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Fleeing the Rat's Nest: Title VII Jurisprudence After Ortiz v. Werner Enterprises, Inc.

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Fleeing the Rat's Nest

TITLE VII JURISPRUDENCE AFTER *ORTIZ V. WERNER ENTERPRISES, INC.*

INTRODUCTION

In a recent opinion in *Ortiz v. Werner Enterprises, Inc.*, the United States Court of Appeals for the Seventh Circuit clarified its standard for reviewing Title VII evidence in employment discrimination cases, ushering forth a drastically more plaintiff-friendly standard in the process.[1] *Ortiz* is well-worth exploring for the following reasons. Practically, the new standard will affect employees in how their evidence is evaluated in employment cases in the Seventh Circuit. From an employee's perspective this is a positive change, but the likely increase in the number of charges filed under Title VII poses a possible challenge to the judicial system.[2] But more important to this note, *Ortiz* suggests a shift away from longstanding federal Title VII jurisprudence to a more holistic approach. This, in turn, has wide implications on the usefulness of a tangled but delicate web of standards that courts have created to resolve Title VII claims.

McDonnell Douglas Corp. v. Green,[3] decided in 1973, set forth the standard for judicial review of Title VII employment discrimination claims nearly a decade after the Civil Rights Act was born[4] and has been the law since. Exploring the *Ortiz* decision, however, it is apparent that the Seventh Circuit may have indirectly relegated the *McDonnell Douglas* analysis to the sideline.[5] In the *Ortiz* opinion, while affirming *McDonnell Douglas* as the proper standard, Judge Easterbrook also explained that when it comes to a plaintiff's discrimination

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[1] Ortiz v. Werner Enter., Inc., 834 F.3d 760 (7th Cir. 2016).

[2] Comparing five-year periods from 2001–2005 and 2011–2015 there has been a 17 percent increase in the number of discrimination charges filed nationally. *Charge Statistics (Charges Filed with EEOC): FY 1997 Through FY 2016*, U.S. EQUAL EMP. OPPORTUNITY COMM'N [hereinafter *EEOC Charge Statistics*], https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm [https://perma.cc/9YNB-37MW].

[3] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[4] *See* Tex. Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 252–56 (1981).

[5] *Ortiz*, 834 F.3d at 765.

claim at the summary judgment stage, evidence "must be evaluated as a whole," and that courts should avoid applying a "rat's nest of surplus tests."[6] As a result of this language, employers within the jurisdiction of the Seventh Circuit may have a more difficult time prevailing at the summary judgment stage,[7] as courts will now evaluate plaintiffs' evidence as a whole[8]—whether the evidence is direct or indirect (circumstantial) evidence of discrimination—rather than using the "rat's nest" multipronged tests and standards that have developed since *McDonnell Douglas*.[9]

The development and respective confusion over the various divergent tests and standards has infected even the Supreme Court. For instance, prior to *Ortiz*, the Court attempted to clarify the application of the *McDonnell Douglas* analysis to Title VII retaliation claims[10] in *University of Texas Southwestern Medical Center v. Nassar*.[11] In *Nassar*, responding to the general confusion over what causation standard applied to retaliation claims, the Court held that "Title VII [employment discrimination] retaliation claims must be proved according to traditional principles of but-for causation" which "requires proof

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[6] *Id.* at 766 (internal quotations omitted).

[7] The district court in *Ortiz* granted summary judgment to Werner, the employer. *Ortiz*, 834 F.3d at 763. When reviewing a motion for summary judgment, a court will "determine whether a genuine issue of material fact exists for trial, which is the case where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir. 1996) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[8] *See, e.g.*, Lord v. High Voltage Software, Inc., 839 F.3d 556, 563 (7th Cir. 2016) ("The parties discuss the 'direct' and 'indirect' evidence of causation and debate whether the record demonstrates a 'convincing mosaic' establishing retaliatory discharge, but we have recently jettisoned that approach in favor of a more straightforward inquiry: Does the record contain sufficient evidence to permit a reasonable fact finder to conclude that retaliatory motive caused the discharge?").

[9] Scholars, like judges, have proposed solutions to the problems that *McDonnell Douglas* promote in the past—yet cases like *Ortiz* demonstrate why the issue deserves continued treatment and scrutiny. *See generally* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659 (1998); Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703 (1995).

[10] *See infra* Section I.A. An example of Title VII retaliation claim might involve an employer demoting an employee for complaining to a manager about some form of discrimination. Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 555 U.S. 271, 273 (2009) (Title VII's protection against retaliation applies to "employee[s] who speak[ ] out about discrimination . . . in answering questions during an employer's internal investigation").

[11] *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[12]

But *Nassar*'s new rule only seemed to further confuse courts in analyzing Title VII cases in the following years. Lower courts began to ask: to which prong of the *McDonnell Douglas* analysis did the "but for" causation requirement apply?[13] Federal courts of appeals have since applied the "but for" requirement to the first prong,[14] the third (pretext) prong,[15] and have also suggested that it applies to the entire analysis.[16] Other courts have stated that *Nassar* did not affect the *McDonnell Douglas* analysis.[17]

This has resulted in a messy circuit split. The Tenth Circuit applies the "but for" requirement to one prong, while the Third and Fourth Circuits have indicated that the "but for" requirement applies to a different prong.[18] One can thus read *Ortiz* as a signal to the legal community in the U.S. that at least some judges or courts may be growing tired of applying the confusing "rat's nest" of multipronged tests when it comes to *McDonnell Douglas* and Title VII employment discrimination cases.

This note explores *Ortiz* in depth, how other circuits analyze *McDonnell Douglas* and Title VII claims, and how *Ortiz* relates to *McDonnell Douglas* and its progeny and Title VII jurisprudence in general. Part I provides a brief background on (1) the Civil Rights Act of 1964 and the motivation behind employment discrimination legislation; and (2) the *McDonnell Douglas* framework and its rationale. Part II

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[12] *Id.* at 2533.

[13] *See* Smith v. Bd. of Supervisors of S. Univ., 656 F. App'x 30, 33 n.4 (5th Cir. 2016) (acknowledging the "disagreement among the circuits regarding whether [*Nassar*] requires a plaintiff to show but-for causation as part of [a] prima facie case of retaliation, or only at the third step of the *McDonnell Douglas* framework to rebut an employer's legitimate stated reason for the adverse employment action").

[14] Foster v. Mountain Coal Co., 830 F.3d 1178, 1191 n.7 (10th Cir. 2016) (noting that in certain situations the "plaintiff must show evidence of but-for causation at the prima facie stage of the *McDonnell Douglas* framework" while also acknowledging that other circuits disagree).

[15] *See* Young v. City of Phila. Police Dep't, 651 F. App'x 90, 92 (3d Cir. 2016) (finding that the district court erred in applying the "but for" requirement at the prima facie stage as opposed to at the pretext stage); Nicholson v. Securitas Sec. Servs. USA, Inc., 830 F.3d 186, 189 (5th Cir. 2016) (if the defendant provides a legitimate reason for employee's termination, a plaintiff "must then rebut [the] explanation as pretextual, that is, she must prove [the defendant] would not have terminated her but for her age").

[16] Guessous v. Fairview Prop. Invs., LLC, 828 F.3d 208, 217 (4th Cir. 2016) ("As the district court noted, the plaintiff's burden to show pretext merges with the plaintiff's ultimate burden of persuading the court that she was a victim of intentional discrimination." (internal quotation marks omitted)).

[17] Foster v. Univ. of Maryland-E. Shore, 787 F.3d 243, 251 (4th Cir. 2015) ("We therefore hold that *Nassar* does not alter the causation prong of a prima facie case of retaliation.").

[18] *See supra* notes 13–16 and accompanying text.

discusses *Nassar* and how since 2013 courts have struggled to apply *McDonnell Douglas* in a uniform way, with the Supreme Court only adding to the confusion. Part III analyzes *Ortiz* and recounts subsequent reaction to the decision, and Part IV reviews *Ortiz*'s possible effect on the *McDonnell Douglas* analysis and Title VII claims going forward. Part V concludes that courts should follow *Ortiz*'s lead and evaluate employees' evidence as a whole at the summary judgment stage, rather than applying different standards or sorting through indirect and direct evidence.

I. HISTORICAL OVERVIEW OF TITLE VII JURISPRUDENCE

Because *Ortiz* foreshadows a possible departure from established Title VII jurisprudence,[19] it is useful to remember why the analysis of Title VII cases is so important, why employment discrimination jurisprudence matters today, and how courts have evaluated Title VII claims over the last few decades. If, as some have argued, the purpose of the law and the judiciary is to promote justice,[20] a brief history of Title VII is needed in order to gain a sense of the purpose of the statute, and why any changes to the balance the Supreme Court has struck in its Title VII jurisprudence would be so impactful.

A. The Civil Rights Act of 1964 and the Birth of Title VII

The enactment of the Voting Rights Act of 1964 was historic. Senator Hubert Humphrey, invoking the words of the Founding Fathers and the U.S. Constitution's preamble while introducing the bill in Congress, remarked that it is the responsibility of the government to recognize that the Preamble was merely a prelude to the Civil Rights Act of 1964 and that the iconic phrase read "We, the people of the United States—Not

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[19] *See infra* Part IV for reaction and commentary on *Ortiz*.

[20] *See* Union Ins. Co. v. Hoge, 62 U.S. 35, 50 (1858) ("[I]t is the object of all law to promote justice and honest dealing"); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 266 (1995) (Stevens, J., dissenting) (discussing the judiciary's mission "of administering justice impartially"); Laird v. Tatum, 409 U.S. 824, 838 (1972) ("The oath prescribed by 28 U.S.C. § 453 that is taken by each person upon becoming a member of the federal judiciary requires that he administer justice without respect to persons, and do equal right to the poor and to the rich, that he faithfully and impartially discharge and perform all the duties incumbent upon [him] . . . agreeably to the Constitution and laws of the United States." (alteration in original) (internal quotation marks omitted)); Bridges v. California, 314 U.S. 252, 284–85 (1941) (Frankfurter, J., dissenting) ("From the earliest days of the English courts, [courts] have encountered obstructions to doing that for which they exist, namely, to administer justice impartially and solely with reference to what comes before them.").

white people, colored people, short people, or tall people, but simply: We the people."[21] In phrasing the passage of the bill in such a way, Senator Humphrey made it clear that the purpose of the Civil Rights Act was to help stem the tide of prejudice and inequality in various realms of public and private life in the United States.[22]

One driving force for the inclusion of Title VII in the Civil Rights Act of 1964 was "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin, in an effort to open employment opportunities for African Americans in occupations which had been traditionally closed to them."[23] In the years after the Act's passage, however, the courts struggled to determine what elements would constitute a proper claim under Title VII's anti-employment discrimination provisions and were unable to come to an agreement on how a Title VII claim should be evaluated at the judicial level.[24]

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[21] 88th Cong. Rec. 6527–28 (Mar. 30, 1964) (testimony of Senator Hubert Humphrey); *see also* U.S. CONST. pmbl.

[22] *See* Barefoot Sanders, *The Civil Rights Act of 1964*, 27 TEX. B.J. 931, 1014 (1964) ("The venerable code of equity law commands 'for every wrong, a remedy.' But in too many communities, in too many parts of the country, wrongs are inflicted on [African American] citizens for which no effective remedy at law is clearly and readily available."); *id.* (discussing President Kennedy's message to Congress regarding the proposed Civil Rights Act of 1963 and that Congressional inaction will lead to "endangering domestic tranquility, retarding our Nation's economic and social progress and weakening the respect with which the rest of the world regards us"); *see also* Paulette Brown, *The Civil Rights Act of 1964*, 92 WASH. U. L. REV. 527, 532–34 (2014) ("In President Kennedy's televised national address on civil rights and race relations, on June 11, 1963, he promised to enforce the civil rights of every American." After President Kennedy's assassination "President Johnson proclaimed that 'no memorial oration or eulogy could more eloquently honor President Kennedy's memory than the earliest possible passage of the civil rights bill for which he fought so long.'" President Johnson later "reiterated the promise of the Civil Rights Act of 1964—'a civil rights law that would eliminate from this Nation every trace of discrimination and oppression that is based upon race or color.'").

[23] Ann K. Wooster, *Title VII Race or National Origin Discrimination in Employment–Supreme Court Cases*, 182 A.L.R. Fed. 61 (2002) (internal citations omitted); *see also* S. REP. NO. 88–352 at 6327 (1964) (explaining that Title VII is designed to give African Americans and other minority groups "a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America"); *id.* at 6329 ("In [T]itle VII we seek to prevent discriminatory hiring practices. We seek to give people an opportunity to be hired on the basis of merit, and to release the tremendous talents of the American people, rather than to keep their talents buried under prejudice or discrimination."). *Cf.* United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 230–55 (1979) (Rehnquist, J., dissenting) (reviewing Title VII's legislative history).

[24] *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791, 797 (4th Cir. 1971) ("This is not to say that actual intent or motive is irrelevant to determining whether rights assured by Title VII have been infringed. In some instances the reasons for taking particular action may determine whether the action is unlawfully discriminatory."); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 249 (10th Cir. 1970) ("When a policy is

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of "race, color, religion, sex, or national origin[,]"[25] and also makes it unlawful for employers to retaliate against employees for filing claims or attempting to resolve issues through Title VII.[26] Title VII also discusses the causation requirement in Section 2000e–2(m), which provides that discriminatory employment actions may be established by demonstrating that a plaintiff's membership in a protected class "was a motivating factor" for the adverse employment action.[27] Thus, the statutory regime considers certain protected categories, including a provision to prevent retaliatory actions, and also provides that a plaintiff need only show that his or her protected trait was a motivating factor of the adverse action, allowing for the existence of other causes. Even with the safeguard of Title VII, however, courts struggled to apply the new law.

After the passage of the Civil Rights Act but before *McDonnell Douglas*, lower courts struggled to apply Title VII in an evenhanded manner. In 1969, one district court judge rejected a discharged employee's Title VII claim based on racial discrimination, even though the employee was allegedly suspended for assisting other African American employees in

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demonstrated to have discriminatory effects, it can be justified only by a showing that it is necessary to the safe and efficient operation of the business.").

[25] Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e–2 (2018)) ("[I]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or . . . to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.").

[26] 42 U.S.C. § 2000e–3(a) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because [an employee or applicant for employment] has opposed any practice made an unlawful employment practice by this subchapter."). *See* King v. Pulaski Cty. Sch. Bd., 195 F. Supp. 3d 873, 882–83 (W.D. Va. 2016) ("Title VII makes it unlawful for an employer to retaliate against an employee for engaging in activity protected by the statute."); *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 59 (2006) ("Title VII's antiretaliation provision forbids employer actions that 'discriminate against' an employee (or job applicant) because he has 'opposed' a practice that Title VII forbids.").

[27] 42 U.S.C. § 2000e–2(m). In *Nassar*, the Supreme Court discussed Section 2000e–2(m) in terms of the causation requirement for retaliation claims. There, the Court rejected the argument that the text of 2(m) applied directly to retaliation claims—specifically the causation requirement of the employee's action being a "motivating factor." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2528 (2013).. *Cf.* Gardner v. Collins, 27 U.S. 58, 93 (1829) ("What the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words.").

filing their own Title VII claims.[28] The judge reasoned that the adverse actions were merely due to the employee making false statements in the Title VII charge.[29] But the United States Court of Appeals for the Fifth Circuit reversed and remanded, noting that the employer's "own candid story" suggested that the employer used the existence of the false statement as a pretext for the adverse actions.[30] Lacking, however, was a concise standard with which the lower court could evaluate the plaintiff's evidence.[31]

That same year, the Eighth Circuit heard a case involving railroad employees' claims that, in denying them opportunities afforded to white employees, the railroad discriminated against them based on race.[32] The trial judge dismissed the claim for lack of jurisdiction.[33] But the appellate court reversed, noting that Title VII was enacted in order to enlarge the bases for discrimination, not shrink them.[34] So, while directing the district court to rehear the complaints, the Eighth Circuit did so without any additional clear direction.[35] In the end, appellate and district courts alike attempted to wade through the murky waters of applying Title VII in employment discrimination cases. But it wasn't until *McDonnell Douglas* that the Supreme Court announced a coherent federal standard.

B. McDonnell Douglas *and Its Progeny*

The seminal case expounding the scope of the Title VII claim as a judicial remedy is *McDonnell Douglas Corp. v. Green*.[36] There, Green, an African American citizen living in St. Louis, was employed as a mechanic and laboratory technician by McDonnell Douglas Corp. (McDonnell Douglas) until in August 1964 when he was laid off as part of an overall workforce reduction plan.[37] Green, who claimed his discharge was racially motivated, engaged in a protest with other employees at McDonnell Douglas' headquarters that involved blocking the main road that led to the plant to prevent other employees to

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[28] Pettway v. Am. Cast Iron Pipe Co., 411 F.2d 998, 1000–01 (5th Cir. 1969).
[29] *Id.* at 1002.
[30] *Id.* at 1008.
[31] *Id.*
[32] Norman v. Missouri Pac. R.R., 414 F.2d 73, 75 (8th Cir. 1969).
[33] *Id.*
[34] *Id.* at 83.
[35] *Id.* at 87.
[36] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[37] *Id.* at 794.

make it to work.[38] Green was arrested and ultimately pleaded guilty to obstructing traffic, but quickly applied for re-employment only to be denied by his former employer.[39]

Green, a "long-time activist in the civil rights movement,"[40] filed a complaint with the Equal Employment Opportunity Commission (EEOC), asserting that McDonnell Douglas refused to hire him because of his race and involvement in the civil rights movement in violation of the Civil Rights Act.[41] After failing to resolve the dispute, the EEOC advised Green of his right to file a civil suit in federal court, but the district court dismissed Green's complaint, finding that the company's refusal to re-hire Green was based solely on Green's participation in the illegal activities and not race.[42] In reviewing Green's evidence, the district court glossed over the race discrimination case and focused primarily on Title VII's directive to stem layoffs aimed at protesting employees.[43] The district court noted that Green's evidence—that he was laid off for protesting and not rehired due to his race—was not enough to suggest a nefarious motive, and that the employer's proffered reason of firing Green due to his disruptive activities—was legitimate.[44]

Attempting to clarify the standards governing the discrimination-retaliation claim made under Title VII, the Eighth Circuit remanded the case while noting that Green had in fact established a prima facie case of racial discrimination.[45] Basing its analysis in the idea that there will rarely be a so-called smoking gun demonstrating discrimination or retaliation, the Eighth Circuit construed the Title VII regime to favor allowing a plaintiff to present circumstantial evidence to support a claim.[46] The Eighth Circuit advised: instead of treating McDonnell

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[38] *Id.*

[39] *Id.* at 795–96.

[40] *Id.* at 794.

[41] *See* 42 U.S.C. § 2000e–2(a)(1) (2018) (prohibiting substantive racial discrimination in an employment decision); *id.* § 2000e–3(a) (prohibiting discrimination against employees or applicants for engaging in activity protected under Title VII). For a comprehensive and easily accessible overview of Title VII's various provisions *see Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/laws/statutes/titlevii.cfm [https://perma.cc/DR6L-BTC9]; *see also* Megan E. Mowrey, *Establishing Retaliation for Purposes of Title VII*, 111 PENN ST. L. REV. 893, 893 (2007).

[42] *McDonnell Douglas*, 411 U.S. at 797.

[43] Green v. McDonnell Douglas Corp., 318 F. Supp. 846, 850–51 (E.D. Mo. 1970).

[44] *Id.*

[45] Green v. McDonnell Douglas Corp., 463 F.2d 337, 344 (8th Cir. 1972).

[46] *Id.* at 343 ("Employers seldom admit racial discrimination," which "is often cloaked in generalities or vague criteria which do not measure an applicant's qualifications in terms of job requirements." (internal citation omitted)).

Douglas's excuse as dispositive, Green "should be given the opportunity to demonstrate that [McDonnell Douglas's] reasons for refusing to rehire him were mere pretext."[47]

In granting certiorari, the Supreme Court set a course to shape the standard for Title VII employment discrimination claims for decades to come.[48] In order to address the confusion over the proper standard to apply and with whom the initial burden rests, the Court explained that "[t]he complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination" and that "[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[49] The Court, however, emphasized that the analysis does not end there. The plaintiff then must:

> be afforded a fair opportunity to show that [the employer's] stated reason for [the employee's] rejection was in fact pretext. . . . In short, [the employee] must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for [the] rejection were in fact a coverup for a racially discriminatory decision.[50]

The Court therefore held that Green should have been permitted a fair opportunity to offer evidence demonstrating that McDonnell Douglas's reasons for not rehiring him were pretext.[51] In order words, while direct evidence can make a case easy, the smoking gun will often not exist in real world situations of workplace discrimination. And the Court seemed unwilling to dismiss otherwise meritorious claims just because the "smoking gun" could not be produced.

The Supreme Court thus set forth a framework to analyze Title VII claims that would allow a plaintiff to make his or her case in court based on various types of evidence. Critical to the Court's analysis was its inclusion of possible avenues to prove discrimination without direct evidence, including the employer's reaction to civil rights activities and statistics on the employer's prior hiring and firing practices that could establish unlawful employment practices based on race.[52] In a succinct opinion, the Court partially adopted the Eighth Circuit's reasoning and crafted a burden-shifting analysis:

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[47] *McDonnell Douglas*, 411 U.S. at 798.
[48] *Id.* at 798.
[49] *Id.* at 801–02.
[50] *Id.* at 804–05.
[51] *Id.* at 805.
[52] *McDonnell Douglas*, 411 U.S. at 804–05.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination.[53] Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.[54]

From the 1973 *McDonnell Douglas* decision to as recently as 2003, the Court used this framework to decide Title VII claims. In *Furnco Construction Corp. v. Waters*, for example, two African American bricklayers, who were denied employment with Furnco, the employer, filed a claim for employment discrimination in violation of Title VII.[55] Although the district court found for the employer at trial, the Seventh Circuit concluded that "under *McDonnell Douglas* [the employees] had made out a prima facie case which had not been effectively rebutted."[56] The Supreme Court, however, explained that the Seventh Circuit had mistakenly "equat[ed] a prima facie showing under *McDonnell Douglas* with an ultimate finding of fact as to discriminatory refusal to hire under Title VII."[57] The Court explained that *McDonnell Douglas* simply requires that after a prima facie showing by plaintiff, defendant need only "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[58] In other words, the directive of *McDonnell Douglas* was not to impose an impossible burden on the employer in the face of an employee's Title VII claim.

In the decades following its decision in *McDonnell Douglas*, the Supreme Court expanded its use of the seminal case's burden-shifting analysis to apply to various federal

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[53] In evaluating retaliation claims under the *McDonnell Douglas* burden-shifting analysis, courts have established that a plaintiff may make out their prima facie case by establishing four elements: (1) the employee engaged in a protected activity as defined by Title VII; (2) the employer had knowledge of the protected activity; (3) an adverse employment action occurred; and (4) a causal connection exists between the protected activity and the adverse action. *See, e.g.*, Lore v. City of Syracuse, 670 F.3d 127, 157 (2d Cir. 2012) (listing the elements needed to establish a prima facie case); Ameristar Airways, Inc. v. Admin. Review Bd., U.S. Dep't of Labor, 650 F.3d 562, 566–67 (5th Cir. 2011) (same); Parsons v. FedEx Corp., 360 F. App'x 642, 647–48 (6th Cir. 2010) (same).

[54] Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981) (affirming the use of the Supreme Court's Title VII analysis in *McDonnell Douglas* (internal quotations and citations omitted)).

[55] Furnco Constr. Corp. v. Waters, 438 U.S. 567, 569 (1978).

[56] *Id.*

[57] *Id.* at 576.

[58] *Id.* at 578 (quoting McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973)).

statutory regimes.[59] In doing so, the Court ensured that this crucial analysis, based in the Civil Rights Act's promise of equality, would remain an invaluable analytical doctrine in the federal court system. But even seemingly established doctrines are often revisited and sometimes manipulated. *McDonnell Douglas* is no different.

II. *UNIVERSITY OF TEXAS SOUTHWESTERN MEDICAL CENTER V. NASSAR* AND ITS SUBSEQUENT APPLICATION OF THE *MCDONNELL DOUGLAS* ANALYSIS

In 2013, the Court revisited its employment discrimination jurisprudence, adding an element of causation to the *McDonnell Douglas* analysis in *University of Texas Southwestern Medical Center v. Nassar*. In *Nassar*, the Supreme Court held that a retaliation claim under Title VII must be established in accordance with the traditional "but for" causation standard.[60] In doing so, the Supreme Court "adopted a rigid tort law causation standard" that one scholar suggested "inhibits an employee's ability to prove retaliation," thus making it more difficult for a plaintiff-employee to bring and vindicate a civil rights claim.[61] Moreover, *Nassar* and its new standard only muddied the waters for courts' evaluating Title VII claims, thus making *Ortiz*'s seeming simplification all the more of a drastic departure.

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[59] *See* Young v. United Parcel Service, Inc., 135 S. Ct. 1338, 1353 (2015) (finding that a plaintiff asserting a claim under the Pregnancy Discrimination Act seeking "to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework.") (citing Furnco Constr. Corp. v. Waters, 438 U.S. 575 (1978)); Raytheon Co. v. Hernandez, 540 U.S. 44, 49–50 & n.3 (2003) (approvingly citing *Pugh v. Attica*, a 2001 case where the Seventh Circuit applied the *McDonnell Douglas* burden-shifting approach to an Americans with Disabilities Act disparate-treatment claim (citing Pugh v. City Of Attica, Indiana, 259 F.3d 619, 621 (7th Cir. 2001))); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 309 (1996) (holding that a plaintiff alleging a "violation of the Age Discrimination in Employment Act of 1967 (ADEA) must show that he was replaced by someone outside the age group protected by the ADEA to make out a prima facie case under the framework established by [*McDonnell Douglas*]" (internal citations omitted)).

[60] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013) ("[A] plaintiff making a retaliation claim . . . must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.").

[61] Matthew A. Krimski, University of Texas Southwestern Medical Center v. Nassar*: Undermining the National Policy Against Discrimination*, 73 MD. L. REV. ENDNOTES 132, 132 (2014); *see also* Lawrence D. Rosenthal, *Timing Isn't Everything: Establishing a Title VII Retaliation Prima Facie Case after* University of Texas Southwestern Medical Center v. Nassar, 69 S.M.U. L. REV. 143, 146 (2016) (arguing that the "pro-employer standard some courts have adopted as a result of *Nassar* is unnecessary"); Steven Greenhouse, *Supreme Court Raises Bar to Prove Job Discrimination*, N.Y. TIMES (June 24, 2013), http://www.nytimes.com/2013/06/25/business/supreme-court-raises-bar-to-prove-job-discrimination.html [https://perma.cc/ZHG2-92Q8].

A. Nassar*—Before and After*

Several cases and legislative actions in the intervening years from *McDonnell Douglas* to 2013 illustrate the groundwork for the Supreme Court's reasoning in *University of Texas Southwestern Medical Center v. Nassar*. In 1989, the Supreme Court in *Price Waterhouse v. Hopkins* attempted to clarify what *McDonnell Douglas* meant when it referred to an adverse employment action taken "because of" an individual's race.[62] In a plurality opinion, six Justices agreed "that a plaintiff could prevail on a claim of status-based discrimination if he or she could show that one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision."[63]

In 1991, Congress passed the Civil Rights Act of 1991, which codified the lowered *Price Waterhouse* standard in a new provision. The Act stated that "an unlawful employment practice is established when the complaining party demonstrates that [a protected trait] was a *motivating factor* for any employment practice, *even though other factors* also motivated the practice."[64] More recently, in *Gross v. FBL Financial Services, Inc.*,[65] the Supreme Court again probed the causation question and explained that, through a textual analysis of the words in question, the words "because of" mean "by reason of" or "on account of."[66] Therefore, *Gross* "declined to adopt the [lessened causation standard] endorsed by the plurality and concurring opinions in *Price Waterhouse*" in context of the AEDA.[67]

In *Nassar*, the Supreme Court for the first time addressed the causation standard required in proving a retaliation claim under Title VII.[68] In holding that "a plaintiff making a retaliation claim under § 2000e–3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action,"[69] the Supreme Court, following Congress's supposed intent in enacting Title VII, adopted a

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[62] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[63] *Nassar*, 133 S. Ct. at 2526 (citing *Price Waterhouse*, 490 U.S. at 258) (internal quotations omitted).

[64] 42 U.S.C § 2000e–2(m) (emphasis added).

[65] Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).

[66] *Id.* at 176 (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1966); 1 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 194 (1966); 1 OXFORD ENGLISH DICTIONARY 746 (1933)).

[67] *Nassar*, 133 S. Ct. at 2527; *see also* 29 U.S.C. § 623(a) (2018). Though in *Gross* the Court confined its analysis to the ADEA, it would rely on its reasoning in *Gross* in holding as it did in *Nassar*. *See Nassar*, 133 S. Ct. at 2528.

[68] *Id.* at 2523.

[69] *Id.* at 2534.

"rigid tort law" causation standard.[70] In the years after *Nassar*, scholars have suggested that the Supreme Court's adoption of a strict causation standard would make it more difficult for plaintiffs to bring retaliation claim against employers, as the potential existence of other causes for adverse actions—poor performance, for instance—give the employer the upper hand in court.[71]

In 1995, the University of Texas Southwestern Medical Center hired Nassar, a medical doctor of Middle Eastern descent, to work as a faculty member and a staff physician.[72] In 2004, Beth Levine was hired as a chief of medicine and became Nassar's superior.[73] Nassar alleged that Levine was biased against him based on his religion and ethnicity, and that Levine made offensive comments revealing the same bias; Levine allegedly said "Middle Easterners are lazy."[74] In 2006, Nassar attempted to arrange a situation in which he could leave the university's faculty and still work at the hospital but ultimately resigned from his position citing Levine's harassment as the reason for his departure.[75]

Nassar filed a Title VII suit including two status-based discrimination claims. First, he alleged that the unlawful

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[70] Krimski, *supra* note 61, at 132, 143. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 14.4 (2d ed. 2016) ("[C]ourts apply a but-for test to determine whether the defendant's conduct was a factual cause of the plaintiff's harm. . . . Under the but-for test, the defendant's conduct is a factual cause of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred. The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a factual cause of the harm."); *see also* RESTATEMENT (SECOND) OF TORTS § 432: NEGLIGENT CONDUCT AS NECESSARY ANTECEDENT OF HARM (1965) ("[T]he actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent."); RESTATEMENT (THIRD) OF TORTS § 26: FACTUAL CAUSE (2000) ("Tortious conduct must be a factual cause of harm for liability to be imposed. Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."); *id.* § 26 cmt. b ("The standard for factual causation in this Section is familiarly referred to as the 'but-for' test, as well as a *sine qua non* test. Both express the same concept: an act is a factual cause of an outcome if, in the absence of the act, the outcome would not have occurred." (emphasis added)).

[71] *See* Krimski, *supra* note 61, at 132 (noting that the strict causation standard in *Nassar* "inhibits an employee's ability to prove retaliation, thereby disadvantaging employees seeking to defend their civil rights"); Edward G. Phillips & Brandon L. Morrow, *Retaliation Claims: More Difficult Standards under* Nassar *and* Ferguson, 49 TENN. B.J. 32, 32 (2013) (noting that *Nassar* "creat[ed] a more onerous burden for plaintiffs" in making a Title VII retaliation claim against an employer); Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical Center v. Nassar*, 14 NEV. L.J. 705, 705 (2014) ("The obvious impact of *Nassar* is that it makes it more difficult for plaintiffs to prove retaliation.").

[72] *Nassar*, 133 S. Ct. at 2523. Nassar left the University's employ in 1998 to obtain additional education but returned in 2001 in the same role. *Id.*

[73] *Nassar*, 133 S. Ct. at 2523.

[74] *Id.*

[75] *Id.* at 2523–24.

harassment resulted in his discharge, and second, that efforts to force the hospital to withdraw its offer to rehire Nassar were in retaliation for making the bias allegations against Levine.[76] While the jury found for Nassar,[77] on appeal, the United States Court of Appeals for the Fifth Circuit affirmed in part and vacated in part, finding that Nassar "had submitted insufficient evidence in support of his constructive-discharge claim," but that his retaliation claim under Section 2000e–3(a) only required "a showing that retaliation was a motivating factor for the adverse employment action" rather than the adverse action's but-for cause.[78]

In granting certiorari, the Supreme Court acknowledged that it was the Court's task "to define the proper standard of causation for Title VII retaliation claims."[79] Thus, the Court waded into the world of tort law, citing Keeton, Dobbs, Owen, Prosser and the Restatements (Second and Third) of Torts in attempting to determine what the plaintiff's burden should be in the context of a Title VII claim.[80] Importantly, the Court effectively split Title VII into two categories: Section 2000e–2, which prohibits employers from discriminating against employees based on the criteria listed in the statute (race, color, religion, sex, national origin), and Section 2000e–3(a), which prohibits discriminating against an employee for submitting a complaint regarding a substantive violation under Title VII.[81] The latter violations are distinct from instances of workplace discrimination because they are based on punishing employees for engaging in protected conduct such as making a Title VII complaint.[82]

By separating Title VII's substantive discrimination provision from its anti-retaliation provision, the Supreme Court set groundwork to logically conclude that the two subsections did not necessarily require a plaintiff to meet the same burden of proof.[83] According to the Court, the Section 2000e–3(a) anti-retaliation provision making it unlawful for an employer to discriminate against an employee for engaging in a protected activity under Title VII, was analogous to the ADEA case discussed in *Gross*, which made it unlawful for an employer to

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[76] *Id.*

[77] A jury awarded Nassar "over $400,000 in backpay and more than $3 million in compensatory damages" but "[t]he District Court later reduced the compensatory damages award to $300,000." *Id.* at 2524.

[78] *Id.*

[79] *Id.*

[80] *See id.* at 2525 (citing W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON LAW OF TORTS 265 (5th ed. 1984)).

[81] *Id.* at 2525. *But cf. id.* at 2534 (Ginsburg, J., dissenting).

[82] *Id.*

[83] *Id.* at 2528.

take adverse employment action "because" of various criteria.[84] For that reason the Court concluded that because there was no "meaningful textual difference" between the text of the ADEA provision in *Gross* and Section 2000e–3(a), it made sense to apply the but-for causation requirement established in *Gross* to the Section 2000e–3(a) anti-retaliation provision.[85]

Ultimately, the Court concluded that Title VII retaliation claims need be proved according to "traditional principles of but-for causation," which "requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[86] Citing employment discrimination statistics from the EEOC, the Court noted the important policy implications that the standard of proof for retaliation claims would have for the country, including the drastic increase in the number of retaliation claims made in the past fifteen years.[87] Additionally, the Court worried that "lessening the causation standard could also contribute to the filing of frivolous claims," which would only be a fiscal drain on employers and agencies, not to mention a burden on judicial resources.[88] But after *Nassar*, not only was the plaintiff's burden in retaliation cases heightened, so was the confusion over whether *Nassar* affected the *McDonnell Douglas* standard.

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[84] *Id.*

[85] *See id.* The Supreme Court dismissed the arguments offered by the government that Section 2000e–2(m) allows a plaintiff to prove unlawful employment practices that were based on a showing that a protected criteria was a "motivating factor," but not necessarily the but-for cause in the adverse employment action. *Nassar*, 133 S. Ct. at 2528. The Court, however, explained first that 2(m) does not cover retaliation claims, but instead is more applicable to the substantive discrimination section of 2000e-2. *Id.* ("[I]t would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." (citing Gardner v. Collins, 27 U.S. 58, 93 (1829), for the proposition that "[w]hat the legislative intention was, can be derived only from the words they have used; and we cannot speculate beyond the reasonable import of these words")). Second, when Congress codified *Price Waterhouse*'s "motivating factor" standard in 1991 by enacting § 2000e–2(m), Congress included 2(m) as a subsection within Section 2000e-2; thus, the Court concluded, considering the structure of the statutes themselves, it would be illogical to impute 2(m)'s standard of proof onto the separate anti-retaliation provision. *See Nassar*, 133 S. Ct. at 2529; *see also Gross*, 557 U.S. 167, 178 n.5 (2009) ("Congress' careful tailoring of the 'motivating factor' claim in Title VII, as well as the absence of a provision parallel to § 2000e-2(m) in the ADEA, confirms that we cannot transfer the *Price Waterhouse* burden-shifting framework into the ADEA.").

[86] *Nassar*, 133 S. Ct. at 2533.

[87] *Id.* 2531.

[88] *Id.* 2531–32.

*B. Post-*Nassar *Application of the* McDonnell Douglas *Burden-Shifting Analysis*

Various courts have interpreted differently the scope of the Supreme Court's reasoning as to the application of the "but for" causation requirement in Title VII cases, evincing the confusion over a plaintiff's burden under *Nassar* and *McDonnell Douglas*. As it appears that this overall confusion may have been part of the motivation for the Seventh Circuit's ruling in *Ortiz*,[89] it is instructive to take stock of several cases from around the country where federal courts applied the *McDonnell Douglas* burden-shifting analysis in light of *Nassar*.[90]

In *Pollard v. New York City Health & Hospitals Corp.*,[91] the plaintiff filed a complaint with the EEOC alleging discrimination and retaliation on the basis of her gender and claimed that her employer retaliated against her for filing the complaint.[92] The *Pollard* court, applying *McDonnell Douglas* in light of *Nassar*, applied the "but-for" causation requirement at the first stage (the prima facie stage) of the analysis during summary judgment.[93] The court determined that the retaliation claim failed "because she is unable to establish a causal connection between her transfer and reduction of responsibilities and her filing of the . . . complaint" nine months earlier.[94] But only two weeks earlier, the same court cited *Nassar,* noting that "but for" causation was a requirement but failed to specify how it applied to the *McDonnell Douglas* analysis.[95]

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[89] Ortiz v. Werner Enter., Inc., 834 F.3d 760. 760 (7th Cir. 2016). *See supra* notes 5, 7; *see also infra* Part III.

[90] To recap, *McDonnell Douglas* instructs that

> [f]irst, the plaintiff has the burden of proving . . . a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove . . . that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1980) (internal quotation marks and citations omitted). Establishing a prima facie case may differ based on which statute the plaintiff brings a claim under. *See supra* note 53.

[91] Pollard v. N.Y.C. Health & Hosps. Corp., No. 13 Civ. 4759, 2016 WL 5108127, at *11–13 (S.D.N.Y. Sept. 20, 2016); *see also* Kennedy v. UMC Univ. Med. Ctr., 203 F. Supp. 3d 1100, 1108–09 (D. Nev. 2016) (also applying the "but for" requirement at the first stage of the *McDonnell Douglas* analysis); Kimball v. Vill. of Painted Post, No. 12-CV-6275, 2016 WL 4417121, at *6 (W.D.N.Y. Aug. 19, 2016) (same; connecting the "protected activity" from the prima facie prong with the "but for" requirement).

[92] *Pollard*, 2016 WL 5108127, at *1, *11.

[93] *Id.* at *13.

[94] *Id.* at *12–13.

[95] Pineda v. Byrne Dairy, Inc., 212 F. Supp. 3d 467, 478–79 (S.D.N.Y. 2016).

Other courts have interpreted *Nassar*'s application differently, applying the "but for" causation requirement to the third prong of the *McDonnell Douglas* analysis where the burden shifts back to the plaintiff to show that the employer's action was in fact discriminatory and that the non-discriminatory reasons given were mere pretext.[96] In *Ucar v. Connecticut Department of Transportation*, the plaintiff alleged that his employer "subjected him to a hostile work environment, discriminated against him on the basis of his national origin and religion, and retaliated against him when he complained."[97] Despite the analogous nature of the complaint, in *Ucar*, the court applied the "but for" causation requirement to the third prong of the *McDonnell Douglas* analysis: "If the employer proffers [a non-retaliatory reason for the adverse employment action], the presumption of retaliation dissipates and the plaintiff must prove that the desire to retaliate was the but-for cause of the challenged employment action."[98]

Similarly, in *Hughes v. Dyncorp International*, the court seemed to suggest that the "but for" causation requirement should be applied to *McDonnell Douglas*'s third prong. There, the court determined that at the summary judgment stage, "a reasonable jury could infer" that plaintiff's complaint alleging discrimination was indeed the "but for" cause and that Dyncorp's nondiscriminatory reason (plaintiff had attended classes instead of appearing for work as instructed) was simply pretext.[99] The court, however, failed to state why it applied the "but for" requirement to the third prong.[100]

Even as recent as 2016, it is clear that courts have been struggling to apply the *McDonnell Douglas* analysis, especially in light of *Nassar*. Without guidance from the Supreme Court, lower courts simply have not applied the but for causation requirement in a uniform manner. This lack of uniformity could lead to a damaging effect on the integrity of the court system as perceived by society. But whether the courts were ready for another shift, the *Ortiz* case changed the Title VII landscape again.

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[96] *See supra* notes 13–17 and accompanying text.

[97] Ucar v. Conn. Dep't of Transp., No. 14-CV-765, 2016 WL 4275578, at *1 (D. Conn. Aug. 12, 2016).

[98] *Id.* at *12 (internal quotation marks omitted).

[99] Hughes v. Dyncorp Int'l, LLC, No. 14-CV-109, 2016 WL 4191194, at *7 (N.D. Miss. Aug. 5, 2016); Feist v. La. Dep't of Justice, 730 F.3d 450. 454 (5th Cir. 2013) ("After the employer states its reason, the burden shifts back to the employee to demonstrate that the employer's reason is actually a pretext for retaliation . . . which the employee accomplishes by showing that the adverse action would not have occurred 'but for' the employer's retaliatory motive." (internal citations omitted)); *see also* Green v. Rochdale Vill. Soc. Servs., Inc., No. 15-CIV-5824, 2016 WL 4148322, at *8 (E.D.N.Y. Aug. 4, 2016) (applying the "but for" requirement to the third prong of *McDonnell Douglas*).

[100] *See Hughes*, 2016 WL 4191194, at *6, *7.

III. THE *ORTIZ* DECISION—REACTION AND APPLICATION

As if Title VII jurisprudence was not complicated enough, the Seventh Circuit in *Ortiz v. Werner Enterprises, Inc.* muddied the waters even further. When *Ortiz* was published in August 2016, commentators were quick to note that although the decision explicitly denounced any reading of the decision dismissing *McDonnell Douglas* as a current and useful analysis,[101] one could read between the lines and predict that decisions like *Ortiz* could eventually lead to the demise of the *McDonnell Douglas* burden shifting analysis.[102]

Ortiz, a freight broker for the shipping company Werner Enterprises, claimed that Werner fired him because of his Mexican ethnicity whereas Werner claimed that he fired Ortiz for falsifying business records.[103] Ortiz sued Werner, *inter alia*, for discrimination pursuant to the Illinois Human Rights Act and 42 U.S.C. Section 1981.[104] In a Section 1981 claim, "[a] plaintiff may prove discrimination . . . through the direct or the indirect [*McDonnell Douglas*] burden-shifting method[] of proof," and because not every discrimination claim involves overt acts of discriminations, *McDonnell Douglas* applicability becomes extremely important as courts continue to utilize *McDonnell Douglas* to evaluate employment discrimination claims as a whole.[105]

The key facts in *Ortiz* are not complex. Werner offered freight brokerage as one of its services and for that service customers pay a fee and Werner finds transportation for their loads; Werner then tracks the loads through a proprietary records system, and after securing carriers, brokers update the internal system to confirm the transactions and who gets credit for the deal.[106] Ortiz, who was tasked with tracking Werner's customers' loads through a records system, was able to earn a commission the months in which Werner generated more than a specified profit taking the aggregate (the difference between what customer pays and what Werner pays the carrier).[107]

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101 *See infra* Part IV; *see also infra* note 131.

102 *See infra* note 131.

103 Ortiz v. Werner Enter., Inc., 834 F.3d 760, 761 (7th Cir. 2016).

104 *Id.* Although Ortiz did not sue under Title VII, the base allegations of employment discrimination are analogous to a Title VII claim. 775 Ill. Comp. Stat. Ann. 5/2-102 (2006) (providing that "[i]t is a civil rights violation . . . [f]or any employer to . . . act with respect to . . . conditions of employment on the basis of unlawful discrimination").

105 *See* Ortiz v. Werner Enters., Inc., No. 13-CV-8270, 2015 WL 3961240, at *3 (N.D. Ill. June 25, 2015), *rev'd and remanded* 834 F.3d 760 (7th Cir. 2016).

106 *Ortiz*, 834 F.3d at 761.

107 *Id.* at 761–62.

Ortiz alleged that Werner assigned him to an unprofitable sector, and as a result, Ortiz ended up left with several unprofitable loads.[108] Though it was unclear why Werner assigned the loads to him, Ortiz claimed that it was racially motivated.[109] Ortiz therefore altered the records to reflect that he had not made these unprofitable assignments, a practice he assumed was acceptable.[110] When Ortiz arrived back at work he was told that he was fired for falsifying records—Ortiz, however, contended that Werner employees subjected him to racial slurs and that the intensity of this harassment increased leading up to his discharge.[111]

The district court granted summary judgment to Werner. Instead of looking at the evidence of discrimination as a whole, the court differentiated between "direct" and "indirect" evidence, eventually concluding that Ortiz had not presented a "convincing mosaic" because the racial slurs had nothing to do with Ortiz's discharge.[112] The Seventh Circuit on appeal, however, explained that "[t]he district court's effort to shoehorn all evidence into [the two categories] . . . detracted attention from the sole question that matters: Whether a reasonable juror could conclude that Ortiz would have kept his job if he had a different ethnicity, and everything else had remained the same."[113]

The court thus made it clear that "convincing mosaic" is not a legal standard, and additionally, courts are to refrain from separating evidence into buckets: indirect evidence here, and direct evidence there.[114] Instead, the question is whether the evidence as a whole allows the plaintiff to make his or her case in order to get past summary judgment and to a jury. The Court therefore held that "[a] reasonable juror could infer that [Ortiz's superiors] didn't much like Hispanics . . . and tried to pin heavy losses on Ortiz to force him out the door."[115] Even while specifically stating that its decision did not concern *McDonnell Douglas*,[116] it was portions of *Ortiz* like this that had commentators wondering if

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[108] *Id.* at 762.

[109] *Id.* at 761. There were apparently other instances of which Ortiz was at first unaware, where other brokers assigned his name to these "losing loads"; in other words, it is further alleged that this was not an isolated incident. *Id.* at 762–63.

[110] *Id.* at 762.

[111] *See id.* at 763. Ortiz alleged that his bosses referred to him as "beaner," "taco eater," "fucking beaner," "taco," "bean eater," "dumb Mexican," "stupid Puerto Rican," "dumb Puerto Rican," "fucking Puerto Rican," "Puerto Rican," and "dumb Jew." *Id.*

[112] *Id.* at 763.

[113] *Id.* at 763–64 (internal quotation marks omitted).

[114] *Id.* at 764.

[115] *Id.* at 766.

[116] *Id.*

the decision was an implicit repudiation of the burden-shifting analysis of *McDonnell Douglas*.[117]

A. Reaction to Ortiz *by the Courts*

Soon after *Ortiz* was decided, courts within the jurisdiction of the Seventh Circuit began applying *Ortiz's* new "test" in the context of employment discrimination cases. For instance, in *Edwards v. Illinois Department of Financial and Professional Regulation*, the court found that even when applying the new standard promulgated in *Ortiz*,[118] "[b]ased on the evidence taken as a whole . . . no reasonable juror could conclude that Defendant failed to rehire Plaintiff based on her sex or race," and "[w]hile Plaintiff present[ed] evidence that [she was treated] differently than other workers, she . . . failed to connect that treatment to her sex or race."[119] In *Edwards*, the treatment of *Ortiz* as a new standard was less than groundbreaking, but in two other cases, the discussion of *Ortiz* highlights some troubling aspects of the *Ortiz* decision and its relation to existing employment discrimination jurisprudence.

In *Davis v. Brennan*, the court discussed whether *Ortiz* had created a new avenue to bring a Title VII claim.[120] In that case, the plaintiff brought a host of Title VII claims against her employer including a national origin discrimination claim, a sex discrimination claim, a discrimination claim brought under the ADEA, and a retaliation claim.[121] The court, acknowledging *Ortiz* as controlling in the Seventh Circuit, found that Davis had "failed to point to sufficient evidence to show that a reasonable factfinder could find that Davis' race or sex was the reason for the alleged adverse actions taken against her," and thus could not defeat the employer's motion for summary judgment "under the *Ortiz* reasonable factfinder method."[122] Interestingly, the court then discussed Davis' argument that she could also separately proceed under the *McDonnell Douglas* burden-shifting method.[123] Thus it appears that if the plaintiff

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[117] *See infra* Part IV.

[118] *See* Edwards v. Ill. Dep't of Fin., 210 F. Supp. 3d 931, 950–54 (N.D. Ill. 2016) (discussing the application of the new standard from *Ortiz*).

[119] *Id.* at 951.

[120] Davis v. Brennan, No. 14 C 753, 2016 WL 5476251, at *2 (N.D. Ill. Sept. 29, 2016).

[121] *Id.* at *1.

[122] *Id.* at *3.

[123] *Id.*

could have made her claim under *Ortiz*, then *McDonnell Douglas* as a judicial framework may be superfluous.[124]

The tension between *Ortiz* and existing Title VII jurisprudence is even more obvious in *Knapp v. Evgeros*.[125] First, the *Knapp* court began by summarizing how courts used to analyze employment discrimination cases: either by viewing "direct" evidence, or when direct evidence was not available, the plaintiff could make a prima facie rebuttable presumption of discrimination under *McDonnell Douglas*.[126] The court, however, notes: "That was the old way" in light of *Ortiz*, and that the plaintiff must present evidence that "considered as a whole, would allow a reasonable juror to conclude that the plaintiff was discriminated against due to a protected characteristic."[127]

While this seems like a mere recitation of the new rule, the court continued: "*McDonnell Douglas* identifies one pattern that the evidence might fit that would enable a reasonable juror to find discrimination," but that this pattern "is just one way" that a reasonable juror could find discrimination.[128] Continuing, the court stated that first, it should lay out the evidence to see if it leads to an inference of whether the adverse action was taken because of a protected trait or disability according to *McDonnell Douglas*. If it does not fit the *McDonnell Douglas* pattern, "the court will step back and—again, *considering the evidence as a whole*—determine whether a reasonable factfinder could conclude that [plaintiff] was discriminated against."[129] The court ultimately held that Knapp failed to meet her burden, but came dangerously close to relegating *McDonnell Douglas* to the side: "Although [plaintiff] cannot forestall summary judgment under *McDonnell Douglas*, the question remains whether, more broadly and stepping outside the *McDonnell Douglas* framework, she has adduced evidence otherwise sufficient to allow a reasonable juror to conclude that she was discriminated against due to her disability."[130]

This language is eye-opening. One should stop and consider whether *McDonnell Douglas* is truly necessary if the plaintiff can fail to meet the standard under that analysis, but

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[124] In other words, if the underlying critical directive of Title VII is the ability for the plaintiff to make his or her case and present evidence, perhaps the *Ortiz*'s suggestion that the burden to present that evidence be lowered (or altered to be more plaintiff-friendly) wins out.

[125] Knapp v. Evgeros, Inc., 205 F. Supp. 3d 946 (N.D. Ill. 2016).

[126] *Id.* at 955.

[127] *Id.* at 956.

[128] *Id.* at 956–57.

[129] *Id.* (emphasis in original).

[130] *Id.* at 958.

still have another opportunity to have the court look at the evidence as a whole. Although it was a lower court making these comments, it seems as though *Ortiz* has already rooted some real confusion in the Seventh Circuit and uncertainty as to the lasting effect of *McDonnell Douglas* as a standard.

IV. *ORTIZ'S* EFFECT ON *MCDONNELL DOUGLAS*, *NASSAR*, AND TITLE VII CLAIMS IN GENERAL

Any employer, practitioner, law professor, or judge might be somewhat startled to read some of the language of the lower courts after *Ortiz*. Indeed, after *Ortiz* was decided law firms, individual practitioners, and online legal commentators immediately questioned whether *Ortiz* meant the downfall of *McDonnell Douglas*.[131] The district courts within the jurisdiction of the Seventh Circuit have commented on *Ortiz* as well.[132] Therefore, having already delved into the history and treatment of *McDonnell Douglas*, it is necessary to make sense of how *Ortiz* affects its burden-shifting framework. Having focused on how *Nassar* muddied the waters of Title VII employment discrimination cases, especially in the context of retaliation claims, it also makes sense to determine if *Ortiz* will have any effect on *Nassar*'s "but for" causation requirement. Finally, it is also necessary to investigate *Ortiz*'s effects on the state of Title VII claims in general.[133]

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[131] *See* William Goren, *McDonell Douglas Dead or Alive?*, LEGAL CONSULTANT: WILLIAM GOREN'S BLOG (Aug. 29, 2016), http://www.williamgoren.com/blog/2016/08/29/mcdonell-douglas-corporation-v-green-dead-ortiz-v-werner-enterprises/ [https://perma.cc/4HQ9-J63F]; Jon Hyman, *Did the 7th Circuit Finally Kill McDonnell Douglas?*, WORKFORCE MAG. (Aug. 23, 2016), http://www.workforce.com/2016/08/23/did-the-7th-circuit-finally-kill-mcdonnell-douglas/ [https://perma.cc/K6E9-7ZST]; Kevin Kraham & Amy Ryder Wentz, *Seventh Circuit to Plaintiffs: Here's Your Burden of Proof*, LITTLER MENDELSON P.C. (Sept. 1, 2016), https://www.littler.com/publication-press/publication/seventh-circuit-plaintiffs-heres-your-burden-proof [https://perma.cc/3U3X-LN3H]; Elizabeth Odian, *The Seventh Circuit Clarifies Evidentiary Standards in Employment Discrimination Cases*, HINSHAW & CULBERTSON LLP ON JD SUPRA (Aug. 23, 2016), http://www.jdsupra.com/legalnews/the-seventh-circuit-clarifies-95675/ [https://perma.cc/8KLF-6SSQ]; Paul C. Sweeney, *Discrimination Claims: Focus on What Really Matters, Not a "Rat's Nest of Surplus Tests"*, ICE MILLER LLP (Oct. 11, 2016), http://www.icemiller.com/ice-on-fire-insights/publications/discrimination-claims-focus-on-what-really-matters/ [https://perma.cc/W4FT-DSJS]; Robert W. Vyverberg & Andrew N. Fiske, *Seventh Circuit Clarifies Evidentiary Standard for Employment Discrimination Claims*, HOLLAND & KNIGHT LLP (Aug. 25, 2016), https://www.hklaw.com/publications/seventh-circuit-clarifies-evidentiary-standard-for-employment-discrimination-claims-08-25-2016/#_ednref1.

[132] *See* Chumbley v. Bd. of Educ. for Peoria Dist. 150, 220 F. Supp. 3d 915, 921 (C.D. Ill. 2016) (collecting cases).

[133] Because *Ortiz* was decided by the Seventh Circuit, it would be controlling only over those district courts within its jurisdiction. This is not to say, however, that *Ortiz* cannot have drastic impacts on other courts of appeals, and ultimately, the country if reviewed by the Supreme Court.

Ortiz does not explicitly repudiate *McDonnell Douglas* in any way; in fact, near the end of the opinion, perhaps anticipating some of the backlash or confusion over the actual directive of the opinion regarding *McDonnell Douglas* discussed herein, Judge Easterbrook specifically noted one "point of clarification that may be helpful":

> The burden-shifting framework created by *McDonnell Douglas Corp. v.* Green, sometimes is referred to as an "indirect" means of proving employment discrimination. Today's decision does not concern *McDonnell Douglas* or any other burden-shifting framework, no matter what it is called as a shorthand. We are instead concerned about the proposition that evidence must be sorted into different piles, labeled "direct" and "indirect" that are evaluated differently. Instead, all evidence belongs in a single pile and must be evaluated as a whole. That conclusion is consistent with *McDonnell Douglas* and its successors.[134]

But despite explicitly stating that the opinion does not affect the technical nature of the *framework* of *McDonnell Douglas*, *Ortiz* does suggest this: that the first prong of the analysis now matters less.[135]

The Seventh Circuit ultimately concluded that a reasonable juror "might infer that, because of Ortiz's ethnicity, Werner's managers fired him for using techniques that were tolerated when practice by other [employees]."[136] This is somewhat startling, because generally, a plaintiff without direct evidence of discrimination (an incriminating email, for example) must proceed within the *McDonnell Douglas* framework, which first mandates that the plaintiff make a prima facie case of discrimination.[137] In *Ortiz*, however, there is no such analysis.[138]

Commentators have thus expressed concern that this lessens the importance of the *McDonnell Douglas* analysis.[139] These effects can be seen in cases like *Davis v. Brennan* and *Knapp v. Evgeros, Inc.*, where the courts both suggested that courts will not conduct the *Ortiz* test separately from a

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[134] *Ortiz*, 834 F.3d at 766 (internal citations omitted).

[135] *See supra* Section III.B.

[136] *Ortiz*, 834 F.3d at 766.

[137] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 807 (1973).

[138] Rather, there is simply "a common-sense discussion of whether a reasonable juror *could* conclude that some protected class motivated the decision[.]" *See* Hyman, *supra* note 131.

[139] *See* Odian, *supra* note 131 ("*Ortiz* may signal a diminishing importance of the prima facie case, shifting emphasis to the ultimate inquiry of whether the employer's rationale for its decision is a pretext for unlawful discrimination."); *but see* Goren, *supra* note 131 (reaching "the exact opposite conclusion" that *Ortiz* "may have killed" *McDonnell Douglas*, and instead noting that "*McDonnell Douglas* in the Seventh Circuit is the only paradigm that matters").

McDonnell Douglas analysis, and that if one test fails, the plaintiff can still make his or her case under the other.[140] If *Ortiz* does not explicitly repudiate the balance struck in *McDonnell Douglas*, it seems to suggest that the focus should now be on taking the evidence as a whole and then skipping to the third prong of *McDonnell Douglas* where plaintiff must show that an employer's non-discriminatory reasons are mere pretext. That is not the balance that *McDonnell Douglas* struck.

An additional problem follows from reading *Ortiz*. The facts of the case suggest that Ortiz alleged a substantive discriminatory practice by his employer, something akin to Title VII's status-based discrimination provision.[141] But assume that Ortiz had complained to his boss before he went on vacation, and when he came back, he was fired in the same manner and all other facts stayed the same. If Ortiz filed a retaliation claim under Title VII, believing that he was fired for complaining, he would be subject to *Nassar*'s strict "but for" causation requirement.[142] If he had never complained, and instead filed a status-based claim, the world of *Ortiz* would be open to him and the judge would instead look at the evidence as a whole (without any thought to "but for" causation). It seems then that any employee who is subjected to perceived discrimination would be smart to avoid filing even a formal complaint for fear of being subject to the harsh "but for" requirement.

Because *Nassar* dealt specifically with Title VII retaliation claims, *Ortiz*, which seemingly would primarily affect the substantive discrimination section of Title VII, does not disavow *Nassar* in any way. With that said, the motivation behind *Ortiz* can be seen as opposing the core precepts of *Nassar*. Whereas *Ortiz* presumably makes it easier for plaintiffs to present their evidence, *Nassar* notes the need to reign in Title VII retaliation claims and forestall frivolous lawsuits or claims, noting that a lessened "causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment."[143] Ironically, if the dissent in *Nassar* had won the

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[140] *See supra* notes 133–42 and accompanying text.

[141] *See supra* Part III.

[142] *See supra* Section II.A.

[143] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2531–32 (2013); *see id.* at 2531 ("The proper interpretation and implementation of § 2000e-3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems. This is of particular significance because claims of retaliation are being made with ever-increasing frequency.").

day, "Title VII's retaliation provision, like its status-based discrimination provision, would permit mixed-motive claims, and the same causation standard would apply to both provisions."[144] If that were the case, *Ortiz* would have the same, potentially destabilizing effect on Title VII retaliation claims and discrimination claims in general.

V. POSSIBLE SOLUTION AND COMPLICATIONS

In light of the major implications for employers and employees dealing with workplace discrimination, there is certain to be continued confusion surrounding the scope and the fallout from *Ortiz*.[145] It would therefore be prudent for the Supreme Court and Congress to acknowledge the confusing territory the federal courts, employers, practitioners, and employees, now find themselves in when it comes to workplace discrimination, or at the very least, how to make a case under Title VII. Additionally, as demonstrated by the number of EEOC claims increasing in the past several years, courts face an extraordinary voluminous increase in the prevalence of every type of employment discrimination cases.[146] With this increase in volume, a cleaner standard is needed.[147] Courts should thus employ the *Ortiz* reasoning and look at evidence as a whole.

Put differently, a simple solution is needed, not because it is a perfect solution, but because it is most prudent. The new test would be simple: the evidence is to be evaluated in its entirety, and the trial judge, who is best equipped and well-positioned to make the call, will decide if the plaintiff has made his or her case to proceed to trial.[148] The plaintiff would still bear a high burden at the outset, as he or she must present enough evidence, on the whole, to show that the discriminatory

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[144] *Id.* at 2545 (Ginsburg, J., dissenting).

[145] *See* Sweeney, *supra* note 131 (advising clients to understand that it is still unknown "whether the *Ortiz* decision will mean more jury trials in the Seventh Circuit").

[146] *See* Crawford v. Metro. Gov't of Nashville & Davidson Cty., Tenn., 555 U.S. 271, 283 (2009) (noting that "[t]he number of retaliation claims filed with the EEOC has proliferated" recently (internal citation omitted)).

[147] *See, e.g.*, Bartlett v. Strickland, 556 U.S. 1, 32 (2009) (discussing the applicability of the "totality of the circumstances" analysis in analyzing a possible violation of Section 2 of the Voting Rights Act of 1965).

[148] Appellate courts have recognized that trial judges are uniquely qualified to rule on matters at trial concerning certain facts and evidence. *See* Neely v. Martin K. Eby Const. Co., 386 U.S. 317, 337 (1967) (Black, J., dissenting) (explaining how trial judges are best equipped to deal with evidentiary issues because "[a]ppellate tribunals are not equipped to try factual issues as trial courts are"); *cf.* Rice v. Collins, 546 U.S. 333, 343 (2006) (Breyer, J., concurring) ("Appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decision about likely motivation.").

behavior existed or that retaliation took place because of a complaint.

In the past, certain judges have advanced the idea of simplified and streamlined tests and standards. Justice William Brennan once noted that "[t]he time has come to borrow William of Occam's razor and sever [a] portion of our analysis."[149] Perhaps not surprisingly, it was Judge Easterbrook, author of *Ortiz*, who advocated for simplicity again almost thirty years ago in *Bonded Financial Services v. European American Bank* where, in discussing "useless steps" in defining certain terms relating to agency and banking law, he advocated that "we slice these off with Occam's Razor and leave a more functional rule."[150] This same method can be applied to Title VII disputes.

Taking Justice Brennan's and Judge Easterbrook's suggestions into account, the new test would be simple: the plaintiff's evidence is to be evaluated in its entirety, and the trial judge, who is best equipped and well-positioned to make the call, will decide if the plaintiff has made his or her case to proceed to trial, weighing the employer's legitimate reason for the adverse action if one exists.[151] The plaintiff still would bear a high burden at the outset, as he or she must present enough evidence on the whole to show that the discriminatory behavior existed or that retaliation took place because of a complaint.

It is worth pausing to return to 2012 and note that Judge Wood of the Seventh Circuit hinted at a sea change in evaluation of Title VII litigation, arguing that judicial rules should be as simple as possible, and specifically, concerning the "rat's nest" of tests concerning employment discrimination and retaliation cases; that

> [p]erhaps McDonnell Douglas was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however . . . the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of

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[149] Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 575 (1990). *See* L.W. Matteson, Inc. v. United States, 61 Fed. Cl. 296, 310 n.10 (2004) ("William of Occam . . . is said to have remarked that '*entiata non sunt multiplicanda preater necessitatem,*' or 'entities should not be multiplied more than necessary.' As such, where there are two competing theories or explanations, all other things being equal, the simpler one is probably correct.").

[150] Bonded Fin. Servs., Inc. v. European Am. Bank, 838 F.2d 890, 894 (7th Cir. 1988). Judge Easterbrook has invoked Occam's famous razor more than once. *See* R.H. Helmholz, *Ockham's Razor in American Law*, 21 TUL. EUR. & CIV. L.F. 109, 113 (2006); *see also* Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712 (7th Cir. 1997) ("[I]t is best to take Occam's Razor and slice off unnecessary steps and proceed directly to the question whether the evidence would permit a rational trier of fact to conclude that the statute has been violated.").

> these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way. . . . Put differently, it seems to me that the time has come to collapse all these tests into one.[152]

Some judges seem to already be trending in this direction. In *Freelain v. Village of Oak Park*, the court seems to infer from the language in *Ortiz* that employment discrimination *and* retaliation claim should be evaluated under the new standard of: "Evidence is evidence."[153] One court has since named the method adopted in *Ortiz* the "reasonable factfinder method."[154]

As discussed above,[155] this new method and proposed application has ramifications for *McDonnell Douglas*: at least one decision has further questioned the overall importance of *McDonnell Douglas* going forward: in *Donley v. Stryker Corp.*, the court specifically stated that "'[a] district court must not limit its analysis to *McDonnell Douglas*,' but broadly examine whether 'the record contain[s] sufficient evidence to permit a reasonable fact finder to conclude that retaliatory motive caused [one's] discharge.'"[156] Thus *McDonnell Douglas*'s preeminence as a standard may now be up in the air. In other words, by making *McDonnell Douglas* optional (the plaintiff can still succeed if he or she cannot make a prima facie case under the burden shifting test), *Ortiz* relegates *McDonnell Douglas* to the side. After all, if a plaintiff can still make his or

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[152] Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) (internal citation omitted); *id.* ("In order to defeat summary judgment, the plaintiff one way or the other must present evidence showing that she is in a class protected by the statute, that she suffered the requisite adverse action (depending on her theory), and that a rational jury could conclude that the employer took that adverse action on account of her protected class, not for any non-invidious reason.").

[153] Freelain v. Vill. of Oak Park, No. 13 CV 3682, 2016 WL 6524908, at *4 n.4 (N.D. Ill. Nov. 3, 2016) (quoting Ortiz v. Werner Enter., Inc., 834 F.3d 760, 765 (7th Cir. 2016)); *id.* at *11 (analyzing the plaintiff's retaliation claim and commenting that "[p]ieces of evidence should not be evaluated in isolation, but as a whole" as espoused in *Ortiz*).

[154] Henderson v. McDonald, No. 15 C 4445, 2016 WL 7231606, at *2 (N.D. Ill. Dec. 14, 2016) ("The Seventh Circuit held that a plaintiff can defeat a defendant's motion for summary judgment under the *Ortiz* reasonable factfinder method by pointing to sufficient evidence to show that a reasonable factfinder could 'conclude that the plaintiff's [protected characteristic] caused the . . . adverse employment action.'" (alteration in original) (citing Ortiz v. Werner Enter., Inc., 834 F.3d 760, 765 (7th Cir. 2016), *vacated and remanded sub nom.* Henderson v. Shulkin, No. 17-1074, 2017 WL 6550598 (7th Cir. Dec. 22, 2017))).

[155] *See supra* Part IV.

[156] Donley v. Stryker Corp., No. 15 C 5586, 2017 WL 66822, at *4 (N.D. Ill. Jan. 6, 2017) (alternation in original) (internal citations omitted) (quoting Zegarra v. John Crane, Inc., 218 F. Supp. 3d 655, 666 (N.D. Ill. 2016).

her case without proceeding under the burden-shifting framework, is it really necessary?[157]

But this note treats these concerns as positives—this new standard, applying our razor, can be simple: the courts can dispose of multi-factored tests and burden-shifting analyses and instead refine the Title VII analysis by making it simpler: look at the evidence as a whole, weighing all direct and indirect evidence against any evidence presented by the employer supporting a legitimate (non-discriminatory or retaliatory) adverse action. Of course, it may be argued that the plaintiff should carry a heavy burden in the face of legitimate reasons for an employer's adverse action. It may also be argued that the judicial system would be harmed by allowing more cases to proceed further than they may have without the new standard. But in consideration of the various core values of the Civil Rights Act and Title VII, one being that "the civil rights of every American" have the chance to be achieved through law,[158] the alternatives to not addressing our Title VII jurisprudence are worse. To allow legitimate employee claims of discrimination and retaliation to be disposed of due to a lack or direct evidence or the existence of disingenuous pretextual employer justifications would put the Civil Rights Act's core mission in jeopardy.

Of course, Congress can also follow the above suggestion by passing legislation directing the courts to abandon the "rat's

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[157] Various courts have noted that simpler is better when it comes to judicial standards and rules. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 80, 94 (2010) (placing "primary weight upon the need for judicial administration of [ ] jurisdictional statute[s] to remain as simple as possible" because, *inter alia*, "[s]imple jurisdictional rules also promote greater predictability"); Payton v. New York, 445 U.S. 573, 620 (1980) (White, J., dissenting) (preferring "to adopt a clear and simple rule" regarding warrantless Fourth Amendment searches and seizures during the daytime wherein an officer may enter a suspect's house after "knocking and announcing their presence"); Hugg v. Augusta Ins. & Banking Co., 48 U.S. 595, 606 (1849) (discussing the common law rule of liability for the destruction of good damaged during shipment, noting that "[t]he rule as settled seems preferable, for its certainty and simplicity"); Blakely v. Wards, 738 F.3d 607, 629–30 (4th Cir. 2013) (noting a preference for a "simpler rule" concerning abusive prisoner-litigants compared to the "amorphous nature of [a] multi-factor test"); United States v. Nunez, 673 F.3d 661, 666 (7th Cir. 2012) (discussing a "welcome simplification of doctrine" concerning criminal conspiracies and wholesale drug dealing).For additional commentary on favoring simple over complex rules, *see generally* Eric W. Orts, *Simple Rules and the Perils of Reductionist Legal Thought Simple Rules for A Complex World by Richard A. Epstein*, 75 B.U. L. REV. 1441 (1995) (book review); *see* Helmholz, *supra* note 150, at 119–20 (discussing the example of Justice Brennan realizing that "the 'scholasticist debate' required to decide whether a remedy was legal or equitable in nature was 'impracticable and unilluminating.' Better to stick with a simpler test" (internal citations omitted)); s*ee also id.* at 115–23 for more examples of judicial interpretation of Ockham's Razor and the idea of judicial simplicity. *But see* Louis Kaplow*, Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 566–67 (1992) (discussing, *inter alia*, the idea that complex standards or rules might often be preferred to their "simple" counterparts).

[158] *See* Brown, *supra* note 22, at 532.

nest" of test they have created and instead follow the plaintiff's evidence.[159] In terms of retaliation claims and disparate-treatment claims, the analysis is the same: if a judge believes, based on all the evidence presented, that an employee was discriminated against based on a protected characteristic, or that an adverse employment action was taken based on those characteristic, the case may proceed. And "if not, then not."[160] Of course, the Supreme Court can clarify this before the legislature acts, following Judge Easterbrook's line of reasoning and abandoning the mess of Title VII tests. Though this may be a plausible expectation concerning Title VII disparate-treatment jurisprudence, it seems unlikely that the Supreme Court would invalidate its recent ruling in *Nassar*, perhaps leaving this work to the next Justice Brennan.

CONCLUSION

This new totality-of-the-circumstances test does not encourage a "rubber stamp" approach[161] where any plaintiff employee may prevail at summary judgment by mere allegation alone. Instead, the judge simply must decide if a reasonable jury could find that the discriminatory behavior existed from the evidence presented by the plaintiff. Bright-line rules and standards are often well intentioned; but the "rat's nest" of Title VII analysis has proved too unwieldy. With a simplified directive from the Supreme Court or Congress to view the evidence as a whole, trial judges can take solace in the fact that they need not apply a mess of tests and analyses and instead focus on the evidence presented and carry out the core directive of the Civil Rights Act as was intended.

Zachary J. Strongin†

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[159] Skeptics as to the application of the famous Razor to the Title VII standard can also consider the fact that courts often advance theories of totality-of-circumstances where look at evidence as a whole. *See* Johnson v. De Grandy, 512 U.S. 997, 1011 (1994) ("courts must also examine other evidence in the totality of circumstances" in cases regarding minority voter dilution under the Voting Rights Act); Strickland v. Washington, 466 U.S. 668, 695 (1984) ("in making [its] determination, a court hearing an [ineffective assistance of counsel] claim must consider the totality of the evidence before the judge or jury").

[160] Pearson v. Ill. Bell Tel. Co., No. 15 C 653, 2016 WL 7374235, at *6 (N.D. Ill. Dec. 20, 2016).

[161] *See* Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 541, 548 (1967) (Clark, J., dissenting).

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