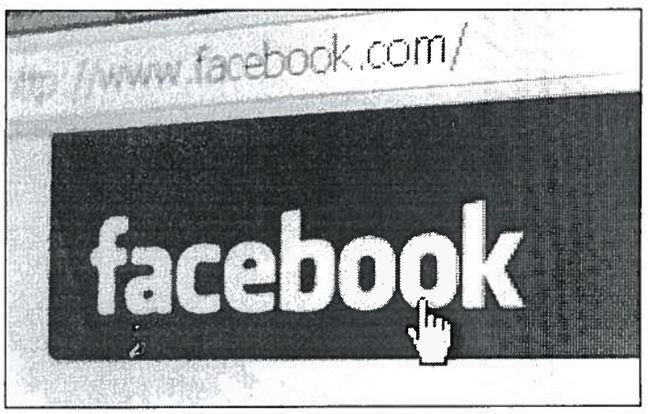
The Cat's Paw: How Social Media Can Lead You Astray

By Eli M. Kantor and Zachary M. Cantor

The pen has become even mightier since Facebook and its kin stepped into the courtroom. Today, courts consider social media posts to be beyond the purview of the right of privacy — and fully admissible in court. Now, with the state Supreme Court's recent decision of *Reid v. Google Inc.*, (2010) 50 Cal. 4th 512, employees can look to stray remarks to reinforce their case. And social media Web sites are a fertile field to unearth such discriminatory remarks.

Until *Google*, social media have mostly allowed employers to gain the upper hand against plaintiff employees. Cases like *Moreno v. Hanford Sentinel Inc.* (2009) 172 Cal.App.4th 1125 paved the way for social media content to appear more regularly in court. The *Moreno* court reasoned that the plaintiff had no privacy in her MySpace profile because it was provided "to the public at large. Her potential audience was vast." And so plaintiffs' attorneys have become leery of what lies in their clients' Facebook profile. Consider the terminated employee who sues her employer for sex discrimination and claims to suffer from severe emotional distress. Pictures posted on her Facebook profile of her smiling face as she slides off the ski lift in Vail, for example, betray her claim for emotional distress. But while social media allow employers to reap rewards from employees' brazen comments, now with *Google*, employees also have an expanded arsenal.



The court ruled in *Google* that California would not apply the federal "stray remarks" doctrine. The controversial rule bars from trial evidence, discriminatory remarks that non-decision makers utter. The *Google* court noted that, "the stray remarks doctrine contains a major flaw, because discriminatory remarks by a non-decision-making employee *can* influence a decision maker." To be sure, prior to the *Google* decision, stray remarks were only considered where the formal decision maker acted as the conduit of an employee's prejudice — a la "the cat's paw." But the court in *Google* expanded the cat's paw argument, reasoning that the remarks may become more significant when combined with other circumstantial evidence to have stronger probative value. The court also observed how courts have disagreed about the discriminatory remark's proximity in time to the firing, in order to categorize it as a stray remark.

Since the advent of social media, privacy seems a thing of the past, and gossip has risen to new heights. Of course, employers will be the least thrilled to learn about what their employees post on Facebook. Employee's comments on Facebook now serve as hard evidence of the cat's paw at work. And social media users are like addicts who feel compelled to comment, read comments, and comment on comments. Sarah Palin's recent Twitter use caught media attention, when she "favorited" an Ann Coulter Twitter message praising a church sign that dubbed President Barack Obama a "Taliban Muslim." Don't expect employees to use better discretion when commenting on other employees. That is why decision makers can be directly implicated when their employees make discriminatory remarks on Facebook or Twitter. Indeed, they can be caught red-handed.

Consider this example: Bobby, who loved Facebook, was an employee at Fat Cat Inc. Tommy was Bobby's manager, and also loved Facebook. Coincidentally, Bobby and Tommy were Facebook friends. But Bobby didn't particularly like his co-worker, Miles, who was many years Bobby's senior. One day, Miles made a presentation at the monthly company meeting. Bobby made comments on Facebook about how Miles' ideas at the presentation were "obsolete" and "too old to matter," and that he was an "old fuddy-duddy" who "lacked energy." Tommy read Bobby's comments and thought they were funny, so he clicked the "Like" button. A few months later, Tommy made the decision to fire Miles. In an action for age discrimination against Fat Cat Inc., Miles pointed to Bobby's Facebook posts as evidence of discriminatory animus.

Before the advent of Facebook, had Bobby made such comments in front of Tommy at the water cooler, Miles could have argued that Bobby's remarks influenced Tommy. But now with Facebook's "Like" button, let alone the ability to comment, Tommy need not even be in the same room as Bobby. Indeed, Tommy and Bobby need not ever have had a face-to-face conversation. Nevertheless, Bobby's comments are even more potent, because Tommy not only read them but also "Liked" them. With a simple request for production of documents, Miles could have the full Facebook profiles of both men in no time.

Moreover, comments posted on Facebook are archived, with the date and time noted for each post, comment, and "Like." Were there any question as to the frequency of Bobby's discriminatory remarks, Miles need only demand a full print out of his Facebook profile wall. Likewise, Miles could derive Tommy's amount and frequency of exposure to such comments from his Facebook activity. And Miles could infer from the frequency, tone and exact words used, how pervasive and influential Bobby's opinions were for Tommy.

Even if Tommy had never "Liked" Bobby's comments, that the two men were Facebook friends might be enough. Miles could argue that because Bobby and Tommy are Facebook friends, Bobby influenced Tommy's decision to fire him and Tommy acted as the conduit of Bobby's prejudice. And Tommy could have read Bobby's comments because, as Facebook friends, Tommy can read all of Bobby's posts.

Further, Miles could even compare the two profiles to see whether the two men were logged on and posting around the same time. Tommy need not have even commented on Bobby's posts. At most, Miles need only show that Tommy posted unrelated comments on his own wall around the same time Bobby was posting discriminatory comments. If so, Miles could easily argue that Tommy was exposed to the remarks — and those remarks influenced his decision to fire Miles.

In view of this, employers may consider formulating a more stringent social media policy. Companies might restrict managers from becoming Facebook friends with employees. Likewise, companies may be tempted to dissuade employees from posting Facebook comments about other co-workers. While some form of such policies are prudent, employers must be wary of Labor Code Section 96(k) as well as Section 8(a)(1) of the National Labor Relations Act (NLRA).

Labor Code Section 96(k) protects employees against adverse action that deprives them of any constitutionally guaranteed civil liberties, e.g. free speech. And NLRA Section 8(a)(1) protects employee's rights to engage in "protected concerted activities." For example, the Nation Labor Relations Board recently filed a case where an employee posted a negative remark about the supervisor on her personal Facebook page, from her home computer. Her remarks drew supportive responses from her co-workers. And these comments set off a further spate of negative comments about the supervisor from the employee. Moreover, the company's Internet policy barred employees from making disparaging remarks when discussing the company or supervisors. Consequently, the employee was fired three weeks later. The NLRB's complaint alleged, among other things, that the company "maintained and enforced an overly broad blogging and Internet posting policy." Accordingly, employers should carefully construct their social media policies and heed the strictures of Labor Code Section 96(k) and NLRA Section 8(a)(1).

In the age of social media everything is fair game. The line between work and play continues to fade. Indeed, *Reid v. Google Inc.* is another warning to employers to beware of employees' social networking commentary. Ironically, not only has this case broadened employers exposure to stray remarks, but Google's Internet innovations have helped pave the way for social networking sites to deliver such remarks to the courtroom.

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