

The Monkey Will Play... Employers Must Guard Against Biased Subordinates In Making Employment Decisions

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In one of Aesop's fables, a clever monkey convinces a cat to pull chestnuts from a burning fire and in so doing, the cat burns its paws. In the "Cat's Paw" theory of liability, an employer, the misfortunate cat, can similarly get burned if it lets an employee, the monkey, convince it to take discriminatory actions which ultimately harm the employer.

How does this play out in the employment law context? An employer may be held liable if it is found that a prejudiced, subordinate employee influenced a decision-maker to make a negative employment decision about another employee based on discrimination. This is true even if the decision-makers are not aware that they have been influenced by discrimination in making the decision. Of course, the harmed employee must provide evidence that the prejudiced employee actually influenced the "powers that be" to make the negative decision, or the Cat's Paw theory will not be found to apply.

Employers are generally aware that their decision-makers may not make employment decisions based on discriminatory reasons. However, employers are often unaware that they must also be concerned about biased, non-decision-makers influencing those charged with making decisions. How can an employer avoid liability in such a situation? He or she can double-check any allegations made by non-decision-makers against another employee. For example, consider a situation where a supervisor without the authority to hire or fire alleges poor performance by an individual whom he supervises. Prior to the employer making the critical decision to terminate the employee on the word of the supervisor, the employer should check other sources to evaluate whether the supervisor's evaluation is correct. Likewise, if a supervisor alleges that an employee is engaged in wrongdoing, the employer should conduct an independent investigation of the allegations. An employer should also provide the employee with an opportunity to respond to and rebut the allegations/evidence against him or her. Doing so enables an employer to ensure that a biased subordinate has not been monkeying with the employer's decision-making process.

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