CAT'S PAW LIABILITY: NINE LIVES LEADS TO IDENTITY CRISIS

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I. INTRODUCTION 63
II. THE EVOLUTION OF THE CAT'S PAW DOCTRINE 66
A. An Overview of Employment Discrimination in the United States 66
B. A Brief History of the Title VII Hostile Work Environment Framework 68
C. The Evolution of Title VII Cat's Paw Liability 69
III. THE SUPREME COURT TAKES ACTION 72
A. Staub: The Supreme Court Adopts the Cat's Paw 72
Vance: The Supreme Court Tightens the Ellerth Framework. 75
B. Synthesis: The Co-Worker Cat's Paw Doctrine 76
IV. FALLOUT: HOW THE CO-WORKER CAT'S PAW DIMINISHES THE DOCTRINE 78
A. The Difference Between a Vance and Staub Supervisor 78
B. Adopting Vance Supervisors Into the Cat's Paw Framework Wrongly Makes A Hastily Constructed Framework's Dicta the Focal Point of Employment Law 80
C. Velázquez, Vasquez & The Co-Worker Cat's Paw 82
V. CONCLUSION 83

I. INTRODUCTION

The cat's paw doctrine is an employment discrimination concept wherein an employer is held liable for the discriminatory act of a non-firing agent when that agent's act caused another, non-discriminatory agent to fire an employee.[1] Under agency law, an employer is generally not liable for an employee's actions made outside the scope of the employee's employment and conjunctively views an employee's intentional torts as employee actions

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[1] *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

made outside the scope of employment.[2] Under Title VII, discrimination is an intentional tort.[3] Therefore, employees can generally discriminate against other employees without imputing liability to the employer under Title VII. However, agency law also provides exceptions to this general rule when employees are somehow assisted by the employer in carrying out the intentional tort. Title VII, adopting agency law's general rule, also adopts its exceptions. Evolving from a judicial analysis of these agency exceptions, the cat's paw doctrine is an important Title VII concept which stretches employer liability to cover employees indirectly empowered to commit discriminatory actions against their fellow employees.

Discrimination is an intentional tort.[4] For an employer to be liable, the employer or one of his agents must take an adverse employment action with the intent to discriminate, which usually requires actions by a "decisionmaker." Consider the following scenario:

> Steve is a male salesman for the Lucky Shoe Company. Steve's supervisor, Bob, distrusts male salesmen because he believes they are lazy. Bob falsely reports to his supervisor, Kevin, that Steve has not been meeting his quota. Kevin relies on Bob's report and fires Steve for missing the quota. Kevin did not know Steve was a man, or that Bob hated men, when he fired him. Steve sues the Lucky Shoe Company for discriminating against him.

Proponents of the cat's paw theory of liability argue that the Lucky Shoe Company should be held liable because Steve's discriminatory supervisor, Bob, used the decision-maker, Kevin, as a conduit for his discriminatory intent. Nearly every circuit had adopted a form of supervisory cat's paw liability before the Supreme Court in *Staub v. Proctor Hospital*.[5]

Although the Supreme Court recognized cat's paw liability in *Staub*, the Court limited the ruling to imputing a *supervisor's* discriminatory actions and intent to the employer, even though the decision-maker did not have a discriminatory motive.[6] The Court "express[ed] no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision."[7]

Recently, several circuits have analyzed *Staub* to determine whether cat's paw liability can apply to co-workers: *Velázquez-Perez v. Developers Diversified Realty Corp.* in the First Circuit and *Vasquez v. Empress*

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2 RESTATEMENT (SECOND) OF AGENCY § 219(2) (AM. LAW INST. 1958).

3 *See* 42 U.S.C.S. § 2000e-2(a)(1) (2016).

4 *Id.*

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

6 *Id.* at 422 n. 4.

7 *Id.*

Ambulance Serv. in the Second Circuit. Both cases applied cat's paw liability to co-workers.[8]

Although the influence for this recent cat's paw case law should primarily be the Supreme Court ruling in *Staub*, both the First and Second Circuit rely on *Staub*'s interplay with the generally restrictive ruling (in the context of the hostile workplace framework) of *Vance v. Ball State University*.[9] *Vance* redefines the term "supervisor" for purposes of vicarious liability under Title VII's hostile work environment (hereinafter "*Ellerth*") framework to include only those employees that were "empowered by the employer to take tangible employment actions against the victim."[10] Thereafter, "supervisors" were defined as employees expressly given the power to hire, fire, demote, promote, or take any similar significant employment action.[11] Directly applied to the cat's paw doctrine, *Vance* would seem to render *Staub*, if not superfluous, at least limited in scope because cat's paw liability is not needed when an empowered agent takes an adverse action with the requisite animus. Rather, the theory holds employers liable despite the absence of empowered agents exhibiting animus. Read alongside *Vance*, *Staub* now seems to hold employers liable for a supervisor's actions only when the supervisor, already expressly empowered to make tangible employment decisions relating to a particular employee, heavily influences another supervisor's tangible employment decision that affects that employee.

Despite this reading, the First and Second Circuits' recent co-worker cat's paw expansion attempts to salvage some remaining precedential value from *Staub*. However, this article will argue that both *Vazquez* and *Velazquez* were wrongly decided because applying the *Vance* supervisor to the independently developed cat's paw doctrine increases *Ellerth*'s significance far beyond its intended scope. The *Vasquez* and Velazquez cat's paws, in implicitly and explicitly adopting the *Ellerth* framework to form the basis for co-worker cat's paw liability, have irreparably limited cat's paw liability.

This article will argue that *Vasquez* and *Velazquez* were wrongly decided and that any further attempt to reconcile *Vance* with *Staub* is both incorrect and unnecessary. Part II of this article will discuss the statutory evolution of employment discrimination law and the common law evolution

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[8] Vasquez v. Empress Ambulance Servs., 835 F.3d 267, 274 (2d Cir. 2016); Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 274 (1st Cir. 2014).

[9] Vance v. Ball State Univ., 570 U.S. 421 (2013); *see Velázquez-Perez*, 753 F.3d at 273–74 (holding that co-worker cat's paw liability must be based on the negligence standard espoused by *Vance*).

[10] *Vance*, 570 U.S. at 431.

[11] *Id.*

of the cat's paw doctrine, comparing the development of the cat's paw theory of liability with the development of the *Ellerth* framework, each culminating in their respective Supreme Court decisions in *Staub* and *Vance*. Part III analyzes the effect of the Supreme Court decisions in *Staub* and *Vance* on the cat's paw doctrine and *Ellerth* framework. Part IV will argue that recent decisions among the circuits have misinterpreted the interplay between these decisions.

This article concludes by explaining that reliance on the *Ellerth* framework, for the purpose of cat's paw liability, should be limited to acknowledgment that negligence is a valid basis for imposing liability on an employer for the acts of his or her agents. Following an examination of the relevant statutes and background law, this article will show the following: (1) the *Vance "*supervisor" must be limited to the *Ellerth* framework; (2) cat's paw liability cannot support a *Vance* "supervisor;" and (3) the cat's paw theory is better served by continuing the proximate cause standard advanced in *Staub.*

II. THE EVOLUTION OF THE CAT'S PAW DOCTRINE

A. An Overview of Employment Discrimination in the United States

Historically, at-will employment has been the law in the United States.[12] An employer may terminate employment for good reason, bad reason, or no reason at all.[13] Few common law exceptions to the at-will doctrine exist.

Therefore, wrongfully discharged employees often turn to statutory exceptions to the at-will employment doctrine. Numerous federal and state statutes provide relief for discriminatory employment actions.[14] For example, Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate in employment actions based on "race, color, religion, sex, or national origin."[15] The prevalence of Title VII as a weapon against employment discrimination is undeniable. In 2015 alone, there were 89,385 individual Title VII charge filings made to the Equal Employment Opportunity Commission (EEOC).[16]

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[12] Richard A. Lord, *The At-Will Relationship in the 21st Century: A Consideration of Consideration*, 58 BAYLOR L. REV. 707, 707 (2006).

[13] Engquist v. Or. Dep't of Agric., 553 U.S. 591, 606 (2008).

[14] *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C.S. § 2000e (2016); Equal Rights Under the Law, 42 U.S.C.S. § 1981 (2016); Americans With Disabilities Act, 42 U.S.C.S. § 12101 (2016); *see also* Cyndi M. Benedict et al., *Employment and Labor Law*, 52 SMU L. REV. 1001, 1043, 1058, 1078 (1999) (citing numerous federal statutory exceptions to the at-will doctrine).

[15] 42 U.S.C.S. § 2000e-2(a)(1).

[16] *Charge Statistics*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/

Title VII rose out of the struggle against segregation in the mid-20th century. President Lyndon B. Johnson signed the Civil Rights Act of 1964 to combat segregation in public accommodations and all programs funded by the federal government.[17] Initially, the Civil Rights Act of 1964 did not include what is now Title VII, but Congress recognized that providing equal employment opportunities was vital to the bill's purpose.[18] The bill also reflected the concern that employment discrimination was an economic waste that needed to be remedied.[19] Over time, it became clear that federal courts were to have the vanguard role in enforcing the bill's provisions and stamping out employment discrimination.[20] Eventually, Congress outlawed other forms of discrimination, such as age and disability discrimination, by passing statutes worded similarly to Title VII.[21]

For the purpose of Title VII, employers include "a person engaged in an industry affecting commerce . . . *and any agent of such a person.*"[22] Courts originally interpreted the "any agent" clause as a source of individual liability against discriminating agents of employers[23] Any supervisory agent of an employer, such as a hiring manager, could be held liable under Title VII for their discriminatory acts.[24] However, federal courts eventually shifted away from this interpretation in favor of reading the "any agent" clause as espousing the congressional desire to apply agency principles to determine an employer's vicarious liability.[25] After this reinterpretation, individual liability for agents decreased.[26] Instead, courts began to apply agency principles to determine whether liability is imputed onto employers whose employees commit discrimination.[27]

The agency principles predominantly used to analyze Title VII vicarious liability are found in the Second Restatement of Agency:

> (1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.

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eeoc/statistics/enforcement/charges.cfm (last visited Dec. 17, 2016) (receiving employee request to proceed with a lawsuit).

17 *See, e.g.*, 42 U.S.C.S. § 2000e-2.

18 Thelma L. Harmon, *What's My Line: Supervisor or Co-Worker?*, 24 TEMP. POL. & C.R. L. REV. 43, 45–46 (2014).

19 *Id.* at 46.

20 *Id.* at 47.

21 *See* 2 U.S.C.S. § 1311 (2016).

22 42 U.S.C.S. § 2000e(b) (2016) (emphasis added).

23 *See, e.g.*, Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986); Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1179–80 (S.D.N.Y. 1992).

24 *See, e.g.*, *Rodgers*, 791 F.2d at 442–43.

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

26 *See* Henry Ting, *Who's the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL'Y 515, 522 (1996).

27 *See id.*

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
> (a) the master intended the conduct or the consequences, or
> (b) the master was negligent or reckless, or
> (c) the conduct violated a non-delegable duty of the master, or
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.[28]

Two separate sources of employer liability emerged from these agency principles: hostile work environment and cat's paw liability. Although these theories evolved separately, their common inspiration has caused their merger in modern legal analysis.

B. A Brief History of the Title VII Hostile Work Environment Framework

General employment discrimination cases deal with an employer's liability for tangible employment actions, such as hirings, firings, or demotions. However, Title VII also protects individuals from being discriminated against in the terms and conditions of their employment.[29] Because harassment, notably sexual harassment, is so pervasive within the employment context, courts needed to determine how to approach cases where an individual was discriminatorily deprived of a harassment-free workplace but was not the target of an adverse, tangible employment action.

Eventually, the Supreme Court cemented a framework for establishing employer liability for hostile work environments in the 1998 twin cases: *Faragher v. City of Boca Raton*[30] and *Burlington Industries v. Ellerth*.[31] The Court held that an employer is vicariously liable when a supervisor creates an actionably hostile work environment.[32] However, the employer has a defense if it did not take a tangible employment action and must show that: (a) it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[33]

Nonetheless, when a co-worker creates a hostile work environment, the employer is liable only if it was negligent in failing to prevent the tortious

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28 RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958).
29 42 U.S.C.S. § 2000e-2(a)(1) (2016).
30 Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
31 Burlington Indus. v. Ellerth, 524 U.S. 742 (1998).
32 *Id.* at 765.
33 *Id.*

conduct.[34] The Court created this co-worker/supervisor dichotomy by parsing through vicarious liability in agency law. First, the Court began with the general idea that sexual harassment, absent any tangible employment action, "is not conduct within the scope of employment."[35] Employers do not want their supervisors sexually harassing employees during work hours.

Since employers are not generally liable for employee torts committed outside the scope of employment, the Court next examined whether there was an applicable exception to the rule.[36] After summarily dismissing the Second Restatement of Agency section 219(a) and (c) as irrelevant to the analysis, the Court held that employers should be held liable for their supervisors' sexual harassment under section 219(d) (aided in accomplishing the tort by the existence of the agency relation) based on the general proposition that only "a supervisor, or other person acting with the authority of the company" can cause a direct economic injury stemming from a tangible employment action.[37] Only a supervisor can fire you, demote you, or dock your pay.[38] A supervisor's discriminatory harassment takes on a more sinister tone because the agency relationship intrinsically supports it.

Because a supervisor's offensive conduct is less likely to be reported and more likely to make an employee's work environment uncomfortable, the Court held that employers should be held vicariously liable when supervisors create a hostile work environment.[39] Employers, however, are not automatically liable when co-workers create a hostile work environment absent employer negligence.[40]

C. The Evolution of Title VII Cat's Paw Liability

The co-worker/supervisor dichotomy also presented itself in the evolution of the cat's paw framework, although most circuits based the cat's paw doctrine on an entirely different element of the "supervisory" relationship.[41] Cat's paw liability is a causation theory that holds an employer liable "when a supervisor with a discriminatory motive influences, but does not make, an adverse employment decision against a fellow

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[34] *See id.* at 758–59 ("Negligence sets a minimum standard for employer liability under Title VII.").

[35] *Id.* at 757.

[36] *Id.* at 758.

[37] *Ellerth*, 524 U.S. at 762.

[38] *Id.*

[39] *Id.* at 765.

[40] *Id.* at 762.

[41] Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (noting how supervisory employees more readily utilize an employer's authority when they influence employment decisions than when they are harassing employees).

employee."[42] The cat's paw derives its name from an Aesop fable wherein a wily monkey convinces a cat to grab chestnuts from a roaring fire.[43] The monkey eats the chestnuts as the cat retrieves them, and the cat is left with nothing but a burnt paw for his trouble.[44]

The 1990 case, *Shager v. Upjohn Company*, injected this myth into the lexicon of employment law.[45] *Upjohn* involved an employment committee that fired a salesman, Shager, based on his poor sales and supervisor reports.[46] Unbeknown to the committee, Shager's supervisor had purposefully marginalized Shager's performance due to the supervisor's own biased views towards older workers like Shager.[47] Judge Richard Posner held that if the employment committee acted as the conduit for the supervisor's discriminatory animus, the employer could be held liable for the supervisor's discriminatory motivation.[48] In empowering the employee's discriminatory intent, the employer played the gullible cat to the discriminatory supervisor's wily monkey and allowed the former employee to burn, or in this case, sue the company.

After *Upjohn*, the cat's paw theory of liability spread throughout the courts.[49] Nearly every circuit adopted a form of subordinate bias liability.[50]

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[42] John S. Collins, *Another Hairball for Employers? "Cat's Paw" Liability for the Discriminatory Acts of Co-Workers After Staub v. Proctor Hospital*, 64 BAYLOR L. REV. 908, 909 (2012).

[43] THE MONKEY AND THE CAT (AESOP FOR CHILDREN, 1919), http://mythfolklore.net/aesopica/ milowinter/61.htm (last visited Nov. 26, 2016).

[44] *Id.*

[45] *Upjohn*, 913 F.2d at 405.

[46] *Id.* at 400.

[47] *Id.*

[48] *Id.* at 405.

[49] Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. Rev. 383, 385–86 (2008) ("[s]ince 1990, every federal circuit court of appeals, as well as the Supreme Court, have endorsed the notion that subordinate bias may be a basis for imputing liability to an employer in appropriate circumstances.").

[50] *See, e.g.*, Potence v. Hazleton Area Sch. Dist., 357 F.3d 366, 370 (3d Cir. 2004) (establishing a cat's paw liability similar to the Second Circuit); Laxton v. Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003) (establishing a two-part test for subordinate bias liability); EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 926 (8th Cir. 2002) (establishing a cat's paw liability test similar to the one established by the Second Circuit); Rose v. N.Y.C. Bd. of Educ., 257 F.3d 156, 162 (2d Cir. 2001) (establishing that cat's paw liability exists in the Second Circuit when an employee has significant influence over the decision-making process); Bergene v. Salt River Project Agric. Improvement and Power Dist., 272 F.3d 1136, 1141 (9th Cir. 2001) (establishing cat's paw liability when a supervisor was involved in the final decision-making process); English v. Colo. Dep't of Corr., 248 F.3d 1002, 1011 (10th Cir. 2001) (finding an identical definition of cat's paw liability as the Eleventh Circuit); Maarouf v. Walker Mfg. Co., 210 F.3d 750, 752 (7th Cir. 2000) (establishing a form of proximate cause liability in the Seventh Circuit); Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999) (adopting cat's paw liability in cases where a biased supervisor's recommendation is followed

However, key differences emerged among the circuits as they developed their theories of cat's paw liability. Notably, the circuits differed on the requisite causal link between a supervisor's discriminatory action and the eventual adverse employment action, along with the extent to which an independent investigation insulated the employer from liability.[51]

The First, Fifth, and D.C. Circuits implemented a lenient causation standard.[52] These circuits adopted a standard that considered whether discriminatory animus tainted the decision-making process.[53] It was enough that the supervisor had "influence or leverage over the official decision-maker."[54]

The majority of circuits forged stricter answers to the causation requirement. This approach required more than a simple discriminatory influence but did not require the supervisor to practically become the decision-maker.[55] In these circuits, a claim would survive summary judgment if the "biased supervisor played a role in the decisionmaking process."[56] The Tenth Circuit required a causal connection between the supervisor's "reports, recommendations, and actions" and the final employment decision.[57] The Sixth Circuit applied the same standard.[58]

The Fourth Circuit embraced the strictest standard.[59] In *Hill v. Lockheed Martin*,[60] the Fourth Circuit held that an employer is liable for the discriminatory actions of a supervisor only when a plaintiff shows that the supervisor "was the one 'principally responsible' for, or the 'actual decisionmaker' behind, the action."[61] In other words, it does not matter that a supervisor "had a substantial influence on the ultimate decision or . . . played a role, even a significant one, in the adverse employment decision."[62]

At its core, the Fourth Circuit was concerned with the *Ellerth* Court's application of general agency principles determining vicarious liability. The Fourth Circuit believed supervisors were acting within the scope of their

without a follow-up investigation); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 355 (6th Cir. 1998) (establishing a causal nexus test for cat's paw liability).

51 *See* Abby Bochenek, *The Cat's Revenge: Individual Liability Under the Cat's Paw Doctrine*, 8 SEVENTH CIR. REV. 120, 125 (2012).

52 *See* Sean Ratliff, Comment, *Independent Investigations: An Inequitable Out for Employers in Cat's Paw Cases*, 80 U. COLO. L. REV. 255, 260 (2009).

53 *See* Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 88 (1st Cir. 2004).

54 Gee v. Principi, 289 F.3d 342, 346 (5th Cir. 2002).

55 Ratliff, *supra* note 52, at 268.

56 *Id.*

57 EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 488 (10th Cir. 2006).

58 Noble v. Brinker Int'l, Inc., 391 F.3d 715, 723–24 (6th Cir. 2004).

59 Ratliff, *supra* note 52, at 263.

60 Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277 (4th Cir. 2004).

61 *Id.* at 288–89.

62 *Id.* at 291.

employment and, thus, subjecting their employers to vicarious liability only when specifically empowered to make employment decisions.[63] Focusing on *Ellerth*'s dicta, stating that "only a supervisor can cause [tangible employment actions]," the Fourth Circuit refused to hold Lockheed Martin liable for its employee's action when the employer had not expressly granted the employee any decision-making authority.[64]

Other circuits ignored the Supreme Court's *Ellerth* distinction, believing that the court could impute an agent's discriminatory motives to the final decision-maker if the plaintiff established a causal link.[65] This rendered any examination of agency principles unnecessary.

The Supreme Court did not resolve the cat's paw circuit split until 2011 in *Staub v. Proctor Hospital*.[66] The Seventh Circuit had affirmed an employer's summary judgment motion on appeal, concluding that an employer's independent investigation cut off liability for its supervisor's discriminatory acts.[67] The plaintiff appealed, and the Supreme Court granted certiorari.[68] In the ensuing decision, the Supreme Court adopted cat's paw liability, but it was not in a form that was familiar to any of the circuits.

III. THE SUPREME COURT TAKES ACTION

A. Staub: The Supreme Court Adopts the Cat's Paw

Vincent Staub was a U.S. Army Reservist who was required to attend drill camp one weekend per month and train full-time for two to three weeks a year.[69] His immediate supervisor, Janice Mullaly, and her supervisor, Michael Korenchuk, believed that Staub's Reservist responsibilities were a waste of time and a drain on the company.[70] Over the course of Staub's employment, Mullaly made it clear that she was "out to get him" and once disciplined him under dubious circumstances.[71]

On April 2, 2004, one of Staub's co-workers complained to a human resources officer, Linda Buck, about Staub's frequent unavailability.[72] Buck responded by directing Korenchuck and Mullaly to create a plan to solve Staub's "availability" problems.[73] Three weeks later Korenchuk informed

63 *Id.*
64 *Id.*
65 Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 355 (6th Cir. 1998).
66 Staub v. Proctor Hosp., 562 U.S. 411 (2011).
67 Staub v. Proctor Hosp., 560 F.3d 647, 656 (7th Cir. 2009), *rev'd*, 562 U.S. 411 (2011).
68 *Staub*, 559 U.S. at 1066.
69 *Id*. at 413–14.
70 *Id.* at 414.
71 *Id.*
72 *Id.*
73 *Id.*

Buck that Staub had left his desk without informing a supervisor.[74] Although Staub contended that he had left Korenchuk a voice-message detailing his absence, Buck relied on Korenchuk's accusation, as well as Mullaly's history of discipline, and fired Staub.[75] Staub challenged his firing through the grievance process, claiming that Mullaly had fabricated his previous demerits, but Staub was unsuccessful.[76]

Staub subsequently brought suit under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),[77] claiming that Buck fired him due to discriminatory animus toward his armed service obligations.[78] A jury decided in Staub's favor, finding that Staub's military status was "a motivating factor in Proctor Hospital's decision to discharge him."[79] The Seventh Circuit reversed, holding that cat's paw liability was appropriate only in cases where the biased supervisor exercised "such 'singular influence' over the decisionmaker that the decision to terminate was the product of 'blind reliance.'"[80] The Supreme Court granted certiorari.[81]

Justice Scalia, writing for the majority, began by noting how similarly Title VII and the USERRA are constructed.[82] Specifically, the USERRA prohibits employer actions if "the person's membership [in the armed forces] . . . 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."[83] Title VII prohibits employer actions when "race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[84]

As the Court noted, the question of liability revolved around the meaning of the phrase, "motivating factor," in the employment action.[85] Staub argued that the supervisors, Mullaly and Korenchuck, were discriminatorily motivated in filing unfavorable entries in his record, sufficing to establish a violation of USERRA.[86] However, the Court quickly dismissed the argument, observing that, while filing false reports was an

74 *Staub*, 559 U.S. at 414.
75 *Id.* at 414–15.
76 *Id.* at 415.
77 *Id.*
78 *Id.*
79 *Id.*
80 *Staub*, 559 U.S. at 415–16.
81 *Id.* 413–14.
82 *Id.* at 417.
83 38 U.S.C.S. § 4311(c)(1) (1994).
84 42 U.S.C.S. § 2000e-2(m) (2016).
85 *Staub*, 562 U.S. at 417.
86 *Id.*

employment action, it was not a significant employment action that would allow the Court to impute liability to the employer under USERRA.[87] Staub's firing was the significant employment action.[88] The Court further rejected the notion that Korenchuk and Mullaly's discriminatory motive could be imputed to Buck's non-discriminatory action, citing the statutory language requirement that "discrimination be 'a motivating factor' *in the adverse action*."[89]

The Court continued by summarily dismissing Proctor Hospital's interpretations of cat's paw liability. Proctor Hospital argued that a violation of USERRA occurs only when the supervisor is the de facto decision-maker.[90] In essence, Proctor Hospital was arguing for the Fourth Circuit's strict causation standard. The Court found such a strict test unnecessary.[91] This, in essence, dismissed the circuit courts' lenient and strict standards for imposing subordinate bias liability.[92] Instead, the Court defined cat's paw liability as follows: "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."[93] Under this rule, an independent investigation does not shield an employer from liability unless it breaks the causal connections between the supervisor's discriminatory act and the eventual employment action.[94]

The Supreme Court specifically left unaddressed the possibility of a co-worker cat's paw liability case, only remarking that traditional agency law must impute liability to the employer for the acts of a discriminatorily motivated agent.[95] Neither did the Court sufficiently define "supervisor," noting only that both cat's paw supervisors and unbiased decision-makers "possessed supervisory authority delegated by their employer and exercised it in the interest of their employer."[96] Mulally and Korenchuk acted "within the scope of their employment" when they reprimanded Staub for violating company rules.[97]

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87 *Id*. at 417–18.

88 *Id.*

89 *Id*. at 418 (emphasis omitted).

90 *Id*. at 419.

91 *Staub*, 562 U.S. at 419.

92 *See id.* at 417–19 (dismissing petitioner's argument that discriminatory intent on the part of a supervisor could qualify as a "motivating factor," while simultaneously dismissing respondent's argument that cat's paw liability requires the biased supervisor to be the de facto decision-maker).

93 *Id*. at 422 (emphasis omitted).

94 *Id*. at 421.

95 *Id*. at 422 n.4.

96 *Id.* at 422.

97 *Id.* at 422–23.

Vance: The Supreme Court Tightens the Ellerth Framework

Three years later, the Court decided an *Ellerth* hostile work environment case, *Vance v. Ball State University*,[98] which many believed would answer some of the questions *Staub* had left unresolved. Maetta Vance, an African-American woman, worked as a Ball State University ("BSU") caterer for over seventeen years.[99] Saundra Davis was also employed as a BSU caterer but at no point had the power to "hire, fire, demote, promote, transfer, or discipline Vance."[100] Vance alleged that Davis made her feel threatened at work by engaging in racially discriminatory actions such as "glaring at her, slamming pots and pans around her, and intimidating her."[101] Vance eventually filed charges of racial harassment and discrimination against BSU, alleging that BSU was liable for the creation of a racially hostile work environment because Davis was Vance's supervisor.[102]

The Court responded to this weak case for liability under the supervisor rubric and established a bright-line rule that would allow lower-court judges to easily determine when an employer is liable for a supervisor's hostile work environment.[103] "An employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim."[104] A tangible employment action causes a "significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[105]

As established by the *Ellerth* framework, an employer is strictly liable for a supervisor's discrimination if it culminates in a "tangible employment action."[106] Otherwise, an employer may escape liability by "establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the plaintiff unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided."[107] Employees who are not supervisors are co-workers.[108] By contrast, an employer is responsible for the discriminatory actions of a co-worker only if the employer is "negligent in controlling

98 Vance v. Ball State Univ., 570 U.S. 421 (2013).
99 *Id.*
100 *Id.*
101 *Id.*
102 *Id.* at 425.
103 *See id.* at 451 (Ginsberg, J., dissenting); *Id.* at 424.
104 *Vance*, 570 U.S. at 424.
105 *Id.* at 421 (quoting Burlington Indus. v. Ellerth, 524 U.S. 742, 761 (1998)).
106 *Id.* at 424.
107 *Id.*
108 *Id.*

working conditions."[109]

The petitioner argued that no reading of the *Ellerth* framework suggested the majority's strict supervisor definition.[110] However, the majority rejected this argument, claiming supervisory status was not a contested issue in the previous cases, and the Court was never asked to define it.[111] The Court emphasized that the *Ellerth* framework mandated a clear definition of the term "supervisor."[112] However, the Court also posited that employers who rely on employees to provide them with the facts of an ultimate firing are, in essence, giving the employees supervisory authority.[113] "If an employer does attempt to confine decisionmaking power to a small number of individuals, those individuals will have a limited ability to exercise independent discretion when making decisions and will likely rely on other workers who actually interact with the affected employee."[114] This language would form the basis for the First and Second Circuits' future attempts at synthesizing *Staub* and *Vance*.[115]

B. Synthesis: The Co-Worker Cat's Paw Doctrine

Following *Vance*, the various circuits were left without clarification as to the proper application of the "supervisor" definition to cat's paw liability.[116] *Vance* was decided without mentioning cat's paw liability, but it did seemingly impose a strict supervisor definition on the entire Title VII jurisprudence. Eventually, both the First and Second Circuits published opinions attempting to reconcile *Vance* with *Staub*.[117]

In *Velázquez-Pérez*, the First Circuit found "limited utility" in a distinction between *Vance* hostile workplace claims and the quid pro quo case presently before it.[118] The First Circuit concluded that a jilted human resources representative, Martinez, was not Velázquez-Pérez's supervisor, despite her attempt at retaliation, which consisted of a thorough and

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109 *Id.*

110 *Vance*, 570 U.S. at 436.

111 *Id.* at 438.

112 *Id.* at 432 ("[T]he framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers.").

113 *Id.* at 447.

114 *Id.*

115 *See* Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 272 (1st Cir. 2014); Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 738 (10th Cir. 2014); *see also* Burlington v. News Corp., 55 F. Supp. 3d 723, 735 (E.D. Pa. 2014).

116 *See* Shazor v. Prof'l Transit Mgmt., 744 F.3d 948, 955–56 (6th Cir. 2014).

117 *Velázquez-Pérez*, 753 F.3d at 265; Vasquez v. Empress Ambulance Servs., 835 F.3d 267 (2d Cir. 2016).

118 *Velázquez-Pérez*, 753 F.3d at 273 (explaining that *Vance* defines quid pro quo claims to include claims where employers or their agents take a tangible employment action against an employee who does not offer sexual favors).

persistent lobbying effort to get him fired.[119] Recognizing that the human resources representative was not his supervisor, the court held that Velázquez-Pérez's employer could still be held liable because the employer was negligent in allowing Martinez's persistent and transparent lobbying efforts to succeed.[120] The First Circuit's opinion synthesized *Vance* and *Staub*. Acknowledging that *Vance* raised the bar for supervisors, the panel nevertheless held that employers could also be held liable under a co-worker cat's paw theory of liability if they were negligent in allowing the discriminatory act to cause an adverse employment action.[121] The First Circuit based this co-worker cat's paw theory on the baseline of negligence established in the *Ellerth* framework.[122]

In *Vasquez*, the Second Circuit concluded that a discriminating employee, Gray, was considered a co-worker under Title VII, after Gray's attempt to cover-up his sexual harassment of a fellow employee, Vazquez, led to Vazquez's firing.[123] Nevertheless, while citing to *Velázquez-Pérez*, the court found that the employer, Empress, was liable under a co-worker cat's paw theory of liability.[124] The Second Circuit held that "an employer may be held liable for an employee's animus under a 'cat's paw' theory, regardless of the employee's role within the organization, if the employer's own negligence gives effect to the employee's animus and causes the victim to suffer an adverse employment action."[125] Interestingly, the Second Circuit did not cite *Vance* when defining the term "supervisor," nor did the court question the co-worker status of the discriminatory employee. However, the Second Circuit did rely on the *Ellerth* framework to justify the imposition of a negligence standard upon co-worker cat's paw liability.[126] Furthermore, the court concurred with the *Velázquez-Pérez* holding and cited that holding in forming its own co-worker cat's paw doctrine.[127]

The *Vance* supervisor question operates as the backdrop of both circuits' opinions, albeit more explicitly in *Velázquez-Pérez* than in *Vasquez*.[128] Although *Vance* never explicitly mentions *Staub*, its language

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[119] *Id.* at 271–73 ("That she was successful may show that she was a formidable adversary as a coworker . . . but it does not make her Velázquez's supervisor as defined in *Vance*.").

[120] *Id.* at 274.

[121] *Id.* at 273–74.

[122] *See* Vance v. Ball State Univ., 570 U.S. 421, 446–47 (2013) (explaining that "negligence provides adequate protection for the majority of tort cases").

[123] Vasquez v. Empress Ambulance Servs., 835 F.3d 267, 269 (2d Cir. 2016).

[124] *Id.* at 276.

[125] *Id.*

[126] *Id.* at 273–74.

[127] *Id.* at 274.

[128] *Id.*; Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 273 (1st Cir. 2014).

suggests a broad interpretation "to all forms of 'unlawful harassment'" and an end to the separation of the harassment framework from other discrimination cases.[129] In step with this broad interpretation, the *Vance* supervisor has seemingly entrenched itself in any cat's paw analysis of retaliation claims in the Second Circuit.[130] Given that retaliation claims have become the most frequently filed charge with the EEOC in recent years, a sensible framework for the application of cat's paw liability to retaliation claims is essential.[131] Because a broad application of the *Vance* supervisor to cat's paw liability limits the ability of the cat's paw doctrine to function as intended, the holdings in *Vasquez* and *Velázquez* must not be narrowly followed.

IV. FALLOUT: HOW THE CO-WORKER CAT'S PAW DIMINISHES THE DOCTRINE

A. The Difference Between a Vance and Staub Supervisor

"Supervisor" is not a statutory term.[132] The workplace harassment framework adopted the term to denote employees whose actions imputed vicarious liability onto their employers.[133] Generally, the toxicity of a worker's environment and the power of a harasser have a direct, positive relationship.[134] A supervisor capable of firing a worker can poison the worker's work environment more effectively than an arbitrary person on the street, or even the person in the parallel cubicle. "A co-worker can break a co-worker's arm as easily as a supervisor. . . . [b]ut one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another."[135]

With this in mind, the Supreme Court adopted the *Ellerth* framework under the general proposition that "only a supervisor, or other person acting with the authority of the company, can cause [tangible employment decisions]."[136] A supervisor's threat is backed by his or her role in the

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129 *Velázquez-Pérez*, 753 F.3d at 273 (citing Vance v. Ball State Univ., 570 U.S. 421, 432 (2013)).

130 *See* Campbell v. Nat'l Fuel Gas Distribution Corp., 723 F. App'x 74, 76 (2d Cir. 2018); Moore v. Conn. Dep't of Corr., No. 3:13-cv-01160, 2018 U.S. Dist. LEXIS 47129, at *4–5 (D. Conn. Mar. 22, 2018).

131 See MICHAEL J. ZIMMER, CHARLES A. SULLIVAN & REBECCA HANNER WHITE, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 454 (Vicki Been et al. eds., 8th ed. 2013).

132 *Vance*, 570 U.S. at 436.

133 *Id.*

134 *See* Burlington Indus. v. Ellerth, 524 U.S. 742, 763 (1998) ("On the one hand, a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation.").

135 *Id.* at 762.

136 *Id.*

company. The supervisor can fire or demote you. For that reason, the harassing behavior is implicitly more toxic, and it was this toxicity that the Supreme Court sought to address by holding employers presumptively liable when a "supervisor" created a hostile work environment.[137] The *Ellerth* Court needed to address sexual harassment, and its decision is steeped in judicial economy. The *Ellerth* supervisor is simply a "term of art" meant to effectuate a sexual harassment framework that employers could follow to limit liability.

The definition of "supervisor" under cat's paw liability necessarily evolved separately. The cat's paw doctrine recognized that employees without express authority to *take* tangible employment actions still had implied authority and the ability to *cause* tangible employment actions.[138] As Judge Posner succinctly stated, "[c]oncern with the futility of derivative liability is absent where the challenged action is not harassment, whether on sexual or other grounds, by a fellow employee but discharge by a supervisory employee."[139] Employers typically rely on reports and opinions in making tangible employment decisions, regardless of whether or not the person in question is a "supervisor."[140] If an employer can be held liable exclusively for discriminatory actions taken by employees with express authority, employers can shield themselves from liability by creating a system wherein disassociated managers approve discriminatory recommendations without facing any burden to investigate the claims.[141] Consequently, when the circuits developed their own cat's paw doctrines, most based their doctrines around theories of causation wherein the employer had, in effect, delegated some authority to the non-decision-making supervisor.[142] In these cases, the "elaborate scheme" conjectured in *Ellerth* is made significantly more simple through the employer's delegation of authority.[143]

The Court decided *Staub* in light of this history. Justice Scalia explicitly rebuffed the *Ellerth* supervisor's application to cat's paw, noting that reliance "on facts provided by the biased supervisor—as is necessary in any case of cat's-paw liability . . . will have effectively delegated the factfinding portion of the investigation to the biased supervisor."[144] While the harassment framework targets a harassing employee's implied ability to take an employment action, cat's paw liability concerns an employee's

137 *Id.*
138 *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).
139 *Id.* at 404.
140 Harmon, *supra* note 18, at 61.
141 EEOC v. BCI Coca-Cola Bottling Co., 450 F.3d 476, 486 (10th Cir. 2006)
142 *Id.* at 487–88.
143 *See, e.g., id.*; Staub v. Proctor Hosp., 562 U.S. 411, 413–15 (2011).
144 Staub, 562 U.S. at 421.

influence over the information that forms the backdrop to that action. With cat's paw liability, the employee has "perform[ed] an act motivated by [discriminatory] animus that is *intended* by the supervisor to cause an adverse employment action," and the act in fact does cause an adverse employment action.[145] The power to fire has necessarily been delegated, whether victims or employers know it or not.

B. Adopting Vance Supervisors Into the Cat's Paw Framework Wrongly Makes A Hastily Constructed Framework's Dicta the Focal Point of Employment Law

The *Ellerth* decision was a brazen attempt at judicial lawmaking. Believing that the lower courts needed exacting guidance in applying agency law to hostile work environment cases, the Court created a framework favoring public policy rather than legal sense. Building on the general proposition that only supervisors could cause employees economic damage, the Court held that employers were liable when supervisors created hostile work environments.[146] This rule has satisfactorily guided courts in analyzing hostile work environment claims, but it is based on the legal fiction that only supervisors can cause employees economic damage.

Basing a legal framework on legal fiction is not damaging on its own. The Court decided *Ellerth* to address a specific subset of employment discrimination law: an employer's vicarious liability for hostile work environments. The framework presupposes that creating a hostile work environment is not conduct within the scope of an agent's employment, and it moves to address situations where individuals are harassed without the company's input.[147] In addressing direct employer discrimination, the framework is simply referring to its catch-all, a point where analysis within the framework should end.[148] It is not attempting to re-write thirty years of evolving Title VII case law. Creating legal fiction with clear-cut boundaries is not damaging to a legal area's evolution.

But the *Ellerth* Court clearly did not intend for *Ellerth* to address causation limits for the entirety of employment law. The notion that "[o]nly supervisors can fire employees" is not a holding, nor does it even rise to the level of dicta.[149] It is at best an overgeneralization, one whose application to employment law is rightfully limited to the framework it created.

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145 *Id.* at 422.

146 *See* Burlington Indus. v. Ellerth, 524 U.S. 762 (1998).

147 *Id.* at 761–62.

148 *See id.* at 765 (noting that a lack of any tangible employment action gives employers a previously unavailable affirmative defense).

149 *See id.* at 762 (noting a general proposition that "only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.").

Numerous circuits correctly dismissed the generalization when they advanced cat's paw causation.[150] Their use of the term "supervisor" did not reflect an intention to expand *Ellerth*'s limited holding to cases outside the hostile work framework. The circuits were simply referring to employees as supervisors whose job descriptions included filing reports on other employees.[151] Perhaps they could have called them "overseers."

The *Staub* court correctly dismissed the *Ellerth* generalization in holding that "[a] 'reprimand . . . for workplace failings' constitutes conduct within the scope of an agent's employment."[152] In holding an employer vicariously liable for employees' "supervisory" acts, when those employees did not meet the *Ellerth* supervisor requirements, *Staub* acknowledged that its holding was outside the *Ellerth* framework.

Attaching the *Vance* holding to *Staub*'s cat's paw unacceptably dilutes the cat's paw. The First Circuit's failure to bifurcate the *Vance* supervisor from *Staub* weakens the class of supervisor to which vicarious liability is attached.[153] A supervisor whose very job is to report on an employee's progress can purposefully affect the employee's firing through doctored reports. But no liability can attach unless the employer had reason to know that he was biased. The First Circuit's adoption of the *Vance's* definition of "supervisor" is an outright rejection of *Staub* and the Supreme Court's theory of cat's paw liability.

The First Circuit based this rejection on the notion that "the language of *Vance*" applies to all forms of harassment, including harassment that ends in a tangible employment action.[154] *Vance* may include in its conception of harassment those cases where the harassment culminates in a tangible employment action.[155] However, it bases this broad definition of harassment on a framework-specific presumption from *Ellerth* that only "supervisors" could cause tangible employment actions, a presumption that the First

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[150] *See e.g.*, Potence v. Hazleton Area Sch. Dist., 357 F.3d 366, 370 (3d Cir. 2004) (establishing a cat's paw liability similar to the Second Circuit); Laxton v. Gap Inc., 333 F.3d 572, 583 (5th Cir. 2003) (establishing a two-part test for subordinate bias liability); EEOC v. Liberal R-II Sch. Dist., 314 F.3d 920, 926 (8th Cir. 2002) (establishing a cat's paw liability test similar to the one established by the Second Circuit); Rose v. N.Y.C. Bd. of Educ., 257 F.3d 156, 162 (2d Cir. 2001) (establishing that cat's paw liability exists in the Second Circuit when an employee has significant influence over the decision-making process); Maarouf v. Walker Mfg. Co., 210 F.3d 750, 752 (7th Cir. 2000) (establishing a form of proximate cause liability in the Seventh Circuit); Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 355 (6th Cir. 1998) (establishing a causal nexus test for cat's paw liability).

[151] *See Laxton*, 333 F.3d at 583.

[152] Staub v. Proctor Hosp., 562 U.S. 411, 423 (2011) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 798–99 (1998)).

[153] Velázquez-Pérez v. Developers Diversified Realty Corp., 753 F.3d 265, 273 (1st Cir. 2014).

[154] *Id.*

[155] Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

Circuit invalidated.[156]

The Second Circuit does not mention *Vance* but cites *Velázquez-Pérez* and the *Ellerth* framework approvingly in establishing a baseline negligence standard for co-worker cat's paw liability.[157] In doing so, the Second Circuit falls into the same trap of extending cat's paw liability to co-workers under a framework established on the proposition that only supervisors have the apparent power to cause tangible employment actions. This apparent power did not mean that co-workers cannot instigate tangible employment actions, but only that the actions and words of supervisors with express power over hiring and firing are more implicitly threatening. This is the distinction that the *Ellerth* harassment framework is designed to tackle.

C. Velázquez, Vasquez & The Co-Worker Cat's Paw

This article argues for two supervisors in one case. In *Velázquez-Pérez*, Martinez was certainly not a supervisor under the *Ellerth* framework when she sexually harassed Velázquez-Pérez. Her persistent lobbying efforts to get him fired are evidence that her words and actions did not constitute the implicit threats which the *Ellerth* framework wards against. Her employer had not granted her sufficient, express firing authority that she could wield over Velázquez in the workplace.[158] But that finding should not preclude a *Staub* analysis because her employer had clearly granted her sufficient authority within its decision-making mechanism to cause the firing.

In *Vasquez*, the opposite may have been true. Gray may very well have been a supervisor under the *Ellerth* framework. Empress had strong reason to suspect Gray's discriminatory intent but did not conduct any investigation, thus de facto "delegat[ing] the power to take tangible employment actions to" Gray.[159] Under *Vance*, Gray was a sexually harassing supervisor who took an adverse employment action against Vazquez.[160] Empress should be held vicariously liable under the *Ellerth* framework.

But Vasquez did not plead that the total lack of an independent investigation effectively made Gray a *Vance* supervisor. Rather, Vazquez pleaded retaliation and the cat's paw, and *Staub* does not necessarily

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156 Burlington Indus. v. Ellerth, 524 U.S. 742, 762 (1998); *Velázquez-Pérez*, 753 F.3d at 274 ("[A]n employer can be held liable under Title VII if: the plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.").

157 Vasquez v. Empress Ambulance Serv., 835 F.3d 267, 270 (2d Cir. 2016).

158 *Velázquez-Pérez*, 753 F.3d at 272–73.

159 *Vance*, 570 U.S. at 447.

160 *See Vazquez*, 835 F.3d at 269–70.

preclude her claim.[161] Under *Staub's* cat's paw, a dichotomy between supervisors and co-workers is unnecessary and oddly placed. Employers are liable under a cat's paw theory of liability when (1) "a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and (2) that act is a proximate cause of the ultimate employment action."[162] Yet, Staub's supervisors took advantage of reporting and disciplinary measures that are often made available to the entirety of the workplace.[163] Indeed, one of Staub's co-workers, Angie Day, complained to human resources about his frequent absences.[164] It is entirely possible that her comments could constitute the proximate cause that Justice Scalia envisioned. And, in *Vasquez*, Gray's actions were presumably only feasible because he took advantage of Empress' sexual harassment policy or reporting system.

There are significant real-world consequences to a cat's paw without a supervisor/co-worker dichotomy. Such a broad cat's paw could expose employers to massive liability. Employers may become more hesitant to credit the opinions of low-level employees, and workplace cohesion might suffer. Accordingly, this article does not argue against the possibility of a negligence-based cat's paw doctrine. In fact, it would be entirely plausible for courts to hold that co-workers cannot take advantage of the employer-employee relationship for the purpose of cat's paw.[165] This article argues only against the implementation of the co-worker cat's paw created in the First and Second Circuits, which would apply a specific framework's limited terms of vicarious liability to an entire field of law. *Vance*'s holding should be limited to the framework from which it is derived, and the cat's paw should not be reversed, absent a Supreme Court decision holding otherwise.

V. CONCLUSION

The First and Second Circuits have ostensibly reversed cat's paw liability. In attempting to overcome *Vance*'s strict "supervisor" definition, the circuits empowered the cat's paw to reach the discriminatory actions of co-workers. But in doing so, the circuits have unnecessarily adopted a framework which negates cat's paw liability in a majority of cases.

This article advocates for a strict interpretation of *Vance*: limiting its supervisor exception to the *Ellerth* framework, which presupposes several generalizations, most importantly the non-existence of *Staub* cat's paw liability. Title VII employment law does not require, nor should it want, a

161 *Id.* at 274–78.
162 Staub v. Proctor Hosp., 562 U.S. 411, 422 (2011) (emphasis in original).
163 *Id.* at 414–15.
164 *Id.* at 414.
165 *See* RESTATEMENT (SECOND) OF AGENCY § 219 (AM. LAW INST. 1958).

universal definition of supervisor. If one is desired, Congress should amend Title VII.

The *Ellerth* framework is designed to deal with a specific type of injury and concerns itself with the specific employees especially attuned to causing that injury: those employees who seemingly have the power to take tangible employment actions at will. The cat's paw theory of liability is concerned with another employee, the employee with the power, patent or latent, to influence the final employment actions of his employer. In bifurcating the two lines of cases and their respective supervisors, this article acknowledges the different statutory histories and legal uses of cat's paw and hostile workplace liability. It now asks the circuit courts to do so as well.