When a Discharged Employee Claims Discrimination, Will the "Cat's Paw" Doctrine Overcome Evidence That the Decision-Maker Harbored No Discriminatory Bias?

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THE CASE OF *BROWN v. UNIVERSITY* (PART TWO): THE TALE OF CAT'S PAW

In our hypothetical, the University's facilities manager, Ms. Smith, hired Mr. Brown, a person of her same race and approximate age, for the position of plumber. Mr. Brown was placed under the immediate supervision of Mr. Wong. Mr. Wong complained to Ms. Smith about Mr. Brown's performance, and she in turn decided to terminate Mr. Brown's employment before the end of his one-year probationary period. Mr. Brown then sued the University for discrimination based upon age and race. In Part One of our article, we examined the application of the same-actor inference to Mr. Brown's claims and concluded that it will enable the University to prevail on summary judgment under federal law, barring an extraordinarily strong showing by the plaintiff. Under state law, on the other hand, it is doubtful that the inference will play any role on summary judgment, much less prove dispositive for the University.[1] Now, in Part Two, we examine the cat's paw doctrine[2] to determine whether it will help Mr. Brown defeat the University's impending motion for summary judgment.

With no evidence that Ms. Smith harboured animosity toward Mr. Brown because of his age or race, the University and its counsel believe not only that they have a solid defense to Mr. Brown's discrimination claim, but also that they will prevail on summary judgment. "Not so fast," responds Mr. Brown's counsel. The facilities manager, Ms. Smith, was merely the "cat's paw" of Mr. Wong, who did in fact harbor discriminatory animus toward Mr. Brown and wanted him fired. Which side is correct?

FEDERAL LAW: THE SUPREME COURT'S BROAD VIEW OF THE CAT'S PAW DOCTRINE

In March 2011, in *Staub v. Proctor Hosp.*,[3] the U.S. Supreme Court issued its first opinion on the "cat's paw" theory of liability and directly addressed "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."

Vincent Staub was employed as an angiography technician by Proctor Hospital. Staub was also a member of the U.S. Army Reserve, which required him to attend drill one weekend per month and to train full time for two to three weeks each year. Both Staub's immediate supervisor, Janice Mulally, and her supervisor, Michael Korenchuk, were hostile to Staub's military obligations. Motivated by their animus toward Staub's military service, Mulally issued Staub a "Corrective Action" disciplinary warning for allegedly violating a company policy, and Korenchuk subsequently accused Staub of violating the "Corrective Action" warning. As a result of this accusation, the hospital's Vice-President of Human Resources, Linda Buck, reviewed Staub's personnel file and made the decision to fire him. There was no evidence that Buck herself bore animus toward Staub because of his military service nor even knew that Mulally and Korenchuk harbored such hostility. Staub filed a grievance over his firing and claimed that his supervisors had fabricated the allegations against him due to their hostility toward his military service. Buck, who was responsible for adjudicating the grievance, upheld the termination.

Staub sued Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[4] claiming that his discharge was motivated by hostility to his obligations as a military reservist. Staub did not contend that Buck personally harbored any such hostility; rather he argued that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision. A jury found that Staub's military status was in fact a motivating factor in the decision to discharge him and awarded him $57,640 in damages.

The Seventh Circuit reversed, finding that Proctor Hospital was entitled to judgment as a matter of law. 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 discharge was the product of "blind reliance." The court noted that because Buck looked beyond what

Mulally and Korenchuk had said, relying in part on her conversation with another employee and her review of Staub's personnel file, she was not wholly dependent on the advice of Korenchuk and Mulally.

The United States Supreme Court granted certiorari, and in an 8-0 opinion written by Justice Scalia (with Justice Kagan abstaining), rejected the Seventh Circuit's "singular influence" standard. The Court instead 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."[5] The Court based its decision, at least in part, on the absurd consequences that could arise if the outcome was different:

> Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action.[6]

The Court further held that a mere independent investigation by the ultimate decision-maker does not absolve the employer from liability. "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."[7] To escape liability, an employer must prove that the adverse employment action was either unrelated to the supervisor's discriminatory action or entirely justified:

> [I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . , then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.[8]

[A]n employer should carefully memorialize the decision-making process and detail the steps it took to "independently" determine that an adverse employment action was warranted . . .

Although *Staub* involved the USERRA, the Supreme Court seemed to suggest that the cat's paw doctrine would be equally applicable to Title VII, noting that the relevant section of USERRA is "very similar to Title VII," which prohibits employment discrimination where a prohibited criterion "was a motivating factor for any employment practice, even though other factors also motivated the practice."[9]

Unfortunately, *Staub* left many questions unanswered. The Supreme Court "express[ed] 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."[10] The Supreme Court also "express[ed] no view as to whether [an employer] would have an affirmative defense if" it had a grievance process and the

[I]n Staub v. Proctor Hospital, *the U.S. Supreme Court issued its first opinion on the "cat's paw" theory of liability . . .*

employee failed to use it.[11] Equally important, the Court did not provide any helpful guidance on what an employer needs to do before taking action against an employee, or what evidence an employer needs to proffer to establish that its "independent investigation" was unrelated to the supervisor-agent's discriminatory animus or was a superseding cause of the harm.[12]

CALIFORNIA LAW: IS THE CAT'S PAW DOCTRINE RELEVANT?

The first California court to expressly address the impact of the cat's paw doctrine in an employment discrimination case was the Sixth District Court of Appeal in *Reeves v. Safeway Stores, Inc.*[13] William McLeod Reeves worked as a clerk at Safeway. Nearly thirty years into his employment, Reeves became aware of conduct in the store where he worked that he believed constituted sexual harassment of female employees. At the behest of several of the female employees, he complained to store manager Fred Demarest. However, Demarest trivialized the complaints, saying that women were "not such pure innocent things" as plaintiff supposed, and later telling Reeves, "Bill, as far as I'm concerned, unless these gals come to me and complain about it . . . , the problem exists between your ears." Shortly after making his complaints to Demarest, Reeves left work at the end of his shift only to have to return immediately to use the restroom due to diarrhea. Sandy Juarez, in charge of the night crew, opened the door enough to talk to Reeves, but refused to let him enter, citing a purported policy not to let anybody into the store after it closed. Reeves, stating that it was an "emergency" and that he had to use the restroom, pushed the door open and went inside to use the bathroom. Juarez complained about the incident to Demarest, and Demarest, without speaking to Reeves, called Safeway's security department and told security officer Darrell Harrison that Reeves had possibly engaged in workplace violence. Harrison investigated and then called district manager Moira Susan Hollis to recommend that Reeves be fired. Hollis, who was unaware of Reeves' sexual harassment complaints, decided to terminate Reeves' employment during the telephone call with Harrison.

Reeves sued for retaliation in violation of the Fair Employment and Housing Act (FEHA). The trial court granted Safeway's motion for summary judgment because Hollis did not know about Reeve's complaints of sexual harassment. On appeal, the court considered "whether an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, but the cause for discipline is separately investigated and the ultimate decision to discharge the plaintiff is made by a manager with no knowledge that the worker has engaged in protected activities."[14]

In reversing summary judgment, the court relied on the cat's paw doctrine to answer the question in the affirmative:

> We hold that so long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be liable for retaliatory discharge. Here the evidence raised triable issues as to the existence and effect of retaliatory motive on the part of the supervisor, and as to whether the manager and the intermediate investigator acted as tools or "cat's paws" for the supervisor; that is, instrumentalities by which his retaliatory animus was carried into effect to plaintiff's injury.[15]

Like the later decision in *Staub*, the *Reeves* decision does not address whether an employer would be liable if a co-worker with a discriminatory animus, rather than a supervisor, influenced the ultimate employment decision.[16]

Four years later, in *DeJung v. Superior Court*,[17] the First District Court of Appeal re-affirmed use of the cat's paw doctrine to defeat summary judgment and potentially broadened the scope of the doctrine. Theodore DeJung was a full time commissioner of the Sonoma County Superior Court, who agreed to a retiring judge's proposal to split the full-time commissioner position. From 1996 through the spring of 2004, DeJung and the retired judge, Gail Guynup,

split the full-time commissioner position between them, with each working alternating two-month stints. During this same time period, DeJung also filled in for judges who were absent, and took overflow from judges with full calendars.

In December 2003, Guynup approached DeJung and told him she would not work beyond April 1, 2004. DeJung told presiding judge Allan Hardcastle about Guynup's decision and suggested a replacement for her. Hardcastle told DeJung that the Superior Court's Executive Committee, which Hardcastle chaired, had decided not to continue splitting the full-time commissioner position. DeJung then said that he would like to return to full-time status. About a week later, Hardcastle told DeJung that "they want[ed] somebody younger, maybe in their 40's." At around that same time, a third party asked Hardcastle whether DeJung would become the full-time commissioner, and Hardcastle responded that DeJung was "a great guy but we're looking for someone younger."

Thereafter, the Executive Committee created a screening panel that did not include Hardcastle, which reviewed 53 applications and selected 12 candidates, including DeJung, for interviews. The members of the interview panel ranked their top choices following extensive discussions, and none ranked DeJung as a top choice. In declarations filed in support of the Superior Court's summary judgment motion, each panel member attributed DeJung's lower ranking to his interview performance, his reputation, and the superb quality of the other candidates. The interview panel's top three choices were 62, 56, and 50 years old, while DeJung was nearly 65. Ultimately, the court appointed to the commissioner position Larry Ornell, who, at 43 years of age, was the second-youngest candidate interviewed and among the six youngest in the entire candidate pool.

DeJung sued for age discrimination, and the Superior Court prevailed on summary judgment. In response to DeJung's appeal, the Superior Court argued that Hardcastle's comments, if made, did not taint the decision-making process because the hiring decision involved a multi-level process conducted by multiple individuals. The First District Court of Appeal rejected this argument, citing the cat's paw doctrine:

> DeJung need not demonstrate that every individual who participated in the failure to hire him shared discriminatory animus in order to defeat a summary judgment motion. [A]n individual employment decision should not be treated as a . . . watertight compartment, with discriminatory statements in the course of one decision somehow sealed off from . . . every other decision. Thus, showing that a significant participant in an employment decision exhibited discriminatory animus is enough to raise an inference that the employment decision itself was discriminatory, even absent evidence that others in the process harbored such animus. This legal principle has been colorfully referred to as the "cat's paw" doctrine.[18]

Most recently, in Reid v. Google, Inc., *the California Supreme Court validated the cat's paw doctrine under California law, at least inferentially . . .*

The court of appeal reversed the grant of summary judgment, finding that it would be "entirely reasonable for a trier of fact to infer that Hardcastle's discriminatory animus influenced the process."[19] This standard appears more liberal than the one articulated in *Reeves* (*i.e.*, that the biased non-decisionmaker was the actuating but-for cause of the adverse employment action).

Most recently, in *Reid v. Google, Inc.*,[20] the California Supreme Court validated the cat's paw doctrine

under California law at least inferentially (without defining its scope) by relying upon it to point out fundamental flaws in the so-called "stray remarks" doctrine.[21]

BROWN v. UNIVERSITY: HOW DOES THE PLAINTIFF FARE?

Returning to our hypothetical, under both federal and California law, the fact that Ms. Smith was the ultimate decision-maker and harbored no discriminatory animus toward Mr. Brown does not win the day for the University. Rather, under federal law, Mr. Brown will be able to defeat summary judgment if he can adduce evidence that Mr. Wong, upon whose complaints Ms. Smith relied, was not only biased against him due to his age or race but also was the proximate cause of his termination. Under California law, the answer it not so clear. Mr. Brown may have to prove as much as required under federal law—*i.e.*, that Mr. Wong not only was biased against him but also that Mr. Wong was the actuating, but-for cause for his termination. Or Mr. Brown may only need to demonstrate that Mr. Wong was biased against him and that Mr. Wong's complaints were a significant factor in the termination decision.

PRACTICAL ADVICE FOR THE EMPLOYER POST-STAUB

So what can an employer do to limit potential liability in taking adverse employment actions against an employee, especially when the employer later learns that a supervisor or manager involved in the decision-making process harbored unlawful animus? First, employers should have effective policies and procedures in place for investigating employee misconduct, and they should provide an effective process through which employees can challenge adverse employment actions that they believe were based upon unlawful motives. Second, employers should craft objective criteria for measuring an employee's performance that is not wholly dependent on the assessment of an immediate supervisor or manager who could harbor discriminatory animus. In other words, an employer should have an "independent" mechanism to test or verify the performance assessment rendered by a supervisor or manager. Lastly, an employer should carefully memorialize the decision-making process and detail the steps it took to "independently" determine that an adverse employment action was warranted or that the employee's claim of animus had no merit. This is not an exhaustive list, and following it is not insurance that employers will escape fault if it is shown that supervisors or managers with discriminatory animus influenced the decision-making process. Nonetheless, employers should be able to use such information to effectively defend against claims of discrimination or retaliation under the FEHA or Title VII.

[A] mere independent investigation by the ultimate decision-maker does not absolve the employer from liability.

ENDNOTES

1. *See* Andrew H. Friedman & Michael E. Whitaker, *Applying the Same-Actor Rule to Defend Against a Claim of Discrimination*, CAL. LAB. & EMP. L. REV., Jan. 2011, at 1, 11.
2. "The term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing." *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1190 n.1 (2011).
3. *Staub*, 131 S. Ct. at 1189.
4. 38 U.S.C. §§ 4301 *et seq.*
5. *Staub*, 131 S. Ct. at 1194 (emphasis in original; footnote omitted).

6. *Id.* at 1193.
7. *Id.*
8. *Id.*
9. *Id.* at 1191.
10. *Id.* at 1194 n.4.
11. *Id.*
12. *Id.* at 1192.
13. *Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95 (2004). Earlier California cases applied the principles underlying the cat's paw doctrine without identifying it as such. *See, e.g., Morgan v. Regents of Univ. of Cal.*, 88 Cal. App. 4th 52, 74 (2000) (stating that "[i]n the context of the academic tenure system, in which decisions and recommendations made in earlier levels of review may be available to decision makers at subsequent levels, it clearly makes sense to acknowledge that the final decision may be influenced by the discriminatory intent of individuals playing a role at any point in the decision making process").
14. *Reeves*, 121 Cal. App. 4th at 100.
15. *Id.*
16. *Id.* at 109 n.9.
17. *DeJung v. Superior Court*, 169 Cal. App. 4th 533 (2008).
18. *Id.* at 551 (internal quotations and citations omitted).
19. *Id.* at 552.
20. *Reid v. Google, Inc.*, 50 Cal. 4th 512 (2010).
21. *Id.* at 542 ("[T]he stray remarks doctrine contains a major flaw because discriminatory remarks by a non-decisionmaking employee *can* influence a decision maker. If [the formal decision maker] acted as the conduit of [an employee's] prejudice—his cat's paw—the innocence of [the decision maker] would not spare the company from liability")(quotation marks and cite omitted).

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