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EMPLOYER GETS BURNED IN “CAT’S PAW” CASE, U.S. SUPREME COURT RULES

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Earlier this week, the Supreme Court issued its decision in *Staub v. Proctor Hospital*, No. 09-400, 562 U.S. ____ (March 1, 2011), which endorses the cat’s paw theory of liability. The cat’s paw theory of liability refers to a situation where an employer is held liable for unlawful discrimination by an employee other than the primary decision maker. Resolving a split in the circuit courts of appeal, the Supreme Court held that an employer exercising “independent judgment” and with no discriminatory intent was liable for wrongfully terminating a protected employee when it acted on information provided by a supervisor who held unlawful motives.

The cat’s paw theory gets its name from a fable written by Jean de la Fontaine, in which a monkey convinces a cat to scoop up chestnuts from a fire, and the cat burns her paw in the process, while the monkey enjoys the fruit of her labor. In the context

of employment law, the theory is used to describe the situation that occurs when an employer’s primary decision maker is influenced by an employee’s bias when taking an adverse employment action against another employee, thereby exposing the employer to liability for a discrimination claim. In such a case, the primary decision maker is described as the “cat’s paw” of the biased employee.

In the case at hand, plaintiff Staub, an Army Reserve member, was terminated by the Director of Human Resources of the hospital where he was employed. Staub filed suit under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), 38 U.S.C. § 4301 *et seq.*, alleging that two of his supervisors, who openly discriminated against him on the basis of his military status, influenced the Director’s decision to terminate him. In other words, he alleged that the Director was the “cat’s paw” of the two supervisors. The hospital argued that the Director made an unbiased decision because she conducted her

own independent investigation of Staub’s performance record before terminating him and was unaware of the discriminatory animus harbored by his two managers.

After a jury trial, Staub was awarded \$57,640, but the Seventh Circuit (which followed the strictest standard regarding cat’s paw liability) reversed because the Director of Human Resources had performed her own investigation before deciding to terminate Staub.

The Supreme Court expressed skepticism over whether an employer could overcome liability by conducting an investigation, finding that if the decision maker’s investigation relies on the facts provided by the biased supervisor, it “effectively delegate[s] the fact finding portion of the investigation to the biased supervisor.” In other words, when a supervisor’s discriminatory motive and desire

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for termination are directly responsible for an adverse employment action taken by another, the employer violates federal antidiscrimination laws. Even where a supervisor does not make the final decision, he “is an agent of the employer [and] when he causes [the termination] the employer causes it.” Accordingly, the supervisor’s discriminatory motive is imputed to the employer. This rule, according to the court, prevents an employer from shielding itself from liability by vesting employment decisions in an isolated decision maker who would exercise independent judgment. However, if the decision maker’s investigation results in adverse action based on facts unrelated to the discriminatory animus of others, the employer may avoid liability.

Because the provisions of USERRA at issue in the *Staub* case are nearly identical to the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 (“Title VII”), this

decision likely will apply to claims brought under Title VII and other federal antidiscrimination laws.

What does this decision mean for employers? Employers should train employees who serve as decision makers on employment issues not to rely blindly on information reported by others. Such decision makers must conduct thorough independent investigations to ensure that any unlawful bias permeating others’ reports is dispelled before taking adverse employment actions against an employee. Such an investigation may include a review of relevant documents, including the affected employee’s personnel file, and personal interviews with, as necessary, the affected employee, his or her supervisor, and any key witnesses. Each step of the investigation should be documented, as should the legitimate, nondiscriminatory reason for any adverse employment action. Of course, the extent of

the investigation depends on the facts and circumstances surrounding the termination or other adverse employment decision. Employers should consult with counsel to determine the appropriate boundaries of such an investigation *before* making an adverse employment decision.

If you have any questions about how to best deal with and avoid “cat’s paw” liability, please call Amy Komoroski Wiwi or Eric Jesse, members of the Firm’s Employment & Labor Practice Group, at 973 597 2500. We also would be pleased to provide you with assistance with other employment practices and workplace compliance issues.

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