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Supreme Court upholds "cat's paw" theory

A highly anticipated decision from the U.S. Supreme Court resulted in a relatively straightforward unanimous decision (on the result), with the Court analyzing the circumstances under which an employer may be held responsible for acts of discrimination along the chain of job decisions resulting in an adverse employment decision. In *Staub v. Proctor Hospital*,[1] the Court held 8-0 that under USERRA,[2] if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action (termination in Staub's case), and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.[3] The decision has broader implications than this holding, however, since Justice Scalia's opinion specifically noted the similarity of the antidiscrimination language in USERRA to the language of Title VII, suggesting the analysis of similar facts under Title VII could have a similar result.[4]

The "cat's paw" doctrine is a theory of liability that allows an employee to prove discrimination in an employment decision where the decisionmaker is unbiased.[5] Under the theory, the discriminatory motive of a non-decisionmaker is imputed to the decisionmaker (and employer) where the discriminator has some influence that leads to the adverse employment action. The phrase "cat's paw" is variously attributed to Aesop, the 17th Century French poet Jean de la Fontaine and Judge Posner of the Seventh Circuit of the U.S. Court of Appeals.[6]

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In the fable, a cunning monkey persuades a naïve cat to snatch chestnuts from a fire. The cat burns her paw while the monkey eats the chestnuts.[7] From this story, the term "cat's paw" has come to mean a "tool" or "one used by another to accomplish his purposes."[8]

In employment discrimination cases, a cat's paw scenario is presented where a biased official of an employer, who lacks decisionmaking power, uses the formal decisionmaker as a dupe (or "rubber stamp") in a deliberate scheme to trigger a discriminatory employment action.[9] It is also referred to as the "rubber stamp" theory of liability, or "subordinate" liability, because a subordinate official or lower-level supervisor with discriminatory bias is the motivating factor in an adverse employment decision.[10]

The court reasoned that a cat's paw case requires a decisionmaker having "blind reliance" on the discriminator, whom the employee must show exercised a "singular influence" over the nondiscriminatory decisionmaker.

In the *Staub* case, Vincent Staub was a medical technician at Proctor Hospital who lost his job after prolonged disputes with supervisors.[11] In a disagreement over the facts that any employment law practitioner will recognize, Staub's supervisors viewed these disputes as related to his lack of availability, poor attitude, and lack of communication, but Staub believed the disputes related to the refusal of his immediate supervisor to accommodate his time commitment as a member of the U.S. Army Reserve.[12] The assistant supervisor in Staub's department at the hospital had expressed open hostility to his reserve duties.[13] She scheduled him for additional shifts without notice, saying that the extra shifts were a way for him to "pay back" the department for everyone else having to adjust their schedules to cover his shifts while on duty for the reserve. She also posted notices asking for other employees to cover Staub's weekend shifts when military obligations required that he change his schedule, and called his military duties "bullshit."[15] The department head also made a comment that Staub's reserve duties consisted of a bunch of smoking and joking and a waste of taxpayer's money.[16] Around the time when Staub received an order to report for "soldier readiness processing"—a precursor to another deployment—he received a written warning for failing to pick up work and be available for work in his department.[17] Staub disputed that such a policy existed, or that he had not been available, but the department head signed off on the written warning. Under the terms of the warning, Staub was to report to the department head or deputy whenever he needed to leave his work station. Within weeks, the department head reported to the hospital's vice president of human resources that Staub would frequently disappear from the department, and was failing to report in as instructed pursuant to the written warning. Based on that report and a review of Staub's file, the vice president of human resources decided that Staub should be fired.[18]

After his firing, Staub sued under USERRA, arguing that his firing was based on discrimination against him for his military reserve membership. A jury in federal court found in favor of Staub; Staub argued to the jury that the discriminatory motive of the deputy director was attributable to the human resources vice president and therefore to the hospital.[19] He persuaded the jury that the deputy director of the department had fed false information to the human resources decisionmaker, and that this was motivated by Staub's membership in and activities with the military reserve.[20]

The 7th Circuit of the U.S. Court of Appeals reversed and dismissed the case. The court reasoned that the cat's paw theory was inapplicable in the case, because the decisionmaker took an independent look at the evidence and conducted her own review of the facts relevant to the decision.[21] The court reasoned that to be a cat's paw requires more—it requires a decisionmaker having "blind reliance" on the discriminator, and that the employee show that the discriminator exercised a "singular influence" over the nondiscriminatory decisionmaker.[22]

The U.S. Supreme Court reversed and remanded the case. The opinion of the Court by Justice Scalia began its analysis with a focus on USERRA as the creation of a federal tort and the principle that when Congress creates a federal tort it adopts the background of general tort law.[23] In reasoning whether the discriminatory acts and motives of Staub's supervisor and the director of Staub's department were attributable to Proctor Hospital, Justice Scalia referred to both the Restatement of Agency and Restatement of Torts.[24] Although the Restatement of Agency generally establishes that the malicious intent of an agent cannot generally be combined with the harmful action of another to hold a principle liable, Justice Scalia noted that the antidiscrimination language of USERRA only requires that discrimination be "a motivating factor" in the adverse action.[25] For the Court, the issue was one of proximate cause—did the employer's investigation result in an adverse action for reasons unrelated to the supervisor's original biased action? If so, the employer would not be liable.[26] If, however, there is some direct relation between the injury asserted and the alleged discriminatory animus, then proximate cause could be established.

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Justice Scalia's opinion also rejected the argument that the mere exercise of judgment by the ultimate decisionmaker was sufficient to insulate the employer from liability, stating "it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm."[27] The Court therefore held that if a supervisor performs an act motivated by antimilitary animus that is intended to cause an adverse employment action, and that act is the proximate cause of the ultimate employment action, then the employer is liable under USERRA.[28]

The Court reversed the decision of the 7th Circuit and remanded the case to that court to decide whether the jury's verdict should be reinstated or whether Proctor Hospital was entitled to a new trial. The Court left it to the 7th Circuit to decide whether the variance between its opinion and the jury instruction requiring only that the jury find that "military status was a motivating factor in [Proctor's] decision to discharge him" would require a new trial.[28]

The Court's opinion also refers back to the seminal employment law cases in 1998 of *Burlington Industries, Inc. v. Ellerth*,[30] and *Faragher v. City of Boca Raton*,[31] which also relied on agency principles in determining when an employer could be held liable in employment discrimination cases. The Court's use of agency principles in this case under USERRA, and reference to the similarity of the antidiscrimination language in Title VII, indicates that agency principles apply in existing and future cat's paw cases.

As a practical matter, decisionmakers and human resources administrators cannot assume that an employer is insulated from the discriminatory acts of lower level managers and supervisors simply by conducting an independent review of a paper record. ◆

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Endnotes

[1] 562 U.S. ____, 131 S.Ct. 1186, 2011 U.S. LEXIS 1900 (2011).
[2] Uniformed Services Employment and Reemployment Rights Act of 1994.
[3] See *Staub*, 2011 U.S. LEXIS 1900, *19-20. Justice Alito concurred in the result but wrote a concurring opinion that Justice Thomas joined. Justice Kagan recused herself from consideration of the case because, as solicitor general, she had advocated reversing the decision of the lower court on behalf of the Obama Administration.
[4] See id., 2011 U.S. LEXIS 1900, *10-11.
[5] See id., fn. 1, 2011 U.S. LEXIS 1900, *9-10.
[6] See, id. ; see also *Staub v. Proctor Hospital*, 560 F.3d 647, 650 (7thCir. 2009), and *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).
[7] See *id.*
[8] *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006), quoting Webster's Third New International Dictionary Unabridged, 354 (2002).
[9] See id., citing *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998).
[10] See *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006).
[11] Justice Scalia noted that both sides continued to hotly dispute the facts surrounding the firing, so the facts related in this article come from the opinions of the Court and Court of Appeals who viewed the alleged facts in the light most favorable to Staub.
[12] See *Staub*, 560 F.3d at 651.
[13] See id.
[14] See id., 560 F.3d at 651-52.
[15] See id.
[16] See id., 560 F.3d at 652.
[17] See id., 560 F.3d at 652-53.
[18] See id., 560 F.3d at 653-55.
[19] See id., 560 F.3d at 655.
[20] See id., 560 F.3d at 655.
[21] See id., 560 F.3d at 658.
[22] See id.
[23] See *Staub*, 2011 U.S. LEXIS 1900, *11.
[24] See id., 2011 U.S. LEXIS 1900, *12-13, 16 fn.2.
[25] See id., *14.
[26] See id., *17-18.
[27] Id., *14-15.
[28] See id., *19-20.
[29] See id., *22.
[30] 524 U.S. 742 (1998).
[31] 524 U.S. 775 (1998).