No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT

RONALD S. COOPER
General Counsel

LORRAINE C. DAVIS
Acting Associate General Counsel

SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission
Washington, D.C. 20507

PAUL D. CLEMENT
Solicitor General
Counsel of Record

GREGORY G. GARRE
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, and in what circumstances, an employer can be liable for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on the alleged bias of a supervisor, where the supervisor did not take the adverse employment action himself but is alleged to have caused that action.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

No. 06-341

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 450 F.3d 476. The memorandum opinion and order of the district court (Pet. App. 32a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. The petition for a writ of certiorari was filed on September 5, 2006. The petition for a writ of certiorari was granted on January 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case presents the question whether, or in what circumstances, an employer may be liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), for discrimination based on the alleged bias of a supervi-

sor, when the supervisor did not take the challenged employment action, but is alleged to have caused it. The court of appeals held that an employer may be vicariously liable in such circumstances where the supervisor's discriminatory actions cause the challenged adverse employment action. Pet. App. 21a. Applying that understanding, it reversed an order granting summary judgment for petitioner and dismissing the case, finding that the Equal Employment Opportunity Commission (EEOC) has produced sufficient evidence of discrimination to create a jury question. That judgment is correct and should be affirmed by this Court.

1. On December 30, 2002, the EEOC filed suit in federal district court against petitioner BCI Coca-Cola Bottling Company, alleging that petitioner discharged Stephen Peters because of his race, in violation of Title VII. J.A. 4-9. The EEOC subsequently explained that its primary theory of liability was that Peters' immediate supervisor, acting with a racially discriminatory motive, reported false information about Peters to the official responsible for discipline, and that the supervisor's racially biased report caused the official to order Peters' discharge. Pet. App. 2a, 9a. Petitioner moved for summary judgment, and the EEOC opposed that motion. *Id*. at 32a-33a. In support of their respective positions, the parties introduced the following evidence:

a. From May 1995 through October 2001, Peters, who is black, worked as a merchandiser for petitioner's Albuquerque, New Mexico facility. Pet. App. 2a. More than 60% of petitioner's Albuquerque employees were Hispanic, while fewer than 2% were black. *Ibid*. Merchandisers are hourly employees who place Coca-Cola products in retail outlets, such as grocery stores. *Ibid*. Merchandising is a physically demanding activity. J.A.

207-208. Merchandisers generally work five days per week, with two days off. Pet. App. 2a. Because grocery stores remain open seven days a week, merchandisers must occasionally work on their scheduled days off to cover shifts. *Ibid.* As the most senior merchandiser, Peters had both Saturdays and Sundays off. *Ibid.* In 2001, the same year in which the events at issue took place, petitioner awarded Peters a certificate for five years of "service, dedication, and commitment to the Company." *Id.* at 2a-3a.

Peters' day-to-day supervisor was Jeff Katt, who is white. Pet. App. 3a. Peters and Katt both reported directly to District Sales Manager Cesar Grado, who is Hispanic. *Ibid.* Grado was responsible for monitoring and evaluating employees under his supervision and had discretion to bring matters relating to their performance or discipline to the attention of petitioner's Human Resources Department. *Ibid.* Grado could not impose discipline himself; only a Human Resources official could. *Ibid.* Sherry Pedersen was the highest ranking human resources official in Albuquerque, and her supervisor was Pat Edgar, who worked in Phoenix. *Ibid.*

On Friday, September 28, 2001, Grado learned that he was short on merchandisers for Sunday, and asked Katt to tell Peters to work that day. Pet. App. 3a-4a. Peters told Katt that he could not work because he had plans. *Id.* at 4a. According to Grado, Katt also relayed to him that Peters had told Katt that he might call in sick. *Ibid.* Peters denied having said that to Katt, and Katt denied having said that to Grado. *Ibid.*

After speaking to Katt, Grado contacted Edgar and told her that he wanted Peters to work on Sunday and that he expected Peters to call in sick. Pet. App. 4a. Grado asked Edgar whether he could require Peters to

work on his day off. *Ibid.* Edgar responded that it was unacceptable for an employee to plan to call in sick two days in advance, and she told Grado to "find out what the situation was" and to order Peters to work on Sunday unless he could present a "compelling reason" for not working that day. *Ibid.* Edgar told Grado to characterize the instruction as a direct order and to warn Peters that failure to comply could subject him to termination for insubordination. *Ibid.*

When Grado spoke with Peters, he told him that he needed for him to work on Sunday. Pet. App. 5a; J.A. 33, 214-216. According to Grado, Peters responded that he had plans, and when Grado asked Peters what his plans were, Peters responded that his plans were "none of [Grado's] business." Pet. App. 5a. Grado also claimed that Peters began yelling. *Ibid*; J.A. 33, 92-93. Peters stated that when Grado told him to work on Sunday, he told Grado he had plans and had been feeling ill all week. Pet. App. 5a. Peters also stated that Grado never asked him what his plans were, or about not feeling well, and that he had remained calm throughout the conversation. *Ibid*; J.A. 70-71, 108. It is undisputed that Grado eventually told Peters that he was directing him to come to work and that his failure to do so could lead to his termination for insubordination, and that the conversation ended when Peters told Grado "[D]o what [you] got to do and I'll do what I got to do." Pet. App. 5a.

Grado then contacted Edgar and, according to him, told her "exactly what happened." Pet. App. 5a. Grado told Edgar that he had asked what Peters' plans were, but that Peters had told him that his plans were none of Grado's business, and that Grado should do what he needed to do. *Ibid.* According to Edgar, after Grado completed his report, she determined that Peters had

engaged in insubordination warranting termination. *Ibid.* Edgar claimed that she did not make a final decision because it was late on Friday. *Ibid.*

Because Peters felt ill on Saturday, he cancelled his weekend plans and went to the doctor. Pet. App. 5a. The doctor told Peters that he had a sinus infection, gave him a prescription, and told him not to work until Monday. *Id.* at 6a. After Peters returned home from the doctor's office, he telephoned Katt and told him that he was sick and that he would be unable to work on Sunday. *Ibid.* In seeking permission to miss work from Katt, rather than Grado, Peters followed standard company practice. *Id.* at 3a. Katt excused Peters from working on Sunday and then repeatedly paged Grado to let him know that Peters was sick and could not work on Sunday. *Id.* at 6a. Grado never returned Katt's pages. *Ibid.* Peters did not work on Sunday. *Ibid.*

On Monday, October 1, Grado and Pedersen spoke with Edgar by telephone several times. Pet. App. 6a. In those conversations, Grado told Edgar that Peters had not worked on Sunday and Pedersen told Edgar that Peters had been involved in an incident in 1999 for which he had received a two-day suspension for insubordination. *Ibid.* Edgar was not aware of the circumstances of the 1999 incident. *Id.* at 6a-7a. Those circumstances were that Peters' supervisor had ordered him to work on a day that Peters was to serve as the pallbearer at the funeral of his fiancee's son. *Id.* at 7a. Peters had raised the boy as his own son. *Ibid.* Peters' supervisor told him that the funeral was no excuse for refusing a direct order because he was not Peters' biological son. *Ibid.*

On Monday afternoon, Edgar instructed Grado and Pedersen to meet with Peters Tuesday morning and tell him that he was being terminated for insubordination.

J.A. 24, 46; Pet. App. 7a-8a. At around 5 p.m. on Monday, Grado told Peters to meet him at the plant the next morning at 8 a.m. J.A. 217-219.

Edgar later claimed that she based her decision primarily on Peters' conduct on Friday, rather than his failure to show up for work on Sunday, and that she also took into account the prior incident in 1999. Pet. App. 7a. Edgar also claimed that, prior to making her final decision, she had learned that Peters had been excused from working on Sunday. *Ibid.* According to Edgar, that circumstance did not affect her decision because she suspected that Peters was not really sick. *Ibid.*

Evidence indicated that Edgar did not know about Peters' excused absence before making her final termination decision. Pet. App. 7a-8a. In particular, Katt stated that he did not tell Grado about Peters' excused absence until Monday night, around 6 p.m. J.A. 252-255. That conversation occurred after Edgar had made her final decision and communicated it to Grado in the afternoon, J.A. 24, 46, and after Grado had communicated to Peters at 5 p.m. that he should meet him the following morning. J.A. 217-219.

The meeting the next morning was attended by Grado, Pedersen, Peters, and Grado's supervisor. Pet. App. 8a. At that meeting, Grado told Peters that he was terminated for insubordination for not showing up to work. *Ibid.* Grado handed Peters a termination document that stated that Peters had been given an order to report to work on Sunday, that he did not report on Sunday, and that he was therefore being terminated for insubordination. *Ibid.* Peters explained that he did not report to work because he was sick and that he had received permission from Katt to miss work that day. *Ibid.* After Peters spoke, the room grew quiet. *Id* at 8a-

9a. Peters then left the room. *Id.* at 9a. After the meeting, Pedersen allegedly called Edgar and asked her whether she knew that Peters was black. *Ibid.* Edgar allegedly did not know that Peters was black before then. *Ibid.*

b. The EEOC presented evidence from merchandisers who worked under Grado as well as evidence from Katt that Grado exhibited racial bias toward black employees. Michael Wilson, a black merchandiser, stated that Grado continually demeaned him and threatened to replace him, but treated Hispanic merchandisers with respect. Pet. App. 10a. Wilson also stated that Grado was "unusually picky" with black merchandisers, while Hispanic merchandisers "were not subject to th[e] same level of scrutiny." *Id.* at 25a. In addition, Wilson stated that Grado made race-based remarks to him during working hours. On one occasion, for example, Grado told him that "Black guys [do] not look good in trucks, they should drive Cadillacs." *Id.* at 10a. On another occasion, while Wilson was performing outdoor work, Grado told Wilson to hurry and finish because "brothers don't like the cold." *Ibid.*

James Young, another black merchandiser who worked under Grado, stated that Grado "nit-picked" his work and constantly threatened to change his days off and route, but did not treat non-black workers in the same manner. Pet. App. 24a-25a. Bryan Esquibel, an Hispanic who worked under Grado, stated that Grado treated black employees worse than other employees. *Id.* at 10a. Esquibel gave a number of examples of Hispanics who had engaged in insubordination, but who were not fired. *Id.* at 25a. Katt stated that he had a conversation with Grado after Peters' discharge and that, although he was not certain, Grado may have used

"the word 'nigger' or a comparable racial epithet to describe [Peters]." *Id.* at 10a-11a.

The EEOC also presented evidence that Grado did not report non-black employees for possible discipline in circumstances that paralleled those of Peters. A particularly striking example involved Grado's treatment of Monica Lovato. Grado directed Katt to order Lovato to work on one of her weekend days off. Pet. App. 11a. Lovato wanted to take both days off for her birthday, but Katt insisted that she work. *Ibid.* Lovato never showed up for work and did not call in or answer Katt's pages. *Ibid.* When Katt informed Grado that Lovato had disobeyed an order to work, Grado responded that "[y]ou can't make somebody work on one of their days off." *Ibid.* Lovato did not even receive a warning for her unexcused conduct. *Ibid.* The EEOC also introduced evidence that Grado ordered another Hispanic merchandiser, Arturo Lopez, to call him or risk termination for insubordination. J.A. 36, 267-268. Lopez did not comply, but Grado never reported Lopez's insubordination to the Human Resources Department. J.A. 36.

2. The district court granted petitioner's motion for summary judgment. Pet. App. 32a-76a. Applying the *McDonnell Douglas* burden-shifting framework, see *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973), the district court held that the EEOC had established a prima facie case of discrimination, but that petitioner had produced evidence that its decision was based on Peters' alleged insubordinate conduct, rather than race, and that the EEOC had not produced sufficient evidence to create a material issue of fact on whether petitioner's asserted explanation was a pretext for discrimination. *Id.* at 52a-75a.

In reaching that conclusion, the district court rejected the EEOC's contention that petitioner could be held liable based on the evidence of Grado's racial bias. Pet. App. 65a-66a. The court held that an employer may be liable based on a subordinate's bias only when the actual decisionmaker relies on a subordinate's recommendation and does not conduct an independent investigation. *Id.* at 66a. That standard was not satisfied, the court concluded, because Grado did not recommend disciplinary action against Peters and because Edgar's discussion with Pedersen on Peters' disciplinary history constituted an independent investigation. *Id.* at 66a-67a.

3. The court of appeals reversed. Pet. App. 1a-31a. The court held that a subordinate official's bias can be imputed to an employer under common law agency principles when the subordinate official "accomplishes his discriminatory goals by misusing the authority granted to him by the employer—for example, the authority to monitor performance, report disciplinary infractions, and recommend employment actions." *Id.* at 16a-17a. The court explained that an employer's liability for a subordinate's misuse of such authority fits within the rule established in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), that an employer "may be vicariously liable for the actions of their employees—even intentional torts outside the scope of their employment—if the employee was aided in accomplishing the tort by the agency relation." Pet. App. 16a (internal quotation marks omitted).

The court of appeals concluded that holding an employer liable for a subordinate employee's discriminatory misuse of delegated authority also serves Title VII's objectives. Pet. App. 17a. The court explained that a biased subordinate who has no power to discipline

an employee can still "effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker." *Id.* at 18a. Applying common law agency principles, the court explained, gives employers an incentive to prevent such discrimination. *Ibid.*

As to "the level of control a biased subordinate must exert over the employment decision," Pet. App. 18a, the court of appeals held that Title VII incorporates common law causation principles and that the relevant inquiry is therefore "whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." *Id.* at 20a-21a. The court held that, under those causation principles, an employer can avoid liability "by conducting an independent investigation of the allegations against an employee." *Id.* at 21a. The court reasoned that "[i]n that event, an employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated." *Ibid.*

The court rejected the rule, adopted by some circuits, that an employer is liable for subordinate bias whenever the subordinate has exerted *influence* that might have caused the challenged employment action. Pet. App. 19a. The court viewed that standard as inconsistent with common law causation principles. *Ibid.* The court also rejected the rule, adopted in *Hill* v. *Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005), that an employer may be held liable for a subordinate's bias only when the subordinate is the "actual decisionmaker." Pet. App. 19a-20a. The court explained that Title VII refers to "agents" not "decisionmakers,"

and that the term "agent" includes not only decision-makers, but also persons whose actions are aided by the agency relation and cause injury. *Id.* at 20a. The court also concluded that the *Hill* standard would undermine Title VII's deterrent purposes because it would permit an employer to escape liability even when a subordinate's discrimination "is the sole cause of an adverse employment action." *Ibid.*

The court also rejected the district court's holding that an employer can be held liable for a subordinate's bias only when the subordinate makes a recommendation to terminate an employee. Pet. App. 21a-22a. That limitation, the court stated, "runs counter to the fairly broad 'aided by the agency relation' principle embodied in Title VII," and "would leave employees unprotected so long as a subordinate stops short of mouthing the words 'you should fire him.'" *Id.* at 22a.

Applying its agency and causation standards, the court held that the EEOC had introduced sufficient evidence to survive summary judgment on its claim that petitioner terminated Peters because of his race. Pet. App. 22a-31a. The court determined that the EEOC had introduced sufficient evidence that Grado was animated by racial bias, *id.* at 23a-26a; that Grado used the authority delegated by petitioner to gather the facts and present them to Edgar, *id.* at 28a; that Edgar relied exclusively on Grado's report in making her decision to terminate Peters, *ibid.*; and that Grado's report caused the termination. *Id.* at 28a-29a. The court concluded that because the jury could infer that Grado's report was tainted by race discrimination, "it could also find that the proffered reason for firing Mr. Peters, which rests entirely on that report, is pretextual." *Id.* at 29a.

The court of appeals rejected petitioner's claim that Edgar had conducted an independent investigation that broke the chain of causation that flowed from Grado's biased report. Pet. App. 30a-31a. The court concluded that the investigation was inadequate because it consisted solely of Pedersen pulling Peters' file and that file did not contain any information about the recent incident involving Grado. *Id.* at 30a. As to that incident, the court concluded, Edgar had relied entirely on Grado's report, permitting the jury to conclude that Grado's report had caused the termination. *Id.* at 31a.

SUMMARY OF ARGUMENT

An employer is liable under Title VII when a supervisor exercises delegated authority in a discriminatory manner and thereby causes a tangible employment action, such as a discharge. Applying that standard, which incorporates standard agency and causation principles, the court of appeals properly concluded that the record does not support the grant of summary judgment for petitioner and that, instead, further proceedings are necessary to dispose of the EEOC's Title VII claim.

A. Title VII expressly incorporates agency principles in defining the scope of an employer's liability. See 42 U.S.C. 2000e(b). Under settled agency principles, an employer is vicariously liable for the acts of its employees (*i.e.*, its agents) in the scope of employment. When an employer delegates authority to a supervisor to engage in customary employment responsibilities—*e.g.*, to monitor employees and report on their performance—a supervisor's exercise of such authority falls within the scope of his employment. If such authority is exercised in a discriminatory manner and causes a tangible em-

ployment action, the employer is liable for its employee's misconduct under settled agency principles.

That conclusion squares with the "aided by the agency relation" principle applied in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). A supervisor who exercises delegated authority to cause a tangible employment action is aided in accomplishing a tort by the existence of the agency relation with his employer. In addition, this approach furthers the objectives of Title VII, including to avoid harm by creating an incentive for employers to ensure that their agents do not engage in wrongdoing and to compensate the victims of discrimination. At the same time, under this inquiry, an employer is not vicariously liable for the acts of individuals who are not employees, or for the acts of employees who are not exercising delegated authority.

B. Petitioner's rule, which would limit an employer's liability to the discriminatory acts of "actual decisonmakers," has no footing in the text of Title VII. It conflicts with the settled agency principles that Congress expressly incorporated when it enacted Title VII. It contravenes the rule that this Court adopted in *Ellerth* and *Faragher* that an employer is vicariously liable —under the "aided by the agency relation" test—for a supervisor's misuse of authority that results in a tangible employment action. And it frustrates the objectives of Title VII by cabining the statute's reach and permitting employer-authorized, discriminatory misconduct to go unremedied. Similarly, while an employer's negligence provides an alternative basis for imposing liability, an employer's liability in this context is not limited to a showing of negligence.

C. To establish a Title VII violation, a plaintiff must also show that the supervisor's discriminatory misuse of delegated authority *caused* the challenged employment practice. See 42 U.S.C. 2000e-2(m), 2000e-2(a)(1). To prove causation, a plaintiff must show both that the challenged employment action would not have occurred in the absence of the supervisor's misconduct (*i.e.*, "but-for" cause), and that the supervisor's misconduct was a substantial factor in producing the challenged harm (*i.e.*, proximate cause). That standard is grounded in traditional tort principles, which are incorporated by the law of agency. It also squares with this Court's decisions, which have incorporated but-for and proximate causation requirements in various contexts.

An employer's independent investigation into the events underlying a tangible employment action may break the chain of causation. The chain will be broken where, as a result of an employer's independent investigation, the supervisor's misconduct is no longer a substantial factor resulting in the challenged employment action—*e.g.*, where a supervisor's allegedly discriminatory version of events is confirmed by other witnesses who lack any discriminatory motive. The causation standard thus gives employers an incentive to conduct truly independent and meaningful investigations into tangible employment actions to uncover any discriminatory conduct of biased supervisors, even though employers are not required to conduct such investigations.

D. Applying these principles, the evidence at this stage of the case precludes the grant of summary judgment for petitioner. It is undisputed that the supervisor (Grado) exercised delegated authority—including the authority to assign work, monitor employees, gather facts, and report disciplinary infractions—in connection

with the events that led to Peters' discharge. Likewise, there is ample evidence that Grado exercised that authority as to Peters with a discriminatory motive, including evidence that Grado made race-based comments in the workplace, treated black employees worse than employees of other races, and failed to report similar disciplinary infractions by employees of other races.

The evidence also supports a finding that Grado's actions caused Peters' discharge. The matter was reported only as a result of Grado's actions. In addition, the ultimate decision-maker (Edgar) relied almost entirely on Grado's biased report in discharging Peters. Edgar's review of Peters' personnel file does not break the chain of causation, because that file contained no information on the incident at issue. Edgar undertook no meaningful "independent investigation" of the incident at issue and, indeed, did not even ask Peters for his side of the story.

Whatever conclusion a reasonable juror might reach on the facts of this case, there is ample evidence to preclude summary judgment for petitioner at this stage under a proper application of Title VII. The judgment of the court of appeals should therefore be affirmed.

ARGUMENT

AN EMPLOYER IS LIABLE UNDER TITLE VII WHEN A SUPERVISOR ACTING WITH A DISCRIMINATORY MOTIVE USES DELEGATED AUTHORITY TO CAUSE A TANGIBLE EMPLOYMENT ACTION SUCH AS A DISCHARGE

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, makes it "an unlawful employment practice for an employer * * * to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation,

terms, conditions, or privileges of employment because of such individual's race." 42 U.S.C. 2000e-2(a)(1). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, specifies that "an unlawful employment practice is established when the complaining party demonstrates that race * * * was a motivating factor for any employment practice." 42 U.S.C. 2000e-2(m). Under that statutory text, proof that a supervisor acted with a discriminatory motive is not sufficient to establish a violation. Rather, the supervisor's discriminatory motive must be attributable to the "employer," and it must be causally linked to the challenged "employment practice." Those prerequisites are met when a supervisor acting with a racially discriminatory motive uses authority delegated from the employer, such as authority to report a disciplinary infraction, and causes a tangible employment action, such as a discharge.

A. Under Agency Principles, An Employer Is Vicariously Liable When A Discriminatorily Motivated Supervisor Uses Delegated Authority To Cause A Tangible Employment Action

Title VII expressly defines "employer" to include "any agent" of an employer. 42 U.S.C. 2000e(b). By defining "employer" to include "any agent," Congress directed "that courts look to traditional principles of the law of agency in devising standards of employer liability in those instances where liability for the actions of a supervisory employee were not otherwise obvious." *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 791-792 (1998); see *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 754 (1998) ("In express terms Congress has directed federal courts to interpret Title VII based on

agency principles.") (citing Section 2000e-(b)); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 72 (1986).

1. Under long established agency principles, "principals or employers" are "vicariously liable for acts of their agents or employees in the scope of their authority or employment." *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). That principle applies to "both negligent and intentional torts committed by an employee within the scope of his or her employment." *Ellerth*, 524 U.S. at 756. It also applies regardless of whether the employer authorized or knew about the acts of the agent. *Railroad Co.* v. *Hanning*, 82 U.S. (15 Wall.) 649, 657 (1873). Employees act within the scope of their employment when they are "exercising the authority delegated to [them.]" *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 494 (1909).

Consistent with those established principles, when an employer delegates authority to a supervisor to engage in customary employment responsibilities—*e.g.*, to assign work, monitor an employee's performance, decide whether to report a matter for discipline, gather the facts relating to that matter, or make a recommendation on what action should be taken—a supervisor's exercise of that authority falls within the scope of the supervisor's employment. Accordingly, when delegated authority is exercised in a discriminatory manner and causes a tangible employment action, the employer is vicariously liable under agency principles and Title VII.

That conclusion squares with the Court's holding in *Ellerth* that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment," and that employer liability for supervisory harassment must therefore be based on other agency principles. 524 U.S. at 757. No employer dele-

gates authority to supervisors to make sexual advances to those under their supervision. Such conduct is therefore generally outside the scope of employment and must be analyzed under other agency principles. In contrast, employers customarily do delegate authority to supervisors to assign work, monitor an employee's performance, refer matters for discipline, investigate the underlying facts, and make recommendations on what should be done. When supervisors exercise such authority, they therefore act within the scope of employment.

The Seventh Circuit reached that conclusion in *Shager* v. *Upjohn*, 913 F.2d 398 (1990) (Posner, J.). In that case, the court held that when employees make sexual advances to other employees, they do not act within the scope of employment. *Id.* at 405. In contrast, the court observed that a supervisor who fires an employee acts within the scope of employment and renders the employer vicariously liable, even when the supervisor does so based on a discriminatory motive. *Ibid.* The court explained 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." *Ibid.* The court added that "[f]rom the outside, at least, it looks as if he is doing his job, which is not the case when one worker sexually harasses another." *Ibid.*

The court in *Shager* then held that the same principle of vicarious liability also applies when a discriminatory supervisor does not make the ultimate decision to fire the employee, but instead misuses delegated authority to evaluate and make recommendations concerning subordinates to procure an employee's discharge. 913 F.2d at 405. The court explained that such a supervisor

would be "acting within (even if at the same time abusing) his authority," rendering the employer vicariously liable. *Ibid.* The fact that the actual decision to fire the employee is made by someone else does not automatically excuse the employer from liability. If the actual decisionmaker (in *Shager*, a "Career Path Committee") "acted as the conduit of [the supervisor's] prejudice—his cat's-paw—the innocence of [the decisionmaker] would not spare the company from liability." *Ibid.*

This theory of liability has been referred to as the "cat's paw doctrine," taking its name from the La Fontaine fable in which "a monkey convinces an unwitting cat to pull chestnuts from a hot fire." Pet. App. 14a (citing *Fables of La Fontaine* 344 (Walter Thornbury trans., 1984)). As the court of appeals explained, "[i]n the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Id.* at 14a-15a.[1]

---

[1] While some courts and the Restatement (Second) of Agency have expressed the view that an agent acts within the scope of employment only when motivated at least in part by an intent to serve the employer, other courts have expressed the view that an agent can act within the scope of employment, regardless of whether the agent's motive is to serve the employer. See *Faragher*, 524 U.S. at 793-796. In the context of a supervisor who has exercised delegated authority with a discriminatory motive and caused a tangible employment action, the conclusion whether the supervisor was acting within the scope of employment should not depend on a factbound inquiry into subjective intent, *i.e.*, whether the supervisor acted in part out of a misguided belief that either the discrimination or the underlying employment action would also benefit the employer. It is difficult enough to determine whether a supervisor has acted with a discriminatory motive, without adding a second, and even more difficult, inquiry into whether the supervisor was

2. A supervisor who exercises delegated authority to cause a tangible employment action is also "aided by the agency relation," under the agency principles adopted by the Court in *Ellerth* and *Faragher*. Under those decisions, an employer can be vicariously liable for a supervisor's conduct when the supervisor is aided in accomplishing a tort by the existence of the agency relation. *Ellerth*, 524 U.S. at 760-765; *Faragher*, 524 U.S. at 801-808. To impose vicarious liability under the "aided in the agency relation principle," it is not enough to show that the supervisor's agency relation provides "[p]roximity and regular contact" with "a captive pool of potential victims." *Ellerth*, 524 U.S. at 760. Rather, as explained above, for vicarious liability to attach, there must be "something more than the employment relation itself." *Ibid.*; see *Faragher*, 524 U.S. at 802.

In *Ellerth*, the Court identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of [the unlawful employment practice]: when a supervisor takes a tangible employment action against the subordinate." 524 U.S. at 760. A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different job responsibilities or a decision causing a significant change in benefits." *Id.* at 761.

---

motivated in part by a belief that discrimination would benefit the employer. However necessary such an inquiry may be to the scope of employment inquiry when a supervisor is engaged in actions, such as making sexual advances, that form no part of a supervisor's delegated authority, such an inquiry is unnecessary in the present context, where the supervisor is exercising delegated authority to undertake customary employment tasks—*e.g.*, to report an employer for a disciplinary infraction—albeit with an improper discriminatory animus.

When a supervisor takes a tangible employment action, "there is assurance the injury could not have been inflicted absent the agency relation." *Id.* at 761-762. Accordingly, the requirements of the "aided in the agency relation" principle of vicarious liability "will always be met when a supervisor takes a tangible employment action against a subordinate." *Id.* at 762-763.

Under *Ellerth* and *Faragher*, that principle of vicarious liability is not limited to supervisors who make the ultimate employment decision that has tangible adverse consequences. Instead, it logically applies whenever a supervisor's "discriminatory act" of a type that a supervisor is empowered to perform because of his supervisory capacity "*results in* a tangible employment action." *Ellerth*, 524 U.S. at 760 (emphasis added). Accordingly, as the court of appeals correctly concluded (Pet. App. 16a-17a), when supervisors, acting with a discriminatory intent, use their delegated authority to monitor performance, report disciplinary infractions, and recommend employment action to effect a tangible employment action, such as a discharge, an employer is vicariously liable under the "aided by the agency relation" principle applied in *Ellerth* and *Faragher*.

3. In construing Title VII, this Court "adapt[s] agency concepts to the practical objectives of Title VII." *Faragher*, 524 U.S. at 802 n.3. Subjecting an employer to vicarious liability for a supervisor's misuse of delegated authority that causes a tangible employment action, such as a discharge, furthers Title VII's objectives.

One of the principal justifications for the common law rule imposing vicarious liability on agents who abuse their authority and cause harm is that it creates an incentive for employers to intensify their efforts to prevent their agents from causing harm. Fleming James,

Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 168 (1954). That principle applies with particular force to supervisors like Grado. The other major reason the common law holds an employer vicariously liable for the acts of its agents who abuse their authority and cause harm is to ensure that the victims of wrongful conduct are compensated. *Id.* at 169-170; *Prosser and Keaton on the Law of Torts* 500-501 (W. Page Keeton ed., 5th ed. 1984). The common law approach rests on the view that, because the employer has sought to profit through its agents, the employer, rather than the innocent victim, should bear the costs when those agents abuse their delegated authority and cause injury to others. *Ibid.*

Title VII's objectives parallel those that support the common law rule imposing vicarious liability for an agent's abuse of delegated authority. Like the common law rule of vicarious liability, one major purpose of Title VII is to provide a "spur" or a "catalyst" for an employer to intensify its efforts to eliminate discrimination from the workplace. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) (citation omitted). It is especially important to do so from the ranks of supervisors. Similarly, like the common law rule of vicarious liability, another major purpose of Title VII is to compensate victims of discrimination. *Id.* at 418. Congress underscored that purpose when it enacted the Civil Rights Act of 1991, which authorizes compensatory damages for intentional violations of Title VII, 42 U.S.C. 1981a(b).

4. The agency principles discussed above apply when an improperly motivated supervisor exercises delegated authority to cause a tangible employment action. An employer would not be vicariously liable, for example, if a customer, or an independent contractor, acting with a discriminatory motive, falsely reported that an em-

ployee engaged in misconduct and that report caused the employee to be discharged. Nor would an employer be vicariously liable if an ordinary employee acting with a discriminatory motive falsely reported another employee's misconduct, and that report caused the employee's discharge. Even a supervisor's racially motivated false report would not subject an employer to vicarious liability if making the report was not part of the supervisor's delegated job responsibilities.

Those limitations cabin the principle of vicarious liability. Employers have "a greater opportunity to guard against misconduct" by supervisors who exercise delegated authority and cause a tangible employment action, than by "common workers" or supervisors who are not delegated that kind of authority. See *Faragher*, 524 U.S. at 803. Employers "have greater opportunity and incentive to screen them, train them, and monitor their performance." *Ibid.* Holding employers vicariously liable when supervisors do engage in discriminatory misconduct gives effect to Title VII, while recognizing that Congress was sensitive to the burdens that employers face. See *Faragher*, 524 U.S. at 786-787. Indeed, the Chamber of Commerce—the largest federation of business, trade, and professional organizations in the United States—has taken the position (Amicus Br. 18) that an employer is vicariously liable for a supervisor's improperly motivated action that causes another official to take a tangible employment action where the supervisor's improperly motivated action "involves an exercise of delegated authority."

B. Petitioner's Effort To Limit Employer Liability To The Acts Of "Actual Decisionmakers" And To Employer Negligence Is Inconsistent With Agency Principles

1. Petitioner argues (Br. 19) that under agency principles, an employer is vicariously liable for the acts of someone who is not the "formal decisionmaker," only if that person is "principally responsible for the decision or is, in effect the actual decisionmaker behind the adverse employment action." For numerous reasons, that proposed standard should be rejected.

a. Petitioner's "actual decisionmaker" standard conflicts with the text of Title VII. The term "actual decisionmaker" does not appear in Title VII. Instead, Title VII defines an employer to include "*any* agent," 42 U.S.C. 2000e(b) (emphasis added). Congress's use of the broad common law term "agent" accompanied by the all-encompassing modifier "any" underscores that Congress did not intend to limit an employer's liability to the acts of "actual decisionmakers." See *Black's Law Dictionary* 59 (5th ed. 1979) ("agent" includes "[a] person authorized by another to act for him").

b. Petitioner's actual decisionmaker standard also conflicts with the rule that employers are vicariously liable for the acts of all employees who act within the scope of employment, not just actual decisionmakers. Petitioner cites (Br. 21) the scope of employment standards articulated in 1 Restatement (Third) of Agency § 2.04, at 139 (2006); *Ellerth*, 524 U.S. at 755-756; and 1 Restatement (Second) of Agency § 219(1), at 481 (1957). All three of those sources, however, refer to *all* employees who act within the scope of employment, not just "actual decisionmakers." *Ibid.* Accordingly, if, as petitioner concedes (Br. 21-22), the scope of employment

principle makes an employer liable when an "actual decisionmaker" acts with a discriminatory motive to effect a tangible employment action, it similarly makes an employer vicariously liable when supervisors who are not actual decisonmakers misuse their delegated authority to cause a tangible employment action. Like actual decisionmakers, such supervisors act within the scope of their employment, rendering the employer vicariously liable for their discriminatory conduct.

c. Petitioner's actual decisionmaker standard also cannot be reconciled with the rule adopted in *Ellerth* and *Faragher*. As previously discussed, the "aided by the agency relation" principle is not limited to actual decisionmakers, but logically applies whenever a discriminatorily motivated supervisor uses delegated authority to cause a tangible employment action. Petitioner argues (Pet. 41) that the "aided by the agency relation" principle is simply a refinement of apparent authority, and therefore applies only when an agent's fraud or deceit causes the plaintiff to believe that the agent has apparent authority. In *Faragher*, however, this Court squarely rejected the same proposed limitation as "untenable," holding that the aided-by-the-agency-relation principle instead applies when "tortious conduct is made possible or facilitated by the existence of the actual agency relationship." 524 U.S. at 801-802.

Petitioner also seeks to rely on the *Restatement (Third) of Agency*'s failure to include aided by the agency relation as a distinct ground of vicarious liability. But the commentary to the relevant section of that restatement explains that the section "is inapplicable to an employer's liability for one employee's tortious conduct toward a fellow employee, a topic being considered by Restatement Third, Employment Law," which the

American Law Institute has not yet published. 2 Restatement (Third) of Agency § 7.07, cmt. a at 199 (2006). Because the question presented here concerns the employer's vicarious liability for the conduct of one employee toward a fellow employee, the *Restatement (Third) of Agency* is "inapplicable."

In any event, Congress enacted Title VII against the backdrop of traditional common law agency principles that included aided by the agency relation as a distinct ground of vicarious liability. The *Restatement (Third) of Agency*—which was formulated after Congress passed Title VII—cannot alter the scope of Title VII, or the backdrop against which it was enacted. Nor could it override this Court's holdings in *Ellerth* and *Faragher* that Title VII imposes vicarious liability under the "aided by the agency relation" principle when a supervisor acting with a discriminatory intent uses delegated authority to cause a tangible employment action.

d. Petitioner's actual decisionmaker standard is also inconsistent with the objectives of Title VII. Under petitioner's theory, even when a supervisor's discrimination is the cause of an adverse employment action, an employer would escape liability unless the supervisor was the "actual decisionmaker." For example, as the court of appeals in this case explained, "[a] biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker." Pet. App. 18a. Under petitioner's standard, unless such a supervisor was the "actual decisionmaker," Title VII would afford no protection against such discriminatory conduct. That consequence cannot be squared with Title VII's goal of

preventing job opportunities from being allocated based on impermissible criteria, such as race or gender.

e. Petitioner's reliance (Br. 14, 23) on the Fourth Circuit's decision in *Hill* v. *Lockheed Martin Logistics Management., Inc.*, 354 F.3d 277 (2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005), is misplaced. As explained in the EEOC's brief in opposition to certiorari (p. 12), *Hill* remains an outlier in the circuits on the question presented. Moreover, as the quotation in the footnote below indicates, it is not entirely clear that *Hill*'s "actual decisionmaker" would apply in a case like this in which a *supervisor* has used delegated authority to cause a tangible employment action.[2]

More fundamentally, *Hill* misconstrued this Court's isolated use of the phrase "actual decisionmaker" in *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, the Court held that, in determining whether a defendant is entitled to judgment as a matter of law, a court should review all of the evidence in the record, drawing all reasonable inferences in favor of the nonmoving party. *Id.* at 150. "Applying th[at]

---

[2] The pertinent passage from *Hill* states:

> [W]e decline to endorse a construction of the discrimination statutes that would allow a biased subordinate who has *no supervisor*y or disciplinary authority and who does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision. * * * [A]n aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

354 F. 3d at 291 (emphasis added).

standard," the Court held that judgment as a matter of law was not warranted on the facts of that case in part because the employee had introduced evidence that would permit a jury to conclude that a biased manager who recommended plaintiff's discharge was the "actual decisionmaker." *Id.* at 151-152.

The *Reeves* Court did not suggest that such a factual inference was a necessary element of employer liability as a matter of law. Instead, as the court of appeals below explained (Pet. App. 20a), by using the phrase "actual decisionmaker," the Court in *Reeves* "was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." Indeed, no agency law question was presented in the case and the phrase "actual decisionmaker" appears in a single sentence describing the evidence in the case in a part of the opinion that did not contain any discussion of agency principles.

2. Petitioner alternatively argues (Br. 28-29) that liability can be established only if the plaintiff can show that the employer was negligent. In particular, petitioner argues (*ibid.*) that a plaintiff must show that the employer knew or should have known of the employee's bias or discriminatory conduct. That is incorrect.

A plaintiff is free to seek to establish an employer's liability by showing that the employer was negligent. *Ellerth*, 524 U.S. at 759. But as *Ellerth* makes clear, employer negligence is a "minimum standard," not a maximum one, and a showing of negligence is not necessary when a plaintiff can satisfy "the more stringent standard of vicarious liability." *Ibid.* As discussed above, vicarious liability is warranted under agency principles when a supervisor acting with a discriminatory intent uses delegated authority to cause a tangible employment action. When such a showing can be made,

there is no need for a plaintiff to make an additional showing that the employer was negligent in failing to take steps to prevent the supervisor's biased actions.

Petitioner seeks to justify its negligence rule based on the notion that such a rule furthers Title VII's deterrent purposes. Br. 30. But as discussed, the common law has imposed vicarious liability on an employer for an agent's misuse of delegated authority because vicarious liability is thought to be more effective in promoting employer efforts to prevent agents from causing harm than a rule that would hinge liability on a difficult case-specific showing that the employer was negligent in supervising or training its agents. Moreover, Title VII's goal of compensating victims would be frustrated by requiring a plaintiff to establish that an employer is negligent in failing to prevent discrimination for which the employer is vicariously liable under agency law.[3]

C. Causation Is Established When A Supervisor's Discriminatorily Motivated Misuse Of Delegated Authority Is A Substantial Factor In Bringing About A Tangible Employment Action

1. To establish a violation of Title VII in this context, a plaintiff must not only show that a prohibited characteristic, such as race, was a motivating factor for a supervisor's conduct, and that the supervisor's discriminatory conduct can be imputed to the employer. A plaintiff

[3] Because the EEOC sought to impose liability on petitioner based on principles of vicarious liability and not negligence, it did not conduct a full-scale investigation into petitioner's claims about the quality of its training and monitoring program. For that reason, petitioner's untested statements about its efforts to ensure nondiscrimination are beside the point. Indeed, even the limited record available on that issue casts doubt on petitioner's claim. J.A. 106, 194, 197 (statements by employees that they did not recall receiving training).

must also show that the supervisor's discriminatory conduct *caused* the challenged employment practice. Such a showing of causation is necessary to prove that the prohibited characteristic was a motivating factor "*for*" the "employment practice," 42 U.S.C. 2000e-2(m) (emphasis added), and that the employment practice occurred "*because of*" the prohibited characteristic. 42 U.S.C. 2000e-2(a)(1) (emphasis added). It is also necessary to satisfy settled agency principles, under which an employer is vicariously liable only "for harm *caused by* misuse of supervisory authority." *Ellerth*, 524 U.S. at 764 (emphasis added); *Faragher*, 524 U.S. at 807.[4]

2. As the court of appeals concluded, the *Restatement (Second) of Agency* incorporates "standard tort concepts like causation." Pet. App. 21a. Cf. *Malley* v. *Briggs*, 475 U.S. 335, 344-345 n.7 (1996) (concluding that "§ 1983 should be read against the background of tort liability," including causation principles) (internal quotation marks and citation omitted). Under the common law of torts, in order to establish causation, a plaintiff must prove that an actor's conduct "is a substantial factor in bringing about the harm." 2 Restatement (Second) of Torts § 431(a) at 428 (1965). That standard has two dimensions. First, the evidence must create an inference that the harm would not have occurred in the absence of the actor's conduct. *Id.* § 431 cmt. a at 429. That showing is commonly referred to as "but-for causa-

[4] This causation standard is distinct from the requirement that race need only be a motivating factor in the decision as discussed in *Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). If a supervisor had a mixed motive for his actions, but race was a motivating factor, that is enough. In addition, however, the supervisor's actions—be it issuing a report or conducting a review—must cause the ultimate employment action challenged in the lawsuit.

tion." Second, the effect of the actor's conduct must not be so insignificant as to make it unreasonable to treat the actor as responsible for the harm. *Ibid.* The effect of the actor's conduct must be "substantial," rather than "negligible" in producing the harm. *Id.* § 431 cmt. b at 429. That showing is commonly referred to as "proximate causation." Thus, both but-for and proximate cause are required to establish causation.

3. This Court has previously applied basic causation principles in the Title VII context. See, *e.g.*, *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 272-273 (2001) (per curiam) (considering "causal connection" between employee's protected activity and adverse employment action). In addition, the Court has invoked the common law's but-for and proximate causation requirements in other analogous contexts. For example, in interpreting the "because of" requirement in the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, the Court has held that a plaintiff must prove that age "played a role in th[e] process and had a *determinative influence* on the outcome." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993) (emphasis added).

Similarly in *Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977), the Court held that a plaintiff raising a First Amendment retaliation claim in the employment context must show that conduct protected by the First Amendment was a "substantial factor" in an adverse employment decision. The public employer may then avoid liability by showing that the same decision would have been made in any event. *Ibid.* The Court has explained that a "substantial factor" is one that creates an inference of but-for causation. *Hartman* v. *Moore*, 126 S. Ct. 1695, 1703-1704 (2006).

The Court has also incorporated the concept of proximate causation in various contexts. For example, in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), the Court examined the question of the appropriate causation standard for cases in which harm is arguably caused by two actors, one of whom is alleged to have influenced the other. *Id.* at 701-703. In that context, the Court held that "[i]t is necessary * * * to conclude that the act or omission [of the initial actor] was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back [to the initial actor]." *Id.* at 703. See also *Anza* v. *Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006) (looking to concept of "proximate-cause" in analyzing RICO claim).

4. The common law and the Court's analysis of causation in analogous contexts properly inform Title VII's causation requirement. Accordingly, to establish a Title VII violation, a plaintiff must show that a supervisor's discriminatorily motivated use of delegated authority was a substantial factor in bringing about a tangible employment decision by another actor. That means it must play a sufficient role to give rise to an inference of but-for causation, and that its effect on the decision must be sufficiently substantial to make it reasonable to regard it as a proximate cause of that decision. The causation standard of tort provides a well-known and workable standard for determining when an employer may be vicariously liable for the acts of supervisory employees. In addition, the standard advances the objectives of Title VII by establishing liability when the biased act of a supervisor results in an adverse employment action, but also will help weed out insubstantial claims.

D. An Employer's Independent Investigation Can Break The Chain Of Causation

As a significant number of courts of appeals have recognized, even when a supervisor acting with a discriminatory motive has used delegated authority in an attempt to bring about a tangible employment action, the employer may be relieved from liability if it conducts a subsequent investigation that breaks the causal chain between the supervisor's misconduct and the tangible employment action. See, *e.g.*, Pet. App. 16a; *Long* v. *Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Shager*, 913 F.2d at 405. The conclusion that a subsequent investigation is capable of breaking the causal chain between a supervisor's misconduct and a tangible employment action follows from the causation standard discussion above. Under that standard, the chain of causation will be broken by a subsequent investigation when, as a result of the investigation, the supervisor's discriminatory misuse of authority can no longer be regarded as a "substantial factor" in the tangible employment action. The causation standard thus creates an incentive for employers to adopt policies encouraging such investigations in appropriate circumstances.[5]

For example, suppose a supervisor's alleged discriminatory action was his misuse of delegated authority to provide inaccurate information to the ultimate decisionmaker, and a subsequent investigation uncovered independent and accurate information supporting the employment action at issue. If the ultimate decisionmaker

---

[5] Of course, an employer might also opt to devote the time and resources to selecting supervisors who are unlikely to engage in discriminatory conduct and training those supervisors to prevent discrimination in the workplace.

then based her decision to discharge the employee on the independent sources, the investigation would break the causal connection between the supervisor's alleged discriminatory conduct and the tangible action. The supervisor's allegedly false information could still be viewed as a but-for cause of the tangible employment action in the sense that it triggered the independent investigation. But, if the ultimate decisionmaker based her decision on the independent sources, then the allegedly biased report of the supervisor would not be a "substantial factor" in bringing about the tangible employment action.

In contrast, suppose the subsequent investigation consisted of nothing more than asking the supervisor for a fuller account, and the supervisor's account remained deliberately slanted for discriminatory reasons. In that event, if the ultimate decisionmaker then relied on the supervisor's deliberately slanted account to take a tangible employment action, the investigation would not break the causal chain. The supervisor's biased report would be a substantial factor in bringing about the tangible employment action, and principles of vicarious liability would subject the employer to liability for the supervisor's discriminatorily motivated misuse of delegated authority. An independent assessment of the facts cannot overcome the fact that a biased supervisor deliberately slanted the facts presented to the ultimate decisionmaker, and the ultimate decisionmaker relied exclusively on that information to take a tangible employment action.

In other cases, it may be more difficult to determine whether a subsequent investigation has broken the chain. But the ultimate inquiry is always the same: whether, in light of the investigation, the supervisor's

discriminatory use of delegated authority was a substantial factor leading to the tangible employment action. In assessing the investigation, the question is not whether the ultimate decisionmaker was negligent in failing to conduct an investigation or in structuring the investigation in a particular way. An employer has no obligation to conduct an investigation. Rather, when an employer chooses to conduct a subsequent investigation (or put in place a policy calling for such investigations), the investigation is relevant to the extent that it sheds light on the question whether the supervisor's discriminatory misuse of delegated authority was a substantial factor in bringing about a tangible employment action.

The more thorough, balanced, and truly independent the investigation, the more likely the termination will be the result of the investigation rather than the discriminatory input. As discussed below, in this case there was no independent investigation worthy of the name. Indeed, the employer failed even to take the simple step of asking the discharged employee for his side of the story. This case therefore presents a clear situation where the chain of causation remains intact.

E. Because A Reasonable Factfinder Could Conclude That Petitioner Discharged Peters Because Of His Race, Petitioner Was Not Entitled To Summary Judgment

1. Under the principles discussed above, the EEOC is required to make three showings to support its claim that petitioner unlawfully discharged Peters because of his race. First, the EEOC must prove that race was a motivating factor in Grado's actions. Second, the EEOC must prove that Grado was exercising delegated authority in connection with those actions. And third, the EEOC must prove that Grado's racially motivated con-

duct caused Peters' discharge, in that the discharge would not have occurred but for the conduct and that the conduct was a substantial factor in the discharge.

Because this case arises on petitioner's motion for summary judgment, the relevant question is whether, when the evidence is viewed in the light most favorable to the EEOC, a reasonable factfinder could make each of those three findings, or whether there are material issues of disputed facts as to those elements. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986); *United States* v. *Diebold*, 369 U.S. 654, 655 (1962) (per curiam). As the court of appeals correctly concluded, Pet. App. 22a-31a, a reasonable factfinder could rule in the EEOC's favor on each of those three elements. Accordingly, petitioner is not entitled to summary judgment on the evidentiary record before the Court.

a. First, there was abundant evidence from which a reasonable factfinder could find that race was a motivating factor in Grado's conduct. In particular, the EEOC introduced evidence—including the affidavits of other employees—that Grado made numerous race-based comments in the workplace and "may have used the word 'nigger' or a comparable racial epithet to describe [Peters]," Pet. App. 10a-11a; that he treated black employees worse than the employees of other races and "nit-pick[ed]" the work of black employees; and that, while he reported Peters for allegedly refusing to comply with an order to work on his day off, he was "unfazed" when an Hispanic employee (Lovato) ignored an order to work on her day off and, instead of calling for discipline, reportedly said 'You can't make somebody work one of their days off.'" *Id.* at 23a-26a.

b. Second, there is abundant evidence that Grado was exercising delegated authority in connection with

the events that led to Peters' discharge. Grado was delegated authority to assign work, to monitor and evaluate employees under his supervision, and to decide when to refer a disciplinary infraction to petitioner's Human Resources Department. Pet. App. 3a. Grado was also delegated authority to gather the facts bearing on an infraction of work rules and present them to a human resources official for a disciplinary decision. J.A. 91.

Every action that Grado took in connection with the events that culminated in Peters' discharge was an exercise of delegated authority, from his decision to assign Peters to work on his day off (Pet. App. 3a-4a); to his decision to ask Edgar if he could order Peters to work on his day off (*id.* at 4a); to his decision to report Peters for allegedly refusing to work on his day off, when shortly thereafter he did not report two Hispanic workers for engaging in similar misconduct (*id.* at 5a, 11a); to his mischaracterization to Edgar of the substance of his conversations with Peters, including his statements that Peters had stated that he was going to call in sick rather than work, *id.* at 4a, that Peters had refused to say what his plans were and had said they were none of Grado's business, and that Peters had raised his voice or yelled at him. *Id.* at 5a. Grado also exercised his delegated authority when he failed to report to Edgar in a timely manner that Peters had an excused absence, *id.* at 7a-8a, and when he told Peters that he had been fired for failing to work on a day that he knew Peters had a legitimate excuse to miss. *Ibid.*

c. Third, there is ample evidence that would permit a reasonable factfinder to find that Grado's racially motivated conduct was a substantial factor in Peters' ultimate discharge. In particular, there is evidence that would permit a reasonable factfinder to conclude that (1)

Grado would not even have brought the matter to Edgar's attention if Peters had not been black, and, if the matter had not been brought up, Peters would not have been terminated; (2) Grado's biased report to Edgar caused Edgar to decide to terminate Peters; and (3) Grado's discriminatory failure timely to report that Peters had been excused from work caused Edgar not to alter her initial decision to discharge Peters.

As the court of appeals concluded, petitioner's evidence on Edgar's alleged independent investigation was not sufficient to preclude an inference that Grado's discriminatory conduct was a substantial factor in bringing about Peters' discharge. Pet. App. 30a-31a. "This investigation consisted of only one action: directing [Pedersen] to pull [Peters'] personnel file." *Id.* at 30a. That file contained no information on the incident at issue—"so it is difficult to see how reading it could 'independently' confirm what happened." *Ibid.* Edgar relied entirely on Grado for information about Peters' recent absence, and a reasonable factfinder could therefore conclude that Grado's report caused the termination. Indeed, as the court of appeals observed, Edgar "failed to take even the basic step * * * of asking [Peters] for his side of the story." *Id.* at 28a.

2. Petitioner argues (Br. 34-39) that the evidence does not establish that Grado's discriminatory conduct caused Peters' discharge. In making that argument, however, petitioner ignores the rule that, on a motion for summary judgment, all reasonable inferences must be drawn in favor of the non-moving party.

For example, petitioner argues (Br. 38) that there is no evidence that Grado would not have reported Peters to Edgar if he were not black. But a reasonable factfinder could conclude that, in light of Grado's decision

not to report an Hispanic worker who ignored an order to work on her day off, Pet. App. 11a, or another Hispanic worker who defied a direct order to contact Grado during the day, J.A. 36, 267-268, his decision to report his anticipation that Peters would refuse to work on his day off was motivated by Peters' race. That is particularly true in light of all the other evidence of Grado's racial bias. Pet. App. 23a-25a.

Similarly, petitioner argues (Br. 34-36) that there was no material difference between Grado's and Peters' version of events and that Grado's report therefore could not have caused Edgar's decision. But as the court of appeals concluded (Pet. App. 29a-30a), a reasonable factfinder could conclude that there were material differences, including Grado's statement that Peters planned to call in sick, and Grado's statement that Peters refused to tell him what his plans were and instead said that his plans were none of Grado's business. A reasonable factfinder could conclude that Grado fabricated or slanted those details and that he did so precisely because he believed that they would ultimately cause Edgar to discipline or discharge Peters. Indeed, as the court of appeals explained (*id.* at 30a), Edgar's own statements make clear that she viewed each of those statements as important, because she insisted that Grado find out why Peters did not want to work on his day off and denounced Peters' alleged plan to call in sick as an unacceptable deviation from company policy.

Petitioner also ignores the summary judgment standard when it argues (Br. 36) that the timing of when Grado informed Edgar that Peters had been given permission to miss work could not have caused Peters' termination because there is allegedly no evidence that Grado withheld this information from Edgar. In fact,

however, a reasonable factfinder could have concluded that he did withhold this information, both because a human resources official who participated at the meeting in which Peters was terminated seemed surprised when Peters told the group that he had been excused from work, Pet. App. 28a, and because common sense suggests that a human resource official like Edgar would not allow a termination notice to be delivered to an employee stating that the employee was terminated for not showing up for work (*id.* at 8a) if that official knew that the employee had permission not to work.

While Edgar indicated that she received the information that Peters' absence was excused before she made her decision, and that it did not affect her decision, Pet. App. 7a, a reasonable factfinder was not required to credit that statement. Instead, a reasonable factfinder could conclude that if Edgar had found out about the excused absence before Grado informed Peters that he was fired, she would have reconsidered and revoked her decision to fire Peters for failing to show up for work, but that once Peters was told he was fired, Edgar decided to defend the decision to avoid the suggestion that she should have done more to inquire into whether Peters' absence was excused before discharging him.

3. In sum, for present purposes, the EEOC presented more than sufficient evidence to permit a reasonable factfinder to conclude that Grado, acting with a racially discriminatory motive, exercised his delegated authority so as to cause Peters' termination. The court of appeals therefore correctly held that petitioner was not entitled to summary judgment on the EEOC's claim that petitioner discharged Peters because of his race and that, instead, further proceedings are necessary.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
GREGORY G. GARRE
Deputy Solicitor General
IRVING L. GORNSTEIN
Assistant to the Solicitor General

RONALD S. COOPER
General Counsel
LORRAINE C. DAVIS
Acting Associate General Counsel
SUSAN R. OXFORD
Attorney
Equal Employment Opportunity Commission

MARCH 2007