

MAY 10, 2017

Sixth Circuit Extends "Cat's Paw" Liability Theory to FMLA Retaliation Claims

BY ANTON A. DIRNBERGER II, PATRICK L. O'BRIEN, AND WILLIAM J. VINCENT

Properly identifying the decisionmaker in an employment discrimination case is important because it is the intent of the decisionmaker that determines whether an adverse employment action was motivated by a discriminatory or retaliatory animus. Where an employer can show that the decisionmaker was free of such animus—either because the decisionmaker was not aware of the employee's protected status or engagement in protected activity—the employee's claim should fail. Given the right set of facts, however, a plaintiff can avoid this result by utilizing a "cat's paw" theory of liability where the bias of a subordinate not charged with making the employment decision is imputed to the ultimate decisionmaker. As the Supreme Court held in *Staub v. Proctor Hospital*, a 2011 decision, "if a supervisor performs an act motivated by [discriminatory] 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 cat's paw theory.

Following the Supreme Court's lead in *Staub*, the Sixth Circuit has applied the cat's paw theory in a variety of discrimination cases and has assumed, without deciding, that the theory is available in Family and Medical Leave Act (FMLA) retaliation cases. Now, in a 2-1 decision recommended for full-text publication, a Sixth Circuit panel has held that the cat's paw theory applies to FMLA retaliation claims, recognizing that "a company's organizational chart does not always accurately reflect its decisionmaking process," and that sometimes subordinate employees "may have significant influence over the decisionmaker."

Background

In *Marshall v. The Rawlings Company LLC*, the plaintiff was a cost containment analyst in the Workers' Compensation Division. In 2012, the plaintiff took a two-month FMLA leave of absence for treatment for mental health issues. When the plaintiff returned from leave, she faced

a backlog of work and there was conflicting evidence whether she received any help to clear the backlog. There was also conflicting evidence whether backlogs were common for analysts or indicative of a serious performance issue.

Rawlings' Division vice president (VP) told the plaintiff she was consistently falling behind on her work. Even after the plaintiff cleared her backlog, the VP purportedly became concerned that a new one was forming, and recommended to the Division president that she demote the plaintiff from a team lead to an analyst, the position the plaintiff held when she joined the company. The Division president attested that she was the "final decisionmaker" regarding the plaintiff's demotion, and that her decision to demote the plaintiff was based "solely" on her performance. The Division president also attested that she "was not familiar with" the plaintiff's FMLA leave or health conditions when she demoted the plaintiff.

A year later, the plaintiff took a second FMLA leave for mental health issues, and when the plaintiff returned to work she continued to take intermittent leave for treatment. Concerns resurfaced regarding the plaintiff's performance, and those concerns came to a head when the Division director and the plaintiff's immediate supervisor observed that the plaintiff and a co-worker were absent from their desks for most of the day. When the director and supervisor met with the plaintiff and her co-worker to discuss their lack of productivity, the plaintiff denied there was any issue until her supervisor confronted her with reports showing she had been logged off her phone for much of the day. The plaintiff then claimed that her productivity issues stemmed from the VP having harassed her on two previous occasions, once during the demotion meeting when he allegedly belittled the plaintiff's ability to do her job, and again during a lunch with other analysts where he allegedly singled the plaintiff out for questions regarding staff morale. The plaintiff claimed she did not report these incidents because she feared losing her job.

The Division director reported the VP's alleged harassment to the Division president, and met with the plaintiff to discuss the details. The Division president concluded that if the harassment occurred it was not based on any protected status. Instead, she believed that the plaintiff had made the allegations regarding harassment to deflect criticism of her job performance. The Division president reported this to the company's owner, who in turn decided to meet with the plaintiff himself. The owner attested that he terminated the plaintiff during the meeting because he believed she had falsely accused the VP of harassment. He also attested that he did not know the plaintiff had taken FMLA leave or that she had any medical conditions.

The plaintiff sued the owner, alleging that the company had retaliated against her for taking FMLA leave by demoting her to an analyst and then terminating her employment. However, the plaintiff did not claim that the ultimate decisionmakers, the Division president and company owner, were biased against her for taking leave. Instead, the plaintiff attributed this bias to the VP and the Division director, and alleged that the duo influenced the Division president's decision to demote her and then influenced the owner's decision to terminate her.

The district court rejected this argument, finding that while the plaintiff could rely on a cat's paw theory to establish liability, the theory did not apply here because there was no evidence that the VP or the Division director harbored any retaliatory animus. Unable to impute their knowledge of the plaintiff's FMLA leaves to either of the ultimate decisionmakers, the plaintiff could not establish the second element of a *prima facie* claim of retaliation, namely that the ultimate decisionmakers knew she had exercised her rights under the FMLA.

Sixth Circuit Decision

The plaintiff appealed and the Sixth Circuit reversed, holding that "the cat's paw theory does apply to claims of FMLA discrimination" and that because there was evidence the VP and Division director had exhibited

animosity towards the plaintiff for taking leave, the district court erred when it precluded the plaintiff from utilizing the theory to impute this animus to the ultimate decisionmakers. The court found that a question of fact existed whether the VP had influenced the decision to demote the plaintiff for poor performance, noting that the VP initially recommended the demotion to the Division president, she did not clarify what role this recommendation played in her decisionmaking, and there was no evidence the president conducted any independent investigation to determine if the VP's criticisms of the plaintiff's performance were valid. The court found that a question of fact also existed whether the VP and Division director influenced the company owner's decision—through the Division president—to terminate the plaintiff for allegedly submitting a false claim of harassment, noting that the only information the owner had regarding this accusation came from a meeting with the Division president, a conversation he had with the Division director, and a brief meeting he had with the plaintiff when he terminated her. The court also noted that when the Division president met with the plaintiff to discuss her allegations against the VP, the only other person present was the Division director, and that he testified the owner was considering firing the plaintiff before the owner had met her.

Besides recognizing the applicability of the cat's paw theory of liability to FMLA retaliation cases, the *Marshall* decision is also significant because it addresses three other issues raised by application of the theory. First, cat's paw liability can be applied where more than one layer of supervision exists between the plaintiff and the ultimate decisionmaker—as was the case with the plaintiff's termination—provided the plaintiff can show the biased subordinate influenced the intermediate decisionmaker who then unwittingly influenced the ultimate decisionmaker. Second, in analyzing a case where a cat's paw liability is asserted, the district court must first apply the *McDonnell-Douglas* burden shifting framework to plaintiff's retaliation claim to determine if the claim can survive summary judgment if the theory is applied. If so, the court must then consider whether there is a sufficient factual basis for imposing cat's paw liability. Finally, if the district court finds that the theory applies, the employer may not avail itself of the "honest belief" rule to exonerate the ultimate decisionmaker because the honesty or sincerity of the decisionmaker's belief is irrelevant where that belief is rooted in a biased recommendation from the subordinate employee. The only way for the employer to avoid this result is to show that the subordinate held an honest belief that justified the adverse action, or that the ultimate decisionmaker conducted an in-depth and independent investigation of the bases for such action that enabled them to base their decision on an independent evaluation of the facts.

Practical Considerations for Employers

Although the *Marshall* court cautions employers that "there is no 'hard-and-fast rule' that a decisionmaker's independent investigation defeats a cat's paw claim," independent fact gathering by the ultimate decisionmaker coupled with the ability to show that the adverse action was "entirely justified" apart from the subordinate's biased recommendation will defeat such a claim. Thus, in those instances where a subordinate supervisor recommends that adverse action be taken against an employee and the ultimate decisionmaker does not have personal knowledge of the factual bases for that recommendation, it is critical that the decisionmaker conduct their own investigation before deciding to take such action. Once that investigation is completed, it is also essential for the decisionmaker to document why they believe such action is warranted independent of the subordinate's recommendation. While this can be a time-consuming process, it not only better positions an employer to defeat a cat's paw claim, but also helps the employer identify those recommendations that may be based on unlawful considerations.