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Employers Must be Vigilant of Discriminatory Motives of Non-Decision Makers

The United States Supreme Court has dealt employers another hurdle to overcome when making employment decisions. On March 1, 2011, the Supreme Court in *Staub v. Proctor Hospital*, 131 S.Ct. 1186, held that employers may be held liable for the discriminatory motives of supervisors who influence but do not make the ultimate employment decision.

Facts of *Staub v. Proctor Hospital*

Vincent Staub, an angiography technologist for Proctor Hospital also was a member of the United States Army Reserves. As a reservist, Staub attended trainings and reported to active duty when called. Staub was supervised by Michael Korenchuk, head of the Diagnostic Imaging Department and his second in command, Janice Mulally.

Korenchuk and Mulally began a course of conduct against Staub due to his reservist status. For example, Mulally scheduled Staub to work weekends in conflict with his reservist training obligations. When questioned about the act, Mulally threw Staub out of her office. In addition, she required Staub to use his vacation for the training obligations and scheduled him for additional work shifts without notice. Mulally also referred to Staub's training in a derogatory fashion. Korenchuk similarly had no love lost for Staub's reservist status. He referred to the Army Reserves in derogatory fashion and informed co-workers that Mulally was out to get Staub.

Eventually, Mulally gave Staub a written warning for failing to assist with diagnostic imaging procedures when requested, which Staub denied. However, the warning remained in Staub's file. In addition, Staub was instructed to report to Korenchuk or Mulally when he completed his duties and also to remain in the general diagnostic area unless he provided Korenchuk or Mulally with notice of where he was going and why.

Months later, Staub, after being unable to locate Korenchuk before lunch, left Korenchuk a voicemail message and went to lunch. When Staub returned from lunch, Korenchuk confronted him about his absence and eventually took Staub to speak with Linda Buck, the Vice-President of Human Resources, where Staub was terminated. Prior to this meeting, Buck had reviewed Staub's personnel file and spoken with Korenchuk regarding Staub. Buck made the ultimate decision to terminate Staub.

Staub's Lawsuit

After his termination, Staub filed a lawsuit against Proctor Hospital for violating the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). Violation of the USERRA exists if a person's membership in the military was a "motivating" factor in an adverse employment action. The case was tried before a jury that decided in Staub's favor, finding that his military status was a motivating factor for his termination. Proctor appealed, and the Seventh Circuit Court of Appeal reserved the jury's verdict, finding that there was insufficient evidence that Staub was fired because of his military status. The Seventh Circuit found that Buck, the decision maker, was admittedly unbiased and a reasonable jury could not find that Korenchuk or Mulally had a "singular influence" over the decision maker.

However, the Supreme Court reversed the Court of Appeal decision and held 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." Additionally, the Supreme Court found that conducting an investigation of the conduct that led to the adverse employment action is not enough, the adverse action must have been taken for reasons unrelated to the supervisor's original biased action.

What does this mean to employers?

In light of *Staub*, employers should be even more vigilant and circumspect when taking an adverse employment action. Employers should not only review the ultimate employment action, but should also review any discipline or corrective action on which the ultimate employment action is based to ensure that those decisions were not made because of any discriminatory motives. Further, the ultimate decision maker can no longer rely on an employee's personnel file and the employee's immediate supervisor in making the ultimate employment decision. The ultimate decision maker must also have confirmed by independent investigation that there was no discrimination or bias in any of the previous actions.