THE PASCHOS LAW UPDATE NEWSLETTER
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I. EMPLOYMENT LAW

Employers May Be Held Liable for Unlawful Discrimination if a Lower Level Supervisor, With Discriminatory Animus, Influences an Adverse Employment Decision, Even Where the Ultimate Decision Maker Has no Such Animus

In *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (U.S. March 1, 2011), the United States Supreme Court gave employees additional protection, and increased the likelihood that employers will face more employment discrimination claims. Even though the Supreme Court decided a discrimination claim based on the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), the Court held that the same theory of liability could apply to other types of discrimination cases.

Petitioner Vincent Staub worked as an angiography technician for respondent Proctor Hospital until 2004, when he was fired. While employed by Proctor, Staub was a member of the United States 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 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 included a directive requiring Staub to report to Mulally or Korenchuk when his cases were completed.

In April 2004, a co-worker, complained to Linda Buck, Proctor's vice president of human resources, and Garrett McGowan, Proctor's chief operating officer, about Staub's frequent unavailability and abruptness. McGowan directed Korenchuk and Buck to create a plan that would solve Staub's availability problems. But three weeks later, before they had time to do so, Korenchuk informed Buck that Staub had left his desk without informing a supervisor, in violation of the January Corrective Action. Staub contended this accusation was false. Buck relied on Korenchuk's accusation, however, and after reviewing Staub's personnel file, she decided to fire him. The

termination notice stated that Staub had ignored the directive issued in the January 2004 Corrective Action.

Staub challenged his firing through Proctor's grievance process, claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations. Buck did not follow up with Mulally about this claim. After discussing the matter with another personnel officer, Buck adhered to her decision.

Staub sued Proctor under the USERRA, which forbids an employer to deny "employment, reemployment, retention in employment, promotion, or any benefit of employment" based on a person's "membership" in or "obligation to perform service in a uniformed service," 38 U.S.C. § 4311(a), and provides that liability is established "if the person's membership ... is a motivating factor in the employer's action," § 4311(c). Staub contended not that Buck was motivated by hostility to his military obligations, but that Mulally and Korenchuk were, and that their actions influenced Buck's decision. A jury found Proctor liable and awarded Staub damages.

The Seventh Circuit reversed, holding that Proctor was entitled to judgment as a matter of law. The court 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. It explained that under Seventh Circuit precedent, 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." It then noted that "Buck looked beyond what Mulally and Korenchuk said," relying in part on her conversation with Day and her review of Staub's personnel file. The court said "It is enough that the decisionmaker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision." Because the undisputed evidence established that Buck was not wholly dependent on the advice of Korenchuk and Mulally, the court held that Proctor was entitled to judgment.

The Supreme Court granted certiorari and reversed the Seventh Circuit. 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 USERRA. The Court held that Proctor erred 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 scienter required for USERRA liability. Moreover, it is axiomatic under tort law that the decisionmaker's exercise of judgment does not prevent the earlier agent's action from being the proximate cause of the harm.

Proctor's approach would have an improbable consequence: If an employer isolates a personnel official from its supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were designed and intended to produce the adverse action.
The United States Supreme Court also held that Proctor erred in arguing that a decisionmaker's independent investigation, and rejection, of an employee's discriminatory animus allegations should negate the effect of the prior discrimination.

II. GENERAL LITIGATION

Attorney-Client Privilege Operates in a Two-Way Fashion to Protect Confidential Client-To-Attorney Or Attorney-To-Client Communications

In *Gillard v. AIG Insurance Co.*, --- A.3d ---, 2011 WL 650552 (Pa. February 23, 2011), William Gillard brought an action against AIG Insurance alleging bad faith in handling Gillard's uninsured motorist (UM) claim. During discovery, Gillard sought production of all documents from the file of the law firm representing AIG in the underlying litigation. AIG withheld and redacted documents created by counsel, asserting the attorney-client privilege. In response, Gillard sought to compel production arguing that the attorney-client privilege in Pennsylvania is very limited.

Gillard took the position that the attorney-client privilege in Pennsylvania is very limited. Gillard's motion allowed, in the abstract, that certain lawyer-initiated communications might contain information originating with the client and, accordingly, may be privileged. Gillard argued, however, that Appellants had not sought such derivative protection, but rather, asserted the privilege broadly, as if it were a "two-way street." Gillard maintained that the privilege is a "one-way street" and must be strictly contained to effectuate the will of the General Assembly and minimize interference with the truth-determining process.

Appellants highlighted the privilege's purpose to foster the free and open exchange of relevant information between the lawyer and his client. To encourage such candid disclosure, Appellants reasoned, both client- and attorney-initiated communications must enjoy protection. Appellants also stressed, that, under caselaw prevailing in the bad-faith litigation arena, a carrier asserting an advice-of-counsel defense waives the attorney-client privilege relative to such advice. According to Appellants, such a waiver would be superfluous were the advice of counsel discoverable from the outset.

The common pleas court adopted the “one-way street” perspective. The court grounded its ruling on the direction of the flow of the information, not the content, suggesting that derivative protection was absent. The court ruled that the statutory attorney-client privilege protected only confidential communications from the insurers to the law firm.

Appellants filed an interlocutory appeal. The Superior Court affirmed the trial court, relying on *Nationwide Mutual Insurance Co. v. Fleming*, 924 A.2d 1259, 1269 (Pa.Super.2007) which held that “protection is available only for confidential communications made *by the client* to counsel.” Consistent with*Fleming*, the *Gillard* panel treated the privilege as being “strictly limited.”

The *Fleming* decision has been the precedent on this issue. This appeal was selected to determine the appropriate scope of the attorney-client privilege in Pennsylvania. In its decision, the Supreme Court acknowledged the discord among Pennsylvania courts with regarding to the scope of the attorney client privilege. The court recognized that the privilege does afford derivative protection stating “it is our own considered judgment, like that of the United States Supreme Court, that-if open communication is to be facilitated-a broader range derivative protection is implicated.”

The Supreme Court rejected Gillard's position, noting that it did not find it clear that the Legislature intended strict limits on derivative protection. The court provided "we appreciate that client communications and attorney advice are often inextricably intermixed, and we are not of the view that the Legislature designed the statute to require 'surgical separations' and generate the 'inordinate practical difficulties' which would flow from a strict approach to derivative protection."

The Supreme Court held that in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.

Absent Judicial Finding that Plaintiff's Injuries Were Caused by Indemnitor’s Negligence, Omission, or Conduct, it Has No Obligation Under the Indemnification Provision in its Contract with Indemnitee

In *Kieffer v. Best Buy, et al.*, --- A.3d ---, 2011 WL 867338 (N.J. March 15, 2011), American Industrial Cleaning Co., Inc. (AIC) entered into an agreement with Best Buy Stores, L.P. to clean and provide maintenance for its stores. AIC then subcontracted to All Cleaning Solutions Co. the daily cleaning of a Best Buy store in Holmdel.

In a civil action, plaintiff Tina Kieffer alleged that she fell and suffered personal injuries as a result of the unsafe condition of the floor of the Holmdel Best Buy. Later, Kieffer filed an amended complaint, naming AIC and All Cleaning as defendants and alleging that their negligence too was the proximate cause of her injuries. Best Buy filed a third-party complaint against AIC, claiming that AIC was “performing floor maintenance at the store” at the time of the accident and was contractually bound to defend and indemnify Best Buy. In turn, AIC filed a fourth-party complaint against All Cleaning, claiming that All Cleaning was “performing floor maintenance at the store” when the accident occurred and was contractually obligated to defend and indemnify AIC.

The trial court granted summary judgment in favor of all three defendants, concluding that they were not negligent or otherwise liable for the patron's injuries. Despite the no-negligence finding, the court ruled that All Cleaning was responsible to pay the legal defense costs of both AIC and Best Buy. The Appellate Division affirmed that finding. The Supreme Court granted All Cleaning’s petition for certification.

The Supreme Court was faced with the primary issue of whether the trial court and Appellate Division properly construed the indemnification provision of the contract between AIC and All Cleaning. The court noted that both courts focused on language in the wrong contract, the broader language of the Best Buy/AIC contract, which required AIC to “indemnify, defend and hold harmless, Best Buy ... from ... actions, suits, causes of actions, claims, demands....” In contrast, the much more narrowly drawn indemnification provision of the AIC/All Cleaning contract was triggered by All Cleaning's own fault or conduct. In its contract with AIC, All Cleaning promised “to defend, hold harmless, and indemnify” AIC and its customer, Best Buy, “from any connection with any act of negligence, omission, or conduct arising out of the operation of [All Cleaning's] business and [its] performance or non-performance of the Services.” Conspicuously absent from the language of this indemnification provision is the explicit obligation to reimburse the legal costs for the defense of suits, causes of actions, and claims that a court later determines to be unfounded.

The court found that the contract entered into between AIC and All Cleaning did not obligate All Cleaning to indemnify AIC or Best Buy for the legal costs of defending a lawsuit that was dismissed for lack of evidence. Unlike the clear language of the Best Buy/AIC contract, the AIC/All Cleaning contract did not require All Cleaning to defend and indemnify AIC or Best Buy based on the assertion of mere “claims” by a party. The indemnification clause drafted by AIC only imposed on All Cleaning the responsibility of paying defense costs “from any connection with any act of negligence, omission, or conduct arising out of the operation of [All Cleaning's] business and [its] performance or non-performance of the Services.”

AIC argued that the language “connection with” and “arising out of” was a proxy for terms explicitly stated in the Best Buy/AIC contract: “claims” and “demands.” The court declined to insert such language in the contract noting that it cannot write a better contract for AIC than the one it drafted for All Cleaning's signature. Further the court provided:

Even if we determined that the indemnification provision was ambiguous and susceptible to another interpretation, our jurisprudence requires that we construe the provision against AIC, the indemnitee and drafter of the document. If AIC wanted broad indemnification coverage encompassing claims, it could have drafted an indemnification similar to the indemnification agreement between it and Best Buy. The court noted that All Cleaning's indemnification obligations depended on a judicial finding of some “negligence, omission, or conduct” on its part based on evidence in the record or an admission by All Cleaning. However, he trial court granted summary judgment in favor of all three defendants, finding no evidence that any of the three exercised a lack of due care in cleaning or maintaining the Holmdel store's floors. The court held that based on this judicial finding along with a plain reading of the AIC/All Cleaning indemnification provision, All Cleaning was not contractually responsible for paying AIC's and Best Buy's defense costs.

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