No. 06-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under what circumstances can an employer be held liable for retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based upon the bias of subordinate company officials, where the officials did not make the adverse employment decision but caused that decision through submission of false evidence?

LIST OF PARTIES

The parties to this action are set forth in the caption.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS - CONTINUED

Page

TABLE OF CONTENTS - CONTINUED

Page

TABLE OF CITED AUTHORITIES

Page

CASES:

TABLE OF CITED AUTHORITIES - CONTINUED

Page

Page

STATUTES:

OTHER AUTHORITIES:

Page

Blank Page

OPINIONS BELOW

The December 13, 2006, opinion of the court of appeals, which is unpublished but unofficially reported at 211 Fed.Appx. 256, 2006 WL 3623697, is set out at pp. 1a-7a of the Appendix. The March 7, 2006, opinion and order of the district court granting summary judgment, which is not officially reported but is unofficially reported at 2006 WL 562195, is set out at 8a. The December 13, 2005, order and report and recommendation of the magistrate judge recommending summary judgment, which is not officially reported but which is also unofficially reported at 2006 WL 562195, is set out at 9a-57a. The March 12, 2007, order of the court of appeals denying Petitioner's motion for rehearing or, alternatively, rehearing *en banc*, which is not officially reported, is set out at pp. 58a-59a.

BASIS FOR JURISDICTION

The judgment of the court of appeals was entered on December 13, 2006. The order denying the petition for rehearing or, alternatively, petition for rehearing *en banc* was entered on March 12, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section701(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e(b), provides in pertinent part

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks

> in the current or preceding calendar year, and any agent of such a person . . . .

Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

DeLong worked for Best Buy as General Manager of its Savannah, Georgia store. When she took over the store in March 2000, it was ranked in the bottom 50% of all Best Buy stores nationwide. By late 2002, her store was regularly ranked as the top store in the district and among the best stores throughout the entire company.[1]

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[1] D47, DeLong Decl. at p.1. Pursuant to Supreme Court Rule 12.7, citations are to the district court record. District Court Docket No. 47 is DeLong's response to Best Buy's Motion for Summary Judgment, which includes a brief in opposition, DeLong's statement of material facts, a response to Best Buy's statement of undisputed material facts, two declarations, and deposition excerpts and other exhibits. Because "D47" consists of multiple documents without any clear numeric designations for its components, DeLong will attempt to describe the relevant document for each citation by name with page or exhibit number.

DeLong was the only female Store Manager in her district and perceived that she was being treated less favorably than the male General Managers. Her District Manager, Dean Wheatman, was demeaning and condescending to her in public, rarely spoke to her otherwise, and avoided visiting her store. Wheatman's discriminatory treatment culminated in an incident in which DeLong had reported a male subordinate manager for theft but Wheatman protected the male, disciplining DeLong instead.[2]

In October of 2002, DeLong submitted a formal complaint accusing Wheatman of sex discrimination. In her complaint, DeLong also accused District Human Resources Manager Janet Brown of tolerating the discriminatory treatment.[3]

In late November of 2002, Scott Crossler, a subordinate manager in DeLong's store, attempted to boost the store's monthly figures for accessory sales by ringing up some $1,500 in electronic accessories on the last day of the month. Crossler, who had credit problems and whose company charge account had been shut down, looked up DeLong's account when she was away from the store and charged the accessories to her account. DeLong knew nothing of Crossler's actions at the time. She only found out what he had done when she received her monthly charge statement. She wrote up a formal reprimand of Crossler and sent the reprimand to the district human resources office for inclusion in Crossler's personnel file. DeLong also reported Crossler's actions to Richard Wakefield, the store's Loss

[2] D47, DeLong Decl. at pp. 2-3, 6, Wakefield Decl. at p. 1.
[3] D47, DeLong Decl. at pp. 6-7.

Prevention Manager. Wakefield observed DeLong's anger at Crossler's behavior.[4]

In late May or early June of 2003, Crossler was accused of rape by a female co-worker and DeLong had Crossler terminated. Announcing his intention to "bring down" DeLong, Crossler then reported his November 2002 accessories purchase to Best Buy higher management, and falsely claimed he had purchased the accessories on DeLong's instructions.[5]

Brown, Wheatman, and District Loss Prevention Manager Brian Frantz were assigned to investigate Crossler's accusation.[6] So empowered, Brown manufactured evidence and used it to procure authorization to terminate DeLong. Specifically, Brown reported to Best Buy's Human Resources Manager, Diane Lemaux, that the team had interviewed Wakefield and that Wakefield had corroborated Crossler's charge.[7] This supposed interview was fictitious, for Wakefield was away on vacation during the investigation; moreover, the information Wakefield

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[4] D47, DeLong Decl. at p. 8-9, Wakefield Decl. at p. 3 and D47, exhibit 9.

[5] D47, DeLong Decl. at p. 9..

[6] D56 at p. 19; D57 at pp. 32-33.

[7] Specifically, Brown stated in her deposition

> Richard Wakefield was -- Brian [Frantz], then spoke to Rich Wakefield, and he admitted that Madeleine had asked h[im] to return these products back to her car[d] because they were trying to win a banner, and they didn't. ... And then from there once we had all of the facts and the information, I partnered with Dianne Lemaux, the regional human resource manager, with the information that we had seeking confirmation and direction on what steps should be taken. D56 at p. 21.

possessed refuted, rather than corroborated, the charge.[8] Nevertheless, based on Brown's false "evidence," Lemaux authorized Brown to terminate DeLong.[9]

The day after DeLong was terminated, Wakefield returned from vacation and was interviewed by Frantz.[10] Wakefield explained to Frantz that it was DeLong who had revealed Crossler's actions to the other store managers—something that would have been foolish if the scheme had been her idea.[11] Frantz reported this exculpatory information to Brown and Wheatman, but they concealed it from Lemaux.[12]

On January 6, 2004, DeLong filed suit against Best Buy alleging, among other things, retaliatory termination of her employment in violation of Title VII of the Civil Rights Act of 1964.[13] During the course of discovery, evidence emerged strongly suggesting that Brown and Wheatman had destroyed a document that would have signaled DeLong's innocence of the charge for which they procured her termination. Specifically, when Best Buy produced Crossler's personnel file during the litigation, it was discovered that all of Crossler's disciplinary records were missing.[14] These disciplinary records would have included DeLong's written reprimand of Crossler for the accessories incident (of course, DeLong was not likely to have created a record of the event if it had been her idea).[15] Until it was turned over to Best Buy's attorneys, Crossler's personnel file had been kept in a locked file cabinet in Brown's office, and

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[8] D47, Wakefield Decl. at p. 3; D57 at pp. 50-51.
[9] D57 at pp. 52-53.
[10] D47, Wakefield Decl. at p. 3.
[11] D47, Wakefield Decl. at 3; D57 at pp. 52-53.
[12] D57 at pp. 52-53.
[13] D1.
[14] D58 at pp. 68-70; D58, exhibit 33.
[15] D47, DeLong Decl. at p.8; Wakefield Decl. at p.3; D58 at p.70.

had been under the exclusive control of Brown and Wheatman.[16]

The crux of DeLong's retaliation claim was that Brown and Wheatman, resentful of DeLong's accusation of sex discrimination against them several months earlier, took advantage of Crossler's accusation and manufactured false evidence to procure authority to terminate DeLong.[17] Brown and Wheatman submitted three kinds of false evidence: *first*, they falsely represented that they had interviewed Wakefield and that he corroborated the charge against DeLong, when in fact they had not spoken to Wakefield;[18] *second*, they concealed Wakefield's exculpatory information when they finally did speak with him;[19] *third*, they sanitized Crossler's personnel file, destroying or discarding the written reprimand of Crossler by DeLong, which would also have shown DeLong to have been innocent.[20] Although Lemaux herself had no motive to retaliate against DeLong, and although she possessed the final authority to approve DeLong's termination, her decision was procured by the false information she received from Brown and Wheatman.[21]

II. DECISIONS FROM THE DISTRICT COURT

On December 13, 2005, a United States magistrate judge for the United States District Court for the Northern District of Georgia, Atlanta Division, issued an order and report and recommendation in which he recommended that

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[16] D58 at pp. 62-65.
[17] D47 at pp. 5-11.
[18] D56 at pp. 30-32.
[19] D57 at pp. 52-53.
[20] D58 at pp. 62-66, 68-70; D47, DeLong Decl. at p.8; D47, Wakefield Decl. at p.3.
[21] D57 at pp. 52-53.

Best Buy's motion for summary judgment be granted in its entirety.[22] In addressing DeLong's claims of retaliation, the magistrate acknowledged that both Brown and Wheatmen had "influential roles" in the decision to terminate DeLong; nevertheless, he credited Best Buy's argument that it had a good faith belief that DeLong was involved in the Crossler scheme.[23]

On March 7, 2006, the district court adopted in full the magistrate judge's report and recommendation and granted Best Buy's motion for summary judgment.[24] On March 20, 2006, DeLong timely filed a notice of appeal.[25] The only issue on appeal was the issue of retaliation.[26]

III. DECISIONS OF THE ELEVENTH CIRCUIT

On December 13, 2006, in an extremely short opinion and without any recitation of the facts, the Eleventh Circuit issued an order affirming the district court's grant of summary judgment.[27] The basis for its decision was stated succinctly

> While DeLong alleged that the investigation leading to her termination was a sham, and that those who terminated her did not honestly believe she engaged in violations of company rules, the facts DeLong points to in support of this claim fail to establish that Best Buy's

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[22] D60, also attached hereto at 9a-57a.
[23] D60 at pp. 41-42 (good faith belief) and pp. 54-55 (Brown and Wheatman influence).
[24] D70, also attached at Appendix 8a.
[25] D72.
[26] See Appendix at 2a.
[27] D79, also attached at Appendix 1a-7a.

> decision to terminate her was anything other than a decision based upon its belief that she had violated the company's policies. She has not established that Best Buy's proffered reason for terminating her was not its true reason. 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.[28]

In reaching this conclusion, the court focused on Best Buy's "honest belief" and ignored entirely the influential role played by biased subordinates Brown and Wheatman.

Following the Eleventh Circuit's opinion, DeLong filed a timely petition for rehearing or, alternatively, for rehearing *en banc*. On March 12, 2007, that petition was denied.[29]

REASONS FOR ALLOWING THE WRIT

Delong respectfully urges this Court to grant her petition for writ of certiorari and review the Eleventh Circuit's decision because there remains a split among the circuits as to the proper standard for applying subordinate bias liability and that split has caused further confusion as to the proper interpretation of this Court's decisions on agency liability in employment discrimination cases. Moreover, the Eleventh Circuit's decision in this case gives credence to a strict standard, in conflict with most other circuits, that offers employers immunity whenever a biased subordinate was not the principal or actual decisionmaker. Delong submits that

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[28] See Appendix 7a.
[29] See Appendix 58a-59a.

the decision of the Eleventh Circuit in her case was founded upon an improper standard inasmuch as the court of appeals focused on the actual decisionmakers in the case without accounting for the subordinate bias that caused her termination.

I. THERE EXISTS A SPLIT AMONG THE CIRCUITS ON THE APPLICATION OF SUBORDINATE BIAS LIABILITY

Seventeen years ago, in *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990), the Seventh Circuit first uttered the words "cat's paw" and began something of a "cat fight" over employer liability based upon the motivations of a biased subordinate. To be sure, whether they are using such illustrative icons as "cat's paw" or "rubber stamp," many circuit courts have acknowledged and embraced the concept of an employer's liability for the discriminatory acts of supervisory employees who may not be the nominal decision maker but who do control the outcome of the decision.[30]

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[30] In *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 127 S.Ct. 1931 (2007), the Tenth Circuit explained the etymology as follows: "The 'cat's paw' doctrine derives its name from a fable, made famous by La Fontaine, in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. *See Fables of La Fontaine* 344 (Walter Thornbury trans., Chartwell Books 1984). As the cat scoops the chestnuts from the fire one by one, burning his paw in the process, the monkey eagerly gobbles them up, leaving none left for the cat. *Id.* Today the term 'cat's-paw' refers to 'one used by another to accomplish his purposes.' Webster's Third New International Dictionary Unabridged 354 (2002). In the employment discrimination context, 'cat's paw' refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action. . . The 'rubber stamp' doctrine has a more obvious etymology, and refers to a situation in which a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate." *Id.* at 484 (internal case citations omitted).

Indeed, lists of the cases establishing circuit precedent have found their way into recent decisions and at least one petition to this Court. *See e.g. Hill v. Lockheed Martin Logistics Management, Inc.*, 354 F.3d 277, 289 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005)(citing cases); *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484-85 (10th Cir. 2006), *cert. dismissed*, 127 S.Ct. 1931 (2007)(citing cases)(hereafter "*BCI*"); and Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit in *BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C.*, No. 06-341, 2006 WL 2582502 ("*BCI* Petition")(citing cases). However, what all of these courts have not embraced and what has hewn them apart and created a split that deserves redress by this Court is the level of control a biased subordinate must exert over the ultimate adverse employment decision.

A. There Remains a Split Among the Circuit Courts of Appeal With Respect to Subordinate Bias Liability

On January 5, 2007, this Court granted certiorari in the *BCI* case. *See BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C.*, 127 S.Ct. 852 (2007). While the petition has been dismissed (*BCI Coca-Cola Bottling Co. of Los Angeles v. E.E.O.C.*, 127 S.Ct. 1931 (2007)), the question presented by the petitioner was almost identical to the question in the present petition: "under what circumstances is an employer liable under federal anti-discrimination laws based on a subordinate's discriminatory animus, where the person(s) who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the impacted employee." *BCI* Petition at p. i. At the time that the petition was granted, there existed a decided split among the circuits as to the standard for

imputing corporate liability based upon subordinate bias. That split remains.

In *BCI*, the Tenth Circuit aptly described the divergence of opinions on the subject. These opinions are best represented by decisions from the Fourth, Fifth and Seventh Circuits, with the Tenth Circuit falling into the Seventh Circuit camp. *See Hill*, 354 F.3d at 291; *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000); *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004); *BCI*, 450 F.3d. at 487. As the Tenth Circuit explained, the most lenient approach to the question is taken by the Fifth Circuit. In the Fifth Circuit, liability for subordinate bias is predicated on a determination of whether the subordinate "'possessed leverage, or exerted influence, over the titular decisionmaker.'" *See BCI*, 450 F.3d at 486 (quoting *Russell,* 235 F.3d at 227). The Tenth Circuit further described this approach as contemplating that "any 'influence,' the reporting of any 'factual information,' or any form of 'other input' by a biased subordinate renders the employer liable so long as the subordinate 'may have affected' the employment action." *Id.* at 486.

The opposite extreme, according to the Tenth Circuit, is held by the Fourth Circuit and articulated in *Hill v. Lockheed Martin Logistics Management, Inc.*, *supra*. The standard in the Fourth Circuit is, indeed, much stricter:

> In sum, to survive summary judgment, an aggrieved employee who rests a discrimination claim under Title VII or the ADEA upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for

> the decision or the actual decisionmaker for the employer.

Hill, 354 F.3d at 291. The Tenth Circuit rejected each of these approaches, adopting, instead, a middle ground approved by the Seventh Circuit in *Lust v. Sealy, Inc., supra*:

> We find ourselves in agreement with the Seventh Circuit, which has rejected the Fourth Circuit's approach as 'inconsistent with the normal analysis of causal issues in tort litigation.' To prevail on a subordinate bias claim, a plaintiff must establish more than mere 'influence' or 'input' in the decisionmaking process. Rather, the issue is whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action.

Id. at 487-88 (internal case citations omitted). In *Lust*, the Seventh Circuit responded to the Fourth:

> We are mindful that [the Fourth Circuit] holds that a subordinate's influence, even substantial influence, over the supervisor's decision is not enough to impute the discriminatory motives of the subordinate to the supervisor; the supervisor must be the subordinate's "cat's paw" for such imputation to be permitted. That is not the view of this court, even though the "cat's paw" formula apparently originated in our decision . . . and has been repeated in a number of our cases. . . . The formula was (obviously) not intended to be taken literally (Sealy employs no felines), and were it taken

> even semiliterally it would be inconsistent with the normal analysis of causal issues in tort litigation.

Lust, 383 F.3d at 584 (internal case citations omitted). Under the Seventh Circuit's approach, causation is the critical element. If the subordinate employee had sufficient influence to actually cause the adverse employment decision, it would not matter that he or she was not the true or "principal decision maker."

Clearly, there is a strong divide among the circuits as to the proper analytical framework for subordinate liability cases. There is the "substantial influence" approach taken by the Fifth Circuit, the "causation approach" articulated by the Seventh Circuit and adopted by the Tenth Circuit and, then there is the "actual" or "principal decisionmaker" standard approved in the Fourth Circuit and, as argued below, utilized by the Eleventh Circuit. Given this split and the likely divergent outcomes of subordinate liability cases, it would be appropriate for this Court to take up the question. In doing so, the Court would also have an opportunity to answer lingering questions over the Court's directives in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000).

B. The Split Has Further Fractured Circuits on How Best to Interpret This Court's Opinions in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000)

The split between the Circuits has created yet another anomaly -- a difference of opinion on what direction this Court has given in construing employer liability under agency theories. This difference is apparent in the nearly polar-opposite opinions in *BCI* and *Hill.* In *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) this Court observed that "Congress directed federal courts to interpret Title VII based on agency principles." *Id.* at 754. In explaining what this may mean in the employment context, the Court held that:

> Tangible employment actions fall within the special province of the supervisor. 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.
>
> * * *
>
> For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer. Whatever the exact contours of the aided in the agency relation standard, its requirements will always be met when a supervisor takes a tangible employment action against a subordinate. In that instance, it would be

> implausible to interpret agency principles to allow an employer to escape liability.

Ellerth, 524 U.S. at 762-763. As evidenced by the decision in *Hill*, the Fourth Circuit has taken this to mean that liability for the acts of an agent requires the imprimatur of "supervisor" at best and "decisionmaker" at minimum. This requirement is apparent from its comparison of the language in *Ellerth* with the Court's later decision in *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000). Specifically, the Fourth Circuit holds up *Reeves* as demanding that a plaintiff prove that the person harboring discriminatory animus be the one "principally responsible" for the adverse action. *Hill*, 354 F.3d at 288 (citing *Reeves,* 530 U.S. at 151). The Fourth Circuit makes the comparison stating that *Reeves'*

> clear emphasis upon who holds "actual decisionmaking" power and authority or who has "principal responsibility" for an employment decision is consistent with the limitations set forth in *Ellerth.* Such individuals, although perhaps not acting as formal decisionmakers, nonetheless act in a supervisory or managerial capacity as the agents of the employer. It is these individuals who must possess the requisite discriminatory motivation behind the adverse employment decision that they make or for which they hold principal responsibility.

Id. at 289. The Fourth Circuit then goes on to refuse any

> construction of the discrimination statutes that would allow a biased subordinate who has no supervisory or disciplinary authority and who

> does not make the final or formal employment decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the adverse employment decision.

Id. at 291. In sum, the Fourth Circuit interprets this Court's rulings in *Ellerth* and *Reeves* to define the outermost contours of subordinate bias liability. The Tenth Circuit flatly rejects such a narrow reading.

In *BCI*, the Tenth Circuit found that the "Fourth Circuit's strict approach makes too much of the phrase 'actual decisionmaker' in *Reeves*." *BCI*, 450 F.3d at 487. According to the Tenth Circuit, this Court "was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." *Id.* (citing *Reeves,* 530 U.S. at 151-52 and pointing out that the phrases "actual decisionmaker" and "principally responsible" appear only in Part III.B, which begins, "Applying this standard here ...")). Contrary to the Fourth Circuit, the Tenth Circuit sees *Reeves* and *Ellerth* as casting a much broader net. Citing to *Ellerth*, The Tenth Circuit explains that Title VII imposes liability for discrimination by employers and their agents. *Id.* (citing 42 U.S.C. § 2000e(b)). According to the Tenth Circuit's interpretation, this "includes not only 'decisionmakers' but other agents whose actions, aided by the agency relation, cause injury." *Id.* (citing *Ellerth,* 524 U.S. at 760). To conclude otherwise, would "allow employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.*

As is apparent from the difference of opinion between the Fourth and Tenth Circuits, the circuit split as to subordinate liability has bled over into a dispute over just what this Court meant when it applied the phrase "aided by agency" from the Restatement (Second) of Agency (1957) to the employment context. Granting Delong's petition will provide an opportunity for the Court to clarify its opinions in *Ellerth* and *Reeves* and resolve this dispute.

C. The Eleventh Circuit Standard is in Conflict with the Fifth and Tenth/Seventh Circuits and, Like the Fourth Circuit Standard, Undermines Title VII's Broad Remedial Purpose

The dissent in *Hill* points out that most circuits have adhered to a more lenient standard than even the Tenth Circuit but most certainly a standard more forgiving than that of the Fourth Circuit. *Hill*, 354 F.3d at 303.[31] The Eleventh

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[31] *Id.* (citing *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1312 (D.C.Cir.1998) ("[E]vidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence."); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir.2000) ("One method [of proving pretext] is to show that discriminatory comments were made by ... those in a position to influence the decisionmaker."); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir.2001) (discriminatory comments of plaintiff's supervisor, who did not have formal firing authority but who "had enormous influence in the decisionmaking process," constitute direct evidence of discrimination); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 286 (3d Cir.2001) (internal quotations and citation omitted) ("Under our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate ... [because] an evaluation at any level, if based on discrimination, [may] influence[ ] the decisionmaking process and thus allow [ ] discrimination to infect the ultimate decision."); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226 (5th Cir.2000) ("If the [plaintiff] can demonstrate that others had influence or leverage over the official decisionmaker ... it is proper to impute their discriminatory attitudes to the formal decisionmaker."); *Ercegovich v. Goodyear Tire &*

Circuit, however, has adopted an approach that more closely resembles that of the Fourth Circuit and, arguably, is an even stricter standard. In that regard, it is in direct conflict with the majority of other circuits.

In *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999), the Eleventh Circuit interpreted the cat's paw line of cases to encompass only those cases where the employee harboring discriminatory animus "*is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for [that employee's] discriminatory animus." *Id.* at 1249 (emphasis in original); *see also Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001)(requiring that the subordinate be a "dominant decision-maker whose decision was rubber-stamped by others"). This interpretation is in direct conflict with the Fifth Circuit's "substantial influence" approach and far removed from the Tenth Circuit's "causation" approach. Moreover, if courts are at least required to give lip-service to the notion that Congress intended Title VII to provide "robust protection against workplace discrimination," then the Eleventh and Fourth Circuit's conflict with other circuits and apparent departure

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Rubber Co., 154 F.3d 344, 354 (6th Cir.1998) ("[R]emarks by those who did not independently have the authority ... to fire the plaintiff, but who nevertheless played a meaningful role in the decision to terminate the plaintiff, [are] relevant."); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir.1994) (internal quotation marks omitted) (discriminatory remarks of a manager, who was the fired plaintiff's supervisor and who was "closely involved in employment decisions," constitute direct evidence of discrimination); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir.2001) (manager's comment was direct evidence of retaliation because "[e]ven if [the] manager was not the ultimate decisionmaker [in denying the plaintiff a promotion], that manager's retaliatory motive may be imputed to the company if the manager was involved in the ... decision")).

from the trend toward a more lenient standard could seriously undermine that intent. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, No. 05-1074, 2007 WL 1528298, at *23 (U.S. May 29, 2007)(Ginsburg, J., dissenting)(citing *Teamsters v. United States,* 431 U.S. 324, 348 (1977)("The primary purpose of Title VII was to assure equality of employment opportunities and to eliminate ... discriminatory practices and devices...." (internal quotation marks omitted)); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975) ("It is ... the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.")).

In the present case, the Eleventh Circuit focused its attention entirely on Best Buy's good faith belief as to the nature of DeLong's infractions. Although in line with circuit precedent, this focus was a departure from and in direct conflict with the weight of authority in other circuits and had the effect of improperly and unfairly shielding the company from liability. Moreover, this focus fails to recognize the plain fact that "many companies separate the decision making function from the investigation and reporting functions, and that [discriminatory] bias can taint any of those functions." *BCI*, 450 F.3d at 488. Because there is evidence that discriminatory bias tainted the investigatory function here and the Eleventh Circuit's decision, while in accord with the Fourth Circuit, is in conflict with practically all other circuits, DeLong is asking that the Court exercise its powers of review and grant her petition.

II. THIS CASE PRESENTS ANOTHER OPPORTUNITY TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The petition for certiorari that was granted in *BCI* was dismissed on April 12, 2007. *See BCI Coca-Cola*

Bottling Co. of Los Angeles v. E.E.O.C., 127 S.Ct. 1931 (2007). As a result, this Court lost the opportunity to resolve an important split in the circuits over the issue of subordinate bias and the contours of the "aided by agency relation" principle. With this petition, the Court has that opportunity once again. Furthermore, DeLong submits that the facts of her case make it all the more appropriate that the petition be granted. This is because her case, underscored by the submission of false evidence to the final decisionmaker by an investigator who had a motive to retaliate, highlights the unjust result that can come from a standard that is as inflexible as that of the Fourth and Eleventh Circuits.

In deciding DeLong's case, the Eleventh Circuit first outlined the elements of a prima facie case of retaliation under Title VII: "'a plaintiff must show that (1) [she] engaged in...statutorily protected expression; (2) [she] suffered an adverse employment action; and (3) there is a causal connection between the two events.'" See Appendix p. 3a, 4a (quoting *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1155 (11th Cir. 2002) (citations and internal quotation marks omitted)).[32] The court assumed for purposes of its opinion that DeLong established a sufficient causal connection to take the case to the next level – a burden shift "to the defendant to rebut the presumption of retaliation by

[32] In a footnote, the court recognized that "adverse employment action" is no longer the appropriate standard in light of the Supreme Court's decision in *Burlington Northern and Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006). Instead, Title VII plaintiffs must now "show that a reasonable employee would have found the challenged [retaliatory] action materially adverse" such that the action "might well have dissuaded a reasonable worker from" engaging in the statutorily protected activity. *Id.* As a result, actionable retaliation need not be "related to employment" and need not "occur at the workplace." *Id.* The court recognized that this element of the prima facie case is not at issue here (termination is certainly materially adverse under anyone's definition).

producing legitimate reasons for the adverse employment action." Appendix at p. 4a (citing *Sullivan v. Nat'l R.R. Passenger Corp.*, 170 F.3d 1056, 1059 (11th Cir. 1999) (citations and internal quotation marks omitted)). The court apparently based this assumption on the temporal proximity between the protected conduct and the adverse action.

At the next level, '[i]f the defendant offers legitimate reasons, the presumption of retaliation disappears,' and "[t]he plaintiff must then show that the employer's proffered reasons for taking the adverse action were actually a pretext for prohibited retaliatory conduct." *Id.* To show pretext, the plaintiff must prove, by a preponderance of the evidence, that the legitimate reasons offered by the employer for taking the adverse action were not its true reasons. Appendix at p. 4a, 5a (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. at 143).

Here, the Eleventh Circuit found that DeLong had failed to show pretext because she had not controverted the legitimate reasons offered by Best Buy; namely, that it honestly believed DeLong had committed a second rule infraction. In so doing, the Eleventh Circuit further advanced its position, consistent with the Fourth Circuit and in conflict with most other circuits, that it is what the principal decisionmaker knows that is important. By holding to such a standard, the court of appeals highlights a further injustice: if by chance the *prima facie* case is proved, an employee will inevitably lose to the "honest belief" defense.

In *BCI*, the Tenth Circuit recognized that a reality of the workplace is that

> [a] biased low-level supervisor with no disciplinary authority might effectuate the termination of an employee from a protected

> class by recommending discharge or by selectively reporting or even fabricating information in communications with the formal decisionmaker.

Id., 450 F.3d at 486. This is just the circumstance here. A biased company official, charged with investigating DeLong's claims of discrimination, claims against herself no less, also investigated allegations of wrongdoing by DeLong and reported false information to the person charged with deciding DeLong's discipline. Clearly, the information was used by the decisionmaker, Lemaux, to authorize the termination of DeLong's employment. Best Buy was thus given the opportunity for absolution through claims of ignorance.

Not surprisingly and consistent with the strict "principal decisionmaker" standard, the Eleventh Circuit focused attention entirely on the company decisionmaker and her "honest belief" rather than the biased subordinate, casting a blind eye on the source of the information that DeLong had committed a second infraction. While this focus may withstand scrutiny under Eleventh and Fourth Circuit precedent, it is in direct conflict with decisions of most other circuits. In *BCI*, the Tenth Circuit explained that a proper recognition of subordinate bias claims can foreclose the strategic option of willful blindness to the source of reports and recommendations. *Id.* The rule adhered to by the Eleventh and Fourth Circuits opens the door to this option and necessarily prevents any employee from proving pretext in the face of the "honest belief" defense.

DeLong's petition asks that this Court use her case as the vehicle for taking up this question and settling the dispute among the circuits through the articulation of a reasonable standard for subordinate bias claims – one that

both recognizes the reality of workplace dynamics and advances the purposes of Title VII.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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