

## Supreme Court Hears Case of Fired Reservist

The Supreme Court on Tuesday heard the case of an Army reservist who alleges he was fired from his job in 2004 because he was deployed by the military. The case is the first that the high court has considered involving the Uniformed Services Employment and Reemployment Rights Act.

Army Reserve Sgt. Vincent Staub of Illinois claims two supervisors, resentful that his military duties called him away from work, set him up to be fired for poor performance. Staub made his claim under USERRA, which was enacted by Congress to make sure employers don't fire reservists just because they are called to serve.

At the heart of the case is whether Staub's employer, Proctor Hospital of Peoria, Ill., can be held liable for a firing prompted by managers but carried out by a proxy.

Roy Davis, the attorney for Proctor, argued that unless Staub was able to show that his department head, Michael Korenchuck, and his deputy, Janice Mulally, exerted a major influence over the woman who did the firing, there was no violation of USERRA because no one is claiming the supervisor held anti-military views. The supervisor, Linda Buck, would have had to be "the Cat's Paw" -- an unwitting tool used by another -- for Staub to make his case, Davis argued.

"But he has to demonstrate that the person who possessed animus exercised so much control over [Buck] that that person became the true decision maker," Davis said.

Chief Justice John Roberts told Davis he was having trouble following what he termed the "domination-motivating factor."

Associate Justice Sonia Sotomayor said Buck would not have been acting in a vacuum.

"She's acting on information that has been supplied to her by people who are authorized to supply that to her in the employment context," Sotomayor said.

The Justice Department weighed in on Staub's side. "An employer is liable under USERRA when a supervisor acting with a discriminatory motive uses a delegated authority to cause an adverse employment action," attorney Eric Miller told the court. Under USERRA, he said, military status has only to be "a motivating factor" in the decision by the employer in the firing.

Staub's attorney Eric Schnapper argued that Proctor was liable because of the employees' actions, including Buck, even if she did not have the anti-military biases of the others. Buck fired Staub based on reports supplied by supervisors with a demonstrated hostility to his service obligations, Schnapper argued.

Here the Justices took issue with Schnapper over the termination cause, with Associate Justice Samuel Alito commenting on Proctor Hospital's claim that Staub was fired based on a history of other issues.

"Let's say an employer calls in an employee and says ... we have to decide who to lay off and

we have looked at your record over the last 10 years ... and based on all of that, we've decided that you are going to be the person to be laid off," Alito said. "Now if it turns out that one of those evaluations was rendered by someone who had an anti-military bias, would that make a ... case against the employer?"

Schnapper said it would, prompting Justice Anthony Kennedy to remark: "Well, that's a sweeping rule."

Staub was an angiography technologist at Proctor when he was called up for a three-month active-duty tour in 2003. In January 2004, he told the hospital he had orders to report for processing in anticipation of another call-up. According to court documents, Korenchuck and Mulally referred to Staub's service obligations as "bulls-t."

Testimony in the original trial in Illinois revealed Korenchuck described Staub's duty weekends as "a bunch of smoking and joking and a waste of taxpayer's money." Mulally later took over employee scheduling and assigned Staub extra shifts without notice, saying they were to "pay back the department for everyone else having to bend over backwards to cover his schedule for the Reserves," according to the high court's outline of the case.

In some cases, Mulally called Staub's unit to try and switch his duty weekends so he could work at the hospital, and even swore at and hung up on a unit administrator when he would not make the switch.

After informing the supervisors that he might be called up for duty again, Staub was given a written warning saying he was in violation of hospital policy requiring angiography techs to assist in more general diagnostic imaging duties when they weren't working with angiography patients. Though he had never heard of the policy and denied violating it, Staub still did the extra duty, according to the court outline. On one occasion when he was free of his usual duties but not able to reach supervisor Korenchuck, Staub left a message and took a late lunch in the hospital cafeteria.

When Staub returned, Korenchuck took him to the office of Linda Buck, where she handed Staub a termination notice.

Staub claims Buck never investigated the biased comments made against him. Buck said she fired him not only for the lunch incident but also because of complaints in his personnel file from former employees who quit because of his abrupt manner.

When Staub's case went to district court in Illinois, the jury found in favor of him. But the federal appeals court overturned the decision, deciding that the lower court made a mistake in letting the jury consider the anti-military remarks made by Korenchuck and Mulally because there was no evidence to show that either one exerted influence over Buck, who actually fired Staub. Mathew Tully -- a partner in the Washington law firm Tully Rinckey and an expert on USERRA law -- said he believes the Supreme Court probably will come down on the side of Staub, notwithstanding its history of siding with employers.

"I think they'll find the 'Cat's Paw' theory not relevant to USERRA and still hold to Staub," he said. He said the court probably will give the servicemember "the benefit of the doubt" by coming to the conclusion that if Staub had not been in the Reserves he probably would not have been fired. "The underlying issue here is if you have this culture that is anti-military, is it no wonder you're going to fire him?" Tully said. "So I'm of the position that if you've got that hostile work environment; if you've got that anti-military atmosphere, you don't need to establish that the direct supervisor had an anti-military bearing, because so many other factors that would have ... prevented him being fired if he was a normal civilian."