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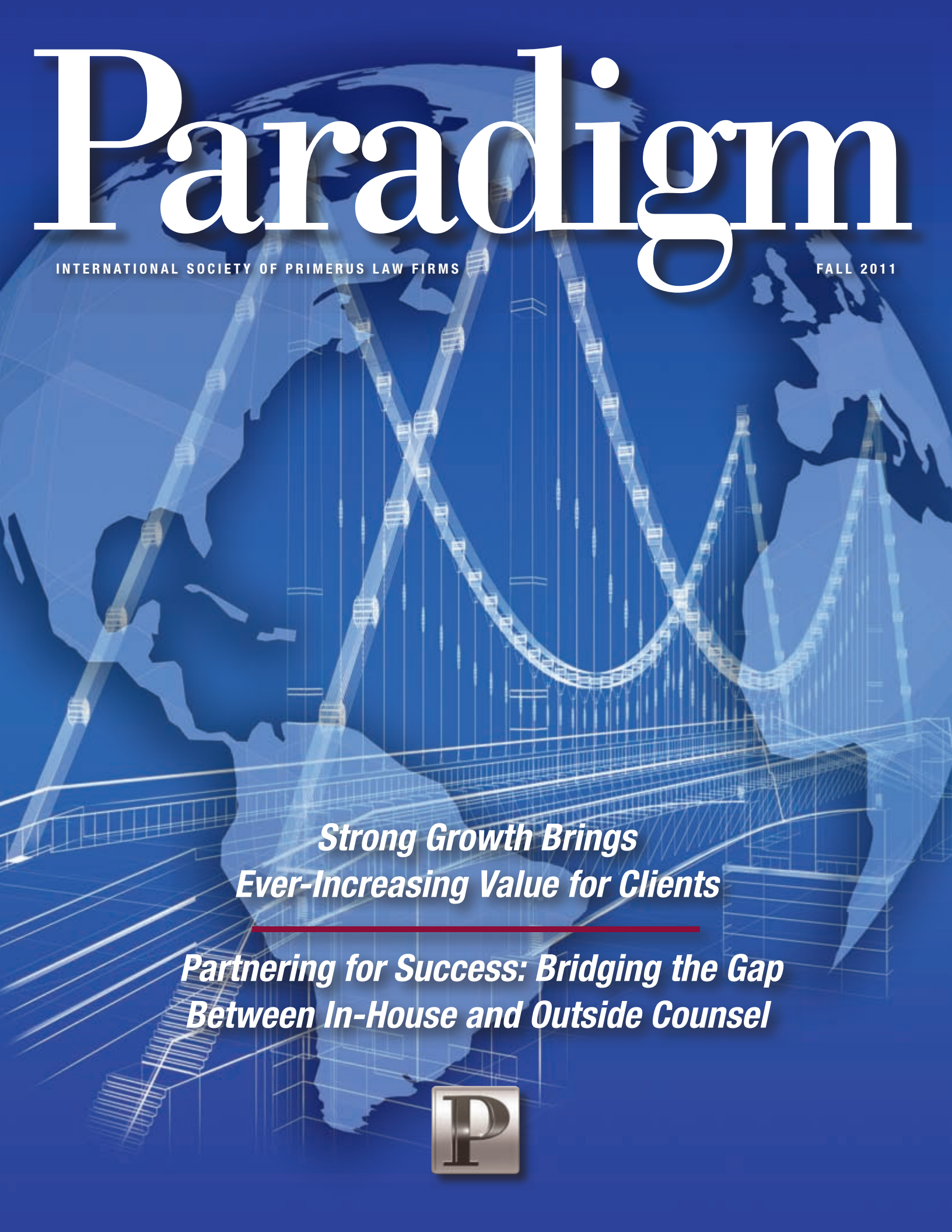
FALL 2011



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US Supreme Court Ruling Opens the Door to Potential Liability for Discrimination by Non-Decision Makers Who Influence Employment Decisions

Relatively early in the 2010 term, the United States Supreme Court issued two significant employment decisions that signal potentially expanding pitfalls of liability for employers. In January 2011, the Court expanded the scope of persons entitled to protection from retaliation under Title VII.[1] See *Thompson v. North American Stainless*, LP, 131 S. Ct. 863 (Jan. 24, 2011). To read more about this case, see also Keith Sieczkowski's article titled "U.S. Supreme Court Ruling Likely to Further Increase Retaliation Claims" on page 12.

Second, in March, the Court expanded the scope of persons whose discriminatory actions and conduct can create liability for employers under the cat's paw theory. See *Staub v. Proctor Hospital*, Case No. 09-400, 2011 WL 691244 (U.S. March 1, 2011). The Court was unanimous in the outcomes of both cases.[2] Just how far the impact of these new pitfalls will extend remains to be seen in subsequent cases.

In this article, we will look more closely at the *Staub v. Proctor Hospital* case, which involves the Uniformed Services Employment and Reemployment Rights Act (USERRA). The Act makes it unlawful to discriminate against an employee because of his membership in the military or his performance of military duties, if the military service is "a motivating factor in the employer's action." *See* 38 U.S.C. §§ 4311 (a), (c).

Although at first glance the case seemingly has limited application, USERRA is actually very similar to Title VII, which prohibits employment discrimination on the basis of race, color, religion, sex or national origin, where any one of those factors "was a motivating factor for any employment practice, even though other factors also motivated

the practice." *See* 42 U.S.C. §§ 2000e-2(a), (m). Thus, *Staub* likely will have a broader impact on employment discrimination cases decided under federal laws with similar language, not only on USERRA cases.

Vincent Staub, a member of the U.S. Army Reserve, worked as an angiography technician with Proctor Hospital until he was terminated in 2004. During his employment, his supervisors were openly hostile to his military obligations and indicated to Staub's co-workers their desire to "get rid of him." (*Staub*, 2011 WL 691244, at *2.)

In January 2004, one of Staub's supervisors gave him a "corrective action" disciplinary warning, which the evidence indicated was motivated by discriminatory animus. A few months later, the supervisor reported to the hospital's vice president of human resources that Staub had violated the directive by leaving his desk without informing a supervisor. Relying in part on the supervisor's report and in part on his own review of Staub's personnel file, the vice president of human resources decided to fire Staub.

Staub unsuccessfully challenged his firing through the hospital's grievance process and ultimately sued the hospital under USERRA, claiming that his discharge was motivated by hostility to his obligations as a military reservist. The jury agreed and awarded Staub damages. The Seventh Circuit reversed, holding that the hospital was entitled to judgment as a matter of law because the decision maker had relied on more than the report of the supervisor in making her decision.

The Supreme Court granted *certiorari* to consider whether an employer may be liable for employment discrimination based on the discriminatory animus of a supervisor who influenced, but did not make, the ultimate employment decision. *Id*. Prior to *Staub*, the circuits had been applying different standards when considering so-called cat's paw cases.[3]

Reversing the Seventh Circuit, the Supreme Court upheld the cat's paw theory of liability but clarified the circumstances when it is properly imposed: "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 a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id*. at *6 (emphasis in original).

Notwithstanding the Court's resolution of the issue of the cat's paw theory of liability, a number of questions remain after *Staub*. First, the Court remanded the case for the Seventh Circuit to determine whether the difference between the Court's standard for liability and the jury instruction, which only required a finding that military status was a motivating factor in the discharge decision, was harmless error or mandated a new trial.

Additionally, the Court specifically left open the question of whether cat's paw liability could be imposed if a co-worker, rather than a supervisor, committed the discriminatory act that influenced the ultimate employment decision. What is now clear after *Staub* is that, if a supervisor has unlawful bias against an employee and intentionally influences an employment decision, the employer can be held liable, even if someone else within the organization carried out the decision; the bias does not have to be held by the one with the ultimate decision-making authority.

Truly understanding the impact of these decisions will be a challenging task left for courts and juries in future cases, as they test the limits of these holdings under different facts and circumstances. Without question, however, these decisions at a minimum raise issues that employers and those advising employers should consider carefully when making employment decisions. P

1 Title VII is an anti-discrimination statute that prohibits discrimination on the basis of race, color, religion, sex and national origin with respect to compensation, terms, conditions or privileges of employment and also discriminatory practices that would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. See 42 U.S.C. § 2000e-2(a).

2 In *Staub*, two justices agreed with the result but concurred in the judgment based on different reasoning than relied on in the opinion. *Staub*, 2011 WL 691244, at *7.

3 "Cat's paw" liability occurs when an employer is held liable for the animus of a supervisor who was not charged with making the ultimate adverse employment decision. *Id*. at *3. The term derives from a 17th century fable about a monkey who persuaded a cat to pull chestnuts from a fire, leaving the cat to get burned while the monkey made off with the chestnuts. *Id*. at *3 n.1.