NO. 09-400

IN THE

SUPREME COURT OF THE UNITED STATES

VINCENT E. STAUB,

Petitioner,

v.

PROCTOR HOSPITAL

Respondent.

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

BRIEF

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1940, the National School Boards Association (NSBA) is a not for profit organization representing state associations of school boards and their 14,500 member school districts across the United States. NSBA is dedicated to the improvement of public education and has long been involved in advocating for reasonable application of federal

the subject employee—even absent any evidence of bias—or face potential liability. Such a universal investigation requirement not only fails to account for the realities faced by school boards but also is unsupported by USERRA itself or by this Court's holdings. Arguments that without such a sweeping requirement, employers may intentionally isolate final decision-makers to avoid responsibility for bias and that bias could be unea

automatically impute a non-decisionmaking subordinate's bias to an employer in every instance where that employee provides negative information about another employee precedent to an adverse employment action by the employer. *Staub v. Proctor Hospital*, 560 F.3d 647 (7th Cir. 2009). To prevent the "cat's paw theory from spiraling out of control," the Seventh Circuit adopts the view that liability attaches only when the biased subordinate exerts "singular influence" over the decisionmaker. Where the decision-maker conducts its own investigation into the facts, the employer is not liable. *Id*. at 656-57 (*citing Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908, 909 (7th Cir. 2007) (rejecting "cat's paw" liability in Title VII case)). While this view appropriately offers some protection for employers unaware of subordinate bias, it is flawed in several respects warranting either rejection of the "cat's paw" theory altogether or an expansion of the defenses available to employers when plaintiffs invoke a derivative theory of liability under USERRA or other federal anti-discrimination laws.

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it unfairly narrows the scope of employer liability under USERRA, which Petitioner asserts by its terms calls for a strict application of agency principles that would yield a different result here. But courts considering whether to hold employers responsible under federal anti-discrimination statutes have generally considered the "cat's paw" liability theory in part "to prevent employers from unfairly insulating themselves from the consequences of adverse employment actions that are in reality based upon the discriminatory motives of a subordinate employee." *Hill v. Lockheed Martin, Logistics Management*, 314 F.3d 657, 684 (4th Cir. 2003)(Traxler, J., dissenting).

I. This Court Should Reject the "Cat's Paw" Theory of Liability Altogether Because the Statutorily Mandated Roles and Responsibilities of School Boards and the Practical Realities of School District Operations Make It Unreasonable To Impute the Unsanctioned, Discriminatory Animus of Subordinates to School Boards.

The statutorily defined roles and responsibilities of school boards and the operational realities of public school systems create obstacles limiting the probability that school boards charged as actual decision-makers will discover the discriminatory animus of subordinates who inform the board's employment decisions. These obstacles make it unreasonable to impose "cat's paw" liability on school boards absent an independent investigation. Instead, a more reasonable approach and one more likely to uncover bias is to require school employees to come forward and inform the school board about the discriminatory bias of subordinates and to provide incentives in the law to do so as discussed in Section III.

School boards are responsible for governing school districts and do so mostly through policy-making, not direct involvement in the daily operation of schools.[3] In most jurisdictions, school boards intersect with employment decisions in two primary ways. First, school boards promulgate rules and policies setting the terms of employment and

[3] BECOMING A BETTER BOARD MEMBER at 7 (NSBA, 2006). ("A major function of any school board is to develop and adopt policies that spell out how the school district will operate.").

governing employee behavior, including discipline.[4] Second, by virtue of state law, in most states school boards are the actual decision-makers in employment matters, including hiring and firing employees.[5]

School boards do not directly manage and supervise employees.[6] These administrative functions are delegated primarily to

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[4] *Id*. at 8. ("The board is responsible for establishing policy governing salaries and salary schedules, terms and conditions of employment, fringe benefits, leave, and in-service training.").

[5] *Id*. at 170. ("In most states, the school board is the ultimate employer of all district employees—a fact that carries the appropriate legal baggage of responsibility and accountability."). *See, e.g.*, WIS. STAT. § 118.22(2) (2008) ("No teacher may be employed or dismissed except by a majority vote of the full membership of the board."); VA. CODE ANN. § 22.1-315 (2010) ("Nothing in this section shall be construed to limit the authority of a school board to dismiss or place on probation a teacher or school employee. . ."); LA. REV. STAT. ANN. § 42:1165A (2008) ("All job actions based upon the causes for disciplining or dismissal of teachers or other public school employees . . . shall remain under the exclusive jurisdiction of

superintendents.[7] Typically the superintendent relies on assistant superintendents, area directors, principals, other supervisors and human resource employees to evaluate, supervise, train, and discipline district employees and recommend employees for hiring and termination. In fact, most school boards have no role in evaluating employees, investigating employee complaints, or developing recommendations for hiring, discipline, or termination.[8] Instead, school boards rely on input from administrators to inform their hiring and firing decisions. This operational structure is in no way designed to insulate the board from liability under federal anti-discrimination laws but rather is a separation of roles and responsibilities generally mandated by state law or dictated by logistical realities.

Where employees have no property or liberty interest in their employment,[9] or no statute or

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[7] *Id*. at 7. ("But although boards set policy, they do not carry it out. The responsibility for implementing policy is delegated to the superintendent of schools.").

[8] *Id*. at 174. ("Prudent boards set out policy guidelines for evaluating their employees, just as they do for evaluating the superintendent. Boards almost always delegate the actual evaluating to the superintendent, however, or to other members of the administrative or supervisory team.").

[9]School district employees have a property interest in their job by virtue of state law or a collective bargaining agreement granting them tenure or contract rights to continued employment. Teachers in most states have tenure rights after two or three years of employment. *See* Education Commission of the States, Teacher Tenure/Continuing Contract Laws: Updated for 1998 (1998), http://www.ecs.org/clearinghouse/14/41/1441.htm. About two-thirds of states have collective bargaining laws, many including all public employees. *See* Education Commission of the States,

collective bargaining agreement requires a hearing, school boards generally will rely only on the recommendations and the facts as presented by an administrator when deciding to terminate. Unless an issue of discrimination is raised by the affected employee, a school board generally will not look beyond the facts as presented. At that point the board is not in a position to identify *sua sponte* whether discriminatory bias played any part in the recommendation. In such instances, plaintiffs asserting a "cat's paw" theory of liability would no doubt point to these circumstances to show the administrator exerted "singular influence" on the board's decision. While in theory an independent investigation might reveal whether bias is contaminating the presentation of facts, for the reasons explained in Section II, such inquiries are neither feasible nor necessarily effective in every instance.

Under such circumstances, relying on the information and recommendation of a superintendent, even if doing so does not reveal discriminatory animus where it might exist, is reasonable. The school board is accustomed to relying on information from the superintendent to inform its policy- and decision-making functions[10] and has good reason to rely on a superintendent's recommendations in general. In most jurisdictions,

superintendent as its top administrator and requires him or her to know and to act in accordance with all district policies, including its anti-discrimination policies.[11] More specifically, the school board has good reason to rely on a superintendent's recommendations regarding employment matters. The superintendent, either through direct supervision or contact with the employee's direct supervisor, is in a far better position than the board to understand the facts supporting the recommended employment action and the credibility of the employees involved.

Where employee property interests are at stake, whether by virtue of state statute or a collective bargaining agreement, school boards ostensibly have the opportunity to determine whether discriminatory bias was a factor in a subordinate employee's recommendation because school boards are required to hold hearings. In a hearing to contest an adverse employment action, an employee can raise issues of discrimination and has a full and fair opportunity to have those claims impartially considered and resolved, thus rendering it unnecessary to impute any discriminatory intent of subordinates to the actual decision-maker. Even so, a number of courts,[12] including the Seventh

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[11] *Id*

Circuit, have concluded school boards may be a "cat's paw," despite providing the aggrieved employee an opportunity to present evidence, to raise issues, and to be fully heard. Imputing liability even after the employee has been provided this opportunity casts doubt on the merits of the "cat's paw" theory as a reasonable basis of employer liability.

In *Mateu-Anderegg v. School District of Whitefish Bay*, 304 F.3d 618, 622-624 (7th Cir. 2002), the plaintiff declined the opportunity for a statutory non-renewal hearing, yet the Seventh Circuit still concluded that the principal's alleged bias was attributable to the school board. Similarly, in *Kramer v. Logan County School District*, 157 F.3d 620, 624 (8th Cir. 1998), although the teacher participated in a five-hour hearing before the board, neither she nor her attorney ever uttered a word about discrimination, the two-judge majority nonetheless affirmed a $125,000 judgment in her favor. While the Eighth Circuit found it "troubling" that the teacher was silent about discrimination at the hearing, the court decided it was a jury question whether the school board had "accurately assessed" the teacher's situation. *Id.* at 624.

It is troubling that any court would allow a "cat's paw" liability claim to go forward where the

employer offered the opportunity for a full scale hearing. It is also surprising that where school districts have held hearings—recognized in most jurisdictions as a thorough form of fact-finding—that such hearings have failed to adduce ev t

investigate, in and of itself, is not an act of discrimination. *See Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (failure to investigate harassment complaint was not evidence of pretext in a Title VII claim where employee never told his employer that alleged harassment was race-related); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (finding no sex discrimination for failing to investigate alleged sexual harassment where none of plaintiff's complaints concerned sexual harassment).

In other employment contexts, this Court has carefully limited the outer contours of the employer's duty to investigate; an employer must determine whether a violation of law has occurred only when the employer has *some prior reason to suspect possible misconduct*. In *Waters v. Churchill*, 511 U.S. 661, 677 (1994), a plurality of this Court, considering

violated. The Seventh Circuit's decision departs from this focused approach. Rather than require an investigation only in those instances in which there is a reasonable concern about potential discrimination, it requires the actual decision-maker, in an effort to avoid liability, to conduct an investigation even if there is no hint of discriminatory animus in the conduct of the subordinate supervisor. This is a flawed analysis, because the failure to conduct an investigation is not, in and of itself, an act of discrimination.

Lower courts that have adopted an investigation requirement in "cat's paw" cases have reasoned that absent such a universal requirement, employers "might seek to evade liability, even in the face of rampant . . . discrimination among subordinates, through willful blindness." *EEOC v. BCI Coca-Cola*, 450 F.3d 476, 486 (10th Cir. 2006). But the Seventh Circuit's proposed solution to this potential problem sweeps too broadly. The solution is not to cast a wide net and require employers to presume bias and conduct investigations whenever information to support an adverse action comes from a subordinate. Rather, a more reasonable approach would be to permit a defense that promotes the purposes of anti-discrimination legislation without placing an onerous burden on either employers or employees.

Under the *Ellerth/Faragher* prevention defense, if the employee being terminated or disciplined believes that the subordinate supervisor is biased but fails to share this information with the actual decision-maker either informally or through an existing grievance or appeal process, then the employer is not liable. Employers could be held accountable if they fail to address on a case-by-case

basis any allegations of discrimination brought to their attention.[14] For the reasons explained in Section III, *Amicus* urges this Court, if it chooses to affirm the viability of the "cat's paw" theory of liability, to provide employers this affirmative defense.

B. Requiring a school board to investigate before every adverse employment action is excessively burdensome and duplicative of other steps school boards have taken to eliminate discrimination.

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[14] Courts have limited this accountability inquiry to determining whether the employer engaged in intentional discrimination in failing to investigate the allegations and not in second guessing the employer's reasonable business judgments. "[T]he court is not a 'super-personnel department' intervening whenever an employee feels he is being treated unjustly." *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 435 (7th Cir. 2005). *See also Riser v. Target Corp.*, 458 F.3d 817, 821 (8th Cir. 2006) (explaining that federal employment laws "have not vested in federal courts authority to sit as super-personnel departments reviewing wisdom or fairness of business judgments made by employers, except to extent that those judgments involve intentional discrimination")(citation omitted); *Young v. Dillon Co.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (stating that purpose of pretext analysis is "to prevent intentional discriminatory hiring practices," not to enable judges to "act as a 'super personnel department' second guessing employers' honestly held (even if erroneous) business judgments") (citation omitted); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 626 (6th Cir. 2006) (law "does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with") (citation omitted). This Court expressed a similar sentiment in *Bishop v. Wood*, 426 U.S. 341, 350 (1976) ("The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies").

A mandatory investigation requirement before every adverse employment action would be particularly burdensome on school districts. It will force school administrators to engage in defensive employment practices that increase employer costs,

solicit applicants, select candidates to interview, conduct interviews, and recommend hiring particular candidates to the board, which has ultimate authority to make the hiring decision. If this Court adopts the Seventh Circuit's holding, a school board would be obligated to investigate the facts surrounding a subordinate's recommendation to hire (or not hire) each employee (and prospective employee).

If the school board, as the actual decision-maker, is required to reach behind the facts presented to ascertain everyone's version of the story or whether there are extant indicia of discrimination for every adverse employment action it considers, the board's entire function may be subsumed by time-consuming and ultimately unnecessary investigations. The board's ability to handle efficiently even the most routine employment decisions, let alone its other

actually overcome the "cat's paw" theory of liability. For example, in *Mateu-Anderegg* the Seventh Circuit appears to reject the school board's investigation conducted at a lengthy hearing as a sufficient means of cutting off the board's status as a "cat's paw." 304 F.3d at 624. Thus, a passing acknowledgment of an investigation defense without more clarification from this Court would surely increase litigation in the federal courts.

D. Requiring a school board to investigate possible discriminatory animus whenever a subordinate

subordinate as an independent investigation.[20] It is also questionable whether employees facing an adverse employment action and other relevant witnesses would necessarily reveal discriminatory bias of informing when

school boards that frequently rely on a subordinate for information before taking adverse employment actions. Screening every employment action for discriminatory bias would likely require innumerable hearings with inquiries-6(e)-5Dnqrrinate

"cat's paw" liability where the employer exercised reasonable care to prevent and promptly correct any discriminatory behavior; and the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. This Court should adopt this "prevention defense" for the following reasons: (1)

considered to be acting within the scope of employment,[24] counseling against a "mechanical application" of agency principles. In those cases, the Court recognized that misuse of supervisory authority alone does not always place the actions clearly within the scope of employment for purposes of determining employer liability.[25]

In *Ellerth*/*Faragher* this Court considered when employers would be liable for the uncondoned discriminatory actions of supervisors outside the scope of employment. Further analyzing agency principles, the Court concluded that where supervisors take a "tangible employment action," there is a clear indication that the agency relationship, whatever its "exact contours," aids the supervisor in the commission of an unlawful employment action, thereby foreclosing any affirmative defense by the employer. But where supervisors take no tangible employment action, the Court found they are not "obviously" aided by the agency relationship. *Ellerth*, 524 U.S. at 763. Employers can thus avoid liability if they are able to meet the requirements of an affirmative defense. In short, when a supervisor is acting outside of the scope of his or her employment, a supervisor's direct ability to impose harm through a tangible employment action is what makes the agency relationship clear and what forecloses an affirmative defense to the employer. While the United States asserts that it is enough for a supervisor's actions to

[24] *Ellerth*gSTJ .8(h) 1 Tatac1 T7441(ob)004 Tw T* [8 Tw 32.89 0 T33 [(r)9(elA)-1sc1 TC4

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805-06 ("Although Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination,' [citations omitted], its 'primary objective' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.").

By adopting a similar affirmative defense in "cat's paw" cases, this Court will further the statutes' deterrent purpose by encouraging 1)employers to create and enforce policies prohibiting discrimination; 2)employees to come forward early with discrimination complaints; and 3)employers to investigate and resolve complaints. Upon receiving a complaint of subordinate bias, an *Ellerth*/*Faragher* prevention

adverse employment action is taken should not be rewarded with a federal cause of action for discrimination premised on the "cat's paw" theory of liability.[34] Yet this is exactly what happened in *Mateu-Anderegg*, 304 F.3d 618, and *Kramer*, 157 F.3d 620, and may continue to happen if the Court t h

citizen, including employees, to use to raise concerns through the district's chain-of-command. A person raising a complaint who is not satisfied by working with administrators can ultimately raise the issue with the board.[36] Moreover, concerns about discriminatory actions also can be raised at regular board meetings where individuals, including employees, can address the board directly by asking to be placed on the agenda or speaking during the public comment period.[37]

Importantly, school boards, as public employers and recipients of federal funds, are bound by numerous federal and state non-discrimination mandates, including USERRA.[38] In compliance with these laws, virtually all school districts adopt non-

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[36] *See e.g.*, Montgomery County Public Schools, Responding to Inquiries and Complaints from the Public, http://www.montgomeryschoolsmd.org/departments/policy/pdf/klara.pdf (last visited Aug. 23, 2010); Tulsa Public Schools, Public Concerns and Complaints, http://www.tulsaschools.org/district/bp/1302R.shtm (last visited Aug. 23, 2010).

[37] BECOMING A BETTER BOARD

discrimination policies,[39] develop complaint and administrative procedures specifically for employees,[40] and disseminate these policies and procedures through various means, including district policy manuals, employee handbooks, and in service

discrimination; where the employer has indicated it is ready, willing, and able to receive and act on such complaints, an *Ellerth/Faragher* type defense should be available in "cat's paw" cases.[41]

C. Putting onus on the employee to come forward is the most practical way to actually uncover subordinate bias.

The *Ellerth/Faragher* prevention defense puts the burden on employees to come forward with complaints of subordinate bias, assuming the employer has procedures in place to receive and respond to such complaints. As discussed in Section II.D., it is neither realistic to investigate every employment decision that involves subordinate input nor to assume that a biased subordinate will confess even if asked directly in such an investigation. For these reasons, the onus of revealing subordinate bias is reasonably placed on the person who experienced it. The Seventh Circuit has acknowledged the practical importance of employees coming forward to put the employer on notice of subordinate bias. *See Brewer v. Board of Trustees of the University of Illinois*, 479 F.3d 908, 919 (7th Cir. 2007) ("No one suggested that [the plaintiff] was unable to bring [information that his supervisor was racist and told him to do what he was fired for doing] to [the actual decision-maker's] attention, and until [the plaintiff] did so [the actual decision-maker] had no reason to suspect that there were additional relevant facts

[41] *Ellerth*, 524 U.S. at 764 ("To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.").

that she had not investigated."). In short, without the prevention defense, employees who do not step forward to disclose subordinate bias but instead allow it to progress in severity

the statutes "contemplate[] that employees will play a critical role in deterring discrimination."[46] Given this protection, it is reasonable to obligate employees to report subordinate bias under a prevention defense, so long as employers have procedures in place to receive and respond to complaints of discrimination.

While arguably some employees do not report discrimination because of fear of reprisal, the number of people taking advantage of anti-retaliation provisions in the past few years has greatly increased.[47] Many "cat's paw" plaintiffs have a long history of employment difficulties (caused by discrimination or otherwise) and at least suspect their continued employment is uncertain well before they are recommended for termination.[48] Employees who suspect that a discriminatory adverse employment action is imminent cannot plausibly claim they fear retaliation since they already believe their jobs are in jeopardy. At that point, they have

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(2003) *quoting* U.S. EEOC, EEOC Compliance Manual 6509 (Judith A. Tichenar et al. eds., 2001).

[46] Smith, *supra* note 43, at 530.

[47] Caplinger, *supra* note 42, at 35.

[48] *See, e.g.*, *Staub*, 560 F.3d at 654 (employee had history of frequent complaints made against him); *Brewer*, 479 F.3d at 910-12 (employee involved in multiple disputes with supervisor); *Mateu-Anderegg*, 304 F.3d at 621-22 (principal met with teacher multiple times to discuss performance problems); *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 921-22 (8th Cir. 2002)(history of animosity between employee and supervisor); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 158-59 (2d Cir. 2001) (employee cited by supervisor for various violations and received list of improvements to make to avoid termination).

little to lose and much to gain by reporting discrimination.[49]

CONCLUSION

For the foregoing reasons, *Amicus* requests this Court to affirm the Seventh Circuit's decision to the extent it places limitations on employer liability under federal anti-discrimination statutes for the bias of non-decision-making employees. *Amicus* respectfully urges the Court in making its decision to take into account the legal requirements and governance realities that school districts, as public employers, face and to place some responsibility on plaintiffs to report discrimination before an adverse employment action is taken by an unbiased decision-maker unaware of the discriminatory animus of a subordinate.

Respectfully submitted,

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[49] Befort, *supra* note 19, at 421 ("Employees who are on the brink of discharge due to subordinate bias will not have that same fear, but instead will see the reporting procedure as the last chance to save their jobs.").