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Beware The Paw: Cat's Paw Liability And Employment Decisions In The Current Economy

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Employers should always make decisions affecting their employees with due deliberation, based on appropriate and accurate information. Yet today, employers must be even more keenly aware of the means by which such decisions are made. Indeed, employers must be especially cautious of a growing theory of liability known as "Cat's Paw Liability."

The term "Cat's Paw" was first applied in the employment law context by Justice Posner of the Seventh Circuit Court of Appeals in his opinion in *Shager v. Upjohn Co*.[1] This term (and the similar "rubber stamp") applies to a broad set of claims under *Title VII*, other Federal anti-discrimination statutes (e.g., *ADEA*, *ADA*), and even state human rights statutes made on the basis of the bias of a subordinate.

> The "cat's paw" doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. [citation omitted] As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. *Id*. Today the term "cat's-paw" refers to "one used by another to accomplish his purposes." [citation omitted] In the employment discrimination context, "cat's paw" refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action. [citation omitted]
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> *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*.[2]

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The Federal Circuits have all generally adopted some form of Cat's Paw or subordinate bias liability theory, whether or not they have called it by such name. What makes these claims particularly troublesome, however, is that the courts have applied a vast spectrum of standards for establishing such liability and a variety of different thresholds for legal defenses to claims of subordinate bias in the decision-making process. Employers need to pay particular attention to the standards applicable to all jurisdictions in which they have a presence.

Standards For Imputing Liability Under The Cat's Paw Doctrine

While the thresholds necessary to establish a claim of discrimination under the Cat's Paw doctrine vary from Circuit to Circuit, they generally fall into two major categories, with a few hybrid outliers.

The Influence Circuits

Most of the Federal Circuits have adopted a standard based on the biased subordinate's level of influence over the decision-maker, ranging from *any* influence to *close involvement* or *enormous* influence.

Although the First Circuit does not appear to have adopted a Cat's Paw liability theory by name, it has, in fact, acknowledged that where there was evidence that an employee's "direct supervisor and general manager …, was in a position to *influence* [the actual decision-maker's]…decision[,]" a jury could find that the employer's non-biased reasons for terminating the employee were pretext.[3]

Likewise, the Second Circuit has adopted a theory of subordinate liability also without applying the Cat's Paw title. In *Rose v. New York City Board of Education*,[4] plaintiff brought sex and age discrimination claims on the basis of remarks made "by her immediate supervisor, who had *enormous influence* in the decision-making process."[5] The Court found that such evidence of discrimination was sufficient "to allow a jury to find that her demotion was motivated, at least in part, by a forbidden factor" and ordered a new trial.[6] However, in relying on the Second Circuit's decision in *Rose*, the Eastern District of New York adopted a much less stringent threshold, going so far as to suggest that an employer may incur Cat's Paw Liability when a supervisor merely recommends a termination, and that recommendation is motivated by race.[7, 8]

The Third, Fifth, Ninth and District of Columbia Circuits all apply some form of a more lenient "influence" standard. In the

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Third Circuit's *Abramson v. William Patterson College of New Jersey*,[9] the Court held that to establish a discriminatory motive in the adverse employment action, "it is sufficient if those exhibiting discriminatory animus *influenced* or *participated* in the decision to terminate."[10] The Fifth Circuit applies a similar standard: "If the employee can demonstrate that others had *influence* or *leverage* over the official decisionmaker, … it is proper to impute their discriminatory attitudes to the formal decisionmaker."[11] The Ninth Circuit applies an even looser "involvement" test, holding that "[e]ven if the manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager was *involved* in the hiring decision."[12] Finally, the District of Columbia Circuit applies a similar "influence" test, holding that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's *influence*."[13]

The Eighth Circuit requires a stronger connection between the biased subordinate and the decision-maker. In *Stacks v. Southwestern Bell Yellow Pages, Inc*., the Circuit held that "evidence that gender was a motivating factor includes evidence of 'comments which demonstrate a discriminatory animus … uttered by individuals *closely involved* in employment decisions.'"[14]

The Alter-Ego Circuits

The Fourth and Seventh Circuits apply very strict thresholds for imputing subordinate bias on the employer and essentially require the biased employee to be the *de facto* decision-maker. In *Hill v. Lockheed Martin Logistics, Inc*.,[15] the Fourth Circuit adopted a Cat's Paw theory "to determine employer liability for the discriminatory acts and motivations of supervisory employees who do not exercise formal decisionmaking authority."[16] Yet, it defined the "outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer"[17] (consistent with its view of the Supreme Court's holding in *Reeves v. Sanderson Plumbing Prods. Inc*.[18]) as only those subordinates who were "'principally responsible' for, or the 'actual decisionmaker' behind, the action."[19]

The Seventh Circuit, which originally coined the Cat's Paw terminology, while initially an "influence" Circuit,[20] now appears to be more closely attuned to the Fourth Circuit's Alter-Ego camp. In the recent decision *Staub v. Proctor Hospital*,[21] the Seventh Circuit confirmed its prior holding in *Brewer v. Board of Trustees of University of Illinois*,[22] that a jury "can only consider nondecisionmaker animosity in the case of *singular influence*,"[23] meaning that "the co-worker was basically the real decision maker."[24]

The Causation Circuits

The Sixth, Tenth, and Eleventh Circuits have adopted a hybrid version of the above standards, instead looking to causation as the threshold. In *Madden v. Chattanooga City Wide Service Dept*.,[25] the Sixth Circuit "held that when a plaintiff challenges his termination as motivated by a supervisor's discriminatory animus, he must offer evidence of a 'causal nexus' between the ultimate decisionmaker's decision to terminate the plaintiff and the supervisor's discriminatory animus." The Tenth Circuit echoes this approach: "[t]o prevail on a subordinate bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions *caused* the adverse employment action."[26] The Eleventh Circuit follows a similar rule, holding that the plaintiff has the burden to prove that the "discriminatory animus caused [the decision-maker] … to terminate her employment."[27]

Recommendations For Avoiding Liability

If anything can be gleaned from the disparate approaches taken by the Circuits regarding their treatment of the Cat's Paw theory, it is that employers must conduct and properly document some form of independent inquiry or investigation before taking adverse employment action against their employees. Yet, such investigation must be meaningful in order to operate as a defense.[28] Indeed, in some Circuits, the independent investigation defeats liability under the Cat's Paw theory.[29] In the Tenth Circuit, for instance "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory."[30] Accordingly, "[e]mployers … have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class."[31]

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[1] *913 F.2d 398 (7th Cir. 1990).*

[2] *450 F.3d 476, 484 (10th Cir. 2006).*

[3] Santiago-Ramos v. Centennial P.R. Wireless Corp., *217 F.3d 46, 51 (1st Cir. 2000) (emphasis supplied).*

[4] *257 F.3d 156 (2d Cir. 2001).*

[5] Id. *at 162 (emphasis supplied);* see also Rosa v. Jewish Home, *No. 5:04 CV 581, 2006 U.S. Dist. LEXIS 68135 (N.D.N.Y Sept. 22, 2006) (holding that the fact finder could conclude that the supervisor's alleged bias should be imputed to the employer because the supervisor's report played a* "substantial role *in the decision to terminate plaintiff") (emphasis supplied).*

[6] Id. *at 163.*

[7] Downes v. John E. Potter, *No. 04 – CV-3876 (JFB), 2006 US Dist LEXIS 51132 (E.D.N.Y. July 26, 2006) at *29.*

[8] *State courts have also recognized the existence of the Cat's Paw theory without so naming it.* See Forrest v. Jewish Guild for the Blind, *786 N.Y.S.2d 382, 393 (N.Y. 2004) (denying the imposition of liability where a plaintiff failed to show a causal relationship between racial epithets and management's decision to terminate an employee),* citing Price Waterhouse v. Hopkins, *490 U.S. 228, 277 (1989).*

[9] *260 F.3d 265 (3d Cir. 2001).*

[10] Id. *at 286 (emphasis supplied).*

[11] Russell v. McKinney Hosp. Venture, *235 F.3d 219, 226 (5th Cir. 2000) (emphasis supplied);* see also Gee v. Principi, *289 F.3d 342 (5th Cir. 2002)* .

[12] Bergene v. Salt River Project Agricultural Improvement and Power Dist., *272 F.3d 1136, 1141 (9th Cir. 2001);* but see Galdamez v. Potter, *415 F.3d 1015, 1026 ("reliance on factors affected by another decision-maker's discriminatory animus" may violate Title VII).*

[13] Griffin v. Washington Convention Ctr., *142 F.3d 1308, 1312 (D.C. Cir. 1998).*

[14] *27 F.3d 1316, 1323 (8th Cir. 1994) (emphasis supplied) [citation omitted].*

[15] 354 F.3d 277 (2004).

[16] Id. *at 289.*

[17] Id.

[18] *530 U.S. 133 (2000).*

[19] *354 F.3d at 289.*

[20] See Shager v. Upjohn Co., *913 F.2d 398 (7th Cir. 1990).*

[21] Staub v. Proctor Hospital, *560 F.3d 647 (7th Cir. 2009).*

[22] *479 F.3d 908 (7th Cir. 2007).*

[23] *560 F.3d 647, 657 (7th Cir. 2009).*

[24] Id.

[25] *549 F.3d 666, 677 (6th Cir. 2008) (citing* Wilson v. Stroh Cos., *952 F.2d 942, 946 (6th Cir. 1992)).*

[26] *450 F.3d at 487.*

[27] Llampallas v. Mini-Circuits, Inc., *163 F.3d 1236, 1248 (11th Cir. 1998).*

[28] See *289 F.3d at 347 (investigation by employer was not the type of independent investigation required to bar liability when tainted by bias); 450 F.3d at 492 (reviewing personnel file not sufficient "investigation").*

[29] See *450 F.3d at 488 (10th Cir. 2006) ("an employer can avoid liability by conducting an independent investigation of the allegations against an employee"); 560 F.3d 647, 656 (7th Cir. 2009) ("[W]here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker"); 913 F.2d at 406 (7th Cir. 1990) (recognizing that if the ultimate decision-maker "was not a mere rubber stamp, but made an independent decision to fire Shager, … there would be no ground for finding even an innocent violation of the Act").*

[30] *450 F.3d at 488.*

[31] Id.