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Extending the Cat's Paw Too Far into the Fire: Rejecting the Second Circuit's Extension of the Cat's Paw Theory of Liability to Co-worker Discriminatory and Retaliatory Animus

Devin Muntz[†]

ABSTRACT

The Second Circuit's recent extension of the cat's paw doctrine to include the discriminatory and retaliatory actions of low-level co-workers without a supervisory role created a circuit split and set the stage for increased Title VII challenges against employers. This Comment argues against the Second Circuit's decision and contends that the cat's paw theory of liability, an employment law doctrine where employers may be held liable for Title VII violations based on the discriminatory actions of their employees, should not be extended to the discriminatory actions of low-level co-workers. Although the Supreme Court established employer liability for a supervisor's discriminatory animus in the Title VII context in Staub v. Proctor Hospital, extending the doctrine to low-level employees will be detrimental to corporations and lead to the inefficient use of resources where employers are forced to mediate employee disputes rather than focus on the business at hand. Extending the cat's paw doctrine in the current complex employment environment will not only frustrate employers, who will face increased liability, but such an action would also deplete corporate resources that could otherwise be directed towards Title VII's ultimate purpose—decreasing discrimination in the workplace.

I. INTRODUCTION

The “cat’s paw” theory of liability, an employment law doctrine sometimes referred to as subordinate bias, establishes that in certain circumstances an employer may be held liable for the discriminatory and retaliatory actions of its employees.¹ The cat’s paw² doctrine has

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¹ See, e.g., Hannah Banks, Staub v. Proctor Hospital: *Cleaning Up the Cat's Paw*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 71 (2011).

² The “cat’s paw” is a reference to a fable where a clever monkey convinces a naïve cat to pull

been applied to Title VII of the Civil Rights Act of 1964,³ as well as to federal employment statutes including the Age Discrimination in Employment Act (ADEA)⁴ and the Americans with Disabilities Act (ADA),⁵ and acts as a means of redress for employees subject to adverse employment action as the result of discriminatory or retaliatory animus.⁶ Cat's paw claims are generally brought by the aggrieved employee, often with the help of the Equal Employment Opportunity Commission (EEOC),⁷ with common remedies including back pay, punitive damages, and reasonable attorneys' fees.⁸

Although the cat's paw theory of liability was an accepted doctrine among the circuit courts, a lack of uniformity with respect to: (1) the appropriate standard of causation to establish employer liability and (2) the level of employee on which a cat's paw claim could be premised, created a circuit split. However, the Supreme Court finally weighed in on the issue in *Staub v. Proctor Hospital*,⁹ where the Court cited both agency and tort law in holding that an employer may be liable for a supervisor's discriminatory or retaliatory animus in the Title VII context.¹⁰ In *Staub*, the Court found that where a supervisor intended to cause an adverse employment action and the supervisor's discriminatory animus was a proximate cause of the adverse employment action, the employer could be liable even though the supervisor was not the ultimate decision maker.¹¹ However, while establishing the standard of causation, the Supreme Court declined to address if low-level, co-worker discriminatory animus that influences an employment decision could be imputed in the cat's paw equation.¹² The Court also declined to create a bright line defense for employers to avoid liability via independent investigations or determine whether a cat's paw claim could be

chestnuts out of a hot fire for the monkey and cat to share; however, the monkey quickly eats the chestnuts as they are pulled out of the fire, leaving the cat with a burnt paw and no chestnuts to show for it.

³ 42 U.S.C. §§ 2000e–e-17 (2012).

⁴ 29 U.S.C. §§ 621–634 (2012).

⁵ 42 U.S.C. §§ 12101–12300 (2012).

⁶ See Eric C. Surette, *Who is "Supervisor" for Purposes of Racial Harassment Claim Under Title VII of Civil Rights Act of 1964* (42 U.S.C.A. §§ 2000e et seq.) *Imputing Liability to Employer*, 92 A.L.R. Fed. 2d 91 (2015).

⁷ See *id.*

⁸ See *Staub v. Proctor Hosp.*, No. 04-1219, 2008 WL 2001935, at *5 (C.D. Ill. May 7, 2008), *rev'd in part*, 560 F.3d 647 (7th Cir. 2009), *rev'd and remanded*, 562 U.S. 411 (2011).

⁹ 562 U.S. 411 (2011).

¹⁰ *Id.* at 422.

¹¹ *Id.*

¹² *Id.*

excused if the aggrieved employee fails to follow an employer's internal grievance policy or procedure.¹³

While the Supreme Court's decision provided guidance for the lower courts, employers, and employees with respect to clear-cut supervisor discrimination, a void nonetheless remains for addressing low-level, co-worker discriminatory actions that can have devastating effects on employees and employers alike when left unchecked. In 2016 alone the EEOC received over 91,000 charges of workplace discrimination, some of which included multiple bases of discrimination.¹⁴ District courts are seeing a rise in co-worker cat's paw cases, and the circuit courts began addressing the issue with varied results.¹⁵ Concurrently, the Bureau of Labor Statistics reported that the number of layoffs and discharges in October 2016 reached 1.5 million, remaining essentially unchanged from prior months.¹⁶ Not only would a clear-cut ruling on co-worker cat's paw liability aid the courts, employers and employees would likewise benefit from the ability to accurately anticipate court review of termination decisions.

The Second Circuit recently decided to extend the cat's paw theory of liability to co-worker discriminatory animus in *Vasquez v. Empress Ambulance Service, Inc.*¹⁷ Citing agency and tort law, the Second Circuit held that an employer is liable if: (1) a co-worker maintains a discriminatory animus towards and intends to cause an adverse employment action against the plaintiff, (2) the co-worker's discriminatory acts are the proximate cause of the adverse employment action, and (3) the employer is negligent in that the employer knew, or should have reasonably known, of the discriminatory motivation of the co-worker.¹⁸ In reaching its decision, the Second Circuit declined to create a hard and fast rule for employer-led independent investigations or to delineate affirmative acts that may provide employers with relief from liability

¹³ *Id.*; see also "CAT'S PAW" THEORY – DISCRIMINATORY ANIMUS OF NONDECISIONMAKER IMPUTED TO DECISIONMAKER, 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:17.10 (2016).

¹⁴ See EEOC Releases Fiscal Year 2016 Enforcement and Litigation Data, EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/newsroom/release/1-18-17a.cfm> [<https://perma.cc/MR22-8T7B>] (although these 91,000 charges are not all related to low-level, co-worker discriminatory actions, the high volume of charges evidences a large burden on employers and courts).

¹⁵ See John S. Collins, *Another Hairball for Employers? "Cat's Paw" Liability for the Discriminatory Acts of Co-Workers After Staub v. Proctor Hospital*, 64 BAYLOR L. REV. 908, 923–30 (2012).

¹⁶ See U.S. DEP'T OF LABOR, BUREAU OF LAB. STAT., JOB OPENINGS AND LABOR TURNOVER – OCTOBER 2016 (Dec. 7, 2016), https://www.bls.gov/news.release/archives/jolts_12072016.pdf [<https://perma.cc/UMA7-UDHL>].

¹⁷ 835 F.3d 267 (2d Cir. 2016).

¹⁸ *Id.* at 274.

when an appropriate investigation is implemented.¹⁹ The Second Circuit also did not address whether following employer initiated internal grievance policies is a requirement for co-worker cat's paw claims.²⁰

This Comment takes an in-depth view of the evolution of the cat's paw theory of liability in employment law under Title VII, focusing on the extension of the cat's paw doctrine to co-worker discriminatory and retaliatory actions that result in adverse employment decisions. This Comment seeks to argue against the Second Circuit's extension of the cat's paw doctrine to co-worker discriminatory animus, which effectively negates the necessity for the creation of a bright line rule with respect to employer-led independent investigations in such scenarios. As the Supreme Court noted, while the intent of Title VII is to remove discriminatory employment practices, the language of Title VII "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."²¹ In the current employment environment, where corporations are made up of thousands of employees and over one million individuals are subject to layoffs and discharges each month,²² extending the cat's paw would lead to an increase in the number of lawsuits against employers and ultimately have the effect of forcing employers to perform the impossible task of complete workplace oversight and full review of every adverse employment decision. Ultimately the cat will not only be dealing with the monkey, but also the boy who cried wolf.²³

Part II of this Comment provides background on discrimination and retaliation in the employment setting as well as a broad overview of the cat's paw doctrine. This overview includes the Supreme Court's decision in *Staub* and the subsequent circuit court treatment of the cat's paw theory of liability with respect to co-worker discriminatory animus. Part III examines the Second Circuit's recent decision in *Vasquez* and elaborates on the Second Circuit's analysis and justifications for extending the cat's paw to co-worker actions. In Part IV, this Comment argues that the cat's paw doctrine should not extend to co-worker discriminatory and retaliatory animus, contrary to the Second Circuit's holding, while highlighting the far-reaching, negative impact of such an extension as well as alternative options for employee recovery.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

²² See U.S. DEP'T OF LABOR, BUREAU OF LAB. STAT., *supra* note 16.

²³ Apologies for the multiple allegories—an inevitable side effect of growing up in a household with an elementary school librarian.

II. BACKGROUND OF THE “CAT’S PAW” THEORY OF LIABILITY IN EMPLOYMENT DISCRIMINATION AND RETALIATION

A. Title VII Framework for Discrimination and Retaliation in Employment

At its core, Title VII of the Civil Rights Act of 1964 responded to unfair labor practices and aimed for “the elimination of race as a factor in employment decisions[,] the improvement of economic status of African-Americans and other minority groups[,] and the minimization of government interference in management’s traditional prerogatives.”²⁴ The text of Title VII established that it is an “unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁵ Title VII specifically prohibits an employer from terminating individuals based on one of the listed protected characteristics both for discriminatory reasons and in retaliation for an employee’s claim of discriminatory conduct.²⁶

The non-retaliation provision of Title VII provides that it is unlawful for an employer to discriminate against an employee “because he has opposed any practice made an unlawful employment practice” or “because he has made a charge, testified, assisted, or participated in any manner” in relation to a Title VII claim.²⁷ Including retaliation in the discrimination framework is largely because “‘fear of retaliation is the leading reason why people stay silent’ about the discrimination they have encountered or observed.”²⁸ Congress later passed the Civil Rights Act of 1991,²⁹ which added that an unlawful employment practice could be established when “race, color, religion, sex, or national origin was a motivating factor for any employment practice.”³⁰ This amendment had a burden shifting effect that allowed an employee to “obtain declaratory relief, attorney’s fees and costs, and some forms of injunctive relief

²⁴ David A. Forkner & Kent M. Kostka, *Unanimously Weaving a Tangled Web: Walters, Robinson, Title VII, and the Need for Holistic Statutory Interpretation*, 36 HARV. J. ON LEGIS. 161, 166–67 (1999).

²⁵ 42 U.S.C. § 2000e-2(a)(1).

²⁶ Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2623 (1998).

²⁷ 42 U.S.C. § 2000e-3(a).

²⁸ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534–35 (2013) (citing *Crawford v. Metro. Gov’t of Nashville and Davidson Cty.*, 555 U.S. 271, 279 (2009)).

²⁹ Pub. L. 102-166, 105 Stat 1071 (1991) (codified in scattered sections of 42 U.S.C.).

³⁰ See 42 U.S.C. § 2000e-2(m).

based solely on proof that race, color, religion, sex, or nationality was a motivating factor in the employment action.”³¹

Although a major consideration in and component of employment law, several aspects of Title VII remain contentious and disputed. While the Supreme Court has weighed in on the purpose of Title VII, declaring the plain language of the statute makes it clear that the goal “was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees,”³² some scholars have argued that Title VII was to have limited reach and that the purpose was neither to completely eradicate discrimination in employment nor to require absolutely no racial discrimination in the workplace.³³

In addition, the use of the term “because of” in both the discriminatory and retaliatory provisions of Title VII is ambiguous as to the causal standard required for establishing discrimination, leading the courts to rely on differing tort law theories.³⁴ While courts have interpreted the “because of” language to include that discrimination against the “prohibited traits was a ‘motivating’ or ‘substantial’ factor in the employer’s decision,”³⁵ both a “but for” causal relationship³⁶ and a proximate causal relationship³⁷ have been read into the text of Title VII. Finally, Title VII’s definition of employer, which includes “any agent of such a person,”³⁸ has led to the utilization of agency principles in assigning employer liability despite agency not being defined in the statute.³⁹ Courts have followed the Restatement (Second) of Agency, which states:

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon

³¹ *Nassar*, 133 S. Ct. at 2526.

³² *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

³³ See Chuck Henson, *Title VII Works—That’s Why We Don’t Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. 41, 52–53 (2012).

³⁴ See Rachel Santoro, *Narrowing the Cat’s Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 831–32 (2009).

³⁵ *Nassar*, 133 S. Ct. at 2532 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)).

³⁶ See *Gross v. FBL Fin. Services*, 557 U.S. 167, 176 (2009).

³⁷ See *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011).

³⁸ 42 U.S.C. § 2000e.

³⁹ Sara Eber, *How Much Power Should Be in The Paw? Independent Investigations and the Cat’s Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 150–51 (2008).

apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.⁴⁰

Thus, the framework for applying Title VII to employment law has been characterized by reliance on tort and agency law as read into Title VII by the courts.

B. The Cat's Paw Theory of Liability

Employment law consistently recognizes that an employer can be held liable for a Title VII violation based on the discriminatory and retaliatory motivations and actions of their employees, although this continues to be a highly controversial area of law.⁴¹ Such an imputation is called the “cat’s paw”⁴² theory of liability (sometimes referred to as subordinate bias) and is derived from an Aesop’s fable where a monkey convinces a cat to pull chestnuts out of a fire with the promise of sharing the chestnuts; however, as the cat pulls the chestnuts out of the fire the monkey eats all of the chestnuts himself, leaving the gullible cat with nothing but a burnt paw.⁴³

First coined by Judge Richard Posner in *Shager v. Upjohn Co.*,⁴⁴ the cat’s paw in employment discrimination refers to a situation where “a discriminatorily motivated employee plays the role of the proverbial monkey and manipulates an innocent manager or supervisor into acting on the employee’s illegal bias.”⁴⁵ Posner’s use of the metaphor was largely in relation to the integration of respondeat superior⁴⁶ into the employment context, positing that “if [the defendant-company] acted as the conduit of [an employee’s] prejudice—his cat’s-paw—the innocence of its members would not spare the company from liability.”⁴⁷ Further, Posner noted that where an independent decision for termination was

⁴⁰ Restatement (Second) of Agency § 219(2) (1957).

⁴¹ See Collins, *supra* note 15.

⁴² MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 181 (10th ed. 2001) (defining cat’s paw as “one used by another as a tool”).

⁴³ See Aesop, *The Monkey and the Cat*, <http://mythfolklore.net/aesopica/milowinter/61.htm> [<https://perma.cc/V453-Q2SV>]. The “cat’s paw” is also commonly associated with Jean de La Fontaine, a poet who adapted the fable in the Fifteenth Century.

⁴⁴ 913 F.2d 398 (7th Cir. 1990).

⁴⁵ Collins, *supra* note 15; see also *Schandelmeier-Bartels v. Chi. Park Dist.*, 634 F.3d 372, 379 (7th Cir. 2011) (“In employment discrimination cases, the ‘cat’s paw’ is the unwitting manager or supervisor who is persuaded to act based on another’s illegal bias.”).

⁴⁶ Restatement (Second) of Torts § 317 (1965) (“[U]nder traditional respondeat superior analysis, an employer is liable for an employee’s torts committed within the scope of that employment; if an employee commits an intentional tort with the dual purpose of furthering the employer’s interest and venting personal anger, respondeat superior may lie; however, if the employee acts purely in his own interest, liability under respondeat superior is inappropriate.”).

⁴⁷ *Shager*, 913 F.2d at 405.

separate from the discriminatory animus, with the decision maker not acting as a “mere rubber stamp,” the cat’s paw would not apply.⁴⁸ The cat’s paw has been found applicable to multiple scenarios, including “when a biased subordinate conceals relevant information from a decisionmaker” or “when the subordinate’s discriminatory animus skews recommendations to higher authorities.”⁴⁹

In the years following Posner’s initial use of the cat’s paw doctrine in the employment discrimination and retaliation context, the circuit courts remained split on the appropriate standard of causation to apply to employer liability for adverse employment actions⁵⁰ derived from the discriminatory acts of employees.⁵¹ Although scholars differ on the exact categorization of the various circuit standards, most note the use of three distinct standards: a strict standard, an intermediate standard, and a lenient standard.⁵²

The Fourth Circuit took the strictest and most pro-employer approach, requiring that the biased employee be a supervisor and “the one principally responsible for the decision or the actual decisionmaker for the employer.”⁵³ At the opposite end of the spectrum, the First, Second, Third, Fifth, Eighth, Ninth, and D.C. Circuit Courts followed a lenient standard of causation that was pro-employee/plaintiff.⁵⁴ Under the lenient standard an employer was generally held liable where a fellow employee had any influence over the ultimate adverse employment action.⁵⁵ Finally, the Sixth, Seventh, Tenth, and Eleventh Circuits found a middle ground and followed an intermediate standard that generally required a causal connection between an employee’s discriminatory animus and the ultimate adverse employment action.⁵⁶

⁴⁸ *Id.* at 406.

⁴⁹ Eber, *supra* note 39, at 146.

⁵⁰ An adverse employment action is “to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or decision causing a significant change in benefits.” Surette, *supra* note 6.

⁵¹ See Sara Atherton Mason, *Cat’s Paw Cases: The Standard for Assessing Subordinate Bias Liability*, 38 FLA. ST. U. L. REV. 435 (2011).

⁵² *Id.* at 260. *But see* Sean Ratliff, *Independent Investigations: An Inequitable Out for Employers in Cat’s Paw Cases*, 80 U. COLO. L. REV. 255, 260 (2009) (creating three categories of review on a “continuum ranging from the most lenient and pro-plaintiff to the most rigid and pro-employer”); Timothy Powderly, *Limiting the Ways to Skin a Cat—An End to the Twenty Year Perplexity of the Cat’s Paw Theory in Staub v. Proctor?*, 31 ST. LOUIS U. PUB. L. REV. 617, 623-27 (2012) (citing the split between the “Actual Decisionmaker” approach, “Tainted Decision” approach, and “Middle of the Causation Spectrum”).

⁵³ *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004).

⁵⁴ See Mason, *supra* note 51, at 443.

⁵⁵ See Collins, *supra* note 15, at 914.

⁵⁶ See Keaton Wong, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1729 (2008).

With respect to co-worker discriminatory animus prior to *Staub*, most courts focused on supervisor discriminatory animus, following the *Shager* court's lead in distinguishing between the actions of a supervisory employee and those of a low-level employee. In *Shager*, Judge Posner reasoned that "[i]f one low-level employee makes sexual advances to another, his conduct is so unrelated to the employer's business that the employer will ordinarily be excused from liability under the doctrine of respondeat superior."⁵⁷ Further, despite most cat's paw cases involving supervisor discriminatory animus, courts were hesitant to find employer liability for co-worker discriminatory animus, even in circuits that followed the lenient standard of review.⁵⁸ Ultimately the circuit split persisted until 2011 when the Supreme Court granted certiorari to hear *Staub*.⁵⁹

C. The Supreme Court's Cat's Paw Framework: *Staub v. Proctor Hospital*

The Supreme Court first attempted to weigh in on the cat's paw theory of liability in employment discrimination in 2007, when it granted certiorari in *Equal Employment Opportunity Commission v. BCI Coca-Cola Bottling Company of Albuquerque*;⁶⁰ however, the sides settled before the Court had the opportunity to decide the issue.⁶¹ Nonetheless, the Court was finally able to scratch its cat's paw itch in March of 2011 when it addressed the cat's paw theory in *Staub*, which involved an employee claim of discriminatory termination in violation of the Uniform Services Employment and Reemployment Rights Act (USERRA).⁶² The case involved Vincent Staub, an angiography technician for Proctor Hospital and also an active member of the United States Army Reserve, which required a substantial time commitment for training.⁶³ Staub's supervisors often had to schedule shifts around Staub's Army Reserve commitment, resulting in hostility towards Staub's military obligations, with one of Staub's supervisors going so far as to say that Staub's "military duty had been a strain on the department" and that the supervisor

⁵⁷ *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

⁵⁸ *See, e.g., Roberts v. Principi*, 283 Fed.Appx. 325 (6th Cir. 2008) (finding that petitions signed and circulated by coworkers in retaliatory animus were not tied to the adverse action because the ultimate decision maker relied on information outside of the petitions even though the ultimate decision maker did not go so far as to claim the petitions were untrue).

⁵⁹ 562 U.S. 411 (2011).

⁶⁰ 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007).

⁶¹ *Id.*

⁶² *Staub*, 562 U.S. at 413.

⁶³ *Id.* at 413–14.

preferred to “get rid of [Staub].”⁶⁴ The supervisor subsequently issued Staub two corrective actions, both of which were issued due to Staub allegedly leaving his desk without informing a supervisor.⁶⁵ Although Staub denied the allegations, he was ultimately fired by Proctor Hospital’s vice president of human resources on the basis of the supervisor’s accusations and the corrective actions issued against Staub.⁶⁶

Overturing the Seventh Circuit’s decision, the Supreme Court held that the employer, Proctor Hospital, was liable for the employment decision based on the discriminatory actions of Staub’s supervisor even though the supervisor did not make the “ultimate employment decision.”⁶⁷ The Supreme Court’s framework provided that “an employer is liable if: (1) a supervisor performs an act motivated by antimilitary animus that is intended to cause an adverse employment action, and (2) that act is a proximate cause of the ultimate employment action.”⁶⁸ Further, although deciding a USERRA claim, the Court suggested that USERRA “is very similar to Title VII,” paving the road for the cat’s paw theory to apply to Title VII claims.⁶⁹

Importantly, the Court relied on agency law to establish that an employer is liable for the actions of its agents when the agent is acting within the scope of employment, which for a supervisor includes generating written reports of employees under their supervision.⁷⁰ The Court also called upon tort law to establish its holding, keying on text within both USERRA and Title VII that prohibits employment discrimination in situations where a discriminatory factor, such as race or gender, is a “motivating factor,”⁷¹ to discern that the statutes require proximate cause as the link between supervisor discriminatory animus and the ultimate employment decision.⁷²

However, the Court left several crucial issues open, which continue to create confusion and inconsistent decisions in the lower courts. First, while the holding in *Staub* created employer liability for the discriminatory motivations of a supervisor, the Court expressed “no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate

⁶⁴ *Id.* at 414.

⁶⁵ *Id.* at 414–15.

⁶⁶ *Id.*

⁶⁷ *Id.* at 417–18.

⁶⁸ *Simmons v. Sykes Enter., Inc.*, 647 F.3d 943, 949 (10th Cir. 2011) (citing *Staub*, 562 U.S. at 422).

⁶⁹ *Staub*, 562 U.S. at 417.

⁷⁰ *Id.*

⁷¹ See 42 U.S.C. § 20002-2(m).

⁷² *Staub*, 562 U.S. at 417.

employment decision.”⁷³ In a concurring opinion, Justice Alito considered co-worker cat’s paw liability and noted that the Court’s approach would cause confusion and would “impose liability unfairly on employers who make every effort to comply with the law.”⁷⁴ Moreover, the imposition of liability on employers is further exacerbated by the fact that “an employer may be held liable if it innocently takes into account adverse information provided, not by a supervisor, but by a low-level employee.”⁷⁵

Second, in response to Proctor Hospital’s argument that the ultimate decision maker was not biased and the adverse employment action was based on a separate, independent investigation, the Court reasoned that “if 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.”⁷⁶ On the other hand, the court admitted that it was “aware of no principle in tort or agency law under which an employer’s mere conduct of an independent investigation has a claim-preclusive effect” nor “somehow relieves the employer of ‘fault.’”⁷⁷ Thus, the Court failed to create a bright line rule with respect to whether cat’s paw liability would extend to discriminatory actions of co-workers and whether the use of independent investigations allow an employer to avoid liability.⁷⁸ Finally, the Court left open the issue of whether internal grievance procedures would provide an affirmative defense for employers, although the concurrence does note that “[s]uch procedures would often provide relief for employees without the need for litigation, and they would provide protection for employers who proceed in good faith.”⁷⁹

D. Post-*Staub* Cat’s Paw Application to Co-worker Discriminatory and Retaliatory Animus

In the years following the *Staub* decision, lower courts disagreed on whether to extend cat’s paw liability to include the discriminatory actions of co-workers. Some district courts declined to extend the doctrine to co-worker situations and others opted for the extension of the

⁷³ *Id.* at 422 n.4.

⁷⁴ *Id.* at 426 (Alito, J. and Thomas, J., concurring).

⁷⁵ *Id.*

⁷⁶ *Id.* at 421 (majority opinion).

⁷⁷ *Id.*

⁷⁸ See Ratliff, *supra* note 52, at 260.

⁷⁹ *Staub*, 562 U.S. at 426 (Alito, J. and Thomas, J., concurring).

cat's paw doctrine where co-workers and not supervisors were involved.⁸⁰ In addition to the lack of a Supreme Court precedent, other issues have plagued the lower courts in their attempt to discern the appropriate causation standard for co-worker discriminatory actions that lead to adverse employment action.

First, in the ever evolving workplace, the distinction between supervisor and co-worker is not always clear cut,⁸¹ and “[s]upervisors, like the workplaces they manage, come in all shapes and sizes.”⁸² Although *Staub* left the definition of supervisor open for discussion, the Supreme Court recently defined a supervisor with respect to Title VII vicarious liability as an employee “empowered by the employer to take tangible employment actions against the victim.”⁸³ While this definition may be easily applied to some employment structures, scholars have debated whether this definition is as clear cut and straightforward as the Court had anticipated.⁸⁴

Second, agency theory provides that a “master is subject to liability for the torts of his servants committed while acting in the scope of their employment” and “not subject to liability for the torts of his servants acting outside the scope of their employment,” notwithstanding certain limited exceptions.⁸⁵ Therefore, while taking adverse employment action against employees, such as termination or suspension, is often within the scope of a supervisor's employment, the same is not usually true for the job function of a low-level employee.⁸⁶ Despite these shortcomings, the circuit courts began to address co-worker cat's paw liability in employment discrimination, albeit with varied approaches.

⁸⁰ Compare *Johnson v. Koppers, Inc.*, No. 10 C 3404, 2012 WL 1906448, at *3 (N.D. Ill. 2012) (reasoning that a biased co-worker is akin to a biased supervisor under the agency theory and finding cat's paw liability applies to co-workers), with *Abdelhadi v. City of New York*, No. 08-CV-380, 2011 WL 3422832, at *2 (E.D.N.Y. 2011) (determining that the holding in *Staub* requires intentional action by a supervisor, therefore declining to extend cat's paw liability doctrine to co-workers) and *Burlington v. News Corp.*, 55 F.Supp.3d 723 (E.D. Pa. 2014) (finding cat's paw liability applies to a nonsupervisory coworker if the act was motivated by discriminatory animus, was intentional, was the proximate cause of the employment action, and the defendant corporation acted negligently in allowing the co-worker's discriminatory acts to affect the ultimate employment decision).

⁸¹ Andrew Freeman, *A Bright Line, But Where Exactly? A Closer Look at Vance v. Ball State University and Supervisor Status Under Title VII*, 19 LEWIS & CLARK L. REV. 1153, 1159 (2015); Surette, *supra* note 6.

⁸² *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2463 (2013) (Ginsburg, J., dissenting).

⁸³ *Id.* at 2454 (majority opinion).

⁸⁴ See Freeman, *supra* note 81, at 1181.

⁸⁵ Restatement (Second) of Agency § 219 (1958).

⁸⁶ See, e.g., Julie M. Covell, *The Supreme Court Writes a Fractured Fable of the Cat's Paw Theory in Staub v. Proctor Hospital*, 51 WASHBURN L.J. 159 (2011).

1. Co-worker cat's paw claims in the Fifth Circuit

Immediately following the Supreme Court's decision in *Staub*, the Fifth Circuit addressed three consecutive cat's paw claims with respect to co-worker discriminatory animus, coming to three different conclusions.⁸⁷ The Fifth Circuit's first encounter with a co-worker cat's paw issue involved a Title VII retaliation claim, with the Court announcing that "[u]nder the cat's-paw theory, if employee demonstrates a co-worker with a retaliatory motive had influence over the ultimate decisionmakers, that co-worker's retaliatory motive may be imputed to the ultimate decisionmakers, thereby establishing a causal link between the protected activity and the adverse employment action."⁸⁸ By analyzing the case based on a pre-*Staub* co-worker cat's paw precedent, the Fifth Circuit ultimately denied the plaintiff's claim due to the inability to show a genuine dispute of material fact on the existence of retaliatory animus.⁸⁹

The Fifth Circuit's second run-in with a co-worker cat's paw claim brought a wholly different result. In *Werner v. Department of Homeland Security*,⁹⁰ a TSA worker brought hostile work environment and disparate treatment claims after being demoted due to the alleged racial animus of co-workers.⁹¹ In the opinion, the Fifth Circuit asserted that "there [was] no evidence to suggest that [the plaintiff's] supervisors had improper motivations in handling the complaints" and that "even if [the plaintiff] could prove that the complaining screeners had improper motives, there is no evidence that the supervisors writing the violation reports acted with any racial animus."⁹² With this dicta the Fifth Circuit appeared to reverse course, requiring supervisor discriminatory animus for a cat's paw claim to take effect.

To complicate matters further, shortly after the decision in *Werner*, the Fifth Circuit addressed a Title VII claim of age discrimination, sex discrimination, sexual harassment, and retaliation, eventually determining that the plaintiff-employee in question was terminated "for legitimate reasons given the extensive record of serious misconduct."⁹³ However, the Fifth Circuit, considering co-worker cat's paw doctrine, determined "[w]e need not resolve this open issue [of co-worker, rather

⁸⁷ See Collins, *supra* note 15, at 928–30.

⁸⁸ Gollas v. Univ. of Tex. Health Sci. Ctr. at Hous., 425 Fed.Appx. 318, 325 (5th Cir. 2011) (citing Roberson v. Alltel Info. Services, 373 F.3d 647, 653 (5th Cir. 2004)).

⁸⁹ *Id.* at 327.

⁹⁰ 441 Fed.Appx. 246 (5th Cir. 2011).

⁹¹ *Id.* at 247–48.

⁹² *Id.* at 250.

⁹³ Bissett v. Beau Rivage Resorts Inc., 442 Fed.Appx. 148, 154 (5th Cir. 2011).

than supervisor discrimination] because [the plaintiff] fails to show the presence of discriminatory animus among any of her subordinates.”⁹⁴ Ultimately, the Fifth Circuit’s treatment of co-worker cat’s paw cases remains uncertain, leaving employers within the Fifth Circuit guessing as to how discrimination claims will be decided in court.

2. Co-worker cat’s paw claims in the First Circuit

With the issue of applying cat’s paw liability to co-worker discriminatory animus undecided amongst the circuit courts, the First Circuit confronted the issue of co-worker cat’s paw claims in *Velazquez-Perez v. Developers Diversified Realty Corp.*,⁹⁵ where a terminated employee brought a Title VII sex discrimination and retaliation claim against his employer.⁹⁶ In essence, *Velazquez-Perez* was terminated after a co-worker, with whom *Velazquez-Perez* declined to become romantically involved, filed unfavorable reports about and commented on *Velazquez-Perez*’s job performance in an effort to get him fired. After finding that *Martinez* was a co-worker and not *Velazquez-Perez*’s supervisor, the First Circuit nonetheless found that an employer could be held liable for a co-worker’s actions under Title VII if:

[T]he plaintiff’s co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff’s firing; the co-worker’s discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker’s acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.⁹⁷

In reaching its conclusion, the First Circuit reasoned that there was no basis for distinguishing between “hostile workplace claims and quid pro quo claims,” maintaining that a negligent employer should be liable for both.⁹⁸

In sum, not only did the two circuit courts addressing co-worker cat’s paw claims in the wake of the *Staub* decision take different approaches, but three different approaches were employed within the Fifth Circuit alone. The Fifth Circuit first extended the cat’s paw theory

⁹⁴ *Id.* at 154 n.5.

⁹⁵ 753 F.3d 265 (1st Cir. 2014).

⁹⁶ *Id.* at 267.

⁹⁷ *Id.* at 274.

⁹⁸ *Id.* at 273 (citing *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751 (1998)).

to co-worker discriminatory animus,⁹⁹ then declined to recognize co-worker cat's paw claim,¹⁰⁰ before declaring the issue was undecided.¹⁰¹ The First Circuit independently reasoned that the cat's paw doctrine extends to co-worker discriminatory and retaliatory animus where the co-worker intends to cause the employment termination and the employer is negligent.¹⁰²

III. THE SECOND CIRCUIT'S SPLIT: TREATMENT OF CO-WORKER CAT'S PAW CLAIMS IN *VASQUEZ V. EMPRESS AMBULANCE SERVICE, INC.*

Recently, the Second Circuit followed the First Circuit's lead by extending the cat's paw doctrine in employment discrimination and retaliation claims to co-workers, while elucidating a related framework based more strongly in agency and tort law.

A. Facts and Procedural History

In *Vasquez v. Empress Ambulance Service, Inc.*,¹⁰³ Andrea Vasquez, an emergency medical technician, brought a Title VII retaliation claim for wrongful termination in relation to a sexual harassment complaint against her employer after being terminated largely due to false evidence provided by a co-worker.¹⁰⁴ The record in the case provides that soon after Vasquez began working at Empress, Tyrell Gray, a co-worker and dispatcher with the company, began making "romantic overtures" towards Vasquez, with Vasquez consistently turning Gray down and even notifying Gray that she had a boyfriend.¹⁰⁵ Gray was not Vasquez's supervisor and Gray did not have any delegated supervisory authority with respect to his employment at Empress.¹⁰⁶ Gray's unwanted advances ultimately boiled over when Gray sent an illicit photograph of his "erect penis" via text message to Vasquez, who was working a shift at Empress.¹⁰⁷ Although distraught, Vasquez completed her shift before approaching her supervisor and describing the situation and the series of events that had precipitated between her and Gray.¹⁰⁸ The supervisor

⁹⁹ See *Gollas v. Univ. of Tex. Health Sci. Ctr. at Hous.*, 425 Fed.Appx. 318, 325 (5th Cir. 2011).

¹⁰⁰ See *Werner v. Dep't of Homeland Security*, 441 Fed.Appx. 246, 247 (5th Cir. 2011).

¹⁰¹ See *Bissett v. Beau Rivage Resorts Inc.*, 442 Fed.Appx. 148, 154 (5th Cir. 2011).

¹⁰² See *Velazquez-Perez v. Developers Diversified Realtors Corp.*, 753 F.3d 265, 267 (1st Cir. 2014).

¹⁰³ 835 F.3d 267 (2d Cir. 2016).

¹⁰⁴ *Id.* at 269.

¹⁰⁵ *Id.* at 269–70.

¹⁰⁶ *Id.* at 270.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

encouraged Vasquez to sit down and file a formal complaint and ensured her that Gray's behavior would not be tolerated at Empress.¹⁰⁹

While Vasquez was in the midst of filing the complaint, Gray entered the workplace and deduced that Vasquez was reporting him.¹¹⁰ In response, Gray asked another co-worker to "lie for [him]" and tell their supervisors that Vasquez and Gray had been in a romantic relationship," a request that was ultimately refused.¹¹¹ Not to be deterred, Gray "manipulated a text message conversation" to make it appear that he and Vasquez had been in a relationship, while also doctoring a photograph to make it appear that Vasquez had sent Gray an inappropriate picture, all of which Gray produced for his supervisor.¹¹² The supervisor examined the text messages and picture as well as checked the phone number to ensure that it matched Vasquez's number.¹¹³ Despite adamantly denying that she had taken part in the fabricated text message conversation, Vasquez was deemed to have been complicit in the sexual harassment based upon the evidence provided by Gray and, without being offered the chance to give her side of the story or provide her cell phone and text messages as evidence, was terminated.¹¹⁴

Vasquez filed suit under Title VII and the New York State Human Rights Law (NYSHRL) claiming retaliatory termination for providing sexual harassment claims against Gray.¹¹⁵ The district court granted Empress' motion to dismiss for failure to state a claim, finding that "Gray's retaliatory intent could not be attributed to Empress" and that "Empress could not have engaged in retaliation against Vasquez,"¹¹⁶ which Vasquez appealed to the Second Circuit. Vasquez had also previously filed suit against Gray individually but ultimately consented to dismiss the suit without prejudice due to an issue regarding service.¹¹⁷

B. The Second Circuit's Analysis

In determining whether to apply cat's paw doctrine to low-level co-workers, the Second Circuit elected to agree with the First Circuit. The Second Circuit maintained that the cat's paw doctrine would extend to

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Brief for Defendant-Appellee at 8, *Vasquez*, 835 F.3d 267 (No. 15-3239-CV), 2016 WL 538145.

¹¹⁴ *Vasquez*, 835 F.3d at 270-71.

¹¹⁵ *Id.* at 271.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 271 n.2.

co-workers where the co-worker intended discriminatory animus to lead to an adverse employment action, where the co-worker's discriminatory animus was the proximate cause of the adverse action, and where the employer acts in a negligent manner so as to allow the discriminatory action to play a role in the ultimate employment decision.¹¹⁸ Thus, in *Vasquez*, the Second Circuit reasoned that Gray intended retaliatory action against Vasquez, that Gray's manipulated text messages were a proximate cause in Vasquez's termination, and that the employer was negligent as Empress knew, or should have reasonably known, that Gray had retaliatory motivation to bring about the adverse employment action.¹¹⁹

In addition, the Second Circuit went one step further in its analysis, applying agency theory to establish co-worker liability by following the Supreme Court's reasoning in *Burlington Industries, Inc. v. Ellerth*.¹²⁰ Under the Restatement (Second) of Agency, an employer can be held liable for the acts of an employee that are outside the scope of employment where the employer's acts are "negligent or reckless."¹²¹ In reaching its decision in *Vasquez*, the Second Circuit determined that Empress should have been aware of Gray's retaliatory animus and therefore acted negligently in allowing Gray's motivations to play a part in the adverse employment action against Vasquez, establishing Gray as an agent who "stands in the same shoes as Staub's 'supervisor,' and is equally able to play the monkey to Empress's cat."¹²²

The Second Circuit further clarified that an employer is not automatically liable if it acts on the discriminatory animus presented by a low-level or biased co-worker; rather, "an employer who, non-negligently and in good faith, relies on a false and malign report of an employee who acted out of unlawful animus cannot, under the 'cat's paw' theory, be held accountable for or said to have been 'motivated' by the employee's animus."¹²³ Despite this declaration, the Second Circuit did not provide further clarity on possible employer defenses to the discriminatory and retaliatory motivations of low-level co-workers, but asserted that "an employer can still 'just get it wrong' without incurring liability under Title VII."¹²⁴ However, an employer "cannot 'get it wrong' without recourse if in doing so it negligently allows itself to be used as

¹¹⁸ *Id.* at 274 (citing *Velazquez-Perez*, 753 F.3d at 274).

¹¹⁹ *Id.* at 276.

¹²⁰ 524 U.S. 742, 758 (1998). The Court applied agency law to employment discrimination, using the factors from the Restatement (Second) of Agency § 219(2).

¹²¹ Restatement (Second) of Agency § 219(2)(b).

¹²² *Vasquez*, 835 F.3d at 274 (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011)).

¹²³ *Id.* at 275.

¹²⁴ *Id.*

[a] conduit for even a low-level employee's discriminatory or retaliatory prejudice."¹²⁵

IV. THE ARGUMENT AGAINST CO-WORKER CAT'S PAW LIABILITY OF EMPLOYERS

A. Argument against the Second Circuit's Extension of the Cat's Paw

The Second Circuit's extension of the cat's paw doctrine to include low-level, co-worker discriminatory animus arguably aids the removal discriminatory and retaliatory animus from the workplace under Title VII,¹²⁶ however, such an extension broadens the scope of employer liability too greatly and will have a negative impact on employers and anti-discrimination efforts alike. Although workplace discrimination is a pervasive issue that negatively impacts employees and "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,"¹²⁷ opening employers up to liability for the actions of low-level co-workers with no supervisory authority will have negative effects on businesses and lead to an inefficient use of resources, especially where at-will employment provides the ability for employers to fire employees without cause.

While the Second Circuit's rationale relies on both agency and tort law, which agrees with the rationale presented by the Supreme Court in *Staub*, the *Staub* Court's decision to "express no view" and reserve the question of law on co-worker discriminatory animus implies that while the Court foresaw possible co-worker issues, it was hesitant to place co-workers under the cat's paw umbrella.¹²⁸ Further, in a concurring opinion Justices Alito and Thomas note that applying cat's paw liability to supervisor discriminatory animus would have "the perverse effect of discouraging employers from hiring applicants who are members of [a protected group]" and therefore have an impact that would "not serve the interests of either employers or employees who are members of [a protected group]."¹²⁹ This effect would be even more greatly exacerbated if the cat's paw doctrine was extended to co-worker discriminatory animus.

¹²⁵ *Id.* at 275–76.

¹²⁶ See Collins, *supra* note 15, at 931.

¹²⁷ Eber, *supra* note 39, at 195.

¹²⁸ See Vasquez, 835 F.3d at 273 (citing *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 n.4 (2011)).

¹²⁹ *Staub*, 562 U.S. at 426 (Alito, J. and Thomas, J., concurring).

In addition, the Second Circuit's use of agency theory to establish that an employer can be liable for the discriminatory animus of its employees committed outside the scope of employment¹³⁰ but where "the master was negligent or reckless,"¹³¹ establishes an extremely low bar for plaintiffs to recover against employers in myriad situations where an employer completely lacks discriminatory intent. Finding an employer liable for acting negligently in that it knew, or reasonably should have known, of the discriminatory motivations of the employee in question¹³² requires employers to operate a business while being responsible for every aspect of the workplace and every interaction between employees. Opening the door for employees to recover from employers based solely on co-worker discriminatory animus will introduce increased litigation to the detriment of both business operations and employer-employee relations.

1. Implications for employers

Extending the cat's paw theory of liability to co-worker discriminatory animus that leads to adverse employment action will have a negative impact on employers without a sufficient benefit for discriminated against or retaliated against employees. Certainly, discrimination is an evil that has no place in society let alone the workplace; however, imputing a low-level employee's discriminatory animus to an employer who lacks any discriminatory intent in an employment decision pushes Title VII protections too far. The Supreme Court has previously noted that language within Title VII "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible"¹³³ even with respect to "some limitation on the liability of employers for the acts of supervisors."¹³⁴ Further, *Staub* set the precedent for employers to review the termination decisions of supervisors for discriminatory animus, an undertaking in itself, and to extend that review to all co-workers increases the amount of possible discriminatory interactions and possible claims to review exponentially.

¹³⁰ Co-workers or low-level employees are rarely acting within the scope of their employment when discriminating against and adversely impacting another employee as they are not required to perform or write employee reviews.

¹³¹ Restatement (Second) of Agency § 219(2).

¹³² See *Vasquez*, 835 F.3d at 275.

¹³³ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

¹³⁴ *Id.* at 77 (Marshall, J., concurring).

a. Increased requirement for employer investigation

An employer faced with a possible cat's paw liability claim for any termination decision will be forced to spend time and resources analyzing and reassuring that each decision is free of discriminatory animus, including that the terminated employee was not discriminated against by a low-level co-worker in any way that may have impacted the employment decision. In the current setting where most employers can terminate employees at will and where there are over one million adverse employment decisions made monthly,¹³⁵ employers would be overwhelmed merely trying to safeguard against possible liability for discrimination. On top of the number of terminations per month, the EEOC received over 91,000 claims of workplace discrimination in 2016¹³⁶ and the number of retaliation claims increased more than 10% over a 15-year span from over 19,500 claims in 2000 to over 31,800 claims in 2015.¹³⁷ In essence, employers would be incentivized to spend incredible time and resources reviewing termination decisions that currently occur with relative frequency rather than spending time and resources towards curbing actual discrimination in the workplace. Reallocating resources in this manner would have a negative impact on a business and its operations, which would be detrimental to the corporation, employees, stockholders, and the economy as a whole.

Further, by extending the cat's paw doctrine to co-workers, courts would be requiring employers to turn into private investigators or hire supervisors with investigatory expertise rather than those individuals best suited towards running and operating a business. For example, the employer in *Vasquez*, Empress Ambulance Service, was a family-run business aimed at providing emergency medical transport services.¹³⁸ Leading up to the ultimate employment decision to terminate both Vasquez and Gray, the Empress supervisors listened to and read Vasquez's complaint, examined the text messages and pictures provided by Gray, and confirmed that the phone number on the text messages matched Vasquez's.¹³⁹ Although the Empress supervisors declined to view Vasquez's phone when offered,¹⁴⁰ Empress's supervisors essentially became pawns in a game of "he said, she said," far removed

¹³⁵ See JOB OPENINGS AND LABOR TURNOVER – OCTOBER 2016, *supra* note 16.

¹³⁶ See EEOC Releases Fiscal Year 2016 Enforcement and Litigation Data, *supra* note 14.

¹³⁷ See U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, CHARGE STATISTICS FY 1997 THROUGH FY 2015, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/Z2QS-8NH7>].

¹³⁸ See Brief for the Defendant-Appellee, *supra* note 113, 1–5.

¹³⁹ *Id.* at 5–8.

¹⁴⁰ *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 270 (2d Cir. 2016).

from the business' scope of providing medical transport. In finding Empress liable for the discriminatory actions of Gray, the Second Circuit is sending a message to employers to prioritize co-worker disagreements over business operations and spend time and resources examining disputes and counterclaims between low-level co-workers. Ultimately, Empress was held liable even though "it is undisputed that Empress made its decision to discharge [Vasquez] free of any discriminatory or retaliatory intent, *i.e.*, in good faith."¹⁴¹

b. Increase in discrimination and retaliation claims upon adverse employment action

The Second Circuit's decision to expand employer liability to co-workers and require employer negligence in lieu of discriminatory intent¹⁴² will lead to an influx in discrimination challenges, with terminated employees taking advantage of the relatively low bar for liability to string employers along. Even if employers can prove the absence of cat's paw liability in a majority of claims, the sheer time and resources, including legal fees, required to address these claims may be prohibitive to running a business, especially for small businesses.¹⁴³ Moreover, such an extension of the cat's paw could influence businesses to merely settle discriminatory challenges¹⁴⁴ or hesitate when terminating employees if there is a possibility that low-level workers may have acted in a discriminatory manner. Ultimately, such behavior modification required to combat low-level employee discriminatory action could lead to an increase in the very behavior that it is intended to prevent.

Claims of retaliation in adverse employment actions would also likely rise in number and would merely require an employee to make a single claim of discrimination against a co-worker during the course of employment. While a claim of this type would be unlikely to prevail, such a claim would forestall a change in employment that may be required for business reasons. If the claim would go to trial, "[e]ven if the employer could escape judgment after trial, the lessened causation standard would make it far more difficult to dismiss dubious claims at the summary judgment stage."¹⁴⁵ Further, assuming valid co-worker cat's paw claims are rare with respect to the total number of lawsuits

¹⁴¹ See Brief for the Defendant-Appellee, *supra* note 113, at 5–8 (citing the Appendix filed by the Plaintiff in the appeal).

¹⁴² See *Vasquez*, 835 F.3d 267.

¹⁴³ See *Powderly*, *supra* note 52, at 638–39.

¹⁴⁴ Following this analysis, low-level cat's paw applicability would essentially be an economic rent for payouts for terminated employees.

¹⁴⁵ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2532 (2013).

initiated, the decision costs associated with sorting through the co-worker cat's paw claims would greatly outweigh the error costs for the small subset of actual discriminatory and retaliatory practices, highlighting the inefficiencies in maintaining a remedy based on employer liability.

Extending the cat's paw and maintaining a low standard of negligence will inevitably "contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat" adverse employment actions due to discrimination or retaliation.¹⁴⁶ Following the Second Circuit's lead in extending the cat's paw theory of liability to co-workers would have risky consequences not only for overall business operations but also with respect to decreasing discrimination in the workplace. As the Supreme Court noted, "it would be inconsistent with the structure and operation of Title VII to so raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent."¹⁴⁷ Increasing time and resources spent to filter through false co-worker cat's paw claims decreases the amount of time and resources available for curtailing actual discrimination in the workplace.

c. Drawing the line on employer liability in the current-day workplace

While the necessity for eliminating discrimination in the workplace is unquestioned, the act of extending cat's paw liability to employers for the actions of low-level co-workers is an inadequate means of accomplishing such a goal. To start, by extending the cat's paw to co-worker discriminatory and retaliatory animus, the Second Circuit begs the question of where the line will be drawn for liability for employed individuals. In the current-day workplace, with fluid job titles and an increased emphasis on contractors and "gig" employees, it is unclear whether the cat's paw would ultimately be extended to part-time employees, interns, and temporary employees, among other employment relationships. If the cat's paw is extended to all employment relationships, the increased complication of the workplace and employment relationships would impose an additional and seemingly unending burden on employers. By following the Supreme Court's holding in *Staub* but declining to extend cat's paw discriminatory animus to co-workers, a definitive line would be drawn, allowing employers and employees

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* (citing Brief for National School Boards Association as Amicus Curiae at 11–12).

alike to rely on a means of redress for supervisor, as defined in *Vance v. Ball State University*,¹⁴⁸ but not co-worker discriminatory animus. Such a framework would incentivize employers to train and hire supervisors with the aim of alleviating discrimination in the workplace and “encourag[ing] employers to be more responsible when crafting policies and when hiring and overseeing subordinate supervisors.”¹⁴⁹

It could certainly be argued that extending the cat’s paw to co-worker actions would assuage concerns of distinguishing between a supervisor and a co-worker, as well as deter an employer’s use of ambiguity in an organizational chart in an effort to reduce the number of individuals listed as supervisors, thus reducing possible instances of liability. However, the Supreme Court has already defined a supervisor in the Title VII context as an employee “empowered by the employer to take tangible employment actions against the victim.”¹⁵⁰ Therefore, a co-worker or low-level employee would be an individual without the ability to effectively take any employment action.¹⁵¹ Leaving this distinction open could have an economic rent effect of forcing employers to be specific in both job descriptions and their employment structure in order to clearly delineate between co-workers and supervisors. Although costlier from a time standpoint up front, an employer’s specifications would save costs associated with discrimination lawsuits down the line.

Finally, application of the cat’s paw to low-level, co-worker discriminatory and retaliatory animus would be detrimental to the present-day economy and employment realm. Present-day employment relationships can be complex and it is possible to have an employee work in some capacity for multiple corporations simultaneously. In such a situation, while one corporation may be the primary employer, questions might arise about discriminatory actions from outside corporations that could lead to termination by the primary employer.¹⁵²

2. Alleviating the necessity for creating bright line rules for employer independent investigations

Declining to extend the cat’s paw in concurrence with the Second Circuit’s holding in *Vasquez* will have the added benefit of precluding

¹⁴⁸ 133 S. Ct. 2434, 2454 (2013).

¹⁴⁹ See Santoro, *supra* note 34, at 829.

¹⁵⁰ *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2454 (2013).

¹⁵¹ See *id.*

¹⁵² See *Shazor v. Prof'l Transit Mgmt. Ltd.*, 744 F.3d 948 (6th Cir. 2014).

the discussion of whether or not to create a bright line rule for independent investigations or appropriate use of employer grievance processes with respect to these co-worker discriminatory animus claims.¹⁵³ In *Staub*, the Supreme Court declined to adopt a “hard-and-fast rule” that would preclude a discrimination claim due to the “decisionmaker’s independent investigation (and rejection) of the employee’s allegations of discriminatory animus.”¹⁵⁴ Although abstaining from creating a bright line rule, the Supreme Court declared that “if 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 that 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.”¹⁵⁵ Relatedly, the Court took no view on whether the employer would have had an affirmative defense if *Staub* had not taken advantage of the grievance process provided by the employer.¹⁵⁶ Whether or not an employer can avoid liability for supervisor animus via certain investigatory steps continues to puzzle employers.¹⁵⁷

In extending cat’s paw liability to co-workers, the question of whether an independent investigation could alleviate liability would persist and would arguably be even more integral to an employer’s decision on how to approach claims of discriminatory adverse employment actions. Similar to *Staub*, the Second Circuit in *Vasquez* did not address the implications of an independent investigation carried out by an employer, although the Court pointed to the lack of investigation into certain issues as the basis of Empress’s negligence.¹⁵⁸ While it could be argued that the creation of a bright line rule for independent investigations would help ensure limited liability for employers when faced with co-worker discriminatory animus claims, such a compromise would be inadequate. Bright line rules are often overly simplistic and tough to implement, especially where cases vary greatly and review on a case-by-case basis is frequently required in discrimination claims.¹⁵⁹ Further, allowing co-worker cat’s paw claims but creating a bright line

¹⁵³ See Collins, *supra* note 15, at 942.

¹⁵⁴ Staub v. Proctor Hosp., 562 U.S. 411, 420 (2011).

¹⁵⁵ *Id.* at 421.

¹⁵⁶ See *id.* at 422 n.4.

¹⁵⁷ Although outside the scope of this Comment, I would argue against any bright line rule for investigations with respect to supervisor cat’s paw claims.

¹⁵⁸ Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 275 (2d Cir. 2016) (noting that Empress should have known Gray would be vengeful, having just found out he was accused of sexual harassment, and that Empress blindly followed assertions made by Gray).

¹⁵⁹ See Katherine Gonzalez-Valentin, *Who’s Burning Now? Avoiding “Cat’s Paw” Liability*

standard would simply highlight that employers and ultimate decision makers could mask discriminatory actions or allow biased actions to go unpunished where an independent investigation failed to acknowledge such discrimination. Such a framework would hardly provide protection for “modern employers who face tremendous uncertainty” in the post-*Staub* world.¹⁶⁰

B. Implications for Employees

Limiting cat's paw claims to instances of supervisor discriminatory animus, as detailed in *Staub*, would have a definitive impact on employees; however, employees would maintain options for redress and would still have the ability to address workplace discrimination. Despite the argument that the extension of cat's paw liability in employment discrimination to co-worker animus comports with the spirit of Title VII and broader public policy initiatives aimed at removing discriminatory and retaliatory animus from the workplace,¹⁶¹ Title VII does not create the expectation for “an employer to be able to purge every trace of . . . harassment from the workplace.”¹⁶²

1. Consistency of limited cat's paw doctrine with Title VII

While it is clear that Title VII was meant to counter employment discrimination and create equal opportunities for individuals of certain protected groups, one could argue that the purpose was also “to balance the prohibition of the most obvious forms of discrimination with the preservation of as much employer decision-making latitude as possible.”¹⁶³ Thus, the decision not to extend cat's paw liability to co-workers is not in opposition to the goals of Title VII and it is unclear what the federal government gains by protecting employees in this fashion, especially where other means of redress are available.

Certainly, preventing co-worker cat's paw claims does not inhibit Title VII, which “depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses.”¹⁶⁴ Also, extending cat's paw liability to co-worker discriminatory animus greatly limits employers tasked with and in need of making adverse

Through Proper Predisciplinary Investigation, FED. LAW. 20, 20 (Jan./Feb. 2012).

¹⁶⁰ Powderly, *supra* note 52, at 617-21.

¹⁶¹ See Collins, *supra* note 15, at 931.

¹⁶² Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990).

¹⁶³ See Henson, *supra* note 33, at 42.

¹⁶⁴ Burlington N. & S.F.R. Co. v. White, 548 U.S. 53, 67 (2006).

employment decisions and creates a framework where employer decisions are restricted due to the possibility of liability from claims of discrimination and retaliation.

2. Alternative option for employee redress

In *Vasquez*, Gray harbored and acted upon a sex-based discriminatory animus against Vasquez, which led to retaliatory acts that eventually saw Vasquez fired from Empress.¹⁶⁵ Gray's actions were truly heinous and unfounded; because of this it is important that Vasquez, and employees like her, have a means of redress against harms caused. However, extending the cat's paw doctrine to co-workers and providing relief for employees against employers who lack discriminatory intent and could terminate the employee at will goes too far.

Employees who suffer adverse employment action due to discriminatory animus are not precluded from recovery and can seek recovery against the biased co-worker. Such claims are frequently successful, even in cases of supervisor discriminatory animus in the setting of corporate bankruptcy.¹⁶⁶ In *Vasquez*, not only did Vasquez file suit against Gray, but if not for an issue regarding service, Vasquez could have recovered.¹⁶⁷ Of course, recovery would be limited by the wealth of the co-worker; yet, it belies justice that "the 'hapless cat' (or at least his employer) get burned but not the malicious 'monkey.'"¹⁶⁸

V. CONCLUSION

This Comment sought to examine the Second Circuit's extension of the cat's paw theory of liability to co-worker discriminatory and retaliatory animus and argue against the Second Circuit's framework creating employer liability with respect to co-worker cat's paw claims. Including the discriminatory actions of co-workers within the cat's paw schema will lead to both an increase in unfounded cat's paw claims as well as an increase in the necessity for employers to fully review such claims, resulting in a dearth of time and resources for employers to spend on business operations. Providing such a low bar for recovery against an employer for liability, especially against an "employer whose

¹⁶⁵ See *Vasquez v. Empress Ambulance Service, Inc.*, 835 F.3d 267 (2d Cir. 2011).

¹⁶⁶ See *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012).

¹⁶⁷ *Vasquez*, 835 F.3d at 271 n.2.

¹⁶⁸ *Smith*, 681 F.3d at 899.

actions were not in fact the result of any discriminatory or retaliatory intent,”¹⁶⁹ will lead to inefficient business practices and have a perverse effect by “not serv[ing] the interests of either employers or employees who are members of [a protected group].”¹⁷⁰

¹⁶⁹ *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2532 (2013) (citing Brief for National School Boards Association as Amicus Curiae at 11–12).

¹⁷⁰ *Staub v. Proctor Hosp.*, 562 U.S. 411, 426 (2011) (Alito, J. and Thomas, J., concurring).