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DISCRIMINATION IN THE AGE OF SOCIAL MEDIA: THE NEW DANGERS OF CAT'S PAW LIABILITY

*Taylor N. Brailey**

The increase of Internet technology has brought human interaction to an unprecedented level of complexity.¹ Individuals now find ways to stay connected to one another through online platforms, such as increasingly-popular social media websites.² These websites are characterized, among other things, by the efficiency with which individuals may share personal information within a certain network of people. This increase in information sharing and inter-connectedness has prompted state legislatures to recognize the need for legislation to protect employee privacy, and many states have acted on that need.³ To date, twenty-five states have passed laws that limit an employer's ability to require or request usernames and passwords or to otherwise require access to employee and prospective employee social media profiles,⁴ and another fifteen states are considering similar legislation.⁵ These laws provide guidance to employers on how to respect the individual privacy interests of current and potential employees.

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¹ See Guo-Ming Chen, *The Impact of New Media on Intercultural Communication in Global Context*, 8(2) CHINA MEDIA RESEARCH 1, 3 (2012) (discussing the impact of new media on globalization).

² See, e.g., *Top sites in United States*, ALEXA INTERNET, <http://www.alexa.com/topsites/countries/US> (indicating that at least five of the top twenty-five most visited sites in the United States—YouTube, Facebook, Twitter, LinkedIn, Instagram—are social media sites) (last visited Dec. 30, 2015).

³ See Katrina Grider, *The "Best of" Litigation Update 2015: Employment Law Update*, 70 THE ADVOC. 138 (2015) ("The legislative torrent has been virtually unprecedented in the area of workplace privacy.").

⁴ See *State Laws About Social Media Privacy*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-usernames-and-passwords.aspx#stat> (Jan. 11, 2017).

⁵ See *Access to Social Media Usernames and Passwords*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx> (Nov. 18, 2016).

As a necessary consequence of their implementation, employee social media privacy laws have prevented at least some discrimination by employers.⁶ Employers are to refrain from requesting any type of access to employee or prospective employee social media accounts, and are also well-advised to hire third parties to monitor any such profiles when monitoring is believed to be necessary.⁷ While failure to follow these rules can result in unwanted legal consequences,⁸ abiding by them might also give employers a false sense of security against liability for employment practices.

Most research dealing with employer liability for discrimination based on information accessed through social media examines situations in which an employer gains access to protected information about an employee through the employee's social media account(s), and accordingly takes adverse action against the employee.⁹ This Note explores a similar, but generally overlooked situation: when employees themselves are *lawfully* connected with one another on various social media platforms, exposing coworkers to personal information about one another.¹⁰ This exposure creates a risk—albeit an indirect one—for even those employers that strive to avoid discriminatory decision-making.

Part I of this Note discusses current employee privacy protections, including recent state social media privacy laws and their relevant similarities and differences. Part II discusses current employment-related anti-discrimination laws, and provides an overview of how courts analyze

⁶ See Mark Bannister et al., *Striking Gold, Not Dynamite When Using Social Media in Employment Screening*, 32 HOFSTRA LAB. & EMP. L.J. 1, 21–22 (2014) (“By searching Facebook or other social media sites, a potential employer may become . . . aware of protected class information. If an employer uses this protected class information in hiring, the employer will have intentionally violated the relevant federal and state statutes.”) (footnote omitted).

⁷ C. David Morrison & Robert L. Bailey, *Employee Privacy Rights: Employer Monitoring and Investigating Employees' Electronic Activities and Communications*, 32 ENERGY & MIN. L. INST. 3, 87–88 (2011).

⁸ See discussion *infra* Part III.B.

⁹ See, e.g., Bannister et al., *supra* note 6 (discussing employers' explicit use of protected class information in employment decisions).

¹⁰ See Janna Andersen & Lee Rainie, *Millennials Will Make Online Sharing in Networks a Lifelong Habit*, PEW RESEARCH CTR., (July 9, 2010), <http://www.pewinternet.org/2010/07/09/millennials-will-make-online-sharing-in-networks-a-lifelong-habit/> (finding that the general pattern of disclosure on social media that characterizes the millennial generation now, will likely remain constant until at least the year 2020).

associated individual disparate treatment cases.¹¹ Part III explores the heightened potential for employer discriminatory liability that results from the expansion of information sharing on social media websites. Part III also surveys recent cases in which employers were exposed to liability by gathering information that led to discovery of covert protected characteristic information of a current or prospective employee. Indeed, even when employers abide by existing social media privacy laws, they may have a false sense of security against liability for workplace discrimination. Part IV argues that, because the Internet has transformed the world into a highly interconnected information hub, *Staub v. Proctor Hospital*'s theory of "cat's paw" liability¹² should not be expanded to allow employer liability for the discriminatory animus of non-supervisory employees.

I. EMPLOYEE PRIVACY PROTECTIONS ONLINE

Employees with personal social media accounts are protected from intrusions into their privacy through both state social media privacy laws¹³ and the Federal Stored Communications Act (SCA).¹⁴ Although federal

¹¹ In an individual disparate treatment claim, an employee alleges that he or she was intentionally discriminated against on the basis of a protected characteristic. *See also* discussion *infra* Part II.

¹² Judge Posner coined the "cat's paw liability" phrase in employment discrimination law in *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). The term "cat's paw" is derived from a 17th century fable in which a cat burns its paws after being lured into getting chestnuts from an open fire by a deceptive monkey. The idea, then, is that an employee can hold an innocent employer (the cat) responsible for the discriminatory animus of a supervisor (the monkey). Under the so-called "cat's paw" theory of liability, an employer can be held liable for discriminatory animus of one of its employees, when that animus (directly or indirectly) leads to an adverse action against the employee. *See also* discussion *infra* Part II.B.

¹³ Employers conducting business in a number of states are bound by the following social media privacy statutes: ARK. CODE ANN. § 11-2-124 (West 2013); CALIF. LAB. CODE § 980 (West 2014); COLO. REV. STAT. ANN. § 8-2-127 (West 2013); CONN. GEN. STAT. ANN. § 31-40x (West 2016); DEL. CODE ANN. tit. 19, § 709A (West 2016); 820 ILL. COMP. STAT. ANN. 55/10 (West 2014); LA. STAT. ANN. §§ 51:1951–1955 (West 2014); ME. REV. STAT. ANN. tit. 26, §§ 616–19 (West 2015); MD. CODE ANN., LAB. & EMPL. § 3-712 (West 2013); MICH. COMP. LAWS ANN. § 37.273 (West 2015); MONT. CODE ANN. § 39-2-307 (West 2015); NEV. REV. STAT. ANN. § 613.135 (West 2013); N.H. REV. STAT. ANN. § 275:74 (2014); N.J. STAT. ANN. § 34:6B-5-10 (West 2013); N.M. STAT. ANN. § 50-4-34 (West 2013); OKLA. STAT. ANN. tit. 40, §§ 173.2, 173.3 (West 2014); OR. REV. STAT. ANN. § 659A.330 (West 2016); 28 R.I. GEN. LAWS ANN. §§ 28-56-1 to 28-56-6 (West 2014); TENN. CODE ANN. §§ 50-1-1001 to 50-1-1004 (West 2015); UTAH CODE ANN. §§ 34-48-201 *et seq.* (West 2013); VA. CODE ANN. § 40.1-28.7:5 (West 2015); WASH. REV. CODE ANN. §§ 49.44.200, 205 (West 2013); WIS. STAT. ANN. § 995.55 (West 2014).

¹⁴ The Federal Stored Communications Act, 18 U.S.C.S. §§ 2701-11 (2016), provides that whoever

social media privacy legislation has been proposed numerous times,¹⁵ nothing has been enacted, leaving states to address the issue of social media privacy in the workplace on an individualized basis.¹⁶ As a result, the current state of social media protection law is varied and complex.¹⁷ Indeed, “one of the only points of uniformity” among these state laws is the basic prohibition they place upon employers to refrain from requesting or requiring that applicants or employees disclose their username, password, or other information needed to access a personal social media account.¹⁸ Most of the statutes place this prohibition on *employers* only, and typically define “employer” in a way that includes the employer’s representatives or agents.¹⁹

The laws, indeed, prevent what could be employer coercion. By asking employees or prospective employees to share their social media usernames and/or passwords, an employer places its employees in a difficult situation. If an employee denies the employer’s request, he or she risks being viewed negatively. On the other hand, if an employee provides the requested access, the employer is now privy to potentially sensitive, personal information about the employee’s private life. What the state laws fail to contemplate, however, are situations in which employees are *lawfully* connected with their employers, supervisors, or other employees. The assumption here is that the

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility, and thereby obtains, alters, or prevents the authorized access to a wire or electronic communication while in electronic storage in such a system shall be liable for damages.

See also Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 961 F. Supp. 2d 659, 666 (D.N.J. 2013) (explaining that Facebook wall posts fall within the purview of the Stored Communications Act). The SCA also provides an “authorized user exception,” in which a user can opt to authorize access to a normally-restricted website. *See id.* at 669 (citing Pietrylo v. Hillstone Rest. Grp., 2009 U.S. Dist. LEXIS 88702, at *2 (D.N.J. Sept. 25, 2009)).

¹⁵ The proposed federal legislation is the Social Networking Online Protection Act (SNOA), H.R. 537, 113th Cong. (2013).

¹⁶ *See* sources cited *supra* note 13.

¹⁷ *See* Brittance L. Friedman, Note, #PasswordProtection: Uncovering the Inefficiencies of, and Not-So-Urgent Need for, State Password-Protection Legislation, 48 SUFFOLK U. L. REV. 461, 477–78 (“The language of these state laws endeavors to protect against the same employer practices, but the laws’ inconsistencies create a ‘complex patchwork’ of laws of varying scopes.”)

¹⁸ Grider, *supra* note 3, at 182.

¹⁹ *See* sources cited *supra* note 13.

employer did not *request* or *require* access in any way, and therefore did not violate any applicable state law.²⁰

Research shows that the aforementioned privacy laws may be largely unnecessary—that employers are generally advised to refrain from requesting access to employee social media profiles in the first place.²¹ But in an increasingly connected world where individuals are inclined to share exceedingly personal information about themselves on the Internet, even those employers that take steps to avoid fault by abiding by state social media privacy laws and the SCA may remain blind to the possibility of incurring liability for discrimination through biases of their other employees, who, as co-workers, are even more likely to be connected with one another online.²²

II. INDIVIDUAL DISCRIMINATION LAW

Since 1963, Congress has passed several laws that prohibit employers from discriminating against individuals when making employment decisions. In 1963, Congress passed the Equal Pay Act (EPA), which mandates that

²⁰ It is admittedly true that prevention of discrimination is not a stated purpose of most of the state social media privacy laws. However, preventing discrimination *is* one reason that employers are often advised to refrain from actually searching for information about an employee online. See Jennifer Valentino-Devries, *Bosses May Use Social Media to Discriminate Against Job Seekers*, WALL ST. J. (Nov. 20, 2013), <https://www.wsj.com/articles/SB1000142405270230375504579208304255139392> (explaining that while employers avoid asking questions about personal information in interviews, technology now makes it easier to find such information: “[Q]uotes from a religious text could indicate a person’s religious beliefs, for example, while mentions of a baby registry might suggest a woman is pregnant or has children.”).

²¹ See Kate Bally, *Top Ten Considerations When Using Social Media in the Hiring Process*, ASS’N CORP. COUNSEL (May 29, 2014), <http://www.acc.com/legalresources/publications/topten/ttcwsmithp.cfm?makepdf=1> (discussing guidelines to employers with respect to monitoring of employee or applicant social media profiles).

²² See Charlie Osborne, *Generation Y ‘Friending’ Facebook colleagues, insight on career prospects*, ZDNET (Jan. 9, 2012), <http://www.zdnet.com/article/generation-y-friending-facebook-colleagues-insight-on-career-prospects-survey/> (“The Gen Y are using social networks as an extension of their professional profile, even though they are also using the same platforms to socialize with family and friends. Sixty-four percent of the group do not list their employer on their profiles, yet they add an average of 16 co-workers each to their contact lists.”); *id.* (clarifying that 84 percent include at least one connection with a coworker on their social media profile; 53 percent have five or more; and 40 percent friend more than ten); see also Kenneth Olmstead et al., *Social Media and the Workplace*, PEW RESEARCH CTR. (June 22, 2016), <http://www.pewinternet.org/2016/06/22/social-media-and-the-workplace/> (finding that 17 percent of workers use social media on the job in order to learn about someone they work with).

individuals cannot be paid differently on the basis of their sex.²³ Title VII of the Civil Rights Act of 1964 prohibits employers from taking adverse employment actions against employees or prospective employees on the basis of race, color, religion, sex, or national origin.²⁴ In addition, the Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees that are forty years of age or older,²⁵ and the Americans with Disabilities Act (ADA) prohibits employers from making hiring decisions or altering application procedures in ways that adversely affect individuals with disabilities.²⁶ Most recently, the Genetic Information in Nondiscrimination Act of 2008 (GINA) was enacted to prohibit employers from receiving any type of access to its employees' genetic information—namely, their family medical history.²⁷ In an effort to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [traditionally advantaged] employees over other employees,” workplace anti-discrimination laws provide causes of action to certain groups of employees who believe that their employer has intentionally and unlawfully discriminated against them.²⁸

A. Application of Discrimination Laws

Courts enforce individual discrimination laws in one of two ways. In 1973, the Supreme Court first established a three-part burden-shifting framework.²⁹ This burden-shifting framework, now widely known as the “pretext model,” operates such that even circumstantial evidence of discrimination may allow a factfinder to infer that intentional discrimination has, in fact, occurred.³⁰ An employee alleging intentional discrimination

²³ 29 U.S.C. § 206(d)(1) (2016).

²⁴ 42 U.S.C. § 2000e-2(a) (2016).

²⁵ 29 U.S.C. §§ 621–34 (2016).

²⁶ 42 U.S.C. § 12112(a) (2016).

²⁷ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified at 42 U.S.C. § 2000ff-1(a)).

²⁸ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1972)).

²⁹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

³⁰ *Id.* at 804–06.

carries the burden of proof,³¹ and must first plead facts that establish a *prima facie* case of discrimination.³² Namely, an employee must show that (1) he or she is a member of a protected class; (2) he or she was qualified for the job in question; (3) that an adverse action occurred; and (4) that the circumstances give rise to an inference of discrimination.³³ In a discriminatory hiring case, the “inference of discrimination” could be met by showing that “the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.”³⁴ Once a plaintiff-employee establishes a *prima facie* case, it creates an inference of discrimination, which the employer can rebut with evidence that discrimination was not the reason for the adverse action—that the plaintiff-employee was, instead, rejected for a legitimate, non-discriminatory reason.³⁵ An employer meets its burden by simply *articulating* any non-discriminatory reason for its action.³⁶ Indeed, employers have a burden of production, not persuasion, and their fulfillment of this burden eliminates the presumption of discrimination originally established by the plaintiff’s *prima facie* case.³⁷

If an employer provides, and the court accepts, a legitimate non-discriminatory reason for its action, then the burden shifts back to the plaintiff-employee, who must produce evidence to show that the so-called non-discriminatory reason articulated by the employer is simply a pretext for discrimination.³⁸ The evidence of pretext can be circumstantial, creating an issue of fact, as long as it shows that the employer’s alleged reason is not the true reason for the adverse action in question.³⁹ In introducing the pretext model in *McDonnell Douglas v. Green*, the Supreme Court suggested some types of evidence that could be sufficient to prove pretext, including:

³¹ See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”) (citations omitted).

³² *McDonnell Douglas Corp.*, 411 U.S. at 802.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 802–03.

³⁶ See, e.g., *id.* at 802 (emphasis added).

³⁷ *Id.* at 803 (“Here petitioner [McDonnell Douglas Corp.] has assigned respondent’s participation in unlawful conduct against it as a cause for his rejection. We think this suffices to discharge petitioner’s burden of proof at this stage and to meet respondent’s *prima facie* case of discrimination.”).

³⁸ *Id.* at 804–06.

³⁹ *Id.*

negative prior treatment of the employee during his or her employment, use of comparators,⁴⁰ and evidence that could reveal the employer's general policy or practice of discrimination.⁴¹ When an employee or prospective employee provides evidence that meets its pretext burden, the question of whether there was intentional discrimination on the basis of a protected characteristic is one of fact.⁴²

In 1988, the Supreme Court contemplated a second model for examining cases of individual discrimination when it was confronted with a unique set of facts in *Price Waterhouse v. Hopkins*.⁴³ The plaintiff, a female senior manager, sued her employer, Price Waterhouse, for its failure to promote her to partner level, alleging that the employer's action constituted discrimination on the basis of sex, a violation of Title VII.⁴⁴ Price Waterhouse admitted that it refused to promote her to partner because a significant percentage of the hiring committee viewed her as overly aggressive, abrasive, and difficult to work with.⁴⁵ On that basis, Price Waterhouse argued that the plaintiff could not show that she would have been promoted to partner if it were not for her status as a female, as was necessary to prove intentional discrimination under Title VII—she could not prove that but-for her sex, she would have been promoted.⁴⁶ The Supreme Court disagreed with the employer's argument, holding that when an employee proves that his or her protected class status played a role in an adverse employment action, the employer must then prove by a preponderance of the evidence that it would have made the same decision without consideration of the protected characteristic in question.⁴⁷ In doing so, the Court provided a cause of action to a class of cases that the pretext model could not reach, through what is

⁴⁰ For example, the Court noted that it would be “especially relevant to . . . a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the ‘stall-in’ were nevertheless retained or rehired.” *Id.* at 805.

⁴¹ *Id.* at 804–05.

⁴² See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 154–55 (2000) (“Given that petitioner [employee] established a prima facie case of discrimination, introduced enough evidence for the jury to reject respondent's explanation, and produced additional evidence of age-based animus, there was sufficient evidence for the jury to find that respondent [employer] had intentionally discriminated.”).

⁴³ 490 U.S. 228 (1988).

⁴⁴ *Id.* at 231–32.

⁴⁵ *Id.* at 234–35.

⁴⁶ *Id.* at 240.

⁴⁷ *Id.* at 258.

now labeled the “mixed-motive” framework of analysis.⁴⁸ In enacting the Civil Rights Act of 1991, Congress codified the mixed-motive framework, providing employees with a cause of action against discriminatory employers when an employer’s legitimate non-discriminatory reason for its adverse action is inextricably intertwined with a stereotype specific to a protected class.⁴⁹ The current consensus is that the mixed-motive framework, like the pretext framework, allows plaintiff-employees to succeed on a claim of individual discrimination short of any direct evidence of such discrimination.⁵⁰

Because neither of the frameworks requires direct evidence of discrimination, the proper application of one over the other is unclear.⁵¹ More importantly, the mere fact that circumstantial evidence of discrimination suffices to prove that such discrimination occurred can be problematic in and of itself.⁵² This Note focuses on a particular type of circumstantial evidence of discrimination, which proves to be especially problematic: discriminatory animus of agents of the employer, rather than the employer itself.⁵³

⁴⁸ See *Univ. of Tex. Southwestern Med. Ctr. v. Nassar*, 113 S. Ct. 2517, 2534 (2013) (“*Price Waterhouse* adopted a complex burden-shifting framework. Congress displaced this framework by enacting § 2000e-2(m) (which adopts the motivating-factor standard for status-based discrimination claims) . . .”).

⁴⁹ Pub. L. No. 102-166 § 107, 105 Stat. 1071 (1991) (codified at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B) (2016)). The Supreme Court has declined to extend application of the mixed-motive framework to age discrimination cases under the ADEA. See *Gross v. FLB Fin. Servs., Inc.*, 557 U.S. 167, 180 (2009).

⁵⁰ *Desert Palace v. Costa*, 539 U.S. 90, 99–101 (2003) (holding that 42 U.S.C. § 2000e-2(m) does not require plaintiffs to produce direct evidence of discrimination).

⁵¹ See Maya R. Warner, Note, *Dare to Step Out of the Fog: Single-Motive Versus Mixed-Motive Analysis in Title VII Employment Discrimination Cases*, 47 U. LOUISVILLE L. REV. 409, 421–22 (explaining that while lower courts have, in large part, determined that the models are alternatives that the plaintiff may select when bringing his or her intentional discrimination case, there is still conflict regarding the correct application of the two frameworks). Furthermore, the Supreme Court’s decision in *Desert Palace* failed to indicate whether the mixed-motive framework would completely supplant the pretext framework.

⁵² See discussion *infra* Part II.B.

⁵³ See discussion *infra* Part II.B.

B. Circumstantial Evidence of Intentional Discrimination: Staub and Cat's Paw Liability

In *Staub v. Proctor Hospital*,⁵⁴ the Supreme Court examined whether a supervisor's animus against an employee for his military obligations, coupled with the employer's adverse action on the basis of that animus, could serve as anti-military discrimination in violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).⁵⁵ The Court held that the supervisor's anti-military animus, along with the employer's resultant adverse action violated USERRA.⁵⁶ After *Staub*, a supervisor's discriminatory animus against an employee that induces an employer to take an adverse action against an employee can serve as evidence of pretext in the pretext model, as well as circumstantial evidence of discrimination as a motivating factor under the mixed-motive model.⁵⁷ This so-called "cat's paw liability" provides plaintiffs with a broad opportunity for success in claims of intentional employment discrimination, and expands employers' exposure to liability under those claims.⁵⁸

Narrowing the opinion in *Staub*, the Supreme Court indicated in a footnote that it did not intend to express a view on "whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."⁵⁹ Most lower courts appeared to follow this narrow interpretation of *Staub*, declining to extend such "cat's paw liability" to an employer accused of an adverse action against an employee based on a non-supervisor employee's

⁵⁴ *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011).

⁵⁵ 38 U.S.C. §§ 4301–4333 (2016).

⁵⁶ *Staub*, 562 U.S. at 422. *See also* Saviano v. Town of Westport, 2011 U.S. Dist. LEXIS 112722, at *23 (D. Conn. Sept. 30, 2011) (describing employer liability under *Staub* as a situation in which "a non-decision-maker with a discriminatory motive dupes an innocent decision-maker into taking action against the plaintiff").

⁵⁷ *See Staub*, 562 U.S. at 422.

⁵⁸ As explained *supra* note 12, this type of discrimination is described by the term "cat's paw" based on a 17th century fable in which a cat burns its paws after being lured into getting chestnuts from an open fire by a deceptive monkey. Similarly, an employee can hold an innocent employer (the cat) responsible for the discriminatory animus of a supervisor (the monkey).

⁵⁹ *Staub*, 562 U.S. at 422 n.4.

discriminatory animus.⁶⁰ A number of other courts, however, including the First, Second, and Seventh Circuit Courts of Appeal and various district courts, have declined to preclude such a possibility.⁶¹ What began as courts *inferring* that employers could be liable for co-worker animus under the cat's paw theory⁶² has now evolved into many courts *expressly* holding that employers are, in fact, liable under the theory for the animus of a co-worker.

For example, in 2012, a district court within the Seventh Circuit, while denying a plaintiff's motion for summary judgment, indicated that the plaintiff would "not [have] be[en] precluded from asserting a claim based on a cat's paw theory of liability simply because . . . [the employee who allegedly had discriminatory animus towards the plaintiff] was a co-worker and not a supervisor."⁶³ Later, the Seventh Circuit Court of Appeals issued two decisions that gave further insight into its views on the matter: in *Matthews v. Waukesha County*, the court dismissed a plaintiff's claim against her employer for the alleged discriminatory animus of a human resources assistant employee, but nevertheless declined to foreclose the possibility that such an employee could serve as a source of discriminatory animus in disparate treatment claims.⁶⁴ In *Simpson v. Beaver Dam Community*

⁶⁰ John S. Collins, Note, *Another Hairball for Employers? "Cat's Paw" Liability for the Discriminatory Acts of Co-Workers After Staub v. Proctor Hospital*, 64 BAYLOR L. REV. 908, 926–28 (2012).

⁶¹ See *Vasquez v. Empress Ambulance Serv.*, 835 F.3d 267, 269 (2d Cir. 2016); *Simpson v. Beaver Dam Cmty. Hosps., Inc.*, 780 F.3d 784, 798 (7th Cir. 2015); *Matthews v. Waukesha Cnty.*, 759 F.3d 821, 829 (7th Cir. 2014); *Velazquez-Perez v. Developers Diversified Realty Corp.*, 735 F.3d 265, 273 (1st Cir. 2014); see also *Burlington v. News Corp.*, 55 F. Supp. 3d 723, 739–39 (E.D. Pa. 2014); *Alamjamily v. Berglund Chevrolet, Inc.*, 2011 WL 1479101, at *11 n.3 (W.D. Va. Apr. 18, 2011).

⁶² See, e.g., *Matthews*, 759 F.3d at 829 (failing to uphold the plaintiff's claim of cat's paw liability on grounds other than the fact that the employee allegedly involved was non-supervisory); *Johnson v. Koppers, Inc.*, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012); *Alamjamily*, 2011 WL 1479101, at *11 n.3 (noting that the plaintiff's failure to claim that anyone other than the decision-maker influenced his termination precluded the application of a cat's paw theory of liability, thus suggesting that even a non-supervisory employee may have the requisite discriminatory animus to impose *Staub*-like liability onto his or her employer if the employee has some decision-making power).

⁶³ *Johnson*, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012); see also Collins, *supra* note 60. But see *Schandelmeier-Bartels v. Chicago Park Dist.*, 634 F.3d 372, 380–81 (7th Cir. 2011) (noting that in a situation in which a plaintiff asserts cat's paw liability on the basis of employee animus, that plaintiff must put forth evidence showing that the "biased voice mattered" and that the employee with the asserted bias had "decisive input in the decision").

⁶⁴ *Matthews*, 759 F.3d at 829 (reaffirming a prior Seventh Circuit decision, *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012), in explaining that liability under the cat's paw theory "can be imposed where a non-

Hospitals, a decision issued months later, the court stated that “an employer can be held liable where a non-decision-making *employee* with discriminatory animus provided factual information or input that may have affected the adverse employment action.”⁶⁵

Two recent decisions by the First and Second Circuit Courts of Appeal prove to be even more significant, demonstrating some courts’ willingness to expressly extend liability to employers under a cat’s paw theory even when a non-supervisory co-worker is involved. In *Velazquez-Perez v. Developers Diversified Realty* and *Vasquez v. Empress Ambulance Service*, the First and Second Circuits expressly held the following:

[A]n employer can be held liable under Title VII if: the plaintiff’s co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff’s firing; the co-worker’s discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker’s acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.⁶⁶

III. ONLINE SOCIAL MEDIA: THE HEIGHTENED EXPOSURE OF EMPLOYERS TO DISCRIMINATORY LIABILITY

A social media website is an online forum where the majority of the content on the site is user-generated, there is a high level of interaction between its users, and in which the website is easily integrated with other websites.⁶⁷ Social media websites include various online platforms, including the increasingly prevalent social networking websites such as Facebook,

decision-making employee with discriminatory animus provided factual information or input that may have affected the adverse employment action”).

⁶⁵ *Simpson*, 780 F.3d at 798 (emphasis added) (internal quotations omitted). However, non-decision-making employee statements are unlikely to be admitted as evidence under Federal Rule of Evidence 801(d)(2)(D). See *Herbert v. JPMorgan Chase Bank, N.A.*, No.13 C 4358 2016 U.S. Dist. LEXIS 6801 (N.D. Ill. Jan. 21, 2016) (discussing non-decision-making employees’ statements as they relate to the federal rules of evidence, stating that “[a] coworker’s out-of-court statement may fall outside the hearsay rule under [Rule] 801(d)(2)(D), but only if the coworker’s duties encompassed some responsibility related to the decision-making process affecting the employment action”) (internal quotations omitted) (citations omitted).

⁶⁶ *Velazquez-Perez*, 735 F.3d 265, 274 (1st Cir. 2014); *Vasquez*, 835 F.3d 267, 274 (2d Cir. 2016) (agreeing with the First Circuit’s holding).

⁶⁷ *History of Communication from Cave Drawings to the Web*, CREATIVE DISPLAYS NOW!, <http://www.creativedisplaysnow.com/articles/history-of-communication-from-cave-drawings-to-the-web/> (last visited Jan. 10, 2016).

Twitter, YouTube, LinkedIn, and Instagram.⁶⁸ These platforms promote the sharing of a wide range of information between users who “connect” with one another.⁶⁹

Facebook, the most popular social networking website, is unique in that it allows individuals to share the most expansive amount and forms of information.⁷⁰ Users, who connect with other users by becoming “friends,” may “post” a myriad of information about topics such as their current mood, their views on current news stories, or events in their own daily lives.⁷¹ Unhindered by a word, photograph, or character limit, Facebook users may choose to include links to other websites, attach photos or documents, and—absent specification of a particular desired audience—each post is communicated to all of a user’s “friends.”⁷² Individuals inherently increase the amount of information they divulge, or, conversely, that they receive, by the simple act of logging onto their (often numerous) social media accounts.

A. Non-Discriminatory Employment Actions on the Basis of Social Media Postings

It is important for employers to protect their reputations and to ensure that employees refrain from divulging trade secrets online,⁷³ and nothing prevents employers from monitoring their employees’ social media accounts for such information, nor are employers substantively limited in monitoring for falsified information that harms their reputation.⁷⁴ Employers are simply

⁶⁸ See *Top sites in United States*, *supra* note 2.

⁶⁹ For example, two individuals who mutually become “friends” on Facebook can view each other’s status postings and pictures, and can post things onto each other’s respective Facebook profiles for other “friends” to see. Similarly, individuals possessing an Instagram or Twitter account can post pictures or thoughts for others who “follow” the individual to see—if an individual opts to make his or her Instagram or Twitter account “private,” only those “accepted” users will be able to view the content posted.

⁷⁰ FACEBOOK, <https://www.facebook.com> (last visited Jan. 10, 2016).

⁷¹ See *Reid v. Ingerman Smith, LLP*, 2012 U.S. Dist. LEXIS 182439 (N.Y.E.D.C. 2012) (“Courts have found, particularly in cases involving claims of personal injuries, that social media information may reflect a plaintiff’s emotional or mental state, her physical condition, activity level, employment, this litigation, and the injuries and damages claimed.”) (citing *Sourdiff v. Texas Roadhouse Holdings, LLC*, 2011 WL 7560647, at *1 (N.D.N.Y. 2011)) (internal quotations omitted).

⁷² *Contra* TWITTER, <https://twitter.com> (last visited Jan. 10, 2016) (limiting users to sharing “tweets” that are 140 characters or less).

⁷³ Morrison & Bailey, *supra* note 7, at 84–114.

⁷⁴ Katrina Grider, *The “Best of” Litigation Update 2015: Employment Law Update*, 70 THE ADVOCATE 138, app’x 14 (2015) (“An employee’s comments on social media are generally not protected

encouraged to hire an outside party for any necessary monitoring.⁷⁵ The simple act of hiring a third party to monitor social media can protect against unwanted liability on the part of employers by preventing the employer's own development of any possible discriminatory animus.⁷⁶ In lawfully monitoring the social profiles of employees, employers may, indeed, discover information that they (rightfully) have the power to act upon, without exposure to liability under discrimination laws or the National Labor Relations Act (NLRA).⁷⁷

Several situations in which employers lawfully took adverse actions on the basis of social media posts of employees illustrate this idea. In 2009, Domino's, a well-known pizza delivery chain, fired two employees and brought criminal charges against them after the employer discovered that the employees posted a video that resulted in severe damage to the company's reputation.⁷⁸ Similarly, Virgin Airlines fired a number of its employees after they unduly criticized their employer's safety standards on Facebook.⁷⁹ And, in the wake of the "Black Lives Matter" protests in Ferguson, Missouri, a hospital in Texas lawfully fired an employee after she posted a "very racist" comment about the protest on Facebook.⁸⁰

if they are mere gripes not made in relation to group activity among employees." In the context of public employment, see *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007) (holding that a sheriff's department was justified in terminating a corrections officer when evidence showed that the officer made statements on a union website comparing the Sheriff to Hitler).

⁷⁵ See Valentino-Devries, *supra* note 20 (noting an employment law specialist's advice to employers to ensure that they "control the information [they] receive so [they]'re only getting information that is legal for [them] to take into account.").

⁷⁶ However, a third party, although hired for their ability to remain neutral, may inform the employer one way or another, without recognizing their own fallibility due to subconscious stereotypes.

⁷⁷ 29 U.S.C. §§ 151–69 (2016). The NLRA prohibits employers from encouraging or discouraging membership in a labor organization as a term or condition of employment, or in regard to the hire or tenure of employment. *Id.* at § 158(a)(3). More significantly, it deems it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of . . ." their "right to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." *Id.* at §§ 157, 158(a)(1).

⁷⁸ Stephanie Clifford, *Video Prank at Domino's Taints Brand*, N.Y. TIMES (Apr. 15, 2009), http://www.nytimes.com/2009/04/16/business/media/16dominos.html?_r=0.

⁷⁹ Ben Quinn, *Virgin sacks 13 over Facebook 'chav' remarks*, THE GUARDIAN (Oct. 31, 2008), <http://www.theguardian.com/business/2008/nov/01/virgin-atlantic-facebook>.

⁸⁰ *Woman Fired for this Facebook Post About Ferguson*, HLNTV (Aug. 22, 2014), <http://www.hlntv.com/article/2014/08/22/ferguson-facebook-fired-hospital-employee>.

B. Discriminatory Liability for Employment Actions Made on the Basis of Information Obtained from the Internet

The type of information that users share today has become exceedingly personal.⁸¹ While studies indicate that young adults ages 18–29 are likely to change their privacy settings to limit what others can view on their social networking profiles,⁸² these individuals are generally “more likely to have posted a wide range of personal digital content online.”⁸³ Often, the personal information shared with those connections contains details revealing an individual’s attributes that may be protected, such as national origin, race, gender, religion, age, pregnancy, and disability status.⁸⁴ Indeed, “[q]uotes from a religious text could indicate a person’s beliefs . . . while mentions of a baby registry might suggest a woman is pregnant or has children.”⁸⁵ “A tweet can reveal [one’s] place of worship[; a] blog post can imply [one’s] sexual orientation . . . [and a] comment on Facebook or an image on a social media profile can suggest [one’s] family status.”⁸⁶ The increasingly personal nature of information posted creates vulnerability for employers when employees share information exposing a protected characteristic that is not otherwise necessarily apparent—for example, religion, disability status, and pregnancy.

While this Note examines discriminatory animus by employees or supervisors against a co-worker based on information gained through social media interactions, most recent cases addressing discrimination in light of social media usage have dealt with first-hand discriminatory intent of an employer who gained direct access to covert protected trait information

⁸¹ See Madden, Lenhart & Cortesi et al., *Teens, Social Media, and Privacy*, PEW RESEARCH CTR. 2–3 (2013), http://www.pewinternet.org/files/2013/05/PIP_TeensSocialMediaandPrivacy_PDF.pdf (finding that teens on social media in 2012 shared much more personal information than teens on social media in 2006).

⁸² Facebook, in particular, allows individuals to change their privacy settings in order to control who can see the information they choose to post.

⁸³ Mary Madden & Aaron Smith, *Reputation Management and Social Media: How people monitor their identity and search for others online*, PEW RESEARCH CTR. 2, 11 (2010), http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP_Reputation_Management_with_topline.pdf.

⁸⁴ Bally, *supra* note 21.

⁸⁵ Valentino-Devries, *supra* note 20.

⁸⁶ Kim Lyons, *CMU study finds employer discrimination via social media sites*, PITTSBURGH POST-GAZETTE (Nov. 27, 2013), <http://www.post-gazette.com/business/2013/11/28/Info-found-on-social-sites-can-be-off-limits/stories/201311280166>.

through an individual employee's social media account or similar website.⁸⁷ Researchers indicate that employers that find protected class information of applicants from the applicants' social media websites are likely to utilize that information in hiring decisions.⁸⁸ These cases shed light on the types of situations in which employers, previously unaware of individuals' membership in a protected class, were exposed to liability because they subsequently learned of protected employee information from social media.

In 2010, a district court in Kentucky confronted one such case.⁸⁹ In *Gaskell v. University of Kentucky*, the evidence indicated that the plaintiff, Martin Gaskell, was the top applicant for a job as the University of Kentucky observatory's founding director, until the employer found his personal website with an article entitled, "Modern Astronomy, the Bible and Creation."⁹⁰ Asserting that the employer utilized suggestions from his website that he may be a "creationist," to later deny him the position, Gaskell claimed that he had been discriminated against on the basis of his religion under Title VII.⁹¹ Because the employer received emails about the employee's religion from the employee's website, the employer could not prove that it was not on notice of the plaintiff's religion, and thus did not have a viable defense to the plaintiff's religious discrimination claim.⁹² The district court denied both parties' motions for summary judgment, concluding that the case presented an issue of material fact,⁹³ and later, the parties agreed to settle the case.⁹⁴

An Illinois district court was confronted with a similar issue—this time, the plaintiff in the case alleged age discrimination.⁹⁵ Namely, the plaintiff

⁸⁷ See Bannister et al., *supra* note 6 and accompanying text.

⁸⁸ Alessandro Acquisti & Christina M. Fong, *An Experiment in Hiring Discrimination Via Online Social Networks* (July 17, 2015), SSRN: <http://ssrn.com/abstract=2031979>; Valentino-Devries, *supra* note 20; Lyons, *supra* note 86.

⁸⁹ *Gaskell v. Univ. of Kentucky*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010).

⁹⁰ *Id.* at *10–11.

⁹¹ *Id.* at *2.

⁹² *Id.* at *11.

⁹³ *Id.* at *29–30.

⁹⁴ David Klinghoffer, *The Martin Gaskell Case: Not an Isolated Incident*, NAT'L REV. (Feb. 3, 2011), <http://www.nationalreview.com/corner/258892/martin-gaskell-case-not-isolated-incident-david-klinghoffer>.

⁹⁵ *Nieman v. Grange Mutual Casualty Co.*, No. 11-3404, 2012 U.S. Dist. LEXIS 59180 (C.D. Ill. Apr. 26, 2012).

claimed that the employer gained information about his age from an Internet search of his LinkedIn profile, and refused to hire him on that basis, in violation of the ADEA.⁹⁶ The court held that the plaintiff alleged sufficient facts to withstand the defendants' motions to dismiss his ADEA claims.⁹⁷

IV. *STAUB*'S DANGEROUS APPLICATION IN THE ERA OF INFORMATION SHARING: EMPLOYERS THAT ABIDE BY SOCIAL MEDIA PRIVACY LAWS STILL AT RISK

Employers generally have a valid defense to discrimination when they can show they were not aware of an employee's or potential employee's protected class status.⁹⁸ However, an employer's unawareness of an employee's protected class status is immaterial when the question is the discriminatory animus of a supervisor, or in many cases, a co-worker, which resulted in some adverse action.⁹⁹ The cat's paw theory of liability essentially permits plaintiffs to circumvent the knowledge requirement in ordinary discrimination law.

Staub clarified decades of confusion surrounding the application of the cat's paw theory of liability in employment law,¹⁰⁰ and has been recognized by some as a step in the right direction for anti-discrimination law.¹⁰¹ But even by eliminating one aspect of ambiguity in the doctrine, Justice Scalia, in one footnote, failed to address a question that now leaves employers in a more unstable position¹⁰²—especially those conducting business within and subject to the jurisdictions of the First, Second, and Seventh Circuit Courts

⁹⁶ *Id.* at *4–6.

⁹⁷ *Id.* at *9, *12.

⁹⁸ *See, e.g.,* Raytheon Co. v. Hernandez, 540 U.S. 44, 54 n.7 (2003) (in discussing an employer's liability for disability discrimination under the ADA, stating, "[i]f [the employer] were truly unaware that such a disability existed, it would be impossible for her hiring decision to have been based, even in part, on respondent's disability").

⁹⁹ *See* discussion *supra* Part II.B.

¹⁰⁰ *See* Benjamin Pepper, Note & Comment, *Staub v. Proctor Hospital: A Tenuous Step in the Right Direction*, 16 LEWIS & CLARK L. REV. 363, 367–81 (2012).

¹⁰¹ *Id.* at 377 (explaining that the Supreme Court's holding ensures that employers cannot insulate themselves from liability for discrimination, further perpetuating the purpose of anti-discrimination laws in the realm of employment).

¹⁰² The footnote, again, left open the question of whether an employer could ever be held liable for discriminatory animus of a co-worker, as opposed to a supervisor. *See supra* note 60 and accompanying text.

of Appeal.¹⁰³ Employers in those jurisdictions may be liable for the discriminatory animus of mere co-workers, and no law exists that discourages non-supervisory employees, acting outside of the scope of their employment, from connecting with one another on social media on their own accord. Even outside those jurisdictions, there exists a great possibility that even *supervisors* could be lawfully connected to lower-level employees on social media, exposing them to personal information.

Courts' willingness to extend *Staub* to reach discriminatory animus of non-supervisory co-workers, exemplified *supra* Part II.B., is dangerous and unfair in light of the technological advances and increased inclination of individuals to share personal information about themselves on their social media accounts. Under the current state of the law, employers are wrongfully exposed to liability for discrimination under the cat's paw theory of liability every day, whether or not they respect the privacy of employees' social media accounts.

V. CONCLUSION

The recently-enacted state social media privacy laws only provide so much protection to employers who abide by them. Indeed, the comingling of these privacy laws and the application of anti-discrimination laws through the *Staub* framework leave employers at risk regardless of whether they, or a supervisor in their employ, actively *request* any access to an employee's social media accounts.¹⁰⁴ The First, Second, and Seventh Circuit Courts of Appeal's interpretations of *Staub* are beyond the Supreme Court's contemplation,¹⁰⁵ and threaten liability for employers that otherwise take all necessary precautions to protect themselves and the privacy of their employees. The need to confine the application of cat's paw liability to discriminatory animus of supervisors is especially heightened in a society where information sharing is at an all-time high.

¹⁰³ See discussion *supra* Part II.B.

¹⁰⁴ Katy Steinmetz, *States Rush to Ban Employers from Asking for Social Media Passwords*, TIME (Apr. 9, 2013), <http://swampland.time.com/2013/04/09/states-rush-to-ban-employers-from-asking-for-social-media-passwords/> (“[E]mployers put themselves at risk if they do ask for access, however: should they learn information that they’re not allowed to consider when making a hire—that applicant is, say, pregnant—and then don’t give the applicant a job, they’ve opened themselves up to potential lawsuits.”).

¹⁰⁵ See *supra* notes 61–65 and accompanying text.