Pacific Employers
Management Advisor
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April 2011

What's New!

Supreme Court Upholds "Cat's Paw" Liability

In a current decision, the U.S. Supreme Court shed light on employers' potential "cat's paw" liability. Justice Scalia, writing for the 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 the United Services Employment and Reemployment Rights Act of 1994 (USERRA). *Staub v. Proctor Hospital.*

The plaintiff in the case, Vincent Staub, worked as an angiography technician for defendant Proctor Hospital (PROCTOR) until 2004, when he was terminated. While employed by PROCTOR, Staub was a member of the U.S. Army Reserve, which required him to attend drill one weekend per month and to train full time for two to three weeks a year. Both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were hostile to Staub's military obligations. In January 2004, Mulally issued Staub a "Corrective Action" disciplinary warning without justification. Then in April 2004, Korenchuk informed PROCTOR's Vice President of Human Resources, Linda Buck, that Staub had violated the Corrective Action, which again was false. Buck relied on Korenchuk's accusation, and after reviewing Staub's personnel file, she decided to fire him.

Staub sued PROCTOR under USERRA, claiming that his discharge was motivated by hostility to his obligations as a military reservist. He did not contend that Buck had any such hostility, but instead that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision.

The relevant statutory provision states: "An employer shall be considered to have engaged in [prohibited discrimination against a member of one of the uniformed services] if the person's membership . . . is a motivating factor in the employer's action." This "motivating factor" language is very similar to that set forth in Title VII.

PROCTOR argued that an employer is not liable under this standard unless the ultimate decision maker is motivated by discriminatory animus. The Court rejected this argument and reasoned that so long as the earlier agent or supervisor intended, for discriminatory reasons, that the adverse action occur, the wrongful intent required for USERRA liability exists. Furthermore, the Court relied on tort law to reason that the ultimate decision maker's use of judgment in making the final employment decision does not prevent the earlier supervisor's action from being the proximate cause of the harm.

In response to the "cat's paw" liability standard articulated in Staub, employers should involve human resources departments and legal counsel as appropriate, to independently review proposed adverse employment actions. In particular, warnings or other recommendations made by supervisors with known or suspected biases should be carefully vetted to ensure credibility and a lack of discriminatory intent. Any termination decisions should be well documented by supporting facts. [PE]

Workplace Violence Flyer Enclosed!

President's Report
~Dave Miller~

Workplace Violence Seminar!

Pipkin Detective Agency and Pacific Employers are proud to announce the date for our 2nd Annual Workplace Violence Seminar which will be presented on May 3, 2011 at the International Agri Center. Registration will open at 8:00 AM and the Seminar will begin promptly at 9:00 AM and will conclude at 3:30 PM. The full schedule and Agenda will be part of our email newsletter in the next few days.

Yours truly will be emceeing the first half of the program and speaking on employer obligations regarding workplace safety.

Opening the day will be guest speaker Attorney David D. Blaine, of the Klein DeNatale Law Firm with offices in Bakersfield and Fresno, speaking on the legal issues of Workplace Violence.

Addressing surveillance and alarm systems will be Rob Shahan and David Primm with Security First Alarm King, and Global Positioning Systems (GPS) will be covered by Jayme Stevens of Stevens Wireless.

Tim Torian with the Torian Group will cover network and computer security and if you care about how your employees use your fuel credit cards, Geary Galush of Roe Oil will speak to establishing secure and audited company vehicle fueling.

Rounding out the day will be Nationally recognized author and Human Resource Expert Stephanie Angelo. The theme of her talk will be "When Domestic Violence goes to Work."

Refreshments and lunch will provided by the Vintage Press. Pre-registration is $125.00 per attendee and $175.00 at the door. We had almost 200 attendees last year so early sign-ups are encouraged. Hope to see you all there! [PE]

"The most terrifying words In the English language are: 'I'm from the government and I'm here to help.'" - Ronald Reagan

Recent Developments

One-Strike Rule Okayed

A recent opinion from the U.S. Circuit Court of Appeals for the Ninth Circuit has clarified employer liability under the Americans with Disabilities Act, where the employer requires drug testing as a prerequisite to employment. In *Lopez v. Pacific Maritime Associates,* the plaintiff challenged a union's one-strike rule, which provided that one positive drug test during pre-employment testing permanently prohibited hiring of the applicant.

In this case, the plaintiff applied for work as a longshoreman in 1997, but was rejected after he tested positive for marijuana. After seeking treatment for his drug addition, the plaintiff again applied in 2004, but was denied under the union's one-strike rule.

In response, the plaintiff sued under the ADA, alleging that he had suffered discrimination on the basis of a disability—his previous drug addiction. The plaintiff alleged both disparate treatment and disparate impact. In reviewing the appeal, the Ninth Circuit rejected the plaintiff's disparate treatment assertions on several fronts. First, the Court held that because the one-strike rule denied employment to both addicts and recreational drug users, it did not discriminate on the basis of addiction. In reaching its holding, the Court emphasized that "the ADA prohibits employment decisions made because of a person's qualifying disability, not decisions made because of factors merely related to a person's disability."

Second, the Court concluded that there was no evidence to indicate that the union imposed the one-strike rule with the intention of excluding recovering addicts from the workforce. Instead, the Court found that the one-strike rule was tied to a history of injuries and fatalities in the longshore industry, resulting from the use of drugs and alcohol in the workplace.

"... OPINION SHOULD REASSURE THOSE EMPLOYERS ..."

Finally, the Court found it significant that the union did not learn of the plaintiff's addiction until after it had again denied him employment in 2004. In the absence of knowledge about his disability, its decision could not have been based on discriminatory animus.

With regard to his disparate impact claim, the Court rejected the plaintiff's argument that the one-strike rule disproportionately impacted recovering drug addicts, because plaintiff did not provide any relevant statistical evidence in support of his allegations.

The Ninth Circuit's opinion should reassure those employers who engage in non-discriminatory drug testing. As we already know, if your drug testing policy applies to all employees meeting certain neutral criteria (e.g. all job applicants, or all employees involved in workplace accidents) your conduct is lawful under the ADA. While the one-strike rule addressed by the Ninth Circuit is severe, the Court's opinion is in keeping with previous ADA jurisprudence protecting employers who drug test job applicants and employees under facially-neutral circumstances. [PE]

Walker: Union Bosses Out of Touch

If most Americans knew what the Wisconsin labor debate was really about, says Gov. Scott Walker (R), they wouldn't be up in arms.

In an opinion piece published in *The Washington Post*, Walker said many people are confused about the budget reform plan that he signed into law. The bill reduced the health insurance and pension benefits of certain civil-service employments and stripped the collective-bargaining rights from those unions so they cannot negotiate salary increases. According to Walker, the bill will help sustain the state, which is running a deficit.

But the introduction of the bill a month ago enraged public employees, who have been part of the protest outside the state capitol in Madison for weeks. And the unrest has spread across the country, with public workers in Ohio, Pennsylvania, and other states fighting to maintain their union rights as well.

"... UNIONS ARE SAYING ONE THING TO THE MEDIA AND DOING ANOTHER ..."

The unions in Wisconsin said they had no problem taking cuts to insurance and pensions, but Walker said the unions are saying one thing to the media and doing another behind closed doors.

"The union bosses in Washington said publicly that their workers were ready to pay a little bit more for their benefits. But the truth is that as the national union bosses were saying one thing, their locals were doing something entirely different," Walker wrote. "Over the past several weeks, local unions across Wisconsin have pursued contracts without new pension or health insurance contributions. Some have even pushed through pay increases."

"Their actions leave one wondering how tone-deaf and out of touch union bosses are with what's happening in the private sector," he said.

In comparison to the private sector, the Wisconsin civil employees pay far less in health insurance costs and pension contributions, Walker said. When you look at federal benefits, he said, Wisconsiners are getting the royal treatment; federal employees contribute more than twice as much in health insurance costs. [PE]

$792,396 For Wage and Hour Violations

Following an investigation by the U.S. Department of Labor's (DOL) Wage and Hour Division, Pythagoras General Contracting Corp., a construction contractor will pay $792,396 in back wages for 79 employees. In addition, Pythagoras and its company president are debarred from working on future federally funded contracts for three years.

"... PYTHAGORAS FAILED TO PAY SOME EMPLOYEES AT THE PREVAILING WAGE RATE ..."

An investigation conducted by the DOL determined that Pythagoras allegedly violated the wage and benefit requirements of the Davis-Bacon Act (DBA) and the Contract Work Hours and Safety Standards Act (CWHSSA) while working on a partially federally funded New York City Housing Authority construction project. According to the DOL, Pythagoras failed to pay some employees at the prevailing wage rate for the skilled labor actually performed due to misclassification of the employees under the DBA and routinely failed to pay some employees for all hours worked on the project.

The DBA requires all contractors and subcontractors performing work on federal and certain federally funded projects to pay their laborers and mechanics the proper prevailing wage rates and fringe benefits as determined by the DOL.

In addition, the CWHSSA requires contractors and subcontractors to pay laborers and mechanics one and one-half times their basic rate of pay for all hours worked over 40 in a week. [PE]

Workplace Violence Flyer Enclosed!

Human Resources Question with Candice Weaver

The Month's Best Question

Social Media Policies

Q: ***"How do we deal with the variety of issues resulting from social media use by employees?"***

A: The first step is to have a Well-Written Policy. A social-media policy that is carefully drafted can be the most effective tool that an employer can hope to have. Although policies can vary greatly depending on the culture and needs of the organization, there are a few essentials that all policies should include.

Be sure to identify a specific contact person (with contact information) who will be the point person for employees' questions about the policy and make it clear that employees are to ask before acting any time they have any doubts about whether their intended action may violate the policy.

Specifically reference other company policies, such as an anti-harassment and -discrimination policy, conflicts-of-interest policy, and confidentiality policy, and make it clear that they apply equally to conduct in the online world just as they do in the "real" workplace.

Require all employees to report online conduct that violates any of these policies as soon as they become aware of it--without this provision, you may find that the only people who don't know about policy violations are those that are charged with its enforcement.

Educate Employees

The goal of your social-media policy should not be to "trick" employees into violating it. Instead, the objective is to prevent employees from acting in a way that hurts the organization or themselves. With that in mind, employers are well advised to offer ongoing education to employees. Topics can include proper online etiquette, good online citizenship, as well as more hands-on subjects, such as how to adjust the privacy settings in a social-networking profile.

Don't rule out the value of learning by example. A discussion of headlines involving employees who are terminated or disciplined for online conduct is an excellent training tool and offers employers valuable insight about what conduct their employees find most (and least) egregious. [PE]

No-Cost Employment Seminars

The Small Business Development Center and Pacific Employers host this Free Seminar Series at the Tulare-Kings Builders Exchange on the corner of Lover's Lane and Tulare Avenue in Visalia, CA. RSVP to Pacific Employers at 733-4256 or the SBDC, at 625-3051 or fax your confirmation to 625-3053.

The mid-morning seminars include refreshments and handouts.

2011 Topic Schedule

♦ **Safety Programs -** Understanding Cal/OSHA's Written Safety Program. Reviewing the IIPP or SB 198 requirements for your business.
Thursday, April 21st, 2011, 10 - 11:30am

♦ **Family Leave -** Federal & California Family Medical Leave, California's Pregnancy Leave, Disability Leave, Sick Leave, Workers' Compensation, etc.; Making sense of them.
Thursday, May 19th, 2011, 10 - 11:30am

♦ **Wage & Hour and Exempt Status -** Overtime, wage considerations and exemptions.
Thursday, June 16th, 2011, 10 - 11:30am

♦ **Hiring & Maintaining "At-Will" -** Planning to hire? Putting to work? We discuss maintaining "At-Will" to protect you from the "For-Cause" Trap!
Thursday, July 21st, 2011, 10 - 11:30am

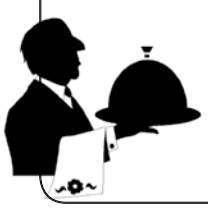
There is No Seminar in August

♦ **Forms & Posters -** as well as Contracts, Signs, Handouts, Fliers - Just what paperwork does an Employer need?
Thursday, September 15th, 2011, 10 - 11:30am

♦ **Guest Speaker Seminar -** Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer.
Thursday, October 20th, 2011, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.
Thursday, November 17th, 2011, 10 - 11:30am

There is No Seminar in December



Dinner for 2 at the *Vintage Press*?

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press*. Call 733-4256 or 1-800-331-2592.

Want Breaking News by E-Mail?
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Pregnancy Action Costs Firm $35,000

A security company that fired a worker who revealed her pregnancy to her boss must pay $35,000 to resolve a discrimination complaint. A federal judge has prohibited Durable Contract Services Inc., a Milwaukee company that provides security for government buildings, from future pregnancy discrimination or retaliation and required the company to provide training to its employees regarding pregnancy discrimination.

The company violated federal law by firing employee Tenisha Yarbrough less than a week after she disclosed to her supervisor that she was pregnant, according to the U.S. Equal Employment Opportunity Commission's Chicago district office. Terminating, demoting or otherwise denying job opportunities and benefits to a worker because of pregnancy is a form of illegal sex discrimination under federal law. [PE]

Medical Interpreter Services Are Compensable

The Workers' Compensation Appeals Board (WCAB), in a recent decision, says employers must pay for reasonably required interpreter services for doctors' visits and other medical appointments that are strictly for treatment when the injured worker is "unable to speak, understand, or communicate in English."

But the WCAB's decision in *Jose Guitron v. Santa Fe Extruders and State Compensation Insurance Fund* allowed employers a bit of relief by putting much of the burden of proof for compensability on the interpreting service provider.

The WCAB decision overturns the workers' comp judge's (WCJ) findings that the interpreter services were not always required under Labor Code section 4600 and rejected services that were provided in East Los Angeles.

"In that part of the city, Spanish is the primary language, and it is reasonable to believe that medical offices (physicians, chiropractors and physical therapists) serving that community are staffed primarily (if not entirely) by people who speak Spanish." the WCJ wrote. [PE]

John Muir Settles Disability Lawsuit

John Muir Health agreed to pay $340,000 to eight health care workers and to implement preventative measures to settle a federal disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC), the agency announced.

The settlement resolves the EEOC's suit, which had charged that John Muir withdrew job offers to seven nurses and one lab technician when it assumed that the eight workers had life-threatening latex allergies and could not safely work in a hospital setting. Subsequently, however, some of the workers were independently evaluated by board-certified allergists, who concluded that they did not have an allergy or sensitivity that would preclude them from working safely in hospital settings. All eventually continued to work in the health care profession. [PE]

Sexual Harassment Prevention Training

Visalia Chamber of Commerce and Pacific Employers, will jointly host a state mandated Supervisors' Sexual Harassment Prevention Training Seminar & Workshop with a continental breakfast on Wednesday, April 27th, registration at 7:30am. Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876 – $25
Certificate – Forms – Guides – Full Breakfast