
EMPLOYMENT LAW — TITLE VII — TENTH CIRCUIT CLARIFIES CAUSATION STANDARD FOR SUBORDINATE BIAS CLAIMS. — *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007).

In order to fulfill Title VII's purpose of rooting out discrimination in employment,¹ courts have held that employers may be liable for "subordinate bias." Under this theory, also known as "cat's paw"² or "rubber-stamp" liability, an employer is liable when the plaintiff's supervisor,³ who has no official decisionmaking authority, is biased against the plaintiff, but the adverse employment decision is made by an official decisionmaker with no alleged discriminatory motive.⁴ Subordinate bias liability helps foster a nondiscriminatory workplace by giving employers the incentive to review the recommendations and conclusions of supervisors for correctness and legitimacy before making decisions.⁵ Recently, in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*,⁶ the Tenth Circuit elaborated on its standard for subordinate bias claims, holding that employer liability exists if and only if the biased subordinate's discriminatory reports "caused the adverse employment action."⁷ The court reaffirmed that a decisionmaker's independent investigation into the facts of the case would break the causal link between the animus and the termination, thus precluding subordinate bias liability.⁸ Although the *BCI* court properly recognized that

¹ See *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984).

² Many courts have analyzed subordinate bias claims by invoking the metaphor of the "cat's paw," which derives from a La Fontaine fable about a monkey who duped a cat into fetching chestnuts roasting in a fire. Each time the cat reached into the fire and was burned, he reflexively batted the chestnut toward the monkey, who in turn contentedly devoured it. See *THE FABLES OF LA FONTAINE* 226–27 (Marianne Moore trans., Viking Press 1954).

³ This comment refers to the potentially discriminatory subordinate above the employee as the "supervisor," and the company official above the subordinate who possesses the power to terminate as the "decisionmaker."

⁴ Subordinate bias liability attaches when the decisionmaker is a conduit — a "cat's paw" — for the biased supervisor's discriminatory actions, or when the decisionmaker perfunctorily approves — "rubber-stamps" — a biased supervisor's explicit recommendation. See *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (finding the employer liable under the Age Discrimination in Employment Act (ADEA) even though the termination decision was made by a committee, not by the biased supervisor, because the committee perfunctorily approved the supervisor's recommendation). The Supreme Court confirmed the validity of the subordinate bias theory of liability in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), in which it held the employer liable under the ADEA because the biased supervisor was the actual decisionmaker. See *id.* at 151–52.

⁵ See, e.g., *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004) (en banc); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997).

⁶ 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 127 S. Ct. 852 (2007).

⁷ *Id.* at 487 (emphasis added).

⁸ See *id.* at 488 (citing *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231–32 (10th Cir. 2000)).

supervisors may manipulate information given to decisionmakers and that independent investigations by decisionmakers may be helpful in rooting out such misdirection, its suggestion that an investigation need not be very thorough to be “independent” was shortsighted. In light of psychological research suggesting that a decisionmaker’s investigation might tend to recreate the bias of a supervisor’s reports, the court should have held that liability attaches unless the decisionmaker counteracts these biases by conducting a broader investigation into the motives and background of the supervisor.

Stephen Peters, an African American, worked as a merchandiser for BCI at its plant in Albuquerque, New Mexico.⁹ Peters’s supervisor, Cesar Grado, was not authorized to make termination decisions, but was required to bring disciplinary issues to the attention of the Human Resources Department, which was ultimately responsible for such decisions.¹⁰ One Friday in 2001, Grado directed Peters’s manager, Jeff Katt, to ask Peters to work that Sunday, his scheduled day off.¹¹ Peters refused, and a frustrated Grado complained to Pat Edgar of Human Resources, the decisionmaker in this case. Edgar asked Grado to contact Peters, order him to work on Sunday, and notify him that refusal would amount to insubordination.¹² Grado did so, and Peters again refused.¹³ After a Saturday visit to the doctor, Peters informed Katt that he was ill. Katt excused Peters from working on Sunday, and Peters did not report to work.¹⁴ On Monday, Grado informed Edgar of Peters’s absence. Edgar also learned that Peters’s file contained a Disciplinary Status Notice from 1999.¹⁵ By the end of the day, Edgar decided to terminate Peters for insubordination, basing her decision primarily on Grado’s account of Peters’s conduct that Friday.¹⁶ No one in the Human Resources Department knew that Peters was African American when the termination decision was made.¹⁷

⁹ *Id.* at 478.

¹⁰ *Id.*

¹¹ *Id.* at 479.

¹² *Id.*

¹³ *Id.* The content of the relevant conversations was disputed; however, both parties agreed that Peters ended the last conversation by saying: “[D]o what [you] got to do and I’ll do what I got to do.” *Id.* (alterations in original) (internal quotation marks omitted).

¹⁴ *Id.* at 480. Peters and Katt both disputed Grado’s claim that Peters mentioned on Friday that he might call in sick. However, by Friday evening, Grado had already told his side of the story to Edgar, who found Peters’s behavior “unacceptable” and began contemplating termination. *Id.* at 479.

¹⁵ *Id.* at 480. Peters had been given a short suspension and a reprimand because he refused to work on his day off. No one in the Human Resources Department ever investigated why Peters had to miss work, but if Edgar had, she would have found he did so in order to serve as a pallbearer at the funeral of a child he raised. *Id.*

¹⁶ *Id.* However, Peters’s paperwork stated that the reason for termination was insubordination for failure to report for work on Sunday. *Id.* at 481.

¹⁷ *Id.* at 481.

The EEOC filed suit on behalf of Peters against BCI for wrongful termination based on Peters's race. Under Title VII of the Civil Rights Act of 1964,¹⁸ it is unlawful for an employer "to discharge any individual . . . because of such individual's race."¹⁹ Invoking the subordinate bias theory, the EEOC argued that even if the decisionmaker, Edgar, did not know Peters was African American, Grado's bias was properly imputed to BCI because of Grado's substantial involvement in the termination process as Edgar's sole source of information about the incident.²⁰ The EEOC presented evidence suggesting that Grado had a history of racial bias. Three other merchandisers alleged that Grado treated black employees worse than employees of other races and "subjected black employees to greater scrutiny."²¹ These affiants reported that Grado made multiple race-based remarks during work hours, and Katt stated that Grado may have used a racial epithet to refer to Peters.²²

The United States District Court for the District of New Mexico granted summary judgment in favor of BCI.²³ It held that although the EEOC established a prima facie case of discrimination, no genuine issue of material fact existed whether BCI's proffered explanation for the termination — insubordination — was pretextual.²⁴ The court reasoned that the EEOC's "subordinate bias" theory did not present a material factual issue for three reasons: Edgar honestly believed that Peters was guilty of insubordination; even assuming Grado's bias, Grado never officially recommended Peters's termination; and Edgar performed an independent investigation.²⁵

Judge McConnell, writing for a unanimous panel of the Tenth Circuit Court of Appeals,²⁶ reversed the grant of summary judgment and remanded for further proceedings.²⁷ The court reaffirmed and elaborated on its prior holdings validating subordinate bias liability as consonant with the agency principles incorporated in Title VII.²⁸ It examined the circuit conflict regarding the causation standard for subordinate bias liability, in which one group of courts deems mere in-

¹⁸ 42 U.S.C. §§ 2000e to 2000e-17 (2000).

¹⁹ *Id.* § 2000e-2(a)(1).

²⁰ *BCI*, 450 F.3d at 482.

²¹ *Id.*

²² *Id.* Additionally, the EEOC compared Grado's treatment of Peters to his treatment of a Hispanic merchandiser who also disobeyed a direct order to work on her day off but did not receive a reprimand from Grado. *Id.* at 482–83.

²³ *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, No. Civ. 02-1644 JB/RHS, 2004 WL 3426757, at *1 (D.N.M. June 10, 2004).

²⁴ *Id.* at *22.

²⁵ *Id.* at *16–18.

²⁶ Judge McConnell was joined by Judges McKay and Lucero.

²⁷ *BCI*, 450 F.3d at 478.

²⁸ *See id.* at 485–88.

fluence by the supervisor over the decisionmaker sufficient to generate liability²⁹ and the other requires that the supervisor have total control over the decision.³⁰ The *BCI* court reasoned that the “mere influence” standard was too lenient³¹ but that the “total control” standard was too harsh.³² It chose a middle ground, deciding that in order to prevail on a subordinate bias claim, a plaintiff must establish that the information provided by the biased supervisor *caused* the adverse employment decision.³³ The Supreme Court recently granted *BCI*’s petition for a writ of certiorari to resolve the circuit conflict regarding the causation standard.³⁴

Additionally, and more importantly for the purposes of this comment, the *BCI* court explicitly stated a premise on which the circuits agree: if an employer conducts an independent investigation before taking the adverse action, it can escape liability because the investigation will break the causal link between the bias and the adverse employment action.³⁵ Under the court’s rule, “simply asking [the] employee for his version of events may defeat the inference that an employment decision was . . . discriminatory.”³⁶ Applying this legal standard, the *BCI* court held that the district court’s grant of summary judgment was inappropriate because genuine issues of material fact existed as to Grado’s racial animus and the pretextuality of *BCI*’s proffered reason for termination.³⁷ The court also held that Edgar’s cursory examination of the employee file did not constitute a sufficiently independent investigation as a matter of law.³⁸

In holding that a good faith independent investigation breaks the chain of causation between the supervisor’s bias and the decisionmaker’s termination decision, the *BCI* court assumed that this sort of disinterested inquiry is feasible. Certainly, a decisionmaker’s independent investigation of the type currently required may successfully prevent the supervisor’s *factual misinformation*³⁹ from infecting the fi-

²⁹ *Id.* at 486 (citing, among other cases, *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)).

³⁰ *Id.* at 487 (citing, among other cases, *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc)).

³¹ *Id.* at 486–87.

³² *Id.* at 487.

³³ *See id.*

³⁴ *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, 127 S. Ct. 852 (2007).

³⁵ *See BCI*, 450 F.3d at 488; *see also, e.g., Willis v. Marion County Auditor’s Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Long v. Eastfield Coll.*, 88 F.3d 300, 307–08 (5th Cir. 1996).

³⁶ *BCI*, 450 F.3d at 488.

³⁷ *Id.* at 490, 493.

³⁸ *Id.* at 492.

³⁹ The supervisor may manipulate the information given to the decisionmaker by presenting the employee in the worst possible light, *see Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), “concealing relevant information from the decisionmaking employee or feeding false infor-

nal decision.⁴⁰ However, the *independent investigation* itself may be tainted with bias: once the decisionmaker receives any complaints, reports, or recommendations from the supervisor, her judgment may be anchored to the information therein, and she may then search for information and process it in a manner tending to recreate the supervisor's bias. The independent investigation standards promulgated by *BCI* and other federal courts fail to recognize this possibility. The *BCI* court should have accounted for this cognitive phenomenon and held that independent investigations immunize employers from subordinate bias liability only when the decisionmaker consciously seeks out evidence of the supervisor's bias and actively corrects for its effect on the investigation and the decision.

The biased supervisor's report may have an anchoring effect on the decisionmaker: once a complaint is lodged or a recommendation is made, it can function as a "prior theory — a tentative hypothesis" — and frame the rest of the investigation.⁴¹ The decisionmaker may also give excessive deference to the supervisor's account because of the supervisor's higher, and presumably more valued, place in the institutional hierarchy as compared with the employee's position.⁴² In *BCI*,

mation to him," *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997), or simply putting a certain spin on relevant events, see Charles A. Sullivan, *Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII*, 56 BROOK. L. REV. 1107, 1139 n.117 (1991). A biased supervisor also may report infractions selectively and enforce disciplinary measures or issue reprimands only for members of disliked classes. See *Willis*, 118 F.3d at 547 (reasoning that the biased supervisor, "by concealing relevant information from the decisionmaker, is able to manipulate the decisionmaking process and to influence the decision"); see also *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 288 (4th Cir. 2004) (en banc); *Griffin v. Wash. Convention Ctr.*, 142 F.3d 1308, 1311 (D.C. Cir. 1998). In *BCI*, for example, there is evidence that Grado chose not to file a complaint against a Hispanic *BCI* employee who, like Peters, did not work on her day off as directed. *BCI*, 450 F.3d at 482–83.

⁴⁰ The *BCI* court recognized the dangers of factual manipulation, *BCI*, 450 F.3d at 486, and this concern is reflected in its approach, which requires the decisionmaker to hear the facts from the employee's perspective, see *id.* at 488. Other courts similarly assume that if the decisionmaker knows the full set of facts, her decision will be unbiased and legitimate. See, e.g., *Johnson v. Kroger Co.*, 319 F.3d 858, 877 (6th Cir. 2003) (finding a decisionmaker's "own direct, repeated, and unchallenged observations" sufficient for an independent investigation); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999) (finding the provision of a hearing and an opportunity for representation by counsel sufficient to constitute an independent investigation); *Willis*, 118 F.3d at 547–48 (deeming an independent investigation sufficient when the decisionmaker observed evidence of objective violations of employment policy, repeatedly spoke with employee regarding the violations, and considered allegations of racial discrimination against the supervisor).

⁴¹ Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 524 (2001).

⁴² Cf. Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 507 (1993) (noting the disadvantage employees face in internal dispute resolution systems as a result of the inherent power imbalance relative to their supervisors).

it is possible that Edgar was anchored to the idea of Peters's guilt before she had the chance to begin an independent investigation.⁴³

When anchored to a presupposition of guilt, the decisionmaker may conduct the investigation in a manner tending to uncover evidence that confirms the expectation created by the supervisor.⁴⁴ Cognitive psychology research suggests that strong expectancies influence the amount and kind of information individuals seek before making a judgment.⁴⁵ Because any investigation costs time and resources, individuals addressing targets about whom they have some preconceived notion ask asymmetric questions that allow confirmation of their expectancies.⁴⁶ Researchers note that subjects may exhibit a confirmation bias because such expectancy-confirming information is easier to process and because the hypothesis being tested makes behaviors consistent with that hypothesis more accessible in memory.⁴⁷ For example, Edgar did not search for, or uncover, information relating to Peters's award for five years of "service, dedication and commitment."⁴⁸

Once the information is gathered, a decisionmaker may also process the information in a theory-confirming manner⁴⁹ and may consequently draw unjustified inferences from the information. The decisionmaker may "remember the strengths of confirming evidence but the weaknesses of disconfirming evidence . . . [and] accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically."⁵⁰ A confirmatory bias is more likely to take effect

⁴³ For example, on the Friday before Peters was fired, Grado made multiple frustrated phone calls to Edgar and told her that Peters planned to call in sick on Sunday instead of coming to work. See *BCI*, 450 F.3d. at 479–80. Based on Grado's reports, Edgar made an immediate determination that Peters's conduct amounted to insubordination warranting termination. *Id.* at 480. Edgar never conducted an independent investigation, even under *BCI*'s standard. However, if she had, the information Grado gave to her could have framed the rest of her investigation.

⁴⁴ See William B. Swann, Jr. & Toni Giuliano, *Confirmatory Search Strategies in Social Interaction: How, When, Why, and with What Consequences?*, 5 J. SOC. & CLINICAL PSYCHOL. 511, 521 (1987) (finding that people who are more certain of their beliefs tend to search in a more constrained manner than those who are uncertain).

⁴⁵ See Yaacov Trope & Erik P. Thompson, *Looking for Truth in All the Wrong Places? Asymmetric Search of Individuating Information About Stereotyped Group Members*, 73 J. PERSONALITY & SOC. PSYCHOL. 229, 240 (1997).

⁴⁶ See *id.*

⁴⁷ See Patricia G. Devine et al., *Diagnostic and Confirmation Strategies in Trait Hypothesis Testing*, 58 J. PERSONALITY & SOC. PSYCHOL. 952, 961 (1990).

⁴⁸ See *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, No. Civ. 02-1644 JB/RHS, 2004 WL 3426757, at *2 (D.N.M. June 10, 2004).

⁴⁹ See Mark Snyder & Nancy Cantor, *Testing Hypotheses About Other People: The Use of Historical Knowledge*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 330, 341 (1979) (concluding that individuals preferentially accumulate evidence that confirms the hypotheses they are testing).

⁵⁰ Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979) (concluding that individuals with strong preconceived opinions examine evidence in a biased manner).

when the evidence is especially ambiguous and complex,⁵¹ as is likely to be the case in the context of employment decisions. These tendencies are intensified in people with positions of power. According to the cognitive economy hypothesis, superiors are more likely to behave in an expectancy-confirming manner because it is a convenient heuristic with no obvious or direct negative consequences for them.⁵² People in positions of power do not need to pay much attention to the powerless and have more demands on their attention and cognitive resources.⁵³ The same factors may lead decisionmakers to conduct investigations in an expectancy-confirming manner.⁵⁴

If the decisionmaker knows about the supervisor's discriminatory animus, she may be able to correct for its influence and conduct the investigation in an independent manner. According to some researchers in the field of cognitive social psychology, it should be possible — albeit quite difficult — to avoid bias. Such avoidance is possible only if one is motivated and able to control one's responses to biased information by increasing awareness of the direction, magnitude, and effect of the bias.⁵⁵ Professors Rebecca White and Linda Krieger posit:

Such an affirmative process would require, among other things, explicitly considering the possibility that bias had influenced the process at its earlier stages, assuring that all . . . recommendation-*inconsistent* facts have been energetically developed and their potential implications thoroughly explored, and subjecting all recommendation-*consistent* information to rigorous critical scrutiny.⁵⁶

Practically, this task can be accomplished through a calculated inquiry into the background and possible motives of the relevant super-

⁵¹ See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 648 (1999) (citing Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 COGNITIVE PSYCHOL. 411, 425–28 (1992)).

⁵² See Monica J. Harris et al., *Awareness of Power as a Moderator of Expectancy Confirmation: Who's the Boss Around Here?*, 20 BASIC & APPLIED SOC. PSYCHOL. 220, 222 (1998).

⁵³ See Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48 AM. PSYCHOL. 621, 624 (1993).

⁵⁴ For example, in *BCI*, instead of continuing to search for disconfirming evidence of Peters's misconduct, Edgar apparently construed the prior Disciplinary Status Notice as support for her decision to terminate Peters. *BCI*, 450 F.3d at 480. Although the file did not explain the extenuating circumstances regarding Peters's prior Disciplinary Status Notice, Edgar could have questioned Peters about this incident.

⁵⁵ See Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 122 (1994).

⁵⁶ White & Krieger, *supra* note 41, at 527; see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 970 (1993) (arguing that decisionmakers must “stop and examine” the motives of the supervisor and ask whether the decisions have been “improperly influenced by discrimination”). The motivation to correct for discrimination is especially important considering that the decisionmaker may strongly favor the original hypothesis even after evidence of bias on the part of the supervisor is uncovered. See Hanson & Kysar, *supra* note 51, at 650–51.

visor whenever a termination or a significant disciplinary action is taken against a member of a protected class. The decisionmaker could, for example, review the supervisor's file for complaints of biased behavior and interview the supervisor's own superiors, colleagues, and employees. If deemed necessary, the decisionmaker might also review the adverse employment reports and recommendations made by the supervisor pertaining to other employees to see if a consistent pattern of bias emerges. In contrast, merely asking the employee for her side of the story, as recommended by the *BCI* court, will not always root out the possible discriminatory motives of the supervisor that may have influenced the independent investigation.⁵⁷

When judging the validity of independent investigations, courts should recognize the time and resource constraints on decisionmakers.⁵⁸ There is no need for an elaborate or lengthy bias-seeking investigation; after conducting the inquiry outlined above, the decisionmaker may reasonably conclude that there is no indication of bias on the part of the supervisor and proceed with the termination. Subjecting employers to potential liability if they do not conduct a bias-seeking investigation before discharging a member of a protected class will encourage employers to reevaluate their procedures and voluntarily implement solutions to effect positive changes in the workplace.

The Tenth Circuit correctly decided that discrimination should be found whenever "the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action"⁵⁹ and that independent investigations are required to break the causal link and certify the legitimacy of these decisions.⁶⁰ However, cognitive psychology provides important insights into how individuals — and employers — seek and process information and counsels in favor of broader, more conscious information gathering during investigations. Holding employers to a higher standard of independence in their investigations will help effect Title VII's purpose of eradicating discrimination in the workplace.

⁵⁷ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 538 (2001) (arguing that "uncritical acceptance of internal . . . processes . . . will often leave underlying patterns and conditions unchanged").

⁵⁸ In other words, a court should not act as a "super personnel department" that dictates employee business practices. *Simms v. Oklahoma ex rel. Dep't of Mental Health*, 165 F.3d 1321, 1330 (10th Cir. 1999) (quoting *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983)) (internal quotation marks omitted).

⁵⁹ *BCI*, 450 F.3d at 487.

⁶⁰ *Id.* at 488.