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The Straw That Breaks the Camel's Back: A Final Argument for the Demise of McDonnell Douglas Framework

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THE STRAW THAT BREAKS THE CAMEL'S BACK: A FINAL ARGUMENT FOR THE DEMISE OF THE *MCDONNELL DOUGLAS* FRAMEWORK

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I. INTRODUCTION

Few relics remain from the 1970s: technology, music, and hairstyles have all changed. Yet, one fad that has refused to yield to the test of time is the framework courts use to decide employment discrimination cases. Typically, legal standards naturally evolve as society progresses,[1] due to shifting policy aims, the discovery of new information, or technological advances.[2] However, employment discrimination jurisprudence has defied the status quo, and refuses to diverge from the framework that was developed forty years ago. Although this anomaly could be explained by the test's merits, a more realistic explanation is that the lack of transformation is due to complacency and an unwarranted adherence to precedent.

This Article questions the continued validity of a decades-old test in an analysis of the *McDonnell Douglas* Framework,[3] which was created in 1973 and remains a stalwart in employment discrimination cases.[4] More specifically, this Article explores (1) the background of the important statutory and judicial developments of employment discrimination claims; (2) the criticisms of the *McDonnell Douglas* Framework and its alternatives, including the "Convincing Mosaic;"[5] and (3) a recent Seventh Circuit case, *Ortiz v. Werner*,[6] which struck down the use of the "Convincing Mosaic." This Article then proceeds to make two arguments as to why the *Ortiz* decision demands the demise of the *McDonnell Douglass* Framework. First, the logic behind the Seventh Circuit's prohibition of the Convincing Mosaic parallels the arguments for the elimination of *McDonnell Douglas*.[7] Second, with the

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1. LARRY W. YACKLE, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2379 (1993).

2. MAX S. OPPENHEIMER, *Zero and the Rise of Technological Lawmaking*, 34 PACE L. REV. 1, 5 (2014).

3. This method for litigating employment discrimination tests has, at different times, been called a test and a Framework. This Article will refer to it as a Framework or simply as *McDonnell Douglas.*

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

5. Troupe v. May Dep't Stores Co., 20 F.3d 734, 737 (7th Cir. 1994).

6. Ortiz v. Werner Enters., Inc., 834 F.3d 760 (7th Cir. 2016).

7. For more criticisms of the Framework *see, e.g.*, Wells v. Colo. DOT, 325 F.3d 1205, 1221-1228 (10th Cir. 2003) (Hartz, J., concurring); Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas is not Justified by Any Canons of Statutory Construction*, 43 HOUS. L. REV. 743

Seventh Circuit's elimination of the distinction between circumstantial and direct evidence, *McDonnell Douglas* is obsolete. This Article concludes with a suggestion of how employment law should carry forward without this cumbersome framework.

II. BACKGROUND

This section explores the history of *McDonnell Douglas*, beginning with a background of Title VII and an explanation of a key principle in the development of *McDonnell Douglas*: the distinction between direct and circumstantial evidence. It then details the case that created the infamous framework and a case that limited its functionality.

A. Title VII of the Civil Rights Act of 1964[8]

Title VII of the Civil Rights Act of 1964 was enacted "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."[9] Title VII states, in relevant part, that it is unlawful for any employer to take any adverse employment action or otherwise discriminate against an employee on the basis of race, color, religion, sex, or national origin.[10] Any person who is legally protected against discrimination on the basis of the aforementioned traits is considered a member of a protected class. Title VII also provides a secondary protection for those members of protected classes by making it unlawful for an employer to retaliate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[11] The Supreme Court noted Congress's deliberately broad language, and has applied it liberally.[12]

Title VII provides a cause of action for employees who experience

(2006); Kenneth Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOKLYN L. REV. 703 (1995).

8. 42 U.S.C.A. § 2000e-2 (West 2016).

9. H.R. Rep. No. 88-914, at 2402 (1963), reprinted in 1964 U.S.C.C.A.N. 2391, 2401; *but see* Chuck Henson, *Title VII Works—That's Why We Don't Like It*, 2 U. MIAMI RACE & SOC. JUST. L. REV. ISS. 41 (arguing that Title VII was not actually enacted to completely eradicate discrimination in the workplace).

10. 42 U.S.C.A. § 2000e-2.

11. 42 U.S.C.A. § 2000e-3 (West 2016).

12. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973). (The Supreme Court took note of Congress's use of broad language, finding that its purpose in enacting Title VII was "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.").

either disparate impact or disparate treatment at the hands of their employers. Disparate treatment is "the most easily understood type of discrimination," and occurs when a plaintiff is treated less favorably than a fellow employee due to the person's membership in a protected class.[13] A disparate impact claim, however, alleges that an employment practice, though lacking deliberate discriminatory motive, resulted in the functional equivalent of intentional discrimination.[14] *McDonnell Douglas* and this Article focus on those disparate treatment claims, which can be substantiated through two different types of evidence: direct and circumstantial.

B. Direct and Indirect Evidence

In any trial, there are two types of evidence that may be presented: direct or indirect evidence. Black's Law Dictionary defines direct evidence as "[e]vidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption."[15] In the employment context, the "fact" is a discriminatory animus motivating the adverse employment decision. Circumstantial—or indirect—evidence, contrarily, is "based on inference and not on personal knowledge or observation."[16] Circuit courts have not been uniform in their designations between direct and indirect evidence, and even within individual circuits, opinions have not demonstrated consistency.[17] Notwithstanding the Federal Rules of Evidence and every other area of law treating circumstantial and direct evidence as equally probative,[18] this distinction is imperative in employment law jurisprudence. The necessity to sort evidence between these two categories developed through the subsequent judicial interpretation of the framework set forth in *McDonnell Douglas v. Green*, as detailed below.[19]

13. Intl. Broth. of Teamsters v. U.S., 431 U.S. 324, 335 at FN 15 (1977).

14. Watson v. Ft. Worth Bank & Tr., 487 U.S. 977, 987 (1988).

15. *Evidence*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16. *Id*.

17. Ezra S. Greenberg, *Stray Remarks and Mize-Motive Cases After Desert Palace v. Costa: A Proximity Test for Determining Minimal Causation*, 29 CARDOZO L. REV. 1795, 1814 (2008).

18. United States v. Kwong, 14 F.3d 189, 194 (2d Cir. 1994) (*citing* HENRY DAVID THOREAU, Journal, 11 Nov. 1850, in 2 *Journal of Henry D. Thoreau* 94 (Bradford Torrey & Francis H. Allen eds., 1962) ("Some circumstantial evidence is very strong, as when you find a trout in the milk")).

19. *See* TWA v. Thurston, 469 U.S. 111, 121 (1985) (holding that the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination).

C. McDonnell Douglas Corp. v. Green*: The Birth of The Burden-Shifting Framework*

In the early 1970s, one man's civil rights activism inadvertently caused a change in employment jurisprudence, the effects of which are still being discussed some forty years later.[20] The case began when, after the plaintiff's employment with the McDonnell Douglas Corporation was terminated, he participated in a "stall-in" against the company to protest his discharge, which he believed was fueled by racial animus.[21] The plaintiff, along with other members of the Congress on Racial Equality, illegally stalled his car on a main road to inhibit the traffic flowing to and from his former employer's factory.[22] When the defendant refused to rehire the plaintiff, he filed suit in the Eastern District of Missouri.[23]

The plaintiff sued his employer for two violations of Title VII under the Civil Rights Act of 1964.[24] The plaintiff alleged that the defendant refused to rehire him due to his race in violation of 703(a)(1), and due to his participation in protected civil rights activities in violation of 704(a).[25] The District Court disagreed with both arguments.[26] The case was then heard by the Eighth Circuit Court of Appeals, which handed down a disjointed decision that was comprised of a majority, a concurrence, and a dissent.[27] The Supreme Court granted a writ of certiorari to reconcile the "two opinions of the Court of Appeals and the several opinions of the three judges," which showed "a notable lack of harmony" in the "applicable rules as to burden of proof and how this shift upon the making of a *prima facie* case."[28] In an attempt to resolve the rift, the Supreme Court promulgated a three-part burden-shifting framework, which directed the plaintiff and employer through an employment discrimination claim.[29] Since 1973, this framework has been a cornerstone of employment law and has been applied to a broad

20. *See, e.g.*, Sandra F. Sperino, *Justice Kennedy's New Big Idea,* 96 B.U.L. REV. 1789 (2016).

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 794-797 (1973).

22. *Id*.

23. *Id*.

24. *Id*. at 796.

25. *Id*.

26. Green v. McDonnell-Douglas Corp., 318 F. Supp. 846 (E.D. Mo. 1970) (The District Court held that because the EEOC had not found "reasonable cause to believe the defendant" refused to rehire the plaintiff because of his race, his 703(a)(1) claim must necessarily be dismissed. Secondly, the District Court found that because Mr. Green's stall-in was illegal, his actions were not protected under Title VII of the Civil Rights Act and consequently dismissed his 704(a) claim as well.).

27. Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972) (affirming the dismissal of the plaintiff's 704(a) and remanded the 703(a)(1) claim for further fact finding).

28. McDonnell Douglas Corp., 411 U.S. at 801.

29. *Id*. at 801-805.

spectrum of employment disputes.

In phase one of *McDonnell Douglas* Framework, the plaintiff "carries the initial burden under [Title VII] of establishing a *prima facie* case of racial discrimination."[30] A *prima facie* case may be proved by showing:

> (i) that he belongs to a racial minority, (ii) that he applied and was qualified for a job 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.[31]

Under this standard, the Court of Appeals and Supreme Court agreed that the plaintiff met his burden because his employer continued to seek applicants for the position for which the plaintiff was well qualified.[32]

In phase two of the Framework, the burden[33] "must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[34] On this prong, the Supreme Court found that the employee's involvement in unlawful deliberate acts against the corporation was a sufficiently legitimate justification to refuse to rehire him.[35] The Court also recognized, however, that corporations may hide true discriminatory animus behind a façade of legitimacy; thus, the inquiry could not stop at this point.[36]

The third and final phase of the Framework—the pretext phase—shifts the burden back to the claimant to prove that "the presumptively valid reasons for [the adverse employment action] were in fact a cover-up for a racially discriminatory decision."[37] On this matter, the Supreme Court remanded the plaintiff's case for further fact finding.[38] The Court

30. *Id*. at 802.

31. *Id*. In footnote 13, the Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id*. at fn. 13.

32. *Id*. at 802.

33. The Supreme Court later clarified that to overcome the plaintiff's *prima facie* case, the burden placed on the employer was only one of production, and that the burden of persuasion remains with the plaintiff. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).

34. *McDonnell Douglas Corp.*, 411 U.S. at 802-03.

35. *Id*. It was under this prong that the Supreme Court ruled that the Court of Appeals erred in its judgment. The Eighth Circuit held that the plaintiff could only be fired for objectively justified reasons. Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972). The Supreme Court held instead that this would disallow corporations from refusing to hire persons for legitimate reasons. *McDonnell Douglas Corp.*, 411 U.S. at 802-03.

36. *McDonnell Douglas Corp.*, 411 U.S. at 804.

37. *Id*.

38. *Id.* at 806.

also provided guidance on the types of evidence that were probative to this prong, including the employer's treatment of the employee, any reaction to previous civil rights acts, and general policy and practice regarding minorities, which can be demonstrated through statistics and hiring practices.[39]

E. Price Waterhouse v. Hopkins*: An Early Limitation on the Framework*

After roughly fifteen years of jurisprudence under *McDonnell Douglas*, it became apparent that the Framework left certain, less obvious discriminatory employment decisions unsanctionable. In *Price Waterhouse v. Hopkins*, the Supreme Court held that *McDonnell Douglas* was not appropriate to adjudicate less palpable "mixed-motive" cases.[40] In mixed-motive cases, an employer has both legitimate legal reasons to take an adverse employment action, but is also motivated by illegal and discriminatory notions. For example, the plaintiff in *Price Waterhouse* was passed over for a promotion partially as a result of illegal gender stereotyping.[41] The employer was also driven, however, by a legitimate desire to maintain satisfactory customer service. "The Court . . . made clear that 'mixed-motives' cases such as [this] are different from pretext cases such as *McDonnell Douglas* . . . ."[42] Thus, rather than apply the three-part *McDonnell Douglas* Framework, the Court maintained that a plaintiff could recover from an employer after two steps: first, the plaintiff must provide proof that the employment decision was motivated at least partially by the employee's membership in a protected class; and second, the employer could not prove that the same decision would have been made notwithstanding the employee's protected class membership.[43]

In the 1991 amendments to the Civil Rights Act, Congress also recognized that mixed-motive cases required a different analysis, and established that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[44] The amendment both superseded and codified the holding in *Price*

39. *Id*. at 804.

40. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

41. *Id*. at 256. The plaintiff presented evidence that the employer made statements such as, her "professional" problems would be solved if she would "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

42. *Id*. at 260.

43. *Id*.

44. 42 U.S.C.S. § 2000e-2(m) (emphasis added).

Waterhouse. Congress maintained the first motivating factor prong, but eliminated the second prong that allowed employers to avoid liability by proving the same decisions would have been made notwithstanding the plaintiff's membership in a protected class.

In accordance with Justice O'Connor's concurrence in *Price Waterhouse*, many courts required "direct evidence" to find for the employee in mixed-motive cases.[45] However, this practice came to a sojourn in 2003, when the Supreme Court, in *Desert Palace v. Costa*, abrogated the "direct evidence" requirement in mixed-motive employment cases.[46] Thus, while finding distinctions between direct and circumstantial evidence is abnormal in general practice, it has become somewhat commonplace in employment law. This need to distinguish between the two types of evidence took hold in other applications of the *McDonnell Douglas* Framework, and is one of many complaints litigants, attorneys, judges, and legal scholars have with the test.[47]

III. IMPLICATIONS OF *MCDONNELL DOUGLAS*

The effects of *McDonnell Douglas* on employment law were profound. This section focuses first on the issues *McDonnell Douglas* aimed to fix. Secondly, it explores the ways in which the Framework has fallen short in the goals it set out to accomplish. Lastly, it details the alternative methods different circuits have employed to decide employment discrimination cases as alternatives to *McDonnell Douglas.*

A. What McDonnell Douglas Aimed to Fix

Before the *McDonnell Douglas* era, employment discrimination claims were treated as any other civil suit. The burden of proof remained with the plaintiff to prove by a preponderance of the evidence that the adverse employment action was taken due to an unlawful animus based on a claimant's protected trait.[48] Many perceived this burden to be

45. Price Waterhouse, 490 U.S. at 276. ("In my view, in order to justify shifting the burden on the issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision") (O'Connor, J., concurring).

46. Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003). Interestingly, though, this holding has been limited to mixed motive claims under Title VII. For Age Discrimination and other claims, the "direct evidence" requirement still percolates.

47. *See, e.g.*, Greenberg, *supra* note 17 at 1798.

48. *See* Reid v. Memphis Publ'g Co., 468 F.2d 346, 348 (6th Cir. 1972) ("The burden of proof is on the plaintiff to prove that he was not hired because of discrimination based upon race or religion. Discrimination must be proved by the plaintiff."); King v. Laborers Int'l Union, Union Local No. 818, 443 F.2d 273, 276 (6th Cir. 1971) ("The burden is upon the plaintiff. Before plaintiff can recover in this lawsuit he must show that this Union intentionally followed a practice or pattern of discrimination against him because of his race. Where the proof is upon a person, he must carry that proof by what is

insurmountable because the employee had only evidence of the employer's actions, not the underlying animus.[49] Thus, the *McDonnell Douglas* Framework was designed "to ease the evidentiary burdens on employment discrimination plaintiffs, who rarely are fortunate enough to have access to direct evidence of intentional discrimination."[50]

Many argue that, although a valiant effort, the Supreme Court's Framework did not amount to the model of clarity that it endeavored to be.[51] Rather, the burden-shifting Framework created more consternation among lower courts than what existed in pre-*McDonnell Douglas* jurisprudence.[52] Yet, this test has garnered critiques for reasons other than the confusion it has produced.[53]

B. Judicial Inefficiency

One prominent criticism of the *McDonnell Douglas* Framework is that its confusing technicalities are inconsistent with the goal of judicial economy.[54] As one commentator articulated, the confusion is a result of two characteristics of the Framework.[55] First, by the time the case reaches trial and as a result of the Framework's three distinct parts, the plaintiff has already proven a *prima facie* case of discrimination, and the defendant has promulgated a valid, legal motivation for the employment action.[56] 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 legitimate, non-discriminatory reason for its actions."[57] When certain elements have already been established, requiring the jury to go back through these phases is time consuming and confusing.[58]

known as a preponderance of the evidence.").

49. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 595 (11th Cir. 1987).

50. *Id.*

51. *See, e.g.*, Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979) ("the 'prima facie case,' 'burden of persuasion,' and the shifting 'burden of production' have caused considerable difficulty for judges of all levels…."); DAVIS, *supra* note 7 ("this cryptic decision has caused endless confusion").

52. *See, e.g.*, *supra* note 7.

53. *See, e.g.*, Hon. Timothy M. Tymkovich, *The Problem With Pretext*, 85 DENV. U.L. REV. 503 (arguing the Framework over-compartmentalized evidence, relied on a dichotomy between "mixed-motive" and single-motive cases, which has no basis in the 1991 Civil Rights Amendment, created an artificial distinction between direct and indirect evidence, and produced jury confusion); Sperino, *supra* note 7 (arguing that the Framework has no statutory basis).

54. *See, e.g.*, Wells v. Colo. DOT, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hurtz, J., concurring) ("the artificiality of the framework exacts a significant, unnecessary expense--in terms of both wasted judicial effort and greater opportunity for judicial error."); Tymkovich, *supra* note 53 at 527-529.

55. Sandra F. Sperino, *Beyond McDonnell Douglas*, 34 BERKELEY J. EMP. & LAB. L. 257, 262 (2013).

56. *Id*.

57. *Id*. at 263.

58. *Id*.

Secondly, because the test places a different burden on the employer—the burden of production—the jury is unlikely to understand that they must judge the second prong with a different level of credence than the first and the third.[59] Indeed, the jury may not be able to relinquish this role as they pass through to the second phase of the Framework.[60] A secondary source of wasted judicial resources arises when, due to the confusion of the Framework, inaccurate decisions are made at trial and are subsequently appealed.[61]

C. Distracts from the Important Inquiry

A second critique of the *McDonnell Douglas* Framework is that the various technicalities take away from the ultimate question of employment discrimination cases: whether sufficient evidence was presented to prove that the employer was motivated by discriminatory animus.[62] Even when utilized by the highest-revered arbiters of law—the Supreme Court—the test has proven "difficult for the bench and the bar."[63] As many have identified, the unfortunate result is that the parties and judges become entangled in distinguishing direct from indirect evidence, proving *prima facie* cases, proffering a valid non-pretextual reason, and subsequently rebutting it, rather than focusing on whether the employer was motivated by illegal discriminatory reasons for taking an employment action against the employer.[64]

D. Summary Judgment Implications

Many argue that the *McDonnell Douglas* Framework produced a third, unforeseen consequence: the persistent use of summary judgment in employment cases.[65] Employment discrimination cases have seen

59. *Id.*

60. *Id.*

61. Whittington v. Nordam Grp. Inc., 429 F.3d 986, 998 (10th Cir. 2005) ("unnecessary complexity increases the opportunity for error").

62. Wells v. Colo. DOT, 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., Concurring) ("The McDonnell Douglas framework only creates confusion and distracts courts from 'the ultimate question of discrimination vel non.") (citing United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 714 (1983))).

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

64. Kenneth R. Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law*, 31 FLA. ST. U.L. REV. 859, 901 ("Applying the multi-element McDonnell Douglas prima facie case may distract the factfinder from the contested issues or may even result in questionable dismissals.").

65. *See, e.g.*, Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 285–86 (2012); Elizabeth M. Schneider, *The*

higher rates of summary judgment than any other type of cases.[66] A Federal Judicial Committee found that summary judgment was granted, either in part or in whole, in employment discrimination cases seventy-seven percent of the time.[67] In tort and contract cases, summary judgment was granted sixty-one percent and fifty-nine percent of times, respectively.[68] Furthermore, on appeal, plaintiffs' employment discrimination victories were reversed with higher frequency than defendants' victories.[69] At least one judge, who has resided at both the trial court and appellate level, attributed the high rate of summary judgment for defendants to the *McDonnell Douglas* Framework.[70] Judge Chin, from the Second Circuit Court of Appeals, argued that it was the aforementioned complexities of the test that distract plaintiffs' attorneys from focusing on the true issue of the intent of the employer.[71] Thus, critics concluded that although the *McDonnell Douglas* Framework was designed to make the plaintiff's case easier to prove, statistical evidence suggested that it had not accomplished this goal.[72]

E. Lacks a Statutory Basis

According to several scholars, the Supreme Court's enunciation of the *McDonnell Douglas* Framework had no valid basis in Title VII.[73] After a thorough exploration of the canons of statutory construction, one commentator concluded that three of the four elements of the *prima*

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Discrimination Cases, 158 U. PA. L. REV. 517, 525–26 (2010).

66. THEODORE EISENBERG & CHARLOTTE LANVERS, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, 17-18 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 08-022, 2008), available at http://ssrn.com/abstract=1138373.

67. Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. Sch. L. Rev. 671, 673 (2012-2013).

68. Chin, *supra* note 67.

69. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court:*

From Bad to Worse? 3 HARV. L. & POL'Y REV. 103, 109 (2009) (plaintiffs' won pretrial and at trial were reversed approximately thirty percent and forty-one percent of the time, respectively, while defendants' won pretrial and at trial were reversed approximately eleven percent and nine percent of the time, respectively).

70. Chin, *supra* note 67.

71. *Id.* at 682; Judge Chin also suggested that the lack of racial diversity may be an additional cause of this phenomenon, as minority judges were far less likely to grant summary judgment to defendants in employment discrimination cases compared to white judges. *Id.*

72. *Id.*

73. 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").

facie case cannot be supported.[74] Specifically, the Framework required the plaintiff to prove he or she was qualified for the job, yet, the plain meaning, the legislative history, and congressional intent do not support the notion that only a qualified plaintiff may be illegally discriminated against.[75] If the Framework operates as an evidentiary standard,[76] critics have similarly found an insufficient relationship between the Framework and Title VII to justify its continued use.[77] When creating evidentiary standards, courts typically begin with considerations of the policy behind the law and allocate the burdens of proof to further the specified policy.[78] Thus, considering the remedial goals of Title VII, a plaintiff-favorable burden is logical.[79] However, as evidenced by the high rate of successful summary judgment motions by defendants, the *McDonnell Douglas* burden-shifting Framework places unnecessary burdens on the plaintiff.[80] It is, therefore, contended that Title VII cannot justify *McDonnell Douglas* as a product of statutory interpretation or as a burden-shifting Framework.[81]

G. Requires a Distinction between Direct and Indirect Evidence

A final concern regarding the Framework is that it requires making a superfluous and, at times, indeterminable distinction between direct and indirect evidence.[82] Many circuit courts attempted to categorize the plaintiff's evidence as direct and exempt from the Framework or indirect and apt for *McDonnell Douglas* analysis.[83] The justification behind this distinction is that when "smoking gun" evidence of an employer's discrimination is presented, the employee no longer needs to go through the *prima facie* phase of the test, and can instead go directly to the merits of the case. Not only does this approach present yet another technicality which distracts courts from assessing the most important question, but it also relies on the "subtle and difficult distinction between direct and indirect or circumstantial evidence."[84]

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74. Sperino, *supra* note 53 at 764-768.

75. *Id.* at 764-768.

76. Professor Sperino detailed the confusion among courts about whether *McDonnell Douglas* served to establish a prima facie case or operates as an evidentiary burden. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *But see* Henson, *supra* note 9 (arguing that Congress never intended Title VII to wholly eliminate discrimination; thus, the McDonnell Douglas Test furthers that aim).

81. *See* Sperino, s*upra* note 53.

82. Tymkovich, *supra* note 55 at 520-21; *see also* Sperino, *supra* note 7 at 773.

83. Griffith v. City of Des Moines, 387 F.3d 733, 743-45 (8th Cir. 2004).

84. Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting).

IV. CONSEQUENCE OF INHERENT ISSUES OF THE *MCDONNELL DOUGLAS* FRAMEWORK

Many courts recognized the latent issues of the *McDonnell Douglas* Framework and, accordingly, drastically limited its application. This section serves two purposes: first, to show the ways in which the limitations of *McDonnell Douglas* caused circuit courts and the Supreme Court to restrict its applicability in certain phases of litigation; and second, to establish that the circuit courts developed an array of tests and methods as alternatives to the *McDonnell Douglas* Framework.

A. Limiting McDonnell Douglas

Recognizing that the *McDonnell Douglas* Framework is unworkable in a jury instruction and that two of the three parts of the test are irrelevant by the time the case reaches the jury, many courts prohibit its use for jury trials.[85] In fact, the Second Circuit held that "the traditional *McDonnell Douglas* formulation, developed by appellate courts for use by judges, is at best irrelevant, and at worst misleading to a jury."[86] For the same reason, other courts limited its use strictly to pretrial proceedings.[87] Some critics have further opined that because the Framework is held back from juries, it may be inappropriate to decide summary judgment motions using *McDonnell Douglas*.[88] Because summary judgment should be granted only if a reasonable jury could not have a sufficient basis for finding for the non-moving party, the argument goes that a standard which is inappropriate for jury determinations is also inapplicable to summary judgment decisions.[89] Yet still, a majority of jurisdictions refused to apply the test at the appellate level, as well, on the grounds that after a full trial has been completed, "the focus is . . . not on the plaintiff's *prima facie* case or the *McDonnell Douglas* framework."[90] Rather, courts of appeals were advised to concentrate on whether the plaintiff presented sufficient evidence to support the jury's finding.[91]

The Supreme Court placed multiple limitations on the applicability of the Framework. First, it was well established that the *McDonnell*

85. *See* Sperino, *supra* note 55 at 262.

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

87. Gehring v. Case Corp, 43 F.3d 340, 343 (7th Cir. 1994) ("The presumptions and burden inherent in the *McDonnell Douglas* formulation drop out of consideration when the case is submitted to the jury.").

88. Sperino, *supra* note 55 at 271.

89. Sperino, *supra* note 55 at 271.

90. Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 993 (5th Cir. 2008).

91. *Id.*

Douglas Framework was inoperable when courts were faced with a mixed-motive case.[92] Secondly, in *Swierkiewicz v. Sorema, N.A*, the Court held that the *McDonnell Douglas* Framework was an evidentiary standard, and plaintiffs were not required to allege facts sufficient to meet the test in pleadings.[93] Lastly, in *United States Postal Service Board of Governors v. Aikens*, the Court agreed with lower courts that once there was a jury verdict, the "*McDonnell Douglas-Burdine* presumption drops from the case, and the factual inquiry proceeds to a new level of specificity."[94]

A majority of circuits courts further limited the Framework's applicability by restricting it to cases where only indirect evidence of employment discrimination was presented.[95] The distinction was based on the premise that "[d]irect evidence of discrimination, if credited by the fact finder, removes the case from *McDonnell Douglas* because the plaintiff no longer needs the inference of discrimination that arises from the *prima facie* case."[96] Other circuits held that the *McDonnell Douglas* Framework simply became unworkable once the plaintiff produced direct evidence of discrimination.[97]

Due to the issues inherent to the *McDonnell Douglas* Framework, courts of all levels across the United States severely confined its application. It was prohibited from use in jury instructions, at jury trials, on appeal, and when direct evidence was presented, thus rendering the Framework applicable in only a negligible portion of cases.

B. Alternative Approaches to McDonnell Douglas

Some circuits have done more than merely limit the use of *McDonnell Douglas*; they have created substitute methods to resolve employment discrimination cases. These approaches include the Missouri Approach, the Harassment Framework, and the Convincing Mosaic.

92. *Supra* Part II E.

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

94. The abandonment of *McDonnel Douglas* when reviewing a judgment after trial has been used to argue that it should no longer be used at the summary judgment stage because "review of summary judgment is essentially the same as our review of a challenge to the sufficiency of evidence at trial." Wells v. Colo. DOT, 325 F.3d 1205, 1228 (Hurtz, J., concurring).

95. *See* Blalock v. Metals Trades, 775 F.2d 703 (6th Cir. 1985); Prince-Garrison v. Md. Dept' of Health and Mental Hygiene, 317 Fed. App'x 351, 353 (4th. Cir. 2009); McCullough v. Univ. of Ark. For Med. Scis. 559 F.3d 855, 860 (8th Cir. 2009).

96. Terbovitz v. Fiscal Court of Adair Cty., 825 F.2d 111, 115 (6th Cir. 1987).

97. Jackson v. Harvard Univ., 900 F.2d 464, 467 (1st Cir. 1990).

1. The Missouri Approach

Missouri adopted its own version of the Civil Rights Act, and similarly prohibits disparate treatment in employment based on race, color, religion, national origin, or sex.[98] Until 2007, Missouri courts used the *McDonnell Douglas* Framework when Title VII claims were brought.[99] However, after the Missouri Supreme Court determined that Title VII claims necessitated a right to a jury trial, complications predictably arose when the state courts attempted to implement *McDonnell Douglas* into jury instructions.[100] Thus, in 2007, the Missouri Supreme Court in *Daugherty v. City of Maryland Heights* abolished the use of the Framework and created an alternative approach.[101] Missouri courts no longer use the three-part burden-shifting Framework in deciding a summary judgment motion; rather, the sole determination is whether the plaintiff's proved membership in a protected class was a "contributing factor" in the adverse employment action.[102]

2. The Harassment Framework

Under Title VII, employees in a protected class may also file a harassment suit against their employer. For these types of cases, which often involve factual patterns similar to those in employment discrimination cases, courts wielded a simpler method of navigating harassment claims. Judges do not rely on the *McDonnell Douglas* Framework.[103] Rather, a plaintiff must simply prove that the harassment occurred because of the protected trait, and that the harassment was sufficiently severe to disrupt the plaintiff's work environment.[104] The Harassment Framework proves that there are alternate ways of conceptualizing employment discrimination and ways to work through a fact-intensive inquiry without utilizing a confusing burden-shifting framework.

98. Mo. Rev. Stat. § 213.055 (LexisNexis, Lexis Advance through the end of the 2016 Regular Session and Veto Session of the 98th General Assembly).

99. Henson, *supra* note 9 at 110-111.

100. *Id.* at 112.

101. *See generally* Daugherty v. City of Md. Heights, 231 S.W.3d 814 (Mo. 2007).

102. Henson, *supra* note 9 at 113 ("The focus of the case begins and ends with the question of discrimination rather than the distraction of legitimate non-discriminatory business reasons, stray comments, same actor inferences and other defenses which enable the kind of disparate treatment we believed Title VII was meant to prevent.").

103. Sperino, *supra* note 55 at 268.

104. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

3. The Convincing Mosaic Framework

The Seventh Circuit also developed an alternative method to adjudicate Title VII claims. In *Troupe v. May Department Stores*, Judge Posner presented the idea that there were certain pieces of evidence, which alone did not provide conclusive evidence, however, when viewed together, the evidence composed "a convincing mosaic of discrimination against the plaintiff."[105] Though *McDonnell Douglas* was not abrogated from the Seventh Circuit's case law, the new method allowed plaintiffs who had circumstantial evidence to forego the *McDonnell Douglas* Framework, and proceed under the Convincing Mosaic.[106] If the plaintiff could present sufficient evidence to demonstrate a convincing mosaic of discrimination, then it was no longer necessary to go through the burden-shifting Framework; the plaintiff could proceed directly to the merits of the case, as if she had presented direct evidence.[107] The Convincing Mosaic became commonplace in both trial and appellate level decisions until it was recently revoked.[108]

V. *ORTIZ V. WERNER ENTERPRISES, INC.*: AN APPLICATION OF THE CONVINCING MOSAIC

In August 2016, the Seventh Circuit struck the death knell for the Convincing Mosaic.[109] The method had recently garnered heavy scrutiny; thus, the court took advantage of the opportunity to prohibit its further use when Henry Ortiz filed a lawsuit against his employer, alleging violations of both the Illinois and Federal Civil Rights Acts.[110] For seven years, Ortiz worked as a freight broker for the defendant, Werner Enterprises, before his termination in 2012.[111] The defendant's decision to terminate Ortiz, he alleged, was illegally motivated by discrimination against Ortiz's race.[112] To support his claim, Ortiz provided evidence that he was barraged with racial slurs by his superiors throughout the tenure of his employment and that he was terminated for commonplace, albeit wrongful, behavior in the company.[113]

105. Troupe v. May Department Stores, 20 F.3d 734, 737 (7th Cir. 1994).

106. Silverman v. Bd. of Educ. of Chi., 637 F.3d 729, 734 (7th Cir. 2011).

107. *Id.*

108. *Id*.

109. Ortiz v. Werner Enters., Inc., 834 F.3d 760 (7th Cir. Aug. 19, 2016).

110. Ortiz v. Werner Enters. Inc., No. 13-cv-8270, 2015 U.S. Dist. LEXIS 82952, *1 (N.D. Ill. June 25, 2015).

111. *Id*. at *4.

112. *Id*. at *6-*8.

113. *Id*.

The district court considered this evidence through two discrete avenues: the direct method and indirect method.[114] Under the direct method, the court found that illegal discrimination could be proved with either direct or circumstantial evidence.[115] Finding the direct evidence—the racial slurs—insufficient to satisfy the direct method,[116] the court then considered whether the circumstantial evidence "create[d] 'a *convincing mosaic* of discrimination,' which would permit a jury to infer intentional discrimination."[117] Citing Seventh Circuit precedent,[118] the district court opined that a convincing mosaic could be established through circumstantial evidence that "'point[ed] directly to a discriminatory reason for the employer's action . . . and [was] directly related to the employment decision.'"[119] Ortiz failed this test as well, largely due to conflicting evidence on the regularity of what Ortiz claimed was customary behavior within the corporation.[120] Ultimately, the district court granted the defendant's motion for summary judgment after it also concluded that Ortiz failed the indirect method of proof under *McDonnell Douglas*.[121]

Ortiz's appeal allowed Judge Posner and the panel to ensure that the Seventh Circuit had seen the last of the Convincing Mosaic.[122] In fact, all prior Title VII employment discrimination decisions were overruled to the extent that the Convincing Mosaic was relied upon.[123] Trial courts were admonished that any future decisions based upon this notion were subject to summary reversal.[124] These drastic measures were taken due to the array of issues that plagued the Convincing Mosaic and the inadvertent consequences of its application. The court laid out these issues in full.

The court criticized the enigmatic categorization of evidence into two disparate categories, which would be analyzed separately under different

114. *Id.* at *9.

115. *Id*. at *9-*10.

116. The court found that this evidence did not meet the direct test because the racial slurs were not directly related to the adverse employment action. *Id.*

117. *Id*. at *12 (internal citations omitted, emphasis added).

118. *See* Dass v. Chicago Bd. of Educ., 675 F.3d 1060, 1071 (7th Cir. 2012); Teruggi v. CIT Grp./Capital Fin., Inc., 709 F.3d 654, 660 (7th Cir. 2013); Adams v. Wal-Mart Stores, Inc., 324 F.3d 935, 938-39 (7th Cir. 2003).

119. Ortiz, 2015 U.S. Dist. LEXIS 82952 at *12 (citing Adams, 324 F.3d at 939).

120. Ortiz, 2015 U.S. Dist. LEXIS 82952 at *11-*14. The district court also cited a lack of evidence of a suspiciously-timed termination. *Id.*

121. *Id.* at *14-*15. The district court found that Ortiz would not be able to pass the pretext phase of the *McDonnell Douglas* Test. *Id.*

122. Ortiz v. Werner Enters., Inc., 834 F.3d 760, 765 (7th Cir. Aug. 19, 2016).

123. *Id*.

124. *Id.* at 763.

standards.[125] The method employed by the lower court required judges to consider whether the plaintiff presented direct evidence or, separately, "a convincing mosaic" of circumstantial evidence that was sufficient to prove discrimination.[126] The Seventh Circuit found this technique problematic for several reasons.[127] First, direct evidence was not inherently more reliable, and should not "be treated differently from other evidence because it can be labeled 'direct' . . . ."[128] Secondly, "shoehorning" evidence into these two distinct categories disallowed trial courts from efficiently viewing the claimant's evidence in its entirety.[129] Frequently, the distinction between the two types of evidence was unclear; thus, the court questioned the efficiency of "hav[ing] two tests if they consider the same information and answer the same question."[130] Lastly, and most importantly, the Seventh Circuit found that the Convincing Mosaic "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."[131]

Beyond the issues created by separating direct and indirect evidence, the court found additional reasons to ban further use of the Convincing Mosaic.[132] For instance, the test lacked any statutory basis, as it was not rooted in any of the statutes governing employment-discrimination cases.[133] Further, referencing the product of the convincing mosaic as "a form of legal kudzu," the court clearly acknowledged that it had only confounded an already challenging area of law.[134]

After underlining the outright ban on both the Convincing Mosaic and any further distinctions between direct and circumstantial evidence, the Seventh Circuit panel made a final "point of clarification [that] may be helpful."[135] The court stressed that the "decision [did] not concern *McDonnell Douglas*."[136] Rather, the court concluded that its ban on separating evidence as direct or circumstantial was "consistent with

125. *Id*. at 763-64.

126. *Id*. at 763.

127. *Id*. at 764-767.

128. *Id*. at 765. In fact, the court states that eliminating this distinction was the very intent of the convincing mosaic image in the first place. It was to serve to view both direct and circumstantial evidence in one image.

129. *Id*. at 763.

130. *Id*. at 765.

131. *Id*. at 764.

132. *Id*. at 764-44.

133. *Id*. at 764.

134. *Id*. at 765.

135. *Id*. at 766.

136. *Id*.

McDonnell Douglas and its successors."[137]

The court subsequently reversed the district court's grant of the defendant's motion for summary judgment under "the correct standard," which focused on whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race caused the adverse employment action.[138] The court held that there remained a genuine issue of material fact as to whether Ortiz was fired for a business practice that was generally tolerated when done by non-protected employees.[139] Thus, the case was remanded to be decided under the re-established legal standard.[140]

VI. ARGUMENT

The decision in *Ortiz v. Werner* presents two new arguments for the abolition of the *McDonnell Douglas* Framework to supplement the prolific literature arguing for such a change. First, many of the justifications behind eliminating the use of the Convincing Mosaic reflect the same shortcomings of *McDonnell Douglas*, and abrogating the use of the former while protecting the latter is inconsistent.[141] Secondly, after *Ortiz v. Werner* firmly eradicated the distinction between direct and circumstantial evidence in the Seventh Circuit, the continued vitality of the Framework stands on unsteady ground, as many circuits continue its use based on this distinction alone.

A. The Similar Shortcomings of the Convincing Mosaic and McDonnell Douglas

The Seventh Circuit's chief complaint about the Convincing Mosaic was that its use "detracted from the sole question that matters: Whether a reasonable juror could conclude that [the plaintiff] would have kept his job if he had a different ethnicity, and everything else had remained the same."[142] Both *McDonnell Douglas* and the Convincing Mosaic have been accused of requiring an inane focus on insignificant technicalities, which blurs the big picture and obfuscates the goal of Title VII: providing recourse for employees who have been discriminated against

137. *Id*.

138. *Id*. at 765.

139. *Id*. at 766-67.

140. *Id*. at 766-67. This standard is termed "re-established" because the standard was used in previous Seventh Circuit cases that did not use the *McDonnell Douglas* Framework. *See, e.g.,* Achor v. Riverside Golf Club, 117 F.3d 339 (7th Cir. 1997).

141. Davis, *supra* note 64 at 869 ("The Court's devotion to stare decisis and the climate of racial politics probably account for the masquerade").

142. Ortiz, 834 F.3d at 764.

in the course of their employment.[143] The parallel complaints find a source in *McDonnell Douglas*' mandate to shoehorn evidence into certain phases and the Convincing Mosaic's requirement to designate evidence as direct or indirect and to analyze each separately.[144] Just as Judge Posner found that "the search for elusive mosaics has complicated and sidetracked employment-discrimination litigation for many years," another Seventh Circuit Judge noted that the goals of the *McDonnell Douglas* Framework, to "clarify and simplify the plaintiff's task in presenting . . . such a case . . . have gone by the wayside."[145]

A further justification for overruling the use of the Convincing Mosaic was its failure to be "rooted in the statutes that govern employment-discrimination cases."[146] Judge Posner queried how lower courts established the Convincing Mosaic without citing to any statutory authority;[147] this same criticism, however, has been launched against the *McDonnell Douglas* Framework.[148] Neither of the methods' plain language has an obvious nexus to Title VII. Indeed, as noted earlier, only one of the four factors in a *McDonnell Douglas prima facie* case can be found in the language of Title VII. Similarly, the Convincing Mosaic was unapologetically founded in a metaphor describing a method to view the plaintiff's direct and circumstantial evidence. Thus, both methods suffer from a dearth of statutory justification.

Further alluded to in the *Ortiz* decision are the inefficiencies plaguing the Convincing Mosaic. First, the Convincing Mosaic requires the fact finder to "consider the same information in multiple ways" if the piece of evidence does not fit squarely within the direct or indirect category.[149] The *McDonnell Douglas* Framework, if employed at the end of litigation, is subject to the same criticism. A further concern of the Convincing Mosaic is that some relevant evidence will not be considered unless it fits into one of the two methods. Likewise, some evidence only relevant to the pretext phase may never be heard under *McDonnell Douglas* if the plaintiff loses on summary judgment and has only provided *prima facie* evidence. Disabling judges and juries from hearing the totality of the plaintiff's evidence will instantaneously result in erroneous decisions and an increased volume of post-verdict

143. *Compare id. with* William R. Corbett, *Unmasking a Pretext for Res Ipsa Loquitur: A Proposal to let Employment Discrimination Speak for Itself*, 62 AM. U.L. REV. 447 (2013) (*McDonnell Douglas* has become a "tool for plaintiffs becomes a straightjacket for litigants and a distraction from consideration of substantive discrimination issues").

144. *Ortiz*, 834 F.3d at 765.

145. Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Coleman, J., concurring).

146. *Ortiz*, 834 F.3d at 764.

147. *Id.*

148. *See, e.g.*, Sperino, *supra* note 53.

149. *Ortiz*, 834 F.3d at 765.

motions.[150]

A secondary source of inefficiency, which is produced by the Convincing Mosaic and is shared with the *McDonnell Douglas* Framework, is confusion. Judge Posner employed the phrase "convincing mosaic" "as a metaphor to illustrate why courts should not try to differentiate between direct and indirect evidence."[151] Lower courts, however, misunderstood it as the opposite and implemented the phrase as a separate test, having elements of its own.[152] Worse, in the years since it was established, the Seventh Circuit vacillated between employing the convincing mosaic and criticizing it.[153] The lack of uniformity within the jurisdiction produced inconsistent results and sent an unclear message to the lower courts as to when, or if, the Convincing Mosaic should be used. Correspondingly, the *McDonnell Douglas* Framework was removed from jury instructions, jury trials, and on appeal by various courts, including the Supreme Court. Thus, lower courts are similarly befuddled as to when or if the Framework applies.[154]

When two tests suffer identical shortcomings and one of them is banished from the judicial toolbox, a logical next step is to question the validity of the other. Yet, after marching through all the deficiencies that plague both the Convincing Mosaic and the *McDonnell Douglas* Framework, the Seventh Circuit veered in the contrary direction and took affirmative steps to protect the Framework.[155] Thus, Seventh Circuit judges cannot claim ignorance as to the complications of the *McDonnell Douglas* Framework, as many have written critiques of *McDonnell Douglas*, which mirror the *Ortiz* decision. Most pointedly, in *Coleman v. Donahue*, Judge Wood wrote a concurrence to highlight the "snarls and knots" the *McDonnell Douglas* Framework has inflicted upon employment discrimination cases, and two other judges signed on

150. Whittington v. Nordam Grp. Inc., 429 F.3d 986, 998 (10th Cir. 2005).

151. Ortiz, 834 F.3d at 764.

152. *Id.*

153. *Id.* at 764-65 (citing Hatcher v. Board of Trustees of Southern Illinois University, No. 15-1599, 829 F.3d 531, 2016 U.S. App. LEXIS 12959 (7th Cir. July 14, 2016), slip op. 13). *See* Chaib v. Indiana, 744 F.3d 974, 981 (7th Cir. 2014); Cloe v. Indianapolis, 712 F.3d 1171, 1180 (7th Cir. 2013); Smith v. Bray, 681 F.3d 888, 901 (7th Cir. 2012); Good, 673 F.3d at 674; Silverman v. Board of Education of Chicago, 637 F.3d 729, 734 (7th Cir. 2011); Phelan v. Cook County, 463 F.3d 773, 779 (7th Cir. 2006) (cases where the Seventh Circuit has treated the convincing mosaic as a legal requirement); *but see* Good v. University of Chicago Medical Center, 673 F.3d 670, 680 (7th Cir. 2012); Harper v. C.R. England, Inc., 687 F.3d 297, 314 (7th Cir. 2012); Hitchcock v. Angel Corps, Inc., 718 F.3d 733, 737 (7th Cir. 2013); Perez v. Thorntons, Inc., 731 F.3d 699, 703 (7th Cir. 2013); Chaib, 744 F.3d at 981 (cases where the Seventh Circuit has disapproved the search for mosaics).

154. Sandra Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the McDonnell Douglas Monolith*, 44 HOUS. L. REV. 349 (2007) ("Regarding state law discrimination claims, state courts should play a role in answering questions about whether McDonnell Douglas and its burden-shifting scheme are even applicable at the trial stage").

155. Ortiz, 834 F.3d at 766.

to the opinion.[156] Judge Wood opined that *McDonnell Douglas* may have been necessary forty years ago, but she questioned whether it should have a role in the future of employment litigation.[157] She ultimately suggested that it was perhaps time to "restore flexibility to the pretrial phase" by eliminating the use of the decades old test.[158] Furthermore, in *Gehring v. Case Corp*., the Seventh Circuit found that *McDonnell Douglas* was irrelevant after the plaintiff proved a prima facie case, recognizing that jury instructions should not include the burden-shifting Framework "for very good reason."[159] *Gehring* effectively eliminated the use of the final two phases of the test.[160] In *Brewer v. Bd. Of Trs. of Univ. of Ill*., the Seventh Circuit even seemed to favor the Convincing Mosaic over *McDonnell Douglas,* referencing the Convincing Mosaic as the "conventional method"[161] when directly comparing the two methods.

The defects that motivated the Seventh Circuit to write a forceful opinion prohibiting further use of the Convincing Mosaic are the very same flaws of the *McDonnell Douglas* recognized by the very same court. The only logical question remaining, then, is how can the continued use of *McDonnell Douglas* be justified? One explanation is forty years of precedential value. In 1993, Justice Souter vouched for the vitality of *McDonnell Douglas,* reasoning that courts and litigants have depended on the Framework to structure lawsuits, and that the structure should not be casually abandoned.[162]

Precedential value, however, is insufficient justification because, although forty years of precedent exists, the case law has done anything but provide clear guidance to lower courts. The principle of *stare decisis* is advanced on grounds that consistency and predictability are integral to "the actual and perceived integrity of the judicial process."[163] Even in situations where precedent is not necessarily correct, the interests of predictability have outweighed the interests of having a correct test or interpretation.[164] However, due to the debilitating flaws of the

156. Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring).

157. *Id.*

158. *Id.*

159. Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994).

160. *Id.*

161. Brewer v. Bd. of Trs., 479 F.3d 908, 915 (7th Cir. 2007) ("A plaintiff can avoid summary judgment in two ways: the burden-shifting method… often called the 'indirect' method of proof, or the *conventional* method of presenting a 'convincing mosaic' of direct or circumstantial evidence….") (emphasis added, internal citations removed).

162. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 540 (1993) (Souter, J., dissenting).

163. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

164. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right").

Framework, it has achieved neither consistency nor predictability and, therefore, cannot be sustained on these grounds. The line of Supreme Court cases from *McDonnell Douglas* to *Burdine*, which attempted to clarify the types of burdens imposed on each party, to *Price Waterhouse*, which provided the "motivating factor" analysis, to *Desert Palace*, which abrogated the need for direct evidence in mixed-motive claims, demonstrate the chaotic incoherence within *McDonnell Douglas'* progenies.[165] Therefore, there is a much stronger argument that the *McDonnell Douglas* Framework should be abolished once and for all because the judicial history of *McDonnell Douglas*, like that of the Convincing Mosaic, has been so severely inconsistent.

A side-by-side comparison of the Convincing Mosaic and *McDonnell Douglas* critiques presents the arduous task of reconciling the abandonment of the former with the protection of the latter. Especially considering the copious criticisms against *McDonnell Douglas* within the Seventh Circuit, it seems clear that the *McDonnell Douglas* Framework has no remaining use in the Seventh Circuit. If the uncanny parallels between the flaws of the two methods are inadequate catalysts for the Seventh Circuit to treat *McDonnell Douglas* with the same disdain, there is an alternate, perhaps stronger argument as to why the Framework should be prohibited.

B. Ortiz v. Werner *Extinguished a Distinction on which the* McDonnell Douglas *Framework Relies*

The *Ortiz* decision made one point abundantly clear: Seventh Circuit district courts are henceforth banned from attempting to categorize and separately analyze evidence as either direct or circumstantial. Though the Seventh Circuit proffered that the merging of the two categories was consistent with the "*McDonnell Douglas* Framework and its progeny," this conclusion ignores the fact that courts still rely on the distinction in determining whether it is appropriate to apply *McDonnell Douglas*.[166] Furthermore, the elimination of the dichotomy renders the *McDonnell Douglas* Framework obsolete. Lastly, although *Ortiz* clearly directed district courts' treatment of evidence, it failed to explain the role of *McDonnell Douglas* in future litigation.

165. Stephen Rich, *A Matter of Perspective: A Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197 (2014).

166. Ortiz v. Werner Enters., Inc., 834 F.3d 760, 766 (7th Cir. 2016).

1. The Abolishment of the Dichotomy is Not Consistent with Subsequent Interpretations of the Framework

Most circuits required the use of the *McDonnell Douglas* Framework only after it had been determined that the plaintiff did not have direct evidence of discrimination.[167] This method originated from *Teamsters v. United States*, one of the Supreme Court's interpretations of *McDonnell Douglas*, and had been consistently employed since its inception.[168] Thus, the Seventh Circuit oversimplified the current state of employment discrimination law by making the conclusory statement that the abrogation of classifying direct and indirect evidence was consistent with *McDonnell Douglas*. On the contrary, the distinction thrived in many other jurisdictions, and was justified by years of case law interpreting *McDonnell Douglas* as requiring the evidentiary dichotomy.[169]

2. The Abolishment of the Distinction Prohibits the Framework in the Seventh Circuit

The *McDonnell Douglas* Framework has no remaining legitimacy in the Seventh Circuit because its use depended upon a legal principle which the *Ortiz* decision rendered void. Before applying the Framework, courts first determined whether the plaintiff had presented direct or indirect evidence.[170] Though this distinction was eradicated in mixed-motive cases and was irrelevant in every other area of law, it has remained pertinent to employment discrimination cases.[171] *Ortiz* recognized that the distinction between the two types of evidence was not only unimportant but was also frequently unintelligible and consequently rebuked the practice of categorizing evidence as such.[172] Therefore, the initial inquiry, which determined the applicability of the

167. Sperino, *supra* note 55 at FN 54 (*citing* 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).

168. *See* Intl. Broth. of Teamsters v. U.S., 431 U.S. 324, 358, FN 44 (1977) (the *McDonnell Douglas* does not require direct evidence of discrimination).

169. *See, e.g.*, TWA v. Thurston, 469 U.S. 111, 121 (1985); Swierkiewicz 534 U.S. 506, 511 (2002).

170. *See supra* Part I B.

171. *See supra* Part I B.

172. Ortiz v. Werner Enters., Inc., 834 F.3d 760, 764-65 (7th Cir. 2016).

Framework, no longer has a place in the Seventh Circuit. Because *McDonnell Douglas* relies on a now defunct legal principle, it is obsolete in that circuit. If the Seventh Circuit's abrogation of the dichotomy serves as a catalyst for other circuits to follow suit, the Framework will similarly be superseded in those jurisdictions, as well.

3. *Ortiz* Failed to Direct District Courts when to Implement *McDonnell Douglas*

Even prior to *Ortiz*, the appropriate time to employ the *McDonnell Douglas* analysis within the Seventh Circuit was not obvious. The Convincing Mosaic essentially allowed plaintiffs to bypass the burden-shifting Framework by proceeding under the direct method with circumstantial evidence. Thus, where most circuits required a plaintiff to utilize the Framework, the Seventh Circuit did not. Post-*Ortiz*, the requirement for when to utilize the Framework is further confounded.

The *Ortiz* opinion exerted an entire paragraph ensuring the vitality of *McDonnell Douglas*, yet, it failed to explain the circumstances which warrant its use. In fact, Judge Posner went on to decide the issue of *Ortiz* without mentioning the burden-shifting Framework again. The court did not assess the district court's application of *McDonnell Douglas*, and it did not indicate that Framework should be employed on remand. On the contrary, Judge Posner explicitly directed the trial court to decide the case under a different standard: "whether the evidence would permit a reasonable factfinder to conclude that the plaintiff's race . . . caused the discharge . . . ." Although *Ortiz* was at the summary judgment stage—the procedural point at which many circuits use *McDonnell Douglas*—the Framework was bypassed. It can be reasonably assumed that the court preferred an alternative method to *McDonnell Douglas*, yet, it nevertheless asserted the Framework's viability despite eliminating one of its key principles.

Seventh Circuit district courts have begun the process of implementing *Ortiz*. In one case, despite the parties spending much of their briefing on the application of the *McDonnell Douglas* Framework, the district court decided the case by viewing the evidence in the entirety, and cited the standard for summary judgment laid out in *Ortiz*.[173] In a Family Medical Leave Act claim, another district court explicitly rejected both the need for the plaintiff to satisfy the *McDonnell Douglas* factors in order to prove a *prima facie* case "in light of Ortiz" and the direction from the Seventh Circuit to stop separating

173. Aliferis v. Generations Health Care Network at Oakton Pavillion, LLC, No. 15 C 3489, 2016 U.S. Dist. LEXIS 127054, at *12 (N.D. Ill. Sep. 19, 2016).

evidence.[174] Yet still, another decision held that "the pattern identified in *McDonnell Douglas* is just one way that the record evidence could enable a reasonable juror to find discrimination," proving that some courts still considered it a viable method.[175] Furthermore, since *Ortiz*, the Seventh Circuit has still advised a district court on the correct application of *McDonnell Douglas*, demonstrating that there remains considerable confusion in the Seventh Circuit regarding the applicability of the Framework.[176]

C. Solution

Determining that Supreme Court precedent should be overruled is not within a Circuit Court of Appeal's prerogative.[177] "[E]ven where subsequent decisions or factual developments may appear to have significantly undermined the rationale for [an] earlier holding," lower courts must adhere to precedent.[178] Thus, until either the Supreme Court or Congress comes to the realization that the flaws and limitations of the *McDonnell Douglas* Framework have rendered it obsolete, the antiquated Framework will haunt Title VII claims. In *State Oil Co. v. Khan*, the Supreme Court overturned a prior decision after it determined that much of the decision had been eroded by its own subsequent decisions.[179] Similarly, "there is not much . . . to salvage" from *McDonnell Douglas.*[180]

In place of the complicated burden-shifting Framework, employment law discrimination claims should be treated as any other tort claim. Judge Wood, in her concurrence in *Coleman*, advocated for the collapsing the three phases of *McDonnell Douglas* into one flexible standard.[181] The sole inquiry would be whether a jury could conclude that the employer took the adverse action on account of his or her protected class, not for any non-invidious reason.[182] Judge Wood's suggestion mirrors the standard articulated in *Ortiz*, and also reflects the

174. Kemp v. Cnty. of Cook, No. 15-cv-4176, 2016 U.S. Dist. LEXIS 152854, at *11 (N.D. Ill. Nov. 3, 2016).

175. Zegarra v. John Crane, Inc., No. 15 C 1060, 2016 U.S. Dist. LEXIS 150225, at *22 (N.D. Ill. Oct. 31, 2016).

176. Volling v. Kurtz Paramedic Servs., 840 F.3d 378 (7th Cir. 2016) (holding that the district court did not use a flexible enough standard in determining whether the plaintiff had presented a prima facie case of discrimination.).

177. United States v. Hatter, 532 U.S. 557, 567 (2001).

178. Roper v. Simmons, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting).

179. State Oil Co. v. Khan, 522 U.S. 3, 21 (1997).

180. *Id.*

181. Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2011).

182. *Id.*

burden placed on plaintiffs in other civil claims.

Eliminating the use of *McDonnell Douglas* in favor of Judge Wood's flexible standard would exponentially simplify employment discrimination law and better serve the original purpose of Title VII. Without the constraints of *McDonnell Douglas*, judges and litigants can focus on one key inquiry rather than on insignificant details, such as whether the evidence is direct or indirect, the phase evidence properly belongs, or if a plaintiff presented a *prima facie* case.[183] Eliminating unnecessary technicalities will produce more accurate and efficient decisions.[184] This solution also resolves various criticisms that the standard utilized to resolve Title VII claims have minimal relation to the statutory language, as Judge Wood's standard plainly reflects the language of Title VII.[185]

VII. CONCLUSION

The *McDonnell Douglas* Framework has remained at the forefront of employment law litigation for over forty years. Though it seemed the Seventh Circuit's recent decision provided sufficient animus to abrogate the use of the inefficient, cumbersome, and out-of-date Framework once and for all, Judge Posner left many wishing for more. The litany of complaints Judge Posner had against the Convincing Mosaic parallels what many argue against *McDonnell Douglas*. Furthermore, *Ortiz's* prohibition on categorizing evidence eliminated the remaining safe haven for the Framework: where the plaintiff presented indirect evidence. Many circuit courts rely on this distinction to indicate when the court should apply the burden-shifting Framework. Thus, without the categorization, the test is left standing on highly unstable grounds. The Framework can no longer be justified in the Seventh Circuit, and if other circuits recognize the fallacy of the evidentiary dichotomy, the Framework will be void in those circuits, as well.

Though the original intent was to ease the plaintiff's burden, the *McDonnell Douglas* Framework has arguably become a judge's instrument to dismiss plaintiff's claim.[186] Perhaps the detailed burden shifting was necessary forty years ago when employment discrimination cases were new; however, the Framework is now out of date and should be abandoned. *Ortiz* provided a glimmer of hope that *McDonnell Douglas* will, like other relics of the 1970s, slowly fade out of use after

183. See *supra* Part III B, C.

184. See *supra* Part III D, F.

185. See *supra* Part III E.

186. Schneider, *supra* note 65 at 564 ("[M]any Federal judges appointed over the last several years appear to be deeply skeptical of civil rights and employment cases").

circuit courts continue to reduce its applicability. However, after recognizing the risk of error and the potential injustices of the Framework, "[o]ne . . . wonders why we need to have this artificial, often confusing, framework. The answer is that there is no need."[187] Judges are well-versed in employment discrimination law, and binding them to the cumbersome Framework is no longer practicable, much less necessary. To avoid the caustic effects of *McDonnell Douglas* and to give full cadence to Title VII, employment discrimination claims should be decided with the flexibility permitted for all other civil cases.

187. Wells v. Colo. DOT, 325 F.3d 1205, 1228 (10th Cir. 2003).