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## U. S. Supreme Court Likely to Review Seventh Circuit's Position on Cat's Paw Theory in Employment Discrimination Cases

In Staub v. Proctor Hospital, 560 F.3d 647 (7<sup>th</sup> Cir. 2009), the Seventh Circuit Court of Appeals addressed an important and emerging issue in employment discrimination cases: Is an employer liable when a decision maker has no discriminatory motive whatsoever but bases an adverse employment action on information received from a non-decision maker with a discriminatory motive? The concept that discriminatory animus of a non-decision maker may be imputed to a decision maker is known as the cat's paw theory.

### Seventh Circuit's Bright-Line Test

In Staub, the Seventh Circuit established a bright-line test – favorable to employers – to prevent the cat's paw theory from spiraling out of control, ruling that animus by a non-decision maker is only relevant if he has “singular influence” over the decision maker and “uses that influence to cause the adverse employment action.” Id. at 651. Furthermore, as held in Staub, an employer will not be liable where the decision maker “‘is not wholly dependent on a single source of information’ and conducts her ‘own investigation into the facts relevant to the decision.’” Id. at 659.\* In narrowing the theory's application, the Seventh Circuit's position is in the clear minority. Importantly, several other Circuits disagree with the Seventh Circuit's position.

### U. S. Supreme Court May Decide

The U. S. Supreme Court will likely provide guidance on the use of the cat's paw theory. On July 22, 2009, a petition for writ of certiorari was filed with the high Court seeking reversal of the Seventh Circuit's ruling in Staub. Signaling that it may review the issue, on November 9, 2009, the Court invited the Solicitor General to file a brief expressing the Department of Labor's views on the cat's paw theory. Staub v. Proctor Hospital, Docket No. 09-400, 78 U.S.L.W. 3269.

The U. S. Supreme Court has granted certiorari twice before in cases alleging liability under the cat's paw theory, but the parties in both instances settled before oral argument was scheduled. See, BCI Coca-Cola Bottling Co. v. EEOC, 549 U.S. 1334 (2007) (dismissing writ of

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\* Staub sued his former employer under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq., alleging that he was discriminated against based on military service and that a non-decision maker's influence resulted in Staub's termination – despite the decision maker's own investigation into the matter. A jury found in favor of Staub, but the Seventh Circuit reversed and remanded with instructions to enter judgment for the employer.

certiorari in race discrimination case under cat's paw theory on appeal from Tenth Circuit); Hill v. Lockheed Martin Logistics Management, Inc., 543 U.S. 1132 (2005) (dismissing writ of certiorari in sex and age discrimination case under cat's paw theory on appeal from the Fourth Circuit).

### **Implications for Employers**

- If the U. S. Supreme Court grants certiorari, it will resolve the wide-spread conflict among the Circuits when dealing with discrimination claims brought under the cat's paw theory:
  - Plaintiffs in the Fourth and Seventh Circuits must currently meet a higher standard, showing that a non-decision maker's discriminatory motive was the sole influence in the adverse employment action. In other words, the non-decision maker must be the de facto or functional decision maker.
  - The Seventh Circuit has further held that no liability exists where the decision maker has conducted an independent investigation, regardless of any influence exerted by a non-decision maker.
  - The Sixth, Ninth, Tenth and Eleventh Circuits employ a causation standard where plaintiffs must establish that a non-decision maker's influence was a cause of the adverse employment action.
  - Plaintiffs in the First, Second, Third, Fifth and Eighth Circuits must presently meet a lower burden, showing only that the non-decision maker influenced or played a role in the adverse employment action.
- If the Seventh Circuit's Staub decision is held out as a model for adjudicating cat's paw claims, admissibility of evidence showing discriminatory animus and influence by a non-decision maker will be determined at the pre-trial stage – long before such evidence could prejudice a jury.
- If the U. S. Supreme Court chooses to uphold Staub, employers in all circuits will be permitted to utilize a powerful defense that liability is limited to circumstances where the decision maker relies entirely on the influence of a non-decision maker and does not investigate the matter independently.

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