NOTES & COMMENTS

STAUB V. PROCTOR HOSPITAL: A TENUOUS STEP IN THE RIGHT DIRECTION

by
Benjamin Pepper[*]

"Cat's paw liability" is a phrase coined by Judge Richard Posner in 1990 to describe the doctrine governing scenarios where an intermediary actor, other than the actual decision-maker, is accused of harboring unlawful discriminatory animus that may have caused or influenced an adverse employment action. In recent years, as the structure of the modern workplace continues to distance decision-makers from the people and conditions "on the ground," the doctrine's importance has escalated along with the prevalence of litigation in which it is invoked. Prior to the Supreme Court's decision in Staub v. Proctor Hospital *on March 1, 2011, the contours of this doctrine had been fashioned by the federal circuit courts over the course of more than two decades, resulting in highly disparate standards in cat's paw cases and widespread uncertainty among employers, employees, and their legal representatives. Given that the Court lost an opportunity to address the doctrine in 2007, when* EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles *was dismissed pursuant to Rule 46.2 prior to oral argument,* Staub *represents a long-awaited attempt to introduce uniformity to a doctrine desperately in need of it. This Comment reviews the issues and developments that have made cat's paw liability such an important yet contentious and inconsistent legal doctrine. It contends that while the Court took a substantial step in the right direction in* Staub*, foreclosing some circuits' strict approaches that had effectively barred employees from availing themselves of the doctrine's protections, Justice Scalia's*

[*] J.D. Candidate, 2012, Lewis & Clark Law School. I would like to thank Professor Henry Drummonds for his assistance with this project, as well as Professors Toni Berres-Paul, Susan Mandiberg, and Amy Bushaw for their invaluable and ongoing guidance and support. Last but not least, I would like to thank my parents, Eric and Margaret Pepper, for far more than I can list here.

somewhat cursory opinion leaves several crucial issues unresolved. Accordingly, absent further clarification from the Supreme Court, development of key aspects of the doctrine will revert to the same circuits that have thus far failed to provide employers and employees with the clarity and uniformity needed given today's complex workplace environments.

I. INTRODUCTION

On March 1, 2011, the Supreme Court decided *Staub v. Proctor Hospital*,[1] attempting to resolve an issue on which the circuits have been split for two decades.[2] This issue is subordinate bias liability—dubbed "cat's paw" liability based on a seventeenth-century French fable in which a cat burns its paws while retrieving chestnuts from a fire for a conniving

[1] 131 S. Ct. 1186 (2011).

[2] *See, e.g.*, Brewer v. Bd. of Trs., 479 F.3d 908 (7th Cir. 2007); Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007); EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (Jan. 5, 2007), *cert. dismissed*, 549 U.S. 1334 (Apr. 12, 2007); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) (en banc); Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77 (1st Cir. 2004); Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).

monkey. The monkey, meanwhile, proceeds to eat all of the spoils, leaving nothing for the cat.[3]

The question presented by the cat's paw issue in the modern employment context does not stray far from its namesake. The question before the Court was ultimately whether, and under what circumstances, an employer may be held liable for an employment action based on unlawful discriminatory animus harbored by a company employee who caused or influenced, but did not actually make, the ultimate employment decision.[4] In other words, a biased subordinate[5] is the "monkey," attempting to pass his or her dirty work along to a "cat" higher up the proverbial ladder (and who may or may not even be acquainted with the targeted employee). In the Tenth Circuit's words, "[t]oday the term 'cat's-paw' refers to 'one used by another to accomplish his purposes.'"[6] And as the Fifth Circuit stated, summarizing the basic question presented by the cat's paw issue (and somewhat prophetically given the Court's later decision), "[w]e therefore look to who *actually* made the decision or *caused* the decision to be made, not simply to who *officially* made the decision."[7]

Originating in the Seventh Circuit,[8] *Staub* is a classic cat's paw case, although it involves a relatively obscure federal antidiscrimination statute. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is designed to allow military reservists to maintain gainful employment in civilian life while fulfilling their duties to the armed forces.[9] The Act specifically prohibits employment discrimination on the basis of reservist or military status, and though the subject matter addressed is different, USERRA's core language is similar to that found in Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the Age Discrimination in Employment Act of 1967, and other cornerstone federal antidiscrimination statutes that produce the majority of today's litigation concerning discrimination in the

[3] JEAN DE LA FONTAINE, *The Monkey and the Cat*, *in* FABLES OF LA FONTAINE 344 (Walter Thornbury trans., Chartwell Books 1984).

[4] *Staub*, 131 S. Ct. at 1189.

[5] Following *Staub*, "biased subordinate" (the primary nomenclature used until this point) means, for the time being, "biased *supervisor*." The Court declined to address whether a co-worker's biased acts would trigger its cat's paw test, focusing exclusively on intermediate supervisors. *Id.* at 1194 n.4. For background on potential cat's paw scenarios involving co-workers, see Ernest F. Lidge III, *The Male Employee Disciplined for Sexual Harassment as Sex Discrimination Plaintiff*, 30 U. MEM. L. REV. 717, 748–49 (2000).

[6] *BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d at 484 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 354 (Philip Babcock Gove ed., 2002)).

[7] Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) (emphasis added).

[8] Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009), *rev'd*, 131 S. Ct. 1186 (2011).

[9] Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–34 (2006).

workplace.[10] Justice Scalia, the opinion's author, explicitly stated that "[t]he statute is very similar to Title VII."[11] Accordingly, *Staub*'s formulation of the cat's paw doctrine will almost surely be applied very broadly to cat's paw cases brought under Title VII and myriad other antidiscrimination statutes.

This Comment will explore the development of the cat's paw liability doctrine prior to *Staub*, the practical implications of that doctrine in the modern workplace, and the practical and doctrinal implications of the Court's recent opinion. It will contend that the Court took a substantial step in the right direction in *Staub*, foreclosing the strict approaches previously applied by the Fourth and Seventh Circuits and providing greater protection for employees in increasingly prevalent cat's paw scenarios. That said, this Comment will additionally posit that the Court missed an opportunity to fully resolve the issue by providing the certainty and uniformity needed by both employers and employees. Several important questions remain following the Court's opinion that, absent further clarification, are likely to perpetuate much of the uncertainty that has plagued the circuit courts over the past 20 years. They are further likely to impede employers' attempts to formulate policies designed to root out bias among their ranks and prevent the occurrence of adverse employment actions stemming from discriminatory animus in the first place.

Part II will examine the twenty-year circuit split and the circuits' various formulations of the doctrine prior to *Staub*, in addition to practical developments in the modern employment context that make comprehensive and decisive resolution of this issue particularly important. Part III will present Vincent Staub's case—a classic illustration of the cat's paw scenario—as well as the new three-part test established by the Court's opinion. Part IV will analyze the implications of that opinion in the modern employment context—focusing primarily on two key questions left unanswered by the Court: First, how will the first two prongs of the Court's test reliably protect employees when the facts are not as clear cut as those in *Staub*? Second, what becomes of the previously crucial independent investigation element of the cat's paw doctrine given the Court's reliance on proximate causation?

[10] *Id.*; *see, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 1981–2000h (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213 (2006); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2006).

[11] *Staub*, 131 S. Ct. at 1191. In fact, the statutory language in which the Court grounded its test in *Staub* is identical to that found in Title VII. Each statute states that discriminatory animus based on the plaintiff's membership in a protected class must have been "a motivating factor" in the employer's action. *Id.* at 1190–91; Uniformed Services Employment and Reemployment Rights Act of 1994 § 4311(c); Civil Rights Act of 1964 § 2000e–2(m).

II. THE EVOLUTION AND STATE OF CAT'S PAW LIABILITY BEFORE *STAUB*

For the past twenty years, the circuits have been grappling with the cat's paw issue, constructing a variety of approaches and applying various tests and factors.[12] This uncertainty and disparity among the circuits has led to both arbitrary results for employees in antidiscrimination lawsuits, and uncertainty for the employers attempting to institute policies to avoid them[13]—particularly for those employers with activities in multiple jurisdictions.[14] This uncertainty, in and of itself, needed remedying. Additionally, the increase in cat's paw scenarios prompted by developments among employers, namely distancing decision-makers from the personnel "on the ground,"[15] made the grant of certiorari in *Staub* an absolute necessity. Accordingly, particularly because the Court's opinion in *Staub* will almost certainly reach suits under Title VII and other federal statutes,[16] the outcome—primarily the certainty with which it could potentially provide both employers and employees—was crucial.

A. The circuits have taken wildly varying approaches since the doctrine's inception in 1990, resulting in substantial uncertainty for, and disparate treatment of, both employers and employees.

The Seventh Circuit, in an opinion written by Judge Richard Posner, first recognized (and named) the cat's paw theory in 1990 in *Shager v. Upjohn Co.*[17] In 1998, the Supreme Court cited *Shager* with approval in the context of a hostile work environment claim under Title VII, holding that "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer" under agency principles, and noting that this effect was unlikely to change even where the tangible employment decision might "be subject to review by higher level supervisors."[18] The Court again acknowledged subordinate bias liability as a legitimate theory, without elaborating, in 2000.[19]

However, beyond its inception and the Supreme Court's cursory affirmation of its existence several years later, the doctrine has seen very

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[12] *See supra* note 2.

[13] *See infra* notes 20–21 and accompanying text.

[14] *See infra* notes 50–51.

[15] *See infra* Part II.B.

[16] *Staub*, 131 S. Ct. at 1190–91.

[17] 913 F.2d 398, 405 (7th Cir. 1990).

[18] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 762 (1998) (citing Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990)).

[19] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151–54 (2000). Additionally, the Supreme Court invited the U.S. Solicitor General to file a brief in *Hill v. Lockheed Martin Logistics Management, Inc.*, another cat's paw case. 542 U.S. 935 (2004). However, the petition for certiorari was later dismissed pursuant to Rule 46.1. Hill v. Lockheed Martin Logistics Mgmt. Inc., 543 U.S. 1132 (2005).

little stability and almost no uniformity.[20] The circuits have also grappled with reconciling the subordinate bias liability theory with the burden shifting framework articulated by the Court in *McDonnell Douglas Corp. v. Green*.[21] As a result, employers have had little to no guidance when formulating policies both to avoid liability and to prevent subordinate bias-driven employment actions from occurring in the first place. In turn, employees—though protected by ostensibly uniform federal laws such as USERRA, Title VII, and their counterparts—have been treated far from uniformly in cat's paw scenarios based solely on the circuits in which they brought their claims.[22] Further, different and changing standards were often applied even within single circuits, compounding the aforementioned uncertainty plaguing both employers and employees.[23]

Staub is not the Supreme Court's first attempt to resolve this issue in recent years. In April 2007, the Court was scheduled to hear oral arguments in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*,[24] a classic cat's paw case much like *Staub*. However, shortly before oral arguments, the case was dismissed pursuant to Rule 46.2 and the uncertainty surrounding the circuit split was left unaddressed.[25] In light of the causation-oriented approach adopted by the Court in *Staub*—discussed in Parts III and IV—it appears to be no small coincidence that in *BCI* the Tenth Circuit explicitly stated: "[T]he issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions *caused* the adverse employment action."[26] In other words, the Tenth Circuit was ahead of its time in applying a causation-oriented test to cat's paw claims in *BCI*, though unlike the Court in *Staub*, it shied away from the qualifier "proximate" and dealt directly with the independent investigation issue that ultimately causes *Staub* to be a somewhat incomplete answer to a very pressing question.[27]

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[20] *See* Galdamez v. Potter, 415 F.3d 1015 (9th Cir. 2005); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998); Abrams v. Lightolier Inc., 50 F.3d 1204 (3d Cir. 1995).

[21] 411 U.S. 792, 802–07 (1973); *see, e.g.*, EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 483–88 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (Jan. 5, 2007), *cert. dismissed*, 549 U.S. 1334 (Apr. 12, 2007) (attempting to reconcile the cat's paw theory with the *McDonnell Douglas* framework).

[22] *See supra* note 2.

[23] *See, e.g.*, Sara Eber, Comment, *How Much Power Should Be in the Paw? Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 187–88 (2008) (highlighting the varying approaches taken within the Second Circuit due to its "relatively undefined position on subordinate bias liability").

[24] 450 F.3d 476.

[25] BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1334 (2007) (dismissing writ of certiorari pursuant to Rule 46.2).

[26] 450 F.3d at 487 (emphasis added).

[27] *Id.* at 484–88; Staub v. Proctor Hosp., 131 S. Ct. 1186, 1192 (2011); *see infra* Parts III, IV.

Despite the circuits' continued varying and conflicting approaches to the issue in the wake of *BCI*,[28] until March 1, 2011, the basic framework underlying the circuits' varying formulations of the doctrine consisted, in its most basic form, of the following elements: First, a company employee other than the actual decision-maker must have harbored unlawful discriminatory animus toward the targeted employee. Second, that official must have influenced the actual decision-maker in some manner—whether personally or via supplied information such as entries in the targeted employee's personnel file. Third, the ultimate decision-maker must have commenced an adverse employment action against the targeted employee without undertaking sufficient precautions to sever his or her ultimate decision from the biased subordinate's influence (generally referred to as the "independent investigation" element).[29] This independent investigation element has been the subject of much of the circuits' disagreement,[30] and, as Parts III and IV of this Comment discuss, the Court afforded this crucial component of the cat's paw theory superficial treatment at best in *Staub*.[31]

Looking beyond the circuits' agreement regarding the basic framework set forth above, many commentators have placed each circuit into one of three rough categories regarding the cat's paw issue, dubbed the "lenient," "intermediate," and "strict" approaches with some slight variations in nomenclature.[32] Although the aforementioned three-tiered framework can be useful from a broad perspective, the circuits' approaches—and most importantly their individual doctrinal components—are best viewed as filling various positions along a continuum.[33] This continuum revolves around two elements that

[28] *See, e.g.*, Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009); Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733 (8th Cir. 2009); Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007); Brewer v. Bd. of Trs., 479 F.3d 908 (7th Cir. 2007).

[29] *See, e.g.*, *Brewer*, 479 F.3d at 918; *Poland*, 494 F.3d at 1181–84; *BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d at 485–88; Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 287–91 (4th Cir. 2004) (en banc); Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 84–85 (1st Cir. 2004); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

[30] *See, e.g.*, *Poland*, 494 F.3d at 1181–84; *BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d at 488; English v. Colo. Dep't of Corr., 248 F.3d 1002, 1009–11 (10th Cir. 2001).

[31] *See infra* Parts III, IV.

[32] *See, e.g.*, Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 389 (2008); Sean Ratliff, Comment, *Independent Investigations: An Inequitable Out for Employers in Cat's Paw Cases*, 80 U. COLO. L. REV. 255, 260 (2009).

[33] This is particularly true because, as one would expect given the profound degree of variance among the circuits, there are differences within each category as well. For instance, within the "strict" approach (utilized by the Fourth and Seventh Circuits), the Seventh Circuit has applied a "singular influence" standard, which is difficult, but not impossible, to meet. *See, e.g.*, *Brewer*, 479 F.3d at 917; Gusman v. Unisys Corp., 986 F.2d 1146, 1147, 1151 (7th Cir. 1993) (upholding a judgment for a fired employee after his supervisor had caused his termination through erroneous reviews). The Fourth Circuit, on the other hand, has all but rejected the cat's paw theory, requiring that the biased

ultimately comprised the cat's paw inquiry prior to *Staub* (assuming the biased subordinate did in fact harbor unlawful discriminatory animus, as was plainly the case in *Staub*[34]): the level of influence exerted by the biased subordinate over the actual decision-maker's adverse employment action, and the sufficiency of any independent investigation that may have been conducted by the actual decision-maker to sever his or her ultimate decision from that biased influence.[35]

Apart from the Fourth and Seventh Circuits' strict tests, which essentially require that the biased subordinate become the de facto decision-maker,[36] the remaining circuits vary with regard to the level of influence required to impute liability to the actual decision-maker and thus the employer (though each requires something less than the Fourth and Seventh), and the tests are often stated in relatively vague and general terms. For instance, the Third Circuit stated, in *Abramson v. William Paterson College of New Jersey*: "[I]t plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decision-making process and thus allowed discrimination to infect the ultimate decision."[37] The Sixth Circuit has used even more permissive language, holding that the biased subordinate must simply have "somehow influenced" the actual decision-maker pursuant to his or her discriminatory animus.[38] The Fifth Circuit has utilized similarly broad (though vague) language, stating that liability may be imputed to the employer if the biased subordinate "possessed leverage, or exerted influence, over the titular decision-maker."[39] The Eleventh Circuit, like the Tenth, has adopted a causation-oriented approach, holding that there must be a "causal link" between the biased subordinate's discriminatory influence and the ultimate employment decision.[40]

Despite these varied and somewhat vague formulations, several factors emerge from what this Comment will hereafter refer to as the "intermediate" approach[41] applied by the majority of circuits prior to

subordinate be "principally responsible" for the ultimate decision, regardless of the level of influence exerted over the actual decision-maker. *See, e.g.*, *Hill*, 354 F.3d at 291.

[34] Staub v. Proctor Hosp., 560 F.3d 647, 655–57 (7th Cir. 2009).

[35] *See, e.g.*, Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999) (stating that, to recover under a cat's paw theory, a plaintiff must demonstrate "that the decisionmaker followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee").

[36] *Hill*, 354 F.3d at 291; *Brewer*, 479 F.3d at 917–18.

[37] 260 F.3d 265, 286 (3d Cir. 2001) (quoting Roebuck v. Drexel Univ., 852 F.2d 715, 727 (3d Cir. 1988)).

[38] Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 877 (6th Cir. 2001).

[39] Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000).

[40] *Compare* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1241–42 (11th Cir. 1998), *with* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 487 (10th Cir. 2006).

[41] Despite the previous reference to a continuum as the ideal means to conceptualize the various approaches, for purposes of this Comment the "lenient" and "intermediate" approaches (advanced in various forms by each circuit save the

Staub.[42] Each factor may be afforded varied weight and encompass varied subtleties in any given jurisdiction; however, the majority of circuits have identified the following as relevant when determining whether the biased subordinate exercised sufficient influence over the actual decision-maker to impute liability to the employer: (1) whether the biased subordinate affirmatively initiated the adverse employment action or the investigation leading to it; (2) whether the biased subordinate exhibited unusual interest in the employment action or investigation, either via direct contact with the ultimate decision-maker or by circumventing the employer's standard procedures to see that adverse employment action was taken; and (3) whether the actual decision-maker was predisposed to defer to the biased subordinate's judgment under similar circumstances.[43]

The independent investigation element, while it is formulated in more manageable terms, has been applied with equal inconsistency both among and within the circuits. For instance, in the Eleventh Circuit, ostensibly applying the intermediate approach, the court has held that the occurrence of one element of a sufficient independent investigation, a face-to-face meeting between the actual decision-maker and the targeted employee, is not only relevant to the sufficiency of the investigation but in fact "except[s] [the] case from the cat's paw line of cases."[44] The Seventh Circuit, though it had been applying a form of the strict approach to cat's paw cases, in contrast with the Eleventh Circuit, nonetheless has likewise held that where a decision-maker meets with the targeted employee before acting on the biased subordinate's recommendations, the case is simply no longer a "cat's paw" case.[45]

Fourth and Seventh) will simply be viewed together and labeled "intermediate" for the sake of consistency. The precise contours of the doctrine are far too uncertain to allow for accurate categorization, and in any case the "lenient" and "intermediate" approaches focus on the same key factors in evaluating cat's paw cases. *See infra* notes 42, 46 and accompanying text. Put more succinctly, the labels ascribed to particular approaches are insignificant; their content is the focus here.

[42] This includes each circuit aside from the Fourth and Seventh, although some commentators have lumped the Seventh Circuit into the "intermediate" category, presumably based on older information given that the Seventh Circuit's approach has changed drastically since its first cat's paw decision in 1990. *Compare* Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) *with* Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009) *and* Brewer v. Bd. of Trs., 479 F.3d 908 (7th Cir. 2007). *See also* Eber, *supra* note 23, at 187–88 (discussing the uncertainty surrounding the Seventh Circuit's test).

[43] *See, e.g.*, Poland v. Chertoff, 494 F.3d 1174, 1182–84 (9th Cir. 2007); *Russell*, 235 F.3d at 227–28; Lacks v. Ferguson Reorganized Sch. Dist. R-2, 147 F.3d 718, 724–25 (8th Cir. 1998); Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1060 (8th Cir. 1993).

[44] *Llampallas*, 163 F.3d at 1249.

[45] Willis v. Marion Cnty. Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997) (noting and adopting this aspect of the Seventh Circuit's approach).

Again, however, a core set of factors has emerged from the intermediate circuits[46] and can be set forth with relative clarity. These circuits have identified the following as relevant to whether steps taken by the actual decision-maker were adequate to sever the biased subordinate's discriminatory influence from the ultimate decision: (1) whether the actual decision-maker looked to information beyond that supplied by the biased subordinate (in other words, whether the decision-maker simply relied on reports or evaluations composed directly by the monkey); and (2) whether the actual decision-maker gave the employee an opportunity to speak for him or herself, presumably to expose any discriminatory animus and debunk any false information transmitted by the biased subordinate.[47]

From a broad perspective, the independent investigation element has been, until the Court's opinion in *Staub* was announced, the axis around which much of the uncertainty and disparity among the circuits turned. In *Staub*, the ultimate decision-maker's review of information beyond that supplied by the biased supervisors involved was ultimately decisive in the Seventh Circuit.[48] Accordingly, any definitive resolution of the cat's paw issue by the Court inevitably had to confront and clarify this aspect of the cat's paw theory, and as contended below, the Court inexplicably did precisely the opposite.[49]

B. Decisive resolution of the uncertainty surrounding subordinate bias liability is particularly important given the evolving organizational structures and decision-making practices of most modern employers.

The dominant structure of employers has changed a great deal over the past several decades,[50] and decision-makers are becoming increasingly

[46] Even the Fourth and Seventh Circuits, in most respects, fall in line here and recognize the validity of independent investigations. The standards are simply more stringent, and because the level of influence required to make the independent investigation relevant is so difficult for employees to prove, this aspect of the test receives far less attention (though the two elements are also often conflated). *See, e.g.*, *Staub*, 560 F.3d at 658–59 (conflating the two aspects of the doctrine in holding that, because the biased supervisor conducted an independent investigation, Staub had failed to demonstrate the "singular influence" necessary to prevail on his cat's paw claim); *Brewer*, 479 F.3d at 918; Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 304 (4th Cir. 2004) (en banc).

[47] *See, e.g.*, Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733, 745 (8th Cir. 2009); EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 491 (10th Cir. 2006).

[48] *Staub*, 560 F.3d at 659.

[49] *See infra* Part IV.C.

[50] *See generally* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 10–13 (2006); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003); Esther E. Klein, *Using Information Technology to Eliminate Layers of Bureaucracy*, NAT'L PUB. ACCT., June 2001, at 46, 46–47; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

distant from the employees whose fates they are deciding.[51] As aptly stated by one commentator, because "most employment relationships are more complex than employer-employee, discriminatory bias cannot be confined to this basic relationship. Instead, employers are more likely to rely on managers, supervisory personnel, and other intermediate actors to bridge the gap between employer and employee."[52] Under such circumstances, as Judge Posner recognized when the cat's paw dilemma surfaced in 1990, decision-makers will inevitably be "apt to defer to the judgment of the man on the spot."[53] The Tenth Circuit succinctly related this to the emergence of the cat's paw theory, stating: "[S]ubordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial [or other unlawful] bias can taint any of those functions."[54]

Human resources departments, and their rapidly changing roles in modern organizations, are a key component of this equation. They have become increasingly prevalent as final decision-makers in the modern workplace in matters relating to personnel.[55] At the same time, however, human resources professionals are being "stretched in many directions," often asked to handle duties previously reserved for separate departments such as employee payroll.[56] Further, they are more frequently compartmentalized departments, detached from the day-to-day functioning of the workplace, whether that workplace consists of one or multiple offices or locations.[57] Finally, human resources services are joining the many organizational functions being outsourced at alarming rates.[58] The human resources outsourcing industry produced total

[51] Emily M. Kepner, Comment, *True to the Fable?: Examining the Appropriate Reach of Cat's Paw Liability*, 5 SEVENTH CIR. REV. 108, 110 (2009) ("Higher-level supervisory employees may have to make decisions about employees that they do not personally know or have never even met. Consequently, supervisors must rely on information, recommendations and evaluations provided by subordinate employees when making personnel decisions.") (citations omitted). *Cf.* Donna Scimia, *A Common Sense Approach to Reducing Liability in Today's Workplace*, EMP. REL. L.J., Autumn 2007, at 23, 24–27 (providing an overview of the complex relationships and challenges in the modern workplace, particularly the role of human resources departments). *See also supra* note 50 and accompanying text.

[52] Keaton Wong, Comment, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1759–60 (2008). *See generally* Kepner, *supra* note 51; Scimia, *supra* note 51.

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

[54] EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 488 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (Jan. 5, 2007), *cert. dismissed*, 549 U.S. 1334 (Apr. 12, 2007).

[55] *See generally* Stone, *supra* note 50; Green, *supra* note 50.

[56] Scimia, *supra* note 51, at 24.

[57] *See* Klein, *supra* note 50; Bagenstos, *supra* note 50; Scimia, *supra* note 51.

[58] Paul S. Adler, *Making the HR Outsourcing Decision*, MIT SLOAN MGMT. REV., Fall 2003, at 53, 53.

revenues of $21.7 billion in 2000,[59] indicating that human resources decision-makers may not only be increasingly distanced from the employees whose futures and opportunities they will be determining, but may in fact be divorced from employers altogether.

Because of these practical realities, the cat's paw issue has come to the forefront of employment law, with the potential to become the dominant model underlying employment discrimination claims. And to again borrow Judge Posner's reasoning, this state of affairs almost certainly places substantial and increasing power in the hands of supervisors and other middle-management personnel lacking final decision-making authority, given that decision-makers at a distance will be highly likely to defer to the judgment of "the man on the spot."[60] In other words, to return again to the doctrine's namesake, there are more potential monkeys in the world today. And their power is rapidly increasing.

III. *STAUB V. PROCTOR HOSPITAL*

The facts in brief are as follows: Vincent Staub was employed as an angiography technologist by Proctor Hospital of Peoria, Illinois; he was also a longtime member of the United States Army Reserve.[61] He had been employed by the hospital since 1990.[62] His two immediate supervisors were Janice Mulally, "second in command of the Diagnostic Imaging Department," and department head Michael Korenchuk.[63] Staub's periodic obligations as an Army reservist made scheduling an issue, though until Mulally took over the department's scheduling duties in 2000, Staub had been given weekends off in order to avoid conflicts with his commitments as an Army reservist.[64] Mulally, however, immediately placed Staub on weekend duty.[65] The Seventh Circuit acknowledged that "Mulally did this even though she had advance notice of Staub's military obligations," and "made her reasons plain," openly making a number of disparaging remarks about Staub's military affiliation.[66] Likewise, Korenchuk described Staub's military obligations as "a b[u]nch of smoking and joking and [a] waste of taxpayers['] money."[67] A number of other incidents clearly indicated that Mulally and Korenchuk harbored anti-military and anti-reservist animus, including

[59] *Id.*
[60] Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).
[61] Staub v. Proctor Hosp., 560 F.3d 647, 650–51 (7th Cir. 2009).
[62] *Id.* at 651.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 651–52.
[67] *Id.* at 652 (alteration in original).

one instance where Mulally asked one of Staub's coworkers "to help her get rid of [Staub]."[68]

In 2004, a series of events occurred during which Staub's reliability and performance were impugned by Mulally and Korenchuk. Most importantly, Mulally issued Staub an official "Corrective Action" disciplinary warning alleging violations of company rules (disputed by Staub both because he contended that the rules invoked did not exist, and that even if they did exist, he had not violated them) and mandating that Staub adhere to certain protocol.[69]

The final blow came in April 2004, when Korenchuk spoke with Linda Buck, Proctor's vice president of human resources, alleging that Staub had left his work area without informing a supervisor, in violation of the Corrective Action disciplinary warning (an allegation also contested by Staub).[70] Buck did not investigate the justifications underlying the Corrective Action, nor did she verify Korenchuk's assertion that Staub had violated it.[71] After simply reviewing Staub's personnel file, and without speaking to Staub directly about his alleged violation of the Corrective Action, she fired him.[72] Though she admittedly relied on Korenchuk's input as well as information either provided directly or influenced by Mulally, Buck alone was the ultimate decision-maker and her lack of anti-military and anti-reservist bias was not disputed.[73] As a whole, Staub's situation presents a classic example of the cat's paw dilemma. Buck harbored no anti-military or reservist bias; however, her decision was based almost entirely on information supplied by individuals blatantly harboring and displaying such bias.[74]

Staub initially appealed his dismissal via Proctor Hospital's internal grievance processes, "claiming that Mulally had fabricated the allegation underlying the Corrective Action out of hostility toward his military obligations."[75] After this appeal was rejected, Staub brought a lawsuit against Proctor Hospital under USERRA, and a jury found for Staub on his discrimination claim.[76] However, the Seventh Circuit reversed, setting aside the jury's verdict and awarding judgment as a matter of law to Proctor Hospital.[77] In doing so, the Seventh Circuit applied its most recent formulation of the cat's paw doctrine, which required that the biased subordinate exercise "singular influence" over the actual decision-

[68] *Id.*
[69] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1189 (2011).
[70] *Id.* at 1189–90.
[71] *Id.*
[72] *Id.* at 1189.
[73] *Id.* at 1189–90; *Staub*, 560 F.3d at 655.
[74] *Staub*, 560 F.3d at 653–55; *Staub*, 131 S. Ct. at 1189–90.
[75] *Staub*, 131 S. Ct. at 1189–90.
[76] *Id.* at 1190.
[77] *Id.*

maker in order to impute liability to the employer.[78] The court ultimately conflated its singular influence standard and Buck's purported independent investigation (namely her review of Staub's personnel file), concluding:

> Viewing the evidence reasonably, it simply cannot be said that Buck did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that Staub was not a team player. We do not mean to suggest by all this that we agree with Buck's decision—it seems a bit harsh given Staub's upsides and tenure—but that is not the issue. The question for us is whether a reasonable jury could have concluded that Staub was fired because he was a member of the military. To that question, the answer is no.[79]

The Supreme Court then granted Staub's petition for certiorari, unanimously reversing the Seventh Circuit's ruling and remanding the case back to that court.[80] Because the instructions given to the jury did not "hew precisely to the *rule*" adopted by the Court, the Seventh Circuit must now decide whether the variance constituted harmless error, or alternatively requires that Proctor Hospital receive a new trial.[81]

That rule, set forth with surprising brevity in an opinion authored by Justice Scalia and joined by six of eight Justices,[82] is this: To prevail on a cat's paw claim under USERRA, and presumably under Title VII as well,[83] a plaintiff must demonstrate that (1) a supervisor "perform[ed] an act" motivated by discriminatory animus; (2) that act was "*intended* by the supervisor to cause an adverse employment action"; and (3) that act proximately caused the subsequent adverse employment action.[84]

Justice Alito, joined by Justice Thomas, authored an opinion concurring in the judgment,[85] in effect criticizing the Court for failing to adopt an approach akin to that of the Seventh Circuit but concurring in the judgment itself on factual grounds.[86]

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[78] *Staub,* 560 F.3d at 656 (quoting Brewer v. Bd. of Trs., 479 F.3d 908, 917 (7th Cir. 2007)).

[79] *Staub*, 560 F.3d at 659.

[80] *Staub*, 131 S. Ct. at 1190, 1194–95. The decision was 8–0, with Justice Kagan recusing herself and Justice Thomas joining a concurrence written by Justice Alito. *Id.* at 1195.

[81] *Id.* at 1194 (emphasis added).

[82] *Id.* at 1189, 1195.

[83] *See supra* note 11 and accompanying text.

[84] *Staub*, 131 S. Ct. at 1194.

[85] *Id.* at 1195–96 (Alito, J., concurring in the judgment).

[86] *Id.* Justice Alito's analysis is grounded in statutory interpretation, as is the Court's. *Id.* However, he ultimately concludes that, based on the statute's text, liability should be imputed to the employer only where the biased subordinate becomes the de facto decision-maker. *Id.* at 1195. This is, for all practical purposes, nearly identical to the "strict" approach previously applied by the Fourth and Seventh Circuits, and applied by the Seventh Circuit in Staub's case. *See supra* notes 46, 77 and accompanying text; Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004) (en banc) (concluding that in order to survive a motion for summary judgment, the employee must demonstrate that subordinate employees possess "such authority as to

IV. THE FUTURE OF CAT'S PAW LIABILITY AFTER *STAUB*

The Court took a decisive step in the right direction in *Staub*, ensuring that the uncertainty surrounding the cat's paw doctrine does not create "loopholes" in statutes such as USERRA and Title VII whereby employers, namely those in the Fourth and Seventh Circuits, may insulate themselves from liability simply by further distancing decision-makers from the people and conditions on the ground, or by performing perfunctory "independent" investigations that amount to little more than review of the employee's personnel file (which more often than not includes key material produced by the biased supervisor). In fact, the opinion entirely forecloses the strict approaches previously applied by the Fourth and Seventh Circuits, essentially adopting a form of the intermediate approach—albeit a vague one, as noted below—as the standard nationwide.[87] This represents a decisive, positive step in the right direction, bearing in mind the purpose of the underlying statutes: to prevent, and provide redress for, employment discrimination.

However, careful analysis suggests that this step may not prove to be so decisive after all. The Court's brief and somewhat superficial treatment of a question of law with which the circuits have wrestled for more than two decades leaves a number of gaps to be filled by those very same courts. And if history indeed repeats itself, those gaps are likely to be filled chaotically—perpetuating the very uncertainty that *Staub* presumably intended to remedy.

A. The Court's rejection of the Seventh Circuit's singular influence standard, adoption of an approach based on causation, and rejection of the notion that any independent investigation shields the employer from liability further Congress's broad, remedial purpose in enacting statutes such as USERRA and Title VII.

Given the increasing distance between actual decision-makers and employees detailed in Part II.B, and particularly given the increasing distance and resultant reliance between those decision-makers and the supervisors and other intermediate personnel charged with directing and evaluating employees[88] (in other words, the pool of potential monkeys), adoption of an approach to subordinate bias liability requiring that a targeted employee demonstrate "singular influence" would not only have diminished protection for employees under the federal antidiscrimination statutes generally, but would have created an enormous loophole through which employers could step to shield themselves from liability. Had the Court adopted this approach, it would,

be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer."). Justice Alito's analysis is explored in more detail in Part IV, given his focus on the Court's treatment of the independent investigation issue, which was so crucial to the pre-*Staub* cat's paw theory as a whole. *See supra* Part II.A.

[87] *Staub*, 131 S. Ct. at 1194.

[88] *See supra* Part II.B and accompanying notes.

in effect, have been holding the door to this loophole open, implicitly encouraging employers to further distance actual decision-makers from the people and conditions on the ground such that liability would be imputed to the employer only in the most flagrant instances of subordinate-bias-driven adverse employment actions.

Specifically, prior to *Staub*, employers within the Fourth and Seventh Circuits' jurisdictions had direct incentives to effectuate decision-making hierarchies and policies of "willful blindness," structuring decision-making processes such that they "intentionally mask[ed] the underlying discriminatory motive as a basis to avoid liability."[89] In fact, prior to *Staub*, several commentators proposed a standard based on causation—the Court's ultimate solution—in order to close this very loophole.[90] This discourse revolved around the inherent weakness of the "actual decisionmaker" and "singular influence" standards adopted by the Fourth and Seventh Circuits, respectively,[91] reinforcing this Comment's contention that these standards, or measures of influence, simply gave employers an incentive to further distance decision-makers from conditions on the ground in order to avoid liability.[92] Further, given a powerful shield against liability, employers would have had "little incentive to proactively eliminate discrimination in their workplaces."[93]

Fortunately, the Court eliminated this loophole by establishing a causation-oriented test in lieu of a test based on subjective interpretation of the influence exerted by the biased subordinate over the actual decision-maker.[94] This provides three benefits: First, though the Court's formulation of causation presents several ambiguities in this context as discussed below, causation is doctrinally quantifiable and not subject to the same range of abstractions and presumptions that the circuits have used to gauge influence over the past twenty years.[95] Accordingly, though there are gaps to fill, a framework is now in place that, at least in theory, has the *potential* to produce consistent results across jurisdictions. The previous "level of influence" standard was simply far too malleable, as it was arguably rooted in perception rather than doctrine.

Second, the Court's use of causation as a basis for liability clarified and brought to the surface the doctrinal underpinnings of the circuits' previous formulations as detailed in Part II.A. As some commentators have pointed out, courts applying the strict, intermediate, and lenient approaches to the level of influence necessary to impute liability to the employer were all essentially articulating causation requirements guised in varying degrees of "influence." The underlying standard for causation

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[89] Befort & Olig, *supra* note 32, at 404.

[90] *See, e.g.*, Eber, *supra* note 23, at 183–96; Kepner, *supra* note 51, at 142–47.

[91] *See supra* Part II.A.

[92] *See, e.g.*, Eber, *supra* note 23, at 177–78; Kepner, *supra* note 51, at 145.

[93] Kepner, *supra* note 51, at 145.

[94] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

[95] *See supra* Part II.A.

simply varied according to the test adopted.[96] Accordingly, Justice Scalia's opinion replaced "vague formulations of influence"[97] with a standard at least familiar, albeit less than clearly delineated, in the employment context.[98] In theory this should lead to more coherent development of the doctrine and concomitantly increased certainty and guidance for both employers and employees.

Finally, a standard based on causation comports with the language and purpose of both USERRA (the statute at issue in *Staub*) and the statute upon which the Court's decision is likely to have the greatest effect: Title VII.[99] Each statute states that discriminatory animus must have been a "motivating factor" in the adverse employment decision,[100] suggesting, as the Court confirmed, that the strict approach conflicted with the statutory language to which it has been applied to date[101]:

> [The Seventh Circuit's approach] would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment action in that official, and asks that official to review the employee's personnel file before taking the adverse action, then that employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.[102]

Additionally, while the Court failed to provide complete and clear guidance with regard to independent investigations, it succeeded at least in implicitly rejecting the strict approach to this powerful shield previously wielded by employers in the Fourth and Seventh Circuits.[103] In his concurrence, Justice Alito advocated for an approach to independent investigations[104] that has, in the circuits applying the strict approach, led to near-automatic grants of summary judgment for employers even where the actual decision-maker did little, if anything, more than view the employee's personnel file (typically compiled and produced by the biased supervisor).[105] Had the Court been able to issue an opinion in *BCI*—in retrospect the perfect platform from which the Court might have

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[96] *See* Kepner, *supra* note 51, at 142. *See generally* Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489 (2006) (addressing past judicial and congressional failures at remedying the ambiguity of causation in disparate treatment discrimination cases, and offering a solution by importing ideas from the field of logical causation).

[97] Kepner, *supra* note 51, at 142.

[98] *See generally* Katz, *supra* note 96.

[99] *See supra* note 11 and accompanying text.

[100] *See supra* note 11.

[101] Kepner, *supra* note 51, at 143–44.

[102] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1193 (2011).

[103] *Id.*

[104] *Id.* at 1195–96 (Alito, J., concurring in the judgment).

[105] Ratliff, *supra* note 32.

clarified the cat's paw liability doctrine—the uncertainty surrounding causation and independent investigations may very well have been resolved to a greater degree than it was in *Staub*. In *BCI*, the Tenth Circuit explicitly embraced the independent investigation criterion in terms of causation, positing that an investigation must truly be "independent" and informed by more—contrary to Justice Alito's reasoning[106]—than a mere review of the employee's personnel file in order to "defeat" the "causal link."[107]

Justice Scalia's opinion does appear to call, in a general sense, for much more aggressive and thorough investigations by employers prior to making adverse employment decisions.[108] Justice Scalia directly addressed Proctor Hospital's contention that (in line with the Fourth and Seventh Circuits' approaches, and even many of the intermediate circuits' approaches, as discussed above)[109] even if the "mere exercise of independent judgment does not suffice . . . at least the decisionmaker's independent investigation (and rejection) of the employee's allegations of discriminatory animus ought to do so."[110] Scalia continued, without elaborating: "We decline to adopt such a hard-and-fast rule."[111]

All of this clearly signals positive change. As noted above, several circuits, including some intermediate circuits, either allowed an independent investigation that included an opportunity for the employee to present his or her side of the story to sever the discriminatory animus from the ultimate decision, or worse yet, "except[ed] th[e] case from the cat's paw line of cases."[112] However, empirical research indicates that employees, even when they have important information to communicate (for example, allegations pertaining to a supervisor's unlawful bias and fabricated disciplinary records), often "clam up" in employment settings based on a sense of futility, anxiety, or fear of retribution.[113] Further,

[106] Justice Alito does use the phrase "reasonable investigation." However, he implies that such an investigation would be required only after the decision-maker is alerted to the possibility of bias. *Staub*, 131 S. Ct. at 1195–96 (Alito, J., concurring in the judgment). And, in any case, the term "reasonable" invites the very kind of uncertainty that produced precisely this result in the circuits. *See, e.g.*, Brewer v. Bd. of Trs., 479 F.3d 908 (7th Cir. 2007); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004) (en banc).

[107] EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 487 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (Jan. 5, 2007), *cert. dismissed*, 549 U.S. 1334 (Apr. 12, 2007).

[108] *Staub*, 131 S. Ct. at 1193–94.

[109] *See supra* Part II.A.

[110] *Staub*, 131 S. Ct. at 1193.

[111] *Id.*

[112] Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998); *see also, e.g.*, Willis v. Marion Cnty. Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997) (declining to apply the cat's paw doctrine to a case where the independent investigation into the subordinate's motives constituted a meeting between the employee and the decision-maker prior to any adverse employment actions).

[113] James R. Detert et al., *Debunking Four Myths About Employee Silence*, HARV. BUS. REV., June 2010, at 26, 26; *see also* James R. Detert & Ethan R. Burris, *Leadership Behavior and*

purely internal confrontations between decision-makers and employees—even when they are made more formal—suffer from the same shortcomings.[114] An employee is likely to omit information, or simply fail to clearly articulate his or her side of the story, given the imbalance of power and intimidation factor inherent in these interactions.[115] In other words, giving the targeted employee a chance to tell his or her side of the story is simply not enough.

Justice Scalia's language appears to bar this single element of a proper independent investigation from constituting a sufficient independent investigation in and of itself, perhaps encouraging employers to adopt more formalized internal grievance procedures (for instance, neutral mediators), as well as protocol for independent investigations that involve more structured, rigorous, and wide-reaching inquiry. Incidentally, procedures for formal disciplinary appeals are becoming more prevalent in non-unionized organizations, generally with positive results.[116]

B. The first two prongs of the Court's test leave employees on uncertain footing in protracted cat's paw situations involving ambiguity as to the biased supervisor's subjective intent.

The Court, in setting forth its three-part test, explicitly italicized the word "intended" in its formulation of the subjective inquiry involved in the second step.[117] The test requires an "act" "that is *intended* by the supervisor to cause an adverse employment action."[118] This language may prove problematic for employees in future cat's paw cases in that the test implies a direct subjective link between the biased subordinate's "act" and the ultimate adverse employment action. Though the Court is obviously limited to the "case" or "controversy" before it,[119] the majority of cat's paw cases are not nearly so factually straightforward as Staub's.[120]

Employee Voice: Is the Door Really Open?, 50 ACAD. MGMT. J. 869, 881 (2007) (empirically investigating the effect of management style on employees willingness to speak up).

[114] Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 530 (1993).

[115] *See generally id.* (discussing how many employees are, in effect, dissuaded from pursuing legal action in instances where they are provided a manager trained in "talking the situation over"); Detert et al., *supra* note 113, at 26 (concluding from data collected from 439 respondents that futility is a more prevalent reason for not speaking up than fear of retribution); Detert & Burris, *supra* note 113, at 881.

[116] *See* Brian S. Klaas & Daniel C. Feldman, *The Impact of Appeal System Structure on Disciplinary Decisions*, 47 PERSONNEL PSYCHOL. 91, 103–05 (1994).

[117] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011).

[118] *Id.*

[119] U.S. CONST. art. III, § 2.

[120] *See, e.g.*, Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733 (8th Cir. 2009) (professor alleged cat's paw discrimination following the university's tenure review process, which was "multi-faceted, involv[ed] reviews at the department, college, and university levels," with recommendations regarding promotion made by "multiple

Biased supervisors are not often so bold as to ask others to help "*get rid of*" the targeted employee.[121]

Consider, for example, the following scenario: An employee's supervisor—based on discriminatory animus prohibited by Title VII—issues that employee poor performance reviews and holds that employee to a higher standard than other employees over a long period of time, resulting in disciplinary notices or other negative entries in the employee's personnel file that would not be present if, for instance, the employee were not African-American. Returning to the practical aspect of this issue detailed in Part II.B, suppose that the employee and supervisor work in an office two states away from corporate headquarters where personnel decisions are made. The discriminatory treatment continues for quite some time, say, four years. It does not follow any particular pattern; the supervisor simply harbors bias against African-Americans, and as a result treats this particular employee poorly in general. Some of this poor treatment finds its way into the employee's personnel file, while some does not.

At some point in time, pursuant to a standardized policy set by the company for whom the employee works or merely by happenstance, the actual decision-maker reviews the employee's personnel file. After evaluating the file as a whole, including the various portions of it motivated by discriminatory animus, the decision-maker independently decides to terminate the employee. Or in another variation of this scenario, suppose that economic times become tough, and the company must lay off five percent of its employees in order to stay afloat. In determining which workers to keep and which to lay off, the decision-maker takes performance into account via review of personnel files, and the employee is laid off when he or she otherwise would most likely have been retained absent the material in his or her personnel file motivated by discriminatory animus. In this scenario, the biased supervisor may not even know that the employee is being laid off before the employee does, and in fact the biased supervisor might be laid off at precisely the same time by a decision-maker further up the ladder.

In either case, the supervisor's discriminatory animus was likely a proximate cause of the employee's loss of his or her job; however, when one attempts to apply the Court's new three-part test in its entirety to this scenario, two questions arise: First, do the protracted and dispersed actions by the biased supervisor constitute an "act" within the meaning of the Court's language? And second, by engaging in this conduct, did the

committees and administrators"); Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77 (1st Cir. 2004) (where the facts required four pages of text to be adequately relayed); Gee v. Principi, 289 F.3d 342 (5th Cir. 2002) (where the adverse employment action was justified using the same critique that an alleged animously motivated subordinate forwarded at a separate meeting in the presence of the ultimate decision-maker).

[121] *Staub*, 131 S. Ct. at 1194 (emphasis added).

supervisor "*intend*" to cause an adverse employment action (or perhaps more importantly, can the employee prove it)?

The first question is somewhat easier to answer, and although it leaves room for uncertainty among the circuits, a series of relatively consistent actions over a long period of time most likely satisfies the first prong of the Court's test. The question will become more difficult to answer in situations where the biased supervisor's conduct was particularly vague and disbursed (i.e., as it becomes less consistent), for example various offhand comments made (by telephone or e-mail) to the actual decision-maker regarding the employee's performance over the course of many years—some well founded, some partly true but laced with discriminatory animus, and some purely products of animus. Such a scenario will present the circuits with some difficulty on its own; however, the key difficulty lies in connecting this to the second prong of the Court's test, and thus in answering the second question posed above.

As for this second, and most important, question, the Court states early in its opinion that "[i]ntentional torts such as this . . . generally require that the actor intend the *consequences* of an act, not simply the act itself."[122] This necessarily requires a link, formulated by the court as subjective intent, between the ultimate consequences of the biased supervisor's conduct, whatever they may be, and the conduct itself. This link is almost certainly lacking in the scenario presented above. Accordingly, the Court's opinion may very well fail to reach a substantial percentage of cat's paw cases, leaving employees vulnerable when the discrimination visited on them does not fit the classic, straightforward archetype embodied by *Staub*'s facts.

C. The Court's adoption of proximate cause as the standard by which cat's paw actions are judged leaves the door open to independent investigations that break the chain of causation, yet the Court provided no clear standard with which to evaluate the sufficiency of such investigations.

The Court paid surprisingly little attention to the independent investigation element previously relied upon by the circuits. In fact, one is left wondering, absent Justice Alito's concurrence in the judgment and Justice Scalia's compulsion to respond to it, whether the Court would have addressed this at all. The Court's cursory treatment of the issue left the door open for independent investigations that break the causal chain, failed to establish whether the proximate cause test set forth in its opinion fits within the context of its previous employment discrimination jurisprudence or is simply a direct facsimile of the general tort concept, and ultimately perpetuated uncertainty among the circuits by fully addressing only half of the test developed over the past twenty years. While the Court is certainly free to create an entirely new approach and

[122] *Id.* at 1191 (quoting Kawaauhau v. Geiger, 523 U.S. 57, 61–62 (1998)) (internal quotation marks omitted).

erase "half of the test" developed by the circuits, it did not create anything so novel as to make independent investigations irrelevant.[123] In fact, by resting the inquiry almost entirely on proximate cause, the Court ensured that independent investigations would be the central focus of subordinate bias liability litigation, acknowledged that they will continue to play a role in the resolution of these disputes,[124] and then produced no clear standard by which to judge them.[125] Rather than addressing the role of independent investigations comprehensively and directly, the Court left resolution of this crucial issue to the same circuits that have produced such wildly inconsistent results over the past twenty years.[126]

Specifically, two primary areas of ambiguity with regard to independent investigations accompany the Court's opinion. First, from a purely doctrinal perspective, the opinion leaves courts with no guidance as to how to reconcile the Court's apparent adoption of the general tort concept of proximate cause with the standard mixed-motive and burden-shifting approaches under which employment discrimination cases have generally been analyzed.[127] Second, as an additional result of this de facto omission, proper resolution of disparate treatment scenarios with cat's paw elements, for both this reason and the reasons set forth in Part IV.B above, remains in doubt.[128] The Court appears to be importing pure tort law into the employment context, with its established body of law, and adopting—based on its application of "proximate cause" to *Staub*'s facts—a vague, hybrid standard borrowing elements of "minimal" or "motivating factor" causation and "but for" or "actual" causation.[129] However, assuming that the third prong of the Court's test is meant to draw exclusively on the concept of proximate cause taught to thousands of students in first-year torts courses each year,[130] these ambiguities remain entirely unresolved.

Justice Alito's concurrence in the judgment provides a good vantage point from which to view the Court's curious treatment of independent investigations and proximate cause. Specifically, Justice Alito correctly pointed to the Court's failure to address independent investigations

[123] *Id.* at 1193–94.

[124] *Id.* at 1193.

[125] *Id.* at 1192–94.

[126] *See supra* Part II.A.

[127] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (mixed motive framework); Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (further development of the mixed motive framework); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (burden shifting framework).

[128] For background on disparate treatment scenarios and the cat's paw theory, see Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 503–19 (2001).

[129] For additional background on various standards of causation in this context, as well as an argument proposing a "minimal causation" standard, see Kepner, *supra* note 51, at 142–47.

[130] *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

conclusively; however, he framed the solution to this ambiguity in a manner all too familiar to employees in the Fourth and Seventh Circuits.[131] Alito proposed that the taint of discriminatory animus should be removed "where the officer with formal decisionmaking responsibility, having been alerted to the possibility that adverse information may be tainted, undertakes a reasonable investigation and finds *insufficient* evidence to dispute the accuracy of that information."[132] This standard effectively shifts the burden of persuasion to the employee, presumably requiring "sufficient" evidence challenging the accuracy of the adverse information. This clashes directly with the Court's core employment discrimination jurisprudence, namely *McDonnell Douglas Corp. v. Green*,[133] in that under Justice Alito's formulation the burden of production is never shifted to the employer. The employer is not obligated to so much as suggest a legitimate, nondiscriminatory reason for the adverse employment action, even where the employee has produced clear evidence of discriminatory animus.[134]

By contrast, the Court's opinion suggests a role for independent investigations akin to that in the Tenth Circuit, whereby the investigation must not merely result in "insufficient evidence" of discriminatory taint, but rather must affirmatively unearth a legitimate, nondiscriminatory reason for the adverse employment action.[135] Justice Scalia wrote:

> [I]f the employer's investigation results in an adverse action for reasons unrelated to the supervisor's original biased action . . . then the employer will not be liable. But the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified.[136]

With this language in mind, two questions emanating from the void between employment law and tort law created by the Court in *Staub* arise: First, where an independent investigation reveals a legitimate, nondiscriminatory reason for the adverse employment action, does the biased supervisor's prior discriminatory act nonetheless remain the proximate cause of that action where the investigation, and subsequent adverse employment action, would never have occurred but for the discriminatory act? And second, may the employee still endeavor to prove, under *McDonnell Douglas*, that the legitimate, nondiscriminatory

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[131] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1195–96 (2011) (Alito, J., concurring in the judgment).

[132] *Id.* at 1195 (emphasis added).

[133] 411 U.S. 792 (1973).

[134] *Id.* at 802–07.

[135] *See, e.g.*, Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1230–32 (10th Cir. 2000) (refusing to impute liability to the employer where an independent investigation revealed a legitimate, nondiscriminatory reason for the adverse employment action at issue).

[136] *Staub*, 131 S. Ct. at 1193.

reason was a mere "pretext"[137] for that action given that, using the Court's test, it was ultimately *caused* by the biased subordinate and not the actual decision-maker?

Staub provides an excellent illustration of the first issue. Even assuming that Mulally fabricated the Corrective Action disciplinary notice, and assuming that Korenchuk fabricated Staub's violation of it, Buck also fired Staub due to some separate indications in his personnel file (provided by neither Mulally nor Korenchuk) that he had exhibited difficulty working with others in the past.[138] Assuming that this constituted a legitimate, nondiscriminatory reason for firing Staub, would Proctor Hospital nonetheless be liable? The Court's opinion suggests that the answer is "no." While Mulally and Korenchuk's actions clearly *actually* caused the ultimate adverse employment action (they were a "but for" cause), based on the Court's language above one must assume that they did not proximately cause the ultimate adverse employment action. Absent further clarification from the Court, resolution of the second question posed above will be left to the circuits. Justice Scalia's opinion fails to provide so much as a hint.

Regarding the second area of ambiguity (concerning disparate treatment in this context), one might begin by asking whether the record of Staub's difficulty working with others was truly "unrelated to the supervisor's original biased action."[139] In the context of disparate treatment, independent investigations remain an enigma following *Staub*—particularly for employers attempting to formulate policies to avoid liability. Building on the quasi-hypothetical above, suppose that four other employees had similarly been found to have difficulty working with others. These employees suffer no adverse employment action. In conducting an independent investigation that reveals a legitimate, nondiscriminatory reason for the adverse employment action (in Justice Scalia's words, determining that the action was "entirely justified"[140]), must the decision-maker also ensure that the originally targeted employee was not subjected to disparate treatment? In other words, based on individual analysis of the employer's policies and practices, does such an independent investigation nonetheless break the chain of causation (meaning that the employee's case fails on the third prong of the Court's test) even where the employee has suffered disparate treatment (i.e., the adverse employment action would be "entirely justified" with respect to one or more additional employees) and his or her transgressions would not have resulted in an adverse employment action were he or she not a member of the protected class? The Court's opinion, unfortunately, also fails to provide any clear guidance on this question.

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[137] *McDonnell Douglas Corp.*, 411 U.S. at 804–05.

[138] Staub v. Proctor Hosp., 560 F.3d 647, 651–52, 654, 659 (7th Cir. 2009).

[139] *Staub*, 131 S. Ct. at 1193.

[140] *Id.*

Finally, setting aside the doctrinal implications of *Staub* and looking at the cat's paw issue from a practical perspective, a clear, rigorous standard for independent investigations both protects employees and "affords employers that adopt responsible policies and conduct thorough independent investigations much deserved protection."[141] Additionally, as Justice Alito pointed out (albeit in advocating for a strict approach), certainty surrounding independent investigations "would also encourage employers to establish internal grievance procedures."[142] In short, a clear standard for independent investigations would encourage employers to eliminate bias in the workplace and enact procedures that benefit both employer and employee by providing a means for potential resolution of disputes before the employee is out of a job and both parties begin paying attorneys to resolve the matter for them. Perhaps most importantly, if employers have a clear incentive to incorporate rigorous independent investigations into their policies, the monkeys of the world will be deprived of their chestnuts, will become easier to identify, and, in the end, may find themselves both singed and hungry.

V. CONCLUSION

While the Court's decision in *Staub* is a step in the right direction, it has, in effect, provided an open-ended test with at least two important areas of ambiguity that will directly impact the resolution of future cat's paw cases. If this uncertainty is to be resolved, the Court (to point out the obvious) has two options: It may hand select one or more additional cat's paw cases and resolve these issues itself, or it may allow the gaps in its test to be addressed by the circuits. Given the inconsistent results produced by the circuits over the past twenty years, the Court would be best advised to choose the former course of action. Unfortunately, given the Court's vague and cursory treatment of the crux of the cat's paw issue in dismissing independent investigations as a means to promote employers' policies designed to expose and eradicate bias, and as a means to prevent employees from losing jobs and entering into protracted litigation in the first place, the latter scenario appears more likely at first glance.

On the other hand, the absence of answers to the lingering questions presented above, as well as the Court's express refusal to decide whether its rule applies to biased acts by co-workers that would otherwise satisfy its three-part test,[143] may signal the Court's readiness to begin developing the cat's paw doctrine on its own rather than allowing it to flounder in the circuits. One could persuasively argue that *Staub* was

[141] Rachel Santoro, Comment, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 832 (2009).

[142] *Staub*, 131 S. Ct. at 1196 (Alito, J., concurring in the judgment).

[143] *See supra* note 5.

hand selected by the Court,[144] after *BCI* slipped from its grasp,[145] as a means to take an initial, broad swipe at the tangled ball of yarn in the cat's paw. If this is so, the Court may very well use *Staub* as a springboard to refine and flesh out the doctrine, ideally achieving the clarity and consistency that employers and employees so desperately require in light of the very real potential for a substantial increase in cat's paw scenarios as the modern workplace continues to evolve.[146]

In either case, again, there are more monkeys in the world today, and their power is increasing. While the Court provided employees with some additional protection against them in *Staub*, employees indisputably need clear protections that do not vary with their geographical locations, and employers need the certainty that will allow them to plan in advance and establish clear, effective policies. This last step may very well come from the cats (employers) themselves in the form of rigorous independent investigations and policies designed to root out bias and bridge the gap between employee and decision-maker—if, that is, the Court provides them with the necessary guidance and tools. The trouble is, even now that the Court has finally decided a long-awaited cat's paw case, this remains one very big "if."

[144] *Staub* increasingly appears to be a product of patience and careful selection by the Court when one considers that, between its inability to decide *BCI* and its grant of certiorari in *Staub*, the Court denied certiorari in two cat's paw cases. Brewer v. Bd. of Trs., 479 F.3d 908 (7th Cir. 2007), *cert. denied*, 552 U.S. 825 (2007); Sawicki v. Morgan State Univ., 170 F. App'x 271 (4th Cir. 2006), *cert. denied*, 550 U.S. 902 (2007).

[145] *Supra* notes 24–25.

[146] *See supra* Part II.B.