No. 22-1240

In the

Supreme Court of the United States

NICOLAS TASHMAN,

Petitioner,

v.

ADVANCE AUTO PARTS, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

42 U.S. C. Section 1981(a) guarantees that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts…as is enjoyed by white citizens…." Congress defines "make and enforce contracts" as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. Section 1981(b).

To establish a prima facie case of discrimination in the retail context, a Section 1981 plaintiff must show (1) a membership in a protected class, (2) discriminatory intent on the part of the defendant, and (3) interference by the defendant with an activity protected under statute. *Green v. Dillard's, Inc.*, 483 F.3d 533, 538 (8th Cir. 2007).

The question Petitioner asks this Court to consider is whether the principle of vicarious liability can be used in claims filed under 42 U.S.C. Section 1981 – a liability standard this Court rejected in *General Building Contractors Association*, Inc., 458 U.S. 375 (1982).

PARTIES TO THE PROCEEDINGS

Petitioner is Nicolas Tashman. Respondent is Advance Auto Parts, Inc.

RULE 29.6 DISCLOSURE STATEMENT

Respondent has no parent company and no publicly held company or corporation owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

Nicholas Tashman v. Advance Auto Parts, Inc., No. 20-00943, United States District Court for the Eastern District of Missouri. Judgment in favor of Respondent entered April 8, 2022.

Nicholas Tashman v. Advance Auto Parts, Inc., No. 22-1949, United States Court of Appeals for the Eighth Circuit. Judgment in favor of Respondent entered March 27, 2023.

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JURISDICTION

The judgment of the Court of Appeals was entered on March 27, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 1981(a) provides that "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

42 U.S.C. Section 1981(b) states: "For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

STATEMENT OF THE CASE

On September 19, 2019, Petitioner Nicolas Tashman, a man of middle-eastern descent, entered the Respondent Advance Auto Parts, Inc.'s store in

Florissant, Missouri to have a battery tested. While in the store, Petitioner and Respondent's employee Kevin Doe ("employee") entered into a verbal argument whereby employee is alleged to have directed racist and threatening statements at Petitioner. After an investigation into the incident, employee was terminated by Petitioner.

Petitioner filed a five-count lawsuit against Respondent for unlawful discrimination under 42 U.S.C. Section 1981, assault, intentional infliction of emotional distress, negligent hiring and retention, and negligent supervision.

At the close of discovery, Respondent filed a Motion for Summary Judgment as to all five counts. The District Court granted Respondent summary judgment on all five counts finding Respondent was not liable on all five counts under Federal and State law as there was no evidence to support Petitioner's claims.

The District Court granted Respondent's Motion for Summary Judgment Petitioner's Section 1981 claim because the District Court properly concluded and applied long-established 8th Circuit law set forth in *Green v. Dillard's, Inc.,* 483 F.3d 533 (8th Cir. 2007) which was in line with this Court's holding in *General Building*. *See General Building* at 375. According to this Court's decision in *General Building* as well as the Eighth Circuit's decision in *Green*, a party cannot be held vicariously liable in a section 1981 claim unless there is evidence of that party's own discriminatory intent, shown by

independent negligence or recklessness. *See General Building* at 375 and *Green* at 540.

The District Court also found that liability for employee's conduct could not be imputed to Respondent on a theory of ratification. The evidence, in fact, established that employee's conduct was prohibited by Respondent's workplace policies and employee was terminated for violation of these policies. The District Court held there was no evidence from which a reasonable juror could find that Respondent ratified employee's conduct noting that an investigation had been conducted and Respondent terminated employee.

On appeal, the Eighth Circuit correctly affirmed the opinion of the District Court relying on *Green* which was consistent with this Court's holding in *General Building* and rejected the expansion of employer liability in Section 1981 cases to include vicarious liability.

STATEMENT OF FACTS

Petitioner is a United States Citizen of Arab/Middle Eastern descent. (CA JA 008). On September 19, 2019, Petitioner entered Respondent's store located in Florissant, Missouri. (CA JA 008). Respondent provides free testing and charging of batteries. (CA JA 008). Petitioner entered the store to test a car battery to determine if he needed to purchase a new battery. (CA JA 008). As soon as he entered the store, Petitioner informed employee that he wanted to charge and test his battery to determine if he needed to purchase a new one. (CA JA 009).

Employee handed Petitioner two blank pieces of paper and Petitioner asked employee what he was supposed to do with the paper and employee told him to put his name on it. (CA JA 009). Petitioner put his name on one of the pieces of paper and handed it back to employee. (CA JA 009). Employee then allegedly told Petitioner: "God damn it, fill out the other paper. Put your damn name on there." (CA JA 009). Employee is alleged to have stated, "I'm going to beat your ass right here, right now." (CA JA 009). Another of Respondent's employees' grabbed employee to restrain him. (CA JA 010). Petitioner remained standing near the battery testing area when employee broke free from the other employee and moved towards Petitioner. (CA JA 010). Another employee took employee to the back of the store. (CA JA 010). Petitioner left the store. (CA JA 054).

Respondent strictly prohibits discrimination based on any legally protected status. (CA JA 237-238). This policy against discrimination is part of the Respondent's code of ethics and every employee is required to read and familiarize himself or herself with it. (CA JA 196-197).

Violations of these policies are not tolerated and can be cause for termination. (CA JA 202) The company policies include "Respect for Human Rights" which reads in part: "We must treat each of our team members, customers, vendors, suppliers and any other parties with whom we do business with dignity and respect." (CA JA 199).

The policy goes on to state "Team members must be provided with a work environment that is safe

and free from discrimination or harassment of any type. Advance strictly prohibits discrimination on the basis of race, color, religion, gender, pregnancy, age, national origin, ancestry, ethnicity, citizenship status, disability, marital status, sexual orientation, gender identity or expression, including transgender status, or any other legally protected status." (CA JA 200).

This policy also applies to customers who enter the store. (CA JA 200-201). Employee received training on these policies. (CA JA 233).

During employee's employment, Louis Hogan ("Hogan") served as a senior regional human resources manager for the Midwest region of Advance Auto Parts, Inc. (CA JA 161). The Midwest region encompassed the Florissant, Missouri store at issue in this case. (CA JA 069).

Employee became an employee of Respondent as part of its integration with Carquest. Employee's transfer date was October 1, 2014. (CA JA 164 and 194). There is nothing in employee's employee file showing previous write-ups or misconduct prior to this incident, either at Carquest or Advance Auto Parts. (CA JA 164).

When Hogan learned of the misconduct of employee alleged by Petitioner, he conducted an investigation. (CA JA 078). The employees Hogan spoke with during his investigation had no complaints about employee. (CA JA 164). Based on his investigation, Hogan determined that employee violated company policy prohibiting using obscenities at a customer. (CA JA 202). Hogan's investigation found that employee chose to use language and

statements that violated company policy which resulted in his termination. (CA JA 202).

Hogan recommended employee's termination for violating company policy against employees using obscenities at customers. (CA JA 104). Hogan recommended the termination because he violated company policy requiring that employees treat all customers with dignity and respect. (CA JA 200). The Florissant store's district manager Dante Maranan terminated employee based on Hogan's recommendation. (CA JA 146). Respondent terminated employee on November 12, 2019. (CA JA 148).

Employee Terri Forster ("Forster"), whose deposition was taken by Petitioner's counsel on May 26, 2021, testified she had never heard employee speak to a customer like he did to Petitioner prior to this incident. (CA JA 269). Forster testified that she is unaware of any other incidents involving employee where he either lost his temper or in any way threatened anyone. (CA JA 270).

Employee Doreen Mesick, whose deposition was taken by Petitioner's counsel on May 27, 2021, testified that employee was a good employee and she was not aware of any complaints about him. (CA JA 273).

Employee William Maddox ("Maddox"), whose deposition was taken by Petitioner's counsel on May 27, 2021, testified that employee was a "great employee." (CA JA 275). Maddox testified that he had no knowledge of any complaints made against

employee either by coworkers or customers. (CA JA 275).

Employee Thomas Renfroe, whose deposition was taken by Petitioner's attorney on May 26, 2021, testified that employee was "easygoing" and that he had never had any problems with him at all. (CA JA 053). Renfroe testified that no other coworkers made any complaints to him about employee. (CA JA 053).

The deposition of Advance District Manager Dante Maranan was taken by Petitioner's attorney on July 14, 2021. (CA JA 276). He testified that prior to this incident, he never had any customer complaints towards employee. (CA JA 277). Regardless, as a result of his behavior towards Petitioner, employee was terminated. (CA JA 148).

On April 8, 2022, Petitioner filed a lawsuit against Respondent alleging five counts: Unlawful discrimination under 42 U.S.C. Section 1981, assault under Missouri law, intentional infliction of emotional distress under Missouri law, negligent hiring and retention under Missouri law and negligent supervision under Missouri law. (CA JA 007). After the completion of discovery, Respondent filed a Motion for Summary Judgment on all counts. (CA JA 025). The District Court granted summary judgment on all counts rejecting application of vicarious liability against Respondent. It found that Respondent did not engage in any independent acts which were negligent or reckless. It found that Respondent did not know that employee would act in such a manner towards customer and could not have anticipated employee would act in such a manner towards customers.

Additionally, the District Court found that employee's actions were not performed in the scope of his employment because his sudden and unexpected mistreatment of a customer did not further the interests of Respondent. (CA JA 791).

Petitioner appealed the District Court Judgment on the claims for violation of Section 1981, assault and intentional infliction of emotional distress. (CA JA 792). On March 27, 2023, the Eighth Circuit Court of Appeals affirmed the District Court's Judgment (*See Nicolas Tashman v. Advance Auto Parts, Inc.*, 63 F.4th 1147 (8th Cir. 2023). Petitioner has now filed a Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE PETITION

A. THERE IS NO SPLIT AMONG THE CIRCUITS BECAUSE THIS COURT REJECTED VICARIOUS LIABILITY IN CLAIMS FILED UNDER 42 U.S.C. SECTION 1981 IN *GENERAL BUILDING CONTRACTORS ASSOCIATION, INC. V. PENNSYLVANIA ET AL.* 458 U.S. 375 (1982)

Whether an employer can be held vicariously liable for the acts of an employee which violate 42 U.S.C. Section 1981 was decided by this Court in *General Building Contractors Association, Inc. v. Pennsylvania et al.*, 458 U.S. 375 (1982). In General Building, this Court held that application of vicarious liability is not available in claims filed under Section 1981. *Id.*

In *General Building*, the Commonwealth of Pennsylvania and several black individuals representing a class of racial minorities brought an action in the United States District Court for the Eastern District of Pennsylvania under 42 U.S.C. Section 1981 for alleged racial discrimination in the operation of an exclusive union hiring hall established in collective-bargaining contracts between the local union representing operating engineers, trade associations and industry employers. *Id*. at 378.

The Complaint in *General Building* alleged that the union and Joint Apprenticeship and Training Committee (JATC) violated numerous state and federal laws including 42 U.S.C. Section 1981 by denying black union members access to union referral lists and skewing referrals in favor of white workers. *Id*. at 380. The District Court found that the union practiced a pattern of intentional discrimination creating substantial racial disparities. *Id*. at 381. The District Court also found that the JATC had engaged in similar discriminatory practices. *Id*. The District Court found that both the union and the JATC had violated 42 U.S.C. Section 1981 as well as other laws.

The District Court then turned to the claim that the employers who negotiated with the union were vicariously liable for the discriminatory conduct of the union. *Id*. at 381. The District Court found the employers liable under Section 1981 based on the doctrine of vicarious liability - despite the Plaintiffs failure to produce evidence that the employers were aware of the union's discriminatory practices or themselves had any discriminatory intent. *Id*. at 381. Despite the lack of intent, the District Court found the

employers, among others, vicariously liable under Section 1981. *Id.* The District Court reasoned that liability under Section 1981 did not require proof of purposeful conduct on the part of the employers. *Id.* Instead, the District Court found that the very relationship between the unions and the employers was sufficient to impose vicarious liability. *Id.* at 382.

Defendants sought review of the judgment against them in the Third Circuit Court of Appeals. *Id.* at 375. The Court of Appeals affirmed the District Court ruling and application of vicarious liability to find liability against the employers. *Id.* at 382.

This Court granted certiorari. This Court stated that "The District Court held that petitioners had violated 42 U.S.C. Section 1981 notwithstanding its finding that, as a class, petitioners did not intentionally discriminate against minority workers and neither knew nor had reason to know of the Union's discriminatory practices." *Id.* at 383.

This Court reversed that decision finding that liability under Section 1981 cannot be imposed without proof of intentional discrimination. *Id.* at 382-383. This Court held the lower courts improperly applied vicarious liability to the employers and trade associations for the discriminatory conduct of a third party – the unions. *Id.*

This Court considered whether liability may be imposed under 42 U.S.C. Section 1981 without proof of intentional discrimination. *Id.* at 383. In *General Building*, this Court conducted a thorough analysis of the history and purpose of Section 1981. *Id.* at 384-391. It then concluded that "Section 1981, like the

Equal Protection Clause, can be violated only by purposeful discrimination." *Id*.

Turning to the matter before it, this Court rejected the application of vicarious liability to the employers and others for the discriminatory acts of the union. *Id*. at 391. "In light of our holding that Section 1981 can be violated only by intentional discrimination, the District Court's judgment can stand only if liability under Section 1981 can properly rest on some other ground than the discriminatory motivation of the petitioners themselves." *Id*. at 391.

This Court then addressed the District's Courts various theories upon which it attached respondent superior to establish that even under the traditional doctrine of respondeat superior, the District Court's analysis failed. This Court gave thoughtful consideration to the arguments made by the District Court to support its wrongful decision to vicarious apply vicarious liability, but in the end, firmly rejected vicarious liability in Section 1981 claims. *Id*. at 375.

This Court noted that Section 1981 "…merely declares specific rights held by '[a]ll persons within the jurisdiction of the United States' We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. *It did not intend to make them the guarantors of the worker's rights as against third*

parties who would infringe on them." *Id.* at 396 (*emphasis added*).[1]

Petitioner is correct that this Court in *General Building* "went to great lengths to consider whether the doctrine of respondeat superior would apply to hold an employer liable…." *Petitioner's Brief at page 27.* However, this Court, after careful, thorough and detailed analysis of Section 1981 as well as the principle of vicarious liability firmly rejected its application in Section 1981 cases. *General Building* at 375. Petitioner all but admits this when he states "While this Court has never definitely stated that the respondeat superior doctrine applies to a Section 1981 action…" *Petitioner's Brief at page 27.*

The legal decision upon which Petitioner bases his Petition for Writ of Certiorari is at odds with this Court's precedent in *General Building*, 458 U.S. 375. Petitioner relies on *Arguello v. Conoco*, *Inc.*, 207 F.3d 803 (5th Cir. 2000) to suggest there is a split among the circuits warranting certiorari. But this reliance is misguided and clearly ignores this Court's decision in *General Building,* 458 U.S. at 375. Simply put, *Arguello* was wrongly decided because it ignored the precedent set in *General Building*. *See Arguello* at 803.

In *Arguello*, the Fifth Circuit broadened the strict liability standard of vicarious liability to apply not only to the discriminatory actions of all employees in Title VII cases but to all employees in Section 1983 thereby ignoring this Court's holding in *General*

[1] To adopt the Fifth Circuit standard would essentially make all employers in this Circuit guarantors of the acts of their employees without any knowledge, intent or culpability.

Building that vicarious liability is not permitted in Section 1981 claims. *See Arguello* at 803.

The *Arguello* Court's decision to impose liability on an employer for a low-level employee's discriminatory conduct was based, in part, on this Court's holding in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) where this Court analyzed imputing liability against an employer for Title VII violations. *Faragher* did not involve a Section 1981 claim as in the case at bar or as in *Arguello*. *See id*.

In *Faragher*, this Court found that in Title VII cases, courts may not hold an employer vicariously liable for the discriminatory actions of non-supervisory employees in Title VII cases but only supervisory personnel. *Id*. at 804.

In *Faragher*, Petitioner worked part-time as a lifeguard for the City of Boca Raton. Petitioner brought an action against the City of Boca Raton under Title VII against her supervisors alleging they created a sexually hostile atmosphere including uninvited and offensive touching. *Id*. at 780. The District Court found in favor of Petitioner and against the City of Boca Raton finding that there was justification for holding the city liable for the harassment of its supervisory employees. *Id*. at 783.

On appeal, the Eleventh Circuit reversed the judgment against the City of Boca Raton. *Id*. at 783. The Eleventh Circuit rejected applying vicarious liability principles against the City for the acts of the supervisory employees. *Id*. The Eleventh Circuit relied on this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1957) in reaching its opinion.

Id. at 784. This Court reversed the Eleventh Circuit and adopted a limited theory of employer liability. *Id*. at 804. This Court held that in Title VII claims "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee." *Id*. at 807. The *Faragher* decision was limited to Title VII claims.

The *Arguello* Court, in analyzing employer liability in a Section 1981 case, relied on *Faragher* to expand employer liability in Section 1981 cases - despite *Faragher* being limited to Title VII claims. *Id*. The *Arguello* Court failed to address the distinctions between Title VII and Section 1981 claims. *Arguello* at 803.

The *Arguello* Court found that the reasons for holding an employer vicariously liable for the discriminatory acts of a supervisory employee under Title VII cases, supported (*without any legal precedent*) the finding that employers could also be found vicariously liable for non-supervisory employees under Section 1981. *Id*. at 810. In so holding, the Fifth Circuit ignored this Court's holding in *General Building* and failed to require a finding of discriminatory intent on the part of the employer. *See General Building* at 458 U.S. 375.

Arguello was wrongly decided and failed to follow this Court's clear ruling in *General Building* that vicarious liability is unavailable in Section 1981 claims. *Arguello* does not create a split in the circuits on this issue.

The Eighth Circuit's opinion in the case at bar is in line with this Court's holding in *General Building*. In this case, the Eighth Circuit adopted a standard of liability requiring evidence of the employer's individual discriminatory intent before attaching liability. It rejected application of vicarious liability in claims filed under Section 1981 as required by this Court. *See General Building*, 458 U.S. at 375.

The Eighth Circuit first addressed the issue of vicarious liability in a Section 1981 claim in *Green v. Dillard's, Inc.* 483 F.3d 533 (8th Cir. 2007).

In *Green*, African-American customers brought an action against Dillard's Department store under 42 U.S.C. Section 1981 alleging that the store interfered with their right to make and enforce contracts because of their race. *Id.* at 536. The evidence established that a store employee working on the customer floor thwarted the Greens efforts to purchase a watch including racial hostility. *Id.* at 535. The evidence demonstrated that this employee had been disciplined by Dillard's in the past for hostility towards customers but Dillard's still had her interact with customers on the sales floor. *Id.* at 536. Dillard's moved for summary judgment arguing the Greens failed to make a valid Section 1981 claim. The District Court granted the motion for summary judgment and the Greens appealed to the Eighth Circuit.

The Eighth Circuit held that in order to establish a case of 1981 discrimination in the retail context, a Section 1981 plaintiff must show (1) membership in a protected class; (2) discriminatory intent on the part of the defendant; and

(3) interference by defendant with an activity protected under the statute. *Green* at 538. The Court found that the Greens had sufficient evidence to show they were members of a protected class and that the Dillard's employee had interfered with their contractual interest in purchasing the watch. *Id*. at 539.

The Court then discussed whether the Greens had evidence of discriminatory intent. *Id*. at 540. The Court found that the Greens did have evidence of the discriminatory intent of the store employee but it questioned whether Dillard's could be held vicariously responsible for the employee's conduct. *Id*. The Court, in dicta, briefly noted that the Fifth Circuit in *Arguello v. Conoco, Inc.* 207 F.3d 803 (5th Cir. 2000) held that a retailer could be liable under Section 1981 for the discriminatory actions of non-supervisory employees when they are acting within the scope of their duties. *Id*. However, the Eighth Circuit rejected the *Arguello* liability standard. *Id*. at 540.

In *Green*, the Eighth Circuit noted that it had yet to adopt a liability standard for a retail employer whose non-supervisory employees are alleged to have violated Section 1981. *Id*. at 540. "In the case before the court the issue of employer liability cannot be deferred, and we must address it in the context of the evidence brought forward by the parties." *Id*. The Eighth Circuit, in line with this Court's holding in *General Building,* rejected the application of the broad strict liability theory of vicarious liability adopted by the Fifth Circuit and applied the Restatement (second) of Agency Section 213 standard. *Id*.

Under this theory, an employer can be held liable under Section 1981 only where it is directly liable for harm resulting from its own negligent or reckless conduct. *Id*. In *Green*, The Eighth Circuit found that the Greens produced evidence of Dillard's own independent acts of negligence which led to the Greens' experience. *Id*. at 540-541. According to the Court, there was evidence that Dillard's had reason to know of employee's hostile propensities. There was evidence that Dillard's had disciplined employee in the past for similar conduct. *Id*. at 541. There was evidence that Dillard's inaction towards employee's conduct contributed to the incident. *Id.* at 541. There was evidence that Dillard's lacked procedures to remedy discrimination towards customers. *Id*. at 541. There was also evidence that Dillard's did not conduct a thorough enough investigation into employee's background before she was hired. *Id*.

"We conclude that plaintiffs have produced sufficient evidence to raise a jury issue about whether Dillard's knew or should have known of McCrary's racially hostile propensities and not only failed to take reasonable measures to stop it, but continued to place McCrary on the sales floor and authorize her to interact with customers. See Restatement (Second) of Agency Section 213." *Id*.

The holding in *Green* complies with this Court's holding in *General Building*. *See General Building* at 375. *Green* adopted Restatement of Agency 213 as the basis for imposing liability against an employer for an employee's alleged discriminatory conduct in violation of Section 1981. This principle (adopted by the Supreme Court) requires that in order for an employer

to have liability for such discriminatory conduct the employer itself must have engaged in independent acts such that the employer is directly liable for the harm including negligent supervision, negligent hiring, negligent retention, negligent training, failure to discipline, etc.

The Court noted that there was no evidence that Respondent had issued improper orders, had negligently hired employee, had negligently retained employee, failed to have written policies against discrimination or negligently failed to supervise employee.

This application mirrors the purpose of Section 1981 which is to stop intentional discriminatory conduct in the formation of contracts. Evidence of a discriminatory intent is required to adopt a strict liability standard against an employer is at odds with the requirement that the liable party intend to discriminate.

In this case, the Eighth Circuit affirmed this Court's opinion in *General Building* that the liability standard for employers under a Section 1981 claim is based on the employer's independent purposeful discriminatory acts which caused or lead to the alleged discriminatory conduct. *General Building* is still the only case in which this Court has analyzed liability standards in the context of Section 1981 claims. It has never been overruled or called into question by any later decisions of this Court.

As this Court has already determined that vicarious liability is prohibited in claims under Section 1981, there is no split among the circuits,

Supreme Court precedent exists and certiorari on this issue should be denied.

B. THE ISSUE OF RATIFICATION DOES NOT WARRANT REVIEW BECAUSE PETITIONER MISREPRESENTS THAT THE EIGHTH CIRCUIT REJECTED RATIFICATION AS A POTENTIAL THEORY TO IMPOSE LIABILITY

Petitioner argues that Eighth Circuit failed to consider ratification as a theory of liability against Respondent and that this alleged failure warrants certiorari of this issue. However, Petitioner misrepresents the Eighth Circuit's analysis.

The Eighth Circuit **did** consider ratification to impose liability against Respondent but found the evidence did not support a finding that Respondent ratified employee's conduct. *Tashman v. Advance Auto Parts, Inc.* 63 F.4th 1147, 1155-1156 8th Cir. 2023). The Eighth Circuit did not reject the argument that an employer can be liable for an employee's conduct when it ratifies that behavior but, in fact, confirmed adoption of this liability theory. *See id*.

The Eighth Circuit analyzed Petitioner's claims under the doctrine of ratification and determined that a two-month delay was not a sufficient amount of time between a discriminatory act, an investigation and termination to establish that Respondent had ratified employee's behavior. *Id*. The record establishes that the ultimate form of discipline was taken – termination. *Id.*

Nothing in the Eighth Circuit Court's analysis in this conflicts with the general theory of ratification. The Court accepted the principle of ratification and found "a two-month delay is insufficient to show that Advance Auto ratified Doe's conduct." *See id*. Petitioner simply disagrees with the Court's opinion.

It is noteworthy that Petitioner fails to set forth any case that sets a bright-line rule that taking two months to terminate an employee for conduct that violates section 1981 is "per se" ratification.

In this case, Respondent conducted an investigation of Petitioner's complaints. Once the investigation was complete, employee was fired on November 12, 2019 – less than two months after the incident. Petitioner's disagreement with the Eighth Circuit's finding that Respondent did not ratify employee's conduct does not create a split among the circuits on this issue warranting certiorari.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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