"SORRY, IT'S MY BAD, BUT YOU'RE STILL FIRED—& HAVE NO CASE": THE HONEST BELIEF DEFENSE IN EMPLOYMENT LAW

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ABSTRACT

The honest belief defense for employers to employee claims has been applied by federal and state courts throughout employment law. Under this defense even if the employer's reason for terminating or taking other adverse action against an employee is based on a mistake of fact or law or both, the employee will lose unless the employee proves the reason was not honestly believed and was a pretext for unlawful motive. In many cases where there is no direct evidence of unlawful motive for the employer's adverse action, courts find the plaintiff employee's evidence is insufficient to disprove the employer's honest belief defense and therefore dismiss the employee's claims. Consequently, the honest belief defense, unless accompanied by appropriate rules and safeguards, has the potential to swallow all protections for employee activities or characteristics enacted by Congress and state legislatures or provided by state common law.

To prevent that result, this Article (after discussing federal and state court decisions applying the honest belief defense to a variety of employee claims) makes multiple proposals, which even if not adopted by federal courts could be implemented by Congress or by state legislatures or courts. Regarding the federal Family & Medical Leave Act (FMLA), this Article proposes relying on the FMLA's "interference" provision to apply the U.S. Supreme Court's NLRA "interference" rule from NLRB v. Burnup & Sims *(1964), under which the employer's mistaken but honest reason is not a defense to interference with employee's exercising a right. This Article proposes that the* Burnup & Sims *rule be applied at least to cases in which the employer's reason is based on one or more mistakes of law or fact that are specific and verifiable as true or false.*

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More generally, this Article proposes that courts in employment cases apply "safeguards" when deciding whether an employer's asserted reason is honest or is a pretext for an unlawful motive. Suggested safeguards include considering whether the employer's asserted reason is reasonably believable and whether the employer's fact-finding process was also reasonable. Finally, consistent with views other scholars have expressed specifically about employment discrimination cases, this Article proposes that because the honest belief defense by definition involves the credibility of the employer and/or its agents, and in many cases involves deciding whether specific facts are true, a greater number of honest belief cases should be decided by juries instead of being decided or upheld on summary judgment.

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I. INTRODUCTION

What happens when you make a mistake that results in harm to another person? In social situations, for most adults in the United States, you apologize and, if possible, work to correct it. If you are a vehicle driver in the United States and you get into an accident, it is likely you will be

required to pay to fix the vehicle of the other person involved or compensate them for the harm. In lieu of either of those options, your vehicle insurance company may pay for the damages once the policy's deductible is met and, in return, your premiums will likely increase. More generally, under U.S. tort law if you are a person or enterprise that makes a mistake which causes harm to another person, you can be required to pay compensation to that person, at least if your mistake was unreasonable. But if you are an employer in the United States who fires an employee based on a mistaken belief the employee engaged in misconduct, or other mistaken belief, you will likely not have to correct your mistake or compensate the employee harmed by it. In that situation, multiple courts and agencies will say you owe nothing to that employee.

That result is probably unsurprising to those familiar with the concept of employment at will, which means that the employment relationship "may be terminated at any time, by either the employer or the employee, without cause,"[1] and is the default rule in 49 states.[2] However, what has become known as the "honest belief defense" protects employers from consequences for mistakenly harming employees even when the default rule of employment at will does not apply.[3] Both state courts and—even more so—federal courts apply the honest belief defense when an employee pursues a claim under an employee protection statute, employment contract, or other source of law that has been recognized as an exception to employment at will.[4] Consequently, the honest belief defense has been applied to dismiss claims under anti-discrimination statutes, anti-retaliation provisions, the

1. *Employment*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. *At-Will Employment—Overview*, NAT'L CONF. STATE LEGS. (Apr. 15, 2008), https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx [https://perma.cc/7SDM-3PP8] ("Employment relationships are presumed to be 'at-will' in all U.S. states except Montana.").

3. Robert Iafolla, *Appeals Courts Weigh 'Honest Belief' Rule for Bias Claims*, BLOOMBERG L. (Jan. 22, 2020), https://news.bloomberglaw.com/daily-labor-report/appeals-courts-weigh-honest-belief-rule-for-bias-claims [https://perma.cc/7K4D-SHGS] (stating the "honest belief rule" is "a tool courts use to let companies off the hook for allegedly biased employment actions if they offer legitimate reasons based on incorrect information they trusted at the time [of the cause of action arising]").

4. *See generally* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 3 (stating the three major exceptions are: the public-policy exception, the implied-contract exception, and the covenant-of-good-faith-and-fair-dealing exception).

federal Family and Medical Leave Act (FMLA), employment contracts, and more.[5]

One reason for this may be that Congress and the President of the United States have never enacted a statute that in general makes it illegal for an employer to fire an employee for a mistaken belief.[6] Currently, the only state that arguably has such a statute is Montana, with its Uniform Employment Termination Act which requires terminations be for "good cause."[7]

However, as is discussed in this Article, the National Labor Relations Act (NLRA) already has,[8] and the FMLA at least arguably has,[9] "interference" provisions which make it illegal for an employer to interfere with an employee's exercise of rights under those statutes, even when based on an honest but mistaken belief the employer was justified in doing so. Moreover, just because an employer claims it had an honest reason for its adverse action against an employee does not necessarily mean the true reason of the employer (or its agent or agents) was not unlawful. Courts have already developed standards to deal with the possibility that an employer's claimed reason for action against an employee is pretextual.[10]

5. *See* Ernest F. Lidge III, *Disparate Treatment Employment Discrimination and an Employer's Good Faith: Honest Mistakes, Benign Motives, and Other Sincerely Held Beliefs*, 36 OKLA. CITY U. L. REV. 45, 49–50 (2011) ("The employment-discrimination laws ban discrimination in terms and conditions of employment on the basis of an employee's membership in a protected group. The protected categories include race, color, religion, sex, national origin (Title VII), age (ADEA), and disability (ADA).") (citations omitted).

6. *See, e.g.*, Lambright v. Kidney Servs. of Ohio, 998 F. Supp. 2d 676, 687 (S.D. Ohio 2014), *appeal docketed sub nom.* Lambright v. Ohio Thrift Show & Sells, No. 14-3238 (6th Cir. Mar. 21, 2014) (noting "federal employment law does not require that employers never make mistakes"). *See also* Orr v. City of Albuquerque, 531 F.3d 1210, 1217 (10th Cir. 2008) ("[P]eople make mistakes and Title VII does not provide a cause of action for *every human resources department* error.") (emphasis added); Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 680 (7th Cir. 1997) ("[W]hen an employee is discharged because of an employer's honest mistake, federal anti-discrimination laws offer no protection.").

7. *See* MONT. CODE ANN. §§ 39-2-901 to -915.

8. *See infra* Part III (discussing the *Burnup & Sims* rule).

9. *See infra* Part II.C (discussing the FMLA's "interference" provision).

10. *See infra* Part II.B (discussing employment discrimination); Part IV.C (discussing judicial standards for the honest belief defense).

Although federal and state court decisions are extensively discussed in this Article, it currently appears that in many parts of the United States neither federal nor state courts are likely to do much to assist employees who are harmed by employer mistakes. It should not be overlooked, however, that Congress and state legislatures could amend existing statutes to protect employees who are mistakenly terminated or otherwise harmed by employer action, and state courts could do the same in interpreting state laws such as the growing number of state laws governing minimum wage[11] or requiring leave for employees.[12]

This Article will thus discuss the current legal rules for the honest belief defense for employers and propose some possible changes in the rules for that defense that would provide more protection for employees and, in some cases, further the objectives of statutes. Part II of this Article discusses the current legal rules applying to employer honest belief under state employment contract law, anti-discrimination law, and other illegal motive statutes, as well as federal the FMLA. Part III discusses the rule for the NLRA's interference provision, affirmed in 1964 by the U.S. Supreme Court in *NLRB v. Burnup & Sims, Inc.*, that an employer cannot interfere with an employee's exercise of a protected right even for an honest, but mistaken, reason.[13] Part IV proposes rules for the honest belief defense. Subpart A proposes the *Burnup & Sims* rule be applied to the interference provision of the FMLA when the employer's termination of or other adverse action against an employee interferes with the employee's exercise of a statutory right. Subpart B discusses and assesses some apparent policy reasons why courts have created such a strong honest belief defense for employers. Subpart C discusses standards courts should consider adopting for the honest belief defense.

II. CURRENT LEGAL RULES APPLYING TO EMPLOYER HONEST BELIEF UNDER STATE LAW AND THE FMLA

How is it that when an employer fires an employee for a stated reason, but admits or it is undisputed that the employer-stated reason is erroneous,

11. *See Minimum Wage Chart: Rates and Credits*, BLOOMBERG L.

12. *See* Allison May, *Time Off to Care: State Actions on Paid Family Leave*, NAT'L CONF. STATE LEGS., https://www.ncsl.org/research/labor-and-employment/time-off-to-care.aspx_[https://perma.cc/5QJ9-PDKT]; Molly Weston Williamson, *The Meaning of Leave: Understanding Workplace Leave Rights*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 197, 251–52 (2019).

13. 379 U.S. 21, 23 (1964).

and when the employee sues to challenge the validity of their firing, that employee loses their claim? Federal and state courts have relied on multiple rationales and factors to justify or explain this, all of which have come to be referenced as or related to the good faith or honest belief defense. This Part will discuss a majority of the most prominent and common of these rationales.

A. *Application in State Contract Law Cases*

The earliest decisions confronting this issue were rendered by state courts, including a 1937 decision by the New Jersey Supreme Court.[14] Since the 1980s, many state courts have decided the issue in employment contract or employer policies cases. A seminal case is by the en banc Oregon Supreme Court in 1982 in *Simpson v. Western Graphics Corp*.[15] This court found the issue before it was "who makes the requisite factual determination" as to whether the employee engaged in alleged misconduct constituting just cause for termination.[16] In this case, the court found that individual should be the employer because the just cause provision was not in an agreement negotiated between the employer and the employee, but in a handbook that was "a unilateral statement by the employer of self-imposed limitations upon its prerogatives."[17] The employer was the document's drafter and the court concluded that "the meaning intended by the drafter, the employer, is controlling."[18] The court later again used contract law language to support its conclusion by stating that the "employer agreed to the substantive standard embodied in the term 'just cause,' but did not agree to a secondary level of fact-finding authority."[19] However, as would become important in

14. Cooper v. Singer, 191 A. 849 (N.J. 1937).

15. 643 P.2d 1276 (Or. 1982) (en banc).

16. *Id.* at 1278.

17. *Id.* at 1279.

18. *Id.* Indeed, 17 years after *Simpson*, the Oregon Court of Appeals distinguished *Simpson* on the ground that an employee periodontist and his employer *had* bilaterally negotiated the employee's employment contract and therefore the employer did not have a unilateral right to make the factual determination whether grounds for terminating the employee were present. Janoff v. Gentle Dental, P.C., 986 P.2d 1278, 1280–81 (Or. Ct. App. 1999). Instead, this court concluded, as with "every other contract" the plaintiff employee had a "right to a judicial determination of all factual issues related to whether he had consistently failed to do what the contract required or whether, in contrast, defendant breached its provisions when it terminated his employment." *Id.* at 1281. The Oregon Supreme Court denied the employer's request for review of the *Janoff* decision. Janoff v. Gentle Dental, P.C., 6 P.3d 1098 (Or. 2000).

19. *Simpson,* 643 P.2d at 1279.

subsequent decisions relying on *Simpson*, the Oregon Supreme Court did not rely only on contract law, but also on the prerogatives of an employer under employment at will, which it found included an employer's "power to determine whether facts constituting cause for termination exist."[20]

Seven years after *Simpson*, in 1989, the highest court of the neighboring state of Washington in the *Baldwin v. Sisters of Providence in Washington, Inc.* decision relied on Oregon's decision in *Simpson* when interpreting an employee manual limiting bases for employee dismissal to just cause.[21] As in *Simpson,* the plaintiff employee did not dispute that the reason asserted by the employer for discharge, in this case, sexual abuse of a patient, would be just cause to fire him.[22] Thus, as in *Simpson,* the only issue was who should make the requisite factual determination that the facts supporting the reason for discharge had occurred.[23] The Washington Supreme Court, declaring *Simpson* was "persuasive," agreed that courts should accept the employer's "power to determine whether facts . . . exist."[24] However, the Washington Supreme Court added rules not included in *Simpson*, beginning with one based on its past decision recognizing exceptions to employment at will: "[T]he employer should not be allowed to make arbitrary determinations of just cause."[25] The court added that this meant the discharge must be "based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true."[26] And this court also made clear, in its remand and reference to jury instructions, that a jury would decide whether these two requirements were met.[27]

The decisions in *Simpson* and *Baldwin* were relied on by the Nevada Supreme Court in 1995 in *Southwest Gas Corp. v. Vargas.*[28] The court in *Vargas* considered what it called an "implied contract" based on an employee manual that stated termination must be "for cause" and with an

20. *Id.*

21. *See* Baldwin v. Sisters of Providence in Wash., Inc., 769 P.2d 298, 299 (Wash. 1989) (en banc).

22. *Id.* at 303.

23. *Id.*

24. *Id.* at 303–04 (quoting *Simpson*, 643 P.2d at 1279).

25. *Id.* at 304 (citing Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984)).

26. *Id.*

27. *Id.*

28. Sw. Gas Corp. v. Vargas, 901 P.2d 693, 699–702 (Nev. 1995). *See generally Simpson*, 643 P.2d 1276; *Baldwin*, 769 P.2d 298.

"opportunity to correct" except for "a serious breach of company rules."[29] The court declared that it had "policy concerns" about "treating an employment contract implied from an employee manual in the same manner as a negotiated contract."[30] The court ultimately relied on the Oregon Supreme Court's *Simpson* decision to adopt what it referenced as a "qualified" approach that "balanced" the interests of employers and employees.[31] Prior to explaining its rule, though, the court discussed the policies favoring each side.[32]

In describing the policies favoring deference to employer fact-finding, at least in a case involving a contract implied by an employment manual, the Nevada Supreme Court used language similar to that of federal courts in discrimination cases as discussed below.[33] The court stated:

> [A]llowing a jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of "good cause" for discharge, made in good faith and in pursuit of legitimate business objectives . . . would create the equivalent of a preeminent fact-finding board unconnected to the challenged employer . . . .[34]

The court added,

> This ex officio "fact-finding board," unattuned to the practical aspects of employee suitability over which it would exercise consummate power, and unexposed to the entrepreneurial risks that form a significant basis of every state's economy, would be empowered to impose substantial monetary consequences on employers whose employee termination decisions are found wanting.[35]

29. *Vargas*, 901 P.2d at 696.
30. *Id.* at 699.
31. *Id.* at 700–02. *See also Simpson*, 643 P.2d at 1279.
32. *Vargas,* 901 P.2d at 699–700.
33. *See infra* Part II.B.
34. *Vargas*, 901 P.2d at 699.
35. *Id.* As will be discussed more fully below, the *Vargas* decision's point about the employer's "entrepreneurial risk" has been relied on by other courts, including the North Dakota Supreme Court in *Thompson v. Associated Potato Growers, Inc.*, 610 N.W.2d 53, 58–59 (N.D. 2000) (citing *Vargas*, 901 P.2d at 699–700, 702 n.5). The North Dakota Supreme Court added, at least for employers with shareholders, that allowing a trier of fact to review an employer's fact-finding could "impose significant conflicts on employers in terms of their contractual relationship with employees and their fiduciary responsibilities." *Id.* (citing *Vargas*, 901 P.2d at 702 n.5).

However, the court acknowledged a policy disfavoring deference to employer fact-finding when it stated, "On the other hand . . . an employer's discretion to declare the presence of good cause for termination cannot be immune to challenge; otherwise, an employee's contractual entitlements to continuing employment would be without substance or effect."[36]

Weighing these policies, the court adopted its aforementioned balancing rule.[37] The starting point of this rule was that "absent substantial evidence of an express or implied agreement contracting away its fact-finding prerogatives to some other arbiter, the employer is the ultimate finder of facts constituting good cause for termination."[38] However, the court next identified multiple qualifications to this rule, the first few based on contract law because the employer must comply with "relevant policy provisions defining or limiting the term 'good cause,' or to defined procedures that the employer must follow prior to termination."[39] The court did not limit the employer's obligations to contract compliance as it further held, as other courts discussed earlier had stated that "employers are obligated to act in good faith and upon a reasonable belief that good cause for terminating a for-cause employee exists,"[40] but also that (as decisions discussed earlier had not expressly stated) "*[g]enuine issues of material fact casting a strong doubt on the purported good-faith of the employer are ripe for a jury's consideration*."[41] Ultimately, the court concluded that the employee—an alleged sexual harasser—had failed to present sufficient evidence of such genuine issues regarding his discharge.[42]

Three years after *Vargas*, the California Supreme Court considered an employer's discharge of an alleged sexual harasser in *Cotran v. Rollins Hudig Hall International, Inc.*[43] Like most of the decisions so far discussed, the *Cotran* court adopted the rule that, in general, the jury should not reconsider the fact-finding underlying the employee's termination, but instead could and should consider whether that fact-finding was reasonable.[44] The court

36. *Vargas*, 901 P.2d at 699–700.
37. *Id.* at 700.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (emphasis added).
42. *Id.* at 702.
43. 948 P.2d 412 (Cal. 1998).
44. *See id.* at 422–23.

began its explanation of this rule by contrasting the circumstances under which an employer decides if facts justifying firing an employee really existed, which are "typically gathered under the exigencies of the workaday world," with the jury having the "benefit of the slow-moving machinery of a contested trial."[45] Setting aside the validity of this point, it more clearly stands as a rare compliment for the benefits of the slow-moving trial processes of the late twentieth and early twenty-first centuries.[46]Also, the court's use of the term "workaday" was ill-fitting to the facts of the case before it, as the employer investigated alleged harassment by the employee for more than a month prior to discharging him.[47] It is unlikely the California Supreme Court meant to establish that the longer the time it takes an employer to investigate and consider allegations of misconduct, the less that employer should be protected from a jury reconsidering if the allegations were true.

The court next asserted in *Cotran* that the prospect of a jury second-guessing the employer's factual conclusions would "[dampen] an employer's willingness to act, intruding on the 'wide latitude' that [a California Court of Appeals] had recognized as a reasonable condition for the efficient conduct of business," at least as applied to discharge of high-ranking employees.[48] The court next combined the two reasons just discussed—the differences between jury and employer decision-making and the latitude employers should have to decide the facts—by stating:

> Equally significant is the jury's relative remoteness from the everyday reality of the workplace. The decision to terminate an employee for misconduct is one that not uncommonly implicates organizational judgment and may turn on intractable factual uncertainties, even where the grounds for dismissal are fact specific. If an employer is required to have in hand a signed confession or an eyewitness account of the alleged misconduct before it can act, the workplace will be transformed into an adjudicatory arena and effective decision-making will be thwarted.[49]

45. *Id.* at 420.

46. *See id.*

47. *See id.* at 414–15.

48. *Id.* at 417 (relying on and citing Pugh v. See's Candies, Inc., 250 Cal. Rptr. 195, 212 (Ct. App. 1988) (stating that "an employer must have wide latitude in making independent, good-faith judgments about high-ranking employees without the threat of a jury second-guessing its business judgment")).

49. *Id.* at 421.

The court returned again to the jury's remoteness from the decision when it described that a jury would "reexamine in all its factual detail the triggering cause of the decision to dismiss—including the retrospective accuracy of the employer's comprehension of that event—months or even years later, in a context distant from the imperatives of the workplace."[50] Finally, the court returned once more to the latitude argument by invoking "the need for a sensible latitude for managerial decisionmaking," which the court indicated resulted in an "optimum balance point between the employer's interest in organizational efficiency and the employee's interest in continuing employment."[51]

The court then began defining what it surely regarded as this optimal balance, by more fully describing the jury's role in deciding if an employer's belief in such facts was reasonable.[52] First, more similarly to past courts, the court stated the employee's discharge must be for "fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual," and one or more reasons "supported by substantial evidence."[53] Next, the California Supreme Court added the rule that the jury could and should ensure the employer's conclusion of factual ground or grounds for discharge was "supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."[54] The court had previously made clear that these requirements should be included in instructions to the jury[55] and ordered the case to be retried before a jury with such instructions given.[56]

The most recent decisions by highest courts of states adopting requirements for the "objective good faith employer belief" rule come from the so-called "red states" of Idaho and Wyoming, and in each the court affirmed that the employer lacked good cause to terminate an employee.[57] In its 2018 decision in *Lunneborg v. My Fun Life*, the Supreme Court of

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 422.
54. *Id.*
55. *Id.* at 421.
56. *See id.* at 422–23.
57. *See* Lunneborg v. My Fun Life, 421 P.3d 187 (Idaho 2018); Lietz v. State *ex rel.* Dep't Fam. Servs., 430 P.3d 310 (Wyo. 2018).

Idaho, in affirming a trial court decision, adopted and applied California's *Cotran* rule that when good cause or just cause for firing an employee is required, "the [fact-finder's] role is to assess the *objective reasonableness* of the employer's factual determination of misconduct."[58] Prior to adopting this standard, the court observed, based on multiple Ninth Circuit decisions on proving pretext in discrimination cases, that the standard might be different in federal employment discrimination cases.[59]

In *Lunneborg* the Idaho Supreme Court found that the trial court had applied the correct standard when it had found that the reasons given in the employee's termination were untrue and that the employer could not have reasonably believed they were true because evidence did not support them.[60] The Idaho Supreme Court held, "Such findings are the absolute essence of a trier of fact's purview when weighing 'the evidence and judg[ing] the demeanor of the witnesses and tak[ing] into account [its] superior view of the entire situation.'"[61] The court also concluded that the trial court's factual findings were supported by "substantial and competent evidence."[62]

The Supreme Court of Wyoming in its 2018 decision in *Lietz v. State ex rel. Department of Family Services*, reviewed a trial court's reversal of a state Office of Administrative Hearing's (OAH) ruling in favor of a state government employee.[63] The court, after noting the employer, the Department of Family Services (DFS), agreed that state personnel policies were an employment contract that required good cause to terminate an employee,[64] reaffirmed the Wyoming rule that when good cause for discharge is required, the "good faith objective belief" standard as defined by the California Supreme Court in *Cotran* applies.[65] The court held that this standard includes that the employer's reason for discharge is "supported by substantial evidence gathered through an adequate investigation" and (under Wyoming law only if the contract so provides) "notice of the claimed

58. *Lunneborg*, 421 P.3d at 195–96 (quoting *Cotran*, 948 P.2d at 419).

59. *Id.* at 195 ("[W]e recognize there are occasions pursuant to federal employment discrimination law to give deference to the decisions of the employer in employee termination cases . . . .") (citations omitted).

60. *Id.* at 196.

61. *Id.* (quoting *In re* Doe Children, 413 P.3d 767, 776–77 (Idaho 2018)).

62. *Id.*

63. Lietz v. State *ex rel.* Dep't Fam. Servs., 430 P.3d 310, 312 (Wyo. 2018).

64. *See id.* at 314–16.

65. *Id.* at 319 (citing Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412, 422 (Cal. 1998)).

misconduct and a chance for the employee to respond."[66] The Wyoming Supreme Court held that under this standard the OAH "had to assess the objective reasonableness of DFS's determinations" supporting the employer's firing of the employee.[67] The court found that OAH "did not apply the wrong standard" and did not "substitute its judgment for that of the DFS" when OAH determined "it was not reasonable for the DFS to conclude that [the employee] intended to defraud the DFS."[68] The court further held that OAH's conclusions that DFS's firing of the employee was not reasonable nor made in good faith, were supported by substantial evidence.[69]

In a minority of states, the highest courts have held that when an employer is bound to terminate an employee only for cause, then juries, as fact-finders, can and should review whether the facts supporting the employer's reasons for termination actually occurred. The first such decision was by the Supreme Court of Michigan in *Toussaint v. Blue Cross & Blue Shield*.[70] The court held that "where an employer has agreed to discharge an employee for cause only, its declaration that the employee was discharged for unsatisfactory work is subject to judicial review. The jury as trier of facts decides whether the employee was, in fact, discharged for unsatisfactory work."[71] A specific subset of this, the court held, was that "[w]here the employer claims that the employee was discharged for specific misconduct . . . and the employee claims that he did not commit the misconduct alleged, the question is one of fact for the jury: did the employee do what the employer said he did?"[72] The court concluded, "The jury is always permitted to determine the employer's true reason for discharging the employee."[73]

In explaining why this was the rule, the court engaged in contract law reasoning. The court found that "[a] promise to terminate employment for

66. *Id.* at 316–17 (quoting Life Care Ctrs. of Am., Inc. v. Dexter, 65 P.3d 385, 392–93 (Wyo. 2003)); *see also Cotran*, 948 P.2d at 422 (original quotation).

67. *Lietz*, 430 P.3d at 321 (first citing *Dexter*, 65 P.3d at 392; then citing *Cotran*, 948 P.2d at 419; and then citing Sw. Gas Corp. v. Vargas, 901 P.2d 693, 700 (Nev. 1995)).

68. *Id.* at 321.

69. *Id.* at 322–23.

70. 292 N.W.2d 880 (Mich. 1980).

71. *Id.* at 895.

72. *Id.* at 896.

73. *Id.*

cause only would be illusory if the employer were permitted to be the sole judge and final arbiter of the propriety of the discharge."[74] The court added that "if the cause contract is to be distinguished from the satisfaction contract"[75] there had to be review of the factual basis for the employer's decision, which the court concluded should be done by the usual fact-finder in breach of contract cases—the jury.[76]

The court continued to use contract law reasoning in determining the jury's role in deciding whether facts that the jury agrees occurred actually justified discharging an employee. The Michigan Supreme Court rejected a good faith or reasonableness test, holding that when the employer has promised to discharge only for cause, the employee "has contracted for more than the employer's promise to act in good faith or not to be unreasonable. An instruction which permits the jury to review only for reasonableness inadequately enforces that promise."[77] The court ruled that the jury could decide: "[I]s it the kind of thing that justifies terminating the employment relationship? Does it demonstrate that the employee was no longer doing the job?"[78]

The Supreme Court of Iowa also used contractual reasoning in 2008 in *Kern v. Palmer College of Chiropractic*.[79] That court, reversing a trial court, held that because the written contract between the professor and his employer incorporated the Faculty Handbook, which defined the good cause reasons for which the professor could be terminated,[80] the court would apply the *Toussaint* rule and allow a jury to decide if the employer met the contract's requirements for discharging the professor.[81] The court found it significant that the contract had language setting "a standard that is sufficiently definite to allow a fact-finder to determine whether Palmer had good cause to support the termination of Kern's employment."[82] The court decided that given this definite standard, the employer's interest in not having its judgment substituted by the jury was outweighed by the "employee's substantial interest in the employment security and stability

74. *Id.* at 895.
75. *Id.*
76. *Id.*
77. *Id.* at 896.
78. *Id.*
79. *See* 757 N.W.2d 651 (Iowa 2008).
80. *Id.* at 654.
81. *Id.* at 659–61.
82. *Id.* at 660.

offered by contracts which may not be terminated at will, but only for specified 'good cause.'"[83]

By contrast, in 2009 the Rhode Island Supreme Court reached a conclusion at the opposite end of the spectrum from *Kern*, but also based on contractual reasoning and the language of the contract between the employer and the employee.[84] The Rhode Island court in *New England Stone, LLC v. Conte* observed that the employment contract defined "for cause" as including the employee's "failure to follow any directive of the President with regard to the conduct of the Company's business" and also stated that "cause" would "be determined by the Company in good faith."[85] The employee did not dispute that he had disobeyed a directive of his employer's president, but nonetheless contended, based on application of the multiple precedents discussed above, that the "good faith" the contract expressly promised required notice of reasons for his termination, which he did not receive.[86] The court rejected that argument on the ground that, given the language of the employee's agreement, the argument would "create additional and implied terms" to the employment contract, which the court declined to do.[87] The court added that even if it accepted the employee's argument the employee would not be entitled to relief.[88]

Other highest courts of other states have relied on more general grounds to hold that it is the jury that should decide whether the factual grounds for an employer's reasons for terminating an employee are true. For example, the Supreme Court of New Jersey held in *Witkowski v. Thomas J. Lipton, Inc.*[89] that if the jury found that the employer's employment manual was an implied contract then it was the jury that should also decide if the employee engaged in the misconduct that the employer alleged.[90] The New Jersey Supreme Court based that conclusion on past New Jersey precedent involving individual or collective employment contracts and also on the statement in the *Toussaint* decision of the Michigan Supreme Court,

83. *Id.*

84. *See* New England Stone, LLC v. Conte, 962 A.2d 30 (R.I. 2009).

85. *Id.* at 31.

86. *Id.* at 32–33. *See, e.g.*, Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412, 422 (Cal. 1998).

87. *Conte*, 962 A.2d at 32–33.

88. *Id.* at 33–34.

89. 643 A.2d 546 (N.J. 1994).

90. *Id.* at 553–54.

discussed earlier, that "[t]he jury is always permitted to determine the employer's true reason for discharging the employee."[91]

In Nebraska the courts were more conclusory in holding that whether the employer truly had cause to fire an employee was a factual issue to be decided by a judge or jury.[92] The Nebraska Supreme Court first applied this to a bench trial, holding that in such a trial, "the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and we do not reweigh the evidence on appeal."[93] In that decision, this rule was applied to whether the employer's reason for terminating the employee was true.[94] Thereafter, Nebraska's lower courts apparently decided the same rule applied to the for cause issues in jury trials, and the Nebraska Supreme Court accepted that.[95] The Vermont Supreme Court has similarly upheld jury findings on whether the employer had cause to fire employees, and the federal district court for Vermont, based on these decisions, found that having the jury decide this issue would likely be the Vermont Supreme Court's position.[96]

B. *Application in Employment Discrimination*

Federal courts have applied the honest belief standard or defense in employment discrimination cases to grant summary judgment to the employer or to affirm such grants, usually to find that proof that an employer had one or more mistaken reasons for firing an employee did not prove that the honest but mistaken reasons were pretextual and that the real reasons violated discrimination law.[97] Scholars have disagreed on whether it is

91. *Id.* (citing Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 896 (Mich. 1980)).

92. *See generally* Stiles v. Skylark Meats, Inc., 438 N.W.2d 494 (Neb. 1989).

93. *Id.* at 497.

94. *See id.*

95. *See, e.g.*, Barks v. Cosgriff Co., 529 N.W.2d 749 (Neb. 1995).

96. Raymond v. IBM Corp., 954 F. Supp. 744, 751–52 (D. Vt. 1997) (discussing the implications of the Vermont Supreme Court's decisions).

97. *See, e.g.*, BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION ch. 21 (5th ed. 2012); Elaine K. Zipp, Annotation, *Proving that Discharge was Because of Age, for Purposes of Age Discrimination in Employment Act, 29 U.S.C.A. §§ 621 et seq.*, 58 A.L.R. Fed. 94 § 5(g) (1982); William G. Phelps, Annotation, *What Constitutes Termination of Employee Due to Pregnancy in Violation of Pregnancy Discrimination Act Amendment to Title VII of Civil Rights Act of 1964, 42 U.S.C.A. § 2000e(k)*, 130 A.L.R. Fed. 473 (1996). *See also* Robert A. Kearney, *Death of a Rule*, 16 U.C. DAVIS BUS. L.J. 1, 5–20 (2015) (providing

appropriate to grant summary judgment to an employer based on this defense, or even to recognize the defense at all. This Article will not revisit all aspects of that debate, but it will use a couple examples to illustrate a couple of the most commonly made and relied upon arguments.

Professor Ernest F. Lidge III has expressed that, at least for the alleged employee misconduct cases that are the focus of this Article, courts are correct in applying the defense, including to grant employer motions for summary judgment.[98] Professor Lidge praised the U.S. Court of Appeals for the Seventh Circuit for (at least up to the time his article was published) adopting and applying what he called "a pure honest-belief rule."[99] Professor Lidge found this was consistent with what he regarded as correct rules of discrimination law:

an excellent discussion of the history of the honest or good faith belief defense in the U.S. Court of Appeals in the Seventh Circuit).

98. *See generally* Lidge III, *supra* note 5.

99. *See id.* at 52–53 (citing and quoting McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992) ("[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers."); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560 (7th Cir. 1987) ("[N]o matter how mistaken the firm's managers, Title VII and § 1981 do not interfere.")). Four years after Professor Lidge's article, Professor Robert A. Kearney maintained in 2015 that in *Hutchens v. Chi. Bd. of Educ.*, 781 F.3d 366 (7th Cir. 2015), written by Judge Richard Posner, the Seventh Circuit signaled it was abandoning the honest belief defense. *See* Kearney, *supra* note 97, at 22–28. Professor Kearney based that conclusion on the decision questioning the honesty of the defendant employer and its witnesses regarding its reasons for letting go of the plaintiff, who was black, rather than a comparator white employee, *see id.* at 22–25, that the employer presented little or no credible evidence of the plaintiff's deficiencies, *see id.* at 25–26, and the Seventh Circuit concluded that the true motivation for the employer's decision should be decided by a jury, *see id.* at 27–28. However, by 2020 Professor Kearney agreed that in the intervening years the Seventh Circuit decided to continue to apply the honest belief defense. *See* Iafolla, *supra* note 3. Recent examples of the Seventh Circuit applying the honest belief rule include Castetter v. Dolgencorp, LLC, 953 F.3d 994, 997–98 (7th Cir. 2020) (finding disability discrimination plaintiff did not prove that the employer did not fire him for misconduct, but his cancer, and so could not prove that his cancer was the "but for" reason for his termination) and Skiba v. Ill. Cent. R.R. Co., 884 F.3d 708, 724 (7th Cir. 2018) (concerning age discrimination, the plaintiff did not prove the employer's refusal to rehire him was not for being underqualified, but for his age, and so could not prove his age was the but for reason for the employer's decisions not to rehire him).

> [The] employer may take action against an at-will employee for any reason so long as the reason is not because of the employee's [characteristic protected by statute]. . . . And the [Seventh Circuit] has properly kept the burden of proving illegal discrimination on the [employee].[100]

Professor Lidge contrasted this with the U.S. Court of Appeals for the Sixth Circuit's position on honest belief defenses cases, and he noted that the Sixth Circuit rejected the Seventh Circuit's "pure" defense that "allowed an employer to rely on an honest belief without factual support."[101] The Sixth Circuit standard, as of 2011 as Professor Lidge pointed out and remaining to the present day, is that for the employer to prove its belief was "honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made."[102] In Professor Lidge's view, this standard "departs from traditional Title VII jurisprudence" because "Title VII is not a just cause statute" and "[t]he Sixth Circuit's test . . . requires that the employer's reliance be reasonable and also implicitly requires that the employer make a reasonable investigation" when "such actions are not required by the employment-discrimination laws."[103]

Multiple scholars have taken almost diametrically opposite positions from Professor Lidge and against reliance on the honest belief defense in most circumstances.[104] One of the most recent examples is a 2018 article by Associate Law School Dean Sandra F. Sperino, who included the honest employer belief defense as one of the "disbelief doctrines" in discrimination law that she used as the title of her article and that she much criticized.[105] Associate Dean Sperino observed that the "honest belief rule is correct in a limited subset of cases," namely those in which "the employer truly made its decision under a faulty set of facts and there is no other evidence suggesting discrimination."[106] However, Associate Dean Sperino disapproved of federal courts' overuse of the defense in granting summary judgment or affirming

100. Lidge III, *supra* note 5, at 56.

101. *Id.* at 59 (citing Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998)).

102. *See id.* at 59–60 (quoting *Chrysler Corp.*, 155 F.3d at 807); *see also* Smith v. Towne Props. Asset Mgmt. Co., 803 F. App'x 849, 851 (6th Cir. 2020); Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 322 (6th Cir. 2019) (both stating the same test).

103. Lidge III, *supra* note 5, at 62–63.

104. *See, e.g.*, Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231 (2018).

105. *See id.* at 238–40, 247–52.

106. *Id.* at 238.

such grants, including when the employee had evidence the employer did not truly believe the reason it relied on in court,[107] the employer discharged an employee for violating a policy the employer could not prove it had enforced or that even existed,[108] there were no facts in the record supporting the employer's reason,[109] or the supervisor who decided to fire the employee could not offer any reason why.[110] Associate Dean Sperino offered two main reasons why such decisions are legally invalid.[111]

First, that the U.S. Supreme Court has held that in employment discrimination cases proof that the employer's reason for an adverse decision against an employee is false is probative and highly persuasive evidence proving the ultimate issue that the employer (or its agents) had a discriminatory motive for the adverse decision.[112] Not only that, but the Supreme Court has also indicated that it can often be juries that draw this inference of discriminatory motive from employer's false reasons for its decision, as Associate Dean Sperino illustrated with this quoted language from two Supreme Court decisions:

> '[P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination.' In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.' Moreover, once the employer's justification has been eliminated, discrimination may well be

107. *Id.* at 238–39 (citing Hamilton v. Boise Cascade Express, 280 F. App'x 729, 733 (10th Cir. 2008)).

108. *Id.* at 239 (citing Hale v. Mercy Health Partners, 617 F. App'x 395, 404–05 (6th Cir. 2015) (White, J., concurring in part and dissenting in part); Wilson v. Cleveland Clinic Found., 579 F. App'x 392, 408 (6th Cir. 2014) (Cole, C.J., dissenting in part)).

109. *Id.* (citing Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998)).

110. *Id.* (citing Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir. 1999)).

111. *See id.* at 239–40, 242–52.

112. *See id.* at 239–40 (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000)).

> the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.[113]

Associate Dean Sperino summed up this, and another U.S. Supreme Court decision she cited, as meaning, "In discrimination cases, a jury may find in favor of the plaintiff if it finds that the employer lied about the reason for its action" and "[this] lie is a proper basis from which the jury may infer discrimination."[114] This naturally led into Associate Dean Sperino's second main criticism of federal courts' use of the honest belief defense (other than in the specific circumstance that she had identified) that when courts use it to grant summary judgment or to affirm such grants, as they often do, they are intruding on the fact-finding authority and role of the jury in discrimination cases.[115]

To one extent or another, these two main criticisms by Associate Dean Sperino of applying the employer's honest belief defense to grant summary judgment for the employer have been discussed by multiple other scholars opposing overuse of the honest belief defense in summary judgment in intentional discrimination cases.[116] The final point, for now, about honest belief in employment discrimination cases is that, whatever the current state of the scholarly debate over them is, multiple federal appellate courts

113. *Id.* (first quoting *Reeves*, 530 U.S. at 147; and then St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 517 (1993)).

114. *Id.* at 240 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973)).

115. *Id.* at 242–52.

116. *See, e.g.*, Kearney, *supra* note 97, at 26–29; Steven R. Semler, *Hijacking of Title VII Employment Discrimination Plaintiffs on the Way to the Jury*, 32 HOFSTRA LAB. & EMP. L.J. 49, 49–51 (2014); Nancy Gertner, *Losers' Rules*, 122 YALE L.J. 109, 121–23 (2012); Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 323–36 (2010); Rebecca Michaels, Note, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable?*, 71 FORDHAM L. REV. 2643 (2003); Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 354–55, 372–74 (2002); Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 594–600 (2001). Another line of argument that scholars have made against granting summary judgment to employers based on the honest belief rule, or other rules favoring employers, is that these decisions disregard the possibility of implicit or unconscious bias by employers or their agents. *See, e.g.*, Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of* Ricci v. DeStefano, 57 N.Y. L. SCH. L. REV. 865, 875 (2013); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 135–36 (2006).

continue to apply the honest belief employer defense to summary judgments for employers.[117]

C. *Application in FMLA Cases*

Employers and numerous courts have used the honest belief defense for multiple purposes when dealing with employee claims under the federal FMLA. Unsurprisingly, one of these purposes is to defend against employee claims that an employer took adverse action against an employee for exercising any of the employee's rights under the FMLA (e.g., requesting FMLA, taking FMLA leave, continuing on FMLA leave, requesting reinstatement from FMLA leave, or being terminated for past use of FMLA leave).[118] Courts have also dismissed employee FMLA claims based on employer honest beliefs that an employee did not provide sufficient notice to the employer prior to taking leave,[119] that the employer was not obligated to restore the employee to their prior or an equivalent position,[120] and—

117. *See, e.g.*, Kitchen v. BASF, 952 F.3d 247, 252–53 (5th Cir. 2020); Rinchuso v. Brookshire Grocery Co., 944 F.3d 725, 729–30 (8th Cir. 2019); Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 322 (6th Cir. 2019); Skiba v. Ill. Cent. R.R. Co., 884 F.3d 708, 724 (7th Cir. 2018); DePaula v. Easter Seals El Mirador, 859 F.3d 957, 970–71 (10th Cir. 2017).

118. *See* Family and Medical Leave Act of 1993 § 105(a), 29 U.S.C. §§ 2615(a)(1–2); 29 C.F.R. § 825.220(c) ("The [FMLA's] prohibition against interference prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights."); *See generally Guide to FMLA and Federal Leave Laws*, Bloomberg L. By contrast, to date, federal courts have not applied the honest belief defense to an employee's claim under 29 U.S.C. § 2615(b), which makes it unlawful for an employer "to discharge or in any other manner discriminate against any individual because such individual" has pursued an FMLA claim or otherwise participated in an FMLA proceeding. 29 U.S.C. § 2615(b).

119. *See, e.g.*, Reinwald v. Huntington Nat'l Bank, 684 F. Supp. 2d 975, 984–85 (S.D. Ohio 2010) (finding employer's evidence that it did not have notice of employee's request for leave and therefore decided to treat employee's absence as a "no show" justified dismissal of employee's claim).

120. *See, e.g.*, Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 680–81 (7th Cir. 1997) (finding an employee was not entitled to restoration to prior position because employer honestly believed the employee had misused their FMLA leave); Matson v. Sanderson Farms, Inc., 388 F. Supp. 3d 853, 879 (S.D. Tex. 2019) (holding an employer's good faith and honest belief that employee had fraudulently taken FMLA leave justified employer's decision to not restore employee to a position); *cf.* Persky v. Cendant Corp., 547 F. Supp. 2d 152, 161–62 (D. Conn. 2008) (concluding that even if employer honestly believed plaintiff would have been terminated during her leave, and therefore was not

more commonly—that an employee had misused FMLA leave by not using it as intended by the statute.[121]

Also unsurprisingly, the alleged "employee misuse-of-leave" claims often overlap with the employer adverse-action-against-employee claims.[122] However, at present the federal courts are split over when (if ever) an employee must prove unlawful intent by an employer, and therefore might have to overcome an honest belief defense to prevail on an FMLA claim. Currently all the federal courts are in agreement that the FMLA, like all other federal employee protection statutes, prohibits an employer from taking an adverse action against an employee in response to the employee exercising a right or attempting to exercise a right that the employee has under the statute.[123]

Where federal courts have disagreed, or where sometimes the same court reaches a different conclusion based on differences between the situations that court is considering, is what legal standard should be applied in deciding whether the employer has violated the FMLA. As indicated above, the standards applied in different decisions vary as to whether an employer's motive or intent is relevant. This choice is important to the honest belief defense because, as will be discussed in more detail below, federal courts that find that employer motive is relevant are the same courts that usually (but not always) find that what the employer believed at the time of its decision was relevant. The federal court decisions considering employer motive (or belief) relevant to employee FMLA claims will be discussed first, starting in the next paragraph. However, because the discussion of such decisions is lengthy, it is worth noting here that there are also federal court decisions holding that the employer's motive and beliefs are less central in ruling on an employee's FMLA claim, and that most (but not all) of these decisions are based in whole or in substantial part on the specific FMLA provision making it unlawful for an employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise" any FMLA right by an employee.[124]

entitled to restoration of employment, the grounds for this belief were objectively unreasonable).

121. *See, e.g.*, LaBelle v. Cleveland Cliffs, Inc., 784 F. App'x 437, 443–44 (6th Cir. 2019); Capps v. Mondelez Glob., LLC, 847 F.3d 144, 152–54 (3d Cir. 2017).

122. *See, e.g.*, *Labelle*, 784 F. App'x at 443–44; *Capps*, 847 F.3d at 151–54.

123. *See generally Guide to FMLA and Federal Leave Laws*, *supra* note 118, at ch. 80 (FMLA Retaliation and Prohibited Actions).

124. *See generally id.* (discussing decisions relying on Family and Medical Leave Act

The court decisions ruling that unlawful employer intent or motive is required almost always apply the employment discrimination standard to that issue.[125] The U.S. Court of Appeals for the First Circuit adopted that position in 1998 in its first decision considering an FMLA claim, *Hodgens v. General Dynamics Corp.*[126] Citing both FMLA Sections 105(a)(1) and (2) the First Circuit observed that the FMLA protected employees who exercised FMLA rights,[127] and the court also quoted an FMLA regulation providing that "[a]n employer is prohibited from discriminating against employees . . . who have used FMLA leave" and barring an employer from "us[ing] the taking of FMLA leave as a negative factor in employment actions."[128] The First Circuit then, apparently based on the use of the term "discrimination" in both the FMLA statute and regulation, declared that Sections 105(a)(1) and (2) are essentially proscriptive.[129] The court found it followed that the employee's claim that his termination resulted from FMLA leave was a discrimination claim regarding which "the employer's motive is relevant, and the issue is whether the employer took the adverse action because of a prohibited reason or for a legitimate nondiscriminatory reason."[130] The First Circuit then decided to apply an employment discrimination standard, the *McDonnell Douglas Corp. v. Green* test, to the employee's claim.[131]

The year after *Hodgens*, in 1999, the U.S. Court of Appeals for the Seventh Circuit in *King v. Preferred Technical Group*[132] relied on the First Circuit's decision and reasoning in *Hodgens* to conclude that FMLA Sections 105(a)(1) and (2) and the FMLA regulation implementing that

of 1993 § 105(a), 29 U.S.C. § 2615(a)(1)).

125. *See* Kelly Collins Woodford & Marjorie L. Icenogle, *Terminations While on Family and Medical Leave: Risky but Potentially Defensible*, 65 LAB. L.J., no. 1, 2014, at 1, 4.

126. 144 F.3d 151, 155 (1st Cir. 1998) (noting this was the first time the First Circuit had to "construe" the FMLA).

127. *Id.* at 159 (citing 29 U.S.C. §§ 2615(a)(1–2)).

128. *Id.* (quoting 29 C.F.R. § 825.220(c)).

129. *See id.* at 160.

130. *Id.* As will be discussed later in this Article, this reasoning by the First Circuit overlooked that the FMLA provision it cited, that prohibits discrimination, applies to an employer that discriminates against an employee for "opposing any practice made unlawful by [the FMLA]." *See* Family and Medical Leave Act of 1993 § 105(a)(2), 29 U.S.C. § 2615(a)(2).

131. *Hodgens*, 144 F.3d at 160–61; McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

132. 166 F.3d 887 (7th Cir. 1999).

provision were proscriptive rules,[133] and claims under them constituted claims the employer had discriminated against the employee.[134] The Seventh Circuit next found, as the First Circuit had in *Hodgens*, that this meant that the "issue becomes whether the employer's actions were motivated by an impermissible retaliatory or discriminatory animus."[135] These were the reasons the First Circuit and Seventh Circuit, prior to the end of the twentieth century, concluded that employer intent was relevant to an employee's claim that their employer took an adverse action against them for requesting or taking leave under the FMLA.

The U.S. Court of Appeals for the Sixth Circuit is another one of the courts that has applied its discrimination law standard for honest belief to FMLA claims. In 2006, the Sixth Circuit, in *Joostberns v. United Parcel Services, Inc.*, involving an employee's claim the employer had unlawfully refused to reinstate him to his truck driver position after taking FMLA leave, relied on three of its employment discrimination precedents in announcing that "this Circuit has adopted the 'honest belief rule.'"[136] The court also applied the standard for this rule, mentioned earlier, that it had established for employment discrimination cases: the employer prevailed on an honest belief defense for its adverse action against an employee if the employer provided unrefuted evidence that it "reasonably reli[ed] on particularized facts that were before it at the time the decision was made."[137]

The employer's honest belief in *Joostberns* was that the employee had sent packages without paying for mailing.[138] The court found that the particularized facts the employer could reasonably rely on were facts contained in an investigative report the employer had when deciding to terminate the employee instead of reinstating him.[139] That report showed the employer lacked record of payment for six shipments made by the employee,

133. *Id.* at 891 (quoting *Hodgens*, 144 F.3d at 160) (citing 29 U.S.C. §§ 2615(a)(1–2); 29 C.F.R. § 825.220(c)).

134. *Id.*

135. *Id.* (citing *Hodgens*, 144 F.3d at 160).

136. Joostberns v. United Parcel Servs., Inc., 166 F. App'x 783, 791 (6th Cir. 2006) (citing Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117 (6th Cir. 2001) (applying the honest belief rule to employee claims under Ohio's laws against age discrimination in the employment context)); Smith v. Chrysler Corp., 155 F.3d 799, 806–07 (6th Cir. 1998) (applying the honest belief rule to an employee's claim under the Americans with Disabilities Act).

137. *Joostberns*, 166 F. App'x at 791 (quoting *Chrysler Corp.*, 155 F.3d at 807).

138. *Id.* at 794.

139. *Id.* at 795.

when the employer would usually have a record of customer receipts for such payments.[140] The court found that the employee lacked an alternative explanation for the lack of receipts, observing that although the employee presented three receipts for the shipments, these "were not stamped as paid," and the employee's argument that the unstamped and missing receipts were due to clerical error had no evidence to support it.[141] For these reasons the court concluded that the employer was "entitled to the protection of the honest belief rule."[142] The Sixth Circuit relied on and extensively quoted its *Joostberns* decision in its published decision in *Seeger v. Cincinnati Bell Telephone Co.*,[143] in which the court again relied on the employer's honest belief defense to dismiss an employee's claim that his termination violated the FMLA.[144] Subsequently, numerous Sixth Circuit decisions, mostly unpublished, have relied on *Seeger* in dismissing employee FMLA claims based on the honest belief defense for employers.[145] Other federal courts of appeal that, like the Sixth Circuit, have applied their honest belief employment discrimination rule and standard to dismiss employee FMLA claims include the First,[146] Third,[147] Fifth,[148] Seventh,[149] Eleventh in

140. *Id.*

141. *Id.*

142. *Id.* (citing *Crysler Corp.*, 155 F.3d at 806–07).

143. 681 F.3d 274, 284, 285–86 (6th Cir. 2012).

144. *Id.* at 285–87.

145. *See, e.g.*, LaBelle v. Cleveland Cliffs, Inc., 784 F. App'x 437, 442–44 (6th Cir. 2019).

146. *See, e.g.*, Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 165–67, 169–71 (1st Cir. 1998).

147. *See, e.g.*, Capps v. Mondelez Glob., LLC, 847 F.3d 144, 147, 152–54 (3d Cir. 2017) (noting because employee must prove discriminatory intent by employer, honest belief of employer in non-discriminatory reason for terminating employee meant termination did not violate FMLA).

148. *See, e.g.*, Tatum v. S. Co. Servs., Inc., 930 F.3d 709, 712–15 (5th Cir. 2019) (failing to differentiate between interference and retaliation claims in applying employment discrimination standards, including the honest belief rule, to dismissing employee's FMLA claims).

149. *See, e.g.*, Scruggs v. Carrier Corp., 688 F.3d 821, 825–26 (7th Cir. 2012) (upholding termination of employee based on employer's honest belief employee misused FMLA leave).

retaliation cases,[150] and D.C. Circuits.[151] The Eighth Circuit has itself pointed out that it has conflicting precedents on this issue,[152] though the court does apply the employment discrimination standards to employee claims of discrimination for taking FMLA leave.[153]

Under current precedent, the Sixth Circuit might not apply the honest belief defense in FMLA or discrimination cases, or to employee claims involving so-called "cat's paw" liability, meaning when "a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action."[154] In its 2017 *Marshall v. Rawlings Co., LLC* decision, the Sixth Circuit reasoned, "The agency principles that support application of the cat's paw theory to other types of claims also apply to claims of FMLA discrimination"[155] because similar to federal anti-discrimination statutes under which cat's paw liability has been recognized by the U.S. Supreme Court,[156] the FMLA defines employer as including "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."[157] After deciding that the cat's paw rule could apply even when there were multiple layers between the subordinate with the retaliatory intent and the ultimate decisionmaker,[158] the court decided that the honest belief defense would not apply in this case if it were found at trial that the employer based its demotion decision on the recommendation of

150. *See, e.g.*, Leach v. State Farm Mut. Auto. Ins. Co., 431 F. App'x 771, 776–77 (11th Cir. 2011) (applying the employment discrimination standard, and the honest belief defense, to dismiss employee's FMLA claims).

151. *See, e.g.*, Gleklen v. Democratic Cong. Campaign Comm'n, Inc., 199 F.3d 1365, 1367–68 (D.C. Cir. 2000).

152. *See* Massey–Diez v. Univ. of Iowa Cmty. Med. Servs., Inc., 826 F.3d 1149, 1157 n.5 (8th Cir. 2016).

153. *See id.* at 1160; *see also* Fry v. Rand Constr. Corp., 964 F.3d 239, 245–46 (4th Cir. 2020) (noting that it was not deciding the correct standard to apply to FMLA claims or the validity of the U.S. Department of Labor regulations under the FMLA, and then allowing a panel 2–1 to reverse a jury verdict for the plaintiff because the plaintiff chose to proceed under the *McDonnell Douglas* employment discrimination standard and could not prove the employer's stated reason for terminating the employee was pretextual).

154. Marshall v. Rawlings Co., 854 F.3d 368, 377 (6th Cir. 2017) (quoting EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484 (10th Cir. 2006)).

155. *Id.* at 378.

156. *See e.g.*, Staub v. Proctor Hosp., 562 U.S. 411, 420–21 (2011).

157. *Marshall*, 854 F.3d at 378 (quoting 29 U.S.C. § 2611(4)(A)(ii)(I)).

158. *Id.* at 378–79.

one or more supervisors found to be biased against the employee for taking FMLA leave.[159]

Another wrinkle occurs when courts focus on the language of FMLA Section 104, the provision granting the employee's right to be restored to their former or an equivalent position,[160] which also states that nothing in the statute means "any restored employee"[161] has a legal claim to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave."[162] Federal Department of Labor regulations also state, "An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period," but further add that "[a]n employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment."[163] Based on the language of these regulations, or FMLA Section 104(a)(3), or both, multiple federal courts of appeal have held that if the employer can prove it would not have reinstated the employee for a reason other than that employee's taking FMLA leave, the employee's restoration claim will be dismissed.[164] In such cases, federal appellate courts have also relied on the honest belief defense to uphold employer reasons to not reinstate an employee after that employee completes FMLA leave.[165]

As already referenced above, another provision of the FMLA—Section 105(a)(1)—states that an employer may not "interfere with [or] restrain" FMLA rights.[166] Multiple federal appellate courts have relied on

159. *Id.* at 380.

160. *See* Family and Medical Leave Act of 1993 § 104(a)(1), 29 U.S.C. § 2614(a)(1)(A).

161. *See* Family and Medical Leave Act of 1993 § 104(a)(3), 29 U.S.C. § 2614(a)(3).

162. Family and Medical Leave Act of 1993 § 104(a)(3)(B), 29 U.S.C. § 2614(a)(3)(B).

163. 29 C.F.R. § 825.216(a).

164. *See* Woodford & Icenogle, *supra* note 125, at 60.

165. *See, e.g.*, Mercer v. Arc of Prince Georges Cnty., Inc., 532 F. App'x 392, 396–97 (4th Cir. 2013); Leach v. State Farm Mut. Auto. Ins. Co., 431 F. App'x 771, 776–77 (11th Cir. 2011); Daugherty v. Wabash Ctr., Inc., 577 F.3d 747, 751–52 (7th Cir. 2009); Parker v. Verizon Pa., Inc., 309 F. App'x 551, 562–63 (3d Cir. 2009).

166. Family and Medical Leave Act of 1993 § 105(a)(1), 29 U.S.C. § 2615(a)(1).

this provision and its language to hold that an employer's adverse action against an employee violates that employee's FMLA rights, regardless of the employer's intent for its action.[167] Typical reasoning in such decisions is that of the Tenth Circuit in *Smith v. Diffee Ford-Lincoln-Mercury, Inc.*, which reasoned that "[t]he interference or entitlement theory is derived from the FMLA's creation of substantive rights."[168] Therefore, if the employer interferes with one of those substantive rights under the FMLA (as in the *Diffee Ford* case by terminating the employee during leave to which she had an FMLA right), then the employer's "deprivation of this right is a violation regardless of the employer's intent."[169]

As in the *Diffee Ford* decision, multiple courts have found that when an employer terminates an employee *while* the employee is taking FMLA leave, that constitutes interference with the employee's right to take FMLA leave and so is a claim under FMLA Section 105(a)(1).[170] However, sometimes federal courts have held that even when such a claim is based on the interference provision, the court should consider the reasons the employer gave for terminating an employee. One such example is from the court that decided *Diffee Ford*, the Tenth Circuit, which in a later 2012 decision held that even when an employee is fired during their FMLA leave and the court applies the interference provision, if the employer proves it would have terminated the employee anyway for a reason other than the employee taking FMLA leave, the employee's interference claim will be dismissed.[171] However, the Tenth Circuit in 2015 in *Janczak v. Tulsa Winch, Inc.*[172] emphasized that the employer bears the burden of proving that the employee would have been terminated for a "non-FMLA" reason, and that if there is evidence that the employee's taking FMLA leave could have been considered in the termination decision, a jury might have to decide the

167. *See, e.g.*, Lovland v. Emps. Mut. Cas. Co., 674 F.3d 806, 811 (8th Cir. 2012); Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 960–62 (10th Cir. 2002).

168. *Diffee Ford*, 298 F.3d at 960.

169. *Id.* (citation omitted); *see also Lovland*, 674 F.3d at 811 ("[W]hen the employee asserts a § 2615(a)(1) claim that a right prescribed by the FMLA has been denied, we have held that the employer's intent in denying the benefit is immaterial.").

170. *See, e.g.*, *Lovland*, 674 F.3d at 811; *Diffee Ford*, 298 F.3d at 960–62; *see also* Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1146–48 (8th Cir. 2001) (applying FMLA §105(a)(1) interference analysis, and rejecting *McDonnell Douglas* "discrimination" analysis, to issues in case involving employee fired while taking FMLA leave).

171. *See, e.g.*, Sabourin v. Univ. of Utah, 676 F.3d 950, 961–62 (10th Cir. 2012).

172. 621 F. App'x 528 (10th Cir. 2015).

employee's "interference" claim.[173] In *Janczak,* the Tenth Circuit even rejected the employer's argument that the court should apply the concepts often invoked in honest belief cases, that courts should not be "super-personnel departments" and should not "second guess business judgments" as grounds for dismissing employee's claim. [174]

The U.S. Court of Appeals for the Eleventh Circuit similarly treats as interference an employer terminating an employee during or for requesting FMLA-covered leave.[175] This court reaffirmed in July 2020 that for an FMLA interference claim the employee need not prove unlawful intent by the employer, but only that they were entitled to but denied an FMLA right, which can happen through termination.[176] However, the Eleventh Circuit handles any alternate reason the employer might claim through burden shifting, by requiring the employer to prove the affirmative defense that it would have terminated the employee for another reason even if the employee had not taken FMLA leave.[177]

At least two federal courts of appeals have more generally held that an employee claim that the employer took adverse action against them for exercising an FMLA right is grounded in FMLA Section 105(a)(1), the interference provision, and is proven if the employee shows the FMLA was a factor in the decision. More recently, the U.S. Court of Appeals for the Second Circuit in its 2017 *Woods v. START Treatment & Recovery Centers, Inc.* decision applied FMLA's interference provision to an employee claim that they were terminated for taking FMLA leave.[178] In this decision, the Second Circuit found that the plain language of FMLA Section 105(a)(1) covers such termination claims because terminating an employee for exercising FMLA rights "is certainly 'interfere[nce]' with or 'restrain[t]' of those rights."[179] By contrast, the court found that "[b]eing fired for *taking*

173. *Id.* at 532–34.

174. *Id.* at 534 (citing Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1318 n.14 (10th Cir. 1999), *overruled on other grounds by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002)); *see also* DeJesus v. WP Co., 841 F.3d 527, 534 (D.C. Cir. 2016).

175. *See, e.g.*, Herren v. La Petite Acad., Inc., 820 F. App'x 900, 905–06 (11th Cir. 2020); Strickland v. Water Works & Sewer Bd., 239 F.3d 1199, 1208 (11th Cir. 2001).

176. *See Herren*, 820 F. App'x at 905.

177. *See id.*

178. *See* Woods v. START Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 166–67 (2d Cir. 2017).

179. *Id.* at 167.

FMLA leave cannot easily be described as 'opposing any practice made unlawful' by the FMLA," which is the language used in Section 105(a)(2).[180] The Second Circuit further reasoned, "FMLA rights have two parts—the right to take leave and the right to reinstatement, so terminating an employee who has taken leave is itself an outright denial of FMLA rights."[181] The Second Circuit in *Woods* also concluded, perhaps unsurprisingly, that the FMLA regulation stating that "the prohibition against interference includes a prohibition against retaliation as well as a prohibition against discrimination" was also promulgated under the FMLA's Section 105(a)(1) interference provision.[182]

A bit later in its decision, the Second Circuit considered the language in the same regulation that forbids employers from making the exercise of FMLA rights by an employee a "negative factor in employment actions,"[183] then explained why it found the regulation reasonable.[184] Finally, based on this regulation the court, vacating the district court's ruling in the case, decided the "motivating factor" standard for employment discrimination rather than the "but for" standard should be applied in FMLA cases.[185]

FMLA Section 105(a)(1), as the source of employee claims against employers, was more extensively discussed by the U.S. Court of Appeals for the Ninth Circuit in its 2001 decision in *Bachelder v. American West Airlines, Inc.*,[186] decided by former labor and employment lawyer Judge Marsha Berzon.[187] The Ninth Circuit considered an employee's claim that her employer, America West Airlines, violated the FMLA when it terminated her for poor attendance.[188] Like other decisions discussed earlier in this Article, the *Bachelder* decision was based on the FMLA's Section 105(a)(1) provision prohibiting employers from interfering or restraining employee

180. *Id.* (quoting 29 U.S.C. § 2615(a)(2)).

181. *Id.*

182. *Id.* (quoting 29 C.F.R. § 825.220(c)).

183. *Id.* at 168 (quoting 29 C.F.R. § 825.220(c)).

184. *Id.* at 168–69.

185. *See id.* at 168–70.

186. 259 F.3d 1112 (9th Cir. 2001).

187. *See id.* at 1118 (identifying author of opinion). *See also Shining a Spotlight on Adjunct Faculty Member Judge Marsha* Berzon, U.C. Hastings L. (Jan. 8, 2016), https://www.uchastings.edu/2016/01/08/shining-a-spotlight-on-adjunct-faculty-member-judge-marsha-berzon [https://perma.cc/R9JA-NRZD] (discussing Judge Berzon's practice experience).

188. *Bachelder*, 259 F.3d at 1118–22.

FMLA rights.[189] The Ninth Circuit then observed that regulations issued to implement and explain this prohibition stated that "[e]mployers *cannot use the taking of FMLA leave as a negative factor in employment actions*."[190] The court next discussed why this regulation reasonably interpreted the FMLA and how the regulation should be understood.[191]

In this part of the *Bachelder* decision, as will be more fully discussed later in this Article,[192] the court noted that the use of the terms "interfere" and "restrain" in FMLA Section 105(a)(1) was highly similar to language in Section 8(a)(1) of the NLRA,[193] and the court immediately added, "Like the NLRA, the FMLA entitles employees to engage in particular activities—under the FMLA, taking leave from work for FMLA-qualifying reasons—that will be shielded from employer interference and restraint."[194] The court, invoking the *pari pasu* interpretive maxim used by the U.S. Supreme Court that federal statutes with similar language should be interpreted similarly,[195] then proceeded to extensively discuss the similarities between the FMLA and the NLRA.[196]

The Ninth Circuit next analyzed why the regulation's use of the term "discrimination" did not mean that an employment discrimination standard should be applied to FMLA claims.[197] The court quoted FMLA Section 105(a)(2) "which prohibits '*discriminat[ion]* against any individual for opposing any practice made unlawful by the [FMLA],'"[198] and then found that under the plain meaning of this provision, it did not apply to "visiting negative consequences on an employee simply because he has used FMLA leave."[199] Instead, the court concluded such conduct by the employer must be "covered under § 2615(a)(1), the provision governing 'Interference [with

189. *See id.* at 1122.
190. *Id.* (quoting 29 C.F.R. § 825.220(c)).
191. *Id.* at 1122–25.
192. *See infra* Part IV.A.
193. *See Bachelder*, 259 F.3d at 1123 (citing National Labor Relations Act of 1935 § 8(a)(1), 29 U.S.C. § 158(a)(1)).
194. *Id.* (comparing 29 U.S.C. § 157 with 29 U.S.C. § 2612).
195. *Id.* (quoting Northcross v. Bd. of Educ. of Memphis City Schs., 412 U.S. 427, 428 (1973)).
196. *Id.* at 1123–25.
197. *See id.*
198. *Id.* at 1124.
199. *Id.*

the] Exercise of rights.'"[200] The court then explained that the regulation it was applying, though it references discrimination and retaliation, "implements all the parts of 29 U.S.C. § 2615."[201] Therefore, the court reasoned, although "the particular provision of the regulations prohibiting the use of FMLA-protected leave as a negative factor in employment decisions. . . refers to discrimination," it "actually pertains to the 'interference with the exercise of rights.'"[202] The court concluded regarding the "negative factor" regulation, "While the unfortunate intermixing of the two different statutory concepts is confusing, there is no doubt that [the regulation] serves, at least in part, to implement the interference with the exercise of rights section of the statute."[203]

The court next rejected the employer's argument that it should apply the *McDonnell Douglas* burden-shifting standard from employment discrimination to the case.[204] Declaring that "the *McDonnell Douglas* approach is inapplicable here,"[205] the court explained that this was because the regulation it found applicable "plainly prohibits the use of FMLA-protected leave as a negative factor in an employment decision."[206] As a result, the court reasoned the employee was required only to prove "by a preponderance of the evidence" that the employer had breached this rule by treating her leave as a "negative factor in the decision to terminate her," and therefore "[n]o scheme shifting the burden of production back and forth [like the *McDonnell Douglas* standard] is required."[207]

Near the end of its decision, the *Bachelder* court made holdings more directly related to the honest belief defense.[208] The employer argued that it should not be liable because it (and allegedly the aggrieved employee) believed some of her absences were not FMLA-protected because she had exhausted all her FMLA leave.[209] The court responded that whether the employer or employee believed absences were unprotected was immaterial because "the company's liability does not depend on its subjective belief

200. *Id.*
201. *Id.*
202. *Id.* (citing 29 C.F.R. § 825.220(c)).
203. *Id.* at 1124–25.
204. *Id.* at 1125; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
205. *Bachelder*, 259 F.3d at 1125.
206. *Id.*
207. *Id.*
208. *Id.* at 1130–31.
209. *Id.* at 1130.

concerning whether the leave was protected."[210] Because the uncertainty over whether the employee had exhausted leave was mostly because of a legal issue,[211] the court's further explanation of why employer belief does not matter mostly applied the *ignorantia juris* principle, i.e., that ignorance of the law is no excuse.[212] However, the court's conclusion that an employer's belief about the employee's leave status is immaterial would logically apply with the same force to an employer's mistaken factual belief.[213] And in fact, the court subsequently reached holdings that would apply to employer mistakes of fact.[214] The court held "it is the employer's responsibility, not the employee's, to determine whether a leave request is likely to be covered by the [FMLA]" and whether the requested absence "may qualify for FMLA protection," determinations that of course depend on facts as well as law.[215]

The court next turned to another employer argument that could implicate the honest belief defense.[216] The employer argued that the court should look at two other reasons or factors (besides the employee's FMLA-covered absences) that the employer considered in deciding to terminate the employee.[217] The court responded that this argument was based on the kind of *McDonnell Douglas* pretextual approach that it had found inapplicable to this case, and further was irrelevant because it was undisputed that the employee's FMLA-covered absences were a negative factor affecting the employer's termination decision, and that was all the regulation required to establish an employer's FMLA violation.[218]

This concludes the lengthy discussion of federal appellate courts' current rules on how the employer honest belief defense should be applied in FMLA

210. *Id.*

211. The issue was whether the employer could apply the so-called "rolling period" definition of the 12-week period that bounds how much FMLA leave time an employee can take, and whether the employer adequately notified its employees it was doing so. *Id.* at 1126–29. Because the court concluded that the employer had not provided employees with adequate notice of its definition, the court decided that a more employee-favoring "calendar year" definition applied to the employee and therefore her absences in February were protected by the FMLA. *Id.* at 1129–30.

212. *See id.* at 1130–31.

213. *See id.*

214. *See id.*

215. *Id.*

216. *See id.* at 1131.

217. *Id.* at 1153.

218. *Id.*

cases. The reason for the discussion's length is the variety of approaches that these courts have taken on the issue, and even the different approaches the same court takes depending on when in the process of the employee's requesting, taking, or seeking to return from leave the employer terminated the employee. In Part IV of this Article, Subpart A makes a couple proposals for a more uniform approach to many FMLA claims.[219] First, it will propose, consistent with what experts have argued,[220] that employee claims alleging interference with the exercise of FMLA rights, whether by termination or otherwise, should be considered under the FMLA Section 105(a)(1) interference provision, which does not require that the employee prove unlawful intent by the employer.[221] Second, and more specifically, that the standard applied under the NLRA's interference provision to employer honest but mistaken beliefs be applied to the FMLA.[222] An advantage to these proposals over current FMLA law, if nothing else, is that it will unify the legal rule for honest belief for FMLA claims.

D. *Application to ERISA, Constitutional, and Other Federal Employment Cases*

As compared with claims under federal anti-discrimination statutes or the federal FMLA, there are relatively few employee challenges under any other federal statute covering termination, discipline, or other adverse actions imposed by an employer.[223] Employee claims under all other federal employment statutes, and public employee claims under the U.S. Constitution, are anti-retaliation or anti-discrimination claims (or both) and, because the language of the statute or U.S. Supreme Court precedent (or both), all require the employee to prove unlawful employer motive or intent for the termination or other adverse action the employee is challenging.[224] And for many employees, any of these types of claims are often accompanied by anti-discrimination claims, most often under the Americans with Disabilities Act (ADA).[225] Consequently, at least generally speaking,

219. *See infra* Part IV.A.

220. *See, e.g.*, Williamson, *supra* note 12, at 251–52; Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 358, 366–67 (2003).

221. *See infra* Part IV.A.

222. *See id.*

223. *See generally* Family and Medical Leave Act of 1993, 26 U.S.C. § 2601.

224. *See, e.g.*, Giles v. Transit Emps. Fed. Credit Union, 794 F.3d 1, 5 (D.C. Cir. 2015).

225. *See, e.g.*, *id.* at 4.

the discussions and analyses in this Article applied to anti-discrimination statutes are also relevant to all these other claims as well.

III. THE NLRA'S INTERFERENCE PROVISION

The law governing the employer honest belief defense is *sometimes* very different under the NLRA than from federal employment discrimination law. This notion was upheld by the U.S. Supreme Court in its 1964 decision in *Burnup & Sims*.[226] This decision established a standard for Section 8(a)(1) interference with rights claims that does not require intent and that is distinct from Section 8(a)(3) discrimination cases for which unlawful intent is required.[227] In *Burnup & Sims*, an employer fired two pro-union employees who had been soliciting for the union.[228] The employer did so after a worker told the employer these two employees had said they would dynamite the workplace if the union did not get signatures from a majority of employees.[229] The National Labor Relations Board (NLRB), based on the record evidence, found that the allegation about the dynamite threat was untrue and, because the employer's honest belief in the threat was not a defense, the employer had violated the NLRA by firing the union solicitors.[230] The U.S. Court of Appeals for the Fifth Circuit nonetheless held the discharges were not unlawful because the employer acted in good faith.[231] The U.S. Supreme Court reversed the Fifth Circuit's ruling.[232]

The Court observed that employer action which defeats NLRA rights "does not necessarily depend on the existence of an anti-union bias."[233] One of those NLRA rights is to engage in protected activity, and the Court in *Burnup & Sims* pointed out that the NLRB, at least since 1944, had "ruled that section 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it

226. NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

227. *See id.* at 22 ("We find it unnecessary to reach the questions raised under [§] 8(a)(3) for we are of the view that in the context of this record [§]8(a)(1) was plainly violated, whatever the employer's motive.").

228. *Id.* at 21.

229. *Id.* at 21–22.

230. *Id.* at 22.

231. *Id.*

232. *Id.* at 24.

233. *Id.* at 23.

is shown that the misconduct never occurred."[234] The Court, following that example, then set out its standard:

> Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.[235]

The Court explained why this rule, based on decades of NLRB precedent, complied with Section 8(a)(1) policy.[236] The Court reasoned that without the immunity served by its rule "the example of employees who are discharged on false charges would or might have a deterrent effect on other employees."[237] The Court further found that "if innocent employees can be discharged while engaging in [protected activity,] even though the employer acts in good faith," then such protected activities would "acquire[] a precarious status."[238] The Court added, "It is the tendency of those discharges to weaken or destroy the section 8(a)(1) right that is controlling."[239]

The Supreme Court's *Burnup & Sims* decision established a clear precedent that a federal employee protection statute can be interpreted such that an employer's honest belief defense is irrelevant to an employee's claim of unlawful discharge, and the employer can be found liable for unlawful discharge.[240] The decision is not a one-off as it has been applied and discussed many times by federal courts and the NLRB. An interesting example is the 2016 decision by the U.S. Court of Appeals for the Third Circuit in *MCPC, Inc. v. NLRB*.[241] In that decision, the court had to determine whether the employee's claim was one of unlawful employer discrimination under Section 8(a)(3) or whether it was a Section 8(a)(1) claim that the employee was discharged for engaging in protected activity, which would be governed

234. *Id.* (other citations omitted) (citing *In re* Mid-Continent Petroleum Corp., 54 N.L.R.B. 912, 932–34 (1944)).

235. *Id.*

236. *See id.* at 23–24.

237. *Id.* at 23.

238. *Id.*

239. *Id.* at 23–24.

240. *See id.* at 22–23.

241. 813 F.3d 475 (3d Cir. 2016).

by *Burnup & Sims*.[242] The court explained that if it were the latter, "an employer's good faith that an employee committed misconduct is not the last word on the lawfulness of its adverse employment action."[243] The court then recited the *Burnup & Sims* standard which, as quoted earlier, turns on whether the employer knew the employee was exercising a legal right and believed the employee engaged in misconduct while doing so but that belief was mistaken.[244] The Third Circuit observed that when that test is applied, the employer initially has the "burden of showing that it held an honest belief that the employee engaged in misconduct."[245] If the employer meets that burden, the court explained, the burden of proof "shifts to the General Counsel to 'affirmatively show that the misconduct did not in fact occur.'"[246] The Third Circuit ultimately agreed with the NLRB's finding that the employee's alleged misconduct had not occurred while engaging in protected activity, but had occurred prior to such activity, so *Burnup & Sims* did not apply.[247]

The Third Circuit was correct about the burdens of proof,[248] and the *Burnup & Sims* decision itself identified the even earlier decision from which the burdens originated.[249] The Court noted that the NLRB, in its 1952 decision in *Rubin Brothers Footwear Inc.*, held that after the employer establishes it had an honest belief the employee engaged in misconduct, the General Counsel, to prove unlawful discharge, would have to prove the employee had not engaged in misconduct.[250] The Court also observed that prior to the *Rubin Brothers* decision, the employer had the even greater burden of proving at the outset that the employee had committed the misconduct that the employer claimed as the basis for discharge.[251]

The current NLRB has recognized it must comply with *Burnup & Sims* and has also complied with the allocation of proof burdens the Supreme

242. *Id.* at 487–88.
243. *Id.* at 488.
244. *Id.*
245. *Id.*
246. *Id.* (quoting Pepsi-Cola Co., 330 N.L.R.B. 474 (2000)).
247. *Id.* at 489.
248. *See id.* at 488.
249. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964).
250. *Id.* at 23 n.3 (citing Rubin Bros. Footwear, Inc., 99 N.L.R.B. 610, 611 (1952)).
251. *Id.*

Court accepted and that have been in place for nearly 65 years.[252] Federal courts of appeal have also applied the rule in relatively recent decisions. The U.S. Court of Appeals for the Eighth Circuit did so in 2013 in a case that involved not only an employer's mistaken but honest belief, but a case of mistaken identity.[253] In *NLRB v. RELCO Locomotives, Inc.,* the Eighth Circuit considered the employer's termination of an employee for alleged misconduct when the employee exercised the right to engage in concerted activity when he contacted one of the employer's vendors.[254] The employer terminated the employee for harassing that vendor,[255] but the employer later admitted that it had confused the employee with a co-worker who had engaged in alleged harassment.[256] The employer tried to raise the honest belief defense for its termination of the employee.[257] The Eighth Circuit rejected that defense based on the Supreme Court's holding in *Burnup & Sims* that when the employer's mistaken belief is about misconduct during protected activity then "so long as the employee was not 'in fact guilty of that misconduct,' the employer's honest belief to the contrary does not exempt it from liability."[258] Later in the same decision, the Eighth Circuit again applied *Burnup & Sims* to the employer's termination of two employees based on its mistaken belief that while exercising their right to engage in concerted activity these employees had spread a malicious rumor that a co-worker had been fired.[259] The Eighth Circuit again found the employer liable, holding that even if the employer "honestly believed that [the employees] had behaved maliciously, that subjective belief is irrelevant

252. *See, e.g.*, CP Anchorage Hotel 2, LLC, 369 N.L.R.B. No. 92, slip op. at 1 n.2 (May 29, 2020) (distinguishing *Burnup & Sims* on the grounds that the employee was not engaged in protected activity when discharged); Omnisource Corp., 366 N.L.R.B. No. 23, slip op. at 1 n.1 (Feb. 27, 2018) (citing *Burnup & Sims Inc.*, 379 U.S. at 22) (explaining why multiple employee discharges by the employer violated Section 8(a)(1), and also stating, significantly, that "[w]e find it unnecessary to pass on the judge's finding that the discharges also violated Sec. 8(a)(3), as any such finding would not materially affect the remedy."). *See also* Gen. Motors LLC, 369 N.L.R.B. No. 127, slip op. at 16 n.27 (July 21, 2020) (stating that "[n]othing in the decision," including the new standard announced in it, "should be read as conflicting with Burnup & Sims"). The Board added that its new standard "presupposes that the employee actually engaged in the misconduct." *Id.*

253. *See generally* NLRB v. RELCO Locomotives, Inc., 734 F.3d 764 (8th Cir. 2013).

254. *See id.* at 774–75.

255. *Id.* at 786.

256. *Id.*

257. *Id.*

258. *Id.* (quoting NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964)).

259. *Id.* at 789–91.

unless the two workers were actually guilty of the alleged misconduct during their protected concerted activities."[260]

In 2016 the U.S. Court of Appeals for the D.C. Circuit in *Consolidated Communications, Inc. v. NLRB*[261] discussed *Burnup & Sims* in a case involving what in past decades was one of the most common situations in which the honest but mistaken belief defense was raised and rejected: alleged misconduct while an employee exercised their right to strike.[262] The court quoted the *Burnup & Sims* standard in terms of striking as the protected activity,[263] and also explained how the burden-shifting scheme worked when applied to an honest but mistaken employer belief in striker misconduct.[264] The D.C. Circuit ultimately decided that the NLRB had misapplied *Burnup & Sims* when it had failed to consider all the circumstances in deciding that conduct of a striker while driving on a public highway was not severe enough to justify termination.[265] The case was remanded to the NLRB to reconsider that holding.[266] By contrast, the D.C. Circuit in 2003 decided *Shamrock Foods Co. v. NLRB*,[267] a decision cited multiple times in *Consolidated Communications*,[268] applied *Burnup & Sims* to hold an employer's termination of a striker based on an honest but mistaken belief the employee had threatened co-workers was a violation of Section 8(a)(1),[269] and specifically held that the employer's good faith belief was irrelevant.[270]

260. *Id.* at 791 (citing *Burnup & Sims, Inc.*, 379 U.S. at 23).

261. 837 F.3d 1 (D.C. Cir. 2016).

262. *See id.* at 5–6; *see generally* W.J. Dunn, Annotation, *National Labor Relations Act: Sit-Down Strike, Violence, or Similar Misconduct During Strike as Affecting Employer's Right to Discharge Employee or Employee's Right to be Reinstated After Strike*, 45 A.L.R.2d 887 (1956).

263. *Consol. Commc'ns, Inc.*, 837 F.3d at 7.

264. *Id.* at 8.

265. *See id.* at 16–18.

266. *See id.* On remand, a split Board found that the striker's conduct did justify termination. *See* Consol. Commc'ns, Inc., 367 N.L.R.B. No. 7, slip op. at 3–4 (Oct. 2, 2018), *aff'd and enforced sub. nom.* Loc. 702, Int'l Brotherhood of Elec. Workers, AFL-CIO v. NLRB, 934 F.3d 590, 592–94 (7th Cir. 2019).

267. Shamrock Foods Co. v. NLRB, 346 F.3d 1130 (D.C. Cir. 2003).

268. *Consol. Commc'ns, Inc.*, 837 F.3d at 8, 12 nn.3, 17.

269. *Shamrock Foods*, 346 F.3d at 1133–36; *see* NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23–24 (1964).

270. *Shamrock Foods*, 346 F.3d at 1134–35.

In another case involving an employer's claimed honest belief in striker misconduct, the U.S. Court of Appeals for the Sixth Circuit in *Teledyne Industries, Inc. v. NLRB*[271] relied on the Supreme Court's rationale for the *Burnup & Sims* rule that if employers were allowed to discharge employees based on an honest belief an employee had done wrong while engaging in protected activity, that would deter other employees from engaging in protected activity.[272] Based on its affirming of the NLRB's factual finding that the employer's belief that the striker employee had engaged in misconduct was mistaken, albeit honest,[273] the Sixth Circuit held that to deny remedies to that striker "conflicts with the rule of *Burnup & Sims* that the culpability of the employer is not the relevant question."[274]

The NLRB has also sometimes relied on the *Burnup & Sims* rationale that employees could be deterred from engaging in protected activity if they could be fired based on an employer's mistaken and claimed to be honest belief the employee committed misconduct during that activity. For example, in another striker misconduct case, *Marshall Engineered Products Co.*,[275] the NLRB rejected an honest belief defense for an employer that fired for misconduct a striker who was exonerated by a videotape.[276] The Board paraphrased *Burnup & Sims* by explaining that the decision's rule conformed with the policy behind Section 8(a)(1) because "the example of employees who are discharged on false charges would or might have a deterrent effect on other employees."[277] In 2017 the NLRB adopted an administrative law judge decision relying on this same rationale, applying *Burnup & Sims* to reject the employer's defense that it honestly believed employees had violated its rule against interfering with other employees who were performing work.[278]

Two federal courts of appeal, the Eleventh and D.C. Circuits, applied *Burnup & Sims* to reject an employer's defense that it had terminated an employee based on the employer's honest belief that employee had engaged in misconduct while assisting a co-worker.[279] In its 2011 decision in *Roadway*

271. Teledyne Indus. v. NLRB, 911 F.2d 1214 (6th Cir. 1990).
272. *Id.* at 1222.
273. *See id.*
274. *Id.*
275. 351 N.L.R.B 767 (2007).
276. *See id.*
277. *Id.* at 773.
278. Aqua-Aston Hosp., LLC, 365 N.L.R.B. No. 53, slip op. (Apr. 10, 2017).
279. Roadway Express, Inc. v. NLRB, 427 F. App'x 838 (11th Cir. 2011); Cadbury

Express, Inc. v. NLRB, the U.S. Court of Appeals for the Eleventh Circuit found the employer unlawfully terminated a union steward based on its honest but mistaken belief that the steward, while assisting a colleague who claimed an on-the-job injury, had also aided this colleague with filing a fraudulent workers compensation claim.[280] The court relied on *Burnup & Sims* in stating, "An employer acts unlawfully by discharging an employee for misconduct arising out of protected activity when it is shown that the misconduct never occurred, despite the employer's honest belief that it did."[281] The D.C. Circuit case, *Cadbury Beverages, Inc. v. NLRB*, involved an employer who suspended an employee whom the employer alleged had, while advising an employee who wanted to seek a bonus, defamed employees in the Human Resources (HR) department.[282] The D.C. Circuit accepted the NLRB's findings that the employer was mistaken, even if honest, on the facts because the disciplined employee, while exercising the right to advise a co-worker about an employment matter, had mentioned only a union official and not any HR employees.[283] The D.C. Circuit agreed with the NLRB that the employee had been disciplined for a defamation that had simply not occurred and therefore "*Burnup & Sims* explicitly obviates the need to inquire into intent and ends the analysis."[284] The D.C. Circuit even mildly criticized the NLRB's administrative law judge for analyzing whether the employer's motive for suspending the employee was pretextual, because "since *Burnup & Sims* imposes liability for an employment action erroneously taken because of alleged misconduct, regardless of motive, it is plainly irrelevant whether [the employer's] proffered reason for acting was pretextual."[285]

Beverages, Inc. v. NLRB, 160 F.3d 24 (D.C. Cir. 1998).

280. *Roadway Express, Inc.*, 427 F. App'x at 839, 841–42.

281. *Id.* at 842 (citing NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964)).

282. *Cadbury Beverages, Inc.*, 160 F.3d at 26–28.

283. *See id.* at 28–29.

284. *Id.* at 29.

285. *Id.* at 29 n.4.

IV. PROPOSALS REGARDING THE HONEST BELIEF DEFENSE

A. *FMLA: Proposal to Apply the NLRA's* Burnup & Sims *Rule to Interference Claims*

As discussed in Part II of this Article,[286] the similarities between NLRA Section 8(a)(1) that bars interference with and restraint of employees in their exercise of rights under the statute,[287] and FMLA Section 105(a)(1) that prohibits interfering with or restraining employees from exercising FMLA rights,[288] were recognized and discussed by the U.S. Court of Appeals for the Ninth Circuit in its 2001 *Bachelder* decision.[289] Two years later these similarities were discussed by the distinguished labor and employment law Professor Martin H. Malin in his 2003 article *Interference with the Right to Leave Under the Family and Medical Leave*.[290] Both the *Bachelder* decision and Professor Malin's 2003 article also briefly discussed the Supreme Court's 1964 *Burnup & Sims* decision which, as discussed in Part III of this Article, affirmed the NLRB's finding the employer violated NLRA Section 8(a)(1).[291]

The Ninth Circuit in *Bachelder* quoted the *Burnup & Sims* language on the chilling effect on other employees of an employer discharging an employee for exercising NLRA rights.[292] The court also relied on this effect when stating its inference that in general "the established understanding at the time the FMLA was enacted was that employer actions that deter employees' participation in protected activities constitute 'interference' or 'restraint' with the employees' exercise of their rights."[293] The court next reasoned,

> Under the FMLA as under the NLRA, attaching negative consequences to the exercise of protected rights surely "tends to chill" an employee's willingness to exercise those rights: Employees are, understandably, less

286. *See supra* Part II.

287. *See* 29 U.S.C. § 158(a)(1).

288. *See id.* § 2615(a)(1).

289. *See supra* pp. 560–61 (discussing Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001)).

290. *See* Malin, *supra* note 220.

291. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22–23 (1964); *see supra* Part III.

292. *See Bachelder*, 259 F.3d at 1123–24 (quoting *Burnup & Sims, Inc.*, 379 U.S. at 23–24).

293. *Id.* at 1124.

> likely to exercise their FMLA leave rights if they can expect to be fired or otherwise disciplined for doing so.[294]

However, the court relied on *Burnup & Sims* and this reasoning simply to support its conclusion that the Federal Labor Department was reasonable in promulgating a regulation banning employers from making use of FMLA leave a "negative factor in employment actions."[295] As discussed in Part II of this Article, the court in *Bachelder* relied on this regulation to adopt the test that an employee's use of FMLA leave could not be a motivating factor for an employer in taking an adverse action against that employee.[296] As it happens, this motivating factor standard is the first, or prima facie, stage of the multi-part *Wright Line* test for proving discrimination under NLRA Section 8(a)(3),[297] a test that courts and the NLRB have held an employee does not need to meet to prevail under the *Burnup & Sims* NLRA Section 8(a)(1) test.[298] The other place in the *Bachelder* decision that the court cited *Burnup & Sims* was in a footnote to the section explaining that an employer's defense that it in good faith believed it was complying with the law does not excuse it from liability.[299] In the footnote the court stated that employer good faith has been rejected as a defense in other contexts and cited *Burnup & Sims* to support that assertion.[300]

Two years later in his 2003 article, Professor Malin argued, based on FMLA language and legislative history, that the Section 105(a)(1) interference provision provides broader protection to employees than the

294. *Id.* (quoting Cal. Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998)).

295. *See id.*

296. *Id.* at 1122–25; *see supra* pp. 560–61 (discussing Bachelder v. Am. W. Airlines, Inc., 259 F.3d 1112 (9th Cir. 2001)).

297. *See, e.g., In re* Jackson Corp., 340 N.L.R.B. 536, 536, 556 (2003)(explaining that the General Counsel met its initial burden under the test established in Wright Line, 251 NLRB 1083 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in N.L.R.B. v. Transp. Mgmt. Corp., 462 U.S. 393 (1983)).

298. *See, e.g.*, Marshall Engineered Prods. Co., 351 N.L.R.B. 767, 767–68, nn.4, 5 (2007) (rejecting application of Section 8(a)(3) discrimination analysis to employer's discipline and discharge of strikers); *In re Jackson Corp.*, 340 N.L.R.B. at 571 (rejecting application of Section 8(a)(3) discrimination analysis, and instead applying *Burnup & Sims* Section 8(a)(1) analysis, to the discharge of a striker); Waste Stream Mgmt., Inc., 315 N.L.R.B. 1099, 1099–1100 (1994).

299. *Bachelder*, 259 F.3d at 1130 n.19.

300. *Id.*

decisions applying employment discrimination standards to the FMLA.[301] Supporting this argument, and like the Ninth Circuit in *Bachelder*, Professor Malin relied on the similarities between FMLA and NLRA language, and observed, "It has been established for almost a half century that the NLRA's prohibition on employer interference with statutory rights is broader than a prohibition against discrimination."[302] Later he explained differences in the legal rules when claims can be based on employer interference with employee rights as compared with when the employee must prove discrimination.[303] After explaining that employer remarks hostile to employee rights are more likely to be found relevant to interference claims than discrimination claims,[304] and that FMLA discrimination claims seem to require an ultimate action (like discharge) while interference claims would apply to lesser employer adverse actions that discouraged employees from taking FMLA leave,[305] Professor Malin focused on the honest belief defense.[306]

Professor Malin introduced the topic by observing that because traditional intentional discrimination law requires overt subjective intent to discriminate, "a decision that is objectively erroneous is not discriminatory unless the rationale can be shown to be a lie offered to cover up animus against the protected class rather than an honest mistake."[307] By contrast, Professor Malin pointed out, "Honest mistakes, however, may still interfere with the exercise of FMLA rights."[308] Just as this Article explained in Part II,[309] Professor Malin noted, "Courts that have read a discrimination requirement into section 105(a)(1)" are the ones that allow employers to escape FMLA liability by proving an honest belief defense.[310] Professor Malin illustrated with the *Blackburn v. Potter* decision of the U.S. District Court for the Southern District of Indiana.[311]

301. Malin, *supra* note 220, at 349–63.
302. *Id.* at 349–50.
303. *Id.* at 353–64.
304. *See id.* at 365–66.
305. *Id.* at 366–67.
306. *Id.* at 367–69.
307. *Id.* at 367.
308. *Id.*
309. *See supra* Part II.
310. *See* Malin, *supra* note 220, at 367.
311. *Id.* at 367–69 (discussing Blackburn v. Potter, No. IP01-1645-C-B/S, 2003 WL 1733549 (S.D. Ind. Mar. 31, 2003)).

In the *Blackburn* decision, the court acknowledged there was a factual dispute over whether the employee had falsified a doctor's signature on the leave certification form, which was the employer's reason for discharging the employee.[312] However, the court found that the factual dispute was irrelevant because the sole issue was whether the employer and its agents honestly believed that the employee forged the signature, and the court found the employer did honestly believe that and discharged the employee for the forgery.[313] Professor Malin accepted that this analysis would be correct, at least based on the evidence presented, if the employee claimed discrimination against her for taking FMLA leave.[314] However, Professor Malin indicated that for an interference claim, the result might be different.[315] In support of this, Professor Malin relied on the *Burnup & Sims* rule for NLRA interference, citing that decision to support his statement that "[c]ertainly firing an employee who has done nothing wrong for the honest but inaccurate belief that the employee falsified a doctor's certification of a serious health condition interferes with that employee's right to leave, even though the discharge does not discriminate against the employee."[316] Professor Malin did not discuss the employer honest belief defense any further, instead turning to his recommendations and discussions of the "balancing" and "rule of reason" tests for possible use in FMLA cases.[317]

Since Professor Malin's article, nearly two more decades of employee FMLA claims have demonstrated the strong parallels between many of these claims and employee NLRA interference claims rejecting the honest belief defense under the *Burnup & Sims* rule. In NLRA *Burnup & Sims* cases, the employee exercises a right protected under Section 7 of the NLRA—soliciting co-workers to support a union, engaging in a concerted protest, striking—and the employer comes to believe, mistakenly, that this employee committed conduct that voided the statutory protection so the employer could discharge or otherwise discipline them.[318] Similarly, in many FMLA cases the employee exercises the FMLA-protected right to take leave and

312. *See id.* at 368; *Blackburn*, 2003 WL 1733549 at *7–8.
313. Malin, *supra* note 220, at 368; *see Blackburn,* 2003 WL 1733549 at *8.
314. Malin, *supra* note 220, at 368.
315. *Id.* at 369.
316. *Id.* (citing NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964)).
317. *See id.* at 369–71.
318. *See supra* Part III.

the employer is informed or somehow wrongly comes to believe that the employee lost FMLA protection by misusing the leave, taking more leave than the statute permitted, or some other conduct.[319]

This Article proposes that either in FMLA cases in which by the time of the court's decision it is beyond serious dispute that the employer's reason for action against the employee was factually wrong, or those in which the employer has asserted a reason but never provided any credible evidence to support it, courts should apply the *Burnup & Sims* rule and find the employer violated the FMLA. The *Burnup & Sims* rule would apply to far fewer non-government employers under the FMLA than it does already under the NLRA because the FMLA covers only employers with 50 or more employees[320] and employees at worksites with 50 or more employees or who work for employers with 50 or more employees working within a 75-mile radius.[321] By comparison the NLRA covers "virtually all private and semiprivate enterprises."[322] The FMLA does cover federal, state, and local government employers,[323] while the NLRA does not,[324] but the U.S. Supreme Court established in 2012 that state government employees cannot sue for damages under the FMLA's "self-care" provisions.[325] In sum, on the whole a substantially larger number of employers, including many small enterprises, are currently covered by the Supreme Court's *Burnup & Sims* rule under the NLRA than the number of employers who would be covered by that rule if applied under the FMLA's interference provision in the circumstances referenced above.

A 2020 FMLA decision in which applying a *Burnup & Sims* rule would have led to a more just result was the technically unpublished decision of the U.S. Court of Appeals for the Sixth Circuit in *Smith v. Towne Properties*

319. *See supra* Part II.C.

320. *See* Family and Medical Leave Act of 1993 § 101(4)(A)(i), 29 U.S.C. § 2611(4)(A)(i).

321. *See* Family and Medical Leave Act of 1993 § 101(2)(B)(ii), 29 U.S.C. § 2611(2)(B)(ii).

322. NAT'L LAW. GUILD, 1 EMPLOYEE AND UNION MEMBER GUIDE TO LABOR LAW § 1:3 (May 2021). However, the NLRA does not cover railway and airline employees (who are covered by the Railway Labor Act), agricultural and domestic employees, and independent contractors and supervisors. *See id.*

323. *See* PUBLISHER'S ED. STAFF, CORPORATE COUNSEL'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT § 1:2 (July 2021).

324. *See* National Labor Relations Act of 1935 § 2(2), 29 U.S.C. § 152(2).

325. *See* Coleman v. Ct. of Appeals of Md., 566 U.S. 30 (2012).

Asset Management Co.[326] The opinion by President Donald Trump's first appointee to the federal appellate bench, Judge Amul Thapar,[327] began with what has been referenced as his "folksy and engaging writing style that is meant to be understood by everyday people."[328] The opinion began: "Mistakes happen. Including in the context of employment decisions. But not every mistake amounts to actionable employment discrimination. That's the lesson of this case . . . ."[329] As this beginning suggests, the opinion was also consistent with anti-employee precedents. In the final sentence of the first paragraph of this decision, the court explained it was dismissing the employee's claims "because there's insufficient evidence to show that her firing wasn't motivated by her employer's mistaken belief that she had been engaging in theft or dishonest acts."[330] The employee was a community manager for an apartment complex who lived rent-free, and the theft for which she was fired consisted of also getting free utilities and using the employer's parking garage.[331] As was discovered shortly after Towne Management fired the employee, one of the two co-owners of the apartments actually believed the employee was entitled to free utilities, but the employer did not reconsider the firing.[332] Thus, as the court acknowledged in the first sentences of the decision quoted above, the employer's reason for firing the employee was mistaken.[333] Nonetheless, the court found that because the employer had ample factual bases for believing its reason, and the employee could not prove the employer actually disbelieved it, the employee's discrimination claims were rightly dismissed on summary judgment by the trial court.[334] The court held the same regarding FMLA claims with no more analysis than that "the honest-belief rule applies with as much force to [the employee's] FMLA claim . . . [the

326. 803 F. App'x 849 (6th Cir. 2020).

327. *Id.* at 850; *see Amul Thapar*, WIKIPEDIA, https://en.wikipedia.org/wiki/Amul_Thapa r [https://perma.cc/679D-93J3].

328. *Amul Thapar*, *supra* note 327.

329. *Towne Properties Asset Mgmt. Co.*, 803 F. App'x at 850.

330. *Id.* at 850–51.

331. *Id.* at 851.

332. *Id.* The other co-owner suffered from Alzheimer's disease. *Id.* at 851–52. Unfortunately for the employee he was the co-owner whom Towne Management contacted about the free utilities, and this co-owner told Towne he did not know about those. *Id.*

333. *Id.*

334. *Id.* at 852–53.

employee] thus cannot win on her FMLA claim for the same reason she cannot win on her ADA claim—because she can't show pretext."[335]

The *Towne Properties* decision briefly referenced the Sixth Circuit's standard for honest belief cases when it mentioned "a 'reasonably informed and considered decision' based on 'particularized facts.'"[336] In many other recent Sixth Circuit decisions, the facts are more specifically described as "particularized facts that were before it at the time the decision was made."[337] As the *Towne Properties* decision itself illustrates, this addition of requirements for the employer's belief will not necessarily prevent the firing of an employee for supposedly wrongful conduct that was not actually wrongful.[338] Under the Sixth Circuit standard, even when the mistake is discovered shortly after the firing, the employer is not liable and the employee has no job and no remedy.[339] And as the *Towne Properties* decision also demonstrates, an employer's decision will be found "reasonably informed and considered" even when the information is based on the memory of someone with Alzheimer's disease.[340]

The Sixth Circuit is certainly not alone in dismissing employee claims based on employer reasons for adverse actions that are based on incorrect or little or no credible evidence. The U.S. Court of Appeals for the Seventh Circuit, which as discussed earlier pioneered the acceptance of the honest belief defense in employment discrimination cases, has at least since its 1997 decision in *Kariotis v. Navistar International Transportation Corp.* dismissed employee FMLA claims based on employer reasons with little or no factual support.[341] In *Kariotis*, the employer discharged its employee, an executive assistant, based on its purported belief that she "fraudulently accepted disability benefits following her knee replacement surgery."[342] The employer based this on limited information it received from a private company hired

335. *Id.* at 853.

336. *See id.* at 851 (quoting Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 322 (6th Cir. 2019)).

337. Marshall v. Rawlings Co., 854 F.3d 368, 380 (6th Cir. 2017) (quoting Majewski v. Automatic Data Processing, Inc., 274 F.3d 1106, 1117 (6th Cir. 2001)).

338. *See Towne Properties Asset Mgmt. Co.*, 803 F. App'x at 851, 853.

339. *See id.*

340. *Id.* at 851–52.

341. *See* Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672 (7th Cir. 1997).

342. *Id.* at 674.

to videotape the employee,[343] which this company did on three occasions.[344] No medical practitioner reviewed the tapes of the employee walking,[345] and during the period the employer gave her to seek reinstatement her doctor (whom her employer never contacted) sent a letter to her employer that it was preposterous given her physical condition to charge her with disability fraud.[346] As in *Towne Properties*, the employer did not reconsider its decision not to reinstate the employee, which was based in part on the HR manager's consideration of how long it took for his mother to recover from knee surgery.[347] Although the court stated, "Objectively speaking, their investigation left something to be desired,"[348] the Seventh Circuit in this seminal decision ultimately decided that the employer's information was sufficient to "demonstrate[] that it honestly believed [the employee] was not on a legitimate FMLA leave; or, tracking the language in the statute, . . . not using her leave for its 'intended purpose.'"[349]

One of the employee's rights under the FMLA was to be restored to the same or an equivalent position when she returned from leave,[350] and her employer interfered with that right when it deliberately refused to reinstate her.[351] She argued that the employer's reason for doing so was mistaken because the employer was "careless in not checking its facts before firing her" and the Seventh Circuit acknowledged "that may be true."[352] The

343. *Id.* at 675. At least since *Vail v. Raybestos Products Co.*, the Seventh Circuit has allowed employers to engage in secret surveillance of employees to check if they are misusing FMLA leave. 533 F.3d 904, 909–10 (7th Cir. 2008). This has not been without controversy. *Compare* Brandon Sipherd & Christopher Volpe, Note, *Evaluating the Legality of Employer Surveillance Under the Family and Medical Leave Act: Have Employers Crossed the Line?*, 27 HOFSTRA LAB. & EMP. L.J. 467 (2010) (maintaining surveillance can be a legitimate and lawful means to protect the employer's business), *with* Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 CORNELL J.L. & PUB. POL'Y 609 (2009) (providing a framework that protects employees' right to privacy from technological monitoring by an employer).

344. *See Kariotis*, 131 F.3d at 675.

345. *Id.* at 677.

346. *Id.* at 675.

347. *Id.* at 674–75; *see* Smith v. Towne Props. Asset Mgmt. Co., 803 F. App'x 849, 851 (6th Cir 2020).

348. *Kariotis*, 131 F.3d at 675.

349. *Id.* at 680–81.

350. *See* Family and Medical Leave Act of 1993 § 104(a)(1), 29 U.S.C. § 2614(a)(1).

351. *See Kariotis*, 131 F.3d at 675.

352. *Id.* at 677.

Seventh Circuit could have stopped there because it (like the trial judge whose decision the employee appealed) chose to interpret the FMLA as requiring an employer, when interfering with an employee's right to reinstatement, to have a discriminatory intent in making that decision.[353] However, both the Seventh Circuit and the Sixth Circuit, whose *Towne Properties* honest belief decision was discussed immediately above,[354] have adopted the rule that when an employer's decision is to deny an employee's request for FMLA leave for a valid purpose, interference with that right is sufficient to find that employer violated the FMLA and proving the employer had discriminatory intent is not required.[355] As was discussed in Part II, nothing in the text of the FMLA supports distinguishing between these types of employer decisions and requiring an employee to prove more than employer interference with their exercise of an FMLA right.[356] Requiring employees to prove discriminatory intent, and to do so by proving an employer's asserted reason for interfering with an employee FMLA right was pretextual, is entirely a judicial creation.

An even clearer case of how requiring proof of intent and pretext prevents an employee from winning an interference claim is the U.S. Court of Appeals for the Eighth Circuit's 2008 decision in *Phillips v. Mathews*.[357] The case involved a probationary employee of the Arkansas Department of Heritage (DAH), Ms. Jamila Phillips, who transferred to that agency after working for nearly a year-and-a-half elsewhere for the Arkansas government.[358] Unfortunately for Ms. Phillips, she was in an automobile accident on her way to her second day of work at DAH, which was April 18, 2006.[359] After being taken to a hospital emergency room that morning, Ms. Phillips declined a doctor's offer of excuse from work, and reported to DAH at midday.[360] As this was just Ms. Phillips's second day, DAH did not yet have from her prior state employer her Proof of Prior Service, which would

353. *See id.* at 680–81; *see* Kariotis v. Navistar Int'l Transp. Corp., 951 F. Supp. 144, 148–49 (N.D. Ill. 1997), *aff'd in part, rev'd in part*, 131 F.3d 672 (7th Cir. 1997).

354. *See supra* pp. 576–78 (discussing Smith v. Towne Props. Asset Mgmt. Co., 803 F. App'x 849 (6th Cir. 2020)).

355. *See, e.g.*, Burnett v. LFW Inc., 472 F.3d 471, 477 (7th Cir. 2006); Hoge v. Honda of Am. Mfg., Inc., 384 F.3d 238, 244 (6th Cir. 2004).

356. *See supra* Part II.

357. 547 F.3d 905 (8th Cir. 2008).

358. *Id.* at 907.

359. *Id.*

360. *Id.* at 907–08.

state her leave balance.[361] Ms. Phillips did not know how much leave, if any, she had from her prior employment, so she and her supervisor agreed to treat her missed work from that morning as leave without pay.[362]

Later that week Ms. Phillips told her supervisor that on Monday, April 24 she would have a doctor's appointment in the morning.[363] She and her supervisor agreed that to minimize the amount of unpaid leave she would take, she would report to work at eight o'clock that morning and take an early lunch.[364] On that morning Ms. Phillips phoned DAH to inform them her car (presumably the one that was in the accident) would not start, and later it is possible she phoned her employer again prior to her doctor's appointment, but she did not report to work prior to that appointment.[365] The doctor prescribed physical therapy and recommended Ms. Phillips not work through Thursday, April 27, and completed FMLA paperwork for her to provide to her employer.[366] After the appointment Ms. Phillips went to her workplace and was given a termination letter saying she was discharged for taking leave without pay for the non-FMLA-covered and improper purpose that it was because her car would not start.[367]

Ms. Phillips received her last check stub after her termination and that showed she did have paid leave time available.[368] A couple weeks later DAH received the Proof of Prior Service from her prior employer, but that indicated she had no remaining leave time.[369] No explanation was provided for this discrepancy between the leave balance shown on her final check stub and the zero balance on her Proof of Prior Service.[370]

Ms. Phillips argued that the leave balance on her last check showed she had *paid* leave available for both occasions she agreed to take unpaid leave.[371] The Eighth Circuit rejected the argument because Ms. Phillips and

361. *Id.*
362. *Id.* at 908.
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Id.*
371. *See id.* at 913.

DAH assumed she had no paid leave available and agreed to proceed on that basis. [372] Apparently, based on what Ms. Phillips and DAH agreed to, the court found that her having a leave balance did not raise an issue of fact.[373] What the court chose not to consider was that Ms. Phillips was a probationary employee who likely would agree to anything her employer proposed.[374] Moreover, to the extent the court was relying on the employer-employee agreement, the court did not apply the usual, stricter rules for such oral agreements to be enforceable.[375]

These omissions by the Eighth Circuit are understandable because for the court the issue was whether the reason the employer gave was false and a pretext for retaliating against the employee, not whether it was justified or correct.[376] However, under the *Burnup & Sims* rule, whether the employer made a mistake when it terminated Ms. Phillips for taking unauthorized leave—which the employer had reason to know about within weeks of the discharge and thus well prior to the litigation—would be a central issue. [377] And the employer, especially if defined as the State of Arkansas, whom Ms. Phillips did end up suing, might well have been in a better position than Ms. Phillips to determine the reason for the zero balance on her Proof of Prior Service and the positive balance on her last pay stub, and which balance was correct. If the answer was that the positive balance was correct, then the employer's stated reason for terminating her—improper use of unpaid leave—was incorrect. So the court should probably have considered whether terminating Ms. Phillips also illegally interfered with the FMLA rights she had started to take and was probably about to continue at her doctor's recommendation.[378]

Another issue with federal courts' reliance on employer honest belief in FMLA cases, in addition to it allowing employers to interfere with employee rights under a statute that does not necessarily even require

372. *Id.*

373. *Id.*

374. *See id.*

375. *See id.*; *see, e.g.*, Hoffius v. Maestri, 786 S.W.2d 846, 849–51 (Ark. Ct. App. 1990) (applying the parol evidence rule as well as the Statute of Frauds to hold that an employment contract must be a signed writing with all terms defined to be enforceable).

376. *See Phillips*, 547 F.3d at 912–13.

377. *See generally* NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

378. The Eighth Circuit found that Ms. Phillips "was entitled to FMLA leave starting from her doctor's appointment at 10:45 A.M. on Monday, April 25, through her necessary time off from work." *Phillips*, 547 F.3d at 911.

unlawful intent by employers, is that it makes it unpredictable when an employer's intent will be found relevant. This is demonstrated by another Seventh Circuit case decided eight years after *Kariotis*, *Kauffman v. Federal Express Corp.*,[379] in which like in *Kariotis,* the employer terminated an employee upon return from leave instead of reinstating him.[380] Also, as it had in *Kariotis*, the Seventh Circuit found that the employee could not prove the employer had discriminatory intent when firing him,[381] but unlike in *Kariotis* the Seventh Circuit continued its consideration and found that the employee could perhaps prove an interference claim if he proved his employer was mistaken in finding he was not entitled to FMLA leave based on its erroneous (and according to the court frivolous) reason that the employee had not turned in his FMLA paperwork on time[382] and its reason, disagreed with by the Seventh Circuit, that the employee's medical certification was inadequate to support his taking FMLA leave.[383] The *Kauffman* decision is even more at odds with the Eighth Circuit's decision in *Phillips*, which also at least arguably turned on whether the employee had been entitled to take leave when she did, but the court nonetheless rejected the employee's interference claim.[384]

The experience with the FMLA decisions discussed above, and numerous others, has demonstrated how, at least to further the Congressional purpose in enacting the FMLA and to ensure fairness to more employees, the interference rule from the U.S. Supreme Court's decision in *Burnup & Sims*, rather than the honest belief rule requiring the employee to prove the employer had unlawful intent, should sometimes be used to prove liability. Specifically, it should be used when the employer's action did interfere, for stated reasons that cannot credibly be disputed were wrong, with one or more of an employee's FMLA rights.

379. 426 F.3d 880 (7th Cir. 2005).

380. *See id.* at 882–83; Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 674–75 (7th Cir. 1997).

381. *Kauffman*, 426 F.3d at 884–85; *see Kariotis*, 131 F.3d at 677–78, 680–81.

382. *See Kauffman*, 426 F.3d at 884–86.

383. *See id.* at 881, 886–87.

384. *See supra* pp. 580–82 (discussing Phillips v. Mathews, 547 F.3d 905 (8th Cir. 2008)); Phillips v. Mathews, 547 F.3d 905, 911 (8th Cir. 2008).

B. *Possible Reasons Courts Adopted the Honest Belief Defense & Related Proposals*

1. Refusal to Reconsider Business Judgment

When federal courts first adopted the honest belief defense, they often did so in cases where an employer's stated reason for its adverse action was less clearly verifiable as true or false than in FMLA cases. In many FMLA cases the employer's decision is allegedly based on a claim of a specific fact that is or is not true, which this Article has proposed is suitable to be governed by the U.S. Supreme Court's *Burnup & Sims* rule. By contrast, in non-FMLA cases federal courts frequently have applied the honest belief defense when called upon to consider an employee's termination, not for a specific instance of alleged misconduct that might be easily confirmed or refuted, but for an employee's more overall or general inadequate performance of a job, or a financial or other business reason for letting one or more employees go.

A relatively early instance of this was the 1978 case of *Havelick v. Julius Wile Sons & Co.* in the U.S. District Court for the Southern District of New York.[385] The court in that case considered an employee's claim that he was discharged because of his age, and the court relied on the Age Discrimination in Employment Act (ADEA) Section 623(f)(3) that provides that it is not unlawful "to discharge or otherwise discipline an individual for good cause."[386] The employee argued that his employer could not rely on that provision to defend firing him for its stated reason, which was unsatisfactory performance as a district director and sales manager,[387] because his employer had "never made any 'objective' evaluation" of his performance.[388] The court responded by declaring that to rebut the statutory good cause defense, the plaintiff employee would have to "establish that there was no reasonable or rational basis for the employer's decision."[389] Further explaining this standard, the *Havelick* court then held that an

385. 445 F. Supp. 919 (S.D.N.Y. 1978).
386. *Id.* at 925–26; 29 U.S.C. § 623(f)(3).
387. *Havelick*, 445 F. Supp. at 921–24, 926.
388. *Id.* at 926.
389. *Id.*

ADEA-based claim "must therefore demonstrate that the decision was not made in the exercise of good faith business judgment."[390]

The court then applied this standard to the employer's decision to fire the employee for unsatisfactory job performance by relating at length the evidence supporting this decision.[391] After that, the court repeated that the employee's firing was a business judgment and, quoting the U.S. District Court for the District of Columbia's 1974 ADEA decision in *Bishop v. Jelleff*, held that the ADEA is not violated by "employer decisions which are premised upon a rational business decision" and "[t]o conclude otherwise would make the federal courts *a super board of directors* reviewing bona fide management decisions, a procedure Congress clearly did not intend by passage of this Act."[392] For these reasons the court dismissed the employee's ADEA claim.[393]

Two years later, the U.S. Court of Appeals for the Seventh Circuit relied on *Havelick* in *Kephart v. Institute of Gas Technology*,[394] another case in which an employer claimed it decided to terminate the employee because of unsatisfactory work performance while the employee claimed the employer's motive was age discrimination.[395] The Seventh Circuit cited *Havelick* for the proposition that the ADEA "was not intended as a vehicle for judicial review of business decisions."[396] The court added that the question before it was "not whether the company's methods were sound, or whether its dismissal of [the employee] was an error of business judgment."[397] The court stated, unsurprisingly, that the issue was whether the employer discriminated against the employee because of his age.[398] However, the court next imposed some limits on an employer's treatment of its employees in stating that "an employer may not make unreasonable expectations and must make the employee aware of just what his

390. *Id.*
391. *Id.*
392. *Id.* at 926–27 (quoting Bishop v. Jelleff Assocs., 398 F. Supp. 579, 593 (D.D.C. 1974)).
393. *Id.*
394. 630 F.2d 1217 (7th Cir. 1980).
395. *See id.* at 1221–23.
396. *Id.* at 1223 (citing *Havelick*, 445 F. Supp. at 926).
397. *Id.*
398. *Id.*

expectations are."[399] But "beyond that," the court declared, "the court will not inquire into the defendant's method of conducting its business."[400] The court held that an employer may set legitimate expectations for its employees and that the employee had failed to rebut his employer's findings that he failed to meet its expectations and so should be terminated.[401]

The Seventh Circuit's *Kephart* decision in effect served as a bridge between the Southern District of New York's 1978 *Havelick* decision and the Seventh Circuit's 1986 decision in *Dale v. Chicago Tribune Co*.[402] The *Dale* decision cited and relied on *Kephart*,[403] and though it did not cite or mention *Havelick* it rephrased and repurposed the *Havelick* court's rebuff of making "federal courts a super board of directors"[404] by stating, "This Court does not sit as a super-personnel department that reexamines an entity's business decisions."[405] The Seventh Circuit in *Dale,* like the court in *Havelick,* was rejecting an employee's age discrimination challenge to his termination for inadequate overall performance.[406]

However, the court in *Havelick* raised the prospect of a "super board of directors" to reject the employee's argument that the court should require of employers objective evaluation of an employee's performance,[407] while in *Dale* the court in its own words was rejecting only the employee's "own self-interested, conclusory assertions" that his performance was adequate.[408] The *Dale* court had already noted the employee had offered no documentation or evidence "besides his own perceptions" to support the adequacy of his performance while, as the court described, the employer had offered considerable evidence to the contrary.[409] Moreover, the court a few sentences later held, "[The employee's] perception of himself . . . is not relevant" and "[i]t is the perception of the decision maker which is relevant."[410] Thus, this court did not really need to justify its dismissal of the

399. *Id.*
400. *Id.*
401. *Id.*
402. 797 F.2d 458 (7th Cir. 1986).
403. *See id.* at 463 n.3, 464–65, 465 n.11.
404. Havelick v. Julius Wile Sons & Co., 445 F. Supp. 919, 926–27 (S.D.N.Y. 1978).
405. *Dale*, 797 F.2d at 464.
406. *Id.* at 465; *see Havelick*, 445 F. Supp. at 926–27.
407. *See Havelick*, 445 F. Supp. at 926–27.
408. *Dale*, 797 F.2d at 465.
409. *Id.* at 463–65.
410. *Id.* at 464–65.

employee's claim by rejecting a super-personnel department role and did not explain why it did so. Nonetheless, this catchy phrase from *Dale* has been cited by subsequent federal court decisions more than 440 times, most recently in August 2021.[411]

The appeal of the phrase to busy federal courts is apparent as it is shorthand for declining to devote time to deciding or overseeing a jury's deciding disputes of fact that, as in *Dale* itself, are often irrelevant to the issues in the case.[412] However, it is rather unusual—after all, courts in personal injury or mass torts cases do not proclaim they do not sit as insurance analysts or in shareholder litigation do they state refusal to sit as corporate auditors. So, what does this influential super-personnel department phrase mean and what, if anything, justifies it as a legal rule rather than, perhaps, a rote cliché?

A couple of scholars have proposed some possibilities. In 2015 Professor Robert A. Kearney proposed, "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."[413] That is an apt description of the original decisions using the super-personnel phrase or a similar one, as discussed earlier in this Subpart. However, it is at least doubtful that each of the more than 400 federal court decisions quoting that phrase involved a frivolous claim. In 2018 Associate Dean Sperino discussed the super-personnel department phrase and indicated that as an idea it references that "federal discrimination statutes are not a fairness code" but "prohibit certain conduct because of a protected trait."[414] Associate Dean Sperino also discussed the honest belief rule that is this Article's topic and which is often accompanied by the "court not a super-personnel department" phrase and explained that it is "correct in a limited subset of cases" when "the employer truly made its decision under a faulty set of facts and there is no other

411. This number is based on the author's Westlaw search of September 10, 2021.

412. *See Dale*, 797 F.2d at 464–65.

413. Kearney, *supra* note 97, at 19. For this proposition Professor Kearney quoted *Brill v. Lante Corp.*, as "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.'" *Id.* at n.4 (quoting Brill v. Lante Corp., 119 F.3d 1266, 1270 (7th Cir. 1997) (internal quotation marks omitted)).

414. Sperino, *supra* note 104, at 240.

evidence suggesting discrimination."[415] Associate Dean Sperino combined both concepts in stating, "Courts often rely on the honest belief doctrine and the idea that courts do not sit as super-personnel departments to impermissibly favor an employer's evidence over that presented by the worker."[416]

Federal judges and courts have never stated that they lack the legal authority to consider the validity of employer's business judgments. Experts on federal and state constitutional law on authority of courts, without legislative authorization, to do so could opine on that issue; this Article will not. However, in cases that turn on specific and verifiable issues of fact underlying an employer's reasons for taking adverse action against an employee, no true business judgment is involved—at least no judgment like in the appellate court decisions discussed above in this subsection in which employers fired employees for more general reasons like poor performance or poor management.[417] Therefore, courts and others should consider whether the deferral to business judgment rationale should be applied to discrimination cases and other employment law cases in which it is already apparent that an employer made a specific mistake of fact, law, or both when acting adversely to the employee, and the employer has no credible evidence to disprove a finding of mistake. As when a similar proposal was made above regarding how FMLA cases should be decided,[418] adopting such a rule would result in more just results for employees and would better serve the purposes of the Congress and the President who enacted the federal statutes at issue.

2. *Proving Reason is False or Mistaken Does Not Prove Employer Had Unlawful Motive—& This Can Be a Jury Issue*

Federal courts established the honest belief defense when dealing with claims for which federal statutes required employees to prove an unlawful motive for an adverse action.[419] The Supreme Court's *Burnup & Sims* rule

415. *See id.* at 238.

416. *Id.* at 231. *See id.* at 240–42 for a more full discussion and criticism of the super-personnel department doctrine as one of the "disbelief doctrines" she identified.

417. *See supra* Part IV.B.1.

418. *See supra* Part IV.A.

419. *See, e.g.*, Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 560–61 (7th Cir. 1987) (applying honest belief defense to reverse a trial judge's ruling after a bench trial); Turner v. Tex. Instruments, Inc., 555 F.2d 1251, 1256–57 (5th Cir. 1977) ("Even if TI wrongly believed that Turner knowingly violated this policy, if TI acted on this belief, it was not guilty of racial discrimination."), *overruled in part on other grounds sub nom. by*

on employer mistaken reasons for adverse actions against employees is not applied in such cases, or even in cases under the provision of the NLRA Section 8(a)(3) that requires proving an employer had unlawful intent in taking an adverse action against an employee.[420]A different standard is used for such cases.[421] As discussed earlier, in some decisions federal courts have applied the honest belief defense to dismiss intentional discrimination claims on summary judgment[422] and scholars have disagreed over when, if ever, that is appropriate.[423] Certainly, multiple scholars have criticized courts that have found that the honest belief defense, in a variety of factual circumstances, need not be considered by a jury as factfinder.[424]

As was also discussed earlier, Professor Malin relied on some of the rationales offered by these scholars regarding discrimination claims,[425] as well as arguments of his own based on the text of and policy underlying the federal FMLA, to argue that all or most FMLA claims should be decided under the FMLA's Section 105(a)(1) interference provision.[426] Professor Malin further argued that such FMLA interference claims should be decided using a balancing standard borrowed from the NLRA under which an employer's honest belief would not be conclusive as to whether the employer violated the FMLA.[427] This Article has already referenced Professor Malin's article to support the argument that interference should be used instead of the honest belief defense in cases where the employer's reasons for interfering with FMLA rights are not credible.[428] If the FMLA interference provision is used in such cases, then the employee need not prove the employer had an unlawful motive for the adverse action.[429] Thus, as under

Burdine v. Tex. Dep't of Cmty. Affs., 647 F.2d 513 (5th Cir. 1981). *But see* Brown v. M & M/Mars, 883 F.2d 505, 509–11 (7th Cir. 1989) (distinguishing *Pollard* in refusing to overturn a jury's finding that the employer's asserted reason for firing plaintiff was a pretext for age discrimination).

420. *See* 29 U.S.C. § 158(a)(3).

421. W.J. Dunn, Annotation, *Labor Relations Acts: Discharge of Employee as Reprisal or Retaliation for Union Organization Activities*, 83 A.L.R.2d 532 *passim* (1962).

422. *See supra* notes 97–103 and accompanying text.

423. *See supra* notes 105–16 and accompanying text.

424. *See supra* note 132 and accompanying text.

425. *See* Malin, *supra* note 220, at 336–50.

426. *See id.* at 334–36, 350–53, 358–76.

427. *See id.* at 364–72.

428. *See supra* pp. 573–74 (discussing Professor Malin's article).

429. *See id.* (discussing Professor Malin's article).

the NLRA in general and the *Burnup & Sims* rule more specifically, if the adverse action was taken for a mistaken reason and interfered with the employee's exercise of a statutory right, that improper interference could be remedied.[430]

Returning to discrimination and other federal employment cases that require proof of some type of unlawful motive, it is understandable that courts would regard an employer's asserted lawful reason for its action, even a mistaken one honestly believed, as negating that an employer had an unlawful motive for that action. That would even be conclusive if employment law provided that a court must find an employer's sole and single motive for a termination or other adverse action. Employment law, however, is more realistic than that and most federal employment statutes do not require a finding that an unlawful motive must be the employer's sole motive for its action.[431] Instead, an employee often has to prove that an employer's unlawful motive was a motivating factor for the termination or other challenged action, or must make the more difficult showing that it was a but for (also known as determinative) reason for the adverse action.[432] Under either standard, as discussed earlier,[433] federal courts have relied on the honest belief defense to dismiss employee claims. As was also discussed earlier, Associate Dean Sperino has maintained that federal courts err when they dismiss employee discrimination claims based on honest belief (or what

430. *See id.* (discussing Professor Malin's article).

431. *See*, *e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1744 (2020) (Under Title VII, "the plaintiff's sex need not be the sole or primary cause of the employer's adverse action."); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013) ("An employee who alleges status-based discrimination under Title VII. . . [may show] that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision."); Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 372–73 (2020) (explaining that the "but for" standard the U.S. Supreme Court requires to prove retaliation under Title VII or age discrimination does not require proving the unlawful motive was the "sole cause"); MICHAEL J. CANAN & WILLIAM D. MITCHELL, EMPLOYEE FRINGE & WELFARE BENEFIT PLANS § 16:17 (Mar. 2021). Interference with protected rights (describing proof/causation standards for ERISA "interference with rights" provision and observing multiple times that plaintiff need not prove intent to interfere was the "sole" reason for the challenged action).

432. *See generally* Sullivan, *supra* note 431, at 383, *passim*.

433. *See supra* Part II.B (discussing application of honest belief defense to employment discrimination cases).

she called "disbelief doctrines"), especially on summary judgment.[434] This Article will take a different tack.

Nonetheless, this Article certainly agrees with Associate Dean Sperino that the U.S. Supreme Court has established that an employee's proving the employer's reason for the challenged action is false (or not credibly supported by facts or evidence) is highly persuasive in proving the ultimate issue that the employer had an unlawful motive for that challenged action, and, also, it is often appropriate to have the fact finder or jury decide that issue.[435] In fact, federal appellate courts in twenty-first century decisions have rejected employer honest belief defenses, at least when the employee offers some evidence that the employer's alleged mistake might have been a pretext for, or was accompanied by, an unlawful motive.

For example, then-Judge, now Supreme Court Justice, Neil Gorsuch did this in 2008 in the opinion he wrote reversing a trial court's summary judgment dismissal of employees' pregnancy discrimination and FMLA claims in *Orr v. City of Albuquerque*.[436] After finding that the two employees offered strong evidence refuting the employer's proffered reason that its employment policies required employees to use sick leave for pregnancy-related absences,[437] the court considered the fall-back argument that the employer's Personnel Director had honestly, even if mistakenly, interpreted the employer's policies that way.[438] The court found under Tenth Circuit precedent the employees could not prove discrimination just by showing the employer's belief was mistaken but could seek to rebut an honest belief defense by "com[ing] forward with evidence from which a jury could conclude that the [employer's] behavior was the result of something more than a mistake—namely, discriminatory animus."[439] The court then considered that the employees' evidence showed that when the same Personnel Director had in the past required other police officers to use sick leave for pregnancy,[440] the employer reversed that decision and restored the

434. *See supra* pp. 548–51 (discussing Associate Dean Sperino's article).

435. *See id.* (discussing Associate Dean Sperino's article); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

436. *See* 531 F.3d 1210 (10th Cir. 2008).

437. *See id.* at 1215–17.

438. *See id.* at 1217–18.

439. *See id.* at 1217 (citations omitted).

440. *Id.*

sick leave those officers used.[441] The court found that evidence was sufficient to allow "a reasonable jury [to] disbelieve [employer's] claim that [the Personnel Director's] treatment of [employees] was merely a mistake."[442] The court later added that "the evidence is sufficient to allow, if not compel, a reasonable fact-finder to conclude that [the Personnel Director] did not honestly err but instead intentionally singled out pregnant women for differential treatment."[443]

Four years after *Orr*, in *Brown v. YRC, Inc.*,[444] the Tenth Circuit upheld a jury's finding of pregnancy discrimination (and reversed the trial court's granting employer judgment as a matter of law) based largely on evidence that the employer's stated reason for terminating the employee was not credible.[445] And unlike in *Orr*, the Tenth Circuit in *Brown* based that finding exclusively on the employer's treatment of that employee without referencing the employer's negative treatment of similar employees in the past or past acknowledgment of an error in interpretation of employer policies.[446] The employee was an HR Specialist at the employer's headquarters who, when the employer knew she intended to take maternity leave, was terminated when six months pregnant[447] for the stated reasons of performance problems as she was being trained to take over HR responsibilities for the Phoenix region.[448] The court found the employee's evidence—including that she had received fewer hours of training than HR specialists had in the past, that her supervisor's superior had told her she would not be working during the employer's busy season, that a colleague had nominated her for a performance award, and that she was complimented by her superiors multiple times (including within days of her termination)—could have led the jury as factfinder to "rationally accord more credence to . . . positive assessments of [the employee's] performance than to the negative, subjective assessments provided by [her supervisor and her two co-worker/trainers]."[449] The Tenth Circuit therefore found that a "reasonable jury could conclude [the employee] met her burden of demonstrating [her

441. *Id.*
442. *Id.* at 1218.
443. *Id.*
444. 490 F. App'x 952 (10th Cir. 2012).
445. *Id.* at 960.
446. *Id.* at 957–60; *see Orr*, 531 F.3d at 1217.
447. *Brown*, 490 F. App'x at 954–56.
448. *Id.* at 955–56.
449. *Id.* at 959–60.

employer's] proffered reason for terminating her employment was a pretext for pregnancy discrimination."[450]

In two 2017 decisions by panels of the U.S. Court of Appeals for the Sixth Circuit a majority rejected an employer's motion for summary judgment based on the honest belief defense, with a different circuit judge dissenting in each case. First, in *Lee v. Cleveland Clinic Foundation*,[451] the majority held that the employer's suspension of a registered nurse, who claimed the discipline was both discriminatory and retaliatory, had to be considered by a jury.[452] The court based this decision on evidence that the employee had offered showing he had received harsher discipline than coworkers who committed similar alleged misconduct, and because deciding if the employer's reasons were honestly held or were a pretext for unlawful motive required credibility determinations that should be made by a factfinder.[453] Judge David McKeague in dissent argued that because the nurse admitted patient interactions underlying the suspension had occurred, although the nurse claimed these were mischaracterized, the employer's reasons for the suspension should not be reconsidered.[454]

Two months later the Sixth Circuit in *Adamov v. U.S. Bank National Association* considered the employer bank's termination of a district manager.[455] The manager claimed his termination occurred in retaliation for his complaining about national origin discrimination and the bank claimed it was because he had made a $10,000 bank loan to a college friend.[456] The court majority found that the employee had presented enough evidence for a reasonable jury to find that the loan might not have been the true reason for his termination and retaliation might have been the motive.[457] That evidence consisted of the employee's loan being consistent with the employer's rules and past practices, that the employer had subjected the employee to tighter scrutiny after he complained about discrimination, and that the employer's decision to terminate the employee was close in time to

450. *Id.* at 960.
451. 676 F. App'x 488 (6th Cir. 2017).
452. *Id.* at 498–99.
453. *Id.* at 498–500.
454. *Id.* at 508–09 (McKeague, J., dissenting).
455. 681 F. App'x 473 (6th Cir. 2017).
456. *Id.* at 479–80.
457. *Id.*

his complaining about discrimination.[458] Dissenting, Judge John M. Rogers pointed out that the corporate security department had begun investigating employee's loan to a friend prior to his complaint[459] and thus felt the employer had an honest belief justifying terminating the employee for a "personal loan to a customer" when it had "policies demonstrating that U.S. Bank was legitimately concerned about the conflicts of interest caused by personal loans to and from customers."[460]

The Sixth Circuit and Tenth Circuit decisions discussed in the preceding four paragraphs show that when the employer's challenged reason involves issues of fact, because for example there are facts that indicate the reason might be pretextual[461] or the issues require credibility determinations[462] or both,[463] that federal courts of appeal will hold that the issues should be decided by a jury as fact finder. These cases also demonstrate that federal appellate courts in appropriate cases do what scholars have urged and have a jury review an employer's asserted honest reason for adverse action against an employee to decide if it was a pretext for an unlawful motive.[464]

C. *Possible Standards for the Honest Belief Rule*

Jury review of claimed honest employer beliefs should be made more probable by specific standards that federal appeals courts have adopted for pretext issues and applied in honest belief cases. The Sixth Circuit, for example, held in 2019 that "an employee can still overcome the 'honest belief rule' by pointing to evidence that 'the employer failed to make a *reasonably informed* and considered decision before taking its adverse employment action.'"[465] As was mentioned earlier in discussing honest belief in employment discrimination cases,[466] the Sixth Circuit has also adopted the rule that to be found "honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the

458. *Id.* at 478–79.
459. *Id.* at 481–82 (Rogers, J., dissenting).
460. *Id.* at 483.
461. *See* Orr v. City of Albuquerque, 531 F.3d 1210, 1217–18 (10th Cir. 2008).
462. *See* Brown v. YRC Inc., 490 F. App'x 952, 959 (10th Cir. 2012).
463. *See* Lee v. Cleveland Clinic Found., 676 F. App'x 488, 498–500 (6th Cir. 2017).
464. *See supra* note 126 and accompanying text.
465. Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 322–23 (6th Cir. 2019) (quoting Smith v. Chrysler Corp., 155 F.3d 799, 807–08 (6th Cir. 1998)).
466. *See supra* Part II.B.

time the decision was made."[467] However, the Sixth Circuit also has a rule for honest belief cases that "the [employee] must offer some evidence of 'an error on the part of the employer that is too obvious to be unintentional.'"[468] Given that Sixth Circuit rule, it is good that the Sixth Circuit also recognizes the cat's paw rule in employment discrimination and other employment cases and should apply that rule to obvious mistakes made by an employer's agents.[469]

Like the Sixth Circuit, the U.S. Court of Appeals for the Tenth Circuit requires the employer's reason for terminating an employee must have been believed "in good faith at the time of the discharge, even if they later prove to be untrue."[470] In addition, both that court and the U.S. Court of Appeals for the Seventh Circuit have described an employer's pretextual reason as one in which the employee has "demonstrate[ed] such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions . . . that a reasonable factfinder could rationally find [the reasons] unworthy of credence and hence infer that the employer did not act for the asserted nondiscriminatory reasons."[471]

The U.S. Court of Appeals for the District of Columbia Circuit has gone further by adopting a rule that if an employer's proffered reason is not both honest *and* reasonable then a reasonable jury could find, and should be permitted to decide, whether that reason was a pretext for an unlawful motive.[472] In its 2016 *DeJesus v. WP Co. LLC* decision, the D.C. Circuit reaffirmed that it would not "evaluate the reasonableness of the employer's

467. *Chrysler Corp.*, 155 F.3d at 807.

468. Loyd v. Saint Joseph Mercy Oakland, 766 F.3d 580, 591 (6th Cir. 2014) (quoting Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 286 (6th Cir. 2012)).

469. *See, e.g.*, Marshall v. Rawlings Co., 854 F.3d 368, 377 (6th Cir. 2017) (quoting EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 484 (10th Cir. 2006)). See also the discussion of cat's paw theory on p. 556.

470. *See* Young v. Dillon Cos., 468 F.3d 1243, 1250 (10th Cir. 2006).

471. *See* Brown v. YRC, Inc., 490 F. App'x 952, 958 (10th Cir. 2012); *see also Young*, 468 F.3d at 1250; de Lima Silva v. Dep't of Corr., 917 F.3d 546, 561 (7th Cir. 2019) (stating that the plaintiff must "'identify such weaknesses, implausibilities, inconsistencies, or contradictions' in defendants' stated reasons for their allegedly discriminatory actions 'that a reasonable person could find [it] unworthy of credence'") (quoting Coleman v. Donahoe, 667 F.3d 835, 852–53 (7th Cir. 2012) (in turn quoting Boumehdi v. Plastag Holdings, LLC, 489 F.3d 781, 792 (7th Cir. 2007))).

472. *See, e.g.*, DeJesus v. WP Co., 841 F.3d 527, 532–34 (D.C. Cir. 2016) (citing and quoting Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 496 (D.C. Cir. 2008)).

business decisions" including "whether it made financial sense to terminate an employee who generated substantial revenue."[473] However, the court also held that it is the jury as "factfinder [that] is tasked with evaluating the reasonableness of the decisionmaker's *belief* because honesty and reasonableness are linked: a belief may be so unreasonable that a factfinder could suspect it was not honestly held."[474] The court further declared that when a factfinder's disbelief of an employer's reason "'is accompanied by a suspicion of mendacity,' . . . the likelihood of intentional discrimination is increased, permitting the factfinder to infer discrimination more readily."[475] Based on the evidence in the record, the D.C. Circuit concluded that "a reasonable jury could suspect mendacity on the part of [the employer's decisionmaker]"[476] and reversed the trial court's grant of summary judgment for the employer.[477]

The D.C. Circuit might not have, at least in a published decision, ever expressly stated in a case involving an anti-discrimination statute that an employer must have investigated its reason for terminating an employee. The court has, however, strongly implied that for an employer's reason to serve as a defense in an employment discrimination case, that reason must be investigated. First, as described in more detail below, the D.C. Circuit has rejected summary judgment in discrimination cases for employers who did incomplete or poor investigations. Second, in its 2019 decision in *Cruz v. McAleenan*,[478] the D.C. Circuit declared in ruling on the employee's argument that it should have been allowed more discovery prior to summary judgment that "[t]his [c]ourt has never held that the existence of an independent investigation is dispositive on the question of pretext."[479] The court then discussed its *Brady v. Office of Sargeant of Arms* decision in which the court had held, even though there was an independent investigation, that the employee could attempt to discredit the employer's lawful reason "with evidence that the employer treated other employees lacking protected characteristics more favorably in the same factual circumstances."[480] The

473. *Id.* at 534.

474. *Id.*

475. *Id.* at 535 (quoting Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998)).

476. *Id.* at 535–36.

477. *Id.* at 537.

478. 931 F.3d 1186 (D.C. Cir. 2019).

479. *See id.* at 1193.

480. *See id.* (quoting Brady v. Off. of Sergeant of Arms, 520 F.3d 490, 495 (D.C. Cir.

Cruz court probably would not have said all this and reversed the trial court's grant of summary judgment for the employer on the question of whether the employer's given reason for the reassigning employee was pretextual, had it believed no investigation of any kind into employer's reason would nonetheless permit summary judgment on whether the employer's reason was honest and reasonable.[481]

As noted in the preceding paragraph, the D.C. Circuit has also held—in an opinion joined by future U.S. Supreme Court Justice Brett M. Kavanaugh—that the extent and quality of the employer's investigation matters:

> An employer's investigation that is so unsystematic and incomplete that a factfinder could conclude that the employer sought, not to discover the truth, but to cover up its own discrimination can also permit a factfinder to find pretext. . . Our purpose in smoking out pretextual employer rationales is to discern whether prohibited discrimination may be a real reason for the challenged action. A false 'mistake' or obvious omission can itself bespeak discrimination.[482]

In this 2015 *Burley v. National Passenger Rail Corp.* decision the court ultimately determined that the employee had failed to prove mistakes in the employer's investigative findings that were sufficient to support a finding that the employer's reason for terminating the train engineer—that he had passed a stop and caused a safety derailment of his train[483]—was a pretext for racial discrimination.[484]

By contrast, in the D.C. Circuit's 2006 *Mastro v. Potomac Electric Power Co.* decision relied on in *Burley*, the D.C. Circuit found the employer's faulty investigation of its reason for firing the employee warranted having pretext be decided by a jury.[485] The court considered the employee's claim of reverse discrimination for his firing due to his approval of vacation leave for a jailed subordinate and allegedly lying when he denied

2008)).

481. *See id.* at 1194–95.

482. *See* Burley v. Nat'l Passenger Rail Corp., 801 F.3d 290, 319 (D.C. Cir. 2015) (citing Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 855 (D.C. Cir. 2006)).

483. *Id.* at 293.

484. *Id.* at 299–300.

485. *See Mastro*, 447 F.3d at 857; *Burley*, 801 F.3d at 319.

knowing this employee was in jail.[486] As the court found, "[t]he date [the employee] learned [the subordinate] was actually in jail is the crux of the dispute."[487] This is the kind of specific factual dispute in which a *Burnup & Sims* approach would work well, but because this was a discrimination case, the employee had to prove not only that the employer's reason was false, but that it was a pretext for reverse discrimination.[488]

The D.C. Circuit concluded that he could,[489] although he was the only witness who claimed he did not know his subordinate was in jail when he approved his vacation leave, and multiple witnesses contradicted that testimony.[490] The court found the employee "offered 'ample evidence by which a reasonable jury could conclude' that [the employer's] stated reasons for terminating him were pretextual and that discrimination motivated its decision."[491] That evidence consisted entirely of deficiencies the court found in the investigation by a Senior Employee Relations Investigator.[492]

The first was that the investigator interviewed several witnesses but not the employee, who related his version of facts at a later meeting "when he was on the defensive," and the D.C. Circuit found that the investigator's speaking to everyone, "except the individual at the center of the controversy—and the only Caucasian—might well strike a jury as odd."[493] Second, the court decided that the investigator failed to conduct "[t]he careful, systematic assessments of credibility one would expect in an inquiry on which an employee's reputation and livelihood depended," such as that the employee claimed a key witness had often been insubordinate to him which a jury could find relevant to that witness's credibility.[494] The court also criticized the investigator's failure to ask any of the witnesses he did interview whether they were friends of the jailed subordinate.[495] Based on these findings, the court concluded that the investigation was one-sided[496]

486. *See Mastro,* 447 F.3d at 847–49, 853–54.
487. *See id.* at 847.
488. *Id.* at 850.
489. *Id.* at 855.
490. *Id.* at 848–49.
491. *Id.* at 855.
492. *Id.* at 848, 855.
493. *Id.* at 855.
494. *Id.*
495. *Id.* at 856.
496. *Id.*

and "not just flawed but inexplicably unfair."[497] The standard in that quotation for questioning an investigation sounds demanding but if the problems the D.C. Circuit identified with the employer's investigation of the employee's lying,[498] or comparable issues with an employer's reason for taking adverse action against an employee were sufficient for an employee to avoid summary judgment and obtain a jury trial, there would be more jury trials of employee claims in discrimination and other cases.[499]

If the D.C. Circuit's decision in *Mastro* and other still-valid precedents were followed by other federal courts, then an employer's reason for termination or other adverse action against an employee would have to be found reasonable as well as honest, and an employer at a minimum would have to conduct an investigation in which both sides of the reason were investigated and the credibility of each witness who disagreed with the employee's side of the reason was assessed "carefully and systematically."[500]

The D.C. Circuit requirements are sensible ones for a court to employ to decide whether an employer's investigation of its reason was fair enough that a jury trial is unnecessary and summary judgment can and should be granted for the employer. As was discussed earlier, state court decisions have also suggested some more requirements that should be adopted to ensure fairness.[501] Like the D.C. Circuit, the California Supreme Court in *Cotran* held that in an employment contracts case, the employer's proffered

497. *Id.* at 855.

498. *See id.*

499. The U.S. District Court for the District of Columbia also found the "inexplicably unfair" standard to be met in *Wang v. Washington Metropolitan Area Transit Authority*. 206 F. Supp. 3d 46, 69–73 (D.D.C. 2016) (holding a jury could find pretext in an employer's process for terminating an plaintiff, in part because plaintiff was required to meet based on a "corrective plan" created by and under which plaintiff was evaluated by a superior who had already expressed a desire to terminate the plaintiff). *See also* Kurtiev v. Shell, No. 15-cv-1839, 2020 WL 2838523, at *13 (D.D.C. June 1, 2020) (distinguishing *Mastro* on the grounds that employer's investigator did interview the terminated plaintiff and did make "credibility assessments" of other witnesses). In *Mastro*, the D.C. Circuit acknowledged that the investigator Mr. Duarte (along with one of Mr. Mastro's superiors) did meet with Mr. Mastro, and also the D.C. Circuit never said that Mr. Duarte did not make any credibility determinations, as surely he did, but that he did not make "careful, systematic assessments of credibility." *See Mastro*, 447 F.3d at 848, 855–56. Thus, the *Kurtiev* court's bases for distinguishing *Mastro* are at best questionable.

500. *See Mastro*, 447 F.3d at 855–57.

501. *See generally* discussio*n supra* Part II.

reason must be reasonable.[502] More specifically, the court said that the employer's reasons for terminating an employee must be fair, honest and not "unrelated to business needs or goals, or pretextual."[503] The California Supreme Court agreed with federal courts that the jury should not revisit the employer's actual findings of fact, but it established a rule that it was the jury that could and should consider whether the employer's fact-finding was reasonable.[504] The court also provided more specifics on the standard for reasonable fact-finding by stating it should be "supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond."[505] These conditions are also similar to the requirements of the D.C. Circuit, but somewhat more demanding.[506] The key difference is that the California court ruled that the issue of reasonableness of the fact-finding should be decided by a jury, and the requirements for reasonableness included in instructions to the jury.[507]

Other state courts have also given juries a role in assessing honest belief defenses. The highest court of Maryland in *Towson University v. Conte* held that while juries should not revisit an employer's actual fact-finding, the jury could and should "review the [employer's] *objective* motivation, i.e., whether the employer acted in objective good faith and in accordance with a reasonable employer under similar circumstances" when discharging an employee for just cause.[508]

As the federal and state decisions discussed in this Subpart demonstrate, it is widely understood that some version of a reasonableness requirement should be applied to the honest belief defense. Any employer in any situation could claim its reason for terminating or disciplining an employee was honest. The choice for courts is not between merely accepting the employer's assertion at face value versus allowing a wholesale re-investigation and reassessment of the facts surrounding the employer's decision. Instead, as many courts have done, the employer's asserted reasons

502. Cotran v. Rollins Hudig Hall Int'l, Inc., 948 P.2d 412, 422–23 (Cal. 1998).

503. *Id.* at 422.

504. *See id.* at 422–23.

505. *Id.*

506. *Compare id.*, *with* Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 855–57 (D.C. Cir. 2006).

507. *See Cotran*, 948 P.2d at 421.

508. Towson Univ. v. Conte, 862 A.2d 941, 950 (Md. 2004).

should be evaluated for their substantive plausibility.[509] And, as importantly, the process through which the employer found facts and reached its decision be considered and assessed for its reasonableness.[510] Employers should not be rewarded with summary judgment victories for taking actions against employees for reasons that are not only factually mistaken but also not based on reasonable fact-finding. Legal rules should encourage employers to avoid such unreasonableness and should also prevent those employers who do want to violate the rights of one or more of their employees from seizing upon or simply asserting some alleged (or made up) problem with an employee's performance to terminate or punish the employee for protected activity or a protected characteristic. Requiring and applying reasonableness safeguards is a prudent way for courts to balance the employer's legitimate interests in managing its operation and workforce with appropriate respect for and deference to the statutory protections for employees enacted by the legislative and executive branches of government.

V. CONCLUSION

The honest belief defense for employers to employee claims has been applied by federal and state courts throughout employment law.[511] This defense, unless accompanied by appropriate rules and safeguards, has the potential to swallow all protections for employee activities or characteristics enacted by Congress and state legislatures or provided by state common law. To prevent that result, this Article makes multiple proposals.

First, that under the federal FMLA's interference provision,[512] the Supreme Court's rule from *Burnup & Sims*,[513] under which the employer's mistaken but honest reason is not a defense when the employee is exercising a right, should be applied at least to cases in which the employer's reason is based on one or more mistakes of law or fact that are specific and verifiable as true or false. Second, in employment cases courts should consider carefully, prior to upholding an employer's decision based on deferral to business judgment, whether that decision truly involved judgment deserving deference when the employer or its agent based that decision on a mistaken reason that the employer could have verified as true or false.

509. *See, e.g.*, *Cotran*, 948 P.2d at 422.
510. *See, e.g.*, *id.*
511. *See* discussion *supra* Parts II, III.
512. *See* NLRB v. Burnup & Sims, 29 U.S.C. § 2615(a)(1).
513. *See* discussion *supra* Part IV.A.

Third, that in employment cases when a court is considering whether the employer's claimed reason is pretext for an unlawful reason, the court should consider whether an employer's honest but mistaken basis for its action was reasonable and whether the employer's factfinding process was also reasonable, including whether the facts were investigated and the employee was given an opportunity to share their version of the relevant facts. Fourth and finally, because the honest belief defense by definition involves the credibility of the employer, its agents, or both, and in many cases involves deciding whether specific facts are true, a greater number of honest belief cases should be decided by juries instead of being decided or upheld on summary judgment.