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**Information Memos, Articles, White Papers****Labor and Employment Law: Employer Liability for Actions of a Biased Subordinate (11/06)**By Louis P. DiLorenzo, The Manufacturers Association, *Manufacturing Matters*

Usually, employers are liable for the discriminatory actions set in motion by its decision makers. Recently, however, the Tenth Circuit recognized the theory of a "subordinate bias claim" under Title VII. Under this theory, an employer can be liable even if the actual decision maker lacks any discriminatory intent. In *EEOC v. BCI Coca-Cola Bottling Co.*, (June 7, 2006), the court imputed the discriminatory racial bias of a low level manager to a human resources supervisor, who was stationed hundreds of miles away and did not even know the terminated employee was black.

Most Circuit Courts have endorsed some theory of subordinate bias; some circuits hold that an employer is liable if any influence is exerted, while others find an employer liable only when the subordinate exercises complete control over the decision maker. In this case, the Tenth Circuit chose a middle ground -- it will find subordinate bias liability where the subordinate's reports, recommendations or other acts "caused" the adverse employment action.

According to the court, allowing such claims of subordinate bias liability has "the salutary effect of encouraging employers to verify information and review recommendations before taking adverse employment actions against member of protected groups." The court emphasized that "an employer can avoid liability by conducting an independent investigation of the allegations against an employee," and, "simply asking an employee for his version of events may defeat the inference that an employment decision was [illegally] discriminatory."

In this case, a senior employee, considered a good worker and a "team player", was directed by his district sales manager to report to work over the weekend because of an unusual scheduling crunch. The employee claimed he could not come in as he was not feeling well. The district sales manager claimed the employee yelled at him, refused to work and planned to call in sick. The manager called the main HR department in another city and was told by the HR supervisor that, under these circumstances, if the employee called in sick, he could be terminated for insubordination. As it turns out, the employee was actually sick and was diagnosed by a doctor who excused him from work until Monday. After a series of phone calls with the district manager on Monday, the HR officer decided to terminate the employee. The HR supervisor was the sole decision maker and did know the employee was black. She did, however, rely almost exclusively on information from the district manager and did not conduct an independent inquiry or even ask the employee for his side of the story.

The EEOC sued for race discrimination asserting that the employer could be held liable under the bias subordinate theory. In support of the allegation of racial discrimination, some evidence was presented that showed the district manager subjected black employees to greater scrutiny and more serious discipline than other employees and had made several race-based remarks. The Tenth Circuit endorsed the EEOC's argument finding it proper to hold employers liable under subordinate bias claims where "the biased subordinate's discriminatory reports, recommendations or other acts caused the adverse employment action." The court found that a material question of fact existed as to whether the district manager's bias caused the termination because he was the sole source of information.

Human resource decision makers need to be made aware of the subordinate liability theory and its repercussions. In this case, the company was held liable for the bias of a lower level manager and non-decision maker because his information was relied on almost exclusively and, in finding liability to the employer, it was not necessary for the biased subordinate to explicitly recommend termination or any other adverse employment action. The

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recommended practice is that the investigator get the employee's side of the story before any disciplinary action is taken and that a detailed record of the investigation be recorded. Be careful out there!

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