Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Fourth Circuit

No. 15-1747

MASOUD SHARIF,

Appellant

v.

UNITED AIRLINES, INC.,

Appellee

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association and National Employment Lawyers Association in Support of Appellant

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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of over 370 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), which is the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

MWELA and NELA respectfully submit this amicus brief to aid this Court in addressing whether this Court should create a new defense at the summary

judgment stage based on the sincerity with which an employer asserts a pretextual reason for its challenged actions. The disposition of this issue in this Court could have an important effect on the ability of employees to enforce their statutory rights to be free of retaliation, and on the public interest in allowing employees to take necessary family or medical leave.

For these important reasons, NELA and MWELA respectfully submit this amicus brief.

Statement Pursuant to Rule 29(c), Fed. R. App. P.

Pursuant to Rule 29(c), Fed .R. App. P., *amici* state that:

(A) *Amici* alone authored the entire brief, and no attorney for a party authored any part of the brief;

(B) Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting the brief, exclusive of the dues counsel on each side have paid for their membership in *amici* MWELA and NELA; and

(C) No person, other than the *amici curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

1. The employer here fired the plaintiff after determining that his request for protected Family and Medical Leave was fabricated. On this record, the employer was wrong; a jury could find that plaintiff truly needed the leave and took it under the employer-specified conditions. The district court nevertheless granted summary judgment, finding that the employer honestly held its mistaken belief. In these circumstances: Is permitting the district court to determine that the employer's belief in a false explanation is, as a factual credibility matter, honestly and sincerely held, consistent with Rule 56 and *McDonnell Douglas* and its progeny?

2. Where an employee engages in a statutorily protected activity, such as taking leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2615(a), and his employer takes adverse action against him in the mistaken belief that he was not entitled, does the employer's mistake of fact trump the employee's statutory entitlement?

SUMMARY

The question of whether an interested witness's testimony is "honest" is a credibility determination reserved to the jury. This proposition is not controversial. Yet the district court below granted summary judgment to the employer based on the court's – not the jury's – determination that an interested witness's testimony as to his

own state of mind was honest. This violates Rule 56, Fed. R. Civ. P., and a long line of Supreme Court cases.

This case presents an issue of first impression in the Fourth Circuit. Appellee invites the Fourth Circuit to create an entirely new defense to discrimination and retaliation cases, effectively facilitating the granting of summary judgment in cases that otherwise have sufficient evidence of pretext to go to the jury. The appellee's invitation should be rejected. This Circuit has never recognized an "honest belief rule" because there is no such rule; the only "rule" that governs proof at the summary judgment stage is Rule 56, Fed. R. Civ. P., and that rule prohibits resolving credibility or drawing inferences in favor of the moving party. Determining whether an employer's belief in a discredited explanation was honestly held violates these strictures. As the Supreme Court has explained, even when all other material facts are undisputed, the question of motivation is itself a fact which requires deciding which inference to draw from those facts. *Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) ("The District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted. The legislature's motivation is itself a factual question.").

The "honest belief" defense urged by the employer here contradicts not only Rule 56, but also the Supreme Court's repeated explanation of the significance of pretext. The familiar *McDonnell Douglas* indirect proof scheme consists of three

steps: (1) the employee demonstrates a *prima facie* case of discrimination or retaliation, (2) the employer proffers a legitimate, non-discriminatory explanation, and (3) an opportunity for the employee to show that the employer's proffered explanation is not worthy of belief, *i.e.*, that it is a pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) The Supreme Court has held, consistently and repeatedly, that evidence sufficient for a jury to find the employer's explanation to be unworthy of belief is sufficient, by itself, to permit the jury to infer that the employer's actions were unlawful.

The district court moved the goalposts. The employee satisfied all three prongs of *McDonnell Douglas*, including adducing sufficient evidence for a jury to reject United's proffered explanation as false. That was enough to survive summary judgment and leave the ultimate issue to the factfinder at trial. Appellee now urges this Court to add a fourth step to the *McDonnell Douglas* proof scheme, requiring not only evidence that the employer's explanation is unworthy of belief, but also establishing the absence of mistake. There is no basis for such a change in the law. The Supreme Court clarified that no additional evidence is required in *Hicks* and then more emphatically repeated that in *Reeves*.

An employer is always free to argue to a jury at trial that it made a mistake, so the "honest belief" defense is at play in every trial. But United does not want the right to argue "mistake" to a jury; it asks this Court to create a new defense that provides, in

essence, a "get out of jail free" card by somehow divining from a paper record that the employer's pretextual reason was proffered honestly and not as a cover-up for discrimination. The problem is this new defense runs afoul of the prohibitions on determining credibility or drawing inferences.

Finally, where an employer has fired an employee for the manner in which he engaged in protected activity (such as using FMLA leave, seeking an accommodation for religious beliefs or disability, filing discrimination complaint, etc.), the employer's belief about those actions is irrelevant. An employee who meets the legal requirements for FMLA leave is entitled to that leave whether the employer honestly believes otherwise or not. If an employer chooses to fire its employee on the assertion that the employee fraudulently obtained the benefit, the employer must be correct or it will be strictly liable. There is no room for employee to be deprived of a legally mandated right when she did all that was legally required simply because the employer got the facts wrong, sincerely or otherwise.

ARGUMENT

I. IF THE JURY HAS EVIDENCE TO REJECT AN EMPLOYER'S EXPLANATION PROFFERED UNDER THE *MCDONNELL DOUGLAS* INDIRECT PROOF SCHEME, THEN THERE IS SUFFICIENT EVIDENCE TO SURVIVE SUMMARY JUDGMENT

The Supreme Court recognized that employers do not generally admit unlawful reasons for their employment decisions. As Judge Posner explained, "Defendants of

even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible." *Riordan v. Kempiners*, 831 F. 2d 690, 697 (7th Cir. 1987) (Posner, J.); *see also Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.8 (1981) (the *McDonnell Douglas* analysis "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination").

Recognizing that proof of unlawful motivation is elusive, the Supreme Court held that indirect evidence is one available method that permits the factfinder to infer discrimination. The Court explained:

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas*, 411 U. S. at 804-805.

Burdine, 450 U.S. at 257 (emphasis added) (explaining the *McDonnell Douglas* indirect proof scheme). The Court continued to refine and explain this scheme after *McDonnell Douglas* and *Burdine*, *see, e.g.*, *Furnco Constr. Corp. v. Waters*, 438 U.S.

567 (1978) (describing flexibility of *McDonnell Douglas* analysis and the significance of the pretext stage); *Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983) (*McDonnell Douglas* proof scheme is useful to aid the factfinder in resolving the question of motive).

Since these cases, the Court has twice squarely addressed the significance of pretext evidence, *i.e.*, evidence sufficient for the trier of fact to reject the employer's explanation proffered in the second stage of *McDonnell Douglas*. In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court clarified that a finding of pretext *permits* but does not compel a finding of discrimination:

> Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required."

Id., 509 U.S. at 511 (emphasis added, footnotes and internal citations omitted). This is the key point, even though *Hicks* is also cited for the subsequent proposition that rejection of the defendant's proffered reasons likewise does not *compel* a finding for the plaintiff. In fact, both of these propositions rest on the settled point that competing inferences are possible once the factfinder rejects the employer's proffered explanation. The factfinder may choose to infer discrimination from the falsity of the employer's explanation, or it may infer that some other motivation caused the employer to proffer an untrue explanation, including simple mistake. Because these

are both inferences, they rest in the exclusive control of the jury. *Id.* Accordingly, it was error for the trial court in this case to decide which inference the jury may choose to draw from the evidence undermining United's proffered explanation.

If there were any doubt about this point, the Court resolved it definitively in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In between *Hicks* and *Reeves*, some courts had interpreted *Hicks* as requiring the plaintiff to have some additional evidence of discrimination in addition to pretext, sometimes called "pretext plus." *Gillins v. Berkeley Elec. Co-op., Inc.*, 148 F.3d 413, 416 (4th Cir. 1998) ("This court has adopted what is best described as the "pretext-plus" standard for summary judgment in employment discrimination cases."). *Reeves* rejected the "pretext-plus" standard.

In *Reeves*, the lower court found that the employee had adduced sufficient evidence of pretext for the jury to disbelieve the employer's proffered explanation (namely, that Mr. Reeves had engaged in poor timekeeping practices and supervision, costing the company money). In setting aside the jury verdict for the employee, the lower court largely ignored the inferences that could be drawn from a finding of pretext, and held that there was insufficient evidence that age motivated the plaintiff's termination. The Supreme Court reversed, holding yet again that rejection of the employer's explanation as untrue was, by itself, sufficient for the jury to infer discrimination:

> [T]he Court of Appeals proceeded from the assumption that a prima facie case of discrimination, combined with sufficient evidence for the trier of fact to disbelieve the defendant's legitimate, nondiscriminatory reason for its decision, is insufficient as a matter of law to sustain a jury's finding of intentional discrimination.
>
> In so reasoning, the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence. This much is evident from our decision in *St. Mary's Honor Center*. . . . [¶] In reaching this conclusion, however, we reasoned that it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation. Specifically, we stated:
>
> > "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." *Id.*, at 511.

Id., 530 US at 146-147 (emphasis added). Note that the Supreme Court held that the jury's disbelief of the employer's explanation is sufficient to find for the plaintiff with or without a suspicion of mendacity. But deciding whether the employer was mendacious in its proffered explanation is a credibility issue which cannot be determined at the summary judgment stage.

Employers invariably proffer some legitimate explanation for their actions; one can search in vain for cases where summary judgment was granted against an employer for failing to articulate a legitimate reason. Under *McDonnell Douglas*, the

employer is required to submit "admissible evidence" of its proffered explanation. *Burdine*, 450 U.S. at 255 ("the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection"). What that means is that, in every case, one or more defense witnesses have testified under oath, via deposition or affidavit, in support of the employer's proffered explanation. We know that some percentage of those explanations are not true, but determining which witnesses' testimony to believe is not the proper role for a trial court deciding summary judgment. Indeed, it is likely that almost every employer facing evidence of pretext would claim to have an "honest belief" in its original explanation.

There is no special deference to an interested witness (here, a Human Resources official) testifying as to his own state of mind. As the Supreme Court has explained, even when all other material facts are undisputed, the question of motivation is itself a fact which requires deciding which inference to draw from those facts. *Hunt*, 526 U.S. at 549 ("The District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted. The legislature's motivation is itself a factual question."). A manager whose actions have been challenged as unlawful is an interested witness, and a jury need not believe his testimony as to what his state of mind was at the time of a decision. The Supreme Court emphasized that testimony of interested witnesses was not entitled to deference in *Reeves*:

> [T]he court should review the record as a whole, it *must disregard* all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that the evidence comes from *disinterested* witnesses."

Reeves, 530 U.S. at 151 (emphasis added and internal citations omitted).

Consider criminal cases where state of mind is an element and the defendant proclaims his innocence. Courts do not routinely dismiss charges merely because the accused testifies "I did not know there were drugs in that suitcase" or "I did not know that was insider stock information." Yet there is little analytical difference between these examples and a decision maker who protests that his mistake of fact was an innocent one.

II. THE FOURTH CIRCUIT HAS NEVER CREATED AN "HONEST BELIEF" DEFENSE AND SHOULD NOT DO SO NOW

The Fourth Circuit has never recognized an "honest belief rule" as a distinct entity. Indeed, the district court in this case relied primarily upon out of circuit authority in positing such a defense. Our research has not revealed any cases identifying this as a separate defense in this Court. As noted above, the essence of this defense—mistake of fact—is always available at trial, so as a practical matter, the "honest belief defense" is operative only at the summary judgment stage.

The district court cited only two cases from this circuit in support of this novel defense. In fact, neither case recognized this defense. The first case, *E.E.O.C. v.*

Sears Roebuck & Co., 243 F.3d 846 (4th Cir. 2001) actually supports the plaintiff/appellant because this Court reversed the summary judgment granted to the employer based in large part on the evidence contradicting Sears' proffered explanation. *Id.* at 851-55. Instead, the trial court pulled the phrase "honestly believed" largely out of context, as it appears in a discussion of the reasons that the factfinder could reject Sears' proffered explanation as unworthy of belief. *Id.* at 853.

The second case, *DeJarnette v. Corning Inc.*, 133 F.3d 293 (4th Cir. 1998), comes closer to the mark but still falls short of creating a new defense. More importantly, *DeJarnette* was overruled by *Reeves* (rejected "pretext plus" standard) and also invalidated by *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (summary judgment not proper if based on crediting one side's witnesses over the other). First, *DeJarnette* used the "pretext plus" interpretation of *Hicks* which the Court invalidated in *Reeves*. *See DeJarnette*, 133 F.3d at 298. Second, *DeJarnette* set aside a jury verdict based on the court's theory that the evaluation of a supervisor could not be contradicted by the testimony of either the plaintiff or her co-workers, *see id.* at 299 (noting that plaintiff's testimony regarding her performance and the testimony of her co-workers was "close to irrelevant"). This preference for giving greater weight to the defense's witnesses and ignoring the contradictory evidence from the plaintiff's witnesses was at the heart of the Supreme Court's recent holding in *Tolan*:

> Considered together, these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary

> judgment and failed properly to acknowledge key evidence offered by the party opposing that motion. . . . [¶] The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system.

Tolan, 134 S. Ct. at 1867-68.

This Court recently applied *Tolan* to reverse a summary judgment decision in a discrimination case. In *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562 (4th Cir. 2015), the holding of this Court could be applied with equal force to the case at bar:

> Strikingly, both of the district court's key factual findings — that Jacobs was not disabled and that Tucker did not learn of Jacobs's accommodation request prior to terminating her — rest on factual inferences contrary to Jacobs's competent evidence. The district court thus improperly resolved factual issues at the summary judgment stage, in contravention of well-settled law.

Id. at 569. The district court in this case committed similar errors as the trial court in *Jacobs*.

There are two competing stories in Appellant Sharif's case. In the employer's version, Mr. Sharif had twice taken FMLA leave near vacation and the employer suspected that Sharif was gaming the system with fraudulent use of FMLA leave. The employer did not investigate the 2013 incident, so on this record, a jury could infer that Sharif did nothing improper in 2013, leaving the allegation of misconduct to rest on the 2014 incident. In the employee's version, Mr. Sharif suffered a panic

attack when it appeared that he would not make it back in time from South Africa for his next scheduled shift. Mem. Op. at 3. There was some evidence to support both stories, which makes this a case for the jury to sort out, as in *Tolan* and *Jacobs*.[1]

At bottom, depending on which inferences the jury draws, Sharif was either misusing his leave or panicking about not getting a flight home in time. Similarly, United's superficial investigation and violation of due process protections was either unimportant or an employer going through the motions to reach a predetermined outcome based on hostility to FMLA users. Inferences could be drawn in either

[1] In fact, there was considerably less evidence than met the eye, as the employer's allegation of fraud rests primarily on three supports: (1) the email from Suzanne Hasser noting that Mr. Sharif had twice used FMLA leave adjacent to his vacation, (2) Mr. Sharif had tried to trade the work shift at issue, and (3) that Mr. Sharif got flustered and misspoke when confronted in an investigatory examination. Item 3 does not help United because a jury could interpret the investigation by Kenneth Martin as intended to trigger an anxiety reaction because Martin was aware of Sharif's reason for being on approved intermittent leave, especially in light of United's violation of procedures that were designed to give Sharif advanced notice and an opportunity to consult with the union representative ahead of time. Viewed superficially, Item 1 seems suspicious because of the convenient timing, but Sharif was approved to take off an entire week (five work days) each month simply by calling in with his case number. So an alternate view is to ask "what are the odds that one of Sharif's frequent panic attacks might occur during the half month he was out on vacation?" This is a very different question. Hasser's email is reminiscent of a *Dilbert* cartoon where the malicious secretary points out to the pointy-haired boss that "40% of all sick days taken by your staff are Fridays and Mondays!" (http://dilbert.com/strip/1996-04-17; see also http://dilbert.com/strip/1996-04-18, last visited Oct. 25, 2015). The joke is, of course, that a random use of sick days would mean that about 20% of all sick days would fall on each day of the workweek, so there is nothing suspicious about that 40% figure. So the mere coincidence that Sharif's panic attacks sometimes adjoined vacation is a slender reed upon which to bypass a normal investigation.

direction. The trial court erred in drawing inferences only in favor of United, directly at odds with the law that *all* inferences must be drawn in favor of the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III. THIS COURT SHOULD NOT ADOPT AN "HONEST BELIEF" DEFENSE

The so-called "honest belief rule" violates Rule 56 as well as controlling Supreme Court authority. The court below cited *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274, 285-86 (6th Cir. 2012) for its definition of the defense. That case explains the approach as follows:

> The ground rules for application of the honest belief rule are clear. A plaintiff is required to show "more than a dispute over the facts upon which the discharge was based." *Braithwaite v. Timken Co.*, 258 F.3d 488, 493–94 (6th Cir. 2001). We have not required that the employer's decision-making process under scrutiny "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." *Smith v. Chrysler Corp.*, 155 F.3d 799, 807 (6th Cir. 1998). Furthermore, "the falsity of [a] [d]efendant's reason for terminating [a] plaintiff cannot establish pretext as a matter of law" under the honest belief rule. *Joostberns*, 166 Fed. Appx. at 794 (footnote omitted). As long as the employer held an honest belief in its proffered reason, "the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless." *Smith*, 155 F.3d at 806; *see also Majewski v. Automatic Data Processing, Inc.*, 274 F.3d 1106, 1117 (6th Cir. 2001).

Seeger, 681 F.3d at 285-86. This explanation has three propositions, and every one of those three propositions is a wrong statement of the law.

1. "A plaintiff is required to show 'more than a dispute over the facts upon which the discharge was based." As shown above, the Supreme Court held in *Hicks* and repeated in *Reeves* that evidence sufficient for the jury to reject the employer's explanation is sufficient to sustain a verdict, and therefore deny summary judgment. If there is a dispute of material facts which, if resolved in favor of the non-moving party, discredits the employer's explanation, then summary judgment should be denied. An employer whose proffered reason is discredited does not get a second bite at the apple.

2. "The key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action." This proposition is wrong, and was rejected by the Supreme Court in an employment case where the employer asserted that it should be protected from liability where an independent decision maker conducted an independent investigation. The Court rejected this notion in *Staub v. Proctor Hosp.*, 562 U.S. 411, 421 (2011) ("We are aware of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of 'fault.'"). Indeed, Suzanne Hasser's email insinuating that Sharif had misused FMLA leave sets the chain of events in motion, and is analogous to the accusations in *Staub* by the biased supervisor which triggered the purported

independent investigation. As in *Staub*, the fact that the employer purported to conduct a neutral investigation does not create immunity.

Even if this proposition were correct—and it is not—there is evidence on this record from which a jury could reasonably find that United did not make a reasonably informed decision. Among other deficiencies, a jury could find that United did not investigate Sharif's 2013 use of leave, United did not investigate Sharif's medical condition on March 30, 2014, and United did not consider other explanations for Sharif's demeanor and misstatement at the investigation meeting. Accordingly, even under the Sixth Circuit's explanation, Sharif had sufficient evidence for a jury to find that the employer did not act reasonably.

3. "The falsity of [a] [d]efendant's reason for terminating [a] plaintiff cannot establish pretext as a matter of law' under the honest belief rule." This statement is the crux of the Sixth Circuit's honest belief approach. It is absolutely wrong. The falsity of the defendant's explanation *permits but does not compel* an inference in favor of the employee on the ultimate issue. This statement by the Sixth Circuit violates *Hicks*, *Reeves*, *Tolan*, *Jacobs* and Rule 56, not to mention *Liberty Lobby*. 477 U.S at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be

believed, and all justifiable inferences are to be drawn in his favor."); *see also Adickes v. S.H. Kress*, 398 U.S. 144, 176 (1970) (Black, J., concurring) ("The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.").

This Circuit should not follow any sister circuit into error. Whether an employer acted out of unlawful motive or good faith error is for the jury to decide. If a jury can reject the employer's proffered explanation, the jury is permitted to infer unlawful conduct. That is sufficient to deny summary judgment.

IV. FALSITY AND PRETEXT ARE NOT ALWAYS THE SAME THING

An employer's explanation may be true and still be a pretext for discrimination or retaliation. This is also a jury question. Consider the following example:

> Jane Smith files a complaint of sexual harassment against her supervisor John Doe on Monday. On Thursday (three days later), John Doe sees Jane Smith arrive at her desk 10 minutes after the normal starting time. Doe tells Smith "you're 10 minutes late, so you're fired."

In this simple example, it may be accurate that Jane Doe was 10 minutes late to work, yet that does not mean that tardiness must be the "true" reason as a matter of law. It is possible that a jury would find that the penalty is out of proportion to the

offense, particularly if there is evidence that other situations were not dealt with as harshly.[2]

This analysis could fit the case at bar. On this record, Sharif would have been subject to lesser penalties had he not called his office at all but simply failed to show up for work unannounced. JA 580- 581, 836 ("no call, no show" is not a firing offense). In this respect, Sharif being fired for a single missed shift could be viewed as Jane Smith being tardy by 10 minutes, *i.e.*, insufficient to justify the penalty of termination. United remains free to argue that it "honestly believed" that Sharif gamed the system and attempted to shield his absence from even a mild penalty by fraudulently designating his missed shift as FMLA leave. A jury could so find. On the other hand, the jury could find that Sharif properly complied with his FMLA call-in requirements, and that if United considered the leave to be improper, the penalty should not be substantially worse than it would impose on an employee who completely fails to call his office before missing a shift, so-called "no call, no show." JA 836. This permits a reasonable inference that United's harsher treatment of Sharif reflects hostility to his intermittent FMLA leave, and not simply to the fact that he missed a shift. With competing inferences to be drawn from the same facts, summary judgment was improper.

[2] Moreover, whether or not the supervisor "honestly believed" Ms. Doe to be late does not change the calculus.

V. "SINCERITY" IS DIFFERENT THAN NON-DISCRIMINATORY

A bigoted supervisor may well be sincere in believing that men are better workers than women, or that white employees are preferable to black ones. Civil rights laws would be hollowed out if a decision maker could choose a substantially inferior candidate based on unlawful discrimination but then be relieved of liability because he testified that he "honestly believed" the minority candidate was less qualified than the selectee.

Far from dispelling unlawful motives, an "honest belief" in the rightness of one's management decisions could co-exist quite easily with prejudice, stereotyping and bigotry. Consider Archie Bunker, the fictional bigot from TV's *All in the Family*, forced to decide between hiring a white candidate and a minority one. One can easily imagine how sincere Bunker would be in finding the minority candidate less qualified, yet Bunker's honest belief that he chose the better candidate is hardly a guarantee that the decision was race neutral.

Similarly, the record below permits an inference that both Hasser and Martin were quick to view minimal facts in the light most harshly to Sharif. Hasser pointed out that he had used FMLA leave adjacent to a vacation twice, and Martin violated normal procedures in what could be viewed as a rush to judgment. Even if Hasser and Martin sincerely suspected Sharif of fraud, that very "sincerity" may flow from an honest hostility to, and distrust of, those employees who can self-designate FMLA

leave whenever they want. It would be interesting to know, for example, whether Hasser ever wrote an email about an employee who took sick leave adjoining a vacation, and if so, how the employer responded. It is plausible that some employees fraudulently use sick days to extend their vacation, but it is also conceivable that employees sometimes get sick while on vacation. Again, there are competing inferences to be drawn, so summary judgment was improper.

VI. AN EMPLOYER THAT TAKES ADVERSE ACTION AGAINST AN EMPLOYEE BECAUSE IT MISTAKENLY BELIEVES HE WRONGFULLY TOOK FMLA LEAVE HAS VIOLATED THE FMLA

The purpose of the FMLA is to give employees the right to take necessary medical leave without jeopardizing their employment. 29 U.S.C. § 2601. While this protection is contingent upon the employee complying with certain requirements, it is *not* contingent on the employer's belief that such leave is required. That is, FMLA leave is an entitlement, and an employer's mistaken belief that the employee does not qualify cannot defeat the legal rights conferred by statute. Indeed, the FMLA would not have been necessary if there was not widespread resistance or even hostility to employees taking family or medical leave.

On this record, the jury could find that Sharif was actually on approved FMLA leave in March 2014. At the time, United had approved Sharif for up to 5 days per month of self-designated FMLA leave. All that Sharif had to do to take FMLA leave was to call his employer, provide the dates of absence and his FMLA case number.

Mem. Op. at 2. A jury could find that Sharif did this. United now contends that Sharif's use of FMLA leave in March 2014 was not medically justified but was merely a fraudulent attempt to extend his vacation. A jury could find on this record that Sharif was having a panic attack when he called to designate his FMLA leave. The question is whether Sharif's statutory entitlement to FMLA leave can be lost based on United's mistake of facts. And on this record, United did not even investigate Sharif's medical condition on the day in question.

Amici submit that the FMLA creates an entitlement that is *not* contingent upon the employer's subjective beliefs about the propriety of the leave; whether an employer believes an activity is protected is not relevant to whether the law actually protects that activity.

The FMLA protects an employee's right to request and take FMLA leave, and prohibits an employer from taking an adverse action because its employee exercised, or attempted to exercise, those rights. 29 C.F.R. § 825.220(a), (c). Put another way, the FMLA prohibits an employer from taking any adverse action that it would not have taken but for its employee taking FMLA leave. *Cf.* 29 C.F.R. § 825.216(a); *Yashenko v. Harrah's N.C. Casino Co.*, 446 F.3d 541, 549 (4th Cir. 2006) (stating that, unless an employer would have terminated an employee regardless of his FMLA leave, the employer must reinstate him once the leave is over).

This Court has held that all claims of retaliation under the FMLA are covered under 29 U.S.C. § 2615(a)(2). *Yashenko*, 446 F.3d at 546. These claims concern whether an employer took an adverse action against an employee *for* exercising his FMLA rights, and this Court has found that such claims require evidence of an intent to discriminate, either direct or under the *McDonnell Douglas* burden-shifting framework. *Laing v. Federal Exp. Corp.*, 703 F. 3d 713, 717 (4th Cir. 2013). On the other hand, there is no need to show retaliatory intent for an "interference" claim under § 2615(a)(1). *Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002); *Ainsworth v. Loudoun County School Bd.*, 851 F. Supp. 2d 963, 977 (E.D. Va. 2012).

The case at bar demonstrates the problem with this distinction and its differing proof requirements. United's mistake cannot obliterate an employee's statutory rights. Either Sharif met all the requirements for FMLA leave, or he did not. To add another layer that permits an employer's mistaken belief to trump statutory rights is to transform the law from a guarantee to a suggestion.

Amici respectfully submit that requiring a showing of retaliatory intent for all FMLA retaliation claims is therefore improper, as such a rule ignores circumstances where an employer takes an adverse action against an employee *because* he exercised his FMLA rights, but not necessarily with an explicitly retaliatory intent. Indeed, the FMLA specifically anticipates such an occurrence: "The Act's prohibition against *interference* prohibits an employer from discriminating or retaliating against an

employee or prospective employee for having exercised or attempted to exercise FMLA rights." 29 C.F.R. § 825.220(c) (emphasis added).

In particular, if an employee engages in protected activity and his employer disciplines him for a reason so related to this activity that, but for the activity the discipline would not have occurred, then the discipline and protected activity are so inextricably connected "that they cannot be considered independently." *Womack v. Munson*, 619 F. 2d 1292, 1297 (8th Cir. 1980). For this reason, where an employer takes an adverse action solely because it believes its employee engaged in misconduct in the course of exercising his FMLA rights, and that belief is mistaken, then the employer has taken adverse action *because* its employee legitimately exercised his FMLA rights.

This situation is analogous to the situation in *Forman v. Small*, 271 F.3d 285 (D.C. Cir. 2001). There, the plaintiff was denied promotion for reasons he alleged were discriminatory, and he filed an EEOC charge. While that charge was being litigated, he was again up for a similar promotion. One of the Assistant Secretaries (Hoffman) who had previously supported Dr. Forman's promotion that was being litigated chose not to act on Dr. Forman's subsequent promotion package because he believed that the EEOC litigation would decide whether or not Dr. Forman was entitled to promotion. The district court granted summary judgment to the employer, but the Court of Appeals reversed, noting that even though Hoffman supported Dr.

Forman's promotion, his actions in not processing the subsequent promotion package could be viewed as unlawful retaliation. The Court explained:

> It is true that Hoffman supported Dr. Forman's promotion. And it may be true that his failure to forward the complaint to the Secretary was in good faith. But motive, in the sense of malice, is not required for liability under the ADEA. . . . "[A]n employer may offer a legitimate nondiscriminatory reason for taking an adverse action against an employee who has engaged in protected activity.... However, the employer may not proffer a good faith reason for taking retaliatory action." *EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 427–28 (7th Cir. 1992); *see also Hazen Paper*, 507 U.S. at 616, 113 S. Ct. 1701; *Trans World Airlines*, 469 U.S. at 126 & n.19, 105 S. Ct. 613. Unlawful motive, not malicious motive, is all that Dr. Forman had to show. Consequently, even if Hoffman acted in good faith in failing to forward Dr. Forman's complaint to the Secretary, he nonetheless would violate the ADEA if his reason for doing so was retaliatory, *i.e.*, in response to Dr. Forman's 1991 EEO complaint.

Forman, 271 F.3d at 299-300 (emphasis added). As in *Forman*, United seeks to "proffer a good faith reason for taking retaliatory action." This should not be permitted.

On this record, the jury could find that United was wrong about whether Sharif had a panic attack on March 30, 2014. If the jury concludes that Sharif was having a panic attack and otherwise met the conditions for taking FMLA leave, then whether United honestly believed otherwise should be of no import. Under such circumstances, the relevant analysis should not be whether the employer's belief was honest but whether its belief was accurate.

More than 60 years ago, this Court came to a similar conclusion in an analogous situation in *NLRB v. Industrial Cotton Mills*, 208 F. 2d 87 (4th Cir. 1953), where the law also provided an entitlement:

> [T]here is a right guaranteed by the Act- the right of an employee to reinstatement after a strike. That right is forfeited by serious strike misconduct. What we hold is that this right is not forfeited by the honest but mistaken belief of the employer that the employee has been guilty of strike misconduct

Id., 208 F.2d at 92 (emphasis added). In that case, an employee was discharged because his employer honestly believed that he had engaged in misconduct in the course of a strike. *Id*. at 90. The issue was whether an honest but mistaken belief that the employer had a valid reason to fire the employee eviscerated the employee's statutory rights. This Court held that it did not:

> [T]he statutory protection extended to a blameless employee is a firm and clear guarantee, not one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information. Nor does the Act expose the innocent employee to the hazard of his employer's mistake where the consequence of this mistake is to divest the employee of a right guaranteed by the Act.

Id. at 92 (emphasis added). Thus, the rights guaranteed by the NLRA are "not forfeited by the honest but mistaken belief of the employer that the employee has been guilty of strike misconduct." *Id*.; *see also OCAW Int. U. Local No. 4-23 v. Amer. Petrofina Co.*, 820 F. 2d 747, 753 (4th Cir. 1987).

Amici submit that there is no greater latitude under the FMLA for an employer's mistake, honest or otherwise, to divest an employee of his statutory rights under the FMLA. Holding otherwise would chill legitimate FMLA claims and frustrate the FMLA's central purpose of permitting employees to take necessary medical leave without fear of discrimination or retaliation. 29 U.S.C. § 2601.

CONCLUSION

As the name itself should make clear, the so-called "honest belief rule" used by the court below requires both credibility determinations and the drawing of inferences. Once an employer's proffered explanation is contradicted, it is up to the jury to decide whether the employer offered an inaccurate explanation in good faith or not. Any other rule violates Rule 56 and controlling authority.

Additionally, an employee's entitlement to FMLA leave is not dependent on whether his employer has a wrong understanding of the facts. An employee's entitlement should be adjudicated based on whether he met the statutory and regulatory standards for FMLA leave. To hold otherwise is to subjugate a statutory entitlement to the clouded judgment of a rushed manager on his worst day. That is hardly an entitlement at all.

The summary judgment order should be reversed.

Respectfully submitted,

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I hereby certify that on this 26th day of October 2015, I caused two copies of the foregoing brief to be served on the following by placing them in a postage pre-paid envelope addressed to the following and depositing that into a U.S. Postal Service mailbox:

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