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## Americans with Disabilities Act: You Can't Honestly Believe That, The;Legislative Reform

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## LEGISLATIVE REFORM

### The Americans with Disabilities Act: You Can't Honestly Believe That!

This Note will focus on a nascent split between the Sixth and Seventh Circuits over whether or not a plaintiff, in the context of a discrimination case under the Americans with Disabilities Act (ADA),<sup>1</sup> can attack the underlying reasonableness of the nondiscriminatory reasons that the defendant has put forth when the plaintiff attempts to show pretext.<sup>2</sup> Part I will briefly introduce the ADA and one of the means, pretext, by which an aggrieved plaintiff may make a showing of discrimination under the ADA. Part II will briefly describe the "honest belief" rule, a defense a defendant may use in defeating a plaintiff's showing of pretext. Part III will set out the split between the Sixth and Seventh Circuits with respect to the "honest belief" rule. Part IV will attempt to analyze the two positions in the context of the basic aims and policy underlying the ADA. Part V will conclude that the Sixth Circuit's position is the preferable position, and that Congress ought to amend the ADA to reflect this position.

#### I. Introduction

In 1990 Congress passed the Americans with Disabilities Act, legislation designed to overcome discrimination based on disability, whether real or perceived.<sup>3</sup> "The thesis of the [ADA] is simply this: That people with disabilities ought to be judged on the basis of their abilities; they should not be judged nor discriminated against based on unfounded fear, prejudice, ignorance, or mythologies; people ought to be judged based upon the relevant medical evidence and the abilities they have."<sup>4</sup> Claims of discrimination under the ADA are treated by courts in a manner similar to claims under Title VII of the Civil Rights Act of 1964.<sup>5</sup> This includes allowing a

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1. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994).

2. The split concerns a line of cases in the 7th Circuit, ending with *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672 (7th Cir. 1997) and a new case from the 6th Circuit, *Smith v. Chrysler Corp.*, 155 F.3d 799 (6th Cir. 1998), which explicitly rejected the 7th Circuit's reasoning.

3. 42 U.S.C. § 12102(2)(C) ("Being regarded as having such an impairment."). See also *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998) (holding that a job applicant need not make a showing that he or she is disabled or perceived as having a disability to state a prima facie case under 42 U.S.C. § 12112(d)(2), the section of ADA dealing with impermissible employment application questions).

4. 136 Cong. Rec. 9, 13051 (1990) (statement of Sen. Harkin during debate over Chapman Amendment to the ADA).

5. See *Kariotis*, 131 F.3d at 676 (applying the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) to an ADA claim); *Smith*, 155 F.3d at 805 (applying the *McDonnell Douglas* framework to an ADA claim); *Weigel v. Target Stores*, 122 F.3d 461 (7th Cir. 1997) (applying the *McDonnell Douglas* framework to an ADA claim). See also Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 62 at n.14 (1991) (explaining that the *McDonnell Douglas* framework has been applied to discrimination suits under a variety of federal statutes).

plaintiff to show disparate treatment either by direct evidence of discrimination or by indirect, circumstantial evidence.<sup>6</sup>

A claim based on indirect, circumstantial evidence is usually referred to as a pretext claim.<sup>7</sup> To make a pretext claim of discrimination, a plaintiff must follow the burden-shifting framework first set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>8</sup> Under the *McDonnell Douglas* burden-shifting framework, a plaintiff must first make out a prima facie case of discrimination by a preponderance of the evidence. A prima facie case requires that the plaintiff show: 1) that the plaintiff is a member a class protected by the statute, 2) that the plaintiff was qualified for the position in question, 3) that the plaintiff suffered an adverse decision by the defendant, and 4) that the position remained open to others whose qualifications were similar to the plaintiff's.<sup>9</sup> A successful prima facie showing creates a presumption of discrimination against the defendant. The defendant can then rebut this presumption by "articulating a legitimate, nondiscriminatory reason"<sup>10</sup> for the action the plaintiff is challenging as discriminatory. Once the defendant produces such evidence, the presumption evaporates,<sup>11</sup> and the plaintiff must now show that the defendant's stated reasons are pretext for prohibited discrimination.<sup>12</sup>

6. See, e.g., *Robinson v. Runyon*, 149 F.3d 507, 512-14 (6th Cir. 1998) (discussing the difference between direct versus circumstantial proof in a Title VII case).

7. See John L. Flynn, Note, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2028 at n. 104 (1995) ("They derive their name from the last stage of their succession of proof.").

8. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *McDonnell Douglas* was a Title VII discrimination case, but the framework developed in this case has since been applied to employment discrimination under a variety of federal statutes; see e.g. Catherine J. Lanctot, *supra* note 5, 62 at n.14 (explaining that the *McDonnell Douglas* framework has been used under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1967); the Employee Retirement Investment Security Act (ERISA), 29 U.S.C. § 1140 (1974); and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1866)). See also Lianne C. Knych, Note, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515, 1516 (1995) (noting that various courts have applied the *McDonnell Douglas* framework in interpreting the ADA and providing a sample list of such cases).

9. This is an example of the usual requirements for a prima facie showing; the actual requirements will differ from case to case depending on the facts, as the Court noted in *McDonnell Douglas*, "The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, n.13.

10. *Id.*

11. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 at n. 10 (1981).

12. *McDonnell Douglas*, 411 U.S. at 802-804. This framework from *McDonnell Douglas* has been refined by the Court in *Burdine*, *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983), and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) but the basic framework of: 1) prima facie showing, 2) rebuttal, and 3) showing of pretext remains that articulated in *McDonnell Douglas*.

The second two aspects of the *McDonnell Douglas* framework, the rebuttal of the presumption and the effect thereof, and the subsequent showing of pretext have been the subject of much pretext discrimination litigation, including *Burdine*, *Aikens*, and *Hicks*. Much of this litigation has focused on whether or not one of the two parties is entitled to summary judgment, or can survive summary judgment, without a direct showing of discriminatory intent on the part of the defendant. The circuits have also split over these issues, with several deciding that the plaintiff has made her case without such a showing, and the others deciding that the plaintiff must make such a showing in order to survive summary judgment. The two positions can be roughly summed up as the Pretext-only and the Pretext-plus positions. See Lanctot, *supra* at note 8 for a discussion of these two positions and how the circuits split (as of 1991). See also Note, *The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non-St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993), 73 NEB. L. REV. 953

## II. The Honest Belief Rule

Once the defendant has articulated legitimate, nondiscriminatory reasons to support its actions, the plaintiff must attempt to show pretext.<sup>13</sup> That is, the plaintiff must show either "that a discriminatory reason more likely motivated the employer"<sup>14</sup> or that the defendant's reasons are "unworthy of credence."<sup>15</sup> "An employee can show pretext by offering evidence that the employer's proffered reason had no basis in fact, did not actually motivate its decision, or was never used in the past to discharge an employee."<sup>16</sup> Plaintiffs will often attempt to show that the defendant's reason had no basis in fact, e.g. that the employer mistakenly believed that an employee's clothing contained an inflammatory message,<sup>17</sup> that the employer mistakenly believed that the employee referred to a client improperly,<sup>18</sup> that the employer mistakenly believed that the employee lied to receive disability benefits,<sup>19</sup> or that the employer mistakenly believed that the employee had lied on an application form.<sup>20</sup>

If the plaintiff succeeds in showing that a defendant's proffered reason had no basis in fact, the defendant can respond by claiming that, notwithstanding the lack of factual support, the defendant honestly believed the proffered reason, and that therefore it is not a pretext for some other motive—the "honest belief" rule.

The rationale behind the "honest belief" rule is that since the focus of a discrimination suit is the defendant's intent to discriminate, any reason that the defendant honestly believes cannot, by definition, be a pretext for some prohibited motive.<sup>21</sup> The practical effect of the rule is that a plaintiff may not survive a motion for summary judgment.<sup>22</sup> Whether or not a plaintiff does survive such a motion will depend on how the deciding court applies the honest belief rule.

## III. The Problem: The Split between the Sixth and the Seventh Circuits over the Application of the Honest Belief Rule

It follows that, if one honestly believes in the reason one gives for one's actions, then that reason cannot be a pretext for some other motivation. "[W]hen the employer advances a reason unrelated to a characteristic covered by the statute, the issue 'be-

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(1994).

This Note will not directly discuss the question of pretext-only or pretext-plus but will conclude, in Part V, that the preferable position with respect to the "honest belief" rule harmonizes with a third position. That position follows from, the author believes, an attentive reading of the cases and implies that pretext-only ought to be sufficient (usually) for a plaintiff to survive summary judgment, but not enough to entitle plaintiff to summary judgment.

13. The defendant need not show that the reasons it offers were the actual reasons for its actions, merely that a legitimate, nondiscriminatory explanation for its actions exists. See *Hicks*, 509 U.S. at 510 (quoting *Burdine*).

14. *Burdine*, 450 U.S. at 256.

15. *Id.*

16. *Smith v. Chrysler Corp.*, 155 F.3d 799, 806 (6th Cir. 1998) (citing *Koscis v. Multi-Care Management, Inc.*, 97 F.3d 876, 883 (6th Cir. 1996)).

17. *Toyee v. Reno*, 940 F. Supp. 1081, 1093 (E.D. Mich. 1996) (wearing a Malcolm X T-shirt).

18. *Brill v. Lante Corp.*, 119 F.3d 1266, 1271 (7th Cir. 1997) ("referred to a client as an 'idiot'").

19. *Kariotis v. Navistar Int'l Trans. Corp.*, 131 F.3d 672, 678 (7th Cir. 1997) (degree of mobility after knee surgery).

20. *Smith*, 155 F.3d at 804 (lying on a self-administered medical form).

21. *Id.* at 806 (discussing the rule as applied by the 7th Circuit).

22. See *Kariotis*, 131 F.3d at 674.

comes one of credibility in determining whether the belief is genuinely held' rather than whether the belief is correct."<sup>23</sup>

### A. The Seventh Circuit's Position

The Seventh Circuit has developed its version of the "honest belief" rule through a series of cases culminating with its decision in *Kariotis v. Navistar Int'l Transp. Corp.*<sup>24</sup> The Seventh Circuit applied the honest belief rule strictly and *Kariotis* lost a motion for summary judgment: "if the company honestly believed in those reasons, the plaintiff loses even if the reasons are foolish or trivial or baseless."<sup>25</sup> Two cases are illustrative of the Seventh Circuit's development of the rule, leading up to *Kariotis*: *Pollard v. REA Magnet Wire Co.*<sup>26</sup> and *McCoy v. WGN Continental Broadcasting Co.*<sup>27</sup>

In *Pollard* the trial court found that Pollard had shown pretext and consequent discrimination, because Pollard was able to show that the defendant had fired him on the basis of a mistaken belief. Pollard had asked for leave, a request the defendant denied. Subsequently, on the week Pollard had requested leave, he was absent from work due to an injured ankle.<sup>28</sup> The defendant investigated, but the "investigation went nowhere."<sup>29</sup> Because of the coincidence of the dates and an earlier incident with an injury, the defendant's personnel manager believed Pollard had lied about the injury and fired him on the basis of that belief. Because Pollard was able to show that the defendant's explanation was not based in fact, the trial court found for Pollard. The appeals court reversed the trial court because that court "confused mistake with 'pretext'.... . . . We do not remand, because the finding that Vachon and the other managers believed that Pollard was able to work the week of July 23 ends the case."<sup>30</sup>

In *McCoy* the defendant employer, WGN, first demoted McCoy and then subsequently terminated him.<sup>31</sup> WGN later hired a younger consultant to perform McCoy's tasks.<sup>32</sup> At the time of his termination McCoy was forty-six.<sup>33</sup> McCoy sued under the ADEA<sup>34</sup>, and at trial presented evidence that contradicted all of the defendant's proffered reasons in an attempt to avoid summary judgment. McCoy further argued that the defendant's reasons were so implausible that they must raise an inference of pretext.

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23. *Pollard v. REA Magnet Wire Co.*, 824 F.2d 557, 559 (7th Cir. 1987) (characterizing an earlier 7th Circuit case, *Bechold v. IGW Systems, Inc.*, 817 F.2d 1282, 1285 (7th Cir. 1987)).

24. *Kariotis*, 131 F.3d 672 (7th Cir. 1997). *Kariotis* exemplifies the application of precedent developed under Title VII litigation being applied to discrimination claims under other statutes. *Kariotis* filed suit under the ADA, the ADEA, ERISA, the Consolidated Omnibus Budget Reconciliation Act (COBRA), and an Illinois statute. The court applied the Title VII framework to all of the federal claims. This Note will accept this assumption and will treat precedent under each statute as being applicable to all without noting the particular statute.

25. *Id.* at 676.

26. *Pollard*, 824 F.2d 557 (7th Cir. 1987).

27. *McCoy*, 957 F.2d 368 (7th Cir. 1992).

28. *Pollard*, 824 F.2d at 559.

29. *Id.*

30. *Id.*

31. *McCoy*, 957 F.2d at 370.

32. *Id.*

33. *Id.*

34. The *McDonnell Douglas* burden shifting framework is common to several discrimination statutes, and analysis under one applies equally to the others; see *supra*. note 24.

With respect to one of the defendant's four reasons, the court said: "it is undisputed that WGN had some level of concern with McCoy's performance. . . . Whether or not that level of concern was justified given McCoy's actual performance is irrelevant."<sup>35</sup> The court continued: "[e]ven if the performance concern was a complete mistake, even if McCoy was the best possible person for the job, so long as WGN honestly believed he was not its business judgment will not be second-guessed by federal courts applying the ADEA."<sup>36</sup>

In *Kariotis*, the plaintiff was fired because the defendant believed that she had engaged in disability fraud on the basis of an inaccurate investigation.<sup>37</sup> Kariotis was initially granted disability leave in order to have knee replacement surgery.<sup>38</sup> After the surgery Kariotis required additional procedures and her leave was extended.<sup>39</sup> The human resources manager at Navistar became suspicious of Kariotis' leave and investigated.<sup>40</sup> On the basis of an insufficient investigation Navistar fired Kariotis.<sup>41</sup> Kariotis brought suit under several federal statutes, including the ADA, and one state statute.<sup>42</sup> At trial Kariotis successfully attacked the factual basis for the defendant's decision, and attempted to use the inadequacy of the investigation as evidence from which an inference of pretext could be drawn. The trial court disagreed, granting summary judgment to the the defendant, and the appeals court affirmed: "[i]n the end, we are left with Kariotis' theory that the company's investigation was so impulsive and shoddy that it reeks of discriminatory intent—a theory that we rejected in *Pollard* . . . and one which we reject today."<sup>43</sup>

Thus, once a defendant offers an explanation for its actions, and asserts that it honestly believed in that explanation, the Seventh Circuit will not allow a plaintiff to dispute the validity of that belief by attacking its unreasonableness, or use that unreasonableness to support an inference of discrimination. "[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers."<sup>44</sup> Honest belief is therefore effectively a complete defense to a claim of pretext under the Seventh Circuit's application of the rule.

## B. The Sixth Circuit's Position

The Sixth Circuit first addressed this issue in the ADA context in *Smith v. Chrysler Corp.*<sup>45</sup> In deciding *Smith*, the Sixth Circuit explicitly rejected the Seventh Circuit's approach.<sup>46</sup>

The court in *Smith* drew on an earlier Sixth Circuit decision applying a similar defense in the context of the Rehabilitation Act of 1973.<sup>47</sup> In *Pesterfield v. TVA*<sup>48</sup> the

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35. *McCoy*, 957 F.2d at 373.

36. *Id.*

37. *Kariotis*, 131 F.3d 672, 677 (7th Cir. 1997) (stating that "the company's investigation was 'imprudent, ill-informed, and inaccurate'").

38. *Id.* at 674.

39. *Id.*

40. *Id.*

41. *Id.* at 675.

42. *Id.* (the ADA, ADEA, ERISA, COBRA, and the Illinois Health Insurance Claim Filing Act).

43. *Id.* at 678.

44. *McCoy*, 957 F.2d at 373.

45. *Smith v. Chrysler Corp.*, 155 F.3d 799 (6th Cir. 1998).

46. *Id.* at 806.

47. 29 U.S.C. § 701 (1988).

plaintiff suffered from a series of problems that eventually led to a period of hospitalization.<sup>49</sup> Following hospitalization, Pesterfield's doctor wrote a letter to the TVA about Pesterfield's ability to return to work.<sup>50</sup> The letter described Pesterfield's medical condition, and concluded that "[a]t the present time, he seems unable to return [to work]."<sup>51</sup> Based on this letter the TVA concluded that Pesterfield could not return to work and terminated him.<sup>52</sup> At trial Pesterfield introduced his doctor's testimony to the effect that TVA might have misinterpreted the letter.<sup>53</sup> The court decided that TVA's adverse employment decision was made in good faith, despite the doctor's testimony, because the language in the doctor's letter gave the TVA a reasonable basis for making its decision.<sup>54</sup>

The *Smith* court decided that the *Pesterfield* analysis was relevant to ADA claims because so much other ADA analysis tracks the analysis of claims under other discrimination statutes.<sup>55</sup> The court also found that the reasonable basis analysis honored the policy under the ADA that employment decisions be made on the basis of fact rather than stereotype.<sup>56</sup> The court concluded that in order to take advantage of the "honest belief" rule an employer "must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made."<sup>57</sup> "[T]he key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment decision."<sup>58</sup>

The Sixth Circuit in *Smith* concisely stated the split between itself and the Seventh Circuit: "[t]o the extent the Seventh Circuit's application of the 'honest belief' rule credits an employer's belief without requiring that it be reasonably based on particularized facts rather than on ignorance and mythology, we reject its approach."<sup>59</sup>

#### IV. Discussion

The issue can be succinctly stated as: may a defendant defeat a plaintiff's attempt to show pretext by asserting its honest belief in its proffered nondiscriminatory reasons, despite the absence of any articulable facts that would provide a reasonable basis for that belief.

The Sixth Circuit answers in the negative: in order for a defendant to successfully assert its honest belief in its reasons, such reasons must be objectively reasonable. If an "employer failed to make a reasonably informed and considered decision before taking its adverse employment action . . . then any reliance placed by the employer in such a process cannot be said to be honestly held."<sup>60</sup> The Seventh Circuit, by contrast, will not allow a plaintiff to show pretext by attacking the reasonableness of the

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48. *Pesterfield v. TVA*, 941 F.2d 437 (6th Cir. 1991).

49. *Id.* at 438.

50. *Id.*

51. *Id.* at 439.

52. *Id.*

53. *Id.* at 440.

54. *Id.* at 443-44.

55. *Smith*, 155 F.3d at 807 (quoting *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1177 (6th Cir. 1996)).

56. *Id.* at 806.

57. *Id.* at 807.

58. *Id.*

59. *Id.* at 806.

60. *Id.* at 807.

defendant's proffered reasons.<sup>61</sup> The Seventh Circuit therefore requires that a plaintiff show something more than just a lack of basis in fact to show pretext.<sup>62</sup>

### A. Summary Judgment

The difference is not one of theoretical niceties. As *Kariotis* demonstrates, depending on which standard a court chooses to measure a plaintiff's evidence, that plaintiff may lose on a motion for summary judgment without ever having a fact-finder weigh the issues of credibility so crucial to a finding of intent. As the Seventh Circuit noted in *McCoy*, "[s]ummary judgment is only appropriate when the record reveals that no reasonable jury could find for the nonmoving party. . . . However, this general standard is applied with added rigor in employment discrimination cases, where intent is inevitably the central issue."<sup>63</sup>

The Sixth Circuit's approach to the "honest belief" rule respects the showing that a plaintiff must make to survive a motion for summary judgment. The ultimate issue in a discrimination case is the intent of the defendant, and intent is something that is best measured by a fact-finder's weighing of credibility. By making a prima facie showing of possible discrimination at the first stage of the *McDonnell Douglas* framework, and then by successfully calling the defendant's stated motives into question, the plaintiff establishes a dispute over a question of fact (the defendant's intent) that cannot be resolved without weighing the credibility of both parties.<sup>64</sup>

Summary judgment is based on the evidence presented and the permissible inferences therefrom that a reasonable fact-finder might draw in the nonmoving party's favor; it does not deal with an evaluation of the credibility of that evidence or those inferences.<sup>65</sup> At the pretext stage of the *McDonnell Douglas* framework then, the prima facie evidence, the evidence of a lack of a factual basis for the defendant's stated reasons, and the question about the validity of the defendant's asserted honest belief all raise issues that can only be resolved by weighing the credibility of the parties. Summary judgment is therefore inappropriate, even where the defendant has asserted an honest belief, if the validity of that belief is questionable. In allowing the plaintiff to raise this issue by arguing the unreasonableness of the defendant's belief, the Sixth Circuit's approach respects the evidentiary requirements of summary judgment without imposing a greater burden.

By contrast, the Seventh Circuit's approach raises the evidentiary barrier higher than necessary and allows the granting of summary judgment in the defendant's favor

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61. See *supra* notes 23-32.

62. Readers will recognize the pretext-only versus pretext-plus discussion in microcosm here. This discussion does have roots in that larger discussion but the author prefers to keep the scope of this Note limited to the issue of reasonableness as grounds for supporting a showing of "honest belief." For a discussion of the larger issue, see *Lancot*, *supra* note 5.

63. *McCoy*, 957 F.2d at 370-71 (noting also that "summary judgment [is] 'notoriously inappropriate' where intent [is] at issue").

64. This is not to resurrect the presumption of discrimination that the prima facie showing first created. See *Burdine*, 450 U.S. 248, *Aikens*, 460 U.S. 711, and *Hicks*, 509 U.S. 502. However, even though the presumption has disappeared, the evidence that gave rise to the presumption can still be taken into account in deciding the issue of discriminatory intent. See *Burdine*, 450 U.S. at 256 n.10 (rebuttal of the presumption raised by the plaintiff's prima facie case does not mean that that evidence, and the inferences therefrom, cannot be evaluated in deciding whether the defendant's rebuttal was pretextual).

65. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).



even though there is a legitimate issue of fact, namely the actual honesty of the defendant's asserted "honest belief." This reasoning is inconsistent with the requirements for surviving summary judgment, as well as the Supreme Court's decisions in *Texas Dep't. of Community Affairs v. Burdine*,<sup>66</sup> *United States Postal Service Bd. of Governors v. Aikens*,<sup>67</sup> and *St. Mary's Honor Center v. Hicks*.<sup>68</sup>

### B. Consistency With the Jurisprudence of *McDonnell Douglas*

These three cases have engendered much dispute over what sort of evidentiary showing a plaintiff must make in order to recover for discrimination.<sup>69</sup> This Note will not explore the arguments surrounding pretext-only or pretext-plus with respect to discrimination actions. However, the decisions in these three cases support the argument that the position of the Sixth Circuit is more consistent with existing law than that of the Seventh Circuit.

In *Burdine*, the Supreme Court reversed an appeals court decision that required the employer to prove by a preponderance of the evidence the existence of legitimate nondiscriminatory reasons for its actions.<sup>70</sup> The Court reiterated its decision with respect to the employer's burdens from *McDonnell Douglas*: the defendant must "articulate some legitimate nondiscriminatory reason for the employee's rejection."<sup>71</sup> The "plaintiff must then have an opportunity to prove . . . that the legitimate reasons offered . . . were a pretext for discrimination."<sup>72</sup>

In *Aikens*, the Supreme Court concluded, *inter alia*, that the factfinder (the district court) erred in requiring the plaintiff in a Title VII case to present direct evidence of discriminatory intent in order to make a prima facie showing.<sup>73</sup> The Court reiterated that a plaintiff may succeed, after a prima facie showing, by either directly persuading the court that a discriminatory motive was behind the employer's action, or by showing that the employer's stated reasons are not believable.<sup>74</sup>

In *Hicks*, the Court reversed an appeals court decision that granted judgment as a matter of law where the plaintiff had shown that the defendant's explanations were pretextual.<sup>75</sup> The decision in *Hicks* was not about the amount of proof a plaintiff must show in order to win a verdict of discrimination, but rather the amount and kind of proof that a plaintiff must show in order to win a motion for summary judgment. Under *Hicks*, a plaintiff is not entitled to judgment as a matter of law on a showing of pretext. However, the factfinder is still entitled to find for the plaintiff on a showing of pretext alone, as allowed by *McDonnell Douglas*. *Hicks* does not require that a plaintiff do more than raise an issue as to the believability of the defendant's proffered reasons in order to get to the factfinder.

By not allowing the plaintiff to attack the unreasonableness of the employer's explanation, the Seventh Circuit effectively requires the plaintiff to directly prove that

66. *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

67. *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

68. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

69. See the discussion *supra*, notes 5 and 62.

70. *Burdine*, 450 U.S. at 252.

71. *Id.* at 253.

72. *Id.*

73. *Aikens*, 460 U.S. at 717.

74. *Id.* at 716.

75. *Hicks*, 509 U.S. at 509.

the employer had another (discriminatory) reason for acting. Further, by granting summary judgment for the employer despite evidence that the employer's reasons may be unworthy of credence, the Seventh Circuit denies the plaintiff the opportunity to reach and persuade a factfinder that a discriminatory intent lay behind the employer's actions because the employer is unbelievable. The Seventh Circuit therefore effectively prohibits the plaintiff from showing discrimination indirectly.

### C. Consistency With the Policy Objectives of the ADA

Further, the policy that underlies the ADA is one of prohibiting discrimination on the basis of disability. One aspect of this policy is the determination that stereotypes of disability are themselves harmful. People with disabilities should not be discriminated against based on unfounded fear, prejudice, ignorance, or mythologies but on the relevant medical evidence and the abilities they have.<sup>76</sup> The ADA is designed not only to remedy discrimination against a person who is in fact disabled, but to uproot reliance on stereotypes generally. The ADA defines prohibited activity, in part, as "utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability."<sup>77</sup> The ADA also defines disability, in part, as "being regarded as having such an impairment [as defined in § 12102(2)(A)]."<sup>78</sup> It is possible therefore for a person who is not disabled in reality to maintain an ADA claim on the basis of an employer's unfounded belief alone.<sup>79</sup> The implication of both of these sections is that it is possible to not only be intentionally discriminatory in the traditional Title VII meaning, but to also be recklessly or even negligently discriminatory, at least with respect to the ADA.

The Sixth Circuit's approach to the "honest belief" rule is more consistent with this policy than is that of the Seventh Circuit. By requiring that a defendant be able to point to particular facts on which it reasonably relied when making its decision, the Sixth Circuit in effect prohibits the defendant from making such decisions recklessly (or negligently). *Smith* demonstrates the appropriateness of this approach in the context of stereotyped beliefs about disabilities.

One of the two reasons that the employer in *Smith* put forward as justification for its firing of Smith was that he had lied on an initial employment form.<sup>80</sup> Smith denied suffering from unusual tiredness or fatigue on the employment form and then subsequently requested accommodation for narcolepsy. The manager who made the decision to fire Smith decided that because, in her personal opinion, people with narcolepsy suffered from unusual tiredness that Smith had lied on the employment form.<sup>81</sup> The court decided that an uninformed personal opinion, based on common lay beliefs about people with narcolepsy, was not reliable enough to justify the defendant's decision to fire Smith.<sup>82</sup> This sort of "honestly believed" idea about what narcoleptics do and do not suffer from is one of the aspects of discrimination that the ADA was designed to overcome. Asking that a defendant make "reasonably informed and consid-

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76. See statement of Sen. Harkin, *supra* note 4.

77. 42 U.S.C. § 12112(b)(3)(A) (1994).

78. 42 U.S.C. § 12102(2)(C) (1994).

79. See, e.g., *Griffin v. Steeltek, Inc.*, 160 F.3d 591 (10th Cir. 1998), *supra* note 3.

80. *Smith*, 155 F.3d at 804 (lying on a self-administered medical history form).

81. *Id.* at 808.

82. *Id.* at 808. However, the court found that Smith was not able to overcome the defendant's other nondiscriminatory reason for firing him and affirmed the lower court's decision against Smith.

ered decisions"<sup>83</sup> is consistent with the underlying policy of the ADA and the explicit provisions of the law itself.

The Seventh Circuit's approach, because it allows a defendant to avoid liability so long as it "honestly believes" unfounded stereotypes about disabled people is not consistent with the ADA. If the Sixth Circuit had applied the Seventh Circuit's rule to Chrysler's decision with respect to its belief that Smith lied about suffering from unusual tiredness, Chrysler would avoid liability for an action founded on a stereotyped image of narcoleptics.

Because the Sixth Circuit's approach to the issue of "honest belief" in the context of a pretext showing properly allows the plaintiff to survive a motion for summary judgment by the defendant while respecting the Supreme Court's admonition from *Hicks*<sup>84</sup> that a showing of falsity does not automatically entitle a plaintiff to judgment as a matter of law and respects the underlying policy concerns of the ADA, that approach is preferable to the Seventh Circuit's approach.

### V. Conclusion

The Sixth Circuit's approach to the "honest belief" rule is more consistent with both the evidentiary requirements of summary judgment, the Supreme Court's decisions in *Mcdonnell Douglas* and its progeny, and the policies that Congress identified as underlying the Americans with Disabilities Act. Congress should therefore amend section 103 of the ADA<sup>85</sup> to explicitly incorporate the Sixth Circuit's version of the "honest belief" rule as a defense to discrimination claims under the ADA.

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83. *Id.* at 807.

84. 509 U.S. 502 (1993).

85. 42 U.S.C. § 12113 (1994) (defining some defenses to claims under the ADA).

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