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Employment Law Update

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Employment Auditor's Notepad

When is it OK to Fire Someone Who Complained?

Most employers have run into the following scenario at least once: Employee is not performing. Employer counsels employee. The pattern of nonperformance and counseling continues until Employer makes the decision to terminate Employee. Days, or even hours, before the intended termination, Employee files a complaint with Employer about discrimination, harassment, wage and hour violations, etc.

Now what? Go forward with the termination because Employer knows the reasons for termination were strictly performance-based? Or hold off for fear of a potential retaliation lawsuit?

In the recent Ninth Circuit case, *Dawson v. Entek International*, the Ninth Circuit held that where an employee was terminated 48 hours after complaining of sexual orientation harassment, the close proximity between the Employee's complaint and termination created an issue of fact, which must be determined by a jury.

In deciding whether and when to terminate employees who complained, Employers should take into account the risk of a retaliation lawsuit and likelihood that suggestive timing will mean paying a settlement or committing to a lawsuit all the way through a jury trial.

US Supreme Court Upholds "Cat's Paw" Liability

In *Staub v. Proctor Hospital*, the United States Supreme Court recently upheld the "Cat's Paw" theory of liability for discrimination; such a theory arises when a supervisor fires an employee because of the complaints of another employee who harbors a discriminatory animus.

Staub, a member of the United States Army Reserve, was employed by Proctor Hospital. Both his supervisors were hostile towards his military obligations. They gave Staub performance-related Corrective Action, which Staub violated. Thereafter, Proctor Hospital's Vice-President terminated his employment. Staub complained that the basis for the Corrective Action was fabricated, but the Vice-President adhered to her decision.

Staub sued Proctor Hospital for violation of USERRA, which forbids an employer to deny employment or any benefit thereof based on a person's membership in or obligation to the military.

Proctor Hospital argued that because the Vice-President made the final decision to terminate Staub and she lacked discriminatory motive, the case should be dismissed. The Supreme Court disagreed with this approach: "Proctor errs in contending that an employer is not liable unless the *de facto* decisionmaker is motivated by discriminatory animus. So long as the earlier agent intended, for discriminatory reasons, that the adverse action occur, he has the [intent] required for USERRA liability." Any other holding would, in effect, allow an employer to insulate itself from liabilty by isolating an official from its discriminatory supervisors, having the official review the supervisor's recommendations, and make the termination decision. The Supreme Court also rejected Proctor's argument that a decisionmaker's independent investigation, and rejection, of an employee's discriminatory animus allegations should negate the effect of prior discrimination.

As always, employers must take every complaint of discrimination seriously and conduct an investigation to determine whether those on whose opinions it relies are free of discriminatory and illegal motive. Employers must scrutinize supervisor and manager personnel recommendations if there is any suspicion or concern of ulterior motive.

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