

No. 09-M-11

IN THE
Supreme Court of the United States

VINCENT E. STAUB,
Petitioner

v.

PROCTOR HOSPITAL,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the
Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals committed reversible error in determining that no reasonable jury could have concluded that the plaintiff was fired because he was a member of the military, where the undisputed facts in the record show that the unbiased decision maker terminated the plaintiff following an independent investigation?

CORPORATE DISCLOSURE STATEMENT

No. 09-M-11

Vincent E. Staub,

Petitioner

v.

Proctor Hospital,

Respondent.

As required by Supreme Court Rule 29.6, Respondent Proctor Hospital states as follows:

- (1) Proctor Hospital is a nongovernmental corporation;
- (2) Proctor Hospital's parent corporation is Proctor Healthcare Incorporated; and
- (3) No publicly held company owns 10% or more of Proctor Hospital's stock.

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STATEMENT OF THE CASE¹

Respondent, Proctor Hospital ("Proctor"), substantially disputes the facts recited in the Petition because they are incomplete, inaccurate, and in some instances not supported by the record. Proctor submits the following as facts material to the consideration of the question presented.

Proctor is a full-service health care facility serving the residents of Central Illinois. Proctor hired Staub in 1990, at which time he was a member of the United States Army Reserve. (Tr. 285-87.) Staub was employed as an angiography technologist ("angio tech") in Proctor's Diagnostic Imaging Department. The Diagnostic Imaging Department is physically divided into two areas -- one in which traditional diagnostic imaging services are performed (radiology, MRI, ultrasound, mammography, and CAT scan) and another in which angiography services are performed. Angio techs are qualified to work in either area of the Diagnostic Imaging Department. (Tr. 91, 114, 121.)

¹ The facts stated herein are set forth in the transcript of the trial proceedings and exhibits admitted at trial. References to the transcript are designated "Tr.", references to exhibits admitted by Plaintiff are designated "P. Ex.", and exhibits admitted by Defendant are designated "D. Ex.", followed by the page or exhibit number. Additionally, references to the Petition Appendix are designated by "App." followed by the page number and the letter "a".

The head of the Diagnostic Imaging Department was Michael C. Korenchuk, who reported to Proctor's Vice President and Chief Operating Officer, R. Garret McGowan. (Tr. 515.) Korenchuk was assisted by Jan Mulally, a staff technologist working in MRI who primarily performed mammography and related services. In addition to her clinical work, Mulally performed certain administrative tasks, such as preparing work schedules and assisting with employee evaluations. She had no authority to discharge employees. (Tr. 91-92, 141.)

The events leading to Staub's termination were triggered by concerns raised by Angie Day, another angio tech. In his Petition, Staub attempts to portray Day as a co-worker with military animus. However, Staub's Petition only cites to disputed factual allegations considered in pre-trial motions.² None of this purported evidence of military animus was admitted at trial. While evidence was presented that Day disliked Staub, there was absolutely no evidence linking Day's dislike of Staub to his military status. There was simply no evidence of military animus on the part of Day introduced at trial.

² Staub cites to Judge Joe Billy McDade's August 1, 2006 Order on Proctor's first motion for summary judgment, Magistrate Judge John Gorman's February 28, 2007 Order on motions in limine and Magistrate Judge Gorman's August 16, 2007 Order on Proctor's second motion for summary judgment.

On March 26, 2004, Day lodged a complaint against Korenchuk with Linda Buck, the Vice President of Human Resources. Day complained that Korenchuk had been disrespectful of her, chastising her loudly in front of other employees and blowing kisses at her. Day was so upset that she threatened to quit. Upon hearing this, Buck decided that Korenchuk's conduct should be brought to the attention of his boss, McGowan. Buck arranged a meeting between herself, Day, Korenchuk, and McGowan on April 2, 2004. (Tr. 74-76.)

During the April 2 meeting, Day repeated to McGowan her complaints about Korenchuk. Day went on to add that she had also complained to Korenchuk regarding Staub's behavior toward her and that Korenchuk had failed to act on her complaints. Day complained that Staub was unhelpful, abrupt, hard to work with, and would absent himself from the department. (Tr. 50-51.) After an apology from Korenchuk, Day left the meeting. (Tr. 77-78.) McGowan chastised Korenchuk for his conduct towards Day. McGowan then went on to discuss Staub. This was not the first time that McGowan had received complaints about Staub. McGowan had learned from various sources within Proctor that there were issues involving Staub's behavior. (Tr. 78, 517.) In fact, McGowan and Korenchuk had discussed Korenchuk's apparent inability to manage Staub prior to the April 2 meeting. (Tr. 516.) The April 2 meeting ended with McGowan directing Korenchuk to work with Buck to develop a plan of action for dealing with Staub's behavior. (Tr. 78, 518.) There is absolutely no

evidence in the record that McGowan, a four-year veteran who served with the First Marine Division in Vietnam running an intensive care facility in the field, harbored any animus toward Staub on account of his military service. (Tr. 514-15.)

Day's comments at the April 2 meeting were not the first negative reports Buck had heard regarding Staub. Buck began her employment at Proctor in November 2001 and almost immediately began receiving reports critical of Staub's behavior. (Tr. 51.)

- In early 2002, Employment Specialist Mandy Carbiledo told Buck that Cindy Herbold, a recently hired angio tech, quit because she could not work with Staub. Herbold complained that Staub made her "feel like the gum on the bottom of his shoe." (Tr. 52, 67.) No evidence of military animus on the part of Carbiledo or Herbold was presented at trial.
- In November 2002, Nurse Recruiter Sheila Johnson informed Buck that a registered nurse in angiography had quit, and that Johnson had a difficult time recruiting nurses to work there because of Staub's reputation and because people did not want to work with him. (Tr. 67-68.) No evidence of military animus on the part of Johnson was presented at trial.
- Also in 2002, Doneda Halsey, who arranges on-site visits to Proctor for radiology school students, complained to Buck about Staub's

inappropriate flirtatious behavior toward the students. (Tr. 69.) No evidence of military animus on the part of Halsey was presented at trial.

- In January 2004, Brenda Carothers, Proctor's Director of Human Resources, informed Buck that Staub was receiving a written Corrective Action for failing to assist in Diagnostic Imaging. The discipline included a mandate that Staub must remain in Diagnostic Imaging unless he first told Korenchuk and Mulally that he was going elsewhere. While the Corrective Action was drafted by Mulally, it was Carothers who recommended the Corrective Action after she personally investigated the allegations against Staub.³ (Tr. 57, 73; P. Ex. 17.) Carothers also discussed the matter directly with Staub. (Tr. 347.) No evidence of military animus on the part of Carothers was presented at trial.

Pursuant to McGowan's directive, Korenchuk and Buck decided to meet in Buck's office on the afternoon of April 19, 2004, to develop a plan of action for dealing with Staub's behavior. When Korenchuk arrived, he told Buck that he had just been looking for

³ Staub's Petition glosses over this point. Mulally first raised the incident by going to Carothers. Carothers, after completing her own investigation, determined that the discipline was proper. Mulally penned the discipline, but it was Carothers who approved it. (Tr. 57, 73, 161-62.)

Staub and could not find him. Upon hearing this statement, Buck told Korenchuk "I think we need to terminate him." (Tr. 79.) No evidence of military animus on the part of Buck was presented at trial.

However, before terminating Staub, Buck gave herself time to reflect and to review Staub's personnel file. (Tr. 62, 80-81.) The personnel file contained additional examples of Staub absenting himself from the Department and failing to follow directives.

- In 1998, Staub was fired for failure to follow Korenchuk's order that he work past 5 p.m. on June 25, 1998. (D. Ex. 1.)
- Staub grieved his 1998 discharge and was reinstated with conditions, including the following: "You will communicate with your supervisor whenever you are leaving the work area." (D. Ex. 2.)
- 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 work hours." (D. Ex. 18.)
- 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 Diagnostic and work needs to be done in both areas.” (P. Ex. 32.)

Buck decided to move forward with Staub’s termination. She prepared the termination notice to give to him. Korenchuk brought Staub to Buck’s office. (Tr. 80-81.) 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. (Tr. 361-63.)

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 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. (Tr. 81, 363; P. Ex. 28.)

Buck reviewed Staub’s grievance, considered Staub’s version of events, and investigated his claims that the January 27, 2004 discipline was false. Ultimately, Buck determined that the termination decision should stand and notified Staub of her

decision by letter on May 3, 2004. (Tr. 62-65, 81-84; D. Ex. 59.) On May 5, 2004, Staub filed another grievance directly with Proctor's President and Chief Executive Officer Norman LaConte. (Tr. 363; P. Ex. 27.) However, before LaConte could consider the grievance, Staub filed the instant action in the United States District Court for the Central District of Illinois. (Tr. 520.)

ARGUMENT

- I. **This Case Is Not A Proper Vehicle For Considering The Appropriate Standard Of Influence Necessary To Impute The Animus Of A Non-Decision Maker To An Employment Decision Because The Resolution Of That Issue Would Not Alter The Outcome Of This Case.**

The circuit court disagreement raised in Staub's Petition regarding the standard of influence needed to impute discriminatory animus of a non-decision maker to an employment decision (often referred to as the cat's paw doctrine) is inapposite to the outcome of this case. Even if a different "standard of influence" were applied here, the outcome would still be the same because Buck's independent investigation broke any causal link between Mulally's and Korenchuk's alleged military animus and Staub's termination.

There is no disagreement or split among the circuit courts of appeal regarding the impact that a decision maker's independent investigation has on a plaintiff's ability to impute a non-decision maker's

animus to an employment decision. The circuit courts are in agreement that where a final decision maker bases her decision on an independent investigation, 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. *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 College*, 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 v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992) (finding that animus of Wilson's supervisor was not imputed to employer because decision was based on independent investigation); *Brewer v. Board of Trustees of University of Illinois*, 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 v. Sugg*, 448 F.3d 1046, 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, 640-41 (9th Cir. 2004) ("Vasquez has not shown the necessary nexus because [the decision maker] conducted her own investigation"); *English v. Colorado 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"); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (finding no liability where decision maker met with plaintiff and gave her opportunity to explain).

The undisputed facts in this case demonstrate that in terminating Staub, Linda Buck, Proctor's Vice President of Human Resources, received and considered information regarding Staub absenting himself from the Diagnostic Imaging Department and failing to follow directives, from various, unbiased sources other than Mulally and Korenchuk.

First, 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. (Tr. 50-51, 77.) As previously discussed in Proctor's

Statement of the Case, despite Staub's best attempts to portray Day as an individual with military bias, there was no evidence admitted at trial demonstrating such.

Second, Garret McGowan, Proctor's Chief Operating Officer expressed concerns about Staub's 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. (Tr. 78.) As a result, McGowan directed Buck and Korenchuk to come up with a plan to address Staub's behavior. (Tr. 78, 518.)

Third, 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 directives documented by various, unbiased supervisors and officials of Proctor. (Tr. 62, 80.) That included Staub's termination in 1998 for failure to follow an order, and his reinstatement with conditions such as "You will communicate with your supervisor whenever you are leaving the work area." (D. Ex. 2.)

Additionally, Buck received information from Brenda Carothers, Proctor's Director of Human Resources, pertaining to the events described in the

January 2004 Corrective Action.⁴ While Mulally prepared the document, it was Carothers who recommended the issuance of the Corrective Action following her investigation of the allegations against Staub. Carothers spoke to Staub directly about the events set forth in the Corrective Action. (Tr. 57, 345-47.) There is no evidence in the record that Carothers was biased against Staub.

Moreover, during his termination meeting and again in connection with her review of Staub's written grievance, Buck considered Staub's version of the events giving rise to his discharge. She gave him the opportunity to present his side of the story. (Tr. 81, 361-63.) This further illustrates 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; *Llampallas*, 163 F.3d at 1249.

Simply put, Buck based her termination decision on her own independent investigation 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. The Seventh Circuit Court of Appeals concurred:

⁴ Staub's co-worker Leslie Sweborg, who is not a member of the military, also received a Corrective Action in January 2004 for the same reasons Staub did. (Tr. 74.)

[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.

(App. 20a-21a.)

Therefore, no matter what “standard of influence” is applied to this case, the outcome will be the same -- Buck’s independent investigation broke any causal link between Mulally’s and Korenchuk’s alleged military animus and Staub’s termination. As there is no disagreement among the circuit courts of appeal regarding this issue -- the fact that an independent investigation breaks any causal connection between allegedly biased non-decision makers and the ultimate termination decision -- this case is not the proper vehicle for deciding the appropriate “standard of influence” under the cat’s paw doctrine. Therefore, Staub’s Petition for Writ of Certiorari should be denied.

II. This Case Presents A Poor Vehicle For Considering The Legal Question Posed Because It Requires An Intricate Study of Salient Details Buried In The Record But Unaddressed By The Petition.

In an effort to entice the Court to take this case, Staub has attempted to present it as a simple, straightforward legal issue involving minimal facts. Such is not the case. There are several hundred pages of trial transcript and numerous exhibits bearing on the subtleties of the alleged cat's paw in this case, many of which have gone unaddressed in the Petition. For example:

- Unaddressed is the fact that Linda Buck received information regarding Staub from Garret McGowan, Proctor's Vice President and COO -- an undisputedly non-biased source.
- Unaddressed is the fact that Linda Buck had information from Employment Specialist Mandy Carbiledo -- an undisputedly non-biased source -- that at least one angio tech had quit because of Staub's attitude and conduct.
- Unaddressed is the fact that Linda Buck had information from Nurse Recruiter Sheila Johnson -- an undisputedly non-biased source -- that another employee had quit, and that Johnson generally had trouble recruiting employees for angiography, because of Staub's attitude and conduct.

- Unaddressed is the fact that Linda Buck had received complaints from Doneda Halsey -- an undisputedly non-biased source -- about Staub's inappropriate behavior towards radiology students.
- Unaddressed are the actual circumstances surrounding Staub's receipt of the January Corrective Action, which are incorrectly portrayed in the Petition. Proctor's Director of Human Resources, Brenda Carothers *personally* investigated the circumstances surrounding the January Corrective Action, *personally* recommended that the Corrective Action be issued, and *personally* discussed the matter with Staub. It was undisputed that Carothers harbored no animus toward Staub.
- Unaddressed is Staub's true tract record at Proctor, which has been inaccurately depicted as that of an exemplary employee. Staub may have been an angio tech at Proctor for a total of 14 years, but that period was interrupted by his termination for insubordination and repeated refusals to cooperate with Proctor's directives.
- Perhaps most fundamental, unaddressed is the actual trial evidence regarding the actions of Angie Day. In his Petition, Staub tries to paint Day as a co-worker loaded with military animus. To the contrary, there was no such evidence of bias presented at trial.

Staub would like this Court to believe that he is a patriot victimized by a workplace conspiracy -- and nothing else. Swept under the carpet are all of the complaints, the attitude problems, the refusals to cooperate and contribute while in the workplace. Likewise absent from his Petition are any discussion of his prior termination and any reference to the host of non-biased sources who reflect the collective view that Staub was simply a bad egg.

The full slate of facts appears in the record. However, the task of locating and reconciling those facts with the spotty version presented in Staub's Petition is daunting. This case is not a straight shot, light on facts and primed for appeal. To the contrary, it will require a fact-intensive analysis, an exercise that, given the other points raised by Proctor in this brief, ultimately will serve none of the purposes outlined in Supreme Court Rule 10. As a result, Staub's Petition should be denied.

III. Petitioner's Current Arguments Are Contrary To His Position Below And Represent An Attempt To Entice The Court To Take An Ill-Suited Case On The Sole Basis That It Involves The Cat's Paw Doctrine.

Until arriving on the Supreme Court's doorstep, this case has *never* been about the appropriate standard to apply. The Petition for Writ of Certiorari should be denied: (1) because Staub never argued for a different standard -- not at the district court level,

not on appeal, and not even in asking for reconsideration by the Seventh Circuit *en banc*; (2) because Staub in fact endorsed and argued *in favor of* the Seventh Circuit's standard articulated in *Brewer*; and (3) because the litigation has now been contorted in an attempt to persuade this Court to accept a cat's paw case regardless of the issues in dispute.

This Court's practice is to decline to decide issues not raised or resolved in the lower courts. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001). The current argument advanced by Staub is just that -- one that he failed to raise or have resolved in the lower courts. Despite numerous opportunities, including two briefs to the Seventh Circuit as well as on oral argument, Staub failed even to suggest that a different standard may be appropriate.

Staub never asked the Seventh Circuit to apply -- or even consider applying -- a different standard. His failure to object to the application of *Brewer*-- and in fact his argument *in favor of it* -- deprived the appellate court of an opportunity to reexamine the validity of the standard.

This case has never been a contest regarding the appropriate standard of influence a non-decision maker must have to impute her animus to an employment decision. To the contrary, Staub has been a continuous advocate of the Seventh Circuit's standard throughout, arguing instead that Buck's investigation was not adequate -- until now.

Staub's briefs bear this out, demonstrating that the validity of the *Brewer* decision's standard on the level of influence has never been at issue. In his appellate brief, Staub first attempted to argue that this was not a cat's paw case at all, an argument properly rejected by the Seventh Circuit as not having been raised below. Staub then went on to stress the appropriateness of the Seventh Circuit's standard:

This Circuit, like other circuits, has worked carefully to craft an appropriate standard for imputing subordinate bias to a decisionmaker. The *Brewer* case resolved the previous confusion with two simple expressions of the appropriate standard: The subordinate must exert "singular influence" over the decisionmaker, and an employer may avoid such a finding if the decisionmaker conducts a truly "independent investigation" into the underlying circumstances.

(Staub App. Br. 34.) Staub also made no argument whatsoever against the Seventh Circuit's standard in his Petition for Panel Hearing and Rehearing *En Banc*. Rather than argue for a new standard, as he would have done had it truly been an issue in this case, Staub again argued *in favor of Brewer* -- contending that the Seventh Circuit's reversal was contrary to

*Brewer, Hill*⁵, and the portion of *BCI Coca-Cola*⁶ regarding the adequacy of the independent investigation:

The Panel decision conflicts with the Court's decision in *Brewer v. Board of Trustees* and the decisions of the Fourth and Tenth Federal Court of Appeals.

* * *

Contrary to its prior decision in *Brewer v. Board of Trustees*, the Panel decision has held that an employee fired for misconduct cannot, as a matter of law, establish singular influence supporting a cat's paw theory if a decision maker simply reviews the employee's personnel file without independently investigating the animus-driven charges of misconduct which caused the termination.

Brewer requires that a decision maker independently investigate the charges of misconduct before the employer can be absolved of liability....*Brewer* holds that

⁵ *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004).

⁶ *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006).

the employer “will not be liable...so long as it independently considers both stories.” Here, there was no independent investigation.

(Emphasis in original; citations omitted.) (Staub Pet. for Panel Hr’g 1, 4-5.)

Addressing the argument that Staub actually raised, the Seventh Circuit held that Buck’s investigation *was* adequate: “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.” (App. 21a.)

The current Petition represents a forced attempt to thrust an off-point cat’s paw matter before this Court on issues not dispositive in this case. Rather than appealing on issues consistent with his ongoing theory of the case, Staub now tries to mold his argument into a dispute among the circuits about the appropriate standard regarding level of influence, abandoning his long-standing position that the *Brewer* standard is correct and that Buck did not conduct an adequate independent investigation.

This Court has always acted in a reasoned, practical fashion, accepting only those cases that address clear points of contention that have been fully litigated by the parties, and that maximize judicial resources. Here, Staub attempts to push a square peg

through a round hole. Unsurprisingly, the fit is not a good one. While the Court may wish to address the “standard of influence” under the cat’s paw doctrine in an appropriate case, this simply is not it.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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