

# ALERT

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## LABOR AND EMPLOYMENT

News Concerning  
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## THE EFFECT OF A CAT'S PAW ON EMPLOYMENT LAW AND WHY EMPLOYERS SHOULD LIMIT SOCIAL MEDIA EMPLOYEE RESEARCH

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On Tuesday, March 1, 2011, the U.S. Supreme Court issued a unanimous decision in the long-awaited "cat's paw" case of *Staub v. Proctor Hospital*. The decision will likely broaden the permissible theories under which a current or former employee might bring a discrimination lawsuit against a company. It may also serve as another cautionary tale for those who use social media for employment-related decisions.

The term "cat's paw" is derived from a fable in which a monkey tricks a cat into taking chestnuts from another's fire, only to eat the chestnuts while the cat burns its paw. In other words, it's a situation where one is influenced to do the wrongful work of another. In the context of discrimination claims, "cat's paw" is, thus, used to refer to a situation where the decision maker may not have any discriminatory animus against the employee, but was so influenced by someone who did have discriminatory animus so as to infect the ultimate decision.

In *Staub*, the plaintiff was a member of the Army Reserve, and the record reflected that his immediate supervisor, and that supervisor's immediate supervisor, harbored hostility toward the plaintiff's military service. After receiving some disciplinary warnings relating to plaintiff's performance, the company's vice president of human resources made the decision to terminate plaintiff's employment. Plaintiff filed suit alleging that, even though the vice president may not have been motivated by unlawful animus, the actions and animus of plaintiff's supervisors influenced the termination decision.

After trial, a jury found in favor of the plaintiff, however the court of appeals reversed that verdict. In Monday's decision, the Supreme Court reversed that ruling on appeal and reinstated the plaintiff's claim, holding that unlawful discrimination *can* be found upon evidence that a supervisor performed an act motivated by unlawful animus that was intended by that supervisor to cause a subsequent adverse employment decision, even when the decision is made by someone else without such animus.

What should you as an employer take away from this development? There will undoubtedly be much more analysis of Tuesday's Supreme Court decision in the coming days, including possible limitations of the Court's holding, and the likely applicability of the holding to other types of discrimination claims. In the meantime, this case should serve to remind you that your company may no longer be completely insulated from potential liability just because a decision maker did not - himself or herself - have any discriminatory animus against the subject of the adverse action.

One area where this can become particularly complicated is in social media, and particularly with respect to whether employers should utilize social media (including social networking sites) to obtain information about current employees or potential hires. As we all know by now, companies continue to use social media for various employment-related decisions in increasing numbers. Often the information posted by individuals on their personal social media profiles provides information that is not relevant to any business-related decision. Or worse,

the information may be of the type that cannot lawfully be considered by the company for any decisions, and would not be the type of information about which the company could lawfully inquire of the individual outside the realm of social media. Examples of such type of information include potential knowledge about an employee's age, marital status, pregnancy, disabilities, sexual orientation, organizational affiliation, and even off-duty lawful activities.

Employers need to be careful that the information that they are pulling from these sites do not affect their decisions on employment or termination, whether the person that obtained the information was the decision maker, or merely someone reporting to the decision maker.

Tuesday's Supreme Court ruling suggests that when it comes to the decision making process, it is now more critical than ever that the decisions and decision makers are effectively sterilized from any potentially unlawful motivations developed by those who are tasked with obtaining social media information, and who may end up with more information than they perhaps wanted.

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