HARRANG /LONG /GARY /RUDNICK P.C.

ATTORNEYS & COUNSELORS AT LAW

May 6, 2011

Supreme Court Affirms Employer Liability Under "Cat's Paw" Theory

In *Staub v. Proctor Hospital*, 562 U.S.___ (2011) LW 691244, Case No. 09-400 (March 1, 2011), the United States Supreme Court affirmed employer liability under the "Cat's Paw" theory,[1] which attributes an intermediate supervisor's animus toward the employee to the disciplining supervisor despite the disciplining supervisor's lack of knowledge of the intermediate supervisor's animus toward the disciplined employee.

The Facts

Vincent Staub was an angiography technician at Proctor Hospital and a member of the United States Army Reserve. Staub's immediate supervisor, Mulally, and Mulally's supervisor, Korenchuk, were hostile toward Staub because his military obligations created scheduling difficulties. As a result of this hostility, Mulally issued Staub a false "Corrective Action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area when he was not working with a patient. The Corrective Action also directed Staub to report to Mulally or Korenchuk when he had no patients and his angiography cases were complete. The Corrective Action was false because no such company rule existed. Korenchuk later informed Buck, the company's V.P. of Human Resources, that Staub had violated the Corrective Action directive. Relying on Korenchuk's accusations, Buck reviewed Staub's file and then decided to fire him. The termination notice stated it was based on Staub's failure to comply with the Corrective Action directive.

For employers in business and government alike, employees are your most valuable, and often most expensive, asset. How you handle employment issues can have a significant impact on your bottom line. Our labor and employment attorneys provide creative, strategic legal counsel – targeted to your mission and business environment – to help ensure the most proficient use of human resources, prevent costly disruptions, and help you identify and address issues before they become costly claims or lawsuits.

We specialize in providing labor and employment advice, counseling and litigation services to public and private employers.

Labor and Employment Team:
Mark P. Amberg
Sharon A. Rudnick
Jens Schmidt
Jeffery J. Matthews
Joshua P. Stump
Hwa Go
Andrea M. Nagles
Kate G. Watkinson

[1] The Cat's Paw Doctrine is discussed in detail in Harrang Long Gary Rudnick's "Supervisor Liability" discussion below.

The Legal Proceedings

Staub brought suit under the Uniformed Services Employment and Reemployment Rights Act (USERRA), alleging his termination was motivated by hostility to his military obligations in violation of 38 U.S.C. § 4311. Staub did not contend Buck was hostile toward him based on his military obligations. Rather, he argued that Mulally and Korenchuk were hostile toward him and Buck based her decision to terminate his employment on their influences. In the district court, a jury found that Staub's military status was a motivating factor in Proctor Hospital's decision to terminate his employment.

The Seventh Circuit reversed. It observed that Staub had brought a "Cat's Paw" case: seeking to hold his employer liable for the unlawful animus of a supervisor who didn't make the ultimate employment decision. Under Seventh Circuit precedent, Cat's Paw liability could not be established "unless the non-decision maker exercised such 'singular influence' over the decision maker that the decision to terminate was the product of 'blind reliance.'" Because Buck had gone beyond the accusations of Mulally and Korenchuk and had conducted a review of Staub's personnel file, the Seventh Circuit concluded Proctor Hospital was entitled to judgment in its favor.

The Analysis

In reversing the Seventh Circuit, the Supreme Court first noted that USERRA is very similar to Title VII, which prohibits employment discrimination because of race, color, religion, sex, or national origin and imposes employer liability when one of those factors is "a motivating factor" for an adverse employment action. The Court then began its analysis with "the premises that when Congress creates a federal tort it adopts the background of general tort law." As the Court stated: "Intentional torts such as this, . . . generally require that the actor intend the *consequences* of an act, not simply the act itself." (Internal quotes omitted). Moreover, the unlawful action must be a "proximate cause" of the resulting injury. However, the Court noted, there can be more than one "proximate cause." Thus, even where the employer conducts an independent investigation that results in adverse employment action, the employer can still be liable. ". . . [T]he supervisor's biased report may remain a causal factor if the independent investigation take it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." "The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and in fact did cause, an adverse employment decision."

The Holding and its Implications

Utilizing the common law tort "proximate cause" analysis, the Supreme Court concluded: ". . . 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."

While the Court's holding in *Staub* is specific to USERRA, the Court's discussion indicates it very likely will apply this "proximate cause" analysis to any number of federal statutory schemes under which "Congress creates a federal tort." In particular, the Court's reference to the similarity between USERRA and Title VII predicts its application to Title VII discrimination claims and other federal discrimination statutes, such as the Age Discrimination in Employment Act and the Americans with Disabilities Act.

Impact on Employers

Before disciplining an employee based on a recommendation from a lower level supervisor, the supervisor who imposes the discipline should conduct an independent evaluation which is sufficiently thorough to assure the recommendation is not based on an unlawful bias, but rather a legitimate reason that warrants the proposed discipline.

If you have questions about the *Staub* decision, "Cat's Paw" liability or liability based on the actions of your supervisors, please feel free to contact one of our labor and employment lawyers.

The Cat's Paw Doctrine – Liability for Supervisor Bias

A. What is it?

1. The courts have recognized a theory of liability for an employer for discrimination when the employer relies on the comments/records/information provided by a biased subordinate supervisor when taking an adverse employment action against an employee even when the supervisor doesn't make the adverse decision.

2. Applies in situations where there is no evidence that the actual decision maker was biased or engaged in any discriminatory behavior himself or herself.

3. The term originally was coined in the case law by Judge Posner (7th Circuit) in the case of *Shager v. Upjohn*, 913 F.3d 398 (7th Cir. 1990). The term "Cat's Paw" originally comes from a fable authored by Jean de La Fontaine and means getting someone else to unwittingly do one's bidding.

THE CAT, THE MONKEY, AND THE CHESTNUTS

An Aesop Fable

One day a cat and a monkey sat watching some chestnuts put into the fire to roast.

"How good they must be!" said the monkey. "I wish we had them. I am sure you can get some out. Your paws are so much like hands."

The cat was much pleased at these words. She put out her paw for the chestnuts. She took one out but burned her paw.

"How well you did that!" said the monkey. "I am sure you can get them all."

So the poor cat pulled out the nuts one by one, burning her paw each time.

At last they were all out. Then she turned around, but only in time to see the monkey crack and eat the last of the nuts.

So the poor cat had only her burnt paw for her pains.

Moral: A thief cannot be trusted even by another thief.

– or –

Never completely trust your supervisors.

B. Related doctrine – "rubber stamp" theory of liability applies in situations in which the subordinate affirmatively recommends an adverse employment action and the person or persons with authority to implement the decision do so based on the supervisor's recommendation without conducting an investigation.

C. The different federal court circuits are split on their application of Cat's Paw liability but all recognize it as a valid theory of liability.

1. The more liberal view (followed by the majority of circuits, including the 9th Circuit). Employer can be liable for an "adverse employment action taken in reliance on factors affected by another decision maker's discriminatory animus." *Galdamez v. Potter*, 415 F.3d 1015, 1026, fn. 9 (9th Cir. 2005).

2. The middle view – *e.g.* the 10th Circuit. Looks at the level of influence of the biased subordinate supervisor. *EEOC v. BCI Coca-Cola Bottling Company of Los Angeles*, 450 F.3d 485 (9th Cir. 2006).

Problem with this viewpoint is the court's look at the adequacy of the investigation or review done by the decision maker. The court in *EEOC* held that merely reviewing the employee's personnel file and prior disciplinary record before making the adverse employment decision was "inadequate as a matter of law."

3. Strict view – the 4th Circuit. Biased subordinate supervisor must be "principally responsible" for the adverse employment action.

D. How to Protect Yourself Against the Cat's Paw.

1. Don't simply rely on what you are being told by your supervisors or simply rely on records.

2. Always conduct an independent review and investigation of allegations brought against an employee. Investigation needs to be prompt, fair, neutral, thorough and complete – especially in termination situations.

3. Always ask the employee for his or her side of the story before taking action.

4. Look at all the facts before taking action.

5. Get the supervisor out of the process.

Please visit our website at:
www.harrang.com

LOCATIONS:

Portland
1001 SW Fifth Avenue
16th Floor
Portland, OR 97204-1116
Phone: (503) 242-0000
(800) 315-4172
Fax: (503) 241-1458

Eugene
360 E 10th Avenue
Suite 300
Eugene, OR 97401-3273
Phone: (541) 485-0220
(800) 315-4172
Fax: (541) 686-6564

Salem
333 High Street, NE
Suite 200
Salem, OR 97301-3632
Phone: (503) 371-3330
(800) 315-4172
Fax: (503) 371-5336

www.harrang.com