From Meritor to the New Millennium - Adapting Sexual Harassment Legal Standards for the Internet Age

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FROM MERITOR TO THE NEW MILLENNIUM – ADAPTING SEXUAL HARASSMENT LEGAL STANDARDS FOR THE INTERNET AGE

INTRODUCTION

Given the explosive growth and adoption of Internet technologies in the past few decades, it is time to examine how these technologies interact with current sexual harassment law. Do elements of the prima facie case, such as, what constitutes severe and pervasive harassment, need to be adjusted to adapt to the ways individuals communicate and share information with each other in the modern workplace? Additionally, how do employers limit their liability for sexual harassment claims when technology is pushing the boundaries of what is considered to be the work environment?

This article will focus on the current state of technology in the workplace and what it may mean for the continued evolution of hostile work environment sexual harassment. The article will explore how the law may need to adapt to adjust to the unique characteristics of email and social networking sites, both online technologies commonly used in the contemporary workplace. Next, it will consider the implications of private viewing of pornography in the workplace. Finally, it will provide suggestions for employers interested in trying to limit their liability for workplace sexual harassment claims motivated by an abuse of technology resources.

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I. BRIEF OVERVIEW OF THE EVOLUTION OF TITLE VII FROM CORNE TO ONCALÉ

Since the introduction of Title VII of the Civil Rights Act of 1964, legal and societal understandings regarding what constitutes discrimination in the workplace have continuously evolved. For example, historically, sexual harassment laws provided minimal relief for female plaintiffs. Although the 1977 decision in Corne v. Bausch and Lomb, Inc. has since been vacated,¹ the Arizona District Court expressed in its opinion that extending the Civil Rights Act to women, who claimed to

have suffered verbal and physical sexual advances in the workplace, was a "ludicrous" proposition.\textsuperscript{2}

Eleven years later, the Supreme Court revisited this issue, and it departed from the Arizona District Court analysis.\textsuperscript{3} Specifically, when it decided \textit{Meritor Savings Bank, FSB v. Vinson}, the court held that, "A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."\textsuperscript{4}

In 1998, the Supreme Court decided \textit{Oncale v. Sundowner Offshore Services, Inc.} and further extended the interpretation of the Civil Rights Act to cover same-sex sexual harassment.\textsuperscript{5} Justice Scalia, drafter of the unanimous opinion, wrote that there was "no justification in the statutory language or [Supreme Court] precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."\textsuperscript{6} Therefore, in the span of just over twenty years, the legal understanding of workplace sexual harassment evolved from being characterized as "ludicrous" to being characterized as a right that deserves to be respected so that both men and women may enjoy a workspace free of unwanted sexual advances.

\section*{II. Growing Use of Online Technologies in the Workplace}

Today, the presence of technology in the workplace has added another layer of complexity to the analysis of what constitutes sexual harassment under Title VII. Specifically, courts must decide if Title VII principles need to be adapted or reinterpreted to address the increased presence of technology in the workplace. To illustrate, in 1972, there were approximately 50,000 computers in existence worldwide.\textsuperscript{7} In the fourth quarter of 2012

\begin{flushleft}
\textsuperscript{4} Id. at 66.
\textsuperscript{6} Id. at 79.
\end{flushleft}
alone, 90.3 million personal computers were shipped to buyers around the world.\textsuperscript{8}

By their very natures, online technologies allow people to communicate from a distance, which already has significantly altered how people interact with each other both in and out of a work setting. In a work setting, co-workers no longer have to talk to each other in real time. Instead, they can use email or instant messages to communicate. Additionally, video programs like Skype enable employees from different offices to work together by having videoconferences in real time. It is not surprising, therefore, that many corporations are taking advantage of technological innovations to lower office space expense while providing flexibility so that employees may work from anywhere. In Telework Trendlines 2009, WorldatWork estimated that 17.2 million workers in the United States use telecommunication.\textsuperscript{9}

Online communication has grown tremendously since its inception. For example, the first email was sent in October of 1971.\textsuperscript{10} Forty years later, in 2012, corporate global daily email traffic totaled 89 billion messages.\textsuperscript{11} However, researchers at technology market research firm Radicati hypothesize that the growth in the number of emails sent each day is slowing down\textsuperscript{12} because other forms of communication, such as instant messag-
ing and social networks are becoming more popular. As email use fades into the background and other forms of communication technologies become more popular, the communication tools that are necessary in a work setting will continue to change and evolve at a fast pace.

Sexual harassment law needs to evolve again, just as it did during the twenty years between the Corne and Oncale cases, in order to address novel situations created in technologically enhanced work environments. Given that widespread use of Internet technology is still a relatively recent development, case law addressing sexual harassment through the use of Internet technologies needs to be explored and developed. As a result, it is difficult to ascertain what standards courts apply towards work related sexual harassment cases that occur in cyberspace.

Nevertheless, employers need to know how to protect their employees from Internet based sexual harassment so, at the very least, they might limit their own liability. Most importantly, employees need to be able to protect themselves from the unwelcome behaviors of coworkers who are using the unique characteristics of the online environment to their own advantage, for example, to send unwarranted anonymous messages. Lastly, courts need to become educated regarding the use of the various technologies and need to recognize how one negative email message can impact an individual’s work environment.

III. POTENTIAL FOR SEXUAL HARASSMENT IN NEW VENUES

The Internet is essentially a place or location. Therefore, a discussion of a different approach to incidents of alleged Internet sexual harassment seems to be akin to discussing whether there should be different rules for incidents of sexual harassment that occur in an office’s break room as opposed to its conference room. However, the virtual world poses a greater risk because people have the ability to hide behind anonymous
names and send messages instantaneously to an entire office, which can have disastrous effects. Moreover, the fact that technology has melded our professional and personal lives, warrants that sexual harassment laws be applied differently to sexual harassment that occurs through a virtual medium. At the very least, it is necessary to discuss and acknowledge how online interactions are changing how people work and interact with each other and consider what that means for sexual harassment legal theories.

A. Email

Each of the following sections (Email, Social Networks, and Internet Pornography) will be introduced with a fictional scenario that details many of the issues that an employer and an employee may face in today’s technologically dependent workplace. The scenarios are intended to illustrate how an affected employee may perceive behavior as harassment and highlight potential problem areas for employers.

i. Example Scenario

Amelia recently began working for a large insurance company. The members of Amelia’s team all telecommute and, initially, she was excited about the opportunity to do so as well. Nate, one of her co-workers, enjoys sending the team daily jokes. He thinks it helps with group moral and helps them bond. However, Nate’s jokes started focusing more on women and racial groups. For example, on one occasion, he sent a joke about how beer is better than women, which Amelia found offensive, so she sent a terse reply back to the group. She received back a few supportive messages from other women in the group, but received other emails that told her to lighten up. Amelia has complained to her supervisor, and he told her that he would talk to Nate. However, the jokes continued to be sent to her inbox each morning. Amelia got the impression that neither Nate nor her supervisor understood why she disliked the jokes. Instead both indicated that they think she should be a better sport. As a
result, Amelia started feeling like an outcast and became anxious whenever she heard the email alert ping on her computer.13

ii. Characteristics of Email

Email is commonly used in office settings and a part of office employees natural course of work. Email accounts are accessed through desktop or laptop computers and, increasingly, by smartphones. For corporate accounts, each employee is assigned a username. In contrast, if an employee is using a public service, he or she can select any name he or she would like, provided that someone else has not claimed it first.14 Even more alarming, however, is the existence of anonymous remailers that are capable of stripping the identity of the sender and forwarding email on to the recipient.15 This is problematic because it makes it difficult to trace the message back to the original sender.16 Additionally, anyone who has access to an individual employees email address can use the address to sign the owner up for newsletters, announcements, or other services without the owner’s knowledge. In some cases, this can result in explicit emails being directed to the owner’s inbox without that individual’s knowledge or consent.17

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13 Each of the scenarios used in this paper are fictional situations that are used to illustrate the principles involved. Although fictional, inspiration was drawn from popular articles such as Michelle Singletary, Email Punch Lines Can Carry Price, Wash. Post, Mar. 18, 1997, A1, available at http://www.washingtonpost.com/wp-srv/local/frompost/nov98/sidebars/jokes01.htm.

14 Michelle Stute, Job Seekers Beware! - Choosing an Appropriate Email Name, CALAWJOBS.COM, http://www.calawjobs.com/articles/email-names.


16 Id.

iii. Sexual Harassment Through Email

In an early journal article about email harassment, *Sexual Harassment in Cyberspace: The Problem of Unwelcome Email*, author David McGraw raises the issue that the ability to send messages to coworkers from a distance will encourage people to say things online that they would never say in person.\(^\text{18}\) His main concern is that women will bear the brunt of this imagined freedom and, as a result, be further marginalized in an increasingly online world.\(^\text{19}\)

McGraw grounds this fear in the origins of the Internet; specifically he fears that since men developed technology, it will remain a boys' club.\(^\text{20}\) To support this theory, McGraw shares the hacker ethic, which he puts forth as a typical response given by proponents of an open Internet to those who want to impose order on the system. This ethic encourages a lawless attitude online by espousing the principles that "access to computers should be unlimited, that all information should be free, that authority is to be mistrusted, and that all systems should be open and without boundaries."\(^\text{21}\) However, McGraw argues that boundaries are necessary because without them, male creators and builders of the Internet would be free to keep their online kingdom private and free from the female presence.\(^\text{22}\) Specifically, he is concerned that men will attempt to keep women offline by making it too unpleasant for women to participate.\(^\text{23}\)

Although there are relatively few cases of sexual harassment that occurred exclusively through email that have been filed, these kinds of cases typically fall into two categories. The first category includes cases where the harasser targets a single, spe-

\(^\text{18}\) David K. Mcgraw, *R*, 21 Rutgers Computer & Tech L.J. 491, 496 (1995). (Discussing the ability to send anonymous emails as well as the behavior that is caused by the ability to make comments from a distance.)

\(^\text{19}\) Id. at 497-503.

\(^\text{20}\) Id. at 500-502.

\(^\text{21}\) Id. at 498.

\(^\text{22}\) Id. at 497-503.

\(^\text{23}\) Id. 497 -503.
cific victim and sends him or her emails professing undying love or requesting sexual favors. The second category includes cases where an individual or group circulates an email that targets a member of a protected class.

Schwenn v. Anheuser-Busch is a case that illustrates the first category. In Schwenn, the plaintiff submitted a harassment complaint after receiving sexually harassing emails for three weeks at the computer terminal. In granting the request of the defendant for summary judgment, the court held that even looking at the evidence in the light most favorable to the plaintiff and from the her subjective viewpoint, the allegations were "very minor in comparison to those considered to create hostile work environments."

The judge went on to cite specific cases to establish a relative threshold for a successful hostile work environment claim, each of which included a degree of physical contact—from requests that the employee touch the alleged harasser to rape. Each of the cases cited by the court also had a longer time window than the events in Schwenn. But, the perceived lack of severity of the incidents played a role in how the court judged the totality

25 Id. at 4.
26 Id. at 4. "See, e.g. Harris v. Forklift Systems, 510 U.S. 17, 17 (1993) (over a period of years, company president made derogatory comments and sexual innuendos to women, propositioned plaintiff, asked female employees, to get coins from his front pants pocket, and threw objects on the ground and request females employees to pick them up); Tomka v. Seiler, 66 F.3d 1295, 1300-01 (2nd Cir. 1995) (over a period of 18 months, co-workers subjected plaintiff to sexual jokes, comments, propositions, and innuendos and ultimately raped her after a business dinner); Father Belle, 642 N.Y.S.2d at 742 (over a period of years, plaintiffs’ supervisor made inappropriate and demeaning remarks and sexual overtures to them, engaged in unwelcome physical contact, and threatened to fire or demote plaintiffs).”
27 Id. at 1 – 4. (Stating that the plaintiff was transferred to a new worksite and complained about the email harassment three weeks after her transfer. In contrast, the time period cited by the court for Harris was a “period of years,” for Tomka it was “a period of 18 months,” and for Father Belle it was a “period of years.”).
of the circumstances.\textsuperscript{28} The question remains, however: If the plaintiff had been subjected to the same comments or requests in person, would the court have viewed the interactions as sufficiently severe or pervasive?\textsuperscript{29}

Many individuals who find themselves targeted by an email harasser have bolstered their claims by linking the technological harassment with unwanted physical encounters because doing so makes the case more similar to traditional conceptions of sexual harassment. For example, in an unpublished Minnesota opinion, \textit{Petersen v. Minneapolis Community Development}, Steven Peterson complained of sexual harassment by his supervisor, Martha Dusell.\textsuperscript{30} The harassment began as touching and requests for dates.\textsuperscript{31} When Petersen told Dusell that her conduct was unacceptable she switched from physical contact to sending him emails to profess her interest for a relationship.\textsuperscript{32} The Minnesota Court of Appeals held that Petersen had presented sufficient evidence to withstand a motion for summary judgment.\textsuperscript{33} Here, Petersen was able to connect the emails he received from Dusell to physical manifestations of harassment, instead of merely depending on the emails to carry the weight of the case.

The second type of email case involves jokes sent to a group and can sometimes make national news headlines, which may aid the plaintiffs in settling their cases successfully. The legal issue arises when an email is sent out and either a subset of the original recipients find the message offensive, or the email is mistakenly sent out to a larger group than was intended. For example, Chevron settled a joke email case with

\textsuperscript{28} \textit{Id.} at 4. (stating that the emails were "merely offensive" therefore not actionable and drawing a contrast between the "most serious incident," which was a physical attack at the plaintiff's home and the emails that were received at work.)

\textsuperscript{29} \textit{See also} Knox v. Indiana, 93 F.3d 1327 (7th Cir. 1996) (Case in which supervisor focused harassment on emailed requests for sex. Defendant prevailed on harassment charges and plaintiff on retaliation.)


\textsuperscript{31} \textit{Id.} at 1.

\textsuperscript{32} \textit{Id.} at 1.

\textsuperscript{33} \textit{Id.} at 1.
four women in 1995 for $2.2 million. Among the evidence of a hostile work environment produced by the women was an email that was circulated among the staff that detailed why beer was better than women.³⁴ Cases such as this, which garner a good deal of media attention and then settle, likely make employers nervous, but provide little guidance as to how courts would view a case based solely on email evidence to prove the existence of a hostile work environment.

Olivant v. Department of Environmental Protection is another example of a joke gone wrong.³⁵ An administrative law judge held in favor of the plaintiffs on the basis of a single email containing a series of offensive jokes.³⁶ The content of the jokes was not disclosed in the opinion, but the fact that defendants considered them to be “corny,” was.³⁷ However, because one of the defendants was charged with sexual harassment, it was clear that at least some of the jokes were sexual in nature.³⁸

The plaintiffs in another group email case, Owens v. Morgan Stanley, did not initially fare as well as those in Olivant or Chevron. Owens is a case that deals with hostile work environment based on race rather than sex, where white employees allegedly circulated an email containing racist jokes.³⁹ In its dismissal of the claim, the court held that while the conduct was reprehensible, email alone was not sufficient to form the basis of a hostile work environment claim.⁴⁰ The court in Owens followed the holding of the second circuit in Schwapp v. Town of Avon, which stated that for jokes to constitute a hostile work environ-

³⁶ Id. at 5.
³⁷ Id. at 3.
³⁸ Id. at 3.
⁴⁰ Id. at *2. See also Curtis v. Dimaio, 46 F. Supp. 2d 206, 213 (E.D.N.Y. 1999)(also finding that a single joke could not create a hostile work environment).
ment "there must be more than a few isolated incidents of racial enmity, meaning that instead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments." Thus, whether racial slurs constitute a hostile work environment typically depends upon the frequency and severity of those slurs." In the end, the claim in Owens was allowed to proceed and the parties reached a confidential settlement.

In Autoliv v. Department of Workforce Services, two employees tried to claim that they were unaware that they had violated company policy by sending out sexually explicit emails. The pair managed to convince the Workforce Appeals Board that the company failed to consistently enforce its policy against excessive email use and should have told them that what they were doing was incorrect. However, when the defendants reached the Utah Court of Appeals, they did not find as sympathetic an audience. The opinion issued by the Court of Appeals stated that it normally would have remanded the case for consideration as to whether the emails violated a "universal standard of behavior." Nevertheless, the Court found that it was able to make that determination based on the egregious nature of the conduct presented.

By analyzing the various cases that address sexual harassment in the workplace, a few issues are apparent. First, courts have not articulated the quantity of emails that are necessary to create a hostile work environment. In Olivant, a single email was found to be sufficient, whereas in Schwenn, multiple emails sent over the course of a few weeks were insufficient. Secondly, it is

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41 Id. at 2.
44 Autoliv Asp, Inc. v. Dep't of Workforce Servs., 29 P.3d 7, 10 (Ct. App. Utah 2001).
45 Id. at 11.
46 Id. at 8. (Holding that the employees had been discharged for just cause).
47 Id. at 11.
48 Id. at 11-13.
unclear how much weight that courts give to in-person conduct versus speech delivered via email. Specifically, it is difficult to ascertain whether email alone would be enough to sustain a successful sexual harassment claim. Given that speech sent through email is captured in multiple places (such as on a computer's hard drive and company's servers), and that messages are easily forwarded to co-harassers or victims, email speech should constitute harassment at a lower threshold than in-person speech.

In considering whether email alone is enough to create a hostile work environment, it is interesting to contrast McGraw's position with that of the judges in Schwenn. McGraw puts forth the idea that technology will be used aggressively by male creators to drive females out. However, the opinion of the court in Schwenn did not find email was severe enough to create a hostile work environment. It is important to find the fine line between the fear that technology is a weapon in and of itself and that it is a trivial nuisance.

A final issue to consider is that not all employees are sophisticated enough when it comes to office email etiquette, which in turn, has the potential to create a legal headache for employers. These employees may unintentionally get themselves, and the organization, into trouble by sending out ill-advised messages. Although in Autoliv, the defendants used the fact that they did not understand the employer's email policy as a defense strategy, it's also possible that the pair really did not know how to use email appropriately. Companies interested in mitigating their risk of Internet sexual harassment suits may want to institute formal educational trainings in addition to including written policies in an employee handbook. Written policies are a good starting point, but should not be relied upon exclusively because there is no guarantee that the people who need to read them will do so.49

To revisit the example of Amelia, it is debatable whether a prima facie case of hostile work environment harassment could

49 Id. at 10. (Employees claimed that they likely deleted the emails containing information on acceptable use policy before reading them).
be sustained. As with many of the cases in this area, the strength of Amelia’s case depends on whether a court would agree that the emails were severe and pervasive enough to alter the conditions of her employment. On one hand, the emails came frequently enough to cause her anxiety and make her uncomfortable in her work environment. On the other, she was at home and had no physical contact with her alleged abuser. She was able to delete the email without reading it or could take other action to avoid the perceived harassment.

iv. Email Danger for the Plaintiff

Although email can be a smoking gun in providing support for a hostile work environment claim, it also presents a challenge for some plaintiffs. E-discovery goes both ways. The defense attorneys will likely spend time going through the plaintiff’s computer, which stays in the defendant employer’s possession. In *Dufresne v. J.D. Fields and Company*, the court allowed the defense to introduce evidence that the plaintiff had downloaded and emailed pornography from her office computer, finding the acts to be relevant and probative to the issues of hostile work environment and damages. Although the case does not go into much detail, the court appears to view the plaintiff’s conduct in viewing pornography at work relevant as to whether she was offended by the defendant’s behavior and perceived it as creating a hostile work environment. Therefore potential plaintiffs and their attorneys should be aware that even though a single harassing email does not constitute sexual harassment, a single incident of risqué behavior could prove damaging to a plaintiff’s credibility.

50 *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003) (Example of the scope and cost of e-discovery in Title VII case as well as discussion of which party should bear costs.)
52 *Id.* at 1.
B. Social Networks

i. Example Scenario

Kelly is one of the few females to coach a male basketball team at the college level. Her team started out the season strong, but lost two key players to injuries. In the final game, the team lost a close game with a rival school and likely missed their chance to be invited to the NCAA tournament. Following the game, a number of students and alumni voiced their displeasure with Kelly’s coaching tactics on Facebook. A few of the comments focused on Kelly’s gender and recommended activities for which the authors thought Kelly would be better suited. Alumni posting to the page threatened to withdraw their financial support of the school unless administrators fired Kelly. The alumni office, which maintains the page, responded to the postings, but did not remove them. A week after losing the game, college administrators fired Kelly and replaced her with a male assistant coach.53

ii. Characteristics of Social Networking Sites

Arguably, the first social networking site to make it onto the national radar by attracting a large and distributed base of users was Friendster in 2002.54 Friendster allowed users the ability to create a password protected user profile, upload pictures and other media items, and connect a user’s profile to that of friends. Today, Facebook is the largest networking site with more than one billion active monthly users, which, for comparison purposes, is close to three times the population of the United States.55 In addition to accounts created by individual users,

corporations and other types of organizations are able to set-up profile pages for Facebook that users to follow and post comments.

LinkedIn is another major networking site.\footnote{LinkedIn, Crunchbase, http://www.crunchbase.com/company/linkedin} It shares many of the same characteristics as the other sites, such as the ability to create a profile and link to associates. However, LinkedIn has positioned itself as more of a business-networking site than a social site and it has limited some of its functions, such as the ability to upload pictures, accordingly.\footnote{Profile Photo Guidelines and Conditions, http://help.linkedin.com/app/answers/detail/a_id/430} As of October 2013, LinkedIn claimed to have more than 259 million members.\footnote{LinkedIn Announces Third Quarter 2013 Financial Results, http://press.linkedin.com/News-Releases/319/LinkedIn-Announces-Third-Quarter-2013-Financial-Results.}

iii. Possible Employer Liability for Comments Made on Social Networks – Blakey v. Continental Airlines

Because social networks exist apart from an employer's proprietary or organizational network and are owned and operated by another entity, it would seem logical that the employer would not face any liability for harassing activity on such sites. However, the precedent set by \textit{Blakey v. Continental}, given the right circumstances, could present an enterprising plaintiff's attorney an opportunity to establish a nexus between comments made on social networking sites and the employer’s work site.

In \textit{Blakey}, pilot Tammy Blakey brought a hostile work environment suit against Continental Airlines alleging that there was pornography in and around the cockpit.\footnote{Blakey v. Cont'l Airlines, Inc., 1995 WL 464477, 1 (D.N.J. 1995).} Blakey complained to Continental, but she claimed that the pornography continued to be present in the planes.\footnote{Id. at 1 (D.N.J. 1995).} Following the filing of Blakey's initial suit, other crew members began to post defamatory threads regarding Blakey and her performance as a pilot on an Internet posting board that was affiliated with Continental,
but managed and maintained by CompuServe. The site was accessed by crewmembers from their homes using their personal computers. The comments made by other pilots on the site disparaged Blakey’s skills as a pilot and accused her of doing expensive damage to planes.

In 2000, the Supreme Court of New Jersey heard Blakey and held that although the electronic bulletin board may not have a physical location within a terminal, hangar or aircraft, it may nonetheless have been so closely related to the workplace environment and beneficial to Continental that a continuation of harassment on the forum should be regarded as part of the workplace. As applied to this hostile environment workplace claim, we find that if the employer had notice that co-employees were engaged on such a work-related forum in a pattern of retaliatory harassment directed at a co-employee, the employer would have a duty to remedy that harassment.

After Blakey, courts should consider whether online sites that are not owned or affiliated with the employer may be considered to be so “closely related to the workplace environment” and “beneficial” that the organization has duty to remedy harassment for any disparaging comments made on the site. However, in order to find a duty, it is likely that the site would have to be one that has been branded by the organization and is closed to the public. However, as social networks continue to evolve, a court may have to consider whether a public social network established and controlled by an employer has a close enough relation to the work environment to be considered an extension of it.

In the example scenario involving Kelly at the beginning of the section, given the Blakey ruling, would it be conceivable that

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62 Id. at 856.
63 Id. at 858-860.
Kelly has a claim against the college? The webpage at issue in the example was a site that was owned by Facebook, but was maintained by the alumni association and closely identified with the college. The webpage was beneficial to the college because it allowed the college to communicate with students, alumni, and staff. Kelly may have an argument that given the college had control over the website, it also had a duty to remedy the harassment. And, if the speech that took place on the site contributed to the adverse employment action against Kelly, the online speech may provide her with the grounds for a hostile environment claim.

C. Internet Pornography

i. Example Scenario

Sabrina worked for the A-1 Trading for the past year. During that time, she noticed that the majority of the employees tend to spend their days in their offices with their doors closed. One day she overheard the network administrator talking about the organization’s Internet logs and how much porn is downloaded on a daily basis in the office. After that, all Sabrina could think about when she was at work was all of the people in the offices with their doors shut are downloading pornography, which she found to be disturbing. She hesitated before she walked into an office or avoided entering closed offices altogether to avoid encountering a difficult or embarrassing situation. Sabrina’s manager noticed that her performance has decreased and was considering putting Sabrina on a performance improvement plan that could eventually lead to termination.65

ii. Daily Dose of Pornography in Corporate America

Elizabeth A. Cameron and Dawn Swink found that employees at Apple, AT&T, and IBM, visited the Penthouse website over 12,000 times in one month. Additionally, 75 percent of all Internet pornography access occurs during hours that most of the adult population is at work. However, if an employee finds that he (or she) cannot access pornography at work because his (or her) employer has set up blocking technology, there are websites devoted to helping these employees find a workaround.

Government employees are also taking advantage of an employer’s high-speed connection to access pornography at work. Ed O’Keefe offers the examples below of government employees accessing pornography on the job.

• A senior executive at the National Science Foundation spent at least 331 days looking at pornography on his government computer and chatting online with nude or partially clad women without being detected. The problems reportedly were so pervasive they diverted the agency’s watchdog from its main mission.

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washingtontimes.com/news/2010/feb/02/sec-workers-investigated-for-viewing-porn-at-work/?page=all
67 Id. at 102.
68 See www.wikihow.com/Not-Get-Caught-Looking-at-Porn (Tips on how to access porn at work. As of December 31, 2011 the site had been accessed nearly 400,000 times).
• National Park Service employee John A. Latschar, who oversaw the Gettysburg National Military Park, used his office computer over a two-year period to search for and view more than 3,400 sexually explicit images. He was later reassigned to an unspecified desk job.

• Alex Kozinski, chief judge of the U.S. 9th Circuit Court of Appeals, established a website that featured sexually explicit photos and video. He later acknowledged posting images, defended the content as “funny” (no, really) and said he thought the site was for his private storage. All of this while he was presiding over an obscenity trial. He later took the site down.71

iii. How Current Sexual Harassment Law Fails to Address Issues with Private Porn at Work

If the above statistics are true, it stands to reason that there is a significant amount of pornography being consumed each day at work. Employees being fired for watching pornography at work have not made headline news on a large-scale level. This suggests that pornography is being viewed surreptitiously. However, if employees are viewing pornography privately in the workplace, but it is known that they are doing so, should employers be able to avoid liability for a sexual harassment lawsuit? Or should the private viewing of pornography at work constitute a hostile work environment? Even though some employees may not know that others are consuming large amounts of pornography at work, that consumption must have some impact on the overall quality of the work environment.

One way to conceptualize the issue is by arguing that the employer has notice of the activity that is arguably creating a hostile work environment, even without an individual worker complaining about the office Internet pornography problem. When an employee visits a website, the cache on the employee’s computer creates a record of the sites that employee has vis-

71 Id.
Additionally, the employee may have used Google or another search engine to find sites to view, which also creates a record. Finally, many employers have hired network administrators, who are charged with managing access to the Internet within the office and creating records of use. The current situation is comparable to an employer deciding to overlook an employee’s desktop display of a possibly offensive photo because the employee keeps his door closed. Given modern technology, the ability to track employee visits to explicit sites on the Internet is slightly harder to access, but not much.

As mentioned above, making private viewing of pornography actionable would require a different conception of the prima facie case for hostile work environment. Regarding the element of severity or pervasiveness, one could argue that if 75 percent of the office is viewing pornography, the situation is both severe and pervasive. However, the employee making a hostile environment claim may face difficulty in establishing a prima facie case without viewing the pornography being brought into the workplace by coworkers. For example, an employee like Sabrina, in the example above, would need to be able to demonstrate that her knowledge of the pornographic viewing habits of her officemates, even without viewing the pornography, has affected the conditions of her work environment negatively.

Research shows that pornography in the workplace is not taken seriously and many do not seem to understand why others feel marginalized by the prevalence of Internet pornography at work. Even so, some research does attempt to address the po-

tential issues in a thoughtful manner. For example, Evelyn Oldenkamp incorporates Catharine MacKinnon’s theory that “pornography essentially sexualizes societal inequality and institutionalizes the sexuality of male dominance thereby violating women’s right to equal protection under the law. Pornography defines how men see women.” Therefore, it could be that the consumption of pornography by men in the office diminishes the work environment for women, even though women are not viewing pornography themselves or even know that it is taking place. Rather than dismissing the presence of Internet pornography in the workplace as unimportant or humorous, employers and courts need to find a solution that protects employees that feel victimized by the hostile work environment created when coworkers privately view online pornography.

Of course, the easiest way to address the situation is by instituting greater degree of employee monitoring. Justifiably, privacy advocates have raised concerns regarding the level of employee monitoring, which occurs when employers control what Internet sites their employees may visit. The privacy argument is important and should be considered. Employers have broad authority to monitor employee access of employer networks using employer provided equipment. This is problematic because employee morale decreases if employees feel that they are not respected or trusted as individuals, and fear that

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76 See Evelyn Oldenkamp, Pornography, the Internet, and Student-to-Student Sexual Harassment: a Dilemma Resolved with Title VII and Title IX, 4 DUKE J. GENDER L. & POL’Y 159 (1997).

77 Id. at 164.


79 Id.
every keystroke they make is being monitored and reported to management. Going forward employers will need to develop policies that respect the privacy and civil rights of employees. However, employees will also need to accept some restriction of Internet access or monitoring while in the workplace as employers seek to limit their liability.

IV. CONFLICTS WITH TRADITIONAL TITLE VII SEXUAL HARASSMENT FRAMEWORK - DOES LACK OF IN-PERSON CONTACT WEAKEN ELECTRONIC BASED SEXUAL HARASSMENT CASES?

As previously discussed, current technologies are beneficial because they facilitate easy and effective long-distance communication. However, this is equally harmful because when an employee uses Internet communication to sexually harass another employee, that distance may make it harder for the harassed worker to establish his or her case successfully. Courts, accustomed to applying sexual harassment framework to incidents of physical contact or in-person verbal abuse, may evaluate a communication sent through email or instant messaging as failing to be severe or pervasive enough to create a hostile work environment.

Courts should weigh Internet contact and physical contact similarly. In doing so, they should consider the unique characteristics of the Internet. Emails can be forwarded instantly to multiple people, which can expand the number of people who are joining into the harassing behavior very quickly. Also, technologies like email reach into our homes and personal lives because work mail is often accessed on smart phones. This, in turn, makes it difficult for an employee to disengage from a harassing situation. Therefore, judges should apply the reasona-

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80 Id.
81 See Shannon Leger, Employment Law – Here’s Looking at You: High Tech “Peeping” in the Workplace and the Role of Title VII, 28 W. New Eng. L. Rev. 89 (2005). (Uses the idea of workplace peeping facilitated by technology to address the reliance of courts on physical touching to establish a prima facie case of hostile work environment harassment.)
ble person standard and focus their analysis on how a person similarly situated would have reacted and whether what happened at a distance was any less upsetting to the victim than it would have been, if it occurred in person.

V. SUGGESTIONS FOR EMPLOYERS

Employers should implement a comprehensive policy related to employee access and use of the Internet. The policy should be written with an eye toward what the employees will find fair and reasonable and what they might consider to be overly restrictive and demeaning. In the end, the policy should strive to create a positive work environment while providing the employer some protection from liability.

This policy should spell out clearly how the Internet should be used at work as well as what types of behaviors are off-limits for employees while they are using company resources. The Internet use policy should be given to all new employees during the orientation process so they may review and sign it. Continuing employees should also have an opportunity to sign the policy as it is implemented. Then the company should review the policy on a pre-selected schedule, whether it be every six months or every year. When it is reviewed, employer representatives should read it to see if anything in it has become outdated or if there are any new technological advances that require the policy

82 Supra note 71 at 19 – 22.
84 Supra note 71 at 18.
to be modified to take into account these changes. Subsequently, the new version should be distributed to the employees along with an explanation of the changes. All employees should sign or otherwise acknowledge that they have received and understand the changes to the policy.

In addition to ensuring that the policy is updated and distributed on a regular basis, the organization should take steps to properly train managers regarding proper application of the policy. In Quon v. Arch Wireless, the employer failed to update the policy to cover texting. Supervisors then gave Quon information that did not match the official policy, which the court frowned upon and, as a result, exposed the employer to liability.

Along with reviewing, editing, and distributing revised versions of the technology policy, organization should also follow the same steps with their sexual harassment policies. Too often, both of these documents are issued once—usually at hiring—and never seen or discussed again. Or, they are issued without adequately discussing the policy with employees and asking for their input in order to ensure that they understand and support the principles behind the documents.

Finally, employers should decide whether a written version of the policy is sufficient or whether they would also find additional training on the policy valuable. In person or online training may help increase the understanding of the principles behind the policy. It may also provide valuable time for employees to give feedback on the policy and its implementation.

85 See Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008) (Case focused on employee's right to privacy for texts received on employer issued form; company failed to update policy and applied inconsistently). See Amanda Lavis, Employers Cannot Get the Message: Text Messaging and Employee Privacy, 54 VILL. L. REV. 513 (2009). (Discussion of issues in Quon).
86 Quon, 529 F.3d at 896.
87 Id. at 896-98.
VI. CONCLUSION

Sexual harassment law has had to evolve over the past forty years to keep pace with changing circumstances in society. The new millennium will continue to bring changes and new challenges for both employers and employees in regard to managing the employment environment and keeping it free of sexual harassment. The key is to understand how people use technology in the work environment without minimizing the benefits of technologies on employees and the workplace as a whole.

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