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 OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 56 national and international labor organizations with a membership of approximately 11.5 million working men and women.[1] This case presents the question of when an employer may be held liable under the Uniformed Services Employment and Reemployment Rights Act of

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus*, made a monetary contribution to the preparation or submission of this brief.

1994, 38 U.S.C. § 4301 *et seq.*, (USERRA) for an adverse employment action against a member of the uniformed services that was based in part on the predicate actions of lower level supervisors taken with anti-military animus where the ultimate decision to take the adverse employment action was made by a higher level supervisor without such animus. The AFL-CIO has filed briefs in other cases concerning the appropriate method for proving employment discrimination. *See*, *e.g.*, *Desert Palace*, *Inc. v. Costa*, 539 U.S. 90, 92 n. * (2003). The present case is of particular concern for the AFL-CIO because the proof scheme used under USERRA is the same as that used in cases of unlawful discrimination arising under the National Labor Relations Act.

STATEMENT

Vincent Staub was a member of the United States Army Reserve, who until the discharge challenged in this case was employed as an angiography technologist in the diagnostic imaging department of Proctor Hospital. Staub's Reserve duties typically required him to be present for drills and training one weekend per month and two weeks in the summer. JA 32a. Both the head of the department, Michael Korenchuk, and the second in command, Janice Mulally, repeatedly expressed hostility regarding Staub's reserve duty.

When Mulally began setting the schedule for the department in 2000, Staub started to experience difficulty getting the appropriate days off to meet his Reserve duty. Mulally reacted to Staub's requests for a schedule that allowed him time for his Reserve duty by telling him she "didn't want to deal with it," by making Staub use vacation days for that duty, and by scheduling him for extra shifts without advance notice. JA 32a.

On several occasions, Mulally went beyond taking

actions that frustrated Staub's attempts to reconcile his work schedule with his Reserve duty to expressly state her anti-military animus. Mulally referred to Staub's Reserves duties as "bullshit," charged that "everyone else [in the department] ha[d] to bend over backwards to cover [his] schedule for the Reserves," and posted notices on the employee bulletin board soliciting volunteers to cover Staub's shifts on his Reserve duty weekends in a way that created resentment among other employees. JA 33a. Coworkers reported that Mulally was "out to get" Staub, and on one occasion when Mulally met technologists Angie Day and Leslie Sweborg after work for drinks, Mulally complained about the "strain on the[] department" due to Staub's military obligations and asked Sweborg to "help her get rid of him." Sweborg refused. JA 35a.

On several occasions, Staub asked Korenchuk to intervene with Mulally on his behalf, but to little effect. Korenchuk, for his part, also expressed hostility to Staub's Reserves duties, calling it "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayer money." JA 34a.

Hostility to Staub's Reserves duties increased after he returned to the Hospital from 92 days of active duty service in 2003 and intensified further after January 9, 2004, when Staub was notified that he was to be deployed for additional active duty. JA 34a-35a. A deployment would have been costly to the Hospital, because at that time the department only had two angiography technologists and the hospital would have to hire temporary workers during Staub's absence. JA 35a.

Against this background, Staub and Sweborg received a written warning from Mulally on January 27, 2004, for failing to volunteer for work elsewhere in the diagnostic imaging department when they had no angiography

patients. JA 36a. Staub and Sweborg disputed the warning on the ground that hospital policy had not previously required them to report for work elsewhere in the hospital if they had no patients in the angiography unit. Staub and Sweborg also noted that they had learned of the cancellation of a scheduled procedure only at the last minute, which limited their availability to help elsewhere in the department. JA 37a. The warning required Staub and Sweborg to "report to [Korenchuk] or [Mulally] when [they] ha[d] no patients and [the angiography] cases [we]re complete[d]," as well as "remain in the general diagnostic area unless [they] specified" to Korenchuk or Mulally where they were going. JA 37a.

Following the disciplinary notice to Staub, Mulally made a phone call to Staub's Reserve Unit Administrator to see if Staub could be excused from some of his training commitments that summer. JA 37a. The Administrator told Mulally that the training was mandatory and that reservists could not be excused due to work conflicts. Mulally ended the conversation by calling the Administrator an "asshole" and hanging up the phone. *Ibid.*

Thereafter, on April 2, 2004, Angie Day, who had since resigned from the Hospital, returned for a meeting with Korenchuk (department head), Linda Buck (vice president of human resources), and R. Garrett McGowan (chief operating officer). JA 38a. As mentioned, Day was present when Mulally tried to convince Sweborg to help Mulally get rid of Staub. At the April 2 meeting, Day told the group of Hospital managers that she had trouble working with Staub and that he was "absent . . . from the department." *Ibid.* In response to Day's complaints, Korenchuk was advised to "put together a plan for addressing [Staub]'s behavior." JA 73a.

On April 20, Staub and Sweborg had completed their

work in the angiography department at midday. They reported to Korenchuk's office, but finding him absent, they left a voice mail informing him that they were going to lunch and went to the cafeteria. JA 39a. When they returned a half-hour later, Korenchuk immediately escorted Staub to the human resources office where Buck informed Staub that he was discharged. *Ibid.* Apparently, Korenchuk had already informed Buck that in the face of the January 27 warning Staub had been absent from the department without informing Korenchuk or Mulally, and Buck had already decided to terminate Staub. *Ibid.* Sweborg, who was also subject to the January 27 warning and who had accompanied Staub to lunch on April 20, was not subjected to any discipline. *Ibid.* Staub filed a grievance challenging his discharge on the ground that Mulally bore animus against him due to his military service, but Buck did not investigate that allegation. JA 40a.

Staub brought suit against Proctor Hospital alleging that his discharge violated the anti-discrimination provisions of USERRA. Following a trial, the jury specifically found both that Staub "proved by a preponderance of the evidence that [his] military status was a motivating factor in the [Hospital's] decision to discharge him" and that the Hospital failed to "prove[] by a preponderance of the evidence that [Staub] would have been discharged regardless of his military status." JA 68a. The Seventh Circuit reversed on the ground that Staub had failed to prove that Mulally and Korenchuk had "exercised singular influence" over Buck. In this regard, the Seventh Circuit observed that "Staub faced an uphill battle in his USERRA discrimination suit," because, in that court's view, Staub had the burden of "show[ing] that the *decisionmaker* [, i.e., Buck,] harbored animus and relied on that animus in choosing to take action." JA 41a (emphasis in original).

SUMMARY OF ARGUMENT

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) prohibits employment discrimination against persons who serve in the uniformed services. USERRA specifies that an employer shall be considered to have engaged in prohibited discrimination if a person's service is a motivating factor in an adverse employment action. The implementing regulations provide that an employee can establish prohibited discrimination by showing that his service was one of the reasons for his employer's adverse employment action.

The evidentiary scheme for proving employment discrimination under USERRA was derived from the scheme developed by the National Labor Relations Board in applying the anti-discrimination provisions of the National Labor Relations Act. Applying that scheme, the NLRB has frequently considered the question of when an employer should be held liable for the discriminatorily motivated actions of lower level supervisors that form the basis for a decision to take adverse employment action made by a higher level supervisor who has no personal discriminatory motive. The NLRB decisions hold that the employer is liable for discrimination where an adverse employment action is based in whole or in part on the discriminatorily motivated actions of lower level supervisors. Under the NLRA evidentiary scheme, carried over in USERRA, the employer can escape liability in that circumstance by proving that it would have taken the adverse employment action without regard to the employee's protected status.

In this case, Staub presented ample evidence that the decision of Proctor Hospital's vice president to discharge him was substantially based on the discriminatorily motivated predicate actions of two lower level supervisors. The Seventh Circuit held that this showing was insufficient to establish a discrimination claim under USERRA

and that, instead, Staub needed to prove that the vice president "harbored animus and relied on that animus in choosing to take action." The Seventh Circuit's rule substitutes a "sole cause" requirement for the substantial cause requirement provided for by the text of USERRA and the implementing regulations.

ARGUMENT

The instant case involves a recurrent fact pattern in cases brought under various federal laws that prohibit employment discrimination. An employer's lower level supervisor, acting within the scope of his or her employment and out of a discriminatory motive, takes some predicate action, such as reporting an infraction of company rules, that could constitute grounds for discharging or otherwise disciplining an employee. A higher level company official, acting on the basis of that discriminatory predicate action but without any personal discriminatory motive, disciplines or discharges the employee. The employee responds by bringing a claim against the employer for violating the anti-discrimination law.

Under the National Labor Relations Act – the longest standing of the federal employment discrimination laws – the settled rule is that, in this recurrent situation, the employee has a claim against the employer. *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 117 (6th Cir. 1987), explains the NLRA rule:

> Section 8 of the Act states that the 'employer' may not engage in unfair labor practices. 29 U.S.C. § 158(a). '[A]ny person acting as an agent of an employer, directly or indirectly . . .' comes within the definition of that term. 29 U.S.C. § 152(2). [Thus, when a person] qualifies as a 'supervisor' under the Act, 29 U.S.C. § 152(11), . . . the company will be liable for the consequences of his actions. * * *

> "[It follows that] 'a supervisor's unlawful, anti-labor motivation in [taking a predicate action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus. Thus, the company is deemed to possess the unlawful animus.' *JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 619 (6th Cir. 1985) (citations and footnote omitted)."

As we now show, the anti-discrimination provision of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 *et seq*., (USERRA), and the Secretary of Labor's regulations implementing that provision are modeled on the NLRA anti-discrimination provision as elaborated in the line of NLRB cases approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), and under that evidentiary scheme, Staub's USERRA discrimination claim against Proctor Hospital – like the parallel NLRA discrimination claim in cases such as *Grand Rapids Die Casting* – is meritorious.

I. USERRA prohibits "[d]iscrimination against persons who serve in the uniformed services" by broadly providing:

> "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." 38 U.S.C. § 4311(a).

Of critical importance for the instant case, USERRA goes on to specify:

> "An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the per-

> son'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." 38 U.S.C. § 4311(c).

By expressly imposing liability where anti-military animus is "a motivating factor in the employer's action," "Congress disavowed the sole-motivation requirement inferred by *Monroe* [*v. Standard Oil Co.*, 452 U.S. 549 (1981),] and its progeny" from the anti-discrimination provisions of the Veterans Reemployment Rights Act of 1968, which were superseded by USERRA. *Gummo v. Village of Depew*, 75 F.3d 98, 105 (2d Cir. 1996).

The Secretary of Labor has authority to "prescribe regulations implementing the provisions of [USERRA] with regard to the application of [USERRA] to States, local governments, and private employers." 38 U.S.C. § 4331(a). Exercising this authority, the Secretary prescribed the following regulation delineating "the burden of proving discrimination or retaliation in violation of USERRA":

> "The individual has the burden of proving that a status or activity protected by USERRA was *one of the reasons* the employer took action against him or her, in order to establish that the action was discrimination or retaliation in violation of USERRA. If the individual succeeds in proving that the status or activity protected by USERRA was one of the reasons the employer took action against him or her, the employer has the burden to prove the affirmative defense that it would have taken the action anyway." 20 C.F.R. § 1002.22 (emphasis added).

In promulgating this regulation, the Secretary explained that, "[u]nder this structure, in order to establish a case of employer discrimination" a claimant must prove the following three "elements of a violation":

> "[i] membership in a protected class (such as past, present or future affiliation with the uniformed services; [ii] an adverse employment action by the employer or prospective employer; and [iii] a casual relationship between the claimant's protected status and the adverse employment action (the 'motivating factor')." 70 Fed. Reg. 75246, 75250 (Dec. 19, 2005).

With regard to the third element, the Secretary emphasized that "a claimant need not show that his or her protected activities or status was the sole cause of the employment action." 70 Fed. Reg. at 75250. To the contrary, "in order to establish a case of employer discrimination" under USERRA, a claimant needs to show "a casual relationship between the claimant's protected status and the adverse employment action" but "need *not* show that his or her protected activities or status was the sole cause of the employment action." *Ibid.* (emphasis added). Thus, "the person's activities or status need be *only one of the factors*" causing the adverse employment action. *Ibid.* (emphasis added).

As the Secretary of Labor has explained, in drafting USERRA's anti-discrimination provision, "Congress intended that the evidentiary scheme set forth by the United States Supreme Court in *NLRB v. Transportation Management Corp.* 462 U.S. 393, 401 (1983), apply to the analysis of violations under USERRA." 70 Fed. Reg. at 75250. "Under that scheme, a claimant carries his burden of proving a prima facie case of discrimination by showing, by a preponderance of the evidence, that his protected status was 'a substantial or motivating factor in the adverse [employment] action'; but the employer may nonetheless escape liability by showing, as an affirmative

defense, that it would have made the same decision without regard to the employee's protected status. *Transportation Management*, 462 U.S. at 401." *Gummo*, 75 F.3d at 106. *See Transportation Management*, 462 U.S. at 401 ("the Board's decisions . . . have consistently held that the unfair labor practice consists of a discharge or other adverse action that is based in whole or in part on antiunion animus").

II. In applying "the evidentiary scheme" approved by this Court in *Transportation Management* – and incorporated in USERRA – the National Labor Relations Board has had considerable experience in dealing with the problem presented by this case, namely when an employer should be held liable for discriminatory actions of lower level supervisors that contribute to a decision by a higher level supervisor, who has no personal discriminatory motive, to take adverse employment action.[2] In applying that scheme, the NLRB has been careful not "to adopt a rule that would permit the company to launder the 'bad' motives of certain of its supervisors" by relying upon the decision of "a neutral superior." *Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982). Thus, in many cases applying that scheme, employers have been found to have violated the NLRA for adverse employment actions that were caused in part by the discriminatorily motivated predicate acts of lower level supervisors "even though the management official who ultimately fired the complainant was unaware of that employee's union activity." *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d at 118. *Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312

[2] The NLRB is familiar with the "cat's paw" fable. *See Brown Shoe Co.*, 1 NLRB 803, 828 (1936). But the Board has wisely refrained from employing that metaphor in addressing the problem of when a lower level supervisor's unlawfully motivated actions can serve as the basis for employer liability.

F.2d 529 (3d Cir. 1962), applies that evidentiary scheme to a factual situation that is essentially identical to that presented here.

In *Allegheny Pepsi-Cola Bottling*, an anti-union supervisor "reported to [the] company president" that a key union supporter "had misused a company-leased panel truck on two occasions." 312 F.2d at 531. Relying on that report, the company president "then ordered [the union supporter] dismissed." *Ibid.* The Board found that the supervisor "was discriminatorily motivated in making his report and that because of this, [the union supporter's] discharge violated the Act," even though the company president "himself was not so motivated in ordering the discharge." *Ibid.* Since the person who reported the union supporter was "a supervisor within the meaning of the Act" and "the report he made to [the company president] was obviously within the scope of his employment" and unquestionably "the cause of [the union supporter's] discharge," "the only issue was whether [the supervisor] was discriminatorily motivated in making the report." *Ibid.* citing *Federal Tool Corp.*, 130 NLRB 210, 220-21 (1961) (superintendent's decision to lay off union supporter based on supervisor's negative evaluation that was influenced by antiunion animus violates the NLRA, even though the superintendent did not know of the laid off employee's union activity). Finding that the evidence showed the supervisor was so motivated, the Board found the employer guilty of an unfair labor practice. *Ibid.* As the Third Circuit observed in enforcing the Board's decision, "To rule otherwise would provide a simple means for evading the Act by a division of corporate personnel functions." *Ibid.*

The principle reflected in these decisions applying the NLRA anti-discrimination provision is that "a supervisor's unlawful, anti-labor motivation in [taking a predicate

action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting*, 831 F.2d at 117 (citation and quotation marks omitted).

III. The lesson to be drawn from the foregoing is that a prima facie case of discrimination under USERRA can be proven by showing a causal connection between a discriminatorily motivated action by a lower level supervisor and the decision of a higher level employer official to take adverse employment action.[3] As the Tenth Circuit succinctly stated the matter, in such a case, "the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007).[4]

That is so, because "in order to establish a case of employer discrimination" under USERRA, a claimant needs to show "a casual relationship between the claimant's protected status and the adverse employment action" but "need not show that his or her protected activities or status was the sole cause of the employment action." 70 Fed. Reg. at 75250. Where a supervisor takes

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[3] Like the NLRA, 29 U.S.C. § 152(2), USERRA defines "the term 'employer'" to include, not only "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment," but also "a[ny] person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. § 4303(4)(A).

[4] BCI Coca-Cola Bottling was decided under Title VII of the Civil Right Act, which, like USERRA, requires that a claimant show that a proscribed animus was "a motivating factor" for the adverse employment action. 42 U.S.C. § 2000e-2(m).

an action "within the scope of his employment" that is "the cause of [a USERRA-protected employee's] discharge," "the only issue [i]s whether [the supervisor] was discriminatorily motivated in [t]aking the [action]." *Allegheny Pepsi-Cola Bottling*, 312 F.2d at 531. Under USERRA, "a supervisor's unlawful, anti-[military] motivation in [taking an action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting*, 831 F.2d at 117 (citation and quotation marks omitted).

In the instant case, the decision to discharge Staub was made by Linda Buck, Proctor Hospital's vice president of human resources. "According to the written notice [issued by Buck], Staub was discharged for failing to heed the earlier warning instructing him to report to Korenchuk whenever he had no more work in the angio department and otherwise to remain in the general diagnostics area." Jt. App. 39a. Buck testified that "[w]ithout the January 27 write-up [leading to the earlier warning], Day's April 2 complaint, and the event of April 20 . . . she would not have fired Staub." *Ibid.* Staub presented ample evidence that the "January 27 write-up" on which the "earlier warning" was the result of anti-military bias on the part of Staub's immediate supervisor Janice Mulally and of department head Michael Korenchuk. And the event of April 20 – leaving a recorded message for Korenchuk explaining that Staub was at lunch when he was unable to find Korenchuk to report in person – was not a violation of the January 27 instruction at all, as demonstrated by the fact that Sweborg, who was also subject to that instruction and who accompanied Staub to lunch that day, was subject to no disciplinary action.

By Buck's own testimony, then, her decision to discharge Staub was caused by the earlier discriminatorily

motivated actions of Staub's immediate supervisor and the department head. The fact that Buck herself may not have harbored the anti-military animus that motivated the predicate actions of the lower level supervisors does not refute Staub's showing that the unlawfully motivated actions of those supervisors was "a motivating factor in the employer's action." 38 U.S.C. § 4311(c). Thus, Staub submitted sufficient evidence to satisfy his "burden of proving that a status or activity protected by USERRA was one of the reasons the employer took action against him." 20 C.F.R. § 1002.22.

The Seventh Circuit held that it was insufficient for Staub to establish that Buck's decision to discharge him was based on the discriminatory actions of his immediate supervisors. JA 41a. Rather, that court imposed on Staub the burden of "show[ing] that the *decisionmaker*[, i.e., Buck,] harbored animus and relied on that animus in choosing to take action." *Ibid.*

The Seventh Circuit's ruling is squarely in conflict with the Secretary of Labor's implementing regulations, which provide that the claimant's burden is to show that anti-military animus was "one of the reasons the employer took action against him." 20 C.F.R. § 1002.22. Under the evidentiary scheme adopted by those regulations, it is sufficient that Korenchuk and Mulally's discriminatory actions were "a substantial or motivating factor in the adverse [employment] action." *Transportation Management*, 462 U.S. at 401. Contrary to the Seventh Circuit, it is not necessary to show that the discriminatory actions of these lower level supervisors "exercised singular influence" over Buck, JA 46a, making the actions of the lower level supervisors, in effect, "the sole cause of the employment action," 70 Fed. Reg. at 75250. To the contrary, under the evidentiary scheme enacted by Congress, "a supervisor's unlawful, anti-labor motivation

in [taking a predicate action] leading to discharge must be imputed to the Company, even though the officers who actually make the firing decision do not share that animus." *Grand Rapids Die Casting*, 831 F.2d at 117 (citation and quotation marks omitted).

As the circumstances of this case amply demonstrate, the rule adopted by the Seventh Circuit "would permit the company to launder the 'bad' motives of certain of its supervisors" by hiding behind the decision of "a neutral superior." *Boston Mutual Life*, 692 F.2d at 171. Such an approach "would provide a simple means for evading the Act by a division of corporate personnel functions." *Allegheny Pepsi-Cola Bottling*, 312 F.2d at 531. For precisely that reason, that approach was rejected by Congress in drafting USERRA and by the Secretary of Labor in issuing regulations implementing the anti-discrimination provisions of that statute.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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