

Supreme Court Recognizes Cat's Paw Liability in Army Reservist's USERRA Discrimination Case

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The U.S. Supreme Court has ruled unanimously that employers may be subject to liability in employment discrimination cases even if the ultimate decision to take an adverse employment action was made by a manager who was not biased toward the affected employee. *Staub v. Proctor Hospital*, No. 09-400 (Mar. 1, 2011).

In a case alleging discrimination because of military status under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Court ruled an employee's supervisor's act that was motivated by bias and intended to cause an adverse employment action can make an employer liable under USERRA where the act is the proximate cause of the termination or other ultimate employment action.

While the employee in this case brought his claims under USERRA, the Court's holding undoubtedly will apply to claims under other anti-discrimination laws, such as Title VII of the Civil Rights Act, as well. Independent investigations by ultimate decision makers of employee complaints of allegedly inappropriate faultfinding by supervisors may provide a defense to USERRA and other discrimination claims, though it may burden already busy human resources executives.

The Facts

Vincent Staub sued Proctor Hospital of Peoria, Illinois, after he was discharged from his position as an angiography technologist. Staub, who was an Army Reservist, alleged that the hospital's stated reasons for the termination — insubordination, shirking, and attitude problems — were simply pretext for discrimination based on his military status.

As an Army Reservist, Staub had to report for military duty one weekend each month and two weeks during the summer. Over time, his supervisor allegedly began to show animosity toward

Staub's military obligations. There was also evidence that the head of Staub's department had made derogatory comments about his military service.

The trial evidence showed Staub had been counseled for problems with his work attitude, professionalism, and ability to work well with others. After one incident, he was warned in writing that he must remain in his assigned work area and not leave without permission from his supervisor or the department head.

Roughly three months later, Staub was terminated by the hospital's Vice President of Human Resources for leaving his work area without permission. Staub explained to the Vice President of Human Resources that he had left a message for his department head that he was going to lunch. The Vice President of Human Resources apparently did not investigate this assertion.

Staub sued the hospital, claiming its stated reasons for terminating him were actually pretext for discrimination in violation of USERRA. He argued that although the Vice President of Human Resources, who made the decision to terminate him, was not one of the supervisors who had shown hostility toward his military obligations, the Human Resources professional was influenced by the two supervisors. This is the "Cat's Paw" theory of liability.

Lower Court Decisions

At trial, the jury found for Staub, concluding his "military status was a motivating factor in [the hospital's] decision to discharge him." The parties stipulated Staub's lost wages were \$57,640. Although under USERRA, a successful plaintiff may be awarded double lost wages plus attorneys' fees if the violations were found willful, the jury did not find willfulness here. The district court entered judgment accordingly.

The Seventh Circuit Court of Appeals disagreed with the verdict imposing liability. It relied on the ground there was no evidence the ultimate decision maker, the Vice President of Human Resources, considered Staub's military status in discharging him.

Supreme Court Decision

The Supreme Court unanimously reversed the Seventh Circuit's decision. (Justice Elena Kagan did not participate in the case.)

The Court described the case as one where the ultimate decision maker was not biased, but was influenced by previous company action that was discriminatory. Because the jury found in favor of Staub, the Court had to consider the facts in a light most favorable to him, accepting his claim that his supervisors had made a number of derogatory comments regarding his Army Reserve service.

After reviewing its prior decisions, the Court noted bias by a supervisor is not sufficient by itself; the biased supervisor's action must be a cause of the ultimate adverse employment action.

The Court rejected the hospital's claim that the supervisors' actions were not the cause of Staub's discharge because the hospital had conducted an investigation. The Court explained that if an "independent investigation" simply "relies on facts provided by the biased supervisor," then the employer "will have effectively delegated the factfinding portion of the investigation to the biased supervisor." Ultimately, the Court held, "if the 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." (Emphasis in original.)

The Court found significant that Staub's termination notice specifically referred to the directive of the purportedly biased supervisors. Evidence that Staub's supervisors had the "specific intent" to cause Staub to be discharged also was noteworthy to the Court.

Seeing a difference between its holding and the instructions given to the trial jury, the Court remanded the case to the Seventh Circuit with directions to consider whether the discrepancy was harmless error or should require a new trial.

Implications for Employers

The Court's holding will make it more difficult for employers to avoid trial through motions for summary judgment based on an absence of bias by the ultimate decision maker. The Staub motivating-factor test applies both to USERRA and mixed-motive Title VII claims. It does not apply, however, to age discrimination claims. (See our article, [Supreme Court Rules ADEA Plaintiffs are Not Entitled to "Mixed Motive" Instruction](#).)

While the implications of the decision are not favorable for employers, the Supreme Court's careful language regarding investigations points to an effective way of reducing exposure to discrimination claims. The "Cat's Paw" theory can only provide a basis for liability if the purportedly biased supervisor's action was the proximate cause of the adverse action. The Court noted, "[I]f the employer's investigation resulted in adverse action for reasons unrelated to the supervisor's original biased action [], then the employer will not be liable."

Future cases will certainly define the necessary scope of internal investigations. Meanwhile, employers should consider applying some minimum requirements. For example, employers should review relevant documents and speak with the employee, the referring supervisor and other witnesses, as appropriate. Ultimately, the decision maker needs to be in a position to testify that he or she determined, "apart from the supervisor's recommendation," that the adverse action was "entirely justified."

The facts in *Staub* also highlight the importance of training supervisors on employers' obligations and employees' rights under USERRA and other anti-discrimination statutes. For example, the testimony suggests the supervisors were unaware of the protected nature of the employee's military duty and made a number of allegedly discriminatory comments.

Additionally, inquiries regarding the ability to reschedule military training may have been better handled through Human Resources rather than supervisors.

It is also important for supervisors to counsel employees consistently in writing regarding misconduct and performance issues and to keep good records of counseling sessions. Such records may help show that an employee's membership in a protected class — such as military status — was not the reason for an adverse employment action.

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