

2008

## Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes

Stephen F. Befort  
University of Minnesota Law School, befor001@umn.edu

Alison Olig

Follow this and additional works at: [https://scholarship.law.umn.edu/faculty\\_articles](https://scholarship.law.umn.edu/faculty_articles)



Part of the [Law Commons](#)

---

### Recommended Citation

Stephen F. Befort and Alison Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Anti-Discrimination Statutes*, 60 S.C. L. REV. 383 (2008), available at [https://scholarship.law.umn.edu/faculty\\_articles/448](https://scholarship.law.umn.edu/faculty_articles/448).

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

**WITHIN THE GRASP OF THE CAT’S PAW: DELINEATING THE SCOPE OF  
SUBORDINATE BIAS LIABILITY UNDER FEDERAL ANTIDISCRIMINATION  
STATUTES**

STEPHEN F. BEFORT\*  
ALISON L. OLIG\*\*

I. INTRODUCTION.....	1
II. THE ORIGINS OF SUBORDINATE BIAS LIABILITY.....	5
III. CURRENT CIRCUIT COURT POSITIONS.....	7
A. <i>The Lenient Standard</i> .....	7
B. <i>The Strict Standard</i> .....	10
C. <i>The Intermediate Standards</i> .....	13
IV. THREE CRUCIAL ISSUES.....	15
A. <i>Causation</i> .....	16
1. <i>Proving Causation</i> .....	16
2. <i>Causation in the Context of Subordinate Bias Liability</i> .....	19
B. <i>Agency Principles</i> .....	23
1. <i>Employer Responsibility for the Acts of Its Agents</i> .....	23
2. <i>Agency Principles in the Context of Subordinate Bias Liability</i> ...	25
C. <i>Employer Investigation</i> .....	30
1. <i>Type of Investigation</i> .....	31
2. <i>When an Investigation Should be Required or Expected</i> .....	35
V. CONCLUSION.....	39

I. INTRODUCTION

Federal antidiscrimination statutes generally ban adverse employment actions taken “because of” certain specified traits or characteristics. Under the Civil Rights Act of 1964, Title VII, for example, an employer is prohibited from discriminating “because of” an individual’s “race, color, religion, sex, or national origin.”<sup>1</sup> The Age Discrimination in Employment Act of 1967 (ADEA)

---

\* Gray, Plant, Mooty, Mooty, & Bennett Professor of Law, University of Minnesota Law School.

\*\* J.D. 2008, University of Minnesota Law School; Associate, Best & Flanagan LLP, Minneapolis, Minnesota.

1. 42 U.S.C. § 2000e–2(a) (2000).

uses similar language in banning discrimination “against any individual . . . because of such individual’s age.”<sup>2</sup> And, while the antidiscrimination formula utilized by the Americans with Disabilities Act of 1990 (ADA) is more complicated than either Title VII or the ADEA, it too prohibits discrimination “against a qualified individual on the basis of disability.”<sup>3</sup>

As the Supreme Court has stated, “The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.”<sup>4</sup> The antidiscrimination prohibition contained in each of these three statutes, however, extends only to actions undertaken by an “employer” and “any agents” of an employer.<sup>5</sup> Thus, liability hinges upon the showing of a causal connection between some discriminatory action attributable to a statutory employer and some adverse employment action suffered by an employee.<sup>6</sup>

This connection is most easily established when a sole proprietor discriminates by discharging or otherwise taking some adverse action with respect to a rank-and-file employee. More typically, in a corporate organizational structure, a plaintiff may establish a statutory violation by showing that a supervisor has used his or her delegated authority to alter an employee’s terms and conditions of employment because of the employee’s protected class status.<sup>7</sup> In both contexts, the necessary causal nexus is present because the employer or the agent harboring the discriminatory intent also is the party who effectuates the resulting adverse employment action.

---

2. 29 U.S.C. § 623(a)(1) (2000).

3. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (to be codified as amended at 42 U.S.C. § 12112(a)). The ADA’s antidiscrimination formula is more complicated in two significant respects. First, only individuals who have a qualifying “disability” have standing to assert a claim under the ADA. *See id.* Second, in ascertaining whether an employer is discriminating under the ADA, the statute asks whether the employee is qualified for the job “with or without reasonable accommodation.” 42 U.S.C. § 12111(8) (2000); *see also* Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court’s Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 69–70 (1999).

4. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

5. 29 U.S.C. § 630(b) (ADEA definition of “employer”); 42 U.S.C. § 2000e(b) (Title VII definition of “employer”); 42 U.S.C. § 12111(5)(A) (ADA’s definition of “employer”). Title VII and the ADA define covered employers as entities employing fifteen or more employees. 42 U.S.C. § 2000e(b) (Title VII definition of covered employers); 42 U.S.C. § 12111(5)(A) (ADA definition of covered employers). The ADEA covers employers with twenty or more employees. 29 U.S.C. § 630(b) (ADEA definition of covered employers).

6. *See Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272–73 (2001) (per curiam).

7. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) (“[A] tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer.”); *see also* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 520–22 (2001) (explaining the Supreme Court’s decision in *Ellerth*).

But what if these two attributes, although both present in the workplace, do not coalesce in the same individual? That is the conundrum presented in subordinate bias litigation. The typical scenario presenting the issue of subordinate bias liability consists of a frontline supervisor or other employee who harbors a discriminatory animus toward a protected group or trait. The supervisor does not possess authority to implement adverse employment actions against the target employee, but instead influences those with decision making authority by making unfavorable recommendations or by falsifying records. Someone on a higher rung of the human resources ladder, who does have authority to make concrete decisions about terms and conditions of employment, then relies on the information. In this setting, although the adverse employment action is not made directly by someone acting with a conscious intent to discriminate, the bias of the lower level supervisor taints the decision making process.<sup>8</sup>

Judge Posner, in *Shager v. Upjohn Co.*,<sup>9</sup> coined the term “cat’s paw” liability to refer to employer liability resulting from subordinate bias. The term derives from the fable of the monkey and the cat by Jean de La Fontaine.<sup>10</sup> The fable tells the tale of a conniving monkey that wants to eat chestnuts roasting in a fire.<sup>11</sup> The monkey is unwilling to burn himself to get the chestnuts, and instead convinces a cat to do his bidding.<sup>12</sup> As the cat repeatedly burns its paws retrieving the chestnuts from the fire, the monkey sits back unharmed, devouring the chestnuts.<sup>13</sup> The modern connotation of “cat’s-paw” refers to “one used by another to accomplish his purposes.”<sup>14</sup> In the employment context, the monkey represents the biased subordinate, while the cat represents the employer who acts as the conduit to commit discriminatory adverse actions against the victimized employee.<sup>15</sup>

Since 1990, every federal circuit court of appeals,<sup>16</sup> as well as the Supreme Court,<sup>17</sup> have endorsed the notion that subordinate bias may be a basis for imputing liability to an employer in appropriate circumstances. The problem is

---

8. See *infra* text accompanying notes 23–38.

9. 913 F.2d 398, 405 (7th Cir. 1990).

10. See THE FABLES OF LA FONTAINE (Elizur Wright trans., 1882).

11. See EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476, 484 (10th Cir. 2006) (describing the La Fontaine’s fable), *cert. dismissed*, 127 S. Ct. 1931 (2007).

12. *Id.*

13. *Id.* (citing THE FABLES OF LA FONTAINE, *supra* note 10, at 344).

14. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 354 (2002).

15. BCI, 450 F.3d at 484.

16. See Ali Razzaghi, 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, 1715–23 (2005) (explaining the different holdings of the circuit courts of appeals with respect to subordinate bias liability).

17. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 152–54 (2000).

that no agreement exists as to just what set of circumstances are appropriate for such an outcome. The majority of circuit courts have adopted a relatively lenient standard which imposes liability whenever a biased subordinate influences an adverse action made by an ultimate decisionmaker.<sup>18</sup>

More recently, three circuits have raised the bar for finding subordinate bias liability. The strictest standard, adopted by the Fourth Circuit, limits liability to the situation in which the biased subordinate is the de facto actual or principal decisionmaker.<sup>19</sup> Two other circuits have adopted intermediate approaches that focus more closely on causation and on whether the employer has undertaken an independent investigation into the underlying circumstances.<sup>20</sup> In taking review of one of the decisions espousing an intermediate approach, it appeared for a while that the Supreme Court might provide some answers as to the scope of subordinate bias liability.<sup>21</sup> But, those hopes were dashed in 2007 when the parties settled the underlying action, and the Supreme Court dismissed the appeal.<sup>22</sup>

This Article attempts to fill this gap by suggesting the appropriate contours for determining the reach of subordinate bias liability. Part II reviews the origins of the cat's paw theory in the *Shager* decision and in the Supreme Court's subsequent *Reeves v. Sanderson Plumbing Products, Inc.* decision. Part III lays out the competing standards established by the circuit courts of appeals. Part IV then analyzes three crucial issues that inform the policy bases for subordinate bias liability: (1) What is the appropriate causation standard regarding the impact of the biased subordinate's conduct?; (2) When is the subordinate's discriminatory bias properly attributable to the employer in terms of agency principles?; and (3) What should be the impact of an employer's investigation into the underlying circumstances? Finally, in Part V, rather than endorsing any of the existing standards recognized by the courts of appeals, the Article proposes a new test that draws on the various strengths of the current formulations. Under this test, a plaintiff should be recognized as making out a prima facie case of subordinate bias liability by showing that a supervisor, or other employee with delegated authority, influenced an adverse employment action to the extent that discrimination was a motivating factor in that outcome. Once an employee makes such a showing, an employer should be liable unless it can establish the existence of either of two affirmative defenses. First,

---

18. See *infra* Part III.A.

19. See *infra* Part III.B.

20. See *infra* Part III.C.

21. See *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 127 S. Ct. 852 (2007) (granting certiorari to the United States Supreme Court).

22. See *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 127 S. Ct. 1931 (2007) (dismissing certiorari to the United States Supreme Court).

borrowing from sexual harassment jurisprudence, an employer should not be liable where it has taken reasonable measures to prevent and correct such bias—for instance, by implementing an anti-bias policy—and the plaintiff unreasonably has failed to use the opportunities provided. Second, where the plaintiff has utilized such a policy or where no policy exists, an employer should be able to avoid liability only if it has dissipated the taint of subordinate bias by undertaking a fair and independent investigation into the circumstances underlying the contemplated employment action. This new test would encourage employers to protect themselves by preventing discrimination in the workplace while still providing plaintiffs with a reasonable opportunity to obtain redress for such discrimination that nonetheless may occur.

## II. THE ORIGINS OF SUBORDINATE BIAS LIABILITY

The Seventh Circuit Court of Appeals, in 1990, first addressed the issue of cat's paw liability in *Shager v. Upjohn Co.*<sup>23</sup> Shager worked as a sales representative for a seed company.<sup>24</sup> At the time of his termination, Shager was fifty-three years of age and reported to Lehnst, a thirty-eight-year-old district manager.<sup>25</sup> Lehnst manipulated Shager's sales territory and then placed him on probation for alleged performance deficiencies.<sup>26</sup> Eventually, Lehnst recommended to the employer's "'Career Path Committee,' which reviews personnel actions," that Shager be fired, and the committee concurred.<sup>27</sup> Shager sued under the ADEA claiming age discrimination, but the district court granted the employer's motion for summary judgment.<sup>28</sup>

Judge Posner, writing for the Seventh Circuit, provided a primer on employment discrimination basics.<sup>29</sup> After reviewing basic agency principles, Judge Posner opined that if supervisor Lehnst had directly fired Shager due to age-related animus, the employer would be liable regardless of whether anyone else connected with the company shared that particular viewpoint.<sup>30</sup> But, Judge Posner added:

Lehnst did not fire Shager; the Career Path Committee did. If it did so for reasons untainted by any prejudice of Lehnst's against older workers, the causal link between that prejudice and Shager's discharge

---

23. 913 F.2d 398 (7th Cir. 1990).

24. *Id.* at 399.

25. *See id.* at 399–400.

26. *Id.*

27. *Id.* at 400.

28. *Id.* at 399.

29. *See id.* at 400–02.

30. *Id.* at 404–05.

is severed, and Shager cannot maintain this suit even if [the employer] is fully liable for Lehnst's wrongdoing. But if Shager's evidence is believed, as in the present posture of the case it must be, the committee's decision to fire him was tainted by Lehnst's prejudice. . . . If it acted as the conduit of Lehnst's prejudice—his cat's-paw—the innocence of its members would not spare the company from liability.<sup>31</sup>

Finding this to be an unanswered question of fact, the Seventh Circuit reversed the trial court's grant of summary judgment and remanded.<sup>32</sup>

The Supreme Court, eight years later, endorsed the general concept of subordinate bias liability in *Reeves v. Sanderson Plumbing Products, Inc.*<sup>33</sup> In *Reeves*, there was no direct or circumstantial evidence that the official decisionmaker held any discriminatory animus.<sup>34</sup> Instead, the plaintiff presented evidence that a supervisor, who was also the official decisionmaker's husband, harbored discriminatory animus toward the plaintiff because of the latter's age.<sup>35</sup> The Supreme Court held that the absence of a discriminatory intent on the part of the official decisionmaker did not mandate judgment as a matter of law for the defendant because the plaintiff had provided evidence that one of the plaintiff's superiors "was motivated by age-based animus and was principally responsible for petitioner's firing."<sup>36</sup> Under the circumstances, the Court found that the supervisor was the "actual decisionmaker" behind the firing,<sup>37</sup> and that his actions were sufficient to support a jury verdict finding the employer liable for age discrimination.<sup>38</sup>

While the Supreme Court in *Reeves* recognized subordinate bias liability in principle, the Court did not discuss the range of circumstances under which such liability would ensue.<sup>39</sup> As a result, the task of determining the contours of subordinate bias liability has been left to the circuit courts of appeals. As the next section demonstrates, this has led to a plethora of competing standards.

---

31. *Id.*(citations omitted).

32. *Id.* at 406.

33. 530 U.S. 133 (2000).

34. *See id.* at 146.

35. *Id.* at 151–52.

36. *Id.* at 152.

37. *Id.*

38. *Id.* at 153–54.

39. *See, e.g.,* White & Krieger, *supra* note 7, at 497 ("But *Reeves*, we believe, is best read as not confronting directly the difficult question of how to determine whether discriminatory intent is present in cases where multiple actors are involved in the decision making process.").

### III. CURRENT CIRCUIT COURT POSITIONS

The circuit courts of appeals have adopted a diversity of positions with respect to subordinate bias liability, and it would be most accurate to see these positions as falling along a widely arching continuum. For purposes of discussion and analysis, however, we describe these viewpoints using three basic categories: lenient, intermediate, and strict. Despite the considerable variations in the tests articulated in individual decisions, the cases within each of these three groupings share a similarity in underlying theory and operative criteria. In addition, the order in which these three categories are presented reflect the order of chronological development.

#### A. *The Lenient Standard*

The majority of circuits employ a lenient standard in determining the existence of subordinate bias liability. This approach, adopted in the vast majority of decisions issued prior to 2005, sets a relatively low threshold that a plaintiff must satisfy in order to avoid summary judgment, and, ultimately, in order to establish grounds for employer liability. Under this standard, “[S]ummary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.”<sup>40</sup> Courts that follow this approach generally believe that discrimination on any level of the decision making process has the ability to influence the ultimate decisionmaker and thus constitutes a reasonable basis for imposing liability.<sup>41</sup>

Most courts adhering to the lenient standard require that the biased subordinate exercise some degree of “influence” over the ultimate employment decision at issue.<sup>42</sup> A typical example is the First Circuit’s decision in *Santiago–Ramos v. Centennial P.R. Wireless Corp.*<sup>43</sup> In that case, the plaintiff, Santiago–Ramos, was a high-level female executive for Centennial who was married with one child and working with all male counterparts.<sup>44</sup> Santiago–Ramos’s supervisor, Rivera, made several comments to Santiago–Ramos, which were direct evidence of sex-based discrimination.<sup>45</sup> In determining whether

---

40. *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994).

41. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001) (“[I]t plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision.” (citing *Roebuck v. Drexel Univ.*, 852 F.2d 715, 727 (3d Cir. 1988))).

42. *See infra* text accompanying notes 46–54.

43. 217 F.3d 46 (1st Cir. 2000).

44. *Id.* at 50.

45. *Id.* at 50–51.

liability could be imposed on Centennial through the bias of Rivera, the court discussed Rivera's "influence" on Mayberry, the formal decisionmaker:

Santiago-Ramos can establish that Centennial's stated reasons for her dismissal are a pretext for discrimination in a number of ways. One method is to show that discriminatory comments were made by the key decisionmaker *or those in a position to influence the decisionmaker*. . . . There is evidence that Mayberry, head of Puerto Rico operations for the parent company, was the key decisionmaker in the termination of Santiago-Ramos' employment. It is also clear that Rivera, Santiago-Ramos' direct supervisor and general manager in Puerto Rico, *was in a position to influence Mayberry in that decision*.<sup>46</sup>

Not surprisingly, the decisions have described the amount of influence required in various terms, including:

[E]vidence of a subordinate's bias is relevant where the ultimate decision maker *is not insulated* from the subordinate's influence.<sup>47</sup>

[T]he plaintiff must offer evidence that the supervisor's racial animus was the cause of the termination or *somehow influenced* the ultimate decisionmaker.<sup>48</sup>

Consequently, it 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 decisionmaker.<sup>49</sup>

Young's alleged statements to Rose . . . were comments made directly to her on more than one occasion by her immediate supervisor, who had *enormous influence* in the decision-making process.<sup>50</sup>

Other decisions have focused more on the subordinate's participation in the decisionmaking process:

---

46. *Id.* at 55 (emphasis added) (citation omitted) (emphasis added).

47. *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1312 (D.C. Cir. 1998) (emphasis added).

48. *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 877 (6th Cir. 2001) (emphasis added).

49. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (emphasis added).

50. *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (emphasis added).

Even if a manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager *was involved* in the hiring decision.<sup>51</sup>

Instead, this case involves a nondecisionmaker who *was closely involved* in the decisionmaking process . . . .<sup>52</sup>

Based upon these facts, we conclude that a jury could reasonably find that [the store manager] *played a significant role* in [the district manager's] decisionmaking process.<sup>53</sup>

Our cases have noted that this situation may occur in an instance in which a subordinate, *by concealing relevant information* from the decisionmaker, is able *to manipulate* the decisionmaking process and to *influence the decision*.<sup>54</sup>

The Third Circuit has summarized the lenient standard approach most accurately by stating that subordinate bias liability can be established when “those exhibiting discriminatory animus *influenced or participated* in the decision to terminate.”<sup>55</sup>

The Eleventh Circuit has articulated a somewhat different approach in stating that it will find subordinate bias liability when the titular decisionmaker is a “mere conduit” for the subordinate's discriminatory animus.<sup>56</sup> Although one commentator has described the Eleventh Circuit as utilizing a variation of the lenient standard,<sup>57</sup> the use of the term “conduit” seems to indicate a somewhat higher hurdle. Rather than simply asking whether a subordinate's bias influenced an adverse decision, the conduit language suggests that the subordinate's impact must substantially displace the decisionmaker's exercise of discretion. Because the case law in the Eleventh Circuit is not well developed on this issue, the best we can do is to speculate that this circuit's position remains uncertain.

---

51. *Bergene v. Salt River Project Agric. Improvement and Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (emphasis added).

52. *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 924 (8th Cir. 2002) (emphasis added).

53. *Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003) (emphasis added).

54. *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997) (emphasis added).

55. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001) (emphasis added); *see also Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (finding liability where a “biased subordinate influenced or was involved in the decision or decisionmaking process”).

56. *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249 (11th Cir. 1998).

57. *See Razzaghi, supra* note 16, at 1721–22.

Thus, throughout the circuits that use the lenient standard, there is some variety as to the specific requirements needed to show that the subordinate possessed the requisite amount of influence on the adverse employment decision. However, what is clear—except perhaps in the Eleventh Circuit—is that a plaintiff need not show that the individual making the ultimate decision simply rubber-stamped the subordinate’s decision.<sup>58</sup> Instead, the influence or taint of subordinate bias itself is sufficient to establish a causal link to employer liability. Similarly, the courts using the lenient standard do not look to agency principles in determining whether an employer should be liable for a decision tainted by subordinate bias. Courts using the lenient standard simply presume that if a subordinate’s influence is causally connected to an ultimate employment decision, then such decision must necessarily be attributable to the employer for purposes of liability.

### B. *The Strict Standard*

In *Hill v. Lockheed Martin Logistics Management, Inc.*,<sup>59</sup> the Fourth Circuit Court of Appeals adopted a decidedly different approach to subordinate bias liability. The Fourth Circuit’s strict standard requires that the biased subordinate be the “actual decisionmaker” or the one “principally responsible” for the adverse employment decision in order to impute liability to the employer.<sup>60</sup> The court in *Hill* explained that these requirements establish the outer limits for holding employers liable under the cat’s paw theory, a result that sets a very high benchmark for employees to meet.<sup>61</sup>

Ethel Hill worked as an aircraft mechanic on a military base.<sup>62</sup> She claimed that her supervisor, safety inspector Ed Fultz, harbored a discriminatory animus against her, as evidenced by demeaning comments concerning her age and gender, such as calling her a “troubled old lady,” a “useless old lady,” and “a damn woman.”<sup>63</sup> Fultz reported Hill for various work rule infractions which eventually led Lockheed Martin’s East Coast senior site supervisor, Archie Griffin, to discharge Hill when she was fifty-seven years old.<sup>64</sup> Hill brought suit claiming violations of Title VII and the ADEA, and the district court granted the employer’s motion for summary judgment, noting Griffin’s lack of discriminatory animus.<sup>65</sup> A divided Fourth Circuit panel initially reversed, but

---

58. *See supra* text accompanying notes 40–57.

59. 354 F.3d 277 (4th Cir. 2004) (en banc).

60. *Id.* at 290.

61. *See id.* at 289–91.

62. *Id.* at 282.

63. *Id.* at 283 (internal quotation marks omitted).

64. *Id.* at 282–83.

65. *Id.* at 282–83.

the court subsequently reheard the case en banc and, in a 7–4 decision, affirmed the district court.<sup>66</sup>

The majority in *Hill* began by noting that agency principles govern employer liability under the two statutes.<sup>67</sup> The court then reviewed three Supreme Court decisions that have interpreted the reach of these principles.<sup>68</sup> First, in *Meritor Savings Bank, FSB v. Vinson*,<sup>69</sup> the Supreme Court had explained that “by defining employer” covered by Title VII to include “any agent,” Congress “‘evinced an intent to place some limits on the acts of employees for which employers . . . are to be held responsible.’”<sup>70</sup> The *Hill* court then turned to *Burlington Industries, Inc. v. Ellerth*,<sup>71</sup> a case in which the Supreme Court considered the issue of an employer’s vicarious liability for the sexually harassing acts of a supervisor.<sup>72</sup> In *Ellerth*, as well as in *Faragher v. City of Boca Raton*,<sup>73</sup> a companion case, the Supreme Court had ruled that employers are strictly liable where a supervisor inflicts harassment in the form of a tangible employment action, such as a demotion or termination.<sup>74</sup> According to the *Hill* majority, *Ellerth* “defined the limits of such agency as encompassing employer liability for the acts of its employees holding supervisory or other actual power to make tangible employment decisions.”<sup>75</sup> Finally, the Fourth Circuit discussed *Reeves v. Sandiscon Plumbing Products, Inc.*,<sup>76</sup> noting that the biased subordinate in that case was the actual decisionmaker behind the plaintiff’s firing.<sup>77</sup> The *Hill* majority summarized the import of *Reeves* in the following passage:

In sum, *Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the “formal decisionmaker” to impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the

---

66. *Id.* at 283.

67. *Id.* at 286–87.

68. *Id.* at 287–88.

69. 477 U.S. 57 (1986).

70. *Hill*, 354 F.3d at 287 (alterations in original) (quoting *Vinson*, 477 U.S. at 72).

71. 524 U.S. 742 (1998).

72. *Hill*, 354 F.3d at 287 (citing *Ellerth*, 524 U.S. at 763) (considering issue of vicarious liability for acts of supervisors).

73. 524 U.S. 775 (1998).

74. *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 764–65.

75. *Hill*, 354 F.3d at 287 (citing *Ellerth*, 524 U.S. at 762).

76. 530 U.S. 133 (2000).

77. *Hill*, 354 F.3d at 288–89 (citing *Reeves*, 530 U.S. at 152).

subordinate was the one “principally responsible” for, or the “actual decisionmaker” behind, the action.<sup>78</sup>

The majority then turned its attention more specifically to the cat’s paw theory.<sup>79</sup> Although citing *Shager* and *Reeves* favorably, the majority noted that other courts have not described the cat’s paw theory consistently, “and rarely have they done so after a discussion of the agency principles from which the theory emerged and that limit its application.”<sup>80</sup> Applying agency principles, the Fourth Circuit found it inappropriate to impute liability to an employer where a biased subordinate, without supervisory or disciplinary authority, influences or plays a role in the adverse employment decision.<sup>81</sup> Instead, the majority ruled that cat’s paw liability is appropriate only if a biased subordinate both (1) possesses “supervisory or disciplinary authority,”<sup>82</sup> and (2) is “the one principally responsible for the [adverse] decision or the actual decisionmaker for the employer.”<sup>83</sup> Applying this standard to the facts of the case, the *Hill* majority found that Fultz, the biased subordinate, merely initiated the decision making process that led to Hill’s termination, and thus did not meet the “actual decisionmaker” threshold necessary to impute liability to Lockheed Martin.<sup>84</sup>

Judge Michael filed a spirited dissent in which he claimed that the majority’s decision renders Title VII and the ADEA “essentially toothless when it comes to protecting employees against unlawful employment decisions that are motivated by biased subordinates.”<sup>85</sup> Judge Michael contended that the majority went astray in focusing primarily on principles of agency law, to the detriment of what he saw as the key causation issue.<sup>86</sup> The dissent also took issue with the majority’s transformation of *Ellerth* and *Reeves* from simple examples of situations resulting in agency liability to the outer boundaries of such liability.<sup>87</sup> In the end, the four dissenters endorsed the lenient standard, stating that “when a biased subordinate has substantial influence on an employment decision, the subordinate’s bias [should] be imputed to the formal decisionmaker.”<sup>88</sup>

---

78. *Id.* (citing *Reeves*, 530 U.S. at 151–52).

79. *Id.* at 289.

80. *Id.* at 290.

81. *See id.* at 291.

82. *Id.*

83. *Id.*

84. *Id.* at 297.

85. *Id.* at 301 (Michael, J., dissenting).

86. *Id.* (“[The majority] overlooks the statutory focus on causation, that is, whether an adverse employment action was taken “because of” a protected trait such as sex or age.”).

87. *Id.* at 302–04.

88. *Id.* at 304.

As compared to the lenient standard, the Fourth Circuit's strict approach places a greater reliance on agency principles. These principles, at least according to the *Hill* majority, make employers vicariously liable only for the actions of subordinates with supervisory or disciplinary authority. The strict standard also appears to utilize a but for model of causation. Under this approach, an employer is not legally responsible for subordinate bias that might play some motivating role in an adverse employment decision unless that subordinate's role rises to the level of the employer's de facto principal decisionmaker. The combination of these two requirements establishes a very high threshold for subordinate bias liability.

### C. *The Intermediate Standards*

More recently, two circuits have charted intermediate courses. Both the Tenth and the Seventh Circuits have crafted standards that reject the *Hill* approach, yet require a greater showing of causation than does the lenient standard. While the views of the two circuits are not identical, both focus on issues of causation and the role of an employer's independent investigation.

In 2006, the Tenth Circuit forged a middle path in its *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*<sup>89</sup> decision. In that case, Stephen Peters, an African-American, was terminated from his position as a merchandiser at a New Mexico facility where more than 60% of the employees were Hispanic and less than 2% were African-American.<sup>90</sup> The Equal Employment Opportunity Commission (EEOC) brought suit claiming BCI was liable for discriminatory discharge under Title VII through cat's paw liability.<sup>91</sup> The EEOC argued that Peters's immediate supervisor, Grado, who was Hispanic, displayed discriminatory bias toward Peters and other African-American employees.<sup>92</sup> BCI argued that Grado was not involved in the termination process, and *BCI*, therefore, could not be liable under Title VII.<sup>93</sup> Indeed, the termination decision was made by a manager, Edgar, who was not even aware of Peters's race.<sup>94</sup> The district court granted summary judgment for the employer, but the Tenth Circuit Court of Appeals reversed.<sup>95</sup>

The Tenth Circuit initially reviewed the existing subordinate bias liability landscape.<sup>96</sup> The court disagreed with the "any influence" analysis used by

---

89. 450 F.3d 476, 484 (10th Cir. 2006), *cert. dismissed*, 127 S.Ct. 1931 (2007).

90. *Id.* at 478, 481.

91. *Id.* at 482.

92. *Id.*

93. *Id.* at 483.

94. *Id.* at 481.

95. *Id.* at 483, 493.

96. *Id.* at 484–88.

those circuits following the lenient standard, stating that “[s]uch a weak relationship between the subordinate’s actions and the ultimate employment decision improperly eliminates a requirement of causation.”<sup>97</sup> But, the Tenth Circuit also rejected the Fourth Circuit’s more restrictive approach, contending that “agency law principles include[] not only ‘decisionmakers’ but other agents whose actions, aided by the agency relation, cause injury.”<sup>98</sup> Having rejected these two alternatives, the Tenth Circuit set its own course, stating that the key issue in this context “is whether the biased subordinate’s discriminatory reports, recommendation, or other actions *caused* the adverse employment action.”<sup>99</sup> The court also noted that this standard provides employers with an avenue to avoid liability.<sup>100</sup> Because this standard requires a causal connection, an employer can prevent liability by showing a break in the causation chain.<sup>101</sup> Thus, an employer avoids liability “by conducting an independent investigation of the allegations against an employee.”<sup>102</sup> The court suggested that “simply asking an employee for his version of events may [be sufficient to] defeat the inference that an employment decision was racially discriminatory.”<sup>103</sup> In this case, because the manager relied exclusively on information provided by Grado and conducted no independent investigation beyond pulling Peters’s personnel file, the Tenth Circuit reversed the lower court’s grant of summary judgment.<sup>104</sup>

The Seventh Circuit also initially voiced its disapproval of *Hill* in a 2004 opinion.<sup>105</sup> But, three years later in *Brewer v. Board of Trustees of the University of Illinois*,<sup>106</sup> the Seventh Circuit took a turn in *Hill*’s direction. The court in *Brewer* reviewed its cat’s paw jurisprudence, noting that “our approach . . . has not always been completely clear.”<sup>107</sup> Although the court admitted that some earlier opinions had suggested that “any influence” over an employment decision was sufficient to impose liability on an employer, it

---

97. *Id.* at 486–87.

98. *Id.* at 487.

99. *Id.* (emphasis added) (citing *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004)).

100. *Id.* at 488 (citing *English v. Colo. Dep’t of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001)).

101. *Id.*

102. *Id.* (citing *English*, 248 F.3d at 1011).

103. *Id.* (citing *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1231–32 (10th Cir. 2000)).

104. *Id.* at 493.

105. *See Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (“We are mindful that *Hill* . . . holds that a subordinate’s influence, even substantial influence, over the supervisor’s decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate’s ‘cat’s paw’ for such imputation to be permitted. That is not the view of this court . . .”).

106. 479 F.3d 908 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 357 (2007).

107. *Id.* at 919.

rejected “[t]hese dicta [as] doubtful.”<sup>108</sup> The *Brewer* court, instead, ruled that an employer is liable only if a biased subordinate has a “singular influence” over the employment decision.<sup>109</sup> The court then nudged even closer to the Fourth Circuit by stating that “[f]or a nominal non-decision-maker’s influence to put an employer in violation of Title VII, the employee must possess so much influence as to basically be herself the true ‘functional[] . . . decision-maker.’”<sup>110</sup> Then, in a manner similar to the Tenth Circuit in *BCI*, the Seventh Circuit stressed that even if a plaintiff establishes such a level of influence, “the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting.”<sup>111</sup>

The *BCI* and *Brewer* decisions share some important features. Both decisions adopt a causation threshold that requires a greater showing than the lenient “influence” standard.<sup>112</sup> Additionally, both decisions underscore that an independent investigation conducted by the ultimate decisionmaker is sufficient to break the chain of causation. The devil here is in the details. The Tenth Circuit in *BCI* did not explain what is required of a plaintiff in order to show that a subordinate’s bias “caused” the adverse employment decision. Similarly, neither decision provided much guidance as to what constitutes an adequate employer investigation or under what circumstances such an investigation should be expected or required. It is to these and other questions that we now turn.

#### IV. THREE CRUCIAL ISSUES

The three standards discussed above rely on very different theoretical and policy foundations. Considerations of causation and corrective justice serve as the foundation for the lenient standard.<sup>113</sup> The core notion here is that employees should be afforded redress for employment decisions tainted by workplace discrimination.<sup>114</sup> The strict standard is primarily grounded in agency principles with the guiding objective being that an employer should not be held liable for employees’ acts that are neither enabled by delegated authority nor otherwise aided by the agency relationship.<sup>115</sup> Finally, the

---

108. *Id.*

109. *Id.* at 917 (citing *Rozskowiak v. Vill. of Arlington Heights*, 415 F.3d 608, 613 (7th Cir. 2005)).

110. *Id.* (alterations in original) (quoting *Little v. Ill. Dep’t of Revenue*, 369 F.3d 1007, 1015 (7th Cir. 2004)).

111. *Id.* at 920.

112. *See supra* text accompanying notes 46–54.

113. *See supra* text accompanying notes 40–57.

114. *See id.*

115. *See supra* text accompanying notes 59–84.

intermediate standard also pays homage to questions of causation, but with a focus aimed more at prevention than redress.<sup>116</sup>

Each of these foundational considerations has considerable merit. Rather than endorsing any one of these principles to the detriment of the others, however, a better approach is to attempt to achieve a balance among these laudable principles. Toward that end, this Part examines these key objectives sequentially by asking the following questions: (1) What is the appropriate causation standard regarding the impact of the biased subordinate's conduct?; (2) When is the subordinate's discriminatory bias properly attributable to the employer?; and (3) What should be the impact of an employer's investigation into the underlying circumstances?

#### A. Causation

##### 1. Proving Causation

As indicated above, federal antidiscrimination statutes generally prohibit an employer or agent from discriminating "because of" an individual's protected trait.<sup>117</sup> Cases addressing the cat's paw concept of liability implicate the realm of disparate treatment rather than disparate impact forms of discrimination.<sup>118</sup> Thus, the ultimate question in such cases "is whether the plaintiff was the victim of intentional discrimination."<sup>119</sup>

A plaintiff can prove a claim of intentional discrimination through one of two methods. The first is the three-part "pretext" framework set forth in the seminal case of *McDonnell Douglas Corp. v. Green*.<sup>120</sup> Under that approach, a plaintiff must first establish a prima facie case of discrimination.<sup>121</sup> Second, the employer must respond with a legitimate, nondiscriminatory reason for its

---

116. See *supra* text accompanying notes 89–111.

117. See *supra* text accompanying notes 1–3.

118. Claims of disparate treatment arise when an employer treats some people less favorably because of their protected class status. See, e.g., *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)). Disparate impact claims, in contrast, involve employment practices that are facially neutral in form, but which disproportionately disqualify members of a protected group in practice. See *id.* (quoting *Teamsters*, 431 U.S. at 335–36 n.15).

119. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

120. 411 U.S. 792, 802 (1973).

121. *Id.* Typically, this step consists of proof that the employee (1) is a member of a protected class; (2) was qualified for the position; (3) was discharged from the position; and (4) was replaced by a nonmember of the protected class. See, e.g., *id.* (establishing the framework); *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 654 (5th Cir. 1996) (applying the framework).

decision.<sup>122</sup> This burden is only one of production and involves no credibility assessments.<sup>123</sup> If the employer carries this burden, the presumption of discrimination disappears, and the employee must then prove by a preponderance of the evidence that the employer's proffered reason for its action was a pretext for intentional discrimination.<sup>124</sup> The Supreme Court, in two clarifying decisions, has held that a showing of pretext does not automatically entitle an employee to judgment as a matter of law,<sup>125</sup> but the plaintiff's prima facie case, combined with a showing that the employer's asserted justification is false, "may permit the trier of fact to conclude that the employer unlawfully discriminated."<sup>126</sup>

The second proof method is the "mixed-motive" framework. In its 1989 decision in *Price Waterhouse v. Hopkins*,<sup>127</sup> the Supreme Court held that even if an employee demonstrates that an employer considered an impermissible factor such as age, race, sex, or disability in making an employment decision, the employer may avoid liability by showing it would have made the same decision even without consideration of the impermissible factor.<sup>128</sup> The burden of persuasion shifts to the employer on this latter issue.<sup>129</sup>

Congress, in the Civil Rights Act of 1991, modified the *Price Waterhouse* analysis by providing that liability under Title VII occurs if discrimination was a motivating factor in the employer's decision, even if the employer also was motivated by a legitimate nondiscriminatory reason.<sup>130</sup> Pursuant to the Act, an employer's showing that it would have made the same decision even if it had not considered the impermissible factor serves only to limit the employee's remedies to injunctive and declaratory relief and, in appropriate cases, reasonable attorney's fees and costs.<sup>131</sup>

Following the lead of Justice O'Connor's concurring opinion in *Price Waterhouse*,<sup>132</sup> most courts utilize the mixed-motive method of analysis in

---

122. *McDonnell Douglas*, 411 U.S. at 802.

123. *See* *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255–56 (1981).

124. *See* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

125. *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146–47 (2000) (citing *St. Mary's*, 509 U.S. at 519); *St. Mary's*, 509 U.S. at 519 ("It is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.").

126. *Reeves*, 530 U.S. at 148.

127. 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e–2m (2000)).

128. *Id.* at 244–45.

129. *Id.* at 246.

130. 42 U.S.C. § 2000e–2(m) (2000).

131. *Id.* § 2000e–5(g)(2)(B). The provision explicitly bars the award of damages and the issuance of an order requiring admission, reinstatement, hiring, or promotion.

132. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment

cases where plaintiffs present direct evidence of discrimination,<sup>133</sup> while utilizing the *McDonnell Douglas* framework in cases involving only circumstantial evidence of discrimination.<sup>134</sup> That dichotomy has been called into question following the Supreme Court's decision in *Desert Palace, Inc. v. Costa*.<sup>135</sup> In *Desert Palace*, the Supreme Court held that direct evidence is not needed to meet the plaintiff's burden.<sup>136</sup> Interpreting the 1991 Civil Rights Act amendment, the Court said that "a plaintiff need only present sufficient [direct or circumstantial] evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"<sup>137</sup>

The *Desert Palace* decision, on its face, clearly modifies the mixed-motive framework.<sup>138</sup> Since *Desert Palace*, however, the circuit courts have disagreed as to how *Desert Palace* affects the *McDonnell Douglas* framework. Some circuits have held that *Desert Palace* did not affect *McDonnell Douglas*, while other circuits have held that, as a result of *Desert Palace*, the motivating factor inquiry merges with the third step of the *McDonnell Douglas* analysis.<sup>139</sup> Under the latter approach, a trial court is likely to grant an employer's motion for summary judgment only if the employee fails to raise a genuine issue of material fact concerning whether a protected characteristic was a motivating

plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision.").

133. Direct evidence, as contrasted with circumstantial evidence, refers to evidence that, if believed, would prove the existence of discrimination without inferences or presumption. *See, e.g.*, HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 3.2, at 115 (2001) ("Examples [of direct evidence] include epithets or slurs uttered by an authorized agent of the employer, a decisionmaker's admission that he would or did act against the plaintiff because of his or her protected characteristic, or, even more clearly, an employer policy framed squarely in terms of race, sex, religion, or national origin."). There is widespread disagreement as to what type of evidence is "direct" in nature. *Id.* at 117.

134. Steven J. Kaminshine, *Disparate Treatment As a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 28–29 (2005); *see also* Johnson v. Kroger Co., 319 F.3d 858, 865–66 (6th Cir. 2003) ("Because [the plaintiff] has failed to present any direct evidence of discrimination, the burden-shifting approach first set forth in [*McDonnell Douglas*] . . . applies to the present case." (citing Johnson v. Univ. of Cincinnati, 215 F.3d 561, 572 (6th Cir.2000))); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 222 (5th Cir. 2000) ("Absent direct evidence of discriminatory intent, as is typically the case, proof via circumstantial evidence is assembled using the framework set forth in the seminal case of [*McDonnell Douglas*]").

135. 539 U.S. 90 (2003).

136. *Id.* at 101–02.

137. *Id.* at 101 (quoting 42 U.S.C. § 2000e–2m (2000)).

138. *See id.* at 101–02.

139. *See* Kristina N. Klein, Comment, *Oasis or Mirage? Desert Palace and its Impact on the Summary Judgment Landscape*, 33 FLA. ST. U. L. REV. 1177, 1187 (2006) (discussing the Eighth and Eleventh Circuit Courts of Appeals' approach to leave *McDonnell Douglas* unaffected, and the Fourth and Fifth Circuit Courts of Appeals' approach to alter *McDonnell Douglas*'s third prong).

factor in the employment decision.<sup>140</sup> Some circuits have not applied the *Desert Palace* holding to cases arising under the ADEA and continue to limit the mixed-motive framework in the age discrimination context to cases entailing direct evidence.<sup>141</sup>

Regardless of the pertinent evidentiary framework, the bottom line in cases of subordinate bias is that some causal link must be established between the biased views of the subordinate and the adverse employment action. This link can be accomplished through either framework. Under the pretext framework, the plaintiff can argue that an employer's asserted legitimate reason was actually a pretext for discrimination harbored by a subordinate.<sup>142</sup> Under the mixed-motive framework, the plaintiff can argue that, although there may have been some legitimate reason for the adverse employment action, the subordinate's bias played a motivating role in the decision.<sup>143</sup> Under either framework, the ultimate question posed by Title VII is whether discrimination was "a motivating factor" in the employer's decision,<sup>144</sup> and both frameworks are designed to provide an answer to that question.<sup>145</sup>

## 2. Causation in the Context of Subordinate Bias Liability

The three subordinate bias liability standards discussed above utilize a variety of causation tests. On one end of the spectrum, the lenient standard requires only that the subordinate's bias have some causal "influence" on the resulting employment decision.<sup>146</sup> On the other end of the spectrum, the Fourth Circuit's strict standard finds causation satisfied only if the biased subordinate is, for practical purposes, the "actual" or "principal" decisionmaker.<sup>147</sup> The two intermediate decisions describe their respective causation requirements in

---

140. See, e.g., *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 315–16 (5th Cir. 2004) ("Such comments preclude summary judgment because a rational finder of fact could conclude that age played a role in [the supervisor's] decision to terminate [the plaintiff].").

141. See, e.g., *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 & n.3 (3d Cir. 2004) ("If direct evidence is used, the proponent of the evidence must satisfy the test laid out in *Price Waterhouse*, in order to prove a violation of the ADEA."); *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163 n.1 (4th Cir. 2004) ("[D]irect evidence is still a prerequisite for a mixed-motive analysis in ADEA cases."). But see *Rachid*, 376 F.3d at 311 (applying the reasoning of *Desert Palace* in an ADEA case).

142. See *supra* text accompanying notes 120–126.

143. See *supra* text accompanying notes 127–141.

144. 42 U.S.C. § 2000e-2(m) (2000).

145. See, e.g., Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 134–38 (2008) (asserting that the *McDonnell Douglas* test, similar to the mixed-motive framework, proves "motivating factor" causation rather than "but for" causation).

146. See discussion *supra* Part III.A.

147. See discussion *supra* Part III.B.

different terms. The Tenth Circuit requires that the subordinate bias “cause” the resulting harm, but the court does not describe how that step should be accomplished.<sup>148</sup> The Seventh Circuit, meanwhile, requires a showing of “singular influence” akin to that of the “functional[] . . . decision-maker,” bringing it nearer to the Fourth Circuit’s approach on this issue.<sup>149</sup>

The most appropriate causation test is the one that replicates the language of Title VII itself. That is, an employment action may be deemed to be “because of” discrimination where subordinate bias operates as “a motivating factor” of the employer’s employment action.<sup>150</sup> Since this test tracks the core requirement of Title VII causation, it is most likely to effectuate the causal touchstone envisioned by Congress.<sup>151</sup>

The lenient standard’s “any influence” test<sup>152</sup> sometimes falls short of this benchmark. It is true, of course, that subordinate bias that “influences”<sup>153</sup> an employment decision will often be “a motivating factor”<sup>154</sup> of such a decision. But, to the extent that the lenient standard imposes liability in circumstances where the influence in question does not rise to the level of a factor that actually motivates the employer’s decision, the Tenth Circuit’s criticism in *BCI* that such a “weak relationship . . . improperly eliminates a requirement of causation”<sup>155</sup> is well taken.

However, both the *Hill* and *Brewer* decisions go too far in the opposite direction. To the extent that these decisions require that a biased subordinate serve as a “principal,” “actual,” or “functional” decisionmaker,<sup>156</sup> they essentially impose a “but for” causation requirement. But for causation contemplates a causal connection that is definitive or necessary in nature, such that the event in question would not have occurred but for that specific factor.<sup>157</sup> As the Supreme Court noted in *Price Waterhouse*, Title VII’s “because of” language, even prior to the 1991 amendment, did not require a showing of but

---

148. See *supra* text accompanying notes 99–104.

149. See *supra* text accompanying notes 109–111.

150. See 42 U.S.C. § 2000e–2(a)(1), (m) (2000).

151. See, e.g., *Sadki v. SUNY Coll. at Brockport*, 310 F. Supp. 2d 506, 519 (W.D.N.Y. 2004) (finding that evidence created a genuine issue of material fact as to whether a biased subordinate’s actions so influenced a formal decisionmaker’s conclusion “that her discriminatory animus became a *motivating factor* in the ultimate decision” (emphasis added)).

152. See *supra* note 41 and accompanying text.

153. See *supra* text accompanying notes 46–54.

154. See 42 U.S.C. § 2000e–2m (2000).

155. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 486–87 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007).

156. See *supra* text accompanying notes 59–60.

157. *Katz, supra* note 145, at 121.

for causation.<sup>158</sup> And, such a requirement certainly compels a greater degree of proof than does the “motivating factor” language added by the Civil Rights Act of 1991.<sup>159</sup> As Professor Martin Katz notes, the motivating factor standard is “*minimally causal*,” as compared to a but for standard, requiring only that a factor have a tendency to bring about a certain outcome.<sup>160</sup> By imposing a more onerous causation standard for subordinate bias cases than that embodied in Title VII, the Fourth and Seventh Circuits effectively immunize employment decisions that Congress meant to prohibit.

The *Hill* court attempted to justify this higher standard by maintaining that the Supreme Court’s decision in *Reeves* mandated the “actual decisionmaker” standard.<sup>161</sup> While it is true that the Court in *Reeves* described the formal decisionmaker’s husband as the “actual decisionmaker,”<sup>162</sup> the use of that phrase was more likely descriptive of the evidence presented in that case than a pronouncement of legal principle. As the Tenth Circuit noted in *BCI*, the majority in *Hill* misinterpreted *Reeves*, taking the term “actual decisionmaker” as setting the outer boundaries of liability, when in fact this language was used only to describe the subordinate’s role in the particular fact pattern presented.<sup>163</sup>

Policy considerations provide further support for preferring a motivating factor standard over an actual decisionmaker standard. Federal antidiscrimination statutes serve two primary purposes: to compensate the victims of discrimination and to deter the occurrence of discrimination in the workplace.<sup>164</sup> As remedial legislation, these statutes should be interpreted broadly in order to effectuate these purposes.<sup>165</sup>

The Supreme Court has explained that the purpose behind the compensation goal of antidiscrimination statutes is “to restore the employee to the position he

---

158. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2m (2000)).

159. Katz, *supra* note 145, at 121–22.

160. Katz, *supra* note 145, at 121.

161. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288–89 (4th Cir. 2004).

162. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 152 (2000).

163. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487 (10th Cir. 2006).

164. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2m (2000)) (stating Congress’s “Findings” and “Purposes” for amending the Civil Rights Act of 1964); *see also* *McKennon v. Nashville Banner Publ’g Co.*, 513 U.S. 352, 357–58 (1995) (stating that both Title VII and the ADEA seek to remove discrimination from the work place and compensate victims of workplace injustice); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417–18 (1975) (stating that the primary objectives of Title VII are to equalize employment opportunities and “to make persons whole for injuries suffered on account of unlawful employment discrimination”).

165. *See EEOC v. Total Sys. Servs., Inc.*, 240 F.3d 899, 899 (11th Cir. 2001).

or she would have been in absent the discrimination.”<sup>166</sup> When a subordinate’s bias acts as a motivating factor for an adverse employment decision, the victimized employee suffers harm resulting from discrimination. Yet, if the subordinate’s bias falls short of constituting the act of an ultimate decisionmaker, the Fourth Circuit’s standard would not redress the employee’s loss. As Judge Michael noted in his dissenting opinion in *Hill*, the Fourth Circuit’s strict causation standard “removes an entire class of discrimination cases from the protection” of antidiscrimination statutes with the result that “unlawful discrimination will go unaddressed in many cases.”<sup>167</sup>

The strict standard also fails to further the deterrent purpose of federal antidiscrimination statutes. In the context of cases involving subordinate bias, discriminatory employment actions often take place even though the formal decisionmaker is unaware of the subordinate’s underlying motives. Without any meaningful threat of liability, employers will have little incentive to create processes to prevent and uncover these situations. A more accessible motivating factor test likely will “have the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against members of protected groups.”<sup>168</sup>

Similarly, but in the opposite direction, a less accessible causation test—such as the Fourth Circuit’s strict standard—may provide employers with an incentive to design decision making processes that intentionally mask the underlying discriminatory motive as a basis to avoid liability. An employer, for example, may set up “many layers of pro forma review” as a means to insulate itself from potential subordinate bias.<sup>169</sup> It would not serve the deterrent purpose of antidiscrimination statutes to encourage such “willful blindness” of subordinate motives as a defensive human resources strategy.<sup>170</sup>

---

166. *McKennon*, 513 U.S. at 362 (citing *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 764 (1976)).

167. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 304 (4th Cir. 2004) (Michael, J., dissenting).

168. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 486 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007). In addition, the Tenth Circuit stated, “The Fourth Circuit’s standard also undermines the deterrent effect of subordinate bias claims, allowing employers to escape liability even when a subordinate’s discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.” *Id.* at 487.

169. *Willis v. Marion County Auditor’s Office*, 118 F.3d 542, 547 (7th Cir. 1997) (citing *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir.1993)); *see also Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 n.13 (5th Cir. 2000) (“If . . . we adhered to a rigid formalistic application, employers could easily insulate themselves from liability by ensuring that the one who performed the employment action was isolated from the employee, thus eviscerating the spirit of the ‘actual decisionmaker’ guideline.”).

170. *See BCI*, 450 F.3d at 486 (“Recognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race

In sum, the motivating factor test represents the causation standard that is most consistent with the language and purposes of federal antidiscrimination statutes. This standard will absolve employers from liability for decisions that are not actually motivated by discrimination, while affording redress for those decisions in which unlawful discrimination plays a motivating role.

## B. Agency Principles

### 1. Employer Responsibility for the Acts of Its Agents

A second key issue concerns when an employer should bear legal responsibility for the biased acts of subordinate employees. As noted above, the prohibition contained in federal antidiscrimination statutes extends only to actions undertaken by an “employer” and “any agents” of an employer.<sup>171</sup> Thus, even if a biased subordinate’s actions can be linked in a causal sense with an adverse employment action, the question remains as to whether the subordinate is acting as an agent of the employer such that the subordinate’s conduct is legally attributable to the employer for liability purposes.<sup>172</sup>

In general, an employer may be liable under federal antidiscrimination statutes in one of two ways. First, an employer may be directly liable for its own actions, such as where a corporate board of directors adopts a policy that adversely affects members of a protected group.<sup>173</sup> Second, and alternatively, an employer may be vicariously liable for the discriminatory acts of its agents.<sup>174</sup>

In *Burlington Industries, Inc. v. Ellerth*,<sup>175</sup> the Supreme Court discussed these two bases for employer liability in the context of sexual harassment. The Court initially recognized that “[n]egligence sets a minimum standard for

---

discrimination among subordinates, through willful blindness as to the source of reports and recommendations.” (citing *Russell*, 235 F.3d at 227 n.13)).

171. See *supra* text accompanying note 5.

172. See, e.g., *Razzaghi*, *supra* note 16, at 1713 (citing *Hill*, 354 F.3d at 287) (“[W]hether a subordinate employee who influences the employer’s decision to terminate the plaintiff can properly be defined as an ‘employer’ or an ‘agent,’ rests in an analysis of agency principles.”).

173. See, e.g., *Levendos v. Stern Entm’t, Inc.*, 909 F.2d 747, 751 (3d Cir. 1990) (“[D]iscrimination is rarely carried out pursuant to a formal vote of a corporation’s board of directors. . . . Nonetheless, Title VII remedies . . . generally run against the employer as an entity.”).

174. See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998) (Thomas, J., dissenting) (“The Court today manufactures a rule that employers are vicariously liable if supervisors create a sexually hostile work environment . . . .”); *Levendos v. Stern Entm’t, Inc.*, 909 F.2d 747, 751 (3d Cir. 1990) (“[D]iscriminatory policies violative of Title VII, acts that may constitute Title VII violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy.”).

175. 524 U.S. at 742.

employer liability under Title VII.”<sup>176</sup> Under the negligence standard, a court may hold an employer liable where the employer’s own negligence is the cause of the harassment.<sup>177</sup> For example, an employer will be liable for the harassment caused by a coworker or a supervisor acting outside the scope of employment if the employer “knew or should have known about the conduct and failed to stop it.”<sup>178</sup>

The Court then explained that although negligence may be a source of direct liability, the plaintiff in *Ellerth* had raised a different issue: whether an employer could be strictly liable for harassment undertaken by a supervisor.<sup>179</sup> The Court responded in the affirmative, ruling that employers are vicariously and strictly liable where a supervisor with immediate authority over the employee creates an actionable hostile environment resulting in a “tangible employment action.”<sup>180</sup> A “tangible employment action,” according to the Court, is “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>181</sup> The Court rationalized imposing strict liability upon the employer by explaining that a supervisor cannot make a tangible employment decision absent an agency relationship; therefore, “[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.”<sup>182</sup>

The Court, however, limited its holding by stating that an employer should not be subject to strict liability when a supervisor’s harassment does not take the form of a “tangible employment action.”<sup>183</sup> In this context, the employer may raise an affirmative defense to liability or to damages.<sup>184</sup> Under the affirmative defense, the employer must prove both “that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and “that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>185</sup> As subsequent decisions illustrate, this defense is most often

---

176. *Id.* at 759.

177. *Id.*

178. *Id.*

179. *Id.*

180. *See id.* at 765.

181. *Id.* at 761.

182. *Id.* at 761–62. The Court had initially noted, “Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.” *Id.* at 762.

183. *Id.* at 765.

184. *Id.*

185. *Id.*

established where an employer establishes an antiharassment policy and an employee claiming harassment fails to use that policy to report the alleged harassment.<sup>186</sup>

Although the exact scope of vicarious liability under antidiscrimination statutes is uncertain, some basic principles are clear. First, Congress, by defining a covered employer for purposes of antidiscrimination statutes to include “any agent” of the employer, “evinced an intent to place some limits on the acts of employees for which employers . . . are to be held responsible.”<sup>187</sup> In other words, an employer is not liable for each and every discriminatory act committed by one of its employees. Second, because discrimination is in the nature of a statutory tort, an employer is liable for the intentional acts committed by its employees within the scope of employment when the employee is motivated, at least in part, by a purpose to serve the employer.<sup>188</sup> However, an employer is also vicariously liable for employee acts taken outside the scope of employment—such as acts of sexual harassment that are not undertaken in order to serve the employer’s interests<sup>189</sup>—only if the employee “was aided in accomplishing the tort by the existence of the agency relation.”<sup>190</sup>

## 2. Agency Principles in the Context of Subordinate Bias Liability

The circuit courts, here again, have taken a wide variety of approaches with respect to the issue of agency liability. Those circuits following the lenient standard tend not to discuss agency principles at all.<sup>191</sup> These courts generally

---

186. See, e.g., Stephen F. Befort & Sarah J. Gorajski, *When Quitting is Fitting: The Need for a Reformulated Sexual Harassment/Constructive Discharge Standard in the Wake of Pennsylvania State Police v. Suders*, 67 OHIO ST. L.J. 593, 632 (2006) (“A statistical analysis of published federal court decisions issued after *Ellerth* and *Faragher* concludes that ‘employees can almost guarantee a [summary judgment] victory for the employer if they fail to report.’” (alteration in original) (quoting David Sherwyn, Michael Heise, & Zev J. Eigen, *Don’t Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1286 (2001))).

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

188. *Faragher v. City of Boca Raton*, 524 U.S. 775, 793 (1998) (quoting RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1958)); *Ellerth*, 524 U.S. at 756 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 70, at 505 (5th ed. 1984)).

189. See, e.g., *Faragher*, 524 U.S. at 798–801 (finding such acts of sexual harassment not to be taken in the course of employment).

190. *Ellerth*, 524 U.S. at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1958)); see also *Faragher*, 524 U.S. at 802 (“[Restatement § 219] covers not only cases involving the abuse of apparent authority, but also cases in which tortious conduct is made possible or facilitated by the existence of the actual agency relationship.”).

191. See, e.g., *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004) (“[W]hile the courts often utilize the same terminology as that employed by the *Shager*

find that employer liability automatically follows once causation is established. Given the lack of overt discussion, it is not clear whether these courts view the agency link as established by virtue of the actions of the biased subordinate or by virtue of the actions of the ultimate decisionmaker. The Seventh Circuit in *Shager*, one of the few decisions to address agency concerns, seems to have adopted the former view. The *Shager* court stated,

But a supervisory employee who [by influencing a formal decisionmaker] fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.<sup>192</sup>

In essence, the court in *Shager* found that, unlike errant acts of coworker harassment, the biased acts of a subordinate taken pursuant to delegated authority are within the scope of employment and are attributable to the employer by means of respondeat superior.<sup>193</sup>

The Fourth Circuit, in contrast, relied on agency principles to limit employer liability to situations where a biased subordinate has “supervisory or disciplinary authority” and is “the one principally responsible for the [adverse] decision or the actual decisionmaker for the employer.”<sup>194</sup> By this ruling, the *Hill* majority construed the Supreme Court’s *Ellerth* decision as establishing the outer contours of agency liability, such that an employer may be vicariously liable only for the acts of supervisors that result in a tangible employment action.<sup>195</sup> The *Hill* court’s unstated premise is that acts of subordinate bias necessarily fall outside the scope of employment and only may be attributed to

---

court, they have not always described the theory in consistent ways, and rarely have they done so after a discussion of the agency principles from which the theory emerged and that limit its application.”).

192. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (citing RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

193. *Id.* at 404–405. The *Shager* court went on to state,

Concern with the futility of derivative liability is absent where the challenged action is not harassment, whether on sexual or other grounds by a fellow employee, but discharge by a supervisory employee. The deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through agents.

*Id.* at 404 (citing *Hunter v. Allis-Chalmers Corp.*, Engine Div., 797 F.2d 1417, 1422 (7th Cir. 1986); *North v. Madison Area Ass’n for Retarded Citizens–Developmental Ctrs. Corp.*, 844 F.2d 401, 407 (7th Cir. 1988)).

194. *Hill*, 354 F.3d at 291.

195. *Id.* at 287 (stating that *Ellerth* “defined the limits of such agency as encompassing employer liability for the acts of its employees holding supervisory or other actual power to make tangible employment decisions” (citing *Ellerth*, 524 U.S. at 762)).

an employer who has empowered the subordinate through the delegation of supervisory authority.

The Tenth Circuit in *BCI* once again charted a middle course with respect to the agency issue. Chiding the Fourth Circuit for its more restrictive approach, the *BCI* court found that “agency law principles include[] not only ‘decisionmakers’ but other agents whose actions, aided by the agency relation, cause injury.”<sup>196</sup> The Tenth Circuit noted, as examples, those employees with delegated “authority to monitor performance, report disciplinary infractions, and recommend employment actions.”<sup>197</sup> The Tenth Circuit, accordingly, appears to have assumed that acts of subordinate bias may fall outside the scope of employment, but that an employee’s misuse of some form of delegated authority—although not necessarily supervisory authority—is necessary for such actions to be imputed to the employer. The Tenth Circuit’s analysis of the agency issue is the best approach. Its focus on the misuse of delegated authority is superior to the extremes of the other two standards.

A fundamental problem with the lenient standard is that it essentially jettisons the agency issue altogether. This is inappropriate, as the Supreme Court has expressly cautioned that the inclusion of the term “agents” in the statutory definition of a covered employer in antidiscrimination statutes was intended to serve as a limitation on the reach of employer liability for employee conduct.<sup>198</sup> To the extent that the lenient standard makes employers liable for the biased acts of any and all employees, the standard improperly ignores this limitation.

As a matter of policy, one of the principal purposes of the agency limitation is to make employers legally responsible only for the discriminatory acts of employees that it reasonably may have prevented.<sup>199</sup> Thus, employers are not liable for the harassing acts of its rank-and-file employees unless the employer knew or should have known about such conduct and failed to take steps to curb it.<sup>200</sup> The same concern exists in the context of subordinate bias. Consider, for example, the situation of an employee with no delegated authority who, acting

---

196. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 487 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007) (citing *Ellerth*, 524 U.S. at 760). The Seventh Circuit’s decision in *Brewer v. Board of Trustees of the University of Illinois*, 479 F.3d 908 (7th Cir. 2007), the other decision adopting an intermediate standard for subordinate bias liability, did not address the agency issue.

197. *BCI*, 450 F.3d at 485.

198. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 791–92 (1998) (noting that the traditional parameters of agency law delimit the reach of employer liability).

199. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (“[T]he ultimate concern is with confining the employer’s or principal’s liability to the general class of cases in which he has the practical ability to head off the injury to his employee’s, or other agent’s, victim.”).

200. *Ellerth*, 524 U.S. at 765.

on discriminatory bias, surreptitiously intercepts and alters a supervisor's performance evaluation of a fellow employee. Unless the employer has reason to suspect the alteration, it should not automatically be liable for consequences it did not set in motion.

The Seventh Circuit's discussion in *Shager* of employer liability for biased actions taken by a subordinate in the course of employment is not to the contrary.<sup>201</sup> In *Shager*, the subordinate employee in question was a lower level supervisor to whom the employer had delegated the authority to make disciplinary recommendations.<sup>202</sup> When the *Shager* court described the supervisor's biased actions as taken in the course of employment, it likely was referring to the fact that the employer's grant of such delegated authority aided the supervisor's actions.<sup>203</sup> That does not mean, however, that the biased manipulations of employees with no delegated authority should automatically be attributed to the employer on a respondeat superior basis.

While the lenient standard sets too low of a bar for agency liability, the strict standard errs in the opposite direction. Here again, the Fourth Circuit in *Hill* inappropriately construed a Supreme Court decision as establishing the outer boundaries of potential liability. In *Ellerth*, the Supreme Court held that an employer is strictly liable for a supervisor's workplace harassment that takes the form of a tangible employment action.<sup>204</sup> The Fourth Circuit seized upon this ruling to conclude that an employer *only* may be held liable for subordinate bias when the subordinate is a supervisor who serves as the principal or the ultimate decisionmaker concerning a tangible employment action.<sup>205</sup> But, the *Ellerth* Court did not limit the reach of potential employer liability solely to that set of circumstances.<sup>206</sup> The *Ellerth* Court, instead, found that "[w]hatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate."<sup>207</sup> Beyond that zone of automatic liability, the Supreme Court noted that other circumstances also might implicate the agency relation, but that the outcome in such cases "is less obvious."<sup>208</sup>

---

201. See *supra* text accompanying notes 192–193.

202. *Shager*, 913 F.2d at 399–400.

203. *Id.* at 405 (“But a supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do . . .”).

204. See *Ellerth*, 524 U.S. at 762–63.

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

206. See Razzaghi, *supra* note 16, at 1736 (“The Court in *Ellerth*, however, never limited vicarious liability to acts of one who was principally responsible for the adverse employment action . . .”).

207. *Ellerth*, 524 U.S. at 762–63.

208. *Id.* at 763.

Of particular significance is the fact that the *Ellerth* Court made its ruling in the context of determining the grounds for *strictly* imposing liability on an employer.<sup>209</sup> However, subordinate bias liability poses a different issue.<sup>210</sup> The issue here, instead, is whether an employer *potentially* may be liable for an adverse act set in motion by a biased subordinate. Just as an employer may be held liable for an agent's harassing conduct beyond those circumstances warranting strict liability—such as where an employer is unable to establish the two-part affirmative defense—so too should an employer face possible liability for the misuse of delegated authority by a subordinate in circumstances beyond the narrow confines of the *Ellerth* strict liability test.

The *Ellerth* decision ultimately stands for the proposition that an employer may be liable for agency purposes when an employee misuses delegated authority that results in an adverse employment action.<sup>211</sup> In policy terms, the crucial point is that an employer may appropriately face potential liability when it has empowered an employee with authority that carries with it the potential to inflict injury.<sup>212</sup> The misuse of delegated authority by a supervisor who acts as a principal decisionmaker certainly falls within the parameters of this prohibition; it does not, however, exhaust the universe of such possibilities. The misuse of other types of delegated authority also may enable employees—including on occasion nonsupervisors—to inflict economic injury on their fellow employees.<sup>213</sup> Consider, for example, the case of an employer who empowers an employee with no formal supervisory authority over another employee to

---

209. See *id.* at 764–65.

210. See *Hill*, 354 F.3d at 302 (Michael, J., dissenting) (“*Ellerth* simply tells us that when a supervisor or other decisionmaker fires an employee for whatever reason, we automatically have an agent whose personnel action is imputed to the employer. That does not answer today’s question: when a biased subordinate who lacks decisionmaking authority substantially influences an employment decision, may his bias be imputed to the formal decisionmaker who acts for the employer. I would hold that it can be.”).

211. See *Ellerth*, 524 U.S. at 760–65.

212. See RESTATEMENT (SECOND) OF AGENCY § 219(2) cmt. e (1958) (explaining that the aided by the “agency relation” standard of section 219(2) applies to situations where “the servant may be able to cause harm because of his position as agent”); see also *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 485 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007) (“The ‘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 . . .”).

213. See, e.g., *BCI*, 450 F.3d at 487 (“[T]he issue is whether the biased subordinate’s discriminatory reports, recommendations, or other actions caused the adverse employment action.” (citing *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004))); *Razzaghi*, *supra* note 16, at 1729–30 (“While in some of these cases the biased employees may have had certain supervisory authority, the courts never considered that authority as a precondition to imputing liability to the employers.”).

make a recommendation on matters such as promotion or discipline. Even if the recommender does not serve as a principal decisionmaker 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.<sup>214</sup> Indeed, the EEOC has expressly endorsed that position in an enforcement guidance.<sup>215</sup>

In the end, this Article argues that the Tenth Circuit's decision in *BCI* provides the proper balance for gauging agency liability. Such liability should not extend overbroadly to the actions of all employees or be limited too narrowly to only those supervisors who act as ultimate decisionmakers. The test, instead, should focus on whether a biased subordinate misuses authority delegated by an employer as a means of causing an adverse employment action.

### C. *Employer Investigation*

While the two circuits championing an intermediate path with respect to subordinate bias liability expressly describe the impact of an employer's investigation as part of their proposed analytical framework,<sup>216</sup> there is broad agreement among all viewpoints that such an investigation can play a major role in assessing the propriety of imposing employer liability. The core notion here is that an employer's investigation into the circumstances underlying the allegations made by a biased subordinate can serve to break the chain of causation by removing the taint of discrimination introduced by the subordinate's actions.<sup>217</sup>

---

214. See, e.g., *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226–29 (5th Cir. 2000) (finding that allegedly biased influence of a subordinate employee may be imputed to employer with respect to an adverse action suffered by someone in a coordinate position).

215. EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, EEOC Comp. Man. (BNA) No. 915.002, at 17 (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (stating that an individual may be a “supervisor” if his job includes recommending “tangible job decisions affecting an employee” and those recommendations are given “substantial weight by the final decisionmaker[s]”).

216. See *supra* text accompanying notes 90–111.

217. See, e.g., *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001) (“[The employer’s] attempt to balance the investigators’ findings with [the plaintiff’s] own version of events cuts off any alleged bias on the part of the investigators from the chain of events leading to English’s termination. Therefore, the cat’s paw doctrine does not apply in this case.”); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (“If [the employer] based his decisions on his own independent investigation, the causal link between [the biased subordinates’] allegedly retaliatory intent and [the plaintiffs’] terminations would be broken.”); *Wilson v. Stroh Cos., Inc.*, 952 F.2d 942, 946 (6th Cir. 1992) (“[The employer] had conducted an independent investigation of [the plaintiff’s] conduct. . . . The causal nexus necessary to support [the plaintiff’s] prima facie case is absent.”).

Both the Tenth and the Seventh Circuits give the role of an employer's investigation—or lack thereof—center stage in determining the reach of subordinate bias liability. The Tenth Circuit in *BCI* stated that an employer can avoid liability “by conducting an independent investigation of the allegations against an employee.”<sup>218</sup> Similarly, the Seventh Circuit stressed that even if a plaintiff makes out a singular level of influence by a biased subordinate, “the employer does not face Title VII liability so long as the decisionmaker independently investigates the claims before acting.”<sup>219</sup>

Courts following both the lenient and the strict standards have also recognized that an independent investigation of a subordinate's allegations may serve to insulate an employer from liability. At least four circuits following the lenient standard have expressly recognized the possibility of an investigation defense.<sup>220</sup> Similarly, the Fourth Circuit in *Hill*, in explaining that the biased subordinate was not the actual decisionmaker, stated, “[I]t is undisputed that Dixon personally investigated and verified the accuracy of the discrepancy reports, and made an independent, non-biased decision . . . that the infractions were sufficiently serious to warrant . . . termination.”<sup>221</sup>

Given the nearly universal recognition of the importance of an employer's investigation into subordinate bias liability, the crucial questions concerning this topic devolve into two subsidiary issues. First, what type of an investigation is sufficient to dissipate the taint of subordinate bias? Second, when should an employer be expected or required to undertake such an investigation?

### 1. *Type of Investigation*

As the Fourth Circuit's articulation suggests, the general requirement for a causation-breaking investigation is that it be a fair and independent examination

---

218. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (citing *English*, 248 F.3d at 1011).

219. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 920 (7th Cir. 2007).

220. *See, e.g., Poland v. Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007) (“Thus, if an adverse employment action is the consequence of an entirely independent investigation by an employer, the animus of the retaliating employee is not imputed to the employer.”); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1250 (11th Cir. 1998) (“When the employer makes an effort to determine the employee's side of the story before making a tangible employment decision affecting that employee, however, it should not be held liable under Title VII for that decision based only on its employee's hidden discriminatory motives.”); *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998) (“[T]he key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action.”); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996) (“If [the employer] based his decisions on his own independent investigation, the causal link between [the biased subordinates'] allegedly retaliatory intent and [the plaintiffs'] terminations would be broken.”).

221. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 296 (4th Cir. 2004).

of circumstances underlying the contemplated employment action.<sup>222</sup> As a conceptual matter, an investigation is fair and independent if it serves to replace the influence of a subordinate's bias with the untainted determination of an unbiased ultimate decisionmaker.<sup>223</sup> That goal, of course, is easier to state than are the particulars of what constitutes a fair and independent investigation on a ground level.

In this regard, it is important to recognize that the mere fact that an unbiased decisionmaker undertakes an investigation may not necessarily have the effect of dispelling the taint of subordinate bias. Social psychology research suggests that once a lower level supervisor offers a recommendation, "it can reasonably be expected to influence the ultimate decision maker's judgment in a recommendation-consistent direction, *even if he conducts his own investigation.*"<sup>224</sup> This phenomenon, known as expectancy confirmation bias, derives from the likelihood that the decisionmaker will give deference to the supervisor's view of the situation due to the supervisor's more highly influential position in the corporate power structure.<sup>225</sup> As a result, the independent investigation itself may be tainted with bias because "once the decisionmaker receives any complaints, reports, or recommendations from the supervisor, her judgment may be anchored to the information therein, and she may then search for information and process it in a manner tending to recreate the supervisor's bias."<sup>226</sup> Thus, some commentators suggest that an investigation can succeed at purging the taint of subordinate bias only by "explicitly considering the possibility that bias had influenced the process at its earlier stages."<sup>227</sup> A bias-

---

222. See *id.*; Razzaghi, *supra* note 16, at 1732–34.

223. See, e.g., *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547–48 (7th Cir. 1997) ("[I]t is clear that, when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and legally permissive basis, the basis of the subordinate is not relevant." (citing *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996))); *Recent Cases: Tenth Circuit Clarifies Causation Standard for Subordinate Bias Claims*, 120 HARV. L. REV. 1699, 1702–06 (2007) [hereinafter *Tenth Circuit Clarifies Standard*] ("The BCI court should have . . . held that independent investigations immunize employers from subordinate bias liability only when the decisionmaker consciously seeks out evidence of the supervisor's bias and actively correctives for its effects on the investigation and the decision.").

224. *White & Krieger, supra* note 7, at 524.

225. See, e.g., *id.* at 525 ("[R]esearch has demonstrated quite convincingly that when presented with a claim (i.e., Mary is a poor performer and should be fired), people tend to treat the claim as a tentative hypothesis and proceed to test that hypothesis by searching for evidence that will confirm it."); see also Monica J. Harris, et al., *Awareness of Power as a Moderator of Expectancy Confirmation: Who's the Boss Around Here?*, 20 BASIC & APPLIED SOC. PSYCHOL. 220 (1998) ("People tend to defer to those who are in positions of higher power, and that deference may include confirming the expectations of the others.").

226. *Tenth Circuit Clarifies Standard, supra* note 223, at 1703.

227. *White & Krieger, supra* note 7, at 527.

conscious investigation often will be necessary to eradicate the causal effect of subordinate bias.

The existing case law provides some guidance as to the type of investigations that courts have found to be adequate or, in contrast, inadequate. The Eleventh Circuit in *Stimpson v. City of Tuscaloosa*<sup>228</sup> found that an employer's three-day evidentiary hearing, complete with legal counsel and witnesses before a three-member panel of neutral decisionmakers, clearly passed muster.<sup>229</sup> Most courts that have considered the issue also have found that a face-to-face meeting, or an offer of such a meeting, between the formal decisionmaker and the employee alleging discrimination is sufficient to break the chain of causation.<sup>230</sup> In this regard, the Tenth Circuit in *BCI* stated in dictum that "under our precedent, simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory."<sup>231</sup> Finally, some courts' decisions have suggested that an independent examination of the underlying circumstances may be sufficient even without a personal interview of the individual about to be disciplined.<sup>232</sup>

While less attention has been devoted to describing instances in which investigations are not adequate to dispel subordinate bias liability, courts have identified at least two such circumstances. First, a formal decisionmaker cannot justify the investigation defense simply by meeting with the biased subordinate to discuss the subordinate's recommendation.<sup>233</sup> That step is likely to

---

228. 186 F.3d 1328 (11th Cir. 1999).

229. *See id.* at 1330–31.

230. *See, e.g.,* English v. Colo. Dep't of Corr., 248 F.3d 1002, 1011 (10th Cir. 2001) ("A plaintiff cannot claim that a firing authority relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond to and rebut the evidence supporting the recommendation."); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249–50 (11th Cir. 1998) (finding that an employer's meeting with the employee broke the chain of causation between the supervisor's harassment and the employer's decision to terminate employee); Willis v. Marion County Auditor's Office, 118 F.3d 542, 547–48 (7th Cir. 1997) (finding that the chain of causation was broken by the employer's "proactive involvement" in investigating the claims and by employer affording the employee numerous opportunities to explain the alleged misconduct).

231. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 488 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (citing *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231–32 (10th Cir. 2000)).

232. *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 919 (7th Cir. 2007) (finding that a decisionmaker's examination of underlying evidence of wrongdoing was sufficient even without a follow up interview with the target employee); *see also* *Johnson v. Kroger Co.*, 319 F.3d 858, 877 (6th Cir. 2003) (Rosen, J., dissenting) (suggesting that an ultimate decisionmaker's investigation should be deemed adequate when her assessment of employee job performance is "informed principally by her own direct, repeated, and unchallenged observations").

233. *See, e.g.,* *Gilbrook v. City of Westminster*, 177 F.3d 839, 857 (9th Cir. 1999) ("[A biased subordinate] was involved directly in the disciplinary process. He serves as plaintiffs' *Skelly* hearings officer . . ."). It is likely that the purported investigation in the Fourth Circuit's *Hill*

exacerbate rather than alleviate the taint of subordinate bias. Second, the Tenth Circuit in *BCI* stated that the mere review of a personnel file by a decisionmaker did not constitute an adequate investigation where the file did not provide background information concerning the allegations asserted by the biased subordinate.<sup>234</sup>

In general, an employer who receives a subordinate's recommendation for an adverse employment action would be well advised to engage in a personal interview of the subject of the recommendation. In some instances, however, a personal interview, by itself, may not necessarily establish such a defense.<sup>235</sup> For example, a decisionmaker might conduct only a perfunctory interview or fail to follow through by examining key exculpatory evidence identified by the employee during the interview. Similarly, a decisionmaker might conduct the interview under circumstances that are overly intimidating or otherwise not conducive to a fair and meaningful exchange of information. In circumstances such as these, the mere fact that an interview took place might not serve to remove the taint of subordinate bias.

A fair and independent investigation need not be an onerous undertaking. An employer should not be expected to hold a full-blown evidentiary hearing of the type utilized in *Stimpson*<sup>236</sup> or to follow up on each and every explanation offered by an employee during an interview.<sup>237</sup> Indeed, it should not even be a prerequisite for the decisionmaker to reach a "correct" conclusion.<sup>238</sup> The touchstone, instead, should be whether the decisionmaker has taken sufficient

---

decision also would be found inadequate by most courts since the ultimate decisionmaker in that case relied on a requested report from the biased subordinate rather than a face-to-face interview with the employee under scrutiny. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 296 (4th Cir. 2004); *see also Razzaghi, supra* note 16, at 1734 ("[B]y simply relying on Fultz's report as the basis for the decision to terminate Hill, his inquiry falls short of an independent investigation.").

234. *BCI*, 450 F.3d at 492–93.

235. *Tenth Circuit Clarifies Standard, supra* note 223, at 1706 ("[M]erely asking the employee for her side of the story . . . will not always root out the possible discriminatory motives of the supervisor that may have influenced the independent investigation."); *see also Susan Sturm, Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 538 ("[U]ncritical acceptance of internal dispute resolution processes . . . will often leave underlying patterns and conditions unchanged.").

236. *See supra* text accompanying note 228.

237. If such a requirement were imposed, some employees subject to contemplated discipline would have an incentive to provide multiple explanations and evidentiary leads as a means of deterring the successful conclusion of the investigative process.

238. *See, e.g., Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 411 (7th Cir. 1997) ("[T]he pertinent question is not whether [the decisionmaker] was right to believe that [the plaintiff] struck [his coworker] and that as a result [the plaintiff] should be discharged, but whether [the decisionmaker's] belief that this was so was genuine or whether his rationale is merely a pretext for age discrimination.").

steps under the circumstances of the case to eliminate subordinate bias as a motivating factor in the employer's ultimate determination; this should include a bias-conscious examination of the circumstances in question.<sup>239</sup>

## 2. *When an Investigation Should be Required or Expected*

With respect to the second investigation subissue, courts generally recognize that an employer has discretion in deciding whether to undertake an independent investigation into the circumstances of an adverse action recommended by a subordinate. In essence, employers have the option to engage in an investigation as a means of negating the possibility that a plaintiff will be able to establish causation with respect to the impact of subordinate bias.<sup>240</sup> In that sense, an employer is not required or expected to engage in an investigation, but acts at its peril if it chooses not to do so.

The Seventh Circuit in *Brewer* adopted a somewhat different approach. In that case, a state university discharged Brewer for, among other things, dishonestly altering a parking permit.<sup>241</sup> One of Brewer's supervisors, Thompson, relayed information concerning the incident to Hendricks, the ultimate decisionmaker.<sup>242</sup> In addition to receiving Thompson's information, Hendricks examined the altered permit and confirmed that it had been altered.<sup>243</sup> She did not, however, take any steps to ascertain whether Thompson had withheld any additional relevant information because no one, including Brewer, had reported such an allegation.<sup>244</sup> Hendricks eventually terminated Brewer, who filed suit claiming that Thompson had withheld certain relevant information due to racial animus.<sup>245</sup> The Seventh Circuit affirmed dismissal of Brewer's suit, finding that Brewer had failed to alert the decisionmaker of the need for a broader investigation.<sup>246</sup> The Seventh Circuit explained,

---

239. See *supra* text accompanying notes 224–227 (discussing the problem of expectancy confirmation bias).

240. See, e.g., *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 920 (7th Cir. 2007) (“The line of cases addressing this particular situation is univocal, and indicates that even where a biased employee may have leveled false charges of misconduct against the plaintiff, the employer does not face Title VII liability so long as the decision maker independently investigates the claims before acting”); *English v. Colo. Dep’t of Corr.*, 248 F.3d 1002, 1010–11 (10th Cir. 2001) (suggesting that an employer can avoid liability by conducting an independent investigation of the allegations against an employee).

241. *Brewer*, 479 F.3d at 913–14.

242. *Id.* at 919.

243. *Id.*

244. *Id.*

245. *Id.* at 909.

246. *Id.* at 919.

Brewer never claimed that Thompson was holding anything back. No one has suggested that Brewer was unable to bring such a claim to Hendrick's attention, and until he did so Hendricks had no reason to suspect that there were additional relevant facts that she had not investigated. . . . Hendricks therefore conducted an independent investigation that absolved the University of liability for any deception on Thompson's part.<sup>247</sup>

Accordingly, the Seventh Circuit placed responsibility on the plaintiff to alert the decisionmaker as to the need for and scope of the investigation.

The Seventh Circuit's position deserves some sympathy because without some triggering catalyst an employer can protect itself only by engaging in an independent investigation into each and every instance where an adverse employment action is premised on some input from a subordinate employee.<sup>248</sup> On the other hand, the *Brewer* court's approach places too great of an onus on an employee, unless accompanied by some mechanism that facilitates an employee complaint process.

Regarding a related policy issue, both of the principal cases espousing an intermediate standard cite policy grounds that militate in favor of encouraging employers to engage in independent investigations. As the Seventh Circuit stated in *Brewer*, "Title VII's primary objective is 'not to provide redress but [to] avoid harm' by giving employers an incentive to control their employees."<sup>249</sup> Similarly, the Tenth Circuit in *BCI* noted that a policy of encouraging investigations has "the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions."<sup>250</sup>

An affirmative stance that encourages independent investigations serves the deterrent purpose of antidiscrimination statutes. Allowing a sufficiently fair and independent investigation to serve as a defense to liability gives employers the motivation and the processes with which to prevent discrimination in the

---

247. *Id.* (citations omitted).

248. *See, e.g.,* Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1250 (11th Cir. 1998) ("We hesitate to require an employer to investigate . . . every action of its employees that could be motivated by a discriminatory animus.").

249. *Brewer*, 479 F.3d at 920 (quoting *Erickson v. Wis. Dep't of Corr.*, 469 F.3d 600, 605–06 (7th Cir. 2006)); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998) ("[Title VII's] 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975))).

250. *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 486 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931.

workplace *ab initio*.<sup>251</sup> Preventing adverse actions from occurring in the first place is a better alternative than providing a route to possible future compensation in the event such an action comes to pass. Both the employer and the employee suffer costs, delays, and other harms that result from litigation, no matter the outcome of a particular case. Therefore, if the courts can provide a means to encourage employers to prevent these harms from occurring in the first place, it seems justifiable and appropriate to do so.

These same policy considerations apply to workplace harassment. In both contexts, an employer faces the potential for liability because of employee misdeeds of which the employer may or may not have been aware. The Supreme Court responded in the sexual harassment context by establishing a liability framework that affirmatively prefers internal deterrence and dispute resolution over federal court litigation.<sup>252</sup> Thus, as noted above, the Court in *Ellerth* and *Faragher* established a two-part affirmative defense available to employers in cases where a supervisor engages in harassment that does not constitute a tangible employment action.<sup>253</sup> Pursuant to this defense, an employer can avoid liability if it can prove two elements:

- (a) That the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>254</sup>

A similar affirmative defense should be recognized in the context of subordinate bias liability. In particular, this Article recommends the adoption of the following two-prong defense: an employer should not be liable for acts of subordinate bias where (1) it has taken reasonable measures to prevent and to correct such bias, such as by the implementation of a meaningful anti-bias policy, and (2) the plaintiff has unreasonably failed to take advantage of the preventative or the corrective opportunities provided by the employer or

---

251. *Tenth Circuit Clarifies Standard*, *supra* note 223 at 1706 (“Subjecting employers to potential liability if they do not conduct a bias-seeking investigation before discharging a member of a protected class will encourage employers to reevaluate their procedures and voluntarily implement solutions to effect positive changes in the workplace.”).

252. LEWIS & NORMAN, *supra* note 131, § 2.22, at 73 (stating that the *Ellerth* and *Faragher* framework provides employers with an incentive to adopt internal grievance procedures and that “[s]uch procedures will encourage internal complaints, thereby enhancing the employer’s ability to take prompt corrective action”).

253. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

254. *Id.*

otherwise to avoid harm. Alternatively, where the plaintiff has taken advantage of such measures, or where no policy exists, an employer should be able to avoid liability only if it has dissipated the taint of subordinate bias by undertaking a fair and independent investigation into the circumstances underlying the contemplated employment action.

This recommendation provides several advantages. First, the affirmative defense would encourage employers to adopt explicit policies that prohibit bias in the workplace and facilitate employee complaints of biased treatment. Second, these employee complaints would provide a specific triggering mechanism for an employer to undertake an investigation. Third, the recommended framework would encourage employers to seek out and to deter potential adverse employment actions motivated by subordinate bias through a bias-conscious investigation.<sup>255</sup> Fourth, the proposed defenses provide a means by which employers can protect themselves from litigation and from liability. Finally, the recommendations facilitate resolution by an internal mechanism that would be quicker, less costly, and less emotionally taxing than federal court litigation.

Both employers and employees will likely criticize this proposal. Employees could argue that this framework would bar a number of suits by employees with otherwise meritorious claims simply because the employees in question do not utilize a formal complaint process. These critics could cite to experience in the harassment realm, pointing out that the vast majority of harassment victims are reluctant to file a formal complaint and, accordingly, are barred from legal recourse.<sup>256</sup>

This criticism misses the mark for two reasons. First, an internal dispute resolution system like the one proposed will serve to deter many more inappropriate adverse employment actions than the handful of subordinate bias cases that make it to federal court each year. Second, victims of subordinate bias will be far more likely to utilize an internal reporting process than victims of harassment. The most common reason that employees do not make formal complaints of harassment is because they fear that reporting will invite

---

255. See *supra* text accompanying notes 222–223.

256. See, e.g., Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 374 (2004) (“[T]he social science research on employees’ responses to harassment has consistently found that very few victims pursue complaints through official grievance procedures.”); Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 208–09 (2004) (“The research over the past twenty years, however, has consistently shown that ‘filing a formal complaint or reporting the harassment to an authority appears to be a very uncommon occurrence.’” (quoting Bonnie S. Dansky & Dean G. Kilpatrick, *The Effects of Sexual Harassment*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 152, 158 (William O’Donohue ed., 1997))).

retaliation or otherwise make the situation worse.<sup>257</sup> Employees who are on the brink of discharge due to subordinate bias will not have that same fear, but instead will see the reporting procedure as a last chance to save their jobs.

Employers, however, are likely to criticize this proposal for just that reason; the internal reporting process will lead to an increase in the number of complaints—many unmeritorious—and add yet another layer of internal bureaucracy to the human resource function. Again, two responses are in order. First, the internal process itself quickly will weed out unmeritorious claims. Indeed, it will be quicker and cheaper to resolve these matters internally than in federal court. Second, such a process will provide more benefits than burdens for employers. The recommended process will pinpoint when independent investigations are needed and provide a mechanism by which employers can protect themselves from both litigation and liability. A few more complaints are a small price to pay for these resulting benefits.

In sum, an employer's independent investigation is an important third component in assessing the appropriateness of subordinate bias liability. Such investigations should be encouraged through the use of an affirmative defense and internal reporting procedure similar to those adopted by the Supreme Court for sexual harassment cases. Such investigations can serve the laudatory purposes of deterring discriminatory actions and reducing litigation, but only to the extent that they are fair, independent, and bias-conscious, so as to dissipate the otherwise motivating influence of subordinate bias under the circumstances.

## V. CONCLUSION

The topic of subordinate bias liability is beset with layers of complexity. Some of the layers flow from the multiplicity of actors in such cases. Subordinate bias cases invariably implicate at least two actors: a biased subordinate—usually a lower level supervisor—and a higher ranked formal decisionmaker. But, it is not uncommon for additional actors to play roles in these cases, such as other supervisors and managers in a vertical hierarchy, or committee members who participate on a horizontal level.<sup>258</sup> The possibility of an independent investigation offers the potential for yet another actor or team of actors. These many participants pose a daunting challenge for a court in determining the ultimate causal role of subordinate bias in the particular circumstances.

---

257. Befort & Gorajski, *supra* note 186, at 633; Chamallas, *supra* note 256, at 375; Lawton, *supra* note 256, at 257.

258. See White & Kieger, *supra* note 7, at 511, 530 (discussing decision making that takes place in vertical and horizontal structures).

Subordinate bias liability also implicates layers of important policy issues. Concerns related to causation, agency principles, and the role of employer investigations serve as portals to many critical policy concerns.

Finally, the appellate courts themselves have contributed to this layering effect by providing several layers of confusion. As this Article demonstrates, the circuit courts have adopted at least three different standards for determining subordinate bias liability. In actuality, far more than three viewpoints currently exist, as several gradations in approaches appear within the lenient and intermediate standards.

A striking feature of the various liability standards is that each serves legitimate and substantial policy interests. The lenient standard legitimately recognizes that liability should be possible for subordinate liability that is causally linked to an adverse employment action. The strict standard legitimately recognizes that an employer should be vicariously liable only for the acts of its agents who have been empowered by delegated authority. The intermediate standard, meanwhile, legitimately recognizes the important role that employer investigations can play in furtherance of both discrimination deterrence and litigation avoidance goals.

Given the positive underpinnings of all three standards, our proposed solution is not to choose one standard and one policy to the exclusion of the others, but to attempt an appropriate balance among all three approaches. With that goal in mind, our recommendations may be summarized as follows:

- (A) An employer may be liable under federal antidiscrimination statutes for the biased acts of a subordinate employee if
  - (1) the employee acting with bias is a supervisor or otherwise acts in furtherance of authority delegated by the employer, and
  - (2) the biased acts are a motivating factor in a resulting adverse employment action taken by the employer.
  
- (B) An employer, nonetheless, may avoid liability if it establishes a two-part affirmative defense showing that
  - (1) it has taken reasonable measures to prevent and to correct such bias, such as by the implementation of a meaningful anti-bias policy, and
  - (2) the plaintiff, unreasonably, has failed to take advantage of the preventative or corrective opportunities provided by the employer or otherwise to avoid harm.

(C) Alternatively, where the plaintiff has taken advantage of such measures, or where the employer has not established an anti-bias policy, an employer may avoid liability if it has dissipated the taint of subordinate bias by undertaking a fair, independent, and bias-conscious investigation into the circumstances underlying the contemplated employment action.

This set of recommendations provides a balanced, policy-based analytical framework for addressing the issue of subordinate bias liability. It represents the appropriate grasp of the cat's paw theory.