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DISPARATE TREATMENT EMPLOYMENT DISCRIMINATION AND AN EMPLOYER'S GOOD FAITH: HONEST MISTAKES, BENIGN MOTIVES, AND OTHER SINCERELY HELD BELIEFS

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I. INTRODUCTION

When does an employer's “good faith” constitute a defense to a charge of intentional employment discrimination? Suppose an employer terminates an employee because of an honest, but mistaken, belief that the employee stole merchandise? Or suppose an employer desires to hire a female but truly believes that, if he does so, his customers will not patronize his business and the business will collapse? Or suppose an employer honestly believes that women are better drivers and therefore hires only women? Or suppose an employer fires a black employee because the employee is a Gemini and the employer genuinely believes that Geminis are bad employees? Or suppose an employer sincerely believes Geminis are better workers and therefore pays a (male) Gemini worker more than a (female) Capricorn? Or suppose an employer engages in intentional discrimination for a lofty, idealistic purpose? Consider the following hypotheticals.

Hypothetical 1) Al owns a retail store. Al, in good faith, believes that employee Paula stole an item from the store. Al terminates Paula and hires Warren, a male, as her replacement. Paula sues Al's store for sex discrimination. At trial, Paula is able to establish that, although Al honestly believed that Paula had stolen the item, she was completely innocent of the theft.

Hypothetical 2) Bill, the owner-manager of Beta Company, is a good employer. Bill pays his employees generously and treats them well. Bill has one fault—he is obsessed with astrology. One day, Bill reads in the newspaper's astrology column, “Beware of Geminis—they will be bad for your life and bad for your business.” Bill comes to work, visibly shaken, and
reluctantly informs his workforce that all Geminis would have to be terminated. He gives the affected employees generous compensation packages but is adamant about firing them. Peter, a black employee who Bill terminated because he is a Gemini, files a racial discrimination charge against Beta. At trial, Peter is able to show that he was an exemplary employee who received the best evaluations in the workforce.

Hypothetical 3) Carl, an owner of a small company, believes in good faith that Geminis are the most productive people. Carl, therefore, pays Geminis more than similarly situated non-Geminis. As a result of Carl's policy, Phil, an African-American and a Capricorn, is getting paid less than Caucasian Gemini Mike, even though they perform the same tasks. Phil sues under the employment discrimination laws, challenging the unequal pay.

Hypothetical 4) The facts are the same as Hypothetical 3 but, instead, it is Prudence, a female employee who is getting paid less than Mike because Prudence is a Sagittarius. Prudence also sues under the employment discrimination laws.

Hypothetical 5) Employer Earl, owner/president of Epsilon Company, loves and respects women and has a strong desire to promote their advancement in the workplace. Over three-quarters of Earl's workforce is composed of women, except for the manual labor department. Earl refuses to hire women for that department. Earl believes that women are fully capable of performing manual labor but does not want women in the department because the jobs are dirty, demeaning, and dead-end. Furthermore, hiring women into the manual labor department would not serve Earl's goal of promoting women's advancement in the workplace. Earl has an opening in that department and Pam applies for the position. Earl, however, refuses to hire Pam, hires a less qualified male, and offers Pam a management trainee position. Pam refuses the trainee
position and sues Epsilon Company for sex discrimination.

Hypothetical 6) Fred owns a small trucking company and has an opening for a truck driver position. Fred, in good faith, believes that women are naturally better drivers. Paul, an experienced truck driver, applies for the position but Fred refuses to hire him because he is a man. Paul sues for sex discrimination.

Hypothetical 7) Gary owns a warehouse and has an opening. Positions in the warehouse require that employees lift very heavy loads on a continuous basis. Gary, in good faith, believes that men are stronger and therefore hires only men for warehouse positions. Patricia applies for work at the warehouse but Gary refuses to hire her because she is a woman. Patricia files a claim of sex discrimination.

Hypothetical 8) Employer Hank owns a bar and has an opening for a bartender position. Hank believes, in good faith, that if he hires a female for the position all his customers will leave and his company will go bankrupt. Polly applies for the position but Hank refuses to hire her because she is a woman. Polly files suit for sex discrimination under the employment discrimination laws. At trial, Hank is able to establish both that he genuinely believed all his customers would leave and that the customers actually would leave.

This article discusses under what circumstances an employer's good faith will be a defense to a claim of intentional employment discrimination. Part II will provide a brief summary of the employment discrimination laws.

Part III discusses Hypotheticals 1 and 2. Hypotheticals 1 and 2 relate to the indirect method of proving discrimination and, more specifically, the issue of "pretext" under McDonnell
Douglas Corp. v. Green.¹ Hypothetical 1 deals with an employer's good faith mistake. The employer mistakenly believes that an employee, who is actually innocent, stole merchandise. Most courts follow the Seventh Circuit's view that courts dealing with the issue of pretext should not be concerned with the correctness of an employer's decision, but only whether the employer made the decision in good faith. Even if the employer's decision is irrational, it is not thereby an illegal pretext for discrimination. The Sixth Circuit, however, has departed from this view, requiring the employer to "establish its reasonable reliance on the particular facts that were before it at the time the decision was made."² According to the Sixth Circuit, the employer must have made a "reasonably informed and considered decision."³ Under the Sixth Circuit's analysis, the plaintiff in Hypothetical 1 may prevail. At the least, the Sixth Circuit's rule departs from established Title VII jurisprudence by improperly shifting the burden of proof, requiring the employer to establish a lack of discriminatory intent.⁴ At the most, the Sixth Circuit's rule has

³ Id.
⁴ See Rebecca Michaels, Note, Legitimate Reasons for Firing; Must They Honestly be
the potential for seriously eroding the employment-at-will doctrine by impermissibly importing a “just cause” element into Title VII.

Hypothetical 2 deals with an issue similar to the one in Hypothetical 1. Here, an employer’s reason for firing an employee is completely irrational and not justified by any legitimate business rationale. In the hypothetical, the employer fires an employee because of the employee's astrological sign. The employer, in good faith, sincerely believes that the retention of employees with a particular astrological sign will harm his business. Under traditional Title VII principles, the employer does not violate Title VII by firing a minority employee because of that employee's astrological sign. The employer's action was not because of the employee's race. The Sixth Circuit's “reasonable reliance on particularized facts” rule, however, may engender a different result.

Reasonable?, 71 FORDHAM L. REV. 2643, 2669 (2003) (stating that “[a]llowing a claim to survive summary judgment just because the employer's reason might not have been reasonable in the eyes of the court does not hold an employee to the burden of persuasion”).
Part IV and Hypotheticals 3 and 4 deal with the unique issues posed by pay discrimination claims. The two hypotheticals show the possible contrasting treatment of sex-based wage claims and claims presented by other protected groups. Because of the Equal Pay Act's ("EPA") partial incorporation into Title VII, by the Bennett Amendment,\(^5\) some courts may refuse to allow employers to raise a "good faith" defense in sex-based wage claims. The same courts, however, would probably allow employers to raise a "good faith" defense in other wage discrimination claims (\textit{e.g.}, race-based claims).

Hypotheticals 5 through 8, discussed in part Part V of this article, all involve overt discrimination, employer good faith, and the application of the bona fide occupational qualification ("BFOQ") defense. In Hypothetical 5, the employer, in good faith, believes that his discriminatory policy is necessary to advance women's position in the workplace. Discussion of the first hypothetical also involves the well-recognized distinction between motive and intent and the Supreme Court's recent departure from that distinction in \textit{Kentucky Retirement Systems v. Equal Employment Opportunity Commission}.\(^6\)

Hypotheticals 6, 7, and 8 also involve overt discrimination in which the employer has "good faith" about a particular issue. In Hypothetical 6, the employer has a good faith belief that women are better drivers. In Hypothetical 7, the employer has a good faith belief that men are stronger and strength is necessary for the position at issue. In Hypothetical 8, the employer has a good faith belief that his business will suffer financial ruin unless he discriminates. In all these hypotheticals, the employer will be unable to establish a BFOQ, his good faith notwithstanding.

\(^{5}\) Title VII of the Civil Rights Act of 1964, \$ 703(h), 42 U.S.C. \$ 2000e-2(h) (2000).
II. THE EMPLOYMENT DISCRIMINATION LAWS

The employment discrimination laws ban discrimination in terms and conditions of employment on the basis of an employee's membership in a protected group. The protected categories include race, color, religion, sex, and national origin (Title VII),\(^7\) age (ADEA),\(^8\) and disabilities (ADA).\(^9\)

There are two types of employment discrimination claims. First, employers can be liable for intentionally discriminating against an employee (or an applicant for employment) on the basis of the employee’s membership in a protected group (disparate treatment). Second, employers can be liable for maintaining a neutral employment practice that causes a significant impact on members of a protected group, unless the employer can demonstrate that the policy is job related and consistent with business necessity (disparate impact).\(^{10}\)

The most common form of employment discrimination is intentional discrimination or disparate treatment, the subject of this article. Intentional discrimination is not always easy to prove because, in most circumstances, employers will not overtly discriminate and plaintiffs will not have direct evidence of the employer's intent to discriminate.\(^{11}\)

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\(^{10}\) HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 3.1, at 164-65 (2d ed. 2004).

If an employer does not overtly discriminate, the plaintiff will have to prove the employer's intent to discriminate by using circumstantial (indirect) evidence. The United States Supreme Court, in a line of cases beginning with *McDonnell Douglas Corp. v. Green*,\(^\text{12}\) developed a system for plaintiffs to use circumstantial evidence to prove the employer's intent to discriminate. Using this method, the plaintiff must first prove a prima facie case of discrimination.\(^\text{13}\)

Establishing a prima facie case is usually not difficult.\(^\text{14}\) For example, in a failure to hire case, the plaintiff must prove that (1) she is a member of a protected class; (2) she was qualified and applied for an open position; (3) she was rejected by the employer; and (4) after the employer rejected her, the employer continued to seek to fill the available job.\(^\text{15}\) The plaintiff's establishment of a prima facie case "creates a presumption that the employer unlawfully discriminated."\(^\text{16}\) If the employer fails to meet its burden to produce evidence of a legitimate, nondiscriminatory reason for its action, the trial court must enter judgment for the plaintiff.\(^\text{17}\) To avoid judgment for the plaintiff who has established a prima facie case, the burden shifts to the employer to articulate or produce evidence of a "legitimate nondiscriminatory reason" for its


\(^{13}\) Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).

\(^{14}\) See *id.* at 253 (establishing a prima facie case is "not onerous").

\(^{15}\) *Id.* at 254 n.6 (quoting *McDonnell Douglas Corp.*, 411 U.S. at 802).

\(^{16}\) *Id.* at 254.

\(^{17}\) *Id.*
action.\textsuperscript{18} The defendant's burden is only one of producing admissible evidence of its reason for the employment action. Once the employer has produced evidence of a legitimate, nondiscriminatory reason, the plaintiff has an opportunity to prove that the employer's rationale was not the real reason for the employment action but was a pretext for discrimination.\textsuperscript{19}

In some circumstances an employer may engage in overt discrimination, when the employer admittedly refuses to employ members of one of the protected groups. If an employer does so, it will have to rely on the statutory bona fide occupational qualification defense ("BFOQ"). Section 703(e)(1) of Title VII states that it is not unlawful “for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or nation origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."\textsuperscript{20} The ADEA also contains a BFOQ defense.\textsuperscript{21}

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III. AN EMPLOYER'S GOOD FAITH MISTAKE AND THE SIXTH CIRCUIT'S INCORRECT DEPARTURE FROM TRADITIONAL TITLE VII JURISPRUDENCE – HYPOTHETICALS 1 AND 2
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Hypothetical 1) Al owns a retail store. Al, in good faith, believes that employee Paula stole an item from the store. Al terminates Paula and hires Warren, a male, as her replacement. Paula sues Al's store for sex discrimination. At trial, Paula is able to establish that, although Al honestly believed that Paula had stolen the item, she was completely innocent of the theft.

\textsuperscript{18} Id. at 253 (quoting McDonnell Douglas Corp., 411 U.S. at 802).

\textsuperscript{19} Id.


Hypothetical 2) Bill, the owner-manager of Beta Company, is a good employer. Bill pays his employees generously and treats them well. Bill has one fault – he is obsessed with astrology. One day, Bill reads in the newspaper's astrology column, "Beware of Geminis – they will be bad for your life and bad for your business." Bill comes to work, visibly shaken, and reluctantly informs his workforce that all Geminis would have to be terminated. He gives the affected employees generous compensation packages but is adamant about firing them. Peter, a black employee who Bill terminated because he is a Gemini, files a racial discrimination charge against Beta. At trial, Peter is able to show that he was an exemplary employee who received the best evaluations in the workforce.

Under Seventh Circuit precedent, followed by other courts, the plaintiffs in Hypotheticals 1 and 2 will not recover because the two employers both had an "honest belief" in the plaintiffs' misconduct (Hypothetical 1) or threat to the business (Hypothetical 2). Therefore the plaintiffs failed to prove that their employers discriminated on the basis of sex (Hypothetical 1) or race (Hypothetical 2). The Sixth Circuit, however, has departed from the Seventh Circuit's "honest belief" rule and, under Sixth Circuit precedent, the plaintiffs may recover.

The Seventh Circuit has adopted a pure "honest belief" rule. As the court said in McCoy

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22 See Michaels, supra note 4, at 2658 n. 101 (listing cases); see also Woodruff v. Peters, 482 F.3d 521, 531 (D.C. Cir. 2007) (“We review not 'the correctness or desirability of the reasons offered but whether the employer honestly believes in the reasons it offers"’) (quoting Fischbach v. D.C. Dep’t of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996); Piercy v. Maketa, 480 F.2d 1192, 1200-01 (10th Cir. 2007) (the relevant issue is the employer's good faith beliefs regarding the employee's performance, not what the employee believes about his own performance; Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002) (“In judging whether. . .proffered justifications were false, it is not important whether they are objectively false. . .[r]ather courts 'only require that an employer honestly believe its reasons for its actions"’) (quoting Johnson v. Nordstrom, Inc., 260 F.3d 727, 733 (7th Cir. 2001)); Bacchus v. Tubular Textile LLC, No. 1:01CV00621, 2003 WL 21796550, at *6 (M.D.N.C. Mar. 19, 2003) (employer's decision need not be “objectively correct in all its particulars"; the decision only needs to be “made in good faith and without discriminatory animus”).

23 See infra notes 49–90 and accompanying text for a discussion of the Sixth Circuit approach.
v. WGN Continental Broadcasting Co.,24 "[T]he issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers."25 In Pollard v. Rea Magnet Wire Co.,26 the court stated that "A district judge does not sit in a court of industrial relations. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, Title VII and § 1981 do not interfere."27 The key question is "whether the employer gave an honest explanation of its behavior."28

The operation of the “honest belief” rule can be demonstrated in a Seventh Circuit case, Kariotis v. Navistar International Transportation Corp.29 In Kariotis, the employer Navistar terminated Executive Assistant Kathleen Kariotis because it believed that, following knee replacement surgery, she had fraudulently accepted disability benefits.30 After the surgery, Kariotis took longer than the expected ten weeks to return to work and received extended disability benefits. The employer was suspicious of the extended leave because, two years earlier, the plaintiff had been accused of unethical conduct and her “claimed disability was

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24 957 F.2d 368 (7th Cir. 1992).
25 Id. at 373.
26 824 F.2d 557 (7th Cir. 1987).
27 Id. at 560.
28 Id.
29 131 F.3d 672 (7th Cir. 1997).
30 Id. at 674.
inconsistent with observations made by some Navistar employees."\textsuperscript{31} William Vlcek, the Human Resources manager, and his boss, Robert Goldie, became suspicious and decided to investigate.

As the Seventh Circuit noted, the company's "investigation left something to be desired."\textsuperscript{32} Instead of approaching Kariotis or her doctor, the company hired investigators to videotape her while she was off duty. The investigators reported that she did not appear physically impaired and she engaged in "walking, driving, sitting, bending, and shopping (pushing a grocery cart)."\textsuperscript{33} The investigators, however, were not medical experts. At a management meeting, Kay Carrol, another manager, suggested that Kariotis' physician be asked about the videotape but Vleck refused, believing that the videotape spoke for itself.\textsuperscript{34} Vleck met Kariotis, and gave her a termination letter stating that she was being discharged because of her dishonesty in claiming disability benefits and her absence from work for five days without good reason. Kariotis was given three more days to seek reinstatement in writing. Kariotis wrote the company stating she should not have been fired. In addition, her physician also wrote the company a letter stating that, given her physical condition, the company's charges of disability fraud were preposterous. The company, however, wrote Kariotis informing her that the decision was final. The company eventually replaced the 57-year-old Kariotis with a 32-year-old woman.\textsuperscript{35} In her subsequent suit alleging, \textit{inter alia}, discrimination under the ADA and the

\textsuperscript{31} Id.
\textsuperscript{32} Id. at 675.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
ADEA, the employer Navistar filed a motion for summary judgment, contending that while it may have erred in believing that Kariotis committed fraud, it had an honest belief that she had done so. The district court granted the employer summary judgment on the ADA and ADEA claims along with a number of other claims.36

On appeal, Navistar conceded that the plaintiff had established a prima facie case of discrimination. Therefore, according to the Seventh Circuit, “the only issue was whether she successfully called into question Navistar's reasons for firing her.”37 However, the plaintiff could not meet its burden by simply criticizing the company's evaluation process or its judgment regarding the plaintiff's job performance.38 Instead, the plaintiff had to adduce evidence showing that the employer's reasons for its decision were false, “thereby implying (if not actually showing) that the real reason [was] illegal discrimination.”39 The key issue was “not whether the employer's reasons for a decision [were] 'right but whether the employer's description of its reasons [was] honest.”40

The court acknowledged that the company never discussed the matter with Kariotis' physician or showed the videotape to its own physician. In addition, when a manager suggested that the results of the videotape be shown to Kariotis' physician, this was never done. The court

36 Id.
37 Id. at 676.
38 Id. at 677.
39 Id.
40 Id. (quoting Gustovich v. AT&T Communications, Inc., 972 F.2d 845, 848 (7th Cir. (1992)).
acknowledged that from the plaintiff’s perspective, Navistar’s “investigation was ‘imprudent, ill-informed, and inaccurate.’”41 The investigation “hardly look[ed] world class” and there were “better ways” to investigate the plaintiff than to secretly videotape her.42 Nevertheless, federal law did not “require[ ] just cause for discharges.” A “poorly founded” but an “honestly described” reason for discharge was not an illegal pretext for discrimination.43

According to the court, the plaintiff had not elicited any evidence that the company investigated other (younger or non-disabled) employees in a different manner. The plaintiff’s main contention was that “the company was careless in not checking its facts before firing her.”44 Such carelessness arguably resulted in an erroneous decision, but did not amount to a showing of illegal discrimination.45 There was no evidence showing that Navistar had made the termination decision because of Kariotis’ age or because she had physical problems that were a financial burden to Navistar.46 The company believed that Kariotis had committed disability fraud and company managers saw her engaging in physical activities that “equaled and perhaps even exceeded what she was asked to do on the job.”47 The Seventh Circuit, therefore, affirmed the

41 Id.
42 Id.
43 Id.
44 Id.
45 Id. at 678.
46 Id. at 678.
47 Id. at 677.
district court's grant of summary judgment to the employer on the ADEA and ADA claims.\textsuperscript{48}

\textit{Kariotis} demonstrates that, in the Seventh Circuit, the employment at will doctrine is still alive and well. The employer may take action against an at-will employee for any reason, so long as the reason is not because of the employee's race, color, gender, national origin, religion, age or disability. The court has refused to transform the employment discrimination statutes into a “just cause” regime. And the court has properly kept the burden of proof to prove discrimination on the plaintiff.

The Sixth Circuit, however, has departed from the Seventh Circuit's “honest belief” rule. In \textit{Smith v. Chrysler Corp.},\textsuperscript{49} the employer terminated the plaintiff James Smith for lying on two company forms.\textsuperscript{50} The plaintiff filed suit under the American's with Disabilities Act ("ADA")\textsuperscript{51} and the state anti-discrimination statute,\textsuperscript{52} alleging that the employer's stated reason for the termination was a pretext.\textsuperscript{53} Smith contended that he had not lied on either form.\textsuperscript{54} The employer argued that it had honestly believed that Smith had lied.\textsuperscript{55}

Before working at Chrysler, Smith experienced episodes while driving in which he

\begin{itemize}
\item \textsuperscript{48} \textit{Id.} at 674.
\item \textsuperscript{49} 155 F.3d 799 (6th Cir. 1998).
\item \textsuperscript{50} \textit{Id.} at 801-04.
\item \textsuperscript{51} 42 U.S.C. § 12101, \textit{et. seq.}
\item \textsuperscript{53} \textit{Smith}, 155 F.3d at 801.
\item \textsuperscript{54} \textit{Id.} at 805.
\end{itemize}
missed his turn and was not able to recall driving for a mile. Smith was diagnosed with a sleep disorder. A physician's assistant, Steve Miller, under the supervision of Dr. Harvey Organek, told Smith that he did not suffer from narcolepsy but a narcolepsy-related disorder and he would be treated as if he had narcolepsy. Drug treatment alleviated the symptoms.56

Three years later, Smith applied for a job at a Chrysler assembly plant. On one of the application forms, Smith answered “no” to the query “Have you ever had or have you now unusual tiredness or fatigue?”57 Smith subsequently testified that he answered “no” because the episodes were not caused by fatigue; instead they occurred without warning when he was not focused on any activity.58

Several months later, Smith applied for an in-plant driver's license, allowing him to operate electric carts and other heavy machinery in the plant.59 To the question as to whether he had ever had narcolepsy, Smith answered “no.”60 Smith apparently answered “no” because Miller had told him he did not suffer from narcolepsy, but a narcolepsy-related disorder.61

Smith's earlier symptoms reemerged a few months later. To facilitate diagnosis and treatment, Smith's physician, Dr. Organek, wrote a letter to the company physician, Dr. Rood,

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55 Id. at 806.
56 Id. at 802.
57 Id.
58 Id.
59 Id. at 803.
60 Id.
61 Id. at 802.
requesting that Chrysler give Smith a regular day shift position. The letter explained that Smith was being treated for a sleep disorder. Dr. Rood wrote in Smith's medical chart that Smith had been narcoleptic for several years and desired a transfer to the day shift. Dr. Rood also noted that Smith had not mentioned the problem when he was hired.62

When Chrysler did not respond to Smith's request for a transfer to the day shift, Smith's doctor sent another letter to the company doctor again requesting a transfer to the day shift. Dr. Organek's letter stated that Smith was under his care “for treatment of narcolepsy” and a transfer to the day shift would facilitate “the treatment of his Narcolepsy Syndrome.”63

Shortly after these communications, in an apparent attempt to persuade the company to transfer Smith to the day shift, a union representative informed the plant assembly superintendent Valerie Michael that Smith was having trouble staying awake while driving home in the evenings. Michael then pulled Smith's files and investigated his employment record. Michael asked the in-house physician, Dr. Rood, whether Smith had narcolepsy and Dr. Rood said that he did. Michael then terminated Smith for lying on the original medical history and the in-house driver's license forms.64

In the subsequent lawsuit under the ADA and the Michigan state statute, Chrysler filed a motion for summary judgment. Although the district court found that Smith's sleeping disorder was a disability and that he had established a prima facie case in regard to his discharge, the court granted summary judgment in favor of Chrysler because Smith could not show that Chrysler’s

62 Id. at 803.
63 Id.
64 Id. at 803-04.
legitimate non-discriminatory reason was a pretext.\textsuperscript{65}

On appeal, Chrysler conceded that Smith had established a prima facie case of discrimination and Smith acknowledged that Chrysler had met its burden of offering evidence of a legitimate non-discriminatory reason for the termination – “that he lied on various job forms wherein he stated that he was not narcoleptic and had not suffered from unusual fatigue.”\textsuperscript{66} The appeal, therefore, focused on whether Chrysler's proffered reason for firing Smith was a pretext for discrimination.\textsuperscript{67}

Smith claimed that the evidence showed that he had not lied because he did not actually have narcolepsy but, instead, another sleeping disorder very similar to narcolepsy. Furthermore, he did not have symptoms of unusual fatigue. He also claimed that the employer's investigation “was ill-informed and shoddy.”\textsuperscript{68} According to Smith, Chrysler had not attempted to educate itself about sleeping disorders or his condition before it decided to terminate him. Chrysler had not interviewed him or his doctors. In addition, the employer's investigation took place immediately after he requested a change to the day shift in order to accommodate his disorder.\textsuperscript{69} The court summarized the plaintiff's argument regarding pretext in the following manner:

If Chrysler had made an attempt to probe further when conducting its investigation, such as by talking to Smith or reading medical literature on the nature of sleeping disorders, then it would have learned that Smith did not have narcolepsy or suffer from unusual

\textsuperscript{65} \textit{Id.} at 804.
\textsuperscript{66} \textit{Id.} at 805.
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.}
fatigue and, hence, did not lie on his job forms. Alternatively, Smith notes that he disclosed up front that he was narcoleptic when he first applied for a job at Chrysler; so if Chrysler had conducted a more in-depth inquiry, it would have learned that the impact of his false responses on the job forms was muted by this earlier disclosure. The discriminatory linchpin to Smith's argument is that Chrysler consciously refused to make an effort to uncover this evidence because it wanted to fire him after it learned he had a disability. The basis for this "sticking its head in the sand" argument is that the investigation was conducted almost immediately after Smith requested an accommodation for his disability and that the facts uncovered were judged using stereotyped assumptions.\(^70\)

Thus Smith asked the court to focus on two issues: first, whether he (Smith) had actually lied; and second, the alleged shoddiness of Chrysler's investigation.

Chrysler, on the other hand, urged the Sixth Circuit to adopt the Seventh Circuit's "honest belief" rule. The Sixth Circuit described that rule in the following terms: "so long as the employer honestly believed in the proffered reason given for its employment action, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless."\(^71\)

The Sixth Circuit in Smith, however, rejected the Seventh Circuit's pure "honest belief" rule because it allowed an employer to rely on an honest belief without factual support. According to the Smith court, this violated the purpose of the ADA "that employment actions taken regarding an individual with a disability be grounded on fact and not 'on unfounded fear, prejudice, ignorance, or mythologies."\(^72\) Relying on a Sixth Circuit Rehabilitation Act case, the

\(^70\) Id. at 806.

\(^71\) Id. For a discussion of the Seventh Circuit's "pure" honest belief rule, see infra text accompanying notes 24–48.

\(^72\) Id. (quoting 136 Cong. Rec. S 7422-03, 7437 (daily ed. June 6, 1990) (statement of Sen. Harken)).
Smith court stated that for an employer's action “to be considered honestly held, the employer must be able to establish its reasonable reliance on the particularized facts that were before it at the time the decision was made.” Once the employer makes a showing of particularized facts that motivated the employment action, the employee can still produce contrary proof. The court stated that “if the employer made an error too obvious to be unintentional, perhaps it had an unlawful motive for doing so.” The court said that in applying the “reasonably relied on particularized facts” test, it was not requiring that the employer's decisional process “be optimal or that it left no stone unturned.” Instead, the employer had to have made a “reasonably informed and considered decision.” Courts should not “micro-manage” the employer's decision making process, but “neither should [courts] blindly assume that an employer's description of its reasons is honest.”

The court then applied its “reasonably relied on particularized facts” test to the facts at hand. The court found that Chrysler had satisfied this test in determining that Smith had lied on

73 Id. at 807 (citing Pesterfield v. TVA, 941 F.2d 437, 443-44 (6th Cir. 1991)). The Smith court's reliance on Pesterfield in promulgating the court's "reasonable reliance on particularized facts test" is illuminating. While Smith involved the Court of Appeals' review of the district court's grant of summary judgment to an employer, the court's citation of Pesterfield indicates the court intended the test to have a broader application. Pesterfield involved appellate review of a district court judgment after a bench trial. Pesterfield, 941 F.2d at 440.

74 Smith, 155 F.3d at 807.

75 Id. (quoting Fischbach v. District of Columbia Dept. of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996)).

76 Id.

77 Id.

78 Id.
the in-house driver's license form when he stated that he was not narcoleptic. Chrysler had relied on letters from Smith’s treating physician and its in-house doctor's notes that stated that Smith himself had admitted that he had narcolepsy. According to the court, Chrysler had been “diligent in investigating the matter” and its reliance on the medical opinion of Smith's treating physician was “reasonable.”

The court, however, found that Chrysler had not met its “reasonably relied on particularized facts” test in determining that Smith had lied on the medical history application form. Chrysler believed that Smith had lied when he said that he had not suffered from fatigue or unusual tiredness. According to the court, Chrysler's belief “was not the result of any particularized facts uncovered during its investigation.” Instead, the company's belief was “based solely on Michael's personal opinion that people with narcolepsy suffer from unusual fatigue.” The court noted that narcoleptics do not “fall asleep.” Relying on a medical treatise, the court stated that narcoleptics “suddenly and uncontrollably lapse into a sleep-like state for a brief interval, typically when their mind is not focused on some task or activity.” According to the court, narcoleptics did not experience tiredness and fatigue and superintendent Michael had never attempted to find out whether narcoleptics suffered from such tiredness.

79 Id. at 808.
80 Id.
81 Id.
82 Id.
83 Id. (citing 1 ISSELBACHER ET AL., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 129 (9th ed. 1980)).
The court acknowledged that the key inquiry was not whether narcoleptics became unusually tired, “but whether Chrysler had a reasonable basis to believe that Smith had lied when he checked ‘no’ to the questions ‘Have you ever had or have you now unusual tiredness or fatigue?’” The court said that since narcolepsy and its symptoms had an “unknown etiology,” Chrysler, without further investigation, “could not have reasonably believed that Smith had lied” when he said he had not suffered from tiredness or fatigue.\(^\text{84}\) The court said that without particularized facts supporting its belief that Smith had lied about experiencing fatigue, Chrysler only had “Michael's own incorrect, stereotyped assumption that all narcoleptics suffer from unusual fatigue.”\(^\text{85}\) Because the ADA required employers to avoid stereotypes and mythology in reaching its employment decisions, Chrysler’s belief was not honestly held.

Although the court found that Chrysler could not rely on its belief that Smith had lied on the medical history form, Chrysler did have a reasonable belief that Smith had lied in filling out the in-house driver's license form. This provided enough justification to terminate Smith. Therefore, the Sixth Circuit affirmed the district court's grant of summary judgment to the employer.\(^\text{86}\)

Judge Clay concurred with the majority's decision, but wrote separately because he believed that both reasons Chrysler had given for Smith's termination were reasonable. According to Judge Clay, Chrysler had reasonably believed that Smith had lied on the medical history form when he stated that he never suffered from unusual tiredness or fatigue. Judge Clay

\(^{84}\) Id.

\(^{85}\) Id. at 809.

\(^{86}\) Id.
looked at the same medical treatise that the majority had used. That treatise stated that "the essential characteristic of narcolepsy is uncontrollable sleepiness. Many times a day the individual is assailed by an uncontrollable desire to sleep."\textsuperscript{87} Thus Michael's belief was based on a "lay person's common understand of this disease" and, "based upon the thorough description" from the medical treatise, the belief was not an "unfounded stereotype."\textsuperscript{88}

The Sixth Circuit's "reasonable reliance on particularized facts" test departs from traditional Title VII jurisprudence. Title VII is not a "just cause" statute.\textsuperscript{89} The Sixth Circuit's test, however, requires that the employer's reliance be "reasonable" and also implicitly requires that the employer make a reasonable investigation. Certainly, it is a good business practice for an employer to make a reasonable investigation and only rely on particularized facts before terminating an employee for misconduct. But such actions are not required by the employment discrimination laws.\textsuperscript{90} Consider the following hypothetical (a more detailed version of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{87} Id. at 810 (Clay, J., concurring) (quoting 1 ISSELBACHER ET AL., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 129 (9th ed. 1980)).
\item \textsuperscript{88} Id.
\item \textsuperscript{89} See e.g., Wernsing v. Department of Human Services, 427 F.3d 466, 469 (7th Cir. 2005) ("in disparate treatment litigation . . . the employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age, or religion"); Ward v. Post-Tribune Pub., Inc., No. 97-4048, 1998 WL 516786, at *3 (7th Cir. July 23, 1998) (unpublished op.) (stating "Title VII does not require discharges to be supported by just cause"); Smith v. Equitrac Corp., 88 F. Supp. 2d 727, 7 (S.D. Tex. 2000) (to conflate "unfair, capricious, arbitrary, ill-considered" or "irrational" "employment decisions with unlawful decisions based on discriminatory animus would "impermissibly convert Title VII into a 'just cause' employment statute for protected groups").
\item \textsuperscript{90} The Sixth Circuit has applied the Smith "reasonably relied on particularized facts" rule to other employment discrimination statutes. See Burks v. Yellow Transportation, Inc., 258 Fed. Appx. 867, 875 (6th Cir. 2008) (unpublished op.) (Title VII and § 1981 race discrimination claims); Larocque v. City of Eastpointe, 245 Fed. Appx. 531, 537-38 (6th Cir. 2007)
\end{enumerate}
\end{footnotesize}
Hypothetical 2) applying the Sixth Circuit rule to an imaginary (and admittedly farfetched) Title VII case.

Joe is a good employer. He owns a widget manufacturing company that employs 20 workers. Joe pays his employees well and has never been accused of violating the employment discrimination laws. Joe has one quirk: he is obsessed with astrology. He often makes decisions based on the astrological advice contained in the newspaper. When the column has said, “Buy some recycled paper,” he did so. When it said “You could support and encourage the arts,” he gave a donation to the local arts council. When the column said, “Look your best,” he got a haircut. When the column said, “Read something with a positive ecological orientation,” he read Al Gore’s book, _Earth in the Balance: Ecology and the Human Spirit_. When it said, “Commission a portrait,” he did so. Joe often talked with his employees about his horoscope (unpublished op.) (Title VII retaliation claim); Haughton v. Orchid Automation, 206 Fed. Appx. 524, 532-33 (6th Cir. 2006) (unpublished op.) (Title VII and § 1981 race discrimination claims); Joostberns v. United Parcel Services, Inc., 166 Fed. Appx. 783, 794-95 (6th Cir. 2006) (unpublished op.) (FMLA claim); Braithwaite v. Timken Co., 258 F.3d 488, 494 (6th Cir. 2001) (Title VII, § 1981 and § 1985 race discrimination claims). Furthermore, at least one other court has rejected the Seventh Circuit’s “honest belief” rule and approved of the Sixth Circuit’s criticism of that rule. See Obike v. Applied EPI, Inc. No. Civ. 02-1653, 2004 WL 741657, at *5 (D. Minn. Mar. 24, 2004).

91 The hypothetical is not _that_ farfetched. In early 2009, a Salzburg, Austria insurance company posted an advertisement in newspapers seeking applicants for part-time jobs in sales and management. The company only wanted workers born under certain star signs (Aquarius, Aries, Capricorn, Leo and Taurus). The company contended that a statistical study indicated that these employees were the best workers. Mail Foreign Services, _We Only Employ Workers Born Under Specific Star Signs, Says Insurance Company_ (Feb. 4, 2009), http://www.dailymail.co.uk/news/worldnews/article-1135643/We-employ-workers-born-specific-star-signs-says-insurance-company.html

92 All of the above were actual examples of advice given on an internet site dealing with astrology. http://www.adze.com/Horoscopes/sunsign.html
and his decisions. Since he was such a good employer, the employees good-naturedly put up with Joe's one idiosyncrasy.

However, one day Joe came to work visibly shaken. He had read in the astrological column that he must avoid working with Geminis and that they would be bad for his business. Joe informed his employees about the astrological advice and reluctantly told Todd that he had to terminate him because he was a Gemini. Todd protested the decision, pointing out that Joe was acting irrationally. Joe acknowledged that Todd had been doing a good job and gave him a generous severance benefit but Joe insisted that he leave the premises immediately. Todd was African-American. Todd filed an employment discrimination claim, alleging that he had been fired because of his race.

Under normal Title VII jurisprudence, the employer should prevail in this Hypothetical. The employer's reason for terminating the plaintiff was improper, stupid, and immoral. But racial discrimination did not motivate Joe's decision. Therefore, the employer cannot be liable under the employment discrimination laws.93

An improper, stupid, immoral, decision does not violate the employment discrimination laws, so long as the employer does not discriminate because of the employee's membership in one of the protected groups. The Supreme Court has made this clear in Hazen Paper Co. v. Biggins.94

In Biggins, the plaintiff Walter Biggins, age 62, claimed that the employer violated the

93 Presumably, the astrological signs are distributed evenly among various population groups. Therefore, the plaintiffs terminated because of their astrological sign would not be able to recover under a disparate impact theory.

ADEA and the Employee Retirement Income Security Act of 1974 (ERISA)\textsuperscript{95} when it allegedly terminated him in order to prevent his pension benefits from vesting. According to the plaintiff, the employer terminated him only a few weeks before he reached the ten-year vesting mark.\textsuperscript{96} The First Circuit found that the employer’s action violated the ADEA because the trial court jury could have reasonably found that “age was inextricably intertwined with the decision to fire [respondent]. If it were not for [respondent’s] age, sixty-two, his pension rights would not have been within a hairbreadth of vesting. [Respondent] was fifty-two years old when he was hired; his pension rights vested in ten years.”\textsuperscript{97}

The Supreme Court would have none of it. Age was “analytically distinct” from years of service.\textsuperscript{98} A younger employee could have greater seniority with a particular employer than an older employee. Firing an employee because he was close to the ten-year vesting mark was not firing him “on the basis of age.”\textsuperscript{99}

The Court acknowledged that firing an employee to prevent his pension benefits from vesting violated § 510 of the ERISA.\textsuperscript{100} But such an action did not violate the ADEA. The

\textsuperscript{95} See 29 U.S.C. §1140 (stating that it is unlawful to discriminate against anyone for exercising rights under an employee benefits plan “or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . .”).

\textsuperscript{96} Biggins, 507 U.S. at 606-07.

\textsuperscript{97} Id. at 607 (quoting Biggins v. Hazen Paper Co., 953 F.2d 1405, 1412 (1st Cir. 1992), \textit{vacated and remanded}, 507 U.S. 604 (U.S. 1993)).

\textsuperscript{98} Id. at 611.

\textsuperscript{99} Id. at 612.

\textsuperscript{100} Id. (citing 29 U.S.C. § 510).
ADEA simply required an employer to “ignore an employee's age.”\textsuperscript{101} The statute did not “specify further characteristics that an employer must also ignore.”\textsuperscript{102} The Court stated:

Although some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing an employee is improper in any respect, see McDonnell Douglas Corp. v. Green . . . (employer must have “legitimate, nondiscriminatory reason” for action against employee), this reading is obviously incorrect. For example, it cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA.\textsuperscript{103}

Thus, an employer can have an unreasonable reason for firing an employee. In our hypothetical, Title VII requires the employer to ignore Todd's race. The statute does not require the employer to ignore the employee's astrological sign. Under \textit{Biggins}, the employer Joe should prevail.

However, under the Sixth Circuit's test the plaintiff Todd would presumably prevail. The employer's belief that Geminis would be bad for him would not be “reasonable.” This would be one ground for failing the Sixth Circuit's test. Similarly, any responsible investigation would determine that Geminis are not more likely than other employees to harm employers.

\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} Id.
In essence, the Sixth Circuit's test shifts the burden of proving a lack of discriminatory intent onto the employer. But this is clearly improper under Title VII jurisprudence. The ultimate burden of proving discrimination remains with the plaintiff.

The Sixth Circuit's test is impractical as well. The test is difficult to apply and the Chrysler v. Smith case demonstrates this. The Smith panel was split, not because the judges disagreed about the elements of the test, i.e., that the employer had to show a “reasonable” belief, but about how to apply the test. The majority believed that Chrysler had engaged in improper stereotyping in believing that narcolepsy involved being tired and experiencing fatigue. The panel majority referred to a medical treatise that stated that narcolepsy involved lapsing into a “sleep-like state” for brief intervals. According to the majority, this sleep-like state was not fatigue or tiredness. The concurrence, on the other hand, referred to the same treatise and

\[104\] See Michaels, supra note 4, at 2669 (stating that “[a]llowing a claim to survive summary judgment just because the employer's reason might not have been reasonable in the eyes of the court does not hold an employee to the burden of persuasion”).


107 Id.
found that narcolepsy did involve “uncontrollable sleepiness.”

Where does this leave employers in the Sixth Circuit? Presumably, when Chrysler was investigating whether Smith had lied on the application forms, it had a duty to consult the correct medical treatise. If it failed to do so, the employer would have been uninformed about narcolepsy and, under the Sixth Circuit’s analysis, liable for failing to conduct a “reasonable” investigation. However, even if Chrysler had examined a medical treatise, as evidenced by the split between the majority and the concurrence on the issue, the employer could reach the wrong conclusion. Both the majority and the concurrence consulted the same medical text, but arrived at different conclusions regarding whether it was improper stereotyping for an employer to believe narcoleptics suffered from fatigue.

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108 Id. at 810 (Clay, J., concurring) (quoting 1 ISSERBACHER ET AL. HARRISON’S PRINCIPLES OF INTERNAL MEDICINE 129 (9th ed. 1980)).
It is entirely proper for the *Smith* court to be concerned about stereotyping, but the court misapplied that concept. In the *Smith* case, the employer contended that it genuinely believed that the employee had lied. The employer had not engaged in any stereotyping that disabled people or people with narcolepsy were more likely to lie. If the employer *had* operated under the assumption that narcoleptics were liars, then the employer’s belief would have been based on improper stereotypes and would not have been a legitimate, nondiscriminatory reason. Another example of stereotypical decision-making would be if the employee had disclosed that he had narcolepsy and the employer made employment decisions based on a stereotypical view of that affliction. For example, suppose the employer had refused to employ an individual with narcolepsy because the employer had a stereotypical view that narcoleptics always fall asleep and therefore cannot perform the job. That would not be a legitimate, nondiscriminatory reason and would therefore not fall under the “honest belief” rule.109 But believing that narcolepsy involves tiredness and fatigue and therefore concluding that the employee had lied when he denied suffering from fatigue, is not such “stereotyping.”110

Carrying the “astrological” hypothetical further, suppose that the employer had made a

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109 See EEOC v. Francis W. Parker School, 41 F.3d 1073, 1078 (7th Cir. 1994) (plaintiff must demonstrate that employer's justification for its action "was a pretext for a stereotype-based rationale"); c.f., Bellaver v. Quanex Corp., 200 F.3d 485, 492-93 (7th Cir. 2000) (in mixed-motive case, evidence that employer "may have relied on impermissible stereotypes of how a woman should behave" may show employer's discriminatory intent).

110 It would also be unlawful if the employer discriminated on the basis of disability in the manner in which it carried out the investigation. Suppose the employer in *Smith* exhaustively investigated all allegations of employee lying, but only perfunctorily investigated allegations that disabled (or narcoleptic) employees lied. If disabled or narcoleptic employees routinely lost their jobs under such a regime, they would have a legitimate claim of disability discrimination. The plaintiff in *Smith*, however, had not produced evidence of discriminatory investigations.
mistake about the terminated employee Todd being a Gemini. Suppose that Todd was actually born under the sign of Cancer. In Todd's race discrimination suit, could the court find for the plaintiff because the employer did not look in the files to find out his true birthday? Presumably the Sixth Circuit would say yes because the employer had not made a reasonable investigation. But this is improperly transforming Title VII into a “just cause” regime. Assuming that the employer genuinely believed that Todd was a Gemini and honestly believed that Geminis would be harmful to him, the employer is not liable under Title VII. There is no evidence of discrimination against Todd based on race.

To summarize, under the Seventh Circuit's “honest belief” rule, the employers in Hypotheticals 1 and 2 would not be liable under the employment discrimination laws. Their honest belief in the employee's theft (Hypothetical 1) and the employee's toxic astrological sign (Hypothetical 2) shows their true motivation. The plaintiffs have failed to show that their sex or race motivated the terminations. Under the Sixth Circuit's “reasonable reliance on particularized facts” standard, however, the employers in Hypothetical 1 and 2 may be liable under the employment discrimination laws. In Hypothetical 1, a court may find that the employer had not made a reasonable investigation and had not relied on particularized facts. In Hypothetical 2, a court could find that the employer had failed to investigate whether Geminis would truly be bad for the employer's life and business.

The Sixth's Circuit's “reasonable reliance on particularized facts” test impermissibly shifts the burden of proof to the employer to prove a lack of discriminatory intent and partially transforms Title VII into a “just cause” regime. The Seventh Circuit's pure honest belief rule is a better construction of the statute.
IV. THE PARTICULAR PROBLEMS OF DISCRIMINATORY
WAGE CLAIMS – HYPOTHETICALS 3 AND 4

Hypothetical 3) Carl, an owner of a small company, believes in good faith that Geminis are the most productive people. Carl, therefore, pays Geminis more than similarly situated non-Geminis. As a result of Carl's policy, Phil, an African-American and a Capricorn, is getting paid less than Caucasian Gemini Mike, even though they perform the same tasks. Phil sues under the employment discrimination laws, challenging the unequal pay.

Hypothetical 4) The facts are the same as Hypothetical 3 but, instead, it is Prudence, a female employee who is getting paid less than Mike because Prudence is a Sagittarius. Prudence also sues under the employment discrimination laws.

Title VII bans discrimination “with respect to . . . compensation [based on an] individual's race, color, religion, sex, or national origin. . . .”\textsuperscript{111} Thus, courts will deal with Hypothetical 3 in the same manner as Hypothetical 2, discussed above. In Title VII compensation cases not involving gender, courts will generally use the allocation of the burdens of proof developed in the line of cases beginning with \textit{McDonnell Douglas Corp. v. Green}.\textsuperscript{112} Although Carl cannot pay Phil less because he is black, if the fact finder determines that Carl is paying Phil less because Phil is a Capricorn and Mike is a Gemini, the court will enter judgment for Carl, the employer. Carl is not discriminating in regard to Phil's compensation because of Phil's "race."

Cases involving sex-based claims of compensation discrimination, such as the claim in Hypothetical 4, present greater difficulties. Plaintiffs may possibly proceed under both Title VII


\textsuperscript{112} 411 U.S. 792 (1973). \textit{See} 1 \textsc{Barbara T. Lindemann & Paul Grossman, Employment Discrimination Law} 1285 (4th ed. 2007) ("Courts generally have applied the allocation of proof articulated in \textit{McDonnell Douglas Corp. v. Green} and later cases to wage discrimination lawsuits brought under a disparate treatment theory"). For a short discussion of \textit{McDonnell Douglas} and its progeny, see \textit{supra} text accompanying notes 12–19.
and The Equal Pay Act of 1963 (EPA) and the interplay between the two statutes is somewhat complex. The EPA preceded Title VII by a year. The EPA provides:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

Equal Pay Act claims do not proceed under the McDonnell Douglas burden shifting analysis. Instead, “EPA claims proceed in two steps.” The plaintiff first establishes a prima facie case by proving that the employer paid an employee of the opposite gender at a greater rate for performing substantially equal work. If the plaintiff establishes a prima facie case, “the burden of persuasion then shifts to the defendant to prove that wage disparity was justified by one of [the aforementioned statutory defenses].” If the employer fails to meet its burden of proof by establishing one of the four affirmative defenses, then the plaintiff will prevail.

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114 1 LINDEMAN & GROSSMAN, supra note 112, at 1212.


117 Id.

118 Id.

119 Id.
To illustrate the differences between Title VII and the EPA, the following hypotheticals will be useful. Hypothetical A. Prentice, an Asian American, brings suit under Title VII, alleging that his employer Y Corporation, is paying him less than similarly situated whites because of his race. At trial, the employer presents evidence that the employer is paying Prentice less than a similarly situated white employee because Prentice’s attendance record is spottier than the white employee’s record. At the conclusion of the trial, the factfinder is unsure whether Prentice’s race or the spotty attendance motivated the pay differential.

Under McDonald Douglas v. Green and its progeny, the employer Y Corporation will prevail. Prentice has presented a prima facie case by proving that he is a member of a protected class and that Y Corporation is paying him less than a similarly situated white employee. The employer Y Corporation has then met its burden of presenting evidence of a legitimate nondiscriminatory reason, i.e., Prentice’s spotty attendance record. The burden then shifts back to Prentice to establish that the employer’s reason is actually a pretext for discrimination. The ultimate burden of proving discrimination remains with the plaintiff. Since, at the conclusion of the trial, the fact-finder does not know the reason for the pay differential, the plaintiff has failed to meet his burden and the court will enter judgment for the defendant Y Corporation.

Hypothetical B. Now assume that Penny brings a suit under the Equal Pay Act, alleging that she is being paid less than a similarly situated male employee. Otherwise, the facts are the same as Hypothetical A. The employer presents evidence regarding Penny’s allegedly spotty attendance record. At the conclusion of the trial, the factfinder does not know whether the pay differential was motivated by Penny’s gender or by her allegedly spotty attendance record.
Under the Equal Pay Act, Penny will prevail. Penny has established a prima facie case of pay discrimination under the EPA by showing that she is being paid less than a male who performs equal work. Because Penny has elucidated a prima facie case under the EPA, the burden of persuasion shifts to the defendant to prove that the compensation is caused by a “factor other than sex.” Because, at the conclusion of the trial, the factfinder does not know what motivated the decision, the employer has failed to meet its burden of proof and the court will enter judgment for Penny.

Suppose, however, that Penny had brought a Title VII claim rather than (or in addition to) an EPA claim, challenging the pay differential. Some courts would handle Penny's Title VII claim like any other Title VII claim, as in Hypothetical A (above). Other courts, however, would treat the claim differently, because of their interpretation of the Bennett Amendment.

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Congress enacted Title VII only a year after the Equal Pay Act. Since Title VII would also ban discrimination in compensation based on an employee's gender, Congress enacted the Bennett Amendment to “resolve any potential conflicts between Title VII and the Equal Pay Act.”121 Congress wanted to ensure that courts and administrative agencies consistently interpreted both statutes.122 The Bennett Amendment to Title VII states:

It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].123

In County of Washington v. Gunther,124 the Supreme Court discussed the meaning and interpretation of the Bennett Amendment. In Gunther, female guards in the county jail alleged that the county paid them substantially less than male guards and that “the pay differential was attributable to intentional sex discrimination.”125 The plaintiffs alleged that the county had conducted a survey of outside markets and the worth of the jobs and set the pay scale for female guards, but not the male guards, at a level lower than that warranted by the survey.126

The district court dismissed the female guards claims regarding unequal pay. The district court held that because of the Bennett Amendment, “a sex-based wage discrimination claim

122 Id.
125 Id. at 164.
126 Id. at 165.
cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act."¹²⁷ Since the male guards supervised more than ten times as many prisoners as the female guards, the female guards could not satisfy the equal work standard.

The Supreme Court rejected the district court's holding, finding that Title VII sex-based wage discrimination claims were not limited to claims of equal pay for equal work. The Court stated that the Bennett Amendment was intended “to incorporate only the affirmative defenses of the Equal Pay Act into Title VII."¹²⁸ The Court, however, stated that it was not deciding how “sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense [i.e., the “factor other than sex defense”] of the Equal Pay Act . . .

In the wake of Gunther, the lower courts have taken different approaches in structuring Title VII sex-based compensation suits. Some courts have found that the effect of the Bennett Amendment is to incorporate the Equal Pay Act's allocation of burdens of proof into Title VII sex-based wage claims. In Kouba v. Allstate Insurance Co.,¹³⁰ the Ninth Circuit, in a Title VII suit, held that the employer had to plead and prove the existence of a “factor other than sex,” if he

¹²⁷ Id.

¹²⁸ Id. at 168.

¹²⁹ Id. at 171. See also id. at 166 n.8 (stating that the Court was not laying "down standards for the future conduct of [the] litigation") and id. at 181 (concluding that the Court was not deciding “the precise contours of lawsuits challenging sex discrimination in compensation under Title VII”).

¹³⁰ 691 F.2d 873 (9th Cir. 1982).
plaintiff established a prima facie case. The Sixth and Eighth Circuits take the same approach. On the other hand “[o]ther courts, including the Fifth and Seventh Circuits, have not abandoned the distinctions between Title VII and the EPA. . . .” These courts would use the normal Title VII burden-shifting analysis for Title VII sex-based wage claims.

Courts also differ on the nature of the EPA’s “factor other than sex” affirmative defense. A great deal of litigation has arisen under this catch-all defense. According to one treatise “[t]he Second, Fourth, Sixth, Ninth, and Eleventh circuits, but not the Seventh, have suggested that this defense applies only to considerations adopted to serve legitimate business purposes.”

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131 Id. at 875.

132 1 LINDEMANN & GROSSMAN, supra note 112, at 1296 (stating that “the Sixth, Eighth and Ninth circuits have concluded that 'the Bennett Amendment is a way to say that EPA liability automatically leads to Title VII liability for gender-based wage discrimination'”) (quoting Rodriguez v. SmithKline Beecham Pharmaceutical, 62 F. Supp. 2d 374, 382 (D.P.R. 1999)).

133 Id. at 1297.

134 See id. (stating that “these courts leave Title VII's burden-shifting analysis unchanged”).

135 This defense is the most important of the EPA's four affirmative defenses. The first three affirmative defenses (i) – (iii) “are rarely used” because these defenses “require a 'system.'” LEWIS & NORMAN, supra note 10, § 7.5, at 477.

136 1 LINDEMANN & GROSSMAN, supra note 112, at 1254.

137 Id. at 1255 (citing Beck-Wilson v. Principi, 441 F.3d 353 (6th Cir. 2006); Brinkley v. Harbour Recreation Club, 180 F.3d 598, 620 (4th Cir. 1999); Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 525 (2d Cir. 1992); Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1506 (11th Cir. 1988); EEOC v. J. C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1998); Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982) as requiring that the employer establish a legitimate business purpose and Fallon v. Illinois, 882 F.2d 1206, 1211 (7th Cir. 1989); Wernsing v. Department of Human Services, 427 F.3d 466 (7th Cir. 2005) as not imposing such
A good illustration of the issue is contained in *Price v. Lockheed Space Operations Co.* 138 an Equal Pay Act case in which the plaintiff appealed from a directed verdict in favor of the employer. In *Price*, the employer Lockheed, as part of the bidding process on a contract, had committed to NASA that it would not lower the compensation of employees below the salaries paid the employees by their prior employers. 139 In order to keep this commitment and keep the bid as low as possible, Lockheed decided to pay employees “precisely the same salary paid to that employee by the previous employer.” 140 The employer planned to gradually reduce the resulting inequities by making periodic salary adjustments. 141

In spite of receiving a greater pay adjustment than her colleagues, the plaintiff Cleatrice Price's salary was still less than twenty-two of her twenty-four colleagues, twenty of whom were males. Price claimed that this pay differential violated the EPA. 142

The Eleventh Circuit found that Price had established a prima facie case under the EPA by showing that Lockheed was paying her male colleagues in the same positions at a greater rate. 143 Therefore, the issue was whether Lockheed's policy of initially matching an employee's

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138 856 F.2d 1503 (11th Cir. 1988).
139 *Id.* at 1505–06.
140 *Id.* at 1506.
141 *Id.* at 1505.
142 *Id.*
143 *Id.*
prior salary constituted a “factor other than sex.”\textsuperscript{144}

The Eleventh Circuit rejected the notion that prior salary constituted a \textit{per se} factor other than sex because this would “perpetuate the traditionally unequal salaries paid to women for equal work.”\textsuperscript{145} The employer had to show that “other business reasons . . . explain[ed] the utilization of prior salary.”\textsuperscript{146}

In the case at hand, the evidence at trial had raised “two competing inferences, that the [employer] had discriminated on the basis of sex, and that there existed a reason other than sex for the continued wage disparity.”\textsuperscript{147} Furthermore, the evidence also created an inference that Lockheed had “acted too slowly in rectifying the admittedly inequitable salary paid to the plaintiff.”\textsuperscript{148} Therefore, the trial court had erroneously granted the employer a directed verdict.\textsuperscript{149}

The \textit{Price} court clearly placed the burden on the employer to establish a legitimate

\begin{itemize}
  \item [\textsuperscript{144}] \textit{Id.} at 1506.
  \item [\textsuperscript{145}] \textit{Id.}
  \item [\textsuperscript{146}] \textit{Id.}
  \item [\textsuperscript{147}] \textit{Id.}
  \item [\textsuperscript{148}] \textit{Id.}
  \item [\textsuperscript{149}] \textit{Id.}
\end{itemize}
business reason for pay inequities. Even if there was no intent to discriminate and the employer had a good faith reason for its belief that the wage differential was justified by a legitimate business reason, the employer may still be liable. If the court decided on remand that the use of prior salary was not justified by business reasons or even if, in light of the employer's business reasons, Lockheed was too slow in raising Price's salary, the employer would be liable.

Similarly, in *Kouba v. Allstate Insurance Co.*[^150] a Title VII case, the issue was whether the employer's use of an employee's prior salary to determine the employee's pay could constitute a “factor other than sex.” The court said that such factor had to be justified by an “acceptable business reason.”[^151] The requirement had to “effectuate some business policy.”[^152] The Ninth Circuit stated that, on remand, the district court would have to engage in a searching inquiry into the employer's practices. The district court should look at

1. whether the employer also uses other available predictors of the new employee's performance,
2. whether the employer attributes less significance to prior salary once the employee has proven himself or herself on the job, and
3. whether the employer relies more heavily on salary when the prior job resembles the job of sales agent.^[153]

The Ninth Circuit applied this EPA requirement in a Title VII suit.

Similarly, in *EEOC v. J.C. Penney Co.*[^154] a Title VII case, the Sixth Circuit has held that the factor other than sex defense, incorporated by the Bennett Amendment into Title VII, did not

[^150]: 691 F.2d 873 (9th Cir. 1982).

[^151]: *Id.* at 867.

[^152]: *Id.*

[^153]: *Id.* at 878.

[^154]: 843 F.2d 249 (6th Cir. 1988).
preclude a disparate impact claim. The statutory defense required that the employer show that the pay differential served a “legitimate business reason.”

On the other hand, the Seventh Circuit has rejected this reasoning. In *Wernsing v. Department of Human Services*, the court stated that the EPA dealt “exclusively with disparate treatment” and did “not have a disparate impact component.” The EPA did “not authorize federal courts to set their own standards of ‘acceptable’ business practices.” Indeed, under the employment discrimination laws, “the employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age, or religion.”

Supreme Court dicta from a 2005 ADEA case has strengthened the argument for the Seventh Circuit’s position. In *Smith v. City of Jackson*, the Supreme Court held that disparate impact claims were cognizable under the ADEA. In it analysis, the Court contrasted the ADEA with the EPA:

> We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the [EPA], Congress barred recovery if a pay differential was based “on any other facter”-reasonable or unreasonable-“other than sex.” The fact that Congress provided that employers could use only reasonable factors in

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155 *Id.* at 253.

156 427 F.3d 466 (7th Cir. 2005).

157 *Id.* at 469.

158 *Id.* at 468.

159 *Id.* at 469.

160 544 U.S. 228 (2005).

161 *Id.* at 232.
defending a suit under the ADEA is therefore instructive.\textsuperscript{162}

If this dicta regarding the EPA's allowance of "unreasonable" factors is followed by the courts, then the employer's good faith will provide a defense to a wage discrimination claim under the EPA or Title VII. However, some courts in the Second, Sixth, Ninth, and Eleventh Circuits continue to adhere to their view that the EPA's factor other than sex defense requires that the employer establish a legitimate business reason.\textsuperscript{163}

\textsuperscript{162} Id. at 239 n.11.

\textsuperscript{163} For recent district court cases from the Second Circuit, see Ebbert v. Nassau County, No. 05-CV-5445, 2009 WL 935812, at *5 (E.D.N.Y. Mar. 31, 2009) ("[T]o establish the 'factor other than sex' defense, an employer must also demonstrate that it had a legitimate business reason for implementing the gender-neutral factor that brought about the wage differential." (quoting Belfi v. Prendergast, 191 F.3d 129, 136 (2d Cir. 1999)); Bronzini v. Classic Security LLC, No. 08 Civ. 475, 2009 U.S. Dist. Lexis 2865, at *20 (S.D.N.Y. Jan. 15, 2009) (same); Moore v. Webster Central School District, No. 06-CV-6566, 2007 U.S. Dist. Lexis 69142, at *16 (Sept. 17, 2007) (same). For relatively recent cases from the Sixth Circuit, see Vehar v. Cole National Group, Inc., 251 Fed. Appx. 993, 1000 (6th Cir. 2007) (the EPA's factor other than sex provision "does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason." (quoting EEOC v. J.C. Penney Co., 843 F.2d 249, 253 (6th Cir. 1988) (same); Beck-Wilson v. Principi, 441 F.3d 353, 365 (6th Cir. 2006) (same); Mills v. Mason Consolidated School Dist., No. 07-CV-14648, 2008 WL 4457808, at *12 (E.D. Mich. Sept. 30, 2008) (same); Turner v. Grande Pointe Healthcare Community, No. 1:05 CV 1327, 2007 WL 2601386, at *9 (N.D. Ohio Sept. 10, 2007) (same). For a relatively recent district court case from the Ninth Circuit, see Clements v. Oregon Dept. of Corrections, No. 04-CV-1417-BR, 2006 WL 1888907, at *5 (D. Or. July 7, 2006) ("The term ‘based on a factor other than sex’ does not mean literally any other factor, but rather a factor that, at a minimum, was adopted for a neutral legitimate business reason; \emph{i.e.}, superior experience, education, and ability may justify pay disparities that are not based on gender"). For a relatively recent Eleventh Circuit case, see Prewett v. Alabama Dep't of Veteran Affairs, 533 F. Supp. 2d 1160, 1176 (M.D. Ala. 2007) (stating that “[t]he Eleventh Circuit has strongly suggested that the factor other than sex must be business-related") (citing Price v. Lockheed Space Operation Co., 856 F.2d 1503, 1506 (11th Cir. 1988) and Glenn v. General Motors Corp., 841 F.2d 1567, 1571 (11th Cir. 1988)).

Recent cases in the Fourth Circuit are not as clear-cut. In 1999, the Fourth Circuit in Brinkley v. Harbour Recreation Club, 180 F.3d 598 (4th Cir. 1999), used language arguably imposing a requirement that the factor other than sex be business related. \textit{See id.} at 615 ("To survive summary judgment, the plaintiff must produce evidence. . .that controverts the defendant's evidence that a legitimate ground justifies the pay difference\) (emphasis added).
However, some Fourth Circuit district courts in subsequent cases citing *Brinkley* have seemed to back away from the implications of *Brinkley*'s language. For example, the court in McDougal-Wilson v. Goodyear Tire & Rubber Co., 427 F. Supp. 2d 595, 605 (E.D.N.C. 2006) cited *Brinkley* for the simple proposition that a plaintiff’s EPA claim fails if the pay differential is based on a factor other than sex. In Haught v. Louis Berkman, LLC, No. 5:03CV109, 2004 U.S. Dist. LEXIS 28457, at *13 (N.D. W. Va. Nov. 18, 2004), the court quoted *Brinkley*'s "legitimate ground" language, but interpreted that language as requiring that the pay differential not be "motivated by sexism." *Id.* Thus it is not completely clear whether there is an EPA business-related requirement in the Fourth Circuit.
Thus to return to Hypotheticals 3 and 4, in Hypothetical 3, Phil will not be able to recover in his race-based claim against Carl because, under Title VII, he has not proven a case of intentional racial discrimination. Carl is paying him less, not because of his race, but because of his astrological sign.

Prudence in Hypothetical 4, however, may have more success, depending on the court's approach. If she brings an EPA claim, she will win in those courts that require that the "factor other than sex" serve a legitimate business purpose. Presumably, those courts would find that paying a Sagittarius at a greater salary does not serve a legitimate business purpose.

Furthermore, a court that requires the employer to demonstrate business necessity to establish a "factor other than sex" may interpret the Bennett Amendment to incorporate this requirement into Title VII sex-based wage claims. Under this approach, Prudence could bring a successful Title VII claim. Prudence would not be successful with courts that refuse to interpret the Bennett Amendment as incorporating a "legitimate business reason" requirement into Title VII.

V. BONA FIDE OCCUPATIONAL QUALIFICATIONS AND AN EMPLOYER'S GOOD FAITH – HYPOTHETICALS 5 THROUGH 8

In disparate treatment cases, courts have traditionally distinguished between an employer's motive and intent. While the burden is on the plaintiff to prove the employer's discriminatory intent, i.e., an intent to treat employees differently because of the employee's membership in a protected group, the plaintiff does not have to demonstrate malice or ill will on
the part of the employer. In *Automobile Workers v. Johnson Controls, Inc.*,\(^{164}\) the employer barred all female employees (except infertile workers) from working on jobs that exposed them to lead. Presumably, the policy was not intended to reenforce stereotypes about women, but, instead, to protect unborn children against birth defects. The Supreme Court stated that, “the absence of a malevolent motive [did] not convert a facially discriminatory plan into a neutral policy with a discriminatory effect.”\(^{165}\) Since the policy was facially discriminatory and the employer was unable to establish a BFOQ, *i.e.*, that gender related to the actual duties of the job, the policy violated Title VII’s ban on sex discrimination.\(^{166}\)

Lower courts have applied the same rule, *i.e.*, that a beneficent motive does not excuse a discriminatory action. In *Vaughn v. Edel*,\(^{167}\) the plaintiff’s manager instructed the plaintiff’s supervisor not to confront the plaintiff, a black female, about her work. The manager wanted to avoid provoking her into filing a discrimination suit.\(^{168}\) The manager also gave the plaintiff higher performance evaluations than she deserved because he did not want to spend the time “going through the procedures which could result from a lower ‘rating’ and which could lead to terminations.”\(^{169}\) Although the plaintiff had performance problems, she was not criticized or

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\(^{165}\) *Id.* at 199.

\(^{166}\) *Id.* at 211.

\(^{167}\) 918 F.2d 517 (5th Cir. 1990).

\(^{168}\) *Id.* at 521.

\(^{169}\) *Id.* at 520.
counseled in order to avoid "rocking the boat" and "because she was black." ¹⁷₀

Subsequently, the company decided to eliminate two positions as a cost-saving measure. The company terminated the plaintiff and one other employee, a white male. The company chose the plaintiff because she was the lowest ranked performer in her position.¹⁷¹ The United States Magistrate found that the company's "failure to counsel and to criticize [the plaintiff] because she was black and later firing her as one of the 'lowest rated' contract analysts was not racial discrimination." ¹⁷²

The Fifth Circuit reversed the magistrate's decision. The court acknowledged that race had not directly motivated the company's decision to terminate the plaintiff. However, the company had treated the plaintiff differently because of her race when it failed to criticize her for her unsatisfactory work and failed to counsel her. As a result, the company failed to give the plaintiff "the same opportunity to improve her performance. . .as it did its white employees."¹⁷³ Although the company's initial decision not to criticize the plaintiff "may have appeared beneficial" and the reasons "benign," she nonetheless suffered intentional racial discrimination.¹⁷⁴ Benign motives do not excuse intentional discrimination.¹⁷⁵

¹⁷₀ Id.
¹⁷¹ Id.
¹⁷² Id.
¹⁷³ Id. at 522.
¹⁷⁴ Id. at 523.
¹⁷⁵ See also Hopkins v. Price Waterhouse, 825 F.2d 458, 468 (D.C. Cir. 1987) (unlawful intentional discrimination can be found even if the employer's motivation was “unconscious”), aff'd in part, rev'd in part and remanded, 490 U.S. 228 (1989); Wilson v. Southwest Airlines Co.
Cases decided under the Fair Housing Act ("FHA"), Title VIII of the Civil Rights Act of 1968,¹⁷⁶ are also relevant. Courts in FHA cases use the analytical framework borrowed from Title VII cases.¹⁷⁷ In FHA disparate treatment cases, courts have stated that the plaintiff does not have to prove that the discriminatory purpose was malicious or invidious, but only that the defendant treated her differently because of a protected characteristic.¹⁷⁸

Recently, however, the Supreme Court has departed from its normal rule that the employer’s benign motivation or good faith will not be a defense to a facially discriminatory policy. In Kentucky Retirement Systems v. EEOC,¹⁷⁹ the EEOC alleged that a state retirement system’s disability retirement benefits plan violated the ADEA. Under Kentucky's plan, workers in hazardous positions, such as policemen and firemen, could retire after working for 20 years or after working for 5 years and reaching age 55. An employee's pension would be calculated by multiplying the years of service times 2.5 percent times the employee's final pre-retirement pay.

517 F. Supp. 292, 304 n.28 (N.D. Tex. 1981) ("Even in cases of unintentional discrimination, the absence of bad motive or intent does not redeem employment practices with forbidden discriminatory consequences").


¹⁷⁷ Community Services, Inc. v. Wind Gap Municipal Authority, 421 F. 3d 170, 177 (3d Cir. 2005); see also id. at n.5 (citing cases).

¹⁷⁸ Id. See also Community Household Trust v. Dep't of Consumer and Regulatory Affairs, 257 F. Supp. 2d 208, 225 (D.D.C. 2003) (defendant's discriminatory purpose does not have to be invidious or malicious); Horizon House Developmental Services, Inc. v. Township of Upper Southampton, 804 F. Supp. 683, 696 (E.D. Pa. 1992) ("In order to prove intentional discrimination it is not necessary to show an evil, or hostile motive. It is a violation of the FHAA to discriminate even if the motive was benign or paternalistic"), aff'd, 995 F.2d 217 (3d Cir. 1993).

If an employee in a hazardous position became disabled under certain circumstances, the employee could retire immediately. In calculating the disabled employee's benefits, the plan added "imputed" years to the actual years that the employee worked. The plan granted disabled employees imputed years equal to "the number of years that the disabled employee would have had to continue working in order to become eligible for normal retirement benefits, i.e., the years necessary to bring the employee up to 20 years of service or to at least five years of service when the employee would turn 55 (whichever number of years is lower)."\(^{180}\)

Thus, in some circumstances, the plan would compensate individual workers differently because of differences in their ages. The dissent gave the example of two employees, one aged 55 and one aged 45, who both have the same annual salary and five years of service. If they are both injured in the same accident, the fifty-five year old will only be credited with his actual five years of service, while the forty-five year old will receive an additional five years of imputed service. Thus the forty-five year old's pension will be based on ten years of service while the fifty-five year old's will be computed on the basis of five years. If they each made $60,000.00 per year prior to the accident, the forty-five year old will receive $1,250.00 per month, while the fifty-five year old will only receive $625.00 per month.\(^{181}\)

Nevertheless, in spite of this age-based differential treatment, the Court majority found that the pension plan did not violate the ADEA. The Court relied on *Hazen Paper Co. v. Biggins.*\(^{182}\) In *Hazen*, the plaintiff, aged 62, brought a disparate treatment claim. The plaintiff

\(^{180}\) *Id.* at ____, 128 S.Ct. at 2365.

\(^{181}\) *Id.* at ____, 128 S.Ct. at 2373 (Kennedy, J., dissenting).

alleged that the employer had violated the ADEA when it terminated him after 9½ years in order to prevent his benefits from vesting at ten years of service. The Hazen Court held that although pension status and years of service “typically go hand and hand with age,” “the two concepts were nonetheless ‘analytically distinct.’”\(^{183}\) The plaintiff’s termination, if based on pension status, “was not based on a 'prohibited sterotype' of older workers.”\(^{184}\)

The Kentucky Retirement Systems majority, citing Hazen, stated that pension status and age were “analytically distinct.”\(^{185}\) The provisions at issue were designed to help disabled employees by treating them as if they “had become disabled after, rather than before, [they] had become eligible for normal retirement benefits.”\(^{186}\) The plan factored age into the benefits calculation “only because the normal retirement rules themselves permissively include age as a consideration.”\(^{187}\)

In some circumstances, the pension plan could work to the benefit of a disabled older employee.\(^{188}\) The Court gave the example of two disabled employees, aged 40 with fifteen years of service and aged 45 with ten years of service. Because the plan would impute five years to the


\(^{184}\) *Id.* at ____, 128 S.Ct. at 2366-67 (quoting *Hazen Paper*, 507 U.S. at 612).

\(^{185}\) *Id.* at _____. 128 S.Ct. at 2367 (quoting *Hazen Paper*, 507 U.S. at 611).

\(^{186}\) *Id.* at ____, 128 S.Ct. at 2368.

\(^{187}\) *Id.* at _____. 128 S.Ct. at 2368.

\(^{188}\) *Id.* at ____, 128 S.Ct. at 2369.
forty-year-old and ten years to the forty-five-year-old, the older worker benefits more.\textsuperscript{189} According to the Court, “that fact helps to confirm that the underlying motive is not an effort to discriminate ‘because of...age.’”\textsuperscript{190}

Furthermore, according to the Court, the plan did “not rely on any of these sorts of stereotypical assumptions that the ADEA sought to eradicate.”\textsuperscript{191} The plan did not engage in any stereotyping regarding the capacity of older employees to work relative to the capacity of younger employees. Although the plan did assume that disabled workers would have worked to the age of pension eligibility and no further, “these ‘assumptions’ d[id] not involve age-related stereotypes, and they appl[ied] equally to all workers, regardless of age.”\textsuperscript{192}

Finally, the Court was concerned about costs to the plan. The Court stated:

[U]nless Kentucky were severely to cut the benefits given to disabled workers who are not yet pension eligible (which Kentucky claims it will do if its present Plan is unlawful), Kentucky would have to increase the benefits available to disabled, pension-eligible workers, while lacking any clear criteria for determining how many extra years to impute for those pension-eligible workers who already are 55 or older. The difficulty of finding a remedy that can both correct the disparity and achieve the Plan’s legitimate objective – providing each disabled worker with a sufficient retirement benefit, mainly, the normal retirement benefit that the worker would receive if he were pension-eligible at the time of disability – further suggests that this objective and not age “actually motivated” the Plan.\textsuperscript{193}

The Court concluded that the plan did not “on its face, create treatment differences that [we]re

\textsuperscript{189} Id. at ____, 128 S.Ct. at 2369.

\textsuperscript{190} Id. at ____, 128 S.Ct. at 2369.

\textsuperscript{191} Id. at ____, 128 S.Ct. at 2369.

\textsuperscript{192} Id. at ____, 128 S.Ct. at 2369.

\textsuperscript{193} Id. at ____, 128 S.Ct. at 2369.
‘actually motivated' by age."\(^{194}\)

The Court did limit the reach of its holding. The Court stated that the opinion did not disturb the rule that an age-based facially discriminating policy is sufficient to bring an ADEA disparate treatment claim.\(^ {195}\) According to the Court, this was a "special case," dealing with "differential treatment based on pension status, where pension status...itself turns, in part, on age."\(^ {196}\)

The dissent stated that the plan was a pure, straightforward case of disparate treatment on the basis of age in violation of the ADEA. The plan made age a factor "in a formal, facial, deliberate and explicit manner, to the detriment of older employees..."\(^ {197}\) because the plan caused, in some circumstances, a benefit disparity based on a disabled employee's age.\(^ {198}\)

The dissent stated that the majority opinion did not contain a "clear rule of law."\(^ {199}\) According to the dissent, the majority had misconstrued Hazen Paper Co. v. Biggins, inasmuch that Biggins involved a policy that was neutral on its face.\(^ {200}\) The majority had violated the principle that, "An otherwise discriminatory employment action cannot be rendered lawful

\(^{194}\) Id. at ___, 128 S.Ct. at 2369.

\(^{195}\) Id. at ___, 128 S.Ct. at 2369.

\(^{196}\) Id. at ___, 128 S.Ct. at 2369-70.

\(^{197}\) Id. at ___, 128 S.Ct. at 2371 (Kennedy, J., dissenting).

\(^{198}\) Id. at ___, 128 S.Ct. at 2372-73 (Kennedy, J., dissenting).

\(^{199}\) Id. at ___, 128 S.Ct. at 2373 (Kennedy, J., dissenting).

\(^{200}\) Id. at ___, 128 S.Ct. at 2375-76 (Kennedy, J., dissenting) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)).
because the employer's motives were benign."\textsuperscript{201} As stated by the Court in \textit{Automobile Workers v. Johnson Controls, Inc.}, "the absence of a malevolent motive does not convert a facially discriminatory plan into a neutral policy with a discriminatory effect."\textsuperscript{202} Accordingly, the majority was incorrect in requiring the plaintiff to show an improper motive in addition to a facially discriminatory policy.\textsuperscript{203} Even assuming that a benign motive could save a facially discriminatory plan, the plan at issue did not meet this test. The dissent pointed out that the employer's brief had referred to the plaintiff Charles Lickteig, aged 61, in the following manner:

An employee in Mr. Lickteig's position has had an extra 21 years to devote to making money, providing for himself and his family, saving funds for retirement, and accruing years that will increase his retirement benefits. Thus, the forty-year-old employee is likely to need more of a boost.\textsuperscript{204}

Thus, in effect, the plan rested on the stereotypical assumption that a younger employee "had more productive years of work left in him at the time of his injury than Lickteig [the older employee] did."\textsuperscript{205}

The dissent said that the Court's concerns about cost to Kentucky were understandable.

\textsuperscript{201} \textit{Id.} at \____, 128 S.Ct. at 2377 (Kennedy, J., dissenting).

\textsuperscript{202} \textit{Id.} at \____, 128 S.Ct. at 2377 (Kennedy, J., dissenting) (quoting \textit{Automobile Workers v. Johnson Controls}, 499 U.S. 187, 199 (1991)).

\textsuperscript{203} \textit{Id.} at \____, 128 S.Ct. at 2374 (Kennedy, J., dissenting) (stating that "Hazen Paper makes quite clear that no additional proof of motive is required in an ADEA case once the employment policy at issue is deemed discriminatory on its face").

\textsuperscript{204} \textit{Id.} at \____, 128 S.Ct. at 2378 (Kennedy, J., dissenting) (quoting Brief for Petitioners 23).

\textsuperscript{205} \textit{Id.} at \____, 128 S.Ct. at 2378 (Kennedy, J., dissenting).
However, an employer could not give benefits to employees in a discriminatory manner.\footnote{Id. at ___, 128 S.Ct. at 2378-79 (Kennedy, J., dissenting).}

Does the Court's opinion in \textit{Kentucky Retirement Systems} reverse the traditional rule that an employment discrimination plaintiff only has to show disparate treatment based on membership in a protected group and does not have to make an additional showing that the underlying motivation was based on ill will? The Court's language limiting the reach of the opinion to the special care of “pension status”\footnote{Id. at ___, 128 S.Ct. at 2369-70.} may mean that a benign motive will not be a defense to disparate treatment claims in any other circumstances.

With this background, it is possible to answer the problems posed by Hypotheticals 5-8.

Hypothetical 5 – Employer Earl, owner/president of Epsilon Company, loves and respects women and has a strong desire to promote their advancement in the workplace. Over three-quarters of Earl's workforce is composed of women, except for the manual labor department. Earl, however, refuses to hire women for that department. Earl believes that women are fully capable of performing manual labor but does not want women in the department because the jobs are dirty, demeaning, and dead-end. Furthermore, hiring women into the manual labor department would not serve Earl's goal of promoting women's advancement in the workplace. Earl has an opening in that department and Pam applies for the position. Earl refuses to hire Pam, hires a less qualified male, and offers Pam a management trainee position. Pam refuses the management trainee position and sues Epsilon Company for sex discrimination.

Employer Earl's good motivations do not justify his refusal to hire Pam for the manual labor position. Since Earl is overtly discriminating on the basis of gender, his only recourse is establish a bona fide occupational qualification ("BFOQ").\footnote{Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 200 (1991) (stating that “an explicit gender-based policy is sex discrimination. . .and thus may be defended only as a BFOQ").} Courts interpret the BFOQ defense
“narrowly.” To establish such a defense, the employer must show that the employee's gender (or national origin, religion, or age) “relate[s] to ability to perform the duties of the job.” Furthermore, the at-issue job duties must involve “those aspects of a woman's job-related activities that fall within the 'essence' of the particular business.”

In Hypothetical 5, employer Earl's desire to promote the advancement of women in the workplace does not involve job-related duties going to the essence of the Earl's business. Therefore, Earl cannot establish a BFOQ and he has violated the law by forbidding Pam to work in the manual labor department.

Earl may try to rely on Kentucky Retirement Systems v. EEOC. As in Kentucky Retirement Systems, Earl's discriminatory treatment of Pam did not rest on discriminatory stereotypes and was, in fact motivated by a desire to advance Pam (and women generally) in the workplace. However, if the Kentucky Retirement Systems Court is taken at its word, the opinion will be limited to the special case of pensions and Earl will not be able to rely on the case. Pam will probably prevail.

209 Id. at 201.

210 The statutory BFOQ defense is not available as a defense to discrimination based on race or color. Burwell v. Eastern Airlines, Inc., 633 F.2d 361, 370 n.13 (4th Cir. 1980).

211 Id. at 204.

212 Id. at 206.


214 Earl may also try to argue that he has not taken a "materially adverse" employment action against Pam. In Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), a Title VII retaliation case, the Supreme Court held that, in order to state a retaliation claim, a plaintiff must show that the employer took a "materially adverse" action. Id. at 57. In
Hypothetical 6 – Fred owns a small trucking company and has an opening for a truck driver position. Fred, in good faith, believes that women are naturally better drivers. Paul, an experienced truck driver, applies for the position but Fred refuses to hire him because he is a man. Paul sues for sex discrimination.

In Hypothetical 6, the employer is again facially discriminating and will therefore have to establish a BFOQ. Notwithstanding the employer's good faith belief in women's better motoring skills, the employer will not be able to establish a BFOQ. The BFOQ defense requires an employer to prove that sex relates to be the actual ability to perform the duties of the job in the context of a retaliation claim, a materially adverse action is defined as one that would have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” Id. The court distinguished between “trivial harms,” “petty slights,” and “minor annoyances,” and, on the other hand, actions that were likely to deter employees from filing charges with the EEOC. Id. at 68.

While the Burlington Northern “materially adverse” action test dealt with retaliation cases, some courts have applied a similar “materially adverse” test to claims of discrimination based on membership in one of the protected groups. See, e.g., Douglas v. Donavan, 559 F.3d 549, 554-56 (D.C. Cir. 2009) (employer's failure to recommend employee for a Presidential Rank award not a materially adverse action); de la Rama v. Illinois Dept. of Human Services, 541 F.3d 681, 685-86 (7th Cir. 2008) (employer's retention in its records of 24 unauthorized absences not a materially adverse action). An employer could attempt to argue that, in Hypothetical 5, Pam did not suffer a materially adverse action because Earl offered Pam a more desirable management trainee position. However, the statute speaks in terms of “discrimina[tion],” meaning different treatment. Title VII of the Civil Rights Act of 1964, § 703(a), 42 U.S.C. § 2000e-2(a) (2000). Pam desired the manual labor position and the employer should not discriminate in regard to hiring for that position. The failure to hire Pam should be considered a “materially adverse” action, even if the employer offered her an objectively more desirable job.

Indeed, Burlington Northern gives support to the notion that Pam has suffered a materially adverse action. Although the Court promulgated what it termed an “objective” test, Burlington Northern, 548 U.S. at 68, the Court also introduced a subjective element. The Court stated that a retaliatory acts significance would “depend upon the particular circumstances” and that “context matter[ed].” Id. at 69. “Expectations” were a factor and while a work schedule change may make little difference to many employees, it “may matter enormously to a young mother with school age children.” Id. Thus Pam in Hypothetical 5 can make a strong argument that Earl's failure to hire her for the manual labor position constituted a materially adverse action since she subjectively desired the job and did not want the management trainee position. Indeed, a failure to hire should always be considered a materially adverse action. The only exception would be if the employer refused to hire an applicant for Job A, but offered the applicant Job B, a
question, not the employer's belief that gender relates to that ability.

Hypothetical 7 – Gary owns a warehouse and has an opening. Positions in the warehouse require that employees lift very heavy loads on a continuous basis. Gary, in good faith, believes that men are stronger and therefore hires only men for warehouse positions. Patricia applies for work at the warehouse but Gary refuses to hire her because she is a woman. Patricia files a claim of sex discrimination.
Hypothetical 7 presents a similar situation to Hypothetical 8, except here the employer Gary's good faith belief is an accurate stereotype – men are usually physically stronger than women. However, Gary cannot discriminate in this manner and cannot establish a BFOQ because being a man is not required for the essential duties of a warehouse worker. As stated by the Supreme Court in City of Los Angeles, Department of Water & Power v. Manhart, an employer cannot discriminate based on generalizations, even generalizations that are true. As the Supreme Court said:

[Title VII] precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

While the employer may impose a job-related strength test as a requirement for the warehouse job, the employer may not exclude all women simply because men are stronger than women.


\[216\] Id. at 708.

\[217\] If a neutral strength test had a significant disparate impact on females, the policy would be subject to a disparate impact challenge. The employer would need to prove that the policy was job related and consistent with business necessity. See Zaman v. City of Cleveland, 906 F.2d 209 (6th Cir. 1990) (finding that physical test for firefighter candidates was sufficiently job related).
Hypothetical 8 – Employer Hank owns a bar and has an opening for a bartender position. Hank believes, in good faith, that if he hires a female for the position all his customers will leave and his company will go bankrupt. Polly applies for the position but Hank refuses to hire her because she is a woman. Polly files suit for sex discrimination under the employment discrimination laws. At trial, Hank is able to establish both that he genuinely believed all his customers would leave and that the customers actually would leave.

In Hypothetical 8, the employer believes that the customers will leave him if he hires a woman. This belief will not justify discrimination, even if the belief is accurate and the employer faces bankruptcy if he hires a woman.\textsuperscript{218} Customer preference is not a defense to

\textsuperscript{218} The exclusion of a protected group because customers will leave and the employer faces bankruptcy if he hires a woman is different from the hypothetical presented by Justice Scalia in UAW v. Johnson Controls, Inc., 499 U.S. 187, 224 (1991) (Scalia, J., concurring). In that case, Justice Scalia stated that he believed that a shipping company could establish a BFOQ and “refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive.” \textit{Id}. In Justice Scalia’s hypothetical, the employer’s cost concerns are not engendered by the sexism or racism of customers or employees, but by the nature of the job itself. For further discussion of Justice Scalia’s hypothetical, see Ernest F. Lidge III, \textit{Financial Costs as a Defense to an Employment}
discrimination. The reason for this is obvious. Allowing customer preferences to excuse discrimination would merely “serve to entrench the sexual stereotypes Congress sought to address in passing Title VII” and it was “these very prejudices the Act was meant to overcome.”

V. CONCLUSION

The role of an employer's good faith in a case alleging intentional discrimination depends on what type of case it is. The first set of cases involve an employer's good faith mistake regarding the employee's conduct. Assuming that the employer's belief regarding the employee's conduct is completely genuine and the employer has no discriminatory intent, then the employer

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219 I Lindemann & Grossman, supra note 112, at 422 (absent privacy concerns, “courts will generally not permit mere customer preference to support a BFOQ defense”); see also 29 C.F.R. § 1604.2(a) (2008) (preferences of fellow workers or customers cannot justify a BFOQ); Lidge, supra, at 11 n.52 (listing cases).


should prevail. The employee has failed to prove that the employer based its decision on the employee's race, color, gender, national origin, religion, age, or disability. However, under the Sixth Circuit's "reasonable reliance on particularized facts" rule, the employee may prevail if the employer's actions are found not to be "reasonable." The Sixth Circuit's rule improperly places the burden of proof on the employer to prove the reasonableness of its action and partly (and improperly) transforms Title VII into a "just cause" regime.

The same analysis applies to a different set of cases, when the employer's reason for an employment decision is not business-related, such as firing the employee because of the employee's astrological sign. The employer should prevail under these circumstances. The employer is not acting because of the employee's race, gender or other protected characteristic. Again, however, the employer's action may not be able to survive the Sixth Circuit's "reasonable reliance on particularized facts" test. A court may find that the employer's reliance on the employee's astrological sign was not "reasonable."

Cases involving allegations of discriminatory pay practices are more complex. Courts will use normal Title VII principles (discussed in the preceding two paragraphs) in dealing with allegations of unequal pay based on race, color, national origin, religion, age, or disability.

However, some courts may treat sex-based pay claims differently. Under the Equal Pay Act, if the employee elucidates a prima facia case, the employer has the burden of proving the existence of a "factor other than sex." Some courts go further and require that the employer justify the "factor other than sex" defense with a business reason. These courts are willing to delve into the "legitimacy" of the employer's rationale. Furthermore, some courts incorporate these principles and the EPA's burden of proof scheme into Title VII, requiring employers to
prove a business reason for a pay differential in a Title VII sex-based pay claim. Under these circumstances, an employer's failure to prove a legitimate business reason for the sex-based pay differential would be fatal to the employer's case, regardless of the employer's good faith.

Other courts maintain that the EPA's "factor other than sex" defense only requires that the employer demonstrate that the decision was not based on the employee's gender. Assuming that there is no proof of sex-based animus, the employer's good-faith belief that the pay differential is justified by a factor other than sex will be sufficient for the employer to escape liability.

Finally, in cases involving an employer's overt, facial discrimination, the employer's good faith belief that one sex is better at the job will not justify excluding women (or any other protected group) from the position. The employer will not be able to establish a BFOQ, which requires that gender (or national origin, religion, or age) be directly related to the ability to do the job. Similarly, an employer's benign motive for not hiring women or another protected group will not provide a defense; nor will an employer's good faith belief that hiring a member of a protected group will bankrupt his business.

The bottom line is that when an employer intentionally and overtly discriminates against a protected group, the employer's good faith will not provide a defense to a finding of liability. On the other hand, if an employer does not intentionally discriminate, but makes, in good faith, a stupid or even irrational mistake, or relies on a characteristic totally unrelated to business, the employer's good faith should provide a defense to a charge of intentional discrimination. The employer has simply not discriminated on the basis of sex, race, color, national origin, religion, age, or disability. Nonetheless, some courts will second guess the employer's decisions and this improperly engenders a partial transformation of the employment discrimination statutes into a
“just cause” regime.