
Comment

How Much Power Should Be In the Paw? Independent Investigations and the Cat's Paw Doctrine

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Every truth has two sides; it is as well to look at both, before we
commit ourselves to either.

—Aesop

I. INTRODUCTION

Lonnell Brewer, a graduate student at the University of Illinois Urbana-Champaign, found himself fired from his job because of a parking pass.¹ Brewer, who is black, parked his car in a certain lot at the direction of his immediate supervisor, who allegedly harbored a discriminatory bias toward him.² When news of Brewer's improper parking reached his supervisor, Brewer was terminated without any objective inquiry as to why he parked in the wrong lot.³

Although it may seem like an episode fit for a primetime sitcom,⁴ Brewer's plight more accurately reflects a growing issue in employment law regarding the efficacy of independent investigations.⁵ In a work

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1. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 913 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007).

2. *Id.* at 909–10.

3. *Id.* at 913.

4. Judge Cudahy actually introduced this case as concerning “the corrupt, Machiavellian world of permit parking at the University of Illinois’s Urbana-Champaign campus, and the ill fortune of a student who became involved in it.” *Id.* at 909.

5. See generally Tristin K. Green, *Insular Individualism: Employment Discrimination Law After Ledbetter v. Goodyear*, 43 HARV. C.R.-C.L. L. REV. 353, 370–71 (2008) (discussing a pro-employer trend in the Supreme Court and the likelihood that the Court will adopt a relaxed standard of what constitutes a causation-breaking activity); Recent Cases, *Employment Law—Title VII—EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006),

culture that increasingly relies on information from lower-level employees who lack authority to make personnel decisions, anti-discrimination laws must make necessary adjustments as well, including requiring employers to provide for adequate independent investigations.⁶

For example, the growing demand to increase the speed of decisionmaking has prompted some employers to “flatten” their workplace hierarchies.⁷ This flattening process vests more power in subordinate employees, allowing employers to make decisions without in-person communication.⁸ It is increasingly common for employment decisions to be made by individuals or groups who do not personally know the employees they are reviewing. Often, such decisionmakers must rely on input from lower-level supervisors to make decisions.⁹ This situation presents a problem in the context of employment discrimination, where an employer is traditionally liable for the discriminatory acts of a supervisory employee only if that employee has *authority* to execute a tangible employment action, such as hiring, firing, changing work assignments, or altering compensation.¹⁰

cert. granted, *127 S. Ct. 852 (2007)*, 120 HARV. L. REV. 1699, 1706 (2007) (addressing problems with merely asking an employee for his side of the story, as articulated by some courts).

6. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 2, 11–12 (2006); see also PETER CAPPELLI ET AL., CHANGE AT WORK 15, 24–26 (1997) (noting the changes in the modern workplace); Esther E. Klein, *Using Information Technology to Eliminate Layers of Bureaucracy*, 46 NAT'L PUB. ACCT. 46, 46 (2001) (explaining that the demand of faster decisionmaking is influencing the organizational structures in the workplace).

7. Klein, *supra* note 6, at 46–47.

8. *Id.* Most large employers now use multi-tiered employment structures comprised of varying levels of supervisors and decisionmakers, each with different degrees of delegated authority. Petition for Writ of Certiorari at 26–27, *Brewer v. Bd. of Trs. of the Univ. of Ill.*, No. 06-1694 (June 19, 2007), *cert. denied*, 128 S. Ct. 357 (Oct. 1, 2007) [hereinafter *Brewer Petition*].

9. *Brewer Petition*, *supra* note 8, at 2–3; see also Phillip J. Fowler, *Employment Cases and the 'Cat's Paw' Theory*, CBA REC., Jan. 2008, at 44, 44 (stating that human resources personnel, general counsel, and CEOs often make employment decisions based on recommendations from subordinates); Posting of Helen Norton to ACSBlog, <http://www.acsblog.org/economic-regulation-employment-supreme-court-preview-rubber-stamp-firings-and-antidiscrimination-law.html> (Apr. 11, 2007, 12:30 EST) (noting that a decision about the liability of subordinate employees would have great consequences “in a world where employers increasingly empower upper-level personnel to make key decisions based on a subordinate’s reports and recommendations”). Examples of tangible adverse employment decisions include “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

10. *Faragher v. City of Boca Raton*, 524 U.S. 775, 790–91 (1998) (“A supervisory employee who fires a subordinate is doing the kind of thing that he is *authorized* to do”) (emphasis added) (quoting *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990)).

Thankfully, there are signs that employment discrimination laws have adjusted to the changing dynamics of the workplace.¹¹ Nearly all circuits recognize subordinate bias liability—sometimes referred to as the “cat’s paw doctrine”—where an employer may be liable for the discriminatory animus of a non-decisionmaking employee.¹² Yet simply providing a mechanism to theoretically hold an employer accountable does not easily bring employment discrimination laws up to speed with the realities of the American workplace.¹³ Inevitably, employers must decide to what extent these decisions are reviewed before becoming final.¹⁴

Not only are thorough investigations sensible from a management-human resources perspective,¹⁵ but they also provide employers with an effective mechanism for avoiding costly discrimination lawsuits.¹⁶ First, the savvy employer with an efficient grievance and investigation procedure will discover potential claims before they become a problem, lowering the risk that the claim will proceed to litigation.¹⁷ Second, if an employer finds itself involved in a lawsuit—particularly one dealing with subordinate bias—the good faith investigation may help the employer avoid liability in some circuits.¹⁸

11. Namely, the growth of the relatively new cat’s paw doctrine, promulgated as recently as 1990 in *Shager v. Upjohn*. *Shager*, 913 F.2d 398. See also Part III.B (discussing EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 484 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007), a cat’s paw case nearly heard by the Supreme Court during its 2006-2007 Term).

12. Angelo J. Genova & Francis J. Vernioia, *Litigating Employment Discrimination Claims 2007*, in LITIGATION, at 9, 20–21 (PLI Litig. & Admin. Practice, Course Handbook Series No. 10836, 2007).

13. See Green, *supra* note 5, at 371–72 (discussing the possibility that even a seemingly employee-friendly Supreme Court ruling may lack the necessary teeth to be effective).

14. See Human Resource-Civil Rights Risk Assessment, *Internal Investigations 1* (May 1, 2007), <http://www.hrcrra.com/whitepapers> (follow “White Paper 6: Employee Investigations” hyperlink) [hereinafter HRCRR, *Internal Investigations*] (advocating that employers should “integrate” their investigations into their general process of monitoring their workforce).

15. See George J. Terwilliger, *Internal Investigations*, 30 NAT’L L.J., Nov. 26, 2007, at 12, 12 (discussing internal investigations as a strategic tool for corporations); HRCRR, *Internal Investigations*, *supra* note 14, at 1 (advocating effective management through the use of prompt and efficient investigations).

16. See HRCRR, *Internal Investigations*, *supra* note 14, at 2, 18 (a proper investigation could be a significant tool in subsequent litigation). For example, a thorough, independent investigation could be used as leverage in any settlement negotiations or during summary judgment.

17. *Id.* at 2. If conducted early enough, investigations can help an employer “rectify the wrongdoing or to assure those in leadership positions that the charges are without merit.” *Id.*

18. See generally *infra* Part III.B (discussing the Tenth Circuit’s causation approach in EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 484 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007)); Part IV.C (analyzing the merits of the causation standard); Part V.A (arguing that the Supreme Court should adopt the causation approach when it

Before fully examining why independent investigations will become an increasingly important factor in employment law, it is necessary to understand when a subordinate employee has sufficient authority that his or her employer can be liable for the subordinate's discriminatory actions.¹⁹ Currently, the circuits vary widely on this question.²⁰ Several, including the Tenth Circuit, have allowed suits against employers to proceed when non-decisionmaking employees' discriminatory behavior *caused* an adverse action.²¹ Others, including the Fourth²² and Seventh Circuits,²³ hold that employers can never be liable for discrimination by non-decisionmaking employees. In its 2006-2007 term, the Supreme Court came very close to resolving this issue in *EEOC v. BCI Coca-Cola Bottling Co.*, but BCI withdrew the case days before oral argument.²⁴ Now, the question of subordinate liability remains and is increasingly relevant to the American workplace.²⁵

This Comment argues that the United States Supreme Court should consider a cat's paw case in the near future to resolve the split among the circuits concerning the degree of influence a subordinate must have over the decisionmaking process to trigger employer liability.²⁶ In so doing, the Court should adopt the Tenth Circuit's causation-based approach, holding an employer liable when a subordinate's animus actually caused an adverse employment action.²⁷ Additionally, the Court can encourage the use of independent investigations by allowing employers to escape liability where they demonstrate reasonable efforts

rules on a cat's paw case).

19. See, e.g., HRCRR, *Internal Investigations*, *supra* note 14, at 18-19 (acknowledging the cat's paw doctrine in the context of conducting independent investigations) (quoting *BCI*, 450 F.3d at 484-85); see generally *BCI*, 450 F.3d at 484-87 (discussing the cat's paw doctrine, decisionmakers under Title VII, and the role of independent investigations).

20. *Genova & Vernioia*, *supra* note 12, at 20.

21. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006).

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

23. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007).

24. *BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852 (2007). The *BCI* case had been referred to as "the most anticipated case of the term." Michael Selmi, *The Supreme Court's 2006-2007 Term Employment Law Cases: A Quiet but Revealing Term*, 11 EMP. RTS. & EMP. POL'Y J. 219, 219 (2007).

25. Selmi, *supra* note 24, at 219.

26. See *infra* Part V.A (highlighting the importance of a resolution by the Supreme Court on this issue).

27. See *infra* Part V.A (arguing that the causation standard provides the most reasonable approach to addressing subordinate bias liability).

to investigate claims of a subordinate's discriminatory bias.²⁸ This approach serves the deterrent purposes of Title VII while providing a clear opportunity for employers to avoid liability.²⁹

Part II of this Comment will begin by addressing the development of the cat's paw doctrine,³⁰ its relationship to the broader employment discrimination statute, Title VII of the Civil Rights Act,³¹ and how it may be used to impute the liability of a non-decisionmaking employee³² to the employer.³³ Next, Part III will discuss the three general approaches to analyzing subordinate bias liability through case illustrations: 1) the input standard, 2) the causation standard, and 3) the actual decisionmaker standard.³⁴ Part IV will then analyze the practical and philosophical merits and disadvantages of each standard.³⁵ Finally, Part V of this Comment suggests that the Supreme Court should examine a subordinate bias liability case in the near future and adopt the causation model as the appropriate standard, emphasizing the need for employers to conduct truly independent investigations when contemplating tangible employment decisions.³⁶

28. See *infra* Part V.B (discussing why the Supreme Court should adopt the causation model and the importance of independent investigations).

29. Brief for Respondent at 32, *BCI*, 127 S. Ct. 852 (No. 06-341) [hereinafter Brief of EEOC] (discussing the necessity of establishing causation based on the statutory language of Title VII).

30. See *infra*, Part II.A (describing the development of the cat's paw doctrine by Judge Posner in *Shager v. Upjohn*).

31. See *infra*, Part II.B (exploring the relevant statutory provisions of Title VII and significant Supreme Court cases that bear on the subordinate bias liability debate).

32. In this article, "subordinate" will generally refer to an employee who, though often standing in a position of authority, lacks the power to make tangible employment decisions, such as hiring, firing, or compensation decisions.

33. See *infra* Part II.C (providing an explanation of how the cat's paw doctrine may be used in employment discrimination cases, whether proceeding under the direct or indirect frameworks).

34. See *infra* Parts III.A, B, and C (describing the facts and analysis of *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007), *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), and *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007), as models of the input, causation, and actual-decisionmaker standards respectively).

35. See *infra* Parts IV.A, B, and C (weighing the arguments in favor and in opposition to each model).

36. See *infra* Parts V.A and B (advocating that there is a great need for the Supreme Court to address this issue in the near future, and that the causation standard provides an appropriate middle-ground to satisfy the needs of employers and employees, provided meaningful independent investigations are demanded).

II. BACKGROUND

The cat's paw doctrine³⁷ serves as a guidepost for courts, aiding them in determining when an employer should be liable for an adverse employment decision that may have been "tainted by a biased subordinate employee."³⁸ This Part will address the origins of the cat's paw doctrine,³⁹ its relationship to the broader employment discrimination statutes in Title VII,⁴⁰ and how it is used in litigation.⁴¹

A. *The Origins of the Cat's Paw Doctrine*

The term "cat's paw," while a relatively new legal doctrine, comes from a fable made famous by Jean de La Fontaine.⁴² In the story, a monkey induces a cat to scoop chestnuts from a fire, and as the cat continuously reaches into the fire and burns his paw, the monkey eats the chestnuts and leaves none for the cat.⁴³ In the context of employment law, "'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action."⁴⁴ A cat's paw relationship can develop in a variety of circumstances, such as when a biased subordinate conceals relevant information from a decisionmaker, thereby manipulating an employment decision, or when the subordinate's discriminatory animus skews recommendations to higher authorities.⁴⁵

37. Courts frequently use the phrases "subordinate bias" liability or "rubber stamp" liability to describe the cat's paw doctrine as well. *BCI*, 450 F.3d at 484. However, rubber stamp more accurately refers to a situation where "a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate." *Id.*

38. *Genova & Vernoia*, *supra* note 12, at 13.

39. *See infra* Part II.A (explaining the cat's paw fable and its development into a legal doctrine).

40. *See infra* Part II.B (discussing how the cat's paw doctrine fits into the terms of Title VII and past employment discrimination cases).

41. *See infra* Part II.C (noting that the cat's paw doctrine may be used to proceed under the direct or indirect framework of proving discrimination).

42. *BCI*, 450 F.3d at 484; *see also Genova & Vernoia*, *supra* note 12, at 19 (noting that the moral of La Fontaine's fable is the "impetus for the legal doctrine known as the 'cat's paw'").

43. *BCI*, 450 F.3d at 484.

44. *Id.* (citing *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998)). The court also described the term "cat's paw" generally as, "one used by another to accomplish his purposes." *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 354 (2002)).

45. *Lust v. Sealy*, 383 F.3d 580, 584 (7th Cir. 2004); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 512-13 (2001); *see also Russell v. McKinney Hosp. Venture*, 235

The Seventh Circuit first developed the cat's paw doctrine in *Shager v. Upjohn*, holding that a genuine issue of material fact existed as to whether a committee's firing decision was "tainted" by a supervisor's age-based prejudice.⁴⁶ Shager, the plaintiff, worked as a seed sales representative.⁴⁷ His supervisor recommended to the committee that Shager be fired even though he exceeded sales goals.⁴⁸ Evidence suggested that the supervisor exaggerated Shager's deficiencies and "portray[ed] Shager's performance to the committee in the worst possible light."⁴⁹ In an opinion written by Judge Posner, the court found that if the committee merely "acted as the conduit of [the supervisor's] prejudice—his cat's paw—the innocence of [the committee's] members would not spare the company from liability."⁵⁰

Since *Shager*, most circuits have adopted some form of the cat's paw doctrine, but they disagree about how much influence a biased subordinate must have over an employment decision before an employer is liable.⁵¹ Some circuits utilize a more lenient standard, requiring only that a plaintiff demonstrate that a biased employee may have had "influence" or "leverage" over a decision.⁵² Others adopt a

F.3d 219, 227–28 (5th Cir. 2000) (noting that although the supervisor did not have the power to make promotion decisions, he possessed the power to recommend candidates for promotion).

46. *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990); *see also* *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004) (noting that the Seventh Circuit developed the cat's paw doctrine).

47. *Shager*, 913 F.2d at 399.

48. *Id.* at 400.

49. *Id.* at 400, 405. Shager, fifty years old, brought a case of age discrimination under the ADEA against his former employer, for wrongful termination. *Id.* at 399. Shager outsold a newer, younger representative despite the fact that the regional supervisor assigned Shager poor quality farmland and the younger employee covered the richest seed market. *Id.* at 399–400. Still, Shager's supervisor recommended to the Career Path Committee that Shager be fired, while he excused the young employee's poor performance. *Id.* at 400. The Seventh Circuit found that the supervisor's influence "may well have been decisive" in Shager's firing. *Id.* at 405.

50. *Id.* at 405; *see* *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 484 (10th Cir. 2006), (noting that Judge Posner "inaugurat[ed]" the descriptor "cat's paw" for this category of claim), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007).

51. *Genova & Vernoia*, *supra* note 12, at 20; Marcia Coyle, *High Court Scrutinizes Key Job Bias Liability Case*, NAT'L L.J., Apr. 9, 2007, at 1, 25.

52. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 228–29 (5th Cir. 2000) (holding that a jury could find that an employee with age-based animus contributed significantly to the plaintiff's termination and was therefore principally responsible); *see also* Douglas B. Lipsky, *The Expansion of the Subordinate Bias Liability Theory Under Title VII—The 'Cat's Paw' Grows Nails*, GIBBONS EMP. & LAB. L. ALERT (March 8, 2007), http://www.gibbonslaw.com/news_publications/articles.php?action=display_publication&publication_id=21116&practice_id=33 (finding that under the lenient standard, a plaintiff can avoid summary judgment by showing that a biased subordinate provided information "that *may have affected* the adverse employment decision").

more strict approach, requiring that the subordinate be the “actual decision maker” or one principally responsible for a decision in order for an employer to be liable.⁵³ Still other circuits have found that a middle-ground, causation-based standard is most appropriate, only finding liability where traditional tort standards of causation are satisfied.⁵⁴

Despite these differences, the common thread among all circuits is that regardless of the degree of discriminatory action, if an employer takes independent steps—or, in other words, conducts an independent investigation—before reaching its decision, the employer will not be held liable for a biased subordinate’s acts.⁵⁵ The circuits are also in general agreement in cases of obvious subordinate control.⁵⁶ Where the degree of control by a subordinate is so great that the subordinate is in essence the actual decisionmaker, even circuits adopting the strict interpretation of the cat’s paw doctrine will hold an employer liable.⁵⁷ Furthermore, in cases where the employer’s acts are tantamount to a “rubber stamp” of a subordinate’s recommendation, courts consistently find employers liable as well.⁵⁸

B. *The Cat’s Paw Doctrine’s Relationship to Title VII*

Because the cat’s paw doctrine serves as a mechanism to establish employer liability for discriminatory acts, it derives its authority from Title VII of the Civil Rights Act of 1964.⁵⁹ Title VII outlaws

53. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004) (holding that an employer will be liable for the acts of the “actual decisionmaker”).

54. See *BCI*, 450 F.3d at 487 (finding that more than “mere ‘influence’ or ‘input’” is needed for employer liability and that the true issue is whether a subordinate’s actions caused the employment action); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584–85 (7th Cir. 2004) (liability is imputed to an employer where a discriminatory employee caused the ultimate injury).

55. See, e.g., *BCI*, 450 F.3d at 486 (noting that “an employer can escape liability entirely by performing an independent investigation”); *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 921 (7th Cir. 2007) (finding that it would be contrary to Title VII to hold the University liable because the University investigated the issue), *cert. denied*, 128 S. Ct. 357 (2007); see also *infra* Part V.B (discussing in detail independent investigations and their importance).

56. *White & Krieger*, *supra* note 45, at 512–13.

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

58. *Id.* at 290–91; see also *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226–27 (5th Cir. 2000) (citing cases that stand for the proposition that if an employer rubber stamps an employment decision, it will be held liable).

59. Because the cat’s paw doctrine analyzes when liability can apply to discrimination not sanctioned by the employer or authority figure, the scope of Title VII’s agency principles govern. See 42 U.S.C. § 2000e(b) (2000) (defining “employer” as including “any agent”); see also 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, 250–51 (2007) (discussing Title VII’s application to the cat’s paw doctrine).

employment discrimination based on “race, color, religion, sex, or national origin.”⁶⁰ Congress designed Title VII to “encourage the creation of anti-harassment policies and effective grievance mechanisms.”⁶¹ The statute’s terms provide a base for the debate among the circuits regarding the extent to which a subordinate must exercise control over a tangible employment action.⁶² Specifically, the statute provides 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 motivated the practice.”⁶³

Title VII’s use of the term, “because of,” raises issues of common law causation in the application of subordinate bias liability.⁶⁴ Although the Supreme Court has long utilized “but-for” and proximate causation principles to limit liability in a variety of areas,⁶⁵ the role of

60. 42 U.S.C. § 2000e-2(a) (2000) (stating in pertinent part that it is unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin; or to limit, segregate, or classify” employees in a way that would deprive or adversely affect them on account of the aforementioned classifications).

61. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998).

62. *See generally* *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 485 (10th Cir. 2006) (quoting the language of Title VII to demonstrate that subordinate bias liability is consistent with the principles promulgated in the statute), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Hill*, 354 F.3d at 287 (interpreting Title VII’s terms to mean that employers will not be liable for the acts of everyone in their employ).

63. 42 U.S.C. § 2000e-2(m) (2000). Congress added the “motivating factor” language in 1991 in response to the Court’s ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Hill*, 354 F.3d at 284. Prior to the amendment, in *Price Waterhouse*, the Court held that if an employer made a decision motivated by forbidden reasons, the employer could escape liability by showing it would have made the same decision even without a forbidden motive. *Id.* With the addition of the “motivating factor” language, employers can no longer automatically escape liability in this manner. *Id.* Now, a plaintiff may proceed by demonstrating—by direct or circumstantial evidence—that an employer used a “forbidden consideration with respect to ‘any employment practice.’” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 97–98 (2003). The implication of the term “motivating factor” is evidence to some proponents of the doctrine that Congress intended to hold an employer liable when forbidden classifications are but a factor. *Brewer Petition*, *supra* note 8, at 25. Yet some courts disagree, finding that, because Title VII was designed to avoid discrimination by providing employers with an incentive to control their employees, forbidden classifications must be used as more than just a motivating factor. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 920 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007). It would be contrary to the underlying intent of Title VII if an employer could be liable for employee conduct that it could not practically prevent, as the employer would have no incentive to create mechanisms deterring discrimination and harassment in the workplace. *Id.*; *see also Ellerth*, 524 U.S. at 764 (discussing the deterrent purpose of Title VII).

64. 42 U.S.C. § 2000e-2(a). *See, e.g.*, Brief of EEOC, *supra* note 29, at 29–30 (discussing the necessity of establishing causation based on the statutory language of Title VII).

65. *See BCI*, 450 F.3d at 48–87 (noting how standard tort causation comports with Supreme Court precedent).

these principles in subordinate bias liability is not clearly defined.⁶⁶ Although courts consistently find that independent investigations break the chain of causation,⁶⁷ proponents of either extreme—the input standard and the actual decisionmaker standard—vary with respect to causation’s importance.⁶⁸ In addition, what suffices as a truly independent investigation is far from clear.⁶⁹

For example, the U.S. Chamber of Commerce, in its brief as amicus curiae in support of BCI Coca-Cola Bottling Company’s petition to the Supreme Court in an employment discrimination case, argued that causation alone is not enough to hold an employer liable.⁷⁰ The U.S. Chamber of Commerce argued that a plaintiff must prove that the employer is liable based on agency principles.⁷¹ In contrast, on appeal to the Fifth Circuit in *Russell v. McKinney Hospital Venture*, the plaintiff argued that substantial evidence showing her co-worker’s age-based animus “played a role” in the decisionmaker’s choice to terminate her should be adequate to maintain a jury verdict in her favor.⁷² Indeed, some scholars suggest that Congress’ use of the phrase “motivating factor” in Title VII evinces an intent to eliminate “but-for” causation entirely.⁷³ They argue that although the statute still requires causation in some form, the discriminatory conduct need not be the “but-for” factor.⁷⁴

Furthermore, the statutory definition of “employer” includes “any agent” of an employer.⁷⁵ Therefore, according to the U.S. Chamber of

66. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 8–9, *BCI Coca-Cola Bottling Company v. EEOC*, 127 S. Ct. 852 (2007) (No. 06-341) [hereinafter Brief of U.S. Chamber of Commerce]; see also *BCI*, 450 F.3d at 486–87 (discussing how circuits vary in use of causation and advocating that Title VII requires that a subordinate play more than a “peripheral role”).

67. *BCI*, 450 F.3d at 488. By ensuring that any tangible employment actions are the result of an inquiry the causal nexus is broken, and discrimination cannot be the substantial factor for the action. *Id.*

68. Brief of U.S. Chamber of Commerce, *supra* note 66, at 9–11.

69. Compare *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007), with *Tate v. Executive Mgmt. Servs., Inc.*, No. 105-CV-47-TS, 2007 WL 1650410, at *4 (N.D. Ind. June 4, 2007) (for an indication of varying standards regarding the impartiality of investigations).

70. Brief of U.S. Chamber of Commerce, *supra* note 66, at 11.

71. *Id.* at 11–12.

72. Appellant’s Brief at 24–25, *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000) (No. 99-41390) [hereinafter *Russell* Brief].

73. *White & Krieger*, *supra* note 45, at 505.

74. *Id.*

75. *Id.*; 42 U.S.C. § 2000e(b) (2000). The term “agent” directs courts to look to agency principles in determining employer liability. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 791–92 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (jointly holding that an employer will be vicariously liable for “an actionable hostile environment created by a

Commerce, Congress explicitly directed lower courts to utilize agency principles in interpreting Title VII.⁷⁶ Yet Congress did not define agency in the statute.⁷⁷ Thus, the courts must rely on common law interpretations of agency.⁷⁸ The resulting problem, as the Restatement (Third) of Agency (Restatement of Agency) notes, is that in Title VII cases common law agency principles are often modified depending on the facts of each case.⁷⁹ Thus, the circuits still differ with respect to *who* should be liable under subordinate bias theory.⁸⁰ The Fourth Circuit declined to hold an employer liable for the acts of a subordinate with no supervisory or disciplinary authority.⁸¹ In contrast, the Tenth Circuit found such a position to be contrary to the spirit of Title VII, instead finding that a simple agency relationship is sufficient to impose liability.⁸²

In employment litigation, courts often apply the Restatement of Agency's position that an employer will be liable if his servant was "aided in accomplishing" his act "by the existence of the agency relationship."⁸³ In *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court clarified its standard for supervisor liability.⁸⁴ The Supreme Court stated that it is appropriate to

supervisor with immediate (or successively higher) authority over the employee"). In addition, the Court fashioned an affirmative defense for employers if they "exercised reasonable care to prevent and correct" employee behavior, and if the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

76. Brief of U.S. Chamber of Commerce, *supra* note 66, at 11–12; *see also Ellerth*, 524 U.S. at 754–55 (instructing lower courts to rely "on the general common law of agency" in analyzing employer liability, as opposed to any state laws) (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989)).

77. 42 U.S.C. § 2000e (2000).

78. *Ellerth*, 524 F.3d at 755–56.

79. RESTATEMENT (THIRD) OF AGENCY, Introduction 8–9 (2006); *see also Ellerth*, 524 U.S. at 755 (noting that, since its decision in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), courts acknowledge that not all common law principles are applicable to Title VII cases).

80. *See EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487 (10th Cir. 2006) (arguing that the "aided by the agency relation" standard would permit an employer to be vicariously liable for the bias of a subordinate who caused an adverse employment decision), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (holding that an employer should only be liable for the acts of a subordinate who was essentially the actual decisionmaker in an adverse employment decision).

81. *Hill*, 354 F.3d at 291, 297–98.

82. *BCI*, 450 F.3d at 487–88 (exploring the agency relationship between employer and employee and when tort liability of the employee applies to the employer).

83. *Faragher v. City of Boca Raton*, 524 U.S. 775, 801–02 (1998) (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)); *Ellerth*, 524 U.S. at 758.

84. *Faragher*, 524 U.S. at 807 ("An employer is subject to vicarious liability to a victimized

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.⁸⁵ Yet, the Court also emphasized that to avoid overly broad and excessive liability, more than a mere employment relationship is needed.⁸⁶ A tangible employment action⁸⁷ 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.”⁸⁸

Faragher and *Burlington* are significant cases defining employer liability under Title VII, yet they deal with acts of *supervisors* and implicitly emphasize situations where the discriminatory party has power to take action.⁸⁹ In other words, unlike subordinate bias liability—the subject of this Comment—*Faragher* and *Burlington* speak to situations in which supervisors do not need a cat to reach into the fire for them.⁹⁰ Nonetheless, the Court’s view of agency principles and the “aided by the agency relationship” standard is instructive about possible solutions to subordinate bias liability claims.⁹¹ Parties advocating a stricter model of subordinate liability argue that expanding the “aided by the agency relationship” standard to subordinate bias liability claims would expose employers to liability for unreasonable acts of employees.⁹² On the other hand, supporters of a less-stringent measure

employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee.”); *Ellerth*, 524 U.S. at 764–65 (adopting the holding set forth in *Faragher* establishing supervisory liability).

85. *Faragher*, 524 U.S. at 802; *Ellerth*, 524 U.S. at 762–63.

86. *Ellerth*, 524 U.S. at 760. Otherwise, the Court reasoned, “[p]roximity and regular contact may afford a captive pool of potential victims,” and an employer could be liable for all co-worker harassment. *Id.*

87. A tangible employment action results in a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Id.* at 761.

88. *Id.* at 760, 763.

89. See generally *Faragher*, 524 U.S. at 791–92; *Ellerth*, 524 U.S. at 754 (describing employer liability for the discriminatory acts of supervisors based on principles of agency law).

90. The Court’s discussion throughout both opinions does not address any situations where a worker with discriminatory animus motivates another to make an employment decision. Instead, in *Ellerth*, the Court emphasizes the tangible employment actions at issue: “[O]ne co-worker cannot dock another’s pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor.” *Ellerth*, 524 U.S. at 762. In fact, the Court cites the Seventh Circuit’s decision in *Shager* in both cases as a valid application of the cat’s paw doctrine but does not reveal an opinion regarding the doctrine. *Faragher*, 524 U.S. at 791; *Ellerth*, 524 U.S. at 762.

91. Brief of EEOC, *supra* note 29, at 26.

92. Brief of U.S. Chamber of Commerce, *supra* note 66, at 13 (interpreting the “aided by the agency relation” standard literally would “unreasonably impose strict liability on employers for many a frolic and detour that the employer simply cannot reasonably control or prevent”).

contend that the “aided by the agency relationship” standard balances Title VII’s objectives by creating an incentive for employers to take action to ensure their agents conduct themselves in a permissible manner, while also precluding employer liability for employee acts obviously outside the scope of their authority.⁹³

*C. Using the Cat’s Paw Doctrine to Bring an Employment
Discrimination Claim*

Although the cat’s paw doctrine is relatively new in employment discrimination law, it operates as part of the traditional framework for proving discrimination.⁹⁴ Under this traditional framework, a plaintiff can bring an employment discrimination claim either indirectly or directly.⁹⁵ Under the indirect method, the plaintiff has the burden of establishing a prima facie case of discrimination.⁹⁶ This can be done by proving four elements: 1) membership in a protected class, 2) qualification for the job, 3) an adverse employment decision, and 4) circumstances indicating the protected class membership was the reason for the adverse employment decision.⁹⁷ Upon proving these elements, the burden then shifts to the employer to produce a legitimate, nondiscriminatory rationale for the adverse employment decision.⁹⁸ If the employer establishes a nondiscriminatory rationale, the burden shifts back to the plaintiff to prove that the employer’s reason was pretextual.⁹⁹ In contrast, under the conventional direct method, a plaintiff simply presents direct or circumstantial evidence to prove that an employer acted with discriminatory animus.¹⁰⁰

Under either method, plaintiffs believing a fellow employee induced an adverse employment action based on prohibited animus may choose to use the cat’s paw doctrine to advance their case.¹⁰¹ Employing the

93. Brief of EEOC, *supra* note 29, at 13.

94. *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

95. *Russell*, 235 F.3d at 222.

96. *Id.* (citing *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 142 (2000)).

97. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Dyke v. O’Neal Steel, Inc.*, 327 F.3d 628, 631 (7th Cir. 2003). This is known as the “McDonnell-Douglas” burden-shifting framework. For a discussion of *McDonnell Douglas*, see Christopher R. Hedican et al., *McDonnell Douglas: Alive and Well*, 52 *DRAKE L. REV.* 383, 385 (2004) (summarizing the history of *McDonnell Douglas* and its progeny).

98. *McDonnell Douglas*, 411 U.S. at 802.

99. *Id.*

100. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 915 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007).

101. Circumstances where a biased employee might wield control over employment decisions

indirect method (*McDonnell-Douglas* framework), evidence of subordinate bias may be used either to establish elements of the prima facie case of discrimination or to prove pretext.¹⁰² Alternatively, a plaintiff could proceed under the direct theory of proof, “presenting a ‘convincing mosaic’ of direct or circumstantial evidence that could permit a reasonable jury to conclude that the employer acted with discriminatory intent.”¹⁰³

With an understanding of the cat’s paw’s beginnings, its relationship to the broader employment discrimination context, and its real-world application in litigation, this Comment will next discuss representative cases addressing subordinate bias liability, focusing on how various circuits apply the cat’s paw doctrine to Title VII principles.

III. DISCUSSION

While the circuit courts unanimously agree that a subordinate’s bias can trigger liability,¹⁰⁴ they lack a uniform approach as to which circumstances support a cause of action.¹⁰⁵ The standards set forth by the various circuits “differ as to the degree to which a biased intermediate supervisor must contribute to an adverse employment decision before an employer may be held liable.”¹⁰⁶ This Part will explore the three main approaches used by the circuit courts to establish subordinate bias or cat’s paw liability.¹⁰⁷ Part III.A addresses the more lenient “input” standard employed by the First, Third, and Fifth circuits.¹⁰⁸ Part III.B will analyze the middle-ground “causation”

include omitting relevant information, providing “tainted” recommendations, or otherwise manipulating the manner in which employment decisions are conducted. *White & Krieger, supra* note 45, at 513–14 (citing *Willis v. Marion County Auditor’s Office*, 118 F.3d 542, 547 (7th Cir. 1997)).

102. Loren Gesinsky & Douglas B. Lipsky, *When The Subordinate’s Bias Matters*, N.Y. L.J., May 21, 2007, at 10. A reason is pretextual if it is a “dishonest explanation” or a “deliberate falsehood.” *Ptasznik v. St. Joseph Hosp.*, 464 F.3d 691, 696 (7th Cir. 2006). For example, in *McDonnell Douglas*, where the employer fired a black employee for engaging in civil rights activities, the Court noted that evidence of pretext could be found if the employer did not fire a white employee for comparably serious acts. 411 U.S. at 805.

103. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 915 (7th Cir. 2007) (citing *Jordan v. City of Gary*, 396 F.3d 825, 832 (7th Cir. 2005)), *cert. denied*, 128 S. Ct. 357 (2007).

104. *Genova & Vernoia, supra* note 12, at 20.

105. *Brewer Petition, supra* note 8, at 16.

106. *Id.*

107. *See EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 486–88 (10th Cir. 2006) (detailing the three approaches and ultimately adopting the causation standard), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007).

108. *See infra* Part III.A (discussing the Fifth Circuit’s decision in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227–28 (5th Cir. 2000), and the more lenient standard for analyzing cat’s paw claims).

standard originally adopted by the Seventh Circuit and used by the Tenth Circuit.¹⁰⁹ Part III.C then discusses the strictest “actual-decisionmaker” standard promulgated by the Fourth Circuit and (arguably) recently adopted by the Seventh Circuit.¹¹⁰

A. *The Input Standard*

Under the input standard, a more lenient approach to the cat's paw doctrine, a plaintiff can avoid summary judgment by demonstrating that a biased supervisor without decisionmaking authority gave information that *might* have influenced or affected an adverse employment decision.¹¹¹ This is the most pro-plaintiff model, subjecting employers to liability even if the plaintiff cannot prove that another subordinate's biased views actually motivated or influenced the decision.¹¹² While several circuits have utilized this method, including the First and Third Circuits,¹¹³ this Part will discuss the Fifth Circuit's decision in *Russell v. McKinney Hospital Venture* as a model of the input standard.¹¹⁴

Russell involved a claim for violation of the Age Discrimination in Employment Act (ADEA) based on Sandra Russell's termination as Director of Clinical Services at Columbia Homecare of McKinney (McKinney).¹¹⁵ A jury found that defendant McKinney violated the ADEA, but the trial court granted McKinney's motion for judgment as a

109. See *infra* Part III.B (discussing the Tenth Circuit's use of the causation standard in *BCI*).

110. See *infra* Part III.C (explaining the Fourth Circuit's use of the actual decisionmaker standard in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), and arguing that the Seventh Circuit recently aligned itself with this standard through its decision in *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 915 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007)).

111. Gesinsky & Lipsky, *supra* note 102, at 10; Brewer Petition, *supra* note 8, at 22.

112. See Gesinsky & Lipsky, *supra* note 102, at 10 (discussing the lenient standard).

113. The First Circuit found the necessary inquiry to be whether “discriminatory comments were made by the key decisionmaker or those in a position to *influence* the decisionmaker.” *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (emphasis added). Furthermore, the Third Circuit determined that the defendant college could be liable for religious discrimination even where there was evidence that the decisionmaker had no discriminatory animus, and the discriminatory conduct of a supervisor influenced the termination. *Abramson v. William Patterson College*, 260 F.3d 265, 285 (3d Cir. 2001). The court stated, “Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate.” *Id.*

114. See *infra* notes 115–35 and accompanying text (discussing the facts of *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227–28 (5th Cir. 2000)).

115. *Russell*, 235 F.3d at 221; see also 29 U.S.C. § 623(a)(1) (2000) (it is unlawful “to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age”).

matter of law, and Russell appealed.¹¹⁶ Russell, age fifty-four, began work at McKinney the same day as her supervisor, Carol Jacobsen, age fifty-three.¹¹⁷ Shortly after, twenty-eight-year-old Steve Ciulla began work as the Director of Operations, a job hierarchically equal to Russell, in which Ciulla also reported to Jacobsen.¹¹⁸ Importantly, Ciulla's father was the CEO of McKinney's parent company.¹¹⁹

To assess whether judgment as a matter of law was appropriate, the *Russell* Court utilized the aforementioned *McDonnell-Douglas* framework for indirect discrimination.¹²⁰ McKinney offered a legitimate reason for terminating Russell: a need for a new management style.¹²¹ To prove this was merely pretextual, Russell offered evidence that Ciulla's age-based animus was the true reason for her firing.¹²² Russell submitted that she received favorable evaluations only two months prior to her termination and received no formal warnings about any problems with her work.¹²³ The jury heard evidence that Ciulla referred to Russell as an "old bitch"¹²⁴ so often that Russell needed earplugs to continue her work.¹²⁵ In addition, Jacobsen's administrative assistant testified that Ciulla gave Jacobsen an ultimatum that he would quit if Russell was not fired.¹²⁶

116. *Russell*, 235 F.3d at 221.

117. *Id.*

118. *Id.*

119. *Id.*

120. *See supra* note 97 (discussing the *McDonnell-Douglas* framework). The Court of Appeals found that Russell undoubtedly established her prima facie case of discrimination. *Russell*, 235 F.3d at 224.

121. *Id.*

122. *Id.*

123. *Id.* In fact, Russell's evaluations noted her performance to be "exceptional" or "exceeding expectations" in all categories but one (where she received a "meets standards" rating). *Id.* McKinney's employment policies specified that an employee should receive a formal oral warning or a "corrective action plan" for problems with their work. *Id.* These facts supported the court's determination that a reasonable jury could find McKinney's proffered reasons for Russell's termination to be pretextual. *Id.*

124. *Id.* at 226. The court referenced an explanation by Judge Posner differentiating stray remarks inapplicable to a plaintiff's case and those which are relevant:

It is different when . . . it may be possible to infer that the decision makers were influenced by [the discriminatory] feelings in making their decision Emanating from a source that influenced the personnel action (or nonaction) of which these plaintiffs complain, the derogatory comments became evidence of discrimination.

Id. at 229 (quoting *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 652–53 (7th Cir. 2000)).

125. *Russell*, 235 F.3d at 226.

126. *Id.* at 224. Given these unique facts, Russell's case did not necessitate a discussion of independent investigations.

The court found that although Ciulla lacked the power to fire Russell, a jury could reasonably find that he was influential in causing Russell's termination.¹²⁷ Ciulla's apparent role and the underlying facts of the case led the court to reverse the district court's judgment as a matter of law and reinstate the jury's original verdict in Russell's favor.¹²⁸

The court rejected a more rigid formalistic application of employer liability, reasoning that such a standard would insulate employers from liability "by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the 'actual decisionmaker' guideline."¹²⁹ The necessary inquiry then, according to the Fifth Circuit, is to examine whether evidence shows an employee with discriminatory animus "possessed leverage, or exerted influence, over the titular decisionmaker."¹³⁰

B. The Causation Standard

While the input standard simply speaks of influence, the middle-ground causation approach is rooted in causation principles, requiring that a subordinate's bias be a "substantial factor" in an adverse

127. *Id.* at 226. In particular, the court noted that although ordinary employees usually cannot affect employment decisions, "[i]f the employee can demonstrate that others had *influence* or *leverage* over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker." *Id.* (emphasis added). In support of this view, the court cited the Seventh Circuit's seminal cat's paw case, *Shager v. Upjohn*. *Id.* at 227; *Shager v. Upjohn*, 913 F.2d 398 (7th Cir. 1990); *see also supra* notes 46–49 and accompanying text (discussing the facts of *Shager*). Ciulla, as the son of the CEO, enjoyed many perks that other employees did not, and the court found that a reasonable jury could conclude that he wielded more power than the typical worker. *Russell*, 235 F.3d at 228. Ciulla's ultimatum to Jacobsen, combined with the fact that Ciulla's father controlled Jacobsen's budget and that Jacobsen feared losing her job indicated that while she may have exercised her actual power to terminate Russell, in truth Ciulla had significant influence. *Id.*

128. *Id.* at 230. For a discussion on the admissibility of employee comments under the Federal Rules of Evidence, see Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias In Proving Intentional Discrimination*, 73 MO. L. REV. 83, 110–13 (2008) (in proving intentional discrimination, existence of discriminatory comments makes it more probable that prohibited characteristics were taken into account in employment decision, yet comments may be excludable based on grounds of unfair prejudice or hearsay).

129. *Russell*, 235 F.3d at 227 n.13. The court's use of the term "actual decisionmaker" may be confusing in this context, as the term generally refers to the stricter interpretation of the cat's paw doctrine. Brewer Petition, *supra* note 8, at 22. It can be inferred from the context of the court's statements that they are opposed to such a strict standard, and adhering to one would fail to recognize the person who actually made the decision.

130. *Russell*, 235 F.3d at 227. The First and Third Circuits also echo this approach. *See Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Abramson v. William Patterson Coll.*, 260 F.3d 265, 285 (3d Cir. 2001).

employment decision.¹³¹ This model finds support from traditional tort law as well as the statutory language of Title VII.¹³² The language of 42 U.S.C. § 2000e-2 outlaws employment actions made “because of” certain prohibited classifications or when those classifications were a “motivating factor” of an employment decision.¹³³ In essence, a plaintiff must show that a subordinate’s biased action played a “sufficient role to give rise to an inference of but-for causation, and that its effect on the decision must be sufficiently substantial to make it reasonable to regard it as a proximate cause of that decision.”¹³⁴ This Part will discuss the causation model by examining the Tenth Circuit’s decision in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*.¹³⁵

In *BCI*, the Tenth Circuit reviewed a race discrimination claim stemming from Stephen Peters’ termination.¹³⁶ Peters, who is black, worked at BCI’s Albuquerque facility as a merchandiser for six years before being fired in 2001.¹³⁷ The EEOC filed suit on Peters’ behalf on the theory that, even if the BCI decisionmakers who actually fired Peters did not harbor any discriminatory animus, the racially motivated conduct of Peters’ supervisor, Cesar Grado, so substantially affected the firing process that BCI should be liable.¹³⁸

The Albuquerque branch of BCI employed 200 workers, of which sixty percent were Hispanic, and two percent were black.¹³⁹ Because Peters was the most senior merchandiser in the district, he had the most preferable work schedule, including weekends off.¹⁴⁰ The management structure at BCI operated as follows: Peters reported to Grado, a district sales manager responsible for scheduling and work assignments, but

131. Brief of EEOC, *supra* note 29, at 33.

132. *Id.* at 32; *see also supra* Part II.B (discussing the relevant portions of Title VII).

133. 42 U.S.C. § 2000e-2 (2000); Brief of EEOC, *supra* note 29, at 30.

134. Brief of EEOC, *supra* note 29, at 32.

135. *See infra* Part III.B (addressing the causation model through a discussion of *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007)).

136. *BCI*, 450 F.3d at 478. The district court granted summary judgment in favor of BCI, holding the EEOC established a prima facie case, but BCI effectively conveyed a legitimate reason for the termination, namely Peters’ “insubordinate conduct toward Grado.” *Id.* at 483.

137. *Id.* at 478. Merchandisers’ job responsibilities consisted of putting Coca-Cola’s products in retail facilities and maintaining the product displays. *Id.* They typically worked five days a week, but given the nature of Coca-Cola’s retail outlets, merchandisers were needed every day of the week; therefore, employees had “staggered” schedules. *Id.*

138. *Id.* at 482.

139. *Id.* at 478.

140. *Id.* Peters generally had a reputation for doing his job well. *Id.* In 2001—the same year Peters was fired—BCI gave him a certificate of appreciation for his five years of service and for “being a team player.” *Id.*

lacking firing or disciplinary power;¹⁴¹ an account manager supervised Peters on a daily basis, but also reported to Grado.¹⁴² BCI's human resources department (HR) in Albuquerque and Phoenix made all employment decisions.¹⁴³

The events leading to Peters' termination began when Grado found himself in a scheduling bind one weekend and received word that Peters would not come in to work.¹⁴⁴ Grado contacted the Phoenix HR department to ask if he could require Peters to come in on his day off.¹⁴⁵ HR responded that it was unacceptable for Peters to refuse to work absent a compelling reason and told Grado to order Peters to work; failure to do so would amount to insubordination and be grounds for termination.¹⁴⁶ When Grado called Peters, Peters replied that he had plans and could not work.¹⁴⁷ Grado told Peters that failure to report would amount to insubordination.¹⁴⁸ Grado immediately called HR and told them of his conversation with Peters and of Peters' comment that his plans were "none of [Grado's] business."¹⁴⁹ HR determined that Peters' conduct was tantamount to insubordination and warranted termination, although it did not make a formal firing decision because it

141. *Id.* Although Grado, who is Hispanic, lacked actual authority to discipline employees, he evaluated and monitored employees working under him and had great discretion in reporting events to BCI's HR department. *Id.*

142. *Id.* Although the Account Manager also worked under Grado, it was common practice for merchandisers like Peters to contact their account managers, rather than the District Manager, when calling in sick. *Id.*

143. *Id.* at 478–79. The management structure of BCI was such that the highest-ranking human resource officials in both the Albuquerque and Phoenix offices were unaware of Peters prior to the events that gave rise to this case. *Id.* at 479.

144. *Id.* The parties dispute what was actually said between Peters, his account manager and Grado. *Id.* Grado contends that the manager told him Peters "might call in sick," which the manager denied. *Id.* The semantics do not have a significant bearing on the outcome of the case, and, as the court reviewed a grant of summary judgment, they were bound to take the facts in the light most favorable to Peters and the EEOC. *Id.* at 483.

145. *Id.* at 479.

146. *Id.* Grado told HR that Peters planned to call in sick that Sunday (though it is disputed whether Grado actually knew this to be true). *Id.* BCI had a policy against calling in sick two days in advance, which prompted HR to call such a suggestion "unacceptable." *Id.*

147. *Id.*

148. *Id.* Peters replied, "Do what you got to do and I'll do what I got to do," which Grado believed to mean that Peters did not intend to not work that Sunday. *Id.* Again, the parties dispute the exact content of the exchange. Grado alleges that he asked Peters what his plans were, and Peters responded, "none of [Grado's] business," and then began yelling. *Id.* Peters however, said that Grado never asked him about his plans. *Id.*

149. *Id.* at 480.

was too late in the day.¹⁵⁰ Peters never reported to work that weekend.¹⁵¹

On Monday, HR officials in the Albuquerque and Phoenix offices discussed Peters' failure to attend work.¹⁵² They found a disciplinary status notice from 1999 in his personnel file giving him a suspension and final warning for a separate incident in which Peters refused to work.¹⁵³ HR officially decided to fire Peters Monday evening and informed him the next morning.¹⁵⁴ The termination papers stated that BCI chose to fire Peters for insubordination resulting from his "failure to comply with the directive [to work on Sunday]."¹⁵⁵

In order to understand how the EEOC proceeded under a theory of cat's paw liability, it is instructive to explore the nature and extent of Grado's discriminatory conduct toward Peters.¹⁵⁶ Several BCI workers submitted affidavits regarding Grado's discriminatory behavior toward black employees, describing incidents where Grado treated black employees more harshly than Hispanic employees.¹⁵⁷ For example, one weekend when Grado did not have enough merchandisers to work, he instructed a Hispanic merchandiser to work on her day off.¹⁵⁸ She told

150. *Id.*

151. *Id.* Peters actually became ill that weekend and visited an urgent care clinic, where the doctor diagnosed him with a sinus infection and ordered him not to work until Monday. *Id.* Peters called his Account Manager to tell him he was sick, and the manager excused him from work. *Id.* The manager tried repeatedly to contact Grado with this information, but Grado never returned the communication. *Id.*

152. *Id.*

153. *Id.* This disciplinary incident, though not detailed in the personnel file, stemmed from Peters' refusal to work on his day off when he was acting as a pallbearer at his fiancé's son's funeral. *Id.* His supervisor at the time refused to allow this as an excuse because the boy was not Peters' biological son, even though Peters had raised the boy for years. *Id.* As a result, Peters' personnel file stated that he was "rude and unprofessional," and he received a final warning for insubordination. *Id.*

154. *Id.* at 480–81.

155. *Id.* at 481. Yet, in a statement prepared for litigation, HR stated that the termination was based on Peters' encounter with Grado the previous Friday, bolstered by the 1999 incident in the personnel file. *Id.* at 480–81. HR said that Peters was not fired for failure to appear at work that Sunday, but that his exchange with Grado exemplified a general intent to defy a direct order. *Id.* at 481. In addition, HR said that, although they knew Peters was actually sick, it did not change their decision, because they believed it to be "highly suspect." *Id.* This is also in dispute, as Peters' Account Manager alleged that he did not even tell Grado that Peters called in sick until after Edgar made the termination decision. *Id.*

156. Brief of EEOC, *supra* note 29, at 35–36.

157. *BCI*, 450 F.3d at 482. The EEOC collected affidavits from two black employees and one Hispanic employee. *Id.* One affidavit said, "If Grado did not like you, he treated you badly; but African American employees were treated even worse." *Id.* Others described Grado's demeaning jokes and comments about black men dating white women. *Id.*

158. *Id.*

him that she intended to celebrate her birthday that weekend and could not work.¹⁵⁹ She did not show up to work that weekend despite being directed to do so.¹⁶⁰ When Grado learned that she did not follow the order to work, he replied, “[y]ou can’t make somebody work on one of their days off,” and never disciplined her.¹⁶¹ The court found that Grado’s behavior toward this Hispanic employee was “dramatic[ally] differen[t]” compared with his treatment of Peters.¹⁶² Combined with other evidence of racial remarks, this provided sufficient evidence for a reasonable jury to “infer that racial animus played a role in Mr. Peters’ treatment.”¹⁶³

After finding that BCI put forth a nondiscriminatory reason for firing Peters, the court turned to the issue of subordinate bias liability to determine whether the EEOC adequately proved that BCI’s nondiscriminatory reason was pretextual.¹⁶⁴ In reversing the district court’s grant of summary judgment and remanding the case for further determination regarding pretext, the court discussed its sister circuits’ varying approaches to liability under these circumstances.¹⁶⁵ The Tenth Circuit had never found for a plaintiff on subordinate liability prior to *BCI*, yet in this instance the court determined that the causation approach best addressed the needs of employers and plaintiffs based on its agreement with general agency principles and the purposes of Title VII.¹⁶⁶ The true issue then, according to the Tenth Circuit, was “whether the biased subordinate’s discriminatory reports, recommendation, or other actions *caused* the adverse employment action.”¹⁶⁷

159. *Id.*

160. *Id.*

161. *Id.* at 482–83.

162. *Id.* at 490.

163. *Id.*

164. *Id.* at 484. The court stated that because Edgar had no idea Peters was black she could not possibly have fired him based on discriminatory motivations. *Id.* Therefore, the EEOC needed to demonstrate that “Grado harbored a racial animus toward black employees,” and that such animus should be grafted onto BCI even though Grado did not actually fire Peters. *Id.*

165. *Id.* at 486–87 (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)); *see also* *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291, 289, 290 (4th Cir. 2004); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994).

166. *BCI*, 450 F.3d at 487–88.

167. *Id.* at 487 (emphasis added) (quoting *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004)). The court explicitly stated, “[w]e find ourselves in agreement with the Seventh Circuit,” citing *Lust* as a model. *Id.* In fact, the middle-ground standard in *Lust* has been referred to as “the most cogently articulated position in the middle of the subordinate bias spectrum.” Gesinsky & Lipsky, *supra* note 102, at 10. *Lust* involved a sex discrimination case by a female mattress sales representative who was passed over for a promotion in favor of a male representative. *Lust*,

The court expressed support for subordinate bias liability in general based on the theory's agreement with standard agency principles.¹⁶⁸ While the Supreme Court's rulings on vicarious liability for employers did not examine liability for the actions of subordinates, the *BCI* court reasoned that the "aided by the agency relationship" standard articulated by the Supreme Court in *Ellerth* and *Faragher* "applies even more clearly to subordinate bias claims . . . because the allegedly biased subordinate *accomplishes* his discriminatory goals by misusing the authority granted to him by the employer."¹⁶⁹ In contrast, the Court in *Ellerth* contemplated employer liability for acts that did not result in tangible employment actions.¹⁷⁰ In addition, the *BCI* court further reasoned that holding employers liable for the discriminatory acts of their subordinates advances the underlying purposes of Title VII by providing employers with incentives to verify information before making employment decisions.¹⁷¹

As to their adoption of a causation-based approach to cat's paw liability, the court reasoned that requiring proof of causation simply makes sense in light of previous Supreme Court cases affirming the requirement of a causal connection in Title VII cases.¹⁷² Because Title VII's definition of "employer" utilizes agency and tort concepts, the Tenth Circuit reasoned that the causation aspects of tort law should also

383 F.3d at 583. Lust's supervisor made sexist comments to her and thought that, as a mother, she would not be interested in relocating from Wisconsin to Chicago, even though he never asked if this was true. *Id.* Even though Lust's supervisor did not make promotion decisions, he had the power to recommend candidates for promotions. *Id.* at 584. In its opinion, the Seventh Circuit clearly stated that it did not follow the strict approach set forth by the Fourth Circuit in *Hill v. Lockheed Martin*, as such a view is "inconsistent with the normal analysis of causal issues in tort litigation." *Id.* Rather, "the prejudices of an employee . . . are imputed to the employee who has formal authority over the plaintiff's job . . . where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to *influence* the decision." *Id.* at 585 (emphasis added) (citations omitted).

168. *BCI*, 450 F.3d at 485 (citing 42 U.S.C. § 2000e(b) (2000); *Ellerth*, 524 U.S. at 758). The court engaged in a brief discussion of agency principles embodied in Title VII (how an employer covers "any agent" of the employer as well), and the "aided by the agency relation" standard articulated in *Ellerth*. *Id.*; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 763 (1998).

169. *BCI*, 450 F.3d at 485 (emphasis added).

170. *Ellerth*, 524 U.S. at 765 (noting the difficulty when a tangible employment action is not taken, and holding that where such action is taken, certain affirmative defenses apply to employers, such as taking preventative measures).

171. *BCI*, 450 F.3d at 486. This incentive exists because employers may avoid liability if they perform an independent investigation. *Id.* In addition, "[r]ecognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as the source of reports and recommendations." *Id.*

172. *Id.* at 487-88 ("Both the Supreme Court and this Court require a comparable causal connection as part of analogous workplace discrimination claims.").

apply in this context.¹⁷³ This approach provides an avenue for employers to avoid liability by requiring a plaintiff to demonstrate that the biased subordinate's actions caused the adverse employment action.¹⁷⁴ Thus, for employers who "[do not] rely exclusively on the say-so of the biased subordinate . . . the causal link is defeated."¹⁷⁵ In contrast, the court refuted the input and actual decisionmaker standards as too extreme on either side of the spectrum and devoid of a relationship with Title VII principles.¹⁷⁶

Applying its newly articulated standard to the facts of Peters' case, the court found that although the HR manager actually fired Peters, she did so based solely on Grado's description of Peters.¹⁷⁷ Moreover, HR did not conduct any independent investigation or any separate inquiry into the facts of the case.¹⁷⁸ As Grado's story caused Peters' termination,¹⁷⁹ the court reasoned that if a jury found Grado's report to be tainted with a racial animus, "it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual."¹⁸⁰ Given the many facts in dispute and accepting the possibility of subordinate bias as a basis for liability, the court remanded the case for further factual determination.¹⁸¹

173. *Id.*

174. *Id.* at 486.

175. *Id.* at 488. However, the court suggested that an employer may be able to avoid liability by merely asking an employee for his version of events. *Id.* While in more minor situations this may be sufficient and certainly the level of investigation necessary will vary depending on the circumstances, however, simply asking an employee his side of the story may set the bar too low for a respectable standard. *See, e.g.*, Recent Cases, *supra* note 5, at 1703 (discussing expectancy confirmation bias). For a further discussion on independent investigations under the causation standard, see *infra* Part V.B (advocating a more discerning approach with respect to investigations to break the chain of causation).

176. The court found the Fifth Circuit's "influence" standard to be weak, erroneously removing causation from the inquiry and potentially exposing even diligent employers to liability. *BCI*, 450 F.3d at 486–87. In contrast, the court stated that the Fourth Circuit's "actual decisionmaker" standard took the concept of a cat's paw "too literally," and failed to take into consideration the "aided by the agency relation" principle of Title VII. *Id.* at 488.

177. *Id.* at 491.

178. *Id.*

179. The court noted that BCI put forth two explanations for why it fired Peters, both of which could be found pretextual by a reasonable jury. *Id.* at 490–91. If, as stated on the termination papers, BCI fired Peters for not showing up to work, a jury could find pretext because Katt excused Peters from work. *Id.* BCI changed its position later to state that Peters' insubordination caused his termination, in which case the racial discrimination of Grado would come into play. *Id.*

180. *Id.* at 491–92.

181. *Id.* at 492–93.

Following the Tenth Circuit's decision, BCI applied for a writ of certiorari to the Supreme Court, and the Court granted certiorari on January 5, 2007.¹⁸² Days before oral arguments were scheduled, however, BCI dismissed the case.¹⁸³ The need for the Supreme Court to hear a cat's paw case will be discussed in Part V.¹⁸⁴

C. The "Actual Decisionmaker" Standard

Compared with the input and causation standards, the "actual decisionmaker" model is the most demanding, virtually requiring that the employer with decisionmaking power act merely as a marionette of its biased subordinate.¹⁸⁵ For courts following by this standard, the relevant inquiry is "[whether] the decisionmaker [is] completely

182. BCI Coca-Cola Bottling Co. v. EEOC, 127 S. Ct. 852 (2007). A variety of organizations filed amicus briefs on behalf of both parties, including: [For Petitioners] The Chamber of Commerce of the United States, 2007 WL 527497 (Feb. 20, 2007); National School Boards Association, 2007 WL 542424 (Feb. 20, 2007); Equal Employment Advisory Council, 2007 WL 549101 (Feb. 20, 2007); Food Marketing Institute, 2007 WL 549102 (Feb. 20, 2007); Society for Human Resource Management, 2007 WL 647974 (Feb. 20, 2007); [For Respondents] National Employment Lawyers Association and NAACP Legal Defense and Educational Fund, 2007 WL 966520 (Mar. 27, 2007); American Association for Justice, 2007 WL 951132 (Mar. 27, 2007); Lawyers' Committee for Civil Rights Under Law, AARP, American Association of People with Disabilities, Asian American Justice Center, National Partnership for Women & Families, National Women's Law Center, Pick Up The Pace, and Public Justice Center, 2007 WL 951130 (Mar. 27, 2007).

183. BCI Coca-Cola Bottling Co. v. EEOC, 127 S. Ct. 1931 (2007); Marilyn Geewax, *CCE Unit Tells Court to Let Bias Case Proceed*, ATLANTA J. & CONSTIT., Apr. 13, 2007, at G1. A statement from the EEOC's general counsel stated that the dismissal was a unilateral decision on the part of BCI, "and does not involve any settlement or any agreement between the parties. We expect that the case will be remanded to the district court in New Mexico for further proceedings, consistent with the Tenth U.S. Circuit Court of Appeals' decision." Mark A. Hofmann, *Subordinate Bias Case Pulled from High Court*, BUS. INS., Apr. 16, 2007, at 3. Ultimately, BCI settled with the EEOC for \$250,000 in addition to several injunctive measures. News Release, EEOC, *BCI Coca-Cola Bottling Co. to Pay \$250,000 to Black Worker for Race Discrimination* (Apr. 15, 2008), available at <http://www.eeoc.gov/press/4-15-08.html>. The injunctive relief includes: carrying out policies that promote a discrimination-free work environment; distributing those policies to current and new employees, including written statements about reporting bias in the workplace; and providing training sessions to all management and supervisory employees. *Id.* Finally, the settlement prohibits BCI from retaliating against Peters or any employee who acted as a witness in the case, and Peters' firing was turned into a voluntary resignation. *Id.*

184. See *infra* Part V.A (discussing the importance of the Supreme Court ruling on a cat's paw case in the near future).

185. The standard is recognized as the most employer-friendly standard. Jeffrey L. Needle, *Defeat the 'Cat's Paw' Defense to Vicarious Liability*, TRIAL, Jun. 2008, at 52, 54. By requiring that the subordinate be the "actual decisionmaker" or one "principally responsible" for an employment decision, adherents to this standard come very close to a literal interpretation of the cat's paw doctrine, essentially mandating that a subordinate control the decisionmaker completely. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (holding that an employer will only be liable for the acts of the person who in reality makes the decision).

beholden to the subordinate such that the subordinate is the actual decisionmaker.”¹⁸⁶ *Hill v. Lockheed Martin Logistics Management*,¹⁸⁷ decided by the Fourth Circuit, is often cited as the model for this standard.¹⁸⁸ In addition, the Seventh Circuit recently clarified its position regarding the cat's paw doctrine in *Brewer v. Board of Trustees of University of Illinois*,¹⁸⁹ arguably adopting the actual decisionmaker standard.¹⁹⁰ This section will discuss the details of each case separately.

1. *Hill v. Lockheed Martin Logistics Management*

Hill involved a claim for wrongful termination based on sex and age under Title VII and the ADEA.¹⁹¹ Ethel Hill, the plaintiff, worked for Lockheed Martin Logistics Management (Lockheed), the defendant, as a sheet metal mechanic fixing military aircraft from 1987 until her termination in 1998.¹⁹² Lockheed organized its management as follows: Hill reported to a “lead person,” who in turn reported to a senior site supervisor and program manager.¹⁹³ Lockheed also assigned a safety inspector to each site.¹⁹⁴ The safety inspectors had no supervisory or disciplinary authority; they too worked under the lead

186. Gesinsky & Lipsky, *supra* note 102, at 10.

187. See *infra* Part III.C.1 (discussing the details of the *Hill* case and Fourth Circuit's decision).

188. See, e.g., EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 487 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); Gesinsky & Lipsky, *supra* note 102, at 10; Genova & Vernoia, *supra* note 12, at 20–21 (all citing *Hill*). Additionally, the Eleventh Circuit generally follows this model. See Petition for Writ of Certiorari at 13–14, *Sawicki v. Morgan State Univ.*, 127 S. Ct. 2095 (No. 06-306) (2007).

189. See *infra* Part III.C.2 (discussing the details of the *Brewer* case and the Seventh Circuit's decision).

190. See *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 917 (7th Cir. 2007) (stating that “the employee must possess so much influence as to basically be herself the true ‘functional decision-maker’”), *cert. denied*, 128 S. Ct. 357 (2007). See also *Brewer* Petition, *supra* note 8, at 13, 17 (arguing that the Seventh Circuit rejected precedent by adopting the actual decisionmaker standard similar to the Fourth Circuit).

191. *Hill*, 354 F.3d at 281. The district court granted Lockheed's motion for summary judgment, and a divided Fourth Circuit panel reversed. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 314 F.3d 657 (4th Cir. 2003). The Fourth Circuit reheard the case *en banc*, ultimately ruling 7-4 to reinstate summary judgment. *Hill*, 354 F.3d at 281.

192. *Hill*, 354 F.3d at 282. At the time of termination, Hill was fifty-seven years old. *Id.* She worked at Lockheed for eleven years, but was employed in the aircraft industry for twenty-five years. *Id.* at 300 (Michael, J., dissenting). Hill was the only woman on her eight-member crew at Fort Drum. *Id.*

193. *Id.* at 282 (majority opinion). The senior site supervisor did not work at the mechanic's field site. *Id.*

194. *Id.*

person but were additionally responsible for making sure that certain aircraft modifications were properly carried out.¹⁹⁵

Hill received three written reprimands in the last eight months of her employment at Lockheed from two different lead persons.¹⁹⁶ According to Lockheed's Standard Operating Procedures (SOP), if an employee received two written reprimands with no suspension and one with a suspension, that employee would be subject to termination.¹⁹⁷ After Hill's third reprimand, her lead person sent her paperwork to the senior supervisor, whereupon he and the program manager decided to fire Hill pursuant to Lockheed's SOP.¹⁹⁸

Hill subsequently filed discrimination and retaliation charges with the EEOC and brought suit against Lockheed on the theory that her safety inspector, Ed Fultz, discriminated against her based on her age and sex, which led to the reprimands that instigated her termination.¹⁹⁹ According to Hill, Fultz called her a "useless old lady" who needed to be retired, a "troubled old lady," and a "damn woman," on several occasions.²⁰⁰ Hill believed that because she reported Fultz's comments to her lead person, Fultz retaliated against her by reporting the safety violations.²⁰¹

The court began its analysis by considering which employees can be decisionmakers under the terms of Title VII. It reasoned that, although "employer" includes an agent of the employer, employers are not vicariously liable for the discriminatory acts of everyone they

195. *Id.*

196. *Id.* at 281. Hill's reprimands included 1) a violation for "unsatisfactory quality or quantity of work" at Fort Bragg for installing rivets that were too small; 2) a reprimand with a suspension for failing to report a missing tool; and 3) another unsatisfactory quality violation for Fort Drum. *Id.* at 282, 292, 295.

197. *Id.* at 282.

198. *Id.* Lockheed filled her position with a forty-seven-year-old male. *Id.*

199. *Id.* at 282, 283. Hill conceded that neither lead person discriminated against her in issuing the reprimands and that senior management did not act out of biased motivations either. *Id.* at 283. She pursued her case under two frameworks: mixed-motive and pretext. *Id.* at 285. For mixed-motive, she asserted that, although her reprimands may have been a factor in Lockheed's termination decision, the discrimination by Fultz made the decision one of mixed-motivation. *Id.* at 286. For pretext, she argued that Fultz's involvement in her firing could provide evidence of discrimination, and that Lockheed's proffered reasons were pretextual. *Id.* at 286.

200. *Id.* at 283. The dissenting opinion notes that "Fultz targeted Hill immediately" and that Fultz did not like having women working beneath him. *Id.* at 300 (Michael, J., dissenting). Although Hill complained to Dixon, he took no action against Fultz. *Id.*

201. *Id.* at 283 (majority opinion). The court also noted that Fultz reported "admittedly valid infractions." *Id.*

employ.²⁰² After discussing the Supreme Court's views of vicarious liability and the origins of the cat's paw doctrine, the court concluded that statutory construction and precedent did not support an expansive view of cat's paw liability (such as "substantial influence"), as Hill argued.²⁰³

Previous Supreme Court cases emphasizing responsibility for those who actually made tangible employment decisions led the court to decide that the motivations of such decisionmakers should determine responsibility.²⁰⁴ The court reasoned that such a philosophy would be consistent with the cat's paw doctrine because if a subordinate induces a decisionmaker to take an action—like the monkey inducing the cat to stick its paw into the flames—it is consistent to call that subordinate the actual decisionmaker.²⁰⁵ This limited application of subordinate bias liability was sensible to the court in that it would not permit a biased subordinate without any decisionmaking authority to cause an employer to be liable merely because the subordinate may have influenced a decision.²⁰⁶ To hold otherwise, the court reasoned, would graft liability onto an employer for acts of employees who were not actually agents simply based on influence.²⁰⁷

Applying these principles to the facts of Hill's case, Lockheed could only be found liable if Fultz acted as a functional decisionmaker in

202. *Id.* In fact, the court reasoned that by virtue of incorporating agents into the definition of employer, Congress "evinced an intent to place some limits on the acts of employees for which employers are to be held responsible." *Id.* (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 F.3d 277, 287 (4th Cir. 2004)).

203. *Hill*, 354 F.3d at 287–89. The court discussed *Ellerth's* emphasis that tangible employment actions are generally the province of supervisors and official company acts, and *Shager v. Upjohn*, and *Reeves v. Sanderson's* finding that summary judgment is inappropriate in light of evidence that a subordinate was the actual decisionmaker in a termination proceeding. *Id.* at 287–88; *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 137 (2000); *Shager v. Upjohn*, 913 F.2d 398, 405 (7th Cir. 1990); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 763, 765 (1998).

204. *Hill*, 354 F.3d at 287–89 ("[T]he Court's clear emphasis upon who holds 'actual decisionmaking' power and authority or who has 'principal responsibility' for an employment decision is consistent with the limitations set forth in *Ellerth*.").

205. *Id.* at 290. The court also declined to "further parse" applications of the cat's paw doctrine, like other circuits. *Id.*

206. The court stated:

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

Id. at 291.

207. *Id.*

Hill's termination.²⁰⁸ The circumstances of Hill's second reprimand involved a missing tool, which Fultz reported to the lead person.²⁰⁹ The court heard evidence that Hill lied about not having the tool in a conversation with the lead person and determined that because the lead person investigated the matter personally, Fultz was not principally responsible for the second reprimand.²¹⁰ The events leading to Hill's third reprimand occurred several days after her return from suspension and involved discrepancies in the requirements of modification work orders on which Hill signed off.²¹¹ Fultz wrote six discrepancy reports based on Hill's work, which she asserted were "nitpicky and trivial," and issued in the context of his discriminatory comments toward her.²¹² Nevertheless, because the lead person conducted an independent investigation, individually investigated each discrepancy report, and found all but one to be accurate, Fultz could not be the actual decisionmaker in Hill's third reprimand either.²¹³ With respect to her overall termination, the court ruled that although Fultz brought issues of Hill's performance to his superior's attention, thus initiating the disciplinary and termination processes, Fultz could in no way be deemed "principally responsible" for her firing.²¹⁴

208. *Id.* at 294.

209. *Id.* at 292. Lockheed had a tool control policy that required mechanics to report lost tools; each mechanic had tools with their identification number printed on them. *Id.* Military employees at Fort Drum found cutters with Hill's identification on them and delivered them to Fultz, who reported and delivered the missing cutters to the lead person. *Id.* Although the evidence is disputed, the court found that when the lead person asked Hill about the missing cutters, she denied losing any tools. *Id.* at 292-93. The lead testified that had Hill admitted to losing the tool, she would not have been reprimanded. *Id.* at 295. Judge Michael's dissent however, gives a very different view of the circumstances leading to Hill's reprimands and termination. *Id.* at 300-01 (Michael, J., dissenting). His opinion states that Hill, owning three identical pairs of cutters, had no idea a pair was missing; in addition, Hill contended that Fultz lied to the lead person about her knowledge of the cutters, and his report caused the lead to believe Hill lied, which was the reason for her reprimand. *Id.*

210. *Id.* at 295 (majority opinion).

211. *Id.* Judge Michael's dissent also adds more context in a light favorable to Hill regarding the third reprimand. *Id.* at 300 (Michael, J., dissenting). Apparently, upon returning from suspension, Hill again complained to her lead person about Fultz's discriminatory conduct and the lead told Fultz that Hill initiated a complaint against him. *Id.* This caused Fultz to "react[] with noticeable anger towards Hill." *Id.*

212. *Id.* at 295-96 (majority opinion). In fact, Fultz wrote that each error was "minor," and had discretionary power to determine whether or not to write up small errors. *Id.* at 300 (Michael, J., dissenting).

213. *Id.* at 295-96 (majority opinion).

214. *Id.* at 297. Moreover, the court emphasized that the lead person made "independent, non-biased determinations" after each infraction reported by Fultz, and therefore, summary judgment in favor of Lockheed was appropriate. *Id.* Judge Michael's dissent discusses how management actually spoke with Fultz in great detail before making the ultimate determination to fire Hill. *Id.* at 301 (Michael, J., dissenting). Neither manager ever contacted Hill during their deliberations,

In a dissenting opinion,²¹⁵ Judge Michael expressed dissatisfaction with the court's adoption of the actual decisionmaker standard, describing the position as "at odds with virtually every other circuit" and the statutory language.²¹⁶ Judge Michael stated the standard rendered Title VII and the ADA "essentially toothless when it comes to protecting employees."²¹⁷ In addition, Judge Michael chided the court for failing to draw inferences in Hill's favor.²¹⁸ By overlooking causation, he argued that the majority opinion created a narrow standard that authorizes discriminatory employment actions simply because subordinates do not have managerial or supervisory power.²¹⁹ In Judge Michael's view, if a biased subordinate "substantially influences" an employment decision, regardless of whether he has supervisory responsibility, his bias should be imputed to the employer.²²⁰

2. Brewer v. Board of Trustees of University of Illinois

Although some scholarship following the decision in *Brewer v. Board of Trustees of University of Illinois* maintains that the Seventh Circuit follows the causation-based approach,²²¹ the opinion arguably aligns the Seventh Circuit with the Fourth Circuit in adhering to the actual decisionmaker standard.²²² Lonnell Brewer, the plaintiff,

which was a violation of Lockheed's policy. *Id.* Most interesting however, is that the managers "relied on Fultz to write and sign Hill's termination statement, a document explaining that Hill was fired because Fultz found her work to be unsatisfactory." *Id.*

215. Dissenting opinions were not published for any of the other cases discussed in this Part.

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

217. *Id.* at 299, 301. Three other circuit judges joined Judge Michael. *Id.* at 305.

218. *Id.* at 299. Taking the facts in the light most favorable to Hill, Judge Michael concluded that Fultz used his discretion in issuing safety violations to Hill and manipulated the lead person into issuing reprimands. *Id.* at 304–05. Fultz portrayed Hill "in the worst possible light" to her supervisors and managers, which, taken with the aforementioned, supported an inference that he "orchestrated those reprimands because of an animus toward Hill." *Id.* at 305. Finally, the dissent noted that the senior managers, those with the actual power to terminate Hill, did not exercise independent judgment in making their decision. *Id.* A significant lesson from the dissent's opinion is the importance of the appellate standard of review, because a comparison of the majority and dissent's description of the facts indicates that perhaps the majority did not take all reasonable inferences in Hill's favor. *Id.* at 282–83, 299, 300. Under the dissent's interpretation of the circumstances, "[t]he record also provides ample grounds for labeling Fultz as an actual decisionmaker," yet Judge Michael declined to delve into that issue in his opinion. *Id.* at 305.

219. *Id.* at 301.

220. *Id.* at 302.

221. See Brief of EEOC, *supra* note 29 (discussing *Lust v. Sealy*, 383 F.3d 580 (7th Cir. 2004), cited as the Seventh Circuit's approach using the causation standard).

222. For example, while *Brewer* was decided in March 2007, in June 2007, Angelo J. Genova and Francis J. Vernioia wrote an article stating that "[t]he Seventh Circuit has established a low threshold," and the article cited *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir.

brought this case against the University of Illinois alleging that it violated Titles VI and VII when it fired him based on his race and removed him from his graduate studies program.²²³ Brewer argued that the racial bias of his supervisor, Kerrin Thompson, should have been imputed to the University, as she caused his termination.²²⁴ The district court granted the University's motion for summary judgment, and the Seventh Circuit Court of Appeals affirmed.²²⁵

Brewer, who is black, was a student in the University's Institute of Labor and Industrial Relations master's program and, as part of the program, worked as a research assistant at the University's Personnel Services Office (PSO).²²⁶ Thompson, his supervisor, worked as assistant to the PSO Director, Denise Hendricks.²²⁷ When Brewer began his employment, Thompson explained the details of the job—specifically, where he could park while working at the PSO.²²⁸ Shortly thereafter, Brewer began to experience difficulty at the PSO, which he attributed to Thompson learning that his fiancée was white.²²⁹ Brewer

2004) for support. *Genova & Vernioia*, *supra* note 12, at 20. In May 2007, Loren Gesinky and Douglas B. Lipsky put the Seventh Circuit in the middle of the spectrum, citing its decision in *Lust*. Gesinsky & Lipsky, *supra* note 102, at 10. While the court did not explicitly adopt the Fourth Circuit's standard in *Brewer*, it recognized that its precedent on the cat's paw had not always been clear and stated that "the employee must possess so much influence as to basically be herself the true functional decisionmaker." *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 917, 919 (7th Cir. 2007), *cert denied*, 128 S. Ct. 357 (2007). In contrast, only three years prior, the Seventh Circuit stated in *Lust* that the *Hill* standard "is not the view of this court," and cited cases holding that subordinates may cause an employer to be liable where they are "able to influence the decision." *Lust*, 383 F.3d at 584–85 (quoting *Maarouf v. Walker Mfg. Co.*, 210 F.3d 750, 754 (7th Cir. 2000)). See also *Davis*, *supra* note 59, at 258 (analyzing the Seventh Circuit model as enunciated by *Shager*). Within the Seventh Circuit, uncertainty exists as to how significant a departure *Brewer* may have been. See *Staub v. Proctor Hosp.*, 2007 WL 2566259, at *2 (C.D. Ill. Aug. 16, 2007) (noting that the parties disagreed as to whether *Brewer* changed subordinate bias law or simply clarified it). As a further example of how muddled the characterizations of cat's paw cases can be in general, see *Fowler*, *supra* note 9, at 45, which calls the Fifth Circuit's approach in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000), a "middle of the road approach."

223. *Brewer*, 479 F.3d at 914. This discussion will primarily address Brewer's Title VII claim for his job termination. While his subsequent removal from his graduate studies program is related to the circumstances of his job, it is not as pertinent to this article's discussion.

224. *Id.*

225. *Id.* at 909.

226. *Id.* at 909–10.

227. *Id.* at 910, 917. Both Thompson and Hendricks were white. *Id.*

228. *Id.* at 910. The facts were taken in a light most favorable to Brewer and were significant to the events that followed. See *infra* note 249 (discussing how the court construed facts in favor of the University). According to Brewer, Thompson provided him with a temporary parking sticker that day and gestured to general areas where he could park. *Brewer*, 479 F.3d at 910. Brewer determined from her gesturing that he could park anywhere around the PSO vicinity. *Id.*

229. *Id.*

believed that Thompson became hostile toward him and attempted to embarrass him.²³⁰ Another black employee at the PSO warned him that Thompson was a racist and that Thompson had been overheard reproaching Brewer behind his back.²³¹

The event leading to Brewer's termination came during the spring semester and involved a problem with his parking pass.²³² Brewer received a parking ticket because his temporary pass broke off his rearview mirror.²³³ When he took the pass to the university's parking services to be replaced, parking services discovered that the PSO's parking application for Brewer contained inaccurate information.²³⁴ When Brewer went to speak with Thompson about the situation, Thompson became "irate," and told Brewer that he was not supposed to have a parking tag and should not have gone to parking services.²³⁵ Thompson explained that she had lied in filling out the parking application so Brewer could get a tag.²³⁶ Thompson rebuffed Brewer's claim that she had given him permission to park anywhere, stating she was "'through with you people' and that Brewer was 'a smart one.'"²³⁷

Brewer told Hendricks, Thompson's supervisor, that he had permission to park in the lot from Thompson and that Thompson had behaved in a racist manner toward him.²³⁸ Hendricks responded that those were issues between Thompson and Brewer.²³⁹ After examining the parking pass, Hendricks fired Brewer.²⁴⁰ At her deposition,

230. *Id.* For example, at his deposition, Brewer said that Thompson would ask people in the office where he was on days he was not supposed to work and did not allow him to work off-site at the University's facility for people with dyslexia. *Id.*

231. *Id.* at 911. This employee also warned Brewer that Thompson could influence Hendricks and advised him to keep his own record of the time spent on his work; thereafter, Brewer had the PSO secretary verify his time in the office. *Id.*

232. *Id.* at 913.

233. *Id.*

234. *Id.* Brewer wrote on the pass to say that he was authorized to park in the lot and Brewer admitted to adding the ILIR lot on without exact permission. *Id.*

235. *Id.*

236. *Id.* at 913, 917.

237. *Id.* at 913. In his deposition testimony, Brewer also stated that, as he left Thompson's office, she yelled, "I have had it with you nigger, get my tag!" *Id.*

238. *Id.*

239. *Id.* Again, these were the facts taken in a light most favorable to Brewer. It is disputed what exact conversations occurred between him and Hendricks.

240. *Id.* Hendricks knew that in general, a parking mishap did not warrant termination, but given PSO's "special relationship" with the parking authority, and the prospect of losing "parking flexibility" and paying an additional \$1,000 each year, Hendricks felt she needed to fire someone to please parking services. *Id.* While this will not address Brewer's removal from the ILIR graduate program, it is worth noting at this juncture that Brewer's termination from the PSO also affected the program's decision. *Id.* at 914.

Hendricks stated that she never spoke with Brewer about the parking situation but had she known that Thompson gave Brewer permission to write on the pass or that Thompson had acted with discriminatory animus, there would have been further conversation.²⁴¹

In analyzing Brewer's cat's paw claim that Thompson was responsible for his firing, the court recognized that in some situations, "what one employee says or doesn't say about another will control . . . or may even get an employee fired."²⁴² Indeed, the court noted that in this situation a reasonable jury could find that Thompson withheld relevant information from Hendricks, thereby exercising influence over the decision to fire Brewer, but only if a jury believed Hendricks' view of the facts.²⁴³ Even so, the court found that a minimal amount of influence was insufficient to hold an employer liable; the subordinate in question needed to exercise "singular influence."²⁴⁴ In this sense, the decisionmaker must be "totally dependent on another employee to supply the information on which to base that decision. . . . [T]he employee that selects, colors and supplies the information [must have] such power over the nominal decision maker that she is in fact the true, functional decisionmaker."²⁴⁵

Yet even in situations where a subordinate exercises such substantial control, the court emphasized that if a decisionmaker independently investigates facts, he is no longer beholden to the opinion of a biased employee and will no longer be liable.²⁴⁶ Thus, the employer will not be liable for such bias so long as the decisionmaker "independently

241. *Id.* at 913–14; *see also* Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at Additional Material Facts, ¶ 41, *Brewer v. Bd. of Trus. Of Univ. of Ill.*, 407 F. Supp. 2d 946 (C.D. Ill. Dec. 22, 2005) (citing Hendricks' deposition testimony that she did not seek Brewer's version of the story before taking action).

242. *Brewer*, 479 F.3d at 917. The court noted that this influence might be present in the context of performance reviews, supplying misinformation or failing to provide relevant information. *Id.*

243. *Id.* at 917. Under Brewer's view of the facts, the court found that Hendricks simply acted in a "cynical but non-racial" way, firing Brewer to curry favor with parking services. *Id.* Yet, the court stated that, ironically, Hendricks' spin on the events suggested that she fired Brewer for "dishonestly altering his parking tag," and, if she knew that he was not being dishonest in doing so, it might be a different story. *Id.* Under this scenario, a jury could find that Thompson withheld information that Brewer did not act in a dishonest manner, thus influencing Brewer's termination. *Id.*

244. *Id.* (citing the Seventh Circuit's position in *Rozskowiak v. Vill. of Arlington Heights*, 415 F.3d 608, 613 (7th Cir. 2005)).

245. *Brewer*, 479 F.3d at 918.

246. *Id.* (citing *Byrd v. Ill. Dep't of Pub. Health*, 423 F.3d 696, 708 (7th Cir. 2005); *Willis v. Marion Cty. Auditor's Office*, 118 F.3d 542, 547 (1997)).

considers both stories.”²⁴⁷ In Brewer’s case, the court determined that such an independent investigation occurred when Hendricks personally examined the parking tag at issue and saw for herself that Brewer altered it.²⁴⁸ Moreover, Hendricks had no responsibility to contemplate that Thompson withheld information from her because, according to the court, “Brewer never claimed that Thompson was holding anything back.”²⁴⁹ Given this independent investigation and that Hendricks terminated Brewer for misconduct, Thompson’s racial animus did not singularly influence the employment action and could not be imputed to the University.²⁵⁰

Finally, the court clarified its position regarding subordinate bias liability, noting that its “approach to Title VII cases involving an employee’s influence over a decision maker has not always been completely clear.”²⁵¹ The court explained that its prior cases should not be construed to permit “significant influence” or “any influence” as sufficient to impose liability on an employer, calling the dicta “doubtful” and “at odds with numerous cases.”²⁵² While the *Brewer* court did not explicitly adopt the actual decisionmaker standard, its use of terms nearly identical to those used by the Fourth Circuit in *Hill*—“actual decisionmaker” and “principally responsible”—certainly draw

247. *Brewer*, 479 F.3d at 918. The court urged that independent investigations make sense given the practical realities of business and employment decisions. *Id.* at 920. Furthermore, the investigations should be seen from the view of Title VII’s objectives, which is not to provide redress, but to give employers an incentive to keep their employees’ behavior in check. *Id.* With that understanding, only acts that an employer could reasonably prevent should be allowed to impose liability. *Id.*

248. *Id.* at 919.

249. *Id.* It is difficult to understand the court’s finding that Brewer never claimed Thompson withheld information, seeing as earlier in the opinion, the court wrote, “Brewer told Hendricks that Thompson gave him permission to park in the C8 lot. He also said that Thompson could not be trusted to confirm this because she was a racist and wanted him fired . . .” *Id.* at 913, 919. While these facts are certainly disputed, the court’s finding that Brewer never informed Hendricks that Thompson omitted information seems to be taking facts in the University’s favor rather than Brewer’s. In fact, the court stated that the University investigated all of Brewer’s claims, “including all arguments Brewer made to the University that his mistake was innocent (*according to Hendricks’s account*, he made none).” *Id.* at 921 (emphasis added). The court implies that, had Hendricks known that Thompson withheld information from her, Hendricks would have had an obligation to further investigate. *Id.* at 919. Therefore, given Brewer’s assertion that he did provide Hendricks with such information, it appears that the facts, taken in Brewer’s favor, demonstrate that Hendricks did not perform a sufficient independent investigation. *Id.*

250. *Id.* at 919.

251. *Id.*

252. *Id.*

into question the Seventh Circuit's position on the subordinate bias spectrum.²⁵³

Thus, the circuit courts remain in disagreement as to the amount of influence a biased subordinate must have on the decisionmaking process to trigger employer liability.²⁵⁴ Where a court falls on the spectrum of cat's paw liability depends on that particular court's interpretation of Title VII and what that court deems an appropriate balance between the need for employee redress and employer protections.²⁵⁵ This Comment will next address the varying philosophies behind each model of subordinate liability.²⁵⁶

IV. ANALYSIS

Essentially, the debate surrounding the application of these models is a normative one, depending in significant part on the courts' underlying philosophies of employer liability.²⁵⁷ Having examined cases that illustrate the varying standards of subordinate bias liability, this section will delve further into the philosophy behind each stream and address the merits and disadvantages of adopting the input,²⁵⁸ actual-decisionmaker,²⁵⁹ and causation²⁶⁰ standards.

A. The Input Model Fails to Provide an Adequate Incentive for Employers to Avoid Liability Because the Standard Is Unfeasible

The input standard serves as the most lenient model for cat's paw liability by holding an employer potentially liable if a biased subordinate "influenced" the decisionmaking process.²⁶¹ However,

253. Compare *Hill v. Lockheed Martin Logistics Mgmt. Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (using terms such as "actual decisionmaker" and one "principally responsible for"), with *Brewer*, 479 F.3d at 917 (requiring that a subordinate exercise "singular influence").

254. *Genova & Vernioia*, *supra* note 12, at 21.

255. See *Gesinsky & Lipsky*, *supra* note 102, at 10 (noting that applications of subordinate bias liability are no more than "attempt[s] to apply some form of a normative standard"); *Norton*, *supra* note 9 (discussing the various beliefs of different groups' views on cat's paw litigation).

256. See *infra* Part IV (explaining why the circuits adopt the input, causation, or actual-decisionmaker models).

257. *Gesinsky & Lipsky*, *supra* note 102, at 10.

258. See *infra* Part IV.A (discussing how the input standard provides the best avenue for plaintiffs, but may work contrary to the principles of Title VII by not providing employers with an adequate method to protect themselves from liability).

259. See *infra* Part IV.B (noting that employers favor the actual decisionmaker approach as it seeks to avoid strict vicarious liability, but finding that it is overly harsh and its terms do not mirror those in Title VII).

260. See *infra* Part IV.C (discussing the causation model as an appropriately tailored middle ground framework, but noting that the terms of Title VII may draw into question its accuracy).

261. *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 486-87 (10th Cir. 2006), *cert.*

allowing employer liability based on mere input largely ignores the principles embodied in Title VII, such as deterring employer misconduct.²⁶² This standard, employed by the Fifth Circuit, provides the greatest opportunity for a plaintiff to proceed in litigating an employment discrimination claim.²⁶³ By only requiring that a subordinate exert influence over a decisionmaker, the lower threshold makes genuine issues of material fact more likely, thereby permitting juries to assess whether discriminatory actions affected adverse employment actions.²⁶⁴ Support for this view may also be found in the language of Title VII.²⁶⁵ Some scholars argue that the 1991 amendments—which added that plaintiffs need only demonstrate that a prohibited classification was a “motivating factor” for an employment decision—suggest a lower threshold is required and may remove but-for causation from any determination.²⁶⁶

Certain studies also lend support to the input standard by highlighting the potentially pervasive influence unconscious biases have in the workplace.²⁶⁷ Investigations into the cognitive processes of suggestion indicate that how people think—and how bias often comes about—is a matter of deep subconsciousness.²⁶⁸ Recommendations become “tentative hypotheses,” and people unconsciously seek to confirm these recommendations in their interactions with others.²⁶⁹ To the

granted, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007).

262. *Id.*

263. Gesinsky & Lipsky, *supra* note 102, at 10 (stating that the Fifth Circuit “seemingly espoused in *Russell v. McKinney Hosp. Venture* the most pro-plaintiff standard”); Coyle, *supra* note 51, at 25; *see also* Julie Miller, *High Court to Hear ‘Cat’s Paw’ Liability Case*, INSIDE COUNSEL, Apr. 2007, available at <http://www.insidecounsel.com/section/litigation/1042> (noting that the Fifth Circuit stands on the “employee-friendly” end of the subordinate bias spectrum).

264. Genova & Vernoia, *supra* note 12, at 21. Where this standard applies, a plaintiff may merely attempt to show that a prohibited trait was given any consideration by an ultimate decisionmaker or HR official. Needle, *supra* note 185, at 53–54.

265. 42 U.S.C. § 2000e (2000).

266. White & Krieger, *supra* note 45, at 504–05; *see also* Brewer Petition, *supra* note 8, at 25 (“The 1991 amendment makes it explicit that an employer may be found liable when it or its agents use race as a *factor* in making an employment decision.”).

267. White & Krieger, *supra* note 45, at 499. Though White and Krieger ultimately argue for a causation-based approach, their insights into unconscious discrimination help highlight that perhaps a more lenient standard is necessary to adequately reflect the complexity of modern discrimination. *See also* Green, *supra* note 5, at 379 (discussing social science research that employers “filter information to confirm a hypothesis”).

268. *Id.* at 499.

269. *See* White & Krieger, *supra* note 45, at 524 (noting that courts often assume that decisionmakers who receive recommendations and then conduct an investigation of their own “approach[] the decision *de novo*,” but that “[c]ognitive social psychology teaches that this is not a reasonable assumption”) Further, recommendations “tend to function as a prior theory—a tentative hypothesis” and “can reasonably be expected to influence the ultimate decision maker’s

extent that biases may be filtered through the workplace on an undetected, subconscious level, the lower “influence” standard for establishing discrimination makes sense if a plaintiff can prove such leverage.²⁷⁰ Though not necessarily advocating for the lenient standard, some employment lawyers have stated that because unlawful motivations taint the decisionmaking process, the decision itself is simply unlawful.²⁷¹ Simply because other non-biased participants may have also been part of a decision cannot reverse the spoiled determination.²⁷²

Some legal scholars argue that as workplace boundaries diminish, unconscious biases create issues that current discrimination statutes simply cannot address.²⁷³ These scholars contend that the nature of the modern, flexible workforce and disapproval of overt discrimination makes bias operate at multiple stages of employment, not in singular concrete instances.²⁷⁴ Employers structure their companies to allocate work and responsibility as they deem efficient.²⁷⁵ Those structural decisions inevitably influence how employment decisions are made.²⁷⁶ Procedures in the workplace or the general work culture may influence

judgment in a recommendation-consistent direction, *even if he conducts his own investigation.*” *Id.* White & Krieger provide as an example the statement, “Mary is a poor performer and should be fired,” and argue that a decisionmaker who hears this comment will tend to seek information that confirms this statement or interpret information as confirming it. *Id.* at 525–26. *See also* Recent Cases, *supra* note 5, at 1704 (“When anchored to a presupposition of guilt, the decisionmaker may conduct the investigation in a manner tending to uncover evidence that confirms the expectation created by the supervisor.”).

270. *See* Bagenstos, *supra* note 6, at 3 (by inference, if biased opinions consistently fly below the radar in the workplace, then requiring a lower influence threshold may make sense to best address the current realities of discrimination). Simply by “spinning” facts in a way reflecting their bias, an employee can exert influence. White & Krieger, *supra* note 45, at 515.

271. Coyle, *supra* note 51, at 25.

272. *Id.*

273. Bagenstos, *supra* note 6, at 3; Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 461 (2001).

274. Bagenstos, *supra* note 6, at 13; Sturm, *supra* note 273, at 469. For instance, the Implicit Association Test (IAT), which “measures differences in the speed of cognitive processing in order to identify biases not found in response to explicit questioning,” indicates that there is a “substantial dissociation between explicit and implicit beliefs and attitudes regarding race and sex.” Green, *supra* note 273, at 855. The IAT test may be viewed at <https://implicit.harvard.edu/implicit/>. A recent study also found that resumes with white-sounding names had a fifty percent better chance of receiving a call-back than African-American sounding names. *Id.* at 856. These studies indicate that modern-day biases are more covert, and represent unique challenges to current employment discrimination law.

275. *See* Klein, *supra* note 6, at 46–47 (discussing workplace structural changes implemented by employers to increase efficiency).

276. Green, *supra* note 273, at 890.

the amount of unconscious discrimination.²⁷⁷ In response, the legal system must find a way to address biases that develop because of a company's organization.²⁷⁸ To the extent that an employer uses committees or lower-level personnel to make employment decisions, it is reasonable to argue that the law should recognize the potential for a biased employee to affect the process.²⁷⁹

Further supporting the philosophy underlying the input standard is the general understanding of power.²⁸⁰ As argued by the plaintiff in *Russell* in her brief to the Fifth Circuit Court of Appeals:

Power is a perception, an idea Actual power within an organization does not depend on some chart created by [a] well-meaning corporate bureaucrat. Actual power within an organization depends in large part on the relationship of the individuals within the organization and their perception of the power of other individuals within the organization.²⁸¹

Recognizing the influence that power may have on employment structures not only calls into question the value of the actual decisionmaker standard, as discussed in Part IV.B,²⁸² but also highlights the advantages of a more lenient standard.²⁸³

Nonetheless, many circuits reject this model as overly tolerant of plaintiffs' accusations of discrimination.²⁸⁴ Permitting a "weak" or "peripheral" relationship to impute liability to an employer eliminates causation—a significant aspect included in Title VII—and has no deterrent effect on employers.²⁸⁵ Arguably then, even if an employer

277. *Id.* at 856–57. Some social science research also indicates that the race of an authority figure may influence the bias in subordinates. *Id.* at 856.

278. *See id.* at 850 (noting that Title VII is "fall[ing] short" of addressing present discrimination problems in the workplace).

279. Green, *supra* note 273, at 856–57; White & Krieger, *supra* note 45, at 538.

280. Russell Brief, *supra* note 72, at 20–21.

281. *Id.*

282. *See infra* Part IV.B (discussing that by using the actual decisionmaker standard, courts will not move toward establishing strict vicarious liability for employers).

283. *See* Russell Brief, *supra* note 72, at 21 (arguing that the jury had ample evidence to determine that Ciulla, the subordinate, had such power to make or influence the termination decision).

284. *See* EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 486–87 (10th Cir. 2006) (calling influence or input standards "weak"), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004) (finding no precedent that would allow an employer to be liable for the acts of an employee simply because they influenced a decision).

285. *BCI*, 450 F.3d at 486–87. Under this view, the court argued that employers would be punished "for any 'input'—no matter how minor . . . even where an employer has diligently conducted an independent investigation." *Id.* at 487. It has been argued that the lenient standard serves to disserve the very aims of Title VII:

made a full inquiry and found a valid reason for terminating an employee, that employee could still pursue a discrimination claim if she demonstrated that her racist supervisor had some degree of influence on the process.²⁸⁶ Because Title VII was designed in part to give employers incentives to implement anti-discrimination and anti-harassment mechanisms, allowing claims to progress regardless of an employer's preventative measures would seem to undercut these aims.²⁸⁷ From a policy perspective, a balance must be struck between the difficult evidentiary hurdles facing plaintiffs and the danger of holding employers liable for actions of non-authoritative employees.²⁸⁸ Under this standard, if employees can move forward merely by demonstrating that a subordinate influenced an adverse employment action, employers can be constantly bombarded with costly litigation.²⁸⁹

B. The Actual Decisionmaker Standard Is Contrary to the Terms of Title VII and Imposes Too High a Threshold for Liability

At the opposite end of the subordinate liability spectrum, proponents of the actual decisionmaker standard rely on Supreme Court precedent from other Title VII cases to support their view that an employer should only be liable for acts of a subordinate employee when that employee was "principally responsible" for, or the actual decisionmaker in, an adverse employment action.²⁹⁰ Citing the Court's analyses in *Reeves v.*

Because the lenient standard allows employees to recover even if an employer has complied with Title VII, the employer's incentive to aggressively identify and eliminate discrimination through responsible company policies and structure is significantly diminished. Such a result is directly contrary to the objectives of Title VII. Courts should not endorse any standard of imputing liability that creates such a paradox, because to do so would cause severe detriment to employers and employees alike.

The Legal Scoop Blog, *Circuit Split: Cat's Paw Liability*, Jan. 29, 2008, <http://www.thelegalscoop.com/legalscoopblog/2008/1/29/circuit-split-cats-paw-liability.html>.

286. See *BCI*, 450 F.3d at 486–87.

287. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 920 (7th Cir. 2007), cert. denied, 128 S. Ct. 357 (2007) (noting Title VII's history and stating that "[i]mposing liability for employee wrongs that an employer could not practically prevent (that is, could prevent only with prohibitive expense or through unreasonable efforts) would not induce employers to impose additional controls on its employees and would therefore not be effective to avoid any harm").

288. See Brief of U.S. Chamber of Commerce, *supra* note 66, at 22–25 (arguing that the Tenth Circuit assumed vicarious liability and would "automatically impose[] vicarious liability on an employer once causation is established").

289. See Coyle, *supra* note 51, at 25 (quoting *BCI* attorneys criticizing the causation standard, but stating that so many employees "influence" the decisionmaking process that litigation would be "boundless").

290. Brief in Opposition to Petition for Writ of Certiorari at 6–7, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (No. 03-1443), 2004 WL 1243067 [hereinafter *Lockheed Brief*].

Sanderson Plumbing Products, Inc. and Ellerth, advocates contend that the Court favors liability where sufficient evidence exists to demonstrate that the subordinate was essentially the person making the adverse decision.²⁹¹

Although the Supreme Court has yet to explicitly examine the cat's paw doctrine, its past decisions may shed light on the limitations it would impose.²⁹² Past use of causation *and* agency principles in employment cases may indicate that even with regard to subordinates, cat's paw liability may only extend to certain subordinates who fall under the typical conception of an "agent."²⁹³ By including agency in the standard, even if a plaintiff demonstrates that another employee caused an adverse employment action through his discriminatory animus, the employer will not be liable unless that employee exercised sufficient authority to be deemed an agent.²⁹⁴

As support for inclusion of agency principles, some argue that Congress' qualification of employer to include "any agent of the employer,"²⁹⁵ surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."²⁹⁶ Though the Restatement of Agency states that an agent's acts outside the scope of employment will not bring liability unless he was "aided . . . by the existence of the agency relation,"²⁹⁷ the exact contours of this standard are uncertain.²⁹⁸ Those in favor of the

291. *Id.* at 5–6. In *Reeves*, the Court determined what kind of evidence was necessary to sustain a jury's verdict for age discrimination and whether judgment as a matter of law could stand if the plaintiff's case used comprised only a prima facie case of discrimination and evidence of pretext. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 137 (2000). The Court ruled that judgment as a matter of law was inappropriate, as plaintiff established his prima facie case of discrimination and created a jury issue regarding pretext, and additionally, provided evidence that his superior was motivated by age-based animus. *Id.* at 151. The plaintiff introduced evidence to show that the superior, husband of the company's president, was the actual decisionmaker in the firing decision. *Id.* at 152. The Court, however, did not discuss subordinate bias liability explicitly.

292. See Brief of U.S. Chamber of Commerce, *supra* note 66, at 2–4 (summarizing the argument that causation and agency are necessary under past Supreme Court jurisprudence).

293. See generally *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 756–65 (1998) (evaluating the role of agency in employment cases and Title VII).

294. See Brief of U.S. Chamber of Commerce, *supra* note 66, at 11 ("Thus, for liability to be imposed, a legal rule allowing imposition of agency-based liability is also required; and, for that reason, even where causation exists, liability does not always lie.").

295. 42 U.S.C. § 2000e(b) (2000).

296. Brief of U.S. Chamber of Commerce, *supra* note 66, at 12 (quoting *Meritor Savs. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)).

297. *Id.* at 13 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)).

298. Compare *Ellerth*, 524 U.S. at 760 (noting that "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation," but more than the

actual decisionmaker standard contend that the Court should be hesitant to interpret the aided by the agency relationship standard too literally, as “[i]t would unreasonably impose strict liability on employers for many a frolic and detour that the employer simply cannot reasonably control or prevent.”²⁹⁹

It is precisely this fear of virtual strict liability that causes many advocates to favor a stricter standard.³⁰⁰ The U.S. Chamber of Commerce, as amicus curiae in support of BCI’s petition to the Supreme Court, argued that the Tenth Circuit’s standard would propose a “wholly unworkable and impracticable standard” for employers, requiring them to invest an unreasonable amount of time to ensure compliance.³⁰¹ In abandoning an inquiry into agency, the Chamber argued that the Tenth Circuit “effectively inaugurated a regime that automatically imposes vicarious liability on an employer once causation is established,” contrary to Supreme Court jurisprudence.³⁰²

The significant problem with proponents’ emphasis on agency is that it glosses over the fact that subordinate bias liability often arises in circumstances where *supervisors*, or those acting with *delegated authority*,³⁰³ misuse their power to effectuate an adverse employment

employment relation itself is needed), *with Faragher v. City of Boca Raton*, 524 U.S. 775, 802 (1998) (arguing that the illustrations to the aided by the agency relation standard articulated in the Restatement “make clear that it covers . . . [cases] in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship”)

299. Brief of U.S. Chamber of Commerce, *supra* note 66, at 13.

300. *See id.* at 2 (arguing that the EEOC “seeks to establish a strict liability regime that would penalize employers for any acts by employees in the workplace that arguably have a factual connection to an adverse employment action”).

301. *Id.* at 22. This critique centered in large part on the court’s discussions of independent investigations, but the Chamber of Commerce also found that the court did not consider agency principles properly. *Id.* at 22–26.

302. *Id.* at 24–25. As support, the Chamber of Commerce cited *Faragher*’s reminder that an employer will not be automatically liable for harassment. *Id.* at 25 (citing *Faragher*, 524 U.S. at 804).

303. Brief of U.S. Chamber of Commerce, *supra* note 66, at 20. The Chamber of Commerce argues that, “there is no exercise of official delegated authority even by a direct supervisor of the plaintiff where that supervisor’s actions are not part of his official delegated duties.” *Id.* Yet this standard is overly harsh, as it permits a supervisor in an influential position to parlay his authority in a prohibited manner without responsibility. As the court noted in *Faragher*, the aided by the agency relation allows employers to be liable for conduct of their employees “made possible by abuse of his supervisory authority.” *Faragher*, 524 U.S. at 802. If a supervisor or employee lacking decisionmaking power uses his position and knowledge—say, from performance evaluations—to further his discriminatory motivations, even though that employee is not exercising a specifically delegated position, he is still relying on his authority in satisfying his objective. If the employer takes the employee at his word and does not complete an independent investigation, the employer should not be off the hook simply because the employee did not act pursuant to an official delegated duty. As also noted in *Faragher*, “When a person with

action.³⁰⁴ In focusing on the agency relationship, these advocates seem to suggest that the courts are a step away from holding that any random employee may subject an employer to liability.³⁰⁵ Yet the Supreme Court has noted that not all agency concepts may be adaptable to Title VII jurisprudence, though still generally eschewing the notion of holding employers automatically liable for the conduct of employees.³⁰⁶ Given the principle of *stare decisis*, it seems reasonable to infer that the courts are not in danger of succumbing to a strict liability standard for employers.³⁰⁷ Therefore, it is unnecessary to argue that the actual

supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position" *Id.* at 803.

304. Brief of EEOC, *supra* note 29, at 17. See generally *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 913–17 (7th Cir. 2007) (reviewing parking incident that led to Brewer's termination, and his desire to hold the University responsible for the discriminatory conduct of his supervisor, Thompson), *cert. denied*, 128 S. Ct. 357 (2007); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 478–83 (10th Cir. 2006) (discussing factual background of Peters' case against BCI and how Peters sought to impute the discriminatory motives of his supervisor, Grado, to BCI), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 282–83 (4th Cir. 2004) (Hill based her claim on the discriminatory animus of her safety inspector, Fultz). Conversely, *Russell* dealt with the discrimination of a non-supervisory employee, Ciulla, but the court found that because Ciulla was the son of the parent company's CEO, he wielded greater authority than the typical employee. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 225, 227–28 (5th Cir. 2000). The Supreme Court recognized the possibility of such influence in *Reeves* as well, in the context of a husband influencing his wife, the president of the company. *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 152 (2000). The dissent in *Hill* also noted that "[b]iased subordinates without decisionmaking authority often influence these decisions." *Hill*, 354 F.3d at 299 (Michael, J., dissenting).

305. The *Hill* court stated:

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

Hill, 354 F.3d at 291; see also Brief of U.S. Chamber of Commerce, *supra* note 66, at 24–25 (arguing that the Tenth Circuit is imposing vicarious liability on an employer simply based on causation).

306. *Faragher*, 524 U.S. at 803–04; see also RESTATEMENT (THIRD) OF AGENCY, Introduction 8–9 (2006).

307. *Faragher*, 524 U.S. at 804 (acknowledging that the Court is bound to follow *stare decisis* and the terms outlined in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), regarding vicarious liability). In fact, it seems that proponents of the strict standard intertwine the cat's paw doctrine with the "rubber stamp" doctrine. *BCI*, 450 F.3d at 484. While the two phrases may be used interchangeably, rubber stamp "refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate." *Id.* By finding that employers should only be liable when a subordinate serves as the actual decisionmaker, it essentially holds that only rubber stamp situations will bring liability, ignoring a whole line of cat's paw cases where subordinates, as cunning monkeys in the fable, induce their employers—the cats—to burn their hands in the fire. *Id.* at 484, 490–93.

decisionmaker standard is appropriate simply as a guard against unlimited liability.

Regardless of whether cat's paw cases involve the traditional agency relationship, they rely on the premise that the subordinate acted in a way to effectuate an adverse employment action through discriminatory means.³⁰⁸ This is true despite what power the subordinate is supposed to exercise in the official employment structure.³⁰⁹ As proponents of the actual decisionmaker model concede, adhering to this paradigm completely ignores the fact that a subordinate *caused* the adverse employment decision through his discriminatory animus.³¹⁰ To dismiss an otherwise valid claim simply because the perpetrator was not vested with the appropriate title would lead to unjust results.³¹¹ To abide by a structure that ignores causation goes against the terms of Title VII and would allow employers to create hierarchies that would avoid liability, even where it is proven that discrimination caused a tangible

308. See Gesinsky & Lipsky, *supra* note 102, at 10 (noting that plaintiffs may bring cat's paw claims where they suffered an adverse employment action).

309. See generally *supra* Part III (describing the facts of representative cat's paw cases and the relevant employment structures). Yet even in cases where a subordinate did not act pursuant to his employment duties, such as in *Russell*, courts—including the Supreme Court—have recognized that ordinary employees can exert substantial influence in certain situations to effectuate an employment decision. See *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 152 (2000) (detailing how an ordinary employee wielded "absolute power" over employees purportedly on his own level); *Russell*, 235 F.3d at 228–29 (discussing the level of "informal" influence Ciulla held within the company). Typically, the analyses in these cases do not follow a mechanical discussion of whether the subordinate at issue is an "agent" within the meaning of the statute. See generally *Reeves*, 530 U.S. at 149–54 (in evaluating whether judgment as a matter of law was appropriate, not addressing whether subordinate was an "agent"); *Russell*, 235 F.3d at 228–29 (stating that the evidence *Russell* relied on to show Ciulla influenced her termination, but not discussing agency principles). Even *Hill* did not rest its holding on finding that Fultz was not an "agent," but rather held that he did not exert enough influence to be considered the actual decisionmaker. *Hill*, 354 F.3d at 297. Thus, to the extent that some proponents of a stricter standard focus on agency, it is not necessarily an integral aspect of the actual decisionmaker standard. See generally *id.* at 289–91 (while discussing agency in its holding, the court in *Hill* did not proceed through any specific analysis of why Fultz was or was not an "agent"). Rarer are cases such as *Russell*, where the influence of an ordinary employee is at issue. *Russell*, 235 F.3d at 221.

310. Brief of U.S. Chamber of Commerce, *supra* note 66, at 11; *Hill*, 354 F.3d at 299 (Michael, J., dissenting). In essence then, under this model, a court can say to a plaintiff, "You set out sufficient evidence that your project supervisor caused your firing through her discriminatory motives, and, had she not acted in such a way, you would undoubtedly still have your job, but because her specific job duties only included rating your performance, we really can't do anything about it here." See also White & Krieger, *supra* note 45, at 499 (arguing that the actual decisionmaker standard "would require a finding against the plaintiff in too many contexts in which even conscious, deliberate discrimination by an agent of the employer, acting within the course and scope of his employment, had caused the challenged action to be taken").

311. See Brief of EEOC, *supra* note 29, at 32 (by inference, admitting that a stricter standard would not fulfill the purposes of Title VII).

employment decision.³¹² Courts acknowledge that companies' work structures often do not mirror the decisionmaking process,³¹³ and to take the metaphors used in these cases—cat's paws and rubber stamps—too literally misses the purpose of these doctrines.³¹⁴ As the Tenth Circuit noted in *BCI*, “[s]tripped of their metaphors, subordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial bias can taint any of those functions.”³¹⁵

Further, a significant criticism of the actual decisionmaker standard is that it is “at odds” with nearly every circuit as well as the language of Title VII.³¹⁶ Focusing on who is the actual decisionmaker or the one “principally responsible” for an employment decision is curious because Title VII never discusses the term “decisionmaker,” only agents of employers.³¹⁷ To restrict liability to those who can be deemed actual decisionmakers seems wholly contrary to the statutory principles at issue.³¹⁸

C. The Causation Standard Exemplifies Title VII and Strikes the Appropriate Balance Between Employers and Employees

As the middle ground between two extremes, the causation standard is an appealing model.³¹⁹ It effects the purposes of Title VII and achieves a balance between the realities employers face in structuring their businesses and the need for appropriate redress for plaintiffs.³²⁰

312. See *Russell*, 235 F.3d at 227 n.13 (in discussing opinions of sister circuits, the court commented that if it “adhered to a rigid formalistic application, employers could easily insulate themselves from liability by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the ‘actual decisionmaker’ guideline”); see also *BCI*, 450 F.3d at 486 (the importance of recognizing subordinate bias claims is that it “forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations”).

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

314. *Id.*

315. *Id.* at 488.

316. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 299 (4th Cir. 2004) (Michael, J., dissenting).

317. *BCI*, 450 F.3d at 487. In fact, the court referred to *Hill*'s use of the decisionmaker term as “peculiar.” *Id.*

318. *Id.* As 42 U.S.C. § 2000e(b) mentions employers and their agents, “which in accordance with agency law principles includes not only ‘decisionmakers’ but other agents whose actions, aided by the agency relation, cause injury.” 42 U.S.C. § 2000e(b) (2000).

319. See *supra* Parts IV.A, IV.B (evaluating the merits of the input standard and actual decisionmaker standard).

320. See Brief of EEOC, *supra* note 29, at 32 (arguing that the causation standard “advances the objectives of Title VII . . . but also will help weed out insubstantial claims”). Nonetheless,

The standard conforms to the statutory language of Title VII and past jurisprudence³²¹ and uses basic tort principles as a guide, making subordinate bias claims capable of equal application across the nation rather than “parsing” court-invented metaphors and definitions.³²²

Title VII states that it is unlawful for an employer to discriminate against a person “*because of*” race, color, religion, sex, or national origin.³²³ From this, courts have found that it is appropriate to consider liability for an employer where an employee *causes* harm by misusing authority.³²⁴ Thus, from a statutory perspective alone, this middle-ground approach is an appropriate mechanism for evaluating subordinate bias claims.³²⁵

The causation approach is also sensible because of its universality.³²⁶ Whereas assessing whether an employee is an “actual decisionmaker,” “functional decisionmaker,” one “principally responsible for,” or one who “influenced” an action is a function of semantics, causation principles are well-defined and widely understood by the courts.³²⁷

Fowler argues the approach by the Tenth Circuit “should give any employer pause, because it presents the very real danger that an employer may be liable for a bigoted subordinate even though the ultimate decisionmaker is completely innocent.” Fowler, *supra* note 9, at 46. Surely, an employer should be cautious, but as Fowler notes, this approach does provide a mechanism by which an employer, vigilant in its investigations, may avoid liability. *Id.*

321. *BCI*, 450 F.3d at 487–88 (discussing how causation agrees with the agency principles and citing employment discrimination cases where the Supreme Court used causation). *See also* Brief of EEOC, *supra* note 29, at 31–32 (providing additional examples of the Supreme Court’s use of causation in Title VII cases).

322. *See* Brief of EEOC, *supra* note 29, at 32 (advocating that “[t]he causation standard of tort provides a well-known and workable standard for determining when an employer may be vicariously liable”); *see also* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 290 (4th Cir. 2004) (“[W]e decline the opportunity to further parse the varying applications of the cat’s paw or rubber stamp theory as employed by our sister circuits.”).

323. 42 U.S.C. § 2000e-2(a)(1) (2000) (emphasis added).

324. *See* Brief of EEOC, *supra* note 29, at 30 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) and Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 764 (1998), as supporting an inquiry into causation).

325. As the Supreme Court has stated, where a statute is “clear and unambiguous,” its intent must be given full effect. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 282 (1988). For an additional discussion of the merits of the Tenth Circuit’s approach, see Taran S. Kaler, *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, 1092 (2008).

326. Brief of EEOC, *supra* note 29, at 32.

327. *See* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 290 (4th Cir. 2004), (declining to further parse the applications of the cat’s paw doctrine); *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 486–88 (10th Cir. 2006), (discussing various terms used by the courts to analyze cat’s paw liability and finding no reason to limit situations based on the “metaphors that imaginative lawyers and judges have developed to describe such claims”), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); *see also* Davis, *supra* note 59, at 262

Using established evidentiary guidelines—in the same way courts do in cases of circumstantial evidence—fact finders can determine if prohibited classifications caused an employment action.³²⁸ Causation provides a mechanism to root out baseless cases through the same processes used in more typical employment discrimination cases.³²⁹

The causation standard also strikes a balance between the interests of employers and employees in that, through independent investigations, employers may break the chain of proximate cause.³³⁰ The standard provides employers with an incentive to train supervisors appropriately and create cogent anti-discrimination policies.³³¹ While some argue that requiring such investigations would overly burden employers,³³² the Supreme Court has previously acknowledged that employers are in the best position to guard against misconduct by their supervisors.³³³ Using a model that encourages employers to check their employees serves Title VII's deterrent purpose better than the actual decisionmaker standard, which allows employers to shield themselves from liability by creating an intricate management structure.³³⁴ Furthermore, relative to the cost of litigating the claim, the burden that independent investigations might impose would not be substantial.³³⁵

(noting that “[t]he difference between one who is ‘principally responsible’ and one who is a ‘substantial influence’ is ‘merely semantic’”).

328. White & Krieger, *supra* note 45, at 510–11.

329. Brief of EEOC, *supra* note 29, at 32.

330. See *BCI*, 450 F.3d at 488 (“[T]he employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. . . . Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class.”). For a further discussion on independent investigations, see *infra* Part V.B (discussing how independent investigations should properly be utilized under the causation standard, consistent with the spirit of Title VII).

331. See Norton, *supra* note 9 (noting that the Tenth Circuit’s proposal in *BCI* seeks to “encourage employers to select and train their supervisors carefully, thus rooting out bias and preventing future discrimination”).

332. Brief of Amici Curiae of the Equal Employment Advisory Council and the Chamber of Commerce of the U.S. in Support of the Defendant-Appellee and in Support of Affirmance at 7, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (No. 01-1359).

333. The Court stated:

Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim’s employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.

Faragher v. City of Boca Raton, 524 U.S. 775, 803 (1998).

334. *BCI*, 450 F.3d at 486; see also Norton, *supra* note 9 (discussing the position of the federal government and civil rights organizations regarding the deterrence benefits of broadening subordinate liability beyond the “actual decisionmaker” model).

335. See HRCRR, *Internal Investigations*, *supra* note 14, at 2 (noting that early investigations

The efficacy of independent investigations nevertheless presents a challenge to properly applying the causation model.³³⁶ If employers are permitted to evade this requirement by conducting non-independent inquiries, the utility of this model will be destroyed.³³⁷ The importance of independent investigations will be discussed in Part V.B.³³⁸

V. PROPOSAL

This section proposes that the Supreme Court should consider a subordinate bias liability case in the near future to finally resolve the conflict between the circuits. When the Court does, it should adopt the Tenth Circuit's causation-based approach.³³⁹ In doing so, it is imperative that the Court emphasize the necessity of meaningful independent investigations to break the chain of causation.³⁴⁰

A. *The Supreme Court Should Examine a Cat's Paw Case and Adopt the Causation Model*

The Supreme Court recognized this circuit split and its importance twice in the past three years, granting certiorari in the *BCI* case and inviting the U.S. Solicitor General to file a brief in anticipation of the *Hill* case.³⁴¹ Although it has yet to hear a subordinate bias case on the

can result in quickly resolving disputes, and, by inference, thereby avoiding litigation costs). However, the Tenth Circuit indicated that simply asking an employee for his side of the story "may defeat the inference that an employment decision was discretionary." *BCI*, 450 F.3d at 488. See also Debra L. Raskin & Jamie Ostrow, *Don't Blame the Messenger: Supervisors Can Face Discrimination Claims for Following a Biased Colleague's Advice*, THE RECORDER, June 13, 2007.

336. Genova & Vernoia, *supra* note 12, at 24–25; see also The Legal Scoop, *supra* note 285 ("The problem with [the Tenth Circuit's causation] standard is that the discussion quickly digresses into a debate over the 'adequacy' of the investigation undertaken by the HR professionals before they made their decision," and arguing that such inquiries are improper role for the courts . . . such is not the role of the court.").

337. See *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (noting that an investigation is not independent if the biased subordinate is involved in or had influence over the process).

338. See *infra* Part V.B (advocating that the Supreme Court emphasize the importance of truly independent investigations).

339. See *infra* Part V.A (discussing the importance of the Court resolving the circuit split on subordinate bias liability); see also Kaler, *supra* note 325, at 1090–93 (arguing that circuits should adopt the causation standard).

340. See *infra* Part V.B (arguing that the causation standard best embodies the principles of Title VII and fits the needs of both parties, but that independent investigations should be held to a high standard).

341. *BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. 852 (2007), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 542 U.S. 935, 935 (2004) (inviting Solicitor General to file a brief); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 543 U.S. 1132, 1132 (2005) (dismissing petition for a writ of certiorari); see also Brewer Petition, *supra* note 8, at 3 (arguing that the Court is aware of the conflict and

merits, a number of employment lawyers predict that the Court will soon revisit the issue.³⁴² Only then can employers and employees nationwide have the same opportunities to defend or pursue their claims.³⁴³ Despite this need, the Supreme Court in 2007 denied certiorari in two cat's paw cases, *Brewer* and *Sawicki v. Morgan State University*.³⁴⁴ The Court's prior indication of interest in this area has led at least one observer to construe these denials not as an unwillingness by the Court to consider subordinate bias liability, but simply a desire to wait for the right case.³⁴⁵

Currently, without a uniform standard, similarly situated parties receive different treatment depending on where they bring their cases.³⁴⁶ For example, if the Fifth or Third Circuit had heard *Brewer*, the decision may have turned out differently.³⁴⁷ Under the input standard, the court could have found that Brewer's supervisor "influenced" the decision to terminate him, and a jury would have been able to hear Brewer's case.³⁴⁸ Instead, by requiring that the biased subordinate be the "functional decisionmaker," Brewer's claim was defeated on summary judgment.³⁴⁹

The exact contours of the cat's paw doctrine are also unclear among the circuits, creating the potential for varying outcomes.³⁵⁰ The Second Circuit, for example, has a relatively undefined position on subordinate bias liability.³⁵¹ As a result, recent district court cases demonstrate a willingness to adopt a more pro-plaintiff, influence-based approach, despite past appellate decisions indicating a more moderate position.³⁵² Additionally, in the Seventh Circuit, debate exists as to whether the

has previously deemed it worthy of recognition).

342. Hofmann, *supra* note 183, at 3; Gesinsky & Lipsky, *supra* note 102, at 10.

343. See Brewer Petition, *supra* note 8, at 3 (noting that the current split "inevitably leads to irreconcilable outcomes among, and even within, the circuits").

344. *Brewer v. Bd. of Trs. of the Univ. of Ill.*, 128 S. Ct. 357 (2007), *cert. denied*, 128 S. Ct. 357 (2007); *Sawicki v. Morgan State Univ.*, 170 F. App'x 271 (2007), *cert. denied*, 127 S. Ct. 2095 (2007).

345. *Supreme Court's 2006-2007 Docket Resolved Some Employment Issues but Created Others*, 29 Emp. Discrimination Rep. (BNA) No. 05, at 152 (Aug. 1, 2007).

346. Brewer Petition, *supra* note 8, at 24. This results in great uncertainty for employers. Fowler, *supra* note 9, at 46.

347. See *supra* Parts III.A, C.2 (discussing the input standard, and, by inference, if influence was the necessary standard in *Brewer*, arguably a court could have found Brewer's claims should survive summary judgment based on Hendricks' involvement in the parking dispute).

348. Brewer Petition, *supra* note 8, at 23–24.

349. *Brewer*, 479 F.3d at 909.

350. Gesinsky & Lipsky, *supra* note 102, at 10.

351. *Id.*

352. *Id.*

recent *Brewer* decision was a significant departure from past decisions.³⁵³ In opposition to *Brewer*'s petition to the Supreme Court, the Board of Trustees of the University of Illinois argued that the Seventh Circuit's decision was in fact consistent with its previous holdings in cat's paw cases.³⁵⁴ It argued that "influence" and "cause" were synonymous terms, each only requiring an investigation of whether a biased subordinate's conduct "result[s] in a tangible employment action."³⁵⁵ This argument is tenuous given the plethora of scholarship identifying that causation and influence are indeed different in this context. But it highlights that, in light of *Brewer*, the scope of the Seventh Circuit's current approach is hazy.³⁵⁶

The Court's ruling would also have a significant impact on employee-plaintiffs facing summary judgment, and on employers' human resources decisions.³⁵⁷ The increasingly flexible corporate structures vest more decisionmaking power in lower-level employees, and with different standards of subordinate bias liability among the circuits, it is difficult for a corporation doing business in many jurisdictions to appropriately tailor its personnel policies.³⁵⁸ For the large number of employers who centralize employment decisions and delegate upper-level management to make determinations based on the recommendations of subordinates, a decision by the Supreme Court is necessary and important.³⁵⁹

353. Brief for Respondent In Opposition To Petition at 17, *Brewer v. Bd. of Trs. of the Univ. of Ill.*, 479 F.3d 908 (7th Cir. 2007) (No. 06-1694) [hereinafter Board of Trustees Brief].

354. *Id.* at 6.

355. *Id.* at 7.

356. See *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487–88 (10th Cir. 2006) (discussing the various circuits' approaches and specifically expressing disapproval for the Fifth Circuit's "influence" standard, distinct from its causation approach), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007); Board of Trustees Brief, *supra* note 353, at 14–15 (arguing that the Seventh Circuit's approach in *Brewer* was consistent with its precedent and other circuits).

357. Board of Trustees Brief, *supra* note 353, at 14–15; Miller, *supra* note 263 (quoting Todd Presnell, an attorney who was to represent BCI before the Supreme Court). See also Genova & Vernoia, *supra* note 12, at 22 (stating that the Supreme Court's decision in *BCI* was expected to have a "profound impact" on subordinate bias liability).

358. *Brewer* Petition, *supra* note 8, at 26. This uncertainty is particularly important to termination decisions:

The most significant effect of these decisions comes in how employers carry out their business decisions with respect to terminations. If the employers work in a circuit where courts interpret the law much like the Fourth Circuit, employers may make all of their decisions through committees who thus insulate the company from liability

Davis, *supra* note 59, at 248.

359. Norton, *supra* note 9; Genova & Vernoia, *supra* note 12, at 24.

Some attorneys contend that the current composition of the Supreme Court has assumed a pro-employer stance, taking “an axe to the sea of protections afforded by Title VII . . . and greatly restricting employees’ rights to seek redress.”³⁶⁰ While it is impossible to predict how the Court would rule on a cat’s paw case, it should find in accord with the Tenth Circuit in *EEOC v. BCI Coca-Cola Bottling Company*.³⁶¹ The causation approach, as previously discussed, provides the most cogently articulated standard for addressing subordinate bias claims.³⁶² In contrast, the input and actual decisionmaker models leave the lower courts to wrestle with relatively undefined terms in evaluating important discrimination claims.³⁶³ The causation model also strikes a balance between the pitfalls of an overly ambiguous guide and an excessively specific formula, as causation requires definitive components, but each component also mandates a factual inquiry.³⁶⁴ This balance is important. Ambiguous rules run the risk of engendering uncertainty in the workplace, motivating employers to merely make gestures of

360. Lisa J. Banks & Debra S. Katz, *The Legacy of ‘Ledbetter’*, NAT’L L.J., Aug. 1, 2007, at 13, 14 (arguing that the Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007), “imposed a significant limitation on workplace protections for victims of discriminatory pay”). In *Ledbetter*, a pay discrimination case, the Court restricted employees’ abilities to challenge allegedly discriminatory pay structures, finding that employees must challenge a pay decision within 180 days of when the pay decision was first made. Green, *supra* note 5, at 353. Because most employees may not be aware that their salaries are different from their co-workers, or may only think to challenge a wage disparity when it has accumulated to a significant difference, this ruling created a large hurdle for potential plaintiffs seeking to challenge their pay. *Id.* Green contends that this decision reflects “a much deeper and more potentially devastating conceptual shift” in employment discrimination law, what she refers to as “insular individualism.” *Id.* at 354. Insular individualism is “the belief that discrimination can be reduced to the action of an individual decisionmaker (or group of decisionmakers) isolated from the work environment and the employer.” *Id.* This trend is of great relevance to the discussion of subordinate bias liability, as the actual decisionmaker approach belies a great separation between the conduct of an employee and employer.

361. See Green, *supra* note 5, at 370–71 (arguing that although the Court might be “tempted” to rule alongside the Fourth Circuit’s actual decisionmaker standard, it will more likely find in accord with the Tenth Circuit’s causation standard).

362. See *supra* Part IV.C (discussing how causation conforms with the provisions in Title VII while using well-known tort principles as a guide).

363. See *supra* note 317 and accompanying text (noting the various terms used to analyze cat’s paw claims and court’s disdain for their myriad applications).

364. Establishing causation requires a finding of both “but-for” cause (the action would not have occurred without the subordinate’s conduct) and proximate cause (the subordinate’s conduct “must not be so insignificant as to make it unreasonable to treat the actor as responsible for the harm,” and be substantial). Brief of EEOC, *supra* note 29, at 30–31 (quoting RESTATEMENT (SECOND) OF TORTS § 431(a) (1977)). Because each prong has its own separate formulas, it provides a workable yet flexible standard.

compliance.³⁶⁵ In contrast, an overly specific standard could not “neatly adapt to variable and fluid contexts.”³⁶⁶

B. In Adopting the Causation Model, the Supreme Court Must Emphasize the Importance of Truly Independent Investigations

One of the most attractive features of the causation model is that it provides a relatively simple way for employers to avoid liability: conduct an independent investigation.³⁶⁷ By not relying on the information of one (potentially biased) source and by taking steps to understand all sides of a situation before making a tangible employment decision, an employer breaks the chain of proximate causation.³⁶⁸ Indeed, the *BCI* court noted that perhaps merely hearing both sides of a story would be sufficient.³⁶⁹

Yet what it means to conduct a truly independent investigation must be clarified. The level of investigation sufficient to shield an employer from liability is uncertain, and is an essential question for the Supreme Court to address in the future.³⁷⁰ In the present system, courts could easily be satisfied when an employer complies on paper.³⁷¹ However, cursory acceptance of an employer’s compliance on paper would not necessarily examine whether the policies or procedures used were effective, and this does not fulfill the purpose of Title VII: avoiding harm from workplace discrimination.³⁷²

365. For example, “[a]ccepting a wide range of causation-breaking activity” would promote the idea that employers are mere “innocent bystanders to discrimination,” and that they need not change their work cultures and organization. Green, *supra* note 5, at 371–72.

366. Sturm, *supra* note 273, at 461.

367. EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 488 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007). While employers are not necessarily required to conduct independent investigations, doing so can relieve them of liability. Brief of EEOC, *supra* note 29, at 33. This provides an incentive to objectively evaluate claims involving potential subordinate bias before taking action. *Id.*

368. *BCI*, 450 F.3d at 488.

369. *Id.* However, though hearing both sides of a story may be sufficient under some circumstances, the Court should strive for a more meaningful policy regarding independent investigations, not just the bare minimum. In *Controlling the Cat’s Paw*, Taran S. Kaler argues that, “at minimum,” an employer should conduct an interview to evaluate a potential problem. Kaler, *supra* note 325, at 1092–93. Yet labeling this as a “nominal requirement” underscores the potential problem with a Supreme Court decision that does not emphasize meaningful investigations. Without stressing this point, employers may be able to avoid liability by merely paying lip service to the investigation requirement.

370. Genova & Vernioia, *supra* note 12, at 25.

371. Green, *supra* note 5, at 379–80.

372. Genova & Vernioia, *supra* note 12, at 25; Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (noting that the primary objective of Title VII is to avoid harm stemming from employment discrimination). As Davis notes, independent investigations may merely result in a

In *Brewer*, for example, the court stated that even if it were to accept a lesser degree of influence to impute liability to the University, it would not do so in a case like that because the decisionmaker independently reviewed the circumstances of employee misconduct.³⁷³ The “independent investigation” in *Brewer* consisted of Hendricks (the decisionmaker) reviewing an altered parking tag, which served as the impetus for Brewer’s termination.³⁷⁴ Yet Hendricks testified that had she known that Thompson (her subordinate) used racist language and told Brewer to alter the parking tag, her decision might have been different, and would at least have led to further conversation.³⁷⁵ Setting aside the disputed facts about whether Brewer actually told Hendricks of Thompson’s racial comments, merely looking at a parking sticker seems inadequate to serve as an “independent investigation.” Moreover, concluding that Hendrick’s actions qualified as an independent investigation is even more difficult in light of her admission that further, easily obtainable knowledge might have changed her decision to fire Brewer.³⁷⁶

The *Brewer* court noted at great length the merits of conducting an independent investigation, stating that in cases of misconduct, false charges are irrelevant “so long as the decisionmaker independently investigates the claims before acting.”³⁷⁷ Yet in *Brewer*, Hendricks simply looked at a parking sticker; beyond that, she did not investigate facts behind Thompson or Brewer’s charges.³⁷⁸ The court also properly

“revolving door” effect, “where a committee’s investigation could be considered complete as long as the committee interrogated the biased employee on his or her reasons for seeking to terminate the protected employee.” Davis, *supra* note 59, at 257. For courts to quickly accept compliance on paper from an employer is closely analogous to an employer rubber-stamping the recommendations of a biased subordinate.

373. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 917, 920–21 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007).

374. *Id.* at 913–14. The court noted that Hendricks “suggested that she might have changed her mind if the alteration were an honest mistake. The jury could believe that the alteration was an honest mistake, that Thompson knew it and that she failed to tell Hendricks. If that is the case, Thompson had influence over Brewer’s firing; if she had talked, it might not have happened.” *Id.* at 917.

375. *Id.* at 914. Brewer testified that he told Hendricks that Thompson gave him permission to park in the lot at issue, and that Thompson was a racist. *Id.* at 913. Yet the court did not seem to take this into account. *See id.* at 917.

376. *See id.* at 914 (noting that Hendricks testified that had she been told of Thompson’s racist comments, she would have taken it very seriously).

377. *Id.* at 920.

378. *Id.* at 914. According to her testimony, “[Hendricks] decided to fire Brewer after inspecting the tag and verifying the addition for herself. She did not talk to Brewer before reaching her decision and in fact never talked to him about the parking fiasco at all.” *Id.*

noted that in many cases, evidence comes from competing statements, “a model ‘swearing contest.’”³⁷⁹ It stated that

[t]he best way the courts can find to deal with such puzzles is to empanel a jury and hope for the best; it might be too demanding to expect an employer to do more than have an employee conduct a fair-minded, independent investigation into the available evidence and then make a decision in good faith.³⁸⁰

This is a laudable statement, yet it is not what occurred in Brewer’s case.³⁸¹ When the very issue in a termination involves *why* a parking tag was altered, merely looking at the tag does not constitute an independent investigation of the claim.³⁸² Simply asking for Brewer’s side of the story and then making a “decision in good faith”—as advocated by the Tenth Circuit—would have been appropriate.³⁸³

The situation in *Brewer* illustrates why the Supreme Court should issue a clearly articulated statement about the importance of a *meaningful* independent investigation as an avenue for employers to avoid liability.³⁸⁴ Independent investigations should only immunize employers “when the decisionmaker consciously seeks out evidence of the supervisor’s bias and actively corrects for its effect on the investigation and the decision.”³⁸⁵ Although there may be situations

379. *Id.* at 920.

380. *Id.* at 920–21.

381. *Id.* at 913–14, 917.

382. The problem of this course of conduct is discussed by Tristin Green, as she argues that “[i]tigators should search for such contextual evidence and urge courts to examine the decisionmaking process as a whole and the culture of the workplace.” Green, *supra* note 5, at 380.

383. *Brewer*, 479 F.3d at 920; *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 488 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *cert. dismissed*, 127 S. Ct. 1931 (2007).

384. See *Genova & Vernoia*, *supra* note 12, at 24–25 (“[A] fundamental question remains, [as to] how many resources . . . the employer [must] use to conduct an independent investigation . . .”). In the aftermath of *Brewer*, courts’ interpretations of proper independent investigations may not model the spirit of what such investigations are designed to accomplish. For example, in *Tate v. Executive Management Services, Inc.*, the Northern District of Indiana discussed *Brewer* and stated that “[i]t does not matter that in a particular situation much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially or by virtue of her role in the company limit her investigation to information from that source.” *Tate v. Executive Mgmt. Srvs., Inc.*, No. 105-CV-47-TS, 2007 WL 1650410, at *4 (N.D. Ind. Jun. 4, 2007). Yet this reliance on one biased source for the majority of information may result in an inherently flawed investigation, and therefore, courts must stress greater emphasis on obtaining information from as many diverse sources as possible. See Green, *supra* note 5, at 379–380 (discussing expectancy-confirmation bias and the importance of contextual investigations).

385. Recent Cases, *supra* note 5, at 1703. Part of the reasoning for this goes back to the aforementioned bias confirmation theory discussing the possibility that biased comments function as prior theories that people seek to confirm in their subsequent investigations, limiting even the

where an employer can only compare competing statements between employees, the *BCI* court's suggestion that merely getting the other side of a story may be sufficient does not adequately emphasize the importance of these investigations.³⁸⁶

To the extent possible, independent investigations may be best conducted by asking an employee for his side of the story, gathering all potentially relevant information, searching into a supervisor's background, looking for the motives involved in the recommendation, reviewing any history of biased behavior, and examining relevant documents.³⁸⁷ Employers could also, where necessary or appropriate, interview other employees and hire outside counsel or investigators.³⁸⁸ Objectivity lends credibility to the overall investigation, which can only help an employer avoid additional problems.³⁸⁹

Although some employers balk at the idea of having to complete burdensome inquiries, the extent of the investigation will necessarily depend on the facts of each case and will not always mandate a lengthy

efficacy of well-meaning independent investigations. *See id.*; *see also generally* White & Krieger, *supra* note 45, at 524–25 (warning against the assumption that a decisionmaker reviews recommendations *de novo* and discussing expectancy confirmation bias); Green, *supra* note 5, at 379 (discussing expectancy confirmation bias and arguing that, even when an employer conducts an investigation, social science may limit the efficacy of such an investigation).

386. *See* Recent Cases, *supra* note 5, at 1706 (arguing that simply asking an employee for her side of the story, as stated in *BCI*, “will not always root out the possible discriminatory motives of the supervisor that may have influenced the independent investigation.”); *see also* Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 920 (7th Cir. 2007) (noting that evidence in employment discrimination cases often consist of “the mere say-so” of employees), *cert. denied*, 128 S. Ct. 357 (2007).

387. Recent Cases, *supra* note 5, at 1706; Genova & Vernoia, *supra* note 12, at 26; James Petrie, LAB. L. NEWSLETTER (Mondaq Business Briefing), Aug. 13, 2006; Fowler, *supra* note 9, at 46; *see also supra* note 382 (an examination into the overall context of a situation is optimal). The EEOC also recommends proactive prevention methods, such as: creating a clear explanation of prohibited conduct; giving a clearly described complaint process that provides multiple, accessible avenues of complaint; providing assurances that the employer will protect the confidentiality of harassment complaints to the extent possible; and instituting a complaint process that provides a prompt, thorough, and impartial investigation. EEOC Compl. Man. (CCH) § 15-IX (Sept. 19, 2006), *available at* <http://www.eeoc.gov/policy/docs/race-color.html#IX>.

388. Genova & Vernoia, *supra* note 12, at 26. Needle argues that no investigation by HR personnel is ever neutral, “[m]uch like a police department’s internal investigation of an excessive force complaint.” Needle, *supra* note 185, at 55.

389. *See* HRCRR, *Internal Investigations*, *supra* note 14, at 18 (“[I]t is critical that the investigation be viewed as independent and fair. . . . the validity of the investigation process will often provide a powerful defense tactic for the firm’s lawyers. In this regard, in cases in which the determining factor is the motivation of the employer in taking a particular employment action (i.e. discrimination and/or whistleblowing cases), a well developed, independent, investigation process can provide powerful evidence of good faith.”).

investigation.³⁹⁰ Despite costs, employers stand to gain many benefits from conducting thorough investigations—benefits that may have unquantifiable value.³⁹¹ Employers may discover new information through their inquiries to help alleviate future problems. Through this knowledge employers can tailor training programs to avoid similar mistakes in the future.³⁹² Moreover, early discovery of a problem may help employers learn of potential problems and avoid mandatory disclosure of a lawsuit to the public.³⁹³ Finally, holding employers to a standard of meaningful independent investigations simply furthers the underlying purpose of Title VII: eliminating discrimination in employment decisions.³⁹⁴

A reexamination of proximate causation also emphasizes why truly independent investigations are important to maintaining consistency with this tort principle.³⁹⁵ In his famous dissent in *Palsgraf v. Long Island R.R. Co.*, Justice Andrews wrote that in dealing with proximate cause courts should look to whether “there was a natural and continuous sequence between cause and effect. Was the one a substantial factor in producing the other? Was there a direct connection between them, without too many intervening causes? Is the effect of cause on result not too attenuated?”³⁹⁶ If a purported independent investigation is so

390. Miller, *supra* note 263; Gesinsky & Lipsky, *supra* note 102, at 10; *see also* Genova & Vernoia, *supra* note 12, at 13 (noting that in employment law, the specific facts of each case determine the outcome). If, for example, Brewer complained to Hendricks that Thompson was a racist and had been seeking to fire him, the appropriate conduct for Hendricks would likely require taking reasonable steps to investigate Brewer’s assertion—such as asking him further questions, speaking with Thompson, or interviewing other employees in the PSO office, and documenting the findings. If, after such investigation, Hendricks decided that the parking tag alteration indeed warranted termination, or there was insufficient evidence to find that Thompson acted in a racist manner, then a full and fair investigation took place. Given that Brewer’s alleged misconduct was tied so closely to the alleged discrimination of Thompson, merely looking at the parking sticker to confirm Brewer altered it seems to evade the spirit of requiring an independent investigation.

391. Terwilliger, *supra* note 15, at 12 (noting that proper investigations can be “a valuable opportunity to enhance a company’s reputation,” and the opportunity to learn from investigations and establish remedial measures may mitigate the risk of future problems).

392. *Id.* at 13.

393. *See* HRCRR, *Internal Investigations*, *supra* note 14, at 25 (discussing mandatory disclosures of lawsuits in financial statements for publicly traded companies).

394. Recent Cases, *supra* note 5, at 1706. For a general discussion on the potential pitfalls of a lax policy regarding independent investigations, *see* Needle, *supra* note 185, at 52 (arguing that HR departments can easily conduct “so-called independent investigations” that evade the spirit of true objectivity).

395. *See* Needle, *supra* note 185, at 56 (discussing considerations in determining superseding causes under traditional proximate cause analyses in tort law).

396. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104 (N.Y. 1928) (Andrews, J., dissenting). For additional insight into proximate cause and *Palsgraf*, *see* Joseph W. Little,

cursory that it does not break the connection between a subordinate's bias and a termination decision, then the discriminatory conduct remains the proximate cause of the employment decision and the employer should not be relieved of liability under the causation model.³⁹⁷ Thus, the relevant inquiry in determining the validity of an investigation is whether, *based on the investigation*, the biased subordinate's conduct remained "a substantial factor leading to the tangible employment action."³⁹⁸

By holding employers to a meaningful standard in conducting their investigations and not merely permitting cursory gestures to suffice, both employer and employee interests are served under the causation model.³⁹⁹ As the EEOC has argued in its brief to the Supreme Court, "[t]he more thorough, balanced, and truly independent the investigation, the more likely the termination will be the result of the investigation rather than the discriminatory input."⁴⁰⁰

Thus, in the near future, the Supreme Court should grant certiorari to a case addressing subordinate bias liability and find that the causation standard is the appropriate way to analyze these claims, while emphasizing the importance of meaningful independent investigations.

VI. CONCLUSION

Subordinate bias liability presents a challenging dilemma to the courts. It necessitates a balance between employers—who should be able to conduct their operations with a reasonable degree of certainty—and employees—who must be provided with a meaningful method of redress for discrimination. As corporate structures change and personnel directors have the power to make decisions affecting offices several time zones away, so too must legal doctrines expand to reflect these modifications. Discrimination is no longer an overt practice; it

Palsgraf Revisited (Again), 6 PIERCE L. REV. 75, 75–107 (2007) (analyzing *Palsgraf* from a modern perspective and discussing the elements involved in proximate causation).

397. See Brief of EEOC, *supra* note 29, at 33 (noting that the chain of causation will be broken when the biased subordinate's conduct "can no longer be regarded as a 'substantial factor' in the tangible employment action").

398. Brief of EEOC, *supra* note 29, at 34–35. Nonetheless, in the aftermath of the Supreme Court's decision in *Ledbetter* in 2007, Green argues that the Supreme Court is likely to "accept[] a wide range of causation-breaking activity," making it easier for an employer to evade liability. Green, *supra* note 5, at 371. Such a philosophy "is consistent with the belief that employers are largely innocent bystanders to discrimination." *Id.*

399. Recent Cases, *supra* note 5, at 1706.

400. Brief of EEOC, *supra* note 29, at 35; see also, Genova & Vernioia, *supra* note 12, at 24 (suggesting that employers who take "appropriate preventative, investigative and corrective measures" will be protected).

works in subtle ways and should not be permitted to hide in an intricate corporate structure. By giving employers an incentive to thoroughly evaluate potential claims before they become a problem, the courts can fairly blend the interests of employer and employee. Applying the causation standard—with the “teeth” of meaningful independent investigations—in cat’s paw cases will be a step forward in facing new employment law challenges.