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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*

BRIEF FOR THE NATIONAL SCHOOL BOARDS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not for profit organization representing state associations of school boards and their 14,500 member school districts across the United States. NSBA is dedicated to the improvement of public education and has long been involved in advocating for reasonable application of federal non-discrimination laws in a manner that recognizes the special concerns and operational realities of public school systems, collectively the largest public employer in the nation. NSBA submits this brief to support the Seventh Circuit's decision to the extent it places limitations on employer liability under federal anti-discrimination statutes for the bias of non-decisionmaking employees, but more importantly to emphasize some of the shortcomings of the decision in its failure to account for the legal requirements and governance realities that school districts, as public employers, face and to place some responsibility on plaintiffs to report discrimination before an adverse employment action is taken by an unbiased decisionmaker unaware of the discriminatory animus of a subordinate.

[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case presents the strong possibility of serious unintended consequences for the nation's school districts if this Court renders a decision that fails to recognize and account for the particular legal requirements and governance realities that dictate school board operations.

Under many state statutes, school boards are the final decision-makers in employment decisions subject to the Uniformed Services Employment and Reemployment Right Act (USERRA) and other non-discrimination statutes. At the same time, school boards generally are not involved in the day-to-day operation of schools and necessarily rely on the recommendations of their administrators in rendering these personnel decisions. So while the Seventh Circuit's decision appropriately recognizes that employers should be held liable for non decision-maker animus in only very limited circumstances, its decision does not account for situations where reliance on a "single source of information" is reasonable in light of legally mandated governance and supervisory structures and the practical realities encountered by school districts as public employers.

Similarly, the Seventh Circuit correctly holds that where an employer has conducted its own investigation, it is not liable under federal anti-discrimination statutes for an employee's animus in supplying misinformation to the decision-maker. However, by itself this approach in essence requires an employer to investigate and reach an independent decision for every tangible employment action where a subordinate has supplied some information about

the subject employee—even absent any evidence of bias—or face potential liability. Such a universal investigation requirement not only fails to account for the realities faced by school boards but also is unsupported by USERRA itself or by this Court's holdings. Arguments that without such a sweeping requirement, employers may intentionally isolate final decision-makers to avoid responsibility for bias and that bias could be unearthed if employers tried harder are irrelevant in the school board context.

By acknowledging only independent investigations as the means for employers to avoid liability in "cat's paw" cases, the Seventh Circuit ignores, and perhaps undermines, the numerous safeguards school districts have already put into place to address discrimination early on. Where an employer exercises reasonable care to prevent and promptly correct discriminatory behavior and the plaintiff unreasonably fails to take advantage of these opportunities to avoid additional harm, the bias of a discriminatory employee without formal authority to take tangible employment actions should not be imputed to the employer. A plaintiff who skips the opportunity to raise concerns about discrimination before an adverse employment action is taken should not be rewarded with a cause of action for discrimination premised on the "cat's paw" theory of liability.

ARGUMENT

The Seventh Circuit's decision appropriately holds that the "cat's paw" theory of liability[2] does not

[2] Petitioner argues that the Seventh Circuit's injection of the "cat's paw" liability theory into this case was improper because

automatically impute a non-decisionmaking subordinate's bias to an employer in every instance where that employee provides negative information about another employee precedent to an adverse employment action by the employer. *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009). To prevent the "cat's paw theory from spiraling out of control," the Seventh Circuit adopts the view that liability attaches only when the biased subordinate exerts "singular influence" over the decisionmaker. Where the decision-maker conducts its own investigation into the facts, the employer is not liable. *Id*. at 656-57 (*citing Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 909 (7th Cir. 2007) (rejecting "cat's paw" liability in Title VII case)). While this view appropriately offers some protection for employers unaware of subordinate bias, it is flawed in several respects warranting either rejection of the "cat's paw" theory altogether or an expansion of the defenses available to employers when plaintiffs invoke a derivative theory of liability under USERRA or other federal anti-discrimination laws.

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it unfairly narrows the scope of employer liability under USERRA, which Petitioner asserts by its terms calls for a strict application of agency principles that would yield a different result here. But courts considering whether to hold employers responsible under federal anti-discrimination statutes have generally considered the "cat's paw" liability theory in part "to prevent employers from unfairly insulating themselves from the consequences of adverse employment actions that are in reality based upon the discriminatory motives of a subordinate employee." *Hill v. Lockheed Martin, Logistics Management*, 314 F.3d 657, 684 (4th Cir. 2003)(Traxler, J., dissenting).

I. This Court Should Reject the "Cat's Paw" Theory of Liability Altogether Because the Statutorily Mandated Roles and Responsibilities of School Boards and the Practical Realities of School District Operations Make It Unreasonable To Impute the Unsanctioned, Discriminatory Animus of Subordinates to School Boards.

The statutorily defined roles and responsibilities of school boards and the operational realities of public school systems create obstacles limiting the probability that school boards charged as actual decision-makers will discover the discriminatory animus of subordinates who inform the board's employment decisions. These obstacles make it unreasonable to impose "cat's paw" liability on school boards absent an independent investigation. Instead, a more reasonable approach and one more likely to uncover bias is to require school employees to come forward and inform the school board about the discriminatory bias of subordinates and to provide incentives in the law to do so as discussed in Section III.

School boards are responsible for governing school districts and do so mostly through policy-making, not direct involvement in the daily operation of schools.[3] In most jurisdictions, school boards intersect with employment decisions in two primary ways. First, school boards promulgate rules and policies setting the terms of employment and

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[3] BECOMING A BETTER BOARD MEMBER at 7 (NSBA, 2006). ("A major function of any school board is to develop and adopt policies that spell out how the school district will operate.").

governing employee behavior, including discipline.[4] Second, by virtue of state law, in most states school boards are the actual decision-makers in employment matters, including hiring and firing employees.[5]

School boards do not directly manage and supervise employees.[6] These administrative functions are delegated primarily to

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[4] *Id*. at 8. ("The board is responsible for establishing policy governing salaries and salary schedules, terms and conditions of employment, fringe benefits, leave, and in-service training.").

[5] *Id*. at 170. ("In most states, the school board is the ultimate employer of all district employees—a fact that carries the appropriate legal baggage of responsibility and accountability."). *See, e.g.,* WIS. STAT. § 118.22(2) (2008) ("No teacher may be employed or dismissed except by a majority vote of the full membership of the board."); VA. CODE ANN. § 22.1-315 (2010) ("Nothing in this section shall be construed to limit the authority of a school board to dismiss or place on probation a teacher or school employee. . ."); LA. REV. STAT. ANN. § 42:1165A (2008) ("All job actions based upon the causes for disciplining or dismissal of teachers or other public school employees . . . shall remain under the exclusive jurisdiction of the appropriate parish or city school board."); MO. ANN. STAT. § 174.090 (West 2006) ("[No] teacher [may be] employed or dismissed, unless a majority of all the members of the board vote for the same."); CONN. GEN. STAT. ANN. § 10-220(a)(3) (2010) ("Each local or regional board of education … shall employ and dismiss the teachers of the schools of such district. . ."); KY. REV. STAT. ANN. § 164.340 (West 2009) ("[N]o teacher [may be] employed or dismissed, unless a majority of all the members of the board vote for it.").

[6] BECOMING A BETTER BOARD MEMBER at 8. ("Unless otherwise specified in state statutes or board policy, a board exercises daily supervision and control primarily through its chief administrator and does not directly deal with staff members employed to assist the superintendent in implementing board directives.").

superintendents.[7] Typically the superintendent relies on assistant superintendents, area directors, principals, other supervisors and human resource employees to evaluate, supervise, train, and discipline district employees and recommend employees for hiring and termination. In fact, most school boards have no role in evaluating employees, investigating employee complaints, or developing recommendations for hiring, discipline, or termination.[8] Instead, school boards rely on input from administrators to inform their hiring and firing decisions. This operational structure is in no way designed to insulate the board from liability under federal anti-discrimination laws but rather is a separation of roles and responsibilities generally mandated by state law or dictated by logistical realities.

Where employees have no property or liberty interest in their employment,[9] or no statute or

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[7] *Id.* at 7. ("But although boards set policy, they do not carry it out. The responsibility for implementing policy is delegated to the superintendent of schools.").

[8] *Id.* at 174. ("Prudent boards set out policy guidelines for evaluating their employees, just as they do for evaluating the superintendent. Boards almost always delegate the actual evaluating to the superintendent, however, or to other members of the administrative or supervisory team.").

[9] School district employees have a property interest in their job by virtue of state law or a collective bargaining agreement granting them tenure or contract rights to continued employment. Teachers in most states have tenure rights after two or three years of employment. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Updated for 1998 (1998), http://www.ecs.org/clearinghouse/14/41/1441.htm. About two-thirds of states have collective bargaining laws, many including all public employees. *See* Education Commission of the States,

collective bargaining agreement requires a hearing, school boards generally will rely only on the recommendations and the facts as presented by an administrator when deciding to terminate. Unless an issue of discrimination is raised by the affected employee, a school board generally will not look beyond the facts as presented. At that point the board is not in a position to identify *sua sponte* whether discriminatory bias played any part in the recommendation. In such instances, plaintiffs asserting a "cat's paw" theory of liability would no doubt point to these circumstances to show the administrator exerted "singular influence" on the board's decision. While in theory an independent investigation might reveal whether bias is contaminating the presentation of facts, for the reasons explained in Section II, such inquiries are neither feasible nor necessarily effective in every instance.

Under such circumstances, relying on the information and recommendation of a superintendent, even if doing so does not reveal discriminatory animus where it might exist, is reasonable. The school board is accustomed to relying on information from the superintendent to inform its policy- and decision-making functions[10] and has good reason to rely on a superintendent's recommendations in general. In most jurisdictions, the school board has carefully selected the

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State Collective Bargaining Policies for Teachers (2002), http://www.ecs.org/clearinghouse/37/48/3748.pdf .

[10] BECOMING A BETTER BOARD MEMBER at 129. ("Your superintendent should provide you the information you ask for when it is available. If it is not easily available, your superintendent should explain what effort is required to obtain it.").

superintendent as its top administrator and requires him or her to know and to act in accordance with all district policies, including its anti-discrimination policies.[11] More specifically, the school board has good reason to rely on a superintendent's recommendations regarding employment matters. The superintendent, either through direct supervision or contact with the employee's direct supervisor, is in a far better position than the board to understand the facts supporting the recommended employment action and the credibility of the employees involved.

Where employee property interests are at stake, whether by virtue of state statute or a collective bargaining agreement, school boards ostensibly have the opportunity to determine whether discriminatory bias was a factor in a subordinate employee's recommendation because school boards are required to hold hearings. In a hearing to contest an adverse employment action, an employee can raise issues of discrimination and has a full and fair opportunity to have those claims impartially considered and resolved, thus rendering it unnecessary to impute any discriminatory intent of subordinates to the actual decision-maker. Even so, a number of courts,[12] including the Seventh

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[11] *Id*. at 135. ("Selecting a new superintendent is perhaps the most important decision your board will ever make."). Where elected, the superintendent is generally charged by law "to advise and counsel with the district school board on all educational matters and recommend to the district school board for action such matters as should be acted upon. *See, e.g.,* FLA. STAT. § 1001.49(2) *et seq*. (2010).

[12] In an unpublished opinion, the Fourth Circuit also applied "cat's paw" reasoning to a school board regardless of the fact it held a hearing. In *Kozlowski v. Hampton Sch. Bd.*, No. 02-

Circuit, have concluded school boards may be a "cat's paw," despite providing the aggrieved employee an opportunity to present evidence, to raise issues, and to be fully heard. Imputing liability even after the employee has been provided this opportunity casts doubt on the merits of the "cat's paw" theory as a reasonable basis of employer liability.

In *Mateu-Anderegg v. School District of Whitefish Bay*, 304 F.3d 618, 622-624 (7th Cir. 2002), the plaintiff declined the opportunity for a statutory non-renewal hearing, yet the Seventh Circuit still concluded that the principal's alleged bias was attributable to the school board. Similarly, in *Kramer v. Logan County School District*, 157 F.3d 620, 624 (8th Cir. 1998), although the teacher participated in a five-hour hearing before the board, neither she nor her attorney ever uttered a word about discrimination, the two-judge majority nonetheless affirmed a $125,000 judgment in her favor. While the Eighth Circuit found it "troubling" that the teacher was silent about discrimination at the hearing, the court decided it was a jury question whether the school board had "accurately assessed" the teacher's situation. *Id.* at 624.

It is troubling that any court would allow a "cat's paw" liability claim to go forward where the

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1485, 77 Fed.Appx. 133 (4th Cir. 2003), a non-renewed head football coach, represented by counsel, failed to mention at his non-renewal hearing before the board that the principal recommending the non-renewal allegedly stated he wanted a younger coach. Despite this, the appeals court ratified the trial court's instruction that the board's liability rested solely on the motivation of the principal, in effect, that the school board was the "cat's-paw" of the principal, and ruled certain other evidence presented at the board hearing should have been excluded from the trial. 77 Fed.Appx. at 150-51.

employer offered the opportunity for a full scale hearing. It is also surprising that where school districts have held hearings—recognized in most jurisdictions as a thorough form of fact-finding—that such hearings have failed to adduce evidence of discriminatory bias on the part of informing subordinates.[13] This illustrates that some employees will not reveal evidence of discriminatory bias by subordinates no matter what the employer does to uncover such information, unless, perhaps, the employee has some incentive to do so.

II. Requiring School Boards To Investigate Discriminatory Animus on the Part of Informing Subordinates As the Only Means To Avoid Liability Is Unsupported by USERRA and Other Precedent and Imposes Unproductive and Counterproductive Burdens on School Boards.

According to the Seventh Circuit, an employer can avoid liability for a subordinate's discriminatory animus by investigating the facts relevant to the decision. *Staub*, 560 F.3d at 656 (citation omitted). While *Amicus* agrees that employers that conduct independent investigations before taking adverse employment actions should not be held liable under USERRA or other federal anti-discrimination statutes for subordinate bias, the Seventh Circuit's reliance on investigations as the sole means to

[13] *See also Qamhiyah v. Iowa State Univ. of Sci. and Tech.*, 266 F.3d 733, 743 (8th Cir. 2009); *Tucker v. Talladega City Schs.*, 171 Fed.Appx. 289, 297 (11th Cir. 2006); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 720 (8th Cir. 1998).

absolve employers from liability in such circumstances is supported by neither law nor policy.

There is no investigation requirement under USERRA or any of the other federal employment discrimination statutes where the "cat's paw" theory has been applied. In addition, other policy considerations weigh against it. First, imposing such a requirement would impose undue burdens on employers. Because every employee belongs to at least two protected classes (race and sex), under the Seventh Circuit's rationale, an investigation would be mandatory for every adverse employment decision based on subordinate input. Second, the scope of investigations sufficient to relieve employers of liability remains unclear under current law. Unless this Court crafted a clear and easily applied investigation standard, frequent litigation would arise over whether a proper investigation was performed. Finally, investigations aimed at finding discrimination are likely to be unproductive or even counterproductive.

A. Neither the plain language of USERRA nor prior Supreme Court precedent supports imposing an investigation requirement on employers.

Requiring employers to investigate all adverse employment actions in which a subordinate has provided input to make sure they comply with federal employment discrimination statutes would be a dramatic change for employers. This requirement has no grounding in the plain language of USERRA or any other federal employment discrimination statute. In fact, the failure to

investigate, in and of itself, is not an act of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (failure to investigate harassment complaint was not evidence of pretext in a Title VII claim where employee never told his employer that alleged harassment was race-related); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (finding no sex discrimination for failing to investigate alleged sexual harassment where none of plaintiff's complaints concerned sexual harassment).

In other employment contexts, this Court has carefully limited the outer contours of the employer's duty to investigate; an employer must determine whether a violation of law has occurred only when the employer has *some prior reason to suspect possible misconduct*. In *Waters v. Churchill*, 511 U.S. 661, 677 (1994), a plurality of this Court, considering the First Amendment free speech claim of a terminated employee, determined that an employer is obligated to investigate if the supervisor knows "that there is a substantial likelihood that what was actually said was protected [speech]." Similarly, in *Burlington Industries v. Ellerth*, 524 U.S. 742, 765 (1998), this Court recognized employers can avoid liability under Title VII of the Civil Rights Act of 1964 (Title VII) for the sexual harassment of supervisors where no tangible employment action was taken by receiving and responding to complaints of sexual harassment.

Under both *Waters* and *Ellerth,* no investigation is required until some specific allegation is made that an employee's legal rights are at stake. The purpose of the employer's inquiry is to determine whether a federal law has been

violated. The Seventh Circuit's decision departs from this focused approach. Rather than require an investigation only in those instances in which there is a reasonable concern about potential discrimination, it requires the actual decision-maker, in an effort to avoid liability, to conduct an investigation even if there is no hint of discriminatory animus in the conduct of the subordinate supervisor. This is a flawed analysis, because the failure to conduct an investigation is not, in and of itself, an act of discrimination.

Lower courts that have adopted an investigation requirement in "cat's paw" cases have reasoned that absent such a universal requirement, employers "might seek to evade liability, even in the face of rampant . . . discrimination among subordinates, through willful blindness." *EEOC v. BCI Coca-Cola*, 450 F.3d 476, 486 (10th Cir. 2006). But the Seventh Circuit's proposed solution to this potential problem sweeps too broadly. The solution is not to cast a wide net and require employers to presume bias and conduct investigations whenever information to support an adverse action comes from a subordinate. Rather, a more reasonable approach would be to permit a defense that promotes the purposes of anti-discrimination legislation without placing an onerous burden on either employers or employees.

Under the *Ellerth/Faragher* prevention defense, if the employee being terminated or disciplined believes that the subordinate supervisor is biased but fails to share this information with the actual decision-maker either informally or through an existing grievance or appeal process, then the employer is not liable. Employers could be held accountable if they fail to address on a case-by-case

basis any allegations of discrimination brought to their attention.[14] For the reasons explained in Section III, *Amicus* urges this Court, if it chooses to affirm the viability of the "cat's paw" theory of liability, to provide employers this affirmative defense.

B. Requiring a school board to investigate before every adverse employment action is excessively burdensome and duplicative of other steps school boards have taken to eliminate discrimination.

[14] Courts have limited this accountability inquiry to determining whether the employer engaged in intentional discrimination in failing to investigate the allegations and not in second guessing the employer's reasonable business judgments. "[T]he court is not a 'super-personnel department' intervening whenever an employee feels he is being treated unjustly." *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 435 (7th Cir. 2005). *See also Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006) (explaining that federal employment laws "have not vested in federal courts authority to sit as super-personnel departments reviewing wisdom or fairness of business judgments made by employers, except to extent that those judgments involve intentional discrimination")(citation omitted); *Young v. Dillon Co.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (stating that purpose of pretext analysis is "to prevent intentional discriminatory hiring practices," not to enable judges to "act as a 'super personnel department' second guessing employers' honestly held (even if erroneous) business judgments") (citation omitted); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626 (6th Cir. 2006) (law "does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with") (citation omitted). This Court expressed a similar sentiment in *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies").

A mandatory investigation requirement before every adverse employment action would be particularly burdensome on school districts. It will force school administrators to engage in defensive employment practices that increase employer costs, either through the hiring of additional human resources staff and investigators or through the adoption and implementation of even more rigorous grievance and appeal policies that consume countless hours of time searching for a discriminatory motive where there is neither "smoke nor fire."[15]

School systems also would be subjected to more unworkable burdens because federal anti-discrimination statutes protect employees against other employment actions besides termination.[16] A requirement that boards investigate all recommendations to *hire* a particular individual over all the other applicants would be particularly onerous.[17] In a typical school district, administrators

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[15] Employers make countless decisions every day that do not involve discrimination. In 2009 the EEOC received 93,277 charges of discrimination; 60.9% of these were found to lack reasonable cause (ADA claims--59.5%; ADEA claims—63.6%; Title VII claims—61.3%). *See* EEOC Enforcement Statistics, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. In 2008, the Department of Labor opened 1,389 new USERRA cases; 31% were dismissed for "no merit." *See* USERRA Fiscal Year 2008 Report to Congress, http://www.dol.gov/vets/programs/userra/main.htm.

[16] USERRA, 38 U.S.C. § 4311(a).

[17] *See, e.g., Natay v. Murray Sch. Dist*, 119 Fed.Appx. 289, 261 (10th Cir. 2005) (employee alleged superintendent's decision to not promote her was based on negative reports from principal who was allegedly racially biased); *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002) (employee claimed she was passed over for promotion because of discriminatory animus of non-decision-

solicit applicants, select candidates to interview, conduct interviews, and recommend hiring particular candidates to the board, which has ultimate authority to make the hiring decision. If this Court adopts the Seventh Circuit's holding, a school board would be obligated to investigate the facts surrounding a subordinate's recommendation to hire (or not hire) each employee (and prospective employee).

If the school board, as the actual decision-maker, is required to reach behind the facts presented to ascertain everyone's version of the story or whether there are extant indicia of discrimination for every adverse employment action it considers, the board's entire function may be subsumed by time-consuming and ultimately unnecessary investigations. The board's ability to handle efficiently even the most routine employment decisions, let alone its other governance functions, would be severely hampered.

As part of their governance function, school boards take affirmative steps to ensure that subordinates recommending adverse employment actions do not act based on discriminatory animus and are satisfied that their recommendations are justified pursuant to state and federal law and school board policy. These steps include careful screening of administrator candidates, non-discrimination employment policies, employee training, internal complaint procedures, and the accessibility of the school board to receive complaints at school board meetings. If school boards must ignore administrator recommendations and conduct

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maker); *Barbano v. Madison County*, 922 F.2d 139, 143 (2d Cir. 1990) (finding that board's hiring decision relied on discriminatory recommendation from hiring committee).

their own investigations, particularly when hiring employees, the untenable result will be to shift the administrative personnel role to the school board itself.[18]

C. Unless this Court crafts a precise investigation standard, much litigation will ensue over whether an investigation was done correctly.

Without a clear investigation standard, "cat's paw" litigation will ensue in the federal circuits over whether the investigation was thorough enough, whether it sought the correct information using the correct methodology, whether the right conclusions were drawn from the information received, etc. Although Petitioner asserts that the Seventh Circuit's investigation standard would absolve the employer of liability if the final decision-maker were merely to give a cursory review of the subject employee's personnel file, it is far from clear that this would be the standard. Extensive discussions in the decision below and other subordinate liability cases of how the decision-maker responded after

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[18] Where state law delineates powers of the school board and administrators, a ruling to this end would throw statutorily established roles into disarray. In Illinois, for example, state statute specifically awards school boards the power to make employment decisions with respect to many types of employees. 105 ILCS 5/10-21.1; 105 ILCS 5/10-22.4; 105 ILCS 5/10-23.5; 105 ILCS 5/10-22.23; 105 ILCS 5/10-22.23a; 105 ILCS 5/10-22.24a; 105 ILCS 5/10-23.8a and 10-23.8b; and 105 ILCS 5/24-12. School boards must consider the superintendent's recommendations concerning selection, retention, and dismissal of employees. 105 ILCS 5/10-16.7.

receiving the allegedly biased recommendation belie the validity of this contention.

In addition, lower courts have been unable to craft a precise and uniform investigation standard. In fact, the lower courts that have concluded employers can escape "cat's paw" liability by doing investigations do not agree on what makes for a proper investigation.[19] For example, the Seventh Circuit in *Staub* and the Tenth Circuit in *BCI* both purport to adopt an investigation standard. However, it is unclear the investigation in *Staub*, which was acceptable to the Seventh Circuit, would have necessarily satisfied the Tenth Circuit because the actual decision maker did not ask Staub for his version of the events prior to making her termination decision. *See BCI*, 450 F.3d at 488 ("simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory"). The Eighth Circuit takes a far different approach than either the Seventh or Tenth Circuits and invites the jury to decide the merits of employer investigations—*no matter how thorough*. *See Kramer*, 157 F.3d at 624. Finally, conflicts exist as to whether investigations

[19] *See, e.g.*, Stephen F. Befort & Alison L. Olig, *Within Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-discrimination Statutes*, 60 S.C. L. REV. 383, 413-14 (2008); Sara Eber, *How Much Power Should Be in the Paw? Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 190 (2008); Rachel Santoro, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 835 (2009); Curtis J. Thomas, *Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 61 OKLA. L. REV. 629, 644 (2008).

actually overcome the "cat's paw" theory of liability. For example, in *Mateu-Anderegg* the Seventh Circuit appears to reject the school board's investigation conducted at a lengthy hearing as a sufficient means of cutting off the board's status as a "cat's paw." 304 F.3d at 624. Thus, a passing acknowledgment of an investigation defense without more clarification from this Court would surely increase litigation in the federal courts.

D. Requiring a school board to investigate possible discriminatory animus whenever a subordinate has recommended an adverse employment action would unduly burden employers and may be unproductive and even counterproductive.

Under the "cat's paw" theory the employer is liable because the discriminatory subordinate uses his or her influence in effect to make the employment decision without giving the actual decision-maker all the relevant facts. The subordinate may not be telling the truth about what happened—or may be making a recommendation that he or she would not make but for discriminatory bias.

Unfortunately, investigations aimed at uncovering animus are unlikely to be productive. Biased subordinates intent on misleading the decision-maker are unlikely to reveal their bias even when asked directly about it, which is why some courts do not count a meeting with the biased

subordinate as an independent investigation.[20] It is also questionable whether employees facing an adverse employment action and other relevant witnesses would necessarily reveal discriminatory bias of informing when asked directly about it, especially if they were not willing to bring it up themselves beforehand. In fact, there would be no "cat's paw" cases at all if employees were willing to come forward and reveal the bias of the subordinate to the actual decision-maker, unless the actual decision-maker turned a deaf ear to the complaint.

Investigating for discriminatory bias in every employment decision may even be counter-productive, because it may discourage employees from becoming whistleblowers, knowing that reporting another employee's behavior could result in an inquiry into their own potential discriminatory motives for disclosing information that may play a factor in an employment decision. Such reticence can have disastrous consequences in a school setting where administrators often discover employee misconduct, such as inappropriate sexual relationships between employees and students, through other employees reporting their suspicions.[21] Such a rule would particularly burden

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[20]*See, e.g.*, *Brewer*, 479 F.3d at 918 ("It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source."); *BCI Coca-Cola*, 450 F.3d at 488 (finding independent investigation exists when "the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated").

[21] *See, e.g., P.H. v. School Dist. of Kansas City,* 265 F.3d 653 (8th Cir. 2001) (other teachers complained to administration

school boards that frequently rely on a subordinate for information before taking adverse employment actions. Screening every employment action for discriminatory bias would likely require innumerable hearings with inquiries regarding the bias of all informing subordinates before making any decision. Even where state law, collective bargaining agreements, or constitutional provisions already require a hearing before employee terminations, the focus of the hearings would shift from determining whether just cause for the termination exists to searching for the potential, if not evanescent, discriminatory animus of the employee informing the board's decision. The administrator recommending the adverse action would have to simultaneously prosecute the case and mount a defense to his or her motivations. In summary, the employer's burden in chasing this fleeting dragon in the sky would be inordinate, unreasonable, unnecessary and would discourage administrators from taking some adverse employment actions altogether.

Finally, investigating for discriminatory animus in all instances, especially where the actual decision-maker has no reason to believe it exists, may only serve to encourage employees on the brink of termination to manufacture claims of bias to avoid termination. A number of the "cat's paw" cases

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that teacher was spending too much time with student); *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57 (D. Me. 1999) (substitute teacher reported to administration that she saw male teacher dance in sexually suggestive manner with several boys); *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001) (school librarian reported to principal that she saw student sitting on teacher's lap in inappropriate manner).

decided by the lower courts were brought based on scant evidence of discrimination. *See, e.g., Rose v. New York City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001) (age discrimination claim based on supervisor allegedly telling plaintiff twice she could be replaced by someone "younger" and "cheaper"); *Schreiner v. Caterpillar, Inc.,* 250 F.3d 1096 (7th Cir. 2001) (sex discrimination case based on supervisor's statement during investigation that the female plaintiff's position is "not a woman's area," where the supervisor immediately approved both of plaintiff's requests for a pay increase upon being informed of them). At the very least, such cases illustrate that it would take little effort for a disgruntled employee to misconstrue an innocuous statement or simply to manufacture a discriminatory statement in an attempt to avoid termination.

III. If This Court Adopts the "Cat's Paw" Theory of Liability, It Should Provide School Boards with a Workable Affirmative Defense

This Court should reject the "cat's paw" theory of subordinate bias liability for the reasons discussed above. However, if this Court adopts the "cat's paw" theory, it should provide employers an affirmative defense similar to that provided in *Ellerth*, 524 U.S. 742 and *Faragher v. City Boca Raton,* 524 U.S. 775, 778 (1998), instead of making an independent investigation the only means for an employer to avoid liability.[22] Employers should be able to avoid

[22] *Amicus* found no federal circuit courts opinions permitting employers to avoid "cat's paw" liability by relying on the *Ellerth/Faragher* defense. At least one law review article

"cat's paw" liability where the employer exercised reasonable care to prevent and promptly correct any discriminatory behavior; and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This Court should adopt this "prevention defense" for the following reasons: (1) in "cat's paw" cases the power of the agency relationship to aid discrimination is weakened; (2) the defense is consistent with statutory goals of deterring discrimination; (3) the most practical way to uncover subordinate bias is requiring employees to come forward; and (4) complaints of bias are protected by statutory retaliation provisions.

A. In cat's paw cases the power of the agency relationship to aid discrimination is sufficiently weakened to such a degree that an affirmative prevention defense is appropriate.

Petitioner argues that Proctor Hospital should be vicariously liable for the discriminatory animus of Korenchuk under agency principles because he acted in the scope of his employment by engaging in a number of "employment-related responsibilities".[23] that led to Staub's termination. This argument overlooks the long accepted principle recognized by this Court in *Ellerth/Faragher* that a supervisor engaging in discrimination is generally not

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promotes this affirmative defense, after discussing the disadvantages of requiring employers to engage in investigations to avoid liability. *See* Befort, *supra*, note 19.

[23] Petitioners Br. at 30.

considered to be acting within the scope of employment,[24] counseling against a "mechanical application" of agency principles. In those cases, the Court recognized that misuse of supervisory authority alone does not always place the actions clearly within the scope of employment for purposes of determining employer liability.[25]

In *Ellerth/Faragher* this Court considered when employers would be liable for the uncondoned discriminatory actions of supervisors outside the scope of employment. Further analyzing agency principles, the Court concluded that where supervisors take a "tangible employment action," there is a clear indication that the agency relationship, whatever its "exact contours," aids the supervisor in the commission of an unlawful employment action, thereby foreclosing any affirmative defense by the employer. But where supervisors take no tangible employment action, the Court found they are not "obviously" aided by the agency relationship. *Ellerth*, 524 U.S. at 763. Employers can thus avoid liability if they are able to meet the requirements of an affirmative defense. In short, when a supervisor is acting outside of the scope of his or her employment, a supervisor's direct ability to impose harm through a tangible employment action is what makes the agency relationship clear and what forecloses an affirmative defense to the employer. While the United States asserts that it is enough for a supervisor's actions to

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[24] *Ellerth*, 524 U.S. at 744"As Courts of Appeals have recognized, a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer."

[25] *Faragher*, 524 U.S. 775, 801.

"result" in a tangible employment action,[26] this argument ignores the frequent references in *Ellerth* to the supervisor actually taking the action himself or herself.[27]

In a "cat's paw" case *there is a tangible employment action, but it has not been taken by a biased supervisor but instead by an unwitting actual decision-maker*. Indeed in "cat's paw" cases the biased supervisor lacks authority to take tangible employment actions and must purposely mislead or deceive the decision-maker to achieve his or her desired end. Except perhaps where the decision-maker routinely "rubber stamps" or engages in only a brief or perfunctory review,[28] the agency relationship as a basis for liability is more

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[26] Brief of United States at 16.

[27] "For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate." *Ellerth*, 524 U.S. at 763-64. "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 769 (Thomas, J., dissenting). In discussing tangible employment actions, the Court does cite *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), a "cat's paw" case, noting that supervisors' tangible actions may sometimes be subject to review and that supervisors must sometimes obtain the "imprimatur of the enterprise." *Id*. at 762.

[28] *Cf. Shager*, 913 F.2d at 405 (looking to causation as linchpin in ADEA case to find employer liable for discriminatory animus of supervisor who recommended termination of older worker; court noted supervisor's recommendation may have been "decisive" because review committee performed only "brief" and "perfunctory" review that no committee member could recall).

attenuated than where the supervisor has direct authority to hire and fire, thus making an affirmative defense appropriate.

B. The *Ellerth/Faragher* defense promotes the deterrent purposes of federal non-discrimination statutes.

Unlike the approach the Petitioner advocates here—strict and unswerving application of agency principles—this Court has recognized that in discrimination cases, imposition of employer liability may sometimes turn on accommodating "equally basic" statutory goals such as promoting the adoption of anti-harassment policies by employers and encouraging employees to report harassing conduct before it escalates.[29] Two of the purposes of USERRA are "to encourage noncareer service in the uniformed services by eliminating and minimizing the disadvantages to civilian careers and employment which can result from such service"[30] and "to prohibit discrimination against persons because of their service in the uniformed services."[31] Similarly, the primary purpose of other federal employment statutes, including Title VII, is to prevent discrimination.[32] *See Faragher*, 524 U.S. at

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[29] *Faragher*, 524 U.S. at 807.
[30] USERRA, 38 U.S.C. § 4301 (a)(1) (2006).
[31] *Id*. at § 4301(a)(3).
[32] When determining subordinate bias claims, lower courts have applied the same legal principles to Title VII, ADEA, and ADA cases. *See Hill v. Lockheed Martin Logistics Management, Inc*., 354 F.3d 277 (4th Cir. 2004), (noting Title VII and ADEA define "employer" the same); *Russell v. McKinney*, 235 F.3d 219 (5th Cir. 2000) (ADEA case); *Iduoze v. McDonald's Corp*., 268 F.Supp.2d 1370 (N.D. Ga. 2003) (ADA case). Lower courts will

805-06 ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' [citations omitted], its 'primary objective' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.").

By adopting a similar affirmative defense in "cat's paw" cases, this Court will further the statutes' deterrent purpose by encouraging 1)employers to create and enforce policies prohibiting discrimination; 2)employees to come forward early with discrimination complaints; and 3)employers to investigate and resolve complaints. Upon receiving a complaint of subordinate bias, an *Ellerth/Faragher* prevention defense would encourage employers to do an investigation *when it makes sense to do so*, instead of requiring an investigation before taking *any* adverse employment action based on input from subordinates. Ideally, the *Ellerth/Faragher* defense will help prevent actual decision-makers who have been informed by biased subordinates from taking tainted adverse employment actions.[33] Even if the employer erroneously concludes after receiving and investigating an employee's complaint of subordinate bias that no such bias existed and is subsequently successfully sued, at least the employer is not blind-sided by the subsequent discrimination lawsuit.

An employee who skips an opportunity to raise concerns about discrimination before an

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likely apply the Court's ruling here to "cat's paw" suits brought under these other employment statutes.

[33] *Cf. Shager*, 913 F.2d at 405 (noting that review committee accepted biased supervisor's information as plausible, in part because it was not "conversant with the possible age animus that may have motivated [the] recommendation").

adverse employment action is taken should not be rewarded with a federal cause of action for discrimination premised on the "cat's paw" theory of liability.[34] Yet this is exactly what happened in *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, and may continue to happen if the Court adopts "cat's paw" liability without a suitable defense for employers. In both cases despite the availability of a full and fair hearing during which the plaintiffs could have raised concerns about discrimination but did not, the courts entertained "cat's paw" claims. Dissenting and concurring opinions in both cases appropriately suggest that offering employees a mechanism for complaining about the bias should be enough to avoid "cat's paw" liability.[35]

Most school boards have mechanisms in place to receive and respond to complaints of subordinate bias or other discrimination. Aside from formal hearings related to employment actions, school boards typically have complaint procedures for any

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[34] *See generally Faragher,* 524 U.S. at 806-07 ("If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so... If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care").

[35] *See Kramer*, 157 F.3d at 629 (Hansen, J., dissenting) (expressing concern that teacher had "sandbagged" school board by not revealing concerns about discrimination during a five-hour school board hearing and then "blindside[d]" the board with a subsequent Title VII lawsuit). *See Mateu-Anderegg*, 304 F.3d at 628 (Ripple, J., concurring) (stating school board did not rubber stamp principal's recommendation to non-renew a teacher where board planned to conduct independent inquiry into reasons for non-renewal but teacher declined to participate).

citizen, including employees, to use to raise concerns through the district's chain-of-command. A person raising a complaint who is not satisfied by working with administrators can ultimately raise the issue with the board.[36] Moreover, concerns about discriminatory actions also can be raised at regular board meetings where individuals, including employees, can address the board directly by asking to be placed on the agenda or speaking during the public comment period.[37]

Importantly, school boards, as public employers and recipients of federal funds, are bound by numerous federal and state non-discrimination mandates, including USERRA.[38] In compliance with these laws, virtually all school districts adopt non-

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[36] *See e.g.*, Montgomery County Public Schools, Responding to Inquiries and Complaints from the Public, http://www.montgomeryschoolsmd.org/departments/policy/pdf/klara.pdf (last visited Aug. 23, 2010); Tulsa Public Schools, Public Concerns and Complaints, http://www.tulsaschools.org/district/bp/1302R.shtm (last visited Aug. 23, 2010).

[37] BECOMING A BETTER BOARD MEMBER at 44. ("Your board should have a policy on how citizens can request speaking time, when they can speak, how many citizens can speak, and how long they can speak.").

[38] Other federal non-discrimination laws applicable to school districts include: Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.;* Section 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981; Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*.

discrimination policies,[39] develop complaint and administrative procedures specifically for employees,[40] and disseminate these policies and procedures through various means, including district policy manuals, employee handbooks, and in service training. These policies typically include procedures for reporting and investigating discrimination complaints to ensure the alleged misconduct is addressed and resolved at the earliest point possible.

In fact, many school board policies oblige all employees, including supervisors, to report discriminatory misconduct specifically to detect unlawful discrimination from the outset. For these processes to be most effective, employees must come forward and raise discrimination issues with their employer *before* filing a lawsuit. This Court should reaffirm the importance of encouraging employees to bring forward complaints of discrimination immediately, so as to prevent and remedy

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[39] BECOMING A BETTER BOARD MEMBER at 171 (noting typical hiring policy includes equal employment opportunity clause and nondiscrimination statement.). *See also* U.S. Department of Education, Office for Civil Rights, Notice of Non-Discrimination, http://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html (last visited July 19, 2010) (listing numerous anti-discrimination laws and requisite notices affecting school districts).

[40] BECOMING A BETTER BOARD MEMBER at 177 ("A grievance procedure should begin with an informal attempt to resolve the problem with the employee's immediate supervisor. If the initial step doesn't provide relief the complainant finds satisfactory, most grievance procedures allow for a written complaint and response at the same level. Then, subsequent appeals move along, step-by-step, up through the chain of command. Finally, if the employee still is not satisfied with the administrative response, a typical grievance procedure allows for further appeal in the form of a hearing before the superintendent, or in some cases, before the school board.").

discrimination; where the employer has indicated it is ready, willing, and able to receive and act on such complaints, an *Ellerth/Faragher* type defense should be available in "cat's paw" cases.[41]

C. Putting onus on the employee to come forward is the most practical way to actually uncover subordinate bias.

The *Ellerth/Faragher* prevention defense puts the burden on employees to come forward with complaints of subordinate bias, assuming the employer has procedures in place to receive and respond to such complaints. As discussed in Section II.D., it is neither realistic to investigate every employment decision that involves subordinate input nor to assume that a biased subordinate will confess even if asked directly in such an investigation. For these reasons, the onus of revealing subordinate bias is reasonably placed on the person who experienced it. The Seventh Circuit has acknowledged the practical importance of employees coming forward to put the employer on notice of subordinate bias. *See Brewer v. Board of Trustees of the University of Illinois*, 479 F.3d 908, 919 (7th Cir. 2007) ("No one suggested that [the plaintiff] was unable to bring [information that his supervisor was racist and told him to do what he was fired for doing] to [the actual decision-maker's] attention, and until [the plaintiff] did so [the actual decision-maker] had no reason to suspect that there were additional relevant facts

[41] *Ellerth*, 524 U.S. at 764 ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.").

that she had not investigated."). In short, without the prevention defense, employees who do not step forward to disclose subordinate bias but instead allow it to progress in severity can still claim that the very same discrimination should be imputed to an employer unaware of the discrimination for purposes of determining liability for an adverse employment action.

D. Anti-retaliation provisions in federal employment anti-discrimination laws are intended to protect employees who report discrimination.

USERRA[42] and other federal anti-discrimination employment laws[43] protect employees from being retaliated against for reporting discrimination, including the bias of subordinates. These anti-retaliation provisions "prevent employers from misusing their authority in order to deter discrimination claims and inhibit the effectiveness of anti-discrimination provisions."[44] The employee's initial claims of discrimination need not even been true, just reasonable, because "a violation of the retaliation provision can be found whether or not the challenged practice ultimately is found to be unlawful."[45] By providing anti-reprisal provisions,

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[42] 38 U.S.C. § 4311(c)(2).

[43] ADEA, 29 U.S.C. § 623(d); ADA, 42 U.S.C. § 12203(a); Title VII, 42 U.S.C. § 2000e-3(a).

[44] Nancy L. Caplinger & Diane S. Worth, *Vengeance is Not Mine: A Survey of the Law of Title VII Retaliation*, 73 APR. J. KAN. B.A. 20, 21 (2004).

[45] Terry Smith, *Everyday Indignities: Race, Retaliation, and the Promise of Title VII*, 34 COLUM. HUM. RTS. L. REV. 529, 555

the statutes "contemplate[] that employees will play a critical role in deterring discrimination."[46] Given this protection, it is reasonable to obligate employees to report subordinate bias under a prevention defense, so long as employers have procedures in place to receive and respond to complaints of discrimination.

While arguably some employees do not report discrimination because of fear of reprisal, the number of people taking advantage of anti-retaliation provisions in the past few years has greatly increased.[47] Many "cat's paw" plaintiffs have a long history of employment difficulties (caused by discrimination or otherwise) and at least suspect their continued employment is uncertain well before they are recommended for termination.[48] Employees who suspect that a discriminatory adverse employment action is imminent cannot plausibly claim they fear retaliation since they already believe their jobs are in jeopardy. At that point, they have

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(2003) *quoting* U.S. EEOC, EEOC Compliance Manual 6509 (Judith A. Tichenar et al. eds., 2001).

[46] Smith, *supra* note 43, at 530.

[47] Caplinger, *supra* note 42, at 35.

[48] *See, e.g.*, *Staub*, 560 F.3d at 654 (employee had history of frequent complaints made against him); *Brewer*, 479 F.3d at 910-12 (employee involved in multiple disputes with supervisor); *Mateu-Anderegg*, 304 F.3d at 621-22 (principal met with teacher multiple times to discuss performance problems); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 921-22 (8th Cir. 2002)(history of animosity between employee and supervisor); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 158-59 (2d Cir. 2001) (employee cited by supervisor for various violations and received list of improvements to make to avoid termination).

little to lose and much to gain by reporting discrimination.[49]

CONCLUSION

For the foregoing reasons, *Amicus* requests this Court to affirm the Seventh Circuit's decision to the extent it places limitations on employer liability under federal anti-discrimination statutes for the bias of non-decision-making employees. *Amicus* respectfully urges the Court in making its decision to take into account the legal requirements and governance realities that school districts, as public employers, face and to place some responsibility on plaintiffs to report discrimination before an adverse employment action is taken by an unbiased decision-maker unaware of the discriminatory animus of a subordinate.

Respectfully submitted,

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[49] Befort, *supra* note 19, at 421 ("Employees who are on the brink of discharge due to subordinate bias will not have that same fear, but instead will see the reporting procedure as the last chance to save their jobs.").