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### Cover Page Footnote

J.D., Catholic University of America, Columbus School of Law, 2018. I would like to thank my husband, Brian, for his love, patience, and understanding during the writing of this Note and throughout law school. A very special thank you to my children, Kenzie, Baylee, and Wes for putting up with my long hours away from home, being my biggest cheerleaders, and helping me maintain my sanity during law school. The three of you inspire and motivate me every day. I would especially like to thank my parents for the unconditional, love, support, and encouragement they have given me all my life. Finally, I would like to thank the staff of The Catholic University Law Review for their handwork and assistance in publishing this Note.

# CAT SCRATCH FEVER: THE SPREAD OF THE CAT'S PAW DOCTRINE IN THE SECOND CIRCUIT

*Crystal Jackson-Kaloz*<sup>+</sup>

The term “cat’s paw” comes from a seventeenth century fable about a deceitful monkey and a gullible cat.<sup>1</sup> The monkey convinces the cat to steal chestnuts roasting in a fire so that they can eat them together. When the cat pulls out the last chestnut, he turns around and discovers that the monkey has eaten them all. The monkey received what he wanted with no risk to himself, leaving the cat with nothing but a burnt paw.<sup>2</sup>

Judge Richard Posner inserted the term “cat’s paw” into employment discrimination law when he used the term to describe situations where an employer is vicariously liable for the discriminatory bias of its subordinate.<sup>3</sup> In 2011, the Supreme Court adopted the “cat’s paw” doctrine in *Staub v. Proctor Hospital*.<sup>4</sup> However, the Supreme Court only applied the “cat’s paw” doctrine to situations where an adverse employment decision<sup>5</sup> was influenced by a supervisor who possessed a discriminatory or retaliatory intent against the employee but declined to consider whether the doctrine could be applied to decisions influenced by a co-worker.<sup>6</sup>

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1. Jean de La Fontaine, *The Monkey and the Cat*, MUSÉE JEAN DE LA FONTAINE, <http://www.musee-jean-de-la-fontaine.fr/jean-de-la-fontaine-fable-uk-4.html> (last visited Sept. 12, 2016); *accord The Monkey and the Cat*, AESOPICA: AESOP FOR CHILDREN, <http://mythfolklore.net/aesopica/milowinter/61.htm> (last visited Apr. 9, 2018).

2. See sources cited *supra* note 1.

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

4. 562 U.S. 411, 421–22 (2011).

5. The Second Circuit has broadly defined an “adverse employment action” to include: termination, failing to hire or promote, demotion, reduction in pay, reprimand, and some lesser actions. See *Lovejoy-Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223 (2d Cir. 2001). Moreover, although federal employment discrimination law encompasses multiple anti-discrimination statutes, the focus of this Note will center on Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

6. *Staub*, 562 U.S. at 422 n.4 (“We express 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 employment decision.”). For purposes of Title VII liability, the Supreme Court defined a supervisor as a person that “is empowered by the employer to take tangible employment actions against the victim.” *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

On August 29, 2016, the Second Circuit expanded employer liability under the “cat’s paw” doctrine in *Vasquez v. Empress Ambulance Service, Inc.*<sup>7</sup> to include the impermissible bias of a non-supervisory employee when it influences an employer’s adverse employment decision. In *Vasquez*, the plaintiff filed an employment discrimination suit against her employer under both state and federal law, claiming that she was wrongfully terminated in retaliation for filing a sexual harassment complaint against a co-worker. Specifically, while the employer investigated the plaintiff’s sexual harassment allegations, the co-worker who was the subject of the complaint learned of the investigation.<sup>8</sup> In response, the co-worker presented false evidence to the employer, alleging that he was the true victim of sexual harassment, and that it was the plaintiff who sexually harassed him. Without further investigation and refusing to consider plaintiff’s evidence, the employer made the decision to fire her based solely on the self-serving evidence presented by the co-worker who was the subject of the original complaint.<sup>9</sup>

The trial court, relying on *Staub*, granted the employer’s motion to dismiss and held that the co-worker’s retaliatory intent could not be imputed to the employer because he was not her supervisor.<sup>10</sup> The Second Circuit reversed, holding that an employee may succeed in a retaliation claim under a “cat’s paw” theory “even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the [co-worker] shown to have [an] impermissible bias played a meaningful role in the decision-making process.”<sup>11</sup>

This Note examines the Second Circuit’s decision extending the “cat’s paw” doctrine to non-supervisory co-workers. Part I provides an overview of the “cat’s paw” doctrine and discusses prior case law underlying the decision. Part II provides a factual summary of *Vasquez* and the Second Circuit’s rationale. Part III explains why the Second Circuit’s holding was correct and suggests there is a need to define what a proper independent investigation entails. Finally, this Note concludes by recommending measures employers should adopt to minimize the risk of a “cat’s paw” claim.

## I. TITLE VII, AGENCY LAW, AND CAT’S PAW DOCTRINE

### A. Where the Term “Cat’s Paw” Originates and What It Means

In the 1990 decision *Shager v. Upjohn Co.*,<sup>12</sup> Seventh Circuit Judge Richard Posner introduced the concept of “cat’s paw” liability when he used the term to

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7. 835 F.3d 267 (2d Cir. 2016).

8. *Id.* at 270.

9. *Id.* at 270–71.

10. *Id.* at 271–72.

11. *Id.* at 272 (quoting *Holcomb v. Iona Coll.*, 521 F.3d 130, 143 (2d Cir. 2008)) (“Such a role is surely played by an employee who ‘manipulates’ an employer into acting as mere ‘conduit’ for his retaliatory intent.”).

12. 913 F.2d 398 (7th Cir. 1990).

describe situations where an employer is vicariously liable for the discriminatory bias of its subordinate.<sup>13</sup>

In *Shager*, a fifty-three-year-old salesman filed a wrongful termination suit under the federal Age Discrimination in Employment Act (ADEA).<sup>14</sup> The employee in *Shager*, a salesman for a seed manufacturing company, claimed his supervisor assigned him a tougher sales territory, treated him unfairly compared to younger salesmen, and recommended his termination despite his outstanding sales performance.<sup>15</sup> The employer argued the committee that made the ultimate decision to terminate the employee did not have any bias toward him; therefore, it could not be liable even if the supervisor's recommendation to terminate was based on the employee's age.<sup>16</sup> The court used well-established principles of agency law to hold that employers may be held liable when a biased supervisor influences an adverse employment action, even if the supervisor does not make the ultimate decision.<sup>17</sup>

Today, the term "cat's paw" is regularly used in employment discrimination cases to refer to situations where an employee has been subjected to an adverse employment decision by his or her employer (the gullible cat)—who has no discriminatory or retaliatory bias—but who has been manipulated or influenced by a subordinate supervisor (the deceitful monkey) who does possess an impermissible discriminatory or retaliatory bias.<sup>18</sup>

### B. Agency Law and Title VII Claims

Because there is no statute that specifically addresses vicarious liability for employment discrimination or retaliation claims, courts have developed the doctrine through case law. However, the substantive basis for such claims are found under federal anti-discrimination statutes such as Title VII of the Civil Rights of 1964 (Title VII).<sup>19</sup> Title VII makes it unlawful to discriminate against

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13. *Id.* at 405.

14. Pub. L. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. ch. 14 (2012)).

15. *Shager*, 913 F.2d at 399–400. The territory Shager was assigned consisted of poor quality farmland, and consequently the demand for seeds was low. Despite being assigned to the territory with the worst sales potential, Shager surpassed the sales goals set for him and those of the salesmen assigned to territories with better sales potential. *Id.* at 400.

16. *Id.* at 404.

17. *Id.* at 404–05 (holding that a genuine issue of material fact existed as to whether a supervisor's age-based bias tainted the committee's decision to fire the plaintiff).

18. See 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, 146 (2008); accord Patrick Dorrian, *Watch Out for Witness Bias in Workplace Investigations*, BLOOMBERG BNA (Sept. 2, 2016), <https://www.bna.com/watch-witness-bias-n73014447157/>.

19. Pub. L. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)). In addition to Title VII, Congress enacted other anti-discrimination statutes "to deter workplace discrimination and allow plaintiffs to recover for unlawful workplace discrimination." See Michael L. Fessinger, Note, *Balancing the Reasonable Requirements of Employers and Veterans Living with Traumatic Brain Injury—The Modern U.S. Military's "Signature Injury" is a Game Changer*, 53 WASHBURN L.J. 327, 339 (2014) (citing ADEA, 29 U.S.C. ch. 14 (2012));

an employee on the basis of race, color, religion, sex, or national origin.<sup>20</sup> Title VII also contains a provision prohibiting retaliation by an employer against employees who file discrimination charges or otherwise engage in protected activity.<sup>21</sup>

Congress directed courts to interpret Title VII claims using agency principles.<sup>22</sup> Courts regularly apply section 219 of the Restatement (Second) of Agency (the Restatement) to determine when an employer is liable for the actions of its employees.<sup>23</sup> The section provides that:

- (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
- (2) 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 non-delegable duty of the master, or

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Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. 103-353, 108 Stat. 3149 (codified as amended in scattered sections of 38 U.S.C. (2012)); Americans with Disabilities Act of 1990 (ADA), Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–213 (2012)); and Family Medical Leave Act of 1993 (FMLA), Pub. L. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. ch. 28 (2012)). The ADA protects employees with disabilities by placing “an affirmative obligation on the employer to help employees perform the ‘essential functions’ of a job,” and the FMLA prevents employers from dismissing an employee when he or she takes time away from work to manage personal or family illness. 42 U.S.C. §§ 12101-213; 28 U.S.C. ch. 28.

20. 42 U.S.C. § 2000e-2(a)(1)–(2).

21. *Id.* § 2000e-3(a). A retaliation claim is a separate claim and may proceed even if the underlying discrimination claim fails. *See, e.g.,* *Sims v. MME Paulette Dry Cleaners*, 580 F. Supp. 593, 594 (S.D.N.Y. 1984) (“Under Title VII, the act of retaliation is a separate violation, in and of itself, without regard to the plaintiff’s success or failure on the merits of the underlying discrimination claim.”). To prove a retaliation case under Title VII, a plaintiff must show: “(1) that she engaged in activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action.” *Ge v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002).

22. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 791 (1998) (“[The] definition of employer in Title VII, as including an ‘agent,’ expressed Congress’s intent that courts look to traditional principles of the law of agency in devising standards of employer liability . . .” (internal citations omitted)); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (“Congress wanted courts to look to agency principles for guidance in this area. . . . Congress’s decision to define ‘employer’ to include any ‘agent’ of an employer surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.” (internal citation omitted)); *accord* Glen Allen Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for A Supervisor’s Hostile Work Environment Sexual Harassment*, 48 VAND. L. REV. 1057, 1067 (1995).

23. *See, e.g., Faragher*, 524 U.S. at 777 (concluding in the context of a hostile work environment case that “§219(2)(d) provides an appropriate starting point for determining liability”); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 487–88 (10th Cir. 2006) (relying on purpose of section 219 to determine causation standard of employer subordinate liability).

(d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.<sup>24</sup>

Section 219(1) establishes traditional vicarious liability in the employment context by holding an employer automatically liable if an employee's challenged conduct falls within the scope of his employment.<sup>25</sup> Whether conduct is within the scope of employment is generally determined by whether the conduct is performed "at least in part, by a purpose to serve the master."<sup>26</sup> However, an employee's discriminatory or retaliatory conduct is typically never done with the purpose of serving the employer but, instead, is done solely for personal reasons, and courts often view such conduct as being outside the scope of employment.<sup>27</sup> Thus, courts look to section 219(2) to determine if there are other justifications to hold an employer vicariously liable for the impermissible actions of the employee.<sup>28</sup> In the absence of a statutory definition of vicarious liability within Title VII, courts have wide discretion to determine "when the employer is to be held liable for . . . its employees' actions, and [what] standard of liability to impose on employers for the [impermissible] acts of their employees."<sup>29</sup>

### C. Vicarious Liability Standard for Employment Discrimination Defined

The Supreme Court defined the standard for employer liability where an employee's conduct is outside the scope of his employment in *Burlington Industries, Inc. v. Ellerth*.<sup>30</sup> In that case, Kimberly Ellerth worked as a

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24. RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958).

25. *Id.* § 219(1); see also Jennifer K. Weinhold, Note, *Beyond the Traditional Scope-of-Employment Analysis in the Clergy Sexual Abuse Context*, 47 U. LOUISVILLE L. REV. 531, 539 (2009) ("[T]raditional [agency] analysis maintains that 'if an employee wholly abandons, even temporarily, the employer's business for personal reasons, the act is not within the scope of employment, and the employer is not liable under respondeat superior for the employee's conduct during that lapse.'" (quoting *O'Shea v. Welch*, 350 F.3d 1101, 1105 (10th Cir. 2003))).

26. RESTATEMENT (SECOND) OF AGENCY § 228(1)(c). For guidance in determining whether conduct falls "within the scope of employment," see *id.* §§ 229–37.

27. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998) (stating that harassment is not within the scope of employment because harassment is not motivated by intent to serve the employer).

28. *Entente Mineral Co. v. Parker*, 956 F.2d 524, 529 (5th Cir. 1992) ("[T]he principal's liability is based on the theory embodied in §§ 219(2)(d) and 261 of the Restatement, rather than traditional 'scope of employment' liability contained in § 219(1)."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987) ("Although § 219(1) of the Restatement of Agency provides scant assistance in assessing employer liability under Title VII, § 219(2) is more helpful.").

29. Justin P. Smith, Note, *Letting the Master Answer: Employer Liability for Sexual Harassment in the Workplace After Faragher and Burlington Industries*, 74 N.Y.U. L. REV. 1786, 1789 (1999).

30. *Ellerth*, 524 U.S. at 758–59.

salesperson for Burlington Industries.<sup>31</sup> As part of her duties, Ellerth was required to speak regularly with Ted Slowik, the vice president of sales and marketing.<sup>32</sup> Ellerth alleged that she was sexually harassed by Slowik on a constant basis<sup>33</sup> and eventually resigned because of it.<sup>34</sup> Although, Slowik had limited authority to make hiring and promotion decisions, Slowik was not Ellerth's direct supervisor. However, her supervisor reported directly to Slowik.<sup>35</sup>

The Supreme Court in *Ellerth* applied principles of agency law to hold that an employer may be held liable for the improper conduct of an employee's actions that are outside the scope of his or her employment in two instances.<sup>36</sup> First, under section 219(2)(d) of the Restatement, the employer may be held liable if the employee was "aided in accomplishing [his improper act] by the existence of the agency relationship."<sup>37</sup> Second, under section 219(2)(b), an employer may be liable when an employee's improper conduct "is attributable to the employer's own negligence."<sup>38</sup>

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31. *Id.* at 747.

32. *Id.*

33. *Id.* at 747–48. Ellerth alleged: (1) after Slowik made remarks about her breasts, she ignored him but, in response, he told her to "loosen" up and warned her that he could make her life easy or hard at Burlington Industries; (2) during an interview for a promotion, Slowik told her he was concerned about her promotion because she was not "loose enough" and rubbed her knee; and (3) when Slowik informed her by telephone that she received the promotion she was seeking, he added that she would be working with men in factories and that they "like women with pretty butts/legs." *Id.*

34. Initially Ellerth's stated grounds for resignation were unrelated to Slowik's conduct, but three weeks later, she alleged that her resignation was motivated by the sexual harassment she experienced from Slowik. *Id.* at 748–49.

35. *Id.* at 747.

36. *Id.* at 758 ("Scope of employment does not define the only basis for employer liability under agency principles [and] [i]n limited circumstances, agency principles impose liability on employers even where employees commit torts outside the scope of employment.").

37. *Id.* at 760 (noting that most employees are "aided in accomplishing their tortious objectives" because of the close proximity and regular contact provided by the employment relationship and would not have had access to the injured plaintiff otherwise). Under the "aided in accomplishing" standard, the Court "evaluates the principal's liability based on the degree to which the employment relationship facilitated the employee's intentional tort." Weinhold, *supra* note 25, at 540.

38. *Ellerth*, 524 U.S. at 758. Section 213 of the Restatement states:

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

(a) in giving improper or ambiguous orders of [sic] in failing to make proper regulations; or

(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others; or

(c) in the supervision of the activity; or

### D. Judicial Development of the Cat's Paw Doctrine

#### 1. The Circuits Split Hairs over the Causation Standard

Following Judge Posner's holding in *Shager*, "most circuits have adopted some form of the cat's paw doctrine."<sup>39</sup> However, those courts have applied inconsistent standards regarding the level of influence over the adverse employment decision that is necessary for an employee's impermissible bias to be imputed to the employer.<sup>40</sup> In *Shager*, because the firing decision was made by an independent committee—rather than the allegedly biased supervisor—the court focused on whether the supervisor's impermissible prejudice "tainted" the committee's decision. If the non-firing supervisor's bias had any influence in the committee's decision to fire Shager, then a "causal link between that prejudice and Shager's discharge" exists sufficient to impute liability to the employer.<sup>41</sup>

Although several circuits adopted the "any influence" approach used in *Shager*,<sup>42</sup> the Fourth Circuit adopted the strictest approach, which requires the biased subordinate to be "principally responsible for the decision or the actual decision-maker for the employer."<sup>43</sup> Notably, the Tenth Circuit established a middle-ground approach that requires a "causal connection" between the biased subordinate's actions and the adverse employment action.<sup>44</sup>

#### 2. Supreme Court Accepts the Cat's Paw Doctrine and Creates a New Standard

The U.S. Supreme Court resolved the circuit split in *Staub v. Proctor Hospital*.<sup>45</sup> However, instead of adopting one of the three standards established

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(d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

RESTATEMENT (SECOND) OF AGENCY § 213 (AM. LAW INST. 1958).

39. Eber, *supra* note 18, at 147; *accord* Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 289 (4th Cir. 2004) (recognizing *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), as the predecessor to other courts' application of the "cat's paw" doctrine).

40. See Eber, *supra* note 18, at 147, 154–75 (discussing the different standards of causation used by the courts).

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

42. See, e.g., Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 55 (1st Cir. 2000) (direct supervisor was in position to influence the decision-maker); Rose v. N.Y.C. Bd. of Educ., 257 F.3d 156, 162 (2d Cir. 2001) (immediate supervisor had "enormous influence" in the decision-making process).

43. Hill, 354 F.3d at 290 (holding that a subordinate must possess some kind of supervisory authority and must be the actual decision-maker of the adverse employment decision).

44. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 487–88 (10th Cir. 2006) (holding that more than mere influence and more than mere input must be established in the decision-making process to satisfy the element of causation).

45. Staub v. Proctor Hosp., 562 U.S. 411, 418 (2011).

by the circuit courts, the Supreme Court established a new “proximate cause” standard for analyzing a “cat’s paw” theory of liability.<sup>46</sup>

In that case, plaintiff Vincent Staub was an angiography technician at Proctor Hospital and a member of the U.S. Army Reserve.<sup>47</sup> As an Army Reserve soldier, Staub was required to be absent from Proctor Hospital to attend monthly drills and one two-week training session during the year.<sup>48</sup> Staub claimed that his immediate supervisor Jane Mulally and her supervisor Michael Korenchuk harbored hostility toward him because of his military obligations and consequent absences from work.<sup>49</sup>

Specifically, he alleged that Mulally issued a Corrective Action against him for fabricated reasons.<sup>50</sup> Then, shortly thereafter, another co-worker filed a complaint with the Vice-President of Human Resources Linda Buck and the Chief Operating Officer Garrett McGowen regarding Staub’s “frequent unavailability and abruptness.” As a result, McGowen directed Buck and Korenchuk to develop a performance improvement plan to remedy Staub’s “unavailability problems.”<sup>51</sup> However, before the plan could be put into place,

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46. Writing for the Court, Justice Scalia posited:

Proximate cause requires only “some direct relation between the injury asserted and the injurious conduct alleged,” and excludes only those “link[s] that [are] too remote, purely contingent, or indirect.” We do not think that the ultimate decisionmaker’s exercise of judgment automatically renders the link to the supervisor’s bias “remote” or “purely contingent.” The decisionmaker’s exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes.

*Id.* at 419–20 (alteration in original) (footnote omitted) (internal citation omitted) (quoting *Hemi Group, LLC v. City of N.Y.*, 559 U.S. 1, 9 (2010)).

47. *Id.* at 413.

48. *Id.* at 413–14.

49. *Id.* at 414. Mulally often scheduled Staub to work during his mandatory training sessions or made him use vacation time “so that he would ‘pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule.’” She also openly discussed her discontent with Staub’s “military duty” and her desire to “get rid of him” with other staff members. Likewise, Korenchuk expressed his discontent with Staub’s military service by referring to his obligations to the military as “a b[un]ch of smoking and joking and [a] waste of taxpayers['] money.” *Id.* (alteration in original).

50. The Corrective Action was a “disciplinary warning for purportedly violating a company rule requiring him to stay in his work area whenever he was not working with a patient.” *Id.* In litigation, Staub contended that “Mulally’s justification for the Corrective Action was false for two reasons: [1] the company rule invoked by Mulally did not exist; and [2] even if it did, Staub did not violate it.” *Id.*

51. *Id.*

Korenchuk filed another complaint against Staub claiming that he violated the Corrective Action,<sup>52</sup> and Buck fired him.<sup>53</sup>

Staub filed suit against Proctor Hospital under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)<sup>54</sup> claiming that Mulally and Korenchuk's complaints were motivated by their anti-military bias, which influenced Buck's decision to fire him.<sup>55</sup> The jury found in favor of Staub, and Proctor Hospital appealed to the Seventh Circuit.<sup>56</sup> The Seventh Circuit reversed, holding that an employer may be held liable only where a biased supervisor exercised "singular influence" over the decision maker, and the adverse employment decision was made in "blind reliance" on the supervisor's actions.<sup>57</sup>

In a unanimous decision, the Supreme Court applied tort and agency principles to hold that liability could be imputed to an employer under the "cat's paw" doctrine: "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a *proximate cause* of the ultimate employment action, then the employer is liable under USERRA."<sup>58</sup> The Court suggested that an employer may be able to avoid "cat's paw" liability if an independent investigation uncovers a legitimate reason for the adverse employment decision that is "unrelated to the supervisor's original biased action."<sup>59</sup> However, the

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52. In his complaint, Korenchuk alleged that Staub violated Mulally's previously issued Corrective Action by leaving his desk without informing a supervisor. At trial, Staub contended that the "accusation was false: He had left Korenchuk a voice-mail notification that he was leaving his desk." *Id.* at 414–15.

53. *Id.* at 415 ("Buck relied on Korenchuk's accusation, however, and after reviewing Staub's personnel file, she decided to fire him.").

54. Pub. L. 103-353, 108 Stat. 3149 (codified as amended in scattered sections of 38 U.S.C. (2012)). The purpose of USERRA is to protect veterans who are rejoining the workforce after completing their military service obligations from anti-military discrimination in the workplace. For an in-depth discussion regarding USERRA, see Elizabeth A. Leyda, Note, *The War(riors) at Home: Examining USERRA's Veterans' Reemployment Protections When Hostility Follows Soldiers to the Workplace*, 28 GA. ST. U.L. REV. 851, 852 (2012).

55. *Staub*, 562 U.S. at 414–15.

56. *Id.* at 415.

57. *Id.* at 415–16.

58. *Id.* at 422 (emphasis added) (footnotes omitted).

59. Specifically, the Court posited 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 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. We are 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 do we think the independent investigation somehow relieves the employer of "fault."

*Id.*

Court failed to provide guidance on what a sufficient independent investigation entails.

Although the Court significantly clarified the standard for “cat’s paw” claims involving supervisors, it declined to consider whether a “cat’s paw” claim could be made for an adverse employment action caused by the bias of a low-level, non-supervisory co-worker.<sup>60</sup>

#### *E. Judicial Expansion of the Cat’s Paw Doctrine*

The question left unanswered by *Staub* has caused mixed results among the courts regarding the imputed bias of a co-worker under the “cat’s paw” doctrine. For example, lower courts within the Fourth and Seventh Circuits have indicated some support for extending “cat’s paw” liability to the impermissible bias of non-supervisory employees.<sup>61</sup> However, courts in the Sixth and Tenth Circuits have opposed extending the doctrine to encompass non-supervisory employees.<sup>62</sup>

The First Circuit, in *Velázquez-Perez v. Developers Diversified Realty Corp.*,<sup>63</sup> was the first federal circuit court to decide that a “cat’s paw” claim can proceed against an employer if a co-worker’s discriminatory intent influences an adverse employment decision. In that case, Antonio Velázquez-Perez filed a Title VII claim against his former employer for sex discrimination and retaliation.<sup>64</sup> He alleged that Rosa Martinez, a human resources (HR) representative, devised a scheme to get him fired after he rejected her romantic advances.<sup>65</sup> Velázquez claimed that he and Martinez were friendly and often exchanged e-mails that were sometimes flirtatious.<sup>66</sup> However, Martinez “expressed her romantic interest more explicitly” when she tried to gain entrance

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60. *Id.* at 422 n.4 (“We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed the discriminatory act that influenced the ultimate employment decision.”).

61. *See, e.g.,* Alamjamili v. Berglund Chevrolet, Inc., No. 7:09-CV-213, 2011 WL 1479101, at \*31–32 n.3 (W.D. Va. Apr. 18, 2011) (holding that because the plaintiff never alleged that any other person influenced his admittedly non-biased supervisor’s decision to fire him, *Staub*’s “cat’s paw” theory of liability was not applicable); Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at \*6 (N.D. Ill. May 12, 2012) (finding that *Staub* “neither precludes nor endorses” claims based on whether a non-supervisory co-worker’s impermissible bias can be imputed to the employer under the “cat’s paw” doctrine).

62. *See, e.g.,* Hysten v. Burlington N. Santa Fe Ry. Co., 415 F. App’x 897, 912 (10th Cir. 2011) (finding no cat’s paw liability because the biased actors were the plaintiff’s co-workers with “no supervisory authority or influence with respect to [the plaintiff], including authority or influence relating to employee discipline”); Voltz v. Erie Cty., 617 Fed. App’x 417, 424 (6th Cir. 2015) (recognizing that the Sixth Circuit only extends cat’s paw liability to Human Resources employees because, like supervisors, they can “effect a significant change in employment status”).

63. 753 F.3d 265 (1st Cir. 2014).

64. *Id.* at 267.

65. *Id.* at 267–69.

66. *Id.* at 268.

into his room during a business trip. He told her then that he was not interested in a romantic relationship.<sup>67</sup>

Shortly after the trip, Martinez began sending Velázquez angry e-mails threatening his job security.<sup>68</sup> Velázquez mentioned the e-mails to one of his supervisors who told him to send her a “conciliatory e-mail” so that she would not “get [him] terminated”; his supervisor and another man proceeded to jokingly advise him to have sex with Martinez.<sup>69</sup> During this time, Martinez also began complaining about Velázquez’s work performance to his supervisors.<sup>70</sup> When her complaints only resulted in a warning memorandum and the issuance of a Performance Improvement Plan, she went over the supervisors’ heads by filing a complaint and recommendation for termination with senior officials at the company’s headquarters.<sup>71</sup> Shortly thereafter, Velázquez was fired.<sup>72</sup>

The First Circuit determined that the employer was not “necessarily absolve[d] . . . of potential liability for Velázquez’s discharge” simply because Martinez was not his supervisor.<sup>73</sup> Applying negligence-based agency principles, the First Circuit held that:

an employer can be held liable under Title VII if: the 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

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67. Specifically, the record indicated that Martinez followed Velázquez to his room, tried to force her way in, and stood outside of his door until he threatened to call hotel security. Immediately after, Martinez sent Velázquez several e-mails and also e-mailed another female employee who she saw him talking to earlier “suggesting that Velázquez was going to have sex with the woman.” *Id.*

68. In the days that followed the rejection at the hotel, Martinez and Velázquez exchanged several e-mails in which he “firmly stated that he had no interest in a romantic relationship and asked Martinez to respect that decision.” *Id.* In response,

Martinez wrote, for example, “I don’t have to take revenge on anyone; if somebody knows your professional weaknesses, that person is me.” In another e-mail in the same chain, [she] said, “you disappoint me and . . . are not even half of what you boast you are,” adding, “I cannot allow any of you to risk the team’s success.”

*Id.*

69. *Id.* at 268.

70. *Id.* at 269.

71. During another business trip, Martinez once again followed Velázquez to his hotel room and told him that she loved him and not her husband. After Velázquez rejected her again, she sent an e-mail to the company’s senior officials in Ohio stating that “because [Velázquez’s] behavior has been against the company code of conduct and has already impacted the trust from other team members . . . [i]t is my recommendation this person [be] terminated immediately.” *Id.*

72. *Id.*

73. *Id.* at 273.

acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.<sup>74</sup>

## II. EXPANSION OF THE CAT’S PAW DOCTRINE CONTINUES IN THE SECOND CIRCUIT

On August 29, 2016, the Second Circuit issued its opinion in *Vasquez v. Empress Ambulance Service, Inc.*, and joined the First Circuit in expanding the scope of the “cat’s paw” doctrine to co-workers.<sup>75</sup>

### A. *The Facts*

In *Vasquez*, Andrea Vasquez had been working as an emergency medical technician for Empress Ambulance Service, Inc. (Empress) for only a few months when she met Tyrell Gray, one of the company’s dispatchers.<sup>76</sup> Gray began flirting with Vasquez shortly after they met. His flirting made Vasquez uncomfortable, and she repeatedly denied his requests to go out.<sup>77</sup> A few months later, Gray again asked her out, to which Vasquez replied that she had a boyfriend and was not interested in dating him.<sup>78</sup> Gray told her that he would send her something special later that night that would make her forget about her boyfriend.<sup>79</sup>

While Vasquez was out on a shift, Gray sent Vasquez a picture of his erect penis, asking her what she thought. When Vasquez returned to the office, she was visibly upset and immediately told her supervisor.<sup>80</sup> The supervisor put her in an office to type out a formal complaint and assured her that the situation would be dealt with. When Gray returned to the office, he noticed Vasquez crying at the computer.<sup>81</sup> He asked her if she was reporting him. After she ignored him, he left.<sup>82</sup>

Once Vasquez completed her report, she met with her supervisor and the HR director. As she recounted her story, she offered to show them the text messages

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74. *Id.* at 274.

75. *Vasquez v. Empress Ambulance Serv. Inc.*, 835 F.3d 267, 276 (2d Cir. 2016).

76. *Id.* at 269.

77. *Id.* at 269–70 (“Over the course of their acquaintance, Gray ‘constantly asked [Vasquez] out on dates,’ ‘attempted to flirt with her,’ and ‘repeatedly . . . put his arm around her or touched her shoulders,’ causing Vasquez ‘to be extremely uncomfortable’ as she tried to reject his advances.” (alteration in original)).

78. *Id.* at 270.

79. When Vasquez told him she had a boyfriend, he “insisted that ‘I bet I can make you leave your man’ and promised to ‘send . . . something between you and me.’” *Id.* (alteration in original).

80. *Id.*

81. Gray walked into the office, “to see a visually distressed [Vasquez] crying and typing at the computer. Gray, noticeably nervous, asked Vasquez if she was ok and, after Vasquez declined to engage his attempts at conversation, stated, You’re reporting me, right?” *Id.* (internal quotations omitted).

82. *Id.*

from Gray;<sup>83</sup> however, both declined the invitation.<sup>84</sup> While Vasquez made her report, Gray frantically sought to undermine her report. After telling another co-worker that he thought Vasquez was reporting him, he asked that co-worker to tell their supervisor that he and Vasquez were in relationship.<sup>85</sup>

When the co-worker refused, Gray began doctoring his text messages to make it seem as if he and Vasquez were in a sexual relationship by combining screen shots of portions of his conversations with Vasquez and another woman.<sup>86</sup> He printed the screenshots and showed them to the supervisor and a representative from HR. He included a racy self-photo of a woman with only a small portion of her face visible claiming it was Vasquez and that she had sent him the photo in response to his photo.<sup>87</sup>

Shortly after Gray met with HR, Vasquez had a meeting with her union representatives, the owner of Empress, and HR to discuss the investigation.<sup>88</sup> She was told they spoke with Gray, and after considering his evidence, they determined she had been in an “inappropriate sexual relationship” with him. They then informed her *she* was being fired for engaging in sexual harassment.<sup>89</sup> Although Vasquez vehemently denied the accusations and urged them to look at her cell phone as proof that no such conversations between her and Gray ever occurred, they refused. Additionally, she denied the existence of any photo, and when she requested to see it, they refused her request.<sup>90</sup>

Vasquez filed suit against Empress under Title VII and the New York State Human Rights Law claiming she was wrongfully terminated in retaliation for her sexual harassment complaint.<sup>91</sup> Empress filed a motion to dismiss, which the district court, applying *Staub*, granted and dismissed Vasquez’s complaint

83. The supervisor and HR director “thanked Vasquez for ‘telling [her] story,’ assured her that, ‘[w]e don’t tolerate this sort of behavior here,’ and promised to ‘sort the situation out.’”

84. The court noted that after this exchange:

To aid in their investigation, Vasquez offered to show the supervisors Gray’s messages on her cell phone, but they rejected the offer. They then asked Vasquez whether she preferred to go home or to wait in the office while they investigated the incident that morning, and Vasquez elected to wait.

*Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 271.

88. *Id.* at 270.

89. *Id.* at 270–71 (“[T]he [investigative] committee had already considered Gray’s documents and had concluded that Vasquez was ‘having an inappropriate sexual relationship’ with Gray.”).

90. Vasquez was informed “that Gray had shown them ‘a racy self-taken photo’ that Vasquez had allegedly sent in response to Gray’s explicit picture message, which they considered ‘proof that [Vasquez] had been sexually harassing [Gray]’” After denying the allegation and contending that Gray was lying, the firing supervisor “insisted that ‘the committee had all seen the photograph’ and ‘kn[ew] it was [her in the photo].’”—despite the fact that the “photo depicted only ‘a small fraction of a face’ that could ‘by no means [be] concluded to be that of [Vasquez].’” *Id.*

91. Although *Vasquez* involves claims on both state and federal anti-discrimination statutes, this Note focuses exclusively on federal anti-discrimination law.

on grounds that Gray's retaliatory intent could not be imputed to Empress because he was not her supervisor.<sup>92</sup>

### B. The Holding

The Second Circuit “vacated the [district] court’s decision and remand[ed] [Vasquez’s claim] for further proceedings.”<sup>93</sup> Writing for the court, Circuit Judge Calabresi employed the negligence-based agency principles used in *Ellerth* to hold that employers may be held liable under the “cat’s paw” doctrine for an employee’s discriminatory or retaliatory bias—regardless of the employee’s position in the company—if the employer negligently gives effect to the unlawful bias by causing the “victim to suffer an adverse employment decision.”<sup>94</sup>

The Second Circuit supported its decision by relying on the Supreme Court’s reasoning in *Ellerth*, notwithstanding the fact that *Ellerth* involved a hostile work environment claim.<sup>95</sup> Judge Calabresi explained:

Significantly, in addressing employer culpability for employee misconduct, the *Ellerth* Court expressly noted that Section 219(2)(b) [of the Restatement] holds employers liable “when the [employee’s] tort is attributable to the employer’s own negligence. Thus, although a[n employee’s] sexual harassment is outside the scope of employment . . . , an employer can be liable, nonetheless, where its own negligence is a cause of the harassment[, . . . i.e.,] if it knew or should have known about the conduct but failed to stop it.”<sup>96</sup>

Analogizing Vasquez’s Title VII claim to the sexual harassment claim in *Ellerth*, Judge Calabresi determined that Gray’s status as a low-level employee could not “shield Empress from [liability] for Gray’s conduct” because, “under *Ellerth* and agency law,” Gray was an agent of Empress sufficient to “hold Empress accountable for his unlawful intent.”<sup>97</sup>

Focusing on Empress’s “blind faith” reliance on Gray’s accusations and its failure to give any consideration to Vasquez’s contradictory evidence, the Second Circuit found that a reasonable jury could find that Empress had been negligent in firing Vasquez.<sup>98</sup> However, it noted that an employer does not

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92. *Vasquez*, 835 F.3d at 269.

93. *Id.*

94. *Id.* at 269, 273–74.

95. *Id.* at 273 (citing *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742, 758–59 (1998)) (“We see no reason why *Ellerth*, though written in the context of hostile work environment, should not also be read to hold an employer liable under Title VII . . .”).

96. *Id.* at 273 (alteration in original) (quoting *Ellerth*, 524 U.S. at 758–59).

97. *Id.* at 274 (“Once deemed Empress’s agent, Gray stands in the same shoes as *Staub*’s ‘supervisor,’ and is equally able to play the monkey to Empress’s cat.”).

98. *Id.* at 276. The Second Circuit determined that Empress’s failure to fully investigate the matter—by refusing to consider Vasquez’s evidence—constituted negligence that gave effect to Gray’s impermissible motive. *Id.* at 274 n.6.

automatically expose itself to liability by acting on information provided by a biased employee, instead courts must consider whether the employee's bias played a meaningful role in the adverse decision.<sup>99</sup> It explained that employers "can still 'just get it wrong' without incurring liability under Title VII," they just cannot get it wrong by negligently allowing "itself to be used as a [cat's paw] for even a low-level employee's" improper bias.<sup>100</sup>

### III. SECOND CIRCUIT DECISION WAS CORRECT TO EXPAND THE CAT'S PAW DOCTRINE TO CO-WORKERS

The Second Circuit's decision to expand an employer's "cat's paw" liability to discriminatory or retaliatory acts of its co-workers is consistent with the purpose of Title VII and agency principles.

#### A. *The Decision Is Consistent with the Purpose of Title VII*

The primary purpose of Title VII is to avoid harm to employees by ridding the workplace of discrimination and any retaliation that may follow for reporting acts of discrimination.<sup>101</sup> Restricting discrimination and retaliation claims to only the discriminatory acts of a biased supervisor while allowing the same discriminatory acts of co-workers clearly undermines the goals of Title VII.<sup>102</sup> Further, the Second Circuit noted that in accordance with Title VII precedent, plaintiffs are entitled to succeed on claims of discrimination against even non-

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99. *Id.* at 275–76. The Second Circuit noted that:

Empress's alleged negligence—in crediting Gray's accusations to the exclusion of all other evidence, and specifically declining to examine contrary evidence tendered by Vasquez, when it knew or, with reasonable investigation, should have known of Gray's retaliatory animus—caused Gray's accusations to form the sole basis for Empress's decision to terminate Vasquez. Thus, as a result of Empress's negligence, Gray achieved a "meaningful," and indeed decisive, role in Vasquez's termination.

*Id.* at 275.

100. *Id.* (stating that courts consider "what '*motivated*' the employer rather than . . . 'the truth of the allegations'" the employer relied upon).

101. See *Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms."); accord *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) ("The dominant purpose of [Title VII], of course, is to root out discrimination in employment.").

102. This point was best illustrated by a case out of the D.C. Circuit, which explained:

To hold that an employer cannot be reached for Title VII violations unknown to him is, too, to open the door to circumvention of Title VII by the simple expedient of looking the other way, even as signs of discriminatory practice begin to gather on the horizon. As the Ninth Circuit has said, "such a rule would create an enormous loophole in the statutes," one we think the courts should strive to seal. Instead of providing a reason for employers to remain oblivious to conditions in the workplace, we think the enlightened purpose of Title VII calls for an interpretation cultivating an incentive for employers to take a more active role in warranting to each employee that he or she will enjoy a working environment free from illegal . . . discrimination.

*Vinson v. Taylor*, 753 F.2d 141, 151 (D.C. Cir. 1985), *aff'd sub nom. Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (footnotes omitted).

biased employers as long as the biased individual “played a meaningful role in the [decision-making] process.” It then relied on that reasoning to hold that an employee clearly plays a meaningful role when he “‘manipulates’ an employer into acting as mere ‘conduit’ for his [impermissible] intent.”<sup>103</sup>

*B. The Decision Is Consistent with Principles of Agency Law*

The Supreme Court in *Ellerth* and *Staub* make clear that agency principles govern the “cat’s paw” doctrine.<sup>104</sup> As mentioned above, the Supreme Court in *Staub* determined that a supervisor is an agent of the employer by applying Section 219(1) of the Restatement because it found that the supervisors in *Staub* were acting within the scope of their employment. It did not, however, adopt a bright-line rule to impute liability to the employer exclusively for the impermissible bias of supervisors.<sup>105</sup>

Pursuant to section 219(2)(b) of the Restatement, an employer is subject to liability for the torts of its employees even when acting outside the scope of their employment, if it is found that the employer was “negligent or reckless.”<sup>106</sup> Although Gray’s manipulative conduct was well outside the scope of his employment, Empress’s negligence in the matter could give rise to liability for Gray’s retaliatory motive. Particularly, because Vasquez filed a sexual harassment complaint against him just a few hours before, a reasonable employer would suspect or should suspect that Gray had a retaliatory motive in proffering his evidence.<sup>107</sup> Therefore, by refusing to consider the counter-evidence proffered by Vasquez, Empress “negligently chose to credit his, and only his, account” in deciding to terminate Vasquez.<sup>108</sup>

Thus, in reaching its decision, the Second Circuit correctly applied Title VII precedent and section 219(2)(b) of the Restatement to determine that the “cat’s paw” doctrine extends employer liability to the actions of co-workers when the employer negligently gives effect to the co-worker’s discriminatory or retaliatory intent.

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103. *Vasquez*, 835 F.3d at 272.

104. *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011); *Ellerth*, 524 U.S. at 764–65.

105. *Staub*, 562 U.S. at 422–23 & n.4 (“We express 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 employment decision.”).

106. RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (AM. LAW INST. 1958).

107. The nature and timing of Gray’s evidence was suspicious. Only a few hours had passed from the time of Gray sending the text message and Vasquez filing her complaint, yet, Gray conveniently was carrying around printed screenshots of his text messages with Vasquez. Appellant’s Brief at 20–21, *Vasquez v. Empress Ambulance Serv. Inc.*, 835 F.3d 267 (2d Cir. 2016). In addition, Gray told his supervisors and HR that Vasquez sent the racy photo to him in response to his text. However, Vasquez was out on a shift when she received the text, filed her complaint immediately upon her return, and waited in the office until her meeting with the supervisors and HR. *Id.* at 20–21.

108. *Vasquez*, 835 F.3d at 275.

### C. Independent Investigation Guidelines Still Needed

Independent investigations are a crucial step in protecting employers against “cat’s paw” claims. Courts have implied that employers are likely to be absolved of “cat’s paw” liability where a sufficient independent investigation shows the adverse employment action was based on reasons wholly unrelated to the original bias.<sup>109</sup> In other words, an independent investigation may sever the link of causation between the biased employee and the adverse employment action.<sup>110</sup>

For example, if in the course conducting an independent investigation of Gray’s claims, Empress had discovered that Vasquez was guilty of violating the company’s policy regarding cell phone use while driving an ambulance, Empress would be less likely to be found liable under the “cat’s paw” doctrine. Well-defined standards for independent investigations would provide employers with an effective defense to “cat’s paw” claims and reduce the risk of litigation.<sup>111</sup> Furthermore, encouraging independent investigations promotes the purpose of Title VII—ridding the workplace of discrimination.<sup>112</sup> Thus, the Supreme Court should provide guidelines and identify standards that could guide future courts in determining whether an investigation is sufficient to avoid “cat’s paw” liability.

## IV. PUTTING AN END TO MONKEY BUSINESS IN THE WORKPLACE

As a result of the *Vasquez* decision, employees have been given greater protection under Title VII. However, employers now face greater exposure to liability in “cat’s paw” claims, especially in regard to how they investigate and

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109. See, e.g., *Staub*, 562 U.S. at 421; *Clack v. Rock-Tenn Co.*, 304 F. App’x 399, 408 (6th Cir. 2008) (Moore, J. dissenting) (acknowledging that “the fact of an independent investigation is an important factor”); *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 486 (10th Cir. 2006) (noting other Circuits’ acceptances of absolving employers when there is an independent investigation); *Collins v. N.Y.C. Transit Auth.*, 305 F.3d 113, 119 (2d Cir. 2002) (holding that termination was proper after an independent investigation was based on “substantial evidence, of an undisputedly independent, neutral, and unbiased adjudicator”).

110. See *Staub*, 562 U.S. at 421; *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 289 (4th Cir. 2004); accord Sara Atherton Mason, Note, *Cat’s Paw Cases: The Standard for Assessing Subordinate Bias Liability*, 38 FLA. ST. U. L. REV. 435, 446–47 (2011); Curtis J. Thomas, Note, *Cat’s in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in EEOC v. Coca-Cola Bottling Co. of Los Angeles*, 61 OKLA. L. REV. 629, 663–64 (2008) (providing a general discussion on independent investigations).

111. The EEOC argued in its appellate brief to the Supreme Court that “the more thorough, balanced, and truly independent the investigation, the more likely the termination will be the result of the investigation rather than the discriminatory input.” Brief for Respondent at 35, *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, 127 S. Ct. 852 (2007) (No. 06-341), 2007 WL 951131.

112. See Eber, *supra* note 18, at 194; see also Thomas, *supra* note 110, at 663 (“The independent investigation requirement is correct because it serves the purpose of Title VII by ensuring that employees who are the victims of intentional discrimination can recover even though the persons who made the adverse employment decision did not act with any bias.”).

respond to discrimination complaints.<sup>113</sup> While the *Vasquez* decision and the cases before it failed to clarify specific standards of a sufficient independent investigation, some guidance can be found by looking at the U.S. Equal Employment Opportunity Commission's (EEOC) guidelines and other court decisions regarding Title VII "cat's paw" claims.<sup>114</sup>

#### A. EEOC Guidelines

In 1999, the EEOC issued guidelines for the enforcement of vicarious liability for unlawful harassment by supervisors.<sup>115</sup> Although the guidelines were issued specifically for discrimination by supervisors, they can easily be applied to discrimination by co-workers. The EEOC urges employers to "set up a mechanism for a prompt, thorough, and impartial investigation into alleged [discrimination]."<sup>116</sup> When choosing an investigator, the EEOC instructs that "the individual who conducts the investigation [should] objectively gather and consider the relevant facts."<sup>117</sup> Specifically, the investigator should be skilled in interviewing and evaluating the credibility of witnesses, and the alleged wrongdoer should not have any "direct or indirect control" over the investigator.<sup>118</sup>

#### B. Judicial Guidance

One example of a sufficient independent investigation is found in *Sirpal v. University of Miami*.<sup>119</sup> In *Sirpal*, an Indian-American student claimed that racial discrimination motivated his dismissal from both the University's graduate school and medical school.<sup>120</sup> The Eleventh Circuit held that even if

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113. See Dorrian, *supra* note 18.

114. See, e.g., *Sirpal v. Univ. of Miami*, 509 F. App'x 924, 927 (11th Cir. 2013) (finding that the "cat's paw" doctrine did not extend liability to the employer because it conducted a sufficient independent investigation prior to dismissing the plaintiff-employee); *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 353 (6th Cir. 2012) (holding that the employer's investigation was not sufficiently independent to absolve it of vicarious liability); *Jennings v. Ill. Dep't of Corr.*, 496 F.3d 764, 765–66 (7th Cir. 2007) (demonstrating how employers can avoid vicarious liability by conducting independent investigations before terminating employees); see generally U.S. EQUAL EMP. OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.pdf> (last modified Mar. 29, 2010) [hereinafter EEOC ENFORCEMENT GUIDANCE].

115. The EEOC's use of the word harassment can be used interchangeably with discrimination. See EEOC ENFORCEMENT GUIDANCE, *supra* note 114, at 1–2 ("While the anti-discrimination statutes seek to remedy discrimination, their primary purpose is to prevent violations. The Supreme Court, in *Faragher* and *Ellerth*, relied on Commission guidance which has long advised employers to take all necessary steps to prevent harassment." (footnotes omitted)).

116. *Id.* at 14.

117. *Id.* at 15.

118. *Id.*

119. 509 F. App'x 924 (11th Cir. 2013).

120. *Id.* at 925–26. The independent investigations revealed that Sirpal had engaged in misconduct and unethical behavior in the graduate school's lab where he worked and that there

Sirpal's claims of racial discrimination were true, this was not a "cat's paw" case because "each school conducted some sort of investigation," both of which determined that, notwithstanding evidence of peripheral racial animus, his dismissal was justified by his misconduct and unethical behavior.<sup>121</sup> The court noted that the investigations were sufficiently independent to support such a finding because each one included a hearing at which Sirpal was able to testify. Then, after the decision to dismiss him was reached by the Graduate Committee, Sirpal was able to appeal the decision to the Associate Dean for Graduate Studies.<sup>122</sup>

*Jennings v. Illinois Department of Corrections*,<sup>123</sup> provides another example of a sufficient independent investigation. This case involved a Title VII claim filed by a Mexican-American prison guard who was terminated for smuggling contraband cigars into the prison and trading them with inmates.<sup>124</sup> The prison's warden initiated an independent investigation upon discovering cigars in the possession of an inmate.<sup>125</sup>

Eight inmates were interviewed before the investigator concluded that Jennings had engaged in the prohibited conduct. Based on the results of the investigation, a disciplinary hearing was held before the Employee Review Board, which in turn recommended a discharge.<sup>126</sup> After Jennings was officially terminated, an independent arbitrator upheld the termination finding that the termination "was appropriate in light of the seriousness of the misconduct and Jennings' recent disciplinary history."<sup>127</sup> The Seventh Circuit found that the independent investigation conducted by the independent investigator and subsequent arbitration were sufficient to break "any connection between [the supervisor's alleged] improper motivations" and the adverse action.<sup>128</sup>

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were some serious questions regarding the data he used in an article he was writing for the medical school. *Id.* at 927.

121. *Id.* ("Therefore, even if Sirpal's supervisor, Dr. Potter, had submitted to the Graduate Committee a report that 'rubberstamped' the discriminatory animus of Sirpal's harassers as Sirpal alleges, this is not a cat's paw case because the independent investigation determined that dismissal was, apart from Dr. Potter's recommendation, entirely justified.")

122. Noting the thoroughness of the appeal process, the Eleventh Circuit emphasized that "Dr. John Bixby, Associate Dean for Graduate Studies for the medical school, met with the Graduate Committee members, the University Security Officer who had investigated one of the allegations of misconduct, the lab manager, Ms. Jones, and Sirpal." *Id.*

123. 496 F.3d 764 (7th Cir. 2007).

124. *Id.* at 765. Jennings claimed he was fired because of his national origin and presented evidence of discriminatory remarks made about him and other Hispanic employees, including that he was called a "lazy Mexican" shortly before he was investigated. *Id.* at 766.

125. *Id.* at 765.

126. *Id.* at 765-66.

127. *Id.* at 766.

128. The Seventh Circuit noted that there was no evidence that the warden, the investigator, or the arbitrator "bore any discriminatory animus towards Mexican-Americans or Jennings' in particular." *Id.* at 769.

In contrast, *Chattman v. Toho Tenax America, Inc.*<sup>129</sup> is an example of circumstances when a court held that an independent investigation did not absolve the employer from “cat’s paw” liability. *Chattman* involved a Title VII claim alleging that an African American employee’s disqualification from promotion considerations was based on a disciplinary action issued against him by his racially-biased supervisor.<sup>130</sup> The Sixth Circuit held that the investigation conducted by the employer did not protect it from liability because the supervisor “was ‘involved in some parts of the discussion’ regarding *Chattman*’s discipline and non-promotion.”<sup>131</sup> It further found that the investigation was not entirely unrelated to the HR manager’s biased recommendation because the manager “both misinformed and selectively informed [the ultimate decision-maker] about the incident.”<sup>132</sup>

### C. Practitioner Tips

Although both the EEOC guidelines and judicial decisions do not generally provide clear-cut standards for sufficient independent investigations, there are a few key measures employers can put into practice to ensure that a sufficient independent investigation is conducted.<sup>133</sup>

First, interview both the employee making the report or recommendation and the subject of the report or recommendation, and review all evidence proffered by each.<sup>134</sup> Second, interview all witnesses to the alleged wrongdoing or others who may have knowledge of the complaint, and review any additional evidence they may provide. Finally, make certain the investigation remains impartial at

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129. 686 F.3d 339 (6th Cir. 2012).

130. As evidence that his supervisor was biased against African Americans, *Chattman* pointed to two instances in which his supervisor made racially hostile statements. First, in response to another employee’s comment about her son fighting at school, the supervisor allegedly responded, “[y]ou know what my grandmother always says about boys scuffling? That’s how the nigger graveyard got full.” Then, when commenting on then-Presidential-candidate Barack Obama, the supervisor said, “[w]ell you better look close at Obama’s running mate because Americans won’t allow a nigger president.” *Id.* at 343.

131. *Id.* at 353.

132. *Id.*

133. See Aaron J. Graf, *Avoiding and Defending Claims of Cat’s Paw Liability in Employment Discrimination Cases*, WDC JOURNAL (Mar. 21, 2016), <http://www.wdc-online.org/wdc-journal/archived-editions/avoiding-and-defending-claims-cats-paw-liability-employment> (“[I]t can be said that a cat’s paw theory is unlikely to be brought, or will easily be defeated, where the decision maker: (1) performs their own independent investigation of the grounds supporting the employment action; (2) relies almost exclusively on testimony or documents created by unbiased or disinterested individuals instead of on the individual initially making the recommendation; and (3) provides the employee a brief opportunity to rebut or disprove the allegations.”).

134. For recommendations regarding guidelines for independent investigations, see Rachel Santoro, Comment, *Narrowing the Cat’s Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 836–41 (2009), and see also Katherine González-Valentín, *Who’s Burning Now? Avoiding “Cat’s Paw” Liability Through Proper Predisciplinary Investigation*, 59 FED. LAW. 20, 22 (2012).

all stages by ensuring the employee reporting the wrongdoing or making the recommendation has no authority or influence over the investigator. This includes ensuring the employee reporting the wrongdoing or making the recommendation is not involved in discussions regarding the investigation beyond his or her report or recommendation.

Furthermore, employers can minimize the risk of liability in “cat’s paw” claims by: (1) adopting, educating, and training all employees—supervisors and lower-level alike—on anti-discrimination and anti-retaliation policies; (2) keeping detailed disciplinary and performance records; and (3) making sure that all similarly-situated employees are subject to similar disciplinary actions.<sup>135</sup>

## V. CONCLUSION

The Second Circuit’s recognition of “cat’s paw” liability in co-worker discrimination and retaliation claims represents a positive step in the attempt to protect employees from discrimination and is an effective response to the nationwide problem of workplace discrimination and retaliation.<sup>136</sup> Other Circuits should adopt the First and Second Circuit’s expansion of “cat’s paw” cases to co-workers. Further, the expansion of the “cat’s paw” doctrine to include co-worker bias should motivate employers to reexamine their existing personnel practices in order to eliminate discriminatory and retaliatory bias from playing a role in employment decisions.<sup>137</sup>

Despite the positive impact that the *Vasquez* decision and the “cat’s paw” cases before it will have in employment discrimination law, they have left unanswered the standards employers should follow when conducting independent investigations in order to avoid “cat’s paw” liability. Employers must keep in mind that an employee’s discriminatory or retaliatory actions may be a causal factor in an adverse employment action where there is no evidence that the adverse action was not justified for reasons apart from the biased employee’s report. Although it is always important to thoroughly investigate

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135. This is a recommendation commonly made by human resources representatives across all industries. See Ivo Becica, *More than Just a Fable—Why the “Cat’s Paw” Matters for Employers*, HR LEGALIST (Apr. 14, 2015), <http://www.hrlegalist.com/2015/04/more-than-just-a-fable-why-the-cats-paw-matters-for-employers/>.

136. Discrimination continues to be a pervasive problem in the workplace. In Fiscal Year 2016, the EEOC received 91,503 charges and secured more than \$482 million for victims of discrimination. *What You Should Know: EEOC’s Fiscal Year 2016 Highlights*, U.S. EQUAL EMPL. OPPORTUNITY COMM’N, [https://www.eeoc.gov/eeoc/newsroom/wysk/2016\\_highlights.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/2016_highlights.cfm) (last visited Apr. 6, 2018).

137. See, e.g., *Legal Alert: Cat’s Paw Theory of Discrimination Adopted by 2nd Circuit*, FISHER PHILLIPS (Aug. 30, 2016), <https://www.fisherphillips.com/resources-alerts-cat-s-paw-theory-of-discrimination-adopted-by-2nd-circuit>; Brian Hall, *2nd Circuit “Cat’s Paw” Decision Highlights Importance of Employer Investigations Before Termination*, PORTER WRIGHT: EMPLOYER L. REP. (Sept. 6, 2016), <https://www.employerlawreport.com/2016/09/articles/traps-for-the-unwary/2nd-circuit-cats-paw-decision-highlights-importance-of-employer-investigations-before-termination/>.

discrimination complaints with a critical eye toward potential bias, the Second Circuit's decision makes it even more so.

Until clear standards are provided for deciding when an investigation will be sufficiently independent, it will be left to the courts to define what constitutes a "sufficient independent investigation" that absolves employers from liability in "cat's paw" claims. Thus, employers must take discrimination and retaliation complaints seriously by verifying that adverse employment actions are justified, properly supported, and based on non-discriminatory reasons.