

FITZGERALD & MULÉ LLP

EMPLOYMENT LAW BULLETIN

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In a typical discrimination case, the motives of the decision maker are often called into question to ascertain whether the decision maker acted with discriminatory animus when making an employment decision.

In this issue we present a United States Supreme Court case that invokes the Cat's Paw theory of discrimination, a name inspired by an Aesop fable involving a monkey who tricked a cat to get what he wanted. In the fable, the monkey induced the cat by flattery to extract roasting chestnuts from a fire. After the cat did so, burning its paws in the process, the monkey made off with the chestnuts and left the cat with nothing.

Under the Cat's Paw theory of discrimination, it is not the motivations of the decision maker, but the motivations of those who influence the decision maker that are under scrutiny.

USERRA / Discrimination

The "Cat's Paw" Theory of Discrimination

Staub v. Proctor Hospital (US 3/1/11)

In a unanimous decision by the United States Supreme Court, a plaintiff was allowed to prove employment discrimination even though there was no evidence that the decision maker harbored any discriminatory animus. The Cat's Paw theory of discrimination imputes liability to an employer for the animus of a supervisor who was not the one who made the ultimate employment decision.

Plaintiff Staub was employed by Proctor Hospital as an angiography technician. Staub was also a member of the U.S. Army Reserve. Both his immediate supervisor (Mulally) and

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REPRESENTING CLIENTS IN ALL ASPECTS OF THE
EMPLOYMENT RELATIONSHIP

The *Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)*, forbids an employer from denying “employment, reemployment, retention in employment, promotion, or any benefit of employment” based on a person’s “membership” in or “obligation to perform service in a uniformed service.”

It also provides that liability is established “if the person’s membership . . . is a motivating factor in the employer’s action.”



Mulally’s supervisor (Korenchuk) were hostile to his military obligations. Mulally gave Staub disciplinary warnings and directed Staub to report to her or Korenchuk when his cases were completed. After receiving a report from Korenchuk that Staub had violated the corrective action, Proctor’s vice president of human resources (Buck) reviewed Staub’s personnel file and decided to fire him.

Staub sued Proctor under the *Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)*. He contended while Buck may not have been motivated by hostility to his military obligations, Mulally and Korenchuk were, and that their actions influenced Buck’s decision.

On review, the Supreme Court 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.

The Court stated that both Mulally and Korenchuk acted within the scope of their employment when they took the actions that allegedly caused Buck to fire Staub. There was also evidence that their actions were motivated by hostility toward Staub’s military obligations, and that those actions were causal factors underlying Buck’s decision. Finally, there was evidence that both Mulally and Korenchuk had the specific intent to cause Staub’s termination.

Wage & Hour

Oral Complaint Triggers FLSA Anti-Retaliation Protection

Kasten v. Saint-Gobain Performance Plastics Corp. (US 3/22/11)

Plaintiff Kasten brought an anti-retaliation suit against his former employer (Saint-Gobain) under the *Fair Labor*

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Standards Act.

Kasten claimed that he was discharged in retaliation for orally complaining to company officials about the company's placement of time clocks which prevented workers from receiving credit for the time they spent donning and doffing work related protective gear.

Overturing the trial court's and appellate court's prior rulings, the Supreme Court held that the scope of the statutory term "filed any complaint" includes oral as well as written complaints. Although the language of FLSA does not expressly allow for oral complaints, the court found that such a narrow interpretation of the statute would be inconsistent with the intent of Congress that the anti-retaliation provision would cover oral as well as written complaints. The Court stated that a narrow interpretation of the FLSA would undermine the Act's basic objective, which is to prohibit "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." Further, the Court noted that FLSA's requirement that an employer receive fair notice of an employee's complaint can be met by oral, as well as written, complaints.

Disability Discrimination

Court Upholds One-Strike Rule for Drug Testing

Lopez v. Pacific Maritime Association (9th Cir. 3/2/11)

The Ninth Circuit recently upheld an employer's right to deny employment to an applicant who failed a drug test, even though the applicant claimed he was protected by the *Americans with Disabilities Act* ("ADA").

Specifically, the court held that an employer's "one-strike" rule permanently barring employment for any applicant who failed a drug test, did not violate the ADA.

The *Fair Labor Standards Act of 1938* provides minimum wage, maximum hour, and overtime pay rules. It also forbids employers "to discharge . . . any employee because such employee has filed any complaint" alleging a violation of the Act.

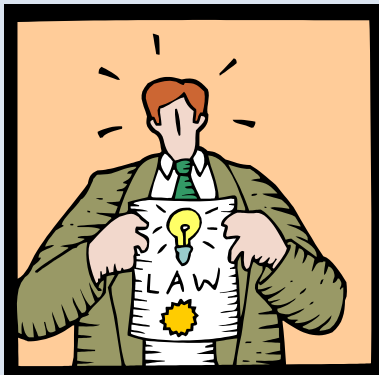
- 29 U.S.C. §215(a)(3)

Drug Testing



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Before doing any drug and alcohol screening of either applicants or current employees, employers must have a valid drug and alcohol testing program in place providing adequate notice to employees.



Plaintiff Santiago Lopez applied for a job with Pacific Maritime in 1997. At that time, he failed a pre-employment drug test which disqualified him from employment. Approximately seven years later after being clean and sober as a recovering addict, he re-applied for employment. The employer again rejected Lopez' application because it had a one-strike rule, permanently disqualifying applicants who previously failed a drug test.

Lopez sued, claiming Pacific Maritime violated the ADA by discriminating against him based on his protected status as a rehabilitated drug addict which is a recognized disability.

The Court dismissed the case, holding that there was no ADA violation. The employer's policy treated all test failures the same – whether the failure was due to a disability or recreational drug use. Significantly, the employer did not know of Lopez' disability or rehabilitated status at the time of the drug test or subsequent rejection of his employment application. As a result, the employer could not have discriminated against Plaintiff on that basis.

LEGISLATIVE AND REGULATORY DEVELOPMENTS

EEOC Releases Final ADAAA Regulations

For nearly two years, the EEOC has been considering amendments to the *Americans with Disabilities Act* ("ADA"). On March 25, 2011 the EEOC released its final regulations implementing the *ADA Amendments Act* ("ADAAA").

The EEOC's final regulations provide rules of construction to guide the analysis of what conditions may or may not constitute disabilities. The regulations emphasize that the definition of "substantially limits" is to be construed broadly in favor of expansive coverage to the maximum extent permitted by the ADA.

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Under the rules, a disability is an impairment which substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. It need not prevent, or significantly restrict, the individual from performing a major life activity in order to be considered “substantially limiting.”

Given these final rules, it appears the focus of disability discrimination cases will be whether the employer’s actions were improperly motivated by disability discrimination, rather than whether the individual in question suffered from a disability that substantially limited a major life function.

Mandatory Paid Sick Leave Bill Is Back on the Table

Under Assembly Bill 400, employers with 10 or less employees would be required to offer full-time employees five days of paid sick leave per year. Employers of more than 10 employees would have to offer nine paid sick days per year to all full-time employees. If passed, the bill would make paid sick leave mandatory for any employee who works in California for 7 or more days in a calendar year. AB 400 does not apply to employees who are covered by a collective bargaining agreement that provides for sick leave.

The bill states that the leave would be available for diagnosis, care, or treatment of health conditions of the employee or an employee’s family member, or for leave related to domestic violence or sexual assault. The bill also imposes a rebuttable presumption of unlawful retaliation if an employer denies an employee the right to use sick days, discharges, threatens to discharge, demotes, suspends, or in any manner discriminates against an employee within 90 days of filing a complaint under the statute or participates in any investigation related to denial of sick leave.



Mandatory paid sick leave legislation was unsuccessfully introduced in 2008 and 2009. The third time may be the charm. We will keep you posted.

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Make sure that your employee handbook is up to date and reflects recent developments in the law.

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REPRESENTING CLIENTS IN ALL ASPECTS OF THE EMPLOYMENT RELATIONSHIP

Accommodation for Use of Medical Marijuana

The debate over California employers' right to enforce a drug free workplace is underway in Sacramento as the Legislature considers Senate Bill 129. SB 129 "would declare it unlawful for an employer to discriminate against a person in hiring, termination, or any term or condition of employment" for the lawful use of medical marijuana, "except as specified."

However, terminating an employee "who is impaired on the property or premises of the place of employment, or during the hours of employment," is permitted under the "as specified" language in the bill.

SB 129 would prohibit employers from taking corrective action against employees using medical marijuana, unless the drug use "impaired" the employee's job performance. Under the proposed legislation, an employee returning from lunch, for example, smelling strongly of marijuana could not be disciplined unless the employer could demonstrate that the employee's job performance was impaired as a result of the drug use.

Conversely, an employer would be permitted to prohibit alcohol consumption during the workday, regardless of whether the alcohol impacted job performance.

Moreover, in a move that would overturn a current California Supreme Court decision, employers would be prohibited from denying employment to an applicant who tested positive for "medical" marijuana in the course of pre-employment drug screening.

Should SB 129 pass, one would expect to see a significant amount of litigation involving applicants and employees claiming discrimination for their use of medically prescribed marijuana, particularly given the increasing use of medical marijuana.

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