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INSIDE THIS EDITION

Possible Ramifications on Franchising of the Supreme Court's Expansion of Employer Liability for the Biases of Non-Decision Makers

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On March 1, 2011, the United States Supreme Court, in *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), held that an employer may be liable for the discriminatory motives of mid-level supervisors if their unlawful bias could have influenced an unbiased manager making the adverse employment decision. Although the *Staub* decision was decided under the Uniformed Services Employment and Reemployment Rights Act, 28 U.S.C. § 4311 ("USERRA"), this article analyzes what ramifications *Staub* may have on a franchisor's potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII"), 42 U.S.C. § 1981 ("Section 1981"), and state franchise discrimination laws. While *Staub* is not likely to affect a franchisor's liability under Title VII and state discrimination laws, it may very well have a significant impact on Section 1981 claims of racial discrimination brought by a franchisee against a franchisor.

The *Staub* Case

Staub was a member of the United States Army Reserve while employed as an angiography technician at Proctor Hospital. As a member of the Reserves, he was required to attend drills one weekend per month and to train full time for two to three weeks a year. Two supervisors, including Staub's immediate supervisor, were alleged to be openly hostile to Staub's military obligations. Staub's immediate supervisor allegedly scheduled Staub for additional shifts without notice so that he would "pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves." *Staub* at 1189. Staub's immediate supervisor also supposedly informed a co-worker that Staub's "military duty had been a strain on th[e] department" and asked the co-worker to help "get rid of him." *Id.*

In January 2004, Staub's supervisor issued Staub a "Corrective Action" disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient. The Corrective Action also included a directive requiring Staub to report to his supervisors when he had no patients and the angio cases were completed. Staub claimed the justifications for the Corrective Action were false for two reasons. First, the company rule invoked by his supervisor did not exist. Second, if such rule did exist, Staub did not violate it.

In April 2004, a co-worker of Staub complained to Proctor's vice president of human resources and Proctor's chief operating officer regarding Staub's alleged frequent unavailability and abruptness. A few weeks later, one of the supervisors, believed to be hostile to Staub's military commitments, informed the vice president of human resources that Staub had again left his desk without informing a supervisor in violation of the earlier Corrective Action. The vice president of human resources, relying on this recent accusation and after

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speaking to another employee and reviewing Staub's personnel file, decided to terminate Staub's employment. The termination notice stated that Staub had ignored the directive issued in the earlier Corrective Action.

Staub challenged his termination through Proctor's grievance process, asserting that his immediate supervisor fabricated the allegations underlying the Corrective Action due to hostility toward his military obligations. The vice president of human resources did not follow up with Staub's immediate supervisor about this assertion and stood by her decision.

Staub then sued Proctor under USERRA alleging that his termination was motivated by hostility to his obligations as a military reservist. An employer violates USERRA if the employee's military status is "a motivating factor" in the employer's denial of "initial employment, reemployment, retention in employment, promotion, or any benefit of employment," unless the employer can prove that the action would have been taken in the absence of such membership. *Id.* at 1190-91 (citing 38 U.S.C. § 4311(c)). Staub's contention was not that the vice president of human resources had any hostility to his military membership, but that the supervisors did, and that their actions influenced the ultimate employment decision. The jury in the federal district court case determined that Proctor's decision was motivated by Staub's military status, and it awarded him $57,640. *Id.* at 1190. The Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law. *Id.* (citing *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009)).

Back to Top

The Seventh Circuit observed that Staub had brought a "cat's paw" case, meaning that he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision. *Id.* (citing *Staub*, 560 F.3d at 659). Under Seventh Circuit precedent, a "cat's paw" case could not succeed unless the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance." *Id.* In Staub's case, however, the vice president of human resources looked beyond what Staub's supervisors said, relying in part on her conversation with a co-worker and a review of Staub's personnel file.

The Supreme Court reversed. The Court's analysis begins by noting that the central difficulty is construing the phrase "motivating factor in the employer's action." The Court rejected the application of general agency principles to ascertain liability as providing no clear guidance. Specifically, the supervisors could not be liable under USERRA because their acts of discriminatory animus -- the making of the reports -- were not a denial of "initial employment, reemployment, retention in employment, promotion, or any benefit of employment," as required under USERRA. *Id.* at 1191. The Restatement of Agency also suggests that the malicious mental state of one agent (either of the supervisors) generally cannot be combined with the harmful action of another agent (the vice president of human resources) to hold the principal (Proctor) liable for a tort that requires both. *Id.* (citing Restatement (Second) Agency §275, Illustration 4 (1958)). Some cases involving federal torts apply this rule, and others do not.

The Supreme Court further noted that cases addressing whether discrimination was a "factor" or a "causal factor" are inapplicable because USERRA requires that military status be a "motivating factor" in the adverse employment action. *Id.* at 1192. The "cat's paw" analysis is inappropriate because "singular influence" and "blind reliance" are too high a burden, given that the statute requires that discrimination merely be a "motivating factor." *Id.* The Court then articulated the analysis to be used to assess liability and 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, the employer is liable under USERRA. *Id.* at 1194. Proximate cause only requires "some direct relations between the injury asserted and the injurious conduct alleged" and excludes only those "link[s] that are too remote, purely contingent or indirect." *Id.* at 1192. The employer may be liable, however, only when the supervisor acts within the scope of his or her employment, or when the supervisor acts outside the scope of his or her employment, but liability is imputed to the employer under traditional agency principles.

Implications for Franchising

When a franchisor terminates a franchise relationship, the key issue often is whether there is "good cause" as that term is defined under the applicable contract provisions or franchise laws. If the franchisee believes that a termination was based in part on unlawful discrimination, the franchisee may consider bringing claims under Title VII, Section 1981, or state franchise anti-discrimination statutes or regulations.

Title VII prohibits employment discrimination "because of . . . race, color, religion, sex, or national origin" and provides that such discrimination is established when one of those factors "was a motivating factor for any

employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(a), (m). It is likely that the standard for determining liability established by *Staub* will be extended to Title VII cases. The Supreme Court in its analysis and reasoning cited the statutory similarity of the purpose and language in Title VII and USERRA. *See Staub* at 1191. As to franchisor liability, however, this may not be too impactful because Title VII is an employment statute, which does not apply directly to the franchisor/franchisee relationship. Rather, franchisor liability under Title VII typically arises under joint employer or vicarious liability scenarios for the acts of the franchisor's franchisees.

The *Staub* decision may, however, have a significant impact related to Section 1981 claims of racial discrimination. Section 1981 is a statute that was first adopted in the Reconstruction-era for the purpose of providing all people, including freed slaves, with the same rights as white people in the making, enforcing, performing, modifying and terminating of contracts. Unlike Title VII, it applies directly to franchise contracts. *See, e.g., Elkhatib v. Dunkin Donuts, Inc.*, 493 F.3d 827 (7th Cir. 2007). Section 1981 claims are often considered more attractive than Title VII actions (which also cover race) because there is a longer statute of limitations (four years versus one year), there is no requirement to file a charge with the Equal Employment Opportunity Commission or administrative agencies before bringing a claim, there is no requirement for a minimum number of employees, and there is no limit on compensatory and punitive damages. *See* Laurie Wardell and Michael K. Fridkin, *Title VII and Section 1981: A Guide for Appointed Attorneys in the Northern District of Illinois*, Chicago Lawyers' Committee For Civil Rights Under Law (March 2006).

Section 1981 franchise claims, however, have been difficult to prove, particularly when, as often **Back to Top** is the case, the person making the adverse franchise decision -- such as a termination -- is not the same person that reported the defaults. Even though courts and arbitrators may allow "a mosaic of evidence" to establish racial bias, plaintiffs still often have the high burden of showing that the decision maker without, the discriminatory animus, was acting upon "blind reliance" or the "singular influence" of the biased employee. *See Kennedy v. Schoenberg, Fischer & Newman, Ltd.*, 140 F.3d 716, 724-25 (7th Cir. 1988). As such, even when a default notice is issued because of racial animus, a franchisor often avoids liability by merely conducting some type of independent investigation.

It is not a given, however, that the *Staub* decision will be extended to Section 1981 because of the absence of the "motivating factor" language in Section 1981. Nevertheless, the argument for its extension exists because the Supreme Court in *Staub* recognized the harshness of the "cat's paw" analysis in which discrimination may go un-redressed. Moreover, proximate cause could exist in a Section 1981 case, like in USERRA and Title VII, if the discriminatory bias of the reporter of the alleged franchise violation caused the franchisor to take an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse action against the franchisee. Arguably, it would influence the decision if there had been no meaningful independent investigation to ascertain the appropriateness of the action.

It is less likely, however, that the *Staub* analysis will be extended to state franchise discrimination statutes and regulations. The *Staub* decision is not precedent under state law. Moreover, franchise discrimination statutes and regulations are intended to protect franchisees from being treated differently from similarly situated franchisees. They are not specifically intended to protect franchisees against racial or gender bias. The analysis for determining liability does not depend on determining "motivating factors" or "proximate cause" under tort principles articulated by the Supreme Court. Rather, franchisors avoid liability, and likely will continue to do so under state franchise laws, if they present a "rational business decision" for treating franchisees differently or articulate why the franchisees are not similarly situated.

What Should Franchisors and Franchisees Do?

Attorneys would be well served to inform their franchisor and franchisee clients that the bar for bringing franchise discrimination claims, at least related to those based on racial bias, might have been lowered considerably. Attorneys should also advise their franchisor clients that claims for racial bias may be significantly more difficult to dispose of on motions to dismiss or summary judgment. It is now more important than ever that decision makers conduct meaningful independent reviews, with an eye toward possible discrimination, before any franchisee is terminated.

Back to Top

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