No. 09-400

IN THE
Supreme Court of the United States

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AARP, AND EQUAL JUSTICE SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law and its *amici* submit this brief as *amici curiae* in support of Petitioner pursuant to Sup. Ct. R. 37.3(a), on the consent of the parties. *Amici* are interested in furthering the goal of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), and other anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, to eradicate employment discrimination.[1]

The Court's decision here will seriously impact employment discrimination statutes' power to combat illegal discrimination and will directly affect the rights of employees who suffer adverse employment action not only on the basis of military service, but also on the basis of race, sex, religion, national origin, or ethnicity. As such this case impacts the constituency served by the *amici*.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to help defend the civil rights of minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The Petitioner has filed a blanket consent to the filing of all *amicus* briefs. The consent of the Respondent is being lodged herewith.

Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee, through its Employment Discrimination Project, has been continually involved in cases before the Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting employment discrimination.

AARP is a non-partisan, non-profit organization of people age 50 or older dedicated to addressing the needs and interests of older people. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. More than half of AARP's members are in the work force and are protected by the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and other anti-discrimination statutes. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other employees who rely on them to deter and remedy employment discrimination. In this case, AARP's concern is that the Court should broadly construe USERRA to effectuate the congressional purpose of protecting military reservists by ensuring that adverse employment decisions are not motivated by their military status.

The Equal Justice Society ("EJS") is a national organization of scholars, advocates, and citizens that seeks to promote equality and enduring social change through law, public policy, public education, and research.

SUMMARY OF ARGUMENT

This case provides the Court with an opportunity to ensure that Congress's intent in enacting USERRA will be implemented, and that an employer can be held liable for the bias of an official, even if that official did not make the final decision, if the plaintiff proves that the bias was a motivating factor for an adverse employment practice.

Under USERRA, a plaintiff establishes an unlawful employment practice by demonstrating that an individual's military service was a "motivating factor" for an adverse employment practice, even though other factors also motivated the action. *Amici* ask the Court to hold that an employer can be held liable under the express language of USERRA for the bias of a supervisor, even when the ultimate decision-maker harbored no discriminatory motive toward the affected employee. An employer can—and should—be held liable whenever unlawful animus is a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

Clarifying this principle will further USERRA's primary purpose of encouraging military service by protecting service members from employment discrimination. For, in order for the "motivating factor" language to be meaningful, USERRA must provide for employer liability for the biased actions of employees.

Well-established agency principles impute to an employer the actions of an employee committed within the scope of employment, or those that are "aided by" the agency relationship. Accordingly, an employer may be held liable for acts committed by

biased supervisors if such actions result in an adverse employment practice against an employee in a protected class. This finding of agency does not hinge on whether the biased supervisor is the ultimate decision-maker.

USERRA also gives employers a defense. Even if the jury concludes that a person's individual military service was a motivating factor, an employer still avoids liability under the statute if the employer can prove that it would have taken the same action "in the absence of" the employee's military service, which is an issue of fact that must be determined on a case-by-case basis.

ARGUMENT

I. CONGRESS ADOPTED THE "MOTIVATING FACTOR" STANDARD IN USERRA TO MAKE IT CLEAR THAT EMPLOYER LIABILITY SHOULD EXIST IN "MIXED MOTIVE" CASES

USERRA provides that an employee has established employer liability if that employee can show that the employee's "membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such" membership, service, obligation, or application. 38 U.S.C. § 4311(c)(1) (emphasis added).[2]

Congress adopted the "motivating factor" language in USERRA to ensure that military service, like those classifications covered under Title VII, plays no adverse roll in (or, in the words of Justice Brennan, is "not relevant" to) employment decisions. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion). The predecessor statute to USERRA had stated that an employee "shall not be denied retention in employment or any promotion or other incident or advantage of employment *because*

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[2] As this case does not present the issue, *amici* take no position on whether this standard should be applied to other employment anti-discrimination statutes. *See Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2348-50 (2009) (distinguishing the Age Discrimination in Employment Act (ADEA) from Title VII because ADEA does not contain the "motivating factor" language of Title VII).

of any obligation as a member of a reserve component of the Armed Forces." 38 U.S.C. § 2021(b)(3) (emphasis added). In *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), the Court stated that the legislative history of the statute indicated it "was enacted for the significant but limited purpose of protecting the employee-reservist against discriminations like discharge and demotions, motivated solely by reserve status." Some lower courts thereafter interpreted the word "solely" to mean that a violation of the statute could only occur if illegal bias was the one and only cause of the employment action. *See, e.g.*, *Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988).

Congress, however, flatly rejected this interpretation in passing USERRA. The new language was broader, replacing the "because of" standard with the "motivating factor" language. A House committee made clear that this change was no accident, but instead was a direct response to the narrow interpretation of *Monroe*:

> To the extent that courts have relied on dicta from the Supreme Court's decision in *Monroe v. Standard Oil Co.*, 452 U.S. 549, 559 (1981), that a violation of this section can occur only if the military obligation is the sole factor (*see Sawyer v. Swift & Co.*, 836 F.2d 1257, 1261 (10th Cir. 1988)), those decisions have misinterpreted the original legislative intent and history of 38 U.S.C. 2021(b)(3) and are rejected on that basis.

H.R. Rep. No. 103-65, at 24 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457. As such, Congress intended USERRA to apply so long as the discriminatory animus was a "motivating factor" for the adverse employment decision.

Congress's message in USERRA that military service should have no adverse role in employment decisions was not an aberration, but was rather entirely consistent with its treatment of discrimination under Title VII. In fact, Congress's passage of USERRA in 1994 mirrored its amendment to the Civil Rights Act in 1991. Congress adopted the "motivating factor" language for Title VII in response to the Court's *Price Waterhouse* decision that potentially narrowed the statute's reach.[3]

Two years after the Court's plurality decision in *Price Waterhouse*, Congress passed the 1991 Civil Rights Act and wrote the "motivating factor" language used by Justice Brennan into the statute.

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[3] In *Price Waterhouse*, a plurality opinion, the Justices disagreed on the proper standard to apply under the "because of" language of § 2000e-2(a). Justice Brennan's plurality opinion argued for a "motivating factor" standard, 490 U.S. at 249, Justices White and O'Connor argued that courts should consider whether a forbidden factor played a "substantial role" in the employment decision, *Id.* at 259, 269, while Justice Kennedy argued for a "but-for" causation standard. *Id.* at 282 (Kennedy, J., dissenting). The disagreement between the Justices left lower courts confused over how to interpret the statute. *See, e.g.*, *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 352 n.13 (1st Cir. 1989) (noting that Justice Brennan's plurality opinion in *Price Waterhouse* "casts some doubt" on the proper causation standard).

In choosing that language, Congress explicitly rejected the "but for" or "substantial" causation approach Justice O'Connor and Justice White had espoused, and endorsed Justice Brennan's "played a part" or "influence" standard instead. *See* 42 U.S.C. § 2000e-2(m). The 1991 amendment makes it clear that a plaintiff need not prove "but for" causation to show that an unlawful employment practice occurred. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m).

The legislative history of USERRA parallels the legislative history of the 1991 Amendment to the Civil Rights Act. In both cases, Congress adopted the "motivating factor" language to send a clear message to the courts that liability for employers can exist in mixed-motive cases.

II. USERRA'S PRIMARY PURPOSE IS TO ENCOURAGE NONCAREER SERVICE IN THE UNIFORMED SERVICES BY PROHIBITING DISCRIMINATION AGAINST THOSE WHO SERVE

USERRA serves the important goals of: 1) encouraging "noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service"; 2) minimizing disruption to service members by providing for their prompt reemployment once their service is completed; and 3) prohibiting "discrimination against persons because of their service in the uniformed services." 38 U.S.C. § 4301(a).

Similar language appears in the legislative history of the statute. In discussing one of USERRA's predecessor statutes, a Senate committee stated: "Employment practices that discriminate against employees with Reserve obligations have become an increasing problem in recent years. Some of these employees have been denied promotions because they must attend weekly drills or summer training and other[s] have been discharged because of these obligations." S. Rep. No. 1477, at 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3421, 3421.

Likewise, the Supreme Court has observed that the purpose of the USERRA line of statutes is to protect reservists from the discrimination they face in their everyday employment. In *Monroe*, Justice Stevens, writing for the majority, said of USERRA's predecessor statute: "[T]he consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations." 452 U.S. at 560.

USERRA itself sought to reaffirm this goal by strengthening the protection provided by the statute. A House committee concluded that "the primary goals of the Committee, in undertaking the revision of chapter 43, were to clarify, simplify, and, where necessary, strengthen the existing veterans' employment and reemployment rights provisions." H.R. Rep. No. 103-65, at 18 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2449, 2457. Congress did not intend for USERRA to be a narrow statute. Instead, "The Committee intends that these anti-discrimination

provisions be broadly construed and strictly enforced." *Id.* at 23, 1994 U.S.C.C.A.N. at 2456.

Just as Title VII aims to protect victims of discrimination by ensuring that a person's sex, race, religion, or national origin do not motivate an employment decision, USERRA aims to protect reservists by ensuring that a person's military status does not motivate such a decision. When considered in light of USERRA's primary purpose, it is clear that USERRA should be enforced as it is written, so that employers may be held liable whenever military status is a "motivating factor" in an employment decision, provided that applicable agency requirements are met.

III. IN ORDER FOR THE MOTIVATING FACTOR LANGUAGE TO HAVE MEANING, USERRA MUST PROVIDE FOR EMPLOYER LIABILITY FOR THE BIASED ACTIONS OF EMPLOYEES WHO ACT AS AGENTS OF THE EMPLOYER

A. Well-established agency principles apply to USERRA.

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), Congress intended that general principles of agency would apply in cases of unlawful discrimination by employers and their agents.

The Supreme Court has consistently applied agency principles in the similar context of Title VII cases. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (applying principles of

agency law under Title VII). The Court has recognized that agency principles impute to the employer the actions of a biased employee that culminate in an unlawful employment practice. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 791-92 (1998) (holding that Title VII "expressed Congress's intent that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee was not otherwise obvious . . . .") (citations omitted); *Ellerth*, 524 U.S. at 754. As this Court has noted:

> An employer can, in a general sense, reasonably anticipate the possibility of such conduct occurring in its workplace, and one might justify the assignment of the burden of the untoward behavior to the employer as one of the costs of doing business, to be charged to the enterprise rather than the victim. . . . [D]evelopments like this occur from time to time in the law of agency.

Faragher, 524 U.S. at 798.

In addition, the lower courts routinely apply agency principles to USERRA. *See, e.g.*, *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 18-19 (1st Cir. 2007) (finding that discriminatory remarks of employees, even if made by non-decision-makers, can be attributed to the employer); *Maxfield v. Cintas Corp. No. 2*, 427 F.3d 544, 552 (8th Cir. 2005) (imputing a supervisor's decision to demote an employee to the company as a whole).

B. Imputation of bias under USERRA is not properly limited to situations where the final decision-maker is biased.

The Seventh Circuit's rule is that, in discrimination cases, employers are responsible for acts that result from the animus of final decision-makers *or* the animus of an intermediate supervisor—but only if that intermediate supervisor had a "singular influence" over the final decision-maker. This rule is contrary to the plain language of the statute and is inconsistent with the Court's cases on agency.

The Supreme Court has previously recognized the applicability of the "scope of authority" and "aided by agency" forms of agency in Title VII cases. *See Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 760. Limiting the application of agency principles to individuals who are the formal, ultimate decision-makers, as the Seventh Circuit has done, is inconsistent with both of those agency principles. Moreover, such a limitation would frustrate the primary purpose of the statute—to encourage noncareer service by protecting service members from discrimination—and would deprive plaintiffs of relief against employers who empower biased supervisors to cause adverse employment actions based on discriminatory motives.

Employment decisions often involve input and action by a wide range of supervisory and human resources employees. This is increasingly true today, when so many companies maintain offices in multiple locations and employ hundreds, or even thousands, of employees. Neither the plain language of USERRA, general agency principles, nor this

Court's reasoning in the similar context of Title VII limit agency to the "actual decision-maker" or to the person with "principal responsibility" or to the person officially delegated to act.

C. A supervisor's actions may be imputed to an employer when they fall within the supervisor's "scope of employment" or actual authority.

The Restatement (Second) of Agency (1958) ("the Second Restatement") is a useful starting point for the content and application of general agency principles.[4] The Second Restatement provides that agency principles impute to an employer an employee's conduct when the employee's conduct occurred within the scope of his or her employment or when an employee's act has been "aided by" the agency relationship. Second Restatement § 219(1) ("A master is subject to liability for the torts of his servants committed while acting in the scope of their employment."). The Second Restatement further states that, "[t]o be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized." *Id.* at § 229(1).

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[4] *See Ellerth* 524 U.S. at 755 ("[T]he Restatement (Second) of Agency (1957) (hereinafter Restatement), is a useful beginning point for a discussion of general agency principles.") (citation omitted); *Faragher*, 524 U.S. at 792 ("[A]lthough we cautioned that 'common-law principles may not be transferable in all their particulars to Title VII,' we cited the Restatement §§ 219-237, with general approval.") (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)). Under the Restatement (Third) of Agency, actions of employees within "the scope of employment" are also imputed to employers. *See* Restatement (Third) of Agency § 7.07 (2006).

Where bias taints an employment practice through the actions of a supervisor—such as the management and evaluation of subordinate employees—long-established agency principles dictate that the bias may be imputed to the employer.[5] This is true even when the ultimate result of the lower-level supervisor's discriminatory actions is something the employer never intended, or even something the employer attempted to prevent. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 544 (1999) (observing that the Second Restatement provided that intentional torts may be within the scope of an agent's employment "even if the employee engages in acts 'specifically forbidden' by the employer and uses 'forbidden means of accomplishing results'") (citing Second Restatement § 230); *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir. 1990) (holding an employee liable "as an agent acting within the scope of his authority, even though [his] conduct was willful and unauthorized") (citing Second Restatement § 231; Prosser & Keeton, On the Law of Torts 505 (5th ed. 1984)), *cited in Faragher*, 524 U.S. at 791. An employer may well wish to prevent a supervisor from making biased reports or recommendations about a subordinate employee, but when a supervisor nonetheless does so, the supervisor's wrongful act is within his or her scope of employment because the supervisor has behaved illegally while undertaking exactly the kind of task

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[5] Although this case involves the actions of a supervisor of Mr. Staub, the applicability of agency principles is not limited to supervisors of employees subjected to adverse employment actions but rather also extends to biased employees.

the employer has authorized the supervisor to undertake.[6]

IV. "MOTIVATING FACTOR" IS THE ONLY APPROPRIATE STANDARD FOR DETERMINING WHETHER A SUPERVISOR'S DISCRIMINATORY ACTIONS CAUSED AN ADVERSE EMPLOYMENT ACTION

USERRA prohibits employers from discriminating against employees "on the basis of" the employee's military service obligations. 38 U.S.C. § 4311(a). In 1994, Congress passed USERRA to clarify the causation standard required by its

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[6] On the facts here, all the relevant actions may properly be imputed to Proctor Hospital under an actual authority analysis. Those acts include: (i) Janice Mulally's placement of Mr. Staub in the weekend rotation, creating a conflict with his drill schedule; (ii) Ms. Mulally's decision to force Mr. Staub to use his vacation time for drill days; (iii) Michael Korenchuk's derisive statements about the merits of Mr. Staub's training; (iv) Ms. Mulally's phone call to Mr. Staub's reserve unit to determine whether Mr. Staub could skip his reserve training; and (v) Ms. Mulally's written warning that accused Mr. Staub of shirking his duties, a warning that was rooted in hostility toward Mr. Staub's service. Each of the kinds of action taken by Ms. Mulally and Mr. Korenchuk were tasks of the kind Proctor Hospital had delegated to them, and thus fell within the scope of their actual authority. Ms. Mulally, as second in command at Mr. Staub's department, was authorized to determine Mr. Staub's work schedule and was further authorized to evaluate his performance. Mr. Korenchuk, as head of the department, likewise was authorized to evaluate the merits of Mr. Staub's reasons for missing his shifts. Their actions may properly be imputed to Proctor Hospital even if the hospital never gave them the authority to carry out their supervisory tasks in a discriminatory way. *See, e.g.*, *Kolstad*, 527 U.S. at 544; *Ellerth*, 524 U.S. at 756.

predecessor statute. The 1994 change makes it explicit that an employer also may be found liable when it or its agents use military service as a factor in making an employment decision.

The statute provides that an employer has engaged in a prohibited action if:

> [U]nder subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor* in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service . . . .

38 U.S.C. § 4311(c)(1) (emphasis added).

Thus, under USERRA, if a plaintiff proves that the defendant acted "on the basis of" an individual's military service by showing that unlawful bias against that service was "a motivating factor" in the employment practice at issue, the employer may be held liable.[7]

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[7] In interpreting a statute, a court must first consider whether the statutory language "has a plain and unambiguous meaning." *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If it does, the court must end its inquiry, so long as the statutory scheme is "coherent and consistent." *Id.* (internal quotation marks omitted). Whether language is plain or ambiguous "is determined by reference to the language itself, the specific context in which the language is used, and the broader context for the statute as a whole." *Id.* at 341 (citations omitted). Courts must presume that "Congress 'says in a

The "motivating factor" standard in USERRA is satisfied if a plaintiff can show that the animus of an intermediate supervisor contributed to the adverse employment action.

A. The Seventh Circuit's "singular influence" standard is contrary to the plain language of USERRA and the intent of Congress.

The Seventh Circuit relies heavily on the "cat's paw" metaphor derived from Jean de la Fontaine's fable "The Monkey and the Cat," even though M. de la Fontaine contributed far less to American jurisprudence than he did to seventeenth century French poetry. The Seventh Circuit requires a plaintiff suing for discrimination to show that the discriminatory animus of the intermediate supervisor (the "monkey" in the fable) had a "singular influence" over the ultimate decision-maker (the "cat"), who acted in "blind reliance" on the biased supervisor's opinions. This "singular influence" standard has no basis in law and conflicts directly with the "motivating factor" language of USERRA.

In USERRA, as in Title VII, "motivating factor" means that the discrimination is "shown to play a role" in the adverse employment action. H.R. Rep. No. 102-40(I), at 48 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 586. To interpret the phrase as requiring a "singular influence" flies in the face of

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statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

the plain meaning of the statute and Congress's own clear statement of what those words mean.

Furthermore, Congress's primary purpose in enacting USERRA—to encourage noncareer service in the uniformed services by eliminating disadvantages to civilian careers—would be frustrated by the Seventh Circuit's test. The Seventh Circuit's holding allows employers to discriminate against their reservist employees and be free from liability so long as the final decision-maker did not harbor bias against that plaintiff due to his or her military status. Reservists, as a result, may often be exposed to employment discrimination in such contexts. Allowing companies to employ individuals who harbor and act on a bias against military service with impunity would contravene the statutory purpose of prohibiting discrimination.

B. The "causation" or "influence" standard of the majority of federal circuits, rather than the Seventh Circuit's "singular influence" test, is required by the plain language of USERRA and is faithful to Congress's intent.

While the lower courts have had little opportunity to address cases of "cat's paw" liability under USERRA,[8] they have analyzed such cases in other contexts, such as Title VII or the Age Discrimination in Employment Act. And in those

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[8] One exception is the Eleventh Circuit. *See Dees v. Hyundai Motor Mfg. Ala., LLC*, No. 09-12107, 2010 WL 675714, at *2 (11th Cir. Feb. 10, 2010) (analogizing USERRA to Title VII and allowing employer liability under USERRA if the employee "proves that the recommendation directly resulted in" the adverse employment action) (internal citation omitted).

cases, the Seventh Circuit is in the minority. Most courts have correctly held that bias is a "motivating factor" so long as the biased employee exerted influence over or contributed to the adverse employment decision. *See, e.g.*, *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (holding that a subordinate's bias is imputed to the employer if the plaintiff can prove that the biased subordinate "influenced or was involved in the decision or decisionmaking process"); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001) ("[I]t is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) ("[I]t is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decision-maker."); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) ("One method [of proving pretext] is to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker.").

Thus, the majority of circuits have understood that the "influence" or "causation" standard is in keeping with the "motivating factor" language of Title VII and USERRA. As the Ninth Circuit has recognized, courts that apply the "singular influence" test "seem[] to take the cat's paw metaphor too literally." *Poland*, 494 F.3d at 1182. Indeed, Judge Posner of the Seventh Circuit Court of Appeals, who coined the "cat's paw" phrase in the Seventh Circuit's opinion in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), has recently complained that courts

employing a "substantial influence" test misapply the original "cat's paw" formula: "The formula was (obviously) not intended to be taken literally ([the employer] employs no felines), and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).

V. APPLICATION OF THE "MOTIVATING FACTOR" STANDARD OF CAUSATION WILL NOT DEPRIVE EMPLOYERS OF A DEFENSE TO LIABILITY

Consistent application of the "motivating factor" causation standard would significantly clarify the substantive rights of employers and employees in employment discrimination cases. As a practical matter, however, it would not alter the procedural landscape and employers would still have a defense if they have not acted unlawfully.

To prevail under a motivating factor analysis, the employee must demonstrate the following: (i) supervisor bias; (ii) an agency relationship to impute liability to the employer; and (iii) that the supervisor's action was a motivating factor for the ultimate employment decision. *See* 38 U.S.C. §§ 4303(4), 4311(c)(1). A jury must therefore conclude that an improper discriminatory intent was a motivating factor.[9] Under USERRA, the employer is free from liability if "the employer can prove that the action would have been taken in the absence of such

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[9] At any time during the litigation, the trial court can, of course, apply the appropriate summary judgment analysis and determine whether there are contested issues of material fact warranting a decision by the fact finder and, if not, dismiss the claim.

membership, application for membership, service, application for service, or obligation for service. . . ." 38 U.S.C. § 4311(c)(1). Thus, assuming that the jury concludes that discrimination was a motivating factor, in appropriate cases the employer may still be able to limit its exposure if it can prove that it would have taken the same action "in the absence of" the protected classification, *i.e.*, if the employer can prove that the causal chain between the discriminatory conduct and the employment decision has been broken.

VI. IN EMPLOYMENT DISCRIMINATION CASES, EMPLOYER LIABILITY IS NECESSARILY BASED ON FACTUAL DETERMINATIONS, THUS FORM CANNOT BE ELEVATED OVER SUBSTANCE

The Seventh Circuit's "singular influence" standard is problematic for another reason. It elevates form over substance by allowing that an internal investigation—whether robust or completely inadequate—is enough to break any causal link between discriminatory animus and an adverse employment decision. As the court below noted:

> We admit that Buck's investigation could have been more robust, *e.g.*, she failed to pursue Staub's theory that Mulally fabricated the write-up; had Buck done this, she may have discovered that Mulally indeed bore a great deal of anti-military animus. But the rule we developed in *Brewer* does not require the decisionmaker to be a paragon of independence. It is enough that the decisionmaker "is not

> wholly dependent on a single source of information" and conducts her "own investigation into the facts relevant to the decision."

(JA 51a) (citation omitted)

Although an independent investigation of potential bias may be sufficient to break the causal chain in one case, it may be woefully insufficient in another, depending on the facts and circumstances of each case. As the unanimous Court so aptly explained in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 69 (2006), "[c]ontext matters. 'The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships . . . .'" (citing *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81-82 (1998)). What investigation an employer may, or may not, have performed may have relevance. Ultimately, the "context" in which the action takes place "matters" and requires a case-specific analysis that judges and juries can effectively perform.

The employment relationship is unique to each employer and its employees. And the facts surrounding "routine" employment decisions vary from workplace to workplace and from employee to employee. Although courts are not "super-personnel departments," they are charged with reviewing employment decisions that involve discrimination. *See Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006) (citing *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995)). There is no one type of investigation that, based on

its mere existence, should insulate the employer from liability.[10]

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[10] Nor may Respondent insulate itself from liability based on the mere existence of anti-discrimination policies. Courts have flatly rejected formalistic approaches that allow employers to insulate themselves from liability while permitting discrimination to continue. *See, e.g.*, *Vinson*, 477 U.S. at 72 ("[W]e reject petitioner's view that the mere existence of a grievance procedure and a policy against discrimination, coupled with respondent's failure to invoke that procedure, must insulate petitioner from liability. While those facts are plainly relevant, the situation before us demonstrates why they are not necessarily dispositive."); *see also Russell*, 235 F.3d at 227 n.13 ("If . . . we adhered to a rigid formalistic application, employers could easily insulate themselves from liability by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the 'actual decisionmaker' guideline."); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (holding that the "[decision-maker] rule was never intended to apply formalistically, and [thus] remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant"). Furthermore, there is no guarantee that a workplace policy would be effective in preventing and rooting out discrimination. Some researchers suggest that many of these policies are no more than symbolic statements against discrimination, with no practical or deterrent effect. *See* John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 Am. Soc. Rev. 794, 800 (1996); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 Law & Soc'y Rev. 497, 511 (1993).

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below and make clear what Congress already has made clear in USERRA: an employer can be held liable for the bias of a supervisor if the bias was a motivating factor for an adverse employment practice.

Respectfully submitted,

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