Buffalo Law Review

Volume 71 | Number 4 Article 3

10-30-2023

Honest Belief and Proof of Unlawful Motive

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INTRODUCTION

A large number of federal statutes impose liability on a defendant if it acted with a forbidden motivation. Intent is also central to the meaning of a number of constitutional provisions, including many applications of the First Amendment and the Equal Protection Clause. The large volume of litigation under these provisions does not turn on doctrinal differences about the meaning of intent or purpose, but on disputes about the types of evidence that are and are not sufficient to establish the existence of the forbidden purpose. Those standards, as a practical matter, determine the efficacy of the prohibition at issue and can illustrate tactics which a potential defendant can use to evade compliance.

In litigation about whether such an unlawful motive existed, defendants frequently seek to avoid liability by contending that their action, even if unwarranted, was based on an honest (although perhaps mistaken) belief. The so-called honest belief doctrine has been raised in a wide variety of circumstances, and there are a large number of decisions evaluating that issue.

Some commentators have strongly criticized the honest belief doctrine, but it is a well-established part of litigation in a wide range of fields. For judges and litigants, what matters is when the doctrine could apply, what types of evidence would be probative of whether the requisite honest belief existed, and how to analyze a number of recurring areas of confusion.

Part I explains the difference between a defendant's claim that the factual premise of its action was correct (the explanation was "objectively valid") and a defendant's claim that its action, even if based on an incorrect factual premise, was the result of an honest belief. Part II describes the types of evidence that courts have recognized can demonstrate that a defendant did not actually hold an asserted belief, including whether it is significant that a claimed belief was unreasonable. Part III summarizes the various ways in which an asserted belief could be shown not to be honest, including why deficiencies in a defendant's investigation may be relevant. Part IV explains how courts should

determine whether the issue in a particular case is objective validity or honest belief. Part V sets out the types of situations in which the existence of an honest belief would not preclude a finding of liability and discusses whether an honest belief instruction would be appropriate in a jury trial.

I. HONEST BELIEF AND OBJECTIVE VALIDITY

A large number of federal statutes establish prohibitions against actions taken for a particular forbidden purpose. In some laws, such as Title VII of the Civil Rights Act of 1964, the core substantive provisions are directed at certain motive-based actions; such as discrimination in employment on the basis of race or sex.[1] Other laws create substantive rights that are not, themselves, tied to a forbidden motive, but protect those rights by forbidding adverse action taken to retaliate against individuals who exercise the rights themselves. Such anti-retaliation provisions are essential parts of statutory schemes, such as the National Labor Relations Act[2] and the Family and Medical Leave Act.[3] An even wider range of federal laws forbid retaliation against those who oppose or report violations of their core prohibitions.[4]

These various types of motive-based prohibitions have given rise to a large volume of federal litigation, much of it arising from defense motions for summary judgment. The resulting judicial decisions are not simply fact-bound analyses. Rather, these decisions address the types of evidence that can be relied on to establish, or preclude, a finding of an unlawful motive and raise a number of recurring issues about presumptions and burdens of proof. Often the doctrines that have arisen in the context of one statutory prohibition have subsequently been applied by the courts to motive-based claims under other statutes. For example, the Supreme Court decision in *McDonnell Douglas*

1. 42 U.S.C. §§ 2000e-2000e-17.

2. 29 U.S.C. §§ 151-169.

3. 29 U.S.C. §§ 2612-2654.

4. *See* Civil Rights Act of 1964 § 704(a), 42 U.S.C. §§ 2000e-5(a).

Corp. v. Green,[5] discussing how courts should evaluate claims of race discrimination under Title VII of the Civil Rights Act of 1964, has been applied to claims under a wide variety of other laws as well as to claims of discrimination violating the Equal Protection Clause.[6] Similarly, there is substantial overlap in the types of evidence and arguments advanced in support of and opposing claims under various statutes that a disputed action was the result of an unlawful purpose.

One of the most common and important types of evidence relied on by plaintiffs[7] seeking to establish an unlawful motive is an attack on a defendant's proffered benign explanation of the action in question. Defendants alleged to have acted for an unlawful purpose invariably advance some other, legally permissible reason for their conduct. And as the Supreme Court noted in *Reeves v. Sanderson Plumbing Products, Inc.*,[8] "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."[9] "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."[10] Attacks on the veracity of a defendant's explanation of its actions are the most common type of evidence offered to prove the existence of an unlawful motive.

A defendant's proffered exculpatory explanation of its motive virtually always identifies particular circumstances

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5. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

6. *See, e.g.*, Johnson v. California, 545 U.S. 162, 171 n. 7 (2005).

7. In a few of the honest belief cases the issue of discrimination is raised by a criminal defendant who argues that the prosecution engaged in racial discrimination in the exercise of its peremptory challenges. For simplicity this Article describes the party seeking to prove discrimination as the plaintiff.

8. Reeves v. Sanderson Prods. Plumbing, Inc., 530 U.S. 133 (2000).

9. *See id.* at 147 ("[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation."); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) ("[R]ejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.").

10. *Reeves*, 530 U.S. at 147–48.

on which the explanation, and decision, were based. A vague explanation—such as "we fired the plaintiff because he broke a rule"—would be unpersuasive and, in certain contexts, probably legally insufficient. Even a somewhat general account ("we fired the plaintiff because she came to work late") will usually, at least in the course of discovery, become fairly specific (e.g., "we fired the plaintiff because she was due at work at 8 a.m. and did not come in until 11 a.m."). A plaintiff's attack on a defendant's proffered explanation most often takes the form of a challenge to this asserted factual premise. If the asserted factual premise is unworthy of credence, the explanation usually fails as well. The Court of Appeals for the District of Columbia has helpfully characterized this type of attack on the correctness of the asserted factual basis of a defendant's explanation as challenging the "objective validity" of that explanation.[11]

When the asserted factual basis is within the personal knowledge of the defendant, proof that the asserted factual premise is factually incorrect would usually establish that the defendant's explanation was false. This is because the defendant would know that the asserted factual basis of that explanation did not exist. If there is no possibility of a mistake because the defendant has personal knowledge of the asserted facts underlying its explanation, objective invalidity would be compelling evidence that the defendant was lying, not only about those facts, but also about its motive. So if a defendant asserts that its decisionmaker personally saw the plaintiff arriving at work three hours late at 11 a.m., and claims to have fired the plaintiff for tardiness, but the factfinder concludes that the defendant actually arrived on time at 8 a.m., the factfinder could easily reject as well the explanation that the plaintiff was fired for tardiness.

In other instances, however, the defendant does not have that sort of personal knowledge of the circumstances that constitute the asserted factual basis of its explanation. Rather, the decisionmaker (for example, a human resources official) might rely on information (e.g., a supervisor's report

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11. Morris v. McCarthy, 825 F.3d 658, 671 (D.C. Cir. 2016); George v. Leavitt, 407 F.3d 405, 416 (D.C. Cir. 2005). In *Amos v. McNairy Cnty.*, 622 F. App'x 529, 541 n.10 (10th Cir. 2015), the court referred to this as "the 'had no basis in fact' theory of pretext."

that he or she first saw a worker at 11 a.m.) and infer the pivotal asserted factual basis (e.g., that the worker was tardy) for a dismissal decision. In that situation, and if the underlying facts turn out not to be those the decisionmaker inferred (e.g., the worker actually was on time, but the supervisor just did not notice the worker until later), the decisionmaker is not lying. He or she made a mistake, a mistake which may undermine the wisdom of the decisionmaker's decision, but not its truthfulness. In other words, if the decisionmaker, in good faith, subjectively *believed* the asserted factual basis of the decision, it would not matter if that belief later turned out to be objectively incorrect. In that respect, motive-based prohibitions are different from statutes or contracts that prohibit some action (such as a dismissal) unless it is, in fact, supported by good cause.[12]

Even if a defendant did (mistakenly) believe the asserted factual premise of its explanation, that belief might still involve an unlawful state of mind in some other way. The lower courts have thus characterized the issue raised by this line of cases as being whether the defendant had an "honest belief," not just a "belief." "Honest" is judicial shorthand for a variety of different ways in which a belief might be tainted by illegality. This requirement of good faith is doctrinally distinct from the requirement of an actual belief, although in practice the evidentiary issues are often interrelated.[13]

Every federal geographical circuit has in some cases applied an honest belief standard in evaluating claims that

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12. In *Illinois Tool Works*, the court distinguished between motive-based discrimination claims and good cause claims, holding that the dismissal of the former under the honest belief doctrine did not require dismissal of the latter. *Illinois Tool Works, Inc. v. Abdel-Ghaffar*, No. 12-CV-5812, 2016 WL 3453653, at *2–3 (N.D. Ill. June 20, 2016); *see* Sanders v. Kettering Univ., 411 F. App'x 771, 774–77, 779–80 (6th Cir. 2010) (rejecting retaliation claim because of honest belief doctrine, but remanding for trial just cause claim); Slinger v. Pendaform Co., 779 F. App'x 378, 380–81 (6th Cir. 2019) (defendant's good faith belief that plaintiff had breached contract not a defense to a contract claim).

13. Some opinions frame this issue as being whether a defendant "honestly believed" its reasons. *E.g.*, Cung Hnin v. TOA (USA), *L.L.C.*, 751 F.3d 499, 507 (7th Cir. 2014). That phrasing, however, could refer to whether a defendant honestly believed its characterization of its motives, even though the defendant might have acted on the basis of an unconscious prejudice.

a defendant acted with an unlawful purpose.[14] In addition to its regular application in federal court, the doctrine has been utilized by courts in twenty-three states.[15]

The language in the honest belief opinions can, at times, be confusing, or perhaps confused. Whether a defendant honestly believed the asserted factual basis (e.g., believed the plaintiff was late to work) is different from whether it honestly believed its explanation (e.g., believed that tardiness, not retaliation, was the reason it fired the plaintiff). Some opinions use both phrases without distinguishing between them.

Honest belief, motive, and pretext are distinct issues and important to distinguish. They all refer to states of mind but have different meanings and may not refer to the same point in time. *Honest belief* refers to what facts a defendant (honestly) believed to be true and refers to the point in time at which the disputed decision was made. *Motive* refers to the defendant's purpose in taking that disputed action and also

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14. *See* Filter Specialists, Inc. v. Brooks, 879 N.E. 2d 558, 572–73 (Ind. App. 2007).

15. *See* Taylor v. State, 666 So. 2d 36, 42 (Ala. 1944); Gottschalk v. State, 36 P.3d 49, 51 (Alaska 2001); Kelly v. Canyon Ranch, Inc., No. 2 CA-CV 2015-0003, 2015 WL 7288189, at *7–8 (Ariz. Ct. App. Nov. 18, 2015); Brown v. United Parcel Serv., Inc., 531 S.W.2d 427, 436–37 (Ct. App. Ark. 2017); Mateen-Bradford v. City of Compton, No. B300491, 2021 WL 5002230, at *11 (Cal. Ct. App. 2d Oct. 28, 2021); Hatheway v. Bd. of Regents of Univ. of Idaho, 310 P.3d 315, 327 (Idaho 2013); *Filter Specialists*, 879 N.E.2d 558, 573–76 (Ind. Ct. App. 2007); Plagmann v. Square D. Co., No. LACV 39136, 2002 WL 32832031, at *3 (D Ct. Iowa Mar. 19, 2002); State v. Gonzalez-Sandoval, 431 P.3d 850, 860 (Kan. Ct. App. 2018); Hughes v. Norton Healthcare, Inc., No. 2019-CA-0222-MR, 2020 WL 7295190, at *12 (Ky. Ct. App. Dec. 11, 2020); Swartz v. Berrien Springs Pub. Sch. Dist., No. 286285, 2009 WL 4163539, at *5 (Mich. Ct. App. Nov. 24, 2009); Brown-Rojina v. Minneapolis Glass Co., No. A12-2203, 2013 WL 4504385, at *3 (Minn. Ct. App. Aug. 26, 2013); Grayson v. State, 736 So. 2d 394, 399 (Miss. Ct. App. 1999); Sheldon v. Cooper Health Sys., No. A-4954-18, 2021 WL 1115986, at *11 (N.J. Sup. Ct. App. Div. Mar. 24, 2021); Walls v. City of Winston-Salem, No. COA10-1248, 2011 WL 1467581, at *6 (N.C. Ct. App. Apr. 19, 2011); Horsley v. Burton, No. 10CA3356, 2010 WL 5441985, at *8 (Ohio Ct. App. Dec. 10, 2010); Jespersen v. Sweetwater Ranch Apts., 390 S.W.3d 644, 656 (Tex. App. 2012); Kunej v. Labor Comm'n, 306 P.3d 855, 861 (Utah Ct. App. 2013); Gauthier v. Keurig Green Mountain, Inc., 129 A.3d 108, 119–24 (Vt. 2015); Haley v. Pierce Cnty., No. 4'948-3-II., 2013 WL 544017, at *9 (Wash. Ct. App. Feb. 13, 2013); Skaggs v. Elk Run Coal Co., 479 S.E.2d 561, 588 n. 33 (W. Va. 1996); McMillian v. Labor & Indus. Comm'n, No. 79-947, 1980 WL 99190, at *2 (Wis. Ct. App. May 2, 1980); Sheaffer v. State ex rel. Univ. of Wyo. Bd. of Trustees, 202 P.2d 1030, 1037 (Wyo. 2009).

is assessed at the point in time at which the decision occurred. *Pretext* refers to whether a defendant spoke with a particular deceitful purpose[16]—to hide the existence of some other motive—when it explained what its motive was at the time of the action. That explanation itself could be given at the time of the action, but it could also occur later, such as in a deposition or a declaration or at trial. A defendant could have an honest belief in the asserted factual basis recounted in its explanation, and yet have acted with an unlawful motive and have given a pretextual explanation. On the other hand, if a factfinder concluded that a defendant did not (honestly) believe the asserted factual basis, the factfinder could, and probably would, find that the motive was unlawful and the explanation was pretextual. Courts sometimes use language that makes it unclear whether they are referring to honest belief in an asserted factual basis; that ambiguous language may reflect a failure to distinguish among these issues.[17]

The earliest articulation of what is now called the honest belief doctrine appears to have been in a pair of 1941 cases under the National Labor Relations Act.[18] Decisions

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16. Similarly, whether a decisionmaker's account of his or her beliefs was truthful is doctrinally a different question than whether the decisionmaker's account of his or her motives was deceitful. In theory a decisionmaker could lie about one but not the other. As a practical matter, however, a jury which concluded the decisionmaker was being dishonest about one issue would very likely conclude the decisionmaker was being dishonest about the other.

17. If the *only* evidentiary basis on which a plaintiff sought to establish pretext was proof that the asserted non-discriminatory ground of the disputed employment action was incorrect (e.g., that the worker was not actually tardy), then a finding of an honest belief would preclude a finding of pretext. Thus, an opinion might set out the honest belief rule, summarize the evidence, and conclude that the plaintiff could not show pretext, skipping the intermediate step of concluding that the plaintiff could not disprove honest belief, and *therefore* could not show pretext.

18. *See* Nevada Consol. Copper Corp. v. NLRB, 122 F.2d 587, 595 (10th Cir. 1941) ("Furthermore, it was not essential that petitioner establish that the grounds upon which it refused reemployment actually existed. It is sufficient if petitioner in good faith reasonably believed they existed.") (footnote omitted); NLRB v. Vincennes Steel Corp., 117 F.2d 169, 173 (7th Cir. 1941) ("The material question, however, is not the character or extent of his disability but whether respondent acted in good faith in discharging him. In other words, did the respondent discharge him because of its honest belief that his vision was impaired so as to interfere with the proper discharge of his duties? The burden

involving that doctrine have increased greatly in the wake of numerous subsequently adopted federal laws creating motive-based prohibitions and today involve a large number of different federal statutes.[19] The doctrine has also been

was upon the Board to show that the discharge was on account of his Union activities.").

19. These Federal statutes and associated decisions include:

- Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1); Abaza v. ProMedica Cent. Physicians, No. 3:18 CV 60, 2019 WL 2183034, at *1 (N.D. Ohio May 21, 2019);
- Americans with Disabilities Act (ADA), 42 U.S.C. § 12101-12213; Frost v. BNSF Ry. Co., 914 F.3d 1189, 1194 (9th Cir. 2019); Babb v. Maryville Anesthesiologists, 942 F.3d 308, 310–11 (6th Cir. 2019);
- Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301-1438; Small v. Office of Congressman Henry Cuellar, 485 F.Supp. 3d 275, 277–78 (D.D.C. 2020);
- Employment Retirement Income Security Act, 29 U.S.C. § 1144; Kouchinov v. Parametric Tech. Corp., 537 F.3d 62, 65 (1st Cir. 2008);
- Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2612-2654; Allen v. Peabody N.M. Servs., L.L.C., No. 1:19-CV-0120-SWS/MLC, 2020 WL 995771, at *1 (D. N.M. Feb. 28, 2010); Dobson v. Fulton Cnty., No. 1:19-CV-00902-ELR, 2020 WL 5548771, at *1 (N.D. Ga. Aug. 31, 2020);
- Federal Employer's Liability Act (FELA), 45 U.S.C. § 51-60; Carman v. Central of Georgia RR. Co., No. 4:18-CV-203 (CDL), 2020 WL 4574492, at *1 (M.D. Ga. Aug. 7, 2020);
- Federal Railroad Safety Act, 49 U.S.C.A. § 20101; Blackorby v. BNSF Ry. Co., 936 F.3d 733, 734 (8th Cir. 2019);
- National Labor Relations Act, 29 U.S.C. §§ 151-169; Good Samaritan Med. Ctr. v. NLRB, 858 F.3d 617, 633 (1st Cir. 2017); Charter Commc'ns, Inc. v. NLRB, 939 F.3d 798 (6th Cir. 2019); Hawaiian Dredging Constr. Co. v. NLRB, 847 F.3d 877 (D.C. Cir. 2017);
- Rehabilitation Act of 1973, 29 U.S.C. § 701-799; Dobson v. Fulton Cnty., No. 1:19-CV-00902, 2020 WL 5548771, at *1 (N.D. Ga. Aug. 31, 2020); Hall v. Washington Metro. Area Transit Auth., No. 19-1800, 2020 WL 5878032, at *7 (D.D.C. Oct. 2, 2020); and
- Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(a); Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 42 (1st Cir. 2002); De Lima Silva v. Dept. of Corr., 917 F.3d 546, 551 (7th Cir. 2019); Shazor v. Professional Transit Mgmt, 744 F.3d 948, 955 (6th Cir. 2014); 42 U.S.C. § 1981; Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 231, 245–46 (1st Cir. 2006); *De Lima Silva*, 917 F.3d at 551.

applied to federal constitutional claims[20] and in federal court litigation under state statutes and local ordinances.[21]

Today, cases in which defendants invoke the honest belief doctrine are a routine part of a wide range of federal and state court litigation. The doctrine is invoked most often in employment cases, particularly those in which the plaintiff claims that he or she was unlawfully dismissed or otherwise disciplined. The overwhelming majority of these disputes arise in connection with defense motions for summary judgment.

Some commentators have strongly criticized the honest belief doctrine, arguing that it should be abandoned or sharply narrowed.[22] But the doctrine is deeply embedded in decades of federal and state decisions, and it is unrealistic to anticipate that these objections will have significant impact. The number of different statutes to which the doctrine has been applied is so great that substantial legislative change is also unlikely. What matters to lawyers and judges as a practical matter is the manner in which disputes related to honest belief are litigated and resolved.

Critics have suggested that it would be virtually impossible for a plaintiff to prevail once a defendant invokes

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20. *See De Lima Silva,* 917 F.3d at 551 (Equal Protection); R.H. v. Obion Cnty. Bd. of Educ., No. 18-cv-01086, 2019 WL 6718674 at *1 (E.D. Tenn. Dec. 10, 2019) (First Amendment); Sanchez v. Roden, 808 F.3d 85, 95 n.6 (1st Cir. 2015) (racial discrimination in use of peremptory challenge); Currie v. Adams, 149 F. App'x 615 (9th Cir. 2005) (same).

21. *See* Brown v. Adams & Assocs., Inc., No. 4:19-cv-01864, 2020 WL 7353702 at *5 (E.D. Mo. Dec. 15, 2020) (Missouri law); Eaves v. United Techs. Corp., No. 3:19-CV-1153, 2020 WL 3976972 at *2 (N.D. Tex. July 13, 2020) (Texas law); Donaldson v. Coca Cola Refreshments USA, Inc., No. 3:18-CV-01713, 2020 WL 2542779 at *1 (D. Conn. May 19, 2020) (Connecticut Law); Gaines v. FCA USA L.L.C., No. 18-11879, 2020 WL 1502010 at *1 (E.D. Mich. Mar. 30, 2020) (Michigan law); Lucas v. United Parcel Service, No. 3:17-cv-00275, 2020 WL 491192 at *1 (S.D. Ohio Jan. 30, 2020) (Ohio law); Singh v. American Ass'n of Retired Pers., Inc., 456 F. Supp. 3d 1, 3 (D.D.C. 2020) (District of Columbia ordinance).

22. *E.g.*, Sandra F. Sperino, *Disbelief Doctrines*, 39 BERKELEY J. EMP. & LAB. L. 231 (2018); Robert A. Kearney, *Death of a Rule*, 16 U.C. DAVIS BUS. L.J. 1, 1 (2015); Michael Hayes, *"Sorry, It's My Bad, But You're Still Fired—& —Have No Case": The Honest Belief Defense in Employment Law,* 69 DRAKE L. REV. 531, 571–602 (2021).

the honest belief doctrine.[23] But in reality plaintiffs continue to succeed, most often to succeed in defeating summary judgment motions, even when defendants invoke the doctrine. Because the doctrine has existed for several decades, and is applied under a wide variety of statutes as well as some constitutional claims, these disputes have matured into a distinctive area of litigation with recurring subsidiary legal, doctrinal, and factual issues that are common to a large number of separate types of claims. Understanding the nature of those subsidiary issues, and evidence relevant to each, is important for both practitioners and courts.

Most fundamentally, there are two distinct elements of a dispute about honest belief: whether a decisionmaker actually believed the asserted factual premise underlying its explanation, and whether any such belief was an honest one are separate, although (sometimes) interrelated, questions. A plaintiff to prevail need only show that one or the other is absent. For doctrinal and practical reasons, there are distinct types of issues and types of evidence that bear on each question. Often one or both of those questions will turn on a subsidiary dispute of fact, such as disagreements about what information the decisionmaker had (and when)[24] or what statements the decisionmaker made before or after taking the action in question.[25] Disputes often arise as to whether a reasonable person would have inferred a fact from certain partial information[26] or would have refrained from doing so without further inquiry.[27]

The litigation and resolution of these disputes is complicated because whether the belief existed and whether

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23. *E.g.*, Anne Lawton, *The Meritocracy Myth and The Illusion of Equal Employment Opportunity,* 85 MINN. L. REV. 587, 546–51 (2000); Benson v. City of Chicago, No. 1-12-1899, 2014 WL 1309294, at *10 (Ill. Ct. App. Mar. 31, 2014).

24. *See infra* page 40.

25. *See id.*

26. *See* Flores v. Preferred Tech. Group, 182 F.3d 512, 516 (7th Cir. 1999) ("the more objectively reasonable a belief is, the more likely it will seem that the belief was honestly held.").

27. *See infra* page 22.

it was held in good faith are questions of fact;[28] thus in the context of a summary judgment motion, the question before the court is not belief and good faith as such, but rather how a reasonable jury could evaluate those issues. The Seventh Circuit observed in one case:

> According to the district court, "the issue is whether the [defendant] honestly believed that it promoted the most qualified persons for the positions." The district court is not quite correct. At the summary judgment stage, the district court evaluates whether plaintiffs have produced evidence from which a *fact-finder could* infer that the employer lied about the reasons for promoting the selectees.[29]

Then-Judge Gorsuch made this point repeatedly while on the Tenth Circuit, commenting in one case that the issue is whether "a reasonable factfinder could conclude that it was not an honestly held belief,"[30] and holding in another case that summary judgment would not be granted because "a reasonable jury could disbelieve defendants' claim that [the defendants'] treatment of [the plaintiffs] was merely a mistake."[31] Questions about what a reasonable person would have believed or done are classic factual issues ordinarily resolved by a jury.[32] Courts have refused to grant summary judgment with regard to the existence of an honest belief where a jury could conclude the decisionmaker did not have the claimed belief.[33] Conversely, courts have granted

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28. *See, e.g.*, Thomas v. Fairfield Mfg. Co., No. 4:08-CV-96-WCL-APR, 2009 WL 5031333, AT *9 (N.D. Ind. Dec. 15, 2009); Hill v. Shoe Show, Inc., No. 13-2931-STA-cgc, 2015 WL 4527722, at *9 n. 58 (W.D. Tenn. July 27, 2015); Smith v. Yelp, Inc., No. 20 CV 1166, 2021 WL 1192576, at *4 (N.D. Ill. Mar. 30, 2021). Juries are routinely asked in both civil and criminal cases to determine if a defendant had an honest or good faith belief. The Supreme Court in *Harlow v. Fitzgerald* eliminated good faith as an element of qualified immunity precisely because it is a factual issue, and because the Court wanted to avoid submitting qualified immunity issues to a jury.

29. Bell v. EPA, 232 F.3d 546, 551 (7th Cir. 2000) (emphasis added).

30. Young v. Dillon Companies, 468 F.3d 1243, 1250 (10th Cir. 2006) (opinion by Gorsuch, J.).

31. Orr v. City of Albuquerque, 531 F.3d 1210, 1218 (10th Cir. 2006) (opinion by Gorsuch, J).

32. *See* Hana Fin., Inc. v. Hana Bank, 574 U.S. 418, 422–23 (2015).

33. *See* Adamov v. U.S. Bank Nat'l Ass'n, 681 F. App'x 473, 480 n.6 (6th Cir. 2017) ("[A] reasonable jury could find [the defendant's] mistake too obvious to be

summary judgment with regard to this issue when they found that a reasonable jury would have to conclude that the decisionmaker indeed held the honest belief in question.[34]

Resolution of a dispute about honest belief is further complicated because, although belief and good faith are doctrinally distinct, courts have recognized that a factfinder's assessment of one issue might be affected by evidence on the other issue. For example, if the factfinder had doubts about the existence of a claimed belief (e.g., that the plaintiff was tardy) because it was based on relatively little (e.g., the fact that boss did not see the plaintiff at her desk early in the day), even a small amount of evidence that the defendant could have had an ulterior motive might be of critical importance.[35] Similarly, a factfinder's doubts about a defendant's good faith might be confirmed by the marginal nature of the information on which it based its claimed belief. Thus, in a case in which the evidence of non-belief and the evidence of bad faith, each considered in isolation, might not be sufficient to withstand a motion for summary judgment,

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unintentional"); Lee v. Cleveland Clinic Found., 676 F. App'x 488, 498 n.3 (6th Cir. 2017) ("Defendants may not simply assert the doctrine to disguise an improperly imposed disciplinary action if the decisionmakers could not have had that belief at the time of their decision. A jury must decide that the belief was indeed honest before a determination of liability may be made, and thus summary judgment was improper.") (quoting Maben v. Southwestern Med. Clinic, 630 F. App'x 438, 443(6th Cir. 2015)); Pye v. NuAire, Inc., 641 F.3d 1011, 1023 (8th Cir. 2011) ("[I]t is for the jury to decide . . . whether NuAire's [action was based on] an honestly held belief that Pye engaged in 'extortion'"); Nguyen v. Gambro BCT, Inc., 247 F. App'x 483, 490 (10th Cir. 2007) ("[A] jury that choses to adopt Nguyen's version of the facts could doubt whether Gonzales honestly believed a breach of confidentiality had taken place."); Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1266 (11th Cir. 2002) ("A reasonable jury could have found that Defendant . . . could not have honestly believed that Plaintiff's apartment was filthy. . . . [A] reasonable jury [could] conclude that [Defendant] did not honestly believe that Plaintiff and her children were responsible for the trash problems . . . .").

34. *See* Mendiola v. Exide Techs., 791 F. App'x 739, 744 (10th Cir. 2019) ("Mendiola has not come forward with evidence from which a reasonable jury could find that Defendants lacked . . . a[n] honest belief."); Kosan v. Utah Dep't of Corr., 290 F. App'x 145, 149 (10th Cir. 2008).

35. *But cf.* Gordon v. United Airlines, Inc., 246 F.3d 878, 889 (7th Cir. 2001) ("[T]he more objectively reasonable a belief is, the more likely it will seem that the belief was honestly held.") (quotation marks and citation omitted).

the combination of the two types of evidence might easily do so.[36]

Although there are a large number of lower court decisions applying the honest belief doctrine, there is no meaningful agreed-upon methodology for evaluating assertions that the asserted factual basis for a disputed decision was, if unsound, merely an innocent mistake. There is no single account delineating the relevant primary and subsidiary issues or summarizing what could be learned from assessing the numerous cases on a particular such issue. Many summary judgment decisions rejecting this defense contention are fact-bound accounts of the relevant evidence and of why the court found that a jury could conclude that the decisionmaker did not hold the asserted honest belief. On the other hand, many decisions accepting an honest belief argument only recite that the plaintiff had failed to adduce any evidence that the decisionmaker did not act on the basis of an honest belief; those decisions necessarily provide little guidance as to how courts should decide cases in which there is some such evidence.[37] Many of the precedents cited in these decisions are simply cases that recognize the existence of the honest belief doctrine, opinions that are not of substantial assistance in assessing how a court should decide whether a jury could find that an honest belief did not exist.

The problem is not that there are no such issues, but that there are too many of them. There is no single subsidiary question that arises in all or even most of these cases. Thus a judge or lawyer could handle several cases involving honest

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36. *E.g.*, Ramsey v. Siskiyou Hosp., Inc., No. 2:14-cv-01908, 2016 WL 3197557, at *10 (E.D. Cal. June 9, 2016):

> The evidence that her conduct did not in fact violate HIPAA, together with the evidence of the administration's discriminatory animus and the defects in Madden's investigation, raises a genuine dispute as to whether Fairchild honestly believed Ramsey violated HIPAA, or whether Fairchild's proffered reason was pretext.

37. For referring to a jury: *see, e.g,*, Nelson v. Oshkosh Trucking Corp., 2008 WL 4379557, at *6 (E.D. Wisc. Sept. 23, 2008). For just saying the plaintiff did not refute honest belief, with no reference to a jury: *see, e.g.*, Seeger v. Cincinnati Bell Tel. Co., LLC, 681 F.3d 274, 287 (6th Cir. 2012).

belief contentions and yet not see common issues or draw any useful lessons from one case to the next. The existence of a recurring issue that arises in only a minority of cases is likely to go unrecognized by lawyers or judges who personally work on only a few honest belief cases. Conversely, because there are a large number of honest belief cases, legal research regarding decisions using the phrase "honest belief" might well fail to turn up one of the scattered cases that has an insight relevant to the particular case at hand. Attorneys working on actual litigation do not have the time to read through hundreds of honest belief cases to find something that might prove useful in a specific situation.

As a consequence, courts and litigants continue to wrestle with a number of recurring, potentially dispositive questions. When can the honest belief doctrine even be invoked? Does it matter whether a belief was reasonable or baseless, and if so, why? Is it relevant that a defendant's investigation was defective, and if so, why and how defective? What is the relationship between the evidence that would bear on objective validity and the evidence that would bear on honest belief? How does a court decide whether the applicable standard in a given case should be honest belief or objective validity? What types of subsidiary factual disputes can preclude granting summary judgment on the basis of honest belief, and why? When can a plaintiff prevail on a motive-based claim even though the defendant's explanation of its actions rested on an honest belief, and why? The large volume of honest belief litigation often turns on the answers to these questions.

This Article seeks to fill that gap by reviewing the large number of honest belief cases to identify the lessons to be learned from that substantial body of judicial experience. It describes the distinct types of honest belief contentions adduced by defense counsel and the various kinds of evidence offered by plaintiffs and attempts to explain what types of proof are relevant to what kinds of honest belief disputes and why. The Article details the ways in which courts have assessed honest belief contentions in the context of summary judgment motions, identifies a number of inconsistencies, and suggests the most appropriate form of analysis. The analysis explains the ways in which evidence relevant to

objective validity differs from the evidence bearing on honest belief as well as the types of evidence that (for different reasons) is relevant to both. It sets out a number of recurring legal issues and recommends how each should be resolved. In practice these issues are often interrelated.

II. EVIDENCE OF NON-BELIEF

A variety of types of evidence may tend to show that a defendant did not actually hold the belief on which it claims to have based the decision at issue. In some instances, the evidence that would be probative if the parties were litigating objective validity would be irrelevant if the parties were instead litigating honest belief. In other situations, the same evidence that would be relevant to a dispute about objective validity also would be probative in litigation about honest belief, albeit for somewhat different reasons. Courts sometimes mistakenly assume that evidence that tends to undermine objective validity must be irrelevant in an honest belief case. Objective validity and honest belief are different issues, but the same evidence may bear on both.

A. *Personal Knowledge Inconsistent with the Asserted Belief*

The linchpin of the honest belief doctrine is that the matter was one regarding which the decisionmaker had only a "belief"; beliefs can be mistaken, and thus could be honestly mistaken. The honest belief doctrine usually[38] concerns a decisionmaker who did *not* have personal knowledge of the fact at issue and, lacking such personal knowledge, arrived at a belief by drawing an inference from some other information the defendant did possess. Thus courts have repeatedly recognized that the honest belief doctrine at least

38. In some cases, the asserted belief concerns, not an observable event (e.g., who punched the decisionmaker in the nose), but a necessarily somewhat subjective evaluation of a body of information (e.g., which of two applicants was better qualified on paper). In that situation, the issues would include whether, in light of that information, the claimed evaluation was plausible. *See infra* Section II.D. In some situations, the nature of the asserted belief could be unclear, at least on the face of deposition testimony. If, for example, two witnesses disagreed about whether a worker had been rude or merely outspoke at a meeting, they might be disagreeing about what had occurred (e.g., about whether the worker used an insulting phrase, or about his or her tone of voice) or about how they were evaluating agreed upon observations.

ordinarily does not apply if the trier of fact could conclude that the asserted factual basis of the defendant's explanation was within the personal knowledge of the decisionmaker.[39]

If the defendant had such actual knowledge, one court commented, "it is hard to imagine how [the defendant] would have had a good faith belief"[40] inconsistent with that knowledge, or, more on point, hard to imagine why a reasonable jury would have to conclude that the decisionmaker had such an honest belief.[41] Where the decisionmaker had such personal knowledge and the decisionmaker's account of the factual basis for its explanation is incorrect, that would not be a mistake (honest or otherwise)—it would be a lie. Thus, if a supervisor explained that he fired the plaintiff because the plaintiff punched the supervisor in the nose, the honest belief doctrine would be irrelevant because, if the plaintiff were innocent, the supervisor would have known that.

In some instances, it would be apparent on the face of a decisionmaker's explanation that the decisionmaker had personal knowledge as to the asserted factual basis of its explanation. That would be the case, for example, if the decisionmaker's explanation was based on something that

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39. *See* Hawthorne v. University of Tenn. Health Sci. Ctr., 203 F. Supp. 3d 886, 892 n.4 (E.D. Tenn. 2016) ("[T]he honest belief rule does not apply to situations where the decisionmaker relied on her own personal observations in making the decision rather than receiving information secondhand."); Sorensen v. National R.R. Passenger Corp., 786 F. App'x 652, 655 n.3 (9th Cir. 2019) ("Nor can Amtrak avail itself of the 'honest belief' doctrine. Crozier, the primary decisionmaker, would have known whether she authorized Sorensen to go over the thresholds or not."); Castro v. DeVry Univ., Inc., 786 F.3d 559, 572 (7th Cir. 2015) ("[T]his is not a case where a supervisor had to decide which of two conflicting stories to believe; Berry herself made the decisive recommendation to fire Florez, on advice from Strauss. They relied on their own accounts—not reports from co-workers or third-parties—to justify Florez's termination."); *cf.* Johnson v. Nordstrom, Inc., 260 F.3d 727, 732 (7th Cir. 2001); Flores v. Preferred Tech. Grp., 182 F.3d 512, 515 (7th Cir. 1999).

40. Abrams v. Tube City, IMS, L.L.C., No. 15-0105, 2016 WL 632564 at *9 n.17 (S.D. Ala. Feb. 16, 2016).

41. A moviegoer who saw only the last minute of *Casablanca* might think the Captain Renault, when he ordered a subordinate to "round up the usual suspects," had an honest belief that one of those known miscreants had killed Major Strasser. But a moviegoer who saw the entire film would understand that Renault had no such honest belief, because Renault had personally seen Rick Blaine shoot Strasser.

the decisionmaker allegedly said to the plaintiff,[42] something that the plaintiff had allegedly said to the decisionmaker,[43] or on something that the decisionmaker claimed to have seen the plaintiff do.[44] That would also be true if, in response to an explanation that the plaintiff had been fired for reported misconduct, the plaintiff offered evidence that the decisionmaker had personally authorized,[45] approved,[46] or directed[47] the very conduct which the decisionmaker asserted he or she believed was improper. Even where the

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42. *E.g.*, Sandowski v. McAleenan, 423 F. Supp. 3d 959, 976 (D. Haw. 2019) ("Tadaki says that one of the reasons he fired Sandowski was that Sandowski had disobeyed an order by missing work on August 12, 2006. . . . According to Sandowski, however, Tadaki did in fact tell him to stay home. . . . A genuine dispute exists as to whether Tadaki honestly believed that Sandowski had disobeyed his order.").

43. *See* Coone v. Chattanooga-Hamilton Cnty. Hosp. Auth., No. 1:16-cv-481, 2018 WL 1004037 at *10 (E.D. Tenn. Mar. 21, 2018) ("Ms. Carman and Ms. Phillips claim plaintiff admitted that she accessed the Patient's records without permission. . . . Plaintiff vehemently disputes this."); Bylicki v. McGee Tire Stores, Inc., No. 8:15-cv-1177-T-24, 2016 WL 4272211 at *4 (M.D. Fla. Aug. 15, 2016) (plaintiff disputes supervisor's assertion that plaintiff failed to notify supervisor he would be absent from work).

44. *See* Atkinson v. MacKinnon, No. 14-cv-736, 2016 WL 2901753 at *4–5 (W.D. Wis. May 18, 2016) (decisionmaker's testimony regarding actions by plaintiff that the decisionmaker had witnessed was disputed by plaintiff; "I must accept [the plaintiff's] allegations that defendants are lying (and not just mistaken) about defendant[the decisionmaker's] catching plaintiff trying to [engage in forbidden conduct]"); Lapera v. Federal Nat'l Mortgage Ass'n, 210 F. Supp. 3d 164, 183–84 (D.D. C. 2016) (witnesses "flatly contradicted" decisionmaker's testimony about the conduct of the plaintiff which the decisionmaker claimed to have observed at a disputed meeting); Gries v. Zimmer, Inc., No. 90-2430, 1991 WL 137243 at *8 (4th Cir. July 29, 1991) (other managers familiar with plaintiff's work disputed decisionmaker's description of perceived deficiencies).

45. *See* Turner v. American Bottling Co., No. 17 C 4023, 2019 WL 932017 at *6 (N.D. Ill. Feb. 26, 2019); McKinney v. Sheriff of Whitley Cnty., 866 F.3d 830, 810–11 (7th Cir. 2017); Crown v. Danby Fire Dist., 676 F. App'x 87, 91 (2d Cir. 2017).

46. *See* Sorensen v. National R.R. Passenger Corp., 786 F. App'x 652, 655 n.3 (9th Cir. 2019); King v. Butts Cnty., 576 F. App'x 923, 926, 929–30 (11th Cir. 2014); Larimer v. U.S. Bank N.A., No. 17-cv-2110, 2018 WL 3438905, at *6 (D. Kan. July 17, 2018); Bagi v. AT&T Mobility Servs. L.L.C., No. 12-CV-214, 2013 WL 1682987, at *6 (W.D. Mich. Apr. 17, 2013).

47. *See* Berger v. Automotive Media, L.L.C., No. 18-11189, 2020 WL 3129902, at *17 (E.D. Mich. June 6, 2020) (plaintiff offered evidence that the action relied on to justify dismissal had been done at the direction of the decisionmaker).

decisionmaker asserted that he or she relied on a report from someone else, the honest belief doctrine would not apply to the extent that the plaintiff offered evidence that the decisionmaker also had personal knowledge which was inconsistent with the claimed belief (and with the accuracy of the asserted report). In the context of a summary judgment motion, the issue is not whether the court thinks that the decisionmaker had personal knowledge but whether a reasonable jury could find that the decisionmaker did.

Ordinarily a factfinder could reasonably assume that a defendant has personal knowledge of what its own rules and practices are, and thus would not have made a mistake about those matters. On its face it seems odd even to assert, for example, that a defendant did not know what its rules were. As the Seventh Circuit has observed, in theory "even if [the plaintiff] broke no rule, [the employer] may still have mistakenly *believed* she did—and that's what counts in the pretext analysis . . . . Nevertheless, the [employer] can be presumed to understand its own code of conduct":[48] or, more precisely, although a defendant would be free to contend that its official did not understand the defendant's own rules, a factfinder could easily reject that sort of contention. The fact that a decisionmaker worked for an employer in a position of authority, rather than being a stranger who wandered in off the street, is evidence that he or she would have known the employer's standards and practices. A jury, at least usually, could believe that an employer would not entrust the authority to discipline employees to a manager who did not understand the policies for which a worker could be disciplined. A defendant might argue that the particular official who made the decision at issue somehow personally misunderstood what the employer's rules and practices were; it is theoretically possible that a particular official could be unfamiliar with his or her employer's rules and practices, and a defendant could argue that at trial. But summary judgment based on that sort of contention would rarely be warranted because a factfinder could ordinarily conclude that an official would know what the rules and practices were

48. Coleman v. Donahoe, 667 F.3d 835, 855 (7th Cir. 2012) (citation omitted).

at a plant or office where he or she personally worked,[49] and that a defendant would train its officials about such matters.[50] Thus when a defendant's explanation relies on a disputed assertion about its rules or practices, courts resolving summary judgment motions routinely ask what the rule or practice actually was,[51] assuming that a factfinder could conclude that these were matters within the personal knowledge of the defendant (and any official) and thus could not be a matter of mistaken belief.

A defendant's assertion that a decisionmaker believed its rules forbade a worker's conduct would usually be fatally undermined at summary judgment by evidence that the defendant had not punished other workers who engaged in the same conduct.[52] A factfinder could conclude that a decisionmaker would have had personal knowledge about what conduct was and was not permitted in practice. In theory, one official could assert he or she did not know what the other officials at his or her plant or office were doing, but a factfinder would disbelieve that sort of assertion absent unusual circumstances. Similarly, evidence regarding how other officials were interpreting a particular rule could lead a factfinder to conclude that the official in a particular case was aware of that accepted interpretation.[53] Defense witnesses rarely, if ever, testify that they actually did not know what was going on at the plant or office and that they just made an uninformed guess as to what the rules or practices were. Where a plaintiff points to common practices to demonstrate that a decisionmaker did not honestly believe

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49. *See* Tullock v. Loretto Hosp., No. 14 C 2066, 2016 WL 109986, at *7 (N.D. Ill. Jan. 11, 2016).

50. *See* Gordon v. United Airlines, Inc., 246 F.3d 878, 889–91 (7th Cir. 2001) (summary judgment denied where officials gave suspiciously conflicting accounts of employer's rules).

51. *See* Dowell v. Speer, No. 14-cv-01314, 2017 WL 1108650 at *9 (M.D. Tenn. Mar. 23, 2017); Tullock, 2016 WL 109986, at *7; Coleman v. Donahoe, 667 F.3d 835, 855 (7th Cir. 2012).

52. *See* Smith v. American Mod. Ins. Grp., No. 16-cv-844, 2018 WL 3549788, at *11 (S.D. Ohio July 24, 2018), *overruled in part on other grounds*, 2018 WL 4599911 (S.D. Ohio Sept. 25, 2018); Sharp v. Aker Plant Servs. Grp., Inc., 600 F. App'x 337, 344 (6th Cir. 2015).

53. Orr v. City of Albuquerque, 531 F.3d 1210, 1217–18 (10th Cir. 2008) (opinion by Gorsuch, J.).

the plaintiff had done something wrong, courts at summary judgment ask whether a factfinder would conclude those were indeed the practices at the time, properly assuming that a factfinder could conclude that a particular decisionmaker would have known what those established practices were.[54] Similarly, a factfinder could at least ordinarily conclude that a decisionmaker would have known what a worker's job duties were,[55] or who his or her supervisor was,[56] and thus could not have had a mistaken belief about such matters.

Personal knowledge of the fact in question on the part of a decisionmaker does not as such either support or undermine a contention that the decisionmaker honestly believed the fact or an assertion that the justification based on that fact was objectively valid. Rather, such personal knowledge collapses the difference between honest belief and objective validity. If the fact asserted by the decisionmaker (e.g., that the plaintiff punched the decisionmaker in the nose) is correct, it would follow (at least ordinarily) both that the asserted fact was believed by the decisionmaker and that the justification based on it (dismissal because of violence) was objectively valid. If the asserted fact was not true, it would follow that the assertion itself was not believed (the decisionmaker knew better) as well as that the justification that rested on it was not objectively valid.

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54. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. at 144–45 (2000) (practice of marking worker as arriving at 7:00 a.m. if time clock did not work); Mulero-Rodríguez v. Ponte, Inc., 98 F.3d 670, 675 (1st Cir. 1996) (practice of suspending purchases at certain times of the year).

55. *See* Fortkamp v. City of Celina, 159 F. Supp. 3d 813, 826 (N.D. Ohio 2016) ("This evidence suggests . . . that the City did not 'honestly believe' Fortkamp was a safety risk" because the tasks he would have had difficulty performing were rarely if ever engaged in by workers in the position in question); *Reeves*, 530 U.S. at 145 (plaintiff's job duties did not include disciplining tardy employees); *Mulero-Rodríguez*, 98 F.3d at 675 (plaintiff was no longer in charge of certain salesmen).

56. *See* Wendel v. Morton Bldgs., Inc., No. 15-1127, 2016 WL 2866204, at *4 n.31 (D. Kan. May 17, 2016).

B. *Absence of the Claimed Foundation for the Asserted Belief*

A belief, correct or not, is usually based on something. Religion and perhaps politics aside, a belief is usually an inference that the believer has drawn from some other information. A manager might explain that she believed that a worker was tardy because the worker was observed putting on his apron several hours after starting time and inferred that the worker must just have come to work.

In some cases, the plaintiff disputes whether the defendant actually had the information that was the claimed foundation of its belief. An attempt to invoke the honest belief doctrine cannot be evaluated without knowing whether the defendant actually had that information. When that is in dispute, as one court of appeals put it, "an inquiring court's focus must be on what the decisionmaker knew and when he or she knew it."[57] What a decisionmaker knew, and when he or she knew it are classic questions of historic fact. So, when such a dispute arises in connection with a motion for summary judgment, the relevant judicial inquiry is what a reasonable jury could find the decisionmaker knew and when that jury could conclude that knowledge was acquired.

To be sure, people sometimes believe things for no reason at all; such as that their lucky number will come up in the lottery. It is theoretically possible, however unlikely, that a decisionmaker might take an action based on a belief that had no basis at all. A supervisor could (barely) conceivably just wake up one morning with a conviction that a particular employee was an embezzler and fire that worker as a consequence. Some courts have commented that *if* a defendant actually had an honest belief in some key fact, that would satisfy the honest belief doctrine even though there was no foundation for that belief.[58] But in litigation about

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57. Kouchinov v. Parametric Tech. Corp., 537 F.3d 62, 70 (1st Cir. 2008).

58. Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 285–86 (6th Cir. 2012) ("As long as the employer held an honest belief," baseless would not matter); Tingle v. Arbors at Hillard, 692 F.3d 523, 530–31 (6th Cir. 2012) (baseless does not matter "[i]f an employer has an 'honest belief'"); De Lima Silva v. Department of Corr., 917 F.3d 546, 561 (7th Cir. 2019) (baseless does not matter "if the employer 'honestly believed'").

whether a defendant honestly believed something, the absence of a factual foundation for a claimed belief would be fatal to the defendant's case—particularly at summary judgment—by undermining the defendant's contention that it actually held that belief. A reasonable jury could, and almost certainly would, believe that a defendant would not adopt a belief that had no basis, just as, as the Supreme Court wrote, decisionmakers almost always "act[] with *some* reason" for their conduct.[59] Thus the courts of appeals distinguish between whether an actual but baseless belief could satisfy the honest belief doctrine (it could) and whether a reasonable jury could reject a claimed belief precisely because it had no basis (it could).[60] It would almost always be reasonable for a jury to conclude a decisionmaker did not actually believe some fact if the decisionmaker could not point to any information on which that belief would have been based. The courts of appeals have repeatedly rejected reliance on the honest belief doctrine where the defendant failed to point to *any* information received by the decisionmaker that either the defendant or the decisionmaker asserted was the basis of the belief in question.[61]

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59. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis in original).

60. *Compare Seeger*, 681 F.3d at 285–86 ("As long as the employer held an honest belief in its reason, 'the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless.'") (quoting Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998)) *with* Clay v. United Parcel Serv., Inc., 501 F.3d 695, 714 (6th Cir. 2007) ("One way in which a plaintiff may demonstrate pretext is by showing that the reason given by the employer 'is ultimately found to be mistaken, foolish, trivial, or baseless'") (quoting *Smith*, 155 F.3d at 806).

61. *E.g.*, Adamov v. U.S. Bank Nat'l Ass'n, 681 F.3d 473, 480 n.6 (6th Cir. 2017); Brooks v. Davey Tree Expert Co., 478 F. App'x 934, 943 (6th Cir. 2012); Mai v. Virginia Power, No. 86-1551, 1987 WL 36770, at *1 (4th Cir. Mar. 10, 1987); Dowell v. Speer, No. 14-cv-01314, 2017 WL 1108650 at *9 (M.D. Tenn. Mar. 23, 2017). The Sixth Circuit, for example, requires that a defendant seeking to invoke the honest belief doctrine in a motion for summary judgment identify the "particular facts" or "specific facts" on which it asserts the belief was based. *E.g.*, EEOC v. HP Pelzer Auto. Sys., Inc., 836 F. App'x. 422, 428–29 (6th Cir. 2020); Blizzard v. Marion Tech. Coll., 698 F.3d 275, 286 (6th Cir. 2012); Wright v. Murray Guard, Inc., 455 F.3d 702, 708 (6th Cir. 2006).

The same result follows if a defendant asserted that it had a specific factual foundation for a belief, but a jury finds that the defendant did not actually have that information (at least at the time of the decision and action in question).[62] Thus if there is a triable question of fact as to whether a defendant actually had the information which it claims was the basis of the asserted belief, summary judgment for that defendant would ordinarily be denied. If a trier of fact were to determine that a defendant lacked the claimed information, and that the defendant had indeed lied about its possession of that information, the trier of fact would be quite likely to conclude as well that the defendant's explanation for its action was pretextual.

Triable questions of fact usually arise when a decisionmaker asserts that his or her belief was based on something a decisionmaker claims to have personally observed.[63] For example, assertions that the decisionmaker based his or her belief on something he or she saw or heard the plaintiff do or say might be disputed by the plaintiff.[64] A

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62. The timing is critical if there is evidence that the decisionmaker made the decision in question *before* receiving the cited information. Turner v. Am. Bottling Co., No. 17 C 4023, 2019 WL 932017, at *6 (N.D. Ill. Feb. 26, 2019) ("A reasonable jury also could believe multiple witnesses' recollections that Graham finalized the decision to terminate Plaintiffs during the November 24, 2015 conference call at which point Hughes and Ferguson still had not conducted the final interview that led them to believe that Turner was being dishonest . . . .") (citations omitted); Shields v. Boys Town La., Inc., 194 F. Supp. 3d 512, 531 (E.D. La. 2016) ("Shields has presented evidence that Defendants actually had made the decision to terminate Shields prior to the conclusion of the investigation."); EEOC v. Bob Evans Farms, L.L.C., 275 F. Supp. 3d 635, 656 n.13 (W.D. Pa. 2017); Rentz v. William Beaumont Hosp., 195 F. Supp. 3d 933, 944–45 (E.D. Mich. 2016); Lankford v. Reladyne, L.L.C., No. 14-cv-682, 2016 WL 7217178, at *2 (S.D. Ohio May 10, 2016) ("facts that were before it at the time").

63. *E.g.*, B.H. v. Obion Cnty. Bd. of Educ., No. 18-cv-01086, 2019 WL 6718674, at *7 (E.D. Tenn. Dec. 10, 2019) ("trier of fact could find it would have been impossible" for defense witness to have observed acts described).

64. *See* Brown v. Adams & Assocs., Inc., No. 19-cv-01864, 2020 WL 7353702, at *5 (E.D. Mo. Dec. 15, 2020) ("[I]t is a matter of [the decisionmaker's] word against [the plaintiff's]"); Johnson v. Brennan, No. 17 C 8878, 2020 WL 1139253, at *8–9 (N.D. Ill. Mar. 9, 2020) (plaintiff denied making threats allegedly heard by defendant's officials); Harris v. Union Pac. R.R., No. 16-cv-11607, 2019 WL 4749982, at *9 (N.D. Ill. Sept. 30, 2019) ("[A] reasonable jury could credit Plaintiff's testimony and on that basis conclude that [official]'s concerns here were not legitimate because he fabricated statements by Plaintiff to support his initiation of the . . . evaluation."); Vaden v. DeKalb Tel. Coop., Inc., 21 F. Supp.

decisionmaker's assertions about what he or she observed may be inconsistent with observations by others of those same events.[65] Justifications based on the asserted contents of documents,[66] photographs,[67] or videotapes[68] may be sufficiently called into question by examination of the cited material to require resolution at trial. In some cases, courts have found that a trier of fact could conclude the events allegedly observed by the decisionmaker did not occur because there was evidence that the occurrence of those events would have been impossible[69] or at least quite unlikely.[70] Summary judgment has also been denied where a

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3d 901, 914 (M.D. Tenn. 2014) ("While [the defendant] says over and over again that Plaintiffs admitted to stealing from the company, repetition doesn't make it true, as both Plaintiffs vigorously deny they were involved in copper theft.").

65. *See* Brown v. M & M/MARS, 883 F.2d 505, 509 (7th Cir. 1989); Graefenhain v. Pabst Brewing Co., 827 F.2d 13, 17–19, 21–22 (7th Cir. 1987), *overruled on other grounds by* Coston v. Plitt Theatres, Inc., 860 F.2d 834, 836 (7th Cir. 1988); Banks v. Perdue, 298 F. Supp. 3d 94, 107–08 (D.D.C. 2018).

66. *See* De Lima Silva v. Dep't of Corr., 917 F.3d 546, 563 (7th Cir. 2019) (opinion joined by Barrett, J.) (documents in personnel file); Jones v. Nissan N. Am., Inc., 438 F. App'x 388, 403 (6th Cir. 2011) (previous written decision); Scales v. TMS Int'l, L.L.C., No. 18-cv-01652, 2020 WL 4500484, at *2 (N.D. Ala. Aug. 5, 2020) (expert opinion); Small v. Office of Congressman Henry Cuellar, 485 F. Supp. 3d 275, 281 (D.D.C. 2020) (allegedly defective press releases by plaintiff); Donez v. Leprino Foods, Inc., No. 19-cv-00285, 2020 WL 1914958, at *4 (D. Colo. Apr. 20, 2020) (police report); Karrick v. Unified Gov't of Wyandotte Cnty., No. 17-cv-2225, 2018 WL 2683967, at *5 (D. Kan. June 5, 2018) (investigation conclusions); Torrice v. NGS Coresource, No. 15-11747, 2016 WL 3611879, at *12 (E.D. Mich. July 6, 2016) (plaintiff's past evaluations); Wendel v. Morton Bldgs., Inc., No. 15-1127, 2016 WL 2866204, at *5 (D. Kan. May 17, 2016) (workers' compensation form).

67. *See* Burt v. Maple Knoll Cmtys., No. 1-cv-225, 2016 WL 3906233, at *10 (S.D. Ohio July 19, 2016).

68. *See* De Lima Silva v. Dep't of Corr., 917 F.3d 546, 564 (7th Cir. 2019); Donaldson v. Coca Cola Refreshments USA, Inc., No. 8-CV-01713, 2020 WL 2542779, at *7 (D. Ct. May 19, 2020); Tullock v. Loretto Hosp., No. 14 C 3066, 2016 WL 109986 at *7 (N.D. Ill. Jan. 11, 2016).

69. *See* R.H. v. Obion Cnty. Bd. of Educ., No. 18-cv-01086, 2019 WL 6718674, at *7 (E.D. Tenn. Dec. 10, 2019) ("The trier of fact could find that it would have been impossible for L.H. to go home, talk to her sister, call the school, return to the school, and take drugs and experience the effect in ten minutes.").

70. In Spears v. Kaiser Found. Health Plan of Ga., Inc., No. 17-cv-02102, 2019 WL 1225214 (N.D. Ga. Jan. 30, 2019), the decisionmaker testified that records showed there had been over 200 calls to the plaintiff's work phone on a Sunday night. The court denied summary judgment in part because that assertion "'d[id]

factfinder could reject a decisionmaker's assertion that some key fact was a matter of "common knowledge."[71] Where the decisionmaker is the only witness regarding the key alleged foundational information, courts have recognized that a jury might disbelieve the decisionmaker because he or she is an interested witness.[72]

If a decisionmaker asserts that he or she had (and relied on) information that was received from another person, summary judgment will usually be denied if a factfinder could reject that assertion about the source of the information.[73] A defendant's account of having received information from another party is sometimes directly disputed by the alleged source.[74] Courts have also recognized

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not comport' with" the fact that the daily average of calls to the phone was only 150-200. *Id.* at *23.

71. Edelman v. Loyola Univ. Chi., No. 16 CV 07971, 2019 WL 2161027, at *7 (N.D. Ill. May 17, 2019); Diamond v. American Fam. Mut. Ins. Co., No. 16-00977-CV, 2017 WL 5195881, at *5 (W.D. Mo. Nov. 9, 2017) ("[T]he parties dispute . . . whether it was common knowledge that Plaintiff used other phones on a regular basis . . . .").

72. *See* Kilgore v. Trussville Dev., L.L.C., 646 F. App'x 765, 775–76 (11th Cir. 2016); Ramirez v. Landry' Seafood Inn & Oyster Bar, 280 F.3d 576, 579 (5th Cir. 2002); Downing v. Abbott Lab'ys, No. 15C05921, 2019 WL 4213229, at *6, *7 (N.D. Ill. Sept. 5, 2019); Perry v. Covenant Med. Ctr., Inc., No. 15-cv-11040, 2016 WL 865732, at *7 (E.D. Mich. Mar. 7, 2016).

73. *See* Wagoneka v. KT&G Corp., No. 4:18-CV-859-SDJ, 2020 WL 6065037, at *10 (E.D. Tex. Oct. 14, 2020) ("KT&G USA points to a statement from its CFO, Song, stating that . . . he heard from someone at the company—not Wagoneka—that she had job interviews with other companies . . . . Wagoneka, however, disputes Song's statement both as to its substance, i.e. that Wagoneka had attended interviews, and that anyone provided such information to Song" and "the recollections of the parties, reflected in their sworn testimony, are conflicting.").

74. *Ramirez*, 280 F.3d at 579 (Richardson asserts that Carol Cree informed him about the alleged rumor [circulated by the plaintiff], but Cree's affidavit does not mention it."); Lee v. Addiction & Mental Health Servs., L.L.C., No. 2:18-cv-01816-KOB, 2020 WL 4284050, at *6–*7 (N.D. Ala. July 27, 2020) (physician's office allegedly called by decisionmaker denied having received the call; physician's office denied having sent fax to office claimed by decisionmaker); Lewis v. United States Steel Corp., No. 2:18-cv-00428-RDP, 2019 WL 6829993 at *11 (N.D. Ala. Dec. 13, 2019); Burt v. Maple Knoll Cmtys., No. 1:15-cv-225, 2016 WL 3906233, at *10 (S.D. Ohio July 19, 2016) ("Bolin also claims that witnesses observed Plaintiff snuggling up to Getz . . . . However, at her deposition, Kosar testified that the story she had told Bolin about Plaintiff and Getz's interaction was very different from Bolin's report of the incident.").

that summary judgment is inappropriate where a plaintiff offers evidence that the alleged source itself did not actually believe what the source allegedly told the decisionmaker.[75] Courts have reasoned that a jury could be suspicious of claims that a decisionmaker received information from an unnamed source[76] or where the alleged information was suspiciously vague[77] or had not been documented at the time.[78] Where both the decisionmaker and the alleged source are employees of the defendant, a factfinder is not required to believe their accounts of what was said between them, even if those accounts are consistent, because the witnesses are interested parties.[79]

Although proof that the decisionmaker did not have the information that was the asserted basis of the claimed belief would at least usually be fatal to an honest belief contention, that circumstance would be essentially irrelevant to litigation about objective validity. A justification can be objectively valid even if it was (at the time) just a baseless

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75. *See* Amos v. McNairy Cnty., 622 F. App'x 529, 541 n. 12 (6th Cir. 2015).

76. *See* Singh v. American Ass'n of Retired Pers., Inc., 456 F. Supp. 3d 1, 9 (D.D.C. 2020) ("During her deposition, . . . [the decisionmaker] was unable to recall which member or members of the former Audience Engagement team said that Ms. Singh was difficult to work with."); Diamond v. American Fam. Mut. Ins. Co., No. 4:16-00977-CV-RK, 2017 WL 5195881, at *1 (W.D. Mo. Nov. 9, 2017) ("[Supervisor who fired plaintiff] has never identified to Plaintiff the customers that allegedly complained . . . and has never shown Plaintiff any notes of such complaints.").

77. *See* Frazier v. AK Steel Corp., No. 1:15-cv-427, 2016 WL 6600624, at *6 and *7 (S.D. Ohio Nov. 8, 2016) ("If Frazier's conduct was truly the most egregious he encountered during his 33 years at AK Steel, it is remarkable that [the decisionmaker] cannot give any examples, made no complaints about Frazier, and never received any complaints about Frazier."); *Ramirez*, 280 F.3d at 579 ("[The decisionmaker] . . . refused to provide any details about the alleged rumor when he terminated Ramirez"); Kilgore v. Trussville Dev., L.L.C., 646 F. App'x 765, 775–76 (11th Cir. 2016) ("[The decisionmaker]'s testimony that the guest later identified Kilgore as the offending front-desk agent alone does not defeat Kilgore's claims because the jury is not required to believe [the decisionmaker]'s testimony on that point, particularly when it refers only vaguely to 'information provided' by the guest.").

78. Dowell v. Speer, No. 3:14-cv-01314, 2017 WL 1108650, at *9 (M.D. Tenn. Mar. 23, 2017) ("[T]he defendant has not produced documentation to support [the decisionmaker]'s conclusions about the plaintiff's performance record").

79. *See* Reeves v. Sanderson Plumbing Prods., Inc, 530 U.S. at 155 (Ginsburg, J., concurring).

lucky guess. A plaintiff who has this type of evidence might well be better off raising the issue of honest belief rather than attempting to base proof of pretext on a challenge to the objective validity of the justification offered for the disputed action.

C. *Statements and Actions Inconsistent with the Asserted Belief*

Courts have repeatedly denied summary judgment motions invoking the honest belief doctrine where a factfinder could conclude that a decisionmaker's asserted belief was inconsistent with the decisionmaker's own prior statements. That issue arises most often where an employer, which claims it believed a worker's job performance was inadequate, was shown to have had actually commended that performance. In *Brown v. M & M/MARS*, for instance, the Seventh Circuit observed that "[t]he jury could reasonably infer that [the decisionmaker] would not give [the plaintiff] high marks . . . and yet sincerely believe that [the plaintiff] was the inflexible, recalcitrant manager [the decisionmaker] testified."[80] In other cases a decisionmaker who claimed to have believed the plaintiff had engaged in misconduct was proven to have said the opposite. For example, in *Scales v. TMS Int'l, L.L.C.*,[81] the defendant asserted that it had fired the plaintiff because the plaintiff had, or at least the decisionmaker believed that the plaintiff had, written an abusive note. But another supervisor testified that the decisionmaker "told [him] that he did not believe Scales wrote the note."[82] The court explained that the

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80. Brown v. M & M/MARS, 883 F.2d 505, 510 (7th Cir. 1989); *see* Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 425–26 (6th Cir. 2021) (positive performance reviews inconsistent with honest belief that worker's performance was inadequate); Hutchens v. Chicago Bd. of Educ., 791 F.3d 366, 372 (7th Cir. 2015); Jones v. Nissan N. Am., Inc., 438 F. App'x 388, 404 (6th Cir. 2011); Berger v. Automotive Media, L.L.C., No. 18-11180, 2020 WL 3129902, at *17 (E.D. Mich. June 6, 2020); Torrice v. NGS Coresource, No. 15-11747, 2016 WL 3611879, at *12 (E.D. Mich. July 6, 2016); Tinsely v. Caterpillar Fin. Servs. Corp., 766 F. App'x 337 (M.D. Tenn. 2019); Ballard v. Mabus, No. 13-00024, 2016 WL 1180163 at *5 (D. Guam Mar. 25, 2016).

81. Scales v. TMS Int'l, L.L.C., No. 7:18-cv-01652-LSC, 2020 WL 4500484, at *2–*3 (N.D. Ala. Aug. 5, 2020).

82. *Id.* at *2.

reported remark was inconsistent with the asserted belief, and precluded summary judgment, even if that remark was not made at the time of the dismissal.[83] Where a decisionmaker's statement is inconsistent with an asserted belief, a factfinder can conclude that the decisionmaker really believed what he or she said rather than his or her explanation of the disputed action. Explanations and related asserted beliefs which first surface in litigation are particularly unlikely to support summary judgment when they are inconsistent with statements made at the time of the disputed decision.[84] Where several officials were involved in a disputed decision, a statement by even one of them can be sufficient to undermine the employer's assertion of an honest belief.[85] In a number of instances, summary judgment has been denied because the decisionmaker's description of the plaintiff's failings was inconsistent with what the decisionmaker had said to the plaintiff himself or herself.[86] In some circumstances a factfinder could conclude that a decisionmaker's notable silence at a key point in time was

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83. *Id.* ("If . . . [the decisionmaker] stated that he did not believe Scales wrote the note after Scales was terminated, it is reasonable to infer that [the decisionmaker] also held such a belief *before* Scales was terminated.") (emphasis in original); *see* Carman v. Central of Ga. R.R. Co., No. 4:18-CV-203 (CDL), 2020 WL 4574492, at *6 (M.D. Ga. Aug. 7, 2020) ("A reasonable juror could conclude that [the official] did not actually believe that Carman's . . . statement . . . was a true threat against the railroad. [The official] himself described the comment as an 'idle threat'"); Vidal v. Safeway, Inc., No. 3:20-cv-210-SI, 2021 WL 5855658, at *5 (D. Or. Dec. 9, 2021) ("[T]he purported statement to Vidal from a Safeway district manager that the video showed Vidal did nothing wrong . . . call[s] into question whether Safeway 'honestly belie[d] its proffered reason.'") (citation omitted).

84. *See* White v. Johnson, 172 F. Supp. 3d 178, 185–86 (D.D.C. 2016) (contrasting the depositions of four defense witnesses with the contemporaneous documents; "[a] reasonable jury could, viewing this evidence in the context of the discrepancies described above, conclude that [employers]'s proffered explanations are no more than *post hoc* justifications.").

85. *See* Bell v. EPA, 232 F.3d 546, 551–52 (7th Cir. 2000) ("a memorandum written by one of the Panel members prior to any decision"); Allen v. Braithwaite, No. 2:28-cv-02778, 2020 WL 3977671, at *10 (W.D. Tenn. July 7, 2020) (describing statement of "one of the ultimate decisionmakers"); Larimer v. U.S. Bank Nat'l Ass'n, No. 17-cv-2110-JWL, 2018 WL 3438905, at *6 (D. Kan. July 17, 2018) (contrasting testimony of two officials).

86. *See* Redick v. Molina Healthcare, Inc., No. 2:18-cv-60, 2020 WL 59796, at *10, *12 (S.D. Ohio Jan. 6, 2020); Abrams v. Tube City, IMS, L.L.C., No. 15-0105-WS-M, 2016 WL 632564, at *9 n. 17 (S.D. Ala Feb. 16, 2016).

inconsistent with a claimed belief.[87] Conversely, a decisionmaker's overly clever deposition testimony can be inconsistent with, and undermine, his or her original explanation.[88] In all of these types of situations, the issue at summary judgment is not whether the judge disbelieved the decisionmaker's account of his or her beliefs, but whether, in light of the decisionmaker's statements, a reasonable jury could do so.

Courts have also recognized that claims about what a defendant believed can be inconsistent, belied by the defendant's own actions.[89] For example, in *Gulliford v.*

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87. DeJesus v. WP Co. L.L.C., 841 F.3d 527, 534 (D.C. Cir. 2016) ("Such an unperturbed [contemporaneous] reaction to a purportedly dischargeable offense, by itself, could cast doubt on the Washington Post's proffered reason."); Stewart v. Kettering Health Network, 576 F. App'x 518, 523 (6th Cir. 2014) ("[T]he fact that neither doctor present at the time of the incident giving rise to plaintiff's termination saw fit to mention it in his contemporaneous notes undercuts the credibility of their subsequent declarations"); Lott v. ICS Merrill, 483 F. App'x 214, 219 (6th Cir. 2012); Coleman v. Donahoe, 667 F.3d 835, 843 (7th Cir. 2012) ("Although [the official] would later claim that he was 'frightened, afraid and scared' by what he took to be 'a very credible threat,' he did not express such fears [at the time] to either the police or the Postal Service investigators. He also failed even to mention Coleman's supposed threat in an email"); Butler-Burns v. Bd. of Trs. of the Cmty. Coll. Dist. No. 508, No. 16 C 4076, 2018 WL 1468996, at *6 (N.D. Ill. Mar. 26, 2018) (asserted belief that plaintiff was performing poorly was "never memorialized or otherwise communicated to [plaintiff]"); Craft v. Banner Health, No. CV-15-00987-PHX-SRB, 2017 WL 11496865, at *10 (D. Ariz. Mar. 12, 2017) ("Defendant's failure to alert Plaintiff [at the time] to the alleged inappropriate nature of the communication raises a genuine issue of fact as to whether Defendant 'honestly and reasonably believed that Plaintiff's conduct was inappropriate'") (citation omitted).

88. In *Peck v. Elyria Foundry Co.*, 347 F. App'x 139, 146 (6th Cir. 2009), the decisionmaker explained that he never considered hiring the plaintiff for a particular position because he interpreted her application to express interest only in certain other jobs. But in his deposition, he explained that he had rejected her for the position her because there were enough sanitary facilities for women at the plant and because she had a negative reference. *Id.*

89. *See* Brown v. M & M/MARS, 883 F.2d 505, 509 n.2 (7th Cir. 1989) (official's assertion that worker's alleged autocratic style was harmful was inconsistent with official's own autocratic style; "the jury could have found that if [the official] really believed that delegating responsibility was important to good management, it is likely he would have practiced what he preached"); Torrice v. NGS Coresource, No. 15-11747, 2016 WL 3611879, at *11 (E.D. Mich. July 6, 2016) (defendant's criticism of worker's performance inconsistent with past promotions and raises); Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374, 380 (7th Cir. 2000) (defendant's assertion it believed that worker was permanently

Schilli Transp. Servs., Inc.,[90] the employer, which claimed to have fired the plaintiff because it believed he was not performing adequately, subsequently offered to pay the plaintiff to work as an independent contractor. The court observed that "[if] the [employer] believed that [the plaintiff] was not meeting job expectations, a reasonable jury could find that [the employer] would not have offered [the plaintiff] contract work."[91] In *Tinsely v. Caterpillar Financial Services Corp.*,[92] the court noted that the employer's assertion that it believed the plaintiff was performing poorly was inconsistent with the employer's action in giving that worker an award for her work during the same period of time.[93] In other instances an employer's *in*action has been recognized as something that a trier of fact could conclude was inconsistent with the employer's later asserted belief.[94]

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disabled inconsistent with defendant's agreement to plan to allow worker to return to job).

90. Guilliford v. Schilli Transp. Servs. Inc., No. 4:15-CV-19-PRC, 2017 WL 6759135 (N.D. Ind. Jan. 5, 2017).

91. *Id.* at *14.

92. Tinsley v. Caterpillar Fin. Servs. Corp., No. 3:16-cv-01350, 2019 WL 2514718 (M.D. Tenn. June 18, 2019).

93. *Id.* at *11 ("Crucially, [the decisionmaker] gave [the plaintiff] the [award] . . . , during the period in which CFS asserts that Tinsley's performance declined due to her purported failure to follow the prescribed testing methodology."); *see* Peck v. Elyria Foundry Co., 347 F. App'x 139, 146 (6th Cir. 2009) ("Why . . . would Peck's application 'remain[ ] active' until Peck's attorney sent the letter if, as the company maintains, it 'should not feel compelled to interview a candidate who . . . has a history of poor attendance at a former place of employment'? A poor attendance record is a legitimate nondiscriminatory reason to exclude an applicant for consideration for any position. But if a report of Peck's attendance issues dissuaded Elyria from hiring Peck, it does not follow that Elyria would have had any reason to keep Peck's application under consideration.").

94. *See* Abrams v. Tube City, IMS, L.L.C., No. 15-0105-WS-M, 2016 WL 632564, at *9 n.17 (S.D. Ala Feb. 16, 2016) ("Abrams' lack of formal discipline, juxtaposed against the significant/serious disciplinary records of other RIF candidates, raises a genuine issue of material fact as to whether Tube City decision makers really believed Abrams to be a relatively poor performer with a bad attitude (i.e., if they did, then how come they only disciplined other employees, not Abrams?)."); Singer v. Lewis Univ., No. 14 C 7526, 2016 WL 3014807, at *4 (N.D. Ill. May 26, 2016) ("There is some evidence in the record that suggests Defendant did not believe Plaintiff's statement was as 'threatening and ominous' as it now contends it was . . . . The meeting at which Plaintiff allegedly made her threatening statement ended cordially, for example . . . . In addition, Plaintiff was allowed to continue working after the statement and was

A defendant's inability to provide examples or details of the events that allegedly prompted its belief could persuade a factfinder that neither the events nor the belief was real.[95] Similarly, a factfinder can discredit a defendant's account of its belief where the defendant was aware at the time of information inconsistent with that claimed belief and could not explain how or why it nonetheless adopted that claimed belief.[96] Evidence that the decisionmaker fabricated an explanation and factual basis can be sufficient to undermine that account.[97]

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allowed to drive onto the university campus to retrieve her belongings after her termination . . . , and Defendant never informed Plaintiff's colleagues prior to her termination about her alleged statement or otherwise suggest to them that she posed a threat to the workplace."); Courtney v. Biosound, Inc., 42 F.3d 414, 420-21 (7th Cir. 1994) ("Given Biosound's claim that it had placed a 'high premium' on finding an individual who could satisfy its "unique communication needs," a reasonable juror could conclude that Biosound would have included this qualification in the job listing had it honestly believed that it was of primary importance for the new position."); Frazier v. AK Steel Corp., No. 1:15-cv-427, 2016 WL 6600624, at *6, *7 (S.D. Ohio Nov. 8, 2016) (official's assertion that workers performance was "the most egregious he had encountered in 33 years" was inconsistent with official's failure to ever complain about that conduct); Gallo v. Prudential Residential Servs. Ltd., 22 F.3d 1219, 1226 (2d Cir. 1994) (employer's reason that it did not interview its former manager of internal communications because of her lack of experience in external communications presents genuine issues of material fact as to pretext, where job advertisement did not state that the position would include external communication).

95. *See Frazier*, 2016 WL 6600624, at *6 , *7; Butler-Burns v. Bd. of Trs. of the Cmty. Coll. Dist. No. 508, No. 16 C 4076, 2018 WL 1468996, at *6 (N. D. Ill. Mar. 26, 2018).

96. *See* Johnston v. BNSF Ry. Co., No. 15-3685 (SRN/KMM), 2017 WL 4685012, at *7 (D. Minn. Oct. 16, 2017) ("BNSF ignored, without explanation at least four written statements from Johnston's co-workers indicating they had used the lone-worker rule at night without challenge and without suffering any consequences."); Smith v. American Mod. Ins. Grp., No. 16-cv-844, 2018 WL 3549788, at *11, *13 (S.D. Ohio July 24, 2018).

97. In *Meade v. General Motors L.L.C.,* 317 F. Supp. 3d 1259, 1286 (N.D. Ga. 2018), when the defendant fired the plaintiff, it labeled her misdeed "gross misconduct," which would have rendered her ineligible for COBRA benefits. When her attorney contacted the company officials and challenged that designation, one manager sent an email to others saying (about some earlier time) "You had suggested we use this as a bargaining chip so she was coded such that she was ineligible for COBRA. That decision was made during that final meeting before termination . . . ." *Id.* at 1272. The court held that the email could convince a jury that the officials never really believed the plaintiff had engaged in gross misconduct. *Id.* at 1286.

Statements and actions by a decisionmaker that were inconsistent with an asserted belief would be substantial evidence that the decisionmaker did not personally hold that belief. Such statements and actions inconsistent with a claimed explanation would also be relevant to objective validity, regardless of whether the speaker or actor was a decisionmaker, but only to the extent to which the speaker or actor had personal knowledge of—and thus could be understood to convey information about—the relevant facts.

D. *Implausible Inferences and Beliefs*

1. Why Implausibility Matters

An asserted belief is usually an inference that the defendant claims to have drawn from the information it had at the time. In determining whether the defendant actually held the asserted belief, a factfinder could consider, in light of the probativeness and reliability of that information, whether it was unlikely that the defendant actually drew the asserted inference.

The courts have made this point in a number of different ways.[98] One line of opinions holds that a jury can discredit an asserted factual belief if the erroneousness of that belief was "too obvious to be unintentional."[99] A Fifth Circuit decision observed that "[e]veryone can make a mistake—but if the mistake is large enough, we may begin to wonder whether it was a mistake at all."[100] The Third Circuit commented that "the less reliable [a] report may appear, the greater the likelihood that [a defendant's] reliance on it to

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98. *Cf.* Young v. United Parcel Serv., 575 U.S. 206, 233 (2015) ("[W]hen an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder may infer that the employer's asserted reason for its action is a pretext for unlawful discrimination." (Alito, J., concurring in the judgment) (emphasis omitted)).

99. Hooks v. Rumpke Transp. Co. L.L.C., No. 16-3681, 2017 WL 6506360, at *5 n.5 (6th Cir. Aug. 8, 2017) (citation and internal quotation marks omitted); *see, e.g.*, A.C. *ex rel.* v. Shelby Cnty. Bd. of Educ., 711 F.3d 687, 705 (6th Cir. 2013); Blizzard v. Marion Tech. Coll., 698 F.3d 275, 286 (6th Cir. 2012); Smith v. Chrysler Corp., 155 F.3d 799, 807 (6th Cir. 1998); Fischbach v. District of Columbia Dep't. of Corr., 86 F.3d 1180, 1183 (D.C. Cir. 1996).

100. Thornbrough v. Columbus & Greenville R. Co., 760 F.2d 633, 647 (5th Cir. 1985).

justify his actions was pretextual."[101] The Seventh Circuit reasoned in one case that the defendant "should and would have realized" what the facts really were in light of the information it had.[102] The Fourth Circuit commented in another case that "[a] juror could easily find it implausible" that the defendant would conclude that an otherwise qualified applicant had engaged in past misconduct without more "substantial" evidence.[103] "In other words," the District of Columbia Circuit explained, "[a] jury might hear [a defendant's] explanation and think 'she doesn't really believe that.'"[104]

The drawing of an implausible inference is not unlawful; motive-based prohibitions do not forbid stupidity. But the implausibility of a claimed inference would be evidence from which a factfinder might conclude that the inference was not drawn at all because a factfinder could reason that an unbiased decisionmaker would not ordinarily draw implausible inferences or hold implausible beliefs. It is not illegal for a defendant to jump to a conclusion with little justification, but a jury could reason that it is unlikely that a defendant would actually act in that way. If a jury determined that most people would not have drawn a particular conclusion from the information before a defendant, it might conclude that the defendant itself did not actually do so.

The fact that an actual belief, if really held, would suffice under the honest belief doctrine, no matter how implausible, in no way limits the probativeness of implausibility as evidence bearing on a factfinder's determination as to what a defendant's belief actually was. Baseless beliefs can satisfy the honest belief doctrine, but a factfinder can conclude that baselessness is compelling evidence that a claimed belief was not held at all. If a trier of fact determined that an employer really made hiring decisions based on the belief that any person who is a Sagittarius is lazy, it would not matter that such a belief is nonsense; but a trier of fact could rely on

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101. Kowalski v. L & F Prods., 82 F.3d 1283, 1290 (3d Cir. 1996).

102. Coleman v. Donahoe, 667 F.3d 835, 856 (7th Cir. 2012).

103. EEOC v. Sears Roebuck & Co., 243 F.3d 846, 853 (4th Cir. 2001).

104. DeJesus v. WP Co., L.L.C., 841 F.3d 527, 534 (D.C. Cir. 2016).

common sense in determining whether the employer really made employment decisions based on zodiac signs. A properly instructed jury could distinguish between what it thinks a decisionmaker should infer, which is legally irrelevant, and what it concludes the sensible decisionmakers actually would infer, which can be central to application of the honest belief doctrine.

The plausibility of an asserted inference is a frequent issue in honest belief litigation. Often what prompts an individual to think he or she was the victim of discrimination is that the individual knows, or at least believes, that the explanation for the disputed adverse action rests on a premise (the employee was late to work) that is not merely wrong (he or she arrived on time) but so clearly unwarranted (e.g., by the mere fact that the worker was not at his or her desk at 11 a.m.) that the defendant did not really believe it.

Implausibility, like the obviousness of error, is often a question of degree. If someone said he or she purchased a four-wheel drive car because he or she believed there would be a heavy snowfall next year, a reasonable jury could not question the plausibility of that belief if the individual lived in Buffalo and would assuredly discredit that asserted belief if the individual resided in Miami. But there is no specific location along the East Coast where that belief would change from plausible to implausible; its plausibility simply declines the further south the city in question.

This area of the law can be confusing because the erroneousness of an inference is relevant both when the issue is the objective validity and when the issue is honest belief, but in different ways. With regard to objective validity, the question at summary judgment is whether a jury itself could find that the asserted factual basis was erroneous; the correctness or erroneousness of a proposed inference is *the issue* regardless of how sensible the inference might have appeared at the time. With regard to honest belief, on the other hand, the question at summary judgment is whether a reasonable jury could conclude—perhaps based on the obviousness of an error—that the defendant did not draw the asserted inference. Erroneousness that should have been clear to the decisionmaker is what matters, and it is only

evidence bearing on the issue of what inference was actually drawn.

2. Assessing Implausibility

A factfinder's evaluation of the plausibility of an inference often begins with an assessment of the likelihood, in light of the information known to, and relied on, by the defendant, that the inferred fact was actually the case.[105] For example, suppose a defendant asserted that its decisionmaker believed that no one was home at a particular time because he or she rang the doorbell and no one answered. Most of the time the reason that no one answers a doorbell is indeed because no one is home. The likelihood that the inference was correct is high, and a factfinder would have no reason (on this ground) to doubt that the defendant had drawn that inference. On the other hand, suppose a defendant asserted that its decisionmaker believed that no one resided in the house because he or she rang the doorbell (one time) and no one answered. The likelihood that that inference was correct would be small, and a factfinder could conclude that the defendant did not really believe it.

A factfinder's assessment would also consider information the defendant might have chosen to ignore.[106] So

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105. *See, e.g.*, Allen v. Peabody N.M. Servs, L.L.C., No. 1:19-CV-0120-SWS/MLC, 2020 WL 995771, at *5 ("very little evidence"), *6 ("little evidence") (D. N.M. Feb. 28, 2020); Lee v. Addiction & Mental Health Servs., L.L.C., No. 2:18-CV_01816-KOB, 2020 WL 4284050, at *8 (N.D. Ala. July 27, 2020) (handwriting on document "not so clearly identical" to that of plaintiff); Wagoneka v. KT&G USA Corp., No. 4:18-CV-859-SDJ, 2020 WL 6065037 at *1 (E.D. Tex. Oct. 14, 2020) ("[A]n employee attending interviews with other employers does not necessarily imply a firm intent to resign"); Vaden v. DeKalb Tel. Coop., Inc., 21 F. Supp. 3d 901, 914 (M.D. Tenn. 2014) ("[T]he sole person who pointed the finger at Plaintiffs admitted he only 'believed' they were involved, but had no personal knowledge of it one way or the other. (This same individual told [the defendant] that 'everyone' on the line crew was in on the scheme, but that turned out to be at least partly wrong, as two men who denied involvement in the scheme were let off the hook.)").

106. *See, e.g.*, Zamora v. Elite Logistics, Inc., 449 F.3d 1106, 1115 (10th Cir. 2006) (defendant's assertion that it believed that worker was using someone else's social security number undermined by the fact that the worker had been hired when company officials was carefully checking Social Security numbers); Carman v. Central of Georgia R.R. Co., No. 4:18-CV-203 (CDL), 2020 WL 4574492, at *6 (M.D. Ga. Aug. 7, 2020) ("[T]he record . . . would permit a juror to conclude, based on all the other [Facebook] comments and what actually

if there was a sign on the door reading: "Doorbell broken, please knock," a factfinder would have reason to discredit the defendant's assertion that it really believed no one was home simply because no one answered when he or she pressed the doorbell. The unexplained failure of a defendant to address information inconsistent with its asserted belief can support a finding that the claimed belief was not genuine.[107]

A finding of non-belief would be justified if the defendant did not have essential information that most individuals would regard as necessary before drawing any inference at all about the matter. For example, in one opinion joined by then-Judge Barrett, the Seventh Circuit rejected a claim of honest belief that was based on a video where "the video does not record who said what to whom or when, and the video does not clearly show what subtle movements plaintiff or [another individual] made. Such details would be necessary to evaluate whether plaintiff falsely reported [his actions]."[108] In *Smith v. Daimler Trucks NA, LLC*,[109] the defendant asserted that it believed that a worker had falsely claimed to be temporarily disabled, explaining that it reached that conclusion based on a photograph of the individual working out at a gym. The court denied summary judgment because the employer had no information indicating when the photograph had been taken.[110]

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happened after the June 30 Facebook post, that [the decisionmaker] understood by the time of his investigation that Carman did not intend to [engage in misconduct].").

107. Smith v. American Mod. Ins. Grp., No. 1:16-CV-844, 2018 WL 3549788, at *13 (S.D. Ohio July 24, 2018) ("[P]laintiff had adduced evidence that [the defendant] ignored evidence that favored plaintiff . . . ."); Johnston v. BNSF Ry. Co., No. CV 15-3685 (SRN/KMM), 2017 WL 4685012, at *7 (D. Minn. Oct. 16, 2107) ("BNSF ignored, without explanation at least four written statements from Johnston's co-workers indicated they had [engaged as the same conduct as the plaintiff] without challenge and without suffering any consequences."); Burt v. Maple Knoll Cmtys., No. 1:15-CV-225, 2016 WL 3906233, at *10 (S.D. Ohio July 19, 2016) (defendant's explanation "ignored Plaintiff's accusation that [co-worker] had engaged in unwanted, sexual harassment").

108. De Lima Silva v. Dep't. of Corr., 917 F.3d 546, 564 (7th Cir. 2019) (opinion joined by Barrett, J.).

109. Smith v. Daimler Trucks NA, LLC, No. 7:14-2058-BHH-KFM, 2016 WL 762605 (D. S.C. Jan. 21, 2016).

110. *Id.* at *3–4, *12–13 (D. S.C. Jan. 21, 2016); *see* Nguyen v. Gambro BCT, Inc., 242 F. App'x 483, 486 (10th Cir. 2007) (information known to defendant did

Similarly, a factfinder could discredit an asserted belief if the information on which a defendant claimed to have relied did not rule out an explanation that was at least as likely as the one the defendant asserted it drew. An inference that a house is unoccupied, if based only on the fact that no one answered the doorbell, is implausible because there are several other possible explanations that are more likely, such as that none of the occupants were home at the moment. For example, in *Zamora v. Elite Logistics, Inc*., the Eleventh Circuit concluded that a factfinder would discredit the defendant's assertion that it believed a worker was an undocumented alien solely because it had learned that someone else was using the worker's claimed social security number.[111] "[T]he mere fact that another had used the social security number [which a worker claimed was his own] did not make it more likely than not that [the worker] was the perpetrator, rather than the victim, of this violation [of the Social Security laws]."[112] The failure to rule out some benign explanation is particularly telling if the defendant could have obtained additional information but failed to do so. Such a need for some basis to rule out a viable alternative to a defendant's claimed inference is the situation presented by a dispute in which a defendant has received conflicting statements about the relevant events, the so-called "she said / he said" situation. The possibility that the plaintiff is the one telling the truth is the alternative that a defendant must have some reason to rule out. Where a defendant

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not "specif[y] the exact date on which [the] discussion occurred"); Sharp v. Aker Plant Servs. Grp., Inc., 600 F. App'x 337, 344 (6th Cir. 2015) (decisionmaker admittedly unfamiliar with policies of third party which he claimed to be enforcing); Butler-Burns v. Bd. of Trs. of the Cmty. Coll. Dist. No. 508, Cnty. of Cook, Illinois, No. 16 C 4076, 2018 WL 1468996, at *6 (N.D. Ill. Mar. 26, 2018) (manager "didn't know specifically" what plaintiff's deficiencies were); Moffat v. Wal-Mart Stores, Inc., 624 F. App'x 341, 349 (6th Cir. 2015) (Decisionmaker's "own testimony shows that he did not ascertain or know all the relevant facts, and that he did not think it important to know such facts before terminating Plaintiffs' employment. The honest-belief defense, therefore, does not apply.").

111. Zamora, 449 F.3d at 1115; Woodard v. Fanboy, L.L.C., 298 F.3d 1261, 1267 n.7 (11th Cir. 2002).

112. *Id.* (defendant's explanation failed to account for "the other obvious sources" of the problem at issue); Airgas USA, L.L.C. v. NLRB, 916 F.3d 555, 563 (6th Cir. 2019) ("Without sufficient investigation to rule out a viable alternative, [defendant] had no basis to conclude [that worker was at fault]").

cannot explain its choice (or the explanation it offers is one a factfinder could disbelieve), the factfinder could conclude that the defendant did not really believe that the plaintiff's account was the untruthful one.[113]

Similarly, where a defendant's asserted belief rested on the interpretation of such materials, a factfinder can assess the plausibility of that claimed interpretation.[114] A factfinder could also reject a claim that a defendant actually believed an unlikely interpretation of the terms of its written policies. Summary judgment could be denied where a report or investigation on which a defendant claimed to have based its decision was known by the defendant to be sufficiently

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113. *Compare* Azimi v. Jordan's Meats, Inc., 456 F.3d 228, 245 (1st Cir. 2006) (affirming summary judgment where defendant gave "several reasons" for disbelieving plaintiff's account, including unrelated "credibility issues" about the plaintiff and corroboration of the account of the contrary witness), *with* EEOC v. HP Pelzer Auto. Sys., Inc., No. 1:17-CV-31-TAV-CHS, 2020 WL 996453, at *6 (E.D. Tenn. Mar. 2, 2020) ("[W]here the defendant's decision was inevitably based on credibility determinations, the court determined that jury should decide the question of the defendant's honest belief . . . ."); Eboda v. PNC Bank, N.A., No. CV 17-707, 2018 WL 4489649, at *10 (E.D. Pa. Sept. 18, 2018) (denying summary judgment in part because of evidence supporting non-white plaintiff's claim that defendant "valued the accounts of white men and women over her own"); *HP Pelzer Auto. Sys., Inc.,* 2018 WL 3723708, at *8 (E.D. Tenn. Aug. 3, 2018) ("Although employers are protected under the 'honest belief' rule even if their conclusion was incorrect, the Court cannot ascertain the reasonableness of this defendant's belief without ascertaining the credibility of [the worker] or the witnesses defendant interviewed."); Gilooly v. Missouri Dep't of Health & Senior Servs., 421 F.3d 734, 741 (8th Cir. 2005) ("[T]he belief that Gilooly was lying was founded solely on the statements of other employees and witnesses. The letter contained no independently verifiable evidence that contradicted Gilooly's allegations. Without such additional corroboration, the statements in the termination letter amount to little more than a description of conflicting stories with the employer disbelieving Gilooly's version of the events.") (footnote omitted); Shazor v. Professional Transit Mgmt., Ltd., 744 F.3d 948, 960–61 (6th Cir. 2014) ("There is just one problem with Defendants' version of events—it relies on inadmissible hearsay . . . . Stripped of [the defendant's] statements, the record concerning this . . . [asserted] lie [by the plaintiff] is little more than a he-said, she-said. Plaintiff's sworn testimony . . . is enough to create a genuine issue of fact . . . ."); Charter Commc'ns, Inc. v. NLRB, 939 F.3d 798, 817 (9th Cir. 2019) (defendant's own report indicates it knew witness had lied about related matter).

114. *See, e.g.*, Beatty v. Chesapeake Ctr., Inc., 818 F.2d 318, 321 (4th Cir. 1987) (interpretation of statement by plaintiff at orientation session); Jones v. Nissan N. Am., Inc., 438 F. App'x 388, 404 (6th Cir. 2011) (interpretation of court order); Peck v. Elyria Foundry Co., 347 F. App'x 139, 152 (6th Cir. 2009) (interpretation of job application).

unreliable so that a factfinder could conclude the defendant would not really have believed it.[115]

Courts have reasoned that a factfinder could discredit a claim that a decisionmaker believed there was an unwritten rule, especially where the defendant did have written rules,[116] where the claimed policy had never before been applied[117] or been disclosed to the worker to whom it was applied,[118] or where there was a disagreement as to what that rule was.[119]

Inferences matter with regard to both objective validity and honest belief, but in different ways. In a dispute about objective validity, the question at summary judgment is whether a reasonable jury could itself infer the fact urged by the plaintiff (e.g., infer that the plaintiff got to work on time), whereas in an honest belief dispute the question would be whether a reasonable jury could conclude that the inference claimed by the defendant was sufficiently implausible that the defendant did not really draw that inference and hold the asserted belief. In an honest belief case, the assessment of plausibility is limited to, and focuses on, the specific

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115. Kowalski v. L & F Prods., 82 F.3d 1283, 1289–90 (3d Cir. 1996) ("The facial accuracy and reliability of the report is probative of whether [the defendant] acted in good faith reliance upon the report's conclusions: the less reliable the report may appear, the greater the likelihood that [the defendant] reli[ed] on it to justify his actions [were] pretextual.").

116. *See, e.g.*, Thomsen v. Georgia-Pac. Corrugated, L.L.C., 190 F.Supp.3d 959, 971–72 (E.D. Cal. 2016) (jury could reject argument defendant believed there was an "unwritten 'policy'"); Lott v. ICS Merrill, 483 F. App'x 214, 219–20 (6th Cir. 2012) (jury could conclude that defendant did not believe that there was an unwritten rule "not reflected in any handbook, [or] training manual"); Bland v. Carlstar Grp., L.L.C., No. 1:17-CV-01025-STA-EGB, 2018 WL 1787892, at *10 (W.D. Tenn. Mar. 13, 2018) ("Even though Defendant contends that it has a 'zero tolerance provision' in the . . . policy, there is no such explicit provision in the policy.").

117. *See Thomsen*, 190 F. Supp. at 971–72; *Lott*, 483 F. App'x at 219–20; Coleman v. Donahoe, 667 F.3d 835, 855 (7th Cir. 2012) (claiming application of a rule that has rarely been used to punish conduct).

118. *See Lott*, 483 F. App'x at 219–20; Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463, 476 (D.D.C. 2016).

119. Gordon v. United Airlines, Inc., 246 F.3d 878, 889–91 (7th Cir. 2001) (denying summary judgment based on assertion decisionmaker believed plaintiff's action violated firm rule where there were conflicting accounts of what the rule was, or whether there was a rule at all).

information known to the specific decisionmaker at the time, and what was and was not known is often a focus of the dispute. Neither party can point to other information; such as an affidavit from the plaintiff (that he was at work on time) or from someone who had not communicated with the decisionmaker (that he or she saw the plaintiff drive into the parking lot several hours late). In disputes about objective validity, the parties would not advance arguments about what was known to whom and when.

E. *Reasonableness*

There is a degree of confusion about whether it matters that a defendant's claimed belief (and inference) was reasonable, and if so, why. That problem arises at least in part because "reasonable" in this context could have several different meanings:

(1) "Reasonable" can be used to denote an inference that has a substantial likelihood of being correct, in light of the information on which it is based. This usage ("reasonable inference" or "reasonable belief") is essentially objective, an assessment of the probability of one fact (that it rained the night before) in light of another fact (the sidewalk was wet in the morning). The existence or absence of a reasonable belief (in this sense) is an element of some claims; in an excess force case, for example, it matters whether a police officer could have reasonably believed that the individual against whom the force was used posed a serious danger of death or significant injury to others.[120] But reasonableness in this sense is not an element of a motive-based claim, only evidence relevant as to whether the belief was actually held.

(2) "Reasonable" can also refer to individuals who act like typical people in similar circumstances. This usage is descriptive of what people do; it is not a description of the plausibility of a belief or a judgment about what people should do. How

120. Graham v. Connor, 490 U.S. 386, 397 (1989).

reasonable people act is an element, for example, of certain trademark infringement claims, which turn on whether reasonable people would regard one mark as the equivalent of another.[121] Proof of what typical people do also is not an element of a motive-based claim, but would be evidence relevant to a dispute about honest belief.

(3) "Reasonable" can also be a normative term, describing how individuals ought to act. The term is used that way in tort, which imposes liability on defendants who fail to use reasonable care. What a factfinder thinks a defendant should have done is neither an element of a motive-based claim, nor evidence bearing on it. These usages are easily confused because typical people draw only plausible inferences and ought to draw only reasonable inferences when there is a risk of harm to themselves or others. It is possible to draft a sentence that uses "reasonable" in all three senses ("reasonable people only draw reasonable inferences and ought only to do so when someone could reasonably get hurt"), but these are distinct meanings, nonetheless.

Reasonableness in the first two instances is evidence on which a factfinder could rely in attempting to decide what a defendant actually believed.[122] A factfinder can infer, absent evidence to the contrary, that a decisionmaker would ordinarily draw only inferences that were reasonable (i.e., plausible) and would then draw the same inferences that would be drawn by reasonable (i.e., typical) people in the same circumstances. If a factfinder determines that a claimed inference was not objectively reasonable, or that it was an inference which reasonable people would not draw, the factfinder could conclude that the decisionmaker did not actually draw that inference. On the other hand, it does not matter what a factfinder thinks a defendant *should* have

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121. *See* Hana Fin., Inc. v. Hana Bank, 574 U.S. 418, 423 (2015) ("the propensities of a 'reasonable person'"); *Id.* at 425 ("how reasonable persons would behave").

122. *E.g.*, Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc) ("[A] reasonable employer would have found the plaintiff to be significantly better qualified . . . .").

done, but it does matter what the factfinder thinks someone in the defendant's position probably *would* have done. And, because reasonableness (in these senses) is only evidence, but not conclusive proof, of non-belief, it is possible that an unreasonable (i.e., atypical) defendant could have acted unreasonably (e.g., have adopted a belief without any basis) and yet have an honest (albeit very mistaken) belief.

If a defendant actually held a particular belief, and did so untainted by bad faith, the honest belief doctrine applies regardless of whether the defendant's adoption of that belief was unreasonable in any of these senses: even if it was unlikely to be sound, was it a belief no one else would hold, and/or carried an undue risk of harm to one's own interests or the interests of others? Denial of summary judgment is not a punishment for defendants who act in stupid, eccentric, or irresponsible ways. Conversely, if a defendant did not actually hold a particular belief (e.g., did not really believe a worker was tardy), it would not matter that such a belief would have been eminently reasonable (i.e., supported by a mountain of evidence and was shared by everyone else).

A number of Seventh Circuit decisions hold that to prevail in a dispute about honest belief a defendant must show that its belief was reasonably grounded on particularized facts.[123] Other Seventh, along with Eighth Circuit, decisions have disagreed with this rule,[124] and the Sixth Circuit in turn has criticized the Seventh Circuit for not applying it.[125] Although this has been characterized as a circuit split,[126] in practice these differing formulations would rarely matter. The Sixth and Seventh Circuits agree that reasonableness is relevant evidence.[127] One Seventh Circuit decision observed that "the more objectively reasonable a

123. *E.g.*, Seeger v. Cincinnati Bell Tel. Co., L.L.C., 681 F.3d 274, 286–87 (7th Cir. 2012); Smith v. Chrysler Corp., 155 F.3d 799, 806–07 (6th Cir. 2012).

124. Pulczinski v. Trinity Structural Towers, Inc., 691 F.3d 996, 1003 (8th Cir. 2012); Little v. Illinois Dep't of Revenue, 369 F.3d 1007, 1012 n.3 (7th Cir. 2004).

125. *Smith*, 155 F.3d at 806.

126. Dana W. Atchley, *The Americans With Disabilities Act: You Can't Honestly Believe That!*, 23 J. LEGIS. 229 (1999).

127. *Compare In re* Lewis, 845 F.2d 624, 633 (6th Cir. 1988), *with* Gordon v. United Airlines, Inc., 246 F.3d 878, 889 (7th Cir. 2001).

belief is, the more likely it will seem that the belief was reasonably held."[128] In the absence of any evidence supporting the reasonableness of an asserted belief, it would be unlikely that a defendant could obtain summary judgment in any circuit. Similarly, summary judgment for a defendant would be unlikely in any court if a defendant failed to point to any factual basis (e.g., that no one saw the worker at the office until 11 a.m.) as a basis for a belief (e.g., that the worker was tardy), and defendants almost invariably attempt to do so.[129]

There is a circuit conflict regarding when evidence of a worker's greater qualification could support an inference that an employer did not honestly believe another candidate was more qualified for a disputed promotion.[130] The District of Columbia Circuit, consistent with the prevailing view of reasonableness in this context, holds that a plaintiff adduces sufficient evidence if a trier of fact could conclude that a reasonable employer would have found the worker significantly better qualified.[131] On the other hand, the Eleventh Circuit requires such a plaintiff to show that "no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff . . . ."[132] That Eleventh Circuit standard is essentially the same as a classic definition of proof beyond a reasonable doubt.[133] While such a demanding standard is appropriate when the government seeks to incarcerate or even execute a defendant, that is not the standard normally applied in civil litigation. Congress has not seen fit to impose on workers who allege discrimination by their employers a standard more demanding than would apply if the same employer were to sue the worker for misusing a credit card.

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128. Flores v. Preferred Tech. Grp., 182 F.3d 512, 516 (7th Cir. 1999).

129. *See* Filter Specialists, Inc. v. Brooks, 879 N.E.2d 558, 575 n.13 (Ind. Ct. App. 2008) ("[T]he ultimate result of a case will rarely turn on which version of the honest belief rule is applied").

130. *See* Ash v. Tyson Foods, Inc., 546 U.S. 454, 457–78 (2006).

131. Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc).

132. Cooper v. Southern Co., 390 F.3d 695, 732 (11th Cir. 2004).

133. "[N]o other reasonable conclusion is possible." Victor v. Nebraska, 511 U.S. 1, 12 (1994) (quoting Commonwealth v. Costley, 118 Mass. 1, 24 (1875)).

III. EVIDENCE OF BAD FAITH

The limitation of this doctrine to instances of *honest* belief[134] reflects a judicial recognition that an unlawful state of mind could exist despite a defendant's earnest protestation that it believed the facts that were the asserted basis of its explanation. Judicial experience in honest belief cases demonstrates the importance and nature of this issue.

A. *Bias, Animus, and Stereotypes*

In honest belief cases, the information known to the defendant at the time is usually not so overwhelmingly in one direction—such as a worker discovered holding a smoking gun over the lifeless body of a manager he was known to dislike—that any reasonable person would have drawn the same inference. In the many instances in which reasonable people could have drawn different conclusions from the information known to the defendant, or could have interpreted a document or statement in a different manner, the critical question is whether, and if so, why the defendant drew the inference or adopted the interpretation adverse to the plaintiff. That is precisely the type of situation in which, if the defendant had a pre-existing unlawful desire to take a particular action (e.g., to get rid of a worker because he or she had taken FMLA leave), that illegal desire could tip the balance against the worker. The less conclusive the information was against the worker, the more likely that any existing unlawful motive could have affected what inference the defendant chose to draw from that information.

In some situations, although a defendant did actually believe the asserted factual basis of its explanation, the belief itself may be tainted by an unlawful bias. If a defendant wanted to get rid of a worker for some illegal reason, the defendant might be more easily convinced that the worker had acted improperly. An employer that usually would infer

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134. The adjective "honest" and the adverb "honestly" may to convey different meanings. A statement that a person did not have an "honest belief" indicates that there was a real belief, but it was tainted in some way. An assertion that a defendant did not "honestly believe" an asserted factual basis usually is an assertion that the defendant did not *really* believe those facts existed. That is an assertion of *non*-belief.

a worker had engaged in misconduct only if there were substantial evidence might, with regard to workers over sixty, be disposed to arrive at that conclusion based on mere suspicion. A defendant might believe, without corroboration, an accusation against a worker who had just filed an EEOC charge even though the defendant ordinarily would not credit that sort of accusation without some independent confirmation. This would not necessarily involve a conscious double standard: a defendant might simply hear what it wanted to hear.[135] A defendant's conclusion might also be colored by some unlawful stereotype; such as that disabled workers usually are not competent to do their jobs or that workers of a particular race are often dishonest.[136]

In honest belief litigation, the evidence of the existence of an unlawful purpose, which might have tainted the defendant's choice of inference, is often similar to the evidence of unlawful motive in other contexts. Sometimes there is evidence of a particular type of bias; such as a prejudiced remark (e.g., indicating animus towards older workers),[137] or the proximity in time between when a worker

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135. Eaves v. United Techs. Corp., No. 3:19-CV-1153-B, 2020 WL 3976972, at *7 (N.D. Tex. July 13, 2020) ("[investigator] was hearing what he wanted to hear").

136. *E.g.*, EEOC v. Bob Evans Farms, L.L.C., 275 F. Supp. 3d 635, 656 (W.D. Pa. 2017) (assumptions about pregnant workers); Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45–46 (1st Cir. 2002) (stereotyping); Brant v. Fitzpatrick, 957 F.3d 67, 78 (1st Cir. 2020) (stereotypes about African Americans); Hall v. Washington Metro. Area Transit Auth., No. 19-1800 (BAH), 2020 WL 5878032, at *11 (D.D.C. Oct 2, 2020) (assumptions about individuals with disabilities).

137. *See* Stewart v. Kettering Health Network, 576 F. App'x 518, 523 (6th Cir. 2014) ("[T]here are a number of factors here that give us pause about the honesty of defendants' belief in this case. First, . . . , there is a substantial amount of evidence that plaintiff was subjected to a number of ageist remarks"); Ion v. Chevron USA, Inc., 731 F.3d 379, 394 (5th Cir. 2013) (hostile remark about plaintiff's intent to take FMLA leave); Jones v. National Am. Univ., 608 F.3d 1039, 1047 (8th Cir. 2010) (hostile remarks about plaintiff's age); EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1200 (10th Cir. 2000) (discriminatory remarks about pregnant workers); Beatty v. Chesapeake Ctr., Inc., 818 F.2d 318, 321 (4th Cir. 1987) (hostile remark about worker's pregnancy); *Hall*, 2020 WL 5878032, at *11 (discriminatory remarks about individuals with disabilities); Redick v. Molina Healthcare, Inc., No. 2:18-cv-60, 2020 WL 59796, at *9 (S.D. Ohio Jan. 6, 2020) (hostile remark about individuals who take FMLA leave); Ramsey v. Siskiyou Hosp. Inc., No. 2:14-cv-01908-KJM-CMK, 2016 WL

engaged in some protected right (e.g., filed an EEOC charge) and when the defendant drew a particular disputed inference (e.g., that the worker was tardy) might convince a factfinder that animus due to that protected activity had shaped the inference the defendant drew.[138]

In other cases, the evidence might suggest the existence of an undisclosed ulterior motive without specifically indicating what that motive was. There may be evidence that a defendant was already looking for some basis on which to take action against the plaintiff (e.g., singling out the worker for investigation) before the subsequently relied-on information came along.[139] In some situations, a factfinder might conclude that a defendant had an ulterior motive because the defendant was trying to hide its motives; such as by changing stories,[140] by destroying evidence,[141] or by refusing to explain to a worker why he or she was being

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3197557, at *8 (E.D. Cal. June 9, 2016) (discriminatory remarks about older workers); Torrice v. NGS Coresource, No. 15-11747, 2016 WL 3611879, at *8 (E.D. Mich. July 6, 2016) (discriminatory remarks about older workers).

138. *E.g.*, Amos v. McNairy Cnty., 622 F. App'x 529, 541 (6th Cir. 2015) ("[T]he suspicious timing of [the defendant's investigation and dismissal] . . . undercuts that its asserted belief that [a statute] barred [the plaintiff's] employment was honestly held"); Kowalski v. L & F Prods., 82 F.3d 1283, 1290 (3d Cir. 1996); Singh v. American Ass'n of Retired Pers., Inc., 456 F. Supp. 3d 1, 9 (D.D.C. 2020).

139. *E.g.*, Little v. AmeriHealth Caritas Servs., L.L.C., No. No, 19-12150, 2021 WL 5234495, at *12 (E. D. Mich. Nov. 10, 2021) ("There is enough coincidence and oddity in these events to suggest coordinated activity among [officials] at AmeriHealth to actively look for a reason to discipline or fire Little. A jury could reasonably consider this evidence . . . as strongly cutting against the reasonableness of AmeriHealth's claim of honest belief."); *Amos*, 622 F. App'x at 541; Lee v. Addiction & Mental Health Servs., L.L.C., No. 2:18-cv-01816-KOB, 2020 WL 4284050, at *8 (N.D. Ala. July 27, 2020); Small v. Office of Congressman Henry Cuellar, 485 F.Supp.3d 275, at 281 (D.D.C. 2020) (jury could conclude that defendant's efforts to find evidence corroborating assertion of poor performance was "an attempt to collect post hoc justifications"); Karrick v. Unified Gov't. of Wynadotte Cnty., No. 17-cv-2225-JWL, 2018 WL 2683967, at *5 (D. Kan. June 5, 2018); *Ramsey*, 2016 WL 3197557, at *8; *Torrice*, 2016 WL3611879, at *11; *see* Donez v. Leprino, Foods, Inc., No. 19-cv-00285-CMA-NRN, 2020 WL 1914958, at *4 (D. Colo. May 20, 2020) (seeking additional adverse information about worker because "[i]f we don't get that . . . , we probably can't term[innate] him").

140. *See* Charter Commc'ns, Inc. v. NLRB, 939 F.3d 798, 816 (9th Cir. 2019); *Jones*, 608 F.3d at 1047; Rentz v. William Beaumont Hosp., 195 F. Supp. 933, 944 (E.D. Mich. 2016).

141. *See Amos*, 622 F. Appx 529, 540–41 (6th Cir. 2015); Arce v. FCA US L.L.C., No. 19-cv-10815, 2020 WL 6316650 at *13 (E.D. Mich. Oct. 28, 2020).

fired.[142] In cases such as this, a factfinder would look to other circumstances to evaluate what the undisclosed motive was.

Evidence of bias or animus can carry more weight in honest belief disputes than in other litigation involving a claim of unlawful motive. In a case in which a plaintiff concedes having engaged in wrongdoing, evidence of a discriminatory remark has to overcome the possibility that it was that wrongdoing alone that was the reason for, and cause of, a defendant's action. In a case in which the parties are disputing the objective validity of a defendant's explanation (e.g., whether the worker actually was tardy on the day in question), the defendant's motives would usually be irrelevant with regard to that issue. But in an honest belief case, in which the parties are litigating why (and whether) a defendant drew a particular inference from non-conclusive information, evidence of the existence of an unlawful motive often could more easily tip the balance of the factfinder's assessment. Similarly, because the dispute about whether a defendant really drew a particular inference, and why, can turn to a significant degree on the credibility of the defendant's account, courts have recognized that evidence that a defendant was untruthful can be particularly significant in honest belief litigation.[143]

B. *Suspiciously Inadequate Investigation*

One of the most frequently disputed issues related to the good faith of a belief concerns the investigation that was done (or not done) in connection with the claimed inference. Litigation about a defendant's investigation is uniquely

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142. *Charter Commc'ns, Inc.*, 939 F.3d at 816; Kilgore v. Trussville Dev., L.L.C., 646 F. App'x 675, 776 (11th Cir. 2016); Richardson v. Astec, Inc., 366 F. Supp. 3d 983, 997 (E.D. Tenn. 2019).

143. *E.g.*, Mulero-Rodríguez v. Ponte, 98 F.3d 670, 675 (1st Cir. 1996); *Hall*, 2020 WL 5878032, at *11 (jury could conclude that supervisor did not honestly believe plaintiff's job performance was inadequate "from its suspicion of[decisionmaker]'s truthfulness"); Allen v. Peabody N.M. Servs., L.L.C., No. 1:19-CV-0120-SWS/MLC, 2020 WL 995771, at *5 n.5 (D. N.M. Feb. 28, 2020); *Singh*, 456 F. Supp. 3d at 9; Wooten v. BNSF Ry. Co., 387 F. Supp. 3d 1078, 1092–93 (D. Mont. 2019) (at trial key defense witnesses "presented as biased and unreliable"; "the evidence presented at trial fell far short of proving that BNSF had an 'honest' or 'good faith' belief that [worker] was being dishonest"); Banks v. Perdue, 298 F. Supp. 3d 94, 108 (D.D.C. 2018).

pertinent to disputes about the applicability of the honest belief doctrine. The assertion of an honest belief often depends on a claim by the defendant that it was unaware at the time of the disputed action of the information later adduced by the plaintiff to prove that the justification for that action was incorrect. The scope of the defendant's own investigation in turn often determines what the defendant did *not* know at the time of the decision and action in question. If, as a defendant asserts, it was unaware at the time of the information that would have undermined its asserted factual belief, that could have been the result of the scope of its own investigation. A key question in these cases is often *why* the defendant did not unearth that information.

Courts and litigants do not always understand the relevance of a defendant's investigation to an honest belief dispute. Courts sometimes point out that a defendant's investigation does not have to be perfect; but those opinions often fail to explain why it would be relevant even if an investigation were palpably atrocious. After all, if a defendant actually held an honest belief in the asserted factual basis of its explanation, it would not matter if the defendant's investigation related to that matter was lousy or even non-existent. Conversely, if a defendant lacked such an honest belief, it would not matter if its related investigation was superlative. The motive-based laws at issue in these cases do not create a cause of action for inept investigations or provide some sort of affirmative defense based on great ones.

The nature of a defendant's investigation is potentially important, not because the law rewards good investigations or penalizes poor ones, but because the nature of that investigation may be evidence of bad (or good) faith. A factfinder may conclude that the particular defect in an investigation was proof that the defendant limited or shaped its investigation to advance some unlawful, ulterior purpose.

A number of decisions have pointed out that the defectiveness of an investigation can be circumstantial evidence of the existence of an unlawful motive.[144] In

144. Airgas USA L.L.C. v. NLRB, 916 F.3d 555, 563 (6th Cir. 2019); Coleman v. Donahoe, 667 F.3d 835, 851 n. 4, 856–57 (7th Cir. 2012); Bantek West, Inc.,

Valmont Industries, Inc. v. NLRB,[145] the Fifth Circuit rejected the employer's argument that such defects were irrelevant because "the [National Labor Relations] Act does not compel an employer to have a 'meaningful investigation' of suspected misconduct."[146] The court explained that proof of the "absence of a meaningful investigation into alleged impermissible conduct before imposing discipline is an accepted form of circumstantial evidence of antiunion animus."[147] The Supreme Court made the same point in *Miller-El v. Dretke*.[148] The defendant in that case asserted that the state prosecutor at trial had exercised a peremptory challenge on the basis of race.[149] On appeal, the state argued that the trial court prosecutor believed the juror at issue would refuse to impose the death penalty.[150] Noting that the views of the prospective juror were, at best, unclear, the Court reasoned that the failure of the trial court prosecutor to seek more information—by further questioning the prospective juror—was evidence of a discriminatory motive:

> Perhaps [the prosecutor] misunderstood, but unless he had an ulterior reason for keeping [the prospective juror] off the jury we think he would have proceeded differently. In light of [the prospective juror's] outspoken support for the death penalty, we expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike.[151]

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344 N.L.R.B. 886, 895 (2005); K & M Elecs., Inc., 283 N.L.R.B. 279, 291 n.45 (1987).

145. Valmont Indus., Inc. v. N.L.R.B., 244 F.3d 454 (5th Cir. 2001).

146. *Id.* at 466 (quoting dissenting opinion of NLRB member).

147. *Id.* at 466–67.

148. Miller-el v. Dretke, 545 U.S. 231 (2005).

149. *Id.* at 236.

150. *Id.* at 243-44.

151. *Id.* at 244.

Other courts have characterized particular defects in an investigation as "troubl[ing],"[152] "odd,"[153] or "curious."[154]

The ultimate issue regarding an assertedly defective investigation is not whether the investigation was defective but whether the nature of the asserted defect was one that a jury could find was indicative of the existence of some improper motive on the part of the defendant. Some defects would not be probative in that manner; if an investigator decided to credit only interviews conducted on even-numbered days, that would be irrational and irresponsible but would not (absent some unusual circumstance) indicate that the investigator had some unlawful purpose. A plaintiff who points to an asserted defect in an investigation needs to explain why a factfinder could conclude that the defect was the result of bad faith rather than mere incompetence. A defect might be too obvious to be unintentional or might be inherently suspicious under the circumstances.

Courts have recognized several types of situations in which the nature of a defendant's investigation could be probative of bad faith and be sufficient to overcome (at least at the summary judgment stage) a defendant's assertion of an honest belief: (1) where there is a particularly significant (even if facially neutral) defect in that investigation (or a telling lack of investigation), suggesting that the defendant did not really care what the facts were;[155] (2) where the investigation was structured to avoid particular information that would probably be favorable to the plaintiff;[156] and (3)

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152. *See* Singh v. American Ass'n of Retired Pers., Inc., 456 F. Supp. 3d 1, 8–9 (D.D.C. 2020); *see* Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 856 (D.C. Cir. 2006).

153. Mastro v. Potomac Elec. Power Co., 447 F.3d at 855.

154. *Id.* at 855.

155. *See* NLRB v. Baker Hotel of Dallas, Inc., 311 F.2d 528, 533 (5th Cir. 1965) ("[T]here was no real effort to make any investigation as to what actually happened.").

156. *See* Aliferis v. Generations Health Care Network at Oakton Pavilion, L.L.C., No. 15 C 3489, 2016 WL 4987469, at *7 (N.D. Ill. Sept. 19, 2019) ("[defendant's] effort to actively avoid the truth").

where the investigation was otherwise one-sided or otherwise biased.[157]

In some cases, defendants have failed to make any inquiry as to some obviously critical evidence. For example, in *Johnston v. BNSF Railway Co.*, the employer fired a worker for violating a rule prohibiting workers to go on tracks unless there were "natural or artificial light and condition . . . sufficient to observe approaching trains."[158] The worker in question had indeed been on the tracks, but insofar as the inquiry made by the company official who made the dismissal decision, the court noted:

> [The official] had no way of knowing the lighting conditions present . . . , as he was not at the location . . . , and there was no testimony that any [company] officials took the . . . trouble to view the site under approximately the same [or any] conditions.[159]

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157. A factfinder could find an asserted defect in an investigation all the more telling if it was inconsistent with the defendant's own standards or regular practice. Lee v. Addiction & Mental Health Servs., L.L.C., No. 2:18-cv-01816-KOB, 2020 WL 4284050, at *8 (N.D. Ala. July 27, 2020); Richardson v. Astec, Inc., 366 F. Supp. 3d 983, 997 (E.D. Tenn. 2019); Smith v. Daimler Trucks NA, L.L.C., No. 7:14-2058-BHH-KFM, 2016 WL 762605, at *13 (D. S.C. Jan. 21, 2016); Arce v. FCA US L.L.C., No. 19-cv-10815, 2020 WL 6316650, at *13 (E.D. Mich. Oct. 28, 2020); Ramsey v. Siskiyou Hosp., Inc., No. 2:14-cv-01908-KJM-CMK, 2016 WL 3197557, at *10 (E.D. Cal. June 9, 2016).

158. Johnston v. BNSF Ry. Co., No. 15-3685 (SRN/KMM), 2017 WL 4685012, at *3 (D. Minn. Oct. 16, 2017

159. *Id.* at *5; *see* Airgas USA L.L.C. v. NLRB, 916 F.3d 555, 563 (6th Cir. 2019) (failure to investigate whether rattling was actually caused by worker error, rather than by normal rattling of cradle; failure to undertake a "[p]hysical investigation [that] was necessary to confirm the source of the rattling noise"); EEOC v. Sears Roebuck & Co., 243 F.3d 846, 853 (4th Cir. 2001) (failure to ascertain whether job applicant was the individual who had earlier been investigated for sexual harassment); NLRB v. Baker Hotel of Dallas, Inc., 311 F.2d 528, 533 (5th Cir. 1965) (employer fired worker for improper discussion "[w]ithout asking her the nature of the discussion or who started it and without asking any of the other parties who were present at the scene who started the conversation, whose fault it was or to what extent it disturbed the peace and quiet of the coffee shop."); Gaines v. FCA USA L.L.C., No. 18-11879, 2020 WL 1502010, at *13 (E.D. Mich. Mar. 30, 2020) ("FCA did not attempt to determine the amount of time Ms. Gaines spent on [non-company] business during her workday, despite . . . the fact that one of the policies it cited for her termination expressly states that FCA assets 'may occasionally be used for non-business purposes' under certain circumstances."); Anderson v. U.S. Bank Nat'l Ass'n, No. 2:14-cv-2167, 2016 WL 3640692, at *8 (S.D. Ohio June 29, 2016) (worker fired for improperly

In some instances, courts have pointed out that defendants asserting an honest belief had not bothered to look into readily available information bearing on the accuracy of the asserted belief. In *A.C. v. Shelby County Bd. of Education*, for example, a school principal accused a parent of failing to monitor a child's diabetes, and thus of engaging in medical abuse, even though the principal had not checked with the school nurse who had records about that monitoring.[160] In a number of instances, employers have fired a worker based only on an uncorroborated accusation without making any effort to ascertain whether the accusation was accurate.[161] And there are cases, like *Miller-El v. Dretke*, in which a court concluded that a factfinder would discredit a decisionmaker's account because the decisionmaker had not attempted to obtain the information needed to resolve an issue that was, at best, unclear.[162] Courts have recognized a related problem when a defendant relied only on hearsay statements without obtaining a

taking action for her own benefit despite failure to ascertain whether she actually benefitted from it); Smith v. Daimler Trucks NA, L.L.C., No. 7:14-2058-BHH-KFM, 2016 WL 762605, at *13 (D. S.C. Jan. 21, 2016) (worker dismissed for fraudulent claim of disability based on photographs of her at gym, even though "[the defendant] never determined when the photographs were taken").

160. A.C. v. Shelby, 711 F.3d 687, 705–06 (6th Cir. 2013).

161. *E.g.*, Tavakkoli v. J.S. Helwig, No. 3:16-CV-2202-N, 2017 WL 10126204, at *1 (N.D. Tex. June 20, 2017); Coffman v. United States Steel Corp., 185 F. Supp. 3d 977, 986 (E.D. Mich. 2016).

162. Yazidian v. Conmed Endoscopic Techs., Inc., 793 F.3d 634, 654 (6th Cir. 2015) ("[Defendant] did not interview Yazidian, his co-workers, or past managers . . . ."); Jones v. Nissan N. Am., Inc., 438 F. App'x 388, 394–95 (6th Cir. 2011) (despite acknowledging uncertainty as to whether worker was able to return to work, company fired worker as unfit without any physical examination); Currie v. Adams, 149 F. Appx. 615, 618–19 (9th Cir. 2005) (prosecutor failed to clear up possible uncertainty as to whether juror could impose the death penalty); Freeman v. Madison Metro. Sch. Dist., 231 F.3d 374, 380 (7th Cir. 2000) ("[Defendant's] contention that it continued to believe Freeman was permanently disabled because it was 'confused' by [physician's] change in position is belied by [defendant's] failure to seek a second opinion to allay its confusion"); Tullock v. Loretto Hosp., No. 14 C 3066, 2016 WL 109926, at *7 (N.D. Ill. Jan. 11, 2016) (defendant not interviewed workers "who were present during the alleged incident").

statement directly from the individual with personal knowledge.[163]

In some discipline cases, defendants have refused to look into assertions by a worker that there was specific information demonstrating that he or she had not engaged in misconduct. In several instances, employers refused to permit employees to provide exculpatory documents. For example, in *Allen v. Peabody New Mexico Services, LLC*, the employer fired the plaintiff for allegedly falsifying a doctor's note. "Plaintiff offered to get another note or have [the defendant] talk to the doctor directly for clarification regarding the change; however, [the defendant] declined and instead told Plaintiff, 'I made up my mind.'"[164] In several instances, defendants acted without bothering to look into a worker's assertion that the defendant's own records, or officials', would confirm that the worker had done nothing wrong. For example, in *Friday v. Magnifique Parfumes and Cosmetics, Inc.*, the defendant fired the plaintiff because computer records appeared to show a high rate of theft at the store the plaintiff managed without making any effort to check the plaintiff's assertion that the goods were not actually missing but instead did not show up in those records because they would not scan properly during inventory.[165] In

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163. *See* Burt v. Maple Knoll Cmtys., No. 1:15-cv-225, 2016 WL 3906233, at *4 n. 5, *10 (S.D. Ohio July 19, 2016); Connearney v. Main Line Hosps., Inc., No. 15-02730, 2016 WL 6440371, at *6 (E.D. Pa. Oct. 28, 2016); Shazor v. Professional Transit Mgmt, Ltd., 744 F.3d 948, 960–61 (6th Cir. 2014); Vaden v. DeKalb Tel. Coop., Inc., 21 F. Supp. 3d 901, 914 (M.D. Tenn. 2014) ("[T]he sole person who pointed the finger at Plaintiffs admitted he only 'believed' they were involved [in the misconduct], but had no personal knowledge of it one way or the other. . . . No one else told [the defendant] that Plaintiffs were in on it. And the record does not suggest that [the defendant] tried to figure out if anyone else knew of Plaintiffs' roles firsthand.").

164. Allen v. Peabody N.M. Servs., L.L.C., No. 1:19-CV-0120-SWS-MLC, 2020 WL 995771, at *3 (D. N.M. Feb. 28, 2020); *see* Aliferis v. Generations Health Care Network at Oakton Pavillion, L.L.C., No. 15 C 3489, 2016 WL 4987469, at *7 (N.D. Ill. Sept. 19, 2016) ("[Worker] told [the defendants] the [request for time off] form was in his bag at the senior living facility and . . . [the defendants] refused to let him go get it . . . [T]he Defendants have not offered any explanation . . . justifying [their] refusal to let [the worker] go home and return with the form.").

165. Friday v. Magnifique Parfumes & Cosms., Inc., No. 3:17-CV-380 JD, 2019 WL 3035580, at *4 (N.D. Ind. July 11, 2019); *see* Diamon v. American Fam. Mut. Ins. Co., No. 4:16-00977-CV-RK, 2017 WL 5195881, at *4 (W.D. Mo. Nov. 9, 2017)

other cases, the defendant simply refused, before taking action against a worker, to read exculpatory material provided by the worker.[166]

Courts have repeatedly recognized that dismissing an employee for misconduct without first informing the employee of the allegation and permitting him or her to respond to it can be used as evidence of a desire to avoid exculpatory information.[167] Several decisions characterize a

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(employer failed to investigate worker's assertion that certain phone calls did not show up on his office telephone records because he had made those calls on a different phone); Balding v. Sunbelt Steel Tex., Inc., No. 2:14-cv-00090, 2016 WL 6208403, at *10 (D. Utah Oct. 24, 2016) (employer failed to investigate, inter alia, plaintiff's assertion that written purchase order had only been received that day); McNeely v. Kroger, No. 12012608, 2014 WL 3529420, at *6 (E.D. Mich. July 16, 2014) (employer failed to investigate worker's assertion that she had been given permission by department supervisors to take FMLA leave).

166. *Yazidian*, 793 F.3d at 654 (employer dismissed worker "before even reading [worker's] rebuttal letter"); Zamora v. Elite Logistics, Inc., 449 F.3d 1106, 1115 (10th Cir. 2006) (employer suspended worker without "even looking at the documents [the worker] had . . . provided").

167. *See* NLRB v. Esco Elevators, Inc., 736 F.2d 295, 299 (5th Cir 1984) ("'[Defendant] failed to obtain [worker's] version of the fight before deciding he was the unjustified aggressor"); Mastro v. Potomac Elec. Power Co., 447 F.3d 843, 855 (D.C. Cir. 2006) ("[Defendant] spoke[] to everyone in the normal courts of this investigation except the individual at the center of the controversy—and the only Caucasian—might well strike a jury as odd"); NLRB v. Big Three Indus., Inc., 497 F.2d 43, 50 (5th Cir. 1950) ("[Worker] was never afforded a reasonable opportunity to explain the full circumstances of what occurred . . . ."); EEOC v. HP Pelzer Auto. Sys., Inc., No. 1:17-CV-31-TAH-CHS, 2020 WL 996453, at *6 (E.D. Tenn. Mar. 2, 2020) ("[defendant] not provide worker the opportunity to offer more facts or evidence prior to presenting her the option to resign . . . ."); Singh v. American Ass'n of Retired Pers., Inc., 456 F. Supp. 3d 1, 8–9 (D.D.C. 2020) ("A reasonable jury could . . . be troubled by the fact that [the defendant] interviewed every single member of the Audience Engagement team except Ms. Singh prior to making termination decisions."); Lee v. Addiction & Mental Health Servs., L.L.C., No. 2:18-cv-01816-KOB, 2020 WL 4284050, at *8 (N.D. Ala. July 27, 2020) ("[Defendant]did not ask [worker] if she had altered the form"); Merendo v. Ohio Gastroenterology Grp., Inc., No. 2:17-cv-817, 2019 WL 955132, at *6, *13 (S.D. Ohio Feb. 27, 2019); Bland v. Carlstar Grp., L.L.C., No. 1:17-cv-01025-STA-egb, 2018 WL 1787892, at *10 (W.D. Tenn. Mar. 13, 2018) ("[N]either [supervisor] allowed Plaintiff to tell his version of the events before recommending termination."); Smith v. American Mod. Ins. Grp., No. 1:16-cv-844, 2018 WL 3549788, at *13 (S.D. Ohio July 24, 2018) ("[Defendant] never gave plaintiff the opportunity to respond to alleged performance issues before she was fired."); *Burt*, 2016 WL 3906233, at *14 n. 11) ("[D]uring the investigation, no one ever gave Plaintiff a chance to respond to the allegations."); Coffman v. United States Steel Corp., 185 F. Supp. 3d 977, 986 (E.D. Mich. 2016) ("[Defendant] never spoke to Plaintiff about the disciplinary charges."); Frazier v. AK Steel

defendant's decision to refuse to provide an individual with a chance to tell his or her side of the story as particularly suspicious.[168] Such a refusal could support an inference that a defendant was trying to avoid information that would be inconsistent with the conclusion the defendant wanted to reach because an individual facing disciplinary action will usually be the person most able and willing to provide relevant exculpatory facts.

A contention that an investigation was conducted in a biased[169] manner raises somewhat different issues. An investigation can be one-sided; for example, because the investigator only interviewed witnesses of a particular

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Corp., No. 1:15-cv-427, 2016 WL 6600624, at *7 (S.D. Ohio Nov. 8, 2016) ("It is not unreasonable to find that Defendant should have, at the very least, interviewed the Plaintiff in order to make a reasonable informed and considered decision."); Ramsey v. Siskiyou Hosp., Inc., No. 2:14-cv-01908-KJM-CMK, 2016 WL 3197557, at *10 (E.D. Cal. June 9, 2016) ("[Official] did not speak with Ramsey at all about the incident before the administration decided to terminate her employment, even though [the official] testified he always talks to the subject employee before preparing a write up"); Smith v. Daimler Trucks NA, L.L.C., No. 7:14-2058-BHH-KFM, 2016 WL 762605 at *5–6 (D. S.C. Jan. 21, 2016) ("[Official] further acknowledged: ['] Q. Did either you or anybody at Freightliner/Daimler do anything to get Tammie Smith's side of the story before you terminated her employment? A. No.['] ").

168. *See* United States Rubber Co. v. NLRB, 384 F.2d 660, 662–63 (5th Cir. 1967) ("Perhaps most damning is the fact that both [workers] were summarily discharged after reports of their misconduct (both made by the same company supervisor) without being given any opportunity to explain or give their versions of the incidents."); Richardson v. Astec, Inc., 366 F. Supp. 3d 983, 997 (E.D. Tenn. 2019) ("More importantly, . . . [the decision maker] admits that she did not give Richardson an opportunity to tell her side of the story regarding [the] complaint").

169. *See* Stewart v. Kettering Health Network, 576 F. App'x 518, 523 (6th Cir. 2014) (investigator's biased remarks "call into question his ability to serve as an impartial investigator into the alleged misconduct"); Rome v. SmithKline Beecham Corp., 232 Fed. App'x 711, 713 (9th Cir. 2007) ("[Supervisor] conducted an incomplete, partial investigation into the matter"); Mastro v. Potomac Elec. Power Co., 447 F.3d 845, 855–57 (D.D.C. 2006) ("inexplicably unfair," "discriminatory treatment may have permeated the investigation itself," "one-sided investigation," "an inquiry colored by racial discrimination"); NLRB v. Esco Elevators, Inc., 736 F.2d 295, 300 n.5 (5th Cir. 1984) ("one-sided investigation"); Arce v. PCA US L.L.C., No. 19-cv-10815, 2020 WL 6316650, at *13 (E.D. Mich. Oct. 28, 2020) (defendant violated its own requirement that there be a female representative on the investigative team).

race[170] or only asked questions[171] likely to be unfavorable to the plaintiff.

IV. DETERMINING WHETHER HONEST BELIEF OR OBJECTIVE VALIDITY IS AT ISSUE

There is some confusion about whether, in resolving a particular claim of unlawful motive, the courts should consider objective validity or honest belief. Courts regularly apply the objective validity standard. But some decisions suggest that a plaintiff instead must always establish the absence of honest belief, and a third line of decisions characterizes the honest belief doctrine as "an opportunity [for a defendant] to rebut a plaintiff's . . . argument that the defendant's action lacks a basis in fact."[172] The proper method for determining which standard to use is case-specific, but in a different way.

Whether honest belief or objective validity is the appropriate standard in a given case depends on the litigation position of the parties. In our adversarial system, courts do not address legal or factual issues in the abstract: they decide the specific question framed by the litigants. When a defendant seeks summary judgment on a factual issue (such as motive), the defendant does not (and could not) merely put the relevant discovery materials before the court and invite the judge to figure it all out. Rather, the defendant must, and does, advance a specific argument about why the plaintiff's evidence is legally insufficient or why its own evidence is conclusive. Where, as is frequently the case, a plaintiff is challenging the defendant's proffered lawful explanation for a disputed action, a defendant can opt either to assert that the plaintiff cannot prove objective invalidity (e.g., that there is conclusive evidence that the plaintiff was tardy) or to assert that the plaintiff cannot prove that the decisionmaker did not honestly believe that basis of its action (e.g., believe that the plaintiff was tardy). Whether the court is to address objective validity or honest belief depends on which argument is the basis of the motion and the nature of

170. *Mastro*, 447 F.3d at 855.

171. Beatty v. Chesapeake Center, Inc., 818 F.2d 318, 321 (4th Cir. 1987).

172. Briggs v. University of Cincinnati, 11 F.4th 498, 515 (6th Cir. 2021).

the plaintiff's response. The same would be true of a post-trial motion for judgment as a matter of law.

The Supreme Court in *Reeves*[173] addressed objective validity, not honest belief, precisely because objective validity was the basis of the defendant's argument in support of judgment as a matter of law. The company contended that Reeves was performing poorly[174] in that he was *actually* guilty of mismanagement, rather than asserting that the company president (or some other official) had (at worst) made a mistake in believing Reeves was performing poorly. The Court held that Reeves had presented sufficient evidence to undermine the defendant's explanation by showing that that explanation was factually incorrect.[175] For example, the employer had justified dismissing Reeves in part by asserting that he had failed to punish several employees for tardiness or absence. The Court explained that Reeves "cast doubt on whether he was responsible for any failure to discipline late or absent employees" because he testified that a different employee "was responsible for citing employees for violations of the company's attendance policy."[176] The employer had also told Reeves that he had been dismissed for failing to report the absence of a particular employee; Reeves successfully undermined that justification by testifying that he was in the hospital on the days in question and that a different supervisor would have been responsible for reporting that absence. In upholding the jury verdict, the Supreme Court commented that defense witnesses "acknowledged," "admitted," and "conceded" certain key facts favorable to the plaintiff,[177] but did not suggest that those witnesses agreed that the company president personally knew those facts at the time she decided to fire the plaintiff. The Court's opinion never used the

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173. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000).

174. Brief of Petitioner, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (No. 99-536), 2000 WL 14426, at *6–*13 (citing trial transcript); Brief of Respondent, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) (No. 99-536), 2000 WL 135161 at *2–*11, *34–*35.

175. Reeves, 530 U.S. at 144–45.

176. Reeves, 530 U.S. at 145.

177. *See id*. ("P[laintiff] similarly cast doubt on whether he was responsible for [the problem the defendant relied on]").

phrase "honest belief" and never discussed which manager might have believed what.

There are a number of sound tactical reasons why a defendant might prefer to base its summary judgment or post-trial motion on objective validity rather than honest belief. An honest belief argument usually would not be available if the relevant official or officials had personal knowledge of the matter in question. Invoking honest belief can lead to litigation, which a defendant might prefer to avoid, about who knew what when, about whose knowledge mattered because he or she had a role in the decision, and about how to address a situation in which at least some, even if not all, of the disputed facts were within the personal knowledge of a relevant official. Thus, in *Reeves*, if the defendant had chosen to base its motion on a claim of honest belief, it would have had to litigate things like whether the company president knew what Mr. Reeves' job duties were and whether Reeves' supervisor knew he had been in the hospital on a particular day. A defendant would have to assess the comparative strengths of its possible objective validity and honest belief arguments. So, in *Reeves* the defendant might well have concluded that it would be easier to convince the jury that disciplining a tardy worker was indeed one of Mr. Reeves' job duties than to persuade the jury that Reeves' managers somehow did not know what Reeves' duties were. In framing a motion for summary judgment, defense counsel also would want to consider which type of argument would be more at risk of failing because it would turn on a triable subsidiary question of fact. That assessment might be affected by whether the defendant's pre-trial discovery had focused on defending the correctness of its decision rather than on honest belief. For example, in *Amos v. McNairy County*,[178] the defendant rested its honest belief argument in part on an assertion that one of its officials had had a conversation with an employee at the Veteran's Administration; the plaintiff responded with an affidavit from that V.A. employee disputing the official's account.[179]

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178. Amos v. McNairy Cnty., 622 F. App'x 529 (6th Cir. 2015).

179. *See id.* at n. 12; *see also* Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 424–25 (6th Cir. 2021).

What a defendant cannot do is first base its summary judgment or judgment as a matter of law on an assertion that its justification was (clearly) objectively valid and then switch to arguing honest belief if that first argument does not work out. Under Rule 56(f), a court cannot (without calling for additional briefing) grant summary judgment on a ground different than the basis of the original summary judgment motion. Rule 56(f) provides that a court may not grant summary judgment "on grounds not raised by a party" without first "giving notice and a reasonable time to respond."[180] To avoid application of Rule 56(f), the moving party must have raised a ground in its motion or opening brief. The brief and record evidence that a non-moving party offers at summary judgment is filed after, and responds to, the motion and opening brief of the moving party; a moving party's reply brief is filed after the point in time when the non-moving party can make a record. Courts thus routinely hold that arguments first raised in a reply brief are waived.[181]

Under Rule 56(f), a defendant must normally make clear in its summary judgement motion or opening brief whether it is relying on the honest belief doctrine and cannot wait until its reply brief to first advance that argument. That is, the defendant must specify *what* it contends the plaintiff cannot prove—that the plaintiff cannot prove the defendant's explanation was not objectively valid or that the plaintiff cannot prove that any error was not the result of an honest belief. The distinction between a summary judgment motion regarding objective validity and a summary judgment motion regarding honest belief is important because those two types of motions call for different types of evidence and legal analysis by the non-moving party. Tactically, the very purpose of the honest belief argument is usually to convince the court or factfinder that a plaintiff's evidence regarding objective validity is irrelevant to the claim of unlawful motivation since only honest belief is important. Conversely, much of the evidence, discussed above, that a plaintiff might offer in response to an honest belief argument would be

180. FED. R. CIV. P. 56(f).

181. *E.g.*, Narducci v. Moore, 572 F.3d 313, 323 (7th Cir. 2009).

irrelevant if a defendant were asserting that its explanation was objectively valid. The courts have recognized, in the summary judgment context, that an argument based on objective validity and an argument based on honest belief present distinct grounds. In *Willard v. Huntington Ford, Inc.*, the Sixth Circuit permitted a defendant to defend on appeal an award of summary judgment on the ground that the plaintiff could not show the defendant's explanation was factually incorrect but barred the defendant from arguing honest belief. The court reasoned that the defendant had "forfeited its honest-belief arguments because it did not present them to the district court."[182]

If at a jury trial (as in *Reeves*) the plaintiff challenges the objective validity of a defendant's explanation, to preserve a possible objection based on honest belief under Rule 50,[183] the defendant must specifically raise that issue in a motion for judgment as a matter of law prior to the submission of the case to the jury and again in a post-verdict motion for judgment as a matter of law. In *Tuttle v. Metro. Government of Nashville*,[184] the Sixth Circuit refused to permit the defendant to invoke the honest belief doctrine on appeal to challenge a jury verdict because the defendant's district court motion for judgment as a matter of law had not been based on that ground. In *Burns v. Texas City Refining Inc.*, the Fifth Circuit pointed out that the defendant's honest belief argument was "contrary to the theme presented at trial where [the defendant] followed an 'either they're lying or we are' approach."[185]

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182. Willard v. Huntington Ford., Inc., 952 F.3d 795, 812 n.11 (6th Cir. 2020). Similarly, in George v. Leavitt, 407 F.3d 405, 416 (D.C. Cir. 2005), the court of appeals refused to consider on appeal an argument that the defendant had acted on the basis of an honest but mistaken belief, because the defendant had advanced in support of summary judgment in the district court only the "contention that it was 'undisputed' that [the plaintiff] in fact 'suffered from both conduct and performance deficiencies.'" (Quoting defendant's brief).

183. FED. R. CIV. P. 50.

184. Tuttle v. Metro. Gov't of Nashville, 474 F.3d 307, 319 n.11 (6th Cir. 2007).

185. Burns v. Texas City Refining, Inc., 890 F.2d 747, 750 n.2 (5th Cir. 1989).

V. LIABILITY DESPITE HONEST BELIEF

The existence of an honest belief in the factual basis of an explanation does not invariably preclude a plaintiff from proving the existence of an unlawful motive or from defeating a motion for summary judgment. A plaintiff may have other ways of establishing the existence of such an unlawful motive or may be asserting that there was a type of unlawful act to which such an honest belief would be irrelevant.

The existence of an honest belief is not some sort of affirmative defense to a claim of unlawful purpose. Rather, an assertion of honest belief is only a response to a particular type of inculpatory evidence—proof that the defendant's proffered justification for the disputed action is not objectively valid. In some instances, a defendant responds to that type of evidence by asserting that it had an honest belief in that asserted basis. Where an honest belief does exist (or where a plaintiff at summary judgement has insufficient evidence that there was not such an honest belief), the consequence is only that the plaintiff cannot rely on proof of the erroneousness of the asserted factual basis to attack the proffered explanation (and in that manner to prove the existence of an unlawful motive).[186] But courts have repeatedly stressed that the sole consequence of such an honest belief is to preclude reliance on that particular type of evidence.[187] Honest belief would not, without more, bar

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186. Amos v. McNairy Cnty., 622 F. App'x 529, 541 n.10 (6th Cir. 2015) ("[T]he 'honest belief' rule . . . responds more logically to the 'had no basis in fact' theory of pretext"); Blackmon v. Eaton Corp., 587 F. App'x 925, 932 (6th Cir 2014) ("[T]he honest-belief rule . . . means that a 'dispute over the facts upon which the discharge was based,' . . . , will not suffice to establish pretext if the employer 'reasonably relied on the particularized facts that were before it at the time the decision was made.'") (citation omitted); Denhof v. City of Grand Rapids, 494 F.3d 534, 542 (6th Cir. 2007) ("Where the employer took the adverse employment action in the honest belief of information provided by a third party, the plaintiff cannot win by showing that the information was mistaken or incorrect."); West v. Pella Corp., No. 5:16-CV-154-TBR, 2018 WL 345115, at *8 (W.D. Ky. Jan 9, 2018).

187. Miles v. South Cent. Hum, Res. Agency, Inc., 946 F.3d 883, 890 n.5 (6th Cir. 2020) ("[T]he 'honest belief' rule only applies as a defense to a lack of a factual basis for the legitimate nondiscriminatory reason proffered by the employer"); Joostberns v. United Parcel Servs., Inc., 166 F. App'x 783, 795 n.5 (6th Cir. 2006)

liability unless the *only* evidence offered by the plaintiff was an attack on the asserted factual basis of the defendant's explanation.

A plaintiff can still establish the existence of an unlawful motive, despite the existence of an honest belief, if the plaintiff has some other type of evidence of that claimed motive. Thus plaintiffs have defeated summary judgment motions, even when unable to show the absence of an honest belief, by adducing evidence of discriminatory or retaliatory remarks by officials,[188] temporal proximity between protected activity and an employer's adverse action,[189] differing treatment of other comparable individuals,[190] a biased investigation,[191] or inconsistent explanations by a defendant.[192] Plaintiffs have succeeded although they conceded, or did not dispute, the existence of an honest belief (or even the correctness of) in the asserted factual basis of a defendant's explanation.[193]

("The honest belief rule would not prevent Plaintiff from establishing pretext through methods other than the falsity of the reason offered."); Seaton v. Perdue, No. 5:16-CV-309-REW, 2019 WL 1409844 at *15 (E.D. Ky. Mar. 28, 2019); Bruce v. Levy Premium Foodservices Ltd. P'ship of Tenn., 324 F. Supp. 3d 962, 971 (M.D. Tenn. 2018); Sommers-Wilson v. Samsung SDI Am., Inc., No. 16-CV-14259, 2018 WL 8803938 at *7 (E.D. Mich. June 12, 2018); Hawthorne v. University of Tenn. Health Sci. Ctr., 203 F. Supp. 3d 886, 892 n.4 (E.D. Tenn. 2016); Vaden v. DeKalb Tel. Coop., Inc., 21 F. Supp. 3d 901, 913–14 (M.D. Tenn. 2014).

188. *See* Casagrande v. OhioHealth Corp., 666 F. App'x 491, 500–01 (6th Cir. 2016); Ion v. Chevron USA, Inc., 731 F.3d 379, 394 (5th Cir. 2013); *Sommers-Wilson*, 2018 WL 8803938, at *7; Gulliford v. Schilli Transp. Servs., Inc., No. 4:15-CV-19-PRC, 2017 WL 6759135 at *17 (N.D. Ind. Jan. 5, 2017).

189. *Ion*, 731 F.3d at 394; *Gulliford*, 2017 WL 6759135, at *15–16.

190. *See Blackmon*, 587 F. App'x at 932; Currie v. Adams, 149 F. App'x 615, 619 (9th Cir. 2005); *Sommers-Wilson*, 2018 WL 8803938, at *7.

191. *See Casagrande*, 666 F. App'x at 500; Turner v. American Bottling Co., No. 17 C 4023, 2019 WL 932017, at *6 (N.D. Ill. Feb. 26, 2019).

192. *Sommers-Wilson*, 2018 WL 8803938, at *7.

193. *See* Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 323 (6th Cir. 2019) ("[Plaintiff] does not so much challenge the *facts* underlying Marysville's stated reasons for firing [the plaintiff] as she does the likelihood that [the defendant] would have *actually relied on those facts* . . ."); *Blackmon*, 587 F. App'x at 932 ("Plaintiff admitted the relevant facts"); Radentz v. Marion Cnty., 640 F.3d 754, 758 (7th Cir. 2011) ("[W]e can assume for this opinion that the defendants were indeed concerned with the expense of the supplies under the contract. The question remains whether the termination of the contract was based on those

The existence of other forms of evidence may permit a factfinder to conclude that the proffered explanation, although resting on honestly believed facts, simply was not the defendant's actual motive at all.[194] For example, even if an employer genuinely believed that a worker was tardy, a plaintiff could prevail by proving that tardiness was not the employer's actual reason for dismissing the worker. Other evidence may affirmatively convince a factfinder that an unlawful motive, instead, was the employer's real reason. Or a plaintiff might offer evidence from which a factfinder could

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concerns."); Seaton v. Perdue, No. 5:16-CV-309-REW, 2019 WL 1409844, at *15 (E.D. Ky. Mar. 28, 2019) (plaintiff "does not dispute" asserted factual basis).

194. Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 425 (6th Cir. 2021) ("Nissan cannot enjoy the protection of the 'honest belief' rule if Wyatt demonstrates pretext by showing that even if [the decisionmaker] held concerns about her performance, those concerns did not actually motivate [the decisionmaker] to issue the negative performance evaluations."); Westmoreland v. TWC Admin. L.L.C., 924 F.3d 718, 730 (4th Cir. 2019) ("[E]ven if TWC honestly believed Westmoreland violated its policy, the jury could reasonably infer (as it apparently did) that the company used this as a pretext for discrimination"); De Lima Silva v. Dep't of Corr., 917 F.3d 546, 561 (7th Cir. 2019); Coleman v. Donahoe, 667 F.3d 835, 853 (7th Cir. 2012) ("If the Postal Service terminated Coleman because it 'honestly believed' she posed a threat to other employees—even if this reason was 'foolish, trivial, or baseless'—Coleman loses . . . . On the other hand, 'if the stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action, it was a pretext.'"); *Radentz*, 640 F.3d 754, 758 (7th Cir. 2011) ("Although the plaintiffs dispute whether Ballew honestly believed the costs were excessive, or whether she used that as a hook to disturb the contract, we can assume for this opinion that the defendants were indeed concerned with the expense of the supplies under the contract. The question remains whether the termination of the contract was based on those concerns"); Joostberns v. United Parcel Servs. Inc., 166 F. App'x 783, 791 (6th Cir. 2006) (honest belief doctrine inapplicable if the plaintiff demonstrates "that the proffered reason did not actually motivate the employer"); Currie, 149 F. App'x at 619 ("Even if we were to accept that the prosecutor genuinely believed that Juror 210 was not strong on the death penalty, a comparative analysis between Juror 210 and two members of the originally empaneled jury who actually served reveals that her position on the death penalty could not have genuinely motivated him in striking her"); Eastern Associated Coal Corp. v. Federal Mine Safety & Health Review Comm'n, 813 F.2d 639, 643 (4th Cir. 1987); *see* Wittington v. Nordam Grp, Inc., 429 F.3d 986, 998–99 (10th Cir. 2005) (denying honest belief instruction regarding qualifications where defendant had contended that its decision was based on seniority); DTR Indus., Inc., 350 N.L.R.B. 1132, 1135 (2007) (An employer "need only show that it has a reasonable belief that the employee committed the alleged offense *and that it acted on that belief* when it took disciplinary action against the employee.") (emphasis added).

conclude that the proffered explanation at issue could not[195] have been the employer's reason (for example, by showing that the employer did not learn about possible tardiness until after it had fired the worker). Or a plaintiff could conclude that some other reason was the real explanation (for example, the employer told officials to look for a way to get rid of the plaintiff).[196] A factfinder could determine that the proffered explanation was not the defendant's real reason if the defendant refused to reconsider its decision when it later learned that the asserted factual basis of that decision was incorrect.[197]

Even where a defendant was motivated by the legitimate reason supported by an honest belief, a plaintiff may still prevail by demonstrating that the defendant also had a second, unlawful motive.[198] Where a defendant acted for two

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195. *See* Bruce v. Levy Premium Foodservices Ltd. P'ship of Tenn., 324 F. Supp. 3d 962, 971 (M.D. Tenn. 2018).

196. *Eastern Associated Coal Corp.*, 813 F.2d at 643 ("The ALJ specifically found that . . . Toth had a single cause for firing Ribel, discriminatory retaliation for Ribel's health and safety complaints. Eastern's argument that Toth's 'good faith belief' should serve to exculpate it from liability regardless of whether Ribel had in fact committed the act of sabotage is inapposite: It assumes that there was a 'mixed motivation' for the discharge of Ribel, which mixed motivation was not found by the ALJ."); Cox v. LogiCore Corp., No. 5:13-cv-02132-MHH, 2016 WL 2894095, at *13 (N.D. Ala. May 18, 2016) ("LogiCore contends that it fired Mr. Cox because of its 'honest belief that its customer was unhappy with Cox's performance because they believed Cox was violating terms of the contract' . . . . Mr. Cox has presented probative evidence that he was actually terminated because LogiCore acted on the known desire of [the customer] to reduce the number of African-Americans assigned to the . . . contract").

197. *See* Zamora v. Elite Logistics, Inc., 449 F.3d 1106, 1133–34 (10th Cir. 2006) (employer refused to reinstate suspended worker even when he produced his naturalization certificate); Allen v. Peabody N.M. Servs., L.L.C., No. 1:19-CV-0120-SWS/MLC, 2020 WL 995771, at *6 (D. N.M. Feb. 28, 2010) ("[Defendant] refused to reconsider Plaintiff's termination after Plaintiff obtained a second note confirming that the doctor had excused him from work [during the period in question]"); *cf.* NLRB v. Vincennes Steel Corp., 117 F.2d 169, 173 (7th Cir. 1941) (good faith conclusively established by offer of employer to change its decision based if new medical examination by a disinterested physician demonstrated that worker's vision was not impaired).

198. Frost v. BNSF Ry. Co., 914 F.3d 1189, 1196–97 (9th Cir 2019) ("Frost needed to prove only that his protected conduct . . . was a contributing factor to his ultimate termination . . . . This necessarily means it was possible for Frost to show retaliation even if BNSF had an honestly-held, justified belief that he fouled the track. Frost was not required to show that his injury report was the *only*

reasons, one lawful and one not, that may be unlawful per se,[199] or may be unlawful if the unlawful motive was a but-for cause of the disputed action.[200] Several decisions note that the existence of an honest belief does not bar recovery where a plaintiff is claiming that the reason based on that asserted belief would have been "insufficient" by itself to lead the defendant to take the action in question (such as a relatively minor mistake[201]) and that there thus must also have been an additional motive. Because a plaintiff could prevail in that manner, two courts of appeals have correctly rejected jury instructions which would have *required* a verdict for the defendant if the jury found its action was "based on" an honest belief; such a finding, those courts have pointed out, would not preclude a determination that the defendant also had a second, unlawful motive, which was at least a but-for cause of the action complained of.[202]

If a plaintiff asserted two different claims, the existence of an honest belief might bear on only one of them. Thus, where a defendant took two distinct actions (or made two distinct decisions), a showing that the honest belief doctrine precluded liability as to one action (or one decision) would not control the determination of the claim regarding the other. For example, a finding that an employer decided to

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reason or that no other factors influenced BNSF's decision to terminate him.") (emphasis in original); Blackorby v. BNSF Ry. Co., 936 F.3d 733, 737 (8th Cir. 2019) ("[L]iability will still exist notwithstanding such a[n] [honest] belief if the employer's retaliatory motive also played a contributing role in the decision and if the employer fails to carry the burden of proving by clear and convincing evidence that it would have taken the same action in the absence of the protected report."); Ion v. Chevron USA, Inc., 731 F.3d 379, 394 (5th Cir. 2013) ("Ion has presented . . . evidence that Chevron was motivated by discriminatory reasons—and not merely reliance on other employees' reports of Ion's misbehavior"); Gulliford v. Schilli Transp. Servs., Inc., No. 4:15-CV-19-PRC, 2017 WL 6759135, at *16 (N.D. Ind. Jan. 5, 2017); *see* Schlitt v. Abercrombie & Fitch Stores, Inc., No. 15-cv-01369-WHO, 2016 WL 2902233, at *16–17 (N.D. Cal. May 13, 2016).

199. *See* 42 U.S.C. §§ 2000e-2(g)(2)(b), 2000e(2)(m).

200. *See* Gross v. FBS Financial Servs., Inc, 557 U.S. 167, 175 (2009).

201. *See* Frost v. BNSF Ry. Co., 914 F.3d 1189, 1196–97 (9th Cir 2019); Joostberns v. United Parcel Servs., Inc., 166 F. App'x 783, 790–91 (6th Cir. 2006); Yerkes v. Ohio State Highway Patrol, No. 2:19-cv-2047, 2021 WL 6197605, at *10 (S.D. Ohio Dec. 30, 2021); Bruce v. Levy Premium Foodservices Ltd. P'ship of Tenn., 324 F. Supp. 3d 962, 971 (M.D. Tenn. 2018).

202. Blackorby v. BNSF Ry. Co., 936 F.3d 733, 737 (8th Cir. 2019).

discipline an employee based on an honest belief that the worker had done something wrong would not be dispositive of a claim that the employer decided to dismiss the worker, rather than impose a lesser sanction, for an unlawful reason.[203] Similarly, a finding that an employer honestly believed that a worker had engaged in misconduct would not warrant dismissal of a claim that the employer had, for an unlawful reason, targeted the worker for a discriminatory investigation,[204] was enforcing the rule at issue in an unlawfully selective manner,[205] or had itself created the problem for which it, the plaintiff, was being held accountable.[206]

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203. *See* Babb v. Maryville Anesthesiologists, 942 F.3d 308, 323 (6th Cir. 2019); Westmoreland v. TWC Admin. L.L.C., 924 F.3d 718, 730 (4th Cir. 2019) ("[E]ven if TWC honestly believed Westmoreland violated its policy, the jury could reasonably infer (as it apparently did) that the company used this as a pretext for discrimination based on . . . the severity of TWC's response [and] the company officials' contradictory statements regarding the seriousness of her violation"); DeWitt v. Southwestern Bell Tel. Co., 845 F.3d 1299, 1312 (10th Cir. 2017); Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 289–90 (7th Cir. 1999).

204. Casagrande v. OhioHealth Corp., 666 F. App'x 491, 500–01 (6th Cir. 2016); Amos v. McNairy Cnty., 622 F. App'x 529, 540 (6th Cir. 2015); Kowalski v. L & F Prods, 82 F.3d 1283, 1290 (3d Cir. 1996); Eaves v. United Techs. Corp., No. 3:19-CV-1153-B, 2020 WL 3976972, at *5 (N.D. Tex. July 13, 2020); Turner v. American Bottling Co., No. 17 C 4023, 2019 WL 932017, at *6 (N.D. Ill. Feb. 26, 2019); Diamond v. American Fam. Mut. Ins. Co., No. 16-00977-CV, 2017 WL 5195881, at *4 (W.D. Mo. Nov. 9, 2017); Dowell v. Speer, No. 14-cv-01314, 2017 WL 1108650, at *9 (M.D. Tenn. Mar. 23, 2017); Ramsey v. Siskiyou Hosp., Inc., No. 14-cv-01908, 2016 WL 3197557, at *8 (E.D. Cal. June 9, 2016).

205. *See* Frost v. BNSF Ry. Co., 914 F.3d 1189, 1193, 1198 (9th Cir. 2019); De Lima Silva v. Dep't of Corr., 917 F.3d 546, 564 (7th Cir. 2019); Fort Dearborn v. NLRB, 827 F.3d 1067, 1070 (D.C. Cir. 2016) (opinion joined by Kavanaugh, J.); Donaldson v. Coca Cola Refreshments USA, Inc., No. 18-CV-01713, 2020 WL 2542779, at *7 (D. Conn. May 29, 2020); Bland v. Carlstar Group, L.L.C., No. 17-cv-01025, 2018 WL 1787892, at * 11 (W.D. Tenn. Mar. 13, 2018); Tullock v. Loretto Hosp., No. 14-C-3066, 2016 WL 109986, at *7 (N.D. Ill. Jan. 11, 2016).

206. Gries v. Zimmer, Inc., No. 90-2430, 1991 WL 137243 at *8 (4th Cir. July 29, 1991); Hall v. Washington Metro. Area Transit Auth., No. 19-1800, 2020 WL 5878032, at *11 (D.D.C. Oct. 2, 2020) ("Plaintiff testified that her performance record . . . was only in question because Dewey created circumstances in which it was impossible for plaintiff to satisfy the objectives ultimately listed as 'unmet' in her 2018 evaluation . . . ."); Small v. Office of Congressman Henry Cuellar, 485 F.Supp.3d 275, 279–80 (D.D.C. 2020) ("[The Office also] asserts that Small trained staff infrequently and inadequately. But Small . . . claims that Cuellar never provided concrete guidance on what additional training she was supposed to provide"); Downing v. Abbott Lab'ys, No. 15-C-05921, 2019 WL 4213229, at *6

In addition, the honest belief of one official will not bar a finding of liability if another official acted with an unlawful motive and the actions of the improperly motived official was a cause of the adverse action complained of. The Supreme Court addressed this problem, commonly referred to in the lower courts as a "cat's paw" case, in *Staub v. Proctor Hospital*.[207] There, in a not uncommon pattern of events, several supervisors allegedly provided misinformation, and took other steps, to induce a human relations official to fire the plaintiff. The human relations official honestly believed that the plaintiff was guilty of misconduct, but the supervisors had allegedly connived to get the plaintiff dismissed because they objected to his service in the military reserves.[208] The defendant employer attempted, without success, to invoke the honest belief doctrine.[209] The Court observed that decision-making often involves several officials playing different roles and held that, as a matter of general agency law, the motives of all the participants matter, not merely the intent of the so-called ultimate decisionmaker.[210] A defendant is liable if any agent, acting within the scope of his or her responsibilities, takes action (such as recommending the dismissal of the plaintiff) with the intent of injuring the plaintiff (e.g., causing his or her dismissal), and those acts are the proximate cause of the plaintiff's injuries, even if the ultimate decisionmaker acts in good faith.[211]

(N.D. Ill. Sept. 5, 2019) ("Downing does not dispute that [a] customer requested to work with someone else, but Downing maintains that it was [the decisionmaker] who made her look bad [in the eyes of the customer]"); Butler-Burns v. Bd. of Trs. of the Cmty. Coll. Dist. No. 508, No. 16-C-4076, 2018 WL 1468996, at *7 (N.D. Ill. Mar. 26, 2018) ("[I]n response to Defendant's termination rationale that Plaintiff was not performing contract negotiation work, Plaintiff points to evidence that Allen deliberately did not assign her such work . . . .").

207. Staub v. Proctor Hosp., 562 U.S. 411 (2011).

208. *Id.* 414.

209. *See* Brief for Respondent at 27,, Staub v. Proctor Hosp., 562 U.S. 411 (2011) (No. 09-400) ("Even if [the facts were as the worker claimed], no one advised [the decisionmaker] of that fact. 'It is only the decision maker's belief at the time that the decision is made that is the relevant inquiry—not whether the information is later proven to be false.'") (quoting Jenks v. City of Greensboro, 495 F. Supp. 2d 524, 529 (M.D.N.C. 2007)).

210. Staub, 562 U.S. at 420.

211. *Id.* at 422.

Applying the principle in *Staub*, the lower courts have repeatedly refused to permit a defendant to invoke the honest belief doctrine in a cat's paw case.[212] As the Sixth Circuit explained, "[i]n a cat's paw case, the allegation is that a biased subordinate intentionally manipulated the decisionmaker. Under these circumstances, the decisionmaker's intent does not matter, and consequently the honesty of the decisionmaker's belief does not matter."[213] Reliance on the honest belief doctrine has been rejected, regardless of the beliefs of the ultimate decisionmaker, in cases in which an unlawfully motivated official provided misinformation,[214] conducted a biased investigation,[215] made a recommendation,[216] or participated in the decisionmaking process.[217]

There are two instances in which claims that ordinarily require proof of an unlawful motive may be treated differently when a defendant asserts it acted on the basis of a good faith belief. Section 8(a)(1) of the National Labor Relations Act[218] prohibits retaliation against workers who exercise rights protected under that statute. Ordinarily, if a worker asserts that he or she was innocent of the misconduct that was the asserted basis for dismissal, the National Relations Labor Board and the courts will apply the honest

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212. Brandt v. Fitzpatrick, 957 F.3d 67, 79–80 (1st Cir. 2020); Charter Commc'ns, Inc. v. NLRB, 939 F.3d 798, 816 (6th Cir. 2019); Harris v. Powhatan Cnty. Sch. Bd., 543 F. App'x 343, 348 (4th Cir. 2013); Freadman v. Metropolitan Prop. & Cas. Ins. Co., 484 F.3d 91, 100 n.8 (1st Cir. 2007); Russell v. Bd of Trs., 243 F.3d 336, 342 (7th Cir. 2001); *see* JMC Transp., Inc. v. NLRB, 776 F.2d 612, 619 n.6 (6th Cir. 1985) (pre-*Staub* decision).

213. Marshall v. Rawlings Co., 854 F.3d 368, 380 (6th Cir. 2017).

214. *See* Charter Commc'ns, Inc., 939 F.3d at 816; JMC Transport, Inc., 776 F.2d at 619 n.6; Gonzalez v. Aimbridge Hosp., L.L.C., No. 17-CV-00144, 2018 WL 3328078, at *8 (M.D. Tenn. July 6, 2018); Coone v. Chattanooga-Hamilton Cnty. Hosp. Auth., No. 16-cv-481, 2018 WL 1004037, at *10 (E.D. Tenn. Mar. 21, 2018).

215. *See* Turner v. American Bottling Co., No. 17-C-4023, 2019 WL 932017, at *6 (N.D. Ill. Feb. 26, 2019); Connearney v. Main Line Hosps., Inc., No. 15-02730, 2016 WL 6440371, at *5 (E.D. Pa. Oct. 28, 2016).

216. *See Marshall*, 854 F.3d at 380; Harris, 543 F. App'x at 348; Coone, 2018 WL 1004037, at *10.

217. Russell v. Bd. of Trs., 243 F.3d 336, 342 (7th Cir. 2001); *see* Nemet v. First Nat'l Bank of Ohio, No. 98-4076, 1999 WL 1111584, at *7 (6th Cir. Nov. 22, 1999).

218. 29 U.S.C. § 158(a)(1).

belief doctrine; the worker's innocence will be insufficient to establish a statutory violation if the employer's action was based on an honest, although mistaken, belief rather than retaliation.[219] But if the asserted misconduct for which an employer claims to have disciplined a worker occurred in the course of protected activity[220]—such as allegedly throwing rocks during a strike—the Board will hold the disciplinary action unlawful, unless the worker had *actually* engaged in that misconduct, regardless of any good faith belief on the part of the employer that the worker had acted improperly.[221] The Supreme Court approved that interpretation of the statute in 1974 in *NLRB v. Burnup*.[222] Similarly, claims of content-based discrimination violating the First Amendment right of free speech usually require proof of an unlawful purpose.[223] But if a government employer discharges an employee for speech-related activity based on a mistaken belief about what the employee had actually done, the Supreme Court has held that the government's action violates the First Amendment unless its mistaken belief was "reasonable."[224]

There are numerous statutes to which the honest belief doctrine would not apply because the provisions in question do not require a showing of an unlawful purpose at all. Under the Americans With Disabilities Act,[225] for example, an employer cannot defeat a failure-to-accommodate claim by

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219. *See supra* n. 18.

220. The distinction between misconduct occurring in the course of protected activity, and other misconduct, is discussed in *MCPC, Inc. v. NLRB*, 813 F.3d 475, 488–90 (3d Cir. 2016).

221. *E.g.*, *In re* Standard Oil Co., 91 N.L.R.B. 783, 791 (1950) ("To hold otherwise would be to place employees who engage in lawful strike activities with the hope of returning to their jobs at the end of the economic struggle at the mercy of an employer who may sincerely regard their conduct as unlawful . . . . Thus an employer, who discharges a striker on the ground that he has engaged in unlawful strike activities, does so at the peril of deciding wrongly.").

222. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23–24 (1964). That same interpretation has been applied to the Railway Labor Act in *Gioieni v. Alitalia Airlines*, No. 71-Civ.-631, 1975 WL 1095, at *3 (S.D.N.Y. July 2, 1975).

223 *See* Heffernan v. City of Patterson, 578 U.S. 266, 271 (2016).

224. Waters v. Churchill, 511 U.S. 661, 677–78 (1994) (plurality opinion).

225. 42 U.S.C. § 12101-12213.

asserting that it honestly believed it had done enough,[226] or fend off a discrimination claim by asserting that it honestly believed that the plaintiff, because of his or her disability, was not qualified to do the job in question.[227] Similarly, a defendant violates the Family and Medical Leave Act[228] by denying required leave (even if it honestly believed that the worker had used up all his or her FMLA leave)[229] by disciplining a worker for taking protected leave (even if it honestly believed the absence was not FMLA-qualifying or that FMLA leave was being abused)[230] or by failing to notify workers about the consequences of abusing FMLA leave (regardless of its motive).[231] The honest belief doctrine would not be a defense to a refusal to provide COBRA benefits, which can be denied only if a former employee actually engaged in "gross misconduct."[232] Several decisions hold that a refusal to hire or promote an individual because of a foreign accent will constitute national origin discrimination, despite a good faith belief that the accent would interfere with doing the job in question, unless there is a factual basis for that belief.[233]

CONCLUSION

A defendant's invocation of the honest belief doctrine is not, as some commentators have feared and some defendants

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226. EEOC v. Rock-Tenn Co., No. 14-cv-973, 2016 WL 6127844, at *7 (W.D. Mich. Feb. 3, 2016).

227. Evangelist v. Auto-Ware, L.L.C., No. 14-cv-12569, 2016 WL 1407838, at *4 (E.D. Mich. April 11, 2016).

228. 29 U.S.C. §§ 2612-2654.

229. Banks v. Bosch Rexroth Corp., 610 F. App'x 519, 533 (6th Cir. 2015) ("[T]he honest belief rule is not applicable to claims where the employer's frame of mind is not at issue."); Tillman v. Ohio Bell Tel. Co., 545 F. App'x 340, 352 (6th Cir. 2013).

230. West v. Pella Corp., No. 16-CV-154, 2018 WL 345115, at *8 (W.D. Ky.. Jan. 9, 2018); DaPrato v. Massachusetts Water Res. Auth., 123 N.E. 3d 737, 751 (Mass. 2019).

231. Boeckner v. Gatto Glass Co., 412 F. App'x 985, 987 (9th Cir. 2011); *see* 29 C.F.R. § 825.300(b)(1) (2023).

232. Kariotis v. Navistar Int'l Transp. Corp., 131 F.3d 672, 680 (7th Cir. 1997).

233. *See* Fragante v. City and Cnty. of Honolulu, 888 F.2d 591, 596–97 (9th Cir. 1989); Xieng v. Peoples Nat. Bank of Wash., 844 P.2d 389 (Wash. 1993).

may hope, invariably fatal to a claim of unlawful purpose. On the other hand, an effective response to the assertion of that doctrine requires plaintiffs to address issues, and often to offer evidence, that would not be relevant if the limitation were limited to a dispute about objective validity. In responding to a motion for summary judgment, plaintiffs need to carefully evaluate whether the motion is arguing that the basis of the defendant's explanation was objectively valid or is raising honest belief. Because it is impossible to know prior to the filing of a summary judgment motion what its basis will be, plaintiffs should routinely conduct discovery on the assumption that the defendant or the court will at some point raise honest belief.