Supreme Court UPDATE

Employer Liability for USERRA and Other Discrimination Claims Expanded

By Timothy Ramsey, CAPLAW

Employers beware – you may be held liable for the discriminatory intent of your supervisors and managers. A recent decision issued by the U.S. Supreme Court expands the circumstances in which an employer may be found liable for employment discrimination under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). In *Staub v. Proctor Hospital*, the Court held that an employer who terminates an employee based on a supervisor's actions that were motivated by anti-military prejudice may be held liable for employment discrimination, even though the ultimate decision maker was not motivated by discriminatory intent.[1]

Under USERRA, an employer's liability is established if a person's military service is a motivating factor in an employer's adverse employment action. USERRA was designed to ensure that employees who are in the military will not be discriminated against because of that service. In many respects, USERRA is very similar to Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of race, color, religion, sex, or national origin."

In *Staub*, the Court established liability under USERRA by applying the "cat's paw" theory of liability, which derives from the 17th century fable "The Monkey and the Cat." In the fable, a clever monkey uses flattery to convince a gullible cat to pluck chestnuts from a fire. The cat burns its paws and the monkey sits back and eats the chestnuts. The contemporary analogue is a biased supervisor who convinces the decision maker to take an adverse employment action based on inaccurate, incomplete, or misleading information.

Traditionally, cat's paw liability has been restricted to circumstances where the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance." This required the decision maker to be almost completely subject to the influence and hostility of the non-decision maker. However, *Staub* expands cat's paw liability for employers by holding them liable for the discriminatory actions of non-decision makers that result in an adverse employment action even when the employer may have considered other non-discriminatory factors. *Staub* thus makes it easier for employees to succeed in their employment claims.

The Facts and Arguments

Vincent Staub worked as an angiography technician for Proctor Hospital until he was fired in 2004. While employed, Staub was an active member of the United States Army Reserve and his duties required him to attend drill one weekend per month and to train full time for two or three weeks a year. Staub's immediate supervisor, Janice Mulally, and her supervisor, Michael Korenchuk, were hostile to Staub's military obligations. One time, Mulally noted that "Staub's military duty had been a strain on the department" and scheduled him for additional shifts without notice so he would "pay back the department for everyone else having to bend over backwards to cover [his] schedule for the reserves." Another time, Korenchuk asked one of Staub's co-workers to help him "get rid of" Staub, and on another occasion, referred to Staub's military obligations as "a bunch of smoking and joking and a waste of taxpayer's money."

Shortly thereafter, Mulally issued Staub a disciplinary warning for violating a company rule that required him to stay in his work area whenever he was not with a patient. A few weeks later, Staub's supervisor claimed that Staub again violated this rule. Staub disputed his supervisor's allegations. Relying on Staub's supervisors' accusations, Linda Buck, Proctor's personnel officer responsible for terminating employees, reviewed Staub's personnel file and fired him. Staub challenged Buck's termination decision through Proctor's internal grievance process, arguing that his supervisors' accusations were fabricated. Nonetheless, Buck adhered to her decision to fire Staub without following up with Staub's supervisors regarding his accusations.

Staub then sued Proctor under USERRA, claiming that his discharge was motivated by hostility to his military service. He claimed that the discriminatory actions of both of his supervisors influenced Buck's ultimate decision to terminate him.

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Oral Complaints

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narrow interpretation of the Act would be incompatible with the purposes for which it was enacted, namely to protect illiterate, less educated, and overworked employees. Illiteracy rates were particularly high among employees at the time, and to require them to reduce their complaints to written communications would have been a substantial hardship. To provide further support for its original intent analysis, the Court examined interpretations of the anti-retaliation provision from other federal administrative agencies, specifically the Department of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC). Both agencies interpret the anti-retaliation provisions as providing protection for oral complaints.

The Court also addressed the concern raised by Saint-Gobain that oral complaints do not provide employers with fair notice about whether an employee is actually making a complaint under the Act, or simply speaking from frustration. The Court adopted a "reasonableness standard" to determine if an employer has received fair notice of any complaint, written or oral. As long as the oral complaint is "sufficiently clear and detailed" for a reasonable employer to understand that the employee is asserting some protected right under the Act, it will be considered to have been "filed."

Implications for CAAs

Post-*Kasten*, it is clear that oral complaints are protected under the anti-retaliation provision of the FLSA, as long as they provide fair notice to the employer that the employee is asserting rights under the Act. Oral complaints, because they are often difficult to discern, require special attention from employers. As a result, to ensure compliance with the FLSA, employers should consider:

- Implementing a reliable policy and process for documenting and investigating oral complaints. By doing so, if an employer is sued by a current or former employee for retaliation under the FLSA, the employer will have some record or database to search to determine the specific details of the complaint.

- Training supervisors and managers in the complaint process. It is essential that all supervisors and managers become familiar with the entire complaint process and learn to properly identify and document authentic oral complaints. As *Kasten* demonstrates, an employee informing a supervisor or manager that a particular practice is illegal may constitute a valid oral complaint.

- Regularly educating all employees about the complaint process. Employees should receive information explaining how a complaint can be filed orally or in writing. Furthermore, all employees should be constantly informed of any updates to the complaint policy.

Following these suggestions will afford employers additional protection against potential lawsuits. Often, litigation is a battle of credibility between disputing parties and adopting and implementing a sound complaint policy will strengthen an employer's ability to prove that actions were taken for lawful, non-retaliatory reasons.

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USERRA

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Proctor, on the other hand, argued that an employer is not liable under USERRA unless the actual decision maker acted for a discriminatory purpose.

The Supreme Court Opinion

The Court held that under USERRA an employer is liable for employment discrimination based on the biased actions of supervisors and other company officials even if the ultimate decision maker was not biased himself. USERRA specifically provides that:

> A person who is a member of…or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership… or obligation.[2]

USERRA further provides that an employer is liable for unlawful discrimination if the individual's protected status is a "motivating factor in the employer's action."[3] This language is also in other federal anti-discrimination laws, such as Title VII.[4]

In *Staub*, the central issue was how to construe the phrase "motivating factor." Prior to *Staub*, it was unclear whether the discriminatory actions of non-decision makers that resulted in the termination of an employee could be classified as motivating factors in the employer's action. However, in its *Staub* decision, the Court, relying on the cat's paw liability theory, clarified the phrase by creating three requirements for liability.

"Prior to Staub, it was unclear whether the discriminatory actions of non-decision makers that resulted in the termination of an employee could be classified as motivating factors in the employer's action."

First, the non-decision maker must take some action against the employee motivated by hostility or bias against protected uniformed service obligations. The Court found that the supervisor's comments to Staub about his military obligations and the supervisor's having issued Staub a disciplinary warning satisfied this requirement.

Second, the non-decision maker must actually intend to get the employee fired, demoted, or otherwise penalized. The Court found ample evidence that Staub's supervisors specifically intended that he be terminated. One of the supervisors stated that she was trying to "get rid of" and was "out to get" Staub.

Finally, the non-decision maker's discriminatory actions must be one of the causes of the decision maker's adverse employment action. The Court determined that there was evidence that the supervisor's actions motivated the personnel officer's decision to fire Staub. Specifically, the Court noted that Buck's termination notice expressly stated that Staub was terminated because he had ignored the directive in the supervisor's disciplinary warning.

Additionally, the Court refused to adopt a "hard-and-fast" rule absolving an employer of liability where a decision maker conducts an independent investigation. The Court reasoned that even with an independent investigation, a non-decision maker's discriminatory report may still be a motivating factor for the decision maker's ultimate adverse employment action. Furthermore, the Court clarified that the expansion of cat's paw liability did not include circumstances where an employer's independent investigation results in an adverse action for other, nondiscriminatory reasons.

Implications for CAAs

Staub represents an expansion of cat's paw liability for employers in USERRA claims and other types of employment discrimination actions where an employee's protected status is a "motivating factor" in the adverse employment action, even if the ultimate decision maker did not discriminate against the protected employee. Although the Court applied cat's paw liability under USERRA, the Court's analysis and reference to other types of discrimination claims suggests that cat's paw liability may be expanded in the context of such claims. To comply with the potential broad scope of liability, employers should:

- Review an employee's past conduct and work history before initiating an adverse employment action. As *Staub* demonstrates, a proper independent investigation requires an employer to do more than rely solely on personnel files or recommendations from supervisors. Consequently, an employer should speak with the subject employee about the allegations and review other available information. Although the Court makes it clear that an independent investigation might not completely absolve an employer of liability, it bolsters an employer's case should an employee file an adverse employment action.
- Create a complaint policy and procedure that requires documentation and careful review of all complaints and disciplinary actions against an employee. A second layer of review should provide an employer with greater protection if an employee files an adverse employment action.
- Ensure that supervisors, human resources staff, and other organization officials are informed of the federal discrimination laws. Proper training should help reduce the risk of inadvertent discriminatory conduct by supervisors.

See end notes on page 19.