The Employee Rights Advocacy INSTITUTE For Law & Policy

Preserving the Right to a Jury Trial by Preventing Adverse Credibility Inferences at Summary Judgment

By

Matthew C. Koski[1]

I. Introduction

Originally conceived as an efficient means for plaintiff creditors to recover debts from recalcitrant and uncooperative debtors, summary judgment has since evolved into a powerful procedural tool utilized by defendants to prevent plaintiffs from having their claims heard by a jury. As employee advocates know well, this tactic has been used with particular effectiveness by defendants in employment discrimination cases. Recent empirical research confirms that motions for summary judgment are more likely to be both sought[2] and granted[3] against plaintiffs in employment cases than in other types of cases. This practice has contributed to a striking disparity in win rates between plaintiffs in employment cases and plaintiffs in other types of cases.[4]

---

[1] Matthew C. Koski is The Employee Rights Advocacy Institute For Law & Policy's Paul H. Tobias Attorney Fellow and a member of its National Litigation Strategy Project Task Force. In this capacity, Mr. Koski focuses on protecting workers' rights by ensuring meaningful access to the civil justice system. Mr. Koski received his B.A. from the University of California, Davis and his J.D. with distinction from the University of the Pacific, McGeorge School of Law in 2008, where he was a member of the Roger Traynor Honor Society and the Articles Editor for the McGeorge Global Business and Development Law Journal. The Employee Rights Advocacy Institute For Law & Policy (The Institute) is the related charitable and educational arm of the National Employment Lawyers Association (NELA). The author is grateful to NELA Program Director Rebecca M. Hamburg, as well as NELA members Alice W. Ballard, Bruce A. Fredrickson, and David L. Lee, who serve on The Institute's National Litigation Strategy Project Task Force for their valuable contributions to this article.

[2] Joe Cecil and George Cort, The Federal Judicial Center, *Report on Summary Judgment Practice Across Districts with Variations in Local Rules* at 12, tbl. 7 (August 13, 2008).

[3] *Id*. at 15-16, tbls. 10-11.

[4] *See* Kevin M. Clermont and Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 130, 133 (2009) (The authors found that plaintiffs lose employment discrimination cases at a significantly higher rate than other plaintiffs lose their cases, at both the trial and appellate levels. In the district courts, between 1979 and 2006, employees' win rate in employment discrimination cases was 15%, compared with 51% for non-employment discrimination cases.)

For decades it was well-understood that the summary judgment procedure, ill-equipped as it is to facilitate rigorous fact-finding,[5] should be the exception, rather than the rule.[6] This is particularly true because courts have long recognized that "[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"[7] Despite other changes in the jurisprudence of summary judgment,[8] the U.S. Supreme Court has taken care to affirm the principle that credibility determinations are best left to juries, not judges.[9] Nonetheless, as summary judgment has grown more prevalent, courts have shown an increasing willingness to assess the credibility of witnesses at summary judgment.

The Employee Rights Advocacy Institute For Law & Policy's National Litigation Strategy Project is devoted to helping employee rights lawyers overcome judicially-created obstacles they confront at summary judgment. This second paper in our Toolkit Series will examine three pernicious ways in which courts make determinations about the credibility of witnesses at summary judgment – a task more appropriately left to the jury: discrediting the testimony of the plaintiff's witnesses as "self-serving," accepting unchallenged the defendant's "honest belief" defense that they did not discriminate, and deferring to a defendant's "business judgment."

Following a discussion of each of the concepts, this paper concludes with model briefing language for employee rights advocates faced with any of these hurdles.

II. Judgment and Belief

The rules governing summary judgment exist in large part because courts have recognized that there are certain advantages to evaluating the merits of a case through a live trial that are not present when making the same judgments based only on the written submissions of the parties. Of particular relevance to the discussion that follows is the recognition that the value of live questioning and cross-examination of witnesses in the presence of the jury for the purposes of drawing inferences from the evidence, including inferences about credibility, cannot be replicated at summary judgment.

---

[5] *Adickes v. S.H. Kress*, 398 U.S. 144, 176 (1970) (Black, J., concurring) ("The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.")

[6] *But cf. Torgerson v. City of Rochester*, 2011 U.S. App. LEXIS 10938, *22 (8th Cir. 2011). In this case, recently decided 6-5 by an *en banc* panel of the Eighth Circuit Court of Appeals, the plaintiffs had cited extensive circuit authority for the proposition that, because of the role of intent in proving employment discrimination, that courts should proceed "with caution" when evaluating motions for summary judgment in employment cases, and such motions "should 'seldom' or 'sparingly' be granted." The court rejected this proposition, holding that there is no "discrimination case exception" to the summary judgment rules.

[7] *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962).

[8] *See Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.")

[9] *See Matsushita Elec. Indus., Inc. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

a. The Testimony of Interested Witnesses at Summary Judgment

Under Federal Rule of Civil Procedure (FRCP) 56(c), summary judgment is appropriate only if there is "no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."[10] It has been long settled that in making this inquiry the court is to view *all* reasonable inferences from the underlying facts in the light most favorable to the party opposing the motion.[11] Further, and of particular importance to the discussion that follows, is the manner in which courts have evaluated inferences related to the credibility of witnesses.[12]

At common law, interested witnesses were said to be so lacking in credibility that they were *not even competent* to testify.[13] Though courts eventually accepted interested witness testimony in limited circumstances, courts still recognized that their interest in the case may undermine their credibility.[14] In short, the witnesses' interest alone presented a question of credibility that is properly assessed by a jury.[15]

In the context of summary judgment, the longstanding rule, established in *U.S. v. Diebold, Inc.*,[16] is that "[o]n summary judgment the inferences to be drawn from the underlying facts contained in such materials *must* be viewed in the light most favorable to the party opposing the motion."[17] In the employment context, the U.S. Supreme Court, in *Reeves v. Sanderson Plumbing Prods.*,[18] articulated the implications of this rule as it pertains to evaluating the testimony of interested witnesses:

> [A]lthough the court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that the evidence comes from disinterested witnesses.*'[19] (emphasis added and internal citations omitted.)

---

[10] Fed. R. Civ. P. 56(c).
[11] *U.S. v. Diebold*, 369 U.S. 654, 655 (1962).
[12] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.")
[13] *See* Sidney S. Bobbe, *The Uncontradicted Testimony of an Interested Witness*, 20 Cornell L.Q. 33, 36-37 (1934) (*citing* John Henry Wigmore, *A Treatise on the Anglo American System of Evidence in Trials at Common Law*, § 575 (2d ed. 1923)).
[14] *Elwood v. Western Union Telegraph Co.,* 45 N.Y. 549, 554 (1871).
[15] *Id*.
[16] 369 U.S. 654, 655 (1962).
[17] This rule was affirmed in *Matsushita, supra* note 9, and has been reiterated *ad infinitum* by courts at all levels.
[18] 530 U.S. 133 (2000).
[19] *Id*. at 151.

This portion of the holding from *Reeves* buttresses the Supreme Court's admonition in *Liberty Lobby*[20] that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[21] Unfortunately, lower federal courts have not followed this principle with sufficient rigor. To the contrary, federal district and circuit courts frequently presume the credibility of unsupported assertions by defendants' interested witnesses and draw inferences against plaintiffs on summary judgment.

For example, in *Wiley v. Am. Elec. Power Servs. Corp.*,[22] the U.S. Court of Appeals for the Fifth Circuit affirmed summary judgment against employees alleging gender discrimination and retaliation. The supervisor who terminated the plaintiffs alleged that she had no knowledge of the complaints that the plaintiffs had made, and therefore could not have been retaliating against them when she terminated their employment. The court accepted the supervisor's bare assertion of lack of knowledge, refusing to recognize her personal interest in avoiding liability. Instead, the court used her testimony as grounds for granting summary judgment and denying the plaintiffs the opportunity to challenge her credibility through cross-examination at trial.[23]

By contrast, there are numerous examples of federal courts dismissing plaintiffs' testimony as self-serving because of their personal interest in the outcome of the litigation, and finding that testimony to be insufficient to create a genuine issue of fact for trial.[24] This is another example of the double standard plaintiffs in employment cases face in federal court.

By failing to appreciate key portions of the holdings in *Liberty Lobby* and *Reeves* that courts should refrain both from making credibility determinations and accepting the testimony of self-interested witnesses (in particular those of the decisionmakers in the case) at summary judgment, courts have allowed the next two concepts we explore in this paper – the so-called "business judgment rule" and the "honest (even if mistaken) belief

---

[20] 477 U.S. 242 (1986).
[21] *Id.* at 255.
[22] 287 Fed. Appx. 335 (5th Cir. 2008).
[23] *See Adickes, supra* note 5.
[24] *See Santos v. Winter*, 2010 U.S. Dist. LEXIS 99499, *27 (D.S.C. 2010) ("Plaintiff's own self-interested statements as to what he believed or perceived are not sufficient evidence to maintain this claim."); *Shaffer v. American Med. Ass'n.*, 2010 U.S. Dist. LEXIS 38276, *17 (N.D. Ill. 2010) ("The employee 'must do more than challenge the judgment of his superiors through his own self-interested assertions.'") (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986)); *Slaughter v. Jones Day*, 2007 U.S. Dist. LEXIS 2198, *15 (S.D. Tex. 2007) ("This is insufficient to create a disputed issue of material fact, as are plaintiff's own self-interested characterizations of her job performance and qualifications."); *Kelley-Hill v. Ingram*, 2006 U.S. Dist. LEXIS 57369, *27 (N.D. Tex. 2006) ("Plaintiff's self-interested testimony regarding McDuffie's question does not create a fact issue as to whether Defendant's proffered reason is false."); *Haskins v. New Venture Gear*, 2002 U.S. Dist. LEXIS 4552, *18 (S.D. Ind. 2002) ("However, these self-interested assertions cannot raise a genuine issue regarding the honesty of Lemaster's view of her performance . . .").

doctrine" – to spread across the circuits. That these "doctrines" *only* work against plaintiff-employees at summary judgment provides some insight as to why summary judgment is so much more likely to be sought and granted against employees.

b. The "Business Judgment Rule"

The "business judgment rule" is an evidentiary presumption that operates to preserve the autonomy of corporate directors in engaging in the day-to-day management of a corporation's affairs. Even though the U.S. Supreme Court has never applied the "business judgment" presumption against an employee in a discrimination case, lower federal courts in many employment cases have deferred to employers' "business judgments." As this type of deference undermines the ability of employees to present evidence of bias, it is essential that workers' rights advocates understand the contours of the "rule." However, the following discussion about the "rule" should not be read to endorse its general applicability to all types of business decisionmaking. Instead, describing the underlying rationale for the presumption in one context is designed to show that no such rationale exists for applying the "rule" in any form in employment cases.

i. Providing a Limited Presumption for Corporate Directors

The so-called "business judgment rule" is an evidentiary presumption applicable in corporate governance cases, where courts are required to defer to the business decisions made by a corporation's board of directors unless they act in a manner that cannot be attributed to a rational business purpose.[25] Under this "rule," the decisions of corporate directors are *presumed* to be made "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company, thereby shifting the burden to the party challenging the decision…."[26] The "business judgment rule" was conceived as a means of protecting corporate directors from suits by or on behalf of their shareholders every time a board decision results in some financial loss to the company.

While it is often difficult in the corporate governance context to overcome the presumption created by the "business judgment rule," the presumption is not insurmountable. For example, courts have held that a plaintiff can survive a motion to dismiss under Rule 12(b)(6) by pleading facts from which a reasonable inference can be drawn that a majority of the board was interested or lacked independence with respect to

[25] *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del. 2000); *see also Navellier v. Sletten*, 262 F.3d 923, 946 (9th Cir. 2001) (affirming district court's formulation of the business judgment rule as requiring a director to "[r]ationally believe that the [director's] business judgment is in the best interest of the corporation."); *Pacific Northwest Generating Co-op. v. Bonneville Power Admin.,* 2009 WL 2634855, *10 (9th Cir. 2009).
[26] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

the relevant decision.[27] In this context, "[i]ndependence means that a director's decision is based on the corporate merits of the subject before the board rather than *extraneous considerations or influences*."[28] In other words, the presumption is merely intended to prevent a jury from finding for a plaintiff because the jury believes the employer's decision was flawed for reasons other than discrimination.

In the corporate context, the "rule" grew out of the recognition that there is some risk inherent in every business decision, and that directors should be able to make decisions that may result in financial losses to the company without the fear of litigation.[29] Therefore, properly understood, the "rule" provides some limited presumptive deference to those decisions, and is limited only to *lawful* business purposes.[30] However, no such deference is to be accorded to those decisions made with unlawful purposes in mind, regardless of whether some ancillary financial benefit may accrue to the company as a result. Employers often believe they will reap financial benefits by violating workplace laws, and there may be costs associated with ensuring that decisions are not the product of unlawful bias, but that changes neither the employer's responsibilities nor an employee's rights under those laws.

ii. No Such Presumption Should Apply in Employment Cases

The "rule" is, in a sense, analogous in operation to the *McDonnell Douglas*[31] burden shifting framework applicable in employment cases – neither framework is, in and of itself, a substantive rule of law, but rather a system for evaluating evidence that creates a rebuttable presumption should certain prerequisites be satisfied.[32] However, inserting a form of the "business judgment rule" into the employment realm undermines the normally applicable framework for evaluating discrimination cases by presuming the ultimate fact at issue in most discrimination cases.

The "business judgment rule" has never been held to insulate decisionmakers from liability should their decisions be unlawful.[33] Similarly, a decision that may be

---

[27] *Orman v. Cullman*, 794 A.2d 5, 22-23 (Del. Ch. 2002).
[28] *Aronson*, 473 A.2d at 816 (emphasis added).
[29] *See Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996).
[30] *See*, *e.g., Beaird*, *infra* note 33.
[31] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (To make a *prima facie* case of race discrimination in hiring or promotion, for example, a plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.")
[32] *See U.S. Post. Serv. Bd. of Govs. v. Aikens*, 460 U.S. at 715 ("The *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'") (quoting *Furnco Constr. Corp*. v. *Waters,* 438 U.S. 567, 577 (1978)).
[33] *See*, *e.g.*, *Beaird v. Seagate Tech. Corp.*, 145 F.3d 1159, 1169 (10th Cir. 1998) ("The ADEA does not require Seagate's business decisions to be wise – just non-discriminatory. But this principle does not

tainted with unlawful discrimination should not be beyond review because an employer deems it a "business decision."[34] In employment discrimination cases, this rule often arises in the context of an employee seeking to show that her employer's alleged non-discriminatory reason for taking an adverse employment action against her was a pretext for discrimination.[35]

When a plaintiff is attempting to prove discrimination or retaliation, she may, under the framework articulated in *McDonnell Douglas*, prove that an employer's stated nondiscriminatory reason for the adverse action taken against her was pretextual.[36] A plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[37] As only in the rarest of circumstances will there "be 'eyewitness' testimony as to the employer's mental processes,"[38] courts must therefore examine the totality of circumstances surrounding the adverse action to determine whether the defendant's asserted rationale was the true reason for it,[39] though

---

immunize all potential 'business judgments' from judicial review for illegal discrimination.") (internal citations omitted).

[34] *See E.E.O.C. v. Yenkin-Majestic Paint Corp.,* 112 F.3d 831, 835 (6th Cir. 1997) ("Although it is true that a factfinder should refrain from probing an employer's business judgment, a decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision.")

[35] *See Estate of Hamilton v. City of New York*, 627 F.3d 50, 56 n.7 (2nd Cir. 2010) ("Our role is to prevent unlawful hiring practices, not to act as a 'super personnel department' that second guesses employers' business judgments."); *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1265 (11th Cir. 2010) ("A plaintiff is not allowed to recast an employer's proffered non-discriminatory reasons or substitute [her] business judgment for that of the employer.") (quoting *Chapman v. A.I. Transport*, 229 F.3d 1012, 1030 (11th Cir. 2000)); *Ptasznick v. St, Joseph Hosp.*, 464 F.3d 691, (7th Cir. 2006) ("We do not sit as a super-personnel department with authority to review an employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation.") (quoting *Ballance v. City of Springfield*, 424 F.3d 614, 621 (7th Cir. 2005)); *Jaramillo v. Colo. Jud. Dep't.*, 427 F.3d 1303, 1308 (10th Cir. 2005) ("The courts may not 'act as a super personnel department that second guesses employers' business judgments.'") (quoting *Simms v. Okla. ex rel. Dept. of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1328 (10th Cir. 1999)); *Hutson v. McDonnell-Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995) ("[T]he employment-discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination.").

[36] *McDonnell Douglas*, 411 U.S. at 807 ("[R]espondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application.")

[37] *Aikens*, 460 U.S. 711, 716 (1983) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

[38] *Id*.

[39] *See Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638 (3rd Cir. 1993) ("Where direct 'smoking gun' evidence of discrimination is unavailable, this court has found that the proper inquiry is 'whether evidence of inconsistencies and implausibilities in the employer's proffered reasons for discharge reasonably could support an inference that the employer did not act for non-discriminatory reasons, not whether the evidence necessarily leads to [the] conclusion that the employer did act for discriminatory reasons.'") (quoting *Chippolini v. Spencer Gifts Inc*., 814 F.2d 893, 900 (3rd Cir. 1987)).

not necessarily that the reason was false.[40] Plaintiffs may prove pretext by producing "evidence tending to prove that the employer's proffered reasons are factually baseless, were not the actual motivation for the discharge in question, or were insufficient to motivate the discharge."[41] Because engaging in this analysis requires the court to weigh the evidence or draw inferences from the evidence, deferring to an employer's "business judgment" conflicts directly with the basic rules governing summary judgment.

Plaintiffs who lack a "smoking gun" must rely on circumstantial evidence in order to prove pretext. They will often present evidence that the business decision at issue was either unreasonable or unfounded, from which a jury could infer that the adverse action was actually motivated by unlawful discrimination. At this point, defendants have argued that their "business judgments" are entitled to presumptive deference, and that courts and juries should refrain from second-guessing them. However, what defendants are actually requesting is for courts to foreclose the plaintiff from developing the circumstantial evidence necessary in modern discrimination cases. This flies in the face of both *McDonnell Douglas* and other Supreme Court precedent affirming the value and importance of circumstantial evidence.[42] The *McDonnell Douglas* framework exists precisely because we can rarely have direct knowledge of other people's internal thought processes, ergo the need to apply a framework for presenting circumstantial evidence that "eliminates the most common non-discriminatory reasons for the plaintiff's rejection."[43]

As an example of how the "business judgment rule" operates in discrimination cases, in *Webber v. Int'l Paper Co.*,[44] the district court overturned a jury verdict for plaintiff on his disability discrimination claim and granted the defendant's motion for judgment as a matter of law on the basis of the "business judgment rule." Over a period of 18 years, the plaintiff worked his way up from a position as a mechanical draftsman to that of a project manager for the defendant, despite the fact that he did not have a degree in engineering. For the final four years of his employment, the plaintiff was severely limited by a knee injury, but the defendant did not assert that the injury affected his job performance. Instead, the defendant claimed it fired him because he lacked an engineering degree and was therefore unable to manage more complex projects. There was evidence, however, both that the defendant often contracted with outside companies

---

[40] *George v. Leavitt*, 407 F.3d 405, 414 (D.C. Cir. 2005) ("[A]n employer's reason need not be false in order to be pretextual.")

[41] *See Testerman v. EDS Technical Products Corp.*, 98 F.3d 297, 304 (7th Cir. 1996) ("These formulations are simply different ways of recognizing that when the sincerity of an employer's asserted reasons for discharging an employee is cast into doubt, a factfinder may reasonably infer that unlawful discrimination was the true motivation.")

[42] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." (quoting *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508 n.17 (1957)) . . . "[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.")

[43] *Burdine*, 450 U.S. at 253-54.

[44] 417 F.3d 229 (1st Cir. 2005).

on more complex projects and that it continued to undertake projects that the plaintiff *was* qualified to manage. The U.S. Court of Appeals for the First Circuit affirmed the decision of the district court to overrule the jury because, "pursuant to the 'business judgment' rule, an employer is free to terminate an employee for any non-discriminatory reason, even if its business judgment seems objectively unwise."[45]

Similarly, in *Scamardo v. Scott County*,[46] the Eighth Circuit Court of Appeals relied on the "business judgment rule" to reverse a plaintiff's jury verdict finding retaliation for previously having filed a gender discrimination suit, in violation of Title VII. In that previous case, Deanne Scamardo sued Scott County for sex-based unequal pay in 1996. After settling that case in early 1997, the county decided to transfer most of the duties involved in Ms. Scamardo's position to another department, which reduced her weekly hours from 30 to 12 and left her ineligible for continued health coverage. She again sued the county, this time alleging that the decision to reduce her hours was in retaliation for participating in the earlier suit. The Eighth Circuit overturned her favorable jury verdict, holding that the trial judge should have instructed the jury that "you may not return a verdict for plaintiff just because you might disagree with defendant's decision or believe it to be harsh or unreasonable" – in other words, the "business judgment" of the employer trumped the discrimination suffered by Ms. Scamardo.[47]

The "decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision,"[48] and the fact that the action is "harsh or unreasonable" is certainly probative evidence that the asserted reason may not be the actual reason animating the employer's decision.[49] By granting even incredible explanations presumptive validity, the "business judgment rule" short-circuits this well-settled means of proving discrimination.

c. The "Honest (Even if Mistaken) Belief" Defense

Another of these hurdles that commonly arises in employment cases is the idea that an employer can escape liability by merely asserting that they "honestly believed" that there was a lawful reason to take an adverse action against an employee. Like the "business judgment rule," this concept is purely a creation of federal judges, and has yet

[45] *Id*. at 238 (citing *Fennell v. First Step Designs, Ltd*., 83 F.3d 526, 537 (1st Cir. 1996)).
[46] 189 F.3d 707 (8th Cir. 1999).
[47] *Id*. at 711.
[48] *E.E.O.C. v. Yenkin-Majestic Paint Corp.,* 112 F.3d 831, 835 (6th Cir. 1997).
[49] *See e.g. Burdine,* 450 U.S. at 259 (1981) ("[T]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination."); *and see Wichmann v. Bd. of Trs. of S. Ill. Univ.*, 180 F.3d 791, 805 (7th Cir. 1999) ("[A] defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext.")

to be applied by the Supreme Court in an employment case. The "honest belief doctrine" is perhaps best understood as an outgrowth of the "business judgment rule," where judges use the phrase "honest belief" in defining the scope of the presumption created by the "business judgment rule." It is therefore unsurprising that courts in every circuit have a long history of applying this "doctrine" in granting summary judgment against employees.[50] Under the "honest (even if mistaken) belief doctrine," judges have accepted false, trivial and/or baseless rationales for an employer's actions, so long as the employer sincerely believed in the rationale.

As an example, in *Kariotis v. Navistar Int'l Transp. Corp.*,[51] Kathleen Kariotis was fired from her position as an executive assistant at Navistar after the company alleged that "she had fraudulently accepted disability benefits following her knee replacement surgery."[52] In that case, the plaintiff took medical leave to undergo knee replacement surgery. After her initial procedure, she required two extensions of her medical leave to undergo subsequent surgeries to correct complications with the initial surgery. After her supervisor grew suspicious, he hired private investigators to videotape the plaintiff while she recovered. Though neither of the investigators were doctors, the supervisor still deferred to their judgment that the plaintiff did not appear "disabled or

[50] *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) ("The law is clear that, even if a Title VII claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any *prima facie* case of disparate treatment by showing that it honestly believed the employee committed the violation."); *Parker v. Verizon, Inc.*, 309 Fed. Appx. 551, 563 (3rd Cir. 2009) ("[An] employer who discharges employee based on reasonable and honest belief that employee has been dishonest would not be in violation of the FMLA even if its conclusion is mistaken. . . . Regardless of Parker's denial that he actually misrepresented his health condition, Verizon's honest suspicion that Parker misused his leave prevents it from being found liable for violating the FMLA."); *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) ("But instead of producing evidence that shows Price's assessment of her performance was dishonest or not the real reason for her termination – as the law requires – Hawkins disputes the merits of Price's evaluations. . . . But we have repeatedly held that in a wrongful discharge action 'it is the perception of the decisionmaker which is relevant, not the self-assessment of the plaintiff.'") (internal citations omitted); *Deines v. Tex. Dep't of Protective & Reg. Servs.*, 164 F.3d 277, 281 (5th Cir. 1999) ("In Title VII cases, 'we do not try in court the validity of [an employer's] good faith belief as to [one] employee's competence [in comparison to another.]'") (internal citations omitted); *Fercello v. County of Ramsey*, 612 F.3d 1069, 1082 (8th Cir. 2010) ("'[T]he essential question is not whether [the plaintiff] was actually unqualified for the position; it is whether the School District *honestly believed* that she was unqualified.'") (internal citations omitted); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002) ("Rather, courts 'only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.'") (internal citations omitted); *Evans v. Dean Foods, Co.*, 2000 U.S. App. LEXIS 22519, *9 (10th Cir. 2000) ("In this regard, the relevant inquiry is not whether defendants' articulated reason for discharge was wise, fair or correct, but whether they honestly believed their reason and acted in good faith upon that belief."); *Fischbach v. D.C. Dep't of Corrections*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) ("Once the employer has articulated a non-discriminatory explanation for its action, as did the District here, the issue is not 'the correctness or desirability of [the] reasons offered ... [but] whether the employer honestly believes in the reasons it offers.'") (internal citations omitted).

[51] 131 F.3d 672 (7th Cir. 1997).

[52] *Id*.

physically impaired."[53] The supervisor also refused to either contact the plaintiff's physician or seek a second medical opinion on the plaintiff's condition. Instead, the supervisor showed the videotape to other Navistar supervisors, decided that the tape "[spoke] for itself" and fired the plaintiff.[54] The defendant replaced the 57 year old Kariotis with a 32 year old woman. In affirming the district court's grant of summary judgment, the Seventh Circuit Court of Appeals held that as long as "the company honestly believed in those reasons [for the termination], the plaintiff loses even if the reasons are foolish or trivial or baseless."[55]

i. "Honest Beliefs" and Pretext

At its core, the "honest belief doctrine," like the "business judgment rule," distorts the mechanics of the *McDonnell Douglas* burden-shifting framework in such a way that allows for some troubling results for plaintiffs. Courts have emphasized that the second step of the *McDonnell Douglas* analysis does not shift the burden of *persuasion* to the defendant, but merely shifts the burden of *production*, as the overarching burden of proof to show unlawful discrimination rests at all times with the plaintiff.[56] As such, a defendant need only provide a legitimate, non-discriminatory reason for the adverse employment action to shift the focus back to the plaintiff to show that the reason is pretextual. It is the fact that defendants are only required to produce some admissible evidence of a lawful reason for the adverse action, and not prove that the non-discriminatory reason(s) actually motivated their decision,[57] that has allowed the "honest belief rule" to spread to the extent that it has.

Some have argued, and many courts have accepted, that the "honest belief rule" is logically appropriate, because in order to prevail on a discrimination claim, the plaintiff must show that consideration of inappropriate characteristics actually motivated the employment decision.[58] Therefore, if an employer can show that she honestly believed that there was a lawful reason for the adverse employment action, then it was that lawful reason that animated the decision, and the law has not been violated. Such reasoning is undermined both by the manner in which intentional discrimination is proven practically,

---

[53] *Id*. at 675.
[54] *Id*.
[55] *Id*. at 676. *But see infra* Section III(c)(i) for examples of cases that have rejected this broad conception of the "honest belief rule."
[56] *Burdine*, 450 U.S. at 254 ("The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason.")
[57] *Id*. (To shift the burden back to the plaintiff to prove pretext, "[t]he defendant need not persuade the court that it was actually motivated by the proffered [non-discriminatory] reasons.")
[58] *See Hazen Paper Co. v. Biggins,* 507 U.S. 604, 610 (1993) ("[L]iability depends on whether the protected trait . . . actually motivated the employer's decision.")

and by persuasive arguments from critics drawing on both legal and social science research.[59]

One such vein of criticism of the "honest belief doctrine" challenges the assumption that the law excuses (or should excuse) those who "might have acted in an objectively unreasonable fashion, so long as they acted honestly."[60] Critics of the notion that objectively harmful behavior is acceptable so long as it is subjectively "honest" point out that other areas of the law reject that conception of liability,[61] even in cases where doing so may lead to harsher consequences for the honest but unreasonable actor.[62] It is important to remember in this context that the summary judgment standard is by definition an objective one, whereby the court must try to decide whether a reasonable jury could find in favor of the non-moving party based on the evidence presented.

While an employer may assert she "honestly believed" that there was a lawful reason for the adverse employment action, such a purely subjective assertion should therefore be entitled to little or no deference.[63] The level of deference to which it is entitled, should a jury consider it, would be based on whether and to what extent the belief is supported by objective evidence. While it would be appropriate for a jury to accept the employer's "honest belief" at trial, a judge at summary judgment is not entitled to make such subjective determinations about the credibility of witnesses,[64] particularly ones with a vested interest in helping the defendant avoid liability.

Too many courts, however, do not allow juries to rigorously probe the evidence supporting a defendant's asserted non-discriminatory reason. Instead, courts have tended

---

[59] *See generally* Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 Cal. L. Rev. 997 (2006) (Krieger and Fiske) and David L. Faigman, Nilanjana Dasgupta and Cecilia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389 (2008) (hereinafter *A Matter of Fit*). *See also infra* Section III(c)(ii) for further discussion of social science research that undermines the credibility of the "honest belief doctrine."

[60] *A Matter of Fit* at 1401.

[61] *See Id*., citing *Berkemer v. McCarty*, 468 U.S. 420, 442 n.35 (1984) (explaining, in the context of determining custody for possible Fifth Amendment *Miranda* violations, why "an objective, reasonable-man test is appropriate because, unlike a subjective test, it 'is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.'") (internal citations omitted).

[62] *See Id*. at 1400 n.57-61, citing to criminal statutes and decisions from various state courts that require someone asserting the justification of self-defense to prove not only that they subjectively believed in the need to defend themselves, but also that the belief conformed to what a reasonable person would have done in the same circumstances.

[63] *See Aka v. Wash. Hosp. Ctr.,* 156 F.3d 1284, 1298 (D.C. Cir. 1998) ("[C]ourts traditionally treat explanations that rely heavily on subjective considerations with caution," and "an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination.")

[64] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) ("[T]he determination that a defendant has met its burden of production [under *McDonnell Douglas*] . . . can involve no credibility assessment.")

to accept that an employer honestly believed the non-discriminatory reasons for an adverse employment action, even in such cases where the evidentiary foundation for those beliefs is unpersuasive or nonexistent, *i.e.*, the employer's decisions are objectively "mistaken,"[65] "trivial,"[66] or even "baseless."[67] It is difficult to conceive how a court can accept an individual's "honest belief" when faced with objective evidence exposing that belief as "baseless," without inappropriately assessing the credibility of the employer/decisionmaker.[68]

There are, however, examples of courts refusing to accept an employer's asserted non-discriminatory reasons at face value, as the Seventh Circuit Court of Appeals did in *Stalter v. Wal-Mart Stores, Inc.*,[69] where the trivial nature of the reason asserted by the employer cast doubt on the "genuineness of the employer's motives."[70] In that case, Mr. Stalter had at one point complained to his supervisor that he was being treated differently by two other employees because of his race. While refusing to investigate Mr. Stalter's complaint, Wal-Mart eventually fired him for taking and eating a "handful of taco chips from an open bag"[71] in an employee break room. Unbeknownst to Mr. Stalter, the chips in question were not for common consumption, but instead belonged to another employee. Even though the employee to whom the chips belonged told Mr. Stalter that it was "no big deal" and to "forget about it," Wal-Mart fired Mr. Stalter for theft, which was a form of "gross misconduct" under company policies.[72] Because Mr. Stalter technically commited theft under Wal-Mart's policies, the district court granted summary judgment in Wal-Mart's favor.

The appellate court, however, reversed, finding that both Wal-Mart's definition of "theft" and the severity of the punishment levied against Mr. Stalter[73] were so unreasonable as to call into question whether they weren't merely a pretext for discrimination.[74] Mr. Stalter presented evidence "that a similarly-situated Caucasian employee was given a comparatively lenient punishment for "failing to report to work as scheduled and then lying to her supervisor twice about the reason she was absent," an offense that should have been punished with termination.[75] Ergo, the court recognized that even if an employee is technically guilty of violating a workplace rule, evidence of a

---

[65] *See Kariotis*, *supra* note 51.
[66] *See Villiarimo*, *supra* note 50.
[67] *See Kariotis, supra* note 51.
[68] *See Liberty Lobby*, *supra* note 12.
[69] 195 F.3d 285 (7th Cir. 1999).
[70] *Id*. at 289.
[71] *Id*. at 287.
[72] *Id*. at 287-88.
[73] *Id*. at 291.
[74] *Id*. In addition to the other evidence of pretext, Wal-Mart also changed its story between the time of an accompanying administrative proceeding and the one in federal court – at first alleging that the employee to whom the chips belonged had complained about Mr. Stalter's behavior, but later admitting that no complaint was made.
[75] *Id*.

company meting out inconsistent or excessive punishment can still raise a dispute of material fact as to pretext.

Smith v. Chrysler Corp.[76] is a notable example in the Americans with Disabilities Act (ADA) context, where the for the Sixth Circuit Court of Appeals refused to accept, at face value, the sincerity of a defendant's "honest belief," even if the court ultimately found for the defendant in that case. In *Smith*, the court recognized that to the extent that an employer need not "demonstrate that its belief was reasonably grounded on particularized facts that were before it at the time of the employment action,"[77] that the "honest belief rule" is incompatible with the purposes underlying the ADA that "employment actions taken regarding an individual with a disability be grounded on fact and not 'on unfounded fear, prejudice, ignorance, or mythologies.'"[78] Even though the rationale of the court in *Smith* was based in part on the legislative history specific to the ADA, the logic is equally applicable to other discrimination claims, particularly where the employer's "honest belief" may be influenced by stereotypes.[79]

Using similar reasoning in *Jennings v. Mid-American Energy Co.*,[80] the Southern District of Iowa built upon the criticisms of the "honest belief rule" that were raised in the Sixth Circuit Court of Appeals' decision in *Smith*.[81] In a case alleging retaliation in violation of the Family and Medical Leave Act (FMLA), the defendant asserted an honest (though unfounded) belief that the plaintiff had been using her FMLA leave for improper purposes. The court responded that:

> [T]he "honest belief rule" appears to eviscerate the third prong of the *McDonnell Douglas* analysis, as the employee's opportunity to show that the employer's proffered explanation is merely a pretext for discrimination is effectively foreclosed. Keeping in mind that summary judgment should seldom be granted in employment cases, The Court is extremely hesitant to apply any rule that decidedly reduces an employee's opportunity to show that her employer's actions were motivated by unlawful discrimination.[82]

---

[76] 155 F.3d 799 (6th Cir. 1998).
[77] *Id*. at 806.
[78] *Id*. (quoting 136 Cong. Rec. S 7422-03, 7437 (daily ed. June 6, 1990) (statement of Sen. Harkin)).
[79] *See e.g.*, *Zapata-Matos v. Reckitt & Colman, Inc*., 277 F.3d 40, 46 (1st Cir. 2002) ("We agree that the employer might believe its stated reason for its action and honestly believe that the reason was non-discriminatory, while the jury might find that the same reason was honestly held but conclude that it constituted discrimination (e.g., stereotyping).")
[80] 282 F. Supp. 2d 954 (S.D. Iowa 2003).
[81] *Supra* note 76.
[82] *Id*. at 963.

After applying the rationale from both *Smith* and *Jennings*, the District of Minnesota concluded in *Obike v. Applied EPI, Inc.*[83] that, although the defendant need only produce a non-discriminatory reason for the adverse action, the reason must still be "facially reasonable," even if not proven,[84] in order to shift the burden back to the plaintiff to prove pretext. In sum, the court recognized that in the context of summary judgment, an employer can shift the burden to the plaintiff to prove pretext by producing a legitimate, non-discriminatory reason for the adverse action that is, based on the available evidence, also reasonable. The defendant's "beliefs," standing alone, are essentially irrelevant. The appropriate inquiry is whether the defendant has offered a reasonable, non-discriminatory reason for her actions, such that it would be appropriate to shift the burden back to the plaintiff to prove pretext.

ii. An "Honest Belief" Can Still Be Biased

While "honest belief" issues often arise in the context of the plaintiff seeking to prove that the defendant's alternative explanation is a pretext for discrimination under *McDonnell Douglas*, that should not be read to imply that an employer cannot honestly hold beliefs that are themselves the product of bias.

The "honest belief" rules operate under the assumption that people are able to credibly identify the "real" motives for their own actions with precision. However, social science research has significantly undermined fundamental assumptions about the manner in which biases influence decisionmaking.[85] In discussing Justice Brennan's plurality opinion in *Price Waterhouse v. Hopkins*[86] (generally considered to be the most employee-friendly of the various opinions produced in that case), Linda Hamilton Krieger and Susan Fiske (who testified as an expert witness in *Price Waterhouse*) point out that Justice Brennan's assumption that "when disparate treatment discrimination occurs, the discriminator is, at the moment a decision is made, consciously aware that he or she is discriminating,"[87] may be critically flawed.[88] The two authors have

---

[83] 2004 U.S. Dist. LEXIS 6012 (D. Minn. 2004).
[84] *Id*. at *12.
[85] Krieger and Fiske, *supra* note 59 at 1035. ("This approach is plainly inconsistent with what empirical social psychologists have learned over the past twenty years about the manner in which stereotypes, functioning not as consciously held beliefs but as implicit expectancies, can cause a decisionmaker to discriminate against members of a stereotyped group.")
[86] 490 U.S. 228 (1989).
[87] Krieger and Fiske at 1030. One can see from Justice Brennan's conception of the "motivating factor" standard that he presumed that people are capable of honestly assessing the real reasons for their actions. *See Price Waterhouse,* 490 U.S. at 250. ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.")
[88] *Id*. at 1030.

characterized this view as "the official theory" of the relationship between bias and decisionmaking.[89]

As with "honest belief" there is some logical attraction to the assumption that decisionmakers are able to identify the "true" motivations for their actions, and are thereby able to assert with "honesty," and more importantly, accuracy, the reasons for their decisions. But research has shown that "[m]uch of human mental process, including those processes mediating interpersonal perception and judgment, occur . . . outside of the perceiver's mindful attentional focus."[90] As the authors paraphrase:

> If you ask an employer at the moment of the decision what his reasons for making a decision were, he might well not be aware that one of the reasons was that the applicant or employee was a woman, even if her sex did, in fact, influence his judgment.[91]

In essence, individuals are notoriously unreliable in being able to identify the reasons why they make certain decisions.[92] Consequently, it is entirely possible for someone both to have been influenced by bias in making a decision, and for them to "honestly believe" that they were made for "legitimate business reasons" and free of bias.[93]

The notion that biases of which we are not consciously aware can influence decisionmaking has been recognized by the courts in other contexts as well. While concurring in *Miller-El v. Dretke*,[94] a case in which an inmate alleged that the prosecution used peremptory challenges to exclude potential jurors based on their race, Justice Stephen Breyer cites to Justice Thurgood Marshall's concurrence in *Batson v. Kentucky*[95] for the proposition that "'the unconscious internalization of racial stereotypes may lead litigants more easily to conclude 'that a prospective black juror is 'sullen,' or 'distant,'' even though that characterization would not have sprung to mind had the prospective

---

[89] *Id*.
[90] *Id*. at 1030-31.
[91] *Id*.
[92] *See A Matter of Fit* at 1404 ("One of the most important discoveries in empirical social psychology in the twentieth century is that people's perceptions and behavior are often shaped by factors that lie outside their awareness and cannot be fully understood by intuitive methods such as self-reflection.")
[93] *Id*. at 1404-07. The authors discuss research that shows that people are able neither to identify the reasons why they make a decision with any reliable amount of accuracy, nor to "report the reasons guiding their thoughts and actions honestly . . . especially when it comes to socially sensitive topics where there are clear social norms about 'correct' responses (social desirability bias) or when the topic motivates participants to present their attitudes, motivations and actions in the best possible light, consistent with their conscious values (self-presentation bias)."
[94] 545 U.S. 231 (2005).
[95] 476 U.S. 79 (1986).

juror been white.'"[96] Ergo, the neutral reasons that we give for our decisions can still be the product of biases operating on a much deeper level.

III. Model Brief Language

Below is model brief language, which we encourage practitioners to adapt and use as appropriate in their cases.[97]

a. Business Judgment

"Business Judgments" That May Be Grounded in Unlawful Discrimination Are Entitled to No Deference from Courts

Because there are aspects of trials that cannot be replicated at summary judgment,[98] courts have recognized that certain inquires should be left to a jury to resolve.[99] For that reason, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[100] As these rules pertain to evaluating testimony in support of a motion for summary judgment coming from interested witnesses, the U.S. Supreme Court held in *Reeves v. Sanderson Plumbing Prods*.[101] that:

> [A]lthough the court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and

[96] *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring), quoting *Batson v. Kentucky*, 476 U.S. at 106 (1986) (Marshall, J., concurring).

[97] This section is intended to stand separate from the rest of the paper, and as such will appear to repeat many points already discussed *supra*. The goal of this section is not to provide additional analysis, but instead to re-package some of what has already been discussed in a form more appropriate for a brief. It is imperative that the reader carefully examine the suggested model briefing language to ensure that it will be valuable based on the relevant facts of the reader's particular case. It is also imperative that in using this model language that the user take great care in diligently adapting the language to the facts of the reader's case. As always, users should fully check and update the research provided here before re-printing it for their own purposes.

[98] *Adickes v. S.H. Kress*, 398 U.S. 144, 176 (1970) (Black, J., concurring) ("The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.")

[99] *Poller v. Columbia Broad. Sys., Inc*., 368 U.S. 464, 473 (1962) ("It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'")

[100] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 255 (1986).

[101] 530 U.S. 133 (2000).

> unimpeached, *at least to the extent that the evidence comes from disinterested witnesses.*"[102]

As the testimony bearing on the soundness of the defendant's "business judgment" comes from witnesses possessing a personal, professional and/or financial interest in ensuring the defendant avoids liability for discrimination, the weight given to that testimony should be determined by a jury. Courts have in a variety of analogous contexts recognized that a person's testimony about the good faith[103] of her own motives is not a particularly reliable[104] form of evidence, and is insufficient grounds for granting summary judgment.[105]

Certain Business Judgments Are Entitled to Limited Presumptive Deference

The so-called "business judgment rule" is an evidentiary presumption borrowed from corporate governance law, where courts are required to defer to the business decisions made by a corporation's board of directors unless they act in a manner that cannot be attributed to a rational business purpose.[106] Under this "rule," the decisions of corporate directors are

---

[102] *Id*. at 151 (emphasis supplied and internal citations omitted).

[103] *See e.g. Alexander v. Louisiana*, 405 U.S. 625 at 632 (1972) (jury selection) *and Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. at 342 n.24 (1977) (pattern and practice discrimination) ("[A]ffirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of systematic exclusion); *see also Loeb v. Textron, Inc*., 600 F.2d 1003 at 1011 n.5 (1979) (ADEA) (It is insufficient for an employer "to offer vague, general averments of good faith.")

[104] This conclusion is also supported by extensive social science research. *See generally* David L. Faigman, Nilanjana Dasgupta and Cecilia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389, 1404-07 (2008) (*A Matter of Fit*) (The authors discuss research that shows that people are able neither to identify the reasons why they make a decision with any reliable amount of accuracy, nor to "report the reasons guiding their thoughts and actions honestly . . . especially when it comes to socially sensitive topics where there are clear social norms about 'correct' responses (social desirability bias) or when the topic motivates participants to present their attitudes, motivations and actions in the best possible light, consistent with their conscious values (self-presentation bias).")

[105] *See e.g.*, *Lust v. Sealy, Inc*., 383 F.3d 580, 582-83 (7th Cir. 2004) ("Sealy's contention that 'the jury cannot be permitted to simply choose to disbelieve the evidence offered by Sealy' is a misleading half-truth. It is true that a plaintiff cannot prevail without offering any evidence of his own, simply by parading the defendant's witnesses before the jury and asking it to disbelieve them. That would be 'a no-evidence case, and [in] such a case a plaintiff must lose, because he has the burden of proof.' . . . But if the plaintiff offers evidence of her own, as she did here, the jury is free to disbelieve the defendant's contrary evidence. There is no presumption that witnesses are truthful.") (internal citations omitted) *and Dyer v. Cmty. Mem. Hosp.*, 2006 WL 435721 at *11 (E.D. Mich. 2006) ("[S]elf-serving statement by the defendant's representative that no illegal discrimination animated the defendant's actions is insufficient to put the plaintiffs to their proofs at the summary judgment stage of the proceedings.")

[106] *Brehm v. Eisner*, 746 A.2d 244, 264 n.66 (Del.2000); see also *Navellier v. Sletten*, 262 F.3d 923, 946 (9th Cir.2001) (affirming district court's formulation of the business judgment rule as requiring a director

presumed to be made "on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company, thereby shifting the burden to the party challenging the decision."[107]

The presumption is not insurmountable. For example, courts have held that a plaintiff can survive a motion to dismiss under FRCP 12(b)(6) by pleading facts from which a reasonable inference can be drawn that a majority of the board was interested or lacked independence with respect to the relevant decision.[108] Independence in this context means "that a director's decision is based on the corporate merits of the subject before the board rather than *extraneous considerations or influences*."[109] Considerations of [plaintiff's protected characteristic/activity] must certainly qualify as an extraneous consideration when making a business decision.

Decisions Based on Unlawful Motives Are Entitled to No Deference in Discrimination Cases

The "business judgment rule" is an outgrowth of the recognition that there is some risk inherent in every business decision, and that directors should be able to make decisions that may result in financial losses to the company without the fear of litigation.[110] The rule, properly understood, provides some limited presumptive deference to those decisions, and is limited only to *lawful* business purposes.[111] No deference is to be accorded to those decisions made with unlawful purposes in mind, regardless of whether some ancillary financial benefit may accrue to the company as a result. The "decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision."[112]

Moreover, deferring to the defendant's "business judgment," even when those decisions are objectively unwise, harsh or unreasonable, effectively forecloses a plaintiff from proving their case using circumstantial

---

to "[r]ationally believe that the [director's] business judgment is in the best interest of the corporation"); *Pacific Northwest Generating Co-op. v. Bonneville Power Admin.,* 2009 WL 2634855, *10 (9th Cir. 2009).

[107] *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (emphasis added).

[108] *See Orman v. Cullman*, 794 A.2d 5, 22-23 (Del. Ch. 2002).

[109] *See Aronson*, 473 A.2d at 816 (emphasis added).

[110] *See Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996).

[111] *See e.g., Beaird v. Seagate Tech. Corp.*, 145 F.3d 1159, 1169 (10th Cir. 1998) ("The ADEA does not require Seagate's business decisions to be wise – just non-discriminatory. But this principle does not immunize all potential 'business judgments' from judicial review for illegal discrimination.") (internal citations omitted)

[112] *E.E.O.C. v. Yenkin-Majestic Paint Corp.,* 112 F.3d 831, 835 (6th Cir. 1997).

evidence. As employers will almost never admit that the plaintiff's [protected characteristic] motivated their decision to [adverse action] the plaintiff, discrimination must often be proven by drawing inferences from circumstantial evidence. The *McDonnell Douglas* framework exists for precisely this reason, and the U.S. Supreme Court has repeatedly recognized the value and importance of circumstantial evidence in proving intent.[113] That the defendant's decision to [adverse action] was objectively unwise, harsh or unreasonable is circumstantial evidence that raises a dispute of material fact about the defendant's credibility that should be weighed by the jury.[114]

b. "Honest Belief"

Evaluating the "Honesty" of an Employer's "Beliefs" Requires Making Credibility Determinations That Should Be Left to the Jury

Because there are aspects of trials that cannot be replicated at summary judgment,[115] courts have recognized that certain inquires should be left to a jury to resolve.[116] For that reason, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[117] As these rules pertain to evaluating testimony in support of a motion for summary judgment coming from interested witnesses, the U.S. Supreme Court held in *Reeves v. Sanderson Plumbing Prods*.[118] that:

> [A]lthough the court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence

[113] *See e.g., Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." (quoting *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508 n.17 (1957)) . . . "[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.")

[114] *See Anderson v. Liberty Lobby*, *Inc*. 477 U.S. 242, 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.")

[115] *Adickes v. S.H. Kress*, 398 U.S. 144, 176 (1970) (Black, J., concurring) ("The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.")

[116] *Poller v. Columbia Broad. Sys.*, *Inc*., 368 U.S. 464, 473 (1962) ("It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'")

[117] *Anderson v. Liberty Lobby*, *Inc*., 477 U.S. 242, 255 (1986).

[118] 530 U.S. 133 (2000).

> supporting the moving party that is uncontradicted and unimpeached, *at least to the extent that the evidence comes from disinterested witnesses.*"[119]

As the defendant's averments about the "honesty" of her "beliefs" comes from someone possessing a personal, professional and financial interest in avoiding liability for discrimination, the weight given to that testimony should be determined by a jury. Courts have in a variety of analogous contexts recognized that a person's testimony about the good faith[120] of her own motives is not a particularly reliable form of evidence, and is insufficient grounds for granting summary judgment.[121]

To succeed at summary judgment, the defendant must not only offer admissible evidence supporting their alternative, non-discriminatory reason for the adverse action, but it must also show that, based on all of the available evidence, their proffered rationale is the only reasonable explanation for [the adverse employment action].[122] Accepting the defendant's beliefs, regardless of their reasonableness, inappropriately distorts the manner in which the *McDonnell Douglas* framework interacts with the legal standards applicable to summary judgment.[123]

---

[119] *Id.* at 151 (2000) (emphasis supplied and internal citations omitted).

[120] *See e.g. Alexander v. Louisiana*, 405 U.S. 625 at 632 (1972) (jury selection) *and Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. at 342 n.24 (1977) (pattern and practice discrimination) ("[A]ffirmations of good faith in making individual selections are insufficient to dispel a *prima facie* case of systematic exclusion); *see also Loeb v. Textron, Inc.*, 600 F.2d 1003 at 1011 n.5 (1979) (ADEA) (It is insufficient for an employer "to offer vague, general averments of good faith.")

[121] *See e.g.*, *Lust v. Sealy, Inc.*, 383 F.3d 580, 582-83 (7th Cir. 2004) ("Sealy's contention that 'the jury cannot be permitted to simply choose to disbelieve the evidence offered by Sealy' is a misleading half-truth. It is true that a plaintiff cannot prevail without offering any evidence of his own, simply by parading the defendant's witnesses before the jury and asking it to disbelieve them. That would be 'a no-evidence case, and [in] such a case a plaintiff must lose, because he has the burden of proof.' . . . But if the plaintiff offers evidence of her own, as she did here, the jury is free to disbelieve the defendant's contrary evidence. There is no presumption that witnesses are truthful.") (citations omitted) *and Dyer v. Cmty. Mem. Hosp.*, 2006 WL 435721 at *11 (E.D. Mich. 2006) ("[S]elf-serving statement by the defendant's representative that no illegal discrimination animated the defendant's actions is insufficient to put the plaintiffs to their proofs at the summary judgment stage of the proceedings.")

[122] *Id.* at 250-51 (The summary judgment standard "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, *there can be but one reasonable conclusion* as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.") (internal citations omitted and emphasis added).

[123] *See Jennings v. Mid-American Energy Co.*, 282 F. Supp. 2d 954, 963 (S.D. Iowa 2003) ("[T]he 'honest belief rule' appears to eviscerate the third prong of the *McDonnell Douglas* analysis as the employee's opportunity to show that the employer's proffered explanation is merely a pretext for discrimination is effectively foreclosed. Keeping in mind that summary judgment should seldom be granted in employment cases, The Court is extremely hesitant to apply any rule that decidedly reduces an employee's opportunity to show that her employer's actions were motivated by unlawful discrimination.")

Under the evidentiary framework initially developed in *McDonnell Douglas Corp. v. Green*,[124] once a plaintiff establishes a *prima facie* case,[125] the court must *presume* that the defendant has engaged in prohibited discrimination.[126] This presumption is only overcome when the defendant produces a non-discriminatory reason for the adverse action, and if the defendant fails to produce such a reason, the court must rule in favor of the plaintiff.[127]

Even if the defendant produces an alternative, non-discriminatory reason for the adverse action, the plaintiff can still prevail by showing that reason to be a pretext for unlawful discrimination.[128] As few defendants are foolish enough to admit their discriminatory motives, proving that the asserted rationale is a pretext for unlawful discrimination requires drawing inferences from circumstantial evidence[129] that undermines the credibility of the defendant's asserted alternative rationale.[130]

---

[124] 411 U.S. 792 (1973).

[125] *Id*. at 802 (To make a *prima facie* case of race discrimination, for example, a plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.")

[126] *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("Establishment of the *prima facie* case in effect creates a presumption that the employer unlawfully discriminated against the employee.")

[127] *Id*. at 254 ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.")

[128] *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993), in which the Supreme Court presumed that the pretext inquiry is best left for trial. ("'If the defendant carries this burden of production, the presumption raised by the *prima facie* case is rebutted,' and 'drops from the case.' The plaintiff then has 'the full and fair opportunity to demonstrate,' through presentation of his own case and through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision.'" (quoting *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981)).

[129] *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." (quoting *Rogers v. Missouri Pacific R. Co.,* 352 U.S. 500, 508 n.17 (1957)) . . . "[W]e have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required.")

[130] *See Hicks*, 509 U.S. at 511 ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination."); *see also White v. Baxter Healthcare Corp.,* 533 F.3d 381, 393 (6th Cir. 2008) (A plaintiff can prove pretext by showing that "that the employer's stated reason for the adverse employment action either (1) has no basis in fact, (2) was not the actual reason, or (3) is insufficient to explain the employer's action.")

Therefore, while the defendant's burden is only one of production[131] and not one of persuasion,[132] the court should not over-read this burden as either requiring the court to accept *any* non-discriminatory alternative explanation offered by the defendant, or preventing it from allowing the jury to rigorously probe the factual support for that reason.[133] At summary judgment, the moving party's subjective (and self-serving) impressions are entitled to minimal deference,[134] and then only to the extent that accepting them does not require the court to assess credibility of the witnesses or weigh the evidence.[135] As determinations about the defendant's honesty inevitably require evaluating the defendant's credibility, such determinations should be left to the jury.[136]

Honestly Held Beliefs May Still Be Biased

The "honest belief" rules operate under the assumption that people are able to credibly identify the "real" motives for their own actions with precision. However, recent commentary has pointed out that social science research has significantly undermined fundamental assumptions about the manner in which biases influence decisionmaking.[137] Individuals are notoriously unreliable in being able to identify the reasons why they make certain decisions.[138] Consequently, it is entirely possible

[131] *Burdine*, 450 U.S. at 254 ("The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, non-discriminatory reason.")
[132] *Id.* at 254 ("The defendant need not persuade the court that it was actually motivated by the proffered reasons.")
[133] *See e.g. Sischo-Nownejad v. Merced Cmty. College Dist.*, 934 F.2d 1104 (9th Cir. 1991) ("We require very little evidence to survive summary judgment precisely because the ultimate question is one that can only be resolved through a 'searching inquiry' – one that is most appropriately conducted by the fact-finder, upon a full record. Were we to increase the amount of proof required to survive summary judgment when conditions of employment are involved, the result would be to remove from fact-finders the ability to consider claims that merit full exploration.")
[134] *See e.g., Aka v. Washington Hosp. Ctr.,* 156 F.3d 1284, 1298 (D.C. Cir. 1998) (Noting that "courts traditionally treat explanations that rely heavily on subjective considerations with caution," and that "an employer's asserted strong reliance on subjective feelings about the candidates may mask discrimination.")
[135] *See Liberty Lobby*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.")
[136] *Adickes v. S.H. Kress*, 398 U.S. 144, 176 (1970) (Black, J., concurring) ("The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.")
[137] Krieger and Fiske, *supra* note __ at 1035. ("This approach is plainly inconsistent with what empirical social psychologists have learned over the past twenty years about the manner in which stereotypes, functioning not as consciously held beliefs but as implicit expectancies, can cause a decisionmaker to discriminate against members of a stereotyped group.")
[138] *See generally* David L. Faigman, Nilanjana Dasgupta and Cecilia Ridgeway, *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 Hastings L.J. 1389, 1404 (2008) (*A Matter of Fit*) ("One of the most important discoveries in empirical social psychology in the twentieth century is that

> for someone both to have been influenced by bias in making a decision, and for them to "honestly believe" that they were made for unbiased, "legitimate business reasons."[139]
>
> The notion that biases of which we are not consciously aware can influence decisionmaking has been recognized by the courts in other contexts as well. While concurring in *Miller-El v. Dretke*,[140] a case in which an inmate alleged that the prosecution used peremptory challenges to exclude potential jurors based on their race, Justice Stephen Breyer cites to Justice Thurgood Marshall's concurrence in *Batson v. Kentucky*[141] for the proposition that "'the unconscious internalization of racial stereotypes may lead litigants more easily to conclude 'that a prospective black juror is 'sullen,' or 'distant,'' even though that characterization would not have sprung to mind had the prospective juror been white.'"[142] Ergo, the neutral, self-serving reasons that we give for our decisions can still be the product of biases operating on a much deeper level.

IV. Conclusion

Understanding that evaluating the credibility of witnesses, probing their possible ulterior motives, and determining the sincerity of their explanations are best left for the jury at trial, summary procedures are ill-suited for the vast majority of employment discrimination cases, which often turn on such assessments. In employment cases, liability frequently hinges on deciding which of the parties has presented the more credible explanation for the employer's motivations. By deferring to employers' "honest beliefs" or "business judgment," instead of allowing juries to probe the factual support for each, courts have subjugated the objective evaluation of the evidence in a case to the subjective perceptions of defendants. The results have been predictably disastrous for employees. This paper is intended to provide workers' rights advocates with some of the tools necessary to overcome these judicially-crafted means of usurping the jury's role in weighing evidence and evaluating credibility.

---

people's perceptions and behavior are often shaped by factors that lie outside their awareness and cannot be fully understood by intuitive methods such as self-reflection.")

[139] *See Id*. at 1404-07. The authors discuss research that shows that people are able neither to identify the reasons why they make a decision with any reliable amount of accuracy, nor to "report the reasons guiding their thoughts and actions honestly . . . especially when it comes to socially sensitive topics where there are clear social norms about 'correct' responses (social desirability bias) or when the topic motivates participants to present their attitudes, motivations and actions in the best possible light, consistent with their conscious values (self-presentation bias)."

[140] 545 U.S. 231 (2005).

[141] 476 U.S. 79 (1986).

[142] *Miller-El*, 545 U.S. at 268 (Breyer, J., concurring), quoting *Batson v. Kentucky*, 476 U.S. at 106 (1986) (Marshall, J., concurring).