

**“ME TOO” AND “CAT’S PAW” ISSUES ENTER THE LEXICON OF
EMPLOYMENT DISCRIMINATION CASES**

“Me Too” Evidence Must Be Considered On a Case-by-Case Basis

On February 26, 2008, the U.S. Supreme Court ruled that testimony by other employees who reported to different supervisors that they too were discriminated against because of their age is neither always admissible nor always inadmissible in age discrimination cases. (*Sprint/United Management Co. v. Mendelsohn*). In *Sprint*, the lower court had excluded evidence of discrimination against employees not “similarly situated” to the plaintiff, narrowing the inquiry to only those employees selected for the RIF by the same manager who selected the plaintiff and who were rified at the same time.

The Supreme Court decided that such proposed testimony “requires a fact-intensive, context-specific inquiry” by the lower court. Writing for the unanimous Court, Justice Thomas observed that the relevance of other-supervisor evidence in an individual age discrimination case “depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.”

“Cat’s Paw” Cases Require Greater Employer Due Diligence

“Cat’s paw” discrimination occurs when a decisionmaker relies upon information provided by a supervisor with discriminatory animus in making an employment decision, such as firing the employee, without conducting an independent investigation. This legal theory, also known as a “rubber stamp” theory, was first advanced by the U.S. Court of Appeals for the Seventh Circuit in 1990, and has been endorsed by other Circuits to some extent since then.

In 2006, the Tenth Circuit, which adopted the Seventh Circuit standard, held that:

“To prevail on a subordinate bias claim, a plaintiff must establish more than mere ‘influence’ or ‘input’ in the decision making process. Rather, the issue is whether the biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action.” *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*.

“Cat’s paw” decisions put employers in the position of being liable for discrimination even where the decisionmaker has absolutely no knowledge of the subordinate’s bias. Fortunately, employers can avoid “cat’s paw” liability by relying on objective facts rather than naked recommendations and by conducting independent investigations into the facts surrounding the proposed adverse decision, including asking the employee for his or her version of events and obtaining information from other employees who have knowledge of the facts.

For further information concerning “me too” and “cat’s paw” cases, please contact **Joan M. Eagle** at **312-845-5439** or jeagle@schwartzcooper.com or any other member of Schwartz Cooper’s Employment Law Practice Group.