Sills Cummis & Gross P.C.

Client Alert Employment & Labor

U.S. Supreme Court Rules on "Cat's Paw" Theory of Liability

N.J. Appellate Division Reduces Punitive Damages Where Emotional Distress Award Included Punitive Component

The United States Supreme Court, in *Staub v. Proctor Hospital,* 562 U.S. ___ (2011), ruled that an employer can be liable under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), for the antimilitary animus of a supervisor who did not make the ultimate adverse employment decision (known as a "Cat's Paw" case). The Court left open the possibility, however, that employers can escape liability if the adverse action was taken for reasons unrelated to the supervisor's bias.

In *Saffos v. Avaya*, the New Jersey Appellate Division, in assessing whether a multi-million dollar punitive damage award in an employment discrimination case was constitutionally reasonable, ruled that the ratio between compensatory damages and punitive damages need not include the emotional distress award where physical harm and treatment were absent and the emotional distress award contained a punitive element. While the Court found that defendants' egregious acts warranted a five-to-one ratio calculation, it nevertheless reduced the punitive damages awarded to the successful plaintiff by more than one million dollars.

Staub v. Proctor Hospital

Vincent Staub (Staub), while employed as a technician at Proctor Hospital (Proctor), was a member of the United States Army Reserve, which required him to drill one weekend per month and to train full-time for two to three weeks a year. Staub's immediate

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supervisor (Mulally) and second level supervisor (Korenchuk) were allegedly hostile toward his military obligations.

In January 2004, Mulally issued Staub a disciplinary warning for purportedly violating a hospital rule which required employees to stay at their work areas when not working with patients. The corrective action included a directive advising Staub to report to Mulally or Korenchuk when he had no cases and his work was complete. Staub disputed the allegation.

In early April 2004, a co-worker complained to Proctor's Vice President of Human Resources (Buck) and Chief Operating Officer (McGowan) about Staub's frequent unavailability and abruptness. McGowan directed Korenchuk and Buck to solve the alleged availability problem. Korenchuk thereafter informed Buck that Staub had left his desk without notifying a supervisor in violation of the January warning. After reviewing Staub's personnel file, Buck terminated Staub's employment.

Staub sued Proctor under USERRA, alleging that his termination was motivated by Mulally's and Korenchuk's hostility toward his obligations as a military reservist, notwithstanding the lack of such hostility by Buck, the ultimate decision maker. A jury agreed and awarded Staub $57,640 in damages. On appeal, the Seventh Circuit reversed, holding that because Buck was not wholly dependent on the advice of Korenchuk and Mulally, Proctor was entitled to judgment. The Supreme Court granted certiorari.

Writing for the Court, Justice Scalia rejected Proctor's argument that an employer can only be liable if the *de facto* decision maker, that is, the technical decision maker or the agent for whom he is the "cat's paw," is motivated by discriminatory animus. The Court remarked that so long as the agent intends for discriminatory reasons that the adverse action occur, he has the requisite intent to be liable. The Court observed that under tort law principles, a decision maker's exercise of judgment does not prevent the earlier agent's action from being the proximate cause of the harm, as injuries can have more than one proximate cause.

Recognizing that ultimate decision makers normally base actions on the performance assessments of other supervisors, Justice Scalia further disagreed with Proctor's position that an employer should not be held liable if its adverse employment action was vested in a non-supervisor who had reviewed the personnel file before making the ultimate decision, notwithstanding the discriminatory acts and recommendations of a supervisor.

The Court left open the possibility, however, that employers can escape liability if the company's investigation results in an adverse action for reasons unrelated to the supervisor's original biased acts. In addition, the Court ruled that "if 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." The Court specifically confined its holding of employer liability only where the supervisor acts within the scope of his or her employment, or when the supervisor acts outside the scope of employment and liability would be imputed to the employer under traditional agency principles.

Saffos v. Avaya Inc.

Nicholas Saffos (Saffos), an employee of AT&T and then Lucent Technologies (Lucent), moved into the Global Real Estate (AGRE) group at Avaya, Inc. (Avaya) sometime after Avaya was created in 2000 to take over the Business Communications unit of Lucent. M. Foster Werner, Jr. (Werner), hired as AGRE's Director in 2002, began reorganizing the office and restructuring AGRE. A number of older AGRE employees were discharged and replaced by younger individuals.

In 2002, Werner gave Saffos a favorable evaluation and a raise. The following year, Werner placed Saffos on a performance improvement plan (PIP) due to "concerns" with his work and instructed Saffos to devise his own improvement plan. Werner found Saffos's plan to be "incomplete" and did not believe Saffos was taking the PIP seriously. On September 26, 2003, Werner terminated Saffos's employment. Saffos, who at the time was forty-nine years old, was replaced with a thirty-five year old employee with very little real estate experience.

Saffos sued and the jury returned a verdict in his favor, awarding $250,000 for emotional distress, $325,500 for back pay, and $167,500 for front pay. The jury also found that punitive liability was warranted, awarding $10 million in damages, which the trial judge remitted to $3,715,000 (five times the compensatory award). Both sides appealed.

The Appellate Division agreed with the trial judge's refusal to vacate the punitive damage award, finding sufficient evidence of defendants' egregious conduct and willful indifference or active participation by Avaya's upper management. The Appellate Division next considered whether the reasonableness of the punitive damage award

violated defendants' substantive due process rights, in light of the New Jersey Punitive Damages Act and the three guideposts articulated in United States and New Jersey Supreme Court caselaw.

The first guidepost was the degree of reprehensibility of conduct. The Court found defendants' conduct reprehensible given that Werner, with his supervisor's acquiescence, "mounted a deliberate, systematic campaign to terminate the employment of…older employees, including plaintiff, under the pretext of poor performance, and then covered up his unlawful age discrimination…."

The next guidepost was the disparity between actual or potential harm to plaintiff and the punitive award. Defendants disputed the appropriateness of the five-to-one ratio of compensatory to punitive damages, arguing for, at most, a one-to-one ratio. Noting "where physical harm and treatment is absent, the risk of a punitive aspect in the damages for emotional distress is greater," the Appellate Division held that the emotional distress award should have been excluded from the calculation, leaving a compensatory damage base of $493,000. The Court found that a five-to-one ratio was appropriate, opining that a one-to-one ratio would not sufficiently deter such future conduct.

The last guidepost was the difference between the punitive damages awarded and the civil penalties authorized by the New Jersey Law Against Discrimination. The Appellate Division did not find the comparison particularly helpful, in part because the statutory penalties were not great and this case involved a department-wide discrimination scheme.

The Court reduced the punitive damage award to $2,465,000.

HR Tip of the Month: Privacy Protection and Data Breaches

Identity theft is a major concern for employers who are routinely entrusted with private information of employees and customers, especially in the electronic age, where improper use of such data can have widespread ramifications. According

to the Federal Trade Commission (FTC), each year as many as 9 million Americans have their identities stolen. Is your company prepared to address a data breach?

Federal law and many state laws require employers to safeguard private information. For instance, the Fair Credit Reporting Act requires companies to take appropriate measures to dispose of sensitive information derived from consumer reports. If a company becomes aware of a data breach, the FTC also instructs it to immediately report the breach to the local police department, the local office of the FBI, or the U.S. Secret Service, and then to provide notice to individuals whose information was compromised to allow those individuals to take steps to mitigate the misuse of their personal information. Many state laws also require that notice be provided upon discovery of a breach.

New Jersey has enacted the Identity Theft Prevention Act (ITPA), which requires any business that lawfully collects and maintains computerized records to disclose to the New Jersey State Police and to any New Jersey customer (broadly defined to include an individual who provides personal information to a business, including employees) when that customer's personal information was or may have been accessed by an unauthorized person. In the case of a large scale breach, businesses are also required to report to consumer reporting agencies. In addition, the ITPA regulates the use of social security numbers as identifiers, prohibits the display and usage of social security numbers on printed materials except where required by law, and requires the destruction of records containing personal information when no longer needed.

Similarly, the New York State Information Security Breach and Notification Act requires companies who own or license computerized data to provide prompt notification following the discovery of a breach to any New York resident whose private information was, or may have been, acquired without authorization. The New York State Social Security Number Protection Law regulates the handling of social security numbers and requires covered persons and entities to provide safeguards "necessary or appropriate" to preclude unauthorized access to social security account numbers and to protect the confidentiality of such numbers.

Employers must be prepared to continuously protect information. Best practices dictate that employers prepare guidelines for safeguarding private information.

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HR Tip of the Month Update: New York Wage Theft Prevention Act Effective April 9, 2011

In our December 2010 Tip of the Month, we highlighted some of the major provisions of the New York Wage Theft Prevention Act (WTPA). The WTPA becomes effective on April 9, 2011. If you have any questions regarding the WTPA, please contact one of the attorneys in Sills Cummis & Gross P.C.'s Employment and Labor Practice Group.

If you would like additional information, please contact:

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