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Cat's Paw Cases: The Standard for Assessing Subordinate Bias Liability

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CAT'S PAW CASES: THE STANDARD FOR ASSESSING SUBORDINATE BASIS LIABILITY

Sara Atherton Mason

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CAT'S PAW CASES: THE STANDARD FOR ASSESSING SUBORDINATE BIAS LIABILITY

SARA ATHERTON MASON*

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I. INTRODUCTION

There is no doubt that discrimination is still deeply rooted in our society.¹ Although discrimination in any form is despicable, discrimination in the workplace has potentially negative ramifications on a person's career, job performance, and ability to earn a living.²

Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA) were passed by Congress starting in the mid-1900s to combat workplace discrimination.³ Since then, employment discrimination litigation has become commonplace in our legal system.⁴ It is well settled that if the employer's formal decisionmaker discriminates against an employee then unlawful employment discrimination has occurred.⁵ However, it is less clear whether discrimination by a subordinate, who influences the decisionmaker's determination to termi-

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1. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 18, 2011) (showing that for the 2009 fiscal year, 36% of the claims filed with the U.S. Equal Employment Opportunity Commission (EEOC) were based on race, 36% of the claims were based on retaliation, 30% of the claims were based on sex, 24.4% of the claims were based on age, 23% of the claims were based on disability, 11.9% of the claims were based on national origin, and 3.6% of the claims were based on religion). In 2009, more than 93,000 employment discrimination claims were filed with the EEOC. *Id.* This is up from about 77,000 only ten years earlier. *Id.*

2. Keaton Wong, Comment, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1730 (2008).

3. Taran S. Kaler, Comment, *Controlling the Cat's Paw: Circuit Split Concerning the Level of Control a Biased Subordinate Must Exert Over the Formal Decisionmaker's Choice to Terminate*, 48 SANTA CLARA L. REV. 1069, 1069-70 (2008).

4. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Mar. 18, 2011) (showing the number of employment discrimination cases litigated from 1997 until 2009).

5. Wong, *supra* note 2, at 1730-31.

nate, qualifies as employment discrimination.⁶ This is known as subordinate bias liability. Although all United States Courts of Appeal recognize subordinate bias liability, the circuits are split as to what standard of control should be applied when assessing this liability.⁷

Subordinate bias liability “impute[s] the discriminatory bias of a subordinate, who lacks the formal authority to terminate an employee, to the decisionmaker who does have formal authority to terminate.”⁸ This theory of liability is derived from agency principles. Both Title VII and the ADEA use the United States Code’s definition of *employer*, which is “a person engaged in an industry affecting commerce . . . and *any agent of such a person*.”⁹

In cat’s paw cases, although the formal decisionmaker does not discriminate against the employee, the discriminatory animus of the subordinate causes the employer to be liable under federal antidiscrimination statutes.¹⁰ The circuits are split as to how much influence the subordinate must exhibit over the decisionmaker’s determination to terminate to invoke subordinate bias liability. Some circuits apply a lenient standard while other circuits apply a much stricter standard.¹¹

The Supreme Court will hear the case *Staub v. Proctor Hospital* during its 2010 term to determine a uniform standard of control for subordinate bias liability cases.¹² This Note will analyze the current standards amongst the circuits, predict which standard the Supreme Court will announce as the uniform standard, and examine how that standard will affect the outcome of *Staub*.

II. BACKGROUND

A. *Cat’s Paw Doctrine*

Judge Posner was the first to dub subordinate bias liability as the “cat’s-paw” doctrine in *Shager v. Upjohn Co.*¹³ The cat’s paw principle derives from a fable, *The Monkey and the Cat* by Jean LaFontaine, in which a monkey convinces a gullible cat to pull chestnuts from a hot fire.¹⁴ The cat snatches them from the fire, each time burning its paw, only to find that the monkey has eaten all of the chestnuts.¹⁵ Today

6. *Id.* at 1731.

7. Kaler, *supra* note 3, at 1070.

8. *Id.*

9. 42 U.S.C. § 2000e(b) (2006) (emphasis added); *see also* 29 U.S.C. § 623(a) (2006) (ADEA); 42 U.S.C. § 2000e-2(a) (2006) (Title VII).

10. Kaler, *supra* note 3, at 1070.

11. Wong, *supra* note 2, at 1732-33.

12. 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (2010).

13. 913 F.2d 398, 405 (7th Cir. 1990).

14. Rachel Santoro, *Narrowing the Cat’s Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 824 n.3 (2009).

15. Sean Ratliff, Comment, *Independent Investigations: An Inequitable Out for Employers in Cat’s Paw Cases*, 80 U. COLO. L. REV. 255, 258 (2009).

“cat’s paw” is “used to describe a person who is unwittingly manipulated by another to accomplish his purposes.”¹⁶ Particularly with subordinate bias liability, the monkey is the person who convinces the decisionmaker, the cat, to unknowingly engage in employment discrimination.¹⁷

B. Staub v. Proctor Hospital

The case before the Supreme Court in the 2010 term, *Staub*, finally allows the Court to determine the circumstances under which an employer may be held liable based on the unlawful discriminatory intent of subordinates who caused or influenced, but did not make, the final termination decision.¹⁸

Vincent Staub, the petitioner, was a member of the United States Army Reserve and was employed by Proctor Hospital, the respondent, as an angiography technologist (angio tech) in the Diagnostic Imaging Department.¹⁹ Staub contended his supervisor, Janice Mulally, and coworker, Angie Day, had antimilitary animus because Staub required time off from work due to his Army Reserve training schedule and duties.²⁰ Mulally switched Staub’s work schedule to interfere with drills, called his training “bullshit,” and made statements that Staub’s reserve duties were a burden on the other employees.²¹ Day had similar feelings towards Staub and his military commitments, and she criticized him to the department.²²

Staub’s termination was prompted by two separate incidents. First, on January 26, 2004, Mulally issued Staub a written warning for failing to assist with general diagnostics when not in the angiography lab.²³ However, there was never a rule that obligated Staub to assist with general diagnostics when not in the angiography lab.²⁴ Staub reported only signing the warning “to get [Mulally] off of his back.”²⁵ After signing it, the warning became part of his record along with the instructions to report to Mulally or Korenchuk when

16. Mario A. Barrera & Amy Karff Halevy, *Understanding The “Cat’s Paw” Doctrine in the Employment Context*, BRACEWELL & GIULIANI (May 14, 2007), http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/424a4364-9a6a-4133-b091-6abdbe2eed82/Understanding_The_Cats_Paw_Doctrine_in_the_Employment_Context.cfm.

17. Ratliff, *supra* note 15, at 258.

18. Petition for Writ of Certiorari at i, *Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009) (Nos. 08-1316, 08-2255, 08-2402), *cert. granted*, 130 S. Ct. 2089 (2009) (No. 09-400).

19. *Id.* at 3-4; Brief in Opposition to Petition for Writ of Certiorari at 1, *Staub*, 560 F.3d 647 (Nos. 08-1316, 08-2255, 08-2402).

20. *See* Petition for Writ of Certiorari, *supra* note 18, at 4-6.

21. *Staub*, 560 F.3d at 651-52.

22. *Id.* at 652.

23. *Id.* at 653.

24. *Id.*

25. *Id.*

he was not busy with his angio tech duties or when he wanted to leave the diagnostic area.²⁶

The second incident occurred on April 20, 2004, the day Staub was fired, when he left the diagnostic area without permission.²⁷ Unable to find Korenchuk before leaving for lunch, Staub left Korenchuk a voicemail to inform him of his whereabouts.²⁸ Staub and a coworker were only gone for thirty minutes;²⁹ however, Korenchuk told Linda Buck, the formal decisionmaker, he was unable to find Staub all morning.³⁰ When Staub returned from lunch, he was escorted to Buck's office where he was handed a pink slip terminating his employment.³¹ Buck based her decision to terminate Staub on Korenchuk's report, past incidents, and a review of Staub's personnel file.³² She failed to contact any current angio techs and did not investigate Staub's assertions that Mulally wanted him fired.³³ Staub's military involvement was arguably not a factor in her decisionmaking.³⁴

Staub claimed employment discrimination against Proctor under the Uniformed Services Employment and Reemployment Rights Act of 1984 (USERRA), which "prohibit[s] discrimination against persons because of their service in the uniformed services."³⁵ He argued that the cat's paw doctrine was applicable in this case because the prior warnings and complaints in his personnel file were results of Mulally's prejudices.³⁶ Therefore, Staub argued that Proctor Hospital was liable for employment discrimination because the decisionmaker, Buck, was influenced by her subordinate's discriminatory animus.³⁷

Although a jury found that Staub was terminated because of his military affiliation,³⁸ the Seventh Circuit reversed, stating that "Buck took this action free of any military-based animus" and a reasonable jury could not find that Staub was terminated because of his military service.³⁹

26. *Id.*

27. Petition for Writ of Certiorari, *supra* note 18, at 8-9.

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

29. *Id.*

30. Petition for Writ of Certiorari, *supra* note 18, at 9.

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

32. *Id.*; *see also* Brief for the United States as Amicus Curiae at 3, *Staub*, 560 F.3d 647 (Nos. 08-1316, 08-2255, 08-2402).

33. *Staub*, 560 F.3d at 654-55.

34. *Id.* at 655.

35. Petition for Writ of Certiorari, *supra* note 18, at 3; 38 U.S.C. § 4301(a)(3) (2006).

36. *Staub*, 560 F.3d at 655.

37. *Id.*

38. *Id.* at 651.

39. *Id.* at 659.

III. THE CIRCUIT SPLIT CONTINUUM

As previously stated, all circuits acknowledge subordinate bias as a means to impute liability to the employer in employment discrimination cases; however, there is no uniform standard as to what circumstances invoke subordinate bias liability.⁴⁰ Each circuit has determined for itself what standard should be applied leaving a continuum of standards from very strict to lenient.⁴¹ The Fourth Circuit adopted the strictest standard by far, almost eliminating subordinate bias liability except in a very narrow set of cases.⁴² The intermediate standard has been adopted by the Sixth, Seventh, Tenth, and Eleventh Circuits.⁴³ The remaining circuits—the First, Second, Third, Fifth, Eighth, Ninth, and District of Columbia—have adopted variations of the lenient standard.⁴⁴

The language in Title VII creates ambiguity as to which standard should apply in cat's paw cases. Title VII was founded on agency principles and states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."⁴⁵ The Supreme Court has consistently used "but-for" and proximate causation standards in agency cases; however the "motivating factor" language for subordinate bias liability suggests that a but-for causation requirement is not necessary.⁴⁶ By adopting varying standards, circuits are individually determining what level of causation the bias subordinate must have in cat's paw cases.⁴⁷

A. *Strict Standard*

The Fourth Circuit has adopted the strictest standard for determining how much control a subordinate must have over the formal decisionmaker for the employer to be held liable.⁴⁸ In *Hill v. Lockheed Martin Logistics Management, Inc.*, Ethel Louise Hill, a fifty-seven year old female, worked as an aircraft mechanic at a military base for

40. Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 385-86 (2008).

41. *See id.* at 386.

42. Kaler, *supra* note 3, at 1079.

43. *See* Wong, *supra* note 2, at 1745.

44. *Id.* at 1740-41.

45. 42 U.S.C. § 2000e-2(m) (2006).

46. Sara Eber, Comment, *How Much Power Should Be in the Paw? Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 149-50 (2008).

47. *See id.*

48. *See* Kaler, *supra* note 3, at 1078.

Lockheed Martin.⁴⁹ Thomas Prickett, a manager, and Archie Griffin, a senior supervisor, were both superiors of Hill at Lockheed.⁵⁰ Neither spent much time at the military base.⁵¹ At the base, Hill reported to a “lead person,” who, in turn, reported to Griffin.⁵² There was also a safety inspector, Ed Fultz, who ensured the mechanics’ work was in accordance with safety protocol.⁵³ However, Fultz did not have any supervisory authority over Hill or the other mechanics and reported to the lead person.⁵⁴

Hill filed suit against Lockheed for wrongful discharge based on her sex and age, violating Title VII and the ADEA.⁵⁵ She alleged that “Fultz harbored discriminatory bias against her, calling her such names as ‘useless old lady,’ ‘troubled old lady,’ and ‘damn woman.’”⁵⁶ According to Hill, Fultz’s animus toward her resulted in unsubstantiated reports which were the basis of Prickett’s and Griffin’s decision to terminate her employment.⁵⁷ She contended that the cat’s paw doctrine applies because Fultz’s discriminatory animus substantially influenced the decisionmakers in their determination.⁵⁸

The Fourth Circuit recognized subordinate bias liability as a means to bring an employment discrimination action but severely narrowed its applicability.⁵⁹ Relying on agency principles for its decision, the Fourth Circuit held that prior case law “defined the limits of such agency as encompassing employer liability for the acts of its employees holding supervisory or other actual power to make tangible employment decisions.”⁶⁰ Therefore, since the formal decisionmakers were without discriminatory animus and Fultz did not have a supervisory position, Lockheed was not held liable for employment discrimination.⁶¹ “[I]n the Fourth Circuit, the biased subordinate has to be the supervisor or in a managerial-capacity position over the

49. 354 F.3d 277, 282 (4th Cir. 2004).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 282-83.

54. *Id.* at 282.

55. *Id.* Hill had received three written reprimands, including a suspension, from two separate lead people—Ronald Saunders and Richard Dixon—after getting reports from Fultz about faulty work. *Id.* According to company policy, “[a]n employee who receives a combination of two written reprimands not involving a suspension and one involving a suspension . . . will be subject to discharge.” *Id.* Dixon, a lead person, reported to Prickett and Griffin, who were the formal decisionmakers in Hill’s termination. *Id.*

56. Kaler, *supra* note 3, at 1078 (quoting *Hill*, 354 F.3d at 283).

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

58. *See id.*

59. *See Wong, supra* note 2, at 1744.

60. *Hill*, 354 F.3d at 287.

61. *Id.* at 297-98.

terminated employee and must be 'principally responsible' for the formal decisionmaker's decision to terminate the employee."⁶²

In his dissent, Judge Michael claimed that this decision "renders Title VII and the ADEA essentially toothless when it comes to protecting employees against unlawful employment decisions that are motivated by biased subordinates."⁶³ He noted that this decision is at odds with subordinate bias liability theories in the other circuits.⁶⁴

B. Intermediate Standard

The Sixth, Seventh, Tenth, and Eleventh Circuits adopted standards that fall along the middle of the continuum. Under the intermediate approach, a causal connection must exist between the subordinate's bias and the decision to terminate the employee.⁶⁵ The landmark case for this standard is the Tenth Circuit case, *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*.⁶⁶ In this case, Stephen Peters was an African-American employee at BCI in Albuquerque, New Mexico, where 60% of the employees were Hispanic and less than 2% of the employees were African-American.⁶⁷ Peters' district sales manager was Cesar Grado, who was Hispanic; however, Jeff Katt, who was Caucasian, supervised Peters daily.⁶⁸ Grado's duties included monitoring the employees under him, but he had no authority to terminate any employees.⁶⁹ Grado was responsible for bringing any problems to the attention of the Human Resources Department (HR)—Sherry Pederson and Pat Edgar.⁷⁰

Peters claimed BCI wrongfully terminated him under the Title VII cat's paw theory.⁷¹ He argued that Grado discriminated against him because he was African-American.⁷² BCI could have argued that be-

62. Kaler, *supra* note 3, at 1079 (quoting *Hill*, 354 F.3d at 291).

63. *Hill*, 354 F.3d at 301 (Michael, J., dissenting).

64. *Id.*

65. Wong, *supra* note 2, at 1745.

66. 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007).

67. *BCI Coca-Cola*, 450 F.3d at 478.

68. *Id.*

69. *Id.*

70. *Id.* at 478-79.

71. *Id.* at 482. Peters worked a typical workweek—Monday through Friday. *Id.* at 478. Grado was responsible for scheduling and had Katts inform Peters that he needed to cover an extra shift on a Sunday. *Id.* at 479. Peters informed Katts that he had previous plans and would not be able to work that day. *Id.* Katts allegedly told Grado that Peters was not able to work and would call in sick. *Id.* It is disputed whether Peters actually said he would call in sick. *Id.* After that conversation, Grado called Edgar in HR stating that Peters refused to come in on Sunday and planned to call in sick. *Id.* Edgar told Grado to find out why Peters would not work on Sunday, and if there was no "compelling reason" then Peters' failure to go to work on Sunday would be treated as insubordination and grounds for termination. *Id.* When Grado confronted Peters, Peters said that his plans were "none of [Mr. Grado's] business." *Id.* Grado told Edgar about the conversation, and Edgar decided to terminate Peters' employment. *Id.* at 480.

72. *Id.* at 482.

cause Grado was only the messenger and not the formal decisionmaker, BCI could not be held liable.⁷³ Edgar, the formal decisionmaker, had never met Peters and was not aware of his race when she made the decision to terminate him.⁷⁴ The Tenth Circuit, however, forged a new path for determining cat's paw liability and sided with Peters.⁷⁵

The Tenth Circuit rejected both the Fourth Circuit's strict standard and the lenient standard of other circuits.⁷⁶ The court decided that in order to succeed on a cat's paw theory, "a plaintiff must establish more than mere 'influence' or 'input' in the decision-making process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."⁷⁷ Therefore, a causal connection between the subordinate's discrimination and the formal decisionmaker's decision to terminate the employee must exist.⁷⁸ Like other causal standards, the employer is able to break the chain of causation.⁷⁹ By independently investigating allegations against an employee, the employer can avoid liability under the cat's paw theory.⁸⁰ BCI petitioned for a writ for certiorari, which was granted, but the case settled before the Supreme Court could hear the case.⁸¹

The Sixth, Seventh, and Eleventh Circuits have also adopted similar causal approaches to determining liability under the cat's paw theory.⁸² In *Christian v. Wal-Mart Stores, Inc.*, the Sixth Circuit stated that a plaintiff "must offer evidence that the supervisor's racial animus was the cause of the termination or somehow influenced the ultimate decisionmaker."⁸³ In *Brewer v. Board of Trustees of the University of Illinois*, the Seventh Circuit reiterated its standard that an employer is liable under the cat's paw theory only if a subordinate was the "singular influence" over an adverse employment decision so as to make the subordinate the "functional[] . . . decision-maker."⁸⁴ The

73. *Id.* at 484.

74. *Id.*

75. *Id.* at 487-88, 493.

76. *See* Wong, *supra* note 2, at 1749, 1752.

77. *BCI Coca-Cola*, 450 F.3d at 487.

78. Kaler, *supra* note 3, at 1083.

79. *Befort & Olig*, *supra* note 40, at 396.

80. *Id.*

81. *See* 549 U.S. 1334 (2007); U.S. EQUAL OPPORTUNITY COMM'N, PRESS RELEASE, <http://www.eeoc.gov/eeoc/newsroom/release/4-15-08.cfm> (last visited Mar. 18, 2011).

82. *See, e.g.*, *Brewer v. Bd. of Trs. of the Univ. of Ill.*, 479 F.3d 908, 917 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 877 (6th Cir. 2001); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999).

83. 252 F.3d at 877; *see also* *Wilson v. Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (stating that there has to be a "causal nexus" between the biased subordinate and the formal decisionmaker's adverse employment action).

84. 479 F.3d at 917 (quoting *Little v. Ill. Dep't of Revenue*, 369 F.3d 1007, 1015 (7th Cir. 2004)); *see also* *Willis v. Marion Cnty. Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997).

Eleventh Circuit echoed a similar theory in *Stimpson v. City of Tuscaloosa*.⁸⁵ The plaintiff must proffer evidence that the formal decisionmaker relied on biased information or recommendations from a subordinate, and that these recommendations were the actual cause of the employee's wrongful termination.⁸⁶ These circuits also recognize that the causal chain can be broken with an independent investigation.⁸⁷

C. Lenient Standard

The First, Second, Third, Fifth, Eighth, Ninth, and District of Columbia Circuits recognize that a subordinate's bias can be imputed to the employer in cat's paw cases if the subordinate has any influence or involvement in the adverse employment decision.⁸⁸ Unlike the intermediate and strict standards of the other circuits, the circuits with a lenient standard do not require a causal relationship between the subordinate and decisionmaker, nor do they require the subordinate to be the functional decisionmaker. This standard gives the plaintiff a low threshold to meet to survive the summary judgment phase in litigation.⁸⁹

Russell v. McKinney Hospital Venture provides an example of the lenient standard.⁹⁰ Sandra Russell, a fifty-four year old female, worked as the Director of Clinical Services at Columbia Homecare alongside Steve Cuilla, a twenty-eight year old male, who worked as the Director of Operations and was the son of the Chief Executive Officer (CEO) of Homecare's parent company.⁹¹ Both Russell and Cuilla reported to Carol Jacobsen, their fifty-three year old supervisor.⁹²

Homecare fired Russell on January 27, 1997, and she filed suit alleging age discrimination under the ADEA the next year.⁹³ Cuilla referred to Russell as an "old bitch" and other discriminatory names

85. 186 F.3d at 1331; *see also* *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998).

86. *Stimpson*, 186 F.3d at 1331. "When the biased recommender and the actual decisionmaker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity. Instead, the plaintiff must prove that the discriminatory animus behind the recommendation, and not the underlying employee misconduct identified in the recommendation, was an actual cause of the other party's decision to terminate the employee." *Id.* (citing *Llampallas*, 163 F.3d at 1248).

87. *Befort & Olig*, *supra* note 40, at 396.

88. *See, e.g.*, *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001); *Rose v. N.Y.C. Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir. 2000); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998); *Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994).

89. *Befort & Olig*, *supra* note 40, at 389.

90. *See* 235 F.3d at 226.

91. *Id.* at 221.

92. *Id.*

93. *Id.*

so often that Russell needed earplugs to do her work without being bothered.⁹⁴ Russell established that Cuilla, the son of the CEO, “possessed leverage” over Jacobsen, and Cuilla used that leverage so that Jacobsen would terminate Russell.⁹⁵ Homecare asserted that because Cuilla was not the formal decisionmaker, his discrimination could not be assigned to the company.⁹⁶ “The Fifth Circuit explained that the level of control a biased subordinate must exert for courts to hold an employer vicariously liable is whether the subordinate ‘possessed leverage, or exerted influence, over the titular decisionmaker.’ Thus, the biased subordinate could be a co-worker, supervisor, or a lower level worker.”⁹⁷

The remaining six circuits have also adopted similar lenient standards.⁹⁸ Generally when there is any discrimination by a subordinate that merely influences or participates in an adverse employment decision, these circuits will hold the employer liable under the cat’s paw doctrine.⁹⁹ As a result these circuits are extremely pro-plaintiff because plaintiffs are not required to show that the subordinate’s discrimination actually affected the decisionmaker’s determination to terminate.¹⁰⁰

IV. WHAT WILL SCOTUS DO?

The *Staub* case provides the ideal opportunity for the Supreme Court to proclaim a uniform standard. The Supreme Court should adopt the intermediate causation standard because it is the only standard that balances the interests of both employees and employers as intended by Title VII, the ADEA, and the ADA.¹⁰¹

The lenient standard in cat’s paw cases provides too low of a threshold for liability by essentially guaranteeing that any discrimination by an employee of the company will be imputed to the employer.¹⁰² Circuits that have adopted the lenient standard interpret the “motivating factor” language of Title VII broadly—hardly requiring any causation between the discrimination by a subordinate and the adverse employment action by the decisionmaker.¹⁰³ With such a low threshold to impute liability, plaintiffs are almost ensured survival

94. Kaler, *supra* note 3, at 1080.

95. *Id.*

96. *Id.*

97. *Id.* (internal footnotes omitted).

98. See cases cited *supra* note 88 and accompanying text.

99. See Eber, *supra* note 46, at 174.

100. See *id.* at 178 (noting that the lenient standard may result in employers being “constantly bombarded with costly litigation”); see also Befort, *supra* note 40, at 389 (describing the low threshold plaintiffs must meet to go to trial).

101. See *id.* at 183.

102. *Id.* at 175.

103. *Id.* at 177-78.

through the summary judgment phase because there is a higher likelihood of presenting a genuine issue of material fact.¹⁰⁴

Besides providing too low of a threshold of liability, which increases litigation, the lenient standard also does not conform to the policies and principles of Title VII.¹⁰⁵ Title VII was enacted to prevent discriminatory practices from occurring in the workplace by controlling employees' behavior.¹⁰⁶ It is founded on agency principles, which hold employers liable for actions of their employees, even if the actions are not within the scope of the employee's duties.¹⁰⁷ By having such a broad and encompassing standard, employers are being held liable for actions of their employees that they had no control over and could not prevent.¹⁰⁸ Therefore, employers are left open to liability regardless of the antidiscrimination and antiharassment policies they put in place.¹⁰⁹

At the other extreme, the strict standard limits liability so much that the plaintiff has an enormous burden to satisfy to pass summary judgment. Although this standard takes causation principles into account, most agree that it is far too restrictive as represented by the fact that every circuit but the Fourth Circuit had adopted a more lenient standard.¹¹⁰

As stated previously, Title VII relies on agency principles, which refer to any "agent" of the employer, not just the formal decision-maker.¹¹¹ This strict standard shields the employer from liability if the employer can show that the discrimination came from someone other than the one "principally responsible" for the adverse employ-

104. *Id.*

105. See *Equal Emp't Opportunity Comm'n v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 486 (10th Cir. 2006) (stating that employers should be held liable under Title VII even if the discrimination came from a biased subordinate and not the formal decisionmaker because employers should not be able to evade liability).

106. Eber, *supra* note 46, at 149 n.63 (discussing the "motivating factor" language and Title VII).

107. RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) (explaining the foundation of agency principles in general); Eber, *supra* note 46, at 151-52 ("The Supreme Court stated that it is appropriate to hold an employer liable under Title VII for the improper conduct of a supervisor made possible by virtue of his authority even if that conduct was outside the scope of his employment. Yet, the Court also emphasized that to avoid overly broad and excessive liability, more than a mere employment relationship is needed. A tangible employment action is the most obvious trigger, but beyond that the Court declined to articulate a more definitive guideline for what constitutes an 'aided by the agency relationship.'" (internal footnotes omitted)).

108. See Eber, *supra* note 46, at 149 n.63 (claiming that such a standard is contrary to Title VII's underlying intent); see also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (discussing the policy reasons behind Title VII).

109. Eber, *supra* note 46, at 178.

110. See *id.* at 183.

111. Curtis J. Thomas, Note, *Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 61 OKLA. L. REV. 629, 656 (2008).

ment decision.¹¹² This standard ignores the principles of Title VII by severely limiting the agents of the employer that can be responsible for imputed discrimination.¹¹³ If that were the standard used by all circuits then employers would have no incentive for preventing discriminatory practices in the workplace because they would essentially be immune from liability.¹¹⁴

The intermediate causation standard creates a balance between holding employers liable for adverse employment decisions based on discrimination using the agency principles of Title VII while also providing plaintiffs an avenue for redress if they are adversely affected by discrimination.¹¹⁵ The intermediate standard provides plaintiffs protection from discriminatory practices “by not allowing employers to hide behind a shield of unbiased decision-makers.”¹¹⁶ Most importantly it takes into account the realities of the workplace. Although a formal decisionmaker terminates an employee, the causation standard recognizes the authority that supervisors have over employees but does so without blindly imputing liability to the employer.¹¹⁷

When defining the intermediate causation standard, the Supreme Court should use the “motivating factor” language of Title VII.¹¹⁸ If the Court decides that a biased subordinate must be a “motivating factor” in the adverse employment decision, it will be clear that this standard complies with the policies and principles of Title VII. In an earlier employment discrimination decision, the Supreme Court stated that “a plaintiff need only present sufficient [direct or circumstantial] evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.’ ”¹¹⁹ The Court should extend this reasoning to subordinate bias liability cases. This wording not only ensures that some causal link exists between a biased subordinate and an adverse employment action by the decisionmaker, but it also allows for the realities of workplace dynamics to be taken into account.

Like other causal relationship standards, this one can be limited by breaking the chain of causation.¹²⁰ Employers will be encouraged

112. *Id.*

113. *Id.*

114. Wong, *supra* note 2, at 1756.

115. Eber, *supra* note 46, at 183; *see also* Kaler, *supra* note 3, at 1090-91.

116. Wong, *supra* note 2, at 1756 (discussing why the strict standard is too limiting while the intermediate standard provides the proper balance for employers and employees).

117. Kaler, *supra* note 3, at 1092.

118. 42 U.S.C. § 2000e-2(m) (2006).

119. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (quoting 42 U.S.C. § 2000e-2(m) (2006)).

120. *Befort & Olig*, *supra* note 40, at 396.

to conduct independent investigations to determine that a termination decision, or other recommendations and reports, were made free of discriminatory bias.¹²¹ Once this determination is made, the independent investigation would break the chain of causation limiting any potential liability.¹²²

The intermediate option provides the best equilibrium between employers and employees battling discrimination in the workplace. Employers are held liable when there is subordinate discrimination, but they are able to limit their liability by conducting independent investigations, and employees have a judicial means to redress any adverse employment decisions that were not properly investigated. This also assures that there is some type of causation standard, without it being too broad or too restricting, in accordance with Title VII.

V. THE FUTURE *STAUB* DECISION

If the Supreme Court applies the intermediate causation standard to *Staub*, Proctor Hospital will be found liable for employment discrimination under USERRA. The jury found that Staub was terminated because of his military affiliation; however, the Seventh Circuit reversed the jury's decision because the evidence of Staub's supervisor's discriminatory animus was wrongly admitted since there lacked a "singular influence" over Buck's decision to terminate Staub.¹²³ Under the new standard, a "singular influence" does not need to influence the decisionmaker. The Seventh Circuit's standard is closest to the strict standard. If the Court adopts a standard that requires the subordinate to be the "motivating factor," then the standard will be more lenient than the "singular influence" standard. In Staub's case, the jury found enough evidence to link Proctor Hospital to the discriminatory animus of Staub's supervisor, Mullaly, rendering Proctor Hospital liable under the cat's paw doctrine.¹²⁴

Proctor Hospital will likely contend that Buck's (the decisionmaker) independent investigation broke the chain of causation. However, Buck's decision to terminate was largely based on her recollection of past issues with Staub and a review of Staub's personnel file, which contained past incident reports that were caused by Mulally's bias.¹²⁵ In addition, Buck failed to speak to any of Staub's coworkers or to investigate Staub's belief that Mulally was out to get him.¹²⁶ The

121. *See id.*

122. Wong, *supra* note 2, at 1757.

123. Brief for the United States as Amicus Curiae, *supra* note 32, at 5-6.

124. *Id.* at 5.

125. *See Staub v. Proctor Hosp.*, 560 F.3d 647, 654 (7th Cir. 2009); Brief for the United States as Amicus Curiae, *supra* note 32, at 3.

126. *Staub*, 560 F.3d at 654-55.

Court will likely determine that this does not qualify as an adequate investigation to break the chain of causation.¹²⁷

Therefore, without an adequate independent investigation, Proctor Hospital will be liable under the intermediate standard because Mulally was the motivating factor in Buck's termination decision.

VI. CONCLUSION

The Supreme Court, through *Staub*, has the opportunity to create a uniform influence standard for the circuits in subordinate bias liability cases. There are three standards adopted by the circuits—the strict, intermediate, and lenient standards. Only one circuit, the Fourth, has adopted the strict standard, which requires that the actual decisionmaker harbor discriminatory animus in order for an adverse employment action to fall under the purview of subordinate bias liability.¹²⁸ This is far too restrictive as it essentially provides a blanket of immunity for employers against cat's paw cases. The majority of circuits have embraced the lenient standard where any influence by a biased subordinate puts the employer in the realm of liability.¹²⁹

The intermediate causation standard finds a happy medium between the two extremes. It keeps in place some realistic level of causation given the dynamics of workplace environments while staying true to the policies behind antidiscrimination statutes.¹³⁰ The Supreme Court should find the standard met when a biased subordinate is the "motivating factor" for the adverse discrimination decision. This standard encourages employers to investigate reports of discrimination but also releases them from liability when the investigation shows the employee should have been terminated regardless of a biased subordinate. Therefore, it is the only standard that balances the need to realistically limit the employer's liability while still providing an avenue of redress for employees that have been wrongly terminated because of discrimination.

Subordinate bias liability is an essential theory that helps ensure workplaces are free of discrimination. However, without a uniform and workable standard, both employers and employees are disadvan-

127. Independent investigations are extremely important in subordinate bias liability cases. There is also serious contention as to what qualifies as an adequate independent investigation. Because this Note focuses on the influence standard to apply in these cases, rather than the investigation aspect of the decision to terminate, I will not delve into specifics as to what the court should consider a sufficient independent investigation. For more information regarding independent investigations, please see Eber, *supra* note 46; Jeffrey L. Needle, *Defeat the 'Cat's Paw' Defense to Vicarious Liability*, 44 TRIAL 52 (2008); and Ratliff, *supra* note 15.

128. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 297-98 (4th Cir. 2004).

129. See cases cited *supra* note 88 and accompanying text.

130. Kaler, *supra* note 3, at 1092.

taged. The Supreme Court realizes that this is an area of law needing a uniform influence standard and will hopefully adopt the intermediate standard.