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Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*

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NOTES

Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*

> *Many old cats, cunning, subtle, and sharp, and bearing a grudge against the whole race of mice beside, lay in wait for them, caught them, and cleared them out of the house, much to the advantage of the master of the establishment.*[1]

I. Introduction

Stephen Peters, an African-American merchandiser for BCI Coca-Cola Bottling Co. of Los Angeles (BCI), was terminated from his position as a merchandiser on October 2, 2001.[2] Peters had worked in his position in Albuquerque, New Mexico since May 1995 and was considered a "good" merchandiser, having received a certificate thanking him for five years of service and acknowledging him to be a team player.[3] After Peters's firing, the Equal Employment Opportunity Commission (EEOC) filed a complaint on his behalf against BCI alleging discrimination on the basis of race.[4] In response, BCI asserted the reason for Peters's termination was insubordination, and that the human resources official who made the decision was not biased, nor did

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1. JEAN LAFONTAINE, THE QUARREL BETWEEN THE DOGS AND THE CATS AND BETWEEN THE CATS AND THE MICE (BOOK XII—NO. 8), *available at* http://www.gutenberg.org/files/15946/15946-h/15946-h.htm#XXXIX (last visited Mar. 17, 2009). "In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484 (10th Cir. 2006) (citing Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1249 (11th Cir. 1998)). According to the Tenth Circuit,

> the "cat's paw" doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. Today the term "cat's-paw" refers to "one used by another to accomplish his purposes."

Id. (citing FABLES OF LA FONTAINE 344 (Walter Thornbury trans., Chartwell Books 1984); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 354 (2002)).

2. *BCI*, 450 F.3d at 478.

3. *Id.*

4. *Id.*

she know Peters was black.[5] The EEOC conceded that the human resources official was not biased, but argued that the bias of Peters's supervisor, who had an alleged history of treating black employees less favorably and of making racially derogatory remarks, should be imputed to BCI because the human resources official relied exclusively on the supervisor's information.[6]

The EEOC took action on Peters's behalf pursuant to Title VII of the Civil Rights Act of 1964 (Title VII or the Act), which prohibits employers from discriminating against employees because of race, color, religion, sex or national origin.[7] Since the inception of the Act,[8] a vast of amount of litigation has ensued in an attempt to define its seemingly simple prohibitions.[9] As a result, federal courts have become the central players in defining the standards and limits of unlawful employment discrimination.

Despite the pivotal role played by the federal courts in employment discrimination law, few claims actually proceed to federal court. Under Title VII, an aggrieved employee is required to file with the EEOC prior to bringing suit in federal court.[10] The EEOC is required to investigate the charge and determine whether to settle, dismiss, or make a no cause finding as to every allegation in the charge.[11] If the EEOC does not make these determinations, it must find that reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring, and the agency must issue a determination of its findings.[12] The EEOC's determination of reasonable cause allows the agency to issue a notice of a right to sue to the employee who filed the charge.[13] This does not mean, however, that the EEOC will pursue a claim on behalf of the aggrieved employee. Often, the employee will be responsible for their own legal representation. The EEOC has the discretion to file suit on behalf of an aggrieved employee.[14] The EEOC's statistics show a total of 82,792 charges of employment discrimination were filed in fiscal year 2007.[15] The EEOC filed 362 lawsuits as a result of these charges.[16]

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5. *Id.*

6. *Id.*

7. 42 U.S.C. § 2000e-2(a)(1) (2000).

8. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

9. *See* Theodore Eisenberg & Stewart Schwab, *The Evidence Is Clear: Reversing Anti-Bias Case Would Cause Hardship*, LEGAL TIMES, Feb. 20, 1989, at 20.

10. *See* 29 C.F.R. § 1601.13 (2000).

11. *Id.* § 1601.21.

12. *Id.*

13. *Id.* § 1601.28.

14. *Id.* § 1601.27.

15. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, CHARGE STATISTICS FY 1997 THROUGH FY 2007 (2007), *available at* http://www.eeoc.gov/stats/charges.html (last modified

While thousands of charges of employment discrimination are filed each year, as the statistics indicate, the EEOC can only file a handful of enforcement actions, and as a result, a plaintiff often will be responsible for his own legal costs. As a result, many cases are never litigated.[17] Thus, some confusion still exists in employment discrimination law with respect to proving intentional discrimination through individual disparate treatment.[18] It remains unclear when the bias of a subordinate who has no decision-making authority will be imputed to the actual decisionmaker so as to hold the employer liable under Title VII. This issue has been addressed by almost all of the Circuit Courts of Appeal,[19] but the U.S. Supreme Court has yet to definitively rule on the issue. Accordingly, the issue of subordinate liability is in a state of confusion and uncertainty. The importance of the Act and the importance of a clear rule as to employer liability for the acts of a subordinate, both to employers and employees alike, cannot be overstated. Thus, the issue is ripe for the Court's docket, and it is clear that this is an issue in which the Court has an interest.[20] Given the current state of flux in disparate treatment law,[21] the smaller issue of subordinate bias liability provides the Court an opportunity to establish a narrow, yet bright line rule for employer liability consistent with stare decisis.

Almost all circuit courts agree that Title VII permits the subordinate's bias to be imputed to the employer.[22] The question becomes how much control the biased subordinate must exercise over the adverse employment decision. This note describes the United States Court of Appeals for the Tenth Circuit's approach to the question of employer liability for the animus of the

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Feb. 26, 2008).

16. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC LITIGATION STATISTICS FY 1997 THROUGH FY 2007 (2007), *available at* http://www.eeoc.gov/stats/litigation.html (last modified Feb. 26, 2008). These statistics do not account for "private" actions; that is, those lawsuits filed by individuals who hired their own legal representation.

17. Litigation is lacking for a number of reasons including cost, settlements, and the prevalence of handling these issues through arbitration. *See generally* Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. MO. B. 174 (2008). A detailed discussion of the merits/demerits of this lack of litigation is outside the scope of this article.

18. Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 493 (2006) [hereinafter Katz, *The Fundamental Incoherence*].

19. *See infra* Part II.

20. *See* BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1105 (2007). The Supreme Court's grant of certiorari was voluntarily dismissed by the parties. BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1334 (2007).

21. *See generally* Katz, *The Fundamental Incoherence*, *supra* note 18 (detailing the general confusion surrounding causation in disparate treatment law).

22. *See infra* Part II.

subordinate. The note supports the Tenth Circuit's holding that employer liability for a biased subordinate furthers the purposes of Title VII. It further supports the Tenth Circuit's specific holding that defendant BCI was not entitled to summary judgment under a causation standard of liability.

Part II of this note gives an overview of Title VII and the Age in Discrimination Employment Act of 1967 (ADEA),[23] the two most common statutes giving rise to employment litigation. It also surveys the three approaches to subordinate bias liability that have arisen in the circuits. Part III looks at *BCI* in detail, including the facts, the issue presented on appeal, and the Tenth Circuit's holding and rationale. Part IV contends that the Tenth Circuit's decision was correct and argues the need for the Supreme Court to resolve the split among the circuits. Specifically, Part IV asserts that the Tenth Circuit decision finds support in both agency and causation principles. It also defends the viability of the Tenth Circuit's focus on the need for an independent investigation to ensure that a subordinate's bias has not unduly influenced the person making the adverse employment decision and suggests another burden shifting framework for independent investigation analysis. Finally, Part V concludes that the solution to subordinate bias liability exists in the doctrine of independent investigation and that the Tenth Circuit's decision provided a starting point for the ultimate determination of whether the biased subordinate caused the adverse employment action.

II. Disparate Treatment and Subordinate Bias Liability

A. Title VII and the ADEA

Congress, in passing the Civil Rights Act of 1964,[24] evinced its intent to prohibit intentional discrimination by employers.[25] Title VII of the Act renders it unlawful "for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[26] Similarly, the ADEA renders it unlawful for an employer to "fail or refuse to hire . . . any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[27]

23. Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 U.S.C. §§ 621-634 (2006)).

24. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

25. *See, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

26. 42 U.S.C. § 2000e-2(a)(1) (2000).

27. 29 U.S.C. § 623(a)(1).

The conduct Title VII and the ADEA seek to prohibit has come to be termed *disparate treatment*.[28] Under the disparate treatment theory, the plaintiff has the burden of showing that the employer took an adverse employment action against him because of a characteristic he possesses which is protected under the statute.[29] The burden of proving intentional discrimination rests at all times with the plaintiff.[30] In assessing whether the plaintiff has met his burden, two methods of proof or analytical frameworks have developed: the *McDonnell Douglas* framework and the *Price Waterhouse* framework.[31] These methods of proof, set out in more detail below,[32] have been the source of much litigation and confusion in the employment discrimination arena.[33] However, they are essential to an understanding of how a Title VII/ADEA plaintiff, even one arguing subordinate bias liability, must organize their case.

1. The Burden Shifting Framework of McDonnell Douglas

It is extremely rare for plaintiffs to have "smoking gun" evidence of a supervisor telling them or others that their firing or demotion was because of their race, sex, or age.[34] Often, the employer will be able to assert a legitimate, non-discriminatory reason for taking the adverse employment action. The U.S. Supreme Court developed an approach aimed at providing courts a way to "progressively . . . sharpen the inquiry into the elusive factual question of intentional discrimination."[35] To that end, the *McDonnell Douglas* framework provides a three step framework for allocating burdens and shifting presumptions.[36] In *McDonnell Douglas v. Green*, the Court held that the plaintiff in a Title VII case must carry the initial burden under the statute of

28. *See* MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 77 (6th ed. 2003). By way of contrast, *disparate impact* claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory." Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993) (citing Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977)).

29. *Biggins*, 507 U.S. at 610. "Adverse employment action" is a general term employed by courts and commentators to describe a range of actions an employer may take against employee including, but not limited to termination, demotion, and failure to promote.

30. Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

31. *See* Katz, *The Fundamental Incoherence*, *supra* note 18, at 500.

32. *See* discussion *infra* Parts II.A.1-2.

33. *See, e.g.*, Martin J. Katz, *Reclaiming McDonnell Douglas*, 83 NOTRE DAME L. REV. 109, 117-20 (2007) [hereinafter Katz, *Reclaiming*].

34. *See Burdine*, 450 U.S. at 256 n.8.

35. *Id.*

36. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

establishing a prima facie case of discrimination.[37] If the plaintiff establishes a prima facie case, the burden shifts to the defendant employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[38] The Court further held that Title VII does not allow the legitimate, non-discriminatory reason to be used as a pretext for discrimination.[39] Thus, a plaintiff must be given a reasonable opportunity to show that the defendant employer's stated reason for rejection was pretextual.[40]

Developing the framework further, in *Texas Department of Community Affairs v. Burdine* the Court later held that a defendant employer's burden was merely to *produce* evidence of a legitimate, non-discriminatory reason for the adverse employment action.[41] The defendant did not have to persuade the Court that it was actually motivated by the proffered reason; nevertheless, the explanation had to be legally sufficient so as to justify judgment for the defendant.[42] The Court further relaxed the burden of production for defendants some twelve years later by holding that even where a defendant fails to meet their burden of production or where its proffered reasons are deemed to be false, judgment for the plaintiff is not compelled.[43] Because the plaintiff retains the ultimate burden of persuasion, the plaintiff must show not only that the employer's reasons are false, but that the real reason for the adverse employment action was discrimination.[44] The inference of the ultimate fact of discrimination was a permissive one.[45]

2. Price Waterhouse *Framework and the Civil Rights Act of 1991*

In *Price Waterhouse v. Hopkins*, the U.S. Supreme Court considered a plaintiff's claim of constructive discharge because of the plaintiff's sex.[46] A

37. *Id.* The Court clarified that this could be done by showing that the plaintiff: (1) belongs to a racial minority; (2) applied and was qualified for a job for which employer was seeking applicants; (3) despite being qualified, he was rejected; and (4) after his rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. *Id.*

38. *Id.*

39. *Id.* at 804.

40. *Id.*

41. 450 U.S. 248, 254 (1981).

42. *Id.* at 254-55.

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

44. *Id.* at 512.

45. *Id.* at 511.

46. 490 U.S. 228, 231-32 (1989), *superceded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075, 1078, 1079 (codified as amended in scattered sections of 42 U.S.C.), *as recognized in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. 1992).

plurality of the Court held that where "a plaintiff . . . shows that gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role."[47] The plurality distinguished "mixed-motive" cases, those involving both legitimate and illegitimate reasons for the adverse employment action, from pretext cases and found that their holding did not affect the holdings of *McDonnell Douglas* or *Burdine*.[48] Rather, in "mixed-motive" cases the employer must show that it would have made the same decision based on the legitimate reason standing alone.[49]

Concurring in the judgment, Justice O'Connor wrote separately to convey her rationale for departing from *McDonnell Douglas* and *Burdine* "in cases . . . where the employer has created uncertainty as to causation by knowingly giving substantial weight to an impermissible criterion."[50] Justice O'Connor outlined two reasons for a limited divergence from *McDonnell Douglas*: (1) an employer should not have a good faith presumption of complying with Title VII where the plaintiff has produced direct evidence that the defendant "placed substantial reliance on factors whose consideration is forbidden by Title VII,"[51] and (2) the shifting of the burden of persuasion in mixed-motive cases serves Title VII's purpose of eradicating discrimination.[52] Under Justice O'Connor's articulation, when a plaintiff shows through direct evidence that a protected characteristic was a "substantial factor" in the employment decision, the burden of persuasion is properly shifted to the defendant to show that the protected characteristic was not a cause of the employment decision.[53]

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47. *Id.* at 244-45 (emphasis added). The plurality's opinion also contained a lengthy discussion of causation under Title VII. *Id.* at 237-42. Ultimately, the plurality rejected the contention that the words "because of" meant "but-for" causation, finding that "[t]he critical inquiry . . . is whether gender was a factor in the employment decision *at the moment it was made*." *Id.* at 241.

48. *Id.* at 245. "Where a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was '*the* true reason' for the decision . . . ." *Id.* at 247 (citations omitted).

49. *Id.* at 252. The plurality characterized the premise of *Burdine* (and *McDonnell Douglas*) as being that either a legitimate or illegitimate consideration caused the adverse employment decision, and found that its scheme was not designed to help decide cases with both legitimate and illegitimate motives. *Id.* at 248.

50. *Id.* at 261-62. Justice O'Connor disagreed with the plurality's analysis of causation under Title VII, finding that "because of" manifestly meant "but-for." *Id.*

51. *Id.* at 271.

52. *Id.* at 272.

53. *Id.* at 276.

Congress responded to the *Price Waterhouse* decision through passage of the Civil Rights Act of 1991 (the 1991 Act).[54] Specifically, the 1991 Act provided that an unlawful employment practice is established when the plaintiff proves a non-legitimate characteristic was a motivating factor in the adverse employment action.[55] Once the plaintiff shows that a protected trait was a motivating factor in an adverse employment action, liability under the statute attaches.[56] The employer can come forward with evidence that it would have made the same decision or taken the same action despite the presence of the protected characteristic.[57] This evidence limits the remedies available to the plaintiff; however, the defendant is still found to be liable.[58]

Despite the seemingly clear language of the 1991 Act, lower courts divided over whether "direct evidence" of discrimination was required to gain a "mixed-motive" instruction under Title VII.[59] In *Desert Palace, Inc. v. Costa*, the Supreme Court answered in the negative.[60] The Court found no heightened direct evidence requirement in the statute.[61] Furthermore, the Court found the statute's definition of "demonstrate" included no direct evidence requirement and othyther uses of "demonstrate" within the statute made no mention of direct evidence.[62] Finally, the Court found that circumstantial evidence should not be given any less weight than direct evidence, thus there was no "direct evidence" requirement under the 1991 Act.[63]

3. The Role of Agency Principles in Title VII and the ADEA

In *Burlington Industries, Inc. v. Ellerth*, the U.S. Supreme Court considered whether a plaintiff who suffered no adverse employment action could recover from the defendant employer on the basis of a hostile work environment

54. Pub. L. No. 102-166, § 107, 105 Stat. 1075, 1078, 1079 (codified as amended in scattered sections of 42 U.S.C.).

55. 42 U.S.C. § 2000e-2(m) (2000). The 1991 Act provides that "[e]xcept as otherwise provided . . . 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, even though other factors also motivated the practice." *Id.* (emphasis added).

56. *Id.*

57. *Id.* § 2000e-5(g)(2)(B).

58. *Id.* A court may grant declaratory relief, attorney's fees and costs when an employer shows evidence it would have taken the same action. *Id.* A court is precluded from awarding damages or issuing an order requiring reinstatement, hiring, promotion, or payment. *Id.*

59. 539 U.S. 90, 95 (2003).

60. *Id.* at 92.

61. *Id.* at 98-99.

62. *Id.* at 99-100.

63. *Id.*

created by alleged sexual harassment.[64] The Court focused on the common law of agency, finding that employers could be liable for the acts of their employees acting outside the scope of their employment in certain instances.[65] Specifically, the Court found that two situations could give rise to vicarious liability: (1) where the "'master was negligent or reckless'"[66] and (2) where the "'servant . . . was aided in accomplishing the tort by the existence of the agency relation.'"[67] In an attempt to give effect to agency principles and with the goal of encouraging employer forethought to establish anti-harassment policies and procedures, the Supreme Court held that an employer was "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."[68] The Court further held that "when no tangible employment action is taken" by the employer, the employer may raise an affirmative defense that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the plaintiff failed, unreasonably, to make use "of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[69]

In *Reeves v. Sanderson Plumbing Products, Inc.*,[70] the Court considered whether a defendant was entitled to judgment as a matter of law when a plaintiff had proven its prima facie case and presented sufficient evidence to discredit the defendant's proffered legitimate reasons for the adverse employment action.[71] The Court held that the defendant was not entitled to judgment as a matter of law.[72] The Court went on to state that the establishment of a prima facie case and the introduction of sufficient evidence to disprove the employer's stated legitimate reason could permit a finding of liability.[73]

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64. 524 U.S. 742, 746-47 (1998).

65. *Id.* at 754, 765.

66. *Id.* at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(b) (1958)). The Court found that negligence was the floor of liability for Title VII actions. *Id.*

67. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(b)). The Court identified those cases where the "supervisor takes a tangible employment action against the subordinate" as being the quintessential example of the application of the aided in agency relation standard. *Id.* at 760.

68. *Id.* at 764-65.

69. *Id.* at 765.

70. 530 U.S. 133, 137 (2000).

71. *Id.* The plaintiff brought his claim under the ADEA as opposed to Title VII; however, the Court assumed, arguendo, that the burden shifting framework of *McDonnell Douglas* was fully applicable. *Id.* at 142.

72. *Id.* at 153-54.

73. *Id.* at 149 (finding that the Court of Appeals erred in requiring that the plaintiff always produce "additional, independent evidence of discrimination"). The Court clarified that a

The Court found that the plaintiff introduced direct evidence of age-based animus through the discriminatory remarks of his supervisor and through testimony that he was treated differently than younger workers similarly situated.[74] The Court found that the ageist supervisor was "principally responsible" for the plaintiff's termination.[75] Furthermore, the Court concluded that the supervisor was the "actual decisionmaker" behind his termination because he wielded "absolute power" within the company, and he berated others about how to do their jobs.[76]

In sum, two frameworks for proving intentional discrimination have developed. The *McDonnell Douglas* framework requires the establishment of a prima facie case by the plaintiff, the production of a legitimate non-discriminatory reason by the employer, and the opportunity for the plaintiff to prove that the defendant's reason is false or a pretext for discrimination.[77] The *Price Waterhouse* framework applies in cases where the employer is motivated both by legitimate and non-legitimate reasons.[78] After the 1991 Act and *Desert Palace*, a plaintiff is no longer required to present "direct evidence" that an illegitimate motive operated as a substantial factor in the employment decision.

4. The Current State of Disparate Treatment Law

The current state of disparate treatment law is, in the least, difficult to articulate. Since the Supreme Court's decision in *Desert Palace*, commentators have declared everything from the death of *McDonnell Douglas* to the death of *Price Waterhouse*.[79] None of these bold predictions have yet to come to fruition, and the *McDonnell Douglas* and *Price Waterhouse*

showing of the falsity of the employer's reasons and the establishment of a prima facie case will not always be adequate to sustain a jury finding of liability. *Id.* at 148.

74. *Id.* at 151.

75. *Id.*

76. *Id.* at 152.

77. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Again, the establishment of a prima facie case plus proof that the employer's reasons are false does not mandate a verdict for the plaintiff or defendant, but allows the trier of fact to infer the ultimate fact of discrimination. *See supra* notes 43-45.

78. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), *superceded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1075, 1078, 1079 (codified as amended in scattered sections of 42 U.S.C.), *as recognized in* Stender v. Lucky Stores, Inc., 780 F. Supp. 1302 (N.D. Cal. 1992).

79. *See generally* Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of McDonnell Douglas and the Transformation of Every Title VII Case After Desert Palace, Inc. v. Costa into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71 (2003); Michael J. Zimmer, *The New Discrimination Law: Price Waterhouse Is Dead, Whither McDonnell Douglas?*, 53 EMORY L.J. 1887 (2004).

frameworks continue to be employed by the appellate courts.[80] Other commentators, recognizing the uncertainty of disparate treatment law, have suggested approaches to *McDonnell Douglas*, *Price Waterhouse* and the 1991 Act which would attempt to reconcile all three—not as burdens of proof, but as methods of proving the ultimate question: whether the employee suffered an adverse employment action because of a protected characteristic.[81]

This uncertainty bleeds over into the subordinate bias liability theory because the plaintiff is still attempting to prove individual disparate treatment. Thus, some of the confusion in the courts about the level of causation necessary to find an employer liable for the bias of a subordinate can be traced to the U.S. Supreme Court's disparate treatment jurisprudence and its debate over the role of causation, or more importantly, the level of causation the plaintiff must show to hold the employer liable.[82] Such uncertainty calls out for Supreme Court intervention. However, should the Court not be so inclined, the subordinate bias theory can be resolved on much narrower grounds. As I will explain, the role of the independent investigation can serve as a basis for analyzing whether a biased subordinate has caused an adverse employment action without undertaking a comprehensive analysis of the role of causation generally in individual disparate treatment claims. Part B takes a broad look at the relevant case law that has developed in the Circuit Courts of Appeal when tackling the issue of employer liability for subordinate bias.

B. Survey of Various Approaches to Employer Liability

The courts appear to be in agreement that an employer may be held liable for the bias of a subordinate. Yet disagreement arises over the standard of causation which will govern the imposition of liability. The cases are organized under three headings, which characterize the level of the biased subordinate's involvement in the adverse employment action: (1) motivating factor (or "influence or participation") causation, (2) "principally responsible" causation, and (3) actual causation. In addition, the cases themselves reveal the difficulty of classifying a particular circuit's approach to the issue of employer liability. As I will discuss, even among the same circuit, differing standards of liability have been contemplated, thus reaffirming the need for clarification from the U.S. Supreme Court on this specific question.

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80. *See, e.g.*, EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476 (10th Cir. 2006); Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277 (4th Cir. 2003).

81. Katz, *Reclaiming*, *supra* note 33, at 116.

82. *See* Katz, *The Fundamental Incoherence*, *supra* note 18, at 491-93.

1. "Influence or Participation" Causation

The cases in this section generally consider the bias of a subordinate—to the extent that it impacts the decision of an employer who takes an adverse employment action—to be not only relevant, but also a potentially independent basis for liability. About half of the circuits have adopted some form of this approach, or used language indicating support for such a position.

In *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, the First Circuit found that the plaintiff could establish pretext in a number of ways, including "show[ing] that discriminatory comments were made by the key decisionmaker or *those in a position to influence the decisionmaker*."[83] The court found evidence existed that the key decisionmaker and a supervisor at Centennial made comments about the ability of a female employee to balance a career and family and whether she could fulfill her responsibilities to the company when she had a second child.[84] Furthermore, the key decisionmaker consulted with the plaintiff's supervisor on an almost daily basis, and he consulted the supervisor for his opinion regarding the plaintiff's dismissal.[85] The court denied summary judgment for the employer, finding that the comments of the key decisionmaker, together with the comments of the plaintiff's supervisor who was in a position to influence the key decisionmaker, could allow a jury to find that Centennial's alleged reasons for firing Santiago-Ramos were actually a pretext for discrimination.[86]

In *Rose v. New York City Board of Education*, the Second Circuit found that a supervisor's remarks that he could replace the plaintiff with someone "younger and cheaper" were direct evidence of age discrimination, especially where the supervisor "had enormous influence in the decision-making process."[87] Furthermore, the court held that "[i]f . . . plaintiff's . . . evidence is directly tied to the forbidden animus, *for example . . . statements of a person involved in the decisionmaking process that reflect a discriminatory or retaliatory animus[,] . . . plaintiff is entitled to a burden-shifting instruction*."[88] As such, the plaintiff was entitled to a jury instruction under *Price Waterhouse* rather than a jury instruction regarding whether the employer's reasons were pretextual.[89]

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83. 217 F.3d 46, 55 (1st Cir. 2000) (emphasis added).

84. *Id.*

85. *Id.*

86. *Id.*

87. 257 F.3d 156, 162 (2d Cir. 2001) (citing Ostrowski v. Atlantic Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992)).

88. *Id.* at 161-62.

89. *Id.* While this case was decided after the 1991 Act, it was before the *Desert Palace*

The Third Circuit, in *Abramson v. William Paterson College of New Jersey*, found a question of material fact as to whether the plaintiff, a college professor, was terminated because of her religious beliefs.[90] In overturning the district court's grant of summary judgment for the employer, the Third Circuit noted the involvement of two subordinate supervisors in the ultimate decision to terminate the professor and concluded the supervisor's previous conduct towards the professor was relevant and probative of discriminatory animus.[91] The Third Circuit held that it was "sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."[92]

In *Russell v. McKinney Hospital Venture*, the Fifth Circuit considered the district court's grant of judgment for the employer notwithstanding the verdict.[93] At trial, the defendant claimed that the reason for the plaintiff's dismissal was not her age but rather "a change in management style."[94] The Fifth Circuit found that Russell had provided sufficient evidence for the jury to determine the defendant's reason was pretext for age discrimination.[95] Russell's evidence revealed that one employee, who wielded great influence within the office, frequently referred to her as an "old bitch" and laughed at her when she confronted him.[96] The court specifically found that "[i]f the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker."[97] The

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decision which clarified that no direct evidence was required to obtain a burden shifting instruction.

90. 260 F.3d 265, 267 (3d Cir. 2001).

91. *Id.* at 285-86.

92. *Id.* at 286; *see also* Potence v. Hazleton Area Sch. Dist., 357 F.3d 366, 368 (3d Cir. 2004). In *Potence*, the plaintiff alleged he was not hired by the Hazleton Area School District in violation of the ADEA. *Id.* He produced evidence that the district superintendent had discriminatory animus against older workers. *Id.* at 369. The court focused on the fact the superintendent was ultimately responsible for all of the hiring activities of the school district. *Id.* at 371. Even though the superintendent was not responsible for the actual decision not to hire the plaintiff, the court held the superintendent's "direct ability to influence hiring and firing decisions" was sufficient to affirm the jury's verdict. *Id.*

93. 235 F.3d 219, 221 (5th Cir. 2000).

94. *Id.* at 224.

95. *Id.* at 225.

96. *Id.* at 226.

97. *Id.*; *see also* Laxton v. Gap Inc., 333 F.3d 572, 584 (5th Cir. 2003) (deciding that the biased actor's "influence or leverage over" the decision-making process was the relevant inquiry, and dismissing the defendant's contentions that the final decisionmaker was not biased and conducted two independent investigations); Gee v. Principi, 289 F.3d 342, 346-47 (5th Cir. 2002) (holding that the influence of negative statements by those with retaliatory motives tainted

court looked to who actually made the decision or caused the decision to be made and concluded it is proper to impute discriminatory animus to the employer "if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker."[98]

In *Griffin v. Washington Convention Center*, the D.C. Circuit held that evidence of a subordinate's bias is relevant when the ultimate decisionmaker was not insulated from the biased subordinate's influence.[99] The court rejected the defendant's contention that the decisionmaker was insulated from the influence of a biased subordinate because the plaintiff had a union representative involved in the decision to terminate.[100] The court found that the biased subordinate was the "chief source of information regarding [plaintiff's] job performance" and the decisionmaker was unable to independently assess the plaintiff's technical proficiency, the lack of which was the stated reason for her dismissal.[101]

2. "Principally Responsible" Causation[102]

Although the First, Second, Third, Fifth, and D.C. Circuits have held employers liable for the mere influence or participation of a biased subordinate in an adverse employment action, the Fourth Circuit has held plaintiffs to a higher standard of proof on the issue of causation. In *Hill v. Lockheed Martin Logistics Management, Inc.*, the plaintiff brought claims that she was wrongfully terminated from her employment with Lockheed Martin because of her sex and age and in retaliation for her complaints of that discrimination.[103] The defendant was granted summary judgment at the trial court.[104] On appeal, a three-judge panel reversed, finding that genuine issues of material fact were present that the trial court failed to consider.[105] The Fourth Circuit's panel opinion was then vacated, and the case was reheard by the Fourth Circuit sitting en banc.[106] A seven justice majority, led by Judge Traxler, concluded that summary judgment at the trial level was

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the investigation of the final decisionmaker even if the decisionmaker had demonstrated no bias).

98. *Russell*, 235 F.3d at 227.

99. 142 F.3d 1308, 1312 (D.C. Cir. 1998).

100. *Id.* at 1311.

101. *Id.*

102. Causation is used here for organizational purposes only. The Fourth Circuit's decision focused on the formal hierarchy of the employer, rather than any specific causation standard. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 290-91 (4th Cir. 2004).

103. *Id.* at 283.

104. *Id.*

105. *Id.*

106. *Id.*

appropriate.[107] By reinstating summary judgment for the employer, the Fourth Circuit promulgated a standard characterized as very favorable to employers. Four judges dissented based primarily on the majority's analysis of the proper level of control a biased subordinate must exercise over the decision to terminate the plaintiff.[108]

Hill had received three written reprimands under Lockheed's standard operating procedures (SOP).[109] After her third written reprimand, Hill's lead supervisor, Dixon, sought advice from his supervisors, Griffin and Prickett, about how to proceed.[110] Dixon was instructed to forward the paperwork to Griffin who, along with Prickett, made the decision to terminate Hill.[111] Hill alleged that Fultz, the safety inspector at her last job site, held a discriminatory animus against her and that Fultz's animus was the reason for the final two written warnings which served as the basis for her termination.[112]

The Fourth Circuit found that the *Ellerth* decision[113] defined the limit of employer liability under agency principles to those employees who had supervisory power or power to make tangible employment decisions.[114] Citing *Reeves v. Sanderson Plumbing Products, Inc.*,[115] the Fourth Circuit found that the person acting with discriminatory animus does not have to be the formal decisionmaker, provided the plaintiff alleges sufficient evidence to establish the biased subordinate was "principally responsible" or the "actual decisionmaker" behind the adverse employment action.[116]

The Fourth Circuit rejected the plaintiff's contentions that liability should be imputed to the employer when the biased subordinate substantially influences the formal decisionmaker, or whenever the influence of the biased subordinate is sufficient to be a cause of the adverse employment action.[117] In doing so, the court did not view Title VII and other precedent as mandating "such an expansive view of an employer's liability."[118] Such an expansive view would construe the statutes as allowing a biased subordinate with no disciplinary or decision-making authority to become a final decisionmaker because of their substantial influence or significant role in the adverse

107. *Id.* at 281.
108. *Id.* at 299 (Michaels, J., dissenting).
109. *Id.* at 282.
110. *Id.*
111. *Id.*
112. *Id.* at 283.
113. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
114. *Hill*, 354 F.3d at 287.
115. 530 U.S. 133 (2000).
116. *Hill*, 354 F.2d at 288-89 (quoting *Reeves*, 530 U.S. at 151-52).
117. *Id.* at 289.
118. *Id.*

employment action.[119] The court stated that employers would not be liable for the improperly motivated person who influences a decision, but for the person who in reality makes the decision to take an adverse employment action against a member of a protected class.[120]

Further, the Fourth Circuit held that the plaintiff who alleges that the bias of a subordinate should be imputed to the employer must allege sufficient evidence to show that the subordinate employee possessed the authority to be considered an actual decisionmaker or principally responsible for the adverse employment action.[121] Applying this test, the court found that Hill failed to submit sufficient evidence that Fultz, the biased subordinate, had the authority to terminate Hill or was principally responsible for Hill's termination.[122] Instead, the court found that Dixon conducted an independent investigation of each written reprimand, confirmed the details of Fultz's reports, and gave Hill an opportunity to explain her side of the story.[123]

According to the Fourth Circuit, the record established that Fultz, the biased subordinate, could not be considered the one principally responsible for Hill's termination because an independent investigation of Fultz's write-ups was conducted by Dixon, and he confirmed that Hill in fact had violated company policy.[124] In addition, the actual decisionmakers were Griffin and Prickett, thus Fultz could not be considered the actual decisionmaker because he possessed no authority to terminate an employee.[125]

3. Actual Causation

Going beyond the Fourth Circuit's "principally responsible" causation standard, other circuits have at times required that the biased subordinate must have been the actual cause of the adverse employment action. Moreover, these cases hold that the causal chain can be broken by the unbiased decisionmaker conducting an independent investigation into the reasons for termination. Nevertheless, how much of an independent investigation is required has not been fully developed.

In *Long v. Eastfield College*, two plaintiffs made claims for discrimination, hostile work environment, and retaliation and appealed the grant of summary judgment against them.[126] The Fifth Circuit upheld summary judgment for the

119. *Id.*
120. *Id.* at 291.
121. *Id.*
122. *Id.* at 297.
123. *Id.*
124. *Id.*
125. *Id.* at 297-98.
126. 88 F.3d 300, 303 (5th Cir. 1996).

employer on their discrimination and hostile work environment claims, but reversed the summary judgment decision on the retaliation claim.[127] Long and Reavis, who were both terminated by Eastfield College for their participation in duplicating a key to the Human Resources department, alleged that the true reason for their termination was retaliation for their complaints about sexually and racially discriminatory conduct from their supervisors.[128] Eastfield College argued that the supervisors did not terminate the employees, but rather the president of the college, Augero, was responsible for the decision.[129]

In determining whether the plaintiffs had established a prima facie case of retaliation, the Fifth Circuit sought to determine whether Augero's actions severed the causal link between the biased recommendations of the plaintiffs' supervisors and the plaintiffs' eventual termination.[130] The court concluded that the plaintiffs' supervisors only had authority to make recommendations concerning the employment of the plaintiffs, and the final decision about any employment action was to be made by Augero.[131] Thus, it determined that if Augero "based his decisions on his own independent investigation, the causal link between [the supervisors'] allegedly retaliatory intent and [the plaintiffs'] terminations would be broken."[132] Nevertheless, the court also ruled that if Augero "rubber stamped" the supervisors' recommendations and did not conduct an independent investigation, the causal link between the plaintiffs' protected activities and their eventual termination would not be broken.[133] Thus, the supervisors' biased recommendations were not the actual cause of the plaintiffs' termination.

In *Eiland v. Trinity Hospital*, the Seventh Circuit affirmed the district court's grant of summary judgment in favor of an employer who had been sued by a nurse claiming she was terminated because of her race.[134] In so holding, the court focused on the fact that the plaintiff's supervisor, who made the decision to terminate, did not rely on an allegedly biased staff physician's report that the plaintiff failed to follow hospital policy.[135] Instead, the plaintiff's supervisor conducted an independent investigation of the circumstances, which included getting the plaintiff's version of the events.[136]

127. *Id.* at 309.
128. *Id.* at 304.
129. *Id.* at 306.
130. *Id.*
131. *Id.*
132. *Id.* at 307.
133. *Id.*
134. 150 F.3d 747, 749 (7th Cir. 1998).
135. *Id.* at 752.
136. *Id.*

The court found there was no causal connection between the staff physician's allegedly discriminatory conduct and the supervisor's ultimate decision to terminate.[137]

In *Llampallas v. Mini-Circuits, Lab, Inc.*, the plaintiff contended she was the victim of sexual discrimination.[138] Llampallas argued she was fired by defendant Mini-Circuits after her sexual relationship with her supervisor ended.[139] Llampallas further alleged she was terminated because her supervisor was biased against her and that he threatened to quit himself if the defendant did not terminate Llampallas.[140] The Eleventh Circuit found that the supervisor's bias could not be imputed to the ultimate decisionmaker because he afforded an opportunity for the plaintiff to present her side of the story and make the defendant aware of the supervisor's discrimination.[141] The court found that "[w]hen the employer makes an effort to determine the employee's side of the story before making a tangible employment decision affecting that employee . . . it should not be held liable under Title VII for that decision based only on its employee's hidden discriminatory motives."[142]

Finally, in *Stimpson v. City of Tuscaloosa*, the Eleventh Circuit reversed a judgment against multiple defendants in a Title VII claim based on sex discrimination.[143] The plaintiff, a female police officer with a "troubled disciplinary record" was terminated after an outburst at a doctor's office while in uniform.[144] The City of Tuscaloosa Police Chief recommended that the plaintiff be terminated; however, the authority to terminate the plaintiff lay with the city's civil service board, and they made the decision to do so.[145]

The court held that where a biased party makes a termination recommendation but actually has no authority to do so, the plaintiff must prove the biased party's recommendation was the direct cause of the termination.[146] The court found that even if the plaintiff presented enough evidence to show discrimination on the part of the plaintiff's employer, the causal link between that animus and the plaintiff's ultimate termination was broken by the independent decision of a civil service board to uphold the

137. *Id.*; *see also* Maarouf v. Walker Mfg. Co., 210 F.3d 750 (7th Cir. 2000); Willis v. Marion County Auditor's Office, 118 F.3d 542 (7th Cir. 1997).
138. 163 F.3d 1236, 1239 (11th Cir. 1998).
139. *Id.*
140. *Id.*
141. *Id.* at 1249.
142. *Id.* at 1250.
143. 186 F.3d 1328, 1329 (11th Cir. 1999).
144. *Id.* at 1329-30.
145. *Id.* at 1330.
146. *Id.* at 1331.

termination.[147] Here, the plaintiff had an opportunity to present her side of the story in a three day hearing that included representation by legal counsel and the opportunity to put on a defense and witnesses.[148] The court declined to adopt any bright line rule defining when an independent investigation will not suffice for the employer to avoid liability, but it noted that it could not imagine any other type of hearing which might provide plaintiffs with a more independent and fair opportunity to present their side of the story.[149]

Unlike the First, Second, Third, Fourth, Fifth, Seventh and Eleventh Circuit Courts of Appeal, the Tenth Circuit had never found for a plaintiff claiming liability for the bias of a subordinate until *EEOC v. BCI Coca Cola Bottling Co. of Los Angeles*, but it had signaled its support for the theory.[150]

III. EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles

A. Facts

As the most senior merchandiser at BCI's Albuquerque, New Mexico facility, Peters had the most desirable schedule and did not have to work on Saturday or Sunday.[151] Peters reported to Jeff Katt, a white male who supervised Peters on a day-to-day basis, and to Cesar Grado, a Hispanic male, who supervised both Katt and Peters.[152] It was common for merchandisers to call in sick to Katt, even though Grado handled all scheduling and route assignments.[153] Grado was responsible for supervising, monitoring, and evaluating the employees underneath him, but had no authority to terminate or discipline employees.[154] He did, however, have broad authority to bring facts concerning employee performance to the attention of the Human Resources Department, who determined whether a company policy applied and whether any disciplinary action was necessary.[155]

Sherry Pederson was the highest ranking human resources official in the Albuquerque office, and her immediate supervisor was Pat Edgar, who worked

147. *Id.*
148. *Id.* at 1332.
149. *Id.*
150. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 485 (10th Cir. 2006).
151. *Id.* at 478. Merchandisers are hourly employees who place Coca-Cola products in grocery stores and other retail stores and are responsible for arranging, cleaning and rotating product displays. Merchandisers work five days per week with staggered schedules so that they are available to work Saturdays and Sundays. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

in Phoenix, Arizona.[156] It was undisputed that neither Pederson nor Edgar had met Peters, and neither knew he was African-American.[157] The weekend prior to Peters's termination, Grado faced a shortage of merchandisers and ordered Katt to direct Peters to work on Sunday, September 30.[158] Some dispute in facts arose as to the chain of events over the weekend. In sum, Peters indicated that he did not want to work, and Grado told Peters he did not have a choice.[159] Grado contacted Edgar to seek advice about how to handle the situation with Peters.[160] Edgar advised Grado that Peters's actions could be considered insubordination. Insubordination was a violation of company policy for which Peters could be terminated, unless he had a compelling reason not to come into work on Sunday.[161] Peters was informed of the risk of termination if he failed to report to work, and in response he said, "Do what [you] got to do and I'll do what I got to do."[162]

Peters did not show up for the shift on Sunday, and it was covered by Grado.[163] Peters had gone to a clinic on Saturday night where he was diagnosed with a sinus infection and told not to return to work until Monday.[164] Peters informed Katt of this fact, and he was told that returning to work on Monday would not be a problem.[165] On Monday, Grado informed Pederson of the fact that Peters had missed work.[166] Edgar pulled Peters's personnel file and found that Peters had been suspended previously and issued a final warning for insubordination.[167] By the end of the day, Edgar made the decision to terminate Peters.[168]

Much of the factual dispute in this case arises over the conversations between Peters and Grado and over BCI's proffered reasons for terminating Peters. First, Grado directed Katt to contact Peters to let him know he needed to be at work on Sunday.[169] Peters told Katt that he could not work on Sunday because he had plans.[170] According to Grado, when Katt relayed this

156. *Id.* at 479.
157. *Id.* at 481.
158. *Id.* at 479.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 480.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 479.
170. *Id.*

conversation to him, Katt added that Peters said he might call in sick; however, Peters and Katt both deny that Peters said anything about being sick during that conversation.[171] Further, in his declaration to the court, Grado stated that he had already discussed the matter with Katt and that Peters had already agreed to work on Sunday.[172]

Second, there was some conflict between Edgar's stated reasons for terminating Peters and the reasons listed in Peters's termination paper.[173] The date of violation was also in conflict, with the termination paper listing the violation date as Sunday, September 30, rather than Friday, September 28, as Edgar claimed to the court.[174] Finally, the court noted that Pederson's review of Peters's personnel file was so hasty that she did not even gather basic information about Peters, such as his race, which was listed on several documents within the file.[175] The court found this interesting in light of Pederson's duties as a human resources official to train BCI management in affirmative action and equal opportunity issues.[176]

Edgar, the Human Resources Officer, determined late Friday that Peters's conduct in his conversation with Grado, standing alone, constituted insubordination which warranted termination, but made no decision to do so.[177] On Monday, Edgar held a series of phone meetings with Pederson and Grado concerning Peters's conduct, and Pederson pulled Peters's personnel file and discovered a previous incident of insubordination which resulted in a two-day suspension and a final warning from a different supervisor.[178] Peters was terminated, and the EEOC filed a complaint on his behalf against BCI, claiming unlawful discrimination on the basis of race.

B. Issue

The district court employed the *McDonnell Douglas* burden-shifting analysis in resolving Peters's claim.[179] BCI conceded that the EEOC

171. *Id.*

172. *Id.* at 479 n.1. The court found it interesting that Grado felt the need to have Katt contact Peters again. *Id.*

173. *Id.* at 481.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 480.

178. *Id.* The incident was similar in nature to one giving rise to the litigation. *Id.* Peters was ordered to work on his weekend off, but refused and was "rude and unprofessional." *Id.* However, Peters had good reason to miss work because his fiancée's son, whom he was close to, had been killed in a car accident, and he was acting as a pallbearer at the funeral. *Id.*

179. *Id.* at 483-84. The *McDonnell Douglas* framework was appropriate because the issue involved a question of whether BCI's stated reasons for the termination were pretextual rather

established a prima facie case of unlawful employment discrimination by showing that Peters was African-American, he was qualified for his position as a merchandiser, he was terminated from his position, and the position remained open.[180] The burden then shifted to BCI to articulate a legitimate, non-discriminatory reason for the termination.[181] The EEOC conceded that BCI successfully did this by asserting the insubordination of Peters in his phone conversation with Grado on Friday, September 28.[182]

Thus, the only remaining issue for the court's consideration was whether the EEOC made a sufficient showing that BCI's stated reason for termination was actually a pretext for discrimination.[183] It was undisputed that Edgar, who made the formal decision to terminate Peters, did not act with racial animus and did not even know Peters's race.[184] The EEOC had to prove that Grado displayed racial animus toward black employees and that this animus should be imputed to BCI even though Grado did not have the authority to terminate any employee.[185] The district court found that the EEOC had raised a genuine issue of material fact as to Grado's racial animus, but that the agency failed to prove there was a genuine issue of material fact as to whether BCI's proffered reasons were pretextual.[186] Therefore, the court granted summary judgment in favor of BCI.[187] On appeal to the Tenth Circuit, the EEOC contended the district court erred in its holding, arguing that there was a genuine issue of material fact as to whether BCI's proffered reasons for terminating Peters were false. Thus, the EEOC argued an inference could arise that BCI acted for discriminatory reasons.[188]

C. Holding and Rationale

The Tenth Circuit found that the district court erred in its grant of summary judgment.[189] The appellate court agreed with the district court that a genuine

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than a question of whether the adverse employment action was motivated by both legitimate and illegitimate motives.

180. *Id.* at 484.

181. *Id.* Again, this is only a burden of production and not persuasion.

182. *Id.* The court noted that BCI maintained "that Mr. Peters' absence on Sunday, September 30 had nothing to do with the decision, except insofar as it confirmed that Peters' statements on Friday were insubordinate." *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 483.

187. *Id.*

188. *Id.* at 483, 490.

189. *Id.* at 478.

issue of material fact existed as to Grado's racial animus.[190] Further, the appellate court held that a genuine issue of material fact existed as to whether BCI's stated reasons for terminating Peters were pretextual.[191] Specifically, the Tenth Circuit noted that the EEOC had raised a genuine issue of fact as to whether Grado's bias translated into discriminatory actions that caused Peters's termination.[192]

The appellate court found three sets of facts important in determining that there were questions of material fact as to the racial animus of Grado.[193] First, the EEOC produced at least three examples of racial jokes and put-downs spoken by Grado, and Katt indicated that Grado may have used a racial epithet near the time of Peters's termination.[194] Second, affidavits were produced which tended to prove disparate treatment between African-American merchandisers and Hispanic merchandisers.[195] Third, the court found that Grado responded very differently to a Hispanic employee who was ordered to work on his off day.[196] While the Hispanic employee did not act in a defiant manner, Grado reportedly responded that an employee could not be expected to work on their day off.[197] Thus, a jury could infer racial animus on the part of Grado as the reason for the disparity in treatment.[198]

The Tenth Circuit closely examined BCI's proffered reasons for terminating Peters and determined that a reasonable jury could find them to be a pretext for race discrimination.[199] BCI's reasons were characterized as a two part contention: first, that it terminated Peters for his conduct on the phone with Grado, and second, that Peters's failure to show up for work merely confirmed his already insubordinate activity.[200] Grado's first explanation, the Disciplinary Status Notice, and paperwork filed by BCI with the New Mexico Department of Labor all claimed the reason for Peters's termination was his failure to show up for work.[201] Only later, BCI characterized its decision as resulting from Peters's conduct on the phone

190. *Id.* at 489.
191. *Id.* at 493.
192. *Id.* at 492-93.
193. *Id.* at 489.
194. *Id.*
195. *Id.* The disparate treatment included demeaning and threatening African-American employees with schedule changes and being unusually picky as to an African-American's work in merchandising and stocking. *Id.* at 489-90.
196. *Id.* at 490.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 490-91.

rather than his absence from work.[202] The court concluded that a jury could find that BCI's original reason for terminating Peters was pretextual because he was in fact excused from working.[203]

The Tenth Circuit also concluded that a reasonable jury could find BCI's other explanation for terminating Peters—his phone conduct—was a pretext for race discrimination because of Grado's racial animus.[204] Edgar relied exclusively on Grado's account of the Friday phone conversation and did not conduct an independent investigation into the allegations, failing to even ask Peters for his version of the events.[205] Because Grado's report that Peters was defiant and insubordinate caused the actual termination, a jury could find that Grado's report was influenced by racial discrimination, and thus that BCI's proffered reason was in reality a pretext for race discrimination.[206]

The Tenth Circuit dismissed BCI's contention that the factual disputes between Grado and Peters concerning their conversation on Friday, September 28, should be ignored because it is undisputed that Peters ended the conversation "by saying '[d]o what [you] got to do and I'll do what I got to do.'"[207] Furthermore, if the basis of Edgar's decision to terminate had been only Grado's report of this comment, "there would be no reason to believe that racial bias on the part of Mr. Grado caused the termination."[208] However, there were three additional facts reported by Grado which were disputed by Peters and Katt.[209] First, Grado reported that he had learned that Peters was already planning on calling in sick two days previously.[210] Second, he reported that he asked Peters to reveal his plans and gave Peters an opportunity to explain his scheduling conflict.[211] Third, he reported to Edgar that Peters replied angrily that it was none of Grado's business and that Peters was yelling.[212] Thus, Edgar could have relied on the additional facts supplied by Grado in making her decision to terminate because her reaction to these facts indicated she found them important in determining the appropriate punishment.[213] The relevant question was what *actually* caused Peters's

202. *Id.* at 491.
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 491-92.
207. *Id.* at 492.
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*

termination and not what *could have* caused his termination.[214] Under this approach, a jury's crediting of Katt's and Peters's testimony would mean a discrediting of Grado's version of events, thus a conclusion that Grado lied to Edgar about the additional facts.[215]

The Tenth Circuit also dismissed BCI's contention, and the district court's agreement, that BCI conducted an independent investigation sufficient to break any causal chain between Grado's bias and Peters's termination.[216] According to the court, the independent investigation consisted of one action: the pulling of Peters's personnel file.[217] This action was "inadequate, as a matter of law, to defeat the inference that Mr. Grado's racial bias tainted the decision."[218] The court focused on the fact that the file did not give Edgar a way to independently confirm Grado's story, and even though it contained a previous incident of insubordination, Edgar never sought any other version of the events other than Grado's.[219]

IV. Analysis

A. The Need for Supreme Court Action

While the Supreme Court will not have an opportunity to rule on the Tenth Circuit's approach in *BCI* because of the party's voluntary dismissal of the petition for certiorari,[220] the need for a definitive ruling on the issue of subordinate bias liability still remains. The disagreement among and within circuits, in addition to the important nature of Title VII for both employees and employers, necessitates Supreme Court attention.

A comparison of the Fifth Circuit's jurisprudence provides the clearest example of intra-circuit conflict on the issue of subordinate bias liability. *Long* was the first decision within the Fifth Circuit to recognize the theory of subordinate bias liability.[221] The *Long* court found that the plaintiff's retaliation claim could survive summary judgment because a causal link had been established between the supervisors with retaliatory motives and the

214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 492-93.
220. *See* BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1105 (2007). The Supreme Court's grant of certiorari was voluntarily dismissed by the parties. BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1334 (2007).
221. Long v. Eastfield Coll., 88 F.3d 300, 306-07 (5th Cir. 1996) (stating that the claims before it did not fit neatly into any previous analysis the court had done of employer liability for wrongful termination decisions based on recommendations of other employees).

plaintiff's termination.[222] The court went on to hold that the employer could show that the causal nexus was broken if the final decisionmaker, by whom no retaliatory motive was alleged, conducted an independent investigation.[223]

Six years later, the Fifth Circuit again considered the issue of biased subordinate liability. In *Gee v. Principi*, the court found that a plaintiff could survive summary judgment because she had produced sufficient evidence to allow a trier of fact to conclude that the final decisionmaker had been improperly influenced by supervisors with retaliatory motives.[224] In so doing, the court characterized the inquiry under *Long* as "whether the ultimate decisionmaker conducted an independent investigation or was influenced by the retaliatory animus of those who participated in or knew about the alleged harassment."[225] Further, the court found that "[i]f the ultimate decisionmaker was influenced by others who had retaliatory motives, then his investigation cannot in any real sense be considered *independent*."[226] Thus, the majority found that the decisionmaker's selection process did not meet the "independent investigation" requirement of the Fifth Circuit.[227] The dissenting judge characterized the *Long* decision as providing that a decisionmaker who was influenced by biased subordinates could "purge the taint of retaliatory motives by conducting a subsequent independent investigation."[228] The dissenting judge found the decisionmaker did conduct an independent investigation through his interviews of the plaintiff and her co-workers, concluding: "no reasonable jury could find that [the decisionmaker] merely 'rubber stamped' the recommendations of [the biased subordinates]."[229]

The intra-circuit conflict demonstrated by the Fifth Circuit is only magnified by the conflict between the Fourth, Fifth, Seventh, and Tenth Circuits. As demonstrated in Part II.C, each circuit has established its own test for determining when an employer can be held liable.[230] The test employed by the court could have a profound impact on whether the case is resolved at the summary judgment level or whether a full trial is needed. The confusion that remains may stem from the particular facts of each case. Employment law cases are inherently fact driven, and as such it is difficult to

222. *Id.* at 307-08.
223. *Id.*
224. 289 F.3d 342, 347 (5th Cir. 2002).
225. *Id.* at 346 n.2.
226. *Id.*
227. *Id.* at 347.
228. *Id.* at 349-50 (Garza, J., dissenting).
229. *Id.* at 350 (Garza, J., dissenting).
230. *See* discussion *supra* Part II.C.

develop a single rule that can cover all scenarios. Further, when a court is faced with a particularly forceful set of facts counseling either in favor of or against employer liability, it is not pressed with a need to speak with precision about the standards which will govern liability.

Because Title VII is a federal law, the Supreme Court has a duty to interpret its meaning. Furthermore, there is a practical need for guidance for employers, especially those whose reach is nationwide, to know the contours of the subordinate bias theory so they can adopt policies to effectuate its purpose: ensuring that an adverse employment action is taken for legitimate reasons. The Court has set the stage for approving the theory of subordinate bias liability, and one might argue, has given it implicit approval. Nevertheless, the time has come for the Supreme Court to give explicit approval to the subordinate bias theory of liability under Title VII and the ADEA and to craft the theory's boundaries so as to give guidance to employers and employees.

B. The Tenth Circuit Reached the Correct Result

The Tenth Circuit was correct to hold that BCI was not entitled to summary judgment based on the factual record.[231] Moreover, the Tenth Circuit's analysis of the legal issues was also correct because it was supported by agency and causation principles.[232]

1. Agency Principles Support the Tenth Circuit's Decision

Title VII defines an employer to include "any agent of such a person."[233] Relying on this language, the Tenth Circuit rightly rejected the Fourth Circuit's holding in *Hill*.[234] Furthermore, the Tenth Circuit's analysis finds support in both Supreme Court and other federal appellate court opinions. While only federal appellate courts have endorsed agency principles as providing a basis to impose liability for the bias of subordinates, the Supreme Court has signaled its approval of agency law as a basis for liability in other Title VII actions.[235]

a) Tenth Circuit Rightly Rejected the Fourth Circuit's Approach in Hill

In rejecting the Fourth Circuit's approach, in *BCI* the Tenth Circuit found their sister circuit's focus on the term "decisionmaker" misplaced and noted

231. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 493 (10th Cir. 2006).
232. *Id.* at 485.
233. 42 U.S.C. § 2000e(b) (2000).
234. Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 291 (4th Cir. 2004).
235. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

that Title VII and the ADEA imported agency law principles for determining liability.[236] The court, relying on *Ellerth*, held that employers could be liable for the action of "decisionmakers" and other agents who cause injury while being aided by the agency relation.[237] Additionally, the court contended that the deterrent effect of subordinate bias liability was undermined by the Fourth Circuit's approach because the employer can avoid liability for a biased subordinate who causes an adverse employment action if it can show that the biased subordinate did not exercise complete control over the adverse employment decision.[238]

As a result of the Fourth Circuit's focus on who was "principally responsible" or the "actual decisionmaker," the *Hill* decision failed to take into account Title VII's incorporation of agency principles as a basis for liability. The Tenth Circuit was correct in rejecting the Fourth Circuit's "principally responsible" standard and relying on agency principles to find that BCI could be held liable for Grado's bias.[239]

b) Other Federal Circuits Support the Application of Agency Principles to Title VII

Other federal circuit courts of appeals have found support in agency law for subordinate bias liability. In so doing, they have recognized that Title VII's inclusion of the term "agent" was not meaningless;[240] rather, it served as a way of ensuring that the statute's purposes were not skirted by allowing employers to vest lower level supervisors or other co-workers with the ability to discriminate.[241]

In *Hamilton v. Rodgers*, the Fifth Circuit concluded that a "'person is an agent under § 2000e(b) if he participated in the decision-making process that forms the basis of the discrimination.'"[242] The court found that the plaintiff's

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236. *BCI*, 450 F.3d at 487.

237. *Id.* Some disagreement seems to exist, at least on the Supreme Court, as to the particular provision of agency law which will govern liability. *See infra* note 258 and accompanying text. The Tenth Circuit, in relying on *Ellerth*, found that the "aided by the agency relation" standard clearly applied to "cat's paw" or "rubber stamp" liability claims. *Id.* at 485-86. The merit of this contention and the specific provision of agency law which should provide liability is an issue outside the scope of this note.

238. *Id.*

239. *Id.*

240. Title VII defines "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any *agent* of such a person . . . ." 42 U.S.C. § 2000(e)(b) (2000) (emphasis added).

241. *See, e.g.*, Shager v. Upjohn Co., 913 F.2d 398, 404-05 (7th Cir. 1990).

242. 791 F.2d 439, 443 (5th Cir. 1986) (quoting Jones v. Metro. Denver Sewage Disposal

supervisors were agents of the employer, despite their intermediate standing within the organization.[243] Furthermore, the supervisors "wielded [their] authority to [plaintiff's] detriment."[244]

Similarly, the Ninth Circuit, in *Miller v. Maxwell's International, Inc.*, discussed Title VII and the ADEA and found that "[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute."[245] The court found that the agency provision encouraged employers to ensure that supervisory personnel did not violate Title VII because they could be held liable for such violations.[246]

In *Levendos v. Stern Entertainment, Inc.*, the Third Circuit found that two supervisory employees were agents for purposes of Title VII.[247] The court found that the supervisory employees "had the direct ability to influence hiring and firing decisions with respect to the [plaintiff]."[248] The court held that the actions of these supervisory employees could be imputed to the defendant, and the defendant could be liable for the supervisory employee's discriminatory actions.[249]

In *Shager v. Upjohn Co.*, Judge Posner, writing for a unanimous Seventh Circuit panel, considered the role of agency in the ADEA and Title VII and found that the statute left to the courts the job of determining "whether to apply the doctrine of respondeat superior in [ADEA or Title VII cases]."[250] Looking to the Supreme Court's decision in *Vinson*, the Seventh Circuit concluded that the Supreme Court's concern over strict liability for

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Dist., 537 F. Supp. 966, 970 (D. Colo. 1982)).

243. *Id.* at 442.

244. *Id.* The court ultimately held that this finding of agency meant that the supervisors, in their individual capacity, could be held liable for the violations of Title VII. *Id.* at 445. Despite this, the court still recognized the role of agency principles in Title VII litigation. *Id.* at 442-43.

245. 991 F.2d 583, 587 (9th Cir. 1993) (alteration in original).

246. *Id.* at 588. The court found that "[n]o employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief." *Id.* The court, in rejecting individual employee liability in favor of employer liability under Title VII's agency provision, was responding to the Fifth Circuit's argument that not holding individual supervisors liable would encourage violations of Title VII. *Id.*

247. 909 F.2d 747, 752 (3d Cir. 1990).

248. *Id.* The citation of this case as support for the Tenth Circuit's decision on agency grounds does not imply that this case is in agreement with the Tenth Circuit as to the level of causation that should attend employer liability. It simply serves to show that other circuits have found agency principles as a basis for imputing the bias of a subordinate with no decision-making authority to the employer.

249. *Id.*

250. 913 F.2d 398, 404 (7th Cir. 1990).

harassment by a fellow employee had no place where the challenged adverse employment action was termination by a supervisory employee.[251] Specifically, Judge Posner found that a "supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do"[252] and that such action could be said to be within the scope of his employment.[253] This finding led to the conclusion that if the committee who made the decision to terminate the plaintiff acted as the cat's paw of the ageist supervisor, the innocence of the committee members would not spare the company from liability.[254]

c) Supreme Court Precedent Supports the Application of Agency Principles

Just as the Circuit Courts have relied on agency principles, the Supreme Court has similarly found that "Congress wanted courts to look to agency principles for guidance in [Title VII]."[255] In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court relied on agency principles and found that an employer could be held liable for the creation of a hostile work environment by a supervisor with immediate or higher authority over the affected employee.[256] While the Supreme Court has stated that agency law may not be "transferable in all [its] particulars" to Title VII,[257] such a statement does not preclude the imposition of liability when the acts of the subordinate supervisor result in an adverse employment action. The Court simply held that strict liability was not required under the statute and that the common law of agency should be considered in defining employer liability.[258]

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251. *Id.*

252. *Id.* at 405.

253. *Id.* Judge Posner looked to the RESTATEMENT (SECOND) OF AGENCY § 228 (1958) as a basis for imposing liability, finding that "the ultimate concern is with confining the [employer's] liability to the general class of cases in which he has the practical ability to head off the injury to his [biased employee's] victim." *Shager*, 913 F.2d at 405.

254. *Id. Shager* is commonly recognized as applying the cat's paw metaphor to the issue of subordinate bias liability. *See* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 485 (10th Cir. 2006).

255. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

256. 524 U.S. 742, 765; *see also supra* Part II.B.3. The Court in *Ellerth* was considering a sexual harassment claim rather than a racial discrimination claim, but both are actionable under Title VII. Thus, there is ample reason to believe that the same agency principles could provide vicarious liability for an employer when an employee suffers an adverse employment action as the result of a biased supervisor who does not have final decision-making authority.

257. *Vinson*, 477 U.S. at 72.

258. *Id.* Even Justices Thomas and Scalia conceded the potential for employer liability under agency principles in their *Ellerth* dissent. *Ellerth*, 524 U.S. at 772-73 (Thomas, J., dissenting). The dissent was based primarily on the majority's use of the "aided in agency

2. Causation Principles Support the Tenth Circuit's Decision

In addition to agency law, principles of causation support the Tenth Circuit's holding in *BCI*. In order to prove a violation of Title VII, a plaintiff must show that an adverse employment action was taken against them "because of" some protected characteristic such as race or sex.[259] This "because of" requirement has long been understood to impose a burden on plaintiffs to demonstrate that the consideration of a protected characteristic was the cause of the adverse employment action.[260] Even a plaintiff proceeding under the theory that the subordinate's bias should be imputed to the employer must demonstrate a causal nexus. Unfortunately, courts considering these claims have employed imprecise language and have not carefully crafted the boundaries of the theory.[261] The practical result is confusion about how much control or influence a biased subordinate must have over the decision-making process before their bias will be imputed to the employer.

The Tenth Circuit decision is in accord with much of the precedent on the issue of subordinate liability. Where it differs from other circuits, the court's position is justified as striking a better balance between the remedial aims of the anti-discrimination statutes and ensuring that the causation requirement is met. Furthermore, the Tenth Circuit's analysis brings certain clarity to an issue in which it has been difficult for courts to employ language giving clear guidance.

a) The Tenth Circuit's Causation Focus Is Supported by Precedent

The Fifth Circuit, at least in the *Long* opinion, has recognized the importance of the causation requirement.[262] The *Long* court found that the plaintiffs presented sufficient evidence for a reasonable jury to conclude that their supervisors acted with intent to retaliate against the plaintiffs.[263] This retaliation took the form of recommending that the plaintiffs be terminated.[264] The court found that the causal link between the supervisor's retaliatory intent and the plaintiffs' termination was established, unless the defendants could

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relation" standard rather than a "negligent or reckless" standard under agency law. *Id.*

259. 42 U.S.C. § 2000e-2(a)(1) (2000); *see also* 29 U.S.C. § 623(a)(1) (2006).

260. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 262-63 (1989) (O'Connor, J., concurring).

261. *See* discussion *infra* Part IV.B.2.b.

262. Long v. Eastfield Coll., 88 F.3d 300, 307-08 (5th Cir. 1996).

263. *Id.*

264. *Id.* at 308.

show that the final decisionmaker had conducted an independent investigation.[265]

In *Wilson v. Stroh Companies, Inc*., the Sixth Circuit considered a claim by the plaintiff that his direct supervisor's racial animus should be imputed to the managers who made the termination decision.[266] The court found the ultimate question was whether the plaintiff had submitted evidence that the supervisor's racial animus caused the termination.[267] The corporate industrial relations manager conducted an independent investigation of the plaintiff's conduct and recommended termination, a recommendation which the general manager followed.[268] The court found that "[t]he causal nexus necessary to support [the plaintiff's] prima facie case [was] absent."[269]

In *Lust v. Sealy*, the Seventh Circuit clarified that the "cat's paw" formula required that the animus of the subordinate be a cause of the adverse employment action.[270] Additionally, in *Llampallas v. Mini-Circuits Lab*, the Eleventh Circuit held that no causation could be found between a subordinate's animus and the plaintiff's termination.[271] The court found the chain of causation was broken by the employer's efforts to independently investigate the situation surrounding the plaintiff and by the opportunity given to the plaintiff to provide her side of the story.[272]

The Tenth Circuit reached a similar conclusion in *English v. Colorado Department of Corrections*, holding that the decisionmaker'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 [the plaintiff's] termination."[273]

In keeping with its own precedent and that of other federal circuits, the Tenth Circuit emphasized the importance of the biased subordinate actually causing the adverse employment action, and the ability of the employer to ensure this casual chain is broken by conducting an independent investigation. The court expressly determined that "the biased subordinate's discriminatory

265. *Id.* at 307.

266. 52 F.2d 942 (6th Cir. 1992).

267. *Id.* at 946; *see also* Christian v. Wal-Mart Stores, Inc., 252 F.3d 862, 877 (6th Cir. 2001) (applying the subordinate bias liability theory in the context of a claim of interference with the formation of a contract because of race in violation of 42 U.S.C. § 1981 (2000)).

268. *Wilson*, 952 F.2d at 946.

269. *Id.*

270. 383 F.3d 580, 584 (7th Cir. 2004). The court specifically rejected the Fourth Circuit's approach to the issue of subordinate bias liability. *Id.*

271. 163 F.3d 1236, 1249-50 (11th Cir. 1998).

272. *Id.* at 1250.

273. 248 F.3d 1002, 1011 (10th Cir. 2001).

reports, recommendation, or other actions [must have] caused the adverse employment action" for the employer to be liable.[274]

Furthermore, the court found that "an employer can avoid liability by conducting an independent investigation of the allegations against an employee"[275] because when the employer does not rely exclusively on information provided by the biased subordinate the causal link is broken.[276] Additionally, the court stated that an inference of a racially discriminatory employment decision may be defeated by simply asking an employee for his version of the events.[277]

The Tenth Circuit's focus on the causation requirement is supported by the "because of" language in Title VII. Additionally, it is buttressed by the independent investigation requirement. By focusing on causation as a necessary element of the plaintiff's case, the court ensured that the cat's paw theory did not become a means for a plaintiff who could not prove intentional discrimination to make an end-run around the statute by alleging a that a low level supervisor's racial animus somehow impacted the decision to take an adverse employment action.

b) The Tenth Circuit's Causation Focus Clarifies Precedent

Other cases from the United States Courts of Appeals seem to be in conflict with the Tenth Circuit's decision in *BCI*.[278] For example, in *Abramson*, the Third Circuit found that liability could attach if persons with discriminatory animus merely influenced or participated in the decision to take an adverse employment action.[279] The court further held that the record in the case before it demonstrated that the actual decisionmaker was influenced by the biased subordinates, thus there was "ample evidence to support [plaintiff's] religious discrimination claim."[280]

Likewise, the Fifth Circuit has characterized the proper inquiry as whether the discriminatory animus of the biased subordinate influenced the final

274. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 487 (10th Cir. 2006).

275. *Id.* at 488.

276. *Id.*

277. *Id.*

278. While the cases in this section and the cases in Part II.B.1, *supra*, do not clearly speak of causation, it is not this note's contention that the causation requirement is non-existent in these cases. Rather, the disagreement can likely be seen as one of degree. These cases are included to demonstrate the potential for misapplication that accompanies the vague language employed, which in turn, lends further support for the viability of the Tenth Circuit's clear causation requirement.

279. Abramson v. William Patterson Coll. of N.J., 260 F.3d 265, 286 (3d Cir. 2001).

280. *Id.*

decisionmaker.[281] As a result, the court held that the bias of the subordinate could be imputed to the final decisionmaker if the plaintiff could show that the subordinate had "influence or leverage over the official decisionmaker."[282]

The Court of Appeals for the Ninth Circuit has also addressed the issue of subordinate bias liability. While not recognizing it as such, the court has stated that "[a] manager's retaliatory motive may be imputed to the company if the manager was involved in the [adverse employment action]."[283] The court found it sufficient to impute the retaliatory motive of the manager to the company based on their finding that the manager provided the decisionmaker with an assessment of the plaintiff's abilities and that he advised the decisionmaker to remove a qualification which had the effect of disadvantaging the plaintiff.[284]

These cases tend to speak loosely of the causation requirement, couching it in terms of whether the biased subordinate "influenced" or "participated in" the adverse employment action and describing such evidence as relevant and probative. While all courts likely agree that the remarks of those involved in a decision to terminate are relevant, not all courts would (nor do they) agree that this alone would be sufficient to make an employer liable. The absence of a discussion of causation and the related role of an independent investigation gives rise to an inference that an employer may be liable—not on the basis of the biased subordinate having caused the adverse employment action, but rather on the basis of any influence or involvement, no matter how insignificant.

By ignoring causation, such a result has the dual effect of punishing employers and undermining Title VII. The potential burden on employers who have made efforts to ensure that an independent, non-discriminatory basis for the adverse employment action exists is great if the simple involvement of a biased subordinate is sufficient to hold them liable. Furthermore, the influence or involvement standard is inconsistent with Title VII's "because of" requirement. While it is doubtful these appellate courts intended to obviate the "because of" requirement, the language they employ, taken to its logical conclusion, suggests that an employer can be held liable even if there is an

281. Gee v. Principi, 289 F.3d 342, 347 (5th Cir. 2002).

282. *Id.* at 346 (quoting Russell v. McKinney Hosp. Venture, 235 F.3d 219, 226 (5th Cir. 2001)); *see also* Roberson v. Alltell Info. Servs., 373 F.3d 647, 653 (5th Cir. 2004) (holding that a plaintiff alleging the cat's paw theory must establish two things: (1) a co-worker with discriminatory animus, and (2) same co-worker having leverage or influence over the formal decisionmaker).

283. Bergene v. Salt River Project Agr. Imp. & Power Dist., 272 F.3d 1136, 1141 (9th Cir. 2001).

284. *Id.*

independent, non-discriminatory reason for the adverse employment action so long as the biased subordinate was involved in the decision or exercised any influence over the final decisionmaker.

C. Defending the Independent Investigation Requirement

The Tenth Circuit was right to recognize the role of the independent investigation analysis as furthering the purpose of Title VII and being consistent with precedent. Additionally, the independent investigation requirement is fair to employers and employees. While failing to define the scope of the independent investigation, the Tenth Circuit did provide a starting point from which courts could evaluate the ultimate issue: whether the biased subordinate actually caused the adverse employment action.

1. Independent Investigation Requirement is Right, Recognized, and Fair to Employers and Employees

Though the concept of an "independent investigation" appears nowhere in the text of Title VII, the Tenth Circuit rightly focuses on the role and impact of an independent investigation in subordinate bias cases. The independent investigation requirement is supported by other circuits who have addressed the issue. Furthermore, it is fair to employees and employers, thus making it the right mechanism to further Title VII's purpose of eradicating discrimination without unduly burdening employers.

The independent investigation requirement is correct because it serves the purpose of Title VII by ensuring that employees who are the victims of intentional discrimination can recover even though the persons who made the adverse employment decision did not act with any bias. Employers could skirt the law by establishing a system in which the final decisionmaker is free of bias and yet relies solely on the facts presented to them by a biased supervisor. If employers were only liable for the final decisionmaker's bias, they would be rewarded by adopting a "see no evil, hear no evil, speak no evil" policy. The independent investigation requirement allows employers to centralize the personnel decision-making process without allowing them to avoid Title VII's requirements. Employees benefit because employers are incentivized to ensure that the facts giving rise to an adverse employment action are accurate.

Almost all of the circuits recognizing the claim of biased subordinate liability have recognized the corollary independent investigation requirement.[285] These circuits have held that the independent investigation

285. *See, e.g.*, Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 288 (4th Cir. 2003); English v. Colo. Dep't of Corr., 248 F.3d 1002, 1011 (10th Cir. 2001); Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1331 (11th Cir. 1999); Eiland v. Trinity Hosp., 150 F.3d 747,

requirement severs the causal link between the biased subordinate and the adverse employment action.[286] While none of them have outlined how much of an independent investigation is required, all have recognized that the final decisionmaker must have made their decision independent of the biased subordinate.[287] The Tenth Circuit was correct in joining these circuits. Furthermore, it provided some parameters for the requirement: more than reviewing a personnel file, but less than a full scale investigation.[288] The court's less-than-subtle hint that the employer should seek the employee's side of the story[289] provides a practical starting point for courts to determine whether or not the biased subordinate has caused the adverse employment action.

Additionally, the independent investigation requirement is fair. It asks nothing of the employee and can only serve to benefit them, especially if the facts against them are being fabricated or given a spin that is unwarranted. For example, in *BCI*, an independent investigation would have brought to light the fact that Peters had called in sick and had been excused from work by Katt *prior* to Edgar's making the decision to terminate Peters's employment. Unlike much of Title VII, the burden would be on the employer to engage in the independent investigation. At the least, the employer would be required to attempt to get the employee's side of the events in question. Again, in *BCI*, that simple action would have brought to light Peters's legitimate reason for missing work on Sunday.

2. The Scope of the Independent Investigation and a Modest Burden Shifting Proposal

The independent investigation requirement will, in most instances, sever the causal link between a biased subordinate and an adverse employment decision. Again, in *BCI*, if Edgar had made an independent investigation, she would

752 (7th Cir. 1998); Long v. Eastfield Coll., 88 F.3d 300, 307 (5th Cir. 1996); Wilson v. Stroh Cos. Inc., 952 F.2d 942, 946 (6th Cir. 1992).

286. *Stimpson*, 186 F.3d at 1331.

287. *Id.*

288. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 486 (10th Cir. 2006).

289. *Id.* There is only one situation in which the first option might be onerous: failure-to-hire claims. There is some validity to a claim that being required to call every rejected applicant to get their side of the story would not be practical. However, rejected applicants will often have greater difficulty proving individual disparate treatment, and they usually must proceed with claims of systemic disparate treatment or disparate impact. Additionally, an employer who is monitoring its hiring practices to avoid a systemic disparate treatment claim or disparate impact claim should have no problem identifying when an issue arises so that an independent investigation could be conducted. Ultimately, however, to the extent a plaintiff can prove that they were not hired because of their race, the employer should be liable.

have discovered Peters's reason for missing work on Sunday. This would have given Edgar two possible choices: one, accept that Peters was sick on Sunday and excused from work, or two, continue with the decision to terminate because she believed that Peters faked the illness. If Edgar believes Peters, then there is no reason to terminate, and Grado's bias has not caused any adverse employment action. The harder question to answer is what to do if Edgar does not believe Peters was sick, or believes he was lying? In this instance, the independent investigation may not have broken the causal link between Grado's bias and the termination. A discussion of the scope of the independent investigation and a modest burden shifting proposal will help to answer that question.

It can be fairly said that the scope of the independent investigation has three different levels: (1) final decisionmaker gets the employee's side of the story, (2) final decisionmaker conducts an independent investigation of the facts leading to the possible adverse employment action, or (3) a full scale hearing is conducted in which employer and employee present their respective sides (a mini grievance arbitration).[290] The third option can be set aside because it is unrealistic for the vast majority of employers, and for those employers whose employees are union members, a hearing will likely occur anyway. The second option is also somewhat burdensome for employers, but as will be discussed, may be required of employers in some instances. The first option, as discussed previously, is not particularly onerous for employers and provides a good starting point for determining whether the biased subordinate has caused the adverse employment decision.

The recognition of these two remaining levels of independent investigation is important to understanding this burden shifting proposal. Under this burden shifting proposal, an employer defending against a plaintiff's claim of subordinate bias would not be entitled to summary judgment unless they could show, at a minimum, that they had undertaken efforts to gain the employee's version of events. Upon such a showing, the plaintiff would be entitled to point to specific facts demonstrating that the employer's attempt to obtain their side of the story was a sham. In the alternative, the plaintiff could also point to facts showing that the subordinate's bias still caused the adverse employment action even though they were given an opportunity to present their story. The burden would then shift back to the employer to dispute the contention that the independent investigation was a sham or that there were other independent reasons beyond the biased subordinate's information which

290. Surely a more imaginative writer could find far more nuanced differences in the type and detail of independent investigations available to employers. Three levels are employed for purposes of brevity, clarity and sanity. Further, the three levels described accurately reflect the acceptable range of activities in which an employer might engage.

would serve as a legitimate basis for taking the adverse employment action. Often, this information would be gained by the final decisionmaker engaging in the second level of the independent investigation: an independent investigation of the facts leading to the possible adverse employment decision. Such an investigation could take the form of interviewing other employees and supervisors, and otherwise gathering information relevant to the employee at issue. This burden shifting proposal can be put into practice through *BCI* and *Gee*.

In *Gee v. Principi*, it was alleged that a decision not to hire the plaintiff for a new job opening was the result of retaliation by supervisors with discriminatory animus.[291] The decisionmaker conducted the first level of the independent investigation: he interviewed the plaintiff.[292] Under this burden shifting proposal, the defendant was entitled to summary judgment unless the plaintiff could point to facts showing that his interview was a sham. Conceivably, the plaintiff could have pointed to the testimony of one of her supervisors that he felt that she had been denied the job at the end of a meeting in which two other supervisors with retaliatory motives provided negative comments about the plaintiff to the decisionmaker.[293] The burden would then be on the defendant to point to additional, undisputed facts which could have provided a legitimate basis for not choosing the plaintiff. The defendant in *Gee* could make this showing. The final decisionmaker talked with each candidate's supervisors, met with the plaintiff's co-workers, and testified that his decision not to select the plaintiff for promotion was his own.[294] This evidence was undisputed by the plaintiff.[295] Furthermore, the substantive nature of the biased supervisor's comments—that the plaintiff was absent from work and had trouble getting along with others—was not disputed by the plaintiff.[296] Under the burden shifting framework, summary judgment could be seen as appropriate because the plaintiff could not dispute the final decisionmaker's legitimate basis for his failure to select her for the new position. In fact, the decisionmaker conducted the first and second levels of the independent investigation. He interviewed the employee, and he made an independent investigation of the facts surrounding her performance, including interviewing her other supervisors and her co-workers.

The question in *BCI* was: what if Edgars had asked for Peters's version of events, and not believing his version of events, proceeded to terminate him

291. 289 F.3d 342, 345 (5th Cir. 2002).
292. *Id.* at 347.
293. *Id.* at 346-47.
294. *Id.* at 350 (Garza, J., dissenting).
295. *Id.*
296. *Id.*

anyway? BCI failed to engage in the first level of the independent investigation.[297] Had they done so, the need to engage in the second level likely would have revealed itself. The interview with Peters could have revealed that Katt would dispute Grado's version of events.[298] Even if Peters did not know Katt could help him, faced with two differing version of events, Edgar could have contacted Katt to see if he knew anything about the situation. She then would have received Katt's version of the events, which would have undermined Grado's account and verified Peters's account. Under the burden shifting proposal, BCI would not have been entitled to summary judgment. Edgar could only point to the previous act of insubordination as an independent, legitimate basis for terminating Peters. Thus, it would be a question for a jury to determine whether Edgar would be justified in not believing Peters or whether Grado actually caused Peters's termination.

Ultimately, the question for any independent investigation requirement should be whether it breaks the causal chain between the biased subordinate and the adverse employment action. The levels of independent investigation provide a framework for courts to analyze whether the employer was able to break the causal chain. By providing that an employer cannot succeed at the summary judgment stage without an independent investigation, the employee is allowed to go forward with his or her claims and present them to a jury. They must still prove that the biased subordinate caused the adverse employment action. Employers are incentivized, at the very least, to gain the employee's side of the story to ensure that there is a legitimate basis for taking the adverse employment action. The first level of independent investigation may be sufficient to grant the employer summary judgment, but the employee can still produce evidence that the independent investigation was a sham or that it did not break the causal chain. In this instance, the employer's undertaking of the second level of investigation may serve to break the causal chain.

V. Conclusion

While the fables of LaFontaine were meant for children, they bear important lessons for modern day employers. Subordinates, many of whom may be "cunning, subtle and sharp and bearing a grudge against the whole race of mice beside," may be able to achieve their objective of clearing the mice out of the house whether they have final decisionmaking authority or not. Unfortunately, in the context of employment discrimination, such actions are

297. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 493 (10th Cir. 2006).
298. *Id.* at 492.

not to the advantage of the master of the establishment, indeed they can be very harmful to the employer.

BCI failed to conduct an independent investigation of Grado's claims about Peters's conduct. These claims formed the basis of Peters's termination, thus Grado can be seen as having caused Peters's termination, and a reasonable jury could have found that Grado's bias was the reason he brought negative facts about Peters to the attention of human resources personnel. Causation and agency principles, as recognized by other appellate courts and the United States Supreme Court, support the Tenth Circuit's decision to reverse the district court's grant of summary judgment.

Furthermore, the Tenth Circuit laid the foundation for future Supreme Court consideration of subordinate bias claims. By focusing on the role of the independent investigation, specifically the need to gain the employee's version of events, the Tenth Circuit provided the starting point for determining whether the biased subordinate actually caused the adverse employment action. Of course, the plaintiff should be able to allege facts that the employer's independent investigation did not break the causal chain or was a sham conceived to avoid liability. This burden shifting process allows employers, in most instances, to avoid the expense of a trial where they have taken the simple action of interviewing the employee to ensure that the facts surrounding the adverse employment action are accurate. It also protects employees who are the victims of a biased subordinate's discrimination by allowing them to demonstrate that the employer has made no real effort to ensure the accuracy of the facts giving rise to the adverse employment action. The Tenth Circuit has thus provided the silver spoon of determining when liability should attach for a biased subordinate's involvement in an adverse employment action.

Curtis J. Thomas