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**WORKPLACE CYBERHARASSMENT:
EMPLOYER AND WEBSITE OPERATOR LIABILITY
FOR
ONLINE MISCONDUCT**

by

John Paul*

I. INTRODUCTION

Harassment is a serious problem in the United States (U.S.) workplace. One widespread definition of workplace harassment is “repeated and persistent attempts by one person to torment, wear down, frustrate or get a reaction from another. It is treatment which persistently provokes, pressures, frightens, intimidates or otherwise discomforts another person.”¹ While workplace harassment may be immoral and unprofessional, it is not universally illegal in the U.S. workplace for employers to insult, humiliate, ignore or mock employees; furthermore, it is not illegal to gossip, spread rumors or take credit for someone else’s work. Unfortunately, these types of workplace harassment take place with distressing frequency.²

Several recent studies confirm the seriousness of workplace harassment in the U.S. A March 2007 survey of 1,000 U.S. employees conducted by the Employment Law Alliance revealed that 45 percent of respondents reported working for abusive bosses. A September 2007 poll sponsored by the Workplace Bullying Institute (consisting of 7,740 online

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interviews) estimated that 37 percent of U.S. workers (about 54 million people), would report being bullied in the workplace. In a 2008 study conducted by the Society for Human Resource Management and the Ethics Resource Center, 57 percent of the 513 participants reported that they had witnessed “abusive or intimidating behavior toward employees,” excluding sexual harassment (Daniel 2009).³

Workplace bullies can be identified by a number of characteristics: (1) frequent misuse of authority; (2) focus on personal self-interest, as opposed to the good of the organization; (3) inconsistency and unfairness in the treatment of employees; and (4) prone to emotional outbursts. Bullies engage in actions that are perceived as being overwhelmingly negative. These negative actions include: (A) a need for control, exploitation, intimidation, humiliation and embarrassment; (B) a failure to communicate, manipulation and engaging in a pattern of obstructive behavior over time; (C) ostracizing and ignoring employees; and (D) gossiping or spreading rumors about their targets.⁴

The effects of workplace harassment include: (i) depression; (ii) post-traumatic stress disorder; (iii) prolonged-duress stress disorder; (iv) alcohol abuse; and (v) suicide. Workplace bullying is a risk factor for maintaining mental health. The effects of workplace harassment may lead to adverse interpersonal and familial consequences; moreover, the effects are not just limited to the targets of harassment but also impact witnesses to bullying who experience mental stress.⁵ The demoralization harassment victims suffer can create toxic working environments and impair organizational productivity.⁶

Traditionally, workplace harassment has occurred through face-to-face verbal and physical acts in the workplace environment.⁷ The traditional notion of the workplace

environment continues to expand with changing technology, which allows employees to stay connected to the workplace environment at locations outside the four walls of the office.⁸ These technological advances have also expanded the media through which individuals may harass others.⁹ With the rise in the popularity of social media,¹⁰ harassment has moved beyond the physical boundaries of the workplace to the virtual workplace.¹¹

The rise of workplace harassment in cyberspace is one of the most recent examples of the increasing complexity of this phenomenon. Workplace harassment law has not kept up with this evolution. It has not been adequately updated to address the new and amplified practices of workplace discrimination. The two principal limitations of the current law are: (1) treats only workplace harassment that occurs in certain protected settings, such as the physical workplace or school setting, as actionable; and (2) assumes that both the act and resulting harm of workplace harassment occur in the same protected setting. These two limitations make the current workplace harassment law unable to address harassment that occurs completely or partially outside of the traditionally protected settings.¹²

In *Faragher v. City of Boca Raton*¹³ and *Burlington Industries, Inc. v. Ellerth*,¹⁴ the U.S. Supreme Court recognized that employers are liable under Title VII of the 1964 Civil Rights Act for harassment that is sufficiently severe or pervasive to alter the employee's workplace environment. The rise in digital media, however, has created a new medium through which harassment occurs and the courts are just beginning to deal with the issue of whether to consider digital media harassment as part of the totality of the circumstances of a hostile workplace claim.¹⁵

This article argues for a multiple-setting approach to dealing with cyberharassment with liability extending to website operators. Furthermore, this article argues that the courts should examine whether the employer has derived a substantial benefit from the digital media forum in order to consider whether this digital media forum is an extension of the employee's workplace environment. These frameworks: (1) are consistent with the traditional workplace harassment analysis under Title VII; (2) recognize the evolving technology in the modern workplace; and (3) provide employers with guidance on how to maintain an affirmative defense to workplace harassment allegations in the digital media age.¹⁶

II. THE MULTIPLE-SETTING APPROACH TO WORKPLACE HARASSMENT

Workplace cyberharassment causes much harm: victims have committed suicide, lost jobs, dropped out of school and decreased their participation in employment, educational and recreational activities.¹⁷

While cyberharassment creates harm that is equal to or even more severe than harassment that occurs in traditionally protected spaces, there is no clear legal concept of or remedy for cyberharassment. Certain settings are protected under traditional harassment law: workplaces under Title VII, schools in Title IX and to a lesser extent homes via the Fair Housing Act and prisons via the Eighth Amendment. Current law requires that the harassment and the effects of that harassment occur in the same protected setting. While courts have sometimes expanded the concept of protected settings by recognizing that the workplace is not limited to physical location but the relationships that constitute the employment setting, even the most expansive legal view of protected

settings leaves cyberharassment outside the purview of harassment law.¹⁸

The fact that workplace harassment doctrine has developed around a list of single, protected settings means that it does not provide a remedy for harassment that occurs in one setting and produces consequences in another. Thus, if an employee is harassed at her/his workplace by a co-worker, manager or even a visitor in a way that significantly interferes with her/his ability to function there, s/he has a claim; if s/he is harassed by an anonymous stranger on an Internet message board with the same effects, s/he does not. The single concept of workplace harassment is ill-suited for the realities of the Internet age, where harassment occurring in virtual settings can have severe effects in traditionally protected employment and educational spaces.¹⁹

Recently, the courts have begun to adopt a more expansive concept of workplace and school harassment that includes cyberharassment.²⁰

In *Blakely v. Continental Airlines, Inc.*, the New Jersey Supreme Court held that an airline could be liable for the harassment that occurred on an electronic bulletin board used by the pilots of that airline.²¹ The court held that just because the electronic bulletin board was located outside of the workplace doesn't mean that the employer may not have a duty to correct off-site harassment by co-workers as conduct that takes place outside of the workplace tends to permeate the workplace.²²

In *J.S. ex rel. H.S. v. Bethlehem Area School District*,²³ students created a website where they posted comments about their teacher such as "F—k you, Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch," and "Why Should She Die."²⁴ On

another website, there was a sketch of Mrs. Fulmer with her head cut off and blood dripping from her neck.²⁵ When Mrs. Fulmer saw these websites, she was unable to complete the school year and took a medical leave of absence for the following year. She testified that she suffers physically and emotionally as a result of what the students wrote about her on those websites. The Supreme Court of Pennsylvania held that this type of substantial disruptive effect justifies control of student speech and that the student's website containing the threatening comments about the teacher has a sufficient nexus to the school to be considered on-campus.²⁶

One possible interpretation of these cases is that the courts recognize that workplaces and schools, especially in an increasingly virtual world, are not just physical locations. Workplaces and schools tend to be "sets of social relations of power and privilege, which may or may not have a distinct geographical nexus."²⁷ This developing approach provides a reasonably sound way of dealing with harassment cases in which the harassment occurs "off-site" but produces effects in a protected workplace or school setting and is committed by individuals with some relationship to the protected setting.²⁸

Of course, this multiple-setting approach could be seen as being unfair to employers in numerous cases. Should employers be held liable for all off-site harassment cases just because they may produce effects in the workplace and are perpetrated by individuals with a connection to the employer? If a group of employees form their own blog to discuss work and decide to make disparaging comments about a certain employee, should the employer be liable if those comments produce effects in the traditional workplace? There is a possible affirmative defense that an employer in this situation could raise.

III. THE EMPLOYER'S AFFIRMATIVE DEFENSE: SUBSTANTIAL BENEFIT FROM THE DIGITAL MEDIA FORUM

Currently, there is confusion and a scarcity of case law regarding what role evidence of social media harassment should have in a workplace harassment claim. The lack of clear legal boundaries regarding online media encourages harassers to engage in conduct they would have refrained from within the physical walls of the workplace.²⁹ Meanwhile, the increased integration of social media within our personal and professional lives makes it likely that the courts will be confronting social media issues with increased frequency.³⁰

To determine whether harassment over a social media site may serve as evidence of a hostile work environment, the courts should examine whether the employer derived a substantial benefit from this social media site, thereby categorizing the site as a digital extension of the employee's workplace environment.³¹ In these claims, social media harassment should be examined under the totality of the circumstances of a Title VII hostile work environment claim for the purpose of determining employer liability.³²

Although the court in *Blakely* did not clearly define what constitutes a "substantial benefit," it provided several examples of how social media may provide a benefit to an employer.³³ First, employees' access to company information via social media is a benefit because it improves efficiency.³⁴ Second, communication between employees via social media promotes collaboration, spurs innovation and streamlines operations, thereby providing a benefit by reducing costs.³⁵ Third, the greater the number of current employees using social media, the more likely it is that the employer is receiving a

benefit.³⁶ All of these benefits reduce internal transaction costs.³⁷

Based on the substantial benefits test, an employer could be held liable for postings on a corporate Facebook page since the employer benefits from increasing employee communications, encouraging product innovation or streamlining operations.³⁸ As the court in *Blakely* reasoned, when the employer receives a substantial benefit from a social media forum, such as a corporate Facebook page, the forum is sufficiently integrated into the workplace so that it can be characterized as an extension of the employer's workplace environment.³⁹

On the other hand, an employer would not be held liable for postings on an employee's personal Facebook page. In this case, the employer is probably not receiving any type of economic or personal benefit from the employee's personal Facebook page; therefore the employer is not deriving a substantial benefit.⁴⁰ The employee's personal Facebook page cannot be properly characterized as an extension of the workplace environment.

The substantial benefits analysis is consistent with agency principles, which served as the basis of the U.S. Supreme Court's traditional analysis in hostile workplace claims.⁴¹ In both the *Faragher* and *Ellerth* cases, the U.S. Supreme Court held employers liable for harassment by supervisors and non-supervisors under the aided-in-agency theory.⁴² Under this theory, the employer is liable because the agency relationship between the employer and the employee enables the employee's harassment of others in the workplace. Without the agency relationship, the harassment could not have been committed.⁴³

The substantial benefit argument could serve as an affirmative defense for an employer who is being sued for workplace harassment on the basis of postings on a social media forum. The employer would raise the defense that s/he does not derive a substantial benefit from the social media forum and therefore the postings on the social media are not an extension of the workplace; therefore, the employer would not be liable. In situations like this, if the employer is not liable for these postings, which could adversely affect the workplace environment, who would be? It could be the website operator of the social media on which the harassing postings were displayed.

IV. THE WEBSITE OPERATOR'S LIABILITY FOR CYBERHARASSMENT

The anonymity of the Internet appears to bring out the tendencies of certain users to mock and malign others in ways they wouldn't dream of implementing in a "real" or "offline" environment.⁴⁴ Some might say that the best strategy of dealing with the insulting behavior that occurs on the Internet is to just ignore it. However, when the users attack individuals by name with graphic, vicious insults that could interfere with the victims' livelihood or education, ignoring the problem is not a viable solution. This type of cyberharassment could be categorized as a form of workplace harassment since it could adversely affect the way others view and treat the victim in the workplace.⁴⁵

One of the more famous cases of cyberharassment involved AutoAdmit.com, which was a largely unmoderated message board where individuals could share information about law schools, law school admissions, firms, and how to succeed in law school.⁴⁶ In March 2005, Professor Brian Leiter

wrote about AutoAdmit on his blog, Leiter Reports, noting the rampant racism and sexism of AutoAdmit posters.⁴⁷ In March, 2007, the *Washington Post* highlighted the numerous racist, sexist and obscene posts on AutoAdmit.⁴⁸ There were posts that included entire message threads devoted to ranking female students' bodies as well as discussing their alleged sexual activities.⁴⁹

In numerous cases, the personal information of these students, such as their names, email addresses and instant messenger screen names were disclosed. Furthermore, the email addresses of their professors and former employers were disclosed and site members were encouraged to email their insults to these professors and former employers directly.⁵⁰ A number of women knew nothing about these threads until they were informed of them by friends or through Google searches.⁵¹ Some women contacted the AutoAdmit administrators and requested that the offensive threads be removed.⁵² An AutoAdmit administrator responded in an AutoAdmit post by telling them "Do not contact me ... to delete a thread." He warned that if he kept receiving such requests, he would post them on the message board for everyone to see.⁵³ In response to criticism, the AutoAdmit administrators cited First Amendment arguments and claimed that the women invited the attention by posting photographs on social media sites such as Facebook and MySpace. In some cases, the AutoAdmit administrators posted the women's complaints on the site, leading to threads calling the women "bitches" and threats to punish them with rape, stalking and other abuse.⁵⁴

Sites that thrive on gossip and personal insults, such as AutoAdmit are numerous.⁵⁵ The comments sections of many online newspapers and blogs are loaded with obscene abuse.⁵⁶ Social networking sites such as Facebook have become highly

effective media outlets for vengeful individuals to attack ex-lovers and there are numerous sites devoted to “revenge porn,” which is defined generally as homemade porn uploaded by an ex-lover after a particularly nasty breakup as a means of humiliating that ex-lover.⁵⁷

Revenge porn victims are starting to come forward to describe the harms they have suffered, including psychological damage, stalking and a loss of professional and educational opportunities.⁵⁸ Only now are we beginning to get a sense of how large the problem of revenge porn is since more victims are telling their stories. The fact that nonconsensual porn often involves the Internet and social media, leads the legal system to sometimes struggle to understand the mechanics of this type of harassment and the devastation it can cause.⁵⁹

Cyberharassment is theoretically more responsive to control than real-life harassment.⁶⁰ A number of cyberharassment features that magnify the harm of harassment, such as instance and permanence, also make this harassment easier to regulate. Also, since much cyberharassment is recorded and even date- and time-stamped, the evidentiary problems that plague real-life harassment are usually not an issue with cyberharassment.⁶¹ Furthermore, the website operators are clearly identifiable agents of effective control over sites where cyberharassment takes place; therefore, the website operators can control the behavior of users on their sites as effectively as employers and school administrators can control individuals in their respective real-life environments.⁶²

It is recommended that website operators should be held liable for cyberharassment, since they are the agents with effective control over the setting of the harassment.⁶³ Like employers and school administrators in Title VII and Title IX harassment cases, website operators have the most knowledge

about the harassment. They know how vicious it is and whether certain victims are harassed by multiple users; plus, they may also have identifying information about the harassers.⁶⁴ Furthermore, they have control over the users of their sites. Just as employers can fire employees, restrict their behavior or eject abusive customers, website operators can warn and even ban users who engage in cyberharassment on their sites.⁶⁵ Finally, as a public policy issue, it will encourage website operators to create and enforce policies that will discourage cyberharassment from occurring in the first place and the prevention of harm is better than the mitigation of harm after it occurs.⁶⁶

In order to hold website operators liable for cyberharassment, a change in the language of Section 230 of the Communications Decency Act (CDA) would be needed.⁶⁷ Section 230(c)(1) states that “*no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.*”⁶⁸ This section of the CDA provides immunity from liability to providers and users of interactive websites who publish information by others.⁶⁹ Website operators are immunized from the unlawful activities of third parties. Given that cyberharassment perpetrators are often anonymous, the victims of cyberharassment can bring no cause of action because there is no party to hold accountable.⁷⁰

The immunity provided to website operators is not absolute.⁷¹ Section 230(e)(1) states: *Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.*⁷² Section 230(e)(2) states: *Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.* Sections 230(e)(1)

and (e)(2) of the CDA provide exceptions for federal criminal law and intellectual property law.⁷³ The best way to remove the obstacle of Section 230 for cyberharassment cases would be to revise it to include express language on compliance with federal anti-discrimination law. This amendment could include a subsection explaining how website operators, as control agents over message boards and sites, can be held liable for harassment that produces effects in settings protected by current anti-harassment law.⁷⁴

Regulating cyberharassment in this way would provide a much-needed remedy for a serious harm in addition to providing the benefits of relatively low implementation costs, low liberty costs⁷⁵ and a great deterrent.⁷⁶ In order for the website operator to avoid liability for cyberharassment perpetrated by others on the website operator's site, the website operator would just have to remove the offending threads from the site and ban the user who posted those threads. This remedy has the virtue of efficiency.

IV. CONCLUSION

While workplace harassment has been a serious issue for many years, the rise of workplace harassment in cyberspace demonstrates the increasing complexity of this phenomenon. Workplace harassment law has not kept up with the evolution of online digital media. The current law treats only workplace harassment that occurs in traditionally protected settings such as the physical workplace or school environment and assumes that the act and harm of workplace harassment both occur in the same physical setting. As a result, the current law is unable to address harassment that occurs outside of the traditionally protected settings.

Since cyberharassment creates harm that is equal to or even more severe than real-life harassment, a clear legal remedy for cyberharassment is greatly needed. The legal system is beginning to realize that workplaces and schools are not just physical locations but sets of social relations that may or may not have a distinct geographical nexus. Updating current workplace harassment law to include the multiple-setting approach would allow the victims of cyberharassment to seek proper redress for any harm they may have suffered.

To determine whether online harassment may serve as evidence of a hostile work environment, the courts should examine whether the employer derived a substantial benefit from the online site, thereby categorizing this site as an online extension of the employer's workplace. If the employer derives no substantial benefit from the site, then this would serve as an affirmative defense for the employer.

In cases where the employer is not liable for cyberharassment that can create serious harm in the workplace, the website operators could be held liable for such harassment. Since website operators are the agents with effective control over cyberharassment, they should be held liable for allowing such harassment to continue on their sites. The current law that provides immunity to website operators of interactive websites could be amended to provide a much-needed remedy to those whose professional and educational opportunities have been limited as a result of cyberharassment. Furthermore, since the only action website operators must take in order to avoid liability for cyberharassment is to remove the offending threads and ban the creators of these threads from the site, the new remedy for cyberharassment has the virtue of efficiency.

¹ Carroll M. Brodsky, *THE HARASSED WORKER* (1976).

² Teresa A. Daniel, *Tough Boss or Workplace Bullying*, *HR MAGAZINE*, June 2009, at 83, 86.

³ *Id.*

⁴ *Id.*

⁵ William Martin and Helen LaVan, *Workplace Bullying: A Review of Litigated Cases*, 22 *EMPLOYEE RIGHTS JOURNAL* 175 (2010).

⁶ Gina Vega and Debra R. Comer, *Sticks and Stones May Break Your Bones, But Words Can Break Your Spirit: Bullying in the Workplace*, 58 *JOURNAL OF BUSINESS ETHICS* 101 (2005).

⁷ *Supra* note 5.

⁸ See Michelle A. Travis, *Equality in the Virtual Workplace*, 24 *BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW*, 283, 293 (2003) (commenting that nontraditional work arrangements continue to expand and that telecommuting appears to be continuing into the new millennium).

⁹ Rachel Gely, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 *HARVARD JOURNAL OF LAW AND TECHNOLOGY* 287, 301-303 (2007) (discussing how employees are increasing using blogs to communicate with other employees and discuss work).

¹⁰ Defined as: forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos), *MERRIAM-WEBSTER DICTIONARY* <http://www.merriam-webster.com/dictionary/social%20media> (last accessed 1/4/2015).

¹¹ See David K. McGraw, Comment, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 *RUTGERS COMPUTER & TECHNOLOGY LAW JOURNAL* 491, 491-492 (1995) (discussing how the growth of computer networks in the 1980s and 1990s created the means for widespread sexual harassment).

¹² Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 *MARYLAND LAW REVIEW* 655, 655-657.

¹³ *Faragher*, 524 U.S. 775 (1998); *Ellerth*, 527 U.S. 742 (1998) (the Court provided for an employer to raise a defense to a claim of a hostile work environment, if the employer can show that it exercised reasonable care to prevent and correct any sexually harassing behavior, and second, that the plaintiff unreasonably failed to take advantage of any preventative or

corrective opportunities provided by the employer. This created what has become known as the Faragher/Ellerth defense).

¹⁴ *Ellerth*, 527 U.S. 742 (1998) (Held: Under Title VII, an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions, but the employer may interpose an affirmative defense).

¹⁵ *Faragher*, 524 U.S. 775 (1998); *Ellerth*, 527 U.S. 742 (1998).

¹⁶ See Jeremy Gelms, *High-Tech Harassment: Employer Liability under Title IV for Employee Social Media Misconduct*, 87 WASHINGTON LAW REVIEW 249 (2012) and Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 655, 655-657 (2012).

¹⁷ See Danielle Keats Citron, *Cyber Civil Rights*, 89 BOSTON UNIVERSITY LAW REVIEW 61, 89-95 (2009).

¹⁸ Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659 (2012).

¹⁹ *Id.*

²⁰ See, e.g., *McGuinn-Rowe v. Foster's Daily Democrat*, No. 94623-SD, ("alleged sexual assault of plaintiff also contributed to the hostile environment plaintiff experienced at work, even though this particular incident occurred outside the workplace setting."); *Am. Motorists Ins. Co. v. L-C-A Sales Co.*, 713 A.2d 1007, 1013 (N.J. 1998) (recognizing that while the harassing phone calls to the victim's home took place outside of the workplace, the conduct would have arisen outside of the employment relationship).

²¹ 751 A.2d 538, 543 (N.J. 2008).

²² *Id.* at 549.

²³ *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

²⁴ *Id.* at 851.

²⁵ *Id.*

²⁶ *Id.* at 858-859, 869; also see John Paul, *Restorative Justice for the Victims of School Bullying: How Far Does the Law Go?* 32 NORTH EAST JOURNAL OF LEGAL STUDIES 113, 120-121 (2014) (for a discussion of cases in which courts find that cyberbullying causes a substantial disruption in school).

²⁷ J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUMBIA LAW REVIEW 2295, 2313 (1999).

²⁸ Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659, 668 (2012).

²⁹ Azy Barack, *Sexual Harassment on the Internet*, 23 SOCIAL SCIENCE COMPUTER REVIEW 77, 82-83 (2005) (arguing the lack of defined legal boundaries and enforcement mechanisms fosters an online environment that enables harassment).

³⁰ Jeremy Gelms, *High-Tech Harassment: Employer Liability under Title IV for Employee Social Media Misconduct*, 87 WASHINGTON LAW REVIEW 249, 272 (2012).

³¹ See *Blakely v. Continental Airlines, Inc.*, 751 A.2d 538, 551-552 (N.J. 2002).

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id. at 552.

³⁶ Id.

³⁷ Jeremy Gelms, *High-Tech Harassment: Employer Liability under Title IV for Employee Social Media Misconduct*, 87 WASHINGTON LAW REVIEW 249, 273-274 (2012).

³⁸ See, e.g. Rusty Weston, *Facebook: Your Company's Intranet?* FORBES, March 20, 2009, <http://www.forbes.com/2009/03/20/facebook-intranet-serena-entrepreneurs-technology-facebook.html> (creating relationships that wouldn't have existed if it weren't for Facebook) (last accessed 8/29/2014).

³⁹ *Blakely v. Continental Airlines, Inc.*, 751 A.2d 538, 551 (N.J. 2002).

⁴⁰ See, e.g. *Lapka*, 517 F.3d at 983 (noting that a training program where the employer paid for accommodations and food could qualify as part of the employee's workplace).

⁴¹ *Ellerth*, 524 U.S. at 760; *Faragher*, 524 U.S. at 802.

⁴² Id.

⁴³ Id.

⁴⁴ See Danielle Keats Citron, *Cyber Civil Rights*, 89 BOSTON UNIVERSITY LAW REVIEW 61, 89-95 (2009) (application of civil rights doctrine to cyberharassment can help deter Internet mobs).

⁴⁵ Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659, 678 (2012).

⁴⁶ Ellen Nakashima, *Harsh Words Die Hard on the Web; Law Students Feel Lasting Effects of Capricious Remarks*, WASHINGTON POST, March 7, 2007; Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659, 678 (2012).

⁴⁷ Brian Leiter, *Penn Law Student, Anthony Ciolli, Admits to Running Prelaw Discussion Board Awash in Racist, Anti-Semitic, Sexist Abuse*, Leiter Rep.: A Phil. Blog (March 11, 2005)

http://leitereports.typepad.com/blog/2005/03/penn_law_studen.html

(last accessed 8/30/2014).

⁴⁸ Ellen Nakashima, *Harsh Words Die Hard on the Web; Law Students Feeling Lasting Effects of Capricious Remarks*, WASHINGTON POST, March 7, 2007.

⁴⁹ David Margolick, *Slimed Online*, Portfolio.com (February 11, 2009), <http://www.port-folio.com/news-markets/national-news/portfolio/2009/02/11/Two-Lawyers-Fight-Cyber-Bullying/index.html>; Mary Anne Franks, Article, *Cyberlaw: Sexual Harassment 2.0*, 71 MARYLAND LAW REVIEW 659, 678 (2012).

⁵⁰ Citron, *Cyber Civil Rights*, supra note 41.

⁵¹ Nakashima, *Harsh Words*, supra note 43.

⁵² Margolick, *Slimed Online*, supra note 46.

⁵³ Id.

⁵⁴ Franks, *Cyberlaw*, supra note 42, at 679.

⁵⁵ Citron, *Cyber Civil Rights*, supra note 41, at 65-66.

⁵⁶ See Howard Kurtz, *Online, Churls Gone Vile*, WASHINGTON POST, March 26, 2007 (noting the increase of offensive comments in the comments section of the Washington Post, which does not have the resources to screen these comments in advance).

⁵⁷ See Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARVARD JOURNAL OF LAW & GENDER 383, 387-389 (2009) (describing a group of obscene comments left on a YouTube video trailer for a documentary about a rock and roll camp for young girls).

⁵⁸ Danielle Keats Citron and Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST LAW REVIEW 345, 347 (2014) (noting that many victims' lives are upended by images they shared or permitted to be taken thinking they would remain confidential and the states as well as the federal government should craft narrow statutes that prohibit the publication of nonconsensual pornography).

⁵⁹ Id.

⁶⁰ Franks, *Cyberlaw*, supra note 45, at 683.

⁶¹ Id.

⁶² Id.

⁶³ Id. at 684.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ 47 U.S.C. § 230 (2006).

⁶⁸ 47 U.S.C. § 230(c)(1) (2006).

⁶⁹ Id.

⁷⁰ See *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (holding that allowing users to post comments under different screen names did not make the website operator under Section 230).

⁷¹ 42 U.S.C. §230(e)(1)-(2) (2006).

⁷² 42 U.S.C. §230(e)(1) (2006).

⁷³ 42 U.S.C. §230(e)(2) (2006).

⁷⁴ See KrisAnn Norby-Jahner, “*Minor*” *Online Sexual Harassment and the CDA §230 Defense: New Directions for Internet Service Provider Liability*, 32 *HAMLIN LAW REVIEW* 207, 243 (2009) (arguing for statutory clarifications of CDA Section 230 so that website operators can be held liable for creating a hostile online environment).

⁷⁵ The costs regulating freedom from oppressive restrictions on one's way of life, behavior, or political views, Franks, *Cyberlaw*, supra note 45, at 687.

⁷⁶ Franks, *Cyberlaw*, supra note 45, at 688.