No. 09-

In The

SUPREME COURT OF THE UNITED STATES

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?

PARTIES

The petitioner is Vincent E. Staub. The respondent, Proctor Hospital, is a subsidiary of Proctor Healthcare, Inc.

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Petitioner Vincent Staub respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 25, 2009.

OPINIONS BELOW

The March 25, 2009 opinion of the Court of Appeals for the Seventh Circuit, which is reported at 560 F. 3d 647 (7th Cir. 2009), is set out at pp. 1a-21a of the Appendix. The April 28, 2009 order of the Court of Appeals, denying rehearing and rehearing en banc, which is not reported, is set out at p. 22a of the Appendix. The May 7, 2008 opinion and order of the District Court, which is unofficially reported at 2008 WL 2001935 (C.D.Ill. 2008), is set out at pp. 23a-31a of the Appendix. The August 16, 2007 order of the District Court, which is unofficially reported at 2007 WL 2566259 (C.D.Ill. 2007), is set out at pp. 32a-38a of the Appendix. The February 28, 2007 order of the District Court, which is not reported, is set out at pp. 39a-47a of the Appendix. The August 1, 2006 order of the district court, which is not reported, is set out at pp. 48a-57a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on March 25, 2009. A timely petition for rehearing and rehearing en banc was denied on April 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4311(a) of 38 U.S.C., a provision of the Uniformed Services Employment and Reemployment Rights Act, provides:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

Section 4311(c) of 38 U.S.C. provides in pertinent part:

> An employer shall be considered to have engaged in actions prohibited -- (1) under 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 . . . .

Section 4303(13) of 38 U.S.C. provides in pertinent part:

> The term "service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty . . . .

STATEMENT OF THE CASE

This case presents the important question described by Justice Alito in his concurring opinion in Ricci v. DeStefano, 129 S.Ct. 2658, 2688-89 (2009): in what circumstances can an employer be held

liable based on the unlawful intent of officials or employees who did not make the formal decision to take the action complained of? Petitioner's claim arose under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the relevant terms of which are essentially the same as Title VII. A jury found that Staub had been dismissed from his job as a hospital technician because of his service in the United States Army Reserves. The Seventh Circuit set aside that verdict and ordered dismissal of the action, reasoning that under the stringent Seventh Circuit standard the unlawful intent of the officials who allegedly brought about Staub's dismissal could not be attributed to the employer. (App. 18a-21a).

Petitioner Staub is a First Sergeant in the United States Army Reserves, in which he has served since 1984. At the time of the events giving rise to this action he was the Noncommissioned Officer In Charge of the Department of Radiology in either the 801st Combat Support Hospital at Fort Sheridan, Illinois, or the 114th Combat Support Hospital at Fort Snelling, Minnesota. His obligations to the Reserves included one weekend a month of drill and an additional training period of two to three weeks each year. Staub was called to active duty in early 2003 in connection with Operation Iraqi Freedom, and served for several months at Ft. Stewart/Ft. Gordon Georgia, instructing Army personnel on how to establish a Radiology unit in a field hospital in a combat environment.

For fourteen years prior to his dismissal Staub was an

angiography technician in the Diagnostic Imaging Department of the Proctor Hospital in Peoria, Illinois. In late 2000 Janice Mulally became the second in command of the Department[1], and she grew increasingly hostile to Staub's service in the Reserves.[2] "Mulally's negative opinion of Staub's military service and the effects of that service is well documented in the record." (App. 55a).[3]

Prior to Mulally's appointment Staub had weekends off, and thus was able without difficulty to meet his obligation to train with his unit one weekend per month.

> Mulally placed Staub back in the weekend rotation, creating conflicts with his drill schedule. Mulally did this even though she had advance notice of Staub's military obligations, and when Staub approached her about the issue she became agitated. . . . Mulally responded to Staub's questions by throwing him out of her office and saying she "didn't want to deal with it."

(App. 4a; see App. 40a, 50a). "[O]ccasionally Mulally made Staub use his vacation time for drill days or scheduled him for

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[1]"The record shows that the de facto supervisor for the angio techs . . . was Jan Mulally. . . . Mulally was also in charge of scheduling for the department." (App. 49a).

[2]The Statement of the Case summarizes the evidence adduced at trial in support of Staub's claims. There was conflicting evidence regarding many of the important factual allegations. For example, Mulally and Korenchuk (the head of the Department) disputed testimony that they had made remarks and taken actions indicating hostility towards Staub's military service.

[3]There was, the court of appeals acknowledged "abundant evidence of Mulally's animosity" (App. 18a), and at least "part of this animus flowed from [Staub's] membership in the military." (App. 8a). See App. 19a (testimony regarding Mulally was "the strongest proof of anti-military sentiment"), 33a (record is "'well documented' that Mulally had negative opinion about Staub's military service").

additional shifts without notice." (App. 4a). "Sometimes Mulally . . . would post a notice on the bulletin board stating that volunteers were needed to cover the drill weekends, portraying Staub as irresponsible." (Id.). Her actions "had the effect of breeding resentment and animosity toward Staub among his co-workers." (App. 50a; see App. 40a).

> Mulally made her reasons plain: She called Staub's military duties "bullshit" and said [having to work] the extra shifts were his "way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves."

(App. 4a).

> Bad as that was, things became worse in 2003 [when] Staub was called to active duty . . . Staub's return home was less than pleasant. Korenchuk told one of Staub's coworkers, Amy Knoerle, that Mulally was "out to get" Staub. . . . [W]henever Staub approached Mulally about drill obligations, Mulally would roll her eyes and make sighing noises.

(App. 4a-5a).[4]

In July of 2003 Mulally complained to several of her subordinates that Staub's "military duty was a strain on the [] department," and sought assistance to "get rid of him." (App. 5a). In early 2004 Mulally called the administrator of Staub's Army Reserve unit, Joseph Abbidini, to ask if Staub could be excused from some of his military duties. When Abbidini explained that the training was mandatory, Mulally "called Abbidini an 'asshole' and hung up." (App. 8a; see App. 40a-41a, 50a). Mulally scheduled

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[4]The actual testimony was that when Staub attempted to discuss his Reserve obligations with Mulally, she told him to "get the F--- out" and referred to his Reserve duties as "bullshit." (Tr. 312, 315).

Staub to work during every one of his drill duty weekends in 2004, as well as during the period when he was required, in anticipation of being recalled to active duty, to report for soldier readiness training. (Tr. 352).

The head of the Department, Michael Korenchuk, on a number of occasions also expressed hostility to Staub's reserve duties.

> [T]hose comments were none too subtle. Korenchuk characterized drill weekends as "Army Reserve bullshit" and "a b[u]nch of smoking and joking and [a] waste of taxpayers[']money."

(App. 4a). Korenchuk "refused to give Staub additional time necessary for travel when he was training in Minnesota." (App. 50a; see App. 41a). Korenchuk objected that Staub's 2003 call-up had been costly to the hospital, and expressed unhappiness that the call-up anticipated in 2004 would also be expensive for the employer. (Tr. 102-03, 329, 337).

There was also evidence of similar anti-military sentiment on the part of a sometime co-worker, Angie Day. "Day . . . shared Mulally's dislike of Staub." (App. 5a). On occasions when Day was assigned to be "on call" because Staub was on Army Reserve duty, she objected vociferously and refused to accept that assignment. (App. 44a (Day's complaints "linked the 'inconvenience' to Staub's military service"), 56a). Shortly after Proctor hired a new angiography technician, Leslie Sweborg, Day invited Sweborg to a private after-hours meeting with Mulally, who supervised Sweborg and Day as well as Staub. Mulally announced that "[Staub's] military duty had been a strain on the [] department," and asked

Sweborg "to help her get rid of him." (App. 5a).[5] The Magistrate Judge noted that the testimony indicated that there was "a conspiracy to cause Staub to be fired from his job at Proctor." (App. 53a; see App. 33a).[6] In the months that followed, Day provided hospital officials with adverse information about Staub, information which Staub and Sweborg both insisted was untruthful. (App. 8a, 44a).[7]

> Due to her involvement in the alleged conspiracy against Staub, there is a factual question as to whether statements she gave [to hospital officials] were truthful, and also whether those statements tainted the decision-makers in Staub's firing with her apparent prejudices.

(App. 56a). At the time when Staub was dismissed, Day was working for Proctor on only an occasional part-time basis. "Mulally . . . facilitated Day's rehiring to the angio lab at Proctor, seven days after Staub was terminated." (App. 51a). Day was given the vacancy created by the dismissal of Staub.

The dismissal of Staub was rooted in two incidents in early 2004, the facts of which were hotly disputed. In January 2004--two weeks after Staub informed his supervisors that he was likely to be recalled to active duty--Mulally issued a serious (and

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[5]Sweborg refused. (App. 5a).

[6]The Magistrate Judge noted that there was a factual question as to the truthfulness of statements Day had made to Buck "[d]ue to her involvement in the alleged conspiracy against Staub." (App. 56a).

[7]"While defendant argues that Day played no part in the decision to terminate Staub, to the extent her animosity conveyed misleading information to Buck, it may be attributable to Buck . . ." (App. 44a).

controverted) disciplinary warning to Staub (and Sweborg), asserting that they had improperly failed to assist with diagnostic imaging procedures outside the Angiography Lab. Mulally asserted that at the time in question Staub and Sweborg had no work of their own in the Angiography Lab; Staub and Sweborg testified to the contrary, and pointed to records indicating that a patient was scheduled for and present in the Lab in that period. Mulally contended Staub and Sweborg flatly refused to assist in other procedures; Staub and Sweborg stated that they had done so within a few minutes after their own patient cancelled. Mulally asserted that Staub and Sweborg had violated a standing order that all angiography technicians were to go the general diagnostic imaging unit whenever there was no angiography patient; Staub and Sweborg insisted there was no such order. As a result of this disciplinary warning, Staub (and Sweborg) were ordered never to leave the diagnostic area "unless [he] specified to [Korenchuk] or [Mulally] where and why [he should] go elsewhere." (App. 6a-7a).

The second incident occurred on April 20, 2004, the day Staub was fired[8]; here too the key facts were the subject of conflicting testimony. According to Staub and Sweborg, after working all morning in the Angiography Lab, they finished at lunch time and decided to go to lunch. Mindful of the January warning, they went

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[8]Buck insisted that the incident occurred on the 19th, and that pursuant to her invariable practice she had waited 24 hours before firing Staub. Korenchuk as well as Staub and Sweborg testified that the incident occurred on April 20. The court of appeals, assuming a somewhat unusual role, "f[ou]nd the collective recollection of Staub, Sweborg, and Korenchuk more credible." (App. 9a n. 3).

to Korenchuk's office, but he was not there; Staub then called and left a voicemail on Korenchuk's phone, explaining that he and Sweborg would be in the hospital cafeteria. Staub and Sweborg returned to the Angiography Lab within 30 minutes. Korenchuk told a very different story to Linda Buck, the official who made the formal decision to discharge Staub. Korenchuk assertedly complained to Buck that he had been unable to find Staub all morning, and that Staub had not reported in as directed. (App. 9a-10a). According to Buck, Korenchuk did not mention the explanatory telephone message which he had received. Whether or not Korenchuk's statements to Buck were truthful or complete, once Korenchuk so reported to Buck--and before Staub was told of Korenchuk's accusations--Buck decided to dismiss Staub.

> Korenchuk escorted Staub down to Buck's office . . . , picking up a security guard along the way. . . . [T]he decision to terminate was already made. As Staub walked into the room, Buck handed him his pink slip. The guard then escorted him off the grounds.

(App. 9a-10a).

Staub subsequently filed a grievance contesting his termination, and asserting, inter alia, that the critical January 27 warning directive

> was fabricated by Mulally to get him in trouble. Buck did not follow up with Mulally about this . . . and she did not investigate Staub's contention that Mulally was out to get him because he was in the Reserves.

(App. 11a). "Buck . . . 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." (App. 20; see App. 10a ("Buck failed to speak with other

angio techs who worked with Staub")).

At trial there was sharply conflicting testimony about many of the relevant facts, including the alleged anti-military remarks of Mulally and Korenchuk, and the events of January 27 and April 20.[9] Proctor "dispute[d] the vast majority of the facts" adduced by Staub. (App. 56a). "[T]he testimony and documentation about who said what to whom was hotly contested." (App. 25a). "There remain[ed] a question of fact about the degree of Mulally's influence." (App. 38a). The magistrate judge who presided over the case observed that "given the testimony about . . . Korenchuk's role . . . it was not inherently unreasonable or improper for the jury to have disbelieved crucial parts of the testimony offered by . . . Buck and . . . Korenchuk." (App. 26a). "The extent to which the decision to terminate's Staub's employment was colored by the negative attitudes of Mulally and Staub's co-workers was . . . a question of fact." (App.33a-34a). These wide ranging factual disputes were fully aired at trial; the jury returned a verdict in favor of Staub. (App. 12a, 23a).[10]

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[9]In denying Proctor's motion for summary judgment, the Magistrate Judge noted that "[t]he evidence presented by the two sides indicates important factual inconsistencies which must be clarified before a jury." (App. 54a).

[10]The jury returned the following verdict:

1. Has Plaintiff proved by a preponderance of the evidence that Plaintiff's military status was a motivating factor in the decision to discharge him?
   Yes.
2. Has the Defendant proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his military status?
   No.
3. Under the law given you in these instructions, did

The controlling issue on appeal was whether liability could be imposed on Proctor based on the unlawful motives of officials or employees other than Buck. Staub did not contend that Buck herself harbored any animus based on his military service. Rather, Staub argued that Mulally, Korenchuk and Day objected to Staub's weekend and summer Reserve drills and to his active duty Army service. Staub maintained that the actions of Mulally, Korenchuk and Day, including providing inaccurate information to Buck, tainted the decision of Buck, the formal decisionmaker. "The case made it to trial on this theory, where the jury apparently found it convincing." (App. 12a). In the court of appeals, Proctor argued that under controlling Seventh Circuit precedent an employer could only be held liable for the unlawful motives of the formal decisionmaker, or of another individual who so dominated the decisionmaking process as to constitute the "functional decisionmaker."[11]

The court of appeals agreed, holding that any influence the anti-military officials had on Buck was legally irrelevant.

> We were [in prior decisions], and remain to this day, unprepared to find an employer liable based on a nondecisionmaker's animus unless the "decisionmaker" herself held that title only nominally.

(App. 15a). Thus in the Seventh Circuit it is not sufficient for a plaintiff to show that other company officials, acting with an

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> the Defendant act willfully in violation of USERRA in discharging Plaintiff?
>
> No.

(Court of Appeals Record, at 102; Judgment, Docket No.104).

[11]Brief of Defendant-Appellant Proctor Hospital, at 15, 17, 18.

unlawful purpose, caused the ultimate decisionmaker to advance--unawares--their illegal motive. The court of appeals ruled that proof of the motives and actions of persons other than the ultimate decisionmaker are legally insufficient--indeed, inadmissible--except in the rare case in which the ultimate decisionmaker was guilty of "blind reliance" on those other improperly motivated individuals. (App. 21a). To succeed under this stringent standard, the court explained, a plaintiff must show that the ultimate decisionmaker was "wholly dependent on a single [tainted] source of information." (App. 15a)(quoting Brewer v. Board of Trustees of University of Illinois, 479 F. 3d 908, 918 (7th Cir. 2008)).

The court of appeals acknowledged that the actions of Mulally, Korenchuk and Day[12] had all played a role in Buck's decision. "Without the January 27 write-up, Day's April 2 complaint, and the event on April 20 . . . Buck said she would not have fired Staub." (App. 10a; see id. ("Buck's testimony made clear that . . . she relied on Korenchuk's input")). But under the Seventh Circuit standard that was insufficient as a matter of law. Rather, the court below held, the defendant immunized itself from liability by adducing testimony by Buck that she had relied in part on sources of information other than those three assertedly biased employees.

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[12]The court of appeals did not discuss Staub's contention that Day too was hostile to Staub's military service. Under the Seventh Circuit's standard it would not have mattered if Day had indeed acted with such an unlawful purpose, because Buck testified that she had relied in part on information that was not connected to Day, Mulally or Korenchuk.

(App. 20a)[13]. The court of appeals therefore held that it was improper to admit any of the evidence that Mulally or Korenchuk harbored animus toward Staub because of his military service. Because under the Seventh Circuit's legal standard the employer was responsible only for Buck's motives, and because Staub had never claimed that Buck herself shared the anti-military animus of the others, the court of appeals overturned the jury verdict, and directed entry of judgment for the defendant. (App 21a).

Staub filed a timely petition for rehearing en banc. The petition was denied on April 28, 2009. (App. 22a).

REASONS FOR GRANTING THE WRIT

I. THERE IS A DEEPLY ENTRENCHED CONFLICT AMONG THE COURTS OF APPEALS REGARDING WHEN AN EMPLOYER MAY BE HELD LIABLE FOR THE UNLAWFUL MOTIVES AND ACTIONS OF AN OFFICIAL OTHER THAN THE FORMAL DECISIONMAKER

As Justice Alito noted in his concurring opinion in Ricci, there is

> an important question of Title VII law that this Court has never resolved--the circumstances in which an employer may be held liable based on the discriminatory intent of subordinate employees who influence but do not make the ultimate employment decision. There is a large body of court of appeals case law on this issue, and these cases disagree about the proper standard.

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[13]Buck testified that she had also considered a number of other matters which were not connected to Mulally, Korenchuk or Day, testimony which the appellate court apparently regarded as both truthful and conclusive. (App. 10a). The termination notice given to Staub at the time of his dismissal made no mention of any of this other information. (Id.).

129 S.Ct. at 2688. That identical question[14] has arisen under a wide variety of federal statutes[15], including in the instant case USERRA, whose relevant provisions are essentially the same as Title VII.[16] The lower courts have uniformly assumed that the applicable legal standard is the same under all of these laws. The Seventh Circuit decision in the instant case applied the standard which that circuit has fashioned for and utilizes in Title VII cases.[17]

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[14]Although in many situations the biased official is a subordinate of the formal decisionmaker, that is not invariably the case. In Ricci, for example, the assertedly biased Mayor was not a subordinate of the formal decisionmaker, the New Haven Civil Service Board.

[15]Parker v. Verizon Pennsylvania, Inc., 309 Fed. Appx. 551, 559 (3d Cir. 2009)(Family and Medical Leave Act); Davila v. Corporacion de Puerto Rico Para La Difusion Publica, 498 F. 3d 9, 17 n. 3 (1st Cir 2007)(Age Discrimination in Employment Act); Jerge v. City of Hemphill, Texas, 80 Fed. Appx. 347, 351 (5th Cir. 2003)(section 1983); Laxton v. Gap, Inc., 333 F. 3d 572, 584 (5th Cir. 2003)(Pregnancy Discrimination Act); Freadman v. Metropolitan Property and Casualty Ins. Co., 484 F. 3d 91, 100 n. 8 (1st Cir. 2007)(Americans With Disabilities Act); Christian v. Wal-Mart Stores, 252 F. 3d 862, 876-78 (6th Cir. 2001)(Title II of the 1964 Civil Rights Act); Roebuck v. Drexel University, 852 F. 2d 715, 727 (3d Cir. 1988)(section 1981); see Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 126 (2d Cir. 2004)(Equal Protection); Mullinax v. Texarkana Independent School District, 46 Fed. Appx. 917 (5th Cir. 2002)(First Amendment).

[16]Section 4311(c) provides that under USERRA a plaintiff most show that his or her military service was "a motivating factor in the employer's action." When that showing is made, the burden is on the employer to "prove that the action would have been taken in the absence" of that service. Under section 703(m) of Title VII, a plaintiff must show that race, color, religion, sex or national origin "was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m). When that showing is made, the burden is on the respondent to "demonstrate[] that [it] would have taken the same action in the absence of the impermissible motivating factor." 42 U.S.C. § 20003-5(g)(2)(B).

[17]App. 13a-18a, 21a (citing Brewer v. Board of Trustees of the University of Illinois, 479 F. 3d 908 (7th Cir. 2007)(Title VII)), 15a-18a (citing Metzger v. Illinois State Police, 519 F. 3d 677

This Court granted certiorari to resolve this issue[18] in BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC, 549 U.S. 1105 (2007).[19] The petitioner in that case, however, moved to dismiss its petition prior to argument. 549 U.S. 1334 (2007). The instant case presents an excellent vehicle for resolving this longstanding and important question.

This issue has been repeatedly addressed by all twelve of the geographic circuits.

> One standard is whether the subordinate "exerted influence[e] over the titular decisionmaker." Russell v. McKinney Hosp. Venture, 235 F. 3d 219, 227 (C.A.5 2000); see also Poland v. Chertoff, 494 F. 3d 1174, 1182 (C.A.9 2007) . . . . Another standard is whether the discriminatory input "caused the adverse employment action." See EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, [450 F. 3d 476,] 487 [(C.A. 10 2006)] . . . . The least employee-friendly standard asks only whether "the actual decisionmaker" acted with discriminatory intent, see Hill v. Lockheed Martin Logistics Management, Inc., 354 F. 3d 277, 291 (C.A.4 2004)(en banc).

Ricci, 129 S.Ct. at 2688-89 (Alito, J. concurring).

A. The Functional Decisionmaker Standard

In the Fourth and Seventh Circuits the motives of an official other than the formal decisionmaker cannot subject an employer to

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(7th Cir. 2008)(Title VII)).

[18]The question presented in BCI Coca-Cola was:
> Under what circumstances is an employee liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, whether the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee[?]

Petition for Writ of Certiorari, No. 06-341, at i.

[19]The proceedings in the instant case were stayed during the pendency of BCI Coca-Cola. (App. 4a n. 1).

liability unless that official so dominated the decisionmaking process as to be the functional decisionmaker.

The Fourth Circuit holds that an employer ordinarily is legally responsible only for the actions and motives of the "formal decisionmaker,"[20] regardless of whether the action of the formal decisionmaker may have been the direct result of unlawfully motivated actions of other officials. An employer is not liable for the discriminatory acts and motives of officials other than the "formal decisionmaker" "even when such acts or motivations lead to or influence a tangible employment action." Hill v. Lockheed Martin Logistics Management, Inc., 354 F. 3d 277, 287 (2004)(en banc). Even if a supervisory official acting with an unlawful purpose actually caused the adverse action complained of, that is insufficient in the Fourth Circuit to support a finding of liability on the part of the employer so long as the formal decisionmaker had no such motive and was unaware of what was going on.[21] In the Fourth Circuit the only circumstance in which liability can be based on actions of officials other than the formal decisionmaker is where the formal decisionmaker gave "blind approval[]" to "a decision, report or recommendation actually made by a subordinate." 354 F. 3d at 290-91.

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[20]354 F. 3d at 289, 290, 291.

[21]See 354 F. 3d at 289 (employer not liable even if biased official "substantially influences an employment decision made by the formal decision-maker"), 291 (actions of biased official not sufficient to support a finding employer liability even if that official "had a substantial influence on the ultimate decision or because he played a role, even a significant one, in the adverse employment decision.")

The Seventh Circuit standard applied in the instant case is essentially similar to that of the Fourth Circuit in Hill. The court below held that liability for actions of persons other than the formal decisionmaker was limited to cases in which there was "blind reliance" on the opinions of others. (App. 21a). In the Seventh Circuit, as in the Fourth, a plaintiff must demonstrate that the formal decisionmaker was "only nominally" the decisionmaker. (App. 15a). The improperly motivated employee must play such a dominant role in the process "as to basically be herself the true 'functional[] . . . decision-maker.'" Brewer, 479 F. 3d at 917 (quoting Little v. Ill. Dept. of Revenue, 369 F. 3d 1007, 1015 (7th Cir. 2004)); see 479 F. 3d at 917-18 (plaintiff must show that improperly motivated official was "the functional decisionmaker[]."). Under this avowedly stringent standard attempts to impose liability based on the motives of any official other than the formal decisionmaker are "usually ineffective." Metzger v. Illinois State Police, 519 F. 3d 677, 682 (7th Cir. 2008). The very fact that the demonstrated unlawful purposes and actions were those of an official other than the formal decisionmaker "is ordinarily fatal." 519 F. 3d at 682. This Seventh Circuit functional decisionmaker standard typically requires evidence that the formal decisionmaker was "by virtue of her role in the company, totally dependent on another employee to supply the information on which to base that decision." 369 F. 3d at 918. Thus in the instant case the dispositive circumstance that protected Proctor from liability was that the formal decisionmaker,

Buck, testified that she considered at least some information that did not come from Mulally, Korenchuk or Day. (App. 20a). Under the Seventh Circuit standard it was legally irrelevant whether Buck's decision may in fact have been caused by improperly motivated actions from those individuals, who allegedly provided Buck (directly or indirectly) with a wealth of inaccurate information, while withholding critical exculpatory information about Staub.

B. The Causation Standard

In the Sixth, Ninth, Tenth and Eleventh Circuits unlawfully motivated actions by persons other than the formal decisionmaker provide a basis for employer liability if those actions caused the decision of the formal decisionmaker.

The Sixth Circuit imposes liability if the action of a biased official caused the action of the formal decisionmaker. In Madden v. Chattanooga City Wide Service Department, 549 F. 3d 666 (6th Cir. 2008), for example, the Sixth Circuit upheld a judgment against the employer despite the fact that the plaintiff had been dismissed by an unbiased formal decisionmaker who relied on the report of a second unbiased independent investigator. The requisite "causal nexus" was established by proof that a third official, the plaintiff's supervisor, had withheld important exculpatory information from the other two officials.[22]

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[22]The district court, following a bench trial, concluded that racial discrimination tainted the decision because the third official had chosen "to inform senior management about [the black

> [Plaintiff] presented sufficient evidence from which a reasonable factfinder could find a causal nexus between the ultimate decisionmaker's decision to terminate [the plaintiff] and his superior's discriminatory animus.

549 F. 3d at 677. Similarly, in Wilson v. Stroh companies, Inc., 952 F. 2d 942 (6th Cir. 1002), the Sixth Circuit held that a black plaintiff dismissed after having been reported for misconduct by his assertedly biased supervisor could establish that the supervisor's

> racial animus was a cause of the termination . . . [with] evidence that [the supervisor] had not reported such misconduct from white employees.

952 F. 3d at 946. In Simpson v. Diversitech General, Inc., 942 F. 2d 156 (6th Cir. 1991), the Sixth Circuit ordered judgment for the plaintiff who had been fired as a result of the cumulative effect of three disciplinary incidents; the asserted biased supervisor was involved in only the second of those incidents.

> [The fact that the biased supervisor] played no role with regard to Simpson's dismissal does not end the inquiry. . . . If [the biased supervisor] initiated the disciplinary action leading to Simpson's dismissal due to Simpson's race, simply showing that [that supervisor] had no role in the "final" decision to terminate him is insufficient . . . As the evidence revealed that [that supervisor] disciplined Simpson [in the second incident] because of his race and that [the second incident] led substantially to Simpson's dismissal, the fact that [the supervisor] did not "pull the trigger" is of little consequence.

945 F. 3d at 160.[23]

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plaintiff's misconduct] while not informing senior management about white employees [who had done the same thing]." 549 F. 3d at 677 (quoting district court opinion).

[23]The Sixth Circuit applied the same standard in Johnson v. Kroger Co., 319 F. 3d 858 (6th Cir. 2003).

> [The allegedly biased official] not only supervised

In the Ninth Circuit a plaintiff also must show that improperly motivated actions by a non-decisionmaker caused the decision of the formal decisionmaker. In a retaliatory termination case, for example, an employer "cannot use the nonretaliatory motive of a superior as a shield against liability, if that superior never would have considered a dismissal but for the subordinate's retaliatory conduct." Gilbrook v. City of Westminster, 137 F. 3d 839, 854 (9th Cir. 1999).

> The causation issue . . . is purely factual; did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in the chain of causation.

Id. (quoting Professional Ass'n of College Educators v. El Paso County Community College District, 730 F. 2d 258, 266 (5th Cir. 1984)). Proof of that causation can be based on evidence that the biased official initiated the investigation of the plaintiff[24], provided adverse information about him, gave the decisionmaker

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> Johnson on a daily basis, but also spoke with [the formal decisionmaker] about the problems she identified . . . , assisted [the decisionmaker] in preparing Johnson's performance review . . . , and consulted with [the decisionmaker] prior to her ultimate decision . . . . Based upon these facts, we conclude that a jury could reasonably find that [the allegedly biased official] played a significant role in the [formal decisionmaker's] decisionmaking process . . . [and] that Johnson would not have been discharged but for his race.

319 F.3d at 868-69.

[24]Where a plaintiff relies on proof that the biased official was responsible for the initiation of the process which led to the action complained of, the plaintiff must also adduce evidence that that official was also in some way involved in, or influenced, the subsequent decisionmaking process. Poland v. Chertoff, 494 F. 3d 1174, 1182-83 (9th Cir. 2007).

adverse documents or a list of witnesses, "compared notes" with the decisionmaker after the plaintiff was interviewed, or suggested that the standards to be applied be altered in a manner adverse to the plaintiff.[25]

The Tenth Circuit also permits a plaintiff to establish liability by demonstrating that the actions of the biased official caused the action complained of.

> To prevail on a subordinate bias claim, a plaintiff must establish more than mere "influence" or "input in the decisionmaking process." Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions cased the adverse employment action.

EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 487 (10th Cir. 2006). In establishing causation under the Tenth Circuit standard, a plaintiff is not required to show that the biased official utilized any particular tactic to bring about the action in question. In BCI itself, for example, the court of appeals overturned a district court decision which had assumed that the biased official must specifically have recommended the adverse action; in that case the biased official assertedly had brought about the dismissal of the victim by providing false information to the formal decisionmaker. 450 F. 3d at 488, 492; see id. (causation by "selective reporting or even fabricating information

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[25]Poland v. Chertoff, 494 F. 3d 1174, 1183 (9th Cir. 2007); Dominquez-Curry v. Nevada Transportation Dept., 424 F. 2d 1033, 1040 (9th Cir. 2005); Bergene v. Salt River Agricultural Improvement District, 272 F. 3d 1136, 1141 (9th Cir. 2001); Olstad v. Oregon Health Science University, 327 F. 3d 876, 883 (9th Cir. 2003); Gillbrook v. City of Westminster, 177 F. 3d at 853; Perez v. Curcio, 841 F. 2d 255, 258 (9th Cir. 1988).

in communications with the formal decisionmaker"); Flitton v. Primary Residential Mortgage, Inc., 238 Fed. Appx. 410, 418 n. 5 (10th Cir. 2007)("persuad[ing]" the formal decisionmaker). The fact that the formal decisionmaker had also relied in part on information from other sources in the personnel file of the asserted discrimination victim does not preclude a finding of causation. BCI, 450 F. 3d at 492-93.

The Eleventh Circuit applies a similar standard. Where, for example, a biased official recommended that the plaintiff be dismissed, the

> discharge recommendation . . . may be actionable if the plaintiff proves that the recommendation directly resulted in the employee's discharge. . . . [T]he 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).

> One way of proving that the discriminatory animus behind the recommendation caused the discharge is under the "cat's paw" theory. This theory provides that causation may be established if the plaintiff shows that the decisionmaker followed the biased recommendation without independently investigating the complaint against the employee.

186 F. 3d at 1332 (emphasis added). But proof that the formal decisionmaker acted as a mere conduit of the purposes of the improperly motivated official is not the only way to establish liability in the Eleventh Circuit.

C. The "Influence" Standard

The rule in six circuits is that proof that an unlawfully motivated official influenced or played a role in the decisionmaking process is sufficient to impose liability on the employer.

In the First Circuit a plaintiff can prove discrimination by showing "that discriminatory comments were made by . . . those in a position to influence the decisionmaker." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F. 3d 46, 55 (1st Cir. 2000). The requisite showing of influence does not require that the biased official have become the de facto decisionmaker. For example, in Mulero-Rodriguez v. Ponte, Inc., 98 F. 3d 670 (1st Cir. 1996), the fact that the employer had given a biased official special responsibilities was deemed to support an inference that that official was "in a position to influence [the] decisionmaking." 98 F. 3d at 676. In Horney v. Westfield-Gage Co., Inc., 77 Fed. Appx. 24, 31 (1st Cir. 2003), the court concluded that an allegedly biased official was "in a position to influence the decisionmaker" simply because he was the plaintiff's "immediate supervisor." In the First Circuit a plaintiff may establish that a decision was tainted by unlawful influence by a showing "that management relied on biased information from an employee who demonstrably possessed a discriminatory animus." Davila v. Corporacion de Puerto Rico Para La Difusion Publica, 498 F. 3d 9, 17 n. 3 (1st Cir. 2007); see Freadman v. Metropolitan Property and Casualty Ins. Co., 484 F. 3d 91, 100 n. 8 (1st Cir. 2007)("decision maker fed biased information

by discriminatory underlings"); Azimi v. Jordan's Meats, Inc., 456 F. 3d 228, 248 n. 8 (1st Cir. 2006)("neutral decisionmaker . . . induced to act based on inaccurate information provided because of the provider's discriminatory animus"). In the First Circuit, unlike the Seventh, a plaintiff need not show that the assertedly biased official was the sole source of adverse information, but need only demonstrate that such tainted information might have influenced the ultimate decision.

In the Second Circuit employer liability may be based on evidence that a biased official had "influence" on or a "meaningful role" in the decisionmaking process.[26] Proof that the biased

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[26]In Holcomb v. Iona College, 521 F. 3d 130 (2d Cir. 2008), the Second Circuit held that liability could be imposed on the defendant because a recommendation unfavorable to Holcomb had been made by an allegedly biased official (Brennan) to one of the four decisionmakers.

> [A] reasonable jury could . . . find that Brennan . . . possessed a racial motive to discriminate against Holcomb. . . . [A] reasonable jury could conclude that the decision to terminate Holcomb was influenced by Brennan . . . . The college contends that . . . it was Brother Liguori, rather than Brennan . . . , who actually made the decision. . . . Here, there is ample evidence from which a reasonable jury could infer that Brennan . . . played a meaningful role in the decision to terminate Holcomb. Brennan himself testified that he told Brother Liguori that [another worker should be retained instead of Holcomb].

521 F. 3d at 142-43; see Cotarelo v. Village of Sleepy Hollow Police Department, 460 F. 3d 247, 253 (2d Cir. 2006)(assertedly unconstitutional motives of mayor irrelevant where there was no evidence the Mayor "influenced . . . any employment decisions about Cotarelo"); Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 125-26 (2d Cir. 2004)("the individual shown to have the impermissible bias played a meaningful role in the process"; formal decisionmaker's actions were "admittedly influenced" by the assertedly biased worker); Bickerstaff v. Vassar College, 196 F. 3d 435, 450 (2d Cir. 1999)("a meaningful role in the promotion process").

official provided the formal decisionmaker with a recommendation or inaccurate information satisfies this "influence" standard.[27] Unlike the Seventh Circuit, in the Second Circuit that information need not be the only source of information available to the formal decisionmaker. The material provided by the biased employee need only "taint[] the pool of information." Back v. Hastings on Hudson Union Free School District, 365 F. 3d 107, 126 n. 18 (2d Cir. 2004). Unlike the Seventh Circuit, the Second Circuit does not require that the tainted material constitute the entire pool. Thus in Back allegedly unfounded criticisms of the plaintiff were sufficient to establish employer liability even though the formal decisionmaker stated that he had relied on that information only "in part." 365 F. 3d at 126.[28] Indeed, in the Second Circuit liability can be based on evidence that an assertedly biased employee influenced the formal decisionmaker by affecting the conduct of a third party who in turn affected that decisionmaker. Id. at 116, 126 (assertedly biased school principal and human resources director influenced school superintendent who prompted

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[27]Back, 365 F. 3d at 126 (recommendation, "very negative final evaluation", "accusations of poor performance"); Holcomb, 521 F. 3d at 143 (recommendation that another worker be retained instead of plaintiff); Rose v. New York City Board of Education, 257 F. 3d 156, 158 (2d Cir. 2001)("unsatisfactory evaluation" and recommendation that plaintiff be terminated).

[28]In Back the School Superintendent who made the critical decision to recommend termination had repeatedly received information from the plaintiff's attorney. The panel that upheld that recommendation received information from the plaintiff's union. 365 F. 3d at 116. In Rose, in addition to the adverse evaluation from an allegedly biased official, the formal decisionmaker itself also had reviewed "various complaints regarding [the plaintiff's] performance." 257 F. 3d at 159.

parents to write letters of complaint relied on by review panel).

The Third Circuit has long held that liability may be based on a showing that a biased employee had an influence on the formal decisionmaker. "Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision." Abramson v. William Paterson College of New Jersey, 260 F. 3d 285, 286 (3d Cir. 2001); see Kant v. Seton Hall University, 279 Fed. Appx. 152, 159 (3d Cir. 2008)(approving jury instruction permitting inference of retaliation if "individuals involved in the . . . process at later stages reviewed, considered, and were influenced by the earlier evaluation"). In Roebuck v. Drexel University, 852 F. 2d 715 (3d Cir. 1988), the plaintiff had been denied tenure by the university's vice president following a series of divergent recommendations by two committees, a department chair and a dean. The Third Circuit held that bias at any stage in the process could support the jury's finding of liability.

> [A] plaintiff need not prove intentional discrimination at every stage of the review process. It is true that University guidelines and witness testimony support Drexel's claim that each successive evaluator performed a de novo review of Roebuck's candidacy. Nevertheless, it is also uncontroverted that at each stage of the process the evaluator had available and considered the reports and recommendations of each previous evaluator. . . . . Hence it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.

852 F. 3d at 727 (emphasis in original). In Roebuck and Abramson the final formal decisionmaker manifestly was not limited to a single source of information; in both cases there was a wealth of

information from other sources, including in both instances detailed committee reports favorable to the plaintiff. Roebuck, 852 F. 3d at 721-22; Abramson, 260 F. 3d at 268-71.

In the Fifth Circuit,

> [i]f the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker.

Russell v. McKinney Hospital Venture, 235 F. 3d 219, 226 (5th Cir. 2000). That Fifth Circuit standard is palpably less stringent than the Fourth and Seventh Circuit rule; it clearly does not require, for example, proof that the biased workers were the sole source of the information relied on by the formal decisionmaker. In Gee v. Principi, 289 F. 3d 342 (5th Cir. 2002), the court of appeals held that this standard was satisfied by proof that there were two biased officials among the six officials who provided information about the plaintiff. 289 F. 3d at 344, 345-7, 350. In Laxton v. Gap, Inc., 333 F. 3d 572 (5th Cir. 2003), the plaintiff was dismissed as the result of three disciplinary actions. The allegedly biased official was the key actor in the first of those actions, was the "primary"--but not the exclusive--source of information about the second, and played no role at all in the third and last. The court of appeals upheld a finding of liability on that showing, reasoning that those circumstances were "sufficient evidence to enable the jury to conclude that [the biased official] influenced . . . the individuals principally

responsible for the adverse employment action." 333 F. 3d at 584.[29]

In the Eighth Circuit employer liability also can be based on a showing that a biased official had a degree of influence on the disputed decision.[30] In Kientzy v. McDonnell Douglas Corp., 990 F. 2d 1051 (8th Cir. 1993), the court of appeals upheld a finding of liability even though unbiased independent officials had investigated the plaintiff's alleged misconduct and ordered his dismissal. 990 F. 3d at 1055. The biased official had influenced the process by withholding important exculpatory information, referring the investigation to a unit which was more likely to order dismissal, and failing to assist the plaintiff. 990 F. 3d at 1057-59. In Jiles v. Ingram, 944 F. 2d 409 (8th Cir. 1991), the Eighth Circuit affirmed a judgment that the plaintiff had been fired because of his race, despite the fact that the termination

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[29]In Palasota v. Haggar Clothing Co., 342 F. 3d 569 (5th Cir. 2003), the Fifth Circuit held that biased statements by two company officials was admissible and probative of discrimination because they "in a position to influence the decision." 342 F. 3d at 578. In Palasota there was no specific evidence regarding the actions or role of the assertedly biased officials; the court of appeals held that it was sufficient evidence of potential influence that those officials were "members of upper management." Id.

[30]Qamhiyah v. Iowa State University, 566 F. 3d 733, 743 (8th Cir. 2009)(controlling issue is whether "any such discrimination . . . influenc[ed] the . . . final decision"); Okruhlik v. University of Arkansas 395 F. 3d 872, 880 (8th Cir. 2005)(standard is whether a jury could "reasonably 'conclude that [action of another official], if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.'"); Dedmon v. Staley, 315 F. 3d 948, 950 (8th Cir. 2003)(question is whether allegedly biased official exercised "influence or leverage over [the formal decisionmaker's] decision").

decision had been made by unbiased officials after two hearings at which the plaintiff was permitted to call witnesses and a review of the plaintiff's personnel file. 944 F. 3d at 412-13. The biased official had influenced that decision by "contriv[ing] the . . . incident" for which the plaintiff was fired, and lying about what had occurred. 944 F. 3d 411, 413.[31]

The District of Columbia Circuit applies a similar standard.

> [E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence. . . . "[A]n employer cannot escape responsibility for [] discrimination . . . when the facts on which the reviewers rely have been filtered by a manager determined to purge the labor force of [a protected class of] workers."

Griffin v. Washington Convention Center, 142 F. 3d 1308, 1312 (D.C.Cir. 1998)(quoting Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316, 1323 (8th Cir. 1994)). In concluding that the formal decisionmaker was not "insulated from" the assertedly biased

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[31]In Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F. 3d 1316 (8th Cir. 1994), the court of appeals held that liability could be imposed on an employer because a biased supervisor had "set Stacks up to fail by . . . refusing to offer her any assistance [when she] needed help." 27 F. 3d 1325-26.

In Excel Corporation v. Bosley, 165 F. 3d 635 (8th Cir. 1999), in which a woman worker had been fired for shoving a male worker, the Eighth Circuit upheld a jury verdict of sex discrimination because the incident was the result of provocation by a male worker, who insistently showered gender-based verbal abuse on the plaintiff while refusing to leave her work station, and by the refusal of a supervisor to permit the plaintiff herself to escape the abuse by leaving that area. 165 F. 3d at 637-38.

> When an employee is fired because she acted to defend himself against harassment, which supervisors failed to take reasonable measure to prevent or correct, the termination cannot be said to be free from discrimination. . . . This is so even if the ultimate decision maker was moved purely by legitimate concern about personnel matters.

165 F. 3d at 639.

official, the court of appeals in Griffin noted that the biased official had denied the plaintiff needed training, designed the test used to assess her skills, and provided the decisionmaker with some--but not all--of the information relied on to fire the plaintiff. 142 F. 3d at 1311-12.

II. THE INTER-CIRCUIT CONFLICT IS WIDELY RECOGNIZED

The inter-circuit conflict described by Justice Alito in Ricci has long been widely recognized. In Hill the Fourth Circuit expressly declined to follow the standards in other circuits, objecting that those circuits "have not always described the theory in consistent ways" and that there were "varying applications of the cat's paw or rubber stamp theory as employed in our sister circuits." 354 F. 3d at 290. The dissenting opinion in Hill noted that the narrow standard adopted by the majority in that case conflicted with decisions in the First, Second, Third, Fifth, Sixth, Eighth, Ninth and District of Columbia Circuits. 354 F. 3d at 303 (Michael, J., dissenting)(citing cases).

In Poland v. Chertoff, 494 F. 3d 1174 (9th Cir. 2007), the Ninth Circuit rejected the rule in the Fourth and Seventh Circuits that an employer is liable only if the formal decisionmaker was duped into acting as the mere "cat's paw" of the biased official.

> The [defendant] urges that we should impute a subordinate's animus to his or her employer only in cases in which the subordinate dominates the investigatory process and the final decision is a perfunctory approval of the biased subordinate's inclination. Courts have termed this narrow standard the "rubber stamp" or "cat's paw" approach. . . . See Hill v. Lockheed Martin Logistics Mgmt., Inc. . . . . No doubt an employer is

> liable for discriminatory acts of a subordinate in cases where the subordinate is, as a practical matter, the actual decisionmaker. See Shager v. Upjohn Co., 413 F. 3d 398, 405 (7th Cir. 1990). But liability should not be limited to those cases only. . . . A more expansive approach to subordinate bias liability is called for in subordinate bias cases.

494 F. 2d at 1182.

The Tenth Circuit in BCI Coca-Cola rejected both the functional decisionmaker and the influence standards. Under the functional decisionmaker standard, it objected,

> the decisionmaker must be a "cat's paw" so completely beholden to the subordinate "that the subordinate is the actual decisionmaker." [Hill, 354 F. 3d] at 290. . . . The Fourth Circuit's peculiar focus on "who is a 'decisionmaker' for purposes of discrimination actions," Hill, 354 F. 3d at 286, seems misplaced. The word "decisionmaker" appears nowhere in Title VII. . . . The . . . standard . . . allow[s] employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.

450 F.3 d at 486-87. The influence standard applied in other circuits, the Tenth Circuit argued, was also improper:

> Some courts take a lenient approach, formulating the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker." See Russell,235 F. 3d at 227. . . . This standard apparently contemplates that any "influence," the reporting of any "factual information," or any form of "other input" by a biased subordinate renders the employer liable so long as the subordinate "may have affected" the employment action. Such a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation.

450 F. 3d at 486-87.

Federal district courts have frequently noted this division among the courts of appeals.

> The "subordinate bias" theory has been recognized by all the circuit courts that have considered the issue, but a circuit split exists as to the proper standard . . . . The circuit courts have applied at least three distinct approaches in implementing the "subordinate bias" theory.

Foroozesh v. Lockheed Martin Operations Support, Inc., 2006 WL 2924789 at *3 (W.D.Pa. 2006).

> [T]he standards advanced in the various Circuit Courts of Appeals range from a "lenient approach," in which the question is only whether the subordinate possessed leverage, or exerted influence, to a more restrictive approach, in which an employer . . . can only be liable if the decisionmaker was so completely beholden to the subordinate that the subordinate was the actual decisionmaker.

Coe v. Northern Pipe Products, Inc., 589 F. Supp. 2d 1055, 1090 (N.D. Iowa 2008). That inter-circuit conflict has been the subject of extensive commentary.[32]

III. THE QUESTION PRESENTED ISSUE IS OF EXCEPTIONAL IMPORTANCE

The number and variety of cases in which this issue has arisen amply attest to the importance of the Question Presented. At least

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[32]K. Wong, Weighing Influence: Employment Discrimination And The Theory of Subordinate Liability, 57 Am. U. L.Rev. 1729, 1729-52 (2008); S. Befort, Within The Grasp of The Cat's Paw: Delineating The Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes, 60 S.C.L.Rev. 383, 389-97 (2008); T. Davis, Beyond The Cat's Paw: An Argument For Adopting A "Substantially Influences" Standard for Title VII and ADEA Liability, 6 Pierce L. Rev. 247, 253-57 (2007); Comment, Weighing Influence: Employment Discrimination and The Theory of Subordinate Bias Liability, 57 Am.U.L.Rev. 1729, 1733, 1739-49 (2008); Comment, Controlling The Cat's Paw: Circuit Split Concerning The Level of Control A Biased Subordinate Must Exert Over The Formal Decisionmaker's Choice To Terminate, 48 Santa Clara L. Rev. 1069 (2008); Comment, How Much Power Should Be In The Paw? Independent Investigations and The Cat's Paw Doctrine, 40 Loy. U. Chi. L. J. 141, 153-73 (2008); Comment, Independent Investigations: An Inequitable Out for Employers In Cat's Paw Cases, 80 U.Colo.L.Rev. 255, 260-73 (2009).

where a potential dismissal is involved, most major employers today utilize a personnel process in which several different officials are involved in initiating the disciplinary process, providing information, offering recommendations, and making the formal, ultimate decision. "[M]any companies separate the decisionmaking function from the investigation and reporting functions, and . . . bias can taint any of those functions." BCI Coca-Cola, 450 F. 3d at 488. The extent to which employers can be held liable for the actions and motives of officials other than the formal decisionmaker is thus of great practical significance.

The Seventh Circuit's stringent "functional decisionmaker" standard, like the Fourth Circuit's "actual decisionmaker" requirement, effectively legalizes unlawful action in all phases of such a decisionmaking process except the very last stage. If one official initiates disciplinary action for an illegal reason, a second provides inaccurate information for an invidious purpose, and a third recommends dismissal because he dislikes employees who are white, non-white, female, over 40, disabled, or serve in the Army Reserves, the victim of this scheme will almost never have a remedy in the Seventh or Fourth Circuit so long as yet a fourth official, who makes the ultimate decision, remains blissfully ignorant of the illicit motives of his or her colleagues. The decision below is a palpable invitation for evasion of federal employment laws.

The EEOC correctly observed in its brief in Hill that the interpretation of Title VII in that case "would leave much actual

discrimination unabated."[33] A district judge in the Fourth Circuit candidly acknowledged that that circuit's stringent limitation on employer liability "has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker on personnel decisions." Sawicki v. Morgan State University, 2005 WL 5351448 at *7 (D.Md. 2005). As the instant case well illustrates, the resulting safe harbor can protect as well schemes to violate any number of other federal employment statutes.

The United States correctly pointed out in its merits brief in BCI Coca-Cola v. EEOC that the stringent standard applied by the Fourth Circuit--and in this instance by the Seventh Circuit--is inconsistent with the well-established rules of agency law. Congress enacts all federal employment statutes against the backdrop of traditional common law agency principles, which impose liability on an employer for actions taken by an official or other employee within the scope of his or her employment.

> Consistent with those established principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities--e.g., to assign work, monitor an employee's performance, decide whether to report a matter for discipline, gather the facts relating to that matter, or make a recommendation on what action should be taken--a supervisor's exercise of that authority falls within the scope of the supervisor's employment.

Brief for Respondent, No. 06-341, at 19. Those agency principles clearly apply to the roles that Mulally and Korenchuk played in the

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[33]Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant, Hill v. Lockheed Martin Logistics Management, Inc., No. 01-1359 (4th Cir.), p. 13.

events leading to Staub's dismissal. The conduct of Day, assertedly taken in concert with her supervisors, and animated by the belief (however misguided) that Staub's military service was contrary to the interest of the employer, also satisfies those agency standards.

The decision of the Seventh Circuit in the instant case did not even purport to be based on agency principles or on the text and purposes of USERRA. Rather, the decision of the court of appeals turned largely on literary exegesis of a 17th century French fable.

> [I]n this case . . . we try to make sense of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de la Fontaine (1621-1695). In the tale, a clever--and rather unscrupulous--monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one.

(App. 1a-2a).

> If the decision-maker [Buck] wasn't used as a cat's paw--if she didn't just take the monkey's [Mulally's, Korenchuk's and Day's] word for it, as it were--then of course the theory is not in play. . . . Buck was not a cat's paw for Mulally or anyone else.

(App. 15a, 21a).

The Tenth Circuit has correctly rejected both this methodology and the standard to which it has given rise.

> [S]ubordinate bias cases have suffered from an abundance of vivid metaphors. The Fourth Circuit, for example, seems to have taken the "cat's paw" metaphor too literally in deriving its total-control-over-the-actual-decision standard. . . . That limitation of subordinate bias claims . . . runs counter to the fairly broad "aided by the agency relation" principle . . . . We see no reason to limit subordinate bias liability to situations that closely resemble the "cat's paw," . . . or other

> metaphors that imaginative lawyers and judges have developed . . . .

BCI Coca-Cola, 450 F. 3d at 488.

IV. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THIS INTER-CIRCUIT CONFLICT

This case presents an ideal vehicle for addressing this longstanding and deeply entrenched conflict. The evidence adduced by plaintiff would readily meet the "influence" standard applied in six circuits; as the court below readily acknowledged, the formal decisionmaker conceded she had "relied on" information from Korenchuk, one of the assertedly anti-military officials. (App. 10a). The plaintiff's evidence would also support a finding of liability in the four circuits that impose liability based on a showing of causation; Buck testified that she would not have fired Staub but for the incidents involving Mulally, Korenchuk and Day. (Id.). The directive that Staub was charged with violating in April 2004 would not have existed but for the January 2004 incident that was assertedly a scheme by Mulally to punish Staub for his military service. Buck would have had no reason to even consider disciplining Staub on April 20 if Korenchuk had not inaccurately told her that Staub had left his job without first notifying his superiors.

This case presents a fully developed factual record, which allows the Court to assess the question presented in a specific, non-abstract setting. The evidence involves several of the most common ways in which a person who is not the formal decisionmaker

may for an unlawful purpose influence or bring about adverse action against an employee: including providing the formal decisionmaker with inaccurate information, withholding exculpatory information from that formal decisionmaker, building a paper record of supposed infractions, and establishing standards of conduct likely to be harmful to the targeted employee.

In the instant case, to be sure, much of this evidence was controverted. The jury before whom the case was tried, however, rejected the employer's contention that it would have fired Staub even if he had not been serving in the Army Reserves. (See n. 9, supra). The only issue in the court of appeals was what legal standard governs when an employer can be held liable for the actions and motives of officials other than the formal decisionmaker. That is precisely the question of law which has long divided the courts of appeals, which this Court granted certiorari to resolve in BCI Coca-Cola, and which Justice Alito described in Ricci.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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