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 PETITIONER

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QUESTION PRESENTED

In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

PARTIES

The petitioner is Vincent E. Staub. The respondent, Proctor Hospital, is a subsidiary of Proctor Healthcare, Inc.

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STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 25, 2009. A timely petition for rehearing and rehearing en banc was denied on April 28, 2009. The petition for writ of certiorari was filed on July 22, 2009. Certiorari was granted on April 19, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4303(4)(A) of 38 U.S.C., a provision of the Uniformed Services Employment and Reemployment Rights Act, provides:

> [T]he term "employer" means any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including— (i) a person, institution, organization or other entity to whom the employer has delegated the performance of employment-related responsibilities.

Section 4303(13) of 38 U.S.C. provides in pertinent part:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty . . . .

Section 4311(a) provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Section 4311(c) of 38 U.S.C. provides in pertinent part:

> An employer shall be considered to have engaged in actions prohibited — (1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service. . . .

STATEMENT OF THE CASE

Hostility to Staub's Reservist Status

At the time of the events giving rise to this action Vincent Staub was[1] a First Sergeant in the United States Army Reserves, in which he had served since 1984. Staub was the Noncommissioned Officer In Charge of the Department of Radiology at either the 801st Combat Support Hospital at Fort Sheridan, Illinois, or the 114th Combat Support Hospital at Fort Snelling, Minnesota. His obligations to the Reserves require him to work for his Reserve Unit—to "drill"—one weekend a month and to train full time for an additional two to three weeks each year. Like reservists generally, Staub was also obligated to respond when recalled by the Army to active duty. He was called to active duty in early 2003 in connection with Operation Iraqi Freedom, and served for several months at Ft. Stewart/Ft. Gordon Georgia, instructing Army personnel on how to establish a Radiology unit in a field hospital in a combat environment.

For fourteen years prior to his dismissal Staub was an angiography technician in the Diagnostic Imaging Department of the Proctor Hospital in Peoria, Illinois, responsible for assisting physicians in a variety of medical procedures, including angiography, angioplasty, and stenting.[2] In late 2000 Janice Mulally became the

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1. In August 2009 Staub retired as a member of the Army Reserves, having served for almost twenty-five years. Staub remains subject to being recalled to active service.

2. Record, Vol. 5 at 322-26.

second in command of the Department[3], and was "the de facto supervisor for the angio techs." (JA 105a). She "was also in charge of scheduling for the department." (*Id.*). Over time Mulally grew increasingly hostile to Staub's service in the Reserves.[4] "Mulally's negative opinion of Staub's military service and the effects of that service on the hospital is well documented in the record." (JA 111a).[5]

Prior to Mulally's appointment Staub had weekends off, and thus was able without difficulty to meet his obligation to train with his unit one weekend per month. But Mulally placed Staub back in the weekend work rotation, which necessarily created conflicts with his drill schedule.[6] "Mulally did this even though she had advance notice of Staub's military obligations."

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3. "The record shows that the de facto supervisor for the angio techs . . . was Jan Mulally. . . . Mulally was also in charge of scheduling for the department." (JA 105a).

4. The Statement of the Case summarizes the evidence adduced at trial in support of Staub's claims. There was conflicting testimony regarding many of the important factual allegations. For example, Mulally and Korenchuk (the head of the Department) disputed testimony that they had made remarks and taken actions indicating hostility towards Staub's military service.

5. There was, the court of appeals acknowledged "abundant evidence of Mulally's animosity" (JA 49a), and at least "part of this animus flowed from [Staub's] membership in the military." (JA 38a). See JA 49a (testimony regarding Mulally was "the strongest proof of anti-military sentiment"), 81a (record is "'well documented' that Mulally had negative opinion about Staub's military service").

6. Record, Vol. 5 at 333.

(JA 33a).[7] When Staub raised the issue with her, "Mulally responded to Staub's questions by throwing him out of her office and saying she 'didn't want to deal with it.'" (*Id.*).[8] "[O]ccasionally Mulally made Staub use his vacation time for drill days or scheduled him for additional shifts without notice." (*Id.*). In addition, "[s]ometimes Mulally . . . would post a notice on the bulletin board stating that volunteers were needed to cover the drill weekends, portraying Staub as irresponsible." (*Id.*). Her actions "had the effect of breeding resentment and animosity toward Staub among his co-workers." (JA 106a-07a; see JA 95a).

> Mulally made her reasons plain: She called Staub's military duties "bullshit" and said [having to work] the extra shifts were his "way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves."

(JA 34a). Mulally's own supervisor, Michael Korenchuk, "told one of Staub's coworkers, Amy Knoerle, that Mulally was 'out to get' Staub." (*Id.*).

> Bad as that was, things became worse in 2003 [when] Staub was called to active duty . . . Staub's return home was less than pleasant. . . . [W]henever Staub approached Mulally about drill obligations, Mulally would roll her eyes and make sighing noises.

(*Id.*). When Staub attempted to discuss his Reserve obligations with Mulally, she told him to "get the

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7. See Record, Vol. 5 at 334.

8. See Record, Vol. 5 at 335.

F— out" and referred to his Reserve duties as "bullshit."[9]

In July of 2003 Mulally complained to several of her subordinates that Staub's "military duty was a strain on the [] department," and sought assistance to "get rid of him." (JA 34a-35a). In early 2004 Mulally called the administrator of Staub's Army Reserve unit, Joseph Abbidini, to ask if Staub could be excused from some of his military duties. When Abbidini explained that the training was mandatory, Mulally "called Abbidini an 'asshole' and hung up." (JA 37a; see JA 95a, 107a). Mulally scheduled Staub to work during every one of his drill duty weekends in 2004, as well as during the period when he was required to report for soldier readiness training, in anticipation of being recalled to active duty.[10] There was "abundant evidence of Mulally's animosity." (JA 49a).

The head of the Department, Michael Korenchuk, on a number of occasions also repeatedly expressed hostility towards Staub's reserve duties.

> [T]hose comments were none too subtle. Korenchuk characterized drill weekends as "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayers[']money."

(JA 34a). Korenchuk further complained that Staub's 2003 call-up in support of Operation Iraqi Freedom had

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9. Record, Vol. 5 at 335, 338.

10. Record, Vol. 5 at 375.

been costly to the hospital, and he expressed unhappiness that Staub's anticipated deployment in 2004 would also be expensive for the employer.[11]

Despite the hostility of these officials Staub had an excellent evaluation in December 2003, only four months prior to his dismissal. Staub received the highest possible rating in 9 of 10 categories, and had the same overall rating as Mulally.[12]

The Events Leading to the Dismissal of Staub

The dismissal of Staub involved two related events in early 2004. In late January 2004—two weeks after Staub informed his supervisors that he was likely to be recalled to active duty—Mulally issued a serious (and hotly disputed) "Corrective Action" discipline to Staub and Leslie Sweborg, another angiography technician, a disciplinary order that later played a key role in the dismissal of Staub. There was considerable evidence that the Corrective Action contained and was based on statements which Mulally well knew to be false.[13] Mulally

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11. Record, Vol. 5 at 124-25, 352.

12. Record, Vol. 3 at 91, 131-34.

13. Mulally based that disciplinary action on the asserted improper failure of Staub and Sweborg to assist with diagnostic imaging procedures outside the Angiography Lab. Mulally claimed that on the date and time in question Staub and Sweborg had no patient of their own in the Angiography Lab, and had flatly refused to assist in other procedures. Staub and Sweborg testified that none of that was true. Mulally grounded the disciplinary action on the supposed existence of a standing

(Cont'd)

personally signed the "Corrective Action," which was cosigned by Korenchuk and a Human Resources official. (JA 75a).[14] That directive ordered Staub (and Sweborg) never to leave the diagnostic area "unless [he] specified to [Korenchuk] or [Mulally] where and why [he should] go elsewhere." (JA 37a).

The second incident occurred on April 20, 2004, the day Staub was fired[15]; here too the key facts were the subject of conflicting testimony. According to Staub and Sweborg, after working all morning in the Angiography Lab, they finished at lunch time and decided to go to lunch. Mindful of the January warning, they went to Korenchuk's office, but he was not there; Staub then called and left a voicemail on Korenchuk's phone, explaining that he and Sweborg would be in the hospital cafeteria. Staub and Sweborg returned to the Angiography Lab within 30 minutes and went back to work. Korenchuk showed up a few moments afterwards,

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(Cont'd)
order that all angiography technicians were to go the general diagnostic imaging unit whenever there was no angiography patient. Staub and Sweborg testified there was no such standing order, and that they had a patient in the Angiography Lab at the time in question. (JA 36a-37a).

14. Record, Vol. 5 at 168.

15. Buck insisted that the incident occurred on the 19th, and that pursuant to her invariable practice she had waited 24 hours before firing Staub. Korenchuk as well as Staub and Sweborg testified that the incident occurred on April 20. The court of appeals, assuming a somewhat unusual role, "f[ou]nd the collective recollection of Staub, Sweborg, and Korenchuk more credible." (JA 38a).

demanding "to know where they had been." (JA 39a). Korenchuk then escorted Staub to the office of Linda Buck, the Vice President for Human Relations,

> picking up a security guard along the way. . . . [T]he decision to terminate was already made. As Staub walked into the room, Buck handed him his pink slip. The guard then escorted him off the grounds.

(*Id.*). Buck testified that Korenchuk never told her that Staub had left a voicemail message when he and Sweborg went to lunch.[16] Sweborg was not disciplined. (JA 39a).

Staub subsequently filed a grievance contesting his termination, and asserting, *inter alia*, that the critical January 27 warning "was fabricated by Mulally to get him in trouble." (JA 40a).[17] "Buck did not follow up with Mulally about this . . . and she did not investigate Staub's contention that Mulally was out to get him because he was in the Reserves." (JA 40a). "Buck . . . failed to pursue Staub's theory that Mulally fabricated the write-up." (JA 51a). Had Buck investigated, "she may have discovered that Mulally indeed bore a great deal of anti-military animus." (JA 51a; see JA 40a ("Buck failed to speak with other angio techs who worked with Staub")).

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16. Record, Vol. 5 at 71, 108.

17. See Record, Vol. 3 at 59-63.

Proctor's Accounts of Role of Korenchuk and Mulally In the Dismissal

The basis of the decision to dismiss Staub, and the role played in that decision by Korenchuk and Mulally, were disputed at trial. The immediate triggering event was a meeting on April 20, 2004 when Korenchuk went to Buck's office and made a statement to Buck about Staub's asserted failure to report in before leaving his work station. In making her decision Buck relied, at least in part, on the January 27 directive, whose existence Staub claimed had been orchestrated by Mulally. Buck had no personal knowledge regarding Staub's actions on April 20 or the matters described in the January 27 Corrective Action. There was conflicting evidence as to what else occurred on the day in question.

When Staub was dismissed on April 20, 2004, Buck filled out a "Corrective Action" sheet setting forth the reason for the termination. That form required her to "explain in detail" the reasons for her action. Her handwritten explanation was as follows:

> Vince received a warning on 1/27/04 which stated, "Vince will report to Mike or Jan when they have no patients and cases are completed. He will remain in the general diagnostic area unless specifies to Mike or Jan where and why he will go elsewhere." *To date Vince has ignored that directive.*

(P.X. 25, JA 74a)(emphasis added). The last sentence indicated that at the time of the dismissal Buck believed—presumably on the basis of what Korenchuk had just told her—that Staub had never complied at all

with the January 27 directive during the period of almost three months since it was issued. At trial Buck testified that Korenchuk told her Staub "never reported in," and that the explanation in the "Corrective Action" was "the reason why [Staub] was terminated."[18]

Korenchuk, on the other hand, did not testify that Staub had never reported in, or that he had so informed Buck. Rather, Korenchuk insisted that he had told Buck on April 20 that Staub on that particular date had left his work station and been impossible to locate.[19] Buck, on the other hand, insisted that Korenchuk had never told her that Staub had reported in by leaving a voicemail for Korenchuk.[20]

At trial, Buck described a number of other supposed problems in Staub's work history. Buck stated that she reviewed Staub's personnel file only after the decision to dismiss Staub had been made. Korenchuk, on the other hand, testified that other problems were discussed before the dismissal decision.[21] None of these other matters were listed on the contemporaneous "Corrective Action" sheet. That form clearly called for a complete account of the reasons for the disciplinary action described. The form contained 14 separate boxes (such as "discourtesy" or "policy violation") that the

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18. Record, Vol. 5 at 71.

19. Record, Vol. 5 at 129.

20. Record, Vol. 5 at 71.

21. Record, Vol. 5 at 102-03 (testimony of Buck), 145 (testimony of Korenchuk).

official preparing it was to check if the specified problem was among the reasons for the action. If a reason at issue did not fall under one of the listed categories, there was a separate box marked "other" that could be checked, and yet another box into which the official could write any reason. (JA 74a). Below the boxes was the instruction "**Explain in detail** item or items checked. Please give date and time of specific incident." (*Id.*)(emphasis in original).

When completing this form in April 2004, Buck had checked only boxes that were relevant to Staub's asserted failure to report in under Mulally's newly imposed rule. And in Buck's "expl[anation] in detail" of those checks, she referred only to Staub's asserted complete failure to obey the directive to report in when leaving his post.

The District Court Proceedings

At trial, there was sharply conflicting testimony about many of the relevant facts, including the alleged anti-military remarks of Mulally and Korenchuk, and the events of January and of April 20.[22] Proctor "dispute[d] the vast majority of the facts" adduced by Staub. (JA 112a). "[T]he testimony and documentation about who said what to whom was hotly contested." (JA 57a). "There remain[ed] a question of fact about the degree of Mulally's influence." (JA 87a). The magistrate judge

22. In denying Proctor's motion for summary judgment, the magistrate judge noted that "[t]he evidence presented by the two sides indicates important factual inconsistencies which must be clarified before a jury." (JA 110a).

who presided over the case observed that "given the testimony about . . . Korenchuk's role . . . it was not inherently unreasonable or improper for the jury to have disbelieved crucial parts of the testimony offered by . . . Buck and . . . Korenchuk." (JA 58a). "The extent to which the decision to terminate's Staub's employment was colored by the negative attitudes of Mulally and Staub's co-workers was . . . a question of fact." (JA 81a).

After those wide ranging factual disputes were fully aired at trial, the jury returned a verdict in favor of Staub. (JA 41a, 55a). The jury, in response to jury interrogatories, concluded that Staub had proved that his military status "was a motivating factor in the decision to discharge him," and that Proctor had failed to show that Staub "would have been discharged regardless of his military status."[23]

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23. The jury returned the following verdict:

> 1. Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the decision to discharge him?
>
> Yes.
>
> 2. Has the Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status?
>
> No.
>
> 3. Under the law given you in these instructions, did the Defendant act willfully in violation of USERRA in discharging Plaintiff?
>
> No.

(JA 25a-26a, 66a-68a).

The Court of Appeals Proceedings

The court of appeals reversed. It held that it was legally irrelevant whether Korenchuk or Mulally had caused Staub's dismissal, because neither of those biased officials had a "singular influence" over Buck, such that Buck was a mere "cat's paw" of Korenchuk or Mulally. (JA 50a). The court of appeals acknowledged that the actions of Korenchuk and Mulally had played a role in Buck's decision. "Without the January 27 write-up . . . and the event on April 20 . . . Buck said she would not have fired Staub." (JA 39a; see *id.* ("Buck's testimony made clear that . . . she relied on Korenchuk's input")). (JA 39a-40a). But the Seventh Circuit held that was insufficient as a matter of law because the defendant had immunized itself from liability by adducing testimony by Buck that she had relied in part on a source of information other than the assertedly biased employees. (JA 50a-51a).

The court of appeals held that it was improper to admit any of the evidence that Mulally or Korenchuk harbored animus toward Staub because of his military service. Because, under the Seventh Circuit's legal standard the employer was responsible only for Buck's motives, and because Staub had never claimed that Buck herself shared the anti-military animus of the others, the court of appeals overturned the jury verdict, and directed entry of judgment for the defendant. (JA 51a).

Staub filed a timely petition for rehearing en banc. The petition was denied on April 28, 2009. (JA 53a).

SUMMARY OF ARGUMENT

I. When Congress enacts legislation imposing liability on employers for prohibited conduct, it is presumed to have intended that a defendant's liability for the actions of its officials will be governed by traditional agency principles. The terms of USERRA are consistent with agency law, providing that the definition of an employer includes any person "to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4304(a)(i).

"It is well established that traditional vicarious liability rules make principals or employers vicariously liable for the acts of their agents or employees in the scope of their authority." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). An official acts as an agent of the employer when the official is performing the kind of work assigned by the employer or is aided in his or her action by his position. *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742, 759-60 (1998).

Personnel decisions at most employers are frequently the result of a chain of decisionmaking, in which a series of officials, each playing distinct roles, make separate decisions and take different actions. So long as a biased official in so doing acts as an agent of the employer, the employer is liable for injuries caused by the official's conduct. It makes no difference whether or not the discriminatory official is the last or "ultimate" decisionmaker.

The biased officials in this case, Korenchuk and Mulally, clearly were acting as agents of Proctor Hospital. As Staub's supervisors, Korenchuk and Mulally were engaging in traditional employment related responsibilities of supervisors when either reported on Staub's actions,

provided information about him to Human Resources officials, participated in discussions about Staub's status, and issued a disciplinary "Corrective Action" to Staub.

II. The Seventh Circuit erred in failing to consider whether Korenchuk and Mulally were agents of Proctor, and instead applied that circuit's "cat's paw" or "singular influence" standard.

The Seventh Circuit cat's paw standard is a severe departure from settled agency principles. Under that standard an employer is ordinarily absolved from liability for injuries caused by its officials so long as the last official in the decisionmaking chain—the ultimate decisionmaker—had no unlawful purpose. Traditional agency principles contain no such restriction. An investment bank is liable if its CFO knowingly places materially inaccurate information in a prospectus used to sell financial products, regardless of whether the CEO who finally approved the prospectus—the ultimate decisionmaker—was unaware of those misrepresentations and has no personal intent to defraud investors.

The courts will ordinarily apply traditional agency principles unless Congress has expressly directed that they not do so. See *Domino's Pizza, Inc. v. Mcdonald*, 546 U.S. 470, 477 (2006)(declining to "make[] light of" or "ignor[e]" agency law without congressional direction). USERRA contains no such direction. To the contrary, USERRA imposes liability where an unlawful discriminatory purpose was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c)(1). The statute is not limited to instances in which such a discriminatory purpose was a consideration in the mind of the ultimate decisionmaker, or of a person with "singular influence" over the ultimate decisionmaker.

The court of appeals reasoned that in the absence of "singular influence" it would be improper to "impute[] to" Buck the motives of Korenchuk or Mulally. But whether Proctor can be held liable turns on whether under agency law the unlawful animus of Korenchuk or Mulally is imputed to the employer (Proctor), not to another official (Buck). Proctor, not Buck, is the defendant in this action.

The "singular influence" standard would encourage employers to evade the commands of USERRA simply by assigning final decisions to human resources officials with little personal knowledge of the relevant facts. Under the decision below, an employer is not liable so long as the human resources official who made the final decision merely considered some information from an unbiased source, even though the official ultimately decided to dismiss a plaintiff based on inaccurate reports, information or recommendations from a biased official.

There is no reason to assume that Congress intended to hobble the enforcement of USERRA in this manner. Nothing in USERRA indicates that Congress desired such a uniquely stingy standard to apply to a law designed to ensure that those who willingly put their lives on the line to defend the Nation would not also have to sacrifice their economic livelihoods. To the contrary, this Court has long held that USERRA is "to be liberally construed for the benefit of the returning veteran." *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).

The express purpose of USERRA is to "minimiz[e] the disadvantages to civilian careers and employment which can result from [military] service." 38 U.S.C.

§ 4301(a)(1). That purpose is clearly frustrated by an interpretation of USERRA that denies relief whenever biased supervisors impose those very disadvantages by laundering their unlawful purposes through a guileless human resources official.

III. The jury in this case concluded that Staub's military service was a motivating factor in his dismissal. It further held that Proctor had failed to demonstrate that it would have dismissed Staub in the absence of his military service. There was ample evidence to support both of these determinations. This allocation of the burdens of proof was dictated by the terms of the statute. 38 U.S.C. § 4311(c)(1).

Even though Proctor was unable to show it would have fired Staub regardless of his military status, the court below held that "the employer is off the hook if the decisionmaker did her own investigation." (JA 47a).

This judicially fashioned "own investigation" defense has no basis in agency law. So long as Korenchuk or Mulally acted as Proctor's agent, and Proctor cannot show it would have dismissed Staub regardless of their actions, it is irrelevant under agency law whether Buck herself made some separate inquiry.

The Seventh Circuit's "own investigation" defense is inconsistent with the terms of USERRA. Section 4311(c)(1) provides that once a plaintiff has shown that his or her military service was a motivating factor, "[a]n employer *shall* be considered to have engaged in [prohibited] actions . . . unless the employer can prove that the action would have been taken in the absence of

such . . . service." (Emphasis added). The courts have no authority to create an additional defense that precludes imposition of liability under the very circumstance in which section 4311(c)(1) expressly imposes it.

ARGUMENT

This case is controlled by long-established principles of agency law. The question presented is whether Proctor Hospital is legally responsible for injuries to Staub caused by discriminatory actions taken by two supervisory officials, Korenchuk and Mulally. Settled agency law imposes liability on an employer for harms caused by those who act as its agents. Korenchuk and Mulally clearly acted as agents of Proctor Hospital when they engaged in the conduct that led to, and was intended to bring about, Staub's dismissal.

I. AN EMPLOYER IS LEGALLY RESPONSIBLE FOR THE ACTIONS OF EMPLOYEES WHO ACT AS AGENTS OF THE EMPLOYER

(1) USERRA forbids an employer from discriminating against an employee because of his or her military service. Like most federal laws, USERRA does not identify the officials and workers for whose discriminatory actions an employer is liable. Accordingly, in the absence of a contrary congressional direction, this Court applies traditional agency principles.

"[T]he Court has assumed that, when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability

rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). For that reason, the Court has consistently relied on agency principles to decide who is an employee[24], to determine who is an agent for whose actions an employer is liable[25], and to resolve a number of other issues.[26]

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24. *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 445, 448, 449 (2003)(who is an employee under the Americans with Disabilities Act); *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 94 (1995)(who is an employee under the National Labor Relations Act); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-25 (1992)(who is an employee under ERISA); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989)(who is an employee under Copyright Act); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1974)(who is an employee under the Federal Employers' Liability Act); *Logue v. United States*, 412 U.S. 521, 527-28 (1973)(who is an employee of the United States under the Federal Tort Claims Act); *Baker v. Texas & Pacific R.Co.*, 359 U.S. 227, 228 (1959)(*per curiam*)(whether individual was an employee of the employer in question); *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 94 (1915).

25. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 144 (2004); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 801 (1998); *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565-68 (1982).

26. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006)(relying on agency law to determine whether shareholder has claim based on violation of rights of corporation); *Meyer v. Holley*, 537 U.S. 280, 285-86 (2003)(shareholder liability for claims against corporation); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 94 (1994)(ratification).

USERRA's definition of an employer confirms that traditional agency law is the proper reference point. USERRA defines "employer" to include "a person . . . to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4304(a)(i). "Delegation" is a term commonly used in agency law to identify the employees for whose actions a principal is legally responsible.[27] See *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)(use of agency related language indicates intent that agency principles apply).

"It is well established that traditional vicarious liability rules make principals or employers vicariously liable for the acts of their agents or employees in the scope of their authority." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Agency law imposes on a principal liability for the actions of its agents because the principal, having retained those agents to conduct its business and standing to profit from their activities, can in return fairly be held responsible for the injuries inflicted by those agents in the course of those activities.[28]

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27. E.g, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 759-60 (1998)("[w]hen a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule . . . appears to be the appropriate form of analysis"); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986)("[W]here a supervisor exercises the authority actually delegated to him by his employer, by making decisions . . . affecting the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to make them")(emphasis added).

28. W. Seavey, Handbook of the Law of Agency, 141 (1964); 5 F. Harper, F. James & O. Gray, Law of Torts, § 26.5, p. 17 (2d ed., 1956); D. Dobbs, The Law of Torts, 908 (2000).

That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her employment," *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998), as well as in criminal cases. *New York Cent. & H.R.R. Co. v. United States*, 212 U.S 481, 493-95 (1909). It is a rule of strict liability for the actions of an agent, and applies regardless of whether the employer authorized or knew about the acts of the agent. *Railroad Co. v. Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). This Court has repeatedly recognized that such agency principles apply to federal anti-discrimination laws, which USERRA parallels. *Ellerth*, 524 U.S. at 759-60; *Faragher v. City of Boca Raton*, 524 U.S. 775, 784 (1998); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982).

Under respondeat superior an employer can be held liable in several distinct, but often overlapping, circumstances. First, an employer is liable when an official was "aided in" his misconduct by his position. *Burlington Industries Inc. v. Ellerth*, 524 U.S. at 759-60; *Faragher*, 524 U.S. at 784; see Restatement (Second) of Agency, § 219(2)(d). Thus liability is imposed when an employee "exercises the authority actually delegated to him by his employer." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 70 (1986); *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494 (1909)(employees act within the scope of their employment whenever they are "exercising the authority delegated to [them]"). Second, a worker's conduct is within the scope of her employment if she is "performing work assigned by the employer." Restatement (Third) of Agency, § 7.07 (2005); see *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir.

1990)(employer liable when employee does "the kind of thing that [official] is authorized to do")(citing Restatement (Second) of Agency § 228 (1958)).[29]

(2) The application of these principles is straightforward when a disputed employment action, such as a dismissal, was solely the result of a single decision. But except for the smallest employers, employment actions are usually the result of a number of discrete decisions involving two or more different officials, each authorized to play a distinct role. The principles of agency law provide the standard for determining when an employer is legally responsible for the actions of those various officials.[30]

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29. 2 F. Harper, F. James and O. Gray, The Law of Torts 24 (2d ed. 1956)(employer liable when "the servant is engaged in performing what he is hired to do").

30. [T]he allegedly biased subordinate accomplishes his discriminatory goals by misusing the authority granted to him by the employer—for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions.

EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d 476, 485 (10th Cir. 2006); *id*. at 485 ("subordinate bias theories comport with . . . basic agency principles"), 487("causation standard comports with the agency principles that animate the statutory definition of an 'employer.' *See* Restatement § 219 (describing the scope of a master's liability 'for the torts of his servants' and thereby incorporating standard tort concepts like causation)"); *Kramer v. Logan County School Dist. No. R-1*, 157 F. 3d 620, 624 (8th Cir. 1998)("[t]his Court has previously recognized this application of agency principles"); *Long v. Eastfield College*, 88 F. 3d 300,

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This Court has repeatedly recognized that employers, rather than leaving important decisions (particularly dismissals) to the exercise of ad hoc discretion by a single supervisor or manager, frequently utilize instead some sort of "decisionmaking process." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 137, 141 (2000)(plaintiff dismissed by company president based on recommendations of and information from three supervisors); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 236, 248 (1989)(partnership denied by Policy Board after comments by numerous partners and recommendation by Admissions Committee); see *Delaware State College v. Ricks*, 449 U.S. 250, 252 (1980)(tenure denied by Board of Trustees based on recommendation of tenure committee and Faculty Senate).

"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." (Brief *Amicus Curiae* of the Equal Employment Advisory Council, *BCI Coca-Cola Bottling, Co. v. EEOC*, No. 06-341, at 14). "[M]any companies separate the decision-making function from the investigation and reporting functions . . . . [B]ias can taint any of those functions." *EEOC v. BCI Coca-Cola*

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307 (5th Cir. 1996)(allegedly biased officials "as supervisors in their respective departments, had the authority to make recommendations concerning the employment status of their subordinate employees"); *Karibian v. Columbia University*, 14 F. 3d 773, 777 (2d Cir. 1994)(employer liable where supervisor "wields the employer's authority"), cert. denied, 512 U.S. 1213 (1994).

Bottling Co., 450 F. 3d 476, 488 (10th Cir. 2006); see *id.* 491 (supervisor explained "I gather the facts and I present them to our HR department, and they decide whether it is an insubordination or not and whether there's action to be taken or not").

A single disputed employment action will often be the result of a chain of decisionmaking involving several officials each playing a distinct role within the scope of his or her employment.[31] Most disciplinary decisions will result from, and be caused by, a series of such decisions, including

— the decision to report an employee

— the decision to investigate an employee

— the decision to initiate a disciplinary process

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31. *Kant v. Seton Hall University*, 279 Fed. Appx. 152, 155-56 (3d Cir. 2008)(recommendation by School Rank and Tenure committee made to University Rank and Tenure Committee which made recommendation to University Provost); *Back v. Hastings On Hudson Union Free School Dist.*, 365 F. 3d 107 (2d Cir. 2004)(school principal and Director of Pupil Personnel Services made recommendation to School Superintendent who made recommendation to Board of Education); *Ostrowski v. Atlantic Mutual Ins. Co.*, 968 F. 2d 171 (2d Cir. 1992) (recommendation of Senior Vice President to Vice President for Human Resources, who made recommendation to President); *Roebuck v. Drexel University*, 852 F. 2d 715, 723-24, 727 (3d Cir. 1988)(five lawyers of decisionmaking; "at each stage of the process the evaluator . . . considered the reports and recommendations of each previous evaluator")

— the decision to establish the procedures to be followed or standard to be applied

— the decision as to what information will form the record on which action will be taken

— the determination from that record as to what events occurred

— the decision to provide any recommendation

— the decision as to whether particular events violated some applicable rule

— the decision as to what sanction should be imposed for a particular violation

Any disciplinary action will require that several if not most of these distinct decisions be made by *some* official acting as an agent of the employer. All of these decisions and the conduct which they involve fall squarely into the sort of "employment-related responsibilities" that an employer's agent would have. Practical experience in the lower courts makes clear that agents playing any of these roles can use their position to bring about the dismissal of, or other employment actions adverse to, a targeted individual.[32]

An employer, of course, is free to allocate responsibility for these decisions among as few or as many officials as it pleases. But the manner in which an

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32. We set forth in the Appendix to the brief cases illustrating the ways in which this has occurred.

employer does so will not reduce its legal liabilities. So long as the official who takes any particular action does so as an agent of the employer, the employer is liable if that official acts for an unlawful purpose and causes injury to a protected employee.[33]

(3) In the instant case the court below attached particular controlling importance to the last official who took part in the chain of decisionmaking, Vice President Buck. The role of Buck was essentially to select the sanction to be imposed in light of the violation reported (inaccurately) by Korenchuk of the stringent reporting requirement established for Staub by Mulally. But nothing in agency law contemplates that only the last of a series of decisionmakers can be an agent, or attaches greater significance to the act of one agent (e.g., determining the level of sanction) than to the act of another (e.g., reporting alleged misconduct).

So long as the official whose actions led to injury was an agent, it is unimportant whether that official was the first or last in the series of decisionmakers involved. "[W]here a supervisor exercises the authority actually

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33. An employer would not be responsible if someone other than an agent of an employer took a discriminatory action that in turn caused the employer to take an adverse action against a plaintiff, so long as no official knew or had reason to know of that discriminatory motive. For example, an employer is not ordinarily responsible for the motives of a former employer who (for an unlawful reason) may have given a job applicant an adverse recommendation, or for the biases of a patient who may have falsely complained about a health care worker because the patient objected to the worker's race or national origin.

delegated to him by his employer, by making decisions . . . *affecting* the employment status of his subordinates, such actions are properly imputed to the employer whose delegation of authority empowered the supervisor to make them." *Meritor*, 477 U.S. at 70 (emphasis added). In both *Ellerth* and *Faragher* this Court expressly acknowledged and applied the "agency principle[] of vicarious liability for harm *caused by* misuse of supervisory authority." *Ellerth*, 524 U.S. at 764 (emphasis added); *Faragher*, 524 U.S. at 577 (emphasis added); see *Meritor*, 477 U.S. at 70 (employer liable for use of delegated authority "*affecting* the employment status" of a worker)(emphasis added). *Reeves* reiterated that a discrimination plaintiff can prevail by demonstrating that an impermissible consideration "actually played a role in [the employer's decisionmaking] process and had a determinative *influence* on the outcome." 530 U.S. at 141 (*quoting Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)(bracketed material in *Reeves*)(emphasis added). The same agency principles apply here.

Consistent with agency law, USERRA provides that the burden on a plaintiff is to establish that military service was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c). USERRA does not require proof that the impermissible factor have been "a motivating factor" in the action of any particular official, but necessitates only a showing that an impermissible consideration was "a motivating factor" in "the *employer's* action." (Emphasis added). So long as the biased official acted as an agent of the employer—and thus *was* the employer for agency liability purposes—the statutory requirement is satisfied.

(4) Determining whether personnel related tasks are within the responsibilities of a particular official will ordinarily be for the trier of fact. The allocations of such responsibilities commonly are not in writing, and case-specific allocations almost never will be. Although some decisionmaking processes (like a tenure decision) may be highly structured and well established, employers frequently and sensibly distribute responsibility for particular aspects of a decisionmaking process in a highly informal and/or ad hoc manner. The distribution of responsibilities often will simply be a matter of practice. The task of the trier of fact in determining who played what role in a decision may often be complicated by the fact that all the participants are employees of the defendant; although the trier of fact may choose to credit the testimony of such interested witnesses, it need not do so. *Reeves v. Sanderson Plumbing Products*, *Inc.*, 530 U.S. 133, 151 (2000). "It should go without saying that a company's organizational chart does not always accurately reflect its decisionmaking process." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 486.[34]

In the instant case there was ample evidence that Korenchuk was acting as an agent of Proctor—engaging in "employment-related responsibilities"—in his role in the April 20 dismissal. First, it was Korenchuk who initiated the disciplinary process by reporting to Buck (albeit inaccurately) regarding serious misconduct by Staub. Reporting misconduct to Human Resources is ordinarily a core function of line supervisors such as

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34. See *Wells v. New Cherokee Corp.*, 58 F. 3d 233, 238 (6th Cir. 1995)(courts look to actual responsibilities, "whatever the formal hierarchy").

Korenchuk. Second, Korenchuk acted for the employer in determining what information would provide the record before Buck. It was Korenchuk who informed Buck that Staub had never reported in as directed in the January 27 Corrective Action, and who withheld from Buck the fact that Staub had reported in by voicemail on April 20. Korenchuk was precisely the person whom Proctor would have expected to play this role, since it was to Korenchuk (and Mulally) that Staub was to report whenever he left his work station. Providing such information to Human Resources officials is a traditional responsibility of supervisory officials; Proctor does not suggest that this task fell outside of Korenchuk's area of responsibilities. Third, because Buck simply accepted Korenchuk's account of the events in question, Korenchuk was, as a practical matter, accorded the power to determine what facts had occurred. Fourth, Korenchuk participated directly in a discussion with Buck about how Staub should be dealt with, a role that was accorded him as Staub's supervisor.[35]

Mulally was clearly acting in her supervisory capacity in connection with the January 27 Corrective Action.[36] The Corrective Action which she prepared set out inaccurate information provided by Mulally as Staub's supervisor.[37] It was Mulally who personally

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35. Record, Vol. 5 at 129 ("I went down and met with human resources and *we* discussed this and *we* discussed Vince's prior activities")(emphasis added), 145 ("*we* discussed Vince and the problems . . . *[W]e* went over this and *we* went over some other problems")(emphasis added)(Korenchuk testimony).

36. Record, Vol. 5 at 168, 170.

37. Record, Vol. 5 at 120.

wrote the Corrective Action, and in signing it Mulally was assuredly acting as an agent of Proctor.[38]

II. THE SEVENTH CIRCUIT'S "SINGULAR INFLUENCE" AND "CAT'S PAW" STANDARDS ARE INCONSISTENT WITH AGENCY LAW AND USERRA

(1) In holding that Proctor Hospital was not legally responsible for the discriminatory conduct of Korenchuk and Mulally, the court of appeals did not purport to apply either agency law or the terms of USERRA. It relied, rather, on "the cat's paw theory," based on a seventeenth century fable by the French poet Jean de La Fontaine entitled "The Monkey and the Cat."[39] To ascertain the

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38. Record, Vol. 5 at 146.

39. This fable was created in the seventh century B.C. by the Greek writer Aesop, and put into verse by the seventeenth century French poet La Fontaine. In the fable, a monkey and a cat observe chestnuts roasting on a fire in the home of their owner. The monkey persuades the cat to pull the chestnuts from the fire, promising to share the chestnuts and flattering the cat with compliments about his feline dexterity. The cat is persuaded by the monkey, and pulls chestnuts from the fire, singeing his paw in the process. Unfortunately for the cat, he had misjudged the motives of the monkey. While the cat is taking the chestnuts from the fire, the monkey eats them all.

Supervisors do not persuade personnel officials to dismiss workers by promising to share some sort of bonus that the supervisor will receive as a result of the dismissal; employers do not provide financial rewards for adverse employment actions. There appear to be no reported cases in which a supervisor used flattery of a personnel or other official to induct him or her to take an employment action.

controlling legal standard, the Seventh Circuit reasoned, "we turn to the applicability of La Fontaine's 'cat's paw' to 21st century federal anti-discrimination law." (JA 43a). An employer is only responsible for the motives of the ultimate decisionmaker, the Seventh Circuit held, if that decisionmaker was under the "singular influence" of someone else. "To be a cat's paw requires . . . blind reliance, the stuff of 'singular influence.'" (JA 51a). The court of appeals' "singular influence" requirement was imposed "to prevent the cat's paw theory from spiraling out of control." (JA 44a). "If the decisionmaker wasn't used as a cat's paw—if she didn't just take the monkey's word for it, as it were—then of course the theory is not in play." (JA 45a).

Such vivid metaphors[40], whatever their literary provenance, are not part of the corpus of the common law of agency which Congress is presumed to have intended would govern employer liability under USERRA. Whether an official such as Korenchuk or

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40. *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007)("the Fourth Circuit seems to take the cat's paw metaphor too literally": "[t]he metaphor is not a causation rule"); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 488

> subordinate bias cases have suffered from an abundance of vivid metaphors. The Fourth Circuit, for example, seems to have taken the 'cat's paw' metaphor too literally in deriving its total-control-over-the-actual-decision standard. . . . We see no reason to limit subordinate bias liability to situations that closely resemble the 'cat's paw,' 'rubber stamp,' 'conduit,' 'vehicle,' or other metaphors that imaginative lawyers and judges have developed to describe such claims.

Mulally was an agent for Proctor Hospital depends on the nature of their relationship with and responsibilities for their employer, whether they were carrying out their employment-related responsibilities and whether they were using or aided by their authority. What occurred *after* Korenchuk and Mulally acted—how much sway they had over Buck—does not alter after the fact their status as agents.

The Seventh Circuit did not pretend that its "singular influence" requirement has any basis in the common law of agency. Nor did the court of appeals propose that this rule should be applied to any claims except those arising under "federal anti-discrimination law[s]." If the singular influence standard were adopted by this Court as a *general* rule of agency law, the ramifications for corporate compliance with federal and state laws would be monumental. The United States Code is replete with provisions whose applicability (like the USERRA anti-discrimination prohibition) turns on the existence of a particular intent or purpose. There are literally thousands of federal statutes that forbid or regulate conduct taken "because of," "on account of," "on the basis of," or "based on" some prohibited consideration. Fundamental rules of contract and tort turn as well on a defendant's intent. Insofar as these laws apply to corporations, government bodies, or other entities of any size, their effectiveness and even viability would be substantially impaired if the only intent that mattered was the motive of the official who made the last decision in a decisionmaking chain, and the rare individual who exercised "singular influence" over that official.

If, for example, supervisors at a government contractor prepared lavishly exaggerated statements of expenses and wrote up charges for costly but non-existent services, the False Claims Act might not be violated if the accountant who finalized and submitted the bill to the United States did not know what was going on. If Proctor Hospital sold bonds to the public based on an inaccurate prospectus, bond buyers could not demonstrate fraud in the inducement—and get their money back—if the CEO who approved the prospectus had been lied to by Korenchuk (or by the CFO) about the firm's profitability. An investment bank might avoid liability for inaccurate marketing materials if only the trader who drafted those materials, but not the CEO who approved them, was aware of the inaccuracies. A wide range of statutes that govern relations between and the rights of corporations themselves—copyright, patent, securities, anti-trust, trade and other laws—would be affected in unpredictable if not bizarre ways if subject to the Seventh Circuit "singular influence" rule.

The "cat's paw" is assuredly not the usual standard of liability applied to laws other than anti-discrimination statutes. Nothing in USERRA indicates that Congress desired a uniquely stingy conception of agency responsibility to hobble a law designed both to protect the ability of the United States to defend itself through the training and deployment of military reservists, and to ensure that those who willingly put their lives on the line to defend the Nation do not also have to sacrifice their economic livelihoods. Nothing in the Seventh Circuit's decision explains why Congress would have wanted to build into USERRA such an exceptional limitation on the deterrence and correction of unlawful

discrimination against the men and women who serve in the Nation's military reserves.

Beyond that, the principle that corporations are responsible for the knowledge and motives of subsidiary officials, even if those motives are not communicated to ultimate decisionmakers, is a rule that in countless ways protects Proctor Hospital itself. See *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006). When a vendor sells Proctor medical equipment or supplies, Proctor knows it can rely on representations regarding the origin, capacity and content of those materials because the vendor will be liable if any of its officials (not merely some ultimate decisionmaker) were aware that those representations were inaccurate. If medical vendors could hide behind the good faith ignorance of the ultimate decisionmaker who approved such representations, both Proctor and its patients would be in serious jeopardy.

(2) This Court will depart from traditional agency principles only where Congress has expressly so directed. "[T]he courts ordinarily should determine that matter in accordance with traditional principles of vicarious liability—unless . . . Congress . . . has instructed the courts differently." *Meyer v. Holley*, 537 U.S. 280, 290-91 (2003). "Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules." 537 U.S. at 286 (Emphasis in original). "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." 537 U.S. at 285 (*quoting United States v.*

Texas, 507 U.S. 529, 534 (1993)); see *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 477 (2006)(declining to "make[] light of" or "ignor[e]" agency law).

The Seventh Circuit's analysis rests on that court's insistence that in this case it was Buck who was the one and only "decisionmaker" for purposes of USERRA. A plaintiff "must show that the *decisionmaker* harbored animus and relied on that animus in choosing to take action. . . . Buck was the decisionmaker." (JA 41a) (emphasis in original). But the word "decisionmaker," and the phrase "*the* decisionmaker," appear nowhere in USERRA. Instead, the statute imposes liability for discrimination on employers and on those to whom—like Korenchuk and Mulally—employers have given "employment-related responsibilities."[41] Buck may have been the last person in the decisionmaking chain, and in that narrow sense may have made "the ultimate decision" (JA 40a), but she assuredly was not the only decisionmaker in the chain of events that led to Staub's dismissal. Buck decided what sanction should be imposed for the misconduct at issue; but it was Korenchuk who effectively decided (albeit inaccurately) what misconduct Staub had engaged in, since

41. The regulations issued by the Secretary of Labor contain an exemption from the statutory definition of an employer. It excludes from the "employment-related responsibilities" that define an employer "functions that are purely ministerial in nature, such as maintenance of personnel files or the preparation of forms for submission to a government agency." 20 C.F.R. § 1002.5(2)(1)(i). The existence of that regulation indicates that non-ministerial actions that cause unlawful discrimination do fall within the statutory definition of employer.

Korenchuk's account of Staub's asserted failure to report in (whether on April 20 or for months before) was simply accepted by Buck. A jury could find that it was Mulally who effectively imposed the earlier January 27 Corrective Action which Buck believed had been violated. Buck was not, as the court below described her, "*the* decisionmaker" (emphasis added); she was simply one of several decisionmakers.

The court of appeals explained that "the cat's paw theory . . . is a way of proving discrimination when the decisionmaker herself is admittedly unbiased; under the theory, the discriminatory animus of a nondecisionmaker is *imputed to the decisionmaker* where the former has singular influence over the latter and uses that influence to cause the adverse action." (JA 31a-32a)(emphasis added). But whether Proctor can be held liable turns on whether "discriminatory animus . . . is imputed" to the employer (Proctor), not on whether it is imputed to the decisionmaker (Buck). Proctor, not Buck, is the defendant in this action. Whether the discriminatory motive of Korenchuk and Mulally can be imputed to their employer turns on whether those officials acted as agents of the employer, not on the nature of their relationship with or influence over any particular official. *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 392 (1982).

The court of appeals also reasoned that "[d]ecisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more." (JA 51a). But this is not an action against the "decisionmaker" (Buck), but against the corporation

that employed Buck, Korenchuk and Mulally. Proctor Hospital did not "have to" place the ultimate decision to fire Staub in the hands of someone "removed from the underlying situation." The hospital could, for example, have chosen to give that authority solely to Korenchuk. Proctor was not entitled, by giving to one official responsibility for reporting "the underlying situation" and to another official the responsibility for making the "ultimate decision," to escape legal liability for the discriminatory actions of the former.

(3) There is no plausible reason why a Congress that was motivated to protect military reservists from being discriminated against by the very people they risk their lives to defend would have adopted the severe limitation on agency principles that is contained in the Seventh Circuit cat's paw and singular influence standards.

First, given the realities of human resources practices, Congress had no logical reason to attach controlling importance to the actions of the ultimate decisionmaker, while presumptively ignoring all the decisions that may have occurred earlier in the process. Often the only or primary thing determined by the last of the decisionmakers in the disciplinary process is the level of discipline to be imposed on the worker involved. But once a decision has been made (often by someone else) regarding the record (accurate or otherwise) on which that decision will be made, the choice of sanction (even if other information is considered) will often be a foregone conclusion. In this case, for example, the contemporaneous "Corrective Action" memorandum signed by Buck indicates that Buck believed

(presumably because she had been told by Korenchuk) that Staub had never obeyed the January 2004 directive. If that were true, any sensible official in Buck's position would have dismissed Staub. Conversely, if Korenchuk on April 20, 2004, had truthfully told Buck only that Staub before going to lunch on that date had reported in by voicemail, Buck surely would not have disciplined Staub at all, although she might have wondered why Korenchuk had wasted her time with such a pointless report.

Second, the cat's paw rule is at war with other established principles of responsibility under federal anti-discrimination laws. Proctor Hospital would clearly have been liable if Korenchuk, out of unlawful animus toward Staub's military service, had given the same false information to another firm where Staub was seeking employment and thus dissuaded it from hiring Staub.[42] If Korenchuk, by discriminating in that manner against Staub, had prevented him from obtaining a job at another hospital (or gotten him fired by another employer), Proctor would have been liable, even though the "ultimate decisionmaker" at the other employer had no unlawful animus. It is difficult to understand why Proctor should be presumptively immune from liability if Korenchuk gives inaccurate information to a Proctor human resources official, but not when Korenchuk gives the same misinformation to another company's human resources official.

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42. *Bailey v. USX Corp.*, 850 F. 2d 1506, 1509 (11th Cir. 1988); *Smith v. Secretary of Navy*, 659 F. 2d 1113, 1121 (D.C.Cir. 1981); *Rutherford v. American Bank of Commerce*, 565 F. 2d 1162, 1164 (10th Cir. 1977).

Third, the cat's paw rule in some circumstances immunizes discrimination by ensuring that certain discrimination claims will be either premature or too late to vindicate. That is because not every discriminatory action violates federal anti-discrimination statutes. If a discriminatory act by itself has not yet caused any significant harm, it may be not be sufficiently adverse to be actionable.[43] In such situations the lower courts have held that the employer has not (yet) broken the law, and the employee cannot obtain redress until and unless that discriminatory act actually causes some injury. If, for example, Staub had attempted to challenge the January 2004 write up, the lower courts might have dismissed that action as premature. But under the Seventh Circuit's "singular influence" rule, when that January 2004 disciplinary order (presumably just as Mulally intended) actually resulted in Staub's dismissal, and the requisite injury occurred, the employer was no longer legally responsible for the consequences of that earlier discriminatory action.

Fourth, the Seventh Circuit's singular influence rule attaches controlling importance to circumstances that frequently will be exceptionally difficult to assess. While it often may not be a difficult task to determine whether a biased official *caused* a dismissal, it usually will be far harder to determine whether that official had a "singular influence" over another decisionmaker. For example, in this case causation is fairly clear, since Staub

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43. 1 B. Lindemann and P. Grossman, Employment Discrimination Law, 21 (4th ed. 2007). There is considerable disagreement among the lower courts regarding when an employment action is sufficiently adverse to be actionable. This case does not required the Court to address that issue.

would not have been dismissed on April 20 but for Mulally's January 27 write up and Korenchuk's April 20 report. But under the singular influence standard Proctor's liability would turn on whether, after Buck received Korenchuk's report, she considered anything else she knew (from prior meetings, or having seen Staub's file) before making her decision. There usually will be no reliable contemporaneous record of what passed through the mind of the ultimate decisionmaker. Conversations among company officials will usually have been overheard only by officials with an interest in the outcome of the case. Under this liability standard defense witnesses would have a considerable incentive to recollect their mental processes or conversations in a way that minimized the role of the biased official. In the instant case, as in others[44], there is significant

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44. In *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F. 3d 46 (1st Cir. 2000), the court of appeals commented that "[t]he events leading up to th[e] decision are not entirely clear," noting that three company officials gave conflicting accounts of who made the decision and what conversations had preceded it, and that there was evidence the supposedly contemporaneous memorandum explaining the decision "was only written after [the plaintiff] initiated legal proceedings." 217 F. 3d at 52.

In *Gee v. Principi*, 289 F. 3d 342 (5th Cir. 2002), the final decisionmaker initially denied he had participated in a meeting about the plaintiff, and only later admitted that he had. "Asked why he did not disclose this fact [earlier], he responded that he did not know." 289 F. 3d at 347. The final decisionmaker originally claimed that "others were not involved in the [decisionmaking] process, [but] later admitted that he had conferred with several people." *Id.*

> [A]lthough [the final decisionmaker] at first was unable to recall the substance of the statements

(Cont'd)

evidence that the employer's account changed once it realized that the ultimate decisionmaker had relied on information from a biased official. A jury, of course, would not be obligated to accept such accounts. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151

(Cont'd)

> made about [the plaintiff] at the meeting, he later testified that everyone made comments and the general tenor of those comments was unfavorable.

Id. There was a conflict between one witness who recalled that "a consensus against [the plaintiff] was formed at the meeting" and the testimony of the ultimate decisionmaker and the biased officials "who downplayed the significance of the meeting." *Id.*

There was a similar change of explanation in *EEOC v. BCI Coca-Cola Bottling Co.*

> [T]he first explanation provided [for the disputed termination] . . . was "You've been terminated for insubordination, *for not showing up for work.*" . . . The Disciplinary Status Notice unequivocally states that the failure to show up for work . . . *was* the act of insubordination.

450 F. 3d at 490-91 (emphasis in original). In the subsequent litigation

> BCI . . . maintain[ed] that it fired [the worker] solely because of his [alleged] defiant conduct on the phone with [the biased official] . . . and that "[the worker] was not terminated because he did not show up for work . . ." . . . Only later did BCI characterize its decision to fire [the worker] as hinging on his defiant conduct over the phone, rather than on his absence.

450 F. 3d at 491.

(2000). But it seems unlikely that Congress intended to establish a liability standard to protect military reservists that could be so easily manipulated by hostile employers.

The cat's paw rule applied by the Seventh Circuit, moreover, provides an all too simple method by which employers could evade the prohibitions of federal law.[45] Under the "singular influence" standard applied here, an employer is not liable so long as the final decisionmaker relied at least in part on any information that did not come from a biased official. That rule invites employers to largely immunize themselves from liability for violating USERRA or federal anti-discrimination laws merely by requiring human resources officials to go through the motions of reviewing information from

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45. If we applied the rule rigidly, employers could simply create a post for the manager in charge of firing employees and isolate that person so that he or she never met the unlucky employees. Supervisors with no official authority to discharge would effectively make firing decisions before informing this manager, who would then act on the decisions, and the employer would not be liable even if the supervisors admitted discrimination. Companies may not so easily insulate themselves from liability for discriminatory discharges. Instead, courts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee.

Wells v. New Cherokee Corp., 58 F. 3d 233, 238 (6th Cir. 1995).

two different sources, which usually would require no more than a quick pro forma glance at a worker's personnel file.[46] A similarly undesirable effect would follow from a rule limiting liability to cases in which a biased supervisor had expressly recommended the action taken against a plaintiff.

> [R]equiring that an explicit recommendation must cross the desk of the decisionmaker, regardless of whether the subordinate's discriminatory actions in fact caused the termination . . . would leave employees unprotected so long as a subordinate stops short of mouthing the words "you should fire him," in person or on paper, to the decisionmaker.

EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d at 488. The Fourth Circuit's own "ultimate decisionmaker" standard, as a district court judge in that circuit noted, likewise "has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions."[47] Under

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46. Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations.

EEOC v. BCI Coca-Cola Bottling Co., 450 F. 3d at 486.

47. Petition for Writ of Certiorari, *Sawicki v. Morgan State University*, No. 06-306, App. 20a (unpublished opinion).

both the Seventh and Fourth Circuit standards, the greater the number of officials among whom an employer divides up its decisionmaking standard, the smaller the likelihood that the employer will be held responsible for adverse employment actions actually caused by its biased officials, and the less protection will be accorded to military reservists from the discrimination that they all too commonly face for having served and protected the Nation.

The loophole created by this rule is particularly serious because when the discriminatory action of one official leads to dismissal at the hands of another, that result often will have been the very purpose of the earlier discriminatory act. *Stoller v. Marsh*, 682 F. 2d 971, 977 (D.C. Cir. 1982)("[w]hen a supervisor, acting in his official capacity, deliberately places an inaccurate, discriminatory evaluation into an employee's file, he intends to cause harm to the employee"); *Hill v. Lockheed Martin Logistics Mgmnt., Inc.*, 354 F. 3d 277, 300 (4th Cir. 2004)(en banc)(Michael, J., dissenting) (biased official "act[ed] on his bias against [the plaintiff] by orchestrating disciplinary actions against her that made her eligible for termination"); *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1060 (8th Cir. 1993)(biased official "set [plaintiff] up to fail . . . investigation and . . . committee's review" by statements to other officials); *Jiles v. Ingram*, 944 F. 2d 409, 413 (8th Cir. 1991)(biased supervisor "contrived the . . . incident to get [the plaintiff] transferred out of Station 2 for racial reasons"); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 485 (biased supervisor "accomplishes his discriminatory goals").

At best the Seventh and Fourth Circuit cat's paw standards "undermine[] the deterrent effect of subordinate bias claims." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F. 3d at 487. Any interpretation that impairs the deterrent effect of USERRA, and reduces an employer's incentive to prevent and correct violations of the law, would confound Congress' purpose "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. § 4301(a)(1). If a member of the armed forces loses his or her civilian job because of the animus of an official such as Korenchuk or Mulally, the "disadvantages to [his] civilian career[] and employment which . . . result[ed] from such service" are the same whether or not that biased official exercised "singular influence" over the final decisionmaker. And the harm to military readiness and morale that results from leaving such discriminatory actions unchecked is not lessened because the last actor in the employer's decisional chain was ignorant of the motives of his or her colleagues. To the deployed soldiers worrying about their jobs and their families' economic livelihood, it is no comfort that overtly biased actors like Mulally and Korenchuk are required to launder their discrimination through a human resources official. USERRA requires *employers*, not merely the last actor in a decisionmaking chain, to refrain from discriminating against reservists. This Court has long held that USERRA (and its predecessor statutes) are "to be liberally construed for the benefit of the returning veteran." *Coffy v. Republic*

Steel Corp., 447 U.S. 191, 196 (1980).[48] The cat's paw standard employed by the court of appeals here stands that rule of construction on its head, leaving military reservists with little hope of legal redress when—because of their military service—they are subject to discrimination at the hands of any official other than the last decisionmaker.

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48. *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977)(*quoting Fishgold*); *Tilton v. Missouri Pacific RR. Co.*, 376 U.S. 169, 181 (1964)(*quoting Fishgold*); *Boone v. Lightner*, 319 U.S. 561, 575 (1943):

> The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations . . . .

Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946):

> This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. . . . Our problem is to construe the provisions of the Act . . . and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.

When Congress in 1994 enacted USERRA, building on earlier statutes that had provided similar protections to veterans, it expressly endorsed "the basic principle established by the Supreme Court that the Act is to be 'liberally construed.'" H.R.Rep. 103-65, at 19. The House Committee report regarding the definition of employer in section 4304(4) indicated that the definition "is to be broadly construed." H.R.Rep., 103-65, at 21.

III. AN EMPLOYER IS LIABLE FOR DISCRIMINATORY ACTIONS OF ITS AGENTS THAT CAUSE AN ADVERSE EMPLOYMENT ACTION

(1) A plaintiff must show not only that a biased official (such as Korenchuk or Mulally) acted as an agent of the employer, but also that the requisite causal connection existed between the acts of that official and the adverse employment action that injured the plaintiff. The nature of the required showing depends upon the terms of the underlying statute.

If, as is the case under the ADEA, the plaintiff is required to prove that an impermissible consideration was the but-for cause of the adverse employment action, the plaintiff must show that the biased official actually caused the action complained of. See *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343 (2009). On the other hand, where a statute like USERRA merely requires a plaintiff to prove that an impermissible consideration was "a motivating factor in the employer's action," a plaintiff need show only that the biased official influenced the ultimate decision; if that showing is made, a defendant can establish a defense by proving that the ultimate decision would have been the same even if the biased official had not taken any unlawfully motivated action. See 38 U.S.C. § 4311(c)(1).

In the instant case the jury concluded that Staub had shown that his military service was "a motivating factor in the decision to discharge him." (JA 66a-68a). The jury also determined that Proctor had failed to demonstrate that Staub "would have been discharged regardless of his military status." (*Id.*).

> In our adversary system, where a party has the burden of proving a particular assertion and where that party is unable to meet its burden, we assume that that assertion is inaccurate. Thus, where an employer is unable to prove its claim that it would have made the same decision in the absence of discrimination, we are entitled to conclude that [the impermissible factor] *did* make a difference to the outcome.

Price Waterhouse v. Hopkins, 490 U.S. 228, 246 n. 11 (1989)(plurality opinion)(emphasis in original).

There was ample support for the determination of the jury on both of these issues. There was considerable evidence that Korenchuk and Mulally were hostile to Staub, including testimony regarding statements made by both officials objecting to Staub's participation in the Army Reserves. In addition, the jury could have inferred that Korenchuk and Mulally had made false statements to Human Resources officials, withheld important exculpatory information, and took other actions against Staub for the very purpose of bringing about Staub's termination. Given the obvious importance of Korenchuk's April 20 report, and of the January 27 Corrective Action written by Mulally, a jury could easily have concluded that those actions played a role in Buck's decision to dismiss Staub, and that hostility to his military status was thus a "factor" in that decision.

Those same circumstances supported the jury's conclusion that Proctor had failed to show that Staub would have been discharged regardless of his military

status. No defense witness even claimed that Buck would have taken any action regarding Staub on April 20 if Korenchuk had not precipitated the disciplinary process by giving Buck (false) information about Staub's actions. And Korenchuk's report and complaint necessarily rested on the January 27 Corrective Action, written by Mulally, which required Staub to report in to Korenchuk or Mulally whenever he left his work station. Absent Mulally's January 27 Corrective Action, there would have been no rule for Staub to violate by assertedly leaving his work station without reporting in to Korenchuk or Mulally.

(2) The court below held, however, that regardless of whether Proctor had failed to show that it would have fired Staub regardless of his military status, "the employer is off the hook if the decisionmaker did her own investigation." (JA 47a; see JA 44a (if the ultimate decisionmaker "conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker" (*quoting Brewer*, 479 F. 3d at 918)), JA 44a-45a (employer not liable for acting based on information from company official if decisionmaker "conducted her own investigation")). The Seventh Circuit "own investigation" rule provides a complete defense for cases in which, as here, the employer is unable to establish the defense provided by the terms of USERRA because the employer cannot show that it would have taken the action complained of even in the absence of the plaintiff's military status.

Tellingly, the standard for establishing this complete defense based on the ultimate decisionmaker's

unsuccessful "own investigation" is far from demanding. The investigation need not be "robust," and the decisionmaker need not be "a paragon of independence." (JA 51a). In this case, the court apparently concluded that two such self-immunizing "investigations" had occurred, the first when Buck assertedly looked at Staub's personnel file, and the second when Buck spoke briefly with another human resources official about Staub's claim that he had been targeted for dismissal because of his military service. (JA 40a).

The Seventh Circuit's "own investigation" rule is assuredly not part of the common law of agency. If Mulally or Korenchuk acted as Proctor's agent when they provided inaccurate information to Buck, their status as agents of the employer was not altered after the fact by anything Buck herself may have done thereafter. In an ordinary tort case, if one Proctor technician negligently miscalibrated an x-ray machine, the hospital would be liable for any resulting injuries, even if a second technician made a subsequent unsuccessful effort to double check those calibrations. Similarly, if Korenchuk deliberately gave inflated profit data to the hospital CEO, who then put them in a prospectus to sell Proctor Hospital bonds, the company could not avoid liability by showing that the CEO made his own unsuccessful investigation into the accuracy of those figures.

This defense is clearly inconsistent as well with the terms of USERRA. Under section 4311(c), once a plaintiff shows that his or her military service was a motivating factor, "[a]n employer shall be considered to have engaged in actions prohibited . . . under subsection

(a) . . . unless the employer can prove that the action would have been taken in the absence of such . . . service." When, as in the instant case, an employer fails to establish the statutory affirmative defense, section 4311(c) provides without further exception that the employer "*shall* be deemed to have engaged in actions" forbidden by USERRA. (Emphasis added). The courts have no authority to create an additional defense that precludes imposition of liability under the very circumstance in which section 4311(c) expressly imposes it.

The Seventh Circuit "own investigation" rule is based in part on the view that such an investigation is all that should be asked of an employer. *Brewer v. Board of Trustees of U. of Illinois*, 479 F. 3d 908, 920 (7th Cir 2007). But agency law holds an employer responsible for all the torts of its agents, not merely for those torts that could have been prevented if some official had conducted his or her "own investigation." If an employer wishes to eliminate the risk that the biases of officials will influence its decisions, the employer can choose to remain so small that the owner-operator has personal knowledge of all the facts, and never relies on other officials for information or advice. There would be no such influence to misuse if Proctor Hospital were a simple storefront clinic with a single physician, rather than a multi-million dollar enterprise with many hundreds of employees and supervisors and far greater profit potential.

In the case at hand Korenchuk and Mulally, if they were agents of Proctor Hospital, were as much agents of the employer as was Buck. If Buck did all that she

personally could to assure that *her* own actions were not influenced by the unlawful bias of others, that would presumably prevent the imposition of personal liability on Buck herself.[49] But such efforts on the part of one agent do not alter the agency status of other agents, or the principal's responsibility for the harms caused by the actions of those agents.

The Seventh Circuit also reasoned that it would be unduly costly for an employer to do more than have the ultimate decisionmaker conduct her "own investigation." *Brewer*, 479 F.3d at 920. But common law agency principles do not recognize any cost-based exception to liability for the torts of agents.

> [T]he . . . enterprise should pay for the harm caused by the tortious conduct of its members. . . . The expansion of the master's activity by use of the activity of others inevitably leads to wreckage caused by it, and it is proper for [it] to pay for this when tortiously caused in return for the benefits he receives from his servant's proper conduct. . . . [I]t is a rule of strict liability with respect to the master . . . .

Seavey, Handbook of the Law of Agency, 141 (1964).

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49. A number of lower courts have concluded that individual officials who discriminate while carrying out employment-related responsibilities can be personally liable under USERRA. E.g., *Brandasse v. City of Suffolk, Va.*, 72 F. Supp. 2d 608 (E.D.Va. 1999); *Jones v. Wolf Camera, Inc.*, 1997 WL 22678 at *2 (N.D.Tex. 1997).

Nothing in USERRA authorizes any such cost-based exception to the anti-discrimination provisions of section 4311 either. The absolute prohibition in section 4311 contrasts with certain rights under section 4313, which are not available if they "would impose an undue hardship on the employer." 38 U.S.C. § 4312(d)(1)(B); see 38 U.S.C. § 4303(15) (defining "undue hardship"). The Seventh Circuit's creation of a sweeping "independent investigation" exception to section 4311 is contrary to the far more limited case-specific undue hardship exception to section 4313, which requires an employer in each individual case to bear "the burden of proving . . . undue hardship," 38 U.S.C. § 4312(d)(2), and to adduce specific evidence regarding the burden in a particular case with proof of such considerations as "the nature and cost of the action needed" and "the overall financial resources of the employer." 38 U.S.C. § 4304(15).

Under the Seventh Circuit rule a decisionmaker's honest but mistaken conclusion that the plaintiff is not the victim of discrimination by other officials, if based on that decisionmaker's "own investigation," is conclusive.

> [I]t might be too demanding to expect an employer to do more than have an employee conduct a fair-minded, independent investigation into the available evidence and then make a decision in good faith.

Brewer, 479 F. 3d at 920-21. On this rationale a decisionmaker's rejection of a worker's claim of discrimination would operate precisely like res judicata, precluding that worker from later litigating that claim

in federal court. But prior determinations regarding discrimination claims are accorded res judicata effect only when made by federal or state courts, or in some instances by state administrative agencies whose decisions would be accorded res judicata effect in state court. *University of Tennessee v. Elliott*, 478 U.S. 788 (1986). There is no claim that under Illinois law a private employer's investigation of the actions of its own officials would be given res judicata effect in state courts.

Under the provisions of Title VII, an employer's rigorous good faith efforts to assure compliance with the law may be a bar to an award of punitive damages. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999). It would be incongruous if the far less demanding showing of an "own investigation," which does not require the systemic enforcement efforts insisted upon by *Kolstad*, were to result under USERRA (and, presumably, under Title VII itself) in a far more sweeping complete defense to liability than *Kolstad*'s limit on punitive damages.

In determining whether the conduct of another, biased official actually influenced the decision of the ultimate decisionmaker, the trier of fact may of course consider the actions and decisionmaking process of that final decisionmaker. For example, if a biased official provided an inaccurate description of the statement of a key witness, but the decisionmaker chose to disregard that second hand account and personally interviewed the witness, the trier of fact could conclude that the falsified account had no impact on the ultimate decision. But whether an "investigation" or an "independent investigation" prevented a biased official from

influencing the final decision would turn in each case on an assessment of the nature of the conduct of the biased official, the manner in which it could have brought about the action complained of, and the scope of the asserted investigation. An investigation into whether a worker actually engaged in the misconduct asserted by his supervisor would not remove the discriminatory effect of that supervisor's racially selective reporting of such misconduct.[50] "If the ultimate decisionmaker was influenced by others who had retaliatory motives, then his investigation cannot in any real sense be considered *independent*." *Gee v. Principi*, 289 F. 3d 342, 346 n. 2 (emphasis in original); see *Poland v. Chertoff*, 494 F. 3d 1174, 1183 (9th Cir. 2007)(investigation was not "sufficiently independent to break the causal chain" where the biased official did "influence . . . the inquiry").

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50. In *Madden v. Chattanooga City Wide Service Dept.*, 549 F. 3d 666 (6th Cir. 2008), a supervisor reported that the plaintiff had been setting off firecrackers on a job site. A senior manager questioned the plaintiff, who admitted he had done so. The plaintiff was fired on the ground that setting off firecrackers posed a safety threat. The senior managers who made the decision "testified at trial that no other incidents involving employee use of firecrackers had been brought to their attention." 549 F. 3d at 670. Other evidence, not unearthed by this "independent investigation," revealed that the supervisor who had reported the plaintiff had concealed from managers the fact that white workers—including the supervisor himself—had not been reported or punished for identical conduct. 549 F. 3d at 677-78. The court of appeals concluded that the employer was liable under those circumstances.

See *Wilson v. Stroh Companies, Inc.*, 952 F. 2d 942, 946 (6th Cir. 1992)(notwithstanding "independent investigation," plaintiff would have had a viable claim if he had offered evidence that the superior who reported him to higher officials "had not reported such misconduct from white employees").

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

Discriminatory Decisions and Conduct Causing Adverse Employment Action

Discrimination in Reporting Alleged Misconduct

Madden v. Chattanooga City Wide Service Department, 549 F. 3d 666, 678 (6th Cir. 2008)("there was evidence that [biased supervisor] discriminated in the information that he provided about employee misconduct to senior managers by reporting the misconduct of a black employee, but not the virtually identical misconduct of white employees")

Hill v. Lockheed Martin Logistics Mgmnt., Inc., 354 F. 3d 277, 300 (4th Cir. 2004)(Michael, J., dissenting)(biased official used "discretion on whether or not to write up minor mistakes" by filing six reports in three days about errors that were "nitpicky and trivial")

Discrimination in Initiating Disciplinary Action

Simpson v. Diversitech General, Inc., 945 F. 2d 156, 160 (6th Cir. 1991)("If [the biased official] initiated the disciplinary action leading to [the plaintiff's] dismissal due to [the plaintiff's] race, simply showing that [the biased official] had no role in the 'final' decision to terminate him is insufficient to establish that [the employer] would have made the same decision even absent the racial animus")

Poland v. Chertoff, 494 F. 3d 1174, 1181 n. 3 (9th Cir. 2007)("district court correctly concluded that [biased official] did make the . . . decision to initiate the administrative inquiry against [plaintiff] and that [biased official's] animus underlying that decision should be imputed to the [employer]")

Kramer v. Logan County School Dist. No. R-1, 157 F. 3d 620, 624 (8th Cir. 1998)("non-renewal of [plaintiff's] contract was initiated by [biased employees]")

Discrimination in Investigating Alleged Misconduct

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1323 (8th Cir. 1994)("the undisputed evidence was that [plaintiff's] investigation was different from those of male co-workers. . . . [T]he investigation . . . was . . . 'unusual'")

Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1059, 1060 (8th Cir. 1993)(male officers never investigated by biased official for engaging in same conduct for which official requested investigation of female worker)

Discrimination In Determining Disciplinary Process

Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1055 (8th Cir. 1993)(referring rumored misconduct to security investigations department rather than to usual official)

Appendix

Discrimination In Establishing Applicable Standards

Bergene v. Salt River Project, etc. Dist., 272 F. 3d 1136, 1140, 1141 (9th Cir. 2001)(biased official obtained changes in job requirements in a manner adverse to applicant plaintiff)

Gutzwiller v. Fenik, 860 F. 2d 1317, 1326-27 (6th Cir. 1988)(tenure candidate required to publish two books, rather than the usual one book rule; altering to disadvantage of plaintiff process for selecting outside reviewers)

Discrimination in Providing Information

Laxton v. Gap, Inc., 333 F. 3d 572, 584 (5th Cir. 2003)(biased official was the "primary source of information")

Gee v. Principi, 289 F. 3d 342, 347 (5th Cir. 2002)(biased officials "made comments critical of [plaintiff]" at key meeting)

Christian v. Wal-Mart Sores, Inc., 252 F. 3d 862, 878 (6th Cir. 2001)(biased official's "report was the exclusive and decisive factor in . . . decisionmaking" by the final decisionmaker)

Gusman v. Unisys Corp., 986 F. 2d 1146, 1147 (7th Cir. 1993)("An employer cannot escape responsibility for wilful discrimination . . . when the facts on which reviewers rely have been filtered by a manager

determined to purge the labor force of [members of a protected group]")

Providing False Inculpatory Information

Brewer v. Board of Trustees of University of Illinois, 479 F. 3d 908, 917 (7th Cir. 2007)("influence may be exercised by, among other things, "supplying misinformation or failing to provide relevant information to the person making the employment decision")

EEOC v. BCI Coca-Cola Bottling co., 450 F. 3d at 486 ("A biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class . . . by selectively reporting or even fabricating information in communications with the formal decisionmaker"), 492 ("[i]f a jury . . . concludes that [the biased official] lied to [the final decisionmaker], it could also find that the [untrue] claims about [the victim's] conduct caused the termination")

Back v. Hastings On Hudson Union Free School Dist., 365 F. 3d 197, 126 (2d Cir. 2004)(biased officials "made numerous accusations of poor performance, which [plaintiff] insists were . . . pretextual"; "the jury . . . could . . . conclude that the [biased officials] proximately caused the termination by fatally tainting the pool of information about [the plaintiff]")

Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F. 3d 277, 300-01 (4th Cir. 2004)(en banc)(Michael, J., dissenting)(biased official allegedly lied to higher officials about non-existent conversation with plaintiff; biased official provided final decisionmaker with "a written statement of his observations about [plaintiff's] performance")

Kramer v. Logan County School Dist. No. R-1, 157 F. 3d 620, 624 (8th Cir. 1998)("material misrepresentations" made to final decisionmakers by biased officials)

Wallace v. SMC Pneumatics, 103 F. 3d 1394, 1400 (7th Cir. 1997)(employer liable where biased official, "by feeding false information to [the final decisionmaker] is the real cause of the adverse employment action")

Withholding Exculpatory Information

Cariglia v. Hertz Equipment Rental Corp., 363 F. 3d 77, 86-87 91st Cir. 2004)(employer liable if biased official "withheld from [final decisionmaker] exculpatory information about [plaintiff's alleged misconduct"; biased official apparently "never divulged to [final decisionmakers] all of the circumstances surrounding the . . . issue")

Wallace v. SMC Pneumatics, Inc., 103 F. 3d 1394, 1200 (7th Cir. 1997)(employer liable where biased official "by . . . feeding false information to [the final decisionmaker] is the real cause of the adverse employment action")

Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051, 1058, 1059 (8th Cir. 1993)(biased official failed to disclose that plaintiff's action did not actually violate any company policy; biased official did not include in his report regarding female worker fact that at least three male officers had engaged in similar conduct)

Jiles v. Ingram, 944 F. 2d 409, 411-13 (8th Cir. 1991)(supervisor failed to disclose that he had expressly authorized conduct to which supervisor then objected)

Discrimination in Annual or Performance Evaluations

Back v. Hastings On Hudson Union Free School Dist., 365 F. 3d 107 126 (2d Cir. 2004)(biased officials issued "a very negative final annual evaluation [of plaintiff]")

Johnson v. Kroger Co., 319 F. 3d 858, 868 (6th Cir. 2003)(biased official "assisted . . . in preparing [the plaintiff's] performance review")

Rose v. New York City Bd. of Ed., 257 F. 3d 156, 158 (2d Cir. 2002)(biased official gave plaintiff "an unsatisfactory evaluation")

Stoller v. Marsh, 682 F. 2d 971, 972 (D.C.Cir. 1982)("[a]n unfavorable employment decision resulting from inaccurate, discriminatorily-motivated evaluations by the employee's supervisors violates Title VII")

Appendix

Earlier Discriminatory Discipline Determining Subsequent Sanctions

Laxton v. Gap, Inc., 333 F. 3d 572, 584 (5th Cir. 2003) (plaintiff dismissed under the employer's "three-strikes-you're-out policy." The first "strike," a "Written Warning," had been issued by the biased official. The second "strike," a "Final Written Warning," had been issued by an official who relied on the biased official as "her primary source of information")

Simpson v. Diversitech General, Inc., 945 F. 2d 156, 160 (6th Cir. 1991)(biased official filed an adverse personnel report regarding the plaintiff, which led the employer to impose on the plaintiff a "Last Chance Agreement" under which he would be fired for any future infraction. A subsequent incident, in which the biased official played no role, resulted under the Agreement in the plaintiff's dismissal. In upholding liability, the court noted that "the [biased official's] actions led to [the plaintiff's] discharge, having formed the predicate for the Last Chance Agreement. . . . [A]bsent [the biased official's] race-based motive, as found by the district court, there would not have been a Last Chance Agreement")

Discrimination in Making Recommendation

Holcomb v. Iona College, 521 F. 3d 130, 143 (2d Cir. 2008)(biased officials "might well have urged the selection [of individual other than plaintiff] out of discriminatory motives")

Gillaspy v. Dallas Ind. School Dist., 278 Fed. Appx. 307, 313 (5th Cir. 2008)(final decisionmaker "relied on [biased official's] recommendation")

Back v. Hastings On Hudson Union Free School Dist., 365 F. 3d 197, 126 (2d Cir. 2004)(biased officials "issued a direct recommendation against [giving plaintiff] tenure")

Johnson v. Kroger Co., 319 F. 3d 858, 868 (6th Cir. 2003)(biased official "consulted with [final decisionmaker] prior to her ultimate decision")

Abramson v. William Patterson College of N.J., 260 F. 3d 265, 285 (3d Cir. 2001)(final decisionmaker "sought [biased official's] counsel")

Rose v. New York City Bd. of Ed., 257 F. 3d 156, 158 (2d Cir. 2002)(biased official recommended in favor of dismissal of plaintiff)

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F. 3d 46, 55 (1st Cir. 2000)(final decisionmaker "called [biased official] for his opinion regarding [the plaintiff's] dismissal")

Long v. Eastfield College, 88 F. 3d 300, 307 (5th Cir. 1996)(biased officials made adverse recommendations regarding plaintiff)

Ostrowski v. Atlantic Mutual Ins. Co., 968 F. 2d 171, 174 (2d Cir. 1992)(biased official recommended dismissal of plaintiff).

Discrimination in Evaluating Information

Gutzwiller v. Fenik, 860 F. 2d 1317, 1326, 1327 (6th Cir. 1988)("consistently negative interpretations" by biased officials of outsider reviewer comments on tenure candidate's scholarship; decisionmakers relied on opinion of biased official because of his expertise)

Roebuck v. Drexel University, 852 F. 2d 715, 722-23 (3d Cir. 1988)(letter from biased official adversely evaluating information provided by others)

Discrimination While Participating in Decisionmaking Discussion

Gillaspy v. Dallas Ind. School Dist., 278 Fed. Appx. 307, 313 (5th Cir. 2008)(biased official "met with . . . members of the interview panel to discuss the applicants")

Rivera-Rodriguez v. Frito Lay Snacks Caribbean, 265 F. 3d 15, 27 (1st Cir. 2001)(biased official may have influenced the disputed decision when he "participated in some respect in [the] employment decisions [regarding plaintiff]"; final decisionmaker "discussed his decisions about [plaintiff] with the biased officials")

Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1323 (8th Cir. 1994)(biased official "participated in the decisions to suspend and terminate" plaintiff)

Appendix

Other Discriminatory Acts

Jiles v. Ingram, 944 F. 2d 409, 411-13 (8th Cir. 1991)(biased official provoked disagreement with plaintiff in order to discipline him for "back talking")

Long v. Eastfield College, 88 F. 3d 300, 308 n. 8 (5th Cir. 1996)(biased officials directed others to send prejudicial statements to final decisionmaker).