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 *AMICUS CURIAE* RESERVE OFFICERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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July 9, 2010

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INTEREST OF *AMICUS CURIAE*

The Reserve Officers Association[1] of the United States (ROA) was founded in 1922 and chartered by Congress in 1950. ROA is composed of approximately 65,000 members: military officers, former officers, and spouses of all the uniformed services of the United States, primarily the National Guard and Reserve (NG&R). In accordance with the charter, ROA advocates the development and implementation of policies that will provide for adequate national defense, especially policies relevant to the NG&R.

With today's heavy reliance on the NG&R, the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 *et seq.*, plays a vital role in national security. Without a law like USERRA, the services would not be able to recruit and retain the necessary quality and quantity of personnel to defend our country.

In 1997, ROA established a "Law Review" column, published in its monthly magazine and at its website. More than 600 articles, approximately 500 regarding USERRA, and a detailed Subject Index can be found at www.roa.org/law_review. In 2009, ROA established the Service Members Law Center to

[1] The parties consented to the filing of this brief. No counsel for a party authored 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.

educate the bench and bar, NG&R members, employers, and others about USERRA, the Servicemembers Civil Relief Act, the Uniformed and Overseas Citizens Absentee Voting Act, and other laws that are particularly pertinent to those who serve our nation in uniform.

Given its purpose, membership, and history, ROA offers its unique perspective to assist this Court and to promote proper outcomes for future USERRA litigation.

SUMMARY OF ARGUMENT

In light of the history of veterans' reemployment rights, it is the view of ROA that application of "cat's paw theory" to USERRA discrimination claims conflicts with Congress' intent and the plain language of USERRA. If this is permitted to continue it will allow employers to escape liability for taking discriminatory actions against members of the U.S. military.

THE HISTORY OF THE VETERANS' REEMPLOYMENT RIGHTS STATUTE SUPPORTS A LIBERAL CONSTRUCTION FOR THE BENEFIT OF THOSE WHO SERVE OUR NATION IN UNIFORM

In 1940, after World War II (WWII) had begun, but before the United States entered the war, Congress enacted the Selective Training and Service

Act of 1940[2] (STSA), the law that provided for the induction of young men (eventually 10 million) for WWII. Senator Elbert Thomas of Utah conceived of the idea to require civilian employers of those drafted to reemploy them upon their release from service. He offered an amendment to that effect and persuaded his colleagues to support the amendment, which became §8 of the STSA.

Senator Thomas explained the rationale for his amendment as follows:

> [I]f Congress has the power to raise an army that power can be effectively exercised only if Congress can take such measures as are necessary to make it an efficient army and to prevent undue hardships upon the persons who constitute the army. . . . [N]o one can deny that if we guarantee [veterans] their jobs when their military service is completed we have taken a long step in providing the Army and Navy with patriotic men who are willing and anxious to serve their country. . . . [I]t is not unreasonable to require the employers of such men to rehire them upon completion of their service, since the lives and property of employers, as well as the

[2] Pub. L. 76-783, 54 Stat. 885, 890. The reemployment statute had many different formal names, but it came to be known colloquially as the Veterans' Reemployment Rights Act (VRRA). In this brief, ROA will use VRRA to refer to the reemployment statute in effect prior to 1994, when Congress enacted USERRA as a long-overdue recodification of the VRRA.

> lives and property of everyone else in the United States are defended by such service.

96 Cong. Rec. 10573 (remarks of Sen. Thomas), quoted in *Leib v. Georgia Pacific Corp.*, 925 F.2d 240, 246 (8th Cir. 1991).

As originally enacted in 1940, §8 of the STSA accorded reemployment rights only to those who were drafted. Section 7 of the Service Extension Act of 1941[3] amended the reemployment provision to accord persons who voluntarily enlisted in the armed forces after May 1, 1940 the same reemployment rights as draftees.[4] Beginning in the 1950s, Congress expanded the law to accord reemployment rights to persons who left civilian jobs for training or service in the NG&R. In 1955, §2(f) of the Reserve Forces Act of 1955[5] amended the VRRA to accord reemployment rights to persons who left civilian jobs to perform 3-6 months of initial active duty training (IADT) in the NG&R.

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[3] Pub. L. 77-213, 55 Stat. 626, 627.

[4] Although the VRRA applied to voluntary enlistees as well as draftees, this law remained part of the draft law until 1974. The draft law was called the Selective Training and Service Act of 1940. Congress changed the name to the Selective Service Act of 1948, Pub. L. 80-759, 62 Stat. 604. Three years later, Congress changed the name to the Universal Military Training and Service Act of 1951, Pub. L. 82-51, 65 Stat. 75. The final name for the draft law was the Military Selective Service Act of 1967, Pub. L. 90-40, 81 Stat. 100.

[5] Pub. L. 84-305, 69 Stat. 598, 602.

After successfully completing IADT, a member of the NG&R is generally required to perform inactive duty training (IDT), usually but not always on weekends, and active duty for training (ADT), usually for about two weeks once per year. In 1960, Congress amended the VRRA to accord reemployment rights to NG&R members returning to work after IDT and ADT.[6]

After the 1960 amendment, NG&R personnel had the right to absent themselves repeatedly from their civilian employment for periodic military training. Some employers perceived these repeated absences to be a nuisance, and some employers were tempted to rid themselves of the nuisance by firing or otherwise discriminating against NG&R members. Accordingly, in 1968, Congress made it unlawful for an employer to deny a service member retention in employment, promotion, or an incident or advantage of employment because of the employee's obligations as a member of a reserve component of the armed forces.[7] In 1986, Congress expanded that provision to outlaw discrimination in hiring as well.[8]

In 1974, Congress significantly changed the law. Section 9(c)(3) of the VRRA became §2021(b)(3). This

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[6] Pub. L. 86-632, 74 Stat. 467.

[7] Section 1 of Pub. L. 90-491, 82 Stat. 790.

[8] Section 331 of the Veterans' Benefits Improvement and Health-Care Authorization Act of 1986, Pub. L. 99-576, 100 Stat. 3248, 3279.

section is the precursor to §4311 of USERRA, the section that is relevant to the case at bar. That same year, Congress also disconnected the reemployment statute from the draft law, moving the reemployment statute from title 50, national defense, to title 38, veterans' benefits. These enactments became the Vietnam Era Veterans Readjustment Assistance Act[9] (VEVRAA), which also made other important and substantive changes to the reemployment statute, including making the law applicable to state and local governments for the first time.[10]

The Supreme Court has addressed the re-employment statute 16 times[11] and this case will be

[9] Section 404 of the VEVRAA, Pub. L. 93-508, 88 Stat. 1578, 1594-1600.

[10] Section 2021(a)(2)(B) of the VRRA, as amended by VEVRAA, added States and their political subdivisions to the kinds of employers subject to this law. The reemployment statute has applied to the Federal Government and to private employers since 1940.

[11] *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 (1946); *Trailmobile Corp. v. Whirls,* 331 U.S. 40 (1947); *Aeronautical Industrial District Lodge 727 v. Campbell,* 337 U.S. 521 (1949); *Oakley v. Louisville & Nashville Railroad Co.,* 338 U.S. 278 (1949); *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953); *Diehl v. Lehigh Valley Railroad Co.,* 348 U.S. 960 (1955); *McKinney v. Missouri-Kansas-Texas Railroad Co.,* 357 U.S. 265 (1958); *Tilton v. Missouri Pacific Railroad Co.,* 376 U.S. 169 (1964); *Brooks v. Missouri Pacific Railroad Co.,* 376 U.S. 182 (1964); *Accardi v. Pennsylvania Railroad Co.,* 383 U.S. 225 (1966); *Eagar v. Magma Copper Co.,* 389 U.S. 323 (1967); *Foster v. Dravo Corp.,* 420 U.S. 92 (1975); *Alabama Power Co. v. Davis,*

(Continued on following page)

the 17th. Shortly after WWII ended, this Court interpreted the reemployment provision of the STSA for the first time. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946). The decision states a purpose for the Act:

> The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country an advantage which the law withheld from those who stayed behind.

Fishgold, 328 U.S. at 284.

The decision continues with the Court's mandate to construe the law in favor of the veteran: "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." *Id.*, at 285. The defined approach by this Court in *Fishgold* has caused it to serve as the seminal case for interpreting statutes involving veterans' benefits ever since. *See* Recent Decisions, *Veterans. Re-Employment under Selective Service Act. Protection of Seniority*, 33 VA. L.REV. 2, 219 (1947).

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431 U.S. 581 (1977); *Coffy v. Republic Steel Corp.,* 447 U.S. 191 (1980); *Monroe v. Standard Oil Co.,* 452 U.S. 549 (1981); and *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991); *See also* Category 10.1 at www.roa.org/law_review for comprehensive notes on these cases.

During WWII, not unlike today, the United States was embroiled in a war on two fronts. More than 16 million men and women served in the U.S. armed forces during the war. When the Supreme Court decided the *Fishgold* case on May 6, 1946, millions of those U.S. service members had recently returned from war and were settling back into their civilian jobs and lives. Many of the awe-inspiring sounds and images that are now immortalized in our national conscience were fresh in the minds of Americans in 1946, especially the raising of the U.S. flag on Mount Suribachi on Iwo Jima.[12] Similarly, the words and images of today's generation are fresh in our minds, especially the horrors of September 11, 2001.

The Supreme Court's first 14 cases applying the VRRA involved persons who were drafted or who voluntarily enlisted in the regular armed forces, but the last two cases (1981 and 1991) have dealt with the application of this law to NG&R members. This is not surprising. After Congress abolished the draft in 1973, the Department of Defense adopted its "Total Force Policy" and greatly increased reliance upon NG&R personnel.

In *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), the Court addressed the situation of Roger D. Monroe, a junior enlisted member of the Ohio Army National Guard. Mr. Monroe worked for the Standard

[12] February 23, 1945, by photographer Joe Rosenthal.

Oil Co. at its refinery in Lima, Ohio. The refinery operated 24 hours per day, 365 days per year. Mr. Monroe and his colleagues worked five consecutive eight-hour days per week, but not always Monday through Friday. The burden of working weekends was distributed among the employees.

As a member of the National Guard, Mr. Monroe was required to participate in one weekend of IDT (drills) each month, and his drill weekend frequently conflicted with his scheduled work at the refinery. When this occurred, Standard Oil complied with the VRRA and granted him an unpaid military leave of absence for the days when his military training obligation prevented him from working at the refinery.

Monroe's complaint was that showing up for his required National Guard training cost him money. Because he was junior in the Army National Guard, his Army pay for a weekend of training was substantially less than what he could earn for working Saturday and/or Sunday at the refinery. Monroe's National Guard training weekend was generally the same weekend each month, and he had provided his employer with a list of the training dates for the whole fiscal year.

Monroe contended that §2021(b)(3) of the VRRA required the employer to schedule his refinery work around his drill weekends. Monroe asked the employer to schedule his civilian work around his anticipated military training obligations. When the

employer refused to make this accommodation, Monroe sued and prevailed in the United States District Court for the Northern District of Ohio.[13] Standard Oil appealed and prevailed in the Court of Appeals.[14]

The Supreme Court granted *certiorari* because of an apparent conflict among the Circuit Courts.[15] In a 5-4 decision written by Justice Potter Stewart, the Court affirmed the Sixth Circuit's dismissal of Monroe's claim. After reviewing the legislative history of §2021(b)(3), the Court held: "The legislative history thus indicates that section 2021(b)(3) was enacted for the significant but limited purpose of protecting the employee-Reservist against discriminations like discharge and demotion, motivated *solely* by Reserve status." *Monroe*, 452 U.S. at 559 (emphasis supplied). The Supreme Court did not hold that an employee challenging a discharge under §2021(b)(3) would be required to prove that he or she was fired *solely* because of NG&R obligations.

In fact, that interpretation of *Monroe* was not only *dictum* but was taken out of context. Nonetheless, the Tenth Circuit relied on this out-of-context *dictum* in reversing a District Court decision for a

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[13] *Monroe v. Standard Oil Co.,* 446 F. Supp. 616 (N.D. Ohio 1978).

[14] *Monroe v. Standard Oil Co.,* 613 F.2d 641 (6th Cir. 1980).

[15] The Court referred to *West v. Safeway Stores, Inc.,* 609 F.2d 147 (5th Cir. 1980).

Naval Reservist who had been fired. *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988). In *Sawyer,* the District Court had found that the reservist had established that his reserve obligations constituted at least one of the reasons for the firing, and that the firing was unlawful. However, the Tenth Circuit held that the reservist was required to prove that his reserve obligations constituted *the sole reason* for the firing.

A statute that requires the fired employee to prove that he or she was fired *solely* because of military obligations is of little value. As is explained more fully below, Congress forcefully dealt with the *Sawyer* problem when it enacted USERRA in 1994.

After *Monroe*, a decade passed before the last (until now) Supreme Court case on the reemployment statute, *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991). William "Sky" King was a senior enlisted member of the Alabama Army National Guard. The National Guard selected him for the position of Sergeant Major of the Alabama National Guard, a position that would require him to serve full-time for three years as the senior enlisted advisor to the Adjutant General of Alabama. King informed his civilian employer that he would be leaving his job for approximately three years of full-time military service. The employer strenuously objected to the duration and contended that King would not have the right to reemployment upon completion of such a lengthy period of service. King informed the employer that he would be reporting for full-time military

service as ordered and that the question of his reemployment rights could be resolved upon his return from service. The employer was unwilling to wait and filed suit against King in the United States District Court for the Northern District of Alabama, seeking a declaratory judgment to the effect that King would not have reemployment rights upon his completion of service.[16] In an unreported decision, the District Court granted the declaratory judgment requested by St. Vincent's Hospital, and the Eleventh Circuit affirmed.[17]

The VRRA had a four-year limit on the duration of *active duty*, but no limit on the duration of *active duty for training* (ADT). The typical ADT period is approximately two weeks, but starting in the 1970s the services started asking some of their NG&R members to participate in substantially longer ADT periods or more than one ADT period per year.

In 1981, the Fifth Circuit decided that a Reserve Component member did not have the right to unpaid military leave under the VRRA for a lengthy training period that the court found to be unreasonably burdensome on the employer. *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981). Later, the Third Circuit

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[16] Section 4323(f) of USERRA, 38 U.S.C. §4323(f), specifically precludes such employer-initiated lawsuits under the new law.

[17] *St. Vincent's Hospital v. King,* 901 F.2d 1068 (11th Cir. 1990).

agreed with this judicially created "rule of reason" under the VRRA. *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688, 694 (3rd Cir. 1989). In 1990, the Fourth Circuit firmly rejected the argument that a civilian employer was required to accommodate the military service of employees who were NG&R members only if a court found the resulting burden on the employer to be "reasonable." *Kolkhorst v. Tilghman*, 897 F.2d 1286 (4th Cir. 1990), *cert. denied*, 502 U.S. 1029 (1992).

The Supreme Court granted *certiorari* to resolve this conflict. In a decision by Justice David Souter, the Court unanimously rejected the employer's argument that a "rule of reason" limited the right of employees like King to take unpaid military leave from their civilian jobs for military service:

> The inference that Congress intended no such limits as the hospital espouses is buttressed by a joint House-Senate Conference Committee's disapproval of a shift in position taken by the Department of Labor on this question. *See* United States Department of Labor, *Veterans' Reemployment Rights Handbook* 111 (1970). After *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir. 1981), the department adopted the different view that section 2024(d) applied only to leaves of 90 days or less. *See* H.R. Rep. No. 97-782, page 8 (1982). Subsequently, a House-Senate Conference Committee Report announced that the House and Senate Veterans' Affairs Committees "did not agree

> that the 90-day limit was well-founded either as legislative interpretation or application of the pertinent case law." 128 Cong. Rec. 25513 (1982). Coming as it did in the aftermath of Congress' decision to place AGR [Active Guard and Reserve] participants under the coverage of section 2024(d), this statement is decidedly at odds with the hospital's position and confirms the conclusion that the enactment of the AGR program was not intended to modify the ostensibly unconditional application of section 2024(d).

King, 502 U.S. at 222.

The VRRA served our nation well, but by the 1980s numerous piecemeal amendments had made the law confusing and cumbersome. The Department of Labor (DOL) and the Department of Defense (DOD) drafted a proposed new reemployment statute and forwarded it to the White House.

On August 2, 1990, Iraq invaded and quickly occupied Kuwait and threatened Saudi Arabia. President George H.W. Bush drew a "line in the sand" and made clear his determination to protect Saudi Arabia and liberate Kuwait. Part of his response included the first significant call-up of National Guard and Reserve personnel since the Korean War. The call-up focused national attention on perceived deficiencies in laws (including the VRRA) to protect mobilized Guard and Reserve personnel. As a result, President Bush forwarded the DOL-DOD draft to

Congress in February 1991. Both the Senate and House of Representatives acted on the presidential initiative during the 102nd Congress, but the differences between the two versions were not resolved before the end of that Congress.

Near the end of the 103rd Congress, the differences were resolved and the legislation was presented to President Clinton for his signature. On October 13, 1994, he signed the Uniformed Services Employment and Reemployment Rights Act into law.[18]

USERRA's legislative history makes clear that USERRA is not a new law but an improvement upon a law that goes back to 1940:

> The provisions of Federal law providing members of the uniformed services with employment and reemployment rights, protection against employment related discrimination, and protection of certain other rights and benefits have been eminently successful for over fifty years. Therefore, the Committee [House Committee on Veterans' Affairs] wishes to stress that the extensive body of case law that has evolved over that period, to the extent that it is consistent with the provisions of this Act, remains in full force and effect in interpreting these provisions. *This is particularly true of the basic principle established by the Supreme*

[18] Pub. L. 103-353, 108 Stat. 3149.

> *Court that the Act is to be 'liberally construed.' See Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977).

H.R. Rep. No. 103-65, 1994 *U.S.C.C.A.N.* 2449, 2452.

Like §2021(b)(3) of the VRRA, §4311(a) of USERRA[19] forbids discrimination against persons who seek or hold civilian positions of employment, but §4311(a) is significantly broader in terms of who is protected.[20]

Congress sought to overrule the *dictum* from *Monroe* and the holding in *Sawyer* that the NG&R member challenging a personnel action must prove that anti-military animus was *the sole reason* for the denial of a benefit of employment. Section 4311(c) provides:

> An employer shall be considered to have engaged in actions prohibited – (1) under subsection (a) if the person's membership, application for membership, service,

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[19] 38 U.S.C. §4311(a).

[20] "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).

> 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) (emphasis supplied).

USERRA's legislative history also clearly explains the purpose and effect of §4311.

> Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination which includes discrimination against applicants for employment (*see Beattie v. The Trump Shuttle, Inc.*, 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units (*see Boyle v. Burke*, 925 F.2d 497 (1st Cir. 1991)), or employees who have a military obligation in the future such as a person in the Delayed Entry Program, *Trulson v. Trane Co.*, 738 F.2d 770, 775 (7th Cir. 1984). The Committee [House Committee on Veterans' Affairs] *intends that these provisions be broadly construed and strictly enforced*. . . .

Section 4311(b) [later renumbered as 4311(c)] would reaffirm that the standard of proof in a discrimination or retaliation case is the so-called "but for" test and that the burden of proof is on the employer, once a prima facie case is established. This provision is simply a reaffirmation of the original intent of Congress when it enacted current section 2021(b)(3) of title 38, in 1968. *See* Hearings on H.R. 11509 Before Subcommittee No. 3 of the House Committee on Armed Services, 89th Cong., 1st Sess. at 5320 (Feb. 23, 1966). In 1986, when Congress amended section 2021(b)(3) to prohibit initial hiring discrimination against Reserve and National Guard members, Congressman G.V. Montgomery (sponsor of the legislation and Chairman of the House Committee on Veterans Affairs) explained that, in accordance with the 1968 legislative intent cited above, the courts in these discrimination cases should use the burden of proof analysis adopted by the Supreme Court under the National Labor Relations Act. *See* 132 Cong. Rec. 29226 (Oct. 7, 1986) (statement of Cong. Montgomery) citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

This standard and burden of proof is applicable to all cases brought under this section regardless of the date of accrual of the cause of action. To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military

> obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

H.R. Rep. No. 103-65, 1994 *U.S.C.C.A.N.* 2449, 2456-57 (emphasis supplied).

No one has been drafted by the United States since 1973, when Congress abolished the draft and established the All-Volunteer Military (AVM). The Total Force Policy is an integral part of the AVM. The National Guard and Reserve have been transformed from a "strategic reserve" (available only for WWIII) to an "operational reserve" (routinely called to the colors for military operations like the ongoing operations in Iraq and Afghanistan).[21]

Today, the U.S. military is an all-volunteer force. The entire U.S. military establishment, including the National Guard and Reserve, accounts for less than three quarters of one percent of our nation's population. That the numbers are so small (in proportion to our national population more than twice the WWII-era population) only increases the debt

[21] The Office of the Assistant Secretary for Reserve Affairs in the Department of Defense publishes a weekly report on mobilization of National Guard and Reserve personnel. The report dated June 8, 2010 shows that as of that date 771,048 National Guard and Reserve personnel had been mobilized since the terrorist attacks of September 11, 2001.

that our nation as a whole owes to the few good men and women who serve.[22]

One hopes that the circumstances of the times and sentiments like these were reflected upon in 1946 when Justice Douglas delivered the opinion of this Court and wrote:

> 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.

Fishgold, 328 U.S. at 285.

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[22] On August 20, 1940, during the Battle of Britain, Prime Minister Winston Churchill said: "The gratitude of every home in our Island, in our Empire, and indeed throughout the world, except in the abodes of the guilty, goes out to the British airmen who, undaunted by odds, unwearied in their constant challenge of mortal danger, are turning the tide of world war by their prowess and their devotion. Never in the field of human conflict was so much owed by so many to so few." *Never Give In: The Best of Winston Churchill's Speeches,* edited by Winston S. Churchill (grandson), Hyperion Publishers 2003, page 238. These eloquent words about the Royal Air Force apply equally to the members of the U.S. armed forces today.

ARGUMENT

THE SEVENTH CIRCUIT'S APPLICATION OF THE "CAT'S PAW THEORY" TO USERRA DISCRIMINATION CLAIMS CONFLICTS WITH CONGRESS' INTENT AND THE PLAIN LANGUAGE OF §4311(c)(1).

A court interpreting USERRA shall "liberally construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* The legislative history makes clear that Congress intended that courts interpreting the USERRA continue to honor that maxim. *See* S. Rep. No. 103-158, at 40 (1993); H.R. Rep. No. 103-65, Pt. 1, at 19 (1993); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) (recognizing "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *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.").

Congress has also stated its intent that courts use the burden shifting model from *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983) to determine whether an employer discriminated against an employee in violation of USERRA.

See H.R. Rep. No. 103-65, Pt. 1, at 24 (1993), as printed in 1994 *U.S.C.C.A.N.* 2449, 2457; S. Rep. No. 103-158 (1993). In the absence of any indication by Congress that it intended something other than §4311(c)(1) to apply in discrimination claims under the USERRA, the canons of statutory construction must be adhered to and the plain language for §4311 must be followed. *See Hernandez v. Dep't of the Air Force*, 498 F.3d 1328, 1332 (Fed. Cir. 2007); *accord Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003).

Under the USERRA discrimination provision, "[a] person who is a member of [. . .] a uniformed service shall not be denied [. . .] any benefit of employment by an employer on the basis of that membership. §4311(a)." An employee bears the burden of showing by a preponderance of the evidence that his or her USERRA protected status or activity was a motivating factor for the employer's adverse action. §4311(c)(1); 20 C.F.R. §§1002.22, 1002.23(a). The employee is not required to show that the military service was the sole motivating factor. *See Gummo v. Village of Depew, NY*, 75 F.3d 98, 106 (2nd Cir. 1996), *cert. denied*, 116 S. Ct. 1678, 134 L. Ed. 2d 780 (1996); *see NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983).

The factual question of discriminatory motivation or intent may be proven by either direct or circumstantial evidence. *Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). All record evidence may be considered to determine whether an

employee's protected status was a motivating factor for the employer's conduct, including the employer's explanation for the actions taken. *Id.* The term "motivating factor" means that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, one of those reasons would be the employee's military position or related obligations. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

The burden of proof shifts to the employer once the employee has met his or her burden. To prevail on the affirmative defense, the employer must *prove* (not just assert) that legitimate reasons, standing alone, would have induced the employer to take the same adverse action anyway. *Sheehan*, 240 F.3d at 1014; 20 C.F.R. §§1002.22, 1002.23(a).

This framework is not unfamiliar to this Court. As stated in *Price Waterhouse v. Hopkins*:

> We have, in short, been here before. Each time, we have concluded that the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive. Our decision today treads this well-worn path.

Hopkins, 490 U.S. at 250 (1989).

The framework applies to mixed-motive cases; where an employer defends on the ground that, even

if an invalid reason played a part in the adverse action, the same action would have been taken in the absence of the invalid reason. *Sheehan*, 240 F.3d at 1014. However, proving that "the same decision would have been justified . . . is not the same as proving that the same decision would have been made." *Hopkins*, 490 U.S. at 252-253 (1989) (citing *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416 (1979).) An employer may not prevail in a mixed-motive case by offering a legitimate reason for its decision if that reason did not motivate it at the time of the decision. *Id.* (The very premise of a mixed-motive case is that a legitimate reason was present.) The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision; *e.g.*, an employer may not meet its burden in such a case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. *Id.*

In sum, only legitimate reasons, *standing alone*, are sufficient for the employer to escape liability. *See Sheehan*, 240 F.3d at 1014; 20 C.F.R. §§1002.22, 1002.23(a); *Transportation Management*, 462 U.S. at 400.

On the other hand, a cat's paw theory of liability applies when an otherwise unbiased employer makes an adverse employment decision that is influenced by the unlawful intent of a subordinate. *See Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7th Cir. 2007). While a cat's paw theory might at first seem to be applicable to a

§4311 claim, it is different. The employer only becomes liable when the subordinate's unlawful intent rises to some particular level of influence. *See id.* at 917. Cat's paw theory is, thus, a framework used to measure what degree of influence a subordinate's unlawful intent had upon the employer's adverse employment decision. *See id.* When that degree of influence rises to a particular level, the subordinate's unlawful intent is imputed to the employer and the employer's objectivity or neutrality is no longer a defense to liability. *See Hill v. Lockheed Martin Logistics Mgmt.*, 314 F.3d 657, 669-670 (4th Cir. 2003). Depending upon the jurisdiction and applicable law, the degree of influence sufficient to establish employer liability ranges from descriptions such as: "play some role" to "singular influence" or "to rely entirely." *Compare Brewer*, 479 F.3d at 917 *and Hill*, 314 F.3d at 669-670 (citing cases with differing degrees of influence and criticizing the use of the terminology).

A cat's paw theory of liability conflicts with the plain language of §4311(c)(1) because there is nothing in the statute to indicate that Congress intended something other than purely legitimate reasons will allow an employer to escape from liability. It is not necessary to measure what degree unlawful influence may have played in an employer's decision, when the employer must show that its decision was made based upon only legitimate reasons. *See* §4311(c)(1). The latter is the only standard by which an employer may escape liability for discrimination. *Id.* Congress did not include the

former, or some other standard. *See id.* The statute is not ambiguous, and, thus, the courts should not construe it to include another standard. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (where the words of the statute are unambiguous, the judicial inquiry is complete); *accord Hernandez v. Dep't of the Air Force*, 498 F.3d at 1332.

Further, §4311 does not contain a requirement that an employee-plaintiff show some particular degree of unlawful intent, or influence, that is necessary to establish employer liability. At the first instance, the employee bears the burden of proving his or her protected status and that the protected status was *a motivating factor, e.g.,* one reason for the employer's decision. *Sheehan*, 240 F.3d at 1014. Accordingly, all record evidence may be considered to determine whether the employee has carried the initial burden. *Id.*

Likewise, once the burdens of production and persuasion are shifted to the employer, it must prove that no unlawful intent infected its decision. USERRA does not allow an employer to escape liability by proving that the degree of unlawful influence bearing on its decision did not rise to a sufficient level. *See id.* A measure of how minimally unlawful intent may have influenced an employer's decision is of no consequence because only legitimate reasons, *standing alone*, are sufficient for the employer to escape liability. *See Sheehan*, 240 F.3d at 1014.

Similarly, because the burden is on the employer to prove no unlawful intent influenced their decision, a liability framework that measures the level of unlawful influence is inconsistent with Congress' stated intent[23] that courts use a burden shifting framework to resolve whether an employee was discriminated against in violation of the USERRA.

The problems and conflicts that will result from applying the cat's paw theory to USERRA discrimination cases are shown in the case at bar. In the district court, the jury verdict form follows in-step with the framework established for §4311(c)(1). First, the jury determined that Mr. Staub did show by a preponderance of the evidence that his military status was a motivating factor in Proctor Hospital's decision to discharge him. Second, the jury determined that Proctor Hospital failed to show by a preponderance of the evidence that Mr. Staub would have been discharged regardless of his military status. That is all that is required by §4311(c)(1) to establish employer liability. Thus, when the jury was asked to render its verdict and fill out its verdict form, it followed the clear mandate of §4311(c)(1). However, a cat's paw instruction was also given.

On appeal, the court looked to that instruction and took a different course of action. It determined that under Seventh Circuit precedent the degree of

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[23] *See* H.R. Rep. No. 103-65, Pt. 1, at 24 (1993), as printed in 1994 *U.S.C.C.A.N.* 2449, 2457; S. Rep. No. 103-58 (1993).

influence required of a subordinate's unlawful intent must rise to the level of singular influence. *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009). Thus, to escape employer liability, "It is enough that the decision maker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision." *Id.* (citations omitted).

In other words, the jury followed the mandate of §4311(c)(1) when it found that Mr. Staub's association with the military was a motivating factor in his discharge. But the Court of Appeals found that is not enough to establish liability under §4311(c)(1) because the cat's paw theory requires "more [. . .] it requires a blind reliance, the stuff of singular influence." *Id.*

That approach imposes a higher burden on the USERRA discrimination plaintiff than is required by the plain language of §4311(c)(1). If that approach is allowed to stand, then employers will be allowed to escape liability even though it is proven that their decisions are partially motivated by an employee's protected status. Application of cat's paw liability theory therefore artificially raises the bar for members of the military who seek protection from discrimination under the USERRA. And, unless this Court rules otherwise, each Circuit will continue to apply its own standards for what degree of influence is needed to impute unlawful intent to an employer. None of this can be gleaned from the plain language of the USERRA, the intent of Congress or the circumstances which gave birth to veterans' reemployment rights.

CONCLUSION

The ROA understands that the cat's paw theory, as espoused by the parties below, arises frequently in employment discrimination cases. This Court need not issue a broad decision on the application of the theory to various kinds of employment cases. It would be sufficient, and consistent with this Court's policy, *e.g.*, *City of Ontario, California v. Quon*, 560 U.S. ___ (June 17, 2010), to decide this case narrowly. To determine that, application of cat's paw theory in this case is inconsistent with the legislative intent and text of USERRA.

Therefore, the ROA requests that this Court reject the application of the theory to USERRA cases and reverse the Seventh Circuit's decision.

Respectfully submitted, July 9, 2010.

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