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Meow!
The United States Supreme Court Recognizes the "Cat's Paw" Theory of Liability Under the USERRA

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Staub v. Proctor Hospital, -- S.Ct. ---- 2011 WL 691244 (Mar. 1, 2011)

In *Staub v. Proctor Hospital* the United States Supreme Court interpreted the Uniformed Services Employment and Reemployment Rights Act (USERRA) in a claim by an employee that he was terminated because of his membership in the United States Army Reserve. Without dissent, the Court found that the "cats paw" theory of liability under the USERRA is a valid basis on which to hold an employer liable. That is, where a supervisor performs an act motivated by anti-military animus that is intended to cause an adverse employment action, and that act is the proximate cause of the adverse employment action, the employer is liable for discrimination under the USERRA even where the ultimate decision maker did not have any discriminatory animus.

Factual Background and Procedural History

Defendant Proctor Hospital allegedly terminated Plaintiff because of his membership in the U.S. Army reserve. The case proceeded to trial where the jury credited Plaintiff's version of events and awarded Plaintiff approximately $60,000 in damages.

Plaintiff's membership in the reserves required him to attend drills one weekend per month and full time two to three weeks per year. Plaintiff alleged his immediate supervisor and the immediate supervisor's supervisor (supervisor II) were hostile to Plaintiff's military obligations. Plaintiff alleged his immediate supervisor would schedule Plaintiff for additional shifts without notice so that Plaintiff could "pay back" the department and his co-workers for "having to bend over backwards to cover [his] schedule for the Reserves."[1] The immediate supervisor also advised one of Plaintiff's co-workers that Plaintiff's "military duty had been a strain on the department," and had asked the co-worker to help get rid of Plaintiff.[2] Supervisor II referred to Plaintiff's military obligations as a "bunch of smoking and joking and [a] waste of taxpayers[']' money" and was aware that the immediate supervisor was "out to get" Plaintiff.[3]

In January 2004, the immediate supervisor issued a corrective action disciplinary warning because Plaintiff allegedly violated a company rule requiring Plaintiff to stay in his work area whenever he was not working with a patient. Plaintiff alleged that the rule did not exist at the hospital and, even if it did, he did not violate it.

Months later in April 2004, one of Plaintiff's co-workers complained to the vice president of human resources and the chief operating officer ("COO") about Plaintiff's frequent

unavailability and abruptness. The COO directed supervisor II and the vice president of human resources to create a plan to solve Plaintiff's unavailability problems. But a few weeks later, before the plan could be created, supervisor II advised the vice president of human resources that Plaintiff again left his desk without advising a supervisor in violation of the January 2004 corrective action plan. But Plaintiff testified that he had left a voicemail for supervisor II. Relying on supervisor II's allegation, the vice president reviewed Plaintiff's personnel file and decided to terminate Plaintiff. The termination notice provided that Plaintiff violated the January 2004 corrective action plan.

Plaintiff challenged the termination through the hospital's grievance process claiming that the supervisor's allegation was fabricated because of hostilities toward Plaintiff's military obligations. The vice president of human resources did not conduct an independent investigation into the events that led to her termination decision and subsequently adhered to her decision, which led to Plaintiff filing his claim under the USERRA.

Plaintiff did not allege that the vice president of human resources had any anti-military animus. Instead, Plaintiff alleged that the termination decision was influenced by the actions of his supervisors who had anti-military animus. The jury agreed with Plaintiff and award him damages for wrongful termination. The Seventh Circuit Court of Appeals, however, reversed, holding that the hospital was entitled to judgment as a matter of law. Noting that Plaintiff sought to hold the hospital liable for the animus of supervisors who did not make the termination decision (a "cat's paw" case, referring to Aesop's fable), the Court of Appeals found that because the decision maker relied on information in addition to that provided by the supervisors, Plaintiff failed to meet his burden of showing that the anti-military animus was the basis for his termination. The U.S. Supreme Court granted certification to resolve the "circumstances under which an employer may be held liable for employment discrimination based upon discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."[4]

The Court's Decision and Analysis

The Court began its analysis with the plain language of the USERRA, which prohibits, *inter alia*, termination of employment based upon a person's membership is any of the uniformed services. The act provides that "[a]n employer shall be considered to have engaged in actions prohibited . . . if the person's membership . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." 38 U.S.C. § 4311(c). The Court noted that this provision is similar to Title VII, which prohibits certain types of discrimination where one of the prohibited considerations is a motivating factor for an adverse employment action, even though other non-discriminatory factors motivated the practice. *See* 42 U.S.C. §§ 2000e-2(a), (m). The Court, therefore, had to interpret the phrase "motivating factor in the employer's action" where the ultimate decision maker had no discriminatory animus but was influenced by previous company actions that are the product of an anti-military animus.

First, the Court relied on general tort law as applied to the USERRA, a federal statute creating a federal tort. Under that analysis, intentional torts, such as wrongful termination, are distinguished from negligent or reckless torts in that intentional torts require that the actor intend the consequences of his act rather than the act itself. Therefore, although Plaintiff's direct supervisors intended the act of writing him up, that, on its own, would not satisfy the intentional tort standard for liability. Acknowledging that dismissal may have been the result and even the foreseeable consequence of the write ups, the Court still noted that if dismissal was not the purpose of the reports, then Plaintiff would not be able to hold his supervisors liable.

But because Plaintiff was not seeking to hold his supervisors liable but, rather, sought to hold the hospital liable for the actions of several of its agents, the Court looked to general agency law principals. Specifically, whether the actions of one of the hospital's agents (the immediate supervisor or supervisor II) can be combined with the actions of another agent (the vice president of human resources) to impose liability on the hospital. Citing to the Restatement (Second) Agency § 275, Illustration 4 (1958), the Court noted that the malicious mental state of one agent cannot generally be combined with the harmful actions of another agent to hold a principal liable for a tort requiring both elements. Ultimately, the Court wrote that it need not decide the issue since the statute requires that discrimination be the motivating factor and not merely a factor for the termination.

The Court did, however, reject the employer's argument that, unless the ultimate decision maker is motivated by discriminatory animus, the employer should not be held liable. In other words, when the agents intended for discriminatory reasons for their actions to cause the termination, the employer has the scienter required to be liable for wrongful termination under the USERRA. The fact that the ultimate decision maker's action in this case was not motivated by discriminatory animus, and that her action was also the proximate cause of the termination, did not prohibit the other agents' discriminatory actions from also constituting the proximate cause of the termination under tort law.

The Court also rejected a *per se* rule that would shield the employer from liability if the decision maker conducted an independent investigation and rejected an employee's allegations of discriminatory animus. Instead, the Court noted that if the employer's investigation results in an adverse action unrelated to the supervisor's prior biased actions (which is the employer's burden under the statute), then the employer would not be liable. Essentially, the Court rejected an "independent investigation" defense because the employer is liable under the USERRA where one of its agents committed an act based upon discriminatory animus that was intended to cause – and did cause – an adverse employment action.

In the end, the Court held that "if a supervisor performs an act motivated by anti-military 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 the USERRA."[5] The Court did not opine on what would happen if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the decision maker. The

Court also did not opine on what would have happened if Plaintiff had failed to take advantage of the hospital's internal grievance process.

The Court remanded the case to the Seventh Circuit to consider whether the jury verdict should be reinstated or whether to order a new trial under the standard announced by the U.S. Supreme Court.

Implications for Employers

The United States has been engaged in multiple military engagements for almost a decade and it does not appear that that will change in the foreseeable future. Through the USERRA, Congress has decided that discrimination in the terms and conditions of employment based upon military membership is no different and no less sinister than discrimination based upon age, race, gender, religion and the multiple other protected traits under federal law (and state law counterparts). Thus, employers must make sure they are training their supervisors and management regularly on the factors that can be considered in making decisions relating to the terms and conditions of employment. *Staub* is especially instructive to the human resources professional charged with making termination decisions considering that the Court held the employer liable even though the ultimate decision maker (the vice president of human resources) had no anti-military animus. What *Staub* teaches is that the ultimate decision maker should consider conducting an independent investigation of the facts and should not blindly rely upon information provided by supervisors relating to an employee, especially where the employee has alleged his termination was motivated by anti-military animus.

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[1] *Staub v. Proctor Hosp.*, -- S. Ct. ----, 2011 WL 691244 *2 (Mar. 1, 2011).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at *6.

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