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How Evenhanded Employers Can Be “Tricked” Into Discriminating

An employer can be liable to an employee for a wrongful termination if a discriminatory supervisor performs an act intended to cause an adverse employment action against the employee, according to the March 1, 2011, decision by the U.S. Supreme Court in *Staub v. Proctor Hospital*. This landmark case potentially widens an employer's liability to employees who allege discrimination claims.

Vincent Staub, a member of the United States Army Reserves, was employed as an angiography technician at Proctor Hospital. Mr. Staub's military service required him to have a flexible schedule so that he could attend drills, held one weekend a month and annual training, held two weeks a year. Janice Mulally, second in command over Staub's department, and Michael Korenchuk, head of Staub's department, were allegedly hostile toward his military obligations that required him to have a flexible schedule.

Staub claimed that Ms. Mulally, who was responsible for the department's schedule, would purposefully create conflicts between his hospital schedule and his military schedule. Additionally, Ms. Mulally attempted to require Staub to use vacation time while he was fulfilling his military obligations and publically posted requests for people to cover his shifts, making him appear irresponsible to his peers. Mr. Korenchuk supposedly went as far as to call Staub's drill weekends, "a bunch of smoking and joking and a waste of taxpayers' money."

In January 2004, Mr. Mulally issued Staub a written warning that accused him of violating a company rule that required him to stay in his work area whenever he was not with a patient. Staub claims that such a rule did not exist and, even if it did, he did not violate it. Regardless, the warning required Staub to notify Korenchuk or Mulally whenever he left his area.

In April 2004, Korenchuk reported to Linda Buck, Proctor Hospital's VP of Human Resources, that Staub had left his desk without informing a supervisor, violating the January written warning. Staub contends that this accusation was false, claiming he left Korenchuk a voicemail saying that he was leaving his desk. Nonetheless, Ms. Buck relied on Korenchuk's accusation and, after reviewing Staub's personnel file, fired him for violating the written warning.

Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation that he violated a company rule in January 2004 because of her hostility toward his military obligations. Buck again looked at Staub's personnel file but did not investigate any potential military animus on the part of Mulally or Korenchuk. Ultimately, Buck, who was not accused by the plaintiff of having a military animus, upheld her decision to terminate Staub.

Staub sued Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), claiming that his discharge was motivated by hostility towards his military obligations. Prior to the Supreme Court's ruling in Staub's case, Proctor Hospital likely would have been found to not be liable

because Buck, the ultimate decision maker, did not have any military animus. The Court's decision, however, widened an employer's liability for discrimination claims. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (U.S. 2011). Formerly, under the "cat's paw" analysis, as long as the ultimate decision maker regarding an adverse employment action had no discriminatory animus, the employer could not be held liable for that adverse decision.

In *Staub*, the Supreme Court held that the decision maker who authorizes the adverse employment action doesn't have to be the person with the discriminatory intent. Now, if the employee can show someone with bias *influenced* the decision maker in taking an adverse employment action, the employer can be held liable for discrimination.

Although Staub's action was brought under USERRA, the newly-adopted principals in his case will likely extend beyond military personnel. These principals will also almost certainly apply to claims arising from Title VII of the Civil Rights Act, which prohibits employment discrimination based on race, color, religion, sex and national origin.

Tips for Employers

So how does a decision maker avoid this type of clam when making an adverse employment action? For starters, make sure you are not duped into action in order to accomplish another's discriminatory purpose. The following tips will help ensure that decision makers are taking action for the right reasons:

First, don't rubber stamp the decisions of subordinate supervisors. If you are going to make a decision to terminate an employee, don't base the decision solely on the recommendation of another. Employers need to conduct an investigation to make sure the recommendation is based on non-discriminatory reasons.

Second, make sure the investigation is formal and thorough. A court is likely to see right through a perfunctory, mechanical investigation conducted by a decision maker who, in reality, is just accepting the recommendation of a subordinate.

Third, don't assume you know the motivation of the supervisors who are making the recommendation. Just because the subordinate who is recommending that you make an adverse employment action is a long-time employee (or even friend), don't assume there isn't an underlying discriminatory purpose. If you are an unbiased decision maker who authorizes an adverse employment action, you putting yourself at risk if the decision can't be corroborated with other evidence.

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