

No. 09-400

IN THE
Supreme Court of the United States

VINCENT E. STAUB,
Petitioner,

v.

PROCTOR HOSPITAL,
Respondent.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN
SUPPORT OF RESPONDENT ON BEHALF OF CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA
OUT OF TIME

To the Honorable Court, through undersigned counsel, comes the Chamber of Commerce of the United States of America for leave to file its *amicus curiae* brief in support of respondent out of time.

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UNITED STATES OF AMERICA AS *AMICUS
CURIAE* IN SUPPORT OF RESPONDENT**

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Amicus curiae respectfully submits this brief in support of Respondent, pursuant to Supreme Court Rule 37.3.¹ *Amicus* urges the Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

STATEMENT OF INTEREST

Amicus curiae, the Chamber of Commerce of the United States of America (the “Chamber”), is a nonprofit corporation organized and existing under the laws of the District of Columbia. The Chamber is the world’s largest federation of business, trade and professional organizations in the United States. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations. The Chamber has members of every size, in every sector and in every region of the United States.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation’s business community. The Chamber has regularly participated as *amicus curiae* in cases before this Court addressing employment law issues, including, most recently, in *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S.

¹ Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief *amicus curiae*, and their consent letters are on file with the Clerk’s Office.

618 (2007); and, in cases directly relevant to the issues presented here, *BCI Coca-Cola Bottling Co. v. EEOC*, 549 U.S. 1334 (2007), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Kolstad v. American Dental Association*, 527 U.S. 526 (1999).

The Chamber's members have a substantial interest in the proper standards for imposing liability under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. § 4301 *et. seq.*, particularly as the interpretation of this statute may affect the interpretation of other federal statutes addressing employment discrimination. This case presents the question of whether and when an employer is subject to liability for unapproved, biased acts of a renegade employee. The petitioner in this case seeks to establish a strict liability regime that would penalize employers for any discriminatory acts that arguably have a factual connection to an adverse employment action. But employers are not social insurers and should not be held liable for every frolic and detour of their employees. Rather, as the Chamber explains below, consistent with common law principles of agency and causation, adjusted appropriately to reflect the policy concerns of the organic laws in issue, the Court should hold that employers are liable only for discriminatory exercises of delegated authority that actually and proximately cause an adverse employment action; the Court should further hold that proximate cause is lacking where the actual employment decision is made by a non-biased actor guided by and adhering to reasonable anti-discrimination policies and procedures.

SUMMARY OF ARGUMENT

The question in this case is whether respondent, Proctor Hospital, may be held liable under USERRA as an “employer” for terminating petitioner, Vincent Staub, “on the basis” of his military status. Although the court below did not use the correct framework to analyze this question, it nevertheless correctly answered that question in the negative.

I. This Court’s jurisprudence generally establishes that, to hold an employer liable for an allegedly biased act of one of its employees, the plaintiff must show both (1) that the employer is legally responsible for the act under applicable agency law principles; and (2) that the allegedly biased act actually and proximately caused the adverse employment action in issue. These principles should specifically apply in USERRA cases.

A. Employers should not be liable for all frolics and detours or other unauthorized conduct of their employees. Rather, an employer should be responsible only for actions that it has delegated authority to an employee to take.

At common law, an employer could be held vicariously liable for torts of an employee where the employee was “aided in accomplishing the tort by the existence of the agency relation.” RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958). This Court has made clear, however, that the “aided by the existence of the agency relation” standard cannot be applied literally in the employment discrimination context, because it would subject employers to overly broad liability and undermine compliance with employment discrimination laws. *See Burlington,*

524 U.S. at 760; *Faragher*, 524 U.S. at 797; *Kolstad*, 527 U.S. at 544.

Accordingly, under the Court's cases, vicarious liability is appropriate in federal employment cases only where, among other things, the plaintiff proves that an allegedly biased action involved the exercise of official delegated authority and thus properly can be treated as an official or company act. *See Burlington*, 524 U.S. at 762; *Faragher*, 524 U.S. at 805; *Kolstad*, 527 U.S. at 545. An official or company act certainly occurs when a biased employee effectively makes the final decision that constitutes the adverse action for which the plaintiff sues. In such circumstances, the biased employee is acting on delegated authority, and the biased decision is effectively ratified and adopted by the employer as its own.

In contrast, where employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority to take the acts in question, vicarious liability may be properly imposed for unlawfully motivated actions that cause those independent decisions only if, among other things, the unlawfully motivated actions are themselves official exercises of delegated authority. Acts *not* involving the exercise of delegated authority are not acts of the employer; they do not carry with them an "imprimatur of the enterprise"; and they should not subject employers to vicarious liability.

B. Even acts of delegated authority do not allow vicarious liability to be imposed, however, if they are not the actual and proximate cause of the ultimate adverse employment action. Actual causation is

factual causation; proximate causation is legal causation.

Not surprisingly, in construing various federal statutes, this Court has long embraced both actual and proximate causation principles. The Court has held that concepts of actual and “proximate causation” limit liability under a variety of statutory schemes, including RICO, the FTCA, and the Clayton Act. This Court’s cases addressing employment discrimination also embrace such actual and proximate causation principles. So do persuasive employment law decisions in the lower courts.

C. These agency and causation principles should equally apply to USERRA cases. USERRA’s definition of “employer” explicitly references agency principles by applying only to a: “person . . . that has *control* over employment opportunities” or a “person . . . to whom the employer has *delegated* the performance of employment-related responsibilities.” 38 U.S.C. § 4303(4)(A)(i) (emphases added). USERRA’s text also embraces causation principles by applying only to employment actions made “on the basis of [plaintiff’s] membership” in a uniformed service. 38 U.S.C. § 4311(a). Nothing in the statutory scheme suggests that the agency and causation principles applicable under other federal employment laws do not apply in USERRA cases.

II. Under these agency and causation principles, the decision below is correct. Mullaly and Korenchuk may have been exercising delegated authority for which respondent is properly responsible. But their acts were not the proximate cause of the adverse employment action in issue.

A. Under applicable proximate causation principles, there should be no liability where a non-biased decision-maker made the actual decision and engaged in an independent evaluation of the matter. The policies of USERRA—like the policies of other employment discrimination statutes—aim to encourage employers to create and follow reasonable anti-discrimination policies and procedures. Where an employer has done so, these policies are not well served by imposing liability on the employer.

Consistent with these principles, lower federal courts have repeatedly found proximate cause lacking where a non-biased decision-maker made the actual decision in issue and engaged in an independent evaluation of the matter—even matters that are initially initiated or influenced by the act of a biased employee. The cases indicate that receiving input from non-biased sources and/or examining the evidence independently establishes a lack of proximate causation. Likewise, where a decision-maker gives an employee an opportunity to present his side of the story, courts also hold that proximate cause is lacking. These cases recognize that the policies of the underlying statutes would be disserved by imposing liability in these various circumstances.

B. The record here establishes that Buck, the ultimate decision-maker, was non-biased; and, as the record shows, she acted responsibly in making a determination that Staub had to be terminated. These facts suffice to establish that any alleged bias of Mullaly and Korenchuk was not the proximate cause of Buck's decision to terminate Staub.

Before firing Staub, Buck made her own evaluation of the matter. *First*, even before receiving the

recommendation to fire Staub, Buck had received numerous negative reports about Staub in the course of the preceding two years from Staub's non-biased supervisors, managers and colleagues. *Second*, Buck evaluated Staub's side of the story. *Third*, Buck effectively assessed the January 27 incident twice. *Fourth*, Buck reviewed Staub's personnel file, which contained his evaluations indicating his noncompliance with conditions for his return after his 1998 firing.

The Seventh Circuit thus reached the correct conclusion here in holding that respondent is not liable. There is no serious dispute that the allegedly biased supervisors had been delegated authority to report to Buck about Staub. But there is no proximate causation. Although the Seventh Circuit did not engage in an explicit proximate causation analysis, it properly recognized that Buck was not herself biased and acted in a responsible manner in evaluating Staub's personnel problems and in terminating him. Those facts suffice to defeat proximate causation.

III. Although the Government and Petitioner appear to embrace the agency-causation principles framework, their treatment of proximate causation is legally and factually unfounded. *First*, they confuse actual and proximate causation principles: That an independent investigation shows "the adverse action would have been taken anyway" is an actual causation issue, not a proximate causation issue. The role of proximate causation is to preclude liability even where actual causation exists, because of the attenuation between that cause-in-fact and the adverse action in issue, and because of other

statutory policies that are better served by rejecting liability arguments in the particular context. *Second*, the Government ignores and misconstrues crucial facts demonstrating that Buck acted in a responsible manner before firing Staub and thus that there is no proximate causation.

ARGUMENT

USERRA commands 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.” 38 U.S.C. § 4311(a). USERRA defines an “employer” that could be liable for such actions as “any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including—(i) a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities” 38 U.S.C. § 4303(4). There is no issue here concerning whether respondent is an “employer”; it plainly is. Rather, the question here is whether “a person . . . to whom [the] employer has delegated the performance of employment-related responsibilities” “denied [petitioner] retention in employment” “on the basis of . . . membership” in “a uniformed service.” Although the court below did not fully apply the correct legal framework, in analyzing this question it nonetheless correctly held that liability was not legally appropriate in this case, because the alleged discriminatory acts did not proximately cause the ultimate challenged employment action.

I. FOR AN EMPLOYER TO BE HELD LIABLE UNDER USERRA, A PLAINTIFF MUST ESTABLISH BOTH THAT THE EMPLOYER IS LEGALLY RESPONSIBLE UNDER APPLICABLE AGENCY LAW PRINCIPLES FOR THE ALLEGED DISCRIMINATORY ACT AND THAT THE ALLEGED UNLAWFUL ACT ACTUALLY AND PROXIMATELY CAUSED THE ADVERSE EMPLOYMENT ACTION IN QUESTION

As explained below, whether “a person . . . to whom [the] employer has delegated the performance of employment-related responsibilities” “denied [the plaintiff] retention in employment” “on the basis of . . . membership” in “a uniformed service” raises two distinct sub-issues—an agency issue and a causation issue. As to agency, the sub-question is whether applicable agency-law principles make the employer legally accountable for an allegedly discriminatory act. As to causation, the sub-question is whether the alleged discriminatory act was both an actual and a proximate cause of the adverse employment action at issue. As the applicable statutory language and this Court’s cases confirm, both agency and causation are necessary conditions for imposition of vicarious liability.

A. The Plaintiff Must Show That, Under Applicable Agency Law Principles, The Employer Is Legally Responsible For The Alleged Discriminatory Act

This Court’s cases demonstrate that, even where a biased act leads to an adverse employment action, liability for the employer does not always follow. Rather, a fundamental precondition for liability is

that, under applicable agency principles, the act is an “official” or “company” action.

1. For example, in the context of suits against municipalities under Sections 1981 and 1983, the Court has refused to impose *respondeat superior* liability for municipalities. The Court has instead held that vicarious liability may be imposed only for actions taken pursuant to official municipal policy. *See Monnell v. Dep’t of Social Servs.*, 436 U.S. 658, 691 (1978) (section 1983); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736 (1989) (section 1981).

In cases arising under Section 1981, the Court has similarly held that employers may not be held vicariously liable for a union’s discriminatory operation of a hiring hall. *See Gen. Bldg. Contractors Ass’n, Inc. v. Pennsylvania*, 458 U.S. 375, 378 (1982). The Court reasoned that holding an employer vicariously liable for a union’s discriminatory actions would be “alien to the fundamental assumptions upon which the federal labor laws are structured,” because the union is not a legal agent of the employer. *Id.* at 393-95.

The Court’s cases construing Title VII have likewise held that liability may only be imposed on an employer for official acts of its agents. As the Court explained in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), “Congress’s 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 under Title VII are to be held responsible.”

2. Subsequent decisions of the Court have further explained that liability rules in federal

employment statutes find only their “*starting point*” in common law agency principles. *Faragher*, 524 U.S. at 802 n.3 (“our obligation here is not to make a pronouncement of agency law in general or to transplant § 219(2)(d) into Title VII”). The Court has held that such common law principles of agency must be “adapt[ed] . . . to the practical objectives” of the applicable statutory laws. *Id.*

As this Court has explained, the doctrine of “*respondeat superior*, as traditionally conceived . . . enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant.” *Gen. Bldg. Contractors*, 458 U.S. at 392 (citing RESTATEMENT (SECOND) OF AGENCY §§ 215-216, 219). Under these principles, “[a]n employer may be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.” *Burlington*, 524 U.S. at 756; RESTATEMENT (SECOND) OF AGENCY § 229(1) (1958). Furthermore, in certain “limited circumstances,” general principles of agency law allow imposition of vicarious liability where an employee acts outside of the scope of the employment, including where “(d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation.” *Burlington*, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)) (emphasis added). *See also* Petitioner’s Brief (“Pet.”) 23 (same).

As courts have recognized, however, it is not legally appropriate to apply the “aided by the agency relation” standard too literally in the context of employment discrimination laws:

[I]t is difficult to conceive of an instance when the exception would not apply because an employee, by virtue of his or her employment relationship with the employer is always “aided in accomplishing” the tort. Because the exception is not tied to the scope of employment but, rather, to the existence of the employment relation itself, the exception strays too far from the rule of *respondeat superior* employer nonliability.

Zsigo v. Hurley Med. Ctr., 716 N.W.2d 220, 226 (Mich. 2006). For this reason, courts have frequently declined to extend agency principles as far as the “aided in the agency relation” standard would extend them. *See, e.g., id.* at 234 n.11 (Young, J. concurring); *Groob v. Keybank*, 843 N.E.2d 1170, 1179 (Ohio 2006).

This Court similarly has indicated that agency law principles applicable in federal employment discrimination cases do not extend to acts merely because they were “aided” by “the existence of the agency relation.” *Burlington*, 524 U.S. at 760. Because a literal application of the “aided in the agency relation” test in the employment context would impose too broad a liability, the Court has concluded that imposition of liability “requires the existence of something more than the employment relation itself.” *Id.* (emphasis added). *See also* Brief Of The United States As Amicus Curiae Supporting Petitioner (“SG”) 15 (same).

For example, in the sexual harassment context, the Court has held that employers may be vicariously

liable “when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.” *Faragher*, 524 U.S. at 808. Employers may also be liable “for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” *Id.* at 807; *Burlington*, 524 U.S. at 765. *See also* SG 16 (same). However, even in cases involving supervisor misconduct, vicarious liability is not allowed where: “(a) . . . the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Burlington*, 524 U.S. at 765. The Court so concluded by “accommodat[ing] the agency principles . . . as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees.” *Id.* at 764.

Relatedly, in the context of determining the availability of punitive damages under Title VII, the Court has similarly declined to apply literally the “aided in the agency relation” standard, and has held that it is necessary “to modify these principles to avoid undermining . . . the prophylactic goals underlying Title VII.” *Kolstad*, 527 U.S. at 542-43, 545. The Court specifically held that there is no vicarious liability in the punitive damages context where “decisions of managerial agents are contrary to the employer’s good faith efforts to comply with Title VII.” *Id.*

3. The Court’s cases show that, as a threshold matter, it is important to distinguish among the

actors from whom the employer may receive input in making an adverse employment decision. In deciding to terminate an employee, the manager decision-maker may adopt the recommendation of another manager. The decision-maker may also receive a report on an employee's performance from an intermediate supervisor, who is not empowered to recommend a particular action or to take any official action. The decision-maker may be made aware of an informal hallway discussion regarding an employee's performance or receive an anonymous message. The actions of an employer's employees span a broad spectrum and, both because of their variety and their differing relationship to delegated authority (or lack thereof), they do not all properly trigger vicarious liability.

Rather, the Court's employment jurisprudence suggests that vicarious liability may be properly imposed on an employer only for "official acts" that "become . . . the act of the employer," "a company act." *Burlington*, 524 U.S. at 762. The most obvious class of such acts is "when a supervisor takes a tangible employment action against the subordinate." *Id.* at 760-61. It follows that an employer should be vicariously liable for managerial actions that involve no independent assessment but merely rubberstamp discriminatory actions of subordinate employees who are in effect *de facto* decision makers. An "official" act is committed by a biased employee when he is effectively allowed to make the final decision that adversely affects the plaintiff. Holding an employer vicariously liable is appropriate because "the [employee] and the employer merge into a single entity," *id.* at 762, and the biased employee's act becomes the "official act." *See also* RESTATEMENT

(SECOND) OF AGENCY § 219, cmt. a (1958) (“The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm.”).

In contrast, when employment actions do not involve mere rubberstamping but rather reflect independent decisions of agents with delegated authority, vicarious liability may properly be imposed (for unlawfully motivated actions that actually and proximately cause independent decisions) only where the unlawfully motivated act involves an exercise of delegated authority. In elaborating on the scope of the “aided by the agency” standard, the Court in *Burlington*, 524 U.S. at 762-63, cited *Shager v. Upjohn Co.*, 913 F.2d 398, 405-06 (7th Cir. 1990), a case where the plaintiff was formally fired by the Career Path Committee, but which allegedly acted on a report by a biased intermediate supervisor. The *Shager* court noted that, if the committee “was not a mere rubber stamp, but made an independent decision to fire Shager,” there would be “no ground for finding willful misconduct by” the employer. *Id.* at 406. Thus, the “official” responsibility for the adverse employment action would lie with, and would be exercised by, the committee—and not by the employee with the alleged bias.

This Court’s decisions regarding the necessary conditions for imposition of punitive damages in Title VII cases also recognize this distinction between unauthorized employee actions and official actions. *See, e.g., Kolstad*, 527 U.S. at 542-43. Courts of appeals have followed this Court’s reasoning and repeatedly recognized this distinction as well. *See, e.g., Muegge v. Heritage Oaks Golf & Country Club*,

Inc., 209 F. App'x 936, 941 (11th Cir. 2006) (per curiam); *Booker v. GTE.net LLC*, 350 F.3d 515, 519 (6th Cir. 2003); *Jones v. Baisch*, 40 F.3d 252, 254-55 (8th Cir. 1994) (per curiam). See also *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 287-88 (4th Cir. 2004) (en banc), *cert. dismissed*, 543 U.S. 1132 (2005).

Correlatively, acts *not* involving the exercise of the employer's delegated authority do not carry with them an "imprimatur of the enterprise" and are not properly the basis for imposing vicarious liability on the employer. For example, an employer may take an adverse employment action based upon a negative recommendation about the employee from his prior employer, who provides false negative information because of racial bias. However, despite the existence of actual causation, the current employer would not be vicariously liable because he is not legally responsible for the acts of the prior employer. Or, where an employee's fellow employee brings to the decision-maker's attention a conversation overheard in the hall involving the employee, or where an independent contractor sends a note to the manager complaining about the employee, vicarious liability would not be appropriate, because these other persons are not exercising delegated authority. To be sure, they would not have been able to observe the employee's behavior at the place of business had they not also been empowered to be there by the virtue of their relationship with the employer. But, just as in the sexual harassment context, "something more" than "[p]roximity and regular contact" should be required for imposing vicarious liability for alleged employment discrimination. *Burlington*, 524 U.S. at 760. See also SG 16 (employer should not be liable

for false reports of customers, independent contractors or other non-supervisory employees); Pet. 28 n.33 (employer should not be liable for motives of a former employer or “for the biases of a patient”).

Similarly, there is no exercise of official delegated authority even by a direct supervisor of the plaintiff where that supervisor’s actions are not part of his official delegated duties. “[T]he ultimate focus must be on agency, not supervisory status. The [adjudicator] cannot . . . move straight from a finding of supervisory status to a finding of liability without considering evidence showing that the supervisor did not speak on behalf of management.” *NLRB v. Schroeder*, 726 F.2d 967, 969 (3d Cir. 1984). It is not enough that the supervisor complains, or that the supervisor influences; rather, the supervisor must be exercising delegated authority in taking the allegedly discriminatory acts if the employer is to be held vicariously liable for these acts. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring in judgment) (“statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself,” do not suffice to show that the employment decision was based on illegitimate criteria).

This approach to vicarious liability is necessary to properly achieve the multi-dimensional goals of federal employment statutes. For example, as this Court has recognized, Title VII does not intend to make employers liable for every frolic and detour of their employees. *See, e.g., Faragher*, 524 U.S. at 798 (“[T]here is no reason to suppose that Congress wished courts to ignore the traditional distinction between acts falling within the scope and acts

amounting to what the older law called frolics or detours from the course of employment.”). Rather, federal employment laws intend to make employers liable only for discriminatory actions that an employer has empowered an employee to take and that the employer could reasonably have controlled and, if necessary, prevented. *Id.* at 798-99. Moreover, imposing vicarious liability for acts that do not involve the exercise of official delegated authority, such as where a renegade low-level employee’s bias somehow caused a discriminatory action, is not “just.” *Id.* at 797 (quoting RESTATEMENT (SECOND) OF AGENCY § 229, cmt. a) (“the ‘ultimate question’ in imposing vicarious liability is whether “it is just that the loss resulting from the servant’s acts should be considered as one of the normal risks to be borne by the business in which the servant is employed”). Since USERRA’s definition of “employer” expressly references key aspects of agency law (*e.g.*, control and delegation), there is no reason that these principles would not apply here.

B. The Plaintiff Must Also Show That The Alleged Unlawful Act Was Both An Actual And A Proximate Cause Of The Adverse Employment Action In Question

In all events, USERRA only prohibits an employer from making an employment decision “on the basis” of an individual’s military status. This statutory requirement is best understood as embracing common law causation requirements, as does similar or comparable language in other statutes. *See, e.g., Safeco Ins. Co. v. Burr*, 551 U.S. 47, 63-64 & n.14 (2007) (“based on” credit report incorporates causation principles); *Erickson v. United States*

Postal Serv., 571 F.3d 1364, 1368 (Fed. Cir. 2009) (USERRA’s § 4311 incorporates causation requirement); *Coffman v. Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005) (same); see also *Gross*, 129 S. Ct. at 2345 (“because of” age incorporates causation principles) (citing cases); *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 141 (2000) (same); *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion) (“because of such individual’s sex” incorporates causation principles).

1. At common-law, it has long been recognized that, even where official acts of agents are involved, liability is appropriate only for acts that cause the injury of the plaintiff. In this regard, causation has both factual and legal components: “[C]ausation is binary, comprising causation in fact and proximate, or legal, causation; it must be shown both that the plaintiff’s harm would not have occurred but for the defendants’ breach of a legal duty and that the breach proximately caused the harm, that is, that the defendant should bear legal responsibility for the injury.” 57A Am. Jur. 2d NEGLIGENCE § 435 (2006). See also RESTATEMENT (SECOND) OF TORTS §§ 430-431 (1965) (same).

“[D]eterminations of proximate or legal cause involve not only an inquiry into whether there was an actual ‘cause-in-fact’ relation” between the act and the injury, but “also considerations of policy.” 57A Am. Jur. 2d NEGLIGENCE § 466 (2006). See also *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) (“What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word

‘proximate’ is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point.”); 57A Am. Jur. 2d NEGLIGENCE § 466 (no proximate cause where “allowing recovery would place too unreasonable a burden on the tortfeasor”); *id.* at § 468 (“practical considerations must at times determine the bounds of correlative rights and duties [and] the point beyond which a court will decline to trace causal connection”). Indeed, it was these “considerations of policy” that led the common law to recognize the concept of a “superseding” cause—“an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his or her antecedent negligence is a substantial factor in bringing about.” *Id.* at § 561.

Not surprisingly, in construing various federal statutes, this Court has long embraced both actual and proximate causation principles. The Court has required actual or “but-for” causation to limit liability to only injuries that an actor has factually produced. *See, e.g., Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 (1992) (but-for causation is necessary so that only “factually injured plaintiffs . . . recover”). And the Court has explained that “we use ‘proximate cause’ to label generically the judicial tools used to limit a person’s responsibility for the consequences of that person’s own acts. At bottom, the notion of proximate cause reflects ‘ideas of what justice demands, or of what is administratively possible and convenient.’” *Id.* at 268 (citing WILLIAM L. KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 41, at 264 (5th ed. 1984)) (using the proximate cause concept to limit liability in RICO actions).

2. The Court has applied these concepts of “actual” and “proximate” causations to limit liability under a wide variety of statutory schemes, including RICO, 18 U.S.C. § 1962, the Federal Tort Claims Act, 28 U.S.C. § 1346(b), and the Clayton Antitrust Act, 15 U.S.C. § 15. *See, e.g., Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (plaintiff cannot maintain its claim on § 1962(c) of RICO in the absence of proximate cause); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703 (2004) (liability under the FTCA requires “proximate causation”—that the act or omission at home headquarters “was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the headquarters behavior”); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983) (to sue under § 4 of the Clayton Act plaintiff needs to show proximate causation between defendant’s violation and the injury). *See also Blue Shield v. McCready*, 457 U.S. 465, 477 n.13 (1982) (quoting Judge Andrews’ dissent in *Palsgraf* defining proximate causation); *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (common-law causation principles inform imposition of liability under section 1983). Although not as explicit about the matter, the Court’s federal employment law cases also appear to embrace both of these common law causation requirements. *See, e.g., Reeves*, 530 U.S. at 141; *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *Price Waterhouse*, 490 U.S. at 241-42 (plurality opinion).

The lower federal courts have expressly embraced these actual and proximate causation requirements in federal employment cases. *See, e.g., Poland v.*

Chertoff, 494 F.3d 1174, 1182 (9th Cir. 2007) (refusing to adopt a simple “but-for” standard of causation for subordinate bias cases because “such a broad conception of liability is inconsistent with tort law principles of causation that apply to civil rights claims”) (citing RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965) (“to be a legal cause of another’s harm, it is not enough that the harm would not have occurred had the actor not been negligent”)); *Shick v. Ill. Dep’t of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002) (requiring showing of both but-for and proximate causation for Title VII). As the Fifth Circuit has stated, in a federal employment case, “[t]here must be some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation.” *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998).

II. THE CHALLENGED ACT HERE WAS NOT THE PROXIMATE CAUSE OF THE ADVERSE EMPLOYMENT ACTION IN QUESTION

In this particular case, it appears that Mullaly’s and Korenchuk’s acts may have been acts based on official discretion that they had been empowered by respondent to exercise. It also appears that their acts may have in some way been a part of the chain of events leading to the ultimate decision to terminate petitioner. But, as the court below effectively recognized, it would be wrong to treat those acts as the “proximate” cause of the termination decision.

A. Under The Law, Proximate Cause Is Lacking Where A Non-Biased Decision-Maker, Acting Responsibly, Makes The Actual Employment Decision Based On Her Own Evaluation Of The Matter, Even If A Biased Act Is Part Of The Factual Chain Leading To The Actual Employment Decision

In deciding proximate causation issues, the common law directs courts to ascertain whether “the defendant should bear legal responsibility for the injury” based on considerations of “convenience, . . . public policy, . . . a rough sense of justice,” which include a “practical” inquiry into whether “allowing recovery would place too unreasonable a burden on the tortfeasor.” 57A Am. Jur. 2d NEGLIGENCE §§ 466, 468; *Palsgraf*, 162 N.E. at 103 (Andrews, J., dissenting). In the context of employment discrimination laws, that inquiry leads to the following decisional principle: proximate cause is lacking where a non-biased decision-maker made the actual decision and engaged in an independent and responsible evaluation of the matter.

1. As this Court has recognized, employers should not be subjected to liability where their actions are based on reasonable anti-discrimination policies and practices. Declining liability in such circumstances promotes the goals of employment discrimination statutes by providing incentives to employers to create mechanisms to “avoid harm” from discrimination. *Faragher*, 524 U.S. at 805-06. *See Kolstad*, 527 U.S. at 544 (describing Title VII’s “prophylactic” goal and declining to adopt a rule that would “would reduce the incentive for employers to implement antidiscrimination programs”). *See also*

Brewer v. Bd. of Trustees of the Univ. of Ill., 479 F.3d 908, 920 (7th Cir. 2007) (“[E]mployers should be liable for their employees’ racism only in the general class of cases in which an employer has the practical ability to head off injury to its employee’s victim.”).

2. This approach also properly guides the Court’s resolution of issues of proximate causation. The law should encourage employers to verify information and review recommendations before taking adverse employment actions. When they do so, the law should accept that the employer has replaced any subordinate’s bias with the independent and responsible determination of an unbiased decision-maker. Doing so would give effect to this Court’s observation that it is imperative to “recognize the employer’s affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty.” *Faragher*, 524 U.S. at 806. *Cf. Poland*, 494 F.3d at 1181-82 (lack of a proximate causation requirement would “weaken the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation”). In short, recognizing that a decision-maker’s independent and responsible evaluation establishes lack of proximate cause promotes the employment discrimination statutes’ public policies while giving effect to practical considerations of not imposing “too unreasonable a burden on the tortfeasor.” 57A Am. Jur. 2d NEGLIGENCE § 466.

3. Accordingly, the lower federal courts have repeatedly found proximate cause lacking where a non-biased decision maker made the actual decision and engaged in an independent and responsible

evaluation—even in cases where a biased supervisor initiated the inquiry that lead to the ultimate decision. *See, e.g., Richardson v. Sugg*, 448 F.3d 1046, 1052, 1060 (8th Cir. 2006) (decision-maker saw coach’s comments to the press and was “stunned” and “shocked”); *Brewer*, 479 F.3d at 914 (decision-maker “inspect[ed] the [illegally-altered parking] tag and verif[ied]” the alteration herself). Further, where a decision-maker gives an employee an opportunity to present his side of the story, courts again hold that proximate cause for liability is lacking. *See, e.g., King v. Rumsfeld*, 328 F.3d 145, 148 (4th Cir. 2003) (decision-maker spoke with employee and his students and observed his classes); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 639 (9th Cir. 2004) (decision-maker spoke with employee and non-biased supervisors, and read letters from youth who played football with employee’s permission, which he was not authorized to give); *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 179 (1st Cir. 2008) (decision-maker made his own independent decision based on the facts of the situation and gave employee an opportunity to explain his absences, which he failed to do adequately); *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (decision-maker spoke with non-biased manager who interviewed employee and his colleagues, who confirmed that employee lied about unauthorized schedule changes); *Willis v. Marion County Auditor’s Office*, 118 F.3d 542, 547 (7th Cir. 1997) (decision-maker examined overdue invoices and spoke with employee about her numerous reprimands; the office also had a policy of automatic termination after three reprimands).

B. As The Court Below Found, The Record Here Shows That Buck, A Non-Biased Decision-Maker, Acting Responsibly, Made The Actual Employment Decision Based On Her Own Evaluation Of The Matter

The record here establishes lack of proximate cause under these standards. There is no dispute that Buck, the ultimate decision-maker, was non-biased; and, as the record shows, she acted independently and responsibly in determining that Staub had to be terminated.

First, even before receiving the recommendation to fire Staub, Buck had received numerous negative reports about Staub from non-biased supervisors, managers and Staub's colleagues, and was involved in several meetings arising out of those reports in the course of the preceding two years, including the same month (April 2004) as the firing. The complaining personnel, who Staub does not allege to have anti-military bias, included: Employment Specialist Mandy Carbiledo, whose recent tech hire resigned because she could not work with Staub (R.5:90; Pet. App. 10a); Nurse Recruiter Sheila Johnson, whose registered nurse had quit and who had trouble recruiting because Staub was difficult to work with (R.5:90-91; Pet. App. 10a); Doneda Halsey, who complained about Staub's flirtations with radiology students (R.5:92; Pet. App. 10a); Brenda Carothers, the Director of Human Resources, who brought to Buck's attention a meeting conducted to remind Staub and others that they had to help in non-invasive Diagnostic Imaging (R5:94-95); and angio tech Angela Day, who complained, during a meeting with Buck and Vice President McGowan, that Staub

was disrespectful and frustrating to work with (R.5:101). Indeed, McGowan reaffirmed that he had heard negative reports about Staub's conduct from various sources. (*Id.*).

Second, Buck evaluated Staub's side of the story. On April 20th, 2004, in Buck's office and with Buck present, Staub provided his explanation of his whereabouts after Korenchuk (Staub's supervisor) offered his version of the events; Staub then refused to sign the termination notice. (R.5:384-85). On April 25, 2004, Staub filed a five-page written grievance, with his detailed explanation of the January 27, 2004 incident, and of his prior encounters with the Human Resources department arising out of various complaints about his attitude and performance. (P. Ex. 28). The grievance included allegations of anti-military bias by Staub's immediate supervisors, Mullaly and Korenchuk. *Id.* On May 3, 2004, Buck issued a written response. (D. Ex. 59).

Third, Buck effectively evaluated the January 27 incident twice; once as part of the review of Staub's April 20, 2004 grievance after he was terminated, and once even before it became a write-up in January, 2004. Buck received her information from Carothers, who, upon reviewing background facts, recommended the issuance of a write-up for both Staub and Sweborg (Buck's colleague who was also not available to help in the x-ray department that day). (R.5:88, 95-97).

Fourth, Buck reviewed Staub's personnel file, which contained his evaluations and the record of his 1998 firing. Staub was allowed to return on the condition that he was to "communicate to [his] supervisor whenever [he is] leaving the work area."

(R.5:150). It was also made emphatically clear that any insubordination would be grounds for “immediate dismissal.” *Id.* (“Any trends toward the above contingencies or any insubordination, immature behavior, unprofessionalism, or lack of support for management decision will be grounds for immediate dismissal.”). *See also* Pet. App. 3a n.1. Yet Staub’s 2002 and 2003 employment evaluations state that “Vince continues to disappear during scheduled hours and does not voluntarily help during idle time,” (R.3:162, D. Ex. 18), and that “Vince [needs] to be aggressive in his attempt to work throughout the Dept. . . . Angio at Proctor is also a part of diagnostics and work needs to be done in both areas.” (R.5:135, 141, P. Ex. 32).

Given Buck’s independent and responsible evaluation of the information regarding Staub, there is no proximate causation. This is an easier case than *Richardson*, 448 F.3d 1046, or *Brewer*, 479 F.3d 908, where the decision-makers merely independently inspected evidence (press conference remarks and parking tag, respectively), but did not speak to the employee in issue. Buck examined Staub’s file and then also got Staub’s full account about the incident. Furthermore, as in cases where courts have held that there is no proximate causation, Buck received numerous negative reports about Staub from various non-biased sources, such as Carbiledo, Johnson, Halsey, Carothers, Day, and McGowan, who were his supervisors and colleagues and had first-hand encounters with him, and all of whom complained about Staub’s bad attitude, insubordination and unprofessional conduct. *See, e.g., King*, 328 F.3d at 148, *Vasquez*, 349 F.3d at 639, *Thompson*, 522 F.3d at 179, *Wilson*, 952 F.2d at 944-

46. Finally, similar to *Willis*, 118 F.3d at 546-47, where the office had a policy of automatic termination after three reprimands and Willis had at least three that year, here, the very condition of Staub's return after his 1998 firing was that any act of insubordination would be the basis for "immediate dismissal," and as Buck's review of Staub's file demonstrated, Staub engaged in plenty of such acts. The review system that this Court so highly prizes in employment discrimination actions worked exceedingly well here.

The Seventh Circuit therefore reached the correct conclusion here in holding that respondent is not liable for the alleged biased acts of Mulally and Korenchuk. Here, although the Seventh Circuit did not engage in an explicit proximate causation analysis, it recognized that Buck was not biased and acted in a responsible manner in evaluating Staub's personnel problems and in terminating him. The court noted that Buck was aware of Staub's "attitude problems," including "offend[ing] numerous others for reasons unrelated to his participation in the Reserves." Pet. App. 20a. The court further noted that Staub's actions thus deprived him of "the safety net of a good reputation" by the January 27 write-up. *Id.* The court also acknowledged that "Buck looked beyond what Mulally and Korenchuk said" and "determined that Staub was a liability to the company" because he "was not a team player," as also evidenced by past "frequent complaints" about Staub. *Id.* at 20a, 10a. As these facts and additional facts in the Record demonstrate, proximate causation between the acts of Mullaly and Korenchuk on the one hand, and the termination decision made by Buck on the other hand, was lacking.

III. THE CONTRARY ARGUMENTS OF THE GOVERNMENT AND PETITIONER CONCERNING THE PROXIMATE CAUSATION ISSUE ARE UNFOUNDED

The Government appears to embrace the agency and causation principles framework. SG 22 (citing lower court cases finding no liability because the decision-maker reached an independent decision). The Government also appears to accept that an investigation entailing the questioning of non-biased sources would mean that proximate cause is lacking and, thus, there is no liability, unless a decision-maker did “nothing more than ask [a biased] supervisor for a fuller account.” SG 23. *Cf.* SG 26 (“Buck did not conduct a meaningful independent investigation,” because the investigation was “minimal” and could have been “more robust”). Petitioner nominally accepts these principles as well. Pet. 49, 56. But the Government’s treatment of causation and Petitioner’s similar approach are ultimately unfounded.

First, both the Government and Petitioner confuse actual and proximate causation. The Government suggests that an independent investigation would preclude liability because “the adverse action would have been taken anyway.” SG 24 (“The question is not whether the ultimate decisionmaker was negligent in failing to conduct an investigation or in structuring the investigation in a particular way. . . . An investigation is relevant only to the extent that it sheds light on whether the supervisor’s discriminatory misuse of delegated authority was a substantial factor in bringing about an adverse employment action, or on whether the adverse action

would have been taken anyway.”). Petitioner similarly argues that an investigation might show that the biased acts did not actually cause the adverse employment action. Pet. 56 (if in response to a biased supervisor’s recommendation, the decisionmaker “disregard[ed] th[e] second hand account and personally interviewed the witness, the trier of fact could conclude that the falsified account had no impact on the ultimate decision”). But these arguments about whether an action would have happened anyway simply raise an actual causation question. *See, e.g., Price Waterhouse*, 490 U.S. at 240 (plurality opinion) (“In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way.”). There is still the distinct question under the common law of whether the underlying biased acts are the proximate cause of the adverse employment action in circumstances where the ultimate adverse employment decision is made by a non-biased person on the basis of a responsible and independent inquiry. As to that issue, the Government and petitioner are wrongly silent.

Second, the Government ignores and misconstrues crucial facts demonstrating that Buck acted in a responsible manner before firing Staub. Indeed, the Government’s treatment of the evidence is outright misleading.

The Government asserts that Buck “did nothing more than consult with Korenchuk, review petitioner’s personnel file, and rely on her recollection

of . . . past issues.” SG 26-27. As explained in Part II(C), however, “past recollection” is an inadequate description of what happened: The facts show that Buck was made continuously aware (for the two years preceding the firing) by numerous managers and Staub’s colleagues, who had first-hand encounters with Staub, about Staub’s discipline problems. (R.5:90-103). “Review [of Staub’s] personnel file” is also an inadequate description of Buck’s examination of the file which contained Staub’s 1998 firing and the conditions for his return, such as that he “communicate to [his] supervisor whenever [he] leav[es] the work area,” and a warning that any insubordination would be grounds for “immediate dismissal.” (R.5:431). The file also contained evaluations which evidenced such insubordination and unprofessionalism. (R3:162; R.5:135, 141). The file confirmed reports of Staub’s inappropriate attitude that Buck was continuously receiving from various non-biased sources.

The Government is similarly wrong in claiming that Buck consulted only with Korenchuk. In fact, she consulted with Carothers, Director of Human Services, regarding the January 27 incident. (R.5:96, 185). There is no allegation that Carothers had an anti-military bias.

Finally, the Government is wrong to assert that Buck “failed to take even a simple step of asking petitioner for his side of the story.” SG 27. The Government cites the decision below, which noted that “Buck failed to pursue [petitioner’s] theory that Mullaly fabricated the [January 2004] write-up; [and that] had Buck done this, she may have discovered that Mullaly indeed bore a great deal of anti-military

animus.” Pet. App. 20a. However, this statement merely indicates that Buck did not pursue a particular theory, not that Buck did not talk to Staub at all. As explained in Part II(C), on April 20, 2004, Staub gave his oral explanation to Buck. (R.5:361-62). On April 25, Staub submitted a five-page written grievance, explaining the January 27 write-up, prior incidents leading to complaints from various managers to the Human Resources, and including his allegations of Mullaly’s and Korenchuk’s anti-military bias. (P. Ex. 28). Buck clearly evaluated Staub’s explanation and responded in writing. (D. Ex. 59). In short, the only one that is not considering the other person’s “side of the story” is the Government.

In sum, as shown in Part II(C), Buck acted in a responsible manner, consistent with the goals of the employment discrimination statutes. There simply is no proximate causation between the challenged acts and the adverse employment action of which Staub complains.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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