



Wimberly Lawson
Wright Daves & Jones, PLLC

Attorneys & Counselors at Law

Briefly

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SUPREME COURT ADDRESSES CAT'S PAW THEORY OF DISCRIMINATORY INPUT FROM SUPERVISORS



Howard Jackson

"Under this theory, a plaintiff seeks to hold the employer liable based on the discriminatory animus of a supervisor who was not charged with making the ultimate employment decision."

The courts in recent years have struggled with the so-called "Cat's Paw" theory of employment discrimination. Under this theory, a plaintiff seeks to hold the employer liable based on the discriminatory animus of a supervisor who was not charged with making the ultimate employment decision. In these circumstances, the non-decision making supervisor discriminatorily provides input, and the employer relies at least to some extent on that input when taking an adverse employment action against the employee. The courts have struggled with the issue of whether the outcome of such a process is lawful, given that the ultimate decision-maker's motives were "pure," or whether the employer should be held liable because the discriminatory input tainted the process and played a role in causing the ultimate decision. Some courts, and including a federal appeals court in a current case, attempted to carve out a middle ground by stating that the employer is not liable unless the non-decision-maker exercised "singular influence" over the decision-maker, or whether the decision-maker conducted an independent investigation and confirmed the ultimate action. The U.S. Supreme Court has now addressed the issue in a case involving military reservists, Staub v. Proctor Hospital, 190 LRRM 2257 (March 1, 2011).

In Staub, a military reservist's immediate supervisor was hostile to his absences due to military obligations. The supervisor intentionally scheduled him for additional shifts without notice as a form of "pay back" for the difficulties his absences caused other employees when he was on reserve duty. The supervisor stated to others that the military duty had been a strain on the department, and asked others to help the supervisor get rid of him. Subsequently, the supervisor issued certain disciplinary warnings for rule violations that actually did not occur, and made false accusations against the reservist to the HR Department. The HR Department relied on the supervisor's accusations, and after reviewing the reservist's personnel file, decided to discharge him. The terminated reservist sued. He did not contend that HR had any hostility to his military reserve duties. Rather, he claimed that the supervisor who recommended the action and influenced the ultimate employment decision, did.

The Supreme Court held that if a supervisor performed an act motivated by anti-military animus that was intended by the supervisor to cause an adverse employment action, and if that act was a proximate cause of the ultimate employment action, then the employer is liable. The Court refused to adopt a hard-and-fast rule that a decision-maker's independent investigation always negates the effect of prior discrimination based on the supervisor's animus. However, to establish a violation, the plaintiff must show that the biased supervisor's action was a causal factor for the ultimate employment action. Therefore, if the employer's investigation results in a adverse action for reasons unrelated to the supervisor's original biased action, then the employer will not be liable. The Court expressed no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision. The Court also expressed no view as to whether a plaintiff's failure to take advantage of the employer's internal grievance process would constitute an affirmative defense.

The HR lessons? Do not take everything that supervisors and managers say at face value. Also, interview the employee before taking any serious adverse action. That gives the employee a clear opportunity to make you aware of any unlawful hostility before the action is taken.

Editor's Note - The Staub decision is likely to constitute a controlling precedent for applying the Cat's Paw theory to other forms of employment discrimination. The result of the decision is to hold the employer liable in many circumstances if the ultimate decision is influenced by discriminatory input from a lower-level supervisor. The case does not clearly indicate what an employer can do to avoid this problem, although it suggests that the decision-maker might conduct such a thorough independent investigation that the ultimate adverse action is taken for reasons unrelated to the supervisor's original biased input. The decision also suggests that an employer might argue as a defense that the decision-maker did not intend to make a discriminatory decision and therefore the employee should follow through with the internal appeal procedures to avoid the effects of discriminatory animus of the lower-level supervisor.

Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

HEALTH REFORM UPDATE: APRIL SEES FIRST REPEALS OF PPACA PROVISIONS; GUIDANCE ISSUED ON W-2 REPORTING REQUIREMENT AND ANTI-ABUSE RULES FOR GRANDFATHERED PLANS



Catherine Shuck

“Implementing agencies recently issued two pieces of guidance on PPACA that are particularly noteworthy for employers.”

REPEALS

The first repeals of provisions in the Patient Protection and Affordable Care Act (“PPACA”) have made their way through Congress.

First, on April 14, President Obama signed into law a bill repealing one of PPACA’s more unpopular provisions, the 1099 reporting requirement. The requirement would have mandated that businesses, nonprofits, and government entities to issue a Form 1099 to all vendors to whom they made payments of more than \$600 in any tax reporting year, beginning in 2012. The provision was one of PPACA’s several revenue-generating provisions; Treasury had forecast that the reporting requirement would bring in \$19B in otherwise uncollected taxes. Businesses—as well as some within the Treasury—argued that the administrative burden created by the resulting blizzard of 1099 forms would offset any monetary gains, however.

Although the provision was targeted for repeal early on, with the President including a call for its repeal in his State of the Union Address, Congressional leaders had difficulty agreeing on how to replace the \$19B in revenue. After seven attempts, Congress finally agreed on a solution. PPACA now requires that any individual who receives a tax credit to purchase a health plan through an Exchange, but becomes ineligible for all or part of the credit later in the year, to repay the credit.

Second, the budget bill enacted on April 15 includes a section scrapping a lesser-known provision of PPACA, which was projected to add \$4B to the deficit in the coming years. The “free-choice voucher” provision would have required employers to issue a voucher to employees whose required contribution to the employer plan was between 8% and 9.8% of household income, to permit those employees to purchase a health insurance through an Exchange. The voucher amount would have been the amount the employer would otherwise contribute to its health plan on behalf of the employee.

The idea was to allow employees who did not quite qualify for a tax credit to have the flexibility to choose an Exchange plan, which could possibly be more affordable for the employee. The voucher requirement would have been administratively cumbersome, however, and had been criticized by at least one official in the federal Employee Benefit Security Administration (“EBSA”) as being potentially very difficult to enforce. Now that it has been repealed, employers have one less thing to worry about come 2014.

GUIDANCE

Implementing agencies recently issued two pieces of guidance on PPACA that are particularly noteworthy for employers. First, on March 29, the IRS addressed the W-2 reporting requirement in Notice 2011-28. PPACA requires employers to report the aggregate cost of employer-sponsored benefits provided to employees on their W-2 forms. The requirement was originally scheduled to begin for the 2011 tax year, but the IRS had previously stated that the requirement would not become mandatory until 2012.

Notice 2011-28 confirms that the reporting requirement is voluntary this year, and further provides that it will also be voluntary for small employers for the 2012 tax year. Small employers, for this purpose, are those who issued fewer than 250 W-2 forms for the previous tax year. The Notice includes detailed information on how to calculate the aggregate cost of benefits, to be reported on Box 12 of Form W-2. Even though reporting is voluntary for all employers this year, and for many employers next year, employers should consider doing a “test run” on the reporting requirement before it becomes mandatory.

Finally, the implementing agencies (HHS, DOL, and Treasury) jointly issued a sixth installment of “Frequently Asked

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WAGE & HOUR ENFORCEMENT OF MOTOR CARRIER EXEMPTION: ADMINISTRATOR WILL REQUIRE WEEK-BY-WEEK DETERMINATIONS



Carol Merchant

“This exemption generally excludes drivers, drivers’ helpers, loaders, and mechanics who drive, load or service such vehicles from the entitlement to overtime pay when they work more than 40 hours in any week.”

In 2005 and in 2008, Congress changed the U. S. Department of Transportation’s jurisdiction over motor carriers thereby narrowing the Motor Carrier overtime exemption to apply only to commercial motor vehicles (those weighing 10,000 pounds or more, carrying more than 8 passengers for hire, transporting more than 15 passengers for no compensation, or transporting hazardous materials). This exemption generally excludes drivers, drivers’ helpers, loaders, and mechanics who drive, load or service such vehicles from the entitlement to overtime pay when they work more than 40 hours in any week. Now, in a Field Assistance Bulletin in late 2010, the Wage & Hour Administrator has said that exceptions to this exemption will be determined on a week-to-week basis. In other words, if a driver, driver’s helper, loader or mechanic drives or does any work on motor vehicles not covered by the Motor Carrier exemption in any work week, the employee is entitled to overtime pay during that week. This development is going to be an administrative headache for a lot of employers.

Prior to 2007 the Wage and Hour Division took the position that any driver, drivers’ helper, loader, or mechanic whose work concerned vehicle safety was exempt from overtime under 29 U.S.C. §13(b) (1), commonly referred to as the Motor Carrier exemption. The logic was that the U.S. Department of

Transportation had jurisdiction over such employees, and could set their hours of work. The Motor Carrier exemption applied if one of these employees engaged in interstate transportation at any time within any 4-month period and covered any type of vehicle. In fact, the exemption had been held to apply to employees who drove automobiles or pick-up trucks in the course of their work, so long as they crossed state lines at least once every 4 months.

The 2005 amendments (incorporated into Wage and Hour Division enforcement in 2007) restricted the exemption to commercial motor vehicles but retained the 4-month rule. The amendments also provided that if an employee ordinarily subject to the exemption drove or worked on a vehicle weighing less than 10,000 pounds during that period, the exemption would be lost. This left a question: if an employee lost the exemption because of driving or working on vehicles that did not qualify, was the exemption lost for the entire 4-month period?

The latest Administrator’s bulletin on the 2008 amendments provides that if an otherwise exempt employee invalidates the exemption by driving or working on a non-qualifying vehicle, the exemption is lost – and the employee is entitled to overtime - only in the week that he or she drove or worked on a non-qualifying vehicle. For example, if Mike the mechanic normally works only on the big rigs, and is properly exempt under 213(b)(1), but his supervisor asks him to check out the transmission on Mr. Big’s Escalade one day, Mike is going to be entitled to overtime for the week in which he fixed Mr. Big’s car. Instead of just paying his normal rate, payroll will have to add up the number of hours he worked that week and pay him time-and-a-half for any hours worked over 40 that week.

While this is good news in some respects – if the exemption were invalidated for the entire 4-month period, the employer would have to go back and correct payroll for the entire period – it is still going to be an administrative headache, because payroll will have to keep tabs on employees’ activities as well as change the manner in which an employee is compensated in the weeks when the exemption is invalidated.

KNOW YOUR ATTORNEY MARY DEE ALLEN

MARY DEE ALLEN is a Member in the Cookeville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC,



which she joined in 2003. Mary Dee is a practicing trial attorney since 1992, handling primarily workers’ compensation defense and employment discrimination defense, in state and federal Courts and

administrative agencies. She obtained an Associates Degree in Nursing from Union University in 1988, a Bachelor’s Degree in History from Union University in 1989, and a Doctor of Jurisprudence Degree from the University of Memphis in 1992. Mary Dee has been named Co-Chair of the Legislative Committee of the Upper Cumberland Society of Human Resource Management for 2011.

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**“HEALTH REFORM UPDATE”
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Questions” recently (“FAQ VI”), which included a question addressing when Grandfathered Health Plans may transfer employees from one plan to another. The anti-abuse rules for Grandfathered plans generally provide that transferring employees from one Grandfathered plan (transferor plan) to another (transferee plan) will cause the transferee plan to lose its Grandfather status if amending the transferor plan to replicate the terms of the transferee plan would have caused the transferor plan to lose Grandfathered status. The guidance in FAQ VI provides that Bona fide transfers eliminating a benefits package will not cause a loss of Grandfathered status if:

1. The insurer exits the market or no longer offers the benefits package to the employer;
2. Low or declining participation make it impractical to continue offering package;
3. Elimination of the package is agreed upon in collective bargaining; or
4. For “any reason,” as long as multiple benefits packages covering a significant portion of other employees remain available to the transferred employees after the package is eliminated.

This guidance indicates that the anti-abuse rule is much more flexible than it first appeared. The fourth item, in particular, appears to allow employers to eliminate a benefits package as long as two or more other packages remain. This should be welcome news for any employer attempting to retain Grandfathered status for its health plans.

NAVIGATING UNEMPLOYMENT CLAIMS



Andrew J. Hebar

“As the economy continues to struggle, terminated employees have fewer options for replacement work...”

As a Firm, we have noticed a great deal of interest from our clients regarding unemployment compensation claims within the past year. As the economy continues to struggle, terminated employees have fewer options for replacement work and are much more inclined to pursue unemployment benefits on what were historically marginal claims. Alarming, we have noticed plaintiff’s attorneys are not only assisting discharged employees with obtaining unemployment benefits but using the unemployment benefits investigations to boot-strap employment claims. In light of these developments, we offer some advice to wary employers navigating the unemployment claims process.

First, be sure to prepare a Separation Notice. If your State’s Department of Labor requires the Notice to be on a specific form, familiarize HR staff on what the form looks like and how the form is to be completed. Care should be taken to avoid limiting the reasons stated for a person’s separation. Broad, somewhat all-encompassing reasons may serve you best, but keep your sentences concise. Complete the form in its entirety and be sure to provide a terminated employee with a copy. Retain a copy for your records as well. If more than one employer representative is involved in the termination process, or your business utilizes documents in addition to the Separation Notice, please insure that the information contained on these documents is consistent. It’s awfully tough to explain inconsistent documents to a judge or jury!

If the matter involves an Appeals Tribunal, be sure to be prepared ahead of time. If Investigators from an entity such as the Department of Labor are willing to travel, offer them the opportunity to conduct the Appeals Hearing at your place of business. If Supervisors or HR staff will be providing any testimony, be sure that they are familiar with the facts and circumstances of the case. As weeks or months go by, a brief

refresher not only reacquaints someone with the facts, but insures that everyone who offers testimony is on the same page. Anyone who is going to represent your organization at a hearing needs to be familiar with rules of evidence and to understand the limitations of hearsay (second-hand) testimony. Legal representation at the hearing keeps “bad” evidence from becoming part of the record.

Again, be aware that plaintiff’s attorneys are becoming more involved with unemployment claims. Be prepared to encounter a hostile attorney demanding a cross-examination during an appeal hearing. Remember, most tribunal hearings generate a permanent record that can be used to impeach the unwary at a later trial. Unemployment claims could be small charge compared to a retaliatory discharge or employment discrimination claim. When stuck in a corner, sometimes the best recourse is to forego the smaller claim and prepare for the coming battle on a larger claim.

As always, the staff at Wimberly Lawson stand ready to assist with unemployment matters and can advocate on behalf of employers or management during the unemployment claims process. The sooner legal representation is involved on your behalf, the better these contingencies can be addressed.



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Dear Clients and Friends:

Our Annual Fall Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the thirty-five or more topics are:

- Healthcare Reform Headaches for 2012
- FLSA Hot Buttons and Enhanced Federal Enforcement
- Social Media in the Workplace – Unforeseen Dangers for Employers
- Nuts and Bolts of Unemployment Claims
- Employment Contracts and Agreements – How They Can Protect Employers
- Wage and Hour Compliance Tips/Class-Action Alerts
- Employer Policies/Handbooks – For Better or Worse
- Records Retention Guidelines/Litigation Holds
- Employee Conduct and Appearance – On and Off the Job
- Workplace Crisis/Violence in the Workplace – How to Prevent and Protect
- Workers Compensation Update/Strategies – One of Your Biggest Employment Costs
- EEOC Compliance/Charge Responses – EEOC Officials Talk Directly With You
- USERRA (Uniformed Services Employment and Reemployment Rights Act)
- Labor Update/Impacts of Continuing Recession/Union Initiatives
- Employer Access to Employee Medical Information: GINA, ADA and FMLA
- Affirmative Action Requirements – Who and What
- Special Session for Public Employers

Join us in Knoxville on November 3rd and 4th! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves
Managing Member





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THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 3 – 4, 2011

COST: Early, Early Bird (registration AND payment received by May 31, 2011)
\$299 per person
\$279 for each additional person from same company
\$249 for eight or more from same company

Early Bird (registration AND payment received by September 30, 2011)
\$309 per person
\$299 for each additional person from same company
\$259 for eight or more from same company

Registration and payment received AFTER October 1, 2011
\$349 per person
\$339 for each additional person from same company
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Attorneys and Paralegals: Approval of continuing education credits through the Tennessee Commission on CLE and National Association of Legal Assistants (NALA) will be requested.

REGISTRATION INCLUDES:

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

CANCELLATION POLICY: 50% cancellation fee will be incurred for cancellations after October 12, 2011. Cancellations made after October 25, 2011 will forfeit registration fee (registrants will receive the conference materials post-seminar). Substitutions of attendees within the same company will be permitted at any time.

FIVE WAYS TO REGISTER:

1. **Mail to:** Bernice Houle
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3. **Email to:** bhoule@wimberlylawson.com
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