# MORE THAN A FABLE

## The Cat's Paw Theory and Its Role in Employment Discrimination Claims

***By Yvette Davis and Mike Sandulak***

Claims professionals, human resources professionals, and employment lawyers all readily agree that life can be stranger than fiction. Not surprisingly, Aesop's fable "The Monkey and the Cat" has quite literally found its way into the workplace, workplace investigations, and Title VII claims.

In the fable, adapted by Jean de La Fontaine in the second collection of his fables in 1679, the term "cat's paw" is used to tell a story of duping someone. As the story goes, "A cat and a monkey lived as pets in the same house. They were great friends and were constantly in all sorts of mischief together." The clever monkey persuaded the cat to pull roasting chestnuts from the fire, promising it a share. As the cat scooped the chestnuts from the fire one by one, it burned its paw each time. The monkey gobbled up and enjoyed the roasted chestnuts while the cat was left nursing its paw without any reward for its deeds.

Cat's paw liability within the employment context arises in employment claims, such as an alleged violation of Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and other state discrimination laws where the employee plaintiff must prove that discrimination or retaliation is a substantial motivating reason for the adverse employment action, even if the employer's decision-maker acted without animus. (California CACI Jury Instruction 2511.)

In 1990, Judge Richard Posner of the 7th U.S. Circuit Court of Appeals coined the phrase "cat's paw theory," in the case of *Shager v. Upjohn* to describe a theory of liability where an employee or supervisor, motivated by discriminatory intent or other nefarious motive, influences an unwitting decision-maker without animus to take an adverse employment action against another employee.

From 1990 to 2011, some courts found an employer liable pursuant to the cat's paw theory in cases like *Staub v. Proctor Hospital* and *Brewer v. Bd. of Trustees*, where a supervisor, motivated by discriminatory animus, exercises "singular influence over the [non-decision-maker] and uses that influence to cause the adverse employment action," permitting the employer to avoid liability "where a decision-maker is not wholly dependent on a single source of information, but instead

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conducts its own investigation into the facts relevant to the decision," leading to the adverse employment action.

However, in 2011 the Supreme Court rejected that standard in *Staub v. Proctor Hospital*, finding that an employer faces liability where a "supervisor performs an act motivated by [unlawful] animus that is intended by the supervisor to cause an adverse employment action, and…that act is a proximate cause of the ultimate employment action."

On Aug. 29, 2016, the 2nd U.S. Circuit Court of Appeals expanded the cat's paw theory of employment discrimination with a verdict in *Vasquez v. Empress Ambulance Service Inc*. In this case, the plaintiff complained to her employer about the "unwanted sexual overtures" made by a co-worker, which included the transmission of a graphic photograph to the plaintiff's cellphone. The *Vasquez* court explained that the co-worker presented the employer with printouts of a phony text message conversation he purportedly had with the plaintiff, which seemingly reflected the plaintiff's consent to and solicitation of a sexual relationship. When Empress investigated the incident, it declined the plaintiff's offer to show "her own cellphone, in an attempt to prove that no messaging had occurred." Without considering the plaintiff's evidence that the text dialogue was fake, Empress fired Vasquez for engaging in sexual harassment.

The plaintiff brought suit against Empress, alleging in court documents that Empress had retaliated against her [for making a complaint about sexual harassment] in violation of Title VII and New York State Human Rights Law. The district court dismissed the case, holding that the retaliatory intent of Vasquez's co-worker, a low-level employee [who had no decision-making authority], could not be imputed to Empress and that Empress consequently could not have engaged in retaliation.

The 2nd Circuit reversed the district court's dismissal, ruling that "an employee's retaliatory intent may be imputed to an employer where, as alleged here, the employer's own negligence gives effect to the employee's retaliatory animus and causes the victim to suffer an adverse employment decision." The *Vasquez* court noted that the employer refused to "inspect Vasquez's phone or to review any other evidence proffered by Vasquez in refutation," and ruled "an employer may be held liable for an employee's animus under a 'cat's paw' theory, regardless of the employee's role within the organization, if the employer's own negligence gives effect to the employee's animus and causes the victim to suffer an adverse employment action."

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Employers can avoid a similar fate as that of the fable's manipulated feline by conducting thorough investigations. When performing investigations, the employer needs to ensure that the investigation is as complete as possible to avoid negligently and effectively adopting an employee's unlawful motive and unwittingly permitting a biased non-decision-making employee an unauthorized role in the employer's employment decisions.

Examples of best practices that employers can implement to minimize risk include the following:

- Ensure all employees and supervisors are aware of, educated about, and trained on the employer's anti-harassment, anti-discrimination, and anti-retaliation policies.
- Adopt and comply with easily understood policies for employees to report and/or make an internal complaint or grievance within the workplace regarding discrimination claims, such as robust "open door" policies.
- Promptly address and investigate all allegations or even hints of discrimination, which includes interviewing the complainant, alleged harasser, witnesses, and others whom the employer has learned has knowledge of the facts of the complaint. Although isolated and purportedly discriminatory comments might not rise to the level of employment discrimination under a particular state's laws, those comments could create potential liability if the employee making the comments is subsequently subjected to an adverse employment decision.
- The employer should review all documents and other evidence relating to the complaint.
- Ensure that employees' personnel files contain sufficient documentation reflecting the legitimate business reasons supporting adverse employment decisions, and that the appropriate individuals have been consulted in order to determine the appropriate employment action to be taken (particularly when the employee denies wrongdoing).
- Maintain impartiality, document and consider all claims and possible evidence, and re-interview witnesses if necessary.
- Consider whether anyone involved in the adverse employment decision harbored animosity toward the employee being investigated.
- Enforce policies and/or discipline regarding similar violations uniformly where appropriate.

If employers conduct a thorough and complete investigation in good faith, remain impartial, and reach a conclusion supported by objective evidence, then the employer should not be found liable for adverse employment actions. ■