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Who's behind this decision?

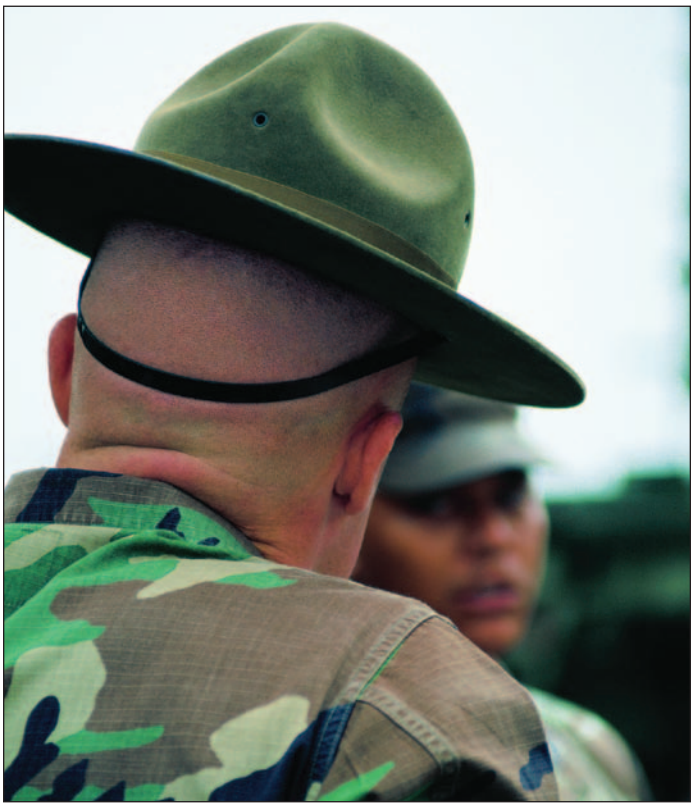
Supreme Court looks at discriminatory bias in termination

Can an employer be held liable for the discriminatory bias of supervisors who influenced an adverse employment decision — even if those supervisors didn't make the ultimate adverse decision? This was a question that rose all the way to the U.S. Supreme Court in the case of *Staub v. Proctor Hospital*.

Requirement to report

While employed by Proctor Hospital, the plaintiff was a member of the U.S. Army Reserves. Both the plaintiff's immediate supervisor and the next higher level supervisor were hostile toward his military obligations because of their effect on his schedule.

In January 2004, the plaintiff's immediate supervisor issued him a disciplinary warning for violating a company rule requiring him to stay in his work area whenever he wasn't with a patient. The warning required the plaintiff to report to his immediate supervisor or the higher level supervisor when he had no patients. The plaintiff contended that the warning wasn't justified because no such rule existed and, even if it did, he hadn't violated it.



A few months later, a co-worker complained to the hospital's Vice President of Human Resources (HR VP) about the plaintiff's frequent unavailability and abruptness. Three weeks after that, the higher level supervisor informed the HR VP that the plaintiff had left his desk without informing a supervisor. The plaintiff claimed that he'd left a voicemail for the higher level supervisor. Yet, based on that supervisor's allegation and a review of the plaintiff's personnel file, the HR VP decided to terminate him.

> *An employer's authority to make an adverse employment decision "is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors."*

USERRA claim

The plaintiff challenged his termination under the hospital's grievance procedure, claiming that his immediate supervisor had fabricated the allegations that led to the January disciplinary warning out of hostility toward his military obligations. The HR VP didn't question the immediate supervisor about the plaintiff's claim. Instead, after discussing the matter with another personnel officer, the HR VP adhered to her decision to terminate.

The plaintiff then sued the hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). He argued that, even though the HR VP had no hostility toward his military obligations, the two supervisors did — and their actions influenced the HR VP's ultimate employment decision. A jury found in the plaintiff's favor, and the hospital appealed. After being heard by the appeals court (see "Seventh Circuit stuck with precedent" on page 3), the case reached the Supreme Court.

Argument rejected

The Supreme Court began its analysis by reviewing USERRA. The law provides that an employer is in violation if an employee's military service "is a motivating factor in the employer's action, unless the employer can prove

Seventh Circuit stuck with precedent

Before *Staub v. Proctor Hospital* reached the U.S. Supreme Court (see main article), the case was heard by the U.S. Court of Appeals for the Seventh Circuit. It reversed the district court's earlier finding in the plaintiff's favor.

The Seventh Circuit explained that, based on its own precedent, the hospital couldn't be liable unless the non–decision-makers (the two supervisors) exercised such "singular influence" over the decision-maker (the Vice President of Human Resources) that the decision to terminate was based on "blind reliance." Because the Vice President of Human Resources had relied on more than just what the supervisors had alleged, the court found that the hospital wasn't liable.

that the action would have been taken in the absence of such membership."

The hospital argued that it wasn't liable unless it could be shown that the HR VP was actually motivated by discriminatory animus. The Court rejected this argument, stating that it would give an unlikely meaning to a provision designed to prevent employer discrimination. It noted that an employer's authority to make an adverse employment decision "is often allocated among multiple agents. The one who makes the ultimate decision does so on the basis of performance assessments by other supervisors."

The Court concluded that, if an employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action, the employer won't be held liable. But, in this case, the supervisor's report remained a causal factor because the HR VP *did* take it into account in her decision to fire the plaintiff — and she didn't investigate the plaintiff's claim that the supervisor's allegation was fabricated out of hostility toward his military obligations or assess whether, without the supervisor's recommendation, the termination would have been entirely justified.

Wider implications

This decision will also likely apply to Title VII cases because the wording of the two statutes is similar. Accordingly, employers may be held liable for the discriminatory actions of lower level supervisors — even when those supervisors have played no role in the ultimate decision to terminate and there's no evidence of discriminatory animus on the part of the ultimate decision-maker. ♦

Off the wall: Office décor prompts religious discrimination case

Office decorations can brighten the workplace, but they can give rise to disputes as well. In *Dixon v. Hallmark Companies*, the U.S. Court of Appeals for the Eleventh Circuit considered whether the employer had violated Title VII of the Civil Rights Act of 1964 when it discharged two employees who'd refused to remove a religious poster from an apartment management office.

Poster problems

The plaintiffs were a husband and wife who were employed as the property manager and maintenance technician, respectively, at Thornwood Terrace Apartments, a rental complex owned by Hallmark Management. While previously employed at another Hallmark complex, the wife was informed that, under Hallmark's policy, she couldn't display religious items in the management office.

Thornwood, as a recipient of federal funds in the form of rental assistance from the U.S. Department of Agriculture's (USDA's) rural development program, was subject to periodic inspections by the USDA. On the date of one such visit, the couple's supervisor noticed a large picture of flowers

with the words, "Remember the Lilies… Matthew 6:28" hanging on the wall.

The supervisor directed the wife to remove the artwork from the wall, believing it to be a violation of the Fair Housing Act. When the plaintiff refused, the supervisor contacted a higher level manager, who instructed the supervisor to take down the picture herself. She did so while the couple was out of the office.

When the couple returned, the wife asked why the picture had been removed and the husband attempted to rehang it. An argument ensued, and the supervisor fired both plaintiffs. The couple claimed that, when the supervisor terminated the husband, she said, "You're fired, too. You're too religious."

The couple sued Hallmark under Title VII, claiming that Hallmark had intentionally discriminated against them because of their religion, failed to accommodate their sincerely held religious beliefs and retaliated against them. The district court granted Hallmark's motion for summary judgment, and the couple appealed.

A precedent in play

The district court had rejected the intentional discrimination claim on the basis that the statement made to the husband was "You're fired, too. You're too religious," rather than "You're fired, too, because you're too religious."

The Eleventh Circuit rejected this analysis based on its own precedent characterizing comparable remarks as evidence of direct discrimination. In one previous case, the court had held that a management memorandum saying, "Fire [the plaintiff] — he is too old," constituted direct evidence of discrimination. Accordingly, it reversed the district court's ruling on the intentional discrimination claim.

Undue hardship?

Regarding the failure-to-accommodate claim, the court noted that the plaintiffs had to first establish that they had:

- Held a bona fide religious belief that conflicted with an employment requirement,
- Informed Hallmark of that belief, and
- Been terminated for failing to comply with the conflicting employment requirement.

The Eleventh Circuit found that the couple had met this burden, so it fell to the defendant to show that accommodating their religious beliefs constituted an undue hardship.

The court concluded that it couldn't resolve this claim based on the evidence in the record. So it sent the claim back to the district court for resolution.

Objectively reasonable?

As noted, the couple further claimed that Hallmark had unlawfully retaliated against them for attempting to rehang the artwork from the manager's office after the supervisor had removed it. The plaintiffs argued that displaying the artwork was permissible under federal housing law, and that the demand to remove it was an improper attempt to cleanse the workplace of all religious references.

The Eleventh Circuit noted that, even if an employment practice is lawful, a plaintiff can establish a case of retaliation "if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices." But a plaintiff must show not only that he or she had a subjective belief that the employer engaged in unlawful employment practices, but also that his or her belief is objectively reasonable.

Here the court found that, though the couple may have subjectively believed that Hallmark had engaged in an unlawful employment practice, they'd failed to demonstrate that there was sufficient evidence to raise a material issue of fact as to the objective reasonableness of their belief.

The plaintiffs cited no statutory or case law that could be construed to prohibit a private employer from keeping its own workplace free of religious references. Thus, the Eleventh Circuit affirmed the district court's grant of summary judgment in favor of the defendant on the retaliation claim.

Tricky business

This case reaffirms that, for employers, dealing with potential religious discrimination can be tricky business. Rather than act in haste — or out of temper — consult with legal counsel before taking action against an employee. ♦

Seven-week leave prompts FMLA lawsuit

The process for granting time off under the Family and Medical Leave Act (FMLA) can be a challenge for employers. In *Tayag v. Lahey Clinic Hospital*, the U.S. Court of Appeals for the First Circuit looked into whether an employer had violated the FMLA for terminating a worker who'd taken a seven-week leave.

Filing the paperwork

In June 2006, the plaintiff submitted a vacation request form for Aug. 7 to Sept. 22. Her supervisor said such an absence would leave the department inadequately covered. But, because the worker indicated that the leave involved medical care for her spouse, the supervisor provided her with FMLA leave paperwork.

On July 8, the plaintiff requested FMLA leave to assist her husband while he traveled but didn't inform Lahey that the trip was a spiritual pilgrimage to the Philippines. On July 11, her husband underwent an angioplasty procedure, and the plaintiff spoke to Lahey's benefits administrator about the FMLA request. As a result of the conversation, the administrator requested FMLA certification from the plaintiff's doctor.

In early August, the plaintiff gave the benefits administrator a note and then a certification from her husband's physician that stated that her husband's medical problems "significantly affect his functional capacity to do activities of daily living." The note also recommended that the plaintiff receive medical leave "to accompany [her husband] on any trips as he needs physical assistance on a regular basis."

In addition, the plaintiff arranged for her husband's cardiologist to submit a certification form, which he did on Aug. 8. The cardiologist stated on the form that her husband was "presently … not incapacitated" and that the plaintiff wouldn't need leave. The benefits administrator mailed the plaintiff letters on Aug. 10 and 14 notifying her that her leave wasn't approved and left phone messages to that effect on Aug. 8 and 17.

Claiming a violation

The plaintiff didn't receive any of these messages because, as of Aug. 7, she was already in the Philippines, where she and her husband remained until Sept. 22. While there, the husband received no conventional medical treatment — only spiritual support at churches and from friends and relatives. On Aug. 18, Lahey terminated the plaintiff.

The plaintiff filed suit in federal district court claiming her termination violated the FMLA. Lahey moved for summary judgment, which the court granted after determining the trip wasn't FMLA-protected because it was effectively a vacation. The plaintiff appealed.

Establishing validity

The First Circuit focused on whether a spiritual pilgrimage constitutes medical care under the FMLA. The act entitles

an employee to take up to 12 weeks annually to care for his or her spouse (or certain other family members) — if the spouse has a serious health condition.

The cardiologist stated on the form that her husband was "presently … not incapacitated" and that the plaintiff wouldn't need leave.

But the serious health condition in question must involve diagnosis and treatment by a "health care provider," a term defined under the FMLA as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or … any other person determined … to be capable of providing health care services." FMLA regulations do permit Christian Science practitioners to be included in the definition of "health care provider" under certain conditions.

The plaintiff argued that it was unconstitutional for Christian Science practitioners to be covered by the exception while practitioners of other religions were not. But Christian Scientists reject ordinary medical care, whereas the plaintiff's husband did, in fact, receive it.

The court concluded that the plaintiff's FMLA claim failed because she didn't secure adequate medical certification for the leave. The first certification provided no basis for a seven-week leave and, as noted, the second certification from the cardiologist stated that the husband wasn't incapacitated and the plaintiff didn't require any leave.

Getting the form

For employers, this case emphasizes the importance of requiring employees to submit FMLA certification forms from their doctors. These forms require physicians to submit much more detailed information than a typical doctor's note and provide employers with a stronger basis for granting or denying leave. ♦

Up with EAPs

Company benefit helps mitigate employee lawsuit

Employee benefits can *benefit* more than just the employees themselves. Case in point: *Ames v. Home Depot Incorporated*, in which the U.S. Court of Appeals for the Seventh Circuit had to decide whether the plaintiff's alcoholism constituted a disability under the Americans with Disabilities Act (ADA) or a serious health condition under the Family and Medical Leave Act (FMLA). A Home Depot employee benefit — its Employee Assistance Program (EAP) — played a role in the outcome.

Benefit triggered

When the plaintiff was hired by Home Depot in November 2001, she was given a copy of the company's Code of Conduct. It defined having a detectable level of alcohol as a major violation that justified termination on first offense. On Sept. 15, 2006, she informed the store manager that she had an alcohol problem and needed assistance through Home Depot's EAP.

Although the plaintiff's alcoholism hadn't yet affected her work, in accordance with company policy, the plaintiff was put on paid administrative leave and notified that she could return to work once she'd:

- Received a treatment plan,
- Obtained authorization to return to work, and
- Passed a drug and alcohol test.

On Sept. 23, the plaintiff signed an EAP agreement under which she agreed to be subject to periodic drug and alcohol testing and acknowledged that she'd be terminated if she failed such a test. On Oct. 18, after a one-month leave of absence with pay, the plaintiff passed a drug and alcohol test and obtained authorization to return to work.

Lawsuit filed

On Nov. 18, the plaintiff was arrested for driving under the influence of alcohol. After this arrest was reported in the local newspaper, the company notified the plaintiff that she had violated her EAP agreement and she must be evaluated at an alcohol treatment facility. The plaintiff never requested leave from her job to deal with her alcohol problem.

On Dec. 23, the plaintiff reported for her scheduled work shift and managers observed that she smelled of alcohol and was slurring her words. The plaintiff was sent for a blood alcohol test, which came back positive.

On Jan. 1, the plaintiff checked herself into the hospital. She was discharged the next day with instructions to start an outpatient alcohol rehabilitation program. On Jan. 10, Home Depot sent a letter to the plaintiff advising her that she was terminated effective Dec. 23 — the day she came to work under the influence of alcohol.

The plaintiff filed suit in federal district court claiming ADA and FMLA violations. The court granted Home Depot's motion for summary judgment, and the plaintiff appealed.

Claim examined

The Seventh Circuit first rejected the plaintiff's FMLA claims. She asserted that Home Depot had unlawfully interfered with her right under the act to take up to 12 weeks of unpaid leave for a serious health condition that made her unable to perform the functions of her job.

The court noted that substance abuse can qualify as a serious health condition under the FMLA if treatment for it involved "inpatient care" or "continuing treatment by a health care provider." Because the plaintiff had never received inpatient care for her condition before Dec. 23 (the day she violated the company's substance abuse policy), she couldn't establish a serious health condition by virtue of that test.

Moreover, she couldn't establish "continuing treatment" because the definition of this term requires a period of incapacity of more than three consecutive calendar days, and the record didn't reflect that the plaintiff's condition entailed this level of treatment. There was also no evidence that her condition made her unable to perform her job functions.

Additionally, the Seventh Circuit affirmed the district court's conclusion that the plaintiff had no valid ADA claim. To establish such a claim, the plaintiff would have to show that she had an ADA-defined disability. Alcoholism may qualify as a disability if it "substantially limits one or more major life activities." But, the court concluded that the plaintiff hadn't established that her alcoholism substantially limited her major life activities.

The law permits an employer to hold an alcoholic employee to the same standards for job performance and behavior that it holds other employees.

The Seventh Circuit held that, in any event, Home Depot wasn't required to accommodate an alcoholic by overlooking violations of its legitimate workplace policies. The law permits an employer to hold an alcoholic employee to the same standards for job performance and behavior that it holds other employees — even if the unsatisfactory performance is related to the employee's alcoholism.

Policies succeed

In this case, Home Depot gave the plaintiff paid time off and help via its EAP for her alcoholism — even though it wasn't required by law to do so. Although the company still wasn't able to avoid a lawsuit, its policies may have influenced the court's decision to affirm summary judgment. ♦