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## The GSH 60-Second Memo

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### Don't Fall Prey to Cat's Paw Liability

By: Jerilyn Jacobs, Esq.

Rachel is the Human Resources Director of XYZ Company. She just received a telephone call from one of the supervisors, Jim, who is under her management. Jim has authority to issue oral and written warnings, but he cannot hire or fire employees. Jim tells Rachel that one of the employees he supervises, Carrie, has missed an important mandatory meeting for all employees. For Jim, this is the final straw. Jim also tells Rachel about Carrie's ongoing poor attitude and performance issues. Jim says that Carrie does not get along with her coworkers and that he has issued Carrie multiple warnings in compliance with XYZ's progressive discipline policy. Jim recommends that Carrie's employment be terminated. Rachel trusts Jim and acts on his information. After all, she thinks, she has to be able to delegate some responsibilities, right? What kind of trouble might Rachel be in? Rachel may have unwittingly become what is often times referred to as a "cat's paw."

The term "cat's paw" is derived from a fable in which a monkey persuades an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire, it burns its paw.

Meanwhile, the monkey eagerly gobbles up the chestnuts, leaving none for the cat.

In the employment context, the term "cat's paw" refers to a situation where a biased supervisor, one who is without decision-making power, deliberately schemes and makes a case for the discipline or termination of a subordinate or fellow employee because of an underlying discriminatory motivation. This biased supervisor provides misinformation to, or alternatively withholds information from, the decision maker, who, based on this misinformation takes an adverse employment action against the targeted employee. In other words, the decision maker is duped into carrying out of the biased supervisor's discriminatory intent. In these circumstances, an employee can prevail in a discrimination suit even if the employer successfully establishes that the actual decision maker harbored no discriminatory animus toward the employee, so long as the employee can show that the decision maker's decision was influenced by an employee who was motivated by an unlawful discriminatory intent. Such claims may become more prevalent as businesses with multiple locations centralize human resources departments and rely on information gathered by non-decision-making representatives in local offices.

Just last November, an employer in Tennessee was found liable for discharging an employee under a "cat's paw" theory. In this case, [\*Madden v. Chattanooga City Wide Service Dept.\*, 549 F.3d 666 \(6th Cir. 2008\)](#), a black crew member, Ronald Madden, was fired for setting off firecrackers at the work site. Madden had admitted to supervisor Keith Templin, who was white, that he had set off the firecrackers. Templin, in turn, reported the incident to his supervisor. Thereafter, three senior managers conducted an investigation of the incident. They concluded that Madden's conduct constituted a safety issue. They submitted a recommendation to an even higher administrator that Madden's employment be terminated. The administrator followed the recommendation. Neither the senior managers conducting the investigation nor the decision-making administrator were aware of any other incidents involving employees setting off firecrackers.

However, at the trial, evidence came to light that it was commonplace for employees to set off firecrackers. In fact, there was evidence that Templin, the supervisor who first reported Madden's conduct, was present for other incidents where firecrackers were set off and had even himself thrown "poppers" at a fellow employee. Because there was evidence that Templin had reported Madden's misconduct but had not reported virtually identical misconduct by white employees, the employer was found liable under the cat's paw theory. The trial court accepted as true that the managers who conducted the investigation knew nothing about the other incidents or that the decision maker himself was not aware of similar incidents. It simply did not matter. As the Sixth Circuit noted when it affirmed the trial court's judgment, "By relying on this discriminatory information flow, the ultimate decision makers acted as a conduit of the supervisor's prejudice - his cat's paw."

In order to make sure that you do not fall prey and become a

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"cat's paw," it is advisable to keep the following in mind:

- Conduct your own investigation. Break any potential causal link between a biased supervisor's discriminatory animus and the employment action you would like to take. If an employer can demonstrate that that an investigation was conducted separate and apart from information provided by the biased supervisor, it is less likely that a court will find a causal link between the adverse employment action and any discriminatory motivation.
- Make sure that a decision maker talks directly with the employee, to get his or her side of the story. In some circuits, this in and of itself may be sufficient to break the causal chain. Even in circuits where this is insufficient in and of itself to avoid liability, it is considered a key part of any unbiased investigation.
- If appropriate, identify other managers and supervisors who may have relevant information regarding the targeted employee and any possible performance issues.
- Don't assume that ignorance is bliss, and that, by not meeting the employee and not knowing if the employee is a member of a protected class, one can insulate oneself from liability. For instance, in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), the Tenth Circuit allowed the EEOC to go forward with a claim for racial discrimination even though the human resources official who made the decision to terminate employment lived in a different city, had never met the employee and did not know that the employee was a member of a protected class.
- Be sure that your harassment policy includes a clearly written reporting requirement. Too often at the heart of a discrimination claim based on the "cat's paw" theory is a claim by a discharged employee, previously undisclosed, that they were long ago harassed by his or her supervisor. While such a harassment claim would be time-barred, this evidence may be admissible to show that the supervisor harbored a discriminatory animus. While having a reporting requirement does not absolve an employer of liability, its existence - and the employee's failure to follow it - can be evidence that bears on the employee's credibility.