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No. 06-1644

IN THE

# Supreme Court of the United States

MADELEINE DELONG,
*Petitioner*,

v.

BEST BUY COMPANY, INC.,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

ELLIOT S. KAPLAN *
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

* Counsel of Record

*Counsel for Respondent*
Best Buy Company, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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## QUESTION PRESENTED

The only question actually presented by the Eleventh Circuit's unpublished decision, which assumed *arguendo* the presence of adequate evidence for the causation element of a prima facie case of Title VII retaliation, and which did not address any "cat's paw" issue or the question of a company's liability under an agency-law analysis for subordinates' acts, is whether the court erred in its case-specific, summary conclusion that the plaintiff lacked sufficient evidence to defeat summary judgment and proceed to trial on the issue of whether the employer's legitimate explanation for the plaintiff's discharge was a pretext for illegal retaliation.

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## STATEMENT

This is a garden-variety, Title VII employment case in which the Eleventh Circuit Court of Appeals, in an unpublished decision, held that petitioner lacked sufficient evidence to show that the employer's reason for her discharge (evidence of participation in dishonest sales transactions) was a pretext for illegal retaliation, a showing that the plaintiff (petitioner) below accepted as legally required of a claim of retaliatory discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The court of appeals drew only that narrow, factbound conclusion and did not render—and was not timely asked to render—any ruling on the broader legal issue that petitioner now seeks to inject into the case.

1. In the trial court petitioner unsuccessfully made allegations of both sex discrimination and retaliation. She appealed only on the retaliation claim. The facts involve her firing after several disciplinary warnings and following Best Buy's receipt of objective documentary evidence that she had been involved in a dishonest scheme to inflate the end-of-month sales numbers of the store she managed.[1]

Petitioner was the General Manager of a Best Buy store in Savannah, Georgia. After several years in that position, she was made the subject of a corrective action plan in August, 2002, as the result of multiple complaints received about a negative working environment in that store. Pet. App. 12a-13a.[2]

In October, 2002, one of the assistant managers in petitioner's store was discovered to be "inboarding," *i.e.*, selling merchandise at a discount in order to add accessories and extended warranties to the transaction. When Best Buy fired that employee, he reported to the company that petitioner not only knew of the "inboarding", but had directed him to engage in the conduct to increase the store's sales numbers. This employee also reported that he had stayed at petitioner's house on occasion and that she had asked him to help her take care of her husband under circumstances in which he found it difficult to refuse. After investigating, the company's Regional Human Resources Manager concluded that petitioner had abused her authority, breached professional boundaries between her and the employee, and created an environment where other employees would be fearful of raising concerns

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[1] Pursuant to this Court's Rule 29.6, respondent Best Buy Company, Inc., (registered name Best Buy Co., Inc.) states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

[2] The cited pages of the Magistrate's report and recommendation (Pet. App. 11a-57a) reference the record evidence supporting the fact statement here.

about the assistant manager because of his non-business relationship with petitioner. As a result, Best Buy rescinded the assistant manager's discharge and issued petitioner a written warning citing her failure to provide appropriate leadership. Pet. App. 14a-17a.

Two days after the investigation into the "inboarding" incident was concluded, but three days before the written warning was issued to her, petitioner made a telephone complaint to the company's "open line" regarding what she called sex discrimination by her supervisor, District Manager Dean Wheatman, and other, unnamed, members of his district staff. Among other things, petitioner complained (in the telephone call and a follow-up submission) that Mr. Wheatman and other district staff had inappropriately gone behind her back in making decisions about the assistant manager who accused her of being involved in the "inboarding." Pet. App. 18a-19a.

In June, 2003, about eight months after the warning to petitioner, a second assistant manager accused her of improperly manipulating end-of-month sales figures in her store. Specifically, the assistant manager said that petitioner had instructed him to purchase $1,500 in accessories on the last day of November, 2002, using her credit card, for the purpose of inflating the end-of-month sales figures for her store, and, then, to return the items in December. This assistant manager made these allegations after being discharged because of alleged inappropriate sexual conduct with another employee. The District Human Resources Manager, Janet Brown, passed the assistant manager's allegations along to the District Loss Prevention Manager, Brian Frantz, for investigation. Pet. App. 19a-20a.

Mr. Frantz investigated the allegations. He contacted corporate offices in Minnesota and obtained documentation, including receipts and electronic journal rolls, relating to transactions in the store in November and December, 2002. These documents confirmed the purchase of large numbers

of accessories on petitioner's credit card on the last day of November, 2002. The documents also confirmed that the items purchased were returned in December. Mr. Frantz reported to Ms. Brown and Mr. Wheatman that the documents verified the allegations made by the assistant manager. Pet. App. 20a-21a.

Following Mr. Frantz's report, Ms. Brown, Mr. Wheatman, and Mr. Frantz traveled to Savannah to meet with petitioner. Before the meeting, Ms. Brown phoned Diane Lemaux, her immediate supervisor and the company's Regional Human Resources Manager, and discussed the information compiled by Mr. Frantz and the accusation made by the assistant manager (whom petitioner does not accuse of acting out of retaliation for her sex discrimination grievance) about petitioner's involvement in the improper transactions. Ms. Lemaux then gave Ms. Brown the authority to terminate petitioner's employment. Pet. App. 21a.

In her meeting with the company representatives in Savannah, petitioner acknowledged that she was aware that the accessories were purchased by her assistant manager using her credit card and that the purchases were made to improve the store's sales figures. Pet. App. 21a-22a. Petitioner did not, during this meeting, offer any additional information or explanation for the transactions. Pet. App. 46a. Ms. Brown then told petitioner that Best Buy was terminating her employment. Pet. App. 22a.

2. When petitioner brought suit under Title VII, she alleged that she was the victim of sex discrimination and that she had been fired in retaliation for making a sex-discrimination complaint eight months earlier. The latter allegation is the only one that she pursued on appeal and pursues here. As to that allegation, petitioner accepted the legal framework under which she had to make out a prima facie case of a causal link between protected expression and her discharge and, if Best Buy advanced a legitimate reason for the dis-

charge, had to present evidence sufficient to show that reason to be pretextual. Pet. App. 50a-51a; D 47, Plaintiff's Brief in Opposition to Motion for Summary Judgment, pp. 3-4.

The Magistrate to whom the case was assigned granted Best Buy summary judgment. Applying the legal framework accepted by petitioner, the Magistrate not only rejected all of petitioner's sex-discrimination allegations (Pet. App. 28a-48a), which are not at issue here, but also rejected her retaliation allegation (Pet. App. 49a-56a). Regarding retaliation, the Magistrate first concluded that petitioner lacked sufficient evidence of the required causation between her October 2002 "open line" complaint and her June 2003 discharge. Pet. App. 51a-55a. The Magistrate then concluded that, in any event, "Best Buy has presented ample evidence of a legitimate, non-discriminatory reason for Plaintiff's termination," namely that "she had violated company policy through her involvement in the accessories incident, after the previous determination that she had engaged in serious misconduct," and that petitioner lacked sufficient evidence to show that reason to be pretextual. Pet. App. 55a-56a; and 33a-48a.

Significantly, the Magistrate's report and recommendation contains no ruling on the issue petitioner now seeks to inject into the case. In particular, the Magistrate did not determine that subordinates had acted out of illegal retaliatory motives but that liability was avoided because a non-biased decision-maker actually made an innocent (non-retaliatory, or even non-discriminatory) decision despite the flawed information provided by the biased subordinates. Indeed, the Magistrate assumed that Ms. Brown and Mr. Wheatman (the two subordinates petitioner accuses of having retaliatory motives) *were* involved in the decision to terminate (Pet. App. 53a) and simply found that petitioner had insufficient evidence of a discriminatory or retaliatory motive affecting the discharge decision given the amply documented proffered legitimate reasons (Pet. App. 36a-47a, 56a) and that there was insuf-

ficient evidence of a causal connection between petitioner's October 2002 grievance and her June 2003 discharge (Pet. App. 54a-55a).

The district court subsequently approved and adopted the Magistrate's report and recommendation, thus granting summary judgment. Pet. App. 8a.

3. In the court of appeals, petitioner raised only her retaliation claim. On that claim, moreover, petitioner fully accepted the legal framework applied by the Magistrate, under which, even if there were adequate evidence of causation for the prima facie case, the plaintiff loses if the employer advances a legitimate reason for the discharge and the plaintiff lacks adequate evidence that the reason is pretextual. Nowhere in petitioner's opening or reply briefs did she question that framework or—what the Petition now features—present the arguments or authorities, founded in causation or agency principles, about employer responsibility for subordinates' discrimination-tainted influence in superior's decisions (the "cat's paw" idea, *see* Pet. 9). Rather, petitioner merely disputed the case-specific conclusions about causation and pretext. *See* CA Brief of Appellant at 15-27; CA Reply Brief of Appellant at 8-12.

In a per curiam unpublished decision, the court of appeals (Anderson, Black, Barkett, JJ.) affirmed the district court's grant of summary judgment based on the Magistrate's report and recommendation, deciding only the pretext issue. After expressing some doubt about whether the eight-month lapse of time between the "open line" complaint and the discharge was too great to support the causal link required by the prima facie case, the court said that it need not decide the causation question. Pet. App. 5a. Instead, it "assume[d], for the sake of argument, that DeLong can make out a prima facie case of retaliation." *Id.* On that assumption, the court affirmed the summary judgment on the ground that petitioner lacked sufficient evidence for a reasonable juror to find that Best

Buy's plainly legitimate reason for discharging her was pretextual. Pet. App. 6a-7a. "DeLong has not shown that Best Buy did not honestly believe, following an investigation into the allegations against her, that she had on two separate occasions engaged in activities that violated the store's policies." Pet. App. 7a.

Petitioner sought rehearing, for the first time invoking the "cat's paw" principle. CA Rehearing Pet. at 10-13. The court denied rehearing. Pet. App. 58a-59a.

## ARGUMENT

The ruling of the Eleventh Circuit does not warrant review. It is unpublished and hence non-precedential. And it simply does not involve a ruling on the issue that petitioner seeks to inject into this case—the causation and agency standards for employer liability for adverse actions that may be based on discriminatory acts of subordinates.

The petition rests entirely on an effort to capitalize on this Court's recent interest in that issue. *See BCI Coca-Cola Bottling Co. v. EEOC*, 127 S. Ct. 852, 1931 (2007) (granting then dismissing petition). But the attempt to insert that issue into this case must fail. The Eleventh Circuit did not rule on that issue, and indeed petitioner did not timely present such an issue to the Eleventh Circuit. The ruling below, instead, is a garden-variety, fact-specific decision about the sufficiency of evidence on the pretext element of a retaliation claim, an element whose legal necessity petitioner fully accepted in the court of appeals. This case is accordingly the wrong case for this Court to pursue the issue on which it granted certiorari in the *BCI* case.

The *BCI* "cat's paw" issue involves the causation and agency components of Title VII liability. *See* Brief for EEOC in *BCI* at 16; Brief for Petitioner in *BCI* at 19-20; Brief *Amicus Curiae* for U.S. Chamber of Commerce in *BCI* at 6.

There is no ruling on the cat's paw issue, or the causation or agency components of Title VII liability, in the Eleventh Circuit decision. In fact, the Eleventh Circuit expressly said that it was not deciding even the generic causation question petitioner presented, and it said nothing at all about agency or the "cat's paw" line of authority. The sole ruling by the Eleventh Circuit concerned the sufficiency of evidence of pretext.

The explanation for this limited ruling is not hard to find. Neither petitioner's opening brief nor her reply brief in the court of appeals made any argument about the "cat's paw" theory or line of authority. Those briefs cited none of the precedents, from the Eleventh Circuit or elsewhere, on which the petition now relies. Rather, petitioner fully accepted the legal framework of the Magistrate's decision, including the requirement that she present sufficient evidence to show Best Buy's explanation for her discharge to be pretextual, and simply argued about the particular evidence she had. Not until losing before the panel did petitioner raise a "cat's paw" issue, in her rehearing petition, which is too late. *See, e.g.*, *United States v. Curtis*, 380 F.3d 1308, 1309 (11th Cir. 2004) (reciting longstanding rule that issues not raised in merits briefs, but only on rehearing, are waived), *modified in other respect*, 400 F.3d 1334 (11th Cir.), *cert. denied*, 126 S. Ct. 418 (2005). Petitioner, in short, is trying to inject into this case an issue that not only was not ruled on below but that she did not preserve below.

The Eleventh Circuit, in its only ruling in this case, applied the law governing pretext that petitioner herself accepted—the need for a plaintiff, even after making out a prima facie case, to present sufficient evidence (under the usual summary judgment standards) that the employer's proffered explanation for the adverse action was a pretext for retaliation. And the Eleventh Circuit did no more than decide the wholly case-specific question whether petitioner had presented such

evidence. That is not a ruling on the *BCI* issue that is petitioner's sole question presented. And, being both unpublished and summary in content, it is of no precedential importance.

Like the Eleventh Circuit ruling, the Magistrate's report and recommendation (adopted by the district court) did not involve a claim by petitioner under a "cat's paw" theory—namely, that a non-biased superior is alleged to have made an adverse employment decision based on information supplied by biased, but non-decisionmaking, subordinates. In her opposition to Best Buy's motion for summary judgment in the trial court, petitioner instead argued that the evidence showed that the "decisionmakers" were Ms. Brown and Mr. Wheatman, whom she alleged were motivated by discriminatory and retaliatory motives and never believed that petitioner was actively involved in the improper purchase of accessories using her credit card. Pet. App. 42a, 52a. The Magistrate's report and recommendation assumed that Ms. Brown and Mr. Wheatman were involved in the decision to terminate petitioner (Pet. App. 53a) and analyzed the sufficiency of petitioner's evidence regarding the conduct of these individuals. The Magistrate found that there simply was insufficient evidence, as a matter of accepted law, to determine that the company's explanation for the decision made by these individuals was a pretext for either discrimination or retaliation. Pet. App. 36a-47a, 54a-55a. It was that evidence-specific determination, not involving a "cat's paw" ruling, that the Eleventh Circuit affirmed in concluding that petitioner "has not shown that Best Buy did not honestly believe, following an investigation into the allegations against her, that she had on two separate occasions engaged in activities that violated the store's policies." Pet. App. 7a.

In short, the Eleventh Circuit's decision does not present a "cat's paw" ruling or even a "cat's paw" scenario as presented by petitioner, let alone a "cat's paw" argument timely

made by petitioner in either lower court. This case, accordingly, is not an appropriate one in which to return to the *BCI* issue of the amount of involvement a biased underling must have in a decision made by a non-biased superior before the employer may properly be found liable under agency principles.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ELLIOT S. KAPLAN *
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

* Counsel of Record

*Counsel for Respondent*
Best Buy Company, Inc.