



McKENNA EMPLOYMENT BULLETIN

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SUPREME COURT RECOGNIZES A COMPANY CAN BE LIABLE FOR THE DISCRIMINATORY INTENT OF ITS NON-DECISIONMAKING SUPERVISORS

In Staub v. Proctor Hospital, No. 09-400, the U. S. Supreme Court ruled that an employer can be liable for the discriminatory acts of its supervisors who do not make the final employment decisions. This is called the "Cat's Paw" doctrine. It is the situation where a supervisor with discriminatory intent, but who lacks authority to make the job decision, influences the decisionmaker in a plan to bring about a discriminatory employment action.

In Staub, after receiving a report from the supervisor that the plaintiff had violated the progressive discipline imposed on the plaintiff, the vice-president of human resources reviewed the plaintiff's personnel file and decided to fire the plaintiff. The plaintiff sued the employer and contended not that the vice-president of human resources was motivated by hostility but that the supervisor who wrote the report was and that action influenced the vice-president of human resource's decision. The U.S. Court of Appeals for the Seventh Circuit ruled that the employer was entitled to judgment because the decisionmaker, the vice-president of human resources, had relied on more than the supervisor's advice in making the decision.

The U.S. Supreme Court reversed and held that so long as the earlier supervisor intended, for discriminatory reasons, that the adverse action occur, this intent becomes the intent of the employer as required for liability. The Court held that under tort law the decisionmaker's exercise of judgment does not stop the earlier agent's action from being the proximate cause of the harm. The Court explained that if an employer could isolate its decisionmaking personnel official from its supervisors, invest the decision to take adverse employment actions in that official, and then ask the official to review the employee's personnel file before taking the adverse action, this would improperly shield the employer from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action.

CORRECTIONS OFFICER FIRED FOR NON-DISCRIMINATORY REASON FOR PEPPER SPRAY MISUSE

In Bush v. Houston County Com'n, 2011 WL 507267 (11th Cir. 2011), a female corrections officer was terminated after pepper spraying an inmate. The corrections officer claimed that she was terminated on account of her race and gender. The District Court granted summary judgment in favor of the defendants, which was affirmed on appeal. The Eleventh Circuit found that the defendants reasonably believed that Bush had violated the jail's use-of-force policy by unjustifiably pepper-spraying an inmate, and that there was insufficient evidence to establish that "similarly situated" white male officers had been treated differently. The Eleventh Circuit also found no error with the District Court's reliance upon the investigation report to show that

the reason for the discharge was the defendants' investigation into the unjustifiable pepper spray incident. The employee also failed to show that any males were treated any differently for unjustifiable force.

CONTRACT ARBITRATION CLAUSE UPHELD IN DISCRIMINATION CLAIM

In Robertson v. U-Haul Co. of Texas, 2011 WL 444773 (N.D. Tex. 2011), an at-will employee claimed that his employer discriminated against him on the basis of race and age and filed a claim in the District Court. The employer responded with a motion to dismiss because the employee had signed an employment agreement stating that in consideration for continued employment with the company, the employee agreed to arbitrate all employment disputes, including discrimination claims. The District Court held that the arbitration clause was a valid arbitration clause and the issue of discrimination was required to be arbitrated. In addition, the Court found that the fact that the contract was given to the employee after his employment had begun did not matter; the continued employment was the consideration for the arbitration agreement.

IF YOU HAVE NO KNOWLEDGE OF THE COMPLAINT, THERE IS NO RETALIATION

In Rivera-Colon v. Mills, 2011 WL 504049 (1st Cir. 2011), an employee filed an anonymous administrative complaint about gender discrimination and sexual harassment within her agency. The employee was thereafter suspended, but the Court held that the suspension was insufficient to support a claim of retaliation. The Court found that the employee was suspended before the supervisors who imposed the suspension had learned that she was the source of the anonymous complaint. Thus, the Court found that the suspension of the female employee was not retaliation for the anonymous complaint.

YOUR EMPLOYEE'S "BELIEF" IS NOT SUFFICIENT TO STATE A RETALIATION CLAIM

In Sardiga v. The Northern Trust Company, No. 1-09-2930, Illinois Appellate Court, 1st District, March 15, 2011, the Plaintiff had worked for less than a year in his job as vice-president of the employer's financial consulting group. The employee filed suit for retaliatory discharge in violation of the Illinois Whistleblower Act. But, the plaintiff failed to plead any facts showing his refusal to participate in an alleged illegal activity. The plaintiff repeatedly complained and inquired about "what he believed" were illegal practices. The Court held that this did not constitute an actual "refusal to participate" for purposes of the Whistleblower Act. The Court ruled that a plaintiff has the burden to establish that the employer retaliated against the employee for refusal to participate in a qualifying activity.

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