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STUDENT NOTES

THE SEVENTH CIRCUIT GOT IT WRONG: SUPERVISORS SHOULD NOT FACE INDIVIDUAL LIABILITY UNDER SECTION 1981

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INTRODUCTION

In June 2009, a man named Darrel Smith brought an action against his former employer alleging that in violation of section 1981 he was subjected to racial discrimination and retaliation.¹ His case involved discriminatory acts committed by his supervisor and the manager of his employer's human resources department.² Unfortunately for Smith, his employer went through bankruptcy and was subsequently rendered judgment-proof.³ So Smith amended his original complaint to name both his supervisor and human resources manager individually.⁴

The Seventh Circuit had yet to determine whether supervisors like the two named in Smith's suit could face individual liability for retaliation under section 1981.⁵ In *Smith v. Bray*, the court decided the issue in the affirmative: individual supervisors can and should be personally liable under section 1981 for their acts of racial discrimination including retaliation.⁶ The court did not go so far as to absolve the employer; it simply added individual supervisors as other potential defendants.⁷

In three parts, this comment explains why *Smith v. Bray* was wrongly decided. Part I examines the evolution of section 1981 from its origin over a hundred years ago to its more recent application to cases of employment discrimination. Part II explains how courts assign liability under section 1981 claims in the context of employment discrimination, specifically in circumstances where a supervisor discriminates against an employee. Finally, Part III delineates four specific reasons why the Seventh Circuit's decision in *Smith v. Bray* was incorrect. First, courts are supposed to analyze

* Law student, Chicago Kent College of Law Class of December 2013. The author would like to thank Professor César F. Rosado Marzán for his invaluable insight and editorial assistance.

1. *Smith v. Bray*, 681 F.3d 888, 895 (7th Cir. 2012).
2. *Id.* at 892.
3. *Id.*
4. *Id.* at 895.
5. *Id.* at 899.
6. *Id.*
7. *Id.*

section 1981 the same way they analyze Title VII, and Title VII does not allow for individual supervisor liability. Second, the Seventh Circuit justified its decision based on a flawed comparison between section 1981 and section 1983, a similar but distinct civil rights statute. Third, individual supervisor liability for discrimination and retaliation conflicts with tort, agency, and contract law—all of which create the framework for analyzing section 1981 specifically and employment discrimination generally. Finally, individual supervisor liability results in overdeterrence likely to chill supervisors from efficient, effective service to their employers.

I. THE EVOLUTION OF SECTION 1981: A VEHICLE FOR EMPLOYMENT DISCRIMINATION CLAIMS

Section 1981 was a necessary building block of American civil rights. Drafted nearly a century and a half ago, this statute has only passed through the Supreme Court two dozen times.⁸ Section 1981 demands that all persons within the jurisdiction of the United States enjoy equal benefits and endure equal punishments under the law—regardless of race.⁹ This significant edict of racial equality was born just after the Civil War, nestled into the Civil Rights Act of 1866.¹⁰

As a practicality of post-war reconstruction, Congress drafted section 1981 to help the newly freed black population buy land and make employment contracts.¹¹ By guaranteeing blacks the right to contract, the framers of the Civil Rights Act of 1866 attempted to bestow on them the fundamental rights of American citizenship.¹² Around the same time, Congress enacted the Thirteenth and Fourteenth Amendments, both of which reinforced the Constitutional right to equality for the recently emancipated portion of

8. For a list of the cases, see generally Ann K. Wooster, *Actions Brought Under 42 U.S.C.A. §§ 1981-1983 for Racial Discrimination—Supreme Court cases*, 164 A.L.R. FED. 483 (2000).

9. Section 1981 of the U.S. Code states in relevant part: “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981 (2013).

10. “This provision of the Civil Rights Acts of 1866 was first codified as Revised Statutes § 1977, then recodified as 8 U.S.C. § 41, then finally recodified as 42 U.S.C. § 1981. When § 1981 was amended by the Civil Rights Act of 1991, the original § 1981 was renumbered ‘1981(a).’” Sections 1981(b) and 1981(c), discussed below, were added in 1991. Joanna L. Grossman, *Making a Federal Case Out of It: Section 1981 and At-Will Employment*, 67 BROOK. L. REV. 329, 380 n.7 (2001).

11. Aware that employers in the confederate states used the Black Codes to limit the rights and opportunities of newly freed slaves, Congress drafted Section 1981 to challenge the status quo. See S. EXEC. DOC. NO. 2-39, at 19-20 (1865).

12. See CONG. GLOBE, 39TH CONG., 1ST SESS. 599-600 (1866) (statement of Sen. Trumbull) (“[The bill is] intended to . . . guaranty to every person of every color the same civil rights . . . [A]ll its provisions are aimed at the accomplishment of that one object.”).

the populace.¹³ Unfortunately, Congress' good intentions remained little more than intentions for over a hundred years, due in large part to the Supreme Court's decision in the *Civil Rights Cases*.¹⁴ There, the Court took an extremely narrow view of Congress' power to legislate against private race discrimination.¹⁵ Under that restrictive view, the two amendments—along with federal laws regarding discrimination, like section 1981—offered no protection against *private* acts of discrimination, including employment discrimination.¹⁶

After a century of limited use, the Supreme Court finally flexed section 1981's muscles by explicitly extending it into the employment discrimination law arena. First, in 1975, the Court in *Johnson v. Railway Express* held that section 1981 applies to claims of employment discrimination, a conclusion that had already been reached by several federal courts of appeals.¹⁷ Relying on legislative history and common sense, those lower courts already had concluded that the right to make and enforce contracts necessarily and intentionally included employment contracts.¹⁸ In *Railway Express*, the Supreme Court adopted the reasoning of those lower courts and applied section 1981 to employment contracts and employment discrimination.¹⁹ Prior to *Railway Express*, Title VII had been the predomi-

13. The Thirteenth Amendment provides, in relevant part: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

14. The *Civil Rights Cases* struck down the Civil Rights Act of 1875 because it reached private conduct, which the Fourteenth Amendment did not give Congress authority to regulate. The *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

15. *Id.* at 17-18 (holding the Fourteenth Amendment is not intended to protect individual rights against individual invasion, but to nullify and make void all state legislation and state action which impairs the privileges of citizens of the United States).

16. Two years after the *Civil Rights Cases* limited the Fourteenth Amendment, the Supreme Court applied the same reasoning to limit the scope of the 1866 Act in *Bowman v. Chicago & Nw. Ry. Co.* 115 U.S. 611, 615-16 (1885).

17. "Although this Court has not specifically so held, it is well settled among the federal Courts of Appeals and we now join them—that s[ection] 1981 affords a federal remedy against discrimination in private employment on the basis of race." *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 459-60 (1975).

18. See, e.g., *Long v. Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974) (holding that the purpose for which section 1981 was enacted requires that a court adopt a broad outlook in its enforcement); *Young v. Int'l Tel. & Tel. Co.*, 438 F.2d 757, 760 (3d Cir. 1971) (holding that "[i]n the context of the Reconstruction it would be hard to imagine to what contract right the Congress was more likely to have been referring"); *Waters v. Wisconsin Steel Works of Int'l. Harvester Co.*, 427 F.2d 476, 483 (7th Cir. 1970) (holding that "[e]very indicia of congressional intent points to the conclusion that section 1981 was designed to prohibit private job discrimination").

19. 421 U.S. at 459-60.

nant path to recovery for racial discrimination.²⁰ Initially drafted as part of the Civil Rights Act of 1964, Title VII protects against discrimination based on race, much like section 1981.²¹ However, Title VII is much more expansive, also protecting against discrimination based on color, national origin, religion, and sex.²² The plaintiff in *Railway Express* filed suit under both Title VII and section 1981.²³ In spite of its overlap with Title VII, the Court considered section 1981 to be a distinct avenue for redress for racial discrimination.²⁴

After temporarily expanding the reach of section 1981 in *Railway Express*, the Supreme Court soon scaled back the scope and power of the statute in *Patterson v. McLean Credit Union*, decided just 15 years later.²⁵ In that landmark case, the Court held that while section 1981 applies to employment contracts, it is limited to the *making* and *enforcing* of contracts.²⁶ The Court recognized that section 1981 discrimination claims could certainly deal with post-hire—and thus post-formation—conduct.²⁷ Nevertheless, the Court ultimately rejected the notion that the statute applied to the employer's conduct after the contract was formed, including any acts of discrimination that potentially breached the terms of the contract.²⁸ Thus construed, *Patterson* severely limited section 1981's application to employment discrimination claims. Under the restrictive holding in *Patterson*, failure to promote, failure to transfer, retaliation, termination, and any number of acts based on race that occur throughout the employment relationship would fall outside the scope of section 1981.

In response to *Patterson*, Congress passed the Civil Rights Act of 1991.²⁹ Among other changes, the Civil Rights Act of 1991 added section 1981(b), which states: “[f]or purposes of this section, the term ‘make and enforce contracts’ includes the making, performance, modification, and

20. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985 n.3 (1991) (Title VII claims represented roughly 80% of total employment discrimination claims between 1969–1989).

21. See 42 U.S.C. § 2000e (2013).

22. *Id.*

23. 421 U.S. at 456.

24. “We generally conclude, therefore, that the remedies available under Title VII and under [section] 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.” *Id.* at 461.

25. 491 U.S. 164, 171 (1989).

26. *Id.* at 172.

27. *Id.* at 177.

28. *Id.* at 177-178.

29. See, e.g., H.R. REP. NO. 102-40(I), at 92 (1991), reprinted in 1991 U.S.C.A.N. 549, 630 (“there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination”).

termination of contacts, and the enjoyment of all benefits, privileges, terms, and condition of the contractual relationship.”³⁰ In its House Report, the Committee on Education and Labor declared that section 1981(b) of the statute was intended to prohibit *all* forms of racial discrimination that may occur throughout contractual relations.³¹ Accordingly, under the 1991 amendments, employees can now use section 1981 for post-contract formation conduct.

Once it was settled that section 1981 applied to private acts of discrimination, employment contracts, and discriminatory acts made after a contract’s formation, the Supreme Court endorsed the consensus of the federal courts of appeals that section 1981, as amended, also encompassed retaliation claims.³² With this last pillar in place, employees had a solid framework for claims of discrimination and retaliation under section 1981.

II. DETERMINING EMPLOYER LIABILITY FOR DISCRIMINATION UNDER SECTION 1981

A. Courts Use Agency Law to Assign Liability

Now that it is well established that section 1981 has a home in employment discrimination law, the question remains: who is liable for racial discrimination in the workplace, the employer or its individual employees and agents?

Before the Civil Rights Act of 1964, some employers knowingly and openly adopted discriminatory policies. The legal landscape was such that racial discrimination by an employer was considered private conduct, outside the purview of federal regulation.³³ Today, however, it is highly unlikely that a company’s board of directors would unanimously vote for an openly discriminatory company policy or procedure. The more common scenario is when a mid-level supervisor or manager discriminates against a lower-level employee. Supervisors are the ones who interact with employees on a daily basis. They develop relationships—both good and bad—with their subordinates. Company presidents, CEOs, and boards of directors are often far removed from day-to-day workplace occurrences and staff interactions.

30. 42 U.S.C. § 1981(b) (2013).

31. Suzanne E. Riley, *Employees’ Retaliation Claims Under 42 U.S.C. § 1981: Ramifications of the Civil Rights Act of 1991*, 79 MARQ. L. REV. 579, 594 (1996) referencing H.R. Rep. No. 40(I) at 90 (1991).

32. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 451 (2008).

33. See discussion *supra* pp. 416-19.

In such a corporate structure, the employing entity does not overtly endorse, or in some cases, does not even know about a supervisor's discriminatory animus. However, when individual supervisors discriminate, the legally responsible actor will usually be the employer. This is because when faced with cases of employment discrimination, courts typically turn to some form of vicarious liability to determine who should be liable to the aggrieved party.³⁴ Specifically, the Supreme Court endorses agency theory as the preferable method of determining liability for a supervisor's discrimination. In *Meritor Savings Bank v. Vinson*, a female bank employee alleged her supervisor was discriminating against her based on her sex by sexually harassing her.³⁵ To determine whether the employer was liable under Title VII for the actions of a supervisor, the Supreme Court relied on the principles of agency theory.³⁶ The Court avoided a bright-line rule that employers are *always* liable for a supervisor's acts of sexual harassment against employees, but denied a motion to dismiss the case because the supervisor in question was an agent of the bank, and as such, the principal/bank *might* be liable.³⁷

A decade later, the Supreme Court again relied on agency principles for deciding issues of employment discrimination in *Burlington Industries, Inc. v. Ellerth*.³⁸ That case was also brought under Title VII.³⁹ The Court highlighted Congress' explicit instructions to interpret Title VII based on agency principles.⁴⁰ Once the Court made that determination, it had to decide which agency principles should win the day—those of common law or individual state law.⁴¹ Ultimately, in order to give uniform meaning to Title VII's terms, the Court elected to use the general common law of agency rather than those of any particular state.⁴²

Within the context of the common law agency doctrine, the *Burlington* Court likened sex discrimination to an intentional tort and thus determined that liability turns on whether the agent was acting within the scope of his employment.⁴³ In applying scope of employment principles to intentional

34. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 743 (1998) (analogizing to principles of agency law because the term "employer" is defined under Title VII to include "agents"); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (stating that "Congress wanted courts to look to agency principles for guidance").

35. 477 U.S. at 57.

36. *Id.* at 72.

37. *Id.*

38. 524 U.S. at 754.

39. *Id.* at 742.

40. *Id.* at 754.

41. *Id.* at 755.

42. *Id.*

43. *Id.* at 756.

torts, the Court noted, “it is less likely that a willful tort will properly be held to be in the course of employment.”⁴⁴ The *Burlington* Court also pointed out that a tort committed while “[a]cting purely from personal ill will” is not within the scope of employment.⁴⁵ Accordingly, an employer’s liability for a supervisor’s intentional discrimination was generally more limited.⁴⁶

On the other hand, the Restatement defines conduct, including that of an intentional tort, to be within the scope of employment when “actuated, at least in part, by a purpose to serve the [employer],” even if it is forbidden by the employer.⁴⁷ To that end, the Court acknowledged that misguided supervisors who intentionally discriminate may be violating company policy, but could be doing so with the overall intent to serve the best interests of the company.⁴⁸ In such a case, under the common law of agency, the employing entity bears the legal responsibility for the supervisor’s discrimination.⁴⁹ Therefore, a supervisor’s motivation and intent are often crucial considerations for determining liability.

In other cases, however, whether the supervisor discriminates “for the good of his employer” is irrelevant. For example, the Fifth Circuit considered a supervisor to be acting within the scope of employment whenever he was at work.⁵⁰ Whether or not the supervisor intended his discrimination to further his employer’s interests was not a factor the Fifth Circuit considered in determining an employer’s liability for a supervisor’s misconduct on the job.⁵¹

In summary, under Title VII, the statute under which most employment discrimination law has developed, and which has been used as a template to interpret section 1981, employers can be liable for the

44. *Id.* (quoting FLOYD R. MECHEM, OUTLINES OF THE LAW OF AGENCY § 394, at 266 (Philip Mechem ed., 4th ed. 1952)).

45. *Id.* at 757 (quoting RESTATEMENT (SECOND) OF AGENCY § 235 illus. 2. (1958)).

46. *See id.* at 756.

47. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY §§ 228(1)(c), 230 (1958)).

48. The Court supported this idea with the following example from Prosser and Keeton on Torts § 70, at 505-06: “[W]hen a salesperson lies to a customer to make a sale, the tortious conduct is within the scope of employment because it benefits the employer by increasing sales, even though it may violate the employer’s policies. . . .” *Burlington*, 524 U.S. at 756 (citing WILLIAM L. PROSSER, W. PAGE KEETON, DAN DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 70, at 505-06 (5th ed. 1984)).

49. *Id.*

50. *Arguello v. Conoco, Inc.*, 207 F.3d 803, 810 (5th Cir. 2000) (determining that there are many factors courts should consider when an employee is acting within the scope of his employment, most of which turn on whether the employee was actually at work).

51. *See id.*

discriminatory acts of its agents such as supervisors, particularly when such agents are acting within the scope of their employment.

B. Agency Law Allows for “Cat’s Paw” Liability

The Seventh Circuit deserves special credit for helping hammer out more specific contours of employer liability for a supervisor’s discrimination. In *Shager v. Upjohn Company*, the Seventh Circuit spawned a new theory of employer liability it referred to as “cat’s paw” liability.⁵² The term “cat’s paw” derives from the fable of the monkey and the cat by Jean de La Fontaine.⁵³ The fable, also adopted and retold by Aesop, describes a conniving monkey that wants to eat chestnuts roasting in a nearby fire.⁵⁴ Unwilling to risk burning itself in order to retrieve the chestnuts, the monkey instead convinces a cat to do his bidding.⁵⁵ As the cat repeatedly burns its paws retrieving the chestnuts from the fire, the monkey sits back unharmed, gobbling up all the chestnuts.⁵⁶

The lessons of that fable struck a chord with the Seventh Circuit as the court discussed the plight of Ralph Shager, a sales representative for Upjohn Company, who brought suit for age discrimination against his employer after he was fired.⁵⁷ Shager was in his early fifties while he worked at Upjohn.⁵⁸ Shager’s supervisor was John Lehnst, who, at 35 years old, was the youngest district manager at the company.⁵⁹ Shager claimed Lehnst discriminated against him by assigning him to difficult sales territories, rating his work performance as marginal even when he exceeded his quotas, and consistently making derogatory remarks about his age.⁶⁰ Finally, Lehnst recommended to the company’s personnel committee that Shager be terminated.⁶¹ Relying on Lehnst’s input, the committee fired Shager.⁶²

The court determined that discrimination is an intentional tort and reiterated that at common law, employers are liable for the intentional torts of

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

53. See *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484 (10th Cir. 2006) (describing the La Fontaine fable), *cert. dismissed*, 549 U.S. 1334 (2007).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Shager*, 913 F.2d at 399.

58. *Id.*

59. *Id.*

60. *Id.* at 400.

61. *Id.*

62. *Id.*

employees committed in furtherance of their employment.⁶³ In applying this rule to Title VII, the court concluded that a supervisory employee who fires a subordinate is “doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.”⁶⁴ In cases like *Shager*’s, where a personnel committee terminates someone after relying on the input of a discriminating supervisor, the committee acts as the “cat’s paw” for the malicious monkey.⁶⁵ That the committee, and ultimately the employer, lack discriminatory intent does not shield the employer from liability.⁶⁶

The notion of “cat’s paw” liability lit up the district and appellate courts for a solid decade, with decisions coming down on all sides of the issue. In *Hill v. Lockheed Martin Logistics Management*, the Fourth Circuit rejected cases like *Shager* and its progeny that adopt the “cat’s paw” theory. The Fourth Circuit argued that courts in those cases “have not always described the theory in consistent ways, and rarely have they done so after a discussion of the agency principles from which the theory emerged and that limit its application.”⁶⁷ Instead, the *Hill* court permitted a recovery only for the biased actions of the “actual decisionmaker,” not for the bias of the supervisor who may influence the ultimate employment decision.⁶⁸

In stark contrast, the Third Circuit allowed recovery against the employer as long as the employee could establish that “those exhibiting discriminatory animus influenced or participated in the decision to terminate.”⁶⁹ Similarly in the Ninth Circuit, courts will find an employer liable where a “biased subordinate influenced or was involved in the decision or decision making process.”⁷⁰ In those jurisdictions, it is unnecessary to prove the ultimate decision maker was aware of the supervisor’s discriminatory intent. The sole issue is whether the supervisor had *any* impact on the decision that constitutes an adverse employment action.

C. The Supreme Court Endorses “Cat’s Paw” Liability

In 2000, the Supreme Court implicitly endorsed the “cat’s paw” concept, that employer ignorance about a supervisor’s discriminatory intent is

63. *Id.* at 404.

64. *Id.*

65. *Id.* at 405.

66. *Id.*

67. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 290 (4th Cir. 2004).

68. *Id.* at 291.

69. *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001).

70. *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007).

no shield against liability. In *Reeves v. Sanderson Plumbing Products, Inc.*, there was no evidence, direct or circumstantial, that the official decision maker personally harbored any discriminatory animus.⁷¹ Instead, the plaintiff presented evidence that a supervisor, who was also the official decision maker's husband, was biased against the employee because of his age.⁷² The biased supervisor complained to his wife that the older worker had falsified work documents.⁷³ The wife then fired the plaintiff based on the untrue allegation without any knowledge of the supervisor's bias.⁷⁴ The Court held the employer liable because the biased supervisor essentially had acted as the "actual decision maker."⁷⁵ Due to his relationship with the decision maker (his wife), the supervisor had considerable influence over her and ultimately the plaintiff. As such, the effect of the supervisor's discrimination was the same as if he had actually made the decision himself.

More recently, in *Staub v. Proctor*, the Supreme Court *explicitly* endorsed "cat's paw" liability.⁷⁶ Like *Shager*, this case also came up through the Seventh Circuit and presented a classic "cat's paw" scenario. Staub was an angiography technologist at Proctor Hospital and a member of the army reserve.⁷⁷ His supervisor, Janice Mulally, harbored a strong anti-military and anti-reservist bias.⁷⁸ She recommended to the vice president of human resources that Staub be fired for allegedly leaving his work area without informing a supervisor.⁷⁹ The vice president of human resources did not investigate the alleged infraction.⁸⁰ Rather, she terminated Staub's employment based almost entirely on the biased supervisor's underlying recommendation.⁸¹ As the ultimate decision maker, the vice president of human resources did not know about or share in the supervisor's bias.⁸²

Once again, relying on the tenets of agency law, the Supreme Court held the employer liable because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.⁸³ Since the supervisor was an

71. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 134 (2000).

72. *Id.* at 151-52.

73. *Id.* at 137-38.

74. *Id.* at 152.

75. *Id.*

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

77. *Id.* at 1189.

78. *Id.*

79. *Id.* at 1189-90.

80. *Id.* at 1189.

81. *Id.* at 1189-90.

82. *Id.*

83. *Id.* at 1193.

agent of the employer when she caused an adverse employment action, the employer caused it; and when discrimination was a motivating factor in her doing so, it was a “motivating factor in the employer’s action.”⁸⁴

The Court’s reasoning is extremely pertinent to the discussion of individual supervisor liability under section 1981, because in *Staub*, causation was a major element at issue.⁸⁵ It was important to the Court that the supervisor both intended to cause and actually caused the adverse employment action before the employer could be liable.⁸⁶ In such cases, the guiltier the supervisor, the more likely his employer will be on the hook for his misdeeds. For plaintiffs claiming discrimination under statutes other than section 1981, the stronger the case they build against the supervisors, the more likely the courts will impute liability to the employer instead. As will be discussed in Part III, this will not be the case for plaintiffs in section 1981 claims after *Smith v. Bray*.

Although the Supreme Court cases discussed in this section of this comment do not address specifically employer liability under section 1981, the general rules and approaches of all the cases of each court have been clear: agency principles govern employment discrimination. When a discriminating supervisor acts within the scope of his employment, the employer is vicariously liable, even when the employer is entirely ignorant of the supervisor’s bias.⁸⁷

D. Before Smith v. Bray Courts Did Not Extend 1981 Liability to Supervisors

As mentioned above, there are only a few Supreme Court cases that have discussed section 1981 in any context, let alone in an employment discrimination law context. It is therefore unsurprising that the Supreme Court has never ruled whether supervisors can be individually liable under that law. And in *Smith v. Bray*, the Seventh Circuit became the first circuit to extend liability to individual supervisors for retaliation under 1981.⁸⁸

In *Smith*, plaintiff Darrel Smith alleged “he endured serious racial harassment from his immediate supervisor at former defendant Equistar Chemicals, LP, and was fired for complaining about it.”⁸⁹ He subsequently

84. *Id.*

85. *See id.* at 1192.

86. *Id.* at 1193.

87. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986). Keep in mind that sex harassment is likely to be for completely personal reasons and therefore not within the scope of employment.

88. *Smith v. Bray*, 681 F.3d 888, 899 (7th Cir. 2012).

89. *Id.* at 892.

filed suit for unlawful discrimination and retaliation. Because Equistar Chemicals had recently gone through bankruptcy, it was judgment proof and Smith could not recover from his former employer.⁹⁰ Instead, he sought relief from two individuals who worked at the company and who were directly responsible for his termination. In a question of first impression, the circuit court determined whether a subordinate with a retaliatory motive could be individually liable under section 1981 for causing the employer to retaliate against another employee.⁹¹

In reaching its holding, the Seventh Circuit reminisced that many circuits, itself included, have held or assumed that a “cat’s paw” theory will support holding the *employer* vicariously liable under both section 1981 and section 1983, which applies to local governmental entities (and state and local government employees sued in their official capacities).⁹² But the court struggled to articulate why holding employers liable under 1981 also meant *supervisors* should be liable too.

Further extending the fable analogy and pointing to “good” and “bad” actors, the *Smith* court described supervisor liability as a principle of fairness: why should the “hapless cat” (the employer) get burned but not the malicious “monkey” (the supervisor)?⁹³ Without basis in the law, but instead analogizing to moralistic story-telling, the court determined that it “logically follows” that individual supervisors can be liable under section 1981 for conduct that exposes their employers to liability.⁹⁴ The court rounded out its scant analysis by comparing section 1981 with section 1983, which *does* allow for individual supervisor liability.⁹⁵

The reasons discussed by the court fail to provide a compelling reason to expand supervisor liability under section 1981 for the first time. The next section of this note discusses four reasons why the Seventh Circuit reached the wrong result.

III. FOUR REASONS WHY *SMITH V. BRAY* WAS WRONGLY DECIDED AND SUPERVISORS SHOULD NOT BE HELD INDIVIDUALLY LIABLE UNDER SECTION 1981

From the time it was born in the Seventh Circuit in 1990 to the time it graduated from the Supreme Court in 2011, the courts have struggled with

90. *Id.* at 892

91. *Id.* at 899.

92. *Id.* at 897-98.

93. *Id.* at 899.

94. *Id.*

95. *Id.*

the concept of “cat’s paw” liability. As discussed in Part II of this comment, some circuits try very hard to find a way to hold the employer liable for the discriminatory or retaliatory animus of supervisors. Other circuits shy away from “cat’s paw” liability or at least require a strong causal link between the supervisor’s actions and the ultimate adverse employment action. In any event, jurisprudence in employment discrimination law unequivocally supports the idea that the employer is generally responsible for the discrimination of its supervisors. Courts from the lowest to the highest rely on agency principles to impute this liability on to the employer. Now, in *Smith v. Bray*, the Seventh Circuit has opened the door to another class of defendants: the biased supervisors. This part of the comment argues against that position for four reasons.

A. Section 1981 and Title VII Are Analogous and Title VII Does Not Allow Individual Liability

Title VII and section 1981 share a common goal. Both statutes further the same purpose of stamping out racial discrimination.⁹⁶ Over decades of employment discrimination jurisprudence, courts have determined that the two similar statutes should be analyzed the same way for establishing liability.⁹⁷ Both Title VII and section 1981 are noticeably silent regarding supervisor liability, but this section of the comment explains that Title VII has been repeatedly interpreted to disallow it. Because section 1981 is supposed to be analyzed the same way as Title VII, there is also a strong argument against individual liability under 1981.

1. Courts analyze section 1981 the same as Title VII

In *Smith*, the Seventh Circuit admitted that section 1981 jurisprudence is supposed to parallel Title VII.⁹⁸ On this particular point, the Seventh Circuit got it right. Even though the statutes and remedies are distinct, the analysis for determining whether a defendant intentionally interfered with an employment contract under section 1981 is the same as Title VII.⁹⁹ Parallel treatment of the two like-minded statutes has been articulated and endorsed by nearly every circuit.¹⁰⁰

96. Compare discussion in Part I regarding Congress’ intended goal for section 1981, with 42 U.S.C. § 2000e (2013).

97. See *infra* note 100.

98. *Smith*, 681 F.3d at 899.

99. *Ferrill v. Parker Grp., Inc.*, 967 F. Supp. 472, 474 (N.D. Ala. 1997) *aff’d*, 168 F.3d 468 (11th Cir. 1999).

100. See *e.g.*, *Jackson v. Watkins*, 619 F.3d 463, 466 (5th Cir. 2010) (holding claims “brought pursuant to Title VII and § 1981 are governed by the same evidentiary framework,” such that the anal-

Although the statutes are often used together, section 1981 can be and is used alone. Section 1981, while protecting similar rights as Title VII, presents a number of advantages over Title VII: longer statute of limitations, no cap on damages, and no required exhaustion of administrative remedies.¹⁰¹ As will be discussed more thoroughly in the next section, these differences between the statutes may indeed persuade a plaintiff to file suit under section 1981 but not under Title VII. But even when a plaintiff brings a section 1981 claim without an accompanying Title VII claim, courts still use the same analytical framework they would have if a Title VII claim been brought.¹⁰² Congress wanted plaintiffs to have options when deciding what action to take against their employers.¹⁰³ Title VII was not intended to preclude the applicability of other laws to employment discrimination. In fact, “Congress . . . rejected an amendment to Title VII that would have rendered section 1981 unavailable as a remedy for employment discrimination”¹⁰⁴

2. Title VII does not allow for individual liability

Starting from the premise that section 1981 cases should be treated the same as Title VII for determining liability in cases of racial discrimination,

yses under both statutes are substantively the same”); *Hobbs v. City of Chicago*, 573 F.3d 454 (7th Cir. 2009) (holding § 1981 and Title VII claims can be analyzed together because they both require the plaintiff to prove the same prima facie elements); *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000) (analogizing a § 1981 claim to a Title VII claim); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 13 (1st Cir. 1999) (noting that the language in § 1981(b) “tracks language of Title VII prohibiting discrimination with respect to ‘compensation, terms, conditions, or privileges of employment’ ”); *Stand v. A.B.E.L. Serv., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (holding both statutes have the same requirements of proof and use the same analytical framework, therefore should be analyzed in the same way); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1056 (8th Cir. 1997) (noting that the *McDonnell Douglas* analysis is applicable to both Title VII disparate treatment and § 1981 claims); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1233 n.7 (9th Cir. 1984) (holding that a plaintiff must meet the same standards in proving a § 1981 claim that he must meet in establishing a claim under Title VII).

101. 42 U.S.C. § 1981(b) (2013). *See also* *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004) (determining that section 1981 claims arising out of the amendments contained in the Civil Rights Act of 1991 are governed by federal “catch-all” four-year statute of limitations period for claims “arising under an Act of Congress enacted”); *Johnson v. Lucent Tech., Inc.*, 653 F.3d 1000, 1006 (9th Cir. 2011), *as amended* (Aug. 19, 2011) (determining that retaliation claims under section 1981 are subject to the same four-year statute of limitations).

102. *See, e.g., Smith*, 681 F.3d at 896 (applying Title VII framework for a section 1981 claim because “[t]he substantive standards and methods of proof that apply to claims of racial discrimination and retaliation under Title VII also apply to claims under § 1981”); *Perry v. Woodward*, 199 F.3d 1126, 1134 (10th Cir. 1999) (analyzing a section 1981 using the *McDonnell Douglas* framework even though there was no accompanying Title VII claim).

103. *Riley*, *supra* note 31, at 584.

104. *Patterson*, 491 U.S. at 201 (Brennan, J., dissenting).

the argument in favor of individual supervisor liability begins to break down because Title VII does not allow for individual liability.¹⁰⁵

One of the goals of employment discrimination laws is to prevent illegal discrimination before it ever happens. The remedial scheme of Title VII serves the “dual purposes of compensating victims of illegal employment discrimination for their losses and deterring future discriminatory conduct.”¹⁰⁶ Congress elected to further these goals without overburdening small businesses by limiting liability to employers with fifteen or more employees.¹⁰⁷ In light of this decision to “protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees.”¹⁰⁸

Moreover, the language of Title VII does little to support individual liability. Although the statute includes an employer’s agents in the definition of employer,¹⁰⁹ most appellate courts that have considered individual liability under Title VII have rejected “plain language” arguments in its favor.¹¹⁰ Instead, it has been determined that the “any agent” language was included in the definition of employer to ensure courts rely on *respondeat superior* to allow liability to pass through the supervisor to the employer.¹¹¹

It may be argued that individual supervisor liability should be allowed in those instances where the employer is bankrupt or otherwise judgment-proof.¹¹² Without individual liability, plaintiffs in such cases are left without an avenue for recovery. In recent history, however, the Seventh Circuit was not persuaded by that argument. In *EEOC v. AIC Security Investigations, Ltd.*, the court rejected individual liability under the ADA, even when

105. “Congress never intended individual liability. First, at the time it defined ‘employer’ in the ADA, Title VII, and the ADEA, Congress granted only remedies that an employing entity, not an individual, could provide. It is a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial portions of the statute alone.” *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995). *See also* *Smith v. Lomax*, 45 F.3d 402, 403-04, n.4 (11th Cir.1995); *see also* *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir. 1994); *Miller v. Maxwell’s Int’l. Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993).

106. Henry P. Ting, *Who’s the Boss?: Personal Liability Under Title VII and the ADEA*, 5 CORNELL J.L. & PUB. POL’Y 515, 548 (1996).

107. “Congress did not want to burden small entities with the costs associated with litigating discrimination claims.” *Miller*, 991 F.2d at 587.

108. *Id.*

109. 42 U.S.C.A. § 2000e (2013).

110. *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995); *Grant*, 21 F.3d at 652; and *Miller*, 991 F.2d at 587.

111. *Miller*, 991 F.2d at 587.

112. As discussed in the next paragraph, the plaintiff made this same argument in *Williams v. Banning*, which the Seventh Circuit ultimately rejected. 72 F.3d at 554-56.

the employer was judgment-proof.¹¹³ That court noted that while it is true that plaintiffs with judgment-proof employers are left without recourse that was not a good enough reason to upset the structure Congress set up.¹¹⁴ Congress clearly intended to preclude small businesses and sole proprietors from carrying the heavy financial burden of litigating discrimination suits.¹¹⁵ If small businesses are considered too strapped for resources to litigate these claims, it only makes sense that individuals would be too.

Mere months after *AIC Security*, the Seventh Circuit invoked that case's reasoning in order to once again reject individual liability—this time under Title VII.¹¹⁶ In that case, the employer was not bankrupt, but still “judgment-proof” in that it was innocent of any wrongdoing.¹¹⁷ The court concluded that regardless of why an employer escaped judgment, a plaintiff could not sue individual supervisors under Title VII.¹¹⁸ Ultimately, the court could not justify allowing individual liability under Title VII, even if it meant that a plaintiff would be left without redress.¹¹⁹ Admittedly, the purpose of Title VII is to deter potential employment discrimination, but a court may not expand liability onto another class of persons (supervisors) merely to meet that purpose in the absence of a congressional directive.¹²⁰

B. Sections 1981 and 1983 Are Not Analogous

To round out its analysis in *Smith*, the Seventh Circuit referred to a handful of districts that have imposed individual supervisor liability in *section 1983* cases.¹²¹ The court did not expound on why a few districts' decisions regarding individual liability under section 1983 should have any bearing on individual liability under section 1981. Instead, the court briefly mentioned that, in general, the same standards govern intentional discrimination claims under Title VII, section 1981, and section 1983.¹²² The court

113. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 n.9 (7th Cir. 1995).

114. *Id.*

115. The Federal Judicial Center reported last year that pursuing a civil action in federal court costs an average of \$15,000. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUD. CTR., CASE-BASED CIVIL RULES SURVEY 36 (2009).

116. *Banning*, 72 F.3d at 555.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Lowry v. Clark*, 843 F. Supp. 228, 231 (E.D. Ky. 1994).

121. For a complete list of the cases *see Smith v. Bray*, 681 F.3d 888, 898-99 (7th Cir. 2012).

122. *Id.* at 899.

determined that recognizing individual “cat’s paw” liability under section 1981 is thus consistent with the parallel approaches to these statutes.¹²³

However, the court’s analogy between these statutes is deeply flawed. For instance, the court apparently ignored the fact that Title VII does not allow for individual liability when concluding that treating all three statutes the same should lead to individual liability under section 1981. If all statutes are supposed to be analyzed the same way, none should allow individual liability because Title VII does not. More importantly, the court failed to recognize key distinctions between 1983 and 1981. In order to establish liability under section 1983, a plaintiff must show (a) that the defendant is a “person” acting under the color of state law, and (b) that the defendant caused the plaintiff to be deprived of a federal right.¹²⁴ First and foremost, unlike section 1981, the language of the section 1983 allows—in fact requires—a “person” to be the defendant. Second, the discriminatory act must be committed by someone acting in their official government capacity, which unlike 1981, precludes suits against private sector employers.

Moreover, state government entities and state officials in their official capacities are not considered persons under section 1983; they are immune from such suits.¹²⁵ Thus, if a plaintiff wants to bring a section 1983 claim against a state official, he or she must name the defendants in their personal capacities rather than in their professional capacities.¹²⁶ Therefore, it makes sense to allow for individual supervisor liability under 1983. State government entities are immune from suit. The only permissible defendants are individual employees.¹²⁷ This is not the case for section 1981 claims, which can be and traditionally are brought against the employer. Despite these key differences between the statutes, the court concluded what may be allowed under one should be allowed under the other.

C. The Decision’s Holding Conflicts with Underpinnings of Supervisory Liability: Tort, Contract, and Agency Law

As discussed in Part I, the Supreme Court in *Railway Express* determined that section 1981 was applicable to claims of employment discrimi-

123. *Id.* The court apparently ignored the fact that Title VII does not allow for individual liability in reaching this conclusion.

124. 42 U.S.C. § 1983 (2013).

125. *See* *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989).

126. *Id.*

127. Municipalities may be liable under Section 1983, but not on a theory of *respondeat superior*. Rather, to establish liability against a municipal government entity, a plaintiff must demonstrate that a deprivation of a federal right occurred as a result of a “policy” of the municipal government. *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 659 (1978).

nation because section 1981 applies to employment contracts. In reaching that decision, the Court relied on the reasoning of a number of lower courts that the right afforded by section 1981 to make and enforce contracts logically includes employment contracts.¹²⁸ In one of those lower court decisions, the Third Circuit noted “recently emancipated slaves had little or nothing other than their personal services about which to contract.”¹²⁹ The court opined that “[i]n the context of the Reconstruction it would be hard to imagine to what contract right the Congress was more likely to have been referring.”¹³⁰ The court wondered, “[i]f such contracts were not included, what was?”¹³¹

The Sixth Circuit took a similar view that section 1981 was “intended to uproot the institution of slavery and to eradicate its badges and incidents.”¹³² Through this lens, the court viewed employment discrimination based on race an absolute violation of a person’s right to contract with an employer.¹³³ Similarly, the Seventh Circuit was not persuaded that Congress’ failure to expressly mention employment contracts removed them from the statute’s purview.¹³⁴ The court there parsed the statute’s legislative history for evidence of Congress’ concern for black laborers’ right to contract.¹³⁵

One of several examples referenced in the court’s opinion was the statement Representative Windom gave to the House: “Its object is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil.”¹³⁶ To the court’s mind, such references irrefutably explained the purpose of the statute encompassed employment contracts.¹³⁷ Thus section 1981 jurisprudence acknowledges that employment contracts are protected under—and likely the purpose of—section 1981.

Such thinking does not comport with individual supervisor liability under the statute. The Seventh Circuit concluded in *Smith v. Bray* that it “logically follows” that the supervisor should be individually liable for the

128. *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 459-60 (1979).

129. *Young v. Int’l Tel. & Tel. Co.*, 438 F.2d 757, 760 (3d Cir. 1971).

130. *Id.*

131. *Id.*

132. *Long v. Ford Motor Co.*, 496 F.2d 500, 504-05 (6th Cir. 1974).

133. *Id.* at 505.

134. *Waters v. Wisconsin Steel Works of Intl. Harvester Co.*, 427 F.2d 476, 483 (7th Cir. 1970).

135. *Id.*

136. *Id.* at 483.

137. *Id.*

same behavior that would expose his employer to liability. But according to the Second Restatement of Torts:

One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.¹³⁸

When a supervisor induces an employer to fire an employee, that supervisor has, in a sense, interfered with the employment contract between the latter two parties. Admittedly, there is a certain logic to holding the supervisory individually liable for tortious interference with the employment contract. Under such reasoning, the supervisor might be guilty of violating the employee's constitutional right to enforce his employment.

However, agency law is a guiding light for employment discrimination law, and a supervisor is considered to be an agent of the employer.¹³⁹ What logically follows, therefore, is that the agent/supervisor and the principal/employer are considered to be one entity.¹⁴⁰ Because they are one entity, an employer's agents cannot, as a matter of law, tortuously interfere with the employer's employment contracts except in those limited circumstances when the agent is considered a third party to the contract.¹⁴¹

An agent may constitute a third party when he acts outside the scope of his employment.¹⁴² However, the moment the supervisory strays from the business of the employer and commits an independent trespass, the employer is not liable. At that moment, the agent is no longer acting within the scope of his authority in the business of the principal, but in the furtherance of his own ends.¹⁴³ Contrary to the Seventh Circuit's assertion, it is decidedly *illogical* that both the supervisor and the employer would be liable for the conduct of the supervisor.¹⁴⁴ Either the supervisor was acting in the scope of his employment and the employer is liable, or he was acting in furtherance of his own interest and the employer escapes liability.

Under the Seventh Circuit's holding in *Smith v. Bray*, plaintiffs with a "cat's paw" fact pattern may be forced to choose between two scenarios: suing the supervisor for acting outside the scope of his employment, which

138. RESTATEMENT (SECOND) OF TORTS § 766 (1979).

139. *Souter v. Scott & White Mem'l Hosp.*, 105 F.3d 656, 659 (5th Cir. 1996).

140. *See id.*

141. 82 AM. JUR. 2D *Wrongful Discharge* § 163 (2013).

142. As discussed in Part IIA, in order for an employer and the agent to be considered one entity under *respondeat superior*, the agent's transgressing conduct must be within his scope of employment.

143. *Doe v. Sipper*, 821 F. Supp. 2d 384, 387-88 (D.D.C. 2011).

144. *See Smith v. Bray*, 681 F.3d 888, 899 (7th Cir. 2012).

led to tortious interference with contractual rights actionable under Section 1981; or suing the employer under the theory that the supervisor *was* acting within the scope of employment. The first scenario may satiate the thirst for individual accountability for bad behavior, but the second scenario is more likely to lead to actual compensation for the harm done.

In one respect, adding individual liability for supervisors adds an arrow to an employee's quiver, because it creates another potential defendant. However, in a much more practical respect, supervisor liability adds a great deal to the employer's arsenal as well. Employers may seize this opportunity to escape liability on a technicality. Whenever faced with a discrimination suit, employers may now argue that the supervisor was acting outside the scope of his employment at the time of the discrimination. Such a framework leaves plaintiffs with supervisor defendants who are, in the vast majority of cases, likely unable to compensate them.

In summary, under the doctrine of *respondeat superior*, contrary to the *Smith* court's assertion, it makes no logical sense to hold the supervisor individually liable as another defendant in a general section 1981 case and controversy. Supervisors, when acting within the scope of their employment, act on behalf of the employer. As such, it is the employer and not the supervisor who is liable. Even if the supervisor in some way interferes with the plaintiff's contractual rights with the employer, the supervisor must be considered a third party and not an agent or employee of the employer. In such a case, the employer may be completely off the hook, an outcome that seems contrary to the objectives of any policy that attempts to eradicate discrimination in employment relations.

*D. Supervisors Should Escape Individual Liability Lest They Be Chilled
From Making Crucial Recommendations to Employers*

Removing supervisors from the purview of section 1981 gives supervisors the freedom they need to effectively do their jobs. Upper level management may or may not personally know all of the employees on the workforce. Day-to-day personnel management is often assigned to a supervisory staff. When it comes time to decide whom to promote, whom to lay off, and whom to transfer, the decision makers necessarily rely on input from supervisors who better know employee performance and disciplinary records. When supervisors know that they may face individual liability for the ultimate decisions of the employer, they will be less efficient workers in two ways: 1) they may be more likely to limit their interactions with employees of different races; and 2) they may be less likely to give candid recommendations regarding employees to ultimate decision makers.

Individual liability encourages supervisors to limit their interactions with subordinates in order to avoid exposure to liability, particularly subordinates of another race. There is logic in the argument that if a supervisor knows that he can be sued for discrimination or retaliation, he will be less likely to discriminate or retaliate. This argument is sound, but it isn't the end of the story. From 1979 through 2006, federal plaintiffs won only 15 percent of job-discrimination cases.¹⁴⁵ I introduce this statistical snapshot to illustrate the point that while many discrimination cases are well founded, many others are not.¹⁴⁶ Supervisors know that they don't have to actually discriminate or retaliate in order to be sued. A disgruntled employee can bring a meritless charge for the same filing fee as meritorious ones. So for many supervisors, the fear of *facing* a suit may be the same or greater than the fear of *losing* a suit.

Adding to supervisor apprehension, the number of job-bias claims has risen steadily over the past few years. From 2009 to 2010, the number of EEOC claims filed increased seven percent to an unprecedented 99,922 claims and that number remained relatively steady in 2011 and 2012.¹⁴⁷ While some observers attribute the higher numbers to stricter employer regulation,¹⁴⁸ the increase may also be the result of workers becoming more aware of their rights and more confident in standing up for them. Whatever the reason for the increase, supervisors have cause for concern. The easiest way for a supervisor to avoid a lawsuit is to avoid potential plaintiffs, especially if there is any hint of racial tension between the supervisor and the employee. A company operates less efficiently when the supervisor feels compelled to avoid his own workers.

The next most likely impact of supervisor liability will be an influx of unreliable communication between supervisors and decision-making, high-level personnel. If a supervisor has a history of tension with an employee of a different race even if the source of the tension has nothing to do with race, that supervisor may decide to overcompensate with an undeservedly favorable evaluation of the employee. The supervisor might think it better

145. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 109 (2009).

146. While there are many possible reasons for the low success rate of discrimination claims during the time period listed, one possible explanation is that many of the discrimination or retaliation claims were baseless. This possibility underscores my argument that supervisors need not actually discriminate or retaliate in order to face a lawsuit, adding to the chill in supervisor conduct.

147. *Enforcement & Litigation Statistics: Charge Statistics FY 1997 Through FY 2012*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Nov. 22, 2013).

148. *Fulbright's Litigation Trends Survey: A Little Less Litigation; More Regulation*, NORTON ROSE FULBRIGHT (October 18, 2011), <http://www.nortonrosefulbright.com/news/92870>.

for a sub-standard worker to get an unearned promotion than for the supervisor himself to lose his job or his savings in a discrimination or retaliation lawsuit. Even a meritless suit will cost the supervisor time and money to defend. And of course there is also the added aura of bigotry that may follow the supervisor around should such a suit be brought against him.

These scenarios create an inefficient workplace. Upper level management won't be able to rely on supervisor feedback regarding personnel. As a result, upper level management will be forced to be more involved in the day-to-day dealings with employees; spending more time micromanaging supervisors and less time on their own work.

The chill on supervisors will be quite cold indeed given the advantages to bringing a suit under section 1981 rather than Title VII, the statute's counterpart. First, section 1981 has a longer statute of limitations than Title VII. Aggrieved employees must bring their Title VII suit within 180 days of an unlawful employment practice.¹⁴⁹ Under section 1981, however, a supervisor could be on the hook for his retaliation for *years* after the alleged misconduct.¹⁵⁰

Additionally, there are no caps on damages for actions brought under section 1981 so employees of small businesses are especially induced to bring an individual suit under that statute rather than a suit against the employer under Title VII, where the damages are capped based on the size of the company.¹⁵¹ Finally, unlike suits under Title VII, section 1981 claims of discrimination do not require that plaintiffs first exhaust available administrative remedies.¹⁵² With more time to bring a discrimination suit against supervisors, more potential money to recover, and fewer hoops to jump through, more plaintiffs may turn section 1981. Now that supervisors face individual liability, they will be chilled to the bone.

CONCLUSION

Over nearly a century of carefully considered cases, section 1981 has evolved in such a way as to fulfill its intended purposes and does not need to keep evolving to include individual supervisor liability. Accordingly, the

149. See 42 U.S.C.A. § 2000e-5 (e)(1) (West 2013).

150. For formation-related contract claims under § 1981, which were available even before the Civil Rights Act of 1991, courts continue to apply state statutes of limitations (in contrast to post-formation contract claims, which are governed by the four year statute of limitations in 28 U.S.C. § 1658(a) (2000)). See *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004).

151. Compare 42 U.S.C. § 1981a(b) (2000) (limiting awards under Title VII), with *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1979) (describing remedies under § 1981).

152. *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 832 (1976).

Seventh Circuit made a mistake in *Smith* when it illogically held that section 1981 allows for supervisor liability.

First, section 1981 is an effective vehicle for bringing claims of employment discrimination. Its purpose and use parallel those of Title VII. Over decades of decisions, courts have held that the two statutes should be analyzed the same way in determining liability. Title VII does not allow for individual supervisor liability, even in cases where the employer is bankrupt or otherwise-judgment proof. In keeping with longstanding employment discrimination jurisprudence, courts should interpret section 1981 the same as Title VII and exempt supervisors from individual liability.

Second, the Seventh Circuit may have created a nice analogy between section 1983 and section 1981 in order to provide for individual supervisory liability under the latter, but these two statutes are incompatible on that particular point. The plain language of section 1983 demands an individual defendant whereas the plain language of section 1981 is silent about individual liability. But because section 1981 is supposed to parallel Title VII, which does not allow individual liability, section 1983 jurisprudence is not useful to import supervisory liability to section 1981.

Third, allowing supervisors to be individually liable under section 1981 does not comport with contract, agency, and tort law, all of which form the framework for analyzing section 1981 specifically and employment discrimination generally. Because section 1981 applies to employment contracts, supervisors could potentially violate the statute when they discriminate against an employee in a way that results in an interference with that employment contract. But supervisors can only interfere with a contract if they are third party to that contract. And according to agency law—which governs employment discrimination cases—supervisors are not third parties unless they act outside the scope of their employment. In such a case, the employer escapes liability altogether.

Under that framework, there are two possible scenarios: either the supervisor was acting in the scope of his employment and the employer is liable, or the supervisor was acting outside the scope of his employment and the individual supervisor is liable. Plaintiffs will not be able to have it both ways. To sue the supervisor in his personal capacity, the plaintiff will have to prove that the supervisor was acting outside the scope of his job duties, something that under existing law will be likely only in very exceptional cases.

Finally, the Seventh Circuit's decision leaves supervisors exposed. They will be chilled and deterred from performing their duties. If supervisors know that they could be personally sued for discrimination, they will

take great lengths to avoid even the appearance of impropriety. The chill is compounded by the fact that section 1981 has a longer statute of limitations than Title VII and no cap on damages.

In light of these considerations, the Seventh Circuit reached the wrong result in *Smith v. Bray* and other courts should not follow this faulty precedent.