

THE HARMS OF RACIST ONLINE HATE SPEECH IN THE POST-COVID WORKING WORLD: EXPANDING EMPLOYEE PROTECTIONS

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In one year, the COVID-19 pandemic and egregious incidents of racial violence have created significant shifts in the United States’s workplace culture and social climate. Many employers are transitioning employees to long-term or permanent remote work, and conversations about racial justice are more pervasive and divisive, especially on social media. With people spending more time at home and on the internet, hate speech has increased and inspired global conversations about curtailing its harmful effects. Unlike many other countries, the United States does not penalize hate speech. Nevertheless, its harmful effects have reached the workplace, and employers have fired employees who posted offensive speech on their personal social media pages. Penalizing racist or offensive social media posts is left to employers’ discretion, resulting in inconsistent court rulings. More specifically, some courts have found conduct outside of the workplace and on social media to be actionable in workplace harassment claims while others have not. This Note proposes that the Equal Employment Opportunity Commission should expand its guidelines to state that courts should consider racist hate speech on an employee’s personal social media page in the totality of the circumstances in Title VII hostile work environment claims.

INTRODUCTION.....	1554
I. THE HOSTILE WORK ENVIRONMENT AND SOCIAL MEDIA HATE SPEECH PROTECTIONS.....	1561
A. <i>Development of the Hostile Work Environment Claim...</i>	1561
B. <i>Employer Liability for Harassment Claims.....</i>	1565
C. <i>Tension Between Racial Harassment Claims and Sexual Harassment Jurisprudence</i>	1566

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D. <i>Efforts to Curtail Online Hate Speech in the United States and Abroad</i>	1568
II. CONSIDERING THE BOUNDARIES OF THE WORKPLACE	1572
A. <i>Harassment Outside of the Workplace</i>	1572
B. <i>Harassment on the Web and Social Media</i>	1577
III. THE EEOC SHOULD EXPAND EMPLOYEE PROTECTIONS AS WORKPLACE BOUNDARIES EVOLVE.....	1582
A. <i>Consistency with Plain Text, Precedent, and the Movement to Curtail Hate Speech</i>	1582
B. <i>Benefits to Employees and Protection Against Psychological Harm</i>	1584
C. <i>Benefits to Employers and Combatting Economic and Reputational Risk</i>	1586
CONCLUSION	1588

INTRODUCTION

“If Facebook were a country, it would have the largest population on earth.”¹ The percentage of American adults using social media platforms has risen from 5 percent to over 70 percent in fifteen years.² As one of the most popular online activities, social media³ has become a primary means of networking for individuals and marketing for businesses.⁴ Although social media has conferred several societal benefits, including connectivity, education, information sharing, and community building, it has also had significant negative effects on society, particularly through “online hate

1. Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy?*, NEW YORKER (Sept. 10, 2018), <https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy> [https://perma.cc/7UEH-ZCBN].

2. See J. Clement, *Percentage of U.S. Population Who Currently Use Any Social Media from 2008 to 2019*, STATISTA (May 19, 2020), <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile> [https://perma.cc/QYK4-R9Y4]; *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/social-media> [https://perma.cc/8DY6-836J].

3. See Andreas Kaplan & Michael Haenlein, *Users of the World, Unite!: The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 60 (2010) (defining social media as a general term that can be broken down into six categories: collaborative projects, blogs, content communities, social networking sites, virtual game worlds, and virtual social worlds). For purposes of this Note, the term “social media” will refer to interactive social networking sites, such as Facebook, Twitter, and Instagram.

4. See Maya E. Dollarhide, *Social Media Definition*, INVESTOPEDIA (Sept. 6, 2020), <https://www.investopedia.com/terms/s/social-media.asp> [https://perma.cc/3V6Q-6WLW] (stating that “[s]ocial media originated as a way to interact with friends and family but was later adopted by businesses which wanted to take advantage of a popular new communication method to reach out to customers”).

speech”⁵ and harassment.⁶ In a nationally representative survey conducted in January 2020, 44 percent of respondents said that they experienced online harassment.⁷ Additionally, 25 percent of respondents who reported that they experienced online harassment said that the harassment focused on their ethnicity or race.⁸ Since the survey, online hate speech has increased due to the confluence of the COVID-19 pandemic and rising racial tensions across the nation.⁹

During the COVID-19 outbreak, many employees transitioned to work from home to “flatten the curve” and comply with lockdown orders.¹⁰ Along with these transitions came an increase in videoconferencing on various platforms such as Zoom, Skype, and Microsoft Teams.¹¹ Remote work created challenges for employees, including miscommunication, poor

5. See IGINIO GAGLIARDONE ET AL., COUNTERING ONLINE HATE SPEECH 10 (2015) (explaining that the definition of hate speech is complex but that hate speech generally “refers to expressions that advocate incitement to harm (particularly, discrimination, hostility or violence) based upon the target’s being identified with a certain social or demographic group”); see also *Speech*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining hate speech as speech “whose sole purpose is to demean people on the basis of race, ethnicity, gender, religion, age, disability, or some other similar ground, esp. when the communication is likely to provoke violence”). This Note uses “social media hate speech,” “online hate speech,” “hate speech,” and “racist speech” to refer broadly to speech conveyed through text or images that is offensive, derogatory, and fuels discrimination, hostility, or violence toward people because of their race.

6. See ANTI-DEFAMATION LEAGUE, ONLINE HATE AND HARASSMENT: THE AMERICAN EXPERIENCE 2020, at 17 (2020), <https://www.adl.org/media/14643/download> [<https://perma.cc/S4BM-MDBQ>]. See generally Waseem Akram, *A Study on Positive and Negative Effects of Social Media on Society*, INT’L J. COMPUT. SCI. & ENG’G, Oct. 2017, at 347.

7. ANTI-DEFAMATION LEAGUE, *supra* note 6, at 7.

8. *Id.* at 11.

9. See U.N. Secretariat, United Nations Guidance Note on Addressing and Countering COVID-19 Related Hate Speech, at 2 (May 11, 2020), <https://digitallibrary.un.org/record/3863213?ln=en> [<https://perma.cc/67ZF-DYNP>] (stating that the pandemic has brought an increase in hate speech and discrimination and that “COVID-19 related hate speech” is being spread through social media and other platforms); see also Sara Fischer, *Hate Speech Has Soared Online Since George Floyd’s Death*, AXIOS (July 21, 2020), <https://www.axios.com/hate-speech-online-soars-after-george-floyds-death-463871bb-dfe4-4b0c-becc-e59cdcfb6336.html> [<https://perma.cc/AE5R-HA3X>]; Craig Timberg & Allyson Chiu, *As the Coronavirus Spreads, So Does Online Racism Targeting Asians, New Research Shows*, WASH. POST (April 8, 2020, 5:01 PM), <https://www.washingtonpost.com/technology/2020/04/08/coronavirus-spreads-so-does-online-racism-targeting-asians-new-research-shows/> [<https://perma.cc/MB92-THBE>].

10. See Rita Zeidner, *Coronavirus Makes Work from Home the New Normal*, SHRM (Mar. 21, 2020), <https://www.shrm.org/hr-today/news/all-things-work/pages/remote-work-has-become-the-new-normal.aspx> [<https://perma.cc/RZ3G-XHMK>].

11. See Bob O’Donnell, *Zoom, the Office and the Future: What Will Work Look Like After Coronavirus?*, USA TODAY (Sept. 7, 2020, 12:42 PM), <https://www.usatoday.com/story/tech/columnist/2020/09/07/zoom-work-from-home-future-office-after-coronavirus/5680284002> [<https://perma.cc/MM4A-LSX2>].

collaboration, isolation,¹² and “Zoom fatigue.”¹³ Despite these challenges, several employers plan to let employees work from home permanently even after the pandemic subsides.¹⁴ Thus, the increased usage of telecommunication is likely to remain, forever changing the workplace from one that employees largely experience in a brick-and-mortar building to one that many employees will experience completely online.¹⁵

In the midst of the COVID-19 pandemic and the ensuing transitions in the workplace, another sickness shook the nation. On May 25, 2020, the police killing of George Floyd brought the realities of racial tension in America to the forefront of people’s hearts, minds, and social media timelines.¹⁶ As the hashtag #BlackLivesMatter¹⁷ brought more visibility to support for racial

12. See *Working Remotely: Careers, Management and Strategy*, GALLUP, <https://www.gallup.com/workplace/316313/understanding-and-managing-remote-workers.aspx#ite-316508> [<https://perma.cc/W3JK-AUHS>] (last visited Jan. 27, 2021).

13. See Liz Fosslien & Mollie West Duffy, *How to Combat Zoom Fatigue*, HARV. BUS. REV. (Apr. 29, 2020), <https://hbr.org/2020/04/how-to-combat-zoom-fatigue> [<https://perma.cc/RQQ3-EZEQ>].

14. See Allana Akhtar, *Dropbox Will Let All Employees Work from Home Permanently as It Turns Its Offices into WeWork-Like ‘Collaborative Spaces,’* BUS. INSIDER (Oct. 13, 2020, 4:58 PM), <https://www.businessinsider.com/dropbox-letting-all-employees-work-from-home-permanently-2020-10> [<https://perma.cc/HR3N-7Z4M>]; Uri Berliner, *Get a Comfortable Chair: Permanent Work from Home Is Coming*, NPR (June 22, 2020, 12:26 PM), <https://www.npr.org/2020/06/22/870029658/get-a-comfortable-chair-permanent-work-from-home-is-coming> [<https://perma.cc/EET3-9ERU>]; Shannon Bond, *Facebook Expects Half Its Employees to Work Remotely Permanently*, NPR (May 21, 2020, 5:15 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/05/21/860382831/facebook-expects-half-its-employees-to-work-remotely-forever> [<https://perma.cc/2VKT-FKM5>]; Rob McLean, *These Companies Plan to Make Working from Home the New Normal. As in Forever*, CNN (June 25, 2020, 6:57 PM), <https://www.cnn.com/2020/05/22/tech/work-from-home-companies/index.html> [<https://perma.cc/4WK4-XAE5>]; Jennifer Surane, *Synchrony to Let All U.S. Staff Work from Home Permanently*, BLOOMBERG (Oct. 20, 2020, 9:06 AM), <https://www.bloomberg.com/news/articles/2020-10-20/synchrony-to-allow-u-s-employees-to-work-from-home-permanently> [<https://perma.cc/5RXT-NM9F>].

15. See Katherine Guyot & Isabel V. Sawhill, *Telecommuting Will Likely Continue Long After the Pandemic*, BROOKINGS INST. (Apr. 6, 2020), <https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic> [<https://perma.cc/2N69-9JQ4>]; Rani Molla, *Office Work Will Never Be the Same*, VOX (May 21, 2020, 7:30 AM), <https://www.vox.com/recode/2020/5/21/21234242/coronavirus-COVID-19-remote-work-from-home-office-reopening> [<https://perma.cc/RB3D-54UK>] (stating that reliance on technology and workplace software like videoconferencing and chat applications will likely continue even after people return to the office).

16. See Monica Anderson et al., *#BlackLivesMatter Surges on Twitter After George Floyd’s Death*, PEW RSCH. CTR. (June 10, 2020), <https://www.pewresearch.org/fact-tank/2020/06/10/blacklivesmatter-surges-on-twitter-after-george-floyds-death> [<https://perma.cc/KWX2-33AQ>]; Tyrone Beason, *‘Something Is Not Right.’ George Floyd Protests Push White Americans to Think About Their Privilege*, L.A. TIMES (June 28, 2020, 6:00AM), <https://www.latimes.com/politics/story/2020-06-28/white-voters-racism-reckoning-george-floyd-killing> [<https://perma.cc/6F68-UA7W>]; Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/4T9Q-WZZK>].

17. #BlackLivesMatter is a movement that began in 2013 after a jury acquitted George Zimmerman of the murder of Trayvon Martin, an unarmed Black teenager. See *About, BLACK LIVES MATTER*, <https://blacklivesmatter.com/about> [<https://perma.cc/2YVK-BGQB>] (last visited Jan. 27, 2021); Aleem Maqbool, *Black Lives Matter: From Social Media Post to*

justice¹⁸ and as nationwide protests intensified,¹⁹ online hate speech increased in response.²⁰ The explosion of social media usage as people spent more time indoors and on their mobile devices because of the COVID-19 lockdown²¹ further exacerbated the spread of hate speech.

As hate speech intensified, social media companies faced pressure from civil rights groups and corporate advertisers to regulate hate speech on their platforms.²² Unlike many other countries,²³ the United States does not regulate the dissemination of hate speech.²⁴ Thus, the main restrictive measures against online hate speech are the policies that social media companies implement and the use of content moderation to remove posts that violate those policies.²⁵ While social media companies have made some

Global Movement, BBC (July 9, 2020), <https://www.bbc.com/news/world-us-canada-53273381> [<https://perma.cc/WUQ8-RJNR>].

18. See Anderson et al., *supra* note 16; Scottie Andrew, *People Are Tweeting About Black Lives Matter Now More than at Any Point in the Movement's History*, CNN (June 11, 2020, 3:35 PM), <https://www.cnn.com/2020/06/11/us/black-lives-matter-hashtag-popularity-trnd/index.html> [<https://perma.cc/R3KU-W24R>].

19. See Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [<https://perma.cc/289K-SDA4>].

20. See Fischer, *supra* note 9.

21. See Sarah Fischer, *Social Media Use Spikes During Pandemic*, AXIOS (Apr. 24, 2020), <https://www.axios.com/social-media-overuse-spikes-in-coronavirus-pandemic-764b384d-a0ee-4787-bd19-7e7297f6d6ec.html> [<https://perma.cc/33E4-Q5XW>]; Ella Koeze & Nathaniel Popper, *The Virus Changed the Way We Internet*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/interactive/2020/04/07/technology/coronavirus-internet-use.html> [<https://perma.cc/PDA5-8LFP>]; Alexandra Samet, *How the Coronavirus Is Changing US Social Media Usage*, EMARKETER (July 29, 2020), <https://www.emarketer.com/content/how-coronavirus-changing-us-social-media-usage> [<https://perma.cc/VT89-9X7X>] (stating that “[t]he Harris Poll conducted between late March and early May, found that between 46% and 51% of US adults were using social media more since the outbreak began”).

22. See Claire Atkinson, *Facebook Is Facing Its Biggest Backlash Yet, as Advertiser Boycott Gains Momentum*, NBC NEWS (June 24, 2020, 3:59 PM), <https://www.nbcnews.com/business/business-news/facebook-faces-growing-pressure-advertisers-do-more-counteract-hate-speech-n1231786> [<https://perma.cc/5L9J-WWPY>] (describing a wave of companies that have joined together through the Stop Hate for Profit campaign to pull advertising from Facebook and put pressure on Facebook to improve the counteraction of hate speech); *Civil Rights Groups Call for 'Pause' on Facebook Ads*, U.S. NEWS (June 17, 2020), <https://www.usnews.com/news/technology/articles/2020-06-17/civil-rights-groups-call-for-pause-on-facebook-ads> [<https://perma.cc/K7RZ-UA3U>]; *George Floyd: Ben & Jerry's Joins Facebook Ad Boycott*, BBC NEWS (June 24, 2020), <https://www.bbc.com/news/business-53146256> [<https://perma.cc/U259-CA6T>]; Barbara Ortutay & Tali Arbel, *Social Media Platforms Face a Reckoning Over Hate Speech*, ASSOCIATED PRESS (June 29, 2020), <https://apnews.com/article/6d0b3359ee5379bd5624c9f1024a0eaf> [<https://perma.cc/9XB4-MWWW>].

23. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 858 (2001) (listing countries that prohibit the dissemination of hate speech, including Austria, Belgium, Brazil, Canada, Cyprus, England, France, Germany, India, Israel, Italy, the Netherlands, and Switzerland).

24. See Richard Stengel, Opinion, *Why America Needs a Hate Speech Law*, WASH. POST (Oct. 29, 2019, 8:20 AM), <https://www.washingtonpost.com/opinions/2019/10/29/why-america-needs-hate-speech-law> [<https://perma.cc/KKZ7-S6VW>]; *infra* Part I.D.

25. See Cogito Tech LLC, *What Is Social Media Content Moderation and How Moderation Companies Use Various Techniques to Moderate Contents?*, MEDIUM (May 11, 2020), <https://medium.com/cogitotech/what-is-social-media-content-moderation-and-how->

efforts to curtail hate speech,²⁶ people have criticized content moderation as inconsistent and harmful to human moderators.²⁷ Furthermore, Congress has recently considered whether these existing measures are adequate to curtail online hate speech and its dangerous effects on society.²⁸

Only a short time after Floyd's killing, the effects of the social unrest and social media hate speech reached the workplace. Employers began to fire employees who posted racist or offensive comments on their personal social media pages.²⁹ In the week following George Floyd's killing, for example, the executive producer of *Law & Order* fired the TV show's spin-off writer after he posted a picture of himself on Facebook holding a rifle and commenting that he would "light up" looters who tried to come near his property.³⁰ In his remarks on Twitter, the executive producer stated, "I will not tolerate this conduct, especially during our hour of national grief."³¹ His comments were met with both support and criticism. One Twitter user stated, "[The spinoff writer] should not have been fired because of that statement alone."³² Several other private³³ and public employers³⁴ fired employees for

moderation-companies-use-various-techniques-to-a0e38bb81162 [https://perma.cc/62PH-YZQJ].

26. See Karissa Bell, *Twitter Will Block Links Promoting Hate Speech and Violence*, ENGADGET (July 28, 2020), <https://www.engadget.com/twitter-bans-links-hateful-conduct-violence-010623900.html> [https://perma.cc/K2SS-WF7V]; Salvador Rodriguez, *Zuckerberg: Facebook Will Prohibit Hate Speech in Its Ads*, CNBC (June 26, 2020, 5:20 PM), <https://www.cnbc.com/2020/06/26/zuckerberg-facebook-will-prohibit-hate-speech-in-its-ads.html> [https://perma.cc/MJQ2-YE9R].

27. See Andrew Arshnt & Daniel Etcovitch, *The Human Cost of Online Content Moderation*, JOLT DIG. (Mar. 2, 2018), <https://jolt.law.harvard.edu/digest/the-human-cost-of-online-content-moderation> [https://perma.cc/N823-Y2AL]; Jillian C. York & Corynne McSherry, *Content Moderation Is Broken. Let Us Count the Ways.*, ELEC. FRONTIER FOUND. (Apr. 29, 2019), <https://www.eff.org/deeplinks/2019/04/content-moderation-broken-let-us-count-ways> [https://perma.cc/2M7Q-56WH].

28. See *infra* notes 143–45 and accompanying text.

29. See, e.g., Andrew Dalton, *People Are Getting Fired Over Racist, Violent, and Insensitive Social Media Posts*, FORTUNE (June 4, 2020, 3:30 PM), <https://fortune.com/2020/06/04/racist-violent-social-media-firings-grant-napear-craig-gore> [https://perma.cc/D3FH-TJ4L].

30. Sandra Gonzalez, *'Law & Order' Spinoff Fires Writer After He Appeared to Make Threatening Social Media Post*, CNN (June 2, 2020, 10:37 PM), <https://www.cnn.com/2020/06/02/entertainment/craig-gore/index.html> [https://perma.cc/NP9S-QSXG].

31. Wolf Entertainment (@WolfEnt), TWITTER (June 2, 2020, 2:31 PM), <https://twitter.com/WolfEnt/status/1267886470670323714> [https://perma.cc/7WYP-Y7RG].

32. Riley Scott (@rileypscott), TWITTER (June 2, 2020, 9:18 PM), <https://twitter.com/rileypscott/status/1267988912317882368> [https://perma.cc/WU8B-XMNJ].

33. See, e.g., Will Thorne, *'The Flash' Star Hartley Sawyer Fired Over Racist, Misogynistic Tweets*, VARIETY (June 8, 2020, 11:00 AM), <https://variety.com/2020/tv/news/the-flash-hartley-sawyer-fired-racist-tweets-1234627876> [https://perma.cc/WU8B-XMNJ].

34. See, e.g., Noah Goldberg, *MTA Aims to Fire Worker for Racist Social Media Post Targeting George Floyd Protesters*, N.Y. DAILY NEWS (June 12, 2020, 12:07 PM), <https://www.nydailynews.com/new-york/ny-mta-fire-employee-george-floyd-protests-jason-brown-racist-20200612-e3lao7wk4zgwpp12natqn3gzka-story.html> [https://perma.cc/2TVV-FDDC]; Katie Way, *Cops Are Getting Fired Over Their Racist Social Media Posts*, VICE (June 11, 2020, 4:04 PM), <https://www.vice.com/en/article/dyz7yz/cops-getting-fired-for-racist-social-media-posts> [https://perma.cc/VL72-YUQB]; see also *Bennett v. Metro. Gov't*, 977 F.3d 530, 538 (6th Cir. 2020) (holding that a public employee's social media posting with a

posting racist comments. Although firings for racist speech occurred before the COVID-19 pandemic and the killing of George Floyd,³⁵ this new wave of terminations garnered substantial criticism, including from former president Donald Trump.³⁶

The crux of the debate is this: to what extent should employers have the right to fire employees for posts on their personal social media pages? As it stands, restrictions on how an employer can respond to employees' racist social media posts depend on whether the employer is private or public. In every state except for Montana, private employment is at will, meaning an employee can be fired or can quit at any time and for any cause.³⁷ Generally, the only restrictions on a private employer's right to fire an employee are statutory protections under the National Labor Relations Act,³⁸ the Civil Rights Act of 1964,³⁹ and the Whistleblower Protection Act of 1989.⁴⁰

On the other hand, the First Amendment⁴¹ protects the speech of public employees to a degree.⁴² When evaluating a public employee's free speech claim, the U.S. Supreme Court balances an employee's right to comment on matters of public concern with the state's interest, as an employer, in efficiently providing services to the public.⁴³ Recently, the Fourth Circuit

racially charged comment on the outcome of the presidential election was not highly protected speech).

35. See, e.g., *Venable v. Metro. Gov't*, 430 F. Supp. 3d 350, 353–55 (M.D. Tenn. 2019).

36. Trump commented that cancel culture is a “political weapon[] . . . driving people from their jobs.” Remarks at an Independence Day Celebration at the Mount Rushmore National Memorial in Keystone, South Dakota, 2020 DAILY COMP. PRES. DOC. 1 (July 3, 2020), <https://www.govinfo.gov/content/pkg/DCPD-202000494/pdf/DCPD-202000494.pdf> [<https://perma.cc/6H4N-RRBP>]; see also Moshe Z. Marvit & Shaun Richman, *If “Cancel Culture” Is About Getting Fired, Let’s Cancel at-Will Employment*, IN THESE TIMES (July 29, 2020), <https://inthesetimes.com/article/cancel-culture-just-cause-union-labor-employment> [<https://perma.cc/PC4T-N688>] (arguing that an employer's right to fire at-will should be curbed by a just cause standard). In an open letter signed by over 150 academics, J. K. Rowling and her fellow writers stated, “We need to preserve the possibility of good-faith disagreement without dire professional consequences.” *A Letter on Justice and Open Debate*, HARPER'S MAG. (July 7, 2020), <https://harpers.org/a-letter-on-justice-and-open-debate> [<https://perma.cc/6NCH-R8LL>].

37. Lisa Guerin, *Employment at Will: What Does It Mean?*, NOLO, <https://www.nolo.com/legal-encyclopedia/employment-at-will-definition-30022.html> [<https://perma.cc/P2FN-ZJ6Q>] (last visited Jan. 27, 2021).

38. 29 U.S.C. § 151–169. The National Labor Relations Act prevents employers from limiting speech that is related to concerted activity. *Id.* § 157.

39. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.). Title VII of the Civil Rights Act of 1964 prohibits an employer from discharging an individual based on the individual's race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a)(1).

40. Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 and 22 U.S.C.). The Whistleblower Protection Act of 1989 protects federal whistleblowers who work for the government and report the possible existence of an activity constituting a violation of law, rules, or regulations. *Id.*

41. U.S. CONST. amend. I.

42. See *Connick v. Myers*, 461 U.S. 138, 140 (1983) (stating that “a public employee does not relinquish First Amendment rights to comment on matters of public interest”).

43. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); see also *Connick*, 461 U.S. at 150 (stating that “[t]he *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public”).

arrived at divergent holdings in cases involving public employees and the regulation of their speech on social media.⁴⁴

Regardless of this divergence between the rights of private and public employers to terminate employees for racist or offensive social media posts, all employers with at least fifteen employees are subject to workplace harassment claims under the Civil Rights Act of 1964.⁴⁵ Under Title VII of the Act, employees can sue their employers for failing to prevent or correct harassment and, specifically, for conduct that creates a “hostile work environment.”⁴⁶ However, Title VII and the Equal Employment Opportunity Commission’s (EEOC) guidance on harassment do not specify whether employees may have recourse for content that coworkers post on their personal social media pages when the content creates a hostile work environment. Although employers are expected to prevent and correct workplace harassment that occurs *in* the workplace, the extent of an employer’s responsibility to prevent and correct harassment that occurs on social media is less clear. In light of the changing contours of the workplace and the growing recognition of the harms of hate speech, an evaluation of employers’ responsibility to prevent and correct employees’ racist online hate speech is necessary.⁴⁷

This Note considers how the EEOC can update its employment discrimination guidelines to protect employees from the effects of racist online hate speech that creates a hostile work environment. Part I describes the development of the hostile work environment claim, the boundaries of employer liability, the tensions between sexual harassment and racial harassment jurisprudence, and the protections that social media companies have against hate speech. Part II discusses courts’ responses to and debate regarding harassment outside of the workplace and on social media. Finally, Part III proposes that the EEOC should expand its regulations to state that, in hostile work environment claims, courts may consider racist hate speech on employees’ personal social media pages in the totality of the circumstances.

44. *Compare* Grutzmacher v. Howard County, 851 F.3d 332, 338, 345 (4th Cir. 2017) (holding that a county fire department did not violate an employee’s First Amendment rights upon discharging him for liking and positively replying to a “racially charged” comment made on a social media post because the employer’s interest in preventing workplace disruption outweighed the employee’s free speech interest), *with* Liverman v. City of Petersburg, 844 F.3d 400, 408 (4th Cir. 2016) (holding that a police department’s social media policy prohibiting the dissemination of any information “that would tend to discredit or reflect unfavorably upon the [Department]” violated a police officer’s First Amendment rights (alteration in original)).

45. *See* 42 U.S.C. § 2000e(b) (defining employer as “a person engaged in an industry affecting commerce who has fifteen or more employees”).

46. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/harassment> [<https://perma.cc/JFX2-9AJ6>] (last visited Jan. 27, 2021); *see infra* Part I.A.

47. *See infra* Part III.

I. THE HOSTILE WORK ENVIRONMENT AND SOCIAL MEDIA HATE SPEECH PROTECTIONS

Hostile work environment jurisprudence has developed, primarily, through a series of cases involving claims of sexual harassment in the brick-and-mortar workplace.⁴⁸ This Note considers how the EEOC can bolster protections in the workplace against racial harassment and hate speech online.

Part I discusses the legal background of the hostile work environment claim and describes how hate speech is regulated in the United States in contrast to other countries. Part I.A describes the development of the hostile work environment jurisprudence through case law and EEOC regulation. Part I.B explains the different standards for employer liability in hostile work environment claims. Part I.C highlights scholarship about racial harassment claims and how they should be assessed in light of the overriding jurisprudential and academic focus on sexual harassment. Finally, Part I.D discusses the policies that social media companies have against hate speech, which are the primary protections against online hate speech in the United States. Part I.D also highlights Congress's recent considerations about expanding protections against hate speech.

A. *Development of the Hostile Work Environment Claim*

The hostile work environment claim is a federal discrimination claim that the EEOC and courts developed under the Civil Rights Act of 1964.⁴⁹ The Act is a federal statute that was born out of the civil rights movement and prohibits discrimination in a range of areas including employment.⁵⁰ Title VII of the Act prohibits employers from discriminating against individuals on the basis of race, color, religion, sex, or national origin.⁵¹ Under Title VII, Congress also established the EEOC, a federal agency authorized to issue, amend, and rescind regulations under the Act.⁵² The EEOC also has the authority to enforce these regulations⁵³ and investigate claims.⁵⁴

48. See *infra* Parts I.A–B.

49. See *infra* notes 67–68, 79–80 and accompanying text.

50. See *The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBR. OF CONG., <https://www.loc.gov/exhibits/civil-rights-act/epilogue.html> [<https://perma.cc/VX6E-9XWT>] (last visited Jan. 27, 2021).

51. See 42 U.S.C. § 2000e-2.

52. See *id.* § 2000e-12.

53. See *id.* § 2000e-5.

54. Anyone who believes they have faced discrimination in the workplace can file a charge of discrimination with the EEOC. See *id.* § 2000e-8; *Filing a Charge of Discrimination with the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/filing-charge-discrimination> [<https://perma.cc/9BZB-MAFQ>] (last visited Jan. 27, 2021). Once the employee files the charge, the EEOC notifies the organization and investigates whether there is reasonable cause to believe discrimination occurred. If the EEOC is unable to conclude that there is reasonable cause to believe discrimination occurred, it will notify the charging party, who then has a right to file a federal lawsuit within ninety days of the notice. If the EEOC determines there is a reasonable chance discrimination occurred, it will invite the parties to resolve the charge through mediation or settlement, an informal process called conciliation. If conciliation is unsuccessful, the EEOC has the authority to enforce violations of its statutes

Although Title VII's text does not explicitly include the word "harassment," the recognition of workplace harassment claims began in *Rogers v. EEOC*,⁵⁵ where the Fifth Circuit interpreted § 2000e-2(a)(1) of the Act⁵⁶ to prohibit practices that create a work environment that is "heavily charged" with discrimination.⁵⁷ In *Rogers*, an employee filed a claim with the EEOC against her employers, who owned an optometry business.⁵⁸ She claimed that she suffered discrimination, in part, because her employer had a practice of segregating patients.⁵⁹ The employer argued that this charge could not relate to an unlawful employment practice because the discrimination was aimed at patients rather than employees.⁶⁰ Referring to the text of § 2000e-2(a)(1) of Title VII,⁶¹ the court reasoned that Congress intended to define discrimination "in the broadest possible terms."⁶² Furthermore, the court reasoned that employment discrimination had more "nuances and subtleties" that could not be "confined to bread and butter issues."⁶³ Thus, the court held that the creation of a work environment "heavily charged with ethnic or racial discrimination" was unlawful.⁶⁴ The court also held that statutory protection against employer abuse and workplace discrimination extended to the protection of an employee's psychological as well as economic well-being.⁶⁵

At the time of the *Rogers* decision, the EEOC's Guidelines on Discrimination Because of Sex did not explicitly mention or prohibit harassment.⁶⁶ In 1980, however, the EEOC amended its guidelines to add

by filing a federal lawsuit. See *What You Can Expect After a Charge Is Filed*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed> [https://perma.cc/YLV8-RLKB] (last visited Jan. 27, 2021).

55. 454 F.2d 234 (5th Cir. 1971).

56. Section 2000e-2(a)(1) of the Act states:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise 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.

42 U.S.C. § 2000e-2(a)(1).

57. *Rogers*, 454 F.2d at 238.

58. *See id.* at 236.

59. *See id.*

60. *See id.* at 238.

61. *See supra* note 56.

62. *Rogers*, 454 F.2d at 238.

63. *Id.*

64. *Id.*

65. *See id.* (stating that § 2000e-2(a)(1) of the Act prohibits the creation of a work environment that can "destroy completely the emotional and psychological stability of minority group workers").

66. At the time of the *Rogers* decision, the EEOC's Guidelines on Discrimination Because of Sex only contained § 1604.1–1604.10, which set forth several guidelines related to sex discrimination including situations when employers could not use sex as a bona fide occupational qualification and prohibitions against: classifying a job as "male" or "female," discrimination against married women, job advertising that indicates a preference based on sex, sex discrimination by employment agencies, preemployment inquiries that discriminate based on sex, sex discrimination with regard to "fringe benefits," and discrimination relating to pregnancy and childbirth. See Guidelines on Discrimination Because of Sex, 37 Fed. Reg. 6835, 6836–37 (Apr. 5, 1972) (to be codified at 29 C.F.R. pt. 1604).

29 C.F.R. § 1604.11, Sexual Harassment (“EEOC Harassment Guidelines”), a rule specifically prohibiting sexual harassment.⁶⁷ In its description of the rule, the EEOC noted its aim to curtail the continued prevalence of sexual harassment and stated that “under Title VII, employees should be afforded a working environment free of discriminatory intimidation whether based on sex, race, religion, or national origin.”⁶⁸ Thus, although 29 C.F.R. § 1604.11 is titled “Sexual Harassment,” a footnote states that the principles in the EEOC Harassment Guidelines apply to race, color, religion, and national origin.⁶⁹

The EEOC Harassment Guidelines set out two types of harassment claims. Sections 1604.11(a)(1) and 1604.11(a)(2) are the basis for “quid pro quo” sexual harassment claims, where unwelcome sexual conduct or favors become a condition of employment or are the basis of negative employment actions.⁷⁰ Section 1604.11(a)(3) is the basis for hostile work environment harassment claims, where conduct “unreasonably interfer[es] with an individual’s work performance or creat[es] an intimidating, hostile, or offensive working environment.”⁷¹ The EEOC Harassment Guidelines further highlight that to determine whether conduct constitutes harassment, the EEOC looks at the “totality of the circumstances,” including the “nature” of the harassment and “the context in which the alleged incidents occurred.”⁷² Furthermore, the EEOC Harassment Guidelines state that “the determination of the legality of a particular action will be made from the facts, on a case by case basis.”⁷³

After the codification of the EEOC Harassment Guidelines, the Supreme Court formally recognized harassment claims in *Meritor Savings Bank v. Vinson*.⁷⁴ In *Vinson*, an employee sued her employer alleging that her supervisor had sexually harassed her over three years of employment.⁷⁵ The employer contended that Title VII claims should apply only where the employee has faced tangible or economic losses rather than psychological harm.⁷⁶ Rejecting the employer’s view, the Court first referenced the text of § 2000e-2(a)(1) and stated that the phrase “terms, conditions, or privileges of employment” demonstrates Congress’s intent to prohibit a broad range of discriminatory practices.⁷⁷ Second, the Court highlighted the EEOC

67. See 29 C.F.R. § 1604.11 (2020); Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74,676–77 (Nov. 10, 1980) (to be codified at 29 C.F.R. pt. 1604).

68. Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Interim Interpretive Guidelines, 45 Fed. Reg., 25,024, 25,024 (Apr. 11, 1980) (to be codified at 29 C.F.R. pt. 1604).

69. See 29 C.F.R. § 1604.11 n.1.

70. *Id.* § 1604.11(a).

71. *Id.*

72. *Id.* § 1604.11(b).

73. *Id.*

74. 477 U.S. 57 (1986).

75. See *id.* at 59–60.

76. See *id.* at 64.

77. *Id.*

Harassment Guidelines and the specific prohibition on conduct that creates a hostile or offensive work environment.⁷⁸ Thus, the Court held that hostile work environment claims are actionable under Title VII⁷⁹ as long as the conduct is severe or pervasive enough to “alter the conditions of employment and create an abusive working environment.”⁸⁰ Furthermore, the Court explained that not all conduct that can be classified as harassment rises to the level of altering workplace conditions.⁸¹ The Court noted that the “mere utterance of an ethnic or racial epithet which engenders offensive feelings” is not severe enough to violate Title VII.⁸²

After the *Vinson* decision, the EEOC issued a guidance document entitled, “Policy Guidance on Current Issues of Sexual Harassment.”⁸³ The document, issued on March 19, 1990, does not have the force of law but sought to clarify several issues in light of the *Vinson* decision.⁸⁴ With respect to determining whether a work environment is hostile, the guidance stated that the conduct should be evaluated based on an objective reasonable person standard.⁸⁵ Thus, a “petty slight” would not be sufficient, but a single, very severe incident of harassment, such as unwelcome touching, might be.⁸⁶ The guidance also reiterated the preventative steps that the EEOC Harassment Guidelines encourage employers to take, including implementing explicit anti-harassment policies, and highlighted examples of appropriate and inappropriate remedial actions by employers in response to harassment complaints.⁸⁷

The Court revisited and further considered the definition of a hostile work environment in *Harris v. Forklift Systems, Inc.*⁸⁸ In *Harris*, the employee sued her employer alleging that the company’s president created an abusive or hostile work environment by constantly insulting her because of her gender and targeting her with sexual innuendos.⁸⁹ The Court considered whether a workplace harassment claim has to involve conduct that seriously affects a claimant’s psychological well-being or leads to the suffering of an injury.⁹⁰ The Court held that psychological injury is not required for conduct to be actionable and reiterated the “severe or pervasive test” established in

78. *See id.* at 65. The Court acknowledges that the EEOC’s guidelines are not binding on courts but that they do constitute a body of experience and judgment that the courts should refer to. *Id.* For more on the Supreme Court’s deference to the EEOC, see Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937 (2006).

79. *Vinson*, 477 U.S. at 73.

80. *Id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

81. *See id.*

82. *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

83. Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (Mar. 19, 1990), 1990 WL 1104701 [hereinafter Sexual Harassment Policy Guidance].

84. *See id.*

85. *See id.*

86. *Id.* (quoting *Zabkowicz v. W. Bend Co.*, 589 F. Supp. 780, 784 (E.D. Wis. 1984)).

87. *See id.*

88. 510 U.S. 17 (1993).

89. *See id.* at 19.

90. *See id.* at 20.

Vinson.⁹¹ To clarify the standard, the Court explained that conduct must be both objectively and subjectively hostile.⁹² To meet the objective prong, the conduct has to create a work environment “that a reasonable person would find abusive or hostile.”⁹³ To meet the subjective prong, the victim has to perceive the environment as abusive.⁹⁴ Additionally, the Court found that in assessing whether an environment is hostile or abusive, a court must consider the totality of the circumstances, including the frequency and severity of the conduct, whether it was physically threatening and humiliating or a mere utterance, whether it unreasonably interfered with the employee’s work performance, and whether it affected the employee’s psychological well-being.⁹⁵ The Court explained that while each of these factors is relevant, none is required.⁹⁶

Thus, the hostile work environment doctrine is informed by the EEOC Harassment Guidelines, which favor a broad, factual, and contextual analysis of harassment claims.⁹⁷ Additionally, the Supreme Court’s holdings in *Vinson* and *Harris* favor the prohibition of a broad range of discrimination⁹⁸ and the consideration of both objective and subjective factors to determine when harassment is severe or pervasive enough to be actionable.⁹⁹

B. Employer Liability for Harassment Claims

The EEOC Harassment Guidelines also set differing standards for employer liability depending on whether or not the harasser is a supervisor. Previously, § 1604.11(c) set forth a vicarious liability standard under which employers were responsible for the acts of supervisors regardless of whether the acts were authorized by or known to the employer.¹⁰⁰ Section 1604.11(d) sets forth a negligence standard under which employers are responsible for the acts of nonsupervisory employees where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.¹⁰¹

Section 1604.11(d) is still the operable standard for employee liability for the acts of nonsupervisory employees.¹⁰² The EEOC, however, rescinded § 1604.11(c) after the Supreme Court decided the 1988 companion cases, *Burlington Industries, Inc. v. Ellerth*¹⁰³ and *Faragher v. City of Boca*

91. *See id.* at 21–22.

92. *See id.* at 21.

93. *Id.*

94. *See id.* at 21–22.

95. *See id.* at 22.

96. *See id.* at 23.

97. *See supra* notes 72–73 and accompanying text.

98. *See supra* notes 77, 95–96 and accompanying text.

99. *See supra* notes 91–94 and accompanying text.

100. *See* Discrimination Because of Sex Under Title VII of the Civil Rights Act of 1964, as Amended; Adoption of Final Interpretive Guidelines, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (to be codified at 29 C.F.R. pt. 1604).

101. *See* 29 C.F.R. § 1604.11(d) (2020).

102. *Id.*; *see also* Harassment, *supra* note 46.

103. 524 U.S. 742 (1998).

Raton.¹⁰⁴ In both cases, the employees claimed their supervisors sexually harassed them.¹⁰⁵ The Court decided that the EEOC's vicarious liability standard should only apply in instances where a supervisor¹⁰⁶ creates a hostile work environment that results in a "tangible employment action."¹⁰⁷ Where the supervisor's harassment does not result in a tangible employment action, the Court established that the employer can raise an affirmative defense comprised of two elements: (1) that the employer exercised reasonable care to promptly prevent and correct harassment and (2) that the plaintiff-employee unreasonably failed to take advantage of preventive or corrective measures offered by the employer.¹⁰⁸ The Court reasoned that this negligence standard would not only accommodate the agency principles of vicarious liability but also encourage employers to establish preventative measures and encourage employees to report harassment.¹⁰⁹

Thus, the EEOC and the Supreme Court have framed a liability standard under which employers are penalized when they fail to acknowledge harassment in the workplace or take steps to prevent or correct it.¹¹⁰ Under this standard, employees are also required to utilize the preventative and corrective measures established by their employers before their employers will be liable for creating a hostile work environment.¹¹¹

C. *Tension Between Racial Harassment Claims and Sexual Harassment Jurisprudence*

Although the workplace harassment claim originated in *Rogers*, a case involving a racially hostile work environment, harassment jurisprudence and legal scholarship have mainly focused on sexual harassment.¹¹² Since its codification in the EEOC Harassment Guidelines, racial harassment has been under the regulatory cover of sexual harassment.¹¹³ Furthermore, the five Supreme Court cases through which the hostile work environment

104. 524 U.S. 775 (1998).

105. *Ellerth*, 524 U.S. at 747–48; *Faragher*, 524 U.S. at 780.

106. *See Vance v. Ball State Univ.*, 570 U.S. 421 (2013). In *Vance*, the Supreme Court "reject[ed] the nebulous definition of a 'supervisor' advocated in the EEOC Guidance" and defined "supervisor" as an employee who is "empowered by the employer to take tangible employment actions against the victim." *Id.* at 424, 431.

107. *Ellerth*, 524 U.S. at 765 (highlighting examples of a tangible employment action including discharge, demotion, or undesirable reassignment); *Faragher*, 524 U.S. at 808 (same); *see Harassment, supra* note 46 (explaining that an employer is automatically liable for harassment by a supervisor that causes an employee to be terminated, not promoted, or to lose wages).

108. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

109. *See Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 807.

110. *See supra* notes 101–02, 108 and accompanying text.

111. *See supra* note 108 and accompanying text.

112. *See* Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 1, 23 (2012); Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 56–57 (2006).

113. *See supra* note 69 and accompanying text; *see also* Carter & Scheuermann, *supra* note 112, at 29.

jurisprudence developed involved sexual harassment claims.¹¹⁴ Though the principles established in each of these cases apply to racial harassment, conceptualizing different forms of racial harassment is difficult because there is a lack of scholarship discussing racial harassment exclusively.¹¹⁵ However, on its website, the EEOC broadly defines racial harassment as including “racial slurs, offensive or derogatory remarks about a person’s race or color, or the display of racially-offensive symbols” and states that “the law doesn’t prohibit simple teasing, offhand comments, or isolated incidents that are not very serious.”¹¹⁶ Thus, racial harassment claims usually only succeed when they involve “overt, repeated and egregious racist/hostile acts.”¹¹⁷

Professor L. Camille Hébert contextualizes this by arguing that imposing strict sexual harassment standards, such as the severe or pervasive standard, to racial harassment claims may lead courts to find that serious racially discriminatory acts are not actionable.¹¹⁸ She explains that analogizing racial harassment and sexual harassment claims may not properly acknowledge the differences between them, including differences in historical context and how individuals experience each form of harassment.¹¹⁹ Professor Hébert posits that analogizing racial and sexual harassment claims is a “two-edged sword” because, while it may legitimize sexual harassment claims, it might also subvert legitimate racial harassment claims.¹²⁰

The harms of hate speech are likely exacerbated by the limited academic focus on the effectiveness, or the lack thereof, of racial harassment laws in preventing a racially hostile work environment. If racial harassment claims are only successful when offenses are extremely overt, but not when they are subtle yet harmful, then the racial harassment jurisprudence fails to achieve its purpose of preventing a workplace environment where the conditions of

114. See Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437, 1439 (2003); see also, e.g., *Ellerth*, 524 U.S. 742; *Faragher*, 524 U.S. 775; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

115. See Carter & Scheuermann, *supra* note 112, at 24; Chew & Kelley, *supra* note 112, at 62 (stating that although there is considerable academic discourse about conceptualizing sexual harassment, “not one major legal article exists to conceptualize racial harassment as a unique social phenomenon and harm deserving its own jurisprudential framework”).

116. *Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/racecolor-discrimination> [<https://perma.cc/B9BQ-LVAG>] (last visited Jan. 27, 2021).

117. Carter & Scheuermann, *supra* note 112, at 31.

118. See L. Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 OHIO ST. L.J. 819, 878 (1997).

119. See *id.* at 837, 839. Professor Hébert states that the historical denial of equal rights to women has not left the same legacy as “slavery, segregation, and centuries of racial hatred.” *Id.* at 837. Professor Hébert also notes that, while women have been conditioned to receive harassment as “ambiguously motivated,” individuals experience racial harassment as “unambiguously hostile.” *Id.* at 839.

120. See *id.* at 820; see also Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615, 641 (2006) (arguing that “analogizing racial harassment to sexual harassment in the absence of further study . . . is problematic”).

employment are altered.¹²¹ As the next section will demonstrate, the lack of federal protections against online hate speech in the United States possibly adds to the harms of hate speech as well.

D. Efforts to Curtail Online Hate Speech in the United States and Abroad

In the United States, unlike many other countries, hate speech is unregulated.¹²² The First Amendment generally does not protect speech in certain categories, such as incitement to imminent lawless action, fighting words, and true threats.¹²³ The Supreme Court has declined the opportunity to recognize hate speech as belonging to these categories. Specifically, the Supreme Court declined to grant certiorari in *Collin v. Smith*,¹²⁴ where the Seventh Circuit held that a local ordinance prohibiting the dissemination of materials with hateful content was unconstitutional.¹²⁵ There, the Village of Skokie sought to prevent the Socialist Party of America from having a Nazi protest displaying swastikas and disseminating placards with statements such as “White Free Speech.”¹²⁶ The Seventh Circuit held that the village’s local ordinance was unconstitutional because it prohibited speech that was not lewd and obscene, profane, libelous, or fighting words that would cause violence or disorder.¹²⁷ In other words, the court found that the hateful speech did not fall into a class of speech that can be constitutionally prevented or punished.¹²⁸

Furthermore, the Supreme Court has repeatedly stated that hate speech, although it offends, is protected by the First Amendment.¹²⁹ Commentators have posited that the United States’s protection of hate speech coupled with

121. See *supra* notes 79–80 and accompanying text.

122. See Kevin Boyle, *Hate Speech—the United States Versus the Rest of the World?*, 53 ME. L. REV. 487, 499 (2001) (explaining that the United States attached a reservation to Article 20 of the United Nations International Covenant on Civil and Political Rights, which prohibits national, religious, or religious speech that incites discrimination, stating that it would restrict free speech protected by the Constitution).

123. See Lauren E. Beausoleil, Note, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2104 (2019); see also *Virginia v. Black*, 538 U.S. 343, 359 (2003) (stating that the First Amendment does not protect “true threats”—that is, statements that communicate a serious intent to unlawfully commit violence against a particular individual or group of individuals); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (holding that advocacy that incites imminent lawless action can be proscribed); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that the First Amendment does not protect “fighting words” that by utterance inflict injury or incite a breach of the peace).

124. 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (mem.).

125. See *id.* at 1207.

126. *Id.* at 1200.

127. See *id.* at 1204.

128. See *id.*

129. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding that a Minnesota ordinance violated the First Amendment where the ordinance prohibited conduct known to cause anger or resentment in others on the basis of race, color, creed, religion, or gender); see also *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2018) (stating that free speech jurisprudence protects the expression of speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground).

the discretion it grants to social media companies has created a safe haven for those who share hate speech online.¹³⁰

Social media companies have broad discretion in regulating the conduct on their websites due to the Communications Decency Act of 1996.¹³¹ The Communications Decency Act protects social media companies from liability for content that its users share.¹³² Despite this latitude, however, social media companies have established policies around hate speech, in part because of the pressure they face from civil rights groups and activists.¹³³ Facebook’s hate speech policy states that Facebook does not allow hate speech because “it creates an environment of intimidation and exclusion,”¹³⁴ and its policy continues to expand to include more forms of hate speech.¹³⁵ This prohibition also applies to content on Instagram, which Facebook owns.¹³⁶ Twitter prohibits hateful conduct, including the posting of “content that intends to dehumanize, degrade, or reinforce negative or harmful stereotypes about a protected category.”¹³⁷ Despite these policies, however, hate speech persists. In the second quarter of 2020, Facebook removed 22.5 million posts that violated the hate speech policy.¹³⁸ The number of hateful posts on Instagram also quadrupled to 3.3 million in the second quarter of 2020, from 800,000 in the first quarter.¹³⁹

Social media policies and content moderation efforts have garnered much backlash, and the regulation of the internet has become a hotly contested political debate. On May 28, 2020, then president Trump signed an executive order condemning social media companies for “engaging in selective censorship” and “stifl[ing] viewpoints with which they disagree.”¹⁴⁰ Since then, the CEOs of Facebook, Twitter, and Google have testified before

130. See Boyle, *supra* note 122, at 499–500; see also Tsesis, *supra* note 23, at 859 (explaining that the United States’s laws make it difficult for other countries to regulate hate speech).

131. Pub. L. No. 104-104, 110 Stat. 133 (codified as amended in scattered sections of 15, 18, and 47 U.S.C.).

132. See *id.*

133. See *supra* note 22 and accompanying text.

134. *Hate Speech*, FACEBOOK CMTY. STANDARDS, https://www.facebook.com/communitystandards/hate_speech [<https://perma.cc/UKB3-R3LM>] (last visited Jan. 27, 2021).

135. See Oliver Effron, *Facebook Will Ban Holocaust Denial Posts Under Hate Speech Policy*, CNN (Oct. 12, 2020, 2:11 PM), <https://www.cnn.com/2020/10/12/tech/facebook-holocaust-denial-hate-speech/index.html> [<https://perma.cc/24EG-4SQU>].

136. *Community Guidelines*, INSTAGRAM, <https://www.facebook.com/help/instagram/477434105621119> [<https://perma.cc/P8H8-58YR>] (last visited Jan. 27, 2021).

137. *Hateful Conduct Policy*, TWITTER HELP CTR., <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/E8TK-SXN3>] (last visited Jan. 27, 2021).

138. Danielle Abril, *Hateful Posts on Facebook and Instagram Soar*, FORTUNE (Aug. 11, 2020, 2:11 PM), <https://fortune.com/2020/08/11/facebook-instagram-hate-speech-violations-q2> [<https://perma.cc/Q6DJ-5S43>].

139. See *id.*

140. Exec. Order No. 13925, 85 Fed. Reg. 34,079 (May 28, 2020); see Brian Fung et al., *Trump Signs Executive Order Targeting Social Media Companies*, CNN (May 28, 2020, 9:22 PM), <https://www.cnn.com/2020/05/28/politics/trump-twitter-social-media-executive-order/index.html> [<https://perma.cc/5HFX-VNPG>].

Congress multiple times to address issues, including antitrust,¹⁴¹ censorship, misinformation, and hate speech.¹⁴² Generally, both Republicans and Democrats agree that technology companies should be subject to more regulation,¹⁴³ but they disagree about social media companies' roles in regulating hate speech. Republicans argue that content moderation is a form of selective censorship that has been used disproportionately against conservative views.¹⁴⁴ Democrats, on the other hand, are concerned about whether content moderation efforts can be increased to prevent the spread of hate speech and violence.¹⁴⁵

Although the Supreme Court has deemed the regulation of hate speech violative of free speech,¹⁴⁶ other countries have taken an aggressive approach toward hate speech regulation on social media. On January 1, 2018, Germany began enforcing the Network Enforcement Act,¹⁴⁷ or NetzDG, a hate speech law that penalizes companies such as Facebook, Twitter, and YouTube with fines of up to sixty million dollars if they fail to remove offensive speech within twenty-four hours of receiving a complaint.¹⁴⁸

141. In addition to these congressional hearings, the government has been taking other actions suggesting a more hands-on approach to regulating the technology industry. In December 2020, the FTC and forty states sued Facebook alleging that it engaged in anticompetitive practices. See Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html> [<https://perma.cc/9JEF-VAEN>]; see also Rishi Iyengar, *The Antitrust Case Against Facebook: Here's What You Need to Know*, CNN (Dec. 11, 2020, 6:27 AM), <https://www.cnn.com/2020/12/11/tech/facebook-antitrust-lawsuit-what-to-know/index.html> [<https://perma.cc/3UCN-PYZ5>]. In October 2020, the U.S. Department of Justice also sued Google for alleged antitrust violations. See Cecilia Kang et al., *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020), <https://www.nytimes.com/2020/10/20/technology/google-antitrust.html> [<https://perma.cc/SVJ6-UKF9>].

142. See David Ingram & Ezra Kaplan, *Congress Prepares to Grill CEOs of Amazon, Apple, Facebook and Google*, NBC NEWS (July 28, 2020, 10:15 AM), <https://www.nbcnews.com/tech/tech-news/congress-prepares-grill-ceos-amazon-apple-facebook-google-n1234764> [<https://perma.cc/EG4P-897Q>]; David McCabe & Cecilia Kang, *Republicans Blast Social Media C.E.O.s While Democrats Deride Hearing*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/10/28/technology/senate-tech-hearing-section-230.html> [<https://perma.cc/EGV6-LBKM>]; *Zuckerberg and Dorsey Face Harsh Questioning from Lawmakers*, N.Y. TIMES (Jan. 6, 2021, 7:11 PM), <https://www.nytimes.com/live/2020/11/17/technology/twitter-facebook-hearings> [<https://perma.cc/5EQT-KZ4J>].

143. See McCabe & Kang, *supra* note 142 (stating that “lawmakers from both parties have pushed for new regulations to be applied to the tech companies”).

144. *At Hearing, Republicans Accuse Zuckerberg and Dorsey of Censorship*, N.Y. TIMES (Oct. 28, 2020, 6:28 PM), <https://www.nytimes.com/live/2020/10/28/technology/tech-hearing> [<https://perma.cc/BNY9-J87Z>].

145. See *Zuckerberg and Dorsey Face Harsh Questioning from Lawmakers*, *supra* note 142.

146. See *supra* note 129.

147. Netzdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], Sept. 1, 2017, Bundesgesetzblatt [BGBl] at 3352 (Ger.).

148. See Zoey Chong, *Germany Kicks Year off with Strict Online Hate Speech Law*, CNET (Jan. 1, 2018, 10:15 PM), <https://www.cnet.com/news/german-hate-speech-law-goes-into-effect-on-1-jan> [<https://perma.cc/Z529-53BY>]; Marrian Zhou, *Facebook: We've Removed Hundreds of Posts Under German Hate Speech Law*, CNET (July 27, 2018, 1:19 PM),

Following the murder of a pro-refugee politician in 2019, which the German government said was preceded by threats and hate speech online, the German government increased regulation by requiring technology platforms to send reported content directly to the federal police.¹⁴⁹

India also penalizes online hate speech. Although the constitution of India upholds free speech and expression, the Indian Penal Code punishes any act that “incites or promotes disharmony or feeling of enmity or hatred between different religious or racial or linguistic or regional groups or castes or communities.”¹⁵⁰ Recently, Facebook executives in India answered questions at a hearing before an Indian parliamentary committee on information technology over allegations that they allowed anti-Muslim hate speech on the platform and failed to ban anti-Muslim content shared by politicians.¹⁵¹

These laws have sparked an international movement toward more regulation of hate speech on social media.¹⁵² In September 2020, the Office of the United Nations High Commissioner for Human Rights announced that regional forums would take place in Europe and the Asia-Pacific focused on combatting the “rising scapegoating and targeting of minorities on social media platforms” and “the growth of hate speech and incitement to discrimination, hostility or violence aimed mainly at minorities.”¹⁵³

As concerns about the harms of hate speech spread internationally, considerations about employers’ responsibilities to protect against these harms may also arise. Part II considers the differing judicial views and scholarly debates regarding employers’ reach to regulate conduct beyond the brick-and-mortar workplace.

<https://www.cnet.com/news/facebook-weve-removed-hundreds-of-posts-under-german-hate-speech-law> [https://perma.cc/VT43-6T8E].

149. See Natasha Lomas, *Germany Tightens Online Hate Speech Rules to Make Platforms Send Reports Straight to the Feds*, TECHCRUNCH (June 19, 2020, 10:02 AM), <https://techcrunch.com/2020/06/19/germany-tightens-online-hate-speech-rules-to-make-platforms-send-reports-straight-to-the-feds> [https://perma.cc/D2HG-2RMK].

150. Diya Vaishnav & Nihal Deo, *The Peril of Hate Speech in India*, THE CRIM. L. BLOG (Feb. 3, 2020), <https://criminallawstudiesnlj.wordpress.com/2020/02/03/the-peril-of-hate-speech-in-india> [https://perma.cc/SDC2-ZE7A].

151. See Rishi Iyengar, *Facebook Has More Users in India than Anywhere Else. It’s Now Dealing with a Hate Speech Crisis*, CNN (Sept. 23, 2020, 8:10 PM), <https://www.cnn.com/2020/09/22/tech/facebook-india-hate-speech/index.html> [https://perma.cc/U2PB-UM6B]; Sheikh Saaliq, *Facebook India Grilled Over Hate Speech, Allegations of Bias*, ABC NEWS (Sept. 2, 2020, 10:30 PM), <https://abcnews.go.com/Technology/wireStory/facebook-india-grilled-hate-speech-alleged-bias-72769758> [https://perma.cc/B6AF-9UD3].

152. See J. D. Tuccille, *German-Style Internet Censorship Catches on Around the World*, REASON (Oct. 12, 2020, 10:38 AM), <https://reason.com/2020/10/12/german-style-internet-censorship-catches-on-around-the-world> [https://perma.cc/N6AH-CNGK].

153. *Forums to Tackle Hate Speech, Social Media and Minorities*, UNITED NATIONS OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Sept. 17, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26256> [https://perma.cc/2FDZ-46YU]; see also *Intersectional Approach to Hate Speech Against Minorities in Social Media*, THE INT’L MOVEMENT AGAINST ALL FORMS OF DISCRIMINATION & RACISM (Nov. 20, 2020), https://imadr.org/wordpress/wp-content/uploads/2020/11/IMADR_Oral-Statement_13th-Forum-on-Minority-Issues.pdf [https://perma.cc/BK9U-WHKH].

II. CONSIDERING THE BOUNDARIES OF THE WORKPLACE

The hostile work environment claim developed through cases involving harassment that occurred in the brick-and-mortar workplace.¹⁵⁴ Courts have also considered cases where the incidents of harassment happened outside of the work building. This part presents how courts and scholars have responded to cases involving harassment outside of the workplace and on social media.

Part II.A discusses the scholarly debates and differing judicial responses to hostile work environment claims involving harassment outside of the workplace. Part II.B describes how courts have responded to claims involving social media posts on personal pages that violate employers' social media policies and presents existing opinions about how courts should evaluate employer liability for employee misconduct on social media.

A. *Harassment Outside of the Workplace*

The text and legislative history of Title VII provide little guidance for determining the parameters of the workplace.¹⁵⁵ Although the bill that would become Title VII produced the "longest continuous debate in Senate history,"¹⁵⁶ the legislative focus was on expanding protections for Black Americans and the addition of sex as a protected category.¹⁵⁷ Therefore, there was no discussion regarding the boundaries of the workplace.¹⁵⁸

The EEOC Harassment Guidelines¹⁵⁹ and Policy Guidance on Current Issues of Sexual Harassment, last updated in June 1999,¹⁶⁰ also do not delineate workplace boundaries. In § 1604.11(d) and (e), the EEOC Harassment Guidelines refer to employer liability for acts of sexual harassment "in the workplace" but do not define the workplace or its parameters.¹⁶¹ The EEOC's only mention of harassment outside of the workplace appears on a FAQ page for the Youth@Work program.¹⁶² There, the EEOC states that federal law protects people from harassment whether the harassment occurs on or off the worksite.¹⁶³ Despite the EEOC's seeming support for penalizing harassment outside of the workplace, federal appellate courts have exhibited differing perspectives on whether conduct outside of the workplace is relevant to harassment claims.

154. See *supra* Part I.A.

155. See 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).

156. *Landmark Legislation: The Civil Rights Act of 1964*, U.S. SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilRightsAct1964.htm> [<https://perma.cc/LT4C-JSKF>] (last visited Jan. 27, 2021).

157. See Garmager, *supra* note 155, at 1077.

158. See *id.* at 1077–80.

159. See 29 C.F.R. § 1604.11 (2020).

160. See Sexual Harassment Policy Guidance, *supra* note 83.

161. 29 C.F.R. § 1604.11(d)–(e).

162. See *Harassment—FAQs*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/youth/harassment-faqs#Q8> [<https://perma.cc/3PRT-AJNP>] (last visited Jan. 27, 2021).

163. See *id.*

The Fifth and Tenth Circuits have refused to consider conduct outside of the workplace as relevant to workplace harassment claims. In *Sprague v. Thorn Americas, Inc.*,¹⁶⁴ an employee filed a sexual harassment claim against her employer alleging that, on five occasions across a sixteen-month period, a male coworker made inappropriate comments to her that created a hostile work environment.¹⁶⁵ Four of the incidents involved verbal statements that the male coworker made in the office, but one incident occurred at the plaintiff's wedding reception, where the coworker put his arm around the plaintiff and looked down her dress.¹⁶⁶ The Tenth Circuit concluded that the incident at the plaintiff's wedding was the most serious but did not consider it as a part of the claim because it occurred "at a private club, not in the workplace."¹⁶⁷ Thus, the court held that the incidents did not rise to the level of creating a hostile work environment.¹⁶⁸ In *Gowesky v. Singing River Hospital Systems*,¹⁶⁹ the Fifth Circuit considered a disability harassment claim in which the employee, a physician, contracted Hepatitis C while treating a patient.¹⁷⁰ The employee claimed that when she was slated to return to work, her employer instituted unreasonable conditions on her return, which in part required her to complete refresher courses and submit weekly blood samples.¹⁷¹ The employee challenged certain offensive comments that her supervisors made to her via telephone and in writing.¹⁷² The court held that these incidents did not rise to the level of creating a hostile work environment and refused to extend the claim "to behavior that occurred when [the employee] was not actually working."¹⁷³ The court asserted that harassment "must affect a person's working environment."¹⁷⁴

On the other hand, the First, Second, Seventh, and Eighth Circuits have considered conduct outside of the physical workplace as part of hostile work environment claims. In *Crowley v. L.L. Bean, Inc.*,¹⁷⁵ the employee brought a hostile work environment claim against her employer, asserting that she was stalked by another employee both inside and outside of the workplace.¹⁷⁶ The employer argued that the district court abused its discretion by considering the nonworkplace conduct.¹⁷⁷ The First Circuit, however, upheld the consideration of the nonworkplace conduct, reasoning that it helped to explain why the coworker's presence in the workplace created a

164. 129 F.3d 1355 (10th Cir. 1997).

165. *See id.* at 1365.

166. *See id.* at 1366.

167. *Id.*

168. *See id.*

169. 321 F.3d 503 (5th Cir. 2003).

170. *See id.* at 506.

171. *See id.* at 510.

172. *See id.* at 511.

173. *Id.* at 510.

174. *Id.*

175. 303 F.3d 387 (1st Cir. 2002).

176. *See id.* at 392.

177. *See id.* at 409.

hostile environment.¹⁷⁸ In *Lapka v. Chertoff*,¹⁷⁹ the plaintiff's hostile work environment claim stemmed from an alleged rape by a coworker that occurred in a private hotel room while she was attending a mandatory professional training.¹⁸⁰ Although the conduct occurred outside of the workplace, the court reasoned that it was relevant to the claim because the event grew "out of the workplace environment."¹⁸¹ Additionally, the court held that harassment does not have to occur in the physical workplace to be actionable; "it need only have consequences in the workplace."¹⁸² In *Ferris v. Delta Airlines, Inc.*,¹⁸³ the plaintiff, a female flight attendant, was sexually harassed by a coworker in a hotel room during a layover.¹⁸⁴ The Second Circuit held that the hotel room was sufficiently connected to the work environment to be considered a part of the claim.¹⁸⁵

Similarly, in *Moring v. Arkansas Department of Correction*,¹⁸⁶ the plaintiff was sexually harassed by a supervisor in a private hotel room.¹⁸⁷ The Eighth Circuit did not highlight that the incident took place outside of the workplace but held that the incident was severe enough to affect the terms and conditions of the plaintiff's employment.¹⁸⁸ In *Dowd v. United Steelworkers, Local No. 286*,¹⁸⁹ a case involving a racial harassment claim, the court cited *Moring* and found that "offensive conduct does not necessarily have to transpire at the workplace in order for a juror reasonably to conclude that it created a hostile working environment."¹⁹⁰

This circuit split highlights divergent interpretations of Title VII's reach. While the Fifth and Tenth Circuits maintained narrow views of the workplace,¹⁹¹ the Seventh Circuit considered events growing out of or having consequences in the workplace.¹⁹² Additionally, the Second Circuit considered events occurring in locations connected to the workplace,¹⁹³ and the Eighth Circuit considered events severe enough to affect the workplace, even when they occurred outside of the workplace.¹⁹⁴ This circuit split has also produced scholarly debate about whether courts should consider conduct outside of the workplace in harassment claims.¹⁹⁵

178. *See id.* at 409–10.

179. 517 F.3d 974 (7th Cir. 2008).

180. *See id.* at 978.

181. *Id.* at 983.

182. *Id.* (citing *Doe v. Oberweis Dairy*, 456 F.3d 704, 715–16 (7th Cir. 2006)).

183. 277 F.3d 128 (2d Cir. 2001).

184. *See id.* at 132.

185. *See id.* at 135.

186. 243 F.3d 452 (8th Cir. 2001).

187. *See id.* at 456–57.

188. *See id.* at 457.

189. 253 F.3d 1093 (8th Cir. 2001).

190. *Id.* at 1102.

191. *See supra* notes 164–73 and accompanying text.

192. *See supra* notes 181–81 and accompanying text.

193. *See supra* notes 183–84 and accompanying text.

194. *See supra* notes 186–89 and accompanying text.

195. *See Garmager, supra* note 155. *But see generally* Alisha A. Patterson, *None of Your Business: Barring Evidence of Non-workplace Harassment for Title VII Hostile Environment*

Douglas Garmager argues that courts should consider conduct outside of the workplace in hostile work environment claims.¹⁹⁶ First, Garmager acknowledges that under the “modern notions of the workplace,” many workplace-related events occur outside of the office.¹⁹⁷ He posits that if courts adopted a more progressive view, Title VII would provide the necessary protections as the concept of the workplace expands.¹⁹⁸ Garmager then presents the concept of “economic waste”¹⁹⁹ and highlights that the collateral effects of harassment could negatively affect productivity.²⁰⁰ Garmager also notes that both Title VII’s text and the EEOC Harassment Guidelines are silent regarding harassment and asserts that this silence corresponds with the Supreme Court’s expansive view of protections against workplace discrimination.²⁰¹

Garmager takes his position a step further and argues that employer liability should extend to all interactions between employees.²⁰² *Parrish v. Sollecito*²⁰³ is central to Garmager’s reasoning. There, a supervisor sexually harassed an employee at an event outside of the workplace.²⁰⁴ In considering whether the incident was relevant to the claim, the Southern District of New York reasoned that there is no law that “allow[s] a harasser to pick and choose the venue for his assaults.”²⁰⁵ The court concluded that sexual harassment jurisprudence should not focus on any point in time or location.²⁰⁶ Rather, it should focus on the conduct and whether the employer has created a “workplace” where offenses occur and “alter the victim’s terms and conditions of employment wherever the employment relationship reasonably carries.”²⁰⁷ As Garmager highlights, the court also considers that when harassment occurs outside of the workplace, the perpetrator can “minimize or dismiss” the conduct, while the victim has to deal with its consequences.²⁰⁸

Regarding the practicality of expanding workplace protections, Garmager argues that any increased costs to employers would be negligible because

Claims, 10 U.C. DAVIS BUS. L.J. 237 (2010) (arguing that courts should not consider conduct outside of the workplace in hostile work environment claims based on Title VII’s plain language and agency-based employer liability standards and in the interest of preventing employers from implementing overreaching harassment policies).

196. See Garmager, *supra* note 155, at 1092–102. While Garmager argues that courts should consider all interactions between employees outside of the workplace in hostile work environment claims, this Note specifically argues that courts should consider racist hate speech on an employee’s personal social media page, even when the hate speech is not directly addressed to a coworker or employee.

197. *Id.* at 1092–93.

198. See *id.* at 1093.

199. *Id.*

200. See *id.*

201. See *id.* at 1094–95.

202. See *id.* at 1095–101.

203. 249 F. Supp. 2d 342 (S.D.N.Y. 2003).

204. See *id.* at 346.

205. *Id.* at 350–51.

206. See *id.* at 351.

207. *Id.*

208. *Id.* at 352; Garmager, *supra* note 155, at 1091.

employers would just need to update their policies and train and inform their employees.²⁰⁹ Garmager also addresses the concern that expansion of the workplace harassment claim would cause increased litigation by asserting that the *Ellerth* and *Faragher* negligence standards would still apply to limit employer liability to conduct within an employer's control.²¹⁰

On the other hand, Alisha Patterson argues that the Supreme Court should not consider conduct outside of the workplace when evaluating workplace harassment claims.²¹¹ First, Patterson argues that Title VII's plain text protects an individual's "privileges of employment" and does not mention nonworkplace harassment alongside its use of workplace-related words, like "hire" and "employment opportunities."²¹² Thus, Patterson argues that the plain meaning of Title VII limits protections to conduct in the workplace.²¹³ Additionally, Patterson argues that the extension of Title VII to nonworkplace harassment would be inconsistent with agency principles, which "limit[] [the] scope of employment to work period, workplace, and work services."²¹⁴ Finally, Patterson cautions that "imposing liability for non-workplace conduct encourages employers to implement aggressive harassment policies that insulate themselves from litigation."²¹⁵

Professor Eugene Volokh has also highlighted concerns regarding free speech rights and hostile work environment claims. Analyzing the balance between the government's interest in curtailing harassment and the preservation of free speech rights, Professor Volokh advocates for a directed and undirected speech doctrine.²¹⁶ Professor Volokh defines directed speech as speech that is aimed at a particular employee because of the employee's race, sex, religion, or national origin and undirected speech as offensive words or conversations that are not directed at an employee but are overheard or seen by an employee.²¹⁷

Professor Volokh argues that the First Amendment should protect undirected harassing speech both inside and outside of the workplace.²¹⁸ Regarding undirected harassing speech outside of the workplace, Professor Volokh acknowledges that speech outside of the workplace can create a hostile work environment claim but asserts that the First Amendment does not allow the imposition of liability for speech that is public and political, even if it creates a hostile work environment.²¹⁹ As for harassing speech in the workplace, Professor Volokh acknowledges that employers may prohibit offensive speech for any reason, including to minimize tension in the

209. See Garmager, *supra* note 155, at 1101–02.

210. See *id.* at 1102–03.

211. See generally Patterson, *supra* note 195.

212. *Id.* at 257–58.

213. See *id.* at 258.

214. *Id.* at 262 n. 159.

215. *Id.* at 265.

216. See Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846 (1992).

217. See *id.*

218. See *id.* at 1848–58.

219. See *id.* at 1848.

workplace.²²⁰ He argues, however, that there is a difference between employers restricting workplace speech and the government restricting workplace speech²²¹ and states that when the government is regulating speech, it should err on the side of underregulating to avoid viewpoint discrimination.²²² Professor Volokh also discusses undirected epithets in the workplace and suggests that it is easier to make the case for suppressing epithets, which are “more offensive and less valuable.”²²³ Nevertheless, he claims that this line is difficult to draw and that penalizing such speech could lead to suppression of political speech, “simply because the majority or the elite find it to be offensive.”²²⁴ On the other hand, Professor Volokh argues that directed harassing speech should not be protected because directed insults have little value and an employee should be free from insult.²²⁵

Considering the impact on employment policies, Professor Volokh posits that hostile work environment regulation chills individual free speech because the employer’s only protection against liability is the creation of zero tolerance policies.²²⁶ Thus, he suggests, even though one individual’s statement might not be severe or pervasive enough, it may be actionable when aggregated with other statements, pushing employers to prohibit any and all statements that may lead to a hostile work environment.²²⁷

B. Harassment on the Web and Social Media

As internet and social media use continue to expand, courts have also considered claims of harassment occurring on the web. One of the first cases to consider an employer’s responsibility to prevent workplace harassment on the internet was *Blakey v. Continental Airlines, Inc.*²²⁸ Tammy Blakey, a pilot for Continental Airlines, complained of sexual harassment and a hostile work environment based on comments directed to her by several male employees.²²⁹ Between February and July 1995, a number of male pilots posted derogatory and insulting comments about Blakey on an online computer bulletin board called the Crew Members Forum.²³⁰ The question before the Supreme Court of New Jersey was whether the employer should have a duty to prevent continuing harassment on a bulletin board given that

220. *See id.* at 1853.

221. *Id.* at 1853–54.

222. *Id.* at 1850–56; *see also* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995) (defining viewpoint discrimination as “an egregious form of content discrimination” in which the government favors one speaker over another or targets particular views).

223. Volokh, *supra* note 216, at 1855.

224. *Id.* at 1857.

225. *See id.* at 1863.

226. Eugene Volokh, *What Speech Does “Hostile Work Environment” Harassment Law Restrict?*, 85 GEO. L.J. 627, 638–39 (1997).

227. *See id.*

228. 751 A.2d 538 (N.J. 2000).

229. *See id.* at 543.

230. *See id.* at 544.

it was not a physical location under the employer's control.²³¹ The court reasoned that, although the electronic bulletin board was located outside of the workplace, the employer still had a duty to correct the behavior.²³² Furthermore, the court highlighted that conduct outside of the workplace can still permeate the workplace.²³³ Thus, the court explained that, although employers are not required to monitor an employee's private communications, they do have a duty to stop harassment when it occurs in settings that are "closely related to . . . and beneficial to [the workplace]."²³⁴

The court advised that, on remand, the trial court should first consider whether the employer derived a substantial benefit from the forum.²³⁵ The court did not specifically define what constitutes a "substantial workplace benefit" but indicated relevant factors to consider in determining whether an internet platform benefits an employer.²³⁶ First, the court mentioned that the number of people using the platform was relevant in determining the benefit that the employer derives.²³⁷ Second, the court noted that the employer might have benefited from the employees' access to the information on the platform because it may have improved efficiency and operations.²³⁸ The court also highlighted that the ability of the employees to communicate with one another appeared to be a benefit and stated that, here, the company bulletin board was an extension of the workplace.²³⁹ The court emphasized, however, that employers do not have a duty to monitor the private communications of employees.²⁴⁰ Rather, the court stated, employers have a duty to stop harassment taking place in settings related to the workplace.²⁴¹

Another case involving workplace harassment on social media was *Amira-Jabbar v. Travel Services, Inc.*²⁴² Kareemah Amira-Jabbar, a Black female employee, brought a workplace harassment claim against her employer.²⁴³ One of the relevant incidents involved a comment that a coworker posted on a Facebook photo of Amira-Jabbar at a work-related event.²⁴⁴ Amira-Jabbar claimed the comment was racially motivated.²⁴⁵ The employer argued that it could not be held responsible for the comment because the account did not

231. *See id.* at 542–43.

232. *See id.* at 549.

233. *See id.*; *see also* Schwapp v. Avon, 118 F.3d 106, 111 (2d Cir. 1997) (finding that "[t]he mere fact that [the plaintiff] was not present when a racially derogatory comment was made will not render that comment irrelevant to his hostile work environment claim").

234. *Blakey*, 751 A.2d at 543.

235. *See id.* at 551.

236. *Id.*

237. *See id.* at 551–52.

238. *See id.* at 552.

239. *See id.*

240. *See id.*

241. *See id.*

242. 726 F. Supp. 2d 77 (D.P.R. 2010).

243. *Id.* at 81.

244. *See id.* In the comments section of the picture, Amira-Jabbar wrote "remind me that taking pictures in the shade is really a dis-service to my wonderful chocolate skin." *Id.* The coworker replied, "That is why you always have to smile!!!!" *Id.*

245. *See id.*

belong to the company and the company had no control over it.²⁴⁶ The District of Puerto Rico found that the social media comment was sufficiently work related to be included in the totality of the circumstances but found that it was offhand and not severe or pervasive enough to be actionable in a Title VII claim.²⁴⁷ In contrast, the Eastern District of New York, in *Fisher v. Mermaid Manor Home for Adults, LLC*,²⁴⁸ held that a reasonable jury could find that a coworker's post on a personal Instagram account was severe or pervasive enough to create a hostile work environment where the employee's coworker shared two photographs of the employee comparing her picture to a fictional chimpanzee from the *Planet of the Apes* movie.²⁴⁹ Specifically, the court highlighted that the Instagram post was public and humiliated the plaintiff to such an extent that she was found crying on the workplace premises.²⁵⁰ Thus, in each of these cases, courts found that the social media posts were connected to the workplace when the speech was directed at employees.

Recent court cases have also considered whether offensive social media posts on personal pages and not directed at specific employees violated social media policies. In *Grutzmacher v. Howard County*,²⁵¹ Kevin Buker sued his employer, the county fire department, after he was discharged for violating the department's social media policy, which he alleged was unconstitutional under the First Amendment.²⁵² In November 2012, the department had issued social media guidelines.²⁵³ In addition to prohibiting employees from sharing any statements that could be interpreted as undermining the "views or positions" of the department, the social media guidelines prohibited employees from "posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements . . . may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission."²⁵⁴ On January 20, 2013, Buker made a social media post on his personal Facebook page criticizing liberal gun control policies.²⁵⁵ The comment stated, "My aide had an outstanding idea . . . lets all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its [sic] almost poetic . . ." ²⁵⁶ Shortly after, Mark Grutzmacher, a county volunteer paramedic unaffiliated with the department, replied to the post with a comment stating, "But. . . was it an

246. *See id.* at 82–83.

247. *See id.* at 85–86.

248. 192 F. Supp. 3d 323 (E.D.N.Y. 2016).

249. *See id.* at 329.

250. *Id.*

251. 851 F.3d 332 (4th Cir. 2017).

252. *See id.* at 336.

253. *See id.* at 337.

254. *Id.*

255. *See id.* at 338.

256. *Id.* (alteration in original) (quoting Appendix for Plaintiff-Appellant, Volume I of III at A644, *Grutzmacher*, 851 F.3d 332 (No. 15-2066)).

‘assult [sic] liberal’? Gotta pick a fat one, those are the ‘high capacity’ ones. Oh . . . pick a black one, those are more ‘scary’. Sorry had to perfect on a cool idea!”²⁵⁷ Buker liked the comment and replied, “Lmfao! Too cool Mark Grutzmacher!”²⁵⁸

A captain in the department emailed the fire chief with screenshots of the posts, and the department moved Buker out of his field operations role to an administrative position pending an internal investigation.²⁵⁹ Ultimately, Buker’s own posts and his reply to Grutzmacher’s comment were a part of the charges presented at a pretermination meeting.²⁶⁰ After that meeting, the fire chief terminated Buker’s employment.²⁶¹

The Fourth Circuit found that the First Amendment protected the conversation overall because the subject matter touched on public concerns.²⁶² Considering the racially charged comment, however, the court found that the department was reasonably concerned that people could interpret Buker’s “like” and positive reply as support for racism or bias.²⁶³ The court also found that Buker’s liking and replying to the comment led to the disruption of trust and harmony in the department.²⁶⁴ Thus, the court held that the department’s interest in maintaining public trust, promoting an efficient workplace, and preventing disruption outweighed the employee’s interest in free speech.²⁶⁵

Similarly, in *Sabatini v. Las Vegas Metropolitan Police Department*,²⁶⁶ an officer sued the Las Vegas Metropolitan Police Department claiming that the department’s social media policy violated his First Amendment rights.²⁶⁷ The department’s social media policy, which governed the department’s official use of social media and employees’ personal use of social media, specifically prohibited employees from sharing “speech that ridicules, maligns, disparages, or otherwise promotes discrimination against race, ethnicity, religion, sex, national origin, sexual orientation, age, disability, political affiliation, gender identity and expression.”²⁶⁸ The sheriff fired the officer after he made several racially offensive Facebook posts.²⁶⁹ For example, the officer shared a post from another Facebook profile that displayed a parody of Barack Obama’s campaign image, replacing the words “HOPE” with “ROPE” and depicting him with a noose around his neck.²⁷⁰

257. *Id.* (alteration in original) (quoting Appendix for Plaintiff-Appellant, Volume I of III at A644, *Grutzmacher*, 851 F.3d 332 (No. 15-2066)).

258. *Id.* (quoting Appendix for Plaintiff-Appellant, Volume I of III, at A12 *Grutzmacher*, 851 F.3d 332 (No. 15-2066)).

259. *See id.* at 339.

260. *See id.* at 339–40.

261. *Id.* at 340.

262. *See id.* at 343.

263. *See id.* at 347.

264. *See id.* at 346.

265. *See id.* at 345.

266. 369 F. Supp. 3d 1066 (D. Nev. 2019).

267. *See id.* at 1086.

268. *Id.* at 1097.

269. *See id.* at 1078.

270. *Id.* at 1075.

The officer commented, “I guess the emperor thought it was going to be a lovefest sprinkled with unicorns and glitter when he opened his POTUS twitter account. Think again. I don’t see that lasting very long.”²⁷¹ The officer also made several posts about the Black Lives Matter movement and referred to its supporters as “ghetto trash race baiting scumbags” who “blame their laziness and misfortunes on others” and “[r]ace baiting pieces of shit” who should “[b]urn in hell.”²⁷² He also shared two articles about Michael Brown, a young Black man who was killed by police officers in Ferguson, Missouri.²⁷³ One of the articles was entitled, “Michael Brown Memorial—A Memorial to Why Blacks are Ghetto Dwellers,” to which the officer commented “[a]nd there was a video of this piece of shit punching out an old man. Real hero. Ghetto thug turd.”²⁷⁴

The District of Nevada found that these posts included content that could be protected as a matter of public concern despite the racist connotations but ultimately held that the department’s interest in protecting public trust and promoting an efficient workplace outweighed the employee’s free speech interests.²⁷⁵ Additionally, the court found that the officer’s social media posts “violated the social-media policy by promoting discrimination against African Americans.”²⁷⁶ The court reaffirmed the framework established in *Pickering v. Board of Education*,²⁷⁷ which states that public employees can express themselves as private citizens as long as their speech does not impair the employer’s ability to serve the public.²⁷⁸

Legal commentators have opined about how courts should evaluate employer liability for employee misconduct on social media under Title VII.²⁷⁹ Jeremy Gelms argues that in determining whether social media conduct should be considered in the totality of the circumstances in hostile work environment claims, courts should assess whether the employer derived a substantial benefit from the online forum.²⁸⁰ Gelms explains that, as noted in *Blakey*, the substantial benefit test allows the courts to determine whether the social media was “sufficiently integrated” into the employer’s business

271. *Id.*

272. *Id.* at 1076.

273. *Id.*; see also *Michael Brown’s Shooting and Its Immediate Aftermath in Ferguson*, N.Y. TIMES (Aug. 25, 2014), <https://www.nytimes.com/interactive/2014/08/12/us/13police-shooting-of-black-teenager-michael-brown.html> [<https://perma.cc/9K64-AYYE>].

274. *Sabatini*, 369 F. Supp. 3d at 1076.

275. *See id.* at 1085.

276. *Id.* at 1100.

277. 391 U.S. 563 (1968).

278. *See id.* at 568; *Sabatini*, 369 F. Supp. 3d at 1098–99; *supra* note 43.

279. *See* Jeremy Gelms, Comment, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249 (2012); *see also* John Paul, *Workplace Cyberharassment: Employer and Website Operator Liability for Online Misconduct*, 33 NE. J. LEGAL STUD. 1 (2015).

280. Gelms, *supra* note 279, at 251. Gelms argues that courts should only consider social media hate speech when employers derive a substantial benefit from the online forum. *Id.* This Note argues that courts should consider social media hate speech in discrimination cases as long as the employer knew about the speech and failed to take action against it and regardless of whether the employer derived a substantial benefit from the online forum.

and thus an extension of the workplace.²⁸¹ Gelms presents three arguments to support the use of the substantial benefit test. First, Gelms argues that the substantial benefit test is consistent with agency principles that limit employer liability to actions that are “aided by the agency relationship.”²⁸² In other words, liability is consistent with agency principles if, without the employment relationship, the conduct could not have occurred.²⁸³ Second, Gelms argues that the substantial benefit test recognizes the expanding concept of the workplace while still excluding conduct that is not an extension of the work environment, such as activity on an employee’s personal social media page.²⁸⁴ Third, Gelms argues that the substantial benefit analysis would guide employers on how to update their anti-harassment policies to address the use of technological platforms.²⁸⁵ Professor John Paul sets out the same arguments but further proposes that website operators should be liable for harassment in cases where the employer is not liable because they have control over the sites and can remove offenders.²⁸⁶ The next part proposes that the EEOC should expand workplace protections against racist online hate speech.

III. THE EEOC SHOULD EXPAND EMPLOYEE PROTECTIONS AS WORKPLACE BOUNDARIES EVOLVE

Given the origins and purpose of the Civil Rights Act of 1964, the development of the hostile work environment claim, and the significant changes to the workplace, a focus on curtailing the harmful effects of racist online hate speech in the workplace is needed. This part argues that the EEOC should expand its guidelines to state that courts should consider racist hate speech on social media, including posts on employees’ personal social media pages, in hostile work environment claims. Part III.A demonstrates that such an expansion is supported by the plain text of Title VII and the EEOC Harassment Guidelines, Supreme Court precedent, and the federal government’s recent considerations about curtailing online hate speech. Part III.B expands on the benefits of the suggested change to employees, specifically the protection against psychological harm from racist hate speech. Part III.C describes how expanded protections would advance the employers’ interests in preventing disruptions in the workplace and curtailing reputational harm.

A. *Consistency with Plain Text, Precedent, and the Movement to Curtail Hate Speech*

Expanding federal workplace protections to allow the consideration of racist hate speech on social media in harassment claims is consistent with the

281. *Id.* at 273; *see also* *Blakey v. Cont’l Airlines, Inc.*, 751 A.2d 538, 558 (N.J. 2000).

282. Gelms, *supra* note 279, at 275–76.

283. *See id.* at 275.

284. *See id.* at 276–77.

285. *See id.* at 277–78.

286. Paul, *supra* note 279, at 14.

plain text of Title VII and the EEOC Harassment Guidelines. As the Supreme Court found in *Vinson*, Congress’s use of the broad terms “conditions, or privileges of employment” in Title VII demonstrates that Congress intended to prohibit a broad range of discriminatory practices.²⁸⁷ The EEOC Harassment Guidelines are consistent with this expansive view because they broadly penalize conduct that unreasonably interferes with an individual’s work performance or creates a hostile or offensive working environment.²⁸⁸ Additionally, the EEOC Harassment Guidelines state that the EEOC will consider the totality of the circumstances in harassment claims.²⁸⁹ Furthermore, as the Fifth Circuit described in *Rogers*, the first case recognizing the hostile work environment claim, courts should consider the “nuances and subtleties” of discrimination.²⁹⁰

There have been several instances in which the Supreme Court has expanded the application of Title VII, consistent with this broad reading.²⁹¹ In *Griggs v. Duke Power Co.*,²⁹² the Supreme Court held that Title VII’s prohibitions against discrimination applied to practices that produced a disparate impact and not just conduct that resulted in disparate treatment.²⁹³ In *Vinson*, the Court expanded the doctrine to include practices that create an abusive or hostile work environment and that alter the “conditions of employment.”²⁹⁴ In *Price Waterhouse v. Hopkins*,²⁹⁵ the Court held that employment decisions made based on someone’s gender violate Title VII.²⁹⁶ Most recently, in *Bostock v. Clayton County*,²⁹⁷ the Supreme Court extended Title VII’s protections to prohibit discrimination based on sexual orientation or transgender status.²⁹⁸ This case, resulting in a 6-3 decision, indicates that the current Supreme Court might read the Civil Rights Act broadly. Justice Gorsuch, a conservative and textualist, wrote the opinion, holding that discrimination based on sex included discrimination based on sexual orientation.²⁹⁹ Furthermore, even though Justice Barrett has replaced Justice

287. See *supra* note 77 and accompanying text.

288. 29 C.F.R. § 1604.11(a) (2020).

289. *Id.* § 1604.11(b).

290. See *supra* note 63 and accompanying text.

291. See Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 319–20 (2003) (asserting that courts have been willing to make significant paradigm shifts regarding antidiscrimination doctrine).

292. 401 U.S. 424 (1971).

293. See *id.* at 431 (stating that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”). Congress codified this “disparate impact” doctrine in the Civil Rights Act of 1991, which amended Title VII. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 29, and 42 U.S.C.).

294. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

295. 490 U.S. 228 (1989).

296. See *id.* at 229.

297. 140 S. Ct. 1731 (2020).

298. See *id.* at 1754 (holding that “[a]n employer who fires an individual merely for being gay or transgender defies the law”).

299. See *id.*

Ruth Bader Ginsburg,³⁰⁰ a majority of the Court may support a broad reading of Title VII consistent with *Bostock*.

As several countries³⁰¹ including the United States recognize and consider the need to curtail hate speech on social media, the EEOC should expand its regulations to state that racist hate speech on personal social media pages can be actionable in hostile work environment claims. Even though social media posts on personal pages may not be connected to the workplace and employers may not derive a substantial benefit from an employees' private profiles, racist hate speech shared by an employee can still negatively affect the workplace environment by affecting other employees. This analysis is consistent with *Crowley*,³⁰² *Lapka*,³⁰³ *Dowd*,³⁰⁴ and *Blakey*,³⁰⁵ where courts found that nonworkplace conduct can still create a hostile work environment and that offensive conduct does not need to transpire in the workplace but only needs to have consequences in the workplace. Thus, courts should not have to determine whether the employer derives a substantial benefit from the online platform.³⁰⁶

Additionally, in *Harris*, the Supreme Court stated that courts should consider the totality of the circumstances to assess whether an environment is hostile or abusive, including whether the conduct unreasonably interferes with the employee's work performance and whether it affects the employee's psychological well-being.³⁰⁷ One significant effect of hate speech is the emotional and psychological harm that it can cause employees.³⁰⁸ These effects are no different when the content is viewed on a work-related platform or a personal social media page. Therefore, in hostile work environment claims, courts should consider the psychological harm that can result from viewing a fellow employee's racist social media post.

B. Benefits to Employees and Protection Against Psychological Harm

Courts should consider racist hate speech on an employee's personal social media page in workplace harassment claims because racist hate speech can cause psychological harm and interfere with an employee's work performance. Racial insults can cause psychological harm, such as humiliation, isolation, self-hatred, and physical harm, such as high blood pressure.³⁰⁹ In addition to physical and psychological harm, racial insults

300. See Lara Bazelon, Opinion, *Amy Coney Barrett Is No Ruth Bader Ginsburg*, N.Y. TIMES (Sept. 26, 2020), <https://www.nytimes.com/2020/09/26/opinion/amy-coney-barrett-nominee.html> [<https://perma.cc/DGF5-LXGX>].

301. See *supra* notes 148–52 and accompanying text.

302. 303 F.3d 387, 409–10 (1st Cir. 2002).

303. 517 F.3d 974, 983 (7th Cir. 2008).

304. 253 F.3d 1093, 1102 (8th Cir. 2001).

305. 751 A.2d 538, 549 (N.J. 2000).

306. See *supra* notes 280–83 and accompanying text.

307. See *supra* text accompanying note 95.

308. See generally Carter & Scheuermann, *supra* note 112.

309. See Beausoleil, *supra* note 123, at 2144 (concluding that hate speech should not fall into any protected category under the First Amendment and advocating for a change in First Amendment doctrine to combat the psychological impacts of social media on behavior and

can severely affect victims' careers because employees may experience issues like defeatism or develop expectations of failure.³¹⁰ Negative psychological impacts stemming from the use of social media itself can further compound the harmful effects of hate speech.³¹¹ Even racial jokes, which many people view as less harmful than other forms of racial discrimination, were found by the Ninth Circuit to warrant a valid hostile work environment claim in *Swinton v. Potomac Corp.*³¹²

The Supreme Court has also acknowledged the harms of hate speech.³¹³ Specifically, the Court has stated that “a discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”³¹⁴ Although posts of racist hate speech on personal social media pages may not be directed toward a specific employee, like the posts in *Grutzmacher*³¹⁵ and *Sabatini*,³¹⁶ they can still affect the workplace by impacting employees who have viewed the post and have to interact with the offending supervisor or employee. Furthermore, as the court asserts in *Parrish*, while those who share hate speech can minimize their off-site activities, employees who view the hate speech still have to deal with the consequences.³¹⁷ Thus, courts should consider racist hate speech on personal social media pages in the totality of the circumstances.

In light of the serious psychological and practical harms that racist speech can cause, courts should also consider whether racial harassment deserves its own legal standard. The objective prong of the test used in hostile work environment claims under *Harris* is whether a reasonable person would find the conduct abusive or hostile.³¹⁸ Melissa Hughes suggests that the reasonable person standard might disadvantage minorities because white people may not be aware of how offensive certain comments or behaviors are.³¹⁹ This view is consistent with Professor Hébert’s position that the strict

the psychological harms of hate speech). See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (proposing a tort cause of action for racial insults); Johnny Holschuh, Comment, *#CivilRightsCybertorts: Utilizing Torts to Combat Hate Speech in Online Social Media*, 82 U. CIN. L. REV. 953 (2014) (discussing the viability of tort claims against hate speech, including intentional infliction of emotional distress, defamation, intimidation, and 42 U.S.C. § 1981 claims).

310. See Delgado, *supra* note 309, at 139.

311. See Loren Soeiro, *Is Social Media Bad for You?*, PSYCH. TODAY (June 21, 2019), <https://www.psychologytoday.com/us/blog/i-hear-you/201906/is-social-media-bad-you> [<https://perma.cc/28KV-APRN>] (explaining that research has found links between excessive Facebook and Instagram use and depression and loneliness).

312. 270 F.3d 794 (9th Cir. 2001).

313. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).

314. *Id.*

315. See *supra* notes 255–57 and accompanying text.

316. See *supra* notes 269–73 and accompanying text.

317. See *supra* note 208 and accompanying text.

318. See *supra* note 93 and accompanying text.

319. See Hughes, *supra* note 114, at 1472–74.

sexual harassment standards, such as the severe and pervasive standard, may lead courts to find that serious racially discriminatory acts are not actionable.³²⁰ As a remedy, Hughes notes that some courts and commentators have suggested changing the standard from a reasonable person standard to a reasonable minority standard.³²¹ Such a change in the legal standard would parallel recent state level changes to the standard for sexual harassment³²² and resolve some of the tension that Professor Hébert highlights regarding the detriment of imposing strict sexual harassment standards on legitimate racial harassment claims.³²³ The next section will discuss the benefits that curtailing online hate speech would have for employers and how employers' and employees' interests can be balanced.

C. *Benefits to Employers and Combatting Economic and Reputational Risk*

In considering claims involving racist speech on social media, courts have analyzed the *Pickering* factors to balance an employer's interests against the public employee's free speech interest.³²⁴ Courts have held that an employer's interest in these factors may outweigh an employee's free speech interest. In *Bennett v. Metropolitan Government*,³²⁵ a public employee used a racial slur in a discussion about the 2020 presidential election on Facebook.³²⁶ The Sixth Circuit held that sufficient disruption was found to "tip the *Pickering* balance" toward the employer.³²⁷ In describing the disruption, the court noted that "employees were upset at work, counselors

320. See *supra* text accompanying note 120.

321. See Hughes, *supra* note 114, at 1473.

322. States including California, Illinois, and New York recently implemented new laws removing the severe or pervasive standard for sexual harassment claims in response to the #MeToo movement. See Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*, AM. BAR ASS'N (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims> [<https://perma.cc/P9LN-C2MM>]; *Governor Cuomo Signs Legislation Enacting Sweeping New Workplace Harassment Protections*, N.Y. STATE (Aug. 12, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-enacting-sweeping-new-workplace-harassment-protections> [<https://perma.cc/69YA-PUYB>].

323. See *supra* note 120 and accompanying text.

324. See *supra* note 43 and accompanying text; see also *Bennett v. Metro. Gov't*, 977 F.3d 530, 540–41 (6th Cir. 2020) (finding that impairment of harmony among coworkers, detrimental impact on close working relationships, interference with the operation of the workplace, and detraction from employer's mission were *Pickering* factors weighing in favor of the employer); *Grutzmacher v. Howard County*, 851 F.3d 332, 345 (4th Cir. 2017) (stating that factors include "whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed"); *Sabatini v. Las Vegas Metro. Police Dep't*, 369 F. Supp. 3d 1066, 1071 (D. Nev. 2019).

325. 977 F.3d 530 (6th Cir. 2020).

326. See *id.* at 534.

327. *Id.* at 545.

needed to be involved, and stress levels increased for the agency as a whole.”³²⁸

Although Pickering does not apply to private employers, these factors equally negatively impact them. Professors Robert Carter and Thomas Scheuermann consider the workplace costs of trauma associated with racism and racial discrimination.³²⁹ Specifically, employees can experience lowered productivity and damage to team efforts.³³⁰ Furthermore, racism can significantly harm employees’ creativity and communication.³³¹ Companies that are proactive against racism in the workplace environment experience several benefits, including happier employees, increased collaboration, more effective workplaces with less stress, and fewer harassment and discrimination claims.³³²

Although free speech rights are important to democratic values, they are not absolute and must be balanced with the constitutional value of equal protection.³³³ Along with increased employer responsibility, however, comes the need to balance employer resources and prevent overreaching. Overreaching is not a significant concern for three reasons. First, as Garmager argues, the burden on employers will not be increased because, under the negligence standards of *Ellerth* and *Faragher*, employers will only be liable for failing to take proactive measures against hate speech,³³⁴ and employees would still have to take advantage of the employer’s preventative or corrective measures.³³⁵ Additionally, the EEOC Harassment Guidelines already encourage employers to establish preventative measures against harassment.³³⁶ Second, to achieve a balance of preserving First Amendment interests and prohibiting speech that has little value, employers should only be liable for failing to take action against racist hate speech when it has the potential to affect an individual’s working environment. Critical race theorist Mari Matsuda sets forth three factors to determine whether speech is harmful rather than merely offensive: (1) whether the message is one of racial inferiority; (2) whether the message is directed against a historically oppressed group; and (3) whether the message is persecutory, hateful, and degrading.³³⁷ Employers should apply these factors to complaints to avoid overreaching.

Third, many employers already have antidiscrimination and social media policies that permit them to act against speech to prevent economic and reputational harm. To demonstrate that they have taken preventative steps

328. *Id.* at 536.

329. See Carter & Scheuermann, *supra* note 112, at 11–12.

330. See *id.*

331. See *id.*

332. See *id.* at 99.

333. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 481.

334. See *supra* note 108 and accompanying text.

335. See *supra* notes 108, 210 and accompanying text.

336. See *supra* note 87 and accompanying text.

337. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2357 (1989).

against hate speech on social media, employers should establish clear standards in their policies that put employees on notice about the types of speech on social media that the employer could penalize. In addition to limiting frivolous complaints using Matsuda's factors, employers could also establish appropriate corrective measures and complaint procedures that employees would have to follow when reporting racist social media posts. The Supreme Court explained in *Ellerth* that if the employer has adequate complaint procedures, an employee's failure to use the complaint procedures will usually satisfy the employer's burden in a workplace environment claim.³³⁸ Thus, employers would only be liable if they fail to implement preventative measures, such as updated social media policies, and corrective measures, such as reporting procedures. Preventing economic and reputational harm is worth the implementation of these measures to curtail employees' racist online hate speech and ensure that workplace harassment does not take a pervasive virtual form.

CONCLUSION

The federal government should not ignore the harms of hate speech in the workplace. As harassment jurisprudence continues to expand, the EEOC should consider how a politically divided and increasingly virtual work environment uniquely affects victims of racial harassment. Racist hate speech can damage an employee's psychological well-being and have adverse effects on work performance both inside of the workplace and over the web. To curtail the harms of racist hate speech in the workplace, the EEOC should expand anti-harassment doctrine to state that courts can consider racist hate speech on employees' private social media pages in the totality of the circumstances in hostile work environment claims. This is consistent with the Supreme Court's broad reading of Title VII, the global push to combat hate speech, society's interest in preventing psychological harm in the workplace, and employers' interest in maintaining a productive and efficient work environment.

To comply with this expansion, employers should update their social media policies to notify employees that harmful and degrading racist hate speech on their personal pages may be penalized if viewed and reported by a supervisor or coworker. Updating EEOC regulations to state that courts can consider online hate speech in hostile work environment claims reflects a commitment to Title VII's original purpose of preventing discrimination even in an ever-evolving modern workplace.

338. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).