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# Who's Burning Now? Avoiding "Cat's Paw" Liability Through Proper Predisciplinary Investigation

The recent U.S. Supreme Court decision on "cat's paw" liability requires employers to be more vigilant in ensuring that all employment decisions are not based on discrimination or retaliation. In a continued effort to eradicate forbidden conduct, this landmark case intends to end the days in which liability was limited to the actions of an ultimate decision-maker. To prevent liability resulting from discrimination and retaliation, a heavier burden seems

to weigh upon employers, prompting them to be more cautious when making predisciplinary decisions and independent inquiries. This article discusses the cat's paw liability theory and developments after the decision in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), and offers related practical advice—all as a reminder to employers to be diligent in engaging in fact-finding steps to assess whether a termination is permissible before taking ultimate employment actions.



### Revisiting *Staub* and the Cat's Paw Theory of Liability

In March 2011, the U.S. Supreme Court issued its decision in *Staub v. Proctor Hospital*;<sup>1</sup> the ruling addressed how a formal decision-maker in the process of making an adverse employment decision with no discriminatory intent can be contaminated by the information received from front-line biased supervisors who harbored discriminatory animus against the affected employee. Staub solved a split in the

lower courts over the doctrine referred to as "subordinate bias liability"—also known as the "cat's paw" theory.

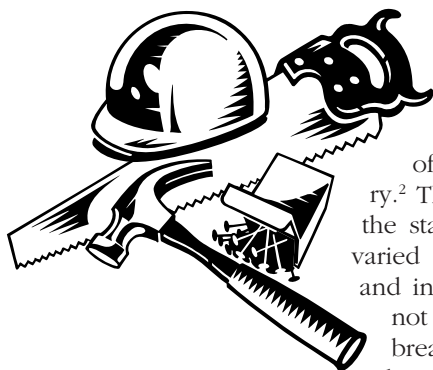
The federal circuits had generally adopted some type of subordinate bias liability theory.<sup>2</sup> The problem, however, was that the standard to impose such liability varied from one circuit to the other<sup>3</sup> and included a split over whether or not an independent inquiry could break the causal nexus between the biased non-decision-maker and the adverse employment action taken by the unbiased decision-maker.<sup>4</sup>

In 1990, Judge Richard Posner of the Seventh Circuit Court of Appeals coined the name of this type of liability as the "cat's paw" doctrine.<sup>5</sup> The term is

derived from a fable in which a sly monkey used flattery to convince an unwitting cat to pick roasting chestnuts from a fire. Each time the cat grabbed a chestnut, it burned its paw, only to realize at the end that the monkey had eaten all the chestnuts, leaving none for the cat.<sup>6</sup> Hence, a cat's paw situation describes "a person who is unwittingly manipulated by another to accomplish his purpose."<sup>7</sup> When applying the cat's paw doctrine, an employer can be held liable as a result of the discriminatory or retaliatory animus of an employee who was not the decision-maker but caused the final adverse action or exerted a level of influence over it. That way, the subordinate, who turns out to be the monkey, deliberately convinces the ultimate decision-maker (the cat) to discriminate or retaliate against the subordinate without realizing that he or she is doing so.<sup>8</sup>

The decision in *Staub*<sup>9</sup> involved a retaliation claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Staub, a member of the U.S. Army Reserve, claimed that he was unlawfully terminated due to his military obligations. Although he conceded that the formal decision-maker was not motivated by ill will toward his military duties, Staub contended that two of his supervisors were and influenced the decision-maker who took the adverse employment action.<sup>10</sup> Staub argued that one supervisor unfairly issued a corrective memorandum requiring him to report to management when he finished certain tasks. The company's vice president for human resources later received a report from Staub's second supervisor stating that he had violated the corrective action. After receiving the report and simply reviewing Staub's personnel file, the vice president for human resources decided to terminate Staub. Staub challenged the decision following the employer's grievance process claiming that his supervisors had been motivated by hostility toward his military status and therefore fabricated the write-ups. Nevertheless, the employer maintained the decision that had been made and did not investigate further.

The Supreme Court reversed and rejected the "singular influence" test the Seventh Circuit had adopted. This test required the non-decision-maker to exercise such "singular influence" over the decision-maker that the decision to terminate Staub was the product of blind reliance.<sup>11</sup> In concluding that the correct test of employer liability was one of proximate cause, the Supreme Court held that, "if a supervisor [non-



decision-maker] performs an act motivated by anti-military 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.”<sup>12</sup> Specifically, the Supreme Court ruled that the two non-decision-makers had been motivated by hostility toward military obligations when they issued corrective action; the vice president for human resources had relied on the wrongly issued corrective actions from the non-decision-makers when they decided to terminate Staub; and both non-decision-makers had had the intent to cause the termination.<sup>13</sup>

### **Staub on Independent Workplace Investigations**

The Supreme Court in *Staub* highlighted the Seventh Circuit’s admission that the investigation that the human resources vice president had conducted could have been more robust.<sup>14</sup> The Court then went further and rejected the proposition that an independent investigation should provide an absolute affirmative defense against the alleged discrimination or retaliation.<sup>15</sup> The Supreme Court “decline[d] to adopt such a hard-and-fast rule,”<sup>16</sup> stating that “We are aware of no principle in tort or agency law under which an employer’s mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of ‘fault.’ 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.”<sup>17</sup>

The Supreme Court also concluded that, “if 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.”<sup>18</sup> From *Staub*, one may also gather that the biased supervisor’s report may cease to be a causal factor if the independent investigation reveals that the adverse action had been “entirely justified.”<sup>19</sup>

### **Post-Staub Developments**

Although in *Staub* the Court concluded that an independent investigation per se does not shield the employer from liability that may result from prior discriminatory acts committed by supervisors who intended to cause an adverse action, predisciplinary investigations continue to be a key step in defending employers against discrimination and retaliation suits. Clear and specific standards within the context of cat’s paw liability have yet to be established, but some lower courts are already providing some guidance by applying the *Staub* ruling to claims under Title VII<sup>20</sup> as well as to other claims of discrimination.<sup>21</sup>

*Hampton v. Vilsack*<sup>22</sup> is an example of a district court’s reference to the *Staub* decision. This case involved a plaintiff who had been terminated following allegations that he had submitted altered hotel

receipts for which he requested reimbursement. He filed suit against his former employer for various violations under Title VII. The district court granted the defendant’s motion for summary judgment and dismissed all but one of the plaintiff’s counts. In dismissing the claims, the *Hampton* court pointed to the sharp contrast between its facts and those in *Staub*, in which the plaintiff had brought forth clear evidence that his supervisors were trying to get him fired based on their hostility to his military status.<sup>23</sup> In *Hampton*, the district court concluded that, even though the plaintiff’s first-line (allegedly biased) supervisor had officially started the investigation into the misconduct, the investigation had been triggered by other individuals who had provided information about the altered receipts.<sup>24</sup> Subsequently, the first-line supervisor took the documents that evidenced wrongdoing to his immediate supervisor and to the compliance review staff who conducted investigations. This investigation revealed that the documents that the plaintiff’s first-line supervisor had shown them were just the tip of the iceberg; the plaintiff had submitted additional hotel bills he forged in an attempt to increase the amounts allegedly owed to him.<sup>25</sup> An employee relations specialist also examined the results of the investigation and recommended termination; the plaintiff’s first-line supervisor ultimately signed a letter referring to the results of the investigation and the recommendation.<sup>26</sup> The district court concluded that “[the first-line supervisor’s] actions were therefore ‘too remote, purely contingent, or indirect’ to constitute the proximate cause of the harm to plaintiff.”<sup>27</sup>

Another example is the case of *McKenna v. City of Philadelphia*, which the Court of Appeals for the Third Circuit heard in August 2011. In this case, the court considered whether the plaintiff’s employer, the city of Philadelphia, showed that its internal disciplinary review hearing had broken the causal nexus between the retaliatory animus of a supervisor and the employer’s adverse employment decision to terminate the employee.<sup>28</sup> In this Title VII case, it appears that one of defendant-employer’s weaknesses was the failure to demonstrate what the decision-maker had seen or relied upon when making the decision to terminate the plaintiff and the lack of evidence presented at trial to explain the nature of the hearing process on which the termination was based. Thus, absent the necessary evidence, the Third Circuit found that the defendant failed to support a conclusion that the hearing was an intervening superseding cause of plaintiff’s termination—separate from the supervisors’ retaliatory animus.<sup>29</sup>

As recently as Oct. 20, 2011, the Court of Appeals for the Seventh Circuit also provided post-*Staub* guidance in its ruling in *Brooks v. Hyundai Motor Manufacturing*.<sup>30</sup> In this case, the court rejected the plaintiff’s reliance on *Staub* seemingly based, among

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other things, on the thoroughness of the employer's investigation. In *Brooks*, the employer terminated the plaintiff because she had abandoned her shift without getting permission from management to leave. An allegedly racially biased co-worker reported her departure to management. Thus, the plaintiff contended that she was terminated because her biased co-worker influenced decision-makers to terminate her. The Seventh Circuit held that "any possible bias on the part of [the plaintiff's non-managerial co-worker] did not operate as a causal factor in the decision to fire plaintiff."<sup>31</sup> In reaching its conclusion, the court referred to different aspects of the investigation that human resources personnel had conducted—such as, the plaintiff's interview in which she admitted to having left her shift without management's permission; the questioning of the allegedly biased co-worker; and confirmation of the time the plaintiff clocked out. In addition, the employer had a clear policy that prohibited the plaintiff from leaving work unexcused. Accordingly, the court concluded that the co-worker's biased report was not the causal factor because "the decision-makers determined, wholly apart from anything [he] said, that plaintiff's firing was entirely justified."<sup>32</sup>

These cases are just a sample of post-*Staub* guidance provided by opinions handed down by several courts. Although it is too early to identify trends, and specific standards have yet to be established, there are certainly a number of things we can learn from the Supreme Court's ruling in *Staub* and other related cases.

#### **Some Dos and Don'ts to Avoid Getting Burned**

- To a certain extent, the *Staub* decision requires a showing not only of discrimination by a non-decision-maker but also of that person's intent to harm an employee. Thus, employers must take employees' discrimination complaints very seriously and study them carefully. Decision-makers must try to verify that prior measures or recommended disciplinary actions are justified, properly supported, and based on legitimate nondiscriminatory reasons.
- It is essential to have open-door policies and complaint procedures in place and to make them available to employees for reporting illegal discrimination or retaliation. For employers who have a multilevel decision-making structure, an internal grievance process to challenge adverse employment actions could prove beneficial when the employer is confronted with allegation of cat's paw liability.
- Employers must provide continued training to decision-makers and non-decision-makers alike in order to educate them about what constitutes illegal discrimination and retaliation and continue

to raise their awareness of these issues.

- Decision-makers should conduct independent investigations prior to taking adverse employment actions. A proper independent inquiry becomes even more transcendental for ultimate employment decisions and in situations in which a supervisor's actual or potential bias has been brought to the decision-maker's attention. The more robust the investigation, the better equipped employers should be to defend themselves against liability resulting from a subordinate's bias. The investigation should attempt to obtain sufficient information to support a conclusion that the employer based the ultimate adverse employment action on reasons unrelated to the supervisor's (non-decision-maker's) original biased action.
- Simply reviewing a personnel file generally may not be sufficient to prevent cat's paw liability, unless the decision-maker identifies a cause that is independent from the information that a biased supervisor provided.
- The decision-maker should not merely rubber-stamp a supervisor's decision and must not forgo confronting and questioning the alleged biased (non-decision-maker) supervisor and other individuals related to the issue under consideration.
- Employers should document the independent inquiry, including the steps taken and the evidence that supports the conclusion that the decision was based on something other than a supervisor's biased action.

Not all situations call for an exhaustive and encompassing internal investigation. Like many employment scenarios, disciplinary processes have to be considered on a case-by-case basis, and strategies and measures need to be drafted and implemented in direct proportion to the situation at issue. Employers can be better positioned to put an end to the monkey business and avoid cat's paw liability by taking a step back before imposing ultimate disciplinary action, determining what should be done, and going forward diligently with the proper initiatives to be undertaken before and after disciplinary action has been taken. **TFL**

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