CIVIL RIGHTS

The Second Circuit Recognizes Cat's Paw Liability

By Cory Morris

Employers and supervisors beware, "[t]he U.S. Court for the Second Circuit explicitly recognized so-called 'cat's paw' liability, where an employer can be held liable for being the negligent conduit of an employee's retaliatory intent." [1, 2] In a footnote, the late Justice Antonin Scalia stated that "[t]he term 'cat's paw' derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990."[3] The legal landscape is changing, and, with it, recognition that negligence in supervision and discipline may subject an employer to liability under Title VII of the Civil Rights Act within the Second Circuit.

"Under such a theory an employer may be held liable where: (1) a supervisor performs an act motivated by retaliatory animus; (2) the act is intended to cause a materially adverse action; and (3) the act is a 'proximate cause' of the ultimate adverse action."[4] While proximate cause can become a dicey issue, the Supreme Court, in analyzing an employee discrimination case under the Uniformed Services Employment and Reemployment Rights Act of 1994, found that agency principles could attribute conduct of the tortfeasor to an independent, and unwary, decision-maker. "Animus and responsibility for the adverse action can both be attributed to the earlier agent … if the adverse action is the intended consequence of that agent's discriminatory conduct."[5] Indeed, "[u]nder a cat's-paw theory, a formal decision maker may be an unwitting conduit of another actor's illicit motives."[6] In *Staub v. Proctor*, the Supreme Court agreed with the Seventh Circuit that such Monkey Business could result in liability. The Second Circuit recently adopted the same rational in *Vasquez v. Empress*.

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The Second Circuit described plaintiff Andrea Vasquez ("Vasquez"), an emergency medical technician, as a victim subjected to unwanted sexual overtures by another employee while on the job. She complained of her co-worker's conduct and was told that her complaint would be investigated. "That investigation, however, consisted of [Empress Ambulance Service ("Empress")] crediting false documents manufactured by Vasquez's co-worker that purported to show Vasquez's eager assent to a sexual relationship and refusing to consider further contradictory evidence."

In a strange twist, the plaintiff-victim was fired as the sexual harasser. Vasquez sued, alleging Title VII and NYSHRL claims. She alleged that Empress terminated her in retaliation for complaining of sexual harassment. Vasquez's suit was dismissed by the Southern District of New York, (Judge Buchwald), on the basis that the retaliatory intent of a low-level employee could not be attributed to Empress. Holding that "agency principles permit the retaliatory intent of Vasquez's co-worker to be imputed, as a result of Empress's alleged negligence, to Empress," the Second Circuit revived her lawsuit.

"[A]n employer may be held liable for an employee's animus under a 'cat's paw' theory, regardless of the employee's role within the organization, if the employer's own negligence gives effect to the employee's animus and causes

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CONSUMER BANKRUPTCY

Trustee and Debtor Have Big Battle Over Bonus

By Craig D. Robins

As we approach the end of the year, consumer bankruptcy practitioners will again encounter clients in the financial sector who may expect to receive substantial cash bonuses.

Routine advice in such cases may have been for the debtor to wait until the bonus is received, then spend the money down in a manner consistent with a good faith filing. However, doing so would mean having to include the bonus in the means test for the following six months — a measure certain to preclude some debtors from qualifying for Chapter 7 relief.

But query this: Can the debtor file first, receive the bonus right after filing, and successfully argue that the Chapter 7 trustee can't touch the money? This was the exact scenario presented to Judge Robert E. Grossman in the Central Islip Bankruptcy Court, in the form of an adversary proceeding that Trustee Allan Mendelsohn brought against a debtor.

In that case, which involved undisputed facts, a debtor employed by Goldman Sachs regularly received year-end bonuses. Her employment policy stated that the firm might grant a performance-based bonus at the end of the year, which would be paid at the discretion of the firm and should not be considered part of the salary, even if paid consistently over a period of years.

The debtor, who was represented by Manhattan bankruptcy attorney Charles W. Juntikka, filed her petition on October 30, 2015. It did not reference the potential bonus. The trustee questioned the debtor at the meeting of creditors about bonuses and the debtor testified that she had not yet received one, but testified that she would advise the trustee if she did. The debtor received a bonus of $24,400 on January 26, 2016, immediately leading to a demand by the trustee that she turn it over. The debtor refused to do so, claiming that the bonus was not property of the estate.

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A month later, the trustee brought an adversary proceeding against the debtor seeking a turnover of the bonus and a denial of the debtor's discharge. The trustee then brought a motion for summary judgment asserting that the court should find, as a matter of law, that the bonus is property of the estate, and that the debtor's failure to disclose her right to the bonus warrants a denial of the debtor's discharge.

The trustee argued that despite the fact that the bonus was paid at Goldman Sachs's sole discretion, the debtor nevertheless had, as of the petition date, a "contingent right" to receive the bonus which was "sufficiently rooted" in the pre-petition period so that the bonus, if and when paid, became property of the bankruptcy estate subject to turnover.

The debtor filed a cross motion for summary judgment asserting that the bonus is not property of the estate because it was made at Goldman Sachs's sole discretion; the debtor had no right to compel Goldman to pay it; and there existed no enforceable interest or property rights with respect to the bonus.

The debtor also argued that her failure to disclose in the petition her possible entitlement to the bonus was rooted in her good faith belief that the bonus was not property of the estate and, therefore, she had no obligation to disclose it.

Judge Grossman, in ruling for the debtor, held that the bonus was not property of the estate, since under New York law an employee has no actionable right to collect a discretionary bonus before it is paid. *In re Gonzalez*, (Bankr. E.D.N.Y., Case No. 15-74657-reg, Adv. Pro. No. 16-08037, September 30, 2016).

He stated that since the debtor had no right to demand payment of the bonus at the time of the filing, she did not have any legal or equitable rights to transfer it to the estate, and the bonus, subsequently paid, did not become property of the estate. Simply put, the debtor did not have a contingent interest in the bonus.

On the date of filing, the debtor merely possessed a bare expectation of receiving the bonus at the employer's sole discretion. That bare expectation was not a contingent interest, the judge stated, the notion that the exercise of discretion by a third party cannot be equated with a contingency.

Judge Grossman commented, "The resolution of the instant case highlights the need for courts to recognize that there is a fundamental difference between a debtor having an expectation of receiving a bonus payment and a debtor having a legally enforceable right to receive such payment ... The fact that the bonus was tied to the debtor's continued employment or even the debtor's job performance is not dispositive."

However, the case will continue. The trustee had also sought to deny the debtor's discharge on the basis that she refused to provide the trustee with documents regarding the bonus. Judge Grossman determined that whether the debtor withheld documents or not, and if so, whether there was fraudulent intent, are questions of fact that cannot be resolved in a motion for summary judgment.

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the victim to suffer an adverse employment action." Cat's paw is defined as "[a] person used by another as a dupe or tool." The term derives from an Aesop fable wherein a "wily monkey flatters a naïve cat into pulling roasting chestnuts out of a roaring fire for their mutual satisfaction; the monkey, however, 'devour[s] ... them fast, leaving the cat with a burnt paw and no chestnuts' for its trouble."[7] The cat's paw metaphor now "refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action."[8] Because the supervisor, acting as agent of the employer, has permitted himself to be used "as the conduit of [the subordinate's] prejudice,"[9] that prejudice may then be imputed to the employer and used to hold the employer liable for employment discrimination.

Adopting the 7th Circuit's reasoning, the Second Circuit found that permitting cat's paw recovery in retaliation cases accords with longstanding precedent in the circuit. In the employment-discrimination context: "a Title VII plaintiff is entitled to succeed, 'even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful role in the [decision-making] process.'"[10]

With Vasquez's lawsuit reinstated, the Second Circuit sets forth significant instruction to practitioners. Cat's paw liability will not be a catchall provision allowing liability to fall upon all employers who undertake efforts to eliminate and prevent discrimination and retaliation:

> Thus, an employer who, non-negligently and in good faith, relies on a false and malign report of an employee who acted out of unlawful animus cannot, under this "cat's paw" theory, be held accountable for or said to have been "motivated" by the employee's animus. And, of course, an employer who negligently relies on a low-level employee's false accusations in making an employment decision will not be liable under Title VII unless those false accusations themselves were the product of discriminatory or retaliatory intent (although the employer may yet be liable for simple negligence under state law) ... Only when an employer in effect adopts an employee's unlawful animus by acting negligently with respect to the information provided by the employee, and thereby affords that biased employee an outsize role in its own employment decision, can the employee's motivation be imputed to the employer and used to support a claim under Title VII.[11]

The inquiry becomes one of whether the discriminator, or the monkey in the fable, "exercised a sufficient degree of control over employment decision-making (including hiring, discipline, and termination) to justify imputing her motives to defendants."[12] "[I]f the independent investigation relies on facts provided by the biased supervisor — as is necessary in any case of cat's paw liability — then the employer (either directly or through the ultimate decision-maker) will have effectively delegated the fact finding portion of the investigation to the biased supervisor."[13] For the lackadaisical, the unwary or the incompetent, reliance on the meddling monkey and/or the discriminating employee is something that can defeat a defendant's motion for summary judgment and expose the main employer to liability.

Note: Cory H. Morris maintains a practice in Suffolk County and is the co-chair of the Suffolk County Bar Association's Young Lawyers Committee. He has been honored as a SuperLawyer Rising Star. Cory also serves as a Nassau Suffolk Law Services Advisory Board Member and is an adjunct professor at Adelphi University. (http://www.coryhmorris.com).

[1] Mark Hamblett, *Recognizing 'Cat's Paw' Liability, Circuit Revives Bias Suit*, New York Law Journal (August 29, 2016), http://www.newyorklawjournal.com/id=1202766232803/Recognizing-Cats-Paw-Liability-Circuit-Revives-Bias-Suit.

[2] *Vasquez v. Empress Ambulance Serv.*, 2016 U.S. App. LEXIS 15889 (2d Cir Aug. 29, 2016, No. 15-3239-cv) ("Vasquez").

[3] *Staub v. Proctor Hosp.*, 562 U.S. 411, 415 n.1 (2011)

[4] *Burton v. Donovan*, 2016 U.S. Dist. LEXIS 133991, *31 (D.D.C. Sept. 29, 2016) (error, emphasis and citations omitted).

[5] *Staub v. Proctor Hosp.*, 562 U.S. at 419.

[6] *Walker v. Johnson*, 798 F3d 1085, 1095 (DC Cir. 2015).

[7] *Vasquez*, at * 9-10.

[8] *Cook v. IPC Intern. Corp.*, 673 F.3d 625, 628 (7th Cir. 2012) (Posner, J.).

[9] *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

[10] *Holcomb v. Iona Coll.*, 521 F.3d 130, 143 (2d Cir. 2008) (quoting *Bickerstaff v. Vassar* Coll., 196 F. 3d 435, 450 (2d Cir. 1999)).

[11] *Vasquez*, at * 20 (external quotation marks omitted).

[12] *Equal Opportunity Empl. Comm'n v. United Health Programs of Am., Inc.*, 2016 US Dist LEXIS 136625, at *77 (E.D.N.Y. Sep. 30, 2016, No. 14-CV-3673 (KAM)(JO)).

[13] *Staub v. Proctor Hosp.*, 562 U.S. at 421.