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

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

Respondent's opposition to certiorari rests not so much on the fact that Petitioner lost her job due to the influences of biased subordinates – a classic "cat's paw" scenario – but instead on the supposition that the cat's paw theory was not raised in the briefing process nor addressed by the Eleventh Circuit other than in its cursory denial of en banc consideration. This argument fails for two reasons. First, although the phrase "cat's paw" was not included in the early appellate briefing on this case, Petitioner put the issue before both the district and appellate courts. Petitioner has consistently attributed her termination to the retaliatory influences of District Manager Dean Wheatman and District Human Resources Manager Janet Brown under a cat's paw theory, first raising the issue in summary judgment briefing. Second, the Eleventh Circuit's failure to address subordinate bias liability by use of the words "cat's paw," when its ruling is on all fours with a strict and, according to Petitioner, inappropriate application of the theory does not rob this Court of the opportunity to consider proper application of the theory.

A. The "Cat's Paw" Argument Has Always Been Central to Plaintiff's Case

Setting aside for the moment the fact that Petitioner directly addressed the cat's paw theory of liability in seeking reconsideration of the Eleventh Circuit's opinion (CA Rehearing Pet. at 10-13), it is clear that the issue has always been present although not expressly stated. In *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), the Fifth Circuit articulated the cat's paw theory as contemplating factual circumstances in which "the evidence indicates that the worker possessed leverage, or exerted

influence, over the titular decisionmaker." *Id.* at 227. In her summary judgment brief Petitioner argued exactly that:

> Where decisions are made by a group, an individual is considered "involved in the decision" if he is a member of the group *or is in a position to influence the group.* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (age-biased comments by one member of a three-member committee raised an inference of discrimination). Evidence of improper motive "by a biased committee member may raise a rational inference that bias impermissibly affected the committee's decision." Jalal v. Columbia Univ. in New York, 4 F.Supp.2d 224, 239 (S.D.N.Y. 1998). *Bias by those who are not even part of the ultimate decision making process, but are factually in a position to influence it, also raise an inference of discrimination.* Haas v. ADVO Sys., Inc., 168 F.3d 732 (5th Cir. 1999). Thus, under established law, a challenged decision is illegal if any participant is shown to have had a discriminatory or retaliatory motive. Wheatman had one. Brown had one.

D47 at 10 (emphasis added). Similarly, in her opening appellate brief, Petitioner argued that:

> Extensive evidence suggested that Brown and Wheatman took advantage of this, their first opportunity to retaliate against DeLong for her accusations of discrimination eight months earlier, and that they deliberately conducted a

> crooked 'investigation' *for the purpose of engineering her termination.*

CA Brief of Appellant at 10 (emphasis added). As Petitioner argued, the termination was engineered by false reports to the "final" decisionmaker, Human Resources Manager Diane Lemaux. *Id.* at 10-11.

In her appellate brief, Petitioner also pointed out the errors of the District Court despite its finding "that Wheatman and Brown 'played *influential roles* in the decision to terminate Plaintiff's employment'" and that "Best Buy did not object to [the] findings." *Id.* at 17 (emphasis and brackets added, record citations omitted). Petitioner highlighted her point by underscoring the fact that "[i]n order to get the approval she needed to fire DeLong, Brown falsely reported to Lemaux that Crossler's accusations had been corroborated" and that "Brown hid . . . information from her superiors." *Id.* at 19. In the end, both the District Court and the Court of Appeals focused on the Respondent's "honest belief" (Pet. Appx. at 43a and 7a) instead of the inherent factual issues that surrounded the biased representations of subordinates Brown and Wheatman, factual issues that the District Court acknowledged but improperly found were "weak." Pet. Appx. at 48a.[1]

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[1] To say that the Eleventh Circuit considered Brown and Wheatman among the decisionmakers would be to assume it ignored substantial authority suggesting that their conduct was sufficient to create a question of fact worthy of the denial of summary judgment. *See Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 147 (2000)("the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'"); *Buckley v. Hosp. Corp. of America, Inc.*, 758 F.2d 1525, 1530 (11th Cir. 1985)(failure to interview key witnesses can indicate

Petitioner did not ask the Eleventh Circuit panel to re-evaluate the Eleventh Circuit standard for "cat's paw" liability, something the panel would have had no authority to do. She plainly, however, laid the facts before the District Court and the Eleventh Circuit panel and, at least in the district court, cited authority for why the bias of Brown and Wheatman should be imputed to Lemaux. Even if she had not, the Eleventh Circuit was free to consider it. *See Booth v. Hume Publishing, Inc.*, 902 F.2d 925, 928 (11th Cir. 2000)("Although as a general rule an appellate court will not consider a legal issue or theory raised for the first time on appeal ..., we have discretion to do so if the new issue or theory "involves a pure question of law, and if refusal to consider it would result in a miscarriage of justice.")(quoting *Lattimore v. Oman Const.,* 868 F.2d 437, 439 (11th Cir.1989)(quoting *United States v. Southern Fabricating Company,* 764 F.2d 780, 781 (11th Cir.1985))). Accordingly, Petitioner's request for rehearing cannot be discounted as evidence in consideration of her preservation efforts. In any event, the Eleventh Circuit's failure to address the issue does not rob this Court of the right to do so where the result is plain error.

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discriminatory intent); *Lathem v. Dept. of Children and Youth Services*, 172 F.3d 786 (11th Cir. 1999); *see also*; *McQueeny v. Wilmington Trust Co.* , 779 F.2d 916, 921-22 (3d. Cir. 1985); *Garrett v. Hewlett-Packard Co.,* 305 F.3d 1210, 1217 (10th Cir. 2002); *Warren v. Prejean*, 301 F.3d 893, 903 (8th Cir. 2002).

B. This Court's Authority To Rule Is Not Compromised By The Circuit Court's Failure to Directly Address The Cat's Paw Theory

By ruling that Petitioner failed to show that Respondent did not honestly believe in her violations of policy (Pet. Appx. at 7a), the Eleventh Circuit applied its existing cat's paw analysis, consistent with the Fourth Circuit and contrary to the Fifth, Seventh and Tenth Circuits, that an employer's knowledge and motivation is limited to that possessed by the "ultimate" decisionmaker. After the Eleventh Circuit issued its opinion, Petitioner sought reconsideration or rehearing en banc and specifically pointed out the cat's paw issue, citing it by name. CA Rehearing Pet. At 10-13. Still, her arguments were rejected. Pet. Appx. at 58a-59a.

Thus, it is the Circuit Court and not Petitioner that failed to address the cat's paw theory by name. Nonetheless, even if it were to be determined that Petitioner did not fully preserve the issue for appeal, this Court retains "the power to notice a 'plain error' though it is not assigned or specified." *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 412 (1947). Even if the issue had not been raised below at all, the decision reflected the application of Eleventh Circuit authority at odds with all other circuits except the Fourth. Petitioner urges the Court to issue the writ for the purpose of resolving the split in authority and correcting the Eleventh and Fourth Circuits' erroneous interpretation of the law.

CONCLUSION

For the reasons cited above and in the Petition, 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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