The Cat's Paw Theory Burns Another Employer

Labor & Employment Law Update

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The "Cat's Paw Theory" in discrimination cases is based upon a fable in which a clever monkey tricks an unwitting cat to pull chestnuts from a fire, so that the monkey can make off with the chestnuts without burning himself. Courts have applied the "cat's paw theory" to hold employers liable for discrimination where the decision maker was not biased or based the decision on discriminatory animus, but was influenced by a supervisor or co-worker who was biased or took actions based on discriminatory intent. Just as the unsuspecting cat is left nursing his burnt paws in the fable, an employer can be left nursing its bottom line, having incurred legal liability after being duped into doing someone else's dirty work.

In *Fisher v. Lufkin Indus., Inc.,* No. 15-40428, 2017 WL 562444 (5th Cir. 2017), the U.S. Court of Appeals for the Fifth Circuit recently applied the "Cat's Paw Theory" to revive an employee's retaliation claim, finding the employer violated federal law when it fired the employee for selling pornographic DVDs on company time. How is it possible that an employer can face legal liability for terminating an employee who undoubtedly engaged in offensive conduct? The answer – the black employee was protected from unlawful retaliation for having complained a month prior that he was subjected to race discrimination by a white supervisor who called him "boy", and the DVD sales were uncovered during a sting operation hatched by a disgruntled co-worker and supervisor who were upset with the employee for complaining about discrimination.

Spurned advances, differing politics, racial prejudices – the workplace is rife with potential powder kegs of animosity that make it difficult to know if your employees are legitimately bringing issues to your attention, or deliberately trying to sabotage a co-worker. Thus, when a company or HR department learns of a work rule violation, especially when it involves an employee who has made a complaint of discrimination, instead of immediately enforcing the rules and disciplining or terminating an employee, HR should make sure to conduct its own independent investigation or review of the alleged work rule violation. The reason for this is that an independent investigation or review can break the causal connection between the protected activity and the adverse employment action that allows the "cat's paw theory" to be applied.

In the *Fisher* case, the court held the ad-hoc investigation was carried out by a biased co-worker and supervisor, and was undoubtedly motivated by a retaliatory animus. A prudent employer would not have been so quick to act on the findings of this sting operation, but would have stepped back and "investigated the investigation." If it had done so, it would have likely discovered that ulterior motives were at play. In the *Fisher* case, because the investigation would not have taken place but for the co-worker and supervisors' desire to retaliate against the complaining employee, the investigative findings that could otherwise have justified termination were "inextricably tied" to the retaliatory animus, and were off limits to the employer.

What if the other employees did not undertake a sting operation, but simply "tipped-off" HR as to the complaining employee's nefarious conduct? Can HR undertake an investigation and discipline its employee if needed, or does the employee's complaint of discrimination, regardless of merit, forever protect him or her from any adverse actions? The answer is that an employer must be allowed to even handedly enforce its work rules. As such, an employer should always conduct an independent investigation with neutral investigators entirely separate and distinct from any taint of the initial protected activity. Otherwise, you may just get burned.