

## SEXUAL HARASSMENT ON SOCIAL MEDIA: WHY TRADITIONAL COMPANY SEXUAL HARASSMENT POLICIES ARE NOT ENOUGH AND HOW TO FIX IT

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### I. INTRODUCTION

In the year 2016, the Equal Employment Opportunity Commission (EEOC) received 12,860 complaints of sexual harassment,<sup>1</sup> illustrating that sexual harassment is ever present in our society. Compounding this issue, the rise of social media use by both individuals<sup>2</sup> and businesses,<sup>3</sup> and its undoubted prevalence in our society, raises concerns that sexual harassment on social media is the workplace sexual harassment issue of the present and future. Despite increased use of social media for personal and business purposes, regulators and courts have given little guidance as to how employers should deal with social media sexual harassment claims.<sup>4</sup> Indeed, case law is especially unclear about when employers will be liable for sexual harassment between employees that occurs on social media.<sup>5</sup>

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<sup>1</sup> *Charges Alleging Sexual Harassment FY 2010 – FY 2015*, U.S. EEOC, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) (last visited Oct. 24, 2017).

<sup>2</sup> Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RESEARCH CTR. (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/> (finding that sixty-five percent of adults use social media as of 2015, which is “a nearly tenfold jump in the past decade”).

<sup>3</sup> Nora Ganim Barnes & Ava M. Lescault, *The 2011 Inc. 500 Social Media Update: Blogging Declines as Newer Tools Rule*, Center for Marketing Research at University of Massachusetts Dartmouth (Sept. 20, 2016), [http://www.umassd.edu/media/umassdartmouth/cmr/studiesandresearch/2011\\_Inc500.pdf](http://www.umassd.edu/media/umassdartmouth/cmr/studiesandresearch/2011_Inc500.pdf) (finding that while business blogging has declined, other social media use by businesses on websites like Facebook, Twitter, and LinkedIn increased between 2008 and 2011).

<sup>4</sup> *See infra* Section III.C.1.

<sup>5</sup> *Id.*

The first purpose of this Comment is to address the rise of sexual harassment and clarify when an employer is liable for such conduct. The second purpose of this Comment is to give employers guidance in creating effective social media sexual harassment policies in an effort to minimize social media sexual harassment in the first place and help employers avoid liability when it does occur. Part II explains what “traditional workplace harassment” is, discusses early workplace harassment case law, examines when employers may be held liable for the conduct of employees, and considers when an employer may be liable for employee conduct outside of work. Part III focuses on the rise of social media use, discusses its effect in the workplace, and examines case law where courts consider social media harassment as evidence in sexual harassment claims. Part IV analogizes other areas of the law in an effort to help determine when employers may be liable for social media sexual harassment. Part V argues that company social media policies and company sexual harassment policies are each insufficient on their own to combat social media harassment and thus, employers must enact policies that specifically address such harassment. Part V also provides policy-drafting guidance so that employers can draft effective anti-harassment policies.

## II. THE DECLINE IN “TRADITIONAL WORKPLACE SEXUAL HARASSMENT”

“Throughout this Comment, the term “traditional workplace harassment” refers to sexual harassment that takes place somewhere other than the Internet. Sexual harassment can include “unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.”<sup>6</sup> The harasser and the victim can be either male or female and the conduct need not necessarily be sexual in nature.<sup>7</sup> For example, “offensive remarks about a person’s sex” can result in a sexual harassment claim.<sup>8</sup> Unlawful sexual harassment does not include minor teasing, isolated minor incidents, or offhand comments; rather, the harassment becomes illegal “when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).”<sup>9</sup> “The harasser can be the victim’s supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.”<sup>10</sup> Title VII of the Civil Rights Act of 1964 (Title VII) makes it an unlawful

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<sup>6</sup> *Sexual Harassment*, U.S. EEOC, <https://www.eeoc.gov/laws/types/sexualharassment.cfm> (last visited Sept. 25, 2016).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

employment practice to discriminate against someone on the basis of “race, color, religion, sex, or national origin.”<sup>11</sup> Discriminatory practices under Title VII include, among other things, harassment on the basis of sex.<sup>12</sup>

A. *Early “Traditional Workplace Harassment” Cases and Title VII Claims*

The District Court for the District of Columbia in *Williams v. Saxbe*,<sup>13</sup> was the first federal court to recognize sexual harassment as unlawful employment discrimination.<sup>14</sup> The issue presented was whether a supervisor’s retaliatory action based on an employee’s denial of the supervisor’s sexual advances constitutes unlawful sex discrimination.<sup>15</sup> After denying her supervisor’s sexual advances, Diane Williams’ supervisor, William Saxbe, began humiliating her and treating her poorly.<sup>16</sup> He refused to give her notice of her work obligations, consider her proposals and recommendations, or recognize her as a competent professional.<sup>17</sup> In addition, he gave her unwarranted reprimands.<sup>18</sup> On September 11, 1972, Saxbe gave Williams notice of his intention to terminate her, and on September 21, 1972, she was given notice of termination, effective the next day.<sup>19</sup>

Taking the facts alleged in the plaintiff’s complaint as true, the court found that the conduct amounted to unlawful employment discrimination because there was an “artificial barrier” to employment created for one gender and not the other, despite both genders being similarly situated.<sup>20</sup> The court rejected the defendant’s argument that discrimination would be unlawful only if the policy or practice targeted a specific characteristic, peculiar to one’s gender.<sup>21</sup> Instead the court stated, “a rule, regulation, practice, or policy [ ] applied on the basis of gender is alone sufficient for a finding of sex discrimination.”<sup>22</sup> The court agreed with the Administrative Hearing Examiner who found the defendant did not meet his burden to show

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<sup>11</sup> 42 U.S.C.A. § 2000e-2(b) (West Year).

<sup>12</sup> *Facts About Sexual Harassment*, U.S. EEOC, <https://www.eeoc.gov/eeoc/publications/fs-sex.cfm> (last visited Oct. 24, 2017).

<sup>13</sup> 413 F. Supp. 654 (D.D.C. 1976), *rev’d on other grounds*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

<sup>14</sup> Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 252 n.15 (2012).

<sup>15</sup> *Williams*, 413 F. Supp. at 657.

<sup>16</sup> *Id.* at 655–56.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 655.

<sup>20</sup> *Id.* at 657–58.

<sup>21</sup> *Williams*, 413 F. Supp. at 658.

<sup>22</sup> *Id.* (citing *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971)).

that the harassment was unconnected to the termination.<sup>23</sup> It was therefore reasonable to infer that the termination was not due to the employee's poor performance, but was instead a retaliatory act.<sup>24</sup>

*Meritor Savings Bank v. Vinson*<sup>25</sup> was the first United States Supreme Court case to recognize workplace sexual harassment as actionable under Title VII, and the first time the Court recognized a cause of action for sexual harassment because of a hostile work environment.<sup>26</sup> Ms. Vinson, a bank employee, brought a Title VII claim alleging her supervisor made unwanted sexual advances towards her.<sup>27</sup> In fear of losing her job, she complied with his sexual demands and had intercourse with him multiple times over the course of her four years of employment.<sup>28</sup> On some occasions, the advances resulted in rape.<sup>29</sup> The bank had no notice of the sexual harassment because Vinson never utilized the bank's complaint procedure out of fear of losing her job.<sup>30</sup>

The employer claimed it was not liable because Title VII prohibits discrimination claims with respect to "compensation, terms, conditions, or privileges" of employment and the statute therefore allows recovery only when there is "tangible loss" of an "economic character."<sup>31</sup> The Court rejected this argument and noted that in Title VII, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a Congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>32</sup> Accordingly, the Court concluded that Title VII claims are not limited to claims resulting in economic injury ("quid pro quo" claims), but can also include harassment that results in a hostile or abusive work environment ("hostile environment" claims).<sup>33</sup> The Court further explained that for sexual harassment to be actionable, the harassment must be "severe or pervasive" under the totality of the circumstances so as "to alter the conditions of [the victim's] employment and create an abusive working environment."<sup>34</sup> This is the current standard for Title VII claims.<sup>35</sup>

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<sup>23</sup> *Id.* at 662.

<sup>24</sup> *Id.* at 656.

<sup>25</sup> 477 U.S. 57 (1986).

<sup>26</sup> Brief for Petitioner, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979).

<sup>27</sup> *Meritor*, 477 U.S. at 60.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 64.

<sup>32</sup> *Id.* (citing *L.A. Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

<sup>33</sup> *Meritor*, 477 U.S. at 65-66.

<sup>34</sup> *Id.* at 67 (citing *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

<sup>35</sup> See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (reaffirming the *Meritor* standard, which has not since been overruled).

The Court has declined to definitively decide the issue of employer liability in cases where the employer is not on notice of conduct.<sup>36</sup> Nonetheless, the Court rejected the lower court's finding that employers are automatically liable for harassment carried out by their supervisor employees, based on inferred Congressional intent to place some limits on employer liability.<sup>37</sup> At the same time, the Court noted that the existence of a policy, and the employee's failure to utilize the policy, does not necessarily exempt the employer from liability.<sup>38</sup>

Thereafter, in *Harris v. Forklift Systems, Inc.*,<sup>39</sup> the Supreme Court established a standard for evaluating what type of conduct may be viewed as unlawful harassment.<sup>40</sup> The claim in *Harris* involved sexual harassment carried out by the president of the defendant company, Forklift Systems, against a female manager, Ms. Harris.<sup>41</sup> In reversing the decision of the District Court of Tennessee, which was affirmed by the Court of Appeals for the Sixth Circuit, the Supreme Court reaffirmed the *Meritor* standard that actionable harassment under Title VII must be "severe or pervasive" under the totality of the circumstances, and that severity and pervasiveness have both objective and subjective elements.<sup>42</sup> The Court found that the lower court erred in looking to whether the sexual harassment affected Harris's psychological well-being or whether it led her to suffer injury.<sup>43</sup> Writing for the majority, Justice O'Connor reasoned that "Title VII comes into play before the harassing conduct leads to a nervous breakdown" and, therefore, the *Meritor* standard does *not* have a psychological harm requirement.<sup>44</sup>

B. *When is an Employer Liable for Sexual Harassment in the Workplace?*

Whether an employer will be liable for a hostile work environment—or any unlawful harassment—perpetrated by one of its employees depends first on whether that employee is the victim's supervisor or co-worker.<sup>45</sup> Two

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<sup>36</sup> *Meritor*, 477 U.S. at 72.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> 510 U.S. 17 (1993).

<sup>40</sup> *See id.* at 21–22.

<sup>41</sup> *Id.* at 19.

<sup>42</sup> *Id.* at 21.

<sup>43</sup> *Id.* at 22.

<sup>44</sup> *Id.* (stating that conduct violates Title VII if it is "so severe or pervasive that it create[s] a work environment abusive to employees because of their race, gender, religion, or national origin").

<sup>45</sup> *Enforcement Guidance on Vicarious Employer Liability for Unlawful Sexual Harassment by Supervisors*, U.S. EEOC, [https://www.eeoc.gov/policy/docs/harassment.html#\\_ftn10](https://www.eeoc.gov/policy/docs/harassment.html#_ftn10) (last visited Oct. 24, 2017) [hereinafter "*Enforcement Guidance*"].

landmark Supreme Court cases decided on the same day,<sup>46</sup> *Burlington Industries, Inc. v. Ellerth*<sup>47</sup> and *Faragher v. City of Boca Raton*,<sup>48</sup> established that employers are subject to vicarious liability for unlawful harassment by their supervisors.<sup>49</sup> The Court's holding in each case is based on two principles: first, that an employer is responsible for the acts of its supervisors based on agency principles, and second, that Congress enacted Title VII to motivate employers to create anti-harassment policies and to encourage employees to avoid or limit the harm from harassment.<sup>50</sup>

Under *Faragher/ Ellerth*, an employer is strictly liable for sexual harassment by a supervisor towards an employee if the supervisor created a hostile work environment for the employee (by sexually harassing him/her) *and* took a tangible employment action (TEA)<sup>51</sup> against the employee.<sup>52</sup> A TEA is an action that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a significant change in benefits."<sup>53</sup> If the alleged harasser did not take a TEA, the employer may raise an affirmative defense by establishing that (a) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) the victim unreasonably failed to take advantage of any preventive or corrective opportunities or to avoid harm otherwise.<sup>54</sup>

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<sup>46</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

<sup>47</sup> *Id.* at 765 (holding that, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee," if the harassment results in the supervisor materially changing the victim's employment position (i.e. taking "tangible employment action")). The employer can raise an affirmative defense to liability, but only if the harassment does not result in tangible employment action. *See id.* The defense must be proven by a preponderance of the evidence and "comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

<sup>48</sup> 524 U.S. 775, 777 (1998) (same holding as *Ellerth*).

<sup>49</sup> *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 777; *see also Enforcement Guidance*, *supra* note 45.

<sup>50</sup> *Enforcement Guidance*, *supra* note 45.

<sup>51</sup> Note that a TEA is similar to an adverse employment action, but is a term of art used specifically in sexual harassment law. TEA is defined above.

<sup>52</sup> *Ellerth*, 524 U.S. at 760–61; *see also* *Watson v. Home Depot U.S.A., Inc.*, No. 01 C 1517, 2003 WL 21799965, at \*7 (N.D. Ill. Aug. 1, 2003) ("[I]f Watson is able to demonstrate that [the alleged harasser] created an actionable hostile environment *and* took tangible employment actions against her, she establishes that Home Depot is vicariously liable for [the alleged harasser's] actions and the inquiry is at an end.").

<sup>53</sup> *Ellerth*, 524 U.S. at 761.

<sup>54</sup> *Id.* at 765; *Faragher*, 524 U.S. at 807; *see also* *Watson*, 2003 WL 21799965, at \*7 (stating that "[i]f . . . Watson demonstrates that she endured an actionable hostile environment but fails to establish that [the harasser] took any tangible employment actions against her,

For example, in *Watson v. Home Depot U.S.A., Inc.*,<sup>55</sup> the Northern District of Illinois granted summary judgment in favor of Home Depot because Watson's alleged harasser, Terrell, did not take a TEA against her, and the company also successfully established the *Faragher/Ellerth* affirmative defense.<sup>56</sup> Among other things, Watson argued that her termination for exceeding her medical leave was a TEA.<sup>57</sup> The court, however, correctly held that the harassing supervisor must carry out the TEA for a successful sexual harassment claim.<sup>58</sup> At the time of her termination, Terrell was already transferred to, and working in, another store.<sup>59</sup> Thus, he could not have been responsible for her termination.<sup>60</sup>

The court next found that Home Depot successfully met each prong of the *Faragher/Ellerth* affirmative defense test. Home Depot satisfied the first prong because it had an in depth anti-harassment policy and grievance mechanism; the company satisfied the second prong because it illustrated that despite its anti-harassment policy and grievance procedure, Watson still unreasonably failed to report the harassment when it occurred.<sup>61</sup>

In contrast to a supervisor harassment claim, if the harassment perpetrator is the victim's co-worker, the employer cannot raise the *Faragher/Ellerth* affirmative defense and is liable only if it knew or should have known of the misconduct, and did not take immediate and appropriate action to correct it.<sup>62</sup> In a case of co-worker harassment, an employer cannot claim lack of knowledge of the harassment as a defense if there is evidence that the employer did not clearly inform its employees of its complaint procedures.<sup>63</sup>

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Home Depot may raise the affirmative defense").

<sup>55</sup> 2003 WL 21799965, No. 01 C 1517 (N.D. Ill. August 1, 2003).

<sup>56</sup> *Id.* at \*10.

<sup>57</sup> *Id.* at \*7.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Watson*, 2003 WL 21799965, at \*9–10.

<sup>62</sup> 29 C.F.R. § 1604.11(d) (1985); *see, e.g.*, *Perry v. Ethan Allen*, 115 F.3d 143, 149 (2d Cir. 1997) (finding that "[w]hen harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it") (internal quotation marks omitted)).

<sup>63</sup> *Enforcement Guidance*, *supra* note 45, at n.58 (citing *Perry*, 115 F.3d at 149 ("When harassment is perpetrated by the plaintiff's coworkers, an employer will be liable if the plaintiff demonstrates that 'the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.'")).

C. *Can an Employer Ever be Held Accountable for Conduct Outside the Workplace?*

Before determining whether the employer is liable for conduct outside the workplace, a court must first determine that unlawful harassment has occurred.<sup>64</sup> In Title VII hostile work environment claims, courts consider the totality of the circumstances to determine whether a plaintiff has a claim.<sup>65</sup> Generally, the circuit courts consider harassment that occurs outside the four walls of the workplace when the harassment is severe or pervasive enough to have consequences at work.<sup>66</sup> The First,<sup>67</sup> Second,<sup>68</sup> Seventh,<sup>69</sup> and Eighth<sup>70</sup> Circuits have all considered harassment that occurred away from work in the totality of the circumstances.<sup>71</sup>

In *Crowley v. L.L. Bean, Inc.*, the First Circuit admitted evidence of events occurring outside the workplace because the conduct “outside of work help[ed] explain why she was so frightened of [the harasser] and why his constant presence around her at work created a hostile work environment.”<sup>72</sup> In *Ferris v. Delta Airlines, Inc.*, the Second Circuit found the airline liable for a rape that happened while flight attendants were in a hotel booked by the employer for an overnight stay between flights.<sup>73</sup> The *Ferris* court stated

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<sup>64</sup> *Id.*

<sup>65</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986); *see also* 29 C.F.R. § 1604.11(b) (1985) (“In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.”).

<sup>66</sup> *See generally* *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002); *Ferris v. Delta Airlines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001); *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008); *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2011); *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510–11 (5th Cir. 2003); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997).

<sup>67</sup> *Crowley*, 303 F.3d at 409–10 (admitting evidence in a claim against plaintiff’s employer for a co-employee’s conduct, including following plaintiff home, encounters in a bar, and breaking into her home, reasoning that the “non-workplace conduct” was relevant to illustrate the severity and pervasiveness of the harassment and also explained plaintiff’s fear of the co-worker).

<sup>68</sup> *Ferris*, 277 F.3d at 135 (finding an airline liable for a rape that happened while flight attendants were in a hotel booked by the employer for an overnight stay between flights).

<sup>69</sup> *Lapka*, 517 F.3d at 983 (finding that “harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace”); *Doe v. Oberweis Dairy*, 456 F.3d 704, 715 (7th Cir. 2006) (same).

<sup>70</sup> *Dowd*, 253 F.3d at 1101–02 (finding that “[t]he touchstone for a Title VII hostile work environment claim is whether the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment”) (internal quotations omitted).

<sup>71</sup> *See* *Gelms*, *supra* note 14, at 260–62.

<sup>72</sup> *Crowley*, 303 F.3d at 409–10.

<sup>73</sup> *Ferris*, 277 F.3d at 135.



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that while the rape was considered to have occurred in a work environment within the meaning of Title VII due to the special circumstances, it was a close call.<sup>74</sup> The court implied that other claims that are more disconnected from the workplace may not be considered the same way.<sup>75</sup>

In *Lapka v. Chertoff*, the Seventh Circuit admitted evidence of harassing events outside the workplace by merely stating that “harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace.”<sup>76</sup> Finally, in *Dowd v. United Steelworkers of America*, the Eighth Circuit admitted evidence of harassing events outside the workplace because the events happened in close proximity to the workplace (outside the building on the workers’ drive in).<sup>77</sup> The court reasoned that the harassment was arguably “perpetrated with the intention to intimidate and to affect the working atmosphere inside the plant,” and, therefore, a reasonable jury could find that the events contributed to creating a hostile work environment.<sup>78</sup>

On the other hand, the Fifth<sup>79</sup> and Tenth<sup>80</sup> Circuits have come close to finding conduct outside the workplace was “sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment,”<sup>81</sup> but have not yet had a case with facts to support this conclusion. In *Gowesky v. Singing River Hospital*, the Fifth Circuit reasoned that because Gowesky never came back to work after being on disability, the alleged harassment that occurred over the phone could not have had consequences in the workplace.<sup>82</sup> In *Sprague v. Thorn Americas*, the Tenth Circuit reasoned that the most severe instance of sexual harassment would not be considered because it occurred at a wedding, not in the workplace, and the other alleged harassment occurred sporadically over sixteen months.<sup>83</sup> Therefore, the conduct taken together was not sufficiently severe

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008).

<sup>77</sup> *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2011).

<sup>78</sup> *Id.*

<sup>79</sup> *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510–11 (5th Cir. 2003) (refusing to extend the workplace beyond the four walls because all of the alleged conduct happened over the phone or in writing while plaintiff was on disability leave and she never returned to work).

<sup>80</sup> *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997) (refusing to consider most severe incident of sexual harassment in a series of events over sixteen months because it took place at a wedding reception and not at work).

<sup>81</sup> *Gowesky*, 321 F.3d at 509 (internal quotations omitted); *see also* Gelms, *supra* note 14, at 263.

<sup>82</sup> *Gowesky*, 321 F.3d at 510–11.

<sup>83</sup> *Sprague*, 129 F.3d at 1366.

or pervasive enough to have consequences in the workplace.<sup>84</sup>

While the circuits may apply a similar test and admit evidence of sexual harassment on social media if it creates effects in the workplace, the answer is unclear. The courts have not given much, if any, thought to the issue thus far.

### III. THE EVOLUTION OF SOCIAL MEDIA IN THE WORKPLACE

#### A. *Background About Social Media's Effect in the Workplace*

Social media is a broad term that encompasses many different types of communication tools, including collaborative projects, blogs, content communities, social networking sites, virtual game worlds, and virtual social worlds.<sup>85</sup> Among the various forms of social media, social networking sites have become the most popular forum for sexual harassment and have been defined by social scientists as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”<sup>86</sup> Social networking sites have become a main source of Internet communication in recent years. Thus, many of the Internet communications that result in sexual harassment have occurred on social networking sites (“social media” for the purposes of this paper) and have resulted in increased potential for employer liability for their employees’ actions on these sites.<sup>87</sup> Businesses are also incorporating the social media world into the workplace by creating business-related social media accounts and websites for their businesses.<sup>88</sup>

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<sup>84</sup> *Id.*

<sup>85</sup> Gelms, *supra* note 14, at 264–65.

<sup>86</sup> *Id.* at 265 (citing Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 210–11 (2007)).

<sup>87</sup> Alison Cain & Katherine O’Brien, *Facebook Status Update: Employer is... Sued: How Internet Harassment Could Lead to a Change in Status*, LEEDS BROWN LAW P.C., <http://www.lmblaw.com/media/in-the-news/articles/internet-harassment/> (last visited Oct. 19, 2016) (stating that, “[a]s a result of the proliferation of communication platforms the potential for employer liability is increasing for the actions of their employees, even when distinctly outside of the workplace”).

<sup>88</sup> Nick Clayton, *Business Joins the Party*, WALL ST. J. (May 4, 2011, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703712504576244622146113118>; *see also* Cain & O’Brien, *supra* note 87 (stating that as early as May 2006, the social networking site, Facebook.com, had over 1,000 work networks).

A recent Pew Research Center study found that employees, both full-time and part-time, regularly use social media at work.<sup>89</sup> The study found that of their 2,003 person sample size, 34% use social media while at work to take a mental break; 27% use it to connect with friends and family outside while at work; 24% use it to make or support professional connections; 20% use it to get information that helps them solve work problems; 17% use it to build or strengthen personal relationships with coworkers; 17% use it to learn about someone they work with; 12% use it to ask work-related questions to someone outside their organization; and 12% use it to ask those questions to people within their organization.<sup>90</sup> These numbers illustrate the proliferation of social media, and thus, the obvious effect that its existence and use has on the workplace.

#### B. *The Rise of Social Media Workplace Harassment*

There is currently no data on the rate of social media workplace sexual harassment over time. There is, however, abundant evidence that social media use is on the rise, and that social media harassment is indeed a significant issue.<sup>91</sup> The Pew Research Center has found that, as of 2015, 65% of American adults use at least one social networking site.<sup>92</sup> This number steadily increased from 46% in 2010.<sup>93</sup> Similarly, online harassment has proven to be a significant problem, with 40% of Internet users being victims of varying degrees of online harassment as of 2014.<sup>94</sup> While there is no data on the rate of social media harassment over time, one can logically infer a rise in online workplace harassment from the increase in social media use and the high percentage of online harassment experienced by Internet users.

The rise of social media use in the employment realm creates more portals for employees to communicate with each other—inevitably resulting in more communication, and thus, more harassment.<sup>95</sup> An article in TIME

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<sup>89</sup> Nicole B. Ellison, Cliff Lampe, & Kenneth Olmstead, *Social Media and the Workplace*, PEW RESEARCH CTR. (June 22, 2016), <http://www.pewinternet.org/2016/06/22/social-media-and-the-workplace/>.

<sup>90</sup> *See id.* Note that data does not add up to 100% because some participants fell into more than one category.

<sup>91</sup> *See id.*; *see also* Perrin, *supra* note 2 (finding that 65% of adults now use social networking sites); *see also*, Maeve Duggan, *Online Harassment*, PEW RESEARCH CENTER (Oct. 22, 2014), <http://www.pewinternet.org/2014/10/22/online-harassment/> (finding that 73% of adults have seen someone be harassed on the Internet, and about 40% have experienced Internet harassment themselves).

<sup>92</sup> Perrin, *supra* note 2.

<sup>93</sup> *Id.*

<sup>94</sup> Duggan, *supra* note 91.

<sup>95</sup> *See generally* Ellison, Lampe & Olmstead, *supra* note 89; *see also* Duggan, *supra* note 91.

magazine about Internet “trolling” explains that the Internet was once simply a portal for the free flow of information, but has now turned into a portal for hatred.<sup>96</sup> “Trolls” are “people who relish in online freedom” at the expense of others.<sup>97</sup> Joel Stein, the author of the aforementioned TIME article, explained that psychologists attribute the rise of Internet hatred to “‘the online disinhibition effect,’ in which factors like anonymity, invisibility, a lack of authority, and not communicating in real time strip away the mores society spent millennia building.”<sup>98</sup>

Though “trolling” (as used in the article) is not analogous to social media sexual harassment in the workplace, comparisons can be drawn. While anonymity may not translate to social media sexual harassment connected to the workplace, a lack of communicating in real time probably does. It is much easier to sexually harass a coworker if you do not have to do it to his or her face. As quoted directly from an online “troll” herself, “[t]he Internet is the realm of the coward.”<sup>99</sup> Furthermore, employees may be under the false assumption that there are less or no consequences of social media harassment because it is less directly connected to the workplace.<sup>100</sup> As a result, employees may view the Internet as a safe space to carry out the harassment that is prohibited at work.

### C. *How Social Media Harassment Changes Employer Liability*

As discussed above, in traditional workplace harassment claims, employers are liable for almost all harassment carried out by their supervisory employees, and they are liable for co-worker harassment if the employer had reason to know of the misconduct and failed to take immediate and appropriate action to remedy it.<sup>101</sup> Even if harassment occurs outside of the four walls of the workplace, the employer will usually be liable if the harassment has some connection to the workplace.<sup>102</sup> Harassment with a connection to the workplace includes for example, if a woman is harassed at a work-sponsored happy hour or if her supervisor follows her home from

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<sup>96</sup> Joel Stein, *Tyranny of the Mob*, TIME MAG., Aug. 2016, at 27.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 32 (quoting a “troll” who has made the author of this article, Stein, her target in the online trolling world).

<sup>100</sup> Ena T. Diaz, *Social Media: A Growing Concern for Sexual Harassment in the Workplace*, ATT’Y AT LAW MAG., <http://www.attorneyatlawmagazine.com/miami/social-media-a-growing-concern-for-sexual-harassment-in-the-workplace-2/> (last visited Sept. 14, 2016) (explaining that the links between private and work-life have been blurred by the use of social media, particularly when colleagues are “friends” on Facebook).

<sup>101</sup> *See supra* Part II.A.2.

<sup>102</sup> *See supra* Part II.A.3.

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work.<sup>103</sup>

Employer liability for social media sexual harassment is more difficult because it is unclear when the use of social media is connected to the workplace such that the employer should be liable.<sup>104</sup> Some scholars have argued that courts should include evidence of social media harassment in the totality of the circumstances for Title VII claims when the employer has derived a “substantial benefit” from the social media source on which the harassment occurs.<sup>105</sup> Whether the employer derived a “substantial benefit” from the social media depends on “whether the social media was sufficiently integrated into the employer’s business operations to qualify as a logical extension of the workplace.”<sup>106</sup> If the employer derives a substantial benefit from the social media, courts can then consider the social media harassment in the claim.<sup>107</sup> This could include harassment through an employer-run bulletin, an employee’s business social media account, or even an employee’s personal account used to promote his or her employer or his or her employer’s products.<sup>108</sup>

Courts often consider harassment that occurs on social media in Title VII hostile work environment claims. The case *Blakey v. Continental Airlines*,<sup>109</sup> concerned a pattern of sexual harassment in the workplace and continuing harassment through defamatory and gender-based statements made on an electronic bulletin board used by employees of Continental Airlines.<sup>110</sup> Continental employees were required to use the forum to access their flight schedules and assignments.<sup>111</sup> Continental argued that (1) it did not have a duty to remedy the situation because operation of the online bulletin was outsourced to another company, and (2) since the Internet cannot be considered “in the workplace,” it did not have a duty to monitor the forum.<sup>112</sup> The New Jersey Supreme Court rejected this argument and instead framed the issue as whether “an employer, having actual or

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<sup>103</sup> Compare *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002); *Ferris v. Delta Airlines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001); *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008); *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2011), with *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510–11 (5th Cir. 2003); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997).

<sup>104</sup> See generally, *Gelms*, *supra* note 14 (exploring the question of when harassment that occurs on social media should be included in the “totality of the circumstances” for a Title VII sexual harassment claim).

<sup>105</sup> *Id.* at 251.

<sup>106</sup> *Id.* at 273.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 751 A.2d 538 (N.J. 2000).

<sup>110</sup> *Id.* at 542–43.

<sup>111</sup> *Id.* at 544.

<sup>112</sup> *Id.* at 545.

constructive knowledge that co-employees are posting harassing, retaliatory, and sometimes defamatory, messages about a co-employee on a bulletin board used by the company's employees, [has] a duty to prevent the continuation of such harassing conduct[.]”<sup>113</sup>

The court explained that if the online forum harassment had happened in an employee lounge, there would be little doubt that it would be “sufficiently severe or pervasive to alter the conditions of employment and to create an intimidating, hostile, or offensive working environment.”<sup>114</sup> The pivotal question then became whether an online electronic bulletin board was equivalent to a bulletin board in a pilot's lounge or a work-related place.<sup>115</sup> The court reasoned, severe or pervasive harassment in a work-related setting which creates a pattern of harassment in the workplace “is sufficiently related to the workplace that an informed employer who takes no effective measures to stop it, ‘sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser.’”<sup>116</sup>

*Blakey* lays out a standard for employer liability that aligns with federal law.<sup>117</sup> The finding that a workplace harassment claim can arise from harassment on a work-related online bulletin board illustrates that courts are not hesitant to expand the workplace to the Internet, especially when the conduct creates hostility within the four walls of the workplace.<sup>118</sup>

In *Amira-Jabbar v. Travel Services, Inc.*,<sup>119</sup> Amira-Jabbar, a black female, brought a hostile work environment claim against her former employer after a co-worker posted a photo of her at a work-related event on his personal Facebook page.<sup>120</sup> Another co-worker posted a comment that the plaintiff claimed was racially motivated harassment. The plaintiff's complaint cited this incident, as well as other incidents of harassment in the workplace.<sup>121</sup>

The Puerto Rico District Court found that the social media incident was relevant enough to be considered in the totality of the circumstances because it was sufficiently work-related,<sup>122</sup> but failed to explain the reasoning behind

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<sup>113</sup> *Id.* at 542.

<sup>114</sup> *Id.* at 548–49. (citing *Lehmann v. Toys ‘R’ Us, Inc.*, 626 A.2d 445, 448 (N.J. 1993)).

<sup>115</sup> *Blakey*, 751 A.2d at 549.

<sup>116</sup> *Id.* at 550 (citing *Lehmann*, 626 A.2d at 463).

<sup>117</sup> See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (establishing that conduct violates Title VII if it is so “severe or pervasive” as “to alter the conditions of [the victim's] employment and create an abusive working environment”); see also *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21 (1993) (reaffirming the *Meritor* standard).

<sup>118</sup> *Blakey*, 751 A.2d at 550.

<sup>119</sup> 726 F. Supp. 2d 77 (D.P.R. 2010).

<sup>120</sup> *Id.* at 81.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 85–86.

this determination.<sup>123</sup> Despite this finding, the court dismissed Amira-Jabbar's claim because the few incidents that occurred were "'offhand comments' or 'isolated incidents' that [were] insufficient to create an abusive environment."<sup>124</sup> The court also found that the remedial action taken by the employer when the sexual harassment was brought to its attention satisfied the "prompt and appropriate action" standard, and the employer was therefore not liable.<sup>125</sup> This action included both an investigation and a review of the company's harassment policies with all of its employees.<sup>126</sup>

Though *Amira-Jabbar* did not deal with sexual harassment, the EEOC takes the position that the same basic standards apply in all types of harassment cases.<sup>127</sup> As in *Amira-Jabbar*, employers must take "prompt and appropriate action" when notified of harassment to avoid liability for the actions of their employees.<sup>128</sup> That action must include a review of company harassment policies. In the days of advanced technology and widespread use of social media, harassment policies specific to social media are crucial to both informing employees of the legality of their actions and reducing employer liability for those actions.

#### IV. USING OTHER AREAS OF LAW TO PIN DOWN EMPLOYER LIABILITY AND POLICY-DRAFTING NECESSITIES

##### A. *Can Employers Be Held Liable for Sexual Harassment Under the NLRA?*

Since workplace sexual harassment claims fall under Title VII, there is no specific provision of the National Labor Relations Act (NLRA or the Act) dealing with sexual harassment in the workplace.<sup>129</sup> While the NLRA does not address sexual harassment, and so the National Labor Relations Board (NLRB or the Board) does not regulate sexual harassment, it is still well

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<sup>123</sup> Gelms, *supra* note 14, at 271.

<sup>124</sup> *Amira-Jabbar*, 726 F. Supp. 2d at 85–86.

<sup>125</sup> *Id.* at 86.

<sup>126</sup> *Id.* at 87.

<sup>127</sup> *Enforcement Guidance*, *supra* note 45; *see also* 29 C.F.R. § 1604.11 (1985) ("The principles involved here continue to apply to race, color, religion or national origin."); EEOC Compliance Manual Section 615.11(a) (BNA 615:0025), <https://www.eeoc.gov/policy/docs/harassment.pdf> ("Title VII law and agency principles will guide the determination of whether an employer is liable for age harassment by its supervisors, employees, or non-employees.").

<sup>128</sup> *Amira-Jabbar*, 726 F. Supp. 2d at 87; *see also Enforcement Guidance*, *supra* note 45 (stating that an employer will be liable for harassment from a co-worker unless it can show that it took "immediate and appropriate corrective action" upon employee complaint).

<sup>129</sup> Jerome B. Kauff & Laura L. Putney, *Sexual Harassment Within the Context of the National Labor Relations Act*, KAUFF MCGUIRE & MARGOLIS, LLP, <http://www.kmm.com/articles-9.html#anchor292162> (last visited Oct. 17, 2016).

within the jurisdiction of the NLRB to determine whether company policies adequately balance employer interests with employee rights under the NLRA.<sup>130</sup> Thus, the NLRB's position on social media policies provides important guidance on drafting an effective social media sexual harassment policy.

B. *The NLRB's Minimal Drafting Guidance on Social Media*

While the NLRB does not regulate sexual harassment, it “has taken a strong stance in favor of privacy,”<sup>131</sup> in terms of social media policies. This strong stance makes it clear that company social media policies cannot violate employees' section 7 rights under the NLRA to engage in “concerted activity”<sup>132</sup> and cannot violate section 8(a)(1) by interfering, restraining, or coercing employees in the exercise of rights guaranteed by section 7.<sup>133</sup> Section 7 allows employees to “engage in concerted activity for collective bargaining or other mutual aid or protection.”<sup>134</sup> The NLRB gives the following guidance on defining concerted activity:

Activity is “concerted” if it is engaged in with or on the authority of other employees, not solely by and on behalf of the employee himself. It includes circumstances where a single employee seeks to initiate, induce, or prepare for group action, as well as where an employee brings a group complaint to the attention of management. Activity is “protected” if it concerns employees' interests as employees.<sup>135</sup>

A company's social media policy violates section 8(a)(1) where the policy reasonably tends to “chill employees in the exercise of their [s]ection

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<sup>130</sup> See generally Belinda R. Gross, *Section 7 of the NLRA*, AM. BAR ASS'N, YOUNG LAWYERS DIV., [http://www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/section\\_7\\_of\\_the\\_NLRA.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/section_7_of_the_NLRA.html) (last visited Oct. 27, 2016).

<sup>131</sup> Symposium, *Sexual Harassment Versus Workplace Romance: Social Media Spillover and Textual Harassment in the Workplace*, 27 ACAD. OF MGMT. PERSPECTIVES 187, 195 (2013).

<sup>132</sup> *The NLRB and Social Media*, NLRB, <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Oct. 27, 2016) (describing memos from the NLRB's General Counsel which advised employers on whether to act on questionable employee social media activity and advised not to act in situations where the employees were engaging in “protected concerted activity”).

<sup>133</sup> Gross, *supra* note 130; see also 29 U.S.C. § 158(a)(1) (2012).

<sup>134</sup> 29 U.S.C. § 157 (2012); Joseph Domenick Guarino, *Drafting Advice: Developing Social Media Policies*, LEXISNEXIS: LEXIS ADVISOR PRACTICE JOURNAL (Nov. 25, 2015), <https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2015/11/25/drafting-advice-developing-social-media-policies.aspx>.

<sup>135</sup> *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NLRB, <https://www.nlr.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1> (last visited Oct. 27, 2016).



7 rights.”<sup>136</sup> In regards to employee social media use outside the workplace, the Board has held that employees will be protected under sections 7 and 8(a)(1) when activity online (even activity disparaging the employer) discusses wages, hours, union membership, and anything else that could reasonably be considered “concerted activity” or is for the “mutual aid or protection” of other employees.<sup>137</sup> The Board has even found that an individual’s activity may be “concerted” if he acts on his own, “but in a way that may benefit the group.”<sup>138</sup> Protecting employees’ section 7 rights is important for regulating sexual harassment policies as well.<sup>139</sup> The same rules protecting concerted activity between employees also apply to company sexual harassment policies.<sup>140</sup>

While concerted activity protection is not relevant for social media sexual harassment, the Board’s guidance on social media policies creates the presumption that the Board views social media as connected to the workplace and that its social media regulations naturally extend to this area of the law. Unfortunately, this recognition still does not help determine when employers will be liable for social media sexual harassment.

### C. *A Useful Comparison—School District Liability for Cyber-Bullying*

While the NLRB’s guidance does not help determine employer liability, an analogy to school district liability for cyber-bullying may prove useful in getting to that determination. While social media sexual harassment jurisprudence began moving towards the possibility of utilizing a “substantial benefits” test,<sup>141</sup> cyber-bullying jurisprudence has moved towards a different standard—the “substantial disruption” test.<sup>142</sup>

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<sup>136</sup> Gross, *supra* note 130.

<sup>137</sup> *Id.* (citing *Three D, LLC v. NLRB*, No. 14-3284, 2015 WL 6161477 (2d Cir. 2015) (upholding a Board decision finding that employees were wrongly terminated based on section 7 and section 8(a)(1) for complaining, on Facebook, about their employer’s failure to withhold the proper amount of payroll taxes).

<sup>138</sup> *Id.* (citing *Pier Sixty, LLC*, 362 N.L.R.B. 59 (Mar. 31, 2015) (finding that an employee was wrongly terminated for posting to his personal Facebook page, a “profanity-charged rant” about disrespectful treatment by an assistant manager). The end of the post at issue in *Pier Sixty* read, “Vote Yes for the Union!” 362 N.L.R.B. 59, at \*2.

<sup>139</sup> See Memorandum from Richard F. Griffin, Jr., General Counsel, Nat’l Labor Relations Board 10 (Mar. 18, 2015), <https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf>.

<sup>140</sup> See *id.* (stating that “anti-harassment rules cannot be so broad that employees would reasonably read them as prohibiting vigorous debate or intemperate comments regarding Section 7-protected subjects”).

<sup>141</sup> Gelms, *supra* note 14, at 251.

<sup>142</sup> *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 571–72 (4th Cir. 2011) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.* 393 U.S. 503, 513 (1969)) (quotations and alterations omitted) (holding that a school can discipline student speech when it “disrupts

In *Kowalski v. Berkeley County Schools*,<sup>143</sup> the Fourth Circuit Court of Appeals adopted the “substantial disruption” test for determining when a school district can legally discipline a student for cyber-bullying outside of school hours.<sup>144</sup> The case involved a high school senior, Kara Kowalski, who created a Myspace.com page that targeted a fellow classmate, Shay N.<sup>145</sup> After Kowalski invited about one hundred classmates to follow the page, Shay found out about the webpage and her parents filed a harassment complaint with the school.<sup>146</sup> Shay did not want to attend classes that day, noting that she felt very uncomfortable about sitting in class with the students who commented on the page.<sup>147</sup> The school determined that Kowalski created a “hate website” in violation of the school policy against “harassment, bullying, and intimidation.”<sup>148</sup> After the school punished her, Kowalski filed a lawsuit against the school system “alleging that the administration’s decision to punish her for the MySpace web page constituted a violation of the First Amendment.”<sup>149</sup>

Adopting the “substantial disruption” test from *Tinker v. Des Moines Independent Community School District*,<sup>150</sup> the Fourth Circuit held that the school district was authorized to discipline Kowalski “because regardless of where her speech originated . . . the speech was materially and substantially disruptive in that it ‘interfer[ed] . . . with the schools’ [sic] work [and] colli[ded] with the rights of other students to be secure and to be let alone.’”<sup>151</sup> While the United States Supreme Court has not yet adopted the “substantial disruption” test for school cyber-bullying, jurisprudence and scholarship suggest that it is the best, and most effective, test.<sup>152</sup>

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classwork, creates substantial disorder, or collides with or invades the rights of others”).

<sup>143</sup> 652 F.3d 565.

<sup>144</sup> Christopher A. Sickles, *Bridging the Liability Gap: How Kowalski’s Interpretation of Reasonable Foreseeability Limits School Liability for Inaction in Cases of Cyberbullying*, 21 WM. & MARY BILL RTS. J. 241, 242 (2012) (citing *Kowalski*, 652 F.3d at 567; *Tinker*, 393 U.S. at 513).

<sup>145</sup> *Id.* at 249.

<sup>146</sup> *Id.* at 250.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> 393 U.S. 503 (1969).

<sup>151</sup> *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573–74 (4th Cir. 2011) (citing *Tinker*, 393 U.S. at 508); *see also* *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 395 (5th Cir. 2015) (applying the *Tinker* rule and holding that “conduct by a student, which materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is not immunized by the First Amendment, [and] applies when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when speech originated off campus”).

<sup>152</sup> Sickles, *supra* note 144, at 259; *see also* *Kowalski*, 652 F.3d at 572; *Bell*, 799 F.3d at 395.

Imagine applying the substantial disruption test in the sexual harassment social media realm. Under a substantial disruption test, a harassing event that occurs on social media—and therefore technically, outside the workplace—would be considered in the “totality of the circumstances” analysis when the harassment creates a “substantial disruption” or has a substantial effect in the workplace. This would achieve the same goal as the *Meritor* “severe and pervasive” standard for traditional workplace sexual harassment. The *Meritor* test holds an employer liable only when the sexual harassment is so “severe or pervasive” under the totality of the circumstances “to alter the conditions of [the victim’s] employment and create an abusive working environment.”<sup>153</sup>

Similarly, the “substantial disruption” test would look only to social media sexual harassment that is so severe and pervasive that the effects spill over into the workplace (the employer’s unquestionable jurisdiction) and alter the victim’s terms and conditions of employment. If the harassment occurring on social media is so severe that it affects the victim’s work life, then it is so “severe and pervasive” that the employer should know about the harassment and, therefore, has an obligation to address it. For these same reasons, the test also aligns with the view adopted by the First,<sup>154</sup> Second,<sup>155</sup> Seventh,<sup>156</sup> and Eighth<sup>157</sup> Circuits, as discussed in Section II.A.3.

The “substantial disruption” test is much more practical than the “substantial benefits” test because the former covers more necessary ground than the latter. Under the “substantial benefits” test, someone who is severely harassed by a supervisor or co-worker in an online forum would not

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<sup>153</sup> *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

<sup>154</sup> *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002) (admitting evidence in a claim against plaintiff’s employer for a co-employee’s conduct, including following plaintiff home, encounters in a bar, and breaking into her home, reasoning that the “non-workplace conduct” was relevant to illustrate the severity and pervasiveness of the harassment and also to explain plaintiff’s fear of the co-worker).

<sup>155</sup> *Ferris v. Delta Airlines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001) (finding the airline liable for a rape that happened while flight attendants were in a hotel booked by the employer for an overnight stay between flights). In *Ferris*, the court implied that while these events are considered to have occurred in a work environment within the meaning of Title VII due to the special circumstances, it was a close call, and other claims that are more disconnected from the workplace may not be considered the same way. *Id.*

<sup>156</sup> *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008) (finding that “harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace”); *Doe v. Oberweis Dairy*, 456 F.3d 704, 715 (7th Cir. 2006) (same).

<sup>157</sup> *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1101–02 (8th Cir. 2011) (finding that “[t]he touchstone for a Title VII hostile work environment claim is whether the workplace is permeated with discriminatory intimidation, ridicule or insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment”) (internal quotations omitted).

have a claim even if the harassment created severe effects in the workplace, unless that online forum provided a substantial benefit for the employer. The substantial benefits test is therefore simply far too narrow. In contrast, this situation would clearly fall within the bounds of the “substantial disruption” test as long as the harassment creates severe effects in the workplace.

Under the “substantial disruption” test, the scope of employer liability may extend far beyond the “four walls of the workplace”—it is a broad test. While this broad test is not ideal for employers, it is the most effective test offered by both scholarship and jurisprudence to date. A broad scope of employer liability makes in-depth social media policies that much more important. Broad liability means that policies must discuss prohibited conduct within the workplace, as well as conduct that could create employer liability outside the four walls.

#### V. HOW TO AVOID EMPLOYER LIABILITY WHEN EMPLOYEES ENGAGE IN HARASSMENT ON SOCIAL MEDIA

As illustrated by *Blakey* and *Amira-Jabbar*, the presence of social media undoubtedly blurs the line of separation between the workplace and the online world.<sup>158</sup> These cases also show that employees likely do not realize that the line is so thin or that what they say on online forums can result in workplace discipline for themselves and civil liability for their employers.<sup>159</sup> Thus, enacting effective policies specifically addressing sexual harassment that occurs on social media is the logical next step for companies to not only educate their employees, but also to minimize the effects of, and liability for, social media harassment.<sup>160</sup> The policies that employers have in place to combat traditional harassment are in most cases insufficient to deal with harassment that occurs on social media because these policies do not deal with the question of whether conduct on social media will be deemed connected to the workplace. General company social media policies are also insufficient because there is some confusion about

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<sup>158</sup> See generally *Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538 (N.J. 2000); *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010).

<sup>159</sup> See generally *Blakey*, 751 A.2d 538; *Amira-Jabbar*, 726 F. Supp. 2d 77.

<sup>160</sup> Kristen Bellstrom, *25 Years After Anita Hill, Have We Made Progress on Sexual Harassment?*, FORTUNE (Apr. 19, 2016, 12:22 PM), <http://fortune.com/2016/04/19/anita-hill-sexual-harassment-eeoc/> (Jenny Yang, the EEOC Chair, explains that one of the biggest factors leading to litigation is employers' failure to communicate their harassment policies); Amy Blackstone, *Fighting Sexual Harassment in the Workplace*, SCHOLARS STRATEGY NETWORK, <http://www.scholarsstrategynetwork.org/brief/fighting-sexual-harassment-workplace> (last visited Oct. 20, 2016) (stating that employers must “spell out clear policies against harassment and make known the consequences of violations for harassers”); Ellison, Lampe & Olmstead, *supra* note 89 (finding that far less employees use social media at work when their employers have a policy prohibiting it).

what constitutes a sound company social media policy.<sup>161</sup>

The social media policy confusion stems from the NLRB's failure to give explicit guidelines about what language companies' social media policies need to use in order to avoid violating their employees' rights under the NLRA.<sup>162</sup> Company policies targeting social media activity tend to be very broad<sup>163</sup> for a number of reasons, but a key motivator is the widespread fear that restricting employees' social media use will indirectly restrict their section 7 rights to engage in concerted activity under the NLRA.<sup>164</sup> While the problems with drafting regular social media policies are an interesting issue, they are beyond the scope of this Comment. The point is that the broad language used in many company social media policies is not sufficient to target and minimize sexual harassment.<sup>165</sup>

Furthermore, scholars have found that workers whose employers have at-work social media policies are less likely to use social media for personal reasons while on the job.<sup>166</sup> Of those whose employers have social media policies, 30% use social media to take a mental break from work as opposed to 40% of those whose employers do not have policies.<sup>167</sup> This data illustrates that at-work policies are effective and allows for the inference that social media policies specific to sexual harassment will contribute to minimizing its pervasiveness.

A. *Does Creating a Sexual Harassment Social Media Policy Amount to a Concession That Social Media is Connected to the Workplace?*

Some may argue that creating sexual harassment social media policies effectively forces the employer to concede that harassment on social media is connected to the workplace. Unfortunately for employers, there is no

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<sup>161</sup> Joel S. Barras, Sara A. Begley, Amanda D. Haverstick & Divonne Smoyer, *Perils and Pitfalls: Social Media Law and the Workplace* 2, U.S. CHAMBER INST. OF LEGAL REFORM (2014).

<sup>162</sup> *Id.*

<sup>163</sup> See Kevin J. Jones & Lisa A. Mainiero, *Sexual Harassment Versus Workplace Romance: Social Media Spillover and Textual Harassment in the Workplace*, 27 ACAD. MGMT PERSP., 193–94 (2013), <http://dx.doi.org/10.5465/amp.2012.0031> (citing many examples of company social media policies with broad language and a general warning not to discuss work-related matters online because the lines between personal and professional are often blurred when social media use is involved).

<sup>164</sup> See Michelle Drouin, Kimberly W. O'Connor & Gordon B. Schmidt, *Helping Workers Understand and Follow Social Media Policies*, 59 BUS. HORIZONS 205, 208, [www.elsevier.com/locate/bushor](http://www.elsevier.com/locate/bushor) (last visited Oct. 22, 2016).

<sup>165</sup> See *infra* Part VI.B.3 for a discussion about drafting sexual harassment social media policies in such a way so as to avoid violating section 7 rights of employees.

<sup>166</sup> Ellison, Lampe & Olmstead, *supra* note 89.

<sup>167</sup> *Id.*

denying that an employee's actions on social media *may be* connected to the workplace. The NLRB gives guidelines on social media policies, implying that social media can be connected to work.<sup>168</sup> Employers themselves often create social media policies as preventative measures, and courts have even found that social media is connected to the workplace in some cases.<sup>169</sup>

An employer who creates a social media sexual harassment policy does not, however, concede that social media harassment is in *every* instance connected to the workplace. Policies that aim to inform employees about what type of conduct a court *may* find to be connected to the workplace are simply preventative measures to inform employees about conduct that may or may not be connected to the workplace.

#### B. *Employers Must Be Aware of When Liability May Arise*

Unfortunately, it is unclear when employer liability will arise because the Circuit Courts of Appeals disagree on the definition of the workplace.<sup>170</sup> In traditional claims, whether a court will expand workplace harassment claims beyond “the four walls of the workplace” will often depend on whether the conduct has consequences at work.<sup>171</sup> But, as the case law illustrates, it is not clear what type of harassment outside of work courts will consider or how severe the consequences at work must be. Thus, these questions are determinable only on a case-by-case basis.

There is a similar lack of certainty for employee conduct online. *Blakey* and *Amira-Jabbar* make clear that there is no bright-line rule to determine what type of social media forum may be considered.<sup>172</sup> *Blakey* sets forth a “substantial benefits” test,<sup>173</sup> which is also endorsed by some scholars as described above,<sup>174</sup> where an employer will be liable if the forum is sufficiently related to the workplace, and the employer receives a substantial benefit from the forum.<sup>175</sup> The court in *Amira-Jabbar*, however, was far less clear about why a post on a personal Facebook page was sufficiently related to the workplace so as to create employer liability.<sup>176</sup> Thus, while the case

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<sup>168</sup> See *supra* Part IV.B.

<sup>169</sup> See *supra* Part III.C.1.

<sup>170</sup> See *supra* Part II.A.3; see also *Blakey v. Cont'l Airlines, Inc.*, 751 A.2d 538 (N.J. 2000); *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77 (D.P.R. 2010).

<sup>171</sup> See *supra* Part II.A.3.

<sup>172</sup> See generally *Blakey*, 751 A.2d 538; *Amira-Jabbar*, 726 F. Supp. 2d 77.

<sup>173</sup> *Blakey*, 751 A.2d at 551.

<sup>174</sup> Cain & O'Brien, *supra* note 87; see also Gelms, *supra* note 14, at 275 (arguing that the standard for whether social media evidence should be considered in a sexual harassment claim should be based on whether the forum was sufficiently related to the workplace, which can be determined by whether the employer received a “substantial benefit” from the forum).

<sup>175</sup> Gelms, *supra* note 14, at 275.

<sup>176</sup> *Id.* at 271.

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law demonstrates the prudence of monitoring any social networking site that could reasonably be connected to the workplace, *Amira-Jabbar* indicates that doing so will not ensure freedom from liability.

The uncertainty about when liability will arise places the employer even more on the defensive. As discussed in Part II.A.2., an employer will be liable for harassment by an employee's co-worker if the employer knew, or should have known, of the harassment and did not take prompt and appropriate action to remedy the situation.<sup>177</sup> In the context of social media harassment, however, whether the employer "should have known" of the harassment, i.e. that the forum is found to be sufficiently related to the workplace, is incredibly unclear.<sup>178</sup> Therefore, social media sexual harassment policies must include specific steps employees should take to inform the employer when they are being sexually harassed online.<sup>179</sup> A clear policy will help ensure that employees make the employer aware of instances of sexual harassment so that action can be taken.<sup>180</sup> Essentially, the key is enacting a policy that makes employees comfortable coming forward, so that the employer stays informed and is never left defending why it should not have known of the conduct.

C. *Sexual Harassment Social Media Policies Must be Clear in Addressing What Constitutes Sexual Harassment on Social Media*

Employees must be made aware of what constitutes sexual harassment on social media not only so that potential perpetrators know when their conduct rises to the level of sexual harassment, but also so that a victim can identify harassment when it occurs.<sup>181</sup> Despite extensive study and attention to workplace sexual harassment, not many people can identify sexual harassment when it occurs.<sup>182</sup> The most successful harassment policies clearly define harassment, explain the options available to a harassment victim, and describe how the employer will act on a claim of sexual harassment.<sup>183</sup> The position that social media sexual harassment policies must include procedures for resolving sexual harassment complaints aligns with the EEOC's previous guidance that companies' general sexual harassment policies should also include appropriate procedures.<sup>184</sup>

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<sup>177</sup> See *supra* Part II.A.2. (citing *Enforcement Guidance*, *supra* note 45).

<sup>178</sup> *Id.*

<sup>179</sup> See Blackstone, *supra* note 160.

<sup>180</sup> Drouin, O'Connor & Schmidt, *supra* note 164.

<sup>181</sup> Blackstone, *supra* note 160 (stating that not many people understand what sexual harassment is, or can identify it when it occurs).

<sup>182</sup> *Supra* note 160.

<sup>183</sup> *Id.*

<sup>184</sup> See *Enforcement Guidance*, *supra* note 45 (stating that "employers should establish anti-harassment policies and complaint procedures covering *all* forms of unlawful

In *Dowd v. United Steelworkers of America*, the Eighth Circuit set forth a definition of harassment that employers can use as a model for defining online sexual harassment in their policies.<sup>185</sup> The court defined unlawful sexual harassment as “discriminatory intimidation, ridicule or insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>186</sup> First, the court addressed what discrimination is—for the purposes of this Comment, it is online sexual harassment defined as sexual intimidation, ridicule, or insult. Second, and arguably more essential to an employer’s policy, the court stated that sexual harassment outside the workplace is actionable under Title VII if severe or pervasive enough that the employee feels the effects of the online harassment in the workplace.<sup>187</sup>

Thus, a good policy will make it clear that employees and employers may be liable for words said online; and that if someone makes sexual comments online that are likely to produce a negative impact in the workplace, he or she will be held accountable. Something else that can be drawn from the distinction—and that should be stated explicitly in a policy—is that liability may arise regardless of who owns the device from which the harassment is carried out.<sup>188</sup>

D. *The Policy Must Use Language to Avoid Violating Employees’ Rights Under Section 7 of the NLRA*

In the context of both company social media policies and company sexual harassment policies, the Board takes the stance that employers must refrain from violating employees’ section 7 rights to engage in “concerted activity.”<sup>189</sup> Therefore, when drafting social media sexual harassment policies, employers must draft policies that avoid “chilling” employees’ section 7 rights.<sup>190</sup> As a reminder, section 7 protects an employee’s right to engage in “concerted activity,” which is defined as discussion between employees about any terms and conditions of employment, including wages, hours, union membership, and anything else that could reasonably be considered for the “mutual aid or protection” of employees.<sup>191</sup>

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harassment,” including sexual harassment, because of the possibility of vicarious liability).

<sup>185</sup> *Dowd v. United Steelworkers of Am.*, 253 F.3d 1093, 1102 (8th Cir. 2011).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Guarino, *supra* note 134.

<sup>189</sup> *See supra* Part IV.B.

<sup>190</sup> *Id.*

<sup>191</sup> Gross, *supra* note 130.



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*E. Employers Must Adequately Communicate Policies to Employees*

Employers often have trouble adequately communicating both sexual harassment and social media policies.<sup>192</sup> Thus, while this last warning may seem superfluous, it is apparently very necessary. Effective communication can be achieved in many ways, including stressing that employees read and understand the policies, requiring signed policy acknowledgements (which will also help minimize employer liability if an action does arise), creating short summaries of policies that employees can easily reference, and even conducting training sessions designed to recognize and prevent sexual harassment on social media.<sup>193</sup>

## VI. CONCLUSION

Now that social media is ingrained in our everyday lives, and has permeated the workplace so thoroughly, workplace harassment has expanded to social media at a rapid rate. To combat this novel type of harassment, it is first paramount to educate employers about when they may be liable for employee sexual harassment and misconduct online, so that their policies accurately reflect the specific language and actions employees must avoid. Because the scope of employer liability is so unclear after *Blakey* and *Amira-Jabbar*, employers must encourage employees to come forward with claims of harassment so that employers are on notice and can address such claims accordingly. Employers must also enact policies that clearly and adequately explain what constitutes sexual harassment on social media, use language that appropriately balances the employers' interests with employees' section 7 rights, and adequately communicate their policies to their employees so that employees know a policy exists and can become familiar with its terms. Social media only amplifies the problems of sexual harassment. Thus, the time has come for employers to fulfill their duty to minimize workplace sexual harassment by enacting effective social media sexual harassment policies.

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<sup>192</sup> Bellstrom, *supra* note 160 (Jenny Yang, Chair of the EEOC, discussing that many employers are not communicating their sexual harassment policies well enough to workers—especially temporary workers); Drouin, O'Connor & Schmidt, *supra* note 164, at 207 (finding in a study that 35% of people did not know that their company had a social media policy, and of the people that did know, 50% did not know what the policy said).

<sup>193</sup> Drouin, O'Connor & Schmidt, *supra* note 164, at 209.