Law of the WORKPLACE

SIEGEL, O'CONNOR, O'DONNELL & BECK, P.C. • **JUNE 2011**

Of Monkeys and Chestnuts: Expanding the "Cat's Paw" Theory of Employer Liability

by **RYAN O'DONNELL**

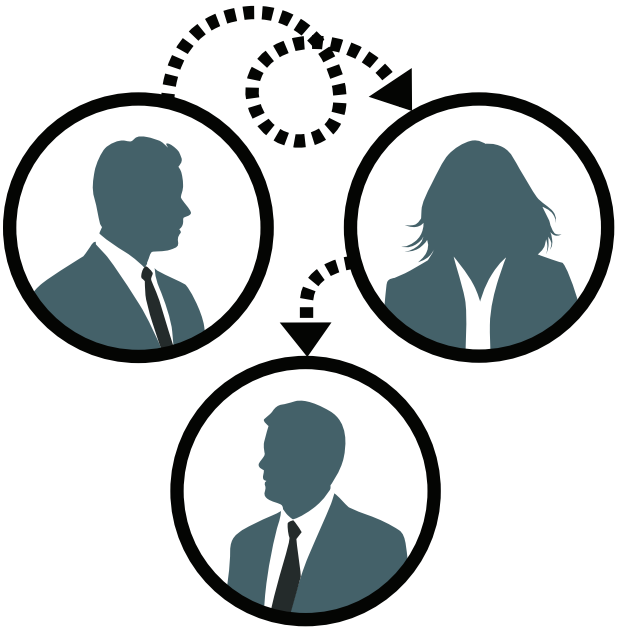
One of Aesop's most memorable fables, "The Monkey and the Cat," tells the story of a monkey who convinces a cat to pull roasting chestnuts from a fire. The cat retrieves the chestnuts, but in doing so, burns his paws. Meanwhile, the monkey scampers away with the chestnuts, leaving the cat with nothing.

So what do monkeys, cats, and white-hot chestnuts have to do with employer liability? In *Staub v. Proctor Hospital*, the U.S. Supreme Court uses the term "cat's paw" to describe an employment law situation where an employer unknowingly makes an adverse employment decision based on a supervisor's unlawful animus. In such a scenario, the employer serves as the "cat's paw," the instrument through which the monkey, (in this case, the supervisor), can exercise his animus without getting burned.

In *Staub*, the plaintiff employee worked as an angiography technician for the Respondent hospital. The plaintiff was also a member of the United States Army Reserve, which required him to train one weekend a month, in addition to full-time training two to three weeks a year.

Two of Respondent's other employees, Janice Mulally—Staub's supervisor—and Michael Korenchuk—Mulally's supervisor—"were hostile to Staub's military obligations." This hostility prompted Mulally and Korenchuk to issue Staub disciplinary warnings for violating nonexistent company rules, warnings that were placed in Staub's personnel file, and used as a basis to terminate Staub's employment with Respondent.

Relying on these allegations, Linda Buck, Proctor's vice president of human resources, decided to fire Staub. In



response, Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), claiming that his discharge was "motivated by hostility toward his obligations as a military reservist." Yet, as the Court noted, Staub's contention was not that "Buck had any such hostility, but that Mulally and Korenchuk did, and that their actions influenced Buck's ultimate employment decision."

Holding that a "cat's paw" case could not "succeed unless the nondecisionmaker exercised such 'singular influence' over the decisionmaker that the decision to terminate was the product of 'blind reliance,'" the Seventh Circuit ruled in

Continued on **Page 2**

Continued from the Cover

favor of Proctor.

The Supreme Court, however, reversed this decision, holding that, if a supervisor performs an act motivated by antimilitary animus "that is intended to cause an adverse employment action, and if that is a proximate cause of the ultimate employment action, then the employer, then the employer is liable under USERRA."

Implications for Employers

So how is this recent "cat's paw" case going to affect employers? First, the cat's paw principle established in the *Staub* decision is likely to be applied to other, similar claims of animus. Second, it is clear that simply conducting an "independent investigation" is not sufficient to protect employers from such claims. It is imperative that employers have an employee handbook which addresses discipline and discharge policies. Furthermore, employers are encouraged to contact legal counsel and make arrangements to train their supervisors with regard to not only this new ruling, but all the nuances of discipline documentation.

FLSA Anti-Retaliatory Provision Not Limited to Written Complaints

by **JASMIN ROJAS**

In another one of its decisions extending employee protections, the Supreme Court recently held in *Kasten v. Saint-Gobain Performance Plastics Corp.* that the scope of the anti-retaliation provision contained in the federal Fair Labor Standards Act (FLSA) is not limited to written complaints. Instead, the Court concluded that the FLSA broadly protects any type of complaint that sufficiently places the employer on notice that the employee is asserting statutory rights under the FLSA.

As employers are aware, the FLSA establishes national standards for minimum wages, overtime pay, recordkeeping provisions, and child labor. The FLSA contains an anti-retaliation provision, 29 U.S.C. § 215(a)(3), that forbids employers from discriminating against any employee that has "filed any complaint" to enforce the FLSA's statutory provisions.

In *Kasten*, the plaintiff employee had repeatedly brought his concerns about the location of the employee time clocks to the defendant company officials. He complained that the clocks kept the workers from receiving compensation for the time they spent putting on and taking off their gear, in violation of the FLSA. The employee, however, never filed a written complaint.

The employee was subsequently discharged. In response, the employee filed suit, claiming that he was discharged in retaliation for his complaints, in violation of the FLSA. The district court entered summary judgment in the employer's favor on the ground that, even if the employee was correct, the FLSA did not protect oral complaints.

On appeal, the Supreme Court held that, depending on the circumstances, oral complaints may fall within the scope of the FLSA's anti-retaliation provision. The Court reasoned that the relevant inquiry is not the form of the complaint. Rather, it is whether the employee's complaint provides fair notice to the employer. Thus, the Court concluded that a complaint is considered "filed" when "a reasonable, objective person would have understood the employee" to have "put the employer on notice that [the] employee is asserting statutory rights under the [FLSA]." Accordingly, the complaint has to be sufficiently clear and detailed for a reasonable employer to understand that the complaint is an assertion of rights under the FLSA.

Implications for Employers

Connecticut's wage and hour laws generally provide greater protections than the FLSA. For example, Conn. Gen. Stat. § 31-69b also prohibits an employer from taking any adverse employment action against any employee that has "filed" a wage and hour "claim." However, § 31-69b contains additional language which provides that an employer cannot discriminate against any employee that has exercised "any right afforded" under the wage and hour statutes. Given the remedial nature of Connecticut's wage and hour laws, and the decision in *Kasten*, Connecticut courts will most likely also interpret § 31-69b to encompass oral complaints.

Accordingly, employers should review their policies regarding how they address employee complaints. Employers should institute a system to uniformly respond to and investigate all wage and hour complaints, both oral and written. For example, employers may want to develop a company policy that defines what a complaint is, and sets forth with specificity to whom complaints should be directed. Employers should also institute a policy that directs supervisors to forward wage and hour complaints, regardless of their trivial nature, to upper level management for determination as to whether an actual protected complaint is being made. Finally, prior to instituting any adverse employment action against an employee, the employer should confirm that such action is not a response to a wage and hour complaint, or any other protected activity.

Supreme Court Upholds Arizona Law that Punishes Businesses for Hiring Illegal Immigrants

by **RYAN O'DONNELL**

SUPREME COURT

Last month, the U.S. Supreme Court upheld an Arizona law that penalizes businesses for hiring illegal immigrant workers. In *Chamber of Commerce v. Whiting*, the Court considered the "Legal Arizona Workers Act" (LAWA), a law that allows Arizona courts to suspend or revoke the business license of any employer who knowingly or intentionally employs an unauthorized alien.

While the U.S. Chamber of Commerce argued that LAWA was preempted by a similar federal provision—the Immigration Reform and Control Act—the Court disagreed, as it found no language in the federal law that preempted a similar state statute.

Of particular interest to employers is the Chamber's argument that states laws such as LAWA would encourage employers to discriminate against potential employees. However, the Court rejected this argument as well, noting that LAWA has a safe harbor provision for employers who use the federal E-Verify system to check on the eligibility of potential employees.

The Court's decision came as a surprise to many observers, who predicated the "conservative" Roberts Court would never rule against business groups such as the U.S. Chamber of Commerce. Instead, the Court delivered a big victory for states interested in enforcing existing immigration laws. Yet, more importantly, the Chamber decision also signals a new opportunity for employers to expand their use of E-Verify procedures.

As a result of the decision in *Chamber of Commerce v. Whiting*, expect more and more states to consider laws similar to LAWA. And as that happens, more employers are going to be adopting E-Verify. Consequently, employers who are not already familiar with E-Verify should contact counsel and request more information.

Insubordinate E-mails Constitute Willful Misconduct

by **MELANIE DUNN**

A recent appellate court decision held that an employee was properly denied unemployment benefits for "willful misconduct" after insulting an accounting supervisor by sending her emails questioning her skills and experience. In *Joseph v. Administrator*, the employee in question claimed he was fired for being a whistle-blower, after having refused to use a specific accounting methodology, and then stating in two emails to the accounting supervisor that she lacked the technical accounting skills and relevant experience for the position. The court declined to disturb the findings of the appeals referee that the emails constituted willful misconduct under the Unemployment Compensation Act, defined as deliberate misconduct in willful disregard of the employer's interest.

An employee's poor attitude or objectionable remarks will generally be found to constitute willful misconduct when the employee has acted deliberately rather than spontaneously. The employee in this case had not made the offensive remarks during a heated discussion, but had instead directed them to the accounting supervisor in emails sent for the purpose of personally insulting her and undermining her authority. In addition, the employee had deliberately failed to follow the accounting supervisor's reasonable request to perform accounting tasks using a specific methodology, with no good cause for refusing to do so.

Willful misconduct can be difficult to prove, requiring employers to establish that the employee committed deliberate misconduct in willful disregard of the employer's interest, or that there was a single knowing violation of a reasonable and uniformly enforced rule or policy. The substance of any communication directed at a supervisor, taken in context with the circumstances under which it was made, should be carefully analyzed in order to determine whether such communication was made in a deliberate attempt to undermine the supervisor's authority. Please contact our attorneys for guidance on specific issues relating to unemployment claims and employee misconduct.

The substance of any communication directed at a supervisor should be carefully analyzed in order to determine whether such communication was made in a deliberate attempt to undermine the supervisor's authority.

STATE LEGISLATION UPDATE

An Act Concerning Discrimination (House Bill 6599) passed its final hurdle on June 3, 2011, by a vote of 20 to 16 in the Senate. The bill includes "gender identity of expression" as a protected characteristic along with race, national origin and sex, and would bar discrimination based on "gender identity or expression" in employment, housing and public accommodations (including use of public restrooms). The bill explains that "[g]ender identity or expression means a person's gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." The Governor is expected to sign this bill, which would then become effective on October 1, 2011, and affects all employers in Connecticut with three or more employees.

The "Paid Sick Leave" bill (Senate Bill 913) passed its final hurdle on June 3, 2011, by a vote of 76 to 65 in the House. The final bill would require certain employers of 50 or more employees to provide one hour of sick time for every 40 hours of work, up to five paid sick leave days a year, for an employee's sickness, an employee's child's, parent's or spouse's sickness, or to deal with sexual assault or family violence issues. The final version does not cover manufacturers or YMCAs/YWCAs, but applies to "service workers" which the bill broadly defines. Moreover, the bill does not include day or temporary workers and permits the sick leave days to be carried over for one year. Employers already offering at least 5 days of "other paid leave," such as paid vacation, personal days or paid time off, will be deemed to comply with the rule. The bill passed with no Republican votes in the House and one in the Senate. The Governor is expected to sign this bill, which would then become effective January 1, 2012.

An Act Concerning Use Of Criminal Records For Temporary Employees Offered Permanent Employment By An Employer (Senate Bill 984) is awaiting action in the Senate, but is not currently scheduled for a vote. This bill would prohibit employers from requiring prospective employees from disclosing their criminal history or submitting to a criminal background check if they have completed one year or more of service as a temporary employee.

An Act Concerning The Use Of Credit Reports In Employment Decisions (Senate Bill 361), which prohibits employers from using credit scores in certain hiring decisions, passed on June 9, 2011, in the Senate. The bill includes several exceptions and now goes to the Governor who is likely to sign. If signed, the measure would become effective October 1, 2011.

Law of the WORKPLACE

HARTFORD OFFICE
150 Trumbull Street
Hartford, CT 06103
(860) 727–8900

NEW LONDON OFFICE
14 Eugene O'Neill Drive
New London, CT 06320
(860) 442–4747

Our Firm's complimentary newsletter for Connecticut employers is available to you electronically. If you would like others in your organization to receive future issues of this tri-annual newsletter by e-mail, please contact **sorf@siegeloconnor.com**.

This newsletter is published by the firm of **Siegel, O'Connor, O'Donnell & Beck, P.C.**, whose practice concentrates on labor and employment law exclusively representing management. The views, analyses and developments in the law that are reported and offered in this issue are intended to educate and assist lay persons in recognizing legal problems. They are neither intended as individual advice nor offered as a general solution to all apparently similar individual problems. Readers are cautioned not to attempt to solve their individual problems solely on the basis of the information contained herein.