

## Cat's Paw Liability: The Impact of Staub v. Proctor Hospital

December 15, 2011 by [Robert Rives, IV](#)

The risk of employer liability for being tricked into taking an adverse employment action against an employee by a supervisor with discriminatory motives, i.e. cat's paw liability, is real. On the heels of the U.S. Supreme Court's March, 2011 decision in *Staub v. Proctor Hospital*, a number of lower courts have taken up the issue and found a basis for cat's paw liability pursuant to various statutes. Additionally, since many states' courts simply follow federal law when interpreting state civil rights laws, the cat's paw legal theory is likely to find its way to purely state law cases as well as administrative agency investigations. This expansion of cat's paw liability risk may require an expansion of HR compliance.

In *Staub*, 131 S.Ct. 1186 (March 1, 2011), the plaintiff sued the Hospital under the United Services Employment and Reemployment Rights Act ("USERRA") alleging that the Hospital's Vice President of Human Resources who fired him from his civilian job as a hospital angiography technician was merely a "cat's paw" for his direct supervisors, who openly expressed their contempt for his U.S. Army Reserve training requirements, which strained scheduling and other work within the department. The Court 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 the USERRA." While the *Staub* Court addressed a claim under the USERRA, other courts have now addressed the issue in other legal contexts.

The *Staub* holding has quickly found its way into courts' analyses of cases brought under Title VII. In *Johnson v. Miles*, 2011 U.S. Dist. LEXIS 99578 (E.D. Ky. September 2, 2011), the Court distinguished *Staub* in plaintiff's quid pro quo sexual harassment claim pointing out that the decision-maker had no knowledge of allegedly harassing remarks and that the decision was based on almost daily complaints from almost a dozen employees. Thus, even if the supervisor harbored discriminatory animus based on plaintiff's failure to respond positively to his alleged advances, there was no evidence that any such animus infected the ultimate decision-making. Moreover, the decision-maker's investigation revealed performance deficiencies with the plaintiff's work wholly unrelated to any possible discriminatory motives of the spurned supervisor such that she could not show any causal relationship between her refusal to submit to alleged sexual overtures and the termination of her employment.

Similarly, Ohio courts have expressed support for the proposition that discriminatory animus can be inferred upwards where the person with the decision making authority bases his decision on assessments or reports of supervisors with a discriminatory animus in analyzing claims of FMLA discrimination and retaliation. *Blount v. The Ohio Bell Telephone Company*, (N.D. Ohio March 10, 2011); *Marks v. Ohio Bell Telephone Co.*, (N.D. Ohio August 2, 2011).

In *McKenna v. City of Philadelphia*, 649 F.3d 171 (3rd Cir. August 17, 2011), the United States Court of Appeals for the Third Circuit recently applied *Staub* in a retaliatory discrimination action brought by police officers under Title VII. There, the city argued that the discriminatory animus of one officer's supervisor was not a proximate cause of the termination because an internal adjudicatory process was an intervening and superseding cause. The Court disagreed and held that once the officer established a prima facie case that his termination was motivated by his supervisor's retaliatory animus, it was the city's burden to come forward with evidence that it terminated the officer for reasons unrelated to the supervisor's original biased action in bringing charges against him.

The Supreme Court and the cases brought in the wake of *Staub* declined to adopt a hard-and-fast rule regarding the type of independent review that would shield an employer from liability under the cat's paw theory. Nevertheless, the *Staub* Court clearly endorsed certain actions indicating advisable practices as follows:

- Company conduct of a complete independent investigation through its HR department or upper level management, which does not rely upon the findings of the complaining supervisor.

The notion of independently reviewing each and every action that could be deemed a tangible employment action may not be the pragmatic approach for many companies to take, and clearly presents the opportunity to slow down operations and the speed of business. What this approach appears to call upon employers to do is review current practices involving discipline, advancement, discharge and other facets of HR and interject additional controls, checks and balances into the system as appropriate.

As a practical matter, the controls, checks and balances should include a mechanism to verify and confirm the factual basis supporting any particular employment action. Employers that already follow best practices are likely managing the cat's paw risk well. Companies that are not certainly have the opportunity, usually with minor adjustments, to reduce or mitigate the risk. Employers should be able to determine whether or not employees are being treated consistently based upon both conduct and application of company policy. For example, employees should be treated consistently under the attendance or other policy and the company should establish a mechanism to monitor decision making. In the end, the processes established to mitigate cat's paw liability risk should result in employment decisions that are objectively and independently defensible even if an improperly motivated supervisor is involved in the decision making. Finally, thorough training of supervisors in anti-discrimination laws, the concept of retaliation and company policy prohibiting discrimination and retaliation is essential. Well trained non-decision-makers can add a layer of protection against discrimination and retaliation.