



DE-CLAWING THE “CAT’S PAW” METHOD OF PROVING DISCRIMINATION

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On March 1, 2011, the United States Supreme Court unanimously recognized the “Cat’s Paw” method of proving discrimination. The term “Cat’s Paw” originated in one of Aesop’s fables, where a monkey induced a cat to perform a dangerous deed for it. In 1990, Judge Richard Posner (7th Circuit Court of Appeals in Chicago) applied the phrase to a new theory of liability. Under the “Cat’s Paw” theory, it does not matter if the decision maker lacks a discriminatory motive when making an employment decision. An employee may still succeed on a discrimination claim if there is proof that a non-decision maker, such as a front line supervisor, had a discriminatory bias and influenced the final decision maker, either directly or indirectly. The controversial theory, which is now the law of the land, significantly enhances potential liability for discrimination and requires Human Resource professionals to adopt new procedures to protect against this exposure.

Facts of the Case

The case, [Staub v. Proctor Hospital](#), highlights the elements of the Cat’s Paw theory and identifies the steps that employers will now need to take to avoid liability. Vincent Staub was an angiography technician employed by Proctor Hospital in Peoria, Illinois. Mr. Staub also served in the Army Reserves and was required to attend one weekend drill per month and annually attend Reserves training lasting two to three weeks. Mr. Staub’s absences were protected by the federal Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”).

During Mr. Staub’s absences, other employees were required to fill his shifts. Over time, Mr. Staub’s supervisors began to express frustrations with his continuous absences and the adverse impact they caused on other employees. One of the supervisors assigned extra shifts to Mr. Staub as “pay-back” for “everyone else having to bend over backwards” to cover his absences. Another supervisor quipped that the weekend drills were a “bunch of smoking and joking” and a “waste of taxpayers’ money.” It is not clear whether either supervisor had ever attended training in federal discrimination laws or whether either were aware of the USERRA rules.

One of the supervisors ultimately issued a disciplinary warning to Staub for failing to stay in his work area when he was not working with a patient. Shortly after that warning, the other supervisor advised Human Resources that Staub had again left his work area without permission and recommended termination.

Staub complained that there was no work rule requiring him to stay in his work area, that he had left a voice message with the supervisor when he left his area, and that he was being targeted because of his military service.

The Human Resources manager investigated Staub’s complaint and the alleged insubordination. She reviewed his personnel file and noted the earlier warning, which she concluded put Staub on

notice of the work rule. She determined that Mr. Staub had left his work area and could find no proof that he was being targeted or had left a message of his whereabouts. She discussed the situation with another personnel officer and then issued a notice terminating Mr. Staub’s employment. She did not interview the two supervisors or take other steps in the investigation.

Staub sued the Hospital for discrimination under USERRA and a jury found in his favor. However, the 7th circuit court of appeals reversed the judgment. That court found that it was undisputed that the Human Resources manager was not biased and had investigated his complaint. Because she had performed an independent investigation and because she was not “singularly influenced” by any bias from the front line supervisors, there was no liability under Cat’s Paw or any other theory of discrimination.

Mr. Staub appealed and the United States Supreme Court reversed the 7th Circuit. It held that the Human Resource’s investigation was not sufficient to avoid liability for the earlier bias of the front line supervisors. The Court declared that the Cat’s Paw theory was a proper method of proving discrimination, and under that theory an employer must establish that its decisions were taken for reasons wholly apart from and unrelated to the biased actions of a front line supervisor. Here, the Human Resources manager relied on the first disciplinary warning, which itself appeared to be the product of bias, and her investigation did not establish independent grounds for termination other than the alleged insubordination which was based on the supervisors’ accounts.

Impact of the Case

The Staub case and the adoption of Cat’s Paw liability will have far-reaching effects. There are also questions which were unanswered in Staub which will create additional challenges. Human Resource professionals will need to evaluate current practices in light of Staub and will need to be extremely vigilant in future terminations and other adverse actions to minimize the potential for Cat’s Paw exposure.

The following is a summary of key issues raised in Staub and recommendations for HR professionals:

- **Multi-level decisional reviews remain helpful but are inadequate by themselves.** Many employers have adopted multi-level decisional reviews for exactly the type of situations associated with “Cat’s Paw” claims. Such reviews remain a valid and recommended practice. However, the Staub case teaches that multi-level reviews by themselves do not provide immunity to Cat’s Paw claims, even if the reviewer is completely unbiased and well trained in federal discrimination laws. The Supreme Court apparently believes that multi-level decisional reviews may still allow unlawful biases to influence personnel decisions, which is why the Court rejected such practices as the sole means of avoiding liability.
- **Independent investigations must be expanded.** More importantly, Staub holds that the fact that an unbiased decision maker independently reviews and investigates prior to upholding a decision may not protect an employer. The Supreme Court declared that the investigation must be “meaningful.” The court did not explain what it meant by “meaningful,” but its rejection of the investigation that was performed in Staub is indicative of the strict

interpretation it appears to have adopted. In Staub, the Human Resources director independently reviewed the personnel file and explored the employee’s complaint that he was being unlawfully “targeted” by his supervisors, but she could find no evidence to support his claims. She reviewed the case with another trained Human Resources professional, who apparently supported the decision to terminate. Yet, the Court found that the investigation was faulty.

What additional steps should an HR professional take? For starters, the investigator should determine whether there is any evidence that the front line supervisor is biased. Input from the supervisor’s record, other supervisors and other workers should be evaluated. The investigator should be sensitive to the age of the supervisor versus the age of the employee, the gender of the supervisor versus the gender of the employee, the race of the supervisor versus the race of the employee, and whether the supervisor has had any prior issues with the employee. The investigator should determine when or if the supervisor last participated in discrimination training.

Second, an investigation should evaluate prior disciplinary warnings and performance evaluations to determine if there is any possibility that they could have been the product of unlawful bias. It should not be presumed that documentation in a personnel file is valid and unbiased.

Third, particularly where the targeted employee is complaining of improper treatment, witnesses should be questioned to verify whether there is any evidence to support the employee’s complaints. In Staub, it appears that the Company was unaware of the biased statements of the two supervisors until co-workers testified in court on behalf of Mr. Staub. The HR staff did not question any witnesses prior to Mr. Staub’s termination.

At the conclusion of the investigation, the investigator should determine whether the termination can be supported without relying on the recommendations or input of the front line supervisor. In many cases, this may be difficult, and the investigator will need to balance the risk of moving forward with the risk of a Cat’s Paw claim.

- **It is unclear whether and how statutes of limitations might “protect” prior disciplinary warnings which were not challenged.** One issue left unresolved in Staub is whether an employer can rely on prior discipline or other information in a personnel file when the time period for challenging such actions has expired. In Staub, the first disciplinary warning occurred only a month before the termination, so the issue was not raised. But if that warning had been issued a year earlier, could Staub have still argued that it was the product of unlawful bias? What would this do to the validity of statutes of limitations? Given the Supreme Court’s insistence on a “meaningful” investigation, a conservative course of action would suggest that all prior discipline, performance evaluations or other records that are being relied on in a termination decision should be reviewed for possible bias.

- **Protected absences, particularly intermittent absences, will continue to be a fertile ground for legal claims against employers.** It is hardly surprising that the Staub case involved a setting where workers became frustrated over an employee’s legally protected time off. As more and more employers operate with “lean” workforces, absences impose increasing hardships on co-workers forced to cover for the absent worker, and on supervisors attempting to meet production goals. Examples of protected time off include military and FMLA leave (including intermittent leave) as well as ADA accommodations such as relief from overtime or weekend work, or the ability to take additional breaks or time off. Employers often find themselves in a quandary when they are unable, due to medical privacy laws, to explain to co-workers why the absent worker has more “rights” than the workers who are filling in for the absences. These situations are ripe for many forms of improper behavior by co-workers and supervisors. Human Resource professionals need to monitor such situations and any actions taken in relation to the worker who is availing himself or herself of protected leave.
- **Enhanced and repeated supervisor training is critical.** The increased liability associated with the Cat’s Paw method of discrimination proof reinforces the need for extensive and repeated training of front line supervisors. It seems surprising that the supervisors in Staub would have openly announced their disgust with Mr. Staub’s military service, but there is no evidence that those supervisors had ever attended any training, much less training on USERRA (an often overlooked topic during management training sessions). HR professionals should audit training schedules and the content of training programs to ensure that all state and local labor and employment laws are being taught to all individuals who may be considered “supervisors.”

Final Thoughts

The Supreme Court’s adoption of the Cat’s Paw method of proof will require modifications of workplace practices. HR managers should become familiar with the Staub case and educate decision makers on the dangers associated with Cat’s Paw liability. New procedures should be adopted for “meaningful” independent investigations and enhanced (and continuous) training in state and federal employment laws should be required of all managers.