

Boston College Law Review

Volume 54 | Issue 4

Article 9


9-27-2013

Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It

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Recommended Citation

Laura E. Diss, *Whether You "Like" It or Not: The Inclusion of Social Media Evidence in Sexual Harassment Cases and How Courts Can Effectively Control It*, 54 B.C.L. Rev. 1841 (2013), <http://lawdigitalcommons.bc.edu/bclr/vol54/iss4/9>

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WHETHER YOU “LIKE” IT OR NOT: THE INCLUSION OF SOCIAL MEDIA EVIDENCE IN SEXUAL HARASSMENT CASES AND HOW COURTS CAN EFFECTIVELY CONTROL IT

Abstract: The increasing use of social media sites like Facebook, Twitter, and Myspace in social interactions has led to a corresponding increase in the use of social media evidence in litigation. Social media sites provide attorneys with easily accessible, up-to-date information about individuals, making such sites highly desirable sources of evidence. Although recent case law indicates that social media evidence is largely discoverable and often admissible, allowing broad discovery of social media evidence in sexual harassment cases could be highly problematic for plaintiffs because it often produces irrelevant and prejudicial evidence that only serves to embarrass plaintiffs and dissuade them from pursuing otherwise meritorious claims. This Note examines the impact of social media discovery and admission on plaintiffs in sexual harassment cases. It argues that in order to prevent the production of irrelevant and prejudicial social media evidence in sexual harassment cases, courts should apply the principles of Federal Rule of Evidence 412 to the discovery phase and conduct an in camera review of social media evidence before allowing the defense to view it.

INTRODUCTION

A company’s in-house counsel learns of a potential sexual harassment claim by a female employee against her supervisor and believes the supervisor’s alleged actions raise liability concerns for the company.¹ Within seconds, counsel finds the employee’s Facebook profile through a simple Internet search.² The employee is a beautiful young

¹ See 29 C.F.R. § 1604.11 (2012) (describing employer liability for the harassing conduct of its employees).

² See Phillip Fung, *Public Search Listings on Facebook*, FACEBOOK BLOG (Sept. 5, 2007, 3:57 AM), <https://blog.facebook.com/blog.php?post=2963412130> (stating that limited versions of Facebook profiles—including a thumbnail of the user’s Facebook profile picture—will be available via Google, Yahoo, and other search engines to people who are not logged into Facebook); *infra* note 17 and accompanying text (explaining that many users do not understand their privacy options on social media sites, and as a result attorneys can often practice “informal discovery” by browsing social media themselves prior to the beginning of the case).

girl, and her profile picture shows her in a short, form-fitting dress, making what the in-house counsel considers to be a seductive face.³ “She doesn’t look like a girl who would be offended by this supervisor’s conduct,” the attorney thinks.⁴ With the insight gained from the employee’s Facebook page, the in-house attorney begins to dismantle the sexual harassment claim before it is even filed.⁵

If a picture is worth a thousand words, then a social media profile is priceless in litigation.⁶ Social media, also known as social networking, describes any type of social interaction using technology with some combination of words, photographs, video, or audio.⁷ Social media sites constitute one of the most commonly used forms of electronic communication worldwide, exceeding even email usage in 2009.⁸ A 2012 Nielson Company social media survey found that people spend more time on social networking sites than any other category of sites, dedicating 20 percent of their time on their personal computer and 30 percent of their time on their mobile device to social media.⁹ The in-

³ See Andrea A. Curcio, *Rule 412 Laid Bare: A Procedural Rule That Cannot Adequately Protect Sexual Harassment Plaintiffs from Embarrassing Exposure*, 67 U. CIN. L. REV. 125, 158–59 (1998) (noting the role that gender bias plays in evaluating a plaintiff’s sexual harassment claim); *infra* note 138 and accompanying text (noting that in order to meet certain social norms, Facebook profile pictures most often depict users as attractive, fun-loving, humorous, or in a successful romantic relationship).

⁴ See Theresa M. Beiner, *Sexy Dressing Revisited: Does Target Dress Play a Part in Sexual Harassment Cases?*, 14 DUKE J. GENDER L. & POL’Y 125, 132 (2007) (introducing the ways that defendants provide evidence of plaintiffs’ behavior to prove they welcomed the allegedly harassing conduct); Curcio, *supra* note 3, at 165 (describing the stereotypical view commonly held by lawyers and judges that women who dress in a certain way invite harassment, causing them to ignore all the other reasons why a woman might want to appear attractive); see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (determining that evidence of the plaintiff’s sexually provocative speech and dress were “obviously relevant” to determining whether sexual advances toward her were unwelcome).

⁵ See Lawrence Morales II, *Social Media Evidence: “What You Post or Tweet Can and Will Be Used Against You in A Court of Law,”* 60 ADVOC. 32, 32 (2012) (explaining that social media evidence can be used to reveal someone’s true personality or everyday behavior); *infra* notes 12–18 and accompanying text (explaining the value of social media evidence in litigation).

⁶ See Morales, *supra* note 5, at 32.

⁷ Aviva Orenstein, *Friends, Gangbangers, Custody Disputants, Lend Me Your Passwords*, 31 MISS. C. L. REV. 185, 187 n.1 (2012) (citing JOHN G. BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW* 17 (2010)).

⁸ Breanne M. Democko, Comment, *Social Media and the Rules on Authentication*, 43 U. TOL. L. REV. 367, 367 (2012); see NIELSON CO., *GLOBAL FACES AND NETWORKED PLACES: A NIELSON REPORT ON SOCIAL NETWORKING’S NEW GLOBAL FOOTPRINT 1* (2009), available at http://blog.nielsen.com/nielsenwire/wp-content/uploads/2009/03/nielsen_globalfaces_mar09.pdf.

⁹ See NIELSON CO., *STATE OF THE MEDIA: THE SOCIAL MEDIA REPORT 4* (2012) [hereinafter *THE SOCIAL MEDIA REPORT*] (stating the amount of time consumers spend on social

creased and multi-faceted use of social media has dramatically altered the way people share information and interact with one another in both personal and professional settings.¹⁰ Facebook, Twitter, and Myspace—three of the most visited social media sites—allow users to post photographs and status updates, share interests, invite others to attend events and join social groups, and send private messages to other users.¹¹

As a consequence of its popularity and omnipresence, social media is now one of the most sought-after sources of evidence in litigation worldwide.¹² Attorneys in a variety of legal disciplines seek the use of this easily accessible, up-to-date, and desirable information available on

media sites on their phones and personal computers); *Newsroom Key Facts*, FACEBOOK, <http://newsroom.fb.com/key-facts> (last visited Sept. 13, 2013) (stating that Facebook has one billion monthly active users as of December 2012 and 618 million daily users in December 2012).

¹⁰ Democko, *supra* note 8, at 368.

¹¹ THE SOCIAL MEDIA REPORT, *supra* note 9, at 7; see Democko, *supra* note 8, at 375–78 (describing Myspace, Facebook, and Twitter); *About Twitter*, TWITTER, <http://www.twitter.com/About> (last visited Sept. 13, 2013); *Facebook*, FACEBOOK, <http://www.facebook.com/facebook> (last visited Sept. 13, 2013); *Press Room*, MYSPACE, <http://www.myspace.com/pressroom/> (last visited Sept. 13, 2013). A “status update” is generally a short, simple statement posted publicly by the user that appears on her profile and in Facebook’s News Feed. See Cory Janssen, *Facebook Status*, TECHOPEDIA, <http://www.techopedia.com/definition/15442/facebook-status> (last visited Sept. 13, 2013). A “message” is privately sent to another user, more similar to traditional email. See *Help Center: Messaging*, FACEBOOK, <http://www.facebook.com/help/326534794098501/> (last visited Sept. 13, 2013). In 2012, the top ten most-visited social media sites were: Facebook, Blogger, Twitter, Wordpress, LinkedIn, Pinterest, Google+, Tumblr, Myspace, and Wikia. THE SOCIAL MEDIA REPORT, *supra* note 9, at 7; see Democko, *supra* note 8, at 367 (noting Myspace, Facebook, and Twitter specifically as popular social media sites); Morales, *supra* note 5, at 32 (describing Facebook and Twitter as the “major players” of social media). This Note focuses only on Facebook, Myspace, and Twitter because of their popularity and similarity in content and structure.

¹² Morales, *supra* note 5, at 32 (describing social media sites as a “treasure trove” of information); Orenstein, *supra* note 7, at 191–92; see Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 7 (2012) (stating that social media has become part of mainstream discovery practice). A 2011 study showed that Americans spend more time on Facebook than any other website. Democko, *supra* note 8, at 367. As of 2012, 15 percent of adults use Twitter, with more than half of them using Twitter on a daily basis. AARON SMITH & JOANNA BRENNER, PEW RESEARCH CTR., TWITTER USE 2012, at 2 (2012). Courts outside the United States have led the way in using social media in litigation. Claire M. Specht, Note, *Text Message Service of Process—No LOL Matter: Does Text Message Service of Process Comport with Due Process?*, 53 B.C. L. REV. 1929, 1929–30 (2012) (explaining modern uses of social media in litigation worldwide). For example, in 2008, the Australian Capital Territory Supreme Court was the first court to allow service of a default judgment via a message on the defendants’ Facebook profiles. *Id.* In 2009, the United Kingdom allowed the service of an injunction on Twitter. *Id.*

popular social media sites to bolster their cases.¹³ For example, many individuals are unusually honest on social media sites, and often post pictures and comments about illegal or provocative activities that can be used to undermine their credibility in litigation.¹⁴ Parties may post information or pictures that contradict their claims.¹⁵ Social media sites also record interactions with others over time, which may help plaintiffs prove allegations of stalking, cyberbullying, or harassment.¹⁶ Additionally, because many social media users either choose to keep their profiles public, or do not fully understand their privacy options, attorneys are able to easily access this attractive evidence simply by browsing the sites.¹⁷ For each of these reasons, attorneys are now regularly seeking

¹³ See Beth C. Boggs & Misty L. Edwards, *Does What Happens on Facebook Stay on Facebook? Discovery, Admissibility, Ethics, and Social Media*, 98 ILL. B.J. 366, 366–67 (2010); John G. Browning, *Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites*, 14 SMU SCI. & TECH. L. REV. 465, 465–67 (2011) (stating that social media sites provide an “abundance” of photographs and statements); Morales, *supra* note 5, at 32; Specht, *supra* note 12, at 1929–31.

¹⁴ Boggs & Edwards, *supra* note 13, at 367.

¹⁵ *Id.*; see *Romano v. Steelcase Inc.*, 907 N.Y.S.2d, 650, 653. (Sup. Ct. 2010). In *Romano v. Steelcase*, a personal injury case, the Supreme Court of New York for Suffolk County allowed discovery of the plaintiff’s full Facebook and Myspace accounts—including historical records and information designated as “private”—because the publically viewable portion of her accounts revealed an active lifestyle she claimed she no longer enjoyed. *Id.* at 653–54. The information on her profile contradicted her statements that her injuries were sufficiently serious to prevent her from doing physical activity. *Id.*

¹⁶ See Orenstein, *supra* note 7, at 192–93 (suggesting social media evidence could show that a witness was stalked).

¹⁷ See Browning, *supra* note 13, at 471. Although easy access to social media sites makes informal discovery an option, practitioners should note that ethical concerns remain about this method and other methods of gaining access to social media. See *id.* at 469; Boggs & Edwards, *supra* note 13, at 369; Browning, *supra* note 13, at 469. Social media sites offer users an opportunity to choose what information is public and private in order to personalize their social media experience. Democko, *supra* note 8, at 375–78 (describing the privacy policies for Facebook, Myspace, and Twitter). Public information is available to anyone, even to people without an account on the site; what constitutes private information depends on each site’s own privacy standards. See *About Public and Protected Tweets*, TWITTER, <https://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited Sept. 13, 2013) (stating that “public” tweets are “visible to anyone, whether or not they have a Twitter account”); *How Do I Edit My Profile?*, ASK MYSFACE, <https://www.askmyspace.com/t5/Your-Profile/How-do-I-Edit-my-Profile/ba-p/987> (last visited Sept. 20, 2013) (stating that unless a Myspace profile is marked as “restricted,” “[it] can be viewed by anyone on Myspace and throughout the web”); *Privacy Settings and Regulations*, ASK MYSFACE, <https://www.askmyspace.com/t5/Privacy-Abuse/Privacy-Settings-amp-Regulations/ba-p/1009> (last visited Sept. 20, 2013) (stating that if a Myspace profile is marked as “public,” “anyone can view [it]”); *What Does “Public” Mean?*, FACEBOOK, <http://www.facebook.com/help/203805466323736/> (last visited Sept. 13, 2013) (explaining that “public” includes “people who are not your friends [on Facebook] and people off of Facebook”).

discovery of social media information from both the parties and the social media sites themselves.¹⁸

Though social media may provide valuable evidence in some cases, social media evidence presents two specific problems for plaintiffs in sexual harassment cases.¹⁹ First, as social media users develop online personas and employees increasingly communicate via social media platforms, the line between a user's private behavior and his or her professional life becomes increasingly blurred.²⁰ In sexual harassment cases, this blurring may cause courts to admit social media evidence to show the plaintiff's appearance and actions "at work," even though such evidence might be irrelevant to a sexual harassment claim.²¹ Second, allowing broad discovery of social media evidence might discourage potential plaintiffs from bringing claims because the social media evidence may be revealed to the defendant during the discovery phase of litigation.²² Although courts have begun to develop methods for utilizing social media evidence, no court has yet identified a comprehensive approach to solve these problems.²³

This Note proposes a two-step process to stringently review social media evidence to determine its true relevancy to the particular sexual harassment case, and to prevent plaintiffs in sexual harassment cases from facing undue embarrassment.²⁴ Under this process, courts should

¹⁸ See Browning, *supra* note 13, at 465, 467 (stating that lawyers in all areas of legal practice are attempting to discover social media information); Jonathan E. DeMay, *The Implications of the Social Media Revolution on Discovery in U.S. Litigation*, BRIEF, Summer 2011, at 62–63 (suggesting that attorneys seek discovery of social media information directly from plaintiffs in order to get the best results); Gensler, *supra* note 12, at 8 (noting the widespread discussion of social media discoverability).

¹⁹ See *infra* notes 20–23 and accompanying text.

²⁰ See Patrick Lane, *A Sense of Place: Geography Matters as Much as Ever, Despite the Digital Revolution*, says Patrick Lane, ECONOMIST, Oct. 27, 2012, at 1–2, available at http://www.economist.com/sites/default/files/20121027_technology_and_geography.pdf. (explaining the increased connection of employees to their workplace due to social media). As of 2012, 51 percent of adults age twenty-five to thirty-four use social media while at work. THE SOCIAL MEDIA REPORT, *supra* note 9, at 11.

²¹ See *Meritor*, 477 U.S. at 69 (stating that courts must consider the totality of the circumstances in which the alleged harassment occurred); *infra* notes 95–104 and accompanying text (explaining why this information may be irrelevant in sexual harassment cases).

²² See *generally* Curcio, *supra* note 3 (explaining how allowing broad discovery may provide ultimately inadmissible information but may still embarrass the plaintiff so much that she chooses not to pursue a claim); *infra* notes 152–175 and accompanying text (describing the problem of embarrassment during discovery for sexual harassment plaintiffs).

²³ See *infra* notes 183–200 and accompanying text (identifying two court decisions that propose partial solutions to the discovery problem of social media evidence for sexual harassment plaintiffs).

²⁴ See *infra* notes 201–221 and accompanying text.

first limit the discovery of social media content by explicitly applying Federal Rule of Evidence 412's admissibility principles to discovery.²⁵ After limiting evidence in this way, courts should then perform an *in camera* review of social media evidence to screen out irrelevant and prejudicial evidence prior to providing the evidence to the defendant.²⁶ This two-step judicial action will not only lessen the existing vulnerability of sexual harassment plaintiffs during discovery but will also prevent courts from admitting irrelevant evidence simply because of its accessibility.²⁷ This Note also recognizes, however, that the success of this approach turns, in part, on increasing the familiarity of judges with social media and the social norms embedded therein.²⁸

This Note examines the current use of social media in litigation, and its impact on plaintiffs in sexual harassment cases specifically.²⁹ Part I first explains current sexual harassment law in the United States.³⁰ Next, it examines the discoverability of social media evidence and its impact on civil litigation.³¹ Part I concludes with a discussion of the admissibility of social media evidence.³² Part II then examines the impact of the discoverability and admissibility of social media evidence in sexual harassment cases specifically.³³ In particular, it focuses on Federal Rule of Evidence 412 and its application to social media evidence in sexual harassment cases.³⁴ Finally, Part III argues that courts must practice consistent, limiting judicial action and strive to understand social media and the social norms associated with it in order to limit the discovery of social media evidence and better protect sexual harassment plaintiffs.³⁵

²⁵ See FED. R. EVID. 412 (providing that evidence offered to prove a plaintiff's sexual behavior or sexual predisposition is inadmissible in cases involving sexual misconduct); *infra* notes 201–221 and accompanying text.

²⁶ See *infra* notes 201–221 and accompanying text. An “*in camera*” review is a trial judge's private consideration of evidence outside of the courtroom or out of the view of any spectators. BLACK'S LAW DICTIONARY 828 (9th ed. 2009).

²⁷ See *infra* notes 201–221 and accompanying text.

²⁸ See *infra* notes 222–229 and accompanying text.

²⁹ See *infra* notes 36–229 and accompanying text.

³⁰ See *infra* notes 39–54 and accompanying text.

³¹ See *infra* notes 55–83 and accompanying text.

³² See *infra* notes 84–118 and accompanying text.

³³ See *infra* notes 119–175 and accompanying text.

³⁴ See *infra* notes 125–151 and accompanying text.

³⁵ See *infra* notes 176–229 and accompanying text.

I. SEXUAL HARASSMENT THEN AND NOW: THE DEVELOPING RELATIONSHIP BETWEEN SEXUAL HARASSMENT LAW AND SOCIAL MEDIA

Section A of this Part explains the existing standards for establishing a hostile work environment sexual harassment claim.³⁶ Section B then examines the current discoverability of social media content in civil litigation.³⁷ Finally, Section C discusses the admissibility of social media content.³⁸

A. *The Passage of Title VII and the Birth of “Hostile Work Environment” Sexual Harassment Claims*

Title VII of the Civil Rights Act of 1964 is the primary federal anti-discrimination statute and the first federal statute to prohibit discrimination in the workplace.³⁹ Although Title VII prohibits discrimination “because of . . . sex,” sexual harassment was not prohibited until 1980 when it was identified in the U.S. Equal Employment Opportunity Commission’s (EEOC) Guidelines on Discrimination Based on Sex (“EEOC Guidelines”).⁴⁰ The EEOC Guidelines, which apply to all employers with fifteen or more employees, established that harassment in the workplace “on the basis of sex” constitutes a form of discrimination that violates Title VII of the Civil Rights Act of 1964.⁴¹

³⁶ See *infra* notes 39–54 and accompanying text.

³⁷ See *infra* notes 55–83 and accompanying text.

³⁸ See *infra* notes 84–118 and accompanying text.

³⁹ See 42 U.S.C. § 2000e-2 (2006); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 379 (2002). Title VII prohibits discrimination by employers or labor unions in hiring, discharge, compensation, and other terms and conditions of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. The Supreme Court has ruled that Title VII also prohibits facially neutral employment practices that disproportionately negatively impact a protected class. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–31 (1971); Befort, *supra* note 39, at 379.

⁴⁰ See 42 U.S.C. § 2000e-2; *Williams v. Saxbe*, 413 F. Supp. 654, 657–58 (D.D.C. 1976) (finding a violation of Title VII when “the conduct of the plaintiff’s supervisor [in response to plaintiff’s denial of the supervisor’s sexual advances] created an artificial barrier to employment which was placed before one gender and not the other”); 29 C.F.R. § 1604 (2012); Glendora C. Hughes, *Sexual Harassment: Then and Now*, 33 Md. B.J., May–June 2000, at 27 (identifying the first case in which sexual harassment was identified as a violation of Title VII in 1976); *About EEOC*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/> (last visited Sept. 13, 2013) (describing the role of the EEOC).

⁴¹ 29 C.F.R. § 1604.11 (2012); see 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e(b) (2006) (defining an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person”).

The EEOC Guidelines describe two types of actionable sexual harassment claims: quid pro quo and hostile work environment.⁴² The two types of claims offer different ways for a plaintiff to prevail on her harassment claim.⁴³ A hostile work environment claim, unlike a quid pro quo claim, allows a plaintiff to prevail without proving that a tangible employment action—such as a firing or demotion—occurred as a result of her refusal of sexual advances.⁴⁴ Rather, the success of a hostile work environment claim turns on the plaintiff proving that unwelcome sexual conduct is so severe or pervasive that it unreasonably interferes

⁴² 29 C.F.R. § 1604.11. This Note will focus on hostile work environment claims (hereinafter “sexual harassment cases”), rather than quid pro quo claims. A plaintiff may bring a quid pro quo sexual harassment claim when a supervisor with authority over her makes submission to or rejection of unwelcome sexual advances, requests for sexual favors, or other verbal or physical sexual conduct a “term or condition” of the plaintiff’s employment. *Id.*; Elsie Mata, *Title VII Quid Pro Quo and Hostile Environment Sexual Harassment Claims: Changing the Legal Framework Courts Use to Determine Whether Challenged Conduct Is Unwelcome*, 34 U. MICH. J.L. REFORM 791, 802 (2001). An explicit condition of employment might be “I will fire you if you don’t have sex with me.” Mata, *supra*, at 802. An implicit condition of employment might be a supervisor mentioning sexual favors while discussing promotion with a lower level employee. *Id.*; see *Nichols v. Frank*, 42 F.3d 503, 512–13 (9th Cir. 1994). Even if an employer is unaware of the harassing conduct, an employer will be liable for any of its supervisor’s harassing actions in a quid pro quo claim unless the employer can prove that it took immediate steps to correct the harassing behavior. *Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998) (noting that employer liability is logical when harassment has tangible results, such as hiring, firing, promotion, or changes in compensation or work assignment); *Meritor*, 477 U.S. at 70–71 (noting that courts have consistently held employers liable for actions of supervisors “whether or not the employer knew, should have known, or approved of the supervisor’s actions.”); 29 C.F.R. § 1604.11(d).

⁴³ See 29 C.F.R. § 1604.11; Mata, *supra* note 42, at 809. Both men and women can be victims of sexual harassment and both men and women can sexually harass members of either or both genders. Mata, *supra* note 42, at 793 n.10. For convenience and because sexual harassment is almost exclusively practiced by men against women, this Note will use the pronoun “he” when referring to the alleged harasser and “she” when referring to the plaintiff. *Id.*; see *Enforcement & Litigations Statistics*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Sept. 13, 2013) (showing that only 16.3 percent of all sexual harassment charges filed with the EEOC or Fair Employment Practices agencies nationwide in fiscal year 2011 were filed by males); *Sexual Harassment in the Workplace*, NAT’L WOMEN’S LAW CTR. (Aug. 1, 2000), <http://www.nwlc.org/resource/sexual-harassment-workplace> (citing a survey showing that almost half of all working women have experienced some form of harassment on the job). Throughout this Note, I will refer to persons subjected to sexual harassment as “plaintiffs.” Although not every victim of sexual harassment becomes a plaintiff in a sexual harassment claim, the use of the term is meant to prevent the negative connotation that comes with the term “victim.” See *Beiner*, *supra* note 4, at 125 n.4.

⁴⁴ *Meritor*, 477 U.S. at 65. Actions that qualify as “tangible employment actions” for the purposes of a quid pro quo claim include “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

with her work performance or creates an intimidating, hostile, or offensive working environment.⁴⁵

The U.S. Supreme Court first recognized a hostile work environment claim under Title VII in its 1986 decision in *Meritor Savings Bank v. Vinson*.⁴⁶ Through *Meritor* and two subsequent sexual harassment cases, the Court established the elements of a hostile work environment claim.⁴⁷ First, the Court determined that for the harassing conduct to be sufficiently severe and pervasive, conduct must be such that a reasonable person would objectively find it abusive, and the plaintiff herself subjectively found it so abusive as to create a hostile work environment.⁴⁸ Although no bright-line test exists for determining whether conduct is severe or pervasive, the Court suggested relevant factors to consider when evaluating the conduct objectively, including: the frequency of the conduct; the severity of the conduct; whether the conduct was physically threatening or humiliating; the social context, atmosphere, and attitudes of the workplace in which the harassment occurred; and, whether it unreasonably interfered with the plaintiff's ability to work.⁴⁹ Whereas these factors suggest sexual harassment, "mere offensive utterances" and the "innocuous differences in the ways men and women routinely interact" such as teasing and isolated comments do not rise to the level of actionable harassment.⁵⁰

Second, the Court held that courts must consider the "totality of the circumstances" in which the conduct occurred to determine whether the sexual advances were unwelcome by the plaintiff.⁵¹ The totality of the circumstances includes the nature of the sexual advances, the context in which the conduct occurred, and the plaintiff's words, actions,

⁴⁵ *Meritor*, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11(a)(3)(1985)); *id.* at 67.

⁴⁶ *Id.* at 66–67.

⁴⁷ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993); *Meritor*, 477 U.S. at 65.

⁴⁸ *Harris*, 510 U.S. at 21–22; *Meritor*, 477 U.S. at 60, 67; see Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL'Y 247, 252 (2008) (stating that the Court "refined the standard for establishing a hostile work environment" by establishing that the offensive conduct must be both objectively and subjectively hostile or abusive). The plaintiff in *Meritor* believed she had to tolerate her supervisor's sexual advances in order to keep her job, which the Court determined made the harassment a condition of her employment. 477 U.S. at 60.

⁴⁹ *Oncale*, 523 U.S. at 81–82; *Harris*, 510 U.S. at 21–23.

⁵⁰ *Oncale*, 523 U.S. at 81; *Harris*, 510 U.S. at 23; see *Faragher*, 524 U.S. at 788.

⁵¹ *Meritor*, 477 U.S. at 68–69 (stating that courts must consider the totality of the circumstances in which the alleged harassment occurred and that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome").

and appearance in the workplace.⁵² The Court explicitly stated that evidence of the plaintiff's dress and "personal fantasies" are "obviously relevant" to determining whether conduct is unwelcome.⁵³ If the objective and subjective prongs are satisfied, the plaintiff has established a cause of action for a hostile work environment claim.⁵⁴

B. *What Happens Online Does Not Stay Online:
The Discovery of Social Media Evidence*

Although the law governing social media discovery is still developing, recent case law shows that social media information is generally discoverable.⁵⁵ For its clear reasoning, interpretation of precedent, and broad applicability, the United States District Court for the Southern District of Indiana's 2010 decision in *E.E.O.C. v. Simply Storage Management, LLC*, has been the model used by other courts as they grapple with similar questions regarding social media evidence.⁵⁶ Additionally, in sexual harassment cases specifically, courts have supported the 2007 holding of the U.S. District Court for the District of Nevada in *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.* that social media communications with non-parties have limited or no relevance in sexual harassment cases.⁵⁷ For example, the U.S. District Court for the District of Colorado's 2012 decision in *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia* balanced the broad discoverability allowed in *Simply Storage* with the limit established in *Mackelprang*.⁵⁸

⁵² *Id.* at 69.

⁵³ *Id.* at 68–69.

⁵⁴ See *Meritor*, 477 U.S. at 65–67; 29 C.F.R. § 1604.11(a)(3) (2012).

⁵⁵ See Kathryn R. Brown, Note, *The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographs*, 14 VAND. J. ENT. & TECH. L. 357, 368 (2012); *infra* notes 56–83 and accompanying text (discussing recent cases on the issue of social media discovery).

⁵⁶ 270 F.R.D. 430, 432, 436–37 (S.D. Ind. 2010); see, e.g., *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570–71 (C.D. Cal. 2012) (citing *Simply Storage* when determining the relevant scope of discovery for social media information); *Robinson v. Jones Lang LaSalle Americas, Inc.*, No. 3:12-CV-00127-PK, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012) (describing *Simply Storage* as the "most frequently cited and well-reasoned" case on social media discovery); *id.* at *3 n.4 (noting that treatises and law reviews have discussed *Simply Storage* as the benchmark on social media discovery); *Holter v. Wells Fargo & Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011) (adopting the reasoning in *Simply Storage*).

⁵⁷ No. 2:06-cv-00788-JCM-GWF, 2007 WL 119149, at *6 (D. Nev. Jan. 9, 2007); *Browning*, *supra* note 13, at 474 (describing the *Mackelprang* decision as "particularly illuminating" to the issue of social media discovery); see *E.E.O.C. v. Original Honeybaked Ham Co. of Ga.*, No. 11-cv-02560-MSK-MEH, 2012 WL 5430974, at *2–3 (D. Colo. Nov. 7, 2012).

⁵⁸ See 2012 WL 5430974, at *2–3; *Simply Storage*, 270 F.R.D. at 435–37; *Mackelprang*, 2007 WL 119149, at *6–8.

1. Social Media Content Is Broadly Discoverable

In *Simply Storage*, a sexual harassment case, the defendants sought discovery of complete copies of the plaintiffs' Facebook and Myspace profiles, including all photographs, videos, status updates, messages, and any other changes to the profiles during the relevant time period.⁵⁹ The defendants argued that this social media content would provide relevant insight into the cause of the plaintiffs' emotional harm, which the EEOC, acting on behalf of the plaintiffs, alleged was due to the defendants' harassment.⁶⁰ The EEOC refused to produce this information, describing it as "overbroad, not relevant, [and] unduly burdensome," claiming that it invaded the plaintiffs' privacy, and asserting that it would harass or embarrass them.⁶¹

Ruling on the general discoverability of social media content, the court determined that although social media presents a new context for its application, the basic principles of discovery embodied in Federal Rule of Civil Procedure 26 still apply to social media evidence.⁶² Rule 26 provides a broad discovery standard that allows discovery of all material

⁵⁹ 270 F.R.D. at 432. A Facebook or Myspace profile typically consists of a picture of the user ("profile picture") and information about her, typically including her age, occupation, relationship status, and interests. See *How Do I Edit My Profile?*, Ask Myspace, *supra* note 17 (describing the information that can be included in a Myspace profile); *Update Your Basic Info*, FACEBOOK, <https://www.facebook.com/help/334656726616576/> (last visited Sept. 13, 2013) (providing information about what constitutes "basic information" on a Facebook Profile). The defendants in *Simply Storage* specifically sought "all photographs or videos posted by [plaintiffs] or anyone on their behalf on Facebook or MySpace" during a specified time period; and electronic or hard copies of the plaintiffs' "complete profile[s] on Facebook and MySpace (including all updates, changes, or modifications to [plaintiffs'] profile[s]) and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications." *Simply Storage*, 270 F.R.D. at 432. In regard to applications, the requests specifically sought information from applications "including, but not limited to, 'How well do you know me' and the 'Naughty Application.'" *Id.* Specifically identifying these applications, which seem to be about the plaintiff's personality and social interactions, implies that the defense was seeking to create a particular image of the plaintiff and raises concerns about social media photos and information being used in a similar way to a plaintiff's dress being used in rape and sexual harassment cases. See Beiner, *supra* note 4, at 126 (explaining concern about the bias that dress continues to create for juries in rape cases and how one would expect a similar result in sexual harassment cases).

⁶⁰ *Simply Storage*, 270 F.R.D. at 432–33 (explaining that the EEOC claimed the harassment increased the plaintiffs' anxiety and caused depression). The EEOC has the authority both to investigate charges of discrimination against employers and, if it finds discrimination has occurred, to attempt to settle or file a lawsuit. See *About EEOC*, *supra* note 40.

⁶¹ *Simply Storage*, 270 F.R.D. at 432.

⁶² *Id.* at 433–36 (establishing general discoverability principles for social media information); see FED. R. CIV. P. 26.

relevant to the claim or material capable of producing relevant and admissible information.⁶³

The court further concluded that social media information is not barred from discovery solely because the user labeled it “private” on the site, and therefore must be produced if relevant to a claim or defense.⁶⁴ Nonetheless, due to the sheer volume of information available on social media sites, courts first must evaluate the substance of social media communications to somewhat limit the amount of content produced.⁶⁵

Therefore, the *Simply Storage* court allowed discovery of the plaintiffs’ social media profiles, postings, messages, applications, third-party communications, and photographs posted on the social media site during the relevant time period of the claim.⁶⁶ The court explained that this information was relevant and discoverable because one could reasonably expect it to contain evidence of the plaintiffs’ claimed emotional distress.⁶⁷ The court instructed the EEOC to err on the side of production if relevance was in question, but also noted that the EEOC

⁶³ See FED. R. CIV. P. 26(b)(1). Rule 26(b)(1) provides the general rule for the scope of discovery and allows parties to discover “any nonprivileged matter that is relevant to any party’s claim or defense. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Rule 26(b)(2)(c) provides a list of reasons for which the court may limit discovery requests. FED. R. CIV. P. 26(b)(2)(c).

⁶⁴ *Simply Storage*, 270 F.R.D. at 434 (finding that although privacy concerns are often integral to determining whether a request for discovery is unduly burdensome, “a person’s expectation and intent that her [social media] communications be maintained as private is not a legitimate basis for shielding those communications from discovery”); see also *Romano*, 907 N.Y.S.2d at 653–54 (finding the plaintiff’s privacy argument unpersuasive because both Facebook and Myspace describe themselves as ways to share information with others and allow users to control the information they share with others).

⁶⁵ *Simply Storage*, 270 F.R.D. at 435 (noting that although most social media communication would reflect a plaintiff’s mental and emotional state, that is “hardly justification for requiring the production of every thought she may have reduced to writing” (quoting *Rozell v. Ross-Holst*, No. 05 Civ. 2936(JGK)JCF, 2006 WL 163143, at *3–4 (S.D.N.Y. Jan. 20, 2006)) (internal quotation marks omitted)).

⁶⁶ *Id.* at 436.

⁶⁷ *Id.* The court rejected the EEOC’s argument that the only relevant communications were those that specifically referenced matters alleged in the complaint, recognizing that such a narrow scope would likely fail to include pertinent information and provide an inaccurate picture of the cause and intensity of the alleged emotional injuries. *Id.* at 435–36 (noting that plaintiffs would likely exclude routine non-events from their social media profiles that might indicate the supervisor’s behavior was typically appropriate and not the cause of their emotional distress).

could still object to the admissibility of the discovered social media evidence at trial.⁶⁸

2. Limiting Discovery of Non-Party Social Media Communications in Sexual Harassment Cases

In contrast to the *Simply Storage* court, which concluded that social media evidence was broadly discoverable, the *Mackelprang* court limited the discovery of evidence of social media communications with non-parties.⁶⁹ There, the defendants sought discovery of the plaintiff's Myspace messages with third parties that they claimed would show that the plaintiff willingly engaged in and actively encouraged her supervisor's alleged sexual communications and that the supervisor's conduct did not offend or emotionally harm her.⁷⁰

The *Mackelprang* court recognized the potentially prejudicial impact of social media content.⁷¹ Explicitly applying the principles of Federal Rule of Evidence 412, which bars admitting evidence of the plaintiff's sexual conduct in particular cases, the *Mackelprang* court limited discovery of the plaintiff's private Myspace messages to those that contained information specifically regarding her sexual harassment claim or her alleged emotional distress.⁷² Other unrelated but sexually provocative messages with third parties, however, were found irrelevant, nondiscoverable, and inadmissible because a plaintiff's enjoyment of certain sexual activity in her private life does not prevent her from finding the same conduct offensive when it comes from a fellow employee or a supervisor.⁷³ The court instructed defense counsel that information

⁶⁸ *Id.* at 436–37. Unless otherwise specified, this Note's references to "social media evidence" refer to pictures, posts, status updates, and messages on Facebook, Twitter, or Myspace.

⁶⁹ See *Simply Storage*, 270 F.R.D. at 436 *Mackelprang*, 2007 WL 119149, at *6.

⁷⁰ *Mackelprang*, 2007 WL 119149, at *3.

⁷¹ *Id.* at *6–8; see *Simply Storage*, 270 F.R.D. at 435 (describing the *Mackelprang* court's decision); Browning, *supra* note 13, at 475 (noting that the *Mackelprang* decision was particularly helpful in determining what social media evidence is relevant); Brown, *supra* note 55, at 359–60 (discussing ways in which social media evidence could be prejudicial).

⁷² *Mackelprang*, 2007 WL 119149, at *6–8 (explaining how courts applying Rule 412 have limited evidence of the plaintiff's sexual conduct and ordering limited discovery); see FED. R. EVID. 412 (excluding evidence of the plaintiff's sexual behavior or predisposition); *infra* notes 125–151 and accompanying text (describing Federal Rule of Evidence 412 and its application in sexual harassment cases).

⁷³ *Mackelprang*, 2007 WL 119149, at *6–8 ("The courts applying Rule 412 have declined to recognize a sufficiently relevant connection between a plaintiff's non-work related sexual activity and the allegation that he or she was subjected to unwelcome and offensive sexual advancements in the workplace.").

from the Myspace account could be properly obtained only through narrow requests for production in order to avoid production of information that would ultimately prove inadmissible under Rule 412.⁷⁴

Though utilizing a different process, the U.S. District Court for the District of Colorado applied similar reasoning when limiting discovery of social media information in *Honeybaked Ham*.⁷⁵ There, the court allowed discovery of the plaintiffs' full, unredacted social media information to combat claims that the plaintiffs suffered emotional harm due to the defendant's sexual harassment.⁷⁶ Explicitly acknowledging that it was not ruling as to admissibility, the court ordered production of each of the plaintiffs' social media, specifically noting the potential relevance of photographs and text that provided insight into the plaintiffs' sexual activities, emotional state, and financial expectations related to the lawsuit.⁷⁷

Acknowledging the tenuous relevancy of certain evidence, however, the *Honeybaked Ham* court devised a process that reflects the balancing of the broad discoverability allowed in *Simply Storage* with the limit established in *Mackelprang*.⁷⁸ To weed out irrelevant information from discovered social media content, the court ordered the parties to provide access to their social media accounts directly to the court.⁷⁹ The court agreed to review the content in camera and then provide only the legally relevant social media information to the EEOC.⁸⁰ The court allowed the EEOC to exclude any privileged content from the

⁷⁴ *Id.* at *6–7 (discussing Rule 412 and explaining that discovery must be limited to prevent the defense from obtaining “irrelevant information, including possibly sexually explicit or sexually promiscuous email communications between Plaintiff and third persons, which are not relevant, admissible or discoverable”); *id.* at *8 (ordering defendant to serve narrow requests for discovery directly to the plaintiff to prevent discovery of irrelevant evidence).

⁷⁵ 2012 WL 5430974, at *2–3.

⁷⁶ *Id.* at *1–2. Because the plaintiffs had voluntarily shared this information with others on the social media sites, the court quickly dismissed any privacy concerns when allowing discovery. *Id.* at *2.

⁷⁷ *Id.* (finding that a photograph of the plaintiff wearing a shirt with the word “cunt” in large letters written across the front, statements by the plaintiff that losing a pet and ending a romantic relationship caused her emotional distress, statements that indicated the plaintiff was sexually aggressive, evidence of sexually charged communications with other class members, the plaintiff's post-termination employment opportunities, and the plaintiff's current financial condition were all potentially relevant for the defendant).

⁷⁸ *See id.* at *2–3; *Simply Storage*, 270 F.R.D. at 435–37; *Mackelprang*, 2007 WL 119149, at *6–8.

⁷⁹ *Honeybaked Ham*, 2012 WL 5430974, at *2–3.

⁸⁰ *Id.* at *3; *see infra* notes 90–94 and accompanying text (explaining Federal Rules of Evidence 401, 402, and 403, which govern relevancy determinations).

relevant social media information, and to object to the court's relevancy determinations.⁸¹ Then, the defendant would receive the remaining, relevant information from the EEOC.⁸² The court determined that this arrangement would allow the court to balance the discovery rules of Federal Rule of Civil Procedure 26 with the relevance rules of the Federal Rules of Evidence.⁸³

C. Admissibility of Social Media Evidence and Its Impact on Discovery

Although the admissibility of evidence is naturally a concern at the time of trial, determining the admissibility of social media evidence is crucial even in the pre-trial discovery phase.⁸⁴ Because Federal Rule of Civil Procedure 26 allows discovery of information "reasonably calculated to lead to the discovery of admissible evidence," a judge must have a clear understanding of what evidence will ultimately be admissible to accurately determine what information should be discoverable.⁸⁵ Thus, an analysis of the admissibility of social media evidence is necessary to fully understanding the vulnerability sexual harassment plaintiffs encounter when this evidence is discovered.⁸⁶

To date, most courts have admitted social media evidence under the Federal Rules of Evidence just as they would traditional forms of evidence.⁸⁷ Therefore, to be admissible, social media evidence must

⁸¹ *Honeybaked Ham*, 2012 WL 5430974, at *3.

⁸² *Id.*

⁸³ *Id.* at *2–3.

⁸⁴ See *Barta v. City & County of Honolulu*, 169 F.R.D. 132, 135 (D. Haw. 1996) (recognizing that "Rule 412 must inform the proper scope of discovery" in a sexual harassment case "to preclude inquiry into areas which will clearly fail to satisfy the balancing test of Rule 412(b)(2)"); Jane H. Aiken, *Protecting Plaintiffs' Sexual Pasts: Coping with Preconceptions Through Discretion*, 51 EMORY L.J. 559, 567 (2002) (explaining that vagueness in Rule 412 as to what information will be admissible causes confusion for judges about whether discovery of certain information will lead to admissible evidence).

⁸⁵ See FED. R. CIV. P. 26(b)(1); FED. R. EVID. 412 advisory committee's note ("In order not to undermine the rationale of Rule 412. . . . [c]ourts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case. . . ."); Aiken, *supra* note 84, at 567, 582 (stating that courts would exclude more evidence as nondiscoverable if they better understood Rule 412's bar against admitting certain evidence).

⁸⁶ See Aiken, *supra* note 84, at 567 (noting that the vagueness of Rule 412(b)'s admissibility standards contributes to "the inability of courts to know whether. . . discovery will lead to admissible evidence"); *id.* at 582 (claiming that Rule 412's civil rule would lead to less confusion if it provided specific instances when the victim's sexual conduct could be introduced, just as Rule 412's criminal rule does).

⁸⁷ Boggs & Edwards, *supra* note 13, at 369; Brown, *supra* note 55, at 379; Morales, *supra* note 5, at 32.

meet the three essential requirements of the Federal Rules of Evidence: it must be relevant, authentic, and not subject to an exclusionary rule.⁸⁸ Despite initial concerns, there is growing acceptance among attorneys and courts that social media evidence generally satisfies these standards, presents very few new challenges, and may be admitted as often as similar evidence in a traditional form.⁸⁹

1. If It's Not on Facebook, It Probably Never Happened: The Inherent Relevancy of Social Media Evidence in Modern Litigation

Due to its ubiquitous use, it is clear that social media evidence will often satisfy the relevancy test of Rule 401 of the Federal Rules of Evidence because it can make a fact of consequence in the case more or less probable than the fact would be without the evidence.⁹⁰ With mil-

⁸⁸ See FED. R. EVID. 401 (stating the test for relevancy); FED. R. EVID. 402 (stating the general admissibility of relevant evidence); FED. R. EVID. 901 (requiring that evidence is authentic); see, e.g., FED. R. EVID. 404(a); FED. R. EVID. 412; Morales, *supra* note 5, at 32.

⁸⁹ See Josh Gilliland, *iWitness: The Admissibility of Social Media Evidence*, LITIG., Winter 2013, at 20–21. One initial admissibility concern was that all social media evidence would be considered inadmissible hearsay under Federal Rule of Evidence 801 because all posts and messages on social media sites are categorically out-of-court statements. See FED. R. EVID. 801; Morales, *supra* note 5, at 42; Orenstein, *supra* note 7, at 194. Nevertheless, because much social media content introduced in court will be used for the reasons explicitly identified as exceptions in Rule 803, such as to refresh a witness's memory or to prove a statement was uttered, social media evidence generally will not be excluded as hearsay. See FED. R. EVID. 803; Gilliland, *supra*, at 21 (describing how social media evidence might fit into the hearsay exceptions); Orenstein, *supra* note 7, at 194–202 (describing the numerous exceptions to hearsay and the tendency of social media evidence to fit within them). Courts also initially struggled to apply Rule 901's authentication requirement to social media evidence due to an inherent distrust of Internet content. See FED. R. EVID. 901; Orenstein, *supra* note 7, at 207. Social media evidence is particularly difficult to authenticate because it is constantly updated, fake profiles are easily created, and hacking of profiles is fairly common. See Morales, *supra* note 5, at 36 (noting that many people post on Facebook about every aspect of their daily routine, sharing over 30 billion pieces of content each month); *Hacked Accounts*, FACEBOOK, <http://www.facebook.com/help/467703053240859/> (last visited Sept. 13, 2013). Though courts initially varied in their approaches to authentication, many courts now recognize that the methods used for authenticating traditional forms of evidence provide sufficient guidelines for ways to authenticate social media evidence. Morales, *supra* note 5, at 43 (explaining that though authentication is more difficult than other admissibility issues for social media evidence, generally traditional evidentiary principles may be used to determine its admissibility); Orenstein, *supra* note 7, at 207–08, 224 (noting that many courts have adopted a liberal approach to authentication due to concerns that a limiting admissibility standard will exclude critical evidence).

⁹⁰ See FED. R. EVID. 401; FED. R. EVID. 402; ; FED. R. EVID. 401 advisory committee's note; Morales, *supra* note 5, at 33 (“Social media evidence may be relevant to nearly every type of legal dispute primarily because, with 901 million people using just Facebook, there is a strong likelihood that the litigants in every case have social media profiles.”); *infra* notes 91–92 and accompanying text.

lions of people using social media every day to describe their daily routine, thoughts, and feelings, it is inevitable that parties will share information that relates to ongoing litigation, thereby satisfying Rule 401's relevance requirement.⁹¹ For example, many courts have found Twitter messages and Facebook posts to be relevant because they show the user's state of mind.⁹²

Nevertheless, Federal Rule of Evidence 403, which allows courts to exclude relevant evidence if the probative value of the evidence is substantially outweighed by its prejudicial effect, may still bar some social media evidence.⁹³ For example, in *Honeybaked Ham*, the court implicitly acknowledged the limits Rule 403 imposes when it expressed doubt that certain discoverable social media evidence pertaining to the plaintiff's character would ultimately be admissible.⁹⁴

2. Sharing More Than Courts Should See: Social Media Evidence and Exclusionary Rules of Evidence 404 and 412

Based on the wide range of content contained within social media evidence, Federal Rules of Evidence 404 and 412 are germane to de-

⁹¹ Morales, *supra* note 5, at 33; see FED. R. EVID. 401. As of June 2013, Facebook had over one billion monthly active users, 699 million of whom were daily users. *Newsroom: Key Facts*, *supra* note 9. In January 2012, Myspace had twenty-five million unique visitors. John Cook, *Say, What? Myspace Moves Up in Ranking of Top 50 U.S. Web Sites*, GEEKWIRE (Mar. 21, 2012, 2:02 PM), <http://www.geekwire.com/2012/Myspace-move-top-50-web-properties/>. Both Facebook and Myspace describe themselves as sites for people to meet and socialize, and both sites allow their users to interact with each other online. See *Myspace*, MYSFACE, <https://www.myspace.com/> (last visited Sept. 20, 2013) (inviting users to “[d]iscover, share, and connect with culture . . . and people”); *Newsroom Key Facts*, FACEBOOK, *supra* note 9 (stating Facebook’s mission “to make the world more open and connected” and to allow users to “stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them”). Facebook and Myspace allow users to connect through playing games, sharing music, recommending restaurants and more. *Newsroom*, FACEBOOK, <http://newsroom.fb.com/platform> (last visited Sept. 13, 2013); *This Is Myspace*, MYSFACE, <https://www.myspace.com/learnmore/> (last visited Sept. 20, 2013) (inviting users to “connect to music from the world’s largest streaming library”).

⁹² Christopher E. Parker & Travis B. Swearingen, “*Tweet*” *Me Your Status: Social Media in Discovery and at Trial*, FED. LAW., JAN.–Feb. 2012, at 35; see Brown, *supra* note 55, at 3361 (noting the use of social media evidence to prove a party’s emotional state).

⁹³ See FED. R. EVID. 403; Morales, *supra* note 5, at 42 (noting that despite the value of social media evidence, a Rule 403 challenge could still prevent the evidence from being admitted). Prejudicial effects include causing jury confusion, causing undue delay, or needlessly presenting cumulative evidence. FED. R. EVID. 403.

⁹⁴ See 2012 WL 5430974, at *2 (explaining that evidence intended to show the plaintiff’s “positive attitude” about certain sexual behaviors might not be admissible if it were unduly prejudicial to the plaintiff).

termining social media information's admissibility.⁹⁵ Companions to Rule 403, Rules 404 and 412 provide specific circumstances in which otherwise relevant evidence should not be admitted.⁹⁶ Rule 404(a) may bar a great deal of social media evidence in sexual harassment cases as the Rule prohibits the admission of evidence when its sole purpose is to convince the jury that a party's past behavior makes her more likely to have committed the bad act at issue.⁹⁷ Social media evidence may provide insight into a person's character because photographs on social media sites could reveal users' daily activities, posts could contain users' unfiltered thoughts or their typical practices, and messages could provide powerful depictions of users' beliefs or emotional state.⁹⁸

Equally important, social media sites provide more subtle insight into a user's character.⁹⁹ Facebook encourages users to "like" comments made by others or pages hosted by affinity groups.¹⁰⁰ These "likes" appear publically below the comment or page.¹⁰¹ Twitter users "follow" individuals, causes, groups, or celebrities, and a list of whom

⁹⁵ See FED. R. EVID. 404; FED. R. EVID. 412; *infra* notes 96–104 and accompanying text (describing the type of character evidence and evidence of sexual conduct available on social media sites).

⁹⁶ FED. R. EVID. 403 advisory committee's note (stating that "certain circumstances call for the exclusion of evidence which is of unquestioned relevance," and that Article IV of the Federal Rules of Evidence serves to "reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated"); see FED. R. EVID. 403; FED. R. EVID. 404(a); FED. R. EVID. 412.

⁹⁷ See FED. R. EVID. 404(a); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 668 (1998) (explaining that Rule 404 prohibits using evidence that the accused has a violent temper or started a fight in the past to argue that he probably started the fight in question). Rule 404(b) allows the admission of character evidence to show motive, identity, knowledge, opportunity, intent, preparation, plan, absence of mistake, or lack of accident. FED. R. EVID. 404(b)(2); Morales, *supra* note 5, at 41. Rule 403's balancing test, which evaluates whether the evidence's prejudicial effects substantially outweigh its probative value, still applies. Morales, *supra* note 5, at 42; see FED. R. EVID. 403.

⁹⁸ Parker & Swearingen, *supra* note 92, at 34–35 ("[A]necdotal evidence suggests that a user's social filter—that buffer that tells us what not to say and do at a dinner party—often stops working the moment a person sits down in front of a computer screen without the surrounding social constraints experienced in everyday life."); see Morales, *supra* note 5, at 41 (describing a Rule 404 challenge to character evidence in a criminal case); Brown, *supra* note 55, at 373 (noting that social media evidence has been used to undermine criminal defendants' remorse).

⁹⁹ See *infra* notes 100–104 and accompanying text (describing the ways the structure of social media sites provides insight into a user's character).

¹⁰⁰ *Like*, FACEBOOK, <http://www.facebook.com/help/like> (last visited Sept. 13, 2013).

¹⁰¹ *Id.*

they follow appears on their profile.¹⁰² Though potentially inaccurate, a list of a Facebook user's likes or whom a Twitter user follows could provide a convincing description of that user's character.¹⁰³ As such, attorneys are increasingly seeking to undermine their opposing party by admitting such readily accessible, unedited, and compelling evidence.¹⁰⁴

Similarly, though only applicable in cases involving sexual misconduct, Federal Rule of Evidence 412 further limits admission of evidence that pertains to certain aspects of a plaintiff's character.¹⁰⁵ Commonly known as the "rape shield law," Rule 412 prohibits the admission of evidence offered to prove a victim's sexual predisposition or that a victim previously engaged in sexual behavior.¹⁰⁶ Although it originally applied only in criminal rape cases and not to civil sexual harassment suits, Rule 412 now applies to any civil or criminal case that involves alleged sexual misconduct.¹⁰⁷ Previously, defendants regularly introduced evidence of a sexual harassment plaintiff's sexual history and sexual conduct to convince the court that the plaintiff was not the kind of person who would have found the workplace environment hostile.¹⁰⁸

In 1994, however, over a decade after its original enactment, Congress extended Rule 412 to civil cases after women's advocacy groups, legal scholars, and some courts recognized that admitting evidence of plaintiffs' past sexual conduct served only to embarrass plaintiffs and

¹⁰² See *FAQs About Following*, TWITTER, <https://support.twitter.com/groups/31-twitter-basics/topics/108-finding-following-people/articles/14019-faqs-about-following> (last visited Sept. 13, 2013).

¹⁰³ See *The Like Button*, FACEBOOK, <https://www.facebook.com/like> (last visited Sept. 13, 2013) (stating that the things you "like" on Facebook "help friends get to know you better"); *FAQs About Following*, *supra* note 102 (indicating that Twitter users follow people they find interesting or meaningful).

¹⁰⁴ See *Morales*, *supra* note 5, at 32 (stating that social media sites give lawyers access to "raw unfiltered evidence of a witness's activities, relationships, emotions, and thoughts"); *Orenstein*, *supra* note 7, at 192 (explaining attorneys' desire to gather uncensored information from social media sites).

¹⁰⁵ See FED. R. EVID. 412 (a); *Mackelprang*, 2007 WL 119149, at *3-4 (providing an example of when social media evidence may be affected by Federal Rule of Evidence 412).

¹⁰⁶ FED. R. EVID. 412(a); *Beiner*, *supra* note 4, at 126 (describing Federal Rule of Evidence 412 as the federal "rape shield law").

¹⁰⁷ See FED. R. EVID. 412; *Curcio*, *supra* note 3, at 137 (describing the extension of Rule 412 to civil cases).

¹⁰⁸ *Curcio*, *supra* note 3, at 133 (providing examples of the types of evidence that courts admitted about a plaintiff's sexual history prior to the extension of Rule 412, including evidence about pre-marital sex she had with her husband, her gynecology records, and evidence that she had watched X-rated films).

discourage women from initiating sexual harassment claims at all.¹⁰⁹ With the extension, Congress sought to protect plaintiffs' privacy and to allow courts to focus on legitimate claims of workplace sexual harassment.¹¹⁰

Nevertheless, Rule 412(b)(2) contains an exception in civil cases that may limit the protection it offers to sexual harassment plaintiffs.¹¹¹ Specifically, Rule 412(b)(2) permits evidence of the plaintiff's private sexual conduct or sexual proclivity as admissible if "its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party."¹¹² Because the Rule requires the defendant to "convince a court that the probative value of the evidence substantially outweighs the potential harm" or any resulting prejudice to the plaintiff, whether certain evidence will be admitted is decided on a case-by-case basis.¹¹³ Therefore, because individual courts decide whether evidence of past sexual behavior is prejudicial or harmful, such evidence is admissible more often in civil cases than in criminal cases, where Rule 412 does not provide such an exception.¹¹⁴

¹⁰⁹ FED. R. EVID. 412 advisory committee's note (stating the reason for the extension to civil cases); see Aiken, *supra* note 84, at 561–62 (describing the extension of Rule 412 and the private and sometimes embarrassing personal information that was admitted prior to Rule 412's extension); Curcio, *supra* note 3, at 126 (describing feminist scholars' and activists' dissatisfaction with Rule 412 prior to its extension to civil cases); *id.* at 135 (citing case law where courts barred discovery of evidence of the plaintiff's sexual history based on an application of Rule 412); *id.* at 137 (stating that Congress amended Rule 412 after public discussion of the issues involved).

¹¹⁰ FED. R. EVID. 412 advisory committee's note (explaining that Congress intended to protect plaintiffs against "invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process"); Curcio, *supra* note 3, at 126–27 (stating that Congress's goal in extending Rule 412 to civil cases was to protect plaintiffs and encourage victims of sexual harassment to bring meritorious claims to court).

¹¹¹ See FED. R. EVID. 412(b)(2); Beiner, *supra* note 4, at 128–29 (describing the Rule 412(b) extension and its effects).

¹¹² FED. R. EVID. 412(b)(2).

¹¹³ See *id.*; Beiner, *supra* note 4, at 129.

¹¹⁴ FED. R. EVID. 412(b)(2) advisory committee's note; see Beiner, *supra* note 4, at 129. The 412(b)(2) exception requires the proponent of the evidence to justify the admission of the evidence. FED. R. EVID. 412(b)(2). Although Rule 412 does not provide the same exception in criminal cases as it does in civil cases, Rule 412 does offer three specific exceptions in criminal cases for: (1) "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;" (2) "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;" and (3) "evidence whose exclusion would violate the defendant's constitutional rights." FED. R. EVID. 412(b)(1).

Although Rule 412 is an admissibility rule and therefore does not govern the discovery process directly, the Advisory Committee's Note to Rule 412 suggests that courts limit the scope of discovery using Rule 412's principles.¹¹⁵ The Advisory Committee's Note suggests that if a plaintiff seeks a protective order to bar discovery of evidence to prevent unnecessary and embarrassing invasions into her private life, the court should presumptively enter such an order under the principles of Rule 412.¹¹⁶

The *Mackelprang* court provided an example of how Rule 412 could limit discovery of social media evidence.¹¹⁷ Based on the *Mackelprang* court's application, courts could use Rule 412 as a guide to find that a Facebook user's relationship status, photographs depicting sexual behavior, or sexually explicit messages or comments each contain information about the plaintiff's personal sexual conduct outside of work that is irrelevant to her sexual harassment claim.¹¹⁸

II. THE SPECIAL DANGERS OF DISCOVERY AND ADMISSION OF SOCIAL MEDIA EVIDENCE IN SEXUAL HARASSMENT CASES

Because sexual harassment cases involve long-held social preconceptions regarding how men and women should behave, determining what information will lead to relevant and admissible evidence is par-

¹¹⁵ See FED. R. CIV. P. 26; FED. R. EVID. 412 advisory committee's note; Katie M. Patton, Note, *Unfolding Discovery Issues That Plague Sexual Harassment Suits*, 57 HASTINGS L.J. 991, 994-95 (2006) (describing the Advisory Committee's Note to Rule 412 and the purpose of the rule).

¹¹⁶ See FED. R. EVID. 412(c) advisory committee's note; *Mackelprang*, 2007 WL 119149, at *3-4 (citing the FED. R. EVID. 412 advisory committee's note); *supra* notes 69-74 and accompanying text (explaining the *Mackelprang* court's reliance on the principles of Rule 412 in noting that sexual conduct outside the workplace is irrelevant, nondiscoverable, and inadmissible). Because the discussion of discovery is limited to the Advisory Committee's Notes, courts must apply Rule 412's principles to discovery on a case-by-case basis. See FED. R. EVID. 412 advisory committee's note; Beiner, *supra* note 4, at 130-31. The Advisory Committee's Note also explains that plaintiffs may seek protective orders under Federal Rule of Civil Procedure 26(c). FED. R. EVID. 412 advisory committee's note. Rule 26(c) states that: "A party or any person from whom discovery is sought may move for a protective order. . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c).

¹¹⁷ See *Mackelprang*, 2007 WL 119149, at *6 (explicitly applying Rule 412's principles to deny discovery of the plaintiff's allegedly sexually promiscuous Myspace emails with third parties and explaining that "courts applying Rule 412 have declined to recognize a sufficiently relevant connection between a plaintiff's non-work related sexual activity and the allegation that he or she was subjected to unwelcome and offensive sexual advancements in the workplace").

¹¹⁸ See FED. R. EVID. 412; *Mackelprang*, 2007 WL 119149, at *6.

ticularly complex.¹¹⁹ Sexual harassment cases are difficult to prove, as they require different evidence and varying trial strategies for each particular case based on the personalities and actions of the parties and the environment in which the alleged harassment occurred.¹²⁰ Consequently, the inclusion of social media evidence as a new form of evidence will likely complicate the discovery and admissibility decisions in these cases even further.¹²¹

This Part examines the impact of social media evidence on the discovery and admission of evidence in sexual harassment cases.¹²² Section A of this Part discusses how Federal Rule of Evidence 412 fails to adequately exclude irrelevant social media evidence of a plaintiff's sexual history, just as it has failed with more traditional forms of evidence in sexual harassment cases.¹²³ Section B then explains why the discovery process is more problematic for sexual harassment plaintiffs than for plaintiffs in other civil suits, and examines why broad discovery of social media evidence will increase those difficulties.¹²⁴

A. *The Admissibility of Social Media Evidence in Sexual Harassment Cases*

Generally, sexual harassment cases present the same evidentiary challenges of relevance, authentication, and overcoming exclusionary rules as any other case.¹²⁵ But, although the elements of a hostile work environment claim—that the plaintiff was subject to unwelcome sexual conduct that was so severe or pervasive as to create an abusive or hostile work environment—should dictate which evidence is admitted, courts have struggled to define the scope of admissible evidence within these

¹¹⁹ See Curcio, *supra* note 3, at 125 (acknowledging that gender myths and sexual stereotypes influence the types of evidence admitted in sexual harassment cases); *infra* notes 120–121 and accompanying text.

¹²⁰ John M. Singleton, *Effective Strategies for Mounting a Successful Sexual Harassment Case*, in REPRESENTING EMPLOYEES IN SEXUAL HARASSMENT CASES: LEADING LAWYERS ON MANAGING SEXUAL HARASSMENT DISPUTES AND ACHIEVING SUCCESSFUL RESOLUTIONS 61, 61–62 (2012).

¹²¹ See DeMay, *supra* note 18, at 56 (noting issues that arise with using social media evidence in litigation); Orenstein, *supra* note 7, at 186 (stating that courts must determine how to apply the Federal Rules of Evidence to social media evidence and noting judicial concerns about how to do so).

¹²² See *infra* notes 125–175 and accompanying text.

¹²³ See *infra* notes 125–151 and accompanying text.

¹²⁴ See *infra* notes 152–175 and accompanying text.

¹²⁵ See *supra* notes 84–118 and accompanying text (discussing admissibility of social media evidence generally).

elements.¹²⁶ Further, courts still struggle to determine the appropriate balance of information to admit under Rule 412 when determining admissibility of evidence regarding the plaintiff's appearance at work or the plaintiff's past sexual conduct.¹²⁷ In particular, two elements of a hostile work environment claim—that the conduct was unwelcome and that the conduct created a objectively and subjectively hostile work environment—have resulted in the admittance of a wide range of evidence that should be barred by Rule 412.¹²⁸

1. It's Complicated: How Social Media Evidence Could Limit the Protection Federal Rule of Evidence Rule 412 Provides to Sexual Harassment Plaintiffs

Despite Rule 412's extension to civil cases, courts still lack clear guidance on applying Rule 412 in civil cases because of both the Supreme Court's disapproval of Rule 412's extension to civil cases and the flexibility of Rule 412(b)'s balancing test.¹²⁹ First, the Supreme Court seemed to support admission of evidence of plaintiffs' sexual activities in its 1986 decision in *Meritor Savings Bank v. Vinson*, where the court concluded that courts could properly consider a plaintiff's speech and appearance when it is relevant to the defense of a sexual harassment claim.¹³⁰ Further, prior to the extension of Rule 412 to civil cases, Chief Justice William Rehnquist, who had written for the Court in *Meritor*, expressed serious concern to the Rules Advisory Committee that extending Rule 412 to civil suits would unduly infringe upon defendants' ability to introduce evidence that the Court had explicitly allowed in

¹²⁶ Curcio, *supra* note 3, at 129–30, 139 (stating that the elements of a hostile work environment claim dictate what evidence will be admissible); Keller & Tracy, *supra* note 48, at 250 (stating that plaintiffs' failure to win sexual harassment cases is a result of misapplication of substantive law standards by lower courts); see *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (establishing the elements of a hostile work environment claim).

¹²⁷ See Curcio, *supra* note 3, at 139 (describing courts' struggle to determine what evidence Rule 412 should exclude).

¹²⁸ *Id.* at 126, 131–33.

¹²⁹ See Beiner, *supra* note 4, at 129 (stating issues with the flexibility of Rule 412(b)'s balancing test); Curcio, *supra* note 3, at 131–32 (describing the Supreme Court's decision in *Meritor* and its support for allowing admission of evidence of the plaintiff's appearance and conduct).

¹³⁰ See 477 U.S. at 68–69; Curcio, *supra* note 3, at 131.

Meritor.¹³¹ Other justices shared Justice Rehnquist's concerns so much so that the Court refused to forward the proposed rule to Congress.¹³²

Second, Rule 412(b) currently provides flexibility for defendants to introduce evidence of the plaintiff's sexual behavior and relationships.¹³³ Because courts have almost universally found concerns about the plaintiff's privacy moot in the context of social media evidence, the Rule 412(b) balancing test usually favors defendants who introduce such evidence.¹³⁴ Courts agree that information posted freely by plaintiffs on social media sites is not protected in the same way as something said in the privacy of a home.¹³⁵

Diminished privacy concerns matter because social media content provides a great deal of irrelevant information about a plaintiff's appearance, sexual relationships, and otherwise private interactions.¹³⁶ For example, a Facebook profile may document the user's romantic relationship status and could track changes in that relationship.¹³⁷ Facebook profile pictures—which are almost always publically viewable—most of-

¹³¹ Letter from Chief Justice William H. Rehnquist to John F. Gerry (Apr. 29, 1994), in H.R. Doc. No. 103-250, at V–VI (1994); Beiner, *supra* note 4, at 131; Curcio, *supra* note 3, at 137; see *Meritor*, 477 U.S. at 68–69.

¹³² Curcio, *supra* note 3, at 137. Although Congress still enacted the extension, the Supreme Court has yet to explicitly utilize Rule 412 to limit evidence from discovery or admission in a sexual harassment case. See Beiner, *supra* note 4, at 130–31.

¹³³ FED. R. EVID. 412(b); see Beiner, *supra* note 4, at 129.

¹³⁴ See Browning, *supra* note 13, at 494 (citing a magistrate judge stating that “one does not venture onto a social networking site to engage in a soliloquy”); see, e.g., E.E.O.C. v. Original Honeybaked Ham Co. of Ga., No. 11-cv-02560-MSK-MEH, 2012 WL 5430974, at *1 (D. Colo. Nov. 7, 2012) (“As a general matter, I view [social media] content logically as though each class member had a file folder titled ‘Everything About Me,’ which they have voluntarily shared with others.”); E.E.O.C. v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (“[A] person’s expectation and intent that her communications be maintained as private is not a legitimate basis for shielding those communications from discovery. . . . [M]erely locking a profile from public access does not prevent discovery”); *Romano v. Steelcase Inc.*, 907 N.Y.S.2d 650, 656. (Sup. Ct. 2010) (“Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy.”).

¹³⁵ See, e.g., *Honeybaked Ham*, 2012 WL 5430974, at *1 (stating that the plaintiff’s social media profile was essentially an “Everything About Me” folder to which the defendant might need access); *Simply Storage*, 270 F.R.D. at 434 (noting that marking information as private on a social media site does not create a right to privacy); *Romano*, 907 N.Y.S.2d at 655 (explaining that the Fourth Amendment constitutional right to privacy protects people, but not places like a social media site).

¹³⁶ See Bianca Boster, *What Facebook Knows About Our Break-ups and Romances*, HUFFINGTON POST, Mar. 23, 2012, available at http://www.huffingtonpost.com/2012/03/23/facebook-break-ups-relationships_n_1375822.html (explaining that Facebook relationship statuses provide insight into the user’s dating habits and other behavior).

¹³⁷ *Id.*

ten depict users as attractive, and interested in romantic relationships.¹³⁸ Consequently, the combination of courts' limited privacy concerns for social media evidence and Rule 412(b)'s flexibility could provide fact-finders with increased access to misleading social media evidence of the plaintiff's personal life that could essentially override the protections Congress sought with the extension of Rule 412.¹³⁹

Presenting a more abstract barrier, the courts' lack of familiarity with social media sites and the changing social norms regarding their use exacerbate the problem of gender bias in admissibility decisions.¹⁴⁰ The desire to create a likable online persona results in users posting pictures of themselves that conform to society's notions of attractiveness or showing themselves as more extraverted than they actually are.¹⁴¹ Though current case law has not yet addressed this scenario directly, a picture posted on a social media site of a plaintiff socializing with male co-workers in which she appears flirtatious or outgoing could undermine her claims that sexual advances from a supervisor were unwelcome.¹⁴² Similarly, a picture of the plaintiff in a revealing dress—likely chosen to highlight her physical appearance—could lead the jury to believe she may have encouraged the alleged sexual advances.¹⁴³

¹³⁸ See Brown, *supra* note 55, at 365 (noting a 2008 study that revealed that Facebook profile pictures are most often chosen to depict the user as attractive, fun-loving, humorous, or in a successful romantic relationship). On Facebook, a user's profile picture is public by default. *Basic Privacy Settings & Tools*, FACEBOOK, <http://www.facebook.com/help/193629617349922/> (last visited Sept. 13, 2013); see also Fung, *supra* note 2 (stating that a thumbnail of the user's Facebook profile picture can be viewed by the general public on Google and other Internet search engines).

¹³⁹ See Curcio, *supra* note 3, at 139 (explaining how the balancing test embodied in Rule 412(b) results in inconsistent protections for sexual harassment plaintiffs); see, e.g., *Honeybaked Ham*, 2012 WL 5430974, at *2–3 (allowing broad social media discovery despite Rule 412).

¹⁴⁰ See Curcio, *supra* note 3, at 157–66 (discussing gender bias and various stereotypes about women that play an explicit or implicit role in sexual harassment cases and their impact); Brown, *supra* note 55, at 381–82 (noting courts' failure to understand the complexities of social motives for putting certain content on social media). Although the extension of Rule 412 to civil cases helped judges recognize when traditional forms of evidence containing information about the plaintiff's sexual activity were prejudicial or irrelevant, a judge's lack of familiarity with social media evidence could lead the judge to admit such information. See *infra* notes 141–143 and accompanying text.

¹⁴¹ See Brown, *supra* note 55, at 364–65 (explaining how social media sites can portray an idealized version of the user).

¹⁴² See Curcio, *supra* note 3, at 166–67 (explaining how evidence of a plaintiff's conduct with co-workers could be used to show that the plaintiff welcomed the conduct from the alleged harasser).

¹⁴³ See Brown, *supra* note 55, at 365 (explaining that a 2009 study highlighted the significance of physical appearance in a typical social media user's self-presentation, concluding that people most often “untag” a photograph because of dissatisfaction with how they

2. Everything Looks Better on Facebook: Why Social Media Evidence Provides Inaccurate Information About Sexual Harassment Plaintiffs

In addition to content implicated by Rule 412, social media's limited ability to accurately reveal a plaintiff's mental state or her genuine social interactions will hurt sexual harassment plaintiffs who seek damages for emotional harm.¹⁴⁴ In 1994, Congress amended Title VII to allow compensation for emotional harm caused by sexual harassment.¹⁴⁵ When a plaintiff seeks such damages, however, she places her psychological history into controversy and is thus vulnerable to the admission of any evidence that implies something other than the alleged harassment caused the plaintiff's emotional harm.¹⁴⁶ Accordingly, defendants may seek admission of social media evidence to prove a sexual harassment plaintiff enjoyed her work, got along with her colleagues, or was depressed for reasons other than the alleged harassment.¹⁴⁷

Social media evidence, however, is particularly unreliable for proving a plaintiff's emotional state because users often project happiness on social media even when they are dealing with emotional distress.¹⁴⁸ As one commentator explained, social media users engage in a "game where [they] try to see who can fabricate the most believable lie in a competition to see who has the best life."¹⁴⁹ Nevertheless, courts in a variety of civil suits have admitted social media evidence as a convincing "snapshot of the user's relationships and state of mind at the time of the content's posting."¹⁵⁰ Until courts recognize the limitations of so-

look in it); *see also Meritor*, 477 U.S. at 68–69 (stating that the plaintiff's appearance is relevant in a sexual harassment case).

¹⁴⁴ *See* Brown, *supra* note 55, at 364–67 (discussing various ways in which social media evidence presents an inaccurate view of the user and why it does so).

¹⁴⁵ *See* 42 U.S.C. § 1981a(b)(3) (2006) (allowing sexual harassment plaintiffs to recover damages for emotional harm); Curcio, *supra* note 3, at 149 (describing the amendment of Title VII to allow recovery for emotional damages and its role in sexual harassment cases).

¹⁴⁶ *See* Curcio, *supra* note 3, at 149.

¹⁴⁷ *See, e.g., Honeybaked Ham*, 2012 WL 5430974, at *1–2 (stating that the defendant sought social media evidence to examine the causes of the plaintiffs' emotional harm other than the alleged harassment); *Simply Storage*, 470 F.R.D. at 435 (noting that social media evidence showing that other stressors could have caused the emotional harm is relevant and discoverable).

¹⁴⁸ Brown, *supra* note 55, at 364–65, 380–82.

¹⁴⁹ *Id.* at 366 (internal quotation marks omitted) (citing Nathan Batson, *The Facebook You*, COMICAL CONCEPT, <http://www.comicalconcept.com/illustrations/the-facebook-you> (last visited Sept. 14, 2013)).

¹⁵⁰ *See* Bass v. Miss Porter's Sch., No. 3:08cv1807 (JBA), 2009 WL 3724968, at *1–2 (D. Conn. Oct. 27, 2009) (requiring further production of information from the plaintiff's Facebook account because each "snapshot" could provide relevant information); Brown, *supra* note 55, at 380 (discussing the proper use of social media evidence in personal injury

cial media, such evidence will continue to be afforded more weight than it deserves, thereby undermining plaintiffs' claims of emotional harm in sexual harassment cases.¹⁵¹

B. *It Has Always Been Broken: How the Inclusion of Social Media Evidence Highlights the Existing Vulnerability of Sexual Harassment Plaintiffs During Discovery*

Given the relevancy of social media evidence, its broad discoverability, and a history of courts misapplying or ignoring Rule 412 in sexual harassment cases, social media evidence of a plaintiff's past sexual conduct will likely be admitted whenever it is found discoverable.¹⁵² Therefore, the discovery stage will play a critical role in determining the impact of social media evidence on sexual harassment plaintiffs.¹⁵³ This is particularly problematic because the discovery process has long been more hazardous to sexual harassment plaintiffs than to those in other civil suits.¹⁵⁴

Chiefly, sexual harassment plaintiffs face increased dangers during discovery because defense counsel can intimidate plaintiffs, as Rule 412 does not sufficiently guard against abusive, probing discovery techniques.¹⁵⁵ Consequently, if the court allows broad and invasive discovery into the plaintiff's sexual conduct prior to trial, the plaintiff can only chose between complying with the discovery request, or withdraw-

cases to show physical harm); *see, e.g.*, *State v. Altajir*, 2 A.3d 1024, 1029, 1033 (Conn. App. Ct. 2010) (admitting Facebook photographs showing the defendant socializing happily as evidence that the defendant did not feel remorse); *Romano*, 907 N.Y.S.2d at 654 (using Facebook and Myspace photographs of the plaintiff outsider her home to undermine her claims of loss of enjoyment of life).

¹⁵¹ *See* Brown, *supra* note 55, at 392–93.

¹⁵² *See id.* at 392 (describing social media evidence's increasing role in litigation); *supra* notes 90–94 and accompanying text (describing the relevancy of social media evidence); *supra* notes 59–68 and accompanying text (examining the *Simply Storage* decision and social media evidence's broad discoverability); *supra* notes 125–151 and accompanying text (discussing the limits of Rule 412 as applied to sexual harassment cases).

¹⁵³ *See* Curcio, *supra* note 3, at 139–40 (explaining the vulnerability of sexual harassment plaintiffs at the discovery stage).

¹⁵⁴ *See id.* at 140–42 (describing problems associated with using Rule 412 to protect sexual harassment plaintiffs during discovery).

¹⁵⁵ *Id.*; Patton, *supra* note 115, at 993; *see* Aiken, *supra* note 84, at 560–61. As an evidentiary rule, Rule 412 adequately protects victims in criminal cases because it prevents irrelevant evidence of the plaintiff's sexual conduct from being admitted at trial, which is the first time opposing counsel can inquire into the victim's personal life. Curcio, *supra* note 3, at 140.

ing or settling her claim to avoid such embarrassment.¹⁵⁶ The lack of protection from discovery of the plaintiff's private sexual conduct often deters victims of sexual harassment from bringing a suit at all.¹⁵⁷ The invasive discovery process may be as emotionally devastating for plaintiffs as the harassment itself.¹⁵⁸ Therefore, sexual harassment plaintiffs find little comfort in the knowledge that much of the information produced during discovery will likely prove inadmissible at trial.¹⁵⁹

Additionally, despite Rule 412's Advisory Committee's Note that encourages courts to apply the principles of Rule 412 to discovery decisions, several problems with the note's language have prevented it from adequately protecting plaintiffs in sexual harassment cases.¹⁶⁰ First, the Advisory Committee's Note states that courts "should"—not "must"—presumptively enter protective orders to limit invasive and irrelevant inquiries into the plaintiff's private life.¹⁶¹ Consequently, the permissive statutory language allows courts to utilize Rule 412's limiting suggestion merely on a case-by-case basis, which can lead to inconsistent and unfair results for plaintiffs.¹⁶²

Second, the Advisory Committee's Note first requires plaintiffs to seek a protective order for Rule 412 to apply at the discovery stage at all.¹⁶³ As a result, uninformed plaintiffs may have their private sexual

¹⁵⁶ Curcio, *supra* note 3, at 140–41; Richard C. Bell, Note, *Shielding Parties to Title VII Actions for Sexual Harassment from the Discovery of Their Sexual History—Should Rule 412 of the Federal Rules of Evidence Be Applicable to Discovery?*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 287 (1998).

¹⁵⁷ See Curcio, *supra* note 3, at 136 (citing a survey in which 90 percent of sexual harassment victims reported they would not sue due to fear of retaliation and fear of loss of privacy).

¹⁵⁸ Patton, *supra* note 115, at 1006–07 (discussing the experience of many sexual harassment plaintiffs during discovery); see Bell, *supra* note 156, at 294 (describing a similar experience for rape victims who are "bullied" during the trial process).

¹⁵⁹ Patton, *supra* note 115, at 997–98.

¹⁶⁰ See FED. R. EVID. 412 advisory committee's note; Patton, *supra* note 115, at 996 (noting that the Advisory Committee's Note is not binding and therefore has limited power); Bell, *supra* note 156, at 289 (explaining problems caused by requiring plaintiffs to take action before Rule 412 can protect them during discovery).

¹⁶¹ See FED. R. EVID. 412(c) advisory committee's note; *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (explaining that using "shall" in the statute "normally creates an obligation impervious to judicial discretion.").

¹⁶² See Curcio, *supra* note 3, at 143 (stating that courts vary in the weight they give to the Advisory Committee's suggestion to presumptively grant protective orders and in the way they integrate Federal Rule of Evidence 412 with Federal Rule of Civil Procedure 26); Patton, *supra* note 115, at 996 (explaining that the Advisory Committee's Note provides only suggested guidance to courts).

¹⁶³ See FED. R. EVID. 412 advisory committee's note; Aiken, *supra* note 84, at 567.

conduct on display during discovery.¹⁶⁴ Placing this burden on plaintiffs makes Rule 412's already non-binding application to discovery even more limited; if a plaintiff fails to move for a protective order, no other bar exists to prevent this evidence from the scope of discovery.¹⁶⁵

Recent rulings allowing broad discovery of social media evidence in sexual harassment cases indicate that social media evidence will increase the existing vulnerability of sexual harassment plaintiffs during discovery.¹⁶⁶ Neither the U.S. District Court for the Southern District of Indiana's 2010 decision in *E.E.O.C. v. Simply Storage Management, LLC*, nor the U.S. District Court for the District of Colorado's 2012 decision in *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia* mentioned the potential limits that Rule 412 places on discovery.¹⁶⁷ In fact, the *Honeybaked Ham* court allowed broad discovery of social media content despite its explicit statement that it remained unconvinced that all of the discovered information would be relevant and admissible at trial.¹⁶⁸ These rulings allowing broad discovery of social media evidence support the argument that the current law fails to prevent the increased embarrassment and harm sexual harassment plaintiffs could face during discovery from the inclusion of social media evidence.¹⁶⁹

Discovery of a sexual harassment plaintiff's full Facebook profile—a request that has been recently approved by a court—provides a concrete example of this increased harm.¹⁷⁰ At a minimum, a Facebook

¹⁶⁴ Bell, *supra* note 156, at 289.

¹⁶⁵ See Aiken, *supra* note 84, at 567.

¹⁶⁶ See *Honeybaked Ham*, 2012 WL 5430974, at *1–3 (allowing broad discovery but emphasizing that the court's decision applied only to discovery by stating that the court was “not determining what is admissible at trial”); *Simply Storage*, 270 F.R.D. at 437 (noting that the court's order for production did not automatically make the social media content admissible).

¹⁶⁷ See *Honeybaked Ham*, 2012 WL 5430974, at *2–3; *Simply Storage*, 279 F.R.D. at 435–36. In *Simply Storage*, the court allowed broad discovery of the plaintiffs' full Myspace profiles, including postings, messages, applications, some third-party communications, and all photographs taken or posted during the claim's relevant time period. 279 F.R.D. at 435–36. Similarly, in *Honeybaked Ham*, the court ordered production of the plaintiffs' full social media profile. 2012 WL 5430974, at *2–3.

¹⁶⁸ *Honeybaked Ham*, 2012 WL 5430974, at *1, *3.

¹⁶⁹ See *Honeybaked Ham*, 2012 WL 5430974, at *2; *Simply Storage*, 279 F.R.D. at 435–36; Curcio, *supra* note 3, at 139–140 (explaining the risk of exposure of embarrassing, private information sexual harassment plaintiffs face during discovery).

¹⁷⁰ See Bass, 2009 WL 3724968, at *1–2 (ordering production of the plaintiff's complete Facebook profile because the court's review of the unproduced profile contained information that was clearly relevant); Curcio, *supra* note 3, at 139–140 (explaining the risk of exposure of embarrassing, private information sexual harassment plaintiffs face during discovery); DeMay, *supra* note 18, at 56 (explaining that discovery of social media provides parties with access to more information than traditional forms of evidence).

profile provides the defendant with a profile picture and other photographs of the user, comments made by or about the plaintiff, and often the user's relationship status.¹⁷¹ Thus, without any depositions or lengthy interrogatories, a simple discovery request could quickly provide the defendant with damaging images of the plaintiff and insight into her romantic relationships.¹⁷² The same result could arise from discovery of a plaintiff's Twitter or Myspace account.¹⁷³ Therefore, social media evidence heightens the threat of exposure of sexual harassment plaintiffs' sexual conduct because it provides such evidence faster and on a larger scale than traditional forms of evidence would.¹⁷⁴ As attorneys show no signs of shying away from social media evidence, courts must create workable rules for social media evidence in sexual harassment cases that allow defendants to utilize this new form of evidence without causing more harm to plaintiffs.¹⁷⁵

III. LIMITING DISCOVERY, PREVENTING EXPOSURE: A PROPOSAL FOR LIMITING SOCIAL MEDIA EVIDENCE AT THE DISCOVERY STAGE IN SEXUAL HARASSMENT CASES

Because social media evidence harms sexual harassment plaintiffs at the discovery stage, protection for sexual harassment plaintiffs must

¹⁷¹ See *Introducing Timeline*, FACEBOOK, <https://www.facebook.com/about/timeline> (last visited Sept. 14, 2013) (providing an example of a user's Facebook profile).

¹⁷² See FED. R. EVID. 412 advisory committee's note (explaining that Rule aims to avoid discovery of the plaintiff's sexual history in order to prevent "sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process"); DeMay, *supra* note 18, at 56 (stating that discovery of social media provides parties with the opportunity to obtain information about which they might otherwise be unaware).

¹⁷³ See Browning, *supra* note 13, at 465 (describing an example, outside of sexual harassment, in which Twitter messages could be used against someone in litigation); see *supra* notes 69–77 and accompanying text (explaining a court's approach to the discovery of information posted on Myspace).

¹⁷⁴ See Curcio, *supra* note 3, at 140–41 (highlighting the increased exposure during discovery for sexual harassment plaintiffs and how discovery rules promote liberal production of evidence of the plaintiff's sexual conduct); DeMay, *supra* note 18, at 56 (noting the additional information provided by one social media request that would not be readily available via traditional forms of evidence); Patton, *supra* note 115, at 998 (stating that inadmissibility at trial does not provide relief to plaintiffs during the discovery stage).

¹⁷⁵ See Browning, *supra* note 13, at 467 (discussing the widespread use of social media evidence by lawyers in private and public sectors and noting a 25 percent increase in usage in 2009); DeMay, *supra* note 18, at 56 (stating that social media evidence has fundamentally changed how businesses run and people interact and therefore has become an integral part of litigation).

apply to the discovery stage as well.¹⁷⁶ Two sexual harassment decisions in the last decade offered methods of limiting discovery of social media evidence that, if combined, will prevent irrelevant social media information from being admitted, and will protect sexual harassment plaintiffs from embarrassing exposure of their private sexual conduct via social media evidence.¹⁷⁷ In its 2007 decision in *Mackelprang v. Fidelity National Title Agency of Nevada, Inc.*, the U.S. District Court for the District of Nevada explicitly utilized Federal Rule of Evidence 412 to limit the discovery of social media information, thereby sending a clear signal to other courts that Rule 412's principles can be effectively applied in the discovery stage of sexual harassment cases.¹⁷⁸ In its 2012 decision in *E.E.O.C. v. Original Honeybaked Ham Co. of Georgia*, the U.S. District Court for the District of Colorado limited unnecessary exposure of the plaintiff's private sexual conduct and other irrelevant evidence through an in camera review of broadly discoverable social media content, thereby allowing for the removal of irrelevant evidence prior to the defendant ever seeing it.¹⁷⁹

Section A of this Part endorses the approaches taken by the *Mackelprang* and *Honeybaked Ham* courts to limit social media evidence at the discovery stage.¹⁸⁰ Section B then argues that a hybrid of the two courts' approaches in handling social media evidence will best protect sexual harassment plaintiffs.¹⁸¹ Finally, Section C explains that for this Note's proposal to have meaningful and long-lasting effects, judges must be made aware of the norms embodied in social media evidence.¹⁸²

¹⁷⁶ See Curcio, *supra* note 3, at 139–40 (explaining the vulnerability of sexual harassment plaintiffs at the discovery stage); *infra* notes 201–221 and accompanying text (describing how protections at the discovery stage would benefit sexual harassment plaintiffs).

¹⁷⁷ See *E.E.O.C. v. Original Honeybaked Ham Co. of Ga.*, No. 11-cv-02560-MSK-MEH, 2012 WL 5430974, at *2–3 (D. Colo. Nov. 7, 2012) (ordering an in camera review of social media evidence); *Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc.*, 2:06-cv-00788-JCM, 2007 WL 119149, at *6 (D. Nev. Jan. 9, 2007) (specifically discussing Rule 412 in regard to discovery of social media evidence); *infra* notes 183–217 and accompanying text.

¹⁷⁸ See 2007 WL 119149, at *6; *infra* notes 189–194 and accompanying text.

¹⁷⁹ 2012 WL 5430974, at *2–3; see *infra* notes 196–200 and accompanying text.

¹⁸⁰ See *infra* notes 183–200 and accompanying text.

¹⁸¹ See *infra* notes 201–221 and accompanying text.

¹⁸² See *infra* notes 222–229 and accompanying text.

A. *Moving in the Right Direction: The Benefits of the Mackelprang and Honeybaked Ham Decisions*

Given the courts' acceptance of social media evidence and its dominance in modern social interactions, it is impractical and inappropriate for courts to bar discovery of social media evidence in sexual harassment cases entirely.¹⁸³ Social media users can send messages, update their statuses, and post photographs from anywhere in the world, including their workplace.¹⁸⁴ Consequently, supervisors and employees may have interactions on social media, and it would be unfair to both parties to exclude these communications from sexual harassment cases.¹⁸⁵ Moreover, in cases of long-term harassment, social media could document the duration of the harassment, therefore benefitting the plaintiff.¹⁸⁶ Accordingly, rather than eliminating social media evidence from sexual harassment cases altogether, courts should seek to limit this evidence during discovery.¹⁸⁷

The two significant problems that social media evidence presents for sexual harassment plaintiffs—the inclusion of irrelevant information and the exposure of the plaintiff's private sexual conduct—were addressed by the *Mackelprang* and *Honeybaked Ham* courts, respectively.¹⁸⁸

¹⁸³ See, e.g., *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 435 (S.D. Ind. 2010) (allowing broad discovery of social media beyond content that directly references the matters alleged in the complaint); *infra* notes 184–186 and accompanying text (explaining why a complete bar to social media evidence would be inappropriate).

¹⁸⁴ See THE SOCIAL MEDIA REPORT, *supra* note 9, at 1 (stating that social media users have the freedom to connect wherever they want); Lane, *supra* note 20, at 2 (describing how employees are constantly connected to their workplace via mobile phones and computers).

¹⁸⁵ See Curcio, *supra* note 3, at 177 (describing defendants' arguments that restrictions on discovery would unfairly limit their ability to bring a full defense); Jeremy Gelms, Comment, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 249–50 (2012) (explaining that social media provides additional ways for colleagues to interact and that the court may consider information posted on social media sites as part of the totality of the circumstances in certain cases).

¹⁸⁶ See Singleton, *supra* note 120, at 66 (noting the importance of documenting the incidences of harassment).

¹⁸⁷ See Gensler, *supra* note 12, at 12–13 (introducing the idea that judicial action is the best way to resolve any discovery issues with social media evidence); *infra* notes 189–221 and accompanying text (describing the *Mackelprang* and *Honeybaked Ham* decisions and why courts should follow a combination of the approaches taken to discovery in these two cases).

¹⁸⁸ See *Honeybaked Ham*, 2012 WL 5430974, at *2–3; *Mackelprang*, 2007 WL 119149, at *6; *infra* notes 189–200 and accompanying text.

1. Utilizing the *Mackelprang* Method: Applying the Limiting Principles of Federal Rule of Evidence 412 During Discovery to Prevent Exposure of Private Sexual Conduct

The *Mackelprang* court established a clear limit on the scope of discoverable social media evidence by explicitly applying Rule 412's principles at the discovery stage.¹⁸⁹ The court's action achieved two important goals.¹⁹⁰ First, though still respecting that Federal Rule of Civil Procedure 26 governs discovery, the court utilized the principles of Rule 412 to remove irrelevant information at the discovery stage to prevent the embarrassment that would likely result from one's private sexual conduct being exposed to the defendant.¹⁹¹

Second, the explicit application of Rule 412's tenets to discovery of social media evidence provides a clear, understandable precedent that other courts can easily apply in their own cases.¹⁹² By explicitly stating its consideration of Rule 412, the *Mackelprang* court's approach prevents potential confusion by other courts about the use of Rule 412 when limiting discovery, a confusion inherent in less explicit applications of Rule 412 in sexual harassment cases.¹⁹³ Consequently, courts that agree that Rule 412 should play a role in discovery can rely on *Mackelprang* to determine the scope of Rule 412 and how to adequately balance it with Federal Rule of Civil Procedure 26.¹⁹⁴ Thus, to protect sexual harassment plaintiffs, courts should include an explicit application of Rule 412's principles.¹⁹⁵

¹⁸⁹ 2007 WL 119149, at *3-4; see Gensler, *supra* note 12, at 15 (noting how the *Mackelprang* court limited the scope of discovery of social media evidence). Though acknowledging the liberal discovery standard of Federal Rule of Civil Procedure 26, the *Mackelprang* court refused to allow discovery of the plaintiff's Myspace messages about her private sexual activities with third parties. 2007 WL 119149, at *4-6.

¹⁹⁰ See *infra* notes 191-195 and accompanying text.

¹⁹¹ See *Mackelprang*, 2007 WL 119149, at *4-6.

¹⁹² See Browning, *supra* note 13, at 474 (stating that the *Mackelprang* decision is particularly helpful to courts determining the discovery of social media evidence). *But see* Beiner, *supra* note 4, at 132 (explaining how a lack of discussion of Rule 412 in *Mackelprang* makes it difficult for other courts to follow the decision).

¹⁹³ See Beiner, *supra* note 4, at 131-32 (explaining that when courts do not mention Rule 412, it is difficult to determine whether the court applied Rule 412 in sexual harassment cases in which evidence of sexy dressing was admitted or excluded).

¹⁹⁴ See *Mackelprang*, 2007 WL 119149, at *3-4; Bell, *supra* note 156, at 288 (noting that the Advisory Committee's Note makes it clear that Rule 412 has a role in the discovery process but that the exact nature of that role remains unclear); *cf.* Patton, *supra* note 115, at 992 (explaining how bright-line rules benefit courts and plaintiffs).

¹⁹⁵ See *supra* notes 189-194 and accompanying text.

2. The *Honeybaked Ham* Approach: Using an “In Camera” Review to Limit Discovery of Irrelevant Social Media Evidence

The *Honeybaked Ham* court provided additional security to sexual harassment plaintiffs by performing an in camera review of social media evidence during discovery.¹⁹⁶ Although Rule 412(c) already requires an in camera review to determine the admissibility of evidence, performing the review in the discovery phase will: (1) provide added protection to the plaintiff by alleviating concerns about public embarrassment that might prevent a sexual harassment plaintiff from coming forward; and (2) more effectively prevent the defendant from receiving irrelevant information about the plaintiff’s private sexual conduct, non-work related socializing, or any other irrelevant evidence via broad social media discovery.¹⁹⁷ Further, the process does not prevent a defendant from gathering relevant evidence to prove his case because it merely allows the judge to eliminate evidence that ultimately will be inadmissible.¹⁹⁸ The in camera review also benefits defendants because it allows a judge to order further discovery if he or she believes the original production was inadequate.¹⁹⁹

Additionally, utilizing an in camera review for social media evidence may allow attorneys to present research about social media’s inability to accurately portray the user’s emotional state, thus reducing the risk of judges giving excessive value to social media content.²⁰⁰

B. *Two Is Better Than One: A Proposed Solution Provided by Combining the Mackelprang and Honeybaked Ham Approaches*

Though each approach has its benefits, the *Mackelprang* and *Honeybaked Ham* approaches better serve sexual harassment plaintiffs as complementary methods for limiting discovery of social media evidence in sexual harassment cases.²⁰¹ Combining the two approaches

¹⁹⁶ See 2012 WL 5430974, at *2–3.

¹⁹⁷ See FED. R. EVID. 412(c); Bell, *supra* note 156, at 298–99; Brown, *supra* note 55, at 387 (suggesting that courts should use in camera review to extract relevant information from the mass of irrelevant information provided on Facebook); *supra* notes 155–159, 170–175 and accompanying text (explaining why sexual harassment plaintiffs fear exposure and embarrassment at the discovery stage).

¹⁹⁸ See *Honeybaked Ham*, 2012 WL 5430974, at *2–3 (allowing discovery of all information relevant to the defense).

¹⁹⁹ See *Bass v. Miss Porter’s Sch.*, No. 3:08cv1807 (JBA), 2009 WL 3724968, at *1–2 (D. Conn. Oct. 27, 2009) (ordering additional discovery because the plaintiff’s original production inadequately responded to the defendant’s request).

²⁰⁰ See Brown, *supra* note 55, at 387–88.

²⁰¹ See *Honeybaked Ham*, 2012 WL 5430974, at *2; *Mackelprang*, 2007 WL 119149, at *3–4.

will best eliminate irrelevant evidence, protect sexual harassment plaintiffs, and provide a clear rule for other courts to follow.²⁰² Explicitly applying Rule 412's limiting principles prior to an *in camera* review of social media evidence creates a discovery method that limits production of irrelevant social media evidence, lessens plaintiffs' concerns about exposure of their private sexual behavior without unduly burdening courts, and provides guidance to other courts on how to review social media evidence.²⁰³

First, combining an *in camera* review with an explicit discussion of Rule 412 provides more security to sexual harassment plaintiffs' private sexual conduct than either approach can provide on its own.²⁰⁴ Making an explicit reference to the balancing of Federal Rule of Evidence 412 and Federal Rule of Civil Procedure 26 shows plaintiffs that the court understands its obligation to balance the goals of the two rules and that it will not allow defendants to circumvent the limits of Rule 412.²⁰⁵ Further, the explicit reference allows plaintiffs to protect themselves from invasive discovery requests by citing a specific legal principle or referring to case law where the court explicitly applied Rule 412's principles to social media discovery.²⁰⁶ Performing an *in camera* review of social media evidence alone would not provide plaintiffs with such an accessible tool.²⁰⁷

Equally important, limiting discovery with Rule 412's principles reduces the amount of information produced for judges to review in

²⁰² See *infra* notes 203–217 and accompanying text (explaining the benefits for sexual harassment plaintiffs of combining the two approaches).

²⁰³ See *Honeybaked Ham*, 2012 WL 5430974, at *2–3; *Mackelprang*, 2007 WL 119149, at *3–4; *Beiner*, *supra* note 4, at 131–32; *Bell*, *supra* note 156, at 288; *Brown*, *supra* note 55, at 387; *infra* notes 204–217 and accompanying text.

²⁰⁴ See *Curcio*, *supra* note 3, at 175 (suggesting a more restrictive discovery rule because Rule 412 currently requires women “to expose intimate personal details of their lives in order to take advantage of a legal remedy [which] makes the remedy come at so great a cost that many victims may choose not to pursue it”); *Patton*, *supra* note 115, at 997–98 (stating that sexual harassment plaintiffs are more likely to bring meritorious claims if judges apply the principles of Rule 412 to the discovery process).

²⁰⁵ *Patton*, *supra* note 115, at 998 (indicating that judges must show their awareness of the policy balance between Federal Rule of Civil Procedure 26 and Federal Rule of Evidence 412 when determining the scope of discovery to give clear signals to both plaintiffs and defendants that they have applied both rules).

²⁰⁶ See *id.* at 996 (noting that some sexual harassment plaintiffs have successfully convinced courts to apply Rule 412 and that doing so protected the plaintiffs' privacy and prevented potential stress and intimidation during discovery).

²⁰⁷ See *Brown*, *supra* note 55, at 387 (stating that an *in camera* review may be requested by a plaintiff but the court may be hesitant to allow it due to the burden it places on judicial resources).

camera and, consequently, alleviates the burden on judicial resources that an in camera review could cause.²⁰⁸ An in camera review alone places a burden on the court to sift through the tonnage of social media evidence produced.²⁰⁹ Without another limiting action prior to in camera review to guide them, courts are unlikely to adopt an in camera review as a tool in cases involving multiple plaintiffs or years of social media content.²¹⁰

Further, judges without much exposure to social media may doubt their ability to critically and efficiently examine social media evidence, especially at such an early stage in litigation.²¹¹ Applying Rule 412's principles to the in camera review process will specify what type of information judges must exclude as irrelevant, thereby simplifying the process for judges and encouraging more consistent results across courts.²¹²

Compatibly, an in camera review helps courts apply Rule 412 at the discovery stage.²¹³ Because the facts and issues of a specific case have not been fully developed at the discovery stage and the court has not

²⁰⁸ See *infra* notes 209–212 and accompanying text (describing the judicial burden an in camera review may impose).

²⁰⁹ Brown, *supra* note 55, at 388 (noting that an in camera review requires significant judicial resources).

²¹⁰ See Gensler, *supra* note 12, at 26 (stating that courts do not want to take on the impractical task of sifting through discovery production unguided); Brown, *supra* note 55, at 388.

²¹¹ See Brown, *supra* note 55, at 388 (discussing one judge's doubts about his ability to accurately determine which social media evidence would be relevant during an in camera review).

²¹² See FED. R. EVID. 412; *cf.* Brown, *supra* note 55, at 387–88 (stating concern that an in camera review at the discovery stage might lead to “guess[ing] as to what is germane to defenses which may be raised at trial” (quoting *Zimmerman v. Weis Mkts., Inc.*, No. CV-09-1535, 2011 WL 2065410, at *1 n.2 (Pa. Ct. Com. Pl. May 19, 2011) (internal quotation marks omitted))). Though the in camera review in *Honeybaked Ham* limited the defendant's access to evidence of the plaintiff's private sexual conduct, the court did not expressly identify such evidence as irrelevant. See 2012 WL 5430974, at *2–3. In fact, the court acknowledged that evidence of the plaintiff's comfort with offensive sexual comments and her sexually promiscuous conduct was potentially relevant. See *id.* at *2 (identifying evidence from Facebook of the plaintiff “wearing a shirt with the word ‘cunt’ in large letters written across the front (a term that she alleges was used pejoratively against her, also alleging that such use offended her) . . . her self-described sexual aggressiveness . . . [and] sexually amorous communications with other class members” as “potentially relevant”). Therefore, after *Honeybaked Ham*, both sexual harassment plaintiffs and courts deciding their cases may remain unsure about the effective exclusion of evidence of private sexual conduct. See Beiner, *supra* note 4, at 131–32 (explaining that it is difficult to determine whether the courts have applied Rule 412 in sexual harassment cases in which evidence of sexy dressing was admitted or excluded because many courts have not mentioned Rule 412 in their decision).

²¹³ See *infra* notes 214–215 and accompanying text.

yet seen the evidence sought, it is difficult for a judge to determine what evidence may be potentially relevant and how the evidence fits into the Rule 412 balancing test.²¹⁴ An in camera review allows courts to see such evidence and to make an informed decision, guided by the principles of Rule 412.²¹⁵

Finally, because Rule 412 only prohibits the admission of evidence of the plaintiff's sexual conduct, an in camera review is necessary to fully relieve plaintiffs' concerns that defendants will have access to private and potentially embarrassing information.²¹⁶ Because social media content often contains both relevant and unfairly prejudicial evidence, reviewing social media evidence in camera will be particularly helpful to eliminate social media evidence that is irrelevant for reasons beyond those contained in Rule 412.²¹⁷

Consistently using this Note's proposed judicial approach will lessen the need for some of the more drastic changes suggested to protect sexual harassment plaintiffs, such as amending Rule 412 or the Federal Rules of Civil Procedure.²¹⁸ The Supreme Court's hesitation about extending Rule 412 to civil cases indicates the Court's disapproval of changes to the Rules of Evidence that might unduly burden defendants by overly restricting the use of certain sources of evidence.²¹⁹ Further, the agreement among most academics and practitioners that the tradi-

²¹⁴ See Curcio, *supra* note 3, at 143.

²¹⁵ See *id.*; see *supra* notes 204–214 and accompanying text.

²¹⁶ See Curcio, *supra* note 3, at 175 (explaining that women may choose not to pursue a sexual harassment claim if they fear exposure of their private sexual conduct); Brown, *supra* note 55, at 392 (describing how in camera review allows courts to focus only on relevant evidence).

²¹⁷ See *Honeybaked Ham*, 2012 WL 5430974, at *2–3 (allowing the plaintiff to object to the relevancy of evidence produced during the in camera review or to claim that certain information was privileged); Brown, *supra* note 55, at 371–72 (describing how courts have already used an in camera review to determine the relevancy of social media evidence in different types of cases); *id.* at 386–87 (advocating for using an in camera review of Facebook evidence as an effective means of limiting irrelevant or unfairly prejudicial Facebook content).

²¹⁸ See Aiken, *supra* note 84, at 582 (proposing an amended Rule 412 that explicitly identifies when evidence of sexual conduct might be relevant); Bell, *supra* note 156, at 342 (suggesting an amendment to Federal Rule of Civil Procedure 26 to protect sexual harassment plaintiffs rather than relying on Rule 412); *but see* Gensler, *supra* note 12, at 9–10 (stating why amending the Rules of Civil Procedure to accommodate social media evidence is an unrealistic solution and explaining that existing judicial action sufficiently accommodates discovery of social media evidence).

²¹⁹ See Aiken, *supra* note 84, at 570 (noting that the Supreme Court's resistance to extending Rule 412 to civil cases indicates the Court's intent to purposefully limit the rule); *supra* notes 130–132 and accompanying text (describing the Supreme Court's resistance to the extension of Rule 412).

tional rules of discovery and admissibility apply to social media evidence undermines the argument that an amended procedural rule is a reasonable solution.²²⁰ Therefore, the courts' consistent willingness to perform an in camera review of social media evidence and to apply Rule 412's principles at the discovery stage provides the most comprehensive and practical protection for sexual harassment plaintiffs.²²¹

*C. Embracing Social Media: The Necessity of Exposure and Awareness
for Effective Change*

Notably, the effectiveness of this proposal relies on judges gaining exposure to social media and improving their understanding of the complex social norms embodied in social media content.²²² Because Rule 412 requires judges to subjectively balance the probative value of the evidence against the danger of harm to the plaintiff, the judge's personal values, social stereotypes of others, and unconscious biases inevitably affect his judgments in any given situation.²²³ To truly protect sexual harassment plaintiffs in modern society, judges must first scrutinize themselves to identify their preconceptions about individuals who share provocative images or statements on social media sites in order to fairly evaluate the probative value of social media evidence.²²⁴

Judges must also recognize their lack of appreciation for the complex social norms embedded in social media sites.²²⁵ Social science studies on the nuances of social media and how others interpret it

²²⁰ See e.g., Boggs & Edwards, *supra* note 13, at 367 (discussing how discovery and admissibility decisions will be made regarding social media evidence); Gensler, *supra* note 12, at 31–33, 36 (explaining the virtual impossibility of promulgating effective discovery rules specifically for social media); Morales, *supra* note 5, at 43 (determining that traditional evidentiary principles can be adapted for social media evidence).

²²¹ See *supra* notes 201–220 and accompanying text.

²²² See Curcio, *supra* note 3, at 181–82; Brown, *supra* note 55, at 381.

²²³ See Patton, *supra* note 115, at 995. These stereotypes may include: assuming the plaintiff caused or initiated the sexual conduct; that women assume the risk of harassment by dressing or behaving in a certain way; and that women are responsible for not preventing sexual conduct from going too far. Aiken, *supra* note, 84, at 570–71. These ideas stem from traditional notions of gender roles and are widely held by both men and women. *Id.* Subconsciously, judges may rely on these notions to determine why some women are victimized and others are not. See *id.*

²²⁴ See Aiken, *supra* note 84, at 570–71 (explaining that judges cannot properly determine the probative value of evidence of sexual misconduct); Curcio, *supra* note 3, at 181 (noting that the first step to educating oneself about gender bias is recognizing that the problem exists); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 79 (1987) (suggesting that judges apply “strict scrutiny to [them]selves” to overcome issues of bias).

²²⁵ See Brown, *supra* note 55, at 392 (stating that to ensure fairness in cases involving social media evidence, courts must evaluate the evidence within the context of social norms).

could help judges to better understand the probative value of this evidence.²²⁶ Judges should also consider the research about the limited value of social media content when evaluating emotional harm.²²⁷ Increased awareness of the stereotypes and biases underlying their decisions may force judges to examine discovery requests more carefully and potentially give greater weight to the principles of Rule 412.²²⁸ A fuller understanding of social media evidence will help judges to treat social media content appropriately.²²⁹

CONCLUSION

Recent determinations that social media evidence is broadly discoverable and generally admissible pose unique dangers to plaintiffs in sexual harassment cases. Sexual harassment plaintiffs have been more vulnerable at the discovery stage than most other civil plaintiffs, and social media evidence serves to increase that danger. Social media evidence provides a new source of information that is less limited by privacy concerns and contains a blend of both relevant and irrelevant evidence. A seemingly harmless picture posted by the plaintiff might also contain comments from other users describing her behavior or reveal aspects of her private life.

Social media content also fails to provide an accurate picture of the plaintiff's mental state, and therefore is less reliable in a sexual harassment case in which it is used to prove the subjective experience of the harassment. Accordingly, in order to use social media evidence in sexual harassment cases, courts must stringently review the material and consider the social norms surrounding social media to determine its true relevancy to the case.

Specifically, to protect sexual harassment plaintiffs as Congress intended to do with the extension of Rule 412 to civil cases, courts must practice a consistent method for evaluating the discovery of social media evidence and strive to improve their understanding of social media. Courts should explicitly apply Rule 412's principles to discovery and then perform an *in camera* review of social media evidence to screen out irrelevant and prejudicial evidence. This judicial approach will not only alleviate the existing vulnerability of sexual harassment plaintiffs

²²⁶ See *id.* at 392–93.

²²⁷ See Brown, *supra* note 55, at 381.

²²⁸ See *id.*

²²⁹ See Curcio, *supra* note 3, at 166 (stating that Rule 412 can best protect sexual harassment plaintiffs after judges recognize the gender bias implicit in their decision making).

during discovery but will also prevent easily accessible, voluminous social media evidence from intensifying the problem.

Finally, in order for this judicial action to be meaningful, courts must be made aware of society's gender biases and how those biases are incorporated in and exacerbated by social media. With a combination of continued awareness and consistent judicial action, courts can provide adequate protection for sexual harassment plaintiffs even as social media evidence plays an increasingly important role in civil litigation.

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