Legitimate Reasons for Firing: Must They Honestly be Reasonable?

Rebecca Michaels
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INTRODUCTION

Did Titlemen's management honestly believe that? Mary is a forty-five year old woman who is disabled as a result of an accident she suffered over twenty years ago. She has been employed at the Titlemen company for over fifteen years. She is a very diligent worker and believes that she is well-liked by both fellow employees and upper management. Mary has worked as a saleswoman for the entire time she has been employed at Titlemen and is responsible for selling Titlemen's goods to private companies who in turn sell to consumers. The salespeople are set up in teams of two, therefore Mary works closely with one individual.

Mary's job is a very good job and her hours are conducive to the kind of lifestyle she would like to lead. She works from 8:00 a.m. to 5:00 p.m. The only caveat is that Titlemen is inflexible in terms of changing hours or employees showing up late to work. In recent months, Mary's supervisors have expressed concern that Mary has been arriving to work late and leaving early and that, as a result, her productivity has suffered.

Before taking action, company managers conducted an investigation. Mary's immediate supervisor reviewed her time sheets and interviewed other employees about the matter, but she never confronted Mary with the allegations nor did she interview Mary's teammate. Eventually the company terminated Mary. Mary alleges that she was not late for work and did not repeatedly leave early. Eventually, Mary came to believe that the alleged lateness and leaving early were not the real reasons she was fired. Instead, it perhaps was her age, or her gender, or maybe her disability.

This Note analyzes the split among the circuit courts regarding whether an employer's belief in its legitimate nondiscriminatory reason for firing an employee must simply be honest or must also be reasonable. Determination of the issue is crucial for both employers and employees so that they can better understand what types of

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evidence they will need to offer in a discrimination suit. This
determination is particularly crucial for employers to determine how
much judicial scrutiny their practices and decisions must endure. Part
I of this Note introduces the discrimination laws relevant to this area:
Title VII of the Civil Rights Act of 1964, the Americans with
Part I also discusses the requirements for a plaintiff to make a case of
discrimination and discusses the use of pretext and the honest belief
rule. Part II discusses the split among circuits regarding whether an
employer’s belief in its legitimate nondiscriminatory reason for the
firing decision must simply be honestly held or must also be
objectively reasonable. Part III of this Note advocates adoption of the
honest belief rule without a requirement of reasonableness and
discusses the policy rationales for this proposal.

I. THE DISCRIMINATION LAWS AND THEIR APPLICATION

Congressional regulation of discrimination in employment is a
relatively new phenomenon and has modified the employee-employer
relationship, which traditionally has been held to be at will.1 Under
the employment at will regime, the employer and employee both have
equal rights to terminate the employment relationship for any reason.2
This regime fell into disfavor with the onset of the civil rights
movements of the 1960s.3 Though the at will regime still exists, it is
limited by congressional anti-discrimination legislation.4 Congress

1. See Stephen F. Befort, Labor and Employment Law at the Millennium: A
Historical Review and Critical Assessment, 43 B.C. L. Rev. 351, 354 (2002). Generally,
before The Civil Rights Act of 1964 was enacted, if employees were not protected by
unions or some form of labor law, they held their jobs at will. They did not have a
contract for employment and they could be terminated for any reason the employer
deemed necessary. By the same token, employees could end the employment
relationship for any reason they felt necessary. Thus, both the employer and
employee were in equal positions. This view is premised on the economic view that
predominated, namely, freedom of contract under a market rule regime. Id. at 356-57.
2. Id. at 356.

The importance of the law against employment discrimination remains as
strong as ever. America is called the land of opportunity, but for the first
350 years of our history we denied equality of opportunity to most of our
citizens. . . . Then a sea change occurred. . . . America began to fulfill its
promise.

The fulfillment began in 1957 when Rosa Parks refused to move to the
back of a bus one afternoon in Montgomery, Alabama.

Id. at xi.
4. The 1960s were not the first time that there was an attempt to eradicate
discrimination. The Reconstruction era civil rights statutes were enacted in the
nineteenth century to prohibit many types of discrimination, but they generally were
not utilized in employment until after the civil rights movements of the twentieth
Cooley Modjeska, Employment Discrimination Law § 1.01 (3d. ed. 2002); see also
began to regulate employment relationships in the 1960s with the passage of the Civil Rights Act of 1964, specifically, Title VII ("Title VII"). Congress then expanded the protection afforded employees with the passage of the Age Discrimination in Employment Act ("ADEA"), adopted in 1967, and the Americans with Disabilities Act ("ADA"), which became law in 1990. Individual states also regulate discrimination in different forms and in some instances afford more protection to individuals than do the federal statutes.

While the passage of the discrimination laws has marked great achievement and promise, it is not clear that employers and the Court have favorably received the laws. There has been some effort to


7. 42 U.S.C. §§ 12101-12213 (2000). Congress has also adopted specific statutes with the purpose of mandating that employers take certain specific action in employment such as offering temporary leave and adherence to safety standards. See The Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (2000) (requiring employers to comply with occupational health and safety standards); The Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000) (requiring employers to allow employees to take up to twelve weeks of unpaid leave to care for a child or a family member with a serious health condition). See Befort, supra note 1, for a discussion of employment discrimination statutes.


For example, some states provide protection against discrimination on the basis of sexual orientation, pregnancy or marital status. Id; see, e.g., Cal. Fed. Sav. and Loan Ass’n v. Guerra, 479 U.S. 272, 290-91 (1987) (complying with both the federal law—in this case, Title VII—and California state law is not an impossibility, thus the state law is valid). The Court held in Guerra that although Title VII did not allow for preferential treatment for pregnant women the California state law that allowed women to be reinstated after pregnancy disability leave could be applied in addition to Title VII. The state law, therefore, was constitutional. Id. Of course, the law subjected California to suits by non-pregnant individuals who required disability leave, but were not afforded automatic reinstatement. Thus, the reasonable solution would be that if protections are afforded to one, they should be given to all. New York has recently enacted legislation to protect the civil liberties of homosexuals. See Shaila K. Dewan, Pataki Signs Law Protecting Rights of Gays, N.Y. Times, Dec. 18, 2002, at A1.

9. Harold S. Lewis, Jr. & Elizabeth J. Norman, Employment Discrimination Law and Practice § 1.1 (2001) ("The predominant theme in the Supreme Court’s jurisprudence has been the impulse to free employers from the dread hand of government regulation. Thus more than half the judicial life of this landmark legislation has been devoted primarily to restriction, retrenchment, and restoration of traditional management prerogatives.” (internal citation omitted)); see also Ronald Turner, Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities, 46 Ala. L. Rev. 375, 479-81 (1995) (noting that Title VII initially had a significant impact to rid society of egregious discrimination, but in reality probably does little
modify this result, particularly with the passage of the Civil Rights Act of 1991; however, the Act’s success is not clear.\textsuperscript{10} The discrimination laws do not confer affirmative rights on employees. They allow an employee, as a member of a particular protected group, the benefit of not being discriminated against based on membership in that group.\textsuperscript{11} Regardless of the opinion on their success, the discrimination laws are still a predominant force in American employment and guide relations among employers and employees.\textsuperscript{12} The next section highlights the important elements of the discrimination laws: Title VII, the ADEA and the ADA.


\textsuperscript{11} According to one commentator, \textit{[T]hese statutes provide protection to individuals not as workers, but as members of a particular group or on the basis of a specified protected trait . . . . [E]ven as to these protected classifications, employers are prohibited only from acting in a discriminatory manner; they are not required to act on the basis of some more expansive notion of fairness or cause.}

\textsuperscript{12} For a discussion, see Lewis & Norman, \textit{supra} note 9, at § 1.1. Some of the criticism stems from Congress’s failure to extend the laws to small employers, which seemingly allows such small employers to discriminate without consequences, at least on the federal level. However, race and ancestry discrimination are also prohibited by 42 U.S.C. § 1981, which has no minimum employee requirement for the employer to be subject to the statute.\textit{Id.}
A. Legislation

1. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964\(^\text{13}\) applies to employers who employ more than fifteen individuals.\(^\text{14}\) It prohibits an employer from making an employment decision on the basis of an individual's race, color, religion, sex\(^\text{15}\) or national origin.\(^\text{16}\) Title VII is very broad and prohibits discrimination in any aspect of employment.\(^\text{17}\) A protected individual can sue for alleged discrimination under Title VII with respect to hiring and firing decisions, promotions, job assignments, shift assignments and other areas of employment.\(^\text{18}\) Although the

\(\text{\textsuperscript{13}}\) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


\(\text{\textsuperscript{14}}\) Empl. Prac. Guide (CCH), ¶ 207 (2002) [hereinafter CCH]. Note that there are strict filing requirements to institute a Title VII action. An individual must file with the EEOC before bringing suit in district court. See, e.g., Ruben H. Arredondo, Different Strokes for Different Folks: Balancing the Treatment of Employers and Employees in Employment Discrimination Cases in Courts Within the Tenth Circuit Court of Appeals, 16 BYU J. Pub. L. 261, 262 (2002). The Supreme Court has held that such filing is not a jurisdictional prerequisite to sue in court, but is rather more akin to a statute of limitations and as such may be subject to estoppel and equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).


\(\text{\textsuperscript{16}}\) See Gold, supra note 5, at 1. Interestingly, “national origin” does not refer to one’s citizenship, but instead refers to the country that one or one’s forebears came from. Id.

Thus, suppose Regina is not an American citizen, but she has permission to work in this country. An employer would violate Title VII by refusing to hire her because she or her ancestors were born in Mexico (her national origin), but would not violate Title VII by refusing to hire her because she is not an American citizen. Id.

\(\text{\textsuperscript{17}}\) See Lewis & Norman, supra note 9, at § 2.1. Title VII applies to all “‘terms, conditions or privileges’ of employment, a phrase the federal courts have construed quite broadly to embrace any benefit actually conferred or burden actually imposed in the workplace, whether or not provided for by contract.” Id. (citations omitted).

\(\text{\textsuperscript{18}}\) Id.
law’s reach is expansive,19 it was primarily enacted to protect African Americans from discrimination.20

The Civil Rights Act of 1991 amended Title VII to change the remedies for discrimination and codify the theory of disparate impact.21 Notably, an employer may violate Title VII without intent, provided a practice has a disproportionate impact on a protected group.22 For instance, if an employer creates a hiring test and only hires those who pass, that employer may be discriminating unknowingly against certain protected groups, who consistently fail the test at a higher rate than non-minority groups.23 Thus, the employer could be liable for discrimination under Title VII.24 Disparate impact theory also applies to groups protected under the ADA and most likely under the ADEA.25

19. In theory, every individual is protected under Title VII because in some aspect each person is a member of a protected group whether it just be the male-female distinction under the term “sex.” Nevertheless, it might be hard, but not impossible, for a male to make a case of sex discrimination because there is no history of males being a disadvantaged group. Also, not every group is protected under Title VII. For instance, Title VII does not prohibit discrimination based on sexual orientation, though the term “sex” has been held to include sexual harassment and pregnancy discrimination. See, e.g., Thomas R. Haggard, Understanding Employment Discrimination 127 (2001) (“[D]iscrimination on the basis of sexual preference or orientation remains beyond the scope of Title VII.... [A]mendments to add sexual orientation to Title VII’s list of protected classes have consistently been rejected [by Congress].”).


22. Disparate impact is present when

a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. . .


23. CCH, supra note 14, ¶ 253 (“Preemployment testing and educational standards often create employment problems by having a disparate impact on racial minorities who statistically . . . fail the tests at a higher rate than non-minorities.”).

24. See supra notes 21-23 for a definition of disparate impact.

25. Keith R. Fentonmiller, The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims, 47 Am. U. L. Rev. 1071, 1081-83 (1998) (noting that Congress has not provided for disparate impact in ADEA claims, but many courts have applied the theory to cases under the ADEA, although some courts refuse to do so); see also CCH, supra note 14, ¶ 253 (noting that disparate impact applies to claims under the ADA, but it is unsettled whether it applies to claims under the ADEA).
2. Age Discrimination in Employment Act

The ADEA makes it unlawful for an employer to use age as a basis for any employment decision.26 Unlike Title VII, the ADEA only protects those individuals who are at least forty years old.27 Similarly to Title VII, the ADEA does not require any preferential treatment towards those over forty, but merely prohibits discrimination against those individuals.28 In creating the law Congress "was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."29 The ADEA applies to private employers with twenty or more employees and to most public employers, though not state employers.30 An individual

26. The statute provides,
   It shall be unlawful for an employer –
   (1) to fail or refuse to hire or to discharge any individual or otherwise
discriminate against any individual with respect to his compensation, terms,
conditions, or privileges of employment, because of such individual's age;
(2) to limit, segregate, or classify his employees in any way which would
deprive or tend to deprive any individual of employment opportunities or
otherwise adversely affect his status as an employee, because of such
individual's age; or
(3) to reduce the wage rate of any employee in order to comply with this chapter.

27. An employer does not violate federal law by refusing to hire someone under
forty because they are too young, 29 U.S.C. § 631(a), though they might be in
violation of a state or local law. In New York, those eighteen or older are protected.
N.Y. Exec. Law § 296 (3-a)(a) (McKinney 2001). Note that there are certain
exceptions to the ADEA, including minimum ages of eligibility for retirement
benefits and seniority systems. 29 U.S.C. §§ 623 (k), (l). There are also mandatory
28. See Lewis & Norman, supra note 9, § 7.1. See also supra note 7 for examples
where Congress has mandated action.

29. Haggard, supra note 19, at 221 (quoting Hazen Paper Co. v. Biggens, 507 U.S.
2213, 2214 ("Hundreds of thousands, not yet old, not yet voluntarily retired, find
themselves jobless because of arbitrary age discrimination." (citation omitted)).
However, it has been argued that increasing age is viewed as less of a social stigma
than the membership in a group protected under Title VII. See Lewis & Norman,
supra note 9, § 7.1. This is of course because of the very nature of the characteristic.
Everyone who survives past forty will become a member of the group protected,
while membership in the protected groups under Title VII is defined at birth and the
characteristics of membership are immutable. Additionally, it is generally accepted
that to some degree performance declines with advanced age, but such a statement
could not be made with respect to Title VII’s protected groups. Id.

30. CCH, supra note 14, § 211. The twenty employee requirement is more
stringent than the fifteen person requirement under Title VII and the ADA. The
Supreme Court has held that the ADEA does not apply to state employees or state
government positions, though it does apply to county and local employees. Kimel v.
Fla. Bd. of Regents, 528 U.S. 62, 66-67 (2000); see also Evelyn Corwin McCafferty,
Comment, Age Discrimination and Sovereign Immunity: Does Kimel Signal the End
of the Line for Alabama’s State Employees?, 52 Ala. L. Rev. 1057 (2001). However,
state employees subject to age discrimination can seek redress under state
employment discrimination statutes. Kimel, 528 U.S. at 91.
alleging discrimination under the ADEA need not show that a non-protected individual, i.e., someone under forty, received the job or promotion, for instance, but simply must create an inference that the employer relied on age in its decision-making process.\textsuperscript{31} The Supreme Court, however, has said that the greater the disparity in age between the plaintiff and the individual chosen, the greater likelihood of drawing an inference of discriminatory animus.\textsuperscript{32}

3. Americans with Disabilities Act

The Americans with Disabilities Act\textsuperscript{33} prohibits an employer from using an employee's disability as the basis for an employment decision.\textsuperscript{34} The ADA requires an employer to provide reasonable accommodations\textsuperscript{35} for those with disabilities unless such accommodation would result in undue hardship to the employer.\textsuperscript{36} The ADA covers those private employers with fifteen or more employees and applies to city and county governments, but not state

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32. Id. at 313 ("Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.").
33. 42 U.S.C. § 12112 (2000). The ADA provides that
No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
Id. § 12112(a).
The term discriminate is defined in the act to include
(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . . .
Id. § 12112(b)(5)(A), (B).
34. Id. § 12112(b).
35. Reasonable accommodations include modifications to the job application process, work environment or those modifications which would allow a disabled worker to enjoy the same benefits that other non-disabled workers enjoy. Id. § 12111(9). Even with modification, the employee must be able to perform the essential functions of the job. Id. § 12111(9); see also Melody Kubo, Extraterritorial Application of the Americans with Disabilities Act, 2 Asian-Pac. L. & Pol'y J. 259, 264 (2001) (discussing generally the provision of Title I of the ADA, including reasonable accommodations).
36. If a reasonable accommodation imposes an undue hardship on the employer, the employer will not be required to make the accommodation. An undue hardship is determined based on the facts of the case, cost, effects on other employees and effects on the business. 42 U.S.C. § 12111(10)(B).
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or federal governments. One commentator boasts that "[s]ince its enactment, the ADA has provided a powerful means to increase workplace equality, promote social integration, and enhance the fundamental dignity of people with disabilities." The law protects disabled, but nonetheless qualified, individuals who can perform the essential functions of the job with or without reasonable accommodation. One is considered disabled under the law if he or she has a physical or mental impairment that substantially limits a major life activity, has a record of impairment, or is regarded as impaired. While the law marked a great advancement for disabled individuals, ADA case law has proved disappointing. Studies show that in over ninety percent of suits brought by disabled individuals, the defendant prevails.

B. The Supreme Court Treatment

The Supreme Court has developed a framework for burdens of proof in a discrimination case premised on circumstantial evidence.

37. See Gold, supra note 3, at 55. The ADA does not apply to the federal government because the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (1994), applies to the federal government and prohibits discrimination by the federal government, Executive Agency or the United States Postal Service. It also requires the above to take affirmative action to hire disabled individuals. Id. § 794. Similar to the Supreme Court's decision concerning states being subject to the ADEA, the Court has held that the ADA does not apply to the states based on federalism concerns. Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001).

38. Paul Steven Miller, Introduction: The Evolving ADA, in Employment Disability, and The Americans With Disabilities Act 3 (Peter David Blank ed., 2000); see also 42 U.S.C. § 12101(a)(1), (7)(2000) (finding that there were over forty million disabled individuals who have been "subjected to a history of purposeful unequal treatment" which needed to be redressed).

39. Id. § 12111(8).

40. Id. § 12102(2). Pregnancy and simple physical characteristics such as eye color or left-handedness are not covered under the Act. CCH, supra note 14, ¶ 214. It is generally difficult to be classified as disabled within the meaning of the Act, thus establishing that one is protected at all under the Act is a large aspect of a prima facie case under the ADA. For a discussion, see Mark C. Weber, The Americans with Disabilities Act and Employment: A Non-Retrospective, 52 Ala. L. Rev. 375, 377-85 (2000). This differs vastly from Title VII or the ADEA where membership in a protected group is in many respects obvious or easily proven. Additionally, there are no per se disabilities under the Act and each alleged disability should be analyzed by the court to determine if it meets the definition. See, e.g., Bragdon v. Abbott, 424 U.S. 624, 631 (1998) (utilizing the definition of a disability under the Act to determine if the Respondent was disabled within the meaning of the Act and failing to classify an HIV infection as a per se disability).

41. Lewis & Norman, supra note 9, § 10.10.

42. This Note addresses the use of circumstantial evidence. When direct evidence is used, the burden shifting framework set forth by the Supreme Court in McDonnell Douglas, does not apply. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); see also discussion, infra Part II.A. For case law about direct evidence of discrimination, see, for example, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (finding that the sex stereotypes found in evaluation forms which were used to determine promotions were an example of direct evidence of discrimination).
A claim of disparate treatment \(^{43}\) discrimination may rely on either direct or circumstantial evidence. The key aspect of a disparate treatment claim is intent by the employer to discriminate. \(^{44}\) When a plaintiff utilizes circumstantial evidence, \(^{45}\) courts employ the framework articulated by the Supreme Court in *McDonnell Douglas Corp. v. Green* \(^{46}\) and later refined in *Texas Department of Community Affairs v. Burdine*. \(^{47}\) Though the test has been modified further in subsequent cases, it still remains the rule in a discrimination case. \(^{48}\)

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43. Generally, employment discrimination claims are premised on one of two theories: disparate treatment or disparate impact. Disparate treatment discrimination requires an employer to intend to treat individuals that are members of a protected group less favorably than others. Hazen Paper Co. v. Biggins, 507 U.S. 604, 609 (1993). While intent or motive is an essential requirement, it can be inferred from circumstantial evidence. *Id.* In a disparate impact case, there is no discriminatory intent. *Id.* An employer’s practices, which appear to be neutral, actually discriminate against a protected group. *Id.* An employer can defend by proving that the practice was a business necessity. *Id.* See also supra notes 21-23 for more information about disparate impact.

44. See *Hazen*, 507 U.S. at 610 ("[L]iability depends on whether the protected trait . . . actually motivated the employer's decision.").

45. Circumstantial evidence can come in many forms and is usually more common than a direct evidence discrimination case. Using indirect evidence became the most common device by which Title VII plaintiffs proved discriminatory grounds was based on circumstantial evidence alone. This was largely because, by the 1980’s, few U.S. employers had official policies excluding women or minorities from particular classes of jobs, as had been the widespread practice when Title VII was first enacted. Similarly, by the 1980’s, most people had learned, whatever their private attitudes might be, not to make statements indicative of racist, sexist, or otherwise prejudiced attitudes. “Direct evidence” of bias was rarely available to plaintiffs in employment discrimination cases.

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48. See infra text accompanying notes 66-81; *see also* Kariotis v. Navistar Int’l Transp. Corp, 131 F.3d 672, 676 (7th Cir. 1997) (noting the frequency of the use of the test).
1. The McDonnell Douglas/Burdine Framework

In *McDonnell Douglas*, Green, an African American male, was laid off during a reduction in force.\(^49\) Green was a civil rights activist and believed that “his discharge and the general hiring practices of [McDonnell Douglas] were racially motivated.”\(^50\) He and others protested McDonnell Douglas’s hiring practices and the reduction in force by illegally parking their cars on the main roads to McDonnell Douglas’s plant during rush hour, thus preventing access to the plant for employees.\(^51\) Green was arrested and pled guilty to obstructing traffic.\(^52\) Almost a year later, McDonnell Douglas advertised for qualified mechanics, and Green’s application was denied based on his participation in the stall-in.\(^53\) Green brought suit under Title VII, claiming racial discrimination and retaliation for his civil rights activities, specifically his protesting of alleged unlawful employment conditions.\(^54\) The district court concluded that Green was lawfully not re-hired because of his activities in an illegal stall-in, not for his civil rights activities.\(^55\) The Eighth Circuit affirmed the district court.\(^56\) The Supreme Court remanded the case for a determination of whether Green satisfied his prima facie case and was able to show pretext in accordance with the new burdens of proof established by the Court.\(^57\)

The Court, in *McDonnell Douglas*, created a three-part burden shifting test for intentional discrimination cases.\(^58\) The Court held that

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50. Id.
51. Id. at 794-95.
52. Id. at 795.
53. Id. at 796. Green also apparently participated in a lock-in at the McDonnell Douglas facility prior to his seeking reemployment, but subsequent to the stall-in. At the lock-in Green and others protested and chained the front door of an office building where McDonnell Douglas employees worked. Green’s activities at the lock-in were also cited as reasons for his failure to obtain reemployment. Id. at 795 & n. 3.
54. Id. at 796.
55. Id. at 797. The court also dismissed Green’s racial discrimination complaint because the EEOC failed to make a determination on the issue. Id.
56. Id. at 797-98. The court determined that having an EEOC determination was not a prerequisite to adjudicating a claim in federal court. The Supreme Court upheld the Eighth Circuit’s determination that absence of an EEOC finding of reasonable cause does not bar suit in federal court. Therefore, the Court found that the racial discrimination claim was not barred. Id. at 798-99.
57. Id. at 807.
58. The *McDonnell Douglas* framework arose from a Title VII discrimination case, but has been applied to claims under the ADEA. See Jackson v. E.J. Brach Corp., 176 F.3d 971, 982 (7th Cir. 1999) (utilizing the *McDonnell Douglas* framework for an ADEA claim); Gustovich v. AT&T Communications, Inc., 972 F.2d 845 (7th Cir. 1992) (employing the three prong burden shifting test). However, it is not as clear under the ADA because claims under the ADA can take two forms. One claim can be discrimination because of a disability in which the *McDonnell Douglas* framework would clearly apply and the other claim is where an employer has failed to provide reasonable accommodations to the disabled. In the latter, the courts generally employ a different test. See Green v. Nat’l Steel Corp., 197 F.3d 894, 897-98
a plaintiff has the initial burden of establishing a prima facie case of discrimination:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

Once the plaintiff satisfies this initial burden, an “inference of illegal intent arises.” The purpose of the prima facie showing is to eliminate the common reasons for denial of employment: the employer never had a position available, no longer needs a position filled, or the applicant was not qualified. The burden then shifts to the employer to articulate a legitimate nondiscriminatory reason for the employment action. Finally, after a reason is articulated, the burden shifts back to the employee to show that the employer’s reason was pretextual.

The Court created this framework with the general goals of Title VII in mind. The Court wrote in dicta that

[the language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered stratified job environments to the disadvantage of minority citizens.... “Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications.”

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(7th Cir. 1999) (citing Weigel v. Target Stores, 122 F.3d 461, 464 (7th Cir. 1997)). “Disparate treatment claims are analyzed somewhat differently than failure to accommodate claims. In disparate treatment claims, the McDonnell Douglas burden-shifting framework commonly employed in Title VII and ADEA actions is generally appropriate... whereas in failure to accommodate claims the McDonnell Douglas framework is ‘unnecessary and inappropriate.’” Weigel, 122 F.3d at 464 (citations omitted).

60. Gold, supra note 3, at 11.
61. McDonnell Douglas, 411 U.S. at 802. See Tex. Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981) (explaining that the burden of persuasion does not shift to the employer, but the employer merely has an evidentiary burden of production to articulate a legitimate reason for the employment action).
63. This framework applies both at the summary judgment stage and if the case were to survive summary judgment and proceed to trial. See, e.g., Reeves v. Sanderson Plumbing Prod., 530 U.S. 133, 140 (2000) (utilizing the McDonnell Douglas framework in a case which went to the jury); Smith v. Chrysler Corp., 155 F.3d 799, 804 (6th Cir. 1998) (utilizing the McDonnell Douglas framework in a case which was disposed of on summary judgment). This framework is helpful at the summary judgment stage to determine if the respective burdens are met.
64. McDonnell Douglas, 411 U.S. at 800 (citations omitted).
Thus, the discrimination laws do not grant affirmative rights, but merely protect one from invidious discrimination.\textsuperscript{65}

Almost a decade after articulating the framework in \textit{McDonnell Douglas}, the Court reconsidered the proper burdens. In \textit{Texas Department of Community Affairs v. Burdine},\textsuperscript{66} the Court specifically granted certiorari to determine whether a defendant's burden during the second prong of the \textit{McDonnell Douglas} test was a burden of production or a burden of persuasion.\textsuperscript{67} The Court determined it was more akin to a burden of production.\textsuperscript{68} In this case, a female accounting clerk was not promoted and was subsequently fired.\textsuperscript{69} She sued under Title VII for gender discrimination.\textsuperscript{70} The district court held that there was no evidence of gender discrimination, and the Fifth Circuit reversed, holding that the defendant did not sufficiently rebut the prima facie case with its nondiscriminatory reason.\textsuperscript{71} The Fifth Circuit reaffirmed its view that the defendant must prove its legitimate nondiscriminatory reason by a preponderance of the evidence, but this was incorrect according to the Supreme Court.\textsuperscript{72}

The Supreme Court vacated and announced the appropriate standard.\textsuperscript{73} The Court held that the ultimate burden of proving discrimination remains at \textit{all times} with the plaintiff.\textsuperscript{74} The plaintiff must satisfy the initial prima facie showing of discrimination.\textsuperscript{75} The burden then shifts to the defendant to show a legitimate nondiscriminatory reason.\textsuperscript{76} The Court described this burden as a burden of production which the defendant can meet with admissible evidence.\textsuperscript{77} The Court further described defendants as bearing only the burden of explaining clearly the reasons for its employment decision.\textsuperscript{78} The defendant need not prove that it was actually motivated by its proffered reasons.\textsuperscript{79} The Court additionally noted that Title VII was enacted to prohibit discrimination and not to give preferential treatment to women or minorities.\textsuperscript{80} Indeed, the

\textsuperscript{65} See supra note 11.
\textsuperscript{66} 450 U.S. 248.
\textsuperscript{67} Id. at 250.
\textsuperscript{68} Id. at 259-60.
\textsuperscript{69} Id. at 250-51.
\textsuperscript{70} Id. at 250-51.
\textsuperscript{71} Id. at 251-52.
\textsuperscript{72} Id. at 252.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 253.
\textsuperscript{75} Id. at 254.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 255.
\textsuperscript{78} Id. at 260.
\textsuperscript{79} Id. at 254.
\textsuperscript{80} Id. at 259.
employer retains discretion to choose between two “equally qualified candidates.”

2. The Importance of the Pretext Step

Many McDonnell Douglas discrimination cases turn on whether an employer’s legitimate nondiscriminatory reason is pretext for discrimination. Pretext is defined as "something that is put forward to conceal a true purpose or object; an . . . excuse." To make a successful claim of discrimination, the employee must offer evidence to show that the employer’s legitimate reason for the personnel action is in fact a pretext for discrimination. The pretext step provides the employee the chance to show that the employer’s legitimate reason was not the real reason for the employment action. On the one hand, pretext has been held to be more than a mistake by an employer. Specifically, it has been held to mean a “phony” reason. The reason for this explanation is that if pretext were merely a mistake, plaintiff’s testimony of such a mistake would often create genuine factual issues in discrimination cases. However, others view

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81. Id.
82. Random House, Webster’s Unabridged Dictionary 1534 (1997). There is a debate within the courts as to exactly what type of pretext would suffice for a plaintiff to survive summary judgment. In St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 534 (1993), the Court indicated that perhaps more than a showing of pretext was necessary to prove intentional discrimination. After Hicks, the pretext-only and pretext-plus circuit split arose.

Courts adhering to the “pretext-plus” school believed that an employee needed to prove the employer’s proffered reasons false and that additional evidence of intentional discrimination existed in order to support an inference of discrimination through the indirect method of proof. Judgment in favor of an employer was proper if an employee failed to present “pretext-plus” evidence. Conversely, courts adhering to the “pretext-only” school believed that evidence of falsity was sufficient to support the inference of discrimination; proof of falsity alone yielded a verdict for an employee.

Henry L. Chambers, Jr., Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm, 60 Alb. L. Rev. 1, 32 (1996). The Court in Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 149-54 (2000), clarified the confusion that resulted from its opinion in Hicks, essentially holding that in most cases pretext-only is sufficient to survive a motion for summary judgment. Although this issue is beyond the scope of this Note, the split is nonetheless important. See Ryan Vantrease, Note, The Aftermath of St. Mary’s Honor Center v. Hicks and Reeves v. Sanderson Plumbing Products, Inc.: A Call for Clarification, 39 Brandeis L.J. 747 (2001); Kevin W. Williams, Note, The Reasonable Accommodation Difference: The Effect of Applying the Burden Shifting Frameworks Developed under Title VII in Disparate Treatment Cases to Claims Brought under Title I of the Americans With Disabilities Act, 18 Berkeley J. Emp. & Lab. L. 98 (1997).

83. See infra Part I.B.1.
85. Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1129 (7th Cir. 1997).
86. Id.
a claim of pretext as where an employee can offer evidence "that the [defendant's] proffered reason had no basis in fact," for example, "that the employer mistakenly believed that the employee lied to receive disability benefits."

In McDonnell Douglas, the Court held that Green could have shown pretext by showing evidence that white employees who were involved in the stall-in were rehired. Green could have also used evidence such as his managers' treatment of him during his employment, their reaction to Green's "legitimate civil rights activities," and their policies with respect to minority employment.

Some circuits have developed an honest belief rule which shields an employer from pretext-based liability when the employer's legitimate reason is honestly held, but perhaps without basis in fact. The circuits disagree, however, over what constitutes an honest belief. The precise origin of the honest belief rule is not clear. The rule has developed from judicial decisions concerning the second and third steps of the McDonnell Douglas framework: legitimate nondiscriminatory reasons and pretext, respectively. The rule has become known as the honest belief rule because the rule is based on honesty of an employer's belief in its legitimate nondiscriminatory reason. Essentially, one could argue the split concerns the subjective "pure" honest view versus the objective honest plus reasonableness view. This Note addresses this split.

II. THE SPLIT

This Note attempts to resolve the split over what exactly constitutes an honest belief. An honest belief essentially requires an employer's belief in its legitimate reason for taking personnel action against an employee to be honestly held. Thus, the legitimate reason does not have to be correct. For example, if an employer's legitimate reason

88. Smith v. Chrysler Corp., 155 F.3d 799, 805 (6th Cir. 1998); see also Kralman v. Illinois Dep't of Veterans' Affairs, 23 F.3d 130, 156 (7th Cir. 1994) (explaining that there is a "fine line" between evidence that shows an employer's reason was unworthy of belief and evidence that shows the employer had poor business judgment).
89. Dana W. Atchley, Note, Legislative Reform: The Americans with Disabilities Act: You Can't Honestly Believe That!, 25 J. Legis. 229, 231 (1999). But see New York Empl. L.-Prac., Oct. 2002, vol. 4, No. 1 at 9 ("Proof that one of an employer's stated reasons for terminating an employee is false does not defeat a motion for summary judgment absent evidence that the false reason was a pretext for discrimination." (citing Augustus v. MSG Metro Channel, 2002 WL 1977732 (S.D.N.Y. Aug. 27, 2002))). Note that even if a mistake did constitute pretext, in jurisdictions that subscribe to some version of the honest belief rule an employer will still be protected by the rule. See infra Part II.
91. Id. at 804-05.
92. See infra Part II.
93. See infra Part II.
94. See infra Part II.
for firing an employee was because that employee stole property from the employer, this reason need not be true. An employer must only honestly believe that the employee stole property. The jurisdictions differ, however, over what exactly constitutes an honest belief.\textsuperscript{95} Some jurisdictions simply require that an employer’s belief in their legitimate nondiscriminatory reason be honestly held,\textsuperscript{96} while other jurisdictions require the belief to be both honest and reasonable.\textsuperscript{97} In essence, the split concerns the evidence the employee and employer must offer at the summary judgment stage.\textsuperscript{98} The reason the split is at issue during the summary judgment stage is because if plaintiff is not able to show some evidence of pretext to rebut defendant’s legitimate nondiscriminatory reason and create a genuine issue of material fact, the case will be dismissed.\textsuperscript{99}

A. The “Pure” Honest Belief Regime

Employees in a “pure” honest belief regime may not attack the reasonableness of an employer’s belief in its legitimate reason for personnel action. They must focus their discrimination suit on evidence that points to discriminatory motive, or evidence that indicates their employer’s belief in its legitimate reason for taking action was not honest.

This view has its greatest support from the Seventh Circuit,\textsuperscript{100} but has been followed by other circuits.\textsuperscript{101} The rule in the Seventh Circuit

\begin{itemize}
  \item \textsuperscript{95} See infra Part II.A.
  \item \textsuperscript{96} See infra Part II.A.
  \item \textsuperscript{97} See infra Part II.B.
  \item \textsuperscript{98} Fed R. Civ. P. 56(c). Summary judgment is only appropriate if “there is no genuine issue as to any material fact.” \textit{Id}.
  \item \textsuperscript{100} See, e.g., Crim v. Board of Educ. of Cairo Sch. Dist. No. 1, 147 F.3d 535, 541 (7th Cir. 1998) (“Because a Title VII claim requires intentional discrimination, the pretext inquiry focuses on whether the employer’s stated reason was honest, not whether it was accurate.”); Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1130 (7th Cir. 1997) (“The pretext inquiry focuses on the honesty—not the accuracy—of the employer’s stated reason for the termination.”); Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir. 1987) (“A reason honestly described but poorly founded is not a pretext.”).
  \item \textsuperscript{101} See, e.g., Twilley v. Integris Baptist Medical Center, Inc., No. 00-6091, 2001 U.S. App. LEXIS 18173, at *4-5 (10th Cir. Aug. 10, 2001) (holding that plaintiff cannot survive summary judgment if he alleges no facts which show that the employer’s belief was not honest); Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1318 (10th Cir. 1999) (“The relevant inquiry is not whether [the employer’s] proffered reasons were wise, fair or correct, but whether [the employer] honestly believed those reasons . . . .”); Fischbach v. District of Columbia Dep’t of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996) (explaining in a Title VII suit that “[o]nce the employer has
originated from decisions explaining that during the pretext stage, the court will not inquire into business processes. From there, the Court held that if an employer honestly explained the reasons for a decision, there was no pretext for discrimination. This formulation in essence became the honest belief rule.

The Seventh Circuit articulated its honest belief rule in *McCoy v. WGN Continental Broadcasting Co.* Ron McCoy, a forty-six-year-old male, was terminated from his position at a television station and sued for age discrimination. He was essentially asking the court to hold that WGN's promotion and demotion processes were not sound. The court determined that this was something the judiciary should not be charged with. McCoy was not approaching his burden correctly. To survive summary judgment, the court held, McCoy had to create some factual issue about whether the station's beliefs in its legitimate reason for firing were honestly held. McCoy, however, offered evidence that WGN's decision was not financially beneficial to the company and that the company should not have demoted him so quickly. His evidence at the pretext stage incorrectly targeted the station's business judgment.

The court noted the importance of an employer's independent business judgment and articulated an understanding of the pretext stage of the *McDonnell Douglas/Burdine* framework. The court firmly announced that it did not "sit as a super-personnel department" reviewing business decisions. Pretext, according to the *McCoy* court, should turn not on whether the employer's reason for the termination is correct or desirable, but rather on whether the

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102. See *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1113 (2d Cir. 1988) ("merely raising a genuine issue of fact as to the credence of [the employer's] asserted reason is an insufficient basis to refuse the grant of summary judgment").

103. Additionally, in *Pollard*, the court discussed pretext and held that if you honestly explain the reasons behind your decision, this is not a pretext. *Id.* at 559. In later decisions the court continued to focus on the honesty of an employer's asserted reasons. See, e.g., *Fairchild v. Forma Scientific, Inc.*, 147 F.3d 567, 573 (7th Cir. 1998); *Nabi v. Aetna Cas. & Sur. Co.*, No. 95-3757, 1995 U.S. App. LEXIS 376, at *17-18 (7th Cir. Jan. 9, 1995).

104. 957 F.2d 368 (7th Cir. 1992).

105. *Id.* at 370.

106. *Id.* at 373.

107. *Id.*

108. *Id.* at 374.

109. *Id.*

110. *Id.* at 373-74.

111. *Id.* at 373.
employer honestly believed in the reason it offered. The court concluded that McCoy's efforts to "ward off summary judgment by showing pretext bear more on the issue of mistake on [the station's] part than on the issue of whether [the station] honestly believed in the reasons it has offered for its actions."113

While the McCoy rule was unambiguous, the court in Gustovich v. AT&T Communications, Inc., offered clarifying examples of how an employee can attack the honesty of the belief.114 In Gustovich, six supervisors over the age of forty were terminated and filed suit under the ADEA and the employer was granted summary judgment.115 The supervisors tried to survive summary judgment by offering evidence that they were incorrectly rated and had they been properly rated, they would not have been fired.116 The court held that the supervisors could not rebut an employer's legitimate reason by showing that they were adequate employees and their employer ratings were incorrect.117 They were required to show that the employer's reasons were pretext for a discriminatory purpose.118 The court held that statements about the accuracy of the ratings "may create a material dispute about the employee's ability but do nothing to create a dispute about the employer's honesty—do nothing, in other words, to establish that the proffered reason is a pretext for discrimination."119 The court then offered ways in which the employee could have attacked the honesty to succeed at the pretext stage: they could have (1) come up with evidence to show that the evaluations had been "cooked" by showing, for example, discriminatory attitudes, or (2) compared the firm's treatment of similarly situated people of different ages.120 Despite their attempts, the employees failed to meet these standards because they compared general comments from different managers' reviews of other employees to their own reviews.121 The court said that this comparison was too general for the sake of accuracy.122

The court in Gustovich reiterated the sentiment of McCoy, proclaiming that "a district court hearing a case under the ADEA should not be mistaken for a labor arbitrator."123 The Seventh Circuit

112. Id.
113. Id.
115. Id. at 847.
116. Id. at 848.
117. Id.
118. Id.
119. Id.
120. Id. at 848-49.
121. Id. at 849.
122. Id.
123. Id. at 848.
would not concern itself with the accuracy of the rating system, a
careful concern the court willingly left to the business.124

The Seventh Circuit's rule was firmly established when it decided
Kariotis v. Navistar International Transportation Corp.125 This case
tested the limits of the "pure" honest belief rule because the
company's actions were arguably more irrational than in McCoy and
Gustovich. The court, however, once again shielded an employer with
the honest belief rule, reasoning that the discrimination laws do not
allow interference with management's decision making process.126

The court stressed that it was not a court of industrial relations and as
such must observe its limitations.127 The court articulated the honest
belief rule—according to the facts of this case—to "mean[] that while
the company may have been mistaken in concluding Kariotis actually
had committed fraud, at the very least it had an honest belief that she
had done so."128 In this case, a fifty-seven-year-old, female, disabled
employee was defeated on summary judgment in her suit against
Navistar after she was fired for fraudulently accepting disability
benefits.129

Kathleen Kariotis took leave from work after knee replacement
surgery and had to extend the leave beyond the length of time
originally anticipated.130 In accordance with company policy, she
received sixty percent of her salary during this extended leave.131
Management became suspicious that extended leave was not
warranted.132 The company videotaped her on separate occasions and
witnessed her walking, driving, and bending before her second knee
surgery.133 The company never spoke with her physicians or asked her
to be examined by one of their own physicians.134 One of the
managers spoke with Kariotis, and she claimed that after her second
knee surgery she was able to do much more than before.135 However,
management disbelieved this statement in light of Kariotis's activities
on the videotape before her second knee surgery.136 She was then
terminated and replaced by a thirty-two-year-old woman.137

124. Id.
125. 131 F.3d 672 (7th Cir. 1997). But see supra Part II.B for a discussion of the
Sixth Circuit's view which differs from the Seventh Circuit's view.
126. Kariotis, 131 F.3d at 678.
127. Id.
128. Id. at 674.
129. Id. at 675.
130. Id. at 674.
131. Id.
132. Id.
133. Id. at 675.
134. Id.
135. Id.
136. Id.
137. Id. See supra note 32 and accompanying text.
The plaintiff indisputably made out a prima facie case in accordance with the McDonnell Douglas framework.\textsuperscript{138} Navistar had set forth its honest reasons for their employment decision: the evidence from the videotape and the lie she told about her abilities before the second knee surgery.\textsuperscript{139} Then, Kariotis had a chance to rebut the employer's offered reasons.\textsuperscript{140} The Seventh Circuit reemphasized its honest belief rule:

[A]n opportunity for rebuttal is not an invitation to criticize the employer's evaluation process or simply to question its conclusion about the quality of an employee's performance. . . . [B]ecause the question is not whether the employer's reasons for a decision are "right but whether the employer's description of its reasons is honest."\textsuperscript{141}

Kariotis alleged that the investigation was "imprudent, ill-informed and inaccurate."\textsuperscript{142} The court held that the investigation was the reason given for the discharge, and "a reason honestly described but poorly founded is not a pretext as that term is used in the law of discrimination."\textsuperscript{143} The court opined that perhaps she needed to show evidence that she was investigated differently from other employees because of age or disability before she would have been able to show pretext.\textsuperscript{144}

The Seventh Circuit consistently focuses on the honesty of the employer's belief in its legitimate nondiscriminatory reason. At the pretext stage of the McDonnell Douglas/Burdine framework, an employee will not survive summary judgment if he attempts to have his employer's business decisions or judgment reviewed for reasonableness. The employee, to be successful, must rebut the honesty of the employer's reason or point to evidence indicating discrimination. For example, the employee can try to show evidence of discriminatory attitudes, or differences in treatment between protected and non-protected individuals. The employee will not be successful by showing evidence that an employer made a mistake, unless this can prove that the employer's belief was dishonest.

B. The Honest Belief Plus Reasonableness Regime

Employees in an honest belief regime may attack the reasonableness of an employer's belief in its legitimate reason for personnel action. They can put forth evidence showing an employer
was unreasonable in its belief in addition to offering evidence indicating a discriminatory animus or lack of honesty.

The Sixth Circuit has held that an employee can rebut an employer's legitimate nondiscriminatory reason by attacking not only its honesty, but also the reasonableness of its belief. As the court noted in *Smith v. Chrysler*, 145 an employer has an honest belief in its reason for discharging an employee when the employer *reasonably relied* "on the particularized facts that were before it at the time the decision was made." 146 In a reasonableness regime, the employer will be more subject to judicial scrutiny in its selection, firing, and promotion processes than in the "pure" honest belief regime.147 In a reasonableness regime, employers concerned about discrimination charges must document their processes adequately in an effort to establish the reasonableness of their belief.148

The Sixth Circuit's version of the honest belief rule—similar to the Seventh Circuit's—emerged from a discussion of pretext. The Sixth Circuit's version of pretext differed from the Seventh Circuit's in that it required reasonableness.149 The court expressly rejected the "pure" honest belief rule and announced the honest belief plus reasonableness rule in *Smith v. Chrysler*.150

In this case, James Smith brought suit under the ADA against Chrysler alleging that he was terminated as a result of unlawful discrimination.151 Smith was diagnosed a narcoleptic, but failed to disclose this condition on his employment form or on a driver's license application which permitted him to operate heavy machinery.152 Smith's physician had written a letter requesting that he be switched to the day shift from the night shift because day employment would help normalize his sleep schedule.153 Smith, however, contended that his record showed that he had a disorder related to narcolepsy, but it

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146. *Id.* at 807; see also Kurincic v. Stein, Inc., No. 00-3747, 2002 U.S. App. LEXIS 2582, at *9-10 (6th Cir. Feb. 14, 2002) (holding that an employer has an honest belief when its belief is reasonable); Pesterfield v. Tenn. Valley Auth., 941 F.2d 437, 443 (6th Cir. 1991) (holding that the employer must reasonably rely on the facts).
147. *See infra* Part II.B.2.
148. The reasonableness view does not necessarily require the employer's decision to be reasonable, but requires the employer's belief in its decision to be reasonable. Thus, if an employer has a belief that an employee stole property from the employer, but has no evidence and made no investigation, its belief might not be considered honest under a reasonableness regime, even though firing someone for stealing is reasonable. The distinction is sometimes difficult to make because, in essence, this is imposing somewhat of a reasonableness requirement on employers' decisions.
149. The court noted in *Smith*, 155 F.3d at 806-07, that it was the first time it had discussed the honest belief rule in the ADA context, but it had discussed the rule in the Rehabilitation Act context in *Pesterfield*, 941 F. 2d at 443.
150. *Smith v. Chrysler*, 155 F.3d at 806.
151. *Id.* at 801.
152. *Id.* at 802.
153. *Id.* at 803.
was not considered actual narcolepsy. He was subsequently fired for lying on his employment form and driver’s license application. Management based this decision on letters from physicians, conversations with those physicians, and a belief that Smith could suddenly fall asleep on the job. The district court held that Smith was unable to demonstrate that management’s reasons were pretextual. Smith did not dispute that Chrysler offered a legitimate nondiscriminatory reason for his firing: he had lied on medical forms and on his driver’s license application. Smith contended, however, that Chrysler’s reasons for the firing were a pretext for discrimination.

The Smith court discussed the Seventh Circuit’s “pure” honest belief rule and rejected the rule inasmuch as the rule did not require an employer “to demonstrate that its belief was reasonably grounded on particularized facts that were before it at the time of the employment action.” The court found this abstract rule at odds with the purpose of anti-discriminatory statutes, which were implemented to prevent discriminatory employment actions based on “unfounded fear.” Thus, the court held that in deciding whether the employment decision was made in good faith, the employer must have had “a reasonable basis for reaching its conclusion.” The court said:

> [W]hen the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process “unworthy of credence,” then any reliance placed by the employer in such a process cannot be said to be honestly held.

The court, however, noted that it would not require the employer to leave “no stone unturned,” but would require merely that the employer make an informed decision.

Despite this heightened burden, the court affirmed summary judgment for Chrysler based on Chrysler’s legitimate good faith belief that Smith had lied on medical forms. Chrysler established reasonable reliance based on the false documentation, and its reliance

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154. *Id.* at 805.
155. *Id.* at 804.
156. *Id.*
157. *Id.* at 808.
158. *Id.* at 805.
159. *Id.*
160. *Id.*
161. *Id.* at 805.
162. *Id.* at 807.
163. *Id.* at 807-08.
164. *Id.* at 807.
165. *Id.* at 801.
166. *Id.* at 807.
on the letters and discussions with doctors. The burden then shifted to Smith to show that Chrysler's reliance on those factors was unreasonable. Smith was unable to meet this burden.

The court held that Chrysler was reasonable in relying on the evidence from the doctors that Smith suffered from narcolepsy, and the evidence that he lied on his driver's license application. However, Chrysler was not reasonable in relying on the alleged lie in the medical form. The question on the form concerned whether Smith suffered from tiredness or fatigue to which he answered no. However, "[t]iredness and fatigue . . . do not even remotely cover the situation experienced by narcoleptics." Thus, it was not reasonable for Chrysler to rely on this stereotype that narcoleptics suffer from these symptoms because it was not accurate. However, this was not harmful to Chrysler because their other reasons for the termination were satisfactory and this alone did not rise to an inference that the real reasons were discriminatory.

The court reiterated its position in Snowden v. Procter & Gamble and indicated reasonable employer responses. In this case, Larry Snowden was fired after ten years of service to Procter and Gamble ("P&G") and sued for violation of the ADA. The court held that Snowden failed to establish pretext. Snowden repeatedly received accommodation from P&G until there was a change in his work team. Management notified him that his unpredictable requests for accommodation caused hardship on his entire group. He was also notified that a fellow employee claimed to have seen him at Wal-Mart during his shift. P&G investigated this claim by asking other employees whether they had seen Snowden at work on that occasion. Snowden was fired after the notes of the investigation were reviewed by management.

P&G's explanation for Snowden's termination was that Snowden had left the plant during working hours and Snowden, while denying he left the plant, did not try to argue that this explanation had no basis

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166. Id. at 808.
167. Id.
168. Id.
169. Id.
170. Id.
171. Id. at 808-09.
172. Id. at 809.
174. Id. at *1
175. Id.
176. Id. at *2.
177. Id. at *3.
178. Id. at *4.
179. Id. at *5.
in fact.\footnote{Id. at *9-10.} Instead, Snowden argued that “P&G failed to make a reasonable and informed decision to terminate him.”\footnote{Id. at *14.} The court held that P&G met their burden of showing “particularized facts underlying its decision” through a reasonable investigation.\footnote{Id. at *11.} Snowden tried to offer evidence showing that P&G failed to make a reasonable decision because the employer could have asked security guards whether they remembered Snowden’s car being in the lot and they could have reviewed Wal-Mart security cameras.\footnote{Id. at *13-14.} The court held that these suggestions did not show that the investigation conducted by P&G was unreasonable. They were simply other avenues that P&G could have pursued.\footnote{Id. at *14.}

After an initial reading of Smith and Snowden, one might understand the technical difference between the Sixth and Seventh Circuit rules, but one might not realize the practical difference because the court, in both cases, ruled in favor of the employer despite a reasonableness requirement. The requirement, however, does have teeth. Indeed, the Sixth Circuit has ruled in favor of the employee based on an employer’s unreasonable belief.

In Archer v. Mesaba Aviation, Inc., the court refused to uphold the reasonableness of the employer’s belief and found its legitimate reason to be pretextual.\footnote{Archer v. Mesaba Aviation, Inc., No. 98-2434, 2000 U.S. App. LEXIS 6420, at *2 (6th Cir. Apr. 3, 2000).} The court, nonetheless, reiterated that in order for Mesaba to be protected by the honest belief rule, the company had to establish their “reasonable reliance on the particularized facts that were before it at the time the decision was made.”\footnote{Id. at *17 (citations omitted).}

Paul Archer, an HIV-positive employee, sued Mesaba, a small regional airline, under the ADA. He alleged that he was fired from his sales position because of his disability.\footnote{Id. at *2.} Mesaba tried to establish the reasonableness of its legitimate reason by asserting that employees complained about Archer leaving work early, that Archer harassed a flight attendant while traveling on one of Mesaba’s planes, and that he engaged in sexual activity while aboard a Mesaba aircraft.\footnote{Id. at *3-11.} Mesaba conducted an investigation, but received conflicting reports about the validity of the alleged sexual encounter.\footnote{Id. at *9.} Archer was never permitted to respond to the action nor was he informed of the

\begin{footnotes}
\item[180] Id. at *9-10.
\item[181] Id. at *14.
\item[182] Id. at *11.
\item[183] Id. at *13-14.
\item[184] Id. at *14.
\item[186] Id. at *17 (citations omitted).
\item[187] Id. at *2.
\item[188] Id. at *3-11.
\item[189] Id. at *9.
\end{footnotes}
allegations. Mesaba claimed that even if the events were not true, they had an honest belief that they occurred. The Sixth Circuit held that Archer had established pretext. The court held that Mesaba did not reasonably rely on particularized facts and could not be protected by the honest belief rule. The court based its decision on conflicting information from the flight attendant. Furthermore, the pilot indicated he failed to see anything during the flight (though the flight attendant told him what was allegedly occurring), while the employer failed to review information and did not inform Archer of the allegations or give him an opportunity to respond. Thus, the determination of this case turned on reasonableness.

If the Archer case was filed in a “pure” honest belief regime, the outcome probably would have been different. Mesaba would be protected by its honest belief in its legitimate reason. The court would not inquire into the reasonableness of the company’s belief or its investigative technique as did the Sixth Circuit.

The reasonableness position allows an employee the opportunity to rebut a legitimate, nondiscriminatory reason, in an attempt to show pretext, with facts indicating the employer’s belief in its employment decision was not reasonable. Thus, in the Sixth Circuit, it is not enough for an employer’s belief to be honest if it is unreasonable. Practically, an employer must ensure that proper steps or procedures were followed before employment action is taken. If employers do not take these steps, they risk a court deciding that their procedures were not reasonable.

III. Resolution of the Split

Adoption of the “pure” honest belief rule makes sense in light of the burdens set forth in McDonnell Douglas, the autonomy necessary for a business to function, and general judicial policy. There can be no intent to discriminate if an employer has an honest and legitimate nondiscriminatory reason for the action. The Seventh Circuit and the other jurisdictions that have adopted the “pure” honest belief view are not advocating that the employee show direct evidence of discrimination to survive summary judgment, nor are they claiming that any reason that appears to be honestly held by the

190. Id. at *19.
191. Id. at *17.
192. Id. at *18.
193. Id. at *17-18.
194. Id. at *19.
195. Id.
196. 411 U.S. 792 (1973). This case is a Title VII case. See supra note 97 for an example in which the honest belief split occurred in a Title VII suit. See also supra note 58 for cases showing that the McDonnell Douglas test applies under the ADA and ADEA.
197. See supra note 42 for a discussion of direct and circumstantial evidence.
employer will be blindly accepted. The courts allow for the employee to rebut the honesty of the belief itself. This approach adequately reveals intent to discriminate and whether real reasons are being covered up.198 Examining the reasonableness of an employer’s decision relates not to intent, but to business rules and operations, an area in which the court should not be involved.199 Thus, this Note does not advocate that employee’s rights be diminished in any way, but advocates a fair playing field for both the employer and employee.

A. The Proper Burden for the Employer and Employee

The burden in a McDonnell Douglas discrimination case remains with the employee throughout the discrimination suit. Once the employee has successfully made out a prima facie case of discrimination the employer then must articulate a legitimate nondiscriminatory reason for the firing. However, the burden never fully shifts to the employer. The Court in Burdine said: “The nature of the burden that shifts to the defendant should be understood in light of the plaintiff’s ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”200 Therefore, requiring the employer to do more than articulate a reason is inconsistent with the Supreme Court’s decision in McDonnell Douglas.

The Supreme Court, in reference to the employer’s burden, has stated that the “employer’s burden is satisfied if he simply ‘explains what he has done’ or ‘produc[es] evidence of legitimate nondiscriminatory reasons.’”201 For example, in Gustovich v. AT&T Communications, Inc.,202 the employer simply had to articulate that the employees were fired because they were the weakest employees and presumably show the tests they used. Had the employer in Gustovich been subject to the reasonableness version of the honest belief rule, the employer would have had to establish the steps they went through to determine that these employees were the weakest.

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198. See infra Part III.B for a discussion of the importance of accuracy of the reason in the just cause regime.

199. While disparate impact theory concerns itself with the rules and operations of a business, disparate treatment is based on intent to discriminate and analysis into the rules and operations is not necessary. Analysis of the rules and operations of a business in certain aspects is essential to a disparate impact claim which is based on a practice or policy which adversely affects a protected group. However, even in a disparate impact claim the court must observe proper limits in second-guessing business decisions. See supra notes 22-23, 43.


201. Bd. of Tr. v. Sweeney, 439 U.S. 24, 25 (1978) (finding that the court of appeals had placed too heavy of a burden on the employer and reiterated that the employer only need articulate a legitimate reason).

202. Gustovich v. AT&T Communications, Inc., 972 F.2d 845 (7th Cir. 1992); see also supra Part II.A.
Their business rules, specifically the method for determining the weakest, would have been subject to analysis by the court. Determination of who is the weakest employee will differ from company to company and thus requires different tests because each company is looking for different strengths in employees. Thus, utilizing the reasonableness test in addition to the "pure" honest belief of the employer demands too much of the employer. While one might argue that the terms "legitimate" and "nondiscriminatory" can be equated with reasonableness, this is not necessarily the case. A legitimate nondiscriminatory reason is simply one that does not utilize an individual's membership in a protected class. It can be completely unreasonable such as a belief that the employee stole company property. Such an honest belief, whether correct or not, is not based on membership in a protected group.

The honest belief rule requires employees to meet their burden of persuasion that must be maintained throughout their discrimination case. Allowing a claim to survive summary judgment just because the employer's reason might not have been reasonable in the eyes of the court does not hold an employee to the burden of persuasion. An employee should be required to rebut the articulation of the legitimate reason with something that elicits evidence of a discriminatory motive or lack of honesty.

The Supreme Court's jurisprudence in the area of First Amendment law can provide an appropriate comparison. There is a similar honesty versus reasonableness split in the area of public speech by government employers. This area is relevant to the employment discrimination laws because the First Amendment's Freedom of Speech Clause protects public employees in employment as do discrimination laws. To summarize, when an employee publicly speaks, information that is a matter of public concern is protected speech under the First Amendment. When speech is protected, an

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203. See supra Part I.B.1 for a discussion of the burdens set forth by the court in McDonnell Douglas and Burdine.

204. See supra note 124 and accompanying text.


206. U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . ").

207. The protection afforded by the First Amendment's Free Speech clause can be considered an express exception to at will employment for public employees. See supra notes 1-4 and accompanying text.

208. Connick v. Myers, 461 U.S. 138, 142 (1983); see also Churchill, 511 U.S. at 668. To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Churchill, 511 U.S. at 668 (citations omitted).
employee cannot suffer personal action as a result of the speech.\textsuperscript{209} The split in this area arises when it is unclear if the speech is protected or unclear exactly what the speech was.\textsuperscript{210} In this instance, there are different views on what constitutes a legitimate reason for the firing: (1) the employer’s belief that the speech was not protected must be in good faith and must be reasonable; or (2) the employer’s belief that the speech was not protected must be honest.\textsuperscript{211}

In \textit{Waters v. Churchill}, a plurality of the Supreme Court decided to adopt the reasonableness test and thus determined that an employer must make a reasonable investigation to determine whether the speech was protected before taking action.\textsuperscript{212} Three Justices, while concurring in the judgment, advocated upholding the simple honesty rule.\textsuperscript{213} They believed that a rule of reasonableness would give the employees new First Amendment rights to an investigation and would stand in opposition to the Court’s jurisprudence.\textsuperscript{214} Justice Scalia said, “[T]he genuineness of a public employer’s asserted permissible justification for an employment decision . . . is all that is necessary.”\textsuperscript{215} The plurality noted that they were advocating this “reasonableness” approach because “the possibility of inadvertently punishing someone for exercising her First Amendment rights makes such care necessary.”\textsuperscript{216} Thus, the exact approach in this area remains uncertain.\textsuperscript{217}

\textsuperscript{209} \textit{Churchill}, 511 U.S. at 695 (Stevens, J., dissenting) (noting that government personnel action based on protected speech may in some instances violate the First Amendment).

\textsuperscript{210} Id. at 668.

\textsuperscript{211} Justice O’Connor, Chief Justice Rehnquist and Justices Souter and Ginsburg advocated the reasonable test. Id. at 664, 677. Justice Souter additionally advocated going one step further by adopting the reasonableness test with a requirement that the employer actually believe the results of the investigation. Id. at 682-83 (Souter, J., concurring). Justices Scalia, Kennedy and Thomas advocated the honest test. Id. at 686 (Scalia, J., concurring). Justices Stevens and Blackmun dissented advocating complete protection of the employee when First Amendment rights are at issue, thus advocating complete accuracy. Id. at 699 (Stevens, J., dissenting).

\textsuperscript{212} Id. at 678. In this case, a nurse was overheard complaining about her department and supervisor and was fired without even being asked her side of the story. She alleged that her termination was a result of her speech and prior complaints she had made. She brought an action alleging that her First Amendment right to free speech was violated and the district court granted summary judgment to the employer. The Seventh Circuit reversed concluding that the nurse’s speech was a matter of public concern and thus protected. The Supreme Court held that summary judgment was not warranted because there was an issue of fact about what actually motivated the employer. Id. at 681.

\textsuperscript{213} Id. at 686 (Scalia, J. concurring).

\textsuperscript{214} Id. (Scalia, J. concurring).

\textsuperscript{215} Id. at 690 (Scalia, J. concurring).

\textsuperscript{216} Id. at 678.

\textsuperscript{217} See D. Keith Fortner, Note, \textit{Constitutional Law—First Amendment and Freedom of Speech—Public Employers Must Conduct a Reasonable Investigation To Determine if an Employee’s Speech Is Protected Before Discharging the Employee Based upon the Speech}, 18 U. Ark. Little Rock L.J. 463, 488 (1990) (discussing the
The government employer must make a legal determination when it decides whether an employee's speech is protected or not. On the other hand, a non-governmental employer deciding whether to fire an individual is not making a legal determination, but rather a factual determination. The employer is deciding that an employee is not satisfying his criteria for employment. Employers usually lack expertise in making legal determinations, therefore, perhaps a government employer should be held to a higher standard when making a legal determination as opposed to a factual determination.

In light of the fact that the Supreme Court itself is divided in the First Amendment area about whether to require reasonableness on the part of the government employer, it is legitimate to believe that in the area of discrimination laws the Court would not hold an employer to such a high bar. First Amendment rights are fundamental rights which the government must protect. While discrimination laws are important to a civilized society, they do not create fundamental rights nor do they even create affirmative rights. They simply allow people the protection of not being discriminated against in employment.

While it can be argued that such protection does exist in other areas of the law which do not involve fundamental rights, mainly just cause termination cases, those circumstances are entirely different than a firing at will. Generally, employment is at will and thus an employer and employee can terminate the employment relationship for any

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218. Note that this split only occurs in the government employer context and a private employer is permitted to fire for speech. See David C. Yamada, Voices From the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace, 19 Berkeley J. Emp. & Lab. L. 1, 22-25 (1998) (noting that the state action doctrine prevents the First Amendment from applying to private sector employees and employers).

219. The Supreme Court has shown deference to business decisions. See Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 101 (1991) (discussing the business judgment rule deference to decisions of directors); Group of Inst. Investors v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 318 U.S. 523, 557 (1943) (deferring to the business judgment of the commission); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 343 (1936) (Brandeis, J., concurring) (stating that courts may not interfere with the management of a company, even if there is a mistake or bad business judgment).

220. The Supreme Court has recognized that certain rights that derive from the Constitution are considered "fundamental" and are incorporated into the 14th Amendment's Due Process Clause. The Court has held that statutes that concern fundamental rights should be reviewed with strict scrutiny. See Anthony Ciccone, The Constitutional Right To Vote Is Not A Duty, 23 Hamline J. Pub. L. & Pol'y 325, 328 (2002) (noting that fundamental rights are reviewed with strict scrutiny). Generally, most of the bill of rights has been incorporated under the Fourteenth Amendment. The exceptions are the Second and Third Amendments, the Fifth Amendment's grand jury requirement, and the Seventh Amendment's rule regarding civil juries. Akhil Reed Amar, 2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame, 53 Ala. L. Rev. 1221, 1229-30 (2002).

221. See supra note 11.

222. See supra Part I.
reason except one that is discriminatory.\textsuperscript{223} In a just cause situation, the employer and employee contractually agree that the employee will only be fired for just cause.\textsuperscript{224} It has been held that just cause means that the employer must show that the employee committed an act which warrants his discharge. The employer must have a sound basis—a reasonable ground—for his decision to terminate the employee. But the employer does not have a reasonable ground if the beliefs or assumptions on which he bases his decision are incorrect.\textsuperscript{225}

Thus, generally complete accuracy of the employer’s decision is warranted for a firing.

This accuracy or reasonableness rule makes sense in just cause contract cases. Here, the employer and employee have contracted that the employee will only be terminated for certain reasons; therefore, the reason would have to be accurate. Otherwise, the employer would be able to subvert the contract and the employee’s job security.\textsuperscript{226} The contract would mean nothing. In the employment at will regime in which the honest belief rule functions, an employee can be fired for any reason whatsoever as long as it is not discriminatory.\textsuperscript{227} If the employer honestly believes that the employee stole from the company, the employee can be fired even if the reason is incorrect or unfair.\textsuperscript{228} There is no contract that exists protecting the employee’s job. A reasonableness rule would incorrectly elevate standards in an at will setting to be more in line with just cause.

\section{B. Intrusion into the Business Judgment of a Company}

Generally the courts, whether advocates of the “pure” honest belief rule or of the reasonableness rule, recognize an employer’s right to make its own business judgment, within reason.\textsuperscript{229} While the

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\textsuperscript{223} See Befort, supra note 1.
\textsuperscript{224} Just cause “exists only by virtue of a mutual agreement between the employer and employee, usually contained in a collective bargaining agreement, or as the result of the acceptance by an employee of a unilateral offer made by an employer.” Sanders v. Parker Drilling Co., 911 F.2d 191, 199 (9th Cir. 1990).
\textsuperscript{225} Id. at 197.
\textsuperscript{226} Presumably, a unionized employee would be able to file a grievance based on a lack of just cause and a non-unionized employee with an individual contract would have an action for breach of contract. See, e.g., Amanda J. Berlowe, Comment, \textit{Judicial Deference to Grievance Arbitration in the Private Sector: Saving Grace in the Search for a Well-Defined Public Policy Exception}, 42 U. Miami L. Rev. 767, 768 (1988) (explaining that employers typically agree to fire or discipline individuals for “just cause,” the union agrees not to strike and both parties agree to a grievance procedure for bringing claims).
\textsuperscript{227} See Befort, supra note 1 and accompanying text.
\textsuperscript{228} See supra notes 1-4 and accompanying text.
\textsuperscript{229} See, e.g., Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998) (finding that courts should not attempt to “micro-manage” the process that was used); McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992) (stating that the court
"reasonableness" courts recognize this right, their inquiry goes too far. Allowing court inquiry into the process that was used by an employer and allowing that process to be subject to a reasonableness test imposes the court's judgment on how the employer should run its business and manage its employees.\(^{230}\) While the courts might have to be aware of the process used in order to compare the plaintiff to other similarly-situated employees who are not alleging discrimination, they do not have to judge the process nor make a determination that it was unreasonable. Employers should not be subject to the judicial determinations of the best way to conduct investigations or of the best reasons to fire people.\(^{231}\) This area has traditionally been left to the expertise of businesspeople, who know their business, industry and employees better than any court.\(^{232}\)

The honest belief regime is adequate to protect employees rights in this respect while at the same time respecting and protecting an employer's business judgment. It ensures that the employer's reason is one that is nondiscriminatory and protects the employer from inquiry into the process they utilized to make their decision. While the honest belief view has not been in existence for decades, the courts that boast such a rule proclaim that they have "long championed an employer's right to make its own business decisions, even if they are wrong or bad."\(^{233}\) The judiciary's second-guessing of business decisions could affect efficiency and profits. Businesses will have to make more decisions in accordance with judicial resolution, resulting in more uniformity of decision among businesses and greater costs. While greater costs and uniformity are endemic to a business administering anti-discrimination laws and policy in general, there

\(^{230}\) See Jayne W. Barnard, The Securities Law Enforcement Remedies Act of 1989: Disenfranchising Shareholders in Order to Protect Them, 65 Notre Dame L. Rev. 32, 45 (1989) ("The very basis of the business judgment rule is the belief that corporate executives have particularized expertise in dealing with business risks which judges do not share.").

\(^{231}\) See Kralman v. Ill. Dept of Veterans' Affairs, 23 F.3d 150, 156-57 (7th Cir. 1994) (stating that an employee will not win at the pretext stage by showing an employer exhibited bad business judgment); Gregory S. Fisher, A Brief Analysis of After-Acquired Evidence in Employment Cases: A Proposed Model for Alaska (and Points South), 17 Alaska L. Rev. 271, 286 (2000) (explaining that courts are reluctant to review management decisions); Ashley S. Heron, Comment, The Americans With Disabilities Act: Who can Claim Its Protection?, 48 Ala. L. Rev. 1023, 1029 (1997) (noting that "[a]n employer's business judgment as to production standards should not be second-guessed" by the courts).

\(^{232}\) The business judgment rule is premised on the notion that fiduciaries owe a duty of care to the company in which they work and therefore they should act in good faith with reasonable care. The rule presumes that directors' decisions are honest, well-intended, rational, and informed. Therefore, courts should abstain from reviewing such decisions. See Gina Marie Agresta-Richardson, Comment, Employee Stock Ownership Plans: Uncertainties Plaguing the Duties of the ESOP Fiduciary with Respect to Voting and Defensive ESOPs, 14 Akron Tax J. 91, 101-02 (1999).

\(^{233}\) Green v. Nat'l Steel Corp., 197 F.3d 894, 899 (7th Cir. 1999).
should be a balancing of such effects with the goals of the laws.\textsuperscript{234} While under a “pure” honest belief regime an employer may incur costs simply from litigating and implementing anti-discrimination policy and subsequently incur some loss of decision making power, under a reasonableness regime the employer will be troubled with much greater costs and diminished power. This additional component of reasonableness is not necessary for the discrimination laws to function successfully, but businesspeople having control with minimal judicial constraints is important for a business to function successfully.\textsuperscript{235}

Additionally, judicial regulation of employment, which is what would amount if courts are going to analyze the reasonableness of employers business decisions, is incompatible with the current regime of employment at will where an employee can be fired for any reason whether reasonable or not.\textsuperscript{236} While the notion of employment at will has diminished in recent years with the passage of these anti-discrimination laws, which some view as an express exception to the employment at will doctrine, it is still the predominant force in employment throughout the nation.\textsuperscript{237} At will employment is grounded in the notion that both the employer and employee can terminate the employment relationship at any time with or without cause. Requiring employment decisions to be based on a standard of judicial reasonableness is repugnant to this notion and not necessary to carry out the purpose of the anti-discrimination laws.

\textbf{C. Policy Rationales}

One rationale for adoption of the reasonableness regime, noted in literature on this split, is that this reasonableness view is more in line with the goals of the anti-discrimination acts. The goals, in general,

\textsuperscript{234} Employers have lost discretion in terms of their business decisions as a result of the passage of the ADA. (This is also as a result of the other anti-discrimination laws.) See Heron, \textit{supra} note 231, at 1038.

\textsuperscript{235} The Supreme Court noted in \textit{Waters v. Churchill}, 511 U.S. 661, 675-76 (1994), that there was a big concern for efficient employment decision making. The Court noted that the employer would be forced to come to conclusions as would a jury later on. Thus, the employer would have to concern itself with things such as hearsay and make conclusions based on what later would be admissible in court. This would be a burden on the employer, considering that employers often rely on complaints made by customers and other employee’s to make their decisions which is in essence reliance on hearsay. \textit{Id.} at 676. Noted theorist Richard Epstein argues in favor of a freedom to contract regime. He believes that the exceptions to employment at will, including the discrimination laws, make the current legal climate too complex and add needless administrative costs to the overall costs of doing business and create poor incentives. Macdonald & Beck-Dudley, \textit{supra} note 4, at 375.

\textsuperscript{236} See \textit{supra} Part I.

\textsuperscript{237} See Befort, \textit{supra} note 1. While the anti-discrimination laws are an exception to at will employment, individuals can still hold employment at will subject to the provisions of the anti-discrimination laws.
are to prevent employment actions based on "unfounded fear, prejudice, ignorance, or mythologies."\textsuperscript{238} It is argued that a "pure" honest belief, without a requirement of reasonableness, is based on this prejudice and fear.\textsuperscript{239} Thus, requiring the employer's actions to be reasonable would prohibit an employer from making decisions based on stereotypes because the employer would have to point to particularized facts.\textsuperscript{240} However, an important goal of the acts was to ensure that there was not discrimination against protected individuals.\textsuperscript{241} Equal opportunity and treatment of those in protected classes was the objective.\textsuperscript{242} It does not follow that these protected individuals should be afforded greater protection than individuals not protected under the anti-discrimination laws.\textsuperscript{243} These non-protected individuals cannot benefit from the reasonableness inquiry that protected individuals would be afforded in an employment at will regime.\textsuperscript{244}

The honest belief regime adequately protects against stereotypes, because the honest belief relates to a legitimate reason for the firing. For example, in Green v. National Steel, Green was fired because her employer honestly believed she was falsifying personnel records, had removed company property and worked unauthorized overtime.\textsuperscript{245} Even if their belief was not true, it does not follow that their reason was a discriminatory one and based on a stereotype of disabled people. While there is an argument that the employer is more lax with investigating those who are disabled which would indicate discrimination, reasonableness is not the only way to examine this possibility. The employee can offer evidence that other similarly situated individuals, not of her protected class, were investigated differently concerning similar allegations.\textsuperscript{246} This evidence directly rebuts the honesty of the employer's reason. If an employer usually investigates theft in a certain way and then in one instance fails to complete half of the investigation, then this might probe the honesty of the employer's belief. If on the other hand, the employer always completes an unreasonable investigation, this would not be evidence that the belief is not honest.

\textsuperscript{238} Aitchley, supra note 89, at 237.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} See supra note 11.
\textsuperscript{242} See supra note 11.
\textsuperscript{243} See supra note 19 for a discussion of who is protected under the acts.
\textsuperscript{244} See supra Part I for a discussion of the requirements to sue under one of the three discrimination statutes. Since only those in protected classes may sue, those not in protected classes must just accept the personnel action they have suffered and may not benefit from a court inquiring into the reasonableness of the employer's belief for its action.
\textsuperscript{245} Green v. Nat'l Steel Corp., 197 F.3d 894, 896-97 (7th Cir. 1999). See supra Part II.A for a discussion.
\textsuperscript{246} See supra note 144 and accompanying text.
Further, judicial efficiency is an important consideration. Many discrimination claims lack merit, and the summary judgment stage becomes an appropriate place to rid the docket of these meritless cases. Summary judgment is a "useful tool for promoting judicial efficiency . . . in the employment context." Employing the "pure" honest belief regime requires the employee to meet his burden and establish some factual issue, whether it is about the honesty of the belief or facts indicating discrimination (whether direct or indirect). However, if the reasonableness regime were adopted many meritless cases would survive summary judgment because the employee would be able to create a material issue of fact based on the reasonableness of the employer's decision. While some believe that summary judgment should not be utilized as often as it is because it prevents individuals from exercising their right to trial, the courts are heavily overloaded with cases. Summary judgment enables courts to decide cases without the cost and time of a trial. Of course, a court would not grant summary judgment if it were not warranted and there was a dispute over a factual issue. Therefore, the honest belief rule allows the court to ferret out cases in which the employee can offer no facts which point to pretext.

CONCLUSION

Consider Mary's case once again. She has no evidence to show that she was terminated for a discriminatory reason. She just believes this is so because she has not been late and perhaps she wants someone to blame. Her supervisor, on the other hand, did a shoddy investigation and could have asked Mary's team worker about her lateness, but just

247. According to McAninch, "[e]mployment discrimination claims and civil rights claims comprised 0.4% of the federal circuit court caseload in 1964. By 1986, 6.8% of all litigation was employment litigation." McAninch, supra note 99, at 949. The Equal Employment Opportunity Commission ("EEOC") reported in 2002 that 84,442 charges were filed under Title VII, the ADA, the ADEA, and the Equal Pay Act. Of those filed charges, the EEOC determined that 59.3% did not have reasonable cause and only 7.2% did have reasonable cause. The U.S. Equal Employment Opportunity Commission, All Statutes, available at http://www.eeoc.gov/stats/all.html (last modified Feb. 6, 2003). The EEOC reports are based on charges filed with the EEOC as a precondition to litigation. See supra note 14.


249. See supra Part II.A.

250. See supra Part II.B.

251. In fact, some jurisdictions do not treat employment discrimination cases on a summary judgment motion the same as other cases being decided on a summary judgment motion. Though there appears no reason to give plaintiffs in discrimination cases preferential treatment. If a court properly determines whether there is an issue of fact, then there is no need for preferential treatment. Some courts cite the trouble with the intent element of a discrimination case as a reason not to favor summary judgment when appropriate. See McAninch, supra note 99, at 956. If intent is at issue the case should proceed to trial because this is a question of fact.

252. See supra note 98.
because she did not, does not mean that her actions were discriminatory. Mary was hired at Titlemen with a disability and had worked there for a long time. Therefore, Mary will most likely not survive summary judgment in an honest belief regime. In a reasonableness regime, however, the court might find that Titlemen's investigation was inadequate and allow Mary to proceed with her case. Therefore, Mary would survive summary judgment without any evidence pointing to discrimination and without rebutting the honesty of the belief of the employer, in essence, without showing pretext in accordance with the third prong of the McDonnell Douglas/Burdine test.

A "pure" honest belief regime is more consistent with the evidentiary burdens established by the Court, the Court's jurisprudence in other areas of the law, autonomy of business decisions and notions of judicial efficiency. While the anti-discrimination laws are perhaps the most important laws passed in the twentieth century, it is important to remember the context of the laws and the regime in which they function. They function in a workplace that has been traditionally non-regulated and has recently come into regulation. It is easy to become subsumed with the rights of the employee because they are traditionally weaker. However, to keep an appropriate balance one must consider the employer's rights and not become captivated with the rights of the employee. Both the employee and the employer are adequately protected by an honest belief regime.