No. 09-400

In the Supreme Court of the United States

VINCENT E. STAUB, PETITIONER

v.

PROCTOR HOSPITAL

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, and in what circumstances, an employer can be liable under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, based on the anti-military animus of supervisors who did not take an adverse employment action themselves, but whose anti-military animus was a motivating factor for that action.

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INTEREST OF THE UNITED STATES

This case presents the question whether, and in what circumstances, an employer can be liable under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, based on the anti-military animus of supervisors who did not take an adverse employment action themselves, but whose anti-military animus was a motivating factor for that action. The United States has a significant interest in the resolution of that question. The Secretary of Labor has substantial administrative responsibilities under USERRA, 38 U.S.C. 4321-4333 (2006 & Supp. II 2008), and has promulgated regulations implementing the statute, 20 C.F.R. Pt. 1002. The Attorney General enforces USERRA in court against public and private employers.

38 U.S.C. 4323 (2006 & Supp. II 2008). USERRA also applies to the United States as an employer. 38 U.S.C. 4324-4325 (2006 & Supp. II 2008). In addition, the Equal Employment Opportunity Commission is responsible for administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and other federal statutes prohibiting employment discrimination, and this case may affect the interpretation of those statutes. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. In enacting USERRA, Congress sought "to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service" and "to prohibit discrimination against persons because of their service in the uniformed services." 38 U.S.C. 4301(a)(1) and (3). To that end, 38 U.S.C. 4311(a) provides that "[a] person who is a member of * * * a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership." *Ibid.*

An employee who has suffered discrimination in violation of USERRA may bring an action against his or her employer for damages and equitable relief. 38 U.S.C. 4323 (2006 & Supp. II 2008). The employee can establish a prima facie case of discrimination by showing that a protected status or activity—such as the performance of military service, see 20 C.F.R. 1002.22—was "a motivating factor in the employer's action." 38 U.S.C. 4311(c)(1). If the employee makes such a showing, the employer may avoid liability by establishing that "the

action would have been taken in the absence of" the employee's military status. *Ibid.*

2. Petitioner, a member of the United States Army Reserve, was employed by respondent as an angiography technologist. Pet. App. 2a-3a. The head of petitioner's department, Michael Korenchuk, was critical of petitioner's reserve obligations, which he called "a b[u]nch of smoking and joking and [a] waste of taxpayers[']] money." *Id.* at 4a (brackets in original). Janice Mulally, who was second in command of the department, was also hostile to petitioner's reserve duties. *Id.* at 3a-4a. In 2000, when Mulally took over preparing respondent's work schedules, she began "schedul[ing] him for additional shifts without notice," *id.* at 4a, saying that the extra shifts were a way for him to "pay[] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves," *ibid.* (second set of brackets in original). Mulally also placed petitioner on a weekend work rotation, thereby creating scheduling conflicts between petitioner's work and his weekend military obligations. *Ibid.* Mulally called petitioner's reserve unit several times to try to change his drill dates so he could work at the hospital; once, when the reserve unit administrator refused to excuse petitioner from mandatory training, Mulally swore at him and hung up. *Id.* at 8a. On another occasion, Mulally told Leslie Sweborg, one of petitioner's co-workers, that petitioner's "military duty had been a strain on the[] department," and she asked Sweborg "to help her get rid of him." *Id.* at 5a (brackets in original). After petitioner returned from active duty in early 2003, Korenchuk knew "that Mulally was 'out to get' [petitioner]," but he did nothing to stop her. *Id.* at 4a-5a.

In January 2004, petitioner was ordered "to report for 'soldier readiness processing'" in anticipation of another call to active duty. Pet. App. 6a. Korenchuk was concerned about the expense of having to hire a temporary replacement for petitioner. *Ibid.* Near the end of the month, Mulally gave petitioner a written warning for not being in his work area. *Ibid.* According to Mulally, employees in petitioner's unit were required to report to the diagnostic imaging services unit whenever they were not working with a patient. *Id.* at 6a-7a. Petitioner and Sweborg (who also received a warning) disputed that such a policy existed or that they had violated it, but Korenchuk signed Mulally's warning to petitioner in order "to get her off of his back." *Id.* at 7a. Under the terms of the warning, petitioner was required to report to Korenchuk or Mulally whenever he did not have any patients and whenever he needed to leave his work station. *Ibid.*; see J.A. 75a.

In April 2004, Angie Day, a former co-worker of petitioner's, met with Korenchuk, Vice President of Human Resources Linda Buck, and Chief Operating Officer R. Garrett McGowan. Pet. App. 8a. In the past, Day had complained about having to work outside of her ordinary scheduled hours when petitioner was away on military duty. *Id.* at 44a. This time, she complained that petitioner was "abrupt" in his dealings with her and would "absent himself from the department." *Id.* at 8a. After the meeting, McGowan ordered Buck to create a plan to solve petitioner's availability problems. *Id.* at 8a-9a. Buck never did that, however, because on April 20, 2004, Korenchuk reported to Buck that petitioner could not be located and had failed to report in as instructed. *Id.* at 9a-10a; see *id.* at 9a n.3. Based on that report and a review of petitioner's personnel file, Buck decided that

petitioner should be discharged. *Id.* at 10a-11a; 1/7/08 Tr. 62, 105-106.

During the time that Korenchuk was unable to find petitioner, petitioner was in the hospital cafeteria having lunch with Sweborg. Pet. App. 9a. When petitioner returned from lunch, he told Korenchuk that he and Sweborg had looked for him earlier and had left him a voice mail explaining that they were leaving for lunch. *Ibid.* Korenchuk then escorted petitioner to Buck's office. *Ibid.* When petitioner arrived, Buck did not ask him about the January warning or whether he had reported in as directed. 1/8/08 Tr. 361-363. Instead, Buck simply gave him his termination notice, and a security guard immediately escorted petitioner out of Buck's office. Pet. App. 10a; 1/8/08 Tr. 362. Sweborg was not disciplined. Pet. App. 10a.

Petitioner's termination notice stated that he was being discharged for failing to follow the terms of the January warning. J.A. 74a; Pet. App. 10a. Specifically, the notice stated: "To date, [petitioner] has ignored [the] directive" that he "remain in the general diagnostic area unless [he] specifies to [Korenchuk] or [Mulally] where and why he will go elsewhere." J.A. 74a. Similarly, Buck's documentation of her meeting with Korenchuk stated that her termination decision was "[b]ased on the disciplinary action done in January and the continuing problems." J.A. 73a.

Petitioner unsuccessfully challenged his termination through respondent's grievance process. Pet. App. 11a. Although petitioner argued in his grievance that Mulally had fabricated the basis for the January warning, "Buck did not follow up with Mulally about this claim * * * and she did not investigate [petitioner's] contention that Mulally was out to get him because he was in the Re-

serves." *Ibid.* Buck's investigation consisted solely of discussing the January warning with another Human Resources employee who had received information from Mulally and was present when the warning was given, but not when the alleged misconduct occurred. 1/7/08 Tr. 65; Pet. App. 11a.

3. Petitioner brought this action against respondent in the United States District Court for the Central District of Illinois, alleging that his termination violated USERRA. With the parties' consent, the district court referred the case for a jury trial before a magistrate judge. Pet. App. 23a. As required by *Brewer* v. *Board of Trustees of the University of Illinois*, 479 F.3d 908, 917 (7th Cir.), cert. denied, 552 U.S. 825 (2007), the court instructed the jury that "[a]nimosity of a co-worker toward the [petitioner] on the basis of [petitioner's] military status as a motivating factor may not be attributed to [respondent] unless that co-worker exercised such singular influence over the decision-maker that the co-worker was basically the real decision maker." Pet. App. 16a. The court also instructed that "[i]f the decision maker is not wholly dependent on a single source of information but instead conducts its own investigation into the facts * * * , [respondent] is not liable for a non-decision maker's submission of misinformation or selectively chosen information or failure to provide relevant information to the decision maker." *Ibid.*

The jury returned a special verdict in which it found that petitioner "proved by a preponderance of the evidence that [his] military status was a motivating factor in [respondent's] decision to discharge him" and that respondent failed to prove that petitioner "would have been discharged regardless of his military status." J.A. 68a. The jury awarded $57,640 in damages. Pet. App.

23a. The magistrate judge subsequently denied respondent's motion for judgment as a matter of law or for a new trial. *Id.* at 23a-31a.

4. The court of appeals reversed. Pet. App. 1a-21a. The court began by stating that the case involved what it described as "the 'cat's paw' theory" of liability, a term derived from a La Fontaine fable in which a monkey persuades an unwitting cat to pull chestnuts out of a hot fire. *Id.* at 1a. Under that theory, "the discriminatory animus of a nondecisionmaker is imputed to the decisionmaker where the former has singular influence over the latter and uses that influence to cause the adverse employment action"—in other words, where the decisionmaker is the dupe, or cat's paw, of the employee with a discriminatory motive. *Id.* at 2a. The court emphasized that, "true to the fable," liability under the cat's paw theory "requires a blind reliance, the stuff of 'singular influence.'" *Id.* at 21a.

The court of appeals held that the jury instructions were "not technically wrong" because they told the jury that it could "only consider nondecisionmaker animosity in the case of singular influence, and even then that the employer is off the hook if the decisionmaker did her own investigation." Pet. App. 17a. But the court added that if there is insufficient evidence to support a finding of "singular influence," then the trial court "has no business admitting evidence of animus by nondecisionmakers." *Ibid.* In this case, the court of appeals concluded, the magistrate judge had erred in admitting evidence of Mulally's animus—"the strongest proof of antimilitary sentiment"—without first "making a threshold determination of whether a reasonable jury could find singular influence." *Id.* at 18a-19a.

The court of appeals went on to hold that, based on the evidence presented at trial, respondent was entitled to judgment as a matter of law. Pet. App. 19a. The court stated that Buck, who made the decision to fire petitioner, was "free of any military-based animus," and "a reasonable jury could not find that Mulally (or anyone else) had singular influence over Buck." *Id.* at 20a. Instead, the court determined that "Buck looked beyond what Mulally and Korenchuk said" about petitioner. *Ibid.* Although her "investigation could have been more robust," the court continued, the decisionmaker need not "be a paragon of independence" so long as she "'is not wholly dependent on a single source of information' and conducts her 'own investigation into the facts relevant to the decision.'" *Id.* at 20a-21a (quoting *Brewer*, 479 F.3d at 918). The court therefore concluded that "a reasonable jury could [not] have concluded that [petitioner] was fired because he was a member of the military." *Id.* at 21a.

SUMMARY OF ARGUMENT

In order to encourage civilian service in the uniformed services, USERRA prohibits employment discrimination "on the basis of" military status. 38 U.S.C. 4311(a). Specifically, 38 U.S.C. 4311(c)(1) provides that an employer is liable if an employee establishes that his or her military status was a "motivating factor" in an adverse employment action, and the employer fails to prove that it would have taken that action regardless of the employee's military status. Under USERRA, an employer is liable when a supervisor acting with a discriminatory motive uses the authority that has been delegated to him or her to cause an adverse employment action.

USERRA specifically defines "employer" to include any person "to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i). When an employer delegates authority to a supervisor to engage in customary employment responsibilities—for example, to monitor employees and report on their performance—a supervisor's exercise of that authority falls within the scope of his or her employment. Accordingly, if such authority is exercised in a discriminatory manner and causes an adverse employment action, the employer is liable for the supervisor's misconduct. That result is a natural consequence of the settled rule of vicarious employer liability for torts committed by agents acting within the scope of their employment. In addition, the employer is liable under the "aided in the agency relation" principle recognized in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), because a supervisor who exercises delegated authority to cause an adverse employment action is aided in accomplishing a tort by the existence of the agency relationship with the employer.

The court of appeals disregarded those principles when it held that an employer is liable for the discriminatory acts of a supervisor only when the supervisor has "singular influence" over the decisionmaker "and uses that influence to cause the adverse employment action." Pet. App. 2a, 21a. The "singular influence" standard has no basis in the text of USERRA. Indeed, it would frustrate the statutory purpose by allowing employers to escape liability even in cases where a supervisor's discrimination is a substantial cause of the adverse employment decision, thus permitting employer-authorized, discriminatory misconduct to go unremedied.

To establish a violation of USERRA, an employee must show causation—that is, that the supervisor's discriminatory misuse of delegated authority was a substantial factor in the adverse employment action. An employer's independent investigation into the events underlying an adverse employment action may break the chain of causation between a supervisor's discriminatory misconduct and that action. In addition, an investigation may establish that the action would have been taken anyway, thus creating a defense to liability under Section 4311(c)(1). Such an investigation, however, must be truly independent. Simply reviewing evidence compiled by a biased supervisor will not break the chain of causation between the supervisor's bias and the ultimate employment action.

In light of those principles, the court of appeals erred in setting aside the jury's verdict. The jury specifically found that petitioner proved by a preponderance of evidence that his military status was a "motivating factor" in respondent's decision to discharge him. J.A. 68a. There was "abundant evidence" of anti-military animus on the part of petitioner's supervisors, Pet. App. 18a, and the evidence established that the supervisors' January 2004 disciplinary action against petitioner and April 2004 report that he had disregarded the terms of the January warning were significant factors in causing his dismissal. *Id.* at 10a; J.A. 74a. The discriminatory animus of the supervisory employees who were not the decisionmaker therefore set in motion and played a substantial role in driving the adverse employment action. That animus was a "motivating factor" even if the biased employees did not exercise "singular influence" over the decisionmaker.

The record at trial also contains substantial support for the jury's finding that respondent's investigation was insufficient to establish that petitioner would have been discharged regardless of his military service. The court of appeals held that the decisionmaker's investigation broke the causal chain between the supervisors' discriminatory motives and petitioner's termination because the decisionmaker considered facts other than the supervisor's discriminatory animus; that is, the decisionmaker was "not wholly dependent on a single source of information." Pet. App. 21a (quoting *Brewer* v. *Board of Trs. of the Univ. of Ill.*, 479 F.3d 908, 918 (7th Cir.), cert. denied, 552 U.S. 825 (2007)). But the limited investigation that respondent undertook was little more than a review of petitioner's personnel record. Review of a preexisting personnel file—which did not contain any information about the incident that precipitated petitioner's termination—could not independently confirm the basis for the termination, and it therefore was insufficient to undermine the jury's verdict.

ARGUMENT

AN EMPLOYER IS LIABLE UNDER USERRA WHEN A SUPERVISOR ACTING WITH A DISCRIMINATORY MOTIVE USES DELEGATED AUTHORITY TO CAUSE AN ADVERSE EMPLOYMENT ACTION SUCH AS A DISCHARGE

A. Under Agency Principles, An Employer Is Vicariously Liable When A Discriminatorily Motivated Supervisor Uses Delegated Authority To Cause An Adverse Employment Action

This Court has recognized that "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate

those rules." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). Since a damages action for a violation of a federal anti-discrimination statute "sounds basically in tort," such an action is governed by general agency principles. *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). In the case of USERRA, that conclusion is reinforced by the statutory definition of "employer," which expressly includes the employer's agents: any "person * * * that has control over employment opportunities" and any "person * * * to whom the employer has delegated the performance of employment-related responsibilities." 38 U.S.C. 4303(4)(A)(i).

Under the agency principles that govern USERRA actions, an employer is liable when a supervisor exercises delegated authority in a discriminatory manner and causes an adverse employment action. Because the supervisor's exercise of delegated authority is conduct within the supervisor's scope of employment, the employer is vicariously liable for it. Moreover, even if the supervisor's conduct were not considered to be within the scope of employment, it nevertheless would give rise to vicarious liability because it is conduct that is aided by the agency relation.

1. USERRA's definition of "employer" reflects long-established agency law, under which "principals or employers" are "vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer*, 537 U.S. at 285. That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her employment." *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998). And it applies whether or not the employer authorized or knew about the acts of the agent. *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). Em-

ployees act within the scope of their employment whenever they are "exercising the authority delegated to [them.]" *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909).

Consistent with established agency principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities—such as assigning work, monitoring an employee's performance, deciding whether to report a matter for discipline, gathering the facts relating to that matter, or making a recommendation on what action should be taken—a supervisor's exercise of that authority falls within the scope of the supervisor's employment. Accordingly, when delegated authority of that kind is exercised in a discriminatory manner and causes an adverse employment action in violation of USERRA, the employer is liable under agency principles and 38 U.S.C. 4303(4)(A)(i).

That conclusion is consistent with this Court's treatment of liability under other employment-discrimination statutes, such as Title VII. In *Ellerth*, the Court held that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment," and that employer liability for supervisor harassment must therefore be based on other agency principles. 524 U.S. at 757. But while no employer delegates authority to supervisors to make sexual advances to those under their supervision, employers customarily do delegate authority to supervisors to assign work, monitor performance, refer matters for discipline, investigate the underlying facts, and make recommendations on what should be done. When supervisors exercise such authority, they act within the scope of their employment.

While some courts have expressed the view that an agent acts within the scope of employment only when

motivated at least in part by an intent to serve the employer, see 1 Restatement (Second) of Agency § 228(1)(c), at 504 (1958) (Restatement (Second)), other courts have held that an agent can act within the scope of employment regardless of the agent's motive, see *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 793-796 (1998). When a supervisor has exercised delegated authority with a discriminatory motive and caused an adverse employment action, the scope-of-employment analysis should not depend on a fact-intensive inquiry into subjective intent, *i.e.*, whether the supervisor acted in part out of a misguided belief that either the discrimination or the underlying employment action would benefit the employer. It is difficult enough to determine whether a supervisor has acted with a discriminatory motive without adding an even more difficult inquiry into whether the supervisor was motivated in part by a belief that discrimination would benefit the employer. And that inquiry is unnecessary in the present context, where the supervisor is exercising delegated authority to undertake customary employment tasks—*e.g.*, to report an employee for a disciplinary infraction—albeit with an improper discriminatory animus. See *Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting that "a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer," and applying the same principle to a supervisor who caused the plaintiff's discharge by exercising his delegated authority to evaluate subordinates).

2. In any event, vicarious employer liability is not limited to the actions of employees within the scope of

their employment. Rather, as this Court recognized in *Ellerth* and *Faragher*, traditional agency principles also allow the imposition of vicarious liability when an employee is "aided by the agency relation" in the commission of a tort. *Ellerth*, 524 U.S. at 760-765; *Faragher*, 524 U.S. at 801-808; see 2 Restatement (Third) of Agency § 7.08, at 221 (2006); 1 Restatement (Second) § 219(2)(d), at 481. To impose vicarious liability under the "aided in the agency relation" principle, it is not enough to show that the supervisor's agency relation provides "[p]roximity and regular contact" with "a captive pool of potential victims." *Ellerth*, 524 U.S. at 760. Instead, for vicarious liability to attach, there must be "something more than the employment relation itself." *Ibid.*; see *Faragher*, 524 U.S. at 802.

In *Ellerth*, the Court identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the [unlawful employment practice]: when a supervisor takes a tangible employment action against the subordinate." 524 U.S. at 760. A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." *Id.* at 761. When a supervisor takes a tangible employment action, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-762. Accordingly, the requirements of the "aided in the agency relation" principle of vicarious liability "will always be met when a supervisor takes a tangible employment action against a subordinate." *Id.* at 762-763.

Under *Ellerth* and *Faragher*, that principle of vicarious liability is not limited to supervisors who make the

ultimate employment decision that has tangible adverse consequences. Instead, it logically applies whenever a supervisor's "discriminatory act" of a type that a supervisor is empowered to perform because of his supervisory capacity "*results* in a tangible employment action." *Ellerth*, 524 U.S. at 760 (emphasis added). Accordingly, when supervisors, acting with a discriminatory intent, use their delegated authority to monitor performance, report disciplinary infractions, and recommend employment action to effect a tangible employment action, such as a discharge, an employer is vicariously liable under the "aided by the agency relation" principle applied in *Ellerth* and *Faragher*.

3. Under the agency principles discussed above, an employer would not be vicariously liable if a customer, an independent contractor, or a non-supervisory employee, acting with a discriminatory motive but not exercising authority delegated from the employer, falsely reported that an employee engaged in misconduct, and that report caused the employee to be discharged—at least not if the employer had no reason to suspect that the report was fabricated because of discriminatory animus. The distinction between supervisory employees and other actors reflects the fact that employers have "a greater opportunity to guard against misconduct" by supervisors who exercise delegated authority and cause an adverse employment action, as compared to "common workers" or supervisors who are not delegated that kind of authority. *Faragher*, 524 U.S. at 803. Employers "have greater opportunity and incentive to screen [supervisors], train them, and monitor their performance." *Ibid.* Holding employers vicariously liable when supervisors engage in discriminatory misconduct thus gives

effect to USERRA without unreasonably burdening employers.

B. The Court Of Appeals Erred In Requiring Petitioner To Show That The Supervisors With Discriminatory Animus Had "Singular Influence" Over The Actual Decisionmaker

The court of appeals believed that the anti-military animus of an individual who is not the ultimate decisionmaker can trigger liability only when the individual "has singular influence over" the decisionmaker "and uses that influence to cause the adverse employment action." Pet. App. 2a, 21a. It is not enough, the court held, that a supervising employee's animus plays a substantial role in a high-level manager's decision to fire another employee; rather, "true to the fable" of the monkey and the cat, actionable discrimination exists only when the decisionmaker exhibits "a blind reliance" on the biased supervisor's opinions. *Id.* at 21a ("Decisionmakers usually have to rely on others' opinions to some extent because they are removed from the underlying situation. But to be a cat's paw requires more; true to the fable, it requires a blind reliance, the stuff of 'singular influence.'"); see *Brewer* v. *Board of Trs. of the Univ. of Ill.*, 479 F.3d 908, 917-918 (7th Cir.) (holding that, to show "singular influence," "the employee must possess so much influence as to basically be herself the true 'functional[] . . . decision-maker'" and "[t]he nominal decision-maker must be nothing more than the functional decision-maker's 'cat's paw'") (first set of brackets in original; citations omitted), cert. denied, 552 U.S. 825 (2007).

In adopting the "singular influence" standard, the court of appeals appears to have attached inordinate

significance to the "cat's paw" metaphor, basing its holding in part on an exegesis of La Fontaine's fable. Pet. App. 21a. The standard adopted by the court is contrary to USERRA's text, and it would frustrate the statutory purpose.

1. The terms "singular influence" and "blind reliance" do not appear in USERRA, and a "singular influence" standard is inconsistent with the language Congress employed in 38 U.S.C. 4311(c)(1). That provision requires the plaintiff to show nothing more than that his or her military status was a "motivating factor in the employer's action." *Ibid.* Although satisfying that standard will require the plaintiff to show causation, this Court has made clear that protected status or conduct is a "motivating factor" in an action whenever it plays a "substantial" role in bringing that action about. *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287 (1977); see *Gagnon* v. *Sprint Corp.*, 284 F.3d 839, 853-854 (8th Cir.), cert. denied, 537 U.S. 1001, and 537 U.S. 1014 (2002).

Protected status can be a "motivating factor" in an adverse employment decision even if it is not a "but-for" cause of that decision. *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 & n.3 (2009) (citation omitted). It follows *a fortiori* that protected status can be a "motivating factor" in an adverse employment decision even if it does not exert "singular influence" over that decision. As the Secretary of Labor observed in commentary accompanying final regulations implementing USERRA, an employee "need not show that his or her protected activities or status was the sole cause of the employment action; the person's activities or status need be only one of the factors that 'a truthful employer would list if asked for the reasons for its decision.'" 70

Fed. Reg. 75,246, 75,250 (2005) (quoting *Kelley* v. *Maine Eye Care Assocs., P.A.*, 37 F. Supp. 2d 47, 54 (D. Me. 1999)). That interpretation is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *United States* v. *Mead Corp.*, 533 U.S. 218, 230 (2001) (explaining that official agency interpretations of a statute formally adopted through notice-and-comment rulemaking, formal adjudication, or some other "relatively formal administrative procedure tending to foster * * * fairness and deliberation" are entitled to *Chevron* deference); *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007) (extending deference to agency's interpretation of its regulations contained in an "Advisory Memorandum" because the interpretation "reflects [the agency's] considered views"); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 477-482 (2001) (applying *Chevron* to agency statements in explanatory preamble to final regulations).

When the discriminatory animus of a supervisory employee who is not the ultimate decisionmaker sets in motion and plays a substantial role in driving an adverse employment decision, that animus is a "motivating factor," even if the ultimate decisionmaker does not act in "blind reliance" on the supervisor's recommendation. See, *e.g.*, *Erickson* v. *USPS*, 571 F.3d 1364, 1368 (Fed. Cir. 2009); *Petty* v. *Metropolitan Gov't of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008), cert. denied, 129 S. Ct. 1933 (2009); *Coffman* v. *Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238 (11th Cir. 2005). The court of appeals therefore erred in holding that "singular influence" and "blind reliance" are required.

2. One of the principal justifications for the common-law rule of vicarious liability is that it creates

an incentive for employers to select their agents carefully and to monitor them so as to prevent them from causing harm. Fleming James, Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954) (James). That principle applies with particular force to supervisors, and it parallels USERRA's objective of providing a catalyst for an employer to intensify efforts to eliminate discrimination from the workplace, thus "encourag[ing] noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service." 38 U.S.C. 4301(a)(1). As the Tenth Circuit aptly observed in *EEOC* v. *BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (2006), cert. dismissed, 549 U.S. 1334 (2007), a functional-decisionmaker standard like that adopted by the court below would frustrate that objective by "undermin[ing] the deterrent effect of subordinate bias claims, allowing employers to escape liability * * * on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.* at 487.

The other major reason the common law holds an employer vicariously liable for the wrongful acts of its agents is to ensure that the victims of wrongful conduct are compensated. James 169-170; *Prosser and Keaton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common-law approach rests on the view that, because the employer has sought to profit through its agents, the employer, rather than the innocent victims, should bear the costs when those agents abuse their delegated authority and cause injury to others. *Ibid.* That rationale parallels USERRA's purpose of compensating victims of discrimination, a purpose that Congress underscored when it authorized compensation for violations of the statute. 38 U.S.C. 4323(d)(1). By

allowing employers to escape liability simply because the biased supervisor who caused the adverse employment action did not exercise "singular influence," the decision below would frustrate that purpose as well.

3. The rule adopted by the court of appeals would impede the enforcement not only of USERRA but also of other federal anti-discrimination statutes, including Title VII. Those statutes are governed by the same agency principles that apply to USERRA. See, *e.g.*, 42 U.S.C. 2000e(b) (defining "employer," for purposes of Title VII, to include "any agent" of an employer); 29 U.S.C. 630(b) (similar definition under Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*); *Ellerth*, 524 U.S. at 754 (concluding that Title VII must be interpreted "based on agency principles"); Gov't Br. at 16-23, *BCI Coca-Cola Bottling Co.* v. *EEOC*, No. 06-341 (2007).

In addition to its basic non-discrimination provision, 42 U.S.C. 2000e-2(a), Title VII, like USERRA, contains language making it an unlawful employment practice for an employer to take an adverse action when an improper consideration is a "motivating factor" for that action. 42 U.S.C. 2000e-2(m); see *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). Certain other anti-discrimination statutes permit relief based not upon a showing that the prohibited consideration was a "motivating factor" for the adverse employment practice, but only upon a showing of "but-for" causation. See, *e.g.*, *Gross*, 129 S. Ct. at 2349-2350 (holding that the ADEA requires "but-for" causation). Whether a biased supervisor's animus must be a but-for cause of an adverse action or merely a motivating factor in that action, the court of appeals' stringent "singular influence" standard is incorrect. For the reasons explained above, a biased supervisor can be a

motivating factor or a but-for cause of an adverse action regardless of whether he or she exerted "singular influence" over the decisionmaker.

C. An Employer's Independent Investigation Can Break The Chain Of Causation Between A Supervisor's Discriminatory Animus And An Adverse Employment Action

As explained above, USERRA requires a plaintiff to establish causation—that is, to show that his or her military status was a "motivating factor" in an adverse employment action. 38 U.S.C. 4311(c)(1); see 38 U.S.C. 4311(a) (prohibiting discrimination "on the basis of" military status). For that reason, even when a supervisor acting with a discriminatory motive has used delegated authority in an attempt to bring about an adverse employment action, the employer may be relieved from liability if it conducts an investigation that breaks the causal chain between the supervisor's misconduct and the adverse employment action. See, *e.g.*, *Poland* v. *Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007) ("[I]f an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer."); accord *BCI Coca-Cola*, 450 F.3d at 488; *Collins* v. *New York City Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002); *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999), cert. denied, 529 U.S. 1053 (2000); *Long* v. *Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996). In addition, an independent investigation may establish that an employee would have been subject to the adverse action anyway, without regard to his protected status, thus creating a defense to liability under 38 U.S.C. 4311(c)(1).

For example, suppose that a supervisor's discriminatory action was his misuse of delegated authority to provide inaccurate information to the ultimate decisionmaker, but a subsequent investigation uncovered independent and accurate information supporting the employment action at issue. If the ultimate decisionmaker then based her decision to discharge the employee on the independent sources, the investigation could break the causal connection between the supervisor's discriminatory conduct and the adverse action. The supervisor's false information might still be viewed as a but-for cause of the adverse employment action in the sense that it triggered the independent investigation. But because the ultimate decisionmaker based her decision on the independent sources, the biased report of the supervisor would not be a substantial causal factor in bringing about the adverse employment action, and the action would not be taken "on the basis of" military status.

In contrast, suppose that the subsequent investigation consisted of nothing more than asking the supervisor for a fuller account, and the supervisor's account remained deliberately slanted for discriminatory reasons. In that event, if the ultimate decisionmaker then relied on the supervisor's deliberately slanted account to take an adverse employment action, the investigation would not break the causal chain. A reassessment of evidence provided by a biased supervisor cannot overcome the fact that the supervisor deliberately slanted the evidence presented to the ultimate decisionmaker, and the ultimate decisionmaker relied substantially on that information to take an adverse employment action.

In many cases, it may be more difficult to determine whether a subsequent investigation has broken the causal chain. But the ultimate inquiry is always the

same: whether, in light of the investigation, the supervisor's discriminatory use of delegated authority was a substantial factor leading to the adverse employment action. The question is not whether the ultimate decisionmaker was negligent in failing to conduct an investigation or in structuring the investigation in a particular way. An employer has no obligation to conduct an investigation in this context. An investigation is relevant only to the extent that it sheds light on whether the supervisor's discriminatory misuse of delegated authority was a substantial factor in bringing about an adverse employment action, or on whether the adverse action would have been taken anyway. The more thorough and truly independent the investigation, the more likely the employment action will be the result of the investigation rather than the discriminatory actions of the supervisor.

D. The Court Of Appeals Erred In Setting Aside The Jury's Verdict

1. The jury in this case made a specific finding "that [petitioner's] military status was a motivating factor in [respondent's] decision to discharge him." J.A. 68a. That finding established a prima facie case of liability under Section 4311(c)(1), and the evidence at trial fully supported it. To be sure, the evidence was conflicting. But viewing the evidence in the light most favorable to petitioner, the jury could have found that Mulally's efforts to have petitioner discharged were motivated in large measure by his military obligations. Indeed, the court of appeals acknowledged that there was "abundant evidence of Mulally's animosity." Pet. App. 18a; see *id.* at 19a (discussing "the strongest proof of anti-military sentiment"). And both the termination notice given to petitioner and Buck's trial testimony show that Mul-

ally's January 2004 disciplinary action against petitioner was a significant factor in causing his dismissal. *Id.* at 10a; J.A. 74a.

Similarly, the jury heard evidence of Korenchuk's anti-military animus. Pet. App. 4a (describing petitioner's Army Reserve duties as "a b[u]nch of smoking and joking and [a] waste of taxpayers[']money") (brackets in original). And he too played a major role in petitioner's dismissal. Indeed, it was Korenchuk who reported the offense for which petitioner was terminated —his alleged violation of the terms of the January 2004 warning. *Id.* at 9a-10a.

Under USERRA, respondent may be held liable for Mulally's and Korenchuk's actions in relation to petitioner's termination. A termination decision is a paradigmatic adverse action triggering vicarious employer liability under the employment discrimination laws, including USERRA. See 38 U.S.C. 4311(a) (providing that a member of a uniformed service "shall not be denied * * * retention in employment * * * on the basis of that membership"); *Ellerth*, 524 U.S. at 760-763; *Faragher*, 524 U.S. at 790; *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 70-71 (1986). Moreover, Mulally and Korenchuk were both acting within the scope of their delegated authority when they took the actions contributing to petitioner's dismissal. See *Ellerth*, 524 U.S. at 756; *Faragher*, 524 U.S. at 793. The two of them were petitioner's superiors and had authority to direct his day-to-day work activities. Mulally acted within her authority when she gave petitioner a formal warning for "Failure to Follow Instructions" and "Lack of Cooperation." J.A. 75a; Pet. App. 6a. Korenchuk acted within his authority when he gave Buck the false report that

petitioner had not complied with the January 2004 directive. 1/7/08 Tr. 47-48; Pet. App. 9a-10a.

Accordingly, the evidence presented at trial was sufficient to allow a reasonable jury to conclude that petitioner's military status was a motivating factor in his termination. The evidence showed that Mulally and Korenchuk harbored anti-military animus, that their animus was a motivating factor in the exercise of their supervisory responsibilities, and that the actions they took as petitioner's supervisors caused his termination. The court of appeals therefore erred in setting aside the jury's verdict in favor of petitioner.

2. The court of appeals also held, as an alternative basis for its judgment, that petitioner would have been fired even "[a]part from the friction caused by his military service." Pet. App. 20a. That holding is directly at odds with the jury's special verdict that respondent had failed to prove that petitioner "would have been discharged regardless of his military status." J.A. 68a. The court of appeals' holding in this regard was based on its erroneous view that Buck had conducted an "investigation," and, "exercis[ing] her independent judgment * * * simply decide[d] that [petitioner] was not a team player." Pet. App. 20a-21a. In reaching that conclusion, the court reasoned that Buck was "not wholly dependent on a single source of information" but instead "conduct[ed] her 'own investigation into the facts relevant to the decision.'" *Id.* at 21a (quoting *Brewer*, 479 F.3d at 918).

In fact, Buck did not conduct a meaningful independent investigation. Instead, she did nothing more than consult with Korenchuk, review petitioner's personnel file, and rely on her recollection of what the court of appeals described as other "past issues" concerning peti-

tioner, none of which had been the subject of discipline. Pet. App. 10a-11a; 1/7/08 Tr. 86-87. Significantly, she failed to take even the simple step of asking petitioner for his side of the story. Pet. App. 20a (noting that Buck "failed to pursue [petitioner's] theory that Mulally fabricated the [January 2004] write-up; [and that] had Buck done this, she may have discovered that Mulally indeed bore a great deal of anti-military animus"). Nor did she interview any other witnesses, such as Sweborg, before deciding to terminate petitioner. *Id.* at 10a-11a.

Buck's mere review of a personnel file was insufficient to break the causal link between Mulally's and Korenchuk's discriminatory motives and petitioner's termination. As the Tenth Circuit reasoned in *BCI Coca-Cola* in response to similar circumstances, review of a pre-existing personnel file cannot "independently" confirm the basis for termination because "[o]bviously the file contain[s] no information about the recent incident" underlying the termination. 450 F.3d at 492-493. Here, petitioner's personnel file contained nothing about the April 20, 2004, incident that precipitated his termination. In any event, because petitioner was terminated for failing to comply with Mulally's January 2004 warning (Pet. App. 10a), Buck's "investigation" obviously did not confirm any reason other than Mulally's warning to justify Staub's termination. See J.A. 74a. The minimal efforts by Buck—which even the court of appeals conceded "could have been more robust" (Pet. App. 20a)—were therefore insufficient to break the causal chain leading from Mulally's and Korenchuk's discriminatory conduct to petitioner's termination, or to undermine the jury's determination that respondent had failed to prove that it would have discharged petitioner regardless of his military service.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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