Berkeley Journal of Employment & Labor Law

Volume 34 | Issue 2 Article 3

6-1-2013

Beyond McDonnell Douglas

Sandra F. Sperino

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z386Q02

ESSAY

Beyond *McDonnell Douglas*

Sandra F. Sperino†

INTRODUCTION

Since 1973, the *McDonnell Douglas* framework has been a key analytical structure in employment discrimination law.[1] Academic debate regarding the framework has alternately sounded its death knell, posited its irrelevance, or asserted its continued vitality.[2] What has gone unnoticed in this discussion is the gradual weakening of the framework over the past two decades. Rather than casting this test into oblivion, courts are slowly chipping away at its preeminent place as a proof structure.

Little by little, courts are gradually eroding the *McDonnell Douglas* test's power through both procedural and substantive means. Procedurally, courts have questioned, rejected or diminished the use of *McDonnell Douglas* at the pleading stage, in jury instructions, and when considering post-verdict motions.[3] Substantively, a growing number of courts have created alternate structures, de-emphasized *McDonnell Douglas* as the primary proof structure, or openly called for the test's demise.[4] These retrenchments from the burden-shifting framework established by *McDonnell Douglas* constitute powerful criticisms of the test's larger applicability.

---

† Professor, University of Cincinnati College of Law. I would like to thank the members of the University of Cincinnati Junior Faculty Reading Group for providing helpful critiques of earlier versions of this Essay.

1. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

2. *See, e.g.*, William R. Corbett, *Fixing Employment Discrimination Law*, 62 SMU L. REV. 81 (2009); Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 HASTINGS L.J. 643 (2008); Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 512-15 (2008) (declaring the continued vitality of the framework, while noting others' calls for its demise); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1930 (2004); Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY J. EMP. & LAB. L. 175 (2001).

3. *See infra* Part II.

4. *See infra* Part III.

This Essay demonstrates the substantive and procedural turn away from *McDonnell Douglas*. It argues that courts and scholars should alter how they discuss the framework to accurately reflect the test's current place in discrimination law. Current ways of describing the test overstate its importance by failing to recognize the rise of other structures by which to analyze employment discrimination and the narrow procedural window in which the courts now use the burden-shifting test.

Part I explains the *McDonnell Douglas* decision and its progeny. Parts II and III demonstrate how courts have diminished the importance of the framework substantively and procedurally. Part IV discusses major critiques of the framework. Part V argues that courts and scholars should alter the language used to discuss *McDonnell Douglas* to better reflect the procedural and substantive retreat from the test.

I.
MCDONNELL DOUGLAS AND ITS PROGENY

In 1973, the Supreme Court decided the case of *McDonnell Douglas v. Green*.[5] In that case, the Court first enunciated the three-part burden-shifting framework that is now called the *McDonnell Douglas* test. The Court held that a plaintiff proceeding on a disparate treatment claim[6] based on circumstantial evidence could prove his case through a multi-part framework. The plaintiff is required to establish a prima facie case by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[7]

After the plaintiff establishes this prima facie case, a rebuttable presumption of discrimination arises.[8] The Supreme Court cautioned, however, that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario of the underlying case.[9]

---

5. *McDonnell Douglas*, 411 U.S. at 793.

6. When this article uses the term "disparate treatment," it is excluding cases of systemic disparate treatment, which are sometimes referred to as pattern or practice claims.

7. *McDonnell Douglas*, 411 U.S. at 802.

8. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311-12 (1996).

9. *McDonnell Douglas*, 411 U.S. at 802.

After a plaintiff makes a prima facie showing, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the allegedly discriminatory decision or action, thereby rebutting the presumption.[10] The plaintiff is then provided the opportunity to show that the employer's stated reason for the employment action was, in fact, pretext and that the plaintiff's protected trait was the real reason for the decision.[11]

After *McDonnell Douglas*, significant confusion existed about how to apply the three-part burden-shifting framework, especially regarding what the shifting burdens meant for litigants.[12] In *Texas Department of Community Affairs v. Burdine*, the Court indicated that "the burden of establishing a prima facie case of disparate treatment is not onerous."[13] According to the Court, the prima facie case serves the function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[14] The Court further explained that if the plaintiff makes a prima facie case, the defendant is required to articulate a legitimate, non-discriminatory reason for its actions to rebut the presumption of discrimination. The defendant's burden is one of production only.[15] After the defendant has articulated a legitimate, non-discriminatory reason, the plaintiff has the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. The Court indicated that the plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[16] The Court held that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[17]

In *St. Mary's Honor Center v. Hicks*, the Court considered whether the factfinder's rejection of the employer's asserted reason for its action mandated a finding for the plaintiff.[18] The Supreme Court held that while the factfinder's rejection of the employer's proffered reason permits the factfinder to infer discrimination, it does not compel such a finding.[19]

---

10. *Id.*

11. *Id.* at 804.

12. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

13. *Burdine*, 450 U.S. at 253.

14. *Id.* at 254.

15. *Id.* at 255-56.

16. *Id.* at 256.

17. *Id.* at 253.

18. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-11 (1993).

19. *Id.*

The Supreme Court originally decided *McDonnell Douglas* under Title VII of the Civil Rights Act of 1964;[20] however, courts now use it when analyzing claims under the Americans with Disabilities Act ("ADA"),[21] the Age Discrimination in Employment Act ("ADEA"),[22] and discrimination cases brought pursuant to 42 U.S.C. sections 1983[23] and 1981.[24] Additionally, courts rely on the *McDonnell Douglas* standard to determine whether a plaintiff can establish discrimination under various state anti-discrimination statutes.[25]

Since 1973, both courts and litigants have struggled to understand and apply the three-step burden-shifting framework. Scholars have argued that the test is now a device used by some judges to defeat plaintiffs' claims.[26] Additionally, some members of the Supreme Court have stated that the numerous and complicated frameworks courts use in the employment context make employment law "difficult for the bench and bar"[27] and that "[l]ower courts long have had difficulty applying *McDonnell Douglas*."[28] One commentator described the test as having "befuddled most of those who have attempted to master it"[29] and calls the burden-shifting framework "complex" and "somewhat Byzantine."[30]

This confusion has only grown since 1991.[31] In that year, Congress amended Title VII to clarify that a plaintiff may prevail on a Title VII

---

20. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973).

21. Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003).

22. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (indicating that the Court assumes, without deciding that it is appropriate to use the framework when analyzing ADEA claims).

23. *St. Mary's*, 509 U.S. at 506 n.1.

24. Garcia v. Hartford Police Dep't, 706 F.3d 120, 127 (2d Cir. 2013).

25. *See, e.g.*, Gamboa v. Am. Airlines, No. 05-13317, 2006 WL 346478, at *1-2 (11th Cir. Feb. 14, 2006) (applying the *McDonnell Douglas* standard to claims asserted under a Florida anti-discrimination statute); Gentry v. Georgia-Pacific Corp., 250 F.3d 646, 650 (8th Cir. 2001) (same under Arkansas law).

26. Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 229 (1993).

27. Price Waterhouse v. Hopkins, 490 U.S. 228, 279 (1989) (Kennedy, J., dissenting).

28. *Id.* at 291.

29. Kenneth R. Davis, *Pricefixing: Refining the* Price Waterhouse *Standard and Individual Disparate Treatment Law*, 31 FLA. ST. L. REV. 859, 859 (2004).

30. *Id.* at 862.

31. William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549 (2005); William R. Corbett, McDonnell Douglas, *1972-2003, May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199 (2003); William R. Corbett, *Of Babies, Bathwater, and Throwing out Proof Structures: It Is Not Time to Jettison* McDonnell Douglas, 2 EMP. RTS. & EMP. POL'Y J. 361 (1998); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima*

discrimination claim if she establishes that a protected trait was a motivating factor in an employment decision.[32] Courts and scholars refer to these claims as mixed-motive claims.[33] The language used by Congress in the 1991 amendments does not mimic the three-part burden-shifting structure of *McDonnell Douglas*. Even though it has been more than 20 years since the 1991 amendments, there has been no satisfactory agreement regarding how the *McDonnell Douglas* test intersects with the mixed-motive rubric. Some courts treat *McDonnell Douglas* as the primary way to evaluate single-motive discrimination claims, while others have tried to integrate *McDonnell Douglas* and the 1991 amendments into one comprehensive test.[34]

II.
THE PROCEDURAL EROSION OF *MCDONNELL DOUGLAS*

Over time, courts have increasingly limited the procedural junctures at which they will use the three-part framework. Courts have declared that *McDonnell Douglas* is not required as a pleading standard and that it should not be used to review jury verdicts. In some circuits, it is improper for judges to instruct juries using the three-part framework. Thus, in some circuits, the primary procedural juncture at which courts use *McDonnell Douglas* is the summary judgment stage.

A plaintiff is not required to demonstrate that she meets the elements of *McDonnell Douglas* to properly plead an individual disparate treatment claim. In *Swierkiewicz v. Sorema, N.A.*, the Court held that *McDonnell Douglas* is "an evidentiary standard, not a pleading requirement."[35] The Court further observed that a plaintiff is not required to use the test to prevail on a disparate treatment claim, specifically indicating that plaintiffs with direct evidence would not be required to navigate the three-part test.[36] It also reiterated the flexibility of *McDonnell Douglas*'s prima facie case,[37] noting that until the parties have engaged in discovery, they may not know

---

Facie Case?, 12 LAB. LAW. 371 (1997); Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743 (2006) (arguing that *McDonnell Douglas* was not supported by the language of Title VII and thus lacks a proper statutory foundation); Zimmer, *supra* note 2.

32. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C. §§ 1981, 2000e-2(m)).

33. *See, e.g.*, Porter v. Natsios, 414 F.3d 13, 19 (D.C. Cir. 2005).

34. Two sentences in a recent Supreme Court opinion clarify the relationship between different portions of Title VII. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2530 (2013) ("For one thing, § 2000e-2(m) is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere in Title VII.").

35. Swierkiewicz v. Sorema, 534 U.S. 506, 510 (2002).

36. *Id.* at 511.

37. *Id.* at 512.

enough about the facts to determine how to craft a prima facie case that reflects the case's specific factual circumstances.

A majority of circuits also discourage the use of the three-part burden-shifting framework in jury instructions.[38] In 1973, when the Supreme Court decided *McDonnell Douglas*, Title VII did not provide jury trials.[39] In its early days, when the framework was used at trial in the Title VII context, it was used by trial court judges sitting as finders of fact.[40] In 1991, Congress amended Title VII to provide for jury trials in certain instances.[41] Shortly thereafter, courts and litigants expressed skepticism that the framework could properly be used in jury instructions. Many pattern jury instructions for discrimination claims direct the jury to determine whether an employer took an adverse action because of the plaintiff's protected trait without proceeding through the three-step burden-shifting framework.[42]

The discomfort expressed by the circuits stems from two different criticisms of the test: it is confusing, and its burden-shifting structure does not apply at trial. The Fourth Circuit Court of Appeals has noted that the shifting burdens of production "are beyond the function and expertise of the

38. Weimer v. Honda of Am. Mfg., Inc., 356 Fed. App'x 812, 817-18 (6th Cir. 2009) (noting that "it is generally inappropriate to instruct a jury on the *McDonnell Douglas* analysis as such"); Whittington v. Nordam Grp. Inc., 429 F.3d 986, 998 (10th Cir. 2005); Sanders v. N.Y.C. Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 539-40 (9th Cir. 2003); Watson v. Se. Pa. Transp. Auth., 207 F.3d 207, 221-22 (3d Cir. 2000) (indicating that it is proper "to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown," but noting that it is error to instruct as to the *McDonnell Douglas* burden shifting scheme); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999); Ryther v. KARE 11, 108 F.3d 832, 849-50 (8th Cir. 1997) (en banc) (Loken, J., in Part II.A. of the dissent, which a majority of the court joined); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (discussing the likelihood of juror confusion). *But see* Rodriguez-Torres v. Caribbean Forms Mfr., Inc., 399 F.3d 52, 58 (1st Cir. 2005) (finding that the district court instructed the jury to evaluate the evidence by applying the *McDonnell Douglas* burden-shifting framework); Kozlowski v. Hampton School Bd., 77 Fed. App'x 133, 141 (4th Cir. 2003) (discussing use of *McDonnell Douglas* framework in jury instructions); Brown v. Packaging Corp. of Am., 338 F.3d 586, 595 (6th Cir. 2003) (Clay, J., concurring) (approving the use of *McDonnell Douglas* in jury instructions).

While discouraging the use of tests in jury instructions, most circuits do not place an absolute prohibition on using *McDonnell Douglas* in this fashion. For a discussion of various approaches, see Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 509 (2008). Some circuits that do not generally countenance the use of the framework will find that it is harmless error for such instructions to be given. *See, e.g.*, *Sanders*, 361 F.3d at 758 (finding it was harmless error for district court to instruct jury as to burden-shifting framework); Vincini v. Am. Bldg. Maint. Co., 41 Fed. App'x 512, 514 (2d Cir. 2002); *Dudley*, 166 F.3d at 1322.

39. 42 U.S.C. § 1981a(c) (2012). Title VII does not provide for jury trials in every instance. *Id.*

40. *See, e.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567, 569 (1978) (noting that case was bench tried and that trial judge had used framework).

41. West v. Gibson, 527 U.S. 212, 212 (1999) ("In 1991, Congress again amended Title VII in the Compensatory Damages Amendment (CDA), which, among other things, . . . adds that any party in such an action may demand a jury trial, § 1981a(c).").

42. Federal Civil Jury Instructions of the Seventh Circuit, 3.01 (2009).

jury" and are "overly complex."[43] Many courts assert that any discussion of the three-part burden-shifting test in jury instructions would be so confusing that the jury may not be able to render a verdict based on such instructions.[44] Some courts have noted that the "presumptions and burdens inherent in the *McDonnell Douglas* formulation drop out of consideration when the case is submitted to the jury."[45] As one court declared, the "language used in the traditional *McDonnell Douglas* formulation, developed by appellate courts for use by judges, is at best irrelevant, and at worst misleading to a jury."[46]

In most cases, once the parties have presented their evidence, it no longer makes sense to require the plaintiff to prove the prima facie case, because that prima facie case is designed to force the defendant to articulate its legitimate reason for acting and to raise a rebuttable presumption of discrimination. By the time the jury deliberates, the defendant has already articulated its reason for acting, and the defendant has rebutted any presumption of discrimination created by the prima facie case. Therefore, applying the entire framework at the end of a jury trial only makes sense in those rare instances where the defendant fails to articulate a legitimate, non-discriminatory reason for its actions.

Further, it is unlikely that most members of a jury will understand the subtle distinctions in the test, namely that the second prong is a burden of production only and that this minimal burden is required only to rebut the presumption of discrimination created by the prima facie case. A jury instructed that it is the arbiter of credibility may find it difficult, if not impossible, to relinquish that role when considering the second prong of the *McDonnell Douglas* test.

Not only do district and appellate courts disfavor the *McDonnell Douglas* mechanism for jury decision making, they also limit its post-verdict use. Appellate courts considering a jury's verdict in a discrimination case typically do not use the *McDonnell Douglas* burden-shifting framework in considering whether the jury's verdict is appropriate.[47]

---

43. Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988).

44. *See, e.g.*, Sanders v. N.Y.C. Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

45. Whittington v. Nordam Grp. Inc., 429 F.3d 986, 998 (10th Cir. 2005); *Sanders*, 361 F.3d at 758; Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994) (indicating that *McDonnell Douglas* is only for use in pretrial proceedings).

46. Mobasher v. Bronx Cmty. Coll. of N.Y., 269 Fed. App'x 71, 73 (2d Cir. 2008).

47. *See, e.g.*, Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 993 (5th Cir. 2008) ("When a full trial on the merits has been conducted, as in this case, our focus is on whether the record contains sufficient evidence to support the jury's finding of no race or sex discrimination—not on the plaintiff's *prima facie* case or the *McDonnell Douglas* framework.").

The Supreme Court has agreed with the lower courts with respect to the usefulness of *McDonnell Douglas* in the later stages of litigation. In the 1983 case of *United States Postal Service Board of Governors v. Aikens*, the Court held that using the *McDonnell Douglas* framework to evaluate a case in which a jury verdict exists evades the ultimate question of whether discrimination has been proven.[48] The Court noted:

[W]hen the defendant fails to persuade the district court to dismiss the action for lack of a *prima facie* case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the *McDonnell-Burdine* presumption drops from the case, and the factual inquiry proceeds to a new level of specificity.[49]

Thus, the Supreme Court has held that the question of whether a plaintiff can make out a prima facie case is irrelevant once the defendant "has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case[.]"[50]

Instead of applying the *McDonnell Douglas* framework, after a full trial on the merits a court considering the verdict must focus on the "ultimate question of discrimination."[51] This is not to say that parts of the prima facie case play no role at the close of a trial. The jury or a judge may use the presence or absence of these facts in support of its verdict.[52] For example, the fact that a plaintiff was treated differently than an individual outside his protected class might be used by the factfinder to determine whether discrimination exists. However, by the time the factfinder is deliberating, the plaintiff has already presented a prima facie case and the employer has articulated a reason for its actions. At this stage, it would be rare for the burden-shifting of the first two steps of *McDonnell Douglas* to be at issue. Rather, the ultimate issue of discrimination is already before the factfinder.

Thus, the use of *McDonnell Douglas* on appeal from verdicts is restricted, and some courts considering motions for renewed judgment as a matter of law decline to use the framework in determining whether the verdict should stand. For example, the Fourth Circuit has held that "the 'rigid, mechanized, or ritualistic' application of the *McDonnell Douglas*

48. 460 U.S. 711, 713-14 (1983).

49. *Id.* at 714-15.

50. *Id.* at 715.

51. Noble v. Brinker Int'l, Inc., 391 F.3d 715, 724-26 (6th Cir. 2004); *see also* Barnes v. City of Cincinnati, 401 F.3d 729, 736 (6th Cir. 2005); Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1194 (11th Cir. 2004); Roberts v. Principi, 283 Fed. App'x 325, 331 (6th Cir. 2008); West v. Nabors Drilling USA, Inc., 330 F.3d 379, 385-86 (5th Cir. 2003).

52. *See, e.g.*, Webber v. Int'l Paper Co., 417 F.3d 229, 235 (1st Cir. 2005) (discussing relevance of prima facie case at end of jury trial).

framework" is inappropriate for renewed motions for judgment as a matter of law.[53]

III.
THE SUBSTANTIVE EROSION OF *MCDONNELL DOUGLAS*

In the past two decades, the courts have become increasingly comfortable using structures other than *McDonnell Douglas* to evaluate employment discrimination cases. The creation of alternate structures has been driven, in part, by congressional action and Supreme Court decisions that continue to alter the employment discrimination landscape. This Part explores three different types of alternate structures: the direct method of proof for claims supported by circumstantial evidence; the motivating factor rubric; and the harassment framework.

A. Direct Method of Proof

Most circuit courts have articulated two ways for plaintiffs to proceed in single-motive disparate treatment cases. Plaintiffs with circumstantial evidence of discrimination proceed through the *McDonnell Douglas* framework, while those with direct evidence of discrimination are not required to use the framework.[54] While many courts continue to maintain this evidentiary dividing line, this dichotomy has softened. The Seventh Circuit Court of Appeals, for example, no longer requires a plaintiff relying on circumstantial evidence to use the *McDonnell Douglas* framework.[55]

Like the majority of courts, the Seventh Circuit has articulated that a plaintiff can establish a single-motive discrimination claim under Title VII in two ways: the direct method or by satisfying *McDonnell Douglas* with circumstantial evidence.[56] Under the former, the plaintiff puts forth evidence that demonstrates that she was a member of a protected class and

53. Gibson v. Old Town Trolley Tours of Wash., D.C., Inc., 160 F.3d 177, 180-81 (4th Cir. 1998); *see also* Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1151-52 (11th Cir. 2005) (citing cases).

54. Ray v. Oakland Cnty. Circuit Court, 355 Fed. App'x 873, 876 (6th Cir. 2009) ("To maintain a Title VII claim where there is no direct evidence of discrimination, the plaintiff's indirect evidence is considered under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973)."); *accord* EEOC v. Boeing Co., 577 F.3d 1044, 1049 (9th Cir. 2009); Martin v. Waring Invs. Inc., 323 Fed. App'x 313, 315–16 (5th Cir. 2009) (same in ADEA case); McCullough v. Univ. of Ark. for Med. Scis., 559 F.3d 855, 860 (8th Cir. 2009); Prince-Garrison v. Md. Dep't of Health and Mental Hygiene, 317 Fed. App'x 351, 353 (4th Cir. 2009); Salinas v. AT&T Corp., 314 Fed. App'x 696, 698 (5th Cir. 2009).

55. *See, e.g.*, Coffman v. Indianapolis Fire Dep't, 578 F.3d 559, 563 (7th Cir. 2009); Winsley v. Cook Cnty., 563 F.3d 598, 604 (7th Cir. 2009); Burks v. Wis. Dep't of Transp., 464 F.3d 744, 751 (7th Cir. 2006); Paz v. Wauconda Healthcare and Rehab. Ctr., LLC, 464 F.3d 659, 666 (7th Cir. 2006).

56. Winsley v. Cook Cnty., 563 F.3d 598, 604 (7th Cir. 2009).

"*as a result* suffered the adverse employment action of which [s]he complains."[57]

However, the Seventh Circuit blurs the dividing line between the two categories, no longer requiring that circumstantial evidence proceed through the three-part framework. Instead, a plaintiff can proceed under the direct method when she presents direct or circumstantial evidence that creates a "convincing mosaic of discrimination."[58] The Seventh Circuit has gone as far as referring to the direct method of proof as the "conventional" way of proceeding on a Title VII claim.[59] The Seventh Circuit has thus emphasized that although *McDonnell Douglas* is one way of proving a discrimination case, it is not a method that should be employed in all cases.[60]

B. Motivating Factor Rubric

Even courts that continue to press most circumstantial evidence claims through *McDonnell Douglas* recognize that strict adherence to the test is not always required.[61] Some circuits, for example, acknowledge the test's importance in single-motive cases while nevertheless diminishing its importance in so-called "mixed-motive" cases. In *Price Waterhouse v. Hopkins*, the Supreme Court recognized that a plaintiff could bring a claim under Title VII without relying on *McDonnell Douglas* when alleging that both legitimate and discriminatory reasons led to an adverse employment decision.[62] In that case, six Justices agreed that the plaintiff could prevail if she could establish that a protected trait played a motivating factor in an employment decision.[63] A plurality provided a two-part test for considering these cases that was different than the *McDonnell Douglas* test.[64]

Shortly after the *Price Waterhouse* decision, Congress amended Title VII. The amendments recognize that plaintiffs can prevail on a Title VII disparate treatment claim by establishing that a protected trait was a motivating factor in a decision.[65] After a plaintiff establishes this, the employer has a partial defense to remedies if it can establish that it would have made the same decision absent consideration of the protected trait.[66] Like the test enunciated in *Price Waterhouse*, the test codified in Title VII's

57. *Burks*, 464 F.3d at 750 n.3.

58. *Winsley*, 563 F.3d at 604 (citations omitted).

59. Brewer v. Bd. of Trs. of Univ. of Ill., 479 F.3d 908, 915 (7th Cir. 2007).

60. Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1088-89 (7th Cir. 2000).

61. Reeves v. DSI Sec. Servs., 331 Fed. App'x 659, 662 (11th Cir. 2009) (noting that "claims of racial discrimination based on circumstantial evidence are *normally* evaluated" under the three-part, burden shifting framework of *McDonnell Douglas*) (emphasis added).

62. Price Waterhouse v. Hopkins, 490 U.S. 228, 251-52 (1989).

63. *Id.* at 258 (plurality); *id.* at 259 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).

64. *Id.* at 240 (plurality).

65. 42 U.S.C. § 2000e-2(m).

66. *Id.* § 2000e-5(g)(2)(B).

1991 amendments does not mimic *McDonnell Douglas*. Unlike *McDonnell Douglas*, the 1991 amendments set forth a two-part test where the employer carries both the burdens of production and persuasion in establishing the same decision affirmative defense to damages.

In *Desert Palace v. Costa*, the Supreme Court considered whether plaintiffs must present direct evidence of discrimination to proceed under a mixed-motive framework.[67] The Court held that plaintiffs could proceed under the motivating factor standard, whether the plaintiff had direct or circumstantial evidence of discrimination.[68] In the mixed-motive context, the Court rejected the dividing line between direct and circumstantial evidence that plays a key role in the single-motive context for determining when to apply *McDonnell Douglas*.

After *Desert Palace*, confusion existed about whether *McDonnell Douglas* was still viable.[69] In the post-*Desert Palace* environment, courts have attempted to reconcile the mixed-motive and single-motive frameworks in multiple ways.[70] The reconciling of *Desert Palace*, the 1991 amendments to Title VII, and *McDonnell Douglas* has been well met in other numerous articles on the topic,[71] and is not a task this Essay undertakes. As one court has nicely summarized: "[s]uffice it to say that the two decisions have not been definitively disentangled or reconciled."[72] What is important, for the discussion of this Essay, is that the attempted reconciliation has created alternatives to *McDonnell Douglas*. In many circuits, a plaintiff can establish a claim of discrimination by demonstrating that a protected trait was a motivating factor in a decision, without proceeding through the three-part burden-shifting framework.[73]

---

67. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

68. *Id.*

69. *See, e.g.*, Charles A. Sullivan, *Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 934 (2005) ("The ramifications of *Desert Palace* are as yet unclear, but the broadest view is that the case collapsed all individual disparate treatment cases into a single analytical method, thereby effectively destroying *McDonnell Douglas*. The decision, however, can be read more narrowly. Because footnote one specifies that the Court was not deciding the effects of this decision 'outside of the mixed-motive context,' *McDonnell Douglas* may continue to structure some cases, although its viability under Title VII is suspect.") (footnotes omitted).

70. *See* Machinchick v. PB Power, Inc., 398 F.3d 345, 352 (5th Cir. 2005); Rachid v. Jack in the Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004) (adopting a modified *McDonnell Douglas* approach); Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004) (concluding "that *Desert Palace* had *no* impact on prior Eighth Circuit summary judgment decisions"); Cooper v. S. Co., 390 F.3d 695, 725 n.17 (11th Cir. 2004) (noting that "the *McDonnell Douglas* burden-shifting analysis . . . was radically revised by the Supreme Court in *Desert Palace*").

71. *See generally* Martin J. Katz, Gross *Disunity*, 114 PENN ST. L. REV. 857 (2010); Prenkert, *supra* note 2; Sullivan, *supra* note 69.

72. Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 n.8 (1st Cir. 2009).

73. *E.g.*, Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005); McGinest v. GTE Serv. Corp., 360 F.3d 1103, 1122 (9th Cir. 2004).

C. The Harassment Framework

Since the late 1980s, courts have also recognized that a plaintiff can prevail on an individual discrimination claim by using a multiple-part harassment framework developed by the courts.[74] There are two key elements of these cases. The plaintiff must prove that the harassment was taken because of a protected trait.[75] The plaintiff also must establish the harassment was "sufficiently severe or pervasive to alter the condition of the victim's employment and create an abusive work environment."[76] This test does not rely on *McDonnell Douglas*, but rather provides a plaintiff another mechanism for establishing intentional discrimination.

As this Part demonstrates, in departing from *McDonnell Douglas*, courts over time developed ways of thinking about substantive discrimination claims that do not require a prima facie case, that do not require burden-shifting, and that do not rely on a sharp distinction between direct and circumstantial evidence. These alternative structures undermine the idea that *McDonnell Douglas* is necessary to evaluating discrimination claims.

IV. GROWING JUDICIAL DISCOMFORT WITH THE TEST

The procedural and substantive erosion described in the prior Parts shows a growing judicial discomfort with the *McDonnell Douglas* test. This Part explores the various reasons for this discomfort, including the complexity of the test, the way in which it distracts courts from the main discrimination inquiry, questions about how much work the test actually performs, and the way the test manifests uncertainty about judges' abilities to evaluate discrimination claims.

The widespread judicial belief that *McDonnell Douglas* should not be used in jury instructions[77] implicitly raises many criticisms of the test outside of the jury context. Courts' repeated concern that jurors will be confused by the framework should give pause regarding whether judges likewise suffer from the same confusion.[78] This criticism is especially apt given that courts spent decades muddling through nuances within the three-part burden-shifting test without fully resolving all of its intricacies.[79]

---

74. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

75. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

76. *Meritor*, 477 U.S. at 67.

77. *See* materials in *supra* note 38.

78. *See, e.g.*, Sanders v. N.Y.C. Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); Sanghvi v. City of Claremont, 328 F.3d 532, 540 (9th Cir. 2003); Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

79. *See* Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 142-43 (2000); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 310-12 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54 (1981).

Circuit splits still exist regarding how to use the framework.[80] Courts are often so enamored with the procedure and substance of the framework that they forget the ultimate question at issue: whether the employer illegally treated the employee differently because of a protected trait.

If juries can, and do, routinely issue judgments about whether discrimination occurred without the assistance of the three-part burden-shifting framework, it weakens the argument that judges need the test to make the same kinds of determinations either at bench trials or at other procedural stages of the litigation, such as summary judgment. That courts can evaluate motivating factor cases and harassment cases without burden-shifting demonstrates that burden-shifting is not critical to the discrimination inquiry. The Seventh Circuit's convincing mosaic of circumstantial evidence rubric identifies a class of cases where plaintiffs can establish discrimination without *McDonnell Douglas*, even though the plaintiff does not have evidence that fits within the traditional contours of direct evidence.[81]

In post-verdict contexts, courts have repeatedly questioned how much work the prima facie case does after a jury has considered the entire case. This same question should arise in most summary judgment contexts. When the defendant moves for summary judgment, it often articulates its legitimate, non-discriminatory reason for acting. In these cases, courts often still proceed through the prima facie case, even though the reason for the prima facie case—to force the defendant to articulate its reason for acting—is no longer present.[82] Modern discovery devices likewise eliminate the need for the prima facie case to serve this function, as plaintiffs can use discovery devices to determine the employer's stated reason for acting.

Judges have openly questioned the continued need for *McDonnell Douglas*. Judge Wood of the Seventh Circuit Court of Appeals, in a concurring opinion joined by Judges Tinder and Hamilton, called attention to "the snarls and knots" that *McDonnell Douglas* inflicts on courts and litigants.[83] She derided the test as "an allemande worthy of the 16th century."[84] Further, she noted that district courts are able to filter other types of cases without reliance on a phalanx of complicated tests.[85] Given the demise of the *McDonnell Douglas* at the trial stage, she urged that the

---

80. *See supra* note 70.

81. Winsley v. Cook Cnty., 563 F.3d 598, 604 (7th Cir. 2009).

82. *See, e.g.*, Megivern v. Glacier Hills Inc., 519 Fed. App'x 385, 395-98 (6th Cir. 2013) (considering prima facie case even when defendant offered performance problems as reason for plaintiff's termination).

83. Coleman v. Donahoe, 667 F.3d 835, 863 (2012).

84. *Id.*

85. *Id.*

test should likewise be abandoned at the pre-trial stage. Similarly, Judge Tymkovich of the Tenth Circuit has argued that the test creates confusion and that it distracts courts away from the ultimate inquiry of whether discrimination occurred.[86] Joining these criticisms, the Eighth Circuit Court of Appeals has opined that the *McDonnell Douglas* test was created without any justification or basis for its complex framework.[87] The growing judicial discomfort with core features of *McDonnell Douglas* should raise questions about whether the test's three-part structure, its prima facie case, and its burden-shifting help or hurt the discrimination inquiry.

V. ALTERING HOW WE DISCUSS *MCDONNELL DOUGLAS*

Despite these retrenchments from *McDonnell Douglas*, courts and scholars continue to describe the test in ways that do not reflect these new paradigms. To account for these changes, descriptions of the *McDonnell Douglas* test should be altered in two important ways. First, when courts refer to the test, they should note that it is largely or primarily used at the summary judgment stage. Second, courts should no longer refer to the test as *the* way, or even the primary way, of proving discrimination claims. These changes can lead to important shifts in how courts perceive and use the test.

Courts often describe *McDonnell Douglas* as one of two ways of proving discrimination, ignoring the existence of the harassment framework, alternatives like the Seventh Circuit's convincing mosaic test, and that the Supreme Court likely did not intend *McDonnell Douglas* to be the only way to establish discrimination with circumstantial evidence.[88] When courts view *McDonnell Douglas* as a test that applies in certain contexts, they fail to recognize how discrimination law should operate as a whole and how the various proof structures should operate to answer the same question—whether an employer treated a person differently based on a protected trait.[89]

Further, although courts often treat *McDonnell Douglas* as the primary way of establishing individual disparate treatment claims,[90] this description

86. Tymkovich, *supra* note 38, at 521-22.

87. Griffith v. City of Des Moines, 387 F.3d 733, 740 (8th Cir. 2004) ("Absent from this opinion was any justification or authority for this scheme.").

88. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 584-85 (2007); Clark v. PNC Fin. Servs. Group, No. 2:10–cv–00378, 2011 WL 5523631, at *4 (W.D. Pa. Nov. 14, 2011); Rhinehart v. City of Gastonia, No. 3:07–CV–541–DCK, 2009 WL 2957973, at *3 (W.D.N.C. Sept. 10, 2009).

89. *See generally* Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011).

90. *See* Walech v. Target Corp., No. C11–254 RAJ, 2012 WL 1068068, at *6 (W.D. Wash. March 28, 2012) (citing *Robinson v. Metro–North Commuter R.R. Co.*, 267 F.3d 147, 158 n.3 (2d Cir. 2001) (noting that "individual disparate treatment claims . . . primarily follow the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green* . . .")).

ignores the reality that most circuits do not use the *McDonnell Douglas* test to instruct juries.[91] While *McDonnell Douglas* may be the primary test used at the summary judgment stage to evaluate individual disparate claims based on circumstantial evidence, it is not the primary way that plaintiffs establish discrimination claims at trial.[92]

Emphasizing that *McDonnell Douglas* largely applies at summary judgment should highlight a large problem with its continued use. Under the federal summary judgment standard, a court can only grant summary judgment if the movant is entitled to judgment as a matter of law.[93] A movant is entitled to judgment as a matter of law when a reasonable jury would not have a sufficient basis for finding for the non-moving party.[94] It is questionable whether the Federal Rules of Civil Procedure countenance the judge using one test to determine summary judgment (*McDonnell Douglas*), when the jury would not be instructed using the same substantive standard. Additionally, reminding courts that juries do not rely on *McDonnell Douglas* to resolve discrimination cases should further judicial skepticism about whether judges need to rely on the test. Recognizing the limited context in which judges use the test is important because this recognition should lead to a serious discussion about which portions of the test actually aid the discrimination inquiry and which portions are unnecessary.

Most importantly, these language changes should make more apparent the large opportunities that exist to describe discrimination in ways that go beyond *McDonnell Douglas*. The courts' ability to handle the conceptual difficulties of modern workplace discrimination depends on giving lawyers the space to argue new theories and factual bases for discrimination claims.

CONCLUSION

Over the last two decades, the courts have subtly reduced the procedural and substantive importance of *McDonnell Douglas*. This gradual erosion is more understated than the immediate demise that many scholars once predicted, and the language used to describe the burden-shifting test has failed to explicitly recognize these changes. If courts and scholars alter their language to reflect a more limited role for the test—reflecting the manner in which it is presently used—they will open

91. *See* materials in *supra* note 38.

92. Howard v. Garage Door Grp., Inc., 136 Fed. App'x 108, 110 n.1 (10th Cir. 2005) (noting that *McDonnell Douglas* only applies at summary judgment); Filipovich v. K & R Exp. Sys, Inc., 391 F.3d 859, 863 (7th Cir. 2004) (noting that the test is only used in pretrial proceedings).

93. FED. R. CIV. P. 56(a).

94. FED. R. CIV. P. 50(a).

opportunities to further critique *McDonnell Douglas* and create space to consider new ways of thinking about discrimination.