

- - - - - x

VINCENT E. STAUB, :

Petitioner :

v. : No. 09-400

PROCTOR HOSPITAL :

Washington, D.C.

Tuesday, November 2, 2010

APPEARANCES:

ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of
Petitioner.

ERIC D. MILLER, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; for
the United States, as amicus curiae,
supporting Petitioner.

ROY G. DAVIS, ESQ., Peoria, Illinois; on behalf of
Respondent.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ERIC SCHNAPPER, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	ERIC D. MILLER, ESQ.	
7	On behalf of the United States, as amicus	
8	curiae, supporting Petitioner	15
9	ORAL ARGUMENT OF	
10	ROY G. DAVIS, ESQ.	
11	On behalf of the Respondent	24
12	REBUTTAL ARGUMENT OF	
13	ERIC SCHNAPPER, ESQ.	
14	On behalf of the Petitioner	47
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (1:01 p.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 this afternoon in Case 09-400, Staub v. Proctor
5 Hospital.

6 Mr. Schnapper.

7 ORAL ARGUMENT OF ERIC SCHNAPPER

8 ON BEHALF OF THE PETITIONER

9 MR. SCHNAPPER: Thank you.

10 Mr. Chief Justice, and may it please the Court:

11 The dismissal of an employee is often the
12 result of the interrelated actions and decisions of
13 several officials. Whether an employer is legally
14 responsible for any particular official and his or her
15 actions and decisions turns on agency law. Congress
16 legislates against a background of agency law and is
17 presumed to have intended agency principles to govern
18 that kind of question. Agency law, not the Eleventh
19 Circuit's "cat's paw" doctrine, is the controlling
20 standard here.

21 There are two principal agency doctrines on
22 which liability can be based.

23 JUSTICE ALITO: Well, before we jump to
24 agency law, shouldn't we take a look at the language of
25 the statute?

1 MR. SCHNAPPER: Yes, Your Honor.

2 JUSTICE ALITO: And the statute says that a
3 prima facie case is made out if it is shown that
4 military service, anti-military animus, was a motivating
5 factor in the employer's action.

6 The employer's action here was discharge,
7 right?

8 MR. SCHNAPPER: That's correct.

9 JUSTICE ALITO: And the word "motivate"
10 means to provide someone with a motive to do something,
11 right?

12 MR. SCHNAPPER: Yes, sir.

13 JUSTICE ALITO: And the person who did
14 something here was the person who discharged, discharged
15 Mr. Staub, right?

16 MR. SCHNAPPER: Well, that's not the --

17 JUSTICE ALITO: So why doesn't it follow
18 that the motivation that's relevant under the statute is
19 the motivation of the person who -- who performs the
20 action that is challenged?

21 MR. SCHNAPPER: Well, there's a -- there are
22 a series of actions and decisions that yield this
23 result. The reference in the statute is to the actions
24 of the employer, not to any particular official. And
25 so --

1 JUSTICE ALITO: No, but the -- what is --
2 what is made illegal are certain employer actions,
3 right? Not everything that's done, not -- just writing
4 up a bad report for a biased reason is not actionable
5 under this statute; isn't that correct?

6 MR. SCHNAPPER: That's correct. But a
7 decision to -- the decision to dismiss an official is --
8 can be, and is here, the result, the cumulative result,
9 of a series of decisions.

10 It's not unlike what occurs in -- in the
11 criminal justice system. Only a sentencing judge can
12 send a defendant to prison, but that decision actually
13 is a result of a series of other decisions, all of which
14 are government action. We think --

15 JUSTICE SCALIA: Yes, but -- but you say
16 that those decisions that contribute have to be
17 decisions by supervisory personnel. If your theory is
18 correct, I don't know why that is so. I don't know why
19 a co-employee who has a hostile motivation and makes a
20 report to the supervisor who ultimately dismisses the
21 individual, why that -- that wouldn't qualify as well.

22 MR. SCHNAPPER: Well, our standard is not
23 whether it's a supervisor, but whether it's an official
24 for whom the employer is liable under agency law. That
25 would not be every supervisor. If a -- if a supervisor

1 unrelated to this particular department put a false
2 charge in a -- a suggestion box, that wouldn't be any
3 different.

4 Ordinarily, a coworker wouldn't qualify
5 under agency principles as an agent of the employer when
6 engaging in that conduct. You have to look at the
7 specific conduct and apply the traditional agency
8 standards. They are laid out, for example, in the
9 Court's decision in Ellerth, which refers to the two
10 branches of agency law: scope of employment, and action
11 which is aided in, where the actor was aided in the
12 conduct by his or her official position.

13 And I think those principles would not
14 ordinarily apply to a coworker, but they would also not
15 apply invariably to a supervisor. This isn't -- we're
16 not advocating the supervisor versus non-supervisor
17 distinction in Ellerth, but -- but a return to just the
18 traditional agency doctrines. And we think those
19 doctrines delineate who is the employer for the purpose
20 of the statute, which bans action by the employer.

21 JUSTICE SCALIA: The -- the employer would
22 be liable for these lower supervisory employees here
23 why? Did they have authority to discharge?

24 MR. SCHNAPPER: No, they had other
25 authorities. They had -- well, there are two -- two

1 doctrines.

2 JUSTICE SCALIA: Why do they stand in
3 different shoes from a co-employee who also contributes
4 to the ultimate decision to fire?

5 MR. SCHNAPPER: But it's -- it's the core
6 responsibility of -- in terms of scope of employment,
7 it's the core responsibility of a supervisor of a
8 particular individual to be monitoring his or her
9 behavior, reporting on it, perhaps initiating
10 disciplinary matters -- measures.

11 That wouldn't be true of all supervisors.
12 It's only true of Mr. Staub's supervisors. So -- what
13 -- the kind of thing they did was the kind of work that
14 they were employed to engage in, and that distinguishes
15 them from, say, another supervisor who might slip a note
16 into a suggestion box.

17 Second, the other branch, major branch, of
18 agency law is that an employer is liable for actions of
19 individuals when their conduct -- when they are aided in
20 their conduct by their official position, which would
21 not typically be true of a fellow worker. But that
22 could be true here.

23 For example, Mulally set much of this in
24 motion when, on the plaintiff's version of the facts,
25 she issued the January 27th corrective order. Everyone

1 agrees she wrote it. She signed it. She was aided in
2 doing that by her position as a supervisor. A coworker
3 couldn't do that. And indeed, somebody else's
4 supervisor couldn't have done that. So --

5 JUSTICE ALITO: Could I just ask where --
6 could I ask where your argument leads? Let's say that
7 an employer calls in an employee and says: Now, we have
8 to decide who to lay off, and we've looked at your
9 record over the last 10 years, and here it is, all the
10 evaluations you've gotten over the past 10 years, and
11 based on all of that, we -- we've decided that you're
12 going to be the person to be laid off.

13 Now, if it turns out that one of those
14 evaluations was rendered by someone who had an
15 anti-military bias, would that make the employee --
16 would that be a prima facie case against the employer?

17 MR. SCHNAPPER: It -- it would. But --

18 JUSTICE ALITO: Even if the --

19 MR. SCHNAPPER: But the affirmative --

20 JUSTICE ALITO: Even if the employer at that
21 time did every -- made every reasonable effort to
22 investigate the validity of all the prior evaluations,
23 still the employer would be on the hook?

24 MR. SCHNAPPER: Yes. There is nothing in
25 the statute or in the common law that creates a special

1 rule for thorough investigation.

2 JUSTICE KENNEDY: Well, that's a sweeping
3 rule. I was going to ask a related hypothetical.

4 Suppose the -- the officer who's in charge, charged with
5 the decision to terminate or not to terminate, says:
6 I'm going to have a hearing. You can both have counsel.
7 And you have -- who is it -- suppose Buck -- suppose the
8 two employees that were allegedly anti-military here
9 testified, and they said there was no anti-military
10 bias, and the person is then terminated.

11 Later the employee has evidence that those
12 two were lying. Could he bring an action then?

13 MR. SCHNAPPER: Yes. Yes.

14 JUSTICE KENNEDY: That's sweeping. That's
15 almost an insurer's liability insofar as the director of
16 employment is concerned.

17 MR. SCHNAPPER: It's respondeat --

18 JUSTICE KENNEDY: He has to ensure -- he --
19 that he has done everything he can. He has a hearing,
20 and he has almost absolute liability.

21 MR. SCHNAPPER: Respondeat -- respondeat
22 superior is absolute liability. There -- there's no due
23 diligence exception. In fact, if you look to section
24 219 of the Restatement of Agency, 219 part (2)(b)
25 provides for liability based on negligence, but part

1 (2)(d), regardless of whether there's negligence,
2 provides liability if you're added in your -- aided in
3 your conduct by the -- by your position.

4 Now, it's possible, depending on the exact
5 facts, that the situation you described wouldn't fit
6 into scope of employment or aided in. If you just had
7 two people whose only role was just as witnesses, then
8 they're not acting as agents; they are just witnesses,
9 perhaps.

10 JUSTICE GINSBURG: But there is --

11 MR. SCHNAPPER: But there is no --

12 JUSTICE GINSBURG: There is a defense for
13 the employer that, no matter that there was this ill
14 will, there was enough else to warrant termination of
15 this employee. And so the --

16 MR. SCHNAPPER: That's correct, Your Honor.
17 And it's the language of section 4311(c)(1) that's
18 critical here. The statute provides that if an improper
19 motive was a motivating factor, there is a defense. But
20 there's only one defense, and the defense is a showing
21 the employer would have fired the plaintiff anyway. The
22 language is mandatory. It says if the defense is not
23 made out, the employer shall be considered to have
24 violated the statute.

25 But the -- the clearest enunciation of the

1 error in the Seventh Circuit is the -- is the language
2 at page 47 of the Joint Appendix, where the court says:
3 Without regard to the jury verdict here, the employer is
4 off the hook if the decisionmaker did her own
5 investigation. That's an additional defense.

6 And it's simply inconsistent with the
7 language of the statute. Now, that may not have been --
8 that may have been harsh, but it's what the statute
9 says.

10 JUSTICE ALITO: That isn't what the statute
11 says. You -- you jump over the language of the statute.
12 It has to be a motivating factor in the decision to
13 discharge. And that speaks -- that looks natural -- the
14 natural reading of that is that it looks at the
15 motivation of the person who actually makes the decision
16 to discharge.

17 Now, I'm not suggesting that's the right
18 rule. That's a very unattractive rule. But the rule
19 that you have suggested is also a very unattractive
20 rule, one that I doubt the Congress intended to adopt.
21 Is there no reasonable middle position here? It's all
22 or nothing?

23 MR. SCHNAPPER: Well, I think that the --
24 the kind of circumstances that the Court has pointed to
25 would be relevant at the remedy stage. The remedies are

1 -- are discretionary and, whereas 4311(c)(1) says
2 "shall," 4323 in describing all the remedies says "may."
3 And so a court could take those things into account in
4 framing a remedy.

5 And certainly the good faith efforts of
6 someone in Buck's position, for example, would be
7 relevant to a determination whether a violation was
8 willful. And that, in fact, reflects what happened in
9 this case, which is that the jury found that there was a
10 violation -- found that the -- the motivations involved
11 here included an improper motivation, rejected the
12 4311(c)(1) defense, but then found the violation wasn't
13 willful.

14 So I think, given the structure of the
15 statute, the -- the play here, the ability to adjust to
16 those circumstances, is in the remedy provision, not in
17 the mandatory language of the 4311(c)(1).

18 JUSTICE SOTOMAYOR: Isn't that -- isn't the
19 Government's formulation that the discrimination has to
20 play a substantial role in the termination a limiting
21 principle? I mean, you answered or appeared to be
22 answering Justice Alito that in a 10-year history, if
23 one report of discrimination existed, that that would
24 shift the burden to the employer.

25 Is that an accurate statement of law? That

1 one report has to play a role that's more than a mere
2 existence, doesn't it?

3 MR. SCHNAPPER: Well, in that regard, I
4 think we would articulate the standard differently.

5 JUSTICE SOTOMAYOR: Than the SG?

6 MR. SCHNAPPER: Yes. The language in the
7 statute is not "a substantial motivating factor." It's
8 "a motivating factor." And that choice of language is
9 clearly deliberate. This whole -- this language in this
10 provision derives from this Court's decision in Price
11 Waterhouse, a very --

12 JUSTICE SOTOMAYOR: But it has to have some
13 materiality to -- to the decision. I mean, it has to
14 have -- it has to play not just any role. It has to
15 play a material role in the decision, no? Or -- they
16 use "substantial." It could be "material." It could
17 be --

18 MR. SCHNAPPER: If I could go back to Price
19 Waterhouse and explain how we got to this language. It
20 was a sharply divided opinion. The plurality standard
21 of Justice Brennan said "a motivating factor." Justice
22 White's standard would have -- was "a substantially
23 motivating factor." Justice O'Connor's standard was
24 "substantial." Justice Kennedy pointed out in his
25 dissenting opinion that was going to lead to fights

1 about how much was enough to be substantial.

2 When Congress then wrote the 1991 Civil
3 Rights Act, from which this language derives, amending
4 Title VII, they used the Brennan language, "a motivating
5 factor." They didn't use "substantial," and I think
6 that was clearly deliberate. Everybody -- anyone who
7 read Price Waterhouse -- and that provision was written
8 about Price Waterhouse -- would have understood that
9 that was a difference within the Court, and they made
10 that choice.

11 JUSTICE SCALIA: Mr. Schnapper, I guess this
12 goes back to Justice Alito's question. I find it
13 difficult to grasp the distinction that you draw or what
14 it seems that could possibly exist between a willful
15 motivating factor and a non-willful motivating factor.
16 I mean, to say that it's motivating is -- is to say that
17 it's willful, it seems to me. But you want us to draw a
18 distinction between a willful motivating factor and a
19 non-willful motivating factor.

20 MR. SCHNAPPER: That's not our position,
21 Justice Scalia. Our position is that, with regard to
22 the liability determination in 4311, that any motivating
23 factor is what's required. And if you have a number of
24 different officials involved, Buck and Mulally and
25 Korenchuk, if anyone of -- if anyone who played a role

1 in this had an unlawful motive, that satisfies
2 4311(c)(1), and the burden shifts to the employer to
3 show it would have done the same thing anyway.

4 Willfulness doesn't have that same language
5 about a motivating factor. It just asks whether the
6 employer's violation was willful. This Court's decision
7 about willfulness in *Thurston* and *Hazen Paper I* think
8 are broad enough to encompass a situation where you had
9 several different officials. And if I might --

10 JUSTICE SCALIA: You -- you want to hold the
11 -- the employer liable for the actions of these other
12 officials, other than the one who did the firing. And
13 if they are liable for -- if you hold them -- the
14 employer liable for their contribution to the filing, it
15 seems to me you have to hold him liable for their
16 willfulness as well.

17 MR. SCHNAPPER: It's our view that the
18 language of the statute permits that distinction because
19 of the discretionary nature of the remedy provision as
20 opposed to the mandatory nature of 4311(c)(1).

21 I'd like to reserve the balance of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, Mr.
23 Schnapper.

24 Mr. Miller.

25 ORAL ARGUMENT OF ERIC D. MILLER

1 ON BEHALF OF THE UNITED STATES, AS
2 AMICUS CURIAE, SUPPORTING PETITIONER

3 MR. MILLER: Mr. Chief Justice, and may it
4 please the Court:

5 An employer is liable under USERRA when a
6 supervisor acting with a discriminatory motive uses a
7 delegated authority to cause an adverse employment
8 action. The court of appeals held that liability does
9 not attach unless that supervisor exerts singular
10 influence over the decisionmaker. But that standard is
11 inconsistent with the statute for two reasons. First,
12 it's incompatible with the statutory definition of
13 "employer," which includes not just the ultimate
14 decisionmaker, but any person to whom the employer has
15 delegated the performance of significant employment
16 responsibilities.

17 Second, it's contrary to the statute's
18 causation standard, which requires only that military
19 status be a motivating factor, not necessarily a
20 singularly important factor or the determinative factor
21 in the adverse employment action. Now --

22 CHIEF JUSTICE ROBERTS: Do you regard -- is
23 that the same as a but-for cause, the motivating factor?

24 MR. MILLER: No. There's two separate
25 components to the inquiry. First -- the first is that

1 it has to be a motivating factor, and that's the
2 plaintiff's burden to establish in order to make a prima
3 facie case under section 4311(c). And then there is an
4 affirmative defense if the employer can show that it was
5 not a but-for factor in the sense that, you know, even
6 had the person not been in the military, the same action
7 would have been taken. That's the -- if the employer
8 can show that, then it's absolved of liability.

9 JUSTICE SOTOMAYOR: Are you using proximate
10 cause in but-for, or are you suggesting a different
11 formulation of causation?

12 MR. MILLER: In our view, the "motivating
13 factor" language captures the idea of proximate cause.
14 Something can be a motivating factor if it is one of
15 many factors, but, in our view, it does need to be more
16 than a trivial or de minimis factor, and if you have a
17 situation where the bias -- the action of the biased
18 supervisor leads through a long and improbable and
19 unforeseeable chain of causation to the adverse
20 employment action, you might have a but-for cause, but
21 you wouldn't have proximate cause, and it wouldn't be a
22 motivating factor.

23 Now, this case, and I think most real-world
24 cases, are quite different from that. Here we have a
25 termination decision, and that was made by Buck on the

1 basis of the January 27th warning that was given to
2 Petitioner and the report that Petitioner had not
3 complied with that warning. And both parts of that, the
4 warning issued by Mulally and the report of
5 noncompliance that came from Korenchuk, both parts of
6 that the jury could have concluded were in --

7 JUSTICE SOTOMAYOR: In that formulation as
8 you've just articulated, where do you place your test of
9 a subordinate setting in motion and playing a
10 substantial role? What is that test that you proposed
11 in your brief -- how does it fit into this?

12 MR. MILLER: The -- the discriminatorily
13 motivated actions in this case, on the evidence
14 interpreted in the light most favorable to Petitioner,
15 were the decision of Mulally to write up Petitioner for
16 this January 27th incident, and that was motivated by
17 her hostility to him because of his status in the Army
18 Reserves; and then the decision of Korenchuk to report
19 that he had violated the terms of that January 27th
20 warning, and that was also motivated by his hostility to
21 Petitioner's membership in the -- in the Army Reserves.
22 And both of those decisions had a substantial causal
23 role in the -- in the ultimate decision made by the
24 employer to terminate. And, because both of those
25 people, Mulally and Korenchuk --

1 JUSTICE SOTOMAYOR: Your -- Petitioner's
2 counsel argues that there is no issue of -- in the
3 motivating factor test, it doesn't have to be a
4 substantial role; it just has to be a motivating factor,
5 so that the subordinates --

6 MR. MILLER: Well, this may just be a
7 semantic disagreement. We don't think it has to be
8 substantial in the sense of predominant. It can be one
9 of -- there can be many factors, and as long as it's one
10 of them, that's a motivating factor. But it needs to be
11 substantial in the sense of more than de minimis or more
12 than trivial, something that the employer actually took
13 into account as one of the reasons --

14 JUSTICE ALITO: What happens in the
15 situation where a prior evaluation or some disciplinary
16 action does have a substantial effect on the decision
17 that's -- the employment decision that's made, but the
18 employer has no notice that the prior evaluation or
19 disciplinary action was based on a biased ground, or any
20 reasonable way of finding out that it was based on a
21 biased ground? What happens in that situation?

22 MR. MILLER: There would still be liability
23 just as there is liability in the situation, which is
24 quite common, where an employer gives a single official
25 the authority to both observe an employee's behavior and

1 make a decision to terminate. If that single official
2 is biased and makes a decision on the basis of that
3 bias, then the employer is going to be liable even if
4 the people who hired that official tried very hard to
5 make sure that he wasn't biased. And that's consistent
6 with --

7 JUSTICE ALITO: How do you get around the
8 statutory language that says that the motivating -- it
9 has to be a motivating factor in the -- in the action
10 that is challenged?

11 MR. MILLER: It -- it has to be a
12 motivating -- the statute says a motivating factor in
13 the employer's action.

14 JUSTICE ALITO: And the employer's action
15 here is -- is discharge.

16 MR. MILLER: Yes, and the employer -- when
17 it's -- the employer is a corporation, and it's -- so
18 you have to look at which individuals do you look at in
19 figuring out whether it was a motivating factor or not,
20 and the statute tells us that. In the definition of
21 "employer" in section 4303, it says that the employer
22 includes everyone who has been delegated the performance
23 of employment-related responsibilities.

24 JUSTICE ALITO: Yes, but those other
25 people -- everybody who has been delegated authority

1 under the -- by the employer are not -- is not involved
2 in the action that is challenged.

3 MR. MILLER: They --

4 JUSTICE ALITO: Does not take the action
5 that is challenged.

6 MR. MILLER: They are not the last person
7 who signs the piece of paper, but they certainly are
8 part of the employer's decision.

9 JUSTICE ALITO: So maybe then the test is
10 whether they were delegated some of the responsibility
11 for the challenged action. Were they delegated
12 responsibility for making the discharge decision?

13 MR. MILLER: They -- they were delegated
14 supervisory responsibility by the -- by the employer,
15 the authority to observe the people under their
16 supervision, to evaluate and report on their
17 performance, the authority to initiate disciplinary
18 proceedings. And they used that authority in a
19 discriminatory manner, and that, that conduct by them,
20 was a substantial causal factor in the -- in the
21 ultimate action of discharge. And given the -- the
22 statutory definition of employer and the motivating
23 factor causation standard, that's enough under the
24 statute for -- for liability.

25 CHIEF JUSTICE ROBERTS: What about a

1 situation where a particular procedure such as the one
2 here is set up for a discriminatory reason, and the
3 employee is really upset with that, and so he, you know,
4 starts a fire in the plant? Wouldn't have had --
5 wouldn't have set the fire if not for the discriminatory
6 purpose. Now, does he have a cause of action in that
7 case when he's fired for setting -- setting the office
8 on fire?

9 MR. MILLER: No, even though, as you say, in
10 a sense there would be but-for causation.

11 CHIEF JUSTICE ROBERTS: It wouldn't have
12 happened -- yes.

13 MR. MILLER: But it is not -- it's not under
14 any standard of proximate causation, and not a -- the
15 initial discriminatory discipline or warning would not
16 be a motivating or substantial factor in the ultimate
17 decision to fire him. He is being fired because of the
18 intervening cause that --

19 CHIEF JUSTICE ROBERTS: So you do accept
20 that the traditional doctrine of an intervening cause is
21 applicable in this?

22 MR. MILLER: Some independent intervening
23 cause. Now, in this case, we don't have anything like
24 that.

25 CHIEF JUSTICE ROBERTS: Well, but what --

1 what independent intervening cause --

2 MR. MILLER: Independent of the employer.

3 In this case, we have a number of people, all of whom
4 are agents of the same employer. So, under traditional
5 principles of -- of an intervening cause, one can't say
6 that any one of those agents of the employer was an
7 intervening cause that broke the chain of causation from
8 misconduct of the other agent of the employer. You have
9 a series of agents of the same employer engaging in a
10 course of conduct that at the beginning of which is an
11 unlawfully -- unlawful discriminatory motive that leads
12 to the termination.

13 That's quite different from the employee
14 deciding to start a fire or engage in some sort of
15 misconduct that has nothing to do with his military
16 status.

17 CHIEF JUSTICE ROBERTS: Well, but -- I'm --
18 I'm sorry, but I think the end there just kind of glided
19 over the whole issue. You say it had nothing to do with
20 his military status. It has to do with a procedure that
21 was set up because the employer was discriminating
22 against him because of his military status. So it
23 certainly had something to do with his military status.

24 MR. MILLER: It is not, I think, a -- one
25 would hope it is not a foreseeable result of discipline

1 given to an employee that he would then start a fire.

2 CHIEF JUSTICE ROBERTS: Well, I know, but
3 the hypothetical is extreme to try to flesh out your
4 position. You can certainly imagine an employee
5 reacting in a particular way by being put through
6 procedures that were set up in a discriminatory manner
7 that would seem to anybody to be a basis for
8 termination, even though the groundwork was laid by the
9 discriminatory procedure.

10 MR. MILLER: I think one would not normally
11 think that, even if it's less extreme than starting a
12 fire, that a course of misconduct by the employee is a
13 foreseeable result of a discriminatory --

14 JUSTICE GINSBURG: Wouldn't it -- wouldn't
15 the employer's defense simply be: Anyone who starts a
16 fire goes. That's -- that's a -- it would have happened
17 no matter what the reason was for doing that.

18 MR. MILLER: Yes.

19 JUSTICE GINSBURG: That -- that just comes
20 under the employer's defense as showing that the same
21 action would have been taken.

22 MR. MILLER: Yes.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Davis.

25 ORAL ARGUMENT OF ROY G. DAVIS

1 ON BEHALF OF THE RESPONDENT

2 MR. DAVIS: Mr. Chief Justice, and may it
3 please the Court:

4 The parties to this case are in total
5 agreement with respect to two points. The first point
6 is that Linda Buck made the decision to fire Vincent
7 Staub. And the second point is there is no evidence
8 whatsoever that Linda Buck possessed animus toward Mr.
9 Staub on account of his service in the Reserve.

10 Applying ordinary tort-related vicarious
11 liability rules, Staub's case against Proctor Hospital
12 would end right here. But the Seventh Circuit, applying
13 what it calls the "cat's paw" doctrine, gives Staub and
14 all other plaintiffs like him a second bite at the
15 apple.

16 JUSTICE SOTOMAYOR: Let's look at the
17 hypothetical. Take it out of the facts of this case.
18 There are two supervisors, each of them have
19 anti-military animus, and they both report that this
20 gentleman was late when he wasn't.

21 MR. DAVIS: Right.

22 JUSTICE SOTOMAYOR: It's absolutely a
23 falsehood. They go in, they report it to Miss Buck.
24 Miss Buck does an investigation. There are no
25 witnesses. There's no one else to prove that they came

1 in late. She just takes the supervisors' word. She
2 looks at their report -- it was moments after the
3 employee didn't show up -- and she says: He's a
4 late-goer. I don't know anything about anti-animus; I
5 simply fired him because two supervisors who are
6 trustworthy -- I've looked at their files, they've never
7 lied about anything before, they are pretty honest
8 people and -- what happens in that situation?

9 MR. DAVIS: I think in that situation,
10 consistent with the "cat's paw" analysis, with the facts
11 that you set up, the two supervisors so dominated her
12 decision that there would be likely a finding that the
13 case goes to the jury.

14 JUSTICE SOTOMAYOR: How? She went and
15 looked for witnesses, didn't find them. She looked at
16 their records. She did what happened here; other people
17 have complained about these people, don't particularly
18 like them.

19 MR. DAVIS: But there being no other input
20 whatsoever beyond that, there still is the domination
21 issue. If I change your-- your hypothetical just a
22 little bit and say that all of what you said is true,
23 but in addition to that the fellow who got fired has a
24 10-year history of being late, and she looked at that
25 history, I think that she's now made an independent

1 decision, which is what happened in this case. And,
2 therefore, under the Seventh Circuit's rule, no
3 liability attaches, and that's the right result.

4 JUSTICE SOTOMAYOR: Well, but that's the
5 question, because you just added a very important fact,
6 which is a 10-year history of being late. But on this
7 day, he wasn't late. On this day, the two supervisors
8 made it up.

9 MR. DAVIS: And --

10 JUSTICE SOTOMAYOR: Would she have fired him
11 absent that report? Isn't that what the jury has to
12 decide?

13 MR. DAVIS: I think that is what the jury
14 has to decide, but I'm not sure that case in the latter
15 extended hypothetical gets that far.

16 JUSTICE SOTOMAYOR: Well, what the -- what
17 this circuit's "cat's paw" theory does and what others
18 do say, if she engaged in any investigation, there's no
19 liability.

20 MR. DAVIS: I -- I disagree with that a
21 little bit. I don't think if she engaged in any
22 investigation, that absolves of liability. I think if
23 she engages in a good faith investigation, it absolves
24 of liability.

25 JUSTICE GINSBURG: What was it -- what was

1 it here? Because the -- when -- what was his name --
2 Korenchuk --

3 MR. DAVIS: Right.

4 JUSTICE GINSBURG: -- takes him into Buck's
5 office, and Buck hands him the pink slip and says,
6 "You're fired," that the jury could have credited that
7 evidence. He was given no opportunity to explain the
8 situation. What kind of investigation? What -- she
9 looked at his personnel file. What else was the
10 investigation?

11 MR. DAVIS: I will answer that. Before I
12 get to that, I disagree with the point about he wasn't
13 given an opportunity to explain. I think the record is
14 clear he was given an opportunity to explain.

15 JUSTICE GINSBURG: When?

16 MR. DAVIS: At the -- two times. At the
17 time he was discharged, on the day that Korenchuk brings
18 him in, Korenchuk says: "I was looking for you and
19 couldn't find you." And in the record, in fact, Staub
20 gave an explanation of his whereabouts. Buck was there.
21 She heard it.

22 The second time is, approximately 5 days
23 later, he files a five-page-long grievance stating
24 all --

25 JUSTICE GINSBURG: This is after he got his

1 pink slip. What -- what point -- when Korenchuk takes
2 him into -- takes Staub into Buck's office, according to
3 his testimony, which the jury could credit, he wasn't
4 asked a thing. She just said: Here's your pink slip;
5 you're fired.

6 MR. DAVIS: I think the record shows he did
7 give an explanation of his whereabouts. The record also
8 shows that he filed a five-page grievance contesting
9 that action.

10 JUSTICE GINSBURG: After he was fired.

11 MR. DAVIS: After he was fired. And that
12 Buck carefully investigated that, and, 5 days after it
13 was filed, gave him a letter saying: I have looked into
14 it, I have considered all your arguments, including your
15 argument that you were discharged on account of your
16 military service, but I don't credit it. And,
17 therefore, I'm sustaining the discharge.

18 And that is absolutely -- Mr. Staub knew
19 that that works for him, because in 1998 he invoked the
20 same procedure when he was discharged the first time for
21 similar reasons, and he was conditionally reinstated to
22 employment at Proctor Hospital.

23 JUSTICE GINSBURG: Did -- did I understand
24 you to say that you do agree with the Seventh Circuit's
25 "cat's paw" approach to this?

1 MR. DAVIS: I do agree with it. The "cat's
2 paw" approach essentially gives Mr. Staub and others
3 like him a second bite at the apple. But he has to
4 demonstrate that the person who possessed animus
5 exercised so much control over the decisionmaker that
6 that person became the true decisionmaker. And that
7 simply doesn't work in this case for a number of
8 reasons.

9 CHIEF JUSTICE ROBERTS: Well, before you --
10 how is that consistent with the statutory language that
11 requires that this discrimination simply be a motivating
12 factor?

13 MR. DAVIS: The answer to that is the
14 statute sets forth five factors, four or five factors,
15 and says that one of the four or five employment actions
16 has to be a motivating factor in arriving at the
17 decision. So --

18 JUSTICE GINSBURG: Can we -- let's look at
19 the statutory factors.

20 MR. DAVIS: Okay. It's 4311(a). And it
21 says --

22 JUSTICE GINSBURG: Yes, and where -- where
23 are you reading it from?

24 MR. DAVIS: From the third line -- well, I'm
25 sorry, I can't tell you what line it is.

1 JUSTICE SCALIA: Page 3 of the blue brief.

2 MR. DAVIS: It says that there are five
3 actions that are prohibited: denial of initial
4 employment, reemployment, retention in employment,
5 promotion, or any benefit of employment.

6 And it says that an employer cannot take
7 action, one of those actions, on the basis of four
8 factors: membership, application for membership,
9 performance, service -- or service of obligation in the
10 uniformed services.

11 So there has to be something to connect one
12 of those factors to one of those five actions. And
13 that's the literal meaning of the statute. And I think
14 the Seventh Circuit's view is absolutely consistent with
15 that.

16 CHIEF JUSTICE ROBERTS: Well, I'm sorry.
17 The statute says is a motivating -- one of those four
18 things, membership, application, et cetera, is a
19 motivating factor in the action.

20 MR. DAVIS: Correct.

21 CHIEF JUSTICE ROBERTS: And I understood
22 your position to be that the supervisor has to have such
23 dominant control that it's the "cat's paw."

24 MR. DAVIS: That -- that -- the
25 subordinate's.

1 CHIEF JUSTICE ROBERTS: Yes.

2 MR. DAVIS: -- motivation is imputed
3 actually to the decisionmaker, and ultimately to the
4 employer.

5 CHIEF JUSTICE ROBERTS: Well, I guess where
6 I'm having trouble following you is the total domination
7 motivating factor. It seems like a much more stringent
8 test that the Seventh Circuit has adopted.

9 MR. DAVIS: Well, I think in the context of
10 this case, Your Honor, it's not, because the definition
11 of "employer" here not only includes Proctor Hospital,
12 what you might call the ultimate employer, but it also
13 includes the person who made the adverse employment
14 decision. And in this case, it's Linda Buck.

15 And this statute creates personal liability
16 for Ms. Buck or anybody else who makes a decision if
17 it's based on one of these factors contained in the
18 statute. I don't think there's any way a jury would be
19 allowed to consider whether or not Ms. Buck is in
20 violation of the statute, because there's an absolute
21 dearth of evidence that any of these factors motivated
22 the decision she made.

23 JUSTICE SOTOMAYOR: But that assumes that
24 the employment decision is solely hers. It's hers, not
25 based on her peccadilloes; it's hers based on

1 information that she has gathered.

2 MR. DAVIS: I agree. It is hers to the
3 extent that she makes a good faith investigation into
4 the background facts.

5 JUSTICE SOTOMAYOR: But -- but she's not
6 acting in a vacuum. She's acting on information that
7 has been supplied to her by people who are authorized to
8 supply that to her in the employment context.

9 MR. DAVIS: And -- and in this case, she's
10 acting on an awful lot of information. They pick out --

11 JUSTICE SOTOMAYOR: We're now talking past
12 the individual case.

13 MR. DAVIS: Okay.

14 JUSTICE SOTOMAYOR: I am talking about just
15 the legal analysis, which is: She's a decisionmaker,
16 but there are multiple actors on behalf of the employer.
17 That's your adversary's position --

18 MR. DAVIS: I agree with that.

19 JUSTICE SOTOMAYOR: Or participating in the
20 process.

21 And they're saying if any of those actors in
22 the process has been delegated employment duties that
23 permit them to participate in this way, then if what
24 motivates them is bias of this kind, then the employer
25 is responsible, not just for Ms. Buck's activities, but

1 for the two supervisors' discriminatory activities.

2 MR. DAVIS: That would lead to a
3 never-ending chain of looking backwards all the time
4 over the course of perhaps a very long employment
5 history to scour the record to determine is there one
6 single or two single actions out there that may somehow
7 have come forward and caused this termination?

8 JUSTICE SOTOMAYOR: Well, in most
9 situations, an employer comes in and says: I fired X
10 for X, Y, and Z reasons. And if they don't mention one
11 of those inconsequential or immaterial reports, why
12 would a court rely on it at all? It's not a motivating
13 factor.

14 MR. DAVIS: I'm not sure I thoroughly
15 understand the hypothetical, but if the true
16 decisionmaker there comes forward and says, I didn't
17 know about this, I didn't rely upon it -- I don't think
18 that the animus can be imputed to the decisionmaker.

19 JUSTICE BREYER: Why is this so complicated?
20 I'm probably missing something.

21 MR. DAVIS: I don't think --

22 JUSTICE BREYER: But the thing -- but it
23 doesn't help you, I don't think, if it isn't
24 complicated.

25 MR. DAVIS: Okay.

1 JUSTICE BREYER: Is the -- because of
2 Burlington, we're only talking about a certain number of
3 employees who could make an employer responsible.

4 MR. DAVIS: Right.

5 JUSTICE BREYER: Right. So those are
6 supervisory people, we'll call them.

7 MR. DAVIS: Correct.

8 JUSTICE BREYER: All right. Now, why don't
9 we just stop there and just say we have a statute, the
10 statute says that if -- if a bad motive was a
11 motivating -- had to be a motivating factor,
12 discriminatory -- a discriminatory motivating factor in
13 the dismissal, then, unless you can prove an affirmative
14 defense, you lose.

15 Why do we have to have something special if
16 one of these small group of employees happens to be the
17 person who said the last words or happens to be somebody
18 who told somebody who said the last words or happens to
19 be somebody who told the somebody the
20 something-or-other? You're just looking for one thing.
21 And there could be five zillion fact situations.

22 So why something special? Why did the
23 Seventh Circuit say where it's not the guy who said the
24 last words, you have to show, quote, "singular
25 influence"? Why singular influence? Why not just what

1 the statute says --

2 MR. DAVIS: I think that --

3 JUSTICE BREYER: -- that it was -- that it
4 led to the -- what she said, led to the discriminatory
5 motive being a motivating factor, period, end of the
6 matter. No special "cat's paw" rule, no special
7 anything rule.

8 MR. DAVIS: No consideration of proximate
9 cause, either.

10 JUSTICE BREYER: Oh, no. Of course, you
11 have to show proximate cause. You have to show cause.
12 You always do. I'm just saying, why have a special
13 rule? Why not have a special rule if somebody was on
14 the second floor? You wouldn't think of that. So if
15 you're not going to do it because the person's on the
16 second floor, why do it because they happen to be
17 somebody who told somebody, rather than somebody who was
18 the person who was told?

19 MR. DAVIS: Because to motivate -- to be
20 motivated by one of these factors, there has to be some
21 element of proximate causation --

22 JUSTICE BREYER: Well, fine. You're
23 perfectly entitled to say that. But what I don't see
24 that you're entitled to say are the words that the
25 Seventh Circuit used, which is: You have to show jury

1 that there was sufficient evidence to support a finding
2 of singular influence.

3 MR. DAVIS: I think that --

4 JUSTICE BREYER: That doesn't just sound
5 like it was a motivating cause. That sounds like it was
6 something really special.

7 MR. DAVIS: I -- I think that that is the
8 Seventh Circuit's way of saying proximate cause.

9 JUSTICE BREYER: Ah, okay. So why don't we
10 say: Seventh Circuit, if that's your way of saying it
11 is just a normal thing like cause, we accept that, but
12 please don't use those words. And because you might
13 have used -- you might have used them meaning something
14 else, we will send this back so we're certain that what
15 you are doing is applying the same test to everything.
16 In other words, was it a motivating factor?

17 MR. DAVIS: I think you could say that.

18 JUSTICE BREYER: All right. Then your --
19 that seems like a good resolution of this case to me. I
20 don't know if it does to them.

21 (Laughter.)

22 JUSTICE SCALIA: I think -- I think that
23 you've misread -- I think that you've misread the "cat's
24 paw" principle of the court of appeals. I don't think
25 that it is, to them, a determination of proximate cause

1 at all.

2 As I understand their opinion, they say that
3 the statute requires that the -- let me get the right
4 language here -- that the discriminatory -- prohibited
5 discriminatory factor must have been a motivating factor
6 in the employer's action. And they say that means it
7 must have motivated the person who took the employer's
8 action.

9 It's not a motivating factor in the
10 employer's action unless the person who took the action
11 on behalf of the employer had that as its motive.

12 Then the court of appeals makes an
13 exception: However, if the person who appears to be
14 taking the action on behalf of the employer is really
15 not the person who took the action, but was totally
16 under the control of a subordinate who -- and the person
17 just swallowed that subordinate's determination, then we
18 will hold, even though the ultimate firing -- the person
19 who signed the pink slip, even though that person didn't
20 have the motive, if in fact the decision was effectively
21 the decision of a lower subordinate, we will hold the
22 employer.

23 It has nothing to do with proximate cause.
24 It has to do with the text that it has to be a
25 motivating factor in the employer's action; not a

1 motivating factor somewhere down the line, but in the
2 employer's action. That's how I read the court of
3 appeals' opinion.

4 MR. DAVIS: And I agree with that, and we
5 get back to the notion that, in this case, it was
6 Ms. Buck who made the decision. She made the --

7 JUSTICE GINSBURG: But the --

8 MR. DAVIS: I'm sorry.

9 JUSTICE GINSBURG: But Mrs. Buck never would
10 have made this decision if Korenchuk hadn't come in and
11 said: Here's Staub, he's goofing off; he was told to
12 tell me when he was going to be absent, and he didn't.

13 Korenchuk, who has the animus, is a
14 motivating factor certainly in what happened to Mr.
15 Staub, because if you didn't have Mr. Korenchuk marching
16 Staub into Buck's office he would have retained his job.
17 Wasn't his last -- his most recent performance rating
18 very good?

19 MR. DAVIS: Only on one respect. He
20 received a technical "very good," but with respect to
21 the narrative portion of that evaluation, it says: I
22 want you to stay in the department when you're being
23 paid to work, and not to be out wandering around.

24 JUSTICE GINSBURG: In any case, there was no
25 indication, apart from Korenchuk's coming in, that Buck

1 would have taken any adverse action against Staub.

2 MR. DAVIS: I don't think we know the answer
3 to that. It was --

4 JUSTICE SCALIA: That's -- that's not the
5 point. It seems to me you have to -- we're not going to
6 second-guess the jury determination here.

7 I understood your point to be that there's a
8 difference between a motivating factor in the decision,
9 which means the person who made the decision on behalf
10 of the employer must have had that motive and, on the
11 other hand, a factor which was relevant to the decision,
12 or a factor which influenced the decision. That's quite
13 different from a motivating factor in the decision.

14 You -- you have to get us to believe -- and
15 I'm not sure we will -- that "motivating factor in the
16 decision" refers to motive on the part of the person who
17 made the decision. That's -- that's essentially your
18 point, isn't it?

19 MR. DAVIS: Yes.

20 JUSTICE BREYER: Well, then you can't agree
21 with me, because my question was why would that be? You
22 have two people, A and B; they are both supervisors. In
23 the one case, B fires the employee because he's in the
24 Army, and he says it: Ha, ha, that's why I'm doing it.

25 In the second case, he fires the employee

1 because he thought the employee was -- in one of Justice
2 Sotomayor's hypotheticals or anyone else, he fires him
3 for a perfectly good reason, but A has lied about it.
4 And the reason A lied about it was because she wanted to
5 tell him a lie so B would fire the employee, and her
6 reason is because he's in the Army.

7 Those two situations -- the second seems to
8 me one of 80 -- 80 million situations, fact-related,
9 that could arise, and I don't know why we want a special
10 standard for such a situation. Why not just ask the
11 overall question: Was this action an action that was --
12 in which the bad motive was a motivating factor? Forget
13 psychoanalysis of A; B is good enough; or vice versa.
14 That was my question.

15 MR. DAVIS: And in B, the employer could not
16 be liable. In B, the person who made the decision, the
17 employer, was not motivated by one of the factors in the
18 statute; that person couldn't be liable. If that person
19 can't be liable, how can that employer of that person be
20 vicariously liable? I don't think they can.

21 JUSTICE BREYER: Because together they
22 dismissed the employee.

23 MR. DAVIS: Oh, no.

24 JUSTICE BREYER: One by supplying the false
25 statement, the other by acting on it.

1 MR. DAVIS: I disagree with that. A
2 corporation can only act through its agents.

3 JUSTICE BREYER: They are both agents.
4 That's why I made them both Burlington people. I wanted
5 to get them in the group. They both have the same
6 Burlington status, so we get that issue out of it. And
7 together they fire this individual. In the absence of
8 either the one or the other, he wouldn't have been
9 fired.

10 MR. DAVIS: I've listened to the
11 hypothetical long enough that I've lost track of who
12 made the decision to fire him.

13 JUSTICE BREYER: I feel I'm going to get
14 nowhere pursuing this hypothetical further. So I will
15 drop it and say --

16 MR. DAVIS: Thank you.

17 JUSTICE BREYER: -- answer it as you wish or
18 as you understand it.

19 MR. DAVIS: As I understand it, the second
20 person in the hypothetical had no motivation whatsoever
21 under the statute to cause the discharge, and,
22 therefore, the employer wouldn't be liable for that
23 decision.

24 JUSTICE GINSBURG: Well, your position is --
25 and it coincides with the Seventh Circuit, but it is in

1 opposition to the Secretary of Labor's commentary on how
2 this works. The Secretary of Labor's commentary is it's
3 a motivating factor. And if Korenchuk precipitates this
4 whole thing, that's a motivating factor.

5 Do we -- I mean, this is -- the Secretary of
6 Labor administers the statute. Do we give any weight to
7 the government's official position on what a motivating
8 factor means?

9 MR. DAVIS: Normally, you would give weight
10 to the government's position, but I think the
11 government's position has to be consistent with the
12 precise language of the statute.

13 JUSTICE SCALIA: How does the Secretary of
14 Labor administer this statute? What are -- what are his
15 or her responsibilities under the statute?

16 MR. DAVIS: There can be a charge filed with
17 the Secretary of Labor, which the Secretary of Labor
18 would then investigate. The Secretary of Labor has the
19 option to bring an action, should the Secretary choose
20 to do so. But, coterminously, the individual service
21 person can bring an independent cause of action, and
22 that's what happened in this case. In this case, there
23 was no Secretary of Labor involvement.

24 JUSTICE KENNEDY: Well, why isn't this just
25 governed by the standard principles of tort for

1 concurrent actors? Actor A was not negligent; actor B
2 was; they both contributed to the accident. And we look
3 to the Restatement of Torts, which is whether or not the
4 wrongful actor made a significant contribution. That's
5 -- that's the end of it.

6 MR. DAVIS: I think that the problem with
7 this situation is, is that one of the actors here, the
8 decision that she made, being Mulally, and that's with
9 respect to whom the most evidence of animus was adduced,
10 didn't commit an action that would be actionable under
11 USERRA. There -- there's no way that issuing the
12 constructive advice record on January 27th violated the
13 statute, even if it was motivated by animus.

14 JUSTICE KENNEDY: But we're -- but we're
15 talking about the test. And the test I gave you is
16 quite different from the "cat's paw" test. And if you
17 use the test something along the lines that I
18 formulated -- I don't know if that's precisely what the
19 Restatement says --

20 MR. DAVIS: Sure.

21 JUSTICE KENNEDY: -- but to that general
22 effect, the instruction given to the jury was really
23 overprotective of your client, under the standard
24 concurrent -- concurrent causation analysis.

25 MR. DAVIS: The instruction may have been

1 somewhat protective, but the problem is, prior to
2 issuing that instruction, the district court did no
3 analysis whatsoever to determine if the instruction was
4 warranted in the first place.

5 And that was simply our point to the Seventh
6 Circuit. Before you allow this to fall into the lap of
7 a jury and try and explain to a jury, as opposed to the
8 Supreme Court, what it means to be a "cat's paw" in the
9 agency theory, the district court should at least make
10 an initial determination that that's what we have here.

11 JUSTICE SCALIA: Can -- can I turn to the
12 Secretary of Labor's regulations? Are what we talking
13 about anything more than the following statement in his
14 commentary accompanying the final regs, namely that an
15 employee, quote, "need not show that his or her
16 protected activities or status was the sole cause of the
17 employment action. The person's activities or status
18 need be only one of the factors that a truthful employer
19 would list if asked for the reasons for its decision."

20 Is that -- is that the only --

21 MR. DAVIS: I believe that is the only thing
22 with -- there may be a section later on, Your Honor, in
23 the regs that deals with the --

24 JUSTICE SCALIA: Well, this is the one that
25 the Government refers to.

1 MR. DAVIS: That's certainly the commentary
2 that goes with it. I agree with that.

3 JUSTICE SCALIA: That doesn't seem to me to
4 be so damning of your case. I think if this employer
5 had been asked the reasons for its decision, it would
6 have given Ms. Buck's reasons.

7 MR. DAVIS: Ms. Buck would have said: I let
8 him go because he has this veritable tsunami of bad
9 behaviors. What he is accused of is absolutely
10 consistent with it. And I made the decision.

11 Is it a truthful statement by her? It is
12 absolutely a truthful statement by her, and that was the
13 reason for her actions.

14 I think Ms. Buck's consideration of the
15 discharge decision wasn't limited to one source. It
16 clearly was not. No one shaped or directed the scope of
17 her determination. Even more important, she gave Mr.
18 Staub the opportunity to tell his side of the story.
19 And after considering all of that, she decided that his
20 discharge was warranted.

21 JUSTICE GINSBURG: Is it -- could a jury
22 find from the testimony before -- before it, that at the
23 time he received his pink slip -- let's not talk about
24 the grievance after --

25 MR. DAVIS: Right.

1 JUSTICE GINSBURG: -- at the time he got the
2 grievance slip, he was not given any opportunity to
3 explain that this charge was not warranted, that he had
4 tried to reach Korenchuk on the phone to tell him:
5 We're going to lunch and was unable to. He did not have
6 an opportunity to say that to Ms. Buck.

7 MR. DAVIS: Again, Your Honor, I believe the
8 record says -- and I apologize, I can't quote it from
9 the page -- that in fact Mr. Staub protested that what
10 he was accused of, i.e., not being where he was supposed
11 to be, was wrong. And he stated his version of it.

12 If there are no other questions, Your Honor,
13 I would respectfully request that the decision of the
14 Seventh Circuit be affirmed. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Mr. Davis.

17 Mr. Schnapper, you have 4 minutes remaining.

18 JUSTICE GINSBURG: Mr. Schnapper, is that
19 your recollection of this record, too, that -- that he
20 was -- he did state his version before he got the pink
21 slip?

22 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

23 ON BEHALF OF THE PETITIONER

24 MR. SCHNAPPER: I think it's -- it's
25 somewhat unclear what happened. It's complicated by the

1 fact that the defendant's account of why he was fired
2 has changed. One -- the written explanation was that he
3 never obeyed the rule for the 3 months it was in effect.
4 The explanation given by Buck was that she had been told
5 that he wasn't -- couldn't have been found on the 19th.
6 The -- the story that was given to Staub at the time was
7 that Korenchuk couldn't find him on the 20th, so if he
8 was responding to that, he was responding to the wrong
9 question.

10 JUSTICE SCALIA: Well, I don't think anybody
11 thought that Buck would have fired him just for that one
12 absence. That -- that was the trigger. But it was the
13 trigger that followed a long series of prior absences
14 for which he had been disciplined before.

15 MR. SCHNAPPER: With all due --

16 JUSTICE SCALIA: I don't see any
17 inconsistency between those two versions.

18 MR. SCHNAPPER: But those aren't the
19 versions in the record -- the written record at the
20 time. The written record at the time says he's fired
21 because he has been breaking this rule ever since
22 January. Nobody claims that's true.

23 If I -- we don't -- a number of questions.
24 I think particularly Justice Alito asked whether
25 Congress would have intended the result in this case.

1 We don't think it's as harsh as you do, but we think
2 that the intent is particularly clear here. Section
3 4301(1) says that the purpose of the -- and this is the
4 codified purpose -- the purpose of the statute is to
5 minimize the disadvantages to civilian careers that can
6 result from service in the military. And -- and that,
7 it seems to me, you have to read -- you have to read the
8 rest of the statute.

9 Secondly, this -- USERRA is unique among
10 employment statutes or close to it, because the employer
11 has an economic incentive to break the law. It's
12 expensive to keep reservists on the book. And Mulally
13 and Korenchuk objected to Staub working there precisely
14 because it cost them more money when he went to drill,
15 and it cost them more money when he was called up for
16 operation Iraqi Freedom.

17 JUSTICE ALITO: Well, do you think that the
18 standard for employer liability is different under this
19 statute than under other Federal antidiscrimination
20 statutes? Is that what you're - you were just
21 suggesting?

22 MR. SCHNAPPER: I think there are
23 particularly compelling textual reasons for the position
24 we're urging here. Other statutes have different
25 language. I'm not trying to address those --

1 JUSTICE ALITO: So that if we -- if we hold
2 here that --

3 MR. SCHNAPPER: You might decide this
4 case --

5 JUSTICE ALITO: If we were to hold here that
6 the "cat's paw" theory doesn't apply under this statute,
7 the Seventh Circuit and other circuits could continue to
8 apply the "cat's paw" theory under Title VII or under
9 the ADEA or under the ADA?

10 MR. SCHNAPPER: Well, we think that would be
11 wrong for some of the reasons we've set out in our
12 brief, but -- but you could write an opinion that only
13 addressed it under USERRA and left those other questions
14 open. The -- and -- but the --

15 JUSTICE GINSBURG: Why would Title VII be
16 different?

17 MR. SCHNAPPER: Well, the -- the language
18 that -- the language in Title VII is similar to
19 4311(c)(1), but the language that I just read about the
20 purpose isn't in Title VII. So if some -- you could
21 decide this case on somewhat narrower grounds and not
22 reach every situation.

23 The -- the interpretation of USERRA
24 adopted by the Seventh Circuit creates a serious
25 loophole in the statute. As a number of the amici have

1 pointed out, amici on the other side, employers
2 typically make a disciplinary decision as a result of a
3 bunch of different decisions.

4 The Seventh Circuit holds that so long as
5 the employer divides up those responsibilities, USERRA
6 will not apply to many of the decisions. On their view,
7 USERRA applies only to what the last decisionmaker did.
8 And the narrower her role, the narrower the protections
9 of the statute.

10 This statute should not be read in that way,
11 not only because of the language that I've recounted,
12 but because USERRA, it's reemployment rights, and it's
13 antidiscrimination rights play an essential role in the
14 national defense. They safeguard the livelihood of men
15 and women who safeguard the nation. And Congress would
16 have wanted that statute read broadly.

17 Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 The case is submitted.

20 (Whereupon, at 1:59 p.m., the case in the
21 above-entitled matter was submitted.)

22

23

24

25

<p>A</p> <p>ability 12:15</p> <p>above-entitled 1:11 51:21</p> <p>absence 42:7 48:12</p> <p>absences 48:13</p> <p>absent 27:11 39:12</p> <p>absolute 9:20,22 32:20</p> <p>absolutely 25:22 29:18 31:14 46:9 46:12</p> <p>absolved 17:8</p> <p>absolves 27:22,23</p> <p>accept 22:19 37:11</p> <p>accident 44:2</p> <p>accompanying 45:14</p> <p>account 12:3 19:13 25:9 29:15 48:1</p> <p>accurate 12:25</p> <p>accused 46:9 47:10</p> <p>act 14:3 42:2</p> <p>acting 10:8 16:6 33:6,6,10 41:25</p> <p>action 4:5,6,20 5:14 6:10,20 9:12 16:8 16:21 17:6,17,20 19:16,19 20:9,13 20:14 21:2,4,11,21 22:6 24:21 29:9 31:7,19 38:6,8,10 38:10,14,15,25 39:2 40:1 41:11,11 43:19,21 44:10 45:17</p> <p>actionable 5:4 44:10</p> <p>actions 3:12,15 4:22 4:23 5:2 7:18 15:11 18:13 30:15 31:3,7,12 34:6 46:13</p> <p>activities 33:25 34:1 45:16,17</p>	<p>actor 6:11 44:1,1,4</p> <p>actors 33:16,21 44:1 44:7</p> <p>ADA 50:9</p> <p>added 10:2 27:5</p> <p>addition 26:23</p> <p>additional 11:5</p> <p>address 49:25</p> <p>addressed 50:13</p> <p>adduced 44:9</p> <p>ADEA 50:9</p> <p>adjust 12:15</p> <p>administer 43:14</p> <p>administers 43:6</p> <p>adopt 11:20</p> <p>adopted 32:8 50:24</p> <p>adversary's 33:17</p> <p>adverse 16:7,21 17:19 32:13 40:1</p> <p>advice 44:12</p> <p>advocating 6:16</p> <p>affirmative 8:19 17:4 35:13</p> <p>affirmed 47:14</p> <p>afternoon 3:4</p> <p>agency 3:15,16,17 3:18,21,24 5:24 6:5,7,10,18 7:18 9:24 45:9</p> <p>agent 6:5 23:8</p> <p>agents 10:8 23:4,6,9 42:2,3</p> <p>agree 29:24 30:1 33:2,18 39:4 40:20 46:2</p> <p>agreement 25:5</p> <p>agrees 8:1</p> <p>Ah 37:9</p> <p>aided 6:11,11 7:19 8:1 10:2,6</p> <p>Alito 3:23 4:2,9,13 4:17 5:1 8:5,18,20 11:10 12:22 19:14 20:7,14,24 21:4,9</p>	<p>48:24 49:17 50:1,5</p> <p>Alito's 14:12</p> <p>allegedly 9:8</p> <p>allow 45:6</p> <p>allowed 32:19</p> <p>amending 14:3</p> <p>amici 50:25 51:1</p> <p>amicus 1:19 2:7 16:2</p> <p>analysis 26:10 33:15 44:24 45:3</p> <p>animus 4:4 25:8,19 30:4 34:18 39:13 44:9,13</p> <p>answer 28:11 30:13 40:2 42:17</p> <p>answered 12:21</p> <p>answering 12:22</p> <p>antidiscrimination 49:19 51:13</p> <p>anti-animus 26:4</p> <p>anti-military 4:4 8:15 9:8,9 25:19</p> <p>anybody 24:7 32:16 48:10</p> <p>anyway 10:21 15:3</p> <p>apart 39:25</p> <p>apologize 47:8</p> <p>appeals 16:8 37:24 38:12 39:3</p> <p>APPEARANCES 1:14</p> <p>appeared 12:21</p> <p>appears 38:13</p> <p>Appendix 11:2</p> <p>apple 25:15 30:3</p> <p>applicable 22:21</p> <p>application 31:8,18</p> <p>applies 51:7</p> <p>apply 6:7,14,15 50:6 50:8 51:6</p> <p>applying 25:10,12 37:15</p> <p>approach 29:25 30:2</p> <p>approximately</p>	<p>28:22</p> <p>argues 19:2</p> <p>argument 1:12 2:2,5 2:9,12 3:3,7 8:6 15:25 24:25 29:15 47:22</p> <p>arguments 29:14</p> <p>Army 18:17,21 40:24 41:6</p> <p>arriving 30:16</p> <p>articulate 13:4</p> <p>articulated 18:8</p> <p>asked 29:4 45:19 46:5 48:24</p> <p>asks 15:5</p> <p>Assistant 1:17</p> <p>assumes 32:23</p> <p>attach 16:9</p> <p>attaches 27:3</p> <p>authorities 6:25</p> <p>authority 6:23 16:7 19:25 20:25 21:15 21:17,18</p> <p>authorized 33:7</p> <p>awful 33:10</p> <hr/> <p>B</p> <hr/> <p>b 9:24 40:22,23 41:5 41:13,15,16 44:1</p> <p>back 13:18 14:12 37:14 39:5</p> <p>background 3:16 33:4</p> <p>backwards 34:3</p> <p>bad 5:4 35:10 41:12 46:8</p> <p>balance 15:21</p> <p>bans 6:20</p> <p>based 3:22 8:11 9:25 19:19,20 32:17,25,25</p> <p>basis 18:1 20:2 24:7 31:7</p> <p>beginning 23:10</p>	<p>behalf 1:15,21 2:4,7 2:11,14 3:8 16:1 25:1 33:16 38:11 38:14 40:9 47:23</p> <p>behavior 7:9 19:25</p> <p>behaviors 46:9</p> <p>believe 40:14 45:21 47:7</p> <p>benefit 31:5</p> <p>beyond 26:20</p> <p>bias 8:15 9:10 17:17 20:3 33:24</p> <p>biased 5:4 17:17 19:19,21 20:2,5</p> <p>bit 26:22 27:21</p> <p>bite 25:14 30:3</p> <p>blue 31:1</p> <p>book 49:12</p> <p>box 6:2 7:16</p> <p>branch 7:17,17</p> <p>branches 6:10</p> <p>break 49:11</p> <p>breaking 48:21</p> <p>Brennan 13:21 14:4</p> <p>BREYER 34:19,22 35:1,5,8 36:3,10 36:22 37:4,9,18 40:20 41:21,24 42:3,13,17</p> <p>brief 18:11 31:1 50:12</p> <p>bring 9:12 43:19,21</p> <p>brings 28:17</p> <p>broad 15:8</p> <p>broadly 51:16</p> <p>broke 23:7</p> <p>Buck 9:7 14:24 17:25 25:6,8,23,24 28:5,20 29:12 32:14,16,19 39:6,9 39:25 46:7 47:6 48:4,11</p> <p>Buck's 12:6 28:4 29:2 33:25 39:16</p>
--	---	--	--	--

<p>46:6,14 bunch 51:3 burden 12:24 15:2 17:2 Burlington 35:2 42:4,6 but-for 16:23 17:5 17:10,20 22:10</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 2:1 3:1 call 32:12 35:6 called 49:15 calls 8:7 25:13 captures 17:13 careers 49:5 carefully 29:12 case 3:4 4:3 8:16 12:9 17:3,23 18:13 22:7,23 23:3 25:4 25:11,17 26:13 27:1,14 30:7 32:10 32:14 33:9,12 37:19 39:5,24 40:23,25 43:22,22 46:4 48:25 50:4,21 51:19,20 cases 17:24 cat's 3:19 25:13 26:10 27:17 29:25 30:1 31:23 36:6 37:23 44:16 45:8 50:6,8 causal 18:22 21:20 causation 16:18 17:11,19 21:23 22:10,14 23:7 36:21 44:24 cause 16:7,23 17:10 17:13,20,21 22:6 22:18,20,23 23:1,5 23:7 36:9,11,11 37:5,8,11,25 38:23 42:21 43:21 45:16</p>	<p>caused 34:7 certain 5:2 35:2 37:14 certainly 12:5 21:7 23:23 24:4 39:14 46:1 cetera 31:18 chain 17:19 23:7 34:3 challenged 4:20 20:10 21:2,5,11 change 26:21 changed 48:2 charge 6:2 9:4 43:16 47:3 charged 9:4 Chief 3:3,10 15:22 16:3,22 21:25 22:11,19,25 23:17 24:2,23 25:2 30:9 31:16,21 32:1,5 47:15 51:18 choice 13:8 14:10 choose 43:19 Circuit 11:1 25:12 32:8 35:23 36:25 37:10 42:25 45:6 47:14 50:7,24 51:4 circuits 50:7 circuit's 3:19 27:2 27:17 29:24 31:14 37:8 circumstances 11:24 12:16 Civil 14:2 civilian 49:5 claims 48:22 clear 28:14 49:2 clearest 10:25 clearly 13:9 14:6 46:16 client 44:23 close 49:10 codified 49:4</p>	<p>coincides 42:25 come 34:7 39:10 comes 24:19 34:9 34:16 coming 39:25 commentary 43:1,2 45:14 46:1 commit 44:10 common 8:25 19:24 compelling 49:23 complained 26:17 complicated 34:19 34:24 47:25 complied 18:3 components 16:25 concerned 9:16 concluded 18:6 concurrent 44:1,24 44:24 conditionally 29:21 conduct 6:6,7,12 7:19,20 10:3 21:19 23:10 Congress 3:15 11:20 14:2 48:25 51:15 connect 31:11 consider 32:19 consideration 36:8 46:14 considered 10:23 29:14 considering 46:19 consistent 20:5 26:10 30:10 31:14 43:11 46:10 constructive 44:12 contained 32:17 contesting 29:8 context 32:9 33:8 continue 50:7 contrary 16:17 contribute 5:16 contributed 44:2</p>	<p>contributes 7:3 contribution 15:14 44:4 control 30:5 31:23 38:16 controlling 3:19 core 7:5,7 corporation 20:17 42:2 correct 4:8 5:5,6,18 10:16 31:20 35:7 corrective 7:25 cost 49:14,15 coterminously 43:20 counsel 9:6 19:2 24:23 51:18 course 23:10 24:12 34:4 36:10 court 1:1,12 3:10 11:2,24 12:3 14:9 16:4,8 25:3 34:12 37:24 38:12 39:2 45:2,8,9 Court's 6:9 13:10 15:6 coworker 6:4,14 8:2 co-employee 5:19 7:3 creates 8:25 32:15 50:24 credit 29:3,16 credited 28:6 criminal 5:11 critical 10:18 cumulative 5:8 curiae 1:19 2:8 16:2</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d 1:17 2:6 3:1 10:1 15:25 damning 46:4 Davis 1:21 2:10 24:24,25 25:2,21</p>	<p>26:9,19 27:9,13,20 28:3,11,16 29:6,11 30:1,13,20,24 31:2 31:20,24 32:2,9 33:2,9,13,18 34:2 34:14,21,25 35:4,7 36:2,8,19 37:3,7 37:17 39:4,8,19 40:2,19 41:15,23 42:1,10,16,19 43:9 43:16 44:6,20,25 45:21 46:1,7,25 47:7,16 day 27:7,7 28:17 days 28:22 29:12 de 17:16 19:11 deals 45:23 dearth 32:21 decide 8:8 27:12,14 50:3,21 decided 8:11 46:19 deciding 23:14 decision 5:7,7,12 6:9 7:4 9:5 11:12 11:15 13:10,13,15 15:6 17:25 18:15 18:18,23 19:16,17 20:1,2 21:8,12 22:17 25:6 26:12 27:1 30:17 32:14 32:16,22,24 38:20 38:21 39:6,10 40:8 40:9,11,12,13,16 40:17 41:16 42:12 42:23 44:8 45:19 46:5,10,15 47:13 51:2 decisionmaker 11:4 16:10,14 30:5,6 32:3 33:15 34:16 34:18 51:7 decisions 3:12,15 4:22 5:9,13,16,17 18:22 51:3,6</p>
---	---	--	---	---

defendant 5:12 defendant's 48:1 defense 10:12,19,20 10:20,22 11:5 12:12 17:4 24:15 24:20 35:14 51:14 definition 16:12 20:20 21:22 32:10 delegated 16:7,15 20:22,25 21:10,11 21:13 33:22 deliberate 13:9 14:6 delineate 6:19 demonstrate 30:4 denial 31:3 department 1:18 6:1 39:22 depending 10:4 derives 13:10 14:3 described 10:5 describing 12:2 determination 12:7 14:22 37:25 38:17 40:6 45:10 46:17 determinative 16:20 determine 34:5 45:3 difference 14:9 40:8 different 6:3 7:3 14:24 15:9 17:10 17:24 23:13 40:13 44:16 49:18,24 50:16 51:3 differently 13:4 difficult 14:13 diligence 9:23 directed 46:16 director 9:15 disadvantages 49:5 disagree 27:20 28:12 42:1 disagreement 19:7 discharge 4:6 6:23 11:13,16 20:15 21:12,21 29:17	42:21 46:15,20 discharged 4:14,14 28:17 29:15,20 disciplinary 7:10 19:15,19 21:17 51:2 discipline 22:15 23:25 disciplined 48:14 discretionary 12:1 15:19 discriminating 23:21 discrimination 12:19,23 30:11 discriminatorily 18:12 discriminatory 16:6 21:19 22:2,5,15 23:11 24:6,9,13 34:1 35:12,12 36:4 38:4,5 dismiss 5:7 dismissal 3:11 35:13 dismissed 41:22 dismisses 5:20 dissenting 13:25 distinction 6:17 14:13,18 15:18 distinguishes 7:14 district 45:2,9 divided 13:20 divides 51:5 doctrine 3:19 22:20 25:13 doctrines 3:21 6:18 6:19 7:1 doing 8:2 24:17 37:15 40:24 dominant 31:23 dominated 26:11 domination 26:20 32:6 doubt 11:20	draw 14:13,17 drill 49:14 drop 42:15 due 9:22 48:15 duties 33:22 D.C 1:8,18 <hr/> <p style="text-align: center;">E</p> <hr/> E 1:3 2:1 3:1,1 economic 49:11 effect 19:16 44:22 48:3 effectively 38:20 effort 8:21 efforts 12:5 either 36:9 42:8 element 36:21 Eleventh 3:18 Ellerth 6:9,17 else's 8:3 employed 7:14 employee 3:11 8:7 8:15 9:11 10:15 22:3 23:13 24:1,4 24:12 26:3 40:23 40:25 41:1,5,22 45:15 employees 6:22 9:8 35:3,16 employee's 19:25 employer 3:13 4:24 5:2,24 6:5,19,20 6:21 7:18 8:7,16 8:20,23 10:13,21 10:23 11:3 12:24 15:2,11,14 16:5,13 16:14 17:4,7 18:24 19:12,18,24 20:3 20:16,17,21,21 21:1,14,22 23:2,4 23:6,8,9,21 31:6 32:4,11,12 33:16 33:24 34:9 35:3 38:11,14,22 40:10	41:15,17,19 42:22 45:18 46:4 49:10 49:18 51:5 employers 51:1 employer's 4:5,6 15:6 20:13,14 21:8 24:15,20 38:6,7,10 38:25 39:2 employment 6:10 7:6 9:16 10:6 16:7 16:15,21 17:20 19:17 29:22 30:15 31:4,4,5 32:13,24 33:8,22 34:4 45:17 49:10 employment-relat... 20:23 encompass 15:8 engage 7:14 23:14 engaged 27:18,21 engages 27:23 engaging 6:6 23:9 ensure 9:18 entitled 36:23,24 enunciation 10:25 ERIC 1:15,17 2:3,6 2:13 3:7 15:25 47:22 error 11:1 ESQ 1:15,17,21 2:3 2:6,10,13 essential 51:13 essentially 30:2 40:17 establish 17:2 et 31:18 evaluate 21:16 evaluation 19:15,18 39:21 evaluations 8:10,14 8:22 everybody 14:6 20:25 evidence 9:11 18:13	25:7 28:7 32:21 37:1 44:9 exact 10:4 example 6:8 7:23 12:6 exception 9:23 38:13 exercised 30:5 exerts 16:9 exist 14:14 existed 12:23 existence 13:2 expensive 49:12 explain 13:19 28:7 28:13,14 45:7 47:3 explanation 28:20 29:7 48:2,4 extended 27:15 extent 33:3 extreme 24:3,11 <hr/> <p style="text-align: center;">F</p> <hr/> facie 4:3 8:16 17:3 fact 9:23 12:8 27:5 28:19 35:21 38:20 47:9 48:1 factor 4:5 10:19 11:12 13:7,8,21,23 14:5,15,15,18,19 14:23 15:5 16:19 16:20,20,23 17:1,5 17:13,14,16,22 19:3,4,10 20:9,12 20:19 21:20,23 22:16 30:12,16 31:19 32:7 34:13 35:11,12 36:5 37:16 38:5,5,9,25 39:1,14 40:8,11,12 40:13,15 41:12 43:3,4,8 factors 17:15 19:9 30:14,14,19 31:8 31:12 32:17,21
---	--	---	--	--

36:20 41:17 45:18 facts 7:24 10:5 25:17 26:10 33:4 fact-related 41:8 faith 12:5 27:23 33:3 fall 45:6 false 6:1 41:24 falsehood 25:23 far 27:15 favorable 18:14 Federal 49:19 feel 42:13 fellow 7:21 26:23 fighths 13:25 figuring 20:19 file 28:9 filed 29:8,13 43:16 files 26:6 28:23 filing 15:14 final 45:14 find 14:12 26:15 28:19 46:22 48:7 finding 19:20 26:12 37:1 fine 36:22 fire 7:4 22:4,5,8,17 23:14 24:1,12,16 25:6 41:5 42:7,12 fired 10:21 22:7,17 26:5,23 27:10 28:6 29:5,10,11 34:9 42:9 48:1,11,20 fires 40:23,25 41:2 firing 15:12 38:18 first 16:11,25,25 25:5 29:20 45:4 fit 10:5 18:11 five 30:14,14,15 31:2,12 35:21 five-page 29:8 five-page-long 28:23 flesh 24:3 floor 36:14,16	follow 4:17 followed 48:13 following 32:6 45:13 foreseeable 23:25 24:13 Forget 41:12 formulated 44:18 formulation 12:19 17:11 18:7 forth 30:14 forward 34:7,16 found 12:9,10,12 48:5 four 30:14,15 31:7 31:17 framing 12:4 Freedom 49:16 further 42:14 <hr/> G G 1:21 2:10 3:1 24:25 gathered 33:1 general 1:18 44:21 gentleman 25:20 GINSBURG 10:10 10:12 24:14,19 27:25 28:4,15,25 29:10,23 30:18,22 39:7,9,24 42:24 46:21 47:1,18 50:15 give 29:7 43:6,9 given 12:14 18:1 21:21 24:1 28:7,13 28:14 44:22 46:6 47:2 48:4,6 gives 19:24 25:13 30:2 glided 23:18 go 13:18 25:23 46:8 goes 14:12 24:16 26:13 46:2 going 8:12 9:3,6	13:25 20:3 36:15 39:12 40:5 42:13 47:5 good 12:5 27:23 33:3 37:19 39:18 39:20 41:3,13 goofing 39:11 gotten 8:10 govern 3:17 governed 43:25 government 5:14 45:25 government's 12:19 43:7,10,11 grasp 14:13 grievance 28:23 29:8 46:24 47:2 ground 19:19,21 grounds 50:21 groundwork 24:8 group 35:16 42:5 guess 14:11 32:5 guy 35:23 <hr/> H ha 40:24,24 hand 40:11 hands 28:5 happen 36:16 happened 12:8 22:12 24:16 26:16 27:1 39:14 43:22 47:25 happens 19:14,21 26:8 35:16,17,18 hard 20:4 harsh 11:8 49:1 Hazen 15:7 hear 3:3 heard 28:21 hearing 9:6,19 held 16:8 help 34:23 hired 20:4	history 12:22 26:24 26:25 27:6 34:5 hold 15:10,13,15 38:18,21 50:1,5 holds 51:4 honest 26:7 Honor 4:1 10:16 32:10 45:22 47:7 47:12 hook 8:23 11:4 hope 23:25 Hospital 1:6 3:5 25:11 29:22 32:11 hostile 5:19 hostility 18:17,20 hypothetical 9:3 24:3 25:17 26:21 27:15 34:15 42:11 42:14,20 hypotheticals 41:2 <hr/> I idea 17:13 ill 10:13 illegal 5:2 Illinois 1:21 imagine 24:4 immaterial 34:11 important 16:20 27:5 46:17 improbable 17:18 improper 10:18 12:11 imputed 32:2 34:18 incentive 49:11 incident 18:16 included 12:11 includes 16:13 20:22 32:11,13 including 29:14 incompatible 16:12 inconsequential 34:11 inconsistency 48:17	inconsistent 11:6 16:11 independent 22:22 23:1,2 26:25 43:21 indication 39:25 individual 5:21 7:8 33:12 42:7 43:20 individuals 7:19 20:18 influence 16:10 35:25,25 37:2 influenced 40:12 information 33:1,6 33:10 initial 22:15 31:3 45:10 initiate 21:17 initiating 7:9 input 26:19 inquiry 16:25 insofar 9:15 instruction 44:22,25 45:2,3 insurer's 9:15 intended 3:17 11:20 48:25 intent 49:2 interpretation 50:23 interpreted 18:14 interrelated 3:12 intervening 22:18 22:20,22 23:1,5,7 invariably 6:15 investigate 8:22 43:18 investigated 29:12 investigation 9:1 11:5 25:24 27:18 27:22,23 28:8,10 33:3 invoked 29:19 involved 12:10 14:24 21:1 involvement 43:23
---	---	---	---	--

Iraqi 49:16	42:3,13,17,24	Laughter 37:21	looked 8:8 26:6,15	17:12 18:12 19:6
issue 19:2 23:19	43:13,24 44:14,21	law 3:15,16,18,24	26:15,24 28:9	19:22 20:11,16
26:21 42:6	45:11,24 46:3,21	5:24 6:10 7:18	29:13	21:3,6,13 22:9,13
issued 7:25 18:4	47:1,15,18 48:10	8:25 12:25 49:11	looking 28:18 34:3	22:22 23:2,24
issuing 44:11 45:2	48:16,24 49:17	lay 8:8	35:20	24:10,18,22
i.e 47:10	50:1,5,15 51:18	lead 13:25 34:2	looks 11:13,14 26:2	million 41:8
J		leads 8:6 17:18	loophole 50:25	minimis 17:16 19:11
January 7:25 18:1		23:11	lose 35:14	minimize 49:5
18:16,19 44:12	keep 49:12	led 36:4,4	lost 42:11	minutes 47:17
48:22	Kennedy 9:2,14,18	left 50:13	lot 33:10	misconduct 23:8,15
job 39:16	13:24 43:24 44:14	legal 33:15	lower 6:22 38:21	24:12
Joint 11:2	44:21	legally 3:13	lunch 47:5	misread 37:23,23
judge 5:11	kind 3:18 7:13,13	legislates 3:16	lying 9:12	missing 34:20
jump 3:23 11:11	11:24 23:18 28:8	letter 29:13	M	
jury 11:3 12:9 18:6	33:24	let's 8:6 25:16 30:18	major 7:17	moments 26:2
26:13 27:11,13	knew 29:18	46:23	making 21:12	money 49:14,15
28:6 29:3 32:18	know 5:18,18 17:5	liability 3:22 9:15,20	mandatory 10:22	monitoring 7:8
36:25 40:6 44:22	22:3 24:2 26:4	9:22,25 10:2 14:22	12:17 15:20	months 48:3
45:7,7 46:21	34:17 37:20 40:2	16:8 17:8 19:22,23	manner 21:19 24:6	motion 7:24 18:9
justice 1:18 3:3,10	41:9 44:18	21:24 25:11 27:3	marching 39:15	motivate 4:9 36:19
3:23 4:2,9,13,17	Korenychuk 14:25	27:19,22,24 32:15	material 13:15,16	motivated 18:13,16
5:1,11,15 6:21 7:2	18:5,18,25 28:2,17	49:18	materiality 13:13	18:20 32:21 36:20
8:5,18,20 9:2,14	28:18 29:1 39:10	liable 5:24 6:22 7:18	matter 1:11 10:13	38:7 41:17 44:13
9:18 10:10,12	39:13,15 43:3 47:4	15:11,13,14,15	24:17 36:6 51:21	motivates 33:24
11:10 12:18,22	48:7 49:13	16:5 20:3 41:16,18	matters 7:10	motivating 4:4
13:5,12,21,21,23	Korenychuk's 39:25	41:19,20 42:22	mean 12:21 13:13	10:19 11:12 13:7,8
13:24 14:11,12,21	L		14:16 43:5	13:21,23 14:4,15
15:10,22 16:3,22	Labor 43:6,14,17,17	lie 41:5	meaning 31:13	14:15,16,18,19,22
17:9 18:7 19:1,14	43:18,23	lied 26:7 41:3,4	37:13	15:5 16:19,23 17:1
20:7,14,24 21:4,9	Labor's 43:1,2	light 18:14	means 4:10 38:6	17:12,14,22 19:3,4
21:25 22:11,19,25	45:12	limited 46:15	40:9 43:8 45:8	19:10 20:8,9,12,12
23:17 24:2,14,19	laid 6:8 8:12 24:8	limiting 12:20	measures 7:10	20:19 21:22 22:16
24:23 25:2,16,22	language 3:24 10:17	Linda 25:6,8 32:14	membership 18:21	30:11,16 31:17,19
26:14 27:4,10,16	10:22 11:1,7,11	line 30:24,25 39:1	31:8,8,18	32:7 34:12 35:11
27:25 28:4,15,25	12:17 13:6,8,9,19	lines 44:17	men 51:14	35:11,12 36:5 37:5
29:10,23 30:9,18	14:3,4 15:4,18	list 45:19	mention 34:10	37:16 38:5,9,25
30:22 31:1,16,21	17:13 20:8 30:10	listened 42:10	mere 13:1	39:1,14 40:8,13,15
32:1,5,23 33:5,11	38:4 43:12 49:25	literal 31:13	middle 11:21	41:12 43:3,4,7
33:14,19 34:8,19	50:17,18,19 51:11	little 26:22 27:21	military 4:4 16:18	motivation 4:18,19
34:22 35:1,5,8	lap 45:6	livelihood 51:14	17:6 23:15,20,22	5:19 11:15 12:11
36:3,10,22 37:4,9	late 25:20 26:1,24	long 17:18 19:9 34:4	23:23 29:16 49:6	32:2 42:20
37:18,22 39:7,9,24	27:6,7	look 3:24 6:6 9:23	Miller 1:17 2:6	motivations 12:10
40:4,20 41:1,21,24	late-goer 26:4	20:18,18 25:16	15:24,25 16:3,24	motive 4:10 10:19
		30:18 44:2		15:1 16:6 23:11
				35:10 36:5 38:11

38:20 40:10,16 41:12 Mulally 7:23 14:24 18:4,15,25 44:8 49:12 multiple 33:16	occurs 5:10 office 22:7 28:5 29:2 39:16 officer 9:4 official 3:14 4:24 5:7 5:23 6:12 7:20 19:24 20:1,4 43:7 officials 3:13 14:24 15:9,12 Oh 36:10 41:23 okay 30:20 33:13 34:25 37:9 open 50:14 operation 49:16 opinion 13:20,25 38:2 39:3 50:12 opportunity 28:7,13 28:14 46:18 47:2,6 opposed 15:20 45:7 opposition 43:1 option 43:19 oral 1:11 2:2,5,9 3:7 15:25 24:25 order 7:25 17:2 ordinarily 6:4,14 ordinary 25:10 overall 41:11 overprotective 44:23 O'Connor's 13:23	48:24 49:2,23 parties 25:4 parts 18:3,5 paw 3:19 25:13 26:10 27:17 29:25 30:2 31:23 36:6 37:24 44:16 45:8 50:6,8 peccadilloes 32:25 people 10:7 18:25 20:4,25 21:15 23:3 26:8,16,17 33:7 35:6 40:22 42:4 Peoria 1:21 perfectly 36:23 41:3 performance 16:15 20:22 21:17 31:9 39:17 performs 4:19 period 36:5 permit 33:23 permits 15:18 person 4:13,14,19 8:12 9:10 11:15 16:14 17:6 21:6 30:4,6 32:13 35:17 36:18 38:7,10,13 38:15,16,18,19 40:9,16 41:16,18 41:18,19 42:20 43:21 personal 32:15 personnel 5:17 28:9 person's 36:15 45:17 Petitioner 1:4,16,20 2:4,8,14 3:8 16:2 18:2,2,14,15 47:23 Petitioner's 18:21 19:1 phone 47:4 pick 33:10 piece 21:7 pink 28:5 29:1,4	38:19 46:23 47:20 place 18:8 45:4 plaintiff 10:21 plaintiffs 25:14 plaintiff's 7:24 17:2 plant 22:4 play 12:15,20 13:1 13:14,15 51:13 played 14:25 playing 18:9 please 3:10 16:4 25:3 37:12 plurality 13:20 point 25:5,7 28:12 29:1 40:5,7,18 45:5 pointed 11:24 13:24 51:1 points 25:5 portion 39:21 position 6:12 7:20 8:2 10:3 11:21 12:6 14:20,21 24:4 31:22 33:17 42:24 43:7,10,11 49:23 possessed 25:8 30:4 possible 10:4 possibly 14:14 precipitates 43:3 precise 43:12 precisely 44:18 49:13 predominant 19:8 presumed 3:17 pretty 26:7 Price 13:10,18 14:7 14:8 prima 4:3 8:16 17:2 principal 3:21 principle 12:21 37:24 principles 3:17 6:5 6:13 23:5 43:25 prior 8:22 19:15,18	45:1 48:13 prison 5:12 probably 34:20 problem 44:6 45:1 procedure 22:1 23:20 24:9 29:20 procedures 24:6 proceedings 21:18 process 33:20,22 Proctor 1:6 3:4 25:11 29:22 32:11 prohibited 31:3 38:4 promotion 31:5 proposed 18:10 protected 45:16 protections 51:8 protective 45:1 protested 47:9 prove 25:25 35:13 provide 4:10 provides 9:25 10:2 10:18 provision 12:16 13:10 14:7 15:19 proximate 17:9,13 17:21 22:14 36:8 36:11,21 37:8,25 38:23 psychoanalysis 41:13 purpose 6:19 22:6 49:3,4,4 50:20 pursuing 42:14 put 6:1 24:5 p.m 1:13 3:2 51:20
<hr/> N <hr/> N 2:1,1 3:1 name 28:1 narrative 39:21 narrower 50:21 51:8 51:8 nation 51:15 national 51:14 natural 11:13,14 nature 15:19,20 necessarily 16:19 need 17:15 45:15,18 needs 19:10 negligence 9:25 10:1 negligent 44:1 never 26:6 39:9 48:3 never-ending 34:3 noncompliance 18:5 non-supervisor 6:16 non-willful 14:15,19 normal 37:11 normally 24:10 43:9 note 7:15 notice 19:18 notion 39:5 November 1:9 number 14:23 23:3 30:7 35:2 48:23 50:25	<hr/> P <hr/> P 3:1 page 2:2 11:2 31:1 47:9 paid 39:23 paper 15:7 21:7 part 9:24,25 21:8 40:16 participate 33:23 participating 33:19 particular 3:14 4:24 6:1 7:8 22:1 24:5 particularly 26:17	<hr/> P <hr/> P 3:1 page 2:2 11:2 31:1 47:9 paid 39:23 paper 15:7 21:7 part 9:24,25 21:8 40:16 participate 33:23 participating 33:19 particular 3:14 4:24 6:1 7:8 22:1 24:5 particularly 26:17	<hr/> Q <hr/> qualify 5:21 6:4 question 3:18 14:12 27:5 40:21 41:11 41:14 48:9 questions 47:12 48:23 50:13 quite 17:24 19:24	

23:13 40:12 44:16 quote 35:24 45:15 47:8	regardless 10:1 regs 45:14,23 regulations 45:12 reinstated 29:21 rejected 12:11 related 9:3 relevant 4:18 11:25 12:7 40:11 rely 34:12,17 remaining 47:17 remedies 11:25 12:2 remedy 11:25 12:4 12:16 15:19 rendered 8:14 report 5:4,20 12:23 13:1 18:2,4,18 21:16 25:19,23 26:2 27:11 reporting 7:9 reports 34:11 request 47:13 required 14:23 requires 16:18 30:11 38:3 reserve 15:21 25:9 Reserves 18:18,21 reservists 49:12 resolution 37:19 respect 25:5 39:19 39:20 44:9 respectfully 47:13 respondeat 9:17,21 9:21 Respondent 1:22 2:11 25:1 responding 48:8,8 responsibilities 16:16 20:23 43:15 51:5 responsibility 7:6,7 21:10,12,14 responsible 3:14 33:25 35:3 rest 49:8	Restatement 9:24 44:3,19 result 3:12 4:23 5:8 5:8,13 23:25 24:13 27:3 48:25 49:6 51:2 retained 39:16 retention 31:4 return 6:17 right 4:7,11,15 5:3 11:17 25:12,21 27:3 28:3 35:4,5,8 37:18 38:3 46:25 rights 14:3 51:12,13 ROBERTS 3:3 15:22 16:22 21:25 22:11,19,25 23:17 24:2,23 30:9 31:16 31:21 32:1,5 47:15 51:18 role 10:7 12:20 13:1 13:14,15 14:25 18:10,23 19:4 51:8 51:13 ROY 1:21 2:10 24:25 rule 9:1,3 11:18,18 11:18,20 27:2 36:6 36:7,13,13 48:3,21 rules 25:11	47:8 48:20 49:3 Scalia 5:15 6:21 7:2 14:11,21 15:10 31:1 37:22 40:4 43:13 45:11,24 46:3 48:10,16 Schnapper 1:15 2:3 2:13 3:6,7,9 4:1,8 4:12,16,21 5:6,22 6:24 7:5 8:17,19 8:24 9:13,17,21 10:11,16 11:23 13:3,6,18 14:11,20 15:17,23 47:17,18 47:22,24 48:15,18 49:22 50:3,10,17 scope 6:10 7:6 10:6 46:16 scour 34:5 Seattle 1:15 second 7:17 16:17 25:7,14 28:22 30:3 36:14,16 40:25 41:7 42:19 Secondly 49:9 second-guess 40:6 Secretary 43:1,2,5 43:13,17,17,18,19 43:23 45:12 section 9:23 10:17 17:3 20:21 45:22 49:2 see 36:23 48:16 semantic 19:7 send 5:12 37:14 sense 17:5 19:8,11 22:10 sentencing 5:11 separate 16:24 series 4:22 5:9,13 23:9 48:13 serious 50:24 service 4:4 25:9 29:16 31:9,9 43:20	49:6 services 31:10 set 7:23 22:2,5 23:21 24:6 26:11 50:11 sets 30:14 setting 18:9 22:7,7 Seventh 11:1 25:12 27:2 29:24 31:14 32:8 35:23 36:25 37:8,10 42:25 45:5 47:14 50:7,24 51:4 SG 13:5 shaped 46:16 sharply 13:20 shift 12:24 shifts 15:2 shoes 7:3 show 15:3 17:4,8 26:3 35:24 36:11 36:11,25 45:15 showing 10:20 24:20 shown 4:3 shows 29:6,8 side 46:18 51:1 signed 8:1 38:19 significant 16:15 44:4 signs 21:7 similar 29:21 50:18 simply 11:6 24:15 26:5 30:7,11 45:5 single 19:24 20:1 34:6,6 singular 16:9 35:24 35:25 37:2 singularly 16:20 sir 4:12 situation 10:5 15:8 17:17 19:15,21,23 22:1 26:8,9 28:8 41:10 44:7 50:22 situations 34:9 35:21 41:7,8
---	---	---	---	---

slip 7:15 28:5 29:1,4 38:19 46:23 47:2 47:21 small 35:16 sole 45:16 solely 32:24 Solicitor 1:17 somebody 8:3 35:17 35:18,19,19 36:13 36:17,17,17 something-or-other 35:20 somewhat 45:1 47:25 50:21 sorry 23:18 30:25 31:16 39:8 sort 23:14 SOTOMAYOR 12:18 13:5,12 17:9 18:7 19:1 25:16,22 26:14 27:4,10,16 32:23 33:5,11,14 33:19 34:8 Sotomayor's 41:2 sound 37:4 sounds 37:5 source 46:15 speaks 11:13 special 8:25 35:15 35:22 36:6,6,12,13 37:6 41:9 specific 6:7 stage 11:25 stand 7:2 standard 3:20 5:22 13:4,20,22,23 16:10,18 21:23 22:14 41:10 43:25 44:23 49:18 standards 6:8 start 23:14 24:1 starting 24:11 starts 22:4 24:15 state 47:20	stated 47:11 statement 12:25 41:25 45:13 46:11 46:12 States 1:1,12,19 2:7 16:1 stating 28:23 status 16:19 18:17 23:16,20,22,23 42:6 45:16,17 statute 3:25 4:2,18 4:23 5:5 6:20 8:25 10:18,24 11:7,8,10 11:11 12:15 13:7 15:18 16:11 20:12 20:20 21:24 30:14 31:13,17 32:15,18 32:20 35:9,10 36:1 38:3 41:18 42:21 43:6,12,14,15 44:13 49:4,8,19 50:6,25 51:9,10,16 statutes 49:10,20 49:24 statute's 16:17 statutory 16:12 20:8 21:22 30:10,19 Staub 1:3 3:4 4:15 25:7,9,13 28:19 29:2,18 30:2 39:11 39:15,16 40:1 46:18 47:9 48:6 49:13 Staub's 7:12 25:11 stay 39:22 stop 35:9 story 46:18 48:6 stringent 32:7 structure 12:14 submitted 51:19,21 subordinate 18:9 38:16,21 subordinates 19:5 subordinate's 31:25	38:17 substantial 12:20 13:7,16,24 14:1,5 18:10,22 19:4,8,11 19:16 21:20 22:16 substantially 13:22 sufficient 37:1 suggested 11:19 suggesting 11:17 17:10 49:21 suggestion 6:2 7:16 superior 9:22 supervision 21:16 supervisor 5:20,23 5:25,25 6:15,16 7:7,15 8:2,4 16:6,9 17:18 31:22 supervisors 7:11,12 25:18 26:1,5,11 27:7 34:1 40:22 supervisory 5:17 6:22 21:14 35:6 supplied 33:7 supply 33:8 supplying 41:24 support 37:1 supporting 1:20 2:8 16:2 suppose 9:4,7,7 supposed 47:10 Supreme 1:1,12 45:8 sure 20:5 27:14 34:14 40:15 44:20 sustaining 29:17 swallowed 38:17 sweeping 9:2,14 system 5:11	40:1 takes 26:1 28:4 29:1 29:2 talk 46:23 talking 33:11,14 35:2 44:15 45:12 technical 39:20 tell 30:25 39:12 41:5 46:18 47:4 tells 20:20 terminate 9:5,5 18:24 20:1 terminated 9:10 termination 10:14 12:20 17:25 23:12 24:8 34:7 terms 7:6 18:19 test 18:8,10 19:3 21:9 32:8 37:15 44:15,15,16,17 testified 9:9 testimony 29:3 46:22 text 38:24 textual 49:23 Thank 3:9 15:22 24:23 42:16 47:14 47:15 51:17,18 theory 5:17 27:17 45:9 50:6,8 thing 7:13 15:3 29:4 34:22 35:20 37:11 43:4 45:21 things 12:3 31:18 think 5:14 6:13,18 11:23 12:14 13:4 14:5 15:7 17:23 19:7 23:18,24 24:10,11 26:9,25 27:13,21,22 28:13 29:6 31:13 32:9,18 34:17,21,23 36:2 36:14 37:3,7,17,22 37:22,23,24 40:2	41:20 43:10 44:6 46:4,14 47:24 48:10,24 49:1,1,17 49:22 50:10 third 30:24 thorough 9:1 thoroughly 34:14 thought 41:1 48:11 Thurston 15:7 time 8:21 15:21 28:17,22 29:20 34:3 46:23 47:1 48:6,20,20 times 28:16 Title 14:4 50:8,15 50:18,20 told 35:18,19 36:17 36:18 39:11 48:4 tort 43:25 Torts 44:3 tort-related 25:10 total 25:4 32:6 totally 38:15 track 42:11 traditional 6:7,18 22:20 23:4 tried 20:4 47:4 trigger 48:12,13 trivial 17:16 19:12 trouble 32:6 true 7:11,12,21,22 26:22 30:6 34:15 48:22 trustworthy 26:6 truthful 45:18 46:11 46:12 try 24:3 45:7 trying 49:25 tsunami 46:8 Tuesday 1:9 turn 45:11 turns 3:15 8:13 two 3:21 6:9,25,25 9:8,12 10:7 16:11
--	--	--	---	---

16:24 25:5,18 26:5 26:11 27:7 28:16 34:1,6 40:22 41:7 48:17 typically 7:21 51:2	versa 41:13 version 7:24 47:11 47:20 versions 48:17,19 versus 6:16 vicarious 25:10 vicariously 41:20 vice 41:13 view 15:17 17:12,15 31:14 51:6 VII 14:4 50:8,15,18 50:20 Vincent 1:3 25:6 violated 10:24 18:19 44:12 violation 12:7,10,12 15:6 32:20	35:2 37:14 40:5 44:14,14 47:5 49:24 we've 8:8,11 50:11 whatsoever 25:8 26:20 42:20 45:3 whereabouts 28:20 29:7 White's 13:22 willful 12:8,13 14:14 14:17,18 15:6 willfulness 15:4,7 15:16 wish 42:17 witnesses 10:7,8 25:25 26:15 women 51:15 word 4:9 26:1 words 35:17,18,24 36:24 37:12,16 work 7:13 30:7 39:23 worker 7:21 working 49:13 works 29:19 43:2 wouldn't 5:21 6:2,4 7:11 10:5 17:21,21 22:4,5,11 24:14,14 36:14 42:8,22 write 18:15 50:12 writing 5:3 written 14:7 48:2,19 48:20 wrong 47:11 48:8 50:11 wrongful 44:4 wrote 8:1 14:2	yield 4:22 Z Z 34:10 zillion 35:21 0 09-400 1:5 3:4 1 1:01 1:13 3:2 1:59 51:20 10 8:9,10 10-year 12:22 26:24 27:6 15 2:8 19th 48:5 1991 14:2 1998 29:19 2 2 1:9 9:24 10:1 20th 48:7 2010 1:9 219 9:24,24 24 2:11 27th 7:25 18:1,16,19 44:12 3 3 2:4 31:1 48:3 4 4 47:17 4301(1) 49:3 4303 20:21 4311 14:22 4311(a) 30:20 4311(c) 17:3 4311(c)(1) 10:17 12:1,12,17 15:2,20 50:19 4323 12:2 47 2:14 11:2	5 5 28:22 29:12 8 80 41:8,8
U ultimate 7:4 16:13 18:23 21:21 22:16 32:12 38:18 ultimately 5:20 32:3 unable 47:5 unattractive 11:18 11:19 unclear 47:25 understand 29:23 34:15 38:2 42:18 42:19 understood 14:8 31:21 40:7 unforeseeable 17:19 uniformed 31:10 unique 49:9 United 1:1,12,19 2:7 16:1 unlawful 15:1 23:11 unlawfully 23:11 unrelated 6:1 upset 22:3 urging 49:24 use 13:16 14:5 37:12 44:17 USERRA 16:5 44:11 49:9 50:13 50:23 51:5,7,12 uses 16:6	W wandering 39:23 want 14:17 15:10 39:22 41:9 wanted 41:4 42:4 51:16 warning 18:1,3,4,20 22:15 warrant 10:14 warranted 45:4 46:20 47:3 Washington 1:8,15 1:18 wasn't 12:12 20:5 25:20 27:7 28:12 29:3 39:17 46:15 48:5 Waterhouse 13:11 13:19 14:7,8 way 19:20 24:5 32:18 33:23 37:8 37:10 44:11 51:10 weight 43:6,9 went 26:14 49:14 we'll 3:3 35:6 we're 6:15 33:11	X x 1:2,7 34:9,10 Y Y 34:10 years 8:9,10		
V v 1:5 3:4 vacuum 33:6 validity 8:22 verdict 11:3 veritable 46:8				