

Client Alert.

March 1, 2011

U.S. Supreme Court Expands Cat's Paw Theory of Liability in Discrimination Cases

By Janie Schulman

INTRODUCTION:

In a decision authored by Justice Antonin Scalia, the U.S. Supreme Court issued a decision today in *Staub v. Proctor Hosp.* (Mar. 1, 2011, No. 09-400) 562 U.S. ____ [2011 U.S. LEXIS 1900], holding that an employer may be liable for employment discrimination even where the decision maker had no discriminatory intent and was merely functioning as the "cat's paw"¹ for a supervisor who did have such discriminatory intent. Justices Roberts, Kennedy, Ginsburg, Breyer and Sotomayor joined in the decision; Justice Alito wrote a concurring opinion in which Justice Thomas joined, agreeing with the result reached by the majority but for a different reason. Justice Kagan did not participate.

QUESTION PRESENTED:

In this closely watched employment discrimination case, the Court granted certiorari to address the question of whether an employer may be held liable in a "cat's paw" situation, where an employee with unlawful intent influences the decision maker but is not involved in making the ultimate employment decision. The Court also accepted *amicus curiae* briefs from the American Association for Justice, the Chamber of Commerce of the United States of America, and the Equal Employment Advisory Committee.

OVERVIEW:

Plaintiff was a member of the Army Reserves and, as a member, was required to attend occasional weekend and two-week training sessions throughout the year. At trial, plaintiff Staub presented evidence that his immediate supervisor, Janice Mulally resented the fact that he was associated with the military as a Reservist, made numerous anti-Reserves comments and purposely scheduled him to work on weekends when he had training. Plaintiff presented additional evidence that Mulally's supervisor, Michael Korenchuk, shared her anti-military animus. In the weeks leading up to his termination, plaintiff was disciplined for allegedly insubordinate behavior as a result of multiple allegations made largely by Mulally. After again engaging in similar insubordinate behavior, plaintiff was terminated by Defendant's Vice President of Human Resources. Plaintiff argued, under a "cat's paw theory," that his termination was discriminatory because Mulally's unlawful animus was attributed to the Vice President and singularly influenced her decision making.

¹ The Court explained that the term "cat's paw" derives from a fable conceived by Aesop, put into verse by Jean de La Fontaine in 1679, and injected into United States employment discrimination law by Posner in 1990. [citation omitted] In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. . . . (2011 U.S. LEXIS 1900, at *9, fn. 1).

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JURY VERDICT FOR PLAINTIFF:

A jury returned a verdict in plaintiff's favor on his claim of discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) which prohibits adverse employment actions on the basis of an employee's membership in a uniformed service. USERRA is violated where "the person's membership . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership. . . (38 U.S.C. § 4311(c)).

7TH CIRCUIT REVERSES:

Defendant appealed, and the Seventh Circuit reversed the lower court's decision, noting that while the Vice President was clearly influenced by Mulally, she did not blindly rely on Mulally's input and took into account other aspects of plaintiff's employment unrelated to the alleged acts reported by Mulally, such as reviewing his personnel file.

SUPREME COURT HOLDING:

Reversing the Seventh Circuit's decision, the Supreme Court held "that if a supervisor performs an act motivated by antimilitary 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, the employer is liable under USERRA.

The decision, based upon traditional concepts of tort law and proximate cause, is narrow. It is limited to situations where (a) a supervisor performs an act motivated by discriminatory intent; (b) the supervisor intends an adverse employment action to result; and (c) the supervisor's act is the proximate cause of the ultimate employment action carried out by the decision maker.

The Court left open the broader question of whether the employer would be liable if a co-worker, rather than a supervisor, committed the discriminatory act that influenced the ultimate decision maker.

The Court also left open the question of whether the employer would have had an affirmative defense if plaintiff Staub had not taken advantage of Proctor's grievance process.

The Court rejected the employer's contention that the employer should be exonerated unless the "cat's paw" is motivated by discriminatory animus. The Court said, "[t]he approach urged upon us by Proctor gives an unlikely meaning to a provision designed to prevent employer discrimination. An employer's authority to reward, punish, or dismiss is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors. Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended to produce the adverse action.*" (2011 U.S. LEXIS 1900, p. 16, emphasis in original).

LESSONS FOR EMPLOYERS:

Before you stick your hand in the fire, make sure the monkey—or the supervisor—who asks you to do so is not using you as a cat's paw. If you are not careful, you will get burned. (See 2011 U.S. LEXIS 1900, at *9, fn 1, above.)

Even though the opinion is narrow, the fact that Justice Scalia wrote this pro-employee opinion and every participating Justice agreed with the result suggest that the holding may end up being applied more broadly.

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Thus, employers must ensure policies and practices are in place to confirm fairness and validity of criticism or discipline taken or recommended by supervisors before relying on those actions or recommendations to effect an adverse employment action.

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