

Supreme Court: Check boss bias before discipline

Starting last month, it's more important than ever for HR professionals to independently check supervisors' disciplinary recommendations to ensure that they have no ulterior motives.

That's because the U.S. Supreme Court, in a much-anticipated "cat's paw" ruling, said that an employer can be found liable for the discriminatory intent of supervisors who influence—but don't ultimately make—an adverse employment decision. (*Staub v. Proctor Hospital*)

Employees typically prove their discrimination claims by arguing that the decision-maker of an adverse action (firing, demotion, etc.) had a discriminatory motive. But when the ultimate decision-maker is unbiased, some courts have let employees argue that a subordinate's bias unlawfully influenced the decision. Last month's ruling endorsed this subordinate bias (or cat's paw) theory.

"*Staub* is a fairly big victory for employees" and will lead to more litigation, says Mark Toth, chief legal officer for Manpower North America. "Employers now have almost no protection against the discriminatory motives of supervisors who cause an adverse employment action but aren't involved in the actual decision-making process."

The case: An Illinois hospital fired employee Vincent Staub based on a supervisor's complaint to HR that Staub left his workstation in violation of hospital rules. But the supervisor didn't mention to HR that Staub had been taking military leave for Reservist training. The supervisor had been giving Staub a hard time for taking the job-protected leave.

Staub sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Supreme Court ruled that the hospital could be liable even though HR didn't know about the supervisor's bias. The court said the hospital made no effort to investigate whether the supervisor might have been looking for an excuse to fire Staub.

The court said an employer would be liable if a supervisor performs an act motivated by discriminatory 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."

The only way to avoid liability in such cases, the court said, is if an employer (1) conducts an independent investigation and (2) that investigation concludes that the decision was entirely justified regardless of the supervisor's input.

Final note: The term "cat's paw" comes from a French fable in which an unscrupulous monkey persuades a cat to pull chestnuts from a fire for the monkey to eat. The cat burns its paws. The term refers to what happens when a third party manipulates a decision-maker into discriminating.

Avoiding liability in 'cat's paw' cases: 5 tips

- 1. No rubber stamps.** Make sure ultimate decision-makers don't simply rubber-stamp the recommendations of intermediate supervisors.
- 2. Independent investigation.** The ultimate decision-maker should independently investigate the incident or behavior that could lead to discipline. The goal: to verify that a legitimate offense occurred, and that intermediate managers aren't pursuing discipline because of bias.
- 3. Train supervisors and employees** on your nondiscrimination policies and reporting procedures.
- 4. Review employee/supervisor relationships.** Be alert for any history of potential adversarial dealings between employees and their bosses.
- 5. Avoid relying on recommendations** from anyone who may harbor potentially improper motives.