No. 09-400

IN THE

Supreme Court of the United States

VINCENT A. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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MOTION OF THE AMERICAN ASSOCIATION FOR JUSTICE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

Pursuant to of the Supreme Court Rule 37(b), The American Association for Justice respectfully moves this Honorable Court to grant leave to file the accompanying Brief of *Amicus Curiae* in this case.

1. Identity and Interest of Amicus Curiae

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, is a voluntary national bar association whose members represent plaintiffs in civil actions, including many who, like Petitioner in this case, seek legal recourse for illegal discrimination in the workplace.

The Question Presented in this case is very similar to that presented in *BCI Coca-Cola Bottling Co. v. EEOC*, Docket No. 06-341, in which AAJ filed an amicus curiae brief. The writ of certiorari in that

case was dismissed pursuant to a motion of the parties. 549 U.S. 1334 (2007).

It remains AAJ's firm conviction that freedom from illegal discrimination is fundamental to the enjoyment of the opportunities offered in a free society. In addition, our society as a whole benefits from the contributions of all its members. To that end, Congress has enacted civil rights laws that seek to eradicate workplace discrimination. Those laws required fair and realistic enforcement by the courts.

2. The accompanying amicus brief is desirable and will assist this Court.

The accompanying *amicus* brief addresses the important question of the legal standard under which a biased supervisor or other employee who exerts some influence over an employment decision may subject the employer to liability under federal anti-discrimination laws. AAJ is confident that the extensive experience of its members in representing

claimants in such actions will be of assistance to this Court.

3. Consent or Opposition to the Motion.

The movant has discussed the motion with counsel for the parties. Petitioner has consented to the filing of the brief. Respondent has refused consent.

CONCLUSION

For the foregoing reasons, the American Association for Justice asks this Court to grant its motion for leave to file the accompanying brief as *amicus curiae* in this case.

Respectfully Submitted,

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INTEREST OF *AMICUS CURIAE*

The American Association for Justice (AAJ) respectfully submits this brief as *amicus curiae* in support of Petitioner in this case.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil actions. Among those plaintiffs are persons whose civil rights have been violated by employers who take adverse employment actions on the basis of race, ethnicity, religion, gender or other inappropriate ground. AAJ views freedom from illegal discrimination as essential to the enjoyment of the opportunities offered in a free society. Illegal discrimination not only frustrates the individual's right to equal opportunity, it also prevents society from reaping the benefits of contributions by highly qualified individuals.

SUMMARY OF ARGUMENT

Corporate entities act only through their human agents. Those who are ultimately responsible for making employment decisions often must rely on the reports and recommendations of others in the company, some of whom may be acting out of discriminatory motives. This case arises under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which, like Title VII and

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

other civil rights statutes, imposes liability where illegal discrimination is "a motivating factor." This Court's decision in this matter will have a profound impact on a broad spectrum of statutory efforts to eradicate illegal discrimination.

If courts are to faithfully carry out Congress's goal of eliminating workplace discrimination, they must necessarily hold employers accountable for the discriminatory conduct of all the agents who influence an employment decision. The Seventh Circuit's "cat's paw" rule, however, requires proof that a biased non-decisionmaker exerted such a "singular influence" over the nominal decisionmaker that he or she became the decisionmaker in all but the title. If the decisionmaker relied on any other source of information or conducted any independent investigation of the facts, the non-decisionmaker's bias may not be imputed to the employer, and may not even be considered by the jury. This rule is inconsistent with the "motivating factor" standard of liability. It not only tolerates illegal discrimination but rewards it.

The "cat's paw" rule empowers human resource officials, who are rarely independent, to avoid corporate liability by structuring the decisionmaking process so that all adverse employment decisions are made by human resource personnel. Thereafter, no inquiry into the existence of discriminatory intent is required, and no witnesses need be interviewed, including the victimized individual. Even negligent investigations or those conducted in bad faith are sufficient to avoid liability so long as the human resources representative did not rely exclusively upon

information from a biased employee. In order for an employee to prevail, illegal bias must be the *only* factor in the decisionmaking process. No recognized standard of causation imposes this burden on an employee alleging illegal discrimination.

In order to satisfy the Seventh Circuit's standard, corporate investigations need not be fair or independent or exercise reasonable care. To be sufficient to avoid liability, an investigation need not consider 1) disparate treatment, 2) the statements by witnesses, including the effected employee, 3) direct evidence of discriminatory intent, 4) the untruthfulness of the allegations against the effected employee, or 5) statistical disparities. The question in all such cases is not whether the investigation was negligent, whether the investigation was actually independent, or whether the supervisor was motivated by illegal bias. The only question is whether the final decisionmaker lacked discriminatory intent and considered a source of information in addition to the biased employee.

This Court should not indulge in the fiction that corporate human resources personnel are neutral decisionmakers and unaffected by the reports and recommendations of line supervisors and managers. In the real world, the recommendations of managers and supervisors are generally followed. Much like a police department's internal investigation of excessive force complaints, investigation by an employer's human resources personnel is not wholly independent. This Court should not allow the fox to guard the hen house. Enforcement of USERRA and all civil rights statutes requires a truly independent inquiry to determine

whether illegal animus was a motivating factor in the decision to take adverse employment action. Congress has created a comprehensive administrative scheme and ultimately recognized the right to trial by jury to "independently" make the "motivating factor" determination.

The lower court's "cat's paw" rule undermines the administrative scheme and the right to trial by jury. It reduces those fact-finding processes to a simple judicial confirmation that the final decisionmaker lacked illegal bias and considered more than one source of information. Congress never intended to replace a comprehensive administrative scheme and the civil justice system with the self-policing efforts of private employers. A rule to the contrary would dramatically alter the enforcement mechanism of the statute.

This Court should instead adhere to recognized concepts of agency and causation. The discriminatory intent of a supervisor should be imputed to the employer where the supervisor influenced or participated in the decisionmaking process to any degree. Recognized principles of agency and this court's precedent have established that a principal is liable for the acts of its agents acting within the scope of employment, even if the agent engages in acts specifically forbidden by the employer. Liability extends to all agents, not only to final decisionmakers.

The application of the "cat's paw" rule is inconsistent with these basic agency principles, and will result in making the enforcement of fundamental civil rights dramatically more difficult.

ARGUMENT

I. THE "CAT'S PAW" RULE IS INCONSISTENT WITH THE CONGRESSIONAL POLICY TO ERADICATE DISCRIMINATION FROM THE WORKPLACE.

Corporate entities act only through their human agents. In the real world, those who are ultimately responsible for making employment decisions often rely on the reports and recommendations of others in the company. To faithfully carry out Congress's goal of eliminating workplace discrimination, courts must necessarily hold employers accountable for the discriminatory conduct of all their agents who influence an employment decision. The decision below fails to carry out Congress's statutory mandate. Instead, it provides a blueprint for corporate employers to insulate themselves from any accountability for workplace discrimination.

Vincent Staub is a member of the United States Army Reserve and was employed by Proctor Hospital as an angiography technologist. Evidence showed that Staub's supervisor (Janice Mulally) and department head (Michael Korenchuk) harbored hostility toward Staub because of his military service and resented having to accommodate his Army Reserve commitments. Whether to fire Staub, however, was not their decision. Instead, they submitted adverse reports to vice-president of human resources Linda Buck. Following a report of insubordination, and after consulting Korenchuk, Buck terminated Staub. There was no indication that

Buck herself harbored any anti-military animus. She relied on reports from Mulally and Korenchuk, as well as from other employees. *Staub v. Proctor Hospital*, 560 F.3d 647, 651-55 (7th Cir. 2009). The jury found that Staub's military service was a motivating factor in the decision, that Proctor would not have terminated him but for his military service, in violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq*., and awarded $57,640 in damages. 560 F.3d at 655.

The Seventh Circuit reversed, holding that, as a matter of law, Proctor could not be liable for the discriminatory conduct of non-decisionmakers Mulally and Korenchuk under the appeals court's version of the "cat's paw" rule:

> [W]here a decision maker is not wholly dependent on a single source of information, but instead 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.

560 F.3d at 656, quoting *Brewer v. Bd. of Tr. of Univ. of Il.*, 479 F.3d 908, 918 (7th Cir. 2007).

Indeed, under the Seventh Circuit view, it is not sufficient that input from biased employees such as Mulally and Korenchuk was a substantial, or even the most important factor in the employment decision. Instead, the non-decider must be shown to have "such power over the nominal decision maker" as to be, in fact, "the true, functional decision maker." *Brewer* at 918. Unless the plaintiff presents

proof of such "singular influence" to the trial court as a threshold matter, "then the court has no business admitting evidence of animus by nondecisionmakers." *Staub*, 560 F.3d at 658. Thus, plaintiffs are deprived of their right to demonstrate to the jurors, who are generally more experienced in detecting veiled workplace discrimination, that, in light of all the evidence, discrimination was a motivating factor in an adverse decision. The lesson for defendants is not to take steps to combat workplace discrimination, but to take steps to design their decisionmaking procedures to evade accountability.

The Congressional purpose underlying the USERRA is "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a)(3). The statute seeks to achieve that purpose by prohibiting discriminatory conduct which is a motivating factor in the decisionmaking process. 38 U.S.C. § 4311(c). Like USERRA, Title VII seeks to achieve its purpose by prohibiting adverse employment actions where discriminatory intent is a motivating factor. 42 U.S.C. § 2000e-2(m). Thus, this Court's decision in this matter will have an impact far beyond USERRA.

The Congressional purpose of the civil rights statutes generally is to eradicate discrimination in the workplace. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court declared:

> The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy work-manship assured through fair and racially neutral employment and

> personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

Id. at 801. *See also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) ("[I]t is important to bear in mind that Title VII is a remedial statute designed to eradicate certain invidious employment practices"); *14 Penn Plaza LLC v. Pyett,* ___ U.S. ___, 129 S.Ct. 1456, 1477 (2009) ("Like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., the ADEA is aimed at '"the elimination of discrimination in the workplace,"' (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995))); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace'" (quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979))); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975) (Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination. (quoting *United States v. N.L. Indus., Inc.*, 479 F.2d 354, 379 (8th Cir. 1973))); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) ("We begin by repeating the observation of earlier decisions that in enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in

employment opportunity due to discrimination on the basis of race, religion, sex, or national origin.").

The "cat's paw" theory of imputed liability doesn't dispute the existence of illegal discrimination. It relieves the employer from liability despite it. As such, it is inconsistent with the statutory policy of eradicating illegal discrimination. In this case, for example, there is no indication that either Mulally or Korenchuk were disciplined for their illegal conduct. Secure in the knowledge that their personnel recommendations will likely be followed by human resources and that their bias will likely not be imputed to the corporation, there is no reason to believe that their discriminatory conduct will not continue. If Proctor Hospital is allowed to terminate Mr. Staub based in part on the discriminatory conduct of its employees, such conduct will not be deterred, undermining the explicit purpose of Congress.

II. PRINCIPLES OF AGENCY REQUIRE IMPUTING LIABILITY TO THE EMPLOYER WHERE A BIASED NON-DECISIONMAKER CAUSED AN ADVERSE EMPLOYMENT ACTION.

This Court is called upon to determine the circumstances under which the discriminatory intent of a supervisor can be imputed to an employer where the final decisionmaker is without discriminatory intent. The Court should adhere to recognized concepts of agency and causation, informed by the purposes of the statute. The discriminatory intent of a supervisor should be imputed to the employer

where the supervisor influenced or participated in the decisionmaking process to any degree.

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court considered the agency theory to be applied for imputing liability to the employer in cases involving sexual harassment. In discussing the Restatement (Second) of Agency § 219(1), the Court recognized that a "master is subject to liability for the torts of his servants committed while acting in the scope of their employment." 524 U.S. at 776, 793.[2] The Court declined to apply that theory of agency only because it was unclear whether a harasser was acting within the scope of employment or on a frolic. Listing examples, the Court clearly indicated that types of discrimination other than

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[2] The Restatement (Third) of Agency § 2.04 (2006) similarly provides that "[a]n employer is subject to liability for torts committed by employees while acting within the scope of their employment." "An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." Restatement (Third) of Agency § 7.07(2) (2006).

This section of the Restatement (Third) of Agency differs from Restatement (Second) of Agency in that it is phrased in more inclusive terms. Under § 228(1)(c) of the Restatement (Second), conduct is not within the scope of employment unless "it is actuated, at least in part, by a purpose to serve" the employer. The Third Restatement exempts only that "conduct intended to serve no purpose of the employer." *See* Restatement (Third) of Agency, § 7.07 comment b.

harassment were within the "scope of employment" theory. *Id.* at 793-801. Also relying upon the Restatement (Second) of Agency, the Court in *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), acknowledged that "even intentional torts are within the scope of an agent's employment if the conduct is 'the kind [the employee] is employed to perform,' 'occurs substantially within the authorized time and space limits,' 'and is actuated, at least in part, by a purpose to serve the' employer." *Id.* at 543-44 (quoting Restatement (Second) of Agency § 228(1)). An employee who satisfies these criteria is acting within the scope of employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results.'" *Id.* at 544 (quoting Restatement (Second) of Agency § 230).[3]

Like harassment, disparate treatment discrimination is a persistent problem in the workplace. This Court has recognized that

> [a]n employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim . . . developments like this occur from time to time in the law of agency."

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[3] The Court in *Kolstad* declined to apply the Restatement rule to impute liability for punitive damages; this case involves only compensatory damages.

Faragher, 524 U.S. at 798.

The Court in *Faragher* declined to impose this burden on the employer, only because "there is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts amounting to what the older law called frolics or detours from the course of employment." *Id.* This case does not involve harassment, and the biased supervisor was clearly acting within the scope of employment and not on a frolic or detour. The discriminatory behavior of the non-decisionmaking supervisor is easily anticipated, and should be charged to the employer as one of the costs of doing business.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court recognized vicarious liability where the action of a supervisor "culminates" in tangible employment action. *Id.* at 765. The Court recognized that supervisors without final decisionmaking authority would "cause" tangible employment action by officials higher in the decisionmaking process. "The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise, and use its internal processes." *Id.* at 762. Non-harassment discrimination cases necessarily culminate in tangible employment action.

The Court's rulings in *Ellerth* and *Faragher* were heavily dependent upon a finding that harassment was not within the scope of employment. In this case, there is no question that both Mulally and Korenchuk were agents of their employer and

that they were acting within the scope of their employment. Their employer delegated to them the authority to report insubordination to human resources, which is exactly what they did, and they were at all times acting within the employer's control. Whether they were specifically designated to make personnel decisions is irrelevant if they were acting within the scope of employment and their conduct "caused" the harm to Staub. An employer is responsible for the wrongful acts of all its employees, not only those in personnel.

III. LIABILITY SHOULD BE IMPUTED TO THE EMPLOYER WHERE A BIASED SUPERVISOR INFLUENCED OR PARTICIPATED IN THE DECISION-MAKING PROCESS.

USERRA specifically provides for liability where a person's military status is "*a motivating factor* in the employer's action." 38 U.S.C. § 4311(c) (emphasis added). Title VII creates an identical standard for liability. *See* 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

The "cat's paw" standard of "singular influence" required to impute liability to the employer is inconsistent with this plain statutory language.

A motivating factor is one that is not irrelevant to the decisionmaking process. *See Price*

Waterhouse v. Hopkins, 490 U.S. 228 (1989). "[A] person's gender may not be considered in making decisions that affect her." *Id*. at 242. Any factor that influences the decisionmaking process is necessarily not irrelevant and is therefore a "motivating factor" within the meaning of the statute.[4]

Under the Seventh Circuit's "singular influence" standard, employer liability is avoided if the decisionmaker considers information from multiple sources, and if the non-biased source provides information of a non-discriminatory reason for discipline. Under those circumstances, however, the biased supervisor still influences the decisionmaking process and is therefore a motivating factor in the decision to take an adverse action. Only where the investigation by the ultimate decisionmaker completely factors out the information supplied by the biased supervisor can the taint be eliminated and no longer be a motivating factor. *See* Br. for the United States as *Amicus Curiae* in Supp. of the Pet. at 15. Whether and to what extent the information from a biased supervisor is factored out is ordinarily a factual question for a jury to decide. The testimony of a human resources representative that the biased information was not considered is the quintessential testimony from an interested witness,

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[4] In *Gross v. FBL Financial Services, Inc.*, ___ U.S. ___, 129 S.Ct. 2343 (2009), this Court declined to adopt the "motivating factor" standard as applicable to a claim brought under the ADEA, based on material differences from Title VII. *Id*. at 2349. Instead, it adopted a "but for" standard of causation, and implicitly recognized that a "motivating factor" standard is satisfied with evidence of less than "but for" causation.

and is not sufficient to decide the question on a motion for summary judgment. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) ("the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses'").

USERRA creates a defense to liability where "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." 38 U.S.C. § 4311(c)(1). Title VII contains a similar provision. 42 U.S.C. § 2000e-5(g)(2)(B). This defense is sufficient to allow employers to punish conduct for legitimate reasons even where the decision to take discipline was influenced by a biased supervisor.

Under the Seventh Circuit's standard, it is not sufficient that the biased information be a motivating factor in the decision to take adverse action, it must be the *only* factor. Under no recognized theory must a plaintiff prove that an illegal reason is the only reason for an adverse action.

When Congress enacted Title VII it "specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of.'" *Price Waterhouse*, 490 U.S. at 241 n.7 (Brennan, J., plurality opinion), citing 110 Cong. Rec. 2728, 13837 (1964). Accordingly, courts in ADEA cases routinely instruct juries age need not be the sole

factor in the employment decision. *E.g., Golomb v. Prudential Ins. Co.*, 688 F.2d 547, 550 (7th Cir. 1982) ("[A] successful claimant in an ADEA action need not prove that age was the sole determining factor for the defendant employer's action, but rather that age was a determining factor"); *Faulkner v. Super Valu Stores Inc.*, 3 F.3d 1419, 1426 n.3 (10th Cir. 1993) ("[A] plaintiff need not prove that age was the sole or exclusive motivation for defendant's failure to hire him. Age is a determining factor if a plaintiff would have been hired except for his age").

In *Poland v. Chertoff*, 494 F.3d 1174 (9th Cir. 2007), the Ninth Circuit considered the situation where a subordinate employee with illegal bias participated in an investigation that led to an adverse employment action, but an employee without bias made the final decision. *Id.* at 1181. In relevant part, the court rejected a "but-for" standard of causation as too expansive and the "rubber stamp" or "cat's paw" standard as too narrow. *Id.* at 1182.

> We hold that if a subordinate, in response to a plaintiff's protected activity, sets in motion a proceeding by an independent decisionmaker that leads to an adverse employment action, the subordinate's bias is imputed to the employer if the plaintiff can prove that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or decisionmaking process.

Id. *See also Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) ("One method [of showing pretext] is to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker."); *Rose* v. *New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (discriminatory remarks made "by her immediate supervisor, who had enormous influence in the decision-making process"); *Abramson* v. *William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir. 2001) ("Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate"); *Madden* v. *Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 677 (6th Cir. 2008) ("We have held that when a plaintiff challenges his termination as motivated by a supervisor's discriminatory animus, he must offer evidence of a 'causal nexus' between the ultimate decisionmaker's decision to terminate the plaintiff and the supervisor's discriminatory animus"); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1322-23 (8th Cir. 1994) (liability found where a biased manager "admitted that he participated in the decisions to suspend and terminate [Plaintiff]"); *Griffin* v. *Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("Thus do we join at least four other circuits in holding that evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."). This standard appropriately applies the congressionally mandated "motivating factor" standard.

Viewing the facts in a light most favorable to Mr. Staub, there is substantial evidence to support

the jury's finding that Mulally and/or Korenchuk were biased against Mr. Staub because he was serving in the reserves; that the bias was a motivating factor in their recommendation to terminate Staub; that Buck, at least in part, relied upon their recommendations; and that the same decision would not have been reached without consideration of the influence of Mulally and/or Korenchuk. Whether and to what extent Buck allegedly considered other information is irrelevant; both Mulally and Korenchuk were agents of Proctor and acting within the scope of their employment. Moreover, USERRA does not require that illegal bias be the only reason for adverse action, only that it be a motivating factor. In this case, that standard is clearly satisfied.

IV. THE LOWER COURT'S "CAT'S PAW" RULE WOULD EFFECTIVELY REPLACE CONGRESSIONALLY MANDATED ADMINISTRATIVE REMEDIAL PROCESSES AND THE RIGHT TO TRIAL BY JURY WITH DECISIONS BY CORPORATE HUMAN RESOURCES PERSONNEL.

Congress created comprehensive administrative processes which employees may initiate and exhaust as a prerequisite for filing suit under USERRA or Title VII of the 1964 Civil Rights Act. If the administrative agency finds a violation of the statute, it is authorized to prosecute the claim on behalf of the claimant and provide a make whole remedy. If the administrative agency finds no violation, the claimant is nevertheless authorized to file suit in federal court and demand that a jury

determine the relevant facts. The vindication of fundamental civil rights and need to eradicate discrimination requires an adversary process, detailed discovery, and ultimately a determination by a jury. An investigation conducted by employees in the corporation's human resources department contains none of the safeguards and attributes necessary for the vindication of civil rights.

Congress never intended an employer's own internal inquiry to replace the statutorily mandated administrative process and the civil justice system. Yet the application of the "cat's paw" rule achieves that result. Under that rule, so long as the company's own human resources decisionmaker considers information from more than one source, the decision becomes non-reviewable by either an administrative agency or a federal jury. The "cat's paw" rule is therefore at odds with the enforcement of fundamental civil rights.

A. The USERRA Administrative Scheme Authorizes Investigation by the Secretary of Labor and Prosecution of the Employee's Claim.

Under USERRA a person claiming a violation of the statute "*may* file a complaint with the Secretary [of Labor] . . . and the Secretary *shall* investigate such complaint." 38 U.S.C. § 4322(a)(2)(B) (emphasis added). In reference to the administrative investigation, the Secretary is granted reasonable access to and the right to interview persons with information relevant to the investigation, and reasonable access to any

documents "that the Secretary considers relevant to the investigation." 38 U.S.C. § 4326(a). The Secretary is further granted subpoena power to implement the testimony of witnesses and production of documents. 38 U.S.C. § 4326(b). The investigation must be completed within 90 days. 38 U.S.C. § 4322(f).

"If the Secretary determines as a result of the investigation that the action alleged in such complaint occurred, the Secretary shall attempt to resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies with the provisions of this chapter." 38 U.S.C. § 4322(d). If the complaint is not resolved by the Secretary, the Secretary must notify the person of the results of the investigation, 38 U.S.C. § 4322(e), and the aggrieved person may request a referral to the attorney general, who may then appear and prosecute the claim on behalf of the claimant. 38 U.S.C. § 4323(a). If an aggrieved person has chosen not to apply to the Secretary for assistance, has chosen not to request that the Secretary refer the complaint to the Attorney General, or has been refused representation by the Attorney General, "[a] person may commence an action for relief with respect to a complaint against a State (as an employer) or a private employer. 38 U.S.C. § 4323(a)(3).

B. The Civil Rights Administrative Scheme Requires Exhaustion of Administrative Remedies.

Many of the federal civil rights statutes require as a prerequisite to suit the exhaustion of administrative remedies including an investigation

by the federal agency charged with enforcement of the statute. A Title VII plaintiff employed in the private sector must file an administrative charge with the EEOC within 180 or 300 days of the last act of discrimination. 42 U.S.C. § 2000e-5(e)(1). If, after investigating, the EEOC finds reasonable cause to believe the charges are true, it undertakes to eliminate the disputed employment practice "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). If the EEOC finds no reasonable cause or if conciliation is unsuccessful, the employee must obtain a right to sue notice, and may then file suit within 90 days. 42 U.S.C. § 2000e-5(f)(1).

In reference to the administrative process, the EEOC is granted broad investigative authority. *See* 29 C.F.R. § 1601.15. The EEOC may accept or require a specific statement from the aggrieved persons, 29 C.F.R. § 1601.15(b), and require a fact-finding conference. 29 C.F.R. § 1601.15(c). Congress grants to the EEOC subpoena power to require the attendance of witnesses, the production of documents, and access to evidence for the purpose of examination and the right to copy. *See* 29 C.F.R. § 1601.16.

The EEOC also has jurisdiction to investigate alleged violations of the ADEA, 29 U.S.C. § 626(a), and the ADA. 42 U.S.C. § 12117(a). Other statutes authorize federal agencies to enforce and investigate alleged violations of federal law within the context of employment. *E.g.*, The Equal Pay Act, 29 U.S.C. § 206(d), the Family and Medical Leave Act (FMLA),

29 U.S.C. § 2616, and the Sarbanes-Oxley Act, (SOX) 18 U.S.C. § 1514.[5]

C. The "Cat's Paw" Investigation Frustrates the Congressionally Mandated Administrative Scheme and Right to Trial By Jury.

By contrast, the "cat's paw" rule relies solely upon the employer's investigation by corporate human resources department personnel. The employer's investigation is sufficient to satisfy the "cat's paw" rule and insulate the employer from liability so long as the decisionmaker considers information from any source other than the biased supervisor, regardless of how biased the supervisor's information or unreliable the other information may be. As conceded by the Seventh Circuit, the employer's investigation need not be "robust" or a "paragon of independence." *Staub*, 560 F.3d at 659.

To satisfy the Seventh Circuit's standard, corporate investigations need not be fair, independent, or free of negligence. Investigations under the "cat's paw" rule are sufficient even though they fail to consider 1) disparate treatment, 2) the statements by witnesses, including the effected employee, 3) direct evidence of discriminatory intent, 4) the untruthfulness of the allegations against the effected employee (pretext), or 5) statistical disparities. Under the "cat's paw" theory, the

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[5] Congress has vested the Department of Labor with broad remedial and investigatory authority to protect whistle-blowers who report fraud by publicly held corporations. *See* 29 C.F.R. § 1980.104.

determination by corporate human resources personnel would be sufficient to insulate the employer from liability even if its factual findings were clearly wrong.[6]

Under the "cat's paw" theory, an employee who is dissatisfied with the employer's "independent" investigation and its decision could still file a charge of discrimination with the agency charged with the statute's enforcement. But the administrative agency's investigation would be limited to determining the identity of the ultimate decisionmaker and the information that person

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[6] Under the "honest belief" rule recognized by the Seventh Circuit, "[t]he reasons for . . . termination are not scrutinized as to whether they were right or wrong, but only 'whether the reason for which the [employer] discharged the [employee] was discriminatory.'" *Balderston v. Fairbanks Morse Engine Div of Coltec Indus.*, 328 F.3d 309, 324 (7th Cir. 2003) (citation omitted). *See also Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) ("[C]ourts 'only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.'") (citation omitted); *Dawson v. Henry County Police Dep't*, 238 Fed. Appx. 545, 549 (11th Cir. 2007) ("The pretext inquiry focuses on the honesty of the employer's explanation; raising a question about the correctness of the facts underlying that explanation without impugning the employer's honest belief, fails to create a triable pretext issue."); *McNary v. Schreiber Foods, Inc.*, 535 F.3d 765, 769-70 (8th Cir. 2008) ("[T]he relevant inquiry is whether the University believed he was guilty of the conduct justifying discharge, . . . Whether they were correct in their surmise that McNary breached company policy is not the issue.).

reviewed. If the ultimate decisionmaker considered information from more than one source, the agency's inquiry is at an end without reaching the merits of the claim even if an illegally biased supervisor influenced the process and was a motivating factor in the decision to take adverse action.

After having received a right to sue notice, the employee could file a Complaint in federal district court. The employer would again argue that ultimate decisionmaker was free of bias, and considered a source of information other than a biased supervisor, who initiated the disciplinary process. If confirmed, those allegations would require dismissal with prejudice without ever reaching the merits of the discrimination claim. Under the "cat's paw" theory, the judgment of corporate human resources about the merits of an employee's discrimination claim is, in effect, *res judicata*.

Much like a police department's internal investigation of an excessive force complaint, an employer's human resources personnel are not unbiased decisionmakers. It would be nothing less than folly to assume the neutrality of an employer's "independent" investigation, and it would be even greater folly to accord its decision binding effect. Cognitive social psychology teaches that once a recommendation has been made, it will tend to function as a prior theory—a tentative hypothesis. As such, it can reasonably be expected to influence the ultimate decisionmaker's judgment in a recommendation-consistent direction, even if the employer conducts its own investigation. This tendency is known as expectancy confirmation bias.

The empirical and theoretical literature on expectancy confirmation bias is vast.[7]

Moreover, many legal scholars seriously question whether employer-developed anti-discrimination policies are effective in preventing discrimination. While courts have developed a comprehensive set of legal rules governing workplace harassment, for example, the incidence of harassment has not changed because employers are only encouraged to adopt rules and not to ensure that harassment is actually prevented. *See* Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance In Sexual Harassment Law*, 26 Harv. Women's L.J. 3 (2003).

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[7] *See* Charles G. Lord, *et al., Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098 (1979); Hillel J. Einhorn & Robin M. Hogarth, *Confidence in Judgment: Persistence of the Illusion of Validity*, 85 Psychol. Rev. 395 (1978); Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. Personality & Soc. Psychol. 1202 (1978); John M. Darley & Paget H. Gross, *A Hypothesis-Confirming Bias in Labeling Effects*, 44 J. Personality & Soc. Psychol. 20 (1983) (demonstrating how expectancy confirmation bias leads to the reinforcement of social stereotypes); John M. Darley & Russell H. Fazio, *Expectancy Confirmation Processes Arising in the Social Interaction Sequence*, 35 Amer. Psychologist 867 (1980)(same); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 (1995).

The existence of prophylactic rules don't insure good faith implementation or compliance with those rules.

> [T]he legal regime has overemphasized compliance with prophylactic rules at the expense of effecting real change in preventing the problem of sexual harassment in the workplace. Employers who play a significant role in maintaining a work environment that is either hostile or hospitable to sexual harassment are rewarded for paying lip service to the regime by enacting standard-issue policies and procedures, regardless of whether those efforts actually reduce harassment or compensate victims. Thus, the triumph of form over substance in sexual harassment law occurs.

Id. at 4-5.

Likewise, a legal regime concerning the adequacy of internal investigations for the purpose of finding illegal discrimination will not necessarily diminish the incidence of illegal discrimination, but only insure the adoption of legally mandated employer rules. While enlightened employer rules concerning internal investigations are to be encouraged, those investigations can never be relied upon to eradicate discrimination at the workplace.

Congress never intended to subordinate the fact-finding functions of the EEOC, the Department of Labor, and federal juries to findings by corporate

human resources personnel. Congress never intended to allow the fox to guard the hen house[8].

CONCLUSION

The decision of the Seventh Circuit should be reversed.

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[8] The Seventh Circuit appears to have taken the cat's paw fable too literally in adopting a rule for imputing liability to a corporation. It is doubtful whether courts should rely upon fables or proverbs as a source of law. Amicus suggests, however, that the more apt adage is that which cautions against allowing the fox to guard the henhouse. That proverb "has been traced back to 'Contre-League' (1589) and is similar to the Latin: 'Ovem lupo commitere' ('To set a wolf to guard sheep'). First attested in the United States in 'Poet's Proverbs' (1924). The proverb is found in varying forms: Don't put the fox to guard the chicken house; Don't let the fox guard the chicken coop; Don't set a wolf to watch the sheep." Gregory Titelman, *Random House Dictionary of Popular Proverbs and Sayings* 64 (2d ed. 2000)

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BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE AS *AMICUS CURIAE* SUPPORTING PETITIONER

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Brief of the American Association of Justice as *Amicus Curiae* in Support of Petitioner contains 6,347 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

July 9, 2010.

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CERTIFICATE OF SERVICE

I, Jeffrey R. White, a member of the Bar of this Court, hereby certify that on this 9th day of July, 2010, three copies of the Brief of the American Association of Justice as *Amicus Curiae* Supporting Petitioner in the above-entitled case were served via Federal Express for overnight delivery, to each counsel listed below. I further certify that all parties required to be served have been served.

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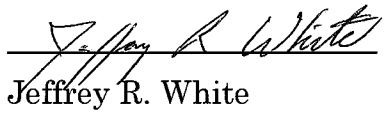

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