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Caught by the Cat's Paw

Sandra F. Sperino

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Sandra F. Sperino*

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INTRODUCTION

Federal employment discrimination law is enamored with court-created doctrines with catchy names.¹ A fairly recent addition to the canon is the concept of the “cat’s paw,” formally recognized by the U.S. Supreme Court in *Staub v. Proctor Hospital*.² With its name coined by Judge Richard Posner and drawn from a fable, the concept of cat’s paw has taken ground quickly, discussed in hundreds of cases.³

The Supreme Court recognized the cat’s paw theory in a case where a hospital fired a worker. The person who made the ultimate decision did not have impermissible bias. However, her decision was influenced by information from two supervisors who arguably did possess such bias.⁴ The Court held that “if a supervisor performs an act motivated by [impermissible] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable.”⁵ Since then, courts have applied cat’s paw analysis under a wide range of federal statutes including Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and others.⁶

This Article argues that the cat’s paw doctrine is a mistake, and the courts should abolish it. Before the Supreme Court recognized it as a separate doctrine, the Court decided numerous cases with facts that could now be called cat’s paw cases. The Supreme Court did not need or even mention the need for a new doctrine to

1. See, e.g., Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (explaining similarly situated comparators); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 347, 357 (2010) (discussing multiple sub-doctrines); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 180 (2012) (discussing stray remarks doctrine).

2. *Staub v. Proctor Hosp.*, 562 U.S. 411 (2011).

3. See, e.g., *Shager v. Upjohn Co.*, 913 F.2d 398, 400 (7th Cir. 1990).

4. *Staub*, 562 U.S. at 413–15, 422. By describing the facts of this case, I am not suggesting that a person is required to act with animus or intent to create liability under federal discrimination law.

5. *Id.* at 422 (footnote omitted).

6. See, e.g., *Acosta v. Brain*, 910 F.3d 502, 514 (9th Cir. 2018) (applying cat’s paw in ERISA retaliation context); *Perkins v. Child Care Assocs.*, 751 F. App’x 469, 475 (5th Cir. 2018) (applying cat’s paw to the FMLA); *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 351 (6th Cir. 2012) (Title VII); *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949 (10th Cir. 2011) (discussing cat’s paw in context of ADEA).

adjudicate those cases. Strangely, the Supreme Court does not cite any of these cases in *Staub*.

Indeed, these Supreme Court cases are going to cause a judicial headache as lower courts try to reconcile pre-*Staub* jurisprudence with the court-created cat's paw doctrine. The current cat's paw doctrine muddles rather than elucidates complex concepts of intent, causation, and agency liability.

Before cat's paw doctrine becomes further entrenched, this Article provides a new and more complete history of the doctrine. This new history shows that courts did not need the cat's paw doctrine prior to its creation. They were resolving cases that presented cat's paw scenarios without any resort to the complicated analytical structure that now accompanies the doctrine. Even the Seventh Circuit decision that coined the phrase "cat's paw" did not rely on cat's paw to resolve the case.⁷

Importantly, there is only one way to reconcile *Staub* with several other canonical Supreme Court cases – to read it as simply recognizing one set of facts under which a plaintiff could prevail under federal discrimination law. Some lower courts are interpreting *Staub* to place significant limits on the scope of discrimination law.⁸ However, using cat's paw to limit the scope is inconsistent with numerous Supreme Court cases as well as the text and purposes of the discrimination statutes.

Cat's paw doctrine should be abolished while it is in its infancy because it is not needed and will likely lead to decades of confusion in employment discrimination jurisprudence. As it is unlikely that the Supreme Court will admit that *Staub*'s complicated holding was a mistake, I also suggest ways that the courts can retain the core of *Staub* while jettisoning its more problematic features.

This Article proceeds as follows. Part I discusses the *Staub* case in-depth, covering its journey from the trial court to the Supreme Court. Part II discusses several Supreme Court cases decided both prior to and after *Staub* that fall within the ambit of what would now be called cat's paw. It demonstrates that the Supreme Court did not need a special cat's paw doctrine to resolve these cases. Part III explores the Seventh Circuit decision in *Shager v. Upjohn Co.*,

7. *Shager*, 913 F.2d at 400.

8. See, e.g., *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 275 (2d Cir. 2016); *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 659 (5th Cir. 2012).

showing that even that court did not rely on cat's paw doctrine. Part IV contrasts the Supreme Court cases and *Shager* with *Staub*, showing that it will be difficult to reconcile a restrictive cat's paw doctrine with them. Part V highlights the problems federal courts are experiencing with cat's paw and charts a path forward based on the text and purposes of the federal discrimination statutes.

I. THE CAT'S PAW

The Supreme Court recognized the cat's paw theory in *Staub v. Proctor Hospital*.⁹ Since *Staub*, there has been surprisingly little scholarly attention paid to cat's paw doctrine.¹⁰ This Part provides an overview of the case as it made its way through the courts, focusing on the important doctrinal and theoretical issues presented at each stage.

A. Staub at the Trial Court

Vincent Staub sued his employer for terminating his employment, alleging the employer violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹¹ USERRA prohibits employers from discriminating or retaliating against service members based on their military service.¹² Staub worked as an angio technician at a hospital. He was also a member of the Army Reserve. As an army reservist, Staub would miss work

9. *Staub*, 562 U.S. 411.

10. L. Camille Hébert, *The Supreme Court's 2010–2011 Labor and Employment Law Decisions: A Large and "Mixed Bag" for Employers and Employees*, 15 EMP. RTS. & EMP. POL'Y J. 279, 293 (2011); Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–34 (2012). Some articles briefly discuss cat's paw theory. Matthew T. Bodie, *The Roberts Court and the Law of Human Resources*, 34 BERKELEY J. EMP. & LAB. L. 159, 183 (2013); Dallan F. Flake, *When Should Employers Be Liable for Factoring Biased Customer Feedback into Employment Decisions?*, 102 MINN. L. REV. 2169, 2202 (2018) (considering whether cat's paw could be used to hold employers liable for using discriminatory customer feedback); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1413–14 (2014) (briefly noting the causal questions cat's paw theory invites); see also Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 389–97 (2008) (discussing the competing standards established by the circuit courts of appeals prior to *Staub*).

11. *Staub v. Proctor Hosp.*, 560 F.3d 647, 650–51 (7th Cir. 2009), *rev'd and remanded*, 562 U.S. 411 (2011). This section recounts the facts as described by the courts. The employer contested many of the facts and the inferences to be drawn from them.

12. 38 U.S.C. § 4311 (2018).

for training and deployments, often on the weekends. After working for the hospital for fourteen years, the hospital terminated his employment. Staub filed suit, arguing that the hospital provided false reasons for firing him and that the real reason was animosity toward his military service.

Staub presented evidence that in 2000, Janice Mulally (who the court described as second-in-command of the imaging department) began to prepare work schedules for the imaging department where Staub worked.¹³ Staub informed Mulally of his Army Reserve duties, which required him to attend training one weekend a month and for two weeks during the summer. Before Mulally took over scheduling, Staub did not work on the weekends; however, Mulally scheduled Staub for weekend work knowing about his Reserve duties.¹⁴ At times, Mulally would change the schedule to accommodate Staub's military obligations when he reminded her about his drill requirements. However, sometimes she would tell Staub's co-workers that volunteers were needed to cover his weekend shift. Occasionally, she required Staub to use vacation days to cover weekend shift time when he was at Reserve training, and she scheduled him for extra shifts without notice. Mulally "called Staub's military duties 'bullshit' and said the extra shifts were his 'way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.'"¹⁵

The department head for Staub's unit was Michael Korenchuk, who sometimes intervened on the scheduling issues, but never finally resolved them. According to the appellate court, "Korenchuk characterized drill weekends as 'Army Reserve bullshit' and 'a b[u]nch of smoking and joking and [a] waste of taxpayers['] money.'"¹⁶

A co-worker, Amy Knoerle, reported that "Mulally would roll her eyes and make sighing noises" when Staub would approach her about his drill obligations.¹⁷ A new employee, Leslie Sweborg, joined the unit. She testified that two weeks into the job she met

13. *Staub*, 560 F.3d at 651.

14. *Id.*

15. *Id.* at 652.

16. *Id.*

17. *Id.*

Mulally and another coworker (Angie Day) for drinks after work. Sweborg testified that Mulally told her Staub's "military duty had been a strain on the[] department" and "she did not like him as an employee." Mulally asked Sweborg "to help her get rid of him."¹⁸ Sweborg refused.

In January of 2004, Staub received a notice that he needed to report for duty as a precursor to an active deployment. Korenchuk became concerned about work coverage because, at that time, Sweborg and Staub were the only angio techs. In late January, Mulally gave both Sweborg and Staub written warnings for failure to help another diagnostic unit when requested. Sweborg and Staub both disputed the facts upon which Mulally relied to issue the warning, and Staub also disputed whether the two violated any work rule.¹⁹ As part of the warning, Staub was required to report to Korenchuk or Mulally when he did not have any patients and to remain in the general diagnostic area unless Korenchuk or Mulally gave him permission to go elsewhere.²⁰

According to the facts as stated by the appellate court, Staub's problems got worse in April of 2004. The court noted:

On April 2, 2004, Day had a meeting with Korenchuk, Linda Buck (vice-president of Human Resources), and R. Garrett McGowan (chief operating officer). Day was upset with Korenchuk because she complained to him about Staub and he did nothing in response. Day said she had difficulty working with Staub, he would "absent himself from the department," and he tended to be "abrupt." After Day left the room, Korenchuk, Buck, and McGowan discussed what they should do. This wasn't the first time McGowan had heard about "availability" problems involving Staub, so he told Korenchuk to work with Buck to create a plan that would solve the issue. They never found time to do that—Staub ran into trouble again and was fired three weeks later on April 20.²¹

The trouble on April 20 began when Sweborg and Staub wanted to go to lunch. They could not find Korenchuk, so they left a voicemail for him letting him know they were going to lunch.

18. *Id.*

19. *Staub v. Proctor Hosp.*, 562 U.S. 411, 414 (2011).

20. *Staub*, 560 F.3d at 653.

21. *Id.* at 653–54.

When they returned thirty minutes later, Korenchuk demanded to know where they had been. Even though they explained that they were at lunch and explained they left a voicemail message, Korenchuk took Staub to the Human Resources office, where Buck told him he was fired.

A written report indicated that the hospital fired Staub because he failed to comply with the conditions of the written warning. Buck made the decision to fire Staub with Korenchuk's input. According to the appellate court, "Without the January 27 write-up, Day's April 2 complaint, and the event on April 20—all of which involved unavailability or 'disappearances'—Buck said she would not have fired Staub."²² Buck also based her decision on past issues regarding Staub of which she was aware. She reviewed his personnel file before making her decision. She was not aware of potential animus by Day or Mulally related to Staub's military service. Staub grieved his termination and raised the issue of potential military animus. Buck did not investigate this claim and reaffirmed her decision to terminate Staub's employment.²³

The trial court judge denied the employer's motion for summary judgment and allowed the case to go to trial. A jury heard Staub's case and awarded him \$57,640.00 in damages.²⁴

The employer filed post-trial motions, which the trial court denied. In considering these motions, the trial court noted that "the testimony and documentation about who said what to whom was hotly contested."²⁵ It emphasized that credibility determinations belong to a jury and that once a witness provides unreliable evidence, the factfinder is allowed to disbelieve other evidence proffered by that witness.²⁶ The trial court judge allowed the jury to determine whether the defendant's investigation was sufficient to break the causal chain for liability.²⁷

22. *Id.* at 654.

23. *Id.* at 655.

24. *Staub v. Proctor Hosp.*, No. 04-1219, 2008 WL 2001935, at *1 (C.D. Ill. May 7, 2008), *rev'd in part*, 560 F.3d 647 (7th Cir. 2009), *rev'd and remanded*, 562 U.S. 411 (2011). The trial in *Staub* was delayed while the appellate courts were considering issues related to cat's paw in contemporaneous cases. Joint Appendix at 89a-90a, *Staub*, 562 U.S. 411 (No. 09-400), 2010 WL 2707600.

25. *Staub*, 2008 WL 2001935, at *2.

26. *Id.*

27. *Id.*

The trial court noted that the employer raised a new cat's paw issue in post-trial motions, pointing to a Seventh Circuit cat's paw case decided after the trial in *Staub—Metzger v. Illinois State Police*.²⁸ In *Metzger*, the Seventh Circuit considered a case in which a board made the final decision regarding whether to increase the pay grade of an employee's position.²⁹ The worker alleged that a supervisor who provided the board with information about the employee's work responsibilities conveyed inaccurate information to the board because of a retaliatory motive.³⁰

Without any reference to Title VII, the Seventh Circuit relied on its prior cases and held that the worker could not prevail. The Seventh Circuit's holding in *Metzger* is a little unclear as it appears to rest on two grounds. The Seventh Circuit held that the plaintiff could not prevail because the board was not wholly dependent on the allegedly biased supervisor's information.³¹ However, the court also noted that there was no evidence that the supervisor's comments influenced the board at all.³²

The distinction between the two possible holdings is important because it would later affect the appellate court outcome in *Staub*. One way to read the *Metzger* case is that it required the plaintiff in a cat's paw case to show that the biased individual had a singular influence on the person or body who made the decision. As discussed in more detail throughout this Article, such a standard is not based on the text of the employment discrimination statutes and requires the plaintiff to prove too tight a connection between a protected class or protected activity and an outcome. However, the second possible holding is more consistent with Title VII. Title VII requires a plaintiff to establish that a protected trait was a motivating factor for any employment practice, even though other factors also motivated the practice.³³ In retaliation cases, a plaintiff must establish that protected conduct was a "but for" cause of the

28. *Id.* at *1.

29. *Metzger v. Ill. State Police*, 519 F.3d 677, 682 (7th Cir. 2008).

30. *Id.*

31. *Id.* at 682 (“[W]here a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee’s submission of misinformation to the decision maker.” (quoting *Brewer v. Bd. of Trs. of Univ. of Ill.*, 479 F.3d 908, 918 (7th Cir. 2007))).

32. *Id.*

33. 42 U.S.C. § 2000e-2 (2018).

outcome.³⁴ If a plaintiff cannot show how her protected trait or protected activity influenced the outcome at all, then the plaintiff has failed to show causation.

The trial court in *Staub* found that *Metzger* did not alter the Seventh Circuit's prior cat's paw jurisprudence.³⁵ In *Staub*, the trial court judge instructed the jury using both of the standards discussed in *Metzger*. The verdict form asked the jury whether Staub proved by a preponderance of the evidence that his military status was a motivating factor in his discharge.³⁶ However, the jury also received a singular influence cat's paw instruction.³⁷ The judge instructed the jury that the "[a]nanimosity of a co-worker toward the Plaintiff on the basis of Plaintiff's military status as a motivating factor may not be attributed to Defendant unless that co-worker exercised such singular influence over the decision maker that the co-worker was basically the real decision maker."³⁸

In ruling on the post-trial motions in *Staub*, the trial judge appeared to be focused on two important issues: the procedural posture of the case and the contested nature of the facts. The trial judge was unsure who did what, when they did it, and how what they did ultimately impacted the outcome. The trial court judge denied the employer's post-trial motions.

B. Staub at the Seventh Circuit

The appeal centered on cat's paw liability. The employer argued that the trial court judge gave improper instructions to the jury and improperly admitted evidence related to animus of non-decisionmakers.³⁹ After recounting the facts of the case in the light most favorable to the verdict, the Seventh Circuit began framing the legal dispute before it. Without any citation, the appellate court first noted, "a plaintiff suing under USERRA does not win by showing prohibited animus by just anyone. He must show that

34. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013).

35. *Staub v. Proctor Hosp.*, No. 04-1219, 2008 WL 2001935, at *2 (C.D. Ill. May 7, 2008), *rev'd in part*, 560 F.3d 647 (7th Cir. 2009), *rev'd and remanded*, 562 U.S. 411 (2011).

36. Joint Appendix, *supra* note 24, at 68a.

37. *Id.* at 71a.

38. *Id.*

39. *Staub*, 560 F.3d at 651.

the *decisionmaker* harbored animus and relied on that animus in choosing to take action.”⁴⁰

As discussed in more detail below, this framing is incorrect because it focuses on the animus of a particular decisionmaker or decisionmakers, rather than the causal factors that led to an outcome. Under employment discrimination law, decisions to take employment actions (like hiring, firing, or promoting individuals) are the employer’s action. Employers as entities do not have animus in the same way that a person could. Even if we can say that an individual employee or group of employees made the decision, the action is situated at the employer or entity level. An individual decisionmaker has no ability to fire an employee because the employee is not employed by the decisionmaker; he is employed by the entity. Thus, the causal connection is between the protected status and the outcome, and not the animus of any particular decisionmaker to an outcome.

One way to prove that a decision is discriminatory is to show that the person who made it had a discriminatory animus, but this is not the only way. As discussed throughout this Article, there is an entire body of law describing different ways to show that a decision was taken because of a protected trait (or in Staub’s case, because of his military service). The appellate court analysis got off on the wrong foot by misstating basic employment discrimination law.

After this introduction, the court then explored whether Staub could prevail under a cat’s paw theory. In framing the issue, the appellate court again made the same mistake about animus and the decisionmaker. It noted, “Deploying the cat’s paw theory, Staub sought to attribute Mulally’s animus to Buck, and therefore to Proctor [the hospital].”⁴¹ When an employer takes a tangible employment action, employment discrimination law does not require the animus of a person to be attributed to the employer (the legal entity). Rather, the question is whether the plaintiff’s protected status caused the outcome.

At the beginning of its opinion, the appellate court noted:

40. *Id.* at 655.

41. *Id.*

One would guess that the chances are pretty slim that the work of a 17th century French poet would find its way into a Chicago courtroom in 2009. But that's the situation in this case as we try to make sense out of what has been dubbed the "cat's paw" theory. The term derives from the fable "The Monkey and the Cat" penned by Jean de La Fontaine (1621-1695). In the tale, a clever – and rather unscrupulous – monkey persuades an unsuspecting feline to snatch chestnuts from a fire. The cat burns her paw in the process while the monkey profits, gulping down the chestnuts one by one. As understood today, a cat's paw is a "tool" or "one used by another to accomplish his purposes."⁴²

Later in the opinion, the court recited its cat's paw standard, which required that the biased subordinate have a singular influence over the decisionmaker.⁴³ If the decisionmaker did not just rely on the information provided by the subordinate, but conducted her own investigation and analysis, there could be no cat's paw liability in the Seventh Circuit.⁴⁴

Although admitting that the trial court gave jury instructions that properly instructed the jury about the singular influence standard, the appellate court found that the trial court improperly introduced evidence of Mulally's bias. The appellate court believed the trial court should have excluded this evidence by finding as a matter of law that no reasonable juror could find that Mulally exercised this singular influence.⁴⁵ The appellate court did not grant a new trial, but rather took the extraordinary step of granting judgment in favor of the employer.

This holding is problematic on a number of fronts. First, given the jury's verdict and the instruction given, the jury did factually find that the military animus singularly influenced the decisionmaker. It is unclear why the appellate court believed it should second-guess this factual finding by declaring that no reasonable jury could so find. A reasonable jury did so find – the actual jury impaneled in this case. Further, the trial court judge believed that a jury could so find, because the trial judge allowed the case to go to trial and denied post-trial motions.

42. *Id.* at 650.

43. *Id.* at 656.

44. It is worth noting that there is no reference to any statutory language in the Seventh Circuit's description of cat's paw doctrine.

45. *Staub*, 560 F.3d at 658.

Second, the Seventh Circuit focused on the connection between Mulally and Buck. It ignored that the correct connection is between the protected trait and the outcome, thus diminishing the evidence presented by the plaintiff. By focusing on the “decisionmaker,” rather than the outcome, the appellate court appears to exclude the evidence that Korenchuk also exhibited bias, and that Mulally may have induced Day to make the original complaint that started the process. Indeed, when the case went to the Supreme Court, the Supreme Court provided additional facts about Korenchuk that are not contained with the appellate court’s set of facts: “that Korenchuk made negative remarks about Staub’s Reserve duties before firing him in 1998,” “that Korenchuk informed Staub of the revenue lost while he was on Active Duty in 2003,” “that Korenchuk was aware in January 2004 that Staub might be called to Active Duty again, and that ‘[b]udget was a big issue with [Korenchuk].’”⁴⁶

Third, the Seventh Circuit then continued by spinning a version of the facts that clearly drew inferences in favor of the employer and not the plaintiff. For example, the court discussed Staub’s alleged history of employment problems, even though the court failed to discuss why, if Staub was such a terrible employee, he remained employed at the hospital for fourteen years.⁴⁷ The court noted that one of Staub’s recent performance reviews rated his performance as nearly perfect.⁴⁸ The court strangely concluded that this prior history justified the discharge even without the more recent performance issues. Again, this claim is contrary to the jury verdict and also to the fact that Staub was a long-term employee. The court then also found that even though Buck’s investigation could have been more “robust,” it was sufficient.⁴⁹

The court then invoked the cat’s paw fable. The court used ideas from the fable to find that the decisionmaker’s reliance must be “blind reliance.”⁵⁰ It is strange indeed that a court would decide a case based on reference to a fable, rather than by reference to the applicable statute.

46. *Staub v. Proctor Hosp.*, 562 U.S. 411, 427 n.* (2011) (Alito, J., concurring).

47. *Staub*, 560 F.3d at 659.

48. *Id.* at 652 n.2.

49. *Id.* at 659.

50. *Id.*

C. Staub at the Supreme Court

The Supreme Court granted certiorari in *Staub* to resolve a circuit split regarding the proper standard in cat's paw cases.⁵¹ The Supreme Court upheld the use of cat's paw doctrine and enunciated a test to apply in some circumstances. Justice Scalia delivered the opinion in which five other Justices joined. Justice Alito filed an opinion concurring in the judgment, which was joined by Justice Thomas. Justice Kagan did not participate in the opinion.

After reciting the facts, the Supreme Court provided the text of USERRA and noted that it is similar to Title VII.⁵² The Court's analysis began with the statement: "[W]e start from the premise that when Congress creates a federal tort it adopts the background of general tort law."⁵³ The Court then applied a tort law overlay to USERRA.

The Court stated that intent requires a person to intend the consequences of his actions or believe that consequences are substantially certain to occur.⁵⁴ It noted that even if Mulally and Korenchuk acted with discriminatory animus, they did not terminate Staub. Instead, they reported performance deficiencies. Staub presented evidence that he had not violated any workplace rules and that the reporting was motivated by his military obligations.

Because reporting performance problems does not itself violate USERRA, no liability attached for the making of those reports. The Court assumed that submitting a negative performance review is

51. See Brief for the United States as Amicus Curiae at 9, *Staub*, 562 U.S. 411 (No. 09-400), 2010 WL 3611711, at *9; Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 927 (2014).

52. *Staub*, 562 U.S. at 417. USERRA provides: "An employer shall be considered to have engaged in actions prohibited . . . under subsection (a), if the person's membership . . . in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership . . ." 38 U.S.C. § 4311(c)(1) (2018). Title VII prohibits employment discrimination "because of . . . race, color, religion, sex, or national origin" and states that such discrimination is established when one of those factors "was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(a), (m) (2018).

53. *Staub*, 562 U.S. at 417; see also Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 [hereinafter Sperino, *Discrimination Statutes*]; Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014).

54. *Staub*, 562 U.S. at 422 n.3.

not cognizable on its own under USERRA. In discrimination jurisprudence, there is a continuing circuit split about this issue.⁵⁵

The Court continued by deciding whether the hospital could be held liable for the animus and actions of the two subordinate supervisors. It stated: “Perhaps, therefore, the discriminatory motive of one of the employer’s agents (Mulally or Korenchuk) can be aggregated with the act of another agent (Buck) to impose liability on Proctor.”⁵⁶ The Court discussed various views of agency law and then somehow resolved the agency issue through causation. The Court stated:

Ultimately, we think it unnecessary in this case to decide what the background rule of agency law may be, since the former line of authority is suggested by the governing text, which requires that discrimination be “a motivating factor” *in the adverse action*. When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a “factor” or a “causal factor” in the decision; but it seems to us a considerable stretch to call it “a motivating factor.”⁵⁷

The lower courts are still struggling with questions about whether cat’s paw doctrine is about causation, agency, or both causation and agency. The Supreme Court rejected the standard suggested by the employer, that the employer is only liable if the decisionmaker possessed discriminatory animus.⁵⁸

As discussed below, another conceptual problem in cat’s paw jurisprudence is the effect of a subsequent decision or a subsequent investigation by a non-biased supervisor prior to making an employment decision. The Court distinguished independent judgment from a subsequent investigation. It specifically held that the independent judgment of a decisionmaker does not break the

55. See, e.g., *Taylor v. N.Y.C. Dep’t of Educ.*, No. 11-CV-3582, 2012 WL 5989874, at *7 (E.D.N.Y. Nov. 30, 2012) (being rated as having unsatisfactory performance not sufficient to constitute an adverse action); *Hill v. Rayboy-Brauestein*, 467 F. Supp. 2d 336, 351 (S.D.N.Y. 2006) (noting that a negative evaluation can be an adverse action if it leads to a material adverse change in work conditions).

56. *Staub*, 562 U.S. at 418.

57. *Id.* at 418–19.

58. *Id.* at 419.

causal chain. The Court purported to address this problem through proximate cause jurisprudence. The Court noted:

And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that [are] too remote, purely contingent, or indirect." *Hemi Group, LLC v. City of New York*, 559 U.S. 1, 9 (2010) (internal quotation marks and brackets omitted). We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent."⁵⁹

The Court continued by noting that the decisionmaker's judgment is a proximate cause of the decision, but provided that the common law allows for multiple proximate causes.⁶⁰ It also indicated that the judgment is not a superseding cause because superseding cause only exists if it is a "cause of independent origin that was not foreseeable."⁶¹

The Court also rejected the idea that the independent judgment breaks the causal chain for practical and fairness reasons. The Court reasoned:

Proctor's view would have the improbable consequence that if an employer isolates a personnel official from an employee's supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking the adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of the text, and one that is not compelled by its words.⁶²

The Court held that the mere fact that an investigation occurred did not relieve the employer of liability. "The employer is at fault because one of its agents committed an action based on

59. *Id.* (footnote omitted).

60. *Id.* at 420.

61. *Id.* (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996)).

62. *Id.*

discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.”⁶³ The Court also noted: “Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a ‘motivating factor in the employer’s action,’ precisely as the text requires.”⁶⁴

However, the Court also recognized that an investigation might break the causal chain, in very limited circumstances. It held that the employer’s investigation must be “unrelated to the supervisor’s original biased action.”⁶⁵ The Court also noted that under USERRA, the defendant would be required to prove the causal break.⁶⁶ However, the biased report remains a factor “if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor’s recommendation, entirely justified.”⁶⁷ Some of the Court’s discussion regarding investigations is dicta, and it is not entirely clear how lower courts should determine when an employer investigation breaks the causal chain and when it does not.

The Court ultimately held: “if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA.”⁶⁸ Turning to the facts of the *Staub* case, the Court held that the facts presented could meet the new standard. However, because the jury was not instructed with this standard, the Court remanded the case to the Seventh Circuit to determine whether the jury’s verdict should be reinstated or whether a new trial should be granted.

The Court explicitly noted that it was not deciding a number of questions related to cat’s paw. It did not decide what should happen if the subordinate supervisor intended one outcome, but a different outcome resulted from a process the subordinate

63. *Id.* at 421.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 422 (footnote omitted).

supervisor started in motion.⁶⁹ It also did not decide whether liability would occur if a co-worker (rather than a supervisor) possessed the required bias.⁷⁰

As discussed throughout this Article, there are many unanswered questions after *Staub*, many of which relate to how restrictive the cat's paw doctrine is in limiting claims. One way to interpret *Staub* is that it merely stated one set of facts under which a plaintiff could prevail and that it did not intend to significantly limit plaintiffs' claims. However, it is also possible to interpret *Staub* robustly to limit the circumstances under which a plaintiff could prevail. For example, *Staub* might be interpreted to limit cat's paw liability to the acts of supervisors or to require the biased actor to intend the action that eventually occurs. Under this second approach, *Staub* creates more questions than it answers.

II. PRE-STAU B LANDSCAPE

One preliminary question worth answering is whether employment discrimination jurisprudence needs a cat's paw doctrine at all. Several canonical Supreme Court employment discrimination cases were decided on facts that could now be characterized as cat's paw cases, but which were not so characterized at the time. The courts were able to resolve these cases without any reference to cat's paw.

Strangely, the Supreme Court did not cite any of these cases in *Staub*. Importantly, the outcomes in these cases are inconsistent with *Staub*, if *Staub* is interpreted to significantly limit the evidence plaintiffs can submit to establish liability.

By looking at these cases collectively, several themes emerge. First, there are many Supreme Court cases in which multiple people interacted in a process that resulted in an employment action against the plaintiff. Pre-*Staub*, the Supreme Court was often unconcerned about who "made" the final decision and about specifically tracing a biased individual's influence to a final decisionmaker.

69. *Id.* at 419 n.2. This footnote is especially confusing because it uses the concept of intent, but the footnote references a portion of the Restatement (Second) of Torts relating to negligence law.

70. *Id.* at 422 n.4.

Rather, the Court was concerned with whether the outcome the employer allowed to happen was caused or impacted by a protected class. Although the plaintiff may show this by establishing that the person who made the decision was biased, the statutes do not require the plaintiff to show that the protected class motivated the decisionmaker. This is an important distinction in some cases. It is the outcome that needs to be connected to the protected trait.

Second, the pre-*Staub* cases do not depend upon proof that a particular person intended an adverse action. Indeed, many of the cases do not even describe facts that would allow a reader to determine what action the allegedly biased individual intended.

Third, many of the pre-*Staub* cases do not rely on the status of the allegedly biased individual to determine employer liability. And, the Supreme Court does not always identify the people involved in the decision or the power that they have to effectuate decisions.⁷¹ The Supreme Court does not use an agency analysis to assign liability to the employer. Rather, the employer has liability because it took an employment action.

Finally, the Court does not frame its analysis in the terms of proximate cause, even when the facts span multiple years and multiple people and when it is unclear exactly how all of the comments and actions impact the contested outcome.

As lower courts try to use cat's paw doctrine after *Staub*, they will constantly be confronted with how to differentiate or integrate cat's paw scenarios with these prior cases. As discussed in Part IV, these pre-*Staub* cases cannot be reconciled with a restrictive version of *Staub* because *Staub* reframed issues of bias, motive, cause-in-fact, proximate cause, and agency law in ways that are not consistent with either the text of the federal discrimination statutes or the Supreme Court's prior interpretations of those concepts.

The cases discussed below show that the courts did not need an elaborate cat's paw analysis and instead prior to *Staub* used an approach that considered whether the plaintiff's evidence taken as a whole demonstrated that a protected trait was connected to the negative outcome.

71. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 233 (1989). The Court refers to people who submitted the evaluations as partners.

Importantly, this line of cases demonstrates that plaintiffs are not required to proceed under a cat's paw analysis to prove their claims. They may proceed under any available analytical structure.

A. Price Waterhouse v. Hopkins

In *Price Waterhouse v. Hopkins*, the Supreme Court considered whether an accountant could bring a sex discrimination claim when her firm did not promote her to partner.⁷² The Supreme Court described the very lengthy partnership decision-making process used by the accounting firm. It allowed partners at the firm to submit written comments about partner candidates.⁷³ The Admissions Committee would then make a recommendation to the Policy Board to accept the candidate as a partner, put the application on hold, or deny partnership.⁷⁴ The Policy Board then decided "whether to submit the candidate's name to the entire partnership for a vote, to 'hold' her candidacy, or to reject her."⁷⁵

The Supreme Court recounted generally how partners have voted related to Hopkins: "Thirteen of the 32 partners who had submitted comments on Hopkins supported her bid for partnership. Three partners recommended that her candidacy be placed on hold, eight stated that they did not have an informed opinion about her, and eight recommended that she be denied partnership."⁷⁶

Multiple partners praised her performance on large projects.⁷⁷ Some criticized her for being brusque with staff members.⁷⁸ The Supreme Court recounted the now-famous comments about Ms. Hopkins submitted by some of the partners.

One partner described her as "macho"; another suggested that she "overcompensated for being a woman"; a third advised her to take "a course at charm school." Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." Another supporter explained that Hopkins "ha[d]

72. *Id.* at 232.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 233.

77. *Id.*

78. *Id.*

matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate." But it was the man who, as [the district judge] found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁷⁹

The Supreme Court held that a plaintiff can prevail on a sex discrimination case if she can show that her gender was the motivating factor for an outcome.⁸⁰ The Supreme Court did not appear to focus on agency issues, but viewed liability as the employer's direct liability.⁸¹

The Court focused on whether the outcome was influenced by sex-based considerations.⁸² The Supreme Court noted: "a person's gender may not be considered in making decisions that affect her. Indeed, Title VII even forbids employers to make gender an indirect stumbling block to employment opportunities."⁸³ The Court also noted that an employer is liable under Title VII when it allows "gender to affect its decision-making process."⁸⁴ The Court also specifically stated that it was not limiting the ways that the plaintiff could prove her sex played a role in the employer's decision.⁸⁵

There are several features of *Price Waterhouse* that are important to our cat's paw discussion. First, the Supreme Court did not even identify who "made" the final decision, other than a "policy board."⁸⁶ Nor did the Court specifically trace a biased individual's influence to that final decisionmaker. It did not discuss the votes of the individual members of the policy board or what information each reviewed.

79. *Id.* at 235 (citations omitted).

80. *Id.* at 240-41. The main opinion in *Price Waterhouse* is a plurality; however, some portions of the plurality analysis constitute a majority when combined with one or both of the concurring opinions.

81. *See id.* at 241-42.

82. *Id.*

83. *Id.* at 242.

84. *Id.* at 248.

85. *Id.* at 251-52.

86. *Id.* at 256.

In *Price Waterhouse*, the Supreme Court was not concerned about identifying how a particular person's animus reached a particular decisionmaker and affected that person's decision. Instead, the Court was broadly concerned with whether the outcome was caused by the protected trait. Indeed, in *Price Waterhouse*, the Court only generally connected the biased comments to the outcome.

Hopkins showed that the partnership solicited evaluations from all of the firm's partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners' comments were the product of stereotyping; and that the firm in no way disclaimed reliance on those particular comments, either in Hopkins' case or in the past. Certainly a plausible—and, one might say, inevitable—conclusion to draw from this set of circumstances is that the Policy Board in making its decision did in fact take into account all of the partners' comments, including the comments that were motivated by stereotypical notions about women's proper deportment.⁸⁷

Justice Sandra Day O'Connor noted in concurrence that requiring the plaintiff to prove that there was one definitive cause of an action would, "[p]articularly in the context of the professional world, where decisions are often made by collegial bodies on the basis of largely subjective criteria, . . . be tantamount to declaring Title VII inapplicable to such decisions."⁸⁸

Rather, the Court was concerned with whether the outcome was caused or impacted by a protected class. While the Supreme Court did discuss motivation in *Price Waterhouse*, it was not a technical discussion of a legal concept of intent, motive, or animus. Rather, the discussion focused on what impacted the employer's decision, not what a particular individual's motive was.⁸⁹ Gender affected the decision-making process even though some of the comments submitted were not facially based on the plaintiff's sex (i.e., comments about her use of profanity).⁹⁰

87. *Id.*

88. *Id.* at 273 (O'Connor, J., concurring). Justice O'Connor's concurrence did state that the biased input played a substantial role in the decision. Additionally, she would have required that the biased input constitute direct evidence.

89. *Id.* at 252.

90. *Id.* at 251 (noting that allowing gender stereotypes to affect the process is discrimination).

Second, *Price Waterhouse* did not identify most of the allegedly biased individuals or describe what adverse action they intended. Indeed, some of the people who described Hopkins in stereotypical ways supported her candidacy.⁹¹ As discussed below, one way to read *Staub* is that the biased individual must intend a negative result and that same result must happen. However, in *Price Waterhouse*, there was little information about what the people who submitted biased comments intended, and there is evidence that some of those people intended a positive outcome, not a negative one.

Third, even though the Supreme Court identified individuals with input as “partners,” it did not describe what authority these partners had. Indeed, from the facts, it appears that many of the partners only had the ability to make recommendations and not to take any specific actions against Ms. Hopkins.

Finally, the Supreme Court did not use proximate cause to resolve *Price Waterhouse*. The Court did not exclude the early partner comments because of some notion that they were too distant or unconnected from the final decision to legally remain part of the causal chain.

Importantly, after *Price Waterhouse*, Congress amended Title VII to codify the idea that a plaintiff can establish discrimination by showing her protected class was a motivating factor in an outcome. That amendment allows a plaintiff to prevail by showing “that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”⁹² This language makes a connection between the protected class and an outcome, not the bias of a particular individual.

B. *Desert Palace v. Costa*

Courts also have a difficult time reconciling cat’s paw doctrine with *Desert Palace, Inc. v. Costa*.⁹³ Here is how the Supreme Court described the facts in that case:

91. *Id.* at 234.

92. 42 U.S.C. § 2000e-2(m) (2018).

93. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95–96 (2003).

Respondent experienced a number of problems with management and her co-workers that led to an escalating series of disciplinary sanctions, including informal rebukes, a denial of privileges, and suspension. Petitioner finally terminated respondent after she was involved in a physical altercation in a warehouse elevator with fellow Teamsters member Herbert Gerber. Petitioner disciplined both employees because the facts surrounding the incident were in dispute, but Gerber, who had a clean disciplinary record, received only a 5-day suspension.⁹⁴

In this case, the Supreme Court held that a plaintiff is not required to provide direct evidence to prevail in a case where she uses motivating factor as the causal standard. Instead, the Court held "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"⁹⁵ The Supreme Court upheld a jury's verdict in the plaintiff's favor.

As with *Price Waterhouse*, the Supreme Court only generally recounted how people were involved in the events leading up to the plaintiff's termination. The Court described some as supervisors and some as co-workers, but it did not describe specifically how any of them contributed to the outcome. Nor did the Court describe what authority each person had. The Court did not discuss agency issues or proximate cause.

The lower court decisions highlight the difficulties that courts will have reconciling *Desert Palace* and cat's paw. The appellate court described differential treatment of the plaintiff by various individuals. These individuals held at least somewhat supervisory roles, though the court did not exactly know who the individuals were, what authority they possessed, or how their treatment led to the plaintiff's termination. The Ninth Circuit en banc described a portion of the facts as follows:

For example, when men came in late, they were often given overtime to make up the lost time; when Costa came in late—in one case, one minute late—she was issued a written reprimand, known as a record of counseling. When men missed work for medical reasons, they were given overtime to make up the lost

94. *Id.*

95. *Id.* at 101.

time; when Costa missed work for medical reasons, she was disciplined. On one occasion, a warehouse supervisor actually suspended her because she had missed work while undergoing surgery to remove a tumor; only the intervention of the director of human resources voided this action.⁹⁶

The Ninth Circuit then continued by describing numerous instances in which various unnamed supervisors treated the plaintiff more harshly than men, mostly resulting in disciplinary write-ups for the plaintiff.⁹⁷

The Ninth Circuit described how the employer justified its termination decision relating to an altercation involving the plaintiff and another employee. The plaintiff presented evidence that the male employee shoved her against a wall. The male employee alleged that the plaintiff hit him, which was contested. Nonetheless, the company gave the male employee a suspension and fired the plaintiff. The company asserted that the plaintiff was fired because of the fight and because of her disciplinary history.⁹⁸

It is unclear whether *Desert Palace* is strictly a cat's paw case. The plaintiff presented evidence that the person who signed the discharge paperwork had expressed an intention to "get rid of that bitch."⁹⁹ The Ninth Circuit panel recounted how three people were involved in the decision to terminate the plaintiff, but there is no discussion about how they made the decision to fire the plaintiff.¹⁰⁰ As discussed below, there is an open question in current cat's paw doctrine about whether a case fits within cat's paw when there is evidence that one member of a multi-member decision-making team exhibits bias, but there is not evidence that the majority of the members were biased. Additionally, it is not clear in *Desert Palace* whether the other "decisionmakers" knew about the alleged bias of the other member.

96. *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 845 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

97. *Id.*

98. *Id.* at 846.

99. *Id.* at 861.

100. *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 888 (9th Cir. 2001), *aff'd in part, rev'd in part en banc*, 299 F.3d 838 (9th Cir. 2002), *aff'd*, 539 U.S. 90 (2003).

The Ninth Circuit en banc never described how the final decision to fire the plaintiff was made and did not absolve the company of liability because some of the decisionmakers did not exhibit bias.

At the very least, *Desert Palace* shows that a plaintiff can use disciplinary write-ups from individuals who are not final decisionmakers to support her claim without going through the hurdles imposed by a restrictive version of *Staub*. To use this evidence, a plaintiff is not required to show that a supervisor with animus intended an adverse action. Evidence of differential discipline is sufficient when the disciplinary history is used in the termination decision. *Desert Palace* also strongly suggests that if there is evidence that one person in a multi-member decision-making team is biased, then cat's paw is not the proper analysis.

C. Reeves v. Sanderson Plumbing Products

Reeves v. Sanderson Plumbing Products is another case that involves multiple inputs by multiple people.¹⁰¹ In that case, the plaintiff Roger Reeves was fired at the age of fifty-seven after working for his company for forty years. He worked in a department called the Hinge Room.¹⁰² Joe Oswalt, who was in his thirties, supervised the Hinge Room's special line.¹⁰³ Russell Caldwell, aged forty-five, supervised both the plaintiff and Oswalt.¹⁰⁴

Powe Chesnut was the company's director of manufacturing. Chesnut was married to the company's president, Sandra Sanderson.¹⁰⁵ In 1995, Caldwell informed Chesnut that production was down, and an audit found numerous timekeeping problems by Caldwell, Oswalt, and the plaintiff.¹⁰⁶ According to the Court, "Chesnut, along with Dana Jester, vice president of human resources, and Tom Whitaker, vice president of operations, recommended to company president Sanderson that [plaintiff Reeves] and Caldwell be fired."¹⁰⁷ Sanderson fired Reeves.

101. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 137 (2000).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 137-38.

107. *Id.* at 138.

In his age discrimination suit, the plaintiff presented evidence contesting any timekeeping errors. The Supreme Court held that this evidence of pretext was sufficient to prevail on his age discrimination claim because a factfinder could infer that the non-credible reason was a pretext for age discrimination.¹⁰⁸ The Court left open the possibility that in some cases evidence of pretext would not be sufficient for the plaintiff to prevail:

Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.¹⁰⁹

Plaintiff also presented evidence that Chesnut told him that he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job."¹¹⁰ In addition, plaintiff presented evidence of Chesnut's differential treatment of the plaintiff and a younger employee.¹¹¹

This case fits within the contours of what would later be called a cat's paw case. Sanderson made the formal decision to fire the plaintiff, and there is no evidence recounted by the Supreme Court that she had any age-based animus. Although the Court cryptically noted that Chesnut was the person "behind [the] firing,"¹¹² the Court did not describe how Chesnut influenced Sanderson. According to the Supreme Court's account, two other individuals were also involved in the decision, and the Court did not provide any evidence that those two individuals were biased. The Court did not even discuss how they influenced the decision in any detail.

Like other pre-*Staub* cases involving multiple decisionmakers, the Supreme Court in *Reeves* was not concerned about connecting

108. *Id.* at 147.

109. *Id.* at 148.

110. *Id.* at 151 (alterations in original).

111. *See id.*

112. *Id.* at 152.

the bias of one person and the influence it had over another person. In fact, the Court provided only the broadest details about the unbiased individuals engaged in the decision-making process. In *Reeves*, the Supreme Court again stressed the connection between the protected class and the outcome.¹¹³

Nor did *Reeves* focus on what adverse action Chesnut intended. Instead, the Court painted a broad picture of the evidence in favor of the plaintiff, which included differential treatment by Chesnut, age-related derogatory comments, and evidence that the reason the employer fired the plaintiff was pretext.

The Supreme Court in *Reeves* did not overtly engage in any agency analysis about whether Chesnut's actions can be imputed to the company, even though the facts strongly suggest that he did not individually possess the power to fire the plaintiff. The Court did not parse out his ability to take adverse actions or "tangible employment actions," nor did it try to determine whether he was a supervisor in the technical sense that the company authorized him to take such actions.

Finally, the Supreme Court did not use proximate cause to resolve the case. The Court did not even provide a detailed timeline about when all of the events in the case happened. Instead, the Court broadly considered the evidence to determine whether it supported the idea that age played a role in the termination.

D. Post-Staub: University of Texas Southwestern Medical Center v. Nassar

The Supreme Court decided *University of Texas Southwestern Medical Center v. Nassar* two years after *Staub*.¹¹⁴ Even though *Nassar* has facts that arguably fit within cat's paw, the Court did not use a cat's paw analysis to resolve the case.

In *Nassar*, the plaintiff alleged that a medical school for which he worked discriminated against him based on his race, national origin, and religion.¹¹⁵ The plaintiff quit his job at the medical

113. *Id.* at 141.

114. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

115. *Id.* at 345; Nassar v. Univ. of Tex. Sw. Med. Ctr., No. 3:08-CV-1337-B, 2010 WL 3000877, at *1 (N.D. Tex. July 27, 2010), *aff'd in part, vacated in part*, 674 F.3d 448 (5th Cir. 2012), *vacated*, 570 U.S. 338 (2013).

school and sought a physician position at the medical school's affiliated hospital.¹¹⁶

When it appeared the hospital would extend the plaintiff an offer, the plaintiff quit his job at the medical school.¹¹⁷ He wrote a letter indicating that he was quitting because of religious, racial, and cultural bias.¹¹⁸ A medical school official responded negatively to this letter and reached out to the hospital, informing it that offering the plaintiff a job was inconsistent with an agreement between the medical school and the hospital.¹¹⁹ The hospital rescinded the offer.¹²⁰

The Supreme Court considered the plaintiff's retaliation claim. This case arguably presented a cat's paw scenario. The medical school official allegedly possessed the retaliatory motive. The separate hospital rescinded the offer. The medical school official did not have the power to rescind the offer made by the hospital, a separate entity. Instead, it could be argued that the medical school administrator used the hospital to retaliate against the plaintiff.

However, like the other cases discussed in this Part, the Court did not use a cat's paw analysis to resolve the case. Importantly, *Nassar* did not focus on the intent or motive of any individual. Rather, it focused on factual cause.¹²¹ It also focused on the wrongful actions of the employer, and did not use an agency analysis to impute liability to the employer based on the individuals who worked for the employer.¹²² The Court held that the required connection was between the protected activity and the adverse action.¹²³ The Court did not use a proximate cause analysis.

Importantly, even though *Nassar* was decided after *Staub*, the Supreme Court did not cite to *Staub* or use its framework to resolve the case.

116. *Nassar*, 570 U.S. at 344–45.

117. *Id.* at 344.

118. *Id.*

119. *Id.* at 345.

120. *Id.*

121. *See generally id.*

122. *Id.* at 360.

123. *Id.* at 362.

E. Summary

Prior to *Staub*, courts did not need or use a cat's paw analysis to resolve cases that arguably fit within a cat's paw model. Indeed, there are even other canonical Supreme Court cases where the Court did not describe who made the contested decision, only reiterating the parties' contentions and evidence about the reason behind the decision.¹²⁴

In these cases, the Supreme Court did not locate the supposedly biased individual and trace his or her motive through to its influence on an unbiased person. Many of these cases do not describe in detail who made the final decision and how bias impacted that person. The cases do not require proof that a biased person intended a particular kind of adverse action. The Supreme Court did not rely on the status of the allegedly biased individual to determine employer liability. Nor did the Court rely on a proximate cause analysis.

From these cases, two broad themes emerge. The Supreme Court did not need a separate cat's paw doctrine to resolve them. Instead, the Court relied on whether there was a connection between the protected trait or protected activity and the outcome. Additionally, these cases suggest that viewing *Staub* to robustly limit discrimination claims is problematic. Indeed, as discussed in Part IV, it is difficult to reconcile *Staub* with many of these cases.

III. A CAREFUL LOOK AT *SHAGER*

The cat's paw theory got its catchy name in the Seventh Circuit case, *Shager v. Upjohn Co.*¹²⁵ Surprisingly, *Shager* did not actually rely on cat's paw doctrine for its central holding. The cat's paw discussion is dicta.

Shager actually held that a plaintiff may get past summary judgment through multiple evidentiary paths and is not required to jump through a cat's paw analysis. The Seventh Circuit did not need any theory with a catchy name to resolve the case. And, as discussed below, the Seventh Circuit admitted as much, repeatedly

124. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Gross v. FBL Fin. Servs., Inc.*, 526 F.3d 356, 358 (8th Cir. 2008), *vacated*, 557 U.S. 167 (2009).

125. *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

stating that the plaintiff possessed multiple kinds of evidence that considered individually would have been sufficient to allow the plaintiff to go to trial.

Re-focusing on *Shager* reveals two important points. First, a cat's paw theory was not necessary. Second, the Seventh Circuit recognized numerous kinds of evidence outside of cat's paw that a plaintiff can use to survive summary judgment that must be viewed outside the lens of the cat's paw doctrine.

In *Shager*, the plaintiff alleged that his younger supervisor exaggerated his performance deficiencies and did not recognize his outstanding sales performance, while applying different standards to other, younger sales representatives.¹²⁶ The employer contested the plaintiff's evidence and offered evidence that it fired the plaintiff for performance deficiencies.¹²⁷ The younger supervisor recommended that the plaintiff be fired to a committee that reviewed personnel actions.¹²⁸

In *Shager*, the Seventh Circuit recognized that holding an older worker to a higher performance standard than younger workers and then firing him based on the differential standard is not simply evidence of discrimination, it actually *is* age discrimination.¹²⁹ No further evidence is necessary to establish a violation of law. Indeed, differential treatment is at the core of discrimination law.¹³⁰

The plaintiff also submitted evidence that the company replaced him with a younger worker and that the younger supervisor evaluated that younger employee noting, "It is refreshing to work with a young man with such a wonderful outlook on life and on his job," though in fact the Seventh Circuit indicated the younger worker's "performance had not been distinguished."¹³¹ These facts also supported the plaintiff's age discrimination claim. Importantly, this evidence did not involve the committee who reviewed the plaintiff's termination. This evidence did not rely on cat's paw.

126. *Id.*

127. *Id.* at 400-01.

128. *Id.* at 400.

129. *See id.* at 402 (noting that the plaintiff did not even need to rely on the *McDonnell Douglas* pretext inquiry).

130. *See generally* *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that disciplining white employees more harshly than others is discrimination).

131. *Shager*, 913 F.2d at 400.

The plaintiff also presented evidence that the younger supervisor said to a younger salesman, “[t]hese older people don’t much like or much care for us baby boomers, but there isn’t much they can do about it,” and that he frequently made comments that “the old guys know how to get around things.”¹³² The Seventh Circuit noted that the trial court had improperly labeled these age-related comments as “stray remarks,” and that these comments were also evidence of discrimination.¹³³

The Seventh Circuit even noted that the company’s replacement of the plaintiff with a younger worker combined with a spurious reason for his termination would be enough evidence to survive a motion for summary judgment.¹³⁴

Shager then took a strange turn. The court turned to the argument of whether the committee’s decision somehow shielded the company from liability.¹³⁵ This is strange for a number of reasons. First, the Seventh Circuit had already catalogued a number of separate evidentiary paths upon which the plaintiff could establish liability. Second, some of that evidence did not depend on the action taken by the committee. There is no evidence that the committee was involved in hiring a young employee and in making age-related remarks about that new employee’s performance.

The Seventh Circuit in *Shager* appeared to struggle with how agency ideas intersect with employer liability. In another case, the Supreme Court had suggested that employers would not be liable for all sexual harassment that occurred in the workplace.¹³⁶ Although the Supreme Court would later address the issue of employer liability for sexual harassment in two cases,¹³⁷ the Court had not decided these cases at the time the Seventh Circuit decided *Shager*. However, the Seventh Circuit was grappling with how to reconcile statements the Supreme Court made about agency in the harassment context to the facts of *Shager*.

132. *Id.*

133. *Id.* at 402.

134. *Id.*

135. *Id.* at 405.

136. *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 72 (1986).

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

The Seventh Circuit could not even decide whether it was discussing derivative liability or the employer's direct liability.¹³⁸ An employer's derivative liability would be based solely on the fact that it is liable for the acts of its agents. An employer's direct liability would be based on the acts or omissions the employer allowed. Although Title VII and the ADEA do not distinguish these two types of liability and do explicitly allow for the employer to be liable for the acts of agents, the Supreme Court later made these distinctions important in the harassment context.¹³⁹ Importantly, all of this discussion about agency and cat's paw was dicta.

It is clear from the Seventh Circuit's discussion that it was not creating a threshold which all plaintiffs in cases involving a biased individual and a later decisionmaker must overcome. It simply noted that, given the facts of the case, the committee action did not absolve the company of liability. Then inexplicably, the Seventh Circuit stated, "If the Career Path Committee was not a mere rubber stamp, but made an independent decision to fire Shager, not only would there be no ground for finding willful misconduct by [the employer], there would be no ground for finding even an innocent violation of the Act."¹⁴⁰ This sentence is unconnected from the prior discussion about agency, but it is from this one sentence that much of the later mischief follows.

The Seventh Circuit implied that once an employee is singled out for negative treatment based on biased information, a subsequent decisionmaker could somehow make an independent decision that justified the negative outcome. This ignores that, in many instances, the ultimate decisionmaker would not be making any decision at all without the biased input and that singling out the employee for further scrutiny because of a protected class is also discriminatory.

Although *Shager* is often cited as a cat's paw case,¹⁴¹ this is inaccurate. A careful review of *Shager* reveals important insights that courts need post-*Staub* to determine how and whether to apply a robust cat's paw analysis. First, not all evidence in cases with a biased person and a later decisionmaker is evidence related to cat's

138. *Shager*, 913 F.2d at 404.

139. 29 U.S.C. § 630(b) (2018); 42 U.S.C. § 2000e(b) (2018). See generally *supra* note 136.

140. *Shager*, 913 F.2d at 406.

141. See, e.g., *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004).

paw. In *Shager*, some of the evidence did not involve the committee or its recommendation at all. Second, the Seventh Circuit in *Shager* identified multiple ways for the plaintiff to survive summary judgment that did not involve a cat's paw analysis, including evidence of differential treatment, pretext, and the hiring of a younger worker to replace the plaintiff. Third, *Shager* did not hold that if a case cannot survive a cat's paw analysis then it is not viable. Most importantly, the court that coined the phrase "cat's paw" did not rely on cat's paw to resolve the case.

IV. RECONCILING *STAUB*

The only way to reconcile *Staub* with the other cases discussed in this Article is to either re-imagine their facts or to abandon cat's paw as a separate doctrine with any restrictive, independent content. I argue that the better path is to abandon cat's paw as a separate doctrine and instead re-frame the inquiry using the parameters of the statutory text, which allow a plaintiff to prevail by connecting her protected trait to a negative outcome.¹⁴² If the courts are unwilling to abolish cat's paw, then *Shager* shows how cat's paw can be greatly diminished.

Under *Staub*, "if a supervisor performs an act motivated by [impermissible] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable."¹⁴³ One way to read *Staub* is that it is just expressing one way to prove a discrimination claim and that its words of limitation are meaningless.

In other words, even though the Supreme Court left open the question of whether co-workers could be the biased actors, the Court did not mean that the doctrine only applies when a supervisor is involved. Co-workers can start the sequence of events, as can others who do not have supervisory power, such as customers. Likewise, the words in *Staub* that require the supervisor to intend an adverse action are also not words of limitation. The plaintiff can prevail by showing the facts as stated in *Staub*, but there are also other ways the plaintiff can prevail. For example, the

142. This is not the only way a plaintiff could prevail under the statute.

143. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (footnote omitted).

plaintiff might be able to prevail if she shows that the biased individual intended one result and another result happened. And, the plaintiff can prevail if the biased individual did not intend any particular result, but an adverse outcome resulted.

Currently the lower courts are struggling with these questions: who can start the sequence of events, what that person must intend, how the person who initiates the sequence must interact with others, and how the initial impetus must impact the outcome?¹⁴⁴ The answers to these questions vary widely right now.

A. *Price Waterhouse v. Hopkins*

Courts are grappling with *Staub*, but they fail to realize that, unless *cat's paw* is almost meaningless as a separate doctrine, it is difficult to reconcile with *Price Waterhouse*. Recall that in *Price Waterhouse*, the Court addressed a woman's claim that Price Waterhouse denied her partnership based on the biased input of numerous individuals.¹⁴⁵ In *Price Waterhouse*, the Court allowed the plaintiff to submit evidence from a wide range of people, and, other than describing these individuals as partners, the Court did not describe whether the partners had any supervisory power over the plaintiff.¹⁴⁶

If the Court ultimately holds that supervisory status is required, the question about who counts as a supervisor is going to be tricky. In another context, the Court has held that a supervisor is a person who has the ability to take a tangible employment action.¹⁴⁷ A tangible employment action is a term of art in employment discrimination law that is reserved for relatively serious outcomes, like failure to hire, termination, or failure to promote.¹⁴⁸ However, this definition does not make sense in the *cat's paw* scenario because if the supervisor had the power to take the negative action, a *cat's paw* analysis would typically be unnecessary. The biased

144. See cases discussed *infra* Section V.B.

145. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232–33 (1989).

146. *Id.* at 233.

147. *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). In *Vance*, the Court considered whether a person who could make some day-to-day decisions about the plaintiff's work counted as a supervisor, if the person did not have the power to terminate the plaintiff. *Id.* at 425–26.

148. *Id.* at 431.

individual would just fire or demote the plaintiff and would not need the unbiased individual to take the action.

But if supervisor status remains as a required element for cat's paw liability, then it is very unlikely that every partner who submitted biased information about the plaintiff in *Price Waterhouse* could be classified as her supervisor. Indeed the expert testimony in the case suggested that some of the negative feedback came from partners "who knew Hopkins only slightly."¹⁴⁹ Unless the courts view *Staub* as simply expressing a way that a plaintiff can prevail, they will have a difficult time explaining which partner comments counted towards Hopkins's claim against Price Waterhouse and which did not count. Of course, this leads to additional questions: why would courts want to make these formal distinctions at all, and how could courts ground such distinctions in the text or purpose of the federal discrimination statutes.

Further, some of the negative comments about Hopkins appear to be based on staff complaints about her.¹⁵⁰ Under current cat's paw doctrine, it is unclear what would happen if a supervisor passes along the biased complaints of non-supervisors. This issue gets complicated because the supervisor who passes along comments could be biased himself or could be passing along complaints about women, but not similar comments about men. The supervisor could just be passing the complaints along, without recognizing that they might be based on differential expectations about how men and women should behave; that is, that women should be nice, but that men are not expected to be nice. The supervisor might also equally pass along similar complaints about men. A restrictive cat's paw doctrine does not precisely describe what should happen in such a scenario, although the Court in *Price Waterhouse* did not feel the need to address this at all. Thus, *Price Waterhouse* militates against a view of the cat's paw doctrine that requires supervisory status as an element.

A restrictive version of the cat's paw doctrine also appears to require the "biased" individual to intend a negative action. In *Staub*, the Court held that "if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of

149. *Price Waterhouse*, 490 U.S. at 235.

150. *Id.*

the ultimate employment action, then the employer is liable.”¹⁵¹ However, in *Price Waterhouse*, though some people wanted the plaintiff to be promoted to partner, they still submitted negative information about the plaintiff that may have been founded on stereotypes of differential expectations between men and women.¹⁵² Nonetheless, the stereotyped comments negatively impacted the plaintiff. Cat’s paw doctrine, as enunciated in *Staub*, does not currently anticipate this set of events. It is unclear what should happen under *Staub* if a supervisor who otherwise supports an employee and wants the employee to succeed, passes along biased, negative information that ultimately contributes to a negative outcome.

Additionally, *Price Waterhouse* did not carefully connect what each partner intended with the ultimate outcome. Some of the partners recommended that the firm deny Hopkins partnership, others wanted Hopkins to become a partner, some indicated they did not have enough information to state an opinion about her partnership, and still others submitted an evaluation without making any kind of indication about how that evaluation should factor into her candidacy.¹⁵³ In *Price Waterhouse*, the Court did not seem to believe that such information was relevant to determining whether the employer discriminated against the plaintiff. However, a restrictive view of *Staub* seems to require a court to discern which people intended a negative outcome.

Further, *Price Waterhouse* did not use a proximate cause analysis. Indeed, to the extent that *Staub* suggests that a proximate cause analysis is required in cat’s paw cases, the proximate cause would need to be broad enough to encompass facts similar to *Price Waterhouse*, which embrace a wide range of comments, from a wide range of people, over a long period of time, and from multiple decision-making bodies.

The Supreme Court also did not frame *Price Waterhouse* in terms of agency analysis. The Court did not find biased individuals who

151. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (footnote omitted).

152. *Price Waterhouse*, 490 U.S. at 234–35 (“Another supporter explained that Hopkins ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate.” (first alteration in original) (citation omitted)).

153. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1113 (D.D.C. 1985), *aff’d in part, rev’d in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d*, 490 U.S. 228 (1989).

were sufficient agents of the employer and base liability on that derivative liability. Instead, it appeared to hold the company liable for the outcome by aggregating all the acts of the employees with the employer's own failure to prevent bias and stereotypes from infecting its process for selecting partners.

Price Waterhouse also points to another problem with cat's paw. Some of the comments were clearly sexist. Others were not facially sexist but reflected sex stereotypes, and still other comments were negative but may or may not have reflected stereotypes. Now that cat's paw doctrine exists, a question remains about how to reconcile it with this set of facts. Does *Price Waterhouse* fall outside cat's paw because some of the comments were clearly based on the plaintiff's sex? Is the court required to apply cat's paw analysis to the comments that are not facially based on sex? Cat's paw doctrine invites this kind of further discussion, but it is a discussion not worth having. *Price Waterhouse* already provides a workable way forward, especially given that Congress largely codified that framework in the 1991 amendments to Title VII.

B. Desert Palace v. Costa

If cat's paw is a restrictive, separate doctrine, it also will be hard to reconcile it with *Desert Palace*.¹⁵⁴ In that case, the Supreme Court only generally described an escalating series of problems between plaintiff and her co-workers and management.¹⁵⁵ Recall that the Court described the facts as follows:

Respondent experienced a number of problems with management and her co-workers that led to an escalating series of disciplinary sanctions, including informal rebukes, a denial of privileges, and suspension. Petitioner finally terminated respondent after she was involved in a physical altercation in a warehouse elevator with fellow Teamsters member Herbert Gerber. Petitioner disciplined both employees because the facts surrounding the incident were in dispute, but Gerber, who had a clean disciplinary record, received only a 5-day suspension.¹⁵⁶

154. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

155. *Id.* at 95-96.

156. *Id.*

Like *Price Waterhouse*, the Court does not recount who had the required bias, what supervisory authority those individuals possessed, or what each one of them intended. The Court does not discuss agency issues or proximate cause.

Importantly, much of the evidence in *Desert Palace* related to disciplinary write-ups given to the plaintiff over a long period of time by various individuals.¹⁵⁷ It is not clear that when a supervisor gives a person a disciplinary notice that the supervisor intends to have the person fired (the end result in *Desert Palace*). Given how many write-ups were given to the plaintiff Costa, it does not even appear to be substantially certain that a write-up would lead to termination. However, whether the supervisors intended for Costa to be fired or not, the write-ups played a role in her ultimate termination. The company stated that it fired her because of both the fight and her disciplinary history.¹⁵⁸

One reading of *Staub* appears to suggest that the biased individual must intend the outcome that later happens. The lower courts are considering this issue.¹⁵⁹ However, requiring a plaintiff to prove that the biased individual intended the outcome would be at odds with the facts of *Desert Palace*. *Desert Palace* suggests that it is enough if the biased negative action played a role in the outcome, whether the individual intended a particular outcome or not. The Court did not describe how each of the incidents in the disciplinary history contributed to the outcome and what each person in the disciplinary chain intended as the outcome.¹⁶⁰

Additionally, much of the evidence in *Desert Palace* related to differential treatment of the plaintiff compared to the men with whom she worked.¹⁶¹ As discussed throughout this Article, it is not clear how such evidence intersects with a cat's paw analysis. Differential treatment because of a protected trait is discrimination, whether it presents as a cat's paw scenario or not.

As mentioned earlier, *Desert Palace* is not strictly a cat's paw case because the plaintiff presented evidence that the person who signed the discharge paperwork had expressed an intention to "get

157. *Id.*

158. *Id.* at 96.

159. *See, e.g.,* *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 352 n.11 (6th Cir. 2012).

160. *Desert Palace*, 539 U.S. at 95-96.

161. *See generally* *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002) (en banc), *aff'd*, 539 U.S. 90 (2003).

rid of that bitch.”¹⁶² However, three people were involved in the decision to terminate Costa, and the Court did not describe in detail how these three reached their decision.¹⁶³ This raises all sorts of questions about cat’s paw analysis. Does cat’s paw not apply if any person along the causal chain who also has the power to take an adverse action is biased? What happens if the other people in the causal chain who also had that power were not biased and were not influenced by any prior biased input? Does it matter what the relationship among the people looks like?

The answers to these questions require a very precise parsing of who had what power and how that power was exercised. The endless variations of how multiple people can reach an outcome will wreak havoc on cat’s paw analysis. For example, will cat’s paw apply if one member of a multi-member panel is biased, but the panel has an unbiased chairperson who can veto the recommendations of the group? What happens if the biased panel member presents information to the group but recuses himself from the voting process regarding the plaintiff? The parade of variables is endless. It is difficult to reconcile a restrictive view of cat’s paw analysis with *Desert Palace*.

C. *Reeves v. Sanderson Plumbing Products, Inc.*

Similar problems exist reconciling a restrictive version of the cat’s paw doctrine with *Reeves*.

In *Reeves*, at least four people were involved in the decision to fire the plaintiff.¹⁶⁴ The Supreme Court did not provide any facts suggesting that three of the four people were acting because of the plaintiff’s age. The Supreme Court did not really describe the decision-making process in detail. It noted that Chesnut (the allegedly biased individual), along with a vice president of human resources and a vice president of operations, recommended to the company president that the company should fire the plaintiff.¹⁶⁵ It is not clear what power Chesnut had compared to the others.

162. *Id.* at 861.

163. Unlike the Supreme Court, the Ninth Circuit panel did address the multi-member decision-making aspect of *Desert Palace*. *Costa v. Desert Palace, Inc.*, 268 F.3d 882, 888 (9th Cir. 2001), *aff’d in part, rev’d in part en banc*, 299 F.3d 838 (9th Cir. 2002), *aff’d*, 539 U.S. 90 (2003) (identifying “one of three [alleged] decisionmakers in Costa’s termination”).

164. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 138 (2000).

165. *Id.*

It could be argued that *Reeves* fits nicely within the current cat's paw doctrine because the Supreme Court noted that Chesnut was the person "behind [the] firing."¹⁶⁶ However, it is not clear from the Supreme Court's description in what way he was "behind the firing." More detail is required here because in many cat's paw cases, the plaintiff is alleging that the biased person was really "behind the firing."

Additionally, *Reeves* presents another complicating factor. Chesnut was married to the company president, who ultimately made the final decision to fire the plaintiff. Does this relationship change cat's paw analysis in any way? For example, imagine a slightly different scenario where Chesnut was the plaintiff's co-worker and did not possess any supervisory authority. Now imagine, this co-worker Chesnut was married to the company president and made false reports about the plaintiff's work because of the plaintiff's protected class. If cat's paw analysis is ultimately going to distinguish liability between co-workers and supervisors, then the doctrine will need to contend with co-workers who have special relationships with people in power, including familial and sexual relationships.

Recall also that the plaintiff in *Reeves* relied on multiple kinds of evidence to support the outcome. In addition to age-related comments, the plaintiff also relied on evidence that the reason given for his termination was incorrect or not true.¹⁶⁷ He also presented evidence of Chesnut's differential treatment of the plaintiff and a younger individual. It is not clear how cat's paw intersects with other evidentiary paths.

Additionally, to the extent that cat's paw is about agency, it will need to create an agency analysis that is compatible with *Reeves*. The facts of the case strongly suggest that the allegedly biased individual did not possess the power to fire the plaintiff. The Court did not parse out his ability to take "tangible employment actions," nor did it try to determine whether he was a supervisor in the technical sense that the company authorized him to take such actions. Finally, any proximate cause analysis would need to contend with the facts of *Reeves*.

166. *Id.* at 152.

167. *Id.* at 148.

D. University of Texas Southwestern Medical Center v. Nassar

Nassar also points to additional questions related to a restrictive cat's paw analysis. Recall that in *Nassar*, a person working for the medical school reached out to a separate entity (the hospital), and the hospital rescinded the job offer.¹⁶⁸

Nassar strongly suggests that cat's paw analysis works across multiple entities.¹⁶⁹ If so, it is unclear why the biased actor would need to be a supervisor. In many instances, the second entity would not be in a position to know or understand the power that the biased actor was exerting. For example, imagine a biased human resources professional gives a negative report to a potential employer who calls to ask about a person's job performance. The potential employer decides not to hire the individual. In this scenario, it is unclear why it would matter if the human resources professional was a supervisor in any sense. To the extent that cat's paw doctrine is about agency, this scenario raises questions about apparent authority and whether it would be a separate basis for holding the employer liable.

Nassar also begs the question of whether the second entity in the cat's paw could be liable for retaliation. The basic structure of cat's paw analysis suggests that the second employer might be liable because it allowed itself to be used as the tool of another (the employee of the first employer), who may have been acting for retaliatory reasons.

E. Reconciling Staub with Shager

Reconciling *Staub* and *Shager* also poses hurdles for a restrictive cat's paw doctrine. These relate to two overarching questions. First, does cat's paw apply when some of the evidence is not part of a cat's paw, in that it is not part of a biased individual influencing another person? Second, how should a court differentiate cat's paw evidence from other types of evidence that on their own may be sufficient to establish liability without relying on the cat's paw?

Cat's paw doctrine appears to apply in cases where one person is influencing another or an outcome. However, not all evidence that supports a finding of discrimination rests on this relationship.

168. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 345 (2013).

169. *Id.* at 350-51.

Recall that in *Shager*, some of the evidence did not involve the committee or its recommendation at all. Instead, the plaintiff presented evidence that the company hired a younger person to replace him and then treated that new hire more favorably.¹⁷⁰

This presents a wrinkle for cat's paw doctrine. Does a case fit within cat's paw if only some of the evidence relies on a cat's paw relationship? If so, it only makes sense to evaluate the cat's paw evidence through the lens of cat's paw doctrine. How would a court weigh other evidence of discrimination that does not depend on the cat's paw relationship? In many cases, existing employment discrimination jurisprudence would allow a plaintiff to get to a jury and ultimately prevail on this evidence alone.

Additionally, even evidence that fits within the parameters of cat's paw is sufficient on its own to establish discrimination without the trappings of the cat's paw analysis. In *Shager*, the Seventh Circuit determined that the plaintiff had presented multiple streams of evidence, each of which on its own would have been sufficient for the plaintiff to prevail.¹⁷¹ The Seventh Circuit focused on evidence of differential treatment and pretext, both of which are sufficient under current discrimination law to establish discrimination.¹⁷² If courts assert a restrictive cat's paw doctrine, they will need to answer endless questions about how the doctrine affects other ways that a plaintiff may prove discrimination. In *Shager*, cat's paw is an afterthought, not the primary lens through which the court viewed the evidence.

This Part shows that it is difficult to reconcile a restrictive cat's paw analysis with a wide swath of Supreme Court employment discrimination jurisprudence or with the case that named cat's paw as a separate doctrine.¹⁷³

170. *Shager v. Upjohn Co.*, 913 F.2d 398, 400 (7th Cir. 1990).

171. *Id.* at 400-02.

172. *Id.*

173. In addition to the cases discussed in this Article, there are other Supreme Court cases that may also raise cat's paw issues because the Supreme Court described the case in general terms, but lower courts described the cases in ways that suggest cat's paw issues. See, e.g., *White v. Burlington N. & Santa Fe Ry. Co.*, 310 F.3d 443, 447 (6th Cir. 2002), *reh'g en banc granted, vacated*, 321 F.3d 1203 (6th Cir. 2003), and *district court aff'd*, 364 F.3d 789 (6th Cir. 2004), *aff'd*, 548 U.S. 53 (2006) (noting that the first action taken against a plaintiff by a supervisor came after complaints from three non-supervisors, suggesting a cat's paw issue).

V. ABANDON CAT'S PAW

Reconciling a restrictive cat's paw doctrine with past Supreme Court case law is impossible. This Part pulls together an overview of the questions a court must answer to reconcile cat's paw with existing case law. The sheer number of questions suggests that continuing to develop a restrictive cat's paw doctrine is a mistake. Instead, courts should recognize that evidence of discrimination can take many forms across many relationships and that the key question in many cat's paw scenarios is causation.

The courts could accomplish this in many ways. The most forthright way would be to admit that labeling some scenarios as "cat's paw" cases and creating a doctrine around it was simply a mistake. In the courts' haste to recognize that a particular set of facts might constitute discrimination, the courts unnecessarily created a doctrine that appeared to limit those claims. The courts could also retain cat's paw, but then hold that *Staub* did not intend to place limits on it.

A. Unanswered Questions

Developing a restrictive cat's doctrine is problematic because it will involve the courts in an avalanche of issues that are not required by the texts or purposes of the federal discrimination statutes. This section pulls together many of the questions that the courts would need to answer to try to reconcile cat's paw with the Supreme Court cases discussed in this Article.

One line of questions relates to the status of the biased individual. The lower courts are currently struggling with problems such as these:

- Can co-workers start the chain of events?¹⁷⁴
- Can subordinates of the plaintiff start the chain of events?¹⁷⁵
- Can customers or others who are not supervisors or co-workers start the chain of events?¹⁷⁶

174. *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 274 (2d Cir. 2016) (applying an agency analysis to consider liability for co-worker input).

175. *Smith v. Comhar, Inc.*, 722 F. App'x 314, 318 (3d Cir. 2018) (noting that the circuit has never decided whether cat's paw theory could apply when allegedly biased individuals were subordinate to the plaintiff).

176. *Daniel v. Sargent & Lundy, L.L.C.*, No. 09 C 7206, 2012 WL 874419, at *11 (N.D. Ill. Mar. 14, 2012).

Co-worker status may be important in some cases because it may point to a problem with causation. The co-worker's actions may be so far removed from the decision that no reasonable jury would find that the co-worker's bias caused the outcome. In many (but not all) instances, a co-worker's input would be farther removed from an outcome than a supervisor's input would be. However, because the Court enshrined the concept of "supervisor" into cat's paw (and left open the question of what happens with co-worker bias), lower courts are diverted into believing that co-worker/supervisor status might be the relevant issue, rather than causation.

If the courts draw a line about what kinds of status create liability, then the courts will need to create a doctrine to define who falls within each status. For example, if the courts claim that only supervisors can create a cat's paw, they will need to define what "supervisor" means. The Court has already defined "supervisor" in the harassment agency context; however, the court-created definition is still ambiguous and does not fit well with what reasonable workers would believe the term means.¹⁷⁷

Additionally, the harassment agency definition of "supervisor" requires the supervisor to be able to take a tangible employment action or that the employer essentially delegate this authority to the individual by relying on her input.¹⁷⁸ This definition does not work well in the cat's paw context. If the biased individual possessed the authority to take tangible employment actions, the biased individual could just take the action and would not need to encourage others to take it. The courts would need to define "supervisor" in at least two different ways: one for purposes of harassment/agency doctrine and the other for purposes of cat's paw. Given that the word "supervisor" does not even appear in the federal discrimination statutes, it seems strange to develop two different definitions of "supervisor."

Further, as Justice Ginsburg pointed out in the harassment/agency context, any definition of supervisor is likely to be unsatisfactory given the infinite variety in the workplace.¹⁷⁹

177. *Vance v. Ball State Univ.*, 570 U.S. 421, 431 (2013).

178. *See, e.g., Cole v. Mgmt. & Training Corp.*, No. 4:11CV-118-JHM, 2014 WL 2612561, at *3 (W.D. Ky. June 11, 2014) (trying to navigate various definitions of supervisor).

179. *Vance*, 570 U.S. at 454, 464-65 (Ginsburg, J., dissenting).

Employers allow many different people with many different titles to make workplace decisions. Creating a rule that is flexible enough to draw the proper line is extraordinarily difficult.

Even if the courts were willing to navigate all of these problems, there would still be unanswered questions. Recall that in *Price Waterhouse*, some of the partners appeared to be passing along critiques of the plaintiff's performance given to them by staff when the partner had little contact with the plaintiff. It is unclear whether courts would count this conduct as the conduct of the supervisor or the conduct of the non-supervisory staff.

It also is unclear whether a person is a supervisor for purposes of cat's paw if they possessed power to take some actions, but not the contested action. For example, some employers may allow certain people to participate in hiring decisions, but have different people make termination decisions. If a supervisor only has the power to hire, is that person a supervisor if the plaintiff contests a termination?

Even if the courts could define the status of participants in the cat's paw, there would be many sets of facts that would not fall neatly within the defined categories. For example, if the courts decide that a co-worker cannot create cat's paw liability, the courts may need to create a different rule for co-workers who have special relationships with the decisionmaker, such as family or sexual relationships.

The courts are also going to need to figure out what the "biased" individual needs to intend. *Staub's* cat's paw doctrine was created in a fact scenario where there was evidence suggesting the biased individual wanted to get the plaintiff fired and the employer fired the plaintiff.¹⁸⁰ However, many of the Supreme Court cases discussed in this Article do not recount what the "biased" individual intended. Indeed, in *Price Waterhouse*, some of the people that supported the plaintiff's candidacy submitted sex-based comments about her performance.¹⁸¹ Further, the biased individual may work for one employer and pass along information to another employer. Is the first employer liable when it could not effectuate the intended result? Is the second employer liable for using the information?

180. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011).

181. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234 (1989).

And, there are fact scenarios where a biased individual may intend one consequence and another consequence occurs. For example, the biased supervisor may want to get the plaintiff fired, but the company retains her and denies her a later promotion. Or the biased individual may want to discipline the plaintiff, but she is fired instead. Likewise, there may be many instances where there is no way to credibly determine what the supervisor intended in a specific sense.

The courts also must figure out how biased input would affect decision-making processes that have multiple tiers or involve multiple people. What if only some of the people in the process receive the biased information? For example, what happens if an employer designates a three-person committee to determine whether to fire individuals? A supervisor reports biased information to one member on the committee, but the other two individuals do not receive the information in any way. The other two individuals vote to terminate the employee based on completely separate information. What happens if two of the members receive the biased information, but the third member does not? What if one member of the committee has more formal power than others on the committee? If cat's paw doctrine develops in a restrictive way, courts will need to determine how an endless variety of factual scenarios fit within it.

Even if the courts can define the required relationship and what is intended, the courts will need to define whether certain fact scenarios simply fall outside of cat's paw analysis. For example, what if a supervisor passes along information that facially conveys that the protected trait played a role in the decision, and the ultimate decisionmaker relies on it? This should fall outside the reach of cat's paw. It is likely that comments that convey stereotypes might also fall outside of the cat's paw. Additionally, if a decisionmaker relies on information from a person that the decisionmaker knows to be biased, this also does not seem to fit well in the cat's paw paradigm. But, defining what fits in and what fits outside of cat's paw will be an impossible task.¹⁸²

Additionally, what if the biased person has the power to take the action, but chooses to have others make the employment

182. Courts have had similar difficulties defining the difference between direct and circumstantial evidence.

decision? For example, what if a biased person is part of a multi-member decision-making group, submits information to that group, but then recuses himself from the decision-making? It is unclear if this is a cat's paw scenario. *Staub* does not fully anticipate that people with power may try to get others to carry out an action.

Courts also would need to decide how to handle cases that present evidence beyond just cat's paw evidence. All evidence of discrimination cannot be analyzed under the cat's paw doctrine because the cat's paw structure does not work for all kinds of evidence. Reconciling cat's paw with all of the different analytical structures that the courts use to evaluate discrimination claims is a decades-long project.

Staub also inserts a proximate cause analysis into cat's paw doctrine. Creating a proximate cause doctrine that is consistent with all past Supreme Court employment discrimination case law, as well as the text and purposes of the statute, is not only daunting but unnecessary. Title VII existed for more than forty years without any need for proximate cause analysis. Indeed, as I discuss extensively in prior work, the statute itself performs the work of proximate cause by defining the people protected by it, the entities liable for discrimination, and defenses and affirmative defenses to liability.¹⁸³

Finally, to the extent that cat's paw doctrine represents the courts' struggles with agency analysis, the emerging doctrine will need to be reconciled with all past Supreme Court cases that have an agency component.¹⁸⁴ No easy task.

B. The Path Forward

As shown in the prior section, the parade of variables is endless. Courts cannot credibly resolve cat's paw cases through an elaborate set of rules. If they try to do so, the rules will be subject to so many exceptions and exceptions to exceptions that they will be useless.

183. See generally Sperino, *Discrimination Statutes*, *supra* note 53 (discussing how proximate cause in statutes cannot typically be coterminous with common law proximate cause).

184. See also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

Additionally, a restrictive cat's paw doctrine would be at odds with prior Supreme Court precedent.¹⁸⁵

Further, it is likely the courts would start drawing factual conclusions from specific scenarios, even though the conclusions are not supported by the lived reality of workers. For example, the courts might start opining that workers are not harmed when a co-worker falsely reports negative conduct to a supervisor because the co-worker does not have official authority over the individual. This would be formalism at its worst.

More importantly, any restrictive cat's paw doctrine would stray far from the text or purposes of the federal discrimination statutes. Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker because of race, sex, national origin, color, or religion.¹⁸⁶ Title VII's main operative provision consists of two subparts. Under the first subpart, it is an unlawful employment practice for an employer to do the following:

- (1) 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.¹⁸⁷

Under Title VII's second subpart, it is unlawful for an employer to do the following:

- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹⁸⁸

These two subparts form the foundation of Title VII's text.¹⁸⁹ The Age Discrimination in Employment Act (ADEA) contains

185. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95-96 (2003); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 137 (2000); *Price Waterhouse*, 490 U.S. at 233.

186. 42 U.S.C. § 2000e-2(a) (2018).

187. *Id.* § 2000e-2(a)(1).

188. *Id.* § 2000e-2(a)(2).

189. As stated earlier, Congress amended Title VII in 1991. However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C. § 2000e-2(a).

similar main language,¹⁹⁰ and the Americans with Disabilities Act (ADA) contains similar concepts, although not always stated in the same language.¹⁹¹

The text of the federal discrimination statutes does not absolve an employer of liability when non-supervisors discriminate. Yet, it is unclear whether *Staub* requires the factfinder to determine whether a supervisor intended an outcome because of a protected trait and the negative outcome resulted from the supervisor's act.¹⁹² One way to read *Staub* is that it is just expressing one way to prove a discrimination claim and that its words of limitation are meaningless.

In other words, even though the Court left open the question of whether co-workers could be the biased actor, the Court did not mean to limit the doctrine in this way. Co-workers can start the sequence of events, as can others who do not have supervisory power, such as customers. Likewise, the words in *Staub* that require the supervisor to intend an adverse action are also not words of limitation. This is just one way that the plaintiff can prevail, but there are others. For example, the plaintiff might be able to prevail if she shows that the biased individual intended one result and another result happened. And, the plaintiff can prevail if the biased individual did not intend any particular result but an adverse outcome resulted.

It is difficult to reconcile any other outcome with the language of the discrimination statutes. The statutes do not use words like supervisor, co-worker, or decisionmaker. Instead, they place liability for discrimination on the employer.¹⁹³

The statutes do not require that bias exist or that it be exhibited in any particular way. The statutes do not contain the term "adverse action." Although the statutes do allow a protected class to be taken into account in limited circumstances, they do not allow employers to escape liability by conducting investigations or exercising independent judgment, as long as the protected trait caused the outcome.

190. 29 U.S.C. § 623(a) (2018).

191. 42 U.S.C. § 12112 (2018).

192. *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011).

193. Section 1981 allows for individual liability. 42 U.S.C. § 1981 (2018).

The statutes do not contain the words “proximate cause.” Even if the causal language in the statutes is assumed to contain a proximate cause analysis, this statutory proximate cause could not be coterminous with common law proximate cause.¹⁹⁴ At the very least, the courts would be required to defer to the statutory text itself in determining the limits of liability under the federal discrimination statutes, and there is a strong argument that Congress already considered the outward reach of the statutes when it chose to limit the people protected by the statutes, the entities liable for discrimination, and exceptions to liability.

A restrictive cat’s paw doctrine is also at odds with the underlying purposes of the discrimination statutes. The Court has repeatedly reiterated, “The phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”¹⁹⁵ Courts also frequently note the broad, remedial purpose of the discrimination statutes.¹⁹⁶

It is difficult to reconcile a restrictive cat’s paw doctrine with the text and purposes of the discrimination statutes, or with numerous Supreme Court cases. Given the confusion that using the words “cat’s paw” invites, it is best to abandon the doctrine completely. Cat’s paw simply is not a different type of liability that requires its own terms of art and analytical structure.

However, if the Court does not want to abandon cat’s paw, it can simply indicate that *Staub* did not limit the factual circumstances under which a plaintiff can prevail. This choice is realistic because the Court has done it numerous times. In fact, employment discrimination jurisprudence is in constant flux because the Court issues ambiguous legal standards that it then needs to clarify and re-clarify over time.¹⁹⁷

194. See generally Sperino, *Discrimination Statutes*, *supra* note 53 (discussing how Congress often places language limiting liability in statutes and that liability-limiting language performs a similar function to proximate cause).

195. *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

196. See, e.g., *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409 (4th Cir. 2015) (citing cases).

197. For example, the courts have tried to clarify the *McDonnell Douglas* test for more than forty years. The major U.S. Supreme Court cases interpreting *McDonnell Douglas* in chronological order are *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976);

CONCLUSION

The courts should abandon cat's paw doctrine while it is still in its infancy. It will be impossible to reconcile a restrictive view of the doctrine with numerous Supreme Court cases. Indeed, these cases demonstrate that the courts did not need a separate cat's paw doctrine to resolve cases.

More importantly, it is easy to predict that cat's paw doctrine will draw the courts into decades of legal battles about what falls within the doctrine and what does not. Indeed, courts are currently trying to define who counts as a supervisor, whether supervisory status is the correct limit, and what a person with bias needs to intend to potentially create liability. Unfortunately, most of these questions do not help us answer whether a person faced unequal treatment because of a protected trait.

Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); Bd. of Trs. of Keene State Coll. v. Sweeney, 439 U.S. 24 (1978); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981); USPS Bd. of Governors v. Aikens (*Aikens I*), 453 U.S. 902 (1981); USPS Bd. of Governors v. Aikens (*Aikens II*), 460 U.S. 711 (1983); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Raytheon Co. v. Hernandez, 540 U.S. 44 (2003); Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006).

