
WEIGHING INFLUENCE: EMPLOYMENT DISCRIMINATION AND THE THEORY OF SUBORDINATE BIAS LIABILITY

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INTRODUCTION

“Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single

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garment of destiny. Whatever affects one directly, affects all indirectly.”¹ This statement made by Dr. Martin Luther King, Jr. during the heart of the civil rights movement continues to capture the essence of the struggle to achieve equality by recognizing the need to eliminate, even at the smallest level, the injustices in our society. One truth of the justice system is that it is imperfect. The reality is that discrimination—whether it is based on race, color, religion, sex, national origin, age, or disability—still exists.² More disturbingly, discrimination continues to pervade workplace environments,³ where there is the greatest potential to negatively impact an individual’s job performance, career, and possibly, the individual’s very subsistence, which may be dependent on employment.⁴ For this reason, Title VII of the Civil Rights Act of 1964 stands at the forefront of the anti-discrimination statutes to protect specifically against workplace discrimination.⁵

It is well established that if an employer discriminates against an employee by firing him, demoting him, or otherwise adversely affecting the terms of his employment because of the employee’s membership in a protected class, courts will impose liability on the

1. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL (1963), *reprinted in* BLESSED ARE THE PEACEMAKERS: MARTIN LUTHER KING, JR., EIGHT WHITE RELIGIOUS LEADERS, AND THE “LETTER FROM BIRMINGHAM JAIL,” 239 (S. Jonathan Bass ed., 2002).

2. *See* Charge Statistics from the U.S. Equal Employment Opportunity Commission FY 1997 through FY 2006, <http://www.eeoc.gov/stats/charges.html> (last visited Jan. 21, 2007) (using data compiled by the Office of Research, Information, and Planning from the EEOC’s Charge Data System to provide statistics on the number of individual discrimination charges filed, which ranged from about 75,000 to 84,000 between fiscal years 1997 and 2006).

3. *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), <http://www.eeoc.gov/policy/docs/harassment.html> (recognizing that harassment, as a form of discrimination, is a “pervasive problem in American workplaces,” and taking into consideration the rise of sexual and racial harassment claims between 1991 and 1998).

4. *See* LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 2.09 (MB 2006) (finding that there are time, expense, and emotional costs of litigation that often prevent victims of discrimination from bringing a claim).

5. *See* 42 U.S.C. § 2000e-2(a) (2000) (stating that an employer cannot discriminate against an employee based on the employee’s membership to a protected class or the employee’s prior engagement in a protected activity); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O’Connor, J., concurring) (noting that, “[w]hile the main concern of [Title VII] was with employment opportunity, Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one’s race or sex”). *But see* LARSON, *supra* note 4, § 1.01 (noting that employers may terminate employees for the wrong reasons or for no reason at all without facing liability as long as termination has nothing to do with a prohibited reason. As a result, employer liability under the anti-discrimination statutes depends entirely on the employer’s intent).

employer for such unlawful discrimination.⁶ In this basic formula of direct discrimination, there are two elements: (1) whether the employer has the authority to take adverse action; and (2) whether the employer causes such action. Generally, a formal decision-maker, such as a high level supervisor or manager, is directly authorized by the employer to take adverse action against an employee. If the action is motivated by any discriminatory animus on the part of the formal decision-maker, liability is directly imputable to the employer.⁷

The law, however, is less settled with respect to finding employers vicariously liable for the discriminatory biases of subordinates,⁸ specifically those who exert influence over the company, corporation, committee, or other formal decision-making entity that embodies the “employer.”⁹ While a small business owner who oversees a few employees may be easily identified as the employer, the question of who the employer is is much less clear in a big business setting with employees at various levels and grades.¹⁰ The presence of

6. See Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 623(a) (2000) (“It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge 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”); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §2000e-2(a) (2000) (“It shall be an unlawful employment practice 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”).

7. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) (imputing liability directly to the employer where “[t]he supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control”); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (“[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.”).

8. See Ali Razzaghi, Comment, *Hill v. Lockheed Martin Logistics Management, Inc.: “Substantially Influencing” the Fourth Circuit To Change Its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker*, 73 U. CIN. L. REV. 1709, 1715-22 (2004-2005) (confirming that courts will hold employers liable for directly discriminating against employees, and introducing the idea of vicarious liability for employers in consideration of the theory of subordinate bias liability).

9. In cases of indirect discrimination where employer liability is vicarious, courts must identify the employer and the extent to which the employer’s decision was influenced by a subordinate’s bias. See Ann Clarke Snell & Lisa R. Eskow, *What Motivates the Ultimate Decisionmaker? An Analysis of Legal Standards for Proving Causation and Malice in Employment Retaliation Suits*, 50 BAYLOR L. REV. 381, 387 (1998) (discussing the difficulty in defining who or what constitutes the “employer,” and arguing that courts should instead determine who ultimately made the decision to take adverse employment action, and for what reasons).

10. See Snell & Eskow, *supra* note 9 (describing the amorphous concept of “employer” and discussing whether it should be interpreted narrowly as the direct supervisor, or broadly as the workplace in general, including co-workers).

intermediate actors like lower level supervisors or managers in a single employment decision increases the possibility that prohibited biases will play a role in the decision.¹¹ For this reason, even though the formal decision-maker is the official agent of the employer, courts cannot ignore the roles of subordinates who use the formal decision-maker as a “cat’s paw,”¹² or tool to take adverse action against a hapless employee, or recommend such action to the formal decision-maker for rubber stamping.¹³

The circuit courts of appeals have split with respect to the standards for determining how much influence a biased subordinate must exercise over the formal decision-maker in order to impose vicarious liability on the employer.¹⁴ A majority have adopted a lenient approach to subordinate bias by subjecting employers to vicarious liability if an aggrieved employee can show that a biased subordinate had *any* influence or involvement in the employment decision that adversely affected the victim employee.¹⁵ On the other

11. See Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 515 (2001) (noting that a biased subordinate may influence an employment decision by withholding relevant information, fabricating evidence, or putting a certain “spin” on the facts (citing *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997)); Mark Blondman & Brooke Iley, *Avoid Adverse Employment Actions that Lead to ‘Cat’s Paw’ Discrimination Suits*, CORP. COUNS., Sept. 22, 2006, <http://www.law.com/jsp/article.jsp?id=1158829527451> (finding that decision-makers often rely on information provided by subordinates to determine whether to terminate an individual without conducting an independent investigation regarding the merits of that decision); see also Razzaghi, *supra* note 8, at 1715 (explaining that an employer may be held liable for the biases of an employee even though the employee was not “principally responsible for the ultimate termination decision”).

12. The phrase “cat’s paw” alludes to situations where one uses another as a dupe or tool to achieve an end. Specifically, it refers to the fable by Jean de la Fontaine in which a monkey convinces a cat to retrieve chestnuts roasting in a fire. As the cat pulls the chestnuts from the fire, burning its paws in the process, the monkey eats the chestnuts, leaving none for the unwitting cat. *Shager*, 913 F.2d at 405.

13. See *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484–85 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007) (explaining that the “rubber stamp” doctrine refers to situations in which the decision-maker blindly approves a biased subordinate’s recommendation to take adverse employment action against a victim employee).

14. See discussion *infra* Part II.A–C (examining case law to point out which circuits adopt the mere influence or involvement standard, the actual decision-maker standard, or the causal nexus approach to claims brought under a subordinate bias theory).

15. The First, Second, Third, Fifth, Eighth, Ninth, and D.C. Circuits recognize that a subordinate employee’s bias can be imputed to the employer if the subordinate merely exercises any influence or has any involvement in the decision-making process to take employment action against a victim employee. See, e.g., *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 923 (8th Cir. 2002) (recognizing that sufficiently pervasive discriminatory comments may allow a fact-finder to conclude that discriminatory animus was a motivating factor in an employment decision); *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 285 (3d Cir. 2001) (reasoning that a rational jury could find that the ultimate decision-maker “did not

hand, the Fourth Circuit alone has taken a narrow approach that holds employers liable only if the biased subordinate is the actual decision-maker.¹⁶

The Tenth Circuit, in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*,¹⁷ rejected both approaches and adopted the causal nexus approach to claims brought under the subordinate bias theory.¹⁸ According to this standard, an employer will only be liable for a subordinate employee's bias if a causal connection exists between the subordinate's bias and the adverse employment action.¹⁹ In *BCI Coca-Cola*, Stephen Peters was terminated for making insubordinate statements to his biased supervisor in a telephone conversation.²⁰ Peters, however, was not fired by the biased supervisor;²¹ instead, a

make his decision in a vacuum"); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (adopting a mere influence standard); *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156, 161–63 (2d Cir. 2001) (acknowledging situations where forbidden discriminatory motives may infiltrate the decision-making process); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 228 (5th Cir. 2000) (holding that the discriminating subordinate was the "de facto decisionmaker" because he was in a position to influence his father, the ultimate decision-maker); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1310 (D.C. Cir. 1998) (holding that evidence of a subordinate's bias is relevant to determining employer liability).

16. Under the Fourth Circuit's actual decision-maker standard, an employer is not vicariously liable even if a subordinate employee with discriminatory animus exerts substantial influence over an employment decision that adversely affects a victim employee. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc).

17. *BCI Coca-Cola*, 450 F.3d at 476.

18. *Id.* at 487–88.

19. The Sixth, Seventh, and Eleventh Circuits also employ a causal nexus analysis to subordinate bias claims. *See Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir. 2001) (holding that a plaintiff must demonstrate a causal nexus between a subordinate's prejudice and the formal decision that adversely affected the plaintiff); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1247 (11th Cir. 1998) (observing that Title VII punishes discriminatory animus only when it causes a change in employment); *see also Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004) (noting that the standard adopted by the Fourth Circuit is "inconsistent with the normal analysis of causal issues in tort litigation").

20. After Peters' supervisor ordered him to work on a day that he was not scheduled to work, Peters said, "do what [you] got to do and I'll do what I got to do," with the apparent intention of ending the conversation peaceably, but his supervisor interpreted the statement as Peters' intention to defy a direct order. *BCI Coca-Cola*, 450 F.3d at 479.

21. Even though the biased supervisor was not the terminating official, the Equal Employment Opportunity Commission (EEOC) filed a civil suit on Peters' behalf, alleging that under a subordinate bias theory, Peters was wrongfully discriminated against on the basis of race. *See id.* at 491 (discussing the evidence offered to support the contention that Peters' supervisor harbored a racial bias, including testimony from other employees that the supervisor treated black employees worse than other employees). In addition, it appeared that when the biased supervisor directed another employee, a Hispanic female, to work on a weekend when she was not scheduled to, she did not suffer any adverse employment action when she failed to comply with his order. *Id.*

human resources official, who did not know Peters and had never met him, handed down the final decision based primarily on the biased supervisor's account of his conversation with Peters.²² The court held that a reasonable jury could have found the employer liable if the biased supervisor exerted influence that caused Peters' termination.²³

The Supreme Court has yet to address the circuit split over the standard for weighing the amount of influence a biased subordinate must exert over an employer in order for the employer to be held vicariously liable.²⁴ When we consider again Dr. King's observation that we are in an "inescapable network of mutuality,"²⁵ it is curious why the Supreme Court has failed to address both direct and indirect discrimination in the workplace, especially because it is a place where multiple layers of networks and relationships exist.²⁶ Employment decisions are often a blend of opinions and recommendations that involve several people other than just the employer and the employee.²⁷ If one discriminatory opinion has the effect of causing an adverse employment action to befall an employee somewhere in the conglomerate of influences,²⁸ an injustice has occurred, and as admonished by Dr. King, justice everywhere is threatened.²⁹

22. See *id.* at 478–79 (explaining that under the structural hierarchy operating within BCI, the company's Human Resources Department was ultimately responsible for employment decisions and actions). In this case, the official responsible for Peters' termination worked in the company's Phoenix, Arizona office, which was 450 miles away from the Albuquerque, New Mexico office in which Peters worked. *Id.*

23. See *id.* (finding that a reasonable jury could have concluded that the terminating official relied on the biased supervisor's report to the extent that the biased supervisor caused Peters' termination). Furthermore, even though the terminating official took steps to pull Peters' file before the final decision, doing so did not constitute an independent investigation of the biased supervisor's report such that any causal connection between the supervisor's bias and Peters' termination would have dissolved. *Id.*

24. See Razzaghi, *supra* note 8, at 1715–22 (reviewing the different approaches the circuit courts of appeals have taken for holding employers vicariously liable for the discriminatory biases of subordinate employees).

25. KING, *supra* note 1.

26. See Laina Rose Reinsmith, Note, *Proving an Employer's Intent: Disparate Treatment Discrimination and the Stray Remarks Doctrine After Reeves v. Sanderson Plumbing Products*, 55 VAND. L. REV. 219, 246 (2002) (discussing the need for the trier of fact to consider discriminatory or biased remarks made by any individual in the work environment in order to determine whether discrimination occurred).

27. See White & Krieger, *supra* note 11, at 496 (stating that employment decisions are sometimes made by a committee or other ad hoc group, or may be the result of a recommendation to an authority).

28. See *id.* at 524 (describing a typical employment decision-making process where a lower level employee recommends a particular employment action to someone higher in the organizational hierarchy).

29. KING, *supra* note 1; see Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring) (“[W]hatever the final outcome of a decisional process,

This Comment evaluates the standards currently used by the circuit courts of appeals to address the issue of subordinate bias, and asserts that the causal nexus approach, most recently affirmed by the Tenth Circuit's decision in *BCI Coca-Cola*,³⁰ is the optimal standard. While the mere influence or involvement majority standard is overly broad in extending imputed liability, and the Fourth Circuit's actual decision-maker standard is unduly narrow, the causal nexus approach is an appropriate middle ground standard. Part I of this Comment reviews the anti-discrimination statutes and examines agency principles as they relate to the subordinate bias theory. Part II uses case law to discuss the different standards that have been adopted by the circuits. Part III analyzes the *BCI Coca-Cola* decision. Part IV discusses why the causal nexus approach is the optimal standard by comparing it to the mere influence or involvement standard and actual decision-maker standard. Finally, this Comment concludes by demonstrating as a policy matter the need for a resolution to the current circuit split regarding subordinate bias liability.

I. BACKGROUND

A. *The Anti-Discrimination Statutes*

Title VII of the Civil Rights Act prohibits employers from discriminating against employees on the basis of their race, color, religion, sex, or national origin.³¹ Similarly, the Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating against employees on the basis of their age.³² A plaintiff-employee may invoke the protections of either Title VII or the ADEA by bringing a claim of disparate treatment discrimination, or by raising a disparate impact claim.³³ For a disparate impact claim, a plaintiff-employee must demonstrate that the employer's practices disproportionately produced an adverse effect on members of a protected class.³⁴ In contrast, a plaintiff-employee bringing a disparate treatment claim bears the burden of affirmatively showing that discriminatory animus factored into the employer's decision to

the inclusion of race or sex as a consideration within it harms both society and the individual.”).

30. 450 F.3d 476 (10th Cir. 2006).

31. 42 U.S.C. § 2000e-2(a) (2000).

32. 29 U.S.C. § 623(a) (2000).

33. See Reinsmith, *supra* note 26, at 225–26 (explaining the difference between disparate impact and disparate treatment claims and finding that the elements of disparate treatment claims are often difficult for claimants to satisfy).

34. *Id.*

take adverse action.³⁵ Claims brought under a subordinate bias theory are disparate treatment claims, and a plaintiff-employee must either show that discrimination caused the injury suffered, or that discrimination was a motivating factor in the injurious employment decision.

Under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*,³⁶ the plaintiff-employee has the initial burden of establishing a prima facie³⁷ case of discrimination.³⁸ Once a prima facie case of discrimination is established, the employer must articulate a legitimate, non-discriminatory reason for the adverse employment action.³⁹ If the employer meets its burden of production, the plaintiff-employee has the ultimate burden of persuasion to show that the employer's proffered reason is merely a pretext for discrimination.⁴⁰ Recognizing, however, that discrimination may not be *the* cause, but instead may be *a* cause in any given employment decision, the Supreme Court established the mixed-motives framework in *Price Waterhouse v. Hopkins*.⁴¹ Under a mixed-motives analysis, the plaintiff-employee must present evidence that discriminatory motive played a substantial role in the adverse employment action.⁴² If the plaintiff-employee successfully produces such evidence, the employer must then persuade the court that it

35. *Id.* at 226 (“[I]n a disparate treatment claim, the plaintiff’s age, race, sex, etc. must have ‘actually played a role in the employer’s decisionmaking process and had a determinative influence on the outcome.’” (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000))).

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

37. See BLACK’S LAW DICTIONARY 999 (8th ed. 2004) (defining prima facie as “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted”).

38. *McDonnell Douglas*, 411 U.S. at 802–05.

39. *Id.*

40. Compare *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (eliminating the opportunity for a plaintiff to indirectly show pretext by discrediting the employer’s proffered reasons and giving the plaintiff an additional burden of affirmatively demonstrating the employer’s discriminatory motives), and *Reeves*, 530 U.S. at 147 (clarifying the plaintiff’s burden in satisfying the pretext requirement by noting that “it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer’s explanation”), with *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (stating that a plaintiff can satisfy the ultimate burden of persuasion by directly showing that a discriminatory reason was more likely the employer’s reason for taking adverse action, or indirectly by showing that the employer’s reason is “unworthy of credence”).

41. 490 U.S. 228, 249 (1989).

42. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003) (holding that direct evidence of discrimination is not required in mixed-motive cases); see also Christopher Y. Chen, Note, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed Motives Discrimination Claims*, 86 CORNELL L. REV. 899, 902 (2001) (pointing out that the mixed-motives framework accommodates “situations in which adverse employment actions were motivated by both legitimate and illegitimate reasons”).

would have taken adverse employment action against the plaintiff-employee even without the presence of discriminatory bias.⁴³

Under either the *McDonnell Douglas* burden-shifting test or the *Price Waterhouse* mixed-motives analysis, a plaintiff-employee in any employment discrimination case must show intentional discrimination against him.⁴⁴ In order for a plaintiff-employee to bring a claim under a subordinate bias theory, it is first necessary to produce evidence that a subordinate to the formal decision-maker harbored discriminatory bias. The plaintiff-employee must then demonstrate that the subordinate's bias affected the decision to take adverse employment action against him.⁴⁵ Ultimately, however, when a biased subordinate with no formal decision-making authority influences an employment action, the extent to which the employer can be vicariously liable depends largely upon agency principles.⁴⁶

B. Agency Principles

Title VII defines an employer as “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person.”⁴⁷ According to the *Restatement (Second) of Agency*, “[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment.”⁴⁸ In addition, a master is subject to liability for the torts of servants committed outside the scope of their employment if “the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.”⁴⁹

43. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989); see Chen, *supra* note 42, at 907–08 (explaining that discrimination as a “motivating factor” was codified in the 1991 Civil Rights Act amendment to Title VII, 42 U.S.C. § 2000e-2(m) (1994), causing conflict with the original “because of” language in the statute).

44. See *Sawicki v. Morgan State Univ.*, No. WMN-03-1600, 2005 U.S. Dist. LEXIS 41174, at *17–18 (D. Md. Aug. 2, 2005), *aff'd*, 170 Fed. App'x 271 (4th Cir. 2006) (highlighting that the ultimate question in disparate treatment cases is whether the plaintiff was the victim of intentional discrimination irrespective of the analytical framework used).

45. See *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (recognizing that one way to prove that an employer's proffered reasons are a pretext for discrimination is “to show that discriminatory comments were made by the key decisionmaker or those in a position to influence the decisionmaker”).

46. See generally David J. Schaibley, *See No Evil, Hear No Evil, Be Vicariously Liable: Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998), 22 HAMLIN L. REV. 531, 549–51 (1999) (expanding on the role of agency principles in the context of employment relationships and Title VII liability).

47. 42 U.S.C. § 2000e(b) (2000).

48. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

49. *Id.*

Under *Burlington Industries, Inc. v. Ellerth*,⁵⁰ however, the mere existence of an agency relationship is not sufficient to render an employer vicariously liable for the torts of employees committed outside the scope of employment.⁵¹ The Supreme Court established that supervisory personnel or other employees with the authority to take tangible employment actions such as “hiring, firing, [or] failing to promote” are a “distinct class of agent.”⁵² Accordingly, an employer is liable for torts committed by employees who have been specially empowered by the employer to take tangible employment actions, even if those torts are outside the scope of employment.⁵³ Following this rule, when a supervisory employee harboring discriminatory animus exercises the special power to *inter alia*, hire, fire, or fail to promote, the employer will be liable for the discriminatory bias of that supervisory employee. In other words, the supervisory employee’s discrimination is an intentional tort⁵⁴ for which the employer is liable.

Subordinate bias liability complicates the agency relationship further because the biased subordinate himself has no authority to take any tangible employment action against other employees.⁵⁵ Given this lack of authority, the biased subordinate exercises influence over the formal decision-maker in order to accomplish

50. 524 U.S. 742 (1998).

51. *See id.* at 760 (explaining that “[t]he aided in the agency relation standard . . . requires the existence of something more than the employment relation itself” because otherwise an employer could be held vicariously liable for the actions of all workplace tortfeasors, supervisors and co-workers alike, regardless of their level of involvement in the employer’s business).

52. *Id.* at 761–62.

53. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (recognizing that a supervisory employee who exercises termination powers is doing that which he is authorized to do, and thus, the employer is responsible for his actions whether or not they are carried out with prohibited motives in mind); *see also White & Krieger, supra* note 11, at 521 (“[V]icarious employer liability always will exist if the supervisor’s impermissibly motivated conduct amounts to a tangible employment action . . . because the supervisor’s ability to engage in the wrongful conduct necessarily will have been aided by the agency relationship.”).

54. *See Shager*, 913 F.2d at 405 (distinguishing intentional torts committed in furtherance of the employer’s business from those unrelated to the employer’s business); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 3 (explaining that the Supreme Court reasoned in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 724 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that employers can be vicariously liable for the harassment activities of supervisors because when supervisors engage in harassment activities, they are aided by the authority that is given to them by the employer).

55. *See Razzaghi, supra* note 8, at 1715 (providing as an example of subordinate bias a situation in which the official decision-maker is not the one who harbors any discriminatory animus).

discriminatory ends.⁵⁶ Consequently, employer liability depends on how much influence the biased subordinate has over an employment decision.⁵⁷

II. THE THEORY OF SUBORDINATE BIAS LIABILITY

In *Shager v. Upjohn Co.*,⁵⁸ Judge Posner first coined the term “cat’s paw” to describe a situation where a biased subordinate with no decision-making authority dupes the unbiased decision-maker into taking adverse employment action against an unfortunate employee.⁵⁹ In *Shager*, an age-biased supervisor lacking decision-making authority recommended the plaintiff’s termination to a committee, which did have decision-making authority.⁶⁰ The Seventh Circuit noted that if the committee had acted as a “conduit” or “cat’s paw” for the supervisor’s age-based animus, or had simply rubber stamped the supervisor’s recommendation without conducting an independent investigation, the employer could not escape liability by relying on the committee’s lack of bias.⁶¹

Recognizing the concept of subordinate bias liability, every circuit has adopted some form of the “cat’s paw” or “rubber stamp” doctrine.⁶² The most lenient standard, the mere influence or

56. See Wood Crapo LLC, *Gulp! Tenth Circuit “Rubber-Stamps” Subordinate Bias Claims*, UTAH EMP. L. LETTER, Aug. 2006, <http://www.woodcrapo.com/index.php?id=59> (“A biased, low-level supervisor with no disciplinary authority could orchestrate an employee’s firing by either recommending discharge or selectively reporting or making up information that serves as the underpinnings for the termination decision.”).

57. See Tinnin Law Firm, *Tenth Circuit Recognizes Subordinate Bias Claims Under Title VII*, N.M. EMP. L. LETTER, Aug. 2006, at 1 (pointing out that the Tenth Circuit in *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2006), cert. dismissed, 127 S. Ct. 1931 (2007), did not hesitate to recognize claims brought under a subordinate bias theory, but the more difficult question was how much influence a biased subordinate would have to exert in order to hold the employer liable).

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

59. *Id.* at 405.

60. It appeared that the supervisor in *Shager* was not comfortable supervising employees who were older than himself, like the plaintiff. *Id.* at 406.

61. See *id.* at 405–06 (reasoning that an employer should be held liable in cases where he has the “practical ability” to prevent injury to his employee’s victim); Snell & Eskow, *supra* note 9, at 392 (referring specifically to reprisal claims but with applicability to other discrimination claims in noting that if the formal decision-maker simply rubber stamps a biased recommendation to take adverse action against a victim employee without conducting an independent investigation, courts may impute the bias to the formal decision-maker, “however squeaky clean he or she may appear in isolation”).

62. See Laura W. Brill, *Circuits Divided on Anti-Discrimination*, CHI. DAILY L. BULL., Sept. 15, 2006, at 5 (pointing out that while most of the circuits have adopted a theory of subordinate bias liability, “there remains a lack of uniformity with regard to the proper standards to apply to such a claim”). But see *BCI Coca-Cola*, 450 F.3d at 488 (admonishing courts by holding that the “cat’s paw” and “rubber stamp” metaphors cannot be taken too literally to mean that a biased subordinate must have absolute

involvement approach, provides that an employer can be vicariously liable if a biased subordinate merely exercises any influence or has any involvement in the decision-making process that adversely affects a victim employee.⁶³ In contrast, the Fourth Circuit's narrow standard recognizes vicarious employer liability for a subordinate's bias only to the extent that the biased subordinate is the actual decision-maker.⁶⁴ The causal nexus standard, however, differs from the other standards because the employer's liability is not dependent on the weight of influence. Instead, under the causal nexus standard the employer is vicariously liable for a subordinate's bias if there is a causal connection between the prohibited bias and subsequent adverse employment action.⁶⁵

A. The Mere Influence or Involvement Standard

The D.C., First, and Fifth Circuits subject employers to liability if a biased subordinate merely influences the decision-making process that adversely affects a victim employee.⁶⁶ On a variation of essentially the same standard, the Eighth and Ninth Circuits find employers vicariously liable when a biased subordinate merely participates or is otherwise involved in the decision-making process that adversely affects a victim employee.⁶⁷ Finally, the Second and Third Circuits

control over the decision, as in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), or that a biased subordinate must actually and explicitly recommend employment action to a formal decision-maker for liability to be imputable to the employer, as held by the district court, *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, No. CIV 02-1644, 2004 U.S. Dist. LEXIS 28277, at *64-65 (D. N.M. June 10, 2004), *rev'd*, 450 F.3d 476 (10th Cir. 2006)).

63. See Razzaghi, *supra* note 8, at 1715-20 (parsing out the difference between the relevancy of a subordinate's influence over an employment decision, and the extent of a subordinate's involvement in an employment decision).

64. The Fourth Circuit is the only jurisdiction that uses a narrow approach to subordinate bias claims. *Hill*, 354 F.3d at 291.

65. See Wood Crapo LLC, *supra* note 56 (noting that by adopting the causal nexus standard, the Tenth Circuit in *BCI Coca-Cola*, 450 F.3d at 487-88, "settled on a compromise approach" between the two extremes of the lenient mere influence or involvement standard and the narrow actual decision-maker standard).

66. See Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77 (1st Cir. 2004); Laxton v. Gap Inc., 333 F.3d 572 (5th Cir. 2003); Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000); Griffin v. Wash. Convention Ctr., 142 F.3d 1308 (D.C. Cir. 1998).

67. See Galdamez v. Potter, 415 F.3d 1015 (9th Cir. 2005); EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920 (8th Cir. 2002); Bergene v. Salt River Project Agric. Improvement & Power Dist., 272 F.3d 1136 (9th Cir. 2001); Stacks v. Sw. Bell Yellow Pages, Inc., 27 F.3d 1316 (8th Cir. 1994); see also Razzaghi, *supra* note 8, at 1717 (articulating the difference between the mere involvement standard and the mere influence standard by explaining that "under the influence theory, the court's focus is on the subordinate's leverage over the decisionmaker; under the involvement theory, the court's focus is on the subordinate's affirmative participation in the decisionmaking process").

blend a biased subordinate's influence and involvement together and consider employers liable when a biased subordinate either influences the decision-making process, participates in the same, or both.⁶⁸

1. Influence

Under the mere influence standard, courts acknowledge the potential for subordinate employees to influence significant employment decisions, but because of the difficulty in establishing bright-line rules for gauging influence, courts simply hold employers liable irrespective of whether the subordinate exerts substantial or even minimal influence.⁶⁹ In *Cariglia v. Hertz Equipment Rental Corp.*,⁷⁰ the plaintiff's allegedly biased supervisor ordered unusually intense audits and investigations of the plaintiff's job performance, which were considered by the corporation's president and two other officers in their decision to terminate the plaintiff.⁷¹ The First Circuit held that the "biases of those who do make or influence the employment decision are probative."⁷² Similarly, the D.C. Circuit held in *Griffin v. Washington Convention Center*⁷³ that a subordinate's discriminatory comments are relevant when the formal decision-maker is "not insulated from the subordinate's influence."⁷⁴ In *Griffin*, the

68. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265 (3d Cir. 2001); *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001); *Abrams v. Lightolier Inc.*, 50 F.3d 1204 (3d Cir. 1995).

69. See *Laxton*, 333 F.3d at 584 (holding that "the relevant inquiry" is whether the biased subordinate "had influence or leverage over" the decision-making process without specifying how much influence or leverage the biased subordinate must have had in order to hold the employer liable); see also *Russell*, 235 F.3d at 226–28 (acknowledging employer liability when a biased co-worker exercises influence over the formal decision-maker). But see *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996) (seemingly adopting a causal nexus approach to subordinate bias liability). In *Long*, the plaintiffs were caught engaging in behavior contrary to the college's policies, but alleged discrimination based on retaliation, sex, and race when their individual supervisors recommended their terminations to the college president. *Id.* at 304. The court held that a reasonable jury could have found that the plaintiffs would not have been terminated but for their previous discrimination complaints against their supervisors. *Id.* at 308.

70. 363 F.3d at 77.

71. *Id.* at 79–82.

72. See *id.* at 85 (following the reasoning of its previous decision in *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 10 (1st Cir. 1990), in which it held that "[t]he biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case"); see also *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (noting that discriminatory comments by either the formal decision-maker or a subordinate in a position to influence the formal decision-maker could prove the employer's articulated legitimate reasons for the disputed employment action to be a pretext).

73. 142 F.3d 1308 (D.C. Cir. 1998).

74. *Id.* at 1310.

plaintiff's supervisor made comments about women staying home "barefoot and pregnant,"⁷⁵ which the court held were improperly excluded as evidence of a discriminatory motive in the decision to terminate the plaintiff.⁷⁶

2. *Involvement*

Similar to the mere influence standard, courts adopting the mere involvement standard also recognize claims brought under a subordinate bias theory. The mere involvement standard subjects the employer to liability when a biased subordinate is affirmatively involved in an employment decision, no matter how extensive or nominal the subordinate's participation.⁷⁷ In *Stacks v. Southwestern Bell Yellow Pages, Inc.*,⁷⁸ the plaintiff alleged sex discrimination against her former employer, claiming that her biased supervisor treated her less favorably and disciplined her differently than her male co-workers.⁷⁹ The Eighth Circuit held that even though the terminating official was unbiased, the fact that the biased supervisor was clearly involved in every step of the decision-making process was sufficient to render the employer liable.⁸⁰

In contrast, even though the superintendent in *EEOC v. Liberal R-II School District*⁸¹ was only minimally involved in the plaintiff's termination decision, the Eighth Circuit held that a reasonable jury could find that the superintendent's comments constituted adequate evidence that discrimination was a motivating factor in the decision to terminate.⁸² The plaintiff in *Liberal R-II* alleged that he was discriminated against on the basis of age when the district Board of

75. *Id.*

76. *Id.*; see Reinsmith, *supra* note 26, at 254 (noting that the Fifth Circuit in *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), found that age-based remarks were relevant even if they were not made by the formal decision-maker, as long as the speaker was someone "in a position to influence the decision").

77. See *Galdamez v. Potter*, 415 F.3d 1015, 1026 n.9 (9th Cir. 2005) ("Title VII may still be violated where the ultimate decision-maker, lacking individual discriminatory intent, takes an adverse employment action in reliance on factors affected by another decision-maker's discriminatory animus.").

78. 27 F.3d 1316 (8th Cir. 1994).

79. *Id.* at 1318–21.

80. *Id.* at 1323; see *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001) (holding that a biased supervisor's discriminatory motives were imputable to the employer because of his involvement in the decision that disadvantaged the plaintiff by preventing her promotion).

81. 314 F.3d 920 (8th Cir. 2002).

82. See *id.* at 923 (citing *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991)) (holding that under a mixed motives analysis, evidence of discriminatory conduct or statements by "persons involved in making the employment decision" that is of a "sufficient quantum and gravity . . . would allow the factfinder to conclude that attitude more likely than not was a motivating factor in the employment decision").

Education decided not to renew his employment contract.⁸³ The district superintendent did not take part in the board's decision; rather, he merely relayed the decision to the plaintiff and, in doing so, implied that the board factored the plaintiff's old age into their decision.⁸⁴ In spite of the superintendent's own lack of age-based bias, the court nevertheless recognized the importance of considering the conduct of all persons involved in an employment decision.⁸⁵

3. *Influence and involvement*

Some of the circuit courts consider both a biased subordinate's influence and involvement in any given employment decision when confronted with claims brought under a subordinate bias theory.⁸⁶ In *Rose v. New York City Board of Education*,⁸⁷ a biased superintendent made comments to the plaintiff indicating that he would replace her with someone "younger and cheaper" before she was terminated.⁸⁸ The Second Circuit recognized that because the comments were made by the superintendent and not merely a colleague, a jury could reasonably find that discriminatory motives unlawfully came into play because the superintendent had substantial influence and involvement in the decision to terminate the plaintiff.⁸⁹ Similarly, the Third Circuit in *Abramson v. William Paterson College of New Jersey*⁹⁰ held that "it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate."⁹¹

83. *Id.* at 921.

84. *See id.* at 921–24 (viewing the facts in a light most favorable to the plaintiff, but noting that it was strongly debated whether the superintendent told the plaintiff that he was terminated because of old age).

85. *See id.* at 925–26 ("[W]e cannot reject as untrue the evidence of [the superintendent's] statements that seemingly indict the Board for making age-based comments in the decisional process.").

86. *See* *Roebuck v. Drexel Univ.*, 852 F.2d 715, 727 (3d Cir. 1988) (noting that "it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decisionmaking process and thus allowed discrimination to infect the ultimate decision").

87. 257 F.3d 156 (2d Cir. 2001).

88. *Id.* at 158–59.

89. *Rose*, 257 F.3d at 161–63; *see* *Snell & Eskow*, *supra* note 9, at 398 (noting that generally, a comment made by someone "outside the chain of decisionmakers who had the authority to hire and fire" is merely a "stray remark" (quoting *Woodson v. Scott Paper Co.*, 109 F.3d 913, 922 (3d Cir. 1997))).

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

91. *See id.* at 285–86 (citing *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995)) (holding that where the plaintiff alleged discrimination based on religion when the president of the college did not reappoint her against the recommendation of a committee, but in agreement with the dissenting opinion of a biased committee member, "a rational jury could find that [the president] did not make his decision in a vacuum").

B. The Actual Decision-Maker Standard

The Fourth Circuit in *Hill v. Lockheed Martin Logistics Management, Inc.*,⁹² departed from precedent set by its sister circuits by rejecting the notion that an employer could be held liable when a biased subordinate exercises influence over an employment decision.⁹³ In *Hill*, the plaintiff, a mechanic, alleged that she was discriminated against on the basis of age because the safety inspector who reported her infractions to the disciplinary authority exhibited age-based animus.⁹⁴ After the plaintiff's supervisor issued three reprimands to her based on the reports filed by the biased safety inspector, the formal decision-makers were contacted and the plaintiff was terminated from employment.⁹⁵

The Fourth Circuit interpreted the Supreme Court's decision in *Ellerth*⁹⁶ as indicating that only personnel with authority to take tangible employment action could be considered "agents" from which liability could be imputed to the employer.⁹⁷ The Fourth Circuit rejected the idea that an employer is liable for any employee, simply by virtue of the agency relationship.⁹⁸ It held that unless the actual decision-maker harbors discriminatory animus in taking an adverse employment action against a victim employee, the employer cannot be held liable.⁹⁹ Accordingly, even if a biased subordinate exercises substantial influence over an unbiased decision-maker by duping the decision-maker or by receiving the perfunctory approval of the decision-maker, the bias of the subordinate is irrelevant as long as the decision-maker remains unbiased and neutral.¹⁰⁰

92. 354 F.3d 277 (4th Cir. 2004) (en banc).

93. *Id.* at 291; see Razzaghi, *supra* note 8, at 1727–28 (asserting that the *Hill* decision was a departure from the approaches other circuits have taken with regard to subordinate bias claims, and also observing its discord with lower district court precedent).

94. *Hill*, 354 F.3d at 282–83.

95. *Id.*; see *Employers Are Not Liable for Influential Bias Absent Supervisory, Decisionmaking Authority*, 22 EMP. DISCRIMINATION REP. (BNA) 37 (Jan. 14, 2004), available at <http://pubs.bna.com/ip/BNA/EDR.NSF> (select "Highlights", go to "1/14/2004" by using the "Next" button, select "1/14/2004", go to the article title, access by clicking on the icon to the right of the article's description) (reviewing the facts and discussing the outcome of *Hill*, 354 F.3d at 277).

96. 524 U.S. 742, 760–61 (1998).

97. *Hill*, 354 F.3d at 287–89.

98. *Id.* at 291.

99. See Razzaghi, *supra* note 8, at 1736 (noting that the Fourth Circuit's holding in *Hill*, 354 F.3d at 277, improperly narrowed the scope of employer liability under Title VII and the ADEA).

100. See *Hill*, 354 F.3d at 304 (Michael, J., dissenting) (pointing out that employers may escape liability under the standard announced by the majority).

C. The Causal Nexus Standard

The Sixth, Seventh, Tenth, and Eleventh Circuits have adopted the causal nexus approach most recently reaffirmed by the Tenth Circuit in *BCI Coca-Cola*.¹⁰¹ A plaintiff-employee must establish a causal connection between a subordinate's bias and the adverse employment action suffered in order for the employer to be held liable. In *Stimpson v. City of Tuscaloosa*,¹⁰² for instance, due to the plaintiff's record of disciplinary problems, her chief recommended her termination to the city board, which was the only body with the authority to terminate the plaintiff.¹⁰³ The Eleventh Circuit held that the plaintiff had to prove that bias was an "actual cause" of the decision to terminate her.¹⁰⁴

Most courts adopting the causal nexus approach also recognize that when a biased subordinate recommends or otherwise influences an employment action to the detriment of a victim employee, the formal decision-maker must take steps to independently investigate the reasons for the recommended action. Otherwise, it is presumed that there is a causal connection between the subordinate's bias and any subsequent adverse action.¹⁰⁵ In *Christian v. Wal-Mart Stores, Inc.*,¹⁰⁶ the Sixth Circuit affirmed its precedent by stating that a plaintiff "must offer evidence that the supervisor's racial animus was the cause of the termination or somehow influenced the ultimate decisionmaker."¹⁰⁷ The court found that because the decision-maker

101. 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007); *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862 (6th Cir. 2001); *English v. Colo. Dep't of Corr.*, 248 F.3d 1002 (10th Cir. 2001); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328 (11th Cir. 1999); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394 (7th Cir. 1997); *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1997); *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990).

102. 186 F.3d at 1328.

103. *Id.* at 1329–30.

104. *See id.* at 1331 ("When the biased recommender and the actual decisionmaker are not the same person or persons, a plaintiff may not benefit from the inference of causation that would arise from their common identity.").

105. *See, e.g., Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000) (holding that a manager's simple act of asking the plaintiff for his side of the story eliminated any discriminatory bias that could have been imputed to the manager, and subsequently, to the employer); *see also White & Krieger, supra* note 11, at 513 ("If the chain of causation is intact, liability is imposed, even when the ultimate decision maker himself acted with no intent to discriminate.").

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

107. *See id.* at 877 (citing *Wilson v. Stroh*, 952 F.2d 942, 946 (6th Cir. 1992)); *see also Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 355 (6th Cir. 1998) ("Although we believe a direct nexus between the allegedly discriminatory remarks and the challenged employment action affects the remark's probative value, the

failed to conduct his own independent investigation of the situation, his reliance on the biased employee's report served as the causal connection between the employee's bias and the subsequent adverse action.¹⁰⁸

Unlike the decision-maker in *Christian*, the formal decision-maker in *Willis v. Marion County Auditor's Office*¹⁰⁹ did conduct an independent investigation of the plaintiff's recorded violations instead of merely relying on the words of two biased supervisors.¹¹⁰ Therefore, when the formal decision-maker terminated the plaintiff, the Seventh Circuit could not impute liability to the employer for the subordinates' biases because no causal connection existed between their biases and the termination decision.¹¹¹

III. *EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. BCI COCA-COLA BOTTLING CO. OF LOS ANGELES*

The long existing circuit split on approaches to cases brought under a subordinate bias theory was given renewed attention in *BCI Coca-Cola*.¹¹² In adopting the causal nexus approach, the Tenth Circuit concluded that the mere influence or involvement standard could not operate as a proper framework for analyzing claims brought under the subordinate bias theory. The court reasoned that the standard puts employers at risk for excessive liability insofar as it

absence of a direct nexus does not necessarily render a discriminatory remark irrelevant.").

108. *Christian*, 252 F.3d at 877.

109. 118 F.3d 542 (7th Cir. 1997).

110. *Id.* at 546.

111. *Id.* at 548. To dispel any concern that employers must conduct thoroughly extensive or burdensome independent investigations to protect themselves, the Tenth Circuit has held that employers who take measures as simple as providing the employee with the opportunity to rebut the evidence against him or at least present his side of the story, need not concern themselves with subordinate bias liability. See *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001) (finding that any bias in investigation could not be causally linked to the termination decision because, in part, plaintiff was given the opportunity to challenge the evidence against him with an attorney present before the termination decision was made); see also *Kendrick v. Penske Transp. Serv., Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000) (concluding that an investigation of a biased supervisor's allegations against the plaintiff, including a request for the plaintiff's version of the events, which was denied, effectively eliminated any causal connection that may have existed between the supervisor's bias and the decision to terminate the plaintiff). But see Recent Case, *Employment Law—Title VII—Tenth Circuit Clarifies Causation Standard for Subordinate Bias Claims* EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles, 450 F.3d 476 (10th Cir. 2006), cert. granted, 127 S. Ct. 852 (2007), 120 HARV. L. REV. 1699, 1706 (2007) (arguing that merely asking employees for their versions of events is not enough; decision-makers must conduct in-depth investigations into the backgrounds and possible motives of their subordinates).

112. EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476 (10th Cir. 2006), cert. dismissed, 127 S. Ct. 1931 (2007).

fails to contemplate any causal connection between a subordinate's bias and the adverse employment action suffered by a victim employee. Conversely, the court flatly rejected the Fourth Circuit's actual decision-maker standard because it provides too little protection for protected class employees by entirely ignoring the role of the subordinate in employment decisions and, thus, it practically immunizes employers from liability.¹¹³

The Tenth Circuit first determined that because the human resources official who made the final decision to terminate Stephen Peters was far removed from Peters, she could not have possibly harbored racial bias against him.¹¹⁴ As a result, BCI could not be subject to direct Title VII liability. Under a theory of subordinate bias liability, however, the court held that BCI could be subjected to vicarious liability if a causal connection existed between Peters' termination and his supervisor's racial bias.¹¹⁵ Even though it appeared as though the final decision-maker made a neutral and detached decision to terminate Peters, the court expressed doubt as to the purity of the decision because of the decision-maker's exclusive reliance on the supervisor's report of his conversation with Peters.¹¹⁶ While it was undisputed that Peters told his supervisor to "do what

113. *See id.* ("The Fourth Circuit's standard . . . allow[s] employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker.").

114. *Id.* at 491; *see Tenth Circuit Is Latest To Adopt a Version of "Cat's Paw" Theory of Employer Liability*, 26 EMP. DISCRIMINATION REP. (BNA) 737 (June 21, 2006), available at <http://pubs.bna.com/ip/BNA/EDR.NSF> (select "Highlights", go to "6/21/2006" by using the "Next" button, select "6/21/2006", go to the article's title, access by clicking on the icon to the right of the article's description) (reviewing the facts and outcome of *BCI Coca-Cola*, 450 F.3d at 476).

115. At the district court level, the EEOC successfully presented a prima facie case of race discrimination, and BCI was able to prove that Peters' termination was consistent with company policy, and therefore legitimate on its face. *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, No. CIV 02-1644, 2004 U.S. Dist. LEXIS 28277, at *30-35 (D.N.M. June 10, 2004), *rev'd*, 450 F.3d 476 (10th Cir. 2006). In order to overcome the apparent legitimacy of Peters' termination, the EEOC raised the subordinate bias claim to demonstrate that BCI's proffered reasons for Peters' termination were mere pretext for race discrimination. *See BCI Coca-Cola*, 450 F.3d at 490-93 (noting that BCI initially maintained that it fired Peters because he failed to show up to work on Sunday, but given the fact that Peters was in fact sick on Sunday, BCI changed its position and relied on Peters' insubordinate statement to his supervisor). Nevertheless, the court noted that a reasonable jury could still find that Peters' termination for stated intent to defy a direct order is merely a pretext for discrimination, considering the testimony on his supervisor's history of negative treatment toward black employees. *Id.*

116. *See BCI Coca-Cola*, 450 F.3d at 491 (noting that [the supervisor] "conducted no independent inquiry into the events that took place that Friday, and failed to take even the basic step . . . of asking Mr. Peters for his side of the story.") (citations omitted).

[you] got to do and I'll do what I got to do,"¹¹⁷ the context and character of this statement, as conveyed to the final decision-maker, was wholly dependent on the color given to it by Peters' frustrated supervisor.¹¹⁸ As a result, the final decision-maker concluded that Peters' statement amounted to insubordinate conduct.¹¹⁹

Consistent with the circuit courts that had adopted the causal nexus standard, the court acknowledged that no liability could be imposed on BCI if the final decision-maker conducted an adequate independent investigation of the facts and events relevant to her decision.¹²⁰ The court found that by merely reviewing Peters' file, the final decision-maker did not conduct an independent investigation of Peters' alleged insubordinate conduct.¹²¹ The file contained Peters' disciplinary record, but provided no information that supported or disputed the version of events relayed to the final decision-maker by the biased supervisor.¹²² Hence, a jury could have concluded that the supervisor harbored racial bias against Peters that affected the decision to terminate Peters due to the final decision-maker's failure to conduct any meaningful independent investigation into the supervisor's allegation of insubordination.¹²³ Such a jury finding would prove BCI's proffered reason to be merely pretextual, and BCI would be liable based on the supervisor's racial bias.¹²⁴

117. *BCI Coca-Cola*, 450 F.3d at 479.

118. The supervisor was frustrated because he needed Peters to work on the weekend due to a shortage of workers and a "serious scheduling crunch." *Id.* at 479; *see id.* at 492 ("[I]t is easy to imagine that the additional details of [the supervisor's] account, in which Peters appeared to be fabricating his illness, started yelling at his supervisor, and refused to answer questions, led [the final decision-maker] to characterize the conversation as 'insubordination' warranting dismissal."); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (accounting for the biased supervisor's influence in the decision to terminate the plaintiff by considering the supervisor's portrayals of the plaintiff's performance in "the worst possible light," and concluding that the supervisor's influence "may well have been decisive"); *see also* White & Krieger, *supra* note 11, at 515 (observing that biased subordinates may put a "spin" on the facts when making reports or recommendations to formal decision-makers that will adversely affect victim employees).

119. *BCI Coca-Cola*, 450 F.3d at 493.

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

121. *Id.* at 492–93.

122. *See id.* ("Obviously the file contained no information about the recent incident involving [Peters' supervisor], so it is difficult to see how reading it could 'independently' confirm what had happened.").

123. *BCI Coca-Cola*, 450 F.3d at 492–93; *see* Razzaghi, *supra* note 8, at 1734 (pointing out that as long as employers take steps to ensure that employment decisions are made free and clear of anyone's subjective evaluation, any causal link between prohibited bias and the ultimate decision would not survive, whether employers conduct independent investigations or implement procedural protections for employees).

124. *BCI Coca-Cola*, 450 F.3d at 492.

A. The Weak Mere Influence or Involvement Standard

The Tenth Circuit rejected the mere influence or involvement standard because an employer could be liable when a biased subordinate influences or participates in the decision-making process, but does not necessarily cause the adverse employment action that results.¹²⁵ For example, if a biased subordinate sits in on a committee meeting deciding whether to terminate an employee but wholly contains his bias and provides no input into the decision, the plaintiff-employee, in contesting the termination, could theoretically produce evidence of the subordinate's bias and assert that such bias is imputable to the employer without any showing of causation.¹²⁶ Alternatively, the biased subordinate could actively participate in the same committee decision to terminate an employee and have his opinions dismissed by the other committee members, but the employer would still face liability as long as the plaintiff-employee could show that the biased subordinate merely influenced the decision or was merely involved in the decision-making process.¹²⁷ Under these circumstances, the employer faces excessive liability if an employee who has suffered an adverse employment action can demonstrate that anyone who influenced the decision to take action, even minimally, harbored discriminatory animus.¹²⁸

125. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (Kennedy, J., dissenting) (“Any standard less than but-for . . . simply represents a decision to impose liability without causation.”); *see also* Razzaghi, *supra* note 8, at 1720 (referring to the mere influence or involvement standard, “a subordinate’s prejudices could be imputed to the employer solely based on the subordinate’s involvement, even if the subordinate was lacking formal authority”).

126. Under a mixed-motives analysis, the employee contesting an adverse employment action simply has to produce evidence of a subordinate’s bias to show that it was a motivating factor in the decision and not necessarily the cause. See *Price Waterhouse*, 490 U.S. at 240 (referring to the “because of” language in Title VII, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for causation’ . . . is to misunderstand them”).

127. Where “[a] strong personality, consciously but secretly motivated by animus, may be able to influence a decision,” even if the group makes a decision free and clear of bias, the group’s decision is still tainted by the mere presence of the biased personality. *White & Krieger*, *supra* note 11, at 530.

128. See *BCI Coca-Cola*, 450 F.3d at 486–87 (expressing concern that under the mere influence or involvement standard, the potential for excessive employer liability weakens the deterrent effect of subordinate bias claims); *see also* Emily M. Pasquinelli, *Recent Decisions of the United States Court of Appeals for the District of Columbia: Employment Law*, 67 GEO. WASH. L. REV. 921, 925 (1999) (noting that after the decision of the D.C. Circuit to adopt the mere influence or involvement standard in *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308 (D.C. Cir. 1998), “employers in the District of Columbia can no longer depend on supervisory evaluations of employees out of fear that any bias of the supervisor may be imputed to the employer”).

Furthermore, the standard is inconsistent with the causation language of Title VII, which implies that any plaintiff bringing a claim of discrimination must show that he suffered an adverse employment action *because of* the bias of the employer.¹²⁹ Recalling the basic formula of direct employer liability under Title VII for unlawful discrimination in employment decisions: (1) the employer must have the authority to take adverse employment action; and (2) the employer must cause the adverse employment action.¹³⁰ The fact that the formula for vicarious liability is more complex because it factors in the intermediate role of a subordinate's bias does not mean that a plaintiff should be absolved of the burden of showing that he suffered adverse employment action "because of" his membership in a protected class or participation in a protected activity.¹³¹

Under the mere influence or involvement standard, employers have no incentive to conduct independent investigations of reports

129. *BCI Coca-Cola* 450 F.3d at 486–87; *see* Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 623(a) (2000) ("It shall be unlawful for an employer . . . to . . . discriminate against any individual . . . because of such individual's age . . ."); *see also* Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin . . ."). *Contra Price Waterhouse*, 490 U.S. at 241 ("It is difficult for us to imagine that, in the simple words 'because of,' Congress meant to obligate a plaintiff to identify the precise causal role played by legitimate and illegitimate motivations in the employment decision [the plaintiff] challenges.").

130. *See* White & Krieger, *supra* note 11, at 534 (simplifying the subordinate bias theory by suggesting that "[t]he court should ask whether there is a causal chain between the protected characteristic and the challenged decision and whether the events that comprise that chain are attributable to the employer"); *see also Price Waterhouse*, 490 U.S. at 284 (Kennedy, J., dissenting) (disputing the assertion that the words "because of" in Title VII mean "solely because of," and instead arguing that "[d]iscrimination need not be the sole cause in order for liability to arise, but merely a necessary element of the set of factors that caused the decision, *i.e.*, a but-for cause").

131. The author notes that while the mere influence or involvement standard is not consistent with the causation language of Title VII, it is consistent with courts' application of the mixed-motives analysis. Because the mixed-motives test lacks a causation requirement, the fact that the mere influence or involvement standard similarly lacks a causation element is immaterial when the mixed motives analysis is applied. *See Price Waterhouse*, 490 U.S. at 240–41 (using a mixed-motives test in which a victim employee does not have to show that discrimination caused the adverse employment action; rather, the employee has the lesser burden of showing that discrimination was a motivating factor in the decision to take adverse employment action). *But see BCI Coca-Cola*, 450 F.3d at 486–87 (stating that the mere influence or involvement standard is a "weak" standard that "improperly eliminates a requirement of causation" and as a result, "punishes employers" for any amount of biased influence); *see also* Pasquinelli, *supra* note 128, at 923 (observing that the D.C. Circuit in *Griffin*, by recognizing the existence of a "relationship" between a subordinate's bias and the decision to terminate the plaintiff, did not disagree with the Seventh Circuit in *Willis v. Marion County Auditor's Office*, 118 F.3d 542 (7th Cir. 1997), which held that a subordinate's bias is not relevant when there is no causation between the bias and the employment decision that adversely affected the plaintiff).

and recommendations from potentially biased subordinates before making employment decisions.¹³² The purpose of conducting an independent investigation is to eliminate any bias that may have tainted the employment decision in the course of its progression through the chain of command.¹³³ If a subordinate somewhere in the chain of command harbors discriminatory animus, the employer suffers liability by virtue of the subordinate's mere influence or involvement in the decision-making process.¹³⁴ In this respect, the mere existence of the agency relationship is sufficient to render an employer vicariously liable for a subordinate's bias, even if the subordinate acts outside the scope of his employment, and even if the subordinate does not directly cause the adverse employment action suffered by a victim employee.¹³⁵ Hence, conducting an independent investigation is a fruitless measure when liability will inevitably be imposed in jurisdictions using such a weak standard.¹³⁶

132. See *BCI Coca-Cola*, 450 F.3d at 487 (noting that an employer who has "diligently conducted an independent investigation" would still be punished as long as a biased subordinate somehow influenced or was involved in the decision to take adverse employment action). But see *Price Waterhouse*, 490 U.S. at 258 (commenting that when the mere influence or involvement standard is applied to a mixed-motives analysis, once the plaintiff proves that discriminatory animus was a motivating factor in a decision that adversely affected his employment, it is the employer's burden to show that it would have made the same adverse employment decision even in the absence of discriminatory animus); *id.* (noting that the employer's burden creates incentives to conduct independent investigations of all reports and recommendations relating to tangible employment decisions because the employer would have to prove that it did not serve as the "cat's paw" for a subordinate's bias, or that it merely "rubber stamped" a biased subordinate's recommendation).

133. See, e.g., *BCI Coca-Cola*, 450 F.3d at 488 ("[A]n employer can avoid liability by conducting an independent investigation of the allegations against an employee.") (citing *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001)). But see *White & Krieger*, *supra* note 11, at 524–26 (arguing that from a cognitive social psychological position, there is no reason to believe that a decision-maker's independent investigation of a biased subordinate's recommendation to take some adverse employment action is automatically going to "purge" the subordinate's bias from the decision to take such action).

134. See *White & Krieger*, *supra* note 11, at 496–97 (using the facts of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), to demonstrate how the bias of a subordinate in the chain of command can impose liability on the employer despite the lack of bias on the part of the official decision-maker).

135. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 304 (4th Cir. 2004) (en banc) (Michael, J., dissenting) (contemplating the sustainability of the mere influence or involvement standard under *Reeves*, 530 U.S. at 147, which "supports the approach of imputing to the employer the biased motives of a subordinate who substantially influences an employment decision," but also pointing out that the Court focused on the importance of the causation requirement).

136. See *BCI Coca-Cola*, 450 F.3d at 487 (explaining that the mere influence or involvement standard weakens the deterrent effect that subordinate bias claims are supposed to have).

Had the Tenth Circuit applied the mere influence or involvement standard in *BCI Coca-Cola*,¹³⁷ BCI likely would have faced liability for the supervisor's bias because the mere fact of the supervisor's involvement in the decision to terminate Peters would have been sufficient to render BCI vicariously liable.¹³⁸ However, had the court applied the Fourth Circuit's actual decision-maker standard, BCI likely would not have faced liability for the supervisor's bias because the human resources official was the actual decision-maker, not the biased supervisor.¹³⁹

B. The Undesirable Actual Decision-Maker Standard

Writing for the Tenth Circuit, Judge McConnell noted the Fourth Circuit's flaw in taking the "cat's paw" metaphor too literally and interpreting it to mean that unless the biased subordinate exercises such control over the duped decision-maker, effectively making the subordinate the actual decision-maker, there can be no liability imputed to the employer.¹⁴⁰ Judge Posner in *Lust v. Sealy, Inc.*¹⁴¹ characterized the *Hill*¹⁴² decision as a misinterpretation of the "cat's paw" analogy, stating that the Fourth Circuit's approach is "inconsistent with the normal analysis of causal issues in tort litigation."¹⁴³ The actual decision-maker standard rigidly follows basic agency principles but ignores the fact that many employment relationships are more extensive and complicated than just employer-employee.¹⁴⁴ Consequently, it also avoids the question of an employer's liability for employees outside of the "distinct class of

137. *Id.* at 476.

138. Even under a mixed-motives analysis, BCI would likely have been unable to show that they would have terminated Peters absent the supervisor's influence and involvement in the termination decision because without the supervisor's heated account of Peters' conduct over the phone, objectively, Peters did nothing wrong. *Id.* at 492.

139. See Razzaghi, *supra* note 8, at 1731 (arguing that the Fourth Circuit in *Hill* "should have found a causal connection between [the subordinate's] prejudice and [the plaintiff's] termination," but because the subordinate lacked any decision-making authority, the employer was not liable); see also *Hill*, 354 F.3d at 305 (Michael, J., dissenting) (recognizing that if the majority adopted a causal nexus approach instead of the actual decision-maker standard, the court would have found that the actual decision-makers relied on tainted information from the biased supervisor in making their decision to terminate the plaintiff).

140. *BCI Coca-Cola*, 450 F.3d at 487.

141. *Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004).

142. 354 F.3d at 277.

143. *Lust*, 383 F.3d at 584.

144. See Razzaghi, *supra* note 8, at 1724 (asserting that the Fourth Circuit in *Hill* construed the anti-discrimination statutes too literally because it "held that an employer will not be liable for the biases of a subordinate who merely influences the employer, but 'for the person who in reality makes the decision'" (quoting *Hill*, 354 F.3d at 291)).

agent[s]”¹⁴⁵ authorized to take tangible employment actions because it fails to contemplate that such employees impact employment decisions.¹⁴⁶ In other words, unless a biased subordinate is expressly authorized by the employer to take tangible employment action, the subordinate’s influence or involvement in a decision, no matter how substantial, would be immaterial under this standard.¹⁴⁷

Under the actual decision-maker standard, even if a biased subordinate exerts substantial influence over the official decision-maker, the subordinate’s bias will not be imputed to the employment decision and thus, the employer escapes liability.¹⁴⁸ This standard is the least desirable because it runs completely contrary to the purpose of the anti-discrimination statutes, insofar as it permits discrimination to permeate the workplace as long as formal decision-makers remain unbiased.¹⁴⁹ In this respect, employees may discriminate against other employees, resulting in various forms of adverse employment actions or worse, but there would never be liability for the employer unless the official decision-maker exhibits discriminatory animus.¹⁵⁰ For example, if a biased subordinate sits in on a committee’s decision-making process to terminate an employee and convinces all of the committee members to terminate the employee, the employer will not be liable in the Fourth Circuit, assuming the actual decision-maker held no discriminatory motive.¹⁵¹

Similar to the mere influence or involvement standard, the actual decision-maker standard also fails to motivate employers to conduct independent investigations of the reports or recommendations by potentially biased subordinate employees before taking adverse

145. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 762 (1998) (considering supervisory personnel or other employees with the authority to take tangible employment actions to be within the “distinct class of agents”).

146. *See Razzaghi, supra* note 8, at 1729 (discussing the Fourth Circuit’s erroneous application of the “cat’s paw” doctrine in *Hill* by failing to recognize the potential influence of biased subordinates who do not have the authority to make employment decisions).

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

148. *Id.* at 299 (Michael, J., dissenting).

149. *See id.* at 304 (recognizing that under the Fourth Circuit’s actual decision-maker standard, many cases of unlawful discrimination will never be addressed as long as the Fourth Circuit continues to ignore subordinate bias claims).

150. *See id.* at 299 (observing that an employer is “off the hook” for employment decisions that are discriminatorily motivated because subordinate biases are not recognized by the Fourth Circuit).

151. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (“A committee of this sort, even if it is not just a liability shield invented by lawyers, is apt to defer to the judgment of the man on the spot.”); *White & Krieger, supra* note 11, at 530 (pointing out that a secretly biased personality may be strong enough to influence a group decision without any group awareness that the decision is tainted by animus).

employment actions.¹⁵² As long as the actual decision-maker harbors no discriminatory animus, the biased reports or recommendations from subordinates that adversely affect the employment of a victim employee are irrelevant in determining Title VII liability.¹⁵³ Under these circumstances, employers have no reason to make efforts to conduct independent investigations. Instead, employers have an incentive to keep formal decision-makers far removed from the employees whose employment they are affecting.¹⁵⁴ As a result, employees in the Fourth Circuit belonging to protected classes face a tremendous hurdle in bringing discrimination claims against their employers.¹⁵⁵ Unless these employees can show that the official who actually made the decision held discriminatory motives, they will be denied the protections they deserve under the anti-discrimination statutes because the Fourth Circuit essentially does not recognize subordinate bias liability.¹⁵⁶

IV. IN FAVOR OF THE CAUSAL NEXUS APPROACH

Considering the weakness of the mere influence or involvement standard and the undesirability of the actual decision-maker standard, the causal nexus approach is the optimal standard. Acknowledging that “a company’s organizational chart does not always accurately reflect its decisionmaking process,” the Tenth

152. See *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 487 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007) (stating that the actual decision-maker standard gives employers the opportunity to avoid liability and thus, undermines the deterrent effect of subordinate bias claims).

153. See *Razzaghi*, *supra* note 8, at 1733 (“[W]ithout considering the non-decisionmaker’s influence, it would not be logically necessary for the court to consider the extent of the decisionmaker’s reasonable investigation.”).

154. See *Pasquinelli*, *supra* note 128 (finding that courts are mindful of employers’ attempts to set up “many layers of ‘pro forma review,’ and then claim[] innocence when the supervisor acts with illegal motive”).

155. See *Hill*, 354 F.3d at 304 (Michael, J., dissenting) (“The majority is frank in explaining that its holding removes an entire class of discrimination cases from the protection of Title VII and the ADEA.”); see also *Sawicki v. Morgan State Univ.*, No. WMN-03-1600, 2005 U.S. Dist. LEXIS 41174, at *27 (D. Md. Aug. 2, 2005), *aff’d*, 170 Fed. App’x. 271 (4th Cir. 2006) (acknowledging that the Fourth Circuit’s actual decision-maker standard “has the unfortunate potential to create a safe harbor for workplace discrimination by any prejudiced supervisor who can fairly be described as not being the final decisionmaker”). But see *Sawicki*, 2005 U.S. Dist. LEXIS 41174, at *34 n.16 (explaining that the actual decision-maker standard should not be interpreted as a “free pass” for subordinates to discriminate against employees, or for formal decision-makers to “duck liability” by distancing themselves from lower management).

156. See *Hill*, 354 F.3d at 301 (Michael, J., dissenting) (asserting that the actual decision-maker standard essentially nullifies the protections afforded to employees under Title VII and the ADEA).

Circuit in *BCI Coca-Cola*,¹⁵⁷ addressed the Fourth Circuit's actual decision-maker standard and noted that employers cannot escape liability simply "by ensuring that the one who performed the employment action was isolated from the employee."¹⁵⁸ While recognizing the importance of subordinate bias liability claims as consistent with the language and intent of Title VII, the court considered the mere influence or involvement standard adopted by a majority of the circuits, but expressed concern that employers would face excessive liability under that standard.¹⁵⁹

A. An Effective Middle Ground Approach

To compensate for the actual decision-maker standard's extremely limited recognition of subordinate bias claims, and to provide a stronger framework than the mere influence or involvement standard, the causal nexus approach is an effective, middle ground approach.¹⁶⁰ The causal nexus standard furthers the deterrent purpose of Title VII¹⁶¹ by extending liability to employers not only for the discriminatory acts of employees authorized to take adverse employment action, but also to any employee who causes an adverse employment action.¹⁶² Consequently, under the causal nexus standard, employers seeking the protections of the actual decision-maker standard by isolating a select few agents with decision-making

157. *Id.* at 486.

158. *Id.* (citing *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 n.13 (5th Cir. 2000)).

159. *Id.* at 486–87.

160. See *White & Krieger*, *supra* note 11, at 511 (insisting that a causation analysis is the "only sensible way" to address discrimination claims involving "multi-agent decision making").

161. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264–65 (1989) (O'Connor, J. concurring), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1075, *as recognized in* *Landgraf v. USI Films Prods.*, 511 U.S. 244 (1994) (observing that one basic purpose of Title VII is to "deter conduct which has been identified as contrary to public policy and harmful to society as a whole," while the other is to compensate those who have suffered from unlawful employment discrimination).

162. *BCI Coca-Cola*, 450 F.3d at 486; see *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 302 (4th Cir. 2004) (en banc) (Michael, J., dissenting) ("When . . . bias of the subordinate has a substantial or determinative influence on a formal decisionmaker's adverse employment action, the causation (or liability) requirement is satisfied."); *Razzaghi*, *supra* note 8, at 1735–37 (observing that the majority in *Hill* narrowed the scope of the causation requirement in Title VII "by only considering the influence of one who was principally responsible for the adverse employment action," and in doing so, "failed to comprehend the underlying policy of Title VII" and "misapplied agency principles").

authority will have to find more legitimate ways to preserve the purity of their employment decisions.¹⁶³

A fundamental flaw of the actual decision-maker standard is the potential for discrimination in the workplace to run rampant.¹⁶⁴ Under this standard, as long as employers ensure that the decision-makers are distanced from the employees who are subject to their decisions, they are virtually immune to vicarious liability.¹⁶⁵ The causal nexus approach prevents this intolerable possibility insofar as it protects employees, deserving of Title VII protections, from pervasive, discriminatory work environments by not allowing employers to hide behind a shield of unbiased decision-makers.¹⁶⁶ Under the causal nexus approach, regardless of an absence of bias on the part of the actual decision-maker, if a biased subordinate causes a victim employee to suffer an adverse employment action and the actual decision-maker fails to independently investigate, the employer faces liability.¹⁶⁷

Given this increased, but not excessive, exposure to liability, employers will have the incentive to review all recommendations and reports to ensure that all employment decisions are free from bias, where they would not have had such an incentive under the actual decision-maker standard.¹⁶⁸ Because a causal connection between a

163. See Razzaghi, *supra* note 8, at 1726–27 (evaluating the dissenting opinion by Judge Michael in *Hill* who seemingly would have adopted a causal nexus approach to claims brought under a subordinate bias theory because this standard retains the causation requirement of the anti-discrimination statutes without narrowing the scope of their enforcement).

164. See *BCI Coca-Cola*, 450 F.3d at 486 (speaking generally, but clearly implicating the Fourth Circuit’s decision in *Hill* by stating that “[r]ecognition of subordinate bias claims forecloses a strategic option for employers who might seek to evade liability, even in the face of rampant race discrimination among subordinates, through willful blindness as to the source of reports and recommendations”).

165. See Razzaghi, *supra* note 8, at 1732 (using a policy perspective to criticize *Hill* for failing “to consider situations in which a non-decisionmaker’s biases influence the employment decision, without the decisionmaker conducting a reasonable investigation”).

166. See *BCI Coca-Cola*, 450 F.3d at 488 (recognizing that the actual decision-maker standard leaves employees unprotected as long as subordinates in the Fourth Circuit “stop[] short of mouthing the words ‘you should fire him,’ in person or on paper, to the decisionmaker”).

167. See, e.g., *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 878 (6th Cir. 2001) (holding that a plaintiff can offer sufficient evidence of a causal connection between a subordinate’s prohibited bias and the adverse decision, thereby making the formal decision maker’s lack of bias irrelevant); see also White & Krieger, *supra* note 11, at 516 (explaining that liability can attach even if the person who fires the plaintiff did not intend to make the decision based on the plaintiff’s group status, “if group status in fact played a causal role in the decision making process”).

168. See Tinnin Law Firm, *supra* note 57, at 3 (referring to the holding in *BCI Coca-Cola* and commenting that, under the causal nexus approach, employers will have an equal interest in both the supervisor’s and the supposed biased subordinate’s explanation for the decision).

subordinate's bias and an adverse employment action suffered by a victim employee must be established to impose liability, employers will look for ways to break any such causal connection in order to prevent liability.¹⁶⁹ As long as employers take measures to independently investigate before making tangible employment decisions, courts will not hold employers vicariously liable for a subordinate's bias.¹⁷⁰

At the same time, employers exposed to excessive liability under the mere influence or involvement standard would be better protected under the causal nexus approach because the discriminatory bias of a subordinate employee is only imputable if the biased subordinate actually causes adverse employment action.¹⁷¹ While it is important to consider the difficulty protected class employees face in bringing successful employment discrimination claims, it would be unreasonable to leave employers completely defenseless against such claims.¹⁷² Under the causal nexus approach, even if biased subordinates engage in the decision-making process by submitting reports and recommendations in favor of adverse action, employers still have the opportunity to cleanse any adverse employment decisions of such bias by conducting independent investigations.¹⁷³

169. See *BCI Coca-Cola*, 450 F.3d at 488 (pointing out that in the Tenth Circuit, if the formal decision-maker simply asks for an employee's side of the story, any causal connection between a subordinate's bias and adverse action against the employee would no longer be inferable).

170. *Id.*

171. *Id.* at 487.

172. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242–43 (1989) (“[O]ur emphasis on ‘business necessity’ in disparate-impact cases, and on ‘legitimate, nondiscriminatory reason[s]’ in disparate-treatment cases, results from our awareness of Title VII’s balance between employee rights and employer prerogatives.”); Pasquinelli, *supra* note 128 (“Although the crackdown on discrimination and sexual harassment in the workplace may seem on the surface to be a positive goal, the issue of how far an employer must go to avoid liability under a Title VII action remains.”); Snell & Eskow, *supra* note 9, at 413 (referring specifically to retaliation claims, but applying to all other discrimination claims, “anti-retaliation provisions must not be transformed into grants of immunity, shielding employees from any adverse employment decision made subsequent to an employee’s protected activity without regard to whether the decision was made *because* of the protected activity”).

173. See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 303 (4th Cir. 2004) (en banc) (Michael, J., dissenting) (noting carefully that “the subordinate’s bias will not be imputed to a formal decisionmaker who acts for reasons that are untainted by discrimination”); Schaibley, *supra* note 46, at 556 (“Employers should ensure that at least one independent supervisor reviews all significant employment decisions . . . before those decisions take effect.”).

B. Consistency in Causation

In light of the Seventh Circuit's statement that the actual decision-maker standard from *Hill*¹⁷⁴ is inconsistent with normal tort analysis,¹⁷⁵ the causal nexus approach clearly comports with the "because of" language in Title VII.¹⁷⁶ From the basic formula for employer liability in cases of direct employer-employee discrimination, the causal nexus standard properly retains the causation requirement when considering an employer's vicarious liability for a subordinate's bias.¹⁷⁷ Furthermore, the Tenth Circuit, in *BCI Coca-Cola*,¹⁷⁸ observed that the Supreme Court has already adopted a similar causal connection approach to Title VII retaliation claims.¹⁷⁹

174. 354 F.3d at 277.

175. *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).

176. The causal nexus approach is also consistent with the legislative intent of Title VII. See *Price Waterhouse*, 490 U.S. at 262 (O'Connor, J., concurring) (demonstrating that the legislative history of Title VII is consistent with the causal nexus approach because the history explains that "a substantive violation of the statute only occurs when consideration of an illegitimate criterion is the 'but-for' cause of an adverse employment action."); see also Razzaghi, *supra* note 8, at 1735 ("The 'because of' language in [Title VII and the ADEA] hinges liability on a consideration of causation theory."). *Contra* 42 U.S.C. § 2000e-2(m) (articulating that an unlawful employment practice occurs when one proves that "race, color, religion, sex, or national origin" was simply one motivating factor, even if it was not the most important factor).

177. See *Price Waterhouse*, 490 U.S. at 265 (considering Congress's motives when crafting Title VII and stating that it "clearly conditioned legal liability on a determination that the consideration of an illegitimate factor caused a tangible employment injury of some kind"); White & Krieger, *supra* note 11, at 505 (illuminating the debate over whether or not liability under Title VII is a "but for" causation analysis or merely a "motivating factor" analysis, and pointing out that the very existence of the debate "suggests that the motive inquiry . . . is, at base, a question of causation, whatever quantum of causation is deemed necessary"). Ultimately, if the Supreme Court were to adopt a causal nexus approach to claims brought under the subordinate bias theory, the Court would have to reconcile the causation-based standard with its holding in *Price Waterhouse* which stated that Title VII was not intended to be a but-for causation analysis. See *Price Waterhouse*, 490 U.S. at 240-41. While the author acknowledges the inconsistency between the "because of" language of Title VII and the Supreme Court's announcement in *Price Waterhouse*, the causation debate is outside the scope of this Comment. However, whether Title VII requires discriminatory bias to cause an adverse employment action or whether Title VII merely requires that discriminatory bias be a motivating factor is significant for determining the appropriate standard of subordinate bias liability. Whereas the causal nexus standard is consistent with the causation language of Title VII, the mere influence or involvement standard is consistent with the *Price Waterhouse* interpretation that Title VII does not require causation. See White & Krieger, *supra* note 11, at 503-04 (asserting that the real causation debate in *Price Waterhouse* was not whether or not Title VII is a but-for causation analysis, but rather, which party would bear the burden of proving causation).

178. 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007).

179. See *id.* at 488 (noting that "[b]oth the Supreme Court and this Court require a comparable causal connection as part of analogous workplace discrimination claims" (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001))); Snell & Eskow, *supra* note 9, at 405 (detailing key questions to guide the court's causation analysis as applied to claims of reprisal discrimination); see also *Price Waterhouse v.*

Notably, the Eleventh Circuit has stated that, “Title VII does not punish the existence of discriminatory animus. It is only when that animus causes an alteration in the terms and conditions of the plaintiff’s employment that the employer will be held liable to the plaintiff under the statute.”¹⁸⁰ Contrary to this idea however, the mere influence or involvement standard does appear to punish the very existence of discriminatory animus because employers are vulnerable to liability when the simple fact of a subordinate’s bias exists.¹⁸¹ On the opposite extreme, the actual decision-maker standard construes the causation requirement too strictly¹⁸² because it imposes liability on employers only when a biased subordinate has the proper authority to affect the terms and conditions of another’s employment.¹⁸³

CONCLUSION

Title VII and the anti-discrimination statutes serve to protect employees from the injustices of unlawful discrimination practices that affect the terms and conditions of their employment.¹⁸⁴ Yet, it is perhaps a greater injustice that the Supreme Court has not formally recognized subordinate bias liability. Considering the fact that most employment relationships are more complex than employer-

Hopkins, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting) (pointing out that the Supreme Court’s previous decisions, such as *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), confirm that Title VII is only concerned with employment decisions that result directly from impermissible motives, and the language used in those previous decisions is synonymous with but-for causation); Schaibley, *supra* note 46, at 559–60 (demonstrating that while *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), “do not expressly mandate a causal connection . . . [i]f the employee cannot establish the causal connection or knowledge of the harassment on the part of the employer, a court may not find vicarious liability without additional compelling evidence”).

180. *Llampallas v. Mini-Circuits Lab. Inc.*, 163 F.3d 1236, 1247 n.19 (11th Cir. 1998); *see* *Snell & Eskow*, *supra* note 9, at 383 (“To balance the rights of employers and employees, courts must focus narrowly on the issue of causation—namely, whether an adverse action was taken by an employer *because* of an employee’s protected activity.”).

181. *See* *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 486–87 (stating that the mere influence or involvement standard “improperly eliminates a requirement of causation”). *But see* *Long v. Eastfield Coll.*, 88 F.3d 300, 308 (5th Cir. 1996) (exemplifying one case in the Fifth Circuit—which has adopted the mere influence or involvement standard—that applied a causation analysis to a subordinate bias claim).

182. *See* *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 302 (4th Cir. 2004) (en banc) (Michael, J., dissenting) (rebuking the majority for misinterpreting *Ellerth* as requiring that the biased subordinate have the authority to make employment decisions in order to impose liability on the employer).

183. *Id.* at 291.

184. Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e-2(a) (1994); Age Discrimination in Employment Act (ADEA) of 1967, 29 U.S.C. § 623(a) (2000).

employee, discriminatory bias cannot be confined to this basic relationship.¹⁸⁵ Instead, employers are more likely to rely on managers, supervisory personnel, and other intermediate actors to bridge the gap between employer and employee.¹⁸⁶ As a result, the Court must be cognizant that there is a greater potential for discriminatory bias.¹⁸⁷

Clearly, when a biased employer directly affects the employment of a victim employee, courts will impose Title VII liability on the biased employer.¹⁸⁸ However, when a biased subordinate exerts influence over an unbiased employer's decision to take adverse action, the formula for imposition of liability on the employer is less clear.¹⁸⁹ The causal nexus approach, most recently reaffirmed by the Tenth Circuit in *BCI Coca-Cola*,¹⁹⁰ is the most favorable standard because it not only borrows the flexibility of the mere influence or involvement standard by accepting the idea that biased subordinates need not have actual authority to make employment decisions, but also emphasizes the element of causation derived from the basic formula for Title VII liability.¹⁹¹ This standard protects employers from excessive liability because it encourages employers to conduct independent investigations of potentially biased reports and recommendations from subordinates. At the same time, the standard provides comparable protection for employees who are indirectly discriminated against by a biased subordinate, and employees who are directly discriminated against by the employer. Hence, the causal nexus approach is the optimal standard because it accommodates the

185. See Recent Case, *supra* note 111, at 1699 (highlighting the importance of subordinate bias because it creates an incentive for employers to review decisions made on various levels of authority within the workplace).

186. See White & Krieger, *supra* note 11, at 515 ("An invidiously motivated supervisor can, of course, influence a decision made higher up the organizational hierarchy in a number of different ways.").

187. *Id.* at 515–16 (noting that if a biased lower level supervisor has influenced the decision process, an employer is not excused from liability although he had no intent to discriminate).

188. 42 U.S.C. § 2000e-2(a); 29 U.S.C. § 623(a).

189. See Schaibley, *supra* note 46, at 559–60 (using *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), to demonstrate the clear causal relationship between discriminatory motive and tangible employment action in a direct liability situation (e.g., when a sexual harasser is the agent who takes tangible employment action)); *id.* (showing the need to similarly establish a causal connection between discriminatory motive and tangible employment action in a vicarious liability situation (e.g., when the harasser controls the means by which tangible employment action results)).

190. 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 127 S. Ct. 1931 (2007).

191. See Razzaghi, *supra* note 8, at 1729 (observing that the Seventh Circuit and other circuits have emphasized the causal connection between a subordinate's bias and an adverse employment decision, rather than focusing on whether or not the subordinate had the requisite authority to make the employment decision).

likelihood that a subordinate's bias could taint a decision-making process, and is also consistent with the basic formula currently used to impose direct Title VII liability on employers.

Dr. King's statement that "[i]njustice anywhere is a threat to justice everywhere" is an indication that discrimination, as a severe form of injustice, may be blatant and jarring, or subtle and slowly degenerative to society.¹⁹² The theory of subordinate bias liability is a step forward in the continuing struggle to eliminate the injustices of workplace discrimination. But until the Supreme Court adopts a standard and formally acknowledges subordinate bias liability, its continued failure to recognize that discriminatory practices are not strictly limited to the employer-employee relationship is an injustice that remains a threat to justice everywhere.¹⁹³

192. KING, *supra* note 1.

193. In January, 2007, the Supreme Court granted certiorari in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, but upon agreement of the parties, the case was dismissed in April, 2007. 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007), *and cert. dismissed*, 127 S. Ct. 1931 (2007). Also in April, the Court denied certiorari in *Sawicki v. Morgan State University*, which was yet another case premised on a theory of subordinate bias liability coming from the Fourth Circuit. 2005 U.S. Dist. LEXIS 41174, at *1 (D. Md. Aug. 2, 2005), *aff'd*, 170 F. App'x 271 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2095 (2007). As such, the three-way circuit split on approaches to subordinate bias cases continues to exist.