A Timely Analysis of Legal Developments

ASAP®

In This Issue:

March 2011

In *Staub v. Proctor Hospital*, the U.S. Supreme Court for the first time recognized the cat's-paw theory of liability, holding that an employer may be liable for employment discrimination based on the unlawful intent of supervisors who directly or indirectly influenced but did not make the ultimate employment decision.

# Beware the Sharp Claws of the Cat's Paw: U.S. Supreme Court Endorses Employer Liability for Personnel Decisions Influenced by Biased Supervisors

**By Gaye Huxoll**

In 1679, French poet Jean de la Fontaine penned "The Monkey and the Cat," a fable about a monkey who persuaded an unsuspecting cat to extract some chestnuts from a fire, and who then absconded with the nuts, leaving the cat with nothing but a burned paw. More than 300 years later, Fontaine's fable became enshrined in employment discrimination law. Under the so-called cat's-paw theory of liability, an employee may establish unlawful employment discrimination when a biased non-decisionmaker (the monkey) influences an unbiased decisionmaker (the cat) to take action that he or she otherwise would not take. Although cat's-paw liability has been recognized by lower courts (using divergent standards of proof), the U.S. Supreme Court had not previously weighed in on the issue. On March 1, 2011, however, the Court announced its decision in *Staub v. Proctor Hospital*. In a unanimous (8-0) decision authored by Justice Scalia, the Court for the first time recognized the cat's-paw theory of liability and announced a broad framework to be applied in such cases.

## Factual Background and Proceedings Below

Vincent Staub began working for Proctor Hospital as an angiography technician in 1990. As a member of the U.S. Army Reserves, Staub was required to attend drill one weekend per month and to train for two weeks each year. Both Staub's immediate supervisor, Janet Mulally, as well as her supervisor, Michael Korenchuk, allegedly expressed hostility toward Staub's military obligations. Among other things, Mulally was alleged to have called Staub's military duties "bullshit." She also assigned Staub extra shifts, which she said were to compensate for "everyone else having to bend over backwards to cover [his] schedule for the Reserves." Korenchuk similarly was alleged to have characterized Staub's drill weekends as "Army Reserve bullshit" and a "waste of taxpayers' money." Korenchuk also allegedly told one of Staub's coworkers that Mulally was "out to get" Staub, and Mulally reportedly asked another coworker "to help her get rid of" Staub.

In January 2004, Mulally issued a Corrective Action disciplinary warning to Staub for purportedly violating a rule that required him to remain in his work area.[1] On April 2, 2004, a coworker complained to the hospital's Vice President of H.R. Linda Buck and

its Chief Operating Officer Garrett McGowan about Staub's brusqueness and frequent unavailability. McGowan directed Buck and Korenchuk to create a plan to resolve Staub's "availability" problems. But, approximately three weeks later, before they got around to doing so, Korenchuk advised Buck that Staub had violated the Corrective Action by leaving his desk without informing a supervisor.

After consulting with Korenchuk and reviewing Staub's personnel file, Buck decided to terminate Staub's employment. In addition to receiving input from Korenchuk, Buck also took into consideration complaints that she had heard about Staub from some of his previous coworkers. Before she reached her decision, however, Buck did not speak with the other angiography technicians who had worked with Staub, nor did she know that Mulally wanted Staub fired. Buck acknowledged that, if not for the January 2004 Corrective Action, the coworker's April 2004 complaint, and Staub's alleged violation of the Corrective Action, she would not have discharged him.

Staub challenged his termination through the hospital's internal grievance process, alleging that Mulally had fabricated the allegation underlying the Corrective Action out of hostility towards his military obligations. Buck discussed the matter with another personnel officer but did not follow up with Mulally or otherwise investigate Staub's allegations. Rather, she stuck with her initial assessment that Staub did not work well with others and deserved to be fired for insubordination. It was undisputed that Buck made the termination decision herself, and that Staub's membership in the Army Reserves did not factor directly into her analysis.

Staub subsequently sued the hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). Among other things, USERRA prohibits an employer from taking an adverse action against an employee because of his or her membership in, or obligation to perform service in, a uniformed service. The case proceeded to trial, where Staub presented evidence that both Mulally and Korenchuk had the specific intent to cause his termination, and that their actions were motivated by hostility toward his military obligations.

Although Staub conceded that Buck did not possess anti-military animus, he alleged that the termination decision was caused by Mulally's and Korenchuk's actions. Thus he argued that the hospital was liable under the cat's paw theory. In accordance with then-existing precedent, the judge instructed the jury to the effect that the hospital would be liable if Mulally and Korenchuk "exercised such singular influence over" Buck that they were "basically the real decision maker[s]." The judge also instructed that the hospital would have acted legitimately if Buck did not depend solely on a single source of information but rather did her own investigation. The jury found in favor of Staub, and awarded him damages of $57,640.

The hospital appealed the jury verdict to the U.S. Court of Appeals for the Seventh Circuit, which found that the lower court should not have admitted evidence of Mulally's or Korenchuk's animosity before determining whether there was enough evidence to support a finding that one or both of them had exercised "singular influence" over Buck's decision. Because the evidence showed that Buck's decision was not based solely on Mulally's and Korenchuk's actions, the appellate court concluded that they had not exercised "singular influence" over Buck. As such, the court concluded that there was insufficient evidence to support the jury verdict. The Seventh Circuit therefore reversed and remanded the case back to the trial court, with instructions to enter judgment in favor of the hospital. Staub appealed the Seventh Circuit's decision to the U.S. Supreme Court.

## The Supreme Court's Analysis

The Supreme Court vacated the Seventh Circuit's decision and remanded the case for further proceedings. The Court found that the "singular influence" standard used by courts in the Seventh Circuit in cases alleging cat's-paw liability was not supported by the statutory language of USERRA. The Act provides that, where an employee presents evidence that his or her membership in a uniformed service was a "motivating factor in the employer's action," the employer will be deemed to have violated the Act unless the employer proves that it would have taken the same action "in the absence of such membership."[2] This language, the Court concluded, did not require a showing that a biased non-decisionmaker exercised "singular influence" over the ultimate decision.

In reaching this conclusion, the Court was required to construe the meaning of the phrase "motivating factor in the employer's action." As the Court noted, actionable employment discrimination requires that the actor intended the consequences of his or her actions. Accordingly, if the actor intended for discriminatory reasons that the adverse action would occur – either by wanting to bring about the consequences or believing that the consequences were substantially certain to result from his actions – he possessed the intent required to impute liability to the employer.

As discussed above, Staub presented evidence that Mulally wanted to get him fired because of his military service, and that Korenchuk knew about Mulally's bias and took action that furthered that goal. The Court found that Mulally's and Korenchuk's actions could be attributed to the hospital because the hospital had given them supervisory authority, and they exercised that authority in the hospital's interest in the scope of their employment. The Court thus found that the hospital was at fault because its agents "committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."

The hospital argued, however, that it was not liable because Buck, the ultimate decisionmaker, independently investigated the matter before she decided to terminate Staub's employment. The Court rejected this argument, stating that "the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." In this case, the evidence showed that Buck had considered the disciplinary actions taken by Mulally and Korenchuk without determining whether those actions were justified. Accordingly, the Court deemed Buck's investigation insufficient to insulate the hospital from liability.

As the Court noted, the language of USERRA is very similar to that of Title VII, which prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Accordingly, the same analysis likely would apply to claimed violations of Title VII.[3]

## Implications for Employers

The *Staub* case involved allegations of egregious conduct that (one would hope) are seldom present in the workplace: supervisory employees who openly expressed hostility toward and a desire to cause the firing of a member of a protected class, and who took action that ultimately resulted in achieving that goal. The case underscores the need for employers to conduct the necessary training to ensure that all employees – and particularly those to whom it has delegated supervisory responsibility – are aware of and agree to abide by all anti-discrimination laws. Arguably the cat's-paw analysis will create the need to conduct anti-discrimination training at the same level of importance as most employers currently apply to anti-harassment training. Employers also should make sure that their employee handbooks and training materials explicitly state that uniformed service members may not be discriminated against on the basis of that status.

Notably, the Court did not decide whether an employer would be liable if the ultimate employment decision was influenced by a biased coworker with no supervisory authority. However, one can imagine circumstances under which that could occur. For instance, a biased nonsupervisory employee could raise false allegations of misconduct by a coworker with the intent of getting the coworker fired. If the employer were to accept the allegations at face value and take action without conducting an adequate investigation, it appears likely that it could be found liable under a cat's-paw theory. The Court in *Staub* reiterated that principles of agency law apply in cases alleging employment discrimination. As such, an employer may be liable for the discriminatory actions of its employees if it knows or should know of the discrimination but fails to take appropriate measures. Thus, an employer should fully and completely investigate the facts before taking action against an employee who has been accused of any type of misconduct.

Although the Court declined to adopt a "hard-and-fast rule" that the decisionmaker's independent investigation would necessarily cancel out the effect of the prior discrimination, it did state that an employer will not be liable if its investigation "results in an adverse action for reasons unrelated to the supervisor's original biased action." Unfortunately, however, this pronouncement raises more questions than it answers. How can an employer be certain that its personnel decisions are not tainted by a supervisor's hidden biases? After all, people's motivations generally are not as transparent as they were in this case.

The *Staub* decision does not make clear just how proactive an employer must be in attempting to ferret out the motivations of its supervisory personnel. What if the employer has no reason to believe that a supervisor has animosity toward members of the protected class? Presumably, the onus is on the employee to raise allegations of discrimination before the employer takes action against him. But is an employer required to raise the issue of potential discrimination if the employee does not, to satisfy itself that there are no hidden motivations at work? Must an employer accept the employee's allegations of discrimination at face value and therefore ignore input received from an allegedly biased supervisor? What if a supervisor is alleged to have discriminatory animus toward a protected class, but she insists that her intention was to correct the employee's behavior, rather than to facilitate his termination? Under the facts

presented, the *Staub* Court was not required to answer these questions. Thus, it remains to be seen how lower courts will interpret this decision under such factual scenarios. Until then, to avoid getting burned, employers should be guided by principles of reasonableness and objectivity, but additional investigation of an independent nature by HR or higher-level management may be appropriate in many situations (especially those involving discharge). Additionally, when in doubt, employers should seek guidance from employment counsel.

Gaye Huxoll is a Shareholder in Littler Mendelson's Miami office. If you would like further information, please contact your Littler attorney at 1.888. Littler, info@littler.com, or Ms. Huxoll at ghuxoll@littler.com.

---

[1] Staub contends that the rule he allegedly violated did not actually exist and that, even if it did, he did not violate it.

[2] 38 U.S.C. § 4311(c).

[3] Neither the Age Discrimination in Employment Act (ADEA) nor the Americans with Disabilities Act (ADA) provides for employer liability where an employee or prospective employee's age or disability is a "motivating factor" in an adverse employment action. Indeed, the Supreme Court has held that age must be the "but-for" reason for an employment decision in order for an employer to be liable under the ADEA. *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). At least one Circuit Court of Appeals has extended the holding of Gross to actions under the ADA. *Serwatka v. Rockwell Automation, Inc.*, 561 F.3d 957 (7th Cir. 2010). Accordingly, it appears unlikely that the *Staub* decision would apply to allegations of age or, somewhat less certainly, disability discrimination.