

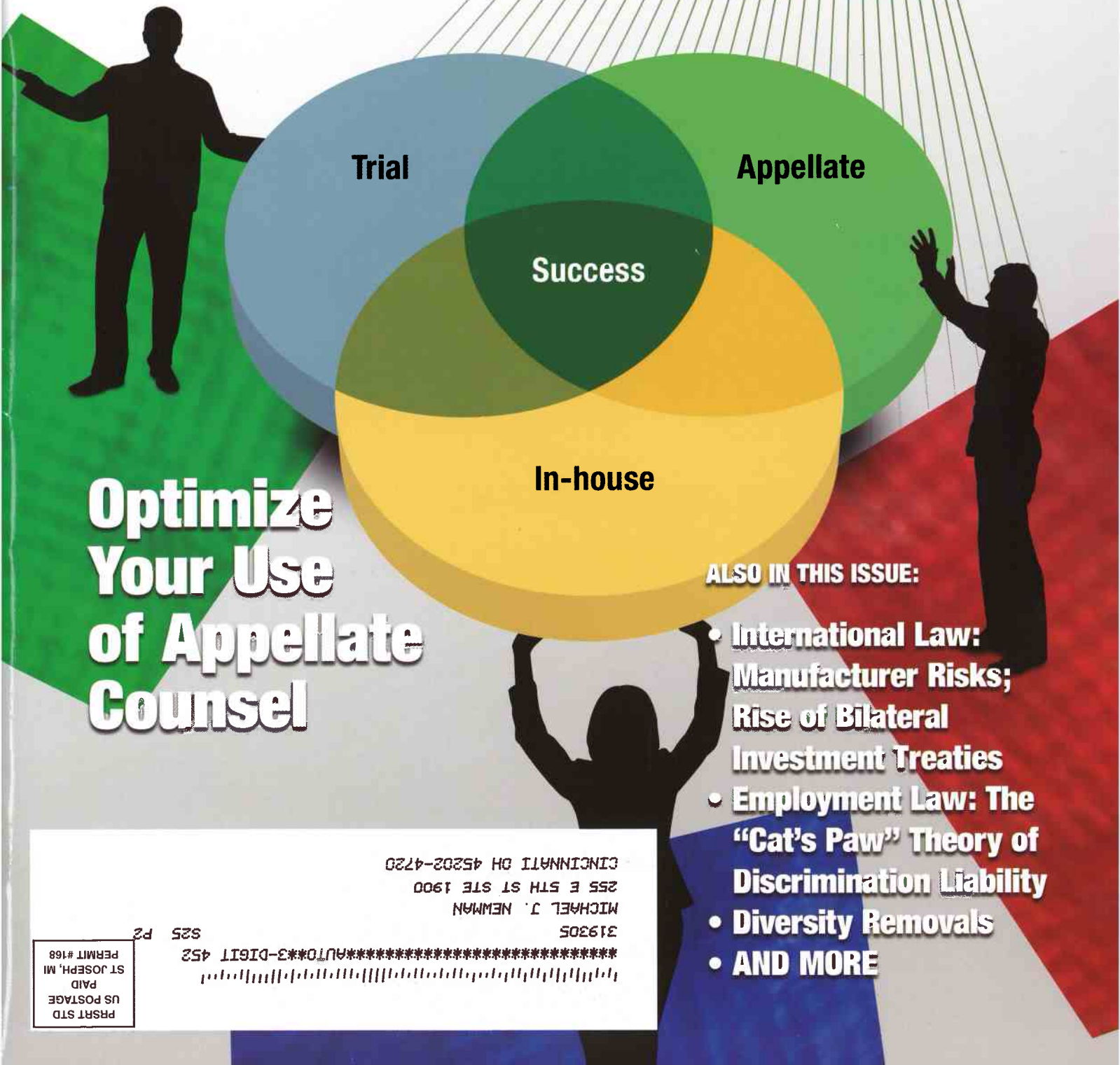
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The “Cat’s Paw” Theory of Employment Discrimination Liability



In the field of employment discrimination law, the focus of almost every inquiry is on the existence of discriminatory

intent. Fair employment practices statutes almost exclusively prohibit conduct that is *intentionally* discriminatory. Accordingly, the heart of an employment discrimination case is whether an individual can demonstrate that he or she was subjected to intentional discrimination. Although rare, at times an individual will have direct evidence of discrimination. However, courts have also established specific guidelines for evaluating cases in which only circumstantial evidence of discrimination exists—in particular, the *McDonnell-Douglas* prima facie framework. In this situation, under the *McDonnell-Douglas* framework, an individual has the opportunity to present fragments of merely circumstantial evidence that *could* be evidence of unlawful intent, and the employer has an opportunity to rebut that conclusion. Regardless of the type, quantity, or quality of the evidence, the fact of the matter is that intent is the touchstone. If a plaintiff can prove that discriminatory intent exists, his or her case is made. If not, success is virtually impossible.

However, some cases involve circumstances that blur the line between lawful, nondiscriminatory conduct and conduct motivated by discriminatory animus. These cases have required innovative theories and corresponding methods to determine whether discriminatory intent has contaminated an employment decision, making it unlawful. The “cat’s paw” theory of liability is just that.

Imagine a situation in which a human resources manager, removed from day-to-day interaction with a company’s employees, must make a discharge decision. The

■ Michael J. Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm Dinsmore & Shohl LLP, where he serves as chair of the firm’s Labor and Employment Appellate Practice Group. He is a member of DRI’s Employment Law and Appellate Advocacy Committees and serves as publications vice chair for DRI’s Lawyers’ Professionalism and Ethics Committee. Trevor E. Gillette is an associate in the Dinsmore & Shohl Labor and Employment Department.



manager is approached by a supervisor with a report of a serious workplace infraction. He or she listens to the supervisor's description of events, reviews the employee's personnel file, and, after considering that information, determines that discharging the employee is appropriate. In that situation, the human resources manager who decided to terminate the employee clearly did not intend to unlawfully discriminate against the employee. In fact, the human resources manager might not even know the employee at all. Accordingly, under a traditional analysis, the decision, lacking discriminatory animus on the part of the decision maker, cannot have been unlawful.

However, what if the supervisor who reported the incident had a history of making discriminatory remarks and, in fact, had treated the employee in question differently from the way that he or she had treated other employees, or the supervisor specifically had targeted the employee for discharge because of his or her status in a protected class? This is precisely the situation that the cat's paw theory was designed to address.

The theory's name originates with a fable in which a monkey convinces an unwitting feline to pull chestnuts from a fire, and as the cat gingerly removes the chestnuts, singeing its paw in the process, the monkey quickly consumes them, leaving none for the cat. As such, the "cat's paw" refers to a situation in which a biased employee without power to make decisions uses an actual decision maker as a dupe in a scheme to covertly engage in a discriminatory employment action. In these cases, the cat's paw theory attempts to prevent decision makers from avoiding liability merely because discriminatory intent has been one step removed from them.

However, the cat's paw theory is still evolving. Although most federal courts recognize at least some variation of the cat's paw theory, they widely disagree on the degree of influence that a subordinate employee must exercise to impute bias to the actual decision maker. However, the Supreme Court may soon reconcile these divisions. This article offers a brief history of the cat's paw theory, its practical effects, and its potential future.

***EEOC v. BCI Coca-Cola Bottling Co.* (10th Cir. 2006)**

The case that brought the cat's paw theory to the national spotlight involved an African-American employee of BCI Coca-Cola Bottling in Albuquerque, New Mexico. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006). This employee

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worked under the supervision of a Hispanic district sales manager. In this case, a human resources official made a final decision to terminate the employee after (1) a dispute arose between the district manager and the employee about whether the employee would work on a Sunday, and (2) the employee ultimately failed to work on that Sunday when requested to do so. The human resources official had never met the employee, and actually worked in BCI's Phoenix office, a location that differed from the location where the discharged employee worked. No evidence existed that the human resources official had any knowledge of the employee's race. She based her decision to terminate the employee primarily on the district sales manager's allegations. But, there was evidence that the district sales manager treated African Americans "unfavorably" compared to other employees.

The EEOC sued BCI on the employee's behalf, alleging racial discrimination and relying on the cat's paw theory of liability. Specifically, the EEOC argued that the district manager, although not the final decision-maker, exhibited racial animus that the court should impute to the employer, BCI. The district court ultimately

granted BCI's motion for summary judgment because (1) BCI claimed that the human resources official had performed an independent investigation, cursorily glancing through the employee's file, and (2) the district manager did not actually recommend that BCI terminate the employee.

The Tenth Circuit was then asked to review the district court's grant of summary judgment. While noting that courts were divided on the level of control a biased subordinate must exert over an employment decision for liability to exist, the Tenth Circuit held that the issue was "whether the biased subordinate's discriminatory reports, recommendation, or other actions *caused* the adverse employment action." *Id.* at 487 (emphasis added). It held that an employer could avoid liability by conducting an independent investigation of a subordinate's allegations against another employee. A decision maker could not simply rely on the comments of one individual, in this case, the district manager. The court ultimately found that the human resources official never sought another version of the events, and, therefore, had no source other than the district manager's report, which was potentially biased, from which to form a reason to terminate the employee. In other words, the court set an attainable standard for overcoming the cat's paw theory of liability but held that the facts in this particular case did not demonstrate that the company had met that standard.

The court analyzed the differing standards that had been set forth by other circuits. At one end of the spectrum, the Seventh Circuit inquired whether the subordinate "possessed leverage, or exerted influence, over the titular decision-maker." *Id.* at 486 (quoting *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) and relying on *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994). At the other end, the Fourth Circuit inquired whether the subordinate holding the racial animus exercised substantial control over the ultimate decision maker. *Id.* at 487 (citing *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004)). Ultimately, the Tenth Circuit settled on a standard requiring an employee to prove that the biased subordinate's discriminatory reports, recommen-

dation, or other actions *caused* the adverse employment action. BCI appealed the court's decision, and the Supreme Court granted a writ of *certiorari* to hear the case.

The EEOC, along with those submitting amicus curiae briefs, urged the Supreme Court to decide that a decision maker's "rubber stamp" review of information from a subordinate should not suffice to insulate an employer from liability because this protection would allow an employer to remain intentionally blind to that subordinate's biased reports, which, in turn, would then shape the decision-making process. Conversely, BCI contended that imputing discrimination from low-level supervisors or other employees without decision-making authority to the agents who held the responsibility for making employment decisions improperly would render employers vulnerable to liability for discrimination that resulted from unauthorized, or, potentially, expressly prohibited employee conduct. Further, these employers may have been completely unaware of this conduct.

However, one week before the case was scheduled for oral argument before the Supreme Court, BCI withdrew its appeal, settling with the plaintiff for \$250,000. Subsequently, the Supreme Court denied review to multiple other cat's paw cases, declining to unify the law on this issue. Accordingly, cat's paw case law has continued to evolve, although most cases appear to have gravitated toward a middle ground between the two extremes that prompted the Supreme Court to accept the *EEOC v. BCI Coca-Cola Bottling Co.* case.

Clack v. Rock-Tenn Co. (6th Cir. 2008)

For example, the decision in *Clack v. Rock-Tenn Co.*, 304 Fed. Appx. 399 (6th Cir. 2008), adopted a position midway between the two extremes represented by the Seventh Circuit on the one hand and the Fourth Circuit on the other. In that case, the Sixth Circuit held that an employer can avoid liability under the cat's paw theory if it can show that it (1) conducted an independent investigation and (2) the biased supervisor or co-worker played no role in the disciplinary action.

In *Clack v. Rock-Tenn Co.*, the plaintiff, an African-American male, Clack, had

been employed at Rock-Tenn's Chattanooga facility as a line worker since 1986. During his employment, he filed at least 15 grievances with his union steward, including race discrimination complaints. In 1998, he filed an EEOC charge and lawsuit against Rock-Tenn, which was ultimately settled in 2000. In 2003, he filed

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a grievance against Rock-Tenn's general manager, alleging harassment and retaliation related to his 1998 lawsuit and a second EEOC claim filed against the company concerning the general manager. In November 2004, Clack filed a grievance against his supervisor. Afterward, the general manager told him that if he thought that his supervisor was harassing him, he should report it to the plant's superintendent. On February 1, 2005, the supervisor instructed Clack to clean up some debris that had fallen near the machine on which he had been working. Clack refused, stating that it was his job to feed material into the machine but someone else's to keep the immediate area clean. When his supervisor insisted that Clack clean the area, Clack left, telling his supervisor that he was going to call the superintendent. The supervisor instructed Clack to call his union representative instead because he had decided to send Clack home for the day because he had been insubordinate. After an independent investigation, the general manager fired Clack for insubordination. He made the final termination decision based on the superintendent's recommendation. *There was no evidence in the record that the supervisor was personally involved in the termination decision.* However, an affidavit submitted by a for-

mer employee of Rock-Tenn, submitted on behalf of Clack, charged that the supervisor had made numerous "racist" comments and targeted "black employees, including Kenneth Clack, for harsher treatment based on race." The affidavit also specified that managers knew about and tolerated the supervisor's behavior. *Id.* at 403. Clack sued Rock-Tenn, alleging Title VII race discrimination and retaliation. The district court granted summary judgment in favor of Rock-Tenn, holding that although Clack had established a prima facie case of both discrimination and retaliation, he had not demonstrated that Rock-Tenn's stated reason for termination—insubordination—was pretextual. The district court's decision recognized that Clack attributed racial animus to his immediate supervisor. However, the district court held that (1) the supervisor was not the decision maker, (2) the general manager was the decision-maker, and (3) no evidence was presented of racial bias or comments by the general manager. Indeed, the supervisor played no role in the ultimate decision to terminate Clack.

On appeal, the Sixth Circuit addressed the question of whether an employer is liable for discrimination and retaliation if a biased employee was a part of the initial incident that led to the employee's discharge but was not involved in the investigation or decision to terminate the employee. The court noted that "unless the statements or conduct of non-decision-makers can be imputed to the ultimate decision-maker, such statements or conduct cannot suffice to satisfy the plaintiff's burden of demonstrating animus." *Id.* at 404 (quoting *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 724 (6th Cir. 2004)). The court cited a previous case for the proposition that a "statement by an intermediate level management official is not indicative of discrimination when the ultimate decision to discharge is made by an upper level official." *Id.* (quoting *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1161 (6th Cir. 1990)). According to the court, "the *McDonald* rule was never intended to apply formalistically," but "remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a *meaningful* role in the decision to termi-

nate the plaintiff, were relevant.” *Id.* The court acknowledged the continued relevance of the “cat’s paw” theory of liability in the Sixth Circuit and noted that “if the [racial] comments were made by a person in a position to influence the alleged employment decision, they will be relevant unless they are so isolated and ambiguous as to be nonprobative.” *Id.* at 405 (quoting *Hopkins v. Electronic Data Sys. Corp.*, 196 F.3d 655, 665 (6th Cir.1999)).

In reaching its decision affirming the lower court’s decision, the Sixth Circuit held that the “pertinent question” was whether the supervisor’s racist attitude “influenced” or “otherwise caused” the undisputed decision maker to terminate Clack. On that question the court held that nothing in the record indicated that the supervisor was included in discussions regarding Clack’s termination or had a say in the ultimate decision. The supervisor filed a written report on the incident. Management then held a meeting with Clack during which he had the opportunity to present his side of the story. The general manager then made the ultimate decision to terminate Clack after hearing his version of the events.

In essence, this case recognized that the cat’s paw theory of liability is still viable in the Sixth Circuit, although the Sixth Circuit applied neither of the extreme standards described in *EEOC v. BCI Coca-Cola Bottling Co.* Instead, it opted for an approach that recognized that if a decision maker lacked discriminatory animus, liability was inappropriate but also required a decision maker take good-faith steps to reasonably distance him- or herself from the animus of a subordinate.

Lakeside-Scott v. Multnomah County (9th Cir. 2009)

Similarly, the Ninth Circuit Court of Appeals has also promulgated a middle-of-the-road standard for use in cat’s paw discrimination cases. In *Lakeside-Scott v. Multnomah County*, 556 F.3d 797 (9th Cir. 2009), the plaintiff, Lakeside-Scott, was an employee of the Multnomah County Department of Community Justice (DCJ). She complained frequently about a supervisor who she believed favored gay and lesbian employees. In October 2001,

Lakeside-Scott filed a formal complaint with the Oregon Bureau of Labor and Industries, alleging that her supervisor gave preferential treatment to gays and lesbians. In November 2001, the director of DCJ’s information systems department ordered the supervisor to search the email of another employee as part of an investi-

The bottom line is that counsel should advise decision makers to take steps to ensure that they rely on credible, accurate, and untainted information.

gation of yet one other DCJ employee who had allegedly sent racially discriminatory emails at work. In searching the relevant emails, DCJ discovered that Lakeside-Scott, the plaintiff, had sent emails to other employees containing derogatory remarks about homosexuals. Also, Lakeside-Scott’s “journal” was found among the emails of one of the other employees under investigation, and the journal contained discriminatory comments and excerpts of other employees’ work documents. The supervisor suspended Lakeside-Scott and reported finding these items to the DCJ’s director, who directed an investigator to conduct an inquiry into Lakeside-Scott’s possible violations of work rules or policies. The investigator decided that Lakeside-Scott had misused county property, conducted personal business on county time, inappropriately accessed the emails and documents of other employees, and engaged in prohibited workplace harassment and prejudicial acts. After meeting with Lakeside-Scott to hear her side of the story, the director terminated the plaintiff.

Lakeside-Scott filed a lawsuit alleging retaliation for complaining about coworkers’ violations of county policies, including her supervisor, who Lakeside-Scott claimed favored gays and lesbians in hiring and promotion decisions. She sued her super-

visor and the county, although the county was later dismissed from the action. The jury awarded Lakeside-Scott \$650,000 in compensatory and punitive damages for the charges against the supervisor. The question on appeal was whether a final decision maker’s wholly independent, legitimate, decision to terminate an employee insulated from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired. The Ninth Circuit Court of Appeals reversed the district court’s decision, stating that “on the record in this case,” the allegedly biased supervisor was insulated from liability because “the termination decision was not shown to be influenced by the [her] retaliatory motives.” *Lakeside-Scott*, 556 F.3d 797, 799.

The Ninth Circuit reiterated its endorsement of the cat’s paw theory of liability. However, based on the facts of this case, it was clear to the court that the employee who was allegedly motivated to retaliate, the supervisor, was, at most, only minimally involved in investigating which workplace rules and policies Lakeside-Scott had violated as part of a large investigation of several employees for workplace rules and policies violations. Given the numerous rules violations revealed in the investigation and the actions that the human resources department undertook, the court found it unreasonable to conclude that the director—who had already initiated the inquiry into another employee’s misuse of emails—would not have been informed of or reacted to the journal but for the supervisor’s animus toward Lakeside-Scott. The evidence in this case demonstrated that the final decision maker made a wholly independent, legitimate, decision to discharge the plaintiff, uninfluenced by her subordinate’s retaliatory motives, therefore, the court held that “the neutrality of the decision-making process eliminated any ‘causal’ link to [the supervisor’s] bias.” *Lakeside-Scott*, 556 F.3d 797, 806.

Accordingly, as in the Sixth Circuit, the standard that the Ninth Circuit applied focused on the extent of the biased employee’s influence in the decision-making process and the extent to which the decision maker independently both investigated an employee and reviewed the employee’s

conduct. However, not all courts have followed this tack.

***Staub v. Proctor Hospital* (7th Cir. 2009)**

Bucking the trend unifying the standard for analyzing cat's paw cases, the Seventh Circuit Court of Appeals recently drew a line in the sand and adopted a very limited application of this theory that severely limits a plaintiff's ability to use it successfully. *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009). The plaintiff, Staub, was an angiography technologist at the Proctor Hospital in Peoria, Illinois, and a member of the Army Reserves. In late 2000, a new individual took over the department's scheduling duties and moved Staub back into the weekend rotation, which sometimes created conflicts with his military schedule. The scheduler was aware, and had advance notice, of Staub's obligations. However, when he approached her about the conflicts, she would become agitated. Sometimes, she would change the schedule after the head of the department spoke with her. On other occasions, she would post a notice on the bulletin board that volunteers were needed to cover the drill weekend, make Staub use his vacation, or schedule him for extra shifts.

In 2003, Staub was called to active duty and was gone for 92 days. On returning, the scheduler continued to be unhappy with Staub and his military requirements. She would roll her eyes about his. The scheduler told another employee that Staub's "military duty had been a strain on the [] department," and "she did not like him as an employee." 560 F.3d at 652. The scheduler also asked other employees to help her get rid of Staub. In January 2004, plaintiff received an order to report for "soldier readiness processing." The department leader "became apprehensive" and asked Staub several times a week when his deployment would begin. The department was shorthanded at the time, and temporary technicians would have to be hired when he left. That month, the scheduler gave Staub a written warning accusing him of shirking his duties, and he was told to remain in the general diagnostics area unless he told his superiors where he was going and why. The scheduler later

called Staub's reserve unit administrator to ask if he could be excused from some of his duties. A few months later, another employee, who also had a problem with Staub, complained that he was abrupt and would frequently "absent himself from the department." *Id.* at 653.

On April 20, 2004, Staub went to the

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Even the most thorough
review process can still
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department head's office to let him know that he was going to lunch. The department head was not there, so Staub left him a voice mail. Staub returned 30 minutes later, at which time the department head arrived and demanded to know where he had been and why he had not been able to find Staub. Staub's explanations did not satisfy the department head, as he already had met with the vice president of human resources and decided to terminate plaintiff had been made. They went to the vice president of human resources' office, and Staub was told that he was terminated and escorted from the hospital. The vice president of human resources testified that she never spoke with any of the other techs and had no idea that the scheduler had wanted Staub fired. She stated that she had reviewed his employee file, including his latest evaluation, which was good, and his write-ups. After reviewing the file, she decided that Staub, despite his technical competency, did not work well with others and had been insubordinate, which warranted termination. She stated that she did not consider his military involvement in her decision to discharge him.

Before trial, Proctor Hospital filed motions in limine to exclude evidence of the non-decision maker's military animus, particularly the scheduler's. The dis-

trict court denied the motions but stated that "the animus by a nondecisionmaker is only relevant if she exercised singular influence over the decision-maker." *Id.* at 657. The court issued that instruction to the jury. The jury returned a verdict in favor of plaintiff and awarded \$57,460 in damages. Proctor Hospital appealed.

The Seventh Circuit reviewed the existing cat's paw theory case law, finally stating that, consistent with Federal Rule of Evidence 104(b), the trial judge should make a threshold determination of whether a reasonable jury could find "*singular influence*" on the part of the biased subordinate before admitting evidence of that non-decision maker's animus or instructing the jury on the cat's paw theory. Consequently, in this case, the Seventh Circuit held that the jury should not have considered the cat's paw theory, and the district court should not have admitted the evidence of animus. The Seventh Circuit further determined that the evidence showed the vice president of human resources had exercised independent judgment, following a reasonable review of the facts, in deciding to terminate Staub, and the Seventh Circuit reversed and directed a judgment in favor of Proctor Hospital. After this ruling, Staub petitioned the Supreme Court for a writ of certiorari.

In his petition for review, Staub contended that the Seventh Circuit's stringent standard—requiring a plaintiff to demonstrate that the nonbiased decision maker had acted merely as a rubber stamp for an allegedly biased supervisor—perpetuated an established conflict among the federal appeals courts about the correct standard for cat's paw cases. However, Proctor Hospital, arguing that the court should deny review, claimed that the circuit courts of appeal did not disagree regarding whether an independent investigation severed a causal connection between allegedly biased subordinates and the ultimate decisions to discharge. Proctor Hospital also argued that this case was not an appropriate vehicle for deciding the appropriate standard of influence under the cat's paw doctrine as a whole.

The Supreme Court has indeed accepted review of this case, creating the possibility
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Improve Trial Practice ◀ page 20

Follow-up conferences, assignments and continuing communication, both within the team and with clients, are required to assure appropriate progress is being made. Any previously established strategy and related operational plans also need to be adjusted as necessary to meet changing circumstances.

Defending litigation in this way integrates appellate counsel fully within the trial team generally. For example, responsibility for particular tasks, such as preparing and filing a motion for summary judgment, can be shared by appellate and trial counsel. Work can flow between the trial and appellate firms as required. There's obviously a learning process in doing so, particularly if counsel haven't previously worked together. However, that process also results in improved working relationships and greater confidence over time, both in the initial case and those occurring later.

Cost Considerations

As previously discussed, appellate counsel can add value to defending trial court litigation by developing, pursuing and presenting defenses based on valid legal/procedural arguments, not simply factual ones. Adding such defenses increases the likelihood of success if the trial court

accepts them. It also increases the likelihood of reversal on appeal in the event the trial court rejects them, since they may involve standards of independent appellate review. If the only disputes in the litigation concern disputed facts or witness credibility, there's generally no valid basis for an appeal. Accordingly, any adverse trial court result necessarily would become final, without any appellate review.


Having appellate counsel visibly involved in adding such defenses to the litigation mix, and plaintiffs' concern that a defendant might appeal and seek a new trial if there are eventual adverse trial court legal/procedural rulings, also may increase the likelihood of a favorable pretrial settlement. The additional cost of engaging appellate counsel thus needs to be considered in relation to the possible greater likelihood of achieving a more favorable outcome than might otherwise occur, either in the trial court or in terms of preserving valid legal/procedural issues for later appellate review.

Cost savings also may be accomplished by encouraging a more efficient approach to general litigation management and work assignments. If a defense team doesn't have a clear idea concerning what it is trying to accomplish to achieve the litigation's general goals, or what those goals might be, substantial time and therefore expense

may be wasted in pursuing tasks that don't have any particular legal or strategic significance. Adopting a more thoughtful approach to general litigation management in relation to a three-dimensional litigation strategy approach results in using the trial team's time and resources in the most productive, efficient ways.

Conclusion

Adding appellate counsel to the trial court defense team can substantially improve the defense's quality. Doing so also can substantially improve the client's likelihood of success in settlement, trial or on appeal. Appellate lawyers' analytical and advocacy skills can be employed to great advantage in such situations. However, there is necessarily a learning curve for all concerned.

To be most effective, appellate counsel should become involved in litigation having appeal potential as soon as it is identified. Cooperative working relationships need to be established with trial counsel. This combined approach to litigation management also should lead to cost savings, as the defense team's efforts are applied most efficiently in relation to the case's goals. This cooperative team approach can be highly effective in helping to achieve the client's litigation objectives. 

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that a final decision will establish a unified standard applying the cat's paw theory and a standard defense against it. However, because *Staub* involves a USERRA claim, with a specific, statutory standard for actionable discrimination that is stricter than many other standards, a Supreme Court ruling reversing the Seventh Circuit and broadening the application of the cat's paw theory might merely apply to USERRA cases, instead of providing a broadly applicable set of guidelines for use in all cases of imputed intent.

Conclusion

A decision by the Supreme Court in *Staub* will certainly affect this area of the law, potentially establishing a general cat's paw standard. At the very least the Supreme Court will provide additional guid-

ance and insight into how this body of law will continue to develop. However, we can already glean some best practices from the existing case law that employers should follow to avoid committing unlawful discrimination.

First, it is apparent that the greater the extent to which a decision maker conducted an independent investigation, the better. While reviewing an employee's personnel file and disciplinary record may establish some degree of independence, courts typically expect a decision maker to interview the employee in question. Evidence that a decision maker conducted a broad investigation, for instance, by interviewing other employees, will strengthen a case. The bottom line is that counsel should advise decision makers to take steps to ensure that they rely on credible, accurate, and untainted information. An inves-

tigation's qualities will depend not only on the facts of a particular case, but also on employer's risk aversion or cautiousness.


Additionally, if a company plans to have the human resources department independently review situations and draw independent conclusions on discipline or discharge, an employer must take all necessary steps to keep individual supervisors or subordinates completely dissociated from that process. If a subordinate is permitted to participate in the process other than to report the facts during an independent investigation, then a company risks having established an independent human resources investigation a process for nothing. Even the most thorough review process can still become tainted by the influence and involvement of a biased employee.

Moreover, an independent investigation has virtue beyond just potentially

protecting an employer from liability due to the influence of a biased, subordinate employee. Accordingly, employers and their counsel must vigilantly ensure that an ostensibly independent review process does not merely become an elaborate “rubber stamp.” An employer should design an independent review to ensure that the

employer makes a correct, unbiased decision regardless of the situation. In other words, not only should the review process help shield an employer from liability, it should prevent these situations from developing in the first place.

The law surrounding the application of the cat’s paw theory certainly has not

been drawn in black and white. While the Supreme Court’s decision in *Staub* may illuminate some of the existing gray areas, employers and their counsel bear responsibility for improving employment decision-making processes, regardless of the twists and turns that the law may take until a precise legal standard emerges in this area. 

Call to “ARMS” page 40


tration process engineered by NAF and the others was merely a more expedient way to accomplish a result. Obviously a consensual process is not going to work here.

Unfortunately, the anti-arbitration tipping point has been the allegations involving the fairness of certain dispute resolution providers that made arbitration the anathema of dispute resolution processes. We must now create simple and consistent processes and make accurate, impartial information readily accessible to consumers to help overcome the aversion to arbitration. Therefore, the “new process” should be a mechanism that continues to offer the benefits of the current system with sufficient fairness protections to minimize the downside risk. An “Arbitration 2.0” if you will.

Widespread procedural applicability is

another key challenge. Business and commerce is no longer tethered to social strata, geography or ethnicity; it occurs anywhere and everywhere. The mechanisms implemented to resolve disputes must be as seamless as the commercial stream from whence they came. Technology is a natural adaptation, but the ADR community has been slow to effectively tie technology with dispute resolution. Exceptions exist such as online purchases being resolved through online dispute resolution processes, like those administered by Square Trade and Pay Pal. We need to figure out how to adapt emerging technologies to better replicate the interpersonal touch necessary to resolve disputes.

Amidst the present turmoil and uncertainty, it is too early to tell whether mandatory pre-dispute arbitration will disappear


forever, or whether it can be dusted off, shined up and placed back on the mantle of viable options. What is for certain is that the status quo cannot just drift and eventually morph into something worse. Businesses and consumers alike rely on the notion that mechanisms exist for the resolution of disputes. It will take a concerted effort by all stakeholders to create mechanisms that satisfy the interests of the constituents. The business community will have to be flexible; the judiciary must be supportive; the legislature must be cooperative; and ultimately the consumers will need to buy into the concept. Especially in these trying times, we cannot afford to let disputes pile up while business bogs down. Resolving disputes requires conscious choices and taking action. This is a call to ARMs. 

Vacating page 36

dential and are binding only on the parties under principles of *res judicata*, refused to vacate the portion of the court’s decision addressing a claim under the Georgia Wholesale Distribution Act, noting that “[v]acating a portion of that opinion deprives the public of the full measure of a reasoned public act.”

Conclusion: Scientia Potentia Est

(“For also knowledge itself is power,” stated originally by Francis Bacon in *Meditationes Sacrae* (1597))

It is important to be aware of the possibility of vacatur as a form of relief from the collateral consequences of an adverse judgment, the standard to be employed by the court from whom relief will be sought and the circumstances under which vacatur as part of a settlement has been found to be equitable and, thus, appropriate, in the past. 



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