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Labor & Employment Law

Three Noteworthy Cases: A Facebook Complaint, a Third-party Protection Issue and a "Cat's Paw" Liability Case

By: Debra Weiss Ford and Nancy Richards-Stower

Editor's note: This is the eighth Bar News "debate" between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate), both Fellows of the College of Labor and Employment Lawyers. Here they discuss the NLRB's recently settled Facebook complaint (Teamsters v. American Medical Response of Connecticut: NLRB Region 34); and new Supreme Court cases: two decided, Thompson v. North American Stainless (1/24/2011), (regarding a third party's protection from Title VII retaliation); and Staub v. Proctor Hospital, ("Cat's Paw" liability under USERRA); and one pending, Bureau of Duryea v. Guarnieri (Scope of First Amendment Petition Clause in government employee retaliation case).

Nancy: I could do a new rap
to the tune of some song,
but th' employment law news,
would make it too long....

Debra: No new raps, not just yet! Let the debate begin!

Nancy: O.K. So, the National Labor Relations Board attempted to body slam those firings for items critical of their employers posted by employees on their personal Facebook pages. The matter recently settled so we will not have a definitive ruling on this issue, but, employee warning: social media postings can kill your job and sink your state and federal employment law claims. So stop posting about work! Stop e-mailing about work! Stop right now!

Debra: Are you advising employees to stop posting those Facebook vacation beach jogging photos overlapping those months of "severe emotional distress" resulting from their alleged, debilitating sexual harassment? Or to stop posting Twitters about how much fun it is to be out on a paid leave?

Nancy: Sort of.... But Deb, after a couple months of sexual harassment, an employee may need a nice quiet beach and some mental health "down time." Therapy is therapy. I clear my head at the beach. But, juries may see it differently; thus my advice to employees: stop those postings right now!

Debra: The NLRB has previously refused to condemn employers who fired Facebook posters for the content of their postings. In this case, the NLRB took this position that the employers' policies were "overly broad."

Nancy: One policy reads: Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." Another says, "Employees are prohibited from posting pictures of themselves in any media, including, but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting."

Those policies are a bit totalitarian. Good to see the NLRB is catching up with workplace policies concerning the new social media, like Facebook, LinkedIn, and Twitter. The Facebook case was filed by the Teamsters as an unfair labor practice complaint against American Medical Response of Connecticut, Inc. for the policies you cite. An NLRB investigation determined that the postings constituted "protected concerted activity" and its Internet policies interfered with those rights of concerted activity.

Debra: My non-union employers have been warned: Section 7 of the National Labor Relations Act protects all employees, union and non-union, for activities constituting "mutual aid or protection," a pretty broad category. But Nance, do you think the federal government ought to support the right of an employee to call her boss a "scumbag" on a public Facebook page?

Nancy: Was there a disparaging adjective before

"scumbag"? Deb, the "devil" is in the context. Earlier that day, the employee had been denied the presence of a union rep at a disciplinary meeting, so she went home and vented on Facebook about what she thought was an illegal act. It's too bad that the matter resolved. It would have been useful to employers and employees to get a decision.

And we just got the Supreme's USERRA Cat's Paw Decision in Staub v. Proctor Hospital: 8-zip for the employee. Hooray! (Sort of.)

Debra: "Cat's Paw," from the 17th Century poem, "The Monkey and the Cat" by Jean de la Fontaine. The monkey wanted fireplace-roasted chestnuts, but didn't want to get burnt, so it sent the cat into the hot coals to get the chestnuts. The cat gets burnt; the monkey gets treats. The monkey used the cat as a tool. The issue in Cat's Paw cases is whether an employer is liable for an employment decision made by an innocent decision-maker (Cat) whose decision was directed by information provided by another employee motivated by illegal discrimination (Monkey). The Court ruled that an "innocent decision-maker" does not absolve an employer from liability if the decision was influenced by a biased supervisor.

Staub sued Proctor Hospital after he was discharged from his position as a medical technologist. As an Army Reservist, Staub had to report for military duty one weekend each month and two weeks during the summer. Over time, his supervisor allegedly began to show animosity toward Staub's military obligations. There was also evidence at trial that the head of Staub's department had made derogatory comments about his military service. Staub had been disciplined for problems with his work, attitude, professionalism, and ability to work well with others. He received a written warning that he must remain in his assigned work area and not leave without permission from his supervisor or the department head.

Roughly three months later, Staub was terminated by the hospital's vice president of human resources for leaving his work area without permission. Staub explained to the VP of HR that he had left a message for his department head that he was going to lunch. The VP apparently did not investigate this assertion. Staub sued the Hospital, claiming its stated reasons for terminating him were actually a pretext for discrimination in violation of USERRA. He argued that although the VP who made the decision to terminate him was not one of the supervisors who had shown hostility toward his military obligations, the VP of HR was influenced by the two supervisors. This is the Cat's Paw theory of liability.

Nancy: But the hospital gets nailed, as it should! The holding language reads: "...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 USERRA"

The First Circuit earlier adopted the Cat's Paw theory using normal agency principles, most recently in the age discrimination case Cariglia v. Hertz Equipment Rental Corp., 363 F.3d 77, 84-88 (1st Cir. 2004). So, not much will change for us, since Staub's logic is not limited to USERRA (with its unusually narrow defenses), and will be applied to all employment statutes with operating systems based on Title VII proof principles.

Debra: Well, Staub relies on tort law: "it is common for injuries to have multiple proximate causes.... A cause can be thought "superseding" only if it is a "cause of independent origin that was not foreseeable.... "

Also, I found this language interesting: "[T]he supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified."

Nancy: That language is gooey! If the independent investigation does acknowledge the biased information, discounts it, receives from other sources information showing that the termination was "otherwise justified," and the investigator's report states that it relied only on the "otherwise justified" stuff, is the employer off the hook? What if there had been no investigation but for the original biased complaints? That's causation.

Debra: The battle will be whether the investigator's decision-making was unaffected by the biased information the investigator learned about and supposedly rejected.

Nancy: Well, HR departments responsible for pre-termination investigations are often hoodwinked by supervisors. Under Staub, they must know about, and acknowledge and reject the biased information. Then they must specify that they are taking action based on a whole other set of performance issues. I fear very carefully drafted affidavits on summary judgment: "I knew about and rejected the information placed in the file by the employee's sexual harasser and relied instead on the fact she couldn't do 50 pushups...." Our federal courts have been prone to accept

such stuff, preventing employees from getting the HR person on the stand and examining the guy. (Sigh.)

Let's move on to the Supremes' "Stop, in the Name of Love" ruling.

Debra: Cute. Well, in Thompson v. North American Stainless, the U.S. Supreme Court upheld the right of lovers and others to be free from retaliation when their beloved has complained about discrimination.

Nancy: It was an 8-to-zip ruling (Justice Kagan recused herself due to her involvement as Solicitor General). Mr. Thompson's fiancé filed a sexual harassment claim, and he was fired from their joint employer three weeks later.

Debra: The Court reminded us that retaliation under Title VII was anything that would reasonably be calculated to dissuade an employee from complaining about discrimination. (See our very first debate, "Burlington Northern and Santa Fe Railroad Company v. White", Bar News, Aug. 11, 2006.) Thus, even though Mr. Thompson did nothing but exist in a relationship, he gets the full panoply of Title VII remedies.

Nancy: The decision was crisp and clear: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

Debra: And that brings us to the pending appeal from the Third Circuit, Bureau of Duryea v. Guarnieri, where the issue is whether state and local government employees can sue their employers for retaliation under the First Amendment's Petition Clause when they petition the government on matters of private concern, and, as stated in the cert petition, "contrary to decisions by all ten other federal and four state supreme courts that have ruled on the issue."

Nancy: The Petition Clause is often neglected in First Amendment government employee retaliation claims, but should be invoked more often:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Charles Guarnieri, chief of police of Duryea, Pennsylvania, was fired, grieved, and reinstated following a successful arbitration and was thereafter subjected to numerous directives on how to do his job. So he grieved again and won reprieve from some of the directives. Later, disputes new and old flared, so he sued under the Constitution's Petition Clause claiming that the directives were wrongful retaliation for his having filed and won his grievances.

Debra: The issue is whether the Petition Clause will be restricted to an employee's non-employment-related petitions. Recall Garcetti v. Ceballos which limited First Amendment free speech protections to non-employment matters. (reference: your Bar News article: Garcetti v. Ceballos, July 7, 2006). The Petition Clause should be similarly read.

Nancy: Ceballos' speech (protesting the corruption of a search warrant) was held (5 to 4) to be not protected First Amendment speech because Ceballos' D.A. job description arguably required him to speak out. So, you want the court to restrict rights under the Petition Clause to petitions unrelated to Chief Guarnieri's police job, like zoning appeals? Where does the Constitution say "only those petitions having nothing to do with your job?" I feel a rap coming on....

Debra:
Don't make us wait.
We'll take the bait.
Nancy:
When the ruling comes down
we'll rap with dismay
if another freedom's snipped away
from employees' rights won yesterday.
Debra:
And what will be the mighty spin
should Chief Guarnieri pull off a win?
Nancy:
Then: The right to Petition need not give way
when the Petition's about a worker's dismay
at how he was slammed for winning his claim
against his employers who wanted to maim
his journey to justice by making fake rules.
(In the end they just look like cranky old fools.)
And regardless of what they intended to say,
their bosses, the taxpayers, will have to pay!

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