

"Cat's Paw" Defense Diminished

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Deciding a case under USERRA, the United States Supreme Court recently diminished an employer's "cat's paw" defense to liability for adverse employment actions. The issue arises when an unbiased manager makes a decision adversely affecting an employee, but which is based at least partly on the recommendation or fact-finding of a biased supervisor. Previously, there was no liability for the biased supervisor's input as long as the unbiased manager made an independent investigation and decision. The Supreme Court changed that rule in *Staub v. Proctor Hospital* (March 1, 2011). *Staub* holds that if the biased supervisor performs an act motivated by animus and which is intended to cause an adverse employment action, and if that act is the proximate cause of the ultimate employment action, the employer is liable for the employment action. Justice Alito would have adopted a rule that immunized employers from liability if the unbiased decision-making manager had performed an independent investigation before making the decision. The Court, however, rejected that approach. The biased supervisor's animus would still lead to liability as long as it somehow influenced the unbiased manager (which typically would be by way of recommendation or accepting any fact-finding made by the biased supervisor). Presumably, depending on the circumstances, an independent investigation can still avoid liability even if a supervisor is biased. But the unbiased manager might need to re-find all the facts, and it would be best if the biased supervisor makes no recommendations as to what employment action should be taken. It can be argued that this decision fails to appreciate the realities of the workplace. It is necessary for decision-makers to rely on the fact-finding and even recommendations of lower-level supervisors; yet the decision would find employers liable if they do so, even if the reliance was in good faith. In addition, employees will contend that this decision has broad application. Although the decision was made under USERRA, employees will contend it applies to other employment discrimination statutes. The standard under USERRA is whether bias was "a motivating factor" in an adverse action, which is the same standard as under, for example, Title VII.

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