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What's on Your Mind? Imputing Motive in a Title VII Case, An Analysis of BCI Coca-Cola Bottling Co. v. EEOC

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What's on Your Mind? Imputing Motive in a Title VII Case

by Barbara J. Fick

PREVIEW of United States Supreme Court Cases, pages 391–396.

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Editor's Note: This case, originally scheduled for oral argument on April 19, was dismissed on April 12 and will not be argued.

ISSUE

Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating against any individual because of race, color, religion, national origin, or sex when making employment decisions, such as hiring or firing. Title VII defines employers as including any agent of the employer. Thus, in order for an employer to be held liable for a violation of Title VII, it must be proven than an agent of the employer, acting with a discriminatory motive, caused an individual to be subjected to an adverse employment decision.

In some instances the employer gives a supervisor the authority to discipline and discharge the employees whom that individual supervises. The supervisor, based on his own observations and evaluations of the employees, makes decisions with regard to discipline and discharge. If these decisions are based on discriminatory animus, the employer will be held liable. In other circumstances the supervisor is required to report personnel problems to a manager who possesses the authority to discipline and discharge. The supervisor plays a role in the process but does not have final authority to make the decision. If the supervisor acts with discriminatory animus, can the employer be held liable for an unlawful employment practice if the manager who made the final decision did not act with an unlawful motive? That is the question presented to the Court in this case.

FACTS

Stephen Peters worked as a merchandiser for BCI Coca-Cola Bottling Company (BCI) for six years in the Albuquerque, New Mexico, facility. Merchandisers deliver Coke products to retail outlets and place the product in display areas. Merchandisers work five-day weeks, with two days off. Since retail accounts need to be serviced

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BCI COCA-COLA BOTTLING CO. OF LOS ANGELES v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DOCKET NO. 06-341

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APRIL 19, 2007
FROM: THE TENTH CIRCUIT

Case at a Glance

In litigating a disparate treatment discrimination lawsuit under Title VII, the plaintiff must prove that the defendant's decision was based on a prohibited motive, such as race. When only one person is involved in making a decision, it is that person's motive which is at issue. But if multiple persons play a role in the decision-making process, it becomes more difficult to determine whose motive is at issue. The Court in this case will decide under what circumstances an employer can be held liable when a subordinate, acting with unlawful motivation, plays a role in the decision-making process.

seven days per week, some merchandisers are scheduled to work on week-ends. Peters, as the most senior merchandiser, had Saturday and Sunday as his regularly scheduled days off.

Peters's immediate supervisor was Jeff Katt, who is white. Peters and Katt both reported directly to the district sales manager Cesar Grado, who is Hispanic. Grado was responsible for monitoring, evaluating, and scheduling employees, but did not have the authority to discipline or discharge employees. Any issues regarding employee discipline were referred by Grado to the senior human resource administrator at the Albuquerque facility, Sherry Pedersen, who had the authority to make all disciplinary decisions except termination. All termination decisions required approval by Pedersen's supervisor, Pat Edgar, who worked in BCI's Phoenix office.

On Friday, September 28, 2001, Grado learned he was short-handed for Sunday and asked Katt to tell Peters to work that day. After speaking with Peters, Katt told Grado that Peters had plans and could not work that day. According to Grado, Katt also said that Peters might call in sick; Katt, however, denied making that statement. Grado then contacted Edgar (Pederson being out of the office) and asked if he could require Peters to work on his scheduled day off; Grado also mentioned that Peters had indicated he would call in sick if required to work. Edgar stated that Grado could require Peters to work and that it was against company policy to call in sick two days in advance. Edgar said that unless Peters had a compelling reason for not working on Sunday, Grado should give Peters a direct order to report to work and warn him that failure to comply would be insubordination that could lead to termination.

Grado then told Peters he had to work on Sunday. Peters said he had plans, and moreover that he had been feeling ill all week. Grado told Peters he was directing him to come to work, and if he did not, it could result in his termination for insubordination. Peters ended the conversation by telling Grado "[D]o what [you] got to do and I'll do what I got to do." Grado reported his conversation with Peters to Edgar. Edgar determined that Peters's conduct was insubordination meriting termination, but since it was late in the day on Friday did not make a final decision at that time.

That Saturday, Peters went to the doctor's office, where he was diagnosed with a sinus infection and told not to work until Monday. Peters telephoned Katt and informed him of his illness and that the doctor told him not to work on Sunday. Katt excused Peters from working and paged Grado to let him know; Grado, however, never answered his page. Peters did not work on Sunday.

On Monday, Edgar, Pederson, and Grado spoke by telephone on several occasions concerning Peters's conduct. Grado confirmed that Peters had not shown up for work on Sunday. Edgar had Pederson pull Peters's personnel file, wherein there was a report that Peters had previously received a two-day suspension for insubordination involving a different supervisor. Edgar decided to terminate Peters for insubordination. Neither Pederson nor Edgar had ever met Peters, and neither knew he was black at the time the decision was made to terminate him.

Peters filed a charge with the EEOC alleging that his termination was the result of racial discrimination. During its investigation of Peters's charge, the EEOC received evidence from a number of BCI employees, including Katt, that Grado treated black employees worse than employees of other races, including using racial epithets and more closely scrutinizing the work of black employees. In particular, there was evidence that Grado did not report nonblack employees for discipline in circumstances similar to Peters's case.

The EEOC filed suit in federal district court for the district of New Mexico alleging that BCI discharged Peters because of his race. The EEOC contended that Grado's racially biased report to Edgar caused Edgar to terminate Peters. BCI filed a motion for summary judgment contending that Peters was fired for insubordination and that the EEOC failed to produce sufficient evidence to create a material issue of fact that BCI's explanation was pretext for discrimination.

The district court granted BCI's motion for summary judgment and dismissed the lawsuit. Although the court found that there was a genuine issue of material fact as to whether Grado had acted with discriminatory animus, it held that this fact was irrelevant to resolving the case at hand. It was undisputed that Edgar honestly believed that Peters was guilty of insubordination and that she was unaware of Peters's race at the time she decided to fire him. Moreover, Grado made no recommendation to Edgar concerning how to handle the matter and thus did not influence Edgar's decision. Finally, Edgar consulted with Pederson and received independent information concerning Peters's employment history from his personnel file. Since Edgar did not rely on any recommendation from Grado and conducted an independent investigation, she did not act as a "cat's paw" for Grado's alleged prejudice. Her decision could not be said to be a pretext for discrimination.

The EEOC appealed the district court's grant of summary judgment to the federal court of appeals. *EEOC v. BCI Coca-Cola Bottling Company of Los Angeles,* 450 F.3d 476 (10th Cir. 2006). The Tenth Circuit reversed. It held that since Title VII imposes liability on an employer for its own acts and those of its agents, common-law principles of agency must be applied to determine when an employer is liable for the bias of subordinate officials.

Under agency principles, an employer is liable for the acts of its employees if the employee "was aided in accomplishing the tort by the existence of the agency relationship." Thus, if a biased subordinate uses the authority given to him by the employer, for example, the authority to report disciplinary infractions to cause an employee's termination, the employer may be liable for the subordinate's discriminatory animus. If, however, the employer conducts an independent investigation and does not rely exclusively on the biased subordinate's report, it will break the causation link between the subordinate's bias and the subsequent employment action—the final decision cannot be said to be "because of" the subordinate's bias. The court concluded that "subordinate bias claims simply recognize that many companies separate the decision-making function from the investigation and reporting functions, and that racial bias can taint any of these functions."

Applying this standard to the facts, the Tenth Circuit held that Edgar relied exclusively on Grado's account of the telephone conversation with Peters and did not conduct an independent inquiry into the incident. Thus, Grado's report caused Peters's termination. Since the EEOC introduced sufficient evidence to raise a disputed issue of material fact as to Grado's racial bias, a jury could conclude that Grado's report was tainted by bias and therefore that the claimed reason for firing Peters, based entirely on Grado's report, was a pretext for discrimination. As there were genuine issues of material fact as to Grado's bias, summary judgment was inappropriate.

BCI filed a petition for writ of certiorari, which the Supreme Court granted, on the question of when an employer can be held liable for a subordinate official's bias when the subordinate is not the actual decision maker. *BCI Coca-Cola Bottling Company of Los Angeles v. EEOC,* 127 S.Ct. 852 (2007).

Case Analysis

Both parties agree that traditional principles of agency law govern the extent to which an employer can be held liable for the discriminatory animus of its subordinates. They disagree, however, on the interpretation of those principles and how they apply to nondecision-making subordinates.

BCI notes that under agency law employers are liable for acts committed by employees while acting within the scope of their employment. Therefore, an employer is liable if an employee, who has been given the authority to effectuate a tangible employment action, such as hiring or firing, makes a decision with discriminatory animus. Neither can employers evade liability if the employee given the authority to make that decision cedes that authority to a subordinate by relying on the recommendation of the subordinate. In that case the subordinate is, in effect, the actual decision maker and the employer is rightly held responsible for the subordinate's discriminatory animus.

In this case it is undisputed that Grado had no authority to impose discipline or terminate employees. Edgar was the actual decision maker, not Grado. Neither is there any evidence to suggest that Grado influenced Edgar's decision in any way. He was not asked to express an opinion concerning how to handle Peters's case, nor did he make a recommendation.

According to BCI, the only other avenue for employer liability for nondecision-makers' bias under agency law is when a person is harmed by the employee and the employer is "negligent in selecting, supervising or otherwise controlling the agent." In determining liability based on negligence, the issue is whether the employer knew or should have known the subordinate was biased and that the bias caused an adverse employment action. An employer who has an effective grievance mechanism for weeding out workplace discrimination is not acting negligently in controlling its agents. Requiring a showing of negligence in order to impose liability is consistent with the underlying purpose of Title VII.

BCI asserts that the congressional intent in passing Title VII was to encourage employers to create policies to detect and eliminate discrimination in advance, rather than to encourage employees to file lawsuits after the fact. A negligence standard requires employees who believe they are the victims of discrimination in the workplace to notify the employer of the problem. There is no evidence that any employee, including Peters, ever complained to BCI about Grado's alleged racial bias. BCI argues that because it had no knowledge of subordinate bias, it was not negligent in supervising its agents and therefore is not liable for its subordinate's alleged bias.

BCI contends that the Tenth Circuit imposed liability based on a provi-

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sion in the treatise *Restatement (Second) of Agency* that holds an employer liable for the actions of a servant when the servant is "aided in accomplishing the tort by the existence of the agency relation." BCI asserts that the court misinterpreted this theory of agency. The "aided in" theory of liability is limited to situations involving misrepresentation or deceit by the servant such that the plaintiff is misled into believing that the agent is acting within the scope of his or her apparent authority. BCI argues that this theory has been so widely misinterpreted by the courts that the *Restatement (Third) of Agency* has abandoned it as expanding employer liability beyond well-established boundaries.

Finally, BCI argues that the Tenth Circuit's standard requiring employers to independently investigate reports of employee misconduct in order to insulate themselves from the possible biased motives of subordinates places an undue burden on employers. In effect employers would have to investigate the motivation behind the report as well as investigate the facts of the report itself. Such investigations would have to be undertaken anytime a report could trigger an adverse employment action, a result that would overburden human resource personnel and cause a backlog in resolving employee personnel problems.

The EEOC contends that applying the agency principle that employers are liable for acts committed by employees while acting within the scope of their employment supports a finding that BCI is liable for the discriminatory animus of Grado. When an employer delegates authority to a supervisor to assign work, monitor employee performance, and report employee misconduct, a supervisor exercising that authority is acting within the scope of his employment. If the supervisor allows discriminatory animus to influence the exercise of that authority and thus causes a tangible employment action, the employer is liable.

In the present case, Grado was delegated the authority by BCI to assign work, to monitor and evaluate employees, to gather facts, and to report on instances of employee misconduct to the human resources department. The actions that Grado took in connection with Peters's termination were all within the scope of that delegated authority: he assigned Peters to work on Sunday; he reported Peters for indicating that he would refuse to work; he allegedly mischaracterized the facts relating to the content of his conversations with Peters; and he failed to timely report to Edgar that Peters had been excused from working by Katt. As found by the district court, there was sufficient evidence presented to raise a triable issue of fact as to whether Grado acted with racially discriminatory animus in performing these delegated duties.

Finally, in order to establish employer liability, it must be proven that the subordinate's conduct caused a tangible employment action. In order to prove causation, it must be shown that the subordinate's conduct is a substantial factor in bringing about the harm. This requires a showing that "but for" the subordinate's conduct, the termination would not have happened and the subordinate's conduct was a substantial factor in causing the termination. Thus, even when the subordinate acts with a discriminatory motive in exercising his or her delegated authority, the employer may not be liable if it can break the causal link between the supervisor's action and the tangible employment action. One way to break the link is if the employer conducts an independent investigation upon which to base its decision, in which case the supervisor's misconduct would no longer be regarded as a "substantial factor" in causing the termination. This standard does not impose an obligation on an employer to conduct an investigation; but if an employer chooses to do so it may break the causal link and thus abrogate employer liability for the subordinate's discriminatory conduct.

In the present case, the EEOC reasons, there is sufficient evidence to permit a fact finder to find that Grado's conduct was a substantial factor in Peters's termination. If Grado had not reported Peters to Edgar, Peters would not have been terminated. The content of Grado's report caused Edgar to decide to terminate Peters. Grado's failure to timely alert Edgar to the fact that Peters had been given an excuse by Katt for not working on Sunday caused Edgar not to change her decision. Edgar's investigation consisted solely of looking at Peters's personnel file, which contained no information on the incident in question: Peters's so-called refusal to work on Sunday. Edgar continued to rely entirely on Grado for information concerning that incident; thus the investigation did not break the causal link between Grado's conduct and Peters's termination.

Contrary to BCI's contention, the EEOC asserts that employer liability based on the agency principle of "aided by the agency relation" is a viable theory and has been adopted by the Supreme Court in its decisions in *Ellerth* and *Faragher*. *Burlington Industries v. Ellerth,* 524 U.S. 742 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). The Court held that an employer can be liable for a supervisor's conduct when the supervisor is aided in accomplishing a tort by the existence of the agency relationship.

The supervisor is aided by the agency relation in accomplishing a tort when he takes a tangible employment action, i.e., when he or she is the actual decision maker. The Court also held that the "aided in" theory applies when a supervisor, acting with discriminatory intent, uses his delegated authority in a manner that results in a tangible employment action.

Imposing liability on employers for a subordinate's misuse of delegated authority causing a tangible employment action furthers the objectives of Title VII. Vicarious liability creates an incentive for employers to prevent their agents from causing harm, thus achieving Title VII's goal of encouraging employers to detect and eliminate discrimination in the workplace. The rule also ensures that victims of unlawful discrimination are compensated and that the cost of compensation falls on the employer rather than on the innocent victim.

The EEOC argues that BCI's attempt to limit liability to "actual" decision makers conflicts with the express language of Title VII. The statute applies to "any agent" of the employer, and is not limited to actual decision makers. Moreover, the "actual" decision-maker standard is contrary to the generally accepted agency principle that employers are liable for the acts of *all* employees who act within the scope of employment, whether or not they are actual decision makers.

Finally, the EEOC notes that BCI's argument that employers are liable for the acts of nondecision makers only if they are negligent is based on an incorrect reading of *Ellerth*. The Supreme Court noted in *Ellerth* that negligence was a minimum standard for employer liability, and a showing of negligence was not required when a plaintiff can meet the more stringent standard of liability under the scope of employment test.

Significance

While this particular case is based on Title VII, the other major federal anti-discrimination statutes—the Age Discrimination in Employment Act and the Americans with Disabilities Act—also impose liability on employers and their agents. Thus, the decision in this case will also affect employer liability under those laws. Moreover, many state anti-discrimination laws mimic the language of Title VII, and state courts often refer to decisions under Title VII when interpreting their own statutes; thus, this decision could impact the imposition of employer liability under some state laws as well.

Employer advocates have voiced concern that if the Supreme Court accepts the EEOC's broad imposition of employer liability for the acts of subordinates, employers would feel required to examine the motives of every informant of employee misconduct in order to insulate themselves from liability. This would undermine efforts to root out workplace problems including, for example, sex harassment, and would impede employer ability to resolve such problems. Moreover, imposing liability for discriminatory actions of nondecision-making subordinates would eliminate any incentive a plaintiff would have for reporting alleged discrimination to the employer, thus defeating one of the purposes of Title VII: to prevent and eliminate workplace discrimination.

There is also concern from employer advocates that adopting an investigation requirement in order to break the causal link for a subordinate's discriminatory animus would hamstring human resources professionals in performing their functions. Workplace misconduct assumes many forms, and sometimes the facts are so apparent that no independent investigation is necessary. For example, assume a supervisor forwards lab results to the decision maker indicating that an employee has tested positive for drug use. If the supervisor decided to forward the report because of the employee's race and the report caused the termination, the employer would be held liable unless the decision maker engaged in an independent investigation of the drug use. Conducting such an independent investigation is not only unnecessary but a waste of corporate resources.

From the employee's perspective, however, limiting employer liability for tangible employment actions to only the actual decision maker's animus would allow workplace bias to operate unchecked. A biased low-level supervisor with no disciplinary authority can still cause employee discipline, including discharge, by selectively reporting or even fabricating information about workers. As the Tenth Circuit noted in its decision, "many companies separate the decision-making function from the investigation and reporting functions, and ... [discriminatory] bias can taint any of those functions." A result that encourages employers to verify information and review recommendations can only have a salutary effect on the workplace.

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Amicus Briefs

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Society for Human Resource Management (Manesh K. Rath (202) 434-4182)

In Support of Respondent EEOC

American Association of Justice (Jeffrey L. Needle (206) 447-1560)

Lawyers' Committee for Civil Rights Under Law et al. (Michael Foreman (202) 662-8600)

National Employment Lawyers Association et al. (Eric Schnapper (206) 616-3167)