

2012

## Limiting the Ways to Skin a Cat—An End to the 20 Year Perplexity of the Cat’s Paw Theory in Staub v. Proctor?

Timothy Powderly  
powdertp@gmail.com

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

---

### Recommended Citation

Powderly, Timothy (2012) "Limiting the Ways to Skin a Cat—An End to the 20 Year Perplexity of the Cat’s Paw Theory in Staub v. Proctor?," *Saint Louis University Public Law Review*. Vol. 31 : No. 2 , Article 11.  
Available at: <https://scholarship.law.slu.edu/plr/vol31/iss2/11>

This Note is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**LIMITING THE WAYS TO SKIN A CAT—AN END  
TO THE 20 YEAR PERPLEXITY OF THE CAT’S PAW THEORY IN  
*STAUB v. PROCTOR*?**

INTRODUCTION

In 1931, during the midst of the Great Depression, Henry Ford remarked that the economic crisis has fallen on this country because “the average man won’t really do a day’s work unless he is caught and cannot get out of it. There is plenty of work to do if people would do it.”<sup>1</sup> “A few weeks later he laid off 75,000 workers.”<sup>2</sup> Of course, this quote should not be interpreted to mean that all adverse employment decisions are the result of a deceitful and fickle employer. This would be a clear overgeneralization of psyche of the average American employer. After all, an employer’s choice to hire or fire one person over another cannot be easy. The decision likely takes food off of an employee’s table and a roof from over his or her head.

What it does suggest, however, is that there is definite need to inquire further into the motives of an employer. Layoffs, pay-cuts, and reductions in hours are often the unfortunate side-effects of an unpredictable and fear-driven economy like the current one in this country, but overlooked in this madness are the underlying motives behind an employer’s decision. While most would like to think that an employer’s decisions are made with the purest of intentions, statistics might show otherwise.<sup>3</sup> In 2009, for example, an astounding 93,277 workplace discrimination charges were filed with the Equal Employment Opportunity Commission (hereinafter “EEOC”), the second-highest total in history, second only to the all-time record of 95,402 charges established in 2008.<sup>4</sup> These statistics are not necessarily proof that discrimination occurred in each and every case, but they could be evidence that more workers are beginning to question the motivation behind adverse employment decisions.

While employers like Henry Ford were surely making decisions without much consultation, the same is not true of decisionmakers in the American

---

1. HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES: 1492–PRESENT* 387 (2003).

2. *Id.*

3. See e.g., *Enforcement & Litigation Statistics All Statutes FY 1997 - FY 2011*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited May 20, 2012).

4. *Id.*

workplace today. Multiple levels of supervisors and managers regularly have some input in company decisions. With layoffs, for example, although most day-to-day employee/employer interactions take place on a personal level with intermediate supervisors, the decision to terminate an employee may be made by a supervisor higher up in the corporate chain that has had little or no interaction with the terminated employee.<sup>5</sup> Employers believe that objectivity is firmly entrenched in the decisionmaking process because seemingly independent and neutral decisionmakers higher in the company ladder are individually pulling the strings.<sup>6</sup> However, a unique theory of employer liability has emerged in the context of this modern decisionmaking process. Employers may find themselves liable when an intermediate supervisor with biased intentions influences the final decisionmaker.<sup>7</sup>

Adversely effected employees have begun to sue their employers under this special theory of liability.<sup>8</sup> Even though the final decisionmaker had no discriminatory motive, the employer may nonetheless be liable if the biased supervisor's input was relied upon in making the adverse employment decision.<sup>9</sup> In the Seventh Circuit case, *Shager v. Upjohn Co.*, Judge Richard Posner famously analogized this influenced-based liability theory to a Seventeenth century fable.<sup>10</sup> The fable goes:

A Monkey and a Cat lived in the same family, and it was hard to tell which was the greater thief.

One day, as they were roaming together, they spied some chestnuts roasting in the ashes of a fire.

"Come," said the cunning Monkey, "we shall not go dinnerless to-day. Your claws are better than mine for the purpose; pull the chestnuts out of the ashes, and you shall have half."

Puss pulled them out, burning her paws very much in doing so. When she had stolen every one, she turned to the Monkey for her share of the booty; but, to her chagrin, she found no chestnuts, for he had eaten them all.

A thief cannot be trusted even by another thief.<sup>11</sup>

Posner cleverly correlated the fable to the underlying principles of the liability theory and coined what is now known as the "cat's paw" theory of liability.<sup>12</sup>

---

5. Holli Hartman, *Thinking Beyond 'You're Fired!'*, COLORADOBIZ MAG., Aug. 2005, at 13.

6. *See, e.g., Mitchell v. USBI Co.*, 186 F.3d 1352, 1355 (11th Cir. 1999).

7. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

8. *See EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 485 (10th Cir. 2006).

9. *Shager*, 913 F.2d at 405.

10. *Id.*

11. A CHILD'S VERSION OF AESOP'S FABLES 107-08 (J.H. Stickney ed., Boston, U.S., Ginn & Co., 1891).

12. *Shager*, 913 F.2d at 405.

The employer faces liability where the ultimate decisionmaker, the Cat, is unknowingly being influenced by the biased supervisor, or manipulative Monkey.

The cat's paw theory could hypothetically be applied to any cause of action that involves a question of intent. Theoretically, it could very well be applied to any intentional tort claim where the actions of a party are caused by motives of another. Yet, the legal application of this theory has been almost completely segregated to the employment law context. The theory has been widely used over the past twenty years under a variety of federal antidiscrimination statutes.<sup>13</sup> These statutes prohibit employers from discriminating against an employee because of his or her status as a member of a protected class. Specifically, Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, or national origin, has been the prominent statute used to challenge adverse employment decisions under this theory.<sup>14</sup> The cat's paw liability theory has also been applied to sexual harassment cases and to situations when employers have retaliated against an employee for reporting a bias or another violation.<sup>15</sup> Additionally, the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA") and the Americans with Disabilities Act of 1990 (hereinafter "ADA"), which protect employees from adverse employment decisions based on age and qualifying disabilities respectively, have also been battlegrounds for the cat's paw theory.<sup>16</sup> Finally, the Family Medical Leave Act (hereinafter "FMLA") and the Pregnancy Discrimination Act (hereinafter "PDA") have also been stages for recent discrimination claims under the cat's paw theory.<sup>17</sup>

Given that this theory is still in its infancy, there should be little surprise that circuit courts of appeal have had difficulty agreeing upon a basic threshold test for determining liability under the cat's paw theory.<sup>18</sup> While all federal circuits adopted some form of cat's paw liability, there was no uniformity, as courts applied a vast spectrum of standards for establishing employer liability.<sup>19</sup> Specifically, the circuits disagreed as to *how much* influence the biased supervisor should have over the decisionmaker in order to attribute the bias of the supervisor upon the employer.<sup>20</sup> Another matter of contention

---

13. See cases cited *infra* notes 14–17.

14. See, e.g., *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006).

15. See, e.g., *Pinkerton v. Colorado Dep't. of Transp.*, 563 F.3d 1052, 1059 (10th Cir. 2009).

16. See, e.g., *Lindsey v. Walgreen Co.*, 615 F.3d 873, 875 (7th Cir. 2010); *Dwyer v. Ethan Allen Retail, Inc.*, 325 F. App'x 755, 757 (11th Cir. 2009).

17. See, e.g., *Long v. Teachers' Ret. Sys.*, 566 F. Supp. 2d 851, 860 (C.D. Ill. 2008), *aff'd*, 585 F.3d 344, 351 (7th Cir. 2009); *Brown v. Sara Lee Corp.*, No. 1:07-CV-1118-DFH-DML, 2009 WL 995755 (S.D. Ind. Apr. 14, 2009).

18. See *infra* Part I.

19. See *infra* Part I.

20. See *infra* Part I.

among the circuits was how much consideration to give employers who have taken affirmative steps to rehabilitate the decisionmaking process by conducting their own independent investigations.<sup>21</sup> Similarly debated among the circuits was whether an employee should be barred from asserting a cat's paw claim if he or she failed to raise the issue of bias when previously given an opportunity.<sup>22</sup>

In order to settle the circuit split, in 2007, the Supreme Court granted certiorari in the Tenth Circuit case, *EEOC v. BCI Coca-Cola Bottling Co.*<sup>23</sup> The case was fully briefed and set for oral arguments, but less than a week before the oral arguments, BCI withdrew its appeal without an explanation and subsequently settled the case with the EEOC.<sup>24</sup> In the spring of 2010, at the urging of the Obama administration, the Supreme Court once again granted certiorari to a cat's paw case, this time to the Seventh Circuit case, *Staub v. Proctor Hospital*.<sup>25</sup>

The statutory context of *Staub* occurred within the confines of a special antidiscrimination statute, the Uniformed Services Employment and Reemployment Rights Act (hereinafter "USERRA").<sup>26</sup> Under USERRA, no limitations on an employee's military leave of absence can be imposed beyond those required by the law (advance notice, cumulative time-in-service limit, and timely return to work).<sup>27</sup> Even if an employer finds the time, duration, frequency, or nature of an employee's military service to be unreasonable, it cannot deny the employee leave from work or refuse to reemploy the person.<sup>28</sup> *Staub* was the case of a fired hospital worker who claimed he lost his job over his service in the U.S. Army Reserve.<sup>29</sup>

Since the cat's paw theory was being examined within the confines of USERRA and not Title VII, some feared that the Supreme Court case may limit the precedential impact of the decision. Ultimately, these fears were eased when the Supreme Court suggested that the statutory similarities between USERRA and Title VII made the Court's holding in *Staub* applicable to future cat's paw cases examined under Title VII.<sup>30</sup>

---

21. See *infra* Part III.

22. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 293 (4th Cir. 2004) (en banc).

23. 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (2007).

24. *BCI Coca-Cola Bottling Co. v. EEOC*, 549 U.S. 1334 (2007) (dismissing the writ of certiorari).

25. 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (2010).

26. 38 U.S.C. §§ 4301–34 (2006).

27. *Id.* § 4316.

28. *Id.*

29. 560 F.3d at 650–51.

30. 131 S. Ct. 1186, 1191 (2011).

Most anticipated that *Staub* would end the twenty year perplexity surrounding the applicability of the cat's paw theory. However, the Supreme Court failed to provide much guidance to courts, and instead, created more questions than answers. Left most bewildered by this decision are the modern employers who face tremendous uncertainty in the wake of this landmark decision. *Staub* has left employers with little protections against the discriminatory animus of someone who may have played no role in the decisionmaking process.

Part I of this note will examine the brief history of the cat's paw theory. Most notably, it will include an analysis into the theory's recent emergence and current place as a point of contention among the circuits. Part II of this note will examine *Staub* and the cat's paw liability issues surrounding the case. Finally, Part III of this note will argue that the Supreme Court missed an opportunity in *Staub* to adopt a balanced causation standard that would allow modern employers to effectively maintain multi-layered decisionmaking processes.

## I. THE HISTORY OF THE CAT'S PAW THEORY

### A. *Origination of the Cat's Paw Theory*

As previously stated, the origin of the cat's paw theory can be traced back to the Seventh Circuit decision in the *Shager v. Upjohn*.<sup>31</sup> Ralph Shager, a fifty-three year-old salesperson, was fired by Upjohn Co.'s "Career Path Committee" after his thirty-eight year old sales manager, John Lehnst, recommended that he be terminated.<sup>32</sup> Believing he was fired because of Lehnst's alleged animus against his age, Shager sued Upjohn Co. under the ADEA claiming age discrimination.<sup>33</sup>

In his decision, Judge Posner recognized the inherent problem of imputing liability on Upjohn Co. when the ADEA is "silent on the issue of derivative liability."<sup>34</sup> Without direct statutory guidance, Posner analyzed the liability question in terms of agency principles.<sup>35</sup> First, he explained that a biased supervisor acting as an agent of the employer could potentially subject the employer to liability.<sup>36</sup> Quite simply, had Lehnst fired Shager directly (without the involvement of the Career Path Committee), Upjohn Co. would be liable

---

31. 913 F.2d 398, 405 (7th Cir. 1990).

32. *Id.* at 399-400.

33. *Id.* Although the Supreme Court recently held that claims filed under the ADEA require "but for" causation, the cat's paw theory is mainly based upon agency principles and is an issue of derivative liability and therefore, the causation analysis should be entirely distinct. *See Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009).

34. *Shager*, 913 F.2d at 404.

35. *Id.* at 404-05.

36. *Id.*

on agency principles because he would have been acting within the scope of his duties.<sup>37</sup> On the flip side, however, Posner admitted:

Lehnst did not fire Shager; the Career Path Committee did. If it did so for reasons untainted by any prejudice of Lehnst's against older workers, the causal link between that prejudice and Shager's discharge is severed, and Shager cannot maintain this suit . . . . But if Shager's evidence is believed . . . the committee's decision to fire him was tainted by Lehnst's prejudice. . . . Lehnst was the district manager; he presented plausible evidence that one of his sales representatives should be discharged; the committee was not conversant with the possible age animus that may have motivated Lehnst's recommendation. If [the committee] acted as the conduit of Lehnst's prejudice—his cat's paw—the innocence of its members would not spare the company from liability.<sup>38</sup>

Posner, by evaluating agency principles, gave birth to the cat's paw theory of liability. Since Lehnst had acted within the scope of his duties when he made his recommendation to the committee, his animus against older workers was imputed to the company because he had influenced the decisionmaker.<sup>39</sup> Left unanswered by this decision, however, was how much influence a biased subordinate would need to exert over the decisionmaker in order to spring employer liability to life. In other words, an exact causation standard for determining liability was absent from the court's analysis.

In *Reeves v. Sanderson Plumbing Products*, some eight years after *Shager*, the Supreme Court endorsed the concept of cat's paw liability (also known as subordinate bias liability), but it too failed to proscribe the proper standard for determining causation.<sup>40</sup> Roger Reeves sued his former employer, alleging that he was terminated because of his age in violation of the ADEA.<sup>41</sup> While not expressly referencing the cat's paw theory directly, the Court held that his employer was not entitled to summary judgment because “[Reeves] introduced additional evidence that [one of his superiors in the chain of authority] was motivated by age-based animus and was principally responsible for [his] firing.”<sup>42</sup> The Court noted that Reeves' supervisor “was the actual

---

37. *Id.* at 405.

38. *Id.* (citation omitted).

39. *Id.* at 404–05.

40. 530 U.S. 133, 140 (2000). Even though the Supreme Court never used the phrase ‘cat's paw,’ the Fourth Circuit has deemed that the Court's language in *Reeves* should be the be-all and end-all under the theory. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004).

41. *Reeves*, 530 U.S. at 138.

42. *Id.* at 151. Although the employee's supervisor only recommended the petitioner's termination to the formal decisionmaker, the formal decisionmaker was the company president; according to testimony from a supervisor in the company, the supervisor had essentially signed

decisionmaker” and was “principally responsible” for his firing, but the Court failed to describe what these terms meant.<sup>43</sup> It seems as though the Court was willing to embrace some form of cat’s paw liability, but to what extent?<sup>44</sup> From *Reeves*, it is clear that when the biased supervisor is the actual decisionmaker behind the adverse employment action, there may be liability imputed to the employer.<sup>45</sup> What is unclear from *Reeves*, however, is whether there might be lower levels of subordinate liability causation that would impute liability to the employer.

In *Shager*, Posner used the word “conduit” to describe the kind of causal relationship between the biased the subordinate and the ultimate decisionmaker.<sup>46</sup> Circuit courts have had difficulty measuring what constitutes this “conduit causation” in the cat’s paw theory. Further, since the *Reeves* decision is largely silent on the issue of employer liability for a biased subordinate, the circuit courts have been left to decipher the causation question themselves. Without guidance for determining the proper causation standard, circuit courts have diverged widely in their causation standards.

### B. *The Circuit Split*

Each circuit has adopted its own approach to decipher the causation question. For illustrative purposes, the standards can appropriately be described as lying on a causation spectrum. On one end of the causation spectrum is the Fourth Circuit’s strict “actual decisionmaker” approach.<sup>47</sup> At the other end of the causation spectrum is the “tainted decision” approach developed by a number of circuits.<sup>48</sup> Before discussing the standard that the Supreme Court developed in *Staub*, it is first necessary to explain how these two causation approaches differ so substantially.

#### 1. The Fourth Circuit’s “Actual Decisionmaker” Approach

The Fourth Circuit case, *Hill v. Lockheed Martin Logistics Management*, is the prominent example of a strict causation approach.<sup>49</sup> With this decision, the

---

Reeves’ pink slip because employees feared the supervisor, and he had exercised absolute power with the company. *Id.* at 152.

43. *Id.* at 151, 152.

44. *See id.* at 151–54.

45. *See id.* at 153–54.

46. 913 F.2d 398, 405 (7th Cir. 1990). Although is it not as prominent as the term “cat’s paw”, some courts have chosen to refer to the theory as “conduit” theory. Other metaphoric descriptions of the cat’s paw theory include “rubber-stamp” and “vehicle,” or quite simply, subordinate bias liability theory. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 488 (10th Cir. 2006).

47. *See infra* Part II.B.1.

48. *See infra* Part II.B.2.

49. 354 F.3d, 277, 288 (4th Cir. 2004) (en banc).



Fourth Circuit became an extreme outlier among circuits. Drawing directly from the Supreme Court's limited language in *Reeves*, the Fourth Circuit requires that the biased subordinate be "principally responsible" for the adverse employment decision.<sup>50</sup> The *Hill* court strictly interpreted the *Reeves* decision and stated that an employer will only be found liable under the cat's paw theory if the subordinate were the "actual decisionmaker" behind the adverse employment action.<sup>51</sup> The Fourth Circuit denounced any broader interpretation of conduit causation and dealt a serious blow to the future of cat's paw claims.<sup>52</sup>

Louise Hill, an aircraft mechanic at a military base, claimed that her supervisor, Ed Fultz, held a discriminatory animus against her because of both her age and gender.<sup>53</sup> While she was employed at Lockheed, Fultz had referred to Hill as a "damn woman" and a "useless old lady."<sup>54</sup> After Hill had received several written reprimands, Lockheed fired her.<sup>55</sup> She subsequently brought suit against Lockheed under Title VII and the ADEA, and also claimed retaliation.<sup>56</sup> After giving special attention to the concepts of agency law in several Supreme Court cases, the Fourth Circuit swiftly dismissed any application of a lenient causation standard.<sup>57</sup> The Fourth Circuit claimed that other courts had failed to accurately apply the cat's paw theory because their interpretations did not comply with Posner's original application of agency law under the theory.<sup>58</sup>

Perhaps the most outlandish stance by the Fourth Circuit was its stance on "supervisory or disciplinary authority."<sup>59</sup> Without such authority in the hands of the biased subordinate, the court held that the cat's paw theory is inappropriate.<sup>60</sup> It stated:

[W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.<sup>61</sup>

---

50. *Id.* at 290.

51. *Id.*

52. *See id.* at 291.

53. *Id.* at 282–83.

54. *Id.* at 283.

55. *Hill*, 354 F.3d at 283.

56. *Id.* at 281.

57. *See id.* at 290–91.

58. *See id.* at 289–90.

59. *Id.* at 291.

60. *See id.* at 291.

61. *Hill*, 354 F.3d at 291.

Thus, according to the Fourth Circuit, the subordinate must be the actual decisionmaker of the adverse employment action *and* possess some kind of supervisory or disciplinary authority.<sup>62</sup> It seems an employer would be immune from liability in situations where the biased subordinate was merely a co-worker or subordinate of the terminated employee.

In a dissent joined by three other judges, Judge Michael fired back at the majority's stance.<sup>63</sup> He stated that the majority's position "puts [the Fourth Circuit] at odds with virtually every other circuit, and it puts [the Fourth Circuit] at odds with the language of the statutes, which impose liability when an adverse employment decision is taken 'because of' sex or age discrimination."<sup>64</sup> The four dissenters supported the adoption of a more lenient causation standard, one where subordinate bias could be imputed to the decisionmaker where the biased subordinate simply has "substantial influence" on the employment decision.<sup>65</sup>

The Fourth Circuit's uncompromising adherence to some select language of the *Reeves* decision led to the adoption of this harsh causation standard.<sup>66</sup> Other than the Seventh Circuit's decision in *Staub*, the Fourth Circuit is the only circuit to incorporate the actual decisionmaker causation standard.<sup>67</sup> Other circuits interpret the "conduit" language of *Shager* more loosely.

## 2. The "Tainted Decision" Approach

The "tainted decision" approach is certainly the most plaintiff-friendly standard among the circuits. In contrast to most other circuits where the plaintiff needs to show that the biased subordinate had infected the *decisionmakers*,<sup>68</sup> in the circuits that have adopted a form of the "tainted decision" approach, an employer could face liability under the cat's paw theory

---

62. *See id.* While it seems that this high bar would limit cat's paw cases in the Fourth Circuit, there have been some plaintiffs who have met it. *See Schafer v. Md. Dep't of Health & Mental Hygiene*, 359 F. App'x 385, 389 (4th Cir. 2009). The court ruled that the requirement was met when testimony had established the biased subordinate had a significant degree of supervision over the formal decisionmaker. *Id.*

63. *Hill*, 354 F.3d at 299 (Michael, J., dissenting).

64. *Id.* (citation omitted). Other circuits have described the Fourth Circuit's stance on cat's paw liability as "inconsistent with the normal analysis of causal issues in tort litigation." *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004); *see also Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007).

65. *Hill*, 354 F.3d at 304 (Michael, J., dissenting) (finding the "substantial influence" standard would be an example of a more balanced causation standard).

66. *See id.*

67. As discussed *infra* in Part II of this comment, the Seventh Circuit uses the causation standard of "singular influence." Although the Seventh Circuit does not use the words "actual decisionmaker," the two causation standards are extremely similar to one another; thus, both the Fourth and Seventh Circuits were notoriously on the strict side of the causation spectrum.

68. *See EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 485 (10th Cir. 2006).

if the overall decisionmaking process *itself* was tainted by a biased subordinate.<sup>69</sup> This subtle but importance difference is best illustrated by the First Circuit case, *Cariglia v. Hertz Equipment Rental Corp.*<sup>70</sup>

John Cariglia, an employee of Hertz, brought an age discrimination claim against Hertz when he was terminated after many years of service.<sup>71</sup> Cariglia's supervisor, James Heard, had allegedly misinformed Hertz executives about Cariglia's performance.<sup>72</sup> Witnesses stated that Heard denigrated Cariglia, and the district court found Heard had "made statements rife with discriminatory animus," specifically that Cariglia was "over the hill," "not our kind," and that he "should not be here."<sup>73</sup> However, the district court found Hertz not liable because there was no evidence that the Hertz executives, the actual decisionmakers, had been influenced by Heard's bias.<sup>74</sup> The First Circuit vacated the decision because the district court had improperly focused on whether the Hertz executives, the decisionmakers, were improperly influenced.<sup>75</sup> Instead, the First Circuit reasoned that the causation question should be analyzed in terms of whether the decision process *itself* had been tainted.<sup>76</sup>

The First, Fifth, and D.C. Circuits have also adopted some form of the "tainted decision" approach.<sup>77</sup> These circuits have held that an employer liability could be imputed even if the decisionmaker is entirely unbiased.<sup>78</sup> For example the D.C. Circuit has stated:

When a [biased subordinate] . . . deliberately places an inaccurate, discriminatory evaluation into an employee's file, he intends to cause harm to the employee. . . . [T]he employer—that is, the organization as a whole—cannot escape . . . liability simply because the final decisionmaker was not personally motivated by discrimination.<sup>79</sup>

---

69. See *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 85–86 (1st Cir. 2004).

70. *Id.*

71. *Id.* at 79.

72. See *id.* at 82.

73. *Id.* at 80.

74. *Id.* at 84–85.

75. See *Cariglia*, 363 F.3d at 88–89.

76. *Id.* at 88.

77. See *id.* at 87; *Stoller v. Marsh*, 682 F.2d 971 (D.C. Cir. 1982); *Laxton v. Gap Inc.*, 333 F.3d 572 (5th Cir. 2003).

78. See, e.g., *Cariglia*, 363 F.3d at 87–88. Theoretically, a manipulative subordinate may not even need to outwardly express his bias; if he merely gave one poor performance evaluation because he inwardly harbored some prejudice, then this might be enough to impute liability to the employer.

79. *Stoller*, 682 F.2d at 977 (citation omitted).

The Fifth Circuit has similarly held that “the discriminatory animus of a manager can be imputed to the ultimate decisionmaker if the [manager] . . . had influence or leverage over” the decisionmaking.<sup>80</sup>

### 3. The Middle of the Causation Spectrum

The causation standards adopted by a majority of the circuits fit somewhere between the extremes of the “actual decisionmaker” approach and the “tainted decision” approach. In *EEOC v. BCI Coca-Cola Bottling Co.*, the Tenth Circuit fashioned perhaps the greatest argument for adopting a balanced causation approach.<sup>81</sup> In *BCI*, the EEOC brought suit against BCI under Title VII.<sup>82</sup> The EEOC claimed that Stephen Peters had been discharged because of his race.<sup>83</sup> Peters’ immediate supervisor, Cesar Grado, allegedly held a discriminatory animus against Peters because he was African American.<sup>84</sup> The district court found for BCI under the cat’s paw theory because the decision to terminate Peters was made by a manager who did not even know that Peters was African American.<sup>85</sup>

The Tenth Circuit Court of Appeals reversed the district court because it found that the manager had exclusively relied on the biased recommendations of Grado.<sup>86</sup> In its analysis, the court disagreed with the extremely arduous causation standards developed by other circuits.<sup>87</sup> The court first dismissed what it felt were too lenient causation standards developed by other circuits.<sup>88</sup> The court stated:

This [lenient] standard apparently contemplates that any “influence,” the reporting of any “factual information,” or any form of “other input” by a biased subordinate renders the employer liable so long as the subordinate “may have affected” the employment action. Such a weak relationship between the subordinate’s actions and the ultimate employment decision improperly eliminates a requirement of causation.<sup>89</sup>

Although the court exaggerated the leniency of the causation standards in other circuits, its desire to eliminate hypothetical reasoning is well-founded.<sup>90</sup>

---

80. Laxton, 333 F.3d at 584.

81. 450 F.3d 476, 483–89 (10th Cir. 2006).

82. *Id.* at 482.

83. *Id.*

84. *Id.*

85. *Id.* at 483.

86. *Id.* at 493.

87. *BCI*, 450 F.3d at 485–88.

88. *Id.* at 486–87.

89. *Id.*

90. *See id.* The Tenth Circuit criticized a pre-*Staub* Seventh Circuit cat’s paw case for adopting a less rigorous causation standard. *Id.* However, the court mischaracterized the standard articulated by the Seventh Circuit. The use of the phrase “may have affected” was not

Causation should not be viewed in terms of what may have happened. A determination of what did occur should be the only relevant question. The Tenth Circuit also quickly rejected the “actual decisionmaker” approach developed by the Fourth Circuit.<sup>91</sup> The court explained:

The Fourth Circuit’s strict approach makes too much of the phrase “actual decisionmaker” . . . . The Fourth Circuit’s peculiar focus on “who is a ‘decisionmaker’ for purposes of discrimination actions,” seems misplaced. The word “decisionmaker” appears nowhere in Title VII. Instead, the statute imposes liability for discrimination by employers and their agents, which in accordance with agency law principles includes not only “decisionmakers” but other agents whose actions, aided by the agency relation, cause injury.<sup>92</sup>

The court’s analysis epitomizes the predicament that has developed due to the disparity across the circuits.<sup>93</sup> As a midpoint solution, the Tenth Circuit panel held that a plaintiff must establish more than mere influence and more than mere input in the decisionmaking process to satisfy the element of causation.<sup>94</sup> The issue should be whether the biased subordinate’s discriminatory reports, recommendation, or other actions *caused* the adverse employment action.<sup>95</sup> The court maintained that the causation standard should be aligned with the agency law principles that animate the statutory definition of an employer.<sup>96</sup>

The court also noted the importance of the employer’s independent investigation.<sup>97</sup> Since a plaintiff has to demonstrate that the actions of the biased subordinate caused the employment action, an employer can avoid liability by conducting an independent investigation of the allegations against an employee.<sup>98</sup> By independently investigating employee records and job performance, the decisionmaker is able to form his own opinions and cleanse

---

presented as a substantive standard; instead, the phrase was used as a procedural benchmark (to highlight when a cat’s paw claim should survive summary judgment proceedings). *See Dey v. Colt Const. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994).

91. *BCI*, 450 F.3d at 487.

92. *Id.* (citations omitted).

93. *Id.* at 485–87. The circuit courts have simply no guidance to delineate the proper causation standard. Each circuit tries to fashion the proper standard for this broadly applicable theory by examining it under just one specific factual scenario and under one specific anti-discrimination statute.

94. *Id.* at 487.

95. *Id.*

96. *Id.*

97. *BCI*, 450 F.3d at 488. It may be easy to think of an independent investigation like the recoil of loaded spring. The employer may bounce back from a showing of improper manipulation by showing that decisionmaking process was indeed accurate even despite the presence of bias.

98. *Id.*

himself of the biased subordinate's influence.<sup>99</sup> An independent investigation by the decisionmaker may not need to be extensive.<sup>100</sup> The court mentioned that simply asking an employee for his version of events may defeat the inference that an employment decision was discriminatory.<sup>101</sup>

The Tenth Circuit's causation standard in *BCI* is indicative of most other circuits that lie in the middle of the spectrum. That is, these circuits hold that the biased subordinate need not be the actual decisionmaker, but still, a definitive causal link between the bias subordinate's discriminatory animus and adverse employment actions is needed.<sup>102</sup> However, it seems that the circuits in the middle of the spectrum are unable to pinpoint the moment that employer liability is imputed.<sup>103</sup> They also have difficulty finding a broadly applicable standard. Quite often, it appears that the variations in the factual scenarios surrounding cat's paw cases make it very difficult to put a broadly applicable standard to words. Also, even when a circuit is able to express a certain standard, there seems to be a virtual certainty another circuit will adopt some other variation of that causation standard. After recognizing the variance in the causation standards, the Supreme Court was poised to finally decide the proper standard in *Staub*.

## II. *STAUB V. PROCTOR HOSPITAL*

As previously mentioned, *Staub v. Proctor Hospital* is the case of a fired hospital worker, Vincent Staub, who claimed he lost his job over his service in the U.S. Army Reserve.<sup>104</sup> As a member of the U.S. Army Reserve, Staub was required to attend occasional weekend training, as well as a two-week training program during the summer.<sup>105</sup> Although employers may not always be thrilled about the prospect of working around a reservist's schedule, they must nonetheless oblige to requirements of the statute without any discriminatory animus or retaliatory treatment.<sup>106</sup> All reservists who meet certain criteria are protected from discrimination by USERRA.<sup>107</sup>

---

99. *See id.* at 488.

100. *See id.*

101. *Id.* As discussed in Part III of this note, the independent investigation defense is perhaps the only weapon in an employer's arsenal that can be used to combat a potential cat's paw claim if a *justifiable* adverse employment action was made in the presence of workplace discrimination.

102. *Id.* at 487.

103. Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 509, 511 (2001).

104. 560 F.3d 647, 651 (7th Cir. 2009).

105. *Id.*

106. This statute is a federal law intended to ensure that persons who serve or have served in the Armed Forces, Reserves, National Guard or other "uniformed services": (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in

In addition to his duties as a reservist, Staub also held a position as a lab technician in the angiography division at Proctor Hospital in Peoria, Illinois.<sup>108</sup> Over time, Staub's relationship with his supervisor, Janice Mulally, became strained as a result of his military reserve duties.<sup>109</sup> Mulally expressed extreme animosity towards Staub's service and duties; she even publicly chastised Staub when he requested weekends off for his mandatory reserve duties.<sup>110</sup> Mulally referred to Staub's duties as reservist "bullshit" and scheduled him to work during his reservist training.<sup>111</sup> She also occasionally made him use vacation time to attend his training sessions.<sup>112</sup> Staub soon contacted Michael Korenchuk, the department head, and complained of the treatment from Mulally, but Korenchuk uttered his own animosity towards Staub's reservist duties on several occasions.<sup>113</sup> Because Staub was one of only two employees specially trained to work in multiple units at the hospital, Mulally implemented a policy that Staub was to report to either her or Korenchuk if he had no work in the angiography division.<sup>114</sup>

On April 20, 2004, the tension between Staub and his two supervisors came to a boil.<sup>115</sup> After completing his tasks in the angiography division, Staub attempted to report to Korenchuk before going to lunch, but Korenchuk was not in his office.<sup>116</sup> Staub then left a voicemail on Korenchuk's phone and went to lunch.<sup>117</sup> When Staub returned to the lab thirty minutes later, Korenchuk came into the lab and asked Staub to come with him to the office of Linda Buck, who was the vice president of Human Resources.<sup>118</sup> Unbeknownst to Staub, Korenchuk had gone to Buck's office while Staub was

---

their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on past, present, or future military service. 38 U.S.C. § 4301(a) (2006).

107. Uniform Services includes the Armed Forces, the Army National Guard and the Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, the commissioned corps of the Public Health Service, and any other category of persons designated by the President in time of war or national emergency. *Id.* § 4303(16). In addition, a veteran's type, job duration, notice, character of service, and a prompt return to work are also required for coverage under the USERRA. *See id.*

108. *Staub*, 560 F.3d at 650–51.

109. *Id.*

110. *Id.* at 652.

111. *Id.*

112. *Id.*

113. *Id.* at 651. Much like Mulally's disdainful comments, Korenchuk's stated that Staub's drill weekends were "a b[u]nch of smoking and joking and [a] waste of taxpayers['] money." *Id.* at 652 (citation omitted).

114. *Staub*, 560 F.3d at 653. This policy was also put in place because of Staub's alleged disciplinary problems. *See id.*

115. *Id.* at 654.

116. *Id.*

117. *Id.*

118. *Id.*

at lunch and complained that Staub was once again missing from his workstation.<sup>119</sup> Although it is not clear whether Korenchuk knew about the voicemail at that time, he did not mention the voicemail to Buck.<sup>120</sup> Buck fired Staub for being absent from his work station.<sup>121</sup> Staub filed a suit claiming that his supervisors were out to get him as a result of disapproval of his military service.<sup>122</sup>

In district court, Buck testified that she terminated Staub based on Korenchuk's complaint as well as Staub's questionable employee record and various employee write-ups.<sup>123</sup> Nonetheless, the jury found that Staub was unlawfully discriminated against in violation of USERRA.<sup>124</sup> The Seventh Circuit reversed, holding for Proctor Hospital that there was no evidence that Buck relied upon the either Korenchuk's or Mulally's anti-military bias.<sup>125</sup> The court ruled that the jury could only consider evidence of Korenchuk' or Mulally's discriminatory animus if the court determined that there was sufficient evidence to support a finding of "singular influence" by Mulally or Korenchuk over Buck.<sup>126</sup> Ultimately, the court found that Buck was not under the singular influence of any other employee and that she had conducted an independent review of Staub's case.<sup>127</sup>

The "singular influence" standard adopted by the Seventh Circuit can be characterized as falling closely to the strict "actual decisionmaker" approach. The Seventh Circuit's analysis and use of the phrase "singular influence" paralleled the Fourth Circuit's actual decisionmaker approach in *Hill*. Seeing that another circuit had shifted to a stricter causation standard in favor of employers, the Supreme Court subsequently granted certiorari in this case.<sup>128</sup>

---

119. *Id.*

120. *Staub*, 560 F.3d at 654.

121. *Id.*

122. *Id.* at 655.

123. *Id.* at 654. Staub was by no means an ideal employee; he had several disciplinary actions in his brief employment at the hospital. *Id.* at 651. It also appears that his communication skills and abrasive personality seemed to rub many hospital employees the wrong way. *Id.*

124. *Id.* at 655.

125. *Id.* at 659.

126. *Staub*, 560 F.3d at 658–59. Moreover, the court specifically questioned the evidentiary requirements under this special theory of liability stating, "[a]llowing the jury to entertain the cat's paw theory and decide whether there was singular influence, but only upon a prior determination that there is sufficient evidence for such a finding, is consistent with Federal Rule of Evidence 104(b)." *Id.* at 658. The court concluded that the district court failed to make this primary determination and found that there existed insufficient evidence of singular influence to allow evidence of Korenchuk's and Mulally's animus to be presented to the jury. *Id.*

127. *Id.* at 659.

128. *Staub v. Proctor Hosp.*, 130 S. Ct. 2089 (2010).



Strangely enough, in his pleadings before the Supreme Court, Staub took the position that this was *not* a cat's paw case.<sup>129</sup> Instead, Staub argued that the cat's paw theory has no basis in the text of USERRA.<sup>130</sup> Staub pointed out that the word "decisionmaker" is completely absent from the statute.<sup>131</sup> Staub contended that Congress did not intend for the cat's paw theory to replace ordinary agency law.<sup>132</sup> He also maintained that basic agency principles should guide employer liability under USERRA.<sup>133</sup>

In its brief, Proctor Hospital argued that USERRA does contain statutory authority that supports a departure from agency common law.<sup>134</sup> Under the statute, if any anti-military animus is a motivating factor in an employer's decision, then the employer will be held liable.<sup>135</sup> Proctor further argued that even if it is assumed that agency common law principles governed the discrimination claims under USERRA, agency law requires that the person who ultimately caused the harm to harbor the discriminatory intent.<sup>136</sup> Proctor contended that under the doctrine of respondent superior, in the context of a principal/agent relationship, if the agent is not liable, then the principal cannot be either.<sup>137</sup> Proctor claimed that it could not be liable as the principal because neither Buck, Mulally, nor Korenchuk (its agents) were liable.<sup>138</sup> Mulally and Korenchuk were not liable because Buck's independent investigation made their actions not the proximate cause of any harm, and Buck simply held no discriminatory animus against Staub.<sup>139</sup>

Proctor Hospital also maintained that the Seventh Circuit's cat's paw analysis (specifically the singular influence approach) is indeed applicable for USERRA cases.<sup>140</sup> In direct contrast to Staub's argument, Proctor argued that the text of USERRA itself makes it improper to hold an employer liable for the discriminatory animus of a biased subordinate who influenced, but did not make the adverse employment decision.<sup>141</sup> Proctor further maintained that biased subordinates cannot legally cause an adverse employment action if the ultimate decisionmaker independently reviews the employment action prior to

---

129. Brief for Petitioner at 32, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (No. 09-400).

130. *Id.* at 35. It's possible that Staub made this argument because he thought he had a better chance under an examination of well-established agency principles rather than the newly minted and judicially problematic cat's paw theory.

131. *Id.* at 37.

132. *Id.* at 36.

133. *Id.* at 34–39.

134. Brief for Respondent at 54, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (No. 09-400).

135. *Id.*

136. *Id.* at 54–55.

137. *Id.*

138. *Id.* at 54.

139. *Id.* at 59–60.

140. Brief for Respondent, *supra* note 134, at 12–13.

141. *Id.*

a decision.<sup>142</sup> Since Buck had conducted her own independent investigation of Staub's past conduct and employee records, Proctor was confident that the causal chain was broken.<sup>143</sup> Therefore, even if the Supreme Court ruled unfavorably on the causation standard, Proctor believed that the independent investigation was enough to sever the subordinate discriminatory animus.<sup>144</sup>

Some speculated that the Supreme Court would limit its analysis to agency principles or to claims strictly arising under USERRA, but it did neither.<sup>145</sup> In an 8-0 decision, with Justices Alito and Thomas concurring in judgment only, the Supreme Court reversed the Seventh Circuit's decision.<sup>146</sup> The majority opinion, written by Justice Scalia, states "that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."<sup>147</sup> As applied to the facts in *Staub*, the Supreme Court held there was evidence that Mulally's and Korenchuk's actions were motivated by hostility toward Staub's military obligations; and further, since there was also evidence that Mulally and Korenchuk had allegedly caused Buck to fire Staub, the Seventh Circuit erred in holding that Proctor was entitled to judgment as a matter of law.<sup>148</sup>

The Supreme Court adopted an extremely lenient, employee-friendly causation standard in *Staub*. Without expressly stating it, the Court adopted the "tainted decision" approach as it declined to separate the internal workings of employer decisionmaking processes. Instead, the Court insinuated that the internal processes are nearly inseparable when discriminatory animus appears at any level.

The majority opinion begins with a discussion of agency principles and proximate causation.<sup>149</sup> It states, "[p]erhaps . . . the discriminatory motive of one of the employer's agents (Mulally or Korenchuk) can be aggregated with the act of another agent (Buck) to impose liability on Proctor."<sup>150</sup> The majority

---

142. *Id.* at 39-40.

143. *See id.* at 46.

144. *See id.* at 54. The Seventh Circuit noted that an influence cannot be singular if the final decisionmaker conducted an independent review before taking any action. *See Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009).

145. Allen Smith, *Supreme Court Hears Oral Argument in 'Cat's Paw' Case*, SOC'Y FOR HUM. RESOURCE MGMT. (Nov. 3, 2010), <http://www.shrm.org/LegalIssues/FederalResources/Pages/SupremeCatsPaw.aspx>. The majority opinion states that the statute is "very similar to Title VII," which provides a hint that the cat's paw analysis in *Staub* will be fully applicable to claims arising under Title VII and any other of the federal antidiscrimination statutes that employ the "motivating factor" language. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011).

146. *Staub*, 131 S. Ct. at 1186, 1194.

147. *Id.* at 1194 (footnote omitted).

148. *Id.*

149. *See id.* 1190-92.

150. *Id.* at 1191.

opinion goes on to state that both the animus and the action itself can be attributed to an earlier agent if the adverse action is an intended consequence of the earlier agent's conduct.<sup>151</sup> The majority sternly rejects Proctor's contention that the person who ultimately causes the harm also needs to be the person to harbor the discriminatory intent.<sup>152</sup> The majority states "the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm."<sup>153</sup>

As unexpected as the adoption of a lenient causation standard was, even more surprising was the majority's harsh treatment of the independent investigation defense. It is obvious that the majority has a very pessimistic view of employers' independent investigations.<sup>154</sup> At first, the Court seems to reject the defense outright, but the Court merely rejects it as a bright line rule that holds a claim-preclusive effect.<sup>155</sup> The majority opinion states:

Proctor suggests that even if the decisionmaker's mere exercise of independent judgment does not suffice to negate the effect of the prior discrimination, at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so. We decline to adopt such a hard-and-fast rule.<sup>156</sup>

This majority's lengthy discussion on this tangential topic, however, seems misplaced. Proctor never advocated that the mere conduction of an independent investigation defense should be a bright line rule to defeat all allegations of discriminatory animus. The majority discusses its potential bright line status because of Justice Alito's concurring opinion.<sup>157</sup> However, the majority mistakenly interprets Justice Alito's views about the independent investigation defense. Nowhere in the concurring opinion does Justice Alito state that merely conducting any type of independent investigation automatically relieves an employer of liability.<sup>158</sup> Justice Alito simply warns that there are times when a "reasonable investigation" can be conducted to

---

151. *Id.* at 1192.

152. *Staub*, 131 S. Ct. at 1192; *contra* Brief for Respondent, *supra* note 134, at 12–13.

153. *Staub*, 131 S. Ct. at 1192.

154. *See id.* at 1193.

155. *Id.*

156. *Id.*

157. *Id.* at 1195 (Alito, J., concurring). The concurring opinion states that liability should not be allocated to an employer "where the officer with formal decisionmaking responsibility, having been alerted to the possibility that adverse information may be tainted, undertakes a reasonable investigation and finds insufficient evidence to dispute the accuracy of that information." *Id.*

158. *Id.* at 1195–96.

separate the accurate information from the tainted information.<sup>159</sup> The concurring Justices advocate that the independent investigation defense needs to remain a tool to shield employers from liability, especially when the facts indicate that an employee was terminated for reasons unrelated to the alleged discriminatory animus.<sup>160</sup> The majority eventually admits that the independent investigation is a potential affirmative defense, as it states:

[I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.<sup>161</sup>

Although the preceding statement by the majority carves out room for the independent investigation defense when it is conducted properly, the majority strangely continues to berate the defense.<sup>162</sup> More specifically, the majority continues to berate the suggestion that the mere conduction of an independent investigation has a claim-preclusive effect.<sup>163</sup> It is baffling why the majority dwells on the issue of bright line status when there was simply no suggestion to begin with. This portion of the opinion certainly seems to contradict the majority's previous acceptance of the independent investigation defense. However, it is important to note that despite the majority opinion's extreme skepticism of the independent investigation defense, the defense does remain available after *Staub*.

### III. THE APPROPRIATE CAUSATION STANDARD AND INDEPENDENT INVESTIGATION

It is easy to see how a modern employer faces increased uncertainty after *Staub v. Proctor Hospital*. Previously established workplace decisionmaking protocols may now no longer be in compliance with federal and state discrimination statutes. For instance, modern corporations often establish multi-layered managerial structures to ensure that employment decisions are made efficiently and unbiasedly. However, that same multi-layered structure may now ironically open up the corporation to liability if a biased employee

---

159. *Staub*, 131 S. Ct. at 1195–96 (Alito, J., concurring). The concurring opinion also differs from majority in stating that cat's paw liability doesn't always exist when the independent investigation relies on facts provided by the biased supervisor. *Id.*

160. *Id.* at 1195.

161. *Id.* at 1193 (majority opinion).

162. *See id.*

163. *See id.*

even so slightly influences the decisionmaking process.<sup>164</sup> After *Staub*, despite an employer's good faith efforts to establish decisionmaker independency, it appears that disproving a cat's paw claim will be an uphill battle when some workplace prejudices may have been present.

Instead of creating greater uncertainty, the Supreme Court should have adopted a causation standard that would enable employers to effectively establish a multi-level decisionmaking structure that is capable of making efficient decisions while carefully shielding off any potential workplace prejudices. This causation standard would need to be consistent with the language of a vast array of federal discrimination statutes and at the same time, be flexible enough to apply to a variety of employment situations. For these reasons, the Supreme Court should have focused on what is the most important feature of the causation standard: its ability to function efficiently and practically for the multitude of employers who are faced with the complexities of the modern workplace.

The Supreme Court had a number of options from which to try to gauge this causation standard. For example, it had the option of choosing one of the two standards at the ends of the causation spectrum, or it could have implemented a standard from one or more of the middle ground circuits within the spectrum. Ultimately, the Court chose to adopt a causation standard that is very much like the tainted decision approach.<sup>165</sup> While the extreme standards at the ends of the spectrum present their own advantages to the modern workplace, in the long run, the adoption of a standard in the middle of spectrum would have been the most practical and beneficial to employees and employers alike.

In addition to embracing a balanced causation standard, the Supreme Court should also have clearly acknowledged that a properly conducted independent investigation will relieve an employer of cat's paw liability.<sup>166</sup> Only one sentence in the majority opinion gave credence to the use of an independent investigation.<sup>167</sup> The Court failed to outline how an employer should conduct independent investigations, and thus, employers are now left in the dark about whether their own independent investigations will continue to be effective.

---

164. Michele J. Gelfand et al., *Discrimination In Organizations: An Organizational-Level Systems Perspective* 23–24 (Ctr. for Advanced Human Res. Studies, Cornell Univ., Working Paper No. 07-08, 2007). The dichotomy between organizational stability and compliance with federal anti-discrimination regulations often puts employers in a predicament. The cat's paw theory is one more thorn in the side of employers who seek to accomplish both efficiently.

165. *See supra* Part II.

166. MAX MULLER, *THE MANAGER'S GUIDE TO HR* 189–190 (2009).

167. *See Staub*, 131 S. Ct. at 1193.

A. *The Functionality of the Staub Standard*

The Supreme Court was wise not to adopt the “actual decisionmaker” approach or another strict causation standard. One can simply look to the Seventh Circuit’s holding in *Staub* to see how employers unfairly benefit from an adoption of this approach.<sup>168</sup> Even when a biased employee or employees may have given some input to the formal decisionmaker, an employer will not be found liable unless the causal connection was so strong that the biased employee became the actual decisionmaker.<sup>169</sup> Employers would seemingly have significant leeway in their workplace processes before they would be faced with cat’s paw liability.

In the long term, the adoption of a strict causation standard would also have immense implications upon the average workplace environment. Over the course of time, it is highly likely that employers would recognize their growing immunity from cat’s paw liability. Employers would begin to realize that some of their anti-discrimination outlays and preventive programs now seem to go to waste. They would begin to cut corners and possibly realize that even the mere *appearance* of independent decisionmaking could eliminate potential cat’s paw liability. Employers would become largely indifferent to their workplace processes because there would be no financial incentive to improve or even maintain their existing anti-discrimination processes. As part of a trickledown effect, the formal decisionmakers would subsequently be content with satisfying the minimum requirements that would ensure a kind of “independence charade.” The biased subordinates would also likely face fewer consequences for expressing their workplace prejudices.<sup>170</sup> Thus, with the dwindling threat of liability, the relaxed and content employer could be inviting a type of discriminatory culture to foster and surface.<sup>171</sup>

As an illustration of this effect, imagine a potential version of Proctor Hospital in a world where a strict standard is adopted. Once Proctor Hospital realizes that it would not be liable for Mullaly’s and Korenchuk’s biases, it has little financial incentive to prohibit their discriminatory animus in the future. Buck would have little motivation to discourage the biased behavior because there would be almost no pressure from hospital administrators to correct it. Likewise, Mullaly and Korenchuk would have no incentive to change how they manage their units because their actions are ultimately safeguarded by Buck’s formal decisionmaking. Suppose a new employee is hired to fill Staub’s position, and a month after he is hired, he joins the U.S. Army Reserves. Mullaly and Korenchuk could theoretically continue in their

---

168. See 560 F.3d 647, 659 (7th Cir. 2009).

169. See *id.* at 657.

170. Gelfand et al., *supra* note 164, at 23.

171. *Id.* at 14 (“[W]hen management fails to punish discriminatory behaviors, employees may assume that such discriminatory actions are acceptable, which then perpetuates such acts.”).

disapproval of military obligations and effectively establish an anti-military atmosphere.<sup>172</sup> Then, once they conveniently have enough evidence of his subpar work performance, Buck could freely terminate him. While some might view this as an unlikely and extremely cynical scenario, this glum outlook could certainly become part of reality. Maybe this would not have occurred in every company or even in the majority of companies, but somewhere, on some level, the adoption of a strict causation standard could be an invitation to an enduring environment of discrimination.

Conversely, the lenient causation standard developed in *Staub* will certainly help to improve the multi-layered managerial structures that are the habitual stage of cat's paw claims. Obviously, the complexity of modern companies makes it more efficient and more cost-effective to establish a multi-layer decisionmaking process.<sup>173</sup> However, these structures are also implemented because they help counteract biases held by individual employees.<sup>174</sup> They provide protection against liability that might result if a single biased employee was solely making employment decisions.<sup>175</sup> Employers establish these multilayered managerial structures partially because they are an internal check on their own decisionmaking processes.<sup>176</sup> As a result of these internal checks, discriminatory terminations are reduced and prejudice-based obstacles are removed. Using this logic, the new lenient causation standard will likely provide additional incentives for employers to eliminate the power of prejudice in the workplace.

Employers will carefully and rigorously review their internal workplace decisionmaking processes to ensure that they are able to sift through managerial prejudices. Formal decisionmakers, managers, and employees alike would be subjected to higher standards of workplace conduct and review. Every adverse employment action would be reviewed numerous times, each with extreme skepticism and concern. Accordingly, an employer's workplace culture would become less inhibited by biased subordinates because the increased attention to unbiased decisionmaking would largely sift out discriminatory sentiments.

However, while the new lenient causation standard approach has the potential to reduce discriminatory actions, the adoption of this standard would

---

172. See *Staub*, 131 S. Ct. at 1195 (Alito, J., concurring). Justice Alito notes that the majority's lenient causation standard may have a similar cultural effect, as he states that the majority's stance "may have the perverse effect of discouraging employers from hiring applicants who are members of the Reserves or the National Guard." *Id.* at 1196.

173. Arie Y. Lewin et al., *Adaptation and Selection in Strategy and Change: Perspectives on Strategic Change in Organizations*, in HANDBOOK OF ORGANIZATIONAL CHANGE AND INNOVATION 108, 127 (Marshall Scott Poole & Andrew H. Van de Ven eds., 2004).

174. Gelfand et al., *supra* note 165, at 13.

175. *Id.* at 15.

176. *Id.* at 14.

also create tremendous burdens on employers. The inherent problem with the adoption of a lenient causation standard is that it fails to consider the logistical realities of the workplace.<sup>177</sup> It is both procedurally burdensome and financially impractical. Now, countless man-hours will be spent ensuring that all employment decisions were void of any discriminatory animus. For a smaller company, the cost spent shielding itself from cat's paw liability may eventually outweigh the pecuniary loss it would have incurred. Additionally, for larger corporations, there would be an increase in the legal fees that a company would have to spend defending itself. No matter how carefully an employer could be in reshaping its workplace processes under such a standard, the amount of wrongful termination claims will certainly multiply. Companies will incur considerable time litigating whether any part of a supervisor's animus impacted an adverse employment decision. Thus, while this new lenient causation standard has the potential to remove a considerable amount of discrimination from the average workplace environment, it will result in too many impractical obligations and tremendous costs for employers.<sup>178</sup>

The unfortunate side effects that result from the adoption of a standard at either end of the spectrum make it apparent that a standard fashioned from the middle spectrum is the only viable choice. A balanced causation standard would eliminate several concerns for employers. First, the financial expenditures that go to combating workplace biases would be significantly less under a balanced causation standard than under the lenient standard. Employers would also not be extensively burdened by the replacement and review of all their workplace decisionmaking protocols. These reduced burdens would also occur without long term side effects that would come with the adoption of a strict causation approach. Employers would not grow complacent in fighting workplace discrimination, and employees would still be provided with the protections from superficial decisionmaking processes.

Secondly, the adoption of a balanced approach corresponds with the Supreme Court's prior employment discrimination decisions.<sup>179</sup> Title VII, for example, prohibits employers from discriminating against employees "because of" protected characteristics.<sup>180</sup> Similarly, the Tenth Circuit stated that cat's paw liability is imputed if the biased subordinate "caused the adverse employment action."<sup>181</sup> The standards are certainly more analogous to one

---

177. See Brief of the Nat'l Fed'n of Indep. Bus. Legal Ctr. as Amicus Curiae in Support of Respondent at 8, *Staub*, 131 S. Ct. 1186 (No. 09-400).

178. See *Staub*, 131 S. Ct. at 1196 (Alito, J., concurring). The concurring opinion warns that "[the majority's] holding will impose liability unfairly on employers who make every effort to comply with the law." *Id.*

179. See Rachel Santoro, Comment, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 831 (2009).

180. See 42 U.S.C. § 2000e-2(a)(1) (2006).

181. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006).



another than either extreme standard. Also, since most circuits had implemented a balance standard, employers would not have to expend tremendous time amending their existing protocols. Therefore under a balanced standard, employers may better structure all of their antidiscrimination policies, and employees would remain protected under federal discrimination laws.

*B. The Independent Investigation: The Ace in the Hole*

Entirely separate from the causation question, but equally as important, is how an employer's independent investigations will hold up after *Staub*. For a host of sensible reasons, the independent investigation by the formal decisionmaker needs to remain a powerful shield for employers in cat's paw cases. It is the only viable action available for employers to effectively make workplace decisions once someone's bias has reared its ugly head. Workplace biases, after all, are certain to exist.<sup>182</sup> Whether these biases are revealed through explicit comments or remain entirely undisclosed, eventually, they are bound to affect even the smallest employer.<sup>183</sup> Employers need a mechanism to sift through these biases. It is the independent investigation that allows the employer to disregard a supervisor's discriminatory animus and allow them to continue (or not continue) with the adverse employment action.

Many recent cat's paw cases have turned on whether the formal decisionmaker conducted an independent investigation before the adverse employment decision was made.<sup>184</sup> Every circuit, even those adhering to the "tainted decision" approach, has held that an employer may escape cat's paw liability with an effective independent investigation.<sup>185</sup> While the Supreme Court in *Staub* viewed the independent investigation defense with skepticism, it admitted that when conducted properly, it *will* shield employers from liability.<sup>186</sup> The Court was clear that employers can eliminate liability if an independent "investigation results in an adverse action for reasons unrelated to the supervisor's original biased action."<sup>187</sup> While in *BCI*, the Tenth Circuit

---

182. Donna Chrobot-Mason & Marian N. Ruderman, *Leadership in a Diverse Workplace*, in *THE PSYCHOLOGY AND MANAGEMENT OF WORKPLACE DIVERSITY* 100, 104–05 (Margaret S. Stockdale & Faye J. Crosby eds., 2004).

183. See, e.g., Evangelina Holvino, Bernardo M. Ferdman, & Deborah Merrill-Sands, *Creating and Sustaining Diversity and Inclusion in Organizations: Strategies and Approaches*, in *THE PSYCHOLOGY AND MANAGEMENT OF WORKPLACE DIVERSITY*, *supra* note 182, at 245, tbl.12.4, 266.

184. See *BCI*, 450 F.3d at 488; *Staub v. Proctor Hosp.*, 560 F.3d 647, 656 (7th Cir. 2009).

185. See, e.g., *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (finding the causal link between the discriminatory animus and the termination is broken when the formal decisionmaker conducts his own independent investigation).

186. See *supra* note 155 and text accompanying.

187. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1193 (2011).

stated that independent investigations need not be extensive,<sup>188</sup> the Supreme Court in *Staub* should have held that a proper investigation should be as widespread as possible. In fact, the Supreme Court missed a tremendous opportunity to identify the criteria for conducting effective independent investigations.

The Supreme Court, at a minimum, should have identified the following as crucial steps that are inherent for an effective independent investigation: 1) establish a qualified person to oversee the independent investigation, 2) ensure that the decision is made upon a careful examination of well-documented evidence, and 3) conduct truth-seeking interviews with all of the parties involved.

#### 1. Establishment of a Qualified Person to Oversee the Independent Investigation

Employers should first choose a qualified person within the company to independently evaluate the whether an adverse employment action should be made.<sup>189</sup> This qualified person operates under the belief that an employee should be presumed innocent until proven guilty.<sup>190</sup> A qualified independent decisionmaker also takes precautions to ensure that his biases do not enter the investigatory process.<sup>191</sup> After all, by their nature, biases often operate below the level of conscious awareness.<sup>192</sup> To combat the inadvertent biases, a qualified formal decisionmaker should cautiously approach every decision as if there may have been some prejudice hidden during the review.

#### 2. Careful Examination of Well-Documented Evidence

Most importantly, the Supreme Court should have stated that adverse employment actions need to be based on substantial documented evidence.<sup>193</sup> There should be enough documentation that another reasonable person looking

---

188. *BCI*, 450 F.3d. at 488 (“Indeed, under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.”).

189. STEPHEN MITCHELL SACK, *FROM HIRING TO FIRING: THE LEGAL SURVIVAL GUIDE FOR EMPLOYERS IN THE ‘90’S* 284–85 (1995).

190. LYNNE CURRY-SWANN, *MANAGING EQUALLY AND LEGALLY: A PRACTICAL BUSINESS GUIDE TO PREVENTING DISCRIMINATION COMPLAINTS AND TERMINATION LAWSUITS* 147–48 (1990).

191. DANA M. MUIR, *A MANAGER’S GUIDE TO EMPLOYMENT LAW: HOW TO PROTECT YOUR COMPANY AND YOURSELF* 62 (2003).

192. *Id.*

193. CURRY-SWAN, *supra* note 190, at 154.

at the information would also decide to fire the employee.<sup>194</sup> The formal decisionmaker should keep a proper paper trail and remember that the evidence might eventually be read by the employee, a judge, or a jury.<sup>195</sup> By keeping careful records of negative performance appraisals, the formal decisionmaker can establish the necessary documentation to ultimately terminate an underperforming employee.<sup>196</sup> Documented records should be reviewed with caution because they may have been tainted by a biased employee or supervisor.<sup>197</sup> If a biased supervisor created a report or a review, they would be contaminated with discriminatory animus and should not be relied upon.<sup>198</sup> Further, the threat of a lawsuit should not keep the formal decisionmaker from giving an employee a negative performance review.<sup>199</sup> This fear could lead to evaluating employees under different standards. The independent review, which is designed to eliminate biases, could then create its own discriminatory effect.<sup>200</sup>

### 3. Conduct Truth-Seeking Interviews With All Parties Involved

Employers should also be conducting truth-seeking interviews as a crucial step in every independent investigation. Decisionmakers may naturally feel the need to rely on front-line managers and “to assume they are acting without a discriminatory motive,” but decisionmakers should “not rely solely on information provided by the employee’s supervisor.”<sup>201</sup> Proper investigations should include an interview with the affected employee to get his or her side of the story.<sup>202</sup> Other relevant witnesses should be interviewed to gather more

---

194. *Id.* at 148. Further, Curry-Swann states that the more severe the discipline, the stronger, more substantial evidence is required. *Id.* Therefore, a decision to terminate an employee should be based upon a vast amount of well-documented evidence. *Id.*

195. *Id.* at 155. The formal decisionmaker should review the documentation regularly and keep it short and sweet to avoid replacing factual assertion with opinion.

196. *Id.* at 156.

197. See Brief for the U.S. as Amicus Curiae Supporting Petitioner at 16, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (No. 09-400).

198. CURRY-SWAN, *supra* note 190, at 142.

199. MUIR, *supra* note 191, at 64–65. Muir also notes that careful record keeping can make the difference in a discrimination claim. *Id.* at 65; see *Wilcox v. State Farm Mut. Auto. Ins. Co.*, 253 F.3d 1069, 1070 (8th Cir. 2001).

200. See Brief for the U.S. as Amicus Curiae Supporting Petitioner, *supra* note 199, at 23–24.

201. Angela R. Rogers, *What to Do if a Supervisor is Biased: Protecting Your Company from Cat’s Paw Liability*, LAB. & EMP’T UPDATE (Bradley Arant Boult Cummings LLP), Dec. 2009, at 3, available at [http://www.babc.com/files/Publication/297ff55c-d4c3-4e8b-ba01-0033192415a3/Presentation/PublicationAttachment/5ab31ede-42a3-4bbf-9d95-a196b0d411b5/Labor%20and%20Employment%20News\\_Dec%202009.pdf](http://www.babc.com/files/Publication/297ff55c-d4c3-4e8b-ba01-0033192415a3/Presentation/PublicationAttachment/5ab31ede-42a3-4bbf-9d95-a196b0d411b5/Labor%20and%20Employment%20News_Dec%202009.pdf).

202. See *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (last modified Apr. 6, 2010), <http://www.eeoc.gov/policy/docs/harassment.html>; Tim Davis, *Beyond the Cat’s Paw: An*

information and to get third party perspective.<sup>203</sup> Only once all the appropriate parties have been interviewed should the formal decisionmaker then begin to make conclusions about the accuracy of the evidence. Independent interviews of all the parties involved shows that the formal decisionmaker's main concern is objectivity.<sup>204</sup>

Some commentators argue that there is too much weight given to independent investigations because the formal decisionmaker's true motives cannot be ascertained with reasonable certainty.<sup>205</sup> For instance, an independent formal decisionmaker may not be able to entirely remove himself or herself from the discriminatory animus because the decisionmaker is too far removed from employee. If the formal decisionmaker is too far removed from the employee, he may be more inclined to "credit the views and opinions" of the biased supervisor than the employee "because of the supervisor's relative place in the institutional hierarchy."<sup>206</sup> Further, there may also be situations where the formal decisionmaker is too closely intertwined with biased subordinate. The formal decisionmaker's friendships and allegiances have the potential to sabotage the independent investigation. There may also be situations where the formal decisionmakers themselves hold a bias against the employee.<sup>207</sup>

Regardless of the criticisms of the independent investigation, one simple fact remains: There are no viable alternatives to the independent investigation. Employers need a method by which they may filter through subordinate biases. Simply because a subordinate may have harbored some bias against an

---

*Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247, 260 (2007).

203. *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, *supra* note 202.

204. See Brief for the U.S. as Amicus Curiae Supporting Petitioner, *supra* note 197, at 10 ("Simply reviewing evidence compiled by a biased supervisor will not break the chain of causation between the supervisor's bias and the ultimate employment action."); *id.* at 24 ("The more thorough and truly independent the investigation, the more likely the employment action will be the result of the investigation rather than the discriminatory actions of the supervisor.").

205. See Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 4 (2001); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 58 (2003); Brief Amicus Curiae of the Equal Emp. Advisory Council in Support of Respondent at 21-24, *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) (No. 09-400) (stating that the Equal Employment Advisory Council argues that employer liability in a cat's paw case should not hinge on whether an employer conducts an investigation before making an adverse employment decision).

206. See Sean Ratliff, *Independent Investigations: An Inequitable Out for Employers in Cat's Paw Cases*, 80 U. COLO. L. REV. 255, 279 (2009).

207. Dennis Duchon et al., *Avoid Decision Making Disaster by Considering Psychological Bias*, REV. BUS., Summer/Fall 1991, at 13, 17 (1991).

inadequate employee, an employer should not be forever constrained from terminating that employee if a valid non-discriminatory reason calls for it.

#### CONCLUSION

Over the past twenty years, the cat's paw theory of liability has emerged as one of the most controversial issues in employment law. When the Supreme Court decided *Staub* during its last term, it missed an opportunity to clarify important issues surrounding this complex theory. A more detailed solution would not only have provided uniformity and assistance to the circuits, but most importantly, it would have also provided guidance to modern employers. When it fashioned the appropriate causation standard, the Supreme Court should have adopted a balanced causation standard in order limit the financial impact and burden on employers and to encourage the development of an unbiased workplace environment. Also, instead of largely dismissing the independent investigation defense, the Supreme Court also should have validated it and provided employers with the specific elements that encompass an effective investigation. At a minimum, an effective investigation should entail the establishment of a qualified person to conduct the investigation, a review of all the documented evidence, and truth-seeking interviews of all involved parties. Unfortunately, the *Staub* decision appears to have ensured that the cat's paw theory will continue to perplex courts and the employment world alike.

TIMOTHY POWDERLY\*

---

\*J.D., 2011. Special thanks to Prof. Marcia L. McCormick for her guidance and assistance developing the topic and content for this article.