Rembolt | Ludtke

Supreme Court to Decide Whether and When "Cat's Paw" Discrimination is Actionable

Mark A. Fahleson, Esq.
Rembolt Ludtke LLP

Can an employer be held liable for unlawful race discrimination in the termination of an employee when the decision maker had no idea what the terminated employee's race was? On April 18, 2007, the United States Supreme Court will hear arguments in a case that will hopefully provide clarity on what's come to be called "cat's paw" liability.

In BCI Coca-Cola Bottling Co. v. EEOC (Case No. 06-341), Stephen Peters was an African American hourly merchandiser working for BCI in New Mexico at a facility where approximately 60 percent of the employees were Hispanic and only 2 percent were African American. Mr. Peters reported to district sales manager Cesar Grado, a Hispanic. Mr. Grado had no authority to terminate Mr. Peters and was required to run all decisions regarding disciplinary action through BCI's human resources department.

Mr. Peters was scheduled to be off work on the weekend of September 29 and 30, 2001. However, due to a shortage of workers Mr. Grado ordered Mr. Peters to report for work on that weekend. Mr. Peters refused, and Mr. Grado warned him that continued refusal would be considered insubordination and grounds for termination. Mr. Peters responded, "You do what you have to do, and I will do what I have to do." As promised, Mr. Peters did not report for work. Pat Edgar, BCI's human resources manager working in Arizona, decided it was necessary to terminate Mr. Peters. Ms. Edgar based her decision on Mr. Grado's account of Mr. Peters' statements and actions and a review of Mr. Peters' personnel file, which revealed an unrelated but similar incident of insubordination two years earlier (not involving Mr. Grado), including a final warning. It is undisputed that at the time of her decision to terminate, Ms. Edgar did not visit with Mr. Peters and did not know that Mr. Peters was an African American.

The federal Equal Employment Opportunity Commission (EEOC) challenged Mr. Peters' termination, claiming that Mr. Grado previously treated other African American employees worse than white or Hispanic employees and that the termination decision, although made by Ms. Edgar, was influenced by racial bias on the part of Mr. Grado. This "cat's

Employment/Labor Law Practice Group

David J. A. Bargen
dbargen@remboltludtke.com

Britt J. Ehlers
behlers@remboltludtke.com

Mark A. Fahleson
mfahleson@remboltludtke.com

Sarah S. Pillen
spillen@remboltludtke.com

Rembolt Ludtke LLP

1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
Fax: 402 / 475-5087
402 / 475-5100

125 South 6th Street
Seward, NE 68434
Fax: 402 / 643-3969
402 / 643-4770

www.remboltludtke.com

paw" theory of liability derives its name from a fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. Thus, under this theory liability exists where a biased subordinate who lacks decision-making authority uses the formal decision maker as a dupe to carry out a discriminatory employment action.

The trial court granted summary judgment for BCI and dismissed the case. Among other things, the trial court concluded that there was no question that Mr. Peters' conduct constituted insubordination warranting termination and that Ms. Edgar had no idea Mr. Peters was African American when she made the termination decision. Moreover, although the trial court held that there was sufficient evidence to conclude that Mr. Grado was racially biased, there was insufficient evidence that Mr. Grado influenced the termination decision.

On appeal, the Tenth Circuit Court of Appeals reversed, finding that the trial court placed too much emphasis on the fact that Mr. Grado did not expressly recommend Mr. Peters' termination. Rather, the appeals court held that Ms. Edgar's cursory investigation (e.g., not interviewing Mr. Peters and only reviewing his personnel file) was insufficient to defeat the inference that Mr. Grado's racial bias tainted her decision.

On January 5, 2007, the Supreme Court announced that it agreed to consider BCI's appeal. It is anticipated that a ruling will be issued before the end of June 2007.

LESSON: Currently, the federal circuit courts are split as to when they will apply the "cat's paw" doctrine. At one end of the spectrum are those appeals courts that require only that the biased subordinate exert some influence over the decision. At the other end of the spectrum are those courts that require proof of a "substantial influence" or "significant role" in the decision. The Supreme Court will hopefully provide much needed clarity to "cat's paw" liability in its BCI decision, hopefully without creating additional liability for employers.

Regardless of what the Supreme Court eventually decides, the BCI decision highlights the need for objective, thorough investigations prior to taking an adverse action against an employee. In BCI, the human resources manager conducted only a cursory investigation and did not attempt to contact Mr. Peters to get his side of the story prior to making the decision to terminate his employment. Had the human resources manager done so, perhaps BCI would not now find itself pleading its case before the highest court in the land.

Fahleson is a partner with the Lincoln-based law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or mfahleson@remboltludtke.com.