

# Killing the Cat's Paw

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I. INTRODUCTION .....	1303
II. BACKGROUND .....	1306
A. The Federal Discrimination Statutes.....	1306
B. Cat's Paw at the Supreme Court .....	1307
III. CAT'S PAW AS METAPHOR GENERALLY.....	1311
IV. CAT'S PAW DOES NOT EXPLAIN REAL WORKPLACES .....	1313
V. KILLING THE CAT'S PAW .....	1316
VI. CONCLUSION.....	1321

## I. INTRODUCTION

In federal employment discrimination law, courts apply the label “cat’s paw” to describe certain cases. Judge Richard Posner first used the term cat’s paw in the context of federal discrimination jurisprudence, invoking a fable about an enterprising monkey who tricks a cat into getting hot chestnuts from a fire.<sup>1</sup> As the cat removes the hot chestnuts from the fire, the monkey eats them, leaving the cat with nothing except burnt paws.

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\*Judge Joseph P. Kinneary Professor of Law, University of Cincinnati College of Law. This article is part of a symposium to honor Professor Charlie Sullivan. Charlie has truly created and nurtured a community of scholars. Personally, I remain grateful for Charlie’s work in creating structures to support junior faculty, which greatly influenced my early work and continues to influence my scholarship today. In addition to his own significant contributions to the literature in employment discrimination and employment law, Charlie has always been a generous, enthusiastic and careful reader for others in the field. I want to thank my research assistant Blythe McGregor for pulling cases and articles for this piece.

<sup>1</sup> *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990). I note at the outset Professor Sullivan’s concerns about the narrowness of any legal inquiries, whether based on fables or not. Charles A. Sullivan, *Is There A Madness to the Method?: Torts and Other Influences on Employment Discrimination Law*, 75 OHIO ST. L.J. 1079, 1080 (2014) (“any legal inquiry can draw on only a limited number of concepts, and there is a natural tendency to analogize to concepts with which the attorney or judicial mind is familiar. It may be that the tendency can be overdone . . .”).

In its traditional form, a cat's paw case is one in which a biased individual passes along negative information about a worker to an "unbiased" decisionmaker.<sup>2</sup> The "unbiased" decisionmaker then takes a negative action against the worker based on the information provided. Although the cat's paw metaphor appears to be an easy way to describe a subset of discrimination cases, the term has grown beyond this descriptive function. There is now an entire body of employment discrimination law built around the cat's paw concept.

This Article explores cat's paw as a metaphor. It argues that courts should abolish the metaphor for three main reasons. First, cat's paw does not function well as a metaphor. Other than providing a clever turn of phrase, cat's paw does not perform any of the traditional functions of metaphor. The concept of cat's paw does not make an abstract principle more concrete. It does not provide fresh insights about discrimination law.<sup>3</sup> It does not make law more accessible by allowing lay readers to better understand the law.<sup>4</sup> Indeed, most people have never encountered the fable that underlies cat's paw.

Second, cat's paw does not promote reasoning by analogy. It is unable to perform this function because the cat's paw fable does not describe what is happening in discrimination cases. The fable portrays two actors (a monkey and a cat) who have no legal relationship to one another and are not imbedded within a larger organization. The monkey is acting for his own personal gain and is not constrained or emboldened by the formal policies and informal norms of a larger organization.

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<sup>2</sup> I use the term "unbiased" in quotes to reflect the idea that the decisionmaker is not overtly motivated by animus based on a protected trait. However, this construct is problematic on a number of fronts. First, it suggests that employment decisions are discrete acts that take place after one decision is made. However, in some instances, a decision develops over time with multiple inputs. Second, using the term bias elevates the required standard for liability. The federal employment discrimination statutes require causation, and not intent. However, causation can be proven through evidence of intent. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1) (using word "because").

<sup>3</sup> Chad M. Oldfather, *The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions*, 27 CONN. L. REV. 17, 20 (1994). This Article is not trying to make any technical claim about the definition of metaphor compared to other rhetorical devices, such as analogy. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 748 n.26 (1993). The problem of metaphor is not unique to discrimination law. *See, e.g.*, Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 359–62 (2003); Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241 (1995) (analyzing the applicability of the physician-fiduciary metaphor in the context of a changing health care system); Eileen A. Scallen, *Promises Broken vs. Promises Betrayed: Metaphor, Analogy, and the New Fiduciary Principle*, 1993 U. ILL. L. REV. 897 (1993) (describing how metaphors of trust and betrayal influence the availability of extracontractual damages in breach of contract cases).

<sup>4</sup> Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 25 (2006).

Unfortunately, the fable does not even relate to the two most important actors in discrimination cases: the worker and the employer. They are simply not part of the idea that the fable conveys. Perhaps most striking, in the fable, the monkey gets away with his mischief. The overall tale told by the cat's paw fable is that a wrongdoer suffers no consequence for his actions. This does not seem like an appropriate idea to guide federal discrimination law.

Finally, employment discrimination as a field has suffered greatly by using cat's paw. Even though the pitfalls of judging by metaphor are well-known, judges have not been careful in using cat's paw.<sup>5</sup> In many cases, judges have inserted aspects of the cat's paw fable when describing the legal standard for proving employment discrimination. Rather than looking to the statutory language or purpose for meaning, the judges view the limits of liability through the fable instead. This happens even though the fable introduces concepts that are not required to adjudicate discrimination claims.

The consequences of this loose analysis are far-reaching. The cat's paw concept has been used in hundreds of cases. 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.<sup>6</sup>

Professor Alexander Bickel once noted that sometimes metaphors need some "scraping . . . off" and refurbishing.<sup>7</sup> This is not one of those cases. There is little value to the cat's paw metaphor. It should not be refurbished, but retired.

The next section of this Article provides the necessary background for understanding how cat's paw doctrine initially developed. Section III demonstrates that cat's paw does not perform the traditional functions of metaphor. Section IV shows it is impossible to use the cat's paw idea to reason by analogy because the cat's paw fable is too dissimilar to discrimination cases. Section V explores how the fable has infected the doctrine as judges draw meaning from the fable itself, rather than the text, history, or purposes of the underlying discrimination statutes.

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<sup>5</sup> *E.g.*, *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

<sup>6</sup> *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.*, No. 17-11096, 2018 WL 5046255, at \*5 (5th Cir. Oct. 16, 2018) (applying it to the FMLA); *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 351 (6th Cir. 2012) (Title VII and ADA); *Simmons v. Sykes Enterprises, Inc.*, 647 F.3d 943, 949 (10th Cir. 2011) (ADEA).

<sup>7</sup> Alexander M. Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 42 (1961).

## II. BACKGROUND

Judge Richard Posner introduced the term cat's paw into employment discrimination jurisprudence in *Shager v. Upjohn Co.*<sup>8</sup> Despite the later significance of this new term of art, *Shager* contains only a passing reference to cat's paw and does not even describe the fable on which the term is based.

Later cases would fill in this gap. In *Staub v. Proctor Hospital*, the Seventh Circuit opined:

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."<sup>9</sup>

At least in its original form, the term "cat's paw" described a situation in which an unbiased individual takes an action against a worker based on input from a biased individual. *Shager* held that the employer could be liable for discrimination in these circumstances.

A. *The Federal Discrimination Statutes*

As currently conceived, cat's paw purports to describe a subset of employment discrimination cases. 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.<sup>10</sup> 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[.]<sup>11</sup>

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<sup>8</sup> *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

<sup>9</sup> *Staub v. Proctor Hosp.*, 560 F.3d 647, 650 (7th Cir. 2009), *vacated*, 562 U.S. 411 (2011).

<sup>10</sup> 42 U.S.C. § 2000e-2(a).

<sup>11</sup> *Id.* § 2000e-2(a)(1).

2020]

*KILLING THE CAT'S PAW*

1307

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.<sup>12</sup>

These two subparts form the foundation of Title VII's text.<sup>13</sup> The Age Discrimination in Employment Act contains similar main language,<sup>14</sup> and the Americans with Disabilities Act contains similar concepts, although not always stated in the same language.<sup>15</sup>

B. *Cat's Paw at the Supreme Court*

The Supreme Court formally recognized the cat's paw concept in *Staub v. Proctor Hospital*.<sup>16</sup> In *Staub*, the plaintiff Vincent Staub sued his employer for terminating his employment, alleging the employer violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>17</sup> USERRA prohibits employers from discriminating or retaliating against service members based on their military service.<sup>18</sup> 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 for training and deployments, often on the weekends. After working for the hospital for 14 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.

There was no evidence that the person who decided to fire Staub took his military service into account when making the decision. However, Staub presented evidence that the decision was influenced by information from two supervisors who arguably did possess such bias.<sup>19</sup>

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<sup>12</sup> *Id.* § 2000e-2(a).

<sup>13</sup> 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).

<sup>14</sup> 29 U.S.C. § 623(a).

<sup>15</sup> 42 U.S.C. § 12112.

<sup>16</sup> 562 U.S. 411 (2011). Professor Sullivan examines the broader implications of *Staub* and cat's paw doctrine in Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431 (2012).

<sup>17</sup> 562 U.S. at 415–16. 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.

<sup>18</sup> 38 U.S.C. § 4311.

<sup>19</sup> *Staub*, 562 U.S. at 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.

A jury heard Staub's case and awarded him \$57,640.00 in damages.<sup>20</sup> The employer filed post-trial motions. In considering post-trial motions, the trial court noted that "the testimony and documentation about who said what to whom was hotly contested."<sup>21</sup>

The Seventh Circuit reversed, relying on its jurisprudence requiring that the biased subordinate have a singular influence over the decisionmaker.<sup>22</sup> 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.<sup>23</sup> In ruling on the case, the Seventh Circuit re-described the cat's paw fable and specifically invoked the fable in describing the legal standard it created.<sup>24</sup>

The Supreme Court granted certiorari in *Staub* to resolve a circuit split regarding the proper standard in cat's paw cases.<sup>25</sup> The Supreme Court upheld the use of cat's paw doctrine and enunciated a test to apply in some circumstances. The Court only briefly refers to the fable in a footnote.<sup>26</sup> This does not mean that the fable played no role in the case. One of the most insidious features of cat's paw doctrine, as discussed below, is the idea that cat's paw is somehow different than other kinds of discrimination cases. Once the Supreme Court recognized these cases as somehow different than other cases, it created a legal standard to apply to them that is different than the legal standard the Court uses to describe cases that do not fall within the cat's paw concept.

After reciting the facts, the Supreme Court provided the text of USERRA and noted its similarity to Title VII.<sup>27</sup> 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."<sup>28</sup> The Court then applied a tort law overlay to USERRA.

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<sup>20</sup> *Staub v. Proctor Hosp.*, No. 04-1219, 2008 WL 2001935, at \*1 (C.D. Ill. May 7, 2008).

<sup>21</sup> *Id.* at \*2.

<sup>22</sup> *Staub v. Proctor Hosp.*, 560 F.3d 647, 656 (7th Cir. 2009), *vacated*, 562 U.S. 411 (2011).

<sup>23</sup> It is worth noting that there is no reference to any statutory language in the Seventh Circuit's description of cat's paw doctrine.

<sup>24</sup> *Staub*, 560 F.3d at 650, 656.

<sup>25</sup> See Brief for the United States as Amicus Curiae, *Staub v. Proctor Hospital*, Docket No. 09-400, \*9 (US filed Mar 16, 2010) (available on Westlaw at 2010 WL 3611711) ("Staub Amicus Brief"); Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 927 (2014).

<sup>26</sup> *Staub v. Proctor Hospital*, 562 U.S. 411, 416, n.1 (2011).

<sup>27</sup> *Id.* at 416–17.

<sup>28</sup> *Id.* I have critiqued the Supreme Court's purported use of tort law in other work. Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051 (2014); Sandra F. Sperino, *Discrimination Statutes, the Common Law and Proximate Cause*, 2013 U. ILL. L. REV. 1.

The Court stated that intent requires a person to intend the consequences of his actions or believe that consequences are substantially certain to occur.<sup>29</sup> It noted that even if the allegedly biased supervisors 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 not cognizable on its own under USERRA. In discrimination jurisprudence, there is a continuing circuit split about this issue.<sup>30</sup>

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 . . . can be aggregated with the act of another agent . . . to impose liability on Proctor.”<sup>31</sup> The Court discussed various views on 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.”<sup>32</sup>

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.<sup>33</sup>

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<sup>29</sup> *Staub*, 562 U.S. at 422 & 422 n.3.

<sup>30</sup> *See, e.g.*, *Taylor v. New York City Dep’t of Educ.*, 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).

<sup>31</sup> *Staub*, 562 U.S. at 418.

<sup>32</sup> *Id.* at 418–19.

<sup>33</sup> *Id.* at 419.

The Court also discussed how the decisionmaker's exercise of independent judgment or an investigation might affect cat's paw.<sup>34</sup> It specifically held that the independent judgment of a decisionmaker does not break the causal chain. The Court purported to address this problem through proximate cause jurisprudence.<sup>35</sup>

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.<sup>36</sup> It also indicated that the judgment is not a superceding cause because superceding cause only exists if it is a "cause of independent origin that was not foreseeable."<sup>37</sup>

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 discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision."<sup>38</sup> 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."<sup>39</sup>

The Court left room for an investigation to 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.<sup>40</sup> The Court also noted that under USERRA, the defendant would be required to prove the causal break.<sup>41</sup> The biased report would remain 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."<sup>42</sup>

The Court ultimately held: "[I]f 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

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<sup>34</sup> By using the term independent, the author is repeating the terminology used by the Court. In many cases, once a biased individual reports that a worker has performance or other problems, it is difficult to determine how a subsequent negative action could be truly independent of the information received from the biased individual.

<sup>35</sup> *Staub*, 562 U.S. at 419–20.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 420. (citing *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 837 (1996) (internal quotation marks omitted)).

<sup>38</sup> *Id.* at 421.

<sup>39</sup> *Staub v. Proctor Hospital*, 562 U.S. 411, 421 (2011).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*



ultimate employment action, then the employer is liable under USERRA.<sup>43</sup> Turning to the facts of the *Staub* case, the Court held that the facts presented could meet the new 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 supervisor started in motion.<sup>44</sup> It also did not decide whether liability would occur if a co-worker (rather than a supervisor) possessed the required bias.<sup>45</sup>

### III. CAT'S PAW AS METAPHOR GENERALLY

In *Shager*, Judge Posner used the term "cat's paw" and simply stated that the employer could be liable for employment discrimination in these scenarios.<sup>46</sup> Thus, an employer could be liable if a biased subordinate gave false information to a decisionmaker and that decisionmaker took a negative action against a worker based on the biased information. If judges limited "cat's paw" to *Shager*, this Article would be unnecessary. Unfortunately, the cat's paw idea has spawned an entire body of confusing doctrine that is unmoored from the underlying federal discrimination statutes.

Given this, it is important to determine whether cat's paw even works as metaphor at a basic level. Metaphor often serves a stylistic function in cases. It can often be a clever turn of phrase that is repeated because of its stylishness. The concept of cat's paw certainly serves this function. The phrase has been used numerous times by courts over the last two decades.

Cat's paw gets high style points, but fares less well in other areas. Indeed, other than providing a clever turn of phrase, cat's paw does not perform any of the traditional functions of metaphor. Judges often use metaphor to make an abstract concept more concrete. For example, First Amendment jurisprudence uses the "marketplace of ideas" concept and constitutional criminal law relies on the metaphor of the "fruit of the poisonous tree."

Cat's paw does not serve this function. Cat's paw is not describing an abstract concept. Instead, it gives a new name to a fairly understandable set of facts. One person sets in motion a chain of events because of the

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<sup>43</sup> *Id.* at 422.

<sup>44</sup> *Id.* at 420 n.2. This footnote is especially confusing because it uses the concept of intent, but the footnote references a portion of the Restatement relating to negligence law.

<sup>45</sup> *Staub v. Proctor Hospital*, 562 U.S. 411, 422 n.4 (2011).

<sup>46</sup> *Shager v. Upjohn Co.*, 913 F.2d 398, 400 (7th Cir. 1990).

worker's protected trait, typically by giving negative information to an unbiased individual. The unbiased individual then takes a negative action against the worker.

Prior to *Posner* giving a name to this set of facts, courts adjudicated these kinds of cases all of the time without any need for the term cat's paw.<sup>47</sup> Indeed, portions of current cat's paw doctrine contradict established Supreme Court case law regarding how to prove discrimination claims.<sup>48</sup> The courts are failing to see these contradictions because the Supreme Court did not label these earlier cases under the heading of cat's paw.

The term cat's paw does express, in a sort of shorthand, a concept. Even giving the concept a name is problematic because it suggests that there is something separate or different about cat's paw cases. Indeed, many of the current problems with cat's paw jurisprudence relate to the fact that the courts have carved it out as a separate area without describing how it fits within the larger jurisprudence. Using the fable and the title "cat's paw" suggests that there is something different, and perhaps something more complicated, about these cases. After all, why use a fancy fable if the concept is not particularly difficult?

Cat's paw does not make the law more accessible by allowing lay readers to better understand the law.<sup>49</sup> The cat's paw story is not one that is commonly known or salient in popular culture. When I teach Employment Discrimination, most of my students have never heard of the fable of "The Monkey and the Cat," and we spend class time discussing the fable.

The limits of metaphor in the law are well documented.<sup>50</sup> "Even the most suspect metaphors may become embedded in judicial precedent and affect judicial reasoning."<sup>51</sup> Justice Cardozo famously warned, "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>52</sup> Others have voiced suspicion of judicial reliance on metaphorical expression. Justice Rehnquist was skeptical about the use of the "wall of separation" metaphor, referring to it as "Jefferson's misleading metaphor,"<sup>65</sup> and asserted that the metaphor "has proved useless as a guide to judging [Bill of Rights issues]."

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<sup>47</sup> See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95–96 (2003); *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 137 (2000); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231–32 (1989).

<sup>48</sup> I explore this concept in detail in Sandra F. Sperino, *Caught by the Cat's Paw*, \_\_ BYU L. REV. \_\_ (forthcoming 2020).

<sup>49</sup> Robert L. Tsai, *Democracy's Handmaid*, 86 B.U. L. REV. 1, 25 (2006).

<sup>50</sup> Stephanie A. Gore, "A Rose by Any Other Name": *Judicial Use of Metaphors for New Technologies*, 2013 U. ILL. J.L. TECH. & POL'Y 403, 403, 414 (2013) (discussing limits).

<sup>51</sup> Gore, *supra* note 50, at 414.

<sup>52</sup> *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926).

There is also a concern about deriving law from figures of speech or metaphor, rather than deriving law from concepts actually contained in the legal document the court is interpreting.<sup>53</sup> The courts have not been attentive to these limits as they articulate cat's paw doctrine.

A few courts have noted the problematic nature of cat's paw doctrine. One court noted that cat's paw jurisprudence suffered when the metaphor is taken "too literally."<sup>54</sup> The court noted that such claims should be "[s]tripped of their metaphors" because the court saw no reason to limit claims to those that closely resemble the metaphors that "imaginative lawyers and judges have developed."<sup>55</sup>

The Seventh Circuit has chided itself for the existing confusion within the jurisprudence, with Judge Posner authoring an opinion calling cat's paw doctrine a judicial attractive nuisance.<sup>56</sup> The Court also noted: "This is all a dreadful muddle, for which we appellate judges must accept some blame because doctrine stated as metaphor, such as the 'cat's paw' theory of liability, which we introduced into employment discrimination law in *Shager v. Upjohn Co.*"<sup>57</sup> In *Lust v. Sealy, Inc.*,<sup>58</sup> Judge Posner noted, "The formula was (obviously) not intended to be taken literally . . . and were it taken even semi-literally it would be inconsistent with the normal analysis of causal issues in tort litigation."

Unfortunately, most courts continue to robustly use the cat's paw concept without expressly or implicitly recognizing the problems involved in using metaphors generally or the fact that the cat's paw metaphor does not perform most of the traditional functions of metaphor.

#### IV. CAT'S PAW DOES NOT EXPLAIN REAL WORKPLACES

Metaphor may also help a reader to understand a concept through a form of analogic reasoning.<sup>59</sup> The metaphor helps the reader to understand similarities between the metaphor and the legal concept and can provide new insights about the legal concept.<sup>60</sup> In this respect, cat's paw fails miserably. Strangely, the fable does not describe what is happening in a "cat's paw" scenario.

<sup>53</sup> *People of State of Ill. ex rel. McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cty., Ill.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).

<sup>54</sup> *E.E.O.C. v. BCI Coca-Cola Co.*, 450 F.3d 476, 488 (10th Cir. 2006).

<sup>55</sup> *Id.*

<sup>56</sup> *Cook v. IPC Int'l Corp.*, 673 F.3d 625, 628 (7th Cir. 2012).

<sup>57</sup> *Id.*

<sup>58</sup> 383 F.3d 580, 584 (7th Cir. 2004).

<sup>59</sup> Oldfather, *supra* note 3, at 22–23.

<sup>60</sup> *Id.*

Let's return to the fable. The wily monkey tricks the cat into obtaining chestnuts and then absconds with them. When courts try to apply the fable, at times they cannot even figure out which entity or person the cat represents. All courts agree that the monkey is supposed to represent the biased individual. Some courts have stated that the cat is the unbiased supervisor.<sup>61</sup> Others have stated that the cat is the employer.<sup>62</sup> The Second Circuit has described cat's paw as follows: "In other words, by merely effectuating or 'rubber-stamp[ing]' a discriminatory employee's 'unlawful design,' the employer plays the credulous cat to the malevolent monkey and, in so doing, allows itself to get burned—i.e., successfully sued."<sup>63</sup>

Knowing whether the cat is the individual decisionmaker or the employer is important in federal discrimination cases. As discussed below, under federal discrimination law, the employer (and not typically the individual decisionmaker) is the entity liable for discrimination.

Even overcoming this basic problem does not revive cat's paw's usefulness. In the cat's paw fable, there are two actors: a monkey and a cat. In the fable, the monkey is not part of a larger organization. The monkey is acting on its own and for its own purposes, and the monkey is not constrained or emboldened by the formal policies or informal norms of a larger organization. The monkey and the cat have no legal relationship with one another. The monkey does not have any particular power over the cat, such as the power inherent in employment relationships.

This is very different than what cat's paw cases actually look like. In all cat's paw cases there are at least four identifiable actors in a legal sense: a "biased" person, an "unbiased" decisionmaker, the employer, and the worker affected by the bias. If the biased person is the monkey and the unbiased decisionmaker is the cat, the fable tells us nothing about the employer's liability or the duties owed to the worker.

Indeed, the most striking feature of the cat's paw fable is that it leaves out two of the key players in discrimination suits: the employer and the worker alleging injury. The federal discrimination statutes are supposed to protect certain workers from discrimination based on a protected trait. Unfortunately, the cat's paw fable does not even include the worker in the metaphor. In the fable, the cat is harmed because he follows the requests of

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<sup>61</sup> *Diaz v. Tyson Fresh Meats, Inc.*, 643 F.3d 1149, 1152 (8th Cir. 2011) ("Indeed, the theory is premised on a biased subordinate—the monkey who effects his discriminatory intentions through the unbiased cat's paw.").

<sup>62</sup> *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 768–69 (6th Cir. 2015) (noting that the employer Ford would be the cat in the scenario, but evidence did not support); *see also* *Macknet v. Univ. of Pa.*, No. CV 15-5321, 2017 WL 4102829, at \*5, n.1 (E.D. Pa. Sept. 14, 2017).

<sup>63</sup> *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (citation omitted) (also using the word manipulated).

the wily monkey. In a cat's paw scenario, the worker who is subjected to biased decisionmaking is the person who can seek the legal remedy under the federal discrimination statutes. When courts use the cat's paw fable, they do not describe the worker as the harmed person. A more apt fable would go something like this: a wily monkey gets a cat to harm a third animal and then a fourth entity is liable for the monkey's conduct. Omitting the worker from the metaphor is a fatal flaw. This, alone, should be a sufficient reason to retire the metaphor.

Most courts view the two actors in the cat's paw as the biased individual and the unbiased supervisor. The worker is left out of this story, but so is the employer. This is important because the employer is the entity that employs the worker and is legally responsible under federal discrimination law. The fable tells courts nothing about whether and why the employer should be held liable for the interaction between the biased and the unbiased individual. In the fable, the monkey is acting for his own ends. When the monkey acts in the fable, the monkey is not subject to corporate policies or external legal constraints.

More importantly, in the fable, the monkey is not held accountable for its conduct. The harm falls on the cat, and the monkey gets away with its misconduct. The lack of accountability in the fable is a strong reason to refuse to apply it in the context of the federal discrimination statutes.

The fable is also too simple in many other respects. In the fable, there is one monkey and one cat. Even if we assume that the cat is supposed to represent the unbiased decisionmaker, the fable does not describe well what happens in real workplaces. Many "cat's paw" cases involve decisions made after input from multiple people, some biased, some not, and some perhaps influenced by the biased information.<sup>64</sup> Cat's paw cases often involve multiple levels of review or the input of a human relations department. Some cat's paw cases involve multi-member decision-making bodies.

In addition, the monkey carries out one act in isolation. In many discrimination cases, the plaintiff will present cat's paw evidence, but may also present additional evidence suggesting discrimination occurred. Calling a case a cat's paw case highlights and isolates this form of evidence and separates it from other kinds of evidence the plaintiff might use to prove discrimination.

Finally, the fable does not illuminate any legal concept that the courts have used to discuss cat's paw: legal cause, factual cause, intent, or agency. Indeed, none of these concepts inform the underlying fable. As discussed

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<sup>64</sup> Kregler v. City of New York, 987 F. Supp. 2d 357, 368 (S.D.N.Y. 2013) (discussing the problem when the biased individual influences the decisionmaker through intermediaries).

later in this Article, it is difficult to apply these concepts within the confines of the cat's paw fable.

#### V. KILLING THE CAT'S PAW

Judges should kill the cat's paw for three reasons. First, other than providing a stylish label, cat's paw does not perform the traditional functions of metaphor. The fable is not well known, and it does not make an abstract concept more concrete. Second, the fable cannot serve as the basis of analogic reasoning because it does not even remotely describe what happens in the workplace. Finally, judges are actually looking to the fable to understand discrimination law, instead of relying on the text, history, and purposes of the underlying federal discrimination law.

Since *Staub*, the federal district and appellate courts have defined cat's paw doctrine in problematic ways. One source of these problems is the courts' constant reference to the cat's paw fable itself. As the jurisprudence develops, the cat's paw fable itself continues to shape the doctrine. Courts have both explicitly and implicitly relied on concepts from the fable to decide cases. This happens even when the statutory text and purposes do not rely on the same concepts. As this section shows, courts are often requiring litigants to prove elements that are not required by the federal anti-discrimination statutes, but which instead are drawn from the fable.

The Second Circuit recited that the phrase "cat's paw" "derives from an Aesop fable, later put into verse by Jean de La Fontaine."<sup>65</sup> In the fable, "a wily monkey flatters a naïve cat into pulling roasting chestnuts out of a roaring fire for their mutual satisfaction; the monkey, however, 'devour[s] . . . them fast,' leaving the cat 'with a burnt paw and no chestnuts' for its trouble."<sup>66</sup>

The fable centers on the guile of the monkey, the monkey's malevolent plan, the naivety of the cat, and the fact that the monkey tricks the cat into getting the chestnuts. This language has worked its way into lower court iterations of cat's paw, with lower courts often using the fable to insert extra requirements into the cat's paw jurisprudence.<sup>67</sup> Courts repeatedly incorporate three ideas from the fable into discrimination law. Courts have asserted that cat's paw involves: (1) the concept of the

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<sup>65</sup> *Vasquez*, 835 F.3d at 271–72.

<sup>66</sup> *Id.*

<sup>67</sup> *Robinson v. Perales*, 894 F.3d 818, 832 (7th Cir. 2018) (using words "dupe" and "deliberate scheme"); *Tshibaka v. Sernulka*, 673 F. App'x 272, 281 (4th Cir. 2016); *Milligan-Grimstad v. Stanley*, 877 F.3d 705, 711 (7th Cir. 2017); *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 515 (10th Cir. 2015); *Hervey v. Miss. Dep't of Educ.*, 404 F. App'x 865, 871–72 (5th Cir. 2010).

unbiased individual being a “dupe;” (2) the idea that the biased individual is engaging in a “deliberate scheme,”<sup>68</sup> or the biased individual “us[ing]” or “intentionally manipulate[ing]” the unbiased individual; and (3) the idea that one actor must be manipulating another person and that manipulation must directly translate into an outcome.<sup>69</sup>

The Eighth Circuit described cat’s paw theory as applying “[i]n the employment discrimination context . . . [when] a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.”<sup>70</sup> Appellate courts have also cited to dictionary or other definitions of the term cat’s paw, which relates to “one used by another as a tool.”<sup>71</sup> The Second Circuit has described cat’s paw as a case where the employer rubberstamps a “discriminatory employee’s ‘unlawful design.’”<sup>72</sup> Other courts have used the term “malevolent intent” to describe the motives of the biased supervisor.<sup>73</sup>

One court used the concept of a “dupe” to preclude liability. In the case, an allegedly biased individual gave the plaintiff negative performance reviews that were later used to fire him during a reduction in force.<sup>74</sup> The court reasoned that cat’s paw liability could not attach in such a case because the supervisor did not know about the possibility of the reduction in force at the time he gave the performance reviews; therefore, the supervisor could not dupe anyone.<sup>75</sup>

Some courts incorporate the concept of a dupe in a slightly different way. They articulate cat’s paw analysis as establishing liability “if the plaintiff shows that the decisionmaker merely ‘followed the biased recommendation [of a non-decisionmaker] without independently

<sup>68</sup> See, e.g., *Tuttle v. Baptist Health Med. Grp., Inc.*, 379 F. Supp. 3d 622, 632 (E.D. Ky. 2019); *McGaha v. Orion Sec. Sols., L.L.C.*, No. CIV-17-1290-G, 2019 WL 1212933, at \*7 (W.D. Okla. Mar. 14, 2019); *McDaniel v. Progress Rail Locomotive*, 343 F. Supp. 3d 753, 767 (N.D. Ill. 2018).

<sup>69</sup> *Smith v. City of Madison, Miss.*, 364 F. Supp. 3d 656, 659 n.1 (S.D. Miss. 2018); *Marshall v. Rawlings Co., LLC*, No. 3:14-CV-00359-TBR, 2018 WL 3745832, at \*4 (W.D. Ky. Aug. 7, 2018).

<sup>70</sup> *Singer v. Harris*, 897 F.3d 970, 978–79 (8th Cir. 2018) (quoting *Qamhiyah v. Iowa State Univ. of Sci. & Tech.*, 566 F.3d 733, 742 (8th Cir. 2009)); see also *Robinson v. Perales*, 894 F.3d 818, 832 (7th Cir. 2018) (using similar articulation).

<sup>71</sup> *Gollas v. Univ. Of Tex. Health Sci. Ctr. At Houston*, 425 F. App’x 318, 325 (5th Cir. 2011) (citing to dictionary).

<sup>72</sup> *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 272 (2d Cir. 2016) (quoting *Nagle v. Marron*, 663 F.3d 100, 117 (2d Cir. 2011)) (also using the word “manipulates”).

<sup>73</sup> *Cook v. IPC Int’l Corp.*, 673 F.3d 625, 629 (7th Cir. 2012).

<sup>74</sup> *Cherry v. Siemens Healthcare Diagnostics, Inc.*, 829 F.3d 974, 977 (8th Cir. 2016).

<sup>75</sup> *Id.*

investigating the complaint against the employee.”<sup>76</sup> Or the court indicates that the employer is only liable if the employer “uncritically relies on the biased subordinate’s reports and recommendations in deciding to take adverse employment action.”<sup>77</sup> Strangely, many of these cases seem to directly contradict the Supreme Court’s holdings in *Staub* related to the effects of independent judgment and investigations.<sup>78</sup>

Additionally, in the fable, the monkey directly influences the cat. Some courts have added this idea in the doctrine. For example, one court described cat’s paw noting that the plaintiff would show that “those exhibiting discriminatory animus influenced or participated in the decision to terminate’ him.”<sup>79</sup> This language suggests that the biased person must influence someone. There are scenarios where the biased individual simply puts a negative evaluation in file, but does not reach out to influence another human being. While this difference does not affect the harm done to the plaintiff or the reason for the harm, some case law implies that the biased person must somehow influence another person.

When the courts use the fable as part of legal doctrine, they import concepts that are not part of the federal discrimination statutes, their underlying policies, or even the *Staub* case. Inserting these new words and concepts into cat’s paw doctrine risks further confusing an already messy jurisprudence. Consider again the three concepts that courts often import from the fable: that the unbiased individual is a dupe; that the biased individual engaged in a deliberate scheme or a malevolent one, and that the biased individual must directly influence another individual.

The *Staub* holding does not require the formal decisionmaker to be a dupe, nor does it require a “deliberate scheme” or intentional manipulation. Indeed, one striking feature of post-*Staub* cases is circuit courts’ tendency to cite to their own circuit’s or other circuits’ articulations of cat’s paw (including pre-*Staub* versions of the test), rather than relying primarily on *Staub*.<sup>80</sup>

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<sup>76</sup> *Harrison v. Belk, Inc.*, 748 F. App’x 936, 942 (11th Cir. 2018) (citing *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999)).

<sup>77</sup> *Armstrong v. Arcanum Grp., Inc.*, 897 F.3d 1283, 1290 (10th Cir. 2018) (quoting *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 514 (10th Cir. 2015)).

<sup>78</sup> See generally *supra* Section II.

<sup>79</sup> *Greenawalt v. Clarion Cty.*, 459 F. App’x 165, 169 (3d Cir. 2012) (citing *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001)). But see *Marshall v. Rawlings Co., LLC*, 854 F.3d 368 (6th Cir. 2017) (allowing liability in the FMLA context even with multiple levels of review).

<sup>80</sup> See, e.g., *Dolan v. Penn Millers Ins. Co.*, 625 F. App’x 91, 94 n.7 (3d Cir. 2015) (citing *Cook v. IPC Int’l Corp.*, 673 F.3d 625, 629 (7th Cir. 2012) (another circuit)); *Greenawalt*, 459 F. App’x at 169 (citing *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001)) (2001 case from same circuit).



The discrimination statutes require that the plaintiff establish a causal link between a protected trait and an outcome,<sup>81</sup> but do not require that causal link to be established through intentional manipulation or a devious scheme. The Supreme Court has recognized that Title VII liability can occur even if the person thought they were acting to help or protect the plaintiff.<sup>82</sup> Indeed, several Supreme Court cases approve of employer liability when the plaintiff shows that discriminatory actions or comments caused a negative outcome, but without directly connecting who specifically engaged in such conduct and exactly how and who that conduct impacted later in the decisional process.<sup>83</sup>

The cat's paw fable does not assist the courts in analyzing questions related to causation. Instead, it complicates those inquiries. In the fable, the monkey makes a request to the cat, and the cat immediately responds and suffers harm. There are only two actors, and it is fairly clear what happens. Thus, there are no questions about factual cause.

Employment discrimination scenarios in the real world look very different than the simple scenario posed by the fable. As discussed earlier, the monkey and the cat are individual actors. The monkey is acting based on its own desires. The monkey is not part of a larger organization, and the monkey and the cat have no legal relationship with one another in the fable. In the fable, there are only two actors and there is no distance in either time, space, or motivation between the monkey's plan and the negative outcome.

All cat's paw scenarios are more complicated than the fable because they involve the employer and the worker, in addition to the biased individual and the unbiased one. Many cat's paw scenarios are even more complex in that they add even more actors (multi-member bodies, multiple levels of supervisory review, an HR department).<sup>84</sup> Many cat's paw cases involve attenuation in that the biased individual's comments or conduct are removed in time or space from the final outcome. Some cat's paw cases also involve some attempt by the employer's agent to investigate the information provided by the biased individual.

Given these differences, labeling something as "cat's paw" reveals very little about the appropriate causal outcome. Some cat's paw cases easily meet a factual cause requirement and others do not. For example,

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<sup>81</sup> See, e.g., 42 U.S.C. § 2000e-2(a) (not using the term "intent").

<sup>82</sup> Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc., 499 U.S. 187, 198–99 (1991).

<sup>83</sup> See, e.g., *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 v. Hopkins*, 490 U.S. 228, 233 (1989).

<sup>84</sup> E.g., *Murphy v. Radnor Twp.*, 604 F. App'x 175, 177 (3d Cir. 2015).

consider a situation where a clearly biased individual provides negative information about an employee. Thirty other people, who do not know the biased individual and who do not know about the information he provides, also provide negative information about the employee's performance. The input received from the biased individual is fairly minor compared to the complaints of the other thirty people, and the biased individual is a non-influential co-worker. Based on the input of all thirty-one people, the employee's supervisor (who also exhibits no bias) decides to fire him. In such a scenario, it is very unlikely that the plaintiff would be able to establish the factual cause standard, which varies by statute.<sup>85</sup> Importantly, the inability to establish causation has very little to do with the fact that this scenario technically falls under the label of a "cat's paw" case. Indeed, labeling this scenario as cat's paw performs no work in determining factual cause. Importantly for the current jurisprudence, cat's paw doctrine and the fable itself tell courts absolutely nothing about where to draw the line on more difficult factual cause questions.

Nor is the fable helpful to any agency analysis. This fable does not capture the dynamics that exist when the unbiased individual and the biased individual work for the same employer. It does not recognize that the employer faces liability under the employment discrimination statutes. The fable contains no basis upon which to ground a theory of liability for the employer. Nor does it instruct courts on what to do when both the monkey and the cat work in a complex environment, governed by employer practices. For example, the fable tells us nothing about the employer's liability when it investigates the facts alleged by the biased individual.

The most significant harm created by the cat's paw fable is that it suggests that cat's paw cases are somehow separate from the rest of employment discrimination law and that causation and agency issues should somehow work differently in this subset of cases. Requiring a court to first determine whether it has a cat's paw case and then applying notions of factual cause and agency specific to that subset of cases is problematic. Nothing in the employment discrimination statutes suggests that cat's paw cases require a separate analysis, and the statutes do not contain a separate cat's paw provision. And, as if one name were not enough, courts have also started to give additional names to "cat's paw," calling it "rubber stamp" liability and "subordinate bias."<sup>86</sup> Some courts appear to

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<sup>85</sup> See, e.g., 42 U.S.C. § 2000e-2(m); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009).

<sup>86</sup> *Armstrong v. Arcanum Grp., Inc.*, 897 F.3d 1283, 1290 (10th Cir. 2018). Referring to cat's paw cases as "rubber stamp" cases is problematic because not all cat's paw scenarios involve the decisionmaker "rubber stamping" a biased individual's recommendation. For example, in the *Staub* case itself, one of the subordinate supervisor's wrote a negative performance review without any specific recommendation. Referring to

2020]

*KILLING THE CAT'S PAW*

1321

differentiate cat's paw from rubber stamp liability.<sup>87</sup> Some courts have referred to cat's paw as creating vicarious liability.<sup>88</sup> These sub-names increase the confusion about cat's paw.

## VI. CONCLUSION

It is time to kill the cat's paw. The concept does not perform any of the traditional functions of metaphor, other than providing a flashy name. The underlying fable does not accurately represent employment scenarios in many ways. Most importantly, the fable does not describe the worker or the employer, the two main actors in discrimination cases. Especially problematic is the fact that at the end of the fable, the monkey gets away with his misdeed. There is no remedy provided. Unfortunately, the cat's paw fable has infected employment discrimination law. It does not help the courts analyze issues related to causation, intent, or agency. Instead, it only provides another lawyer of complexity to an already confused jurisprudence.

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cat's paw cases as subordinate bias cases is sometimes inaccurate because the bias may not come from the subordinate of the decisionmaker. For example, an HR manager could possess the required bias. For a discussion of subordinate bias liability, see Theresa M. Beiner, *Subordinate Bias Liability*, 35 U. ARK. LITTLE ROCK L. REV. 89 (2012).

<sup>87</sup> McGaha v. Orion Sec. Sols., L.L.C., No. CIV-17-1290-G, 2019 WL 1212933, at \*7 (W.D. Okla. Mar. 14, 2019).

<sup>88</sup> Liles v. C.S. McCrossan, Inc., 851 F.3d 810, 820 (8th Cir. 2017) (quoting Bennett v. Riceland Foods, Inc., 721 F.3d 546, 551 (8th Cir. 2013)). Referring to cat's paw cases as vicarious liability cases is also inaccurate in many cases. In some instances, the employer's own action or inaction contributed to bias and impacted the outcome.