AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

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Cut and Paste Post
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Cats, Bears and Eagles…

U.S. Supreme Court:
Another Review of the "Cats Paw" Theory of Liability

In a March 1, 2011 ruling, the U.S. Supreme Court found an employer liable under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), for an adverse employment action motivated by antimilitary feeling of its supervisors.

The issue arose in an action brought against a hospital by a former employee, Staub, who alleged he was terminated in violation of the USERRA. He claimed that the reasons given for his discharge -- insubordination and shirking his duties -- were pretext for discrimination based on his service in the Army Reserve.

The term "cat's paw" derives from "The Monkey and the Cat," a fable conceived by Aesop in which a monkey persuades an unwitting cat to snatch chestnuts from a fire. The cat burns her paw, while the monkey enjoys the chestnuts. Thus, a "cat's paw" is a tool used by another to accomplish his or her purposes. Under the "cat's paw" theory of liability, an employer is held liable if the ultimate decision-maker was the dupe, or "cat's paw," of an employee with a discriminatory motive, even if the decision-maker lacked such a motive.

Staub was fired in 2007 by the Vice President of Human Resources upon information from Staub's supervisor, Mulally, and Mulally's supervisor, Korenchuck. Based on evidence presented, the Court found that Mulally and Korenchuck acted within the scope of their employment when they took the actions that allegedly caused the vice-president to fire Staub. Even though they were acting within the scope of their employment, the Court found evidence that both supervisors were hostile to Staub's military obligations, that both had the specific intent to cause Staub to be terminated, and that the disciplinary actions taken against the Staub by Mulally and Korenchuck were causal factors behind the HR VP's decision to fire Staub. Therefore, under the Cats Paw Theory, the VP was the 'dupe' for Mulally and Korenchuck and, therefore, the company was liable for the actions of those supervisors.

Case takeaway? It's important for supervisors to trust, but verify, their subordinate employees' assessment of their employees' performance, and to ensure that a just cause review is conducted prior to taking disciplinary action.

Read the case: Staub v. Proctor Hospital. http://www.supremecourt.gov/opinions/10pdf/09-400.pdf

9th Circuit:
Properly Administered "One-Strike Rules"
Do Not Discriminate Against Recovering Addicts

The Pacific Maritime Association ("PMA") represents the shipping lines, stevedore companies, and terminal operators that run the ports along the west coast of the United States. PMA enforces the policies that govern the hiring of longshore workers who work along the west coast. One of those policies is a "one-strike rule," which eliminates from consideration any applicant who tests positive for drug or alcohol use during the pre-employment screening process. PMA notifies its

applicants at least seven days in advance of administering the drug test. Failing the drug test, even once, disqualifies an applicant permanently from future employment.

Santiago Lopez wanted to be a longshoreman. He first applied in 1997 at the port in Long Beach, California. When PMA administered its standard drug test, Lopez tested positive for marijuana. PMA therefore disqualified Lopez from further consideration under the one-strike rule. In late 2002, Lopez recognized "the deleterious effects on his health that his addictions had caused" and became clean and sober. In 2004 Lopez reapplied to be a longshoreman. Because of the one-strike rule, PMA rejected Lopez's application.

Lopez sued under the Americans With Disabilities Act ("ADA") and the California Fair Employment and Housing Act ("FEHA") claiming discrimination against him under the protected status of a rehabilitated drug addict. The United States District Court granted summary judgment for PMA. On appeal, the 9th Circuit Court of Appeals upheld the District Court, relying heavily on the U.S. Supreme Court's opinion in *Raytheon Co. v. Hernandez*, where the Court held that an employer's policy not to rehire workers who lost their jobs due to drug-related misconduct constituted a "neutral," "legitimate, [and] nondiscriminatory reason for refusing to rehire" the aggrieved employee.

In Raytheon, the Supreme Court found that the ADA prohibits employment decisions made because of a person's qualifying disability, not decisions made because of factors merely related to a person's disability. In this case, the triggering event for purposes of the one-strike rule is a failed drug test, not an applicant's drug addiction. Based on the assessment under Raytheon, PMA's one strike rule was not discriminatory.

Read the case: Lopez v. Pacific Maritime Ass'n: http://www.ca9.uscourts.gov/datastore/opinions/2011/03/02/09-55698.pdf

Montana Supreme Court:
Employee Entitled To Worker's Comp Even Though "Use Of Marijuana To Kick Off A Day Of Working Around Grizzly Bears Was Ill-Advised To Say The Least And Mind-Bogglingly Stupid To Say The Most"

This is an appeal by Russell Kilpatrick of a decision of the Workers' Compensation Court (WCC), concluding that Brock Hopkins was employed by Kilpatrick, and Hopkins was acting in the course and scope of employment at the time of his injuries and was therefore entitled to workers' compensation benefits.

On November 2, 2007, Hopkins traveled to work at the Great Bear Adventures Park at Kilpatrick's request. On the way, Hopkins smoked marijuana. Kilpatrick instructed Hopkins to raise the boards on the Park's front gates so they would not freeze to the ground. Before proceeding, Hopkins asked Kilpatrick if he should feed the bears as well. Testimony regarding Kilpatrick's answer conflicted. However, the WCC ultimately found that Kilpatrick never told Hopkins not to feed the bears.

After completing work on the gates, Hopkins returned to Kilpatrick's house. Kilpatrick was asleep inside. Hopkins mixed food for the bears and used Kilpatrick's truck to drive into the Park. He entered the bears' pen and began to place food out. Once inside, nothing separated him from the bears. At some point while Hopkins was working, the largest bear, Red, attacked him. He suffered severe injuries.

Kilpatrick did not carry workers' compensation insurance. Hopkins petitioned the WCC for workers' compensation benefits from the Uninsured Employers' Fund. Both the Uninsured Employers' Fund and Kilpatrick opposed Hopkins' petition. The WCC found for Hopkins, concluding that: (1) Hopkins was employed by Kilpatrick at the time of Hopkins' injuries; (2) Hopkins was in the course and scope of his employment at the time of his injuries; (3) marijuana use was not the major contributing cause of Hopkins' injuries; and (4) Hopkins was not performing services in return for aid or sustenance only. On appeal, the Montana Supreme Court affirmed.

Read the case: *http://searchcourts.mt.gov/view/DA%2010-0403%20Published%20-%20Opinion?id={99A0CB74-9C38-44F9-BBAC-CC7481F7AD97}*

NOTE! I'm sure you've already heard about this case. I would encourage you to read this case, and then read HB43. I think you'll see where one of the provisions in HB43 may have originated!

Montana Human Rights Commission
Awards Havre Woman $193,000 after Sexual Harassment

The Montana Department of Labor and Industry has awarded a former employee of the Havre Eagles Club $193,502 in a sexual harassment case. This award included $45,069 in lost wages and benefits, $75,000 in emotional distress, and interest.

In a decision issued April 8th, hearings officer Gregory Hanchett found that Thomas Farnham, the general manager of the Club, sexually harassed Kaycee Groven over a period of years, forcing her to leave her job when the harassment became so severe she could no longer tolerate it. Specifically, Hanchett found that Farnham repeatedly grabbed Groven's breasts, buttocks, and crotch, made inappropriate sexual comments, and tried to hug and kiss her.

Although Farnham denied the claims, Hanchett found his sworn testimony "not credible," and "patently false." Hanchett also found Groven's testimony "entirely credible", and other witnesses supported her testimony.

Hanchett also found that Farnham's actions included numerous sexual assaults. In October 2009, Farnham pled guilty to sexually assaulting Groven and was sentenced to 30 days in jail. Hanchett found that Farnham's actions were "severe and pervasive" and created an "abusive work environment." Hanchett also found that even though Groven repeatedly protested to officers and trustees of the Eagles Club, they took no steps to control Farnham's conduct.

As part of the order, the Eagles must: 1) ensure that Farnham is never alone with any female employees at the Eagles or elsewhere; 2) provide 4 hours of Human Rights Bureau-approved staff training to all managers and staff in the field of employment discrimination, including sexual harassment; 3) adopt Bureau-approved anti- discrimination policies; and 4) consult with all female employees on at least a monthly basis to ensure no harassment is occurring.

As to Farnham:

- In September 2009, trustees of the Havre Eagles Club gave him a written disciplinary warning;
- In March 2010, when the national Eagles organization became involved, Farnham was fired;
- He was rehired in May of 2010; and
- He remains employed as the Club's general manager.

Read the case: *http://erd.dli.mt.gov/human-rights/complaint-process/decisions/cat_view/8-human-rights/12-decisions-and-orders/145-decisions-by-year/173-2011.html?limit=25&limitstart=0&order=date&dir=DESC*

FEDERAL LEGISLATION:

Out of Work? Out of Luck
Proposed Bill Would Ban Discrimination Against Unemployed

Title VII of the Civil Rights Act prohibits employers from discriminating against applicants based on race, color, religion, sex, or national origin. On March 16, 2011, Representative Hank Johnson (D-Ga) introduced H.R.1113, the Fair Employment Act of 2011, which would amend Title VII to add unemployment status to the categories of prohibited discrimination. HR 1113 defines "unemployment status" as being unemployed, having actively looked for employment. Specifically HR1113 it would make it illegal for employers to refuse to hire or to lower compensation for a person because of employment status. HR 1113 was referred to the house subcommittee on Health, Employment, Labor, and Pensions on April 4, 2011.

Track this bill at: *http://thomas.loc.gov/cgi-bin/bdquery/D?d112:2:./temp/~bd04pX::|/home/LegislativeData.php|*

DID YOU KNOW?

The final regulations implementing the ADAAA are on the federal register website! Go to:

http://www.federalregister.gov/articles/2011/03/25/2011-6056/regulations-to-implement-the-equal-employment-provisions-of-the-americans-with-disabilities-act-as

Health Care Reform: Up in the Air or Not?

Even though health care reform is being challenged in the courts, there is nothing that prevents employers from complying with the health care reform legislation's mandates. As of this writing, the Patient Protection and Affordable Care Act has been struck down by two Courts, and upheld by two others. According to Paul Hamburger, an attorney with Proskauer Rose in Washington, D.C., "The best advice right now is to stay the course and implement those aspects of health care reform currently in effect and wait to see what happens."

There are still a few provisions that will begin to apply in 2012, with the next big deadline being in 2014, when the individual mandate is supposed to apply as well as some expanded coverage provisions affecting group health plans. Hamburger believes that, "By then, we should know what the rules will be."

Ilyse Schuman, an attorney with Littler Mendelson in Washington, D.C., agrees with Hamburger, noting that "some employers might see (the court battles over the reform act) as the end of the health care law and the end of health care reform obligations, and that's not the case." Schuman advises against taking the legal challenges as an indication that it is acceptable to stop complying with health care reform, adding, "this is not the end of the story," and ultimately the cases (and the status of the health care reform act) are likely to be decided by the Supreme Court.

With the only certain thing being uncertainty, here are future key health care reform obligations:

Effective 2012

- **W-2 Reporting Requirement**
  Employers will be required to report the aggregate value of each employee's medical, vision, dental and certain supplemental benefits. This is optional for 2011.

Effective 2013

- **Health Care FSA Contribution Cap**
  A cap of $2,500 will be placed on the amount of funds an employee can save in a Health Care Flexible Spending Account (FSA). The limit will be adjusted annually in accordance with the U.S. Consumer Price Index.
- **Medicare Prescription Coverage**
  Subsidies to eliminate the "donut hole" gap in Medicare Part D coverage for prescription drugs will begin phasing in for completion by 2020.
- **Health Exchange Notification**
  Employers will be required to give a notice to their employees if they may be eligible to participate in one of the state-based health insurance exchanges.

Effective 2014

- **State Health Insurance Exchanges**
  States will be required to establish online health insurance exchanges or marketplaces to facilitate the purchase of coverage by individuals and small groups. If states do not fulfill this requirement, the federal government will create an exchange for them.
- **Individual Mandate**
  In what is proving to be one of the most controversial aspects of health care reform, and the basis for states' lawsuits challenging PPACA's constitutionality; individuals will be required to carry minimum essential health care coverage. Those who cannot demonstrate that they have coverage will be required to pay a penalty. However, certain individuals could be exempt.
- **Automatic Enrollment**
  Employers with more than 200 employees will be required to automatically enroll new full-time employees in health insurance coverage. Employers must also provide employees with an opportunity to opt out of coverage. The effective date of this requirement will be delayed until the government provides further guidance and regulations, which are expected to come by 2014.
- **'Play or Pay'**
  Employers with more than 50 employees will be penalized $2,000 per employee for not providing health coverage if their employees are

eligible for a subsidy on insurance exchanges. The first 30 employees would be exempted from the penalty. Employers with insufficient coverage will also be subject to a penalty.

- **Adult Pre-existing Conditions**
  Group health plans will be required to eliminate any pre-existing condition exclusions for adults. The plans will also have to eliminate annual limits on essential benefits coverage for adults.
- **Waiting Period Restrictions**
  Employers will be required to eliminate waiting periods beyond 90 days when enrolling new employees in a group health plan.
- **Small Business Tax Credits**
  The 35% tax credit that went into effect in 2010 for businesses with fewer than 25 employees will increase to up to 50% of the cost of employees' premiums.

Effective 2017

- **State Health Insurance Exchanges**
  States may choose to allow large employers to offer coverage to their employees through the health insurance exchanges.

Effective 2018

- **Excise Tax**
  An excise tax will be applied to high-cost health care plans. High-cost health care plans have premiums of more than $10,200 for individuals and $27,500 for families, increased by a factor intended to reflect medical inflation. The 40% tax will apply to the amount of the premium in excess of the threshold.

Montana Legislative Update

Here is a summary of the status of 'general interest' Human Resources-related bills which have been working their way through the 2011 Montana Legislative Session, beginning with the Bills which have either become, or have a good chance of becoming, law. I will update you as to final outcomes as the legislature winds down.

THESE BILLS HAVE, OR MAY, BECOME LAW….		
LC #	**HB or SB #**	**Description or other basic Bill information.**
LC0296	HB 43	Clarifying employer's rights related to employee use of medical marijuana. A BILL FOR AN ACT ENTITLED: "AN ACT CLARIFYING EMPLOYER RIGHTS RELATED TO **WORKERS' COMPENSATION**, **DRUG TESTING**, AND **DISCIPLINARY ACTION** INVOLVING AN EMPLOYEE'S MEDICAL USE OF MARIJUANA; EXPANDING THE TYPES OF EMPLOYEES COVERED BY THE WORKFORCE DRUG AND ALCOHOL TESTING ACT; CREATING EMPLOYMENT-RELATED EXCEPTIONS TO THE PROTECTIONS OF THE MEDICAL MARIJUANA ACT; PROVIDING DEFINITIONS; AMENDING SECTIONS 39-2-206, 39-2-210, 39-2-313, 39-71-407, 50-46-201, AND 50-46-205, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE." ***Passed both houses; In Conference or Free Conference Committee Process.***
LC0305	HB 334	Workers' Compensation Overhaul. AN ACT GENERALLY REVISING WORKERS' COMPENSATION LAWS; PROVIDING FOR CLOSURE OF CLAIMS; PROVIDING A PROCESS TO REOPEN MEDICAL CLAIMS; ESTABLISHING A **MEDICAL DIRECTOR** AND MEDICAL **REVIEW PANEL**; REVISING **PERMANENT PARTIAL DISABILITY** DEFINITION AND BENEFITS; CLARIFYING WHAT CONSTITUTES **COURSE AND SCOPE** OF EMPLOYMENT; ALLOWING RETROACTIVE BENEFIT PAYMENTS TO CERTAIN WORKERS; PROVIDING FOR **SETTLEMENTS OF MEDICAL CLAIMS**; PROVIDING FOR INSURER DESIGNATION OF **TREATING PHYSICIANS**; PROVIDING PAY SCALES FOR TREATING PHYSICIANS AND HEALTH CARE PROVIDERS; PROVIDING CERTAIN LIMITATIONS ON **MEDICAL PAY SCHEDULES** FOR THE BIENNIUM; REQUIRING THE LEGISLATIVE AUDITOR TO SUBMIT REPORTS ON THE MONTANA STATE FUND TO THE INSURANCE COMMISSIONER; REVISING VOCATIONAL REHABILITATION SERVICES AND TERMS TO ASSIST AN EMPLOYEE IN **STAYING AT WORK OR RETURNING TO WORK**; CREATING A STAY-AT-WORK/RETURN-TO-WORK ASSISTANCE FUND AND PROVIDING FOR ASSESSMENTS; EXTENDING RULEMAKING AUTHORITY; AMENDING SECTIONS AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND APPLICABILITY DATES. ***Became Law.***
LC1791	HB 179	Disallow unemployment benefits for certain employee terminations "AN ACT PROVIDING THAT A CHARGE MAY NOT BE MADE TO THE ACCOUNT OF A COVERED EMPLOYER WITH RESPECT TO UNEMPLOYMENT INSURANCE BENEFITS IF THE BENEFITS ARE PAID TO A WORKER WHO WAS **TERMINATED DURING A PROBATIONARY PERIOD OF EMPLOYMENT**; AMENDING SECTION 39-51-1214, MCA; AND PROVIDING AN APPLICABILITY DATE." ***In Second House--Out of Committee.***

LC2024	HB 300	Allow more than 8 hour workday for certain industries if agreed to. AN ACT REVISING LABOR LAWS; PROVIDING THAT THE WORKDAY FOR **UNDERGROUND MINERS, SMELTER WORKERS, AND EMPLOYEES AT STRIP MINES, CEMENT PLANTS, AND QUARRIES** MAY NOT EXCEED 8 HOURS A DAY UNLESS THE EMPLOYER AND EMPLOYEE AGREE TO A WORKDAY OF MORE THAN 8 HOURS; REVISING PENALTIES; AND AMENDING SECTIONS 39-4-103, 39-4-104, 39-4-107, AND 39-4-109, MCA. ***Transmitted to Governor.***
LC0367	SB 29	Mandatory alcohol server and sales training: AN ACT GENERALLY PROVIDING FOR THE **TRAINING OF PERSONS SELLING OR SERVING ALCOHOLIC BEVERAGES;** PROVIDING A PENALTY; REQUIRING CONSIDERATION OF MITIGATING CIRCUMSTANCES; PROVIDING FOR RULEMAKING; AND PROVIDING THAT THE DEPARTMENT OF REVENUE HAS SOLE JURISDICTION FOR THE TRAINING PROGRAM. ***In enrolling. Next step is transmittal to Governor.***
LC0200	SB 287	AN ACT REQUIRING THAT CERTAIN **CORPORATE OFFICERS AND MANAGERS OF MANAGER-MANAGED LIMITED LIABILITY COMPANIES WORKING IN THE CONSTRUCTION INDUSTRY** BE COVERED BY WORKERS' COMPENSATION OR OBTAIN AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE; AMENDING SECTIONS 39-71-401 AND 39-71-417, MCA; AND PROVIDING AN EFFECTIVE DATE. ***Transmitted to the Governor.***
LC1246	SB 342	Employees can be denied unemployment insurance in cases of misconduct. SB342 has amended MCA to define misconduct for unemploy insurance purposes as including, but not being limited to, the following conduct by an employee: (i) willful or wanton disregard of the rights, title, and interests of a fellow employee or the employer; (ii) deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee; (iii) carelessness or negligence that causes or is likely to cause serious bodily harm to the employer or a fellow employee; or (iv) carelessness or negligence of a degree or that reoccurs to a degree to show an intentional or substantial disregard of the employer's interest. ***Became Law.***
LC1309	SB 290	Exclude independent contractor as employee under Human Rights Act ***Transmitted to the Governor.***

THESE BILLS ARE PROBABLY DEAD…

LC #	HB or SB #	Description	Disposition
LC0118	HB 161	Repeal medical marijuana law.	Vetoed by Governor.
LC0624	HB 175	Submit repeal of Montana Medical Marijuana Act to voters of Montana	In Second House Committee--Tabled
LC0707	HB 201	Allow employees to keep firearms in vehicle in workplace parking lot.	Missed Bill transmittal. Probably Dead
LC0542	HB 274	Provide that employment of an unauthorized alien is unlawful.	In Second House Committee--Tabled
LC0932	HB 368	Allow keeping firearm in parked vehicle or while on employer's business	Missed Bill transmittal. Probably Dead
LC0995	HB 378	Provide criteria for pay equity and dispute processes	Missed Bill transmittal. Probably Dead
LC0113	HB 429	Revise procedures related to the Medical Marijuana Act	Missed Bill transmittal. Probably Dead
LC1536	HB 440	Require all public and private employers to use E-Verify program	Missed Bill transmittal. Probably Dead
LC1627	HB 514	Protect sexual orientation and gender identity and expression	Missed Bill transmittal. Probably Dead
LC2082	HB 634	Generally revise law relating to data privacy	Missed Bill transmittal. Probably Dead
LC1828	SB 196	Address bullying in the workplace	Missed Bill transmittal. Probably Dead
LC1270	SB 251	Prohibit texting while driving	Missed Bill transmittal. Probably Dead