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## Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability

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## Beyond the Cat's Paw: An Argument for Adopting a "Substantially Influences" Standard for Title VII and ADEA Liability

TIM DAVIS\*

### I. INTRODUCTION

Susan, an African-American nurse, has worked for a large group of physicians for nearly twenty years and is nearing the end of her career. Susan's boss has recently retired and has been replaced by a man with an animus toward African-Americans. This has put Susan in a precarious situation.

Instead of overtly discriminating against her, Susan's supervisor complains to the large medical practice's personnel committee that Susan's work is substandard and she no longer is a productive worker. The committee, based on the supervisor's report, fires Susan.

When Susan goes to court to assert her right not to be discriminated against, she may face a very daunting challenge: proving that she was fired *because of*<sup>1</sup> her race and not because of the errant personnel committee's decision. This article is about the different answers courts give to Susan's problem: whether she may vindicate her rights under Title VII when the personnel committee itself harbored no discriminatory bias.

Many courts have considered the question.<sup>2</sup> Two courts, the Seventh Circuit in *Shager v. Upjohn Co.*,<sup>3</sup> and the Fourth Circuit in *Hill v. Lock-*

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1. This "because of" language is required by Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(a)(1) (2006).

2. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004) (giving a long list of cases on point). The U.S. Supreme Court was recently scheduled to hear arguments on this issue in *Equal Employment Opportunity Commission v. BCI Coca-Cola Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007). The question on certiorari was to be "[u]nder what circumstances is an employer liable under federal antidiscrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee." Petition for Writ of Certiorari at 1, *BCI Coca-Cola Bottling Co. of L.A. v. Equal Employment Opportunity Comm'n*, 127 S.Ct. 852 (Sept. 5, 2006) (No. 06-341). However, the case, scheduled to be argued on April 18, 2007, was dismissed by the parties on April 12, 2007. See *BCI Coca-Cola Bottling Co. of L.A. v. Equal Employment Opportunity Comm'n*, 127 S. Ct. 1931 (2007). Eleven days later, the Court denied certiorari for a case presenting the same issue. See *Sawicki v. Morgan State Univ.*, 170 F. App'x 271 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2095 (2007).

heed *Martin Logistics Management, Inc.*<sup>4</sup> provide the best synopsis of the differing views on this point. The Seventh Circuit held that where a personnel committee acted as the “cat’s paw” for the discriminating supervisor, its innocence would not shield the employer from liability.<sup>5</sup> The court adopted the cat’s paw analogy from one of Aesop’s fables:

A Monkey and a Cat lived in the same family, and it was hard to tell which was the greater thief. One day, as they were roaming together, they spied some chestnuts roasting in the ashes of a fire. “Come,” said the cunning Monkey, “we shall not go dinnerless today. Your claws are better than mine for the purpose; pull the chestnuts out of the ashes, and you shall have half.” Puss pulled them out, burning her paws very much in doing so. When she had stolen every one, she turned to the Monkey for her share of the booty; but, to her chagrin, she found no chestnuts, for he had eaten them all. A thief cannot be trusted even by another thief.<sup>6</sup>

The Seventh Circuit analogized the personnel committee to the “cat’s paw.” By doing the monkey’s “dirty work,” the cat committed the monkey’s crime for him and allowed the monkey to escape unharmed and unpunished. In the same way, the committee can implement a biased employee’s discriminatory animus and thus allow the employee and the company to escape unpunished. The Seventh Circuit rejected this outcome and held that “cat’s-paw” discrimination would not shield an employer from liability.

The Fourth Circuit disagreed with the approach adopted by the Seventh Circuit. It held that the committee’s ignorance will establish its innocence and provide a shield from liability.<sup>7</sup> In fact, the court noted that even if the discriminating employee had a “substantial influence” on the decision makers, liability still would not attach.<sup>8</sup>

The most significant effect of these decisions comes in how employers carry out their business decisions with respect to terminations. If the employers work in a circuit where courts interpret the law much like the Fourth Circuit, employers may make all of their decisions through committees who thus insulate the company from liability and leave employees who have been victimized by discrimination without a remedy.

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3. 913 F.2d 398 (7th Cir. 1990).

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

5. *Shager*, 913 F.2d at 405.

6. The Monkey and the Cat, Aesop’s Phrases, No. 88, available at [http://www.geocities.co.jp/bookend/9563/idiom/MONKEY\\_AND\\_THE\\_CAT.html](http://www.geocities.co.jp/bookend/9563/idiom/MONKEY_AND_THE_CAT.html) (last visited Nov. 21, 2007).

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

8. *Id.*

This article agrees with the Seventh Circuit's conclusion that the employer should be held liable when a personnel committee relies on the biased report of a supervisor. Unfortunately, however, the Seventh Circuit's application of agency principles to achieve this outcome may result in "cat's paw" liability not attaching when the person reporting to a personnel committee is not a supervisor, but is instead a non-employee such as a co-worker or an independent contractor or a customer. This article urges courts to adopt a "substantial influence" standard by which an employer would be liable whenever a biased report to a personnel committee or other ultimate decision maker has a "substantial influence" on the committee's decision to take an adverse employment action against an employee. Under this approach, the employer should be held responsible for any discriminatory results whenever its ultimate decision maker takes adverse employment action against an employee based upon the animus-tinged reports of any person. This approach is fully consistent with the plain language of the antidiscrimination statutes and with Supreme Court precedent, and provides the broadest possible protection to employees that have been discriminated against.

Part II of this article provides the legal background that courts use to interpret this issue. It considers common law agency principles and the statutory text of Title VII and other antidiscrimination statutes. Part III examines the approaches to the conflict the two courts have taken, which have placed them on opposite ends of the spectrum. Part IV analyzes these approaches and advocates for an interpretation of the law that protects victims of discrimination and thus furthers the purpose of the nation's antidiscrimination laws. Part V concludes this article.

## II. BACKGROUND

Both common law and statutory law guide the decision to impose liability in the context of a personnel committee acting on a biased employee's recommendation. Common law provides basic agency principles which, when adopted, will impute liability on the employer for the wrongs of the agent/employee. Additionally, the text of Title VII defines terms that are useful in the analysis. An examination of both of these areas of law is helpful in setting the stage for the ultimate decision on this issue.

### A. *Common Law Agency Principles*

At common law, the employer is liable for the intentional torts of its employees, so long as those torts are committed in furtherance or within the scope of the employee's employment.<sup>9</sup> The Restatement (Third) of Agency adopted this principle and refers to it by its traditional name, "respondeat superior."<sup>10</sup>

Respondeat superior is a Latin phrase meaning "let the superior answer." In many respects, that is the intent of the nation's antidiscrimination laws—the company alone answers for an employee's conduct because an incorporated company can only act through its agents and employees.<sup>11</sup> Although this principle derives from the common law, courts typically employ it in cases of statutorily-created torts because a statute rarely sets out all the supplementary doctrines within its text that will govern the case's outcome.<sup>12</sup>

Use of the principle in this way may lead to problems or conflicts between the common law and the statute. The drafters of the most recent Agency Restatement recognized this point: "The third type of [common law/statutory] relationship . . . occurs when a court incorporates common-law doctrine in its construction of a statute but modifies or varies the doctrine in light of the court's understanding of the statute's purpose or broader policy context."<sup>13</sup> Indeed, the drafters cite Title VII jurisprudence as an area where agency principles are often employed but may be tweaked or modified to fit the court's overall view of the outcome of the case.<sup>14</sup> So, it seems that, although the agency principles that will give rise to liability in employment discrimination cases are important, they are not immutable.

### B. *The Statutory Text of Title VII and the Age Discrimination in Employment Act (ADEA)*

Beyond merely mentioning that agency principles and statutory policies may collide, the drafters of the Agency Restatement also noted that where a statute does not define terms, the common law understanding of those terms is likely the one that the statute's authors intended.<sup>15</sup> However,

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9. R.R. Co. v. Hanning, 82 U.S. (15 Wall.) 649, 657 (1872).

10. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

11. North v. Madison Area Ass'n for Retarded Citizens-Developmental Ctrs. Corp., 844 F.2d 401 (7th Cir. 1988).

12. See, e.g., Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 541 (1999) (using agency principles to govern the applicability of punitive damages in Title VII cases).

13. RESTATEMENT (THIRD) OF AGENCY, Introduction (2006).

14. *Id.*

15. *Id.*

in the case of Title VII and the ADEA,<sup>16</sup> the term “employer” is defined within the statutory text:

The term “employer” means 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 . . .*

<sup>17</sup>

The term “agent” is not defined in either statute.<sup>18</sup> Thus, the courts have been left with the task of determining, based on the definition above, when an employer is liable for the wrongs of its “agents.”

The U.S. Supreme Court has remarked that the definition in these statutes is not meant to be all-encompassing, and that it “surely evinces intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”<sup>19</sup> In *Meritor*, a bank employee alleged her supervisor was sexually harassing her.<sup>20</sup> The Court considered whether agency principles would allow an employer, in this case, a bank, to be held responsible for such actions by its employees.<sup>21</sup> The Court turned to agency principles. It rejected a broad rule that would automatically make employers liable for every instance of sexual harassment because the definition within Title VII is somewhat self-limiting.<sup>22</sup> The Court nevertheless allowed the employee to continue her claim because it ultimately concluded that the supervisor was an agent of the bank.<sup>23</sup>

The Court again considered agency principles in *Burlington Industries, Inc. v. Ellerth*.<sup>24</sup> The Court noted that no particular state law of agency would apply in determinations under Title VII.<sup>25</sup> Instead, courts should use the general common law of agency in order to give the terms uniform meaning.<sup>26</sup> When discussing whether an employee violates Title VII with the purpose of furthering the business of the employer, the Court cited

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16. Because of the definition and policies identical to both statutes, this paper considers only Title VII and the ADEA here to provide a more concise analysis for the reader. Certainly though, these principles have applications in other areas of employment law. See, e.g., *Iduozue v. McDonald's Corp.*, 268 F. Supp. 2d 1370 (N.D. Ga. 2003) (utilizing the “cat’s paw” analysis for an Americans with Disabilities Act claim).

17. 42 U.S.C. § 2000e(b) (2006) (emphasis added); see also 29 U.S.C. § 630(b) (2006).

18. 42 U.S.C. § 2000e; see also 29 U.S.C. § 630.

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

20. *Id.* at 59–60.

21. *Id.* at 72.

22. *Id.*

23. *Id.* at 72–73.

24. 524 U.S. 742 (1998).

25. *Id.* at 754–55.

26. *Id.*

cases on both sides of the line.<sup>27</sup> The Court solved the agency question by adopting the “tangible employment action” standard.<sup>28</sup> When a harasser takes a “tangible employment action” against the employee, the harasser has met all of the common law requirements for imposing liability on the employer.<sup>29</sup> The Court defined tangible employment action:

Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.<sup>30</sup>

In defining a tangible employment action as an “official act of the enterprise,” the Court favorably cited *Shager*.<sup>31</sup> For purposes of this article’s analysis, when an employer fires an employee, it makes a tangible employment action.<sup>32</sup>

Post-*Ellerth*, lower courts considered whether the *Ellerth* decision applied beyond the sexual harassment context to other instances of harassment and violations of Title VII. The courts concluded that it did and applied the holding in a number of broad contexts.<sup>33</sup> From these cases it is clear that Title VII provides the starting point for the agency analysis with its textual definition of “employer.” However, when courts need more detailed principles, they turn to the common law of agency to guide their analysis. This was the path taken by both the *Shager* and *Hill* courts, as seen below.

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27. *Id.* at 756–57.

28. *Id.* at 761.

29. *Id.* at 761–62.

30. *Id.* at 762.

31. *Id.*

32. *Id.* at 761.

33. See *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998) (stating that “it appears that the Court [in *Ellerth*, 524 U.S. 742, and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)] intended to apply these same agency principles to all vicarious liability inquiries under Title VII for acts by supervisors, including racial discrimination”); *Wright-Simmons v. City of Okla. City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (stating that “[a]lthough *Burlington [v. Ellerth]* and *Faragher* involved sexual harassment, the principles established in those cases apply with equal force to this case of racial harassment . . . .”); *Wallin v. Minn. Dep’t of Corr.*, 153 F.3d 681, 687–88 (8th Cir. 1998) (applying *Faragher* to a harassment claim under the ADA); see also *Crawford v. Medina Gen. Hosp.*, 96 F.3d 830, 834 (6th Cir. 1996) (stating, pre-*Ellerth* and *Faragher*, that “[t]he elements and burden of proof are the same, regardless of the discrimination context in which the claim arises”); *Harrison v. Metro. Gov’t of Nashville & Davidson Co.*, 80 F.3d 1107, 1118 (6th Cir. 1996) (stating pre-*Ellerth* and *Faragher* that “the elements and burden of proof that a Title VII plaintiff must meet are the same for racially charged harassment as for sexually charged harassment”).

## III. APPROACHES TO THE CONFLICT

As discussed above, many courts have considered whether an employer will be liable for a personnel committee that acts on the biased recommendation of one of its employees. The two cases discussed here provide the best synopsis of the two competing answers to the question and are thus the most appropriate for review.

A. *The Narrow Approach*

The Fourth Circuit case of *Hill* allowed a recovery only in very limited circumstances.<sup>34</sup> Ethel Hill worked for Lockheed Martin as a sheet metal mechanic.<sup>35</sup> Her job required her to perform various modifications to aircraft at numerous military bases across the country.<sup>36</sup> As a result, she was part of a team that traveled to perform these modifications.<sup>37</sup> Her supervisor often did not travel with the team.<sup>38</sup> Instead, a “point person” supervised the workers on the team and served as the contact with the military base.<sup>39</sup> This person was also responsible for making sure that all of Lockheed’s safety protocols and quality requirements were satisfied.<sup>40</sup>

Hill received three reprimands for safety violations in the last few months of her employment with Lockheed.<sup>41</sup> These three reprimands were enough, under Lockheed’s “standard operating procedures,” to terminate Hill.<sup>42</sup> She did not contest that procedure but alleged that Ed Fultz, the safety inspector at one of the bases at which Hill had worked, was hostile to older women which thus led to his filing of safety violations against Hill.<sup>43</sup> She pointed to statements Fultz made, such as calling her a “useless old lady” who needed to be retired, a “troubled old lady,” and a “damn woman” as evidence of his animus.<sup>44</sup> Hill argued that Fultz’s dislike of older women, along with his desire to retaliate against her when she complained to her supervisor about Fultz’s comments, led Fultz to report admittedly valid infractions that resulted in her second and third reprimands

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34. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 287 (4th Cir. 2004).

35. *Id.* at 282.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 283.

44. *Id.*

and which, when combined with her first reprimand, served as the basis for her termination under Lockheed's procedure.<sup>45</sup>

After the district court awarded a summary judgment in Lockheed's favor, the Fourth Circuit, en banc, addressed the question of who is a "decisionmaker" for Title VII purposes.<sup>46</sup> The court essentially mirrored the discussion above: it noted the definition within the text of Title VII of "employer" and set out the agency principles discussed in *Ellerth* and *Meritor*.<sup>47</sup> The Fourth Circuit upheld the notion of the tangible employment action and said that when a supervisor takes a tangible employment action against a subordinate, "it would be implausible to interpret agency principles to allow an employer to escape liability."<sup>48</sup>

The court then discussed other Supreme Court precedent that stands for the proposition that an employer can still be held liable in a similar case, "so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action."<sup>49</sup>

The Fourth Circuit rejected Hill's attempts to argue that as long as an employee "substantially influences" the committee's decision, liability will attach.<sup>50</sup> The court, without much commentary, stated that it believed the statutes and "controlling precedents" do not allow such a broad view.<sup>51</sup> Next, the court rejected cases like *Shager* that adopt the "cat's paw" theory because "they have not always described the theory in consistent ways, and rarely have they done so after a discussion of the agency principles from which the theory emerged and that limit its application."<sup>52</sup>

After noting that Title VII and the ADEA do not only provide liability for the decisions of "formal decisionmakers," the court uttered the pronouncement that condemned Hill's claim:

[W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because

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45. *Id.*

46. *Id.* at 286.

47. *Id.* at 287–88.

48. *Id.* at 287.

49. *Id.* at 288–89 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151–52 (2000)).

50. *Id.* at 289.

51. *Id.*

52. *Id.* at 290.

he has played a role, even a significant one, in the adverse employment decision.<sup>53</sup>

Because the court would only allow a recovery for the biased actions of the “actual decisionmaker,” the court affirmed the district court’s grant of summary judgment for Lockheed.<sup>54</sup>

### B. *The Cat’s Paw*

The “cat’s paw” theory originated in the Seventh Circuit case of *Shager*. The Upjohn Company was the successor company to the Asgrow Seed Company, for whom Ralph Shager sold seeds.<sup>55</sup> Shager began working for Asgrow when he was fifty years old.<sup>56</sup> Beyond working as a seed salesman, Shager supervised the company’s workforce in Wisconsin.<sup>57</sup>

Shager’s supervisor was John Lehnst, who was thirty-five at the time.<sup>58</sup> Lehnst hired a new sales associate for Wisconsin and divided the state into two territories, a northern and southern portion.<sup>59</sup> Shager contended that the territories should be divided into an eastern and western portion because it was more difficult to make sales in the northern region.<sup>60</sup> Lehnst rejected Shager’s contention and assigned Shager to the northern region.<sup>61</sup>

Despite not providing enough sales to justify a third representative, Lehnst actively recruited and hired a third representative for Wisconsin who was twenty-nine.<sup>62</sup> Lehnst was aware that he would eventually have to terminate one of the representatives because of Wisconsin’s poor sales, but when he hired the new salesman, he simply divided the state into three territories.<sup>63</sup>

This division made it difficult for Shager to meet his required sales quotas, but he nonetheless exceeded the goals, even in the depleted northern region.<sup>64</sup> The twenty-nine year old manager failed to meet his quotas.<sup>65</sup> Nevertheless, Lehnst rated Shager’s performance as marginal in a performance evaluation while he made excuses for the younger salesman’s poor

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53. *Id.* at 291.

54. *Id.* at 297–98.

55. *Shager v. Upjohn Co.*, 913 F.2d 398, 399 (7th Cir. 1990).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 399.

62. *Id.*

63. *Id.* at 400.

64. *Id.*

65. *Id.*

performance.<sup>66</sup> Lehnst placed Shager on probation for apparent deficiencies in collecting accounts receivable and for poor management of salesmen in Shager's territory.<sup>67</sup> Lehnst finally recommended to Asgrow's Career Path Committee that Shager should be fired for the deficiencies. The committee accepted the recommendation and terminated Shager.<sup>68</sup>

When Shager left, Lehnst divided the state into an eastern and western division as Shager had recommended.<sup>69</sup> Shager pointed to a number of statements by Lehnst that showed that Lehnst disapproved of older workers, such as "[t]hese older people don't much like or much care for us baby boomers, but there isn't much they can do about it,"<sup>70</sup> and "the old guys know how to get around things."<sup>71</sup>

The district court granted summary judgment in Upjohn's favor. On appeal, the Seventh Circuit began its discussion with a recitation of the basic agency principles and the *Meritor* case.<sup>72</sup> The court recited the common law rule, also applicable to statutory torts such as antidiscrimination laws, that an employer is liable for the intentional torts of its employees, committed in furtherance of their employment.<sup>73</sup> Lehnst, the court reasoned, was Asgrow's agent because he was an employee of Asgrow and because his reports to the personnel committee were in furtherance of his employment. Thus, Lehnst's discriminatory animus could be imputed to Asgrow.<sup>74</sup>

By contrast, the personnel committee, according to the Seventh Circuit, was a mere rubber stamp. The court noted that a personnel committee is likely to defer to the managers who have more "hands on" contact with the employees.<sup>75</sup> With such deference, the committee can "act[] as the conduit of . . . [the supervisor's] prejudice . . ." and the supervisor can abuse his power by allowing his or her discriminatory beliefs to affect his or her recommendation to the committee.<sup>76</sup> Ultimately, the court analogized, the committee acted as a "nonconductor" and is no more culpable or responsible than a secretary who types an employee's discharge papers.<sup>77</sup>

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66. *Id.*

67. *Id.* at 400.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 405.

73. *Id.* at 404.

74. *Id.*

75. *Id.* at 405.

76. *Id.*

77. *Id.*

The court reversed the district court's grant of summary judgment and allowed Shager to proceed with his claim.<sup>78</sup>

#### IV. ANALYSIS

This Part analyzes the dichotomous approaches described above. It also advocates for a theory that provides the greatest amount of protection to employees who have been the victims of discrimination.

##### A. *The Strengths and Weaknesses of Both Approaches*

As is the case in all circuit splits, one circuit will eventually be right and another will eventually be wrong.<sup>79</sup> That does not mean that one approach is without merit whereas the other is entirely correct. Rather, there is often some good and some bad to both views—especially with this issue.

##### 1. *The Fourth Circuit Approach*

The Fourth Circuit view has been widely criticized for being inconsistent and just plain wrong.<sup>80</sup> However, there are some aspects to its jurisprudence that are correct. Often overlooked by a commentator's rush to criticize an otherwise bad case is the fact that the Fourth Circuit will still impose liability on a committee that does not engage in any investigation but merely takes the supervisor's word as the only evidence needed for its determination.<sup>81</sup> Surely this is a step in the right direction. The court could have cut off liability any time a neutral committee makes the ultimate decision, but the court still recognized those cases where employers would make an end run around the law and thus provided for liability in this limited circumstance.

However, this approach presents a problem. This "independent investigation" standard may have the effect of creating a "revolving door" where a committee's investigation could be considered complete as long as the committee interrogated the biased employee on his or her reasons for seeking to terminate the protected employee. If the committee did that, perhaps

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78. *Id.* at 406.

79. *See supra* note 2 and accompanying text (detailing the U.S. Supreme Court's recent certiorari activity on this issue).

80. *See, e.g.,* Ali Razzaghi, Comment, *Hill v. Lockheed Martin Logistics Management, Inc.*: "Substantially Influencing" the Fourth Circuit to Change its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker, 73 U. CIN. L. REV. 1709, 1730 (2005) (noting that "[e]ven the cases cited by the majority are at odds with the Fourth Circuit's previous interpretation").

81. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290–91 (4th Cir. 2004).

it would be all that is required to protect the employer and thus erode the last vestige of protection available to employees in this situation in the Fourth Circuit.

## 2. *The Seventh Circuit Approach*

Of the two approaches, the Seventh Circuit's "cat's paw" theory best enunciates the agency principles pronounced by the Supreme Court in its sexual harassment cases.<sup>82</sup> However, because the Seventh Circuit case only deals with agency principles in the context of a supervisor reporting to a committee, it is unclear what the outcome would be in a case where the committee hears the report of an employee at the same level as the one eventually fired. Nonetheless, recent cases that have considered that exact circumstance still employ the "cat's paw" theory, even in cases of same-level reporting.<sup>83</sup>

In *Shager*, the Seventh Circuit explicitly predicated its finding of liability on the fact that the supervisor recommending discharge to the personnel committee was *an employee* and therefore an agent of the employer.<sup>84</sup> But what if the biased person reporting to a personnel committee or other decisionmaker is neither a supervisor nor fellow employee, but instead an independent contractor or a customer? Such individuals would not be statutory "employees" under the antidiscrimination statutes, and therefore according to the Seventh Circuit's application of agency principles would not be the employer's "agents" for purposes of imputing liability. Thus, an employee fired by a personnel committee which had relied on the animus-tinged report of a non-employee would have no remedy under the antidiscrimination laws. As such, while the Seventh Circuit intended the "cat's paw" theory to extend antidiscrimination protection broadly, its application of agency principles results in a relatively limited scope of antidiscrimination protection. A new approach is needed to extend antidiscrimination protection to circumstances in which a personnel committee or other decisionmaker takes adverse employment action against an employee because of the animus-tinged reports of independent contractors, customers, or other non-employees.

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82. See *Faragher v. City of Boca Raton*, 524 U.S. 790 (1998).

83. See *Young v. Dillon Cos., Inc.*, 468 F.3d 1243 (10th Cir. 2006) (deciding case using "cat's paw" theory where one worker reported his co-worker to human resources).

84. *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990).

### B. Beyond the "Cat's Paw"

There is a standard beyond the "cat's paw" that may provide the best test for imposing liability upon an employer for a personnel committee's decision. Ethel Hill asked the Fourth Circuit to adopt a standard of "substantial influence" so that when a biased employee makes a report to the committee that has a "substantial influence" on the committee—even if the committee makes its own investigation—liability is still appropriate.<sup>85</sup> The Fourth Circuit rejected the standard.<sup>86</sup> Nonetheless, this article argues that courts should adopt a variation on this standard and find that an employer is liable whenever a biased report to a personnel committee, or other ultimate decisionmaker, has a substantial influence on a decision to take an adverse employment action against an employee.

As described above, the problem with the "cat's paw" theory is that the Seventh Circuit's application of agency principles would not permit the imposition of liability on an employer when a personnel committee takes an adverse employment action against an employee because of a discriminatory report of a non-employee. This article argues that an employer should be liable whenever an animus-tinged report, from any source, whether employee or not, has a substantial influence on a decision to take an adverse employment action against an employee. This approach is fully consistent with agency principles.<sup>87</sup>

The personnel committee is comprised of employees who unquestionably are agents of the employer for purposes of Title VII liability. They are the employer's agents because they are employees acting within the scope of their employment. The Restatement (Third) of Agency specifies that "an employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control."<sup>88</sup> If an employer gives a personnel committee authority to take or recommend adverse employment actions, then the committee's actions in furtherance of that authority are "assigned by the employer" and therefore within the scope of the committee members' employment. Members of the personnel committee also are acting within the scope of employment when they act carelessly or mistakenly, or fail to act at all, on matters assigned to them by the employer.<sup>89</sup>

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85. *Hill*, 354 F.3d at 289.

86. *Id.*

87. I am indebted to Roger Billings, who suggested the argument that follows and Richard Bales for its further articulation.

88. RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

89. *Id.* cmt. c ("An employee's conduct is within the scope of employment when it constitutes performance of work assigned to the employee by the employer. The fact that the employee performs the work carelessly does not take the employee's conduct outside the scope of employment, nor does

This is important because the duties owed by a principal to an agent include: the duties of “care, competence, and diligence”,<sup>90</sup> and “to provide information.”<sup>91</sup> The “information” that an agent is under a duty to provide includes information that the agent does not know, but should.<sup>92</sup> In other words, the agent may be under a duty to investigate in order to obtain information that is not readily available to the agent.<sup>93</sup> The “may,” of course, implies a converse “may not.” However, the “may not” appears to apply when a principal has explicitly withheld a duty to investigate, or when it is ambiguous as to whether the principal expects the agent to investigate. On the other hand, when an employer explicitly gives a personnel committee the authority to investigate employee misconduct or poor performance and to take adverse employment action against employees who have engaged in misconduct or poor performance, then the duty to investigate is explicit and is fully consistent with agency principles.

This article argues that a personnel committee’s duties to investigate and inform are not properly discharged by merely taking a third party (such as a customer or an independent contractor) or co-worker at his or her word. In other words, if a customer or independent contractor or co-worker complains about an employee to a personnel committee, the personnel committee is duty-bound under agency principles to conduct an investigation to ensure that the report is accurate and is not tinged with discriminatory animus. If the personnel committee fires the employee without conducting such an investigation, then two consequences follow.

The first consequence is that the employer is liable to the fired employee. This is so because, as discussed above, the personnel committee was acting within the scope of its employment when it fired the employee without an adequate investigation. As such, it was acting as the employer’s agent. Title VII and the antidiscrimination statutes forbid employers from discriminating against employees “because of” protected characteristics such as race, sex, age, and disability,<sup>94</sup> and the statutes specify that employers are liable for the conduct of their agents.<sup>95</sup> If a personnel committee relies on an animus-tinged report to fire an employee, then

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the fact that the employee otherwise makes a mistake in performing the work . . . . An employee’s failure to take action may also be conduct within the scope of employment.”).

90. *Id.* § 8.08.

91. *Id.* § 8.11.

92. *Id.*

93. *See id.* cmt. d. (“If an agent fails to provide information to the principal that is material to decisions that the principal will make, the agent may not have acted with the diligence and care reasonably to be expected of an agent in a particular position. *An agent’s duty of care may require the agent to obtain information that is material to the principal’s interests.*”) (emphasis added).

94. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (2006).

95. 42 U.S.C. § 2000e(b).

that employee has been fired “because of” discriminatory animus and should be protected by the antidiscrimination laws.

The second consequence is that the personnel committee is likely to be liable under the law of agency to the employer. As described above, the personnel committee owes the employer a duty of care, competence, and diligence, as well as a duty to provide information which encompasses a duty of investigation. An agent that fails to discharge its duties to a principal is liable under the law of agency to the principal. Thus, while individuals generally are not personally liable under the antidiscrimination laws for discriminatory actions they take on behalf of their employer,<sup>96</sup> they may be liable to their employer under agency principles for failure to properly discharge their agency duties.

The “substantial influence” approach provides better results than the Seventh Circuit approach for three reasons. First, it is more consistent with the text of the antidiscrimination statutes. Second, it is more consistent with U.S. Supreme Court precedent. Third, it is the best policy approach.

#### 1. “Substantial Influence” Theory’s Consistency with Statutory Text

Title VII and the antidiscrimination statutes forbid employers from discriminating against employees “because of” protected characteristics such as race, sex, age, and disability.<sup>97</sup> If a personnel committee relies on an animus-tinged report to fire an employee, then that employee has been fired “because of” discriminatory animus and should be protected by the antidiscrimination laws.

The Fourth Circuit in *Hill* held that even though employment discrimination existed, it wasn’t the “employer” doing the discriminating, since the personnel committee which was the ultimate decisionmaker did not itself harbor discriminatory animus.<sup>98</sup> However, the text of the antidiscrimination statutes define “employer” as including “any agent” of an employer. As discussed above, the personnel committee is unquestionably an agent of the employer. If it relies on animus-tinged reports supplied to it by others, its reliance should serve as the basis for imputing liability to the employer regardless of whether the committee itself harbored discriminatory animus.

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96. See, e.g., *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583 (9th Cir. 1993).

97. See, e.g., 42 U.S.C. § 2000e-2(a)(1).

98. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004).

## 2. “Substantial Influence” Theory’s Consistency with U.S. Supreme Court Precedent

When a biased co-worker is “principally responsible” for an employee’s termination, liability is appropriate.<sup>99</sup> In *Reeves v. Sanderson Plumbing Products, Inc.*,<sup>100</sup> a biased employee secured the termination of an older employee by complaining that the older worker had falsified work documents.<sup>101</sup> The U.S. Supreme Court held that liability could attach to the employer because the biased employee had essentially acted as the “actual decisionmaker.”<sup>102</sup> In fact, the person who actually terminated the older worker was the biased employee’s wife, and the biased employee was able to have considerable influence over her.<sup>103</sup>

The difference between one who is “principally responsible” and one who is a “substantial influence” is merely semantic. *Reeves* provides enough authority to support the “substantial influence” theory on its facts alone: the decisionmaker was not the biased employee, yet the biased employee was in a position to have a substantial influence over the decisionmaker. Such a scenario can certainly arise beyond the husband/wife context. Perhaps the committee members have a “favorite employee” from whom they prefer to hear personnel reports. If such is the case, the favored employee will yield tremendous power and could act as a “substantial influence” or be “principally responsible” for a decision made by the committee.

Ultimately, the *Reeves* decision, with its “principally responsible” language, provides an implicit endorsement of the “substantially influences” standard. Although the language used is different, the substance behind both standards is the same: an employer should not be free from liability when an employee, in a position to exert influence over the employer, swayed the employer’s decision and thereby induced the employee to engage in discriminatory conduct prohibited by the antidiscrimination statutes.

## 3. “Substantial Influence” Theory is Sound Policy

As a matter of policy, using a “substantial influence” theory provides better, more consistent results. The nation’s antidiscrimination laws were intended to shelter members of protected classes from discrimination.

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

100. *Id.* at 151.

101. *Id.* at 137–38.

102. *Id.* at 152–53.

103. *Id.* at 152.

Therefore, any interpretation of the statutes should be as broad as possible to provide as much protection as possible in order to further the statutes' goal. The "substantial influence" test does exactly that.

When bias plays any role in an employee's termination, the employee should have a cause of action. This is true whether the biased individual is the one making the ultimate decision or if he or she is the one exerting influence on the decisionmaker. If not, employers will take advantage of this "loophole" in the law and make termination decisions only through personnel committees—a result the *Shager* court predicted.<sup>104</sup>

A "substantial influence" theory also mirrors the analysis provided elsewhere in Title VII. Under a "substantial influence" analysis, the employer could still be liable as long as the committee used the discriminatory employee's report as *a* factor in the termination or other adverse action against the employee, as opposed to *the only* factor. This is similar to Title VII's mixed motive analysis that provides for liability as long as a protected characteristic was "a motivating factor" in the adverse action taken against the employee.<sup>105</sup>

Finally, the "substantial influence" theory puts the duty to investigate employee misconduct precisely where agency principles would put it: on the personnel committee to which the employer has delegated its authority to investigate and to take adverse employment actions. Moreover, this allocation of the duty is good policy because the personnel committee, by virtue of its authority to conduct an investigation, is in the best position of all the parties to find out whether a negative report about an employee is legitimate or whether it is tinged with discriminatory animus.

In short, the "cat's paw" theory is clearly superior to the Fourth Circuit's analysis, and the "substantial influence" theory is superior to the "cat's paw" theory. Using the "substantial influence" standard provides a quick analysis for the fact finder. The jury or the judge need only consider the biased employee's statements to the personnel committee and evaluate the impact those statements likely had. If the impact is substantial, liability is appropriate, even if the influence was not the determinative factor. Because courts should seek to protect employees who have been the victims of discrimination, the substantial influence theory should be adopted.

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104. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (speculating that the personnel committee in that case could be "just a liability shield invented by lawyers").

105. *See* 42 U.S.C. § 2000e-2(m) (2006).

## V. CONCLUSION

If a personnel committee relies on an animus-tinged report to fire an employee, then that employee has been fired “because of” discriminatory animus and should be protected by the antidiscrimination laws. If not, the purpose behind the laws—protecting certain classes of our society from invidious behavior—will be meaningless. As a result, when a biased employee or other individual uses the personnel committee as a conduit for his or her bias, the employer should be held liable for acting as the biased employee’s “cat’s paw.” Such a standard is consistent with U.S. Supreme Court precedent and will provide the best amount of protection to the nation’s workers so that someday such a determination will no longer be necessary because bias and discrimination have disappeared from America’s workplaces.