

## Cat's Paw Employer Discrimination Liability: Recent Sixth Circuit Cases Yield Mixed Results For Employers

---

July 20, 2012

On July 13, 2012, the U.S. Court of Appeals for the Sixth Circuit issued the latest of four rulings this year applying the Supreme Court's "cat's paw" theory of discrimination liability, adopted in *Staub v Proctor Hospital*.

Under this theory, discrimination can exist when higher-level decision makers "rubber stamp" the recommendations or actions of lower-level discriminators. To avoid the problem, higher-ups must independently investigate the advice they receive and reach their own reasonable conclusions that independently justify the action taken. Collectively, these four decisions provide some insight into how to apply this theory.

### **The *Staub-Chatmann* Cat's Paw Test**

In *Chattman v Toho Tenax America, Inc.*, the Sixth Circuit reversed summary judgment for the employer even though higher-ups conducted an investigation and rejected a discriminator's recommendation. A black, long-time plant worker engaged in horseplay with a coworker and received a final warning that prevented him from receiving a promotion. He sued for race discrimination, relying on both direct and circumstantial evidence. The cat's paw theory arguably applied to parts of both analyses.

The direct evidence involved the HR Director's racist comments ("You know what my grandfather always says about boys scuffling? That's how the ni\*\*er graveyard got full," and "Well, you better look close at Obama's running mate because Americans won't allow a ni\*\*er president"). The HR Director recommended that the plaintiff be fired, and he falsely told higher-ups that other managers agreed with him. But, the HR Director didn't have the power to fire plaintiff and the higher-ups conducted their own investigation. They independently found the participating coworker's story questionable, learned about widespread general horseplay at the plant and did not fire plaintiff. Instead, they gave final warnings to both plaintiff and his coworker. The company presented its nondiscriminatory reason for warning plaintiff: it had a uniform policy allowing discipline up to termination for horseplay. The company said that plaintiff's horseplay was more severe than routine horseplay, and both men got the same warning. Plaintiff said that was pretextual because many people engaged in substantial horseplay, they were not disciplined, and the higher-ups knew it.

The court considered whether to impute the HR Director's animus to the higher-ups. Looking to *Staub*, the Court held that an employer will be liable whenever a supervisor intentionally does something discriminatory to cause an adverse action, and the action "is a proximate cause of the ultimate employment action." To avoid liability, the employer must break the causal chain by conducting an independent investigation that reaches the ultimate result for wholly unrelated reasons. If the investigation considers the supervisor's biased report or recommendation, the investigation must determine that the ultimate action is "entirely justified" without regard to that recommendation. "Neither independent investigation nor independent judgment . . . provides a *per se* defense."

### **Consider How Influential the Biased Person Is**

The Sixth Circuit held that the investigation was not good enough. The HR Director held a more influential position than an ordinary supervisor, and he selectively reported this incident of horseplay (unlike horseplay by white employees). He also was involved in some earlier discussion with higher-ups about the incident. So, he at least informed the initial

## Continued

---

stages of the matter. Even though the higher-ups later learned of widespread horseplay and came to their own conclusions about how this fit into the overall picture, they apparently did not break free from the initial taint. Therefore, the plaintiff presented enough evidence to warrant a trial.

### **Beware Failure to Get the Full Facts**

The Sixth Circuit issued a similar opinion this past January, holding against the employer. In *Bobo v UPS*, six high-level managers conducted an investigation and decided to fire a UPS driver-instructor for falsifying supervisory reports. The plaintiff claimed the managers knew that the report-falsification practice was widespread. He said UPS really fired him due to anti-military animus against his Army Reserve service. Apparently, lower-level supervisors told plaintiff that he needed to choose between UPS and the military. One of the six decision makers received and was aware of a lower-level supervisor's written statement that he did not want plaintiff "volunteering for additional military duty when he was needed at UPS," but the decision maker hid this information from others. This suggested that animus infected that decision maker's actions in influencing the discussion. Another of the decision makers admitted that if he had known more about the situation, he might have recommended a more lenient discipline. This was enough to remand the case for further proceedings.

### **Plaintiff's Admissions of Wrongdoing**

Last month, in *Davis v Omni-Care* plaintiff's own admissions ended his claim. He was a driver, delivering products and equipment for a drug company. He made a report to some managers about a coworker hanging a noose in the workplace, but he did not report it directly to his supervisor. An Area Director investigated the situation. Ultimately, plaintiff was unsatisfied with the company's response (diversity training), and the relations between him, his supervisor, and his supervisor's supervisor broke down. In the process, plaintiff also responded hostilely to the Area Director. The Area Director initiated efforts to reconcile the matter among everyone involved, but plaintiff failed to participate. As a result, she fired him. Plaintiff sued for retaliation, arguing that the two supervisors tainted the whole process by failing to tell him about some of the Area Director's communications and her requests to meet. But plaintiff admittedly refused to talk with the Area Director on one occasion and chose to go home instead. The Area Director testified that she fired plaintiff because he refused to talk with her *at all*; one refusal was enough to support that rationale. Thus, the firing was independently justified, despite any retaliatory animus of lower-level workers.

### **Sufficient Separation**

In *Romans v Mich. Dep't of Human Services*, the court held that an investigation was sufficiently independent to break the causal chain. Plaintiff was a white, unionized public employee who could only be fired for cause. At one point, he was alleged to have harassed a coworker through verbal comments, unwarranted monitoring, and unnecessary internal complaints against the coworker. An internal review yielded a report attributing, in conclusory fashion, that plaintiff's conduct might be racially motivated due to his race and the history of the local area. The report did not result in any immediate consequence because a supervisor found that racial conclusion to be ill-founded and improper. But the report was forwarded to a senior labor relations representative named Dean, who ultimately decided to fire plaintiff. Plaintiff argued that the report was direct evidence of a racial motive for firing him, which should be attributed to Dean. The court disagreed. Dean sent an email early in his investigatory process, saying that the report would not result in any discipline. He then enlisted two other people to conduct an independent investigation, which confirmed that plaintiff harassed the coworker and violated company policies. The summary of the investigation cited violations of four

Continued

---

separate work rules (only one of which was related to the original report). Plaintiff could have been fired for any single one of them. The causal chain was broken, and cat's paw theory did not apply.

**What Do These Cases Mean For Employers?**

In light of these cases, decision makers should be sure to conduct thorough investigations before taking disciplinary action, and also to reassure themselves that they would make the same decision based on independent reasons—without regard to the recommendation from below.

There is no magic solution and no safe harbor, but one straightforward lesson is to gather as much independent information as possible to support the final decision.

Saura Sahu  
313.496.7645

Misbah Shahid  
313.496.7909