Employment Law

Internal Review Does Not Relieve Employer of 'Cat's Paw' Liability

Jeffrey Campolongo Contact All Articles
The Legal Intelligencer | August 26, 2011


Jeffrey Campolongo

Applying the recent U.S. Supreme Court precedent from *Staub v. Proctor Hospital* , a unanimous 3rd U.S. Circuit Court of Appeals decision determined that an internal and supposedly independent disciplinary review of an employee does not necessarily protect the employer from liability for a supervisor's unlawful discrimination. This is commonly known as the "cat's paw" theory of liability.

The term "cat's paw" is a phrase derived from La Fontaine's fable, "The Monkey and the Cat," referring to a person (in the fable, a cat) used unwittingly by another (the monkey) to accomplish his own purposes. The concept was injected into the employment discrimination landscape by 7th Circuit Judge Richard Posner in 1990 in the landmark case *Shager v. Upjohn Co*.

On Aug. 17, the 3rd Circuit expounded on the cat's paw theory in *McKenna, et al. vs. City of Philadelphia* , in which former Philadelphia Police Officer Raymond Carnation brought numerous complaints to his supervisors regarding mistreatment of and discrimination against minority police officers. According to the facts of the decision, his supervisors did not take any action to address the allegations, and instead assigned Carnation to unassisted duty in dangerous neighborhoods during poor weather conditions. Carnation continued to make complaints about the supervisors' apparent condoning of ongoing racial tensions. He was subsequently transferred and was threatened by his supervisor that his job would become "a living nightmare" if he filed an EEOC complaint.

Disciplinary charges were later brought against Carnation by his former supervisor for insubordination, neglect of duty, and conduct unbecoming of a police officer. A hearing before the Police Board of Inquiry (PBI), a panel that hears evidence then makes a recommendation to the police commissioner, resulted in his discharge in 1999.

Carnation filed an EEOC complaint, alleging "retaliation for his opposition to the City's racially discriminatory treatment of minority officers." The jury found that Carnation proved by a preponderance of the evidence that the disciplinary action against him was motivated by unlawful retaliation by his supervisor stemming from the supervisor's unlawful discriminatory animus. The jury awarded Carnation $2 million in compensatory damages, which was reduced by the judge to $300,000 in accordance with Title VII damage caps. Interestingly, this was not pled as a Section 1983 case or cross-claimed with the Pennsylvania Human Relations Commission, both of which would have avoided the imposition of damage caps.

The city appealed the trial court's denial of its post-trial motions for judgment as a matter of law and judgment notwithstanding the verdict. The city contended that the disciplinary review hearing by the Police Board of Inquiry "severed the causal connection between a supervisor's retaliatory animus and the employer's ultimate employment decision to terminate the employee."

The 3rd Circuit applied the Supreme Court's analysis in *Staub* , which addressed "the circumstances under which an

employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."

As my colleague Sid Steinberg wrote in his March 9 article, the Supreme Court in *Staub* decided that an employer can be held liable for unlawful discrimination if the employer's actions were influenced by discrimination of an employee, the test being one of proximate cause.

According to *Staub* , an independent investigation does not necessarily relieve the employer of liability for a non-decision maker's discrimination. If the investigation leads to an adverse action, the reason for the action must be unrelated to the supervisor's bias and be "entirely justified" without the supervisor's biased opinion in order for the employer to avoid liability.

Essentially, the employer cannot give effect to the supervisor's intent of causing an adverse action based upon discrimination. However, an independent investigation of the employee's allegations of discrimination could relieve an employer of liability.

In *McKenna* , the city challenged "the conclusion that [the supervisor's] animus may be imputed to the PBI, which recommended Carnation's termination, and the Commissioner, who actually terminated Carnation." The 3rd Circuit, in a unanimous vote, upheld the decision. Since Carnation had established a prima facie case that his termination was motivated by retaliation, the city bore the burden of providing evidence that the reason for Carnation's termination was unrelated to the supervisor's originating biased action.

According to the 3rd Circuit, there was sufficient evidence for a reasonable jury to conclude there was a direct and substantial relation between the supervisor's discriminatory animus and the actions taken against Carnation, such that the Police Board of Inquiry did not make an independent recommendation. And, Carnation's discipline and termination would have been foreseeable results to the supervisor at the time he instigated the disciplinary action.

The *McKenna* decision establishes that the courts can be expected to stringently apply the *Staub* holding and will closely analyze the interplay between the alleged discriminatory animus of an employee and the internal review board's decision making process. Employers need to ensure that their disciplinary processes review evidence independently of influence by a complaining supervisor, and that there are legitimate and documented reasons apart from any possible discrimination by an employee or supervisor for any disciplinary action taken. *McKenna* also serves as a reminder to plaintiffs attorneys to be mindful of damage caps and take advantage of all available statutes and remedies offering relief beyond Title VII. •

JEFFREY CAMPOLONGO *is the founder of the* ***Law Office of Jeffrey Campolongo****, a boutique firm focusing on employee rights and counseling aspiring and established entertainers. He can be reached at* ***jcamp@jcamplaw.com.***

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