Second Circuit Adopts Negligence-Based 'Cat's Paw' Doctrine

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The U.S. Court of Appeals for the Second Circuit recently issued a significant decision on the "cat's paw" doctrine. See Vasquez v. Empress Ambulance Service, __ F.3d. __, 2016 WL 4501673 (2d Cir. Aug. 29, 2016). This is a theory of liability whereby an employee may prevail on a discrimination claim if the decision-maker harbors no unlawful animus but unwittingly relies on input from an employee with such intent. The Supreme Court had applied this theory to hold an employer liable for discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) for discharging an employee in reliance on negative information from biased supervisors.

The Second Circuit has now extended the doctrine to retaliation claims under Title VII and the New York State Human Rights Law (NYSHRL) and to situations in which a co-worker, rather than a supervisor, is the bad actor. In so doing, the court addressed issues of first impression and adopted a negligence-based approach to "cat's paw" liability.

'Cat's Paw' in Supreme Court

The "cat's paw" theory of liability takes its name from a fable commonly attributed to Aesop about a foolish cat and clever monkey. The monkey talks 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 who may have ulterior motives. Employers have learned this moral the hard way in discrimination actions. Indeed, courts have recognized some form of the "cat's paw" doctrine ever since Judge Richard Posner adopted the phrase more than 25 years ago in an age discrimination suit in which a negative review by a biased regional supervisor resulted in the firing of a salesperson. See Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

In 2011, the Supreme Court recognized this doctrine in an opinion in which it held that an employer could be liable under USERRA although the decision-maker was acting in good faith, with no intent to discriminate. See Staub v. Proctor Hospital, 562 U.S. 411 (2011). Plaintiff in that case 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. They disparaged plaintiff's

military service, disciplined him for an infraction that plaintiff claimed was fabricated, and put negative information in his personnel file. The employer's human resources executive terminated plaintiff's employment upon reviewing his personnel file and in response to his supervisors' complaints about his performance.

The Supreme Court held that while the decision-maker in the human resources department may not have borne discriminatory animus toward plaintiff, the supervisors did, and her reliance on their biased input made the termination unlawful. Writing for a unanimous court, 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." 562 U.S. at 422. In so doing, the court relied on traditional agency principles to impute the supervisors' bad intent to the employer. Staub, thus, established the viability of "cat's paw" in employment law. However, questions remained. For example, should the doctrine apply to claims under other civil rights statutes, particularly those with a different standard of liability? The Western District of New York answered the question in the affirmative, rejecting an argument that the "but for" causation standard of the Age Discrimination in Employment Act, which differs from the "motivating factor" test of USERRA, rendered the "cat's paw" doctrine inapplicable. See Daniels v. Pioneer Central School District, 2012 WL 1391922 (WDNY April 20, 2012). Likewise, other circuits adopted the "cat's paw" approach in Title VII retaliation cases even though such claims also require "but for" causation. See, e.g., Zamora v. City of Houston, 798 F.3d 326, 330 (5th Cir. 2015).

Staub also left open the question of whether the unlawful intent of an employee other than a supervisor could be imputed to the employer. The Supreme Court specifically declined to opine on the issue, stating, "We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision." Staub, 562 U.S. at 422, n.4. The Eastern District of New York interpreted Staub to mean that "cat's paw" principles are inapplicable if the bad actor is not a supervisor, and held that a city employer bears no liability "for unsolicited comments made by employees of one agency to decisionmakers in another agency." Abdelhadi v. City of New York, 2011 WL 3422832 at *5 (EDNY Aug. 4, 2011).

In the Second Circuit

The Second Circuit recently had occasion to address both questions. The court applied the "cat's paw" doctrine to retaliation claims under Title VII and the NYSHRL, and held an employer responsible for the acts of a non-supervisory employee with retaliatory animus. See Vasquez, 2016 WL 4501673.

In that case, plaintiff asserted claims of retaliation based primarily on a series of events that occurred in a 24-hour period. Plaintiff, a female emergency medical technician, received a sexually explicit photograph and text on her cell phone from a male co-worker while on duty one evening. She reported the matter immediately upon returning to the workplace, at which point her supervisor told her to make a formal complaint. The co-worker who had sent the photograph and text observed plaintiff as she was composing the complaint against him on the computer.

After plaintiff went home, the co-worker manipulated the messages on his cell phone to make it appear as if he and plaintiff "had legitimately been engaging in consensually sexual text banter" and that plaintiff herself had sent "a racy self-taken photo." 2016 WL 4501673 at *2-3. The employer relied on this evidence—which it did know was falsified—to fire plaintiff the next day for sexual harassment.

The employer moved to dismiss the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P. It argued that the "cat's paw" theory should not apply; the co-worker was the only one who may have intended to retaliate, and his improper motive should not be imputed to it because he was a low-level, non-supervisory employee acting outside the scope of his employment.
The district court granted the motion. It held that Title VII is similar to USERRA, and therefore, the "cat's paw" theory was available. Vasquez v. Empress Ambulance Serv., 2015 WL 5037055 (SDNY Aug. 26, 2015) (Buchwald, J.). Under traditional principles of agency law, the bad actor need not be a supervisor if he occupied "a position of sufficient confidence…to be able to corrupt the determination at issue…and not merely serve as an informant." Id. at *6. However, Andrea Vasquez's complaint did not suggest that the co-worker occupied such a position or had any ability at all to influence the decision-making process, and therefore, it was dismissed.
The Second Circuit reversed. It agreed with the district court that the "cat's paw" theory applies to Title VII retaliation cases but took a different approach on the agency issue. The Second Circuit focused on the principle that an employer is liable for an employee's misconduct—regardless of whether the employee occupied a low status in the company or whether the act was outside the scope of employment—if the employer was negligent.

The court held that a non-supervisory employee is "equally able to play monkey to [the employer's] cat" if the employer acts negligently with respect to information provided by the employee. Id. at *6. The complaint alleged facts that could give rise to an inference of negligence, including that the employer refused to consider plaintiff's version of events or inspect her cell phone, which would have supported her position. Accordingly, the action was permitted to proceed.

The Second Circuit was careful to point out that its decision should not be construed to mean that employers are automatically liable for all actions based on information provided by biased co-workers. The relevant inquiry is whether the employer acted reasonably in response to such information. The court recognized, "[A]n employer who, non-negligently and in good faith, relies on a false and malign report of an employee who acted out of unlawful animus cannot, under this 'cat's paw' theory, be held accountable for or said to have been 'motivated' by the employee's animus." Id. This is consistent with the tenet that an internal investigation need not be perfect or a "full-blown, due process, trial type proceeding in order to be reasonable," and that all that is required is an effort to "arrive at a reasonably fair estimate of truth." Kennedy v. Federal Express Corp., 2016 WL 5415774 at *18 (NDNY Sept. 28, 2016).

In the wake of Vasquez, it is clear that the "cat's paw" liability can be imposed in a variety of scenarios and claims. The moral of the case is that a little investigation will go a long way in preventing employers from getting burned.

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