1-1-2008

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Recommended Citation
Taran S. Kaler, Comment, Controlling the Cat's Paw: Circuit Split concerning the Level of Control a Biased Subordinate Must Exert over the Formal Decisionmaker's Choice to Terminate, 48 SANTA CLARA L. REV. 1069 (2008).
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CONTROLLING THE CAT'S PAW: CIRCUIT SPLIT CONCERNING THE LEVEL OF CONTROL A BIASED SUBORDINATE MUST EXERT OVER THE FORMAL DECISIONMAKER'S CHOICE TO TERMINATE

Taran S. Kaler*

I. INTRODUCTION

In a recent survey, fifteen percent of American workers perceived that they had been the subject of employment discrimination or bias at their workplace.1 In 2005, the United States Equal Employment Opportunity Commission (EEOC)2 received approximately 75,000 claims from employees alleging employment discrimination.3 To combat discrimination, beginning in the mid-1900s,

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* Comments Editor, Santa Clara Law Review, Volume 48; J.D. Candidate, Santa Clara University School of Law, 2008; B.A. Political Economy of Industrial Societies and South and Southeast Asian Studies, University of California, Berkeley, 2005. In December 2006, I began the process of researching and writing about this topic. I wish to thank all the sets of eyes that have edited and reviewed the comment since that time.

1. U.S. Equal Employment Opportunity Commission, New Gallup Poll on Employment Discrimination Shows Progress, Problems 40 Years After Founding of EEOC (Dec. 8, 2005), http://www.eeoc.gov/press/12-8-05.html (showing that when broken down into sub-groups, the survey indicated that 31% of Asian-Americans reported incidents of discrimination, making them the largest percentage of any ethnic group, while 26% African-Americans reported discrimination, making them the second largest ethnic group).

2. Filing a Charge of Employment Discrimination (Dec. 20, 2007), http://www.eeoc.gov/charge/overview_charge_filing.html (“A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party's rights . . . This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local antidiscrimination law.”).

the United States Congress passed employment antidiscrimination legislation, such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. Such legislation attempts to provide equal employment opportunities in the workplace, deter discrimination, and provide remedies to victims of discrimination. An aspect of employment antidiscrimination legislation is to prohibit an employer from discriminating because of a person’s protected class in areas such as employment, termination, promotion, compensation, or any other terms, conditions, and privileges of employment.

One manner in which courts have recognized discrimination claims is under the subordinate bias liability theory, also known as the cat’s paw theory. Under this theory, a court will impute the discriminatory bias of a subordinate, who lacks the formal authority to terminate an employee, to the decisionmaker who does have formal authority to terminate. In such instances, even though the formal decisionmaker does not exhibit bias toward the terminated employee, courts can still hold the employer vicariously liable.

Though the various United States Courts of Appeal agree that an employee may bring a discriminatory claim under this theory, the circuit courts are split as to the level of control a biased subordinate must exert over the formal decisionmaker. In order to fully understand the circuit split and the need for a uniform standard, one must understand the diverging levels of control that the different circuit courts currently apply.

Part II of this comment begins with a brief discussion

8. Id.
10. Id. This comment discusses the cat’s paw theory in terms of termination. However, the theory applies to other cognizable adverse employment actions as well.
11. Id. at 406.
regarding antidiscrimination legislation and the agency principles that support them.\textsuperscript{13} It describes subordinate bias liability in detail and discusses how courts utilize the theory to hold employers vicariously liable for the intentional torts of their subordinates.\textsuperscript{14} Part II concludes by discussing the different circuit courts’ standards and provide synopsis of relevant case law.\textsuperscript{15}

Part III of this comment identifies the problems that arise from the current circuit split.\textsuperscript{16} Part IV analyzes why the Fourth and Fifth Circuits’ interpretations do not adequately extend the agency principles of the employment antidiscrimination legislation and neglect to balance the competing interests of employees and employers.\textsuperscript{17} Finally, Part V proposes that all circuits adopt the standard of causation utilized by the Tenth Circuit, and at the same time, consider and account for the distinctions between coworker bias and supervisor bias.\textsuperscript{18} Such a uniform standard will balance the concerns and interests of both employers and employees.\textsuperscript{19}

II. BACKGROUND

A. Title VII, the ADEA, and the ADA

President Lyndon B. Johnson signed into law the Civil Rights Act of 1964 on July 2, 1964.\textsuperscript{20} An important aspect of the law is Title VII, which provides that “it shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge 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.”\textsuperscript{21} The United States Congress intended that such legislation would deter discriminatory

\begin{itemize}
\item \textsuperscript{13} See infra Part II.A.
\item \textsuperscript{14} See infra Part II.B.
\item \textsuperscript{15} See infra Part II.C.
\item \textsuperscript{16} See infra Part III.
\item \textsuperscript{17} See infra Part IV.
\item \textsuperscript{18} See infra Part V.
\item \textsuperscript{20} Pre 1965: Events Leading to the Creation of EEOC, http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html (last visited April 7, 2008).
\end{itemize}
behavior by employers as well as provide remedies to affected employees. Three years later, the Age Discrimination in Employment Act of 1967 (ADEA) added an additional protected class—age. The ADEA prohibits employment discrimination against persons over forty years of age.

On July 26, 1990, President George H. W. Bush signed into law the Americans with Disabilities Act of 1990 (ADA). Title I of the ADA focuses on employment, making it unlawful for an employer to discriminate against a “qualified individual with a disability because of the disability of such individual.” Like Title VII and the ADEA, the ADA provides legal recourse to groups of individuals who have been “subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness in [American] society, based on characteristics that are beyond the control of such individuals.”

Congress directed federal courts to interpret the antidiscrimination employment legislation based on principles of agency law. Agency principles are evident because the acts similarly define “employer” as a “person engaged in an industry affecting commerce . . . and any agent of such a person.” In Burlington Industry, Inc., v. Ellerth, the Supreme Court dealt with agency principles regarding Title VII. The issue was whether courts could hold an employer vicariously liable in an action taken by one of its subordinates who had created a hostile work environment. The Court explained that “it is less likely that a willful tort will properly be held to be in the course of employment and that the liability of the master for such torts will naturally be more limited.”

22. See Lees, supra note 7, at 882.
29. 42 U.S.C. § 2000e(b); 28 U.S.C. § 630(b); see also Caminetti v. United States, 242 U.S. 470, 485 (1917) ("[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed.").
30. Ellerth, 524 U.S. at 742.
31. Id. at 754-65.
32. Id. at 751.
33. Id. at 756 (citing FLOYD R. MECHEM, OUTLINE OF THE LAW OF AGENCY
for personal reasons that are wholly unrelated and adverse to the goals and objectives of an employer.\textsuperscript{34} The discrimination does not serve business interests nor is the discrimination likely in the course and scope of the subordinate’s employment.\textsuperscript{35}

However, in limited circumstances, the Court in \textit{Ellerth} recognized that an employer may be held liable for its subordinate’s intentional torts outside the scope of employment under agency principles.\textsuperscript{36} The Court cited Section 219 of the Restatement (Second) of Agency, which states:

\begin{quote}
[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . 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.\textsuperscript{37}
\end{quote}

Thus, a court may find the employer vicariously liable for the discriminatory behavior of a subordinate employee if the terminated employee can establish that the subordinate acted as an agent of the employer.\textsuperscript{38}

\section*{B. Subordinate Bias Liability—Cat’s Paw Theory}

Courts have recognized claims of employment discrimination based on the discrimination exhibited by the employer’s subordinates.\textsuperscript{39} Usually, “the person with authority over the employment decision is the one who executes the [termination] against the employee.”\textsuperscript{40} However,

\begin{flushleft}
\textsuperscript{266} (4th ed. 1952)).
\textsuperscript{34} See id. at 757.
\textsuperscript{35} See id.
\textsuperscript{36} Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998).
\textsuperscript{37} Id. (quoting \textit{RESTATEMENT (SECOND) OF AGENCY} § 219(2) (1958)).
\textsuperscript{39} See Galdamez v. Potter, 415 F.3d 1015, 1026 (9th Cir. 2005); Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 354-55 (6th Cir. 1998); Long v. Eastfield Coll., 88 F.3d 300, 307 (5th Cir. 1996); Abrams v. Lightolier, Inc., 50 F.3d 1204, 1213-14 (3rd Cir. 1995); Stacks v. S.W. Bell Yellow Pages, Inc., 27 F.3d 1316, 1323 (8th Cir. 1994).
\textsuperscript{40} Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2000).
\end{flushleft}
in certain situations, if the terminated employee can establish that another subordinate had influence over the formal decisionmaker, courts have imputed the subordinate's discriminatory animus to the formal decisionmaker.\textsuperscript{41} Thus, even though the formal decisionmaker did not harbor discriminatory bias toward the adversely affected employee, courts will attribute the discriminating intent of the subordinate to the employer.\textsuperscript{42}

Termed the cat's paw\textsuperscript{43} theory, the principle refers to a "situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory employment action."\textsuperscript{44} In other words, an employer is vicariously liable if the formal decisionmaker who terminated the employee simply rubber stamped the biased subordinate's discriminatory intent.\textsuperscript{45} The subordinate who exhibits bias toward the employee is the one who essentially fires that employee, regardless of whether he had the official title, rank, or authority to do so.\textsuperscript{46}

Under the theory, the biased subordinate "accomplishes his discriminatory goals by misusing the authority granted to him by the employer—for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions"\textsuperscript{47} as pretext for discrimination.\textsuperscript{48} The biased subordinate may discerningly use such reports to fabricate or exaggerate information that would be detrimental to an adverse employment decision.\textsuperscript{49} The reports then can serve as a catalyst for the subordinate's bias

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} BCI Coca-Cola, 450 F.3d at 484 (stating that the name derives itself "from a fable . . . in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire . . . burning his paw in the process, the monkey eagerly gobbles them up, leaving none for the cat.")
\textsuperscript{44} Id. (quoting Llampallas v. Mini Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998)).
\textsuperscript{45} Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1231 (10th Cir. 2000).
\textsuperscript{46} See Long v. Eastfield Coll., 88 F.3d 300, 307 (5th Cir. 1996).
\textsuperscript{47} BCI Coca-Cola, 450 F.3d at 485.
\textsuperscript{48} Black's Law Dictionary defines "pretext" as "ostensible reason or motive assigned or assumed as a color or cover for the real person or motive." BLACK'S LAW DICTIONARY 1187 (6th ed. 1990).
\textsuperscript{49} See BCI Coca-Cola, 450 F.3d at 485.
and influence the ignorant formal decisionmaker's judgment to terminate.\textsuperscript{50}

\textit{Shager v. Upjohn Co.}\textsuperscript{51} is the seminal case to proffer the cat's paw theory.\textsuperscript{52} The Seventh Circuit placed limits on the theory by providing employers a defense.\textsuperscript{53} The Seventh Circuit explained that an employer would not sustain liability if the termination decision by the formal decisionmaker was not a mere rubber stamp of the biased subordinate's suggestions, but rather a decision that the formal decisionmaker rendered independently.\textsuperscript{54} Rubber stamping refers to a situation in which the formal decisionmaker automatically approves the recommendations of the biased subordinate.\textsuperscript{55} \textit{Shager} recognized the practicalities of the workplace in that formal decisionmakers are quick to defer to the subordinate on the spot, whether or not the formal decisionmaker has knowledge of the subordinate's bias.\textsuperscript{56}

As a result, a formal decisionmaker who conducts an independent investigation limits the employer's vicarious liability.\textsuperscript{57} If the rule was different, formal decisionmakers "authorized to rubber stamp personnel actions would preclude a finding of willfulness no matter how egregious the actions in question."\textsuperscript{58} An investigation conducted by the formal decisionmaker negates liability because the employer, acting through the formal decisionmaker, relied on more than the subordinate's recommendations or findings.\textsuperscript{59}

A terminated employee may prove a discrimination claim against an employer under the \textit{McDonnell Douglas} pretext framework.\textsuperscript{60} Under the pretext framework, a claimant bears

\begin{itemize}
\item \textsuperscript{50} See \textit{id.} at 486.
\item \textsuperscript{51} Shager, v. Upjohn Co., 913 F.3d 398 (7th Cir. 1990).
\item \textsuperscript{52} \textit{Hill}, 354 F.3d at 288.
\item \textsuperscript{53} See \textit{Shager}, 913 F.3d at 406.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{BCI Coca-Cola}, 450 F.3d at 484.
\item \textsuperscript{56} See \textit{Shager}, 913 F.2d at 405.
\item \textsuperscript{57} See \textit{id.} at 406.
\item \textsuperscript{58} See \textit{id.}
\item \textsuperscript{59} See \textit{id.}; see also Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1231-32 (finding that in the course of the formal decisionmaker's investigation, he asked the terminated employee to give his version of the story, but he declined to do so).
\item \textsuperscript{60} See \textit{BCI Coca-Cola}, 450 F.3d at 483-84 (arguing that another avenue a claimant may prove discrimination is under the mixed motive theory, in which the claimant uses either direct or circumstantial evidence to demonstrate that his protected class was a motivating factor for the adverse employment action).
\end{itemize}
the initial burden of establishing a prima facie case of discrimination upon the individual's protected class, showing: 1) that he belongs to a protected class; 2) he was qualified for the benefit or position; 3) he suffered an adverse employment action; and 4) that the employer treated him less favorably than others, such as the position remaining open. Thereafter, the employer must articulate and produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. After such a reason is proffered, the terminated employee must demonstrate that the employer's reasons were not in fact legitimate, but rather a pretext for discrimination.

Utilizing the pretext framework for the cat's paw theory, the terminated employee must demonstrate that the subordinate harbored bias animus toward the terminated employee, and argue that the court impute such bias to the formal decisionmaker, even though the formal decisionmaker did not harbor any bias when making the decision to terminate.

C. DISCUSSION OF RELEVANT CIRCUIT COURT CASE LAW

The circuit courts are split as to what level of control a biased subordinate must exercise over the formal decisionmaker's choice to terminate. The Fourth, Fifth, Seventh, and Tenth Circuits best evidence the varying boundaries of the split.

1. Fourth Circuit

In Hill v. Lockheed Martin Logistics Management, Inc., fifty-seven year old female Ethel Louise Hill worked as a
mechanic on a field team maintaining aircrafts at various military bases for Lockheed Martin. Hill's supervisors included Thomas Prickett, program manager of the field teams, and Archie Griffin, a senior site supervisor. Both were rarely present at the military bases. At the jobsite itself, Richard Dixon, as lead person, directly supervised the field teams in order to enforce job duties. Lockheed Martin also employed a safety inspector, Ed Fultz, at Hill's jobsite in order to check whether mechanics were in accordance with safety procedures. However, Fultz "had no supervisory authority over the mechanics, nor any authority to discipline them." Like the mechanics, the safety inspector reported to and worked directly under the supervision of the lead person.

Lockheed Martin fired Hill after she was charged with violating company policy that stated that an employee "who receives a combination of two written reprimands not involving a suspension and one involving a suspension . . . will be subject to discharge." Hill received her first reprimand for improperly installing rivets. Her second reprimand, and subsequent three day suspension, arose from Hill's alleged violation of Lockheed's tool control policy. Military employees found a pair of Hill's cutters and turned them into Fultz, who, in turn, handed them over to Dixon. Fultz allegedly told Dixon that he questioned Hill regarding the whereabouts of her cutters and she stated that she knew where they were. However, according to Hill, she never knew that the cutters were missing and denied that she ever

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68. See id. at 282.
69. See id.
70. See id.
71. See id.
72. See id.
74. See id.
75. Id.
76. See id. at 292.
77. Id. ("Lockheed's tool control policy requires the aircraft mechanics to accurately account for their tools at all times and to promptly report lost or missing tools to their immediate supervisor.").
78. See id.
had such a conversation with Fultz.\textsuperscript{80}

Hill received her third and final reprimand after Dixon received six discrepancy reports that Fultz filed against Hill for faulty work.\textsuperscript{81} Hill claimed that such reports were "nitpicky and trivial," but nevertheless, Dixon investigated the reports and determined that all but one were factually correct.\textsuperscript{82} Therefore, the formal decisionmakers—Prickett and Griffin—terminated Hill.\textsuperscript{83} The formal decisionmakers relied upon the reports prepared by Fultz that documented Hill's job performance and safety record.\textsuperscript{84}

Hill claimed that Lockheed Martin wrongfully discharged her because of her sex and age, thus violating both Title VII and the ADEA.\textsuperscript{85} Hill claimed that Fultz harbored discriminatory bias against her, calling her such names as "useless old lady," "troubled old lady," and "damn woman."\textsuperscript{86} Hill alleged that such bias tainted Fultz's safety reports regarding her—the reports that resulted as a basis for her termination.\textsuperscript{87} Hill requested that the court hold Lockheed Martin vicariously liable because Fultz's discriminatory comments "substantially influence[ed]" the company's formal decisionmakers.\textsuperscript{88}

Recognizing the cat's paw theory, the Fourth Circuit held that the level of control a biased subordinate must possess over the formal decisionmaker should equate to such control "as to be viewed as the one \textit{principally responsible} for the decision or the \textit{actual decisionmaker} for the employer."\textsuperscript{89} The Fourth Circuit, following \textit{Reeves v. Sanderson Plumbing Products},\textsuperscript{90} declined to impute the bias of the subordinate—

\textsuperscript{80} See id.
\textsuperscript{81} See id. at 295-96 (showing that Hill recognized that Fultz's reports were factually accurate, but because Fultz issued them during the same time he was uttering discriminatory remarks toward her, she believed a jury could find that the reprimand was because of her sex and age).
\textsuperscript{82} Id. at 295.
\textsuperscript{83} See id.
\textsuperscript{84} See id. at 296.
\textsuperscript{86} Id. at 283.
\textsuperscript{87} Id. at 297 (showing that Dixon was critical of Hill's job performance, testifying that Hill could "do one job today normal. Tomorrow she would mess it up, and . . . you'd tell her that she messed this up and then she'd correct it.").
\textsuperscript{88} Id. at 289.
\textsuperscript{89} Id. at 291 (emphasis added).
\textsuperscript{90} Reeves v. Sanderson Plumbing Prods., 530 U.S. 133 (2000).
who had no supervisory authority over the terminated employee—to the formal decisionmaker “simply because [the subordinate] had a substantial influence on the ultimate decision or because he [had] played a role, even a significant one, in the adverse employment decision.”

Thus, in the Fourth Circuit, the biased subordinate has to be the supervisor or in a managerial-capacity position over the terminated employee and must be “principally responsible” for the formal decisionmaker’s decision to terminate the employee.

Pertaining to the facts at hand, the Fourth Circuit affirmed Lockheed Martin’s summary judgment and held that Fultz was not Hill’s supervisor and consequently it would not impute Fultz’s bias to Prickett and Griffin. The Fourth Circuit explained that Fultz merely commenced the decision making process through his reports and recommendations that ultimately led to the termination decision by the formal decisionmakers. “The mere fact that Fultz’s opinion was solicited by Griffin during the course of the decisionmaking process is insufficient to change the undisputed fact that Griffin reached an independent, non-biased decision to terminate Hill.”

2. Fifth Circuit

In Russell v. McKinney Hospital Venture, fifty-four year old Sandra Russell worked for Columbia Homecare as the Director of Clinical Services. Russell worked alongside twenty-eight year old Steve Ciulla, who was the Director of Operations. Ciulla was the son of the Chief Executive Officer (CEO) of Homecare’s parent company. Fifty-three year old Carol Jacobsen was the immediate supervisor of both Russell and Ciulla.

Homecare fired Russell and subsequently she brought an

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92. Id.
93. See id.
94. See id. at 297.
95. Id.
97. See id. at 221.
98. See id.
99. See id.
100. See id.
age discrimination claim against the company. Russell argued that the court should impute Ciulla’s bias to Jacobsen because Ciulla commonly referred to her as an “old bitch.” The frequency of name-calling caused Russell to purchase earplugs so she would be able to drone out his remarks and get work done at the office. Homecare contended that Ciulla was not the formal decisionmaker in her firing and that the court should not hold it liable for the intentional torts of its employees that are outside the scope of employment. Homecare repeatedly emphasized that “Russell and Ciulla were both managers at the same level and that Russell was officially terminated by Jacobsen, her supervisor, not by Ciulla.”

The Fifth Circuit denied Homecare’s motion for judgment as a matter of law. The Fifth Circuit explained that the level of control a biased subordinate must exert for courts to hold an employer vicariously liable is whether the subordinate “possessed leverage, or exerted influence, over the titular decisionmaker.” Thus, the biased subordinate could be a co-worker, supervisor, or a lower level worker.

The record in the case established that Ciulla was the son of the CEO and “possessed leverage” that he, in turn, used to his advantage against Jacobsen so she could officially terminate Russell. Ciulla possessed leverage over Jacobsen, and the court explained that it would impute such leverage to Jacobsen even though she did not harbor any discriminatory bias towards Russell.

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101. See id.
102. Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2000) (showing that Russell also explained that Ciulla “viciously” referred to her as “Miss Daisy”).
103. See id.
104. See id. at 227.
105. Id.
106. See id. at 230.
107. Id. at 227; see also Haas v. ADVO Sys., Inc., 168 F.3d 732, 734 (5th Cir. 1999) (rejecting defendant’s argument that subordinate exerted no influence over ultimate decisionmaker and thus determining that sufficient evidence existed to demonstrate a causal nexus between the discriminatory remarks and the employment decision).
109. See id. at 228 (showing Ciulla’s father controlled Jacobsen’s budget and he transferred employees under her supervision to different departments without authority).
110. See id.; see, e.g., Normand v. Research Inst. of Am., 927 F.2d 857, 864
3. Tenth and Seventh Circuits

In Equal Employment Opportunity Commission v. BCI Coca-Cola, Stephen Peters, an African-American, worked as a merchandiser for BCI. On a day-to-day basis, Jeff Katt, an account manager of Caucasian origin, supervised Peters. Both Peters and Katt reported directly to Cesar Grado, a sales manager of Hispanic origin. However, merchandisers commonly called in sick to Katt. Grado had authority to evaluate employees under his supervision, but did not have the authority to discipline or fire employees. Such formal decisionmaking authority extended to Sherry Pederson and Pat Edgar, who were both located in the company's human resources department 450 miles away and who never before met Peters.

On one particular Sunday, BCI needed additional workers and Grado informed Katt to order Peters to work on that day. Peters, who was the most senior merchandiser in the district and therefore had weekends off, refused to work. According to Grado, Peters replied to Katt that he would call in sick that day no matter what, but Katt denied that Peters ever made such a statement. Grado reported the incident to Pederson because BCI policy prohibited employees to call in sick in advance. Pederson told Grado to inform Peters to come to work on Sunday, and if Peters failed to do so, BCI would view it as insubordination and thus grounds for termination. Grado thereafter relayed the information to Peters, who in turn told Grado that he had

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(5th Cir. 1991) (holding that "indirect references to an employee's age . . . can support an inference of age discrimination.").

111. Equal Employment Opportunity Comm'n v. BCI Coca-Cola, 450 F.3d 476 (10th Cir. 2006).
112. Id. at 478 ("More than 60% of the 200 employees at BCI's Albuquerque, New Mexico facility were Hispanic, while fewer than 2% were African-Americans.").
113. See id.
114. See id.
115. See id.
116. See id.
117. See Equal Employment Opportunity Comm'n v. BCI Coca-Cola, 450 F.3d 476, 479 (10th Cir. 2006).
118. See id.
119. See id. at 478.
120. See id. at 479.
121. See id.
122. See id.
weekend plans and those plans were none of his business.  

The day before Grado was ordered to come to work, Peters called in sick to Katt. The doctor had diagnosed him with a sinus infection and directed him not to return to work until Monday. Katt had no problem with this and paged Grado several times with the news; however, Grado never responded to Katt’s pages.

On the following Monday, Peters returned to work. That same day, Edgar, Pederson, and Grado held a series of phone conversations regarding Peters’ conduct. Edgar made a final decision regarding termination and based her decision first and foremost on Peters’ insubordination toward Grado. However, only after they terminated Peters did the three discover that Katt gave Peters permission to miss work that Sunday.

The EEOC filed suit on behalf of Peters arguing that the court should impute Grado’s racial animus against Peters to Edgar and Pederson, the formal decisionmakers, even though they did not know that Peters was African-American nor did they harbor racial animus toward him. Affidavits revealed that Grado treated African-American employees worse than employees of other races. Furthermore, Grado told racial jokes degrading blacks and was more lenient in accommodating working schedules for Hispanic employees than African-American employees.

The Tenth Circuit, aligning itself with the Seventh Circuit, explained that, in order to prevail on the cat’s paw

123. See Equal Employment Opportunity Comm’n v. BCI Coca-Cola, 450 F.3d 476, 479 (10th Cir. 2006).
124. See id. at 480.
125. See id.
126. See id.
127. See id.
128. See id.
129. See Equal Employment Opportunity Comm’n v. BCI Coca-Cola, 450 F.3d 476, 480 (10th Cir. 2006).
130. See id. at 482.
131. See id.
132. Id. (“If Grado did not like you, he treated you badly; but African American employees were treated even worse.”).
133. Id. (showing that on one occasion, watching one of his African-American employees “clean an outdoor vending machine during the winter, Mr. Grado urged him to hurry because ‘brothers don’t like the cold.’”).
134. Id. at 490 (explaining that when accommodating a Hispanic employee’s schedule who could not work on the weekend, Grado explained, “[Y]ou can’t make somebody work [on] one of their days off.”).
theory, "a plaintiff must establish more than mere 'influence,' or 'input' in the decisionmaking process." The issue is whether the biased subordinate's discriminatory reports, recommendations, or other actions caused the adverse employment action." The biased subordinate need not give an explicit recommendation to the formal decisionmaker with regard to terminating the employee but the subordinate's recommendations must cause the termination.

The Tenth Circuit reversed the grant of BCI's summary judgment and explained that the EEOC produced sufficient evidence to create a jury question regarding Grado's discriminatory bias. In its defense, BCI contended that the formal decisionmaker, Pederson, pulled Peters personnel file and reviewed it, thus independently coming to the conclusion to fire Peters. The Tenth Circuit held that the investigation was inadequate to defeat the inference of bias because the file contained no information regarding Peters' recent incident.

4. Other Circuits

Other circuit courts apply standards that parallel in some manner the abovementioned circuit courts.

The First Circuit's standard states that the discharged employee need only "show that the discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker." The Third Circuit describes the level of control as such that the subordinate "exhibiting discriminatory animus influenced or participated in the decision to terminate."

The Sixth Circuit's standard asserts that "remarks by

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136. Id. (emphasis added).
137. See id. at 488.
138. See id. at 493.
139. See id. at 492.
140. Id. at 492-93 ("The problem is that Ms. Edgar never sought any other version of events, and therefore had no reason other than Mr. Grado's report to believe that the file was relevant.").
141. See supra Part II.C.1-3.
those who did not independently have the authority or did not
directly exercise their authority to fire the plaintiff, but who
nevertheless played a meaningful role in the decision to
terminate the plaintiff, were relevant." 144 Three years later,
the Sixth Circuit disregarded its own "meaningful role"
standard and explained that a plaintiff must proffer evidence
that the subordinate's animus was the "cause of the
termination or somehow influenced the ultimate
decisionmaker." 145

The Eleventh Circuit suggests that the biased
subordinate must be a "dominant decision-maker whose
decision was rubber-stamped by others" 146 while the District
of Columbia Circuit Court has held that evidence of
subordinate bias is "relevant where the ultimate decision
maker is not insulated from the subordinate's influence." 147

III. IDENTIFICATION OF THE PROBLEM

The circuit courts are in agreement that a terminated
employee may utilize the subordinate bias liability—cat's paw
theory—to hold an employer vicariously liable for
employment discrimination. 148

However, the circuits are split over the level of control a
biased subordinate must exert over the formal
decisionmaker's decision to fire the employee. 149 The Fourth
Circuit characterizes the level of subordinate control over the
formal decisionmaker by defining the biased subordinate as
one who was a supervisor that was "principally responsible
for the decision or the actual decisionmaker for the
employer." 150 The Fifth Circuit defines the biased
subordinate level of control as a one who "possessed leverage,
or exerted influence, over the titular decisionmaker." 151 The

Cir. 1998) (emphasis added).
(emphasis added).
146. Wascara v. City of S. Miami, 257 F.3d 1238, 1247 (11th Cir. 2001)
(emphasis added).
148. See supra note 43.
149. See Equal Employment Opportunity Comm'n v. BCI Coca-Cola, 450 F.3d
476, 486 (10th Cir. 2006).
Cir. 2004) (emphasis added).
Tenth Circuit aligned itself with the Seventh Circuit and explained that, in order to prevail on a subordinate bias liability claim, "a plaintiff must establish more than mere 'influence,' or 'input' in the decisionmaking process." Rather, the issue is whether the biased subordinate's discriminatory reports, recommendations, or other actions caused the adverse employment action.

The remainder of this comment will discuss and analyze the different circuit courts' arguments regarding the strength and weaknesses of their interpretation of the level of control and the legal principles on which circuits base their decisions. Thereafter, this comment will propose an interpretation for adoption by the United States Supreme Court.

IV. ANALYSIS

A. Fourth Circuit's Narrow Standard Disregards Agency Principals

The Fourth Circuit's standard is improperly narrow because the court only imputes the biases of a supervisor to the formal decisionmaker, even though some other subordinate, such as a coworker, may have tainted the adverse action with bias. The Fourth Circuit adopted the literal meaning of the statements in Reeves, when it explained that "petitioner [had] introduced evidence that [the supervisor] was the actual decisionmaker" and was "principally responsible" for the firing since he was in a managerial position. The Fourth Circuit held that Reeves marked the "outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer."
The Fourth Circuit incorrectly overemphasizes the phrase “actual decisionmaker” that the court provided in *Reeves*. However, in *Reeves*, “the Court was describing what the petitioner’s evidence showed, not prescribing the ‘outer counters’ of liability.” Thus, the Fourth Circuit incorrectly defined *Reeves* as the outer limits of the bias subordinate liability theory instead of interpreting its standard as but one example of level of control. Judge Posner, the originator of the cat’s paw theory, criticized the *Hill* court for applying an excessively literal meaning. Judge Posner stated, “The [cat’s paw] formula was (obviously) not intended to be taken literally... and were it taken even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation.”

Additionally, the Fourth Circuit’s emphasis on the supervisor or “actual decisionmaker” goes against the statutory construct of employment antidiscrimination legislation, as well as agency law principles. The word “decisionmaker” does not appear in Title VII, the ADEA, or the ADA. Rather, the pieces of legislation impose liability to employers and their agents, “which in accordance with agency law principles includes not only ‘decisionmakers’ but other agents whose actions, aided by the agency relation, cause injury.” Title VII and the ADEA both provide that it is unlawful “for an employer... to discharge... because of such individual’s protected trait, such as age or race.” Thus, the statutes focus employer liability upon causation—arising from the “because of” language in the statutes—and therefore it need not matter whether the subordinate was a supervisor who was principally responsible for the termination so long as the biased subordinate caused the

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159. See Equal Employment Opportunity Comm’n v. BCI Coca-Cola, 450 F.3d 476, 487 (10th Cir. 2006).
160. Id.
161. See id.
162. See Lust v. Sealy, Inc. 383 F.3d 580, 584 (7th Cir. 2004).
163. Id.
166. Id.
termination through the formal decisionmaker.\textsuperscript{168}

Furthermore, the Fourth Circuit's narrow standard contradicts public policy considerations and Congress's intent when it passed employment antidiscrimination legislation.\textsuperscript{169} The Fourth Circuit's standard of defining the level of control over a biased supervisor who is "principally responsible" for the termination is unduly narrow, allowing certain victimized employees to go without redress.\textsuperscript{170}

By focusing on the principally responsible supervisor, the Fourth Circuit's interpretation would remove an entire group of discrimination cases—discrimination cases that involve biased subordinates other than supervisors who still have the ability to convey their discriminatory animus to the formal decisionmaker.\textsuperscript{171} Such a narrow standard allows employers to escape liability even when the subordinate's discrimination is the central cause of the firing because the subordinate did not exhibit complete control over the decisionmaker.\textsuperscript{172} As Fourth Circuit Judge Michael stated in the \textit{Hill} dissent, "After today in this circuit, an employer is off the hook for a discriminatory employment decision that is motivated by the bias of a subordinate who lacks decisionmaking authority. That is wrong."\textsuperscript{173}

In a practical sense, the Fourth Circuit's standard would create a significant barrier for terminated employees, such as Hill, to have their cases heard by a jury.\textsuperscript{174} In \textit{Hill}, there was strong evidence suggesting that Fultz conveyed his bias to the formal decisionmakers, Prickett and Griffin.\textsuperscript{175} However, since Fultz was not Hill's supervisor but rather a coworker, the Fourth Circuit declined to impute this to the employer.\textsuperscript{176}

\textsuperscript{168} See \textit{Hill}, 354 F.3d at 302.
\textsuperscript{169} See \textit{id.} at 301.
\textsuperscript{170} See \textit{id.} at 302.
\textsuperscript{171} See \textit{id.} at 304.
\textsuperscript{172} See \textit{id.}
\textsuperscript{173} \textit{Id.} at 299.
\textsuperscript{175} See \textit{id.} at 296-97.
\textsuperscript{176} See \textit{id.} at 297.
B. Fifth Circuit's Lenient Approach Provides a Barrier to the Employer's Defense of Conducting an Independent Investigation

The Fifth Circuit's approach extends liability to employers too broadly.\textsuperscript{177} The Fifth Circuit's standard considers that \textit{any} influence, reporting of factual information, or other means by a subordinate makes the employer vicariously liable provided that such information and influence affected the choice to fire.\textsuperscript{178} A liberal standard "that punishes employers for any 'input'—no matter how minor—weaken the deterrent effect of subordinate bias claims by imposing liability even where an employer has diligently conducted an independent investigation."\textsuperscript{179}

Therefore, the Fifth Circuit's approach weakens the employer's defense of escaping liability by conducting an independent investigation.\textsuperscript{180} Any input by the biased subordinate would taint the investigation itself thereby rendering the employer liable.\textsuperscript{181}

In a practical sense, such a lenient standard increases litigation.\textsuperscript{182} A fired and aggrieved employee may "find someone whose input into the process was in some way motivated by an impermissible factor" and attempt to argue that such bias should be attributed to the final decisionmaker.\textsuperscript{183} The terminated employee may unjustly take advantage of the cat's paw theory and attempt to hold someone liable for his termination, a termination that was not based on any protected trait.\textsuperscript{184} Furthermore, there is a possibility that an employee may be able to immunize himself from any "future disciplinary action for misconduct or poor work performance simply by alleging that [he] was subject to unlawful harassment by a coworker."\textsuperscript{185}

\begin{footnotesize}
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\item 177. \textit{See} Equal Employment Opportunity Comm'n \textit{v.} BCI Coca-Cola, 450 F.3d 476, 486 (10th Cir. 2004).
\item 178. \textit{See id.} at 487.
\item 179. \textit{Id.}
\item 180. \textit{See id.}
\item 181. \textit{See id.}
\item 183. \textit{Id.}
\item 184. \textit{Id.}
\item 185. \textit{Id.}
\end{itemize}
\end{footnotesize}
Moreover, formal decisionmakers and employers rely on subordinates who have first-hand knowledge of the terminated employee’s work.\footnote{186} It would essentially bar formal decisionmakers from soliciting input “from a subordinate who has been accused of bias [because it] would allow an employee to forestall any disciplinary action for misconduct or poor performance based on a subordinate’s report simply by accusing the subordinate of discrimination.”\footnote{187} An employee may be able to hold the employer liable for a biased subordinate’s actions even though the employer has the legitimate right to fire the employee for such causes as weak performance or a lack of productivity.

C. The Seventh and Tenth Circuits Correspond with the Statutory Construct and Agency Principles of Employment Antidiscrimination Legislation

The Tenth Circuit aligned itself with the Seventh Circuit and stated that an employer will be held liable if a biased subordinate’s discriminatory animus, through actions such as reports or recommendations, caused the termination.\footnote{188} Thus, the Tenth Circuit rejected the Fourth Circuit’s approach because the Tenth Circuit’s approach focuses on the causal relationship between the biased subordinate and the formal decisionmaker rather than the title or rank of the biased subordinate.\footnote{189} The Tenth Circuit more clearly conforms to the language of antidiscrimination employment legislation, which provides that it is unlawful for an employer to discharge an individual \textit{because of} that individual’s protected trait.\footnote{190} The “because of” language creates a causal nexus and does not discern what title or authority the biased subordinate holds over the terminated employee.\footnote{191}

In addition, the level of biased subordinate control complies with agency principles that the Court dictated in

\footnote{186. \textit{Id}.}
\footnote{187. \textit{Id}.}
\footnote{188. \textit{See Equal Employment Opportunity Comm'n v. BCI Coca-Cola, 450 F.3d 476, 487 (10th Cir. 2004)}.}
\footnote{189. \textit{See id. at 487-88}.}
\footnote{190. 42 U.S.C. § 2000e(b); 28 U.S.C. § 630(b).}
\footnote{191. \textit{See BCI Coca-Cola, 450 F.3d at 488; see also Rea v. Martin Marietta Corp., 29 F.3d 1450, 1457 (10th Cir. 1994) (requiring a “causal nexus” between the discriminatory workplace statements and the termination decision)}.}
Ellerth.\textsuperscript{192} Agency principles apply because the biased subordinate accomplishes his discriminatory goals by "misusing the authority granted to him by the employer; for example, the authority to monitor performance, report disciplinary infractions, and recommend actions."\textsuperscript{193} Under the Tenth Circuit's view, the biased subordinate does not have to be the supervisor of the terminated employee, but can be a coworker; the terminated employee need only demonstrate a causal connection.\textsuperscript{194} A business's organizational chart does not always echo the employer's decisionmaking process.\textsuperscript{195} A biased coworker may have as much authority over the formal decisionmaker as does the terminated employee's supervisor.\textsuperscript{196}

Furthermore, the need for the biased subordinate to explicitly recommend the firing of the employee would contradict the broad agency principles in Title VII, the ADEA, and the ADA.\textsuperscript{197} Such an explicit recommendation would leave terminated employees without any recourse as long as a subordinate "stops short of mouthing the words 'you should fire him,' in person or on paper to the decisionmaker."\textsuperscript{198} In BCI Coca-Cola, Grado did not explicitly demand that Pederson and Edgar terminate Peters, yet the court suggested that his bias tainted the conversations with the formal decisionmakers.\textsuperscript{199} "Subordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial bias can taint any of those functions."\textsuperscript{200}

V. PROPOSAL

The Supreme Court should resolve the circuit split concerning the level of control a biased subordinate should

\textsuperscript{192} See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755-65 (1998).

\textsuperscript{193} BCI Coca-Cola, 450 F.3d at 485.

\textsuperscript{194} See id. at 486 ("This standard comports with the agency law principles that animate the statutory definition of an 'employer.'").

\textsuperscript{195} See id.

\textsuperscript{196} See id.

\textsuperscript{197} See id. at 488.

\textsuperscript{198} Id.

\textsuperscript{199} See Equal Employment Opportunity Comm'n v. BCI Coca-Cola, 450 F.3d 476, 490 (10th Cir. 2004) (showing the Court believed that the racial incidents taken as a whole would support a charge of discrimination against African-American employees).

\textsuperscript{200} Id. at 488.
exert over the formal decisionmaker's choice to terminate an employee. This comment proposes an interpretation that would solve the problems identified above. In addition, it proposes what courts should consider a sufficient independent investigation in order for courts not to hold an employer vicariously liable. These proposed interpretations maintain a sufficient balance between the policy goals and concerns of terminated employees who seek remedies and employers who seek not to be held liable for the torts of their subordinates conducted outside the scope of their employment.\textsuperscript{201}

The Fifth Circuit's lax approach as to the level of biased subordinate control does not sufficiently ground itself in the statutory construct of the antidiscrimination statutes, which require a causal connection between the subordinate's bias toward the terminated employee and the formal decisionmaker's decision to terminate the employee based on such bias.\textsuperscript{202} A terminated employee would be able to survive summary judgment by showing that a biased subordinate provided factual information or other input, however minimal it may be, that in turn affected the formal decisionmaker's decision to terminate.\textsuperscript{203} Thus, a terminated employee may be able to hold the employer vicariously liable for a subordinate's sexist or racial remark in the workplace even though the employer condemns such behavior and likely has policies and procedures set in place that attempt to mitigate such remarks in the workplace.\textsuperscript{204} Such tenuous influences would only further litigation and make formal decisionmakers weary of any recommendations from subordinates concerning a possible firing in fear of the formal decisionmaker's concerns that the employer will be held liable.\textsuperscript{205}

The Fourth Circuit's narrow, strict approach, which demands that the biased subordinate be in a managerial capacity, works against Congress's intent when it directed federal courts to interpret antidiscrimination legislation based on agency principles.\textsuperscript{206} The Fourth Circuit's standard only allows for agents that are supervisors and neglects the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{201} See Lees, supra note 7, at 881-82.
\item \textsuperscript{202} See supra notes 178-80 and accompanying text.
\item \textsuperscript{203} See BCI Coca-Cola, 450 F.3d at 486 (citing Dey v. Dolt Constr. & Dev. Co., 28 F.3d 1446, 1459 (7th Cir. 1994)).
\item \textsuperscript{204} See id.
\item \textsuperscript{205} See id.
\item \textsuperscript{206} See supra notes 157-61 and accompanying text.
\end{enumerate}
\end{footnotesize}
biases of agents who are in a non-managerial role that may nonetheless convey their bias to the formal decisionmaker. Such a standard allows employers to escape liability because courts would decline to impute the biases of coworkers and other people in non-managerial positions to the employer, thus leaving many terminated employees without a judicial remedy.

The Supreme Court should adopt the interpretation promulgated by the Tenth Circuit. The Tenth Circuit’s standard of causation comports with agency principles and balances the concerns of terminated employees and employers. Agency principles conclude that courts may hold an employer liable for its agent’s torts. Nonetheless, the Supreme Court and lower courts, utilizing the Tenth Circuit standard, should recognize and stress the practical differences in authority a subordinate may have over the terminated employee. Courts should place emphasis on and account for the differences between a subordinate who is a biased supervisor and a subordinate who is a biased coworker of the terminated employee. Unlike a supervisor, a biased coworker likely has no authority over the employee and his work product, such as the ability to write evaluations, recommendations, allocate tasks, create work groups, and assign work schedules. Since a coworker has less authority over the terminated employee, courts should consider this reality of the workplace, along with causation and agency principles.

With regard to the employer’s defense of conducting an independent investigation, at minimum, an independent investigation should include an interview conducted by the formal decisionmaker of the employee before the decisionmaker has determined whether to terminate. Such a nominal requirement would not heavily constrain an employer’s resources, and provide a venue at the workplace for the victim of employment discrimination to be heard by his employer. Speaking with the formal decisionmaker would allow the employee to bring attention to any possible bias by

207. See supra notes 162-64 and accompanying text.
208. See supra notes 165-66 and accompanying text.
209. See supra notes 189-93 and accompanying text.
210. See supra notes 28-38 and accompanying text.
212. See supra Part II.B.
subordinates that the employee believes has tainted the employee's work, such as evaluations and assignments.

VI. CONCLUSION

Under the cat's paw theory, a terminated employee can hold his employer vicariously liable for the actions of a biased subordinate if the court imputes the biased subordinate's animus to the formal decisionmaker. Even though the formal decisionmaker, whether a manager in the human resources department or an employment committee, did not harbor any discriminatory bias toward the terminated employee, the employee may still be held accountable through agency principles.

However, as it currently stands, the different circuit court standards regarding the level of control that a biased subordinate must exert over the formal decisionmaker are not uniform. The United States Supreme Court should adopt the causation standard of the Tenth Circuit and account for the practicalities of the workplace, namely whether the biased subordinate was the supervisor of the terminated employee or whether the biased subordinate was a coworker. Adopting this standard will balance the competing policy concerns regarding a terminated employee's right to remedies and an employer's right to minimize his liability for the torts of his subordinates that are outside the scope of employment.

213. See supra Part II.B.  
214. See supra Part III.  
215. See supra Part V.  
216. See supra Part V.