Proposing and deciding officials are not permitted to take an action for prohibited reasons, such as retaliation for whistleblowing activity or for discriminatory motives (including not only "traditional" discrimination (*e.g.*, race or sex), but also discrimination based on military service, political party, or off-duty conduct that does not affect the efficiency of the service). Moreover, officials – no matter how pure their own motives – have the responsibility to ensure that the action has not been corrupted by someone else in the process who has a prohibited motive.

The Supreme Court has held, in the context of a statute protecting service members from anti-military animus, that "if a supervisor performs an act motivated by anti-military animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable[.]"[86] This is known as the "cat's paw" approach to liability, so named for a fable in which a cat is tricked by a monkey into sticking the cat's paw into a flame to seize some food. The cat gets his paw injured while the monkey, who persuaded the cat to act, escapes with all the food and no injuries.[87] In the employment context, an innocent official can get burned if someone with animus tricks the official into taking a personnel action.

The law instructs the Board that if a decision is based on any PPP, the agency's decision cannot be sustained.[88] The Board and its reviewing court have held that the cat's paw approach applies to this instruction. Even if the official with animus officially recuses himself or herself from preparing the charges or issuing the final decision, if that official is involved in any manner that taints the process, the action cannot be sustained.[89]

The cat's paw theory for determining if an action is corrupted by the commission of a PPP (or other prohibited purpose such as anti-military animus) is one of many reasons why it is so important for decision-makers to listen carefully to an employee's reply to the notice of proposed action. Listening to – or reading – an employee's response to the proposed action is a due process requirement; but, truly paying attention to it is an opportunity for the agency to learn if it has been tricked into sticking a paw into the fire. Whether the deciding official is trying to comply with the Constitution, confirm that the employee is not a scapegoat, avoid the cat's paw, or some other purpose, there are a lot of different ways in which ensuring that the adverse action response period is meaningful can prevent the agency from getting burned.

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[86] *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011).

[87] *Id.* at 415, n.1.

[88] 5 U.S.C. § 7701(c)(2)(B).

[89] *See Sullivan v. Department of the Navy*, 720 F.2d 1266, 1269, 1276 (Fed. Cir. 1983) (holding that despite the official recusing himself, "his dominant role in the case throughout the proceedings" infused the action with the improper motive, thereby rendering the personnel action unsustainable); *Aquino v. Department of Homeland Security*, 121 M.S.P.R. 35, ¶¶ 20-21 (2014) (holding that when a supervisor with a retaliatory animus alleges misconduct by an employee but does not serve as the proposing or deciding official, if the agency uses that allegation as the basis for proposing and implementing an adverse action, then the action itself has retaliation as the basis and the agency must prove by clear and convincing evidence that it would have taken the same action in the absence of the animus).

Avoid Facilitating Prohibited Personnel Practices (PPPs)

For a discussion of the meaning of the individual PPPs and the extent to which employees perceive them, see our report, *Prohibited Personnel Practices: Employee Perceptions*.[90]

[90] U.S. Merit Systems Protection Board, *Prohibited Personnel Practices: Employee Perceptions* (2011), available at www.mspb.gov/studies. *See Prohibited Personnel Practices Frequently Asked Questions*, available at http://www.mspb.gov/ppp/ppp.htm#faq.