53

The Misuse of the Business Judgment Rule in Employment Discrimination Cases

Robert S. Mantell*

Introduction

Employees alleging discrimination sometimes argue that an employer's justification for an adverse action is so irrational that a jury could find such explanation to be pretext. In response to such arguments, the courts respond in a varying and highly contradictory fashion. On the one hand, some courts assert that a factfinder is free to infer that an employer's reason is pretextual if the reason is irrational. "The reasonableness of the employer's reasons may of course be probative of whether they are pretexts."[1] On the other hand, many courts—often the same ones—claim they are not to evaluate the reasonableness of an employer's decisions. "Courts may not sit as super personnel departments, assessing the . . . rationality . . . of employers' business decisions."[2]

Both principles cannot be true.

The notion that a court must not assess the rationality of an employer's decisions—an extreme form of the business judgment rule—is "of course" erroneous.[3] The pretext inquiry requires the factfinder to determine whether an employer's reasons are unworthy of credence.[4] "[T]he reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation."[5]

Juries are supposed to evaluate the rationality of an employer's justification for signs that it is not the actual reason that motivated the employer. "[T]he honesty of an employer's statement is often revealed by analyzing its reasonableness; the more objectively reasonable the

* The author practices plaintiff-side employment law in Boston, MA, and may be reached at RMantell@TheEmploymentLawyers.com. He expresses gratitude to Caryn Groedel, Esq. and Lisa Sahli, Esq. for their assistance in the preparation of this article.

1. Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).
2. Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009).
3. *See Loeb*, 600 F.2d at 1012 n.6; Fuentes v. Perskie, 32 F.3d 759, 765 & n.8 (3d Cir. 1994).
4. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).
5. Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 577 (6th Cir. 2003).

explanation, the more likely it honestly motivated the challenged employment action."[6]

However, the extreme business judgment rule has the effect of granting employers immunity from scrutiny simply because they characterize their decision as a business judgment—it is horrible public policy and an invitation to lawlessness.[7] This judicially created safe harbor for discriminatory businesses affords undue deference for which there is no statutory basis and disrupts the enforcement of civil rights laws, which in large part depends upon proof that an employer's reasons are pretextual. This sense of lawlessness is verified by the fact that rejection of irrationality evidence is contrary to multiple Supreme Court precedents.[8]

The business judgment rule leads to an intolerable asymmetry, whereby employers are free to explain their decisions as fair and reasonable, but employees are precluded from contesting that characterization.[9] The error is compounded when the business judgment rule is applied during summary judgment proceedings, ignoring evidence of irrationality when all proof and legitimate inferences should be considered in a manner favoring the employee.[10] Jurors are the appropriate arbiters of these issues, as they are often called upon to evaluate the reasonableness of employers' discretionary business decisions under various employment laws.[11]

The business judgment rule arose from the legitimate notion that an irrational job decision is not necessarily discriminatory. However, through decades of limiting gloss and parsed quotations, the rule has congealed into an extreme version that restricts the ability of factfinders to scrutinize an employer's asserted explanations to determine if they are pretextual.[12] It prevents plaintiffs from getting to a jury and fairly trying their cases.

---

6. Duncan v. Fleetwood Motor Homes, 518 F.3d 486, 492 (7th Cir. 2008).

7. The business judgment rule, as applied in employment discrimination cases, is different from a rule with the same name that applies to lawsuits brought by shareholders challenging the decisions of a company's board of directors involving day-to-day corporate governance. The corporate law version of the rule presumes that boards of directors act with due care, in good faith, and in honest belief that actions are taken in the best interest of the company. City of Ft. Myers Gen. Emps. Pension Fund v. Haley, 235 A.3d 702, 717 & n.48 (Del. 2020). No court appears to claim that the same presumption applies to employment discrimination law. However, the fact that both rules share the same name raises concerns that the doctrines may be confused for one another.

8. *See infra* part II.

9. *See infra* part V.

10. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

11. *See infra* part IV.

12. *See infra* part III (examining First Circuit decisions, showing the transition from an accurate principle to an extreme, unprincipled exclusion of otherwise competent evidence).

This article concludes that the extreme form of the business judgment rule should be rejected. There is no justification for courts to declare that employers are free to act irrationally, either in jury instructions or court decisions, unless the courts also affirm that an employer's irrational explanation may support a finding of pretext. A description of the employer's freedoms is misleading unless it is combined with an acknowledgment that the exercise of such freedom may raise a suspicion of bias.[13]

I. At-Will Employment and Proof of Pretext

As a general rule, employment is presumed to be at will.[14] An employer is free to fire an at-will employee for almost any reason or no reason—even if the reason articulated by the employer is unfair, arbitrary, or untrue.[15] Employers with an at-will workplace have significant discretion to choose among job applicants and establish workplace conditions and policies.[16]

Against this background, legislatures have granted employees, including at-will employees, various statutory protections. For example, the law prohibits an employer from terminating employees because of race or gender.[17] Employers are not free to exercise their usual discretion in establishing terms and conditions of the workplace if their motive is discriminatory.[18]

In the course of litigating discrimination claims, employers are afforded the opportunity to explain their decisions and offer supporting evidence.[19] When an employer's asserted reason for an adverse action

13. *E.g.*, *In re* Lewis, 845 F.2d 624, 633–34 (6th Cir. 1988) (instructing the jury both that "[y]ou are not to substitute your judgment for Sears' business judgment," and "you may consider the reasonableness or lack of reasonableness of Sears' stated business judgment . . . in determining whether Sears discriminated against [the plaintiff]").

14. Day v. Staples, Inc., 555 F.3d 42, 58 (1st Cir. 2009).

15. *See* Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 606 (2008); White v. Blue Cross & Blue Shield of Mass., 809 N.E.2d 1034, 1039 (Mass. 2004); Richey v. Am. Auto. Ass'n, 406 N.E.2d 675, 678 (Mass. 1980).

16. *See* Carroll v. Xerox Corp., 294 F.3d 231, 242 (1st Cir. 2002); Kolodziej v. Smith, 412 Mass. 215, 221–222 (1992).

17. 42 U.S.C. § 2000e-2(a)(1); Mass Gen. Laws ch. 151B, § 4(1) (2022).

18. Hishon v. King & Spaulding, 467 U.S. 69, 75 (1984); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

19. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506–07 (1993).

is not the real reason,[20] that is evidence of pretext that can, in turn, support a finding of discrimination.[21]

Pretext constitutes "affirmative evidence of guilt," and a jury may "infer the ultimate fact of discrimination from the falsity of the employer's explanation."[22] Pretext evidence can be "quite persuasive."[23] "Resort to a pretextual explanation is like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct."[24] Evidence of a minimal prima facie case, and proof of pretext, by themselves, are generally sufficient to permit a reasonable jury to find discrimination.[25]

Evidence of pretext takes many forms, and plaintiffs are not restricted to proving pretext in any particular way.[26] Evidence of pretext is probative, even though it does not explicitly address the presence of discriminatory bias.[27] For example, pretext for age discrimination can be found where an employer blames an employee for things the employer knows are not the employee's fault.[28] While proof of pretext

20. Plaintiff-employees need not provide proof of a knowingly false or sham reason in order to prove pretext. Reasons driven by internalized stereotypes, implicit biases, or mythology may lead an employer to articulate reasons for an adverse action that it "believes," yet are not the actual reasons for the action. Thomas v. Eastman Kodak, 183 F.3d 38, 58 (1st Cir. 1999); Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 Ala. L. Rev. 741, 756 (2005) ("An employer who had acted with unconscious bias would have no motivation to cover up her reasons for acting.").

21. Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003).

22. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (quoting Wright v. West, 505 U.S. 277, 296 (1992)).

23. *Id.*

24. Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d 1061, 1069 (3d Cir. 1996) (quoting Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995)); *see also* Bronston v. Rees, 773 F.2d 742, 745 (6th Cir. 1985) (guilt may be inferred from a criminal defendant's improbable alibi).

25. *Reeves*, 530 U.S. at 147–48 (a plaintiff's "prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated"); Lipchitz v. Raytheon Corp., 751 N.E.2d 360, 368 (Mass. 2001).

26. Patterson v. McLean Credit Union, 491 U.S. 164, 217 (1989); Watkins v. Tregre, 997 F.3d 275, 284 (5th Cir. 2021) (quoting Brown v. Wal-Mart Stores E., L.P., 571 F.3d 571, 578 (5th Cir. 2020)) (plaintiff may rely on "any evidence that casts doubt on the credence" of the employer's asserted reason).

27. Thomas v. Eastman Kodak Co., 183 F.3d 38, 57–58 (1st Cir. 1999) (rejecting the district court's requirement that, to survive summary judgment, a plaintiff must allege "at least one piece of evidence that explicitly referred to the plaintiff's membership in a protected class," quoting Thomas v. Kodak, 18 F. Supp. 2d 129, 138 (D. Mass. 1998)); Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 50 N.E.2d 778, 794 (Mass. 2016) (evidence of pretext proves discrimination, "even if that evidence does not show directly that the true reasons were, in fact, discriminatory"); Abramian v. President & Fellows of Harv. Coll., 731 N.E.2d 1075, 1085 (Mass. 2000).

28. *Reeves*, 530 U.S., at 144–47.

is not required in every case, it is an important type of circumstantial evidence that can establish discrimination.

II. Pretext May Be Found where the Reason Given by an Employer for an Adverse Action Is Irrational

One of the primary ways in which we determine whether an explanation is truthful is whether it makes logical sense. That is how employers evaluate the truthfulness of their employees, and it is only fair that the explanations of employers be likewise examined. We are permitted to assume that businesses will generally not act in an arbitrary manner.[29] Thus, when an employer, faced with reasonable choices, opts for a ridiculous one, that properly raises a suspicion that other hidden motives are in play.[30]

Even though employers have the right to provide an at-will employee with a false or irrational reason for an adverse employment action, that very act can establish pretext.[31] The Supreme Court has acknowledged, on multiple occasions, that irrational decisions may be scrutinized as evidence of discrimination. The Supreme Court has recognized that an employer's "illogic" can prove pretext.[32] "[I]mplausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination."[33] A jury can, and should, examine whether an employer's reason is "unworthy of credence."[34]

Justice O'Connor asserted, "Reliance on an unreasonable [nondiscriminatory] factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination."[35] Justice Alito wrote, "Of course, when an employer claims to have made a decision for a reason that does not seem to make sense, a factfinder *may* infer that the employer's asserted reason for its action is a pretext for unlawful discrimination."[36]

---

29. Furnco Constr. Corp v. Waters, 438 U.S. 567, 577 (1978) ("[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."); *see also* Shager v. Upjohn Co., 913 F.2d 398, 403 (7th Cir. 1990) ("[I]rrational employers . . . are rare.").

30. DeJesus v. WP Co. LLC, 841 F.3d 527, 534 (D.C. Cir. 2016) ("[A] jury could properly conclude that the [employer's] proffered reason is so unreasonable that it provokes a suspicion of pretext.").

31. *Id.* at 147; Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 259 (1981) (citing Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979)) (stating that while it may be lawful for an employer to misjudge an applicant's qualification, doing so may nevertheless be probative of pretext); Cort v. Bristol-Myers Co., 431 N.E.2d 908, 911, 911 n.6 (Mass. 1982).

32. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284 (1976).

33. Purkett v. Elem, 514 U.S. 765, 768 (1995).

34. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000).

35. Smith v. City of Jackson, 544 U.S. 228, 253 (2005) (O'Connor, J., concurring) (emphasis in original).

36. Young v. United Parcel Serv., Inc., 575 U.S. 206, 233 (2015) (Alito, J., concurring).

Circuit courts, echoing Supreme Court precedent, recognize that pretext may be found where the employer's reason for discharge is irrational, such as when the reason is:

- foolish or unfair,[37]
- riddled with error,[38]
- unreasonable,[39]
- idiosyncratic,[40]
- implausible or incoherent,[41]
- lacking good cause,[42]
- incompetent by comparison to usual operation,[43]

37. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 169 (1st Cir. 1998) ("[D]oubts about the fairness of an employer's decision . . . may be probative of whether the employer's reasons are pretexts for discrimination."); Wichmann v. Bd. of Trs. of S. Ill. Univ., 180 F.3d 791, 804–05 (7th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000) ("[A] defendant cannot escape the fact that a jury must use its good common sense in addressing how much, if at all, the foolishness or unfairness of the employer's decision weighs in the evidence of pretext."); Fuentes v. Perskie, 32 F.3d 759, 765 & n.8 (foolish or imprudent decisions can be found pretextual).

38. *In re* Lewis, 845 F.2d 624, 633 (6th Cir. 1988) ("Lewis has the burden of demonstrating that Sears' stated reasons are pretextual. One way for Lewis to do this is to show that Sears' asserted business judgment is so 'ridden with error that defendant could not honestly have relied upon it'" (quoting Lieberman v. Grant, 630 F.2d 60, 65 (2d Cir. 1980))); Duncan v. Fleetwood Motor Homes, 518 F.3d 486, 492 (7th Cir. 2008) ("We are mystified, then, that Fleetwood would say Duncan could not perform the job of material handler when he was doing exactly that on a daily basis without incident or criticism."); Dister v. Cont'l Grp., Inc., 859 F.2d 1108, 1116 (2d Cir. 1988) ("The distinction lies between a poor business decision and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's 'business decision' was so lacking in merit as to call into question its genuineness.").

39. Velez v. Thermo King de P.R., Inc., 585 F.3d 441, 452 (1st Cir. 2009) ("[P]laintiff has made a showing . . . that Thermo King's stated explanation for firing Velez and not the others so lacks rationality that it supports the inference that the real reason for firing Velez was his age."); Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979) ("[T]he reasonableness of the employer's reasons may of course be probative of whether they are pretexts."); *Duncan*, 518 F.3d at 492 ("We have explained that the honesty of an employer's statement is often revealed by analyzing its reasonableness; the more objectively reasonable the explanation, the more likely it honestly motivated the challenged employment action."); Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 577 (6th Cir, 2003) ("[T[he reasonableness of a business decision is critical in determining whether the proffered judgment was the employer's actual motivation.").

40. *Loeb*, 600 F.2d at 1012 n.6 ("The more idiosyncratic or questionable the employer's reason, the easier it will be to expose as a pretext, if indeed it is one.").

41. Taite v. Bridgewater State Univ., Bd. of Trs., 999 F.3d 86, 94 (1st Cir. 2021).

42. Bullard v. Sercon Corp., 846 F.2d 463, 466 (7th Cir. 1988) ("The fact that a black worker is fired or laid off without good cause does not establish racial discrimination. It may in some cases be evidence of discrimination.").

43. *Fuentes*, 32 F.3d at 765 & n.8 ("Of course, a decision foolish, imprudent, or incompetent by comparison to the employer's usual mode of operation can render it implausible, inconsistent, contradictory or weak [as to establish pretext].").

- an excuse to blame the plaintiff for matters not in her control,[44]
- an overreaction,[45]
- a suspicious "misjudging."[46]

These holdings apply the common-sense notion that an irrational explanation may be a cover-up for a hidden, unlawful reason. The necessary corollary is that juries are positioned to assess the rationality of an employer's justification and determine the issue of pretext using this information. Indeed, this principle is foundational for our civil rights laws. If a jury is precluded from assessing the reasonableness of an employer's decisions to discern pretext, it is improperly hamstrung in its duty to ferret out and remedy discrimination.

III. The Business Judgment Rule Has Evolved to Improperly Limit Scrutiny of the Employer's Reason

Despite the fact that the Supreme Court and many circuit courts have stated that factfinders should scrutinize the reasonableness of employer's reasons for evidence of pretext, some courts have acted to preclude such scrutiny. It is instructive to see how the business judgment rule has evolved over time, from clarifying gloss involving the at-will doctrine to an extreme form that precludes all inquiry into the rationality of the employer's personnel decisions. Perhaps the best example of this evolution is the First Circuit, whose decisions have adopted more restrictive versions of the rule over time, without explanation or justification.

A. An Irrational Reason Is Not Necessarily a Discriminatory Reason

An early expression of the business judgment rule made the simple point that an employer is free to terminate employees for any reason except a discriminatory reason. In *Mesnick v. General Electric Co.*, the Court stated:

> The [Age Discrimination in Employment Act of 1967 (ADEA)] does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, *so long as the decision to fire does not stem from the person's age*. Courts may not sit as super personnel departments,

44. Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140–42 (1st Cir. 2012); *Wexler*, 317 F.3d at 576–77 (employer knew that its store's declining sales were not plaintiff's fault).

45. Kelley v. Corr. Med. Servs., 707 F.3d 108, 118 (1st Cir. 2013) (jury could consider a termination based on failure to obey an instruction to be a calculated, and thus pretextual, overreaction); Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285, 291 (7th Cir. 1999) (employee's termination for eating chips from an open bag in an employee common area found to be too trivial to justify termination).

46. Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 169 (1st Cir. 1998) ("[A]n employer's 'misjudging' of an employee's qualifications, while not necessarily dispositive, 'may be probative of whether the employer's reasons are pretexts for discrimination.'" (quoting Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992))).

> assessing the merits—or even the rationality—of employers' *nondiscriminatory* business decisions.[47]

As the complete quote shows, *Mesnick* limits inquiry into the rationality of an employer's decisions only if that decision is "nondiscriminatory."[48] It was making the point that an irrational reason is not necessarily a discriminatory one.

The *Mesnick* formulation, properly understood, has no bearing on the question of what evidence is admissible or sufficient to permit a reasonable jury *to find* the existence of discrimination. It simply stands for the basic principle that, assuming no discrimination has occurred, an employer's irrational decision will not render it liable under the anti-discrimination laws.[49]

Other First Circuit decisions parrot a version of the business judgment rule that applies only to employment actions already established to be nondiscriminatory. "Whether a termination decision was wise or done in haste is irrelevant, *so long as the decision was not made with discriminatory animus*."[50] Likewise, "an employer is free to terminate an employee for any *nondiscriminatory reason*, even if its business judgment seems objectively unwise."[51] Again, these statements assert the uncontroversial idea that, where the employer's actual reason for termination is non-discriminatory, it does not matter if the asserted reason is irrational.[52] An irrational decision is not necessarily discriminatory.

However, confusion arises from these many statements, because a disconnect arises when court decisions considering *whether* there is evidence of discrimination, appear to rely on principles that *assume* there is no discrimination. This disconnect, repeated in many decisions over many years, leads to the impression that courts are placing their thumbs on the scale in favor of employers—implying that irrationality evidence is not evidence of pretext, without actually saying so. As will be shown, later decisions make this point overtly.

---

47. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991) (emphasis added and internal citation and quotation marks are omitted) (quoting Freeman v. Package Mach. Co., 865 F.2d 1331, 1341 (1st Cir. 1988).

48. *Id.*

49. *Id.*

50. Rivera-Aponte v. Res. Metropol #3, Inc., 338 F.3d 9, 11 (1st Cir. 2003) (emphasis added).

51. Webber v. Int'l Paper Co., 417 F.3d 229, 238 (1st Cir. 2005) (emphasis added).

52. Yet another example of this analysis is *Smith v. Stratus*, which held that a Title VII remedy will not be afforded "to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision." Smith v. Stratus Comput., Inc., 40 F.3d 11, 16 (1st Cir. 1994) (emphasis added); *see also* Brandt v. Fitzpatrick, 957 F.3d 67, 79 (1st Cir. 2020) ("Even the most blatant unfairness cannot, on its own, support a Title VII claim . . . unless facts and circumstances indicate that discriminatory animus, or bias, was the reason for the decision." (internal quotations omitted)).

B. Assuming the Employer Is Motivated by an Earnest Reason

In a similar vein, the First Circuit has held that once it is determined that an employer actually thought it had just cause to fire an employee, then, at that point, it is not appropriate to second-guess that employer's judgment.

> *[A]s long as the [employer] believed that the [employee's] performance was not up to snuff* . . . it is not our province to second-guess a decision to fire him as a poor performer. That is true regardless of whether, to an objective observer, the decision would seem wise or foolish, correct or incorrect, sound or arbitrary.[53]

But once again, this puts the cart before the horse. It is incongruous to cite to a principle that assumes an employer has an earnest belief in a legitimate reason for termination in a summary judgment decision intended to ferret out what the employer believed in the first place.

At summary judgment, it is incumbent on the court to disregard the testimony of the employer's witnesses regarding what they "believed," as a jury would be free to discredit that evidence.[54] "[M]otivation is itself a factual question."[55] A jury need not believe the decision-maker's self-serving, exculpatory, and purely subjective description of his/her state of mind, and so, such evidence is accorded no weight at summary judgment.[56] Therefore, it is not ordinarily possible at the Rule 56 stage to establish the employer's predicate "belief" in its own reason, in order to apply the business judgment rule to that context.

Even if an employer's genuine belief could be established at the summary judgment stage, this iteration of the business judgment rule then wrongly assumes, for at least two reasons, that an employer's earnest belief in poor performance insulates it from liability. First, it is possible for an employer to harbor an unlawful, discriminatory motive,

---

53. Dávila v. Corporación De P.R. Para La Difusión Pública, 498 F.3d 9, 17 (1st Cir. 2007) (emphasis added).

54. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150–51 (2000); Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1243–44 (1st Cir. 2016) (refusing to credit decisionmakers' self-serving testimony that they terminated an employee based on legitimate reasons and that they would have done so even in the absence of discriminatory motive).

55. Hunt v. Cromartie, 526 U.S. 541, 549 (1999); *see also* Lewis v. U.S. Steel Corp., No. 2:18-CV-00428-RDP, 2019 U.S. Dist. LEXIS 214849, at *11 (N.D. Ala. Dec. 13, 2019) ("So while [a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct, the jury must decide if that is what occurred; *i.e.*, that Defendant held a good-faith belief as opposed to constructing a false narrative to mask a discriminatory motive." (internal quotations and citations omitted)).

56. *Reeves*, 530 U.S. at 151; Sartor v. Ark. Nat. Gas Corp., 321 U.S. 620, 628 (1944) ("[T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." (quoting Sonnentheil v. Christian Moerlein Brewing Co., 172 U. S. 401, 408 (1889))).

even if it is also motivated by other legitimate factors.[57] Therefore, an employer's belief in one cause for an adverse action does not preclude the finding of another, illegal, contributing cause, which may be evidenced by a ridiculous justification.[58]

Second, an employer's truly held belief in an employee's poor performance may actually be the result of unlawful bias or stereotype, which has the effect of falsely elevating the significance of an employee's weaknesses.[59] Stereotypes warp decision-makers' perspectives, and impair their ability to evaluate subjective and even objective information.[60] Where an employer's reason is irrational, a jury must be permitted to use that fact to assess whether the employer's perceptions are skewed by bias, even if the employer's belief is honestly held.[61] Consequently, this version of the business judgment rule contains blind spots and doctrinal contradictions that render it unusable for summary judgment analysis in most scenarios.

C. Choice between Reasonable Alternatives

Some expressions of the business judgment rule appear to stand for the principle that there is no evidence of discrimination when an employer chooses among reasonable courses of action.[62] Indeed, the term "business judgment" itself seems to imply that the employer has selected among two or more business-viable alternatives.[63]

However, this characterization ignores the whole point of irrationality evidence, whereby a jury may conclude that the employer had reasonable alternatives and instead, opted for a ridiculous one. An irrational choice is not properly considered a business judgment. While

57. Bostock v. Clayton County, 140 S. Ct. 1731, 1739, 1745 (2020).

58. *Id.*

59. Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36, 251 (1989) (plurality and concurring decisions) (employer's assessment of female employee's workplace demeanor was colored by unlawful gender bias, where she was told to act, dress, and present herself more femininely, and she needed to go to charm school); *id.* at 258 (White, J., concurring) (same); *id.* at 272–73 (O'Connor, J., concurring) (same); Smith v. Chrysler Corp., 155 F.3d 799, 806 (6th Cir. 1998) (noting, in an ADA case, honest belief doctrine will not be used to insulate a good faith decision of the employer that is based on stereotype and not facts).

60. Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014).

61. Given that bias itself can be irrational, it should come as no surprise that a discriminatory decision will reflect that irrationality. Healy v. N.Y. Life Ins. Co., 860 F.2d 1209, 1218 (3d Cir. 1988) ("[B]ias is irrational.").

62. Daumont-Colón v. Cooperativa de Ahorra y Crédito de Caguas, 982 F.3d 20, 32–33 (1st Cir. 2020) ("[M]ere questions regarding the employer's business judgment are insufficient to raise a triable issue as to pretext." (quoting Acevedo-Parilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140 (1st Cir. 2012))); Vélez-Ramírez v. Puerto Rico, 827 F.3d 154, 159 (1st Cir. 2016) ("[T]he ADA does not regulate merely unwise employment decisions and federal courts are not 'super-personnel departments' overseeing the American economy." (quoting Collazo-Rosado v. Univ. of P.R., 765 F.3d 86, 95 (1st Cir. 2014)).

63. Kidd v. Mando Am. Corp., 731 F.3d 1196, 1203, 1205–07 (11th Cir. 2013) ("And it is by now axiomatic that Title VII is not designed to make federal courts sit as a super-personnel department that reexamines an entity's business decisions." (quoting Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1244 (11th Cir. 2001)).

businesses are free to make irrational decisions, juries should be free to find that discriminatory bias has caused the employer to act in a way that suspiciously deviates from its business interests.[64]

D. An Employer's Judgment May Be Questioned if the Plaintiff Has Otherwise Provided Clear Evidence of Discrimination

In the next step on the business judgment rule's downward trajectory, some courts claim they do not consider the rationality of a personnel decision unless there is otherwise evidence of a "clear discriminatory motive." For example, the First Circuit stated that, where courts are "*faced with employment decisions that lack a clear discriminatory motive*, we may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions."[65]

By implication, then, the rationality of an employer's decision may only be considered when there already is "clear" evidence of discrimination.[66] Under this rubric, courts and jurors would never consider irrationality in deciding whether discrimination has occurred as an initial matter.[67] In this peculiar iteration, the only time an employer's decision can be scrutinized is when other evidence already exists that clearly establishes the existence of discrimination. Given that summary judgment must be denied where the evidence raises even a minimal inference of discrimination, this formulation precludes the opportunity to ever *consider* irrationality at summary judgment; irrationality is relevant only when the employer's discriminatory motive is already "clear," and, if such evidence is otherwise present, then a court would deny summary judgment without ever considering irrationality evidence. Thus, irrationality is finessed into a non-issue under this version of the business judgment rule, in that it cannot be used to help establish discrimination as an initial matter.

E. The Rationality of the Employer's Reasons May Not Be Questioned

In the final step, the First Circuit drops all pretense and reaches its apparent ultimate goal of asserting that examining the rationality of an employer's decision is simply off-limits, or not probative of discrimination. Recall the *Mesnick* formulation, which says courts will not sit as super personnel boards assessing employers' "nondiscriminatory"

64. Even where there is a choice between two reasonable business choices, the employer's selection can still be evidence of bias if the selection is reasonably seen as a manipulation to disfavor someone based on protected traits. *See* Mulero-Rodríguez v. Ponte, Inc., 98 F.3d 670, 677 (1st Cir. 1996) (change in bonus structure to a merit-based system could be seen as a strategy to hurt the employees loyal to the plaintiff).

65. Brader v. Biogen, Inc., 983 F.3d 39, 57 (1st Cir. 2020) (emphasis added) (quoting Rodríguez-Cardi v. MMM Holdings, Inc., 936 F.3d 40, 48–49 (1st Cir. 2019)); *see also* Theidon v. Harv. Univ., 948 F.3d 477, 499 (1st Cir. 2020).

66. *See Theidon*, 948 F.3d at 499.

67. *See id.*

decisions.[68] Now courts are quoting the *Mesnick* principle, *while omitting the part that explains that it applies to nondiscriminatory decisions*. For example, the case of *Meuser v. Federal Express Corp.* states:

> Further, even if we disagree with FedEx's personnel or business decisions, a matter on which we take no view, "[c]ourts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' . . . business decisions."[69]

The *Meuser* court eliminated the word "nondiscriminatory" from the phrase "nondiscriminatory business decisions," thereby dramatically altering the meaning of the *Mesnick* formulation and creating an extreme version of the business judgment rule that precludes all irrationality evidence.[70] Yet, *Meuser* fails to acknowledge, explain or justify the profound change wrought by its incomplete quotation of *Mesnick*.[71] Other courts have adopted the extreme form of the business judgment rule, sometimes using different words.[72]

The courts' failure to explain or validate the extreme business judgment rule in a principled fashion or square it with binding precedent suggests that the rule may itself be unprincipled. The fact that the business judgment rule is currently described by the same courts in various evolving, contradictory versions also suggests that the rule lacks grounding.

---

68. Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991).

69. Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009) (alteration in original) (quoting *Mesnick*, 950 F.2d at 825).

70. *Id.*

71. Some cases purporting to quote *Mesnick* omit its condition that the business judgment rule applies only "so long as the decision to fire does not stem from [discrimination]." *Compare Mesnick*, 950 F.2d at 825, *with* Villeneuve v. Avon Prods., Inc., 919 F.3d 40, 48 (1st Cir. 2019), *and* Johnson v. Univ. of P.R., 714 F.3d 48, 54 (1st Cir. 2013), *and* Goncalves v. Plymouth Cnty. Sheriff's Dep't, 659 F.3d 101, 107 (1st Cir. 2011). The courts which so truncate the language of *Mesnick* never explain how the underlying principle remains accurate.

72. Woodward v. Emulex Corp., 714 F.3d 632, 638–39 (1st Cir. 2013) ("We are not concerned with whether the stated purpose is unwise or unreasonable.") (internal quotes and citation omitted); Brandt v. Fitzpatrick, 957 F.3d 67, 78–79 (1st Cir. 2020) (the idea that the employer was "just unreasonable . . . doesn't cut it"); Crim v. Bd. of Educ. of Cairo Sch. Dist. No. 1, 147 F.3d 535, 541 (7th Cir. 1998) ("It is not sufficient to prove that the [employer's] reason was doubtful." (citing Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995)); Pagel v. TIN, Inc., 695 F.3d 622, 630 (7th Cir. 2012) ("[T]his court does not sit as a super-personnel department that reexamines an entity's business decisions."); Meehan v. Med. Info. Tech., Inc., 177 N.E.3d 917, 924 (Mass. 2021) ("We also disagree with the motion judge and the Appeals Court that recognizing this right would provide just cause protection for at-will employees or transform the courts into 'super personnel departments, assessing the merits—or even the rationality—of employers'. . . business decisions.'") (alteration in original) (citations omitted)).

IV. No Policy Arguments Justify the Extreme Business Judgment Rule

The business judgment rule is sometimes explained as a mechanism for distinguishing an untrue reason from a good-faith, but mistaken reason.[73] But this distinction provides no justification to exclude irrationality evidence. An employer's unreasonable or outlandish misfire should be considered as evidence that a claimed "mistake" is actually a feigned or calculated type of ignorance utilized to hide the true, unlawful motive.[74]

If an employer errs in good faith, one would assume that its earnest decision would be reasonable, given the facts it knew at the time and the resources it had to uncover the truth. That is what a good-faith error looks like: it is reasonable.[75] However, when a decision is irrational when made, it no longer looks like a good-faith decision. At that point, a jury should be free to find that the decision is pretextual. Thus, it is impossible at summary judgment to distinguish between an illogical "mistake" and a subterfuge to cover up discrimination.[76] At this point, Rule 50 and 56 standards require the court to assume pretext.[77]

Perhaps judges are wary of the notion that jurors can evaluate business decisions—assuming that they are not qualified arbiters of rationality in the area of human resources.[78] However, anti-discrimination laws routinely contemplate that jurors will assess the rationality of employers' otherwise discretionary business decisions. For example, jurors must determine:

- whether the employer has acted based on a bona fide occupational qualification that is "reasonably necessary to the normal operation of that particular business";[79]
- whether a factor considered by the employer in age discrimination cases is "reasonable";[80]

73. *See* Dávila v. Corporación de P.R. para la Difusión Pública, 498 F.3d 9, 17 (1st Cir. 2007).

74. *See* Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB, 414 F.3d 158, 162–64 (1st Cir. 2005) (inadequate investigation can show a "rush to judgment" caused by unlawful animus).

75. Furthermore, a mistaken employer acting in good faith would likely be anxious to correct an error brought to its attention. An employer's failure to correct an alleged good-faith mistake should be deemed strong evidence that it was not actually a mistake, but a disguise for something else.

76. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254–56, 258–59 (1981).

77. *See id.*

78. *See* Pagel v. TIN, Inc., 695 F.3d 622, 630 (7th Cir. 2012) ("We have little expertise in evaluating the merits of business and personnel decisions, and we see no need to make an exception here.").

79. 42 U.S.C. § 2000e-2(e); *see also* 29 U.S.C. § 623(f)(1).

80. 29 U.S.C. § 623(f)(1).

- whether employers have reasonably accommodated the needs of employees based on their religion or disability;[81]
- whether employers have taken reasonable care to prevent and promptly correct harassing behavior;[82] and
- whether neutral workplace conditions challenged under the disparate impact theory are consistent with "business necessity."[83]

Jurors are commonly called upon to scrutinize employer conduct in this fashion, and it is well within their ken to do so. There is no reason to believe that staffing issues would be a particularly opaque issue for a jury panel, which, collectively may well have centuries of workplace experience. Reasonableness is a quintessential issue for jury determination.

On the other hand, juries routinely address complex questions about the reasonableness of defendants' "business" judgment on matters on which they have no expertise, such as in medical malpractice and product liability cases.[84] Thus, no persuasive public policy supports the extreme business judgment rule in the employment setting.

V. The Extreme Business Judgment Rule Should Be Rejected

If juries may not assess the rationality of an employer's staffing decisions, then a crucial pathway to proving pretext is obliterated. The extreme version of the business judgment rule "should play no role in employment discrimination cases."[85] It is an awful and flawed public

81. 42 U.S.C. § 2000e(j); 42 U.S.C. § 12112(b)(5)(A).

82. Faragher v. Boca Raton, 524 U.S. 775, 807 (1998).

83. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see* Pullman-Standard, Div. of Pullman v. Swint, 456 U.S. 273, 279–80 (1982) (considering the rationality of a defendant-employer's organizational structure as compared with general industry practice). In a disparate impact case, the plaintiff may show that an ostensibly neutral policy is unlawful and that the employer's practice is a pretext for discrimination by identifying some other practice without discriminatory effect that would serve the employer's legitimate interests equally well. EEOC v. SS Clerks Union, Loc. 1066, 48 F.3d 594, 602 (1st Cir. 1995). Thus, jurors evaluate both "legitimate interests" and whether alternate practices would satisfy those interests.

84. Paiva v. Kaplan, 169 N.E.3d 1318, 1225 (Mass. App. Ct. 2021) (discussing jury instruction in medical malpractice case that physicians are allowed a "range in the reasonable exercise of professional judgment"); Evans v. Lorillard Tobacco Co., 990 N.E.2d 997, 1012 (Mass. 2013) (in products liability cases, a jury must assess whether the defendant failed to adopt a "reasonable alternative design" that could reduce foreseeable harm); Dubuque v. Cumberland Farms, Inc., 101 N.E.3d 317, 330–31 (Mass. App. Ct. 2018) (where a patron was killed when a car crashed into a convenience store, the store may be held liable for its failure to install bollards where the store reasonably should have known the risks and could have employed reasonable preventative measures).

85. Elaine Luthens, *Racial Discrimination or Valid Business Judgments: Employment Discrimination and the Business Judgment Rule*, 20 J. Gender Race & Just. 381, 401 (2017).

policy to grant an employer immunity from scrutiny simply because it characterizes its decision as a business judgment.[86]

The extreme rule is without statutory basis. The anti-discrimination statutes do *not* require deference to an employer's "business" decisions. In fact, the laws were established to operate in opposition to the discretion typically afforded at-will employers.

The extreme rule is contrary to Supreme Court precedent on irrationality evidence and contradicts the Court's directive that employees may prove pretext in *any manner*.[87] The rule is also contrary to some First Circuit precedent, which remains good law.[88]

The rule improperly curtails the ability of jurors to make natural, reasonable inferences.[89] For this reason, retired Judge Gertner has spoken out against the business judgment rule for preventing juries from doing precisely what they are supposed to do—analyze an employer's asserted reason to determine if it is the actual reason.

> These are "rules" that turn the employment laws on their head, in which the court refuses to second-guess an employer's decisions and defers to its business judgment. The employment laws necessarily require second-guessing an employer when the plaintiff makes out a prima facie case, or, at the very minimum, the laws permit a jury to do so.[90]

The rule ignores the fact that stereotypes can warp an employer's perceptions,[91] and that its unreasonable explanations may expose such bias.

The business judgment rule leads to a disturbing asymmetry, whereby employers are free to present evidence that their decisions were fair, reasonable, and made in good faith, but employees will not be heard to contest these self-serving arguments.[92] There are no effective limits to an employer's ability to trumpet the alleged rationality of its decision-making, while the employee who suffered the adverse employment action is denied the chance to establish inferences of bias from the employer's irrational, hyperbolic, or ridiculous explanation. This one-sided rejection of pretext evidence is utterly wrong and runs

86. *See* Wexler v. White's Furniture, Inc., 317 F.3d 564, 577 (6th Cir. 2003) (en banc); Weiss v. JP Morgan Chase & Co., 332 F. App'x 659, 663 (2d Cir. 2009).

87. *See supra* part II; Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253, 259 (1981); Patterson v. McLean Credit Union, 491 U.S. 164, 166, 187–88, 217–18 (1989).

88. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n.6 (1st Cir. 1979).

89. FED. R. EVID. 401(a).

90. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 122 (2012), https://www.yalelawjournal.org/forum/losers-rules [https://perma.cc/J3PX-W29S].

91. *See* Ahmed v. Johnson, 752 F.3d 490, 503 (1st Cir. 2014).

92. *See, e.g.*, Brandt v. Fitzgerald, 957 F.3d 67, 78–79 (1st Cir. 2020) (assuming that decisionmaker, in good faith, believed a supervisor's false report—even though the plaintiff was never given a chance to refute the falsehood).

counter to bedrock ideas of fairness, due process, and the adversarial process.

The notion that an employer's decisions may not be reviewed for rationality constitutes a type of categorical evidentiary rule that the Supreme Court has rejected. Evidence is relevant if it "has any tendency to make a fact more or less probable."[93] Assessing evidence under this standard requires a weighing of factors, taking into account the specific circumstances and theory of the case.[94] Consequently, use of a categorical rule that *per se* excludes evidence of irrationality while bypassing such searching review is improper.[95] A rule preventing a court from examining the rationality of a business judgment is a blunt instrument that impermissibly avoids careful examination of relevance in particular cases.

The use of the extreme business judgment rule at the summary judgment stage highlights its impropriety. Courts considering an employer's motion for summary judgment must assume all facts and reasonable inferences in the employee/non-moving party's favor.[96] This process requires the court to leave it to "the jury to weigh the credibility of conflicting explanations" of the adverse action.[97]

For example, if an employer states, in its summary judgment brief, that it terminated the plaintiff for failing to discipline employees, but the plaintiff establishes that the employer knew she never had authority to discipline others, two inferences are possible: (1) that the employer made a rash mistake; or (2) that the purported reason for termination was not the actual reason, but a pretext.[98] In a Rule 56 analysis, it should not be a close call. The court should accept *as true* that the employer's reason was pretextual because that is a reasonable inference in the non-moving party's favor.[99] Consequently, the extreme version of the business judgment rule should have no place in employment discrimination law at all—but especially at the summary judgment stage.

A more moderate approach to the business judgment rule would be to state that employers are entitled to make irrational decisions and that irrational decisions do not necessarily violate anti-discrimination laws. However, to the extent this principle is recognized—either in jury instructions or in a summary judgment decision—it must be

93. Fed. R. Evid. 401(a).

94. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384, 387–88 (2008).

95. *Id.* at 383, 385–88 (where district court may have applied a principle that employees under different supervisors may never be compared to determine the existence of bias, this was an improper *per se* rule).

96. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

97. Blare v. Husky Injection Molding Sys. Boston, Inc., 646 N.E.2d 111, 114 (Mass. 1995).

98. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143, 145–47 (2000).

99. *See id.* at 150–51.

accompanied by the equally true assertion that an irrational reason may trigger an inference of pretext. Asserting the first principle, without the second, is misleading.

Conclusion: Hope for the Future

There is a way forward—away from the clear error of the extreme business judgment rule. In decisions where courts have confronted *both* the business judgment rule and the validity of irrationality evidence, irrationality evidence is often accepted as probative.[100] When courts fairly consider the choice between the two competing doctrines, courts tend to correctly embrace evidence of irrationality.

The Sixth Circuit has found it to be legal error to reject irrationality evidence based on the business judgment rule.[101] The Tenth Circuit has explained that "the business judgment rule does not immunize an employer where its proffered reasons have been shown to be unworthy of belief."[102] When employers demand a business judgment jury instruction, courts sometimes reject it as unnecessary or misleading, as it would falsely indicate that the employer's conduct should not be scrutinized or that jurors are not competent to engage in such scrutiny.[103] Thus, judges and commentators tend to support the admissibility of irrationality evidence when they expressly address the tension between the two doctrines. That is because the support for the probative value of irrationality evidence is strong and grounded, while the extreme business judgment rule is doctrinally unsupported.

On the other hand, as a general matter, neither *Meuser* nor other like cases attempt to harmonize the extreme rule with the precedent endorsing irrationality evidence, or validate it based on sound public policy or evidentiary rules.[104]

Plaintiff's lawyers should continue to fight the extreme business judgment rule by relying on the Supreme Court's repeated endorsement

100. *E.g.*, Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 140–42 (1st Cir. 2012) (plaintiff prevailed where the court considered both the business judgment rule and irrationality evidence); Velez v. Thermo King de P.R., Inc., 585 F.3d 441, 450, 452 (1st Cir. 2009) (same).

101. *See* Wexler v. White's Furniture, Inc., 317 F.3d 564, 576–77 (6th Cir. 2003) (district court reversed for its "unwarranted deference" to employer's "business judgment"); *In re* Lewis, 845 F.2d 624, 633–34 (6th Cir. 1988) (rejecting objection to jury instruction stating that the jury could "consider the reasonableness or lack of reasonableness" of the employer's reason for acting).

102. Stroup v. United Airlines, Inc., 26 F.4th 1147, 1161–62 (10th Cir. 2022) (quoting Beaird v. Seagate Tech., 145 F.3d 1159, 1169 (10th Cir. 1998)).

103. *See* Kelley v. Airborne Freight Corp., 140 F.3d 335, 350–51 & n.6 (1st Cir. 1998); Varlesi v. Wayne State Univ., 643 F. App'x 507, 518 (6th Cir. 2016); Wichmann v. Bd. of Trs. of So. Ill. Univ., 180 F.3d 791, 804–05 (7th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111 (2000); Carrion v. Hashem, No. 13-P-993, 2014 Mass. App. LEXIS 1225, at *8 (Dec. 9, 2014) ("[T]he judge . . . was not required to give the 'business judgment' instruction requested by the defendants.").

104. Meuser v. Fed. Express Corp., 564 F.3d 507, 519 (1st Cir. 2009).

of irrationality evidence, by highlighting the business judgment rule's absurd asymmetry that only permits rationality evidence when it favors employers, and by arguing that scrutiny of an employer's decision is essential for claims that so often rely on pretext. Courts should recognize that the bar on irrationality evidence improperly interferes with the plaintiff's right to show that the reasons advanced by the defendant were pretextual.[105] Discrimination law is far too important to accept rules of evidence that are irrational.

105. *See* EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1193 (10th Cir. 2000).