

HOW TO AVOID “CAT’S PAW” DISCRIMINATION CLAIMS — HOW SUBORDINATE BIAS CAN TAINT AN OTHERWISE NON-DISCRIMINATORY EMPLOYMENT DECISION

By Anne E. Kane

On March 1, 2011, the U.S. Supreme Court issued a pivotal decision analyzing the so-called “cat’s paw” theory of discrimination, under which employers may be liable for the discriminatory acts of a biased manager who influences, but does not make, an adverse employment decision. The term “cat’s paw” derives from a fable in which a monkey induces a cat to steal chestnuts from a fire and then absconds with the stolen nuts, leaving the cat with nothing but burnt paws. In the workplace context, the biased supervisor plays the monkey and the employer is the duped cat.

The standard adopted by the Supreme Court in *Staub v. Proctor Hospital*, adhered literally to the long-held doctrine that if improper bias is a “motivating factor” in an employment decision, the employer may be liable. However, in *Staub*, the Court announced that this remains the rule even if an unbiased company representative, acting unsuspectingly on tainted information, is the ultimate decision-maker. Thus, under a “cat’s paw” theory, if a plaintiff can show that a biased supervisor’s discriminatory intent bears some direct relation to an adverse employment decision, the employer will be responsible despite a seemingly neutral decision-making process.

Background

Vincent Staub worked for Proctor Hospital as a medical technician until his discharge in 2004. Throughout his employment, Staub was a member of the Army Reserve, which required him to attend training one weekend a month and three weeks every year. According to Staub, his immediate supervisors, Janice Mulally and Michael Korenchuk, were hostile to his military obligations and openly displayed an anti-military bias.

In January 2004, Mulally issued Staub a disciplinary warning and corrective action for purportedly violating a rule which required Staub to remain in his work area when not assisting a patient. Several months later, Korenchuk advised the hospital’s vice-president of human resources,

Linda Buck, that Staub had left his work area without informing his supervisor as required by the January 2004 corrective action. After reviewing Staub’s personnel file, Buck decided to terminate Staub for insubordination based on this conduct.

Staub challenged his termination through the hospital’s grievance process, asserting that his supervisors’ disciplinary actions against him were caused by hostility to his military status. After consulting with another human resources manager but conducting no other investigation, Buck declined to change the termination decision.

The Lower Court Proceedings

Staub sued the hospital under the Uniformed Service Employment and Reemployment Rights Act of 1994 (“USERA”), which prohibits discrimination against employees serving in the military based on their military status. Although Staub did not contend that Buck had any anti-military bias herself, he asserted that his supervisors’ anti-military bias had improperly influenced Buck’s decision to terminate him. A jury found in favor of Staub, finding that his military status was a motivating factor in his dismissal.

The U.S. Court of Appeals for the Seventh Circuit reversed, holding that the hospital was entitled to judgment as a matter of law because the facts did not support a finding that Buck was a decision-maker in name only and had “blindly relied” on the input of the two biased supervisors.

The Supreme Court’s Ruling

The Supreme Court unanimously reversed the Seventh Circuit’s decision, holding that the exercise of independent judgment by the final decision-maker does not prevent a lower level supervisor’s discriminatory animus from being the proximate or actual cause of the harm.

Writing for the majority, Justice Scalia explained that an

(continued on page 2)

(continued from page 1)

employer cannot sanitize an adverse employment decision that is based on information provided by a biased supervisor simply by submitting the supervisor's tainted input to an unbiased decision-maker. Justice Scalia explained that in a "cat's paw" liability case, "[t]he employer is at fault because 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."

Accordingly, the Supreme Court ruled that the hospital was not entitled to judgment as a matter of law because of evidence that Staub's supervisors were hostile to his military obligations and successfully acted on this bias in persuading the impartial decision-maker, Buck, that Staub had violated the terms of the corrective action. Under the Court's analysis, the only way that an employer can escape liability for discrimination when acting as a "cat's paw" is if the ultimate decision-maker's own investigation results in an adverse action for reasons unrelated to the supervisor's original biased recommendation.

Practical Implications for Employers

Although the *Staub* case arose under USERRA, employers should anticipate that courts will apply a similar analysis in cases arising under Title VII and other federal employment laws where courts have applied a "motivating factor" test. Accordingly, it likely will become more difficult for employers to obtain summary judgment in a discrimination case where an immediate supervisor's discriminatory motive arguably influenced an adverse employment decision made by unbiased superiors.

Even though the *Staub* decision provides little practical guidance for employers, there are certain measures an employer should take to avoid successful "cat's paw" discrimination claims:

- Review and update the company's discrimination and harassment policies to ensure they contain adequate mechanisms for reporting claims.
- Ensure that supervisors and management personnel at all levels have received up-to-date training and understand how acting on a discriminatory motive can influence an otherwise objective and neutral employment decision.
- Conduct careful and thorough review of all intermediate decisions and recommendations that culminate in an adverse employment action. An employer will no

longer be able to rely on an independent investigation as a defense to liability if the final employment decision is based on information or prior actions that are tainted.

- Look beyond the paper file in conducting an independent review of an adverse decision. Particularly in a discharge situation, the reviewer should conduct an independent assessment of the relevant facts, including interviews of key witnesses, the affected employee and personal review of any relevant documents.
- Confirm that there is a legitimate, non-discriminatory basis for the employment decision. Where a lower level supervisor may have acted at least in part for a discriminatory reason, this means that any adverse action taken against the employee must be based on reasons wholly unrelated to the tainted information provided. Further, if earlier adverse action taken by that biased lower level supervisor against the employee forms any part of the adverse action presently under consideration as in a progressive disciplinary procedure, that earlier action must be excluded in deciding what form of discipline, if any, should be imposed. ♦

This document is a basic summary of legal issues. It should not be relied upon as an authoritative statement of the law. You should obtain detailed legal advice before taking legal action.

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