

U.S. SUPREME COURT EXAMINES THE “CAT’S PAW” THEORY OF EMPLOYMENT DISCRIMINATION

March 3, 2011

To Our Clients and Friends:

On March 1, 2011, the U.S. Supreme Court issued a decision in *Staub v. Proctor Hospital*, addressing for the first time the so-called “cat’s paw” theory of employment discrimination. The decision is an important development for employers because it endorses a broad theory of liability and also provides some guidance for how employers may avoid liability.

THE “CAT’S PAW” THEORY

Generally, the “cat’s paw” theory is that an employer should be responsible for the discriminatory animus of a supervisor who did not make the challenged employment decision but whose actions helped influence the decision. For example, if a supervisor writes a discriminatory negative performance evaluation and a company fires an employee based on the evaluation, the company should be liable even if the decision-maker was unbiased and unaware of the supervisor’s discriminatory animus. The theory’s colorful moniker is derived from an Aesop’s fable about a monkey who induces a cat to grab roasting chestnuts from a fire and then makes off with the chestnuts and leaves the cat with nothing but its burned paws.

The federal circuits have been split in how they applied the theory. The Seventh Circuit, in which *Staub* was litigated, applied a very narrow and restrictive version of the theory. In the Seventh Circuit, liability under the “cat’s paw” theory required that the supervisor exercised such “singular influence” over the decision-maker that the challenged action effectively was the product of “blind reliance” on the supervisor. In most other circuits, liability could be established if the supervisor influenced the decision but was not necessarily the “singular influence.”

STAUB V. PROCTOR HOSPITAL

The *Staub* case involved a hospital employee who claimed that he was fired because of his participation in the U.S. Army Reserve, in violation of the Uniformed Services Employment and Reemployment Rights Act (“USERRA”). Staub alleged that his supervisors were hostile to his obligations as a reservist. He alleged that they issued him a disciplinary warning purportedly based on violation of hospital policies but actually motivated by their discriminatory animus. Subsequently, Staub was fired by a Vice President of Human Resources for alleged failure to comply with the disciplinary warning. Staub’s theory was not that the Vice President who made the firing decision had any discriminatory motive, but

rather than the discriminatory animus of the supervisors who issued the underlying warning influenced the decision.

Staub prevailed at trial. The Seventh Circuit reversed. Relying on the “singular influence” standard for “cat’s paw” liability, the Seventh Circuit held that the employer could not be liable unless the Human Resources Vice President was “wholly dependent” on the allegedly biased supervisors as the “single source” of information supporting the firing decision.

The Supreme Court reversed the Seventh Circuit decision and rejected the restrictive “singular influence” standard. Justice Scalia wrote the majority opinion in which five other justices joined. Justice Alito wrote a concurring opinion in which Justice Thomas joined. Justice Kagan took no part.

The majority decision turned on the precise language of the statute and tort law principles. Justice Scalia emphasized that the statutory language provides that an employer shall be found to have engaged in discrimination if the employee’s military status “is a motivating factor in the employer’s action.” The Court noted that injuries in tort law often have multiple proximate causes. Accordingly, even if the nonbiased decision-maker’s independent judgment is one cause of the challenged action, the employer will nevertheless be liable when a biased supervisor’s discriminatory act is also a proximate cause. The Court held 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 under USERRA.

INDEPENDENT INVESTIGATION

The Court expressly declined to hold that an employer can avoid liability simply by conducting an independent investigation. However, the Court provided some guidance on how such an investigation may support a defense. Specifically, the Court held that if an independent investigation establishes that the challenged action is entirely justified apart from the supervisor’s discriminatory conduct, then the employer will not be liable. For example, if a firing decision is based on evaluations from five supervisors and the employee claims that one of the five was tainted by discriminatory animus, the employer may have a defense if it conducts an investigation and ratifies the firing decision as entirely justified for reasons unrelated to the tainted evaluation.

APPLICATION TO OTHER EMPLOYMENT STATUTES

Although *Staub* addressed only USERRA, the decision is very likely to be applied to Title VII, which prohibits discrimination on the basis of race, color, religion, sex and national origin. As the Court noted, both statutes provide that an employer will be liable where a prohibited consideration “was a motivating factor” in a challenged action.

Whether *Staub* will apply to other employment statutes – such as the Age Discrimination in Employment Act, the Americans with Disabilities Act or the whistleblower provisions of Sarbanes-Oxley and Dodd-Frank – is less clear. The Age Discrimination in Employment Act, for example, unlike Title VII or USERRA, requires that a prohibited consideration be the “but for” cause of a challenged action, not just a “motivating factor.”

IMPLICATIONS FOR EMPLOYERS

By rejecting the restrictive Seventh Circuit approach, the Supreme Court has now endorsed a broad theory of discrimination. An employer may be liable for discrimination, even where the decision-maker is free from bias and bases its decision largely on unassailable factors, if the decision is also based in part on an evaluation or other supervisory action that was tainted by discriminatory animus.

Employers, therefore, should conduct a thorough independent investigation whenever an employee alleges that an adverse action was influenced by a supervisor’s discriminatory conduct. The investigation should examine not only the merits of the alleged discrimination complaint but also the question of whether the challenged action was, apart from the supervisor’s conduct, entirely justified. *Staub* also once again reinforces the critical need for honest, direct and detailed performance evaluations so that the reasons for adverse employment actions are understandable and documented.

Employers should also monitor subsequent legal developments on the extent to which the “cat’s paw” theory endorsed in *Staub* will be applied to employment statutes beyond USERRA and Title VII.

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Please feel free to contact us with any questions.

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