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Staub v. Proctor Hospital—Supreme Court Creates Uncertainty for Employers When Taking Adverse Actions Against Members of a Protected Class

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In Staub v. Proctor Hospital, the Supreme Court confirmed that the "cat's paw" theory of employer liability is valid with respect to many workplace discrimination claims. Staub involved the firing of a hospital employee, allegedly in violation of the Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA). In deciding this case, the Supreme Court reversed the Seventh Circuit's decision that found an employer is only liable for the bias of a supervisor if the decisionmaker's action is "singularly influenced" by the biased supervisor, and held:

"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 under USERRA."

Because the "motivating factor" language of USERRA closely resembles that of many other federal workplace bias laws, this decision will affect many different types of employment discrimination claims, although there is some question whether it will extend to ADEA claims, in light of the Gross v. FBL Financial Services, Inc. holding that such claims are subject to a "but for" causation standard.

Staub's 'Cat's Paw' Case

In April of 2004, Proctor Hospital's vice president of human resources Linda Buck fired an angiography technician named Vincent E. Staub. On the day of Staub's termination, Buck was informed by Michael Korenchuk that Staub violated a disciplinary warning he had received in January of 2004 that directed him to stay in his work area whenever he was not working with a patient. While Korenchuk alleged that Staub had left his desk without informing a supervisor, Staub contended he had left Korenchuk a voicemail indicating he was leaving his desk to go to the cafeteria. Nonetheless, Buck investigated the complaint by reviewing Staub's personnel file and thereafter issued Staub a termination notice explaining that his discharge was a result of violating his January 2004 disciplinary warning.

Staub filed a grievance, claiming that the disciplinary warning that he supposedly violated was wrongly issued by his supervisor, Janice Mulally, who allegedly was hostile towards his military

obligations as a United States military reserve. Rather than discuss this allegation with Mulally, Buck spoke with another personnel officer, after which she decided Staub's termination should stay in effect.

Staub alleged that Mulally's hostility began in 2000, when Mulally was placed in charge of scheduling shifts for Staub's department. Staub gave Mulally advance notice of his military and drill obligations that occurred one weekend per month and two weeks during the summer, although Mulally continued to schedule him to create scheduling conflicts for Staub, often requiring him to use vacation days to get out of his work obligations or take on extra shifts to make up his absence. Staub also submitted evidence that Mulally and Korenchuk made derogatory comments towards the military and Staub's associated duties, that Mulally expressed her intent to "get rid of [Staub]," and that special rules were created just for him.

Staub brought a discrimination claim pursuant to USERRA, claiming he was fired because of his military obligations. USERRA provides in relevant part:

> "A person who is a member of…or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership,…or obligation…An employer shall be considered to have engaged in actions prohibited…under subsection (a), if 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(a), (c).

This claim was brought under a "cat's paw" theory, alleging Proctor Hospital was liable for the animus of Staub's supervisor, Mulally, who did not make the actual decision to fire him, but did induce Buck, the decisionmaker, to fire him based on the animosity she had towards Staub from his membership in the Army Reserves.

The term "cat's paw" refers to Jean de la Fontaine's "The Monkey and the Cat," a fable that describes a devious monkey who persuades an unsuspecting cat to take chestnuts from a fire. In doing as asked, the cat burns its paws, while the monkey eats the chestnuts from the cat unscathed. Although it was the cat that was burned, the monkey induced the cat to take such action, making the cat an agent of the monkey's devious purpose. The "cat's paw" theory applied in the context of employment discrimination imputes liability to an employer for an adverse employment action taken by a nondiscriminating decisionmaker (the cat) that was induced into taking such action by the discrimination of another employee (the monkey).

A jury found in favor of Staub and awarded him $57,740 in damages, determining that Proctor Hospital was liable for Staub's termination based on his supervisor's hostility toward his military duties. On appeal, the Seventh Circuit emphasized that the "cat's paw" theory applies only to impute a nondecisionmaker's animosity to a decisionmaker where the nondecisionmaker had "singular influence" over the decisionmaker. The Seventh Circuit court reasoned that no reasonable jury could determine that Mulally exercised "singular influence" over Buck's decision to terminate because Buck used other sources of information and conducted an investigation before making her investigation; thus, Mulally's animus could not be imputed to Buck. Based on this analysis, the Seventh Circuit court reversed the trial court's decision and remanded to enter judgment in favor of

Proctor Hospital.

Supreme Court Decision

In granting certiorari, the Supreme Court addressed the question:

> "In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?"

Unlike the Seventh Circuit's focus on "singular influence," the Supreme Court focused on construing the statutory phrase "motivating factor in the employer's action" found in the language of USERRA, specifically in the case where an "official has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else."

The Supreme Court decided this case based on principles of tort and agency law. Principles of tort law instruct that, for intentional torts, it is the intended consequences of an act, not simply the act, that determines the state of mind required for liability. Further, principles of agency law provide that both the "cat" and the "monkey," if both acting within the scope of their employment, are agents of the employer and, thus, their wrongful conduct may be imputed to the employer. Importantly, tort and agency principles do not provide a safe harbor for employers that perform independent investigations, particularly where the independent investigation does not justify the adverse action without taking into account the supervisor's discrimination motivated action.

On March 1, 2011, Justice Scalia delivered the majority opinion of the Court. Basing its opinion on these tort and agency principles, the Court held:

> "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 under USERRA."

The Court concluded further that the evidence suggested that a reasonable jury could have inferred that "Mulally's and Korenchuk's actions were motivated by hostility toward Staub's military obligations," and that "Mulally's and Korenchuk's actions were causal factors underlying Buck's decision to fire Staub." Thus, the Court reversed the Seventh Circuit opinion, and remanded for further proceedings to determine whether a new trial is warranted. The Court noted that to rule otherwise would have the unintended consequence of allowing employers to discriminate by simply "isolat[ing] a personnel official from an employee's supervisors, vest[ing] the decision to take adverse actions in that official, and ask[ing] that official to review the employee's personnel file before taking the adverse action."

Justices Alito and Thomas concurred with the majority opinion, but argued that an employer should not be held liable where an adverse employment decision was made after a decisionmaker conducted his or her own investigation. In this case, there was no such investigation, since Buck accepted Korenchuk's accusation of Staub "at face value," even though there was in fact evidence

that discrimination of military duties was a motivating factor. Thus, Proctor Hospital could not have been shielded from liability on this basis.

This decision is broadly perceived as a victory for employees, **as it will create a greater degree of uncertainty for employers** in taking adverse actions against members of a protected class. Based on this decision, only nondecisionmaker motivating factors that are too remote, contingent, or indirect will relieve employers of liability, although the Court has not provided clear guidance on how to make such a determination. Moreover, although the Court's decision suggests that an employer's independent investigation which results in termination "for reasons unrelated to the supervisor's original biased report" may protect an employer from liability, the Court does not clarify to what extent, or under what conditions, an independent investigation will ultimately protect an employer. Nonetheless, while Staub makes clear that an independent investigation will not preclude liability in all instances, it does reinforce the fact that a thorough independent investigation remains a prudent employer practice.

In its decision, the Supreme Court explicitly compared USERRA to Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, where one of those factors "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. §200e-2(a), (m). Thus, the ruling in Staub will be applied more broadly and include discrimination claims brought under Title VII and similar statutes, such as the ADA, which employ a "motivating factor" standard.

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