Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Fourth Circuit

No. 16-2225

Michael Tillery,

Plaintiff-Appellant

v.

Piedmont Airlines, Inc.,

Defendant-Appellee

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
District Court No. 1:15-cv-1256
(The Honorable Leonie M. Brinkema)

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

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Alan R. Kabat Date: February 9, 2017

Counsel for: Metropolitan Wash. Empl. Lawyers

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I certify that on February 9, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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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.

MWELA respectfully submits 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, MWELA respectfully submits this amicus brief.

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

Pursuant to Rule 29(c), Fed .R. App. P., *amicus* MWELA states that:

(A) *Amicus* 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 *amicus* MWELA; and

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

STATEMENT OF THE ISSUES

The employer here fired Mr. Tillery after determining that he engaged in misconduct by virtue of his communications with the flight crew. On this record, the employer was wrong about this; the recording showed that plaintiff did not communicate with the flight crew in that instance. 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?

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 the testimony of witnesses' testimony as to their own state of mind was honest. This violates Rule 56, Fed. R. Civ. P., and a long line of Supreme Court cases.

This is the third case in recent years that MWELA has submitted an *amicus* brief to address the vitality of the so-called "honest belief" theory. *Sharif v. United Airlines, Inc.*, No. 15-1747; *Villa v. Cavemezze Grill*, No. 15-2543. While no panel of

this Court has yet adopted that theory, neither has any panel clearly rejected it. Most recently, in *Sharif v. United Airlines, Inc.*, 841 F.3d 199, 207 n.2 (4th Cir. 2016), a panel of this Court saw "no reason to address the 'honest belief rule.'" MWELA requests that, regardless of the outcome of this appeal, this panel hold definitively that there is no "honest belief" defense in this Circuit.

To date, no panel in this Circuit has adopted the "honest belief" theory. Piedmont Airlines presumably will invite this 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. Piedmont'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.

By invoking "honest belief," the District Court here improperly moved the goalposts of pretext analysis. The employee here satisfied all three prongs of *McDonnell Douglas*, including adducing sufficient evidence for a jury to reject Piedmont's proffered explanation as false. That was enough to survive summary judgment and leave the ultimate issue to the factfinder at trial. Piedmont Airlines will now urge 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 holding 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 Piedmont Airlines does not want the right to argue "mistake" to a jury; instead, 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 that this new defense runs afoul of the prohibitions on determining credibility or drawing inferences.

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**.

Burdine, 450 U.S. at 257 (emphasis added) (explaining the *McDonnell Douglas* indirect proof scheme). The Supreme 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 Supreme 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. 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 District Court in this case to decide which inference the jury may choose to draw from the evidence undermining Piedmont Airlines' proffered explanation.

If there were any doubt about this point, the Supreme 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." *See, e.g., 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 that "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.

Reeves, 530 US at 146-47 (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 that 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 interested witnesses (here, an employer's managers) testifying as to their 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 or her testimony as to what his/her 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. Whether reliance on a false view of the facts is honest or not is always a question for the jury.

II. The Fourth Circuit has Never Created a "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 a single unpublished district court case in support of this novel defense, *Tomasello v. Fairfax County*, No. 15-cv-95 (2016 WL 165708) (E.D. Va. Jan. 13, 2016) [JA 836]. *Tomasello*, in turn, relied primarily on *DeJarnette v. Corning Inc.*, 133 F.3d 293, 299 (4th Cir. 1998), which discussed the plaintiff's lack of admissible evidence contradicting the supervisor's subjective performance evaluation, but still falls short of creating a new defense.

More importantly, *DeJarnette* was overruled by *Reeves* to the extent that *Reeves* rejected the "pretext plus" standard used by the Fourth Circuit in between

Hicks and *Reeves*. *DeJarnette* was 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 ("the plaintiff must prove '*both* that the reason was false, *and* that discrimination was the real reason' for the challenged conduct.") (citations omitted, emphasis original)). 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 Tillery's case. In the employer's version, Mr. Tillery was a problem employee who had been disciplined many times, and the incident on March 18, 2014 resulted in termination because the employer "honestly believed" that Mr. Tillery had improperly communicated with the flight crew on the incident in question. Because the recording disproving this belief was "not available" at the time of termination, Piedmont Airlines claims that it is entitled to summary judgment because its erroneous belief was sincere as a matter of law. In the employee's version, Mr. Tillery had engaged in a variety of protected activity, including advocating for fellow employees in both union matters and EEO matters, and the employer's erroneous belief was not reasonable because the decision makers were aware that recordings existed and could have checked. There was some evidence to support both stories, which makes this a case for the jury to sort out, as in

Tolan and *Jacobs*.

At bottom, depending on which inferences the jury draws, Mr. Tillery was either culpable for misleading the flight crew or was unfairly blamed for the actions of a co-worker, at least partially because of his protected activities. Similarly, Piedmont Airlines' superficial investigation was either unimportant or an employer going through the motions but seizing on a convenient excuse to punish Mr. Tillery for his protected activity. Inferences could be drawn in either direction. The District Court erred applying the "honest belief" rule through drawing inferences only in favor of Piedmont, 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. In a recent case briefed by *amicus* MWELA (*Sharif v. United Airlines, Inc.*, 841 F.3d 199 (4th Cir. 2016), the district court relied upon *Seeger v. Cincinnati Bell Tel. Co., LLC*, 681 F.3d 274, 285-86 (6th Cir. 2012) for its definition of the defense. That Sixth Circuit decision 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 an incorrect 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 Supreme 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, there is nothing in this record that suggests that Piedmont needed to make a final decision without listening to the recording that would definitively prove, or disprove, the alleged misconduct. As in *Staub*, the fact that the employer purported to conduct a neutral (albeit flawed) investigation does not create immunity.

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

On this record, the employee who actually spoke with the Flight Crew was plaintiff's co-worker, Sidy Bah. [JA 060-065]. Bah was not fired for this conduct, nor was any other employee involved even disciplined for it. This raises a factual question of whether this conduct was a terminable offense, even for an employee with Tillery's prior record. With competing inferences to be drawn from the same facts, summary judgment was improper.

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.

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, there are competing inferences to be drawn. 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.

The summary judgment order should be reversed.

Respectfully submitted,

/s/ Stephen Z. Chertkof

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Dated: February 9, 2017

/s/ Alan R. Kabat
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February 2017, I caused the foregoing brief to be filed with the Clerk of the Court by this Court's Electronic Case Filing system, which will serve, via e-mail notice of such filing, to the following counsel registered as CM/ECF users:

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I further certify that on this 9th day of February 2017, I caused the required bound copies of the foregoing brief to be filed with the Clerk of the Court by placing them in a postage pre-paid envelope addressed to the clerk and depositing that into a U.S. Postal Service mailbox.

/s/ Alan R. Kabat

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: Metropolitan Washington Employment Lawyers Association

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

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CERTIFICATE OF SERVICE

I certify that on February 9, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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February 9, 2017
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