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Third Circuit Examines Cat's Paw Retaliation Theory

By Matthew Hank and Shannon Paliotta

In *McKenna v. City of Philadelphia*, No. 09-3567 (3d Cir. Aug. 17, 2011), the Third Circuit had its first opportunity to address the cat's paw theory of employer liability for discrimination and/or retaliation under circumstances where an adverse employment action was influenced, but not ultimately made, by an employee with discriminatory or retaliatory animus. The Third Circuit held that, where the plaintiff seeks to hold an employer liable for the improper motives of a non-decisionmaker, the burden shifts from the plaintiff to the employer to prove that the decision was not substantially caused or influenced by the biased non-decisionmaker.

Background

Raymond Carnation, a terminated police officer, filed a Title VII claim against the City of Philadelphia, arguing that his discharge was in retaliation for protesting the discriminatory treatment afforded his African American colleagues. At trial, the plaintiff produced evidence that he had complained to his supervisor about racial tensions within his squad. When his supervisor failed to respond to that issue to his satisfaction, the plaintiff complained to his supervisor's manager that his supervisor was condoning racism by failing to address the issue.

According to the plaintiff, the manager reacted to his protests by assigning him to dangerous and unpleasant duties, and warned that any complaint to the Equal Employment Opportunity Commission would lead him to make the plaintiff's life "a living nightmare." After the plaintiff continued to complain about his supervisor's failure to take action to resolve the issues plaguing his squad, the manager ordered the plaintiff not to call his supervisor to discuss the matter again. Despite the manager's order, the plaintiff called his supervisor the following day and, in fact, resolved many of his concerns. When the plaintiff informed the manager of his discussion with his supervisor and requested a meeting with his superiors to discuss any remaining issues, the manager responded by filing charges against the plaintiff for insubordination and neglect of duty. The manager submitted the charges to the Police Board of Inquiry ("the PBI"), a three-person panel that receives written and testimonial evidence from both the employee and the party submitting charges. Based on the evidence received, the PBI

then recommends an appropriate sanction for the employee to the Commissioner of Police, who would make the ultimate decision as to whether the sanction should be imposed.

After a three-hour hearing, during which the plaintiff was represented by counsel and both the plaintiff and the manager testified, the PBI found the plaintiff guilty of the charges submitted, as well as an additional charge that the PBI added for conduct unbecoming an officer. The PBI recommended the plaintiff's dismissal. Shortly thereafter, the Commissioner gave the plaintiff notice of the City's intent to terminate his employment.

At the trial of the plaintiff's Title VII claim, the jury concluded that the plaintiff's termination was an act of retaliation for his protests at the treatment of African American officers and/or for raising a complaint of discrimination. The City sought judgment notwithstanding the verdict. The City argued that, although the plaintiff was discharged as a result of disciplinary proceedings begun by the manager, the recommendation to terminate was made by the PBI and the ultimate decision to terminate was made by the Commissioner. As such, the City contended that the independent decision-making of the PBI and the Commissioner severed the causal connection between the termination decision and the manager's improper animus. The district court denied the City's motion, concluding that a reasonable jury could find that the manager's retaliatory motive played a substantial role in the decision to terminate the plaintiff's employment.

In a Cat's Paw Scenario, Third Circuit Effectively Puts Burden on Employer to Prove Decisionmaker Was "Independent" of the Biased Supervisor, and that the Decision Was Not Substantially Caused by the Biased Supervisor

On appeal, the Third Circuit had its first opportunity to apply the U.S. Supreme Court's recent guidance, in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), regarding a "cat's paw case," or one in which the plaintiff seeks to hold the defendant liable for the discriminatory motive of a non-decisionmaker. In *Staub*, the Supreme Court declined to adopt a bright-line rule that a decisionmaker's independent investigation would negate the effect of a non-decisionmaker's discrimination, instead reasoning that liability may not attach where the employer's investigation leads to a termination for reasons unrelated to the supervisor's original, biased action, but that liability may exist where the decision to terminate is based on the original discriminatory report.

The question posed in *McKenna* was this: on which side of the dividing line did the PBI's investigation and recommendation to terminate fall? The Third Circuit began its analysis by defining proximate cause in relation to complaints of discrimination and a subsequent adverse action. Although the plaintiff had the burden to establish that his termination was motivated by retaliatory animus, the Third Circuit effectively imposed an even heavier burden on the City, requiring it to come forward with evidence showing that: (1) the decision to take the adverse action was made by an independent, unbiased decisionmaker; and (2) the adverse action was taken for reasons unrelated to a single actor's retaliatory animus.

In examining the district court's denial of the City's motion for judgment as a matter of law, the Third Circuit observed the lack of factual evidence in the record to support the City's motion. For example, the record at trial failed to show the extent to which the PBI truly employed quasi-judicial features, such as whether the plaintiff could have freely called witnesses on his own behalf or cross-examined the City's witnesses. Even more importantly, the record at trial did not reflect the basis and weight of the PBI's recommendation to terminate, nor did the record reflect what the ultimate decisionmaker, the Commissioner of Police, saw or relied upon when making the decision to terminate. Rather, the evidence demonstrated only that "[the manager] retaliated against Carnation by referring the [charges] against him, the PBI affirmed those charges, and the Commissioner then terminated Carnation." Under those circumstances, the Third Circuit concluded that the jury was entitled to conclude that the plaintiff's termination was caused by the manager's decision to retaliate against him.

Practical Implications for Employers

Although the outcome in *McKenna* was unfavorable to the employer, the Third Circuit has provided employers with a roadmap to insulate themselves against liability in "cat's paw" scenarios. In light of *McKenna*, employers contemplating a termination should bear in mind the following considerations and take the following steps.

- When asserting a lack-of-causation defense, an employer must remember that it has the burden to prove that the ultimate decision was made by an “independent” decisionmaker whose decision was not caused, or unfairly influenced, by a supervisor’s retaliatory animus.
 - To meet that burden, an employer should begin by identifying the independent decisionmaker and clearly defining his or her role in the decision-making process. The outcome in *McKenna* may be explained, in part, by the record’s lack of clarity as to whether the manager, the PBI, or the Commissioner was the driving force behind the decision to terminate. One lesson from *McKenna* is that, in the absence of such clarity, the employer loses.
- The record must also be clear about what that decisionmaker saw, heard, or relied upon in making the decision. To prove that the decisionmaker was, indeed, independent, and based his decision on untainted information, the employer must be able to point to what information informed the decision.
- The record must establish that the employee was not subject to an unfair process. The *McKenna* panel’s focus on procedural protections, or lack thereof, afforded to the plaintiff suggests that employers need to examine their fact-finding methods in conducting investigations into complaints of discrimination and retaliation.
 - Such methods include taking statements from not only the employee and the allegedly biased supervisor, but also any other witnesses identified by the complainant and supervisor with unbiased knowledge of the facts prior to making any final employment decisions.
- Finally, employers should always have a clear record of the grounds on which any termination or other adverse action is based. Part of what doomed the City’s position in *McKenna* was that it was unclear what formed the basis of the ultimate decision to terminate the plaintiff. If the record reflected a non-retaliatory rationale independent of the manager’s bias, the outcome might have been different. For example, there was some evidence in the record that the plaintiff had been diagnosed as having “homicidal tendencies” toward his superior(s). Had this been appropriately investigated and later documented as a basis for the PBI’s recommendation and the Commissioner’s decision, this may have severed the causal connection with the manager’s bias and justified the decision to terminate the plaintiff’s employment.

Where an employer is considering an adverse action against an employee without a clear record of the legitimate, non-discriminatory and non-retaliatory reasons for the decision, or the decision does not include the involvement of an independent, unbiased decisionmaker, employers should seek legal advice before proceeding with any adverse action.

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