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## Employer Liable for Discriminatory Motive of Supervisor

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### Cat's Paw Liability Affirmed.

In its March 1, 2011 opinion in Staub v. Proctor Hospital, 562 U.S. \_\_\_ 1315.Ct.1186, 2011 U.S. LEXIS 1900 (U.S. Mar. 1, 2011), the United States Supreme Court considered the circumstances under which an employer can be held liable for employment discrimination based on the discriminatory animus of a supervisor who influenced, but did not make, the ultimate employment decision. This theory of liability is known as "Cat's Paw" liability.<sup>1</sup> In a Cat's Paw case, an employer is held liable for the discriminatory animus of a supervisor who was not charged with making the ultimate employment decision. In other words, the decision maker did not have a discriminatory motive in making the employment decision but unwittingly relied on information from someone who did, thereby rendering a decision tainted by discriminatory intent.

According to the Supreme Court's opinion, Vincent Staub worked for Proctor Hospital as an angiography technician until he was fired in 2004. He was also a member of the United States Army Reserve which required that he attend drill one weekend per month and training a few weeks each year. Staub's immediate supervisor, Janice Mulally, and Mulally's supervisor, Michael Korenchuk were hostile to Staub's military obligations, both of them having made derogatory comments about those obligations. In January 2004, Mulally issued a Corrective Action to Staub for allegedly violating a

company rule requiring him to stay in his work area when he was not with a patient. Three or four months later, one of Staub's co-workers complained to Linda Buck, the head of the Human Resources Department, that Staub was frequently unavailable and abrupt. A few weeks later, Korenchuk reported to Buck that Staub had violated the January Corrective Action by leaving his desk without informing a supervisor.

Relying upon Korenchuk's report as well as the complaint from Staub's co-worker and her review of Staub's personnel file, Buck terminated Staub. The termination notice stated that Staub had ignored the January Corrective Action. Staub challenged the termination through the Hospital's grievance procedure asserting that there was no company rule requiring him to stay in his work area and, in any event, he did not violate the January Corrective Action. When the termination decision was confirmed during the grievance procedure, Staub filed suit under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 et. seq. which prohibits discrimination against employees based on their status as military reservists. The case went to trial and a jury found in Staub's favor awarding him \$57,640 in damages. The Seventh Circuit Court of Appeals reversed finding that because Buck conducted her own, albeit cursory, investigation, she was not wholly dependent upon Mulally and Korenchuk for her information and therefore Proctor Hospital

<sup>1</sup> The term "Cat's Paw" liability was first used in the employment discrimination context by Judge Posner in a 1990 age discrimination case. See Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990). As noted by the Supreme Court in Staub, the term "Cat's Paw" derives from an Aesop fable which was put into verse by La Fontaine in 1679. "In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning his paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing. A coda to the fable (relevant only marginally, if at all, to employment law) observes that the cat is similar to princes who, flattered by the king, perform services on the king's behalf and receive no reward." Staub at \_\_\_, fn 1.



could not be held liable under Cat's Paw Liability. According to the Seventh Circuit, a Cat's Paw case can only succeed when the non-decision maker exercises such "singular influence" over the decision maker that the decision to terminate is the product of "blind reliance".

The U.S. Supreme Court granted certiorari and reversed. In so doing, the Court analyzed general tort and agency law principles and 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.

The Court rejected the notion advanced by the Seventh Circuit that an employer is automatically relieved of any liability simply because it conducted an investigation. In that regard, the Court explained that Proctor Hospital "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." The fact that Buck reviewed plaintiff's personnel file and considered the complaint of plaintiff's co-worker was not sufficient to relieve Proctor of liability because Korenchuk's report concerning the January Corrective Action was also considered by Buck and was, in the end, the stated reason for the termination decision. In order to avoid liability for making an adverse employment decision, the Court stated that the employer's investigation must uncover reasons for the

adverse action which are unrelated to the supervisor's original biased report.

Although the ruling in Staub was based upon USERRA, it is likely to be applied to other anti-discrimination statutes such as Title VII and the Age Discrimination in Employment Act. What, then, are employers to do to protect themselves from liability under Staub?

- **Training**-Employees and supervisors at every level should be properly trained in the laws prohibiting discrimination so that everyone knows what is and what is not permissible conduct in the work place.
- **Policies**-Employers need written policies prohibiting discrimination in the work place that are distributed, posted and available for all employees to see. Those who violate those policies should be terminated.
- **Investigation**-Ultimate decision-makers cannot take anything for granted when making employment decisions that have a negative impact on employees. Investigations should be thorough and, if possible, conducted by an independent third party who does not have any "skin in the game". An employer who makes an adverse employment decision which does not appear justified based on a good faith investigation (wholly independent of the supervisor's recommendation), does so at his/her own risk.
- **Internal Grievance Procedure**-In his concurring opinion in Staub, Justice Alito encouraged employers to establish internal grievance procedures because they often

provide relief for employees without the need for litigation and also provide some protection for employers who proceed in good faith (although, notably, the grievance procedure utilized by Staub and Proctor did not achieve either result).

If in doubt, employers should review the proposed employment action with in-house or outside counsel for appropriate guidance.

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*For over 25 years, Madeline S. Baio has counseled and defended clients in connection with employment related claims and lawsuits before the EEOC, PHRC and other state agencies as well as the State and Federal Courts. Ms. Baio has undertaken workplace investigations stemming from retaliation and harassment claims and has advised clients with regard to the drafting and implementation of employee policies and procedures. Among other things, she has defended Civil Rights Claims, FLSA claims, ERISA claims and claims of discrimination based on race, age, sex, national origin, and disability. Her clients have included national retail stores, hospitals, aerospace, defense and technology companies, trucking companies, banking institutions, country clubs, municipalities and municipal authorities, county prisons and privately owned businesses and non-profit organizations. For further information about this article or other employment related issues, please contact Ms. Baio at [baio@nicolsonassoc.com](mailto:baio@nicolsonassoc.com) or by calling 610-891-0330.*

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