LAW REVIEW 922

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Is Personal Animus Discrimination? A USERRA case may be headed to the Supreme Court.

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***Staub v. Proctor Hospital,* 560 F. 3d647 (7th Cir. 2009)**

Army Reservist Vincent E. Staub worked for Proctor Hospital in Peoria, Ill., as an angiography technologist from 1990 until he was fired in April 2004. Several of his co-workers and first-line supervisors expressed bitter animus against him because of his membership in the Army Reserve and his occasional absences from work for military training and service. One first-line supervisor characterized Mr. Staub's drill weekends as "Army Reserve BS" (the court decision uses the word, not the abbreviation) and "a bunch of smoking and joking and a waste of the taxpayers' money." A co-worker told another co-worker that Mr. Staub's military duties were a drag on the department and that she (the second co-worker) should join in the effort to lie about Mr. Staub's performance and behavior in order to get him fired. The second co-worker refused to go along with the conspiracy and testified for Mr. Staub at the trial.

Mr. Staub sued the hospital in the U.S. District Court for the Central District of Illinois, contending that the firing violated section 4311 of the Uniformed Services Employment and Reemployment Rights Act (USERRA) because the firing was motivated, at least in part, by his membership in the Army Reserve and his performance of uniformed service, which necessitated occasional absences from his job at the hospital.

The case went to trial before a jury. As I have explained, under USERRA (unlike the reemployment statute prior to the 1994 enactment of USERRA) it is possible to get a jury. I invite the reader's attention to Law Reviews 0737 and 0902, which, along with all previous Law Review articles, are available at www.roa.org/law_review.

The hospital's attorney objected to the admission of testimony about the anti-military statements made by Mr. Staub's co-workers and first-line supervisors. The attorney contended that the statements were irrelevant because those supervisors and co-workers played no role in the decision to terminate his employment. (The hospital claimed that the decision to fire him was made by the vice president for human relations, and there was no direct evidence that she had expressed anti-military animus against him.) The hospital's attorney also contended that the testimony was prejudicial because the jury might give it too much weight.

Mr. Staub's attorney argued that the testimony should be admitted based on the "cat's paw" theory. Mr. Staub's theory was that the vice president for human relations relied on information, or misinformation, provided by these first-line supervisors and co-workers, so that the vice president was merely the cat's paw of the bad actors who had expressed anti-military animus against Mr. Staub. The District Court judge admitted the evidence on that basis, and the jury found for Mr. Staub. The District Court judge denied the defendant's motions for judgment notwithstanding the verdict and for a new trial.

The defendant hospital appealed to the U.S. Court of Appeals for the 7th Circuit, and a three-judge panel of this court ruled for the employer. The appellate court held that there was not a sufficient evidentiary basis for the "cat's paw" theory in this case. The Court of Appeals found that the evidence showed that the vice president for human relations did her own investigation of the underlying facts and did not simply rely on reports about Mr. Staub from those who sought to have him fired because of his military service. Thus, the evidence about anti-military statements by co-workers and first-line supervisors was irrelevant and prejudicial and should not have been admitted, the appellate court said. The appellate court also found that, in the absence of this evidence that should not have been admitted, there was not sufficient evidence to support the jury verdict for Mr. Staub. Thus, the Court of Appeals ruled for the defendant, rather than remanding the case for a new trial, which is the usual procedure in this situation.

I believe that the 7th Circuit panel seriously erred in this case. I think that the appellate panel cherry-picked evidence that seemed to support the employer's arguments rather than viewing the evidence as a whole, as the jury did and the District Court judge affirmed.

Mr. Staub has already filed a motion for rehearing *en banc* by the 7th Circuit. If the motion is granted, all of the active judges of the 7th Circuit would then hear oral arguments and read briefs about this case and review the decision of the three-judge panel. If the 7th Circuit denies Mr. Staub's motion for rehearing en banc or if it grants the motion and then affirms the panel's decision, Mr. Staub's next step would be to petition the U.S. Supreme Court for *certiorari* (discretionary review).

If at least four justices vote to grant *certiorari,* the case would then be set for briefs and oral argument in the Supreme Court. If three or fewer justices vote to grant *certiorari,* the decision of the 7th Circuit would be final.

Staub is a mirror-image of *Wallace v. City of San Diego,* 479 F.3d 616 (9th Cir. 2007). I discuss *Wallace* in detail in Law Review 0902 (January 2009). In that case, the jury ruled for Naval Reservist James D. Wallace, holding that the San Diego Police Department (his long-term employer) had violated USERRA in its treatment of him (including harassment and denying promotion) because of animus against him on account of his Reserve service. The District judge set aside the jury's verdict and found for the employer notwithstanding the verdict. Mr. Wallace appealed, and the 9th Circuit reversed. The appellate court upheld the jury verdict and the award of $256,000 to Mr. Wallace.

I also invite the reader's attention to *Velasquez-Garcia v. Horizon Lines of Puerto Rico Inc.,* 473 F.3d 11 (1st Cir. 2007). I discuss that case in detail in Law Review 0731 (June 2007). That case, like *Staub,* involved statements indicating anti-military animus against the plaintiff by persons who appeared not to have been the decision-makers in his firing. The 1st Circuit held, "Stray remarks by nondecision-makers, while insufficient standing alone to show discriminatory animus, may still be considered evidence of a company's general atmosphere of discrimination and thus can be relevant."

There have been 16 Supreme Court cases on the reemployment statute, the first in 1946 and the most recent in 1991. We have run Law Review case notes on each Supreme Court case. Case note 15 is posting in the on-line Law Review library this month (see box on this page), and the final case note will appear next month. Perhaps it is time for Supreme Court case number 17. The conflict between the 7th Circuit and the 1st and 9th Circuits may lay the proper groundwork for the Supreme Court to review *Staub*. We will keep our readers informed of developments.