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### ON MACAWS AND EMPLOYER LIABILITY: A RESPONSE TO PROFESSOR ZATZ

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Response to: Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357 (2009).

Noah Zatz's article, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*,<sup>1</sup> is a brilliant addition to an important line of scholarship bringing accommodation requirements into the fold of antidiscrimination law. Using the colorful hypothetical of the harassing macaw first introduced by Judge Easterbrook in *Dunn v. Washington County Hospital*,<sup>2</sup> Zatz deftly shows that in cases of third-party harassment employers must do more than merely treat their employees equally; they must affirmatively protect against harassment. Requiring employers to protect their employees from third-party harassment—a position that is uniformly accepted—is like requiring an accommodation—a position that continues to be highly contested. In both cases, the employer must avoid or correct a workplace harm that would have been caused by an individual's membership in a protected group, and, in both cases, the employer bears this responsibility even if none of its agents has treated individuals differently based on their protected group status.

Despite the importance of this contribution, I find myself much less willing than Zatz to believe that a harasser in the workplace is ever like the hypothetical macaw. Workplace harassers, after all, act within an organizational context created by the employer, and their victims are treated differently at work on the basis of a protected characteristic. In

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1. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 Colum. L. Rev. 1357 (2009).

2. 429 F.3d 689, 691 (7th Cir. 2005) (“Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw . . .”).

my view, these realities place third-party harassment much closer to what Zatz calls “internal” membership causation than a biased police stop that results in a subsequent work-related harm, or a construction drawing that omits ramps and elevators from a work site.<sup>3</sup> Indeed, I am deeply troubled by Zatz’s vague definition of internal causation (which he equates with disparate treatment) as turning on whether the employee’s protected trait entered the causal chain “through the employer’s own decisionmaking process.”<sup>4</sup> This seems to me far too narrow an understanding of the employer’s role in the biased treatment of women and minorities at work.

For purposes of this brief Response, however, I will leave my concerns about the precise contours of the distinction between internal and external membership causation mostly to the side. Instead, I want to probe the role of agency principles in employment discrimination law. The distinction between direct and vicarious employer liability for discrimination has been under-analyzed, and this lack of attention, I think, leads Zatz to overstate the applicability of his account—to suggest that it can be used to determine the full extent of an employer’s liability for actions by its agents. In doing so, Zatz puts the future of individual disparate treatment law at risk. He opens individual disparate treatment law to considerations of employer “notice” and “feasibility” where it has traditionally imposed strict liability.

#### I. OVERSTATING THE ACCOUNT: DIRECT AND VICARIOUS LIABILITY

Zatz is on firm footing when he compares cases that require employers to prevent and correct third-party harassment to cases that require employers to accommodate disabilities, pregnancy, or acts of religious observance.<sup>5</sup> The law in all of these cases requires the employer to protect against workplace harms caused by membership in a protected group but resulting from acts of individuals or groups that are not agents of the employer, or by circumstances outside of the employment relationship (e.g., by a woman’s pregnancy or a person’s religious observance). The employer cannot turn a blind eye to the work-related harm caused by an individual’s membership in a protected group on the ground that none of its agents discriminated. Zatz is on shaky footing, however, when he extends his account to subordinate bias cases,<sup>6</sup> for those cases involve biased decisions made by agents of the employer, and they are therefore cases that trigger employer vicarious liability, as well as the possibility of direct liability.

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3. See generally Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 *Vand. L. Rev.* 849 (2007) (objecting to position that there is no fundamental normative difference between antidiscrimination and accommodation mandates and distinguishing the two based on whether costs are imposed for employer wrongs in workplace).

4. Zatz, *supra* note 1, at 1377.

5. *Id.* at 1386–406.

6. *Id.* at 1422–27.

A. *Direct and Vicarious Liability Under Title VII*

Title VII attaches liability to employers for their own acts of discrimination and for the discriminatory acts of their “agents.”<sup>7</sup> When an employer adopts an express policy of discrimination, liability attaches under the former theory. The employer is directly liable for its discriminatory policies. In cases of individual disparate treatment, in contrast, liability typically attaches under the latter, indirect theory. A manager denies a female worker a promotion because she is a woman. A human resources officer declines to hire a black man because he is black. Title VII holds the employer, not the manager or the human resources officer, responsible for the discriminatory decisions in these cases; furthermore, it does so regardless of the precautions taken by the employer to prevent those discriminatory decisions and regardless of the employer’s policies concerning discrimination (regardless, in other words, of whether the employer would be held directly liable). The employer can, of course, be held both directly and vicariously liable for the same action. Think, for example, of an employer who is vicariously liable for the tortious acts of its employee; it may also be directly liable for negligent hiring of that employee. Similarly, an employer might be both directly and vicariously liable for a hiring decision made by a human resources officer who has no policymaking power within the company but who declines to hire a black man pursuant to company policy against hiring blacks.

As Zatz explains, third-party harasser cases, unlike, say, harassment by a supervisor, involve only direct employer liability.<sup>8</sup> The third-party harasser is not considered an “agent” of the employer under principles of respondeat superior.<sup>9</sup> To impose liability, then, the law must find a more primary route to the employer. The same is true of the other third-party examples that Zatz identifies: discriminatory customer preference, discriminatory requests for employee removal made to a temporary services agency, and an insurer’s discriminatory policy.<sup>10</sup> Courts have found employer liability in these cases through negligence, a theory of direct liability. The employer is liable for its failure to take action to correct and prevent discrimination by non-agents of which it

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7. 42 U.S.C. § 2000e(b) (2006) (defining “employer” to mean “a person engaged in an industry affecting commerce . . . and any agent of such a person”).

8. Zatz, *supra* note 1, at 1380–82. This “direct” entity liability for negligence might sometimes be understood as a form of vicarious liability for the action of a high-level decisionmaker, but the inquiry in these cases focuses on the entity’s knowledge and action, as controlled by high-level decisionmakers, rather than on the knowledge and action of the employee who engaged in the tortious act.

9. Although courts have not imposed vicarious liability on employers for third-party harassers, they have imposed vicarious liability in similar circumstances in other contexts. See, e.g., *Sword v. NKC Hosps., Inc.*, 714 N.E.2d 142, 150 (Ind. 1999) (describing “ongoing movement by courts to use apparent or ostensible agency as a means by which to hold hospitals vicariously liable for the negligence of some independent contractor physicians”).

10. Zatz, *supra* note 1, at 1416–22.

knows or should have known.

The accommodation cases also are typically analyzed as cases of primary liability—and this is the way that Zatz analyzes them. These cases are understood as cases of primary liability because the individual decisionmaker, the person who denies the accommodation upon request by the individual with a disability, is assumed to have acted in line with company policy. Moreover, the difficult question in these cases is one of primary employer responsibility: Should employers be expected to adopt policies of accommodation?

Zatz places subordinate bias cases in the company of the third-party harasser and accommodation cases.<sup>11</sup> He is right that in determining the scope of primary employer liability we can and should ask whether and to what extent employers should be expected to prevent discriminatory employment decisions from occurring. But, unlike the cases of third-party harassment and accommodation, the subordinate bias cases involve biased acts by agents of the employer. This means that both vicarious liability and direct liability are potentially in play. In Zatz's view, as courts struggle to develop a coherent doctrine for resolving cases of subordinate bias, they "are debating the extent of an employer's responsibility to insulate its decisions from influences traceable to an employee's race or sex";<sup>12</sup> they are deciding the contours, in other words, of the employer's primary or direct liability for harm incurred because of biased actions of subordinate decisionmakers. In the next section, I show that these cases are better understood as vicarious liability cases. They are cases in which courts hold (or do not hold) the employer liable for the biased acts of its agents. To the extent that courts or commentators see these cases as only involving direct liability, they erroneously eliminate a longstanding form of employer liability.

#### B. *Subordinate Bias Cases: Delayed Action and Multiple Decisionmakers*

As Zatz explains, the prototypical case of subordinate bias is one where a middle manager receives a report of employee misconduct from a subordinate who acted with discriminatory intent in writing and submitting the report.<sup>13</sup> The report prompts the manager to review the entire personnel file of the employee. After conducting the full-file review, the manager, who does not consider (and may not even know) the employee's race, decides to discharge the employee.

Similar cases can involve numerous variations on these facts, including variations that do not involve biased decisionmaking by a subordinate of the ultimate decisionmaker. An immediate supervisor of an employee might give an unduly negative, racially biased annual review of that employee, and another supervisor might later deny the employee a promotion based on the discriminatory review. Or an immediate

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11. *Id.* at 1415.

12. *Id.* at 1426.

13. *Id.* at 1422–23.

supervisor might assign an employee to a particular task based on the employee's race, and another supervisor might later discharge the employee based on the employee's poor performance of that task.

Cases like these raise several doctrinal difficulties for courts. Because the initial discriminatory act—the one that involved discriminatory bias—cannot be immediately challenged under Title VII,<sup>14</sup> there is a delay between the biased decision and the adverse employment action challenged by the plaintiff. That delay can raise complex statute of limitations issues.

But the real detail vexing courts in these cases is the presence of multiple decisionmakers: An initial, biased decisionmaker sets the wheels in motion, and a second, unbiased one takes the adverse action challenged by the plaintiff. Notice that each of these decisionmakers serves as an agent of the employer,<sup>15</sup> and if the initial decisionmaker who acted on his or her discriminatory bias had taken action sufficient to meet the “adverse employment action” requirement, few would question the employer's liability. The employer is vicariously liable in this instance for the discriminatory action of its agent. Statute of limitations issues aside, the same should be true if all that transpires between the initial discriminatory action and the adverse employment action is delay. For example, if a manager later relies wholly and exclusively on a subordinate's discriminatory review of an employee in firing that employee, then the employer should be vicariously liable for that action.

The addition of a second actor complicates this analysis only because events subsequent to the initial discriminatory action, whether those events are brought about by another agent of the employer or by the victim of the initially biased decision herself, can attenuate the causal connection between the initial discriminatory act and the adverse employment action. For example, if, based on an initial discriminatory performance evaluation by an immediate supervisor, a manager undertakes an in-depth review of the employee's entire history of job performance and decides to discharge the employee based on that in-depth review, then we might be less certain that the discriminatory evaluation was a sufficiently immediate cause of the adverse employment

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14. Most courts require an “adverse employment action” before a discriminatory decision can be challenged under Title VII, and many courts define an adverse employment action as one that involves a material, economic change, such as a hiring, promotion, or discharge decision. See, e.g., *Minor v. Centocor, Inc.*, 457 F.3d 632, 634 (7th Cir. 2006) (defining adverse employment action as involving material difference in terms and conditions of employment).

15. The initial decisionmaker, by providing an evaluation or allocating job duties, is likely to have acted within the scope of employment or to have been aided in the agency relation. The individual who engages in these acts “brings the official power of the enterprise to bear on subordinates.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761–62 (1998); see also *id.* at 762 (“The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.”). Even if the initial decisionmaker is a coworker, the official company act involved in subordinate bias cases distinguishes those cases from cases involving coworker harassment. See *id.*

action, even as we accept that it was a but-for cause of the action. Similarly, when an employee is discriminatorily assigned a job and then fails to perform that job adequately (assuming that the job duties are not discriminatorily stacked against the employee), and the employee is fired for lack of job performance, the causal nexus between the discriminatory decision and the adverse employment action becomes attenuated, even as but-for causation remains.

I do not attempt here to resolve the question of whether the employer should be liable in these cases.<sup>16</sup> Instead, I want to highlight that the issue being debated is really one of causation with respect to an individual decision—much like the debate that took center stage between Justice Brennan and Justice O'Connor in *Price Waterhouse v. Hopkins* and was addressed by Congress in the 1991 Civil Rights Act<sup>17</sup>—rather than one of shaping the employer's primary liability or, as Zatz frames it, “the extent of an employer's responsibility to insulate its decisions from influences traceable to an employee's race or sex.”<sup>18</sup> If the employer is held liable for the adverse employment action in these cases, it is being held vicariously liable for the actions of its agents.

It is possible, of course, to imagine a direct liability inquiry in these cases. But this is not the inquiry undertaken by most courts. Few cases, for example, turn on whether the *employer* knew about the biased action and/or whether the *employer* had put in place sufficient review processes to insulate promotion and discharge decisions from biased performance

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16. There is a strong argument that the employer should be liable upon the plaintiff's showing that his or her protected characteristic was a “motivating factor” in the ultimate decision, both because that is what is required by the Civil Rights Act of 1991 § 703(m), 42 U.S.C. § 2000e-2(m) (2006), and because the existence of an “independent investigation” as a test for attenuated causation is so indeterminate that it can be used to limit liability in almost all cases. At the very least, we should expect a defendant's showing that it would have taken the same adverse action had the initial biased decision been unbiased, or that the causal connection is otherwise too attenuated, to affect only the boundaries of remedial relief and not the liability determination. Cf. *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 354 (1995) (considering effect on plaintiff's claim of after-acquired evidence that would support same employment decision).

17. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (Brennan, J.) (arguing that “the plaintiff who shows that an impermissible motive played a motivating part in an adverse employment decision has thereby placed upon the defendant the burden to show that it would have made the same decision in the absence of the unlawful motive”); *id.* at 265–66 (O'Connor, J., concurring) (arguing that only when plaintiff has shown “the illegitimate criterion was a substantial factor in an adverse employment action” will burden shift to defendant to show it would have made same decision anyway); see also 42 U.S.C. § 2000e-2(m) (superseding *Price Waterhouse* and stating liability is established if plaintiff demonstrates that protected factor was “a motivating factor for any employment practice”); *id.* § 2000e-5(g)(2)(B) (stating plaintiff's remedies are limited if defendant demonstrates it would have “taken the same action in the absence of the impermissible motivating factor”). The issue is like the one debated in *Price Waterhouse*, and resolved in the CRA of 1991, because it is about whether a particular decision was caused by discriminatory bias; it is also different because it is about the substantiality of discriminatory bias as a cause rather than about whether discriminatory bias was a but-for cause.

18. Zatz, *supra* note 1, at 1426.

reviews.<sup>19</sup> And, even if some courts do undertake such an inquiry, they are wrong to do so unless they also understand that direct liability is an alternative to vicarious liability. If they instead seek to reframe the plaintiff's claim from vicarious to direct liability, they substantially overreach and fundamentally alter the law of employment discrimination.

## II. WHY OVERSTATING THE ACCOUNT MATTERS

Failure to distinguish between direct and vicarious liability risks setting up employment discrimination law for dramatic substantive change. If existing vicarious liability is reshaped as direct liability, particularly a duty-based direct liability that turns on considerations of employer notice and feasibility,<sup>20</sup> many individual instances of discrimination will go unaddressed. This risk extends far beyond subordinate bias or other delayed action cases to include all individual decisions that are motivated by bias but that are considered, as Zatz would put it, “external” to the employer or not entering the causal chain “through the employer’s own decisionmaking process.”<sup>21</sup>

Zatz suggests that “‘structural discrimination,’ in which systemic workplace practices facilitate repeated acts of individual disparate treatment” might fall in this category.<sup>22</sup> He thinks this presumably because he sees actions based on unconscious biases as deriving entirely from social forces outside of work rather than, at least in part, from factors within the workplace. If he is right, then even decisions motivated by animus or conscious stereotypes—once considered the paradigmatic case of discrimination for which employers would be liable—might be considered “external” to the employer, and the employer will be held liable only if it failed to exercise reasonable care to prevent or correct known acts of discrimination.<sup>23</sup>

The idea that employer liability should be limited by considerations of employer notice, feasibility, and the state of mind of upper-level managers who set company policy is not new. Employers have been making this argument in various permutations for decades.<sup>24</sup> Extending

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19. Although courts use the term “employer,” see, e.g., EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 488 (10th Cir. 2006) (“[A]n employer can avoid liability by conducting an independent investigation of the allegations against an employee.”), the inquiry focuses on the factual question of whether an independent investigation purged the decision of bias rather than on whether the *employer* established sufficient safeguards against bias.

20. See Zatz, *supra* note 1, at 1403 (identifying “[n]otice and cost” as “leading considerations” in coupling membership causation to employer responsibility); see also *id.* at 1415 (“[C]ountervailing considerations involve notice and feasibility . . .”).

21. *Id.* at 1377.

22. *Id.* at 1427 n.270.

23. This is also part of the danger of Zatz’s vague, seemingly narrow definition of “internal membership causation.” See *supra* note 4 and accompanying text.

24. See, e.g., *Slack v. Havens*, No. 72-59-GT, 1973 WL 339 (S.D. Cal. May 15, 1973), *aff’d* as modified, 522 F.2d 1091 (9th Cir. 1975). The defendant in *Price Waterhouse v.*

the question of primary employer obligation into the realm of actions taken by agents of the employer simply breathes new life into the argument that courts have long rejected. It opens the door for courts to cut back on vicarious liability through reframing the inquiry as one of direct liability.

One final point, with which I think Zatz would agree but about which he is not entirely clear: Negligence is not the only or even necessarily the best possible standard for employer direct liability. In the individual context—where Zatz focuses his analysis—it might make sense to adopt a negligence-type theory because these cases will involve individual acts of discrimination. We might ask, “If the employer is not strictly liable for this individual’s act, how else might the entity be liable for this situation? Maybe for failure to monitor, failure to prevent, or failure to correct that individual’s behavior?” This inquiry might naturally involve considerations of employer notice about the individual’s behavior. But Title VII is not exhausted by individual disparate treatment; it also encompasses systemic theories, including patterns and practices of discrimination. In the systemic context, it is particularly important to recognize that direct liability need not hinge on notice or the reasonableness of employer efforts, or even the state of mind of high-level managers. In a current project, I examine these issues as they pertain to pattern or practice claims.<sup>25</sup> It is my contention that the pattern or practice claim is not based on vicarious liability, nor is it founded in negligence; it holds employers directly liable for producing employment discrimination.

### CONCLUSION

*Managing the Macaw* is an important article. It forges analytical connections between disparate treatment and disparate impact theories of discrimination without requiring group harm, and it pushes us to think more carefully about the bases of employer liability available under Title VII. My concerns with the article—although deeply troubling—lie more at the edges than at the core of Zatz’s argument. I agree with him that the questions of whether an employer should be expected to police third-party harassment and whether it should be expected to provide accommodation are fundamentally similar. The questions are not, however, identical, particularly taking into account the fact that the

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*Hopkins* made a similar argument. It argued that it could not be liable under Title VII for its partners’ biased reviews of the plaintiff because members of the Policy Board, the final decisionmaking body that relied on the reviews in voting on the plaintiff’s candidacy, did not act with purpose to discriminate. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 468 (D.C. Cir. 1987) (“Price Waterhouse . . . contends that Hopkins did not prove ‘intentional’ discrimination on the part of the Policy Board, but only ‘unconscious’ sex stereotyping by unidentified partners who participated in the selection process.”).

25. Tristin K. Green, *Discrimination, Asbestos, and Guns: Dangerous Analogies and the Future of Employer Liability for Patterns and Practices of Discrimination* (unpublished working draft on file with author).



third-party harasser acts within an organizational context created by the employer, while the biased police officer making a police stop, for example, does not. This issue of whether third-party harassment involves “external” or “internal” membership causation I leave to another day. The danger explored in this Response is of another kind and extends beyond the distinction between internal and external causation; the danger is that courts and commentators will assume that resolution of this issue determines the full extent of employer liability, even in cases in which employers have long been held strictly liable under a theory of respondeat superior. I think Zatz is likely to agree with me in this regard. We—commentators, courts, legislators, and litigators—must be careful to distinguish between the two forms of employer liability and to recognize when one or another, or both, are applicable.

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