a social media site.

In addition to the escapable nature of social media, victims must also deal with the “unwelcomeness” requirement in hostile environment claims.¹²⁰ Unwelcomeness is a requirement only in sexual harassment claims.¹²¹ The courts have adopted it from the EEOC’s guidelines.¹²² The goal of the “unwelcomeness” requirement is to prevent employees who are romantically involved with co-workers or supervisors from bringing “revenge” suits against their ex-lovers or employers.¹²³ While courts agree that unwelcome conduct cannot be incited or provoked by the victim, there is no generally accepted standard for unwelcomeness.¹²⁴ For example, the Eleventh Circuit Court of Appeals, in *Henson v. City of Dundee*, stated the standard for “unwelcome-

month span could not create a severe and pervasive hostile environment for a student) *and* Urban, 2010 U.S. Dist. LEXIS 124307 (no harassment where sexually suggestive pictures of workers were placed on a MySpace page) *with* Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 70-71 (2d Cir. 2000) (reversing grant of summary judgment for defendants where plaintiffs were subjected to “a stream of racially offensive comments over the span of two to three months” where plaintiffs and harassers were communicating face-to-face).

¹¹⁸ See, e.g., Urban, 2010 U.S. Dist. LEXIS 124307 at *9.

¹¹⁹ See *id.* (stating that however offensive an employee’s MySpace page was, it did not create a hostile environment because the employees had to go out of their way to see it).

¹²⁰ See Avery, *supra* note 56, at 5.

¹²¹ See *id.* (describing unwelcomeness as a special requirement for discrimination based on sex as opposed to other types of discrimination).

¹²² See Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 745-46 (2002) (describing the origins of the unwelcomeness standard in the courts).

¹²³ See Avery, *supra* note 56, at 5.

¹²⁴ See Chambers, *supra* note 122, at 751-52 (describing the various standards for unwelcomeness that courts have used).

ness" simply requires that the victim did not encourage or incite the harassing behavior.¹²⁵ On the other hand, the Seventh Circuit Court of Appeals, in *Reed v. Shepard*, stated regardless of a victim's voluntary participation in an activity, the proper inquiry for "unwelcomeness" is whether or not the victim indicated that the harassing conduct was unwelcome or undesired.¹²⁶

A recent case from the Eastern District of New York, *Urban v. Capital Fitness d/b/a XSport Fitness*, explains the issue of unwelcomeness in relation to sexual harassment over social networking sites.¹²⁷ It suggests that because a social media website is not a physical part of the workplace, and therefore easily escapable, the victim has a higher burden to meet to prove content on a website contributes to the overall hostile environment.¹²⁸ In *Urban*, the victim alleged that a MySpace page developed by a male co-worker contributed to the hostile environment at the workplace because it featured other gym employees in sexually suggestive poses.¹²⁹ These pictures were taken at the workplace, and the page included the gym's logo.¹³⁰ In addition, the same male co-worker operated a MySpace page with all of the gym's female employees listed as his top friends.¹³¹ The court stated that because the female workers featured on the MySpace page did not complain about their photos, there was no "gender related hostility" added to the work environment by the MySpace page.¹³² The court further held that the MySpace pictures, along with the other alleged conduct on the whole, were not objectively severe and pervasive enough to create a hostile environment.¹³³

¹²⁵ See *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (stating that the standard for unwelcomeness is merely that the plaintiff did not incite the harassment).

¹²⁶ See *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991).

¹²⁷ See *Urban*, 2010 U.S. Dist. LEXIS 124307 at *9.

¹²⁸ See *id.* See also *R.S. v. Bd. of Educ.*, 371 Fed. App'x at 233-34.

¹²⁹ See *Urban*, 2010 U.S. Dist. LEXIS 124307 at *7.

¹³⁰ See *id.*

¹³¹ See *id.* at *9.

¹³² See *id.*

¹³³ See *id.* at *9-10.

While *Urban* is a district court case in the Second Circuit, the district court analyzed the pictures posted to MySpace by following the Seventh Circuit's reasoning in the *Reed* decision.¹³⁴ Because the workers featured on the site never complained about the content of the site, the court assumed that the conduct was welcomed by the other female workers and did not create tension or hostility in the workplace.¹³⁵ Therefore, the conduct was not actionable.¹³⁶ The court reasoned that the real victims of the photographs were the subjects of the photographs.¹³⁷ If the subjects of the photos had no objections to their images on a third-party site, why should any other employees be offended?¹³⁸ Such reasoning, however, ignores the fact that a posting on a third-party site, such as MySpace, with the company logo can be analogous to the situation of hard copy photos posted on a cubicle.¹³⁹ Photos of models in bikinis are not photos of the victim, but they suggest an environment which is hostile and demeaning to women.¹⁴⁰ Regardless of which unwelcomeness standard is used, the focus should be on the victim's reaction to it, not the feelings of the people in the photos.¹⁴¹

¹³⁴ See *Urban*, 2010 U.S. Dist. LEXIS 124307 at *9; *Reed*, 939 F.2d at 491 (stating that regardless of a victim's voluntary participation in an activity, the proper inquiry for "unwelcomeness" is whether or not the victim indicated that the harassing conduct was unwelcome or undesired).

¹³⁵ *Urban*, 2010 U.S. Dist. LEXIS 124307 at *9.

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *Biber*, *supra* note 21 (finding that participants thought that misogynist comments made online were more offensive than in a traditional face-to-face setting).

¹³⁹ See *id.*; *Curley*, *supra* note 1, at 542-45 (describing different types of social media, their non-work uses, and the fact that many employers do use social media); *Oncale*, 532 U.S. at 81-82 (stating that the social context of the workplace should be a factor in determining what constitutes harassment).

¹⁴⁰ *Gallagher*, 567 F.3d at 273-74 (finding harassment where co-workers left open pornographic materials on their desks).

¹⁴¹ *Henson*, 682 F.2d at 903 (stating that the standard for unwelcomeness is merely that the plaintiff did not incite the harassment).

Employees are typically not required to join social networks to perform their job functions.¹⁴² As a result, employees can join and leave these networks at will without formal employment related consequences.¹⁴³ Yet, the social context of the workplace could be dependent on social networking if all or most of the employees communicate that way.¹⁴⁴ It would be improper for courts to assume that social networks are completely optional for all employees because even the United States Supreme Court has emphasized the social context of the workplace is an important factor in the determination of a hostile work environment, and courts should take the online environment into account when they consider hostile environment claims.¹⁴⁵

B. Is the Employer Liable for Employee Social Networking Activity?

While the courts in *Urban* and *Jabbar* did not find that the social networking activity created a hostile environment, they did concede that social networking activity has an impact on the workplace, regardless of the time and place where the initial comment was made.¹⁴⁶ Whether or not the conduct occurred off-duty (or not at the workplace) typically plays a large role in determining liability for traditional harassment.¹⁴⁷ Because employer liability is based on agency principles, some argue that an employer is only liable if the harassing conduct happens when

¹⁴² See Curley, *supra* note 1, at 542-45 (2010) (describing different types of social media, their non-work uses and the fact that many employers do use social media).

¹⁴³ See *id.*; Paul, *supra* note 8, at 118.

¹⁴⁴ See Curley, *supra* note 1, at 542-45.

¹⁴⁵ See Oncale, 532 U.S. at 81-82.

¹⁴⁶ *Jabbar*, 726 F. Supp. 2d at 85-86 (the court stated that the instances of harassment, one instance being a posting on a Facebook page, were not severe or pervasive enough to warrant a finding of hostile environment); *Urban*, 2010 U.S. Dist. LEXIS 124307 at *9 (stating that sexually suggestive photos of gym workers on a Facebook page could not contribute to a hostile environment especially considering the subjects of the photos had not complained).

¹⁴⁷ See Patterson, *supra* note 60, at 250-252.

the employees are on-duty or at the workplace.¹⁴⁸ However, it has been established that off-duty conduct can have consequences in the workplace, and the employers are liable for the hostile workplace that results.¹⁴⁹ This section first discusses the role of off-duty conduct. In the social media context, this involves conduct and comments posted to a third-party website. While there is inconsistency among the circuits as to whether off-duty conduct is admissible to prove a hostile environment claim, the courts should take the context of the comments into consideration when deciding whether or not to admit the evidence.¹⁵⁰

Next, this section describes the role of employer policies in determining liability for harassment. In determining liability, courts rely on the policies and procedures employers have in place for dealing with employee misconduct.¹⁵¹ The employer is liable for the actions of a victim's supervisor, unless the employer can assert an affirmative defense that they followed their own policies designed to prevent this type of behavior and that the employee failed to take advantage of these policies in order to stop or mitigate the harassment.¹⁵² The employer is not liable for a co-worker's harassing actions, unless the victim can show

¹⁴⁸ See *id.* at 250-264 (arguing that employer's should only be liable for on-duty harassment).

¹⁴⁹ See *Burlington*, 524 U.S. at 744; *Faragher*, 524 U.S. at 765-66 (establishing employer liability for the hostile environment as opposed to *quid pro quo* actions); *Doe v. Oberweis Dairy*, 456 F.3d 704 (7th Cir. 2006) (where the court acknowledged that harassment which has consequences in the workplace can be used to support a hostile environment claim); *Ferris*, 277 F.3d at 136 (stating that one instance of an off-duty sexual assault could be enough to support a claim of sexual harassment, but mere flirtatious behavior would not be enough to support a claim); *Duggins ex rel. Duggins v. Steak 'N Shake, Inc.*, 3 F. App'x 302 (6th Cir. 2001) (holding that off-duty harassment can be used in a hostile work environment claim if the plaintiff worked closely with the harasser).

¹⁵⁰ See *infra* notes 160-169 and accompanying text (describing the different approaches of the First, Second, Sixth, and Seventh Circuit Courts in admitting or not admitting off-duty conduct used as proof of hostile environment claims).

¹⁵¹ See *Patterson*, *supra* note 60, at 250-252.

¹⁵² See *Avery*, *supra* note 56, at 3-4.

that (1) the employer was negligent in providing an opportunity for the victim to complain; or (2) that the employer knew about the harassment and did nothing to stop it.¹⁵³

1. Admissibility of Off-Duty Conduct

Smart phones, and other mobile devices like laptops and tablets, blur the line between personal and work time.¹⁵⁴ They allow employees to check their work e-mail, post comments or photos to a website, and easily communicate with co-workers from any location at any time.¹⁵⁵ Even more so than laptops, smart phones now make it easier for anyone to post a comment on a social media website from almost any location, including a workplace whose own network blocks the use of social networking sites.¹⁵⁶

The focus of a hostile environment claim is, necessarily, the workplace.¹⁵⁷ Therefore, off-site or off-duty conduct is not always admissible in a hostile environment claim.¹⁵⁸ Though several circuit courts take different approaches, there are fairly uniform guidelines to determine what types of off-duty conduct is admissible to prove a hostile environment claim.¹⁵⁹

While severity of the harassment is a factor, circuit courts generally allow off-duty or off-site conduct that permeates the workplace environment to be admitted as evidence of a hostile work environment.¹⁶⁰ For example, the Sixth Circuit has stated, ". . . when an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the

¹⁵³ Ferris, 277 F.3d at 136.

¹⁵⁴ See Oncidi, *supra* note 2 (describing how voicemail, Blackberries, and the internet make it possible to do work anywhere).

¹⁵⁵ See *id.*

¹⁵⁶ See *supra* Part II.A. See also FACEBOOK, *supra* note 15 (Fifty percent of Facebook users update via mobile phone); Zelizer, *supra* note 15.

¹⁵⁷ See Patterson, *supra* note 60, at 254.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* (arguing that there is a circuit split between the courts on whether off-duty conduct is admissible in Title VII sexual harassment claims).

¹⁶⁰ See Ferris, 277 F.3d at 136; Duggins, 3 F. App'x at 302; Doe, 456 F.3d at 704.

employee may reasonably perceive the work environment to be hostile.”¹⁶¹ In *Duggins v. Steak’n Shake*, a victim’s off-duty rape by a “co-employee” who worked at a different Steak’n Shake location from the victim could not be used as evidence of a hostile work environment in the victim’s case because the victim and her co-employee never worked together.¹⁶² However, in *Doe v. Oberweis*, the Seventh Circuit Court of Appeals allowed evidence that the manager had off-duty sex with the underage victim to support a hostile work environment claim because it contributed to the totality of the circumstances surrounding the hostile environment.¹⁶³ The victim continued to work under the same manager for two weeks before quitting.¹⁶⁴ Additionally, there were several other reported instances of workplace harassment perpetrated on both the victim and other female employees of the store.¹⁶⁵ The court commented that sexual harassment “need not be committed in the workplace . . . to have consequences there.”¹⁶⁶

The relevant difference between these cases is the effect of the off-duty conduct on the workplace atmosphere.¹⁶⁷ The victim in *Duggins* never had to see the co-employee/perpetrator at her workplace, while the victim in *Doe* continued to be supervised by the perpetrator, who continued to harass her.¹⁶⁸ Interpreted in the context of social media, the time and place of online postings or harassment become less important than their effects on the workplace atmosphere.¹⁶⁹ Therefore, if postings from one employee to another on a third-party social networking site have consequences in the workplace, then the victim

¹⁶¹ See *Duggins*, 3 F. App’x at 311 (finding no employer liability where the only instance of harassment was a rape that occurred off-duty and the victim and employee rapist had not and did not work together).

¹⁶² See *id.* at 311-12.

¹⁶³ *Doe*, 456 F.3d at 715-16.

¹⁶⁴ See *id.* at 716.

¹⁶⁵ See *id.* at 712-713.

¹⁶⁶ See *id.*

¹⁶⁷ Compare *Duggins*, 3 F. App’x at 311-12 with *Doe*, 456 F.3d at 715.

¹⁶⁸ See *Duggins* 3 F. App’x at 311-12; *Doe*, 456 F.3d at 715 (holding that certain off-duty conduct had consequences in the workplace).

¹⁶⁹ See *id.*

should be allowed to use that evidence to support a claim of a hostile work environment, regardless of the time, place, and means of the posting.

2. Employer Policies and Actions

As the courts tackle harassment through the use of social media, the employer's knowledge of the online harassment and subsequent inaction to stop the conduct play a large role in determining liability.¹⁷⁰ When an employer is not involved in social media, and it takes action to stop the online harassment, it is less likely to be held vicariously liable.¹⁷¹ In *Jabbar v. Travel Services, Inc.*, for example, the District Court of Puerto Rico held that the employer could not be liable because the company had neither organized nor condoned the Facebook page.¹⁷² A co-worker posted a harassing comment to a Facebook page containing photos of the victim at a work function.¹⁷³ The victim claimed that work party photos were typically uploaded to a Facebook page so that all employees could have access to them.¹⁷⁴ The victim's claim that the employer knew about the Facebook page was the only evidence the victim relied on to prove the employer might have known about the photos.¹⁷⁵ Additionally, there were only two other alleged instances of harassment for which the plaintiff also lacked evidence.¹⁷⁶ In this case, neither the workplace conduct nor the online conduct was enough to support a finding of a hostile work environment.¹⁷⁷

¹⁷⁰ See *Jabbar*, 726 F. Supp. 2d at 85-86 (racially charged comments on a Facebook page dedicated to the company's photos was not imputable to the employer because the employer did not know about the website); *Wolfe*, 600 F. Supp. 2d at 1017 (finding that a school district could potentially be liable for the actions of harassing students when there was clear evidence that they knew about the harassing conduct and did not intervene).

¹⁷¹ See *Jabbar*, 726 F. Supp. 2d at 81-82.

¹⁷² See *id.*

¹⁷³ See *id.* at 81-85.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

Most importantly, the employer was able to demonstrate that it followed through on its anti-harassment policy and procedures because it blocked access to all Facebook pages on its office computers.¹⁷⁸

Conversely, *Wolfe v. Fayetteville, Arkansas Sch. Dist.*, although not a Title VII case, demonstrates that repeated instances of online and in-person harassment that are known to the employer or school district will likely enable the victim to overcome a motion to dismiss or a motion for summary judgment.¹⁷⁹ In *Wolfe*, a student was repeatedly harassed by students and eventually administrators, using a combination of physical, verbal, and online acts.¹⁸⁰ The Western District of Arkansas held that the harassment could be imputed to the school district because the school district knew about the harassing student's acts, including the posting of videos showing the victim being beaten-up, the dedication of a Facebook page to hating the victim, and several defamatory comments posted to that Facebook page.¹⁸¹ Additionally, the school district set up its own website titled "The Whole Story" on which several defamatory comments about the victim were also posted.¹⁸² These online acts created a record, which enabled the victim to show the school administration knew about the victim's complaint and did not follow its procedures to stop the harassment.¹⁸³

Despite the fact that online harassment is more difficult for the employer to monitor than traditional workplace conduct, the employer is obligated to stop or limit access to that harassment when it becomes aware of the harassment.¹⁸⁴ If the employer decides to participate in social media in order to disclaim any

¹⁷⁸ *See id.*

¹⁷⁹ *Wolfe*, 600 F. Supp. 2d at 1020-21.

¹⁸⁰ *See id.* at 1015-18.

¹⁸¹ *See id.* at 1017-21.

¹⁸² *See id.* at 1021.

¹⁸³ *See id.* (jury ruled in favor of the school district in the final outcome of the sexual harassment charge).

¹⁸⁴ *See Kichline, supra* note 5; *Zelizer, supra* note 15; *Curley, supra* note 1, at 541-42 (all describing scenarios in which an employer could be liable for employee social media networking and recommending steps to avoid liability).

liability for the original harassment, this will not adequately insulate it from liability in a harassment claim.¹⁸⁵ As illustrated in *Jabbar* and *Wolfe*, the response of the employer/school district once they became aware of the harassing conduct was the core issue—not the severity of the harassment.¹⁸⁶ In *Wolfe*, the on-line harassment was not the main avenue of harassment, but it did document specific incidents of harassment that the school district could no longer ignore as it had been ignoring the physical assault and name calling.¹⁸⁷ Conversely, in *Jabbar*, the employer followed its anti-harassment policy, blocking Facebook access on its computers once it became aware of the posting.¹⁸⁸

C. Privacy

If postings on a social networking site can lead to employer liability in a hostile environment claim, how can employers be proactive to stop the harassment and their eventual liability? In *Jabbar*, the employer blocked employee access to the offending site when they first became aware of the posting.¹⁸⁹ What other techniques are employers able to use to curb online harassment while respecting the panoply of state and federal privacy laws? In addition to the Fourth Amendment, a host of federal statutes, including the Wiretap Act, the Stored Communications Act, and the National Labor Relations Act, protect different aspects of employee privacy.¹⁹⁰ There are many articles which focus exclusively on employee privacy and discovery as they relate to social media and internet usage, in particular.¹⁹¹ This article only gives

¹⁸⁵ See *Wolfe*, 600 F. Supp. 2d at 1021.

¹⁸⁶ Compare *Jabbar*, 726 F. Supp. 2d at 91-93 with *Wolfe*, 600 F. Supp. 2d at 1015-1018.

¹⁸⁷ See *Wolfe*, 600 F. Supp. 2d at 1015-1018.

¹⁸⁸ See *Jabbar*, 726 F. Supp. 2d at 91-93.

¹⁸⁹ See *id.* at 82-85.

¹⁹⁰ See Paul, *supra* note 8, at 127.

¹⁹¹ See Aaron Blank, Article, *On the Precipe of E-Discovery: Can Litigants Obtain Employee Social Networking Web Site Information through Employers?*, 18 COMM'LAW CONSP'CTUS 487 (2009-2010); Evan E. North, Comment and Note, *Facebook Isn't Your Space Anymore: Discovery of Social Networking Websites*, 58 KAN. L. REV. 1279 (2010).

a brief summary of the issues most pertinent to sexual harassment and hostile environment claims as a result of social media usage to provide the context in which privacy concerns arise during the discovery phase of a hostile environment claim.¹⁹² This section focuses on how employers monitor employees' social networking and internet activity, and the employees' interest in privacy during the discovery phase of a hostile environment claim. While clear employee monitoring policies are not a cure-all for harassment through social media, employers can use these policies to act preventively.¹⁹³ If employers actively monitor employee usage and enforce their anti-harassment policies, they will be able to address problems before litigation commences.¹⁹⁴

1. Employer Monitoring and Access to Employee Activity

As discussed above, employers can be held liable for employee social networking activity.¹⁹⁵ Because the courts and the EEOC impose a duty to prevent sexual harassment on employers, the employers have a strong interest in monitoring employee internet and social networking activity to protect themselves from liability in sexual harassment and other litigation.¹⁹⁶ Employers can easily monitor employee internet activity on a daily basis through employee monitoring software or network monitoring software, both of which can produce the content of social networking sites that employees visit.¹⁹⁷ Employee monitoring software tracks the computer usage of a specific em-

¹⁹² See Blank, *supra* note 191, at 487; North, *supra* note 191, at 1279.

¹⁹³ Compare Blank, *supra* note 191, at 511-13 (discussing the need for clear employer monitoring policies) with Kichline, *supra* note 5, at 16-24 (discussing the potential pitfalls of knowing too much information about employees as a result of monitoring activities).

¹⁹⁴ See Blank, *supra* note 191, at 511-13 (discussing how the need for employers to monitor employees' internet actions trumps employee privacy when there is a clear employer monitoring policy in place).

¹⁹⁵ See *supra* Parts III.A-B.

¹⁹⁶ See Equal Employment Opportunity Commission, 42 C.F.R. § 1604.11(f) (2010); Avery, *supra* note 56, at 19; Harris, 510 U.S. at 21-22.

¹⁹⁷ See Blank, *supra* note 191, at 499-500.

ployee, including e-mails sent or received, internet sites visited, documents accessed, and instant messages sent.¹⁹⁸ Network monitoring software tracks all internet activity on the employer's network and can be sorted by employee.¹⁹⁹ Depending on employer preference, it can capture only the time and the website visited or more detailed information such as the content of the websites visited.²⁰⁰ If an employer uses either of these methods to track employee internet activity before a lawsuit occurs, the employer will easily be able to produce the employee's internet activity in discovery.²⁰¹ However, by actively monitoring employee internet usage, an employer can also use these methods preventively to address issues before they turn into litigation problems.²⁰² For example, the employer may be able to spot a problem between employees or, at a minimum, confirm or deny accusations of harassment.²⁰³ The employer then has an opportunity to put the employees on notice that there is a problem and address that problem through their human resources department's processes.²⁰⁴

Another way to retrieve employee social networking activity is by searching the hard drive of an employee's computer.²⁰⁵ This method is not viable as a preventative monitoring activity because it requires a forensic expert, but it can be used as a discovery method.²⁰⁶ Hard drive searches are also significantly less reliable for producing social networking content because the data may only be available in temporary internet files.²⁰⁷ More-

¹⁹⁸ *See id.* at 499.

¹⁹⁹ *See id.* at 500-501.

²⁰⁰ *See id.* at 500.

²⁰¹ *See id.* at 499-500.

²⁰² *See id.* at 511-513; Zelizer, *supra* note 15, at 56 (describing the situations in which a company might want to intervene when an employee makes a social networking post).

²⁰³ *See id.*

²⁰⁴ *See id.* (describing how an employer has an opportunity to put the employee on notice if they discover prohibited activity through social networking monitoring).

²⁰⁵ *See* Blank, *supra* note 191, at 501-503.

²⁰⁶ *See id.*

²⁰⁷ *See id.*

over, the rich data from social media sites is often harder to trace than other types of data on a hard drive.²⁰⁸

2. Discovery Rules Relating to Electronic Data and Social Media Sites

The United States Supreme Court has recognized an employee's interest in protecting personal information from misappropriation, but limitations have been placed on this interest.²⁰⁹ Employees lose their reasonable expectation of privacy in electronic information stored on their computers when an employer has a well-known computer and internet monitoring policy.²¹⁰ When an employee has been notified of the employer's policy, depending on its parameters, the employee may no longer have a reasonable expectation of privacy in her internet activities on her work computer.²¹¹ Several courts have held that an employer has a greater interest in promoting worker efficiency and keeping the workplace harassment-free than the employee has

²⁰⁸ See *id.* at 503-04.

²⁰⁹ See *id.* at 508-09; *O'Connor v. Ortega*, 480 U.S. 709, 718-19 (1986) (describing an employee's reasonable expectation of privacy in an office where personal information was stored).

²¹⁰ See *Blank*, *supra* note 191, at 508-510.

²¹¹ See *Muick v. Glenayre Electronics*, 280 F.3d 741, 743 (7th Cir. 2002); *id.* at 508-509.

in maintaining his or her privacy.²¹² This is especially true when employees are using employer owned computers or networks.²¹³

Because employers typically own the computers and networks that employees use for their internet access, and they have an interest in keeping the workplace harassment-free, employers can freely monitor employee social networking activity at the office or worksite.²¹⁴ An employer should enforce its anti-harassment policies strictly and evenly among all employees.²¹⁵ Employers are free to monitor their employees' use of social networking sites (when they are at work) and sanction bad behavior according to their internet usage and anti-harassment policies.²¹⁶

Employees who post information to social networking sites may lose their claim to privacy simply because posting on the

²¹² See *Garrity v. John Hancock Mut. Life Ins. Co.*, No. 00-12143-RWZ, 2002 WL 974676, at *2 (D. Mass. May 7, 2002) (holding that the employer's legitimate interest in protecting its employees from harassment trumps employee privacy interests); *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 101 (E.D. Pa. 1996) (holding that the employer interest in preventing employee misconduct outweighs any privacy interests that the employee has); Blank, *supra* note 191, at 512-513 (comparing how courts have weighed employer's interests against employee privacy interests). See also Ronald J. Levine & Susan L. Swatski-Lebson, *Social Networking and Litigation*, E-COMMERCE L. & STRATEGY (Law Journal Newsletters, New York, N.Y.), Jan. 2009, at 1, 2, available at <http://www.herrick.com/siteFiles/Publications/CBC006F756591F0160327DA071BDB3F.pdf> (stating that a social media user is making a "conscious choice" to publicize their information); Blank, *supra* note 191, at 510 (stating that the internet is a public medium so users do not have an expectation to privacy when they post information on the internet).

²¹³ See Blank, *supra* note 191, at 512-513 (describing how employees lose their expectation to privacy when the employer can monitor and access their computers).

²¹⁴ See Equal Employment Opportunity Commission, 42 C.F.R. § 1604.11(f) (2010); Harris, 510 U.S. at 21-22; Blank, *supra* note 191, at 512-13; Avery, *supra* note 56, at 19.

²¹⁵ See Zelizer, *supra* note 15, at 57 (describing the possibility of a discrimination suit resulting in uneven enforcement of an employer's social media or internet usage policy).

²¹⁶ See *id.*; Curley, *supra* note 1, at 541; Kichline, *supra* note 5 (all describing the ability of employers to monitor employees, according to established policies in order to monitor employee behavior and intervene in cases of prohibited behavior).

social network is deemed a public act.²¹⁷ For a social networking post to be deemed private, the user must have a reasonable subjective belief that the information will remain private.²¹⁸ The United States District Court of Puerto Rico addressed individual privacy interests in pictures posted on the internet as a matter of first impression in *United States v. Gines-Perez*.²¹⁹ The court stated, “. . . it strikes the Court as obvious that a claim to privacy is unavailable to someone who places information on an indisputably, public medium, such as the Internet, **without taking any measures to protect the information.**” [bold in original]²²⁰

Even if an employee attempts to restrict access to his or her social networking information, most social networking sites have disclaimers that state the public may still be able to view some information.²²¹ Based on these disclaimers, some courts have ruled that even posts on a private or restricted social networking site may be deemed public because the site cannot control third parties who access the information and publicize it more widely.²²² Despite the fact that employees may feel that they are posting personal thoughts, they are still using a very accessible medium, and these thoughts are not private.²²³ Posting information on the internet, and social media sites in particular, leads to a presumption that the employee intended to publicize the information so that he or she can no longer claim an interest in keeping that information private.²²⁴

²¹⁷ See Levine, *supra* note 212, at 2 (stating that a social media user is making a “conscious choice” to publicize their information); Blank, *supra* note 191, at 510 (stating that the internet is a public medium so users do not have an expectation to privacy when they post information on the internet).

²¹⁸ See *Katz v. U.S.*, 389 U.S. 347, 361-63 (1967) (Harlan, J., concurring) (defendant-telephone user could reasonably have expected that his conversation would remain private).

²¹⁹ See *United States v. Gines-Perez*, 214 F. Supp. 2d 205 (D.P.R. 2002).

²²⁰ See *Gines-Perez*, 214 F. Supp. 2d at 225.

²²¹ See Blank, *supra* note 191, at 511.

²²² See Levine, *supra* note 212, at 2.

²²³ See Blank, *supra* note 191, at 511.

²²⁴ See *id.*

However, the monitoring of employee social networking sites is not without its risks.²²⁵ While trying to prevent sexual harassment, the employer could gain personal information about an employee that they should not have.²²⁶ For example, an employer could learn that an employee has terminal cancer or an illness. Once the employer knows this information, any subsequent employment actions against that employee are suspect.²²⁷ This is likely why a recent survey of chief information officers showed that the majority of them banned social networking sites.²²⁸

Therefore, aggressive monitoring of employee internet and social media activity alone is not always the most efficient or effective way of preventing employer liability in sexual harassment claims.²²⁹ Moreover, an outright ban of social networking does nothing to stop off-duty social networking activity from affecting the workplace environment.²³⁰ Employers should use anti-harassment policies and procedures in conjunction with a clear and evenly applied internet usage monitoring policy in order to best prevent and defend against sexual harassment claims.²³¹

²²⁵ See Curley, *supra* note 1, at 16.

²²⁶ See Kichline, *supra* note 5, at 16-20.

²²⁷ See *id.* at 19-20 (describing this situation in the context of the Americans with Disabilities Act, where access to information about an employee's health status takes away the "unaware" defense).

²²⁸ *No Facebook at Work*, PHYSORG.COM, Oct. 8, 2009, available at <http://www.physorg.com/news174244820.html>.

²²⁹ See Kichline, *supra* note 5, at 16-20, 24.

²³⁰ See *supra* discussion Section B.II on the admissibility of off-duty conduct in sexual harassment suits. See also Zelizer, *supra* note 15, at 254-56.

²³¹ See discussion *supra* Section B on employer harassment policies and affirmative defenses to sexual harassment. See also Zelizer, *supra* note 15, at 254-56 (describing the possibility of a discrimination suit resulting in uneven enforcement of an employer's social media or internet usage policy); Blank, *supra* note 191, at 511-514 (discussing the need for clear employer monitoring policies).

V. CONCLUSION

Although social networking activities may have started out as personal activities that employees did on their own time, they have now invaded the workspace with many employers embracing social media as a recruiting and marketing tool.²³² As employers blur the line between work and personal time by giving employees Blackberries and requiring them to check their e-mail when they are not at the workplace, employees are also blurring the line between work and personal time by changing their Facebook status and posting comments on their friends' blogs while they are at work.²³³

As social media is incorporated into the workplace culture, it becomes another possible forum for harassment and hostility.²³⁴ When social media has been integrated into the workplace culture, and the employer allows employees to access social media at work, the employer should be held accountable for any resultant hostile environment claim caused by unwanted contact by supervisors or co-workers.²³⁵ The employer has a duty to and an interest in preventing hostile environments from occurring.²³⁶ Employers should have monitoring tools and anti-harassment

²³² See Curley, *supra* note 1, at 542-49.

²³³ See Oncidi, *supra* note 2 (describing how voicemail, Blackberries, and the internet make it possible to do work anywhere); Zelizer, *supra* note 15, at 52-53 (the majority of social media posts are made during prime working hours from 10 a.m. CDT to 2 p.m. CDT).

²³⁴ See Kichline, *supra* note 5, at 16-21 (describing possible misunderstandings that could result from employee use of social media in the workplace).

²³⁵ See Crawford, 129 S. Ct. at 852 (holding the employer vicariously liable for harassment perpetrated by a victim's supervisor); Ferris, 277 F.3d at 136 (holding the employer liable for actions of a victim's co-worker); Oncale, 532 U.S. at 81-82 (describing how all the circumstances surrounding the harassment and its context should be considered by the court in determining liability).

²³⁶ See Garrity, 2002 WL 974676, at *2 (stating that the employer's legitimate interest in protecting its employees from harassment trumps employee privacy interests); Smyth, 914 F. Supp. at 101 (holding that the employer's interest in preventing inappropriate and illegal activity over its e-mail system outweighs any privacy interests that the employee has); Blank, *supra* note 191, at 512-13 (comparing how courts have weighed employers' interests against employee privacy interests).

tools at their disposal in order to limit their liability in sexual harassment suits involving social media usage.²³⁷

While the courts may not give as much weight to evidence of online harassment now, it seems likely they will consider social networking sites as contributing to hostility in the workplace environment in the near future.²³⁸ Social networks are becoming part of the workplace culture, and courts should not let the fact that the harassing comments or photos are posted online be a barrier to recovery for the victim. It is important to require a nexus between the online harassment and the workplace, but the courts should recognize employees can rely on social media to communicate with their co-workers whether they are in the office or not. In instances when social media is part of the workplace culture, the court should give as much weight to online harassment as it does to face-to face harassment.

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²³⁷ See Jabbar, 726 F. Supp. 2d at 86-87.

²³⁸ Jabbar, 726 F. Supp. 2d at 93-94 (the court stated that the instances of harassment, one instance being a posting on a Facebook page, were not severe or pervasive enough to warrant a finding of hostile environment; but the court did not address the issue of whether evidence of harassment over the social network could be used to support a harassment claim); Urban, 2010 U.S. Dist. LEXIS 124307 (stating that sexually suggestive photos of co-workers on a Facebook page could not contribute to plaintiff's hostile environment based on the fact that the subjects of the photos had not complained; but the court did not suggest that the photos on the webpage would never be relevant in a harassment claim).

* J.D. candidate 2012, DePaul University College of Law. Many thanks to Carin McDonald and Natalie Parsey for their editorial assistance and to the staff of the *Journal of Women, Gender & the Law* for all of their help. Many thanks also to my family for their continued support.

