

Cat's Paw, Part II: "Termination Review" by Independent Decision Makers Can Break the Causal Chain

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Last week, we wrote about the ["Cat's Paw" theory of liability](#) —where a person is used unwittingly to accomplish another person's discriminatory purpose in the workplace. A common example would be when a racist employee unfairly "frames" a black employee and a supervisor then disciplines the black employee based on information provided by the racist employee, thereby discriminating on account of race without knowing that the discipline ultimately arises from an unlawful racial animus. Under a cat's-paw theory of recovery (also known as "subordinate bias" or "rubber stamp" theory), an employer who acts without discriminatory intent can be liable for a subordinate's discriminatory animus if the employer uncritically relies on the biased subordinate's reports and recommendations in deciding to take adverse employment action.

Last week, the [Tenth Circuit Court of Appeals](#) (covering Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, plus the portions of Yellowstone National Park in Montana and Idaho) found that a careful "Termination Review" process by independent decision makers can weaken or break the causal connection between the alleged racial animus and the ultimate adverse action.

In that case, the minority employee alleged retaliation. He had complained about his group leader, and he then claimed that his group leader retaliated against him for complaining. Indeed, the group leader imposed various disciplinary actions upon the employee and provided negative information to higher management about the employee's performance. There were other disciplinary actions too, however, by several different supervisors. Eventually, the group leader issued (another) written warning to the employee, which was the straw that broke the camel's back. The employer ultimately fired the employee based upon feedback and discipline provided by his group leader.

In this case, the company took another step that the court found significant: after the termination, the company implemented a "Termination Review Process" in which the company permitted the employee to "appeal" the termination decision to a group of two independent managers – a "Review Panel." The court stated, "It is well-established in this Circuit that an employer can 'break the causal chain' between the biased subordinate's unlawful actions and the adverse employment action by independently investigating the allegations against the employee." The independent panel undertook the appeal within two days after the termination decision. In addition to reviewing the entire disciplinary history, the panel interviewed the employee and gave him a chance to tell his side of the story. The court held that the independent review process "broke the causal chain" between the

group leader's purported retaliatory animus and the employee's termination.

This case offers several lessons for reducing exposure: a court is likely to assess (i) whether decision makers took a truly careful and thoughtful review of the evidence; (ii) whether independent decision makers were introduced to take a fresh look at the evidence; (iii) whether the problem employee was asked for his or her side of the story before finalizing the termination; (iv) whether a cat's paw angle was meaningfully analyzed and ruled out; and (v) whether there are other independent facts (in this case, disciplines by several other supervisors) that further support the termination decision.

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