Ogletree Deakins

U.S. Supreme Court Rules On "Cat's Paw" Theory

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By Hera S. Arsen, Ph.D.

On March 1, with Justice Antonin Scalia writing a unanimous opinion, the U.S. Supreme Court ruled that an employer may be held liable for employment discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) based on the discriminatory animus of an employee who influenced, but did not make, an ultimate employment decision.

On March 1, with Justice Antonin Scalia writing a unanimous opinion, the U.S. Supreme Court ruled that an employer may be held liable for employment discrimination under the Uniformed Services Employment and Reemployment Rights Act (USERRA) based on the discriminatory animus of an employee who influenced, but did not make, an ultimate employment decision. In interpreting the so-called "cat's paw" theory of liability, the high court declined to adopt the "hard-and-fast rule" suggested by the employer that a decisionmaker's independent investigation and rejection of an employee's allegations of discriminatory animus should negate the effect of any prior discrimination. Instead, the Court held 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." *Staub v. Proctor Hospital*, No. 09-400, U.S. Supreme Court (March 1, 2011).

Factual Background

Vincent Staub was employed by Proctor Hospital as an angiography technologist and also was a veteran member of the United States Army Reserve. Staub's immediate supervisor, Janice Mulally, was allegedly hostile to his military obligations. For example, Mulally scheduled Staub to work on the weekend rotation, creating conflicts with his drill schedule. According to Staub, she also scheduled him for extra shifts so he could pay back "the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." Staub reported the problem to Michael Korenchuk, the department head; however, Korenchuk also allegedly made similar comments about his reservist duties, characterizing his military obligations as "a b[u]nch of smoking and joking and [a] waste of taxpayers['] money."

In January of 2004, Mulally issued Staub a "Corrective Action." Staub alleged that Mulally's justification for the Corrective Action was false. In April, Korenchuk informed Proctor Hospital's vice president of human resources Linda Buck, that Staub had violated the January Corrective Action. Relying on Korenchuk's accusation, Buck fired Staub.

Staub filed suit against Proctor Hospital claiming that his discharge was motivated by hostility to his obligations as a military reservist in violation of USERRA. Specifically, Staub argued that while Buck was not hostile to his military obligations, Mulally's and Korenchuk's actions influenced Buck's ultimate employment decision. A jury found in Staub's favor. The Seventh Circuit Court of Appeals, ruling that Buck was not wholly dependent on the advice of Korenchuk and Mulally, held that Proctor Hospital was entitled to judgment. The case eventually reached the U.S. Supreme Court.

Legal Analysis

The issue before the U.S. Supreme Court was under what circumstances an employer may be held liable if the company official who makes a decision to take an adverse employment action "has no discriminatory animus but is influenced by previous company action that is the product of a like animus in someone else."

In deciding this issue, Justice Scalia first noted that under USERRA, which "is very similar to Title VII," employers are prohibited from engaging in certain employment actions if an employee's membership in the uniformed services "is a motivating factor in the employer's action." Staub argued that although Buck was not motivated by discriminatory animus in firing him, Proctor Hospital should be responsible because Mulally and Korenchuk acted with discriminatory animus in placing an unfavorable entry on his personnel record. Moreover, Staub argued, Proctor Hospital should be held liable under USERRA, even though Mulally's and Korenchuk's action was not a denial of "initial employment, reemployment, retention in employment, promotion or any benefit of employment," as liability under USERRA requires. Proctor Hospital, on the other hand, argued that an employer is not liable unless the de facto (or actual) decisionmaker has a discriminatory animus.

The Court held that as long as the earlier agents (here, Mulally and Korenchuk) intended, for discriminatory reasons, for an adverse action to occur, that intent is sufficient for liability under USERRA. In rejecting Proctor Hospital's interpretation of USERRA as "implausible," the high court noted that the employer's "view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action."

Thus, the Court concluded that the presence of an independent investigation does not shield an employer from liability where the investigation took into account a supervisor's biased report. According to the Court,

in such circumstances, "[t]he employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision." Because there was evidence that Mulally's and Korenchuk's actions were motivated by hostility toward Staub's military obligations and there was evidence that Mulally's and Korenchuk's actions were causal factors underlying Buck's decision to fire Staub, the U.S. Supreme Court reversed the decision of the Seventh Circuit.

Practical Impact

According to Michael Fox, a shareholder in Ogletree Deakins' Austin office, "Although true 'cat's paw' cases (where one person manipulates another to do his or her bidding) are in reality relatively rare, this decision may open a much wider number of matters to that type of examination based on the analysis that Justice Scalia seems to require. The Staub decision invites much more scrutiny of each underlying disciplinary act along the way to a termination, and the motives of the supervisor involved in those decisions. Couple that with an unfortunate reliance on the tort doctrine of proximate cause, and I am afraid we will have more confusion than we did before. The bottom line is more complexity and less certainty, which is never good for employers or employees."

Matthew Johnson, a shareholder in Ogletree Deakins' Greenville office noted: "In the concurrence, Justice Samuel Alito points out that the majority decision is based on general agency and tort law principles rather than the statutory text. Justice Alito's point that the proper result should be reached by adherence to the statute is well-taken. The 'motivating factor' language found in USERRA would seem to allow for 'cat's paw' liability where the ultimate decisionmaker is on notice of potential animus and fails to undertake an independent investigation. On the other hand, the majority opinion would seem to allow for liability under any circumstance where there is any discriminatory animus in the chain of decisionmaking. Whether the decision is appropriately based on tort law or statutory text, the burden on employers is clear – a meaningful independent investigation is of increased importance after Staub, particularly where there is an indication that a non-decisionmaker's recommendation or opinion may be motivated by discriminatory animus."

According to Chuck Baldwin, a shareholder in Ogletree Deakins' Indianapolis office, "The facts of this case underscore the importance of employers' continued commitment to training not only their human resources staff, but also their supervisors about employment law fundamentals. When supervisors act in ways that arguably suggest discriminatory motives, those bad facts create unnecessary challenges for employers in litigation. One of the disputed facts in this case was the existence of a company rule relied on by the employer to terminate Staub. Obviously, employers need to have all rules that could lead to discipline in writing and be able to prove that their written rules are provided to employees. Written receipts for work rules are a simple and effective manner of proof."

Baldwin continued, "Lastly, the employer did not conduct an independent investigation of the allegations on which it relied to terminate Staub. At times, employers may not conduct factual investigations choosing instead to rely on a good faith belief that the reasons for the terminations are true. Here, however, the

employer's case may have been aided by an independent investigation into the allegations to enable the employer to prove its decisionmaker solely relied on reasons unrelated to the supervisors' original biased comments. According to the Court, 'if an 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.'"

AUTHOR

Hera S. Arsen, Ph.D.

Director of Content, Torrance

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