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Supreme Court Lets Cat's Paw 'Claw' Employers

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The U.S. Supreme Court has now decided *Staub v. Proctor Hospital*, resolving a split in the appeals courts concerning the so-called Cat's Paw Doctrine and whether an employer can be held liable based on the discriminatory intent of lower level officials who caused or influenced – but did not make – an ultimate employment decision. The Cat's Paw Doctrine was named for a 17th century French fable by Jean de La Fontaine about a monkey who convinces a cat to steal chestnuts from a fire. The cat suffers burnt paws while the monkey then takes the benefits of her efforts and eats the chestnuts. Under *Staub*, it's employers who may get burned.

The *Staub* case involved a claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), which bars employers from discriminating against any person because of his or her membership in, or obligations to perform, uniformed services. Under USERRA, liability may be established "if the person's membership is a motivating factor in the employer's action." Staub was a military reservist who asserted that his immediate supervisor was hostile to his military obligations. The supervisor ultimately reported to the HR vice president that Staub had violated a warning, at which point the vice president decided to fire Staub.

Staub alleged that his first-level supervisor had fabricated the incident underlying the warning due to his hostility toward Staub's military obligation. Staub did not indicate that the decision maker had knowledge of the hostility of the immediate supervisor. The 7th Circuit held that Proctor Hospital could only be held liable if the discriminatorily motivated subordinate had "singular influence" over the decision maker.

In an opinion by Justice Scalia, the 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, then the employer is liable." The Court indicated that the requisite intent "denotes that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it."

The decision is particularly important because, although it arose in a USERRA case, Justice Scalia noted USERRA's similarity to Title VII (and presumably other employment discrimination laws, as well as anti-retaliation and whistleblower laws). The Court's decision is based on general tort and agency law. Justice Scalia reasoned that, under tort law, "the exercise of judgment by the decision maker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm."

The difficulty for employers from *Staub* is that it does not provide any guidance as to when an employer who investigates the basis for an adverse employment action could be shielded from liability. The opinion does state that "if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be

liable. But the supervisor's biased report may remain the 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."

The decision will likely make it harder for employers to win summary judgment in cases based on claims that more than one person participated in a decision, and that at least one of them had discriminatory motives that infected the decision making.

Staub makes it much more difficult for employers to create a decision making system that can insulate them from potential liability for discrimination claims. Nonetheless, there are steps which employers should consider to maximize their ability to defeat claims of discriminatory adverse employment actions. The overall goal should be to implement policies to prevent a subordinate's possible bias from influencing employment decisions. Among these steps are the following potential best practices for employers.

What Employers Should Consider after *Staub*:

1. Be sure to specify the reasons for taking adverse employment action and carefully investigate the facts before acting. Specifically identify any parts of the record which are not being considered. Be sure to limit the rationale for the adverse employment action to reasons that are defensible.

2. Ensure, to the extent feasible, that the supervisors who are reporting the "facts" are not harboring any illegal prejudice. Ask them if the employee has ever made allegations of discriminatory treatment and check with HR as to any complaints the employee may have made.

3. Particularly for termination decisions, establish a mandatory and meaningful review process, so that a termination decision cannot occur essentially based solely on a first-level supervisor's recommendation or with a mere rubber stamping of such a recommendation. Consider establishing a small termination review committee that might consist of, *e.g.*, HR, a senior manager, counsel and any other appropriate officials in a particular situation to verify the truth of the reasons asserted for the termination.

4. Train supervisors as to: their nondiscrimination obligations; how to conduct appropriate performance appraisals; how to engage in nondiscriminatory decision making; and how to preserve evidence supporting warnings or discipline.

5. Provide a meaningful internal complaint procedure to ensure that a process exists for employees to report alleged supervisory bias or discriminatory warnings with as much confidentiality as is practical under the circumstances. The procedures that all prudent employers have established to receive complaints of sexual or other harassment should serve as a good model or could potentially be expanded to include complaints of supervisory bias. As with sex harassment lawsuits, the failure of an employee to use such an internal mechanism, so long as it is a *bona fide* process, can have great benefits for the employer in any litigation.

6. Consider a "last chance" agreement in an appropriate instance as a step before termination, including a statement that the employee acknowledges the accuracy of the prior warnings and does not contest them.

7. When writing warnings or performance improvement plans, if there is no immediate adverse employment action, be clear that the warning is an opportunity for the employee to fulfill the requirements of the job. The warning or improvement plan may expressly state that "if the employee improves his/her performance and does not repeat the violation, the employee's wages, working conditions and advancement will not be adversely affected."

For questions about best practices after the *Staub* decision or other employment or labor issues, please contact:

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