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Employment Law—Cat’s Paw Vicarious Liability Doctrine Imputes Discriminatory Intent of Non- Employee Student to Employer—Menaker v. Hofstra Univ., 935 F.3d 20 (2d Cir. 2019)

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**EMPLOYMENT LAW—CAT’S PAW VICARIOUS
LIABILITY DOCTRINE IMPUTES
DISCRIMINATORY INTENT OF NON-EMPLOYEE
STUDENT TO EMPLOYER—*MENAKER V.
HOFSTRA UNIV.*, 935 F.3D 20 (2D CIR. 2019).**

The “cat’s paw” doctrine derives its name from the seventeenth century fable about a deceitful monkey stealing chestnuts from a gullible cat.¹ Adopted to some degree in most federal circuit courts of appeals, this term is used in modern employment discrimination law to describe a legal theory whereby an employer may be held vicariously liable for the discriminatory bias of its subordinate.² The Supreme Court of the United States recognized that employers may be held vicariously liable for a supervisor’s discriminatory intent which causes adverse employment action against an employee; however, a circuit split still exists for the causation standard over the adverse employment decision that is necessary for an employee’s impermissible bias to be imputed onto the employer.³ In *Menaker v. Hofstra University*⁴, the Second Circuit reviewed a district court judgment, which dismissed an employee’s complaint that a private university was vicariously liable for discrimination after the university terminated the employee based on a student’s sexual harassment allegations. The Second Circuit vacated the district court’s ruling, remanded the case, and held that the discriminatory intent of a non-employee may be imputed to the employer if the employee presents a prima facie case that an adverse employ-

¹ See Crystal Jackson-Kaloz, *Cat Scratch Fever: The Spread of the Cat’s Paw Doctrine in the Second Circuit*, 67 CATH. U. L. REV. 410, 411 (2018) (defining cat’s paw).

² See Rachel Santoro, Comment, *Narrowing the Cat’s Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 824-25 (2009) (explaining theory and noting circuit split still exists).

³ See *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (holding that “if a supervisor performs an act motivated by [discriminatory] animus that is *intended* by the superior to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable . . .”); see also Bill Pipal & Jennifer K. Robbennolt, *Court Rules on ‘Cat’s Paw’ Theory of Discrimination*, AM. PSYCHOLOGICAL ASS’N (June 2011), <https://www.apa.org/monitor/2011/06/jn> (discussing context of Staub’s employment discrimination case).

⁴ See 935 F.3d 20, 26 (2d Cir. 2019) (explaining when an employer can be held vicariously liable in terminating an employee).

ment action was discriminatory, and all procedural requirements have been fulfilled.⁵

On January 15, 2016, Jeffrey Menaker joined Hofstra University as the Director of Tennis and head coach of the men's and women's varsity tennis teams.⁶ Michal Kaplan, a member of the women's varsity tennis team and a student at the university, approached Menaker, asked him about her scholarship, and stated that she received an oral promise from the previous head coach that she would receive a significant increase in scholarship money if she continued on the team.⁷ Menaker denied knowing anything about this oral promise, but offered to increase her scholarship during her junior and senior years.⁸ In July of 2016, Kaplan's lawyer sent Hofstra a letter alleging Menaker subjected Kaplan to "unwanted and unwarranted sexual harassment" and "quid pro quo threats [that] were severe, pervasive, hostile, and disgusting."⁹ Menaker denied the accusations in Kaplan's letter during a meeting with university personnel and provided copies of all communications with Kaplan to refute the claims against him.¹⁰ Although Menaker listed several names to the committee of potential witnesses who would provide information in the investigation, Hofstra never contacted them.¹¹ Menaker was subsequently fired for "unprofessional conduct" on September 7, 2016, and after submitting a claim of sex-based discrimination to the United States Equal Opportunity Commission, he filed suit against Hofstra on September 22, 2017, which alleged violations of Title VII of the Civil Rights Act, New York State's Human Rights Law, and the New York City Human Rights Law.¹²

⁵ See *id.* at 39-40 (discussing assignment of discriminatory intent between non-employee or employer).

⁶ See *id.* at 27 (stating Menaker's position at Hofstra).

⁷ See *id.* (describing promise). "Kaplan claimed that Menaker's predecessor had promised to increase her then 45 percent athletic scholarship to a full scholarship in the fall of 2016. Kaplan sought confirmation from Menaker about her scholarship increase . . ." *Id.*

⁸ See *id.* ("Menaker responded that he was unable to increase Kaplan's scholarship for the upcoming year (Kaplan's sophomore year) . . .") Kaplan's father also called Menaker on several occasions threatening that if his daughter's scholarship was not increased, that trouble would "come back to him." *Id.* at 27.

⁹ See *Menaker*, 935 F.3d at 27-28 (describing content of letter and allegations); see also Brief for Defendant-Appellee at 4, *Menaker v. Hofstra Univ.*, 953 F. 3d 20 (2d Cir. 2019) (No. 18-3089), 2019 WL 268473, at *4 (discussing instances of alleged inappropriate conduct).

¹⁰ See *Menaker*, 935 F.3d at 28 (describing Menaker's rebuttal of accusations). In May of 2016, during a phone call with Menaker, Kaplan's father threatened that if his daughter's scholarship was not increased, trouble would "come back to him." *Id.*

¹¹ See *id.* (describing Hofstra's short comings during investigation).

¹² See *id.* at 29 (introducing Menaker's suit against university); see also 42 U.S.C.A. § 2000e-2(a)(1) (West 1970) (prohibiting discrimination in employment situations based on "race, color, religion, sex, or national origin"); N.Y. EXEC. LAW § 296(1)(a) (1951) (outlawing employment discrimination to any individual based on protected class status including sex, disability

The United States District Court for the Eastern District of New York granted Hofstra's Rule 12(b)(6) motion and concluded that Menaker failed to plead sufficient facts supporting a plausible inference that his sex played a role in his termination.¹³ The United States Court of Appeals for the Second Circuit vacated the judgment and remanded the case, reasoning that the court's factual findings were contrary to *Doe v. Columbia University*, which outlined the pleading standard required to establish a prima facie case of sex discrimination against a university.¹⁴ In his complaint, Menaker also alleged that the discriminatory motivation and intent of Kaplan, a non-employee of the University, should be imputed to Hofstra.¹⁵ The Second Circuit held that under the cat's paw theory of liability, Kaplan's discriminatory intent could indeed be imputed to Hofstra, and that the University may therefore be liable for discrimination through its implementation of her intent in its adverse employment action against Menaker.¹⁶ The court held that Menaker adequately stated a claim of sex discrimination, and in doing so, effectively expanded the interpretation of the cat's paw doctrine in the Second Circuit to include imputing non-employees' discriminatory intent to the employer in an adverse employment action in violation of Title VII.¹⁷

The phrase "cat's paw" is derived from a seventeenth century tale in which a deceitful monkey convinces a cat to steal chestnuts so they can eat them together; however, when the gullible cat pulls out the last chestnut, he realizes the monkey already ate all the chestnuts, leaving the cat—that had taken all the risk—with no rewards.¹⁸ In 1990, Judge Richard Posner first used the term "cat's paw" in relation to employment discrimi-

etc.); N.Y.C. CODE § 8-101 (preventing discrimination in New York City against several protected classes including gender or sex).

¹³ See *Menaker*, 925 F.3d at 29 (discussing procedural history); see also FED. R. CIV. P. 12(b)(6) (allowing dismissal of motion for failure to state claim).

¹⁴ See *Menaker*, 935 F.3d at 33 (discussing reliance on precedent in *Doe v. Columbia*); see also *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016) (establishing prima facie case of sex discrimination cases used by Second Circuit).

¹⁵ See *Menaker*, 935 F.3d at 38 ("[S]o long as the agent intended and was the proximate cause of the adverse result, the [employer's] agent's discriminatory intent may be imputed to the employer under traditional agency principles.")

¹⁶ See *id.* at 37 (distinguishing vicarious liability from cat's paw doctrine). Vicarious liability requires that the plaintiff "establish (1) that *the employer's agent* (a) was motivated by the requisite discriminatory intent, and (b) effected the relevant adverse employment action; and (2) that the agent's conduct is imputable to the employer and under general agency principles." *Id.* While the "cat's paw" theory of liability is similar, it is distinguishable because only the intent of the agent is imputed onto the employer. *Id.*

¹⁷ See *id.* at 38 (imputing Kaplan's discriminatory intent onto Hofstra in its adverse employment action against Menaker).

¹⁸ See Jackson-Kaloz, *supra* note 1, at 410 (explaining historical origins of term).

nation as an analogy for situations in which an employer is held vicariously liable for the discriminatory biases of its employees and subordinates.¹⁹ The United States Supreme Court adopted the term to a limited degree where an adverse employment decision was influenced by a supervisor who possessed a discriminatory or retaliatory intent against an employee; however, the Court declined to consider whether the doctrine could be applied to decisions influenced by a co-worker.²⁰ There is no consensus among circuits in applying the cat's paw theory of liability to the discriminatory intent of a co-worker or of a non-employee, which influences the employer's decision in the adverse employment action.²¹

Title VII defines a supervisor in vicarious liability cases as an employee "empowered by the employer to take tangible employment actions against the victim."²² Under agency theory, a master is subject to liability for the torts of his servants committed while acting "within the scope of their employment."²³ This type of vicarious liability permits plaintiffs to

¹⁹ See *id.* at 412 (describing how "cat's paw" applies to employment discrimination law).

Today, the term "cat's paw" is regularly used in employment discrimination cases to refer to situations where an employee has been subjected to an adverse employment decision by his or her employer (the gullible cat)—who has no discriminatory or retaliatory bias—but who has been manipulated or influenced by a subordinate supervisor (the deceitful monkey) who does possess an impermissible discriminatory or retaliatory bias.

Id.; see also *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (presenting first decision where "cat's paw" concept of liability was incorporated into employment discrimination law).

²⁰ See *Staub v. Proctor Hosp.*, 562 U.S. 411, 415-16 (2011) (acknowledging origins of cat's paw term and Seventh Circuit's application of theory). "We express no view as to whether the employer would be liable if a co-worker, rather than a supervisor, committed a discriminatory act that influenced the ultimate employment decision." *Id.* at 422, n.4.

²¹ See Devin Muntz, *Extending the Cat's Paw Too Far into the Fire: Rejecting the Second Circuit's Extension of the Cat's Paw Theory of Liability to Co-worker Discriminatory and Retaliatory Animus*, U. CHI. LEGAL F. 709, 710 (2017) (explaining cat's paw circuit split).

Although the cat's paw theory of liability was an accepted doctrine among the circuit courts, a lack of uniformity with respect to: (1) the appropriate standard of causation to establish employer liability and (2) the level of employee on which a cat's paw claim could be premised, created a circuit split.

Id.

²² See *Vance v. Ball State Univ.*, 570 U.S. 421, 450 (2013) (defining supervisor in Title VII liability cases); see also RESTATEMENT (SECOND) OF AGENCY § 219(1) (outlining agency relationship as origin for vicarious liability in employment discrimination situations). An employer may be held liable for the torts or wrongdoings of an employee if those acts are "committed while acting within the scope of their employment." RESTATEMENT (SECOND) OF AGENCY § 219(1).

²³ See RESTATEMENT (SECOND) OF AGENCY § 228 (explaining what conduct is within scope of employment). Conduct is generally deemed to be within the scope of employment if:

successfully bring Title VII discrimination claims against employers, even if employers themselves did not have discriminatory intent under common law agency principles.²⁴ Title VII of the Civil Rights Act of 1964 states:

It shall be 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, color, religion, sex, or national origin . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin²⁵

Title VII seeks to avoid adverse employment actions brought by employees by reducing workplace discrimination and any retaliation that would likely follow for reporting any acts of discrimination.²⁶ Therefore, in accordance with both agency law and Title VII, an employer is subject to liability for discriminatory animus while acting within the scope of employment, and may even be subject to liability for acts outside the scope of

(a) it is one of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. at § 228 (1), (2); *see also* RESTATEMENT (SECOND) OF AGENCY § 219 (determining whether conduct is performed with purpose to serve master).

²⁴ *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 754 (1998) (citing agency principles as basis for imputed liability). “Congress has directed federal courts to interpret Title VII based on agency principles . . . We rely on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms.” *Id.* (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (citation and internal quotation marks omitted)). Such common law agency principles provide for liability in circumstances where “the servant . . . was aided in accomplishing the tort by the existence of the agency relation,” or where “the master was negligent or reckless.” *Id.* at 758 (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d)).

²⁵ *See* 42 U.S.C.A. § 2000e-2(a)-(b) (West 1970) (providing Title VII's prohibitive language against discrimination in employment setting based on protected class status).

²⁶ *See Jackson-Kaloz, supra* note 1, at 424 (stating purpose of Title VII).

employment if the employer is negligent or reckless in its actions or inactions.²⁷

Various circuits have different interpretations of how to apply the causation standard, or the level of influence over the adverse employment decision that is necessary for the bias to be imputed in cat's paw liability cases.²⁸ However, the Supreme Court has not definitively determined whether or not a cat's paw claim may be adequately pled for an adverse employment action caused by the bias of a low-level, non-supervisory employee or by a non-employee.²⁹ For example, in *Velázquez Perez v. Developers Diversified*, the First Circuit was the first court to impute discriminatory intent of a co-worker, rather than a supervisor, if that intent influenced the employer's adverse employment decision against the employee.³⁰ The Second Circuit expanded the scope of the cat's paw claim, and allowed

²⁷ See *id.* at 425 (noting how employer may still be held liable for employee's actions outside scope of employment); RESTATEMENT (SECOND) OF AGENCY § 219(2) (outlining employer liability).

A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: (a) the master intended the conduct or the consequences, or (b) the master was negligent or reckless, or (c) the conduct violated a non-delegable duty of the master, or (d) the servant purported to act . . . on behalf of the principal and there was reliance upon apparent authority.

RESTATEMENT (SECOND) OF AGENCY § 219(2); see also *EEOC v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476, 487-88 (10th Cir. 2006) (holding more than mere influence or input is required for causation); *Hill v. Lockheed Martin Logistics Mgmt.*, 354 F.3d 277, 289 (4th Cir. 2004) (noting standard where person must be supervisory employee and make actual decision of adverse employment).

²⁸ Compare *Rose v. N.Y.C. Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001) (highlighting instance where immediate supervisor had "enormous influence" in decision-making process), with *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (pointing to case following *Shager* where direct supervisor was in position to influence decision-maker), and *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (noting employer is only liable if employee's actions are in furtherance of business).

²⁹ See *Staub v. Proctor Hosp.*, 562 U.S. 411, 422 (2011) (declining to address whether low-level coworkers' discriminatory animus may be imputed onto employer).

³⁰ 753 F.3d 265, 267 (1st Cir. 2014) (showing cat's paw applicability when discriminatory intent comes from co-worker). *Velázquez* determined that an employer was not necessarily "absolve[d] . . . of potential liability for Velázquez's discharge" simply because Martinez was not his supervisor. *Id.* at 273.

[A]n employer can be liable under Title VII if: the plaintiff's co-worker makes statements maligning the plaintiff, for discriminatory reasons and with the intent to cause the plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be fired; and the employer acts negligently by allowing the co-worker's acts to achieve their desired effect though it knows (or reasonably should know) of the discriminatory motivation.

Id. at 274.

plaintiffs to bring actions if discriminatory intent came from any employee within the company regardless of their position.³¹

In *Menaker v. Hofstra University*, the court considered whether the discriminatory intent of a non-employee may be imputed onto an employer in a Title VII discrimination lawsuit where the employer is influenced by the intent and subsequently takes adverse employment action against an employee partially due to the non-employee's discriminatory intent.³² Menaker argued his pleadings should be analyzed under a "cat's paw" theory of liability where the intent of the non-employee may be imputed onto the employer if the non-employee "manipulates an employer into acting as a mere conduit for his retaliatory intent" and the intent was the proximate cause of the adverse employment action.³³ The Second Circuit vacated and remanded the district court's dismissal of Menaker's Title VII claim that the University discriminated against him based on sex after Menaker was fired in response to the sexual harassment allegations by a non-employee, student-athlete.³⁴ The court remanded the case to the district court for a further analysis of Hofstra University's potential liability under a "cat's paw" theory, and concluded that the lower court relied on improper factual findings in its decision.³⁵

The United States Court of Appeals for the Second Circuit properly held that the district court's dismissal of Menaker's Title VII claim based on sex discrimination was "erroneous and impermissible" because it relied upon improper factual assertions and did not conform with the formal procedure of Hofstra's Harassment Policy.³⁶ Menaker properly asserted a prima facie case of sex discrimination under Title VII by showing (1) he was within a protected class based on sex; (2) he was qualified for the position from which he was fired; (3) he was subject to adverse employment action through being fired; and (4) "the adverse employment action occurred under circumstances giving rise to an inference of discrimination."³⁷

³¹ See *id.* (imputing discriminatory intent to co-workers under cat's paw theory).

³² 935 F.3d 20, 39 (2d Cir. 2019) (outlining issue of case).

³³ See *id.* at 37-38 (internal quotation marks omitted) (citing *Velázquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267 (2d Cir. 2016)) (explaining how discriminatory intent of non-employee may be imputed onto employer).

³⁴ See *Menaker*, 935 F.3d at 26 (describing holding of case).

³⁵ See *id.* (outlining procedural history of case).

³⁶ See *id.* at 35 (describing improper analysis by district court). "The District Court sought to minimize or explain away these clear procedural irregularities. In doing so, however, it failed to draw all reasonable inferences in Menaker's favor and made improper findings of fact." *Id.*

³⁷ See *id.* at 30 (listing requirements for establishing prima facie case under Title VII); *Littlejohn v. City of New York*, 795 F.3d 297, 311 (2d Cir. 2015) (presenting elements for prima facie case of employment discrimination). To establish an inference of discrimination, a plaintiff must only establish facts that give "plausible support to a minimal inference of discriminatory

While there is no dispute as to the first three prongs of Menaker's prima facie case, the Second Circuit analyzed the fourth requirement of an "inference of discriminatory motive" and concluded that Menaker properly alleged at least minimal support for discriminatory motivation.³⁸ Additionally, there were many procedural irregularities in the University's improper application of the "Informal Procedure" of the Hofstra Harassment Policy as this procedure is applicable only when parties reach "a mutually agreeable solution[.]" which did not occur here.³⁹ Instead, the "Formal Procedure" of the school's Harassment Policy, which "requires that Hofstra interview potential witnesses, provide respondents the opportunity to submit a written response, and produce a written determination of reasonable cause," was applicable.⁴⁰ The district court failed to take into consideration the significant procedural irregularities in Hofstra's firing of Menaker, which suggested a presence of bias against Menaker and favor towards the female student.⁴¹

motivation." *Littlejohn*, 795 F.3d at 311; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (outlining additional elements for prima facie case). Once the plaintiff has properly pled a prima facie case of sex discrimination under Title VII, "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell*, 411 U.S. at 802. If the defendant establishes a legitimate, nondiscriminatory reason, the burden then shifts again back to the plaintiff for an opportunity to show that the defendant's stated reason was merely a pretext for discrimination. *McDonnell*, 411 U.S. at 804.

³⁸ See *Menaker*, 935 F.3d at 30-31 (explaining district court's failures in its conclusion).

³⁹ See *id.* at 35 (discussing "Formal Procedure" and "Informal Procedure" of Hofstra's Harassment Policy). The Hofstra Harassment Policy states:

[The Policy] "covers the conduct of all University employees and students" and outlines proper procedures for investigating and resolving harassment claims. . . [the Policy] provides for both an "informal" process for pursuing a "mutually agreeable" resolution and "formal" procedures . . . [including] requirements that Hofstra's investigator interview potential witnesses, that accused parties have the right to submit a written response, and that Hofstra's investigator produce a written determination of reasonable cause.

Id. at 28-29 (outlining Hofstra's "Harassment Policy"); see also *Menaker v. Hofstra Univ.*, No. 2:17-cv-5562, WL 4636818, at *4 (E.D.N.Y. Sept. 26, 2018) (citing App. 126, 128) (analyzing weakness in Menaker's arguments).

⁴⁰ See *Menaker*, 935 F.3d at 35 (distinguishing formal and informal procedures). Additionally, Menaker states he was officially fired for "unprofessional conduct" and not harassment explicitly. *Id.* at 35. Menaker argues he was merely fired for 'unprofessional conduct' as a pretextual front for Hofstra's underlying discriminatory action. *Id.* Furthermore, Menaker alleges Miller-Suber, Hofstra's Director of Human Resources, informed him he was terminated based on the "totality" of the circumstances and not just his "unprofessional conduct[.]" which suggested that there were other reasons for his termination. *Id.* at 36.

⁴¹ See *id.* at 35 (stating irregularity of district court's investigative and adjudicative process).

Furthermore, the Second Circuit concluded the district court erred in limiting *Doe v. Columbia*'s application for three main reasons.⁴² First, the Second Circuit rejected the district court's interpretation that the *Doe* logic applies only to plaintiffs accused of sexual assault, excluding plaintiffs accused of sexual harassment.⁴³ Next, the district court improperly limited *Doe*'s scope as applying only to Title IX claims, and thus only applied to claims brought by student plaintiffs, not employees.⁴⁴ Finally, the district court did not apply *Doe v. Columbia*, and incorrectly interpreted the precedent to apply only to cases where public pressure was "particularly acute" on a university.⁴⁵ The Second Circuit agreed that public pressure "does not automatically give rise to an inference that a male who is terminated because of allegations of inappropriate . . . conduct is the victim of [sex] discrimination[.]" but states that this does not mean the public pressure must reach a particular level of "severity."⁴⁶

The Second Circuit remanded the case for the district court to consider if Kaplan's discriminatory intent may be imputed onto Hofstra University through a "cat's paw" theory of vicarious liability.⁴⁷ To plead cat's paw liability in Title VII cases, a plaintiff must establish "(1) that *the employer's agent* (a) was motivated by the requisite discriminatory intent, and (b) effected the relevant adverse employment action; and (2) that the agent's conduct is imputable to the employer under general agency princi-

⁴² See *id.* at 32 (establishing three, unwarranted limitations on application of reasoning in *Doe*).

⁴³ See *id.* at 32 (highlighting district court's flaws in interpretation). The Second Circuit concludes that the logic in *Doe* to both sexual assault and harassment cases. *Id.* The court highlighted how the university's reaction to accusations of sexual misconduct are often influenced by the sexes of the parties in these matters. *Id.*

⁴⁴ See *id.* at 32 (discussing improper application of *Doe*). Precedent has long held that "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Id.* at 31 (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714-15 (2d Cir. 1994)) (discussing application and interpretation of Title IX); see also 20 U.S.C.A. § 1681 (a) (West 2020) (barring discrimination on basis of sex "under any educational program or activity receiving Federal financial assistance").

⁴⁵ See *Menaker*, 935 F.3d at 33 (rejecting district court's limitation of *Doe* to cases with heightened public pressure).

⁴⁶ See *id.* at 33 (explaining rationale for inference). "[W]hen combined with clear procedural irregularities in a university's response to allegations of sexual misconduct, even *minimal* evidence of pressure on the university to act based on invidious stereotypes will permit a plausible inference of sex discrimination." *Id.* at 33. The procedural irregularity alone already suggests an underlying bias so that just minimal presence of sex-based pressure on the university is sufficient. *Id.* at 31. The Second Circuit agrees that "[p]ress coverage of sexual assault at a university does not automatically give rise to an inference that a male who is terminated because of allegations of inappropriate or unprofessional conduct is the victim of [sex] discrimination." *Id.* at 33.

⁴⁷ See *id.* at 31 (instructing district court to consider cat's paw theory on remand).

ples.⁴⁸ While Kaplan's primary motive may have been financial, by virtue of the scholarship, it is likely that her accusations were partially motivated by Menaker's sex.⁴⁹ Kaplan's accusations alleged specifically *sexual* misconduct on the part of Menaker, which suggested that Menaker's sex was influential in her accusation, and allowed the Second Circuit to conclude that Kaplan's accusation must have been based partially on sex.⁵⁰ Secondly, Kaplan's discriminatory intent may be imputed onto Hofstra University under agency principals where the University exercised "a high degree of control" over its athletes' behaviors.⁵¹ Thus, as Hofstra exercises a "high degree of control" over Kaplan's behavior because she is a student-athlete, her discriminatory intent may be imputed to the university because it negligently acted on her discriminatory motive in the adverse employment action they took against Menaker.⁵²

The cat's paw theory of liability may be utilized based on the discriminatory intent of not only supervisors and co-workers, but also to students, if the university exercises control over them. In *Menaker*, the Second Circuit expanded the liability doctrine to apply in situations where a university uses discriminatory animus of a student in an adverse employment action against the employee as a proximate result of that complaint.

⁴⁸ See *id.* at 37 (listing requirements for prima facie case under cat's paw liability). Cat's paw liability differs from vicarious liability because only the intent of the agent in a cat's paw case is imputed onto the employer. *Id.* The cat's paw theory applies if the agent (1) had discriminatory intent and (2) if the agent was the proximate cause to the adverse employment action on the plaintiff. *Id.* at 38.

⁴⁹ See *id.* 39 ("Title VII requires that we look beyond primary motivations . . . courts must determine whether sex was a motivating factor, i.e., whether an adverse employment action was based, even 'in part,' on sex discrimination.")

⁵⁰ See *id.* (concluding rational fact finder could infer Kaplan's accusation based in part on sex); see also *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998) (discussing sexual harassment discrimination and influence of sex). Courts have historically found an inference of discrimination in male-female sexual harassment cases where the questionable actions involve rhetoric about sexual activity. *Oncale*, 523 U.S. at 80. In these situations, an inference of discrimination is drawn because it is unlikely the same sexual proposals and comments would have been made to someone of the speaker's sex. *Oncale*, 523 U.S. at 80.

⁵¹ See *Summa v. Hofstra Univ.*, 708 F.3d 115, 124 (2d Cir. 2013) (stating conduct may be imputed if university exercises "high degree of control" over its students). The *Summa* court states that a plaintiff must show that the employer "failed to provide a reasonable avenue for complaint or that it knew, or in the exercise of reasonable care should have known, about the harassment, yet failed to take appropriate remedial action." *Id.* (citing *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009)) (internal quotation marks omitted).

⁵² See *Menaker*, 935 F.3d at 39 (discussing reasoning for imputation of intent onto employer). Hofstra controlled Kaplan's academics, her athletic scholarship, and the process through which she brought her initial complaint. *Id.* Additionally, in terminating Menaker, the University specifically acknowledged and referred to Kaplan's accusations: it stated that she "played a meaningful role in the decision." *Id.* Therefore, because Hofstra negligently or recklessly acted on Kaplan's accusations and implemented her "discriminatory design" Kaplan's discriminatory intent may be imputed to Hofstra University. *Id.*

It is arguable that the Second Circuit's expansion of this doctrine to students is adverse to the *Doe* decision, where the Supreme Court both declined to create a bright-line rule for investigations and to expand the theory of liability to apply to co-workers. However, the *Menaker* decision is proper because it is consistent with the purpose of Title VII: "to avoid harm to employees by ridding the workplace of discrimination and any retaliation that may follow for reporting acts of discrimination."⁵³ While there still is an emerging circuit split that will require resolution, the Second Circuit in *Menaker* has not contravened Supreme Court precedent. Rather, the court has instead followed its own interpretation of the cat's paw theory of liability.

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⁵³ See Jackson-Kaloz, *supra* note 1, at 424 (discussing purpose of Title VII).