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Client Alert

Labor & Employment Practice Group

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Supreme Court Ponders "Cat's Paw" Liability
High Court Leaves Important Questions Unanswered

"Cat's paw" liability arises when a well-intentioned employer acts on the recommendation of an employee intending to unlawfully discriminate against another. "In such a case, the recommender [uses] the decisionmaker as a mere conduit, or 'cat's paw' to give effect to the recommender's discriminatory *animus*." *Crawford v. Carroll*, 529 F. 3d 961, 979 n. 21 (11th Cir. 2008) (citations omitted). Traditionally, an employer escapes "cat's paw" liability by demonstrating that it conducted an independent investigation and did not simply rubberstamp the discriminating employee's decisions.

On March 1, 2011, in an 8-0 decision (with Justice Kagan abstaining), the United States Supreme Court injected some uncertainty in defending against those claims. *Staub v. Proctor Hospital*, 562 U.S. ___ (2011).

Staub v. Proctor Hospital

Vincent Staub sued his former employer alleging his discharge violated the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq*. (USERRA).

Construed in a light most favorable to Staub, the facts are involved, but ultimately straightforward. Staub was employed as an angiography technician with Proctor Hospital and also served in the U.S. Army Reserve, "which required him to drill one weekend a month and to train full time for two to three weeks a year." *Id.* at *1. His required absences, however, were not well received. His immediate supervisor, Janice Mulally, and her direct superior, Michael Korenchuk "were hostile to Staub's military obligations" and Mulally sought to "get rid of [Staub]." *Id.* Sharing Mulally's unfavorable opinion of Staub's military service, Korenchuk was aware that Mulally was "out to get" Staub. *Id.* at *2.

In January 2004, Mulally issued a disciplinary warning to Staub for violating a company rule requiring him to remain at his desk during his downtime. Staub contended that Mulally's justification for the warning was false. *Id.* Months later, a coworker complained to the company's vice president of human resources (HR) and the company's chief operating officer (COO) about Staub's "unavailability and abruptness." The COO directed Korenchuk and HR to develop a plan to resolve Staub's

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"availability" concerns. *Id.* But before the plan could be implemented, Korenchuk advised HR that Staub had violated the January disciplinary warning. Again, Staub contended the allegations against him were false. Relying on Korenchuk's accusation and after reviewing Staub's personnel file, HR decided to discharge Staub. The discharge notice expressly stated that Staub had violated the January 2004 disciplinary warning. *Id.*

Staub then challenged his discharge through the company's internal grievance process. HR, however, did not talk with Mulally about Staub's allegation that she fabricated the basis of the January warning. Instead HR discussed the matter with another company officer only. HR denied Staub's grievance and confirmed his discharge. *Id.* at *3.

Alleging that his termination from Proctor was on account of Korenchuk and Mulally's discriminatory *animus* toward his military status, Staub brought suit under USERRA. A jury found that Staub's military status was a motivating factor in his discharge and returned a verdict for him. The Seventh Circuit reversed, holding that "because the undisputed evidence established that [the termination decision] was not wholly dependent on the advice of Korenchuk and Mulally, … Proctor was entitled to judgment." *Id.* at *4.

The Supreme Court granted *certiorari* to "consider the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory *animus* of an employee who influenced, but did not make, the ultimate employment decision." *Id.* at *1. Relying on principles of agency and tort law, the Court reversed, holding that "if a supervisor performs an act motivated by antimilitary *animus* that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at *10 (emphasis in original). Rejecting Proctor's view that its independent investigation should have immunized it from liability, Justice Scalia writing for a unanimous court opined that to escape liability, under USERRA, an employer must prove that the adverse action was either (1) unrelated to the supervisor's discriminatory action or (2) entirely justified. Justice Scalia explained:

> [I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action …, then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.

Id. at *9.

Justice Alito, joined by Justice Thomas, concurring in the opinion, argued that a plain reading of USERRA imposes liability "only when '[the employer] should be regarded as having delegated part of the decisionmaking power' to the biased supervisor." *Id.* at *9 - 10 (*quoting* 562 U.S. ___ at *2 (Alito, J., concurring)). Concluding that "[t]here was sufficient evidence to support a finding that … Korenchuk was actually delegated part of the decisionmaking authority," Justice Alito would have reached the same outcome on that basis. *Id.* at *3 (Alito, J. concurring).

The Impact of *Staub*

While *Staub* concerns an employer's liability under USERRA, the Court very early in its analysis noted the similarity of USERRA and Title VII. *Id.* at *5. So there can be little question that *Staub* will extend to Title VII

claims. But *Staub* leaves unanswered some important questions, including what standards apply to the employee's notice and to the employer's investigation. Until the courts answer these and other questions, *Staub* compels employers to exercise greater vigilance when issuing discipline and when investigating claims of discrimination, particularly when those claims undermine an otherwise legitimate, nondiscriminatory basis. In view of that, employers should accept *Staub's* invitation to review their disciplinary procedures and revise their policies and employee handbooks, as necessary.

King & Spalding's Labor & Employment Group's attorneys routinely advise employers on complying with federal and state employment laws and are available to assist in complying with any new requirements.