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 *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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September 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The Equal Employment Advisory Council respectfully submits this brief as *amicus curiae.* This brief supports the position of Respondent before this Court in favor of affirmance.[1]

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

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to close to 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, as well as other local, state and federal nondiscrimination laws. Most of EEAC's members are federal contractors, and of these, many are defense contractors. EEAC members regularly go beyond the letter of the law to support their employees who are serving our country.

As potential defendants to claims of discrimination under USERRA, and other laws prohibiting discrimination in employment, EEAC's members have a direct and ongoing interest in the issue presented before this Court concerning the circumstances under which an employer may be held liable for intentional discrimination based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision. This issue has been

the subject of much court litigation under a variety of statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*., and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. Although courts generally recognize that employers may be vicariously liable for the actions of a biased non-decisionmaker, they disagree on the extent to which, and under what circumstances, liability might attach. The standard adopted by the Seventh Circuit below, which would impute liability to the employer only where the biased non-decisionmaker is able to "singularly influence" the employment decision, represents a fair and workable solution to the challenges presented in these unique cases.

EEAC seeks to assist the Court by highlighting the impact the decision below may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention matters that the parties have not raised. Because of its significant experience in these matters, EEAC is well-situated to brief this Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

The Respondent, Proctor Hospital of Illinois, hired the Petitioner, Vincent Staub, in 1990. Pet. App. 1a. Petitioner, an angiography technologist (angio tech), worked in the hospital's Diagnostic Imaging Department. *Id.* At the time of hire and throughout his employment, Petitioner served as a member of the United States Army Reserve with drill and training obligations one weekend each month and for a two- to three-week period in the summer. *Id.* at 3a.

Petitioner's supervisor, Michael Korenchuk, headed-up the Diagnostic Imaging Department, which is divided into two units: angiography and a larger general diagnostics unit. *Id.* at 4a, 49a-50a. Although the Respondent assigned Petitioner to angiography, angio techs were trained to work in both units and helped out wherever a need arose. *Id*. at 6a.

Petitioner had a checkered employment history with the Respondent. Although "technically competent," Petitioner exhibited problems relating to his "availability, attitude, and communication." *Id.* In 1998, well before the events that gave rise to this action took place, the Respondent fired Petitioner for refusing to work past a scheduled shift. *Id.* at 3a n.1. The hospital reinstated him after he grieved the decision, but only on the condition that he communicate with a supervisor before leaving his work area. *Id.* The hospital also warned Petitioner at that time that any "insubordination, immature behavior, unprofessionalism or lack of support of [a] management decision[] would be grounds for immediate dismissal." *Id.* In addition, Petitioner's annual performance reviews referenced these and other problems, including his failure to work well with others. *Id.* at 5a-6a n.2.

The situation worsened in 2000 when Janice Mulally, a staff technologist, assumed responsibility for preparing the department's work schedules. *Id*. at 3a. Although Petitioner had been enjoying weekends off, Mulally began assigning him weekend shifts that conflicted with his Reserve drill schedule. *Id.* at 4a. Mulally described Petitioner's military duties as "bullshit," sometimes made him use vacation days to drill, and occasionally made him work extra shifts without advance notice – telling him this was

one way he could "pay back" the department for "bend[ing] over backwards" to accommodate his Reserve activities. *Id.* Petitioner complained to Korenchuk who, in turn, spoke to Mulally. Although Mulally responded by accommodating Petitioner, the scheduling problems persisted. According to Petitioner, Korenchuk also derided the Reserves on two occasions. *Id*.

In January 2004, Petitioner received orders to report for 'soldier readiness processing' – the first step to active deployment. *Id.* at 6a. Mulally and Korenchuk, became apprehensive and questioned Petitioner repeatedly about his deployment schedule. *Id*. Not long after, Mulally gave Petitioner a written warning, approved by Korenchuk, citing Petitioner's failure to provide assistance in the general diagnostics unit on the morning of January 27. *Id.* The incident that gave rise to the warning involved another angio tech, Angie Sweborg. *Id.* According to Mulally, neither showed up to lend a hand in the general diagnostics area when asked to do so, although Sweborg and Petitioner disputed this. *Id.* at 7a. Regardless of what actually transpired, both received a write-up instructing them to: 1) report to Korenchuk or Mulally any time there were no patients or related work in angiography; and 2) remain in the general diagnostics area, unless and until they reported to Korenchuck or Mulally why they needed to go elsewhere. *Id.*

In April of 2004, Angie Day, another coworker of Petitioner, met with Korenchuk, Linda Buck (Vice President of Human Resources), and Korenchuck's supervisor, R. Garrett McGowan (Chief Operating Officer), to complain that Korenchuk ignored complaints that Petitioner was "abrupt," difficult to work

with, and frequently "absented himself" from the department. *Id.* at 8a. She later resigned her position at the hospital, citing Petitioner's behavior as the reason for her departure. *Id.* at 51a.

McGowan, who had heard similar complaints about Petitioner from other staff, directed Korenchuk to develop a performance improvement plan for Petitioner. *Id.* at 9a. Before a plan could be implemented, however, Petitioner violated the terms of his January 27 written warning by leaving the general diagnostics area with Sweborg without first having obtained permission from Korenchuck or Mulally. *Id.* Instead, Petitioner left Korenchuck a voicemail stating that he and Sweborg had gone to lunch. *Id.*

Korenchuck reported the incident to Buck, but did not apprise her of the voicemail. *Id.* Buck made the decision to terminate Petitioner, stating in the termination slip that the reason was Petitioner's failure to comply with the terms of the January 27 write-up. *Id.* at 10a. Buck based her decision on other factors as well, including a review of Petitioner's personnel file and the concerns raised by Day. *Id.* She also considered the "frequent complaints" she received about Petitioner when she first joined the hospital in 2001, as well as the fact that two other female employees, in addition to Day, had resigned from the hospital because of problems with Petitioner. *Id.* One of the women said Petitioner made her feel like "gum on the bottom of his shoe," and the other offered similar reasons. *Id.* Finally, Buck took into account a conversation she had with a hospital recruiter who had complained to her about how difficult it was to attract quality candidates because of Petitioner's reputation. *Id.*

At the time Buck made the decision to terminate Petitioner, she had no knowledge of Mulally's alleged anti-military bias and harbored no such bias herself. *Id.* at 11a. Nor was she aware of Mulally's purported desire to see Petitioner fired. *Id.*

Petitioner grieved Buck's termination decision and, in doing so, claimed for the first time in his grievance that Mulally had fabricated the reasons behind the January 27 write-up because of his military status. *Id.* Buck reviewed and ultimately denied the grievance, and let the decision stand on the basis that, despite Petitioner's technical competencies, he lacked the ability to work well with others. *Id.*

Petitioner filed an action in U.S. District Court alleging violations of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq.*, and argued that, although Buck harbored no anti-military bias, the Respondent should nonetheless be held liable because she had relied on false information from Mulally without vetting the information "in any meaningful way." *Id.* at 12a. A jury returned a verdict for Petitioner, and the district court denied the Respondent's motion for a new trial or judgment as a matter of law. *Id.* The Respondent appealed. *Id.*

The Court of Appeals for the Seventh Circuit reversed the district court ruling and remanded the case with instructions to enter judgment in favor of the Respondent. *Id.* at 21a. In so ruling, the court concluded that Petitioner failed to show that Mulally exerted "singular influence" over Buck, such that she acted as a conduit for unlawful discrimination. *Id.* Petitioner petitioned this Court for a writ of *certiorari*, which was granted on April 19, 2010.

SUMMARY OF ARGUMENT

The Seventh Circuit's "singular influence" standard, which holds an employer vicariously liable under a subordinate bias theory only when the employee who lacks formal authority to take an employment action nonetheless exercises "singular influence" over the person who has such authority, is consistent with this Court's earlier rulings applying agency law principles to federal employment discrimination actions, which declined to hold employers vicariously liable for discrimination in all circumstances. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 70 (1986); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 777 (1998).

The Seventh Circuit standard also is consistent with the Court's ruling in *Reeves v. Sanderson Plumbing*, which held that an employer may be liable for unlawful discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*., if the plaintiff can show that an employee who lacks formal decisionmaking authority nevertheless is "principally responsible" for the adverse employment decision. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52 (2000). In keeping with these rulings, the Seventh Circuit's "singular influence" standard appropriately looks to the actions of the "actual decisionmaker" or the person "principally responsible" for the decision in determining whether to assign liability.

Where, as here, the formal decisionmaker does not blindly rely on the recommendations of a biased subordinate or otherwise defer to his will, but instead exercises independent judgment in making an employment decision, the employer should not

be liable. The formal decisionmaker in this case harbored no anti-military bias and possessed sufficient information to independently assess Petitioner's performance and conduct. Because she was not under the singular influence of someone else, and because she had an honest belief that Petitioner had engaged in misconduct, her decision should be respected without any interference or judicial second-guessing. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410-11 (7th Cir. 1997).

Although the Seventh Circuit correctly held that a formal decisionmaker's independent investigation ordinarily will serve to break the causal chain between the decision of a biased subordinate and the adverse employment action, the Court should not impose any standard that would effectively *require* employers to formally investigate every employment decision as if it were an actual complaint of discrimination. Such a mandate would be unworkable for employers, which make countless employment decisions every day and require the ability to respond quickly to staffing needs. Nor would such a standard encourage compliance or motivate companies to expand prevention efforts because it would be prohibitively expensive, logistically impossible, and unlikely to lead the discovery of discrimination much beyond what is already reported by employees themselves.

Furthermore, requiring employers to question the motives of every person who reports wrongdoing would undermine an employer's efforts to address workplace misconduct by diverting attention away

from the problem at hand. Accordingly, a more appropriate standard should focus on the independence of the actual decisionmaker, affording that person the flexibility to evaluate situations based on experience and judgment.

ARGUMENT

I. THE COURT BELOW CORRECTLY RULED THAT PETITIONER FAILED TO STATE A CLAIM OF INTENTIONAL DISCRIMINATION UNDER THE SO-CALLED "CAT'S PAW" OR "SUBORDINATE BIAS" THEORY

A. In Order To Prevail Under A "Cat's Paw" Or Subordinate Bias Theory, A Plaintiff Must Show That The Biased Subordinate Possessed "Singular Influence" Over The Formal Decisionmaker, Such That He May Be Viewed As The Person Principally Responsible For The Decision Or, For All Intents and Purposes, The Actual Decisionmaker

Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301 *et seq*., in part to prohibit discrimination in employment on the basis of military service. 38 U.S.C. § 4301(a)(3). Section 4311 of the statute provides that "a person who is a member of . . . 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 . . . [or] performance of service . . . ." 38 U.S.C. § 4311(a). Requiring clear

proof of discriminatory motive, USERRA places the burden of proof on the service member to show that his or her military status or duties served as at least one motivating factor behind the adverse personnel decision. 20 C.F.R. § 1002.22.

In their enforcement of USERRA, courts apply the procedural framework and evidentiary burdens applicable to cases brought under the National Labor Relations Act (NLRA), as approved by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). *See, e.g., Sheehan v. Dep't of the Navy*, 240 F.3d 1009, 1013 (Fed. Cir. 2001); *Gummo v. Village of Depew*, 75 F.3d 98, 106 (2d Cir. 1996); *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898-99 (9th Cir. 2002). Under this scheme, the employee first must show, by a preponderance of the evidence, that his or her protected status was "a *substantial or motivating* factor" for the adverse action. *Transp. Mgmt.*, 462 U.S. at 400-01 (footnote omitted) (emphasis added). A "substantial or motivating factor" is one that "a truthful employer would list if asked for the reasons for its decision." *Kelley v. Maine Eye Care Assocs., P.A.*, 37 F. Supp.2d 47, 54 (D. Me. 1999). Likewise, a person's military status or duties may be a "substantial or motivating factor" if the employer "'relied on, took into account, considered, or conditioned its decision on that consideration.'" *Brandsasse v. City of Suffolk*, 72 F. Supp.2d 608, 617 (E.D. Va. 1999) (quoting *Chance v. Dallas County Hosp. Dist.*, 1998 WL 177963, at *3, 1998 U.S. Dist. LEXIS 5110, at *3 (N.D. Tex. 1998)). Once this requirement is met, the burden of proof shifts to the employer to show, as an affirmative defense, that it would have taken the same action anyway for a non-discriminatory reason. *Transp. Mgmt.*, 462 U.S. at 400-01.

The framework applied in USERRA cases differs from the traditional paradigm established by this Court in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), and which applies to discrimination cases brought under other federal antidiscrimination laws. *Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11 (1st Cir. 2007). Under burden-of-proof allocations approved by *Transportation Management*, a USERRA plaintiff must do more than satisfy the basic elements of a *prima facie* case, but rather must demonstrate his or her military status or duties actually motivated the employer's decision. *NLRB v. Weiss Mem'l Hosp.*, 172 F.3d 432, 442 (7th Cir. 1999); *Leisek v. Brightwood Corp*., 278 F.3d 895, 899 n.1 (9th Cir. 2002). Until then, the employer is under no obligation to prove the affirmative defense. *Weiss Mem'l Hosp.*, 172 F.3d at 446; *Leisek*, 278 F.3d at 899 n.1.

By all accounts, the decisionmaker in this case, Linda Buck, never "relied on, took into account, considered, or conditioned [her] decision" to terminate Petitioner on his military status or obligations. *Brandsasse*, 72 F. Supp.2d at 617 (citation omitted). Because Petitioner could not show Buck was in any way motivated by Petitioner's protected military status or obligations, he instead pursued his case under the so-called "cat's paw" or "subordinate bias" theory of liability, which courts have applied in various forms under other federal anti-discrimination laws, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq*., and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq*. Under this theory, an employer may be vicariously liable for discrimination in situations where a biased employee's actions influence or

otherwise lead to an adverse action against another employee, even though the employer is unaware of the bias when it made the employment decision and did not itself consider the employee's protected status in making the decision.

Although courts generally have recognized that employers may be vicariously liable for the actions of a biased non-decisionmaker, their rulings differ on the extent to which, and under what circumstances, liability should be imposed. Under the Seventh Circuit's "singular influence" standard, "'where an employee without formal authority to alter the terms and conditions of a plaintiff's employment nonetheless uses her 'singular influence' over an employee who does have such power to harm the plaintiff for [legally protected] reasons, the actions of the employee without formal authority are imputed to the employer and the employer is in violation [of the law].'" Pet. App. 14a (quoting *Brewer v. Board of Trustees*, 479 F.3d 908, 917 (7th Cir. 2007)). The Fourth Circuit applied a similar standard in *Hill v. Lockheed Martin Logistics Management, Inc*., which held that the plaintiff must show "the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." 354 F.3d 277, 291 (4th Cir. 2004).

The approach taken in both of these rulings is consistent with this Court's earlier pronouncements on the subject of vicarious liability, which declined to hold employers automatically liable for discrimination under all circumstances. In *Meritor Savings Bank, FSB v. Vinson*, for example, the plaintiff argued for strict liability, contending that Title VII's definition of "employer" as including an "agent"

requires employer liability whenever a supervisory employee is involved. 477 U.S. 57, 70 (1986). The employer argued on the other hand that it could not be held liable for a supervisor's misconduct unless it had notice and failed to take action. *Id.* Although this Court did not issue a definitive rule at the time, it did reject an automatic liability standard, having concluded:

> [W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common law principles may not be transferable in all their particulars . . . , Congress' decision to define "employer" to include any "agent of an employer, 42 U.S.C. § 2000e(b), *surely evinces an intent to place some limits on the acts of employees for which employers . . . are to be held responsible*.

Id. at 73 (emphasis added). Indeed, the Court expressly rejected any rule that would "impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." *Id*. *See also Faragher*, 524 U.S. at 804 n.4 (noting that the decision of Congress to "leave *Meritor* intact" when passing the 1991 Amendments suggests it "relied on [the Court's] statements . . . about the limits of employer liability").

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754 (1998), the Court further defined the limits of employer liability for the acts of employees. Once again, the Court declined to automatically impute liability to the employer for the actions of a supervisor, except where the supervisor actually "*makes* a tangible [and adverse] employment decision," such as hiring, firing, failing to promote.

Ellerth, 524 U.S. at 761 (emphasis added). *See also Faragher*, 524 U.S. at 804 (the imposition of liability based on the misuse of supervisory authority must be squared with *Meritor's* holding that an employer is not 'automatically' liable).

Although *Faragher* and *Ellerth* did not address whether an employer may be liable when a biased supervisor who *lacks* authority "to make the tangible employment decision" nonetheless causes or influences the decision, the Court did cite with apparent approval *Shager v. Upjohn Co.*, in which the Seventh Circuit found that an employer could be held liable for the firing of an age-protected employee where an admittedly unbiased personnel committee simply "rubber stamped" the recommendation of a biased supervisor and thereby served "as a conduit of [the supervisor's] prejudice." 913 F.2d 398, 405 (7th Cir. 1990). Significantly, although the Seventh Circuit had ruled that "the establishment of corporate committees authorized to rubber stamp personnel actions" would not prevent employer liability, it also recognized that if the committee "was not a mere rubber stamp, but made an independent decision . . . there would be no ground for finding even an innocent violation of the Act." *Id.* at 406.

This Court similarly ruled in *Reeves v. Sanderson Plumbing* that an employer may be liable for unlawful discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq*., where a plaintiff can show that an employee who lacks formal decisionmaking authority nevertheless is "principally responsible" for the adverse employment decision. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151-52 (2000) (emphasis added). In *Reeves*, the bias of a supervisor who was

married to the "formal decisionmaker" was imputed to the company because he wielded "absolute power" within the organization. *Id.* at 152. Although his wife may have had formal responsibility for making the decision, the Court determined that the husband was the "actual decisionmaker" behind the action. *Id.*

The standard advanced by the Seventh Circuit below, as well as the Fourth Circuit, both of which look to the actions of the "actual decisionmaker" or the person "principally responsible" for the decision in assigning liability, is consistent with application of agency law principles and this Court's holding in *Reeves.* Under the Seventh Circuit's standard, courts appropriately should focus on whether the formal or actual decisionmaker has made his or her own independent decision. Where a biased subordinate exerts *singular influence* over the decisionmaker, such as when the subordinate wields "absolute power" or is able to recommend actions that are simply "rubber stamped," it cannot be said that the formal decisionmaker made an independent decision to take the personnel action in question. Vicarious liability would be appropriate in such cases because employers should not be permitted to "insulate themselves from liability simply by hiding behind the blind approvals, albeit non-biased, of formal decisionmakers." *Hill*, 354 F.3d at 290. *See also Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("courts will not blindly accept the 'titular' decisionmaker as the true decisionmaker"); *Willis v. Marion County Auditor's Ofc.*, 118 F.3d 542, 547 (7th Cir. 1997) (the "cat's paw" line of cases designed to prevent an employer from escaping liability "by setting up many layers of *pro forma* review, thus making the operative decision that of a

subordinate with an illicit motive") (citation omitted) (emphasis added).

However, where a formal decisionmaker does *not* blindly rely on the recommendations of a biased subordinate or otherwise bend to his will, and instead exercises independent (and unbiased) judgment in making the decision, liability should not attach and the employer's decision should be respected. This is true even if someone with improper motives may have played some role in the decision, without having singularly influenced it. This is true, even if the employer later discovers (with the benefit of hindsight and aided by the court's discovery process) that the decision may not have been the best one or even correct.

As this Court previously has observed, the anti-discrimination laws are "not intended to 'diminish traditional management prerogatives.'" *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981) (citation omitted). In keeping with this ruling, courts consistently have recognized that an employer's legitimate, nondiscriminatory reason for taking an adverse employment action, even if based on an honest mistake, is still *not a discriminatory reason*, and therefore, should be respected. *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005) ("the proper inquiry *is not* whether [the company] was factually correct . . . [but] whether [the employer] honestly believed" the employee engaged in misconduct); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997) ("it is not our province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination").

B. The Decisionmaker In This Case Made An Independent Decision To Terminate Petitioner And Was Not Under The "Singular Influence" Of Anyone Else

Here, Linda Buck did not act as a "rubber stamp" for Mulally, Korenchuk, or anyone else. Nor does the evidence suggest that Mulally or Korenchuk wielded "absolute power" over the hospital, the department, or even Buck as the sole decisionmaker. Rather, Petitioner had a long history of conduct and performance-related problems while working for the Respondent, problems that pre-dated Mulally and Korenchuck and which collectively served as the basis for Buck's decision.

Those problems manifested a consistent pattern throughout Petitioner's employment. They included perceived "attitude problems" and an inability to work collaboratively with many of his co-workers. Pet. App. 4a-10a. They involved unscheduled and unapproved "disappearances" from his work area, coupled with poor communication with superiors. *Id.* The Respondent found Petitioner's behavior so concerning that it terminated him once before, however briefly, in 1998. *Id.* at 3a. Although the hospital ultimately gave Petitioner a second chance, the fact that the Respondent conditioned his return on terms virtually identical to those imposed in the contested January 27 write-up is telling. *Id.*

Buck, a seasoned professional schooled in the requirements of the federal anti-discrimination laws and sound human resource practices, had all this in mind when she made the decision to terminate Petitioner. She did not form her opinion of Petitioner based solely on information from Mulally or

Korenchuk, but rather from many different sources including her own independent observations and interactions with hospital staff. She personally fielded "frequent complaints" about Petitioner when she first joined the hospital in 2001. *Id.* at 10a. She knew of three employees, including one with whom she met face-to-face, who had resigned because of Petitioner. *Id.* She spoke with a hospital recruiter who complained of difficulties in attracting qualified candidates to the department because of Petitioner's reputation. *Id.* Many of these problems were documented in performance evaluations and other papers contained in Petitioner's personnel file, which Buck reviewed before making her decision. *Id.* at 5a-6a n.2.

In short, Buck had sufficient information to assess Petitioner's performance, independent of Mulally and Korenchuk, and to make her own decision about whether to retain him. Although the incident that prompted Buck to reevaluate Petitioner's employment may have come to her by way of Korenchuk, the fact remains that she had more in mind than just this one incident when she made the decision to terminate. *Johnson v. Kroger Co.*, 319 F.3d 858, 877 (6th Cir. 2003) (where, as here, the decision-maker "base[s] her decision upon an independent assessment of [the employee's] job performance, informed principally by her own direct, repeated and unchallenged observations," the employer should not be liable, since the biased subordinate "merely corroborated [her] own assessment of [the] employee's shortcomings"); *Maarouf v. Walker Mfg. Co.*, 210 F.3d 750 (7th Cir. 2000) (perception of plaintiff's inadequate work performance based not solely on views of supervisor who harbored religious bias, but

also independently noted by other supervisors as well).

Petitioner speculates that Buck "surely would not have disciplined [him] at all," if only Korenchuk had disclosed the fact that he had left a voicemail explaining his whereabouts. Brief for Petitioner at 40. Although Buck might not have found this information relevant to her decision (there is a fundamental difference between telling a supervisor where you are and asking permission to go there), Petitioner's singular focus on only the last in the series of transgressions misses the broader point, *e.g.*, that Petitioner simply did not "have the safety net of a good reputation" needed to save his job. Pet. App. 20a. As the Seventh Circuit aptly explained, even if Petitioner had behaved reasonably that day, "his track record nonetheless supported Buck's action." *Id.*

Just as important is the fact that Buck made her decision free of any discriminatory motive. As Petitioner himself concedes, Buck harbored no anti-military biases and did not take his military status or obligation into account in any way when making her decision. Buck's decision centered entirely on legitimate, non-discriminatory business concerns and her honest belief that Petitioner had engaged in misconduct. That decision should be respected without any interference and judicial second-guessing. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981); *Johnson v. AT&T Corp.*, 422 F.3d 756, 762 (8th Cir. 2005); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410-11 (7th Cir. 1997).

II. EMPLOYER LIABILITY UNDER A SUBORDINATE BIAS THEORY SHOULD NOT HINGE ON WHETHER THE EMPLOYER CONDUCTS AN INVESTIGATION BEFORE TAKING A PERSONNEL ACTION

Although the Seventh Circuit's ruling below correctly held that a formal decisionmaker's independent investigation ordinarily will serve to break the causal chain between the decision of a biased subordinate and the adverse employment action, EEAC respectfully urges this Court not to adopt any rule that would effectively *require* employers to investigate every time an employment action is contemplated and in the absence of a specific complaint of discrimination. Such a mandate would be wholly unworkable for employers, particularly larger ones, which necessarily make countless employment decisions every day, including those relating to hiring, promotions, raises, suspensions, and as in this case, terminations.

A more appropriate standard should focus on the decisionmaking process and whether the formal decisionmaker made an independent decision, without the "singular influence" of anyone else. Furthermore, it is important that courts afford decisionmakers some flexibility in how they evaluate a situation, based on their own professional experience and judgment, as the Seventh Circuit did here. Thus, a decisionmaker might choose to review the employee's personnel file before making a decision, or not, depending on the circumstances. Likewise, a decisionmaker might speak directly with the affected employee in some cases, while this step might not be necessary or even prudent in others.

The practical consequences of a standard that would effectively require an employer to postpone all personnel decisions until after a formal investigation has affirmatively ruled-out any remote possibility of subordinate bias would be profound. Companies must have the ability to respond expeditiously to staffing needs and thereby ensure business operations are able to continue safely and efficiently. Large companies make hundreds, if not thousands, of employment decisions every week. A company would be unable to function effectively if required to second-guess each and every personnel decision on the off-chance that someone with discriminatory motives might have played some role (however small and inconsequential) in events leading up to it.

Nor could employers shoulder the tremendous costs associated with such investigations. In order to rule-out any possibility of subordinate bias, companies would need to actively investigate not just the employment decision at-hand, but also any previous employment actions that may have informed it. Depending on the circumstances, a single investigation could involve extensive interviews with employees and managers and the review of voluminous documents and data. The employer would have to scrutinize the motives of every person involved in the decision. All this to uncover discriminatory bias that *has never been alleged* and likely will not exist in the vast run of cases.

In the context of this case, which involves a relatively straightforward discharge decision, an "independent investigation rule" might seem deceptively simple. Indeed, it would not be simple at all. This case alone would have required multiple investigations, including extensive witness interviews, into

disciplinary actions that occurred not only at the time of Petitioner's discharge, but *years earlier*. If employers must go to these lengths before *every* discharge, the burden would be crushing.

The same holds true for other types of employment decisions. Consider, for example, a promotion decision involving a single position and fifteen candidates. An independent investigation rule would effectively require the company to actively investtigate the employment backgrounds of all fifteen candidates to ensure that no discrimination of any form, including discrimination based on race, national origin, sex, age, disability, color, religion, or military status, influenced either their selection or non-selection. Arguably this would involve reevaluating a host of previous personnel decisions, including among other things, performance reviews, disciplinary actions, training and mentoring opportunities. In addition, where the employer has selected the pool of candidates to be considered for the promotion, it would have to separately evaluate whether others were not included in the pool because of assumed, but not alleged, illegal discrimination.

It is unrealistic to think companies can operate effectively in such a manner. To require companies to suspect discrimination at every turn, when there is no reason to believe it actually exists, imposes too onerous a burden on employers.

Many companies already devote substantial time and resources to preventing and resolving workplace discrimination complaints. EEAC's members recognized long ago that workplace discrimination not only is against the law, but also is bad for business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with

the company. Accordingly, as many of EEAC's members have found, the benefits of having programs aimed at prevention and early resolution of bias claims can far outweigh the costs.

Yet the same does not hold true here. A standard that holds employers strictly liable for subordinate bias, with the employer's only available defense being a formal investigation of every employment decision, will do nothing to encourage compliance or motivate companies to expand their prevention efforts. This is so because such investigations would be prohibitively expensive, logistically impossible, and unlikely to lead to the discovery of discrimination much beyond what is already reported by employees themselves. *Brewer v. Board of Trustees*, 479 F.3d 908, 920 (7th Cir. 2007) ("Imposing liability for employee wrongs that an employer could not practically prevent (that is, could prevent only with prohibitive expense or through unreasonable efforts) would not induce employers to impose additional controls on its employees and would therefore not be effective to avoid any harm"); *Shager*, 913 F.2d at 405 ("the ultimate concern is with confining the employer's . . . liability to the general class of cases in which he has the practical ability to head off the injury . . .").

III. REQUIRING EMPLOYERS TO EXAMINE THE MOTIVES OF EVERY INFORMANT OF POSSIBLE MISCONDUCT WOULD UNDERMINE EFFORTS TO PROACTIVELY INVESTIGATE AND RESOLVE SUCH INCIDENTS

Large employers often delegate initial investigations of workplace misconduct to local human resources personnel, who in turn report their findings

to a more senior manager who may work in a different city or state. Often, the individual making the employment decision is not the same person who conducted the initial investigation. A rule requiring employers to question the motives of every person who reports wrongdoing so as to rule out any potential underlying bias would be extremely burdensome on these employers and invariably would undermine their efforts to address workplace misconduct. It would divert attention away from the incident being investigated, and would encourage employers to embark on fishing expeditions to uncover any and all possible workplace bias, whether or not such bias is directly related to the underlying investigation.

A conscientious employer has both an incentive and an affirmative obligation to respond appropriately to complaints of workplace bias. Courts should not prevent employers from taking action in response to clear misconduct based on the remote possibility an informant harbors a discriminatory animus in the absence of more than a mere theoretical nexus between the alleged bias and the employment decision. This is particularly true where, as here, the employee facing disciplinary action never previously complained of alleged bias on the part of the subordinate employee.

Employers who have meaningful complaint procedures in place should not be penalized for failing to investigate potential bias where the alleged victim failed to take advantage of those procedures. Punishing an employer whose decisionmaker harbored no discriminatory animus and had no reason to suspect bias on the part of a non-decisionmaking subordinate would eliminate any incentive a plaintiff might other-

wise have for reporting alleged discrimination, and thus would frustrate the primary aims and purpose of Title VII.

CONCLUSION

For all of the foregoing reasons, we respectfully request that this Court affirm the decision of the Seventh Circuit below.

Respectfully submitted,

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September 2010