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2 **UNITED STATES COURT OF APPEALS**  
3 **FOR THE SECOND CIRCUIT**  
4

5 August Term, 2015

6  
7 (Argued: April 27, 2016 Decided: August 29, 2016)

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9 Docket No. 15-3239-cv  
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11 ANDREA VASQUEZ,

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13 *Plaintiff-Appellant,*

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15 - v. -

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17 EMPRESS AMBULANCE SERVICE, INC.,

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19 *Defendant-Appellee,*

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21 TYRELL GRAY, individually,

22  
23 *Defendant.*  
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28 Before: WALKER, CALABRESI, and HALL, *Circuit Judges.*  
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30 Plaintiff Andrea Vasquez, an emergency medical technician working for Empress  
31 Ambulance Service, Inc. (“Empress”), was subjected to unwanted sexual overtures by  
32 another Empress employee while on the job. Vasquez promptly complained of her co-  
33 worker’s conduct and was assured by supervisors that her complaint would be  
34 investigated. That investigation, however, consisted of Empress crediting false documents  
35 manufactured by Vasquez’s co-worker that purported to show Vasquez’s eager assent to a  
36 sexual relationship and refusing to consider further contradictory evidence. In reliance on  
37 these documents, Empress fired Vasquez. Vasquez subsequently filed suit in the Southern  
38 District of New York, alleging that Empress had retaliated against her in violation of Title  
39 VII and New York State Human Rights Law. The District Court (Buchwald, J.) dismissed  
40 the case, holding that the retaliatory intent of Vasquez’s co-worker, a low-level employee,  
41 could not be imputed to Empress and that Empress consequently could not have engaged  
42 in retaliation. We conclude, however, that agency principles permit the retaliatory intent of  
43 Vasquez’s co-worker to be imputed, as a result of Empress’s alleged negligence, to Empress.

1 Accordingly, we vacate the judgment of the district court and remand for further  
2 proceedings.

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4 CASEY WOLNOWSKI, Phillips & Associates, New  
5 York, NY, *for Plaintiff-Appellant*

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7 DEBRA LYNNE WABNIK, Stagg, Terenzi, Confusione  
8 & Wabnik, LLP, Garden City, NY, *for Defendant-Appellee*

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11 CALABRESI, *Circuit Judge*:

12 In the space of twenty-four hours, Andrea Vasquez faced unwelcome sexual  
13 advances in the workplace, complained about that conduct to her employer, and lost her  
14 job. After receiving unsolicited sexual photographs from a co-worker one night shift,  
15 Vasquez promptly informed her supervisor and filed a formal complaint of sexual  
16 harassment, which her employer promised to investigate that same morning. Within a few  
17 hours, however, Vasquez’s co-worker had discovered her complaint and had provided the  
18 employer with false documents purporting to show Vasquez’s consent to and solicitation of  
19 a sexual relationship. In reliance on those documents, and notwithstanding Vasquez’s  
20 offers to produce evidence in refutation, Vasquez’s employer immediately fired her on the  
21 ground that *she* had engaged in sexual harassment. Vasquez consequently brought suit  
22 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (“Title VII”), and  
23 New York State Human Rights Law, N.Y. Exec. Law § 290 *et seq.* (“NYSHRL”), alleging that  
24 she was wrongfully terminated in retaliation for complaining of sexual harassment. The  
25 district court dismissed Vasquez’s claims, holding that Vasquez’s employer could not have  
26 engaged in retaliation because it could not be held responsible for the retaliatory animus of  
27 Vasquez’s co-worker, a low-level employee with no decisionmaking authority. We hold,  
28 however, that an employee’s retaliatory intent may be imputed to an employer where, as

1 alleged here, the employer’s own negligence gives effect to the employee’s retaliatory  
2 animus and causes the victim to suffer an adverse employment decision. As a result, we  
3 vacate the court’s decision and remand for further proceedings.

4 **BACKGROUND<sup>1</sup>**

5 In July 2013, Andrea Vasquez was hired by Empress Ambulance Service, Inc.  
6 (“Empress”) to work as an emergency medical technician on an ambulance crew. In  
7 October of that year, Vasquez met Tyrell Gray, who worked for Empress as a dispatcher  
8 and who almost immediately began making romantic overtures to Vasquez. Over the  
9 course of their acquaintance, Gray “constantly asked [Vasquez] out on dates,” “attempted  
10 to flirt with her,” and “repeatedly . . . put his arm around her or touched her shoulders,”  
11 causing Vasquez “to be extremely uncomfortable” as she tried to reject his advances. App’x  
12 9.

13 This conduct came to a head in January 2014. On January 8, while Vasquez and  
14 Gray both worked in Empress’s office, Gray approached Vasquez, placed his arm around  
15 her, and asked “When are you going to let me take you out?” App’x 9. When Vasquez  
16 replied that she had a boyfriend and was not interested in a romantic relationship, Gray  
17 insisted that “I bet I can make you leave your man” and promised to “send . . . something  
18 between you and me.” App’x 9. Around midnight that night, while out on shift, Vasquez  
19 received a picture message from Gray: a photograph of his erect penis, captioned “Wat u  
20 think.” App’x 9-10. Vasquez did not respond to this message or to a follow-up text  
21 message from Gray as she continued her work. When Vasquez returned to the office at the

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<sup>1</sup> Because this appeal involves review at the motion to dismiss stage, we base this factual background on the allegations contained in Vasquez’s complaint, which we assume to be true. See *Littlejohn v. City of New York*, 795 F.3d 297, 303 n.1 (2d Cir. 2015).

1 conclusion of her shift, however, she was “extremely embarrassed, distraught, and crying.”  
2 App’x 10. And she promptly informed an Empress field supervisor about Gray’s conduct.  
3 Promising that “[w]e’re going to deal with this,” the supervisor walked Vasquez to a  
4 computer in Empress’s office and asked that she compose and send a formal complaint  
5 right away, which Vasquez began to do. App’x 10.

6 As Vasquez was writing her complaint, however, Gray entered the room “to see a  
7 visually distressed [Vasquez] crying and typing at the computer.” App’x 10. Gray,  
8 “noticeably nervous,” asked Vasquez “if she was ok” and, after Vasquez declined to engage  
9 his attempts at conversation, stated, “You’re reporting me, right?” App’x 10. Gray then  
10 went out of the room and ran into another emergency medical technician, Almairis Zapata,  
11 with whom he began discussing Vasquez’s likely complaint. He asked Zapata, as “a favor,”  
12 because he was “afraid he was going to lose his job,” to “lie for [him]” and tell their  
13 supervisors that Vasquez and Gray had been in a romantic relationship.” App’x 11. Zapata  
14 refused, and Gray left the building.

15 After Gray’s departure, Vasquez finished writing her complaint, in which she  
16 explained that she felt “violated” and “disrespected” as a result of Gray’s behavior. She  
17 then waited in Empress’s office until Sheri Baia, one of her supervisors, and Elizabeth  
18 Shepard, a member of the human resources department, arrived to discuss what had  
19 happened. The supervisors thanked Vasquez for “telling [her] story,” assured her that  
20 “[w]e don’t tolerate this sort of behavior here,” and promised to “sort the situation out.”  
21 App’x 12. To aid in their investigation, Vasquez offered to show the supervisors Gray’s  
22 messages on her cell phone, but they rejected her offer. They then asked Vasquez whether

1 she preferred to go home or to wait in the office while they investigated the incident that  
2 morning, and Vasquez elected to wait.

3 Gray, meanwhile, had not finished seeking to undermine the accusations he  
4 anticipated from Vasquez. Rather, in the intervening hours, Gray “manipulated a text  
5 message conversation on his iPhone to make it appear as though a person with whom he  
6 had legitimately been engaging in consensually sexual text banter was [Vasquez].” App’x  
7 12. He then “took screen shots of portions of the conversation, printed them off,” and  
8 “presented it to the management” of Empress as evidence that he and Vasquez had been in  
9 a consensual sexual relationship. App’x 12.

10 By the time Vasquez met with a committee of her union representative, Empress’s  
11 owner, and Shepard to discuss the incident later that morning, the committee had already  
12 considered Gray’s documents and had concluded that Vasquez was “having an  
13 inappropriate sexual relationship” with Gray. App’x 13. Shepard informed Vasquez that  
14 Empress “kn[e]w the truth,” as they had spoken with Gray and had seen his “proof” of her  
15 improper conduct by means of “pictures and text messages.” App’x 13. In particular,  
16 Shepard reported that Gray had shown them “a racy self-taken photo” that Vasquez had  
17 allegedly sent in response to Gray’s explicit picture message, which they considered “proof  
18 that [Vasquez] had been sexually harassing [Gray].” App’x 13. Vasquez “adamantly  
19 denied” Shepard’s allegations and asserted that Gray was lying, but Shepard insisted that  
20 “the committee had all seen the photograph” and “kn[ew] it was [her in the photo].” App’x  
21 13. She made this assertion even though, in fact, the photo depicted only “a small fraction  
22 of a face” that could “by no means [be] concluded to be that of [Vasquez].” App’x 13.  
23 When Vasquez asked to see the photograph, moreover, Shepard refused. Likewise, when

1 Vasquez again offered again to show the committee her own cell phone, in an attempt to  
2 prove that no such messaging had occurred, the committee declined. They then fired  
3 Vasquez for engaging in sexual harassment.

4 Vasquez subsequently brought suit against Empress<sup>2</sup> under Title VII and NYSHRL,  
5 claiming that Empress had wrongfully terminated her in retaliation for complaining of  
6 sexual harassment. Empress moved to dismiss Vasquez’s complaint for failure to state a  
7 claim under Fed. R. Civ. P. 12(b)(6) and the district court (Buchwald, J.) granted the motion,  
8 holding that Gray’s retaliatory intent could not be attributed to Empress and that, therefore,  
9 Empress could not have engaged in retaliation against Vasquez. Vasquez now appeals.

#### 10 DISCUSSION

11 We review *de novo* a district court’s grant of a motion to dismiss under Rule 12(b)(6),  
12 accepting as true all factual allegations contained in the complaint and drawing all  
13 inferences in the plaintiff’s favor. *Littlejohn v. City of New York*, 795 F.3d 297, 306 (2d Cir.  
14 2015). “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
15 accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556  
16 U.S. 662, 678 (2009) (internal quotation marks omitted). In addition, “for a retaliation claim  
17 to survive . . . a motion to dismiss, the plaintiff must plausibly allege that: (1) defendants  
18 discriminated—or took an adverse employment action—against [her], (2) because [s]he has  
19 opposed any unlawful employment practice.” *Vega v. Hempstead Union Free Sch. Dist.*, 801  
20 F.3d 72, 90 (2d Cir. 2015) (internal quotation marks omitted). Under the latter element, a

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<sup>2</sup> Vasquez also filed suit against Gray individually, but later consented to dismissal without prejudice of the claims against him, in response to an issue about service. App’x 41.

1 plaintiff must show a “retaliatory purpose” by “plausibly plead[ing] a connection between  
2 the [adverse] act and [the plaintiff’s] engagement in protected activity.” *Id.*<sup>3</sup>

3 **A. “Cat’s Paw” Liability**

4 Vasquez seeks to recover against Empress under what has been termed “cat’s paw”  
5 liability. The phrase derives from an Aesop fable, later put into verse by Jean de La  
6 Fontaine, in which a wily monkey flatters a naïve cat into pulling roasting chestnuts out of a  
7 roaring fire for their mutual satisfaction; the monkey, however, “devour[s]. . . them fast,”  
8 leaving the cat “with a burnt paw and no chestnuts” for its trouble. “[I]njected into United  
9 States employment discrimination law by [Judge Richard] Posner in 1990,” *Staub v. Proctor*  
10 *Hosp.*, 562 U.S. 411, 415 n.1 (2011), the “cat’s paw” metaphor now “refers to a situation in  
11 which an employee is fired or subjected to some other adverse employment action by a  
12 supervisor who himself has no discriminatory motive, but who has been manipulated by a  
13 subordinate who does have such a motive and intended to bring about the adverse  
14 employment action,” *Cook v. IPC Intern. Corp.*, 673 F.3d 625, 628 (7th Cir. 2012) (Posner, J.).  
15 Because the supervisor, acting as agent of the employer, has permitted himself to be used  
16 “as the conduit of [the subordinate’s] prejudice,” *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th  
17 Cir. 1990), that prejudice may then be imputed to the employer and used to hold the  
18 employer liable for employment discrimination. In other words, by merely effectuating or  
19 “rubber-stamp[ing]” a discriminatory employee’s “unlawful design,” *Nagle v. Marron*, 663  
20 F.3d 100, 117 (2d Cir. 2011), the employer plays the credulous cat to the malevolent monkey  
21 and, in so doing, allows itself to get burned — i.e., successfully sued.

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<sup>3</sup> Because “[t]he standards for evaluating . . . retaliation claims are identical under Title VII and the NYSHRL,” our analysis does not distinguish between Vasquez’s federal and state claims. *Kelly v. Howard I. Shapiro & Assoc. Consulting Eng’rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013).

1           “To date, our Circuit has neither accepted nor rejected the cat’s paw approach.”  
2     *Nagle*, 663 F.3d at 118; *see also Wright v. City of Syracuse*, 611 F. App’x 8, 11 n.2 (2d Cir. 2015).  
3     The Supreme Court, however, has approved its application under the Uniformed Services  
4     Employment and Reemployment Rights Act, a statute “very similar to Title VII,” *Staub*, 562  
5     U.S. at 417, and our sister circuits have overwhelmingly adopted the theory in Title VII  
6     retaliation cases. *See, e.g., Zamora v. City of Houston*, 798 F.3d 326, 332-33 (5th Cir. 2015);  
7     *EEOC v. New Breed Logistics*, 783 F.3d 1057, 1069-70 (6th Cir. 2015); *Bennett v. Riceland Foods,*  
8     *Inc.*, 721 F.3d 546, 551-52 (8th Cir. 2013); *Hicks v. Forest Preserve Dist. of Cook Cty., Ill.*, 677  
9     F.3d 781, 789-90 (7th Cir. 2012); *McKenna v. City of Philadelphia*, 649 F.3d 171, 180 (3d Cir.  
10    2011). Further, permitting “cat’s paw” recovery in retaliation cases accords with  
11    longstanding precedent in our Court, in the employment-discrimination context, that “a  
12    Title VII plaintiff is entitled to succeed, ‘even absent evidence of illegitimate bias on the part  
13    of the ultimate decision maker, so long as the individual shown to have the impermissible  
14    bias played a meaningful role in the [decisionmaking] process.’” *Holcomb v. Iona Coll.*, 521  
15    F.3d 130, 143 (2d Cir. 2008) (quoting *Bickerstaff v. Vassar Coll.*, 196 F. 3d 435, 450 (2d Cir.  
16    1999)). Such a role is surely played by an employee who “manipulates” an employer into  
17    acting as mere “conduit” for his retaliatory intent.<sup>4</sup> Accordingly, we now hold that the

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<sup>4</sup> We note that the parties do not dispute on appeal whether Vasquez has adequately pled Gray’s retaliatory intent. In any event, we conclude that Vasquez’s allegations are more than sufficient to meet her minimal burden plausibly to plead Gray’s retaliatory intent. To do so, she need only plausibly plead that: (1) Gray desired his actions to cause, or knew that his actions were substantially certain to result in, adverse employment action for Vasquez, *see Staub*, 562 U.S. at 422 n.3; and (2) he took those actions “because [s]he ha[d] made a charge” of sexual harassment, 42 U.S.C. § 2000e-3(a) — i.e., he would not have taken those actions if Vasquez had not filed a complaint with human resources, *see Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (holding that “but-for” causation is the proper standard for claims of retaliation under Title VII).



1 “cat’s paw” theory may be used to support recovery for claims of retaliation in violation of  
2 Title VII.

3 **B. Co-Workers and Cat’s Paw(s)**

4 The mere availability of “cat’s paw” liability in Title VII retaliation cases, however,  
5 does not resolve whether Empress may be held to the fire for its reliance on Gray’s  
6 retaliatory information. While the Supreme Court has approved holding an employer liable  
7 for the retaliatory intent of one of its “supervisors” under a “cat’s paw” theory, it  
8 specifically “express[ed] no view as to whether the employer would be liable if a co-worker,  
9 rather than a supervisor, committed a discriminatory act that influenced the ultimate  
10 employment decision.” *Staub*, 562 U.S. at 422 n.4. We must therefore determine in the first  
11 instance under what circumstances the “cat’s paw” approach will render an employer  
12 responsible for the animus of a low-level employee who works alongside the victim.

13 To do so, “[w]e turn to general principles of agency law, for the term ‘employer’ is  
14 defined under Title VII to include ‘agents’” and “Congress has directed federal courts to  
15 interpret Title VII based on agency principles.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742,  
16 754 (1998); *see also Staub*, 562 U.S. at 418 (deriving cat’s paw liability from “general  
17 principles of . . . agency law”). As set out by the Supreme Court in *Ellerth*, speaking in a  
18 hostile work environment case, there are four circumstances in which “agency principles  
19 impose liability on employers even where employees commit torts outside the scope of  
20 employment,” and would not ordinarily be deemed “agents” of the employer:

- 21 (a) the master intended the conduct or the consequences, or
- 22 (b) the master was negligent or reckless, or
- 23 (c) the conduct violated a non-delegable duty of the master, or

1 (d) the servant purported to act or to speak on behalf of the principal where  
2 there was reliance upon apparent authority, or he was aided in  
3 accomplishing the tort by the existence of the agency relation.  
4

5 *Ellerth*, 524 U.S. at 758 (quoting Restatement (Second) of Agency § 219(2) (1957)).

6 Significantly, in addressing employer culpability for employee misconduct, the  
7 *Ellerth* Court expressly noted that Section 219(2)(b) holds employers liable “when the  
8 [employee’s] tort is attributable to the employer’s own negligence. Thus, although a[n  
9 employee’s] sexual harassment is outside the scope of employment . . . , an employer can be  
10 liable, nonetheless, where its own negligence is a cause of the harassment[, . . . i.e.] if it  
11 knew or should have known about the conduct and failed to stop it.” *Id.* at 758-59.<sup>5</sup>

12 We see no reason why *Ellerth*, though written in the context of hostile work  
13 environment, should not also be read to hold an employer liable under Title VII when,  
14 through its own negligence, the employer gives effect to the retaliatory intent of one of its—  
15 even low-level—employees.<sup>6</sup> Not surprisingly, another circuit court has already  
16 determined, in reliance on *Ellerth*, that a discriminatory termination claim can proceed

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<sup>5</sup> We note that a new Restatement of Agency has been published since the Supreme Court decided *Ellerth*, which discusses employer liability for employee torts committed outside the scope of employment in a somewhat different way. See Restatement (Third) of Agency § 2.04. Because both parties rely on the language of the Second Restatement as embodied in *Ellerth*, however, we likewise use that Restatement’s formulation of agency principles to guide our analysis. In any event, the Third Restatement continues to hold employers responsible for harm caused by employees as a result of the employer’s negligence. See Restatement (Third) of Agency § 7.05; *id.* cmt. b.

<sup>6</sup> We decline Empress’s invitation to find that Vasquez failed to raise this argument below and to deem the issue forfeited. At the district court, Vasquez argued that Gray’s retaliatory intent should be imputed to Empress under a “cat’s paw” theory and that the patent insufficiency of Empress’s investigation supported imposition of employer liability. See also Supp. App’x 114 (stating, at oral argument before the district court, that “the adequacy of the investigation is intertwined with the cat’s paw theory of liability,” as determined by “a negligenc[ce] standard”). Although Vasquez failed to articulate precisely that the insufficiency of the investigation constituted negligence and that such negligence permitted imputation of Gray’s intent, we believe her arguments sufficed to raise the issue we address here. Regardless, “the rule against considering arguments raised for the first time on appeal is prudential, not jurisdictional, and we are free to exercise our discretion to consider waived arguments . . . where[, as here,] an argument presents a question of law and does not require additional fact finding.” *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013) (internal quotation marks and citations omitted).

1 against an employer who negligently permitted the plaintiff's co-worker, a low-level  
2 employee harboring discriminatory intent, to induce the plaintiff's termination. In  
3 *Velazquez-Perez v. Developers Diversified Realty Corp.*, the First Circuit explained that the  
4 "conclusion that [a biased employee] was not a supervisor d[id] not necessarily absolve [the  
5 employer] of potential liability for [the plaintiff's] discharge," because there was "no basis"  
6 to believe that *Ellerth's* acceptance of "employer liability premised on a finding of  
7 negligence" should be limited either to "cases of 'hostile workplace' discrimination" or to  
8 supervisory employees. 753 F.3d 265, 273 (1st Cir. 2014).<sup>7</sup> It consequently held that "an  
9 employer can be held liable under Title VII if: the plaintiff's co-worker makes statements  
10 maligning the plaintiff, for discriminatory reasons and with the intent to cause the  
11 plaintiff's firing; the co-worker's discriminatory acts proximately cause the plaintiff to be  
12 fired; and the employer acts negligently by allowing the co-worker's acts to achieve their  
13 desired effect though it knows (or reasonably should know) of the discriminatory  
14 motivation." *Id.* at 274.

15 We agree with the First Circuit, and therefore conclude that Vasquez can recover  
16 against Empress if Empress was itself negligent in allowing Gray's false allegations, and the  
17 retaliatory intent behind them, to achieve their desired end. Assuming that Empress knew  
18 or should have known of Gray's retaliatory animus, the fact that "Gray was nothing more  
19 than . . . a low-level employee with no supervisory or management authority," Appellee's

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<sup>7</sup> See also *id.* ("Suppose, for example, that a white employee repeatedly taunts a black co-worker with vicious racial epithets and also lodges a series of false complaints about the victim to their supervisor in a racially motivated attempt to have the victim fired. Certainly the employer could be held liable for negligently permitting the taunting. So, too, the employer should be liable if it fires the victim based on complaints that it knew (or reasonably should have known) were the product of discriminatory animus. In either situation, the same elements are present: an act of discrimination is allowed to cause harm by an employer that knows or reasonably should know of the discrimination.")

1 Br. 18, cannot shield Empress from answering for Gray’s conduct because Empress’s own  
2 negligence provides an independent basis, under *Ellerth* and agency law, to treat Gray as  
3 Empress’s agent and hold Empress accountable for his unlawful intent. Once deemed  
4 Empress’s agent, Gray stands in the same shoes as *Staub’s* “supervisor,” and is equally able  
5 to play the monkey to Empress’s cat. *See Staub*, 562 U.S. at 421 (“The employer is at fault [in  
6 a cat’s paw case] because *one of its agents* committed an action based on discriminatory  
7 animus that was intended to cause, and did in fact cause, an adverse employment  
8 decision.”) (emphasis added).

9         Such a negligence-based approach to “cat’s paw” liability, moreover, fully comports  
10 with established Title VII caselaw in our Circuit requiring that a biased non-decisionmaker  
11 play a “meaningful role” in an adverse employment decision for the unbiased  
12 decisionmaker to be culpable. *See Bickerstaff*, 196 F. 3d at 450 (“We recognize that the  
13 impermissible bias of a single individual at any stage . . . may taint the ultimate  
14 employment decision in violation of Title VII. This is true even absent evidence of  
15 illegitimate bias on the part of the ultimate decision maker, so long as the individual shown  
16 to have the impermissible bias played a meaningful role in the [decisionmaking] process.”).  
17 Empress’s alleged negligence—in crediting Gray’s accusations to the exclusion of all other  
18 evidence, and specifically declining to examine contrary evidence tendered by Vasquez,  
19 when it knew or, with reasonable investigation, should have known of Gray’s retaliatory  
20 animus—caused Gray’s accusations to form the sole basis for Empress’s decision to  
21 terminate Vasquez. Thus, as a result of Empress’s negligence, Gray achieved a  
22 “meaningful,” and indeed decisive, role in Vasquez’s termination. Put differently, while  
23 Gray might, on other facts, have played no greater part than that of a mere “informant” or

1 “witness at a bench trial,” *Vasquez v. Empress Ambulance Serv., Inc.*, 14 Civ. 8387, 2015 WL  
2 5037055, at \*6 (S.D.N.Y. Aug. 26, 2015) (quoting *Staub*, 562 U.S. at 421), who simply offered  
3 information for the decisionmaker’s examination, on the facts before us, viewed in the light  
4 most favorable to Vasquez, Gray became the entire case against Vasquez when Empress  
5 negligently chose to credit his, and only his, account.

6 We emphasize that such an approach should not be construed as holding an  
7 employer “liable simply because it acts on information provided by a biased co-worker.”  
8 *Id.* As we have long held, when considering the legitimacy of an employer’s reason for an  
9 employment action, we look to “what ‘*motivated*’ the employer” rather than to “the truth of  
10 the allegations against [the] plaintiff” on which it relies. *McPherson v. N.Y.C. Dep’t of Educ.*,  
11 457 F.3d 211, 216 (2d Cir. 2006); *see also Jones*, 796 F.3d at 330 (“[S]howing that an employer  
12 incorrectly found an employee guilty of misconduct is insufficient to prove retaliation . . .  
13 .”). Thus, an employer who, non-negligently and in good faith, relies on a false and malign  
14 report of an employee who acted out of unlawful animus cannot, under this “cat’s paw”  
15 theory, be held accountable for or said to have been “motivated” by the employee’s animus.  
16 And, of course, an employer who negligently relies on a low-level employee’s false  
17 accusations in making an employment decision will not be liable under Title VII unless  
18 those false accusations themselves were the product of discriminatory or retaliatory intent  
19 (although the employer may yet be liable for simple negligence under state law).

20 Only when an employer in effect adopts an employee’s unlawful animus by acting  
21 *negligently* with respect to the information provided by the employee, and thereby affords  
22 that biased employee an outsize role in its own employment decision, can the employee’s  
23 motivation be imputed to the employer and used to support a claim under Title VII. Put

1 simply, an employer can still “just get it wrong” without incurring liability under Title VII,  
2 Supp. App’x 114, but it cannot “get it wrong” without recourse if in doing so it negligently  
3 allows itself to be used as conduit for even a low-level employee’s discriminatory or  
4 retaliatory prejudice.

5       Having determined that Vasquez can recover against Empress if Empress  
6 negligently gave effect to Gray’s retaliatory animus, we need now only decide whether  
7 Vasquez has sufficiently pled that Empress acted negligently in its treatment of Gray’s and  
8 Vasquez’s accusations. Although Vasquez does not use the term “negligence” in her  
9 complaint, we conclude that she has pled facts from which a reasonable person could infer  
10 that Empress knew or should have known that Gray’s accusations were the product of  
11 retaliatory intent and thus should not have been trusted. First, the fact that Gray had just  
12 learned that he had been accused by Vasquez of sexual harassment provided Gray with an  
13 obvious reason to lie and paint Vasquez as the perpetrator rather than the victim. With  
14 Gray more closely resembling a vengeful suspect than an independent informant, Empress  
15 had cause to treat with some skepticism his “he-said, she-said” cross-accusations. In  
16 addition, as Vasquez notes, “the timing . . . is also suspicious,” Appellant’s Br. 20: it seems  
17 unlikely that Vasquez should go from eagerly trading explicit messages to reporting such  
18 conduct as unwelcome harassment within the space of only six hours. It likewise seems  
19 strange that the very morning Gray is accused by Vasquez of harassment he should, when  
20 questioned by Empress, just happen to have on hand printed copies of amorous text  
21 messages purportedly received from Vasquez to substantiate his claim that she initiated the  
22 inappropriate exchange. Moreover, those messages themselves, viewed in the light most  
23 favorable to Vasquez, provide reason to distrust Gray’s account: according to Vasquez’s

1 complaint, the racy picture message “was by no means unequivocally of [Vasquez],” as it  
2 showed only “a small fraction of a face which can by no means [be] concluded to be that of  
3 [Vasquez].” App’x 13.<sup>8</sup> Empress, however, chose to ignore these warning signs and instead  
4 blindly credited Gray’s assertions, obstinately refusing to inspect Vasquez’s phone or to  
5 receive any other evidence proffered by Vasquez in refutation. Accordingly, accepting  
6 Vasquez’s allegations as true, we conclude that a reasonable jury could find that Empress  
7 acted negligently in terminating Vasquez solely on the basis of Gray’s accusations.

8 In sum, we hold that an employer may be held liable for an employee’s animus  
9 under a “cat’s paw” theory, regardless of the employee’s role within the organization, if the  
10 employer’s own negligence gives effect to the employee’s animus and causes the victim to  
11 suffer an adverse employment action. Because Vasquez has plausibly alleged that  
12 Empress’s negligence permitted Gray’s retaliatory intent to achieve its desired effect—her  
13 termination—her claims for retaliation against Empress may proceed.

#### 14 CONCLUSION

15 For the foregoing reasons, we VACATE the judgment of the District Court and  
16 REMAND the case for further proceedings consistent with this opinion.

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<sup>8</sup> In support of its motion to dismiss, Empress attached a copy of the text-message exchange provided by Gray, but the district court does not appear to have considered the document in reaching its judgment, and we therefore do not rely on the document to support our conclusion here. We note, however, that were we to consider the text-message printout as a document incorporated by reference in Vasquez’s complaint, *see DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010), we would find additional fodder to support the inference that Empress should not have believed Gray’s account: for instance, the exchange indicates that Gray’s texting partner was “[a]sleep” at 12:03 AM on January 9<sup>th</sup>, a time when Vasquez was actually on shift working for Empress. *See Supp. App’x 39.*