

Employer Liability for Supervisor Discrimination Under the Cat's Paw Doctrine

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Employers often have imperfect information when making decisions to hire, demote, or terminate employees, but strive to have neutral, unbiased persons making those decisions. Employees making claims of discrimination have traditionally relied upon proof of direct, illegal action by their supervisor to state their case. However, employers should be aware of a theory of liability often used by Plaintiff's counsel to expand the potential for success in discrimination claims. Under the "cat's paw" theory, plaintiffs may attempt to prove a supervisor's animus (hostile intention) to establish illegal discrimination, even where a neutral human resources manager, harboring no illegal animus, performed the actual termination or demotion. In this type of case, the Plaintiff will argue that a biased supervisor may have influenced an upper-tier administrator to demote, cut the pay of, or terminate an employee for discriminatory reasons. As a result, the argument goes, the employer should be held liable through the "ball of string" the cat's paw set in motion.

The theory is best illustrated by the following example: Suppose Ed is a drywall hanger and Sam is his immediate supervisor. Sam does not have the power to terminate Ed. Ed is Latino, and Sam is Caucasian. Sam has been accused of criticizing Ed's work more than that of Ed's coworkers. Sam has been overheard telling a co-worker that Latinos are lazy. However, Sam never told human resources of his opinion; nor has he criticized Ed's work to HR. Later, the company asks Ed to work overtime on a special project. When Ed refuses, human resources manager Tony — unaware of Ed's race — fires Ed for refusing a reasonable work order. Under the cat's paw theory, if Ed can prove Sam's racial bias, the company might be liable for race discrimination under Title VII of the Civil Rights Act (Title VII) for Tony's act.

This argument has been successfully applied in several U.S. district courts, including the 9th Circuit (covering the west coast and Hawaii). Earlier this year, the Supreme

Court agreed to hear a case (BCI Coca-Cola Bottling Co. v. EEOC, 450 F.3d.476 (10th Circuit 2006) cert. dismiss) on the question of under what circumstances an employer may be held liable for discrimination based upon the bias of a supervisor, who himself did not take the adverse employment action complained of. The Court received numerous amici curiae briefs, arguing for and against the cat's paw theory. Employers urged that, under cat's paw, managers are put at an unfair disadvantage if they cannot rely on their neutral and unbiased human resources agents to manage employment practices and instead must expend significant resources investigating even routine employment decisions for potential supervisor discrimination. On the other hand, employee advocates argued, Congress intended to eliminate racial discrimination in the workplace with the enactment of Title VII, which places a greater responsibility on employers.

Unfortunately, before the Court was set to hear oral argument, the parties settled their dispute and the case was dismissed. This issue remains unsettled in the courts



and creates potential concern to employers.

Avoiding potential cat's paw liability is best addressed as part of a comprehensive plan. The first step is to ensure that human resources personnel are not operating in a vacuum. At a minimum, employers should set up policies and procedures aimed at complying with antidiscrimination laws, including:

1. Maintaining an effective anti-discrimination policy.
2. Adopting procedures for the reporting of discrimination.
3. Training employees and supervisors in reporting and documenting discrimination under these policies and procedures.

- 4 Documenting employment decisions so they cover not only the adverse employment action, but include the employee's overall performance.
5. Where warranted, performing "due diligence" investigation into reports of discrimination, or hiring a neutral third-party investigator.

By documenting the potential "ball of string" initiated with the cat's paw, employers may be able to defend themselves by pointing to breaks in the "string" if discrimination issues arise.■

