

LEGAL AND REGULATORY NOTES

U.S. Supreme Court Holds “Cat” Accountable

*No more are the princes, by flattery paid
For furnishing help in a different trade,
And burning their fingers to bring
More power to some mightier king.*
from “The Monkey and The Cat”
by Jean de La Fontaine

The above quoted fable put to verse by 17th Century French poet Jean de La Fontaine tells the story of Bertrand and Ratto (“one was a monkey, the other a cat”). One day while sitting by the fire, the conniving Bertrand convinces the naïve Ratto to pull roasting chestnuts out of the fire for them both to enjoy. Bertrand, instead of sharing the bounty of chestnuts as promised, devours them all for himself leaving poor Ratto with the blame and a singed paw. The moral of the story is to not allow oneself to be unwittingly manipulated into serving another’s purpose. In the idiom which follows, “cat’s paw” means a dupe or pawn of another.

In the employment law context, the cat’s paw theory comes into play when a biased staffer of an employer with no decision-making authority uses the formal decision maker as a cat’s paw or dupe to take some discriminatory employment action. Under this theory, the employer is legally to blame for adverse employment actions taken by an unbiased decision maker (the cat) that are influenced by a biased supervisor (the monkey).

The setting for our modern retelling of this fable is Proctor Hospital in Peoria, Illinois. The cast of characters includes Vincent Staub, an angiography technician for the hospital; Janice Mulally (Staub’s immediate supervisor) and Michael Korenchuk (Mulally’s supervisor), both in the role of Bertrand; and Linda Buck (Proctor’s vice president of human resources) as Ratto. Staub was a U.S. Army Reservist while employed by the hospital and Mulally and Korenchuk were hostile to his military

obligations. Mulally scheduled additional shifts for Staub without advance notice as a means of having him “pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.” She also told a co-worker that his military service was a “strain on the department” and asked her to help “get rid of him.” Korenchuk exhibited similar animus towards Staub’s service, characterizing it as “a bunch of smoking and joking and [a] waste of taxpayers[’] money.” Mulally issued Staub a disciplinary warning (“Corrective Action”) for purportedly violating a company rule requiring him to remain at his work station when not working with a patient. Korenchuk informed Buck that Staub had violated the Corrective Action by failing to inform a supervisor that he left his station. Buck subsequently reviewed Staub’s personnel file and fired him. Staub denied he left his station without prior notice, countering that such a rule didn’t even exist but rather was concocted as part of a scheme by his supervisors to get rid of him in retaliation for his military obligations.

Staub brought suit against Proctor Hospital in federal district court under the Uniformed Services Employment Rights Act (USERRA), alleging not that Buck had any hostility towards his military service but that Mulally and Korenchuk did and it was their actions that influenced Buck’s decision. In essence, Staub argued, Buck was the cat’s paw to Mulally’s and Korenchuk’s monkey. The jury found for Staub, finding that Staub’s military status was a “motivating factor” in his termination. The Seventh Circuit Court of Appeals reversed the decision on the grounds that Staub could not prevail under a cat’s paw theory unless Buck had blindly relied upon the advice of Mulally and Korenchuk. Staub appealed to the United States Supreme Court. *Staub v. Proctor Hospital*, 562 U.S. ____ (2011).

The specific question put before the Court was whether an employer could be liable under a cat's paw theory for violating USERRA. This federal law forbids discriminatory employment practices (hiring, reemployment, retention, promotion, or any benefit of employment) against employees performing military service if that service is a "motivating factor in the employer's action ..." 38 U.S.C. § 4311(c). USERRA applies to employers, both public and private.

The Court was unanimous in its decision, albeit not in how it got there. Writing for a 5-2 split court, Justice Scalia found that the cat indeed was to blame. It matters not, reasoned Scalia, that the ultimate decision maker is unbiased. So long as an employee's supervisor take an act motivated by bias, and that supervisor intends an adverse employment action to result, the supervisor's act will be considered a cause of the ultimate action taken and the employer will be at fault. "[I]f a supervisor performs an act motivated by antimilitary 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 under USERRA." Mulally and Korenchuk, acting as agents for the hospital and motivated by hostility towards Staub's military status, took actions that were casual factors in Buck's decision to fire Staub. Stated another way, the biased actions of Mulally and Korenchuk were a proximate cause of his termination. Because the jury instructions at the district court level were not consistent with the Supreme Court's rule adopted here, the case was reversed and remanded for further proceedings.

Though the Court's holding was limited to USERRA, its language is very similar to other federal anti-discrimination laws and therefore will likely have broader application beyond just USERRA (e.g., race, color, religion, sex, and national origin under Title VII of the Civil Rights Act of 1964).

The moral of this story for Vermont's municipalities is to ensure that adverse employment actions are justified and taken independent of any potentially underlying biased action. The Court opined that "if the employer's

investigation results in an adverse action for reasons unrelated to the supervisor's original biased action ... the employer will not be liable." Towards that end, municipalities would be well served to educate employees about unlawful discrimination in order to address issues as they arise and document performance appraisals and violations of established rules and procedures to rebut any inference of termination for unlawful purposes.

A copy of this decision is at www.supremecourt.gov/opinions/10pdf/09-400.pdf.

Garrett Baxter, Staff Attorney
Municipal Assistance Center