

Cat's Paw Employer Liability

Recent court decisions have increased employers' exposure to so-called "cat's paw" liability from employment decisions. Employers and supervisors alike should understand the risks.

In 2011, the Supreme Court of the United States elevated the risk of employer "cat's paw" liability in a case entitled *Staub v Proctor Hospital*. Other courts have further expanded this risk to supervisory personnel.

The term "cat's paw" derives from a fable conceived by Aesop, and put into verse by La Fontaine in 1679. In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.

As applied to employment discrimination law, this theory holds that an employer is liable for unlawful discrimination in circumstances where the decision maker did not have discriminatory intent, but someone in the chain of command did and acted upon it. In the sense of the fable, the employer is unknowingly led into the fire by the wayward supervisor.

This theory has been in circulation since 1990, but has gained recent prominence and attention. The gist of the doctrine holds an employer liable as a result of the illegal discriminatory intent of a lower ranking non-decision maker (frequently called the "hostile" supervisor) if -

- (1) The hostile supervisor was acting within the scope of his or her authority;
- (2) The hostile supervisor was motivated by hostility to the employee's protected status;
- (3) The hostile supervisor intended to cause an adverse employment result; and
- (4) The hostile supervisor's act or decision is a proximate cause of the adverse employment action against the employee.

In *Staub*, the employee's two immediate supervisors were hostile to his occasional National Guard duties. Any adverse action based on this hostility is barred by a law protecting military men and women from such discrimination (USERRA). The employee was able to show that the unlawful hostility motivated one of the supervisors to issue a Corrective Action that he supposedly violated. The deciding supervisor took the Corrective Action and its violation into account when deciding to fire the employee.

The Supreme Court held the employer could be liable even though the decision maker lacked the illegal discriminatory animus and had conducted an independent investigation. The Court also made it quite evident that this theory will apply to employment discrimination laws other than USERRA, by directly comparing that law to Title VII, which bars employment discrimination based on race, color, religion, national origin, or sex.

On top of exposing employers to this added liability, the ruling in *Staub* denies employers the opportunity to create a "safe harbor" from cat's paw liability through the mere act of

conducting an independent investigation. Clearly, more is needed to avoid liability in cases where cat's paw liability may be presented. The employer's best defense, of course, is to be aware of any potentially hazardous attitudes of its supervisors who may influence employment decisions. An employer who acts with the benefit of this knowledge can then take appropriate action to remove the presence of such animus from its adverse employment decisions.

Employers should not overreact to this decision and avoid all investigations or attempt to isolate decision makers. To the contrary, in many cases independent investigations will be essential to determine the true course of events and root out any potential for cat's paw liability. The employer's use of informed judgment is an essential protection in such cases.

The high profile of the Supreme Court's decision in *Staub* will quite naturally generate many employee claims, and cause employers to yet again reassess and calibrate the employment decision making process. Indeed, some lower court decisions are extending this liability to supervisory personnel. As always, the best medicine is prevention in consultation with counsel.