

Proving the “Honest Belief” Defense in Employment Litigation

By Bart M. Feinbaum

Introduction

Terminations and other adverse employment actions are inevitable occurrences at most companies. Litigation often follows that challenges these decisions. For employers, the ultimate goal is to dismiss these lawsuits by pre-trial motion, thereby eliminating the risk of trying the case before often unpredictable juries. The likelihood of prevailing on motion will depend largely on how credible the judge views the actions undertaken by the company.

Most typically, the garden-variety employment case involves a claim of alleged disparate treatment.¹ In such cases, a fundamental issue will be whether the plaintiff was the victim of intentional discrimination.² The answer to the elusive question of intent will depend on whether the employer acted with illegal motive as opposed to acting in a mistaken, foolish, trivial, or even mistaken manner.³ Even then, the question will often turn to how mistaken or riddled with error an employment decision may be without causing suspicion that discrimination was the real reason for the action.

In addressing the question of liability, the United States Court of Appeals for the Sixth Circuit (“Sixth Circuit”) allows an employer to prevail on summary judgment if it is able to demonstrate that it had an honest belief in its proffered legitimate, non-discriminatory reason, provided that such belief is reasonably based on particularized facts at its disposal at the time of the adverse employment action.⁴ The purpose of this article is to provide practitioners with an overview of the honest-belief rule as adopted by the Sixth Circuit and to suggest steps that employers should consider prior to undertaking discipline to ensure a greater chance of fitting within this rule.⁵

Proving Intentional Discrimination

In most employment discrimination cases, the issue typically boils down to the employee challenging the decisional process reached by the employer in concluding that discipline is warranted for a policy or rule violation.

Through the honest-belief rule, the employer asks the court to honor its business decision, in essence to credit its version of events, leading to the imposition of the discipline, over the employee’s counter-version of the facts. Thus, before describing how the honest-belief rule operates, it is first necessary to understand how employment discrimination cases are proven.

A plaintiff can prove discrimination either directly or by circumstantial evidence.⁶ Direct evidence is that evidence that, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer’s action.⁷ In the context of alleged race discrimination, for example, the alleged statement made by a university president that “we already have two black vice presidents. I can’t bring in a black provost” was considered direct evidence of race discrimination.⁸ The statement, “I fired you because you are disabled” is considered to be direct evidence of disability discrimination.⁹ Such comments require no inference to conclude that illegal considerations motivated, at least in part, the employment decision.

Of course, employers rarely act with such brutal honesty in dealing with their employees. Because direct evidence of discrimination is so uncommon, plaintiffs are able to prove discrimination circumstantially through the well-known framework established in the seminal case of *McDonnell Douglas v Green*.¹⁰ In the absence of direct evidence, a plaintiff must first present a prima facie case of discrimination by showing that he or she (1) is a member of a protected class, (2) experienced an adverse employment action, (3) was qualified for the position, and (4) was replaced by a person outside of the protected class or was treated differently than similarly situated employees.¹¹ If the plaintiff is able to present a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory business reason for the adverse employment action.¹²

If the defendant meets its obligation, the burden then shifts back to the plaintiff, who maintains the ultimate burden of proving

that the defendant's proffered reason is a pretext for discrimination.¹³ As the United States Supreme Court has explained, however, "it is not enough ... to *disbelieve* the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination."¹⁴ Stated differently, a reason cannot be construed as a pretext *for discrimination* unless it is shown *both* that the reason was false *and* that discrimination was the real reason.¹⁵ Under appropriate circumstances, however, the trier of fact can "reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."¹⁶

The decision to discipline an employee results in an exercise of discretion on the part of the employer. Naturally, companies are reluctant to have such decisions second guessed by a judge or jury. Nevertheless, an employer's business judgment is not an absolute defense to claim unlawful discrimination.¹⁷ More specifically, a court may consider the reasonableness of an employer's decision to the extent that it assists in answering the question of whether the proffered reason for the employment action was the actual motivation or, rather, a cover-up for illegal discrimination.¹⁸

In employment litigation the focus will be on whether an employer made a reasonably considered and informed decision before implementing its employment action or, instead, implemented a business judgment "so riddled with error that defendant could not honestly have relied upon it."¹⁹ It is the employer's reasonableness, or lack thereof, that is the fundamental inquiry a court will assess in determining if the honest-belief rule should be applied to assist the employer in convincing the court that its actions were taken in the absence of discriminatory intent.

The Honest-Belief Defense to Pretext

The honest-belief rule is applied when examining the reasons offered by an employer for disciplining an employee. In support of its motion for summary judgment, an employer will argue that, even if its ultimate determination was wrong, it was based on an honest belief and not discrimination. The employee, on the other hand, will assert in opposing such motion that the employer's belief was unreasonable. As will be discussed, the honest-belief assessment serves as a defense to

the plaintiff's claim of pretext. The court, in essence, evaluates the reasonableness of the proffered non-discriminatory basis for the adverse employment action. In doing so, an inference of pretext will not be warranted when an employer can demonstrate that it acted with an honest belief based on particularized facts at its disposal at the time of the employment decision.

The version of the honest-belief rule used in the Sixth Circuit was recognized in *Smith v Chrysler*.²⁰ In *Smith*, the plaintiff applied for and was hired as an electrician at one of the defendant's plants. Before applying for this position, the plaintiff had been diagnosed with a variant of narcolepsy, a sleeping disorder.²¹ The plaintiff did not disclose his narcolepsy on a "Self-Administered Medical History" form completed at the time of his original application for employment or on an application in connection with a heavy-machinery driver's license that he later completed.²² The plaintiff subsequently requested to move from the night shift to the day shift when his sleep problems resurfaced. An investigation commenced, and the defendant's plant superintendent terminated the plaintiff for lying on the forms.²³

The plaintiff sued the defendant under the Americans with Disabilities Act (ADA)²⁴ and the Michigan Handicappers' Civil Rights Act.²⁵ The plaintiff appealed the grant of summary judgment in favor of the defendant. The district court determined that the company's good faith belief that the plaintiff lied on the forms shielded it from liability.²⁶ The defendant did not challenge the district court's holding that the plaintiff had established a prima facie case of disability discrimination. The plaintiff did not contest that lying on forms represented a legitimate, non-discriminatory reason for the termination. Rather the appeal focused on the legitimacy of this proffered reason.²⁷ The plaintiff's argument was that had the defendant undertaken a better and more thorough investigation, it would have learned that he did not have narcolepsy and did not suffer from unusual fatigue. Consequently, he did not lie on the forms.²⁸

In response, the defendant argued that the court should adopt the so-called honest-belief rule as articulated by the Seventh Circuit Court.²⁹ Under this version of the honest-belief rule, an employee cannot establish pretext as long as the employer honestly believed the reasons offered for the termination, even if the employer's reasons were

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ultimately found to be mistaken, foolish, trivial, or baseless. The rationale behind the Seventh Circuit's interpretation of the rule is that the critical issue in employment discrimination cases is discriminatory intent. Therefore, if an employer honestly, albeit mistakenly, believes that the reason it relies upon in implementing discipline is true, then the employer arguably lacks discriminatory intent.³⁰ Under the Seventh Circuit approach, the employer need only articulate an honest reason for taking an adverse action against an employee, even if that reason lacks any factual support.

The *Smith* court rejected the Seventh Circuit approach, finding it to be at odds with the purpose of the ADA, a statute requiring that actions taken against an individual with a disability be based on facts and not on "unfounded fear, prejudice, ignorance or mythologies."³¹ Given this, the Sixth Circuit announced a modified honest-belief rule:

[I]n order for an employer's proffered non-discriminatory basis for its employment action to be considered honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made. If the employer is unable to produce such evidence to support its employment action, then the 'honest belief' rule does not apply.

In deciding whether an employer reasonably relied on the particularized facts then before it, we do not require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action. ... Although courts should resist attempting to micro-manage the process used by employers in making their employment decisions, neither should they blindly assume that an employer's description of its reason is honest. When 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.³²

The court cautioned that the protection under this rule is not absolute. Even if an employer can make a showing of particularized facts that motivated its decision, the employee still has the opportunity to produce "proof to the contrary."³³

Applying these principles, the court held that the defendant reasonably relied on particularized facts at hand when it determined that the plaintiff lied on his driver's license application during the course of its pre-discharge investigation. More specifically, the company consulted letters from the plaintiff's treating physician stating that the plaintiff was being treated for narcolepsy; it relied upon the medical opinion of the company doctor who spoke with the plaintiff's treating physician; and it examined the medical notes from the company doctor indicating that the plaintiff had admitted to suffering from narcolepsy. In view of these particularized facts gathered prior to the discharge decision, the burden of production shifted to the plaintiff to demonstrate that reliance on such facts was unreasonable. The plaintiff failed in this regard.³⁴ Thus, the honest-belief rule applied to defeat the plaintiff's claim of pretext as to the company's justification for terminating his employment for lying on the driver's license application.

On the other hand, the court determined that it was not appropriate to apply the honest-belief rule to support the defendant's belief that the plaintiff lied on his Self-Administered Medical History form, because the conclusion that the plaintiff lied on such a form was not based on any particularized facts revealed during its investigation. Rather, it was reached entirely on the personal and subjective non-medical opinion of the plant superintendent who believed, in a stereotypical way, that persons with narcolepsy also suffer from fatigue.³⁵

In sum, *Smith* holds an employer's proffered, legitimate, non-discriminatory basis for its adverse employment action cannot be a pretext for disability discrimination provided that it is honestly held. In order for a reason to be honestly held, the employer must establish its reasonable reliance on the particularized facts before it at the time of the adverse employment action. Even then, the rule is not applied automatically as the employee has

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the final opportunity to produce proof to the contrary. As the court in *Smith* observed, “if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so.”³⁶

The Sixth Circuit has applied the honest-belief rule in cases involving other grounds of discrimination. In *Majewski v Automatic Data Processing, Inc.*,³⁷ the plaintiff sued the defendant for, among other things, age discrimination under Ohio state law. The defendant maintained that it terminated the plaintiff due to his increasingly poor job performance.³⁸ In response, the plaintiff claimed that his work performance was satisfactory.³⁹ The court rejected this latter argument and noted that the plaintiff’s “disagreement with [Defendant’s] honest business judgment regarding his work does not create sufficient evidence of pretext in the face of the substantial evidence that [Defendant] had a reasonable basis to be dissatisfied.”⁴⁰ Such evidence included the defendant documenting the plaintiff’s performance problems, placing him on a performance improvement plan, verifying lapses in his performance, and investigating problems that he had with his supervisor, all undertaken prior to the decision to discharge.⁴¹

In *Wright v Murray Guard, Inc.*,⁴² the defendant employed the plaintiff as a security guard. The defendant terminated the plaintiff based on sexual harassment allegations made against him, work performance problems, and his failure to follow procedures.⁴³ The plaintiff sued alleging discrimination based on sex and race in violation of Title VII of the Civil Rights Act of 1964 (“Title VII”).⁴⁴ In affirming the grant of summary judgment against the plaintiff, the court applied the honest-belief rule in favor of the defendant. The facts demonstrated that the defendant reasonably relied on particularized facts available to it at the time of the discharge decision. These included the plaintiff’s documented performance problems, an anonymous letter indicating that the plaintiff sexually harassed several women, incident reports supporting the alleged harassment, allegations made by a co-worker that the plaintiff touched her in a sexual manner, and that he pressured her to perform a sex act. In addition, the defendant conducted two separate investigations into the allegations of sexual misconduct.⁴⁵ While the plaintiff challenged the truthfulness of one of the witnesses who complained about him, the court noted that this was not the real

issue. More specifically, the court indicated that the defendant did not need to prove that the plaintiff actually sexually harassed anyone to defeat his claims. Rather, the defendant only needed to show that it made its decision to terminate the plaintiff “based on an honestly held belief in a nondiscriminatory reason supported by particularized facts after a reasonably thorough investigation.”⁴⁶

The employer also prevailed in asserting the honest-belief defense in *Abdulnour v Campbell Soup Supply Co.*,⁴⁷ a claim of national origin discrimination under Title VII. In *Abdulnour*, the defendant terminated the plaintiff for poor performance. At the time of the discharge, the defendant had received complaints that the plaintiff was not adequately performing his job. In addition, the defendant had received complaints from several employees indicating that the plaintiff was demeaning, was not at the work site at critical times, would not communicate with them, and was the “worst supervisor ever.”⁴⁸ Given these particularized facts supporting the work performance problems, the plaintiff failed to meet his burden of producing evidence sufficient for a jury to conclude that the defendant did not have an honest belief that he was performing his job poorly.⁴⁹

To summarize, where an employer can show that the honest belief in its proffered reason for implementing its adverse action against an employee is based on a reasonable reliance on particularized facts, the inference of pretext is not warranted.⁵⁰ In considering whether a reason is honestly held, the issue is not whether the employee, in fact, committed the work rule violation.⁵¹ Moreover, as courts should “resist attempting to micro-manage the process used by employers in making their employment decision,”⁵² an employee likely will not prevail in challenging an employer’s business judgment by merely questioning the nature or sufficiency of an investigation undertaken by the employer, provided that such investigation is credible and generates “particularized facts” supporting the proffered reason for the adverse action. Rather, the key question will be whether the employer *legitimately perceived* that the employee violated a particular work rule based on a “reasonably informed and considered decision” taken before the adverse employment action.⁵³

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Practical Pointers for Establishing the Honest-Belief Defense

The elusive issue of proving discriminatory intent most often boils down to assessing the credibility and veracity of the actions undertaken by the employer. As the United States Supreme Court has observed, “proving the employer’s reason is false becomes part of (and often considerably assists) the greater enterprise of proving the real reason was intentional discrimination.”⁵⁴ The mere fact that “the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff’s proffered reason of [discrimination] is correct. That remains a question for the fact finder to answer...”⁵⁵ This, of course, is where the employer most likely does not want to find itself—having the jury decide whether its actions were reasonable or not.

Cases in which the honest-belief rule is not applied in favor of an employer typically involve situations where employers were sloppy in its actions leading up to the implemented adverse employment actions. In general, these are cases where employers, oftentimes in haste, rush to judgment and skip steps in the overall process leading to the discipline. From these cases and others, the following are suggestions that will assist employers in taking advantage of the benefits of the honest-belief rule.

An Employer Must Know Its Own Policies

Because policies and procedures are created by companies, employers are expected to know the pertinent requirements set forth in these documents. For example, if the policy states that the company must conduct an investigation prior to disciplining an employee, then an investigation must occur unless the policy provides for an exception. If the policy indicates that the accused party must be interviewed prior to issuing discipline, then the employee must be interviewed. If the policy states that progressive discipline should be adhered to, then such steps should be followed unless the policy allows for the skipping of steps depending on the nature and seriousness of the infractions. The bottom-line is that a court is more likely to conclude that an employer’s actions are unreasonable if it fails to follow its own written policies and guidelines on implementing discipline.

Conduct a Thorough Investigation Before Deciding on Discipline

A well-thought-out investigation will lead to a gathering of the “particularized facts” that will form the basis for the reasonableness of adverse action to be taken. Typically, investigations will be undertaken by employees of the company’s human resources (“HR”) department. Thus, it is important that HR personnel whose job it is to conduct investigations be adequately trained on employment laws and on how to investigate. The investigator should interview all relevant witnesses, obtain relevant documentation, retain copies of interview notes, and create a business-like investigative report because this information may be subject to disclosure during pre-trial discovery. The findings of the investigation should be shared with the decision maker before deciding on the level of disciplinary action. By reviewing such findings, the decision maker will have at his/her disposal the “particularized facts” determined through the investigation prior to implementing the adverse employment action.⁵⁶

Do Not Ignore Statements That Could Lead to Finding of Innocence

In a zealous attempt to rid the company of a problem, some employers may purposefully ignore witnesses who might provide facts that could lead to exoneration of the charged employee. A company that operates in such a manner could face a claim that the investigation was merely a sham and, therefore, a pretext or cover-up for discrimination.⁵⁷ On the other hand, a jury may be more likely to find against a company, and perhaps even award punitive damages, if an employer ignores evidence that might have exonerated the individual of the charge.

The Charged Employee Should Be Interviewed As Part of the Investigative Process

It is good practice to allow the charged employee to air his/her version of events. Even for the at-will employee, the notion of due process involves fundamental fairness and is something that a trier of fact may assess in determining whether the employee based his decision on particularized facts. For instance, an interview may result in the employee admitting to the work rule violation. As noted previously, it is not the employee’s subjective view of the situation that matters.⁵⁸ Rather, the question will be whether the employer had a reasonable

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belief based on particularized facts that the employee violated the work rule. The interview of the employee may strengthen such belief. In addition, interviewing the accused may lead to other relevant evidence supporting the adverse employment action.⁵⁹

Obtain and Maintain Documentation of Performance Problems

If an employee is terminated for work performance problems, the most powerful particularized facts supporting the discipline often will be the underlying cause of the problems themselves. Ideally, leadership will have documented these problems along the way. At the very least, HR should ensure through the investigative interview process that the decision maker is able to recount instances of poor performance through specific examples.⁶⁰

The Termination Incident Should Not Be the Only Documentation of Problems

In some cases, employers will overlook opportunities to address performance problems. For example, the leader may possess a non-confrontational personality. Or the employee may have been passed on from one department to another, despite his/her past work deficiencies. Thus, the incident leading to the termination may be the only documentation supporting the work performance problems of the employee. To avoid this dilemma, employers should take a proactive approach in addressing these issues with the employee with the goal of improving performance. Such actions may include coaching and counseling, honest appraisals, performance improvement plans, and formal disciplinary action. These prior actions can serve as additional “particularized facts” that can be relied upon should it become necessary to eventually discharge the employee.⁶¹

Avoid Disparate Discipline

An employee may demonstrate pretext by producing “evidence that other employees, particularly employees not in the protected class, were not fired even though they engaged in substantially identical conduct to that which the employer contends motivated its discharge” decision.⁶² Evidence that other employees not in the protected class were not discharged for similar conduct may call into question the reasonableness and honesty of the proffered reason for terminating

the employee.⁶³ Thus, disparate treatment should be avoided.

Conclusion

As the Sixth Circuit recently observed:

The honest-belief rule is, in effect, one last opportunity for the defendant to prevail on summary judgment. The defendant may rebut the plaintiff’s evidence of pretext, by demonstrating that the defendant’s actions, while perhaps ‘mistaken, foolish, trivial, or baseless,’ were not taken with discriminatory intent. We give the defendant an opportunity to show that its intent was pure because ‘the focus of a discrimination suit is on the intent of the employer. If the employer honestly, albeit mistakenly, believes in the non-discriminatory reason it relied upon in making its employment decision, then the employer arguably lacks the necessary discriminatory intent.’⁶⁴

Under the honest-belief rule, the burden is on the employer to point to specific facts that it had at the time the decision was made that would justify its belief in the proffered, legitimate, non-discriminatory reason for the adverse employment action. The business judgment of the employer in undertaking such action is not absolute. The key inquiry in applying the honest-belief defense will be whether the employer made a reasonably informed and considered decision prior to implementing the adverse action or, in the alternative, a business judgment so riddled with error that the employer could not have honestly relied upon it. If the plaintiff introduces evidence calling into question the veracity of the termination process, a jury likely will be the final arbiter of the dispute, a forum often less predictable and generous to employers. On the other hand, an employer that honestly bases an employment decision on particularized facts gathered prior to the disciplinary action will have a greater chance of prevailing on summary judgment.

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NOTES

1. As the United States Supreme Court has observed, “Disparate treatment’ ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.” *Teamsters v United States*, 431 US 324, 335 n 15 (1977). Dis-

parate treatment also can involve other protected traits such as disability, age, height, weight, marital status, family status, and veteran status.

2. *Tisdale v Federal Express Corp.*, 415 F3d 516, 529 (6th Cir 2005) quoting *Reeves v Sanderson Plumbing Prods Inc*, 530 US 133, 153 (2000).

3. *Clay v United Parcel Serv, Inc.*, 501 F3d 695, 714-15 (6th Cir 2007).

4. *Id.*

5. Michigan courts have not formally recognized the honest belief rule. Thus, this article focuses primarily on how federal courts have applied and developed this defense. The suggestions offered through this article, however, are not meant to be limited to defending litigation brought in federal court but rather can be used as an overall risk prevention strategy for employment discrimination matters filed in both state and federal courts.

6. *DiCarlo v Potter*, 358 F3d 408, 414 (6th Cir 2004).

7. *White v Columbus Metropolitan Housing Authority*, 429 F3d 232, 238 (6th Cir 2005) (quoting *Jacklyn v Schering-Plough Healthcare Prods Sales Corp.*, 176 F3d 921, 926 (6th Cir 1999)).

8. *Johnson v Univ of Cincinnati*, 215 F3d 561, 577 n 7 (6th Cir 2000).

9. *Smith v Chrysler Corp.*, 155 F3d 799, 805 (6th Cir 1998).

10. 411 US 792 (1973).

11. *Id.*, p. 802.

12. *Id.*

13. *Id.* at 804; *Texas Dep't of Cmty Affairs v Burdine*, 450 US 248, 253 (1981).

14. *St. Mary's Honor Center v Hicks*, 509 US 502, 519 (1993) (emphasis in original).

15. *Id.*, p. 515.

16. *Reeves v Sanderson Plumbing Products, Inc.*, 530 US 133, 147-148 (2000) (noting that it is not always necessary for a plaintiff to introduce independent evidence of discrimination to show pretext where there is sufficient evidence to reject the employer's explanation).

17. *EEOC v Yenkin-Majestic Paint Corp.*, 112 F3d 831, 835 (6th Cir 1997).

18. *Wexler v White's Fine Furniture, Inc.*, 317 F3d 564, 576 (6th Cir 2003). See also *Hartsel v Keys*, 87 F3d 795, 800 (6th Cir 1996) ("The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness.") citing *Dister v Continental Group, Inc.*, 859 F2d 1108, 1116 (2d Cir 1988); *EEOC v Yenkin-Majestic Paint Corp.*, 112 F3d 831, 835 (6th Cir 1997) ("A decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision.").

19. *In re Lewis*, 845 F2d 624, 633 (6th Cir 1988).

20. 155 F3d 799 (6th Cir 1998).

21. *Id.*, p. 802.

22. *Id.*, pp. 802-803.

23. *Id.*, pp. 803-804.

24. 42 USC 12101, *et seq.*

25. MCL 37.1101, *et seq.* (now known as the Michigan Persons with Disabilities Civil Rights Act).

26. 155 F3d at 801.

27. *Id.*, p. 805.

28. *Id.*

29. See Michaels, Note, Legitimate Reasons For Firing: Must They Honestly Be Reasonable?, 71 *Fordham L. Rev.* 2643, 2657 (2003).

30. 155 F3d at 806 citing *Kariotis v Navistar Int'l Trans. Corp.*, 131 F3d 672, 676-677 (7th Cir 1997).

31. *Id.* citing 136 Cong. Rec. S 7422-03, 7437 (daily ed. June 6, 1990) (statement of Sen. Harkin).

32. 155 F3d at 807-808 (citations omitted).

33. *Id.*, p. 807 citing *Pesterfield v TVA*, 941 F3d 437, 443 (6th Cir 1991) (Rehabilitation Act).

34. 155 F3d at 808.

35. 155 F3d at 808-809. While the court found that the honest belief rule did not apply to support Defendant's belief that Plaintiff lied medical history form, the court nevertheless affirmed summary judgment as the Defendant did have a reasonable basis to believe that Plaintiff lied on the driver's license form. *Id.*, p. 809.

36. 155 F3d at 807 citing *Fischbach v District of Columbia Dept of Corrections*, 86 F3d 1180, 1183 (DC Cir 1996). One way to demonstrate pretext is to show that a company's "asserted business judgment was so ridden with error that defendant could not honestly have relied upon it." *Wexler v White's Fine Furniture, Inc.*, 317 F3d 564, 576 (6th Cir 2003) citing *In re Lewis*, 845 F2d 624, 633 (6th Cir 1988).

37. 274 F3d 1106 (6th Cir 2001).

38. *Id.*, pp. 1110-1112.

39. *Id.*, p. 1116.

40. *Id.*

41. *Id.*, p. 1117.

42. 455 F3d 702 (6th Cir 1996)

43. *Id.*, pp. 705-706.

44. 42 USC 2000e *et seq*

45. 455 F3d at 708-709.

46. *Id.*, p. 709.

47. 502 F3d 496 (6th Cir 2007).

48. *Id.*, pp. 502-503.

49. *Id.*, p. 503.

50. *Smith, supra*, 155 F3d at 806-808.

51. See *Majewski*, *supra*, note 37, 274 F3d at 1117 ("[Plaintiff's] assertion that he did not delete the payroll wrap is insufficient to call into question [Defendant's] honest belief that he did."); *Campbell v Washington County Public Library*, 2007 US App LEXIS 17393, at 13 (6th Cir 2007) (Unpublished) ("[T]he issue before the court is not whether [employee] was insubordinate ...; instead, the issue is whether the [employer] legitimately perceived [employee] as being insubordinate").

52. *Smith*, 155 F3d at 807.

53. *Id.*, p. 807.

54. *Hicks, supra*, 509 US at 517 (emphasis added).

55. *Id.* p. 524.

56. See *Archer v Mesaba Aviation Inc.*, 2000 WL 376677 (6th Cir 2000) (Unpublished) (Defendant did not base its decision on "particularized facts" where witnesses did not actually observe alleged sex act committed by Plaintiff and the decision maker testified that he only "believed" that he reviewed the reports submitted by the witnesses).

57. See *Braithwaite v. the Timken Co.*, 258 F3d 488, 495-496 (6th Cir 2001) (noting that based on witness statements there was no doubt that Defendant had a reasonable belief that Plaintiff shoved another employee, the basis for the discharge).

58. See note 52 *supra*.

59. *Id.* p. 497 (Plaintiff's evidence did not establish that Defendant did not make a "reasonably informed and considered decision" when, among other things, Defendant allowed Plaintiff several opportunities to present his version of the facts). *Contra, Rhea v Wal-Mart Stores, Inc.*, 2007 WL 3408546 (ED Mich 2007) (Slip Copy) (Defendant did not make a reasonably informed decision before terminating him. Among other things, Defendant terminated Plaintiff the day after the alleged incident without speaking to him even though company policy is not to take employment actions before hearing the employee's "side of the story.").

60. *See Burks v Yellow Trans, Inc*, 2008 US App LEXIS 518, at 20 (6th Cir 2008) (Unpublished) (Defendant reasonably relied on particularized facts when Plaintiff's supervisors recounted in affidavits and depositions as to his specific instances of poor performance and attitude).

61. *Michael v Caterpillar Financial Services Corp*, 496 F3d 584, 598-600 (6th Cir 1997) (Employer's honest belief in employee's performance problems as reflected in company's investigation was buttressed by the fact that employee previously had been placed on a performance improvement plan).

62. *Manzer v Diamond Shamrock Chemicals Co*, 29 F3d 1078, 1084 (6th Cir 1994).

63. *Rhea v Wal-Mart Stores, Inc*, 2007 WL 3408546 (ED Mich 2007) (Slip Copy) (Defendant failed to make a reasonably informed and considered decision in terminating Plaintiff even though the employer's policy generally called for progressive discipline and a younger employee received a warning by the same managers for a comparable offense).

64. *Clay v United Parcel Service, Inc*, 501 F3d 695, 715 (6th Cir 2007).



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