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 FOR RESPONDENT

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QUESTION PRESENTED

Whether, and in what circumstances, a jury should hear evidence of the unlawful animus of persons who did not make the adverse employment decision for which the employee-plaintiff seeks to hold the employer-defendant liable.

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding are set forth in the case caption. The corporate disclosure statement contained in the Respondent's Brief in Opposition to Petition for Writ of Certiorari remains accurate.

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STATEMENT OF THE CASE

Proctor Hospital is a full-service health care facility serving the residents of Central Illinois. This case is before the Court because Linda K. Buck, Proctor's Vice President of Human Resources, discharged Petitioner Vincent Staub on April 20, 2004. (Record Vol. 5 at 68-71.)[1]

Staub was an angiography technologist ("angio tech") in Proctor's Diagnostic Imaging Department. In addition, Staub had been a member of the United States Army Reserve since at least 1985, including when Proctor hired him in 1990. (Record Vol. 5 at 308-310.)

The Diagnostic Imaging Department is physically divided into two areas. Non-invasive diagnostic imaging services such as radiology, ultra sound, CAT scan, MRI, and mammography are performed in one area. The bulk of the Diagnostic Imaging Department's forty-plus employees perform these non-invasive diagnostic imaging duties. (Record Vol. 5 at 47, 114.) Angiography, an invasive imaging process that involves the injection of dies, is performed in a separate, locked area known as the Angiography

[1] The Clerk of the District Court delivered the record in five volumes, with Volume 1 beginning at page 1 and all successive volumes beginning at page 24. Citations to the record reflect the volume and page number where the cited material is found.

Suite. (Record Vol. 5 at 137, 144, 322.) Four employees are employed in Angiography: a registered nurse and three angio techs. Angio techs are trained in radiology but also have advanced training which permits them to work in Angiography. (Record Vol. 5 at 310-312.) Thus, Staub and the other angio techs were qualified to work in both areas of the Diagnostic Imaging Department, while the other employees were limited to non-invasive diagnostic imaging duties. (Record Vol. 5 at 93-94, 143.)

Linda Buck had a negative impression of Staub as an employee long before she decided to fire him. This impression was built on a host of incidents, information, and complaints: Staub had been fired previously and returned to work conditionally; his personnel record included documentation of his disappearances from the Department during work hours as well as his resistance to assisting in non-invasive Diagnostic Imaging when his work load in the Angiography Suite was light; anecdotal evidence from Buck's own Human Resources staff demonstrated that Staub was harsh with his coworkers and difficult to work with; at least one other angio tech had complained about Staub's practice of absenting himself from the Department and the fact that he was hard to work with; and even Proctor's Vice President and Chief Operating Officer discussed with Buck the negative reports he had received about Staub's job performance.

Specifically, Buck was aware that Staub was fired for the first time in 1998, prior to her arrival. Although he was conditionally reinstated, the terms of

his reinstatement were documented in his personnel record and included, among other things:

> You will communicate with your supervisor whenever you are leaving the work area. Any trends to the above contingencies or any insubordination, immature behavior, unprofessionalism, or lack of support for management decision, will be grounds for immediate dismissal.

(D. Ex. 2, Record Vol. 3 at 141; Offered at Record Vol. 5 at 149; Admitted at Record Vol. 5 at 396.)

Buck also knew that though Staub was rated technically competent, the narrative portions of his employment evaluations contained consistent negative comments regarding his overall contribution to the Department. His 2002 evaluation observed:

> Vince continues to disappear during scheduled hours and does not voluntarily help during idle time.

(D. Ex. 18, Record Vol. 3 at 162; Offered at Record Vol. 5 at 428; Admitted at Record Vol. 5 at 451.) His evaluation the following year, while again reflecting his considerable clinical skills, contained the following directives:

> Vince will accept extra tasks when told.

> He needs to be self-motivated to seek needs of the department.
>
> I want Vince to be aggressive in his attempt to work throughout the Dept. I also want Vince not to go on the defensive when questioned. Angio at Proctor is also a part of diagnostics and work needs to be in both areas.

(P. Ex. 32, Record Vol. 3 at 132, 135; Offered at Record Vol. 5 at 132; Admitted at Record Vo. 5 at 162.)

In addition to her awareness of issues documented in Staub's reinstatement and evaluation materials, Buck received ongoing negative reports about Staub from multiple sources. (Record Vol. 5 at 74.) In her first year of employment at Proctor, Buck "heard frequent complaints" about Staub. (Record Vol. 5 at 74.) In 2002, Employment Specialist Mandy Carbiledo, whose job was to recruit angio techs, informed Buck that a recently hired tech, Cindy Herbold, resigned because she could not work with Staub. (Record Vol. 5 at 75, 90.) Herbold told Carbiledo that Staub made her feel like the "gum on the bottom of his shoe". (Record Vol. 5 at 90.) In November 2002, Nurse Recruiter Sheila Johnson reported to Buck that a registered nurse in Angiography had quit, and that she had a difficult time recruiting nurses to work there in general, because of Staub's reputation and the fact that people did not want to work with him. (Record Vol. 5 at 90-91.) In 2002, Doneda Halsey, who works with

students from radiology schools, complained to Buck about Staub's flirtatious behavior toward the students. (Record Vol. 5 at 92.)[2]

In late 2003, Administrative Director of Radiology Michael C. Korenchuk, the head of the Diagnostic Imaging Department, reported to Buck that he was having difficulty getting Staub and the other angio techs to assist in non-invasive Diagnostic Imaging when they did not have Angiography cases. Subsequently, Brenda Carothers, the Director of Human Resources who reported to Buck, informed Buck that to address the issue they had conducted a meeting and made the angio techs aware that they were to cover in non-invasive Diagnostic Imaging when they had no cases in Angiography. (Record Vol. 5 at 93-95.)

Buck was also aware that Staub and Leslie Sweborg, another angio tech, were the subject of discipline issued to them on January 27 and 28, 2004, respectively, for their failure to assist in non-invasive Diagnostic Imaging on January 26. Carothers reviewed the facts and recommended the written discipline. Carothers reviewed the factual background with Buck prior to it issuing. (Record Vol. 5 at 80,

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[2] When Buck received the negative reports about Staub, she followed up with the Diagnostic Imaging Department regarding the reports. (Record Vol. 5 at 74-75.) In response to the reports of flirtatious behavior, Buck informed the Department head that he needed to address that behavior. (Record Vol. 5 at 109.)

95-97; D. Ex. 3, Record Vol. 3 at 142; Offered at Record Vol. 5 at 179; Admitted at Record Vol. 5 at 396.)

While the occurrences outlined above colored Buck's view of Staub, they did not set off the chain of events which resulted in his termination. Rather, the ultimate trigger occurred on March 26, 2004, when another angio tech, Angie Day, appeared in the Human Resources Department to lodge a complaint against Korenchuk. Essentially, Day complained that Korenchuk had been disrespectful of her, chastising her loudly in front of other employees. According to Day, Korenchuk attempted to rectify his conduct by apologizing in a disingenuous manner and compounded his error by blowing kisses at her. Day was so upset with Korenchuk that she threatened to quit. Upon hearing this, Buck decided that Korenchuck's conduct should be brought to the attention of his boss, Vice President and Chief Operating Officer R. Garrett McGowan. Buck arranged a meeting with Day, Korenchuk, and McGowan on April 2, 2004. (Record Vol. 5 at 97-99.)

The first part of the meeting involved Buck, Day, and McGowan. Day was asked to tell McGowan her story.[3] She repeated her previously-made complaints about Korenchuk. McGowan then

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[3] There is no evidence that McGowan, a four-year veteran who served with the First Marine Division in Viet Nam running an intensive care facility in the field, harbors any animus toward Staub on account of his military service. (Record Vol. 5 at 537-538.)

summoned Korenchuk to the meeting and Day again repeated her complaints concerning his conduct. Day went on to add that she also had complained to Korenchuk regarding Staub's behavior toward her and that Korenchuk had failed to act on her complaints. She relayed that Staub was not helpful, abrupt, hard to work with, and would absent himself from the Department. (Record Vol. 5 at 73-74.) Day complained that even though she had brought this to Korenchuk's attention previously, he did nothing about it. (Record Vol. 5 at 99-101.)

After Korenchuk apologized to Day for his behavior, Day was excused from the meeting. (Record Vol. 5 at 100-101.) McGowan chastised Korenchuk for his conduct and then went on to discuss Staub.

Just as with Linda Buck, Staub was no stranger to McGowan at the time of the meeting. McGowan had previously heard from various sources within the Hospital that there were issues involving Staub's behavior, including that Staub would absent himself from the Department. (Record Vol. 5 at 101, 540.) In fact, even prior to the meeting involving Day, McGowan had talked with Korenchuk about Korenchuk's apparent inability to manage Staub. (Record Vol. 5 at 539.) Thus, before ending the meeting McGowan directed Korenchuk to develop a plan of action for dealing with Staub's behavior. (Record Vol. 5 at 541.) When Korenchuk complained that it was difficult to manage someone who is not in sight, McGowan told him to seek the assistance of Buck and the Human Resources Department in

developing the plan to manage Staub. (Record Vol. 5 at 101, 541.)

When Korenchuk and Buck met in her office pursuant to McGowan's directive, Buck already possessed a substantial amount of negative information relative to Staub's employment performance. Korenchuk appeared for the meeting and told Buck that he had been looking for Staub but could not find him. Upon hearing that statement, Buck decided to discharge Staub telling Korenchuk: "I think we need to terminate him". (Record Vol. 5 at 102.) Korenchuk agreed only "reluctantly". (Record Vol. 5 at 69.) However, the discharge decision was made by Buck. (Record Vol. 5 at 102-104, 145.)[4]

At approximately 2:30 p.m. on April 20, Korenchuk called Buck and said he would bring Staub to the Human Resources Department as soon as he could find him. At approximately 2:45, Korenchuk and Staub appeared in Buck's office. (Record Vol. 5 at 104.) By Staub's account the termination meeting lasted five minutes. Buck showed him the termination notice. (D. Ex. 5, Record Vol. 3 at 144; Offered at Vol. 5 at 145; Admitted at Vol. 5 at 396.) Staub read it. Korenchuk explained to him that he could not find him and he was not where he was supposed to be. Staub protested and gave his explanation of his whereabouts.

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[4] Buck testified that this meeting occurred on April 19 and the discharge occurred on April 20. (Record Vol. 5 at 78-79.) Korenchuk testified it was his recollection that both occurred on the same day. (Record Vol. 5 at 128-129.)

He was asked to sign the termination report but refused to do so. He requested a copy of his personnel file. He then was escorted to the Diagnostic Imaging Department, picked up his personal items, and left the Hospital. (Record Vol. 5 at 384-386.)

The Hospital's employment policies gave Staub the right to grieve the termination decision. (Record Vol. 5 at 104.) On April 25, Staub filed a written grievance with Buck protesting his termination. (Record Vol. 5 at 104, 386; P. Ex. 28, Record Vol. 3 at 59-63; Offered at Record Vol. 5 at 86; Admitted at Record Vol. 5 at 162.) Buck considered Staub's arguments including his claim that the January 27 corrective action was false, but ultimately denied his grievance. (Record Vol. 5 at 88, 107.) She issued her written determination on May 3, 2004. (D. Ex. 59, Record Vol. 3 at 160; Offered at Record Vol. 5 at 408; Admitted at Record Vol. 5 at 409.) On May 5, Staub filed another grievance directly with Hospital President and CEO Norman H. LaConte.[5] (Record Vol. 5 at 386; P. Ex. 27, Record Vol. 3 at 53-58; Offered at Record Vol. 5 at 386; Admitted at Record Vol. 5 at 395.) Unilaterally concluding that his discharge would not be overturned, Staub filed the instant action. (Record Vol. 5 at 543.)

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[5] There is no evidence that LaConte, an Air Force veteran and a former member of the National Guard, harbored any animus toward Staub on account of his Reserve service. (Record Vol. 5 at 531-532.)

SUMMARY OF THE ARGUMENT

To establish a violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4311, an employee must show causation. He must show that the person who made the adverse employment decision was motivated to do so by an unlawful purpose. The discriminatory animus of a non-decision maker is irrelevant unless that animus motivated the adverse employment action.

There are two facts in this case which are undisputed. First, Linda K. Buck made the decision to discharge Staub. Second, Buck harbored no military animus toward Staub.

From the inception of this litigation, Staub fought to place before the jury evidence of animus on the part of two persons, Korenchuk and Mulally, who unquestionably did not make the decision to discharge him. Proctor resisted Staub's efforts at every turn, arguing that unless he could somehow connect the animus he attributes to Korenchuk and Mulally to Buck's decision to terminate him, such evidence was irrelevant and highly prejudicial. Ultimately, the district court dumped the entire dispute into the lap of the jury, instructing it to determine what evidence was relevant and what evidence was not.

The Seventh Circuit reversed the district court, holding that prior to allowing such highly prejudicial evidence to be presented to a jury, a trial court should at least make a preliminary determination of whether

the evidence is sufficiently relevant to the jury's consideration of what motivated the decision maker. Unquestionably, the district court failed to make that preliminary determination in this case. After reviewing the trial record, the Seventh Circuit concluded that there was insufficient evidence for a reasonable jury to find that the animus attributed to Kornechuk or Mulally motivated Buck to terminate Staub, and that without it he had no case. The Seventh Circuit ordered the district court to enter judgment in favor of Proctor.

Staub's only evidence to connect the animus he attributes to Mulally to Buck's decision to fire him is a written reprimand he received on January 27 stemming from events that occurred the previous day. He argues Mulally falsely procured the discipline which Buck took into account in reaching her determination. The problem with Staub's argument is that Mulally was little more than the messenger with respect to the events of January 26. The seminal event that day -- Staub's failure to respond to calls for help with an overwhelming patient load in non-invasive Diagnostic Imaging -- was reported by radiologist Heather Dunne, not by Mulally. Confirmation that Staub indeed was available to assist in non-invasive Diagnostic Imaging came from registered nurse Angie Bell, angio tech Leslie Sweborg and the computer tomographer -- not from Mulally. The decision to issue the written warning was recommended by the Director of Human Resources, Brenda Carothers, and was fully vetted with Buck beforehand. Staub even filed a grievance admitting the damning facts. In short, there

is no evidence that Mulally falsified or exaggerated the facts that necessitated the January 27 discipline. Staub cannot connect the animus he attributes to Mulally to Buck's decision to fire him.

Staub has even more trouble connecting the animus he attributes to Korenchuk to Buck's decision. His evidence of animus is two statements which, by Staub's own admission, were made at least six years prior to his discharge. No Circuit would allow such stale evidence of animus to be presented to a jury. Moreover, an intervening event -- Staub's December 2003 nomination and procurement of a "MY BOSS IS A PATRIOT" award for Korenchuk from the Assistant Secretary of Defense -- severed any causal link between the statements attributed to Korenchuk and the decision to discharge Staub. Just as with Mulally, Staub cannot connect the animus he attributes to Korenchuk to Buck's decision to fire him.

Thus, there is an absolute dearth of evidence to connect the animus Staub attributes to Mulally and Korenchuk to Buck's decision to fire him, regardless of what standard is employed to determine when such evidence becomes relevant. Nevertheless, Staub attacks the Seventh Circuit's "singular influence" standard.

USERRA, unlike most other federal anti-discrimination statutes, is unique in that it provides for both personal liability of the supervisor who makes the unlawful decision and vicarious liability of the employer. Consequently, the Seventh Circuit's

"singular influence" standard is particularly appropriate in USERRA cases. Had Staub named Buck as a defendant in the action, she would have been dismissed before the case even reached a jury. After all, Staub concedes he has no evidence that Buck was unlawfully motivated in any respect. And if Buck -- the undisputed decision maker -- could not be held liable, Proctor could not be held vicariously liable for her decision. Unless, of course, Buck was not the real decision maker but rather a dupe of someone with discriminatory motivation -- someone who exercised such singular influence over her as to be the real decision maker.

Regardless of the standards they might apply to determine when the animus of a non-decision maker is relevant to an adverse employment action, the Circuits uniformly agree that an independent decision, even an independent review of the facts giving rise to a possibly tainted decision, breaks the chain of causation. Buck's decision in this case was independent. Moreover, Staub took the opportunity to plead his case to Buck both at the time of his termination and in a subsequently-filed grievance. Buck reviewed his personnel record, considered his grievance, and reflected on information from other sources regarding the history of Staub's checkered employment performance. She did not change her mind and denied his grievance.

Staub's principle complaint regarding Buck's review is that she allegedly did not investigate the animus he attributes to Mulally and its impact on the

January 27 discipline. However, Staub simply ignores the fact that Buck *did* investigate his claim regarding the January 27 discipline at the time he filed his grievance. She discussed the claim with the Director of Human Resources, Brenda Carothers, who had recommended the issuance of the Corrective Action and had personally discussed the Corrective Action with Staub following its issuance. Moreover, Staub conveniently overlooks Buck's involvement in the discipline at the time it was made. The facts were presented to her. She and the Director of Human Resources reviewed the recommended discipline before it was ever issued. Requiring her to review in greater detail a matter as to which she was fully informed and obviously approved is akin to requiring her to perform a useless act.

Staub simply cannot show that the alleged animus motivated Buck's decision to terminate him. Not only is there insufficient evidence to link any purported animus to the termination decision, Linda Buck came to her own independent decision based on a host of other considerations. She was not the dupe, the pawn, the ultimate rubber stamper -- she made the termination decision independently without motivation of animus. To hold Proctor liable in such a situation would be contrary to law and informed human resources practices.

ARGUMENT

I. USERRA REQUIRES A PLAINTIFF TO ESTABLISH CAUSATION.

For an employer to be liable for discrimination under USERRA, an employee must establish causation -- that is, show that his military status was a "motivating factor" in the adverse employment action. *See* 38 U.S.C. § 4311(a), (c)(1). Military status is a motivating factor if the defendant "relied on, took into account, considered, or conditioned its decision on that consideration." *Dees v. Hyundai Motor Mfg. Alabama, LLC*, No. 09-12107, 2010 WL 675714, at *2 (11th Cir. Feb. 26, 2010).

When considering whether to hold an employer liable for a termination decision allegedly fueled by unlawful animus, "the focus is on the question of *causation*." *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 804 (9th Cir. 2009) (emphasis in original). "Conduct is a factual cause of harm when the harm would not have occurred absent the conduct." 5 Restatement (Third) of Torts-PH § 26. However,

> [i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful

> acts, and would set society on edge and fill the courts with endless litigation.

Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 266 n.10 (1992).

Thus, proximate causation must also exist. *See id.* at 287 ("it has always been the practice of common law courts (and probably of all courts, under all legal systems) to require as a condition of recovery, unless the legislature specifically prescribes otherwise, that the injury have been proximately caused by the offending conduct") (Scalia, J., concurring); *see also Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 560 n.16 (5th Cir. 1998) (any employer liability is limited by familiar tort principles -- there must be both legal and proximate cause for damages to arise); *Shick v. Ill. Dep't of Human Servs.*, 307 F.3d 605, 615 (7th Cir. 2002) (under general tort principles governing causation, a plaintiff may only recover damages proximately caused by the defendant's conduct). Proximate cause consists of

> 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. Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between

> the injury asserted and the injurious conduct alleged.

Holmes, 503 U.S. at 268 (internal citations omitted).

In analyzing a discrimination claim, the determinative question is whether the employee has submitted evidence that the prescribed "animus" was a cause of the termination. *Wilson v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992). If the actual decision maker ultimately terminated an employee for reasons untainted by any prejudice against those performing military service, the causal link between that prejudice and the termination is severed. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990); *Equal Employment Opportunity Comm'n v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487-88 (10th Cir. 2006) (plaintiff must demonstrate a causal connection between the alleged harm and the injury).

> We have previously stated the general proposition that in some cases, a discharge recommendation by a party with no power to actually discharge the employee may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. However, as we have recently explained, this causation must be truly direct. When the biased recommender and the actual decision maker are not the same person or persons, a plaintiff may not benefit from the inference of

> causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee.

Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1331 (11th Cir. 1999) (internal citations omitted).

Practically speaking,

> [t]o establish the essential element of causation in a subordinate bias case -- where the investigation that led to the adverse employment decision was initiated by, and would not have happened but for, the biased subordinate -- the plaintiff must show that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or the investigation leading thereto.

Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007). Any alternate causation analysis "as applied within the context of the employment setting, cannot be taken so literally as to convert into a constitutional tort a subordinate supervisor's mere participation in,

while performing her normal supervisory responsibilities, the initiation of a disciplinary process that results in an employee's otherwise appropriate and lawful termination." *Lakeside-Scott*, 556 F.3d at 805.

The mere fact that a non-decision maker possesses animus is not enough to establish causation. Under such a standard,

> any time a biased employee, in response to a plaintiff's protected activity, sets in motion the process that leads to an adverse employment action, the employer would be liable, even if the employer then conducted an entirely independent inquiry and decision-making process insulated from the animus of the biased employee, and no matter how compelling the nondiscriminatory grounds for taking the adverse action….As the Tenth Circuit has observed, such a lenient standard can "weaken the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation." *BCI*, 450 F.3d at 487. Also, such a broad conception of liability is inconsistent with tort law principles of causation that apply to civil rights claims. Restatement (Second) of Torts § 431 cmt. a (1965) ("In order 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."). Thus, "but for" causation in this context is not of itself sufficient to impute the subordinate's bias to his employer.

Poland, 494 F.3d at 1181-82.

Thus, to establish Proctor's liability in this case, there must be a true causal link between his evidence of military animus and the injury Staub sustained -- that is, his termination.

II. STAUB PRESENTED NO EVIDENCE TO THE JURY LINKING THE ANIMUS HE ATTRIBUTES TO MULALLY TO THE DISCHARGE DECISION MADE BY BUCK.

Janice Mulally was a staff technologist in the MRI section of non-invasive Diagnostic Imaging, primarily performing mammography and related services. (Record Vol. 5 at 164.) In addition to her clinical work, Mulally aided Korenchuk in certain administrative tasks such as preparing schedules and assisting with evaluations. She had no authority to discharge employees. (Record Vol. 5 at 114-115.) Despite Proctor's objection, Staub was permitted to introduce to the jury "abundant evidence of Mulally's

animosity" and "the strongest proof of anti-military sentiment came from [this] evidence". (J.A. 49a.)[6]

It is undisputed both that Buck made the decision to terminate Staub's employment and that she harbored no animus toward Staub based upon his Reserve status. There is no evidence in the record that Buck consulted with Mulally or sought her input prior to deciding to terminate Staub. Moreover, there is no evidence that Mulally even knew of Buck's plan to terminate Staub until after the event took place.

In discharging Staub, Buck took into account the discipline he received on January 27, 2004. Staub argues that this Corrective Action was deceptively procured by Mulally to effectuate his termination. However, the evidence presented to the jury provides no support whatsoever for his argument.

Non-invasive Diagnostic Imaging was a very busy place on January 26, 2004. The radiologic technologist that day was Heather Dunne. She was performing x-rays for in-patients, out-patients, emergency room patients, and surgery patients, with the assistance of only a student technologist. (Record Vol. 5 at 470-472.) She testified that between 8:30 and 8:45 a.m. she had "at least four to five patients" waiting for x-rays. (Record Vol. 5 at 472-473.) She passed Angie Bell, the registered nurse assigned to the

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[6] "Anti-military" may not be the appropriate term to describe Mulally whose only son, a Navy Seal, served two tours of duty in the Middle East. (Record Vol. 5 at 178.)

Angiography Suite, in the hallway. Dunne asked Bell if they were busy in Angio and Bell told her they were not. (Record Vol. 5 at 473.) Bell testified she specifically told Dunne: "We don't have any cases right now". (Record Vol. 5 at 485, 495.)

The angio techs in the Angiography Suite that morning were Staub and Sweborg. Dunne's understanding with respect to the angio techs was that "if they weren't doing any patients, they were to come over to the department where I worked to help do patients". (Record Vol. 5 at 480.) Dunne called the Angiography Suite for help. No one answered the telephone. (Record Vol. 5 at 473-474.)

Dunne x-rayed another patient. She again called the Angiography Suite for help. No one answered the telephone. (Record Vol. 4 at 474.) In the meantime, the number of patients awaiting x-rays increased. As a last resort Dunne then called Mulally, who was working in the MRI section, and told her what was happening. Mulally told Dunne she would get someone to help her. (Record Vol. 5 at 475.)

Mulally called the Angiography Suite and Sweborg answered. Mulally asked if there were cases in Angio and Sweborg confirmed that "no" there were not. (Record Vol. 5 at 180.) The computer tomography scheduler also advised Mulally that the only case scheduled in Angio that day had canceled. (Record Vol. 5 at 181.) Mulally spoke to Bell who told her "that by 8:10 a.m. that morning they knew that they had no case, no patients". (Record Vol. 5 at 182.)

With Korenchuk accompanying her, Mulally approached Sweborg. She asked Sweborg to confirm that there were no angio patients between 8:10 a.m. and when Dunne called her at 9:44 a.m. Sweborg responded: "Yes, that's true". (Record Vol. 5 at 182-183.)

Based on the various reports of others and Sweborg's own confirmation, Mulally then told Korenchuk that she thought Staub and Sweborg should be disciplined in writing for not assisting in non-invasive Diagnostic Imaging. Korenchuk agreed. (Record Vol. 5 at 183.)

Brenda Carothers was the Director of Human Resources reporting directly to Buck. (Record Vol. 5 at 95.) Mulally met with Carothers to review the proposed discipline. (Record Vol. 5 at 185.) Carothers then met with Buck. Buck recounted Carothers's report:

> She told me that there had been no cases in angio from 8:00 to 9:30, and that another employee from diagnostic imaging had to call angio to request help and that she called several times and there was no answer. And based on that and the documentation she received from Jan [Mulally] that she [Carothers] was recommending a written warning.

(Record Vol. 5 at 96.) Mulally drafted the Corrective Action. It was signed by Carothers, Korenchuk, and Mulally.

Carothers, Korenchuk, and Mulally met with Staub the next day to deliver the Corrective Action. (Record Vol. 5 at 185-186.) Following the meeting, Carothers spoke to Staub directly about the events set forth in the Corrective Action. (Record Vol. 5 at 370.) In addition to detailing the events of January 26, 2004, the Corrective Action instructed Staub to remain in the Diagnostic Imaging Department area at all times and to report to Korenchuk or Mulally if he went elsewhere. (D. Ex. 3, Record Vol. 3 at 142; Offered at Record Vol. 5 at 179; Admitted at Record Vol. 5 at 396.) A substantially similar document was delivered to Sweborg when she returned to work the next day.[7]

The events giving rise to the January 27 Corrective Action were all reported to Mulally by sources (Dunne, Bell, and Sweborg) who held absolutely no animus toward Staub. Mulally did not fabricate or exaggerate the facts. Mulally reviewed those facts with Human Resources before the discipline issued. Carothers personally reviewed the facts, then discussed the matter with Buck, and

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[7] Both written disciplines were drafted on January 27. However, Sweborg did not work on January 27, so the written discipline was delivered to her on January 28 and the date changed to reflect the date of delivery. (Record Vol. 5 at 188-190; P. Ex. 26, Record Vol. 3 at 52; Offered at Record Vol. 5 at 123; Admitted at Record Vol. 5 at 162.)

recommended the discipline. (Record Vol. 5 at 80, 95-96.)

On February 3, 2004, Staub filed a grievance. (P. Ex. 22, Record Vol. 3 at 73; Offered at Record Vol. 5 at 393; Admitted at Record Vol. 5 at 395.) His grievance confirms the facts as they were reported to Mulally:

> I came into work around my scheduled time of 0800hrs on the morning of 1-26-04, to be told as soon as I crossed the ante-room threshold by coworkers Leslie Sweborg and Angie Bell that I had three messages to return phone calls. These messages regarded action to be taken as my ordinary routine daily activities with the Purchasing Dept. and Mary Jo Carnell about supplies ordered, Jamie Defenbaugh, the Merit Corp. sales rep. regarding changing supplies in our packs to fit the needs of one of our 5 interventional radiologist, and Julie in the Billing and Coding office. I proceeded to call these individuals and take care of routine Angio Department maintenance. At some point during taking care of these tasks I spoke with Interventional Radiologist Kenneth Moresco, who informed me that our two morning patients had cancelled due to various reasons. I then proceeded to speak with Dr. Moresco about additional

> supplies that needed to be ordered for future cases and stenting longer superior femoral arterial lesions and he then informed me that he was on his pager and would be proceeding down to OSF to do cases down there and to page or call him on his cell phone if he is again needed at Proctor which is a practice of CIRA and their group if our schedule is light. I then continued to work on billing problems that were presented to me previously that were outstanding in collecting because they had not received modifiers, which I am the only person presently doing this and held responsible in Angio.
>
> At approximately 0930hrs Leslie came to me in Angio from the ante-room to tell me Jan Mulally called and said one of us had to go into the diagnostic department to work and one of us had to go up to surgery now to help the surgery technologist who had multiple cases.

From 8 a.m. until at least 9:30 a.m. Staub performed "routine" duties, talked on the telephone, and shuffled paper as the number of patients waiting in non-invasive Diagnostic Imaging grew larger. Sweborg testified that she spent a portion of that time putting supplies away and "studying". (Record Vol. 5 at 286.) Neither bothered to answer the telephone when Dunne repeatedly called for help.

By trial time, Staub and Sweborg had changed their tune. They testified they had a patient in Angiography which would have prevented them from assisting Dunne in non-invasive Diagnostic Imaging for at least a portion of the time prior to receiving Mulally's call. While their position is facially plausible, it would not, even if true, demonstrate that Mulally fabricated or misrepresented the facts in order to procure Staub's discipline. "The Court evaluates the legitimacy of the decision maker's decision based on the information available to him or her at the time of the decision." *Jenks v. City of Greensboro*, 495 F. Supp. 2d 524, 529 (M.D.N.C. 2007). Even if there had been a patient in Angiography, no one advised Mulally of that fact. "It is only the decision maker's belief at the time that the decision is made that is the relevant inquiry–not whether the information is later proven to be false." *Id.*; *see also Amadio v. Ford Motor Co.*, 238 F.3d 919, 928 (7th Cir. 2001); *Johnson v. Weld County*, 594 F.3d 1202, 1211-12 (10th Cir. 2010). Bell, the angio nurse, told Mulally they knew by 8:10 a.m there would be no Angio cases that day. Sweborg told Mulally there were no angio patients between 8:10 a.m. and 9:44 a.m. that day. The computer tomography scheduler told Mulally that the only angio patient scheduled that day had cancelled. Even more telling, when Staub filed his grievance -- after having had a week to think about it -- he made no mention of a patient in Angiography. Mulally's belief at the time, shared by Korenchuk and Carothers, was that there was no patient in angio.

Staub also claims the Corrective Action was unfair because he had no idea that waiting patients in non-invasive Diagnostic Imaging should take precedence over his routine duties in Angio. Staub denies he was admonished during the December 9, 2003 meeting referenced in the Corrective Action to report to non-invasive Diagnostic Imaging when he had no patients in Angio. However, Staub was the only person at that meeting who does not recall the admonition. The two other non-supervisory employees in attendance, Bell and Sweborg, recalled the warning. Bell testified:

> Q. What did they [Korenchuck and Mulally] say?
>
> A. They more or less were reminding us that if cases were done in angio that the techs still need to go over to the department and help.
>
> Q. They need to go help?
>
> A. And the RNs, we can go over also and see if there is stuff that we could help out.
>
> Q. Not that the department is going to call you, but if you have no case you were to go over there?
>
> A. We were to call there and check to see if they needed us.

(Record Vol. 5 at 487-488.) Sweborg also recalled the instruction at the time of her deposition but her memory "faded" somewhat between then and the time of trial:

> Q. And do you recall, Miss Sweborg, during this meeting or in your deposition I asked you, quote, "In this December 9th meeting was there a specific discussion though about what you angio techs were supposed to do as far as helping out in diagnostic?"
>
> Do you remember me asking you that question?
>
> A. No, I don't really.
>
> Q. Do you remember what your response was?
>
> A. No.
>
> Q. Would it surprise you that your response was, "The only discussion was that we needed to go help them if they–if we did not have cases."
>
> Do you recall that?
>
> A. No, I don't.

(Record Vol. 5 at 279.) In addition, Buck knew about the December 9 meeting and instruction because Carothers had reported it to her. (Record Vol. 5 at 93-95.)

Furthermore, even if he legitimately failed to recollect the events of December 9, Staub had been exhorted, as recently as his December 2003 evaluation, to help with the work load in non-invasive Diagnostic Imaging:

> I want Vince to be aggressive in his attempt to work throughout the Dept. I also want Vince not to go on the defensive when questioned. Angio at Proctor is also a part of diagnostic and work needs to be in both areas.

(P. Ex. 32, Record Vol. 3 at 135; Offered at Record Vol. 5 at 132; Admitted at Record Vol. 5 at 162.) It was a repeat of the theme of his prior evaluation:

> Vince continues to disappear during scheduled hours and does not voluntarily help during idle time.

(D. Ex. 18, Record Vol. 3 at 162; Offered at Record Vol. 5 at 428; Admitted at Record Vol. 5 at 451.)

Time and time again Staub was admonished to help in non-invasive Diagnostic Imaging when he did not have patients in Angio. On January 26, he once again refused to do so. The information reported in

the Corrective Action came entirely from those who bore no animus. The Corrective Action was reviewed and recommended by Carothers and further reviewed with Linda Buck, neither of whom bore any animus. Buck did not consult with Mulally or ask for her input prior to terminating Staub. With no link to Buck's termination decision, any animus attributable to Mulally cannot support a finding of liability. Therefore, evidence of that animus should not have been presented to the jury.

III. STAUB PRESENTED NO EVIDENCE TO THE JURY LINKING THE ANIMUS HE ATTRIBUTES TO KORENCHUCK TO THE DISCHARGE DECISION MADE BY BUCK.

Staub's proffered evidence of Korenchuk's animus was inadequate to establish even an inference of unlawful motivation. His evidence was limited to two derogatory remarks. He testified that on one occasion Korenchuk referred to "drill weekends as a bunch of smoking and joking and waste of taxpayer money" and on another he referred to Staub's two week annual training assignment as "Army Reserve bullshit". Both of these incidents occurred in 1998 or sometime prior thereto according to Staub. (Record Vol. 5 at 342-344.)

By December 2003, his view had changed substantially. A scant four months before his discharge, Staub presented Korenchuk with a "MY BOSS IS A PATRIOT" award. (D. Ex. 7, Record Vol. 3 at 146-148; Offered at Record Vol. 5 at 64; Admitted at

Record Vol. 5 at 396.) Staub procured the award from the Office of the Assistant Secretary of Defense. In order to qualify Korenchuk for receipt of the award, Staub submitted a nomination petition wherein he stated:

> My boss is very supportive of the Operation Enduring Freedom that I have been called for active duty for and mobilized. He shows complete concern and compassion for myself and my family. He conveys gratitude for my service to man, god and our country. As an employer, he is truly an asset to the U.S. Army Reserve and all of our principals we stand for.

(Record Vol. 3 at 148.)

Richardson v. Sugg, 448 F.3d 1046 (8th Cir. 2006), presented a similar factual situation. Nolan Richardson, distinguished basketball coach of the Razorbacks of University of Arkansas–Fayetteville, alleged he was discharged on account of his race. Richardson's principal evidence consisted of a statement wherein athletic director J. Frank Broyles used the word "nigger" during a sports banquet held two years before Richardson's termination. Affirming the district court's decision in favor of the defendants, the Eight Circuit discussed the effect of subsequent events and the passage of time on the causal link between discriminatory statements and a later adverse employment action:

And though the district court discounted it, we find the span of time between Broyle's remarks and the decision to fire Richardson relevant to a determination of whether discriminatory animus motivated the firing. *See Simmons v. Oće-USA, Inc.*, 174 F.3d 913, 916 (8th Cir. 1999).

We need not weigh in on the correctness of the district court's finding that Broyle's remarks at the sports banquet were "direct" evidence–evidence strong enough to causally link the statement to adverse employment actions–of racial animus in employment actions taken before October 2000. That is because Richardson was fired nearly two years later, and we agree with the district court's finding that Richardson and Broyles had made amends by then. The importance of the ample record evidence of the goodwill between Broyles and Richardson is that it substantially severs any possible causal link between the comments Broyles made at the [October] 2000 sports banquet, and any animus Broyles allegedly might have had toward Richardson at that time, and the decision to fire Richardson in 2002.

Further, the time-span between the comments and Richardson's firing

> required Richardson to establish a causal link. "Because the [racially-charged] statements [by a supervisor] and the adverse employment decision were not close in time, [separated by some two years,] [plaintiff] must establish a causal link between the comments and his termination." *Id.* at 916. *See Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995) ("[W]e [have] held that a four-year gap between the statement and the termination rendered the statement effectively stale when it came to allowing an inference of intentional discrimination. Because these statements had an insufficient causal relationship to the actual decision to terminate, we [have] ruled that they could not support a jury finding of intentional discrimination.").

Richardson, 448 F.3d at 1058-59.

In this case, the MY BOSS IS A PATRIOT award is "ample evidence" that by December 2003 Korenchuk was not a person with animus toward Staub on account of his service in the Reserve. There was additional contemporary evidence, such as the evaluations provided to Staub in 2002 and 2003 touting his clinical skills as well as numerous compliments made to Staub, demonstrating that Korenchuk did not hold Staub's Reserve activities against him. (Record Vol. 5 at 329.) Moreover, the

comments Staub attributes to Korenchuk were so remote in time (six years prior to the discharge decision) that they could not legally support an inference of unlawful motivation.

Staub also testified Korenchuk was concerned about the expense of hiring temporary replacements during his military deployment.[8] This does not demonstrate animus on the part of Korenchuk because Staub did not produce any evidence linking the deployment-related expenses to Korenchuk's compensation or his department's budget. Simply put, Korenchuk had no economic incentive to discriminate against Staub on account of his military duties, and therefore such comments are not evidence of military animus. *See*, *e.g.*, *Larimer v. Int'l Bus. Machs. Corp.,* 370 F.3d 698, 701 (7th Cir. 2004) (finding no discrimination on account of plaintiff's medical expenses where supervisors had no financial incentive to terminate plaintiff because neither compensation nor department budget was tied to cost of employee medical expenses); *Kapetanovich v. Rockwell Int'l, Inc.*, No. 92-3018, 1994 WL 530912, at *3 (3d Cir. July 15, 1992) (same).

Again, it is undisputed that Buck made the decision to fire Staub. Korenchuk did not want to

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[8] The expense of covering for Reservists during absences does not motivate Proctor's employment decisions. It is undisputed that Proctor employed at least five other Reservists at the time it employed Staub. Staub was the only Reservist employed by Proctor to receive discipline. (Record Vol. 5 at 525.)

discharge Staub and did not make that decision. In fact, he went along with Buck's termination decision only "reluctantly".[9] (Record Vol. 5 at 69.)

When Buck and Korenchuck met, pursuant to McGowan's directive to come up with a plan for dealing with Staub, Korenchuk told Buck he had been looking for Staub and could not find him. Upon

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[9] At page 39 of his Brief, the Petitioner states:

> Proctor Hospital did not "have to" place the ultimate decision to fire Staub in the hands of "someone removed from the underlying situation." The hospital could, for example, have chosen to give that authority solely to Korenchuk. Proctor was not entitled, by giving to one official responsibility for reporting "the underlying situation" and to another the official responsibility for making the "ultimate decision," to escape legal liability for the discriminatory actions of the former.

The Petitioner makes it sound as if the Hospital intentionally utilizes Buck to make all discharge decisions to insulate itself from potential liability of biased subordinates. Nothing could be further from the truth. Korenchuk had the authority to discharge Staub and, in fact, had done so in 1998. (Record Vol. 5 at 149, 431.) There was no evidence presented to the jury to the effect that the Hospital assigned Buck to make all discharge decisions. The only reason Buck was involved in the decision to discharge Staub is that McGowan directed her to assist Korenchuk in developing a plan for dealing with Staub's habit of disappearing from the work area. (Record Vol. 5 at 101, 541.) Proctor did not give one official the responsibility for reporting the underlying conduct and another the responsibility for making the discharge decision.

hearing this, Buck had had enough and decided that the best way to deal with Staub was to terminate him.

Staub argues that Korenchuk made a false report to Buck in order to procure his discharge. Staub testified that the reason Korenchuk could not find him is that he and Sweborg were having lunch. Staub testified that he attempted to find Korenchuk to advise him they would be in the cafeteria but he was not in his office. Staub says that he left a voicemail for Korenchuk advising him that he and Sweborg would be at lunch. (Record Vol. 5 at 380-381.)

Staub and Sweborg have a major disconnect on this point. Staub testified that the two of them were together from the time he reported to work until they went to lunch. (Record Vol. 5 at 382.) Yet Sweborg, called as a witness by Staub, testified on direct examination:

> Q. After you finished your cases and went to lunch, did you guys contact Mike Korenchuk?
>
> A. No.
>
> Q. Why not?
>
> A. I guess it didn't occur to us. It was a late lunch. We felt that there was time for us to go to lunch and we still had other duties when we

> came back to complete before the end of the day too.

(Record Vol. 5 at 268.) Sweborg's testimony corroborates Korenchuk's report to Buck.

Notably, Staub's voicemail defense was raised for the first time at trial. Neither of his post-discharge grievances make any reference to having left a voicemail for Korenchuk. (P. Ex. 28, Record Vol. 3 at 59-63; Offered at Record Vol. 5 at 86; Admitted at Record Vol. 5 at 162; P. Ex. 27, Record Vol. 3 at 53-58; Offered at Record Vol. 5 at 386; Admitted at Record Vol. 5 at 395.)

Assuming every word of Staub's story is true, it does not prove that Korenchuk fabricated a falsehood and fed it to Buck. The charge contained in the Corrective Action was that Staub "will remain in the general diagnostics area unless he specifies to Mike or Jan where and why he will go elsewhere". Staub admits he did not speak to Korenchuk and there is no testimony that he made any effort to seek out Mulally. (Record Vol. 5 at 381.) There was no evidence presented to the jury that Korenchuk was aware of any voicemail from Staub.

Again, the link just is not there. Two statements made six years prior to termination do not make it; a report based on facts as confirmed by Leslie Sweborg does not make it. There is no evidence to demonstrate that Korenchuk -- the man who was "very supportive" of Staub, showed him "complete

compassion," and was "truly an asset to the U.S. Army Reserve and all of the principals we stand for" -- harbored any animus toward Staub on account of his service, much less that such animus motivated Buck's termination decision. Therefore, evidence of that animus should not have been presented to the jury.

IV. BUCK'S INDEPENDENT DECISION BROKE ANY CAUSAL CONNECTION BETWEEN THE ANIMUS STAUB ATTRIBUTES TO MULALLY AND KORENCHUK AND HIS TERMINATION.

The federal courts of appeal are in agreement that where a final decision maker makes an independent decision based on an independent review of information, the causal link between a non-decision maker's alleged bias and the employment decision is broken, and the non-decision maker's animus is insufficient to impute liability to the employer (i.e. is not the proximate cause of the employment decision). *See*, *e.g.*, *Thompson v. Coca-Cola Co.*, 522 F.3d 168, 179 (1st Cir. 2008) (no causal connection where "the Separation Review Committee made its own independent decision to terminate Thompson based on the facts of the situation"); *Collins v. New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (no causal link between alleged bias of Collins' supervisors and his termination by Transit Authority Board, where Board made decision following evidentiary hearing); *King v. Rumsfeld*, 328 F.3d 145, 153 (4th Cir. 2003) (ruling that evidence of subordinate's bias was irrelevant because decision maker terminated King

"after conducting his own independent investigation"); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (if decision maker based decisions on his own independent investigation, causal link between alleged retaliatory intent and terminations would be broken); *Wilson*, 952 F.2d at 946 (6th Cir. 1992) (finding that animus of Wilson's supervisor was not imputed to employer because decision was based on independent review); *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 919-20 (7th Cir. 2007) (ruling that decision maker conducted independent investigation that absolved employer of liability for any deception on the part of Brewer's supervisor); *Richardson*, 448 F.3d at 1060 (8th Cir. 2006) (animus of athletic director not imputed to employer where decision maker conducted independent review of recommendation to terminate Richardson, and decision maker's own impression of facts provided an independent basis for his decision to approve termination); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641, n.9 (9th Cir. 2004) (stating that "no nexus exists when the decision maker makes an independent and legitimate decision to discipline the plaintiff."); *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001) (ruling that decision maker's attempt to balance allegedly biased investigators' findings with English's own version of events "cuts off any alleged bias on the part of the investigators from the chain of events leading to English's termination"); *Stimpson*, 186 F.3d. at 1330 (11th Cir. 1999) (finding that independent decision severed causal link between animus and termination decision).

Staub received the benefit of Buck's independent review of the facts giving rise to his discharge not once but twice. The first time was when she made the decision. The second time was when Staub filed his post-discharge grievance with Buck. In both instances, Buck acted upon information she obtained from sources having no animus toward Staub. In the second instance, she carefully reviewed his written grievance, weighed his arguments, and made an independent decision to affirm her discharge decision. Buck's actions broke any causal connection between the animus Staub attributes to Mulally and Korenchuk and her decision to fire him.

A. Buck Independently Decided To Terminate Staub.

The undisputed facts in this case show that Buck had a negative impression of Staub as an employee, independent of any input from Mulally or Korenchuk, long before she decided to terminate his employment. Buck had received and considered information regarding Staub absenting himself from the Diagnostic Imaging Department and failing to follow directives from various, unbiased sources.

During the April 2, 2004 meeting, Angie Day informed Buck that Staub would absent himself from the Diagnostic Imaging Department and that he was not helpful, hard to work with, and abrupt. (Record

Vol. 5 at 73-74, 100.) There was no evidence admitted at trial that Day possessed any military animus.[10]

Garret McGowan, Proctor's Chief Operating Officer, expressed similar concerns about Staub's

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[10] There was no evidence presented to the jury that Day bore animus toward Staub on account of his service in the Reserve. However, the Government, at page 4 of its *amicus* brief, states:

> In the past, Day had complained about having to work outside of her ordinary scheduled hours when petitioner was away on military duty. *Id.* at 44a.

The citation is to the magistrate judge's pretrial ruling on a motion in limine. "In considering whether sufficient evidence was presented to a jury to support a verdict, a court may not consider evidence not before the jury." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 612-13 (6th Cir. 1999). The Petitioner similarly makes gratuitous references to matters outside of the trial transcript. For example, at page six the Petitioner states:

> [Mulally's] actions "had the effect of breeding resentment and animosity toward Staub among his co-workers." (JA 106a-07a; see JA 95a).

Once again, the citations are to the district judge's pretrial ruling on summary judgment (JA 106a-07a) as well as the magistrate judge's pretrial ruling on motions in limine (JA 95a) and not to any testimony or exhibits presented to the jury. The Petitioner's statement of the case contains five other instances of citations, not to the trial record, but to pre-trial rulings. "We do not sit to reweigh evidence based on information not presented at trial." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 155 n.15 (2003).

behavior. McGowan stated to Buck at the April 2, 2004 meeting that he previously had received the same complaints about Staub that Day had made -- Staub would absent himself from the Diagnostic Imaging Department and he was not helpful, hard to work with, and abrupt. (Record Vol. 5 at 101.) As a result, McGowan directed Buck and Korenchuk to come up with a plan to address Staub's behavior. (Record Vol. 5 at 101, 541.)

Buck's review and consideration of Staub's personnel file provided her with numerous examples of Staub absenting himself from the Diagnostic Imaging Department and failing to follow documented directives. (Record Vol. 5 at 85, 103.)[11] That included

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[11] At page 12, Petitioner's Brief states:

> Buck stated that she reviewed Staub's personnel file only after the decision to dismiss Staub had been made.

That statement is inconsistent with her testimony:

> Q. Even though your termination notice just relates to the warning and the failure to follow the directive afterwards, you contend now that you reviewed Vince's personnel file before you decided to terminate; is that correct?
>
> A. I did review his file before he was terminated. I reviewed the file as it stood in human resources.

(continued...)

Staub's termination in 1998 for failure to follow an order, as well as his reinstatement with conditions such as "You will communicate with your supervisor whenever you are leaving the work area." (D. Ex. 2, Record Vol. 3 at 141; Offered at Record Vol. 5 at 149; Admitted at Record Vol. 5 at 396.) Staub's January 2002 evaluation wherein he was given a "0" or unsatisfactory for attitude advised him to: "Focus more on tasks, less on socializing. Be more of a team player in terms of accessibility/productivity. Stay in the department during paid working hours." (D. Ex. 18, Record Vol. 3 at 165; Offered at Record Vol. 5 at 428; Admitted at Record Vol. 5 at 451.) Staub's December 2003 evaluation counseled him to: "be aggressive in his attempt to work throughout the Dept." and "not to go on the defensive when questioned. Angio at Proctor is also a part of diagnostics and work needs to be in both areas." (P. Ex. 32, Record Vol. 3 at 135; Offered at Record Vol. 5 at 132; Admitted at Record Vol. 5 at 162.)

Additionally, Buck received information from Brenda Carothers, Proctor's Director of Human Resources, pertaining to the events described in the January 2004 Corrective Action. Carothers recommended the issuance of the Corrective Action following her review of the allegations against Staub. She subsequently met with him to hear his further protests. (Record Vol. 5 at 80, 368-370.) There is no

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[11](...continued)
(Record Vol. 5 at 85.)

evidence in the record that Carothers was biased against Staub.

Thus, when Buck made the decision to terminate Staub on April 20, 2004, she was aware from a number of sources that Staub had a history of absenting himself from the Department and failing to follow directives, and was independently able to decide that Staub should be terminated.[12] This is not a case where Mulally or Korenchuk shaped or directed the scope of Buck's review and determination, such that the review and determination were not truly independent (*see*, *e.g.*, *Poland*, 494 F.3d at 1183 (finding no independent review and decision where the biased non-decision makers directed and manipulated the scope of the decision maker's investigation by being the primary source of the allegations against the plaintiff and by selecting all of the witnesses to contact)), nor is it a case where Buck considered only Staub's personnel file for her independent review and determination (*see*, *e.g.*, *BCI Coca-Cola Bottling Co.*, 450 F.3d at 492-93 (finding no independent review and

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[12] Buck previously terminated at least one other employee for the same reason she decided to terminate Staub, and that employee was not a member of the military. That employee was a computer operator who often absented himself from his department, just like Staub, and was given a written warning, just like Staub. The employee was subsequently terminated by Buck after being absent again from his department, just like Staub. (Record Vol. 5 at 525-527.) This evidence is sufficient to show that Proctor would have fired Staub regardless of his Reserve status. *See*, *e.g.*, *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 314 (4th Cir. 2001).

determination where the decision maker relied exclusively on information from a biased individual, and the decision maker's review consisted of exactly one action -- reviewing the plaintiff's personnel file)). Because Buck's review and determination were truly independent, any information provided by Mulally and Korenchuk was not the proximate cause of Staub's termination, and the alleged discriminatory animus of Mulally and Korenchuk cannot be imputed to Proctor. *See*, *e.g.*, *Richardson*, 448 F.3d at 1060; *Young v. Dillon Cos., Inc.*, 468 F.3d 1243, 1253 (10th Cir. 2006); *Brewer*, 479 F.3d at 921 (all refusing to impute the animus of a non-decision maker to the employment decision where the decision maker engaged in an independent review or investigation).

> In this case, any claim that Broyles used White and/or Sugg as a "cat's paw" to advance any animus he might have held fails. Richardson's contract provided for independent review by Sugg of any decision to fire Richardson, which review was amply undertaken, and Sugg's own impression of Richardson's comments at the press conference provided an independent basis for his decision to approve Richardson's termination.

Richardson, 448 F.3d at 1060.

> While Branham met with Bauman to discuss the member complaints that Payroll had received, Branham did not

> control all of the information that Bauman had to evaluate the recommendation to terminate Long. The set of data available to Bauman consisted of information provided by Branham, Sherman and Larkin. Nothing in the record suggests that Branham exerted singular influence over Bauman's decision or that Bauman merely "rubber-stamped" Branham's recommendation; to the contrary, the undisputed facts show that Bauman reviewed multiple sources of information on his own, held at least three meetings and received Larkin's independent recommendation before deciding to fire Long.

Long v. Teachers' Ret. Sys., 585 F.3d 344, 352 (7th Cir. 2009).

Moreover, during his termination meeting, Buck considered Staub's version of the events giving rise to his discharge. On April 20, 2004, when Staub was shown the termination notice and Korenchuk explained to him that he could not find him and he was not where he was supposed to be, Staub protested and gave his explanation of his whereabouts. Buck listened to Staub's explanation. (Record Vol. 5 at 384-386.)

B. Buck Independently Decided To Deny Staub's Post-Discharge Grievance.

On April 25, 2004, Staub filed a written grievance with Buck protesting his termination. The grievance laid out in detail his version of events regarding: (1) the January 27, 2004 Corrective Action; (2) his actions with regard to assisting non-invasive Diagnostic Imaging following the Corrective Action; (3) complaints against Mulally pertaining to scheduling; (4) comments made by Day related to covering Staub's drill duty dates; (5) statements made by Korenchuk related to Staub's drill dates, scheduling, and possible deployment; and (6) Mulally's telephone calls to Joseph Abbidinni, a civilian worker for the Army Reserve Center in Bartonville, where Staub had been stationed. (Record Vol. 5 at 104, 386; P. Ex. 28, Record Vol. 3 at 59-63; Offered at Record Vol. 5 at 86; Admitted at Record Vol. 5 at 162.)

Buck reviewed Staub's grievance, considered Staub's version of events, and investigated his claim that the January 27, 2004 discipline was false. She testified under cross examination:

> Q. As far as Vince's grievance, did you undertake any investigation as to his claims about Jan Mulally?
>
> A. Which claims would those be?

> Q. The claims that the January 27th write-up was false.
>
> A. Yes, I did. I brought it up with the director of human resources who was involved in corrective action.

(Record Vol. 5 at 88.) Ultimately, Buck determined that the termination decision should stand. Buck gave Staub the opportunity to present his side of the story. (Record Vol. 5 at 104, 384-386.) This fact alone establishes that Buck made an independent decision to terminate Staub. *See*, *e.g.*, *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547-48 (7th Cir. 1997); *English*, 248 F.3d at 1011; *Thompson*, 522 F.3d at 178; *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1061 (10th Cir. 2009).

> Even if some of the witnesses who testified before the ABI had a hidden agenda, that alone is not sufficient to compel a finding that the agenda caused the adverse action. Where the employer's decision maker tries to get all sides of the story, the employer will not be held liable solely because one side might harbor a hidden bias against the plaintiff employee. As the Tenth Circuit explained, "Simply asking an employee for his version of events may defeat the inference that an employment decision was ... discriminatory."

* * *

> Typically, it will only be with the benefit of 20/20 hindsight that the animosity will become clear. As long as the decision maker seeks input from all sides of the dispute (most importantly from the targeted employee) and as long as the decision maker does not permit a subordinate's biased view to become the overriding influence, then the resulting decision will be an independent one.

Roberts v. Principi, No. 06-6059, 2008 WL 2521094, at *9 (6th Cir. June 25, 2008) (internal citations omitted).

> It does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source. For instance, we have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired. Even though the employer in such situations must often decide what to do based on nothing more than the conflicting stories of two different employees, the employer will not be liable for the racism of the

> alleged frame-up artist so long as it independently considers both stories.

Brewer, 479 F.3d at 918.

The fact that Buck made the original termination decision before receiving Staub's side of the story is immaterial. It is undisputed that Buck considered Staub's version of events at the time of his termination and as part of the grievance process, and that Buck could have elected to rescind Staub's termination and reinstate him.[13] An independent, post-termination review of a termination decision removes the taint of any bias in the decision-making process. *See*, *e.g., Metzger v. Ill. State Police*, 519 F.3d 677, 682-83 (7th Cir. 2008) (holding reconsideration of adverse decision arguably influenced by retaliatory animus was sufficient); *Richardson*, 448 F.3d at 1060 (holding subsequent review of discharge decision arguably influenced by racial animus was sufficient).

Even if Mulally or Korenchuk possessed military animus and provided information considered by decision maker Buck, her independent review and determination broke any causal link between Mulally's

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[13] Staub was fully aware that the Hospital's grievance procedure could work in his favor as it did in 1998 when he was discharged the first time, filed a grievance, and was conditionally reinstated to employment with the Hospital. (Record Vol. 5 at 149-151; D. Ex. 2, Record Vol. 3 at 141; Offered at Record Vol. 5 at 149; Admitted at Record Vol. 5 at 396.)

and Korenchuk's military animus and Staub's termination.

> [A] plaintiff must show that the allegedly biased investigator's discriminatory reports, recommendation, or other actions *were the proximate cause* of the adverse employment action. Thus, we have held that an unbiased supervisor can break the causal chain by conducting an "independent investigation" of the allegations against an employee.

Young, 468 F.3d at 1253 (internal citations omitted) (emphasis added).

> However, when a decision maker makes a decision based on an independent investigation, any causal link between the subordinate's retaliatory animosity and the adverse action is severed.

Roberts, 2008 WL 2521094, at *8.

Simply put, Buck based her termination decision on her own independent review of the situation. Ultimately, she independently determined that Staub had a history of both absenting himself from the Diagnostic Imaging Department and failing to follow directives. At no time did Staub's military status enter into Buck's termination decision. Buck's independent review broke any causal link between Mulally's and Korenchuk's alleged military animus

and Staub's termination and, therefore, any such animus was not the proximate cause of Staub's termination.

> [T]he evidence established that Buck looked beyond what Mulally and Korenchuk said – remember, Korenchuk supported the firing only "reluctantly" – and determined that Staub was a liability to the company. . . Viewing the evidence reasonably, it simply cannot be said that Buck did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that Staub was not a team player.

J.A. 50a-51a.

V. PROCTOR CANNOT BE VICARIOUSLY LIABLE FOR BUCK'S DECISION.

"This Court has recognized that 'when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules.' *Meyer v. Holley*, 537 U.S. 280, 285 (2003)." Br. of the United States at p. 11-12. "Since a damages action for a violation of a federal anti-discrimination statute 'sounds basically in tort,' such an action is governed by general agency principles." *Id.; see also* Br. of the Pet'r at p. 20-21, 36-37.

USERRA, unlike most federal anti-discrimination laws, provides for the personal liability of a decision maker whose animus causes the injury that is the subject of the complaint. USERRA does so by defining "employer" to include "a person . . . to whom the employer has delegated the performance of employment-related responsibilities". 38 U.S.C. § 4303(4)(A)(i). Because the decision maker can be personally liable, USERRA is uniquely suited to resolving the issue before the Court.

The only adverse action Staub complained of in this case was his termination (i.e. the denial of retention of employment) in violation of 38 U.S.C. § 4311(a). (Record Vol. 3 at 242.) Linda Buck undisputedly was the person who made the decision to discharge Staub. Buck unquestionably bore no animus toward Staub on account of his service in the Reserve. Had Buck been named a defendant in this action, the case against her would not have made it to a jury. Applying "the ordinary tort-related vicarious liability rules", if Buck as Proctor's agent cannot be held liable, Proctor cannot be held liable either.

As this Court has noted:

> It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to a like immunity.

* * *

> [H]ere the defense is that the act of the conductor was lawful. If the immediate actor is free from responsibility because his act was lawful, can his employer -- one taking no direct part in the transaction -- be held responsible? ... The question carries its own answer; and it may be generally affirmed that, if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therfor.

New Orleans & Ne. R.R. Co. v. Jopes, 142 U.S. 18, 24, 27 (1891).

The courts of appeal have recognized as much as well:

> [W]hen *respondeat superior* is the sole asserted basis of liability against a master for the tort of his servant an adjudication on the merits in favor of either the master or servant precludes suit against the other. The rule developed as an offshoot of the doctrine of *res judicata*. Although a master and his servant are not technically in privity, the preclusive principles underlying *res judicata* were thought to have equal application in the *respondeat superior* setting because the operative facts and

> law controlling a servant's direct liability are always identical to those that determine the vicarious liability of his master (so long as the agency relationship and its scope are not in dispute). If the master is vicariously liable, the servant must be directly liable (and vice versa); if the master is not vicariously liable, the servant cannot be directly liable (and vice versa).

Muhammad v. Oliver, 547 F.3d 874, 879 (7th Cir. 2008); *see also Crawford v. Signet Bank*, 179 F.3d 926, 929 (D.C. Cir. 1999) ("In the absence of agent liability, therefore, none can attach to the principal"); *Lober v. Moore*, 417 F.2d 714, 717-18 (D.C. Cir. 1969) ("a judgment exonerating a servant or agent from liability bars a subsequent suit on the same cause of action against the master or principal based solely on respondeat superior"); *Carroll v. Hubay*, 272 F.2d 767, 769 (2d Cir. 1959) (favorably quoting the Restatement of Judgments § 106(g) for its statement that "Where an action is brought against a master and a servant based wholly upon the negligence of the servant, a judgment against the master should be set aside, if judgment is given for the servant").

This underlying premise applies equally whether the relationship is described as master/servant or principal/agent. In discussing the dual application, the Tenth Circuit explained:

> While reference here is made only to the relation of master and servant, it also pertains to the relation of principal and agent. In either instance, the liability is grounded upon the doctrine of respondeat superior. It has been held that under that doctrine the liability of the master to a third person for injuries inflicted by a servant in the course of his employment and within the scope of his authority, is derivative and secondary, while that of the servant is primary, and absent any delict of the master other than through the servant, the exoneration of the servant removes the foundation upon which to impute negligence to the master.

Simpson v. Townsley, 283 F.2d 743, 746-47 (10th Cir. 1960), quoting *Jacobson v. Parrill*, 351 P.2d 194, 199 (Kan. 1960). In discussing the liability of a defendant in a second action where the liability is necessarily dependent upon the culpability of the agent defendant in the first action, the court in *Willoughby v. Flem*, 158 F. Supp. 258 (D. Mont. 1958), articulated a similar overview and explanation:

> The rule here applicable is well stated by Corpus Juris Secundum as follows:
>
> > "…if the liability of a person sued for tort is necessarily dependent on the

> culpability of another, who was the immediate actor and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, defendant may set up such judgment as a bar." 50 C.J.S. Judgments § 760c, p.286.

In the case of *Barrabee v. Crescenta Mutual Water Company*, 1948, 88 Cal. App. 2d 192, 198 P.2d 558, 560, the court said:

> "Generally the principle of res judicata applies only between parties to the original judgment or their privies. But in a tort action lack of privity in the former action does not prevent an estoppel where defendant's liability is predicated upon the culpability of another who was the immediate actor and who was exonerated in an action against him by the same plaintiff for the same act. The situation is analogous

> to that of principal and agent."

Willoughby v. Flem, 158 F. Supp. at 260-61; *see also Portland Gold Mining Co. v. Stratton's Independence, Ltd.*, 158 F. 63, 65-68 (8th Cir. 1907) (same); *Preis v. Lexington Ins. Co.*, 508 F. Supp. 2d 1061, 1078 (S.D. Ala. 2007) ("Without a viable claim against the agent, there can be no recovery against the principal under the respondeat superior theory"); *Black v. District of Columbia*, 480 F. Supp. 2d 136, 141 (D.D.C. 2007) (vicarious liability claims "must be predicated upon tortious acts by employees"); *Hayes v. Chartered Health Plan*, 360 F. Supp. 2d 84, 90 (D.D.C. 2004) ("In the absence of agent liability, no liability can attach to the principal").

Again, it is undisputed that Linda Buck harbored no military animus. Thus, Buck committed no wrongful act in discharging Staub. Because there is no underlying wrong, there is nothing for which to hold Proctor, as the employer principal, liable. *See Garcia v. Arribas*, 363 F. Supp. 2d 1309, 1317 (D. Kan. 2005) ("When an employee is not negligent, there is obviously no basis to hold his employer derivatively liable"); *Collins v. Schweitzer, Inc.*, 774 F. Supp. 1253, 1264 (D. Idaho 1991) (where "the foundation of the action is still negligence, or other fault, on the part of the agent …if the agent is found to be not negligent, then the principal cannot be held vicariously liable to the plaintiff because there is no negligence for which to be held vicariously liable"); *Soraghan v. Henlopen Acres, Inc.*, 236 F. Supp. 489, 490 (D. Del. 1964) ("any

liability of the principal is extinguished by reason of the acquittal of the wrongdoer. There being no cause of action existing in the first place, neither principal or agent could be liable").

Applying "ordinary tort-related vicarious liability rules", the analysis of Staub's case against Proctor would end here.[14]

> Under the normal discrimination framework, that would have been the end of the road for Brewer's case. But we held that his claim could survive if he showed Thompson used Hendricks as her cat's paw.

J.A. 43a. The Seventh Circuit, rather than restricting the rights of a plaintiff by a literal application of "general agency principles", actually expands upon them by applying the cat's paw analysis. The cat's

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[14] In his Amended Complaint, Staub alleged that the January 27, 2004 Corrective Action, the April 20 report, and his termination all constituted pretexts for discrimination under Section 4311 of USERRA. However, at trial Staub only advanced to the jury the argument that his *termination* constituted discrimination in violation of USERRA. (Record Vol. 3 at 242.) As a result, Staub has waived any claim that the January 27, 2004 Corrective Action and the April 20 report independently constitute actionable adverse actions in violation of Section 4311 of USERRA. *See*, *e.g.*, *Melford Olsen Honey, Inc. v. Adee*, 452 F.3d 956, 966 (8th Cir. 2006) (ruling that party waived a claim by failing to request a jury instruction on the claim); *U.S. v. Burlington N., Inc.*, 500 F.2d 637, 640-41 (9th Cir. 1974) (same).

paw gives Staub, and all plaintiffs who have no evidence of animus on the part of the employer's agent who made the adverse decision, a second bite at the apple. The Seventh Circuit posits that if Buck was not the real decision maker, but merely a dupe in a diabolically clever scheme to procure Staub's discharge for a proscribed purpose, Proctor might still be vicariously liable because in that situation Buck's decision is actually the decision of someone else. But after examining the trial record, the Seventh Circuit found, as explained in detail above, that this case was so lacking in evidence of that nature that it should never have been presented to a jury for consideration.

Neither Staub nor the Government faults the Seventh Circuit for applying the cat's paw analysis to increase employer exposure under traditional vicarious liability rules. Rather, they argue for a further erosion of those rules. "To prevent the cat's paw theory from spiraling out of control" the Seventh Circuit derived a simple formula:

> We were, and remain to this day, unprepared to find an employer liable based on a non-decision-maker's animus unless the "decision maker" herself held that title only nominally. If the decision maker wasn't used as a cat's paw–if she didn't just take the monkey's word for it, as it were–then of course the theory is not in play.

J.A. 45a. Staub and the Government rail against this part of the Seventh Circuit's ruling while embracing the portion that favors the plaintiff by enhancing employer liability.[15] They can cite to no established agency law principle which would require the Court to overrule it.

The Seventh Circuit's application of the cat's paw has much to recommend it. It relieves a plaintiff who has been the victim of a well orchestrated but concealed plan to discriminate against him from the strict application of ordinary rules of agency and vicarious liability which might otherwise produce a harsh result. It encourages employers to engage in independent decision making with respect to adverse employment actions. Independent reviews and decisions by unbiased decision makers promote the salutary purpose of USERRA by ensuring that the discriminatory bias of an employee does not proximately cause an actionable adverse employment decision. It provides the trial courts with a workable standard by which to assess liability. *See Norfolk*, 538 U.S. at 176 (noting that "it is for the Court to develop and administer a fair and workable rule of decision").

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[15] Staub did not argue against the cat's paw instruction in the trial court. He advocated its use because failure to do so would have terminated his case. If Staub had candidly urged the trial court to grant him the relief he seeks in this Court (i.e. a ruling that evidence of animus from any source is sufficient to present the case to a jury for decision) he would have been the recipient of a judgment as a matter of law.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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