LABOR AND EMPLOYMENT LAW UPDATE

SUPREME COURT ENDORSES YET ANOTHER MEANS OF PROVING INTENTIONAL DISCRIMINATION!

Proving bias in employment discrimination cases has been described as akin to assembling a mosaic from tiny tiles none of which is significant in and of itself but pieced together with enough other tiles forms a distinct picture. Using this metaphor, discrimination plaintiffs now have more tiles from which to assemble a mosaic thanks to a March 1, 2011 decision by the U.S. Supreme Court.

At issue in *Staub v. Proctor Hospital* was the discharge of an employee who was an Army Reservist protected from discrimination by the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The termination decision was made solely by the vice president of human resources, but the reason for dismissal was the employee's violation of a corrective action plan implemented by his immediate supervisor.

The employee could not show bias by the person who made the termination decision, but was able to show bias by the immediate supervisor who implemented the corrective action plan. The Supreme Court ruled such evidence could be sufficient to show his reserve status was a "motivating factor" in his firing if (1) the supervisor intended to cause the employee's dismissal, and (2) the supervisor's action influenced the termination decision. The Court found adequate evidence to prove each of these elements.

WHY IS THIS RULING SIGNIFICANT? The ruling provides a means of proving discrimination which had been rejected by some lower courts. These courts had repudiated efforts by claimants to prove discrimination with evidence of bias by anyone other than the actual decision-maker or someone who exercised such "singular influence" over the decision-maker that the employment decision was the product of "blind reliance."

WHAT EMPLOYMENT DECISIONS CAN BE "INFLUENCED" BY A SUPERVISOR? In addition to employee dismissals, other decisions which may be influenced by a supervisor's prior action include:

* Demotion and/or decrease in compensation.
* Promotion and/or increase in compensation.
* A hiring decision in which a supervisor is a part of the screening process.
* Grant or denial of leave of absence.

WHAT ACTIONS BY A SUPERVISOR CAN "INFLUENCE" AN EMPLOYMENT DECISION? Although the Supreme Court only dealt with a corrective action plan, other supervisory actions which can influence an employment decision include:

* An unfavorable performance review.
* Employee discipline, such as verbal or written warnings, suspensions, probationary periods, etc.
* Job restructuring or reassignment.
* Implementation of new job standards or quotas.
* Report as to performance or conduct of any employee (subordinate or otherwise) which finds its way to decision-maker.
* Inadequate training.
* Close supervision or micro-management.
* A recommendation or ultimatum to the decision-maker.

WILL AN INDEPENDENT INVESTIGATION BY THE DECISION-MAKER IMMUNIZE THE EMPLOYER FROM LIABILITY? Not necessarily. According to the Supreme Court, an investigation does not itself remove the influence of a biased supervisor's prior action. Only the elimination of the supervisor's action from consideration, or a determination that the employment decision is justified even apart from the supervisor's action, can affect potential liability.

DOES THE SUPREME COURT RULING EXTEND TO NON-SUPERVISORY EMPLOYEES? No. The Court declined to express any view as to whether an employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the employment decision. Still, some lower courts have allowed discrimination to be proven with evidence of bias by a co-worker who possesses leverage, or exerts influence over, the decision-maker.

ARE OTHER DISCRIMINATION CLAIMS IMPACTED BY THE SUPREME COURT RULING? Yes. The ruling impacts any statute which requires a claimant to prove that a protected trait, status or activity was a "motivating factor" in an employment decision. Title VII of the Civil Rights Act of 1964, which prohibits discrimination because of race, color, religion, sex or national origin, is specifically cited by the Supreme Court as example. Depending upon applicable case law, other statutes which may be affected include:

* Americans With Disabilities Act.
* Employee Retirement Income Security Act.
* Fair Labor Standards Act.
* Family & Medical Leave Act.
* Civil Rights Act of 1866.

Less clear is the impact of the ruling on statutes which require a higher burden of proof, such as the Age Discrimination in Employment Act.

WHAT SHOULD EMPLOYERS TAKE AWAY FROM THE SUPREME COURT RULING? The primary lesson for employers is that their efforts to minimize the risks of potential liability for discrimination must extend beyond decision-makers. The notions that liability can be avoided simply by isolating the decision-maker or having the decision-maker conduct an independent investigation before an employment decision have been dispelled by the Supreme Court. All those in supervisory roles are subject to being scrutinized as to the motives for their actions. Indeed, as with the claimant in *Staub v. Proctor Hospital*, the supervisors with whom potential claimants have daily interaction may be the best or only potential source of evidence that an employment decision is tainted by unlawful bias.

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