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No. 43641-8-II

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

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City of Vancouver, a municipality, *Petitioner,*

vs.

State of Washington Public Employment Relations Commission and the  
Vancouver Police Officers Guild,

*Respondents.*

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS

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### **3. Identity and Interest of Amicus**

Washington State Association of Municipal Attorneys (WSAMA) is a nonprofit Washington corporation organized primarily for educational purposes and the advancement of knowledge in the area of municipal law. WSAMA has no direct interest in this case. It has an interest in the impact that this case has upon the liability of municipalities under Chapter 41.56 RCW.

### **4. Argument**

Amicus respectfully submits that the decision below of the Washington State Public Employment Relations Commission (PERC) misapplies *Staub v. Proctor Hospital*, 562 U.S. \_\_\_, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011).

The administrative hearing examiner in this case found: "Although Cook's decision not to select Martin *was not substantially based* on union animus, he relied in making that decision on a tainted recommendation from Sutter." AR 1233, ¶ 27 (emphasis added). The examiner therefore reasoned that the tainted recommendation rendered the decision discriminatory. AR 1228-29. PERC acknowledged that the decisionmaker did not demonstrate animus in his decision making but held that "under Chapter 41.56 RCW, a decision maker may be found to have committed a discriminatory act if the

decision maker makes a decision that was influenced by the animus of his subordinate. This holds true even if the decision maker displayed no animus on her or his own part." AR 1394-95. PERC reached this conclusion by applying *Staub v. Proctor Hospital*, 562 U.S. \_\_\_, 131 S.Ct. 1186, 179 L.Ed.2d 144 (2011) to Chapter 41.56 RCW. AR 1395-97.

Although deference is generally accorded to PERC's interpretation of the law it administers, PERC has no more authority than is granted to it by the legislature, and the extent of PERC's authority is a question of law to be determined by the court. *Local 2916, IAFF v. PERC*, 128 Wn.2d 375, 379, 907 P.2d 1204 (1995). PERC's authority in this matter is prescribed by RCW 41.56.160(2) which states that PERC may make orders and take affirmative action "[i]f the commission determines that any person has engaged in or is engaging in an unfair labor practice. . . ." Unfair labor practices are in turn defined by RCW 41.56.140 which states in pertinent part that it shall be an unfair labor practice for a public employer "[t]o interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter[.]" RCW 41.56.140(1).

This case involves an interference claim under RCW 41.56.140(1). AR 1208-09; AR 1233, Conclusions of Law, ¶ 2; AR 1397 (affirming the hearing examiner's decision as the findings, conclusions, and order of PERC).

A discrimination finding is essential to the interference conclusion made in this case, because no separate threatening conduct was found. *See Patrolmen's Ass'n v. City of Yakima*, 153 Wn.App. 541, 565-66, 222 P.3d 1217 (2009). "A discrimination violation occurs under Chapter 41.56 RCW when an employer takes action which is substantially motivated as a reprisal against the exercise of rights protected by Chapter 41.56 RCW." *Patrolmen's Ass'n*, 153 Wn.App. at 554, quoting *Pub. Sch. Emps. of Reardan-Edwall v. Reardan-Edwall Sch. Dist.*, No. 12593-U-96-2997 (Wash. Pub. Emp't Relations Comm'n, Sept. 29, 1998); see also *City of Federal Way v. PERC*, 93 Wn.App. 509, 512-14, 970 P.2d 752 (1998) (adopting the substantial factor test from *Wilmot v. Kaiser Aluminum* for interference claims under RCW 41.56.140(1)); *Cf. Wilmot v. Kaiser Aluminum*, 118 Wn.2d 46, 71-76, 821 P.2d 18 (1991) (adopting a substantial factor test for workers' compensation retaliation claims).

Amicus submits that the examiner's finding adopted by PERC that Cook's decision was not substantially based on union animus foreclosed PERC's authority to determine that an unfair labor practice had occurred. AR 1233, ¶ 27 (adopted by PERC at AR 1397). Amicus further respectfully submits that PERC used *Staub* as a substitute for the substantial motivation requirement for discrimination claims under Chapter 41.56 RCW and

incorrectly diminished the complainant's burden of proof.

*Staub* involved a claim by a worker under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4311(a). The worker was discharged by a decisionmaker (a vice president of human resources) on recommendation of the worker's supervisors who were motivated by hostility to the worker's absences due to obligations as a military reservist. The statute at issue in that case provides that an employer shall be considered to have engaged in prohibited action if a person's membership in the armed services "is a motivating factor in the employer's action. . . ." 38 U.S.C. § 4311(c)(1). The Supreme Court recognized that the question in that case revolved around the particular statutory language at issue. It wrote that "[t]he central difficulty in this case is construing the phrase 'motivating factor in the employer's action.'" *Staub*, 131 S.Ct. at 1191. It analyzed that question by reference to a similar federal statute that prohibits race, color and other discrimination when it is "a motivating factor for any employment practice, even though other factors also motivated the practice." *Staub*, 131 S.Ct. at 1191, quoting 42 U.S.C. § 2000e-2(m).

The *Staub* majority applied what it referred to as a "cat's paw" theory of liability and held that an employer could be held liable under USERRA if a discriminatory recommendation made to a decisionmaker by a subordinate

was a proximate cause of the employment decision even though there might be multiple proximate causes. *Staub*, 131 S.Ct. at 1192. It however recognized that:

When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a "factor" or a "causal factor" in the decision; but it seems to us a considerable stretch to call it "a motivating factor."

*Staub*, 131 S.Ct. at 1192.

Federal cases following *Staub* caution that courts "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." *Sims v. MVM, Inc.*, No. 11-14481, 2013 WL 173431, at \*7 (11th Cir. Jan. 17, 2013); *see also Simmons v. Sykes Enterprises, Inc.*, 647 F.3d 943, 949-50 (10th Cir. 2011). The Circuit Court of Appeals in *Sims* therefore declined to extend *Staub's* multiple proximate cause standard to age discrimination cases under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1), which "requires that the proscribed animus have a determinative influence on the employer's adverse decision." *Sims*, 2013 WL 173431, at \*6. Amicus submits that these cases provide good guidance and prudent caution against blind application of *Staub*.

"In the employment discrimination context, 'cat's paw' refers to a

situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484 (10th Cir. 2006), *cert. granted* 549 U.S. 1105 (2007), *cert. dismissed* 549 U.S. 1334 (2007); *see also Shager v. Uphohn Co.*, 913 F.2d 398, 404-05 (7th Cir. 1990). "Cat's paw," "rubber stamp" and other names are more generally categorized as subordinate bias theories of liability. *E.E.O.C.*, 450 F.3d at 484-86. Federal courts have recognized potential subordinate bias liability in different contexts. However, the standard by which such liability may attach depends upon the context. *See e.g., Staub*, 131 S.Ct. 1192-94 (USERRA); *Simmons*, 647 F.3d at 949-50 (ADEA); *E.E.O.C.*, 450 F.3d at 484-88 (Title VII). Subordinate bias liability is not self effectuating. It is instead dependent upon the underlying liability standard to which it is applied.

Federal Circuit Courts have not agreed upon a uniform test for subordinate bias liability. Polar opposite tests have instead developed. Some have adopted a lenient standard that requires a claimant to demonstrate only that a subordinate had some influence or leverage over a decisionmaker. *E.g., Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-27 (5th Cir. 2000). Others have held that influence is not enough and have required proof

that a subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision. *E.g.*, *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 289-91 (4th Cir. 2004) *cert. dismissed* 543 U.S. 1132 (2005). The Tenth Circuit Court of Appeals extensively reviewed the competing standards developed by other circuits in *E.E.O.C.*, 450 F.3d at 486-88 and noted the deficiencies of each. It recognized that the lenient influence approach adopted in *Russell* and like cases tolerates such a weak relationship between a subordinate's actions and the ultimate employment decision that it improperly eliminates a requirement of causation. *E.E.O.C.*, 450 F.3d at 486-87. It similarly noted that the strict de facto decisionmaker approach employed in *Hill* undermined the deterrent effect of subordinate bias claims by allowing employers to escape liability except in the most extreme cases of subordinate control. *E.E.O.C.*, 450 F.3d at 487. The Tenth Circuit therefore adopted an intermediate test that requires more than subordinate influence but less than subordinate control. *E.E.O.C.*, 450 F.3d at 487-88. Its approach advances the deterrent purposes of subordinate bias liability while preserving a causation requirement. *Id.*

The Washington test for claims under RCW 41.56.140(1) requires that an employee prove more than that discrimination was just "a factor" in an employment decision. It requires proof that it was a substantial factor.

*See City of Federal Way*, 93 Wn.App. at 513-14. The Washington Supreme Court explained in *Allison v. Housing Authority*, 118 Wn.2d 79, 87-96, 821 P.2d 34 (1991) that the substantial factor test lies somewhere between the "to any degree" and the "but for" standards of causation. "A factor supporting the decision is 'substantial' if it so much as tips the scales one way or the other." *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn.App. 611, 621, 60 P.3d 106 (2002); *Rowe v. Vaagen Bros. Lumber*, 100 Wn.App. 268, 277, 996 P.2d 1103 (2000); *see Wilmot*, 118 Wn.2d at 72.

Amicus submits that the findings in this case demonstrate that alleged subordinate bias did not "tip the scales" for the decisionmaker Cook. The administrative hearing examiner's decision below explained: "An employer may, however, have multiple reasons for selecting one candidate over another. In this case, the fact that Cook provided somewhat different reasons for his decision at different points in time raises question, but does not tip the balance toward finding that Cook based his own decision on union animus." AR 1228.

This Court has recognized that the substantial factor test is appropriate for cases alleging retaliation for union activity. *Sharbono v. Universal Underwriters*, 139 Wn.App. 383, 420, 161 P.3d 406 (2007) (citing *City of Federal Way*), *review denied* 163 Wn.2d 1055 (2008). "The plaintiff

need not show that retaliation was the only or 'but for' cause of the adverse employment action, but he or she must establish that it was at least a substantial factor." *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 862, 991 P.2d 1182, *review denied* 141 Wn.2d 1017 (2000); *see also Hollenback v. Shriners Hosps.*, 149 Wn.App. 810, 823, 206 P.3d 337 (2009) (quoting *Francom*). Amicus submits that the mere influence or taint of subordinate bias does not rise to the level of a substantial factor.

The Washington Supreme Court expressly rejected a "to any degree" standard in *Allison*:

[T]he Housing Authority persuasively argues that the "to any degree" standard used by the trial court is not a sound alternative. It persuasively notes that such a standard suggests that even slight retaliatory animus could be a basis for employer liability.

A jury could sensibly suppose that anyone would harbor at least *some* slight retaliatory animus against a person who has filed a complaint. . . . In effect, the "to any degree" language virtually eliminates both the motivation and causation elements from the plaintiff's claim. . . .

*Allison*, 118 Wn.2d at 94. Amicus submits that adoption of an influence or taint standard for subordinate bias liability, without requiring that such influence or taint also be proven to be at least a substantial factor in the decision of the actual decisionmaker, would completely eliminate the causation element from a plaintiff's claim. A mere influence or taint standard

would be the equivalent to a "to any degree" standard. Amicus submits that the substantial factor standard adopted in *City of Federal Way* as established by *Wilmot* and *Allison* requires more.

Amicus submits that *Allison's* rejection of the "to any degree" and "but for" standards of causation, *see Allison*, 118 Wn.2d at 87-96, demonstrates the incompatibility of opposite extreme tests for subordinate bias liability adopted in *Russell*, 235 F.3d at 226-27 and *Hill*, 354 F.3d at 289-91 with Washington's substantial factor test. It further submits that the PERC decision in this case used a mere influence standard herein. The findings upon which PERC relied expressly state that "Cook's decision not to select Martin was not substantially based on union animus. . . ." AR 1233, ¶ 27. Despite the failure of proof on decisionmaker motivation, PERC nonetheless held that a "decision maker may be found to have committed a discriminatory act if the decision maker makes a decision that was influenced by the animus of his subordinate." AR 1394-95. Amicus respectfully submits that the influence standard utilized by PERC improperly diminished the causation requirement under Washington's substantial factor test.

If this Court recognizes subordinate bias liability under Chapter 41.56 RCW, amicus submits that the intermediate federal test should be adopted. "To prevail on a subordinate bias claim, a plaintiff must establish more than

mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *E.E.O.C.*, 450 F.3d at 487; *see also Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999), *cert. denied* 529 U.S. 1053 (2000); *Llampallas v. Mini-Circuits, Lab, Inc.* 163 F.3d 1236, 1248 (11th Cir. 1998), *cert. denied* 528 U.S. 930 (1999). This standard best comports with *Allison*.

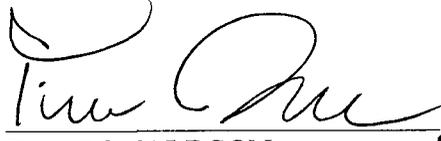
Assuming arguendo that a municipality may have subordinate bias (*ie* "cat's paw") liability under Chapter 41.56 RCW, such theory should only supplement, rather than supplant, Washington's substantial factor test. The examiner findings adopted by PERC expressly confirm that "[t]he union was not successful in proving that union animus was a substantial motivating factor in Cook's decision." AR 1226. Amicus respectfully submits that PERC misapplied *Staub* to substitute a taint for a substantial factor. *See* AR 1233, ¶ 27; AR 1394-97.

## **5. Conclusion**

Amicus curiae requests that this court reaffirm the substantial factor requirement under Chapter 41.56 RCW, and reverse the PERC decision in *Vancouver Police Officers Guild v. City of Vancouver*, Decision 10621-B-PECB (Apr. 11, 2012), AR 1380-97.

DATED February 4, 2012

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**6. Certificate of Service**

I certify that I mailed a copy of the foregoing proposed BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS to: Terry Weiner, Assistant City Attorney, attorney for Petitioner City of Vancouver, at 415 W. 6th St., 4th Floor, P.O. Box 1995, Vancouver, WA 98668-1995; and David Snyder, attorney for Respondent Vancouver Police Officers Guild, at Snyder & Hoag, LLC, 3759 NE MLK Jr. Blvd., Portland, OR 97212; and Spencer Daniels, Assistant Attorney General, attorney for Respondent State of Washington Public Employment Relations Commission, at 7141 Cleanwater Dr. SW, Olympia, WA 98504-0108; postage prepaid, on the date stated below.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

2/04/2013 Walla Walla, WA  
(Date and Place)

  
(Signature)