No. 22-

IN THE

Supreme Court of the United States

JEANNIE PARKER,

Petitioner,

v.

UNITED AIRLINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the standard for proximate causation applied by the court of appeals below, and in other Tenth Circuit cases, conflicts with this Court's decision in *Staub v. Proctor Hospital*, 562 U.S. 411 (2011) — and the post-*Staub* approaches taken by other circuit courts — to the extent that the Tenth Circuit's test dictates that an employer's independent investigation into a biased supervisor's recommendation automatically breaks the chain of causation in "cat's paw" cases brought under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 *et seq.*

RELATED CASES STATEMENT

Jeannie Parker v. United Airlines, Inc., No. 2:19-cv-00045-BSJ, U.S. District Court for the District of Utah. Judgment entered June 28, 2021.

Jeannie Parker v. United Airlines, Inc., No. 21-4093, U.S. Court of Appeals for the Tenth Circuit. Judgment entered November 23, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Jeannie Parker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. Parker's petition should be granted for several interrelated reasons:

First, the Tenth Circuit — in this case and others — has applied an "uncritical reliance" test in the wake of *Staub v. Proctor Hospital*, 562 U.S. 411 (2011), that permits employers to automatically defeat claims alleging cat's paw liability[1] whenever an ostensibly independent investigation into a supervisor's discriminatory report is conducted. *E.g., Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1294 (10th Cir. 2013) ("[A] necessary element to a subordinate bias claim is the decisionmaker's ***uncritical reliance*** on facts provided by a biased supervisor.") (emphasis added) (internal alterations and citation omitted). This test is flatly at odds with the higher burden

1. In *Staub*, Justice Scalia described the theory of cat's paw liability as follows:

> The term "cat's paw" derives from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by Judge Posner in 1990. In the fable, a monkey induces a cat by flattery to extract roasting chestnuts from the fire. After the cat has done so, burning its paws in the process, the monkey makes off with the chestnuts and leaves the cat with nothing.

562 U.S. at 415 n.1 (internal citations omitted). As such, the employee in *Staub* brought a "cat's paw case" because "he sought to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Id.*

set forth in *Staub*, which expressly rejected a "blind reliance" test for cat's paw liability that is nearly identical to the Tenth Circuit's "uncritical reliance" test. Further, applying this uncritical reliance test almost unfailingly results in the Tenth Circuit affirming summary judgment for employers in cat's paw cases.

Second, in the years since *Staub* was decided, a split has arisen between the circuit courts with respect to the handling of cat's paw claims at the summary judgment stage; specifically, the circuit courts diverge as to the manner in which evidence is considered for the purposes of summary judgment and the burden placed on employees who are asserting cat's paw liability.

Third, this petition presents an issue that will certainly arise in the future, and directly affects the ability of employees who have been harmed by discriminatory and illegal conduct to obtain meaningful relief from the courts.

For all these reasons, review is badly needed to clarify the correct standard for proximate causation in cat's paw liability cases — and in particular, the circumstances under which summary judgment for the employer may or may not be appropriate — so that aggrieved employees are no longer being systematically deprived of their FMLA rights and their fair day in court.

OPINIONS BELOW

The Tenth Circuit's denial of the petition for rehearing and petition for rehearing *en banc* is unreported but available at *Parker v. United Airlines, Inc.*, No. 21-4093 (10th Cir. Nov. 23, 2022) (slip. op.). App. A at 1a-33a. The

Tenth Circuit's opinion is reported as *Parker v. United Airlines, Inc.*, 49 F.4th 1331 (10th Cir. 2022). App. C at 51a. The district court's opinion is unreported but available as *Parker v. United Airlines, Inc.*, No. 2:19-CV-00045-BSJ, 2021 WL 3206777 (D. Utah June 28, 2021). App. B at 34a-50a.

JURISDICTION

Jeannie Parker's petition for rehearing and rehearing *en banc* to the Tenth Circuit Court of Appeals was denied on November 23, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1), Parker having timely filed this petition for writ of certiorari within ninety days of November 23, 2022. *See* Sup. Ct. R. 13(2).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Family Medical Leave Act, 29 U.S.C. § 2615(a)(2) App. D at 52a: "It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter."

The Family Medical Leave Act, 29 U.S.C. § 2615(a)(1) App. D at 52a: "It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."

Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights, 29 C.F.R. § 825.220 App. D at 53a-56a.

STATEMENT OF THE CASE

1. This case arises out of the unlawful termination of petitioner Jeannie Parker ("Parker") in retaliation for having exercised her rights under the FMLA. Prior to her termination, Parker was a top-performing customer service representative for United Airlines, Inc. ("United"). As a 26-year veteran of United, she garnered promotions, praise from top executives, and positive customer reviews over her decades of service. All of that suddenly changed in 2018, when Kathy Fooshee became Parker's supervisor and Parker faced two health crises — her own and her father's. At that time, Parker was working as a Lead Remote Reservations Sales & Services Representative, handling issues such as reservations, ticketing, seat assignments, check-in, and other related services. In 2018, Parker also took significant periods of FMLA leave — all approved by United — to tend to her own chronic health condition and to care for her terminally ill father.

Fooshee noticed Parker's absences and sought to punish Parker for taking FMLA leave. Beginning in April 2018, Fooshee began a relentless, obsessive, and ultimately successful effort to oust Parker from her job, spending countless hours over three months listening to Parker's calls and developing a report of her purported misconduct. Indeed, Fooshee claimed to have listened to all of Parker's calls between April to July 26, 2018, which, if true, would have consumed ***hundreds*** of Fooshee's working hours. Parker was not informed that she was being investigated during this period.

Just six months after becoming Parker's supervisor, Fooshee placed Parker on suspension and began a months-

long process to lobby United to fire Parker. While Fooshee claimed she sought termination because of Parker's poor work performance (specifically, an alleged pattern of "call avoidance"), substantial evidence shows that Fooshee's true motivation was an anti-FMLA bias. Among other things, Fooshee repeatedly raised the fact of Parker's FMLA usage during the termination process, in a manner suggesting that her use of FMLA leave was at least one, if not the main, reason for Parker's termination. Fooshee also supervised many other agents with similar or worse performance records — including documented cases of abhorrent customer service/call mishandling or call avoidance — but out of the thirty-five agents she supervised, Parker was ***the only one*** that Fooshee targeted for immediate termination.

When Fooshee was told that she did not have the power to terminate Parker unilaterally, she formally recommended that Parker be terminated, and presented a case against Parker at an Investigative Review Meeting ("IRM"). Another United employee, Emily Yang, presided over the IRM and had the *de jure* power to decide whether to terminate Parker. At her IRM, Parker disputed Fooshee's allegations and provided evidence in support. Parker's union representative argued that, even if Parker's performance had declined, United was supposed to apply its progressive discipline policy to Parker and that this "did not happen." Fooshee also made demonstrably false statements in advancing the termination. Nevertheless, Yang terminated Parker and, in doing so, credited and adopted Fooshee's reasoning and version of events — even those accusations that were proven to be untrue at the IRM.

2. On January 18, 2019, Parker brought suit against United in the United States District Court of the District of Utah, asserting, *inter alia*, a claim for FMLA retaliation. *See generally* Dist. Ct. Dkt. No. 1, Compl. The district court had federal question jurisdiction over the matter pursuant to 29 U.S.C. § 2617(a)(2) (granting federal right of action in federal court to recover damages from employers who violate the FMLA) and 28 U.S.C. § 1331 (conferring jurisdiction for federal questions).

On June 28, 2021, the district court granted summary judgment for United on Parker's claim of FMLA discrimination/retaliation because the court concluded that "there is no evidence to show that United's legitimate, non-discriminatory and non-retaliatory reasons for the termination are pretextual." App. B at 47a. The district court's analysis centered on Yang (the allegedly unbiased decisionmaker), rather than Fooshee (the biased supervisor). *See id.* at 46a-50a. While the district court noted the cat's paw theory of liability, the court held that Parker could not establish cat's paw liability because there was no evidence to show that "Ms. Emily Yang acted as a mere cat's paw for Ms. Fooshee....and that Ms. Yang did in fact hear and consider presentations from both parties." *Id.* at 49a. Thus, Parker could not proceed to the jury on her cat's paw claim because the court concluded that Yang did not simply rubber-stamp Fooshee's request for termination and instead independently verified some of the facts alleged by Fooshee. *Id.*

3. On October 12, 2021, Parker filed her appellate brief in the United States Court of Appeals for the Tenth Circuit. Ct. App. Dkt., Appellant Br. (Oct. 12, 2021). Parker argued the district court improperly construed

facts and drew inferences in favor of the summary judgment movant, United. *Id.* at 30-36. Moreover, she highlighted that the district court applied a standard for cat's paw liability that was set forth in *English v. Colorado Department of Corrections,* 248 F.3d 1002 (10th Cir. 2001). Under *English* — which was no longer good law after this Court's decision in *Staub* — an employer cannot be liable if "the plaintiff had an opportunity to respond and rebut the evidence supporting recommendation." *Id.* at 38-39 (citing *English*, 248 F.3d at 1011).

With respect to *Staub*, Parker argued that this Court's decision stood for a rule that liability may be found under a cat's paw theory ***even if*** the decisionmaker conducted an "independent investigation" and ***even if*** the plaintiff was allowed to respond to the accusations against her. *Id.* at 35 (citing *Staub*, 562 U.S. at 421). Parker further argued that genuine issues of material fact existed as to whether Yang was influenced by Fooshee's biased recommendation to terminate Parker — such that Fooshee's bias was a proximate cause of Parker's termination under *Staub* — despite Yang's purportedly independent review of that recommendation.[2] *Id.* at 43-52.

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2. Among other things, the evidence showed that Yang: adopted all of Fooshee's assertions from the IRM (despite Parker demonstrating many of them to be false); adopted Fooshee's assertion that she was unaware of Parker's medical condition (despite evidence contrary to that assertion); cited United's policy (despite the fact that United's own policy required a progressive discipline procedure to be applied, rather than an immediate termination); and stated that there is "no dispute as to the facts of your misconduct" (despite Parker disputing many of the accusations by Fooshee). *See* Ct. App. Dkt., Appellant Br. at 4-22 (Oct. 12, 2021). Moreover, of the twenty-four calls identified by Fooshee as having allegedly been mismanaged by Parker — which represented only a small fraction of the calls

The Tenth Circuit assumed the truth of Parker's allegation that her use of FMLA leave had sparked retaliation from Fooshee. App. A at 12a. The court further agreed that *English* was no longer the proper standard. *Id.* at 13a. However, the court held that, beyond dispute, United broke the causal chain from the bias by "directing other managers to independently investigate and decide whether to adopt the supervisor's recommendation." *Id.* at 12a. The court's Opinion parsed all the evidence, and in effect held that no reasonable jury could conclude that Fooshee's demonstrated desire for retaliation — which culminated in her recommendation to terminate Parker following months of obsessive monitoring — had any influence upon the ostensibly independent investigation by United's ultimate decisionmakers. *Id.* at 141a-18a. The district court's decision to grant summary judgment for United was affirmed. *Id.* at 22a.

4. On October 10, 2022, Parker filed a petition for rehearing and petition for rehearing *en banc*. Parker argued that the Tenth Circuit's decision repeated the error in the district court's decision by interpreting the facts regarding Yang's alleged investigation in United's favor on summary judgment, and by applying a standard for cat's paw liability that was not consistent with *Staub*.

For example, Parker argued that United did not follow its own progressive discipline policy in adopting Fooshee's recommendation to terminate Parker. The policy allows for immediate termination only for "egregious conduct," which a United manager likened to theft or violence

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Parker handled during the relevant time period — only three were discussed at the IRM and the only evidence of those calls derived from descriptions in a table created and submitted by Fooshee. *Id.*

during a Rule 30(b)(6) deposition. By way of a further example, Parker presented evidence during the hearing that United supervisors (including Fooshee herself) did not terminate an employee who came to work noticeably impaired by alcohol or drugs on "at least 10 occasions." United supervisors instead met with the employee at least fifteen times to discuss the problem, issued a warning, and ultimately transferred her to a different supervisor. Parker, by contrast, was afforded no such leniency by either Fooshee or United.

Despite all this, the court of appeals determined that — although comparators with worse conduct than Parker had received the benefit of progressive discipline — the "employee's testimony did not suggest that these were the only offenses that United considered egregious." App. A. at 18a. Whether United followed its progressive policy, or used the "egregious conduct" exception as pretext, ought to have been treated as a question of fact under the circumstances. To summarily hold, despite the substantial evidence to the contrary, that Parker's conduct falls under "egregious conduct" and thus there is no pretext as a matter of law, construes facts in favor of United and ignores the standards articulated by this Court in *Staub*.

Chief Judge Holmes, and Bacharach and Phillips, denied the petition for rehearing. App. C at 51a. The petition for rehearing *en banc* "was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied." *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals' Decision Conflicts with Decisions of This Court.

A petition for a writ of certiorari may be granted when, as here, a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10(C); *see also Nieves v. Bartlett*, 139 S. Ct. 1715, 1728 (2019) (stating that certiorari was granted to clarify which test should apply to determine causation in a First Amendment retaliatory arrest claim); *Menominee Indian Tribe of Wisc. v. United States*, 576 U.S. 1083 (mem.) (2015) (granting certiorari to determine whether the D.C. Circuit misapplied this Court's precedent). The court of appeals' decision is in direct conflict with *Staub* and other Supreme Court cases dealing with questions of proximate causation.

1. In *Staub*, this Court rejected a Seventh Circuit test that is nearly indistinguishable from the "uncritical reliance" test applied by the court of appeals. Under the Seventh Circuit's now-rejected test, cat's paw liability "require[d] a blind reliance [upon the biased report]." *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009) ("It is enough that the decision-maker is not wholly dependent on a single source of information and conducts her own investigation into the facts relevant to the decision.") (internal quotation marks omitted), *rev'd*, 562 U.S. at 423. It is vital to note that the decisionmaker in *Staub* did ***not*** "blindly rely" upon the biased reports from the employee's immediate supervisors and instead conducted her own investigation into the evidence of wrongdoing. The aggrieved employee was also permitted to file a grievance to supply his side of the story. This was

deemed sufficient to break the chain of causation under the test applied by the Seventh Circuit. *Id.* at 656.

On review, this Court declined to adopt any "hard-and-fast rule" that a decisionmaker's independent investigation, exercise of judgment, and rejection of the employee's allegations of discriminatory animus automatically "negate[s] the effect of the prior discrimination." *Staub*, 562 U.S. at 419-20. Rather, the question of whether a biased supervisor's actions played a causal role in the adverse employment action should be governed by common-law tort principles. *Id.* at 417, 420. Consistent with those principles, "the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm." *Id.* at 419-20 ("[I]t is common for injuries to have multiple proximate causes.").

The theory of cat's paw liability is intended to prevent an employer from ducking liability for "discriminatory acts and recommendations of supervisors that were ***designed and intended*** to produce the adverse action" simply by isolating a personnel official from the discriminatory supervisors and asking that official to review the employee's file. *Id.* at 420 (emphasis in original). This Court thus recognized that — even if an independent investigation was conducted — a biased report may nonetheless remain a causal factor unless the adverse action was "apart from the supervisor's recommendation, entirely justified." *Id.* at 420-21.

What is the takeaway? Under *Staub*, the occurrence of an independent investigation does ***not*** automatically warrant judgment for the employer. *Id.* ("We are aware

of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect."). The Tenth Circuit's current test for cat's paw liability is directly at odds with this binding precedent.

2. The uncritical reliance test presently applied by the Tenth Circuit was first articulated in its 2013 *Lobato* decision, which held that "a necessary element to a subordinate bias claim is the decisionmaker's uncritical reliance on facts provided by a biased supervisor." 733 F.3d at 1294 (internal alterations and citations omitted). Under this test, if the employer independently verifies some facts supplied by the biased source, there can be no cat's paw liability as a matter of law. *Id*. at 1294-95.

Many Tenth Circuit cases have applied *Lobato*'s uncritical reliance standard when evaluating cat's paw claims — and they have all affirmed summary judgment for the employer. *E.g., Lawrence v. School Dist. No. 1*, 560 F. App'x 791, 795-96 (10th Cir. 2014) (holding that cat's paw liability is unavailable when an unbiased third party independently verifies facts); *Brainerd v. Schlumberger Tech. Corp.*, 589 F. App'x 406, 413 (10th Cir. 2015) (determining that the ultimate decisionmaker did not "rely blindly" on the recommendations by the supervisor); *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 514 (10th Cir. 2015) ("[Cat's paw liability only available] if the employer uncritically relies on the biased subordinate's reports and recommendations in deciding to take adverse employment action"); *Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019) ("If a final decisionmaker fires an employee based on 'uncritical reliance' on facts provided by a biased subordinate, the subordinate's bias is the proximate cause of the employment action.").

The court of appeals applied this same incorrect standard in finding that Parker could not proceed on her cat's paw theory as a matter of law, holding that the "causal link is broken when an independent decisionmaker conducts her own investigation and decides to fire the employee." App. A at 2a. While the court of appeals acknowledged that the investigation must be truly independent to preclude liability, its reasoning focused almost entirely on whether United's decisionmaker (Yang) verified certain facts in the biased report from Parker's immediate supervisor (Fooshee), with no analysis as to whether that report still played a causal role in the decision to terminate Parker. *Compare id.* at 13a (citing *Lobato*, 733 F.3d at 1296), *with id.* at 12a ("In our view, United broke the causal chain by directing other managers to independently investigate and decide whether to adopt the supervisor's recommendation."). The concurring opinion by Judge Holmes further supports this conclusion and explicitly cited *Lobato*'s uncritical reliance test. App. A at 27a ("Showing 'uncritical reli[ance]' at the final layer of review is an essential element of cat's paw liability that the plaintiff bears the burden to establish."). Thus, *Parker* rests on the rule that a purportedly independent investigation automatically has a claim-preclusive effect in a cat's paw case — *i.e.*, the very same rule rejected in *Staub*.

3. *Staub* was also very clear that the question of proximate causation in the cat's paw context should be guided by common-law tort principles. 562 U.S. at 417, 420. It is hornbook law that "issues of proximate causation... involve application of law to fact, ***which is left to the factfinder***, subject to limited review." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 840-41 (1996) (emphasis added); *Milwaukee & St. P.R. Co. v. Kellogg*, 94 U.S. 469, 474

(1876) ("The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury."); *Stone v. New York, C., & St. L.R. Co.*, 344 U.S. 407, 409 (1953) (emphasizing that the question of causation should be left to the jury).

In tort cases not involving the cat's paw theory, the Tenth Circuit espouses a like rule. For example, in *Neece v. Internal Revenue Service*, 96 F.3d 460, 464 (10th Cir. 1996), the court held that "[t]he question of proximate cause is generally one for the fact finder[.]" Causation is only an issue of law when there is "no evidence from which a [factfinder] could reasonably find the required proximate, causal nexus between the careless act and the resulting injuries." *Id.* (alteration in original); *see also Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1023 (10th Cir. 2001) ("Ordinarily, what constitutes the proximate cause of any injury is a question of fact."); *Bannister v. Town of Noble, Okla.*, 812 F.2d 1265, 1267 (10th Cir. 1987) (similar).

Those established principles are quickly discarded, however, when an employee brings a cat's paw claim. As evidenced in this case and the other Tenth Circuit cases cited herein, applying the Tenth Circuit's uncritical reliance standard in the cat's paw context uniformly results in the causation question being taken away from the jury and resolved in favor of the employer on summary judgment. *See* Point I.2, *supra* (collecting Tenth Circuit cases applying *Lobato*'s uncritical reliance standard); *see also, e.g.*, *Thompson v. Little Am. Hotel Co.*, No. 22-4006, 2022 WL 10832885, at *1, *6 (10th Cir. Oct. 19, 2022); *Rodriguez v. Brown*, No. 21-1124, 2022 WL 3453401, at *7 n.7 (10th Cir. Aug. 18, 2022); *Wilson v. Textron Aviation, Inc.*, 820 F. App'x 688, 692-93 (10th Cir. 2020); *Didier*

v. Abbott Lab'y, 614 F. App'x 366, 377 (10th Cir. 2015); *Konzak v. Wells Fargo Bank, N.A.*, 492 F. App'x 906, 907, 911-12 (10th Cir. 2012); *Frederick v. Metro. State Univ. of Denver Bd. of Trustees*, 535 F. App'x 713, 719-20 (10th Cir. 2013).[3] Tellingly, not one of the post-*Staub* Tenth Circuit cases affirming summary judgment on a cat's paw claim cite the established rule that proximate cause is ordinarily a question for the factfinder.

Whenever a biased supervisor sets a purportedly independent investigation into motion, it is almost certain that some workplace failing will be uncovered. Courts must therefore examine whether the investigation produced a wholly independent and sufficient reason for the adverse employment action, or was still guided by the biased recommendation that kicked it off. *Staub*, 562 U.S. at 421 (stating that an adverse employment action must be "apart from the supervisor's recommendation, entirely justified").

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3. In fact, undersigned counsel has only been able to locate one cat's paw case decided in the twelve years following *Staub* in which the Tenth Circuit reversed an award of summary judgment for the employer: *Greer v. City of Wichita, Kansas*, 943 F.3d 1320 (10th Cir. 2019). *Greer* is instructive to the extent that it: (1) did not cite *Lobato*, and (2) repeatedly emphasized whether a factfinder could reasonably find for the employee on certain issues — strongly suggesting that a different outcome may be reached in cat's paw cases when the correct standards are correctly applied. *See id.* at 1325-26. In addition to *Greer*, *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726, 741 (10th Cir. 2014) — while not expressly applying the cat's paw theory — held that the employee had raised a genuine issue of fact regarding whether another employee was her supervisor, such that his biased recommendations were a proximate cause of the adverse action, even if the decisionmaker did not blindly rely upon his recommendations. These cases are substantial outliers in the Tenth Circuit, however.

At the very least — unless there is ***no*** evidence from which the required proximate, causal nexus could be found by a reasonable factfinder — this question ought to be submitted to the jury. *See Neece*, 96 F.3d at 464; *Eck*, 256 F.3d at 1023. Cat's paw cases present complex causation and credibility questions that are generally unsuited for resolution on summary judgment. It cannot be ignored that the Tenth Circuit's uncritical reliance test consistently deprives employees of their day in court by ignoring the common-law tort principles applicable to proximate causation and the rules for summary judgment motions, including in this very case.

4. As *Parker*, *Lobato*, and the other cases cited above demonstrate, the Tenth Circuit's "uncritical reliance" test is all but identical to the "blind reliance" test rejected in *Staub*. The court of appeals also departs from common-law tort principles regarding proximate causation when evaluating cat's paw cases, making it near impossible for employees to withstand summary judgment. Parker is just one of many employees so affected. Review by this Court would help to clarify the *Staub* standard and correct any misconceptions regarding the proper test to apply to cat's paw claims, particularly at the summary judgment stage.

II. The Courts of Appeals' Decision Deepens a Circuit Split on the Evidence Needed to Obtain Summary Judgment in a Cat's Paw Case.

In addition to being inconsistent with this Court's *Staub* decision, the uncritical reliance standard used by the Tenth Circuit is out of step with other circuits — primarily the Sixth and Seventh Circuits — that have tailored their summary judgment analyses in FMLA cases to the holding in *Staub*.

1. In *Staub*, the Court's description of the cat's paw theory of liability was simple and clear: a biased supervisor's report remains a causal factor in an adverse action if there is evidence suggesting that the employer's subsequent investigation was not free from the supervisor's discriminatory animus. 562 U.S. at 421. Thus, an employer will be held liable upon proof that: (1) the biased supervisor intended to cause the adverse employment action, and (2) the supervisor's unlawful bias was at least one of the proximate causes for the adverse action. *Id.*

Yet, following *Staub*, the circuit courts have split over the type of evidence that is necessary for an employer to obtain summary judgment when an employee has invoked the cat's paw theory to establish an FMLA retaliation claim. On the one hand, the Eighth and Tenth Circuits will affirm summary judgment in favor of the employer unless the employee produces record evidence affirmatively showing that a biased supervisor tainted the employer's investigation. Essentially, these circuits have continued to apply their pre-*Staub* formulations of the cat's paw theory, which required proof that the biased supervisor effectively controlled the decision-making process. The Sixth and Seventh Circuits, comparatively, have modified their approach to the cat's paw theory and will deny summary judgment in favor of the employer unless there is record evidence showing that the employer took affirmative steps — in addition to an independent investigation — that were sufficient to ensure that the adverse action was entirely free of the supervisor's unlawful bias.[4]

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4. While other circuits have addressed and applied the cat's paw theory of liability in FMLA retaliation cases and other employment disputes, only the Sixth, Seventh, Eighth, and Tenth

As explained below, the circuit courts are divided on the circumstances under which, for the purposes of summary judgment, a biased supervisor remains a proximate cause of FMLA retaliation despite a later investigation. Furthermore, only the latter group is applying the cat's paw theory in manner that is faithful to *Staub*. These divergent approaches to the cat's paw theory are creating anomalous results in FMLA retaliation cases, such that an employee's success in invoking the cat's paw theory of liability — and ability to reach a jury — hinges largely upon the geographical location in which the retaliatory act occurred. The Court should intervene to end this split and provide much need guidance on when proximate cause may be decided as a matter of law in the cat's paw context.

2. As alluded to above and in the preceding section, the Tenth Circuit continues to apply its pre-*Staub* approach to the cat's paw theory of liability, making it virtually impossible for an employee to survive a motion for summary judgment even when there are disputed issues of material fact. More specifically, that court will grant summary judgment unless there is evidence that a biased supervisor used the final decisionmaker as a "dupe" to achieve the unlawful employment action — the burden is on the employee to affirmatively show that the supervisor had "more than mere influence or input" in the adverse employment action, or else the Tenth Circuit will conclude that the biased supervisor was not a proximate cause of the adverse employment decision as a matter of

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Circuits have explicitly addressed the type of evidence that is necessary to cut the causal chain between a biased supervisor and the adverse employment action at the summary judgment stage.

law. *E.g., Llamas v. QC Fin. Servs., Inc.*, 621 F. App'x 906, 913 (10th Cir. 2015) (reciting a standard from a pre-*Staub* decision, *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006)). This approach to the cat's paw theory is overly deferential to the employer and inconsistent with *Staub*, not to mention the standards for summary judgment as a general matter.

Parker's case typifies how the Tenth Circuit's approach to the cat's paw theory renders the theory meaningless in practice. Here, the court of appeals began by parsing all of the evidence Yang considered at the IRM, which had been supplied by Fooshee, the biased supervisor. App. A at 14a-18a. It then concluded that Fooshee was not a proximate cause of Parker's termination because nothing in the IRM suggested a discriminatory pretext. *Id.* What is notably absent from the court's analysis, however, is any meaningful discussion or analysis of whether: (a) the IRM qualified as an independent investigation by United; (b) Yang considered any evidence that was not tainted by Fooshee's unlawful motive; or (c) Fooshee's recommendation nonetheless played a role in the ultimate decision to terminate Parker. Indeed, ***every fact*** that the court of appeals highlighted in its opinion came from Fooshee's report and testimony at the IRM, but the court still decided, as a matter of law, that no reasonably jury could find that Fooshee's bias was at least one proximate cause of Parker's termination.

To be sure, the underlying decision cites to *Staub*, but a review of the court's analysis confirms that this was little more than lip service. The court decided proximate cause as a matter of law because Yang conducted her own analysis, but did not identify any other steps that United

took to cut the causal connection between Fooshee and Parker's termination. In doing so, the court of appeals drew inferences in favor of United and put the onus on Parker — the non-movant on a motion for summary judgment — to affirmatively demonstrate that Fooshee infected the ***entire*** decision making process. This approach is reflective of the Tenth Circuit's pre-*Staub* standard that a biased supervisor's "mere influence" upon the adverse action is not enough to get past summary judgment.

The Tenth Circuit is not alone in requiring employees to demonstrate how a biased supervisor used the formal decisionmaker as a "dupe" to succeed on the cat's paw theory. The Eighth Circuit has likewise retained its pre-*Staub* standard and requires an employee to show that the formal decisionmaker was the biased supervisor's "conduit, vehicle, or rubberstamp." *Cherry v. Siemens Healthcare Diag., Inc.*, 829 F.3d 974, 977-78 (8th Cir. 2016) (citing *Qamhiyah v. Iowa St. Univ. of Sci. & Tech.*, 566 F.3d 733, 742 (8th Cir. 2009)); *see also Liles v. C.S. McCrossan, Inc.*, 851 F.3d 810, 820 (8th Cir. 2017) (concluding that the cat's paw theory did not apply because the employee did not produce evidence to show that her biased supervisor "had sufficient influence" over the final decisionmaker and caused her termination).

In the FMLA retaliation context specifically, the Eighth Circuit recently concluded that the cat's paw theory of liability did not apply because the employee presented "no evidence" that the ultimate decisionmaker was influenced by the biased supervisors — even when those biased supervisors participated in the termination discussion with the ultimate decisionmaker. *Lovelace v. Wash. Univ. Sch. of Med.*, 931 F.3d 698, 702-04, 706 n.3 (8th Cir. 2019). Like in Parker's case, the *Lovelace* court

affirmed summary judgment simply because the ultimate decisionmaker ***could have*** reached the termination decision independently, even though the record did not establish that the decision was free from the supervisors' unlawful taint and disputed issues of material fact remained.

Together, both the Eighth and Tenth Circuits effectively bar employees from successfully invoking the cat's paw theory by continuing to rely on their outdated standards. This Court explained in *Staub* that it is common for an injury to have more than one proximate cause. 562 U.S. at 420. Yet, these circuits are intent on allowing only one proximate cause and deferring to employers. This continued reliance on heightened cat's paw standards is inconsistent with this Court's guidance.

3. Unlike in the Eighth and Tenth Circuits, employees in two other circuits may proceed past the summary judgment stage on a cat's paw theory when the employer fails to present sufficient evidence to conclude that the ultimate decisionmaker came to a decision without reference to a biased supervisor's input. Put differently, the Sixth and Seventh Circuits have all explicitly modified their approach to the cat's paw theory to comport with *Staub*.

The Seventh Circuit's explanation on how *Staub* changed the cat's paw theory is especially helpful in recognizing this circuit split, given that this Court's opinion in *Staub* was a reversal of a Seventh Circuit decision. *See Woods v. City of Berwyn*, 803 F.3d 865, 869-70 (7th Cir. 2015). As discussed above, prior to the reversal in *Staub*, the Seventh Circuit applied a standard that was practically identical to the ones still maintained by the

Eighth and Tenth Circuits: the employee could succeed on a cat's paw theory only when the decisionmaker "blindly relied" upon the report by the supervisor. *Staub*, 560 F.3d at 659. Following reversal, however, the Seventh Circuit adapted its cat's paw standard to reflect this Court's ruling, recognizing that "just because someone else has to make the ultimate termination decision does not remove the subordinate's discriminatory animus as a proximate cause." *Woods*, 803 F.3d at 870. The Seventh Circuit has thus illustrated how it and its sister courts should have developed their cat's paw jurisprudence post-*Staub*,[5] but not every circuit court has done so.

The Seventh Circuit's decision in *Woods* is also helpful to understand the type of evidence that must be present before a circuit court may affirm summary judgment for the employer on a cat's paw claim. More specifically, the *Woods* court was asked to consider whether a biased supervisor was the proximate cause in the employee's termination. *Id.* at 868. The court determined that the causal chain had been cut because the employer conducted a truly independent investigation, as evidenced by a robust fact-finding procedure that included witness

5. This need for adaptation post-*Staub* has been referenced in a number of district court opinions as well. *E.g., Lee v. Waukegan Hosp. Corp.*, No. 10-C-2956, 2011 WL 6028778, at *3-4 (N.D. Ill. Dec. 5, 2011) ("In holding as it did, *Staub* expressly rejected the more constricted approach of Seventh Circuit cases."); *Abdelhadi v. City of N.Y.*, No. 08-CV-380, 2011 WL 3422832, at *4 (E.D.N.Y. Aug. 4, 2011) ("[*Staub*] rejected a stricter view adopted by some circuit courts that cat's paw liability is not available if the ultimate decisionmaker exercises independent judgment."); *Ordogne v. AAA Texas, LLC*, No. H-09-1872, 2011 WL 3438466, at *4 (S.D. Tex. Aug. 5, 2011) ("*Staub* overturned the Fifth Circuit's legal standard for cat's paw liability to the extent that it dictated that an independent investigation automatically broke the causal chain.").

testimony and cross-examination by lawyers. *Id.* at 870. The court noted that while a "hearing procedure does not automatically negate the influence" of a biased supervisor, the procedure used in *Woods* was sufficient because the employer was able to obtain and credit testimony from multiple unbiased employees. *Id.* at 870-71.

Likewise, the Sixth Circuit demands affirmative evidence of a truly independent assessment before granting summary judgment. For instance, in *Marshall v. The Rawlings Company, LLC*, the Sixth Circuit denied summary judgment on an FMLA retaliation claim because there was no evidence that the employer "conducted any independent fact gathering" after biased supervisors recommended that the employee be demoted and, eventually, terminated. 854 F.3d 368, 383 (6th Cir. 2017). While an intermediate supervisor did meet with the employee to discuss the biased supervisors' complaints, the Sixth Circuit determined that genuine disputes of material fact foreclosed summary judgment because there was evidence that the biased supervisors influenced the adverse employment actions, such as by providing a biased recommendation to the decisionmakers. *Id.* at 383-84.

Applying this different standard — which is less deferential to the employer — also produces different results. For example, in *Chattman v. Toho Tenax America, Inc.*, 686 F.3d 339, 353 (6th Cir. 2012), a Title VII case, the Sixth Circuit reversed the lower court's grant of summary judgment for the employer in a cat's paw case, based on evidence very similar to that introduced by Parker below. A genuine issue of fact was found based on evidence that the biased supervisor chose what evidence to present to the decisionmaker (like the biased report provided by Fooshee to Yang). *Id.* Further, there was

evidence that the employee in *Chattman* had not been treated in the same manner as comparator employees and was singled out for discipline (like Parker here). *Id*. The discriminatory supervisor also participated in discussions regarding the employee's discipline, which was additional evidence of their influence over the ultimate decision (like Fooshee's involvement in Parker's IRM). *Id*. Faced with such evidence, the Sixth Circuit could not say that the ostensibly independent investigation was "unrelated" to the biased recommendation, and as such, held that a reasonable factfinder could find that the bias remained a proximate cause of the adverse decisions. *Id*.[6]

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6. The difference between the Tenth Circuit's and Sixth Circuit's approaches is particularly striking when comparing the amount of cat's paw cases that resolved in favor of the employee at the summary judgment stage. Whereas undersigned counsel could locate only one Tenth Circuit case that was decided in favor of the employee on a cat's paw theory post-*Staub*, the Sixth Circuit has held in favor of the employee in at least six other cat's paw cases — in addition to *Marshall* and *Chattman* — decided after *Staub*. *See, e.g.*, *Bledsoe v. Tenn. Valley Auth. Bd. of Directors*, 42 F.4th 568, 583 (6th Cir. 2022) ("When a decisionmaker relies on a biased employee's knowledge about the employee subject to an adverse action, a jury may reasonably infer that the biased employee proximately caused the adverse action."); *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 422 (6th Cir. 2021) (reversing a grant of summary judgment in favor of the employer on a Title VII claim where the ultimate decisionmaker did not conduct "an in-depth and truly independent investigation" into the plaintiff's conduct after receiving the biased supervisor's termination recommendation); *Hickle v. American Multi-Cinema, Inc.*, 927 F.3d 945, 954 (6th Cir. 2019) (reversing a grant of summary judgment in favor of the employer on a USERRA claim where there were factual disputes about whether the decisionmaker's investigation into the employee's conduct was independent or thorough); *Sharp v. Aker Plant Servs. Grp., Inc.*, 726 F.3d 789, 797-98 (6th Cir. 2013) (reversing a grant of summary judgment in favor of the employer on an ADEA claim where the employer provided no evidence that it conducted "any independent fact gathering"

Taken together, these cases confirm that Parker's appeal almost certainly would have been decided differently had she been before the Sixth or Seventh Circuit. Although United conducted the IRM to discuss Fooshee's recommendation, neither the Sixth nor Seventh Circuit would have granted summary judgment in favor of United because there is nothing to suggest that the decisionmaker, Yang, considered any evidence other than the information put together by Fooshee for the meeting, and United failed to introduce any other evidence proving that Fooshee had no lingering influence on the ultimate decision to terminate.

4. Thus, the Tenth Circuit's approach to the evidentiary standard for cat's paw liability — at the summary judgment stage especially — cannot be squared with the Sixth and Seventh Circuit's approaches, and these divergent results require this Court's intervention. Specifically, although *Staub* (i) rejected a "blind reliance" test under which any independent investigation automatically foreclosed an employer's liability, and (ii) held that, to break the chain of causation, an employer's decision must have been "entirely justified" aside from the biased recommendation, it did ***not*** specify what else an employer must do or what evidence must be introduced — in addition to an independent investigation — to successfully break the chain of causation and establish

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about the employee); *Bishop v. Ohio Dep't of Rehab. & Corrs.*, 529 F. App'x 685, 697-98 (6th Cir. 2013) (summary judgment in favor of the employee on a Title VII claim because the jury should decide whether the biased supervisor's performance reviews were a casual factor in the adverse employment action); *DeNoma v. Hamilton Cnty. Court of Common Pleas*, 626 Fed.Appx. 101, 107-08 (6th Cir. 2015) (reversing summary judgment for employer because a reasonable jury could reject the decisionmaker's claims that they did not rely on the biased recommendation and find that the adverse action was based on the criticisms of the employee by the discriminatory supervisor).

that an adverse employment action was entirely justified. It is apparent that the circuits have struggled with that precise question in the years following *Staub*, particularly in the summary judgment context. This case presents the Court with an opportunity to alleviate that confusion and answer the questions left unanswered in *Staub*.

III. The Question of How to Determine Proximate Causation in Cat's Paw Cases Is One of Recurring and Pressing Importance.

Last, this Court's review is critical due to the expansive scope of the FMLA's application and the undeniable and grave ramifications of the Tenth Circuit's uncritical reliance approach for employees seeking meaningful recourse in cases involving cat's paw liability.

1. The scope of the FMLA's coverage is very broad. According to the most-recent survey commissioned by the Department of Labor, the results of which were published in 2020, fifty-six percent of workers in this country are eligible for FMLA. *See* Dep't of Lab., *Employee and Worksite Perspectives of the Family and Medical Leave Act: Executive Summary for Results from the 2018 Surveys* 3 (July 2020).[7] In the twelve months preceding the survey, fifteen percent of those eligible workers took leave for a qualifying FMLA reason. *Id.* Due to the FMLA's sweeping coverage over millions of American workers, it is certain that issues pertaining to cat's paw liability for FMLA retaliation, and proximate causation, will continue to arise with regularity in the federal courts.

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7. The Executive Summary cited herein is available to the public online at: https://www.dol.gov/sites/ dolgov/files/OASP/evaluation/pdf/WHD_FMLA2018SurveyResults_ExecutiveSummary_Aug2020.pdf.

2. Review is also needed to protect employees who may have been subjected to FMLA retaliation, by preserving their ability to obtain relief from the courts. It can scarcely be denied that the uncritical reliance standard applied by the Tenth Circuit systematically prevents employees from reaching a jury on a cat's paw claim. The inequity of this result is compounded by the fact that if those employees, including Parker herself, were instead appearing before the Sixth and Seventh Circuits, it is likely that many would have withstood summary judgment and perhaps prevailed at trial as well.

In *Staub*, this Court recognized that employers should not be "shielded from discriminatory acts and recommendations of supervisors that were ***designed and intended*** to produce the adverse action," merely because an independent personnel official was asked to review the employee's file. 562 U.S. at 420 (emphasis in original). That is the very impetus behind the cat's paw theory of liability.[8] But the exact same outcome occurs if no employees can

8. In fact, in *Hickle*, the Sixth Circuit remarked on the need for the cat's paw doctrine in the face of today's increasingly stratified workplaces:

> As a matter of general policy, we should bear in mind why the cat's-paw doctrine exists: in stratified workplaces...biased direct supervisors who lack firing authority can easily influence those who have such authority to take adverse actions. [The employer] points to its own extremely stratified termination procedure in an attempt to insulate itself from liability, when in fact its procedure demonstrates circumstances in which a biased direct supervisor can make a "cat's paw" of upper management.

927 F.3d at 954.

survive a summary judgment motion on a cat's paw claim. Employees' ability to recover for violations of the FMLA should not be dependent on where they live. Granting this petition in order to clarify the applicable standards for proximate causation in this context will prevent such unjust outcomes, and help to level the playing field for employees alleging FMLA violations nationwide.

CONCLUSION

This petition for a writ of certiorari should therefore be granted.

February 21, 2023

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED SEPTEMBER 26, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4093

JEANNIE PARKER,

Plaintiff - Appellant,

v.

UNITED AIRLINES, INC.,

Defendant - Appellee.

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:19-CV-00045-BSJ)

Before HOLMES, BACHARACH, and PHILLIPS, Circuit Judges.

BACHARACH, Circuit Judge.

This case involves provisions of the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-54. This statute prohibits employers from retaliating against employees for taking FMLA leave. 29 U.S.C. § 2615(a)(2). We may assume for the sake of argument that the prohibition would ordinarily apply when an employer adopts an immediate supervisor's recommendation to fire an employee for taking FMLA leave. With that assumption, we must decide

whether the prohibition would apply when the employee obtains consideration by independent decisionmakers.

We answer *no*. Retaliation entails a causal link between an employee's use of FMLA leave and the firing. That causal link is broken when an independent decisionmaker conducts her own investigation and decides to fire the employee.

I. Ms. Parker's supervisor recommends the firing of Ms. Parker, and two independent decisionmakers consider the recommendation.

Ms. Parker fielded calls for United, booking flight reservations. Ms. Parker took FMLA leave because she had a vision disorder and her father had cancer. About five months after approving the leave, Ms. Parker's supervisor suspected that Ms. Parker was avoiding new calls by telling customers that she would get additional information, putting the customers on hold, and chatting with coworkers about personal matters while the customers waited. The supervisor characterized Ms. Parker's conduct as "call avoidance."

This suspicion led to a meeting between the supervisor, Ms. Parker, and a union representative. At the meeting, the supervisor played recordings of three calls between Ms. Parker and customers:

1. On the first call, Ms. Parker had talked to a customer for about 4 minutes. But she stayed on the line for another 54 minutes. Ms. Parker admitted that she had "failed to

disconnect the call when saying goodbye" or "watch the time," which "resulted in a hung call for a huge amount of time." Appellant's App'x vol. 2, at 383, 390.

2. On the second call, Ms. Parker had put a customer on hold for 15 minutes. Right after putting the customer on hold, Ms. Parker asked another supervisor for help. After getting the help, Ms. Parker and the other supervisor chatted about personal matters for over 18 minutes while the customer stayed on hold. According to another supervisor, Ms. Parker hung up on the customer. Ms. Parker denied hanging up on the customer. But she acknowledged and "regrett[ed] leaving the customer on hold for a LENGHLY [sic] amount of time and the call dropped/disconnected while [she] vented [her] home and work frustrations." *Id.*

3. On the third call, Ms. Parker had put a customer on hold for over 20 minutes and then hung up. *Id.* Ms. Parker explained that (1) her computer had locked up and (2) she had "spent a long time away from the monitor trying to regroup [her] emotions." *Id.* at 390. When she returned to the call, she mistakenly hung up on the customer. *Id.*

Following this meeting, United suspended Ms. Parker while investigating her performance. During

this investigation, the supervisor reviewed more of Ms. Parker's phone calls with customers and recommended that United fire Ms. Parker.

United's policies prohibited the supervisor from firing Ms. Parker. Under these policies, United had to select a manager to conduct a meeting and to allow participation by Ms. Parker, her supervisor, and a union representative. All of them could present arguments and evidence, and the manager would decide whether to fire Ms. Parker.

United applied this policy, selecting a manager to conduct the meeting. In attendance with her were Ms. Parker, the supervisor, and a union representative. The supervisor played recordings of the three calls and presented written summaries of other calls. The supervisor argued that the other calls had violated United's policies by unnecessarily putting customers on lengthy holds while chatting with other employees about personal matters.

Ms. Parker's union representative challenged the supervisor's account about two of Ms. Parker's calls. The union representative contended that

- the customer had ended one of the calls and
- Ms. Parker had to end the other call because of computer problems.

But the union representative acknowledged a decline in Ms. Parker's work performance based on her

circumstances: She suffered from a vision disorder and had been taking care of her terminally ill father. Given the circumstances and Ms. Parker's long work history, the union representative asked United to apply its progressive discipline policy rather than to fire her. The manager sided with the supervisor, agreeing with her recommendation to fire Ms. Parker for serious policy violations.

United's policy allowed Ms. Parker to appeal the firing by submitting a grievance. If she were to submit a grievance, another manager would conduct the appeal through a conference call. In the conference call, the fired employee and a union representative could participate and present further arguments and evidence.

Ms. Parker invoked this procedure by submitting a grievance. She declined to participate, relying on her union representative. The union representative admitted in the conference call that Ms. Parker had "no excuse for the demonstrated behavior of call avoidance except for being under extreme mental duress." Appellant's App'x vol. 2, at 411. With this admission, the union representative asked United to give Ms. Parker another chance. The senior manager declined and concluded that United hadn't acted improperly in firing Ms. Parker.

II. Ms. Parker bore the burden to show pretext.

For a prima facie case, Ms. Parker needed to show that (1) she had taken leave authorized by the FMLA, (2) United had taken a materially adverse action, and (3) a causal connection had existed between Ms. Parker's

FMLA leave and United's decision to fire her. *See Metzler v. Fed. Home Loan Bank of Topeka*, 464 F.3d 1164, 1170 (10th Cir. 2006).

United doesn't question the existence of a prima facie case. So United needed to present "a legitimate non-discriminatory reason for the adverse employment action." *Litzsinger v. Adams Cnty. Coroner's Off.*, 25 F.4th 1280, 1287 (10th Cir. 2022) (quoting *Smothers v. Solvay Chems., Inc.*, 740 F.3d 530, 538 (10th Cir. 2014)). United presented a legitimate reason: call avoidance. So Ms. Parker needed to show that this reason had been pretextual. *Id.* She could show pretext through evidence "that a discriminatory reason [had] more likely motivated [United] or that [its] proffered explanation [had been] unworthy of credence." *Zamora v. Elite Logistics, Inc.*, 478 F.3d 1160, 1166 (10th Cir. 2007) (quoting *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1218 (10th Cir. 2003)).

The district court granted summary judgment to United based on Ms. Parker's failure to show pretext. The court reasoned that United had fired Ms. Parker after hearing her side.

III. We conduct de novo review based on the summary-judgment standard.

We engage in de novo review of the district court's summary-judgment ruling, applying the same standard that applied in district court. *SEC v. GenAudio Inc.*, 32 F.4th 902, 920 (10th Cir. 2022). Under this standard, the district court must view the evidence and draw all

justifiable inferences favorably to Ms. Parker. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Viewing the evidence and drawing reasonable inferences favorably to Ms. Parker, the district court could grant summary judgment to United only without a "genuine dispute as to any material fact" and United's showing of an entitlement "to judgment as a matter of law." Fed. R. Civ. P. 56(a).

IV. Ms. Parker argues that the district court should have imputed the supervisor's retaliatory motive to United.

Ms. Parker argues that the district court erred in

- relying on the manager's independence and
- disregarding the supervisor's retaliatory motive.

For those arguments, Ms. Parker relies on the cat's paw theory. That theory imputes a supervisor's motive to an employer if the motive influenced the employer's decision. *See Singh v. Cordle*, 936 F.3d 1022, 1038-39 (10th Cir. 2019) (discussing the cat's paw theory).

The district court rejected Ms. Parker's reliance on the cat's paw theory, relying on *English v. Colorado Department of Corrections*, 248 F.3d 1002 (10th Cir. 2001). In *English*, the employer allowed the employee to contest findings by an investigator who was allegedly biased. Despite this opportunity, the employee declined

to respond. We observed that "a plaintiff [could not] claim that a firing authority [had] relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond to and rebut the evidence." *Id.* at 1011.

Given this observation in *English*, the district court reasoned that Ms. Parker could have presented evidence and arguments to rebut the recommendation of an allegedly biased supervisor. So in the court's view, the alleged bias could not be imputed to the employer.

Ms. Parker argues that the district court erred by skipping over a later Supreme Court opinion: *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011). *Staub* involved a claim of employment discrimination under another federal statute (the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(a)). There the Court analyzed the claim based on proximate cause: "[I]f a supervisor performs an act motivated by . . . [illegal] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . . ." *Staub*, 562 U.S. at 422 (emphasis in original). We may assume for the sake of argument that this standard applies to FMLA claims. *See Marshall v. Rawlings Co.*, 854 F.3d 368, 378 (6th Cir. 2017) ("The rationale for the cat's paw theory applies equally to FMLA retaliation claims . . . ."); *Marez v. St.-Gobain Containers Inc.*, 688 F.3d 958 (8th Cir. 2012) (applying the cat's paw theory to an FMLA claim).

In *Staub*, the Supreme Court concluded that if an employer had conducted an independent investigation and rejected an employee's allegations of illegal animus by a supervisor, the employer could still incur liability under a cat's paw theory. 562 U.S. at 421. Despite the employer's investigation, "the supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified." *Id.*

Applying *Staub*, Ms. Parker maintains that the district court erroneously relied on our earlier analysis in *English*. She points to our statement in *English* that "[a] plaintiff cannot claim that a firing authority relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond and rebut the evidence supporting the recommendation." Appellant's Opening Br. 38-39 (quoting *English v. Colo. Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001)). After *Staub*, she argues, the opportunity to rebut a biased supervisor's recommendation does not foreclose a cat's paw theory. *Staub*, 562 U.S. at 421. And here, she asserts, the supervisor's bias led to the firing.

V. Ms. Parker did not invite the alleged error.

United argues that Ms. Parker invited any possible error by arguing in district court that *English* applied. We disagree.

The "invited error doctrine" prevents a party from arguing that the district court erred "in adopting a

proposition that the party had urged the district court to adopt." *United States v. DeBerry*, 430 F.3d 1294, 1302 (10th Cir. 2005). The doctrine is based on reliance interests. *Id.* "Having induced the court to rely on a particular erroneous proposition of law or fact, a party may not at a later stage use the error to set aside the immediate consequences of the error." *United States v. Morrison*, 771 F.3d 687, 694 (10th Cir. 2014) (quoting *United States v. DeBerry*, 430 F.3d 1294, 1302 (10th Cir. 2005)).

We have applied the invited error doctrine when a party

- advances an appellate challenge to the same jury instruction that it had proposed at trial, *see United States v. Sturm*, 673 F.3d 1274, 1281 (10th Cir. 2012), or

- urges use of a standard of review that differs from the one that the party had earlier recommended, *see St. Anthony Hosp. v. U.S. Dep't of HHS*, 309 F.3d 680, 696 (10th Cir. 2002).

In arguing that Ms. Parker invited any error, United points to Ms. Parker's reliance on *English* in her district court briefing. There she had cited *English* for the proposition that she needed "to show that the decision maker [had] followed the biased recommendation of a subordinate without independently investigating the complaint." Appellant's App'x vol. 2, at 463. The district

court cited *English* for the same point. Appellant's App'x vol. 7, at 1398.[1] Though Ms. Parker argues that the district court shouldn't have relied on *English*, she didn't invite the district court to reject the argument that she's now making.

In district court, Ms. Parker argued that the manager's investigation hadn't been independent: "[Ms. Parker's immediate supervisor] [had] relentlessly recommended and pursued termination and then [the manager] concurred in that decision without conducting her own separate investigation." Appellant's App'x vol. 6, at 1049-50. On appeal, Ms. Parker argues again that the manager improperly relied on the supervisor despite her bias. *See* Appellant's Opening Br. at 39-42 (arguing that "[the manager] was influenced by [the supervisor's] biased recommendation to terminate [Ms. Parker]").

The district court reasoned that the manager was independent because she had allowed Ms. Parker to present evidence and arguments. Ms. Parker did not invite this reasoning even though she had cited *English*. So Ms. Parker did not invite the error that she now alleges.

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1. United also points to the district court's statement that "[a] plaintiff cannot claim that a firing authority relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond to and rebut the evidence supporting the recommendation." Appellant's App'x vol. 7, at 1398 (quoting *English v. Colo. Dep't of Corrs.*, 248 F.3d 1002, 1011 (10th Cir. 2001)). But Ms. Parker didn't make this statement in district court.

VI. The evidence does not support Ms. Parker's cat's paw theory.

Ms. Parker argues that her use of FMLA leave had sparked retaliation from her supervisor. For the sake of argument, we can assume that Ms. Parker is right. With that assumption, we'd need to decide whether United's procedures had broken the causal chain between the supervisor's retaliatory motive and the firing. In our view, United broke the causal chain by directing other managers to independently investigate and decide whether to adopt the supervisor's recommendation. *See Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019) ("One way an employer can 'break the causal chain' between the subordinate's biased behavior and the adverse employment action is for another person . . . higher up in the decision-making process to independently investigate the grounds for dismissal.").

A. Ms. Parker's opportunity to respond to the supervisor's evidence does not defeat her cat's paw theory.

United argues that it broke the causal chain by relying on independent decisionmakers

- to investigate and decide whether to adopt the supervisor's recommendation and
- to give fresh consideration and decide whether to reverse the decision to fire Ms. Parker.

To challenge these arguments, Ms. Parker relies on a cat's paw theory. But this theory doesn't apply when independent decisionmakers "conduct their own investigations without relying on biased subordinates." *Ward v. Jewell*, 772 F.3d 1199, 1205 (10th Cir. 2014).

Ms. Parker contends that the district court erred in declining to rely on the cat's paw theory. For this contention, she points to the court's observations that (1) she "had the opportunity to present any information she chose" and (2) "the manager did in fact hear presentations from both parties." Appellant's App'x vol. 7, at 1398. Ms. Parker responds that her opportunity to present arguments would not alone prevent liability.

We agree with Ms. Parker. The inquiry involves the independence of the employer's investigation, not the employee's opportunity to respond. *Staub v. Proctor Hosp.*, 562 U.S. 411, 421, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011); *see Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1296 (10th Cir. 2013) (rejecting an employee's cat's paw theory because "there is no indication that [the decisionmakers] ultimately relied on [the supervisor's] version of the facts").

But we need not remand for the district court to apply the right test. Because our review is de novo, we can apply the right test to the undisputed evidence. *See Knitter v. Corvias Mil. Living, LLC*, 758 F.3d 1214, 1227 n.9 (10th Cir. 2014) ("[B]ecause our standard of review is de novo, we are free to apply the proper test here, and we may affirm on any ground supported by the record.").

B. The first manager relied on her own investigation in deciding to fire Ms. Parker.

Ms. Parker contends that she presented evidence of the manager's reliance on the supervisor. In support, Ms. Parker states that the manager

- did not review most of the calls that the supervisor had criticized,
- credited the supervisor's statements about some issues, and
- deferred to the supervisor in refusing to apply United's progressive discipline policy.

We reject these arguments.

1. Review of the Other Calls

The manager's alleged failure to review most of the calls does not show a retaliatory motive. She limited her inquiry based on what Ms. Parker's union representative had said.

In the meeting, Ms. Parker's supervisor had complained about the handling of multiple calls from customers, characterizing Ms. Parker's conduct as a pattern of call avoidance. Ms. Parker's union representative responded that she had listened to

- the 3 calls that the supervisor had relied on and

- other calls from the same 5-week period.

The union representative added that

- there had been "enough to see the pattern" and
- the manager didn't need to listen to the other calls that the union representative had heard.

Appellant's App'x vol. 2, at 396.

The other calls showed that Ms. Parker had

- put a customer on hold for 8 minutes and 40 seconds with no activity,
- put a customer on hold for 21 minutes and 50 seconds,
- put a customer on hold for 6 minutes and 10 seconds with no activity,
- taken 25 minutes to complete a customer call while spending only 2-3 minutes working,
- read trade emails for 2-3 minutes after a call,
- violated company policy in assigning a seat to a caller's wife,

- put a customer on hold for 17 minutes and 30 seconds,
- violated company policy by overbooking and putting a customer on hold for 10 minutes and 30 seconds,
- kept a customer waiting for 21 minutes and 50 seconds to get a seat assignment,
- kept a customer on hold for 12 minutes and 10 seconds, and
- kept a customer on hold for 38 minutes and 10 seconds.

Id. at 380-83. At the meeting, Ms. Parker's union representative did not dispute the supervisor's characterization of these calls. *Id.* at 396.[2]

Given the union representative's admission of a pattern from the calls that she'd heard, the manager's decision to play only 3 of the calls didn't suggest pretext.

2. Crediting the Supervisor's Statements

Ms. Parker also maintains that the manager credited 3 of the supervisor's statements even when they were obviously incorrect:

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2. In her written statement, the union representative acknowledges that she was "not stating that United [was] at fault for [Ms. Parker's] actions [or] denying what happened on the calls." Appellant's App'x vol. 4, at 753.

1. The manager said that Ms. Parker had hung up on a customer during a call when the customer had been disconnected for another reason.

2. The manager didn't acknowledge that another call had ended prematurely because of computer problems rather than Ms. Parker's neglect.

3. The manager erroneously found that the supervisor hadn't known of Ms. Parker's FMLA leave.

The manager's assessment of these statements does not show improper reliance on the supervisor.

For the first call, Ms. Parker acknowledged that she had left the customer on hold for a long time "while [she] vented [her] work and home frustrations" with a coworker. *Id.* at 390. The manager did discount Ms. Parker's denial that she'd hung up on the caller. But Ms. Parker did not deny that she had been at fault in leaving the customer on hold while chatting with a coworker about personal matters.

For the other call, Ms. Parker didn't show influence from the supervisor's retaliatory motive. The manager knew what had happened because she sampled key points throughout the call. And there's no evidence that Ms. Parker or her union representative had said anything in the meeting about a computer problem on this call. *See id.* at 396.

As to Ms. Parker's FMLA leave, the manager said only that the supervisor had denied awareness of Ms. Parker's medical condition. *Id.* at 403. The summary of the meeting supports the manager's account. *See id.* at 397 (reporting the supervisor's statement that "[she] was not aware of [Ms. Parker] using much FMLA [leave] or the condition she had"). And the manager's statement does not suggest a failure to investigate Ms. Parker's work performance. The manager made her findings based on undisputed evidence of deficiencies in Ms. Parker's work.

3. Policy of Progressive Discipline

The manager's refusal to impose progressive discipline also does not show influence from the supervisor. The manager considered the union representative's request, but relied on United's authority to forgo progressive discipline for an egregious offense. *Id.* at 409.

Ms. Parker argues that her offenses weren't egregious, pointing to a United employee's testimony identifying theft or violence as egregious offenses. But the employee's testimony did not suggest that these were the only offenses that United considered egregious. We thus reject Ms. Parker's reliance on the policy of progressive discipline. *See Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1291 (10th Cir. 2013) (concluding that when "'progressive discipline [is] entirely discretionary,'. . . the failure to implement progressive discipline is not evidence of pretext" (quoting *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1120 (10th Cir. 2007))).

C. United's appellate procedure would have broken the causal chain even if the manager's earlier decision hadn't.

Even if the manager's decision had been tainted, Ms. Parker did not stop there. She appealed by filing a grievance, triggering a new opportunity to contest the firing before another manager. Ms. Parker declined to participate, relying instead on her union representative. That representative didn't question the earlier

- "call avoidance and a lapse in good judgment,"
- finding of "egregious behavior" resulting "in significant customer disservice," or
- assessments of particular calls.

Appellant's App'x vol. 2, at 409. 411-12.

United sought summary judgment based in part on the senior manager's decision. In moving for summary judgment, United insisted that Ms. Parker had lacked any evidence of the senior manager's bias.[3] *See* Appellant's App'x vol. 1, at 47. Ms. Parker responded that "she [had] identif[ied] ample evidence of pretext." *See id.* vol. 3, at 443. But she cited no evidence of the senior manager's bias. *See id.* at 444-59 (discussing evidence questioning

3. The district court did not address this argument. But we can rely on this argument because United raised it in district court, the parties fully briefed it there, and United reurges the argument on appeal. *See Havens v. Johnson*, 783 F.3d 776, 782 (10th Cir. 2015).

the supervisor's motives but not the motives of the senior manager).

In her reply brief, Ms. Parker argues that

- the senior manager decided the appeal more than two months after the firing and
- the senior manager relied on the first manager's tainted findings.

We reject these arguments. Though Ms. Parker had already been fired, she admitted that the grievance could have resulted in reinstatement. Oral Arg. at 5:26-5:56. And we've held that the causal chain is broken when an independent decisionmaker reviews the firing after it'd taken place. *Singh v. Cordle*, 936 F.3d 1022, 1039 (10th Cir. 2019) ("The causal chain can even be broken by an independent review that takes place after the adverse action."); *see Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 517 (10th Cir. 2015) (holding that the claimant's "virtually immediate post-termination review process—which was designed to identify and unwind termination decisions that violated company practices and policies—sufficiently constrained any retaliatory animus that [the immediate supervisor] may have possessed").

Ms. Parker points out that the senior manager's decision came 85 days after she'd been fired. We've not yet addressed the significance of a delay between the firing and an appellate decision upholding the firing. When we held that a post-termination review process had broken the chain of causation, the review process had taken place only 2 days after the firing. *Thomas*, 803 F.3d at 517. But

we didn't say anything to suggest that a greater delay would have changed the result.

We can assume for the sake of argument that if the delay had prejudiced Ms. Parker, the appeal to United might not have broken the causal chain. Even with this assumption, however, Ms. Parker couldn't prevail because she hasn't alleged prejudice from the 85-day delay. With no alleged prejudice from the delay, United's appellate procedure would have broken the causal chain even if the first manager's decision hadn't.[4]

VII. We direct Ms. Parker to file some documents under seal.

Ms. Parker moves to file certain documents under seal. She'd attached these documents when responding to United's motion for summary judgment. The district court allowed Ms. Parker to file the documents under seal. Ms. Parker makes the motion based on United's preference, not her own. Responding to the motion, United urges the continued sealing of Ms. Parker's Exhibits I, J, Z, AA, BB, CC, EE, and FF.[5]

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4. Ms. Parker also argues that her supervisor acted with retaliatory intent. *See* Appellant's Opening Br. at 42-53. Because United showed that it had fired Ms. Parker for reasons unrelated to the supervisor's allegedly retaliatory motives, we need not address this evidence. *See Singh v. Cordle*, 936 F.3d 1022, 1039 (10th Cir. 2019) (discussing evidence presented to a grievance committee and stating that this evidence had "conclusively broke[n] the causal chain between [a supervisor's] alleged animus and Plaintiff's nonrenewal").

5. The court clerk instructed Ms. Parker to publicly file all of the previously sealed exhibits that United no longer seeks to keep confidential (H, L, M, Q, R, U, V, and W).

The public enjoys a common law right of access to judicial records. *JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs*, 754 F.3d 824, 826 (10th Cir. 2014). But the right is not absolute. *Id.* The Court may order the sealing of documents if competing interests outweigh the public's interest. *Id.* For example, we have allowed sealing of documents reflecting a party's finances and business practices. *See Sorenson Commc'ns, Inc. v. FCC*, 659 F.3d 1035, 1041 n.4 (10th Cir. 2011).

United contends that eight exhibits contain proprietary information, and Ms. Parker has not rebutted this contention. We thus conclude that United's interests support the sealing of these exhibits (L, J, Z, AA, BB, CC, EE, and FF). So we direct Ms. Parker to file these documents under seal.

* * *

We affirm the grant of summary judgment to United, and we grant in part and deny in part Ms. Parker's motion for leave to file documents under seal.

Appendix A

HOLMES, J., Concurring.

With the exception of Part VII of the principal opinion—which I join in full—I respectfully concur in the judgment. Like the principal opinion, I conclude that Ms. Parker's appellate challenge—brought under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654—fails on the merits because her showing of retaliation under a cat's paw theory is inadequate. Yet I reach that outcome by a path that I respectfully assert is more judicially modest and thus more appropriate—*viz*. by a path that entails less parsing of the record in order to opine on matters that ultimately are not dispositive. For purposes of considering Ms. Parker's cat's paw theory, I make two analytical assumptions. First, unlike Part V of the principal opinion, I only assume *arguendo* that Ms. Parker did not invite the district court to err through her invocation of our decision in *English v. Colorado Department of Corrections*, 248 F.3d 1002, 1011 (10th Cir. 2001). Second, on the merits, I assume without deciding that Ms. Parker's supervisor acted with prohibited retaliatory animus.

Furthermore, though I see no need to opine on whether the Supreme Court's cat's paw holding in *Staub v. Proctor Hospital*, 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed. 2d 144 (2011)—which involved a different employment statute than the one at issue here—applies in all material respects to the resolution of Ms. Parker's cat's paw arguments, like our prior cases, I have no difficulty in determining that, as refined in *Staub*, the "underlying principles of agency upon which subordinate bias theories are based" apply with full force here. *Simmons v. Sykes Enters., Inc.*, 647 F.3d

943, 949 (10th Cir. 2011) (concluding that "the underlying principles of agency" discussed in *Staub* "apply equally" to claims under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, notwithstanding important differences between the ADEA and the statute *Staub* addressed); *see Singh v. Cordle*, 936 F.3d 1022, 1038 (10th Cir. 2019) (interpreting the import of *Staub* and applying that case in the Title VII context); *Lobato v. N.M. Env't Dep't*, 733 F.3d 1283, 1294-95 (10th Cir. 2013) (same). Then, applying those agency principles, I would hold that Ms. Parker cannot prevail under a cat's paw theory because she failed to establish that the final appellate reviewer of her termination relied uncritically on the assumedly biased supervisor's recommendation. Accordingly, with the one exception previously noted, I respectfully concur in the judgment of the principal opinion.

I. Background Legal Principles

I briefly elaborate on the principles developed in our precedents following *Staub* that are relevant to the resolution of Ms. Parker's challenge based on a cat's paw theory.

We have interpreted *Staub*'s import in the context of statutes other than the one at issue in *Staub*. In *Lobato*, for example, we addressed claims alleging, *inter alia*, employment discrimination based on race and subsequent retaliation in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a). *See* 733 F.3d at 1294-95. There, a human resources employee at the

plaintiff's employer had investigated both the plaintiff's claims that his supervisor discriminated against him, as well as the supervisor's accusations that the plaintiff had lied on his résumé and on a reimbursement request. *Id.* at 1286-87, 1291-92, 1296. The employee sent a report to management summarizing her investigation. *Id.* at 1287. Shortly thereafter, the plaintiff was fired. *Id.* at 1287-88. The decisionmaker's stated reasons for termination were, *inter alia*, that the plaintiff had lied on his employment application and on a reimbursement request. *Id.* at 1288. In his Title VII claim, the plaintiff invoked the cat's paw theory, claiming that his supervisor impermissibly influenced the decisionmaker's termination decision. *Id.* at 1294.

We held that the plaintiff failed to establish liability under a cat's paw theory. *Id.* at 1296. Under *Staub*, we explained that "a 'necessary' element to a subordinate bias claim is the decisionmaker's uncritical 'reli[ance]' on facts provided by a biased supervisor." *Id.* at 1294 (alteration in original) (quoting *Staub*, 562 U.S. at 421). "If there is no such reliance—that is to say, if the employer independently verifies the facts and does not rely on the biased source—then there is no subordinate bias liability." *Id.* We concluded that the decisionmaker in *Lobato* did not rely uncritically on the supervisor's biased recommendation. *See id.* at 1294, 1296. Rather, the decisionmaker conducted its own investigation into the plaintiff's conduct and determined independently that the plaintiff had falsified his résumé and a reimbursement request, warranting the adverse action—thereby breaking the causal chain and negating the plaintiff's cat's paw theory. *See id.* at 1296.

We also addressed cat's paw liability under Title VII in *Singh v. Cordle*, 936 F.3d 1022 (10th Cir. 2019). In *Singh*, a university department dean recommended against renewing a non-tenured professor's contract due to the professor's allegedly deficient performance and lack of collegiality. *Id.* at 1031. The university provost reviewed the recommendation, and, although he disagreed regarding the professor's performance, he determined that nonrenewal was warranted based on the professor's lack of collegiality alone. *Id.* Following notice from the provost that his term would end at the close of the following academic year, the professor filed a petition before a grievance committee. *Id.* at 1031-32. He claimed that the dean recommended nonrenewal based on discriminatory animus and that the provost unjustifiably followed the dean's recommendation. *Id.* at 1032. After hearing the professor's case, the committee found that the nonrenewal decision was not based on animus and recommended nonrenewal to the university president, who affirmed the decision. *Id.* In his Title VII claim, the professor invoked the cat's paw theory, alleging that the dean's animus proximately caused the nonrenewal determination. *Id.* at 1038.

We again held that the plaintiff failed to establish liability under the cat's paw theory. *See id.* As we explained, "[o]ne way an employer can 'break the causal chain' between the subordinate's biased behavior and the adverse employment action is for another person or committee higher up in the decision-making process to independently investigate the grounds for dismissal." *Id.* (quoting *Thomas v. Berry Plastics Corp.*, 803 F.3d 510, 516 (10th Cir. 2015)). "[I]f the employer's investigation

results in an adverse action for reasons unrelated to the [biased] supervisor's original biased action, . . . then the employer will not be liable." *Id.* at 1038-39 (alteration in original) (quoting *Staub*, 562 U.S. at 421).

Applying these principles, we concluded that subsequent levels of independent review "broke the causal chain" between the dean's recommendation and the nonrenewal determination. *Id.* at 1039-41. We concluded that the provost did not rely uncritically on the dean's recommendation, as he did not base his decision on alleged performance deficiencies that the dean had reported. *Id.* at 1039. And we concluded that "the grievance committee conclusively broke the causal chain between [the dean's] alleged animus and [the] [p]laintiff's nonrenewal" by reviewing evidence the plaintiff had submitted and independently concluding that "nonrenewal was justified." *Id.* at 1039.

Guided by *Staub*, our decisions in *Lobato* and *Singh* therefore establish that a plaintiff challenging an adverse action under the cat's paw theory must demonstrate, at a minimum, that the entity conducting the final layer of review relied "'uncritical[ly]' . . . on facts provided by a biased subordinate." *See Singh*, 936 F.3d at 1038 (quoting *Lobato*, 733 F.3d at 1294). Showing "uncritical 'reli[ance]'" at the final layer of review is an essential element of cat's paw liability that the plaintiff bears the burden to establish. *See Lobato*, 733 F.3d at 1294 (alteration in original) (quoting *Staub*, 562 U.S. at 421) (explaining that "the decisionmaker's" uncritical reliance is "a '*necessary' element* to a subordinate bias claim" (emphasis added) (quoting *Staub*, 562 U.S. at 421)); *see also Singh*, 936 F.3d

at 1039 (explaining that the "*[p]laintiff had to show* . . . a causal chain between [the supervisor's] allegedly biased input and the decision not to reappoint [the] [p]laintiff" (emphasis added)).

Notably, even "an independent review that takes place *after* the adverse action" can "break the causal chain" if the reviewer is authorized to reverse the decision. *See Singh*, 936 F.3d at 1039 (emphasis added) (citing *Thomas*, 803 F.3d at 517). Thus, in *Singh*, the grievance committee's independent determination "conclusively broke the causal chain" even though it occurred after the provost had formally notified the plaintiff of his upcoming non renewal. *See id.* at 1031-32, 1039 (noting that the provost notified the plaintiff in February 2014 of his decision not to renew the plaintiff's appointment and the final layer of review reached a determination, at the earliest, in November 2014). Similarly, in *Thomas*, a final "independent termination review process" that "was designed to identify and *unwind* termination decisions" "broke the causal chain between [a supervisor's] purported retaliatory animus and [the plaintiff's] termination," even though the employer had "officially terminated" the plaintiff before the final review occurred. *See* 803 F.3d at 513, 516-18 (emphasis added).

II. Analysis

Applying the foregoing principles, Ms. Parker's arguments regarding the final appellate reviewer, *see* Aplt.'s Reply Br. at 25-26, fail to establish United's liability under a cat's paw theory.

In particular, our precedents flatly contradict Ms. Parker's position that the appellate reviewer's decision is "irrelevant" merely because it occurred *after* she was terminated. *Id.* at 25; *see also* Aplt.'s App., Vol. VII, at 1296 (Summ. J. Hr'g, dated Jan. 11, 2021) (asserting that the appellate review decision "is irrelevant"). So long as a reviewer is authorized to reverse the adverse action, even an independent review that occurs after the adverse action can break the causal chain. *See Thomas*, 803 F.3d at 517 (explaining that the "post-termination review process," which "was designed to . . . *unwind* termination decisions that violated company practices and policies," broke the causal chain between the biased recommendation and the termination (emphasis added)); *see also Singh*, 936 F.3d at 1032, 1039 (holding that an independent review, which occurred several months after the plaintiff received notification of nonrenewal, "conclusively broke the causal chain"). Here, Ms. Parker conceded at oral argument that the appellate reviewer could have reversed her termination. Oral Arg. at 5:20-5:55. Ms. Parker is therefore incorrect in asserting that the appellate reviewer's decision is legally irrelevant under a cat's paw theory.[1]

1. Citing *Thomas*'s conclusion that a "virtually immediate post-termination review process" broke the causal chain, 803 F.3d at 517, Ms. Parker further claims that the appellate review is irrelevant due to the amount of time that elapsed following the adverse action. *See* Aplt.'s Reply Br. at 25 (explaining that the appellate decision did not occur until 85 days after her termination). However, I agree with the principal opinion's assertion that nothing in *Thomas* "suggest[s] that a greater delay would have changed the result." Principal Op. at 19. Our decisions do not address whether the timing of the decision of the final allegedly independent reviewer is a relevant factor in

Moreover, Ms. Parker's argument that the appellate reviewer relied uncritically on her supervisor's biased recommendation is unpersuasive. *See* Aplt.'s Reply Br. at 26 (noting that the appellate reviewer "uncritically upheld [the assumedly biased supervisor's] recommendation that [Ms.] Parker be terminated"). The appellate reviewer explained that she relied not only on information stemming from the initial stage of review of the supervisor's termination recommendation—that is, from the Investigative Review Meeting (IRM)—but also on information Ms. Parker's union representative presented at the appellate review meeting, including his concessions

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determining whether the decision breaks the causal chain (that is, cannot be said to uncritically rely on the biased subordinate's recommendation), and I have no reason to believe that it is. Indeed, in *Singh*, the final layer of review, which "conclusively broke the causal chain," occurred months after the provost notified the plaintiff of the nonrenewal determination. *See* 936 F.3d at 1031-32, 1039. Nevertheless, concerning a related matter, I decline to join any suggestion in the principal opinion that insofar as any delay in the appellate reviewer's decision prejudiced Ms. Parker, "the appeal to United might not have broken the causal chain." Principal Op. at 19. The principal opinion appropriately does not decide whether prejudice is a relevant factor; instead, it merely assumes that even if prejudice were relevant, Ms. Parker alleges no such prejudice here. *See id.* at 19-20. But the principal opinion provides no legal foundation for the suggestion that prejudice may be relevant, and I am not aware of any. If the final layer of appellate review is authorized to reverse the completed adverse action suffered by the plaintiff, I do not understand why alleged prejudice to the plaintiff stemming from delay in the appellate reviewer's decision would have any relevance to the resolution of the dispositive question of whether the appellate reviewer uncritically relied on the biased subordinate's adverse-action recommendation.

regarding Ms. Parker's misconduct. *See* Aplt.'s App., Vol. II, at 411-12 (Letter from Laurie Ledonne, Sr. Hum. Res. Manager, United Airlines, to Jeannie Parker, Plaintiff-Appellant, dated Feb. 27, 2019) (explaining that the reviewer reached her decision "[a]fter reviewing the facts that were presented at the [IRM] and the information presented at the [appellate review]"). As explained in her letter, the appellate reviewer focused in part on the "three calls cited for call avoidance." *Id.* at 411. With respect to these calls, the union representative "stated that he could not negate the call avoidance and a lapse in good judgment on [Ms. Parker's] part." *Id.* He further conceded that "there was no excuse for the demonstrated behavior of call avoidance except for being under extreme mental duress." *Id.* These concessions feature prominently in the appellate reviewer's determination, providing strong evidence that the appellate reviewer "independently verifie[d] the facts" supporting Ms. Parker's termination and did not simply rely on information from the supervisor or the IRM. *See Lobato*, 733 F.3d at 1294.

In attempting to establish uncritical reliance on the supervisor's allegedly biased recommendation, Ms. Parker relies on speculation and conjecture and presents only conclusory arguments. That is not enough to carry her burden to establish United's liability under a cat's paw theory. As with the manager who presided over the IRM, there is no indication that Ms. Parker deposed the United manager who served in the role of appellate reviewer to determine her rationale or the specific materials she considered or other specifics of her investigation. Thus, Ms. Parker is left in the problematic position of resorting

to speculation and conjecture, not hard evidence, in attacking the substance and underlying methodology of the appellate reviewer's decision.[2]

More specifically, Ms. Parker offers no evidence to refute the appellate reviewer's description of her methodology, which evinces independent review. *See* Aplt.'s App., Vol. II, at 411-12 (discussing consideration of

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2. At the summary-judgment hearing before the district court, Ms. Parker engaged in similar speculation and conjecture regarding whether the decision of the manager that presided over the IRM was impermissibly infected with the assumedly prohibited bias of her supervisor. *See* Aplt's. App., Vol. VII, at 1312-15 (Summ. J. Hr'g, dated Jan. 11, 2021). She implied that because the record was silent regarding the particular documents that the manager relied on both before and after the IRM in making her decision, as well as about other details of her decisionmaking process, there at least was a genuine dispute of material fact regarding whether the manager impermissibly relied on the supervisor's biased recommendation. *See id.* at 1313. This prompted the district court to effectively inquire whether Ms. Parker—the bearer of the burden of persuasion on the cat's paw theory—had sought to gain answers to the some of these questions it identified regarding the manager's decisionmaking by deposing the manager. Notably, Ms. Parker responded in the negative, stating that the decision not to depose the manager "was not a strategic decision, [it] was merely a decision based on dollars and cents" and that deposing the manager "just wasn't in [their] litigation war chest." *Id.*, at 1314-15. There is no indication from Ms. Parker's arguments on appeal that she deposed United's appellate reviewer either—perhaps based on a similar financial calculation. In any event, as with the manager that presided over the IRM, Ms. Parker bears the burden of showing that the appellate reviewer's decision was impermissibly infected by the supervisor's assumedly prohibited bias, and she cannot rely on speculation and conjecture to do that.

information presented at the IRM and during the appellate review, including the union representative's presentation and concessions regarding Ms. Parker's call avoidance). Without hard evidence to back it up, Ms. Parker's argument that the appellate reviewer's decisionmaking process in refusing to unwind her termination was infected by impermissible subordinate bias is thus speculative and conjectural—and, consequently, unpersuasive. *See* Aplt.'s Reply Br. at 25-26 (asserting that the appellate reviewer only listened to three of the calls and questioning factors referenced in the appellate reviewer's letter to support her decision). In sum, Ms. Parker failed to establish that "the supervisor's biased report . . . remain[ed] a causal factor" in the appellate reviewer's decision to uphold her termination. *Staub*, 562 U.S. at 421. Therefore, her FMLA retaliation claim—predicated on a cat's paw theory—cannot prevail.

Based on the foregoing, with the one exception previously noted, I respectfully concur in the judgment.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION, FILED JUNE 28, 2021

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

JEANNIE PARKER,

Plaintiff,

v.

UNITED AIRLINES, INC., AN ILLINOIS CORPORATION,

Defendant.

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF UNITED AIRLINES, INC.

Case No. 2:19-CV-00045-BSJ

Judge Bruce S. Jenkins

June 28, 2021, Decided;
June 28, 2021, Filed

This matter came before the Court on January 11, 2021, on Defendant United Airlines, Inc.'s Motion for Summary Judgment.[1] Defendant was represented at

1. ECF No. 42.

the hearing by Bryan K. Benard and Karina Sargsian. Plaintiff Jeannie Parker was represented by Austin B. Egan. The Court partially ruled from the bench, granting summary judgment in favor of United on Ms. Parker's second cause of action for interference under the Family and Medical Leave Act ("FMLA"). The Court later issued a written ruling, indicating United was entitled to summary judgment on Ms. Parker's lone remaining claim for discrimination and retaliation under FMLA.[2] For the reasons set forth below and those previously stated in the Court's rulings, Defendant is entitled to summary judgment on Plaintiff's claims.

UNDISPUTED FACTS

Based on the written submission of the parties, the Court concludes that the following material facts are undisputed:

1. Under United's FMLA policy, an employee must give United notice of their need for FMLA by contacting the Employee Service Center.[3]

2. In order to be approved for FMLA leave, Ms. Parker was permitted to submit an FMLA leave application to United's Employee Service Center, which she did; she did not have to ask or inform her supervisor about her FMLA application.[4]

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2. ECF No. 71.

3. ECF No. 46, Ex. 2, Working Together Guidelines ("WTG") at United_Parker_000337-000338.

4. ECF No. 43, Ex. 1, Parker Dep. at 32:13-33:2.

3. Ms. Parker was approved for intermittent FMLA from November 4, 2017, to November 4, 2018.[5]

4. United approved all of Ms. Parker's intermittent FMLA leave requests in 2018.[6]

5. The last date Ms. Parker took FMLA leave was July 23, 2018.[7]

6. Ms. Parker's FMLA leave for herself expired on November 4, 2018.[8]

7. Ms. Parker made no attempt to extend or amend her FMLA leave request after it expired on November 4, 2018.[9]

8. Ms. Parker testified during her deposition that she did not need FLMA leave after her intermittent FMLA authorization expired on November 4, 2018.[10]

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5. ECF No. 46, Ex. 3.

6. *Id.* at ¶ 12.

7. *Id.*

8. ECF No. 43, Ex. 1, Parker Dep. 28:4-7; ECF No. 46, Ex. 3.

9. ECF No. 43, Ex. 1, Parker Dep. at 28:17-21.

10. *Id.* at 28:22-24.

9. Ms. Parker was aware of, and given a copy of, the Working Together Guidelines ("WTG") and knew that she had to comply with the WTG.[11]

10. Under the WTG, United expected its employees to be truthful in their communications, to act in ways that reflected favorably upon the company, and to use good judgment in their decisions.[12]

11. The WTG states that "[f]ailure to comply with any of these guidelines may result in disciplinary action up to and including termination of employment," and "[i]f the severity of an incident warrants it, leaders may by-pass [sic] a performance improvement option and accelerate discipline up to and including termination of employment."[13]

12. On July 26,2018, Fooshee met with Ms. Parker and Ms. Parker's Union Representative, Dave Painter, to review a few of Ms. Parker's recorded customer calls (the "July 26 Meeting").[14]

13. During this meeting, Fooshee played three recorded calls between Ms. Parker and United customers.[15]

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11. ECF No. 44, Ex. 1, Parker Dep. 76:11-13, 19-23.

12. *Id.* at 77:21-24; 78:10-13, 19-21; ECF No. 46, Ex. 2 at United_Parker_000294-000295.

13. ECF No. 46, Ex. 2 at United_Parker_000291, 000351.

14. ECF No. 44, Ex. 1, Parker Dep. 127:10-25.

15. *Id.* at 130:14-16.

14. Fooshee's description of the first call ("Call 1") stated: "7/2/18 10:01A Caller wants seats together with business partner. Jeannie completes call at 4:18 minutes, caller thanks her and both say goodbye. Jeannie remains on Hung Call until it ends at 58:00 minutes."[16]

15. Ms. Parker admitted that this was an actual, improper hung call and Fooshee did not make this up.[17]

16. Fooshee's description of the second call ("Call 2") stated: "7/15/18 Jeannie receives a DSAT [dissatisfied review]. 12:33P Jeannie puts on Hold at 5:40 minutes into the Calls. Calls Lead at 7:15, and gets through to her at 22:20 (15 minutes holding and not servicing the Customer). After discussing issues, starts 'chit-chat' for 18:30 minutes. Returns to pax and HAN[G]S UP ON CUSTOMER! Customer Verbatim from DSAT: The representative apparently tried to help me but after a very long time on hold, I was disconnected. I don't appreciate being hung up on but that's what happened."[18]

17. Ms. Parker agrees that Fooshee's description of Call 2 is "shortened" but correct.[19]

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16. *Id.* at 162:14-21; ECF No. 46, Ex. 5 IRM Exhibits at United_Parker_000402

17. ECF No. 44, Ex. 1, Parker Dep. 161:18-20.

18. *Id.* at 174:15-175:1; ECF No. 46, Ex. 5 IRM Exhibits at United_Parker_000402. The parties disagree as to whether the customer concluded by saying "Goodbye," as United contends, or "to buy a," as urged by Ms. Parker. This dispute is immaterial.

19. ECF No. 44, Ex. 1, Parker Dep. 174:24-175:1.

18. Ms. Parker agrees that the 15-minute personal discussion with the lead, Kathy Weber, was not serving the interest of United's customer.[20]

19. United's call logs showed that Ms. Parker "released" this cal1.[21]

20. Fooshee's description of the third call ("Call 3") stated: "6/25/18 3:40P Customer wants to change PJ883L from 6/22 to 6/11. Jeannie advises she needs to call the Rate desk and puts caller on Hold at 2:10 minutes into call. She shows TP Refresh in EZR. There is no activity on her screen until 19:00 where Jeannie uses Task Manager to get out of EZR. She fills in the Login to EZR at 19:55 but doesn't actually login until 23:40. She then shows as if she is going back to the customer (never calling Rates) and HANGS UP ON HIM ACW."[22]

21. Ms. Parker admitted that Fooshee's description of Call 3 is accurate, but Ms. Parker testified during her deposition that she had audio difficulties during this call.[23]

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20. *Id.* at 175:2-6.

21. *Id.* at 176:9-177:2; ECF No. 46, Ex. 5 IRM Exhibits at United_Paxker_000405. The parties disagree about whether the customer or Plaintiff first terminated the call. For purposes of this motion, the Court assumes the customer first terminated the call.

22. ECF No. 46, Ex. 5 IRM Exhibits at United_Parker_402.

23. ECF No. 44, Ex. 1, Parker Dep. 181:2-182:19.

22. Ms. Parker admitted that there is "no debating what happened on the calls."[24]

23. Ms. Parker admitted that Fooshee was not making up Plaintiff's long hold times, personal discussions while customers were on hold, or hung calls.[25]

24. Ms. Parker admitted that she wrote a statement to Ms. Fooshee indicating, among other things, that Ms. Parker "regret[s] leaving the caller on hold for a LENG[TH]Y amount of time and the call dropped/ disconnected . . . while I vented my work and home frustrations."[26]

25. Ms. Parker admitted that she made mistakes on the calls.[27]

26. Fooshee gave Ms. Parker a suspension letter informing Ms. Parker that United is "conducting an investigation with regards to [Ms. Parker's] job performance, specifically call handling."[28]

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24. *Id.* at 182:24.

25. *Id.* at 172:8-10; 185:6-8.

26. ECF No. 44, Ex. 1, Parker Dep. 184:7-13; ECF No. 46, Ex. 10.

27. *Id.* at 241:2-8.

28. ECF No. 46, Ex. 11, Suspension Letter at United_ Parker_000273; ECF No. 44, Ex. 1, Parker Dep. 128:1-3.

27. Ms. Parker's suspension was with pay.[29]

28. Ms. Parker testified that she did not request any FMLA during her suspension, because she unilaterally interpreted the Suspension Letter as stating that she could not contact United, even though the Suspension Letter only stated: "During this time, you are prohibited from being on United property including the building and parking lot."[30]

29. No one told Ms. Parker either verbally or in writing that she was prohibited from contacting the Employee Service Center to request FMLA time off during her suspension.[31]

30. Fooshee never told Ms. Parker that she should not take FMLA.[32]

31. An Internal Review Meeting ("IRM") was held on November 6,2018, to hear Ms. Parker's case and determine whether termination was appropriate.[33]

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29. ECF No. 46, Ex. 11, Suspension Letter at United_Parker_000273.

30. ECF No. 46, Ex. 11, Suspension Letter at United_Parker_000273; ECF No. 43, Ex. 1, Parker Dep. 23:2-18.

31. ECF No. 43, Ex. 1, Parker Dep. 26:14-20.

32. *Id.* at 43:10-12.

33. ECF No. 46, Ex. 12, IRM Hearing Transcript.

32. Ms. Parker admits that the IRM transcript is an accurate representation of the IRM hearing.[34]

33. Those present at the IRM included: Emily Yang as the hearing manager, Kathy Fooshee as the company presenter, Tammy Cummings as the company scribe, Jen Jolley as the union presenter for Ms. Parker, David Painter as the union scribe, and Ms. Parker.[35]

34. Ms. Parker testified Emily Yang was selected as the hearing decisionmaker through a rotation of assignments among Ms. Yang and others occupying similar employment positions with United; Ms. Yang was expected to be impartial and have an open mind.[36]

35. Ms. Yang was not involved with this matter before the IRM hearing.[37]

36. At the time of the IRM, Ms. Parker knew what the charges were against her—call manipulation and call avoidance.[38]

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34. ECF No. 45, Ex. 1, Parker Dep. 214:10-14.

35. *Id.* at 203:5-10.

36. *Id.* at 215:6-12, 13-17.

37. *Id.* at 247:10-12.

38. *Id.* at 212:19-213:1.

37. Ms. Parker prepared for the IRM meeting by meeting with her union representative, Jen Jolly, and providing her notes.[39]

38. Ms. Parker was given the opportunity to provide whatever information or arguments she wanted during the IRM, and Yang heard whatever arguments either side wanted to present.[40]

39. During the IRM, Ms. Parker accepted responsibility for a decline in performance.[41]

40. At no time during the IRM meeting did Ms. Parker, or her representative, claim that her termination was pretext for discrimination or retaliation related to FMLA, or that her termination was to interfere with Ms. Parker's FMLA rights.[42]

41. Ms. Yang concluded that Ms. Parker's "actions constituted a serious violation of United's Working Together Guidelines" and decided to terminate Ms. Parker's employment.[43]

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39. *Id.* at 213:5-10.

40. *Id.* at 216:17-19; 247:13-16.

41. *Id.* at 226:20-21.

42. *Id.* at 227:6-14; 238:12-16; 243 :4-15.

43. ECF No. 46, Ex. 13, Termination Letter at United_Parker_000011-000012; Ex. 2, WTG at United_Parker 000294-000295.

Appendix B

CONCLUSIONS OF LAW

Based on the undisputed facts, the Court finds that United is entitled to summary judgment on each of Ms. Parker's claims as follows:

I. Ms. Parker's FMLA Interference Claim Fails as a Matter of Law

Ms. Parker contends that United interfered with her right to take FMLA leave by suspending her and eventually terminating her employment. The Court disagrees. To prevail on a FMLA interference claim, Ms. Parker must demonstrate she was entitled to FMLA, that United engaged in adverse action which interfered with her FMLA leave rights, and that United's action was related to her exercise, or attempted exercise, of FMLA rights. *See Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1180 (10th Cir. 2006).[44] "[T]o satisfy the second element of an interference claim, an employee must show that she was prevented from taking the full 12 weeks' of leave guaranteed by the FMLA, denied reinstatement following leave, or denied initial permission to take leave." *Campbell v. Gambro Healthcare, Inc.*, 478 F.3d 1282, 1287 (10th Cir. 2007). The undisputed facts established that United's actions did not interfere with Ms. Parker's right to take FMLA leave.

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44. While not at issue here, an employer can avoid liability if it establishes "the dismissal would have occurred regardless of the employee's request for or taking of FMLA leave." *DeFreitas v. Horizon Inv. Mgmt. Corp.*, 577 F.3d 1151, 1159-60 (10th Cir. 2009).

It is undisputed that United approved all of Ms. Parker's FMLA leave requests. Ms. Parker admitted that no one, either verbally or in writing, told her that she was prohibited from contacting the Employee Service Center during her suspension. Ms. Parker also admitted that Fooshee never discouraged her from taking FMLA. Ms. Parker has failed to offer evidence to create a genuine dispute of fact on whether her suspension interfered with her right to request and take FMLA leave. There was no interference, and, accordingly, this claim fails.

Ms. Parker argues that she "had intent" to take FMLA leave at some unspecified future time.[45] This terse argument does not illuminate for the Court any action on the part of United that interfered with Ms. Parker's right to take FMLA leave. The Court's own review of the record likewise reveals no interference. On November 4, 2017, United approved Ms. Parker's request to take intermittent FMLA leave for a one-year period, which she took periodically on dates in 2018.[46] Despite testifying that she was familiar with the procedure for requesting FMLA leave,[47] Ms. Parker did not request or take any FMLA leave after July 23, 2018, and Ms. Parker testified in her deposition that she had no need for FMLA leave after her authorization for intermittent leave expired in

45. ECF No. 53 at 55; Hr'g Mot. Sumrn. J. 70:19-24.

46. ECF No. 53 at 17-18. Plaintiff also obtained approval to use FMLA leave to care for her ailing father, who passed on June 17, 2018. *Id.* at 18.

47. ECF No. 43, Ex. 1, Parker Dep. 32:13-33:2.

November 2018.[48] Ms. Parker does not identify any time she was denied any FMLA leave. She was not terminated while on FMLA leave or denied reinstatement after returning from leave. Accordingly, Ms. Parker's FMLA interference claim fails.

II. Ms. Parker's FMLA Discrimination/Retaliation Claim Fails

Ms. Parker argues that United discriminated or retaliated against her for seeking FMLA by initially suspending her with pay and later terminating her employment. FMLA discrimination/retaliation claims are analyzed under the *McDonnell Douglas* burden shifting test. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under this test, Ms. Parker has the initial burden to set forth *a prima facie* case demonstrating that "'(1) she engaged in a protected activity; (2) [the employer] took an action that a reasonable employee would have found materially adverse; and (3) there exists a causal connection between the protected activity and the adverse action.'" *Metzler v. Federal Home Loan Bank of Topeka*, 464 F.3d 1164, 1171 (10th Cir., 2006). If Ms. Parker establishes her *prima facie* case, United must offer a "legitimate, non-retaliatory reason" for any adverse employment action. *Id.* at 1170. Ms. Parker "then bears the ultimate burden of demonstrating that the defendant's proffered reason is pretextual." *Id.*

48. ECF No. 53 at 18; ECF No. 43, Ex. 1, Parker Dep. 28:4-24.

Ms. Parker's discrimination/retaliation claim related to her suspension fails on the materially adverse element of her *prima facie* case. Ms. Parker was paid during her suspension pending completion of United's investigation. Under this circumstance, a reasonable employee could not find suspension materially adverse when Ms. Parker suffered no loss of pay or benefits during the suspension period. *See e.g., Juarez v. Utah*, 263 Fed. Appx. 726, 737 (10th Cir. 2008) (unpublished) (placing plaintiff on paid administrative leave pending completion of sexual harassment investigation would not constitute a material adverse action); *Henderson v. United Parcel Service*, No. 04-ev-0545, 2006 U.S. Dist. LEXIS 37302, 2006 WL 1658690, at *10 (D.Colo., 2006) (suspension with pay was a *de minimis* effect on plaintiff and did not amount to a materially adverse employment action as Plaintiff suffered no loss of compensation or change in benefits or employment status); *Talbott v. Public Service Company of New Mexico*, Civ. No. 18-1102, 2020 U.S. Dist. LEXIS 74449, 2020 WL 2043481, at *15 (D.N.M., 2020) (paid investigatory administrative leave was not materially adverse because no facts showed Defendant altered Plaintiffs pay or benefits). Ms. Parker does not describe any harm arising from her suspension with pay and benefits. Accordingly, the Court finds Ms. Parker's suspension did not constitute materially adverse action.

As for the remaining portion of Ms. Parker's claim of discrimination/retaliation related to her termination of employment, the Court finds that the claim fails because there is no evidence to show that United's legitimate, non-discriminatory and non-retaliatory reasons for the

termination are pretextual. When assessing a contention of pretext, courts "examine the facts as they appear to the person making the decision to terminate [the] plaintiff" *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1307 (10th Cir. 2017). The Court must "assess pretext by looking at the final result of the disciplinary process, not the acts or motives of those who may be in the decision-making chain." *Macon v. United Parcel Serv., Inc.*, 743 F.3d 708, 715 (10th Cir. 2014). In other words, the focus of the pretext analysis is on a supervisor only if they have authority to terminate an employee; otherwise, the Court must focus on the individual or group who makes the final decision to terminate. *Id.* Here, Ms. Parker offers no evidence to show her direct supervisor, Ms. Fooshee, had the authority to terminate Ms. Parker. Rather, the undisputed facts show Ms. Parker could not be terminated without an Internal Review Meeting, as mandated by the applicable collective bargaining agreement.[49] Ms. Emily Yang presided over the Internal Review Meeting and subsequently made the final decision to terminate Ms, Parker.[50] Critically, Ms. Parker offers no evidence of pretext that relates to Ms. Yang's stated reasons for terminating her employment. Indeed, Ms. Parker elected not to depose Ms. Yang.[51] Accordingly, the Court finds there is an absence of sufficient evidence to show United's proffered reasons for terminating Ms. Parker were pretextual.

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49. *See* ECF No. 53 at 12; ECF No. 51, Ex. A, Pigozzi Dep. 51:12-19.

50. ECF No. 46, Ex. 13, Termination Letter at United_Parker_000011-000012; Ex. 2, WTG at United_Parker_000294-000295.

51. Hr'g Mot. Swum. J. 69:19-21.

Ms. Parker argues that the "cat's paw" theory of liability applies in this case and urges the Court to conclude that Ms. Yang acted as a proxy for Ms. Parker's direct supervisor, Ms. Fooshee. "To recover under this theory, the plaintiff must show 'that the decisionmaker followed the biased recommendation of a subordinate without independently investigating the complaint against the employee.'" *English v. Colorado Dept. of Corrections*, 248 F.3d 1002,1011 (10th Cir. 2001). Nonetheless, "[a] plaintiff cannot claim that a firing authority relied uncritically upon a subordinate's prejudiced recommendation where the plaintiff had an opportunity to respond to and rebut the evidence supporting the recommendation." The Court finds that there is an absence of evidence on Ms. Parker's side to show Ms. Emily Yang acted as a mere cat's paw for Ms. Fooshee. The undisputed facts demonstrate Ms. Parker had the opportunity to present any information she chose to Ms. Yang, and that Ms. Yang did in fact hear and consider presentations from both parties. As previously stated, Ms. Parker offers no evidence to demonstrate Ms. Yang held an impermissible bias against her. Ms. Parker is unhappy with Ms. Yang's decision. Nonetheless, Ms. Parker offers no evidence the decision was legally impermissible. As the Court earlier remarked, the question of the advisability of terminating a veteran employee for the offenses United proffers differs from the dispositive question here regarding pretext.

For these reasons, the Court concludes that, given the undisputed facts in the record, Ms. Parker's discrimination/retaliation claim fails as a matter of law.

Appendix B

ORDER

For all of the above reasons, it is hereby Ordered that United's Motion for Summary Judgment is GRANTED. The Court will enter judgment in favor of United on all of Ms. Parker's claims.

DATED this 28th day of June, 2021.

BY THE COURT

/s/ Bruce S. Jenkins
Honorable Bruce S. Jenkins

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED NOVEMBER 23, 2022

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4093
(D.C. No. 2:19-CV-00045-BSJ)
(D. Utah)

JEANNIE PARKER,

Plaintiff - Appellant,

v.

UNITED AIRLINES, INC.,

Defendant - Appellee.

ORDER

Before HOLMES, Chief Judge, BACHARACH, and PHILLIPS, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX D — RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 2615

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 USCS §§ 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 USCS §§ 2611 et seq.].

(b) Interference with proceedings or inquiries.

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual—

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [29 USCS §§ 2611 et seq.];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 USCS §§ 2611 et seq.]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [29 USCS §§ 2611 et seq.].

Appendix D

29 C.F.R. § 825.220

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. See § 825.400(c). Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50–employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having

exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under no fault attendance policies. See § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer. This does not prevent the settlement or release of FMLA claims by employees based on past employer conduct without the approval of the Department of Labor or a court. Nor does it prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a light duty assignment while recovering from a serious health condition. See § 825.702(d). An employee's acceptance of such light duty assignment does not constitute a waiver of the employee's prospective rights, including the right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position. The employee's right to restoration, however, ceases at the end of the applicable 12–month FMLA leave year.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (e.g., filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.