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**Sharpening the Cat's Paw: Reconceptualizing Cat's Paw Liability to Fit the Needs of Contingent Workers After *Armstrong v. Arcanum Grp. Inc.***

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**SHARPENING THE CAT’S PAW:  
RECONCEPTUALIZING CAT’S PAW LIABILITY  
TO FIT THE NEEDS OF CONTINGENT WORKERS  
AFTER *ARMSTRONG V. ARCANUM GRP. INC.***

Ransom Smith\*

**ABSTRACT**

*Contingent workers—those employed by staffing firms and contracting firms but often subject to the supervision and control of a firm’s client—are a particularly vulnerable class of employees, less likely to be treated by their employers with the same degree of protection against workplace discrimination as workers in traditional employment arrangements. The Tenth circuit case of *Armstrong v. Arcanum Grp. Inc* magnified yet another disadvantage that contingent workers run up against when attempting to challenge an alleged discriminatory decision. Following *Armstrong*, contingent workers who premise their retaliatory or discriminatory discharge claims on the acts of biased employees who influence employment decisions cannot succeed unless the biased employee and the injured worker share a common employer.*

*This rule, justified by the Tenth Circuit as an extension of agency law, confounds the ability of contingent workers to hold staffing agencies liable when their decisions to suspend or terminate an employee’s position are influenced by the biased actions of client employees. In Title VII vernacular, these employees would not have a viable cat’s paw claim. Such a predicament is exactly of the kind that the plaintiff in *Armstrong* found herself in when federal agency officials spurned by *Armstrong*’s allegations of fraudulent financial reporting convinced her staffing agency employer to remove her from her federal position. This note exposes the effective Title VII coverage gap created by cases like *Armstrong* and leans on EEOC guidance tailored to the needs and interests of contingent workers in its proposal of a solution to bridge the gap.*

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## INTRODUCTION

Cat's paw liability is an actionable theory of liability first articulated in the Seventh Circuit opinion of *Shager v. Upjohn*.<sup>1</sup> The metaphor of cat's paw as an unwitting dupe traces back to Jean de La Fontaine's fable in which a beguiling monkey coaxes an unsuspecting cat to snatch chestnuts from a fire.<sup>2</sup> The cat braves the dangers of the flames and repeatedly singes his paw, while the monkey contents himself with devouring the hard-earned chestnuts. The folly of the cat and enterprise of the monkey became apt symbols for a theory that enables a plaintiff to recover when an individual is impermissibly biased towards a plaintiff, and a decisionmaker innocently relies on the opinions or reports of that individual in deciding to terminate or otherwise impair a plaintiff's employment.<sup>3</sup> The cat's paw theory then stands as one of the several strategies of establishing employer liability under Title VII of the Civil Rights Act of 1964, the first comprehensive statutory scheme to prohibit unlawful discrimination "with respect to compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex, and national origin.<sup>4</sup>

This note seeks to address the issues that arise when an agency worker attempts to rely on the cat's paw liability theory to redress the effects of discriminatory bias attributable to the agency's client. While a firm's client may not have the power to fire the employee placed with it, it nonetheless can affect a decision-making process. When compared to workers in traditional employment arrangements, contingent workers, such as workers employed by temp agencies, staffing agencies, and contracting agencies, are less likely to benefit from federal policies that safeguard against unlawful workplace discrimination. Generally, neither the agency that formally employs contingent workers, nor the agency's client that dictates the terms and conditions of their work, feels accountable for complying with or taking measures to enforce federal anti-discrimination statutes.

Mindy Armstrong, the plaintiff in *Armstrong v. Arcanum Grp. Inc.*, personally experienced the trials that stem from this dual unaccountability.<sup>5</sup> After having been placed by her employer staffing firm with the Real Estate Leasing Services Division of the Bureau of Land Management, Armstrong allegedly discovered evidence of falsification of leasing data and informed a supervisor of her suspicions.<sup>6</sup> Once such suspicions circulated in the department, Armstrong's accusations spurred bitter responses both from Armstrong's immediate supervisor and key department officials.<sup>7</sup> Those affronted by her accusations sent a series of

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

2. See JEAN DE LA FONTAINE, THE FABLES OF LA FONTAINE (Elizur Wright trans., 1882), <https://www.gutenberg.org/files/7241/7241-h/7241-h.htm#IX21> [<https://perma.cc/2693-UMRZ>].

3. See Mark Nehme, *Cat's Paw Liability: Nine Lives Lead to Identity Crisis*, 43 SETON HALL LEGIS. J. 63, 63 (2019).

4. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2 (2012)).

5. *Armstrong v. Arcanum Grp. Inc.*, 897 F.3d 1283, 1284 (10th Cir. 2018).

6. *Id.* at 1285.

7. *Id.*

emails that prompted Armstrong's primary employer, the staffing firm, to remove her from her division placement and subsequently fire her.<sup>8</sup>

Facing discrimination on the job site from both a staffing firm employee and the client's employees put Armstrong in the unenviable position of arguing why the staffing firm which employed her should be held liable for the acts of the client's employees. Her attempt to demonstrate employer liability for the actions of non-employees also clouded Armstrong's more traditional cat's paw claim contending that the bias of a staffing firm's employee was a determinant of her termination. The fog created by these closely related but distinct claims unfairly increased the danger of mistaking wheat for chaff.

Part I of this note will present the legal and historical backdrop for *Armstrong*. It will survey the development of the cat's paw theory of liability used to hold employers legally responsible for allowing their agents making personnel decisions to consider information contaminated with unlawful bias. In analyzing this theory, this part will argue that cat's paw liability is unique among theories establishing employment discrimination due to its use of a more forgiving causation standard. The United States Supreme Court has resorted to agency law to develop a framework for supervisory workplace harassment law.<sup>9</sup> By contrast, the court has selected the tort principle of proximate cause to develop cat's paw liability.<sup>10</sup> In light of this history of the court's use of proximate cause to develop cat's paw liability, courts should be more open to endorsing an expansion of cat's paw liability to cover the discriminatory and influential actions of coworkers. Some courts have done so by acknowledging that coworkers are just as able to make internal reports that can cause an employee to experience harmful employment outcomes as the supervisors to whom the theory traditionally applies.

Part I will conclude by briefly surveying cases that suggest a different approach, set forth in EEOC guidelines, for imposing liability for workplace discrimination on both staffing agencies and their clients.

Part II of this article intends to recreate the main problem that Armstrong faced when pleading her claim and challenge the perspective taken by the Tenth Circuit, which limited the liability of Armstrong's employer through a limiting concentration on agency principles and a misleading recitation of the facts.<sup>11</sup> This type of selective focus should be avoided as it appears to have influenced the *Armstrong* court to overlook the evidence produced for an orthodox case of cat's paw liability, alleging that unlawful bias of a supervisor poisoned an employment decision.<sup>12</sup> Part II will conclude by evaluating the merits of several possible solutions to the dilemma raised in *Armstrong*.

Finally, Part III of this note proposes an additional theory of liability that could be pled to protect the interests of employees of staffing firms, such as

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8. *Id.* at 1286.

9. Nehme, *supra* note 3, at 69.

10. Nehme, *supra* note 3, at 74.

11. *See Armstrong*, 897 F.3d at 1285, 1291.

12. *See* Opening Brief at 7–14, *Armstrong v. Arcanum Grp. Inc.*, 897 F.3d 1283 (10<sup>th</sup> Cir. 2018) (No. 17-1378) (detailing the factual circumstances of the case).

Armstrong. Such a theory informed by EEOC guidelines<sup>13</sup> would establish a staffing firm's status as joint employer to render such employers liable for the discriminatory actions of its client and client employees that the firm knew or should have known about and failed to take prompt action to correct.

Part III will conclude by putting a modified theory of cat's paw liability that is informed by these EEOC guidelines into action by reimagining Armstrong's case as though she had claimed the theory.

## BACKGROUND

### I. Development and Singularity of the Theory

#### A. Development of Cat's Paw Liability

Long after the inception of cat's paw liability in *Shager*, the U.S. Supreme Court officially took notice of this theory and cast it into its current form in *Staub v. Proctor Hospital*.<sup>14</sup> In *Staub*, a heart technician's supervisors made comments denigrating his commitment to military service, allegedly made false accusations that he had left his desk without notice at an impermissible time, and communicated accusations to the vice president of human resources who credited such accusations and fired Staub.<sup>15</sup> The majority probed relevant agency and tort law to decide whether a decisionmaker's adverse action and the subordinate's "malicious mental state" could both be attributed to an unbiased employer.<sup>16</sup> The Court's research into the Restatement of Agency did not lend support to the proposition that a subordinate's malicious mental state could conjoin with a decisionmaker's adverse employment action to result in imposing liability on an employer "for a tort that requires both."<sup>17</sup>

However, the Court had characterized prohibited discrimination under the anti-discrimination law in question, the Uniformed Services Employment and Reemployment Rights Act (USERRA), as a "federal tort" that Congress knowingly "enacted against a background of tort law."<sup>18</sup> The Court recounted instances where federal courts presiding over cases involving federal torts had diverged from conventional agency law and accepted a theory that linked mental state of one agent and harmful action of another to establish principal liability.<sup>19</sup> Since discrimination under USERRA constituted a federal tort in this analysis, the Court followed suit with federal cases that had allowed both malicious mental state or animus of a "firing

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13. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, GUIDANCE NO. 915.002, ENFORCEMENT GUIDANCE: APPLICATION OF EEO LAWS TO CONTINGENT WORKERS PLACED BY TEMPORARY EMPLOYMENT AGENCIES AND OTHER STAFFING FIRMS (1997), 1997 WL 33159161 at \*11 [hereinafter EEOC CONTINGENT WORKER GUIDANCE].

14. See *Staub v. Proctor Hospital*, 562 U.S. 411, 422 (2011).

15. *Id.* at 414–15.

16. *Id.* at 418.

17. *Id.*

18. See *id.* at 417.

19. See *id.* at 418.

agent” and harmful action or decision to terminate by a decisionmaker to be attributed to the employer for purposes of USERRA liability.<sup>20</sup>

While in Staub’s case the vice president of human resources who ultimately fired Staub harbored no discriminatory animus against him and was otherwise innocent, Staub’s supervisors had demonstrated anti-military bias and thus had the culpable state of mind needed to establish liability for USERRA discrimination.<sup>21</sup> Staub’s supervisors insinuated themselves into the decision-making process by making false allegations about Staub’s noncompliance with hospital policy and reporting those allegations to someone in the workplace who had the power to terminate him.<sup>22</sup> The Court drew on the tort concept of proximate cause to reason that once Staub’s supervisors had done so, the influence they as biased individuals had on the decision-making process was a proximate cause of the decision to fire or “a direct relation between the injury asserted and the injurious conduct alleged.”<sup>23</sup> Under the logic of proximate cause, a decisionmaker’s use of his or her own judgment when deciding to terminate “does not prevent the earlier [biased] agent’s action from being the proximate cause of the harm.”<sup>24</sup> When a non-firing subordinate acts in a manner that can influence a firing decisionmaker, such as making false reports about employee misconduct, the effect of such bias will be attributed to the decisionmaker. The only way to break the chain of causation between the submission of biased reports and an adverse employment action is to undertake an independent investigation into the matter that “results in adverse action for reasons unrelated to the [subordinate’s] original biased action.”<sup>25</sup>

#### B. *Cat’s Paw in Comparison to Other Employment Discrimination Claims*

While cat’s paw liability is reminiscent of traditional tort vicarious liability, its standard of causation is an anomaly in employment discrimination law.<sup>26</sup> *Staub* was not novel in its dependence on tort concepts when developing law for “lean [federal] statutes” that do not set forth certain elements needed to prove a certain type of discrimination.<sup>27</sup> *Staub* instead was the next entry in a line of U.S. Supreme Court cases that had leaned heavily on tort law to develop element based proofs and causation standards for Title VII discrimination claims.<sup>28</sup> This line originated with one of the earliest cases in which the Court interpreted Title VII, *McDonnell Douglas*

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20. *Id.* at 418–19.

21. *Id.* at 419.

22. *Id.* at 418.

23. *Id.* at 419 (internal quotation and citation omitted).

24. *Id.* at 421.

25. *Id.* at 421.

26. See Martin J. Katz, *Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment*, 94 GEO. L.J. 489, 510, 535 (2006).

27. See William R. Corbett, *What is Troubling About Tortification of Employment Discrimination Law*, 75 OHIO ST. L. J. 1027, 1032 (contending that there is no particular compelling rationale for expounding Title VII through tort law).

28. See Katz, *supra* note 26, at 494 (observing that tort law has been the vehicle of choice for Title VII causation standards).

v. *Green*.<sup>29</sup> The Court there identified a discrete set of elements that a plaintiff would have to prove for her Title VII claim to establish a prima facie case of unlawful discrimination.<sup>30</sup> While nothing in Title VII suggests that Congress endorsed or prescribed the use of an elements-based framework, the Court's decision to do so was an early signal of its preference for using tort-like principles to develop Title VII statutory law.<sup>31</sup>

Later cases like *Price Waterhouse v. Hopkins* enhanced reliance on tort law by introducing two different causation standards.<sup>32</sup> One, "the motivating factor test," allowed plaintiff to claim that an employment decision had been motivated by consideration of a Title VII trait (race, sex, religion, national origin) in order to shift the burden of production as to legitimate nondiscriminatory reason for action taken to the defendant employer.<sup>33</sup> By contrast, the second causation standard, the "same decision" test, allowed the employer to prevent the plaintiff from recovering monetary damages by showing that the employer would have made the same decision to terminate plaintiff even if it had not considered something like sex or race when making its decision.<sup>34</sup> Stated differently, the second causation standard prevented plaintiffs from recovering monetary damages if defendants could successfully argue that their improper consideration of something like sex or race was not the but-for cause of its adverse decision. This would be true if the employer had a legitimate reason for termination like employee misconduct alongside its illegitimate one.<sup>35</sup> Showing lack of but-for causation allows the defendant to prevent a plaintiff from recovering money damages but not declaratory or injunctive relief.<sup>36</sup>

While the Supreme Court has given different names to other causation tests that have been coined post-*Price Waterhouse*,<sup>37</sup> all tests are just new ways of expressing the two causation standards at work in *Price Waterhouse*, one not related to tort and the other firmly rooted in it. The first "motivating factor" standard has no precise tort analogue and is essentially shorthand for saying that the consideration of something like sex or race played a role in or contributed in some manner to the adverse employment decision.<sup>38</sup> Relating logical concepts to tort causation standards, Professor Martin Katz terms this causation standard "minimal causation."<sup>39</sup> The second is directly derived from the tort-negligence concept of 'but-for causation,' and Professor Katz has pegged it to the logical concept of a necessary condition. In but-for causation, a factor such as consideration of something like sex or race could only be the but-for cause of an adverse decision if the decision would not have happened absent unlawful use of an impermissible criterion like sex or

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29. See Corbett, *supra* note 27, at 1037.

30. *Id.*

31. *Id.*

32. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989).

33. Katz, *supra* note 26, at 528.

34. *Id.* at 502 (referring to the "same decision" as the "same action" test).

35. *Id.* at 491, 496, 512.

36. See *id.* at 511 (proposing that all causation standards in employment discrimination jurisprudence can be collapsed into two categories of logical concepts of necessary condition and minimal causation).

37. *Id.*

38. Corbett, *supra* note 27, at 1054.

39. Katz, *supra* note 26, at 498–99.

race.<sup>40</sup> For this standard, if discrimination is not the but-for cause of the adverse decision then the employer is not liable under Title VII. Cat's paw liability can be established under a minimal causation standard as a biased employee's report need only contribute rather than be the sole cause of an adverse employment decision.

Attentive proponents of Title VII reform have expressed reservations that Title VII is a good area for the application of negligence causation due to a difference in underlying policy objectives and the less physical nature of employment discrimination.<sup>41</sup> Mainly the worries of those concerned cluster around two fundamental distinctions between tort law and federal employment discrimination law. First, negligence law usually implies a harm that is the result of physical events, whereas employment law typically implies a harm that is produced by discriminatory attitudes and mental states.<sup>42</sup> Critics of but-for causation argue that it is categorically harder for a plaintiff to prove that the loss of her job would not have occurred had a defendant been of a neutral and not discriminatory turn of mind, than for a personal injury to prevail on causation by proving that she would not have been injured but for a physical event. Secondly, negligence law primarily functions to make the wronged plaintiff whole through monetary compensation. In contrast, federal employment discrimination law is intended to punish an employer for participating in discrimination and deterring it from doing so in the future.<sup>43</sup> When holding an employer liable for violating Title VII is dependent on a plaintiff proving but-for causation, an employer is able to engage in discriminatory conduct as long as it is not the only reason for its adverse employment decision. In such cases, the congressional commitment to punish and deter any discriminatory conduct in the workplace lies fallow.<sup>44</sup>

*Staub* was the first Supreme Court case to devise of a theory of liability that does not require a but-for causation component, but instead relies on the concept of proximate cause to establish employer liability. Critics of supplementing remedial federal schemes with tort law fault *Staub* for its use of proximate cause without explaining why it should be used now when its use has never been suggested by the text of Title VII.<sup>45</sup> However *Staub*'s use of proximate cause deviated from other previously borrowed tort conceits like but-for causation and is arguably more consistent with the Title VII policy objective of broad deterrence. In its departure from the *Price Waterhouse* motivating factor test, *Staub* installed a new standard that was minimal causation instead of but-for and established both liability of the employer and full recovery for the plaintiff. After *Staub*, a plaintiff did not have to

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40. *See id.* at 515.

41. *See Corbett, supra* note 27, at 1048 (disputing the assumption that Title VII is particularly suited to tort application in part owing to its fundamental concern with deterring future harmful conduct).

42. *Id.* at 1051–52 (quoting *Gross v. FBL Financial Services Inc.*, 557 U.S. 167 (2009) (Breyer J. dissenting) (“It is one thing to require a typical tort plaintiff to show ‘but-for’ causation. In that context, reasonably objective scientific or commonsense theories of physical causation make the concept of ‘but-for’ causation comparatively easy to understand and relatively easy to apply. But it is an entirely different matter to determine a ‘but-for’ relation when we consider, not physical forces, but the mind-related characterizations that constitute motive.”)).

43. *Corbett, supra* note 26, at 1048.

44. *See Katz, supra* note 26, at 517.

45. *See Corbett, supra* note 27, at 1066.



prove that if the act of the biased informer did not occur, the adverse employment decision would not have occurred. Instead, a plaintiff only needed to show that a subordinate's bias played a role in influencing a decisionmaker to harm a plaintiff and was a proximate cause of that harm.<sup>46</sup> While not cause for comment in *Staub* itself, this new standard was more generous to plaintiffs grappling with the problem of establishing causation than any standard to precede it.

C. *Pinning Employers Under the Cat's Paw for a Coworker's Discrimination*

*Staub's* theory of cat's paw liability only addressed when it applied to situations where a biased supervisor influenced an unbiased decisionmaker and left the question of employer liability for the effects of the actions of biased coworkers up for debate.<sup>47</sup> Since *Staub*, no circuit court has "expressly extended the 'cat's paw' doctrine to coworkers" or expressly limited the doctrine to just supervisors.<sup>48</sup> The circuit courts are instead split in terms of being either supportive of or opposed to extending the theory to cover the acts of coworkers.<sup>49</sup>

The Tenth Circuit is among those circuits that have entertained the proposition of extending cat's paw liability to coworkers. Like other circuits, the Tenth Circuit has not foreclosed the possibility of using cat's paw liability but declined in *Hysten* to extend cat's paw liability to certain coworkers who have neither "supervisory authority or influence . . . including authority or influence relating to employee discipline."<sup>50</sup> Plaintiff's coworkers in *Hysten* had made remarks that the plaintiff believed were racist.<sup>51</sup> However, the court held that whatever discriminatory motive such comments may have revealed, such a motive could not be attributed to the employer because the plaintiff had produced no evidence that such comments "directly affected the action of an unbiased decisionmaker."<sup>52</sup> The court then declined to extend cat's paw liability in situations where a coworker had only made suspect comments and had no demonstrable ability to influence an employment decision.<sup>53</sup>

While no circuit court has expressly given its blessing to extending cat's paw liability to the actions of biased coworkers, there are several recurring justifications for doing so.<sup>54</sup> First, Title VII does not have a statutory definition for

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46. EEOC CONTINGENT WORKER GUIDANCE, *supra* note 13, at \*11..

47. See generally John S. Collins, *Another Hairball for Employers? "Cat's Paw" Liability for Discriminatory Acts of Coworkers After Staub v. Proctor Hospital*, 64 BAYLOR L. REV. 908 (2012) (surveying federal circuit court stances on claims relying on the detrimental influence of a coworker's bias over an adverse employment decision).

48. *Id.* at 924.

49. *Id.*

50. *Hysten v. Burlington N. Santa Fe Ry. Co.*, 415 F. App'x 897, 912 (10th Cir. 2011).

51. *Id.* at 911.

52. *Id.* at 912.

53. *Id.*

54. See Nehme, *supra* note 3, at 83 (promoting a practical outlook that takes into account that employees at all levels have access to reporting systems and can precipitate cascading discriminatory effects through their use).

“supervisor,”<sup>55</sup> and using the strict definition of “supervisor” articulated by the U.S. Supreme Court would severely diminish the intended utility of cat’s paw.<sup>56</sup> *Vance* defined supervisor as “an employee . . . empowered by the employer to take tangible employment actions against the victim” entailing “significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>57</sup> This definition clarified when strict liability would apply to an employer for the actions of a supervisor who—by virtue of his or her status and empowerment through an agency relationship—was uniquely positioned to foster a hostile work environment.<sup>58</sup> By contrast, the Court in *Staub* fashioned cat’s paw liability to address situations in which those without express power to take tangible employment actions influenced those with such express power.<sup>59</sup> If cat’s paw liability only applied to those supervisors that had express power to tangibly affect worker employment, then the theory would be rendered near-obsolete as it would only apply to the agents of employers who are already liable under Title VII.<sup>60</sup>

Those opining on the soundness of extending cat’s paw liability have also emphasized that both supervisors and coworkers alike have access to the disciplinary reporting systems that facilitate the transmission and receipt of biased reports.<sup>61</sup> They observe that allowing an artificial line to be drawn between supervisors and coworkers would risk permitting employers to rely on the biased information of rank-and-file employees with impunity.<sup>62</sup> Enforcing such a distinction would also have the far-reaching consequence of inhibiting anti-discrimination statutes’ ultimate purpose of eliminating discrimination in the workplace.<sup>63</sup> As such, the case for extending liability is based on recognition of common access to disciplinary reporting systems vulnerable to bias and consistency with the overarching purposes of federal anti-discrimination laws.

*D. Using EEOC Guidance Standards to Hold an Employer Liable for Discriminatory Acts Attributable to its Co-Employer*

In addition to the possible extension of cat’s paw liability to coworkers, cat’s paw liability can also be extended through the use of the joint-employer relationship recognized by the Equal Opportunity Commission in EEOC guidelines specific to contingent workers. These guidelines recognize the unusual working conditions of contingent workers and needed protections for such workers. Contingent workers face more disadvantageous work conditions than workers in traditional job arrangements. They earn lower wages on average, have lower rates of health and pension coverage, and are less likely to receive full protection under

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55. *Id.* at 78.

56. *See id.* (citing the definition established in *Vance v. Ball State Univ.*, 570 U.S. 421, 436 (2013)).

57. *Vance v. Ball State Univ.*, 570 U.S. 421, 436 (2013).

58. *Vance*, 570 U.S. at 424.

59. Nehme, *supra* note 3, at 79–80.

60. 42 U.S.C. § 2000e-2.

61. Nehme, *supra* note 3, at 79.

62. *See id.*

63. *See id.* (observing that if coworkers fall outside of the scope of cat’s paw, employers and their agents can exclusively rely on their reports without fear of concomitant liability).

federal equal opportunity laws due to the tendencies of both staffing firms and their clients to “assume that they are not responsible for any discrimination or harassment that their workers confront” at their assigned work sites.<sup>64</sup> The Equal Employment Opportunity Commission sought to correct this misconception and clarify when Title VII and EEO guidelines apply to both staffing firms and staffing firm clients who qualify as Title VII employers.<sup>65</sup> The guidance instructs that qualifying as a Title VII employer is dependent on having the “right to control” over “when, where, and how the worker performs the job.”<sup>66</sup> The presence of a right to control, suggesting employer status, can include such factors as ownership of “tools, materials, and equipment” that a worker must access on the job, ability to designate a specific site where work is to be performed, ability to set hours of work, ability to supervise on the job performance and factor observations into performance evaluation, and ability to discharge.<sup>67</sup>

The guidance also acknowledges, in sync with Supreme Court precedent,<sup>68</sup> that “all incidents of the relationship must be assessed with no one factor being decisive.”<sup>69</sup> Drawing from its specialized understanding of how staffing agencies and their clients usually determine terms of employment, the guidance advises that both staffing agencies and their clients will typically qualify as employers under Title VII and thus operate as joint employers under relevant statutes.<sup>70</sup> The guidance then concludes in relevant part that a staffing agency will be liable if “it knew or should have known about the client’s discrimination but failed to take prompt corrective measures within its control.”<sup>71</sup> Such available corrective measures could include a staffing agency notifying its client of alleged discrimination, affirmatively reinforcing its commitment to protect its workers from unlawful discrimination, and demanding prompt investigative measures be taken.<sup>72</sup>

Various federal district courts and courts of appeals cases have relied on the EEOC’s guidance to support the principle that a joint employer (or co-employer) should be liable for the discriminatory conduct of its co-employer if it knew or should have known about its discriminatory conduct and failed to take remedial action within its control.<sup>73</sup> In *Bolin v. General Motors, LLC*, a Michigan district court denied a motion to dismiss contending that the plaintiff had failed to adequately plead that defendants were Title VII joint employers and could be held liable for failure to

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64. EEOC CONTINGENT WORKER GUIDANCE, *supra* note 13, at \*2.

65. *Id.*

66. *Id.* at \*4.

67. *Id.*

68. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

69. *Id.*

70. EEOC CONTINGENT WORKER GUIDANCE, *supra* note 13, at \*5.

71. *Id.* at \*11.

72. *Id.* at \*11.

73. *See, e.g., Whitaker v. Milwaukee County*, 772 F.3d 802, 812 (7th Cir. 2014) (seeing no reason to depart from “course set by other circuits” treating the guidance as a laying out valid bases for employer liability; *see also Lima v. Addeco*, 634 F. Supp. 2d 394, 402 (S.D.N.Y. 2009), *aff’d sub nom. Lima v. Adecco &/or Platform Learning, Inc.*, 375 F. App’x 54 (2d Cir. 2010) (supporting the proposition that a co-employer is liable for the discriminatory conduct of its affiliate if it knew or should have known of the [discriminatory] conduct and failed to take corrective measures within its control”).

reasonably remedy co-employer discrimination.<sup>74</sup> While the court agreed with the defendant employer's contention that a joint employer is generally not liable for discriminatory conduct of a co-employer, it also gave credence to the authority expressed in the guidance.<sup>75</sup> This guidance had previously surfaced in other federal cases and had come to stand for the principle that an employer should be held liable for not just its actions but also its omissions that had facilitated discriminatory conduct.<sup>76</sup> The court observed that all the cases cited by the defendant supported "finding liability for a co-employer if the entity had the power to act but did not."<sup>77</sup> Such a method of establishing employer liability has garnered support in federal district courts in the Sixth,<sup>78</sup> Tenth,<sup>79</sup> and Eleventh<sup>80</sup> Circuits, and been validated by the Second,<sup>81</sup> Fifth,<sup>82</sup> and Seventh Circuit Courts of Appeals.<sup>83</sup>

Most relevant to this note, in *Byorick v. CAS, Inc.*, the plaintiff, Therese Byorick, alleged that her employer-subcontractor should be held liable for the retaliation she experienced at the hands of a defense contractor, also alleged to be her employer.<sup>84</sup> Byorick believed that she had been punished by the defense contractor for reporting her supervisor for sexual harassment because the defense contractor terminated her shortly after her report. Byorick also believed that she had been abandoned by the subcontractor she worked for when it failed to intervene on her behalf after she had expressed fears of reprisal.<sup>85</sup> Despite these beliefs, the subcontractor disclaimed any responsibility over the defendant's decision to eliminate Byorick from the defense contract she had been assigned to.<sup>86</sup>

In disputing this denial, Byorick persuaded the court that EEOC guidance established important basis for holding an employer liable for the discriminatory conduct of its co-employer when it knew or should have known of such discrimination.<sup>87</sup> Additionally, the court refused to find that liability would be triggered only when an employer had knowledge of discrimination that was taking

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74. *Bolin v. Gen. Motors, LLC*, No. 16-13686, 2018 WL 2087313, at \*4 (E.D. Mich. May 4, 2018).

75. *Id.* at \*2-3.

76. *Id.* at \*3.

77. *Id.*

78. *See generally Bolin*, 2018 WL 2087313.

79. *See Byorick v. CAS, Inc.*, 114 F. Supp. 3d 1123, 1127 (D. Colo. 2015) (holding that "a joint employer is liable under Title VII based on its co-employer's discriminatory conduct where it participated in the discrimination, or where it knew or reasonably should have known of the discrimination but failed to take prompt corrective measures within its control").

80. *See Crump v. U.S. Dep't of Navy*, No. 2:13CV707, 2016 WL 901262, at \*3 (E.D. Va. Mar. 3, 2016) (holding that EEOC guidance on contingent workers represents the correct statement of the law regarding the potential liability of joint employers under the ADA and the Rehabilitation Act).

81. *See Lima v. Addeco*, 634 F. Supp. 2d 394, 402 (S.D.N.Y. 2009).

82. *See Nicholson v. Securitas Sec. Servs. USA, Inc.*, 830 F.3d 186, 190 (5th Cir. 2016) (holding that "a staffing firm participates in discrimination by honoring a client's discriminatory transfer request only if it knows or should have known the client's reasons were discriminatory").

83. *See Whitaker v. Milwaukee County*, 772 F.3d 802, 811-812 (7th Cir. 2014).

84. *Byorick*, 114 F. Supp. 3d at 1126.

85. *Id.* at 1125, 1127.

86. *See id.* at 1127.

87. *See id.*

place or had already occurred.<sup>88</sup> The court reasoned that EEOC's inclusion of conduct that the employer should have reasonably had notice of served Title VII's vital premise "not to provide redress but to avoid harm."<sup>89</sup> Both the goal of the guidance to foil discrimination before it produces harm and the implications of an extension of cat's paw liability to the discriminatory acts of coworkers serve Title VII's core purpose of harm avoidance.

## II. *Armstrong v. The Arcanum Group: Disadvantages Faced by Staffing Employees When Asserting a Cat's Paw Theory Claim*

### A. *Factual Basis for Armstrong's Claim*

Mindy Armstrong was an employee of the Arcanum Group Inc. (TAG), an agency which provided for the staffing needs of government agencies.<sup>90</sup> In July 2014, TAG placed Armstrong with the Bureau of Land Management Real Estate Leasing Services Department (BLM), where she would work as a lease administrator.<sup>91</sup> While working for the department, Armstrong was tasked with auditing department reports that documented space that had been leased for agency use.<sup>92</sup> Armstrong compared department reports with underlying lease documentation and found that the footage recorded in the reports did not match up with those listed in the original lease documents.<sup>93</sup> Specifically, Armstrong noticed that the reported leases had been inflated and believed that such inflation tactics were being used by the department to create the misimpression that the department had taken measures to reduce agency leasing cost and space use.<sup>94</sup>

Concerned about the potential of fraud and violating federal policies, Armstrong told a supervising TAG employee, Barbara Burns-Fink, that she had reason to believe that BLM was falsifying data.<sup>95</sup> While there was some dispute between parties as to how Burns-Fink handled Armstrong's accusations, the reports that had disconcerted Armstrong had been prepared by Burns-Fink, strongly implying her involvement in alleged fraud.<sup>96</sup> Eventually Armstrong's accusations reached one of the team leads in the department and were circulated among other department officials. Several BLM employees vehemently denied the accusations.<sup>97</sup> In an email to the officer managing the contract between TAG and BLM, the department team lead spurned Armstrong for having "accused [Burns-Fink] of [having committed] fraud in the reports [she had been] preparing for BLM for more than three years."<sup>98</sup> Burns-Fink also accused Armstrong in an email she sent to the

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88. *See id.* at 1128.

89. *Id.*

90. *Armstrong v. Arcanum Grp. Inc.*, 897 F.3d 1283, 1284 (10th Cir. 2018).

91. *Id.* at 1285.

92. *See id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* Opening Brief, *supra* note 12, at 10.

97. *See Armstrong* 897 F. 3d at 1285.

98. Opening Brief, *supra* note 12, at 17.

team lead in which she acknowledged that “Armstrong accused [her] of reporting fraudulent data.”<sup>99</sup>

These accusations and counteraccusations culminated in the department team lead requesting that Armstrong be removed from her placement with the department.<sup>100</sup> The team lead cited the primary reason for removing Armstrong as the unfounded accusations she had made against Burns-Fink.<sup>101</sup> Shortly thereafter, the BLM contracting officer put in the request to a TAG officer to remove Armstrong from her position with the department, which TAG did without knowledge of the reasons for the removal request.<sup>102</sup> Since TAG had no other vacancies for Armstrong, her employment with TAG was terminated as well.<sup>103</sup>

### *B. Procedural History*

Following her termination, Armstrong sued TAG pursuant to anti-discrimination provisions of the False Claims Act (“FCA”) and anti-retaliation provisions of the National Defense Authorization Act (“NDAA”).<sup>104</sup> At the district level, neither claim survived TAG’s motion for summary judgment because the court found that Armstrong had failed to produce evidence to show that the removing TAG officer had knowledge of her allegations at the time of removal.<sup>105</sup> In the absence of actual knowledge, Armstrong was unable to demonstrate that her allegations were the but-for cause of her termination.<sup>106</sup> Armstrong also asserted that under a cat’s paw theory, TAG should be held liable for relying on the reports of a biased subordinate, Burns-Fink, without independently verifying the credibility of the biased information being used to influence an employment decision.<sup>107</sup> Yet, the district court also rejected this as a source of TAG’s liability, as no evidence had been produced to suggest that Burns-Fink had informed TAG’s removing officer of Armstrong’s allegations of fraud.<sup>108</sup> Therefore, the court found that Armstrong could not prevail on such a theory.<sup>109</sup>

On appeal, the Tenth Circuit responded to Armstrong’s assertion of employer liability under a cat’s paw theory with similar critique.<sup>110</sup> Armstrong had argued that both the BLM team lead that had sent a request to the officer managing TAG’s contracts and that officer had played the role of biased subordinates under a cat’s paw liability theory. Armstrong contended TAG should be held liable for the effect of that bias because its removing officer took the reasons asserted for

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99. *Id.* at 18.

100. *See Armstrong*, 897 F.3d at 1285–86.

101. *Id.*

102. *Id.* at 1286.

103. *Id.*

104. *Id.*

105. *See Armstrong v. Arcanum Grp. Inc.*, No. 16-CV-1015-MSK-CBS, 2017 WL 4236315, at \*4 (D. Colo. Sept. 25, 2017).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *See Armstrong v. Arcanum Grp. Inc.*, 897 F.3d 1283, 1290–91 (10th Cir. 2018).

Armstrong's removal at face value and without independent verification.<sup>111</sup> Furthermore, Armstrong also emphasized that a fellow employee of TAG, Burns-Fink, had played an instrumental role in participating and precipitating the department's retaliation against Armstrong.<sup>112</sup> However, the Tenth Circuit did not recognize either BLM employee as the type of subordinate contemplated in *Staub* because neither were agents nor employees of TAG.<sup>113</sup> The court stressed that the theory rested on agency principles and could not be used to hold employers to account for the biased actions of those completely external to a conceivable agency relationship.<sup>114</sup> While the court considered it plausible that TAG could be held liable for blindly depending upon the reports of its own employee, Burns-Fink, the court remained unconvinced that Armstrong had satisfyingly explained "how Burns-Fink influenced [the team lead's] request insofar as it was motivated by Armstrong's falsification complaints."<sup>115</sup> Once again, Armstrong's articulation of liability under the theory failed to persuade.<sup>116</sup>

### ANALYSIS AND IMPLICATIONS:

#### C. *Dissecting Armstrong's Case to Diagnose Defects of Theory*

The main actors in *Armstrong* and the roles they played in Armstrong's dismissal provoke consideration of the different degrees of cat's paw theory. Armstrong could only establish TAG's liability by alleging that a fellow TAG employee (Burns-Fink) acted as Armstrong's supervisor, possessed discriminatory animus against, and acted on that discriminatory animus to influence and proximately cause Armstrong's termination. This line of argument represents the cat's paw in its most confined state and most resembles how the Supreme Court formulated the theory in *Staub*.

Yet Burns-Fink directed her biased report, in the form of an email claiming that Armstrong had directly accused her of falsifying data, to a BLM team lead instead of a TAG supervisor. That team lead in turn relied on such biased reports but did not herself have express power to terminate Armstrong and could only request the officer managing the contract between the staffing agency and its client to effectuate her removal. Consequently, Armstrong contended that Burns-Fink's report was not transmitted directly to a TAG supervisor but mediated through a non-employee of BLM, which had the effect of concealing Burns-Fink's original bias and misleading the TAG removing officer to blithely accept the request as a product of client prerogative rather than employee bias.<sup>117</sup> Armstrong's case theoretically had all of the constituent parts to make out a case of cat's paw in the mold of *Staub*—a supervisor, evidence of discriminatory bias, use of a reporting system pursuant to that bias, and the production of a report that a firing agent considers when making an employment decision. However, Armstrong's claim was formed in the context of

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111. *See id.*

112. *Id.* at 1291.

113. *See id.*

114. *See id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1290–91

a staffing agency-client relationship, complicating the analysis necessary to hold her employer liable under this theory.

The Tenth Circuit's discussion, while limited, casts into sharp relief the unique problems employees of staffing agencies confront when attempting to recover under the theory. In work environments like Armstrong's, both employees of the agency and employees of the client share office space, exchange ideas, and work towards common agendas, but a staffing agency's liability for relying on biased reports spawned in this work environment hinges on the source of such bias.

At best, the *Armstrong* court ruled out the possibility that either any discriminatory bias of the BLM team lead or the BLM contracting officer could be attributed to TAG. This would be true "even if [the team lead] and [contracting officer] could be considered supervisors or coworkers of Armstrong" because, according to the Tenth Circuit, cat's paw liability is premised on agency principles and "[the contracting officer] and [team lead] were BLM employees and not agents of Arcanum."<sup>118</sup> Burns-Fink, however, was an employee of Arcanum, and had inserted herself into the decision-making process that concluded with Armstrong's termination.<sup>119</sup> Nonetheless, the court dismissed Armstrong's contention that Burns-Fink had influenced the BLM team-lead's request to remove Armstrong and while doing so was "motivated by Armstrong's falsification complaints."<sup>120</sup> Instead the court characterized Armstrong's argument as underdeveloped and reducible to a "one-sentence argument in her brief."<sup>121</sup>

The court's perception of Armstrong's argument regarding the involvement of Burns-Fink as cursory and negligible reveals the challenge faced by staffing employees. Those employees have to carefully identify the source of discrimination to maintain an actionable theory. Armstrong set out to link Burns-Fink, the BLM team lead, and the BLM contracting officer with the discriminatory intent that factored into her termination, but only the intent of Burns-Fink as a subordinate of TAG could legally be imputed to it. In adhering to an element-based analysis of the theory, the court emphasized the nonexistence of agency relationship between BLM employees and TAG, concluding that the theory failed without the establishment of an agency relationship.

Next, the court withdrew from engaging in the type of analysis it undertook in its discussion of the cat's paw as applied to non-employees and wrote off this distinct assertion of cat's paw liability as inadequately supported. By treating the involvement of BLM employees as the primary source of the discrimination alleged and Burns-Fink's involvement as an afterthought, the court did not account for the possibility that both Burns-Fink and BLM employees were equally capable of supplying discriminatory intent.

The court did so in neglect of the evidence Armstrong marshalled to establish Burns-Fink's discriminatory intent. In the court's retelling of the facts, Burns-Fink was merely Armstrong's confidant of choice rather than the author of the

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118. *Id.* at 1291.

119. See Opening Brief, *supra* note 12, at 15.

120. *Armstrong*, 897 F.3d at 1291.

121. *Id.*



data reports to which Armstrong was objecting.<sup>122</sup> The court also framed Armstrong's interactions with the BLM team lead as consisting of the team lead denying Armstrong's accusations that fraud was occurring.<sup>123</sup> Instead, Armstrong provided evidence that the team lead had castigated her in front of the entire division team for accusing Burns-Fink of fraud.<sup>124</sup> The court made no mention of the email Burns-Fink directly sent to the BLM-team lead in which she claimed that "Armstrong had accused [her] of reporting fraudulent data," and described the team lead's companion email complaining of Armstrong to the BLM contracting officer in the most generic terms: "[t]he email requested that Armstrong be removed for a variety of reasons, including Armstrong's falsification accusation."<sup>125</sup>

The actual email did not mince words and cited Armstrong's accusations against Burns-Fink as the primary reason for why her removal was desired, stating that "[Armstrong] accused [Burns-Fink] of committing fraud in the reports that Barb had been preparing for BLM for more than three years."<sup>126</sup> The court additionally failed to address Armstrong's allegation that Burns-Fink had colluded with the BLM team lead in assembling examples of Armstrong's work product which Burns-Fink claimed reflected poorly on her performance.<sup>127</sup> By consistently and selectively overlooking facts that Armstrong had provided to establish Burns-Fink's discriminatory intent, the court rendered Burns-Fink's involvement a practical nullity. The court's determination that Armstrong had failed to demonstrate Burns-Fink's involvement had been motivated by Armstrong's accusations became a self-fulfilling prophesy.

Armstrong's failure to prevail on a cat's paw theory reflects the inability of the theory to function as intended when a staffing agency employee relies on it to attribute discriminatory bias to her employer. As Professor Katz observes, all causation standards in employment discrimination cases can be boiled down to two categories: but-for or necessity causation and motivating factor or minimal causation.<sup>128</sup> The cat's paw theory is a variant of the motivating factor standard, where a plaintiff must establish that a biased report of a decision-maker's subordinate was a factor that contributed to the decision-maker ultimately taking an adverse employment decision against the plaintiff. In non-cat's paw Title VII cases, if a plaintiff establishes causation under a motivating factor standard, a defendant can mitigate the effect of such an accomplishment by proving that the consideration of an immutable trait was not the but-for cause of its employment decision.<sup>129</sup> The employer limits plaintiff to declaratory and injunctive relief if the plaintiff's evidence did not satisfy a but-for causation test.<sup>130</sup>

Critics of grafting tort onto employment discrimination law have derided *Staub's* appropriation of proximate cause as a minimal causation standard for cat's

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122. *See id.* at 1285.

123. *See Armstrong*, 897 F.3d at 1285.

124. *See* Opening Brief, *supra* note 12, at 15.

125. *See id.* at 31; *Armstrong*, 897 F.3d at 1285.

126. *Id.* at 18.

127. *See id.* at 17.

128. Katz, *supra* note 26, at 511.

129. *See id.* at 528.

130. *See id.*

paw as another thoughtless infusion of controversial tort concepts into anti-discrimination law. However, it is the only theory that allows a plaintiff to attain both monetary and equitable relief under a minimal causation standard.<sup>131</sup> This is perhaps on account of the *Staub* majority's recognition that once a biased report has become part of the cumulative information used in making an employment decision, absent independent investigation, the employment decision has been incorrigibly infected with discriminatory motive.<sup>132</sup>

Yet, according to the court in *Armstrong*, for the staffing agency employee, the ability to assert the theory is dependent on the source of discrimination, as a staffing agency cannot be held liable for the discriminatory reports of nonagents such as client personnel and employees. This limitation leaves staffing employees effectively without recourse when their employer considers the biased reports of nonagents when making an adverse decision. Such a result is exactly of the type that the *Staub* majority predicted and tailored the theory to safeguard against. The *Staub* court reasoned that respondent's desire that the theory only be applicable when a decisionmaker is motivated by his or her own discriminatory bias:

... would have the improbable consequence that if employer isolates a personnel official from an employees' supervisors, vests the decision to take adverse employment actions in that official, and asks that official to review the employee's personnel file before taking adverse action, then the employer will be effectively shielded from discriminatory acts and recommendations of supervisors that were *designed and intended* to produce the adverse action. That seems to us an implausible meaning of [Title VII], and one that is not compelled by its words.<sup>133</sup>

A staffing agency that retains the ultimate power to take an adverse action while utilizing the reports of nonagents when doing so is in the same position as a personnel official specially designated to make decisions with the aid of an employee's personnel file, but ignorant of the discriminatory biases that may inform the file's contents. Whether or not a staffing agency decision maker is actually aware of the discriminatory biases of client reporters should be irrelevant, as those reporters' status as nonagents renders an employer legally ignorant of their biases. The staffing agency remains free then to engage in the practice of relying on discriminatory reports while being "shielded from [liability arising out of] the discriminatory acts and recommendations" attributable to their employee's coworkers and supervisors.<sup>134</sup> This is precisely the practice that the *Staub* majority intended to prevent with its proximate cause construction of the theory.<sup>135</sup>

An employee's less favorable chances of recovering under cat's paw owing to the particular employment arrangements they find themselves in frustrate public policy underlying both the theory and Title VII. Diminished utility of the theory frustrates the policy aim of compelling employers to engage in due diligence research

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131. See Corbett, *supra*, note 27, at 1028, 1066.

132. *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011).

133. *Id.* at 420.

134. *Id.*

135. See *id.*

before committing to harming an employee's interests. More broadly, an infirm theory dilutes Title VII's aim of deterring the future commission of workplace discrimination. Finally, the theory's intention to prevent a scheme of liability insulation is compromised when a staffing agency can rely on biased reports that originate outside the agency relation but still from within its employee's workplace.

### III. Sharpening the Cat's Paw: Discovering Alternatives to Fix Cat's Paw Defects

Courts in the Tenth Circuit should take specific measures to correct at least some of these impairments. At a minimum, when confronted with cases similar to *Armstrong*, courts should be more circumspect by analyzing each alleged instance of discriminatory influence separately. To this end, courts should review the record closely and take note of all of the individuals who have been identified as having inappropriately influenced the decision-making process. This request for thoroughness is warranted because each individual represents a plaintiff's discrete attempt to justify reliance on the theory. Only after a court has done this type of sorting can it properly confirm or deny whether the elements necessary to assert the theory: discriminatory intent, agency relationship, adverse decision, and absence of independent investigation are present.<sup>136</sup> If the *Armstrong* court had followed this course, it is unlikely that it would have treated *Armstrong's* cat's paw claim as to *Burns-Fink* with summary disregard.

Expressly extending cat's paw liability to cover the acts of biased coworkers would also better the lot of staffing employees. The Tenth Circuit in *Hysten* made it clear that there are circumstances where it would not consider an extension of the theory appropriate.<sup>137</sup> However, like other circuits, the Tenth Circuit has not ruled out extending cat's paw to cover coworker acts. In fact, a precedent cat's paw case, *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, counseled in favor of extension.<sup>138</sup> While dicta, the *BCI* court theorized that cat's paw claims should cover biased subordinates who accomplish "discriminatory goals by misusing the authority granted to [them] by [their] employer—for example the authority to monitor performance, report disciplinary infractions, and recommend employment actions."<sup>139</sup> Thus, the *BCI* court made the case for extending the theory to apply to coworkers who are "aided by [an] agency relation" and misuse their reporting power to forward their discriminatory purposes.<sup>140</sup>

Notably, the *Armstrong* court did not indicate that the status of *Armstrong's* antagonists as either coworkers or supervisors was material. The court instead made no distinction between supervisors and coworkers that would restrict use of the theory.<sup>141</sup> Even so, expressly incorporating the *BCI* court's position that coworkers who misuse the reporting process are a source of employer liability under the theory would only slightly improve a staffing employee's prospects of recovering under the

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136. See generally *id.*

137. See *Hysten v. Burlington N. Santa Fe Ry. Co.*, 415 F. App'x 897, 912 (10th Cir. 2011).

138. See *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 485 (10th Cir. 2006).

139. *Id.* (emphasis added).

140. See *id.*

141. See *Armstrong v. Arcanum Grp., Inc.*, 897 F.3d 1283, 1291 (10th Cir. 2018).

theory. This relative improvement does not alter the basic reality that such plaintiffs are surrounded by potential reporters who have no agency relation whatsoever with a plaintiff's employer. Fatally, even if cat's paw was extended to cover the biased actions of coworkers, staffing agency employees would still not be able to recover under this extension when non-agent coworkers and supervisors are the discriminating parties.

Ultimately, the current cat's paw theory presents plaintiffs with few options. If the agency relation disappears, plaintiffs are hapless, employers are immunized, and Title VII's machinery of curbing workplace discrimination through individual adverse judgments seizes. In short, the theory is useful insofar as it exists in the context of a case that presents only ideal conditions. To improve the odds of holding an employer liable for its reliance on discriminatory conduct, a plaintiff should must look beyond the current cat's paw theory.

Commenters have lamented the trend of blurring tort law with employment discrimination law and have suggested that there are other bodies of law more suited to the task of filling out federal anti-discrimination statutes.<sup>142</sup> Curiously, these same commenters have not nominated a seemingly natural candidate: labor law. Yet the labor law construct of joint-employer relationship provides the crucial assistance that plaintiffs need to sustain otherwise doomed attempts to establish employer liability.

Following EEOC guidance and past federal decisions,<sup>143</sup> when one employer determines the terms of employment with another employer, that employer is a joint employer.<sup>144</sup> According to the EEOC, staffing agencies and their clients will typically be categorized as joint employers.<sup>145</sup> A staffing agency should be liable for the discriminatory acts undertaken by its client and co-employer if the agency knew or should have known of such discrimination but failed to take prompt corrective measures within its control.<sup>146</sup>

The 1997 guidance resembles *Staub* cat's paw in both purpose and function. Like cat's paw, the guidance rejects the proposition that employers should be held liable only when the actor making the adverse employment decision is motivated by his own discriminatory bias.<sup>147</sup> The guidance denies joint employers the freedom to be blamelessly indifferent to discrimination attributable to its co-employer that it knew or should have known about.<sup>148</sup> Much like a cat's paw decision-maker who can only break the chain of causation by conducting an independent investigation that neutralizes the effect of impermissible bias, the joint employer must take prompt corrective action to disassociate itself from its affiliate's discrimination and its legal aftermath.<sup>149</sup> An employer will only be absolved for the knowable misdeeds of its partner if it actively opposed them.

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142. See generally Corbett, *supra* note 27.

143. See, e.g., Byorick v. CAS, Inc., 114 F. Supp. 3d 1123 (D. Colo. 2015).

144. See EEOC CONTINGENT WORKER GUIDANCE, *supra* note 13, at \*2.

145. See *id.*

146. *Id.* at \*11.

147. See *id.*

148. See *id.*

149. See *id.*

#### IV. Cat Got Your Tongue: Making Employers Responsible for Inaction in the Face of Discriminatory Conduct of a Co-Employer

For the counsel of a plaintiff like Armstrong to make the most of EEOC guidance and the kinship it has with the cat's paw entails several steps. Imagining what Armstrong's case would have looked like had her counsel chose this strategy provides useful context. Like the plaintiffs in *Bolin* who plead facts sufficient in their amended complaint to "make it plausible that [defendant] was a joint employer," Armstrong would have to set forth facts in her complaint adequately pleading that Arcanum and BLM were her joint employers.<sup>150</sup> To do this, Armstrong would point to facts that demonstrate Arcanum's and BLM's joint exercise and control over determining her work and working conditions. Here, Armstrong would plead that Arcanum made final personnel decisions involving Armstrong, continually monitored and evaluated her performance through a senior employee, Burns-Fink, who worked with her on site, paid Armstrong's salary, and withheld her taxes.<sup>151</sup> Armstrong would claim that BLM's exercise of control over her is apparent in its authority to set her work schedule, delegate to her specific assignments, "provide day to day instructions," and supervise her daily performance.<sup>152</sup>

Armstrong would then allege (as she did) that the contract governing her position only permitted BLM to request Arcanum to remove her if its reason for doing so was failure to meet "[g]overnment expectations or requirements for personal, professional, or performance standards."<sup>153</sup> When Arcanum's personnel manager called to determine why BLM's contracting officer was requesting Arcanum to remove Armstrong, he received no explanation related to the acceptable reasons for removal established under the relevant contract. Given that the contract had clearly defined parameters regarding sufficient cause for removal, Arcanum's personnel manager should have known that BLM's refusal to provide a reason contemplated by the contract increased likelihood of impermissible motive.<sup>154</sup> Armstrong would cite Arcanum's failure to adequately inquire into the reasons for her removal request as the omission upon which its liability for the discriminatory conduct of its co-employer would be based.

In anticipation of surviving a motion for summary judgment on the issue of joint-employer status, Armstrong's discovery production requests could have included: her personnel file, performance reviews conducted both by BLM employees and Arcanum's on-site employee as evidence of joint supervision, email communications regarding Armstrong's work assignments and work schedule, Armstrong's W-4 form and Arcanum's state tax withholding certificates as evidence of Arcanum's status as tax withholder, Armstrong's payroll records to establish Arcanum as manager of Armstrong's salary, and any other related documents tending to indicate codetermination of conditions and terms of employment. In later stages of her case, Armstrong could infuse her argument on coworker liability with cat's paw logic. Specifically, Armstrong could contend that an employer should

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150. *Bolin v. Gen. Motors, LLC*, No. 16-13686, 2018 WL 2087313, at \*4 (E.D. Mich. May 4, 2018).

151. See EEOC CONTINGENT WORKER GUIDANCE, *supra* note 13, at \*4.

152. See *Bolin*, 2018 WL 2087313, at \*4.

153. See Opening Brief, *supra* note 12, at 8.

154. *Cf. Armstrong v. Arcanum Grp., Inc.*, 897 F.3d 1283, 1289 (10th Cir. 2018).

know that if it relies on a client's report without independent verification, it risks tainting its own decision with covert discriminatory bias. Armstrong could also posit that conducting an independent investigation is squarely among the prompt and corrective actions an employer must take if it is to preserve its innocence in the face of its co-employer's discriminatory conduct. Overall by leaning on EEOC guidance, invoking the cases that legitimize its authority, and taking pointers from the cat's paw theory, employees of staffing agencies could devise a complete theory of liability analogous in effect to a traditional cat's paw claim.

### CONCLUSION

Contingent workers as a class are already taxed with lower wage rates, lower rates of health and pension coverage, and fewer fringe benefits. There is no reason that the blunting of federal tools fashioned for worker protection should be counted among their hardships. Some grave consequences of leaving the *status quo* undisturbed are vividly captured in an Arcanum manager's jarring admission that he would honor a client's request for removal "even if the request were based on race discrimination, sex discrimination, or some other illegal reason."<sup>155</sup> That the spirit and letter of Title VII and many other related federal anti-discrimination statutes would countenance such practices because they arise out of peculiar industry circumstances is improbable. After *Armstrong*, contingent worker plaintiffs should posit a theory that will grant them access to a valuable strategy for establishing employer liability, and the Tenth Circuit should be cognizant of the ills that spring from denying such access and join other circuits in their uplift of Title VII's mission "not to provide redress but to avoid harm."<sup>156</sup>

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155. See Opening Brief, *supra* note 12, at 20.

156. *Byorick v. CAS, Inc.*, 114 F. Supp. 3d 1123, 1128 (D. Colo. 2015) (internal quotation and citation omitted).