



The GSH 60-Second Memo

March 9, 2011

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The Supreme Court Takes a *Staub* at Cat's Paw Liability

By Jerilyn Jacobs, Esq.

The last time I wrote about the "cat's paw" theory of liability, the response was great - at least in one respect. At a meeting I attended not long after my article had published, I had multiple co-workers approach me, raise their hands, make a claw, and exclaim "cat's paw!" It's a fun thing to do. If you haven't tried it already, I encourage you to do so. And, if you're rolling your eyes at the idea, perhaps that's a sign that you're a dog person. "Cat's paw" is a fun term. But dealing with claims that could fall under a cat's paw theory of liability? Not so fun.

A cat's paw theory of liability exists when an employee claims that his or her supervisor's discriminatory bias influenced the ultimate decisionmaker of an employment decision. The ultimate decisionmaker is not alleged to have a discriminatory bias, but rather is alleged to have relied on statements or employment actions of a supervisor who was influenced by a discriminatory bias. The federal courts of appeal split over when an employer is and is not liable under such a scenario, but recently the Supreme Court weighed in for the first time.

The case, *Staub v. Proctor Hospital*, involved Vincent Staub, an angiography technician with Proctor Hospital and army reservist. Staub claimed that both his direct and indirect supervisor were "hostile" to his reservist obligations because his obligations made him unavailable to work one weekend a month and two to three weeks per year. In January 2004, Staub's direct supervisor gave Staub a disciplinary corrective action for violating a company rule by not staying within his work area when not with a patient.

According to the corrective action, Staub was to notify either the direct supervisor or indirect supervisor when he had no patients. Staub later contended that such a company rule did not exist.

A few months later, one of Staub's co-workers complained to the Vice President of Human Resources, Linda Buck, about Staub's availability. Soon thereafter, Staub's indirect supervisor told Buck that Staub had violated the terms of his corrective action by leaving his desk without informing either supervisor. Staub denied the allegation, saying he had left a voice-mail message. Buck investigated the matter by interviewing the complaining co-worker and reviewing Staub's personnel file. But Buck also relied on the corrective action and statement of Staub's direct and indirect supervisor without independently investigating whether those disciplinary actions were truly warranted or rather the result of discriminatory bias. Eventually, Buck decided to terminate Staub. When Staub appealed that decision, claiming bias by his supervisors against his military obligations, Buck failed to investigate the allegations and adhered to her initial decision.

Staub sued Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act (USERRA). Staub claimed that while Buck did not harbor any hostility against him for his military obligations, his supervisors did, and that Buck's decision was influenced by their discriminatory bias.

A jury found in Staub's favor, but the Seventh Circuit (covering Wisconsin, Illinois, and Indiana) reversed, finding for Proctor Hospital as a matter of law based on circuit precedent that a "cat's paw" case could not succeed unless the biased supervisor(s) exercised such "singular influence" over the decisionmaker that the ultimate employment decision amounted to "blind reliance." While the Seventh Circuit was critical of Buck's investigation, saying that it could have been "more robust," it nevertheless held that, because Buck examined Staub's personnel file and interviewed the complaining co-worker, her decision to fire Staub was not "wholly dependent" on the bias of the supervisors. Therefore, Proctor Hospital was not liable.

The United States Supreme Court unanimously disagreed with the Seventh Circuit. The Court held that an employer is liable under USERRA when a biased supervisor's action is the "proximate cause" of the ultimate adverse employment action. The supervisor's actions are a "proximate cause" when the supervisor intends, through his or her actions, to cause the ultimate employment decision. If that is the case, an employer will be liable for the ultimate employment decision even if the ultimate decisionmaker relies on factors other than the actions of the biased supervisor. As the Supreme Court explained:

[I]f 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 a causal factor if the independent investigation takes it

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into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.

Thus, although Buck performed some independent investigation, she also took into account the corrective action and statements of the biased supervisors. Therefore, there was enough for a jury to find Proctor Hospital liable.

The *Staub* decision is notable both for the question it answers and the questions it leaves for another day. The Court expressly chose not to decide whether an employer can be liable when the ultimate decisionmaker is influenced by the discriminatory actions of a co-worker rather than a supervisor. The Court also did not decide whether an employer has an affirmative defense when an employee fails to avail himself or herself of the internal grievance mechanisms an employer has in place (like in cases involving alleged sexual harassment by a supervisor). Most notably, the Court did not state what level or quality of investigation needs to be conducted by decisionmakers to ensure a decision is "unrelated to the supervisor's original biased action." That will be left to lower courts to decide in the future.

Lest any employer think that *Staub* is limited to USERRA cases, the Court expressly noted the "very similar" language of USERRA and Title VII and noted that both statutes impose liability on an employer when a discriminatory animus is a "motivating factor" for an adverse employment action. Thus, one should expect that lower courts will soon find the logic of the *Staub* decision applicable to Title VII cases.

In the end, what can be drawn from the *Staub* decision? One clear takeaway is that a decisionmaker has to do more than review the personnel file. When acting in reliance on disciplinary notices and warnings issued by others, decisionmakers may want to review them carefully and confirm that they were warranted and consistent with company policy, especially if there is any allegation of discriminatory bias. Decisionmakers may also want to interview the employee who is the subject of the investigation in order to give that employee an opportunity to provide the reasons, if any, why he or she disagrees with the prior disciplinary warnings. If (make that when) *Staub* is extended to Title VII cases, early resolution of cases via motions for summary judgment may become more difficult as credibility determinations of supervisors and decisionmakers might need to be made. Finally, while there is no definitive set of steps that one can follow to guarantee, 100%, that liability under a cat's paw theory will not attach, the more thorough and "robust" the investigation is, the less likely an employer will get burned.

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