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JUST (DON'T) DO IT: OREGON SUPREME COURT WARNS AGAINST CAT'S PAW RETALIATION

Insights
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The Oregon Supreme Court just revived a whistleblower retaliation claim filed against sportswear giant Nike by adopting for the first time a novel legal concept known as the "cat's paw" theory. The July 18 opinion opens new avenues for employees to pursue retaliation and discrimination remedies against employers. By reading a summary of the case and gaining a better understanding of this theory, you can avoid running into similar legal trouble with your employees.

ELECTRICIAN GETS JOLTED BY TERMINATION

Douglas Ossanna began at Nike's Beaverton world headquarters in 2007, working as a licensed electrician in the company's maintenance department. The trouble began a few years later when Ossanna claims that he discovered several apprentices working without direct supervision as required by their community college training program. He claims that he reported his concerns to his direct supervisor, Dan Delgado. Similar concerns arose in 2011 when Ossanna reportedly saw unsupervised apprentices performing electrical work that he believed created a substantial risk of electrocution or other serious injury. Although Delgado assured him each time that the apprentice program was being run in compliance with state regulations, Ossanna claims that he did not observe any significant changes in response to his concerns.

Around that time, Mark Treppens began work as Nike's maintenance operations manager. He soon learned about

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Ossanna's safety concerns, and in fact discovered that someone had overheard Ossanna discussing plans with a fellow employee to file a complaint with Oregon Occupational Safety and Health Administration (OR-OSHA). A short time after that, a middle management position opened up that Ossanna applied for; Treppens rejected him for that promotion, and Ossanna believed it was because of his safety reports. That didn't deter Ossanna, however; he soon reported his safety concerns directly to the apprenticeship program administrator and followed through by filing a safety complaint with OR-OSHA.

A few months later, while Nike's campus was in "PowerDown" mode for the holidays, Ossanna happened to be on site on his day off to help two contractors access a building to complete a project. While there, he invited them to shoot baskets in the gym (and even invited his son who lived nearby), and the four of them shot hoops for 20 minutes or so. Delgado and Treppens learned about these athletic escapades and confronted Ossanna, going so far as to imply that he had damaged the gym's newly varnished floor by playing on it while the building was in PowerDown mode.

They conducted an investigation and concluded that Ossanna had committed a serious breach of trust and violated Nike's code of ethics and other employment policies by using the gym while the building was closed. They recommended termination to Nellie St. Jacques, the facilities director, and she terminated Ossanna's employment. After being fired, Ossanna sued Nike for retaliation, alleging that he had been inappropriately fired because he had raised safety complaints. He lost at the trial court level but the Oregon Court of Appeals ruled in his favor. Nike asked the Supreme Court to weigh in; on July 18, the court ruled in Ossanna's favor.

CAT'S PAW THEORY, EXPLAINED – AND ADOPTED BY THE COURT

Ossanna argued that, even if St. Jacques herself had not personally harbored a retaliatory motive to terminate him, she based her decision to terminate upon the recommendation from Treppens and Delgado, who did have such a retaliatory motive. Because their recommendation was tainted, he argued, the final decision should be found to be tainted as well. This novel concept is called the "cat's paw" theory.

The 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 influenced 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 advance claims if they can show that the decisionmaker 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.

The Oregon Supreme Court had never explicitly adopted the cat's paw theory – until it heard Ossanna's case and ruled in his favor. It concluded that a plaintiff can prove whistleblower retaliation if they can show that the protected activity "caused" the discrimination, and that it was not necessarily necessary to prove that the person who made the final decision actually had that protected activity in mind when carrying out the termination. The court concluded: "we agree that the 'cat's paw' doctrine is a viable theory for use in providing discriminatory or retaliatory motivation in Oregon statutory employment discrimination and retaliation cases."

However, there are limitations on the application of this theory. The court also noted that a plaintiff relying on this doctrine must actually establish a causal connection between the supervisor's bias and the adverse employment action. As the court aptly stated, "the causation requirement for the claim at issue controls the degree of causation required to impose liability."

DECISION DEMONSTRATES IMPORTANCE OF PROPER INVESTIGATION PROCEDURES

This case offers a reminder that you should thoroughly investigate allegations (and defenses) before taking disciplinary action against one employee in response to the

findings of another. You need to ensure that such an investigation is impartial and thorough, and you as the final decision maker should document and consider all claims and all possible evidence raised by all parties. In other words, you can't blindly rely on the findings of other employees (even supervisors) if you are the final decision maker. You need to poke around a little bit to find out if there are potential biases that could be clouding the judgment of those who are making recommendations to you, because you will be held accountable if the recommendation was tainted by an impure motive. Being consistent on how employees are disciplined for the same or similar misconduct also helps to undercut any argument that the alleged protected activity "caused" the adverse action.

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 should 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.

CONCLUSION

We will continue to monitor further developments on the application of this theory and provide updates on this and other labor and employment issues affecting Oregon employers, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in [our Portland office](#).

This Legal Alert provides an overview of a state court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.