LJN LAW JOURNAL NEWSLETTERS

Employment Law Strategist®

An ALM Publication

Volume 20, Number 3 • September 2012

Banning Smokers May Harm Your Company's Health

By Michael D. Homans

Companies have been attracting a lot of headlines lately by adopting new policies that prohibit the hiring of smokers. Proponents of these policies recite a number of benefits for the organization and the workforce, including promoting employee health, lowering health insurance costs and improving employee productivity. Among the employers adopting these policies have been Humana, Geisinger Health System, Alaska Airlines and Union-Pacific Railroad. An estimated 6,000 companies across the country refuse to hire smokers.

What the Law Says

With the exception of states that ban discrimination against smokers (such as New Jersey), employers are entitled under the law to choose not to hire smokers. And for many employers, especially those in health care, banning smokers is consistent with their missions and makes a lot of sense. Nevertheless, for a variety of reasons set forth below, a "no-smokers" rule may create a variety of unintended and undesirable consequences. Perhaps most disturbing, such a policy takes the unprecedented step, for most employers, of regulating lawful, off-duty conduct by workers.

Listed on page 8 are my top 10 reasons that employers should think before jumping on the bandwagon to adopt a "smokers need not apply" rule:

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Transgender Issues in the Workplace

By Ariel D. Cudkowicz, Laura Maechtlen, Asilia S. Backus and Natascha B. Riesco

Although no federal statute explicitly prohibits employment discrimination based on gender identity, courts have increasingly held that transgender individuals are protected from discrimination under federal law. (Note: The terms "sex," "gender," "sexual orientation" and "transgender" are distinguishable. "Sex" is a term used to denote whether an individual is biologically male or female. "Gender" refers to an individual's external characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine, regardless of their biological sex, with "gender identity" being a person's internal, deeply felt sense of being male, female, something other or in-between. "Sexual orientation" describes an individual's enduring physical, romantic and/or emotional attraction to another person. "Transgender" is an umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth.) Indeed, on April 20, 2012, in the landmark ruling *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, EEOC Appeal No. 0120120821 (April 23, 2012), the Equal Employment Opportunity Commission (EEOC) held that transgender individuals may state a claim for sex discrimination under Title VII.

The *Macy* ruling by the EEOC serves as a reminder to employers that they must become more attuned to issues related to employees' gender identity and/or expression, in addition to other protected characteristics under federal law.

The EEOC's Ruling in *Macy*

Complainant Mia Macy applied for an open position with the Bureau of Alcohol, Tobacco, Firearms and Explosives. Macy was assured that she would receive the position pending completion of a background check. During the background check process, Macy informed the Bureau that she was in the process of transitioning from male to female. Five days later, Macy received an e-mail from the Bureau notifying her that, due to federal budget cuts, the position was no longer

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available. Macy later learned that the position was not eliminated, and another candidate was hired. Macy therefore believed that her transgender status resulted in the Bureau's failure to select her for the position.

Because Macy was a federal agency job applicant, she was required to follow the federal sector EEO process of filing an internal complaint with the Bureau, instead of filing a charge of discrimination directly with the EEOC. (*See generally* 29 C.F.R. § 1614.) In her EEO complaint filed with the Bureau, Macy checked the box for "sex" and alleged that she had been discriminated against and denied the position on the basis of her "sex, gender identity (transgender woman), and on the basis of sex stereotyping."

The Bureau accepted Macy's complaint, but limited adjudication of her charge solely to the discrimination claim based on "sex" pursuant to Title VII and the EEOC regulations that apply to federal agencies. The Bureau also accepted Macy's remaining claims based on "gender identity stereotyping," but informed Macy that such claims would only be processed and investigated according to the Department of Justice (DOJ) policy, which does not provide the same rights and remedies afforded by Title VII and EEOC regulations.

Macy appealed to the EEOC, arguing that the Bureau's decision to bifurcate her claims amounted to a "*de facto* dismissal" of her entire Title VII claim, which included a claim of discrimination based on gender identity and transgender status. The EEOC accepted Macy's appeal and, while it did not rule on the merits of her claims, determined that claims of discrimination based on transgender status and gender identity are cognizable as claims of sex discrimination under Title VII. The EEOC concluded that the Bureau had erroneously separated Macy's complaint into distinct claims, and that each of the allegations contained in the complaint was simply a different means of stating a claim of discrimination based on sex, which is actionable under Title VII. Accordingly, it remanded Macy's complaint to the Bureau.

The EEOC found support for its decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989), in which the U.S. Supreme Court held that Title VII bars discrimination based on gender stereotypes, in other words, "failing to act and appear according to expectations defined by gender" — a form of sex discrimination that has since been described as "sex stereotyping." (*Macy* at 6.) The EEOC also cited to *Smith v. City of Salem*, 378 F.3d 566, 568-575 (6th Cir. 2004), in which the Sixth Circuit held that Title VII prohibited sex stereotypes regardless of whether the plaintiff was labeled a transsexual. (*Macy* at 6.)

In sum, the EEOC reasoned that, "although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one way of proving sex discrimination." (*Macy* at 12.) The EEOC went on to state that "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort." (*Id.*) While the EEOC acknowledged that transgender, like sex stereotyping, is not an independent protected status, it concluded that a transgender person "may establish a *prima facie* case of sex discrimination through a number different formulations." (*Macy* at 12-13.)

What the Decision Means For Employers

The significance of the EEOC's decision in *Macy* cannot be understated. In ruling that transgender employees may state a claim for

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Employment Law Strategist® (ISSN 1069-3741) is published by Law Journal Newsletters, a division of ALM. Telephone: (877) 256-2472
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271
Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
www.ljnonline.com

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Disability-Related Misconduct

Part Two of a Two-Part Article

By Andrew A. Nicely

Part One of this article in last month's issue discussed the definition of disability, disabled-employee miconduct, and discipline. Part Two herein continues the discussion.

Non-Violent Misconduct Related to a Recognized Disability

Most employers have adopted employee handbooks to encourage conduct that furthers the company's objectives while prohibiting behavior that may jeopardize its interests or the health and safety of its workforce. Even in smaller firms where employment policies may be unwritten, misconduct unquestionably is a legitimate basis for discipline, including termination. When confronted with the possibility of termination or other disciplinary action, an employee may attribute his misconduct to a physical or psychiatric disability.

For example, a grocery store employee who was disciplined for uttering racial epithets argued that his inflammatory remarks were an uncontrollable symptom of Tourette's Syndrome, for which the store was obligated to make reasonable accommodations. *See Ray v. The Kroger Co.*, 264 F. Supp. 2d 1221 (S.D. Ga.2003), aff'd 90 Fed. Appx. 384 (11th Cir. 2003). A university professor argued that his non-collegial and disruptive behavior was caused by obsessive compulsive disorder, and that his termination therefore was in violation of the ADA. *See Newberry v. E. Tex. State Univ.*, 161 F.3d 276 (5th Cir. 1998). And employees caught sleeping on the job have attributed their drowsiness to a variety of medical causes, including insomnia, sleep apnea, and medications prescribed for back injuries. *See, e.g., Hill v. Kan. City Area Transp. Auth.*, 181 F.3d 891 (8th Cir. 1999); *Leschinskey v. Rectors & Visitors of Radford Univ.*, No. 7:11cv189, 2011 WL 5029813 (W.D. Va. Oct. 24, 2011). Whether an employer is privileged to discipline employees for conduct that may be related to a disability depends on the jurisdiction in which the employer is located, whether the employer is aware of the asserted disability and the employee's need for an accommodation prior to imposing discipline, and the extent to which the disability and associated misconduct can reasonably be accommodated.

EEOC: Misconduct Related To a Disability Can Be Disciplined

As noted in Part One of this article, the ADA bars employers from discriminating against a qualified person with a disability with respect to the terms and conditions of employment. In simple terms, one cannot terminate an employee merely because he or she has a disability. If an employee's disability causes him to violate a workplace rule and the company terminates his employment, was the employee terminated because of his disability, or because of the violation of the employer's rules? The statute does not answer this question directly; the EEOC, for its part, has opined that "an employer is not required to excuse past misconduct even if it is the result of the individual's disability." *See* Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act ("EEOC Enforcement Guidance"), Q&A No. 36 (Oct. 17, 2002). Most courts have agreed with the EEOC's approach. The Fourth Circuit, for example, has held that "misconduct — even misconduct related to a disability — is not itself a disability," and may be grounds for discipline. *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 n.3 (4th Cir. 1997). Stated another way, the ADA "does not excuse workplace misconduct [that] is related to a disability," and therefore, "on-the-job misconduct and poor work performance always constitute legitimate and nondiscriminatory reasons for terminating employment, even where the misconduct is caused by an undivulged psychiatric condition." *Canales-Jacobs v. N.Y. State Office of Court Admin.*, 640 F. Supp. 2d 482, 500 (S.D.N.Y. 2009).

EEOC Does Not Require That Past Disciplinary Actions Be Rescinded

Courts following the EEOC approach generally will not require employers to rescind disciplinary actions that already have been taken against a disabled employee who violated the employer's policies. Thus, an employee who has received a written warning for violating a workplace rule will not be entitled to have it expunged from his file, and a worker who has been terminated for misconduct will not be entitled to reinstatement. This rule is applied inflexibly in instances where the employer was not aware of the employee's disability at the time of the disciplinary action. *See, e.g., Canales-Jacobs*, 640 F. Supp. 2d at 487-88 (holding that a court clerk who suffered from clinical depression was not entitled to a lesser sanction than dismissal for yelling at a judge, throwing court papers, and subjecting the public to a "barrage of obscenity"); *Calandriello v. Tenn. Processing Ctr., LLC*, No. 3:08-1099, 2009 WL 5170193 (M.D. Tenn. Dec. 15, 2009) (holding that an employer was entitled to terminate a technician who manifested a preoccupation with serial killers and weapons, notwithstanding the technician's after-the-fact announcement that he suffered from bipolar disorder).

Minor Infractions May Have to Be Excused

Although courts generally are hesitant to second-guess employers' administration of their personnel policies, they may entertain ADA claims brought by disabled employees who were dismissed if it appears that termination was an unduly harsh penalty under the circumstances. For example, in *Walsted v. Woodbury County, Iowa*, 113 F. Supp. 2d 1318 (N.D. Iowa 2000), the employer fired a mildly retarded employee who admitted stealing items from the workplace on two occasions. The district court denied the employer's motion

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for summary judgment, concluding that an issue of fact existed whether, with further training and other reasonable accommodations, the employee could refrain from further transgressions. The EEOC has opined that, in the case of minor infractions, employers, upon request, must "make reasonable accommodation to enable an otherwise qualified employee with a disability to meet [the company's] conduct standard[s] in the future, barring undue hardship." *See* EEOC Enforcement Guidance, Q&A No. 36. Consistent with this guidance, the court in *Leschinskey* refused to dismiss the ADA claim of an employee who requested an accommodation for medical conditions that caused him to fall asleep at work, resulting in a violation of the employer's personnel rules. *See* 2011 WL 5029813, at *2-3. And in a case arising under Title III of the ADA, involving a medical student with an anger management problem supposedly caused by Attention-Deficit Hyperactivity Disorder, the Fourth Circuit observed that "[a] school, if informed that a student has a disability with behavioral manifestations, may be obligated to make accommodations to help the student avoid engaging in misconduct." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012).

The Ninth and Tenth Circuits' More Lenient Approach

Employers located within the territorial limits of the Ninth and Tenth Circuits must tread more cautiously before disciplining disabled employees for misconduct. Those courts have rejected the "disability v. disability-caused conduct dichotomy," except with respect to misconduct related to an employee's use of alcohol or illegal drugs. *Den Hartog v. Wasatch Acad.*, 129 F.3d 1076 (10th Cir. 1997); accord *Humphrey v. Mem'l Hosps. Assoc.*, 239 F.3d 1128, 1139-40 (9th Cir. 2001) ("For purposes of the ADA, with a few exceptions, conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination.") (Internal footnote omitted.) As the Tenth Circuit observed, the ADA expressly permits employers to hold alcoholics and illegal drug users to the same standards of conduct that are applied to non-disabled employees, and it also relieves them of any duty to offer accommodations that would be unduly burdensome or that would benefit workers who pose a "direct threat" in the workplace. *See Den Hartog*, 129 F.3d. at 1087. The "necessary corollary" of these provisions, however, "is that there must be certain levels of disability-caused conduct that have to be tolerated or accommodated." *Id.* To minimize the risk of liability under the ADA, employers in the Ninth and Tenth Circuits should evaluate whether an accommodation is possible before terminating an employee for misconduct related to a disability. If the misconduct renders the employee unable to perform essential functions of the job even with an accommodation, or if the proposed accommodations would be unduly burdensome, a reviewing court likely would conclude that the employer was justified in dismissing the employee. For example, in a decision handed down in April 2012, the Ninth Circuit concluded that regular attendance was an essential job requirement for nurses working in a neonatal intensive care unit and, on that basis, it upheld the termination of a nurse whose fibromyalgia made it impossible for her to show up for work on a consistent basis. *See Samper v. Providence St. Vincent Med. Ctr.*, No. 10-35811 (9th Cir. Apr. 11, 2012). By contrast, if the misconduct is fairly trivial and the employee is able to perform the essential functions of his position without materially disrupting the employer's operations, an employer in the Ninth or Tenth Circuits may be obliged to tolerate the infractions.

Conclusion

Employers generally endeavor to apply their personnel rules in a consistent manner and, of course, federal, state and local anti-discrimination statutes preclude disparate enforcement of such rules based on an employee's membership in a protected class. Employees who violate workplace rules because of drug abuse, alcoholism, and other conditions exempted from the ADA's definition of "disability" can expect to suffer the same penalties meted out to employees who do not suffer from those conditions.

By contrast, courts may expect employers to consider possible accommodations for employees with recognized disabilities who, despite their violation of a workplace rule, may be able to perform the essential functions of their positions (and avoid future infractions) with an accommodation. Employers in the Ninth and Tenth Circuits generally will be held to a higher standard; they will be expected to offer reasonable accommodations to disabled employees and to tolerate some level of aberrant behavior on the part of disabled employees who otherwise are able to perform the essential functions of their positions.

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sex discrimination under Title VII, the EEOC explicitly reversed course and overturned several of its own administrative decisions, and issued a holding that is contrary to several federal court rulings interpreting Title VII. While previously there was no apparent consensus on whether the EEOC would accept such charges (and no consensus among federal courts), and administrative decisions were likely relegated to individual district offices or investigators, the EEOC's ruling makes clear that the EEOC will now accept charges of discrimination based on gender identity and/or transgender status at all of its 15 district offices.

Going forward, it is expected that the EEOC's decision will result in an increased number of charges of discrimination filed and investigated based on gender identity and/or expression. We also anticipate that the EEOC will take a more aggressive stance in investigating and litigating charges based on gender identity and/or expression. Moreover, given the EEOC's

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The 'Cat's Paw' Doctrine in the Second Circuit

By Frances K. Browne and Sean Sullivan

Current business management theory champions a collaborative and open work environment in which employees are empowered to share viewpoints about everything from product development to the performance of co-workers. Organizations as large as Facebook (where even Mark Zuckerberg does not have an office) and as modest as the corner coffee shop have recognized the benefits of encouraging employees to trade strategies and arrive at shared decisions. However, collaborative decision-making can have unintended legal consequences. Courts have found that if employees with supervisory responsibilities are motivated by discriminatory animus, and employers innocently rely on their recommendations, then a discrimination claim may lie against the employer.

The 'Cat's Paw Doctrine

Imputing liability to an employer that relies on input from a biased employee is known as the "cat's paw" theory of liability. The name originates from Aesop's fable of the foolish cat and the clever monkey. The monkey, through flattery, tricks the cat into pulling roasted chestnuts from a fireplace. As the cat takes the chestnuts from the fire, the monkey eats them, leaving the cat with a burned paw and the monkey with a full stomach. One moral of the story is to beware of those with ulterior motives, and the term "cat's paw" now commonly refers to someone who is being used as a pawn by another. In the employment law context, an employer that takes the word of a prejudiced supervisor may end up getting burned.

The Supreme Court's Decision in *Staub*

Courts have recognized some form of the "cat's paw" doctrine since Seventh Circuit Judge Richard Posner adopted the phrase in a 1990 age discrimination suit in which a negative review by a biased regional supervisor resulted in the firing of a salesperson. *See Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990). Last year, the Supreme Court clarified the doctrine. In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the Court held that an employer could be liable for relying on the recommendations of biased supervisors in terminating an employee, even if the employer did not know of, or ratify, the discriminatory beliefs. Plaintiff Staub was a medical technician at a hospital and a member of the Army Reserves. Two of his supervisors were openly hostile to his participation in the reserves, and made disparaging remarks about his service. One of the supervisors referred to the plaintiff's military obligations as "a bunch of smoking and joking and a waste of taxpayer money." *Id*. at 1189. On numerous occasions, the two supervisors disciplined him for rule infractions that the plaintiff claimed were fabricated. In reviewing his performance, the defendant's human resources executive relied on reports from the allegedly biased supervisors, and terminated his employment. The plaintiff filed suit under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which protects members of the armed services from discrimination. He argued that while the decision-maker in the human resources department may not have borne discriminatory animus toward him, his supervisors did, and her reliance on their reviews made the termination unlawful. The hospital countered that the decision-maker had conducted an independent investigation into the situation and found no discrimination.

The plaintiff prevailed at trial, but the verdict was set aside by the Seventh Circuit, which ruled that a "cat's paw" case could not be maintained unless the biased employee exercised "such singular influence over the decision-maker that the decision to terminate was the product of blind reliance." *Id*. at 1190 (internal citations omitted). The Supreme Court reversed. Writing for a unanimous Court, with Justices Alito and Thomas concurring, Justice Scalia 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 the proximate cause of the ultimate employment action, the employer is liable." *Id*. at 1994. The Court was not persuaded that an investigation absolved defendant of liability, stating, "we are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim preclusive effect." *Id*. at 1993.

Necessary Factors

Staub sets forth the factors necessary for the imposition of liability under the "cat's paw" theory. First, the biased individual must be a supervisor of the plaintiff, although he need not be the ultimate decision-maker. Second, the supervisor must intend to cause an adverse employment action. Third, the supervisor must be acting within the scope of his employment or, if the supervisor is acting outside its scope, the employer will be liable if the employee's actions would be imputed to the employer under traditional agency principles. *Id*. at 1993-94.

Application of the 'Cat's Paw' Doctrine to Other Statutes

In the wake of *Staub*, courts in the Second Circuit have extended the "cat's paw" doctrine beyond military service discrimination. It has been applied to claims of discrimination based on age, race, disability, ethnicity, religion, and pregnancy. The plaintiffs in a variety of discrimination cases were permitted to proceed with allegations that the adverse job action was the result

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of a collaborative decision-making process, which included a discriminatory motive as one of the inputs.

Employers' attempts to draw a distinction between the operative language of USERRA and other statutes have not succeeded. For example, in *Daniels v. Pioneer Central School District*, 08 Civ. 767, 2012 U.S. Dist. LEXIS 55964 (W.D.N.Y. Apr. 20, 2012), the Western District of New York recently rejected an argument that the "but for" causation standard of the Age Discrimination in Employment Act (ADEA) differed from the "motivating factor" test of USERRA such that the "cat's paw" doctrine is inapplicable. Thus, the doctrine is available across the panoply of anti-discrimination statutes.

Actionable Evidence or Stray Remarks

Plaintiffs have succeeded in advancing a "cat's paw" theory where there is substantial evidence of discriminatory animus by a supervisor. These cases tend to include statements plainly evincing unlawful bias, as in *Staub*. For instance, a school teacher had a triable age discrimination claim where the principal encouraged her to retire and stated that he needed to make room for "younger staff," "new thinking," and "bright young teachers coming in at the other end." *Daniels*, 2001 U.S. Dist. LEXIS 55964 at *1. It was no defense that the school's superintendent was untainted by bias because he relied on the recommendation of the principal in terminating the teacher's employment.

By contrast, employers have prevailed where the statements reflected no clear animus and fell into the category of "stray remarks." Courts will assess whether the statements "show that the decision-maker was motivated by assumptions or attitudes relating to the protected class." *Tomassi v. Insignia Fin. Group, Inc.*, 478 F. 3d 111, 115 (2d Cir. 2007). Four factors are considered: "(1) who made the remark, *i.e.*, a decision-maker, a supervisor, or a low-level co-worker; (2) when the remark was made in relation to the employment decision at issue; (3) the content of the remark, *i.e.*, whether a reasonable juror could view the remark as discriminatory; and (4) the context in which the remark was made, *i.e.*, whether it was related to the decision-making process." *Silver v. North Shore Univ. Hosp.*, 490 F. Supp.2d 354, 363 (S.D.N.Y. 2007).

For example, in *Rajaravivarma v. Bd. of Trustees for the Conn. State Univ. Sys.*, 3:09 Civ. 1550, 2012 U.S. Dist. LEXIS 40848 (D. Conn. Mar. 26, 2012), a university successfully utilized a "stray remarks" defense in a "cat's paw" discrimination action. A professor alleged that he was denied tenure in violation of Title VII because the tenure decision was influenced by supervisors who harbored religious, racial, and national origin animus. One supervisor allegedly made comments regarding the plaintiff's Indian heritage and Hindu faith, including, "I don't care what your religious beliefs are … I care about the lab … you son-of-a-bitch," and "you guys from India are taking away all these jobs." *Id.* at **60, 71. The District of Connecticut granted summary judgment for the employer, holding that there was no nexus between the denial of tenure and the remarks, which were relatively innocuous and temporally remote from the adverse job action.

Supervisor or Low-Level Employee

As Justice Alito noted in his concurrence, *Staub* leaves open the issue of whether "an employer may be held liable if it innocently takes into account adverse information provided not by a supervisor but by a low-level employee." 131 S. Ct. at 1196.

The Eastern District of New York has had occasion to address a similar issue in *Abdelhadi v. City of New York*, 08 Civ. 380, 2011 U.S. Dist. LEXIS 85606 (E.D.N.Y. Aug. 3, 2011). The case involved a Muslim corrections officer of Middle Eastern descent who claimed he had been discharged because of his race and national origin in violation of Title VII. The plaintiff alleged that representatives of the New York City Police Department had contacted his supervisors at the Department of Corrections and, with the intention of having him terminated, reported that the plaintiff was a potential terrorist who wanted to engage in jihad. The police officers were not the plaintiff's supervisors, nor did they work with him. The court recognized that, "Holding the City liable for unsolicited comments made by employees of one agency to decisionmakers in another agency contemplates a scope of liability that the *Staub* court did not confront." *Id.* at *14. It declined to extend the "cat's paw" doctrine this far, and granted summary judgment for the City.

CONCLUSION

In conclusion, it is clear that litigating "cat's paw" cases can be a challenge for practitioners. For plaintiffs' lawyers, the law in the Second Circuit indicates that courts will require, among other things, strong evidence that a supervisor, who was not the decision-maker, was biased against the plaintiff and that the supervisor intended that action be taken against him. Offhand remarks are likely insufficient to demonstrate discriminatory animus.

For defense attorneys, the modern workplace culture of collaborative decision-making and "360 reviews," in which employees evaluate one another, is potential fodder for litigation. The "cat's paw" doctrine is a departure from the traditional notions of employer liability in which only the motivation of the ultimate decision-maker is relevant. Now, courts will examine the motivations of other participants to ensure that the job action is free from discrimination. As decision-making in the workplace continues to become more inclusive, it is likely that the number of cases utilizing the "cat's paw" will grow.

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key objectives in its Strategic Plan for 2012-2016 to ensure that members of the public understand their rights as well as the recourse available to them, employers can expect that the EEOC will take additional measures to educate future and potential claimants regarding this ruling.

Further, while the EEOC's ruling is not binding on federal courts, given the trend in federal decisions, employers should be mindful that transgender individuals may be protected under Title VII. (Note: Currently, the statutes of only 16 states and the District of Columbia specifically protect transgender identity as a separate protected category in employment.) Employers should also be mindful that any allegations concerning transgender discrimination, gender stereotyping or gender identity — to the extent they can be interpreted to fall within the EEOC's interpretation of "sex" — may expose them to liability, in addition to protections that may exist under state or local laws. This decision may also impact the Employment Non-Discrimination Act, a proposed amendment to Title VII that would add "sexual orientation" and/or "gender identity" to Title VII as protected categories. This decision by the EEOC could provide political support for the passage of the bill in Congress.

Based on these developments, and this evolving area of law, employers must familiarize themselves with issues related to gender identity and expression to avoid potential liability. While in certain respects an employer's approach to transgender employee issues may be similar to those already in place to prevent discrimination against individuals in other protected categories, claims by gender non-conforming individuals may present unique challenges and pitfalls while the law in this area develops.

Employer Best Practices

In order to avoid potential pitfalls in this emerging area of law, employers must be mindful of issues related to gender identity or expression that might arise during interviewing, hiring, discipline, promotion and termination decisions. Human Resources professionals and management must also be particularly vigilant when an employee identifies him or herself as transgender, or announces his or her plan to undergo sex change surgery. Moreover, the *Macy* decision, and the implications of *Price Waterhouse's* "sex stereotyping" theory are not just limited to transgender employees. Indeed, employers should be careful to understand that many forms of "sex stereotyping" may give rise to actionable claims, not just discrimination or harassment against individuals who identify as transgender.

Following the *Macy* decision, the following are best practices that employers should consider:

Revisit Non-Discrimination Policies

Although the EEOC's decision is not binding and there is no federal law that explicitly protects transgender employees from discrimination, employers should consider revising internal equal employment, non-discrimination and anti-harassment policies to include gender identity and expression as protected categories.

Conduct Training

Employers should also make their managers and employees more sensitive to gender identity and expression by incorporating these topics in EEO and harassment training programs. In addition to general training, employers may also consider conducting a more targeted training in this area when a transgender employee announces that he/she is transitioning. Such training will not only support the employee and help manage the specifics of the transition process, but may also foster respect, sensitivity and understanding from other employees.

Revise Dress Codes

Employers should revise dress codes and policies to make them gender-neutral. For instance, policies that specifically define the kinds of attire that males and females may wear tend to be based on sexual stereotypes and gender expectations. By contrast, policies that require professional business attire irrespective of sex or gender are recommended. For employers who have a "male" and "female" version of a uniform, employees should be allowed to wear the uniform that comports with their gender identity.

Modify Use of Pronouns

Employers should be mindful about using the appropriate pronouns consistent with the employee's gender presentation. To the extent there is uncertainty about an employee's gender, it may be appropriate to respectfully communicate with an employee regarding his or her preference in a confidential matter, and agree with the employee on a communications plan for notifying co-workers and customers of any change to pronoun or name use.

Consider Restroom Access

Employers should consider access to restrooms, locker rooms and other gender-specific facilities. An employer should consider an employee's full-gender presentation and identity when making decisions regarding restroom access or whether unisex facilities may be appropriate for a temporary time period.

Develop Guidelines for Managing Workplace Transition

It also prudent for an employer to develop guidelines and procedures to manage situations where an employee announces that he/she will be transitioning. Employers should approach an employee's transition as an interactive process. This may involve, for example, designating a key human resources official or manager to serve as a liaison and point of contact for the transitioning employee. The employer should have an open and continuous dialogue with the employee and set clear expectations regarding how the transition will occur, the steps that need to take place (*e.g.*, notification to clients, coworkers and others), and the information the employer will require from the transitioning employee.

Ensure Employee Privacy and Confidentiality

Employers must be mindful that although a transgender employee's transition may become a matter of public knowledge in the workplace, personal details about any employee's transition are private and entitled to confidentiality.

Make Approriate Administrative And Personnel Changes

Employers should be prepared to update or change the employee's name and sex in certain employee records.

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Smokers

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1. The slippery, smoky slope. If employers decide to exclude employees who smoke at home, what is next? Banning those who drink alcohol, eat fast food, gamble or ride motorcycles? It may make more sense for all involved to focus on how well the employee does his or her job, as opposed to what legal lifestyle choices he or she makes outside of work.

2. Constricting the candidate pool. About 25% of adults in the United States are smokers. This policy eliminates all such smokers from the candidate pool, statistically guaranteeing that your company may not be able to hire the best candidate for the job one out of every four times.

3. Enforcement concerns. If an employer adopts a "no-smokers" policy, then it should plan on enforcing it. This is a logistical challenge that should not be overlooked. Some employers have adopted random screening of blood or urine to detect tobacco use. Others require regular sworn oaths. Does your company really want to become Big Brother? These are headaches and dilemmas that most employers want to avoid, not voluntarily undertake.

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4. Privacy concerns and claims. Plaintiffs' class action lawyers are starting to collect employee complaints about these policies. They allege that requiring employees to disclose whether they engage in lawful activity, like smoking, inside of their homes and outside of the workplace is an unlawful invasion of privacy. Although no such claim has yet prevailed, the argument is certainly plausible, and employers that adopt such policies should be aware of the possibility of such lawsuits.

5. It may be illegal. Currently, 29 states, including New Jersey, prohibit employment discrimination against smokers. Any multistate employer that adopts a policy restricting employment rights of smokers will have to exempt employees in some states but not others, creating unequal policies for workers, depending on work location. Moreover, these companies will have to pay their lawyers to keep up with new developments or risk violating the law and employee rights.

6. Health insurance costs. One of the best arguments for workplace bans on smokers is that smokers are, on average, less healthy than nonsmokers. Consequently, smokers have 18% higher health care costs, according to the Centers for Disease Control and Prevention. The simpler and more effective way to deal with this cost issue is to charge higher health insurance premiums for smokers so that they pay for their own risky behavior. This is the solution used by hundreds of prominent companies, including PepsiCo, Macy's and Gannett.

7. It's better to take positive steps to promote employee health. If employers really want to make their employees healthier, there are many positive ways to incentivize healthier lifestyles, including fostering employee affinity groups that promote healthy activities such as walking, bicycling, running or hiking.

8. Opposition to these policies. Surveys repeatedly confirm that the vast majority of Americans oppose workplace prohibitions against hiring smokers. Consequently, companies that adopt and publicize such policies are alienating the majority of Americans — their customers and their potential employees, including nonsmokers. Thus, deciding whether to adopt such a policy should include a discussion with the company's public relations and marketing functions.

9. Ban smoking breaks, not smokers. Nothing in the law requires employers to provide smoking breaks to employees. Therefore, if the issue is the alleged loss of productivity due to excessive smoking breaks, employers should require that smokers live by the same rules as nonsmokers, and limit or eliminate breaks for smoking.

10. Disparate impact. These policies hit the poor the hardest. Tobacco use is highest among low-income workers. As a result, when an employer adopts a "no-smokers" policy, it affects low-income workers the most.

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Transgender

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Review Health Insurance and Benefits

Employers may also consider whether changes can be made to its disability and leave-related policies and/or to its health insurance plan offerings to better accommodate the needs of transgender employees.

CONCLUSION

In sum, employers should increase their awareness of, and sensitivity to, issues related to gender identity and expression in the workplace. Employers must be aware that transgender individuals may be protected under federal law in addition to relevant state or local laws, and that any allegations concerning transgender discrimination, gender stereotyping or gender identity require the same analysis, investigation and response as a traditional sex discrimination complaint. Finally, employers must evaluate their internal policies, practices and procedures with an eye toward transgender issues to avoid potential complaints and liability.

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