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 NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The National Federation of Independent Business ("NFIB") Small Business Legal Center is a nonprofit, public-interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.[1] NFIB is

[1] 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. No persons other than NFIB, its members or its counsel made a

the nation's leading small-business association, with offices in Washington, DC, and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide.

The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent-setting cases that will impact small businesses nationwide.

The issue presented in this case is of critical importance to small business. Small businesses need a clear standard that provides certainty and predictability for the employer when taking adverse employment action. A clear standard is important to small businesses as they often lack the ability of larger organizations to parse the language of complicated legal standards before making decisions that could expose them to significant liability. Additionally, small business owners often rely on many people in the chain of command when making employment decisions and may often follow informal information-gathering procedures. Under the standards enunciated by certain courts of appeal on the issue before the Court, the small business owner in many instances would find himself in a position of facing liability if any one of the employees consulted prior to an adverse employment action were shown to harbor any discriminatory animus.

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monetary contribution intended to fund the preparation or submission of this brief. Petitioner has filed with the Court a consent to the filing of all *amicus curiae* briefs. Consent of Respondent to the filing of this brief has been filed herewith.

This case provides a perfect opportunity for the Court to enunciate a judicial standard that provides clear guidance to employers on how to make necessary employment decisions while complying with the law and growing a business.

STATEMENT OF THE CASE

Vincent Staub worked as an angiography technologist at Proctor Hospital. *Staub v. Proctor Hosp.*, 560 F.3d 647, 651 (7th Cir. 2009). He also was in the United States Army Reserve. *Id.* His Army Reserve duties required him to attend drill and training sessions one weekend out of every month and for two weeks during the summer. From 1990 to 2000, these obligations posed no problem with his work. *Id.* at 651.

In 2000, Janice Mulally came into a supervisory role over Mr. Staub and expressed displeasure with his participation in the Army Reserve. *Id.* She scheduled him for work on weekends, which interfered with his Army Reserve duties. *Id.* Ms. Mulally also questioned the legitimacy of Mr. Staub's Army Reserve duties. *Id.* at 652.

Mr. Staub went to department head Michael Korenchuk about the issue but did not get meaningful relief. *Id.* at 651. Mr. Korenchuk also appears to have harbored animus toward the Army Reserve. *Id.* at 652.

In January 2004, Mr. Staub received an order to report for "soldier readiness processing" as a precursor to a deployment. *Id.* Mr. Staub gave Ms. Mulally and Mr. Korenchuk a copy of the order, and Mr. Korenchuk became apprehensive. *Id.* He asked Mr. Staub repeatedly when he would be shipping out. *Id.* Mr. Staub was one of only two angio techs at Proctor,

and his departure would require Proctor to take on temporary angio techs at an increased cost. *Id.*

Later in January 2004, Ms. Mulally gave Mr. Staub a written warning for failing to respond to a request by Ms. Mulally to lend a hand on some open projects when he had available time. *Id.* at 653. Mr. Korenchuk signed the warning. *Id.* The warning required Mr. Staub to report to Ms. Mulally or to Mr. Korenchuk when he had no patients and to remain in the general diagnostic area at all times. *Id.*

On April 20, 2004, Mr. Staub worked in the angio department all morning and finished his work around lunchtime. *Id.* at 654. He then left Mr. Korenchuk a voicemail that he was going to get some lunch. *Id.* When Mr. Staub returned from lunch, Mr. Korenchuk demanded to know where he had been. *Id.* Mr. Staub's explanation that he had left a voicemail for Mr. Korenchuk was insufficient. *Id.* Mr. Korenchuk immediately escorted Mr. Staub to the office of Human Resources Vice President Linda Buck. At that meeting, Ms. Buck notified Mr. Staub that he was being terminated for failing to follow the terms of the January warning. *Id.* In fact, the termination decision had been made earlier that day. *Id.*

There is no dispute that Ms. Buck alone made the decision to terminate Mr. Staub. *Id.* There is also no dispute that Ms. Buck harbored no anti-military animus. *Id*. In coming to the termination decision, Ms. Buck reviewed Mr. Staub's personnel file. *Id.* at 655. Mr. Staub's reviews were mixed. While his performance was technically competent, his reviews noted that he had problems getting along with colleagues and that he had a tendency to disappear

during scheduled hours and not help out during idle time in the angio department.

Ms. Buck also relied on her personal knowledge of past issues with Mr. Staub, including her knowledge: (1) of several complaints about Mr. Staub during her first year with Proctor in 2001; (2) that two Proctor employees had resigned in 2002 because of Mr. Staub; and, (3) that a recruiter had told Ms. Buck that she was having difficulty attracting workers to the angiography department because Mr. Staub was known for unwelcome "flirting" with medical students and "had a reputation" with female colleagues for unwelcome conduct. *Id.* at 654. Ms. Buck had no idea that Ms. Mulally wanted Mr. Staub fired. *Id.* at 654-55.

Mr. Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act, which, like Title VII and other employment-discrimination statutes, prohibits adverse employment action because of an individual's protected classification—in Mr. Staub's case, his service in the Army Reserve. *Id.* at 655. Mr. Staub won his case at trial. The jury found that Ms. Buck made the decision to terminate Mr. Staub but that Ms. Mulally's anti-military animus heavily influenced that decision and was therefore properly imputed to Ms. Buck and to Proctor. *Id.* at 655. The trial court denied Proctor's motion for a new trial or for judgment as a matter of law. *Id.* at 655.

The Court of Appeals for the Seventh Circuit set aside the jury's verdict and entered judgment for Proctor. The Seventh Circuit reiterated the rule in that circuit that a non-decisionmaker's unlawful animus may be imputed to the decisionmaker only if the decisionmaker was "wholly dependent on a single

source of information." *Id.* at 656 (internal quotations omitted). However, if the decisionmaker "conducts its own investigation in the facts relevant to the decision, the employer is not liable" for a non-decisionmaker's unlawful animus. *Id*. Here, although Ms. Mulally and Mr. Korenchuk contributed to Ms. Buck's decision to terminate Mr. Staub, the decision was informed by many other pieces of information, including Ms. Bucks' review of Mr. Staub's personnel file, her personal knowledge of Mr. Staub's attitude problems and interpersonal issues at Proctor, and tales from other Proctor employees who worked with Mr. Staub about problems they encountered working with him.[2] *Id.* at 659.

According to the Seventh Circuit, the law "does not require the decisionmaker to be a paragon of independence. It is enough that the decisionmaker was not wholly dependent on a single source of information." *Id.*

SUMMARY OF ARGUMENT

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits adverse employment action based on an employee's membership or service in the armed forces. Like other federal anti-discrimination laws that address race, gender, disability, and other protected classifications, USERRA creates a scheme that proscribes disparate treatment on the basis of service in the armed forces.

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[2] Because the Seventh Circuit found that Ms. Buck's termination decision was not "wholly dependent" on Ms. Mulally or Mr. Korenchuk, it held that evidence of their animus should not have been admitted at trial. And because that leaves Ms. Buck as the lone decisionmaker who admittedly harbored no discriminatory animus, judgment for Proctor was appropriate.

Petitioner, in his Petition for a Writ of Certiorari, concedes that judicial interpretations of other federal anti-discrimination laws govern resolution of this case.

Under Title VII of the Civil Rights Act, which has one of the largest bodies of decisional law in the federal courts, the disparate treatment standard prohibits adverse action taken with the intent or motive to discriminate. In creating a disparate treatment cause of action, Congress did not intend a scheme of strict liability in which intent is irrelevant; nor did Congress proscribe or seek to penalize adverse employment action devoid of discriminatory intent. Thus, the unlawful animus must reside in the person taking the adverse action.

The requirement of unity of animus and action has caused a split in the circuits regarding the proper standard to govern when the animus of a non-decisionmaker may be imputed to the decisionmaker and on to the employer. Several circuit courts of appeal that have confronted the issue of subordinate bias have developed a "causation" and "influence" standard. Under these standards, the unlawful animus of a non-decisionmaker may be imputed to the decisionmaker if the non-decisionmaker was a cause in fact of, or influenced in some way, the adverse employment action.

These standards are problematic because they focus on the employee who possesses the animus rather than on the employer and the decisionmaker who are in a position to modify their behavior to comply with the law. These standards also are inconsistent with anti-discrimination law insofar as they allow a plaintiff to graft the animus of a non-decisionmaker onto the actions of a decisionmaker

merely by showing that somewhere in the adverse decisional process, a biased employee provided information to the decisionmaker. This essentially reads a strict liability standard into disparate treatment law, which Congress did not intend. These standards also fail to consider the realities of the workplace, where information always flows up the chain of command to decisionmakers. Under the standards of these courts, an adverse employment action is forever tainted if an employee who later is shown to harbor unlawful animus reports a fact or writes a report that puts into motion events that led to an adverse employment action.

The realities of the small-business workplace require a clear employer-focused standard that provides certainty for employers making adverse employment decisions.

NFIB therefore agrees with the Seventh Circuit's two-step approach in this case which correctly places the focus on the decisionmaker rather than on other employees who may have contributed in some way to the decision. To admit the animus of a supervisor or other employee under the Seventh Circuit's approach to subordinate bias cases, a plaintiff first must demonstrate that the decisionmaker was "wholly dependent" on a single source of information. That is, the plaintiff must prove that the decisionmaker did not act independently and thus there were in fact multiple decisionmakers. Next, if the plaintiff satisfies this, the plaintiff will be permitted to introduce evidence of unlawful animus held by the supervisor or other employee upon whom the decisionmaker was wholly dependent. This standard provides small businesses much-needed clarity and certainty by placing the focus on the decisionmaker and his or her

actions. The Seventh Circuit's standard permits employers and their decisionmakers to modify their behavior to avoid liability.

The Seventh Circuit held that Ms. Buck's investigation into the facts, which revealed ample evidence supporting Mr. Staub's termination, was sufficient to demonstrate Ms. Buck's independence. While an employer investigation into the facts is certainly one way to demonstrate that the decisionmaker acted independently, it should not be necessary in every case. For example, an investigation should not be necessary when an employee's terminable offense is open, apparent, and obvious. Similarly, no investigation should be necessary when a company has an automatic termination policy, such as a zero-tolerance policy for guns or drugs, a three-strikes policy, or a uniformly-applied no-fault absence policy.

ARGUMENT

I. DISPARATE TREATMENT CLAIMS REQUIRE PROOF THAT AN EMPLOYER INTENDED TO DISCRIMINATE AGAINST A PLAINTIFF

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits adverse employment action based on an employee's membership or service in the armed forces. 38 U.S.C. § 4311(a). An employer violates USERRA if the employee's activity in the armed forces is a motivating factor in the adverse employment action. *Id.* at 4311(c)(1). Like other federal anti-discrimination laws that address gender, sex, disability and other protected classifications, USERRA creates a scheme that proscribes disparate treatment on the basis of service in the armed forces. Petitioner concedes that

the standards applied by the federal courts for disparate treatment claims under Title VII and other anti-discrimination laws apply to this case. *See* Petition for a Writ of Certiorari.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which contains the disparate treatment standard, prohibits adverse action with the intent or motive to discriminate. The words "intent" and "motive" are used interchangeably in Title VII jurisprudence. In creating a disparate treatment cause of action, Congress did not enact a scheme of strict liability. Nor did Congress prohibit or seek to penalize conduct void of discriminatory intent.

Under Title VII, an employee may bring a claim against an employer for disparate impact or for disparate treatment. *E.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 617 n.2 (1999) (Thomas, J., dissenting) ("This Court has recognized that two forms of discrimination are prohibited under Title VII: disparate treatment and disparate impact."). *See also Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (Plaintiff brought both a disparate treatment claim and a disparate impact claim). This case involves a claim for disparate treatment, as do all cases that involve the issue of subordinate bias, which the Seventh Circuit Court of Appeals has dubbed "cat's paw" cases. *Proctor Hosp.*, 560 F.3d at 650.

For a plaintiff to survive summary judgment in a disparate treatment claim, he or she must show that the decisionmaker, not just any employee, took adverse action with discriminatory intent. *E.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Tex. Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In *Reeves,* this Court held

that the ultimate question is whether the employer intentionally discriminated. 530 U.S. at 146. The first step in the Court's analysis was to determine the motives of the several decisionmakers. *Id.* at 140 (noting that there were no allegations that two of the decisionmakers were motivated by age). Thus the Court's focus in disparate treatment cases is on the motives of the decisionmakers and who should be considered a decisionmaker.

The element of motive or intent is integral to disparate treatment claims. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 72 (2006) ("Congress amended Title VII in 1991 to permit victims of intentional discrimination to recover compensatory . . . and punitive damages"); *Reeves,* 530 U.S. at 143; *Burdine*, 450 U.S. at 256; *Pers. Adm'r of Mass. v. Feeney,* 442 U.S. 256, 278-79 (1979); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989). In *Reeves*, this Court held that "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'" 530 U.S. at 141 (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993)).

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the Court held that the plaintiff could show that McDonnell Douglas' proffered reason for refusal to rehire was pretextual by showing that McDonnell Douglas exhibited racial discrimination during Mr. Green's previous employment, or by showing that McDonnell Douglas rehired whites with a similar criminal background. Mr. Green was arrested and convicted for illegally blocking traffic at the entrance of McDonnell Douglas' worksite. He then applied for re-employment. Thus, the burden remains with the plaintiff to show that the person making the adverse employment decision took the plaintiff's protected

status into consideration. *See Reeves*, 530 U.S. at 143 (holding that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.") (alteration in original) (internal quotations omitted).

"'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. Rather, to show intentional discrimination, a plaintiff must show that the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" the protected characteristic. *Id.*

A. Disparate Treatment Claims Require Proof of Unlawful Motive or Intent by the Person Taking the Adverse Employment Action

The essence of a disparate treatment claim under the federal anti-discrimination laws is discriminatory motive or intent by the decisionmakers taking an adverse action. *E.g.*, *Burlington N.*, 548 U.S. at 72.

In contrast to disparate treatment claims, disparate impact claims operate under a scheme more similar to strict liability, as the question of unlawfulness centers upon the result and disregards the motivation of the decisionmaker. Disparate impact claims recognize that an employer may violate Title VII even without intending to discriminate. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Eliminating a plaintiff's burden to prove the decisionmaker's discriminatory intent in essence converts cat's paw cases from disparate treatment claims to disparate impact

claims, as the intent or motive of the decisionmaker would no longer matter. Congress did not wish for this when it enacted two distinct schemes of liability.

In the instant case, the Seventh Circuit correctly looked to the motive or intent of the lone decisionmaker, Ms. Buck. Under the two-step framework set forth in the case, only if Ms. Buck was wholly dependent on the biased information such that it became her own would the animus of Ms. Mulally or Mr. Korenchuk be a material issue.

B. A Plaintiff May Not Graft the Discriminatory Motive or Intent of a Non-Decisionmaker onto the Decisionmaker's Adverse Action

Because a disparate treatment plaintiff is required to show that the decisionmaker harbored a discriminatory motive, cat's paw cases would appear to be easily dispensable simply by showing that the decisionmaker harbored no discriminatory animus. Indeed, the *sine qua non* of a cat's paw case is the decisionmaker's neutrality. Cat's paw cases are not easy to resolve, however, because the decisionmaker's level of independence from employees who harbored discriminatory animus varies from case to case. All circuit courts of appeal that have confronted the issue agree on this.

What is clear, however, is that a plaintiff cannot prevail merely because he or she can show, without more, that discriminatory animus resided in one person and an adverse action was taken by another person. This was the case here, where Ms. Mulally and Mr. Korenchuk harbored anti-military animus, but Ms. Buck made the termination decision.

However, when the neutral decisionmaker relies exclusively on information that comes from a biased employee or otherwise is wholly dependent on a biased employee's report or recommendation, the cat's paw cases become more difficult as the decisionmaker begins to lose his or her independence from the biased information. This creates the appearance that the decisionmaker and the biased subordinate form a collaborative of interdependent decisionmakers. This is the zone in which the circuit courts of appeal have struggled and have arrived at different standards for resolution.

NFIB believes that the proper standard to guide small businesses should focus on the decisionmaker's conduct rather than on the universe of other employees who may harbor unlawful animus. Only then will employers know what the law expects of them and be in a position to comply.

C. The Court's Inquiry Should Focus on the Independence of the Decisionmaker, Not Upon Whether a Biased Non-Decisionmaker *Caused* or *Influenced* the Decisionmaker

The courts of appeal are split over the proper standard to employ to determine when an employer is liable for the discriminatory animus of its employees. The Courts of Appeal for the Sixth, Ninth, and Tenth Circuits employ a factual causation standard, under which an employer will be held liable if a biased non-decisionmaker *caused* the adverse employment action. *E.g., Madden v. Chattanooga City Wide Service Dep't*, 549 F.3d 666 (6th Cir. 2008); *Gilbrook v. City of Westminster*, 137 F.3d 839, 854 (9th Cir. 1999); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2004).

The Court of Appeal for the First, Second, Third and Fifth Circuits have adopted a slightly different, though related, standard, which looks at whether a biased employee *influenced* the decisionmaker. *E.g.*, *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 285 (3d Cir. 2001).

1. The causation and influence standards provide no meaningful guidance to employers and fail to consider the realities of the workplace

Focusing on the biased non-decisionmaker and whether his or her action *caused* or *influenced* the adverse employment action fails to provide guidance to employers on how to change their own behavior to make sure they stay on the right side of the law. A neutral decisionmaker may be fully unaware of the improper influence being exerted upon her. Rather than give certainty to employers on how to avoid missteps—and protracted litigation—in handling sensitive employment decisions, the causation and influence standards leave employers in the dark on what their employment decisionmakers should do to ensure that terminations and other adverse employment actions are lawful.

The causation and influence standards also fail to distinguish instances in which a supervisor's influence is proper. All supervisors—and in some instances regular employees—direct information upward to decisionmakers. To be helpful, a legal standard must distinguish between instances in which a decisionmaker, through his or her complete depen-

dence on biased information, assumes the discriminatory animus of the biased supervisor from instances in which the decisionmaker acts independently.

The decisionmakers in employment settings often do not have direct supervisory authority over the affected employee. That falls to the supervisors that are put in place to relay information up the chain of command. Under the causation and influence standards, any time information flows from an individual up the chain of command, the individual from which the information flowed will necessarily be a but-for cause or an influence of any adverse employment decision. This will be the case regardless of the steps the decisionmaker takes along the way to satisfy him or herself that the termination is justified. Such a standard leaves the employer completely exposed to liability whenever a plaintiff later discovers an unlawful animus in the supervisor who directed information upward to the decisionmaker. As stated, *supra,* this takes on the underpinnings of a strict liability standard for a claim that has always required intent or motive. *Burlington N., supra.*

2. The causation and influence standards do not comply with anti-discrimination laws

Moreover, the causation and influence standards do not comport with the principles of anti-discrimination jurisprudence. These standards presume that a court is permitted in the first instance to graft one person's unlawful motive onto the actions of a concededly non-biased person. This premise has no roots in anti-discrimination law. For example, Title VII prohibits an adverse action "because of" an individual's protected status. 42 U.S.C. § 2000e-2. This Court has construed the words "because of" to mean

that protected status must be irrelevant to the employment decision. *Price Waterhouse*, 490 U.S. at 240. In *Price Waterhouse*, the Court held that to construe "because of" to mean "but-for causation" "is to misunderstand" the statutory language. *Id.* A but-for causation analysis, the Court held, incorrectly asks whether an employer would have terminated an employee if the protected status was not present. *Id.* According to the Court, the critical inquiry is "the one commanded by the words of" the statute—whether protected status "was a factor in the employment decision *at the moment it was made*." *Id.* at 241.

Cautioning that we "need not leave our common sense at the doorstep when we interpret a statute," the Court reasoned that in drafting the words "because of," Congress did not require a plaintiff to identify a precise causal role played by discriminatory motives. *Id.* at 241. Rather, the Court concluded that Congress intended to require a plaintiff to prove that the employer "relied upon sex-based considerations in coming to its decision." *Id.* at 241-42. Congress did not intend to allow a plaintiff to take a short cut in his burden by attributing a supervisor's bias to an employer merely because the supervisor's conduct was a but-for cause of a particular result. Instead, Congress intended a more rigorous burden to show improper considerations were a factor in the decision.

Because Title VII and USERRA prohibit only conduct by an employer, the inquiry should focus upon the decisionmaker—the individual empowered to bind the employer through adverse employment decisions. Not only would this approach respect the principles of Title VII, it would also provide much-needed guidance to the small-business community on

how best to manage employment decisions. The small business community is most in need of a standard that sets forth a clear bright line for employers. A standard that clearly defines what the law expects of the decisionmaker would go a long way to minimize needless litigation costs so that small business owners can stay focused on growing their business.

3. The Seventh Circuit's "wholly dependent" standard complies with anti-discrimination laws and provides meaningful guidance to employers

The Seventh Circuit's "wholly dependent" standard is a good framework from which this Court can build a fully-functioning legal principle to guide employers. The Seventh Circuit correctly placed the focus of the inquiry on the decisionmaker by asking what he or she has done during the decisional process and whether that comports with the law. The converse of "wholly dependent" is independent, and the principle of independence should guide the Court here.

That is, courts should inquire whether the decisionmaker made the adverse employment decision independently. If so, then the animus of non-decisionmakers is of no consequence. However, if the decisionmaker did not act independently, and was "wholly dependent" on the word of a biased employee or supervisor, then the bias of that employee becomes relevant in the analysis. In such a case, the decisionmaker and the biased employee can be said to have acted interdependently in the decisional process, and courts may conclude that the biased employee has become one of a collaborative of decisionmakers. Once a court makes this determination,

it would be appropriate to permit evidence of the new decisionmaker's animus.

II. DIFFERENT FACTUAL SITUATIONS IN THE WORKPLACE REQUIRE A FLEXIBLE APPROACH TO DETERMINING THE INDEPENDENCE OF THE DECISIONMAKER

All discrimination disputes can be broadly divided into three factual patterns. In the first class of cases, the decisionmaker harbors the animus, and plaintiff alleges that the adverse employment decision was motivated by that animus. *See, e.g., McDonnell Douglas*, *supra*. In these cases, the decisionmaker's animus is rightly imputed to the employer.

In the second class of cases, the biased individual has no supervisory or disciplinary authority over the employee against whom adverse action is taken. Expressions of animus by these individuals are mere "stray remarks," and they may not be imputed to the employer. In *Price Waterhouse*, 490 U.S. at 277, this Court stated that stray remarks, "cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard."

Although the Fourth Circuit did not characterize it as such, the facts of *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), fall within the "stray remarks" doctrine. In that case it was undisputed that the allegedly biased safety inspector who reported Ms. Hill's violations of company policy had no supervisory or disciplinary authority over

Ms. Hill. *Lockheed Martin*, 354 F.3d at 282. Rather, the safety inspector merely reported violations to Ms. Hill's supervisor, who possessed disciplinary—but not termination—authority. *Id.* It was also undisputed that none of Hill's four direct supervisors harbored any age-based animus. *Id.* at 282-83. Using similar reasoning to the "stray remarks" doctrine of *Price Waterhouse*, the Fourth Circuit rightly concluded that the safety inspector's bias could not be attributed to the employer. *Id.* at 296.

In the third class of cases, where we presently find ourselves, an allegedly-biased supervisor with disciplinary but not termination authority, reports to someone up the chain of command who possesses termination authority. In these cases, the approach most faithful to Title VII is to follow the Court's analysis in *Reeves* and the Seventh Circuit's approach in this case and look to the independence of the decisionmaker's action. In *Reeves*, Ms. Sanderson was the decisionmaker who fired Mr. Reeves, but evidence presented by Mr. Reeves showed Mr. Chesnut also to be a decisionmaker. *Reeves*, 530 U.S. at 152. The Court implicitly determined that Ms. Sanderson did not act independently but rather acted *inter*dependently with Mr. Chesnut. *Id.* Once the Court was satisfied that Mr. Chesnut was a decisionmaker, it followed that his animus could be imputed to the employer. Similarly, in the instant case, Ms. Buck was the decisionmaker who terminated Mr. Staub. 560 F.3d at 654. However, Mr. Staub's supervisors Ms. Mulally and Mr. Korenchuk allegedly harbored anti-military animus. The Seventh Circuit analyzed whether Ms. Buck's decision was "wholly dependent" on Ms. Mulally or whether Ms. Buck acted independently. *Id.* at 659. The Seventh Circuit

looked at the independent actions Ms. Buck took to ensure that the termination was warranted and concluded that Ms. Buck was not wholly dependent on Ms. Mulally and Mr. Korenchuk. *Id.*

The approach NFIB advocates here does not require a determination of who the principal decisionmaker is, for there may be several decisionmakers who all played an equal role throughout the chain of command. NFIB proposes that, through the "wholly dependent" analysis, courts identify the individual or the group of individuals who acted as decisionmakers. Because the titular decisionmaker will always be included in this class, the most practical approach is to look to facts not in dispute to show that the titular decisionmaker made an independent decision. If the titular decisionmaker acted independently, then the animus of non-decisionmakers is irrelevant. However, if the titular decisionmaker did not make the adverse employment decision independently, at least one other employee is necessarily part of a group of decisionmakers, and that person's animus may be imputed to the employer.

To determine independence courts may look to several undisputed facts in the record. For example, the fact that the formal decisionmaker conducted an inquiry would always be sufficient to show the independence of the formal decisionmaker. However, an inquiry is not always necessary. Factual situations vary widely, and the law should be clear yet permit employers the flexibility to deal with cases in the most efficient and appropriate method. In these cases, courts should defer to the business judgment and experience of human resource professionals.

A. The Decisionmaker May Demonstrate Independence by Conducting an Investigation

In *BCI Coca-Cola*, the Tenth Circuit held that a defendant cannot prevail on summary judgment unless it conducted an investigation that was "adequate" as a matter of law. In the court's view, an adequate investigation must consist, at a minimum, of asking the employee for his side of the story. *BCI Coca-Cola*, 450 F.3d at 488, 492. Because Ms. Edgar did not directly ask Mr. Peters his side of the story prior to his termination, the court held that BCI Coca-Cola did not conduct an adequate investigation and reversed the district court's grant of summary judgment. The Tenth Circuit's holding is wrong for two reasons.

First, the Tenth Circuit's "adequate investigation" standard is overbroad. It erroneously imposes a strict legal standard for a factual question best left to the discretion of employers and human resources professionals. The Seventh Circuit got this correct, holding instead that an employer can demonstrate independence merely by "conducting its own investigation into the facts relevant to the decision." *Proctor Hosp.*, 560 F.3d at 656 (quoting *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 918 (7th Cir. 2007)). According to the Seventh Circuit, "[b]y asking whether the decisionmaker conducted her own investigation and analysis, we respected the role of the decisionmaker." *Id.* at 656.

NFIB proposes that an investigation be defined as any active search for evidence probative of the reliability of the non-decisionmaker's stated grounds for an adverse employment action. If the decisionmaker makes such an inquiry, then she has estab-

lished that she independently made her decision, and was not "wholly dependent" on the supervisor's report, and the supervisor's animus becomes irrelevant. In the instant case, Ms. Buck conducted an investigation into the facts presented by Ms. Mulally and Mr. Korenchuk, and she satisfied herself that termination was warranted. *Id.* at 654-55. Ms. Buck reviewed Mr. Staub's personnel file and drew on her own several years of rather extensive personal knowledge of Mr. Staub's behavior. *Id.* In that investigation, she found evidence that affirmed her decision that termination was appropriate. The Seventh Circuit reached the same result in *Brewer*, 479 F.3d at 919, in which it declined to impute a non-decisionmaker's animus to the employer because the decisionmaker did not simply rely on the information from the biased employee but looked into the situation for herself and confirmed that termination was appropriate.

B. There are Numerous Other Ways to Demonstrate Independence

The collective experience of the small business community teaches that an investigation, while always sufficient to show independence, is not always necessary. Rather, small business professionals need the flexibility and latitude to handle employment decisions in an efficient and responsible manner. Often times, an investigation will not be the best way to establish the decisionmaker's independence.

1. Termination under a policy of automatic termination (*e.g.*, a zero-tolerance policy)

Some facts leading to an adverse employment decision are so apparent that no investigation is required

by the decisionmaker before taking the contemplated action. For example, a company may have a zero-tolerance drug policy in place and requires routine testing pursuant to a written policy. If the supervisor receives the lab results showing that the employee tested positive and forwards the results to the decisionmaker who promptly terminates the employee, no claim should lie against the employer even if the supervisor harbored unlawful animus. The termination decision was based entirely on the facts of the zero-tolerance drug policy and the positive test results. Under these circumstances, the supervisor's forwarding of the test results could hardly be said to compromise the independence of the formal decisionmaker's action.

In addition to policies of automatic termination, NFIB's experience is that, in the field of occupational safety and health, a decisionmaker may decide immediately to terminate an employee for a safety infraction. In such cases, the decisionmaker should be given the latitude to do so without investigation—even if the decision is based entirely on a supervisor's report—if in doing so the decisionmaker acted in good-faith furtherance of the safe and healthful conditions of the workplace.

Lockheed Martin and *BCI Coca-Cola* are examples of this situation. In *Lockheed Martin*, Ms. Hill did not dispute the basis for any of the three reprimands issued to her by the "lead person" (Ms. Hill's direct supervisor). *Lockheed Martin*, 354 F.3d at 283. Of the three reprimands, one included a suspension. *Id.* at 282. Company policy provided that "an employee who receives a combination of two reprimands not involving a suspension and one involving a suspension . . . will be subject to discharge." *Id.* Upon

issuing Ms. Hill her third reprimand, Mr. Dixon, the lead person, contacted the human resources department and inquired how to proceed under the automatic termination policy. *Id.* Mr. Dixon was told to follow company policy, which he did by forwarding Ms. Hill's disciplinary paperwork to his own supervisors who made the decision to terminate Ms. Hill. *Id.* Under these facts, in which the formal decisionmakers were acting pursuant to a policy of automatic termination, a thorough investigation was not necessary. However, Mr. Dixon's supervisors—the formal decisionmakers—did conduct an inquiry inasmuch as they reviewed Ms. Hill's file. This satisfied the court that they arrived at their decision independently.

2. The non-decisionmaker does not advocate but merely reports facts to or seeks advice from the decisionmaker

Courts also should look to the strength of the biased non-decisionmaker's advocacy as an indicator of whether the supervisor's behavior tends to make him or her one of several interdependent decisionmakers. In cases in which the supervisor in effect becomes an advocate for a particular decision, the court may need to look further for facts relating to the formal decisionmaker's independence. However, where a supervisor merely reports facts or seeks advice from the decisionmaker, an investigation should be unnecessary. The non-decisionmaker's only role in this scenario is to convey or receive information, not to influence the formal decisionmaker. Thus, there is no threat to the independence of the formal decisionmaker's actions.

In the leading cases in which the employee subordinate to the formal decisionmaker strongly advocated

for the adverse employment decision, the reviewing court denied summary judgment for the employer. In *Reeves*, "Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that petitioner and Caldwell be fired." 530 U.S. at 138. In *McKinney Hosp. Venture*, Mr. Ciulla, the non-decisionmaker, gave Ms. Jacobsen, the decisionmaker, "an ultimatum . . . that he would quit if Russell were not fired." 235 F.3d at 224.

In *Lockheed Martin* and this, the non-decision-makers did not advocate for a particular result but merely presented facts to the human resource department. The Fourth Circuit affirmed summary judgment for the employer in *Lockheed Martin* and the Seventh Circuit entered judgment for Proctor in this case. In *Lockheed Martin*, after Ms. Hill received her third reprimand which, under company policy, required automatic termination, her supervisor, Mr. Dixon, contacted his own supervisor, Mr. Griffin, to apprise him of the situation and "to obtain guidance on how to proceed." 354 F.3d at 282. Mr. Griffin instructed Mr. Dixon to proceed under company policy, which required forwarding Ms. Hill's disciplinary paperwork to Mr. Griffin who, along with Mr. Prickett, made the decision to terminate Ms. Hill. *Id.* At no time did Mr. Dixon suggest or recommend to his superiors that Ms. Hill be terminated; rather, as the opinion makes clear, his contact with Mr. Griffin was limited to obtaining guidance on how to deal with a delicate employment matter. Thus, Mr. Dixon cannot be found to be a part of a collaborative of independent co-decisionmakers. Further, in the absence of advocacy, there is no evidence that Mr. Griffin was "wholly dependent" upon Mr. Dixon.

In the instant case, it appears that Ms. Mulally had little contact with Ms. Buck. Indeed, Ms. Buck testified that she had no idea that Ms. Mulally wanted Mr. Staub fired. 560 F.3d at 655. Mr. Korenchuk had greater contact, but in the one pre-termination meeting at which Mr. Korenchuk and Ms. Buck were present, there appears to have been no discussion between the two. *Id.* at 654. Therefore, all we know from this case is that Ms. Mulally and Mr. Korenchuk issued Mr. Staub the January 2004 warning, which eventually made its way to Ms. Staub's desk without advocacy. *Id.* at 655.

NFIB's approach yields results similar to those reached by the circuit courts, but it does so in a way that is faithful both to the intent requirement of the anti-discrimination laws and the Court's holding in *Reeves*. The factors NFIB highlights as important for consideration in subordinate bias cases are the same factors that implicitly led the circuit courts to their decisions. An analysis of independent decision-making, with a focus on the titular decisionmaker, will determine who the decisionmakers were and, ultimately, whose animus may be imputed to the employer.

CONCLUSION

The judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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