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# Subordinate Bias Liability

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## SUBORDINATE BIAS LIABILITY

Theresa M. Beiner\*

### I. INTRODUCTION

Employment decisions are often made with the input or based on the observations of more than one person. Because multiple people often play a role in an adverse employment decision, complications arise for employment discrimination plaintiffs trying to prove that discriminatory animus played a part in that decision. Can an employee complain when her coworker or direct supervisor is overly critical of her because she is a woman? What if that person provides incorrect information or distorted information about the employee that results in those who do have the authority to fire her terminating her employment? Does she have a claim for sex discrimination?

The Supreme Court of the United States sought to answer this and other related questions in *Staub v. Proctor Hospital*.<sup>1</sup> Prior to the *Staub* decision, the circuit courts were split about the circumstances under which factfinders could hold an employer liable for the discriminatory animus of subordinate supervisors or coworkers who did not have decision making authority, which is known as the “cat’s paw” theory of liability or “subordinate bias liability.”<sup>2</sup> In particular, *Staub* addressed subordinate bias liability in the context of bias by a non-decision making supervisor. This article sets out the varying theories that the circuit courts adopted to handle such cases, parsing the differences and ambiguities that resulted. It then looks at the Supreme Court’s attempt to settle these ambiguities in the *Staub* case and points out where the Court created additional ambiguities. The article also addresses the substance of *Staub* and finally critiques the Court’s approach. In the end, the Court adopted none of the formulations used by the circuit courts and set a standard that may be difficult for plaintiffs to meet.

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1. 131 S. Ct. 1186 (2011).

2. See, e.g., Sara Eber, Comment, *How Much Power Should Be in the Paw? Independent Investigations and the Cat’s Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 155–74 (Fall 2008) (describing the three approaches adopted by various circuit courts).

## II. THE CAT'S PAW, SUBORDINATE BIAS LIABILITY, AND THE SPLIT

Cat's paw liability originally got its name from Judge Posner's decision in the Seventh Circuit case *Shager v. Upjohn Co.*,<sup>3</sup> which involved age discrimination. The "cat's paw" term comes from the Aesop fable, "The Cat, the Monkey, and the Chestnuts."<sup>4</sup> In this fable, a cat and a monkey are sitting in front of a fireplace in which some chestnuts are roasting in the hot ashes.<sup>5</sup> The monkey convinces the cat that he has the perfect paws with which to pick the chestnuts out of the fireplace.<sup>6</sup> The cat tries to do so, burning his paws, but eventually successfully pulls multiple chestnuts out of the fireplace.<sup>7</sup> When he finally stops to enjoy his ill-gotten chestnuts, he finds that the monkey has eaten them all.<sup>8</sup> The moral of this fable has been variously stated. One interpretation is that "[a] thief cannot be trusted, even by another thief."<sup>9</sup> Another common moral ascribed to this story is "[t]he flatterer seeks some benefit at your expense."<sup>10</sup> A more simple interpretation is "[d]on't be tricked into misbehaving."<sup>11</sup> Finally, Webster's dictionary defines it as "one used by another as a tool."<sup>12</sup>

As for how Judge Posner used it in *Shager*, the "cat's paw" was a two-word characterization of his "conduit" theory of subordinate bias liability in the context of an age discrimination claim.<sup>13</sup> *Shager* involved the termination of Ralph Shager from his job as a sales representative for Asgrow Seed Company ("Asgrow"), which Upjohn acquired when Shager was fifty-years-old.<sup>14</sup> Shager reported to Asgrow's youngest district manager—John Lenhst—who Shager argued harbored animus against older workers.<sup>15</sup> In spite of being placed in a division in which it was very difficult for Shager

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

4. Aesop, *The Cat, the Monkey, and the Chestnuts*, FABLES AND FAIRY TALES: A TREASURY OF CHILDHOOD STORIES FROM 1909, <http://fairytale4u.com/fable/fable2.htm> (last visited Sept. 29, 2012).

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* (the cat and monkey stole the chestnuts from their master).

9. Aesop, *Aesop's Fable: The Monkey and the Cat*, READ BOOK ONLINE, <http://www.readbookonline.net/readOnline/6648/> (last visited Sept. 29, 2012).

10. Aesop, *The Monkey and the Cat*, CHILD BIBLE STORY ONLINE, <http://www.childrenstory.info/childrenstories/themonkeyandthecat.html> (last visited Sept. 29, 2012).

11. Aesop, *The Monkey and the Cat*, NURSERY-RHYMES-FUN, <http://www.nursery-rhymes-fun.com/themonkeyandthecat.html> (last visited Sept. 29, 2012).

12. *Cat's Paw Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/cat's%20paw> (last visited Nov. 1, 2012).

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

14. *Id.* at 399.

15. *Id.* at 399–400.

to meet the sales goals Lehnst set, Shager actually surpassed his sales goals.<sup>16</sup> Yet, Lehnst placed Shager on probation because of purported difficulties in collecting on accounts and eventually recommended to the Career Path Committee that Shager be fired.<sup>17</sup> That committee thereafter fired Shager.<sup>18</sup> Shager submitted evidence suggesting that Lehnst was uncomfortable with older employees and that Lehnst sought out another younger man with no experience to work as a sales representative in an easier territory.<sup>19</sup> The trial court granted summary judgment in Asgrow's favor.<sup>20</sup>

One of the issues on appeal was whether Lehnst's hostility toward older workers could be imputed to Asgrow.<sup>21</sup> The court concluded that there was sufficient evidence that Lehnst's bias could have "tainted" the decision making process to withstand summary judgment.<sup>22</sup> As Judge Posner explained:

If [the Career Path Committee] acted as the conduit of Lehnst's prejudice—his cat's-paw—the innocence of its members would not spare the company from liability. For it would then be a case where Lehnst, acting within (even if at the same time abusing) his authority as district manager to evaluate and make recommendations concerning his subordinates, had procured Shager's discharge because of his age. Lehnst would have violated the statute, and his violation would be imputed to Asgrow.<sup>23</sup>

In ruling in this manner, Judge Posner explained that "[i]f the rule were different, the establishment of corporate committees authorized to rubber stamp personnel actions would preclude a finding of willfulness no matter how egregious the actions in question."<sup>24</sup>

The cat's paw theory eventually became known by a more apt name—subordinate bias liability.<sup>25</sup> Not surprisingly, subordinate bias liability took on a life of its own after this case, resulting in splits among the circuits regarding the circumstances under which fact-finders should hold an employer liable for an adverse employment decision where the decision maker did not have discriminatory animus but those who informed his or her decision did.

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16. *Id.* at 400.

17. *Id.*

18. *Id.*

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

20. *Id.* at 401.

21. *Id.* at 404.

22. *Id.* at 405.

23. *Id.*

24. *Id.* at 406.

25. See, e.g., Taran S. Kaler, *Controlling the Cat's Paw: Circuit Split Concerning the Level of Control a Biased Subordinate Must Exert over the Formal Decisionmaker's Choice to Terminate*, 48 SANTA CLARA L. REV. 1069, 1070 (2008).

Fortunately, other commentators already have identified and characterized the nature of the split. Most commentators have recognized three different approaches adopted by various circuits, while occasionally suggesting that the range of approaches falls more on a continuum.<sup>26</sup> However one characterizes the split, it appears that it resulted in three predominant approaches: one that is more lenient and therefore more easily satisfied by the plaintiff<sup>27</sup> (sometimes referred to as the “input standard”<sup>28</sup> or “any influence standard”);<sup>29</sup> one that is in the middle, which purportedly balances the interests of the plaintiff and the defendant<sup>30</sup> (sometimes referred to as the “causation standard”);<sup>31</sup> and one that is more strict and is much more difficult for a plaintiff to satisfy<sup>32</sup> (sometimes referred to as the “actual decision-maker standard”<sup>33</sup> or “principally responsible standard”).<sup>34</sup>

*Russell v. McKinney Hospital Venture*,<sup>35</sup> from the Fifth Circuit, provides an example of the most lenient, or “input,” standard.<sup>36</sup> As the name coined for this standard suggests, to meet it, a plaintiff need show only that “a biased supervisor without decisionmaking authority gave information that might have influenced or affected an adverse employment decision.”<sup>37</sup> Plaintiff Sandra Russell alleged that she was fired from her job as director of clinical services for Columbia Homecare based on her age—fifty-four-years-

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26. See, e.g., Stephen F. Befort & Alison L. Olig, *Within the Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 389 (2008) (calling it a “continuum,” but then settling on three predominant approaches—the lenient, intermediate, and strict approach); Eber, *supra* note 2, at 155–74 (describing three approaches—the input standard, causation standard, and actual decision maker standard); Kaler, *supra* note 25, at 1076–84 (identifying three standards by circuits that espouse them and then an array of varied standards); Sean Ratliff, *Independent Investigations: An Inequitable Out for Employers in Cat's Paw Cases*, 80 U. Colo. L. Rev. 255, 260–68 (2009) (describing the three standards as “able to influence,” actual decision maker, and essentially the causation standard); Rachel Santoro, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. Pa. J. Bus. L. 823, 824 (2009) (breaking the approaches down to three categories, including “principally responsible,” “any influence,” and “causal connection”).

27. See Befort & Olig, *supra* note 26, at 389.

28. See Eber, *supra* note 2, at 155.

29. See Santoro, *supra* note 26, at 824.

30. See Befort & Olig, *supra* note 26, at 395.

31. See Eber, *supra* note 2, at 157–58; see also Santoro, *supra* note 26, at 824 (calling it the “causal connection” standard).

32. See Befort & Olig, *supra* note 26, at 392–94.

33. See Eber, *supra* note 2, at 164–65.

34. See Santoro, *supra* note 26, at 824.

35. 235 F.3d 219 (5th Cir. 2000).

36. See *id.* Commentators have noted that the First and D.C. Circuits follow a similar standard. See, e.g., Ratliff, *supra* note 26, at 260–62 (citing and describing *Cariglia v. Hertz Equip. Rental Corp.*, 363 F.3d 77, 87 (1st Cir. 2004) and *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308 (D.C. Cir. 1998)).

37. Eber, *supra* note 2, at 155.

old.<sup>38</sup> Russell alleged that her fifty-three-year-old boss, Carol Jacobsen, fired her at the behest of twenty-eight-year-old Steve Ciulla, who was the son of the chief executive officer of Columbia Homecare's parent company.<sup>39</sup> A jury agreed, returning a verdict in Russell's favor and awarding her \$25,000 in back pay.<sup>40</sup> The trial judge, however, disagreed and granted Columbia's renewed motion for judgment as a matter of law.<sup>41</sup>

As part of the appeal, the Fifth Circuit considered what influence Ciulla had on Russell's termination.<sup>42</sup> Apparently wanting Russell fired, Ciulla allegedly issued an ultimatum to Jacobsen (who was also his boss) that he would quit if she did not fire Russell.<sup>43</sup> There was evidence that Ciulla had problems with Russell's age.<sup>44</sup> Specifically, Russell testified that Ciulla frequently called her "old bitch" to the point where she actually wore earplugs to avoid hearing it.<sup>45</sup> In ruling that a reasonable jury could find for Russell under these circumstances, the court used language of subordinate influence: "If the employee can demonstrate that others had influence or leverage over the official decisionmaker, and thus were not ordinary coworkers, it is proper to impute their discriminatory attitudes to the formal decisionmaker."<sup>46</sup> The court further explained that "it is appropriate to tag the employer with an employee's age-based animus if the evidence indicates that the worker possessed leverage, or exerted influence, over the titular decisionmaker."<sup>47</sup> While this language gives rise to an influenced-based form of liability, the court also suggested that Ciulla effectively became the decision maker in this instance because of the "informal power" he possessed.<sup>48</sup> Still, with such broad language of influence, it is easy to see how a court could determine that if a biased supervisor or coworker in some way influenced the decision maker (by, for example, providing erroneous information about the intended victim of discrimination), the language of this case would be broad enough to cover that situation.<sup>49</sup>

The intermediate standard, or causation standard, is usually attributed to the Tenth Circuit in *EEOC v. BCI Coca-Cola Bottling Co. of Los Ange-*

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38. *Russell*, 235 F.3d at 221.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 225–26.

43. *Id.* at 224.

44. *Russell*, 235 F.3d at 226.

45. *Id.* at 226.

46. *Id.*

47. *Id.* at 227.

48. *Id.* at 227–28.

49. See, e.g., *Laxton v. Gap Inc.*, 333 F.3d 572, 584 (5th Cir. 2003); *Bowden v. Potter*, 308 F. Supp. 2d 1108, 1121 (N.D. Cal. 2004).

les.<sup>50</sup> In this case, Stephen Peters alleged that BCI Coca-Cola Bottling Co. of Los Angeles ("BCI") fired him based on the racially discriminatory animus of a non-decision making supervisor, Cesar Grado.<sup>51</sup> Peters, who was black, alleged that Grado treated black employees worse than he treated Hispanic employees, including providing evidence regarding a Hispanic employee who was not fired (or even disciplined) for engaging in the same actions that allegedly caused Peters's termination.<sup>52</sup> BCI asserted that Peters was fired for insubordination based on a conversation he had with Grado in which Peters refused to work on the weekend.<sup>53</sup> It ended up that Peters had actually called in sick to another supervisor, Jeff Katt, and was excused from working on that weekend.<sup>54</sup> However, rather than Grado, it was Pat Edgar, who worked 450 miles away in the company's Phoenix office, that terminated Peters.<sup>55</sup> At the time Edgar made the decision to terminate Peters, she did not know he was black.<sup>56</sup>

In making the determination to fire Peters, Edgar relied on representations by Grado about the events leading up to the weekend shift that Peters missed.<sup>57</sup> Grado's description of what happened that Friday varied from that of both Peters and Katt, and Edgar never asked Peters for his "side of the story."<sup>58</sup> Because of the influence of Grado on Edgar's decision to terminate Peters, as well as the evidence of Grado's purported discriminatory animus, the court held that summary judgment was improper because there was an issue of fact as to whether the reason BCI gave for Peters's termination—insubordination—was a pretext for discrimination.<sup>59</sup>

In reaching this conclusion, the court provided another standard for subordinate bias liability. Rejecting the stricter "rubber stamp" version of liability, the court began by noting that the term "decisionmaker" did not appear in Title VII and that limiting liability to actual decision makers

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50. 450 F.3d 476 (10th Cir. 2006). Commentators have noted that the Ninth, Second, Third, Sixth, Eighth, and Eleventh Circuits follow some variations on the middle of the road standard. See Ratliff, *supra* note 26, at 266–68. There appears to be some disagreement regarding whether the Seventh Circuit still uses the standard set out in Judge Posner's decision in *Shager* or has adopted the more stringent standard that the Fourth Circuit follows. See, e.g., Ratliff, *supra* note 26, at 266 (arguing that the Seventh Circuit has maintained its centrist position); Eber, *supra* note 2, at 164–65 (placing the Seventh Circuit in the more stringent group).

51. *BCI*, 450 F.3d at 477.

52. *Id.* at 482–83.

53. *Id.* at 480.

54. *Id.* at 481.

55. *Id.* at 478–79, 483.

56. *Id.* at 482.

57. *BCI*, 450 F.3d at 491.

58. *Id.*

59. *Id.* at 492–93.

would undermine its deterrent effect on subordinate bias.<sup>60</sup> The court re-framed the issue as “whether the biased subordinate’s discriminatory reports, recommendation, or other actions caused the adverse employment action”<sup>61</sup>—hence, its moniker as the “causation standard.”<sup>62</sup> Arguing that this standard incorporates agency law principles that underlie Title VII liability, the court also provided a potential “out” for defendants.<sup>63</sup> It explained that if the employer had conducted an independent investigation of the allegations made against the employee, the employer could no longer be said to have relied upon the representations of the discriminatory employee, and the chain of causation would be broken.<sup>64</sup> The court suggested that this is not too tough a standard for an employer to meet: “[S]imply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory.”<sup>65</sup> As the court explained, this provides employers with “a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class.”<sup>66</sup>

The most difficult standard for plaintiffs, sometimes referred to as the “actual decisionmaker” standard,<sup>67</sup> is typified by the Fourth Circuit’s decision in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*<sup>68</sup> Sheet metal mechanic Ethel Hill claimed Lockheed fired her based on her sex and age as well as in retaliation for complaining about such discrimination.<sup>69</sup> Like other cases involving subordinate bias liability, Hill worked directly under supervisors who did not have the authority to hire and fire.<sup>70</sup> She also worked with Ed Fultz, a safety inspector who, although he had no supervisory authority, reported work infractions to Hill’s superiors.<sup>71</sup> Hill argued that the sex and age discriminatory animus of Fultz motivated his complaints and resulted in two reprimands from her direct supervisor, Dixon, which in turn led to her termination.<sup>72</sup> According to Hill, Fultz made derogatory statements to her, including “calling her a ‘useless old lady’ who needed to be retired, a ‘troubled old lady’ and a ‘damn woman,’ on several occasions while they were

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60. *Id.* at 487.

61. *Id.*

62. *Id.* at 487; see Eber, *supra* note 2, at 157–58.

63. *BCI*, 450 F.3d at 485–86, 488.

64. *Id.* at 488–89.

65. *Id.* at 488 (citing *Kendrick v. Penske Transp. Servs. Inc.*, 220 F.3d 1220, 1231–32 (10th Cir. 2000)).

66. *Id.*

67. See Eber, *supra* note 2, at 164–65.

68. 354 F.3d 277 (4th Cir. 2004) (en banc).

69. *Id.* at 281–82.

70. *Id.* at 282–83.

71. *Id.* at 283.

72. *Id.*



working together.”<sup>73</sup> The trial court granted Lockheed’s motion for summary judgment, and a divided panel of the Fourth Circuit reversed.<sup>74</sup> The Fourth Circuit granted an en banc hearing in the case, which resulted in the opinion that forms the basis for this approach to subordinate bias liability.<sup>75</sup>

While the court rejected that discrimination claims should be limited only to the actions of the final decision maker, it also made clear that the biased person in effect had to be the decision maker in order for the employer to be liable.<sup>76</sup> As it explained:

[W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.<sup>77</sup>

Relying largely on *Reeves v. Sanderson Plumbing*<sup>78</sup> and agency principles coming out of sexual harassment cases,<sup>79</sup> the court concluded that in order to survive summary judgment in a case involving subordinate bias liability, a plaintiff “must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.”<sup>80</sup> Thus, in Hill’s case, Fultz would have had to be the de facto decision maker.<sup>81</sup> From there, the court examined each individual reprimand and the final decision to terminate Hill, finally holding that Fultz did not have sufficient involvement in Hill’s termination to be considered the actual decision maker.<sup>82</sup>

Interestingly, Judge Michael, joined by three of his colleagues, dissented.<sup>83</sup> He argued that the majority failed to take the facts in the light most favorable to Hill.<sup>84</sup> He also asserted that the majority set the wrong standard for subordinate bias liability under Title VII and the Age Discrimination and Employment Act (ADEA), thereby undermining the efficacy of these anti-

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73. *Id.*

74. *Hill*, 354 F.3d at 283.

75. *Id.*

76. *Id.* at 290–91.

77. *Id.* at 291.

78. 530 U.S. 133 (2000).

79. *See Hill*, 354 F.3d at 286–89.

80. *Id.* at 291.

81. *Id.*

82. *Id.* at 297.

83. *See id.* at 299 (Michael, J., dissenting).

84. *Id.* at 299–300.

discrimination statutes.<sup>85</sup> Reading the facts as set out by Judge Michael suggests that one is reading about a wholly different fact pattern. Judge Michael described facts that suggest Fultz orchestrated Hill's termination after she complained about his discriminatory comments by writing up what could be characterized as trivial work infractions.<sup>86</sup> Instead of adopting the de facto decision maker test, Judge Michael argued for liability where the "biased subordinate has substantial influence on an employment decision."<sup>87</sup> In this case, Fultz provided the factual basis for two of the reprimands that the decision maker considered in firing Hill.<sup>88</sup> This, along with some factual issues surrounding one of the reprimands, led the dissenters to argue that there was sufficient evidence linking Fultz's discriminatory animus to Hill's termination to make summary judgment inappropriate.<sup>89</sup>

Another area of confusion in subordinate bias liability cases is the role of "independent investigations" in breaking the chain of causation linking the biased employee to the actual decision maker.<sup>90</sup> This issue was raised in the *BCI* case, and the Supreme Court of the United States actually granted certiorari in that case in 2007, only to dismiss the appeal after the parties settled.<sup>91</sup> As a result, the issue has lingered. It appears that most circuits agree that an independent investigation that reveals misconduct by the disciplined employee severs the chain of causation.<sup>92</sup> They disagree, however, regarding what that investigation must look like and who gets to make the call on the sufficiency of the investigation—the judge at summary judgment or the jury at trial.<sup>93</sup> Some courts are satisfied if the employee is asked to provide his or her side of the story.<sup>94</sup> Other courts have held that employees who fail to raise the issue of discrimination when presented with an opportunity to do so are barred from arguing that the employer conducted an im-

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85. *Hill*, 354 F.3d at 299, 301 (Michael, J., dissenting).

86. *See id.* at 299–301.

87. *Id.* at 304.

88. *Id.* at 305.

89. *Id.*

90. *See* Ratliff, *supra* note 26, at 268–72 (describing the split among the circuit courts).

91. *See* EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476 (10th Cir. 2006), *cert. granted*, BCI Coca-Cola Bottling Co. of L.A. v. EEOC, 549 U.S. 1105 (2007), and *cert. dismissed*, 549 U.S. 1334 (2007); *see also* Hannah Banks, Comment, Staub v. Proctor Hospital: *Cleaning Up the Cat's Paw*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 71, 80 (2011) (noting history).

92. *See* Ratliff, *supra* note 26, at 268.

93. *See id.* at 269–72 (describing cases).

94. *See, e.g., BCI*, 450 F.3d at 491–93 (suggesting summary judgment for employer might have been appropriate had employer sought out plaintiff's version of the facts); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1250 (11th Cir. 1998).

proper investigation.<sup>95</sup> Finally, some courts hold that issues as to the independence of investigations are best left to the jury, making summary judgment improper.<sup>96</sup> Thus, the role and nature of an “independent investigation” in subordinate bias liability cases was unclear at the time the Supreme Court of the United States granted certiorari in *Staub*.

### III. *STAUB V. PROCTOR HOSPITAL*

In *Staub v. Proctor Hospital*,<sup>97</sup> the Supreme Court of the United States, through an opinion written by Justice Scalia, purported to resolve the split over application of subordinate bias liability in employment discrimination suits.<sup>98</sup> In doing so, however, the Court did not wholly adopt any of the various circuits’ approaches.<sup>99</sup> The issue arose in an unusual discrimination setting—employment discrimination based on the plaintiff’s membership in the United States Army Reserve.<sup>100</sup> Thus, rather than the more common Title VII, Americans with Disabilities Act (ADA), or ADEA violation, this case arose under the Uniformed Services Employment and Reemployment Rights Act (USERRA).<sup>101</sup> That Act states:

A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.<sup>102</sup>

If a person’s military service is a “motivating factor” in an employer’s adverse action, the employer is liable for such discrimination.<sup>103</sup> Thus, according to the Court, USERRA mirrors the language of Title VII.<sup>104</sup>

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95. See, e.g., *Brewer v. Bd. of Trs. of the Univ. of Ill.*, 479 F.3d 908, 919 (7th Cir. 2007); *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 293 (4th Cir. 2004) (en banc).

96. See, e.g., *Kramer v. Logan Cnty. Sch. Dist. No. R-1*, 157 F.3d 620, 624 (8th Cir. 1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996).

97. 131 S. Ct. 1186 (2011).

98. *Id.*

99. *Id.*

100. *Id.* at 1189–90.

101. 38 U.S.C. § 4311(a)–(c) (2006).

102. *Id.* § 4311(a).

103. *Id.* § 4311 (c)(1). The Act also prohibits retaliation. See *id.* at § 4311 (c)(2).

104. 42 U.S.C. § 2000e-2(m) (2006). The Court’s suggestion in this regard is not precisely correct. Title VII uses “because of” language in its principal anti-discrimination section. See *id.* § 2000e-2(a). Title VII does establish liability if an employee can prove that a protected status was a “motivating factor” in the adverse employment action. See *id.* § 2000e-2(m).

In *Staub*, the plaintiff worked as a technician at Proctor Hospital until 2004.<sup>105</sup> While employed there, plaintiff Staub was a member of the United States Army Reserve.<sup>106</sup> This required him to attend drills one weekend each month and to participate in training full time for two to three weeks each year.<sup>107</sup> Staub alleged that both his immediate supervisor, Michael Korenchuk, and Korenchuk's supervisor, Janice Mulally, were hostile to his military service.<sup>108</sup> Mulally would assign Staub to shifts without notice to "pa[y] back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves."<sup>109</sup> She also told one of Staub's coworkers that his "military duty had been a strain on th[e] department" and that she wanted to "get rid of him."<sup>110</sup> "Korenchuk referred to Staub's military duties as 'a b[u]nch of smoking and joking and [a] waste of taxpayers['] money.'"<sup>111</sup>

There also were purported problems with Staub as an employee.<sup>112</sup> In January of 2004, Mulally issued a corrective action to Staub because he allegedly violated a company rule that required him to stay in his work area when he was not with a patient.<sup>113</sup> Staub argued that there was no such company rule and, even if there was, he did not violate it.<sup>114</sup> The corrective action also included a requirement that Staub report to Mulally or Korenchuk when he had no patients.<sup>115</sup> In addition, one of Staub's coworkers, Angie Day, complained to a human resources official, Linda Buck, and the chief operating officer, Garrett McGowan, that Staub was frequently unavailable and was abrupt.<sup>116</sup> McGowan asked Korenchuk and Buck to work out a plan to solve Staub's availability problems.<sup>117</sup> However, before they did so,

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However, a later section makes clear that this is used to limit the type of relief available to the plaintiff when the employer can show it "would have taken the same action in the absence of the impermissible motivating factor." *Id.* § 2000e-5(g)(2)(B). USERRA provides for a complete defense to liability if "the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311(c)(1). Thus, the statutes are not directly parallel in this regard.

105. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1189 (2011).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* (alterations in original) (quoting *Staub v. Proctor Hosp.*, 560 F.3d 647, 652 (7th Cir. 2009)).

110. *Id.* (alteration in original).

111. *Staub*, 131 S. Ct. at 1189 (alterations in original).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Staub*, 131 S. Ct. at 1189.

Korenchuk notified Buck that Staub had left his desk without informing a supervisor, which violated the corrective action.<sup>118</sup> While Staub argued that this was not true and that he had left a voicemail for Korenchuk before leaving his desk, Buck relied on Korenchuk's statement and, after reviewing Staub's file, decided to fire him.<sup>119</sup> Staub challenged his termination through an internal grievance process, arguing that Mulally had made up the infraction underlying the corrective action because she was hostile to his military service.<sup>120</sup> Buck did not investigate this allegation, but instead, after consulting with another personnel officer, upheld her decision to fire him.<sup>121</sup>

A jury found that Proctor had violated USERRA and awarded Staub \$57,640.<sup>122</sup> Staub successfully alleged that, while Buck may not have harbored hostility toward his military service, Mulally and Korenchuk did and influenced Buck's decision to terminate him.<sup>123</sup> The Seventh Circuit reversed, observing that a cat's paw case could not be successful unless the non-decision maker had such "singular influence" over the decision making supervisor that the ultimate decision was based on "blind reliance" on that non-decision maker.<sup>124</sup> The Seventh Circuit reasoned that because Buck relied not only on statements by Mulally and Korenchuk but also "looked beyond" their statements, did her own review of Staub's personnel file, and relied partly on her conversation with Day, she was not "wholly dependent" on the purported discriminatory supervisors.<sup>125</sup> While the Seventh Circuit noted that Buck's investigation could have been better, her failure to investigate Staub's allegations that Mulally was motivated by his Reservist status was insufficient to overcome the requirements for subordinate bias liability as set out by the Seventh Circuit.<sup>126</sup>

The Supreme Court disagreed with the Seventh Circuit's subordinate bias liability standard and held "that if a supervisor performs an act motivated by antimilitary animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."<sup>127</sup> In doing so, the Court rejected the positions of both the plaintiff and the defendant, and instead adopted its own interpretation of what was meant by USERRA's "motivating factor" language.<sup>128</sup>

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118. *Id.*

119. *Id.*

120. *Id.* at 1189–90.

121. *Id.* at 1190.

122. *Id.*

123. *Staub*, 131 S. Ct. at 1190.

124. *Id.* (quoting *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009)).

125. *Id.*

126. *Id.*

127. *Id.* at 1194.

128. *Id.* at 1190–91.

Staub argued that Mulally and Korenchuk's discriminatory animus motivated the corrective action and that was sufficient for liability, even if they did not intend for him to be fired.<sup>129</sup> The Court rejected this argument because discrimination was not part of Buck's reason for terminating him.<sup>130</sup> Even if Mulally and Korenchuk acted with discriminatory animus in the earlier report, this alone was not the type of employment action covered by USERRA because it did not involve initial employment, reemployment, retention, promotion, or any benefit of employment, and, therefore, did not fall within the plain language of the statute.<sup>131</sup>

Justice Scalia, writing for the majority, also considered whether Mulally and Korenchuk's motive could be aggregated with the acts of Buck to impose liability on the employer.<sup>132</sup> For this, he looked to agency law, which the Court often does in employment discrimination cases.<sup>133</sup> Explaining that the answer under agency law was less than clear, the Court eventually decided that it was unnecessary to decide what agency law required because the governing USERRA text provided the answer by specifying that discrimination be a "motivating factor" in the employer's decision.<sup>134</sup> Justice Scalia concluded:

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 (unknownst 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>135</sup>

Why is this the case? The reader is left to ponder this because Justice Scalia provided no further explanation of the distinction between a "factor," "causal factor," and "motivating factor." One interpretation of Justice Scalia's approach is that he means that the non-decision making supervisor must intend for the adverse employment action to occur in order for it to be a motivating factor. That the non-decision making supervisor merely provided a report that was "prompted by discrimination" does not render discrimination a "motivating factor"—instead it is a mere "factor"—in the adverse employment action. Thus, the non-decision maker must have a motive to influence the decision maker to take the adverse action against the targeted em-

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129. *Staub*, 131 S. Ct. at 1190–91.

130. *Id.*

131. *Id.* at 1191.

132. *Id.*

133. *Id.* See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754–65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 785–86 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

134. *Staub*, 131 S. Ct. at 1191.

135. *Id.* at 1192.

ployee. This is a very fine line distinction that may be difficult to assess factually in actual cases. It also does not seem to be justified by the "motivating factor" requirement under USERRA. The jury should decide what motivated the employer's action, as discussed in the conclusion below.

Justice Scalia then turned to Proctor's arguments, which he likewise rejected.<sup>136</sup> Proctor asserted that an employer was not liable unless the actual decision maker (in this case, Buck) was motivated by discriminatory animus of others.<sup>137</sup> The Court reasoned that, while this has the advantage of avoiding the difficulties associated with aggregating the adverse action and the animus, other tort principles covered the situation.<sup>138</sup> It is possible to attribute animus and responsibility for the adverse action if those with the animus, i.e., Mulally and Korenchuk, intended that Staub be fired based on their discriminatory actions. This provides the requisite scienter necessary under USERRA. As Scalia explained, "[I]t is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm."<sup>139</sup> While the Court recognized that the actual decision maker's judgment (in this case, Buck's) was a proximate cause of Staub's termination, a wrongful act can have multiple proximate causes, including the discriminatory actions of Mulally and Korenchuk.<sup>140</sup> Nor do superseding causes help Proctor here because for Buck's decision to be a superseding cause, it must be "of independent origin that was not foreseeable."<sup>141</sup> Apparently, if Buck relied on the corrective action motivated by Mulally and Korenchuk's discriminatory animus in making her ultimate decision, her decision to fire Staub could not be considered of independent origin.

The Court also was concerned with the consequences of adopting Proctor's position. The Court reasoned that Proctor's position permitted an employer to be "shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action."<sup>142</sup> So long as an employer "isolated" the decision maker from the employee's supervisor and asked that decision maker to review the employee's file before making his or her decision, the employer would be insulated from liability. The Court argued that such a reading was not supported by the statute's text.<sup>143</sup>

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1192.

140. *Staub*, 131 S. Ct. at 1192.

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

142. *Id.* at 1193.

143. *Id.*

The hospital also argued that the independent investigation of the alleged discriminatory animus by the decision maker (and her rejection of the allegations) should negate any prior discrimination.<sup>144</sup> The Court rejected this in part, explaining that if the decision maker's actions were not based on the original biased actions, then it would not be liable under USERRA; however, if the decision maker takes the biased information or report into consideration in the decision making process, bias can remain a causal factor in the decision.<sup>145</sup> As Justice Scalia explained, "We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect."<sup>146</sup> Thus, interestingly, the Court seemed skeptical of the use of independent investigations as a mechanism by which employers can break the chain of causation. However, it does contemplate that the employer may have legitimate reasons for an adverse employment action that do not encompass discriminatory animus, and that such reasons will relieve the employer of liability.

Justice Scalia also spent some time explaining the majority's disagreement with Justice Alito's concurrence. In a concurrence joined by Justice Thomas, Justice Alito agreed that the Court should reverse the Seventh Circuit decision but based his position entirely on the statutory text. He argued that the "motivating factor" language from USERRA required that discrimination motivate the action taken—not that some other action was motivated by discrimination and that this, in turn, caused the termination.<sup>147</sup> Justice Alito argued that the fears that decision makers will merely rubberstamp the discriminatory decisions of others are misplaced. If it is truly a rubberstamp situation, the decision maker effectively delegated his or her authority to the discriminatory supervisor, and the employer can be held liable.

Similarly, in a case like that of *Staub*, Justice Alito "would reach a similar conclusion where the officer with the formal decisionmaking authority is put on notice that adverse information about an employee may be based on antimilitary animus but does not undertake an independent investigation of the matter."<sup>148</sup> However, if that decision maker "undertakes a reasonable investigation and finds insufficient evidence to dispute the accuracy of that information," then the employer should not be held liable.<sup>149</sup> Justice Alito was clear that an employer who relies on information from a biased supervisor has not "'effectively delegated' decisionmaking authority."<sup>150</sup> Justice Alito argued that just as a judge who relies on information from a witness

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144. *Id.*

145. *Id.*

146. *Staub*, 131 S. Ct. at 1193.

147. *Id.* at 1195 (Alito, J., concurring).

148. *Id.*

149. *Id.*

150. *Id.*



during a bench trial does not delegate his decision making authority, an employer does not delegate decision making authority to another person simply by relying on information that person provides.<sup>151</sup> Justice Alito's approach was designed to encourage the same sort of internal grievance mechanisms that the decisions in *Burlington Indust., Inc. v. Ellerth*<sup>152</sup> and *Faragher v. Boca Raton*<sup>153</sup> spawned for sexual harassment cases. He also feared that the majority's approach would discourage employers from hiring members of the National Guard.<sup>154</sup>

Justice Scalia, writing for the majority, disagreed with Justice Alito's assessment of the statutory language. Instead, he argued that "[s]ince 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>155</sup> Syllogistically, Justice Scalia's reasoning appears to be as follows: A supervisor as an agent of the employer causes an adverse employment action. The adverse employment action was motivated by animus. Therefore, the supervisor as an agent of the employer was motivated by animus. According to the Court, giving credit to facts supplied by a biased supervisor effectively delegates that portion of the fact finding to a biased agent.<sup>156</sup> Justice Scalia argued that Justice Alito's analogy to a witness at trial was misplaced.<sup>157</sup> The "witness is not an actor in the events that are the subject of the trial;" however, the biased supervisor and decision maker are agents of the employer who the plaintiff seeks to hold liable.<sup>158</sup> The majority was likewise unimpressed with Justice Alito's argument that this would lead to employers not wanting to hire members of the National Guard.<sup>159</sup> As Justice Scalia pointed out, this in and of itself would violate USERRA.<sup>160</sup>

In the end, the Court reversed the Seventh Circuit's decision, holding that a reasonable jury could find for Staub under this new standard. However, because the jury instructions did not include this standard—instead, according to the Court, they simply required that his military status be a motivating factor in the decision to discharge him—the Court remanded so that the Seventh Circuit could determine if the difference between the jury in-

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151. *Id.* at 1195–96. Perhaps the more apt analogy is whether a judge who relies on biased evidence may be guilty of bias in his or her decision making.

152. 524 U.S. 742 (1998).

153. 524 U.S. 775 (1998).

154. *Staub*, 131 S. Ct. at 1196.

155. *Id.* at 1193.

156. *Id.* at 1193–94.

157. *Id.* at 1193.

158. *Id.*

159. *Id.* at 1194.

160. *Staub*, 131 S. Ct. at 1194.

structions and the Court's standard was harmless error.<sup>161</sup> Likewise, Justice Alito concurred in the judgment because he too believed that there was enough evidence to support that the employer had delegated at least part of the decision making authority that resulted in Staub's termination.<sup>162</sup> Because there was evidence of bias directed at Staub, he agreed that the Seventh Circuit's decision should be overturned.<sup>163</sup> On remand, the Seventh Circuit granted the new trial motion.<sup>164</sup>

#### IV. UNANSWERED QUESTIONS

As is often the case, part of what is interesting about this decision is what the majority does not resolve. In an interesting footnote—footnote four—the majority opened up potential caveats. First, the Court explained, rather cryptically, that “the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles.”<sup>165</sup> Given the language of USERRA, which covers hiring, rehiring, retention, promotion, and benefits of employment,<sup>166</sup> one is hard pressed to think of a situation in which a decision maker would be acting outside the scope of his or her employment and engaging in an action that is covered by USERRA. The Court cites to *Burlington Industries, Inc. v. Ellerth*, suggesting some sort of military service harassment claim, perhaps.<sup>167</sup>

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161. *Id.*

162. *Id.* at 1195–96.

163. *Id.* at 1196 (Alito, J., concurring).

164. *Staub v. Proctor Hosp.*, 421 Fed. App'x. 647, 649 (7th Cir. 2011). The court reasoned that the trial court's initial instructions varied too greatly from the new Supreme Court rule. In particular, the trial court's jury instructions read:

Animosity of [Mulally or Korenchuk] toward [Staub] on the basis of [Staub]'s military status as a motivating factor may not be attributed to [Proctor] unless [Mulally or Korenchuk] exercised such singular influence over [Buck] that [Mulally or Korenchuk] was basically the real decision maker. This influence may have been exercised by concealing relevant information from or feeding false information or selectively-chosen information to [Buck].

*Id.* at 648 (alteration in original) (quoting *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009), *rev'd*, 131 S.Ct. 1186 (2011)). The Seventh Circuit reasoned that the emphasis under the new standard is on the antimilitary animus of Mulally and Korenchuk—not Buck.

165. *Staub*, 131 S. Ct. at 1194 n.4.

166. 38 U.S.C. § 4311(a) (1996).

167. *Staub*, 131 S. Ct. at 1191–94.

The Court also “express[ed] no view” regarding the possibility of liability when the bias-motivated employee is a coworker.<sup>168</sup> Yet, it seems logical that a bias-motivated coworker could just as easily as a supervisor provide incorrect biased information that is relied upon by a decision maker in making an adverse decision about an employee.<sup>169</sup> Indeed, in the military leave context, coworkers may bear the brunt of a reservist’s leave needs. It is not hard to imagine a bunch of coworkers engaging in a campaign to have such a reservist fired.

Finally, the Court noted that Staub used the employer’s internal grievance mechanism, and, citing *Pennsylvania State Police v. Suders*,<sup>170</sup> once again “express[ed] no view” about whether Proctor would have had an affirmative defense if Staub had not.<sup>171</sup> The issue in *Suders* was whether constructive discharge constituted a tangible employment action such that the *Ellerth/Faragher* affirmative defense would not be available in a sexual harassment case.<sup>172</sup> It is unclear what Justice Scalia means by this reference in *Staub*, unless he is alluding to harassment based on military status. If he means to suggest an *Ellerth/Faragher* type defense is available when an employee is discharged, this seems an inappropriate extension of a defense that was developed for sexual harassment cases, in part because such harassment has weak links to actions that in some way implicate the employer. Indeed, if a decision maker is motivated to fire a reservist because of biased information from the reservist’s direct supervisor or coworker, what difference does it make whether a grievance mechanism is in place?

Additionally, while the Court appears skeptical of independent investigations,<sup>173</sup> footnote four suggests that investigations pursuant to an *Ellerth/Faragher* type grievance process might provide a defense.<sup>174</sup> Commentators have noted that the courts’ multiple approaches to independent investigations in subordinate bias liability cases have become problematic.<sup>175</sup>

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168. *Id.* at 1194 n.4.

169. See Santoro, *supra* note 26, at 833 (arguing that “[t]here should not be a difference between non-supervising employees and supervisors if both groups are able to lodge complaints, make false allegations, or otherwise unfairly undermine another party’s employment status because of a discriminatory motive”).

170. 542 U.S. 129 (2004).

171. *Staub*, 131 S. Ct. at 1194 n.4.

172. The portion of the *Suders* case that Justice Scalia cited is the discussion of the circumstances under which an employer will or will not have such a defense in a purported constructive discharge scenario. *Staub*, 131 S. Ct. at 1194 n.4 (citing *Suders*, 542 U.S. at 148–49). The Court there held that an employer cannot use the defense when the constructive discharge is the result of an “official act” of the employer, such as a demotion, etc. *Suders*, 542 U.S. at 149.

173. *Staub*, 131 S. Ct. at 1193.

174. *Id.* at 1194 n.4.

175. See, e.g., Santoro, *supra* note 26, at 835 (noting the need for more development and a coherent standard for independent investigations).

This footnote seems to make at least investigations that result from a grievance process a possible defense. How this would work in a situation in which an employee was, for example, terminated, is unclear. After all, in *Ellerth* and *Faragher*, the Court was clear that where an employer took a tangible employment action—such as a termination—against the complaining employee, the affirmative defense provided in those cases would be unavailable.<sup>176</sup> Indeed, given the criticism that the affirmative defense has received in the sexual harassment context, in part based on the lack of what might constitute an adequate grievance process and investigation,<sup>177</sup> it seems unwise to extend this affirmative defense to scenarios outside of harassment claims.

It does appear that the Court intended for this subordinate bias liability standard to apply in other discrimination contexts. Justice Scalia noted early in the decision that USERRA is “very similar to Title VII,” which prohibits discrimination based on race, color, religion, sex, or national origin and uses motivating factor language like USERRA.<sup>178</sup> Thus, it appears that the Court means for this decision to at least apply in the Title VII context. However, it is unclear how it applies in age and disability discrimination cases. Neither statute includes the motivating factor language found in USERRA and Title VII.<sup>179</sup> However, at least a couple of lower courts have applied a modified version of *Staub* to ADEA cases,<sup>180</sup> and another court assumed it applied in the ADA context.<sup>181</sup>

#### V. CONCLUSION OR DO WE NEED THIS AT ALL GIVEN THE LANGUAGE OF TITLE VII AND USERRA?

Since the Supreme Court issued its decision in *Staub*, the theory it purportedly solidified has taken on a life of its own.<sup>182</sup> Yet, there are several problems with the manner in which the Court resolved *Staub*. One problem

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176. See *Suders*, 542 U.S. at 137–38 (describing cases).

177. See, e.g., Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 57 (2003).

178. *Staub*, 131 S. Ct. at 1191.

179. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–79 n.5 (2009) (rejecting motivating factor and mixed motive analyses in the ADEA context and adopting “but for” causation); *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (rejecting the same in ADA context).

180. See *Marcus v. PQ Corp.*, 458 F. App'x. 207, 210–11 (3d Cir. 2012); *Simmons v. Sykes Enters., Inc.*, 647 F.3d 943, 949 (10th Cir. 2011) (requiring “but for cause”); *Wojtanek v. Dist. No.8, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 435 Fed. App'x. 545, 549 (7th Cir. 2011).

181. See *Dickerson v. Bd. of Trs. of Cmty. Coll. Dist. No. 522*, 657 F.3d 595, 602 (7th Cir. 2011).

182. The Court issued its decision in *Staub* on March 1, 2011. As of October 6, 2012, Westlaw indicates that 224 courts have cited the case.

is the ambiguities that resulted from the Court's allusions to grievance processes. Another is the extra bit of causation that the plaintiff must show—that the non-decision maker must intend an adverse employment action—and the potential problems this may cause plaintiffs with meritorious claims. This section will suggest a simple fix that could eliminate these problems and ambiguities.

To begin with, the Court's approach to how grievance processes might interact with subordinate bias liability is left in a state of confusion. The Court explains that the outcome might have been different had Staub not complained about the bias based on his reservist status and subsequently been ignored on this point by the decision maker.<sup>183</sup> What exactly does the Court intend by this? This is especially unclear given that the Court also rejected the defendant's arguments that an independent investigation breaks the chain of causation.<sup>184</sup> Grievance processes often result in just this type of investigation. Employers would do well to set up some type of internal grievance process to take discrimination complaints. This case suggests a possible defense if an employee does not complain pursuant to the grievance process and a potential out for an employer even where an employee does follow the process.

Yet, these grievance processes in and of themselves are problematic.<sup>185</sup> First, an employee must know that discrimination was a factor in the adverse action at the time it happens. Sometimes the employee does not know this until later or is unsure at the time of the adverse action. Second, even where he or she does suspect discrimination, the employee runs the risk of further retaliation due to her complaint. If Staub's complaint was investigated, who would the employer believe—Staub or his supervisors? It seems unlikely that the employer would have believed Staub's account over two supervisors and another coworker. If she had believed them, would the employer have been off the hook because she followed its grievance process and conducted a proper investigation? The Court does not answer this question, but does explain that the outcome of the case might have been different had Staub not complained about the bias based on his reservist status and subsequently been ignored by Buck.<sup>186</sup>

In addition, Justice Scalia's formulation adds something to the intent analysis that is unnecessary. Unlike the circuits that adopted either the input standard or the causation standard, the Court places emphasis on what the non-decision making supervisor was trying to accomplish with the biased information he or she provided to the decision maker. According to the

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183. *Staub*, 131 S. Ct. at 1191–94.

184. *Id.* at 1193–94.

185. See Grossman, *supra* note 177.

186. *Staub*, 131 S. Ct. at 1191–94.

Court, this supervisor must “intend” to cause an adverse employment action.<sup>187</sup> While in some cases this may be easy to show, in others it may well be that the biased supervisor is trying to get the employee in trouble or make that employee’s life difficult. Consider the *Hill* case as an example.<sup>188</sup> Ms. Hill would have a problem under this standard because there is little evidence of what Fultz intended by his reports of her work infractions. Was he simply trying to make Hill’s life difficult so she would quit, or did he want her fired? The only evidence of Fultz’s intent was that he told Hill she should retire.<sup>189</sup> That Fultz did not intend, for example, for his biased reports to cause Hill to be fired does not make her termination any less a result of those biased reports than if the decision makers used them in making their decision.

Further, there are difficulties for plaintiffs in gathering evidence that the supervisor intended that particular adverse employment action. Staub, of course, was lucky. His supervisor actually stated that she wanted to “get rid of him.”<sup>190</sup> But how often does an employee hear that kind of “smoking gun” evidence of an intent to have a person terminated or to want some other adverse employment action by a worker without decision making authority? It probably is rather rare. Yet, as formulated, the Court’s subordinate bias liability standard requires that that intent be demonstrated.

Finally, it is not clear that this new standard is needed at all. While the varying circuit standards required Supreme Court clarification, the textual language that Justice Scalia ultimately relies upon seems to do the job. If members of a jury are convinced that Staub’s reservist status was a “motivating factor” in his termination, then they should find in his favor. Why can’t a jury simply make this decision? Why is a forty-two word standard necessary to replace this two word phrase?<sup>191</sup> An alternative syllogism to the one suggested by the Court that works better is a supervisor or coworker’s discriminatory animus motivates a false report about an employee; the false report about an employee causes an adverse employment action; therefore, the supervisor or coworker’s discriminatory animus motivates or causes the adverse employment action. If a supervisor, or a coworker for that matter, provides misinformation to get a worker in trouble because they do not appreciate picking up extra hours while that person does his or her reserve duty, should it matter for purposes of liability that the non-decision making employee did not intend an adverse employment action to result? It is not

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187. *Id.* at 1194.

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

189. *Id.* at 300. It is also problematic that Fultz was not a supervisor. The Court left the case of a discriminatory coworker, which Fultz was in this case, for another day.

190. *Staub*, 131 S. Ct. at 1189.

191. *See id.* at 1194.

apparent why the employer's actions would not be motivated by the discriminatory animus of that supervisor or coworker, who is acting as an agent of the employer.

At least for purposes of Title VII, the motivating factor analysis can also provide an answer to the problem of other legitimate reasons an employer might have for terminating an employee—including reasons found during an independent investigation or grievance process. Title VII states that:

On a claim in which an individual proves a violation under section 2000e-2(m) [covering motivating factors] of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).<sup>192</sup>

Thus, an employer who had another legitimate reason for taking an adverse employment action against an employee (whether it be found in an internal investigation or the result of other non-biased information) would be able to limit its liability. This result would best accomplish all of Title VII's goals: prevention of harm, deterrence, and making victims whole.<sup>193</sup>

Instead, the Court creates a three-pronged standard and adds ambiguity to what should be a straightforward determination by the fact-finder. Was discriminatory animus a motivating factor in the adverse employment ac-

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192. 42 U.S.C. § 2000e-5(g)(2)(B).

193. While this does not solve the problem for the ADEA and ADA, which do not have the "motivating factor" language, a similar analysis using the "but for" causation standards developed for the ADEA should suffice. Some courts have used "motivating factor" analysis in evaluating claims under Title I of the ADA. See Lauren R.S. Mendonsa, *Dualing Causation and the Rights of Employees with HIV Under § 504 of the Rehabilitation Act*, 13 SCHOLAR 273, 293–96 (2010). However, this seems questionable after *Gross*. See, e.g., *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957, 962 (7th Cir. 2010) (rejecting motivating factor analysis for ADA in light of *Gross*). Interestingly, USERRA has similar language. It provides that an employer will be liable when the employee's military status is a motivating factor "unless the employer can prove that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. § 4311 (c)(1) (2006). Thus, this would also provide a defense for employers under USERRA. One easy fix for the ADA and ADEA problem would be for Congress to add the "motivating factor" language to those statutes.

tion? The Court needs to put more faith in jurors to make this common sense determination.