ANOTHER HAIRBALL FOR EMPLOYERS? "CAT'S PAW" LIABILITY FOR THE DISCRIMINATORY ACTS OF CO-WORKERS AFTER *STAUB V. PROCTOR HOSPITAL*

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I. INTRODUCTION

Eddie is an entry-level employee for a chemical company who has recently been transferred to a new plant. He is an African American man in his mid-thirties. Although Eddie was well liked by employees at the other plant, two of his new co-workers,[1] Brad and David, have behaved strangely towards him ever since he arrived. Brad and David are both white and hold entry-level positions like Eddie. Unbeknownst to Eddie, Brad and David dislike African Americans and have been scheming of ways to get rid of him. In order to get Eddie fired, they fabricate a story about him accosting and threatening Brad, which they then "report" to their supervisor, Andy. Upon hearing the story, Andy is surprised that Eddie would get into altercations with his co-workers, given his even-keeled and cordial demeanor. Nevertheless, Andy reports the alleged incidents to his immediate supervisor, Frank. Frank is in charge of making the hiring and firing decisions for the plant and has a zero-tolerance policy when it comes to fighting. Rather than conducting an independent investigation, Frank relies entirely on Andy's report and fires Eddie. After unsuccessfully engaging in the company's grievance process, Eddie files suit. During the course of discovery, Brad and David's discriminatory scheme comes to light, and Eddie asserts that his co-workers' discriminatory "report" caused him to be terminated. Should the company be held liable for firing Eddie?

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[1] For the purposes of this Comment, a co-worker is an employee whose position is equal or subordinate to the plaintiff's. *See infra* Part IV(B).

The Supreme Court declined to answer that difficult question in its decision *Staub v. Proctor Hospital*.[2] In *Staub*, the Court resolved a circuit split regarding the appropriate standard for holding an employer liable when a supervisor with a discriminatory motive influences, but does not make, an adverse employment decision against a fellow employee.[3] This form of vicarious liability has become known as the "cat's paw" doctrine.[4] In an 8–0 decision,[5] the Supreme Court held that if a supervisor performs an act motivated by discriminatory animus that is intended to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer could be held liable.[6] Thus, if Brad and David were Eddie's supervisors in the hypothetical above, Eddie would likely be able to hold his former employer liable under *Staub*.[7] The Supreme Court, however, expressed no opinion 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."[8]

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[2] 131 S. Ct. 1186, 1194 n.4 (2011).

[3] *See id.* at 1194.

[4] *See id.* at 1190 n.1. The "cat's paw" doctrine is also referred to as the subordinate-bias theory of liability. *See* Hannah Banks, Comment, Staub v. Proctor Hospital*: Cleaning Up the Cat's Paw*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 71, 77 (2011) ("Under subordinate-bias liability, known as the cat's paw theory . . . .").

[5] *Staub*, 131 S. Ct. at 1195. Justice Kagan recused herself, making *Staub* an 8–0 majority decision with two justices concurring.

[6] *Id.* at 1194. The Supreme Court explained that the anti-discrimination statute at issue in *Staub*, the Uniformed Services Employment and Reemployment Rights Act (USERRA), was "very similar to Title VII," suggesting that its holding could be extended to other anti-discrimination statutes. *See id.* at 1191. The new standard enunciated in *Staub* has since been applied to suits brought under Title VII, *see* Palermo v. Clinton, No. 08–CV–4623, 2011 WL 1261118, at *7 (N.D. Ill. Mar. 31, 2011); the Age Discrimination in Employment Act (ADEA), *see* Simmons v. Sykes Enters. Inc., 647 F.3d 943, 949 (10th Cir. 2011) (applying *Staub* to an ADEA claim, but finding that the ADEA also requires "but-for" causation); the Americans with Disabilities Act (ADA), *see* Dickerson v. Bd. of Trs. of Cmty. Coll. Dist. No. 522, 657 F.3d 595, 602 (7th Cir. 2011); and the Family and Medical Leave Act (FMLA), *see* Lee v. Waukegan Hosp., No. 10 C 2956, 2011 WL 6028778, at *3–4 (N.D. Ill. Dec. 5, 2011).

[7] *See* 131 S.Ct. at 1194.

[8] *Id.* at 1194 n.4; *see also* Benjamin Pepper, Comment, Staub v. Proctor Hospital*: A Tenuous Step in the Right Direction*, 16 LEWIS & CLARK L. REV. 363, 387 (2012) (noting that co-worker "cat's paw" liability was one of the main issues that the Supreme Court left unanswered in *Staub*); Julie M. Covel, Comment, *The Supreme Court Writes a Fractured Fable of the Cat's Paw Theory in* Staub v. Proctor Hospital [Staub v. Proctor Hospital, 131 S. Ct. 1186 (2011)], 51 WASHBURN L. J. 159, 187 (2011) ("[T]he issue of co-worker bias deserved more treatment than a footnote that

The Court's refusal to answer that thorny question has left lower courts struggling with how to treat discriminatory co-workers in "cat's paw" cases.[9] How courts resolve the issue of co-worker "cat's paw" liability will have significant ramifications for employers[10] and employees alike.[11] For employers, the co-worker "cat's paw" theory presents another potential source of liability,[12] creates an incentive to train all employees on anti-discrimination policies, rather than just those with supervisory authority,[13] and makes it imperative that independent investigations are conducted whenever a co-worker makes a report or recommendation concerning a fellow employee.[14] For employees, it is an invaluable theory to assert in

created more questions than answers.").

[9] *See infra* Part IV(C) (explaining how circuit and district courts have already begun to split on the issue of co-worker "cat's paw" liability); *see also* John E. Higgins et al., *Supreme Court's Recent "Cat's Paw" Decision May Burn the Hands of Employers*, NIXON PEABODY LLP, 5 (Mar. 11, 2011), http://www.nixonpeabody.com/files/Employment_Law_Alert_03_11_2011.pdf (surmising that "[o]nly future decisions, and no doubt much litigation, will provide [the] answer" to the issue of co-worker "cat's paw" liability).

[10] *See infra* notes 12–14 and accompanying text.

[11] *See infra* notes 15–16 and accompanying text.

[12] *See* Gaye Huxoll, *Beware the Sharp Claws of the Cat's Paw: U.S. Supreme Court Endorses Employer Liability for Personnel Decisions Influenced by Biased Supervisors*, LITTLER MENDLESON, P.C., 3 (Mar. 8, 2011), http://www.littler.com/files/press/pdf/2011_03_ASAP_BewareSharpClawsCatPaw_USSupremeCourt_EmployerLiability_BiasedSupervisors.pdf ("If the employer were to accept the allegations at face value and take action without conducting an adequate investigation, it appears likely that it could be found liable under a [co-worker] cat's-paw theory."); Alex W. Craigie, *Recent US Supreme Court Cases Suggest an Increasing Willingness to Expand the Scope and Availability of Retaliation Claims*, ASPATORE, 2011 WL 5629129, at *7 (2011) ("An adverse employment action made based on a co-worker's biased complaint, without an independent determination that the adverse action was entirely justified, could expose an employer to liability for retaliation.").

[13] *See* Huxoll, *supra* note 12 ("[*Staub*] underscores the need for employers to conduct the necessary training to ensure that all employees . . . are aware of and agree to abide by all anti-discrimination laws."); Craigie, *supra* note 12 ("Conservatively, some might argue [preventative training on retaliation] should extend all the way to co-workers with no supervisory authority whatsoever."); 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 2:17.50 (2011) ("[E]mployers should ensure that anti-discrimination training reaches the broadest cross-section of the workforce, rather than just human resources staff, supervisors or other top-level decision makers.").

[14] *See, e.g.*, Fla. Dep't of Children & Families v. Shapiro, 68 So. 3d 298, 306 (Fla. Dist. Ct. App. 2011) (finding an employer was not liable on a co-worker "cat's paw" claim where the employer's investigator interviewed twelve witnesses regarding the alleged incident); Roberts v. Principi, 283 Fed. App'x 325, 332–33 (6th Cir. 2008) ("These investigations were more extensive than ones found adequate by this and other courts to break any causal link between a co-worker's

circumstances where a fellow employee causes an adverse employment action to be taken against them[15] and, in some cases, represents their only avenue to recovery.[16] Given that the circuit and district courts have already begun to split on whether the "cat's paw" doctrine should be extended to co-workers,[17] it is probable that the Supreme Court will be called upon to resolve the issue in the not so distant future.[18]

This Comment seeks to clarify the unsettled area of co-worker "cat's paw" liability and, in so doing, proposes that the "cat's paw" doctrine should be extended to co-workers because it is consistent with the principles relied upon by the Supreme Court in *Staub*,[19] as well as the express language[20] and purpose of the anti-discrimination statutes.[21] Part II of this Comment provides a brief background of the "cat's paw" doctrine and the circuit split that existed prior to *Staub* regarding the appropriate standard for imposing liability in "cat's paw" cases. Part III provides a summary and analysis of the Supreme Court's decision in *Staub v. Proctor Hospital*. Part IV briefly discusses co-worker "cat's paw" cases that were decided before *Staub*, provides a workable definition of co-worker that can be applied by future courts, and surveys how the circuits currently stand on the issue of co-worker "cat's paw" liability. Part V sets forth justifications for why the "cat's paw" doctrine should be extended to co-workers. Finally, in Part VI, this Comment explains how co-worker "cat's paw" liability can be reconciled with traditional agency principles.

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animosity and an adverse action."); *see also* Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 918 (7th Cir. 2007) (suggesting that independent investigations can immunize employers from co-worker "cat's paw" liability).

[15] *See* Alexandra Lee Newman & Yelena Shagall, *The "Cat's Paw" Theory in Illinois After* Staub, 100 ILL. B.J. 88, 91–92 (2012) ("[P]laintiff[s] should pursue a co-worker theory if doing so would support the finding of proximate cause needed for employer liability.").

[16] *See infra* note 183 and accompanying text.

[17] *See infra* Part IV(C) (discussing how the circuit courts currently stand on the issue).

[18] *See supra* note 17; *see also* Newman & Shagall, *supra* note 15, at 92 ("Until the Supreme Court explicitly decides to exclude co-worker influence . . . from the 'cat's paw' framework, the plaintiff should pursue a co-worker theory if doing so would support the finding of proximate cause needed for employer liability."); Pepper, *supra* note 8, at 387 (suggesting that the Court's refusal to answer the question of co-worker 'cat's paw' liability in *Staub* "may signal the Court's readiness to begin developing the cat's paw doctrine on its own rather than allowing it to flounder in the circuits.").

[19] *See infra* Part V(C).

[20] *See infra* Part V(A).

[21] *See infra* Part V(B).

II. BACKGROUND

A. The "Cat's Paw" Doctrine

1. Origins of the Doctrine and Its Application in Employment Discrimination Suits

The phrase "cat's paw" derives from a fable conceived by Aesop[22] that was later put into verse by Jean De La Fontaine in 1668.[23] In the fable, a monkey convinces a cat to pull roasting chestnuts from a fire.[24] After the cat had pulled the chestnuts from the fire, burning its paws in the process, the monkey steals the chestnuts and leaves the gullible cat with nothing.[25] The phrase was injected into employment discrimination law when Judge Richard Posner, in *Shager v. Upjohn*, used "cat's paw" to describe instances in which an employer could be held liable for the acts of a subordinate employee who influences, but does not make, an adverse employment action.[26] Thus, in the employment-law context, a discriminatorily motivated employee plays the role of the proverbial monkey and manipulates an innocent manager or supervisor into acting on the employee's illegal bias.[27] Usually, the employee accomplishes this by either feeding the supervisor a false report or concealing relevant information about a fellow employee.[28] Once a plaintiff is able to show that the biased employee had some degree of influence over the ultimate decision maker, jurors are instructed that they may draw an inference that the employee's impermissible bias infected an adverse employment decision.[29]

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[22] Aesop, *The Monkey and the Cat*, SOUTHERN ILLINOIS UNIVERSITY EDWARDSVILLE, 1, http://www.siue.edu/~jvoller/Common/AnimalTales/monkey_and_cat_fable.pdf (last visited Dec. 6, 2012).

[23] *Id.*; 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 Dec. 6, 2012).

[24] *See* Aesop, *supra* note 22.

[25] *See id.*

[26] *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990). Today, "cat's paw" is defined as "one used by another as a tool." *Cat's Paw Definition*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/cat's-paw (last visited Dec. 6, 2012).

[27] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 n.1 (2011).

[28] *See* Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997).

[29] *See* Schandelmeier-Bartels v. Chi. Park Dist., 634 F.3d 372, 379 (7th Cir. 2011).

2. The Circuit Split that Existed Prior to *Staub*

Every circuit court utilized some form of the "cat's paw" doctrine prior to the Supreme Court's decision in *Staub*.[30] The circuits, however, differed greatly as to the degree of influence a subordinate employee had to exert in order to trigger employer liability.[31] The Fourth Circuit applied the strictest standard: to hold an employer liable using a "cat's paw" theory, the biased subordinate had to be in a supervisory or managerial capacity and be the one who makes or is principally responsible for the adverse employment action.[32] This employer-friendly standard made it extremely difficult for plaintiffs to prevail on a "cat's paw" claim.[33] The Sixth,[34] Seventh,[35] Tenth,[36] and Eleventh Circuits[37] employed standards that required plaintiffs to prove a causal connection between the discriminatory act and the adverse employment action. The Tenth Circuit's causation standard required a plaintiff to show that the biased subordinate's discriminatory reports or recommendations *caused* the adverse employment action.[38] The Seventh Circuit applied a more stringent test: a plaintiff could only succeed on a "cat's paw" case by showing that the non-decision maker exercised such "singular influence" over the ultimate decision maker that the decision to

[30] For a more comprehensive analysis of the circuit split regarding "cat's paw" liability prior to *Staub*, *see* Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 385–412 (2008); Sara Atherton Mason, Recent Development, *Cat's Paw Cases: The Standard for Assessing Subordinate Bias Liability*, 38 FLA. ST. U. L. REV. 435, 439–44 (2011).

[31] *See supra* note 30.

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

[33] *See* Keaton Wong, Comment, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1753 (2008) (arguing that the Fourth Circuit's standard runs counter to the purpose of the anti-discrimination statutes).

[34] *See* Madden v. Chattanooga City Wide Serv. Dep't, 549 F.3d 666, 677 (6th Cir. 2008) (requiring a causal nexus between the ultimate decision maker's decision and the employee's discriminatory animus).

[35] *See* Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 917–20 (7th Cir. 2007) (noting that the Seventh Circuit has repeatedly suggested in dicta that its "cat's paw" standard requires a lesser degree of influence).

[36] *See* E.E.O.C. v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 487 (10th Cir. 2006).

[37] *See* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1246 (11th Cir. 1998) (holding that the plaintiff had failed to establish a causal link between the employee's discriminatory animus and the adverse employment decision).

[38] *See BCI Coca-Cola Bottling Co.*, 450 F.3d at 487.

terminate was one of blind reliance.[39] A more lenient approach was adopted by the First,[40] Second,[41] Third,[42] Fifth,[43] Eighth,[44] Ninth,[45] and District of Columbia Circuits.[46] An employer could be held liable on a "cat's paw" theory in these circuits if the plaintiff proved that his or her fellow employees merely had influence over the ultimate decision maker or was involved in the decision-making process.[47]

When the Supreme Court granted certiorari in *Staub v. Proctor Hospital*,[48] it was unclear what standard the Court would adopt to govern "cat's paw" cases.[49] While the Court went on to adopt a new proximate cause standard, thereby resolving a circuit split that had been ongoing for

[39] *See Brewer*, 479 F.3d at 917; *but see* Lust v. Sealy, Inc., 383 F.3d 580, 584 (7th Cir. 2004) (suggesting that employers could be held liable even when the discriminatory employee has lesser influence over the ultimate decision maker).

[40] *See* Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 85 (1st Cir. 2004) (holding that evidence that an employee had influence over the decision maker is probative in an employment discrimination case).

[41] *See* Rose v. N.Y.C. Bd. of Educ., C.S.D. #13, 257 F.3d 156, 162 (2d Cir. 2001) (holding that employers could be exposed to liability if the discriminatory employee had influence in the decision-making process).

[42] *See* Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001) ("[I]t is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate.").

[43] *See* Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) ("[I]t is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decision[ ]maker.").

[44] *See* Stacks v. Sw. Bell Yellow Pages, Inc., 27 F.3d 1316, 1323 (8th Cir. 1994) (requiring the discriminatory employee to be "closely involved" in the decisional process).

[45] *See* Poland v. Chertoff, 494 F.3d 1174, 1184 (9th Cir. 2007) (holding that a plaintiff must prove that the discriminatory employee "influenced or was involved in the decision or the investigation leading thereto.").

[46] *See* Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998) ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence.").

[47] *See supra* notes 40–46.

[48] 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (2011) (No. 09-400).

[49] *See* Burlington v. News Corp., No. 09–1908, 2011 WL 79777, at *2 (E.D. Pa. Jan. 11, 2011); *see also* Gregory J. Wartman, *Coworker's Conduct Creates 'Cat's Paw' Situation*, 21 NO. 6 PA. EMP. L. LETTER 4 (2011) ("[T]he federal circuit courts of appeal are divided on the scope of cat's-paw liability and, in particular, whether it applies to a situation in which a biased coworker without decision-making power has 'a lesser degree of control or input' into the employee's termination.").

over two decades,[50] it left the issue of co-worker "cat's paw" liability for another day.[51]

III. STAUB V. PROCTOR HOSPITAL

A. Facts and Procedural History

Vincent Staub was an angiography technician at Proctor Hospital, as well as a member of the United States Army Reserve.[52] As an Army reservist, Staub was required to attend drill one weekend per month and to train full time for two to three weeks a year.[53] At the hospital, both Janice Mulally, Staub's immediate supervisor, and Michael Korenchuk, Mulally's supervisor, were antagonistic towards Staub's military obligations.[54] Korenchuk considered Staub's reservist responsibilities to be "'a b[u]nch of smoking and joking and [a] waste of taxpayers[']' money.'"[55] Similarly, Mulally would schedule Staub to work extra shifts to "'pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.'"[56] Furthermore, Mulally enlisted the assistance of Staub's co-worker, Leslie Sweborg, to help "'get rid of him.'"[57] In addition to his supervisors, Staub's co-worker, Angie Day, also complained to management officials about Staub's military commitments.[58]

In January 2004, Mulally issued Staub a warning for allegedly violating a company rule that required him to stay in his work area when he was not assisting a patient.[59] In the warning, Staub was instructed to inform either Mulally or Korenchuk whenever he was not working with a patient.[60] Three weeks later, Korenchuk reported to Linda Buck, Proctor's vice president of human resources, that Staub had left his desk without informing a

[50] *See Staub*, 131 S. Ct. at 1194.

[51] *See id.* at 1194 n.4.

[52] *Id.* at 1189.

[53] *Id.*

[54] *Id.*

[55] *Id.* (alterations in original).

[56] *Id.* (alterations in original).

[57] *Id.*

[58] *See id.*

[59] *Id.* Staub contended at trial that the company rule he purportedly violated did not actually exist. *Id.*

[60] *Id.*

supervisor in violation of the January disciplinary warning.[61] Based on Korenchuk's report and after reviewing Staub's personnel file, Buck decided to fire him.[62]

Staub challenged his termination through Proctor's grievance process, claiming that Mulally had lied about his violation of the January disciplinary warning out of hostility towards his military obligations.[63] Nevertheless, Buck adhered to her decision.[64] Following his termination, Staub sued Proctor under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[65] His contention was not that the ultimate decision maker, Buck, had any such hostility.[66] Instead, Staub alleged that Buck served as the "cat's paw" for Mulally and Korenchuck, and she allowed their discriminatory animus towards his military obligations to influence her decision to terminate him.[67] A jury found that Buck's decision to terminate Staub was motivated by the discriminatory animus of Staub's supervisors and awarded $57,640 in damages.[68] Proctor appealed the decision to the Seventh Circuit, which reversed.[69] Under the Seventh Circuit's "cat's paw" standard, an employer could only be liable if a supervisor exercised such "singular influence" over the decision maker, and the decision to terminate was made in "blind reliance."[70] Since Lindsay Buck had not blindly relied on Mulally and Korenchuk's statements, but instead had reviewed Staub's personnel files and spoken with another employee about the matter, the Seventh Circuit found that Proctor was

[61] *Id.*

[62] *Id.*

[63] *Id.* at 1189–90.

[64] *Id.* at 1190.

[65] *Id.* The relevant portions of the USERRA provide the following: "A person who is a member of . . . or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership . . . or obligation." 38 U.S.C. § 4311(a) (West 2006). "An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership . . . is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership." *Id.* § 4311(c).

[66] *Staub*, 131 S. Ct. at 1190.

[67] *See id.*

[68] *See id.*

[69] *See id.*

[70] *See id.* (citing *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th. Cir. 2009), *rev'd*, 131 S. Ct. 1186 (2011)); *see also supra* note 39.

entitled to judgment as a matter of law.[71] Staub then petitioned for certiorari to the Supreme Court.[72]

B. The Supreme Court Decision

The Supreme Court granted certiorari in *Staub* to clarify the "circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."[73] In an 8–0 decision, the Court held that "if 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."[74] While the Court's holding clarified the appropriate standard for "cat's paw" cases involving supervisors, it left the area of "cat's paw" cases involving co-workers murky.[75] The issue of whether the discriminatory animus of a co-worker could be used to hold an employer liable arose during oral argument.[76] Yet, when it came time to author the

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

[72] *See Staub*, 131 S. Ct. at 1190.

[73] *Id.* at 1189.

[74] *Id.* at 1194 (emphasis in original). Justice Kagan did not participate in the consideration or decision of the case. *Id.* at 1195.

[75] *See* Pepper, *supra* note 8, at 387–88.

[76] *See* Transcript of Oral Argument at 5, Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011) (No. 09-400). Justice Scalia asked Staub's attorney, "[W]hy a co-employee who has a hostile motivation and makes a report to the supervisor who ultimately dismisses the individual . . . wouldn't qualify as well." *Id.* Staub's attorney responded with the following:

> [O]ur standard is not whether it's a supervisor, but whether it's an official for whom the employer is liable under agency law. That would not be every supervisor. If a . . . supervisor unrelated to this particular department put a false charge in a . . . suggestion box, that wouldn't be any different.
>
> Ordinarily, a coworker wouldn't qualify under agency principles as an agent of the employer when engaging in that conduct. You have to look at the specific conduct and apply the traditional agency standards. They are laid out, for example, in the Court's decision in *Ellerth*, which refers to the two branches of agency law: scope of employment, and action which is aided in, where the actor was aided in the conduct by his or her official position.
>
> And I think those principles would not ordinarily apply to a co[-]worker, but they would also not apply invariably to a supervisor. This isn't -- we're not advocating the

opinion, Justice Scalia, writing for the majority, just gave cursory reference to the issue of co-worker "cat's paw" liability in a single footnote.[77] He explained, "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."[78] Apart from this brief reference, the Court did not discuss co-worker "cat's paw" liability anywhere else in the opinion.[79] In his concurrence, Justice Alito surmised that the Court's lack of analysis on the issue would create problems in the future.[80] He opined, "[B]y leaving open the possibility that an employer may be held liable if it innocently takes into account adverse information provided, not by a supervisor, but by a low-level employee, the Court increases the confusion that its decision is likely to produce."[81] It is understandable that the Court would be reluctant to probe the outer boundaries of the "cat's paw" doctrine in *Staub*.[82] Unfortunately, just as Justice Alito predicted, the Court's lack of direction on the issue of co-worker "cat's paw" liability has already produced mixed results among the lower courts.[83]

IV. CO-WORKER "CAT'S PAW" LIABILITY

A. Co-Worker "Cat's Paw" Liability Prior to Staub

Prior to *Staub*, there was case precedent in the First,[84] Third,[85] Fifth,[86] Sixth,[87] Seventh,[88] Tenth,[89] and Eleventh Circuits[90] in which plaintiffs

> supervisor versus non-supervisor distinction in *Ellerth*, but . . . a return to just the traditional agency doctrines.

Id. at 5–6.

[77] *See Staub*, 131 S. Ct. at 1194 n.4; *see also* Pepper, *supra* note 8, at 387–88; Covel, *supra* note 8, at 187 (arguing that the issue of co-worker "cat's paw" liability "deserved more treatment than a footnote").

[78] *Staub*, 131 S. Ct. at 1194 n.4.

[79] *Id.*

[80] *Id.* at 1196.

[81] *Id.*

[82] *See id.*

[83] *See infra* Part IV(C).

[84] *See, e.g.*, Oakstone v. Postmaster Gen., 332 F. Supp. 2d 261, 273–74 (D. Me. 2004) ("In this case, the Postal Service cannot immunize itself from the misinformation supplied by its employee, even though the employee was not [the plaintiff's] supervisor.").

[85] *See, e.g.*, Burlington v. News Corp., 759 F. Supp. 2d 580, 599 (E.D. Pa. 2010); Root v.

asserted co-worker "cat's paw" claims. One takeaway from these earlier cases is that co-worker "cat's paw" claims can potentially arise in a wide array of circumstances.[91] For example, several cases involved a scenario in which a group of the plaintiff's co-workers lodged an allegedly discriminatory complaint against the plaintiff together.[92] In this situation, a member of upper management is far more likely to rely on a report

Keystone Helicopter Corp., No. 10–1457, 2011 WL 144925, at *7 (E.D. Pa. Jan. 18, 2011); Howard v. Blalock Elec. Serv., Inc., 742 F. Supp. 2d 681, 702–03 (W.D. Pa. 2010).

[86] *See, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2000); Hervey v. Miss. Dep't of Educ., 404 Fed. App'x 865, 872–73 (5th Cir. 2010) (per curiam); Bryant v. Compass Grp. USA Inc., 413 F.3d 471, 477–78 (5th Cir. 2005); Johnson v. Keyhole Rd. Assist, Inc., No. 4:06CV81, 2007 WL 1342498, at *8 (E.D. Tex. May 4, 2007); *see also* Land v. Dietz, 276 Fed. App'x 384, 387–88 (5th Cir. 2008) ("In the employment context, the actions of ordinary, non-supervisory employees are not typically a basis for a claim. An exception is where the decision-maker functions as the ordinary employee's 'cat's paw' such that the adverse employment decision could fairly be attributed to the employee.") (citation omitted).

[87] *See, e.g.*, Roberts v. Principi, 283 Fed. App'x 325, 332–33 (6th Cir. 2008); Cobbins v. Tenn. Dep't of Transp., 566 F.3d 582, 586 n.5 (6th Cir. 2009).

[88] *See, e.g.*, Denham v. Saks, Inc., No. 07 C 694, 2008 WL 2952308, at *4 (N.D. Ill. July 30, 2008); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997); *see also* Newman & Shagall, *supra* note 15, at 92 (stating that the Seventh Circuit defined the "cat's paw" doctrine as "'a link between an employment decision made by an unbiased individual and the impermissible bias of a non-decisionmaking *co-worker* . . .'") (quoting Schandelmeier-Bartels v. Chi. Park Dist., 634 F.3d 372, 379 (7th Cir. 2011)).

[89] *See* 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, 1090 (2008) ("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."); Rachel Santoro, Comment, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Standard*, 11 U. PA. J. BUS. L. 823, 833 (2009) ("[T]he causal connection standard is broad enough in scope to extend to situations in which the biased subordinate is any other employee, not just a supervisor, who may impact an employment action.").

[90] *See, e.g.*, Soto v. Genentech, Inc., No. 08-60331-CIV, 2008 WL 4621832, at *4 (S.D. Fla. Oct. 17, 2008); Sirpal v. Univ. of Miami, 684 F. Supp. 2d 1349, 1358 (S.D. Fla. 2010); Rionda v. HSBC Bank U.S.A., N.A., No. 10–20654–CIV, 2010 WL 5476725, at *6 (S.D. Fla. Dec. 30, 2010).

[91] *See supra* notes 84–90.

[92] *See, e.g.*, Burlington, 759 F. Supp. 2d at 586; Bryant v. Compass Grp. USA Inc., 413 F.3d 471, 477 (5th Cir. 2005); Hervey v. Miss. Dep't of Educ., 404 Fed. App'x 865, 872 (5th Cir. 2010) (per curiam); Werner v. Dep't of Homeland Sec., 441 Fed. App'x 246, 250 (5th Cir. 2011) (per curiam); Roberts, 283 Fed. App'x at 332; Abdelhadi v. City of New York, No. 08–CV–380, 2011 WL 3422832, at *5 (E.D.N.Y. Aug. 4, 2011), *aff'd*, 472 Fed. App'x 44 (2d Cir. 2012).

originating from multiple co-workers, as opposed to just one.[93] Another scenario that arose involved a co-worker filing a harassment complaint[94] or making an allegedly retaliatory report against the plaintiff.[95] Because employers train their decision makers to give credence to complaints they receive from lower-level employees,[96] complaints provide a perfect vehicle

[93] *See supra* note 92. An interesting illustration of this scenario occurred in *Burlington v. News Corp*. 759 F. Supp. 2d at 580. The plaintiff was Tom Burlington, a white male who was a reporter for Fox Television. *Id.* at 584. During a newsroom editorial meeting, Burlington and several of his co-workers discussed a story about the Philadelphia Youth Council of the NAACP holding a symbolic burial for the word "nigger." *Id.* At one point in the meeting, Burlington posed the question, "Does this mean we can finally say the word 'nigger'?" *Id.* at 585. Although one of Burlington's African American co-workers was completely aghast by his comments, none of the other staff members believed that Burlington used the word in its pejorative sense as a racial slur. *Id.* After the meeting, Burlington was confronted by his co-anchor, Joyce Evans, an African-American woman, who informed him that several of the attendees at the meeting were offended by his comments. *Id.* at 585–86. Thereafter, Evans called the Assistant News Director, Leslie Tyler, at her home to express concern over Burlington's comments. *Id.* at 586. Tyler, in turn, spoke to the News Director at the station, who then passed the message along to the General Manager who ordered that an investigation take place into what transpired at the meeting. *Id.* at 586–87. The news station suspended Burlington, and after the investigation, terminated him. *Id.* at 587–89. Burlington responded by filing suit, claiming that the actions of Evans and his other co-workers in the wake of the meeting were motivated by discriminatory animus and influenced the decision to terminate him. *Id.* at 599. The district court held that Burlington had produced enough evidence to survive summary judgment. *Id.* at 600. The court later stayed its order in anticipation of the Supreme Court's ruling in *Staub* and whether it would impact co-worker "cat's paw" cases. *See* No. 09–1908, 2011 WL 79777, at *2 (E.D. Pa. Jan. 10, 2011) ("If the Supreme Court's decision in *Staub* bars us from considering the bias of Plaintiff's coworkers in ruling on Defendants' Motion to Reconsider, it will necessarily affect whether Plaintiff has adduced sufficient evidence to avoid summary judgment.").

[94] *See, e.g.*, Oakstone v. Postmaster Gen., 332 F. Supp. 2d 261, 273–74 (D. Me. 2004).

[95] *See, e.g.*, Root v. Keystone Helicopter Corp., No. 10–1457, 2011 WL 144925, at *1 (E.D. Pa. Jan. 18, 2011); *Roberts*, 283 Fed. App'x at 332–33; *see also* Wartman, *supra* note 49. Essentially, these are "he said, she said" scenarios that employers frequently encounter. *See* Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 918 (7th Cir. 2007) ("[W]e have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired.").

[96] For example, Wal-Mart, the largest employer in the United States, encourages all of its employees to "exercise the Open Door process, contact someone in Human Resources, or the Global Ethics Office" when a fellow associate makes an offensive remark. *Harassment and Inappropriate Conduct*, WAL-MART STATEMENT OF ETHICS, 11, http://www.walmartstores.com/media/cdnpull/statementofethics/pdf/U.S_SOE.pdf (last visited Dec. 6, 2012). Similarly, ExxonMobil instructs employees who observe or become aware of harassment to "immediately advise their supervisors, higher management, or their designated Human Resources Department

for co-workers to conceal their discriminatory intent.[97] Lastly, several of these earlier cases involved situations in which the plaintiff's co-worker made a discriminatory report or recommendation while serving on a peer review committee.[98] Although only a few of the plaintiffs managed to survive summary judgment in these earlier cases,[99] they provide some indication of the types of situations that might give rise to co-worker "cat's paw" claims under the new *Staub* standard.[100]

B. Definition of Co-Worker

An important aspect of the "cat's paw" doctrine that could have been more clearly elucidated in the *Staub* opinion is the dichotomy between supervisors and co-workers.[101] The classic "cat's paw" scenario, such as the one that arose in *Staub*, involves a supervisor with discriminatory animus that causes an adverse employment action to be taken against a fellow employee.[102] Unfortunately, for the purposes of an employment-discrimination suit, it is unclear when a co-worker becomes a supervisor.[103]

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contacts." *Harassment in the Workplace Policy*, EXXONMOBIL HARASSMENT POLICY, 13, http://www.exxonmobil.com/files/pa/uk/Harassment_Policy.pdf (last visited Dec. 6, 2012).

[97] *See* Michael C. Subit, *Goodbye Kitty: Employer Liability for Subordinate Bias One Year After* Staub v. Proctor Hospital, AMERICAN BAR CONFERENCE, at 10 (2012) ("Under [agency] principles, employers can be liable for the actions of non-supervisory co-workers under certain circumstances, such as in the co-worker harassment context.").

[98] *See* White & Krieger, *infra* note 202, at 537 ("Although group members may be peers or co-workers of the plaintiff, and generally would not be considered agents of the employer, when the employer has delegated decision making authority to the peer group, they become agents for purposes of the particular decision.") (citations omitted); *see, e.g.*, Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733, 745 (8th Cir. 2009) (analyzing the co-worker "cat's paw" claim of a teacher who was denied promotion by peer committee); DePree v. Saunders, 588 F.3d 282, 288–89 (5th Cir. 2009) (holding that the plaintiff had not demonstrated that a faculty administrator was the "cat's paw" for the plaintiff's peers).

[99] *See, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 221 (5th Cir. 2000); Burlington v. News Corp., 759 F. Supp. 2d 580, 586 (E.D. Pa. 2010); *Oakstone*, 332 F. Supp. at 273–74; *Root*, 2011 WL 144925, at *7.

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

[101] *See id.* at 1194 n.4.

[102] *See id.*

[103] *See* Corcoran v. Shoney's Colonial, Inc., 24 F. Supp. 2d 601, 605 (W.D. Va. 1998) ("It is not always clear when a co-worker becomes a supervisor."); Schele v. Porter Mem'l Hosp., 198 F. Supp. 2d 979, 989 (N.D. Ind. 2001) (citing Dinkins v. Charoen Pokphand USA, Inc., 133 F. Supp. 2d 1254, 1265–68 (M.D. Ala. 2001) ("Determining whether an employee is a supervisor as opposed to a mere co-worker has been a tricky business for courts . . . .")). Courts have long

Before *Staub*, courts would often use the words co-worker and supervisor interchangeably when referring to the alleged discriminatory employee.[104] Given that the distinction between supervisors and co-workers has taken on greater importance after *Staub*,[105] this loose usage could pose problems for courts faced with co-worker "cat's paw" claims in the future.[106] Thus, to properly frame the issue of co-worker "cat's paw" liability for analysis, it is critical that courts adopt a precise and uniform definition of co-worker.[107]

A co-worker is defined in the dictionary as a fellow worker,[108] especially someone with a similar status or position in an organization.[109] Therefore, for the purposes of co-worker "cat's paw" cases, courts should define co-worker as any employee whose position is equal[110] or subordinate

wrestled with the precise definition of supervisor. For an in-depth analysis of this issue, *see* Stephanie Ann Henning Blackman, Note, *The* Faragher *and* Ellerth *Problem: Lower Courts' Confusion Regarding the Definition of "Supervisor"*, 54 VAND. L. REV. 123 (2001).

[104] *See, e.g.*, Lindsey v. Walgreen Co., 615 F.3d 873, 874 (7th Cir. 2010) (referring to plaintiff's direct supervisor as one of her co-workers); Britt v. Merrill Lynch & Co., Inc., No. 08 CV 5356(GBD), 2011 WL 4000992, at *1–3 (S.D.N.Y. Aug. 26, 2011) (referring to the alleged discriminatory employee as plaintiff's co-worker, even though his position was directly above the plaintiff's in the corporate hierarchy).

[105] *See* 131 S. Ct. at 1194 n.4.

[106] *See supra* note 103 and accompanying text; *see also* Paul Harris, *The Schnapper Trio*, 49 HOUS. LAW. 36, 38 n.42 (Jan./Feb. 2012) (suggesting that since it is often difficult to determine whether the discriminatory employee in a "cat's paw" case is a co-worker or a supervisor, courts should focus on whether the employer should be held liable under traditional agency principles).

[107] Neal Mollen & Mitchell Mosvick, *An Employment Decision Can Be Discriminatory Even If the Decision-Maker Has No Discriminatory Intent, Supreme Court Rules*, PAUL HASTINGS (Mar. 2011), http://www.paulhastings.com/assets/publications/1849.pdf ("[T]he Court expressly refused to evaluate the impact of biased input provided by *non*-supervisors, and similar questions will be raised when the information comes from supervisors outside the supervisory chain of command."); *see* Harris, *supra* note 106, at 38 n.42 (suggesting that since it is often difficult to determine whether the discriminatory employee in a "cat's paw" case is a co-worker or a supervisor, courts should focus on whether the employer should be held liable under traditional agency principles).

[108] *Co-Worker Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/thesaurus/co-worker?show=0&t=1341971329 (last visited Dec. 6, 2012).

[109] *Co-Worker Definition*, MACMILLAN DICTIONARY, http://www.macmillandictionary.com/dictionary/british/co-worker (last visited Dec. 6, 2012).

[110] *See, e.g.*, Russell v. McKinney Hosp. Venture, 235 F.3d 219, 221 (5th Cir. 2000) (involving two employees who occupied the same position and reported to the same supervisor); Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997) ("There is only one situation in which the prejudices of an employee, normally a subordinate but here a coequal, are

to the plaintiff's in the organizational hierarchy.[111] Although courts could define co-worker narrowly as a lower-level employee who does not possess *any* supervisory authority,[112] the former definition is more consistent with how courts use the term co-worker in practice.[113]

C. The Current State of Co-Worker "Cat's Paw" Liability

Currently, there is case law in the Second,[114] Fourth,[115] Fifth,[116] Sixth,[117] Seventh,[118] Eighth,[119] Ninth,[120] Tenth,[121] and Eleventh Circuits[122] in which plaintiffs have asserted co-worker "cat's paw" claims under the new *Staub*

imputed to the employee who has formal authority over the plaintiff's job."); Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012).

[111] *See, e.g.*, Werner v. Dep't of Homeland Sec., 441 Fed. App'x 246, 250 (5th Cir. 2011) (per curiam); Bissett v. Beau Rivage Resorts Inc., 442 Fed. App'x 148, 153–54 (5th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1764 (2012).

[112] *See Staub*, 131 S. Ct. at 1196 (Alito, J., concurring) ("[B]y leaving open the possibility that an employer may be held liable if it innocently takes into account adverse information provided, not by a supervisor, but by a low-level employee, the Court increases the confusion that its decision is likely to produce.") (citation omitted).

[113] *See, e.g.*, Hysten v. Burlington N. Santa Fe Ry. Co., 415 Fed. App'x 897, 912 (10th Cir. 2011) ("These two men were Mr. Hysten's co-workers; they had absolutely no supervisory authority or influence with respect to Mr. Hysten, including authority or influence relating to employee discipline.").

[114] *See* Abdelhadi v. City of New York, No. 08-CV-380, 2011 WL 3422832, at *5 (E.D.N.Y. Aug. 4, 2011), *aff'd*, 472 Fed. App'x 44, 45 (2d Cir. 2012).

[115] *See* Alamjamili v. Berglund Chevrolet, Inc., No. 7:09-cv-213, 2011 WL 1479101, at *11 (W.D. Va. Apr. 18, 2011).

[116] *See Bissett*, 442 Fed. App'x at 154 n.5; Turner v. Jacobs Eng'g Grp., Inc., 470 Fed. App'x 250, 253–54 (5th Cir. 2012); *Werner*, 441 Fed. App'x at 250; Guillen v. Aransas Cnty. Sheriff's Office, No. C–11–223, 2012 WL 1552886, at *6 (S.D. Tex. May 1, 2012).

[117] *See* Reynolds v. Fed. Express Corp., No. 09-2692-STA-cgc, 2012 WL 1107834, at *17 (W.D. Tenn. Mar. 31, 2012).

[118] *See* Harris v. Warrick Cnty. Sheriff's Dep't, 666 F.3d 444, 448 (7th Cir. 2012); Keefer v. Olin Corp., No. 09-CV-23-WDS, 2011 WL 4474966, at *3 (S.D. Ill. Sept. 26, 2011); Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012).

[119] *See* E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 685 (8th Cir. 2012).

[120] *See* Crudder v. Peoria Unified Sch. Dist. No 11, 468 Fed. App'x 781, 784 (9th Cir. 2012); E.E.O.C. v. Willamette Tree Wholesale, Inc., No. CV 09–690–PK, 2011 WL 886402, at *2 (Mar. 14, 2011) (holding that it was unclear whether the discriminatory employee could be considered a supervisor or a co-worker in a "cat's paw" case).

[121] *See* Hysten v. Burlington N. Santa Fe Ry. Co., 415 Fed. App'x 897, 912 (10th Cir. 2011).

[122] *See* Sirpal v. Univ. of Miami, 684 F. Supp. 2d 1349, 1358 (S.D. Fla. 2010); *see also* Fla. Dep't. of Children & Families v. Shapiro, 68 So. 3d 298, 306 (Fla. Dist. Ct. App. 2011).

standard. To this point, none of the circuit courts have expressly extended the "cat's paw" doctrine to co-workers,[123] and none have restricted the doctrine to apply only to supervisors.[124] Consequently, the issue of co-worker "cat's paw" liability has received noticeably different treatment both among[125] and within the circuits.[126] This portion of the Comment provides an overview of circuit and district court opinions that have addressed co-worker "cat's paw" liability in the wake of *Staub* and suggests the direction the circuits are moving on the issue.

1. Cases Supporting an Extension of the "Cat's Paw" Doctrine to Co-Workers

There is recent case law in the Fourth[127] and Seventh Circuits[128] supporting an extension of the "cat's paw" doctrine to co-workers. To this point, the Seventh Circuit has taken the strongest stance in favor of extending the doctrine,[129] with one of its district courts doing so expressly.[130] In *Johnson v. Koppers, Inc.*, Marica Johnson, an African American woman, was fired from her position as a laboratory technician after getting into altercations with a fellow employee named Michael O'Connell.[131] Following her termination, Johnson filed suit against her

[123] *See infra* Part IV(C)(1).

[124] *See infra* Part IV(C)(2).

[125] *Compare* E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 685 (8th Cir. 2012) (suggesting that only the recommendations of supervisors can trigger "cat's paw" liability), *with* Turner v. Jacobs Eng'g Grp., Inc., 470 Fed. App'x 250, 253–54 (5th Cir. 2012) (analyzing plaintiff's "cat's paw" claim, but taking no issue with the fact that the alleged discriminatory reports originated from plaintiff's subordinates).

[126] *See infra* Part IV(C)(3). (analyzing the conflicting opinions issued by the Fifth Circuit pertaining to co-worker "cat's paw" liability).

[127] *See* Alamjamili v. Berglund Chevrolet, Inc., No. 7:09-cv-213, 2011 WL 1479101, at *11 (W.D. Va. Apr. 18, 2011).

[128] *See* Harris v. Warrick Cnty. Sheriff's Dep't, 666 F.3d 444, 448 (7th Cir. 2012) (noting that co-worker "cat's paw" liability might have been available had the plaintiff established causation); Keefer v. Olin Corp., No. 09-CV-23-WDS, 2011 WL 4474966, at *3 (S.D. Ill. Sept. 26, 2011) ("Plaintiff *has* to show that there is supportable evidence that the unidentified 'nurse' somehow actually influenced the decision maker . . . or that the nurse was in a supervisory capacity.") (emphasis in original); Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012) (expressly extending the "cat's paw" doctrine to co-workers).

[129] *See supra* note 128.

[130] *Koppers*, 2012 WL 1906448, at *6–7.

[131] *Id.* at *1–4.

employer, Koppers, Inc., claiming that O'Connell had engineered her termination by falsely alleging that she had assaulted him.[132] In response, Koppers argued that the "cat's paw" doctrine should be limited to situations where an adverse employment action is brought about by a discriminatory supervisor.[133] Thus, Koppers contended it could not be held liable on Johnson's co-worker "cat's paw" claim.[134] The district court, however, rejected this argument.[135] The court noted that while the Seventh Circuit has not yet spoken on the issue of co-worker "cat's paw" liability, it has suggested in dicta that the distinction between supervisors and co-workers is not significant.[136] The court reasoned that if the biased employee's motive is imputed onto the supervisor who takes the adverse employment action, it would not matter whether the employee is a co-worker or a supervisor.[137] According to the court, in both instances "a supervisor who is an agent of the employer has caused an adverse employment action that is motivated, in part, by discriminatory bias."[138] The court therefore concluded that Johnson was not prohibited from asserting a co-worker "cat's paw" claim.[139] Although Johnson ultimately lost on summary judgment, the case is nevertheless significant because it is the first in which a court has expressly recognized co-worker "cat's paw" liability as a viable theory under the new *Staub* standard.[140]

Similarly, at least one district court in the Fourth Circuit has suggested that co-worker "cat's paw" liability might be an available theory.[141] In *Alamjamili v. Berglund Chevrolet, Inc.*, the plaintiff, an Iranian-American man, worked for a car dealership and was repeatedly subjected to verbal insults from his co-workers.[142] After the plaintiff's employment was

[132] *Id.* at *12.

[133] *Id.* at *6.

[134] *Id.*

[135] *Id.* at *6–7.

[136] *Id.* at *7 ("The [Seventh Circuit's] use of the word 'subordinate,' rather than 'supervisor,' undermines Kopper's argument that the employee with discriminatory animus must be a supervisor and not a co-worker")

[137] *Id.*

[138] *Id.*

[139] *See id.* ("Johnson will not be precluded from asserting a claim based on a cat's paw theory of liability simply because O'Connell was a co-worker and not a supervisor.").

[140] *Id.*

[141] *See* Alamjamili v. Berglund Chevrolet, Inc., No. 7:09-cv-213, 2011 WL 1479101, at *11 (W.D. Va. Apr. 18, 2011).

[142] *Id.* at *1.

terminated, he filed suit against the dealership.[143] Notably, in analyzing the viability of the plaintiff's claims, the district court suggested that a co-worker "cat's paw" theory of liability might have been available had it been asserted by the plaintiff.[144]

In sum, it is important for employers located in either the Fourth or Seventh Circuits to be aware of the emergence of co-worker "cat's paw" liability as a viable theory under *Staub*.[145] To avoid liability, it is imperative for an employer's human-resources department or in-house counsel to examine the underlying basis of a co-worker's report to uncover whether it is discriminatorily motivated.[146] For employees, these cases have laid the groundwork for an extension of the "cat's paw" doctrine and serve as valuable support for plaintiffs advancing co-worker "cat's paw" theories in future cases.[147]

2. Cases Opposing an Extension of the "Cat's Paw" Doctrine to Co-Workers

In the Second,[148] Sixth,[149] Eighth,[150] and Tenth Circuits,[151] courts have expressed hesitancy towards extending the "cat's paw" doctrine to co-

[143] *Id.* at *4.

[144] *See id.* at *11 ("Nor has Alamjamili ever claimed that [his supervisor] knew about the derisive and ethnically-charged comments made by Alamjamili's co-workers or that they factored into the decisions that he made with respect to Alamjamili."). The *Alamjamili* decision is particularly interesting considering that the Fourth Circuit expressly rejected co-worker "cat's paw" liability prior to *Staub*. *See* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004) ("[W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory . . . authority . . . to become a decision[ ]maker simply because he had a substantial influence on the ultimate decision . . . .").

[145] *See supra* notes 127–144 and accompanying text.

[146] *See* Katherine González-Valentín, *Who's Burning Now? Avoiding "Cat's Paw" Liability Through Proper Predisciplinary Investigation*, 59 FED. LAW. 20, 22 (Feb. 2012) (providing suggestions for avoiding "cat's paw" liability after *Staub*).

[147] *See supra* notes 127–130 and accompanying text.

[148] *See* Abdelhadi v. City of New York, No. 08-CV-380, 2011 WL 3422832, at *5 (E.D.N.Y. Aug. 4, 2011), *aff'd*, 472 Fed. App'x 44 (2d Cir. 2012).

[149] *See* Reynolds v. Fed. Express Corp., No. 09-2692-STA-cgc, 2012 WL 1107834, at *19 (W.D. Tenn. Mar. 31, 2012), *reconsideration granted by*, No. 09-2692-STA-cgc, 2012 WL 2089952 (W.D. Tenn. June 8, 2012).

[150] *See* E.E.O.C. v. CRST Van Expedited, Inc., 679 F.3d 657, 685 (8th Cir. 2012) (suggesting that only the suggestions or recommendations of supervisors are relevant when analyzing a "cat's paw" claim). It is worth noting that state courts within the Eighth Circuit have restricted the "cat's

workers. For example, in *Abdelhadi v. City of New York*, Omar Abdelhadi, an observant Muslim and former employee of the Department of Corrections, alleged that New York Police Department officers motivated by discriminatory animus informed his supervisor that he was the subject of an anti-terrorism investigation, which caused him to be terminated.[152] In analyzing the viability of Abdelhadi's "cat's paw" claim under *Staub*, the district court noted:

> Several limiting principles are built into the Supreme Court's holding. First and foremost, the supervisor must intend his or her acts to cause the adverse employment action. Second, the biased individual must be a supervisor of the plaintiff. Third, "the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles." The second and third limitations are related because one reason not to extend cat's paw liability to the acts of co-workers is that such acts may often be gratuitous. Supervisors, by contrast, are usually expected to give feedback on their subordinates to decision makers as part of their duties.[153]This portion of the opinion is particularly illuminating because it addresses the primary hurdle standing in the way of a possible extension of the "cat's paw" doctrine to co-workers: agency law.[154] Ultimately, the court held that Abdelhadi had not produced a genuine issue of material fact and dismissed the case.[155]

Similarly, in *Reynolds v. Federal Express Corp.*, the district court refused to extend the "cat's paw" doctrine to co-workers.[156] Specifically,

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paw" doctrine to supervisors. *See, e.g.*, Dantzler v. Elliot, No. 301141, 2011 WL 6279241, at *1 (Mich. Ct. App. Dec. 15, 2011) ("[P]laintiff has presented no evidence to demonstrate that the alleged discriminatory acts were committed by employees who had any supervisory authority . . . . Given that the record contains no indication of discriminatory conduct by a supervisory employee, the cat's paw theory does not apply to plaintiff's claim.").

[151] *See* Hysten v. Burlington N. Santa Fe Ry. Co., 415 Fed. App'x 897, 912 (10th Cir. 2011) ("These two men were Mr. Hysten's co-workers; they had absolutely no supervisory authority or influence with respect to Mr. Hysten, including authority or influence relating to employee discipline.").

[152] 2011 WL 3422832, at *1–2.

[153] *Id.* at *5 (citations omitted).

[154] *See* Covel, *supra* note 8, at 184–85 (noting that agency law poses a hurdle to an extension of the "cat's paw" doctrine); *but see infra* Part VI (discussing how the agency hurdle can be overcome).

[155] *Abdelhadi*, 2011 WL 3422832, at *7.

[156] No. 09-2692-STA-cgc, 2012 WL 1107834, at *19 (W.D. Tenn. Mar. 31, 2012),

the court explained that even though the "Supreme Court left open the question of whether to extend cat's paw liability to co[-]workers' biased statements or actions, the Court finds it inappropriate to step beyond the bounds of delineated authority at this time."[157] As such, the court held the plaintiff could not establish a "cat's paw" claim and dismissed the suit on summary judgment.[158]

The above cases could prove to be useful for employers seeking to avoid co-worker "cat's paw" liability.[159] Nevertheless, until a circuit court expressly restricts the "cat's paw" doctrine to supervisors, co-workers litigating in the foregoing circuits should continue to assert co-worker "cat's paw" claims if doing so would support a finding of employer liability.[160]

3. Mixed Results Within the Fifth Circuit

Prior to *Staub*, the Fifth Circuit was one of the few circuit courts to expressly recognize co-worker "cat's paw" liability as a viable theory.[161] Recently, however, the Fifth Circuit has issued contradictory decisions that cast doubt as to whether co-worker "cat's paw" claims are still available.[162] In *Gollas v. University of Texas Health Science Center at Houston*, which was decided only a few months after *Staub*, the Fifth Circuit explained that a plaintiff can prevail on a "cat's paw" claim by demonstrating that "a *co-worker* with retaliatory motive had influence over the ultimate

reconsideration granted by, No. 09-2692-STA-cgc, 2012 WL 2089952 (W.D. Tenn. June 8, 2012).

[157] *Id.*

[158] *Id.* at *19, *26.

[159] *See supra* notes 148–151 and accompanying text.

[160] *See* Newman & Shagall, *supra* note 15, at 91–92 ("Until the Supreme Court explicitly decides to exclude co-worker influence (as opposed to supervisor influence) from the 'cat's paw' framework, the plaintiff should pursue a co-worker theory if doing so would support the finding of proximate cause needed for employer liability.").

[161] *See supra* note 86 and accompanying text.

[162] *Compare* Bissett v. Beau Rivage Resorts Inc., 442 Fed. App'x 148, 154 n.5 (5th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 1764 (2012) (declining to address whether "cat's paw" liability could be imposed for the acts of a co-worker), *and* Guillen v. Aransas Cnty. Sheriff's Office, No. C-11-223, 2012 WL 1552886, at *6 (S.D. Tex. May 1, 2012) (holding that a co-worker's report or recommendation can form the basis of a "cat's paw" claim), *with* Werner v. Dep't of Homeland Sec., 441 Fed. App'x 246, 250 (5th Cir. 2011) (per curiam) (stating that even if the plaintiff's co-workers were motivated by discriminatory animus in making their complaints, the plaintiff would not be able to hold the defendant liable using a "cat's paw" theory).

decision[]makers."[163] This articulation of the "cat's paw" doctrine is entirely consistent with how the Fifth Circuit treated "cat's paw" cases prior to *Staub*.[164] However, the Fifth Circuit's stance with regards to co-worker "cat's paw" liability would change demonstrably with its decision in *Werner v. Department of Homeland Security*.[165] In that opinion, the Fifth Circuit suggested that the plaintiff was unable to assert a "cat's paw" claim because the allegedly discriminatory complaint originated from her co-workers, rather than her supervisor.[166] Unless the Fifth Circuit panel simply used imprecise language, the *Werner* decision marks a substantial departure from a "cat's paw" standard it had applied for decades.[167] To complicate matters further, only a week after *Werner* was decided, a different Fifth

[163] *See* 425 Fed. App'x 318, 325 (5th Cir. 2011) ("Under the cat's-paw theory, if [an] employee demonstrates [that] a *co-worker* with a retaliatory motive had influence over the ultimate decision[ ]makers, that *co-worker's* retaliatory motive may be imputed to the ultimate decision[ ]makers, thereby establishing a causal link between the protected activity and the adverse employment action.") (emphasis added); *see also* Harrison v. Formosa Plastics Corp. Tex., 776 F. Supp. 2d 433, 443 (S.D. Tex. 2011) ("'To invoke the cat's paw analysis, [a plaintiff] must submit evidence sufficient to establish two conditions: (1) that a *co-worker* exhibited discriminatory animus, and (2) that the same *co-worker* 'possessed leverage, or exerted influence, over the titular decision maker.'") (alteration in original, emphasis added).

[164] *See supra* note 86 and accompanying text.

[165] 441 Fed. App'x at 250. The plaintiff, Kathleen Werner, was a white woman who worked as a supervisory transportation security officer at the New Orleans airport. *Id.* at 247. The impetus for Werner's lawsuit occurred when Werner tried to take team photos that would be used for posters honoring the victims of Hurricane Katrina. *Id.* According to witnesses, there was "a total loss of control" during the photo shoot, with some employees displaying "outlandish" behavior. *Id.* At one point, Werner allegedly shouted at her employees, who were predominately African American, "come on, y'all know you know how to line up." *Id.* Other witnesses, however, recalled Werner yelling, "y'all know y'all have been in a line up before." *Id.* Several airport screeners, who were Werner's subordinate co-workers, complained about Werner's outburst to her supervisor. *Id.* After conducting an investigation, the supervisor demoted Werner. *Id.* Werner responded by filing suit against her employer shortly thereafter. *Id.* Werner's theory was that the complaining screeners were motivated by discriminatory animus, and that the supervisor who demoted her served merely as the screeners' "cat's paw." *Id.*

[166] *See id.* at 250. In dismissing Werner's "cat's paw" claim, the Fifth Circuit explained:

> [T]here is no evidence to suggest that Werner's *supervisors* had improper motivations in handling the complaints and issuing the reprimands that later were part of the reason for her demotion. . . . Here, even if Werner could prove that the complaining screeners had improper motives, there is no evidence that the *supervisors* writing the violation reports acted with any racial animus.

Id. (emphasis added).

[167] *See supra* notes 112–116 and accompanying text.

Circuit panel explicitly stated that co-worker "cat's paw" liability was still an open issue in the Fifth Circuit.[168] Interestingly, recent opinions from the Fifth Circuit[169] and its district courts have simply ignored the troublesome language from *Werner* and intimated that co-worker "cat's paw" liability is still an available theory.[170] Nevertheless, until the Fifth Circuit is forced to reconcile *Werner* with its other decisions, the issue of co-worker liability in "cat's paw" cases will remain somewhat uncertain.[171]

V. JUSTIFICATIONS FOR EXTENDING THE "CAT'S PAW" DOCTRINE TO CO-WORKERS

It is clear from the cases that have been decided since *Staub* that the issue of co-worker "cat's paw" liability is one that lower courts are going to wrestle with for the foreseeable future.[172] This section of the Comment proposes that the "cat's paw" doctrine should be extended to co-workers because it comports with the express language and purpose of the anti-discrimination statutes, and it is consistent with the new "cat's paw" standard pronounced in *Staub*.

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[168] *See* Bissett v. Beau Rivage Resorts, Inc., 442 Fed. App'x 148, 154 n.5 (5th Cir. 2011) (per curiam), *cert. denied*, 132 S. Ct. 174 (2012) ("The Supreme Court, however, declined to reach the issue of whether the cat's paw doctrine applies to a discriminatory act committed by a subordinate employee that influenced the decision[ ]maker. . . . We need not resolve this open issue because [the plaintiff] fails to show the presence of discriminatory animus among any of her subordinates.") (citation omitted).

[169] *See, e.g.*, Turner v. Jacobs Eng'g Grp., Inc., 470 Fed. App'x 250, 253–54 (5th Cir. 2012) (analyzing plaintiff's "cat's paw" claim, but taking no issue with the fact that the allegedly discriminatory reports originated from plaintiff's subordinates); Hernandez v. Yellow Transp., Inc., 670 F.3d 644, 659 (5th Cir. 2012) ("Hernandez does not offer evidence that the individuals responsible for his termination were tainted by discriminatory animus, or that his *co-workers* 'possessed leverage, or exerted influence, over the titular decision[ ]maker.'") (quoting Robertson v. Alltel Info. Servs., 373 F.3d 647, 653 (5th Cir. 2004)) (emphasis added and citations omitted).

[170] *See, e.g.*, Clayton v. John H. Stone Oil Distrib., LLC, No. 2:11-cv-2276, 2012 WL 4359293, at *7–9 (E.D. La Sept. 21, 2012) (allowing the plaintiff to survive summary judgment on a co-worker "cat's paw" claim).

[171] *See id.*; *see also* Susan L. Nardone, *Burned Again? Cat's Paw Liability Post-*Staub, THE METROPOLITAN CORPORATE COUNSEL (Oct. 20, 2011, 2:41 PM), http://www.metrocorpcounsel.com/articles/16271/burned-again-cat's-paw-liability-post-staub ("The *Gollas* decision did not turn on the status of the non-decision maker, so it is unclear whether the Fifth Circuit's pronouncements are in conflict.").

[172] *See supra* notes 114–172 and accompanying text; *see also* Higgins et. al., *supra* note 9, at 5 (surmising that "[o]nly future decisions, and no doubt much litigation, will provide an answer" to the issue of co-worker "cat's paw" liability).

A. The Express Language of the Anti-Discrimination Statutes

One reason the "cat's paw" doctrine should be extended to co-workers is that it is consistent with the express language of the major anti-discrimination statutes.[173] For instance, Title VII, the most significant piece of anti-discrimination legislation passed in our country's history, prohibits an employer from taking an employment action "because of" an individual's membership in a protected class.[174] Likewise, the Age Discrimination in Employment Act (ADEA) makes it illegal for employers to discriminate "because of" an individual's age.[175] Finally, the Americans with Disabilities Act (ADA) bars employers from discriminating "on the basis" of an individual's disability.[176] When an ultimate decision maker takes an adverse employment action against an employee based on the recommendation of a discriminatory co-worker, there is no question that the adverse employment action was taken "because of" or "on the basis" of the fellow employee's membership in a protected class.[177] Therefore, from a purely syntactical standpoint, co-worker "cat's paw" liability fits within the express language of the primary anti-discrimination statutes.

[173] *See* Higgins et. al., *supra* note 9, at 6. It has been suggested that extending the "cat's paw" doctrine to co-workers would contradict the express language of the anti-discrimination statutes. *See* Covel, *supra* note 8, at 184–86. In *Meritor Sav. Bank v. Vinson*, a seminal decision on sexual harassment, the Supreme Court explained that Congress's definition of "employer" in Title VII "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." 477 U.S. 57, 72 (1986). However, the rule from *Meritor* results less from a derivation of the statutory language in Title VII than from recognition that it is virtually impossible for employers to purge sexual harassment from the workplace. *See* Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990). As Judge Posner explained in *Shager*, employers are not helpless to prevent wrongdoing in "cat's paw" cases. *See id.* at 405. By conducting thorough independent investigations, rather than relying entirely on the recommendations of lower-level employees, employers can avoid "cat's paw" liability. *See id.*; *see also* González-Valentín, *supra* note 146, at 21.

[174] 42 U.S.C. § 2000e-2 (2006).

[175] 29 U.S.C. § 623(a)(1) (2006).

[176] 42 U.S.C. § 12112(b)(3)(A) (2006).

[177] *See* Tim Davis, *Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247, 264 (2007) ("If a personnel committee relies on an animus-tinged report to fire an employee, then that employee has been fired "*because of*" discriminatory animus and should be protected by the anti[-]discrimination laws.") (emphasis added).

B. The Purpose of the Anti-Discrimination Statutes

Co-worker "cat's paw" liability also fulfills the purpose of the anti-discrimination statutes.[178] While the anti-discrimination statutes vary in regard to the classes of individuals they seek to protect, their overarching goal is to create workplaces free from discrimination.[179] Recall the hypothetical at the beginning of this Comment in which Brad and David fabricate a story that Eddie had accosted and threatened Brad, which ultimately leads to Eddie's being terminated.[180] If Brad and David were both supervisors, Eddie would have a strong "cat's paw" claim under the new *Staub* standard.[181] However, if the hypothetical were changed, and Brad and David were merely Eddie's co-workers, Eddie's "cat's paw" claim could fail in several circuits.[182] This result would clearly thwart the purpose of the anti-discrimination statutes because it would leave victims of flagrant discrimination, like Eddie, without a remedy.[183]

From a policy standpoint, there is no reason to distinguish between supervisors and co-workers, so long as there is discriminatory animus that

[178] *See* 29 U.S.C. § 621(b) (2006) (stating that the purpose of the Age Discrimination in Employment Act (ADEA) is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment"); 42 U.S.C. § 12101(b)(1)–(2) (2006) (stating that the purpose of the Americans with Disabilities Act (ADA) is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities").

[179] *See* McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 358 (1995) ("The ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'") (quoting Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)); Albemarle Paper Co. v. Moody, 422 U.S. 405, 417–18 (1975) (explaining that the anti-discrimination statutes were created to encourage employers "to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.").

[180] *See supra* Part I.

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

[182] *See supra* notes 148–151 and accompanying text.

[183] *See* Ernest F. Lidge III, *The Male Employee Disciplined for Sexual Harassment as Sex Discrimination Plaintiff*, 30 U. MEM. L. REV. 717, 746–49 (2000) (noting that it would be inequitable to allow a plaintiff's claim to succeed when based on the discriminatory animus of a supervisor, but not when it is based on a co-worker's discriminatory animus); *see also* Curtis J. Thomas, *Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in* EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 61 OKLA. L. REV. 629, 656 (2008) (arguing that Title VII's purpose would be flouted if employers could simply vest "co-workers with the ability to discriminate").

can be traced to an adverse employment action.[184] In many circumstances, the business organization's structure does not mirror the decision-making power within the organization.[185] Certainly, it is possible for co-workers to have a significant amount of influence in the decision-making process.[186] To apply a blanket rule that distinguishes between co-workers and supervisors could allow employers to rely entirely on the recommendations of co-workers, no matter how far-fetched or improbable, enabling them to escape liability.[187] Courts should extend the "cat's paw" doctrine to co-workers because it would "foreclose[] a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among [co-workers], through willful blindness as to the source of reports and recommendations."[188] Lastly, allowing co-worker "cat's paw" liability would encourage employers to verify information or recommendations from lower-level employees, and it ensures that employers conduct independent investigations prior to taking an adverse employment action.[189]

[184] *See supra* note 183.

[185] *See* E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 486 (10th Cir. 2006).

[186] *See id.* at 486; *see also* Sara Eber, *How Much Power Should be in the Paw? Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 182 n.309 (2008) ("Yet even in cases where a subordinate did not act pursuant to his employment duties . . . courts—including the Supreme Court—have recognized that ordinary employees can exert substantial influence in certain situations to effectuate an employment decision.").

[187] *See* Lidge III, *supra* note 183, at 746–49 (stating courts "should recognize the 'cat's paw' doctrine regardless of whether the accuser is a rank-and-file employee or a supervisor"); Amber L. Hurst, *Anticipating and Overcoming the Challenges Associated with Discrimination Cases*, ASPATORE, 2012 WL 3058211, at *7 (2012) ("[A]fter *Staub*, employers may try to defend a lawsuit by claiming that the ultimate decision maker relied on information received *from sources other than the discriminating supervisor*.") (emphasis added).

[188] *BCI Coca-Cola Bottling Co.*, 450 F.3d at 486; *see also* Hurst, *supra* note 187, at *7; Thomas, *supra* note 183, at 656.

[189] *See* Santoro, *supra* note 89, at 832 (2009) (explaining that the causal connection standard, which is similar to the new "cat's paw" standard announced in *Staub*, "reward[s] careful employers that implement procedural mechanisms to weed out discriminatory influence on employment actions, but . . . still protect[s] employees' rights by allowing causes of actions against irresponsible employers that do not take the necessary steps to break the causal chain in an investigation.").

C. The New "Cat's Paw" Standard

Another justification for extending the "cat's paw" doctrine to co-workers is that the "cat's paw" standard pronounced in *Staub* is flexible enough to encompass co-worker "cat's paw" claims.[190] To prevail on a "cat's paw" claim under *Staub*, a plaintiff now must prove the following elements: (1) a supervisor performed an act motivated by discriminatory animus; (2) that was *intended* by the supervisor to cause an adverse employment action; and (3) that act proximately caused the adverse employment action.[191] Like a supervisor, a co-worker can make a report that is *intended* to cause an adverse employment action against a fellow employee.[192] Furthermore, numerous courts, both before[193] and after[194] *Staub*, have found the causal link between a discriminatory co-worker's recommendation and an adverse employment action to be strong enough to trigger employer liability.

To further illustrate this point, consider once again the hypothetical involving Eddie. There is no question that Eddie's co-workers, Brad and David, made a report to their supervisor, Andy, that was discriminatorily motivated and intended to cause Eddie's termination. Thus, the only remaining question is whether Brad and David's report could be considered

[190] *See* Stacey L. Smiricky & Theresa M. Van Vuren, *Supreme Court Sharpens 'Cat's Paw' Liability*, ALM LAW JOURNAL NEWSLETTERS 3, 4 (May 1, 2011) ("[G]iven the Court's broad tort analysis for cat's paw liability, a co-worker's biased reports could potentially lead to employer liability if such reports have a sufficient causal connection to the decision to take adverse action, assuming other tort elements are satisfied."); Hurst, *supra* note 187, at *7 ("In [co-worker 'cat's paw' cases], plaintiffs should cite to *Staub* and its embrace of the proximate cause analysis to prove discrimination."); Newman & Shagall, *supra* note 15, at 92 ("By including co-workers in its previous articulation of the 'cat's paw' doctrine, the [S]eventh [C]ircuit seems open to the possibility that a co-worker's influence could form the basis of liability if that influence proximately causes the adverse employment action; *the logic of* Staub *does not appear to deny that possibility*.") (emphasis added).

[191] *See* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011) (emphasis in original).

[192] *Id.*

[193] *See* Kaler, *supra* note 89, at 1090–92 ("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."); Santoro, *supra* note 89, at 832–33 ("[T]he causal connection standard is broad enough in scope to extend to situations in which the biased subordinate is any other employee, not just a supervisor, who may impact an employment action.").

[194] *See, e.g.*, Harris v. Warrick Cnty. Sheriff's Dep't, 666 F.3d 444, 448 (7th Cir. 2012); Keefer v. Olin Corp., No. 09-CV-23-WDS, 2011 WL 4474966, at *3 (S.D. Ill. Sept. 26, 2011); Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012).

a proximate cause of Eddie being fired. Certainly, Andy's subsequent report to Frank, the ultimate decision maker, and Frank's termination of Eddie were proximate causes.[195] However, as the Supreme Court noted in *Staub*, there can be multiple proximate causes of an adverse employment action.[196] Moreover, Frank's exercise of judgment in choosing to terminate Eddie cannot be deemed a superseding cause.[197] Thus, at no point in the hypothetical was the chain of causation that connected Brad and David's discriminatory act to the adverse employment action ever broken.[198] As such, Brad and David's report proximately caused Eddie to be fired.[199]

VI. CLEARING THE AGENCY LAW HURDLE

The Supreme Court explained in *Staub* that an employer could only be held liable "when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles."[200] Therefore, in order for the "cat's paw" doctrine to be extended to co-workers, it would likely have to comport with the agency principles that underlie the *Staub* holding.[201] Unfortunately, the intersection of agency law with co-worker "cat's paw" liability has proven to be a problematic and divisive area for courts, both before[202] and after *Staub*.[203]

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[195] *See Staub*, 131 S.Ct. at 1192 (citing Sosa v. Alvarez-Machain, 542 U.S. 692, 704 (2004)) ("The decision maker's exercise of judgment is *also* a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes.") (emphasis in original).

[196] *See id.*

[197] *See id.* ("Nor can the ultimate decision[ ]maker's judgment be deemed a superseding cause of the harm.").

[198] *See supra* note 193 and accompanying text.

[199] *See id.*

[200] *See* Staub, 131 S. Ct. at 1194 n.4 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998)).

[201] *See* Subit, *supra* note 97, at 10 ("There is no reason why employer liability for the conduct of a non-supervisory co-worker of the plaintiff should not also be determined by traditional agency principles.").

[202] *See* Long v. Eastfield Coll., 88 F.3d 300, 306 (5th Cir. 1996) ("Because ordinary employees do not have control over the employment status of co-employees, one employee's recommendation that another employee be terminated will normally be so unrelated to the employer's business that it cannot be deemed 'in furtherance' thereof."); Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 537 (2001) (explaining that employers ordinarily cannot be held vicariously liable for the actions of an employee's co-workers), *but see* Eber, *supra* 183, at

The issue is especially troublesome because co-workers are ordinarily not acting within the course and scope of their employment when playing the role of the monkey in "cat's paw" cases.[204] While agency law unquestionably poses a substantial hurdle to an extension of the "cat's paw" doctrine to co-workers,[205] this section of the Comment proposes that it can be overcome by either applying the "aided by the agency relation" standard or by imposing a negligence standard.[206]

A. An Overview of Agency Law in Employment Discrimination Suits

Under the anti-discrimination statutes, an employer can be held liable for discriminatory acts that are directly attributable to it, as well as the discriminatory acts of its agents.[207] By defining employer to include "any agent" of the employer,[208] it is clear that Congress intended to place some limitations on the "acts of employees for which employers . . . are to be held responsible."[209] In determining whether an employer should be held liable for its agent's discriminatory acts, Congress has directed federal

182 n.309 ("Yet even in cases where a subordinate did not act pursuant to his employment duties . . . courts—including the Supreme Court—have recognized that ordinary employees can exert substantial influence in certain situations to effectuate an employment decision.").

[203] *Compare* Abdelhadi v. City of New York, No. 08-CV-380, 2011 WL 3422832, at *5 (E.D.N.Y. Aug. 4, 2011), *aff'd*, 472 Fed. App'x 44, 45 (2nd Cir. 2012) (opining that co-workers will never be acting as agents of their employer in co-worker "cat's paw" cases), *with* Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012) (holding that co-worker "cat's paw" liability is entirely consistent with traditional agency principles).

[204] *See supra* note 202.

[205] *See supra* note 202 (applying traditional agency principles in co-worker "cat's paw" cases under the new *Staub* standard and reaching different results); *see also* Covel, *supra* note 8, at 185 (arguing that the "cat's paw" doctrine should not be extended to co-workers if it is beyond traditional agency principles).

[206] *See infra* Part VI(C)–(D) and accompanying text.

[207] For Title VII, *see* 42 U.S.C. § 2000e(b) (2006) (defining employer as "a person engaged in an industry affecting commerce" and "any agent of such a person"). For the ADEA, *see* 29 U.S.C. § 630(b) (2006) (defining employer as a "person engaged in an industry affecting commerce" and "any agent of such a person"). For the ADA, *see* 29 U.S.C. § 12111(5)(A) (2006) (defining employer as "a person engaged in an industry affecting commerce" and "any agent of such a person"). For the FMLA, *see* 29 U.S.C. § 2611(4)(A) (2006) (defining employer as "any person engaged in commerce or in any industry or activity affecting commerce" and "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer").

[208] 29 U.S.C. § 630(b) (2006).

[209] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

courts to look to traditional agency principles.[210] According to the Restatement (Second) of Agency, "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[211] In addition, a master is subject to liability for the torts of servants committed outside the scope of their employment if the servant was "aided in accomplishing the tort by the existence of the agency relation."[212] Based on the foregoing principles, were a court to extend the "cat's paw" doctrine to co-workers, it would likely have to fit within one of the two branches of agency law: (1) the course-and-scope-of-employment branch, or (2) the aided-by-the agency-relation branch.[213]

B. Course and Scope of Employment

Under the Restatement (Second) of Agency, an agent acts within the course and scope of his or her employment only under certain circumstances.[214] Courts, however, have repeatedly noted that agents are

[210] *See id.* ("Congress wanted courts to look to agency principles for guidance in this area."); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998) ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles.").

[211] RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

[212] A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:

> (a) the master intended the conduct or the consequences, or
>
> (b) the master was negligent or reckless, or
>
> (c) the conduct violated a non-delegable duty of the master, or
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, *or he was aided in accomplishing the tort by the existence of the agency relation.*

Id. § 219(2) (emphasis added).

[213] *See Ellerth*, 524 U.S. at 761 (establishing the two prongs of agency-law analysis for employment-discrimination suits); *see also* Transcript of Oral Argument, at 7, Staub v. Proctor Hosp., 131 S. Ct. 1186 (2011) (No. 09-400) (arguing that co-worker "cat's paw" liability must fit within one of the two branches of agency law).

[214] Conduct of a servant is within the scope of employment if, but only if:

> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master; and

not acting within the scope of their employment when committing an intentional tort because the agents are acting wholly for personal reasons, rather than to serve their employer.[215] As such, most courts find that co-workers in "cat's paw" cases are not acting within the scope of their employment and therefore cannot be considered their employer's agent under that branch of agency law.[216] Nevertheless, in the wake of *Staub*, some courts have eschewed this traditional view, focusing instead on whether the ultimate decision maker, rather than the discriminatory co-worker, acted within the scope of its employment.[217] If the decision maker took an adverse employment action against the plaintiff while acting within the scope of its employment, these courts would hold the employer liable on a co-worker "cat's paw" claim.[218] Unfortunately, because this view of agency law runs contrary to both established "cat's paw" precedent[219] and principles relied upon by the Supreme Court in *Staub*, it is unlikely that co-workers will ever be acting within the scope of their employment in "cat's paw" cases.[220]

C. Aided by the Agency-Relation Standard

The likelier route for a court wishing to extend the "cat's paw" doctrine to co-workers is by the "aided by the agency relation" standard.[221] In

> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

RESTATEMENT (SECOND) OF AGENCY § 228(1).

[215] *See* Kaler, *supra* note 89, at 1072–73 (citing *Ellerth*, 524 U.S. at 757); *see* Long v. Eastfield Coll., 88 F.3d 300, 306–07 (5th Cir. 1996); Shager v. Upjohn Co., 913 F.2d 318, 404–05 (7th Cir. 1990).

[216] *See supra* note 215.

[217] *See, e.g.*, Johnson v. Koppers, Inc., No. 10 C 3404, 2012 WL 1906448, at *6–7 (N.D. Ill. May 25, 2012).

[218] *Id.* This interpretation of agency principles with regard to co-worker "cat's paw" liability was propounded even before the *Staub* decision. *See* Davis, *supra* note 177, at 260 (arguing that if a personnel committee relies on the discriminatory report of a co-worker to take an adverse employment action against another employee, the employer could be held liable because the personnel committee acted within the course and scope of their employment).

[219] *See supra* note 215 and accompanying text.

[220] Staub v. Proctor Hosp., 131 S. Ct. 1186, 1191–92 (2011) (citing RESTATEMENT (SECOND) OF AGENCY § 275, illus. 4 (1958) ("The Restatement of Agency suggests that the malicious mental state of one agent cannot generally be combined with the harmful action of another agent to hold the principal liable for a tort that requires both.")).

[221] In E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles, the Tenth Circuit explained:

Burlington Industries, Inc. v. Ellerth, the Supreme Court explained that the mere existence of an employment relationship is not enough to impose liability on an employer.[222] The Court held, however, that if the agent was aided in accomplishing its discriminatory act by the existence of the agency relationship, then the employer could be held liable.[223] Specifically, the "aided by the agency relation" standard applies where "the servant may be able to cause harm because of his position."[224]

Employers frequently rely on the factual observations[225] and complaints of co-workers in making employment decisions.[226] This is especially true with regard to smaller employers that do not have an elaborate hierarchy of supervisors.[227] When the ultimate decision maker takes into consideration a

> [T]he "aided by the agency relation" standard applies even more clearly to subordinate bias claims, such as "cat's paw" or "rubber stamp" claims, because the allegedly 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.

450 F.3d 476, 485 (10th Cir. 2006) (emphasis added). While the Tenth Circuit was specifically addressing classic "cat's paw" cases involving a discriminatory supervisor, the quoted portion applies equally to co-workers, who have the ability to report disciplinary infractions up the chain of command. *See* Santoro, *supra* note 89, at 832 ("A decision[ ]maker, such as a human resources representative, who works in a centralized department is unlikely to know an employee who may be at the center of an adverse employment action. These decision[ ]makers necessarily rely on evaluations provided by supervisors and *complaints filed by co-workers*.") (emphasis added).

[222] 524 U.S. 742, 760 (1998) ("The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.") (citations omitted).

[223] *See id.* at 761–62.

[224] *See* RESTATEMENT (SECOND) OF AGENCY § 219(2) cmt. e.

[225] *See, e.g.*, Burlington v. News Corp., 759 F. Supp. 2d 580, 586–87, 589 (E.D. Pa. 2010) (relying on the factual reports of co-workers in choosing to terminate the plaintiff); Root v. Keystone Helicopter Corp., No. 10-1457, 2011 WL 144925, at *7 (E.D. Pa. Jan. 18, 2011); *see also* Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 918 (7th Cir. 2007) (noting that employers frequently deal with the conflicting factual observations of co-workers).

[226] *See, e.g.*, Oakstone v. Postmaster Gen., 332 F. Supp. 2d 261, 266, 273–74 (D. Me. 2004) (relying on the harassment complaint of a co-worker in choosing to eliminate job duties and deny promotions to the plaintiff); *see also* Santoro, *supra* note 89, at 832. ("These decision[ ]makers necessarily rely on . . . complaints filed by co-workers.").

[227] Title VII applies to all employers with fifteen or more employees. 42 U.S.C. § 2000(e)(b) (2006). The ADA also has a fifteen-employee requirement. 29 U.S.C. § 12111(5)(A) (2006). The ADEA only imposes liability on employers with twenty or more employees. 29 U.S.C. § 630(b) (2006). The FMLA requires that employers have fifty or more employees. 29 U.S.C. § 2611(4)(A).

report or complaint originating from an ordinary co-worker in a "cat's paw" scenario, it has necessarily delegated at least some fact-finding authority to that co-worker.[228] For example, employers normally encourage their rank-and-file employees to file complaints of harassment.[229] Similarly, employers rely heavily on the reports and recommendations of ordinary co-workers where there is a peer-review system in place, as there is in many universities.[230] In each of these instances, ordinary co-workers are aided in accomplishing an intentional tort by the agency relationship and can harm others because of their position.[231] Thus, co-worker "cat's paw" liability is consistent with the "aided by the agency relation" standard.[232]

However, the mere fact that co-worker "cat's paw" liability fits within the "aided by the agency relation" standard should not give courts license to impose liability in all instances in which employers rely on a co-worker's reports and recommendations tinged with discriminatory bias.[233] As Justice Alito noted in his concurrence in *Staub*, courts should not impose liability

[228] *See supra* note 221; *see also* Befort & Olig, *supra* note 30, at 411–12 ("The misuse of other types of delegated authority also may enable employees—including on occasion non[-]supervisors—to inflict economic injury on their fellow employees. . . . Even if the [co-worker] does not serve as a principal decision[ ]maker on that issue, employer liability may be appropriate if the recommender's misuse of that lesser form of delegated authority serves as a motivating factor in an adverse employment action."); Staub v. Proctor Hosp., 131 S. Ct. 1186, 1195 (2011) (Alito, J., concurring) ("Where the officer with formal decision[ ]making authority merely rubberstamps the recommendation of others, the employer, *I would hold, has actually delegated the decision-making responsibility to those whose recommendation is rubberstamped*.") (emphasis added).

[229] *See supra* note 93; *see also* Subit, *supra* note 97, at 10 ("Under [agency] principles, employers can be liable for the actions of non-supervisory co-workers under certain circumstances, *such as in the co-worker harassment context.*") (emphasis added).

[230] *See* White & Krieger, *supra* note 202, at 537 ("Although group members may be peers or co-workers of the plaintiff, and generally would not be considered agents of the employer, when the employer has delegated decision making authority to the peer group, they become agents for purposes of the particular decision.") (citations omitted); *see, e.g.*, Qamhiyah v. Iowa State Univ. of Sci. & Tech., 566 F.3d 733, 745 (8th Cir. 2009) (analyzing the co-worker "cat's paw" claim of a teacher who was denied promotion by peer committee); DePree v. Saunders, 588 F.3d 282, 288–89 (5th Cir. 2009) (holding that the plaintiff had not demonstrated that a faculty administrator was the "cat's paw" for the plaintiff's peers).

[231] *See supra* notes 225–230 and accompanying text.

[232] *See supra* note 222.

[233] *See Staub*, 131 S. Ct. at 1196 (Alito, J., concurring) ("[B]y leaving open the possibility that an employer may be held liable if it innocently takes into account adverse information provided, not by a supervisor, but by a low-level employee, the Court increases the confusion that its decision is likely to produce.") (citation omitted).

when employers *innocently* rely on a discriminatory report from a lower-level employee.[234] For example, if an employer conducts an independent investigation based on a co-worker's report, but relies on it because the co-worker's bias is particularly well concealed, the employer should not be held liable.[235] Rather, courts should impose liability when upper management has been derelict in their obligations, such as by failing to conduct any investigation whatsoever or by relying on a co-worker's report when the circumstances indicate that it might be discriminatorily motivated.[236]

D. An Elevated Standard for Co-Workers in "Cat's Paw" Cases?

Even if co-worker "cat's paw" liability does not fit within either of the two traditional branches of agency law, the "cat's paw" doctrine could still be extended to co-workers by imposing a negligence standard.[237] The Supreme Court has explained that "[n]egligence sets a minimum standard for Title VII liability."[238] Consequently, in sexual harassment cases involving co-workers, lower courts have uniformly adopted a negligence standard, requiring plaintiffs to prove that the employer knew or should have known of the harassment and failed to take corrective measures.[239] Were the Court to eventually take up the issue of co-worker "cat's paw" liability, it could impose a similar negligence standard for triggering employer liability.[240] Under this standard, an employer could be held liable

[234] *Id.*

[235] *Id.*

[236] *See* Santoro, *supra* note 89, at 832 (explaining that the causal connection standard, which is similar to the new "cat's paw" standard announced in *Staub*, "reward[s] careful employers that implement procedural mechanisms to weed out discriminatory influence on employment actions, but . . . still protect[s] employees' rights by allowing causes of actions against irresponsible employers that do not take the necessary steps to break the causal chain in an investigation.").

[237] *See* Huxoll, *supra* note 12, at 3 ("The Court in *Staub* reiterated that principles of agency law apply in cases alleging employment discrimination. As such, an employer may be liable for the discriminatory actions of [co-workers] if it knows or should know of the discrimination but fails to take appropriate measures."); *but see* Sandra F. Sperino, *The "Disappearing" Dilemma: Why Agency Principles Should Now Take Center Stage in Retaliation Cases*, 57 U. KAN. L. REV. 157, 183 n.133 (2008) (explaining that a negligence standard might not be required for co-worker "cat's paw" cases).

[238] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 744 (1998).

[239] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 776 (1998) ("[T]he lower courts . . . uniformly judg[e] employer liability for co-worker harassment under a negligence standard.").

[240] *See infra* note 246.

on a co-worker "cat's paw" theory if it knew or should have known that the co-worker's report was discriminatory and relied on it anyway.[241] Thus, by applying either the "aided by the agency relation" standard or by imposing a negligence standard,[242] courts can overcome the most significant barrier standing in the way of an extension of the "cat's paw" doctrine to co-workers.[243]

VII. CONCLUSION

This Comment has sought to clarify the unsettled area of co-worker "cat's paw" liability and provide a basis for extending the doctrine that is consistent with both the principles relied upon in *Staub* and the express language and purpose of the anti-discrimination statutes. Moving forward, it appears unlikely that courts will allow plaintiffs to hold their former employers liable based on a co-worker "cat's paw" theory unless the co-worker's connection to the adverse employment action is particularly strong.[244] In addition, even though the *Staub* Court refused to provide employers with an absolute defense when they conduct an independent investigation in "cat's paw" cases,[245] lower courts have noted in the past that independent investigations have the effect of immunizing employers from co-worker "cat's paw" liability.[246] Unfortunately, until the Supreme Court provides definitive answers to these questions, lower courts will continue to struggle with how to treat co-workers in "cat's paw" cases.

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[241] *See* Huxoll, *supra* note 12, at 3.

[242] It has also been suggested that the "cat's paw" doctrine could be extended to co-workers even if it is outside traditional agency principles. *See* Covel, *supra* note 8, at 184–86 ("However, employers should take note that the Court left open the possibility that employer liability for a subordinate's discriminatory bias could be expanded beyond traditional agency principles.").

[243] *See supra* notes 214–241 and accompanying text.

[244] *See* Pepper, *supra* note 8, at 383 (suggesting that employees' "cat's paw" claims are unlikely to succeed when the discrimination suffered by them "does not fit the classic, straightforward archetype embodied by *Staub*'s facts.").

[245] *See* Staub v. Proctor Hosp., 131 S. Ct. at 1193–94 (rejecting Justice Alito's argument that an employer's independent investigation should preclude "cat's paw" liability).

[246] *See, e.g.*, Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 918 (7th Cir. 2007) ("For instance, we have frequently dealt with employees that claim they were framed for misconduct by a racist coworker or superior, which caused the employee in question to be fired. Even though the employer in such situations must often decide what to do based on nothing more than the conflicting stories of two different employees, the employer will not be liable for the racism of the alleged frame-up artist so long as it independently considers both stories.").