EMPLOYMENT LAW: THE *STAUB* DECISION

by

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This article briefly reviews the United States Supreme Court case of *Staub v Proctor Hospital*, 562 US ___ (2011).

In *Staub* the Supreme Court considered the issue of under what circumstances may an employer be held liable based on the unlawful intent of employees who caused or influenced but did not make the ultimate employment decision. This is called the “cat’s paw” theory. The "cat's paw" theory comes from an Aesop's fable, in which a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing except burnt paws. In the employment law context, the cat is the ultimate decision maker and the monkey is the discriminatory supervisor who influenced the ultimate decision maker. See generally *Aesop for Children*, 61 *The Monkey and the Cat*, (1919), http://www.mythfolklore.net/aesopica/milowinter/61.htm , and *Shager* v *Upjohn Co*, 913 F2d 398, 405 (CA 7, 1990). The cat’s paw theory is discussed at *Madden v Chattanooga City Wide Serv Dept*, 549 F3d 666 (CA 6, 2008); *Ercegovich v Goodyear Tire & Rubber Co,* 154 F3d 344 (CA 6, 1998); *Ramanathan v Wayne State Univ Bd of Gov*, 480 Mich 1090; 745 NW2d 115 (2008); and *Jenkins v Trinity Health Corp*, unpublished opinion of the Michigan Court of Appeals issued July 28, 2009 (Docket No 284659).

In *Staub* an employee sued under the Uniformed Services Employment and Reemployment

Rights Act of 1994, 38 USC 4301 *et seq.* The employee claimed that his discharge was motivated by hostility to his military obligations. His contention was not that the ultimate decision maker had military hostility but that lower level supervisors did, and the lower level supervisors' actions influenced the higher level supervisor's ultimate employment decision. A jury found that the employee's military status was a motivating factor in the decision to discharge him.

The Seventh Circuit reversed. The Seventh Circuit held that the employer was entitled to judgment as a matter of law because the undisputed evidence established that the ultimate decision maker was not wholly dependent on the advice of the lower level supervisors. 560 F3d 647 (7th Cir 2009). The Supreme Court granted certiorari. 559 US ___ (2010).

The Supreme Court reversed. Justice Scalia delivered the opinion of the Court, joined in by Justices Roberts, Kennedy, Ginsburg, Breyer, and Sotomayor. According to Justice Scalia the issue concerned the phrase "motivating factor in the employer's action." When the ultimate decision maker is personally acting out of hostility to the employee's military service, a motivating factor obviously exists. The problem the Court confronted arises when the decision maker has no discriminatory animus but is influenced by prior employer action that is the product of someone else's discriminatory animus.

Justice Scalia indicated that animus and responsibility for the adverse action can be attributed to the lower level discriminatory supervisors if the adverse action is the intended consequence of that earlier discriminatory conduct. So long as the lower level supervisors intend, for discriminatory reasons, that the adverse action occur, they have the scienter required for the employer to be liable. The judgment exercised by the ultimate decision maker does not prevent the earlier agent's action and animus from being the proximate cause of the harm. Proximate cause

requires only some direct relation between the asserted injury and the alleged injurious conduct, and excludes only those links that are too remote, contingent, or indirect.

A supervisor is an agent of the employer. When the supervisor causes an adverse employment action, the employer causes it. When discrimination is a motivating factor in the supervisor's act, it is a motivating factor in the employer's action.

The Supreme Court held that, if a supervisor performs an act motivated by discriminatory 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. The Court expressed no view as to whether the employer would be liable if a co-employee, rather than a supervisor, committed a discriminatory act that influenced the ultimate decision.

Justice Alito wrote a concurring opinion, joined by Justice Thomas. The concurring opinion stated that the Court strayed from the statutory text by holding that it is enough for an employee to show that discrimination motivated some other action and that this prior action caused the termination decision. According to the concurring opinion, the prior discriminatory action is, in effect, purged when the ultimate formal decision maker, having been alerted to the possibility that adverse information may be tainted, completes a reasonable investigation and finds insufficient evidence to dispute the accuracy of that information.

Justice Kagan took no part in the decision of the case.

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