

EMPLOYMENT LAW ALERT

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Two Supreme Court Decisions Potentially Expand Employer Liability

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"Cat's Paw" Ruling Significant but Not Surprising

An employer can be held liable for discrimination if its decision is "influenced" by a biased employee, even if the biased employee did not directly participate in the employment decision being challenged. In the recent decision of *Staub v. Proctor Hospital*, the United States Supreme Court officially recognized what has become known as the "cat's paw" theory of liability, also known as the "subordinate bias" or "rubber stamp" theory. Under this theory, even if the individual with final decision-making authority (a human resources official, for example) does not harbor any unlawful bias against the plaintiff, the employer can still be held liable if the decision-maker relies on information provided by an employee who does harbor such a bias (for example, the plaintiff's immediate supervisor). The Supreme Court's ruling is significant, but frankly it is not surprising.

The ruling's significance, as discussed in more detail below, is: (a) the ruling uses a more employee-friendly standard, and as such, it will increase further the number of discrimination lawsuits and the number of successful claims; and (b) the ruling highlights the importance of employers investigating claims of "tainted" information when such information is relied upon in making an adverse employment decision.

The case involved a military reservist who claimed that his written warnings, which were considered in his termination, were prepared by managers who were biased against him because of his military service. The reservist sued under USERRA, a federal statute that prohibits employers, among other things, from discriminating against employees on account of their military service. A jury had awarded the reservist a judgment, but a higher court had overruled that decision. The higher court's ruling was based upon the lack of any evidence that the "real" decision-maker was biased. On appeal, the Supreme Court agreed that there was a lack of evidence that the ultimate decision-maker was biased. BUT, there was evidence that the unbiased decision-maker relied upon "tainted" evidence – the allegedly biased written warnings and reports of misconduct. The Supreme Court also noted that the unbiased decision-maker had been made aware of the reservist's claims that the evidence relied upon was tainted with bias, but neither the company nor the unbiased decision-maker conducted a thorough investigation of those claims. These facts, the Supreme Court held, were sufficient to support a finding of liability under USERRA.

Why is this significant?

There is now no question that the "cat's paw" theory is a viable theory for plaintiff-employees to pursue in challenging employment actions.

The standard for application of the "cat's paw" theory is the more lenient of the standards that lower courts had applied. The Seventh Circuit Court of Appeals, the court that reversed the reservist's jury award, said that the "cat's paw" theory required the unbiased decision-maker to be "singularly influenced" by the biased information. The Supreme Court disagreed and considered that standard too rigid. Rather, the reservist need only show that the biased evidence was a "proximate cause" of the firing – in essence, that the biased evidence was a motivating factor or influence in the firing.

Biased information alone is not sufficient to establish liability. Based on the Supreme Court's statements, it would appear that the biased supervisor must intend to cause the adverse employment action being challenged. Thus, a plaintiff must do more than show that the information compiled or provided by the "bad actor" was tainted with bias; the plaintiff must show that the bad actor intended to have him fired. The Court appeared to distinguish between the bad actor's merely serving in the role of a witness (which would not be sufficient to establish that liability) and taking a more influential role in the company's employment decision (which could establish that bias was a "motivating factor" in the ultimate employment decision).

Employers faced with such claims of biased evidence or reports are now forewarned to investigate those claims in a manner that insulates from the process any of the allegedly biased influences. In other words, investigate whether there is a basis for the alleged bias in the information and, if so, evaluate the situation without consideration of that "tainted" information.

It is unclear whether the "cat's paw" theory would be available when there is not yet any suspicion of bias at the time of the employment decision. The Supreme Court noted in this case that the employer was aware when it terminated the plaintiff that he claimed that his managers had provided biased information. However, it is unclear whether this fact was important to the Court's ruling. It does not seem reasonable that an employer could be held liable for relying on the input of a biased supervisor, where the plaintiff made no attempt at the time to alert the employer of this alleged bias. This is an open issue that will need to be clarified by subsequent court decisions. Until the issue is clarified, employers should consider, during the course of an investigation, asking the employee being investigated whether s/he believes any managers who are providing potentially adverse information are biased.

Supreme Court Rules that Wage and Hour Anti-Retaliation Provision Protects Oral Complaints

The Supreme Court recently ruled that the federal Fair Labor Standards Act (FLSA) prohibits an employer from retaliating against an employee who has made oral complaints to the company about potential wage and hour violations. In *Kasten v. Saint-Gobain Performance Plastics Corp.*, the employee stated that he had made oral complaints to various management personnel that the placement of the time clock where employees clocked in and out for their work shifts did not result in employees being properly compensated for "donning and doffing" necessary work attire. After he was fired, he sued under the FLSA, alleging that his termination had been in retaliation for those complaints. The Court of Appeals dismissed his case, holding that the statutory language of the FLSA

protects any employee who has "filed any complaint," and that the word "filed" implies that a complaint must be made in writing to be protected.

The Supreme Court reversed, finding that the term "filed" was broad enough to encompass both written and oral complaints. This holding reaffirms that employers should train management personnel about how to respond to both written and oral employee complaints; have procedures in place to make sure that all employee complaints concerning potential violations of the law are documented and investigated; and be mindful of such complaints (whether made orally or in writing), when making decisions regarding discipline and termination. Notably, the Supreme Court declined on procedural grounds to address the employer's argument that the plaintiff's complaints were not protected by statute because they were made internally rather than to a government investigating authority. Thus, despite the clear instruction that oral complaints are protected by the FLSA, it remains an open question whether the FLSA protects internal complaints in addition to complaints made to the government.

If you have any questions about these two court decisions or wish to discuss their implications, please contact one of our Labor and Employment attorneys below.

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