DEATH OF A RULE

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ABSTRACT

The "honest belief" rule in employment law cases is so lethal that once it is incanted in the decisions of the federal courts, where many discrimination cases are litigated, the relevant legal analysis ends abruptly. And like a Wandering Albatross, the bird with the largest wingspan among all living birds, there is little not within its reach.

All that is about to change, thanks to the federal court largely responsible for the rule in the first place: the Seventh Circuit. The fact that Circuit Judge Richard Posner, arguably the most influential lawyer in the country not counting the Supreme Court Justices, is the one to strike it down is equally important because it will likely give psychological permission to other courts and judges to do the same.

The origins of the honest belief rule, its long run, and its quick and shocking dismantling is a story about whether a plaintiff's day in court should include a jury trial and whether courts and judges rely too much on precedent, blind adherence to boilerplate, and not enough on common sense. It is the story of an Albatross' grounding.

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I. INTRODUCTION

For over thirty years, an important but made-up, judicially-created, extra-legislative principle has killed off an endless stream of employment cases. The principle is so sacrosanct that it is often called a rule, and it is so lethal that once it is incanted in the decisions of the federal courts, where many discrimination cases are litigated,[1] the relevant legal analysis ends abruptly, and often with boilerplate. And like a Wandering Albatross, the bird with the largest wingspan among all living birds,[2] there is little not within its reach. In fact, it is indiscriminate in ending all sorts of discrimination cases: those under Title VII, the ADEA, and the ADA among them,[3] along with any case under an employment law where an employer's intent is a necessary element of proof for a successful plaintiff.[4]

Like many powerful legal principles or presumptions, the "honest belief" rule derives much of its power from its simplicity.[5] It asks whether a plaintiff in an intentional discrimination case can point to enough evidence calling into question the honesty of an employer's stated reason for its employment decision.[6]

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[1] One in seven or eight federal cases is an employment discrimination case, *see* Scott A. Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV., 981, 997 (2007), and these cases account for 12 to 14 percent of all federal litigation. *See* Ann C. Hodges, *Mediation and Transformation of American Labor Unions*, 69 MO. L. REV. 365, 369, n.27 (2004).

[2] *See Albatross,* animals.nationalgeographic.com/animals/birds/albatross (last visited May 28, 2015).

[3] Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-2(a)(1)(2010) (prohibiting discrimination "because of" race, color, religion, sex, or national origin); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623(a)(1) (prohibiting discrimination "because of" age); Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(a) (prohibiting discrimination "on the basis of disability" of an otherwise qualified individual).

[4] The Supreme Court has made it abundantly clear that, setting aside disparate impact cases, intent or motive are critical in employment discrimination cases because "[t]he words 'because of' mean 'by reason of: on account of.'" Gross v. FBL Fin'l Servs., Inc., 557 U.S. 167, 176 (2009) (quoting dictionary definition). *See also* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) ("[t]he critical inquiry, the one commanded by the words of [the statute], is whether gender was a factor in the employment decision *at the moment it was made*.") (emphasis in original).

[5] As explained later in this paper in Parts II and III, the honest belief defense is phrased in various ways in the federal courts, but a recent Westlaw search reveals federal courts have referred to it precisely as the "honest belief rule" in at least 302 reported decisions. Westlaw search conducted May 1, 2015 in "all federal courts" database.

[6] As the Sixth Circuit described it: "The ground rules for application of the honest belief rule are clear. A plaintiff is required to show more than a dispute over the facts upon which the discharge was based." Seeger v. Cincinnati Bell Tele. Co., 681 F.3d 274, 285 (6th Cir. 2012). Further, under the rule, "[a]s long as the employer held an honest belief in its proffered reason, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless." *Id.* at 286. *See also* Little v. Illinois Dept. of Rev., 369 F.3d 1007, 1012 (7th

Attacking the reason itself is a common mistake certain to doom the plaintiff's chances; federal courts are not inclined to sit as labor arbitrators and certainly not as super-personnel departments in these cases.[7] Rather, the plaintiff must attack the employer's credibility, which in shorthand means calling it a liar.[8] Whether plaintiffs are uncomfortable with this approach or misunderstand what is required is a distinction that does not matter in all events.[9]

On the one hand (the hand that has guided employment discrimination cases for decades), the honest belief rule makes perfect sense. Most employment discrimination cases are litigated as intentional tort cases,[10] and Title VII does use the words "because of" (as in, the employer acted "because of" the employee's sex).[11] So motive must matter.[12] The Supreme Court has even stated that the issue in these cases is to figure out what is technically impossible: to look into the heart of the decision-maker at the moment the decision is made.[13] If the heart is pure and without discriminatory animus, then there can be no case.[14]

Cir. 2007) ("This circuit adheres to the honest-belief rule: even if the business decision was ill-considered or unreasonable, provided that the decision maker honestly believed the nondiscriminatory reason he gave for the action, pretext does not exist.").

[7] The philosophy of the courts in this regard is discussed in detail in Parts II and III. *See infra*.

[8] Pretext "means a lie, specifically a phony reason for some action. To say that it was only a 'pretext' that [plaintiff] was transferred to the wrapper's job because he needed closer supervision is to say that the company is lying when it proffers that reason for the transfer; the true reason was different." Russell v. Acme-Evans, Co., 51 F.3d 64, 68 (7th Cir. 1995).

[9] Most likely it's the latter. *See, e.g.*, *Little*, 369 F.3d at 1013 ("It is not entirely clear how we should treat [plaintiff's] argument. At first blush, it appears that [he] contends that [his employer's] investigation was so shoddy as to give rise to an inference of discriminatory intent. That argument, however, would be a nonstarter.").

[10] *See* Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990).

[11] 42 U.S.C. § 2000e-2(a)(1)(2010).

[12] *See* EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028, 2033 (2015) ("the intentional discrimination provision [of Title VII] prohibits certain *motives*"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (rejecting any "suggest[ion] that workplace harassment that is sexual in content is always actionable, regardless of the harasser's . . . motivations"). That is not to say what constitutes causation under Title VII is undisputed by scholars. *See generally* Deborah Zalesne, *Lessons from Equal Opportunity Harasser Doctrine: Challenging Sex-Specific Appearance and Dress Codes*, 14 DUKE J. GENDER LAW & POLICY 535, 545 n.63 (2007) ("There has been a flurry of recent law review articles dealing with the causation requirement.") (providing list).

[13] *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.").

[14] Of course, animus unconnected to the challenged employment decision is not, by itself, unlawful. *See id.* at 277 (O'Connor, J., concurring) (eliminating from the category of 'direct evidence' of discrimination statements by non-decision makers and statements by decision-makers unrelated to the decisional process); *see also* Sheehan v. Donlen Corp., 173 F.3d 1039, 1044 (7th Cir. 1999) (determining that decision-maker's comments "related to his motivation for the decision" to fire plaintiff).

On the other hand (the hand that steers the law away from becoming rote and unthinking, and therefore untrusted by litigants and the public), the rule has lost its mooring and is now more likely to be used by a court as a lazy judicial stopper. Once the anthropomorphic Albatross wanders into a plaintiff's case, it is assumed more than it is discussed that her work record is irrelevant, and that the employer's good faith should be taken for granted. In other words, the employer should be taken at its word that it did not discriminate.

All that is about to change, thanks to the federal court largely responsible for the rule in the first place: the Seventh Circuit. The fact that Circuit Judge Richard Posner, arguably the most influential lawyer in the country not counting the Supreme Court Justices,[15] is the one to strike it down is equally important because it will likely give psychological permission to other courts and judges to do the same.[16]

The origins of the honest belief rule, its long run, and its quick and shocking dismantling is a story not only about the future of employment discrimination cases, but also about judging and deciding cases in an area with little statutory language,[17] lots of clumsy judicial approaches from the Supreme Court all the way down,[18] and an evolving sense that the legal landscape is tilted

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[15] In addition to serving as a federal appeals court judge since 1981, one journal named him as the most cited legal scholar of the 20th Century. *See* Fred R. Shapiro, *Interpreting Legal Citations: A Symposium Sponsored by the West Group: The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409 (2000).

[16] Judges and courts cling to precedent for multiple reasons, ranging from treating consistency and predictability as values, to the time saved by not coming to the same conclusion over and over again. But one additional reason is that judges do not like to be reversed, and adhering to norms in the legal community (precedent) is the safe path.

[17] Title VII is so spare, in fact, that it does not contain the words "sexual harassment." The legal claim grew up in legal scholarship before courts recognized it as a form of discrimination. *See* CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 50-70 (1979) (proposing the hostile environment sexual harassment claim under Title VII of the Civil Rights Act of 1964). For that matter, Title VII did not contain the words "disparate impact," either. The Supreme Court recognized the theory in *Griggs v. Duke Power Co*. 401 U.S. 431 (1971) (Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); *see also* Watson v. Fort Worth Bank Tr. Co., 487 U.S. 977, 986-87 (1988) ("In certain cases, facially neutral employment practices that have significant adverse effects on protected *groups* have been held to violate the Act without proof that the employer adopted those practices with a discriminatory intent."). Congress wrote the disparate impact claim into the law as part of the Civil Rights Act of 1991. *See* 42 U.S.C. § 2000e-2(a)(2) (2015) (P. L. 102-166, 105 Stat. 1071, 1075) (making it an unlawful employment practice "to limit . . . employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex"); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075.

[18] *See* Gordon v. United Airlines, Inc., 246 F.3d 878, 893 (7th Cir. 2001) (Easterbrook, J., dissenting).

and ungenerous in the first place.[19] It is the story of whether a plaintiff's day in court should include a jury trial and whether courts and judges rely too much on precedent,[20] blind adherence to boilerplate, and not enough on common sense.[21] It is the story of an Albatross' grounding.

II. THE ORIGINS OF THE HONEST BELIEF RULE

Most employment discrimination statutes require intent, which is to say that the law proscribes decisions motivated by a plaintiff's status in a protected category. Title VII is the first federal law to require such discriminatory animus, or intent. Title VII does so with the words "because of," and it is not the only one.[22] The ADA and ADEA are worded similarly,[23] and from the very start, the burden was on the plaintiff in these cases to prove by a preponderance of the evidence that the employer fired him or her not mistakenly, or foolishly, or even recklessly, but deliberately because the employee is black, or a woman, or over 40 years old, and so on.[24]

The easy part is requiring discriminatory intent; the hard part is proving it. There is no magic formula for plaintiffs to follow in these cases, but there are two established paths to a jury trial and past summary judgment. A plaintiff may offer direct evidence of discrimination, which means evidence bearing directly on the issue of intent.[25] It is rare, it does not include prejudice captured in remarks

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[19] *See, e.g.*, Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 400 (2010) ("[T]he advancement of the law suffers as procedure, particularly summary judgment, becomes the vehicle for making law in this area. We must confront the anti-plaintiff ethos that has taken hold in workplace jurisprudence."); *see also* Moss, *supra* note 1.

[20] They do, according to Judge Posner, and precedent gets in the way of pragmatism. *See* James Ryerson, *The Outrageous Pragmatism of Richard Posner*, 10 LINGUA FRANCA 26, 35 (2000), linguafranca.mirror.theinfo.org/0005/posner.html (quoting Posner as stating, "Judges have a terrible anxiety about being thought to base their opinions on guesses, on their personal views. To allay that anxiety, they rely on the apparatus of precedent and history, much of it extremely phony.").

[21] *See id.* (quoting Posner as stating, "I do think judges can and should get away with a lot more candor so that the public sees what a court is – not geniuses, or even particularly erudite people, but just lawyers trying to give some reasonable ground for their opinions.").

[22] *See* Title VII of the Civil Rights Act of 1964 (Title VII), *supra* note 3.

[23] *See id.*

[24] Of course, all races and for that matter colors are protected characteristics under the law; the only issue is what motivated the employer's decision and whether it was anything other than a protected characteristic. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998) (acknowledging that Title VII could become a general civility code unless courts give "careful attention to the requirements of the statute").

[25] *See* Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1359 (11th Cir. 1999) (providing an example of direct evidence by citing a management memorandum stating, "Fire Early – he is too old."); *see also* Hasham v. Cal. State Bd. of Equalization, 200 F.3d 1035, 1044 (7th Cir. 2000) (giving, as an example of direct evidence, the statement, "I did not promote you

unrelated to a decision even if they are uttered by a decision maker, but it happens.[26] Alternatively, a plaintiff may proceed through an indirect, burden-shifting path, articulated by the Supreme Court in *McDonnell Douglas v. Green*;[27] it is essentially a three-step process.[28]

Under the first step, the plaintiff sets forth a prima facie case of discrimination. That requires showing that he: (1) belongs to a protected class; (2) applied for and was qualified to do the job in question; (3) suffered an adverse job action, such as a firing or non-promotion; and (4) that after the rejection the position remained open, and the employer continued to seek applicants from persons with qualifications similar to the plaintiff.[29] The prima facie case was always intended to be flexible and fits the facts of the case. In a firing case, for example, there likely would not be any facts related to a job application.[30]

If the plaintiff can establish a prima facie case, then she has raised a presumption of discrimination, though it is rebuttable.[31] In step two, the employer is expected to advance a legitimate, "clear and reasonably specific"[32] reason for its decision. The reason does not have to be a good one, but of course it must be a lawful one.[33] It may be a reason that is seen as subjective,[34] but in that case, as we will see later, the employer runs the risk of giving the plaintiff all the "evidence" she needs to convince a jury that the real reason was discrimination. The reason at this stage must not only be expressed, but backed up by admissible evidence (an affidavit would do, though mere argument from counsel in a brief would not).[35]

Another consideration at step two matters greatly: the employer need not persuade at this point that the stated reason is the actual reason, which it might do by pointing to record evidence about an employee's job performance, or personnel record, or even its finances and "books" if the reason is related to money. In other words, at this stage it is possible for the employer to give a

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because of your national origin"). For a general discussion of the kinds of evidence a plaintiff needs without resorting to magic labels*, see* Troupe v. May Dept. Stores Co., 20 F.3d 734, 736 (1994).

[26] *See, e.g.*, Jones v. Robinson Prop. Grp., L.P., 427 F.3d 987, 993 (5th Cir. 2005) (witness "testimony clearly and explicitly indicates that decision maker(s) in the poker room used race as a factor in employment decisions, which is by definition direct evidence of discrimination").

[27] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[28] *Id.* at 802-05.

[29] *Id.*

[30] *See id.* at 802 n.13; *see also* Collier v. Budd Co., 66 F.3d 886, 890 (7th Cir. 1995) ("The exact content of the fourth prong may vary from case to case to take differing circumstances into account. RIF cases present such a situation.").

[31] *See McDonnell Douglas*, 411 U.S. at 802-03.

[32] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

[33] *See McDonnell Douglas*, 411 U.S. at 803-04

[34] *See id.* at 803.

[35] *See Burdine*, 450 U.S. at 255 & n.9.

flimsy reason and leave it at that. Once the reason is produced, the employer's work at this stage is complete.[36]

Because the plaintiff always bears the ultimate burden in these cases (and any other case in the civil world), the prima facie case answered by a legitimate reason does not necessarily end things.[37] Rather, in step three, where many cases die,[38] the plaintiff gets the chance to prove by a preponderance of the evidence that the reason offered is not the employer's "true" reason,[39] but instead is a "pretext for discrimination"[40] because it is "unworthy of credence."[41]

There are lots of different ways to establish pretext, ranging from pointing to shifting reasons on the employer's part[42] to blatant inconsistency, as in saying one thing but doing another when it comes to its treatment of other employees.[43] But because an obvious and common reason for an employer's decision in these cases is the employee's own performance, it matters whether that reason can be backed up with record evidence. If it can, then the plaintiff will have a hard time convincing anyone, including a federal judge presented with a summary judgment motion, that the reason is unworthy of credence or a sham.[44] If it cannot be backed up, perhaps because the record is especially thin or simply nonexistent or it is based on the non-objective opinions of a decision-maker, then the employee will argue that it should not be believed in the first place.[45]

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[36] The employer's burden is only a "burden of production" at this stage. *See id.* at 255.

[37] *See McDonnell Douglas*, 411 U.S. at 804 ("Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here.").

[38] *See generally* Martin, *supra* note 19 at 324 ("much of the difficulty for plaintiffs derives not only from how pretext is defined but also from the derivative loopholes left open by the numerous Supreme Court attempts at clarifying parameters for evaluating evidence of pretext for discrimination").

[39] *See Burdine*, 450 U.S. at 256.

[40] *Id.* at 253.

[41] *Id.* at 256.

[42] *See, e.g.,* Hitchcock v. Angel Corps, Inc., 718 F.3d 733, 738 (7th Cir. 2013) ("We count at least four potentially different explanations given for Hitchcock's firing.").

[43] *See McDonnell Douglas*, 411 U.S. at 804 ("Petitioner may justifiably refuse to rehire one who has engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."); *see also* Ondricko v. MGM Grand Detroit, LLC, 689 F.3d 642, 651 (6th Cir. 2012) (reversing summary judgment for employer because its inconsistency supported finding of pretext).

[44] The Supreme Court expected that "the defendant normally will attempt to prove the factual basis for its explanation." *Burdine*, 450 U.S. at 258; *see also* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000) (noting that an employer is entitled to judgment as a matter of law "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred").

[45] *See Reeves*, 530 U.S. at 144 ("showing that [the employer's] explanation was false" can support an inference of discrimination); *see also* Vaughn v. Woodforest Bank, 665 F.3d 632, 638-39 (5th Cir. 2011) (stating that employer's firing of plaintiff for "unsatisfactory conduct" was not backed up by evidence).

There is another possibility to explain why the employer's reason in step two of the indirect case might not be substantiated: because the record that does exist actually contradicts it. This might happen if the reason for a firing is poor performance, but the employee's job record shows satisfactory job evaluations, especially relative to other employees who were not fired.[46]

The obvious risk in these cases is that the employer will advance a fake reason in step two; it will be non-discriminatory but a sham.[47] For example, the reason might be the employee's inability to get along with other employees, or the need to cut costs, and the like. Still, the Supreme Court has held that the risk of a sham is not a good enough reason to make an employer prove that its purported basis for its decision is actually true. For the Court, that risk is managed by the requirement that the reason be specific enough to give the plaintiff a "full and fair opportunity" to demonstrate pretext,[48] and also because a reasonable employer has an "incentive to persuade the trier of fact that the employment decision was lawful" in the first place,[49] which for the Court meant that an employer "normally will attempt to prove the factual basis for its explanation."[50] As a result, the Court relieved employers of the burden of persuasion in step two: "we are unpersuaded that the plaintiff will find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext."[51]

It quickly became particularly difficult. In 1987, Judge Frank Easterbrook, writing for the Seventh Circuit, confronted an employer that fired a black employee for being absent from work without a good excuse.[52] The employee, Oliver Pollard, wanted to attend a body-building event in Las Vegas, but his employer said no. During the week of the event, Pollard did not appear for work, citing an ankle injury.[53] His employer was immediately suspicious, not only because of the timing (the purported injury fell on the same week of the event he wanted to attend), but also because it did not trust Pollard to begin with. In an earlier instance, Pollard was out on account of a back injury but at the same time he was spotted lifting weights at a gym (for that he was suspended three

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[46] *See, e.g.*, Hamilton v. National Propane, 276 F. Supp. 2d 934, 949 (W.D. Wis. 2002) (denying summary judgment for employer and finding it important that "plaintiff's 1999 performance review, in which defendant rated him as meeting its expectations, occurred three weeks before he was terminated").

[47] According to the Supreme Court, that is what Fifth Circuit "feared" in *Burdine*, 450 U.S. at 257.

[48] *See id.* at 258.

[49] *Id.*

[50] *Id.*

[51] *Id.*; the Court added that it "remain[ed] confident" in it its *McDonnell Douglas* framework. *Id.*

[52] *See* Pollard v. Rea Magnet Wire Co., Inc., 824 F.2d 557, 558 (1987).

[53] Pollard called a supervisor and cited "personal reasons" as well as an ankle injury. *See id.*

days). On top of those reasons for suspicion, Pollard had no written corroboration of the injury, such as physician's note or report.[54]

Only one problem: Pollard really had been injured and did not use his week off work to go to Las Vegas. He was telling the truth. But according to the court, so was his employer in describing the reason for suspending and then firing him: Pollard's employer simply did not believe him, especially after the previous incident. His employer did not believe him even though his managers tried to find evidence he went to Las Vegas "from airlines and tourist bureaus" and even though the "investigation went nowhere."[55] It made a mistake, and the evidence showed the company and its decisional process "was not well run."[56] And yet while those are issues for a proverbial court of industrial relations, they are the same considerations that convince a federal court that what happened here can be attributed to "medieval" or "high-handed" practices,[57] but not racial animus.

But what about the Supreme Court's assurance that it will not be "particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext?"[58] The basis for Pollard's firing was essentially fraud, but it turned out not to be true. Couldn't a jury conclude that without facts in support of its decision, the employer's real motive was Pollard's race? Not under the approach the Seventh Circuit set out in *Pollard* with resoluteness: "If you honestly explain the reasons behind your decision, but the decision was ill-informed or ill-considered, your explanation is not a 'pretext.'"[59]

Other facts in the case underscore the breadth and expanse of what came to be known as the Seventh Circuit's "honest belief rule" after *Pollard*. The reason for Pollard's firing (leave without permission) was honestly presented even though there were really no written procedures telling employees how to obtain medical permission for leave, and his employer did not tell him that the lack of written permission would be used against him.[60] According to the employer, it did not tell any employee, regardless of race, about the need for written documentation, although the employees were already aware of this.[61] His employer might have told him about the rule when he returned to work a week later, but under the unwritten rule, that would be too late because the physician's care had to be contemporaneous with the leave.[62] In other words, Pollard was not

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[54] *Id.* at 558-59.
[55] *Id.* at 559.
[56] *Id.* at 560. That was the conclusion of the district court, and on that point the court of appeals agreed.
[57] *Id.* "Under the view implied by the district court's decision, every black employee fired without just cause is entitled to recover." *Id.* at 561.
[58] *See Burdine*, 450 U.S at 258.
[59] *See Pollard*, 824 F.2d at 559.
[60] *Id.* at 560.
[61] *Id.*
[62] *Id.*

told about a rule that was not in writing, and when he learned about it, it was too late under the terms of the unwritten rule. Lastly, under the company's point system, Pollard was not supposed to be fired at all because his missed days were consecutive, meaning they were to be treated as a single day's absence for the purpose of awarding points.[63] At best another mistake, held the court, but no more.

"No more" basically because there was no evidence that the employer was any more enlightened or professional when it came to the treatment of white employees, though there was evidence that it fired two white employees who actually had lied about needing to miss work for a week (Pollard, it turned out, had not lied at all).[64] In short, though there was no support for the reason Pollard's employer fired him, and reasons for a fact-finder to believe that its shoddy practices could have been used to camouflage its animus, the court found the honest explanation (a reason "honestly described")[65] to rule out pretext for discrimination. It went further and directed judgment for Pollard's employer, too, which it had to do once the district court, having made factual findings in Pollard's bench trial, found that his employer really did believe that he was lying.[66]

Pollard was decided based on a full trial record, and as the court pointed out, at that point in litigation the *McDonnell Douglas* burden-shifting paradigm and its order of proof fall by the side.[67] The only issue at trial is whether there is sufficient evidence to support a verdict of intentional, unlawful discrimination.[68] But the employer's stated reason (undoubtedly the same reason it gave in step two under *McDonnell Douglas*) is still relevant, even front-and-center. If the reason is disproven as pretext, then a fact-finder may infer that the real reason is discrimination.[69] *Pollard* announced to the world that disproving a reason is simply not the same as disproving it as pretext, no matter what the Supreme Court suggested in *Burdine*.

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[63] *Id.*

[64] The white employees lied about both their "whereabouts and activities." *See id.*

[65] *Id.* at 559 (citing Bechold v. IGW Systems, Inc., 817 F.2d 1282, 1285 (7th Cir. 1987); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1426 (7th Cir. 1986)).

[66] *See Pollard*, 824 F.2d at 560 ("there is no need for a new trial; the existing findings simply require a judgment for Rea").

[67] *Id.* at 558.

[68] *See* FED. R. CIV. P. 50(a)(1) (allowing that the court may grant a motion for judgment as a matter of law against a party if "a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). The standard for granting judgment under Rule 50 mirrors the summary judgment standard under Rule 56; the inquiry under both is the same and under each Rule "the court should review all of the evidence in the record." *Reeves*, 530 U.S. at 150.

[69] *See id.* at 147 (though not compelled to do so, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation") (citing St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993)).

There is a difference between deciding these cases at trial on the basis of a full record as opposed to beforehand at the post-discovery, summary judgment stage.[70] If honesty is a matter of looking into the proverbial heart of the decision maker to determine if he is lying, then that is the job of juries because "appellate panels have no opportunity to observe witness demeanor and second-guessing credibility determinations will rarely, if ever, lead to a more 'just' result."[71] That's what the Seventh Circuit said two years after it decided *Pollard* in *Brown v. M&M/Mars*.[72]

Brown sued Mars for age discrimination after the company fired its oldest shift manager because of a costly "down-time" incident on his shift.[73] It also cited his performance in general and his "antagonistic" relationship with the man who fired him.[74] At trial, the jury heard the whole story about each of these issues, most importantly how it took an entire shift to restart a production line that broke down on Brown's watch. According to Mars, Brown and his crew should have been able to fix the problem; the decision maker called it a "people problem" starting with Brown and described the entire scene as a "comedy of errors."[75]

But the Seventh Circuit concluded the jury had enough evidence to blame unforeseeable problems, not Brown and his crew, for the long delay and the lost shift. An electrical problem did not help, the Court stated, and the line had to be shut down a second time during Brown's shift because of it.[76] Still, for Mars the downtime incident was just the last straw when it came to Brown's performance.

As for Brown's performance, the Court looked past Brown's evaluations (which contained some negativity) to recount testimony about the overall productivity and profitability of the shift Brown supervised. Brown's shift produced "more candy and controlled scrap and product quality better than the other two shifts," which translated to "positive performance" for the court.[77] Did it translate to showing that Mars' performance-based reason for firing Brown was pretext, or unworthy of credence? Yes, because "[p]oorly trained" workers (one of Mars' only concrete criticisms of Brown's supervision) do "not normally outperform" their counterparts.[78] "In short, there was ample evidence from which

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[70] The trial record may be fuller than the pre-trial record simply because the parties may choose not to engage in extensive discovery. Under the federal rules, the parties must make some initial disclosures under Rule 26, but there is no requirement that they engage exchange written requests or take depositions. *See* FED. R. CIV. P. 26(a); *see also* FED. R. CIV. P. 30, 33, 34.

[71] *See* Brown v. M&M/Mars, 883 F.2d 505, 511-12 (7th Cir. 1989).

[72] *Id.*

[73] *Id.* at 507.

[74] *Id.* at 508.

[75] *Id.*

[76] *Id.* at 509.

[77] *Id.* at 508.

[78] *Id.*

the jury could conclude that Brown was effective in the areas in which Mars asserted he was not."[79]

In short, the jury heard evidence that Brown could not be that bad of a manager with a profitable line, and evidence that the downtime incident may not have been directly his fault. The court was then left to consider Brown's "antagonism," as measured by Mars. According to the Court, this was not much of a reason, given the doubt about what caused the downtime and whether Brown was really a poor manager. The Court even emphasized that Brown testified he was not, in fact, antagonistic or disrespectful, which the jury was entitled to take as evidence and believe.[80]

This means that Brown had enough evidence of pretext to support the jury's verdict. In particular, he had evidence that the purported factual basis for Mars' decision was false. But did he have enough evidence to call into question the honesty of Mars' belief about his performance given *Pollard*'s announcement that undermining the facts is not enough? He did, according to the Court, because there was evidence the decision maker in the case considered product quality and profit to be the most important indicators of a shift manager's performance. Indeed, that is what he had harped on when he met with his line managers.[81]

So the jury could have disbelieved Mars when it later said that Brown's attitude or whether he trained his employees were important enough to get Brown fired. Both an earlier evaluation and the testimony of other witnesses corroborated Brown's assertion that he was a good manager (or good enough), which would mean Mars could not be sincere in its assertion that Brown was the "inflexible, recalcitrant manager" that it said he was at trial.[82] In short, not only did the record fail to support the company's factual basis for its decision, it contradicted it. The contradiction was enough for the jury to rule out a mistake on Mars' part. This was not a case like *Pollard* where not all of the facts were known. Mars had access to the same facts as Brown about his performance; if it was not being honest in relaying the facts, then a jury was entitled to conclude that the company really fired Brown because of his age.

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[79] *Id.*

[80] *See id.* at 510. At first blush Brown's own testimony might seem self-serving, but that does not make it inadmissible, and of course it was subject to cross-examination.

[81] "The jury could reasonably conclude that the subjects that [Brown's supervisor] harped on when he met with his managers were the subjects that made the most difference to him, and therefore that the reasons he gave for firing Brown were not the true reasons." *Id.* at 509.

[82] *Id.* at 510. Testimony from one's coworkers isn't offered in a case like this to prove that Brown was a good employee, or better than he was evaluated to be; that would be hearsay. *See* FED. R. EVID. 801(c)(2). Rather, it's offered to establish that Brown's bosses aren't being honest and that their stated belief about Brown's performance is not sincere. *See, e.g.*, Massey v. Johnson, 457 F.3d 711, 718 (7th Cir. 2006) (statement leading to employee being fired fully admissible not because statement is true, but because it explains what prompted an action).

Taken together, *Pollard* and *Brown* set the following as the law in the Seventh Circuit: (1) proving that an employer's reason was unworthy of credence or pretext was not enough to support a jury verdict in a discrimination case unless the employee proved it was a lie or pretext to cover up discrimination; (2) proving the lie or cover-up necessarily meant proving dishonesty on the part of the employer; (3) dishonesty could be inferred on a full record where the plaintiff disproves or seriously undermines the company's facts supporting its reasons, especially by debunking purported performance-related facts; and (4) dishonesty cannot be inferred on a full record if at best the plaintiff proves that the company made a mistake and fired him for something that he did not do or was not guilty of.

III. THE HONEST BELIEF RULE IN THE SUMMARY JUDGMENT PHASE

Just a few years after *Pollard* and *Brown*, however, the Seventh Circuit extended its "honest belief" rule to the summary judgment phase. It would be difficult to overstate the significance of the extension. At the summary judgment stage, the court may or may not have the benefit of testimony, and while there may be uncontested facts at this point, courts are forbidden from weighing them in the way that we expect, and instruct, juries to do.[83]

Two cases in particular are responsible for the dramatic extension of the honest belief rule. The first, *McCoy v. WGN*,[84] involved a middle manager, Ron McCoy, who received bonuses, raises, and "good performance evaluations," including one evaluation from an outside consultant.[85] But the Seventh Circuit was persuaded that McCoy's bosses had serious concerns about McCoy's performance despite these facts; one of the bosses told McCoy that they were not on the same "wavelength."[86]

Five years after hiring him, WGN fired McCoy even though only a few months earlier they had transferred him to a new position with less responsibility (in other words, just after his employer demoted him, though his salary remained unchanged). When McCoy took the issue of his firing to an Illinois state administrative agency and claimed age discrimination, WGN defended itself on

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[83] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial").

[84] 957 F.2d 368 (7th Cir. 1992).

[85] *Id.* at 369.

[86] *Id.* at 370.

the ground of money: it had determined not to budget for his position any longer.[87]

In a brief and undeveloped opinion authored by a district court judge sitting on a panel by designation,[88] the Seventh Circuit allowed for many possible interpretations of the evidence in favor of McCoy, but then abruptly rejected them all once they ran up against the honest belief rule. It allowed for the possibility that WGN's transfer of McCoy was nothing more than a sham so that WGN could fire him without eliminating an entire position. It acknowledged that neither the performance-based or financial reasons for McCoy's termination held up well to scrutiny. The court described WGN's issues with McCoy's performance as "some level of concern,"[89] which does not sound like much and is even generously stated based on a record where at most his boss concluded the two were not on the same "wavelength." And at the state administrative level, WGN did not even mention McCoy's performance in support of its decision. It cited finances, but this did not fare well in the light of day because after it transferred McCoy, it replaced him with a younger person and paid her "substantially more" than it paid McCoy for doing the same job.[90]

McCoy is not a summary judgment case under the standard set forth in *Burdine*, or for that matter *Pollard*, in large part because the record is so thin and open to interpretation favoring the plaintiff. In fact, it's difficult to imagine what McCoy would have needed in order to establish pretext in his age discrimination case; his employer's reasons for its decision shifted from one forum to the next (money as the reason at the administrative level before performance was the reason in court); he directly contradicted evidence of his poor performance with performance reviews and raises; and his transfer from one job and quick firing from the next could easily look suspicious and pretextual to a jury. Even the court called it a "close case,"[91] just before it concluded that it was a summary judgment case in favor of WGN.

How could that be? The court concluded that McCoy's "efforts to ward off summary judgment by showing pretext bear more on the issue of mistake on WGN's part than on the issue of whether WGN honestly believed in the reasons it has offered for its actions."[92] In so doing, the court did two things: it opened the door to using the honest belief rule at the summary judgment stage at the same time it set the bar low for using it. As just one perplexing example, the court did

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[87] *See id.* At oral argument, the lawyers for the parties disputed whether WGN raised the issue of performance at the state hearing. McCoy's lawyer was present at the state proceedings and said no. In all events, the dispute was settled in McCoy's favor for the purposes of the appeal. *See id.* at n.1.

[88] Judge Easterbrook, the author of *Pollard*, was on the panel.

[89] *McCoy,* 957 F.2d at 373.

[90] *Id.* at 370.

[91] *Id.* at 373.

[92] *Id.*

not explain how WGN could be credited for mistakenly sizing up McCoy's performance when it contradicted much of McCoy's work record and the reason the station had given earlier (at the administrative stage). Or, put another, way, how could McCoy or any employee ever point to his recorded job performance if an employer's bailout in these cases could simply be the equivalent of "sorry for the mistake." A jury might well conclude that a mistake was all that it was, but the fact that a jury could also conclude the opposite explains why McCoy should not have been a summary judgment case.

Just a few months after deciding McCoy, the Seventh Circuit affirmed summary judgment in another age discrimination case, *Gustovich v. AT&T*.[93] This time the case was brought by five middle managers at AT&T. They were part of their company's budget cuts based on performance; AT&T had decided to let them go because they were near the bottom of 36 supervisors it had evaluated. Four of the five had evaluations of "partially met objectives," which was fourth of five possible performance ratings (the lowest being "unsatisfactory").[94] They complained that they would not have been fired had they been more accurately rated (rated "as they should have been," as relayed by the court),[95] but there was no evidence that the rating was tainted by age discrimination at the time it was made, at least with respect to these four. The fifth employee presented a more suspicious case: her rating was "fully met objectives," which was the same rating that her 35-year-old coworker had received.[96] AT&T retained the coworker, who was also "judged to be weak in knowledge and skills" because that employee had previous experience with one of the decision makers and had excellent organizational skills.[97]

But the employee's evaluation did not mention such skills, which might lead a jury to wonder how it could matter when the stakes were even higher and an employer had determined to let its weakest employees go. Soft distinctions between employees were too much for the Seventh Circuit to wade into in this case; it had little patience for "shallow platitudes and equally shallow criticism rather than numerical indicators."[98] Never mind what we now know: that in business numerical indicators themselves are often the result of rank subjectivity and have little utility.[99] By this time the Court had firmly established the honest belief rule at the summary judgment stage: "To repeat, the question is not

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[93] 972 F.2d 845 (7th Cir. 1992).
[94] *Id.* at 847.
[95] *Id.* at 848.
[96] *Id.* at 849.
[97] *Id.*
[98] *Id.*; The opinion isn't assigned (it was released "per curiam" for the two-judge panel in this instance), but Judge Easterbrook is on the panel, and it reads in his style.
[99] *See* Rachel Feintzeig, *The Trouble with Grading Employees*, WALL ST. J., Apr. 21, 2015, at D1 ("An analysis of 30,000 employees by [one] organization shows ratings don't have a direct impact on performance.").

whether the managers displayed skill in expressing subtle gradations in the supervisors' performance, but whether the managers' explanation is honest rather than fabricated to hide discrimination."[100]

In fact *McCoy* and *Gustovich* did much more than extend the honest belief rule to the summary judgment phase. They gave federal judges permission to stop cases even though facts could be read to infer discrimination. The court even conceded that the plaintiffs in *Gustovich* had "pointed to many facts and events that are consistent with age discrimination," but "no evidence" that AT&T actually fired them because of their age.[101] If facts line up with discrimination and are to be interpreted in the plaintiff's favor at the summary judgment stage (assuming the plaintiff is the non-movant),[102] then it is hard to see how the case can be described as one with "no evidence." For the court, the honest belief rule was powerful: evidence concerning an employee's job performance "may create a material dispute about the employee's ability but do nothing to create a dispute about the employer's honesty – do nothing, in other words, to establish that the proffered reason is a pretext for discrimination."[103] That statement, too, perplexes in this sense: why should an employee who proves he was actually able or performing well have to take an employer at its word that it thought otherwise?

If there was any lingering doubt about the full application of the Seventh Circuit's honest belief rule and its maturity as a case-killer for plaintiffs in employment discrimination cases, that doubt evaporated after the court issued three opinions in 1997. In two of the cases, *Brill v. Lante*[104] and *Hartley v. Wisconsin Bell*,[105] the employer-defendants answered discrimination claims by pointing to the plaintiffs' job performance. Lante fired Brill because she could not get along with clients and failed to improve her technical skills (and because she was looking for a job elsewhere).[106] Brill had little evidence and a heap of conjecture. Her evaluations were, in fact, negative; one review admonished her for referring to a client as an "idiot" and suggesting he be shot and for showing "defensiveness and intolerance" in the face of constructive criticism.[107] Brill contested the "idiot" remark, among other things, but the record contained contemporaneous reports about it in one of her supervisor's emails.[108] At that point, the legal issue shifted from whether she actually said those things to

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[100] *Gustovich*, 972 F.2d at 849.
[101] *Id.* at 851.
[102] *See Reeves*, 530 U.S. at 150.
[103] *Gustovich*, 972 F.2d at 848.
[104] 119 F.3d 1266 (7th Cir. 1997).
[105] 124 F.3d 887 (7th Cir. 1997).
[106] *Brill,* 119 F.3d at 1273.
[107] *Id.* at 1268.
[108] *Id.*

whether her employer's higher-ups had any reason to disbelieve it. Without such evidence, Brill's entire case crumbled.[109]

Brill's case gave the court the opportunity to apply the honest belief rule to firings precipitated by a specific event, and an employer's perception of that event, rather than to how the employer sized up the plaintiff's general job performance. Carole Hartley's case against her employer gave the court a similar chance to apply the rule once she claimed that the decision maker who decided to let her go, instead of two younger managers, was the same one who made her "nauseated."[110] Whether she actually said that just two weeks before the decision was disputed, but the record contained a memo about it and there was no evidence that the memo itself was planted in her file with a made-up accusation to cover-up discriminatory animus if Hartley ever contested the firing or sued.[111] Nor was there evidence challenging the honesty of one of her employer's other reasons for letting her go: that after her position was eliminated, she was late in turning in her preference slip for a spot in a different unit. At first she conceded that she was late, but then searched her memory and changed her story in a post-deposition affidavit. That certainly did not help her chances at proving discriminatory intent on the part of her employer, Wisconsin Bell: "At most Hartley has proven that Bell was mistaken about when it received her preference slips just as she initially was mistaken about when she sent them in."[112]

The third case from the same year, *Kariotis v. Navistar*,[113] referred to the "so-called 'honest belief' rule" by name[114] and announced that it would be applied to any federal employment law where intent was at issue: "Under Title VII, the ADA, the ADEA, and ERISA, an employer's honest belief is critical."[115] Kariotis, who like Pollard, had been fired after her employer concluded she was faking an inability to work, had lots of head-shaking evidence that her employer was inept. It hired a company to videotape her movements while off-duty; her boss watched the tape with other supervisors, determined that it spoke for itself, and then fired her.[116] No one at her employer talked to Kariotis about it first, or to

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[109] Actually, it left her with a grand conspiracy theory ("her evaluators, two of whom were women, conspired to negatively assess her technical 'skill set' and temperament toward clients, and gave her poorer marks than they gave men . . . to cover up their discriminatory animus;" *id.* at 1272). The court rejected the theory. *See id.* (citing Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985) ("the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it")).

[110] *Hartley,* 124 F.3d at 892.

[111] *See id.*

[112] *Id.* at 891.

[113] 131 F.3d 672 (7th Cir. 1997).

[114] *See id.* at 680.

[115] *Id.* at 679.

[116] *See id.* at 675-76.

her physician, or to the company's own doctor. The employer could have asked its doctor to examine Kariotis but did not do that, either.[117]

The Seventh Circuit agreed that Kariotis' employer's investigation "hardly looks world-class,"[118] but there was no evidence that it investigated younger or non-disabled employees differently. In that respect, it appeared to be a level playing field of questionable decision-making for everyone. And there was no evidence that Kariotis' supervisors doubted she was faking; hiring a private investigator in the first place corroborated its honest suspicion, even if her physician was correct when he later wrote a letter to her employer that there was no fraud in the first place.[119]

Kariotis is important for a further reason, too. It explained why the court had determined that it would not submit these cases to juries under the honest belief "rule" even if the basis for an employer's belief is impulsiveness or shoddy work. To do so would be to sit as a "super-personnel department that reexamines an entity's business decisions," which the court said it rejected 10 years earlier in *Pollard* and "again reject[s] today."[120] Taken together, the honest belief rule and the rule against reviewing employment practices provide two powerful layers of protection for an employer and its challenged decision. The employer's practices leading to the decision are irrelevant (the super-personnel department rule); all that matters is whether the profession of sincerity is a sham (honest belief). The Court then extended its honest belief rule to the FMLA, too.[121]

IV. A RULE FOR ITS TIME

In one sense the honest belief rule can be explained with reference to its timing. Employment law as practiced in the federal courts was still getting its bearings in the 1980s,[122] when the Seventh Circuit decided *Pollard*, and even into

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[117] *Id.*

[118] *Id.* at 677.

[119] In fact, Kariotis' physician called the charge of disability fraud "preposterous." *Id.* at 675.

[120] *See id.* at 678.

[121] *See id.* at 681; the court explained that if Kariotis' employer "had to prove more than an honest suspicion simply because Kariotis was on [FMLA] leave, she would be better off (and enjoy 'greater rights') than similarly situated employees (suspected of fraud) who are not on leave." *Id. Kariotis* was the first federal court of appeals decision to hold that the honest belief rule applied to FMLA discrimination or interference claims. *See* Medley v. Polk Co., 260 F.3d 1202, 1207-08 (10th Cir. 2001). *But see* Yontz v. Dole Fresh Vegetables, Inc., 2014 WL 5109741, at *9 (S.D. Ohio Oct. 10, 2014) ("Dole may not use an honest mistaken belief that [plaintiff] misused FMLA leave as a legitimate non-discriminatory reason for his termination.").

[122] It was not until 1986 that the Supreme Court decided its first sexual harassment case. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-67 (1986) ("Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."). During this decade, and much of the next, it was unsettled whether same-sex

the 1990s, when the court decided *McCoy*, followed by *Brill*, *Hartley*, and *Kariotis*. And there was a tug of war of sorts in the federal courts between the steady judicial expansion of employment law and a call to leave any expanding up to Congress.[123] Certainly the admonition that federal courts are not "super-personnel" departments was a reaction to a perceived line of frivolous cases, or at least cases that exposed the bad but not unlawful practices of employers.[124] Courts also pumped the brakes on Title VII litigation by declaring that plaintiffs could sue for only materially adverse decisions,[125] stating that sexual harassment had to be "hellish" in order to be actionable,[126] and by ruling out the liability of individual supervisors.[127]

Around the same time, the Supreme Court determined on its own that Title VII litigation would be treated differently because it was in need of a special, burden-shifting legal framework. Plaintiffs in other civil cases, whether trademark infringement[128] or RICO[129] cases, would simply be expected to point to sufficient evidence that could clear the "preponderance of the evidence" standard.[130] Title VII cases, by contrast, could proceed through a so-called

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harassment was also unlawful. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (holding same-sex sexual harassment to be actionable under Title VII).

[123] *Price Waterhouse* exemplifies the tug of war; the case caused the Court to splinter into separate opinions, including a plurality opinion joined by four Justices. 490 U.S. at 229. A concurring opinion authored by Justice O'Connor was treated as controlling. *Id.* at 261; *see also* Gross v. FBL Fin'l Servs., 557 U.S. 167, 172 (2009). In 1991, Congress stepped in not only to codify the disparate impact claim but also to clarify that a mixed-motives framework applies to Title VII claims. *See* 42 U.S.C. 2000e-2(k) (2010) (disparate impact); 42 U.S.C. § 2000e-2(m) (motivating factor standard).

[124] *See* Brill v. Lante Corp., 119 F.3d 1266, at 1270 (7th Cir. 1997) (describing the *McDonnell Douglas* burden-shifting scheme as a routine but "necessary schematic if the real cases of discrimination are to emerge from the 'spurious ones'") (quoting Russell v. Acme-Evans Co., 51 F.3d 64, 69 (7th Cir. 1995)).

[125] *See, e.g.*, Spring v. Sheboygan Area School Dist., 865 F.2d 883, 886 (7th Cir. 1989) (public humiliation was not "a term or condition" of plaintiff's employment). *See also* Crady v. Liberty Nat. Bank & Trust Co. of In., 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.").

[126] *See* Bakerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (discussing the "concept of sexual harassment" and what it was "designed" to address).

[127] *See, e.g.*, Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995).

[128] *See* Lanham Act, 15 U.S.C. § 1051-1127 (2015).

[129] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (2015).

[130] *See* Addington v. Texas, 441 U.S. 418, 423 (1979) (explaining that in the "typical civil case involving a monetary dispute between private parties" the standard is "mere preponderance of the evidence" because society has "a minimal concern with the outcome" of such cases).

indirect method that creates a presumption of discrimination after only a prima facie case and that requires a defendant employer to defend itself.[131]

Against this backdrop, the honest belief rule was a judicial effort to tack back to first principles and statutory language: Title VII required a plaintiff to prove that an employer acted "because of" the plaintiff's sex or other protected characteristic. The Supreme Court held that those words described the employer's motive, or what actually triggered the decision, which left the door open for both courts, and then employers, to expect evidence of "animus."[132] Without direct or smoking gun evidence revealing motive, plaintiffs were left to rebut the reasons given by their employers, most typically performance reasons. When that is all the indirect or circumstantial evidence they could produce, the employer argued that at worst it showed it acted mistakenly, or rashly, or even poorly, but honestly so. Never mind that the exchange of arguments showed the important presumptions decisively favored defendants in these cases: the employee would argue about his work record in order to show dishonesty or pretext, only to have the employer argue that even if the assessment was wrong, it honestly believed in it. When the plaintiff answered that no one could honestly believe in something so wrong, the super-personnel department principle bailed employers out with the argument that it may be wrongheaded to run a business this way, but it is not illegal.

But rules are difficult to dislodge, even those that were judicially created in the first place. A principle expressed as unimpeachable, because it is tied to statutory language, is destined to be known as a rule before long. And what happens after that is the worst part of judicial decision-making and writing: it is cited lazily and in rote, with little application to the facts of the case, as if incanting the rule should be enough.[133] Without taking care to tie the rule to facts, or to its original expression, it expands and becomes bloated, eventually swallowing up all sorts of cases that might not have been successful at trial, but should have gotten that far.[134]

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[131] *See Burdine*, 450 U.S. at 254 ("[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee").

[132] Indeed, the words "because of" were front and center in the *Price Waterhouse* case, and the Court's opinion makes it clear that it treated the term as one of causation. 490 U.S. at 237 ("The specification of the standard of causation under Title VII is a decision about the kind of conduct that violates that statute.").

[133] *See* RICHARD A. POSNER, *Foreword* to THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS vii (Robert F. Blomquist ed., 2010) (decrying false objectivity in judicial opinions in the form of "heavy use of legal jargon and dense citation of cases and of other orthodox legal materials").

[134] "Circuit drift," which refers to each circuit building up its own case law and then relying on it as precedent separate from the work of other circuits, which are enforcing the same national laws, is also to blame. *See* Nightingale Home Healthcare, Inc. v. Anodyne Therapy, LLC, 626 F.3d 958, 962 (7th Cir. 2010). To make matters worse, circuit opinions "avoid commitment by using vague

So the honest belief rule has lived a normal life, as these things go. Years after its imagining it is still recognized for its importance and power.[135] It made sense, then, that because a strong judicial voice gave it its power decades ago, it would take an equally strong voice to silence it now.

V. A RULE PAST ITS TIME: THE CASE OF JOYCE HUTCHENS

A. In the District Court[136]

In 2009 the Chicago Board of Education determined to "reorganize" its Office of Human Resources, which is another way to say that layoffs were imminent.[137] Joyce Hutchens worked in the Professional Development Unit within the Office. The Board of Education hired Alan Anderson to restructure the Office and accomplish the layoffs; Anderson met with Amanda Rivera, Hutchens' boss, for an accounting of the Unit.[138]

During their meeting, Anderson asked Rivera to name the employees who worked with the Unit's National Board Certification program, which could not be cut because it was separately funded. Rivera mentioned two employees, Debbie Glowacki and Tabita Sherfinski, but either did not mention Hutchens or did not cause Anderson to remember Hutchens' name.[139] Later Rivera contended that she recommended keeping Glowacki over Hutchens because she "generally thought" (the district court's wording) Glowacki was better at the job.[140]

There was some evidence that Hutchens was an imperfect employee. Hutchens' March 2009 performance review, conducted by another manager, concluded with a "partially meeting expectations" grade, as opposed to the evaluations of Glowacki and Sherfinski, who were rated as meeting or exceeding expectations.[141] Hutchens' supervisors also claimed that she was often tardy and

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words and explicit escape clauses," making the standards or principles they impose unreadable, too. *Id.*

[135] And often criticized. *See* Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 646 (2000) ("The so-called 'honest belief' standard has made it virtually impossible for a plaintiff to prevail on an employer's motion for summary judgment absent direct evidence of the employer's discriminatory intent."); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Impact*, 94 CAL. L. REV. 997, 1028 (2006).

[136] The District Court's Order in this case is not reported (and not available on-line), but it is available on PACER. *See* Hutchens v. Chicago Board of Education, et al No. 1:09-cv-07931,PACER, at *75 (N.D. Ill. July 3, 2012) (Doc. 75 on PACER).

[137] Order at 2.

[138] *Id.* at 3-4.

[139] *See id.* at 4-5.

[140] *Id.* at 6.

[141] *Id.* at 5.

once fell asleep in a meeting.[142] Finally, Rivera discounted Hutchens' overall teaching experience, some of which occurred at a "prison school" instead of a traditional school setting.[143]

After cutting through distractions in Hutchens' race discrimination case against the Board, the district court framed the issue: while the parties did not dispute that the Board and Anderson had decided that someone in the Unit had to be fired because of budget cuts, they disputed why the Board determined it was Hutchens who had to go and not Glowacki.[144] Hutchens was black and Glowacki was white, but it did not take long for the court to frame its cursory analysis and its conclusion by invoking both the super-personnel department and honest belief rules: "Whether or not the [performance] justification led Defendants to an objectively correct employment decision is not the question. What is clear is that Defendants honestly believed that Glowacki was the better employee, and the one who should survive the steep personnel cuts . . . ."[145]

The court granted the Board's motion for summary judgment and ended Hutchens' case. Ultimately, it did not matter whether Hutchens was correct that she did not fall asleep in a meeting, or that her prison school experience was worthy, or that she did not even receive a copy of the performance evaluation which contained many of the issues with her work that the Board later cited as reasons it chose Glowacki over her. None of that was important because the court concluded her bosses were being honest when they said they believed those things.[146]

B. In the Court of Appeals for the Seventh Circuit[147]

It did not take long after oral argument for the Seventh Circuit to reverse,[148] and when it immediately immersed itself in Hutchens' work background and compared it to Glowacki's, it was announcing an end to the honest belief rule. In fact, in an opinion authored by Judge Richard Posner, the court determined to occupy the role of super-personnel department, even though

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142 *See id.*

143 *Id.* at 6. The prison school (versus traditional school) distinction was "important," according to the court, because "so-called 'prison schools' make up only around 1% of Chicago Public Schools, and a teacher from that background would lack familiarity with the Professional Development Unit's work." *Id.*

144 *Id.* at 13 ("the dispute is over the Board's decision to retain Glowacki as opposed to Hutchens").

145 *Id.* at 14.

146 *See id.* at 12 (stating that the only issue is whether the Board's reason is "honestly the reason Glowacki was rehired"); citing Gordon v. United Airlines, 246 F.3d 878, 889 (7th Cir. 2001).

147 *See* Hutchens v. Chicago Board of Education, 781 F.3d 366 (7th Cir. 2015).

148 Twenty-one days, to be exact. *See id.*

for years it had assured litigants that it had no interest in re-weighing the credentials of employees.

In multiple ways, the Court found Hutchens' credentials to be superior to Glowacki's:

- While Glowacki had prior teaching experience at Chicago parochial schools, Hutchens had taught at a prestigious high school in Lincoln Park and also at an "alternative high school" for juveniles detained in a Cook County jail; "[a] reasonable jury could also have found that Hutchens had a stronger resume than Glowacki, given the standing of the Lincoln Park school and the challenge of teaching jail detainees;"[149]
- Hutchens had eight more months of experience than Glowacki in the Professional Development Unit, so "one might have expected Glowacki to be laid off rather than Hutchens unless Glowacki was the better worker;"[150]
- "And there was more: Hutchens had two masters degrees" while Glowacki had "only one," and Hutchens had twelve additional graduate-level hours in education while Glowacki did not testify to having any;[151]
- While both were National Board certified, only Hutchens was additionally certified in specific subject areas, in this case both at the high school and middle school levels, including English and business;[152] and
- Hutchens had been named in 2007 as one of the recipients of a performance-based award for going to "extraordinary lengths to make a difference" in student lives.[153]

The court of appeals called Glowacki's credential's "seemingly inferior"[154] to Hutchens, which meant that it mattered why Rivera, a codefendant in Hutchens' case, told Anderson to retain Glowacki but did not tell him about Hutchens at all (because Anderson was acting only on information supplied by Rivera, she was the real decision maker here.)[155] The Board cited Hutchens' 2009

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[149] *Id.* at 368. The court determined the "standing" of the Lincoln Park school, and other facts, including Hutchens' teaching awards, the background of the prison school, and even Glowacki's ethnicity (Polish-American) by searching the internet on its own. That's not unusual for Judge Posner, who will cite to Wikipedia without hesitation, as he did in this opinion, but it was challenged by the Board in its Petition for Rehearing (which the Court denied, see Order, Hutchens v. Chicago Board of Education, Case No. 13-3648 (7th Cir. April 30, 2015)). The Petition and the Order can be found on PACER (Petition for Re-Hearing Doc. 48; Order Doc. 50).

[150] *Hutchens*, 781 F.3d at 368.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *See id.*

[155] The Seventh Circuit refers to this as a cat's paw, meaning the decision maker is an unknowing tool of someone else with input into decision. *See id.* at 373; Smith v. Bray, 681 F.3d 888, 897 (7th Cir. 2012).

performance write-up, assessing her as only partially meeting expectations, and Rivera testified that several intangibles worked against Hutchens, most notably her inability to work well with others or "in collaboration."[156]

As for the evaluation, Hutchens was generally aware of being evaluated, but not aware that it was a formal evaluation. The Board apparently did not produce the evaluation during discovery and one witness testified that she thought it had been destroyed.[157] But there was no dispute that the Board believed it had evaluated Hutchens; it was able to quote from the evaluation ("partially met expectations"). In other words, there was no evidence that it was inventing the evaluation after-the-fact to support its decision. Nor was there other evidence that its belief in the evaluation was not honest under the honest belief rule. Indeed, under that "rule," the Board would have been credited with the poor evaluation of Hutchens, because that's what it believed had occurred, whether it ever evaluated Hutchens negatively at all.

The court chucked aside the honest belief rule to get past the collaboration criticism as well. Though it was never mentioned by the district court, the court of appeals considered whether Hutchens' coworkers were correct that Hutchens participated in a bickering incident when they all worked in one room. Hutchens' supervisor at the time testified that more than one coworker had complained about Hutchens' bickering; later she testified that it had only been one coworker who had complained. The court found it "odd" that the supervisor had not observed any of the bickering herself and had "just listened to complaints about it, apparently making no effort to evaluate the accuracy of the complaints."[158]

While odd, that lack of follow-through is irrelevant under the honest belief rule. Under that rule it should only have mattered whether Hutchens' supervisor at the time honestly believed the complaints; the fact that she remembered the complaints and blamed Hutchens is important, while her decision to not double-check their accuracy is not important. For the same reason, under the honest belief rule, it is not important whether Hutchens' coworkers thought she collaborated well or, for that matter, whether she bickered. The court was correct to label the coworkers', or for that matter the supervisor's, testimony about Hutchens as hearsay if it was meant to establish that Hutchens did not, in fact, collaborate, or did, in fact, bicker. But the testimony should have been evidence, and not hearsay, to explain why the Board honestly believed what it did about Hutchens' performance.[159]

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[156] *Hutchens*, 781 F.3d at 369.
[157] *Id.* at 370.
[158] *Id.*
[159] *See Brill*, 119 F.3d at 1271 ("Brill is mistaken to think that her difficulties with clients . . . are supported by inadmissible hearsay. . . . The question is not whether Brill actually referred to a

The court appeared to acknowledge the basis of the Board's conclusion about Hutchens ("The team worked in one room, so doubtless there was a lot of chatter, some of which could be characterized as bickering."),[160] and yet found it suspicious that there was no documentation of the "alleged bickering" even though Hutchens' supervisor testified that there ordinarily would not be in that instance because it did not lead to discipline.[161] None of this evidence came close to challenging the honesty of the Board's assessment of Hutchens. Instead, the court relied on what a good supervisor would do (check out the bickering complaint on her own) or what a series of coworkers, none of them supervisors or decision-makers or, for that matter, performance assessors, thought about Hutchens while on the job. At that point the court could have simply declared the honest belief rule to be dead.

And what about Hutchens' purported tardiness or falling asleep during a meeting? Rivera could not say who told her that Hutchens was tardy, but it would not have mattered for the court because the information would have come from coworkers. The court did not explain why the coworkers could be relied upon to undermine the Board's assessment of Hutchens as not being a team player or as someone who bickered but could not be trusted to tell Rivera if Hutchens was late to work.[162] Nor did the Board get any credit for testifying under oath that the tardiness could be substantiated in documents that had been lost.

As for the contention that Hutchens once fell asleep, that information came from other workers too, rather than through Rivera's observation. The court said it was hearsay (again, even though it was not evidence to prove that the sleep incident actually occurred),[163] and pointed to the lack of discipline for the incident. But there was no evidence that the Board disciplined for an incident like that as a matter of routine; like the bickering incident which also did not result in a write-up, the lack of a paper trail would call into question the employer's honesty at this point only if it were the sort of thing that this particular employer reduced to writing. In that case, the lack of documentation might suggest that it never happened in the first place, and that the employer made up the incident as pretext to cover up its discrimination; in other words, to cover its tracks.[164]

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client as an 'idiot' and suggested that he be shot; what is important is Lante's honest belief that she said those things., citing Rand v. CF Inds., Inc., 42 F.3d 1139, 1145 (7thCir. 1994)).

[160] *Hutchens*, 781 F.3d at 370.

[161] *Id.*

[162] *See* Little v. Illinois Dep't of Revenue, 369 F.3d 1007, 1015 (7th Cir. 2004) ("The analysis of pretext focuses only on what the decisionmaker, and not anyone else, sincerely believed."); *Brill*, 119 F.3d at 1273 (plaintiff's "expert" affidavit concerning her technical skills was irrelevant because "[w]hat could it prove?").

[163] *Hutchens,* 781 F.3d at 371.

[164] *See Burdine*, 450 U.S. at 258 ("a proffered explanation lacking a factual basis" can prove pretext).

Without credit for any of its honest beliefs, or at least credit for beliefs whose honesty was not really questioned by record evidence, the court was left with its own assessment of Hutchens' work. It concluded that Hutchens was a better writer than she got credit for because after her termination one of her supervisors wrote a "rave" letter of reference for her extolling her writing ability.[165] The court suggested that it agreed with that assessment based on Hutchens' written appellate work (Hutchens appeared pro se). The reference to Hutchens' writing ability and two appellate briefs could have been an aside by the court, not considered in reversing summary judgment, but including the reference in the opinion suggests that the court gave it some weight rather than none.[166]

What really impressed the court was Hutchens' work experience before she came to the Professional Development Unit, in particular her work in a "prison school." The court referred to her "toughness in teaching inmates of Cook County jail year after year" not once, but twice,[167] just before reversing summary judgment in favor of Hutchens' employer. Undoubtedly the court was correct as far as the toughness issue goes, but for whatever reason that kind of pre-Unit teaching did not count for Rivera, maybe because she could not relate to it or maybe because she saw the prison setting as just too different from the Unit's work. There was no suggestion that if Glowacki's experience had been in the same setting, she would have gotten credit for it while Hutchens did not.

The rest of Hutchens' work record (including her seniority over Glowacki and her better credentials, in addition to her writing skills) meant that she was arguably better qualified than Glowacki. It did not matter, as it would have under the super-personnel department principle, that those were not the attributes valued by the Board in its decision, which was based more on Hutchens' perceived disengagement and overall performance relative to Glowacki. It also did not matter that there did not appear to be any evidence, or at least not much, that Rivera and the others who testified were being dishonest about what kind of employee they perceived Hutchens to be. For example, though there was little to document Hutchens' performance (or her tardiness, or the purported bickering incident), at most that shows her employer to be inept and careless rather than dishonest.[168] It would be different if an employer shifted its reasons for a decision or acted inconsistently relative to other employees, but that does not appear to have happened in this case.

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[165] *Hutchens,* 781 F.3d at 372.

[166] Indeed, Judge Posner has written that he tries "to include everything that I am conscious of having influenced the decision" in his judicial opinions. *See* POSNER, *supra* note 133.

[167] *Hutchens,* 781 F.3d at 373.

[168] The court allowed for that possibility but the Board did not get the benefit of it. *See id.* at 373-74 ("Certainly the Professional Development Unit seems to have been poorly managed, with little effort at recordkeeping . . . Hutchens may have been a victim of incompetence rather than of racism.").

C. A Jury Gets to Call the Lie

Ultimately the court of appeals was left with two possibilities, in large part because it worked hard (but not inappropriately) to find any evidence in the record that might support Hutchens. The first possibility was that the record did not contain evidence of the things another employer might have documented because at the time, Hutchens' employer did not know it would matter, or was just careless or inept. Under similar thinking, the Board mistakenly did not credit her enough for the tough teaching she did before she arrived at the Unit. So Hutchens lost her job and would not have had the court been running things; still, there was nothing dishonest about it and therefore nothing to suggest it was all a pretext for discrimination.

The second possibility was that a jury could look at credentials the Board did not consider, such as Hutchens' seniority (however short) over Glowacki and, yes, her "toughness" teaching in a jail, and conclude that the Board's reasons for firing her were a "tissue of lies"[169] in light of that evidence. In the second instance whether Hutchens really merited the job after all, instead of Glowacki, would be what mattered. The honest belief rule would not save her employer because in theory, everyone could be lying,[170] whether or not there was evidence to suggest it.

The court chose the second path and in so doing so, left little room for the honest belief rule in the future. Any plaintiff can now simply say the rule has no place in these cases because his employer may be lying; in other words, the evidence calling into question its honesty or its motive is simply the possibility that it may be willing to continue the lie under oath. Without question, these cases are now for the jury, as the court of appeals made clear:

> The district judge himself, by emphasizing his belief that the defendants' witnesses had been 'honest,' implied correctly that if they were liars a reasonable jury could conclude that Hutchens' race had been a decisive factor in the decision to prefer Glowacki over her. But these are factual issues for a jury to resolve.[171]

There is no room for the honest belief rule after *Hutchens*. As an example, certainly the result from Judge Posner on behalf of the panel cannot be

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[169] *See id.*

[170] That possibility was not enough to get to a jury in the past. *See* Massey v. Blue Cross-Blue Shield of Illinois, 226 F.3d 922, 926 (7th Cir. 2000) (affirming judgment as a matter of law in favor of defendant after jury verdict favoring plaintiff and stating, "it is always possible, of course, that the jury might have disbelieved everything [the decision maker] said, but we routinely deny summary judgments based on that kind of hope, and consistency requires us also to reject that possibility as a way of saving the jury's verdict").

[171] *Hutchens,* 781 F.3d at 374.

reconciled with *McCoy* or *Gustovich*. Recall that WGN fired McCoy and claimed only "some level of concern"[172] about his performance; the cause of concern was never articulated beyond him not being on the same "wavelength" of his boss and it was not reflected in an evaluation.[173] In fact, WGN never mentioned McCoy's performance the first time it justified its decision against his age discrimination complaint (in an administrative hearing), and his performance evaluations were not only good but were confirmed by an outside consultant. WGN was credited with at worst a mistake, but not for being dishonest despite the contradictory record.

Similarly, one of the AT&T plaintiffs in *Gustovich* had "fully met objectives," according to her evaluation, but was let go based on a record "brimming with shallow platitudes and equally shallow criticisms."[174] There the court said the question was not the supervisors' skill, but whether there was any reason to question their honesty. Yes, under *Hutchens*, because they could simply be lying. After that, there is no honest belief rule.

VI. CONCLUSION

The honest belief rule, and for that matter the principle that a court will not sit as a super-personnel department, emerged in the years following the Supreme Court's *McDonnell-Douglas* decision and its creation of an awkward, burden-shifting contraption that sadly it continues to impose on federal courts and recently reaffirmed.[175] In one sense it fits with what Congress wrote (discrimination is unlawful only if it is "because of" a protected characteristic), but in another sense it never should have been necessary in the first place. It grew out of a fear that plaintiffs will be able to prove discrimination merely by disproving the employer's reason (given in step two of the *McDonnell Douglas* scheme) or by showing the reason to be silly or the result of shoddy work.

But of course this is what *McDonnell Douglas*, and in particular *Burdine*, invite; indeed, *Burdine* could not have been more direct when it allowed that in some cases "the plaintiff's initial evidence [the prima facie case], combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."[176] Of course plaintiffs had no choice but to argue about their job performance on the merits when performance is such a common reason for a firing and the Supreme Court promised that it will not be "particularly difficult to prove that a proffered explanation lacking a factual basis is a

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[172] *McCoy*, 957 F.2d at 373.
[173] *See id.* at 370.
[174] *Gustovich*, 972 F.2d at 849.
[175] *See* Young v. United Parcel Service, Inc., 135 S. Ct. 1338, 1353-54 (2015).
[176] *Burdine*, 450 U.S. at 255 n.10.

pretext."[177] The honest belief rule may have always misunderstood why the plaintiff was rehashing her performance in the first place. She was not using the performance to show that she was good enough not to be fired. Rather, she was using it to show that she was not fired for not being good enough in the first place.

The hard truth is that *Hutchens* is correctly decided under *Burdine* and *McDonnell Douglas* even though the plaintiff had very little, if any, actual evidence of discrimination. Imagine litigating a traditional intentional tort case with no evidence of deliberateness or willfulness but getting to a jury anyway. That is employment law under those high court cases. For years, decades really, the honest belief rule reigned in trial court cases and put the focus on the employer's motive for its decision, not the decision itself. However, it was inevitable that the rule would be invoked too often by employers, undoubtedly abused in some cases, misunderstood by many courts, and ultimately would become the kind of boilerplate precedent that Judge Posner finds both lazy and destructive.[178] Without the benefit of the rule, defendant-employers will have an incentive to improve their practices, act less lazily, and get important decisions correct. They won't have the rule to fall back on in cases, and because Judge Posner is known to prefer it when the law connects to incentives[179] and works well off the legal books and in practice,[180] his decision on behalf of the court in *Hutchens* is probably equal parts legal and behavioral.

What was in the heart of the decision-maker at the moment the decision was made?[181] It is hard to say. It involves a fair degree of after-the-fact mind reading, and after *Hutchens* it is unlikely to be a case for summary judgment. If an albatross is like a curse or an oppressive burden, the honest belief rule has qualified as one for many years for plaintiffs. They're free as a bird now.

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[177] *Id.* at 258.

[178] *See* POSNER, *supra* note 133 (noting that the "typical appellate opinion nowadays is more formalistic or 'legalistic' than the typical opinion of a half century ago" and decrying opinions with "strings of citations that would not bear careful scrutiny," "vacuous" language, and "legal clichés").

[179] A good example in this area is Judge Posner's separate opinion in *Ellerth v. Burlington Inds., Inc.*, in which he argued for strict liability in the case of supervisory sexual harassment (that accompanies a company act) because it will "deter this kind of sexual harassment more effectively" and the employer "will monitor the exercise of this delegated authority very carefully." 123 F.3d 490, 512 (7th Cir. 1997) (Posner, concurring in part and dissenting in part), *aff'd*, *sub nom*. Burlington Inds., Inc. v. Ellerth, 524 U.S. 742 (1998).

[180] "At bottom, American law, like American political culture generally, is pragmatic. Most legal rules, provided they are not allowed to expand to their outer interpretive limits, make a certain practical sense. Finding and exhibiting that sense is a particular goal of my opinion writing." POSNER, *supra* note 133, at xi.

[181] *See Price Waterhouse*, 490 U.S. at 250.