CONSTANGY
BROOKS & SMITH, LLP
The Employers' Law Firm, Since 1946

CLIENT BULLETIN

Client Bulletin #447

Clarifying the Cat's Paw: Just how independent does "independent" have to be?

By Susan Bassford Wilson
St. Louis Office

Earlier in the year, the Supreme Court unanimously held in a **landmark decision** that employers could be liable for employment decisions influenced by managers or supervisors who had unlawful motives. Although the Court indicated that an independent review could help shield the employer from so-called "cat's paw" liability, the opinion did little to define what type of internal review or investigation would cure the problem.

A recent **decision** from the U.S. Court of Appeals for the Third Circuit (Delaware, New Jersey, and Pennsylvania) leaves employers wondering whether the "cat's paw" has even longer claws than originally suspected.

In short, the Third Circuit held that a decision may be suspect even though

* a non-biased team investigates and hears both sides, and
* the non-biased team makes the decision to terminate.

The term "cat's paw" is drawn from a fable conceived by Aesop and written by 17th-century French poet Jean la Fontaine, in which a monkey convinces a cat to steal roasting chestnuts from a fire. The cat burns her paws in doing so, while the monkey takes all the nuts for himself.

McKenna v. City of Philadelphia

The case involved three Philadelphia police officers who alleged they were disciplined in retaliation for protesting discrimination against their African-American colleagues. Only one of the three officers had a "cat's paw" claim. He contended that, after he and his colleagues complained about discrimination to their sergeant and their captain, they were assigned to duty in dangerous areas alone, and in bad weather. When the officer tried to discuss his concerns with his captain, the captain allegedly threatened to make the officer's life "a living nightmare" if he brought it up again. The captain also ordered the officer to apologize.

The officer claimed he suffered anxiety and depression, and was placed on restricted duty. He then tried to call his sergeant, and the same captain called him back, cursed at him, and ordered him not to contact his sergeant. Not long afterward, the captain brought proceedings against him before the Police Board of Inquiry for insubordination.

The Board of Inquiry proceedings were similar to a military court martial. The employee had the right to have his own attorney at the proceedings (which he did), and the three-person Board could determine the appropriate penalty for the alleged infraction. The Board reviewed the case, added another count of conduct unbecoming of an officer, and recommended the officer's dismissal. The City's Police Commissioner then terminated the officer.

The officer, with his co-workers, sued for retaliation, and a jury found in their favor. The City appealed, arguing that, even if the captain's conduct was unlawful, the City should not be liable because the Board decision intervened between the captain's actions and the Commissioner's termination.

Unfortunately for the City, because the officer's retaliation lawsuit was litigated long before the Supreme Court's cat's paw decision, the record contained little evidence of what actually took place at the Board proceedings. According to the Third Circuit, the evidence was essentially that the officer was charged with insubordination, the charges were affirmed by the Board, and the Commissioner terminated the officer.

The City attempted to argue that the Board was independent *per se* because it conducted a *quasi*-judicial proceeding. The Third Circuit rejected that argument, finding that, although the Board may not have been biased, its actions were based on the charges brought by the captain and therefore there was a causal link between the captain's retaliatory motive and the ultimate termination by the Police Commissioner.

The Implications

It appears that the Third Circuit decision was primarily based on the lack of *specific* evidence that the Board independently reviewed the evidence against the officer before affirming the charges against him. And, no doubt, the City was significantly hindered by the fact that the decisions were made well before the Supreme Court issued its decision.

Going forward, employers with "appeal" processes can avoid Philadelphia's fate by ensuring that their review procedures are truly "independent":

* **The appeal board should not be beholden to the decisionmaker.** No appeal board can be truly independent if the members have to be concerned about their own job security if they make the "wrong" decision. The members should outrank the person whose decision is being reviewed, or, at worst, be peers of the decisionmaker.

* **No rubber stamps!** Employers' appeal processes should be fair and should take a fresh look at each employment decision being reviewed. Decisions should be reversed where warranted.

* **Cross-examination isn't just for lawyers.** Appeal processes should include a mechanism for "cross-examining" the decisionmaker. This does not have to be done in an adversarial way, but the reviewers should have the authority to question the basis for the decision, its fairness, and its legality, as well as whether the "punishment fits the crime."

* **Employees should have the right to some type of representation if they want it, and should be allowed to review the disciplinary documents that will be used against them.** The City of Philadelphia was criticized for the fact that the officer was not allowed to have copies of the charges against him. There may occasionally be compelling reasons why documents should not be given to the employee appealing a decision, but normally it's a good idea to share relevant documentation with the employee. It's also usually the fair and right thing to do.

As the cat's paw theory is expanded to **age discrimination** and other claims, savvy employers will ensure that their review procedures are genuinely "independent."