

## THE CAT'S PAW OR AGE DISCRIMINATION

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*This case was prepared by the authors (Leonard and Hodge) and is intended to be used as a basis for class discussion. The views represented here are those of the case authors and do not necessarily reflect the views of the Society for Case Research. The views are based on the professional judgment of the authors.*

As Jane White, Vice President for Human Resources (VP HR) at Anderson Memorial Regional Hospital, drove to the emergency meeting called by John Hart, the Daleville HR director, and Terry Squires, the Daleville pharmacy manager, she wondered if the meeting had been called about additional issues with their “problem pharmacist.” He had already been demoted and was “on warning” that one more violation of hospital policy would result in his termination. If this was about him, would there be enough evidence to overcome his protected-class status?

Had White and others been careful to “dot the i’s and cross the t’s”? If another violation had occurred, would it be one that Terry discovered directly or one discovered by someone else, a “cat’s paw,” so to speak? From an article that White read recently, she had become intrigued with the “Cat’s Paw Theory” and wondered if it would ever have application to Anderson Memorial Regional Hospital. Unfortunately, she was about to find out.

### **The Supreme Court Case**

One Sunday afternoon, White, age 46, decided to closet herself in her at-home-office to catch up on some reading. One article in particular got her attention. The article discussed the 17<sup>th</sup> century French fable called “The Monkey and the Cat.” In the fable, a clever and cunning monkey convinced a naïve cat to retrieve some chestnuts from a fire where they were roasting. The cat burned her paw while the monkey grabbed and ate the chestnuts. From this fable, the term “cat’s paw” has come to mean a “tool” or “one used by another to accomplish his/her purposes.” The reason that this drew White’s attention was that the case, decided by the U. S. Supreme Court on March 1, 2011 used the “Cat’s Paw” Theory and involved a hospital in Peoria, Illinois.<sup>1</sup>

The court case that White had read that Sunday afternoon was about Vincent Staub, a medical technician at Proctor Hospital, who lost his job after disagreements with his supervisors. His supervisors argued that Staub’s lack of availability, poor attitude, lack of communication, and repeated warnings were grounds for firing him. Staub argued that the disputes were related to the fact that his immediate supervisor (Mulally) refused to accommodate his service in the United States Army Reserve. Mulally was openly hostile to Staub’s Reserve duties. Staub

alleged that Mulally scheduled him for additional shifts without notice, saying the extra shifts were a way for him to repay the department for everyone else having to bend over backward to cover his Reserve schedule. She also posted notices asking other employees to cover Staub's weekend shifts and called his military duties "bullshit."<sup>2</sup>

The department head (Korechuk) commented that Staub's Reserve duties consisted of a bunch of smoking and joking, and they were a waste of taxpayers' money. About the time Staub received an order to report for "soldier readiness process," a precursor to another Middle East deployment, he received a written warning for failing to pick up work and failing to be available for work in his department. Staub disputed the warning, but it stood nonetheless. Under the terms of the warning, Staub was to report to the department head or to the assistant department head when he completed his cases or whenever he needed to leave his work station. Two weeks later, the department head reported to the hospital's Vice President of Human Resources that Staub would frequently disappear from the department and was failing to report as instructed in the written warning. The department head recommended that Staub be fired. After a review of his file, the Vice President agreed. Staub claimed that, although the HR vice president did not have an anti-military bias, she relied on false information from his supervisors who were biased. The actions were anti-military in violation of the Uniform Services Employment and Reemployment Act of 1994 (USERRA).

What made this case interesting to White was the introduction of the "Cat's Paw" Theory. Staub's attorneys argued that the discriminatory motives of the department head and assistant department head should be attributed to the Human Resources Vice President (HR VP), and, therefore, to the hospital. The jury found that the department managers gave false information to the HR VP and that the department managers' actions were motivated by Staub's membership and activities in the military reserve. The Seventh Circuit Court reversed the decision and reasoned that the "Cat's Paw" Theory was irrelevant in this case. It concluded the HR VP took an independent view and made her decision on the facts relevant to the situation.

On March 1, 2011, the United States Supreme Court, in a unanimous decision, concluded that the hospital was liable for unlawful discrimination if a lower-level supervisor influenced an adverse employment decision. The Supreme Court's "Cat's Paw" Theory required showing that a supervisor acting within the scope of his or her employment performed an act that was motivated by discrimination, which was intended by the supervisor to cause an adverse employment action, and that the act was a proximate cause of the adverse employment action. If such a showing is made, then the employer may be liable for discrimination.<sup>3</sup>

### **Where Do We Go From Here?**

Anderson Memorial Regional Hospital had 12 facilities within a ninety-mile area, and Jane White was Vice President of Human Resources. She had an HR director at each of the affiliate facilities. The policies and procedures were the same at all locations.

Based on her weekend review of the *SHRM Magazine* and other publications, White decided that it would be worthwhile for her office to take a proactive approach in educating managers on the laws and hospital policies so that Anderson Memorial didn't find itself in a predicament like those about which she had been reading. She reviewed her notes from a management seminar

the hospital had conducted for its department managers last year. The presenter, an esteemed university professor, had discussed the “OUCH Test” for guiding supervisory actions. He suggested that human resources always pause before it says or does anything, then be objective, i.e., always have an open mind, be uniform in application, be consistent in effect, and make sure that the action(s) has job relatedness.<sup>4</sup>

White also thought about other issues that affected the employment arena. For the first time in history, four generations of employees were present and active in the workforce. This area was another one where managers might find an educational seminar useful. The oldest group in the workforce was the group referred to as the Matures who were people born before 1946. The second group was the Baby Boomers who were employees born between 1946 and 1964. Generation X comprised the third group, which included people born between 1965 and 1978. The final group was the Millennials who were born between 1979 and present. Each of these groups had different work values, work ethics, and work needs (Arsenault, 2004)—fertile ground for conflict. White had read research articles that indicated that organizations with increased diversity in generations experienced more conflict and that this conflict was greater than conflict created due to diversity of sex or race. Additionally, for all groups except the Millennials, managers needed to be aware of and act according to the Age in Discrimination Act, which said: “it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training” (Facts about Age Discrimination, 2008).

### **The Rest of the Story**

On Friday, May 13, White received a text message from John Hart, the HR director at the Daleville facility, an affiliate facility. The gist of his message was that he and the pharmacy manager, Terry Squires, needed to meet with her before the end of the day. White checked her calendar and decided that she would drive the 30 miles to Daleville. During the drive, White thought to herself, “This must be another crisis or Hart would not have said he needed to meet with me before day’s end.”

At the meeting, Hart and Squires relayed the following: Jack Creager, who was 56-years old, began working as a staff pharmacist in 2005 at the Whitley facility (another affiliate facility), and after two years he was promoted to manager. Shortly thereafter, management began receiving complaints about Creager from co-workers, hospital staff, and patients. Creager admitted that he had been filling expired prescriptions, offering unauthorized discounts, and committing other violations of policy. Some of these acts not only were violations of policy, but also were illegal actions. Creager’s supervisors determined that he (Creager) was not fulfilling the expectations of a pharmacy manager, so he was demoted to staff pharmacist and transferred to the Daleville facility rather than terminated. It should be noted that four factors are at play in the hospital: (1) pharmacy colleges had all moved from a five-year pharmacy program to a six-year PharmD program, and thus for one year there were no new pharmacy graduates; (2) Wal-Mart and other big-boxes had added pharmacies to their store services; (3) insurance reimbursement practices were implemented; and (4) the starting salary for a beginning pharmacist approached \$100,000 in many markets. These factors may, in part, explain the reluctance of the hospital to terminate Creager and to try to find another pharmacist to replace him.

At the time of the transfer, Creager was warned that he would be fired the next time he failed to follow hospital procedures. Creager was not welcomed warmly by his new co-workers. They complained that he was “lazy” and “slow” and he “dumped scripts” for others on the next shift to fill. The day before the meeting, Marie McAllister, age 26 and a staff pharmacist, was presented with a prescription for Fluconazole, a drug used to treat fungal infections. The hospital database alerted McAllister to a potentially dangerous interaction between Fluconazole and Simvastatin, another medicine that the patient was taking to treat high levels of cholesterol. According to the database, taking the two medications simultaneously produced a high risk of rapid muscle weakness and wasting. Concerned about the patient’s safety, McAllister telephoned the prescribing physician but could not reach him. Since the prescription had already been entered in the database, McAllister placed it in the “exception queue” and added a notation that she was waiting to hear back from the doctor about a potential serious drug interaction.

When Creager relieved McAllister later in the day, she told him that she had been waiting on a call back from the patient’s doctor. She also told him that the script should not be filled until they heard back from the physician. About an hour later, Creager entered a notation that required him to override the database’s drug-interaction warning, and he filled the patient’s script.

The morning of the meeting, the patient’s physician called McAllister and told her not to fill the prescription because of the potential for harm. Going into the database, McAllister discovered that Creager had already dispensed the Fluconazole to the patient. McAllister immediately reported the incident to pharmacy manager, Terry Squires.

Squires, who was 54-years old, reviewed the database records and independently analyzed the patient’s medical history and the potential interaction between the two drugs. He concluded that Creager should not have filled the script and that he had inappropriately overridden the database’s drug-interaction warning.

“What’s going on here? What have we done to deserve this? Why can’t professionals act like professionals and do the job they are paid to do?” Jane White thought to herself. At the meeting, the discussion among White, Terry Squires, and John Hart centered on the following: (1) Creager had received notice that he would be fired the next time he violated hospital policy; (2) Creager was 56-years-old and a member of a protected-class; and (3) whether the “cat’s paw” principle might apply because it was McAllister, a much younger pharmacist, who found and reported the violation.

The three agreed that Squires would immediately tell Creager that he was suspended while the allegations were investigated. White told Squires to think about the situation overnight and at 7:30 a.m. the next day, Saturday, they (White and Hart) would meet to listen to Squires’ recommendations.

What should Squires consider about suspending Creager? Are there any other actions Squires, Hart, and White should consider when determining the outcome of this case?

## END NOTES

1. The term “cat’s paw” is used to refer to a “tool” or “an action used by another to accomplish his purposes.” The term comes from the French poet Jean de La Fontaine. La Fontaine published “Le Singe et le Chat” or “the Monkey and the Cat,” in *Fables*, book 1X, No. 17, 1679. Also See David Gee, “What The Heck Is The “Cat’s Paw Theory” and Why Should You Care,” March 22, 2011, <http://staffingtalk.com/heck-cats-paw-theory-care/> or Adam Santucci, “United States Supreme Court Approves “Cat’s Paw” Theory of Liability,” Pennsylvania Labor and Employment Blog, March 5, 2011.
2. See *Staub v. Proctor Hospital*, 560 F. 3d 647, reversed and remanded. United States Supreme Court, NI 09-400, decided March 1, 2011. Google *Stuab v. Proctor Hospital* to review the many concerns and analyzes of that decision.
3. *ibid.*
4. The authors first heard of the “OUCH” test in a Life Office Management Association training program presented by Jagerson Associates, Inc. For a more detailed explanation see Edwin C. Leonard, Jr., *Supervision: Concepts and Principles of Management* (Mason, OH; South-Western Cengage Learning, 2010), pp. 461-462.

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## Appendix A.

### Code of Ethics for Pharmacists

#### PREAMBLE

Pharmacists are health professionals who assist individuals in making the best use of medications. This Code, prepared and supported by pharmacists, is intended to state publicly the principles that form the fundamental basis of the roles and responsibilities of pharmacists. These principles, based on moral obligations and virtues, are established to guide pharmacists in relationships with patients, health professionals, and society.

I. A pharmacist respects the covenantal relationship between the patient and pharmacist.

Considering the patient-pharmacist relationship as a covenant means that a pharmacist has moral obligations in response to the gift of trust received from society. In return for this gift, a pharmacist promises to help individuals achieve optimum benefit from their medications, to be committed to their welfare, and to maintain their trust.

II. A pharmacist promotes the good of every patient in a caring, compassionate, and confidential manner.

A pharmacist places concern for the well-being of the patient at the center of professional practice. In doing so, a pharmacist considers needs stated by the patient as well as those defined by health science. A pharmacist is dedicated to protecting the dignity of the patient. With a caring attitude and a compassionate spirit, a pharmacist focuses on serving the patient in a private and confidential manner.

III. A pharmacist respects the autonomy and dignity of each patient.

A pharmacist promotes the right of self-determination and recognizes individual self-worth by encouraging patients to participate in decisions about their health. A pharmacist communicates with patients in terms that are understandable. In all cases, a pharmacist respects personal and cultural differences among patients.

IV. A pharmacist acts with honesty and integrity in professional relationships.

A pharmacist has a duty to tell the truth and to act with conviction of conscience. A pharmacist avoids discriminatory practices, behavior or work conditions that impair professional judgment, and actions that compromise dedication to the best interests of patients.

V. A pharmacist maintains professional competence.

A pharmacist has a duty to maintain knowledge and abilities as new medications, devices, and technologies become available and as health information advances.



VI. A pharmacist respects the values and abilities of colleagues and other health professionals.

When appropriate, a pharmacist asks for the consultation of colleagues or other health professionals or refers the patient. A pharmacist acknowledges that colleagues and other health professionals may differ in the beliefs and values they apply to the care of the patient.

VII. A pharmacist serves individual, community, and societal needs.

The primary obligation of a pharmacist is to individual patients. However, the obligations of a pharmacist may at times extend beyond the individual to the community and society. In these situations, the pharmacist recognizes the responsibilities that accompany these obligations and acts accordingly.

VIII. A pharmacist seeks justice in the distribution of health resources.

When health resources are allocated, a pharmacist is fair and equitable, balancing the needs of patients and society.

\* adopted by the membership of the American Pharmacists Association October 27, 1994.

Source: American Pharmacists Association. Retrieved 8/15/11 from  
<http://www.pharmacist.com/AM/Template.cfm?Section=Search1&template=/CM/HTMLDisplay.cfm&ContentID=2903>

## OATH OF A PHARMACIST

At this time, I vow to devote my professional life to the service of all humankind through the profession of pharmacy.

I will consider the welfare of humanity and relief of human suffering my primary concerns.

I will apply my knowledge, experience, and skills to the best of my ability to assure optimal drug therapy outcomes for the patients I serve.

I will keep abreast of developments and maintain professional competency in my profession of pharmacy. I will maintain the highest principles of moral, ethical and legal conduct.

I will embrace and advocate change in the profession of pharmacy that improves patient care.

I take these vows voluntarily with the full realization of the responsibility with which I am entrusted by the public.

Source: US PHARM D Retrieved 8/15/11 from [http://www.uspharmd.com/pharmacist/pharmacist\\_oath\\_and\\_code\\_of\\_ethics/](http://www.uspharmd.com/pharmacist/pharmacist_oath_and_code_of_ethics/)