What Does the Cat's Paw Have to do With Employment Law?

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What do we mean by Cat’s Paw? It sounds cute, right?
In Employment Context

Wrong, Cat’s Paw = DANGER!
The Origin

The Cat’s Paw doctrine derives its name from La Fontaine's fable, "The Monkey and the Cat", where a monkey convinces an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire one by one thereby burning his paw, the monkey eagerly gobbles them up, leaving none for the cat. Today, the term "Cat's Paw" is used to describe a person who is unknowingly manipulated by another to accomplish the other’s purposes.
Case Law History

The “Cat’s Paw” phrase was apparently first applied to employment law in 1990 by the famous or infamous, depending on your opinion, Judge Richard Posner in an age discrimination case, *Shager v. Upjohn Co.*
In *Shager*, a front-line supervisor was accused of harboring age-based animus toward his direct report, the plaintiff, and of improperly influencing a corporate committee to terminate the plaintiff based upon this animus. Though no evidence existed that the committee members had discriminatory intent, Judge Posner wrote:
“If [the committee] acted as the conduit of [the supervisor's] prejudice — his **cat’s-paw** — the innocence of [the committee] members would not spare the company from liability.”
“For it would then be a case where [the supervisor], acting within (even if at the same time abusing) his authority as district manager to evaluate and make recommendations concerning his subordinates, had procured [the plaintiff's] discharge because of his age. [The supervisor] would have violated the statute, and his violation would be imputed to [the company].”
Recent Supreme Court Decision

Twenty-one years after Judge Posner used the phrase in *Shager*, the phrase “cat’s paw” became part of the Supreme Court’s lexicon with the recent decision of *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (U.S. 2011).

- While employed by the employer, the plaintiff, Richard Staub, was a member of the United States Army Reserve.
- Staub worked as an angiography technician for the employer Proctor Hospital until 2004, when he was fired.
- The employee's immediate supervisor and that supervisor's supervisor were hostile to his military obligations.
- Evidence was presented that his supervisors scheduled Staub for additional shifts without notice so that he would “pay back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.”
• There was also evidence that the immediate supervisor stated that Staub’s “military duty had been a strain on th[e] department.”

• The second level supervisor was also accused of referring to Staub’s military obligations as “a b[u]nch of smoking and joking and [a] waste of taxpayers[‘] money.”
In January 2004, the supervisors issued Staub a “Corrective Action” disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. The Corrective Action included a directive requiring Staub to report to either supervisor “when he had no patients and the cases were completed.”
Several months later, in April, a co-worker complained to Proctor’s Vice President of Human Resources and to the chief operating officer about Staub’s frequent unavailability and abruptness.
Three weeks later, the upper level supervisor informed the VP of HR that Staub had left his desk without informing a supervisor, in violation of the January Corrective Action.
The VP of HR relied on the supervisor’s accusation, however, and after reviewing Staub’s personnel file, she decided to fire him. The termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action.
Staub challenged his firing through Proctor’s grievance process, claiming that the supervisors had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations. The VP of HR did not follow up with the supervisors about this allegation. After discussing the matter with another personnel officer, the VP upheld her decision.
The District Court Action

Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 et seq., claiming that his discharge was motivated by hostility to his obligations as a military reservist. His contention was not that the VP of HR had any such hostility, but that both his supervisors did, and that their actions influenced the VP’s ultimate employment decision.
The text of USERRA expressly defines causation to include situations where discriminatory animus is a “motivating factor” in an adverse employment decision.

The jury found that Staub's “military status was a motivating factor in [Proctor's] decision to discharge him,” and awarded him $57,640.
Seventh Circuit Court of Appeals

Proctor appealed the jury’s decision, and the Seventh Circuit reversed, holding that the employer was entitled to judgment as a matter of law on Staub’s claims. 560 F.3d 647.
Court of Appeals

The court explained that under Seventh Circuit precedent, a “cat’s paw” case could not succeed unless the non-decision maker exercised such “singular influence” over the decision maker that the decision to terminate was the product of “blind reliance.” Id. at 659.
Court of Appeals Reasoning

Applying the law to the case, the court found that the VP of HR looked beyond what the supervisors said, and relied in part on her conversation with others and her review of the employee’s personnel file. The court said that the “singular influence” rule “does not require the decision maker to be a paragon of independence.” “It is enough that the decision maker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision.” *Id.*
Seventh Circuit’s Holding

Because the undisputed evidence established that the VP of HR was not wholly dependent on the advice of the supervisors when making the termination decision, the court held that the employer was entitled to judgment as a matter of law and found in Proctor’s favor.
Outcome of the Seventh Circuit’s Opinion

- The Seventh Circuit’s ruling put some substantial limitations on when and how a plaintiff can avail his or herself of the Cat’s Paw Doctrine.
- The decision limited the doctrine to basic blind reliance circumstances. Whether you agree or not, this was good for employers.
- But the story is not over yet. Staub then appealed, and the Supreme Court decided to hear the case.
Supreme Court Opinion by Justice Scalia

“We consider the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision.”

In other words, the Cat’s Paw Doctrine was revisited.
Supreme Court’s Reasoning

✓ The Court 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 a proximate cause of the ultimate employment action, then the employer is liable under USERRA.

✓ If the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA it is the employer's burden to establish that), then the employer will not be liable.
So, an employer may be liable if:

• a plaintiff’s supervisor takes an adverse action (writing up a negative report, for example) that is motivated by a discriminatory animus;

• the supervisor intends to get the worker fired, demoted or otherwise penalized in some fashion; and

• the supervisor’s action is found to be the “proximate” cause of the ultimate decision — even if the executive or supervisor who actually carries out the firing or other penalty is someone else, and that person was not at all biased.
Proximate Cause?

In the law, a proximate cause is an event that is sufficiently related to a legally recognizable injury to be held the cause of that injury.

The dreaded case by case analysis.
Outside Scope of Employment

“Needless to say, the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles.”
Limited Holding to Supervisors?

“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.”

We expect the next cat’s paw decision to involve this co-worker situation. Based on the proximate cause standard, the doctrine could very well be expanded.
Where can the Cat’s Paw reach now?

The Supreme Court’s reasoning in *Staub* applies to more than just USERRA cases.
Other Federal Statutes

- Importantly, the *Staub* opinion noted that Title VII uses the “motivating factor” causation standard, the same standard as USERRA.
- As such, the Supreme Court has green-lighted Plaintiff’s counsel to assert cat’s paw theories under Title VII.
  - Race claims
  - Gender claims
  - Nation Origin or Ancestry claims
Other Discrimination Claims

Employers should assume the cat’s paw theory could apply broadly and to any discrimination claim.

– Age discrimination claims under the ADEA.
– Disability discrimination claims under the ADAAA.
– FMLA retaliation claims
– Whistleblower claims
Ways it Can Reach You

These laws apply to all types of workplace situations, including hiring, firing, promotions, harassment, retaliation, training, wages, and benefits.
Cases in the Circuit

In *Nida*, the trial court found that if a subordinate is able to manipulate or influence a decision by concealing relevant information, the existence of bias on the part of that subordinate becomes important to the analysis. As such, the trial court allowed age discrimination claims to proceed to a jury despite the employer’s independent investigation of the decision to terminate the plaintiffs, where there was evidence that the subordinate supervisor concealed information during the investigations.
What to do now?

Unless the decision maker has first-hand knowledge of the reasons justifying the action, he or she should undertake some independent investigation and verify that the decision is the result of a legitimate non-discriminatory reason and not an unlawful animus.
Other Lessons from *Staub*

- The holding of *Staub* suggests the VP of HR’s investigation was far from adequate—she reviewed the personnel file and consulted another HR employee, but relied most substantially on the supervisors’ accusation that Staub had violated a workplace rule.

- The importance of an adequate investigation is mirrored in the *Nida* decision.
Investigations

The better the independent investigation, especially into the underlying facts, the more likely the investigation will break the “proximate cause” nexus between the discriminatory motive and the ultimate decision.
Conducting An Investigation

• Train your managers to manage
• Determine the goals of the investigation
• Select the appropriate investigator
  – This will be your key witness at trial if the matter turns into litigation
  – Who? Line manager, HR, outside counsel?
    • The appropriate investigator depends on the circumstances
Investigation Steps

• Identify potential witnesses
• Identify, secure, and review relevant documents (written warnings, personnel files, company policies, etc.)
• Prepare an outline of questions in advance
• Have the outline reviewed by more than just the investigator
Investigation Steps

• Interview the complainant or the person accused of wrongdoing!
• Interview the supervisor(s) recommending the decision.
• Interview other current or supervisors for their input on the decision under the circumstances.
• Ask interviewees to identify other potential witnesses!
Investigation Steps

- Ask the people you are interviewing to provide written statements.
- Ask the interviewees to sign and date the written statements.
- If the interviewees refuse to provide statements, ask if they will initial or sign off on the investigators notes or reports.
- Reach a conclusion and document the conclusion.
Cat’s Paw

While nothing in life is certain, if you follow these steps, you may just be able to avoid being the zebra we saw at the beginning of this presentation.
Questions?

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