BARRON | SMITH | DAUGERT PLLC

ATTORNEYS AT LAW

BUSINESS AND EMPLOYMENT NEWSLETTER

FIRST QUARTER 2011

USING BUSINESS TO POWER SOCIAL CHANGE

By Kirsten Barron
and Jamia Burns

S corporation, C corporation, 501, LLC, PLLC, LLP, LLLP: Lawyers and legislators are very good at identifying entity type and status through the use of a few letters and numbers (and, frankly, keeping us on our toes). We want to acquaint you with yet another designation, the B Corporation. The B Corporation is not authorized by the state, the federal government, or the Internal Revenue Service; rather, a private company is in the business of certifying companies who want to qualify as B Corporations.

What is a B Corporation ?

The "B" stands for Benefit. The B Corporation is a designation for a business that uses the power of business to solve social and environmental problems. The objective is to expand the responsibilities of the corporation to include consideration of the interests of employees, consumers, the community, and the environment.

In Washington State, the directors of a corporation owe a duty to the shareholders to maximize corporate profits. The idea behind the B Corporation is that the directors owe a duty to a larger constituency, which can include the employees, consumers, the community, the environment, etc. In some states, what is referred to as a constituency statute allows a corporation to answer to a constituency other than the shareholders. Washington State does not have this type of law; therefore, a Washington State B Corporation could be subject to a shareholders' suit if the directors answered to another constituency. If the shareholders and the directors are the same, as in most small businesses, such a suit is unlikely, given that the people making the decisions and the people owning the company are one and the same.

Who Decides if You Qualify as a B Corporation?

The B Corporation was created by B Lab, a nonprofit organization in Pennsylvania. The B Corporation must meet rigorous and independent standards of social and environmental performance, accountability, and transparency. These standards are set

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B CORPORATIONS—CONTINUED

by B Lab. Unlike most corporations, B Corporations must consider nonfinancial interests when making decisions.

What are the Benefits of Certification?

B Lab offers benefits to those who qualify as B Corporations. Similar to AAA and other membership organizations, B Lab offers special rates on particular products and services, including business consulting, and is also an effective way to market that your business has a purpose greater than making money for shareholders.

How do You Become a B Corporation?

To become a Certified B Corporation, B Lab requires your business to:

1. Take and pass the *B Impact Ratings System*. This sets a benchmark for social and environmental impact for good companies. This involves filling out a lengthy questionnaire to determine if your business meets the standards.

2. Adopt the *B Corporation Legal Framework* to make the mission of the company into its legal DNA (to the extent possible within the corporate law of the company's state of incorporation).

3. Sign a *Term Sheet* that makes your certification official.

4. Pay an annual fee to B Lab based on revenues.

Firms who are "certified" by B Lab are termed B Corporations.

What are the Tax Savings?

One goal of the B Corporation movement is to obtain tax breaks for B Corporations. Presently there are no federal or state tax breaks for B Corporations.

This is an interesting idea and clearly in the early stages. At this point it seems like it is similar to a designation from our local Sustainable Connections, but this type of entity could be a way for business to bring social change if such entities were favored under state and federal laws, and most importantly, tax law.

For more information about B Corporations go to *http://www.bcorporation.net*.

A REMINDER ABOUT RETALIATION

By Kirsten Barron

Employers are generally aware that employees are entitled to assert protected rights without retaliation. This message was sent again by the U.S. Supreme Court in *Kasten v. Saint-Gorbain Performance Plastics Corp.*, No. 09-834 (U.S. Mar. 22, 2011). The Court held that an employee who had made oral complaints to the employer asserting that the employer had violated the federal Fair Labor Standard Act ("FLSA") had engaged in protected activity, and therefore, was protected from retaliation by the employer.

The plaintiff in the *Kasten* case verbally complained about the location of the employer's time clock and argued that its location actually deprived employees of time worked. The plaintiff asserted that he was disciplined because of this oral complaint asserting a federally protected right to compensation for hours worked.

The Supreme Court limited its review to the question of whether an employee's complaint has to be in writing to support a retaliation claim under the FLSA. Not surprisingly, the Court found an oral complaint was sufficient to engage in protected activity.

Many employment lawyers have questioned whether the complaint must be made to the government (in the form of filing a claim or complaint) or whether making the complaint to the private employer is sufficient. The Court did not specifically rule on this issue, although by implication it appears that a complaint to a private employer is sufficient. Note - the dissenting justices did not agree with this and in their dissenting opinions stated that the complaint must be made to the government.

The Court noted that a complaint must not be trivial in nature and is something important; however, a "complaint" will be determined by the facts and circumstances of the situation.

We have told many of you that the real risk of protected activity is in retaliation. There are many cases out there where the employer is not found to be liable for discrimination claims but is found liable for retaliation claims. This new Supreme Court case is another example of that. At risk of sounding preachy, it is important to treat complainants and their complaints as an opportunity to do something better. It may turn out that the complainant was wrong or unreasonable, but the approach the employer takes is key.

CORPORATE HIBERNATION

By Debbie Nelson

The definition of "hibernation" is "to be in an inactive or dormant state or period."

I can't think of a better introduction to this article about "inactive corporation" status with the State of Washington.

Inactive Corporation Status

RCW 23.01.530 allows corporations to file as an inactive corporation if they have not done business in the state of Washington for the past year, yet still wish to remain registered as a corporation. Filing as an inactive corporation rather than letting an annual renewal lapse (administrative dissolution)[1] can be beneficial for several reasons:

It protects the name of the corporation so it can't be used by another company.

It saves money by avoiding late fees and penalties if the corporation decides to reinstate.

It provides corporate protection during the inactive period.

Can a corporation file for "inactive" status anytime?

No. A corporation may only file for inactive corporation status when it receives its annual report renewal notice from the Department of Licensing ("DOL"). Rather than file the annual report renewal (keeping the corporation active) the corporation must mail the annual report renewal notice to the DOL with a letter stating that it wishes to be placed on inactive status, that the corporation has had no current business activity, and will have no business activity for the next year.

Does the corporation still pay an annual report filing fee?

Yes; however, rather than pay the annual filing fee of $69 to keep the corporation active, a $19 filing fee must be submitted to the DOL when a corporation requests inactive status in the manner above. To remain an inactive corporation, the corporation must follow the same procedure each year when it receives it annual renewal notice on its anniversary date.

How long can a corporation do this?

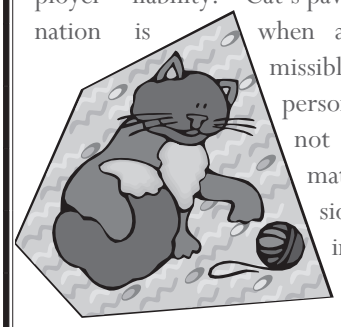
There are many things to consider before making this decision. If your corporation is in hibernation and the inactive corporation status appeals to you, we are available at any time to answer your questions. Please call us at 360-733-0212.

[1] RCW 23B.14.200. The Secretary of State has the authority to administratively dissolve a corporation if 1) the corporation does not pay its license fees or penalties when they become due, 2) the corporation does not deliver its completed initial report or annual report when it is due, 3) the corporation is without a registered agent or registered office in this state, or 4) the corporation does not notify the Secretary of State that its registered agent has resigned or that its registered office has been discontinued.

CAT'S PAW DISCRIMINATION

By Kirsten Barron

What does a household pet mean to discrimination liability for employers? Imagine a kitty playing with its prey – batting it around but reserving the lethal blow. This is what cat's paw discrimination is in the context of employer liability. Cat's paw discrimination is when an impermissibly biased person who is not the ultimate decision maker in the employment action influences the decision of the unbiased decision maker.



On March 1, 2011, the U.S. Supreme Court issued a decision on cat's paw discrimination in *Staub v. Proctor Hospital*. Plaintiffs argued that the cat's paw theory applies when a biased supervisor or manager influences but does not personally make an employment decision, and the actual decision maker is not demonstrably biased. The Supreme Court held that employers can be held liable for cat's paw discrimination. The Supreme Court did not provide much guidance in regard to how much influence qualifies as cat's paw discrimination; however, any impermissibly biased person in your business presents a risk.

Note – the term "impermissibly biased" means a bias based on a protected status, i.e., gender, race, ethnicity, sexual orientation, disability, veteran status, religion, or genetic information.

Factual Background

Vincent Staub believed, and the jury agreed, that supervisors at Proctor expressed open hostility toward his military

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CAT'S PAW DISCRIMINATION—CONTINUED

service in the U.S. Army. Staub had received a written warning for purportedly violating a company rule, which Staub argued did not exist, and that even if it did, he never violated it. Staub's co-worker reported that Staub had violated the terms of the written warning. Staub's supervisor reported the violation to Human Resources. The vice president of Human Resources relied on the supervisor's accusation, and after reviewing Staub's personnel file, discharged Staub. Staub challenged the discharge through Proctor's grievance process, claiming that his supervisor fabricated the underlying corrective action out of hostility toward his military service.

Staub filed suit under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et seq.*, claiming that the discharge was motivated by his military service. Staub argued that his supervisor influenced the employment decision by Human Resources to discharge him. The jury found that the vice president of Human Resources was not biased, but that Staub's supervisor was biased in regard to his military service.

On the employer's appeal, the Court of Appeals reversed, holding that a cat's paw case could not succeed unless the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance." Staub then appealed the case to the Supreme Court.

U.S. Supreme Court Decision

The Supreme Court focused on the phrase "motivating factor in the employer's action," which is found in USERRA and other discrimination statutes, including Title VII. The Supreme Court held that the ultimate decision maker's exercise of his or her own judgment does not automatically render the non-decision-making supervisor's bias irrelevant. The Supreme Court found that another's bias can be a motivating factor in a decision, even if the decision maker's unbiased judgment was also a motivating factor. The Supreme Court held that "if a supervisor performs an act motivated by discriminatory 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."

Lesson

While there is not much guidance to employers, this is a good reminder that impermissible bias in any part of your organization presents a risk if there is any ability to influence an employment decision. In *Staub*, one of the employees who reported misconduct was found to be biased against Staub's military status. The case appears to imply that even bias in reporting may expose the employer to liability.

We are excited to announce that Megan Curry, a new associate attorney, will be joining the firm in June. Megan has been living and practicing in Wenatchee, so we want to welcome her to the west side of the mountains. Megan will be a wonderful addition to our team.

Megan received her LL. M. in taxation from the University of Washington in 2008. Prior to that, she received her law degree from Gonzaga University, cum laude, and her undergraduate degree from the University of Oregon. Megan's practice will focus on estate planning and probate, as well as corporate and employment law. Her tax background will prove especially useful in each of these practice areas. Megan has been working for Jeffers, Danielson, Sonn & Aylward, P.S. in Wenatchee for the past few years.

When Megan's not practicing law, she enjoys jumping out of airplanes. Megan is an accomplished private pilot and skydiver. She also enjoys a variety of outdoor sports. We are confident that Megan will feel right at home with the firm and in Bellingham.

A PERSONAL NOTE FROM THE DEPARTMENT:

By Kirsten Barron

Welcome spring – I think it really is here, and not a minute too soon. It has been a long winter. Many of our business clients report that they believe that this "recession" is actually less of a time limited event and more of a change in the way they do business. The clients are surviving and some are certainly thriving – but I believe they would attribute the success to a change in the business model.

Hart Hodges from WWU spoke to the Whatcom County Bar Association not too long ago. What I found most interesting about what he has to say is that these types of economic events change, sometimes significantly, the way the economy works. Dr. Hodges said, as I understand it, that it is not so much a question of when the economy "comes back" or "recovers," but what will the economy look like when recovery does come? His statements ring true to me when I think about the comments from my clients about the economic conditions spurring a change in the way they do business.

The state and federal legislatures have been relatively consumed with budgets, so we are not seeing a lot of new legislation. As we have reported in prior newsletters, the number of employment claims is up – which has led to some interesting decision from our courts. We have covered several of those in this newsletter.

The Equal Employment Opportunity Commission issued new regulations in late March interpreting the ADA Amendments Act of 2008, which expanded the definition of disability. We will cover those new regulations in more detail in our next newsletter.

As always, we hope this is helpful and we are ever appreciative of your feedback.

Kirsten Barron

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Sallye Quinn is a partner in the firm and focuses her practice on business and real estate transactions and creditor's rights.

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Jamia Burns, our guest contributor, was recently admitted to the Bar and is working as a contract attorney.

To read past issues of our Newsletter, visit our website at

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