INDEPENDENT INVESTIGATIONS: AN INEQUITABLE OUT FOR EMPLOYERS IN CAT'S PAW CASES

SEAN RATLIFF*

This Comment addresses the extent to which judges should be allowed to grant summary judgment for employers who conduct "independent investigations" in cat's paw employment cases. A cat's paw employment case is one in which an employee attempts to hold an employer liable for an adverse action based upon the conduct of a biased supervisor. The supervisor, who lacks decision-making authority, may have influenced or participated in the decision to take the adverse employment action. Currently, the circuits split over the requisite level of influence that the supervisor must have over the ultimate decisionmaker in order to impute liability. This Comment explores that split and summarizes the various standards used by the circuits. More importantly, this Comment looks at the role that independent investigations play in the courts' analyses. Most circuits will absolve an employer of liability where the employer conducts an independent investigation before taking an adverse action. However, the circuits split as to whether the independence of an investigation is a question of law or fact. This Comment asserts that the question should be one of fact and that judges should be prohibited from granting summary judgment based on the independent investigation defense.

INTRODUCTION

The typical American worker is far from an angel. According to one study, over ten percent of American workers sur-

* Candidate for Juris Doctorate, University of Colorado, May 2009. Bachelor of Arts, Sociology and Comparative Religion, Western Michigan University, May 1998. I would like to thank, first and foremost, my wife Shannon and my son Mason for their love, patience, and understanding throughout this long and arduous process. I would also like to thank the many members of the *University of Colorado Law Review* staff, whose comments and encouragement have been invaluable. Finally, I want to thank the attorneys at the Colorado Education Association who introduced me to the subject of cat's paw liability. Their dedication to preserving the rights of teachers and other school district employees should not go unnoticed.

veyed admit to arriving late to work on a weekly basis,[1] and nearly a quarter are late "at least once a month."[2] Moreover, one in five employees admits to lying about why he or she was late.[3] In another study, over half of the workers surveyed reported observing "at least one type of misconduct in the workplace in the past year."[4] Examples of observed misconduct and the corresponding percentage of employees who observed such conduct include: abusive and intimidating behavior (twenty-one percent), dishonesty (nineteen percent), violations of safety regulations (sixteen percent), misrepresenting time worked (sixteen percent), theft (eleven percent), discrimination (twelve percent), and sexual harassment (nine percent).[5]

These studies reveal at least two things. First, they show that intimidation, discrimination, and sexual harassment still exist to a considerable degree in the American workplace.[6] The significance of the problem is also highlighted by the fact that in 2007 alone, the Equal Employment Opportunity Commission (EEOC) received 82,792 charges of unlawful discrimination or retaliation.[7] Second, the studies suggest that the ammunition to dispose of less favored employees is readily available in the hands of a biased, vengeful, or unscrupulous supervisor. Put differently, because employees are not angels, a supervisor or a company that wants to terminate a given employee likely can find a lawful reason to do so.[8]

Fortunately for the employee, antidiscrimination statutes in the United States prohibit an employer from basing an adverse employment action on the employee's status as a member of a protected class. The premier statute in this regard is Title VII of the Civil Rights Act of 1964, which prohibits discrimina-

---

1. *See* CareerBuilder.com, *One-in-Five Workers Admit to Making Up Fake Excuses for Arriving Late to Work, CareerBuilder.com Survey Finds*, Apr. 25, 2006, http://www.careerbuilder.com/Share/AboutUs/PressReleases.aspx?archive year=2006 (follow "4/25/2006" hyperlink) [hereinafter *One-in-Five*].

2. *Id.*

3. *See id.*

4. Press Release, Ethics Resource Center, Survey Documents State of Ethics in the Workplace (Oct. 12, 2005), *available at* http://www.ethics.org/research/2005-press-release.asp.

5. *See id.*

6. *See id.*

7. EEOC, Charge Statistics FY 1997 Through FY 2007, http://www.eeoc.gov/stats/charges.html (last visited Sept. 29, 2008).

8. The tardiness statistics alone should suffice given that one-in-five managers say they would fire someone who is late three times in one year. *See One-in-Five*, *supra* note 1.

tion on the basis of "race, color, religion, sex, or national origin."[9] In addition to Title VII, the Age Discrimination in Employment Act of 1967 (ADEA) protects workers from adverse action based on age,[10] and the Americans with Disabilities Act of 1990 (ADA) protects against discrimination based on certain qualifying disabilities.[11] Furthermore, under Title VII and the ADEA, it is unlawful for an employer to retaliate against an employee who reports or opposes such bias.[12]

For an employee to receive a remedy in discrimination or retaliation cases, the employee ultimately must prove that he or she "was the victim of intentional discrimination."[13] This may be done either directly or indirectly.[14] The direct method involves showing, through direct or circumstantial evidence, that an employer's discriminatory intent was a motivating factor in taking an adverse employment action.[15] The indirect method operates under a burden-shifting framework, whereby the plaintiff must first make out a prima facie case of discrimination or retaliation.[16] The employer must then proffer a legitimate non-discriminatory reason for its actions.[17] Finally, the plaintiff must show that the employer's alleged legitimate non-discriminatory reason is merely pretext for unlawful discrimination.[18]

---

9. 42 U.S.C. § 2000e-2 (2000).

10. *See* 29 U.S.C. § 623(a) (2000).

11. *See* 42 U.S.C. § 12112 (2000). Title VII, the ADEA, and the ADA were all amended by the Civil Rights Act of 1991. *See* Pub. L. No. 102-166, 105 Stat. 1071.

12. *See* 42 U.S.C. § 2000e-3 (2000); 29 U.S.C. § 623(d) (2000).

13. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).

14. *See, e.g.*, Brewer v. Bd. of Trs. of the Univ. of Ill., 479 F.3d 908, 915 (7th Cir. 2007); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 284–85 (4th Cir. 2004).

15. *See Brewer*, 479 F.3d at 915; *Hill*, 354 F.3d at 285 (citing Desert Palace Inc. v. Costa, 539 U.S. 90 (2003)).

16. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 807 (1973). The elements of a prima facie case vary depending upon the statutory basis for the claim. However, the general standard in a discrimination case is to show that the person is (1) a member of a protected class, (2) was qualified for the job, (3) suffered an adverse employment action, and (4) was treated differently than similarly situated employees or was replaced by someone outside the protected class. *See Brewer*, 479 F.3d at 915; *Hill*, 354 F.3d at 285. In retaliation cases the plaintiff must show (1) that he engaged in a protected activity such as complaining about the unlawful act, (2) that he suffered an adverse employment action, and (3) that the adverse employment action was causally linked to the protected activity. *See, e.g.*, Gee v. Principi, 289 F.3d 342, 345 (5th Cir. 2002) (citation omitted).

17. *See McDonell-Douglas*, 411 U.S. at 807.

18. *See id.*

Within the above framework, the law has evolved to allow a plaintiff to establish employer liability where a biased supervisor plays some role in the adverse employment action.[19] For example, a female employee might be fired after her misogynistic supervisor reports that she has somehow misbehaved. This misbehavior may be real or fictitious. The supervisor, however, is not the decisionmaker, and the decisionmaker harbors no resentment toward women. If the decision to terminate is based solely on the biased supervisor's input, courts will typically recognize the validity of a sex discrimination claim.[20] These cases are often referred to as "cat's paw" cases. The cat's paw analogy originates from a fable about a monkey who convinces a cat to pull chestnuts from a fire.[21] As the cat burns his paw scooping the chestnuts from the fire, the monkey gobbles them up.[22] In the employment context, the monkey is the biased supervisor who dupes the unwitting decisionmaker (the cat's paw) into taking a discriminatory employment action.

Cat's paw cases have recently become an area of particular interest in employment law.[23] The interest partly results from the disparity between the circuits as to the exact test for imputing liability on an employer for the actions of a biased supervisor.[24] In addition, the United States Supreme Court recently attempted to weigh in on the cat's paw issue only to be thwarted by a settlement between the interested parties.[25]

This Comment focuses on one of the common features of cat's paw analyses, namely the extent to which an employer may absolve himself of liability by conducting an "independent investigation" before taking an adverse employment action.

---

19. The seminal case in this regard is *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990). *See* EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 485 (10th Cir. 2006) (citing *Shager* for "inaugurating the descriptor 'cat's paw' "); *Hill*, 354 F.3d at 289 (acknowledging *Shager* as the predecessor to other circuit courts' application of cat's paw and rubber stamp theories); *see also infra* note 64.

20. The details of each circuit's standard for imputing liability will be discussed in Part IIA.

21. *See BCI Coca-Cola Bottling Co.*, 450 F.3d at 484 (citing FABLES OF LA FONTAINE 344 (Walter Thornbury trans., Chartwell Books 1984)).

22. *See id.*

23. *See* Robert B. Fitzpatrick, *Emerging Employment Law Issues*, SN012 A.L.I.-A.B.A. 1915, 1987–89 (2007). The circuits are not unanimous in the use of the cat's paw symbolism. Some circuits speak of rubber-stamping while others merely speak of employers' liability for subordinate bias. Nevertheless, the cat's paw analogy is fairly common.

24. See section II *infra* for a more detailed discussion of the Circuit split.

25. *See BCI Coca-Cola Bottling Co.*, 450 F.3d 476, *cert. granted*, 127 S. Ct. 852 (2007), *and cert. dismissed*, 127 S. Ct. 1931 (2007).

This Comment proposes that courts should not allow an independent investigation to automatically absolve an employer of potential liability where the plaintiff can produce evidence that his supervisor was biased and that the supervisor had contact with the decisionmaker at any point prior to the adverse employment action. Thus, where a plaintiff can establish that the supervisor was biased and that the supervisor had connections to the decisionmaker, an employer who asserts the independent investigation defense to liability should never win a motion for summary judgment. The independence of the investigation should be a question of fact for a jury to decide.

Part I of this Comment examines the current state of cat's paw liability in the various circuits and the role that independent investigations play in the courts' analyses. One will see that disagreements abound not only as to the standard for imputing liability, but also as to the proper role of a jury in determining whether an investigation is sufficiently independent to absolve an employer of liability. Part II argues in favor of a standard that makes the independence of an investigation a question of fact.

I. THE CURRENT STATE OF CAT'S PAW LIABILITY IN THE CIRCUIT COURTS

This section summarizes the current state of cat's paw liability in the various circuit courts of appeals. Part A addresses the basic threshold tests adopted by the circuits for determining liability in cat's paw cases. These tests vary as to the degree of influence that a biased supervisor must have over the decisionmaker in order to impute the supervisor's bias to the employer. In other words, the tests determine the necessary causal connection between the biased supervisor and the ultimate adverse employment decision. Part B discusses the role of independent investigations in the causal analysis. Specifically, Part B explores the split between circuits over the appropriate role of the court in determining what kind of independent investigation is necessary to break the causal chain and absolve an employer of liability. In many ways, the two analyses overlap. The determination of causation is influenced by the degree to which there is an independent investigation. One could rationally decide to discuss the two issues in tandem; certainly it is necessary to discuss both. Nevertheless,

because this Comment focuses on the independent investigation analysis, it is analytically important to separate the two.

A. Standards of Liability—the Circuit Split

The United States Circuit Courts of Appeals vary in their determination of the threshold level at which liability may be attributed to an employer for the actions of a biased supervisor. It is possible to separate the circuits into three different categories: those that see a subordinate's influence on a decisionmaker as relevant, those that look to the extent to which the subordinate was actually involved in the decisionmaking process, and those that impute liability only where the decisionmaker is seen as the conduit for the subordinate's prejudice.[26] One might also choose to place the circuit courts on a sort of continuum ranging from the most lenient and pro-plaintiff to the most rigid and pro-employer.[27] This Comment uses a hybrid of the two approaches and divides the circuits into three categories along a continuum—the most lenient, the most restrictive, and the centrist position. The subtleties of the various circuits' opinions on cat's paw liability often make it difficult to definitively place them within one category or another; therefore, these categories are admittedly somewhat arbitrary. Nevertheless, a grouping of the various circuits is appropriate if for no other reason than to show that they significantly vary in their approach to cat's paw cases.

1. The Case for Leniency

The question of whether an employer can be held liable for a biased supervisor who does not have ultimate decisionmaking authority is answered leniently by the First, Fifth, and D.C. Circuit Courts of Appeals.

The First Circuit considers whether a supervisor was "able to influence the decision."[28] *Cariglia v. Hertz Equipment*

26. *See* Ali Razzaghi, Comment, *Hill v. Lockheed Martin Logistics Management, Inc.: "Substantially Influencing" the Fourth Circuit to Change Its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker*, 73 U. CIN. L. REV. 1709, 1715–22 (2005).

27. Positioning itself in the middle, this is the approach taken by the Tenth Circuit in *BCI Coca Cola Bottling Co.* 450 F.3d at 486–87.

28. Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 87 (1st Cir. 2004) (quoting Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997)).

Rental Corp. is an example of the court's analysis.[29] John Cariglia, a veteran employee of Hertz, was fired after his supervisor, James Heard, allegedly provided misleading and incomplete information about Cariglia's performance to company executives.[30] Cariglia brought an age discrimination claim against Hertz based on comments made by Heard and a claim of tortious interference against Heard himself.[31] Both claims failed in the district court despite a finding that Heard acted on age-based animus.[32] The district court reasoned that Hertz could not be liable because the executives who ultimately made the decision to fire Cariglia did not harbor discriminatory animus, nor could it be shown that they were "infected" with Heard's bias.[33] The First Circuit vacated the decision, finding that the district court erred in focusing on whether discriminatory animus had infected the executives themselves, as opposed to whether discriminatory animus infected the overall process.[34] So long as Heard did in fact mislead the executives with false or incomplete evidence, the "grounds for termination would be impermissibly tainted with Heard's animus."[35]

The Fifth Circuit established a similarly lenient standard that requires a plaintiff to prove that the biased employee had "influence or leverage over the official decisionmaker."[36] Provided that a plaintiff can produce enough evidence for the factfinder to infer a causal connection between the biased employee's actions and the ultimate decision, summary judgment is not warranted.[37] The necessary amount of evidence is often set at a very low threshold.[38] For example, in *Gee v. Principi*, summary judgment was reversed where Gee, an employee of the Department of Veteran Affairs, presented evidence that two of her supervisors made derogatory comments while in the presence of the ultimate decisionmaker, who chose not to select Gee for a new job opening within the Department.[39] Both of the supervisors were aware of a prior sexual harassment

29. *See id.*
30. *Id.* at 79–82.
31. *Id.* at 79.
32. *Id.* at 86.
33. *Id.* at 84–85.
34. *Id.* at 85.
35. *Id.* at 87.
36. *See, e.g.*, Gee v. Principi, 289 F.3d 342, 346 (5th Cir. 2002) (quotations omitted).
37. *See id.* at 347.
38. *See id.* at 346–47.
39. *See id.*

charge levied by Gee two years previously, and one of the supervisors had actually been the subject of that charge.[40] Thus, since their comments could be seen as having allowed retaliatory intent to improperly influence the decisionmaker, summary judgment was not appropriate.[41]

The D.C. Circuit also focuses on the ability of a supervisor to "influence" the decisionmaker.[42] In *Griffin v. Washington Convention Center*, Juanita Griffin, a female electrician, brought a Title VII sex discrimination claim against her employer after she was fired for failing a skills test.[43] The main evaluator of Ms. Griffin's skills was her supervisor, Cleo Doyle, who allegedly expressed the belief that women should be home "barefoot and pregnant" rather than working as electricians.[44] Doyle also recommended that Griffin be terminated.[45] Griffin based her claims on Doyle's bias, even though the director of operations, Reba Evans, ultimately decided to fire Griffin.[46] In reversing the lower court's decision to exclude mention of Doyle's bias as irrelevant, the D.C. Circuit stated that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."[47] In this instance, Ms. Evans relied on Doyle throughout the decisionmaking process; therefore, evidence of Doyle's bias was improperly excluded at trial.[48]

Critics of the more lenient standards mentioned above argue that they "improperly eliminate a requirement of causation."[49] Yet, it is also possible to go too far in the other direction by making a plaintiff show that the biased supervisor was, for all intents and purposes, the actual decisionmaker.[50] This view is explored in the following section.

---

40. *See id.* at 344.
41. *See id.* at 347.
42. *See* Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998).
43. *See id.* at 1310.
44. *Id.*
45. *See id.*
46. *See id.*
47. *Id.* at 1312.
48. *See id.*
49. EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 486–87 (10th Cir. 2006).
50. *See id.* at 487.

2. The Harsh Anomaly of the Fourth Circuit

The Fourth Circuit in *Hill v. Lockheed Martin Logistics Management, Inc.*[51] lays out the most difficult test for an employee trying to win a discrimination case based upon cat's paw liability. In *Hill*, the plaintiff was a fifty-seven-year-old female aircraft mechanic who had a ten-year history with Lockheed.[52] Over the course of eight months, she received three written reprimands that, under Lockheed policies, subjected her to discharge.[53] Lockheed fired Hill, and Hill subsequently brought Title VII, ADEA, and retaliation claims against Lockheed.[54] In pursuing these claims, Hill chose not to contest the reprimands themselves, but instead based Lockheed's liability on the actions of Ed Fultz, the safety inspector who reported Hill's violations and who allegedly referred to Hill as a "damn woman" and a "useless old lady."[55] In a seven-to-four en banc decision, the court held that summary judgment for Lockheed was appropriate because

> a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision [can not] become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.[56]

In other words, a plaintiff in the Fourth Circuit will not prevail unless he can show that the biased subordinate "possesse[s] such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer."[57]

Critics of the *Hill* decision point out that the Fourth Circuit failed to follow precedent,[58] mischaracterized or misinter-

---

51. 354 F.3d 277 (4th Cir. 2004).
52. *Id.* at 282.
53. *Id.*
54. *Id.*
55. *Id.* at 283.
56. *Id.* at 291. In this case, the fact that Ed Fultz did not have supervisory authority over Hill should not diminish the court's application of the same test to biased supervisors who lack decisionmaking authority. In *Hill*, the court makes clear that it is applying a cat's paw standard and even goes as far as to criticize other circuit courts' cat's paw jurisprudence. *See id.* at 289–90.
57. *Id.* at 291.
58. *See* Razzaghi, *supra* note 26, at 1727–31.

preted other courts' cat's paw standards,[59] and created a standard that "undermines the deterrent effect of subordinate bias claims."[60] Thus, it should come as no surprise that the Fourth Circuit stands alone in its insistence on an overbearing and employer-friendly standard.

3. Finding a Middle Ground

Somewhere between the harsh standard of the Fourth Circuit and the lenient standards of the First, Fifth, and D.C. Circuits are the standards of the majority of other circuits. In these circuits, a plaintiff need not show that the biased subordinate was, for all intents and purposes, the actual decisionmaker. On the other hand, a plaintiff cannot rely on a biased supervisor's potential to influence, in and of itself, as a basis for imputing liability. Rather, a plaintiff must show that the biased supervisor actually caused the adverse action by taking some part in the decisionmaking process.

The classic middle-ground analysis can be found the in the seminal case of *Shager v. Upjohn Co.*[61] *Shager* was the first case to use the "cat's paw" analogy[62] and the first to hold an unknowing and innocent decisionmaker liable for deferring to the recommendations of a biased supervisor.[63] Consequently, it has served as a guidepost for other circuits' analyses of cat's paw cases ever since.[64]

Shager was a fifty-year-old seed salesman who was set up to fail by his younger supervisor Lehnst.[65] Lehnst gave Shager a disproportionately difficult sales goal compared to Shager's

59. *See* EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 487 (10th Cir. 2006) (rejecting the Fourth Circuit's interpretation of Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151–52 (2000)); Razzaghi, *supra* note 26, at 1727–31 (discussing the Fourth Circuit's mischaracterization of Seventh Circuit case law).

60. *BCI Coca Cola Bottling Co.*, 450 F.3d at 487.

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

62. *See supra* note 19 and accompanying text.

63. *See Shager*, 913 F.2d at 405.

64. References to *Shager* are ubiquitous within the cat's paw literature. Circuits on both ends of the spectrum cite to *Shager* as support for their rulings. *Compare* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 290 (4th Cir. 2004) (noting the "limited" holding of *Shager* in support of its own more restrictive view of cat's paw liability) *with* Gee v. Principi, 289 F.3d 342, 346 (5th Cir. 2002) (coupling *Shager*'s cat's paw rationale with its own determination that mere influence over the decisionmaker is enough to impute liability).

65. *Shager*, 913 F.2d at 400, 405.

younger counterparts.[66] Yet, Shager managed to exceed the sales goals.[67] Lehnst nevertheless gave him a marginal evaluation and placed him on probation based on other alleged deficiencies.[68] Ultimately, Lehnst recommended to a "Career Path Committee" that Shager be fired.[69] The committee, without any serious deliberation, obliged.[70]

In analyzing the case, Judge Posner noted the difficulties of faulting a seemingly innocent committee for the recommendations of a biased supervisor.[71] For one, he noted that the ADEA, despite listing "agents" within the definition of "employer," is "silent on the issue of derivative liability."[72] Moreover, under sexual harassment precedents, a company could be held liable for a coworker's actions only if it knew or had reason to know of the harassment and failed to take corrective action.[73] By contrast, the conduct of a supervisor acting as an agent of the employer could subject the employer to liability.[74] Thus, if Lehnst had fired Shager directly, there would be no question as to liability because he would have been acting within the scope of his duties as a supervisor.[75] But Lehnst did not fire Shager directly; the Career Path Committee did.[76] If the Committee chose to do so based on reasons "untainted by any prejudice," there could be no liability because the "causal link between the prejudice and Shager's discharge [would be] severed."[77] However, because Lehnst was acting within the scope of his duties when he recommended Shager's termination, and because his recommendation decisively influenced the committee's decision, Lehnst's prejudice against older workers could be imputed to the company.[78] The committee had served, after all, as "the conduit of Lehnst's prejudice—his cat's paw."[79]

---

66. *Id.* at 400.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 405.
71. *Id.* at 404–05.
72. *Id.* at 404.
73. *Id.* Sexual harassment case law has since been updated and revised. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). Nevertheless, for coworker harassment, the minimal standard for employer liability is still negligence. *See Ellerth*, 524 U.S. at 759.
74. *Shager*, 913 F.2d at 405.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

Any other conclusion would allow such committees to serve as liability shields, even though the reality is that they are "apt to defer to the judgment of the man on the spot."[80]

More recent Seventh Circuit decisions confirm the court's position within the centrist camp. For example, in *Brewer v. Board of Trustees of the University of Illinois*, the court held that "it is not enough just to have some minimal amount of influence" over a decisionmaker.[81] Similarly, in *Lust v. Sealy, Inc.,* the Seventh Circuit expressly rejected the *Hill* standard, emphasizing that a causal link will suffice to impute liability.[82]

Another good example of the centrist analysis can be found in *Poland v. Chertoff*.[83] This case reached the Ninth Circuit on appeal after the lower court entered judgment in favor of the plaintiff on his ADEA retaliation and constructive discharge claims.[84] The claims arose when the U.S. Customs Service involuntarily transferred the plaintiff from his existing position in Portland, Oregon to a similar position in Vienna, Virginia after the plaintiff complained of age discrimination.[85] Defendants argued that, although an admittedly prejudiced supervisor initiated the inquiry into the plaintiff's performance, the Customs Service decided to transfer the plaintiff through an independent process.[86] In its review, the Ninth Circuit proposed three possible rules for governing when an employer will be liable for the actions of a biased non-decisionmaker: straight "but for causation," a *Hill* test whereby the biased employee dominates the investigatory process to such an extent that he is the decisionmaker, and a middle ground test.[87] Ultimately the court chose the middle ground test, holding that the correct measure for liability is whether the supposed independent process lacked independence because of the biased individual's influence or participation.[88] The mere initiation by a biased subordinate of an investigation, the court said, would not be enough to compromise the independence of the investigation.[89]

---

80. *Id.*
81. Brewer v. Bd. of Trs. of the Univ. of Ill., 479 F.3d 908, 917 (7th Cir. 2007).
82. *See* Lust v. Sealy, Inc., 383 F.3d 580, 584–85 (7th Cir. 2004).
83. 494 F.3d 1174, 1182 (9th Cir. 2007).
84. *See id.* at 1179.
85. *See id.*
86. *See id.* at 1181.
87. *See id.* at 1181–83.
88. *Id.* at 1182.
89. *See id.* at 1183. The court's seamless discussion of liability and the independence of the investigation is a classic example of how courts frequently treat the question of liability as a single question rather than parsing out the inde-

However, where the biased subordinate frames the investigation and provides various paperwork and input into which witnesses should be contacted, the independence of the investigation may be called into question.[90]

A third excellent example of a circuit court that expressly creates a more centrist test is the Tenth Circuit. Its decision in *EEOC v. BCI Coca-Cola Bottling Co.*[91] almost became the test case for the proper standard for cat's paw liability. The United States Supreme Court granted certiorari to review the case, but ultimately dismissed it because the parties settled.[92] In *BCI*, a black employee, Stephen Peters, was fired after his supervisor, Cesar Grado, allegedly made various misleading and incomplete statements about Mr. Peters, leading to his termination.[93] Evidence presented by Peters suggested that Grado was racially biased.[94] Yet, the decision to terminate Peters was made by Pat Edgar, a Human Resources supervisor in another state who did not even know that Peters was black.[95] The court held that the proper method for analyzing cat's paw cases was to emphasize agency principles by requiring a causal connection between the actions of the biased supervisor and the adverse employment action.[96] In reaching this conclusion, the court explicitly rejected a more lenient approach that would allow liability to accrue based on a "mere 'influence' or 'input' in the decisionmaking process."[97] Such a lenient approach, the court said, would "improperly eliminate[ ] a requirement of causation."[98] On the other hand, the court also rejected the Fourth Circuit's standard in *Hill* as out of step with proper agency principles and detrimental to "the deterrent effect of subordinate bias claims."[99]

The other circuits that use a more centrist test for determining cat's paw liability include the Second,[100] Third,[101]

---

pendent investigation analysis.

90. *See id.* at 1183–84.

91. 450 F.3d 476 (10th Cir. 2006).

92. *See supra* note 25 and accompanying text.

93. *BCI*, 450 F.3d at 478–81.

94. *See id.* at 489–90.

95. *See id.* at 478.

96. *See id.* at 487–88.

97. *Id.* at 487.

98. *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998) for the proposition that Title VII requires a causal connection).

99. *Id.*

100. *See* Rose v. New York City Bd. of Educ., 257 F.3d 156, 162 (2d Cir. 2001) (holding that because of the superintendent's role in the decisionmaking process

Sixth,[102] Eighth,[103] and Eleventh Circuits.[104] All require more than mere influence to establish liability for a biased supervisor.[105] Yet, none requires the biased supervisor to be the actual decisionmaker.[106] Instead, they look at whether the biased supervisor played a role in the decisionmaking process[107] or whether there was a "causal connection" between the actions of a biased supervisor and an adverse employment action.[108]

B. The Independent Investigation Defense

The above discussion of liability standards provides only a partial picture of the extent to which an employee may prevail in a cat's paw liability case. To complete the picture, one must examine the various courts' views regarding the role of independent investigations in absolving an employer of liability. Here, the courts are generally in agreement: a truly independent investigation that results in a finding that the plaintiff employee was in fact engaged in some type of inappropriate activity will absolve the employer from liability where a cat's paw

---

to demote a principal, and because of his "enormous influence" on the Board of Education, the superintendent's age-based animus could be imputed to the District).

101. *See* Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001) (holding that summary judgment for the college was inappropriate where a tenure track professor, Abramson, provided evidence that her department chair and the dean, who arguably harbored religious animosity toward Abramson, "played a role in the ultimate decision to terminate [her]").

102. *See* Noble v. Brinker Int'l., Inc., 391 F.3d 715, 723 (6th Cir. 2004) (holding that a causal nexus was missing where the plaintiff lacked evidence that the decisionmaker relied on input from a biased employee); Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 878 (6th Cir. 2001) (holding that judgment as a matter of law for Wal-Mart was inappropriate where the African-American plaintiff, a customer at a Wal-Mart store, was able to show that a store manager relied solely on a racially biased employee's allegations of shoplifting in his decision to have police remove the plaintiff from the store).

103. *See* EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 924 (8th Cir. 2002) (criticizing the lower court for placing too much influence on the fact that the allegedly ageist superintendent was not the ultimate decisionmaker, especially given that the superintendent was "closely involved" in the decision to terminate a seventy-year-old bus driver).

104. *See* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1247–49 (11th Cir. 1998) (holding that an aggrieved employee could not prevail in a Title VII discrimination case where the employee "failed to establish a causal link" between the discriminatory animus of her supervisor and the ultimate decision to terminate her).

105. *See supra* notes 100–104.

106. *See supra* notes 100–104.

107. *See supra* notes 100, 101, 103.

108. *See supra* notes 102, 104.

theory is pursued.[109] Even in a lenient jurisdiction such as the First Circuit, which requires only a showing of potential "influence," an employer may still avoid liability if it conducts an independent investigation.[110]

Despite a general agreement that an independent investigation will break the causal chain between a biased supervisor and the ultimate decision maker, the circuits split over the requisite extent of the investigation and the degree to which a judge should defer to a jury in determining whether the investigation was truly independent. The following two subsections explore this split. For the sake of simplicity, circuits are cast in two categories, those that are more judge-centered, and those that defer to the jury.

1. Judge-Centered Circuits

The judge-centered circuits are those that have either implied or directly held that the investigating employer may avoid liability by simply allowing the affected employee to respond to allegations against him or to tell his side of the story.

The First Circuit in *Cariglia v. Hertz Equipment Rental Corp.*, for example, wrote that its decision to remand the case for further determinations may have been different if the plaintiff "had been afforded a meaningful chance to address the allegations against him."[111] The Tenth Circuit in *BCI* similarly implied that if the ultimate decisionmaker had sought the plaintiff's version of the dispute rather than relying solely upon the input of the biased supervisor, then summary judgment for BCI would have been appropriate.[112] However, because the decisionmaker failed to even converse with the plaintiff before terminating him, the question of whether a sufficient causal connection existed to impute liability was a matter for a jury to

109. *See, e.g.*, Poland v. Chertoff, 494 F.3d 1174, 1183 (9th Cir. 2007); EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 486 (10th Cir. 2006); Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 87 n.4 (1st Cir. 2004); Collins v. New York City Transit Auth., 305 F.3d 113, 119 (2d Cir. 2002); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1250 (11th Cir. 1998); Willis v. Marion County Auditor's Office, 118 F.3d 542, 547 (7th Cir. 1997); Long v. Eastfield Coll., 88 F.3d 300, 307 (5th Cir. 1996).

110. *See Cariglia*, 363 F.3d at 87 n.4 (insinuating that had the plaintiff been provided an opportunity to explain his position and rebut the allegations against him the court may have come out differently in its denial of summary judgment).

111. *Id.*

112. *See BCI*, 450 F.3d at 491–93.

decide.[113] The Eleventh Circuit has taken an identical view, holding in *Llampallas v. Mini-Circuits, Lab, Inc.*, that liability should not accrue "[w]hen the employer makes an effort to determine the employee's side of the story."[114]

In a similar vein, at least two circuits, the Fourth and Seventh, have held that a plaintiff who fails to raise issues of bias when given the opportunity is barred from asserting that the investigation into his conduct was improperly tainted. In *Hill v. Lockheed Martin Logistics Management, Inc.*, the plaintiff, Ms. Hill, was confronted with negative evaluations created by her biased supervisor.[115] She failed to dispute any of the information.[116] The Fourth Circuit regarded this as an utter failure on her part, holding that "it was incumbent upon her to dispute any basis for the reprimand at that time if she intended to complain later."[117]

The failure of the plaintiff to raise issues as to the potential withholding of relevant information was also a deciding factor in *Brewer v. Board of Trustees of the University of Illinois*.[118] There, the Seventh Circuit held that the decisionmaker had "no reason to suspect that there were additional relevant facts that she had not investigated" because the plaintiff failed to point out omissions of important facts when given the opportunity to do so.[119] The investigation, therefore, was sufficiently independent and "absolved the University of liability."[120]

2. Deference to the Jury

In contrast to the five circuits mentioned above, at least two circuits, the Fifth and Eighth, see the independence of an investigation as a question of fact best left to a jury.

The Fifth Circuit is the leader in this regard. Its opinion in *Long v. Eastfield College*[121] is often cited for the proposition that the independence of an investigation is a question of

113. *See id.*
114. *Llampallas*, 163 F.3d at 1250.
115. *See* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 293 (4th Cir. 2004).
116. *See id.*
117. *Id.* at 294.
118. *See* Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 919 (7th Cir. 2007).
119. *Id.*
120. *Id.*
121. Long v. Eastfield Coll., 88 F.3d 300 (5th Cir. 1996).

fact.[122] *Long* was a case brought by Fayette Long and Jeanell Reavis, two employees of Eastfield College who at an earlier time in their employment with Eastfield made complaints about the discriminatory conduct of their supervisors.[123] Subsequently, these same supervisors recommended the plaintiffs' dismissals.[124] The supposed basis for the supervisors' recommendations was an incident in which Reavis lied about a lost key and enlisted the help of Long to replace the key.[125] The ultimate decisionmaker with regard to the terminations was the college president, Dr. Robert Aguero.[126] Aguero terminated Long and Reavis, but only after taking written reports from all the parties involved.[127] Long and Reaves brought discrimination and retaliation claims against Eastfield College only to have them dismissed on summary judgment.[128]

In conducting its de novo review of the grant of summary judgment, the Fifth Circuit analyzed whether Dr. Aguero's actions sufficiently "severed the causal link between the allegedly retaliatory recommendations . . . and the final terminations of Long and Reavis."[129] In an oft-cited passage, the Court held that "[t]he degree to which Aguero's decisions were based on his own independent investigation is a question of fact which has yet to be resolved at the district court level."[130] When seen in the light most favorable to Long and Reavis, the evidence was sufficient to prove the causal connection.[131]

The Fifth Circuit reiterated its ruling from *Long* in *Gee v. Principi.*[132] In *Gee*, the court held that even though the ultimate decisionmaker conducted an investigation after the alleged improper influence by meeting with the plaintiff and other persons, the investigation was not dispositive.[133] Rather,

122. *See, e.g.*, Gee v. Principi, 289 F.3d 342, 346 (5th Cir. 2002); Haas v. ADVO Sys., Inc., 168 F.3d 732, 734 n.1 (5th Cir. 1999); Kitchen v. WSCO Petroleum Corp., 481 F.Supp.2d 1136, 1147 (D. Or. 2007); Harlow v. Potter, 353 F. Supp. 2d 109,117 (D. Me. 2005); Jackson v. Mid-Am. Apartment Cmty., 325 F. Supp. 2d 1297, 1302 (M.D. Ala. 2004); Sadki v. Suny Coll. at Brockport, 310 F. Supp. 2d 506, 515 (W.D.N.Y 2004).

123. *Long,* 88 F.3d at 303–04.

124. *Id.* at 304.

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

129. *Id.* at 306.

130. *Id.* at 307.

131. *See id.*

132. *See* Gee v. Principi, 289 F.3d 342, 346–47 (5th Cir. 2002).

133. *See id.* at 347.

the crux of the issue was whether "the ultimate decisionmaker was influenced by others who had retaliatory motives."[134] If such influence occurred, "then [the decisionmaker's] investigation cannot in any real sense be considered *independent*."[135]

The Eighth Circuit takes a similar position. In *Kramer v. Logan County School District No. R-1*, a high school science teacher brought a Title VII gender discrimination claim against the school district after her contract was not renewed for a succeeding school year.[136] The teacher, Deborah Kramer, presented evidence at trial that her principal, Mike Apple, and the superintendent, John Broadbent, who recommended her termination, both made "off-color and/or inappropriate remarks."[137] She also presented witness testimony that principal Apple disciplined female teachers more severely than their male counterparts.[138] Finally, Kramer provided evidence that at her pre-termination hearing before the school board, both Apple and Broadbent made "material misrepresentations and omissions to the school board in presenting their recommendation that her teaching contract not be renewed."[139] A jury returned a verdict in favor of Kramer.[140] The school district appealed, based in part on an argument that the school board had conducted an independent investigation when they provided Kramer a pre-termination hearing.[141] The Eighth Circuit, conducting a de novo review, refused to overturn the lower court despite the fact that Kramer appeared to have received a fair dismissal hearing.[142] Given the circumstances, the court decided that the question of whether the school board rubber stamped the recommendation for non-renewal was "appropriately presented to the jury."[143]

---

134. *Id.* at 346 n.2.
135. *Id.*
136. *See* Kramer v. Logan County Sch. Dist. No. R-1, 157 F.3d 620, 622 (8th Cir. 1998).
137. *Id.*
138. *See id.*
139. *Id.*
140. *See id.* at 623.
141. *See id.* at 624.
142. *Id.* (noting that Kramer was represented by counsel at the hearing, called favorable witnesses, and cross-examined school district witnesses).
143. *Id.* at 624.

II. THE NEED TO LIMIT THE POWER OF THE INDEPENDENT INVESTIGATION

As noted in the previous section, a majority of Circuit Courts find that an independent investigation will absolve the employer of any liability for the actions or influence of a biased supervisor.[144] A significant subsection of these further hold (or imply) that the opportunity for a plaintiff to respond to allegations of wrongdoing and to present his side of the story will constitute an independent investigation.[145] This portion of the Comment contests the view that mere opportunity to present one's side of the story is enough for a court to negate liability as a matter of law. Rather, the appropriate position is the one taken by the Fifth and Eighth Circuits, which hold that the independence of an investigation is a question of fact. Because the independence of an investigation is best seen as a question of fact, summary judgment is inappropriate in any case where a plaintiff can present evidence of a biased supervisor's contact with the ultimate decisionmaker.

There are three overarching reasons to adopt a more lenient, plaintiff-friendly independent investigation rule. First, discrimination and retaliation claims are often determined by circumstantial evidence, the import of which is best left to the judgment of a jury. Second, a more lenient rule accords with the general intents and purposes of antidiscrimination statutes. Finally, a rule that would preclude summary judgment in cases where an employee can show that a biased supervisor had some form of contact with the ultimate supervisor acknowledges the subtle ways in which bias can creep into a decisionmaking process. These three reasons are explored in turn in subsections A, B, and C. Section D will address some of the potential criticisms of a question-of-fact approach.

A. The Independent Investigation Defense: A Question of Fact

By setting a minimum standard that permits a judge to declare an investigation independent, certain circuits have made it too easy for district court judges to dismiss a case on

144. *See supra* note 109.
145. *See supra* Part II.B.1.

summary judgment.[146] That the independence of an investigation is a question of fact seems self-evident. So long as the plaintiff is able to provide some evidence of a supervisor's bias and some evidence that the supervisor had contact with the ultimate decisionmaker, a juror could feasibly conclude, under almost any cat's paw standard of liability, that the biased supervisor improperly influenced or caused the outcome.[147] The question therefore should become one of how much weight to give to the testifying witnesses, not whether the case should be dismissed on a motion for summary judgment.[148]

Nevertheless, many circuits are more than willing to take the decision out of the hands of a jury and to place it within the hands of a judge so long as the plaintiff has been given an opportunity to respond to the allegations.[149] Such a rule makes it far too easy for judges to dispose of cases they themselves disfavor.[150]

Albo v. Durango School District No. 9-R provides a recent illustration of the inherent flaws associated with a judge-based

146. *See supra* Part II.B.1.

147. *Gee v. Principi*, 289 F.3d 342 (5th Cir. 2002), discussed *supra* notes 132–35 and accompanying text, and *Kramer*, 157 F.3d 620, discussed *supra* notes 136–143 and accompanying text, are two examples where circuits with different cat's paw standards for imputing liability nevertheless found that a jury could have reasonably found an employer liable for the improper actions of a non-decisionmaking biased supervisor. Only under the standard laid out by the Fourth Circuit in *Hill v. Lockheed Martin Logistics Management Inc.*, 354 F.3d 277 (4th Cir. 2004), discussed *supra* Part II.A.2., would such a connection be impermissible.

148. *See, e.g.*, *Kramer*, 157 F.3d at 624 (refusing to find that a school district's conducting of a pre-termination interview would entitle the district to judgment as a matter of law).

149. *See supra* Part II.B.1.

150. A number of authors have attempted through empirical means to show that judges frequently rule according to their political preferences. *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (Cambridge 2002); CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (Brookings 2006); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004). Within the employment context, Professor Catherine Lanctot, while writing about the need for clearly defined standards in pretext cases, has also noted the propensity of courts to exploit loopholes in Supreme Court pretext jurisprudence as a way to "dismiss what they consider to be unmeritorious discrimination suits." Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546 (2001). As shown by the case of *Albo v. Durango School District No. 9-R*, discussed *infra* notes 151–169 and accompanying text, that same propensity for dismissing cases can be found in jurisdictions using the judge-centered approach to determining the independence of investigations.

standard.[151] In *Albo*, four custodians brought Title VII discrimination claims against their employer, the Durango School District.[152] According to the plaintiffs, their supervisor, Thomas Dickson, was a racist who repeatedly complained about the "lazy Mexicans" who worked for the district.[153] Three witnesses, separate from the plaintiffs, testified to Dickson making racist remarks.[154] The plaintiffs also alleged that they reported Dickson's bias to district administrators who "failed to investigate Dickson's racist comments."[155] When a coworker passed out on the job, all four plaintiffs and the other janitor at the building were suspended pending an investigation.[156] Supervisor Dickson took part in making this decision.[157] The school district then hired a private investigator to determine whether the coworker passed out due to a misuse of undiluted chemical cleaners.[158] However, the scope of the investigation went beyond the misuse of cleaning products and included an investigation into "harassment[ ] and misuse of tobacco on school grounds."[159] In fact, even when it was determined that the employee who passed out suffered from vertigo and did not have any unusual chemicals in his bloodstream, the investigation continued.[160] The continuing investigation was guided in part by a set of questions that the district's Human Resources Director, Susan Terrill-Flint, provided to the investigator.[161] Throughout the investigation, "Dickson had frequent contact with Susan Terrill-Flint."[162] Ultimately the investigator determined the plaintiffs had used undiluted chemicals, had smoked at work, and "had helped to create a hostile work environment."[163] Based on these findings, the district terminated

151. *See* Albo v. Durango Sch. Dist. No 9-R, No. 05-CV-02044-REB-MEH, 2007 WL 2684533 (D. Colo. Sept. 7, 2007) (granting defendant's motion for summary judgment).

152. *Id.* at *2.

153. *Id.* at *4.

154. *Id.*

155. *Id.*

156. *See id.* at *1.

157. *See id.* at *4.

158. *See id.*

159. *Id.*

160. *See* Plaintiffs' Response to the Defendant's Brief in Support of Motion for Summary Judgment at 7, Albo v. Durango Sch. Dist. No. 9-R, No. 05-CV-02044-REB-MEH, 2007 WL 2684533 (D. Colo. Sept. 7, 2007) (No. 05-CV-2044-REB-OES), 2006 WL 4062292.

161. *See Albo*, 2007 WL 2684533, at *4.

162. *Id.*

163. *Id.* at *2.

the plaintiffs.[164] Dickson was "involved in the decision to initiate the termination process," and he was present when the ultimate decision to terminate was made, but he supposedly said nothing.[165]

In his summary judgment determination in favor of the school district, Judge Blackburn found that despite all of the circumstantial evidence cited above, "no reasonable fact finder could conclude that [the] investigation was not independent or that it was influenced by discriminatory motives."[166] Moreover, he concluded that "no reasonable juror could conclude that Dickson's allegedly discriminatory comments or recommendation caused the plaintiff's terminations."[167]

The case should not have turned out as it did. When the facts are viewed in the light most favorable to the plaintiffs, a reasonable juror could easily find that Dickson's racism was a causal factor in the ultimate terminations of the four janitors. After all, Dickson initiated the suspension, continued to remain in contact with a key decisionmaker throughout the investigation, conferred on the initiation of dismissal proceedings, and attended the termination meeting.[168] Moreover, the scope of the investigation went far beyond the incident that precipitated it.[169] In the average juror's eyes this case might look like a witch hunt instigated and promulgated by a racist and his not-so-unwitting accomplices. However, because the plaintiffs had a chance to defend themselves, and because the Tenth Circuit case law establishes that the causal link is broken when an employer conducts an independent investigation in which he takes care "not to rely exclusively on the say-so of the biased subordinate," Judge Blackburn was well within the boundaries of the law when he issued his decision.[170]

Under a more flexible rule for judging the independence of an employer's investigation into employee misconduct, the facts of *Albo* would not have resulted in summary judgment on independent investigation grounds. Given that "direct evidence of discriminatory intent is rare and such intent often must be in-

164. *See id.* at *5.
165. *See id.*
166. *Id.*
167. *Id.*
168. *See id.* at *4–5.
169. *See id.* at *4.
170. *See* EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 487–88 (10th Cir. 2006).

ferred from circumstantial evidence," such caution is certainly warranted.[171]

B. The Intent of Antidiscrimination Statutes

Beyond providing a means of skirting the traditional role of the jury, allowing judges to dismiss discrimination cases on independent investigation grounds is adverse to the intents and purposes of the various antidiscrimination statutes.

Both the ADEA and the ADA articulate specific purposes within the statute. The ADEA seeks "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[172] Congress established the ADA, in part, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[173]

Title VII, on the other hand, does not contain a specific statutory statement of purpose.[174] However, in *Faragher v. City of Boca Raton*, the Supreme Court stated that "[a]lthough Title VII seeks to make persons whole for injuries suffered on account of unlawful employment discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."[175]

Under a rule that absolves employers of liability whenever they provide an employee with the opportunity to respond to allegations against him, discrimination is too easily left unchecked. A biased supervisor need only report some impropriety to the ultimate decisionmaker. The report may be a conscious lie or it may, especially in the case of a less consciously biased supervisor, be the result of heightened scrutiny. The decisionmaker, familiar with the rules of liability, will then call the affected employee in for a conversation. In many circuits, at this point, the company's hands are clean.[176] The decisionmaker has conducted an independent investigation as a matter

171. Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 69 (2d Cir. 2001) (citations omitted).

172. 29 U.S.C. § 621(b) (2000).

173. 42 U.S.C. § 12101(b)(1) (2000).

174. *See* 42 U.S.C. §§ 2000e to e-17 (2000).

175. Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (citations and quotations omitted).

176. *See supra* Part II.B.1.

of law.[177] It does not matter that the employee denies the allegation or provides evidence that the supervisor is biased. If the decisionmaker chooses to believe the supervisor, he can proceed with termination without fear of legal consequence.

Obviously, not all decisionmakers will behave so indifferently in the face of denials and accusations of racism; however, some may. Furthermore, even if a more expansive investigation reveals that the employee did commit some offense, it does not change the fact that the offense may have been discovered because of a biased supervisor's more searching scrutiny. Whereas the biased supervisor may overlook or dismiss the improprieties of a favored employee, assessment may be intense when it comes to the disfavored employee. So long as the supervisor turns up legitimate and confirmable impropriety, the dismissal will be upheld. The biased supervisor goes unchecked, and nothing stops him from using similar tactics against future employees. The company thus continues to lack any incentive to root out the supervisor's bias.

On the other hand, these difficulties would disappear if the independence of an investigation were considered an issue of fact. Employers would have an incentive to conduct a thorough investigation for fear that a future jury might find them liable under a cat's paw theory of liability. The more thorough investigation may, in turn, reveal the supervisor's bias. Future actions of discrimination by the biased supervisor would be thwarted, and the purposes of the statutes would be served.

C. The Subtle Influence of Discriminatory Animus

A third reason for denying summary judgment on independent investigation grounds is that discrimination is often a subtle and unconscious factor. Biased supervisors may be able to imperceptibly cloud an investigation. A recent Harvard Law Review article argues that "[i]n light of psychological research suggesting that a decisionmaker's investigation might tend to recreate the bias of a supervisor's reports," courts should require a "broader investigation into the motives and background of the supervisor."[178] The article cites numerous pieces of so-

177. *See supra* Part II.B.1.

178. *Employment Law—Title VII—Tenth Circuit Clarifies Causation Standard for Subordinate Bias Claims*—EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), Cert. Granted, 127 S. Ct. 852 (2007)*, 120 HARV. L. REV. 1699, 1700 (2007) [hereinafter *Employment Law*].

cial science research that demonstrate the manner in which a decisionmaking process can be skewed from the outset.[179] For example, a decisionmaker is more likely to credit the views and opinions of a supervisor than an individual employee because of the supervisor's relative place in the institutional hierarchy.[180] When the biased supervisor alleges wrongdoing on the part of an employee, he provides the decisionmaker with a "tentative hypothesis" which sets the stage for a theory confirming investigation.[181] Consequently, "[t]he decisionmaker may 'remember the strengths of confirming evidence but [not] the weaknesses of disconfirming evidence . . . [and] accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically.' "[182] The only way to break this influence is if the decisionmaker consciously considers the possibility of bias on the part of the supervisor and proceeds with the investigation accordingly.[183]

Requiring a "broader investigation into the motives and background of the supervisor"[184] would improve the existing state of the law in many circuits. However, such a test is not without problems. For example, how extensive would the investigation have to be? How many people need to be questioned about a supervisor's potential bias? Whose opinions as to the supervisor's bias would count? The problem with the rule is that it continues to allow a question of fact to be treated as a question of law. Under the rule, even a cursory inquiry into potential supervisor bias would allow a judge who is inclined to dismiss a case on summary judgment the power to do so. The better proposition is to bar summary judgment altogether in cases where a plaintiff presents evidence of a supervisor's bias and establishes the supervisor's connection to the investigation. The jury ought to decide whether the investigation was truly independent or whether the biased supervisor had the requisite connection to the decisionmaker to impute liability.

---

179. *See id.* at 1703–05.

180. *See id.* at 1703–04.

181. *Id.* at 1704–05.

182. *Id.* (alteration added) (quoting Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979)).

183. *See id.* at 1705.

184. *Employment Law*, *supra* note 178.

D. Responding to the Critics

Critics of the standard proposed by this Comment will likely cite increased caseloads and the financial burden placed on businesses as reasons for rejecting the standard. Each of these concerns will be explored in turn. Neither, as we shall see, is sufficient to outweigh the arguments of the previous three sections.

1. The Inconsequential Impact on Caseloads

For federal judges, the unfortunate reality is that "since the 1880s, the federal courts have found themselves confronting an expanding and, in the view of many, increasingly unmanageable caseload."[185] Various approaches have been proposed and implemented to deal with the problem. These include

> expanding the number of judgeships[,] . . . altering institutional structure[,] . . . adding support services, auxiliary personnel, and administrative capabilities[, and] . . . compressing the docket through a variety of formal and informal devices that include limiting discovery, encouraging settlements, shifting parties to arbitration or mediation, and granting summary judgment earlier and more readily[.][186]

These methods appear to be working. From 2006 to 2007, the number of cases filed in federal district court held steady at 325,920.[187] In that same period, the number of civil cases filed decreased to 257,507, a number not significantly higher than five years ago in 2003.[188] The number of criminal cases is actually smaller than five years ago.[189] Thus, it appears that much of the concern over increased caseloads, though valid with regard to a long range historical analysis, is substantially less convincing when viewed over the last five years.

---

185. Edward A. Purcell, Jr., *Caseload Burdens and Jurisdictional Limitations: Some Observations from the History of the Federal Courts*, 46 N.Y.L. SCH. L. REV. 7, 11 (2002–2003).

186. *Id.* at 12–13.

187. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 21 (2008), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf.

188. *Id.* at 22, Table 3. The number of civil cases in 2003 was 252,962. *Id.*

189. *Id.* at 26, Table 5.

Even if caseloads were mushrooming out of control, the number of cat's paw cases saved by making the independence of investigations a question of fact rather than a question of law is such a tiny fraction of overall caseloads that the impact would be inconsequential. Only 13,375 (5.2%) of the 257,507 civil cases filed in 2007 were employment cases.[190] Even assuming that a quarter of employment cases fit into the cat's paw category (a very generous estimate), the current impact on caseloads, given that there are 678 authorized federal judgeships,[191] is less than five cases per year per judge. Thus, only a handful of existing cases would be affected by a question-of-fact rule. Of these, it is safe to assume that a majority will settle.[192] Others may lose at summary judgment on separate grounds.[193]

It is also possible, of course, that a question-of-fact rule will cause some plaintiffs' attorneys to take cases they otherwise would not have taken. However, even if the relevant number of cat's paw cases in the system doubles as a result of a more difficult summary judgment standard, the additional impact is only a handful of cases per year per judge. Again, most of these will settle or be disposed of on other grounds.[194] Thus, to claim that the courts will be overburdened by a rule that makes the independence of an investigation a question of fact in a cat's paw case is to drastically overstate the problem. Any additional burden on the courts is far outweighed by the overarching policy concerns enunciated in the above sections.

2. Increasing Costs to Business

A second potential argument against this Comment's thesis and in favor of giving judges the right to dismiss a cat's paw case on independent investigation grounds is that early dis-

190. *Id.* at 148–50, Table C-2A. Unfortunately, it is beyond the scope of this Comment to determine what fraction of employment cases filed in federal court is based on a cat's paw theory, and of these, how many involve a question concerning an independent investigation.

191. *Id.* at 22, Table 3.

192. *See* Jonathan D. Glater, *The Cost of Not Settling a Lawsuit*, N.Y. TIMES, Aug. 8, 2008, at C1.

193. *Cf.* Crawford-El v. Britton, 523 U.S. 574, 593 (1998). For example, the plaintiff may fail to connect his biased supervisor to the ultimate decisionmaker. A plaintiff might also fail to provide any evidence beyond a mere allegation that the supervisor was even biased. In either case, a defendant may be entitled to summary judgment.

194. Glater, *supra* note 192; *see Crawford-El*, 523 U.S. at 593.

missals will prevent potentially innocent employers from having to pay out large sums in continued litigation fees and settlement costs.

The problem with this argument is that it ignores two critical facts. First, the main purpose of employment discrimination law is not to protect employers. Second, the argument ignores the incentives created by a question-of-fact rule. Employers who are faced with the prospect of greater liability for the actions of their supervisors will have an incentive to root out bias within their supervisory ranks. Successful attempts to rid their workplace of bias will in turn protect them from future legal action. More importantly, it will better serve the aims of the antidiscrimination legislation.

CONCLUSION

This Comment began by noting that the average American worker is far from an angel and that, in the hands of a biased supervisor, an employee's random improprieties can serve as ammunition for termination and a pretext for unlawful motivations. Consequently, this Comment asserts that in cat's paw cases the independence of an investigation into the employee's wrongdoing should be a question of fact. As discussed, such a rule has numerous benefits. It recognizes the appropriate role of the jury in our judicial system and guards against judicial bias. The rule also prevents the burdens of discrimination from being thrust upon the backs of the very people who are supposed to be protected by antidiscrimination legislation. It is therefore in accord with the purposes of the antidiscrimination statutes. Finally, the rule proposed by this Comment recognizes the often subtle nature of discrimination in the American workplace. Arguments against a question of fact rule are overstated and pale in comparison to the weight of arguments in favor of such a rule.

In a world where employees are not angels and where both subtle and not-so-subtle biases continue to exist, the jurisprudence in many circuits provides employers with an inequitable out in a cat's paw case. Consequently, in many parts of our country, very real discrimination goes unchecked. Such intolerance should not be tolerated. The time has come for the Supreme Court to step in and rule that judges may no longer grant summary judgment to an employer who merely asks an

employee for his version of the story. Discrimination is too widespread and too complex for such a facile determination. The question of whether a decisionmaker, under a totality of the circumstances, sufficiently severed his connection to a biased supervisor is best left to a jury. Whether an investigation is truly independent should be a question of fact.