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## **NARROWING THE CAT'S PAW: AN ARGUMENT FOR A UNIFORM SUBORDINATE BIAS LIABILITY STANDARD**

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### INTRODUCTION

Jane was an employee at a paper manufacturing plant for seven years. For the first six and a half years of her employment, Jane had always received satisfactory reviews from her plant supervisor John, although these reviews documented her occasional tardiness and one disciplinary action for a safety violation. However, Jane's performance was always rated satisfactory overall, and John did not consider the infractions grounds for termination.

Dave replaced John as plant supervisor in a management overhaul at the plant six months ago. Other company employees had overheard Dave making comments that working in a manufacturing plant is a "man's job" and a plant is "no place for women" because they are not "strong enough or tough enough to get the job done right." Other plant workers described Dave as generally curt and abrupt with his female employees, while being easygoing and friendly when interacting with his male employees. Jane has likened Dave's management style to an "old boy's club." During Jane's annual evaluation one month ago, Dave evaluated Jane's work performance as unsatisfactory in a majority of the evaluation criteria in which she had always received positive marks. Jane took issue with this evaluation and expressed her objections to Dave during their review meeting. Dave responded that he thought her petite size and strength made performing laborious tasks at the plant difficult, and suggested that she find work more appropriate for "workers like her."

The plant was recently faced with financial difficulties and had to downsize; as a result, it fired Jane. A human resources manager located at the employer's corporate headquarters in a different city made termination

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decisions based upon an investigation that included a review of personnel files and supervisor recommendations. Performance evaluations and supervisor recommendations were heavily weighed in termination decisions, but past disciplinary actions and other performance related factors were considered as well. Although the human resources manager who terminated Jane never met her and did not harbor discriminatory animus towards women, at least part of the decision was based on Dave's input. Should the paper manufacturing plant be held liable for terminating Jane because of her immediate supervisor's discriminatory animus towards women?

The Supreme Court was scheduled to hear arguments on a similar issue in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*<sup>1</sup> in April 2006. The question was presented as: "Under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee."<sup>2</sup> Several circuit courts of appeals have adopted variations of the "cat's paw"<sup>3</sup> theory to answer similar questions and impute liability to the employer for a subordinate supervisor's discriminatory treatment of a statutorily protected employee. The "cat's paw" theory imputes liability to an employer when a biased employee uses his or her employer as the formal mechanism through which to fire an employee for discriminatory reasons.<sup>4</sup> It is also referred to as "subordinate bias" theory. The circuit courts of appeals are split along three general levels of subordinate bias influence that is necessary to impute liability to the employer in cases where subordinate supervisor bias influences employment actions: (1) "principally responsible"<sup>5</sup>; (2) "any influence"<sup>6</sup>; and (3) "causal connection."<sup>7</sup> Days before the Supreme Court was scheduled to hear arguments for *BCI*, the case was dismissed,<sup>8</sup> and this

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1. 450 F.3d 476 (10th Cir. 2006).

2. Petition for Writ of Certiorari, *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, 549 U.S. 1105 (2007) (No. 06-341), 2006 WL 2582502.

3. Judge Posner first dubbed the subordinate bias theory of liability as the "cat's paw" in *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). The doctrine derives its name from a fable titled "The Monkey and the Cat" by Jean LaFontaine. In the story, a cunning monkey persuades a cat to pull chestnuts out of a hot fire for the two animals to eat. While the cat pulls the chestnuts and burns his paws, the monkey eats all of the chestnuts himself and deserts the cat.

4. See *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998) (discussing the nature of a cat's paw case).

5. *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 291 (4th Cir. 2004).

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

7. *BCI*, 450 F.3d at 487-88.

8. The parties settled and requested a dismissal. See *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, 549 U.S. 1334 (2007) (dismissing writ of certiorari).

important split remains unaddressed.<sup>9</sup>

This Comment argues that the Supreme Court should resolve this important employment discrimination circuit split. Part I of this Comment summarizes the various circuits' subordinate bias liability approaches in detail and identifies why one consistent standard is necessary. Part II contends that subordinate bias theory has support in federal anti-discrimination statutory frameworks. Part III explains why the Tenth Circuit's "causal connection" is the closest to an appropriate standard and identifies areas for improvement if it were to become the uniform standard. Finally, Part IV addresses the need for a definitive approach to the "independent investigation" requirement articulated in all of the subordinate bias liability approaches.

## I. THE CIRCUIT SPLIT

*Shager v. Upjohn Co.* is the original "cat's paw" case. In an opinion written by Judge Posner, the Seventh Circuit held that "any influence" of a biased supervisor is enough to impute liability for discrimination to an employer.<sup>10</sup> In *Shager*, a middle-aged fertilizer salesman alleged that he was terminated from his position because of his younger, age-biased supervisor.<sup>11</sup> The employee claimed that his supervisor asked him how he felt about being supervised by a younger person, assigned him a more challenging sales territory, and treated him poorly compared to a younger salesman who held the same employment position.<sup>12</sup> The Seventh Circuit reversed the summary judgment order to defendants, and extended the doctrine of respondeat superior<sup>13</sup> to the employment discrimination context. The court held that when a biased subordinate deliberately acts to create an unfavorable employment situation for an employee, the employer for which the biased subordinate is an agent should be held liable for

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9. The Supreme Court had two more opportunities to review subordinate liability bias, but declined both. See *Sawicki v. Morgan State Univ.*, 170 Fed. App'x 271 (4th Cir. 2006), cert. denied 127 S. Ct. 2095 (2007); *Ray v. CSX Transp., Inc.*, 189 Fed. App'x 154 (4th Cir. 2006), cert. denied 549 U.S. 1053.

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

11. *Id.* at 401.

12. *Id.* at 400.

13. The common law tort principle of respondent superior was adopted in the Restatement (Third) of Agency § 7.07 (2006) for employees acting within the scope of their employment. See *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807, 817 (7th Cir. 1985) ("[T]he plaintiff must show that the employee's tort was in attempted (though often misguided) furtherance of the employer's business . . ."). The *Shager* court noted that the common law rule is usually carried over to statutory torts because statutes often do not cover all the issues necessary to construct a complete tort liability regime. *Shager*, 913 F.2d at 404.

disparate treatment.<sup>14</sup> Most circuits have adopted some variation of the “any influence” standard formulated by the *Shager* court, although the courts have differed over the level of influence the biased subordinate must exert over the employment action in order for the employer to be held liable.<sup>15</sup>

In stark contrast to the broad “any influence” approach, the Fourth Circuit has held that a biased subordinate must be “principally responsible” for a termination based on disparate treatment of a protected employee in order to be held liable for employment discrimination.<sup>16</sup> In *Hill v. Lockheed Martin Logistics Mgmt.*, a fifty-seven-year-old female employee alleged that she was terminated from her mechanic’s job at Lockheed Martin due to age and sex discrimination and in retaliation for her complaints about the alleged discrimination.<sup>17</sup> The mechanic was terminated after a series of written reprimands for violations of quality and safety standards.<sup>18</sup> Although she admitted that the reprimands were for valid violations, she contended that a safety inspector at her military jobsite reported two of these violations because he harbored discriminatory animus for her, evidenced by the inspector’s disparaging remarks about her age and gender.<sup>19</sup> Because the two reports the inspector made resulted in the mechanic’s second and third reprimands, she alleged her termination was because of the inspector’s discrimination.<sup>20</sup> The court declined to adopt the approach of the Seventh Circuit and affirmed summary judgment to Lockheed, declaring that even if the biased subordinate had played a significant role or had a substantial influence on the adverse employment action, it was not sufficient to hold the employer liable.<sup>21</sup> The Fourth Circuit’s “principally responsible” test has been widely criticized and not followed by any other circuit court of appeals.<sup>22</sup>

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

15. See *Lancaster*, 773 F.2d at 819-20; *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007); *BCI*, 450 F.3d at 487. For a detailed discussion of the standards developed in these cases, see Genova & Vernoia, *infra* note 28, at 20.

16. *Hill*, 354 F.3d at 281-82.

17. *Id.* at 282.

18. *Id.*

19. *Id.* at 283.

20. *Id.*

21. *Id.* at 290-91.

22. See, e.g., *BCI*, 450 F.3d at 487 (“The Fourth Circuit’s strict approach makes too much of the phrase ‘actual decisionmaker’ . . . [and] also undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate’s discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.”); *Poland*, 494 F.3d at 1182 (“No doubt an employer is liable for the discriminatory acts of a subordinate in cases where the biased subordinate is, as a practical matter, the actual decisionmaker. But liability should not be limited to those cases only.”); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (“We are mindful [of the Fourth Circuit’s opinion in *Hill*] . . . . That is not

Finally, the Tenth Circuit has adopted a “causal connection” standard that is positioned intermediately between the “any influence” and “principally responsible” standards previously discussed. In *BCI*, a Hispanic District Sales Manager reported an African-American merchandiser to human resources for insubordination because the merchandiser failed to report to work after telling his supervisor that he would not make it in.<sup>23</sup> The District Sales Manager had a history of making disparaging comments about African-American employees and treating them less fairly than other employees under similar circumstances.<sup>24</sup> When the District Sales Manager reported the merchandiser to a human resources manager, she reviewed his personnel record and made the decision to terminate him.<sup>25</sup> The human resources manager harbored no discriminatory views against the merchandiser—in fact, she didn’t even know he was African-American.<sup>26</sup> The merchandiser filed suit against *BCI* after he was terminated, alleging racial discrimination.<sup>27</sup>

Adopting a middle-ground approach,<sup>28</sup> the Tenth Circuit held in this case that a plaintiff must demonstrate a “causal connection” between his or her biased supervisor and the adverse employment action in order to prevail on the merits of a subordinate bias claim.<sup>29</sup> The court further held that an employer could be held liable for the subordinate’s discriminatory bias if the plaintiff established that the biased supervisor’s report to the actual decision maker was the real reason for termination, that the other reasons given were pretextual, and that the employer did not undertake a sufficiently independent investigation of the complaint.<sup>30</sup>

The inconsistency of these three general approaches to subordinate bias liability has led to more questions than answers for employers. Depending on the jurisdiction in which these disputes are litigated, employers currently have varying levels of responsibility to ensure liability-free employment actions. For instance, an employer under the Fourth Circuit’s standard could insulate itself from liability by having all adverse employment decisions performed by a committee, essentially creating a “revolving door” where the committee could terminate an

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the view of this court.”).

23. *BCI*, 450 F.3d at 480.

24. *See id.* at 482 (describing allegations of mistreatment lodged by Sales Manager at Hispanic employees).

25. *Id.* at 481-82.

26. *Id.* at 481.

27. *Id.* at 482.

28. Anjelo J. Genova & Francis J. Vernoia, Practical Considerations from Recent Development in Employment Law. 759 Prac. L. Inst./Litig. 9, 21 (2007).

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

30. *Id.* at 488.

employee for any discriminatory reason as long as the affected employee was questioned.<sup>31</sup> In stark contrast, an employer defending against a lawsuit in the Seventh Circuit is faced with a difficult situation: a single complaint or allegation by a biased supervisor could impute liability to the employer if an adverse employment action is taken in relation to the complaint, despite good faith policies and compliance with anti-discrimination laws.<sup>32</sup> Somewhere in the middle of these contrasting approaches, an employer under the Tenth Circuit's standard may know that some type of independent investigation policy is necessary to protect against subordinate bias liability, but just who should investigate and how the investigation should proceed is unclear.<sup>33</sup> These differing approaches not only leave employers uncertain about what type of procedural mechanisms to instate for adverse employment actions, but they also deprive affected employees of clear recourse for discriminatory actions and undermine the objectives of anti-discrimination legislation.

## II. THE CAT'S PAW THEORY OF EMPLOYER LIABILITY FURTHERS THE OBJECTIVES OF STATUTORY ANTI-DISCRIMINATION AND AGENCY PRINCIPLES

Although the threshold of employer responsibility for discriminating employees with no actual decision-making authority varies among the different approaches, all agree that liability can be imputed to the employer. This agreement to impose liability on an employer for a biased subordinate's act or influence is firmly grounded in federal anti-discrimination statutes and statutory principles of agency.<sup>34</sup>

Adopting agency principles in the employment context furthers many purposes. First, holding employers responsible for the actions of their

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31. Tim Davis, *Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247, 257-58 (2007).

32. *See* Dey v. Colt. Constr. & Dev. Co., 28 F.3d 1446, 1459 (7th Cir. 1994) (An employer may be liable if "an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action."). For a discussion of the many other circuits that have adopted lenient approaches, see *Cat's Paw Liability*, [http://www.uslaw.com/library/Law\\_Students/Circuit\\_Split\\_Cats\\_Paw\\_Liability.php?item=34000](http://www.uslaw.com/library/Law_Students/Circuit_Split_Cats_Paw_Liability.php?item=34000) (last visited March 25, 2009).

33. Genova & Vernioia, *supra* note 28, at 21.

34. Davis, *supra* note 31, at 249-51. *But see* Brief for Soc'y for Human Res. Mgmt. as Amicus Curiae Supporting Petitioner, BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 127 S. Ct. 852 (2007), 2007 WL 647974 (arguing that Title VII's definition of an "agent" in subordinate supervisor cases includes only the formal decision maker, not the subordinate supervisor because an "agent" is only a party that has the authority to act on behalf of the employer).

biased employees in some cases, and recognizing that the decision-makers who are given official authority to take employment actions are not always the individuals who solely make the decisions, encourages employers to be more responsible when crafting policies and when hiring and overseeing subordinate supervisors.<sup>35</sup> Additionally, it furthers the objectives of federal anti-discrimination statutes by ensuring that employees are afforded adequate remedies from employers that may attempt to shield themselves from liability by having all personnel decisions made through centralized committees or other removed decision-makers.<sup>36</sup>

The Supreme Court has recognized subordinate bias liability based on agency principles.<sup>37</sup> In *Meritor Savings Bank, FSB v. Vinson*,<sup>38</sup> the Court considered a case in which a female bank employee brought a sexual harassment suit against her supervisor and the bank.<sup>39</sup> Although the Court declined to find employers automatically liable for any wrongdoing by supervisors,<sup>40</sup> it did acknowledge that Congress intended for courts to look to agency principles when deciding whether to impute liability to employers for discriminatory or harassing supervisors.<sup>41</sup> The Court stated:

While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.<sup>42</sup>

The transfer of agency principles to employment discrimination was reinforced again in *Burlington Industries v. Ellerth*.<sup>43</sup> The Court examined agency principles when deciding whether an employer was vicariously liable for a supervisor who sexually harassed an employee and made threats against the employee's job security.<sup>44</sup> Citing Section 219 of the Restatement of Agency,<sup>45</sup> the Court acknowledged that "An employer may

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35. Mary-Kathryn Zachary, *Subordinate Bias Liability: Cat's Paw, Rubber Stamp, and Other Theories*, SUPERVISION, 67(10), Oct. 1, 2006, at 22.

36. *Id.* at 23.

37. See Ali Razzaghi, Comment and Case Note, *Hill v. Lockheed Martin Logistics Management, Inc.: "Substantially Influencing" the Fourth Circuit to Change Its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker*, 73 U. CIN. L. REV. 1709, 1713 (2005) (explaining that agency principles are used to determine whether a person or entity is an agent or employer).

38. 477 U.S. 57 (1986).

39. *Id.* at 60.

40. *Id.* at 72.

41. See *id.* ("[W]e do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area.")

42. *Id.* (internal citations omitted).

43. 524 U.S. 742 (1998).

44. *Id.* at 755.

45. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) ("A master is subject to

be liable for both negligent and intentional torts committed by an employee within the scope of his or her employment.”<sup>46</sup> Lower federal courts have applied this principle based on this Supreme Court precedent.<sup>47</sup>

The cat’s paw theory of employer liability supports the objectives<sup>48</sup> The federal anti-discrimination statutes that are most intertwined in subordinate bias cases are Title VII of the Civil Rights Act (Title VII),<sup>49</sup> the Americans with Disabilities Act of 1990 (ADA),<sup>50</sup> and the Age Discrimination in Employment Act of 1967 (ADEA).<sup>51</sup> These statutes were enacted to combat discrimination in the workplace, protect employees most susceptible to discriminatory practices, and compensate employment discrimination victims.<sup>52</sup>

The statutory language of these three statutes articulates these objectives very clearly. Title VII states that it is unlawful for any employer to deprive an individual of employment based on “such individual’s race, color, religion, sex, or national origin.”<sup>53</sup> Title VII’s goals are clear: “[T]o eradicate employment discrimination and provide redress for victims of such discrimination.”<sup>54</sup> Similarly, the ADA provides unambiguous language of intent: No employer may discriminate “[A]gainst a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . .”<sup>55</sup> Lastly, the ADEA also offers clear guidance on its objective: to make it illegal for an employer to terminate an employee “because of such individual’s age.”<sup>56</sup>

These statutes encourage employers to enact responsible policies that prevent and identify discrimination.<sup>57</sup> However, the circuit split on subordinate bias liability thus far has only left employers with uncertainty as to how best to protect themselves against imputed liability for discriminatory non-decision-makers. Employers can only enact responsible policies if they are certain of the guidelines that apply to them, and of the “depth of the investigation required to defeat potential subordinate bias in

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liability for the torts of his servants committed while acting in the scope of their employment.”).

46. *Ellerth*, 524 U.S. at 756.

47. *Razzaghi*, *supra* note 37, at 1715-16.

48. *Davis*, *supra* note 31, at 249.

49. 42 U.S.C. § 2000e-2 (2000).

50. 42 U.S.C. § 12101 *et. seq.* (2000).

51. 20 U.S.C. § 621 *et. seq.* (2000).

52. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975) (discussing the objective of federal anti-discrimination statutes).

53. 42 U.S.C. § 2000e-2(a)(2) (2000).

54. Scott B. Goldberg, Comment, *Discrimination By Managers and Supervisors: Recognized Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 580 (1994).

55. 42 U.S.C. § 12112(a) (2000).

56. 29 U.S.C. § 623(a)(1) (2000).

57. Goldberg, *supra* note 54, at 577.

‘cat’s paw’ claims.”<sup>58</sup>

### III. A “CAUSAL CONNECTION” STANDARD IS THE MOST BALANCED APPROACH TO THE SUBORDINATE BIAS IMPUTATION PROBLEM CONFRONTING EMPLOYERS

#### A. *Benefits Of a “Causal Connection” Standard*

A “causal connection” standard that closely tracks the standard announced in the Tenth Circuit’s *BCI* ruling is the most appropriate approach because it conforms to the established anti-discrimination statutory framework and corresponds with the Supreme Court’s prior employment discrimination decisions. Additionally, the “causal connection” standard serves the practical realities of the expanding modern workplace, where actual decision-makers are increasingly more likely to use combinations of their own business judgment and recommendations and evaluations from other subordinates to make employment decisions regarding employees whom they do not know well.

Because the cat’s paw theory of liability is a commonly invoked theory in this sub-category of disparate treatment cases,<sup>59</sup> a uniform standard should be aligned most closely with other disparate treatment standards. In order to make a case for disparate treatment under Title VII, the ADEA or the ADA, an employee has to demonstrate that the adverse employment action was “because of” the plaintiff’s membership in a protected class.<sup>60</sup> Legal scholars have long argued that the “because of” language requiring discriminatory intent should be accepted as a causal connection standard.<sup>61</sup> These scholars point not only to the “because of” language articulated in the statutes, but also to the Supreme Court’s interpretation of the language as applied to disparate treatment cases

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58. Genova, *supra* note 28.

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

60. Title VII’s protected categories are “race, color, religion sex, or national origin.” 42 U.S.C. § 2000-2(a)(1)(2000). The ADEA protects a class of employees over the age of 40. 29 U.S.C. §§ 621-624 (2000). The ADA covers employees with disabilities. 42 U.S.C. §§ 120101-12213 (2000).

61. See White & Krieger, *supra* note 59, at 503 (citing Paul A. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Motivation*, 1971 SUP. CT. REV. 95, 115-24); Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17 (1991); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Opportunity*, 47 STAN. L. REV. 1161, 1247 (1995); Michael Selmi, *Proving Intentional Discrimination The Reality of Supreme Court Rhetoric*, 86 GEO. L. J. 279, 288-291 (1997)).

brought under federal anti-discrimination statutes.<sup>62</sup>

The causal connection standard is also favorable because it allows an employer to break the causal relationship between the biased subordinate and the adverse employment action if an “independent investigation of the facts” is conducted.<sup>63</sup> This provision affords employers that adopt responsible policies and conduct thorough investigations much deserved protection. It also acknowledges the practical realities that large employers face as human resources departments become more centralized. A decision maker, such as a human resources representative, who works in a centralized department is unlikely to know an employee who may be at the center of an adverse employment action. These decision-makers necessarily rely on evaluations provided by supervisors and complaints filed by co-workers. Without this “independent investigation” provision, employers would be vulnerable to imputed liability because of organizational structures that often rely on subordinate recommendations and evaluations for crucial personnel decisions. The “causal connection” approach, however, allows for an employer to escape liability if the employer conducts a reasonable, good faith independent investigation.<sup>64</sup> In these circumstances, the standard would reward careful employers that implement procedural mechanisms to weed out discriminatory influence on employment actions, but would still protect employees’ rights by allowing causes of actions against irresponsible employers that do not take the necessary steps to break the causal chain in an investigation.

If the “causal connection” test were to be adopted uniformly, it would also fairly address at least two otherwise tricky situations. First, the causal connection standard would provide guidance when an allegation or complaint is made against an employee for discriminatory reasons, but

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62. See White & Krieger, *supra* note 59, at 503 (“[T]he ‘because of’ test corresponds to the statutory language used in Title VII, the ADEA, and the ADA [and] . . . the Supreme Court’s disparate treatment decisions, properly construed, would view the motive or intent inquiry . . . as a search for causation.”). The authors discuss a series of opinions supporting the view that some degree of causation is necessary in disparate treatment cases. *E.g.*, *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (“‘Discriminatory purpose’ . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (arguing that plaintiff must show that action was motivated by discriminatory conduct); *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (concluding that the claim turns on whether the real reason for employer’s actions was racial discrimination); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (discussing the balance of burdens once gender is shown to be a motivating factor).

63. *BCI*, 450 F.3d at 485 (10th Cir. 2006).

64. *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (discussing the impact of an independent investigation as compared to simply accepting the recommendations of supervisory employees).

upon the independent, nondiscriminatory investigation, legitimate misconduct is confirmed and the employer has valid grounds for an adverse employment action.<sup>65</sup> Under this scenario, the causal connection test would not impose liability on the employer because the adverse employment action would be the result of actual misconduct discovered through an investigation by a decision maker without discriminatory bias.

Second, the causal connection standard is broad enough in scope to extend to situations in which the biased subordinate is any other employee, not just a supervisor, who may impact an employment action.<sup>66</sup> Broadening the standard announced in *BCI* to address this situation makes sense from a statutory perspective, as it is in line with the goal of eliminating disparate treatment for discriminatory reasons.<sup>67</sup> It also makes sense from a practical perspective. There should not be a difference between non-supervising employees and supervisors if both groups are able to lodge complaints, make false allegations, or otherwise unfairly undermine another party's employment status because of a discriminatory motive.<sup>68</sup> If adopted uniformly, a "causal connection" standard would allow room for the inclusion of a broad range of workplace actors and further anti-discrimination objectives.<sup>69</sup>

#### *B. Areas for Improvement*

Several questions remain open regarding a "causal connection" standard for subordinate bias liability. First, it is unclear what level of influence a subordinate must actually have to be said to "cause" an adverse employment action.<sup>70</sup> In disparate treatment cases that turn on whether the

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65. This situation is similar to the factual scenario in *Kendrick v. Penske Transp. Services, Inc.*, 220 F.3d 1220 (10th Cir. 2000). In *Kendrick*, the court did not impute liability to the employer because the investigation unearthed a legitimate, nondiscriminatory reason to terminate the employee, and the employee declined the decision maker's request to give his version of events. *Id.* at 1231-32 (concluding that the court must consider the facts as they appeared to the decision-maker at the time of deciding to take adverse employment action).

66. Ernest F. Lidge, III, *The Male Employee Disciplined for Sexual Harassment as Sex Discrimination Plaintiff*, 30 U. MEM. L. REV. 717, 748 (2000) (detailing a scenario whereby the discriminatory animus of a supervisory employee would be attributed to the employer, even where another manager makes the decision to terminate).

67. See *supra* Part II (discussing liability imputed to the employer).

68. Lidge, *supra* note 66, at 749 (describing hypothetical situations whereby rank and file employees lodge complaints with a discriminatory animus).

69. The Tenth Circuit causation test does include imputed liability for employees on the same level of employment as the employee bringing suit. See *Young v. Dillon Companies, Inc.*, 468 F.3d 1243 (2006) (imputing liability to an employer for a worker who reported a co-worker on the same employment level to human resources with a discriminatory intent).

70. See *White & Krieger*, *supra* note 59, at 514 (describing the focus on causation in vertical decision making cases involving a subordinate and a higher level supervisor).

actual decision maker was motivated by discriminatory bias to take an adverse employment action, the employee alleging the discrimination must demonstrate that the decision maker is motivated to discriminate against the employee due to membership in a protected class.<sup>71</sup> However, it is not clear under the cat's paw theory that plaintiffs alleging employment discrimination must show the immediate supervisor or co-worker acted with conscious discriminatory animus. Are subordinates and actual decision makers held to different standards for purposes of employment discrimination claims? This remains unclear and should be resolved in favor of one standard for both groups to maintain a consistent approach to disparate treatment claims under a cat's paw theory.

Additionally, the question of whether liability can be imputed to an employer when a biased non-employee third party, such as an independent contractor or client, has undermined an employee's status with discriminatory intent remains open.<sup>72</sup> The causal connection standard (or any approach under the cat's paw theory for that matter), has yet to be applied in a case where an employee is alleging that a non-employee caused an adverse employment action due to discriminatory animus. Because the cat's paw doctrine is at least partly grounded in principles of agency and non-employees are not under the scope of federal anti-discrimination laws, it would be difficult to impute liability to an employer, even if a discriminatory non-employee had substantial influence over the adverse employment action.<sup>73</sup> However, this significantly narrows the protection afforded to employees by the cat's paw theory. In order for the causal connection standard to be consistent then, this tension needs to be resolved in favor of employee protection in circumstances where there is a causal connection between the biased individual's discriminatory animus for a protected employee and an adverse employment action against the employee.<sup>74</sup>

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71. *Id.* at 514-15 (discussing biases the court will consider in relation to negative employment decisions by supervisors).

72. *See Davis, supra* note 31, at 258. The author identified this issue in relation to the Seventh Circuit's broader "any influence" test because the circuit has only addressed a subordinate bias case in the context of a biased supervisor. However, it is an open issue under the "causal connection" standard as well.

73. *Id.* at 258 (describing agency principles for purposes of imputing liability to the employer).

74. *Id.* at 259-63. The author introduces a "substantial influence" standard and argues that under this approach, an employer may be held liable, consistent with agency principles, for an adverse employment action if a non-employee makes a discriminatory report that leads to action. *Id.* The argument is that any employee tasked with investigating complaints or accusations of wrongdoing by an employee is acting within the scope of employment, and therefore, such employees are obligated by their duty of "care, competence, and diligence" owed to the employer to investigate *all* allegations, regardless of source. *Id.*

#### IV. THE NEED FOR A DEFINITIVE APPROACH TO INDEPENDENT INVESTIGATION

All three approaches articulated by the current circuit split do have one commonality: the concept of independent investigation. Whatever uniform approach is eventually adopted for subordinate bias liability, this “independent investigation” standard will need to be significantly developed. Previous cases have suggested that it is an employer’s only way of breaking the causal connection between a subordinate’s discriminatory animus and the ultimate decision maker’s employment action.<sup>75</sup> As such, it is imperative that employers know how far they are obligated to probe for an investigation to be considered sufficiently “independent” for purposes of avoiding liability.

The current ambiguities surrounding what an independent investigation is create a burden for large and small employers alike, irrespective of their resources. For instance, a large employer with significant resources at its disposal may have a large, centralized human resources department that handles all employment matters and takes adverse actions.<sup>76</sup> In a large, centralized department, it is unlikely that the actual decision maker will know the employee involved in an adverse employment action. An employer with this type of personnel department needs some guidance as to what it needs to do to ensure that a biased subordinate supervisor’s influence on an employment action does not fall through the cracks of an investigation. In contrast, a smaller employer with fewer resources needs to know how much time and money must be put into an investigation. While it may be less difficult to investigate a biased supervisor or alleged employee misconduct or violations in a smaller operation, resources may be more scarce, making outside counsel and/or internal manpower to complete a thorough investigation cost-prohibitive.

Several circuits have discussed the concept of independent investigation,<sup>77</sup> but the approaches of these circuits have not formulated a clear definition. The varying statements describing what an independent investigation may look like only add to the confusion and uncertainty that surrounds subordinate bias liability as a whole. Currently, it is unclear to employers how to best prepare and protect themselves through independent investigations from liability stemming from the actions of biased non-

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75. See, e.g., *Shager*, 913 F.2d at 406 (concluding that an independent decision by the employer’s career committee would have prevented a finding of a willful or innocent violation of the Act).

76. *Id.* at 405 (describing the role of the centralized career committee as the ultimate decision maker).

77. See *supra* Parts I, III (discussing outcomes in various circuits).

decision makers.<sup>78</sup> A coherent framework needs to be constructed that defines the parameters of what type of investigation is sufficiently “independent” to absolve an employer of liability for a discriminatory subordinate.

The courts that have adopted “any influence” and “causal connection” standards to impute subordinate bias to an employer have articulated some elements of the independent investigation requirement that should be included in a uniform formulation. First, the Seventh Circuit announced some hallmarks of independence in *Shager*.<sup>79</sup> The *Shager* Court stated that a thorough, independent investigation must amount to more than a mere “rubber stamp” on the biased subordinate supervisor’s recommendation or complaint;<sup>80</sup> that is, the actual decision maker cannot accept the recommendations or allegations of a subordinate non-decision maker at face value.

The Seventh Circuit, in *Brewer v. Board of Trustees of University of Illinois*,<sup>81</sup> also noted that a decision maker cannot limit the investigation to only information received from an employee who may be biased, and must have some other procedural safeguards<sup>82</sup> or unbiased documentation to support the independence of an investigation.<sup>83</sup> An independent investigation is marked by “some affirmative act by the decision maker to come to his own decision.”<sup>84</sup> In *Brewer*, an African-American student who worked at a university was fired from his parking services job because his supervisor failed to tell his boss that the student was given permission to park in a reserved parking space.<sup>85</sup> The student alleged that his supervisor kept silent because of her racially discriminatory views towards him, which led to his termination.<sup>86</sup> The court upheld summary judgment for the employer because the facts demonstrated that the decision maker conducted her own investigation to determine whether the student’s parking permit had been altered and if he had been parking illegally.<sup>87</sup> “[W]here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the

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78. Genova & Vernioia, *supra* note 28, at 25.

79. See 913 F.2d at 406 (describing failures of the employers decision committee).

80. *Id.*

81. 479 F.3d 908 (7th Cir. 2007).

82. See also *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999) (holding that a three-day hearing to investigate an allegation of employee misconduct was an independent investigation absolving the employer of liability for a biased subordinate).

83. See *id.*

84. Genova & Vernioia, *supra* note 28, at 25.

85. 479 F.3d at 909-10.

86. *Id.* at 909.

87. *Id.* at 919-21 (upholding summary judgment on claim since decision maker did not simply rely upon information supplied to her).

decision, the employer is not liable for an employee's submission of misinformation to the decision maker."<sup>88</sup>

Other courts have offered suggestions regarding how much independent information has to be involved in an adverse employment action to break the causal link. An investigation should not only rely on other sources besides a biased subordinate, but decision makers should also speak with the affected employees directly, try to ascertain their points of view, and assess the situation from as many perspectives as possible. In *BCI*, the Tenth Circuit began to define independent investigation by stating that a review of a personnel file by the decision maker is not enough, as articulated by the other cases discussed above.<sup>89</sup> Instead, the court went on to suggest that an independent investigation can amount to "hear[ing] both sides of the story before taking an adverse employment action against a member of a protected class,"<sup>90</sup> and can be as cursory as "'in the course of [the] investigation' the decision maker asked the employee 'to give his version of the exchange.'"<sup>91</sup> The Ninth Circuit cited the *BCI* standard in *Poland v. Chertoff*,<sup>92</sup> noting that for an independent investigation to be legally permissible and assist the employer in escaping liability, the biased subordinate cannot have influenced, affected, or been involved in the investigation in any way.<sup>93</sup>

Similar to the principle of conducting a fair investigation by gathering as much independent evidence from the involved parties that was articulated in *BCI*, the Fifth Circuit held in *Long v. Eastfield College*,<sup>94</sup> that an employer is liable for subordinate bias if the final decision maker bases his or her adverse employment action on the recommendation of the discriminatory supervisor, instead of conducting an investigation independently that considers all parties' perspectives and finds additional evidence to confirm or refute the biased supervisor's claims.<sup>95</sup> In this case, two female employees sued a university for their terminations, alleging gender and national origin discrimination and retaliation.<sup>96</sup> The president of the university made the decision to fire both employees, although he was not the party the employees claimed harbored discriminatory animus.<sup>97</sup> The court reversed the summary judgment grant on the unlawful retaliation

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88. *Id.* at 918.

89. *BCI*, 450 F.3d at 492-93 (holding that examining personnel file without any additional action does not suffice as an independent investigation by the decision maker).

90. *Id.* at 488.

91. *Id.* at 485.

92. 494 F.3d 1174 (9th Cir. 2007).

93. *Id.* at 1183.

94. 88 F.3d 300 (5th Cir. 1996).

95. *Id.* at 307.

96. *Id.* at 303-04.

97. *Id.* at 308.

claim, and discussed how different factual findings would determine the independence of the investigation taken.<sup>98</sup> The president's letters stating that his decision was based on the recommendation of the employees' supervisors went in favor of "rubber stamping" the biased subordinates' decisions, while the written statements requested from all parties to consider the different perspectives favored the finding of an independent investigation.<sup>99</sup>

Speaking with the affected employee directly or examining statements made by the employee about the situation and in the process uncovering additional, independent evidence of a valid violation seems to be a strong indication that an investigation has considered the situation independent of any discriminatory bias.<sup>100</sup> In *Smith v. Chrysler Corp.*, an employee with narcolepsy alleged a discriminatory termination but did not prevail because the employee's supervisor reasonably relied on documentation from the employee's physicians and statements made by the employee himself that indicated he lied on his employment application.<sup>101</sup> Even if a supervisor's judgments are initially based on discriminatory views, the Sixth Circuit in this case suggested that independent evidence validating the claims is enough for the employer to escape liability.<sup>102</sup>

A few cohesive characteristics stand out from these piecemeal descriptions of an investigation standard that may guide a future uniform standard and help employers develop investigation policies and avoid litigation: (1) an investigation must be based on more than recommendations or allegations by subordinate supervisors; (2) an investigation must consist of more than reviewing a personnel file because of the risk that the contents may be tainted by subordinate supervisors; (3) an investigation must include asking affected parties for their versions of the story and documenting these statements; (4) an investigation must be conducted independent of a subordinate supervisor's involvement; and (5) procedural safeguards must be in place to protect against an investigator becoming tainted, such as an investigation that obtains the perspectives of multiple parties and uncovers actual evidence of the affected employee's wrongdoing.<sup>103</sup>

There are some issues to consider under an investigation standard that bears the characteristics described above. First, who should conduct the investigation: someone involved in the organization, or an outsider? If an

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98. *Id.*

99. *Id.* at 307, n.8.

100. See *Smith v. Chrysler Corp.*, 155 F.3d 799 (6th Cir. 1998); *Ware v. Unified Sch. Dist. No.492*, 902 F.2d 815 (10th Cir. 1990).

101. *Smith*, 155 F.3d at 807-09.

102. *Id.* at 808-09.

103. See discussion *supra* Part II.

investigation is conducted by an “insider,” such as a human resources representative or in-house legal counsel there are many considerations if that party is also the individual who fielded the initial evaluations, complaints, or other communications that triggered the adverse employment action. For instance, one criticism of the *BCI* standard of independent investigation is that it does not take into account that the “factual misinformation”<sup>104</sup> provided by a biased subordinate may taint the actual decision maker, even if this person was originally unbiased and approached the situation with independent judgment.<sup>105</sup> This tendency is referred to as “expectancy confirmation bias.”<sup>106</sup> This bias is often formulated when a recommendation has been made by another individual to the decision maker that functions as what the decision maker expects to find, even if conducting his or her own investigation.<sup>107</sup> The vague investigatory standards that have been formulated by the circuits thus far have not accounted for these cognitive issues.

This “cognitive phenomenon”<sup>108</sup> also highlights other potential issues that arise when a company decision maker is making a personnel decision. A decision maker may consciously search for wrongdoing on the part of the affected employee by giving deference to the biased party’s superior position in the organization or the party’s relationship to the organization,<sup>109</sup> investigating the claim in a way that focuses on uncovering other instances of employee conduct that confirm the original complaint,<sup>110</sup> and processing the information uncovered in a way that looks favorably on confirming evidence and unfavorably on contradicting evidence of the employee’s conduct.<sup>111</sup>

A uniform investigation standard should account for these cognitive issues. These biases that may permeate a decision maker’s investigation may be counteracted by also establishing mandatory procedures to check into the background, motives, behavior, and other circumstances surrounding the individual recommending the adverse employment action.<sup>112</sup> Furthermore, investigations that involve interviewing neutral

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104. Comment, *Employment Law—Title VII—Tenth Circuit Clarifies Causation Standard for Subordinate Bias Claims*, 120 HARV. L. REV. 1699, 1703 (2007).

105. *Id.*

106. White & Krieger, *supra* note 59 at 524.

107. *Id.*

108. *Employment Law—Title VII—Tenth Circuit Clarifies Causation Standard for Subordinate Bias Claims supra* note 104, at 1700. The Comment suggests that psychological research supports a theory that decision makers will subconsciously recreate the findings of biased supervisors, ending in a decision that mirrors the discriminatory animus and undercuts any marks of independence.

109. *Id.*

110. *Id.* at 1704.

111. *Id.* at 1704-05.

112. *Id.* at 1705-06.

employees not otherwise involved in the employment matter and looking into how similar employment matters have been handled by the employer previously would further preserve the independence of the investigation.

The lack of objectivity risked by using an in-house party to undertake an investigation and make a decision is counterbalanced by the risks of using an outsider. An independent consultant or external legal counsel may have more expertise in investigations, be more experienced in conducting interviewing employees and examining evidence, and be more likely to approach the investigation from an impartial perspective.<sup>113</sup> However, outsiders may also be less familiar with the organizational structure of an employer, the parties involved in the employment matter, how similar situations had been handled previously, and the employer's workplace culture.<sup>114</sup> Additionally, the cost of hiring external parties to conduct investigations could be prohibitively expensive.<sup>115</sup>

Therefore, who conducts a sufficiently "independent" investigation will depend on factors that include the severity of the allegation, the credibility issues of the employer and involved employees, cost, and ability to utilize objective parties in an investigation.<sup>116</sup>

Additionally, the flexibility of a standard that adopts the described characteristics is a consideration. A uniform investigation standard should be flexible enough to provide employers with discretion to make their own business decisions. Actual decision makers, such as human resources personnel, are specially trained and experienced in making tough employment decisions. An independent investigation standard should not be so stringent that it interferes with decision makers from tailoring investigations to particular circumstances, based on their experience and judgment. Courts have long recognized that employers should have the authority to make their own decisions without excessive restrictions or judicial second-guessing.<sup>117</sup> Therefore, in formulating a coherent independent investigation standard, the courts should be concerned with

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113. John Montoya, *Who Should Investigate Sexual Harassment Complaints?*, 43 HRMAGAZINE, Jan. 1998, at 113.

114. *Id.*

115. *Id.* The author also warns of the risk that employing counsel to both investigate an employment matter and provide legal advice may risk the waiver of attorney-client privilege. *See, e.g., Stoner v. New York Ballet Co.*, 90 Fair Emp. Prac. Cas. (BNA) No. 597 (S.D.N.Y. Oct. 24, 2002) (permitting the plaintiff to depose the employer's legal counsel in an employment discrimination matter because the attorney also conducted the investigation surrounding the employment action).

116. *Id.*

117. *See, e.g., Stallings v. Hussman Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006) (noting that a court's responsibility in ruling on disparate treatment matters is only to interfere if there is evidence of intentional discrimination, not to "sit as super-personnel departments reviewing the wisdom and fairness of the business judgments made by employers") (internal quotations omitted).

balancing the prevention and remedying of employment discrimination with the employer's interest in autonomous and discretionary decision-making.

#### CONCLUSION

The “cat’s paw theory” of subordinate bias liability has resulted in three inconsistent approaches to this subset of disparate treatment employment discrimination and created uncertainty for employers seeking to adhere to anti-discrimination legislation and protect themselves from liability. The overarching goals of the federal anti-discrimination statutory frameworks—to encourage responsible employer policies<sup>118</sup> and hold employers accountable for their actions<sup>119</sup>—can only be achieved if employers have an incentive for putting such policies in place. Without a uniform standard that articulates employer responsibilities, some employers are vulnerable to liability exposure for virtually any biased subordinate’s actions that relate to adverse employment decisions, while other less responsible employers have unfettered protection from liability as long as they filter their adverse employment actions through centralized committees or human resources departments. This uncertainty creates unreasonable and costly burdens for employees while simultaneously undermining employee protections and rights.

When the Supreme Court granted the parties’ request to dismiss certiorari in *BCI* and later declined to hear two similar cases, it punted the question of what approach is appropriate back to the circuits. Because this issue is vital to both employers and employees, the Supreme Court should accept a cat’s paw case and adopt a uniform approach that resolves the current Circuit split. The “causal connection” standard adopted by the Tenth Circuit in *BCI* is the closest to a favorable approach because it furthers anti-discrimination objectives and strikes a balance between employer and employee interests. The standard is stringent enough to protect employers because it does not allow for a “a lenient ‘may have affected’ standard that punishes employers for any ‘input’—no matter how minor—to weaken the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation.”<sup>120</sup> Such a standard will also allow courts to enforce anti-discrimination laws without sitting as super-personnel departments, second-guessing the personnel decisions of an employer,<sup>121</sup> by still holding employers accountable for “rubber-stamping” subordinate

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118. *Subordinate Bias Liability*, *supra* note 35, at 22.

119. *BCI*, 450 F.3d at 486.

120. *Id.* at 487.

121. *Stallings*, 447 F.3d at 1052.

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decisions or for conducting investigations that are not sufficiently independent from a biased subordinate's recommendations or allegations.

Whatever uniform approach to subordinate bias liability is eventually formulated, the parameters of what constitutes an independent investigation must be defined. Several circuits have discussed independent investigations; while none form a complete definition on their own, taken together, a clear and consistent standard can be formulated. It is imperative that the Supreme Court hears a subordinate bias liability case to answer these unresolved questions.

If the Supreme Court ultimately articulates a uniform test, it should balance an employer's interest in making autonomous and reasonable personnel decisions without fear that every termination will be grounds for a suit, with an employee's interest in protection against an employer who allows biased supervisors to affect a personnel decision without repercussions. The judicial system should enforce and encourage responsible employer practices that underscore the objectives of federal anti-discrimination statutes. It should also be wary of substituting its own judgment for that of the employers', so that judicial overreaching and second-guessing do not undermine the deterrent effect of legislative enactments and otherwise undermine antidiscrimination goals.