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## "Bring Your Own Device" Policies Also Bring Complications in Workplace Sexual Harassment Lawsuits

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## “BRING YOUR OWN DEVICE” POLICIES ALSO BRING COMPLICATIONS IN WORKPLACE SEXUAL HARASSMENT LAWSUITS

MORGAN DAVENPORT

### INTRODUCTION

Sexual harassment in the workplace became legally actionable in the late 1970s, when quid pro quo harassment was first held to be “sex discrimination within the meaning of Title VII.”<sup>1</sup> Since the 1970s, the legal doctrine of sexual harassment has continuously developed, responding in part to rapid technological changes that have helped to reshape the workplace.<sup>2</sup> A newly emerging company policy called “Bring Your Own Device” (BYOD), where employees use personal devices for work rather than using company-supplied technology (for example, personal cell phones),<sup>3</sup> is another such change that will continue to reshape the workplace. Although BYOD policies exist at the intersection of several major tensions in workplace sexual harassment, the impact that these policies will have on sexual harassment claims is unclear.

This Note discusses the legal challenges that arise with BYOD policies in the workplace in relation to sexual harassment claims and employer liability. Part I gives a brief background to the legal development of workplace sexual harassment claims. Part II discusses the general impact of technology on workplace sexual harassment. Part III discusses the rise of BYOD policies and examines the legal challenges that these policies pose when traditional sexual harassment law is applied to cases of sexual harassment involving these policies. Finally, Part IV explores several different options, both in addition to and instead of traditional sexual harassment law, which could be used for dealing with

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<sup>1</sup> Lucetta Pope, *Everything You Ever Wanted to Know About Sexual Harassment But Were Too Politically Correct to Ask (Or, the Use and Abuse of “But For” Analysis in Sexual Harassment Law Under Title VII)*, 30 SW. U. L. REV. 253, 272 (2001). See *infra* Part I for a definition of “quid pro quo” and an in-depth discussion of the development of sexual-harassment law.

<sup>2</sup> Jeremy Gelms, Comment, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 249 (2012).

<sup>3</sup> Hope A. Comisky & Tracey E. Diamond, *The Risks and Rewards of a BYOD Program: Ensuring Corporate Compliance Without Causing “Bring Your Own Disaster” at Work*, 8 CHARLESTON L. REV. 385, 387 (2014).

sexual harassment claims. Ultimately, this Note recommends that Congress provide federal statutes that clarify the problems with workplace sexual harassment law, particularly in the areas identified in this paper: location, electronic employee monitoring, and First Amendment issues.

Perpetrators of sexual harassment should not be able to exploit loopholes in Title VII sexual harassment law to get away with sexually harassing those with whom they work. Yet, with the current state of the law, this may be exactly what would happen. Resolving those problems through federal statutes, as advised by this Note, would allow courts to deal with BYOD policies and workplace sexual harassment in a uniform manner that recognizes the unique characteristics of BYOD devices and still provides remedies to victims. Without these statutes, the liability of employers for harassment on BYOD devices will remain unclear, which may leave victims without protection from their employers and without a remedy from the court.

## I. THE BASICS OF SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>4</sup> The lower federal courts first found sexual harassment actionable under Title VII during the late 1970s<sup>5</sup> under the theory that it was sex discrimination.<sup>6</sup> The Equal Employment Opportunity Commission (EEOC), the federal executive agency that enforces prohibitions against job discrimination,<sup>7</sup> created rules prohibiting workplace sexual harassment in 1980.<sup>8</sup> Six years later, the Supreme Court found that sexual harassment in the workplace was a “viable legal claim” protected by Title VII, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).<sup>9</sup>

In *Meritor*, the Supreme Court recognized two forms of actionable sexual harassment: quid pro quo and hostile work environment.<sup>10</sup> First, quid pro quo harassment is “sexual extortion” in which sex acts are proposed in exchange for a “tangible job benefit.”<sup>11</sup>

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4 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added). For an updated explanation of the current state of Title VII protections, which have been amended by various subsequent legislative acts, see *Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Oct. 14, 2014).

5 Glendora C. Hughes, *Sexual Harassment: Then and Now*, 33 MD. B.J. May-June 2000, at 27, 27 (discussing *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976) and *Barnes v. Costle*, 561 F.2d 983 (D.D.C. 1977)).

6 Anita Bernstein, *Law, Culture, and Harassment*, 142 PA. L. REV. 1227, 1243 (1994).

7 *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Oct. 14, 2014).

8 Bernstein, *supra* note 6, at 1235.

9 Michele Ann Higgins, Note, *Blakey v. Continental Airlines, Inc.: Sexual Harassment in the New Millennium*, 23 WOMEN’S RTS. L. REP. 155, 160 (2002).

10 *Id.*

11 Pope, *supra* note 1, at 257.

These cases are generally only actionable if there is a tangible harm, rather than “mere threats of retaliation.”<sup>12</sup> Second, hostile work environment sexual harassment exists if an employee is subjected to “unwelcome verbal or physical sexual behavior that is either severe or pervasive.”<sup>13</sup> Physical sexual conduct is interpreted broadly enough to include “visual signs and pornography.”<sup>14</sup> “Unwelcome” has been interpreted to mean that the conduct is “neither solicited nor incited” and is viewed as “undesirable or offensive.”<sup>15</sup> In a lawsuit for hostile work environment claims, the plaintiff has the burden of proving sexual harassment by a preponderance of the evidence.<sup>16</sup> Courts either use a reasonableness standard<sup>17</sup> or look at the totality of the circumstances<sup>18</sup> when determining whether the conduct was both sexual and unwelcome.

Even though sexual harassment occurs between individuals, Title VII does not “create a cause of action against the harasser”;<sup>19</sup> instead, plaintiffs seek compensation from the liable employer.<sup>20</sup> In both *Ellerth*<sup>21</sup> and *Faragher*,<sup>22</sup> the Supreme Court held that “an employer is vicariously liable for a hostile work environment created by a supervisor.”<sup>23</sup> In relying on this framework, the Court made the distinction between quid pro quo and hostile environment cases less critical for establishing employer liability, explaining that while the terms were still helpful in discussing the situation, they “should no longer define employer responsibility.”<sup>24</sup> The reason behind changing the framework was primarily to prevent plaintiffs from stretching the definition of quid pro quo harassment to cover their claim so that the employer would automatically have vicarious liability.<sup>25</sup> After these decisions, employers are strictly liable for quid pro quo harassment if there is a “tangible job detriment,” regardless of whether they knew about the harassment.<sup>26</sup> Employers are also vicariously liable if there is a hostile work environment because of a supervisor. However, if a co-worker engaged in the harassment, then the employer is only liable if she

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<sup>12</sup> *Id.*

<sup>13</sup> Higgins, *supra* note 9.

<sup>14</sup> George Noël Lawrence, *What Everyone Should Know About Sexual Harassment, but Was Afraid to Ask*, 60 TEX. B.J. 1024, 1027 (1997).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 446 (1997).

<sup>18</sup> Lawrence, *supra* note 14, at 1027.

<sup>19</sup> Debra D. Burke, *Workplace Harassment: A Proposal for a Bright Line Test Consistent with the First Amendment*, 21 HOFSTRA LAB. & EMP. L.J. 591, 598 (2004).

<sup>20</sup> Bernstein, *supra* note 17, at 492.

<sup>21</sup> *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

<sup>22</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

<sup>23</sup> Gerald L. Miller, *What the General Practitioner Needs to Know to Recognize Sexual Harassment Claims*, 62 ALA. LAW. 247, 248 (2001).

<sup>24</sup> Burke, *supra* note 19, at 599–600.

<sup>25</sup> See *Ellerth*, 524 U.S. at 753.

<sup>26</sup> Jason L. Gunter & Tammie L. Rattray, *Recent Developments in Employer Liability for Sexual Harassment*, 72 FLA. B.J. 94 (1998).

knew or should have known about the harassment and did not take prompt, appropriate action to stop the harassment.<sup>27</sup>

The *Ellerth* and *Faragher* cases also provided employers with an affirmative defense if the employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior,” and if the employee “unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>28</sup> This affirmative defense is not available in supervisor-sexual-harassment cases where an actual adverse official act was taken; for example, if an employee was fired or demoted for failing to comply with sexual demands.<sup>29</sup> For co-worker harassment, an employer can defend a claim by showing that she took immediate and appropriate corrective action.<sup>30</sup>

The state of sexual-harassment litigation is not without criticism. Noting that sexual harassment is the only “subcategory of American federal antidiscrimination law” that requires the victim to prove it was subjectively “distasteful,” some scholars have argued that sexual-harassment law does not fit under Title VII.<sup>31</sup> Similarly, other authors have argued that the confusion between “sexual traits and sex” in sexual harassment suits “creeps beyond Title VII’s bounds.”<sup>32</sup> Specifically, one scholar argued that the courts conflate sexual traits (things that occur usually in either males or females), with the actual category of sex (being either male or female), and so define sex incorrectly during a sexual-harassment analysis by “equating sexual attraction and discriminatory intent.”<sup>33</sup> In other words, she argues that there is a causation issue with whether someone is being treated differently because of sexual attraction or because she belongs to a protected group.<sup>34</sup>

Other scholars have argued that the courts should create a common-law tort of sexual harassment<sup>35</sup> or that sexual harassment should be regulated through the Occupational Safety and Health Administration.<sup>36</sup> Additionally, some argue that the reasonableness standard, or that of a “rational woman,” should be replaced with a “respectful person” standard.<sup>37</sup> The rationale is that sexual harassment is an act of

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27 *Id.* The authors also note that there may be a rare case where an employee’s harassing actions are within the scope of employment (for example, if the employer wants fewer women workers and the harassment aids that goal); if that is the case, the employer is vicariously liable.

28 Miller, *supra* note 23, at 248.

29 *Id.*

30 Burke, *supra* note 19, at 599.

31 Bernstein, *supra* note 6, at 1250.

32 Pope, *supra* note 1, at 254.

33 *Id.* at 255.

34 *Id.* at 271.

35 Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 61 (1999); Bernstein, *supra* note 6, at 1249.

36 Bernstein, *supra* note 6, at 1292.

37 Bernstein, *supra* note 17, at 450 (“[H]ostile environment complaints should refer to respect; the plaintiff should be required to prove that the defendant—a man, or a woman, or a business entity—did not conform to the standard of a respectful person.”).

“disrespect” and so the second standard more closely aligns with what is actually occurring.<sup>38</sup> It is also a gender-neutral standard, one that focuses on the “conduct of an actor rather than the reaction of the complainant.”<sup>39</sup>

Given all of these criticisms, it is clear that sexual-harassment law is not perfect. These imperfections become clearer when the limits of sexual-harassment law are probed with a hypothetical case involving a BYOD device. Those imperfections may leave victims of sexual harassment without a remedy. However, these criticisms also offer potential solutions to the problems identified in this paper, as discussed in Part IV of this Note.

It is important to recognize that workplace sexual-harassment claims under Title VII grew out of the 1970s feminist movement, though they have since evolved from those beginnings.<sup>40</sup> Beginning with the inception of the term “sexual harassment,” scholars have focused on women as the subordinates at work who bear the brunt of this type of harassment.<sup>41</sup> However, newly-emerging literature on sexual-harassment claims recognizes the variety of ways that sexual harassment can actually occur:

Actionable harassment now includes, for example, a gay supervisor’s demotion of a gay or straight male employee based on rejected (or accepted) sexual advances, a female supervisor’s demotion of a male employee for the same reasons, as well as the comparable demotion by a lesbian female supervisor of a female employee. Similarly, sexual harassment does or will include sexual advances towards co-workers (or supervisees), or hostile behavior towards co-workers (or supervisees) who have rejected advances, in all the above combinations.<sup>42</sup>

## II. TECHNOLOGY’S IMPACT ON SEXUAL HARASSMENT

The original legal concept of sexual harassment at work arose in a world that did not yet have some of the technological devices and tools that are integral to a workplace today: Internet, smart phones, laptops, emails, and text messaging.<sup>43</sup> But as workplaces benefit by incorporating new technologies, sexual harassers in employment are also able to take advantage of these new technologies.<sup>44</sup> Three problems arise when technology is used to sexually harass someone at work: (1) the harassment does not always take place at work; (2) employers’ monitoring of their employees’ online activities is controversial; and (3)

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

<sup>39</sup> *Id.* at 455.

<sup>40</sup> See Pope, *supra* note 1, at 259.

<sup>41</sup> Katherine Roush, *Let’s Talk About Sex Discrimination: The Tenth Circuit’s Decision in Dick v. Phone Directories Co.*, 83 DENV. U.L. REV. 719, 721–22 (2006).

<sup>42</sup> Pope, *supra* note 1, at 262. This Note focuses on victims of workplace sexual harassment generally, without differentiating the gender of either the harasser or the victim, as this issue is not the focus of this Note. For a discussion on same-sex harassment, see, for example, William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487 (2011).

<sup>43</sup> See Higgins, *supra* note 9.

<sup>44</sup> *Id.* at 155.

employers' efforts to minimize liability for sexual harassment possibly infringe upon the First Amendment right to free speech. Part II provides a brief summary of each of these issues, which will provide the basis for analyzing a putative claim involving BYOD devices, discussed in Part III.

#### A. *The Location Issue*

When sexual-harassment lawsuits began, employers only owed a duty to employees within the “physical environment of the workplace.”<sup>45</sup> Since then, liability has been extended to include harassment that occurs outside of the physical workplace.<sup>46</sup> Specifically, some out-of-office activities like “meetings, business trips, and employer-sponsored social events” can be considered under the “totality of the circumstances” standard used to evaluate sexual-harassment claims because they are an “extension” of the workplace.<sup>47</sup>

But new technological developments, like the Internet and devices that can constantly access the Internet, have even further obliterated the boundaries of the traditional workplace. These technological developments make it difficult to determine “when an employee is on duty,” and they complicate the analysis of whether behavior that occurs out of the office contributes to sexual harassment.<sup>48</sup> Unfortunately, Title VII and its legislative history do not address the boundaries of the workplace issue, leaving it to the courts.<sup>49</sup>

However, the courts have not come to a clear determination on this issue. The Supreme Court has not yet addressed the location issue and circuit courts have come down differently on the issue of whether non-workplace behavior matters in lawsuits on sexual harassment. The Fifth Circuit, for example, held that evidence of non-workplace conduct can “help determine the severity and pervasiveness of hostility in the workplace.”<sup>50</sup> Similarly, the Seventh Circuit held that harassment that occurs outside of work is actionable, as long as there are “consequences in the workplace.”<sup>51</sup> In contrast, the Sixth Circuit has said that an employer is “[generally] not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from the workplace setting.”<sup>52</sup> But the Sixth Circuit has also said that it would be reasonable

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45 *Id.* at 162.

46 *Id.*

47 Gelms, *supra* note 2, at 269.

48 Megan Shuba Glowacki, Comment, *On the Job and Off: Why Evidence of a Hostile Work Environment Should Never Clock Out*, 78 U. CIN. L. REV. 351, 360 (2009).

49 Douglas R. Garmager, Note, *Discrimination Outside of the Office: Where to Draw the Walls of the Workplace for a “Hostile Work Environment” Claim Under Title VII*, 85 CHI.-KENT L. REV. 1075, 1077 (2010).

50 Glowacki, *supra* note 48, at 358.

51 Garmager, *supra* note 49, at 1076.

52 Glowacki, *supra* note 48, at 359 (citing *Duggins v. Steak n’ Shake, Inc.*, 3 F. App’x 302, 311 (6th Cir. 2001)).

for an employee to subjectively feel that a workplace is hostile if “forced to work for, or in close proximity to, someone who is harassing her outside the workplace.”<sup>53</sup>

The EEOC likewise provides little guidance on how to handle these new technological developments affecting the harassment in the workplace. In a page on its website entitled “Prohibited Employment Policies/Practices,” the EEOC notes that “[h]arassment outside of the workplace may also be illegal if there is a link with the workplace.”<sup>54</sup> But there is no corresponding regulation that explains what constitutes a satisfactory “link”; nor is there clarifying information available on the website.<sup>55</sup> Additionally, the example given is physical harassment (an employer driving an employee to a meeting), so it is unclear from EEOC regulations if harassment occurring in the *virtual* world is a strong enough link to the workplace to be illegal under Title VII.<sup>56</sup> This is problematic for victims of electronic harassment because employers, if not legally liable, are not incentivized to provide protections to employees or internal remedies, leaving victims without either legal or workplace remedy against sexual harassment.

### B. *Electronic Employee Monitoring Issues*

Technology has not only impacted the ability of people to harass those they work with but it has also enabled employers to monitor their employees’ electronic actions. Employers monitor their employees for a variety of reasons: to protect trade secrets and confidential information and to make sure that employees are not engaging in inappropriate behavior, harassment included.<sup>57</sup> Common ways to monitor employees include “access panels, filters and firewalls, and [the] monitoring of social network and search engine usage.”<sup>58</sup> The majority of employers use at least some form of electronic monitoring,<sup>59</sup> and it is estimated that “more than three-quarters of major U.S. corporations record and review employee communications and activities on the job, including telephone calls, e-mail, internet communications, and computer files.”<sup>60</sup>

Monitoring employees relates to sexual harassment primarily for the implications it has in an employer’s awareness of harassment. David Garrie notes that employers cannot physically observe everything their employees do during a workday, but that employers can “actively monitor” behavior online.<sup>61</sup> Garrie argues that this ability to monitor employees

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53 *Id.*

54 *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.c.gov/laws/practices> (last visited Oct. 14, 2014).

55 *Id.*

56 *Id.*

57 Comisky & Diamond, *supra* note 3, at 401.

58 Corey A. Ciochetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 AM. BUS. L.J. 285, 301–02 (2011).

59 *Id.* at 286.

60 Daniel B. Garrie, *Limiting the Affirmative Defense in the Digital Workplace*, 19 MICH. J. GENDER & L. 229, 242 (2012).

61 *Id.* at 231.

electronically should limit an employer's ability to use the *Ellerth* and *Faragher* affirmative defense.<sup>62</sup> He says that the courts should take into consideration the "size and scope" of a company's "technological infrastructure" and the affirmative defense should only be available if the company lacked the ability to monitor employees' behavior.<sup>63</sup> Garrie argues that because employers have the ability to monitor their employees, those employers should "bear the burden" to protect employees from sexual harassment.<sup>64</sup>

But monitoring comes with a high cost to employees: the lack of privacy. Employees have no expectation of privacy if the employer owns the computer, if the employee accessed information through the employer's network, or if the employer specifically tells its employees that there is no expectation of privacy (for example, tells them of monitoring policies).<sup>65</sup> The general principle is that "employees have no reasonable expectation of privacy in the presence of an employer monitoring policy."<sup>66</sup> Indeed, the Supreme Court has created a "perverse incentive"<sup>67</sup> for stringent employee monitoring because, under the standard in *Ortega*, workplace searches are limited by the "operational realities of the workplace."<sup>68</sup> This means that actual practices may give employees an expectation of privacy that employers cannot then intrude upon.<sup>69</sup> It is therefore in employers' best interests to constantly monitor, with employees' knowledge, so as to enable further future monitoring. While this is helpful in preventing sexual harassment, or rectifying it once it has been discovered, it does come at a high cost to employee privacy.

Employees are not without protection from invasions into their privacy, but those protections are piecemeal. There is no "comprehensive statutory scheme" that protects employees' privacy or governs electronic monitoring.<sup>70</sup> At the federal level, there are two acts that may apply. The Computer Fraud and Abuse Act (CFAA) "makes it a criminal offense to gain unauthorized access to an individual's computer and permits the recovery of civil damages when the unauthorized access results in damage exceeding \$5,000."<sup>71</sup> The Electronic Communications Privacy Act of 1986 (ECPA) has two titles that are also relevant to electronic monitoring.<sup>72</sup> First, the Wiretap Act "regulates intentional interception, use,

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62 *Id.* at 248-49.

63 *Id.* at 232.

64 *Id.* at 247.

65 Amanda J. Lavis, Note, *Employers Cannot Get the Message: Text Messaging and Employee Privacy*, 54 VILL. L. REV. 513, 534 (2009).

66 *Id.* at 533.

67 Justin Conforti, Comment, *Somebody's Watching Me: Workplace Privacy Interests, Technology Surveillance, and the Ninth Circuit's Misapplication of the Ortega Test in Quon v. Arch Wireless*, 5 SETON HALL CIR. REV. 461, 486 (2009).

68 Marissa A. Lalli, Note, *Spicy Little Conversations: Technology in the Workplace and a Call for a New Cross-Doctrinal Jurisprudence*, 48 AM. CRIM. L. REV. 243 (2011) (citing *O'Connor v. Ortega*, 480 U.S. 709 (1987)).

69 *See id.* at 245.

70 Garrie, *supra* note 60, at 245 n.94.

71 Comisky & Diamond, *supra* note 3, at 401.

72 Ciocchetti, *supra* note 58, at 292.

or disclosure of wire, oral, and electronic communications.”<sup>73</sup> Second, the Stored Communications Act (SCA) “governs electronic communications already transmitted and currently in storage.”<sup>74</sup> However, scholars have argued that the ECPA is “essentially meaningless in today’s workplace environment” because “technology has advanced to the point where almost no transmissions are covered by the statute.”<sup>75</sup> At the state level, there are also some laws that provide protection.<sup>76</sup>

### C. *The First Amendment Issue*

Related to the privacy issues raised by electronically monitoring employees, sexual-harassment litigation also raises First Amendment issues regarding the restriction of the right of free speech. Employees may feel or believe their private e-mails or text messages should be protected under the First Amendment.<sup>77</sup> Some have argued that employers will “suppress protected expression” to prevent Title VII liability, which will have a “chilling effect” on free speech.<sup>78</sup>

But the First Amendment provides only “limited protection against speech restrictions” in the workplace.<sup>79</sup> First Amendment protection extends only to public employees,<sup>80</sup> and even those employees are only protected if they speak on matters of public concern, subject to a balancing test.<sup>81</sup> Currently, private employers can also restrict off-duty speech, if they can “prove a legitimate business interest in regulating their employee’s off-duty conduct.”<sup>82</sup> In addition, scholars have noted that sexual harassment is an act, not speech, and as such, deserves no protection under the First Amendment.<sup>83</sup> As long as “‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct,” it appears that there is no First Amendment problem with employers restricting employees’

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73 *Id.*

74 *Id.* at 293.

75 *Id.* at 293–94.

76 Comisky & Diamond, *supra* note 3, at 401. *See also* Garrie, *supra* note 60, at 245 n.94 (citing Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J.L. & PUB. POL’Y 609, 620–21 (2009)). Examples include laws restricting employers from asking prospective and current employees for password-protected information on personal social media accounts or laws requiring employers to give notice or obtain permission for monitoring. In *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650 (N.J. 2010), the New Jersey Supreme Court held an employer liable when it inappropriately accessed information from employee e-mail. So these state laws do provide some employee protection.

77 Higgins, *supra* note 9, at 167.

78 Burke, *supra* note 19, at 612–13.

79 Patricia Sánchez Abril, Avner Levin, & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 90 (2012).

80 Amy Horton, Comment, *Of Supervision, Centerfolds, and Censorship: Sexual Harassment, the First Amendment, and the Contours of Title VII*, 46 U. MIAMI L. REV. 403, 419 (1991).

81 Abril et al., *supra* note 79, at 91.

82 *Id.* at 94–95 (discussing how the lack of statutes governing the intersection between social media and work means that U.S. employers can legally fire employees for information posted on social media sites, even while off-duty).

83 *See* David K. McGraw, *Sexual Harassment in Cyberspace: The Problem of Unwanted E-mail*, 21 RUTGERS COMPUTER & TECH. L.J. 491 (1995).

ability to say what they want, whether or not it occurs during work.<sup>84</sup> Therefore, this is generally an issue that may seem like a bigger challenge than it legally would be.

### III. BRING YOUR OWN DEVICE POLICIES

#### A. *The Basics of a BYOD Policy*

“Bring Your Own Device” (BYOD) policies allow employees to use their own personal devices for work.<sup>85</sup> These policies do two things: they decrease technology costs to employers and keep employees happy.<sup>86</sup> These benefits have employers rapidly switching to BYOD programs. Up to “fifty-three percent of employees are using their own technology for work purposes,”<sup>87</sup> while “thirty-eight percent of chief information officers told Gartner [a technology research and advisory firm] that their organizations will stop providing company-issued laptops, smartphones, and tablets to workers by 2016.”<sup>88</sup>

The proliferation of this policy has led some practitioners to publish articles that both highlight some potential legal problems that may occur under this type of policy and give some general advice on implementing such a policy.<sup>89</sup> But there has yet to be a full academic discussion of the impact BYOD policies will have on the landscape of sexual-harassment cases, which is the gap that this Note begins to address. The few academic articles that discuss BYOD policies have focused primarily on the policies connection to electronic monitoring, as well as how to draft a successful BYOD policy that would make sure employees are aware of the conditions of participating in the program.<sup>90</sup> Some of these articles recommend that employers inform employees that use of personal devices must comply with harassment policies,<sup>91</sup> but not all of them do.<sup>92</sup>

The only academic article that does briefly mention harassment in relation to BYOD devices assumes that there would be employer liability for harassment that occurs while

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84 Burke, *supra* note 19 (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). See this source for a more detailed explanation of the First Amendment complexities in sexual-harassment cases.

85 See Dave Zielinski, *Bring Your Own Device*, HRMAGAZINE, Feb 2012, <http://www.questia.com/magazine/1P3-2581316401/bring-your-own-device>.

86 Comisky & Diamond, *supra* note 3, at 386.

87 *Id.*

88 Yaron Dori & Jeff Kosseff, *Employers Must Obtain Employee Consent for BYOD Programs*, LAW360 (May 24, 2013, 11:12 AM EST), <http://www.law360.com/articles/444702/employers-must-obtain-employee-consent-for-byod-programs>.

89 See, e.g., John Chapas, *Don't Ignore the Risks of BYOD Programs*, LAW360 (Feb. 20, 2013, 12:06 PM EST), <http://www.law360.com/articles/409944/don-t-ignore-the-risks-of-byod-programs>; Philip Gordon, *5 Lessons for Employers From California v. Riley*, LITTLER MENDELSON (July 10, 2014), <https://www.littler.com/five-lessons-employers-california-v-riley>; Damian LaPlaca, *The Legal Challenges of 'Bring Your Own Device'*, LAW360 (Jan. 8, 2013, 12:06 PM EST), <http://www.law360.com/articles/402551/the-legal-challenges-of-bring-your-own-device>; Dori & Kosseff, *supra* note 88.

90 See Comisky & Diamond, *supra* note 3.

91 See, e.g., *id.* at 391 (“Employers must ensure that their existing policies extend to inappropriate communications on employee-owned devices and properly train employees on acceptable standards of conduct.”).

92 See, e.g., Chapas, *supra* note 89; LaPlaca, *supra* note 89 (focusing on security and employee privacy).

using a BYOD device.<sup>93</sup> This assumption is made without exploring the unique aspects of digital sexual harassment and BYOD devices and so does not explore whether the law is suited for a BYOD claim.

To understand likely outcomes of sexual-harassment cases involving BYOD devices, this Note will first look at some cases involving digital workplace sexual harassment. “Few cases have addressed employer liability” for “digital workplace sexual harassment.”<sup>94</sup> Those cases did not involve BYOD devices. One case held that rampant, “unchecked” offensive e-mails going around a workplace could be sexual harassment, but a single instance of an offensive e-mail was not enough to constitute a claim.<sup>95</sup> In another, e-mails from supervisors, in combination with non-digital comments, were considered relevant in considering a claim of sexual harassment.<sup>96</sup> Finally, the New Jersey Supreme Court recognized a claim of sexual harassment for material posted on an electronic bulletin board.<sup>97</sup>

The first case involving BYOD devices and sexual harassment will look very different from the facts of these three cases because of the issues discussed in Part II. Each issue will be discussed below.

## B. *The Legal Challenges of a BYOD Policy Under Traditional Sexual Harassment Law*

### 1. The Location Problem

First, BYOD devices are paid for by the employee and double as that employee’s work and personal device.<sup>98</sup> Consider an employee who works forty hours a week and has a BYOD smartphone that she takes with her everywhere. Even if that employee sleeps eight hours a night, that still leaves seventy hours—a majority of the week—when the employee is carrying and using that phone as a personal device, off-site. This creates a situation where harassment of a co-worker or a supervisee could occur almost entirely from home, on a personal device. This stands in contrast to the cases where e-mails have come from employees on work computers, at work.<sup>99</sup>

Given the circuit split on the issue of employer liability for off-site harassment, consider the following situation: harassing texts or e-mails are sent from one employee’s BYOD smartphone to another, only during non-work hours, from non-work places, and

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93 Comisky & Diamond, *supra* note 3, at 387 (“One of the risks associated with BYOD is that employees will use their own devices to communicate in an inappropriate manner, leading to employer liability.”).

94 Garrie, *supra* note 60, at 238.

95 *Id.* (discussing *Owens v. Morgan Stanley & Co.*, No. 96 CIV. 9747, 1997 WL 403454, at 2 (S.D.N.Y. July 17, 1997)).

96 *Id.* at 238–39 (discussing *Strauss v. Microsoft Corp.*, 91 CIV. 5928, 1995 WL 326492, at 4–5 (S.D.N.Y. June 1, 1995)).

97 *Id.* at 239 (discussing *Blakey v. Cont’l Airlines*, 751 A.2d 538 (N.J. 2000)).

98 See Comisky & Diamond, *supra* note 3, at 387.

99 See, e.g., *Owens v. Morgan Stanley & Co.*, No. 96 CIV. 9747, 1997 WL 403454, at 2 (S.D.N.Y. July 17, 1997) (describing one e-mail that was sent while at work); *Strauss v. Microsoft Corp.*, 91 CIV. 5928, 1995 WL 326492, at 4–5 (S.D.N.Y. June 1, 1995) (describing the e-mails from a supervisor to employees in the office).

there are no other harassing activities taking place at the actual workplace. Is this conduct for which an employer is liable? Under the Fifth Circuit's test, a claim like this is unlikely to succeed because there is no hostility that is occurring *in the workplace*.<sup>100</sup> The Seventh Circuit would likely consider these actions to be harassment but would still require the plaintiff to prove that there are consequences in the workplace.<sup>101</sup> So if a plaintiff cannot show any type of harassment or repercussions at work, the claim may be barred. Finally, the Sixth Circuit may only find that there is employer liability if the harasser and the harassed have to work "in proximity" together.<sup>102</sup> In *Duggins v. Steak N' Shake, Inc.*, the Sixth Circuit found that even though both the plaintiff and her alleged rapist were employees of Steak N' Shake, because they never worked at the same restaurant and he never managed her, it was not a hostile work environment.<sup>103</sup> Under this test, if the harassment occurs between two individuals who do not see each other at work (for example, they work in two different offices in the same city), this claim may be barred as well.

If this claim is not successful, then the employee is unprotected in this situation, and yet, it is clear that the employee is suffering from some type of sexual harassment. Because the location matters so much, traditional sexual-harassment law does not clearly protect those who are victimized far from work, even though the work relationship is central to the harassment.

## ii. The Employer Notice Problem

Another potential difference for cases involving sexual harassment and BYOD devices is the limitations employers may have on electronic monitoring of those dual-purpose devices. Employers are still able to monitor BYOD devices because they can require employee consent to monitoring as a prerequisite for participation in the program.<sup>104</sup> However, employees tend to be leery of their employer's ability to monitor them. A 2012 Harris Poll found that 82 percent of employees think it is an invasion of privacy if the employer can track them, for example, through a smartphone's GPS capabilities; 76 percent

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<sup>100</sup> See Part II-A; see also Glowacki, *supra* note 48, at 356–58 (discussing the Fifth Circuit's test as requiring harassment to affect the work environment, but not considering behavior that occurred outside the workplace in *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503 (5th Cir. 2003)).

<sup>101</sup> See *supra* Part II; see also Garmager, *supra* note 49, at 1076.

<sup>102</sup> Glowacki, *supra* note 48, at 360 (citing *Duggins v. Steak n' Shake, Inc.*, 3 F. App'x 302, 311 (6th Cir. 2001)).

<sup>103</sup> 3 F. App'x 302, 311 (6th Cir. 2001). The alleged rape took place at a non-work event off-site.

<sup>104</sup> See, e.g., Comisky & Diamond, *supra* note 3, at 408. An interesting question is whether an employer could escape liability by contracting only for certain applications, programs, or capabilities on a BYOD device, thus considering all other programs "personal" and not having to monitor them. For example, if a company only allows email on personal smartphones, but expressly does not allow workplace texting on the phone, then could they be liable for harassment via text? Given that companies often monitor for multiple reasons, primarily to make sure no sensitive information (like trade secrets) are being shared, it seems unlikely that companies would limit their own ability to monitor employees in an attempt to avoid liability, however, this is a question that warrants further exploration, but is beyond the scope of this paper.

of employees would not allow their employer to access applications they have installed on a personal device; and 82 percent of employees are concerned about employers tracking their internet usage while not at work.<sup>105</sup>

There are some current legal restrictions to what an employer can access on the BYOD device as well. For example, employers have been held liable for “inappropriately accessing and using information obtained from employee social media and electronic communication accounts.”<sup>106</sup> And there are some limited protections for employee privacy in the form of the Computer Fraud and Abuse Act and the Electronic Communications Privacy Act of 1986;<sup>107</sup> however, as discussed in Part II, these boundaries are murky and may not apply to the technology BYOD devices use.

Ultimately, what an employer can monitor on BYOD devices will come down to the legal limitations, but that is not to say that employee concerns over privacy will not factor into what the company policy allows. The results of the Harris Poll show that employers having too much access on personal devices is a serious concern of employees.<sup>108</sup> Given this concern, employers may face difficulty with policies that are too broad and allow for too much access, and so they may be limited by their own policies as well.

Either way, employers will not have unfettered access to personal devices. This limited access may provide employers with immunity from sexual-harassment suits because they may lack notice of the sexual harassment. An employer cannot escape liability for harassment if the employer knew about it and failed to take corrective and preventative measures.<sup>109</sup> With electronic monitoring, employers with the technological capacity could constantly be checking for electronic harassment by flagging emails or other correspondence that include problematic words; some scholars have argued that having the capability to monitor employees and not doing so should prevent the employer from using the *Ellerth* and *Fargher* affirmative defense at all.<sup>110</sup> Thus, with electronic monitoring, employers potentially have a greater chance of being on notice of this behavior; the difference between liability and no liability, then, is whether or not the company acts to rectify the situation. But if employers cannot monitor all of what is happening on a BYOD device, then they may be less likely to be on notice of problematic behavior, making it slightly easier for companies to avoid liability due to the limitations of electronic monitoring on BYOD devices.

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105 *Harris Survey Exposes Concerns About Employee Privacy for BYOD*, PR NEWSWIRE (Sept. 27, 2012), <http://www.prnewswire.com/news-releases/harris-survey-exposes-concerns-about-employee-privacy-for-byod-171520251.html>.

106 Comisky & Diamond, *supra* note 3, at 403.

107 See *supra* Part II-B for a discussion on these two acts.

108 *Harris Survey Exposes Concerns About Employee Privacy for BYOD*, *supra* note 105.

109 Burke, *supra* note 19, at 599.

110 Garrie, *supra* note 60.

It should be noted that, when faced with the issue, courts have not imposed a duty on employers to monitor employees electronically. But courts will still hold employers liable for harassment. For example, in *Blakey*, the New Jersey Supreme Court held that an employer was liable for messages posted on an electronic bulletin board.<sup>111</sup> Part of the decision in *Blakey* was that the forum was so closely intertwined with the workplace that it was an extension of the workplace.<sup>112</sup> The other part of the decision rested on whether an employer has notice of the harassment.<sup>113</sup> Still, the court “explicitly stated” that an employer has no duty to monitor employee e-mail.<sup>114</sup>

### iii. The (Lack of a) First Amendment Problem

As discussed in Part II, the First Amendment protections to what employees say is actually quite limited, and as such, has a smaller role to play in the analysis of a BYOD policy than many employees may believe. If a private employer can prove that they have a legitimate business interest in curtailing an employee’s off-the-clock speech, then they can limit it.<sup>115</sup> This means that if an employer became aware of inappropriate or harassing speech made on a BYOD device, it would be able to take action, given its interest in complying with Title VII.

## **IV. POTENTIAL SOLUTIONS FOR THE PROBLEMS CREATED IN APPLYING TRADITIONAL SEXUAL HARASSMENT LAW TO CLAIMS INVOLVING BYOD DEVICES**

As sexual harassment suits have stretched Title VII’s protection against sex discrimination to its limit (and perhaps beyond),<sup>116</sup> that stretching only continues with the introduction of BYOD policies, which highlight how the state of the law focuses on location and notice, potentially leaving victims without recourse. The uniqueness of these policies requires an exploration of possible alternatives, which include both finding ways to change the law so as to clearly hold the employer liable, or removing the location (and employer liability) from the equation completely, and focusing on other forms of remedy for victims.

### **A. Substantial Benefits Test**

One solution that has been offered to deal with the proliferation of employee social media use is a “substantial benefits” test.<sup>117</sup> This test is a modification of the current sexual-

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<sup>111</sup> *Blakey v. Con’t Airlines*, 751 A.2d 538, 542-43 (N.J. 2000).

<sup>112</sup> *Id.* at 551-52 (the test for determining if something is “sufficiently integrated” is whether the company received an economic benefit from the site).

<sup>113</sup> *Id.* at 543.

<sup>114</sup> Higgins, *supra* note 9, at 168.

<sup>115</sup> Abril et al., *supra* note 79, 94-95 (discussing how the lack of statutes governing the intersection between social media and work means that U.S. employers can legally fire employees for information posted on social media sites, even while off-duty).

<sup>116</sup> See Bernstein, *supra* note 6, at 1250.

<sup>117</sup> Gelms, *supra* note 2, at 251.

harassment law. Jeremy Gelms argued that if an employer obtains a substantial benefit from the social media that the employee used, then harassment that occurs on that medium should be considered as part of the totality of the circumstances under traditional sexual-harassment law.<sup>118</sup> Gelms relied on the New Jersey Supreme Court's decision in *Blakey* to articulate when an employer is deemed to receive a substantial benefit.<sup>119</sup> The test depends on whether "the social media was sufficiently integrated into the employer's business operations," including whether or not employees could access company information on social media, whether employees are communicating about company business or working on a work-related project, and how many employees were using the social media forum.<sup>120</sup> Using this modified, traditional sexual-harassment law, a court could examine whether the employer received a substantial benefit from the device. If so, then any harassment that occurred through the device could be considered in the totality of the circumstances and factored into the hostile-workplace claim.

Social media and BYOD devices are similar in several ways: both can be accessed from work or home, both usually contain very personal information, and both can also be used as a business tool.<sup>121</sup> A substantial benefits test, modifying the current sexual-harassment law, solves both the location and ownership problems identified with BYOD devices because it does not matter where, when, or how the harassing content was posted. Use of this test would also solve the circuit split on including off-the-clock harassment in the totality of the circumstances test for a hostile environment because it would standardize when the court considers activity on a BYOD device during a sexual-harassment suit.

Even though this approach would provide a clear remedy for victims, it does have some major drawbacks. First, it is probable that courts would always find that employers got substantial benefits from a BYOD device, because one of the main reasons behind implementing this policy is an economic benefit to employers.<sup>122</sup> Second, these benefits would likely incentivize employers to heavily monitor all of the activity on a BYOD device. Intrusive monitoring on a dual-purpose device may cause some employees to refuse to use a BYOD device or give rise to claims that the monitoring restricts First Amendment speech.<sup>123</sup> Additionally, smaller employers may not be capable, financially or technologically, of monitoring their employees' phones. These drawbacks make this solution unlikely to succeed.

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118 *Id.*

119 *Id.* at 273.

120 *Id.*

121 *Id.* at 264–67.

122 Comisky & Diamond, *supra* note 3, at 386.

123 *See supra* text accompanying notes 115–16 (discussing the fact that First Amendment claims are likely to be unsuccessful).

## B. *Employers are Not Liable*

One forceful critique of current sexual-harassment law is that it only recognizes sexual harassment that “occurs in certain protected settings,”<sup>124</sup> one of which is the employment setting. But the problems discussed in this paper demonstrate that the expansion of electronic communications has resulted in harassment that is not limited to one protected setting. Nor are the repercussions limited to the workplace.<sup>125</sup> It begs the question, is focusing on employer liability the best way to analyze sexual-harassment claims? This section explores a few alternatives to protecting individuals who are sexually harassed without going through Title VII. This Note argues that the proliferation of technology has changed how work is done, and so tying sexual-harassment law to a certain physical location leaves victims of sexual harassment exposed and without remedy. The following potential solutions recognize that location is less important and change how victims could fight back against harassment.

### i. Civil Tort Remedies

There is a distinction between the harm caused by harassment and the context of the harassment.<sup>126</sup> Because sexual-harassment law is focused on Title VII as the solution to workplace sexual harassment, some have argued that it places too much emphasis on the context of the sexual harassment rather than the dignitary harm the harassment causes.<sup>127</sup> For example, rather than providing a solution to anyone who is a victim of sexual harassment, solutions are only available to those who are victimized within a certain context: work. One solution is to step back from Title VII litigation for sexual harassment and instead use common-law tort actions.<sup>128</sup>

Under the common-law tort approach, claims that “can be said to injure an individual’s dignitary interests” are actionable.<sup>129</sup> While there are several torts that could potentially be relied upon in pursuing a tort claim against a harasser—like battery, assault, invasion of privacy, or intentional infliction of emotional distress—all of the actions recognize the inherent human dignity in the harassed individual.<sup>130</sup> This is appealing because it recognizes that the dignitary interests of the harassed individual are not simply affected while at work—for example, if employees receive messages on the weekends sent through BYOD devices.

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<sup>124</sup> Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 657 (2012).

<sup>125</sup> See Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 879 (1997) (discussing how sexualizing women can “poison relations in the workplace as well in more intimate contexts”).

<sup>126</sup> See Ehrenreich, *supra* note 35, at 3.

<sup>127</sup> *Id.* at 4.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 22.

<sup>130</sup> *Id.* at 22–23.

Monetarily, it may be appealing to plaintiffs as well, as there are caps on what some federal employees can get from employers under Title VII.<sup>131</sup> Additionally, in 1976, the Supreme Court held that Title VII was “an exclusive, preemptive administrative and judicial scheme for the redress of federal employment discrimination.”<sup>132</sup> This has led to a circuit split on whether Title VII preempts torts that arise out of the same set of facts as the Title VII suit.<sup>133</sup> If civil torts, as opposed to Title VII, were adopted as the method for dealing with sexual harassment, then federal employees in particular would be relieved of the financial limits involved in Title VII litigation, which may make it a more attractive option for plaintiffs.

Using common-law torts as the primary method of dealing with sexual harassment has several benefits, the most important being the untying of harassment to a location, since modern technology allows for harassment to occur anywhere and anytime. First, as discussed above, it would be better for federal employees who are victims of sexual harassment. Second, this approach recognizes that sexual harassment can cause harm to an individual’s dignity without requiring a hostile workplace, while solving the location problem caused by BYOD devices. Additionally, under civil torts, the plaintiffs may sue the perpetrator of the harassment rather than the employer. An employer would likely still monitor BYOD devices for business-related information, like exposure of trade secrets, but the company would be less concerned about monitoring purely personal e-mails or texts, giving individuals more privacy. This could solve the concerns about overly-intrusive electronic monitoring and its accompanying privacy concerns. And if the company is less concerned about what people say, there is little chance of employees making a First Amendment chilling-speech argument.

But plaintiffs would likely still find it financially attractive to sue employers under the tort doctrine of *respondeat superior*, if the plaintiff can prove the harasser was acting within the scope of employment.<sup>134</sup> This means that employers are still going to be incentivized to monitor employees, and so the problems of monitoring and free speech may not be solved after all. Still, what the plaintiff would have to prove for a tort would revolve less around the context of the harassment (whether there was an impact on the work environment) and focus more on the harm that matters to the plaintiff—the dignitary harm.

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<sup>131</sup> Robert M. Mahoney, Note, *Don’t Discriminate Against Distinct or Highly Personal Harms: An Analysis of Section 717 of Title VII Pertaining to Preemption of Alternative Theories of Recovery by Federal Employees*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 310, 329 (2014) (discussing the Civil Rights Act of 1991, administrative requirements, statute of limitations, and other caps on recovery).

<sup>132</sup> *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 828–29 (1976).

<sup>133</sup> See Mahoney, *supra* note 131, at 316–17 (discussing specific court decisions).

<sup>134</sup> See *Respondeat Superior*, BLACK’S LAW DICTIONARY (10th ed. 2014).

## ii. Stalking Laws

In contrast to the civil-tort remedy, stalking laws may provide an alternative criminal recourse for victims of sexual harassment. For those who are victimized by BYOD device users outside of the workplace, this may be a very beneficial tool, because it focuses on the harassment rather than the impact on the workplace.<sup>135</sup> This would be a very limited solution because stalking laws focus on a very specific type of harassment and definitions of stalking vary from state to state,<sup>136</sup> though there is also a federal statute that prohibits stalking under the Interstate Commerce Clause.<sup>137</sup> Stalking laws would likely not encompass behavior that, under traditional sexual-harassment law, has been shown to create a hostile work environment, such as repeated passing comments that disparage women in general.<sup>138</sup> However, these statutes usually include engaging in “harassing or threatening behavior . . . such as following a person, appearing at a person’s home or place of business, making harassing phone calls, leaving written messages or objects, or vandalizing a person’s property.”<sup>139</sup> So it may be a solution if the harassment is “sufficiently repetitive, obsessive, and frightening.”<sup>140</sup> It is possible to envision, then, a type of sexual harassment that occurs at work and involves repeated, specific threats that may qualify under stalking laws.

Taking responsibility off of the employer and putting it onto the harasser/stalker eliminates the employer monitoring issues discussed earlier and the location issue of the BYOD device. But relying on stalking laws has serious downsides for the average employee who is harassed at work. These statutes may only be effective for the most serious cases of sexual harassment. Additionally, stalking tends to conjure up the image of a stalker being in a place they should not be. In an employment context, if both the harassed and the harasser were employed at the same company, the harasser would have every right to be in the same building as the harassed person; it may be difficult to prove claims of stalking, meaning that some claims of harassment may go without repercussions. This would not be a problem, though, if a state defines contact to include electronic contact. Still, relying solely on stalking laws, as an alternative to Title VII, is dangerous and leaves too many victims without protection.

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<sup>135</sup> See Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 702 (2001).

<sup>136</sup> Rebecca K. Lee, *Essay: Romantic and Electronic Stalking in a College Context*, 4 WM. & MARY J. WOMEN & L. 373, 379 (1998).

<sup>137</sup> 18 U.S.C. § 2261(b)(6) (2012).

<sup>138</sup> Rodes, *supra* note 135, at 702 (“ordinary sexual harassment is not” the problem anti-stalking laws were designed to prevent).

<sup>139</sup> Lee, *supra* note 136, at 379 (citing KENNETH R. THOMAS, CONG. RESEARCH SERV., 92-735 A, ANTI-STALKING STATUTES: BACKGROUND AND CONSTITUTIONAL ANALYSIS 2 (1992)).

<sup>140</sup> Rodes, *supra* note 135, at 702.

C. *Specific Federal Statutes and Federal Agencies That Can Address Sexual Harassment*

The last alternative to traditional sexual-harassment law that this Note will address is the creation of specific federal statutes to address each tension in traditional sexual-harassment law illustrated when applying it to BYOD devices. This would be a modification of traditional sexual-harassment law and is the best alternative to existing law.

There are two types of statutes that Congress could enact to address the issues of traditional sexual-harassment law that arise when applied to BYOD devices. First, Congress could enact a statute that addresses the location issue. Courts have struggled with pinpointing when an employer should be liable for off-location harassment since the location of the harassment is not addressed in Title VII.<sup>141</sup> A statute that defined the location for the sex discrimination, however Congress chose to set those boundaries, would clarify whether employers are liable for harassment that occurs on BYOD devices outside of the workplace. Having clear boundaries is important for establishing clear remedies. If an employer is clear about its legal liability, it is more likely to provide more effective internal solutions in addition to a victim's legal rights.

Second, Congress could also create statutes that establish the limits of employer electronic monitoring; currently there is no federal comprehensive scheme on this issue.<sup>142</sup> As discussed in Part II, the only applicable statutes that address this issue are the CFAA and the ECPA, but scholars have noted that these provisions do not realistically cover the technological transmissions that employees may be using to sexually harass other employees.<sup>143</sup> Establishing the limits of this type of monitoring also would establish the limits on the particular sexually harassing behavior on BYOD devices that can reasonably be expected to give employers notice. This would simultaneously eliminate any First Amendment chilling-speech claims, because the employee would be expected to know what programs and types of communications on the BYOD device are protected from monitoring. Again, the current legal standard is that an employer must only establish a legitimate business interest to curtail employee speech on the parts of the device that are being monitored.<sup>144</sup>

A related, but different, solution is for Congress to create federal statutes that would move away from the traditional sexual-harassment law rather than modifying it. One such possibility is moving liability for this type of harassment away from the work world and towards the virtual world. Congress could enact statutes that hold Internet Service Providers (ISPs) liable for content that creates a hostile environment online. ISPs have been defined as entities that host websites and entities that host message boards, auction sites,

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<sup>141</sup> See Garmager, *supra* note 49, at 1077.

<sup>142</sup> Garrie, *supra* note 60, at 245 n.94.

<sup>143</sup> Ciocchetti, *supra* note 58, at 293-94.

<sup>144</sup> Abril et al., *supra* note 79, at 95.

e-mail listservs, and Internet dating sites.<sup>145</sup> This approach has been advocated by at least one author searching for a legal recourse when teenagers use the Internet to bully each other.<sup>146</sup> However, under current law, this approach is not a possibility because of § 230 of the Communications Decency Act (CDA), which has been interpreted to give ISPs immunity from those claims.<sup>147</sup> The § 230 defense is that ISPs are not liable for content from third parties.<sup>148</sup> If Congress abrogated this defense, then ISPs could replace employers as the party liable for sexual harassment that occurs through harassing emails or posts on social media. There are some recent court decisions that indicate that courts “may be ready to rethink” the blanket immunity of § 230,<sup>149</sup> and perhaps it is time that Congress does so too. However, this would create great administrative problems: how is a company like Comcast supposed to monitor each of its users and quickly flag harassing activity? Because of the enormity of the administrative challenges, this solution is not likely to be successful.

With respect to federal agencies, a final solution is to have the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) each regulate the Internet and other online communication issues;<sup>150</sup> this would also take the liability out of the hands of the employers. The FCC was established in 1934 and regulates “interstate and international communications by radio, television, wire, satellite, and cable.”<sup>151</sup> The FTC has a charter to “protect consumers and police anticompetitive practices.”<sup>152</sup> Scholars have argued that the FTC and the FCC should “jointly develop general privacy principles” for users of communication technologies.<sup>153</sup> The flip side of the legal ability for these Commissions to create privacy rules is the power to create rules that would establish liability when the technologies are abused and used to sexually harass individuals.

Because new technologies and electronic communications are increasingly interconnected and increasingly ubiquitous, liability for the abuse of these technologies could be considered a step removed from a specific context (for example, the workplace) or a specific technology (for example, an e-mail). However, the same administrative issues

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<sup>145</sup> Walter Stillwell, Note, *Carafano v. Metrosplash.com: An Expansion of Tort Immunity for Web Service Providers Under 47 U.S.C. 230, Even When They Take a Greater Editorial Role in Publishing Material from Third Parties*, 6 TUL. J. TECH. & INTELL. PROP. 307, 311–12 (2004).

<sup>146</sup> KrisAnn Norby-Jahner, Comment, “Minor” Online Sexual Harassment and the CDA § 230 Defense: New Directions for Internet Service Provider Liability, 32 HAMLINE L. REV. 207, 209 (2009). Teenagers who are bullied online generally have only common-law theories as legal recourse. In contrast, workers and students have Title VII and Title IX, respectively, as a legal recourse.

<sup>147</sup> *Id.* at 210.

<sup>148</sup> *Id.* at 233.

<sup>149</sup> *Id.* at 239–40 (discussing these cases and their implications).

<sup>150</sup> John Soma, Melodi Mosley Gates & Michael Smith, *Bit-Wise But Privacy Foolish: Smarter E-Messaging Technologies Call for a Return to Core Privacy Principles*, 20 ALB. L.J. SCI. & TECH. 487, 491 (2010); see also Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1679–80 (1999).

<sup>151</sup> Soma et al., *supra* note 150, at 518 (citing FED. COMMUNICATIONS COMM’N, *About the FCC*, <http://www.fcc.gov/aboutus.html> (last visited Apr. 25, 2015)).

<sup>152</sup> *Id.*

<sup>153</sup> Soma et al., *supra* note 150, at 530.

that exist in creating ISP liability exist in having these federal agencies oversee harassment and so is also unlikely to succeed.

## CONCLUSION

BYOD policies and devices test the strength of workplace sexual-harassment law because they exist at the tensions between location and ownership, privacy, and First Amendment concerns. As there has yet to be an explicit case concerning BYOD devices, policies, and sexual harassment to reach the courts, it is unclear how the courts will address those claims and whether any of those issues will be so problematic as to prevent employers from being liable under Title VII, thus leaving sexual-harassment victims without legal remedies for their harassment.

Although there are numerous problems with the current state of the law, the offered solutions to these problems are not without their own challenges, either in adoption or in practice. For example, if traditional sexual-harassment law is modified by the substantial benefits test, courts will likely always find that an employer gets substantial benefits from a BYOD device, meaning it is unlikely to be adopted because it would make employers de facto liable for any sexual harassment that occurs on the device. On the other hand, relying on civil-tort remedies, rather than traditional sexual-harassment law, may end up just being a different way to reach employer liability, which means employee monitoring would remain an issue. Similarly, relying solely on stalking laws might leave some victims without remedy (if the behavior does not meet the elements of the stalking statute), and the employer would not be liable. Using federal agencies or transferring liability to the Internet provider provides incredibly complex administrative problems, and so is also unlikely to be a successful solution to the problem.

The most straightforward solution, it seems, is for Congress to recognize that there are limits to the current Title VII protections that may leave some victims without a remedy and to enact specific statutes that address those limitations. If Congress addresses the issue, then courts can have clear lines on employer liability under Title VII and can address BYOD devices within those lines. Additionally, keeping liability through Title VII (as opposed to relying on civil torts, or creating liability for ISPs) has the benefit of keeping the long history of legislation and jurisprudence relating to Title VII relevant rather than attempting to start from a clean slate. Finally, Congress-enacted statutes may be the best approach to reconcile the impact sexual harassment has both on the employee and on the employer. Employers are economically disadvantaged when the work environment is hostile.<sup>154</sup> By keeping responsibility on employers, while defining limits of this liability, employers can work within well-defined legal bounds regarding location, employee privacy, and First

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<sup>154</sup> See Krista J. Schoenheider, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461, 1464–65 (1986); McGraw, *supra* note 83, at 502.

Amendment issues to run an efficient workplace that minimizes the harms of sexual harassment.

With the increasing integration of technology into our lives, we need to make sure we are updating our protections so that the vulnerable are not left without protection. Asking Congress to create specific federal statutes addressing the weakness in Title VII legislation is the best solution to ensure remedies are available to victims of workplace sexual harassment, regardless of where, when, or how harassing messages are communicated.