

# THE DAILY RECORDER

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## The Cat's Paw Swipes Employers

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In light of a recent United States Court decision, Staub v. Proctor Hospital, careful employers should consider requiring a review of lower-level managers' and supervisors' recommendations to terminate or take other actions against employees. A review allows more responsible managers to detect ill-motivated decisions that could turn into legal claims. Senior managers, uninvolved in the day-to-day supervision of an employee, can lend a degree of objectivity. They also ensure consistent application of company policies. Depending on the level of scrutiny, a second or third-level review can also ensure proper documentation identify "red flags" and assess potential risks.

Although an approval process is a good idea, it is not a vaccine against employment claims. Even if detailed policies and procedures are in place, the more senior management generally relies on lower-level employees' good faith and skill to report the relevant facts. Further, senior managers cannot always independently assess the facts that lead to a proposed decision. Some may merely "rubber stamp" a recommendation, whether because they are too busy, not trained how to review such recommendations, or because they place too much reliance on the assessment of those "on the ground."

In Staub, the Court explained that decisions tainted by discrimination cannot be cured by an innocent manager's "blessing." Whether or not

the final decision maker knew of the unlawful bias, a tainted decision is attributed to the employer. This principle is known as "cat's paw" liability, as explained below.

The employer is liable for discrimination or retaliation if an unlawful bias was a motivating factor in an adverse action. This standard means employers may be liable for discrimination even if there are good reasons for taking action and the discriminatory or retaliatory animus was just one of several motivating factors.

The Staub decision combined with the "motivating factor" liability standard may frustrate employers seeking to prevent liability for unlawful decisions. What is an employer to do? The following provides an overview the "cat's paw" liability Staub affirmed. We also provide some practical steps employers can follow to minimize their potential liability.

### Liability for the "Cat's Paw"

As discussed above, a plaintiff claiming unlawful discrimination or retaliation must show that the person making the decision was motivated, at least in part, by bias against plaintiff's engaging in "protected activity" (retaliation) or protected characteristics (e.g., race, religion, sex, etc).

In a cat's paw scenario, a plaintiff alleges that someone else, acting with a discriminatory motive,

influenced the decision but was not ultimately responsible for the adverse action taken against the plaintiff. The term "cat's paw" comes from a 1990 court decision in which the court analogized to a fable involving a monkey and a cat. The monkey convinced the cat to reach into a fire and pull out roasting chestnuts. The monkey then took the chestnuts, leaving the cat with nothing except for a burned paw.

Thus, under the cat's paw theory, a lower-level supervisor (monkey) asks the upper level manager (cat) to approve a decision (chestnuts). The manager (cat) is unaware of the peril and ends up approving a decision that was tainted by discrimination.

Before Staub, employers successfully argued that they could not be liable unless the actions of the discriminatory lower-level manager were the "sole influence" for the employer's adverse action. So, if the employer did even a minimal amount of review before approving the lower manager's recommendation, it could escape liability for the lower manager's unlawful motive. Staub killed this strategy.

### Staub v. Proctor Hospital

Staub was an Army reservist, whom Proctor Hospital employed until it discharged him in 2004. Staub sued Proctor for violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA). Under USERRA, an employer may be liable for unlawful

discrimination if “the person’s [military] membership is a motivating factor in the employer’s action.”

Staub claimed two of his supervisors openly discriminated against him because of his military status and activities. He further alleged that their actions, including trumped up disciplinary warnings for violations of non-existing policies, influenced the ultimate decision to terminate his employment. Staub acknowledged that the person who made the termination decision, the Director of Human Resources, had no discriminatory animus. Rather, she was the unknowing “cat’s paw” of the discriminatory supervisors. Nonetheless, Staub argued that his lower-level supervisors discriminatory actions were “a motivating factor” in his termination, because the Human Resources Director based her decision on the supervisors’ recommendation.

Proctor Hospital argued the “sole influence” theory to defeat Staub’s claims. According to Proctor, the Director of Human Resources performed her own “independent investigation” by reviewing Staub’s personnel file to verify past performance issues.

The Supreme Court adopted a broad standard, applying cat’s paw liability if: (1) a supervisor acts with discriminatory motive; (2) the discriminatory supervisor intends to cause the adverse action; and (3) the discriminatory act is a “proximate cause” of the adverse action.

#### Staub’s Impact on Internal Investigations

The Court also rejected the argument that a decision maker’s independent investigation could scrub the decision clean of any discriminatory motive. That may work sometimes, but not always. If

a supervisor has a discriminatory motive, the investigation must reveal an independent basis to support the adverse action. Otherwise, there is a lingering link between the bias and the decision. So long as that link is present, there is potential liability for unlawful discrimination.

Recommendations by lower-level supervisors cannot be “rubber-stamped.” Now, there are two potential levels of investigation: (1) investigating whether there is any evidence of discriminatory animus by the lower-level supervisor; and (2) if so, investigating whether there is an independent basis to support the recommended adverse action.

#### Investigations: Prevention and Protecting Against Cat’s Paw Liability

Employers may conduct internal investigations after complaints of discrimination or retaliation arise. However, by the time an investigation is initiated, the negative action likely has already taken place. Accordingly, the potential for cat’s paw liability should prompt employers to consider “pre-adverse action” investigations in appropriate cases.

Not every discharge or other adverse action warrants a pre-investigation. For example, a manager responsible for making a decision without the need for approval from superiors does not have to investigate his or her own motivations. This situation may occur in smaller workplaces. It may also occur when the manager making the decision is the supervisor of the employee to be disciplined or discharged.

In cases where decisions are based on subjective criteria, or in larger businesses, however, a fresh look at the circumstances may be warranted. Employers with policies and procedures in place for pre-

action review should examine whether the review is sufficiently thorough and systematic to avoid later claims.

At minimum, employers should ensure that decisions are supported by facts that can be verified objectively. If a supervisor wishes to discharge someone for violating a policy, the person reviewing the situation should be satisfied that the facts establishing the violation are verifiable. It is also important to determine whether a policy is applied consistently or selectively.

The investigator/reviewer should assess whether there is a “history” between the employee and supervisor, and whether the employee has made complaints in the past or otherwise could be vulnerable to a decision motivated by an illegal reason.

Identification of corroborating information is another important component. If the lower-level supervisor is recommending termination for attendance issues, have other supervisors identified the same attendance issues with this employee? The more corroboration there is, the less likely it is that there is a discriminatory lower-level supervisor attempting to use the employer as a cat’s paw.

Another issue worth examination is to anticipate whether an employee will offer an excuse for the conduct underlying the negative action. It is worth determining if the decision maker is “pouncing” on an error that is attributable to something beyond the employee’s control. Although employment is often “at will,” the issue here is ensuring that a decision is motivated by lawful considerations.

As with most things employment law, documentation is very important. Managers and

supervisors should be required to produce documentation to a reviewer or investigator that establishes the justification for proposed action, particularly if a supervisor takes the position that the employee “knew” of his or her performance deficiency, or that prior counseling had been given.

#### Other Tools to Help Employer’s Avoid Becoming a Cat’s Paw

Preventing “cat’s paw” liability is consistent with good human resources practices generally. For example, employers should clearly communicate job expectations to employees so they understand what

is expected. When an employee is not surprised by adverse action, the chance of a discrimination claim is reduced.

A proper open-door and complaint procedure is also important. When an employee is disciplined and does not seek a review or complain of unfair or discriminatory treatment, that helps the supervisor justify discharge or more severe discipline based on similar reasons.

Proper training also plays a role. Managers and supervisors should be trained how to communicate disciplinary action and job expectations. They also must be

alerted to the company’s efforts to prevent liability through a proper review procedure discussed above. Supervisors need to understand that their proposed negative actions will be subjected to scrutiny and analysis, which will encourage them to put more thought into their decisions.

The workplaces may seem to require quick decisions and operates at an increasingly faster pace. However, sound human resources policies permit management to “put on the brakes” to review and investigate before taking action that can result in expensive and time consuming employment claims.

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