Allen Matkins Employment Alert

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Two 2011 U.S. Supreme Court Rulings Expand Employer Liability For Employment Discrimination

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Third-Party Discrimination Complaints Get New Life

Complaint causes fiancé's discharge

Lawsuits involving office romances are rarely a good thing for employers. In January of this year, the U.S. Supreme Court [1] decided that firing an employee who was the fiancé of a female employee who filed a discrimination claim was a form of illegal retaliation. Eric Thompson and his fiancée, Miriam Regalado, were both employed at a Kentucky plant. Three weeks after Regalado filed a discrimination claim, her fiancé was fired. Not unnaturally, the Court reasoned that employees would be hesitant to file a discrimination claim if they knew their fiancé or family member would be fired as a result.

Slippery Slope

The Court admitted to the "slippery-slope" problems this case will generate: "We expect that firing a close family member will almost always meet the . . . standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize." *Id.*, 131 S.Ct. at 868. No one knows what less-obvious relationships will be protected.

Retaliation

The Court found the more difficult question was whether Eric Thompson, the fired employee, could sue for retaliation, given that he had never engaged in protected activity. The Court concluded that Mr. Thompson could sue because he was an employee and the goal of our discrimination laws is to shield employees from unlawful acts of their employers.

Accepting the facts as alleged, Justice Scalia wrote that Mr. Thompson's discharge was the employer's intended mean of getting back at his fiancée because she filed a claim of sex discrimination.

Expanded rights

This decision expands the rights of employees to sue for retaliation, although most of the line-drawing lies in the future, e.g. whether a co-employee who is a second cousin, childhood friend or neighbor has the same rights as a fiancé.

Managers Who Rely on Supervisors' Input Must be Cautious

In March 2011, the U.S. Supreme Court [2] held that an employer can be liable for discrimination if a decision that is detrimental to the employee is influenced by bias – even if the person who ultimately made the decision is not the biased person. The decision also gave a hint of what actions employers might take to try to avoid liability – an independent investigation which somehow (and the Court was not specific) removes the tainted/hostile motivating factors.

Bias-free manager not enough

The employer's HR Vice President naturally relied in part on the input of the discharged employee's two supervisors when she decided to fire Vincent Staub. Because those supervisors had a bias against Staub's Army reserve status, the discharge was discriminatory, even though the decision-maker Linda Buck, the HR Vice-President, had no bias against Staub or others in the military.

"Cat's paw" fable

To dramatize this improper action, the Court discussed the "cat's paw" fable, which involves a monkey who persuades a cat to grab chestnuts from a fire. The cat's paw gets burned and the monkey grabs the chestnuts, i.e., one is improperly used by another to accomplish a purpose. Because those supervisors who gave their input to Buck were biased, the termination decision was discriminatory, even though she was bias-free.

"Motivating factor"

Staub, a technician for Proctor Hospital, was also an Army reservist, which caused him to be gone a weekend a month and two to three weeks a year. Both Staub's immediate supervisor and her supervisor were grumpy about the disruptions caused by Staub's unavailability. They generated complaints and disciplinary actions which led Buck to fire Staub. Buck had no hostility to Staub's military duties and Staub did not claim that Buck was biased. Nonetheless her reliance on the input from Staub's two supervisors caused the discharge to be tainted and hence a violation of the federal law prohibiting use of military service as "a motivating factor" in any employment decision. This "motivating factor" language is similar to the federal and state laws prohibiting discrimination where either race, religion, sex, etc. is "a

motivating factor" for an employment practice.

"Agency" rationale

The Court rejected the hospital's argument that it was not liable because Staub's direct supervisors had not influenced the discharge decision. Even though decision-maker Buck looked beyond what the two supervisors said and also reviewed Staub's personnel file before she made the discharge decision, the Court decided that because her decision was influenced by the two hostile supervisors, the discharge could not stand. In other words, Buck was, akin to the cat's paw fable, used as a tool by the two supervisors. In some sense, this "agency" rational for liability is unexceptional.

This concept has also been referred to as "subordinate bias" or "rubber stamp" theory. Hiding behind semi-blind approvals (even if non-biased) of personnel actions will not automatically avoid liability. As another example, an employer is not free from race discrimination liability even if the decision-maker did not know that a discharged employee was African-American, if the decision-maker relied on biased input from others.

Employer's defenses

The employer's best defenses are always careful investigations, with accurate and detailed evaluations and write-ups. A focused follow-up after listening to the employee's specific complaint is suggested, with the cat's paw theory in mind.

Justice Scalia wrote both of these decisions. Although some justices issued concurring opinions or did not take part, there were no dissents in either case, contrary to frequent claims that the high court is uniformly pro-business.

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[1] *Thompson v. North American Stainless, 562 U.S. ___, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011).*

[2] *Staub v. Proctor Hospital, 562 U.S. ____, 2011 U.S. LEXIS 1900 (2011).*
