

Employment Edge 121st Edition—The Supreme Court Upholds the “Cat’s Paw” Theory of Employment Discrimination

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In a highly anticipated decision, the United States Supreme Court has ruled that employers may be liable for intentional employment discrimination under what is known as the "cat's paw" theory—even if the ultimate decision-maker didn't personally intend to discriminate. In *Staub v. Proctor Hospital*, No. 09-400 (March 1, 2011), the Supreme Court ruled that an employer is liable when an unbiased decision-maker's decision is influenced by the underlying discriminatory bias of a supervisory level employee who intended to cause the adverse decision. While it has always been wise for employers to conduct independent investigations to ensure that employment decisions are justified and nondiscriminatory, the *Staub* ruling makes such investigations even more critical to ensure that no discriminatory bias has influenced or caused the chain of events leading up to an adverse action.

The Staub Decision

In *Staub*, U.S. Army reservist Vincent Staub sued his former employer, Proctor Hospital, for discrimination under the federal Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA prohibits discrimination based on military service, and is, in many respects, analogous to Title VII, which prohibits discrimination based on race, color, sex, religion, and national origin. Staub, an angiography technician, was fired by Proctor's vice president of human resources after two lower level supervisors reported that he had violated a written corrective action on which he'd been placed by those supervisors. While it was undisputed that the vice president had no discriminatory motive in firing Staub, Staub produced evidence that the lower level supervisors were hostile towards his military obligations, placed him on the corrective action for falsified reasons, and later falsely reported that he had violated the corrective action. Proctor claimed that it should not be liable, because the vice president had independently reviewed Staub's personnel file and fired him for additional reasons beyond his alleged violation of the corrective action. A written termination notice provided to Staub stated, however, that he'd been fired for violating the corrective action warning.

Despite the lack of any discriminatory bias by Proctor's ultimate decision-maker, the Supreme Court held Proctor liable under the "cat's paw" theory of discrimination. The phrase "cat's paw" stems from an Aesop

fable in which a monkey uses flattery to induce a cat to retrieve roasting chestnuts from a hot fire and then takes the chestnuts. Based on the fable, "cat's paw" refers to a person who is unwittingly used by another to accomplish his purposes. Under the "cat's paw" theory, the Supreme Court ruled that Proctor had violated USERRA, because the vice president's termination decision was motivated, in part, by the underlying discrimination of the lower level supervisors. Specifically, the Court ruled that, if an underlying supervisor performs an act motivated by discriminatory bias that is intended to and does, in fact, proximately cause the adverse employment action, the employer is liable even if the ultimate decision-maker wasn't personally biased. The Court declined to address whether the same outcome would apply if the underlying discriminatory bias was on the part of a non-supervisory employee.

Without providing much guidance, the Supreme Court did note that an employer's independent investigation prior to taking an adverse action may, in some instances, provide a defense to liability. If the investigation results in an adverse action being taken for reasons unrelated to the original biased action, the employer should not be liable. An employer may be liable, however, if the investigation rubber-stamps the biased action or takes the biased action into account without determining, apart from that action, that the adverse decision is entirely justified.

Tips for Avoiding Liability Under the "Cat's Paw" Theory

In light of the Staub ruling, employers should review their antidiscrimination prevention and response efforts to mitigate the risk that underlying bias by a supervisor results in legal liability. Steps that employers should consider taking include the following:

- **Antidiscrimination Policy.** Employers should maintain and enforce a well-written, comprehensive discrimination policy that encourages employees to report discrimination and explains how to do so. Discrimination complaints should be promptly and thoroughly investigated and, if discrimination has occurred, the company should work with counsel to ensure that the discrimination does not influence future decisions.
- **Training.** Employers should provide discrimination training to all employees and should separately train supervisors to ensure they understand the scope of the employer's antidiscrimination obligations and their unique obligation not to engage in discrimination. Such training should be mandatory for all new supervisors, and refresher training should be provided periodically.
- **Progressive Discipline.** While the law does not require written progressive discipline, taking the time to thoroughly investigate and to timely and accurately document performance issues as they arise better positions employers to prevent and defend against discrimination claims. Accurate, timely documentation that is independently reviewed and verified before being issued can greatly assist employers in establishing that a decision was made for legitimate, nondiscriminatory reasons.
- **Independent Investigation.** Employers should take care to ensure that decision-makers do not blindly rely on and simply rubber-stamp the recommendations of other employees when making adverse employment decisions. Instead, a decision-maker should act based on a thorough and independent



investigation. Before acting, the decision-maker should be confident he or she is acting on complete and accurate information, that the adverse action is entirely justified, and that the adverse action is not based on the discriminatory bias of any employee influencing the decision or on any other unlawful factor. In conducting investigations, employers should examine not only the immediate events that may lead to an adverse decision, but also the underlying chain of events to ensure there has been no discrimination in the chain of events leading to the decision.

If you should need assistance with issues related to discrimination, investigations, or taking adverse action against employees, please contact Megan Anderson or another member of the Gray Plant Mooty Employment and Labor practice group.

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