Is There a Monkey in the Workplace? 'Cat's Paw' Doctrine in Second Circuit

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Current business management theory champions a collaborative and open work environment in which employees are empowered to share viewpoints about everything from product development to the performance of co-workers. Organizations as large as Facebook (where even Mark Zuckerberg does not have an office) and as modest as the corner coffee shop have recognized the benefits of encouraging employees to trade strategies and arrive at shared decisions. However, collaborative decision-making can have unintended legal consequences. Courts have found that if employees with supervisory responsibilities are motivated by discriminatory animus, and employers innocently rely on their recommendations, then a discrimination claim may lie against the employer.

Imputing liability to an employer that relies on input from a biased employee is known as the "cat's paw" theory of liability. The name originates from the well-known fable of the foolish cat and the clever monkey.[1] The monkey, through flattery, tricks the cat into pulling roasted chestnuts from a fireplace. As the cat takes the chestnuts from the fire, the monkey eats them, leaving the cat with a burned paw and the monkey with a full stomach. One moral of the story is to beware of those with ulterior motives, and the term "cat's paw" now commonly refers to someone who is being used as a pawn by another. In the employment law context, an employer that takes the word of a prejudiced supervisor may end up getting burned.

The Decision in 'Staub'

Courts have recognized some form of the "cat's paw" doctrine since Judge Richard Posner adopted the phrase in a 1990 age discrimination suit in which a negative review by a biased regional supervisor resulted in the firing of a salesperson.[2] Last year, the Supreme Court clarified the doctrine. In *Staub v. Proctor Hospital*, the court held that an employer could be liable for

relying on the recommendations of biased supervisors in terminating an employee even if the employer did not know of, or ratify, the discriminatory beliefs.[3] Plaintiff Vincent Staub was a medical technician at a hospital and a member of the Army Reserves. Two of his supervisors were openly hostile to his participation in the reserves and made disparaging remarks about his service. One of the supervisors referred to plaintiff's military obligations as "a bunch of smoking and joking and a waste of taxpayer money."[4] On numerous occasions, they disciplined him for rule infractions which plaintiff claimed were fabricated.

In reviewing plaintiff's performance, defendant's human resources executive relied on reports from plaintiff's allegedly biased supervisors and terminated his employment. Plaintiff filed suit under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects members of the armed services from discrimination. He argued that while the decision-maker in the human resources department may not have borne discriminatory animus toward him, his supervisors did, and her reliance on their reviews made the termination unlawful. The hospital countered that the decision-maker had conducted an independent investigation into the situation and found no discrimination.

Plaintiff prevailed at trial, but the verdict was set aside by the U.S. Court of Appeals for the Seventh Circuit which ruled that a "cat's paw" case could not be maintained unless the biased employee exercised "such singular influence over the decision-maker that the decision to terminate was the product of blind reliance."[5] The Supreme Court reversed. Writing for a unanimous court, with Justices Samuel Alito and Clarence Thomas concurring, Justice Antonin Scalia held that "if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is the proximate cause of the ultimate employment action, the employer is liable."[6] The court was not persuaded that an investigation absolved defendant of liability stating, "we are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim preclusive effect."[7]

Staub sets forth the factors necessary for the imposition of liability under the "cat's paw" theory. First, the biased individual must be a supervisor of the plaintiff, although he need not be the ultimate decision-maker. Second, the supervisor must intend to cause an adverse employment action. Third, the supervisor must be acting within the scope of his employment or, if the supervisor is acting outside its scope, the employer will be liable if the employee's actions would be imputed to the employer under traditional agency principles.[8]

Application of the Doctrine

In the wake of *Staub*, courts in the U.S. Court of Appeals for the Second Circuit have extended the "cat's paw" doctrine beyond military service discrimination. It has been applied to claims of discrimination based on age,[9] race,[10] disability,[11] ethnicity,[12] religion,[13] and pregnancy.[14] In each of these cases, the plaintiff alleged that the adverse job action was the result of a collaborative decision-making process, which included a discriminatory motive as one of the inputs. Employers' attempts to draw a distinction between the operative language of USERRA and other statutes have not succeeded. For example, on April 20, the Western District of New York in *Daniels v. Pioneer Central School District*, rejected an argument that the "but for" causation standard of the Age Discrimination in Employment Act (ADEA) differed from the "motivating factor" test of USERRA such that the "cat's paw" doctrine is inapplicable.[15] Thus, the doctrine is available across the panoply of anti-discrimination statutes.

Stray Remarks

Plaintiffs have succeeded in advancing a "cat's paw" theory where there is substantial evidence of discriminatory animus by a supervisor. These cases tend to include statements plainly evincing unlawful bias, as in *Staub*. For instance, a school teacher had a triable age discrimination claim where the principal encouraged her to retire and stated that he needed to make room for "younger staff," "new thinking," and "bright young teachers coming in at the other end."[16] It was no defense that the school's superintendent was untainted by bias because he relied on the recommendation of the principal in terminating the teacher's employment.

By contrast, employers have prevailed where the statements reflected no clear animus and fell into the category of "stray remarks." Courts will assess whether the statements "show that the decision-maker was motivated by assumptions or attitudes relating to the protected class."[17] Four factors are considered: "(1) who made the remark, i.e., a decision-maker, a supervisor, or a low-level co-worker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, i.e., whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made, i.e., whether it was related to the decision-making process."[18]

For example, a university successfully utilized a "stray remarks" defense in a "cat's paw" discrimination action.[19] A professor alleged that he was denied tenure in violation of Title VII because the tenure decision was influenced by supervisors who harbored religious, racial, and national origin animus. One supervisor allegedly made comments regarding plaintiff's Indian

heritage and Hindu faith, including "I don't care what your religious beliefs are…I care about the lab…you son-of-a-bitch," and "you guys from India are taking away all these jobs."[20] The District of Connecticut granted summary judgment for the employer, holding that there was no nexus between the denial of tenure and the remarks, which were relatively innocuous and temporally remote from the adverse job action.

Indeed, the Second Circuit has recently emphasized the importance of actionable evidence of discriminatory animus. In *Adamczyk v. New York State Dept. of Correctional Services*, the court on April 5 affirmed the grant of summary judgment to an employer because the plaintiff failed to adduce sufficient evidence that a supervisor's alleged racial remarks were "intended to cause an adverse employment action."[21] This is because one of the remarks was made at the beginning of plaintiff's tenure, six years before his dismissal, and other remarks were not made to plaintiff or "in the context of the decisionmaking process that resulted in [plaintiff's] termination."

Supervisor or Employee

As Alito noted in his concurrence, *Staub* leaves open the issue of whether "an employer may be held liable if it innocently takes into account adverse information provided not by a supervisor but by a low-level employee."[22] The Eastern District of New York has had occasion to address a similar issue. The case involved a Muslim corrections officer of Middle Eastern descent who claimed he had been discharged because of his race and national origin in violation of Title VII.[23]

Plaintiff alleged that representatives of the New York City Police Department had contacted his supervisors at the Department of Correction and, with the intention of having him terminated, reported that plaintiff was a potential terrorist who wanted to engage in jihad. The police officers were not plaintiff's supervisors nor did they work with him. The court recognized that, "Holding the City liable for unsolicited comments made by employees of one agency to decisionmakers in another agency contemplates a scope of liability that the *Staub* court did not confront."[24] It declined to extend the "cat's paw" doctrine this far, and granted summary judgment for the city.

Conclusion

In conclusion, it is clear that litigating "cat's paw" cases can be a challenge for practitioners. For plaintiff's lawyers, the law in the Second Circuit indicates that courts will require, among other things, strong evidence that a supervisor, who was not the decision-maker, was biased against the

plaintiff and that the supervisor intended that action be taken against him. Offhand remarks are likely insufficient to demonstrate discriminatory animus.

For defense attorneys, the modern workplace culture of collaborative decision-making and "360 reviews," in which employees evaluate one another, is potential fodder for litigation. The "cat's paw" doctrine is a departure from the traditional notions of employer liability in which only the motivation of the ultimate decision-maker is relevant. Now, courts will examine the motivations of other participants to ensure that the job action is free from discrimination. As decision-making in the workplace continues to become more inclusive, it is likely that the number of cases utilizing the "cat's paw" will grow.

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Endnotes:

1. Although the origin of the fable is not clear, it has been attributed to Aesop and is included in La Fontaine's 1679 edition of *Fables Choisies.* It has been used in a variety of legal contexts, including bankruptcy, antitrust and securities litigation.

2. *Shager v. Upjohn*, 913 F.2d 398 (7th Cir. 1990).

3. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

4. 131 S. Ct. at 1189.

5. 131 S. Ct. at 1190 (internal citations omitted).

6. 131 S. Ct. at 1994.

7. 131 S. Ct. at 1993.

8. 131 S. Ct. at 1993-94.

9. *Daniels v. Pioneer Central School District*, 08 Civ. 767, 2012 U.S. Dist. LEXIS 55964 (WDNY April 20, 2012).

10. *Adamczyck v. N.Y. State Dept. of Corrections*, 11 Civ. 1406, 2012 U.S. App. LEXIS 6781 (2d Cir. April 5, 2012).

11. *Saviano v. Town of Westport*, 3:04 Civ. 522, 2011 U.S. Dist. LEXIS 112722 (D. Conn. Sept. 30, 2011).

12. *Abdelhadi v. City of New York*, 08 Civ. 380, 2011 U.S. Dist. LEXIS 85606 (EDNY Aug. 3, 2011).

13. Id.

14. *Baron v. Maxam North America*, 3:11 Civ. 198, 2012 U.S. Dist. LEXIS 52315 (D. Conn. April 13, 2012).

15. *Daniels*, 2001 U.S. Dist. LEXIS 55964.

16. *Daniels*, 2001 U.S. Dist. LEXIS 55964 at *1.

17. *Tomassi v. Insignia Fin. Group*, 478 F.3d 111, 115 (2d Cir. 2007).

18. *Silver v. North Shore Univ. Hosp.*, 490 F.Supp.2d 354, 363 (SDNY 2007).

19. *Rajaravivarma v. Bd. of Trustees for the Conn. State Univ. Sys.*, 3:09 Civ. 1550, 2012 U.S. Dist. LEXIS 40848 (D. Conn. March 26, 2012).

20. *Rajaravivarma*, 2012 U.S. Dist. LEXIS 40848 at **60, 71.

21. *Adamczyk*, 2012 U.S. App. LEXIS 6781 at *8.

22. *Staub*, 131 S. Ct. at 1196.

23. *Abdelhadi*, 2011 U.S. Dist. LEXIS 85606.

24. Id. at *14.