

# CAUTION SOCIAL MEDIA CYBERBULLIES: IDENTIFYING NEW HARMS AND LIABILITIES

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## I. INTRODUCTION

As social media has grown in popularity and accessibility, previously un contemplated cyber-crimes have emerged, and both the social media platforms and the legal system have failed to progress at the same rate. The cyberbully has become one of the most prevalent purveyors of cyber-crime. According to a national survey, 36.5% of our children report having been cyberbullied.<sup>1</sup> Historically, the victims have been children and teenagers, and many of these antics are attributed to unfortunate schoolyard behaviors. But the cyberbully problem is growing up before our eyes: the Cyberbully Research Center is now logging more inquiries about adult victims than teenage victims.<sup>2</sup> No longer confined to the

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1. Justin W. Patchin, *2019 Cyberbullying Data*, CYBERBULLYING RSCH. CTR. (July 9, 2019), <https://cyberbullying.org/2019-cyberbullying-data> [<https://web.archive.org/web/20201027235435/https://cyberbullying.org/2019-cyberbullying-data>].

2. Justin W. Patchin, *Advice for Adult Victims of Cyberbullying*, CYBERBULLYING RSCH. CTR. (Oct. 3, 2020), <https://cyberbullying.org/advice-for-adult-victims-of-cyberbullying> [<https://web.archive.org/web/20201005142526/https://cyberbullying.org/advice-for-adult-victims-of-cyberbullying>].

schoolyard, cyberbullies permeate all platforms, appearing all over social media and invading the adult workplace. In fact, 35% to 40% of adult workers claim to have been bullied in the workplace.<sup>3</sup> While social media platforms have created an online space for adults and children to share their creativity, work, and lives, a culture of harassment has emerged that threatens the harmony. A Pew Research Center study revealed that while we are optimistic that digital life will expand people's boundaries and opportunities, about a third of people are beginning to believe that digital life is harmful to their personal health, mental fitness, and happiness.<sup>4</sup> So, while the internet is a place of utility and is becoming necessary to the work life of adults,<sup>5</sup> we are beginning to recognize it as a place where both personal and societal harms can occur.

Cyberbullying is unquestionably mentally painful and psychologically harmful, consisting of the "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices."<sup>6</sup> The terms "cyberbullying" and "cyberstalking" are relatively interchangeable, with cyberstalking being a subset of cyberbullying behavior more likely used to refer to adult perpetrators.<sup>7</sup> The typical cyberbully uses social media and messaging services like Twitter and Facebook Live to harass and threaten their victims. There is now a new trend of harassing messages surfacing, and this harassment is so disturbing, it reaches into the physical world, causing real harm to the victim.

In 2012, Tyler Clementi, a college student, committed suicide by jumping off the George Washington Bridge after his roommate secretly

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3. Tina M. Maiolo, *Labor: The Costs of Ignoring Workplace Bullying*, AM. LAW. (Feb. 25, 2013, 3:00 AM), <https://www.law.com/insidecounsel/sites/insidecounsel/2013/02/25/labor-the-costs-of-ignoring-workplace-bullying/> [<http://web.archive.org/web/20201005142637/https://www.law.com/insidecounsel/sites/insidecounsel/2013/02/25/labor-the-costs-of-ignoring-workplace-bullying/?slreturn=20200905102637>].

4. Janna Anderson & Lee Rainie, *The Future of Well-Being in a Tech-Saturated World*, PEW RSCH. CTR. (Apr. 17, 2018), <https://www.pewresearch.org/internet/2018/04/17/the-future-of-well-being-in-a-tech-saturated-world/> [<https://web.archive.org/web/20201027235658/https://www.pewresearch.org/internet/2018/04/17/the-future-of-well-being-in-a-tech-saturated-world/>].

5. *Id.*

6. SAMEER HINDUJA & JUSTIN W. PATCHIN, *BULLYING BEYOND THE SCHOOLYARD: PREVENTING AND RESPONDING TO CYBERBULLYING* 11 (2d ed. 2014).

7. See Brian Spitzberg & Gregory Hoobler, *Cyberstalking and the Technologies of Interpersonal Terrorism*, 4 NEW MEDIA & SOC'Y 71, (2002); see also Laura Jane Crocker, *Where Does Cyberbullying Happen?*, LEARNSAFE (Jan. 25, 2018), <https://learnsafe.com/where-does-cyberbullying-happen/> [<http://web.archive.org/web/20201005142932/https://learnsafe.com/where-does-cyberbullying-happen/>].

used a webcam to film Clementi in an embrace with another man.<sup>8</sup> Another extreme example of cyberbullying includes “swatting,” where a bully makes a hoax call to 911, declaring the victim caused an imminent threat to life at the victim’s address, prompting police to respond to the scene.<sup>9</sup> For Andrew Finch, swatting led to his death; Finch was shot by police while exiting his house at the request of police, who believed the misinformation given to the dispatcher.<sup>10</sup>

Now, a new threat has emerged—so new, in fact, the crime has no name and will be a matter of first impression in most states; using social media, cyberbullies are able to reach out to their victims and cause real physical harm by sending electronic messages targeting individuals with epilepsy in the hopes of inducing seizure activity.<sup>11</sup>

Legal scholars worry about the future of similar types of cyberbully attacks that could affect medical devices, like hacking into insulin pumps or pacemakers.<sup>12</sup> Medical device manufacturers, Johnson & Johnson and

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8. Ian Parker, *The Story of a Suicide: Two College Roommates, a Webcam, and a Tragedy*, NEW YORKER (Feb. 6, 2012), <https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide> [http://web.archive.org/web/20201005143326/https://www.newyorker.com/magazine/2012/02/06/the-story-of-a-suicide].

9. See *The Crime of ‘Swatting’: Fake 9-1-1 Calls Have Real Consequences*, FED. BUREAU OF INVESTIGATION (Sept. 10, 2013), <https://www.fbi.gov/news/stories/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences1> [http://web.archive.org/web/20201003175147/https://www.fbi.gov/news/stories/the-crime-of-swatting-fake-9-1-1-calls-have-real-consequences1].

10. Cecilia Kang, *A Tweet to Kurt Eichenwald, A Strobe and a Seizure. Now, an Arrest*, N.Y. TIMES (Mar. 17, 2017), <https://www.nytimes.com/2017/03/17/technology/social-media-attack-that-set-off-a-seizure-leads-to-an-arrest.html> [https://web.archive.org/web/20200811103542/https://www.nytimes.com/2017/03/17/technology/social-media-attack-that-set-off-a-seizure-leads-to-an-arrest.html].

11. See Elizabeth Wolfe & Saeed Ahmed, *A Twitter Cyberattack on the Epilepsy Foundation Posted Stroboscopic Images That Could Trigger Seizures*, CNN (Dec. 17, 2019), <https://www.cnn.com/2019/12/17/tech/epilepsy-strobe-twitter-attack-trnd/index.html> [https://web.archive.org/web/20201028000807/https://www.cnn.com/2019/12/17/tech/epilepsy-strobe-twitter-attack-trnd/index.html]. See also Steve Almasy & Melissa Alonso, *His ‘Swatting’ Call Led to the Death of a Man. Now He is Going to Prison for 20 Years.*, CNN (Mar. 30, 2019), <https://www.cnn.com/2019/03/29/us/swatting-suspect-20-year-sentence/index.html> [https://web.archive.org/web/20201028000506/https://www.cnn.com/2019/03/29/us/swatting-suspect-20-year-sentence/index.html].

12. Max Ehrenfreund & Antonio Olivo, *Seizure-Inducing Tweet Leads to a New Kind of Prosecution*, WASH. POST (Mar. 19, 2017), [https://www.washingtonpost.com/national/seizure-inducing-tweet-leads-to-a-new-kind-of-prosecution-for-a-new-kind-of-crime/2017/03/18/c5915468-0c10-11e7-b77c-0047d15a24e0\\_story.html](https://www.washingtonpost.com/national/seizure-inducing-tweet-leads-to-a-new-kind-of-prosecution-for-a-new-kind-of-crime/2017/03/18/c5915468-0c10-11e7-b77c-0047d15a24e0_story.html) [https://web.archive.org/web/20201028001037if\_/https://www.washingtonpost.com/national/seizure-inducing-tweet-leads-to-a-new-kind-of-prosecution-for-a-new-kind-of-crime/2017/03/18/c5915468-0c10-11e7-b77c-0047d15a24e0\_story.html].

Hospira, have already warned insulin pump users of the security vulnerabilities in some pump models that allow hackers to control the pumps remotely and could result in the user's death.<sup>13</sup> It is difficult to predict what will become of cyberbully behavior in the future.

This Article focuses on what can be done to hold cyberbullies accountable for these new attacks. Part II gives the facts of a case involving this surprising new form of cyberbullying and discusses the application of the federal anti-cyberstalking statute and liability under a new application of common law battery. Part III discusses current cyberbully laws and the success of First Amendment defenses, as well as harms posed by cyberbullies under the protection of the First Amendment. Part IV discusses a culture of harassment that permeates social media platforms and affords unmonitored freedoms to cyberbullies. Part V discusses potential workplace liability under Title VII's hostile work environment protections that might curb the tide of these cyberattacks on those who are vulnerable.

## II. CONSIDERING *EICHENWALD V. RIVELLO*, A NEW KIND OF CYBERBULLY

Kurt Eichenwald is an award-winning investigative journalist and best-selling author whose works have twice been considered for the Pulitzer Prize, and he is also a two-time George Polk award winner.<sup>14</sup> As a senior writer for both *Newsweek* and *New York Times*, part of Eichenwald's job is to keep up with the news and reactions to it; as such, Eichenwald is an avid Twitter user with over 50,000 tweets.<sup>15</sup> Eichenwald also suffers from epilepsy and is vocal about his condition, discussing his epilepsy in his *Newsweek* article, titled "Sean Hannity: Apologize to Those with Epilepsy, or Burn in Hell."<sup>16</sup>

During the 2016 election cycle, Eichenwald expressed views about then-presidential candidate Donald Trump in his writings. During the

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13. Jim Finkle, *J&J Warns Diabetic Patients: Insulin Pump Vulnerable to Hacking*, REUTERS: HEALTHCARE & PHARMA (Oct. 4, 2016), <https://www.reuters.com/article/us-johnson-johnson-cyber-insulin-pumps-e/jj-warns-diabetic-patients-insulin-pump-vulnerable-to-hacking-idUSKCN12411L> [[https://web.archive.org/web/20201028001622if\\_/https://www.reuters.com/article/us-johnson-johnson-cyber-insulin-pumps-e/jj-warns-diabetic-patients-insulin-pump-vulnerable-to-hacking-idUSKCN12411L](https://web.archive.org/web/20201028001622if_/https://www.reuters.com/article/us-johnson-johnson-cyber-insulin-pumps-e/jj-warns-diabetic-patients-insulin-pump-vulnerable-to-hacking-idUSKCN12411L)].

14. *Eichenwald v. Rivello*, 318 F. Supp. 3d 766, 769 (D. Md. 2018). Since the case was published, Kurt Eichenwald is a two-time Pulitzer Prize nominee, updated by facts from *Kurt Eichenwald*, <https://kurteichenwald.com/> [<https://web.archive.org/web/20201117223931/https://kurteichenwald.com/>].

15. *Eichenwald*, 318 F. Supp. 3d at 769.

16. *Id.*

resulting public criticism of his views on Twitter, Eichenwald received “numerous threats and messages over the Internet,” and Eichenwald wrote about the abuse for *Newsweek*.<sup>17</sup> Specifically, Eichenwald wrote about an instance of online harassment in which someone with the Twitter handle ‘Mike’s Deplorable AF’ made mention of Eichenwald’s seizures and sent a video with “some sort of strobe light, with flashing circles and images . . . flying toward the screen.”<sup>18</sup> The video was epileptogenic, meaning it was intended to trigger seizures.<sup>19</sup> The device played the message, but fortunately, Eichenwald dropped the device and avoided a seizure, and Eichenwald later wrote about the incident.<sup>20</sup> Then, about a month later, John Raye Rivello, using a false name on his Twitter account, sent Eichenwald a Graphics Interchange Format (GIF) with a blinding strobe light affect.<sup>21</sup> Rivello had read Eichenwald’s post regarding his susceptibility to seizures and sent the epileptogenic GIF with a message: “You deserve a seizure for your posts.”<sup>22</sup>

That time, Eichenwald had a significant seizure. Eichenwald’s wife found him unresponsive on the floor with the Twitter post still on Eichenwald’s screen.<sup>23</sup> Eichenwald suffered an eight-minute seizure with complete loss of his bodily functions and mental faculty.<sup>24</sup> The FBI investigated the incident and brought criminal charges against Rivello under the federal cyberstalking statutes. Eichenwald eventually sued his attacker in civil court, with the criminal proceeding underway in Texas. In the criminal case, Rivello was indicted under the federal cyberstalking statute and assault with a deadly weapon.<sup>25</sup> Eichenwald’s civil suit successfully navigated summary judgment under the theories of battery, assault, and intentional infliction of emotional distress.<sup>26</sup>

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17. Kurt Eichenwald, *How Donald Trump Supporters Attack Journalists*, NEWSWEEK (Oct. 7, 2016), <https://www.newsweek.com/epileptogenic-pepe-video-507417> [https://web.archive.org/web/20201117224128/https://www.newsweek.com/epileptogenic-pepe-video-507417].

18. *Id.*

19. *Id.*

20. *Id.*

21. Manny Fernandez, *Epilepsy Foundation Was Targeted in Mass Strobe Cyberattack*, N.Y. TIMES (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/us/strobe-attack-epilepsy.html> [https://web.archive.org/web/20201117224241/https://www.nytimes.com/2019/12/16/us/strobe-attack-epilepsy.html].

22. *Id.*

23. *See* Kang, *supra* note 10.

24. Criminal Complaint at 6, United States v. Rivello, No. 3-17MJ192-BK (N.D. Tex. Dall. Div. 2017).

25. *Id.* *See also* Eichenwald v. Rivello, 318 F. Supp. 3d 766, 770 (D. Md. 2018).

26. *Eichenwald*, 318 F. Supp. 3d at 777.

Unfortunately, similar seizure-inducing GIFs have continued to proliferate since the *Eichenwald* incident.<sup>27</sup> As recently as November 2019, the Epilepsy Center has periodically had multiple epileptogenic attacks aimed at the Epilepsy Center's online followers.<sup>28</sup> In the most recent attack, timed to occur during National Epilepsy Awareness Month, thousands of Twitter followers of the Epilepsy Foundation received similar strobe-light epileptogenic messages.<sup>29</sup> It is still unclear at this time how many people were affected in the November 2019 attacks, and an investigation is ongoing.<sup>30</sup> While cybersecurity experts said these attacks were not the first to expose medically vulnerable people to injury, this was the first time they heard of prosecutors bringing criminal charges.<sup>31</sup> In *Eichenwald*, new ground was broken in the criminal case for cyberstalking and assault charges and in the civil suit for battery as described in the sections below.

#### *A. Cyberstalking Statutes*

Cyberstalking is a subset of cyberbullying behaviors, requiring the use of assistive technology to make victims feel embarrassed, harassed, threatened, or afraid.<sup>32</sup> Cyberstalking is governed, to some degree, by slander and harassment law and includes a variety of online behaviors, such as publishing private personal information online, monitoring a victim's whereabouts by using social media, hijacking a victim's webcam, viewing metadata, such as geotags, to locate victims, sending unwanted messages, hacking an online account, stealing a victim's identity online, and slandering a victim online.<sup>33</sup>

Federal law does provide some protection. Under 18 U.S.C. § 2261A(2)(A) and (B):

[w]hoever—

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27. See Wolfe & Ahmed, *supra* note 11.

28. See Fernandez, *supra* note 21.

29. *Id.*

30. *Id.*

31. See *id.* See also Ehrenfreund & Olivo, *supra* note 12.

32. Ashley Perna, *Cyberstalking: Definition, Laws, and How to Stay Safe*, PRIVACY NEWS ONLINE (Jan. 5, 2019), <https://www.privateinternetaccess.com/blog/cyberstalking-definition-laws-and-how-to-stay-safe/> [web/20201223074305/https://www.privateinternetaccess.com/blog/cyberstalking-definition-laws-and-how-to-stay-safe/].

33. *Id.*

(2) with the intent to kill, injure, harass, intimidate . . . uses . . . interactive computer service or electronic communication service or electronic communication system of interstate or foreign commerce to engage in a course of conduct that—

(A) places that person in reasonable fear of the death of or serious bodily injury to [that] person; or

(B) causes, attempts to cause, or would be reasonably expected to cause substantial emotional distress to [that] person;

shall be punished as provided in section 2261(b) of this title.<sup>34</sup>

However, note that 18 U.S.C. § 2261A(2) only applies to interstate cyberstalking where a course of conduct is established by two or more of the described offenses.<sup>35</sup> 18 U.S.C. § 2261A(2) does not give a private right of action, but once an individual is convicted, they may be held liable for the actual and proximate harms caused by cyberstalking.<sup>36</sup>

In *United States v. Rivello*, the government's complaint argued Eichenwald was a victim of cyberstalking under 18 U.S.C. § 2261A(2).<sup>37</sup> In the complaint, the FBI agent gave an affidavit detailing how the Dallas Police Department followed leads from the Twitter handle provided on the seizure triggering message, through the internet protocol (IP) address, to Rivello, tracking Rivello's subscriber information to his phone. Using the AppleID associated with the phone, the police tracked Rivello's whereabouts in Maryland.<sup>38</sup> Rivello's posts left little doubt of the intent behind the Tweets; Twitter complied with a search warrant revealing Rivello's post-attack Tweets regarding Eichenwald, including, "I hope this sends him into a seizure," "let's see if he dies," and "I know he has epilepsy."<sup>39</sup> The actual seizure-inducing Tweet was found in Rivello's iCloud account, and it included a response from Eichenwald's wife: "This

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34. 18 U.S.C. § 2261A (2018). *See also* Criminal Complaint at 3, *United States v. Rivello*, No. 3-17MJ192-BK (N.D. Tex. Dall. Div. 2017).

35. 18 U.S.C. § 2261A.

36. *See* *United States v. Matusiewicz*, 165 F. Supp. 3d 166 (D. Del. 2015) *aff'd sub nom.* *United States v. Gonzalez*, 905 F.3d 165 (3d Cir. 2018).

37. Criminal Complaint at 3, *United States v. Rivello*, No. 3-17MJ192-BK (N.D. Tex. Dall. Div. 2017).

38. *See id.* at 8–10; *United States v. Rivello*, No. 3-17MJ192-BK (N.D. Tex. Dall. Div. 2017).

39. *Id.* at 7.

is his wife, you caused a seizure. I have your information and have called the police to report the assault.”<sup>40</sup>

The cyberstalking charges against Rivello were eventually dropped without prejudice in order to pursue the more serious charge of assault with a deadly weapon.<sup>41</sup> On December 6, 2019, the prosecutor presented a new indictment replacing the “deadly weapon” charge with the lesser charge that the assault caused “serious bodily injury.”<sup>42</sup> The case was brought before the Criminal District Court in Dallas, and it denied Rivello relief—and on appeal to the Court of Appeals for the Fifth District, the Appellate Court affirmed the order below.<sup>43</sup>

Finding a cyberstalker liable for the harms resulting from the crime depends upon the actual and proximate cause of the harms suffered.<sup>44</sup> In the stalking case of Christine Belford, the stalkers, including Belford’s ex-husband and two others, were found guilty of cyberstalking that led to Belford’s death.<sup>45</sup> The group mounted an online campaign against Belford, posting online accusations, sending an accusation to Belford’s children’s school, and soliciting friends to visit and monitor Belford’s home.<sup>46</sup> As a result, Belford’s ex-husband’s father shot and killed Belford and her companion while they were out of state attending a family court hearing, and then he shot himself.<sup>47</sup> The court explained that finding stalking behavior the proximate cause of death is a tricky concept:

The idea of proximate cause . . . defies easy summary. It is a “flexible concept” that generally “refers to the basic requirement

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40. See Kang, *supra* note 10.

41. Tom Steele, *Federal Charge Dropped Against Man Accused of Sending Tweet That Set off Dallas Journalist’s Seizure*, DALL. MORNING NEWS (Nov 28, 2017), <https://www.dallasnews.com/news/courts/2017/11/28/federal-charge-dropped-against-man-accused-of-sending-tweet-that-set-off-dallas-journalist-s-seizure/> [<https://web.archive.org/web/20201109040101/https://www.dallasnews.com/news/courts/2017/11/28/federal-charge-dropped-against-man-accused-of-sending-tweet-that-set-off-dallas-journalist-s-seizure/>].

42. Charles Star, *Yes, Sending Kurt Eichenwald a GIF Can Be a Crime*, FUTURE (Dec. 17, 2020), <https://theoutline.com/post/8439/jail-assault-gif-kurt-eichenwald-seizure?zd=1&zi=vpzlv12m> [[https://web.archive.org/web/20201117225637if\\_/https://theoutline.com/post/8439/jail-assault-gif-kurt-eichenwald-seizure?zd=2&zi=ezzt26ht](https://web.archive.org/web/20201117225637if_/https://theoutline.com/post/8439/jail-assault-gif-kurt-eichenwald-seizure?zd=2&zi=ezzt26ht)].

43. *Ex Parte Rivello*, No. 05-19-00676-CR, <http://www.search.txcourts.gov/Case.aspx?cn=05-19-00676-CR&coa=coa05> [<https://web.archive.org/web/20201117230819/http://www.search.txcourts.gov/Case.aspx?cn=05-19-00676-CR&coa=coa05>].

44. *United States v. Matusiewicz*, 165 F. Supp. 3d 166 (D. Del. 2015).

45. *Id.* at 167.

46. *Id.*

47. *Id.*

that . . . there must be ‘some direct relation between the injury asserted and the injurious conduct alleged.’” . . . Proximate cause is often explicated in terms of foreseeability or the scope of risk created by the predicate conduct. A requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity.<sup>48</sup>

The final jury instruction read, “was Christine Belford’s death the result of the particular offense in a real and meaningful way? This includes your consideration of whether her death was a reasonably foreseeable result of the particular offense . . . .”<sup>49</sup> Judge McHugh emphasized that the criminal standard for proximate cause is higher than in tort cases because it must show a genuine nexus between the defendant’s conduct and the victim’s death.<sup>50</sup>

Meanwhile, other states, like Wisconsin, passed legislation that mimics the federal law for cyberstalking violations inside the state.<sup>51</sup> Punishment can range from a one hundred dollar fine to imprisonment for up to ten years depending on the jurisdiction.<sup>52</sup> In some states, these laws are referred to as cyberbullying laws. In others, they can be found within criminal stalking statutes, while other local legislation simply terms it “stalking through electronic means.” Whatever the statute is called, it is important to identify it and go through the correct channel (likely requiring police and potentially FBI involvement) to prosecute the behavior.<sup>53</sup>

### *B. Battery by GIF*

Unquestionably, the *Eichenwald* battery case was helped by the intentional nature and online documentation of Rivello’s actions that had been revealed in Rivello’s criminal prosecution. The seizure-causing GIF was constructed to trigger a seizure.<sup>54</sup> Rivello admitted he knew about

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48. *Id.* at 168 (citing *Paroline v. United States*, 134 S. Ct. 1710, 1719, 188 L. Ed. 2d 714 (2014)).

49. *Id.* at 170.

50. *Id.*

51. See Justin W. Patchin, *Should Cities Have Cyberbullying Ordinance*, CYBERBULLY RSCH. CTR. (Oct. 15, 2012), <https://cyberbullying.org/should-cities-have-a-cyberbullying-ordinance> [<https://web.archive.org/web/20201117231053/https://cyberbullying.org/should-cities-have-a-cyberbullying-ordinance>].

52. *Id.*

53. See Perna, *supra* note 32.

54. See Star, *supra* note 42.

Eichenwald's epilepsy and sensitivity to strobe lights.<sup>55</sup> The GIF had the phrase "You deserve a seizure for your post" emblazoned over the triggering image.<sup>56</sup> Though novel in concept, using a civil battery theory to litigate Rivello's cyberbullying behavior found support in the United States District Court in Maryland.<sup>57</sup> This idea of "Battery by GIF" is a novel approach that should have wide-reaching applications in the future.

Eichenwald brought his civil suit in the United States District Courts of Maryland, where Rivello resides, and included separate claims for both the torts of battery and assault under Texas law, where the crime was committed and the criminal case is proceeding.<sup>58</sup> In Texas, in the criminal case against Rivello, the grand jury already indicted Rivello for cyberstalking, criminal assault with a deadly weapon, and assault with intention to inflict serious bodily injury based on what Rivello did with the GIF.<sup>59</sup> The criminal case is still proceeding and the civil case will follow in time; however, the district court in Maryland has already heard the defendant's motion for summary judgment on the issue of battery.

In the civil case, the issue on summary judgment was whether the charge of battery would apply because the harmful and offensive touch was done entirely over the internet.<sup>60</sup> The Texas Penal Code defines battery as "the intentional, knowing, or reckless causing of a bodily injury, or intentionally or knowingly causing physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative."<sup>61</sup> Texas law differentiates between civil battery and assault based on whether a touch or physical contact occurred, as in battery, or if the touch was only threatened but not consummated, as in assault.<sup>62</sup>

It is undeniable that Rivello's threatening message with the seizure-inducing image put Eichenwald under fear of an attack legally sufficient for assault. The problem with Eichenwald's battery claim was that no court had previously recognized the act of sending an image as touching; in fact, whether indirect touch is sufficient for battery at all, is generally undecided

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55. See Criminal Complaint at 17, *United States v. Rivello*, No. 3-17MJ192-BK (N.D. Tex. Dall. Div. 2017).

56. *Id.* at 6, 15.

57. See Star, *supra* note 42.

58. *Eichenwald v. Rivello*, 318 F. Supp. 3d 766, 771–72 (D. Md. 2018).

59. *Id.* at 770.

60. *Id.* at 776 n.8.

61. *Id.* at 773 (citing TEX. PENAL CODE ANN. § 22.01(a)(1), (3) (West 2019)).

62. *Id.* at 774 (citing RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 101 cmt. b (AM. LAW INST., Tentative Draft No. 1, 2015)).

under Texas law and is evaluated on a case-by-case basis according to the facts specified.<sup>63</sup>

Eichenwald put forth the theory that the GIF was constructed with intent to cause harm, and the GIF was able to reach out and touch Eichenwald, causing the seizure.<sup>64</sup> The court accepted the following reasoning: the GIF is made of light, light is made of photons, photons are particles, and those photon particles were transmitted via electronic means, thus touching Eichenwald's eye. Additionally, the touch of those particles on Eichenwald's eye began the cascading effect that triggered the seizure in Eichenwald's brain with knowledge that Eichenwald was likely to suffer seizure as a result of the contact.<sup>65</sup>

This is not entirely new territory; other courts have held the physical touch required for battery may be indirect. The Restatements give numerous examples,<sup>66</sup> such as blowing smoke in one's face<sup>67</sup> or intentionally shining a laser pointer into someone's eye.<sup>68</sup> However, under Texas law, the rules for what constitutes a physical contact, or touch, have not been thoughtfully argued according to records available on the public docket.<sup>69</sup> Rivello pointed to *Marshall v. AT&T*, where the controlling Fifth Circuit Court declined to acknowledge touch from chemicals emanating from perfume as being a harmful or offensive touch.<sup>70</sup> Yet in *Eichenwald*, the judge distinguished the case at hand from *Marshall* because Rivello knew the GIF was likely to cause a seizure and the message was constructed with the intention of causing a seizure.<sup>71</sup> Therefore, Texas law supported the claim of battery, albeit by novel means, to classify a GIF as an intentionally harmful physical contact that touched Eichenwald in a manner worthy of the civil battery statute.<sup>72</sup> Under this theory, the battery claim in the *Eichenwald* case was able to survive summary judgment.<sup>73</sup>

The concept of social messaging reaching out to touch the victim in order to cause physical harm is new, both as an emerging crime and in the use of civil battery theory to litigate the civil actions; Judge James K. Bredar called it, "Battery by GIF."<sup>74</sup> The idea behind all tort law is to base

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63. *Id.* at 776 n.7.

64. *Id.* at 770.

65. *Id.*

66. RESTATEMENT (THIRD) OF TORTS: INTEN. TORTS TO PERSONS § 101 cmt. e (AM. LAW INST., Tentative Draft No. 1, 2015).

67. *Leichtman v. WLW Jacor Comm.*, 634 N.E.2d 697 (Ohio Ct. App. 1994).

68. *Adams v. Commonwealth*, 534 S.E.2d 347 (Va. Ct. App. 2000).

69. *See Star*, *supra* note 42.

70. *See Eichenwald*, 318 F. Supp. 3d at 776 n.7.

71. *Id.* at 774.

72. *Id.*

73. *Id.* at 777.

74. *Id.* at 772.

liability on unreasonable interference with the interests of others.<sup>75</sup> Creative use of the old common law tort is exactly what is needed to hold cyberbullies accountable for using internet messaging to trigger physical reactions. Here, Rivello's liability for battery could open the door for future cases where the offender uses images to cause a physical reaction on the receiving party's side.

### III. CYBERBULLYING LAWS AMID FIRST AMENDMENT ISSUES

Though there is variation among the states in the degree of protections granted to victims of cyberbullying, there is a broad and all-encompassing protection afforded to the companies that give cyberbullies a platform to harass.<sup>76</sup> Following the tragic case of Megan Meier in 2006, who committed suicide as a result of cyberbullying, many cities and counties began to propose ordinances to address cyberbullying.<sup>77</sup> At the time of this writing, all fifty states have laws to address some form of cyberbullying, and many counties and school districts have their own versions of cyberbully ordinances in place.<sup>78</sup> Many of the state laws simply require that school districts have policies to deal with cyberbullying incidents within the school system, but others impose criminal penalties. So, each cyberbullying case needs to be carefully evaluated under specific circumstances to see which statutes are jurisdictionally applicable in any given set of circumstances.<sup>79</sup>

While the majority of states have attempted to pass legislation to stem the tide of cyberbullying, many applications of these anti-cyberbullying laws have been found to be overbroad restraints on the First Amendment right to free speech.<sup>80</sup> As an example, the United States Court of Appeals for the Third Circuit found that a student's suspension for creating a sexually explicit internet profile of her school principal was a violation of

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75. *Id.* (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 6 (5th ed. 1988)).

76. *See* 47 U.S.C. § 230 (2018).

77. *See* Patchin, *supra* note 51. *See also Analysis and Implications of Laws, CYBERBULLY RSCH. CTR.*, <https://cyberbullying.org/cyberbullying-laws> [<https://web.archive.org/web/20201117231256/https://cyberbullying.org/cyberbullying-laws>].

78. *Id.*

79. *Id.*

80. Aaron Short, *Cyberbullies Get First Amendment Protection*, N.Y. POST (July 1, 2014), <https://nypost.com/2014/07/01/cyberbullies-get-first-amendment-protection-from-court/> [<https://web.archive.org/web/20201117231542/https://nypost.com/2014/07/01/cyberbullies-get-first-amendment-protection-from-court/>].

the student's First Amendment right to free speech.<sup>81</sup> In another case, application of state cyberbully law in North Carolina<sup>82</sup> was found an overbroad restraint on free speech when applied to the defendant's online social media posts in which the defendant attempted to pursue a romantic relationship with a woman the defendant had only barely met.<sup>83</sup> In yet another example, a school district's use of a cyberbully ordinance to expel a student who posted a photo on Snapchat of another student, falsely indicating a potential school shooter, was deemed a violation of free speech. The court reasoned that posts are constitutionally protected speech.<sup>84</sup> Part of the reason that finding alternative litigation strategies under civil battery, assault, or cyberstalking is so important in cyberbullying cases is the way a finding of any of these minimizes First Amendment defenses. Actions like battery, assault, and stalking are not generally covered by the free speech protections the way words are.<sup>85</sup>

Overall, cyberbully legislation provides patchwork coverage that, at best, results in erratic, if any, punishment for offenses and does little to set the victim's world right. Where cyberbully laws excel is at making schools aware of the problem and initiating a school protocol to respond. In *Vergara v. Wesleyan Academy, Inc.*, the school ignored a mother who, on at least two occasions, reported cyberbullying of her child with special needs.<sup>86</sup> The school documented the reports, but no action was taken. Amid other litigations about the readmission of the student to the school, the court denied the school summary judgment specifically on the issue of cyberbullying because of the school's indifference to the complaint.<sup>87</sup>

Critics of cyberbullying statutes outside of the schoolyard say these statutes have a tendency to run aground of the First Amendment because they have a chilling effect on free speech, are overbroad, and are vague.<sup>88</sup> For instance, the Albany County ordinance prohibited:

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81. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011).

82. N.C. GEN. STAT. § 14-277.3A (2017).

83. *State v. Shackelford*, 825 S.E.2d 689 (N.C. Ct. App. 2018).

84. *J.S. v. Manheim Township Sch. Dist.*, 231 A.3d 1044 (Pa. Commw. Ct. 2019).

85. See David L. Hudson Jr., *NY High Court Says Anti-Bullying Law Won't Pass First Amendment Muster*, AM. B. ASS'N J. (Nov. 1, 2014), [https://www.abajournal.com/magazine/article/bully\\_fighting\\_new\\_yorks\\_high\\_court\\_says\\_anti\\_cyberbullying\\_law\\_wont\\_pass\\_f](https://www.abajournal.com/magazine/article/bully_fighting_new_yorks_high_court_says_anti_cyberbullying_law_wont_pass_f)

[[https://web.archive.org/web/20201117233309/https://www.abajournal.com/magazine/article/bully\\_fighting\\_new\\_yorks\\_high\\_court\\_says\\_anti\\_cyberbullying\\_law\\_wont\\_pass\\_f](https://web.archive.org/web/20201117233309/https://www.abajournal.com/magazine/article/bully_fighting_new_yorks_high_court_says_anti_cyberbullying_law_wont_pass_f)].

86. *Vergara v. Wesleyan Acad., Inc.*, No. 17-1013 (PG), 2019 U.S. Dist. LEXIS 152218, at \*22–23 (D.P.R. Sept. 4, 2019).

87. *Id.* at \*49–50.

88. David L. Hudson Jr., *Cyberbullying*, FIRST AMEND. ENCYCLOPEDIA (2009), <https://www.mtsu.edu/first-amendment/article/1581/cyberbullying> [<https://web.archive.org/web/2020111235355/https://www.mtsu.edu/first->

[A]ny act of communicating or causing a communication to be sent by mechanical or electronic means, including posting statements on the internet or through a computer or email network, disseminating embarrassing or sexually explicit photographs; disseminating private, personal, false or sexual information, or sending hate mail, with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm or another person.<sup>89</sup>

The ordinance was found to be overbroad by the Court of Appeals because it was not limited to the audience or activities that would be specific to cyberbullying.<sup>90</sup> Generally, the courts find overreach when the legislation limits speech on all forms of electronic communication, reaching all people; meanwhile, legislation that limits the schoolyard speech of children is much more likely to pass constitutional muster.<sup>91</sup> However, threats are not protected speech. Thus, threatening behavior like that in battery, assault, or cyberstalking cases is not covered by the First Amendment.<sup>92</sup>

Part of the reason arguments for civil battery and criminal assault were so effective in *Eichenwald* was that the contents in Rivello's messages were not what Rivello was charged for but the intention to cause physical harm.<sup>93</sup> The indictment spells it out clearly: Rivello knew Eichenwald had epilepsy, and the GIF was capable of causing a seizure; therefore, the act of tweeting brought on the charge, not the message.<sup>94</sup> This is the beauty in the "Battery by GIF" argument present in *Eichenwald*.<sup>95</sup> This theory is a valuable tool in the arsenal of litigation for cyberbullying if a physical impact can be shown as a result of a "photon" hitting the eye.

The First Amendment, though a proper guardian against overbroad laws that may curb free speech on the internet, is often the justification for

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amendment/article/1581/cyberbullying] [hereinafter *Cyberbullying*] (last visited Apr. 4, 2020).

89. Local Law No. 11 [2010] of County of Albany § 2.

90. *The First Amendment or Regulating Cyber-Bullying – Do We Have to Choose?*, EDISCOVERY ASSISTANT, <https://www.ediscoveryassistant.com/facebook-and-cyberbullying-what-not-to-do/> [<https://web.archive.org/web/20201117233545/https://www.ediscoveryassistant.com/facebook-and-cyberbullying-what-not-to-do/>] (last visited Mar. 20, 2020).

91. *Id.*

92. See Hudson, *supra* note 85.

93. See Star, *supra* note 42.

94. *Id.*

95. *Eichenwald v. Rivello*, 318 F. Supp. 3d 766, 772 (D. Md. 2018).

many cyberbullies who hide behind its protection in order to harass individuals in the world and on social media.

Consider the growing trend of “First Amendment Auditors.” These are individuals who film government employees in the course of their duties in the hopes of catching them violating someone’s constitutional rights.<sup>96</sup> In viewing this trend, an important question to consider is whether these “audits” are another form of cyberbullying or merely a way to keep police officers in check.<sup>97</sup> While some auditors are praised for their actions, many have been linked to the anti-government sovereign citizens, a movement labeled as a top domestic terrorism threat by the FBI because of the way in which they go about their “audits,” harassing city and government employees.<sup>98</sup>

First Amendment auditing has become a trend for YouTube sensationalists and can often place the auditors and innocent bystanders in danger, as was the case for Zhoie Perez, a transgender woman known by the name of “Furry Potato” on YouTube.<sup>99</sup> Perez was shot by a security guard working for the Etz Jacob Congregation and the Ohel Chana High School when Perez would not stop live-streaming her recording of the synagogue.<sup>100</sup> What Perez was not aware of during her “impromptu audit,” was that, only the year before, an anti-Semitic gunman had entered a Pittsburgh synagogue and shot eleven worshipers dead.<sup>101</sup> Because of that incident, tensions were high in the Jewish community, and many organizations had taken protective measures like placing security guards outside their synagogues during times of worship.<sup>102</sup> Following the incident, the security officer was detained and arrested.<sup>103</sup> In another event, Perez went on to perform an “audit” of a Marine Corps recruitment facility

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96. Kayla Epstein & Avi Selk, *What Is ‘Auditing,’ and Why Did a YouTuber Get Shot for Doing It?*, WASH. POST (Feb. 5, 2019), [www.washingtonpost.com/2Ftechnology%2F2019%2F02%2F15%2Fwhat-is-auditing-why-did-youtuber-get-shot-doing-it%2F&usg=AOvVaw104Gmri3adr8gw4LEL5qkQ](http://www.washingtonpost.com/2Ftechnology%2F2019%2F02%2F15%2Fwhat-is-auditing-why-did-youtuber-get-shot-doing-it%2F&usg=AOvVaw104Gmri3adr8gw4LEL5qkQ).

97. *Id.*

98. Judy L. Thomas, *They Roam Public Buildings, Making Videos. Terrorism Experts Say They May Be Dangerous.*, KAN. CITY STAR (Jan. 13, 2019), <https://www.kansascity.com/News/Local/Crime/Article224221620.Html> [<https://web.archive.org/web/20201117233734/https://www.kansascity.com/News/Local/Crime/Article224221620.Html>].

99. See Epstein & Selk, *supra* note 96.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

in Texas and was arrested for a hate crime after allegedly making derogatory comments to an African-American recruiter.<sup>104</sup>

Once these audits are uploaded to social media platforms, they can garner millions of views, thereby encouraging thousands of comments from fans who are eager to spew negative and hate-filled commentary. This is the lure of the social media platform for the auditor—it is an uncomplicated way to earn reactions with little to no moderation from the companies.<sup>105</sup> Though nearly every circuit court has agreed that there is a First Amendment right to film the police, “subject only to reasonable time, place, and manner restrictions,” the question left undecided is whether the intentional recording of these individuals and the virtual broadcasting of their interactions on the social media forum is simply cyberbullying disguised as activism.<sup>106</sup> Some states likely agree that it is a kind of bullying, as ordinances protecting police from aggressive First Amendment Auditors have emerged in some counties.<sup>107</sup> Tucson’s ordinance was unanimously passed following a video audit in which two police officers were subjected to an “X-rated tirade” of obscenities for twenty minutes to viewers via live stream.<sup>108</sup> The stream garnered comments, many of which were derogatory anti-police slurs, such as “Oink Oink” and “Here Piggy-Piggy.”<sup>109</sup> Moreover, because the right of

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104. Jim Holt, *Racist Comments Allegedly Made at Marine Corps Recruiting Office Probed as a Hate Crime*, SIGNAL (June 13, 3018), <https://signalscv.com/2018/06/Racist-Comments-Allegedly-Made-At-Marine-Corps-Recruiting-Office-Probed-As-Hate-Crime/> [<https://web.archive.org/web/20201117234534/https://signalscv.com/2018/06/Racist-Comments-Allegedly-Made-At-Marine-Corps-Recruiting-Office-Probed-As-Hate-Crime/>].

105. Tauriq Moosa, *Comment Sections Are Poison: Handle with Care or Remove Them*, GUARDIAN (Sept. 12, 2014), <https://www.theguardian.com/science/brain-flapping/2014/sep/12/comment-sections-toxic-moderation> [<https://web.archive.org/web/20201117234654/https://www.theguardian.com/science/brain-flapping/2014/sep/12/comment-sections-toxic-moderation>] (arguing that webhosts and social media companies with comment sections need to begin prioritizing safety, solidarity, and quality over so-called “free speech,” which benefits only the loudest and most vile, by strictly moderating comment sections).

106. See *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017) (holding that there is a First Amendment right to film the police subject only to reasonable time, place, and manner restrictions).

107. Carol Ann Alaimo, *Tucson Creates New Ordinance to Deter Aggressive ‘First Amendment Auditors’*, TUSCON.COM (June 8, 2020), [https://tucson.com/news/local/tucson-creates-new-ordinance-to-deter-aggressive-first-amendment-auditors/article\\_be17ffeb-7de9-56c2-a1e0-a9292dfe1757.html](https://tucson.com/news/local/tucson-creates-new-ordinance-to-deter-aggressive-first-amendment-auditors/article_be17ffeb-7de9-56c2-a1e0-a9292dfe1757.html) [[https://web.archive.org/web/20201117234803/https://tucson.com/news/local/tucson-creates-new-ordinance-to-deter-aggressive-first-amendment-auditors/article\\_be17ffeb-7de9-56c2-a1e0-a9292dfe1757.html](https://web.archive.org/web/20201117234803/https://tucson.com/news/local/tucson-creates-new-ordinance-to-deter-aggressive-first-amendment-auditors/article_be17ffeb-7de9-56c2-a1e0-a9292dfe1757.html)].

108. *Id.*

109. *Id.*

auditors to film government employees is protected by the First Amendment, some states were forced to create instructions on how to cope when auditors come into the building to record and, essentially, harass employees.<sup>110</sup> Auditors do not just film police but also other public employees, like librarians, as they try to increase their viewership and gain notoriety online.<sup>111</sup>

To reiterate, the point is not that the right to film police or government employees should be taken away from auditors, but rather, as the audits tend to harass individuals more than reveal constitutional violations, the platforms where the audits are streamed and posted should prioritize the monitoring of such content for the safety of its users.

#### IV. EMPOWERING THE CYBERBULLY ON SOCIAL MEDIA AND THE HARASSMENT CULTURE

Because social media platforms have been referred to as the modern public square since speech increasingly occurs in cyberspace more often than it does in traditional public forums,<sup>112</sup> social media companies and webhosts are faced with the tension of controlling the commentary to protect users and protecting other users' First Amendment rights.<sup>113</sup>

Monitoring the commentary at this moment in time is especially necessary—in the wake of the recent protests against racial injustice that began over the murder of George Floyd in Minneapolis on May 28,

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110. Mun. Ass'n of S.C., *Keeping Calm with First Amendment Audits*, UPTOWN (Jan. 2020), <https://www.masc.sc/Pages/newsroom/uptown/January-2020/Keeping-Calm-With-First-Amendment-Audits.aspx> [<https://web.archive.org/web/20201117234947/https://www.masc.sc/Pages/newsroom/uptown/January-2020/Keeping-Calm-With-First-Amendment-Audits.aspx>].

111. Taylor Hartz, *Free Speech—or Free-for-All?*, AM. LIBR. (Jan. 2, 2020), <https://americanlibrariesmagazine.org/2020/01/02/free-speech-free-for-all-first-amendment-audits/> [<https://web.archive.org/web/20201117235151/https://americanlibrariesmagazine.org/2020/01/02/free-speech-free-for-all-first-amendment-audits/>].

112. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (holding that “in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”).

113. TMZ deleted the ability of fans to post commentary on its site in the wake of the protests and racial tension following the death of George Floyd in Minneapolis until it came up with a way to control the hate comments; TMZ has since updated its comment rules. See *The TMZ Comments Rules on the Road*, TMZ, <https://www.tMZ.com/pages/tMZ-comment-rules/> [<https://web.archive.org/web/20201117235440/https://www.tMZ.com/pages/tMZ-comment-rules/>].

2020,<sup>114</sup> hate comments, racial tension, political polarization, and divisive misinformation has run rampant on social media.<sup>115</sup> Consider the recent instance in Atlanta on Memorial Day weekend, when an individual known as Cortez Sailor tweeted out a call for the public to start looting the shops at Phipps Plaza.<sup>116</sup> Sailor claimed that it was not only “freedom of speech,” but, since Twitter was the platform, “it was a joke. . . .”<sup>117</sup> Despite Sailor’s insistence that no one would take it seriously, the police were called, the Plaza was shut down, employees were sent home, and panic ensued.<sup>118</sup> Sailor’s original tweet sparked over one thousand likes, almost two thousand retweets, and one comment urging participants to “wear your masks, protective gear and anything else to hide your identity.”<sup>119</sup> As this instance suggests, the Twitter platform offers a ripe opportunity for anyone to post a threat or hate comment under the excuse that it was either a joke or freedom of speech. Though Twitter did eventually suspend Sailor’s account for violating its rules,<sup>120</sup> his tweet had already spread and garnered attention online and in the city of Atlanta, causing significant panic and unrest.<sup>121</sup>

In an effort to control these kinds of accounts that engage in inciting violence, Twitter has attempted to monitor accounts that violate its platform manipulation and spam policies, which are essentially fake

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114. Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Aug. 13, 2020), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>

[<https://web.archive.org/web/20201117235910/https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html>]. See also *Killing of George Floyd*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Killing\\_of\\_George\\_Floyd](https://en.wikipedia.org/wiki/Killing_of_George_Floyd) [[https://web.archive.org/web/20201118000039/https://en.wikipedia.org/wiki/Killing\\_of\\_George\\_Floyd](https://web.archive.org/web/20201118000039/https://en.wikipedia.org/wiki/Killing_of_George_Floyd)].

115. Davey Alba, *Misinformation About George Floyd Protests Surges on Social Media*, N.Y. TIMES (June 22, 2020), <https://www.nytimes.com/2020/06/01/technology/george-floyd-misinformation-online.html> [<https://web.archive.org/web/20201118000317/https://www.nytimes.com/2020/06/01/technology/george-floyd-misinformation-online.html>].

116. Jamie Kennedy, *Tweet Creates Panic in Buckhead as Calls to Riots Are Heard*, CBS 46 (May 28, 2020), [https://www.cbs46.com/news/tweet-creates-panic-in-buckhead-as-calls-to-riot-are-heard/article\\_d7918b86-a147-11ea-a372-83c753bf988f.html](https://www.cbs46.com/news/tweet-creates-panic-in-buckhead-as-calls-to-riot-are-heard/article_d7918b86-a147-11ea-a372-83c753bf988f.html) [[https://web.archive.org/web/20201118000522/https://www.cbs46.com/news/tweet-creates-panic-in-buckhead-as-calls-to-riot-are-heard/article\\_d7918b86-a147-11ea-a372-83c753bf988f.html](https://web.archive.org/web/20201118000522/https://www.cbs46.com/news/tweet-creates-panic-in-buckhead-as-calls-to-riot-are-heard/article_d7918b86-a147-11ea-a372-83c753bf988f.html)].

117. *Id.*

118. *Id.*

119. *Id.*

120. Cortez Sailor (@1kcelebutaunte), TWITTER (May 28, 2020, 9:40 AM), <https://twitter.com/1kcelebutaunte> [<https://web.archive.org/web/20201117233651/https://twitter.com/account/suspended>].

121. See Kennedy, *supra* note 116.

accounts, and suspend them.<sup>122</sup> Yet not all users get blocked and not all hate messages get deleted, and Twitter's crafted response to complaints from users often remains the same: "We have reviewed your report carefully and found there was no violation of Twitter rules."<sup>123</sup> Social media companies still remain protected from liability and often permit online hate and harassment to go unchecked.<sup>124</sup> This lack of moderation has been noticed, however. The Department of Justice issued a press release that proposed a number of reforms to the broad coverage allotted to social media platforms under § 230 of the Communications Decency Act,<sup>125</sup> specifically when platforms "purposefully facilitate or solicit content that violates federal criminal law or are willfully blind to criminal content on their own services."<sup>126</sup> Whether this means that there will be an increase in the moderation of cyberbullying and large scale harassment

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122. Ben Collins, Brandy Zadrozny, & Emmanuelle Salib, *White Nationalist Group Posing as Antifa Called for Violence on Twitter*, NBC NEWS: AOL.COM (June 2, 2020) <https://www.aol.com/article/news/2020/06/02/white-nationalist-group-posing-as-antifa-called-for-violence-on-twitter/24507617/> [<https://web.archive.org/web/20201118000758/https://www.aol.com/article/news/2020/06/02/white-nationalist-group-posing-as-antifa-called-for-violence-on-twitter/24507617/>] (explaining that Twitter suspended hundreds of accounts during Memorial Day weekend 2020, during which two hashtags trended worldwide, falsely claiming that there was a "cover-up" or a "blackout" of protests in Washington, D.C.; typically, those accounts were engaged in inciting violence and/or hate).

123. See generally David Goldman, *Big Tech Made the Social Media Mess. It Has to Fix It*, CNN BUS. (Oct. 29, 2018, 3:17 PM), <https://www.cnn.com/2018/10/29/tech/social-media-hate-speech/index.html> [<https://web.archive.org/web/20201118001047/https://www.cnn.com/2018/10/29/tech/social-media-hate-speech/index.html>] (arguing that critics of social media companies have increasingly said that the moderation used by the platforms is not comprehensive). See also Rishi Iyengar, *WhatsApp Has Been Linked to Lynchings in India. Facebook is Trying to Contain the Crisis.*, CNN BUS. (July 27, 2018), <https://edition.cnn.com/2018/09/30/tech/facebook-whatsapp-india-misinformation/index.html> [<https://web.archive.org/web/20201118001401/https://edition.cnn.com/2018/09/30/tech/facebook-whatsapp-india-misinformation/index.html>] (explaining that Facebook is slow to make adjustments to its platforms with regard to online threats and has even caused problems globally when its company, WhatsApp, did not monitor widely distributed hoax messages, which were linked to several lynchings in India).

124. See generally Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Trump*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html> [<https://web.archive.org/web/20201118001925/https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html>].

125. Communications Decency Act, 47 U.S.C. § 230 (2018).

126. Press Release, Dep't of Justice, Justice Department Issues Recommendations for Section 230 Reform (June 17, 2020) (on file with the Dep't of Justice).

from the social media platforms remains to be seen.<sup>127</sup> However, currently it appears that social media companies are more devoted to cherry picking between monitoring political advertising or President Trump's tweets.<sup>128</sup> And recently, Twitter restricted Donald Trump Jr.'s account, temporarily taking away his ability to tweet for twelve hours, because Trump Jr. posted a video of a doctor allegedly spreading misinformation regarding protections against the coronavirus.<sup>129</sup> This instance with Trump Jr.

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127. Ben Cohen, *Antisemitic French 'Pseudo-Comedian' Dieudonné Booted from YouTube for Racist Content*, ALGEMEINER (June 30, 2020), <https://www.algemeiner.com/2020/06/30/antisemitic-french-pseudo-comedian-dieudonne-booted-from-youtube-for-racist-content/> [<https://web.archive.org/web/20201118002028/https://www.algemeiner.com/2020/06/30/antisemitic-french-pseudo-comedian-dieudonne-booted-from-youtube-for-racist-content/>] (explaining that YouTube may be tightening up on violations of its policies, at least if they are frequently breached, as was the case for the popular French Comedian, Dieudonné M'bala M'bala's channel, which had been deleted due to his repeated violations of YouTube's hate speech rules).

128. See generally Harriet Alexander, *REVEALED: How Mark Zuckerberg Has Been Bending Facebook's Rules to Allow Trump's Posts Since 2015 - as the Social Media Giants Deal with Ad Boycott Crisis Over 'Hate Speech'*, DAILY MAIL (June 29, 2020), <https://www.dailymail.co.uk/news/article-8469333/How-Mark-Zuckerberg-continually-altered-Facebooks-rules-allow-Trumps-controversial-posts.html> [<https://web.archive.org/web/20201118002051/https://www.dailymail.co.uk/news/article-8469333/How-Mark-Zuckerberg-continually-altered-Facebooks-rules-allow-Trumps-controversial-posts.html>] (explaining that when it comes to political monitoring, social media platforms arguably bend with the current political climate, and Mark Zuckerberg has come under scrutiny, as it was claimed that he bent Facebook's guiding principles in order to keep Donald Trump's posts on the site). See also Zeke Miller, *Trump Signs Executive Order Aimed at Curbing Protections for Social Media Giants*, FOX 5 ATLANTA (May 28, 2020), <https://www.fox5atlanta.com/news/trump-signs-executive-order-aimed-at-curbing-protections-for-social-media-giants> [<https://web.archive.org/web/20200621030349/https://www.fox5atlanta.com/news/trump-signs-executive-order-aimed-at-curbing-protections-for-social-media-giants>] (explaining that Twitter added fact-checking labels to President Trump's tweets in an effort to direct social media users to news articles from trusted outlets next to tweets containing misleading or disputed information).

129. See generally Joan E. Greve & Martin Pengelly, *Twitter Limits Donald Trump Jr.'s Account for Posting Covid-19 Misinformation*, GUARDIAN (July 28, 2020) <https://www.theguardian.com/us-news/2020/jul/28/donald-trump-jr-twitter-restricted-hydroxychloroquine> [<https://web.archive.org/web/20201118002224/https://www.theguardian.com/us-news/2020/jul/28/donald-trump-jr-twitter-restricted-hydroxychloroquine>]; see also Jason Slotkin, *Twitter Restricts Donald Trump Jr.'s Account Over COVID-19 Misinformation*, NPR (July 28, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/28/896166651/twitter-restricts-donald-trump-jr-s-account-over-covid-19-misinformation> [<https://web.archive.org/web/20201118002412/https://www.npr.org/sections/coronavirus-live-updates/2020/07/28/896166651/twitter-restricts-donald-trump-jr-s-account-over-covid-19-misinformation>] (reporting that Trump Jr. received an alert that Twitter was

suggests that social media platforms are comfortable with ‘slap-on-the-wrist’ punishment for individuals deemed to violate their standards for political monitoring, yet when it comes to large scale harassment and cyberbullying, these companies do not do enough to protect users.<sup>130</sup>

Consider the numerous celebrities who have been subject to hateful posts, negative treatment, and severe online bullying.<sup>131</sup> Many people may argue that being subject to negative press comes with the territory of being a celebrity, but should being famous mean one must tolerate cyberbullying and death threats without any help from the platforms to curb such commentary? Celebrity cyberbullying amplifies the issue that social media platforms have created: they open virtual public forums, allowing people to speak and share freely, but, as a consequence, celebrities must inevitably put up with harassment and bullying from fans with little to no monitoring from the platforms.

In 2016, American singer Beyoncé released her highly anticipated sixth studio album, *Lemonade*.<sup>132</sup> Lyrics in Beyoncé’s song “Sorry” from the album hinted at a mysterious woman, “Becky with the good hair,” who was believed to be the mistress of Beyoncé’s husband, Jay-Z.<sup>133</sup> The identity of Becky was never confirmed, but due, in part, to her professional

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placing a temporary limit on his account based on the company’s policy on spreading misinformation on COVID-19).

130. See generally Taylor Lorenz, *Instagram Has Massive Harassment Problem*, ATLANTIC (Oct. 15, 2018), <https://www.theatlantic.com/technology/archive/2018/10/instagram-has-massive-harassment-problem/572890/>

[<https://web.archive.org/web/20201118002415/https://www.theatlantic.com/technology/archive/2018/10/instagram-has-massive-harassment-problem/572890/>] (discussing the case of Violet Paley, an actress who accused James Franco of sexual misconduct, who was subject to such severe harassment and bullying on her Instagram page, she resorted to the FBI, as Instagram ignored her multiple reports of harassers); see also Lindsay Dodgson, *The Frenzy of Unrelenting Online Bullying Further Destroys the Mental Health of Those Already Suffering, and Everyone Has a Role to Play*, INSIDER (Feb. 25, 2020), <https://www.insider.com/toxic-tragic-results-of-online-hate-bullying-cancel-culture-2020-2>

[<https://web.archive.org/web/20201118002537/https://www.insider.com/toxic-tragic-results-of-online-hate-bullying-cancel-culture-2020-2>] (discussing TV personality Caroline Fleck, who was subject to outrageous bullying and harassment online, which was speculated to be a contributing factor in Fleck’s suicide in 2019).

131. Michael Baggs, *Toxic Fandom: Online Bullying in the Name of Your Favorite Stars*, BBC NEWS (Aug. 1, 2018), <https://www.bbc.com/news/newsbeat-44950274> [<https://web.archive.org/web/20201118002600/https://www.bbc.com/news/newsbeat-44950274>] (arguing that the most common bullies of celebrities are the fans of other rival celebrities; under the open umbrella of social media, people can publicly ridicule or demean whomever they want, all in the name of their favorite stars).

132. BEYONCÉ, *LEMONADE* (Parkwood Entertainment and Columbia Records 2016).

133. BEYONCÉ, *Sorry*, on *LEMONADE* (Parkwood Entertainment and Columbia Records 2016).

relationship with Jay-Z at the time, Rachel Roy, a fashion designer, became the insatiable target of the “Beyhive,” the name given to Beyoncé’s fan base, and was subject to massive amounts of trolling and bullying.<sup>134</sup> The Beyhive has often been entangled in instances of toxic fandom that draws its strength in numbers, has been far too prevalent on platforms like Instagram and Twitter, and has received little to no moderation by the companies.<sup>135</sup> Roy received death threats against her and her daughters and over a million lemon and bee emojis (symbols of the Beyhive). She even had to call the police, claiming her Gmail and iCloud accounts were hacked.<sup>136</sup> The swarm appeared to surge when Roy posted a picture of herself on her Instagram with the caption, “Good hair don’t care, but we will take good lighting, for selfies, or self truths, always. Live in the light #nodramaqueens.”<sup>137</sup> Fans attached to this comment a declaration of guilt and filled Roy’s page with comments like “your legit dead” and “WHOREEEEEEE.” Fans also posted on Roy’s sixteen-year-old daughter’s page, commenting, “Yo mom needs to drink bleach.”<sup>138</sup> The fans were so incensed that they vandalized Roy’s Wikipedia page, created disparaging memes, and continued hate comments, even after Roy issued a plea on Twitter saying, “I respect love, marriages, families and strength.

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134. See generally Angelina Chapin, *The Wrath of Beyoncé’s Beyhive: How Fans Have Lost the Plot*, GUARDIAN (Apr. 30, 2016), <https://www.theguardian.com/music/2016/apr/30/beyonce-beyhive-fans-rachel-roy-lemonade> [<https://web.archive.org/web/20201118002801/https://www.theguardian.com/music/2016/apr/30/beyonce-beyhive-fans-rachel-roy-lemonade>].

135. Patrick Evans, *Beyoncé: ‘Beyhive’ Hounds Woman off Instagram*, BBC NEWS (June 7, 2019), <https://www.bbc.com/news/blogs-trending-48556109> [<https://web.archive.org/web/20191207072121/https://www.bbc.com/news/blogs-trending-48556109>] (explaining that this is not the only instance where the Beyhive has attacked another celebrity perceived to threaten Beyoncé. In 2019, Nicole Curran, the wife of the owner of the Golden State Warriors basketball team, was also a target of the colony, when she was pictured leaning past Beyoncé to speak to Jay-Z at a basketball game. The hive swarmed over the image and interpreted the gesture of leaning past their queen to talk to her husband as being a direct slight against the singer. Curran deleted her Instagram the next morning due to the amount of bullying and harassment she received on her page).

136. Lauren Le Vine, *Rachel Roy Is Doubling Down on Anti-Bullying Efforts (and Enlisting the L.A.P.D.) After Lemonade*, VANITY FAIR (Aug. 4, 2016), <https://www.vanityfair.com/style/2016/08/rachel-roy-becky-lemonade-bullying-lapd-investigation> [<https://web.archive.org/web/20201108125643/http://www.vanityfair.com/style/2016/08/rachel-roy-becky-lemonade-bullying-lapd-investigation>].

137. See Chapin, *supra* note 134. See also Emily Smith, Carlos Greer, & Emily Saul, *Rachel Roy’s Cryptic Post Sparks Jay Z Cheating Rumors*, PAGE SIX (Apr. 24, 2016), <https://pagesix.com/2016/04/24/rachel-roys-cryptic-post-sparks-jay-z-cheating-rumors/> [<https://web.archive.org/web/20201118003013/https://pagesix.com/2016/04/24/rachel-roys-cryptic-post-sparks-jay-z-cheating-rumors/>].

138. *Id.*

What shouldn't be tolerated . . . is bullying, of any kind."<sup>139</sup> Going even further, the harassment meant for Roy found its way onto chef Rachael Ray's page, when "Ray" was confused with "Roy," and Rachael Ray found herself victimized by the Beyhive.<sup>140</sup> Though Roy changed her profile to private and issued a statement denying all allegations that she was "Becky," the damage was done, and there was no helpful avenue by which she could escape from the harassment that followed her and her daughters online.<sup>141</sup> During the time Roy's profile was public, neither Twitter nor Instagram removed the threats and harassing comments made against Roy.<sup>142</sup>

Though social media platforms have help centers by which a person can report abuse, spam, and hate, for an individual with thousands—or even millions—of followers, reporting those accounts would be nearly impossible, and not to mention, the companies often take days to respond to problems.<sup>143</sup> Additionally, many individuals with large followings on social media make their livings off of their social pages. These "influencers," or "lifestyle Instagrammers," could effectively lose their livelihoods by blocking users, making their pages private, or having to

139. Julia Brucculieri, *Rachel Roy Responds to the Beyhive After 'Lemonade' Backlash*, HUFF POST (Apr. 25, 2016), [https://www.huffpost.com/entry/rachel-roy-responds-to-lemonade-backlash\\_n\\_571e0a80e4b0d4d3f723c1a7](https://www.huffpost.com/entry/rachel-roy-responds-to-lemonade-backlash_n_571e0a80e4b0d4d3f723c1a7) [https://web.archive.org/web/20201118003152/https://www.huffpost.com/entry/rachel-roy-responds-to-lemonade-backlash\_n\_571e0a80e4b0d4d3f723c1a7].

140. Lauren Le Vine, *Rachel Roy and Rachael Ray Sent Each Other Gifts to Get Through "Becky with the Good Hair" Drama*, VANITY FAIR (May. 12, 2016), <https://www.vanityfair.com/style/2016/05/rachel-roy-rachael-ray-becky-with-the-good-hair-drama-gifts> [https://web.archive.org/web/20201118003137/https://www.vanityfair.com/style/2016/05/rachel-roy-rachael-ray-becky-with-the-good-hair-drama-gifts].

141. Alex Apatoff & Andrea Park, *Rachel Roy Denies She's the 'Becky' Who Beyoncé Called Out in Lemonade: 'There Is No Truth to the Rumors'*, PEOPLE (Apr. 26, 2016), <https://people.com/celebrity/beyonces-lemonade-rachel-roy-denies-being-becky-from-album/> [https://web.archive.org/web/20201118003255/https://people.com/celebrity/beyonces-lemonade-rachel-roy-denies-being-becky-from-album/].

142. *See id.*

143. *See Help Center - Privacy and Safety Center*, INSTAGRAM, <https://help.instagram.com/165828726894770> [https://web.archive.org/web/20201118003509if\_/https://help.instagram.com/165828726894770] (last visited Oct. 3, 2020). *See also Someone on Twitter Is Engaging in Abusive or Harassing Behavior*, TWITTER, <https://help.twitter.com/forms/abusiveuser> [https://web.archive.org/web/20201118003523/https://help.twitter.com/forms/abusiveuser] (last visited Oct. 3, 2020); *Help Center: Report Inappropriate Content*, YOUTUBE, <https://www.youtube.com/reportabuse> [https://web.archive.org/web/20201118003701/https://support.google.com/youtube/answer/2802027?hl=en] (last visited Oct. 3, 2020).

delete their accounts. Do these people need to just grin and bear this kind of abuse, accepting it as a necessary evil of using social media?<sup>144</sup>

There is no question as to the capability of social media companies to engage in more monitoring, as they already censor commentary deemed to violate their existing policies. However, the reality is that the monitoring done by these companies is more discretionary than compulsory. The prevailing issue is that large-scale harassment and cyberbullying often goes unnoticed and unchecked by these companies, leaving the harassers to hide behind the First Amendment and the victims to either make their accounts private or delete them altogether.<sup>145</sup> In either instance, the social media platforms should not give such free reign to their users if their control of the commentary is so tenuous.

#### V. LIABILITY FOR WORKPLACE CYBERBULLYING UNDER HOSTILE WORK ENVIRONMENT PROTECTIONS

Title VII of the Civil Rights Act of 1964 can be used to find employers liable for the creation of a hostile work environment.<sup>146</sup> A hostile workplace in violation of Title VII exists “when the workplace is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of a victim’s employment and to create an abusive working environment . . . .”<sup>147</sup> The EEOC considers conduct based on race, color, religion, sex (including pregnancy), national origin, age (if over forty), disability, or genetic information to be harassment.<sup>148</sup> However, the U.S. Supreme Court has been famously resistant to turning Title VII into a general civility code, holding that not all verbal or physical harassment is actionable under Title VII in various cases.<sup>149</sup> The Supreme Court has repeatedly emphasized the plaintiff’s burden to objectively show that any reasonable person, considering all the circumstances, in a similar situation, would consider the behavior so offensive so as to alter the conditions of the victim’s

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144. See Lorenz, *supra* note 130.

145. Jesselyn Cook, *Facebook Didn’t Seem to Care I Was Being Harassed Until I Decided to Write About It*, HUFF POST (Apr. 17, 2018), [https://www.huffpost.com/entry/i-was-sexually-harassed-on-facebook\\_n\\_5a919efae4b0ee6416a3be76](https://www.huffpost.com/entry/i-was-sexually-harassed-on-facebook_n_5a919efae4b0ee6416a3be76) [https://web.archive.org/web/20201118003717/https://www.huffpost.com/entry/i-was-sexually-harassed-on-facebook\_n\_5a919efae4b0ee6416a3be76].

146. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

147. See *id.* at 21.

148. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/harassment.cfm> [https://web.archive.org/web/20201114230744/https://www.eeoc.gov/harassment].

149. See, e.g., *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

employment.<sup>150</sup> The courts tend to find that cases involving the casual use of social media, e-mail, and text communications do not rise to the necessary level of severe and pervasive behavior.<sup>151</sup> These standards were designed to “filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.”<sup>152</sup>

An employer is liable for allowing harassment by a non-supervisory employee or a non-employee if the employer knew or should have known about the harassment and failed to take prompt appropriate corrective action.<sup>153</sup> The employer has an affirmative defense and can avoid liability if it can prove that it took reasonable and prompt action to correct the harassment and that the employee unreasonably failed to take advantage of preventative opportunities to correct the behavior.<sup>154</sup>

Cyberbullying is becoming a critical issue in the workplace, causing lack of productivity and loss of reputation. If employers do not respond appropriately, cyberbullying can also result in a hostile work environment claim against the employer.<sup>155</sup> While no states have workplace cyberbullying laws in place yet, employers should still be on the alert because un-actionable bullying claims can easily resurface later as actionable hostile work environment claims.<sup>156</sup> Cyberbullying is often at the heart of claims for sexual harassment and racial discrimination.<sup>157</sup> Luckily for employers, courts are hesitant to find mere uncivil workplace behavior in violation of Title VII.<sup>158</sup> However, employers should be vigilant; while many workplace claims do not rise to the level of harassment, some do, and the employer can still be liable. It is not a stretch to imagine the workplace conversations and bathroom wall graffiti mentioned below being preserved in online chats or texts.

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150. *Id.* at 81.

151. *See generally* Meshell v. City of El Dorado, No. 1:15-cv-1017, 2017 U.S. Dist. LEXIS 8062 (W.D. Ark. Jan. 20, 2017) (finding that emailing explicit stories, texting, and contact via Facebook live did not rise to the level severe and pervasive harassment).

152. *Martin v. Champion Ford, Inc.*, 41 F. Supp. 3d 747, 758 (N.D. Iowa 2014) (holding that repeated texting of images containing partially clad women and various racially motivated “jokes” did not constitute severe and pervasive harassment).

153. U.S. EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 148.

154. *Id.*

155. Abigail Rubenstein, *5 Tips for Employers to Beat Workplace Bullying*, LAW360 (Mar. 10, 2014), <https://www.law360.com/articles/516977/5-tips-for-employers-to-beat-workplace-bullying> [[https://web.archive.org/web/20201118003923if\\_/https://www.law360.com/articles/516977/5-tips-for-employers-to-beat-workplace-bullying](https://web.archive.org/web/20201118003923if_/https://www.law360.com/articles/516977/5-tips-for-employers-to-beat-workplace-bullying)].

156. *Id.*

157. *Id.*

158. Title VII is not a “general civility code.” *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

Consider the case of Tommy Reedy, who was subject to racial slurs and two incidences of bathroom stall graffiti, one of which read “all n\*\*\*\*\*s must die.”<sup>159</sup> The Eighth Circuit reversed a finding of summary judgment for the employer and found for Reedy due to the threatening nature of the graffiti and the employer’s delay in attempting to remediate the situation.<sup>160</sup>

Likewise, in *May v. Chrysler Group*, the court found several instances of graffiti and a threatening note left in an employee toolbox using racial epithets and telling an employee his family was not safe was significant enough to merit liability for the employer.<sup>161</sup> The main difference between a lunch box note or wall graffiti and online postings or texts is that the former are easier for a plaintiff to preserve.

Threats to employees, like those above, should be taken seriously by the employer. The means of transmission matters little, be it cyber threats or workplace graffiti. In the two cases mentioned, *Reedy* and *May*, the courts found that employers had adequate anti-harassment policies in place, the employee reported dutifully, and the management made a response, but the response was not sufficient to the level of threat.<sup>162</sup> In both cases, the court found for the employee.<sup>163</sup> Cyber threats in the workplace is cyberbullying; anytime an employee is threatened at work with serious bodily injury or worse, the employer response should be prompt and thorough.<sup>164</sup> An employer’s failure to act, report, educate, and, when possible, put protections in place, is not taken lightly by the courts as shown by the results in *May* and *Reedy*.

## VI. CONCLUSION

The use of social media and the internet is growing and will continue to do so. As such, special issues regarding prosecution and liability for crimes and torts created by this cyber-activity will change the face of the legal system. Modern cyberbullies should be on notice that the legal system is targeting their threatening bad behavior: whether by creating new legislation like the federal cyberstalking statute, carefully applying state and local ordinances, reforming § 230 of the Communications Decency Act to increase more moderation on social platforms, or repurposing the old common law rules to prosecute offenses like “battery

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159. *Reedy v. Quebecor Printing Eagle, Inc.*, 333 F.3d 906, 909 (8th Cir. 2003).

160. *Id.* at 910–11.

161. *May v. Chrysler Grp.*, 716 F.3d 963 (7th Cir. 2012).

162. *See generally Reedy*, 333 F.3d at 908, 910. *See also May*, 716 F.3d at 975.

163. *Id.*

164. *See Rubenstein, supra* note 155.

by GIF.” The law is beginning to catch up with the cyberbully, particularly when those behaviors constitute physical harms, which is becoming easier to show. Increasingly, cyberbullies cannot hide behind First Amendment protections when the courts find the bully took actions that resulted in physical harm to the victim. Yet, more must be done. Legislation should expand beyond the schoolyard, and cyberbullying in the workplace should be recognized for the threat it is. New forms of cyberbullying can affect our physical world and alter our workplaces. We are all responsible for finding new methods to hold bullies accountable for their actions in cyber space.