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No. 09-400

IN THE
Supreme Court of the United States

VINCENT E. STAUB,
Petitioner,
v.
PROCTOR HOSPITAL,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. PROCTOR IS LEGALLY RESPONSIBLE FOR THE INJURY TO STAUB CAUSED BY PROCTOR'S AGENTS MULALLY AND KORENCHUK

(1) Correctly noting that Buck would not have been personally liable under the circumstances of this case, Proctor insists it necessarily follows that Proctor itself must be immune from liability. Respondent relies on the agency rule that a principal can only be held liable for the tort of an agent if the agent herself actually committed a tort. (R.Br. 54-60). "[I]f Buck as Proctor's agent cannot be held liable, Proctor cannot be held liable either." (R.Br. 54).

But Buck is not the only agent of Proctor at issue in this case. Mulally and Korenchuk are the company officials whose unlawful motive led to Staub's dismissal, and Proctor does not deny that Mulally and Korenchuk were acting as its agents when they engaged in the conduct that led, as they doubtless intended, to Staub's termination.

Where a tort is the result of the interrelated actions of several agents, the liability of the principal does not require a showing that *all* of the agents committed a tort. For example, if a medical technician negligently mislabeled a vial of medicine, and a nurse as a consequence later administered the wrong medicine to a patient, the injured patient could sue the hospital even though only the technician—and not the nurse who was most immediately responsible for administering the medicine—would be culpable. Similarly, if a mechanic employed by the hospital negligently repaired the

brakes on an ambulance, and an ambulance driver subsequently had an accident because the brakes failed, the hospital would be liable even though the driver herself had not engaged in tortious behavior.

The decisions on which respondent relies do not hold otherwise. Rather, those decisions address the distinct situation in which only a single agent was involved in the events leading to the harm complained of. E.g., *New Orleans & N.E.R.Co. v. Jopes*, 142 U.S. 18 (1891)(knife-wielding passenger shot by conductor in self-defense). In that category of cases "the operative facts . . . controlling a servant's direct liability are always identical to those that determine the vicarious liability of his master." (R.Br. 56)(*quoting Muhammad v. Oliver*, 547 F. 3d 874, 897 (7th Cir. 2008)).[1] But in the instant case the operative facts controlling Buck's liability (her own actions and motives) are not identical to the facts bearing on Proctor's liability (which also include the actions and motives of Korenchuk and Mulally).

Respondent relies on section 106(g) in the Restatement of Judgments, which recognizes that

> where an action is brought against a master and a servant based wholly upon the negligence of the servant, a judgment against the master should be set aside if judgment is given for the servant.

1. See *Preis v. Lexington Ins. Co.*, 508 F.Supp. 2d 1061, 1078 (S.D.Ala. 2007)("if all tort claims against an agent are dismissed with prejudice, then a subsequent tort claim *based on the same facts* will not lie against the agent's principal")(emphasis added)(*quoting Hundley v. J.F.Spann Timber, Inc.*, 962 So. 2d 187, 193-94 (Ala. 2007))(cited at R.Br. 59).

(R.Br. 56)(*quoting Carroll v. Hubay*, 272 F. 2d 767, 769 (2d Cir. 1959)(*quoting* Restatement)). The instant action, however, is not "based wholly upon" the actions and motives of Buck; rather, it rests largely on the actions and motives of Mulally and Korenchuk, which caused Buck in turn to dismiss Staub. Thus the fact that Buck individually would not have been liable does not mean, as Proctor argues, that "there is no underlying wrong." (R.Br. 59).

Although USERRA in some cases[2] imposes liability on officials as well as on their employers, that does not limit the circumstances in which employers themselves would otherwise be liable. An employer could be liable under USERRA even if, because of the limitations on individual liability under the statute, no individual official were personally liable.[3] The manifest purpose of

2. In the case of federal employees, USERRA appears to authorize judicial relief only against the agency itself, not against federal officials who may have violated the statute. See 38 U.S.C. § 4324(d)(1)(authorizing judicial review of final decision of the Merit Systems Protection Board); cf. 38 U.S.C. § 4324(c)(2)(Board may "requir[e] the agency or Office [of Personnel Management] to . . . compensat[e a complainant] for any loss of wages or benefits.").

The lower courts are divided regarding whether USERRA authorizes relief against officials of state or local government bodies. *Compare Townsend v. University of Alaska*, 543 F. 3d 478, 485-86 (9th Cir. 2006)(no individual liability) *with Risner v. Ohio v. Dept. of Rehabilitation and Correction*, 577 F.Supp. 2d 953, 966-67 (N.D.Ohio 2008)(individual liability).

3. In the instant case Proctor does not contend that individual liability could not be imposed in this case on Mulally or Korenchuk.

the authorization (in some but not all circumstances) of individual liability under USERRA is to enhance the deterrent effect of the statute; that deterrent purpose would obviously be defeated if, as Proctor argues, a biased official (such as Mulally) could immunize both herself and her employer from claims under USERRA simply by laundering her unlawful purpose through an intermediary (such as Buck).

(2) This Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), confirm the applicability of agency law principles to employment claims. Both *Faragher* and *Ellerth* held that an employer is liable for unlawful actions taken by an employee acting within the scope of his employment. *Faragher*, 524 U.S. at 793; *Ellerth*, 524 U.S. at 755-56. The plaintiffs in those cases could not establish that the officials at issue were acting in the scope of their employment because the discrimination at issue was sexual harassment; the Court noted that sexual harassment ordinarily neither is among the types of duties assigned to supervisors nor is engaged in with an intent to advance the interests of the employer. *Faragher*, 524 U.S. at 793-801; *Ellerth*, 524 U.S. at 756-57. In the instant case however, as in at least most dismissal cases, both of those factors were present.

The plaintiffs in *Faragher* and *Ellerth* also invoked the agency principle that an employer is liable for torts of an employee if the employee was "aided in" committing that tort by his official position. The "aided in" principle, this Court concluded, was not squarely applicable to sexual harassment, because a harassing

supervisor was only aided "in a sense" by his position. *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 760. It was only after reaching that conclusion that the Court fashioned the special liability rule in *Faragher* and *Ellerth*. In the instant case, on the other hand, the supervisory positions held by Korenchuk and Mulally clearly aided them in their efforts to get rid of Staub. "[O]nly a supervisor, or other person acting with the authority of the company," could have engineered Staub's dismissal in the manner in which Mulally and Korenchuk did. *Ellerth*, 524 U.S. at 762.

The liability rule in *Faragher* and *Ellerth* was based in particular on the Court's earlier decision that sexual harassment is an unusual type of discrimination which should not invariably result in employer liability. *Faragher*, 524 U.S. at 803. On the other hand, as the Court noted in both *Faragher* and *Ellerth*, employers have invariably been held liable for discrimination in "hiring, firing, promotion, compensation, and work assignments." *Faragher*, 524 U.S. at 790; *Ellerth*, 524 U.S. at 761. This is that case.

II. USERRA DOES NOT RECOGNIZE ANY OF THE NEW DEFENSES PROPOSED BY RESPONDENT

An employer is liable for harms caused by its employees when acting within the scope of their employment. Respondeat superior "is a form of strict liability." Prosser and Keeton on The Law of Torts, § 69, p. 499 (5th ed. 1984). What Proctor wants, and what the Seventh Circuit fashioned, is a special exception to this rule for employment discrimination cases. The Seventh Circuit has acknowledged that its cat's paw

doctrine, to the extent that it requires a plaintiff to show more than that a biased supervisor caused the adverse employment action at issue, is "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F. 3d 580, 584 (7th Cir. 2004).

Respondent urges the Court to create seven new defenses unknown to tort or agency law. Where the discriminatory conduct of a biased supervisor causes adverse action against a plaintiff, respondent argues, an employer should be immune from liability if it shows that either (1) the ultimate decisionmaker made an "independent review" of a decision by a biased supervisor[4], (2) the ultimate decisionmaker made an "independent decision," even though that decision was based on information from a biased supervisor[5], (3) the ultimate decisionmaker conducted an "independent investigation," even though that decisionmaker still relied on information from or the recommendation of a biased supervisor[6], (4) the ultimate decisionmaker invited the plaintiff to make a statement before the adverse action was taken[7], (5) the plaintiff actually made some sort of statement before the adverse action was taken[8], (6) a company official considered a grievance submitted by the plaintiff following the adverse action[9]

4. R.Br. 13, 14, 39, 40, 45, 46, 48, 49, 52.

5. R.Br. 13, 39, 40, 41, 45, 46, 51, 52, 62.

6. R.Br. 14-5, 39, 40, 46, 48, 51.

7. R.Br. 49, 50.

8. R.Br. 8, 13, 47, 51.

9. R.Br. 51.

or (7) the ultimate decisionmaker, although relying on information from or a recommendation by a biased supervisor, was not so inept as to be a mere "pawn" or "dupe".[10]

Amicus briefs submitted in support of respondent urge the Court to create several other new defenses to USERRA (and other employment-related) claims. Under these proposals an employer could escape liability for a dismissal caused by a biased supervisor if either (1) the ultimate decisionmaker, although relying completely on information from a biased supervisor, was acting in furtherance of health and safety concerns[11], (2) the ultimate decisionmaker acted "responsibly,"[12] (3) the biased supervisor, even though the sole source of the information relied on by the ultimate decisionmaker, did not "advocate" for a particular course of action against the plaintiff[13], or (4) the discrimination victim did not first complain to the employer before filing suit.[14]

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10. R.Br. 13, 14, 61. Under this proposed defense an employer could avoid liability by showing that the machinations of the biased supervisor fell short of being a "diabolically clever scheme." (R.Br. 62).

11. Brief of the National Federation of Independent Business Small Business Legal Center as *Amicus Curiae* In Support of Respondent, 23-25.

12. Brief of Chamber of Commerce of the United States of America as *Amicus Curiae* In Support of Respondent, 6, 7, 26, 28, 29, 33.

13. *Id.* at 25-27.

14. Brief for the National School Boards Association as *Amicus Curiae* Supporting Respondent, 28-34.

The amici candidly acknowledge that these various affirmative defenses would apply to a large portion of all employment cases arising under federal law; important employment decisions such as dismissals, they explain, are frequently made by officials who rely on information or recommendations from other supervisors.[15]

Every one of these proposed new defenses has the same fatal flaw: none of them has any basis in the terms

15. Brief *Amicus Curiae* of The Equal Employment Advisory Council in Support of Respondent, 24-25 ("Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation."); Brief of the National Federation of Independent Business Small Business Legal Center as *Amicus Curiae* in Support of Respondent, 2 ("small business owners often rely on many people in the chain of command when making employment decisions"), 8 ("information always flows up the chain of command to decisionmakers"), 16 ("the decisionmakers in employment settings often do not have direct supervisory authority over the affected employee. That falls to the supervisors that are put in place to relay information up the chain of command"); Brief for the National School Boards Association as *Amicus Curiae* Supporting Respondent, 7 ("typically the [school] superintendent relies on assistant superintendents, area directors, principals, other supervisors and human resource employees to . . . recommend employees for . . . termination. In fact, most school boards have no role in evaluating employees . . . or developing recommendations for . . . discipline, or termination. Instead, school boards rely on input from administrators to inform their . . . firing decisions. . . . [S]chool boards generally will rely only on the recommendations and the facts as presented by an administrator when deciding to terminate.").

of USERRA, and all are inconsistent with the provisions of section 4311(c). Under that provision, once a plaintiff demonstrates that an impermissible purpose was a factor in the employer's action, the employer "shall be considered to have engaged in actions prohibited," subject to only a single statutory defense. The employer can avoid liability solely by proving "that the action [complained of] would have been taken in the absence of such membership [in the armed forces.]" Judicial adoption of any of the proposed new defenses would be inconsistent with the statutory language mandating a finding of liability if the single *statutory* defense is not established.

If, as respondent urges, a discrimination claim could be defeated by proof that the ultimate decisionmaker relied in part on evidence from some other source, a plaintiff would in effect be required to prove that tainted information from that biased supervisor was the *sole* factor relied on by the ultimate decisionmaker. Section 4311(c)(1), however, only requires a plaintiff to prove that an unlawful motive was *a* factor in the action complained of. If, as respondent contends, an employee were required to present his or her USERRA claim when asked for his version of a dispute, or whenever an employer has a grievance process, employees would be obligated to exhaust, and perhaps be limited to, an employer's internal remedial mechanisms. Section 4302(b), however, provides that USERRA

> supersedes any . . . contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter . . . .

Thus an employer could not, by establishing a grievance procedure or other mechanism, require an employee to invoke that procedure before or instead of filing suit. Section 4302 (b) precludes an employer from "impos[ing] a requirement that the employee grieve a USERRA matter." *Russell v. Merit Systems Review Bd.*, 324 Fed. Appx. 872,875 (Fed. Cir. 2008).

If, as respondent contends, an ultimate decisionmaker's "independent" consideration (and rejection) of a worker's USERRA claim provides a complete defense, that company official's decision constitutes the authoritative determination of the merits of that claim; section 4323(b), however, provides that USERRA claims are to be determined by independent federal and state courts. And if, as respondent urges, the existence of *any* investigation by the ultimate decisionmaker is a bar to litigation, then that ex parte self-interested inquiry conducted by the employer itself would replace the adversarial process established by the Federal Rules of Civil Procedure for discovering and presenting relevant evidence. Thus in this case, in lieu of the depositions, document production, sworn testimony, cross-examination and evidentiary record which convinced a jury that Staub was the victim of discrimination forbidden by USERRA, the process for assessing Staub's USERRA claim would be reduced to a single, casual conversation between Buck (who had already dismissed Staub) and Carothers (who was one of Buck's subordinates).

Respondent argues that if one of the circumstances constituting any of its proposed defense is present, that would "break[] the chain of causation" between the

biased supervisor and the adverse employment action.[16] But whether an earlier event (such as a false statement by a biased supervisor) is a cause of a later occurrence (e.g., the dismissal of the plaintiff) is a quintessential factual issue not susceptible to such per se rules. Causation in fact is

> a matter upon which lay opinion is quite as competent as that of the most experienced court. For that reason, in the ordinary case, it is peculiarly a question for the jury.

Prosser and Keeton on The Law of Torts, § 41 pp. 264-64 (5th ed. 1984).

To be sure, in some instances one of the circumstances invoked by Proctor might demonstrate that the requisite causation was absent. For example, if a report from a biased supervisor contained both truthful and inaccurate information, and the ultimate decisionmaker decided on the basis of some other source to disregard the falsehoods and rely only on the rest of the report, there would be no causal connection between the inaccuracies and whatever action was taken by that ultimate decisionmaker. On the other hand, a dismissal decision based on charges fabricated by a biased supervisor would still be caused by those fabrications even if the ultimate decisionmaker made an "independent decision" about the seriousness of those (inaccurate) reports, or considered additional evidence that had no bearing on the truthfulness of the charges.

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16. R.Br. 13, 39, 41, 51, 52.

Most if not all of the new proposed defenses would allow employers to effectively exempt themselves from the requirements of USERRA, as well as from all federal employment discrimination laws. An employer would be largely immune from liability if it gave ultimate decisionmaking authority over important employment decisions to officials other than immediate supervisors (something that the amici insist already is common), and then followed whatever prescription was required by the defense, directing, for example, the ultimate decisionmakers take the pro forma step of obtaining information from more than one source.

The traditional agency doctrine of respondeat superior imposes strict liability on employers for the acts of officials acting as their agents. That strict liability provides an employer with

> the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely.

Prosser and Keeton on The Law of Torts, § 69, p. 501 (5th ed. 1984).

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst . . . which causes employers . . . to self-examine and to self-evaluate their employment practices . . . ."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975)(*quoting United States v. N.L. Industries, Inc*,

479 F. 2d 354, 379 (8th Cir. 1973)). The proposed new defenses would largely undermine that salutary incentive, and replace it with incentives to hire better lawyers and to take every precaution to isolate higher officials from knowledge of any violations of federal employment statutes.

III. PROXIMATE CAUSE DOES NOT IMMUNIZE PROCTOR FROM LIABILITY

Proctor asserts that in a case such as this the discriminatory actions of Mulally and Korenchuk, even if they were in fact the but-for cause of Staub's dismissal, nonetheless were not the proximate cause of that termination.[17] Respondent apparently contends that Buck's own actions, at least if one of the asserted defenses can be established, would be the superseding cause of the dismissal. Although the existence of a superseding cause does bar imposition of liability in tort for an earlier tortious act, the well-established standards regarding a claim of superseding cause make abundantly clear that that doctrine does not apply here.

First, a defendant cannot invoke an asserted superseding cause where an *intentional* tort resulted in the very harm that was the specific purpose of that original act.

> A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable, except where

17. R.Br. 16, 46, 53.

> the harm results from an outside force the risk of which is not increased by the defendant's act.

Restatement (Second) of Torts, § 435A (1965).[18] In this case the dismissal of Staub that ultimately occurred was indeed the harm that Mulally and Korenchuk intended.

Second, superseding cause cannot be invoked to defeat a claim where the later cause at issue was itself a result of the earlier misconduct.

> Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

Restatement (Second) of Torts, § 442A.[19] In the instant case Buck's actions did not occur, by sheer coincidence, after the actions of Mulally and Korenchuk; to the contrary, the termination order signed by Buck expressly relied on, and was a result of, the Corrective Action engineered by Mulally and the misinformation provided by Korenchuk.

Third, the superseding cause defense can only be invoked where the later action was that of a "third party." *Id.* at §§ 440[20], 442(d), 442(e), 442(f), 442B, 452. In this instance, however, Buck, Mulally and Korenchuk were all agents of the same principal—Proctor.

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18. See § 442(a) (harm must be "different in kind from that which would otherwise have resulted from the actor's negligence").

19. See *id.*, §§ 443, 449.

Finally, a defendant cannot invoke the superseding cause defense by demonstrating that *after* the original wrong occurred the defendant did everything in its power to prevent the subsequent injury.

> If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.

Id. at § 437.[21]

IV. FEDERAL EMPLOYMENT STATUTES SHOULD NOT BE LIMITED BY SPECIAL AGENCY OR CAUSATION STANDARDS

The administrative arrangement in the instant case—in which one or more supervisors provide information or recommendations to a separate, ultimate decisionmaker—is a common one in all but the smallest organizations, and is used to make innumerable decisions about a wide range of matters other than employment. Whether the entity's liability is limited by the purposes and knowledge of that ultimate decisionmaker is thus a matter of broad significance.

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20. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

21. See section 437, comment a ("Once his negligence has created the risk, his efforts to prevent it taking harmful effect, no matter how carefully planned and executed, can avail him
(Cont'd)

The Seventh Circuit's restrictive cat's paw doctrine—which largely immunizes organizations from liability for the motives or knowledge of anyone but the ultimate decisionmaker—is avowedly a rule applicable only to employment claims. That circuit has applied the doctrine in twenty-nine decisions, every one involving employment-related claims[22]; the court of appeals has never on this ground rejected any other type of claim.

To the contrary, the Seventh Circuit has made clear that in commercial and other litigation, liability will turn simply on whether the official who acted with an unlawful purpose was acting in the scope of his employment. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F. 3d 702, 708 (7th Cir. 2008). In most cases the Seventh Circuit adheres to the doctrine of respondeat superior, correctly explaining that that rule imposes strict liability on a defendant, regardless of whether the defendant did all it could to prevent the misconduct at issue. *Browning-Ferris Industries, Inc. v. Ter Mart*, 195 F. 3d 953, 956 (7th Cir. 1999).

> The liability of an employer for torts committed by its employees—without fault on his part—when they are acting within the scope of their employment, the liability that

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(Cont'd)
only if they are successful and so prevent his conduct from resulting in the harm which was threatened by the risk he created. . . . His liability is based upon his negligence in creating the risk, not upon his failure to exercise reasonable care to nullify it—as might be the case if the risk had been created by a third person.").

22. A list of those decisions is set out in an appendix to the brief.

> the law calls "respondeat superior," is a form of strict liability. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault.

Konradi v. United States, 919 F. 2d 1207, 1210 (7th Cir. 1990). But in employment cases subject to its cat's paw doctrine, the Seventh Circuit takes the opposite position, rejecting respondeat superior as unfair and insisting that a principal ought not be held liable unless it can be faulted for having failed to take some practicable step to prevent the violation complained of. "[E]mployers should be liable for their employees' racism only in the general class of cases in which an employer has the practical ability to head off injury to its employee's victim." *Brewer v. Bd. of Trustees of the Univ. of Ill.*, 479 F. 3d 908, 920 (7th Cir. 2007).

In the instant case amici representing a large number of private businesses have urged this Court to adopt some version of the stringent cat's paw doctrine. But although these amici differ in their arguments and approach, they share one common position—none of them argues that the cat's paw doctrine should be applied to ordinary, non-employment litigation. Only in the context of a claim under USERRA or other federal employment statutes do they object that the application of otherwise traditional agency and tort principles would be unfair. From the perspective of these amici, that distinction is understandable, indeed vital. Private businesses which buy goods, services, or complex financial products could not rely on the good faith of

their counter-parties or of private financial rating agencies, could not obtain redress for fraud, and could not enforce their rights under a wide range of federal statutes if those with whom they deal were able to avoid liability by asserting the innocence or ignorance of some ultimate decisionmaker.

We urge only that the same established principles of agency and tort law that Proctor Hospital itself would invoke and which the Seventh Circuit would apply in a mundane commercial dispute ought to protect as well the members of the armed forces who risk their lives, burden their families, and imperil their jobs by serving the nation in the Reserves and the National Guard. "[O]ur men and women in uniform . . . . should not have to worry whether they will have a job waiting at home when they are . . . carrying out the President's orders." 139 Cong. Rec. H2210 (May 4, 1993) (remarks of Rep. Stump).

V. THIS COURT NEED NOT REVISIT THE FACTUAL DISPUTES LITIGATED IN THE COURTS BELOW

Respondent devotes the largest portion of its brief to factual issues that were litigated in the courts below. Respondent contends that Korenchuk was not motivated by any objection to Staub's military service, and that neither Korenchuk nor Mulally had any improper influence on the ultimate dismissal decision. These factual issues were fully litigated at trial, resolved by the jury that heard this case, and reviewed by the courts below. This Court need not revisit these issues.

(1) The trial jury was specifically instructed that the plaintiff was required to prove that his military service was a motivating factor in his dismissal. (Doc. 109, p. 18). The jury was also instructed that it could not hold Proctor liable based on the motives of Korenchuk or Mulally unless the plaintiff demonstrated that one or both actually affected Buck's decision. (JA 71a).

The jury concluded that the "Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the Defendant's decision to discharge him." (JA 68a). That finding necessarily meant that the jury determined that Mulally and/or Korenchuk had such an unlawful motive. The jury also found that the defendant had not "proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status." (*Id.*). That finding necessarily meant that the jury determined that Proctor had failed to demonstrate that neither Mulally nor Korenchuk used misinformation to bring about the dismissal of Staub. Had the jury concluded (as Proctor contends) that the improperly motivated official or officials had not caused Staub's termination, it would have found that the actual dismissal had occurred "regardless of [Staub's] military status," and thus would have returned a verdict for the defendant.

The district court denied Proctor's post-trial motion for judgment as a matter of law, concluding that "there was sufficient evidence put on by the Plaintiff to sustain the jury's verdict." (JA59a).

> I reject Defendant's characterization of Plaintiff's evidence as a "scintilla" and of the remarks as "stray." There were a number of

> remarks, some of them temporally proximate to the discipline originally imposed on Plaintiff and others temporally proximate to his discharge. There were inconsistencies between the facts as various witnesses recalled them and as set forth in the documents related to the discipline.

(*Id.*). The court of appeals, although holding that Staub failed to satisfy the Seventh Circuit's stringent "singular influence" standard, did not question the sufficiency of the evidence, "viewed in the light most favorable to the verdict" (JA 32a), to demonstrate that misinformation from an improperly motivated official—Mulally and/or Korenchuk—had brought about Staub's dismissal. (See JA 32a-39a).

(2) Respondent urges that the district court erred in admitting evidence regarding statements by Korenchuk that indicated hostility towards Staub's military status. (R.Br. 12 ("No Circuit would have allowed such stale evidence of animus to be presented to a jury"), 39a).[23] But respondent never objected to the admission of this evidence, either in its motions in limine or when the testimony was offered at trial (Tr. 256-64). Any objection to its admissibility was thus waived. In this Court respondent argues that there was insufficient evidence that Korenchuk objected to Staub's military service; in the court of appeals, however, respondent did not challenge the jury verdict on that basis.

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23. As the district court noted, Korenchuk made these remarks about Staub's military service at about the same point in time when Korenchuk fired Staub. (JA 59a; see JA 32a n. 1).

Korenchuk's biased remarks were not the only evidence offered by Staub to demonstrate that Korenchuk had acted with an unlawful motive. In the period leading up to Staub's dismissal, Korenchuk expressed displeasure that Staub was away for drill on weekends, and indicated unhappiness at the prospect that Staub would be called up again in 2004. (JA 35a). Korenchuk was well aware of Mulally's objection to Staub's military service, and consciously did little about it. (JA 33a; Tr. 344, 375-76). When Staub returned to work following Operation Iraqi Freedom, Korenchuk warned a hospital employee that Mulally was "out to get" Staub. (JA 34a). A reasonable jury could infer that Korenchuk made no effort to stop Mulally's vendetta because he sympathized with her hostility to Staub's military service. A jury could also infer that Korenchuk acted with such a motive on March 20, 2004, when he reported to Buck that he had been unable to find Staub but said nothing about Sweborg, who was with Staub during the hours at issue, and who necessarily would have been no more easy to locate. And a jury assuredly could have concluded that Korenchuk's conduct in 2004 indicated that his earlier outspoken objection to Staub's military service had never abated.

(3) Proctor objects that Korenchuk's motives were irrelevant because he did not provide any inaccurate information to Buck or withhold from her any important facts. (R.Br. 39-39). Respondent, however, failed to advance that argument in the court of appeals.

The termination notice signed by Buck on March 20 indicated that she believed that Staub had never complied with the January 27 directive to report to

Korenchuk or Mulally whenever he left the Angio lab. (JA 74a). Buck testified that the misconduct asserted in the notice reflected her reason at the time for the dismissal. (Tr. 48). If she so believed, it could only have been because that is what Korenchuk told her; Korenchuk was the sole source of such information. Korenchuk, however, did not claim that Staub had never complied with the directive (Tr. 107), and in this Court respondent does not defend the accuracy of the accusation in the termination notice. If, as that evidence indicates, Buck decided to fire Staub based on a false report from Korenchuk, that report clearly would have been the cause of the dismissal.

There is also evidence that Korenchuk deliberately withheld from Buck the fact that Staub had left a voicemail message for Korenchuk on March 20, 2004. Although Proctor attacks the credibility of Staub's testimony that he left such a message, there was not even a direct conflict of testimony on this issue. Staub stated that he had left the voicemail message, and Korenchuk testified only that he could not recall one way or the other whether Staub had left telephone messages. (Tr. 108). Proctor insists there was no evidence "that Korenchuk was aware of any voicemail from Staub." (R.Br. 38). But if the jury credited Staub's testimony that he left such a message for Korenchuk, it would reasonably have inferred that Korenchuk had heard it.

This fact-bound argument now advanced by Proctor in this Court is different from the contention which it offered in the trial court. At trial, rather than disputing Staub's testimony about the voicemail, Proctor argued

that it simply did not matter whether Staub had left such a message on March 20 because—or so the hospital then contended—Staub actually was fired for having failed to report in to Korenchuk on March 19, the day before. (Tr. 627-28). (Korenchuk, however, testified that the asserted problem occurred on March 20, not a day earlier. (JA 38a)). Proctor no longer advances that contention, but instead faults the jury for failing to accept an argument which Proctor's trial counsel never made.

(4) Proctor does not dispute the existence of substantial evidence that Mulally objected to Staub's military service. It argues, however, that there was no connection between Mulally's hostility and the decision to fire Staub. Specifically, Proctor insists that Mulally had no significant role in the issuance of the January 27 directive. There is, however, compelling evidence to the contrary.

It is undisputed that Mulally herself actually prepared and co-signed the Corrective Action. (Tr. 123). At trial Korenchuk testified that he approved the Corrective Action because he was told by Mulally that Staub could not be found on January 26. (Tr. 97). But neither Mulally nor anyone else testified that they had looked for or been unable to find Staub, who testified without contradiction that he was in the Angio unit during the entire period in question. If the jury credited Korenchuk's testimony, it could have concluded that the Corrective Action drafted by Mulally was approved by Korenchuk only because Mulally had provided him with inaccurate information.

At trial Mulally offered a different justification for the January 27 Corrective Action. Mulally testified that Staub, by remaining in the Angio unit after he learned there were no patients, had violated a standing order that he was to go to the Diagnostic unit whenever that occurred. (Tr. 147). Staub and Sweborg, on the other hand, testified that there was no such standing order. (JA 37a; Tr. 251-52, 357-58). Here too the jury could have concluded that inaccurate information from Mulally was the basis of the Corrective Action.

In this Court Proctor offers yet a third explanation designed to minimize Mulally's role, asserting that the Corrective Action was issued because Staub and Sweborg failed to answer several telephone calls from the Diagnostic unit on the morning of January 26. (R.Br. 25-27). The Corrective Action itself, however, makes no reference to these asserted telephone calls. Moreover, none of the officials who actually signed the Corrective Action, including Mulally, ever testified that that disciplinary action was taken because Staub had failed to answer a telephone call.

CONCLUSION

The decision of the Court of Appeals should be reversed and the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — SEVENTH CIRCUIT DECISIONS INVOLVING THE CAT'S PAW DOCTRINE

Hill v Potter, — F. 3d —, 2010 WL 3385194 (7th Cir., Aug. 30, 2010)(employment claim under the Age Discrimination in Employment Act and the Americans With Disabilities Act)

Lindsey v. Walgreen Co., — F. 3d —, 2010 WL 3156549 (7th Cir. Aug. 11, 2010)(employment claim under the Age Discrimination in Employment Act)

Kodish v. Oakbrook Terrace Fire Protection Dist., 604 F. 3d 490 (7th Cir. 2010)(employment claim under the First Amendment)

Long v. Teachers' Retirement System of Illinois, 585 F. 3d 344 (7th Cir. 2009)(employment claim under the Family and Medical Leave Act)

Waters v. City of Chicago, 580 F. 3d 575 (7th Cir. 2009)(employment claim under the First Amendment)

Mach v. Will County Sheriff, 580 F. 3d 495 (7th Cir. 2009)(employment claim under the Age Discrimination in Employment Act)

Martino v. MCI Communications Services, Inc., 574 F. 3d 447 (7th Cir. 2008)(employment claim under the Age Discrimination in Employment Act)

Hobbs v. City of Chicago, 573 F. 3d 454 (7th Cir. 2009)(employment claim under Title VII and section 1981)

Staub v. Proctor Hospital, 560 F. 3d 647 (7th Cir. 2009)(employment claim under USERRA)

Campion, Barrow & Associates, Inc. v. City of Springfield, Ill., 559 F. 3d 765 (7th Cir. 2009)(employment contract claim under the First Amendment)

Andonissamy v. Hewlett-Packard Co., 547 F. 3d 841 (7th Cir. 2008)(employment claim under Title VII and the Family and Medical Leave Act)

Metzger v. Illinois State Police, 519 F. 3d 677 (7th Cir. 2008)(employment claim under Title VII)

Jennings v. Illinois Dept. of Corrections, 496 F. 3d 764 (7th Cir. 2007)(employment claim under Title VII)

Brewer v. Board of Trustees of University of Ill., 479 F. 3d 908 (7th Cir. 2007)(employment claim under Title VI and Title VII)

Phelan v. Cook County, 463 F. 3d 773 (7th Cir. 2006)(employment claim under Title VII and the Fourteenth Amendment)

Healy v. City of Chicago, 450 F. 3d 732 (7th Cir. 2006)(employment claim under the First Amendment)

Byrd v. Illinois Dept. of Public Health, 423 F. 3d 696 (7th Cir. 2005)(employment claim under Title VII)

Myrick v. Aramak Services, Inc., 125 Fed. Appx. 705 (7th Cir. 2005)(employment claim under Title VII and section 1981)

Lust v. Sealy, Inc., 383 F. 3d 580 (7th Cir. 2004)(employment claim under Title VII)

Davis v. Con-Way Transp. Central Express, Inc., 368 F. 3d 776 (7th Cir. 2004)(employment claim under Title VII)

Rogers v. City of Chicago, 320 F. 3d 748 (7th Cir. 2003)(employment claim under Title VII)

Mateu-Anderegg v. School Dist. of Whitefish Bay, 304 F. 3d 618 (7th Cir. 2002)(employment claim under Title VII)

Schreiner v. Caterpillar, Inc., 250 F. 3d 1096 (7th Cir. 2001)(employment claim under Title VII)

Eiland v. Trinity Hosp., 150 F. 3d 757 (7th Cir. 1998)(employment claim under Title VII and section 1981)

Sattar v. Motorola, Inc., 138 F. 3d 1164 (7th Cir. 1998)(employment claim under Title VII)

Willis v. Marion County Auditor's Office, 118 F. 3d 542 (7th Cir. 1997)(employment claim under Title VII)

Wallace v. SMC Pneumatics, Inc., 103 F. 3d 1394 (7th Cir. 1997)(employment claim under Title VII)

Appendix A

Moses v. City of Evanston, 97 F. 3d 1454 (7th Cir. 1996)(employment claim asserting bias in decisionmaking)

Shager v. Upjohn Co., 913 F. 3d 398 (7th Cir. 1990)(employment claim under the Age Discrimination in Employment Act)