

The HR Cat's Paw

Linda D. McGill, Esq. | March 2007

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Consider this situation: A human resources manager, whose office and job are removed from daily interactions on the shop floor, is called upon to make a decision about whether to fire an employee for reported insubordination and unauthorized absence. She listens to the account of the supervisor, checks the employee's personnel file and finds an earlier similar incident of insubordination and refusal to report to work, confers with a colleague and reviews the Company's policies. Based on the information at hand, she concludes that the employee should be fired. The termination decision is finalized, and the manager and supervisor meet with the employee to deliver the news. Only at the termination meeting does the human resources manager learn that the employee is African-American, that he received permission from another supervisor to be absent because of illness and that he disputes the accusation of insubordinate conduct. The termination decision stands. In the ensuing EEOC charge of race discrimination and federal court litigation, testimony and affidavits reveal that the supervisor has a history of racist remarks and appears to have treated the plaintiff more harshly than he treated Caucasian and Hispanic employees in similar circumstances. But there is no evidence that the human resources manager, whose job includes conducting affirmative action and equal employment opportunity training sessions for the company, acted out of bias in making the decision. On the contrary, she did not even know the employee's race until the decision was final. Should the supervisor's alleged racial animus be imputed to the human resources manager's decision, resulting in liability for the employer?

The contours of imputed discrimination – termed the “cat's paw” theory after a classic fable about a cat, a monkey and hot chestnuts – will be decided by the U.S. Supreme Court in its current term. The issue on the Court's docket arises from an appeal by Coca Cola Bottling Company of Los Angeles from an adverse decision by the Tenth Circuit Court of Appeals which involves the facts outlined above. As the Tenth Circuit explained in its 2006 ruling, in the employment discrimination context, “cat's paw” refers to a situation in which a biased subordinate, who lacks decision-making power, uses the formal decision-maker as a dupe in a deliberate scheme to trigger a discriminatory employment action. The companion “rubber stamp” doctrine, which is also at play in the pending case, refers to a situation in which a decision-maker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate, without independently investigating the complaint against the employee.

In deciding the case, the Supreme Court will resolve a split among the circuit courts, whose respective judges have generally recognized the cat's paw theory (except for the Fourth Circuit, which has rejected it all together) but used different tests for determining how great the influence of the biased subordinate must be on the decision-making process in order to generate liability. The First Circuit, which hears appeals from cases that arise in

Maine's federal courts, held definitively in 2004 that a subordinate's bias could be the basis for liability for employment discrimination. In *Caraglia v. Hertz Rental Corporation*, the issue was whether a vice-president of Hertz, who had made age related comments about the plaintiff, had withheld information on a key point favorable to the plaintiff from the three more senior level members of Hertz management who had made the termination decision. If so, the First Circuit held, the decision would be impermissibly tainted with age-based bias. In 2005, Justice Woodcock of the Maine Federal District Court applied *Caraglia's* cat's paw analysis to find that the U.S. Postal Service in Bangor could be liable for retaliation if a supervisor who evidenced discriminatory *animus* toward the plaintiff meaningfully influenced the decision to discipline the plaintiff, when the final decision was made by a human resources manager who accepted the supervisor's version of the facts without conducting an independent investigation. *Harlow v. Potter and USPS*, 353 F. Supp.2d 109 (D. Me. 2005).

In its brief to the Supreme Court, Coca Cola Bottling Company, as well as the U.S. Chamber of Commerce in its Friend of the Court brief, has argued that employers should be held liable under Title VII only for decisions made by those whom a company has authorized to make them. Causation, the Company argues, is only one prong of the test for liability. The other prong, which was wrongly ignored by the Tenth Circuit (and, by extension, other circuit courts using the same approach), is that of agency. If the courts are allowed to impute discrimination from lower level supervisors or other employees who have no decision-making authority in the matter at hand to the agents who have the responsibility for making employment decisions, employers will be vulnerable to liability for discrimination based on the "frolic and detour" of an employee outside the decision process. This would be at odds with the principles of agency and vicarious liability that have been applied in other Title VII cases and would broaden the reach of Title VII by the length of the cat's paw – which could be long indeed. The EEOC, on behalf of the terminated employee, argues that Coca Cola Bottling Company, and by extension other employers, should be liable for a decision that is tainted by the discriminatory motive of a supervisor, whether the taint is from withholding key information, selective reporting or misrepresenting facts. The EEOC, along with amicus, urges the Court to hold that a decision-maker's cursory or "rubber stamp" review should not be allowed to insulate an employer from liability, because such insulation would allow an employer to be intentionally blind to the bias of a supervisor whose reports are an integral part of the decision-making process.

Whether the Supreme Court's decision will radically alter the scope of liability for employment discrimination remains to be seen. It will surely provide consistency to the Circuit Courts' treatment of cat's paw cases and, hopefully, to human resources managers and others involved in and responsible for making employment decisions. Meanwhile, the best practice for those responsible for making decisions affecting employees is to take all necessary actions to be sure that the information relied on is credible, accurate and untainted by discriminatory bias. In some cases, this will mean interviewing witnesses beyond the immediate supervisor or otherwise not relying on a single source. Other cases may require an independent and full-fledged investigation as a predicate for decision-making. In all cases, no important decision regarding an employee should be made with a rubber stamp. Like the fabled cat who was duped into using his paw to fish chestnuts out of the fire for the more clever monkey, a decision maker who acts in a cursory way based

on untested information, no matter how pure the intention, may get burned. Oral argument in *Coca Cola Bottling Company of Los Angeles v. EEOC* will be held on April 18, 2007.

Linda D. McGill is a shareholder at Bernstein Shur. She can be reached at lmcgill@bernsteinshur.com or by calling 207 774-1200.