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HOW TO AVOID THE DREADED "CAT'S PAW" IN LIGHT OF *STAUB*

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Many employers are scratching their heads about l**ast week's "cat's paw" decision** from the Supreme Court. The Court unanimously held that employers can be liable for decisions that were influenced by managers or supervisors who had unlawful motives. However, the decision was short on advice about how to avoid "cat's paw" liability.

In this case, Vincent Staub sued Proctor Hospital under the United Services Employment and Reemployment Act ("USERRA"). He alleged that the human resources executive who fired him from his civilian job as a hospital technician was merely the "cat's paw" for two of Staub's direct supervisors, who were openly hostile to his obligations as a Army Reservist.

Staub was originally awarded $58,000 by the jury, but the U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana, and Wisconsin) reversed that decision, holding that Staub had failed to show that the two biased supervisors exercised such "singular influence" over the final decisionmaker that the decision to terminate was in "blind reliance" on the biased supervisors. Thus, it held that the hospital was not liable for Staub's termination. The Supreme Court reversed the Seventh Circuit decision and remanded the case without reinstating the original verdict.

The Supreme Court concluded that the exercise of judgment by the final decisionmaker did not automatically prevent or cure the animus of the earlier supervisors' actions, nor did it prevent the earlier biased action from being the proximate cause of harm to Staub. The decision is significant, and appears to apply to discrimination cases under Title VII of the Civil Rights Act of 1964 as well as USERRA suits. Justice Samuel Alito, joined by Justice Clarence Thomas, concurred but took the position that an investigation by the employers should automatically shield the employer from liability.

(According to Justice Antonin Scalia, who wrote the majority opinion, the term "cat's paw" is drawn from a fable conceived by Aesop and written by 17th-century French poet Jean la Fontaine, in which a monkey convinces a cat to steal roasting chestnuts from a fire. The cat burns her paws in doing so, while the monkey takes all the nuts for himself.)

But if the ultimate decisionmaker's heart is pure, what can he or she do to protect the company from liability?

First, the Court's opinion suggests a more aggressive investigatory role for the human resources department or in-house counsel. Although the Court did not adopt Justice Alito's view that an investigation should be an automatic defense, the major-

ity opinion does indicate that an independent investigation should help. Thus, human resources representatives or in-house attorneys should "check behind" the allegations made by a manager or supervisor before approving the adverse employment action. The investigator should ensure that the offense actually did occur (or that there was adequate reason to believe that it occurred) and was against the company's written policy or established practice. The investigation should also include a review of similarly situated employees – is this individual being treated more harshly than co-workers who have committed similar offenses, or about the same? – and whether there are any extenuating circumstances that should be taken into account. Finally, the investigator should satisfy himself or herself that the company could defend its decision before a government agency or a court if necessary. A good question to ask oneself at the end of the investigation is, Overall, does the proposed action "feel" fair and like the right thing to do? (This is also known as "the smell test.")

Second, ensure that supervisors and managers are well trained in the anti-discrimination laws and understand the concept of retaliation. Obviously, the best way to prevent "cat's paw" liability is to ensure that the "paw" knows not to discriminate or retaliate. Training supervisors and managers about their legal obligations and the company's expectations should prevent many problems from ever arising. If you have not had this training in a few years, the Supreme Court decision is a good reason to offer a refresher.

Offer an effective grievance procedure for employees who believe that they have been treated unfairly, and investigate grievances with an open mind before approving final action. In the Supreme Court case, the plaintiff had complained internally that he was being discriminated against because of his reserve duty. It's not entirely clear what the employer did in response, but it is possible that a thorough investigation of his grievances before the termination would have created a different result. Although most employees will complain of being treated unfairly whether they were or not, sometimes their complaints are well-founded. It is much better to find this out before a termination decision is made.

As a general proposition, be extremely cautious in taking action against individuals who serve in the military. The USERRA is strongly skewed in favor of the individual serving in the military because Congress wanted to reward those who serve. (The same applies to the military leave provisions in the Family and Medical Leave Act.) Jurors are even more strongly in favor of military personnel. Therefore, even if you feel you have air-tight grounds for terminating an individual who is serving in the military, check and re-check all the circumstances before taking irreversible action. Know, that if you do take action, you will be fighting an uphill battle.

"Cat's paw" situations are fortunately relatively rare, but the Supreme Court's decision means that employers will have to take such allegations seriously and ensure that they have mechanisms in place to prevent the situations and to correct them when they occur. If you need assistance with developing investigative guidelines, a military leave procedure, or a grievance procedure, dealing with a potential "cat's paw" situation, or providing management training on USERRA or the anti-discrimination laws, please contact any member of Constangy's **Litigation Practice Group** or the Constangy attorney of your choice.