Insights, News & Events

CAT'S PAW THEORY OF DISCRIMINATION ADOPTED BY 2ND CIRCUIT

False Sexting Claims Prove Employer's Downfall

Insights
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The federal appeals court in New York just adopted a broad standard for employer liability as a consequence of discriminatory acts by their employees. This standard opens the door to a significant increase in claims being filed by disgruntled workers. In an August 29 decision, the 2nd Circuit Court of Appeals joined several other federal courts and, for the first time, adopted the "cat's paw" theory of liability in the context of a Title VII claim. This decision now puts employers on notice that they need to be extremely careful before acting on employee-generated evidence of wrongdoing when proceeding with disciplinary action (*Vasquez v. Empress Ambulance Service, Inc.*).

Here are three things you need to know about this decision and what it means for your workplace.

Cat's Paw Theory Gaining Momentum
The "cat's paw" theory is named after one of Aesop's fables, in which a clever monkey flatters (or in some versions of the story, forces) a naïve cat into snatching chestnuts out of a fire; the monkey quickly eats them, leaving the cat with a burnt paw and no chestnuts. In the employment law context, it refers to any situation where a well-intentioned but unwitting supervisor is manipulated by a subordinate employee who harbors some nefarious motive, resulting in the supervisor unintentionally acting improperly towards some other worker.

First coined in a 1990 opinion by respected federal court Judge Richard Posner, the theory allows plaintiffs to

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advance a claim if they can show that the supervisor was used as a conduit of the subordinate employee's prejudice. In those cases, the prejudice can be imputed to the employer, and the employer can be ultimately held liable for the discrimination or retaliation, even though it originated with a low-level subordinate.

In 2011, the Supreme Court adopted the theory in the context of military USERRA discrimination claims. Subsequently, five federal circuit courts of appeals have adopted and applied the theory to Title VII retaliation claims: the 3rd Circuit Court of Appeals (covering Pennsylvania, New Jersey, and Delaware), the 5th Circuit (Texas, Louisiana, and Mississippi), the 6th Circuit (Ohio, Michigan, Tennessee, and Kentucky), the 7th Circuit (Illinois, Indiana, and Wisconsin), and the 8th Circuit (Missouri, Minnesota, Arkansas, Iowa, Nebraska, North Dakota, and South Dakota).

The 2nd Circuit Court of Appeals, which covers federal courts in New York, Connecticut, and Vermont, had neither approved nor rejected the cat's paw approach until yesterday's decision.

Graphic Sexting Claim Not Investigated Thoroughly
The relevant allegations at issue in *Vasquez* are summarized as follows: Andrea Vasquez worked as an emergency medical technician on an ambulance crew for Empress Ambulance Service beginning in summer 2013. One of her coworkers, dispatcher Tyrell Gray, immediately began making romantic overtures towards her, all of which Vasquez rejected. In January 2014, while Vasquez was out working a midnight shift, Gray texted to her naked pictures of himself. Vasquez was disgusted and immediately reported the situation to her supervisor, who instructed her to file a formal complaint with the human resources department.

Meanwhile, Gray realized that he was in hot water and took various actions in an attempt to avoid responsibility for his harassing conduct. He manipulated texting correspondence he apparently engaged in with another woman, to make it appear that Vasquez had initiated an explicit exchange with him, including a racy selfie (with the woman's face conveniently obscured). He printed screenshots of the correspondence, transmitted them to human resources, and claimed that Vasquez had been sexually harassing him.

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Gray's complaint and manipulated screenshots had already been reviewed by a management committee by the time Vasquez's claim reached the same committee. By the time Vasquez's claim was elevated, that committee (consisting of the company owner, a human resources manager, and a union representative) had already concluded that Vasquez had acted inappropriately towards Gray. Vasquez denied Gray's accusations and offered to demonstrate her version of events, but the company did not pursue her defense and complaint. The committee also refused to show Vasquez view the "selfie" image that Gray claimed was a picture of Vasquez, and management fired her for engaging in sexual harassment.

After deciding that it would adopt the cat's paw theory, the 2nd Circuit panel had a relatively easy time applying it to the case at hand. It concluded that an employer should be liable under the doctrine if a plaintiff could prove that the employer's negligence gave effect to the retaliatory intent of the low-level employee.

The court found evidence of negligence by Empress. One of the employer's mistakes was immediately crediting Gray's accusations and dismissing Vasquez's version of events simply because Gray reported it first. Moreover, the employer declined to examine contrary evidence, which, upon reasonable investigation, would have revealed another side to the story. For this reason, the court permitted Vasquez's claim to proceed to trial despite a lack of any evidence that the committee members harbored any discriminatory animus toward Vasquez.

Decision Demonstrates Importance Of Proper Investigation Procedures

This case offers a stark reminder that you should thoroughly investigate allegations (and defenses) before taking disciplinary action against one employee in response to the allegations of another. If you deem allegations so serious as to require immediate disciplinary action (i.e., to prevent potentially disastrous real-time consequences), you should consider intermediate steps, such as a paid suspension or leave pending the conclusion of the investigation.

Such an investigation should be impartial, thorough, and the decision maker should document and consider both claims and all possible evidence. Under no circumstances should an investigation "conclude" without speaking to the accused and entertaining all of the defenses and proffered evidence.

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Yesterday's decision isn't all bad news for employers, as the court provided a roadmap to avoiding employer liability even where the employer inadvertently makes a demonstrably incorrect decision, so long as a proper investigatory and decision-making process was followed. The court stated that an incorrect finding of an employee's misconduct, without more, is insufficient to prove retaliation.

If you act in good faith, perform a reasonable, non-negligent investigation, and arrives at a conclusion supported by objective evidence, liability for any disciplinary action will not attach. This should provide comfort when you are faced with difficult decisions, especially where credibility is at issue in "he-said, she-said" swearing contests.

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