

## Labor and Employment Alert: Sixth Circuit Expands Cat's Paw to FMLA Cases

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The Family and Medical Leave Act (FMLA) prohibits an employer from discriminating or retaliating against employees who have used FMLA leave. It also states that employers cannot use the taking of leave as a negative factor in employment actions. The term "cat's-paw" refers to situations where a biased subordinate uses the formal decision-maker as a dupe to deliberately trigger a discriminatory employment action. The plaintiff thus seeks to hold the employer liable for the discriminatory animus of a supervisor who did not make the ultimate employment decision. The Sixth Circuit Court of Appeals (which covers Kentucky, Michigan, Ohio, and Tennessee), recently expanded the theory of cat's paw liability to cases under the FMLA.

In *Marshall v. Rawlings Co.*, the employee took FMLA leave and claimed that she had been harassed, demoted and then ultimately terminated by two lower-level supervisors after returning from leave. While neither supervisor made the decision to demote or terminate her, the employee asserted they unlawfully influenced the decision-makers who actually made those decisions. In reversing the trial court which had dismissed the case, the Sixth Circuit expressly adopted the cat's paw theory of liability to FMLA retaliation claims and, in doing so, made several important observations.

First, the Court explained the cat's paw theory applies even if there are multiple levels of supervision between the employee and the individual who made the ultimate decision or took the ultimate adverse action. "The primary rationale for the cat's paw theory of liability is that, because a company's organizational chart does not always accurately reflect its decision-making process, an employee of lower rank may have significant influence over the decision-maker." The Court did note that "in some cases, allegations that a lower-level supervisor successfully carried out such a scheme might be far-fetched. But those cases can be screened out using existing legal procedures."

Second, to prevail under this theory, the employee must establish a prima facie case of discrimination or retaliation then show the employer's reason for taking the adverse employment action was

merely a pretext to mask its discriminatory or retaliatory animus. Then, the employee must prove that the ultimate decision-maker was the cat's paw of the biased lower-level supervisor.

And third, the Court held that the "honest belief" rule does not apply in cat's paw cases. Under this rule, as long as an employer has an honest belief in its non-discriminatory or non-retaliatory reason, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect. The Court explained that the honesty or sincerity of the decision-maker's belief is irrelevant to whether a biased low-level supervisor intentionally manipulated the decision-maker. Instead, what is relevant is that the belief is rooted in a biased recommendation. An employer can protect itself from liability by showing its decision-maker made an independent investigation before taking the adverse action. However, that investigation will defeat a cat's paw claim only when it finds "that the adverse action was, apart from the supervisor's recommendation, entirely justified."

The *Marshall* decision highlights the importance of training managers and supervisors in their EEO responsibilities at the frontend. It also shows that decision-makers may need to conduct independent and objective investigations without relying solely upon information from or a recommendation by a subordinate. Contact your Vorys lawyer if you have questions about the FMLA or about conducting internal workplace investigations.