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Employers Beware of the Cat's Paw

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The cat scratches again! Five years ago, the United States Supreme Court handed down *Staub v. Proctor Hospital*, wherein it held that an employer may be liable for a **supervisor**'s discriminatory animus when the independent decision-maker merely rubber-stamps the supervisor's recommended adverse employment action. 131 S. Ct. 1186 (2011). This is the cat's paw theory of liability. Last week, the Second Circuit extended this theory to find an employer liable for a **co-worker**'s retaliatory animus even though the co-worker was neither a decision-maker nor a supervisor.

Background

In 1990, Judge Posner used the "cat's paw" metaphor in employment discrimination cases. Cat's paw now refers to a situation where an employee suffers an adverse employment action (e.g. termination) by a supervisor, who has no discriminatory motive, but was manipulated by a subordinate who does have a discriminatory motive and intended to bring about the adverse employment action. In the *Staub* decision of five years ago, the Supreme Court focused on "supervisor" conduct to conclude that the cat's paw theory of liability was proper because the supervisor acted as an agent for the employer, and the neutral decision-maker was merely a conduit of the subordinate supervisor's prejudice. The Court specifically noted that it "expressed 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." The Second Circuit has now addressed this question.

In *Vasquez v. Empress Ambulance Service, Inc.*, the Second Circuit, while noting that the Supreme Court did not address co-worker liability in *Staub*, held that an employer can also be liable for a co-worker's retaliatory animus. The Second Circuit reasoned that in hostile work environment cases even if the employee's sexual harassment is outside the scope of employment, the employer can be liable where its own negligence is a cause of the harassment, (i.e., if it knew or should have known about the conduct and failed to stop it). The court believed that this reasoning should extend to Title VII retaliation cases.

Therefore, the court concluded that an employee can recover against the employer if the employer negligently allowed false allegations and the retaliatory intent behind the allegations to achieve the desired adverse employment action. If the employer knew or should have known of the co-worker's retaliatory animus, the fact that the co-worker was a low-level employee with no supervisory or management authority cannot shield the employer from liability. The employer's negligence requires treating the co-worker as the employer's agent, which places that person in the same shoes as a supervisor.

What's the reality?

Retaliation is an ever-increasing claim being asserted by employees who report protected activity, (e.g., discrimination or harassment). In fact, according to the EEOC, retaliation claims continue to rise each year, and the EEOC Chair recently indicated that retaliation is asserted in nearly 45 percent of all charges received by the EEOC. The EEOC even released a Final Enforcement Guidance on Retaliation on August 29, 2016. Now, with rulings like *Vasquez*, employers must beware of potential liability for retaliation based on a co-

worker's retaliatory animus to the extent that such animus motivated the employer's adverse employment action.

Plaintiffs use a cat's paw theory of liability when they are unable to demonstrate that the decision-maker – the person who took the adverse employment action – personally had retaliatory animus against the employee. Pursuant to the cat's paw theory, plaintiffs may establish liability by showing that the person with a retaliatory motive influenced the decision-maker. The Supreme Court found this proper for supervisor conduct. The Second Circuit's extension of the theory allows employees to establish liability based on a co-worker's animus. To do so, the co-worker's allegations must influence the decision-maker, and the employer must know or should have known of the co-worker's retaliatory animus.

What does this mean for employers?

This means that it is critical that investigations are neutral, independent and sufficient to break any chain of causation in a cat's paw case. The employer should not simply rely on what a supervisor or other co-worker says. Before taking any adverse employment action against an employee, the decision-maker should conduct a fair, impartial and good faith investigation into the allegations to ensure the employer is not acting on false or misleading information. During investigations, the employer should, at a minimum:

1. Interview both the accused and the claimant and allow them to present evidence.
2. Gather ALL and COMPLETE documents or other pertinent information.
3. Consider contrary evidence.
4. Conduct necessary interviews.
5. Follow any and/or establish complaint procedures or a grievance policy.
6. TRUST but VERIFY. The investigator should not simply trust statements or evidence presented by supervisors or co-workers. The investigator should verify all information where possible. Additionally, the investigator should consider whether the accused employee, supervisor, etc. has any retaliatory motive or animus against the complaining employee.
7. Be PATIENT (do not make rash or hurried decisions).
8. Take Appropriate Interim Action. Decide whether to separate the employees or place anyone on leave during the investigation.

An employer is not required to conduct an evidentiary hearing, but thorough investigations should be conducted when appropriate. Contact counsel to discuss the proper scope of investigations, choice of investigator, the material *supporting* and *opposing* any adverse employment decision, whether more than the usual review of prior written warnings is necessary to support the termination decision (particularly where the employee has alleged harassment or discrimination) and other concerns.