NEWS

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By Patrick Dorrian

Sept. 1 — Employers need to keep a close eye out for potential biases of witnesses and managers when investigating employee complaints of workplace discrimination.

That's the big takeaway from a ruling Aug. 29 by a federal appeals court in New York, a pair of employment law attorneys told Bloomberg BNA.

Employers should and likely will be more cautious and "think twice about relying on" statements by a complaining employee's co-workers in the wake of *Vasquez v. Empress Ambulance Service Inc.*, 2016 BL 280409 (2d Cir.), plaintiffs' attorney Mike Pospis of Pospis Law PLLC in New York said Aug. 31.

In *Vasquez*, the U.S. Court of Appeals for the Second Circuit said for the first time that the "cat's paw" theory of employer liability applies to claims under the primary federal employment discrimination law—Title VII of the 1964 Civil Rights Act.

Under the cat's paw doctrine, employers can be liable for job bias if it's shown that a nonbiased supervisor who made the decision to fire or otherwise discipline an employee was influenced to do so by another worker who harbored a discriminatory or retaliatory intent against the employee.

Perhaps more significantly, the court joined one other federal appeals court in holding that employers can be found liable under the theory when the worker whose bad intent influenced the decision maker was a co-worker of the employee.

The U.S. Supreme Court has only applied the cat's paw doctrine where a decision maker was influenced by the bias of another supervisor.

The Second Circuit ruling "broadens the scope of liability for employers," Pospis said.

'Negligence-Based Overlay.'

The Second Circuit in *Vasquez* "placed kind of a negligence-based overlay on what otherwise appears to be an employment discrimination or retaliation case," Joseph Baumgarten of management firm Proskauer Rose LLP said Aug. 31.

He was referring to that part of the court's holding that established a negligence standard for analyzing cat's paw claims in situations in which a biased co-worker corrupts an otherwise neutral supervisor's decision-making process.

In such situations, the employee who was harmed by the bias can recover if she can show the employer was negligent in failing to uncover the co-worker's biased intent.

The *Vasquez* decision drew on the Supreme Court's landmark 1998 decision in *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 77 FEP Cases 1 (1998), which laid out the standard under which employers can be liable for negligently handling employee complaints that they're being harassed by a co-worker.

"We see no reason why *Ellerth*, though written in the context of hostile work environment, should not also be read to hold an employer liable under Title VII when, through its own negligence, the employer gives effect to the retaliatory intent on one of its—even low-level—employees," the Second Circuit wrote.

It noted that the First Circuit reached the same conclusion in *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 122 FEP Cases 1692 (1st Cir. 2014).

The New York-based Baumgarten noted that in cases in which a neutral decision maker is influenced by the bias of another supervisor, courts have almost always applied a strict liability standard, rather than the lesser negligence test. But the courts have to some degree "been all over the lot," he said.

Need Proof of Both Negligence and Biased Intent

In *Vasquez*, the plaintiff claims she was fired after telling her employer that a co-worker was sexually harassing her, and the employer, relying on doctored evidence supplied by her alleged male harasser, actually fired her for sexually harassing him.

Reviving her case, the Second Circuit found that she stated a viable claim for employer retaliation under Title VII.

The plaintiff in *Vasquez* alleged that her employer conducted an incomplete investigation into her sexual harassment complaint, and the Second Circuit said she should have the opportunity to develop evidence to help prove that assertion, Baumgarten said.

Her potential ability to show the employer's investigation was incomplete, coupled with possible evidence of her alleged harasser's intent to retaliate against her for reporting him for sexual harassment, "is why the case is going forward," he said.

Baumgarten said the ruling could have a significant impact on employers' exposure to and liability for damages for workplace discrimination. "Anything that expands the population of workers whose bad intent" can lead to possible claims of discrimination or retaliation against a company "increases the company's potential liability and exposure," he said.

"What the case does is really expand the circumstances under which" evidence of a flawed investigation together with proof of a witness's bad intent may create potential exposure for a company to liability for employment bias, Baumgarten said.

Does Holding Extend to Other Laws?

Pospis said another important takeaway from *Vasquez* is that its holding will probably send "reverberations throughout other employment discrimination statutes with similar proof standards."

For example, he said courts may embrace the argument in cases brought under the Americans with Disabilities Act that they should apply a negligence standard to cat's paw

claims involving allegedly biased co-workers since ADA and Title VII claims both require proof that a discriminatory intent was a motivating factor in the challenged employment action.

The Supreme Court case that first recognized the cat's paw doctrine— *Staub v. Proctor Hospital*, 562 U.S. 411, 111 FEP Cases 993 (2011)—was decided under the Uniformed Services Employment and Reemployment Rights Act, another statute that uses a "motivating factor" standard to assess worker discrimination claims.

On the other hand, courts are less likely to apply *Vasquez's* negligence standard in cat's paw cases brought under the Age Discrimination in Employment Act, Pospis said. The ADEA uses a more demanding "but-for" standard of proof of causation, he said.

Liability Not Automatic

Baumgarten stressed that the Second Circuit made clear in *Vasquez* that employer liability isn't automatic in situations in which a company takes adverse action against an employee based on the biased influence of a co-worker/witness.

An employer still "can get it wrong" during a workplace investigation, "so long as it acted reasonably under the circumstances," he said.

Companies—at least those in the First and Second circuits, which include Connecticut, Maine, Massachusetts, New Hampshire, New York, Puerto Rico, Rhode Island and Vermont—need to make sure in workplace bias investigations involving multiple witnesses and decision makers that "there are no underlying motives or biases" at play, Baumgarten said.

That's true even if it's clear that management had the "purest motives" in its handling of the situation, he added.

"The bottom line is that you always want to conduct reasonably thorough investigations," tailored to the particular circumstances at hand, Baumgarten said.

His advice for employers is to "approach every investigation with a critical eye toward the biases of potential witnesses, to test their credibility and motives."

It's always been important to take that approach, and the *Vasquez* decision makes it even more important to do so, Baumgarten said.

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