

## Supreme Court Reinforces Obligation of Decision-Maker to Carefully Examine the Basis for Taking Employment Action

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*On March 1, 2011, the Supreme Court handed down its ruling in the employment discrimination case *Staub v. Proctor Hospital*, \_\_ U.S. \_\_, slip op. (2011). The takeaway lesson from this ruling is that an employer may be liable for a employment decision made by an innocent ultimate decision-maker (i.e., one who possesses no discriminatory animus towards an employee subject to adverse employment action) if that decision is tainted by discriminatory input provided by the employee's supervisors.*

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In *Staub*, the Court addressed the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee's supervisor who influenced, but did not make, the ultimate employment decision. The statute at issue was the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), which provides in relevant part:

- A person who is a member of . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, . . . or obligation.
- An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." §4311(c).

38 U.S.C. §4311(a), (c). The Court noted that USERRA is "very similar to Title VII," which prohibits employment discrimination where "race, color, religion, sex, or national origin" "was a motivating factor for any employment practice, even though other factors also motivated the practice." Therefore, this ruling will likely have broad application across a number of anti-discrimination employment statutes.

The employee claiming bias (*Staub*) was a member of the U.S. Army reserves, which service required him to train one weekend per month and two or three full weeks per year. Evidence at jury trial showed that both *Staub's* immediate supervisor (*Mulally*) and *Mulally's* supervisor (*Korenchuk*) were hostile to *Staub's* military obligations because (among other reasons) *Staub's* military duty caused strain on the hospital

department in which he served. Evidence also showed that Korenchuk was aware that Mulally was “out to get” Staub.

The circumstances leading to Staub’s termination involved both Mulally and Korenchek, but the ultimate decision to terminate Staub rested with the Human Resources Vice President, Buck. Mulally issued Staub a “Corrective Action” disciplinary warning for purportedly violating a company rule. Korenchuk and Buck were tasked with implementing a corrective action plan to address Staub’s alleged work performance deficiencies. Before that plan was implemented, Korenchuk accused Staub of again violating the company rule. Based on this accusation, and on a review of Staub’s personnel file, Buck fired Staub for ignoring the direction in the Corrective Action.

A jury found that Staub’s military status was a motivating factor in Proctor’s decision to discharge him. The Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law because Staub’s claim impermissibly sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision.

The Supreme Court reversed and remanded the Seventh Circuit’s decision.<sup>1</sup> Although no evidence existed showing Buck had discriminatory animus towards Staub, the Court held that, “if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment decision, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.” The Court defined intent as where “the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.” Importantly, the Court also emphasized that employers can be liable even if the decision-maker exercised independent judgment or other factors contribute to the adverse employment decision: “it is common for injuries to have multiple proximate causes.” The only way for an employer to avoid liability for a termination that is connected to the animus of a supervisor would be if “the employer’s investigation [of the basis for the recommended termination] results in an adverse action for reasons unrelated to the supervisor’s original biased action.”

Applied here, the Court found that both Mulally and Korenchuk were acting within the scope of their employment when they took the actions (issuing the Corrective Action for violating company rule, re-accusing Staub of violating the same rule) that allegedly caused Buck to fire Staub. Evidence existed that Mulally and Korenchuk were motivated by antimilitary bias. There was also evidence showing that Mulally’s and Korenchuk’s actions were causal factors underlying Buck’s decision to fire Staub – his termination notice expressly stated that Staub had “ignored” the Corrective Action directive issued by Mulally. There was also evidence that Mulally and Korenchuk had the specific intent to cause Staub to be terminated.

In sum, *Staub* shows that the ultimate decision-maker’s lack of discriminatory animus will not insulate an employer from a discrimination claim where the adverse employment decision is influenced by a discriminatory act performed by the employee’s supervisor, and where that supervisor specifically intended the adverse employment decision to result.<sup>2</sup>

The ultimate decision-maker must not only be unbiased, but also confident that the grounds underlying the employment decision are not tainted by the discriminatory animus of the employee’s supervisors. As a result, employers should closely scrutinize personnel decisions and ensure that the ultimate decision-makers are equipped to withstand this heightened level of scrutiny for employment decisions, as well as ensure that all personnel are properly trained to prevent and avoid unlawful discrimination in the

<sup>1</sup> The Supreme Court remanded the case to the Seventh Circuit to determine whether the jury verdict should be reinstated, or Proctor should have a new trial because the jury instruction did not precisely follow the contours of the *Staub* ruling.

<sup>2</sup> The Supreme Court noted that it expressed no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision.

workplace. The decision also underlines the responsibility of employers to absorb the staffing burdens associated with having employees in military service (either active or on reserve duty), without retaliating or discriminating in any way against those employees for their service to the country.

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If you have any questions about the content of this publication, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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