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EMPLOYERS TAKE CARE NOT TO GET BURNED BY REACH OF THE CAT'S PAW

Why it Matters

An employer may be liable for employment discrimination even when the employee who makes the final adverse employment decision did not intend to discriminate.

The United States Supreme Court recently held an employer liable for violation of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) based on the anti-military hostility of a supervisor who influenced a higher-level manager to terminate the employee. Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011). The Court held an employer may be liable where: 1) the supervisor performs an act motivated by discriminatory animus, with the intent to cause an adverse employment action, and 2) the act is a proximate cause of the ultimate employment action. As a result of this case, which may be applied to nearly all statutes prohibiting employment discrimination, employers must take even greater care in performing and documenting investigations before taking adverse employment actions.

The Staub Decision

After Vincent Staub was fired by the Vice President of Human Resources of Proctor Hospital, he brought a discrimination case under USERRA. The basis of Staub's claim was that his supervisors' hostility towards his Reserve obligations influenced the ultimate decision of the Vice President of Human Resources to terminate his employment. This theory of liability, when one individual causes another in the organization to perform a negative act, is known as the "cat's paw" theory. It is based on Aesop's fable where a clever monkey induces a cat to extract roasting chestnuts from the fire, steals the chestnuts, and leaves the burnt-pawed cat with nothing.

The Staub decision expands the "cat's paw" theory of liability.

The jury found in favor of Staub, awarding him damages. There was no finding that the Vice President of Human Resources held any anti-military bias against Staub. However, the jury found that the employee's two immediate supervisors were hostile towards him because of his obligations to the Army Reserve. One supervisor scheduled Staub for additional shifts on short notice to "pay back the department for everyone else having to bend over backwards to cover his schedule for the Reserves." Another supervisor referred to Staub's Reserve duties as "a bunch of smoking and joking and a waste of taxpayer's money."

In January 2004, Staub received a disciplinary warning from one of these supervisors for allegedly violating a company rule that required him to stay in his work area whenever he was not with a patient. The Corrective Action warning required him to report to a supervisor when he had no patients. Separately, one of his co-workers complained to the Vice President of Human Resources about Staub's frequent unavailability. In April 2004, the other supervisor informed human resources that Staub violated the Corrective Action by leaving his desk without informing a supervisor. The Vice President of Human Resources reviewed Staub's personnel file and terminated Staub based on the supervisor's report for violating the Corrective Action direction. Staub then filed a grievance alleging that his supervisor fabricated the initial Corrective Action because he was hostile towards his Reserve obligations. The Vice President of Human Resources consulted with another personnel officer, and then confirmed her decision to terminate Staub. She did not investigate the accusations about Staub's supervisor who had allegedly fabricated the Corrective Action.

Following the jury verdict in favor of Staub, the employer appealed. The Seventh Circuit Court of Appeals reversed, holding that Proctor was entitled to

judgment as a matter of law. The Seventh Circuit Court reasoned that because the ultimate decision maker Vice President of Human Resources was not singularly influenced by the supervisors, and not entirely dependent on their advice for her decision, Staub's "cat's paw case" could not succeed. Staub appealed to the United States Supreme Court.

Reversing the Seventh Circuit, the United States Supreme Court held that an employer is liable for discrimination when "one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." The Court rejected the employer's defense that the employer is not liable unless the ultimate decision maker is motivated by discriminatory animus. It also rejected the defense that the discriminatory animus of supervisors who did not make the ultimate employment decision is cured when the ultimate decision maker conducts an independent investigation into the facts underlying the biased report. Instead, the Court stated that the proper test is whether the discriminatory act is a cause of the ultimate employment decision. Based on this test, the Court explained that an employer is at fault because one of its agents committed an action based on another agent's discriminatory animus that was intended to cause an adverse employment decision. Only if the employer's investigation results in an adverse action for reasons unrelated to the agent's original biased action will the employer avoid liability.

What this Means to Employers

The rule announced in Staub is important for employers because it increases exposure to liability for employment discrimination based on the discriminatory acts of supervisors who influence, but do not make, the ultimate employment decision. To avoid liability, employers must take care to investigate and document a report of employee misconduct before taking an action adverse to an employee.

It is especially important to follow-up when an employee alleges that they are receiving less favorable treatment because of their membership in a protected class. Employers should instruct those charged with decision making to investigate allegations of discriminatory motivations involved with a report of employee misconduct. In such a situation, employers should ensure that there is a well documented reason to support an adverse employment action that does not rely on the report from the allegedly biased supervisor.

*This client advisory was written by **Constance M. McGrane** and **Jan Kendrick**. If you wish to inquire further about our Employment Practices group please contact **Constance M. McGrane** or your attorney at **Conn Kavanaugh Rosenthal Peisch & Ford, LLP**.*

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