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Towards an Honest Belief Plus Standard in California Employment Discrimination Cases

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TOWARDS AN "HONEST BELIEF PLUS" STANDARD IN CALIFORNIA EMPLOYMENT DISCRIMINATION CASES

I. INTRODUCTION

In employment discrimination actions, most courts currently apply an "honest belief" standard to determine whether an employer had a legitimate, non-discriminatory motive for its adverse employment action, such as termination or refusal to hire. The employer need only demonstrate that he or she "honestly believed" that the employment action was based on factors other than discrimination. Once the employer does so, the presumption of discrimination following the plaintiff's showing of the prima facie case drops out. Consequently, the employer is entitled to summary judgment, notwithstanding the plaintiff's showing of its prima facie case.

California has yet to adopt a preferred method for reviewing such discrimination claims. However, this article argues that the "honest belief" standard is unduly difficult for plaintiff-employees to overcome. Instead, California courts should follow the "honest belief plus" standard articulated by the Sixth Circuit in *Smith v. Chrysler Corp.*[1] That standard requires that an employer demonstrate reasonable reliance on a particularized set of facts leading to the adverse action.[2] In other words, the employer cannot rebut the prima facie discriminatory presumption simply by declaring that he or she believed the employment action was based on nondiscriminatory factors. The employer should be required to show that the action followed a reasonable examination of business considerations. With this changed standard, more employment discrimination actions would survive summary judgment and proceed to trial.

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1. 155 F.3d 799 (6th Cir. 1998).
2. *Id.* at 806.

Part II of this Article presents the current legal framework for deciding employment discrimination claims in California. Part III describes the two competing visions regarding use of the "honest belief" standard: the Sixth Circuit's "honest belief plus," and the Seventh Circuit's "pure honest belief."[3] Part IV argues that the "honest belief plus" standard is the better approach because it would maintain consistency with past U.S. Supreme Court decisions, evidentiary requirements of summary judgment, and the goals of anti-discrimination statutes. Finally, Part V observes that, although California courts have yet to directly address the debate over the "honest belief" standard, California has signaled its movement towards "honest belief plus" in *Green v State of California*,[4] which is pending review by the California Supreme Court.

II. LEGAL FRAMEWORK

Several key statutes and the seminal case, *McDonnell Douglas v. Green*,[5] provide the framework for any employment discrimination lawsuit brought in California.

A. Relevant Statutes

California plaintiffs alleging employment discrimination have potential causes of action under both federal and state law.

Federal statutes provide protection against employment discrimination in a variety of contexts. Disability discrimination suits, for example, are governed by the Americans with Disabilities Act (ADA), which makes it unlawful to discriminate based on an individual's disability.[6] The ADA covers a wide range of employment decisions, including job application procedures; employee hiring, advancement, or discharge; compensation; job training; and other terms or conditions of employment.[7] The Age Discrimination in Employment Act (ADEA) provides similar

3. The Sixth and Seventh Circuits are the two primary federal circuits that have squarely addressed the "honest belief" standard within the context of employment discrimination cases.

4. 33 Cal. Rptr. 3d 254 (Ct. App. 2005)

5. 411 U.S. 792 (1973).

6. 42 U.S.C. § 12112(a) (2000).

7. *Id.*

protections against age-based discrimination.[8] Finally, Title VII of the Civil Rights Act of 1964 covers discrimination based on race, color, religion, sex, or national origin.[9]

The equivalent California law is the Fair Employment and Housing Act (FEHA), which prohibits discrimination due to race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation.[10] FEHA also makes it unlawful for an employer "to fail to take all reasonable steps necessary" to prevent discrimination from occurring.[11]

B. Relevant Case Law—The McDonnell Douglas Burden-Shifting Framework

The U.S. Supreme Court articulated the current framework for adjudicating discrimination claims in *McDonnell Douglas Corp. v. Green*.[12] In that case, the employer laid off Green, an African American, following a reduction in the company's work force.[13] Believing that his discharge and McDonnell Douglas's general hiring practices were racially-motivated, Green participated in a "stall-in," in which Green and others parked their cars in front of a McDonnell Douglas plant during rush hour.[14] Police arrested Green and he subsequently pled guilty to the charge of obstructing traffic.[15]

Nearly a year later, Green participated in a "lock-in," in which a chain and padlock were placed on the front door of a McDonnell Douglas building to prevent certain employees from leaving.[16] Three weeks after the "lock-in," Green responded to a McDonnell Douglas advertisement for qualified mechanics.[17] The company decided not

8. 29 U.S.C. § 623(a)(1) (2000).

9. 42 U.S.C. § 2000e-2(a)(1) (2000).

10. Fair Employment and Housing Act, CAL. GOV'T CODE § 12940(a) (West 2005).

11. *Id.* § 12940(k).

12. 411 U.S. 792 (1973).

13. *Id.* at 794.

14. *Id.* at 794–95.

15. *Id.* at 795.

16. *Id.* (noting that although Green knew of the planned lock-in, there was no evidence that he participated in the event itself; he was not, after all, arrested).

17. *Id.* at 796.

to hire him, however, based on his participation in both the stall-in and his association with the lock-in.[18] Green then brought suit under Title VII, alleging racial discrimination and retaliation.[19]

The *McDonnell Douglas* Court created a new three-part test for a plaintiff-employee to survive summary judgment. First, the employee initially carries the burden of establishing a prima facie case for discrimination.[20] The burden of production then shifts to the employer to present evidence of a legitimate, non-discriminatory motive for the adverse action.[21] Finally, the employee then has the burden to present evidence that the employer's stated non-discriminatory motive is pretextual.[22] This approach is commonly referred to as the "*McDonnell Douglas* burden-shifting" framework.[23]

1. Part 1—Employee's Burden to Establish Prima Facie Case

To establish a prima facie case for discrimination, the plaintiff must demonstrate that: (1) he was a member of a protected class; (2) he was performing competently in the position he held; (3) he suffered an adverse employment action (e.g., termination); and (4) some other circumstance suggests discriminatory motive.[24]

An employee can satisfy the fourth element of the prima facie case, discriminatory motive, by showing that the employer replaced him with somebody outside the protected class with equal or inferior qualifications.[25] However, "failure to prove replacement . . . is 'not necessarily fatal' to [a] . . . discrimination claim where the discharge results from a general reduction in the work force due to business conditions."[26] Rather, the employee can satisfy this element by adducing circumstantial, statistical, or direct evidence that the discharge occurred "under circumstances giving rise to"

18. *Id.*
19. *Id.*
20. *Id.* at 802.
21. *Id.*
22. *Id.*
23. *See, e.g.*, Heard v. Lockheed Missiles & Space Co., 52 Cal. Rptr. 2d 620, 632 (Ct. App. 1996).
24. Guz v. Bechtel Nat'l Inc., 8 P.3d 1089, 1113 (Cal. 2000).
25. Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421 (9th Cir. 1990).
26. *Id.*

discrimination.[27] Although the alleged basis for discrimination may differ (e.g., race, age, or physical disability), the overall analytical approach in determining whether there is discriminatory motive is the same.[28]

Several California cases provide insight as to what does and does not constitute sufficient evidence of a discriminatory motive. In *Heard v. Lockheed Missiles & Space Co.*,[29] the plaintiff, an African-American employee of Lockheed Corporation brought suit under FEHA alleging racial discrimination.[30] Specifically, Heard argued that his new manager, Parisi, subjected him to racially-motivated adverse employment actions (including those affecting travel restrictions, his ranking within the company, and his merit wage increase).[31] In finding for the plaintiff, the court noted the following evidence as supporting an inference of discrimination: Heard had previously performed his job satisfactorily, and it was only after Parisi became manager that Heard was subjected to the adverse employment actions; Lockheed's own investigation concluded that these actions were not justified; Heard and other employees believed Parisi had engaged in racist conduct, and some of these employees had previously complained about Parisi being racist; and that Parisi stated that all minorities were low performers.[32] The court rejected the contention that the plaintiff must prove that other similarly situated non-African-American employees received the employment terms and conditions that the employer denied the plaintiff.[33] Rather, the Court held that such a showing is only "one way of proving intentional discrimination" and that, instead, the key determination is whether "a *particular individual* was discriminated against and why."[34]

Likewise, the court found discriminatory motive in *Mixon v.*

27. *Id.*
28. *See infra* notes 29–34 and accompanying text.
29. 52 Cal. Rptr. 2d 620 (Ct. App. 1996).
30. *Id.* at 622.
31. *Id.* at 624.
32. *Id.* at 633–34.
33. *Id.* at 632.
34. *Id.* (citing Cumpiano v. Banco Santander P.R., 902 F.2d 148, 156 (1st Cir. 1990)).

Fair Employment & Housing Commission.[35] The plaintiff, an African-American employee of the Hospital and Institutional Workers' Union, alleged his termination was racially motivated.[36] Holding that the plaintiff established his prima facie case, the court noted that despite the plaintiff's satisfactory work performance, he was fired whereas white workers were not fired, and he was replaced by a white worker with no more experience than he had.[37]

On the other hand, the court held there was no discriminatory motive in *Rose v. Wells Fargo & Co*.[38] There, two former employees of Wells Fargo, ages fifty-three and fifty-six, sued in California federal court alleging age discrimination under ADEA and FEHA.[39] The two plaintiffs were former vice presidents of Crocker Bank who were terminated upon the merger of Crocker and Wells Fargo.[40] After noting that the plaintiffs did not necessarily need to show that they were replaced by younger employees to support an inference of discriminatory motive, the Court held that "in a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated."[41] Rather, it maintained that the employee had to show that his employer still had a continuing need for his skills and services.[42] The court subsequently held that the plaintiffs did not demonstrate such a continuing need.[43]

In sum, the prima facie case of discrimination is relatively easy to establish. To establish the fourth element, discriminatory motive, the employee need only adduce *some* evidence tending to reveal a discriminatory intent behind the employment action.

2. Part 2—Employer's Burden to Show Non-Discriminatory Motive

Once the plaintiff establishes the prima facie case under the

35. 237 Cal. Rptr. 884 (Ct. App. 1987).
36. *Id.* at 885.
37. *Id.* at 892.
38. 902 F.2d 1417, 1422 (9th Cir. 1990).
39. *Id.* at 1420, 1425.
40. *Id.* at 1419–20.
41. *Id.* (alteration in original) (quoting Leichihman v. Pickwick Int'l & Am. Can Co., 814 F.2d 1263, 1270 (8th Cir. 1987)).
42. *Id.*
43. *See id.* at 1422.

McDonnell Douglas framework, a rebuttable presumption of discrimination arises.[44] At this point, the burden of production shifts to the employer to present evidence that the adverse action was based on nondiscriminatory factors.[45]

Case law demonstrates that an employer can satisfy this requirement by presenting *credible* evidence of non-discriminatory motive. *Guz v. Bechtel National, Inc.*[46] provides an illustration. In *Guz*, the plaintiff alleged age discrimination after being laid off from his position as a financial reports supervisor for a firm that provided engineering, construction and environmental remediation services.[47] The California Supreme Court held that the defendant made an adequate showing that the plaintiff's termination was not motivated by discrimination, but rather by business decisions following the elimination of the plaintiff's work unit.[48] The court considered relevant testimony from a BNI executive that transferring the plaintiff's unit's work to another part of the company would benefit the company. Furthermore, the court referenced testimony from another manager explaining why the company offered other employees, and not the plaintiff, these newly-created positions.[49] The manager's testimony included the observations that other employees were "veterans" with whom he had "direct experience with their backgrounds, skills, performance levels, and work habits"[50] and that he was not even aware the plaintiff was available for one of the positions.[51]

Similarly, in *Rose*, the court noted that even if the plaintiff had been able to establish the prima facie case, the general reduction in work force due to job elimination and business necessity constituted a legitimate nondiscriminatory reason for the plaintiff's discharge.[52]

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44. *See, e.g.*, Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1114 (Cal. 2000).

45. *See, e.g.*, Horn v. Cushman & Wakefield W., Inc., 85 Cal. Rptr. 2d 459, 465 (Ct. App. 1999) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

46. 8 P.3d 1089 (2000).

47. *Id.* at 1094–95.

48. *Id.* at 1112.

49. *Id.*

50. *Id.*

51. *Id.* at 1116.

52. 902 F.2d 1417, 1423 (9th Cir. 1990).

On the other hand, in *Sada v. Robert F. Kennedy Medical Center*,[53] the court found the employer's proffered nondiscriminatory reasons for its hiring decisions to be insufficient to warrant summary judgment.[54] A registered nurse of Mexican descent sued a hospital under FEHA after being turned down for a nursing position for which she was allegedly qualified.[55] After finding that the plaintiff proved her prima facie case,[56] the court held that the employer did not present adequate evidence that the plaintiff was underqualified for the position she sought.[57] Specifically, the court emphasized the broad, general nature of the hiring manager's declaration that Sada's work experience "did not 'come close'" to the experience of the individuals who were hired.[58] Moreover, the court concluded that the "general and sometimes conclusory nature of [the hiring manager's] description of the applicants who were hired" was insufficient to show these applicants were more qualified than Sada.[59]

Thus, these cases establish that an employer can satisfy the second part of the *McDonnell Douglas* test by presenting *credible* evidence that discrimination did not motivate its employment action.

3. Part 3—Employee's Burden to Show Pretext

If the employer satisfies the second step, "the burden shifts back to the employee to meet his ultimate obligation of proving that the reason for the adverse action was . . . discrimination."[60] California courts disagree to some extent as to the precise showing required by a plaintiff to meet this burden.[61] However, the predominant view is that an employee must show that the employer's stated nondiscriminatory reason for the employment action was false or

53. 65 Cal. Rptr. 2d 112 (Ct. App. 1997).
54. *Id.* at 122.
55. *Id.* at 115.
56. *Id.* at 120–21.
57. *Id.* at 122.
58. *Id.* at 121.
59. *See id.*
60. Horn v. Cushman & Wakefield W., Inc., 85 Cal. Rptr. 2d 459, 465 (Ct. App. 1999) (quoting Hersant v. Dep't of Soc. Servs., 67 Cal. Rptr. 2d 483, 487 (Ct. App. 1997)).
61. *See id.*

pretextual, and/or that the employer acted with a discriminatory animus, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.[62]

In *Horn v. Cushman & Wakefield Western, Inc.*,[63] the Court upheld summary judgment in a wrongful termination suit brought by a fifty-nine year old former regional communications manager of a commercial real estate company.[64] Cushman & Wakefield Western ("C & W") laid off Horn following the restructuring of his position to focus on external, rather than internal, communications.[65] C & W eventually replaced Horn with thirty-eight year old Marsh, who had more experience in sales and marketing than Horn.[66]

Although both parties conceded that Horn had established the prima facie case, C & W produced evidence of a legitimate, nondiscriminatory reason for terminating their employee.[67] Namely, C & W restructured the position and the hiring manager believed that Horn was not the best fit for the restructured position.[68] In arguing that the stated nondiscriminatory reasons were pretextual, Horn contended that his job was not restructured and that C & W gave inconsistent reasons for terminating him.[69]

After considering the reasonableness of these arguments in light of the evidence, the court held that Horn had presented insufficient evidence of pretext.[70] Specifically, the court noted that the duties

62. *Id.* (citing Hersant, 67 Cal. Rptr. 2d at 487–89; Martin v. Lockheed Missiles & Space Co., 35 Cal. Rptr. 2d 181, 190 (Ct. App. 1994)). If an employee has *direct* evidence that the employer based the adverse action at least in part on discriminatory motives, he can pursue a "mixed motives" theory. Under such a theory, "both legitimate and illegitimate factors contribute to the employment decision." Heard v. Lockheed Missiles & Space Co., 52 Cal. Rptr. 2d 620, 627 (Ct. App. 1996). Typically, however, the availability of such direct evidence is uncommon. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). The plaintiff, therefore, will usually rely on circumstantial or statistical evidence to prove discriminatory motive.

63. 85 Cal. Rptr. 2d 459 (Ct. App. 1999).

64. *Id.* at 464.

65. *See id.* at 467.

66. *Id.* at 464.

67. *See id.* at 466.

68. *Id.*

69. *Id.* at 468.

70. *Id.*

initially performed under Horn's position had changed significantly, and that Horn was unable to show that C & W gave "ever-changing" reasons for terminating him.[71] Notably, the court found it irrelevant whether the employer's decision was "wrong, mistaken, or unwise."[72] Rather, the employee needed to demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" in the employer's proffered nondiscriminatory reasons that a reasonable factfinder *could* have found them unworthy of credence.[73]

Conversely, the court found adequate evidence of pretext in *Sada v. Robert F. Kennedy Medical Center*.[74] The court determined the hiring manager's remarks suggested a discriminatory motive in her decision not to hire the plaintiff.[75] For example, the court noted the manager's comment that "Hispanics spend 20 to 30 years in this country and do not bother to learn English, but they sure can find those public offices where they can get food stamps and all kinds of public assistance."[76]

In sum, the *McDonnell Douglas* framework gives both the employee and employer an opportunity to present evidence supporting or refuting the existence of discriminatory intent. The employee carries the initial burden of satisfying the prima facie case for discrimination. The employer then has an opportunity to refute the employee's claim by offering evidence of nondiscriminatory motive. If the claim is refuted, the employee is then allowed to challenge the legitimacy of this evidence.[77] Otherwise, the court can dismiss the claim by summary judgment.

III. SPLIT OVER USE OF THE "HONEST BELIEF" STANDARD

Although the *McDonnell Douglas* burden-shifting framework provides a useful starting point for evaluating discrimination claims, courts are divided over the exact showing required by the employer

71. *Id.* at 469–70.

72. *Id.* at 465.

73. *Id.* (citing Hersant v. Dep't of Soc. Servs., 67 Cal. Rptr. 2d 483, 487 (Ct. App. 1997)).

74. 65 Cal. Rptr. 2d 112 (Ct. App. 1997).

75. *Id.* at 122.

76. *Id.* at 116.

77. *See supra* note 22 and accompanying text.

when it asserts a nondiscriminatory reason for the employment action under the second and third steps.[78] In particular, the Seventh Circuit follows an "honest belief" rule (referred to here as the "pure honest belief" standard) that "shields an employer from pretext-based liability" upon a showing that the employer "honestly believed" in the asserted nondiscriminatory basis for the discriminatory action.[79] Under this approach, the employee may not question the reasonableness of the employer's asserted nondiscriminatory reason. Rather, the employee must focus their discrimination suit on direct evidence that points to discriminatory motive, or evidence that indicates their employer's belief in its legitimate reason for taking action was not honest.[80]

In contrast, the Sixth Circuit applies an "honest belief plus" standard in which the employee can put forth evidence showing the employer's asserted non-discriminatory justification was unreasonable.[81] Under this approach, the employer must have reasonably relied upon particularized facts" in making its adverse employment decision.[82]

A. "Pure Honest Belief" Standard

Several circuits currently apply the "pure honest belief" standard, with the Seventh Circuit as perhaps its most ardent advocate.[83] That court first articulated the "pure honest belief" standard in *McCoy v. WGN Continental Broadcasting Co.*[84] The defendant, WGN television, demoted McCoy from "Director of Creative Services" to "Director of Promotions and Publicity."[85] Soon thereafter, WGN terminated McCoy, who was then in his mid-forties, and replaced him with a younger employee.[86] Believing his demotion and termination to be age-based, McCoy filed a lawsuit

78. *See supra* notes 79–82 and accompanying text.

79. Rebecca Michaels, *Legitimate Reasons for Firing: Must They Honestly Be Reasonable?*, 71 FORDHAM L. REV. 2643, 2657 (2003).

80. *Id.* at 2658.

81. *Id.* at 2658.

82. *See* Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998).

83. *See supra* notes 84–96 and accompanying text.

84. 957 F.2d 368 (7th Cir. 1992).

85. *Id.* at 369–70.

86. *Id.*

under ADEA.[87] At the summary judgment phase, McCoy presented evidence showing that WGN's asserted reasons for firing McCoy, while premised on performance and budget-related concerns, were implausible.[88] With respect to WGN's claim that his demotion and termination were performance-related, the court held that "[even] if the performance concern was a complete mistake, even if McCoy was the best possible person for the job, so long as WGN honestly believed he was not, its business judgment will not be second-guessed by federal courts applying the ADEA."[89]

In *Kariotis v. Navistar International Transportation Corp.*, the Seventh Circuit reaffirmed its commitment to the "honest belief" approach.[90] The defendant corporation terminated Kariotis from her position as an executive assistant after the company asserted she had fraudulently accepted disability benefits following her knee replacement surgery.[91] Kariotis filed suit under the ADA, ADEA, and several other federal statutes.[92] In response, Navistar filed a motion for summary judgment, invoking the "honest belief" standard.[93] In ruling for the defendant, the court held that although "[o]bjectively speaking, [Navistar's] investigation left something to be desired,"[94] the

> opportunity for rebuttal [of the employer's non-

87. *Id.*

88. Specifically, he argued that: (1) he performed well; (2) WGN never asserted poor performance in the state administrative proceedings; (3) that WGN ultimately hired a more expensive employee to replace him; and (4) the decision to eliminate his final job came so quickly after his transfer that it is implausible to suggest WGN wanted to give him a chance there. *Id.* at 373.

89. *Id.*

90. 131 F.3d 672 (7th Cir. 1997).

91. *Id.* at 674.

92. *Id.* Kariotis also filed claims under the Employee Retirement Income Security Act, the Consolidated Omnibus Budget Reconciliation Act, the Family and Medical Leave Act, and the Illinois Health Insurance Claim Filing Act. *Id.*

93. *Id.*

94. *Id.* at 675 (noting that Navistar did not approach Kariotis or her doctor, but instead hired investigators to videotape her off-duty movements, who were not medical experts). The court also acknowledged a letter sent by Kariotis' physician to a Navistar manager, in which he vehemently objected to the charge of disability fraud given Kariotis' physical condition. *Id.* at 675.

> discriminatory rationale] is not an invitation to criticize the employer's evaluation process or simply to question its conclusion about the quality of an employee's performance. Rather, . . . arguing about the accuracy of the employer's assessment is a distraction . . . because the question is not whether the employer's reasons for a decision are "*right* but whether the employer's description of its reasons is *honest*."[95]

Thus, *Kariotis* reflects the Seventh Circuit's refusal to entertain questions of the reasonableness of the employer's actions, even when these actions are arguably "irrational."[96]

B. "Honest Belief Plus" Standard

Under the "honest belief plus" approach, the Sixth Circuit allows plaintiff-employees to question the reasonableness of the employer's actions. The Sixth Circuit first enunciated the "honest belief plus" standard in *Smith v. Chrysler Corp.*[97] The defendant, Chrysler Corporation, terminated Smith from his job as an electrician for failing to disclose a narcoleptic-like sleeping disorder on his medical history forms.[98] In response to a recurrence of Smith's narcoleptic episodes, Smith's physician wrote a letter to Chrysler requesting that Smith be switched from the night shift to the day shift due to a medical condition related to a sleep/wake disorder.[99] In response, the company's physician—relying on letters from physicians, his own medical notes, and a telephone phone conversation with Smith's physician—informed Chrysler that Smith suffered from narcolepsy. Chrysler subsequently fired Smith for lying on his employment form and driver's license application.[100]

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95. *Id.* at 677.

96. Michaels, *supra* note 79, at 2661.

97. 155 F.3d 799 (6th Cir. 1998).

98. *Id.* at 801. On a medical history form, Smith checked "no" to the question, "Have you ever had or have you now unusual tiredness or fatigue?" *Id.* at 802. In addition, after approximately eight months on the job, Smith was told to obtain a driver's license enabling him to operate the company's electric carts. To obtain the license, Smith had to complete a form, on which he checked "no" to the question, "Have you ever had narcolepsy?" *Id.* at 802–03.

99. *Id.* at 803.

100. *Id.* at 804.

Smith contended that, although his condition was similar to narcolepsy, it was not in fact narcolepsy. Smith then filed suit alleging that Chrysler's employment decision violated the ADA and a similar Michigan statute.[101]

The Sixth Circuit expressly rejected the Seventh Circuit's "pure honest belief" standard.[102] That standard, according to the Sixth Circuit, is "at odds with the underlying purpose behind the [ADA]—*i.e.*, that employment actions . . . be grounded on fact and not 'on unfounded fear, prejudice, ignorance, or mythologies'."[103] Instead, the court explained that for an employer's proffered nondiscriminatory reason to be considered honestly held, the employer must demonstrate "reasonable reliance on the particularized facts that were before it at the time the [employment] decision was made."[104] The court went on to qualify the "reasonable reliance" test by noting that "the decisional process used by the employer [need not] be optimal or . . . [leave] no stone unturned. Rather, the key inquiry is whether the employer made a reasonably informed and considered decision before taking an adverse employment action."[105]

Applying this standard to the facts of the case, the court found that Chrysler had reasonably relied on the particularized facts when it determined that Smith had falsely claimed he was not narcoleptic on his driver's license application.[106] However, the court held that Chrysler was unreasonable in its belief that Smith lied on the part of his medical history form where he stated that he did not suffer from tiredness and fatigue.[107] The court noted that "tiredness and fatigue . . . do not even remotely cover the situation experienced by narcoleptics."[108] More importantly, Chrysler never attempted to

101. *See id.*
102. *See id.* at 806.
103. *Id.*
104. *Id.* at 807.
105. *Id.*
106. *Id.* at 808. The court noted that Chrysler based its decision on the medically-informed opinions of Smith's physician, based on first-hand information provided by Smith himself. *Id.* Given the "amount and the source of information," the court concluded that Chrysler was diligent in conducting its investigation. *Id.*
107. *Id.*
108. *Id.*

adequately investigate whether there was such a link.[109] Instead, Chrysler relied on an "incorrect, stereotyped assumption that all narcoleptics suffer from unusual fatigue," rather than on particularized facts resulting from its investigation.[110] However, the court held that this failure to rely on particularized facts was harmless, since Chrysler's other reasons for the termination were satisfactory.[111]

The Sixth Circuit reiterated the "honest belief plus" approach in *Joostberns v. United Parcels Service, Inc.*[112] In that case, Joostberns brought suit under the ADA, the Family and Medical Leave Act, and Michigan's Persons with Disabilities Civil Rights Act after being fired from his position as truck driver.[113] Acting on a tip that Joostberns shipped packages without paying for them, an investigator at United Parcels Service ("UPS") looked at tracking information in the UPS system, which revealed that there was no record of payment for six packages shipped to Wisconsin.[114] When the investigator confronted Joostberns about the matter, he admitted that he recognized the address to which the packages had been shipped as that of his daughter.[115] Joostberns was subsequently terminated.[116]

In finding for UPS, the court noted that Joostberns had no payment record for the six shipments in question, and was unable to give a reasonable explanation for the missing receipts.[117] Consequently, the court held that UPS had adequately relied on particularized facts that were before it at the time it terminated Joostberns.[118]

Unlike *Smith* and *Joostberns*, in which the Sixth Circuit ruled against the plaintiffs,[119] in *Archer v. Mesaba Aviation, Inc.*,[120] the

109. *See id.* at 808–09.
110. *Id.* at 809.
111. *Id.*
112. No. 04-2370, 2006 U.S. App. Lexis 533 (6th Cir. Jan. 9, 2006).
113. *Id.* at *4.
114. *Id.* at *4–*5.
115. *Id.* at *5.
116. *Id.* at *6.
117. *Id.* at *29.
118. *Id.*
119. *See supra* notes 97 and 112 and accompanying text.
120. No. 98-2434, 2000 U.S. App. LEXIS 6420 (6th Cir. Apr. 6, 2000).

Sixth Circuit found the defendant could *not* overcome the heightened scrutiny under "honest belief plus."[121] Archer brought suit against Mesaba under the ADA, alleging the company terminated him from his position as a customer service supervisor because he was HIV-positive.[122] Mesaba claimed it fired Archer because he allegedly engaged in inappropriate sexual conduct while riding as a non-revenue passenger on a Mesaba flight.[123]

Applying the "honest belief plus"[124] standard, the court held that "[w]hile an employer is not required to turn over every stone, we do not believe that Mesaba demonstrated its reasonable reliance on particularized facts."[125] Specifically, the court noted that Mesaba terminated Archer despite conflicting accounts of the alleged incident.[126] In addition, Archer was never given an opportunity to refute the allegations.[127] Noting that "[s]ignificantly, credibility judgments and weighing of the evidence are prohibited during the consideration of a motion for summary judgment,"[128] the court reversed the defendant's summary judgment award.[129]

Thus, these Sixth Circuit cases demonstrate that while the "honest belief plus" standard does "have teeth" in terms of affecting the outcome of a defendant's summary judgment motion,[130] it does

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121. *See id.* at *18–*19.

122. *Id.* at *2–*3.

123. *Id.* at *14.

124. While the court states it is applying the "honest belief" rule, in effect, it utilizes "honest belief plus." *See id.* at *17–*19.

125. *Id.* at *19.

126. *Id.* at *18–*19. These accounts consisted of conflicting statements by the flight attendant, captain, and first officer regarding whether anyone actually witnessed the alleged acts take place.

127. *Id.* Under a "pure honest belief" standard, the outcome likely would have been different, since Mesaba would only have had to demonstrate that it "honestly believed" that the events in question actually transpired. *See* Michaels, *supra* note 79, at 2667.

128. *Archer*, 2000 U.S. App. LEXIS 6420, at *11.

129. *See id.* at *19.

130. Michaels, *supra* note 79, at 2666. *See also* Dana Atchley, *The Americans with Disabilities Act: You Can't Honestly Believe That*, 25 J. LEGIS. 229, 235 (1999) ("The difference [between 'honest belief' and 'honest belief plus'] is not one of theoretical niceties . . . depending on which standard a court chooses to measure a plaintiff's evidence, that plaintiff may lose on a motion for summary judgment without ever having a fact-finder weigh the

not preclude the success of all summary judgment motions. Rather, the standard merely requires that the employer conduct a reasonable investigation prior to taking an adverse employment action. If the employer conducts a reasonable investigation, the court will presumably grant summary judgment.

IV. JUSTIFICATION FOR ADOPTING "HONEST BELIEF PLUS"

For several reasons, California should follow the Sixth Circuit's lead in adopting the "honest belief plus" standard. First, such a system would be fairer to plaintiff-employees by eliminating the virtually impossible burden of disproving an employer's claims of "honest belief." Second, the standard is more consistent with past Supreme Court decisions, in particular, *United States Postal Service v. Aikens*[131] and *St. Mary's Honor Center v. Hicks*[132]—both of which support a standard that allows examination of the true motivations behind a defendant's employment action. Third, the "honest belief plus" standard is more consistent with the standard of decision on summary judgment. Namely, since the actual honesty behind the employer's asserted "honest belief" is a question of fact, the factfinder should evaluate the credibility of an employer's proffered nondiscriminatory reason. Finally, the "honest belief plus" approach supports the legislative goals behind both the federal and California antidiscrimination laws.

A. Fairness to Plaintiff-Employees

From the perspective of a plaintiff trying to avoid summary judgment in an employment discrimination suit, there is perhaps no more daunting a task than trying to "prove" that an employer did not honestly believe in its proffered non-discriminatory reason. As Professor Anne Lawton observes, "[the] 'honest belief' standard has made it virtually impossible for a plaintiff to prevail on an employer's motion for summary judgment absent direct evidence of the employer's discriminatory intent."[133] This is because, at bottom,

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issues of credibility so crucial to the finding of intent.").

131. 460 U.S. 711 (1983).

132. 509 U.S. 502 (1993).

133. Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 646 (2000).

the "pure honest belief" approach requires an employee to prove the employer's state of mind.

Hughes v. Koppers Industries, Inc.[134] illustrates this point. Hughes, an African American, sued Koppers Industries for failing to promote him to laboratory supervisor at Koppers' chemical plant.[135] Koppers instead chose Traczek, a white man, for the position.[136] Hughes was clearly more qualified than Traczek: he had nineteen years of experience in the industry and over five years with Koppers, whereas Traczek had no industry experience prior to his four years at Koppers;[137] Hughes had trained co-workers, including Traczek;[138] and Hughes had performed all of the functions of supervisor, whereas Traczek had been on the "swing shift" and had not performed many such functions.[139] Hughes' one alleged "deficiency" was that he lacked a college degree, which was ostensibly Koppers' basis for selecting Traczek.[140] Nevertheless, the court held that "the issue is not whether Hughes was more qualified than Traczek, but whether the employer could not have honestly believed that Hughes was less qualified than Traczek . . . Hughes does not provide any citations to the record to cast doubt on [his manager's] beliefs about Hughes' deficiencies."[141] Thus, to survive summary judgment, Hughes was charged with the impossible task of proving "the authenticity of the employer's belief,"[142]—i.e., proving the employer's state of mind.[143]

The problem is particularly acute in lawsuits alleging discriminatory hiring. As Professor Lawton notes,

> [h]ow does a plaintiff in a circumstantial evidence case ever prove that the employer did not honestly believe its reasons for hiring another candidate? The standard is even more

134. No. 96-2625, 1997 U.S. App. LEXIS 223 (7th Cir. Jan. 3, 1997), *discussed in* Lawton, *supra* note 133, at 648.

135. *Id.* at *2–*3.

136. *Id.* at *3.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at *6–*8.

141. *Id.*

142. Lawton, *supra* note 133, at 649.

143. *Id.* at 650.

> problematic when applied to subjective hiring criteria. For example, how does a plaintiff demonstrate that her employer did not honestly believe the candidate had superior interpersonal skills? . . . By forcing plaintiffs to provide such evidence at the summary judgment stage, the federal courts employing the 'honest belief' standard effectively ensure that few employment discrimination plaintiffs will ever have their day in court.[144]

The effect is to preclude potentially valid claims of discriminatory hiring at the summary judgment phase, never giving the plaintiff a chance to present his case before a jury.

The "honest belief plus" approach would mitigate this problem by requiring the employer to present at least some particularized facts upon which it based its decision. For example, in *Hughes*,[145] the employer would have needed to present specific deficiencies in Hughes' qualifications that led the company to select the otherwise less-qualified Traczek for promotion. Thus, rather than imposing an impossible evidentiary burden upon the employee to prove the employer's state of mind, under the "honest belief plus" standard the employer would bear some responsibility for justifying its own actions.

B. Consistency with Supreme Court Precedent

By adopting "honest belief plus," California courts would also align themselves with two important U.S. Supreme Court employment decisions, *United States Postal Service v. Aikens*[146] and *St. Mary's Honor Center v. Hicks*.[147] These cases follow from the Court's decision in *McDonnell Douglas*,[148] and they both support "honest belief plus."[149]

In *Aikens*, the Supreme Court rejected the district court's requirement that the plaintiff in a Title VII case present direct

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144. *Id.* at 650–51.

145. *See supra* notes 134–41 and accompanying text.

146. 460 U.S. 711 (1983).

147. 509 U.S. 502 (1993).

148. 411 U.S. 792 (1973). For a more in-depth discussion of the Court's decision in *McDonnell Douglas*, see *supra* text accompanying notes 12–23.

149. For a detailed discussion of how these cases support "honest belief plus," see Atchley, *supra* note 130, at § IV.B.

evidence of discriminatory intent in order to make a prima facie showing.[150] Rather, the plaintiff could defeat a summary judgment motion either by providing direct evidence that the employer was motivated by discrimination, or indirectly by challenging the credibility of the employer's proffered explanation.[151] Ultimately, the court "must decide which party's explanation of the employer's motivation it believes."[152]

The "pure honest belief" standard renders this "decision" meaningless, however, since there is no basis to evaluate the credibility of the employer's proffered explanation. An employer will always claim that nondiscriminatory reasons motivated its employment decision. However, under the "pure honest belief" standard, neither the employee nor the court is "invit[ed] to criticize the employer's evaluation process or . . . question its conclusion about the quality of an employee's performance."[153] Given these constraints, the employee effectively has no ammunition with which to contest the employer's proffered reason.

In *Hicks*, the Supreme Court held that the plaintiff is not entitled to judgment as a matter of law on a showing of pretext alone under the third step of the *McDonnell Douglas* test.[154] However, the plaintiff still has an opportunity to cast doubt on the defendant's proffered reason:

> 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 . . . no additional proof of discrimination is *required*.[155]

Thus, the opinion in *Hicks* supports an evidentiary requirement that allows meaningful exploration into the defendant's true motivations. Absent a standard that allows for attacking the reasonableness of the

150. *Aikens*, 460 U.S. at 717.
151. *Id.*
152. *Id.*
153. *See supra* note 95 and accompanying text.
154. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).
155. *Id.* (alteration in original) (quotation marks omitted).

employer's explanation, it is difficult to imagine how an employee can possibly convince a factfinder to "disbelieve" the employer's proffered reason.

C. Consistency with the Evidentiary Requirements of Summary Judgment

A key rationale behind the Seventh Circuit's decision in *McCoy* establishing the "pure honest belief" standard is that the credibility of an employer's proffered reason is a question of fact that should be reserved for the fact finder.[156] As the court noted, "[s]ummary judgment is only appropriate when the record reveals that no reasonable jury could find for the nonmoving party . . . [T]his general standard is applied with added rigor in employment discrimination cases, where intent is inevitably the central issue."[157]

Under the "pure honest belief" approach, however, a defendant can obtain summary judgment even in the face of a legitimate factual dispute. For example, in *Kariotis*, the court issued summary judgment for the defendant, Navistar, even though the plaintiff had raised serious doubts as to Navistar's true motivations for her termination.[158] In so doing, the Seventh Circuit "raises the evidentiary barrier higher than necessary," resulting in the dismissal of cases that would ordinarily proceed to trial in any other context.[159]

D. Consistency with Federal and State Antidiscrimination Laws

The "honest belief plus" standard is consistent with one of the primary legislative goals underlying federal antidiscrimination laws: to prevent employment decisions based on unfounded stereotypes.

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156. *See supra* notes 84–89 and accompanying text.

157. McCoy v. WGN Cont'l Broad. Co., 957 F.2d 368, 370–71 (7th Cir. 1992).

158. *See supra* notes 90–96 and accompanying text. *See also* William R. Corbett, *The "Fall" of* Summers, *the Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305, 347 (1996) ("Struggling with *Hicks*'s evidentiary requirements for plaintiffs attempting to satisfy their burden at the third stage, some lower courts not only have taken the sword from plaintiffs, but also have allowed defendant employers to brandish the swords of summary judgment and judgment as a matter of law more freely.").

159. Atchley, *supra* note 130 at 235.

ADA is designed to prevent people with disabilities from "be[ing] discriminated against based on unfounded fear, prejudice, ignorance, or mythologies."[160] Likewise, the ADEA is intended to avoid similar stereotyping based on age.[161] As one member of Congress debating the bill authorizing ADEA noted, "[w]e must provide meaningful opportunities for employment to the thousands of workers . . . who are well qualified but nevertheless denied jobs which they may desperately need because someone has arbitrarily decided that they are too old."[162]

As Dana Atchley observes in writing about ADA, the "honest belief plus" approach is more consistent with this goal of avoiding stereotyping than is the "pure honest belief" standard:

> The Sixth Circuit's approach to the "honest belief" rule is more consistent with [ADA] than . . . the Seventh Circuit. By requiring that a defendant be able to point to particular facts on which it reasonably relied when making its decision, the Sixth Circuit in effect prohibits the defendant from making such decisions recklessly (or negligently) . . .
>
> The Seventh Circuit's approach, because it allows a defendant to avoid liability so long as it 'honestly believes' unfounded stereotypes about disabled people, is not consistent with the ADA.[163]

In other words, the "honest belief plus" standard ensures that employers do their research before blindly making assumptions regarding how an employee's age, sex, race or disability might affect his or her work abilities.

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160. *See id.* at 237 (citing 136 Cong. Rec. S 7422–03, 7437–7438 (daily ed. June 6 1990)(statement of Sen. Harkin during debate over Chapman Amendment to the ADA)).

161. *See* General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 588 (2004) (noting that the Congressional testimony at the ADEA hearings "dwelled on unjustified assumptions about the effect of age on ability to work").

162. *Id.* (quoting *Age Discrimination in Employment: Hearings Before the General Subcomm. on Labor of the H. Comm. on Education and Labor,* 90th Cong., 1st Sess. 23 (1967) (testimony of representative Claude Pepper)).

163. Atchley, *supra* note 130, at 237–38.

E. Arguments in Favor of the "Pure Honest Belief" Standard are Unconvincing

Advocates of the "pure honest belief" standard raise several arguments, none of which justify adopting this standard. First, they claim that a "reasonableness" requirement would be too intrusive on an employer's rights to make business judgments.[164] One "pure honest belief" supporter writes, "[a]llowing court inquiry into the process that was used by an employer and allowing that process to be subject to a reasonableness test imposes the court's judgment on how the employer should run its business and manage its employees."[165]

However, this argument misinterprets what the "honest belief plus" standard actually requires. The "honest belief plus" standard does not require that employers make *sound* business decisions, but rather that they make *informed* decisions. For example, suppose Navistar, the employer in *Kariotis*,[166] had *first* conducted a thorough investigation and subsequently reached the conclusion that Kariotis had fraudulently accepted disability benefits. This fact alone would satisfy the "honest belief plus" standard, since Navistar would have based its decisions on a particularized set of facts. The court would *not* inquire into whether Navistar's decision was sound from a business perspective (e.g., by considering whether Kariotis' valuable contribution to the company justified retaining her). Thus, the notion that "honest belief plus" would require courts to interfere with business judgments is ill-founded, since these judgments are unrelated to the "honest belief plus" inquiry.

Advocates of the "pure honest belief" standard also argue that this approach is consistent with the burdens set forth in *McDonnell Douglas*. Specifically, they argue that, despite the "burden-shifting" framework articulated in *McDonnell Douglas*, the burden "never fully shifts to the employer" because the ultimate burden of persuasion rests with the plaintiff.[167] Therefore, "allowing a claim to survive summary judgment just because the employer's reason might not have been reasonable in the eyes of the court does not hold an

164. *See* Michaels, *supra* note 79, at 2672–74.
165. *Id.* at 2673.
166. *See supra* text accompanying notes 90–96.
167. Michaels, *supra* note 79, at 2668.

employee to the burden of persuasion."[168] However, as discussed above, the legitimacy of an employer's "honest belief" is a question of *fact* that should be decided by fact-finders, not a judge during summary judgment proceedings.[169] Moreover, the fact that the plaintiff retains the burden of persuasion does not mean that this burden should be unreasonably difficult, like requiring an employee to prove the employer's subjective state of mind.

Finally, advocates of "pure honest belief" argue that this approach furthers judicial economy by ridding the docket of meritless cases.[170] However, this standard sweeps too far by eliminating legitimate cases in which plaintiffs are unable to disprove the employer's proffered "honest belief." Thus, while judicial economy is a worthwhile goal, it ought not come at the expense of denying judicial relief to plaintiffs who are otherwise entitled to recovery.

V. IMPLICATIONS OF *GREEN V STATE OF CALIFORNIA* ON THE "HONEST BELIEF PLUS" STANDARD IN CALIFORNIA

Although California courts have yet to directly address the debate over the "honest belief" standard, California has signaled its movement towards "honest belief plus" with the pending case *Green v. State of California*.[171] Green was placed on disability retirement after twelve years as a stationary engineer for a California correctional facility.[172] Green suffered from back problems and Hepatitis C, the latter requiring medication resulting in fatigue and other side effects.[173] As a result of these conditions, the company placed Green on light duty assignment in June of 1997, followed by temporary disability leave.[174] In June of 2000, he returned to work with a letter from his back doctor clearing him for full duty.[175] However, after reviewing a 1997 doctor's report that limited Green

168. *Id.* at 2669.

169. *See supra* text accompanying notes 150–151.

170. Michaels, *supra* note 79, at 2676.

171. 33 Cal. Rptr. 3d 254 (Ct. App. 2005). This case is currently pending review by the California Supreme Court.

172. *Id.* at 257.

173. *Id.*

174. *Id.*

175. *Id.* at 258.

to light work, Green's employer decided that he was incapable of performing his duties.[176] Green was ultimately placed on disability leave.[177] Green filed a claim under FEHA, alleging disability discrimination and failure to accommodate.[178] The jury returned a verdict in his favor, awarding him nearly $600,000 in economic damages and $2,000,000 in non-economic damages.[179]

On appeal, the court considered the following question regarding the first step of the *McDonnell-Douglas* test: "Does plaintiff have to prove he has the capacity to perform his essential duties as an element of his prima facie case or does [the] defendant have to establish that plaintiff cannot perform his duties with reasonable accommodation?"[180] After examining the language of FEHA and administrative regulations, the court concluded the *employer* has the burden of proving the employee's incapacity to perform the job: "The prima facie case for disability discrimination under [FEHA] . . . does not require plaintiff to prove that he is a qualified individual. Rather, the burden is on defendant to establish that plaintiff is incapable of performing his essential duties with reasonable accommodation."[181]

Although *Green* does not directly address the "honest belief" standard, it does at least implicitly require more of employers than a simple "honest belief." Under *Green*, the burden is on the *employer* to prove that the employee was incapable of performing her job functions.[182] It is not sufficient for the employer to claim that he or she "honestly believed" the employee's disability prevented her from performing her job. In fact, in some ways, the *Green* holding seems to actually exceed the "honest belief plus." Under *Green*, an employer must show that the employee *could not* perform her job functions, whereas under "honest belief plus" the employer must only show that he or she relied on a set of facts that led to this

176. *Id.*

177. *Id.* Green initially elected to be on disability leave, but later requested to return to work—a request which his employer denied. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 259.

181. *Id.* at 262.

182. *Id.*

conclusion.[183]

Thus, should the holding in *Green* survive review by the California Supreme Court, the case certainly would provide precedential support for applying the "honest belief plus" standard in the future.

VI. CONCLUSION

In jurisdictions that choose to follow the Seventh Circuit's "pure honest belief" standard, victims of employment discrimination currently face an unreasonably difficult battle. They must not only prove an employer's intent to discriminate, but must also show that the employer's proffered nondiscriminatory reasons were not honestly held. California courts should balance the scales between plaintiff-employee and defendant-employer by rejecting this requirement and instead adopting "honest belief plus." As discussed above, this standard is both fairer to plaintiffs and truer to Supreme Court precedent and the underlying goals of anti-discrimination statutes.

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183. *See supra* note 4 and accompanying text.

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