

1st Circuit denies 'cat's paw' retaliation claim

Fired employee fails to show unlawful animus

By Eric T. Berkman

An employee who was fired for timecard violations that he claimed were reported to management out of retaliatory animus could not sue his employer under a "cat's paw" theory of liability, the 1st U.S. Circuit Court of Appeals has ruled.

Under the "cat's paw" theory, an employer who disciplines or fires a worker for legitimate reasons can still be held liable for discrimination or retaliation if the information the decision-maker is acting on was provided for discriminatory or retaliatory reasons.

In the case before the 1st Circuit, the plaintiff employee claimed that the supervisors who reported his timecard violations to an upper-level manager — who, in turn, made the decision to fire him — did so because they resented that he took leave under the Family and Medical Leave Act. Accordingly, the plaintiff argued, the defendant employer should be held liable for FMLA retaliation.

But the 1st Circuit disagreed, affirming a U.S. District Court judge's summary judgment for the defendant.

"[The plaintiff] has the burden of proving that [the defendant's] stated reason for his termination was a pretext ... and absent retaliatory animus, there can be no pretext," Judge O. Rogeriee Thompson wrote on behalf of the court.

Because the plaintiff failed to present concrete evidence of such animus, Thompson continued, the "cat's paw theory is effectively declared."

The 25-page decision is *Ameen v. Amphenol Printed Circuits, Inc.*, *Lawyers Weekly* No. 01-014-15. The full text of the ruling can be found by clicking here.

'Correctly reinforced'

Jonathan D. Rosenfeld of WilmerHale in Boston, who represented the defendant, said the decision "correctly reinforces that an employee is not insulated from adverse action simply by engaging in protected activity — in this case the taking of an FMLA leave — and then later brandishing that protected activity as a shield. Where the employee engages in wrongdoing and the employer acts in response, the prior protected activity will not provide protection."

Rosenfeld also noted that as more and more employees seek to use the cat's paw theory to support discrimination and retaliation claims, the decision highlights for employers how important it is for decision-makers to conduct their own investigations rather than simply "rubber-stamping" recommendations from subordinates that a plaintiff might later claim were motivated by unlawful animus.

Tawny W. Alvarez of Verrill Dana in Portland, Maine, represents employers and is licensed in Massachusetts. She said she found particularly interesting the plaintiff's argument that the cat's paw theory applies even if those reporting the improper act leading to the termination decision provide truthful information.

Though the 1st Circuit found it unnecessary to address that aspect of the plaintiff's argument, Alvarez said if the passing of accurate information could indeed be used as the basis for an assertion of unlawful animus, employers would never be able to discipline employees, since an argument of retaliation couched in a cat's paw theory could be used to hold the employer liable.

That would contradict the standard laid out by the U.S. Supreme Court in its 1973 *McDonnell Douglas Corp. v. Green* decision that an individual can be terminated or otherwise disciplined for reasons independent of any protected activity, Alvarez said.

Boston lawyer Robert S. Mantell, who represents employees, said the decision raises another interesting issue: whether there is proof



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of pretext when an employer targets an individual employee in an investigation, finds an improper practice, and thereby terminates that employee, only to find out later that the improper practice is more widespread. In *Ameen*, the plaintiff apparently was not the only employee manipulating the timecard system to his advantage.

"A plaintiff's attorney would argue that [his] client should not be singled out for investigation, and that doing so is the product of bias," said Mantell, a lawyer at Rodgers, Powers & Schwartz. "However, the court indicates that, under certain situations, it is appropriate and not pretextual to target individual employees for investigation."

Plaintiff's counsel Lauren S. Irwin of Upton & Hatfield in Concord, New Hampshire, declined to comment.

Stealing time

Plaintiff Murad Ameen worked for defendant Amphenol Printed Circuits, a manufacturer of printed circuit boards, as a "group leader" responsible for operating drill machines, leading

other drill operators on the second shift, and assisting in planning overtime staffing to meet customer demand.

In March 2012, Ameen requested and received a two-week leave under the FMLA in conjunction with the birth of his second child. He then requested and received a one-week extension. He worked a reduced schedule during most of that time.

When he returned to work full time, he declined requests to work overtime due to his wife's poor post-partum health. Though overtime was not mandatory, he and his employer disagreed over whether it was expected.

On April 4, 2012, Ameen requested three and a half weeks of non-FMLA personal leave to take a trip to his native Iraq. At a meeting attended by Ameen, supervisor Joseph Silva, operations manager Raymond Pratt and human resources director Valerie Hartlan, Pratt expressed concern about the timing of the trip because it was a busy time for the company.

Ameen allegedly responded that he planned to take the trip whether or not the company granted his request. Pratt apparently warned that even if leave was granted, Ameen's position might be filled while he was away, as had happened when another group leader took a leave of absence. Ameen apparently agreed to "help out" with overtime after he returned, and the leave was approved. The company also spread his accrued vacation time over the weeks of his leave to protect his benefits.

In the meantime, Ameen committed an error that cost the company production time. The company claimed he tried to cover it up and he received a written warning, the second he had received as an employee.

When Ameen returned from his personal leave in late May, he apparently declined to work overtime despite his earlier promise. According to Ameen, Pratt became angry when he refused overtime even though Pratt knew Ameen needed time to be with his family.

On June 22, 2012, first-shift group leader Paul Conners reported to Pratt that according to two of Ameen's co-workers, he was cheating on his time card.

Pratt brought the matter to the attention of

operations director Christine Harrington. She ordered a follow-up investigation that revealed Ameen had punched out at some point each day for 30 minutes but would continue working. Then, at another time, he would leave the property for about an hour. That way, Ameen — who was entitled by company policy to a 30-minute unpaid lunch break and 15-minute paid break — would apparently be compensated for an additional 15 minutes of time he did

CASE: *Ameen v. Amphenol Printed Circuits, Inc.*, Lawyers Weekly No. 01-014-15

COURT: 1st U.S. Circuit Court of Appeals

ISSUE: Could an employee who was fired for committing timecard violations, which he claimed were reported to management out of retaliatory animus, sue his employer under a "cat's paw" theory of liability?

DECISION: No

not work.

After further investigation, Harrington ordered that Ameen be terminated. In the termination meeting, Ameen accused Pratt of "picking" on him because he could not work overtime due to his wife's health situation. Pratt denied the accusation.

Ameen subsequently sued Amphenol in U.S. District Court, alleging that the company violated the FMLA by retaliating against him for taking family leave.

In doing so, Ameen asserted a "cat's paw" theory that, even though Harrington was not aware of his leave when she made the decision to fire him, Pratt and Conners acted out of retaliatory animus in reporting his timecard violations. Thus, he argued, the purported violations were a pretext for unlawful retaliation.

Judge Landya B. McCafferty granted summary judgment for the employer, finding that Ameen had produced no facts that would support the theory.

Ameen appealed.

Insufficient showing

The plaintiff argued before the 1st Circuit that McCafferty applied an incorrect "heightened standard" by reading a 2004 1st Circuit ruling, *Cariglia v. Hertz Equip. Rental Corp.*, to require in a cat's paw case that information

provided by allegedly discriminatory or retaliatory actors to a decision-maker be "inaccurate, misleading or incomplete."

According to the plaintiff, the U.S. Supreme Court's 2011 *Staub v. Proctor Hospital* decision suggests that the reporting of truthful information motivated by unlawful animus can support a cat's paw claim.

But the 1st Circuit declined to analyze that issue, emphasizing that either interpretation still requires a showing that the person providing the information was motivated by retaliatory animus. That is where the plaintiff's claim failed, the court found.

First, the panel rejected the plaintiff's argument that Conners' failure to report other workers who took excess break time was sufficient to demonstrate animus.

"Other than pointing to Conners having reported Ameen's extended breaks to superiors, Ameen gives us no other explanation or evidence of this hostility," Thompson wrote.

"Regardless of Ameen's opinion on what may have motivated Conners to report his extended break times, his 'subjective belief in retaliation is not enough' to show animus on Conners' part, and no objective evidence in the record supports his animus theory," Thompson continued, quoting the 1st Circuit's 2010 decision in *Roman v. Potter*.

The court was similarly unmoved by the plaintiff's contention that Pratt's failure to escalate the issue of extended breaks by other employees to upper management constituted a showing of retaliatory animus.

"[The defendant] repeats it had never before encountered a case in which an employee had consistently combined two breaks and then took an additional unauthorized quarter hour on top of that," Thompson said. "Nothing in the record contradicts this assertion. ... Similarly, there is nothing to connect Ameen's general and vague allegations of hostility by Pratt to Ameen's FMLA-protected activity, if any, rather than to his unauthorized breaks."

Accordingly, the 1st Circuit concluded, the plaintiff failed to make the required showing that the defendant's stated reason for his termination was a pretext for retaliation. Thus, the panel ruled, the trial court's summary judgment should be affirmed.



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