STAUB v. PROCTOR HOSPITAL: CLEANING UP THE CAT'S PAW

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I. INTRODUCTION

Based on a fable by Jean La Fontaine and introduced by Judge Richard Posner in 1990, the "cat's paw" theory refers to a person who is duped into action in order to accomplish another's purpose.[1] Within the context of employment discrimination law, the cat's paw theory seeks to deal with the ever-changing landscape of employer liability.[2] As company structures change, supervisory roles and decision-making capabilities often are spread out among a variety of individuals.[3] Thus it becomes harder for a plaintiff to bring a case of discrimination when the person harboring discriminatory animus is not the same person that ultimately makes the adverse employment decision.[4]

Staub v. Proctor Hospital[5] is an employment discrimination case brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA).[6] In *Staub*, the employee seeks to hold his employer liable for the actions influenced by the anti-military animus of two of his supervisors, even though neither one ultimately made the decision to terminate his employment.[7] Although this is a USERRA case, its resolution is likely to affect the

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1. Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 385 (2008).

2. *Id.* at 384–85.

3. *Id. See also* Brief for Petitioner at 25–26, Staub v. Proctor Hosp., No. 09-400 (U.S. July 2, 2010) (discussing the delegation of duties and separation of decision making from investigation).

4. Befort & Olig, *supra* note 1, at 384–85.

5. Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (U.S. Apr. 19, 2010) (No. 09-400).

6. Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C.A. §§ 4301–4335 (West 2011).

7. *Staub*, 560 F.3d at 655.

subordinate-liability standard for Title VII[8] and other federal anti-discrimination statutes.[9] Due to a circuit split,[10] the Supreme Court granted certiorari.[11] This is the Court's second attempt[12] at creating a uniform standard for the circuits and it is likely that the Court's decision will seek to balance the goal of ending employment discrimination while recognizing the problems created by the hierarchies and intricacies of the modern workplace.

II. FACTS

Vincent Staub was employed as an angiography technician in the Diagnostic Imaging Department of Proctor Hospital (Proctor), located in Peoria, Illinois.[13] He was simultaneously a member of the United States Army Reserves.[14] As a result of his military service, Staub required a flexible schedule so that he could attend drill and training obligations that occupied one weekend a month and two weeks during the summer.[15] For ten years, Staub balanced both sets of responsibilities without any significant disturbance.[16]

Staub's employment problems began in 2000 when Janice Mulally took over scheduling for the Diagnostic Imaging Department.[17] At that time, Mulally, second in command of the department, and Michael Korenchuk, head of the department, resented Staub because of his military service and took actions based on that animus that resulted in his termination.[18] As evidence of the discrimination, Staub cites incidents in which Mulally purposefully created conflicts between his civilian and military obligations, required him to use vacation time for his drills, scheduled him for additional shifts, and

8. Title VII, 42 U.S.C.A. §§ 2000e–2000e-17 (West 2011).

9. Brief for the United States as Amicus Curiae Supporting Petitioner at 21, Staub v. Proctor Hosp., No. 09-400 (U.S. July 9, 2010).

10. Ricci v. DeStefano, 129 S. Ct. 2658, 2688 (2009) (Alito, J., concurring) ("There is a large body of court of appeals case law on this issue, and these cases disagree about the proper standard.").

11. Staub v. Proctor Hosp., 130 S. Ct. 2089 (2010) (mem.).

12. *See infra* text accompanying note 87.

13. Staub v. Proctor Hosp., 560 F.3d 647, 650–51 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (U.S. Apr. 19, 2010) (No. 09-400).

14. *Id.* at 651.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 651–52.

publicly posted requests for people to cover Staub's shifts, making him appear irresponsible to his coworkers.[19]

Both Mulally and Korenchuk made discriminatory remarks about Staub's military service.[20] Mulally stated that the extra shifts were Staub's way of "paying back the department for everyone else having to bend over backwards to cover [his] schedule for the reserves"[21] and called his military duties "bullshit."[22] Korenchuk made similar statements regarding Staub's duties, calling the drill weekends "a b[u]nch of smoking and joking and [a] waste of taxpayers[']money."[23] Mulally continued to express her discontent with Staub's military obligations by commenting to one of Staub's coworkers, Leslie Sweborg, that his military duties were a "strain on the[] department," and asked Sweborg to help get rid of him.[24]

On January 27, 2004, Staub received a written warning from Mulally accusing him of "shirking his duties" and disappearing without notice.[25] Both Staub and one of his coworkers dispute the events of the day that resulted in the warning.[26] The warning required him to "remain in the general diagnostic area" unless he notified Korenchuk or Mulally of his plans and reasons for leaving.[27]

On April 20, 2004, Proctor fired Staub for violating the January 27 written warning.[28] Korenchuk reported that he was unable to locate Staub during his shift, but Staub asserted that he had followed the procedures laid out in the warning by calling to let Korenchuk know that he would be in the hospital cafeteria eating lunch.[29] Staub was escorted to the office of Chief Operating Officer Linda Buck by Korenchuk and a security guard, and was fired on the spot.[30] Earlier that day, Buck had already listened to Korenchuk's complaint about Staub's failure to abide by the previous warning and reviewed previous incidents and Staub's file.[31]

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19. *Id.*
20. *Id.*
21. *Id.* at 652.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 652–53.
26. *Id.* at 653.
27. *Id.*
28. *Id.* at 654.
29. *Id.*
30. *Id.*
31. *Id.*

Staub filed a grievance with Proctor following his termination, arguing that Mulally's fabrication of the incident resulted in the January 27 written warning.[32] Buck again reviewed Staub's personnel file and previous reports of Staub's problems working with other Proctor employees and denied his grievance.[33] Buck did not speak with other current angiography technologists or investigate Staub's claim that Mulally had a military animus.[34] Buck herself harbored no animus toward Staub as a result of his status in the military.[35]

Staub filed an employment discrimination suit based on his military status under USERRA.[36] The trial court allowed the jury to hear all evidence of animus against Staub by Korenchuk and Mulally and then instructed the jury under the Seventh Circuit's cat's paw theory of "singular influence" that "[a]nimosity of a co-worker . . . on the basis of [Staub's] military status as a motivating factor may not be attributed to [Proctor] unless the co-worker exercised such singular influence over the decision-maker that the co-worker was basically the real decision[-]maker."[37] The jury also was also instructed that if the decision maker conducted an independent investigation, the employer was not liable for the discriminatory animus of a non-decision maker.[38] The jury found for Staub and concluded that Proctor had not proved that Staub would have been fired "regardless of his military status."[39] The court denied Proctor's motion for judgment as a matter of law. Proctor appealed on the grounds that the district court misapplied the singular-influence standard by allowing insufficient evidence of non-decision maker animus and incorrectly instructed the jury.[40]

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32. *Id.* at 655.
33. *Id.*
34. *Id.* at 654–55.
35. *Id.* at 655.
36. *Id.*
37. Brief for the United States, *supra* note 9, at 6.
38. *Id.*
39. *Id.*
40. Staub v. Proctor Hosp., 560 F.3d 647, 655 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (U.S. Apr. 19, 2010) (No. 09-400).

III. LEGAL BACKGROUND

A. USERRA

USERRA was enacted in 1994 to protect part-time members of the military from employment discrimination while they continued their civilian careers and fulfilled their military responsibilities.[41] Similar to the language in Title VII,[42] USERRA states that an employer is subject to liability if an employee's military service "is a motivating factor in the employer's [adverse] action, unless the employer can prove that the action would have been taken in the absence of such membership . . . ."[43] USERRA's definition of employer includes "a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."[44] Courts generally interpret USERRA according to the standards applicable to Title VII and other federal anti-discrimination statutes.[45]

B. Traditional Employment Discrimination Tests

The traditional test for determining employer liability in employment discrimination cases originated in the Supreme Court's ruling in *McDonnell Douglas Corp. v. Green*.[46] Under the *McDonnell Douglas* burden-shifting framework, the burden is on the plaintiff to make out a prima facie case by showing that: (1) he is a member of the protected class; (2) he was meeting his employer's legitimate expectations; (3) an adverse employment action was taken against him; and (4) circumstances exist that give rise to an inference of discrimination.[47] If the plaintiff successfully establishes a prima facie

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41. USERRA, Pub. L. No. 103-353, 108 Stat. 3149 (codified as amended at 38 U.S.C.A. §§ 4301–4335 (West 2011)).

42. 42 U.S.C.A. § 2000e-2(m) (West 2011) ("An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice . . . .").

43. 38 U.S.C.A. § 4311(c)(1).

44. *Id.* § 4303(4)(A)(i).

45. Brief for the United States, *supra* note 9, at 21.

46. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

47. *See id.* at 802 (holding that a plaintiff establishes a prima facie case "by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

case, a rebuttable presumption of discrimination is established.[48] The burden then shifts to the defendant to show that there was a "legitimate, nondiscriminatory reason" for the adverse action.[49] If this burden of production is met, the plaintiff must then demonstrate that the employer's proffered reasons are only a pretext for discrimination.[50]

This standard was adapted to "mixed-motive" cases in *Price Waterhouse v. Hopkins*.[51] Under the *Price Waterhouse* test, when membership in a protected class is one of several motives for the adverse employment action, the employer can avoid liability by establishing the "same decision" affirmative defense—that the adverse action would have been taken irrespective of the employee's protected status.[52] Congress modified the *Price Waterhouse* decision with the Civil Rights Act of 1991.[53] This Act amended Title VII to provide that "an unlawful employment practice is established when the complaining party demonstrates that [the protected characteristic] was a *motivating factor* for any employment practice . . . ."[54] Congress chose the motivating factor language over alternatives (such as a substantial factor or a substantial motivating factor) arguably to allow the statute to reach a broader realm of discrimination.[55] In order to balance out broader employer liability, the Act also added a provision that forbids certain types of damages and injunctive relief that places the employee back in the job when the employer proves the "same decision" affirmative defense.[56] The Act reframed the affirmative defense as interpreted by the Supreme Court from a liability-escaping mechanism to one that merely limits an employer's damages.

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48. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981) (explaining that under the *McDonnell Douglas* framework, "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee").

49. *McDonnell Douglas*, 411 U.S. at 802–03.

50. *Id*. at 804.

51. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075 (codified as amended at 42 U.S.C.A. §§ 2000e-2(m), 2000e-5(g) (West 2011)).

52. *Id.* at 244–45.

53. Befort & Olig, *supra* note 1, at 399.

54. 42 U.S.C.A. § 2000e-2(m) (emphasis added).

55. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 505–10 (2006) (discussing the history behind "a motivating factor" and how it differs from "a substantial factor").

56. 42 U.S.C.A. § 2000e-5(g)(2)(B).

C. Agency Law in Employment Discrimination Cases

In addition to its decisions on the standards for causation, the Supreme Court has also heard cases on the application of common law agency principles in the employment discrimination context. In *Burlington Industries, Inc. v. Ellerth*,[57] the Court applied principles of agency law and vicarious liability to a hostile work environment harassment case.[58] The Court held that under the "aided in the agency relation standard," an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."[59] The Court concluded that an employer would always be held vicariously liable when a tangible employment action was taken against the aggrieved employee, but liability could also exist when no such action was taken.[60] When an employee has not suffered a tangible employment action, the employer can prove the affirmative defense that it took reasonable measures to prevent or promptly correct the harassment and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[61] The Court's reasoning relied on policy implications and the purpose of Title VII to encourage employers to form their own procedures to eliminate discrimination.[62]

D. The History and Variations of the Cat's Paw Doctrine

Theories of agency liability are also used in non-harassment employment discrimination cases. Under subordinate-bias liability, known as the cat's paw theory, an employer may be held liable when an adverse employment action was taken by a person who held no animus, but was influenced or relied on information provided by a biased subordinate.[63] The cat's paw first was used as a legal theory in

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57. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

58. *Id.* at 764–65. *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (decided the same day at *Ellerth* and standing for the same premise).

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

60. *Id.* at 763.

61. *Id*. at 765.

62. *Id*. at 764 (with Title VII Congress sought to "encourage the creation of antiharassment policies and effective grievance mechanisms" and the EEOC's policy is to "encourag[e] the development of grievance procedures").

63. *See infra* notes 65–87 and accompanying text.

Shager v. Upjohn.[64] In an opinion written by Judge Posner, the Seventh Circuit held that a material issue of fact existed where a committee decision could have been tainted by a supervisor's age-based discriminatory recommendation.[65] The court concluded that if the committee relied on the biased advice of the supervisor, the committee's own lack of animus "would not spare the company from liability."[66]

All of the federal circuits currently recognize some variation of the cat's paw doctrine.[67] The different tests can be grouped into three categories: (1) the actual decision-maker standard; (2) the input or influence standard; and (3) the causation standard. The actual decision-maker standard is the strictest standard and is the most difficult for plaintiffs to meet.[68] Used most notably by the Fourth Circuit in *Hill v. Lockheed Martin*,[69] this standard requires the subordinate to possess a "supervisory or disciplinary authority" and be "the one principally responsible for the decision" for an employer to be held liable.[70] In other words, the subordinate must be the actual or functional decision maker in order for the employer to be liable for the subordinate's actions.[71] Focusing on the power of the subordinate, this standard depends on a narrow interpretation of agency law.

The input or influence standard is the most lenient and is used in some form by the majority of circuits.[72] Under this standard, the focus is on whether an employee with discriminatory animus provided or withheld information that could have affected the ultimate decision,[73] substantially influenced the decision maker,[74] or closely participated

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64. Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990).
65. *Id*. at 401.
66. *Id*. at 405.
67. Befort & Olig, *supra* note 1, at 389.
68. *See infra* text accompanying notes 70 and 71.
69. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2004).
70. *Id.* at 291.
71. *Id*.
72. *See infra* notes 73–76 and accompanying text.
73. *See* Simpson v. Diversitech Gen., Inc., 945 F.2d 156, 160 (6th Cir. 1991) ("If [the biased official] initiated the disciplinary action . . . simply showing that [the biased official] had no role in the 'final' decision is insufficient to establish that [the employer] would have made the same decision absent the racial animus."); Gee v. Principi, 289 F.3d 342, 347 (5th Cir. 2002) (finding liability when biased supervisors "made comments critical" of the plaintiff at a hiring meeting).
74. *See* Rose v. N.Y. City Bd. of Educ., 257 F.3d 156, 162 (2d Cir. 2001) (finding "comments made directly to her on more than one occasion by her immediate supervisor, who had enormous influence in the decision-making process" to be evidence of discriminatory animus); Russell v. McKinney Hosp. Venture, 235 F.3d 219, 227 (5th Cir. 2000) (finding that "it is appropriate to tag the employer with an employee's age-based animus if the evidence

in the decision making process.[75] Although this standard varies from circuit to circuit, it provides the lowest threshold for an employee to prove discrimination because each court focuses on assessing the causal connection between the subordinate's act and the ultimate adverse employment decision, rather than determining which supervisors are covered under strict agency principles.[76]

The intermediate standard, the causation standard, focuses both on causation and agency law. In *EEOC v. BCI Coca-Cola*,[77] the Tenth Circuit held that the appropriate test is "whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."[78] Under this standard, liability turns on causation and whether the subordinate was aided in his or her action by the employment relationship.[79] This "aided in the action" standard from *Ellerth* represents a broader view of agency principles than the "decision maker only" standard because it attaches employer liability to a greater number of supervisory employees.[80] By focusing on actual causation, the Tenth Circuit determined that an independent investigation by the decision maker could break the causal connection.[81] Nevertheless, the court did not provide any clear standards as to what such an independent investigation would require.[82]

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indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker"); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000) (holding that "discriminatory comments . . . made by the key decisionmaker or those in a position to influence the decisionmaker" can be evidence of pretext); Griffin v. Wash. Convention Ctr., 142 F.3d 1308, 1312 (D.C. Cir. 1998) (holding that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence").

75. *See* Stacks v. Southwestern Bell Yellow Pages, Inc., 27 F.3d 1316, 1323 (8th Cir. 1994) (finding that the person harboring animus "participated in the decisions to suspend and terminate" employee); Poland v Chertoff, 494 F.3d 1174, 1181 n.3 (9th Cir. 2007) (finding that a biased official made the "decision to initiate the administrative inquiry against [the employee] and that [biased official's] animus . . . should be imputed to the [employer]").

76. Madden v. Chattanooga City Wide Serv. Dep't, 549 F.3d 666, 677 (6th Cir. 2008) (finding that when a plaintiff challenges his termination as motivated by a supervisor's discriminatory animus, he must offer evidence of a "causal nexus" between the ultimate decision-maker's decision to terminate the plaintiff and the supervisor's discriminatory animus).

77. EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105, *and cert. dismissed*, 549 U.S. 1334 (2007).

78. *Id*. at 487.

79. *Id*. at 488.

80. *Id*.

81. *Id.*

82. *See id.* (lacking a description of what an independent investigation entails).

The Seventh Circuit revisited the cat's paw problem in *Brewer v. Board of Trustees of University of Illinois*.[83] In this Title VII case, the court held that in order to impose liability on an employer for the actions of a subordinate, the subordinate must have had "such power over the nominal decision maker that she is in fact the true, functional decision maker."[84] Because a subordinate must exert *singular* influence over the decision maker, *any* independent investigation by the decision maker into the employment situation bars employer liability.[85] The court explained that it "does not matter that . . . much of the information has come from a single, potentially biased source, so long as the decision maker does not artificially . . . limit her investigation to information from that source."[86]

Due to the variety of standards applied by the circuits, the correct test for determining employer liability based on subordinate bias is ripe for clarification. Though the Court granted certiorari for *BCI Coca-Cola*, the case was settled and certiorari dismissed.[87] Because the cat's paw theory affects a variety of employment discrimination statutes, including Title VII and USERRA, the Court most likely will seize this opportunity to develop a uniform standard for dealing with cases of subordinate bias.

IV. HOLDING

In *Staub*, the Seventh Circuit held that because there was insufficient evidence under the singular influence theory to show that Mulally or Korenchuk singularly influenced Buck's decision to fire Staub, the jury's decision should be vacated and judgment entered for Proctor.[88] The court concluded that although the district court's jury instructions were "not technically wrong" about the correct legal standard,[89] the lower courts should "determine whether a reasonable jury could find singular influence on the evidence to be presented" and, if the evidence is insufficient, the animus of non-decision makers should not be admitted.[90]

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83. Brewer v. Bd. of Trustees of Univ. of Ill., 479 F.3d 908 (7th Cir. 2007).
84. *Id.* at 918.
85. *Id.*
86. *Id.*
87. BCI Coca-Cola Bottling Co. v. EEOC, 549 U.S. 1334 (2007) (mem.).
88. Staub v. Proctor Hosp., 560 F.3d 647, 659 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (U.S. Apr. 19, 2010) (No. 09-400).
89. *Id.* at 657.
90. *Id.* at 658.

In explaining the role of the judge to keep prejudicial and insufficient evidence from the jury, the Seventh Circuit focused its analysis on the cat's paw theory. Under the standard previously set forth in *Brewer*, the court held again that "[w]here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker."[91] The court was "unprepared to find an employer liable based on a nondecisionmaker's animus unless the 'decisionmaker' herself held that title only nominally" and the subordinate was in fact the true decision maker.[92]

The court acknowledged the military animus of Mulally and Korenchuk, but asserted that Buck's independent investigation into Staub's employment meant that a jury could not find the existence of singular influence.[93] In describing the importance of the independent investigation, the court "admit[ted] that Buck's investigation could have been more robust," but believed that the *Brewer* standard "does not require the decisionmaker to be a paragon of independence."[94]

Had Staub argued in the alternative that Korenchuk was a decision maker as well and that this was a traditional discrimination case, Buck's independence under the cat's paw theory would be irrelevant because the jury could find that Korenchuk himself, as a decision maker, held military animus and exerted authority in a discriminatory manner.[95] Nevertheless, the Seventh Circuit held that because Staub did not present this theory at the trial stage, the theory was not allowed on appeal because of the uncertainty of the possible jury outcome.[96]

V. ANALYSIS OF THE SEVENTH CIRCUIT'S HOLDING

Under the Seventh Circuit's strict singular influence standard—developed in *Brewer* for cases involving animus by people other than an official decision maker—the court's ruling in *Staub* probably was correct. It is not clear under this standard that the evidence supported Staub's claim that Buck based her decision solely on the word of

91. *Id.* at 656 (quoting *Brewer*, 479 F.3d at 918).
92. *Id.* at 656.
93. *Id.* at 659.
94. *Id.*
95. *Id.* at 655.
96. *Id.* at 655–56.

Korenchuk or Mulally, making them the functional decision makers.[97] Additionally, Staub's personnel file included evidence of behavioral problems with other employees that may have caused Buck to fire him, regardless of the direct incidents that led to his termination on April 20, 2004.[98]

Although the Seventh Circuit correctly applied the singular-influence standard to the facts of the case, the standard itself is troubling. The standard only allows for the finding of employer liability when the decision maker is a pawn of another employee's discriminatory motivation.[99] It may be necessary to protect employers from absolute liability based on third party animus, but this pro-employer standard ignores both the statutory language of USERRA and the realities of the workplace.[100] Under USERRA, an employee only needs to show that his military status was a "motivating factor" in his termination.[101] The motivating factor should not need to be limited to the decision maker's own animus. Instead, the motivating factor language should be interpreted to include any action caused by the animus of a subordinate that motivated or led to the ultimate termination decision.[102] This broader conception of "motivating factor" is different from the singular influence standard, which essentially seeks to impute the discriminatory motivation of the supervisor directly to the decision maker.[103] In today's business world, the prevalence of complex managerial structures means that the animus of a lower ranked supervisor could influence an ultimate employment decision, even if the higher ranked decision maker was unaware of the animus or considered other factors. Employees should also be protected from this type of discrimination in the workplace.

Furthermore, the court's focus on independent investigation has no basis in the statute[104] and the elements of a sufficient independent investigation are unclear.[105] Although an independent investigation

97. *Id.* at 658–59.

98. *Id.* at 654–55.

99. *See id.* at 656 ("We were, and remain to this day, unprepared to find an employer liable based on a nondecisionmaker's animus unless the 'decisionmaker' . . . . just take[s] the monkey's word for it, as it were.").

100. *See supra* note 3 and accompanying text.

101. 38 U.S.C.A. § 4311(c)(1) (West 2011).

102. *See infra* text accompanying notes 161 and 162.

103. *See id.*

104. *See* 38 U.S.C.A. § 4311 (containing no language about an independent investigation).

105. *See* Staub v. Proctor Hosp., 560 F.3d 647, 659 (7th Cir. 2009), *cert. granted*, 130 S. Ct. 2089 (U.S. Apr. 19, 2010) (No. 09-400) (explaining that Buck's investigation could have been

certainly will break the chain of causation between a subordinate's discriminatory animus and an adverse employment action if the employer can prove that the same decision would have been made despite the animus, this will not always be the case.[106] The Seventh Circuit's decision in *Staub* leaves open the possibility that *any* independent action on the part of the decision maker will excuse the employer from liability—regardless of the extent and depth of the investigation, the influence of the animus on the employment action, and the authoritative role of the discriminatory subordinates.

VI. ARGUMENTS

A. Staub's (Petitioner's) and the United States' Arguments

Staub's argument focuses on the role of traditional agency law in employment discrimination cases.[107] Staub argues that, under traditional agency principals, an employer is held liable for the actions of its employees when the employees are aided in their conduct by their position or are performing duties that have been delegated to them by the employer.[108] The reasoning behind this principle is that when an employer stands to benefit from the expansion of its business through the delegation of authority, vicarious liability should attach for any negligent or intentional tort that is committed by its agent.[109] Staub believes that agency principles are properly applied in employment discrimination cases because a disciplinary decision often will be the result of various smaller decisions such as "the decision to report an employee," "investigate an employee," "initiate a disciplinary process," and "provide any recommendation."[110] The employer's decision to spread these responsibilities among one or many employees should not act as a shield from liability.[111]

The United States has considerable interest in this case because of its role in creating regulations and enforcing federal anti-discrimination statutes. Due to this interest, the Solicitor General filed

more robust, but was enough because she was not under a singular influence).

106. Brief for Petitioner, *supra* note 3, at 56–57.

107. *Id.* at 16–20.

108. *Id.* at 23.

109. *Id.* at 22.

110. *Id.* at 26–27.

111. *Id.*

a brief in support of Staub and participated in oral arguments at the Court's invitation.[112]

The arguments of the United States echo Staub's agency arguments. The United States advocates that "when an employer delegates authority to a supervisor to engage in customary employment responsibilities . . . a supervisor's exercise of that authority falls within the scope of the supervisor's employment" and when it "is exercised in a discriminatory manner and causes an adverse employment action in violation of USERRA, the employer is liable under agency principles . . . ."[113] The United States also agrees with Staub that under the *Ellerth* standard, an employer is vicariously liable when a supervisor is aided by his agency relationship to take a tangible action against a subordinate.[114]

Staub contends that the language of USERRA is consistent with these traditional agency principals.[115] USERRA defines an employer as including "a person . . . to whom the employer has delegated the performance of employment-related responsibilities"[116] and requires the plaintiff to show that military service was "a motivating factor in the employer's action."[117] In light of these standards, the singular influence analysis is inappropriate because Korenchuk and Mulally are liable as Proctor's agents with supervisory responsibilities whose animus influenced Staub's dismissal.[118] Thus, the cat's paw singular influence standard is inconsistent with agency law and, if adopted by the Supreme Court, would affect other areas of law, allowing companies to hide behind the "good faith" ignorance of a sole decision maker.[119]

The United States further argues that the singular influence standard is incompatible with the Secretary of Labor regulations for

112. Staub v. Proctor Hosp., 130 S. Ct. 573 (2009) (inviting the Solicitor General to file a brief expressing the views of the United States). *See also* Brief for the United States, *supra* note 9, at 2.

113. Brief for the United States, *supra* note 9, at 13.

114. *Id.* at 15.

115. Brief for Petitioner, *supra* note 3, at 22–24.

116. 38 U.S.C.A. § 4303(4)(A)(i) (West 2011).

117. *Id.* § 4311(c)(1).

118. Brief for Petitioner, *supra* note 3, at 30–32.

119. *See id.* at 38 (arguing that Proctor should not escape liability merely because it chose to divide responsibilities between different levels of management).

USERRA.[120] Under these regulations, the employee must show only that his protected status was a motivating factor and "need not show that his or her protected activities or status was the *sole* cause of the employment action . . . ."[121] The United States also emphasizes that the singular influence standard undermines the deterrent effect of agency principles because vicarious liability encourages employers to "select their agents carefully."[122]

Staub argues that Proctor's view of the cat's paw theory focuses incorrectly on the decision maker as the target of liability.[123] The proper question is not whether liability can be imputed to the ultimate decision maker, in this case Buck, but whether liability can be imputed to the employer, Proctor.[124] Staub urges that it is incorrect to focus on whether Buck was the cat's paw of Mulally and Korenchuk; the Court should focus on the discriminatory animus of all agents of the employer that may have caused or influenced the chain of events that culminated in the final employment decision.[125]

Another of Staub's concerns is that the singular influence standard will create a policy that results in decision-making capabilities being vested in a single, isolated individual.[126] Even worse, if an independent investigation is allowed to function as a shield against employer liability, the decision of how thorough and independent an investigation is largely will be decided by an employer, rather than a jury.[127] The United States argues that it will always be difficult to determine whether the investigation has broken the causal chain by looking at the type and source of evidence considered, but that the investigation is "relevant only to the extent that it sheds light on whether the supervisor's discriminatory misuse of delegated authority was a substantial factor in bringing about an adverse employment action, or on whether the adverse action would have been taken anyway."[128] Staub believes that the additional

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120. Brief for the United States, *supra* note 9, at 18–19.

121. Uniformed Services Employment and Reemployment Rights Act of 1994, 70 FR 75246, 75250 (Dec. 19, 2005) (to be codified at 20 C.F.R. pt. 1002) (emphasis added).

122. Brief for the United States, *supra* note 9, at 19–20.

123. Brief for Petitioner, *supra* note 3, at 38.

124. *Id.*

125. *Id.* at 38–40.

126. *Id.* at 45–46.

127. *See id*. at 42–44 (arguing that an employer may have the incentive to minimize the impact of certain subordinate influences in their independent investigation, but the jury can still choose whether or not to accept those accounts as fact).

128. Brief for the United States, *supra* note 9, at 23–24.

independent investigation defense takes the decision of whether the animus was a motivating factor away from its proper place, the jury.[129]

B. Proctor's (Respondent's) Arguments

Respondent Proctor's argument is largely fact-based and focuses on the theory that there was insufficient evidence to establish a causal link between the animus of Korenchuk and Mulally, and Buck's ultimate decision to fire Staub.[130] Citing standards from the Ninth and Eleventh Circuits, Proctor argues that to establish subordinate liability, a plaintiff must show not only that a subordinate possesses animus and participated in the employment decision, but that his recommendation based on animus was the ultimate reason for the adverse action, and not the employee's actions supporting the recommendation.[131] Proctor argues that if there is nothing an employer can do to break the causal chain through an independent investigation, then the deterrent effect of vicarious liability will be weakened.[132] This argument directly opposes Staub's proposition that the deterrent effect is strengthened when an employer is liable for the discriminatory actions of its employees.[133]

Proctor believes that insufficient evidence links the animus of Mulally and Korenchuk to Buck's decision and that the evidence of this animus should not have been submitted to the jury.[134] Proctor also argues that Buck's investigation was independent and therefore broke the causal chain between the animus that Staub attributes to Mulally and Korenchuk, and Staub's termination.[135] In making this argument, Proctor emphasizes the other sources that Buck consulted in making the decision to terminate Staub,[136] the blemishes on Staub's record that were unrelated to any actions of Korenchuk or Mulally,[137] and the undisputed fact that Buck harbored no military animus.[138] Proctor also points out that after Staub's termination, Staub filed a grievance and

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129. *See* Brief for Petitioner, *supra* note 3, at 43–44 (arguing that regardless of the testimony of the employer regarding an independent investigation, "[a] jury, of course, would not be obligated to accept such accounts").

130. Brief for Respondent at 11–12, Staub v. Proctor Hosp., No. 09-400 (U.S. Aug. 31, 2010).

131. *Id.* at 17–19.

132. *Id.* at 19.

133. *See supra* text accompanying notes 110 and 1111.

134. Brief for Respondent, *supra* note 130, at 31, 38–39.

135. *Id.* at 46.

136. *Id.* at 41–45.

137. *Id.* at 44.

138. *Id.* at 21.

Buck independently reviewed his file once more, further breaking any remaining causal link.[139]

Proctor brings to light a unique aspect of USERRA: the statute provides for personal liability as well as employer liability.[140] Because Buck had no military animus and would not be held personally liable for her decision, Proctor contends that "if Buck as Proctor's agent cannot be held liable, Proctor cannot be liable either."[141] Proctor cites various circuit court opinions that hold there can be no liability for the principal when there is no liability for the agent.[142] Thus, under the normal vicarious liability principles, the analysis would end and Proctor would not be liable.[143] Proctor argues that the cat's paw theory gives employees a "second bite at the apple" when they are unable to prove that the decision maker had any animus; it allows them to show that the decision maker was actually the pawn of another.[144] For this reason, Proctor believes that the cat's paw rule departs from the traditional rules of vicarious liability by extending to situations in which an agent is the dupe of a non-agent.[145]

C. Oral Arguments

The Supreme Court heard oral arguments on November 2, 2010 from Staub, Proctor, and the United States as amicus curiae in support of Staub.[146] The Court seemed to be most interested in finding a middle ground that would allow for some subordinate liability without exposing employers to absolute liability for the actions of non-decision makers.

Justices Scalia, Alito, and Kennedy were concerned with the possibility of extending liability from certain tangible employment actions, in this case termination, to any employment action, such as a negative report, by a subordinate.[147] Justice Alito commented that "what is made illegal are certain employer actions" and expressed a hesitancy to extend liability beyond such tangible employment

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139. *Id.* at 51.
140. *Id.* at 54.
141. *Id.*
142. *Id.* at 56.
143. *Id.* at 60.
144. *Id.* at 60–61.
145. *Id.*
146. Transcript of Oral Argument at 1, Staub v Proctor Hosp., No. 09-400 (U.S. Nov. 2, 2010).
147. *Id*. at 5, 21.

actions.[148] Justice Scalia echoed this concern by asking "why a co-employee who has a hostile motivation and makes a report to the supervisor . . . wouldn't qualify as well"?[149] Justice Alito proposed that the test might be "whether [the supervisor was] delegated some of the responsibility for the challenged action."[150] Similarly, Justice Kennedy was concerned that extending liability to non-tangible subordinate actions would create a sweeping rule that imposed almost absolute liability on the employer regardless of his efforts to independently investigate the employment situation.[151] Justice Kennedy suggested applying traditional tort law to establish whether, in the case of two actors who both contributed to a particular result, one negligent and one not, there was a substantial contribution by the negligent actor, rather than using a singular influence test.[152]

Justice Sotomayor and Chief Justice Roberts focused on the issue of causation. Justice Sotomayor questioned the requisite materiality of the discriminatory animus in influencing the ultimate employment decision.[153] She asked whether the discriminatory act needed to play a substantial role, material role, or simply any role in the adverse employment action to be deemed a "motivating factor," therein acknowledging that the ultimate decision maker is not acting in a vacuum and must depend on information she receives from others.[154] Staub explained that from the different standards articulated in *Price Waterhouse*, Congress purposefully chose "motivating factor," rather than "substantial motivating factor."[155] The United States expressed the view that the motivating factor language represented proximate causation, and that the animus can be "one of many factors, but . . . does need to be more than a trivial or de minim[i]s factor."[156]

Chief Justice Roberts questioned the extent to which an independent intervening cause would sever the connection between the subordinate's animus and the employment decision.[157] He also commented that the Seventh Circuit's cat's paw standard of

148. *Id.* at 5.
149. *Id.*
150. *Id.* at 21.
151. *Id.* at 8–9.
152. *Id.* at 42–43.
153. *Id.* at 12–13.
154. *Id.* at 13, 32.
155. *Id.* at 13.
156. *Id.* at 17.
157. *Id.* at 22.

subordinate domination over the decision maker appears to be a "more stringent test" than the motivating factor language of the statute.[158] Justices Sotomayor and Ginsberg expressed dissatisfaction with the independent investigation standard and the lack of guidance for determining how detailed and thorough an independent investigation must be in order for an employer to avoid liability.[159]

Justice Breyer asked whether there should be a special rule for subordinate liability at all, proposing to simply focus on whether an act was a motivating factor or proximate cause.[160] Rather than attempting to analyze the motivations of the ultimate decision maker or assess how much influence a subordinate had over her, Breyer suggested that the correct test is to determine whether the animus was a motivating factor of the action that caused the termination.[161] Similarly, Justice Scalia questioned whether a motivating factor refers to the motive of the person who made the decision, or simply a factor that was relevant to or influenced the decision.[162] He indicated that the Court might not be convinced that it refers to the motives of the person who made the decision.[163]

Oral arguments concluded with Staub suggesting that if the Court so chose, it could decide the case on narrower principles based on the purposes of USERRA.[164] In response to an inquiry by Justice Alito, Staub suggested that because USERRA's animating purpose is to "minimize the disadvantages to civilian careers that can result from service in the military," and because employers have an economic incentive not to employee reservists, the Court could decide this case by focusing entirely on purpose, thereby limiting this decision's effect on other employment discrimination statutes.[165]

VII. LIKELY DISPOSITION

Given the circuit split over the correct standard for subordinate-based employer liability and the number of federal statutes affected by the cat's paw theory, the Supreme Court most likely will attempt to

158. *Id.* at 31.
159. *Id.* at 27–28.
160. *Id.* at 34–35.
161. *Id.* at 39–40.
162. *Id.* at 36–38.
163. *Id.* at 39.
164. *Id.* at 48–50.
165. *Id.* at 47–49.

fashion a standard that will have effects beyond USERRA. Although Staub raised the option (in oral arguments) of deciding this case based on the statutory purpose of USERRA alone, it is unlikely that the Court will give up the opportunity to create a uniform rule after missing one in *BCI Coca-Cola*.

In creating a uniform standard, the Court likely will look for a middle ground between the narrow singular influence standard used by the Seventh Circuit and the broad influence or input standard used by several other circuits. During oral arguments, the Court seemed dissatisfied with the extremes presented by both sides—establishing a threshold that would be too high for most plaintiffs to meet given the changing landscape of company policies and sizes or calling for sweeping employer liability.[166] The Court likely will base its decision on principles of agency law, causation, and a decision maker's independent investigation.

Given the Court's decision in *Ellerth*, the Court once again will probably apply the agency standard that an employer is liable for the action of a subordinate when the subordinate was aided in his action by the employment relationship.[167] Under this standard, the biased subordinate would not need to have any official decision-making capacity as long as he used his delegated supervisory powers to influence or affect an official decision.[168]

During oral arguments the Court questioned the level of causation needed to establish liability. The Court seemed to consider that the motivating factor language could refer not only to the mentality of the biased subordinate that took the action, but also to the effects of the employment action itself on the ultimate decision.[169] The Court appeared to reject the standard that the employer could be held liable when subordinate bias only nominally affected the employment decision. Rather, the justices likely will focus on proximate causation and the materiality or substantial nature of the bias in affecting the ultimate decision.[170]

Finally, the issue of a decision maker's independent investigation is also likely to play a role in the Court's decision. No clear standard

166. *Id.* at 11.
167. *See supra* notes 57–61 and accompanying text.
168. *See id.*
169. *See supra* text accompanying note 162.
170. *See supra* text accompanying notes 153–156.

has been set for how thorough an employer's independent investigation needs to be to avoid liability.[171] Most employment discrimination cases are extremely fact intensive and it may be hard to create a uniform standard that will apply to all employers given the differences in size and organizational structures. Although it may be easy to decide a standard based on the facts of this case, it is unlikely that the Court will choose to rule on this case without considering the potential effects on other cases and discrimination statutes.

As Justice Breyer suggested in oral arguments, there may be no need to create a new rule for subordinate liability.[172] If the Court chooses to apply the same agency standards in subordinate liability as it did in *Ellerth* for cases involving harassment, then the causation standard and independent investigation problem could be dealt with within the *Price Waterhouse* framework used for mixed-motives cases.[173] Under this test, the plaintiff would have the burden of showing that the action of the supervisor was a motivating factor or proximate cause of the adverse employment decision.[174] Once this burden is satisfied and the plaintiff has made out a prima facie case, the burden shifts to the employer to establish that the same decision would have been made regardless of the employee's protected status.[175] In doing so, the employer could introduce evidence showing that an independent investigation was conducted. The fact finder would then determine whether, within the specificities of each case, the investigation was sufficient to break the chain of causation. The application of the preexisting *Price Waterhouse* test to cases of subordinate bias would allow more plaintiffs to survive summary judgment, but would not create sweeping liability for employers. Employers would still be able to win at the summary judgment stage if the plaintiff was unable to establish that the subordinate's bias played a causal role in the adverse employment action.

Studies have shown that recently, fewer plaintiffs make it to trial in employment discrimination cases and those that do succeed less often than plaintiffs in previous years.[176] Against this backdrop, and

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171. *See* Transcript of Oral Argument, *supra* note 146, at 27 (Justices Sotomayor and Ginsburg questioned Proctor on what an independent investigation must consist of for an employer to avoid liability.).

172. *Id.* at 34–35.

173. *See supra* notes 51–56 and accompanying text.

174. *Id.*

175. *Id.*

176. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in*

due to the policies behind federal anti-discrimination statutes, it is likely that the Court will choose a middle path that allows for employees to succeed in their discrimination suits without creating absolute liability for the employer that extends to any action by a person not vested with decision-making authority. Although there may still be a place for the singular influence standard in those rare cases where the person with animus has no supervisory authority whatsoever, the Court's previous applications of agency law in the employment discrimination context indicate that this strict standard is entirely inappropriate for the more common discrimination claims involving supervisors.

Federal Court: From Bad to Worse?, 3 HARV. L. & POL'Y REV. 103, 131–32 (2009).