No. _____

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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Question Presented For Review

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.

Parties to the Proceedings

The parties to this proceeding include the Equal Employment Opportunity Commission ("EEOC"), a governmental agency, and BCI Coca-Cola Bottling Company of Los Angeles ("BCI"), a non-governmental corporation.

Rule 29.6 Statement

BCI Coca-Cola Bottling Company of Los Angeles is a wholly owned subsidiary of Coca-Cola Enterprises Inc., a publicly traded company. The Coca-Cola Company, a publicly traded company, owns ten percent (10%) or more of the stock of Coca-Cola Enterprises Inc.

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The opinion of the United States Court of Appeals for the Tenth Circuit (App. 1a-31a) is published at 450 F.3d 476. The memorandum opinion and order of the United States District Court for the District of New Mexico (App. 32a-76a) is unpublished, but unofficially reported at 2004 WL 3426757.

Jurisdiction

The judgment of the court of appeals was entered on June 7, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

Section 703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1), which provides as follows:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Statement of the Case

I. BACKGROUND FACTS AND ISSUES

This case, which arises under Title VII of the 1964 Civil Rights Act, stems from an incident of insubordination involving an African American merchandiser, Stephen Peters, who was employed at BCI's facility in Albuquerque, New Mexico.[1] Mr. Peters reported to the local District Sales Manager ("DSM"), Cesar Grado, who is Hispanic. Mr. Grado had no authority to terminate employees, and was required to run all decisions regarding disciplinary action through BCI's Human Resources Department. (App. 35a).

Mr. Peters was scheduled to be off work on the weekend of September 29 and 30, 2001. Due to a shortage of workers, Mr. Grado ordered Mr. Peters to come to work on the weekend. Mr. Peters refused, and Mr. Grado warned him that continued refusal would be considered insubordination and could be grounds for termination. (App. 40a). Mr. Peters admitted in his deposition that he responded by saying: "You do what you have to do, and I will do what I have to do." (App. 40a). True to his word, Mr. Peters did not appear for work as ordered, and was terminated for insubordination. He later claimed he was sick, and presented evidence he had visited a walk-in clinic on Saturday, September 29, 2001. (App. 43a). The EEOC claims that Mr. Peters was a victim of race discrimination, in that white and Hispanic employees who missed work were not treated as harshly. (App. 46a).

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[1] BCI is a bottler of Coca-Cola® products. Merchandisers are hourly employees whose job duties include product placement, and cleaning, arranging, and rotation of displays and promotional materials in retail grocery outlets. (App. 33a).

The termination decision was actually made by Pat Edgar who, at the time, was a Human Resources Manager working in Phoenix but who had supervisory authority over Albuquerque. It is undisputed that Ms. Edgar did not know that Mr. Peters was African American when she made the termination decision. (App. 9a). She based her decision in part, but not exclusively, on Mr. Grado's account of Mr. Peter's statements and actions. Ms. Edgar never spoke to Mr. Peters prior to the termination; however, she did pull Mr. Peters' personnel file, discovering an unrelated but similar incident of insubordination two years before, including a final warning, which also contributed to her decision to terminate. The prior incident of insubordination did not involve Mr. Grado. (App. 42a-43a).

Contrary to the EEOC's characterization of the incident, Mr. Grado did not initially contact Ms. Edgar in order to report Mr. Peters' insubordination. Rather, he contacted Ms. Edgar, before he ever contacted Mr. Peters, for advice on handling the possibility that Mr. Peters would refuse to work on the weekend (which in fact occurred). Thus, Ms. Edgar was involved in advising Mr. Grado while the incident was unfolding. Ms. Edgar walked Mr. Grado through the exact statements to make and instructions to give to Mr. Peters, and it is undisputed that Mr. Grado followed Ms. Edgar's directions. It is also undisputed that Mr. Grado was never asked for his opinion as to what should happen to Mr. Peters based on his refusal to work, never recommended termination, and, in fact, never made any comments or suggestions at all other than asking Ms. Edgar's advice on how to handle the situation and reporting to her what had occurred. (App. 44a).

The EEOC argued that a subordinate bias theory of liability (sometimes referred to as "cat's paw" or "rubber

stamp" liability)[2] should apply, because the termination decision, though made by Ms. Edgar, was supposedly influenced by racial bias on the part of Mr. Grado. The EEOC presented some rather vague and conclusory declarations from former, disgruntled employees, indicating that Mr. Grado previously treated other African Americans worse than white or Hispanic employees, and made racially disparaging remarks towards African Americans. (App. 46a – 47a). The EEOC claimed that Mr. Grado, though he never expressly recommended or even mentioned termination, presented Ms. Edgar with a distorted version of what occurred with Mr. Peters, resulting in his termination.

II. DECISION OF THE DISTRICT COURT

The District Court granted summary judgment in favor of BCI, dismissing the case in its entirety. (App. 76a). The district court found that there was no question that Mr. Peters' conduct (most significantly, his undisputed admonition to Mr. Grado to "do what you have to do") was insubordination warranting termination (App. 58a), and that Ms. Edgar had no idea Mr. Peters was African American when she made the termination decision. (App. 69a-71a). The district court also

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[2] The "cat's paw" doctrine derives its name from a fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. Courts typically use "cat's paw" language to refer to a situation in which a biased subordinate who lacks decision making power uses the formal decision maker as a dupe to carry out a discriminatory employment action. (App. 14a). The "rubber stamp" doctrine refers to a situation in which a decision maker gives perfunctory approval for an adverse employment action initiated or recommended by a biased subordinate. (App. 15a). Judge Posner is believed to have been the first to use the descriptor "cat's paw" for this category of claim. *See Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990).

found that, while there was sufficient evidence to conclude that Mr. Grado was racially biased (App. 71a) (a decision with which BCI disagrees), there was insufficient evidence of influence by Mr. Grado on the termination decision to warrant application of a subordinate bias theory of liability. (App. 66a-67a,71a). The court pointed to the fact that Mr. Grado never made any recommendation to Ms. Edgar as to what should happen to Mr. Peters, and to the fact that Ms. Edgar independently researched Mr. Peters' employment history prior to making the termination decision. (App. 66a-67a,71a).

III. DECISION OF THE TENTH CIRCUIT

The Tenth Circuit reversed the order of summary judgment, holding that the district court misapplied the subordinate bias theory of liability because it placed too much emphasis on the fact that Mr. Grado made no express recommendation to terminate Mr. Grado. (App. 21a-22a). The Court expressly rejected the notion that a plaintiff must show that a decisionmaker followed the recommendation of a biased subordinate in order to prevail under a subordinate bias theory of liability, thereby effectively overruling a prior Tenth Circuit decision addressing this issue. *See English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001).

The Court also ruled that Ms. Edgar's independent investigation of the report received from Mr. Grado—namely, looking at Mr. Peters' personnel file including his prior history of insubordination—was insufficient, as a matter of law, to defeat the inference that Mr. Grado's racial bias tainted her decision. (App. 30a-31a). The Court implied that direct contact by the decisionmaker with the accused employee is an essential requirement for a true "independent

investigation" sufficient to negate subordinate bias liability. (App. 30a-31a). The Court acknowledged that Mr. Peters telling Mr. Grado to "do what you have to do" was undeniably insubordinate, but focused on discrepancies (which BCI contended were immaterial) between Mr. Grado's and Mr. Peter's accounts of events leading to the termination, pointing out that only Mr. Grado's version of events was relayed to Ms. Edgar. (App. 28a-30a). The Court held that whether or not Mr. Grado's supposed bias was a factor in the termination decision was for a jury to decide, and remanded the case for trial. (App. 31a).

REASONS FOR GRANTING THE PETITION

BCI respectfully submits that there are two reasons why this Court should grant its petition for writ of certiorari and review the Tenth Circuit's decision. First, as the Tenth Circuit and other courts have recognized, there is a distinct split of opinion among the circuit courts of appeal as to the proper standard for applying subordinate bias liability, or the so-called "cat's paw" theory of liability, under Title VII. Second, the Tenth Circuit's ruling hinges upon an important question of federal employment law that has not been, but should be, settled by the Supreme Court: namely, under what circumstances may an employer be held liable for intentional discrimination when the person who made the adverse employment decision admittedly harbored no discriminatory bias toward the impacted employee.

I. THE CIRCUITS ARE SPLIT

Judge Posner of the Seventh Circuit is believed to have been the first to use the descriptor "cat's paw" to label the doctrine of employer liability based upon the motivations of a biased subordinate. *See Shager*, 913 F.2d at 405. The

circuit courts of appeal that have subsequently considered the issue of subordinate bias liability have generally embraced the concept that an employer's culpability for an adverse employment decision may sometimes extend beyond the motivations of the official decisionmaker. *See*, *e.g.*, *Gee v. Principi*, 289 F.3d 342, 345-47 (5th Cir. 2002); *Christian v. Wal-Mart Stores, Inc.*, 252 F.3d 862, 876-78 (6th Cir.), *reh'g denied*, 266 F.3d 407 (2001); *Bergene v. Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Abramson v. William Paterson Coll. of New Jersey*, 260 F.3d 265, 285-86 (3d Cir. 2001); *Wascura v. City of South Miami*, 257 F.3d 1238, 1247 (11th Cir. 2001); *Rose v. New York City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001); *Rios v. Rossotti*, 252 F.3d 375, 381-82 (5th Cir. 2001); *English v. Colorado Dep't of Corr.*, 248 F.3d 1002, 1011 (10th Cir. 2001); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 226-28 (5th Cir. 2000); *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1231 (10th Cir. 2000); *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1249-50 (11th Cir. 1998), *reh'g denied*, 178 F.3d 1305, *cert. denied*, 528 U.S. 930 (1999); *Griffin v. Washington Convention Ctr.*, 142 F.3d 1308, 1310-11 (D.C. Cir. 1998); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998); *Eiland v. Trinity Hosp.*, 150 F.3d 747, 752 (7th Cir. 1998); *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997); *Walden v. Georgia-Pacific Corp.*, 126 F.3d 506, 514-15 (3d Cir. 1997), *cert. denied*, 523 U.S. 674 (1998); *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1325 (8th Cir. 1994). As expressly acknowledged by the Tenth Circuit, however, there has been much confusion, disagreement, and outright debate over both the appropriate analytical framework for such a theory of

liability, and the facts that a plaintiff must show to permit it to be applied.

A. There is an Acknowledged Split Among the Tenth/Seventh, Fifth, and Fourth Circuit Courts of Appeal With Respect to Subordinate Bias Liability

Prior to the Tenth Circuit's decision in this case, the most fully fleshed-out analyses of the subordinate bias theory of liability were found in decisions from the Seventh, Fourth, and Fifth Circuits, none of which utilized the same standards or approach in applying the theory. *Compare Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004), *cert. dismissed*, 543 U.S. 1132 (2005), *with Russell*, 235 F.3d at 219, *with Lust v. Sealy, Inc.*, 383 F.3d 580 (7th Cir. 2004). Before setting forth its own analysis, the Tenth Circuit expressly acknowledged this split of authority:

> Despite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision.

(App. 18a)

The Tenth Circuit then presented its own characterization of the split, first recognizing what it described as a "lenient" approach, currently followed by the Fifth Circuit, wherein a plaintiff is merely required to demonstrate some "influence" over the titular decision maker in order to prevail on a theory of subordinate bias liability. (App. 18a-19a) (*citing Russell*, 235 F.3d at 227). Under this view

> summary judgment generally is improper where the plaintiff can show that an employee with discriminatory animus provided factual information or other input that may have affected the adverse employment action.

(App. 19a) (*quoting Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994)). The Tenth Circuit rejected this "lenient" approach, observing that "[s]uch a weak relationship between the subordinate's actions and the ultimate employment decision improperly eliminates a requirement of causation." *Id.*

The Tenth Circuit next discussed the approach set forth in *Hill*, 354 F.3d at 277, in which the Fourth Circuit held that

> to survive summary judgment, an aggrieved employee who rests a discrimination claim…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 of the employer.

Id. at 291. In *Hill*, the Fourth Circuit ruled that an employer cannot be held liable unless this standard is met, even if there is evidence the biased subordinate exercised "substantial influence" or played a "significant" role in the employment decision. *Id.* at 289. The Tenth Circuit rejected the Fourth Circuit's standard as being so strict as to undermine the deterrent effect of subordinate bias claims. (App. 20a).

After characterizing the Fifth and Fourth circuits as being at "opposite extreme[s]" on the issue of subordinate bias liability (App. 19a), the Tenth Circuit announced it was aligning itself with the Seventh Circuit, which, while expressly rejecting the "actual decision maker" standard set forth by the Fourth Circuit in *Hill*, also requires the plaintiff to establish more than mere "influence" or "input" in the decisionmaking process in order to prevail on a claim based on subordinate bias. (App. 20a-21a) (*citing Lust*, 383 F.3d at 584 (Posner, J.)). The Tenth Circuit thus embraced what might be described as the "causation" standard of subordinate bias liability, an approach that requires the plaintiff to establish a causal link between the subordinate's bias and the adverse employment decision. *Id*. at 488.

The Tenth Circuit is not the first court to wrestle with intra-circuit confusion, disagreement, and conflicting precedent on the issue of subordinate bias liability, nor is it the first court to observe the extra-jurisdictional conflict among the circuits on how this theory is articulated and applied. In the *Hill* decision, for instance, a divided Fourth Circuit panel initially reversed an award of summary judgment to the employer, applying a theory of subordinate bias liability based on the "substantial influence" standard applied by the Fifth Circuit. *See* Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, No. 03-1443, 2004 WL 838126 at *4 ("*Hill* Petition"). The dissenting panel member maintained that an employer could be held liable only if there was a discriminatory purpose on the part of the "actual decisionmaker." *Id*. at *4-5. The Fourth Circuit reheard the case *en banc*, voting 7-4 to vacate the panel opinion and reinstate the award of summary judgment. *Id*. at 5.

Like the Tenth Circuit, the Fourth Circuit in *Hill* expressly acknowledged the split of opinion on this issue, observing that "while the courts often utilize the same terminology…they have not always described the theory in a consistent way…." *Hill*, 354 F.3d at 290. The *en banc* majority opinion in *Hill* frankly recognized that its holding conflicted with the Fifth Circuit's decision in *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003), which held that "the relevant inquiry is whether the supervisor harboring a discriminatory animus had 'influence or leverage over' the decisionmaking of those 'principally responsible' for the adverse employment actions." *Hill*, 354 F.3d at 290 (*quoting Laxton,* 333 F.3d at 584). The dissent in *Hill* also acknowledged the split, noting that the majority's decision "puts us at odds with virtually every other circuit…" *Id*. at 299.

The Seventh Circuit (specifically, Judge Posner, revisiting the "cat's paw" theory of liability which he inaugurated fourteen years prior) has also expressly acknowledged the split of authority on this issue, stating that the rationale set forth by the Fourth Circuit in *Hill* is "not the view of this court." *Lust*, 383 F.3d at 584. Judge Posner pointedly criticized the *Hill* court for applying what he characterized as an overly literal reading of his earlier opinion in *Shager*:

> The [cat's paw] 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.

Id. As is readily apparent from Judge Posner's comments, as well as the conflicting commentary and analysis set forth in

the *Hill* case and the case at bar, the issue of subordinate bias liability presents a pronounced divergence of opinion, ripe for resolution by this Court.

B. The Tenth and Fourth Circuit Courts of Appeal are in Conflict over the Proper Application of *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), in the Area of Subordinate Bias Liability

In articulating their contradictory standards for subordinate bias liability, the Fourth and Tenth Circuits based their holdings, in part, on this Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). In *Reeves*, this Court reinstated a jury verdict for a plaintiff, finding that he had produced sufficient evidence of age discrimination. This evidence included testimony that Powe Chestnut, the director of manufacturing (and the company president's husband) harbored age animus against the plaintiff. *Id.* at 151. Although the president, Sandra Sanderson, made the decision to terminate plaintiff's employment, this Court acknowledged plaintiff's "evidence that Chestnut was motivated by age-based animus and was *principally responsible* for [plaintiff's] firing." *Id.* (emphasis added). The Court also noted plaintiff's evidence that "Chestnut was the *actual decisionmaker* behind his firing" even though it was Sanderson "who made the formal decision to discharge [plaintiff]." *Id.* at 152 (emphasis added).

Relying upon this language in *Reeves*, the Fourth Circuit stated that:

> *Reeves* informs us that the person allegedly acting pursuant to a discriminatory animus need not be the "formal decisionmaker" to

> impose liability upon an employer for an adverse employment action, so long as the plaintiff presents sufficient evidence to establish that the subordinate was the one "principally responsible" for, or the "actual decisionmaker" behind, the action.

Hill, 354 F.3d at 288-89. The Fourth Circuit rejected the argument that this language in *Reeves* "does not define the outer contours of who may be considered a decisionmaker for purposes of imposing liability upon an employer." *Id.* at 289. Rather, the court embraced the *Reeves* language, and further noted that "the Court's clear emphasis upon who holds the 'actual decisionmaking' power and authority or who has 'principal responsibility' for an employment decision is consistent with the limitations set forth in [*Burlington Indust., Inc. v. Ellerth*, 524 U.S. 742 (1998)]." *Id.*

In adopting a different standard than *Hill*, the Tenth Circuit expressly rejected *Hill*'s reliance upon *Reeves*. In a clear contradiction of opinion, the Tenth Circuit stated that "[t]he Fourth Circuit's strict approach makes too much of the phrase 'actual decisionmaker' in *Reeves*; the Court was describing what the petitioner's evidence showed, not prescribing the 'outer contours' of liability." (App. 20a). Finding the *Hill* court's reliance upon *Reeves* "peculiar," *id.*, the Tenth Circuit stated bluntly that the Fourth Circuit's "focus on 'who is a decisionmaker' for purposes of discrimination actions seems misplaced." *Id.* (citation omitted). Moreover, while the Fourth Circuit found its standard consistent with this Court's agency analysis in *Ellerth*, the Tenth Circuit found just the opposite. *Compare Hill*, 354 F.3d at 289 *with* App. 20a.

The circuit split over the appropriate standard for subordinate bias liability, therefore, includes a circuit split over the proper application of this Court's holdings and findings in *Reeves*. This circuit split further supports BCI's petition for review as this case will present the opportunity for this Court to rule upon how its findings in *Reeves* affect and control the contours of subordinate bias liability.

C. Other Circuit Courts of Appeal Apply Different Standards of Subordinate Bias Liability

The current stand-off among the Tenth/Seventh, Fifth, and Fourth circuits on the appropriate standard for application of subordinate bias liability is only the latest permutation of a shifting but longstanding discord among the circuits (and even within circuits) regarding this issue. *See*, *e.g*, *Hill* Petition, *9-19 (gathering and summarizing cases applying various theories of subordinate bias liability). Over the years, courts have widely differed on the level of influence that an allegedly biased subordinate or supervisor must have on the ultimate decisionmaker, and the level of involvement the subordinate must have in the decisionmaking process, before liability will be imposed on the employer.

A prime example of this divergence of opinion is presented by the case at bar, where the Tenth Circuit announced and applied a standard that conflicts with its prior precedent. Specifically, the court stated that, under its chosen standard for application of a theory of subordinate bias liability, an employer may be liable even if the biased subordinate never expressly recommended termination. (App. 21a-22a). Indeed, the Tenth Circuit held that the trier of fact might conclude that Mr. Grado caused Mr. Peters' termination, despite the fact that Mr. Grado admittedly made no comments or suggestions at all regarding what should

happen to Mr. Peters.[3] In so doing, the Tenth Circuit effectively overruled circuit precedent, which required that a claimant "must show that the decisionmaker 'followed the biased recommendation [of a subordinate] without independently investigating the complaint against the employee.'" *See English*, 248 F.3d at 1011. By altering its position on the requirement of a recommendation, the Tenth Circuit not only contradicted (without expressly overruling) its precedent, but also placed itself in opposition to numerous cases clearly indicating that, in order for subordinate bias liability to apply, a subordinate must assert more overt influence over the decisionmaker and/or play a more proactive role in instigating or orchestrating the employment decision than occurred in the case at bar. *See*, *e.g.*, *Russell*, 235 F.3d at 221 (finding that plaintiff's fellow-manager substantially influenced the termination decision of upper-level management, when he gave his boss the ultimatum that he would quit if she did not fire the plaintiff); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000) (stating that plaintiff's direct supervisor substantially influenced the termination where he had repeated "daily conference calls" with regional manager regarding plaintiff, and was asked for his opinion regarding plaintiff's dismissal).

The Sixth Circuit has also offered varying standards. In a 1998 case, the court stated that "remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless *played a meaningful role* in the decision to terminate the plaintiff, were relevant." *Ercegovich*, 154 F.3d

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[3] Even assuming Mr. Grado harbored a racial bias, the EEOC failed to present any evidence demonstrating that Mr. Grado, who was short-staffed and desperately seeking workers to cover shifts, wanted Mr. Peters to be terminated. (App. 38a-39a).

at 354-55 (emphasis added). Three years later, however, the court ignored *Ercegovich*'s "meaningful role" standard and stated that "the plaintiff must offer evidence that the supervisor's racial animus was the cause of the termination or *somehow influenced* the ultimate decisionmaker." *Christian*, 252 F.3d at 877 (emphasis added).

Whereas the Sixth Circuit maintains the different standards of a subordinate's level of involvement —"meaningful role" vs. "somehow influenced"— the Ninth Circuit applies a more lenient standard than either of the Sixth Circuit standards, requiring that the subordinate merely be "involved" in (as opposed to have actually influenced) the decision. *See Bergene*, 272 F.3d at 1141 (stating that, "[e]ven if a manager was not the ultimate decisionmaker, that manager's retaliatory motive may be imputed to the company if the manager *was involved* in the hiring decision"). The Eighth Circuit, on the other hand, describes its standard in terms of whether the subordinate used the ultimate decisionmaker as a conduit and actually acted to set the plaintiff up to fail. *See Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051 (8th Cir. 1993); *Stacks*, 27 F.3d at 1316.

Some circuit courts of appeal simply state that liability will be imposed if there is evidence that the biased subordinate merely "influenced" the ultimate decisionmaker. The First Circuit, for example, stated that, in order to prove that the employer's reason for the adverse action was a pretext for discrimination, the employee need only "show that discriminatory comments were made by the key decisionmaker or *those in a position to influence the decisionmaker*." *Santiago-Ramos,* 217 F.3d at 55 (emphasis added). The Third Circuit described the standard differently, stating that, "[u]nder our case law, it is sufficient if those exhibiting discriminatory animus *influenced or participated in*

the decision to terminate." *Abramson*, 260 F.3d at 286 (Alito, J., participating) (emphasis added).[4]

The level of influence that must be exerted by a biased subordinate in order to impose liability on the employer is higher in the Eleventh Circuit. In that circuit, liability will be imposed where the biased subordinate actually "*is* the decisionmaker, and the titular 'decisionmaker' is a mere conduit for the harasser's discriminatory animus." *Llampallas*, 163 F.3d at 1249 (emphasis in original). *See also Wascura*, 257 F3d at 1247 (indicating that the biased subordinate must be a "dominant decision-maker whose decision was rubber-stamped by others"). The District of Columbia Circuit has spoken in reverse terminology, "holding that evidence of subordinate bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin*, 142 F.3d at 1312 (Ginsburg, J.).

As these decisions reveal, there existed intercircuit and intracircuit disagreement over the appropriate standard long before the issue ripened over the last two years in *Hill*, *Lust*, *Russell*, and (now) *BCI*. In short, there is a longstanding, expressly acknowledged circuit split with respect to the determinative issue in this case, bringing this matter squarely within the ambit of this Court's discretionary jurisdiction.

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[4] The Third Circuit cited, among other cases, the D.C. Circuit's 1998 decision, authored by then-Judge Ginsburg, wherein the court held that "evidence of a subordinate's bias is relevant where the ultimate decision maker is not insulated from the subordinate's influence." *Griffin,* 142 F.3d at 1312 (Ginsburg, J.).

II. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The ultimate question in any employment discrimination case involving a claim of disparate treatment is whether the plaintiff was a victim of intentional discrimination. *Reeves*, 530 U.S. at 153. This ultimate question is at the heart of the matter that was presented to the Tenth Circuit in this case: Based on the undisputed facts, could a reasonable trier of fact conclude that Mr. Peters was subjected to intentional discrimination on the basis of his race? It is clear that the answer to this question would have been different if the matter had arisen in the Fourth Circuit. Indeed, the case might have turned out very differently even under the supposedly "lenient" standard applied in the Fifth Circuit, where in *Russell*, the Fifth Circuit found that a theory of subordinate bias liability was applicable in a case where the influence exercised by the subordinate over the decisionmaking process far exceeded the supposed "influence" exerted by Mr. Grado over Ms. Edgar. *See Russell*, 235 F.3d at 228 (observing that the allegedly biased subordinate exerted so much influence over the decisionmaker that she "essentially regarded her decision to terminate [the employee] as ordained by other forces"). In fact, the case might have turned out differently in any circuit, even the Tenth Circuit, depending upon the predilections of the panel regarding which of the various available standards to apply. Such indirection and ambiguity in the law severely undermine the best efforts of multi-jurisdictional employers such as BCI to comply with Title VII and other anti-discrimination laws.

In the realities of today's workplace, ultimate decisions are frequently made by decisionmakers who are at some level removed from employees and who must rely to varying

degrees on information received from subordinates. Indeed, the practice utilized by BCI in this case, of elevating the decision at issue to trained Human Resources personnel, is inarguably a deterrent against discrimination, as it provides for consistent application of policies and neutrality in decisionmaking. Are employers such as BCI best advised to eschew such centralized decisionmaking, either entirely, or in certain areas, depending upon the prevailing judicial views in its various operational divisions? As the Tenth Circuit suggests, is someone in Ms. Edgar's position required to have direct contact with the employee at issue in every instance, in order to avoid a claim based upon subordinate bias liability? And if that is the case, does that mean it is now appropriate, in contradiction to the overwhelming weight of prior authority,[5] for courts to act as "super personnel department(s)" dictating in minute detail the practices of employers? All of these extremely important and timely questions underlie the issue presented for review, and make this case an excellent vehicle for the Court to provide much-needed guidance to employers, employees, the EEOC, and all interested parties, regarding these matters.

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[5] The following cases state that courts may not act as a "super personnel departments" that second guess employers' business judgments: *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197 (10th Cir. 2006) (quoting *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Serv.*, 165 F.3d 1321, 1330 (10th Cir. 1999)); *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1203 (10th Cir. 2006); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 628 (6th Cir. 2006); *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir. 2006); *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1181 (7th Cir. 2002), *cert. denied*, 537 U.S. 884 (2002); *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006).

The issue presented for review undeniably has a far-reaching impact, applying to all employers covered by federal anti-discrimination laws, including Title VII, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq*. ("ADEA").[6] *Christian*, 252 F.3d at 868; *Hill*, 354 F.3d at 283-84, 286-87. Moreover, parties on all sides of the issue agree both as to the importance of the issue and the need for guidance—as the Court will recall, the unsuccessful plaintiff in the *Hill* case petitioned this Court for review of this very issue in 2004.[7] *See Hill* Petition, 2004 WL 838126. In fact, the Court invited the Solicitor General to submit a brief addressing the issue of subordinate bias liability, prior to the petitioner's voluntary withdrawal of the petition in *Hill*. BCI is hopeful the Court will seize upon this renewed opportunity to articulate a reasonable, universal standard for application of the subordinate bias theory of liability.

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[6] This Court's review of this issue will also have an impact on state anti-discrimination laws, as state courts frequently look to federal law for guidance when applying their own state anti-discrimination statutes. *See*, *e.g.*, *Ocana v. American Furniture Co.,* 91 P.3d 58, 68 (N.M. 2004) (applying New Mexico law); *Christian*, 252 F.3d at 880 (applying Ohio law); *Beason v. United Tech. Corp.*, 337 F.3d 271, 276 (2d Cir. 2003) (applying Connecticut law); *LaBove v. Raftery*, 802 So. 2d 566, 573 (La. 2001) (applying Louisiana law).

[7] The EEOC has gone on record opining about the importance of the issue of subordinate bias liability, filing an amicus brief with the Fourth Circuit in the *Hill* case.

CONCLUSION

For all of the reasons set forth above, BCI Coca-Cola Bottling Company of Los Angeles respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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