LABOR & EMPLOYMENT

U.S. SUPREME COURT RECOGNIZES "CAT'S PAW" THEORY OF LIABILITY IN EMPLOYMENT DISCRIMINATION UNDER USERRA

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On March 1, 2011, the U.S. Supreme Court held unanimously that an employer may be held liable for discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4301 et seq., when the decision to terminate an employee is influenced by a supervisor's anti-military animus, even if the supervisor was not the ultimate decision maker. Staub v. Proctor Hospital, 2011 U.S. LEXIS 1900 (U.S. Mar. 1, 2011). In so holding, the Supreme Court recognized the "cat's paw" theory of liability.

The term "cat's paw" derives from the 17th century fable "The Monkey and the Cat" by French poet Jean de La Fontaine. In the story, a monkey convinces a cat to snatch chestnuts from a fire. The cat burns her paw while scooping up the chestnuts. The monkey eagerly gobbles up the chestnuts and leaves the cat with nothing. In the employment law context, the term refers to an ultimate decision maker who acts as the conduit of a supervisor's prejudice, or "cat's paw." See Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

1. Facts and Procedural History

Plaintiff Vincent Staub worked as an angiography technician for Defendant Proctor Hospital in Peoria, Illinois. He was also a member of the U.S. Army Reserves. As part of his military duties, he attended drills one weekend a month and participated in two to three weeks of annual full time training. The Plaintiff spent 92 days on full time active duty beginning in February 2003.

Unfortunately, the Plaintiff's immediate supervisor, Mulally, made no bones about her hostility towards the Plaintiff's military service. Even with advanced notice of the Plaintiff's military obligations, Mulally scheduled him at times conflicting with his drill schedule. She scheduled the Plaintiff to work extra shifts without notice as payback for other employees covering for him when he missed work because of his military service. She made comments to the Plaintiff's co-workers about the problems his military service created. She even went so far as to call the Plaintiff's Reserve Unit Administrator to see if the Plaintiff could be excused from his mandatory two-week summer training because he was needed at work. Mulally's supervisor, Korenchuk, also was hostile to the Plaintiff's military service. He referred to the Plaintiff's military service as "a bunch of smoking and joking" and a waste of taxpayer money.

Before the Plaintiff alleged that problems with his military service arose at work, his personnel file was already "thick" with previous disciplinary actions. The Defendant had fired the Plaintiff in 1998 after he refused to work past his scheduled shift. The Plaintiff was reinstated after filing a grievance, with certain conditions put in place. One such condition required him to communicate with his supervisor whenever he left his work area. The Defendant warned the Plaintiff that future insubordination and unprofessionalism would be grounds for dismissal. In January 2004, Mulally issued a "Corrective Action" disciplinary warning when the Plaintiff allegedly left his work area without notice to his supervisor. Three months later, Korenchuk notified Buck, the Defendant's Vice President of Human Resources, that the Plaintiff had left his desk in violation of the Corrective Action, which the Plaintiff vehemently denied. Buck relied on Korenchuk's accusation and, after reviewing the Plaintiff's personnel file, terminated the Plaintiff's employment. The written termination notice stated that the Plaintiff had ignored the January 2004 Corrective Action.

The Plaintiff appealed his termination through the Defendant's grievance process. He claimed that Mulally had fabricated the allegation that led to the January 2004 Corrective Action out of hostility towards his military service. Surprisingly, Buck did not discuss this allegation with Mulally and, after speaking with one other human resources official, upheld the termination decision.

The Plaintiff sued the Defendant for terminating him in violation of his rights under USERRA, which states in pertinent part that "[a] person who . . . has performed . . . service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any other benefit of employment by an employer on the basis of that . . . performance of service . . . ." 38 U.S.C. § 4311(a). The Plaintiff did not claim that Buck was personally hostile towards his military service, but that Mulally and Korenchuk were, and that they influenced the decision to terminate his employment. The jury found that the Plaintiff's military status was a motivating factor in the Defendant's decision to discharge him. Pursuant to the parties' stipulation, the Plaintiff received $57,640 in damages.

On appeal, the Seventh Circuit not only reversed the jury verdict, but also entered a judgment as a matter of law for the Defendant. In order for the "cat's paw" theory to apply, the Court explained that under Seventh Circuit precedent, the discriminatory animus of an employee without formal authority to materially alter the terms and conditions of the plaintiff's employment is imputed to the decision maker only when the former has "singular influence" over the latter and uses that influence to cause the adverse employment decision. The Court found that the district court should have made a determination whether a reasonable jury could find "singular influence" before admitting evidence of animus by nondecisionmakers or instructing the jury on the "cat's paw" theory, Because the evidence established that Buck conducted her own investigation of the facts that led to the Plaintiff's termination beyond what Mulally and Korenchuk had told her, and terminated the Plaintiff because he was a liability to the hospital, a reasonable jury could not find that Mulally or anyone else had singular influence over Buck. The Court found that a reasonable jury could not have concluded that the Plaintiff was fired because he was a

member of the military, and entered a judgment for the Defendant.

2. The Supreme Court's Opinion

The Supreme Court reversed the Seventh Circuit's decision to enter a judgment as a matter of law for the Defendant. The Court found that the "central difficulty" in the case was construing the phrase "motivating factor in the employer's action" in 38 U.S.C. § 4311(c), which is very similar to the language of Title VII. If the decision maker takes an adverse employment action based on the employee's military service, a motivating factor obviously exists. The problem arises when the decision maker has no discriminatory animus but is influenced by a prior decision of someone with the requisite animus.

In addressing this issue, the Supreme Court relied on principles of tort law. Intentional torts generally require that the actor intended the consequences of an act, not just the act itself. The Court found that if a supervisor intends, for discriminatory reasons, for an adverse action to occur, and that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA. The ultimate decision maker's exercise of independent judgment in the employment decision does not automatically immunize the employer from liability from the supervisor's discriminatory act. If the ultimate decision maker conducts an independent investigation and decides to terminate the employee for reasons unrelated to the supervisors' original biased action, then the employer will not be liable. The Court held that "the supervisor's biased report may remain a 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."

Applying its analysis to the facts of the case, the Court found that Mulally and Korenchuk were acting within the scope of their employment when they took the actions that resulted in Buck terminating the Plaintiff's employment. There was evidence that their decision was motivated by hostility towards the Plaintiff's military obligations. There was evidence of a causal connection between their actions and the Plaintiff's termination because Buck's termination notice stated that he was fired for violating the Corrective Action. A reasonable jury could infer that Korenchuk intended for the Plaintiff to be fired for the Plaintiff's noncompliance with Mulally's corrective action. The Court held that the Seventh Circuit erred in entering a judgment as a matter of law for the Defendant.

3. Application

The Staub opinion highlights the importance of employers taking the following three steps:

1. Maintain an informal internal complaint procedure. Employers should have an effective procedure for employees to report claims of alleged discrimination. If an employee raises an allegation of discriminatory treatment, the employer has the opportunity to investigate and take corrective action, which Buck did not do in this case. The Supreme Court did not address what would happen if the employer has such a grievance procedure and the employee fails to report the alleged discrimination. Future litigation may determine that the employer has an affirmative defense in this situation that forecloses the employee's ability to rely on the cat's paw theory.

2. In situations in which an employee alleges discriminatory treatment, the employer must conduct an independent investigation of the adverse employment action. The issue of what it will take for an employer to immunize itself from liability where there is an allegation of discriminatory treatment will be the most difficult challenge for employers. Employers frequently rely on performance evaluations and disciplinary actions taken by others in making termination decisions. If a supervisor acts with hostility towards an employee's military obligations or other protected conduct or classification, it will not always be so blatantly obvious as it was in this case. The ultimate decision maker certainly needs to make an independent investigation when an employee alleges discriminatory treatment, but the Supreme Court's opinion provides little guidance as to under what circumstances that independent investigation will prevent liability in a cat's paw case. An employer can still absolve itself of liability if the termination decision rests on reasons unrelated to the prior discrimination. The employer should be prepared to show that it followed its own written policies on investigation and employee discipline.

3. Provide training to all employees on anti-discrimination policies, not just supervisors. The Supreme Court's opinion does not address an employer's potential liability for discriminatory acts by co-workers, although the opinion does mention that one of the Plaintiff's co-workers complained about the Plaintiff's "frequent unavailability" shortly before he was terminated. Until future cases clarify the employer's potential liability for discriminatory actions taken by co-workers, employers would be well served to make sure that all employees receive training on the employer's anti-discrimination policies.

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