Supreme Court Blesses 'Cat's Paw' Theory Making it Easier for Employees to Prove Discrimination

March 17, 2011

According to a recent U.S. Supreme Court ruling, employers will need to use up one of their nine lives in an employment action when the cat's paw theory is used by the plaintiff.

The cat's paw theory permits a plaintiff to prove an employment decision is unlawful when the decision maker, who had no unlawful bias, relied on information from one who did. The Supreme Court's ruling not only approves of the theory's use, but makes it more difficult for employers to avoid its application to their employment decisions. *See Staub v Proctor Hospital* (March 1, 2011).

The term "cat's paw" comes from a 1600s fable in which a monkey induces a cat, through flattery, to smack chestnuts roasting in a fire with his paw. Rather than sharing the chestnuts, the monkey makes off with them all.

In this case, the plaintiff was a member of the U.S. Army Reserves and was required to train full-time two or three weeks a year and one weekend each month. Allegedly, his supervisor (Mulally) and her supervisor (Korenchuk) were both hostile to the plaintiff's military obligations and allegedly wanted to "get rid of him." Of course, terminating an employee because of his or her military obligations would violate the Uniform Services Employment and Re-Employment Act (USERRA).

In January 2004, the plaintiff was disciplined by Mulally for violating a work rule requiring him to stay in his work area when he was not working with a patient. He contested that such a rule existed and further contested that, if it did, he had violated it.

In late April, Korenchuk wrote the plaintiff up a second time for the same work rule violation. The plaintiff claimed this was unfounded because he had left his supervisor a voicemail indicating he was leaving his desk.

The vice president of human resources (Buck) relied on Korenchuk's accusation, and after reviewing the plaintiff's personnel file, terminated his employment for ignoring the directive in the January 2004 discipline notice.

The plaintiff prevailed at trial on his claim brought under USERRA. The evidence at trial showed that Mulally and Korenchuk had an unlawful motivation. However, there was no such evidence regarding Buck. Rather, the plaintiff argued that, under the cat's paw theory, Buck's decision, which relied on the

corrective actions given to him by Mulally and Korenchuk, had been poisoned by their unlawful animus.

The Seventh Circuit Court of Appeals reversed the trial court's decision because, in that federal circuit, the cat's paw theory "could not succeed unless the non-decision maker exercised such 'singular influence' over the decision maker that the decision to terminate was the product of 'blind reliance.'" Since Buck not only reviewed the personnel file, but talked her decision over with another human resources employee, blind reliance had not been proven. The plaintiff sought review by the U.S. Supreme Court, which was granted.

The Supreme Court reviewed the arguments of the parties and agency principles before upholding the cat's paw theory and provided some guidance for its use. The guidance is not good news for employers.

The court explained that:

"if the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action (by the terms of USERRA, it is the employer's burden to establish that), then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think that the independent investigation somehow relieves the employer of 'fault.' The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."

Dismissing arguments by Justice Samuel Alito, which would have held the employer liable only when it delegates "'part of the decision-making power' to the biased supervisor," the court explained that "if the independent investigation relies on facts provided by the biased supervisor – as is necessary in any case of cat's paw liability – then the employer … will have effectively delegated the fact-finding portion of the investigation to the biased supervisor." Therefore, the Supreme Court held that the Seventh Circuit erred in holding that the employer was entitled to judgment as a matter of law.

In light of the court's ruling, how should employers make termination decisions? In the past, it has been recognized that, generally, a direct supervisor should not have the authority to terminate an employee and that there should be an independent investigation by someone of higher authority or the human resources employee/department.

Given the court's ruling, in a cat's paw case, the focus will be entirely on whether the decision maker relied upon information from the biased supervisor.

There is nothing in the court's opinion to suggest, for example, that Buck met with witnesses to determine whether the plaintiff did what he was accused of doing. Rather Buck relied almost exclusively on the disciplinary actions prepared by the biased supervisors in making the discharge decision.

Bottom line, "if a supervisor performs an act motivated by [an unlawful 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 key is to ensure that individuals, who make termination decisions based upon the reports of others who are allegedly biased, should investigate the facts contained in those reports and make an independent decision based upon the facts and their own conclusions.

Given potential liability, employers are wise to consult with experienced employment attorneys prior to making discharge decisions. If you have any questions, please contact the author Claudia D. Orr or any member of Plunkett Cooney's Labor and Employment Law Practice Group. To review a practice group directory, click here or call Labor and Employment Practice Group Leaders Christina L. Corl at (614) 629-3018 or Courtney L. Nichols at (248) 594-6360.