IRRECONCILABLE: *MCDONNELL DOUGLAS* AND SUMMARY JUDGMENT*

SANDRA F. SPERINO**

The McDonnell Douglas framework is the most important analytical structure in employment discrimination law. Scholars and judges have regularly criticized the three-part burden-shifting test. Despite decades of criticism, a central feature of the framework remains unexamined—its second step is incompatible with the summary judgment standard.

In employment discrimination cases courts often grant summary judgment in the employer's favor. Scholars have offered various accounts of why this happens, including docket pressures and published case law that focuses on grants of summary judgment. The second step of the inquiry has largely escaped scrutiny because it appears to be a quirky, but somewhat harmless, part of the McDonnell Douglas framework.

This Article demonstrates that the conventional view of the second step is wrong. When a defendant files a motion for summary judgment, a court must draw all reasonable inferences in favor of the plaintiff, the non-moving party. The second step of McDonnell Douglas requires courts to credit the employer's reason for acting and give it a certain weight and legal effect in discrimination analysis. It also labels an employer's reason for acting as legitimate and non-discriminatory even though the defendant is not required to establish either proposition. Even when a defendant's reason does not respond to the plaintiff's theory of the case, courts still credit the employer's reason.

The year 2023 marks the fiftieth anniversary of McDonnell Douglas. Yet, no one has recognized what has been hiding in plain sight for decades: the second step cannot be reconciled with the summary judgment standard. The second step

* © 2024 Sandra F. Sperino.

** Elwood L. Thomas Endowed Professor of Law, University of Missouri School of Law. I would like to thank Bill Corbett, Katie Eyer, Michael Green, Rigel Oliveri, Daiquiri Steele, Charlie Sullivan, and Deborah Widiss for helpful comments on earlier drafts of this Article. This article also benefitted from feedback given during the AALS Employment Discrimination Law Section Summer Workshop, with special thanks to Doron Dorfman for serving as a paper commentator and to David Simson, Nicole Porter, Andrea Johnson, and Marcia McCormick for their questions and comments. I feel so lucky to belong to such a supportive community of labor and employment law scholars.

alters discrimination analysis in ways that deny plaintiffs their right to have juries decide contested cases.

INTRODUCTION 460
I. FEDERAL DISCRIMINATION LAW AND *MCDONNELL DOUGLAS* 463
A. *Federal Discrimination Law* 463
B. *The Three-Part Burden-Shifting Test* 464
II. CREDIT AND EFFECT 468
A. *The Summary Judgment Standard* 469
B. *Crediting and Prioritizing the Defendant's Evidence* 471
III. THE MAGIC LABEL 474
A. *The "Legitimate" and "Non-Discriminatory" Label* 474
B. *Articulate Versus Prove* 477
C. *The Label and the Honest Belief Rule* 479
IV. SHIPS PASSING IN THE NIGHT 483
A. *Theory-of-the-Case Mismatch* 484
B. *Order-of-the-Case Mismatch* 486
C. *Skipping to Step Three?* 488
V. WHY AND SOLUTIONS 492
A. *The Test Itself* 492
B. *Small Solutions* 498
C. *A Medium Solution* 500
D. *The Broader Solution* 502
CONCLUSION 506

INTRODUCTION

The *McDonnell Douglas* framework is the most important analytical structure in employment discrimination law.[1] Scholars and judges have regularly criticized the three-part burden-shifting test.[2] Despite decades of criticism, a central feature of the framework remains unexamined—its second step is incompatible with the summary judgment standard.[3]

1. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–07 (1973).
2. *See infra* Section V.A.
3. FED. R. CIV. P. 56(a) ("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."). This Article addresses the use of *McDonnell Douglas* in the context of defendants' motions for summary judgment and does not discuss the rare instances in which plaintiffs marshal the test to support their motions for summary judgment.

In employment discrimination cases, courts often grant summary judgment in the employer's favor.[4] Scholars have offered various accounts of why this happens, including docket pressures[5] and published case law that focuses on grants of summary judgment.[6] The second step of the inquiry has largely escaped scrutiny because it appears to be a quirky, but somewhat harmless, part of the *McDonnell Douglas* framework.[7]

This Article demonstrates that the conventional view of the second step is wrong. The second step favors defendants and is not consistent with summary judgment rules.[8] It skews discrimination analysis in ways that deny plaintiffs their right to have juries decide contested cases.

In many discrimination cases, the question at summary judgment should be straightforward.[9] Does the plaintiff have evidence from which a jury could find that a protected trait was a cause in the contested employment outcome?[10]

Instead of using this structure, courts often funnel discrimination cases through the *McDonnell Douglas* test.[11] In the first step, the plaintiff establishes a prima facie case from which a rebuttable presumption of discrimination arises.[12] In the second step, the defendant articulates (but does not fully prove) a legitimate, non-discriminatory reason for acting.[13] If the defendant does this, it

4. *See, e.g.*, Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 710 n.16 (2012) (discussing ways employment discrimination claims fare worse than other claims); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131 (2009) (discussing how appellate court reversals favor employers); Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1966 (2009) (discussing empirical studies about loss rates in discrimination cases); Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 891–92 (2006) (summarizing empirical results about race discrimination claims); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999) (discussing win rates for ADA plaintiffs).

5. *See* Natasha T. Martin, *Pretext in Peril*, 75 MO. L. REV. 313, 316 (2010).

6. Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113–14 (2012).

7. *See, e.g.*, Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 320 (6th Cir. 2019) (noting the second step is "rarely onerous"); Ebersole v. Novo Nordisk, Inc., 758 F.3d 917, 925 (8th Cir. 2014) (noting that the second step is not onerous and quickly proceeding to the rest of the test); Keeton v. Morningstar, Inc., 667 F.3d 877, 885 (7th Cir. 2012) (indicating court can skip to final step); Martin, *supra* note 5, at 325 (noting that the focus is often on the third step of the test).

8. *See* FED. R. CIV. P. 56(a); Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 274 n.1 (2009).

9. This Article focuses on disparate treatment cases, in which a single plaintiff or a small group of plaintiffs allege discrimination because of a protected trait.

10. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020). In *Bostock*, the Supreme Court used a "but for" causation standard to ground its analysis, although it also correctly noted that Title VII does not require a plaintiff to establish "but for" cause. *Id.* at 1739–40.

11. *See, e.g.*, Rahman v. Exxon Mobil Corp., 56 F.4th 1041, 1044 (5th Cir. 2023) (incorrectly noting that if a plaintiff does not possess direct evidence, the plaintiff must proceed through *McDonnell Douglas*).

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

13. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

rebuts the presumption of discrimination, and the framework proceeds to the third and final step. The plaintiff can prevail on the third step by establishing the defendant's reason is pretext or by presenting other evidence of discrimination.[14]

The second step is not compatible with the summary judgment standard in important ways. First, the second step requires judges to credit the defendant's reason for acting and to give it a certain effect.

If the employer proffers a reason that is somewhat specific, supported by evidence, and not facially discriminatory, then the reason rebuts the prima facie case.[15] A judge is required to credit a defendant's reason and give it this legal effect, even if a jury would find the evidence not credible and would ignore it. It is not clear why a defendant moving for summary judgment can receive any inference, especially when it has only carried a minimal burden of production.

Second, judges give a magic label to the minimal evidence offered in step two that transforms the employer's evidence into something much more substantial than what the court required the defendant to proffer. When the defendant meets its burden in the second step, the court declares the employer articulated a "legitimate" and "non-discriminatory" reason for acting. The court declares this based on the defendant's evidence alone. Unfortunately, it is not possible to determine whether the defendant acted in a legitimate and non-discriminatory manner without all the evidence, especially the plaintiff's evidence.

When courts state that a defendant has presented a "legitimate," "non-discriminatory reason," this label is a tricky term of art that often has an outsized rhetorical force. Once a court declares that an employer has a legitimate and non-discriminatory reason, it makes it difficult to declare later in the analysis that the employer's reason might not be legitimate or might be discriminatory.

Courts compound this labeling problem with a mistake. Even though the defendant has a minimal burden at step two, courts often give the employer the benefit of having conclusively established its reason for acting in the second step. This misstep is especially problematic when courts combine this benefit with other doctrines that also favor defendants.

Finally, the second step also creates a problem of ships passing in the night. In many cases, the defendant's articulated reason for acting does not respond to the theory of the case being argued by the plaintiff. In some cases, the employer's minimal step two evidence partially addresses, but does not fully rebut, the plaintiff's step one evidence. Once the defendant meets its step two burden, the defendant rebuts the presumption of discrimination created by the

14. *Id.* at 254–55.

15. *Id.* at 258; *see also* Figueroa v. Pompeo, 923 F.3d 1078, 1087 (D.C. Cir. 2019). *Figueroa v. Pompeo* contains an extensive discussion of the second step. *Id.* at 1087–93.

prima facie case. The defendant gets legal credit for rebutting the prima facie case, even if the defendant's reason does not respond to the plaintiff's case.

This Article explores these problems and suggests ways for the federal courts to avoid or minimize them. Part I explains the *McDonnell Douglas* framework. Part II argues that the second step violates the summary judgment standard by crediting and giving legal effect to the defendant's reason. Part III discusses the labeling problem, how courts magnify this issue by acting as if the defendant fully proved its reason for acting, and how the honest belief doctrine exacerbates these issues. Part IV addresses the ships-passing-in-the-night problem and other matters related to the order of proof. Part V offers solutions that do not distort the discrimination inquiry and that give required deference to the summary judgment standard.

I. FEDERAL DISCRIMINATION LAW AND *MCDONNELL DOUGLAS*

In *McDonnell Douglas Corp. v. Green*,[16] the Supreme Court held that a plaintiff proceeding on a disparate treatment claim[17] based on circumstantial evidence could prove his case through a three-part burden-shifting framework. This test is often called the *McDonnell Douglas* test or framework.

This Article focuses on what happens at the second step in the analysis. To understand the second step, it is important to have an overview of federal discrimination law and the entire *McDonnell Douglas* framework.

A. *Federal Discrimination Law*

Federal employment discrimination law is primarily grounded in four statutes: Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), and 42 U.S.C. § 1981 ("Section 1981").[18] Title VII is the cornerstone federal employment discrimination statute. Title VII prohibits an employer from discriminating against a worker because of race, sex, national origin, color, or religion.[19]

Under Title VII, an employer may not take certain employment actions or "otherwise discriminate" against a person with respect to compensation or in

16. 411 U.S. 792 (1973).

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

18. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)) (Title VII's primary operative provisions); Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4(a), 81 Stat. 602, 603 (codified at 29 U.S.C. § 623(a)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(a)–(b), 104 Stat. 327, 331–32 (codified at 42 U.S.C. § 12112(a)–(b)).

19. 42 U.S.C. § 2000e-2(a).

the "terms, conditions, or privileges of employment" because of race, color, religion, sex, or national origin.[20]

The ADEA contains similar language,[21] and the ADA contains similar concepts, although not always stated in the same language.[22] Section 1981 does not use similar language; however, the courts have often used the same frameworks to analyze disparate treatment claims under Section 1981 and Title VII.[23] Each of these statutes also prohibit retaliation.[24] Under each of these statutory regimes, a plaintiff has a right to a jury trial under certain circumstances.[25]

On numerous occasions, the Supreme Court has reiterated that federal discrimination statutes are designed to "strike at the entire spectrum" of discriminatory conduct.[26] The Court has repeatedly stated that "Title VII tolerates no . . . discrimination, subtle or otherwise."[27]

B. *The Three-Part Burden-Shifting Test*

Courts do not typically use the text of the federal discrimination statutes to analyze disparate treatment claims when the plaintiff relies on circumstantial evidence. Instead, they primarily rely on the *McDonnell Douglas* three-part burden-shifting framework.

20. *Id.* § 2000e-2(a)(1). Under Title VII's second subpart, it is unlawful for an employer to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of a protected trait. *Id.* § 2000e-2(a)(2). Congress amended Title VII in 1991. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.). However, this does not change the fact that the foundational text of Title VII is contained in 42 U.S.C. § 2000e-2(a).

21. *See* 29 U.S.C. § 623(a).

22. *See* 42 U.S.C. § 12112.

23. *See, e.g.*, Kim v. Nash Finch Co., 123 F.3d 1046, 1056 (8th Cir. 1997). *But see* Comcast v. Nat'l Ass'n of Afr. Am.-Owned Media, 140 S. Ct. 1009, 1013 (2020) (holding a plaintiff is required to establish "but for" cause in Section 1981 cases).

24. 42 U.S.C. § 2000e-3(a); 29 U.S.C. § 623(d); 42 U.S.C. § 12203(a). While 42 U.S.C. § 1981 and the ADEA as applied to federal employees have no expressed non-retaliation provisions, both statutes implicitly prohibit retaliation using standards similar to the expressed statutory protection. CBOCS W., Inc. v. Humphries, 553 U.S. 442, 454–55 (2008); Gomez-Perez v. Potter, 553 U.S. 474, 487–88 (2008).

25. 42 U.S.C. § 1981a(c); 29 U.S.C. § 626(c). Plaintiffs are not entitled to a jury trial in all instances. For example, a jury trial is not available for disparate impact claims under Title VII. 42 U.S.C. § 1981a(a), (c). The ADEA's federal sector provision does not provide a jury trial. Lehman v. Nakshian, 453 U.S. 156, 168 (1981); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 357 (2013).

26. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

27. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280–81 & n.8 (1976); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348 n.31 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

In theory, a judge begins the *McDonnell Douglas* analysis at the first step, which is often called the prima facie case. In the *McDonnell Douglas* case itself, the Supreme Court described one possible prima facie case:

> (i) that [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[28]

The Supreme Court cautioned that the facts required to establish a prima facie case will necessarily vary, depending on the factual scenario of the underlying case.[29] There are different iterations of the factors within the prima facie case.[30] On multiple occasions, the Supreme Court has held that "the burden of establishing a prima facie case of disparate treatment is not onerous."[31] According to the Court, the prima facie case serves the function of "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection."[32]

After the plaintiff establishes this prima facie case, a rebuttable presumption of discrimination arises.[33] After a plaintiff makes a prima facie showing, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the allegedly discriminatory decision or action, thereby rebutting the presumption.[34] The defendant's burden is one of production only.[35] The defendant is not required to persuade the court that it was "actually motivated by the proffered reasons."[36] The Supreme Court has stated that step two "serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."[37]

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

29. *Id.*

30. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (articulating a prima facie case that required the plaintiff to show he was within a protected class, he was otherwise qualified for the position, he was fired, and that the employer hired three people to replace the plaintiff and those people were younger than the plaintiff); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (articulating a different version of the prima facie case).

31. Young v. United Parcel Serv., 575 U.S. 206, 228 (2015); Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 253 (1981).

32. *Burdine*, 450 U.S. at 254.

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

34. *Burdine*, 450 U.S. at 254.

35. *Id.* at 255 n.8.

36. *Id.* at 254.

37. *Id.* at 255–56 (emphasis added).

Step two requires very little of the defendant. The second step requires the defendant to articulate its reason with sufficient clarity and to support that reason with evidence. However, the defendant is not required to carry the burden of persuasion. The Supreme Court has admonished courts that the second step does not assess the employer's credibility or truthfulness.[38]

A reason can be a legitimate, nondiscriminatory reason for purposes of *McDonnell Douglas*, even if it violates another source of law.[39] A defendant also fulfills step two if it articulated a discriminatory reason for its action based on a protected class not at issue in the suit.[40] For example, if the plaintiff alleges race discrimination under Title VII, the employer could meet step two by presenting evidence that it discriminated against the plaintiff based on her age. Age is not a protected class under Title VII.[41]

While there are ways for the defendant to fail to meet its step two burden, this is rare. If the evidence demonstrates that it is not possible for the employer to have been motivated by the offered reason, the court can find that the employer did not satisfy the second step.[42] If an employer offers a reason that did not exist at the time of the challenged decision, a court may find that the employer did not submit evidence sufficient to satisfy the second step.[43] Courts may also reject the employer's proffered reason if it is "objectively unreasonable"[44] or if it is "vague, generalized, nebulous, or unclear."[45]

In most cases, it is not difficult for the employer to meet the step two requirement. As the Eleventh Circuit has noted, an employer would not meet its burden if it stated it did not like the plaintiff's appearance; however, if the defendant presented evidence that the plaintiff's appearance was a problem "because his hair was uncombed and he had dandruff all over his shoulders," or "because he had his nose pierced," or "because his fingernails were dirty," or "because he came to the interview wearing short pants and a T-shirt," the defendant would meet its burden at step two.[46]

38. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (noting the second step does not involve a "credibility assessment" (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993))).

39. Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419, 1433 (10th Cir. 1993).

40. Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1993).

41. *See* 42 U.S.C. § 2000e-2(a).

42. Patrick v. Ridge, 394 F.3d 311, 318 (5th Cir. 2004).

43. Burton v. Freescale Semiconductor, Inc., 798 F.3d 222, 231 (5th Cir. 2015).

44. Duncan v. Fleetwood Motor Homes of Ind., Inc., 518 F.3d 486, 492 (7th Cir. 2008).

45. Lewis v. City of Detroit, 702 F. App'x 274, 283 (6th Cir. 2017); Iadimarco v. Runyon, 190 F.3d 151, 167 (3d Cir. 1999) (noting that employer cannot meet second step by stating that another candidate was "the right person" for the job).

46. Chapman v. AI Transp., 229 F.3d 1012, 1034 (11th Cir. 2000). However, the Supreme Court specifically noted that the plaintiff could still rely on evidence submitted as part of the prima facie case to convince the factfinder that the employer discriminated against a worker because of a protected trait. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981).

Once the employer meets its burden of production under step two, the rebuttable presumption created by the prima facie case no longer exists.[47] After the defendant has articulated a legitimate, non-discriminatory reason, the burden of production returns to the plaintiff. The plaintiff can prevail in the third step by showing "that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[48] The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[49]

In *St. Mary's Honor Center v. Hicks*,[50] the Court considered whether the factfinder's rejection of the employer's asserted reason for its action mandated a finding for the plaintiff.[51] The Supreme Court held that while the factfinder's rejection of the employer's proffered reason permits the factfinder to infer discrimination, it does not compel such a finding.[52]

Originally, the Supreme Court decided *McDonnell Douglas* under Title VII of the Civil Rights Act of 1964;[53] however, courts now use it when analyzing claims under the ADA,[54] the ADEA,[55] and discrimination cases brought pursuant to 42 U.S.C. §§ 1983[56] and 1981.[57] Additionally, courts rely on the *McDonnell Douglas* standard to determine whether a plaintiff can establish discrimination under various state antidiscrimination statutes.[58]

When the Supreme Court created *McDonnell Douglas*, Title VII cases were not submitted to juries. In the *McDonnell Douglas* case, the Supreme Court was reviewing factual determinations by a district court judge after a bench trial.[59]

Congress amended Title VII in 1991 to allow for jury trials.[60] Even prior to this, the Supreme Court recognized that in bench trials, once the defendant

47. *Burdine*, 450 U.S. at 255.

48. *Id.* at 256.

49. *Id.* at 253.

50. 509 U.S. 502 (1993).

51. *Id.* at 510–11.

52. *Id.*

53. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793–94 (1973).

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

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

56. *Hicks*, 509 U.S. at 506 n.1.

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

58. *See, e.g.*, Gamboa v. Am. Airlines, 170 F. App'x 610, 611–12 (11th Cir. 2006) (applying the *McDonnell Douglas* standard to claims asserted under a Florida antidiscrimination statute); Gentry v. Ga. Pac. Corp., 250 F.3d 646, 650 (8th Cir. 2001) (same under Arkansas law).

59. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973).

60. 42 U.S.C. § 1981a(c).

has already articulated its legitimate, non-discriminatory reason, it is not appropriate for the judge sitting as a factfinder to parse through the entire test.[61]

Many circuits discourage the use of the three-part burden-shifting framework in jury instructions.[62] Pattern jury instructions for discrimination claims direct the jury to determine whether an employer took an adverse action because of the plaintiff's protected trait without proceeding through the three-step burden-shifting framework.[63]

The discomfort expressed by the circuits stems from two different criticisms of the test: it is confusing,[64] and its burden-shifting structure does not apply at trial.[65] As one court declared, the "language used in the traditional *McDonnell Douglas* formulation, 'developed by appellate courts for use by judges,' 'is at best irrelevant, and at worst misleading to a jury.'"[66]

In most jurisdictions, the full *McDonnell Douglas* test is now used primarily by judges and in the context of summary judgment.[67] As discussed in Section V.A., judges and scholars have criticized the framework on numerous grounds. I offer another critique. Even if a judge intends to fully enforce discrimination law and wanted to resist docket pressures to dismiss cases, the second step pushes the judge to view the evidence in a way that favors the defendant. The second step is exerting its own defendant-favoring force. Courts have never fully grappled with whether the second step violates the summary judgment standard.

II. CREDIT AND EFFECT

The second step of *McDonnell Douglas* is not consistent with the summary judgment standard. It requires judges to credit the defendant's evidence and to give that evidence a certain weight and place in the court's analysis of the

61. U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713–14 (1983).

62. *See, e.g.*, Teixeira v. Przybyla *ex rel.* Town of Coventry, 882 F.3d 13, 15 (1st Cir. 2018) (discussing reasons why framework is not ideal for jury instructions); Sanghvi v. City of Claremont, 328 F.3d 532, 539–40 (9th Cir. 2003) (discussing cases). While discouraging the use of tests in jury instructions, most circuits do not place an absolute prohibition on using *McDonnell Douglas* in this fashion. For a discussion of various approaches, see Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 527–28 (2008).

63. FED. CIV. JURY INSTRUCTIONS OF THE SEVENTH CIR. § 3.01 (2017).

64. Sanders v. N.Y.C. Hum. Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 576 (5th Cir. 2004); *Sanghvi*, 328 F.3d at 540; Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999); Mullen v. Princess Anne Volunteer Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988).

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

66. Mobasher v. Bronx Cmty. Coll. of N.Y., 269 F. App'x 71, 73 (2d Cir. 2008) (quoting Gordon v. N.Y.C. Bd. of Educ., 232 F.3d 111, 118 (2d Cir. 2000)).

67. For additional information about this topic, see generally Sandra F. Sperino, *Beyond* McDonnell Douglas, 34 BERKELEY J. EMP. & LAB. L. 257 (2013) [hereinafter Sperino, *Beyond*].

plaintiff's claim. This happens even if a factfinder would not credit the defendant's evidence or would not give it the effect imagined by *McDonnell Douglas*.

Step two only requires the defendant to carry a minimal burden of production. It is not clear why such evidence deserves any deference for purposes of summary judgment. This part begins with a brief discussion of the federal summary judgment standard before showing how the second step violates that standard.

A. *The Summary Judgment Standard*

It is helpful to consider the summary judgment standard using an example from an actual case. In *Noel v. United Parcel Service, Inc.*,[68] a plaintiff alleged that one of his supervisors "call[ed] me Haitian boy, mimick[ed] my accent, mock[ed] me and call[ed] me Muhammad and ask[ed] me that, you know, do we have cars in Haiti or do you just ride elephants, do you have McDonald's in Haiti or do you just eat whatever you can find."[69] The plaintiff testified that a supervisor regularly threatened to fire him and gave him more onerous work. The plaintiff said the supervisor stated, "I thought you guys worked like that back in your country."[70]

One day when it was hot, the plaintiff wrapped a towel around his head. The plaintiff said a supervisor called him "Muhammad" and threatened to fire him if he did not remove the towel from his head.[71] The plaintiff complained about this incident and alleged that after he complained, the harassment continued, and the supervisor repeatedly called him "boy."[72]

The employer claimed that the plaintiff resigned after the employer accused him of taking two bottles of juice from a package.[73] The evidence about whether the plaintiff stole the bottles of juice was heavily contested, with the plaintiff stating that he moved the juice bottles to a supervisor's office and did not take them.[74] The plaintiff claimed that the employer gave him the option to resign and "that, if he did not, he would go to jail and be fired under circumstances that would preclude him from finding work in the future."[75]

68. No. PWG-13-1138, 2014 WL 4452667 (D. Md. Sept. 9, 2014).
69. *Id.* at *2.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at *2–3.
74. *Id.* at *3.
75. *Id.*

The plaintiff filed suit against the employer under 42 U.S.C. § 1981, asserting several claims, including a race discrimination claim.[76] The employer filed a motion for summary judgment.[77]

The Federal Rules of Civil Procedure explicitly cabin judges' ability to grant summary judgment. Specifically, Rule 56(a) provides that summary judgment is only appropriate "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."[78] When considering a motion for summary judgment, a federal court is required to "view all facts and draw all reasonable inferences in favor of the nonmoving party."[79] The Supreme Court has explained that summary judgment is only appropriate when "a reasonable jury could [not] return a verdict for the nonmoving party."[80]

Given the comments by the supervisor, evidence that the supervisor assigned the plaintiff more onerous work, and the contested evidence about whether plaintiff stole the juice bottles, a reasonable jury could believe that the plaintiff's race was a cause of his termination. Even though a jury might ultimately believe the employer's asserted reason for the outcome, the summary judgment standard requires that the case go to trial. However, as discussed below, in the *Noel* case, the court used the *McDonnell Douglas* framework to grant summary judgment in the employer's favor.[81]

Proper summary judgment practice is not just a matter of complying with procedural norms. It is essential in making sure that the right entity resolves factual disputes.[82]

In discrimination cases, the entity that resolves factual disputes is important. Federal judge Jack Weinstein has noted that Article III judges "usually" live "in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting [the] subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications."[83] For most federal discrimination claims, Congress has decided that the plaintiff has a right to a

76. *Id.* at *1.

77. *Id.*

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

79. Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 274 n.1 (2009) (quoting Brosseau v. Haugen, 543 U.S. 194, 195 n.2 (2004) (per curiam)).

80. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

81. *Noel*, 2014 WL 4452667, at *5–8; *see infra* text accompanying notes 85–92.

82. *See generally* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007) (explaining the importance of the right to jury trial but also arguing summary judgment is unconstitutional).

83. Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998).

102 N.C. L. REV. 459 (2024)

jury trial.[84] Judges curtail this right when they improperly grant summary judgment.

B. *Crediting and Prioritizing the Defendant's Evidence*

In the *Noel* case, the court granted summary judgment in the employer's favor on the plaintiff's race discrimination and retaliation claims.[85] Using this case as an example illustrates how the second step of *McDonnell Douglas* contradicts the summary judgment standard.

At step two of *McDonnell Douglas*, an employer is only required to articulate, with evidence, a somewhat specific reason for why it acted that is not facially discriminatory.[86] Once the employer does this, a judge is required to find that the employer rebutted the plaintiff's prima facie case.[87] In most cases, a judge is required to find the defendant met step two and to give the employer its benefit, even if a factfinder would not believe the defendant or consider the defendant's reason as relevant. Courts credit this evidence even though the defendant has only carried a minimal burden of production.

Giving credit to the defendant's reason is not the same thing as finding that reason to be credible. A strange feature of *McDonnell Douglas* is that the second step only places a burden of production on the defendant, and a judge is not allowed to make a credibility determination at the second step.[88] The Supreme Court has admonished courts that the second step does not assess the employer's credibility or truthfulness.[89]

In *Noel*, the trial court granted summary judgment on the plaintiff's discrimination and retaliation claims.[90] According to the court, summary judgment was appropriate because the plaintiff could not rebut the employer's articulated reason for acting: that it believed he took the two bottles of juice.[91]

84. *See, e.g.*, 42 U.S.C. § 1981a(c); 29 U.S.C. § 626(c)(2).

85. *Noel*, 2014 WL 4452667, at *1. The court did not grant summary judgment on the plaintiff's harassment claim. *Id.* at *11.

86. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256–57 (1981).

87. *Id.* at 257.

88. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

89. *Id.* This does not mean that the court cannot interrogate the proffered reason in certain circumstances. *See, e.g.*, Duncan v. Fleetwood Motor Homes of Ind., Inc., 518 F.3d 486, 492 (7th Cir. 2008) (noting that a court may reject a reason that is objectively unreasonable); Patrick v. Ridge, 394 F.3d 311, 318 (5th Cir. 2004) (discussing that employer would not meet the second step if it was not possible for the employer to have been motivated by the stated reason); *see also* Young v. United Parcel Serv., Inc., 575 U.S. 206, 229 (2015) (noting that the "reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates").

90. *Noel*, 2014 WL 4452667, at *1. The court did not grant summary judgment on the plaintiff's harassment claim. *Id.* at *11.

91. *Id.* at *6–8.

The analysis in this case is problematic in many ways. *McDonnell Douglas*'s second step requires the judge to give some credit to the employer's reason, whether or not a jury would do so.

Given the facts of the case as articulated by the court, it seems entirely plausible that a jury might completely discount the employer's asserted reason for acting. Yet, *McDonnell Douglas* does not allow a judge at summary judgment to completely discount the employer's reason in most cases, even if that is what a reasonable factfinder would do. Instead, the test requires a judge to recognize the employer's reason and to give it the legal meaning of rebutting the prima facie case.

The problem with crediting the employer's reason at the second step is also seen in other contexts. Some circuits have mistakenly held that if an employer articulates multiple reasons for an action, the plaintiff must rebut every reason to prevail under *McDonnell Douglas*.[92]

Imagine that an employer asserts that it fired the plaintiff because she received a negative evaluation five years ago and because she was recently insubordinate. If the plaintiff presents evidence to contest the insubordination, but not the performance review, some courts will hold that summary judgment in the employer's favor is appropriate because the plaintiff has not rebutted every reason.[93] However, a factfinder looking at this evidence might be skeptical that a five-year-old performance review played any role in the termination.

Strangely, the Supreme Court has held that step two of *McDonnell Douglas* is met if the "defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."[94] This statement does not align with the summary judgment standard. When a defendant files a summary judgment motion, the issue is not whether the *defendant's* evidence raises a genuine issue of fact, but whether the defendant can convince the court that the *plaintiff* is not able to raise a genuine issue of fact.

92. Smith v. Comhar, Inc., 772 F. App'x 314, 317 (3d Cir. 2018) (noting that the plaintiff must show "each reason" was untrue); Flournoy v. CML-GA WB, LLC, 851 F.3d 1335, 1339–40 (11th Cir. 2017); Rodriguez v. Eli Lilly & Co., 820 F.3d 759, 766 (5th Cir. 2016); Chapman v. AI Transp., 229 F.3d 1012, 1037 (11th Cir. 2000) (en banc); DeJarnette v. Corning Inc., 133 F.3d 293, 299–300 (4th Cir. 1998); Wolf v. Buss (Am.) Inc., 77 F.3d 914, 918 (7th Cir. 1996); *see also* Morgan v. Wash. Metro. Area Transit Auth., No. 15-0401, 2016 WL 6833926, at *14 n.13 (D.D.C. Nov. 18, 2016) (summarizing cases and stating it is unclear how many reasons the plaintiff must rebut).

93. For cases in which employers relied on old performance reviews, see Bolton v. Sprint/United Mgmt. Co., 220 F. App'x 761, 763 (10th Cir. 2007) (reciting performance deficiencies in otherwise satisfactory performance reviews from 1996 and 1998 when the challenged employment action occurred in 2003); Silver v. Am. Inst. of Certified Pub. Accts., 212 F. App'x 82, 85 (3d Cir. 2006) (recounting evidence of the plaintiff's performance from 1992 for a contested termination in 2000, thus allowing the employer to recount performance evidence over an eight-year period).

94. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981). It should be noted that the Supreme Court decided this issue on appeal from a bench trial. *Id.* at 251.

For summary judgment purposes, it should not matter whether the defendant can raise a genuine issue of fact about why it acted. But, under *McDonnell Douglas*, it does. The defendant gets the benefit of rebutting the plaintiff's prima facie case.

The courts have never grappled with why a defendant should receive a beneficial inference at the summary judgment stage, especially considering the defendant's minimal burden of production. At the second step, the defendant has not been required to prove anything. A factfinder hearing the same evidence at trial would be free to reject it, find it irrelevant, or find it outweighed by the plaintiff's evidence.

Once a judge determines that the employer met the minimal step two burden, the employer gets another huge benefit: the articulated reason receives priority of place in the judge's reasoning. This elevates the defendant's evidence, rather than allowing the factfinder to view both parties' evidence according to the dictates of the procedural standard. In the *Noel* case, the analysis centered on the defendant's asserted reason: the allegedly stolen juice bottles.

One of the oddest features of the test is that the defendant's reason for acting is sandwiched in the middle of the plaintiff's evidence. This is not just a harmless quirk. It shifts the analysis in an important way. With just a minimal showing by the employer, the employer's articulated reason becomes the reason against which the judge evaluates the worker's third step evidence. The plaintiff's evidence and the defendant's evidence are not considered together, according to their relative merits, and the required procedural standard. Instead, once the defendant rebuts the prima facie case, the defendant's evidence is now given the favored position. It is considered first, and the plaintiff's evidence is considered second. This order can and often does radically skew how judges view cases.

This contradiction has been hiding in plain sight for decades. I believe courts have failed to explore it for two reasons. The first reason is a historical anomaly. The Supreme Court developed *McDonnell Douglas* in the context of Title VII bench trials.[95] When it heard cases using *McDonnell Douglas* in the summary judgment context, it did not consider whether the difference in the procedural posture challenged the second step. Indeed, in several Supreme Court cases using *McDonnell Douglas* in the summary judgment context, the Court assumed the test applied without deciding the issue.[96]

95. *Id.* at 252–53. I leave aside the question of what role the Supreme Court should play in overseeing federal judges in their roles as factfinders during bench trials.

96. Courts may believe that they are making a legal determination at the second step. Instead of deciding facts in the defendant's favor, the court may view step two as merely deciding whether a defendant has presented sufficient facts to overcome the prima facie case. Whether as a theoretical

Second, the Supreme Court has never resolved exactly what *McDonnell Douglas* is as a procedural matter but has vaguely referred to it as an "evidentiary" standard.[97] It is easy to mistake *McDonnell Douglas* for a set of elements that must be established for a plaintiff to prevail on a claim. Instead, it is one evidentiary path that a plaintiff may take to establish a claim.

The second step provides employers with a significant advantage at summary judgment to the extent that it credits the defendant's reason, gives it a legal effect, and often prioritizes the defendant's reason for acting. This is not consistent with the summary judgment standard.

III. THE MAGIC LABEL

At step two of *McDonnell Douglas*, an employer is only required to articulate, with evidence, a somewhat specific reason for why it acted.[98] Once the defendant does this at summary judgment, a judge is required to find that the employer has provided both a "legitimate" and "non-discriminatory" reason for acting. It is not clear how courts can apply this label to the defendant's evidence in a way that is consistent with the summary judgment standard.

This problem is even trickier when reviewing how courts treat the label. Although the label is a highly stylized term of art, the courts do not treat it that way. Instead, they appear to believe the label. They act as if the defendant's reason is legitimate and non-discriminatory.

Some courts then compound the labeling problem by treating the defendant's reason as fully established. The second step only requires the defendant to carry a minimal burden of production, but judges often act as if the defendant has carried the full burden of persuasion. While these issues are problematic in their own right in the context of summary judgment, they are especially pernicious when combined with court-created doctrines, like the honest belief doctrine.

A. *The "Legitimate" and "Non-Discriminatory" Label*

If the defendant meets its minimal obligation under step two, the judge is required to declare that the employer has articulated a legitimate, non-discriminatory reason for acting. The label is a problem because in most instances the court is not able to determine whether the employer's reason is legitimate and non-discriminatory based solely on the employer's evidence.

Hypotheticals are helpful to illustrate these problems with step two. Imagine a case in which the plaintiff claims his employer fired him because of

matter this could redeem the use of *McDonnell Douglas* at summary judgment is irrelevant because judges do not apply it in this way.

97. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002).

98. *Burdine*, 450 U.S. at 258.

his race. The employer moves for summary judgment and presents an affidavit from a supervisor stating that the supervisor fired the plaintiff because he was late for work three times. In response, the plaintiff submits an affidavit stating that he was on time for work on the three occasions. The plaintiff also presents evidence that workers outside the plaintiff's protected class who were late three times were not fired.

Imagine also that the judge is asked whether the defendant has a legitimate, non-discriminatory reason for acting and that this question is not answered through the *McDonnell Douglas* framework. The likely response would be that the factfinder needs to answer that question. The evidence is contested. Given the conflicting testimony, it is not clear whether the supervisor gave a truthful reason for acting, whether the supervisor made a mistake, or whether the plaintiff is telling the truth. Even if the supervisor truthfully believed that the plaintiff was late three times, it is not clear whether the plaintiff's race played a role in the termination given what happened to other workers outside the plaintiff's protected class. Seeing these fact issues is not difficult.

However, if we apply the *McDonnell Douglas* framework to these facts the second step distorts what is clear without the framework. At the second step, the judge only considers the employer's evidence and whether it meets the minimal burden. The supervisor's affidavit based on personal knowledge is evidence, and the affidavit is reasonably specific about the reason for the plaintiff's termination. The plaintiff was late three times. Firing a person for being late could be non-discriminatory.

Under *McDonnell Douglas*, the judge is required to find that the employer has articulated a legitimate, non-discriminatory reason for acting. This is the outcome even though it is impossible to tell from the defendant's evidence whether the reason is legitimate or non-discriminatory. The judge is not allowed to make any credibility determination, even though the judge has likely already read the plaintiff's summary judgment response and knows that the evidence is contested.

The declaration that the defendant has articulated a legitimate, non-discriminatory reason is a term of art. While it is correct that the defendant has articulated a reason and that the articulated reason *might* be legitimate and *might* be non-discriminatory, it is uncertain whether the reason is legitimate or non-discriminatory.

Nonetheless, the conventions of the second step of *McDonnell Douglas* require the court to append a label to the defendant's evidence. The label states that the defendant has articulated a reason that is both legitimate and non-discriminatory.

As discussed earlier, when the defendant moves for summary judgment, the judge is required to draw inferences in favor of the plaintiff, the non-moving

party.[99] It is not clear how a judge can label an employer's reason for acting as either legitimate or non-discriminatory because these labels favor the defendant. This is even more problematic because the labels are misleading.

Here is another hypothetical that demonstrates the factual problem with the label. Imagine a company undertakes a reduction-in-force. A terminated worker files an age discrimination claim and meets his prima facie case by showing that the company disproportionately terminated workers in their sixties during the reduction-in-force and that workers in the plaintiff's group tended to fare worse on the subjective criteria used in the reduction-in-force. The employer provides an affidavit from the plaintiff's supervisor stating that the reason the company fired the plaintiff was that the plaintiff performed poorly on three subjective criteria used to determine which employees to fire.

In this scenario, the judge is required to declare that the employer met its burden at step two: it did articulate a legitimate, non-discriminatory reason with evidence. The label attaches to the defendant's evidence at step two, even though it is impossible to determine whether the defendant's evidence is legitimate or non-discriminatory without all the evidence, including evidence from the plaintiff's prima facie case and any evidence the plaintiff presents at step three.

The evidence in the hypothetical supports multiple outcomes. Perhaps the supervisor objectively evaluated plaintiff based on non-discriminatory criteria. It could be that the supervisor objectively evaluated plaintiff based on discriminatory criteria. For example, the criteria could ask supervisors to rate how long the employer was likely to work for the company and to negatively rank employees nearing retirement. It also is possible that the supervisor scored older employees worse on the subjective criteria than warranted by those employees' job performance. Nonetheless, the court will declare under *McDonnell Douglas* that the employer has articulated a reason that is both "legitimate" and "non-discriminatory."

The label imbues the defendant's reason with rhetorical force and evidentiary power that the defendant did not necessarily earn.[100] *McDonnell Douglas* is strange in that it requires courts to label the defendant's evidence as non-discriminatory and then after labeling it, to determine whether that label is correct in the third step. In this way, the label overvalues the evidence presented by the employer in many cases. Again, it is not clear how the label is consistent with the summary judgment standard.

99. *See supra* text accompanying notes 79–80.

100. In some cases, a defendant may provide more evidence than required by the second step. However, the second step's cursory nature does not require the judge to fully explain the employer's evidence.

As shown in the next section, courts often compound this labeling problem by forgetting that the defendant only articulated its reason and did not prove it. Courts often act as if the employer fully proved its reason for acting in step two.

B. *Articulate Versus Prove*

Once courts append the label to the defendant's evidence, they often act as if the employer's reason is non-discriminatory and as if the defendant has fully proven its reason, even though the defendant has not done so.

Here is an example of this phenomenon. In *Lockhart v. Republic Services, Inc.*,[101] plaintiff Ricky Danell Lockhart alleged that his employer fired him because of his race.[102] The employer filed a motion for summary judgment. The plaintiff presented evidence from a fellow former employee that his supervisor referred to him using what the court called a "Spanish-language racial slur,"[103] and the parties presented conflicting evidence about the plaintiff's job performance.[104] Yet, the trial court granted summary judgment to the employer, and the appellate court affirmed that decision.[105]

Here is how the trial court judge and the appellate panel used *McDonnell Douglas*'s second step to favor the employer's evidence and disfavor the plaintiff's evidence.[106] The appellate court assumed that the plaintiff could establish a prima facie case. It then noted that the defendant had provided a legitimate, non-discriminatory reason for its termination.[107] Earlier in the opinion, the panel described the facts of the case related to the second step as follows:

> Republic uses a progressive discipline plan to address employee infractions: The first infraction elicits an oral warning; the second a written warning; the third a suspension; the fourth the termination of employment. Kenny Ramzinski, Lockhart's supervisor, orally reprimanded Lockhart in April 2017 for recording the incorrect container pay on his route sheets. Lockhart next received a warning in June of that year for abuse of company equipment, charging him with causing more than $4,000 in damage to his company-owned vehicle by pushing the truck's "regen button" in excess of forty times. A few months later, Lockhart was suspended for (1) discussing his personal vehicle with an on-duty mechanic, (2) refusing to wear personal protective equipment as

101. No. 20-50474, 2021 WL 4955241 (5th Cir. Oct. 25, 2021).

102. *Id.* at *2, *4. The plaintiff also raised other claims, but for purposes of clarity, I will focus on the evidence related to race discrimination.

103. *Id.* at *4.

104. *Id.* at *3.

105. *Id.* at *2, *8.

106. In evaluating this case, I am not making any claims about which party should prevail at trial.

107. *Lockhart*, 2021 WL 4955241, at *3.

required, and (3) being insubordinate to Shop Manager Hilda Juarez. Finally, in November 2017, Lockhart was terminated after he entered a landfill through an exit gate, in violation of company policy.[108]

Notice a couple of features about the way the court recited the applicable facts. First, even though the employer was only required to articulate its reason for acting, the court described the employer's reason as if the employer definitively proved it. The court stated that the employer "uses a progressive discipline plan," not that the employer presented evidence that it used a progressive discipline plan. The court stated that the plaintiff was suspended for four reasons, not that the employer presented evidence to support these four reasons.

Second, the court provided no details about the evidence that supported the employer's reason for acting. There is no ability to judge the strength of the evidence offered by the defendant, and the reader has no information about that evidence.

Finally, after the court stated that the employer had met its step two burden, the court acted as if the employer had absolutely proven its reasons for acting and that the reason was non-discriminatory. This is shown by how the court evaluated the evidence the plaintiff offered in the third step of the framework.

The court noted that the plaintiff contested the basis for three of the disciplinary issues, asserting that "(1) he never abused his truck's regen button, (2) it was common practice for drivers to speak to mechanics about their personal vehicles, and (3) the exit gate to the landfill was not properly marked."[109] The court then proclaimed, "But Title VII does not allow us to second guess an employer's reasonable business decisions."[110] Notice that even though the court did not require the employer to prove its reason for firing the plaintiff, the court was willing to declare that it could not second guess it.

The plaintiff had presented evidence that in the same year the employer fired him, it had selected him to attend a national event showcasing the company's best drivers.[111] This evidence did not cast any doubt on the employer's articulated reason.

The plaintiff also presented evidence from a fellow, former employee that his supervisor referred to him using what the court called "Spanish-language racial slur"[112] and noted the word allegedly used was "the Spanish-language equivalent to the n-word, which the Ninth Circuit has described as 'perhaps the

108. *Id.* at *1.
109. *Id.* at *3.
110. *Id.* The honest belief doctrine also played a role in this case.
111. *Id.* at *1.
112. *Id.* at *4.

most offensive and inflammatory racial slur in English,' and 'evoking a history of racial violence, brutality, and subordination.'"[113] The way that the appellate court explained this testimony downplayed the plaintiff's evidence. The district court (which granted summary judgment in the employer's favor) described testimony from a coworker that the use of racial slurs was "commonplace" and that a supervisor and others used multiple, racial slurs about employees, including the plaintiff.[114]

This evidence was not sufficient to call into question the employer's articulated reason for acting. The court critiqued the evidence offered from the former coworker as being "non-specific in time and context."[115] The panel seemed unwilling to believe that the racial slur affected the discipline in any way.

The evidence, if viewed in its totality without the *McDonnell Douglas* framework, is contested. Yet, the employer's evidence got a boost from the court in the second step of *McDonnell Douglas* when the court labeled that evidence as being legitimate and non-discriminatory and when the court acted as if the employer had fully proven its reason for acting.

Under a proper use of *McDonnell Douglas*, the labels "legitimate" and "non-discriminatory" just mean that the employer has presented some minimal evidence of a reason that could be legitimate and non-discriminatory reason if fully proven and not contested. The employer has not carried the burden of persuasion of showing that it acted for this reason, and the court or a factfinder would not be able to conclusively determine that the employer's reason is legitimate and non-discriminatory until after reviewing all the evidence. Once a judge asserts the employer's reason is legitimate and non-discriminatory, it is difficult for the judge to declare that the employer's reason might not be legitimate or non-discriminatory.

C. *The Label and the Honest Belief Rule*

The magic label is especially problematic when judges combine it with the honest belief rule. While scholars and some judges have criticized the honest belief rule,[116] they have not been attentive to how courts amplify the pernicious effects of the doctrine by misapplying *McDonnell Douglas*'s second step.

---

113. *Id.* (internal citations omitted).

114. Lockhart v. Republic Servs., Inc., No. CV SA-18-CA-766, 2020 WL 2308438, at *18 (W.D. Tex. May 8, 2020), *aff'd*, No. 20-50474, 2021 WL 4955241 (5th Cir. Oct. 25, 2021).

115. *Lockhart*, 2021 WL 4955241, at *4.

116. *See, e.g.*, Obike v. Applied EPI, Inc., No. CIV.02-1653, 2004 WL 741657, at *5 (D. Minn. Mar. 24, 2004) (discussing reluctance of some courts to use doctrine); Gertner, *supra* note 6, at 121–22 (noting that the doctrine allows the employer to prevail even if its reason for acting is baseless); Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1034–38 (2006) (discussing how doctrine does not comport with social science research related to discrimination); Martin, *supra* note 5, at 351–52.

In many cases in which the courts rely on the employer's "honest belief" the employer has not actually proven that it had such a belief or that the reason it acted was non-discriminatory. Instead, the defendant has only met the minimal burden of articulating its reason with some evidence. Recall that at the second step the court concludes that the defendant has met its burden without analyzing the plaintiff's evidence. The courts often transform this minimal showing into something more, claiming that the defendant has fully established that it had an honest belief in a reason and the reason was not based on a protected trait.

Under the honest belief doctrine, a court will find that if an employer took a negative action against an employee based on wrong information, there is no discrimination if the employer honestly believed the wrong information at the time it made the decision.[117] For example, if an employer fires a worker for three unexcused absences, the employer will not be held liable for discrimination if it later turns out that the worker did not have three unexcused absences. Even though the employer was wrong, courts reason, the termination was not caused by the worker's protected trait.

The honest belief doctrine is, like *McDonnell Douglas*, court-created and not contained within the text of the discrimination statutes. Many honest belief cases seem to contradict Supreme Court precedent, which allows the plaintiff to establish pretext by showing the employer's reason for acting is not true.[118] While the honest belief doctrine is problematic standing alone, the way the courts apply the second step of *McDonnell Douglas* amplifies the problem.

Again, a hypothetical is helpful to think about this problem. Imagine a worker sues his employer for race discrimination. The employer presents evidence that a supervisor reported to his boss that the worker was insubordinate and should be fired. The supervisor fires the worker. The worker, who is Black, presented evidence that the supervisor repeatedly referred to Black employees with racial epithets and said they were lazy. The worker presented evidence that the supervisor asked him to clean up a mess when it was another employee's responsibility to clean up the mess. Looking at the evidence as a whole, it seems race could have played a role in the outcome.

Yet, courts have granted summary judgment in cases with similar facts using the *McDonnell Douglas* framework.[119] While the honest belief doctrine is partially driving this outcome, the second step of *McDonnell Douglas* framework exacerbates it. It is counterintuitive to definitively declare that the employer's reason is non-discriminatory given the totality of the evidence, yet *McDonnell*

117. Martin, *supra* note 5, at 351–52; Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1087 (2009).

118. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

119. Clack v. Rock-Tenn Co., 304 F. App'x 399, 403 n.2, 407 (6th Cir. 2008).

Douglas directs the judge to label that the reason the employer has articulated as non-discriminatory.

The allocation of proof is also problematic in the honest belief context. Courts often proclaim that the employer had an "honest belief" about why it acted when the employer did not prove its reason for acting. Instead, under *McDonnell Douglas*, the employer has only presented some minimal evidence about why it acted. The employer gets the benefit of the doctrine without even fully proving that it is entitled to it.[120]

At a minimum, defendants must be required to carry the burden of persuasion before getting the benefit of the honest belief doctrine. When the defendant files a motion for summary judgment, it should not be possible for the defendant to get the benefit of the honest belief doctrine if the evidence is contested.

The following cases illustrate this phenomenon. In *Hamilton v. Boise Cascade Express*,[121] the plaintiff alleged that her employer fired her because of her race.[122] The employer asserted that it fired her for intentionally falsifying her time cards.[123] The trial court granted summary judgment in the employer's favor, and the appellate court affirmed that decision.[124]

The appellate court recited evidence that supported the employer's case and found that employer had articulated a legitimate, non-discriminatory reason for acting: the plaintiff committed time-card fraud.[125] Recall that to meet the step two burden, all the defendant was required to do was to present some reasonably specific evidence about its reason for acting and that the reason was non-discriminatory. The employer was not required to conclusively prove the plaintiff committed time-card fraud.

In response to the employer's motion for summary judgment, the plaintiff presented evidence that one of the people involved in the investigation into her time cards had stated that the worker did not purposely falsify her time card.[126] The employee also had evidence that both Black and white coworkers complained to human resources that Black employees were being unfairly disciplined.[127] Using the honest belief rationale, the court dismissed this case on summary judgment, and the appellate court affirmed that dismissal.[128]

120. Martin, *supra* note 5, at 392 (arguing that if the employer gets the benefit of the same-actor inference it should carry the burden of persuasion to show it is entitled to it).
121. 280 F. App'x 729 (10th Cir. 2008).
122. *Id.* at 730.
123. *Id.* at 730–31.
124. *Id.* at 730.
125. *Id.* at 730–32.
126. *Id.* at 732.
127. *Id.* at 737 (Ebel, J., dissenting).
128. *Id.* at 730, 732, 734.

Applying the honest belief doctrine in this scenario is problematic. However, the magic label effect of step two amplifies the problem even more. The employer never definitively proved that the plaintiff committed time fraud or even that it honestly believed that is why it acted. The defendant was not held to a burden of persuasion because at step two of *McDonnell Douglas*, it was only required to articulate its reason for acting. The parties presented contested evidence on these points. Yet, the court treated the employer's evidence as if the employer had fully established its honest belief.

In another case, *Hale v. Mercy Health Partners*,[129] a worker alleged that her employer terminated her because of her age and the employer asserted that it fired her after she "altered and falsified time records and approved her own timesheets in violation of Defendant's timekeeping policy."[130] The plaintiff conceded that the defendant had met its burden under step two to articulate a legitimate, non-discriminatory reason.[131]

Both the trial court and the appellate court applied the honest belief doctrine to the facts, even though there was evidence that the employer did not discipline or fire any other employee for violations of the time card policy and the plaintiff's supervisor had offered a legitimate reason to explain the plaintiff's timekeeping.[132] A dissenting appellate judge noted, "There is no record evidence that [the plaintiff] falsified her timesheets, i.e., recorded hours she did not actually work."[133] The employer got the benefit of the honest belief doctrine, although it appears it was not required to conclusively establish its honest belief.

These problems happen in case after case.[134] While the honest belief doctrine is a problem standing alone, the way courts apply step two of *McDonnell Douglas* exacerbates it. Judges are required to declare that a reason is legitimate and non-discriminatory, even when the judges do not know whether the reason will eventually meet those criteria. Even though the second step language is a term of art, judges often act as if the defendant has fully established

129. 20 F. Supp. 3d 620 (S.D. Ohio 2014), *aff'd*, 617 F. App'x 395 (6th Cir. 2015).

130. *Id.* at 630.

131. *Id.*

132. *Id.* at 631; Hale v. Mercy Health Partners, 617 F. App'x 395, 404–06 (6th Cir. 2015) (White, J., concurring in part and dissenting in part).

133. *Hale*, 617 F. App'x at 404 (White, J., concurring in part and dissenting in part).

134. *Id.* at 404–06 (arguing the plaintiff presented evidence to contest the employer's asserted reason); Wilson v. Cleveland Clinic Found., 579 F. App'x 392, 407–08 (6th Cir. 2014) (Cole, C.J., dissenting in part) (noting that the majority found there was an honest belief that the employer fired the plaintiff for violating a procedure when there was evidence that no procedure existed); Hamilton v. Boise Cascade Express, 280 F. App'x 729, 735 (10th Cir. 2008) (Ebel, C.J., dissenting) (noting that the majority found summary judgment to be proper when defendant articulated the plaintiff committed time card fraud, even though plaintiff presented evidence that manager stated that the plaintiff did not purposefully falsify her time); *see also* Courtney v. Wright Med. Tech., Inc., No. 21-5683, 2022 WL 1195209, at *9 (6th Cir. Apr. 22, 2022) (Thapar, C.J., concurring in part) (treating the defendant's reason as fully established).

its reason and that the reason is legitimate and non-discriminatory. Thus, even if a judge wanted to objectively evaluate a discrimination claim and was immune to docket-management pressures, the second step of *McDonnell Douglas* exerts pressure that favors the defendant.

IV. SHIPS PASSING IN THE NIGHT

The *McDonnell Douglas* inquiry is out of sync with the summary judgment standard in another way. Under the test, once a defendant meets its step two burden, the rebuttable presumption of discrimination disappears. However, in many cases, the defendant has not actually rebutted the case made by the plaintiff or even responded to the plaintiff's theory of the case.

This is the problem of ships passing in the night. Unfortunately, this is not just an analytical misstep. The defendant's articulated reason often takes over the judge's view of the case, essentially robbing the plaintiff of the ability to prove a theory of the case that is not responsive to the defendant's reason.

Judges often forget that the plaintiff is not required to rebut the defendant's articulated reason to survive a summary judgment motion. Instead, the plaintiff's claim should be allowed to proceed if a reasonable jury could find in the plaintiff's favor on the underlying claim.[135]

Additionally, the second step of *McDonnell Douglas* is often misaligned with the way parties present evidence to judges at summary judgment. *McDonnell Douglas* anticipates that judges will evaluate evidence in a certain order, which I will call the plaintiff-defendant-plaintiff pattern. The test starts with the prima facie case, then proceeds to the second step, and once this step is met, proceeds to the final prong. Unfortunately, this pattern is not how judges encounter evidence.

Instead, when an employer files a summary judgment motion, it files a motion and memorandum in support. Then, the plaintiff responds to the defendant's motion. The defendant then replies to the plaintiff's response. When a defendant files a motion for summary judgment, a judge often encounters the evidence in a defendant-plaintiff-defendant order. The plaintiff-defendant-plaintiff order of *McDonnell Douglas* is out of step with the defendant-plaintiff-defendant order in which judges often encounter evidence at summary judgment.

When employers move for summary judgment, they almost always articulate their reason for acting. For example, if an employer asserts that it fired a worker because she was late for work three times, the employer would submit evidence to support this reason in its motion for summary judgment. Although *McDonnell Douglas* contemplates that a judge will first analyze the

135. *See* FED. R. CIV. P. 56(a).

prima facie case, the first evidence the judge often sees is the evidence related to the test's second step.

The plaintiff-defendant-plaintiff order of *McDonnell Douglas* is also contrary to how any reasonable factfinder or judge would likely analyze evidence. The test is placing judges in analytically uncomfortable positions where they are constantly needing to conform their written judgments into a mold that does not mimic how they are likely encountering and analyzing the evidence. This disconnect creates real problems for courts and litigants. In some cases, the order makes the prima facie case and its rebuttable presumption of discrimination seem absurd.

A. *Theory-of-the-Case Mismatch*

The second step of *McDonnell Douglas* does not require the defendant's articulated reason to be responsive to the plaintiff's theory of the case. The second step thus creates a ships-passing-in-the-night problem, where a judge can proceed through the test without fully reconciling the competing claims. This can be especially problematic at summary judgment if the judge does not recognize that the second step can allow the defendant to hijack the theory of the case.

Here are examples of this problem. One example occurs quite frequently in the reduction-in-force context. Courts will often state that the defendant has met its burden under step two and that its legitimate reason for the plaintiff's termination was a reduction in force.[136] However, this reason is not responsive to the plaintiff's evidence in many cases. In cases in which the employer chose which employees to fire and which to retain, the central question is why the employer chose to fire the plaintiff. Stating that the employer undertook a reduction in force is not responsive to the plaintiff's evidence.

Imagine another scenario that occurs in reduction-in-force cases. A company undertakes a reduction in force. The company fires a sixty-year-old employee. The worker files an age discrimination claim and meets his prima facie case by showing that the company disproportionately terminated workers in their sixties during the reduction in force. The employer articulates that the reason it chose to terminate the plaintiff was that his supervisor rated him poorly on three criteria used to determine which employees to fire.

In such a case, a judge will be required to find that the employer met its burden at step two and that the presumption of discrimination created after the prima facie case disappears. What is perplexing about this declaration is that

136. *See, e.g.*, Richard v. Clear Lake Reg'l Med. Ctr., No. CIV.A. H-14-358, 2015 WL 3965735, at *8 (S.D. Tex. June 30, 2015); Beck v. Buckeye Pipe Line Servs. Co., No. 10 CV 319, 2011 WL 2076487, at *3 (N.D. Ohio May 25, 2011); Roberson v. Alltel Info. Servs., No. 01-CV-2687, 2003 WL 22060726, at *2 (N.D. Tex. Aug. 28, 2003).

the employer's articulated reason might not respond to the plaintiff's asserted theory of the case. If the plaintiff argues that the employer chose criteria that disfavored older workers, the employer's assertion that the worker performed poorly on those criteria does not rebut the plaintiff's evidence. Yet, for purposes of *McDonnell Douglas*, the defendant has met its step two obligation.

This same phenomenon happens in many temporal proximity cases. In a temporal proximity case, a plaintiff relies on closeness in time to help establish her discrimination or retaliation case. For example, in a retaliation case, a plaintiff may allege that she engaged in protected activity and then the employer took a negative action against her.[137] In the discrimination context, the plaintiff might allege that the employer took a negative action against her shortly after learning about a protected trait.[138]

In the prima facie case, the plaintiff would provide evidence of temporal proximity. The defendant then articulates its reason for acting and the court declares that the defendant has rebutted the prima facie case. However, in some cases, the defendant has not actually rebutted anything, just added a factual question to the case.

Consider a hypothetical. Mary has been late for work two times. Mary tells her supervisor she is pregnant. Shortly thereafter, Mary is late for work a third time. Her boss fires her, stating that he fired her because she was late three times.

Given this set of facts, a court would hold that a plaintiff has met the prima facie case, and it would also hold that the defendant has rebutted that prima facie case. However, it is impossible to tell whether the defendant factually rebutted anything. There is still an unanswered question about the reason the employer fired Mary.

It is unclear how the defendant can get the benefits of the second step at summary judgment if its second step evidence does not respond to the plaintiff's theory of the case. Additionally, once the defendant articulates its reason for acting, the plaintiff is often forced to respond to the defendant's reason and that reason often overtakes the court's analysis. A plaintiff is not required to rebut the defendant's articulated reason to prevail on a discrimination claim.[139] Yet, courts often appear to hold plaintiffs to this standard.

137. *See, e.g.*, Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643, 653–54 (4th Cir. 2021); Spector v. District of Columbia, No. 1:17-CV-01884, 2020 WL 977983, at *12 (D.D.C. Feb. 28, 2020); Buchanan v. Delta Air Lines, Inc., 727 F. App'x 639, 642 (11th Cir. 2018); Garcia v. City of Everett, 728 F. App'x 624, 627–28 (9th Cir. 2018); Garcia-Garcia v. Costco Wholesale Corp., 878 F.3d 411, 426 (1st Cir. 2017).

138. *See, e.g.*, Rosencrans v. Quixote Enters., Inc., 755 F. App'x 139, 142–43 (3d Cir. 2018).

139. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020) (articulating a straightforward causation-based analysis for discrimination claims).

This ships-passing-in-the-night problem also calls into question one of the reasons the Supreme Court has justified *McDonnell Douglas*. In *Texas Department of Community Affairs v. Burdine*,[140] the Supreme Court described the test as an ever-sharpening inquiry that proceeds to a new level of specificity at each step.[141] However, in some instances, the test is not sharpening the inquiry because the parties are talking past one another.

B. *Order-of-the-Case Mismatch*

When the defendant files for summary judgment, it almost always articulates its legitimate, non-discriminatory reason for acting, the second step of the *McDonnell Douglas* framework. In practice, judges are often seeing the defendant's articulated reason first and then trying to apply it to a framework that anticipates a plaintiff-defendant-plaintiff pattern. This ordering problem creates dissonance between what the framework requires and how a factfinder or judge would analyze evidence.

Let's start with an example of the ordering problem by considering a longer version of a hypothetical presented in the prior section. In a pregnancy discrimination case, the central inquiry is whether pregnancy played a negative role in a challenged outcome.[142] Assume Mary has worked for a company for ten years with glowing performance reviews. One day she tells her boss she is pregnant, and the next day the company fires her. Right after Mary tells the company about her pregnancy, she murders a coworker at work. The company fires her and asserts the reason that it fired her was because she murdered her co-worker. If Mary filed a pregnancy discrimination case, and the defendant filed a motion for summary judgment, consider the analysis that would occur if a judge went through the steps of *McDonnell Douglas* in order, starting with the prima facie case.

The judge would absurdly find that a rebuttable presumption of discrimination arises because Mary can establish a prima facie case. The judge would be required to accept Mary's facts as true and, given the summary judgment standard, should not balance the defendant's evidence in the prima facie case even though the judge is fully aware of this evidence. The employer would then articulate its legitimate, non-discriminatory reason: the murder.

This extreme example highlights a problem with the order of proof in many cases, especially at summary judgment. The judge is already aware of the defendant's reason for acting before the judge would begin the *McDonnell Douglas* analysis.

140. 450 U.S. 248 (1981).
141. *Id.* at 255.
142. *See* 42 U.S.C. § 2000e-2(a).

The murder example is extreme, but it highlights the tensions that exist less starkly in almost every disparate treatment case. The ultimate issue in every disparate treatment case is whether the plaintiff's protected trait played a role in the contested outcome, and that answer often depends on viewing the plaintiff's evidence in contrast to the evidence put forward by the defendant, with deference to the applicable procedural standard.

Take the same example, modified to make it less extreme and more in line with the kind of case a court might evaluate. Mary has been late for work two times. Mary tells her supervisor she is pregnant. Shortly thereafter, Mary is late for work a third time. Her boss fires her, stating that he fired her because she was late three times. Mary has evidence that non-pregnant workers were late three times but were not fired.

At summary judgment, the employer would present its second step evidence: that it fired Mary because she was late for work three times. Applying *McDonnell Douglas* in order would require a judge to temporarily forget about this evidence, to evaluate the prima facie case, then evaluate the second step, and continue to the third step. The anticipated plaintiff-defendant-plaintiff order of *McDonnell Douglas* is contrary to the order in which the judge often receives evidence at summary judgment.

It also is contrary to the way that people would likely interrogate whether discrimination happened. In such a case, the natural inclination is not to look at a prima facie case, then look at the defendant's reason, and then look at the plaintiff's response. Instead, it is to ask whether the plaintiff might convince a factfinder that pregnancy played a role in the outcome, looking at both the defendant's and the plaintiff's evidence and viewing that evidence in the light required by the procedural context.

The order problem does not just exist between the prima facie case and the second step. It also exists between the second step and the final step of the analysis. Returning to the last example, a factfinder evaluating Mary's case against her employer would tend to consider all the evidence together.

When a judge considers the evidence at summary judgment, *McDonnell Douglas* requires the judge to hold the defendant to a low burden at the second step. The defendant is only required to articulate its reason and support it with some evidence. Then, the judge considers whether the plaintiff appropriately responds to the employer's evidence.[143]

This order mismatch also challenges the theoretical foundations of the *McDonnell Douglas* test. One commonly cited reason for *McDonnell Douglas* is

143. The ordering problem is not just a summary judgment issue. *McDonnell Douglas* has always been out of sync with how parties present evidence to judges, and it is even more out of sync now that the primary procedural juncture at which courts use *McDonnell Douglas* is the summary judgment stage. *See generally* Sperino, *Beyond*, *supra* note 67 (discussing how courts have diminished the role of the test outside of the summary judgment context).

that the prima facie case is an information-forcing device.[144] After the plaintiff meets the prima facie case, the defendant is heavily incentivized to provide some evidence about why it acted. It has always been doubtful whether the test performed this function because the plaintiff has access to discovery and thus can obtain this information without the assistance of the test. It would be especially strange for a plaintiff to appear at trial without possessing any information about the employer's theory of the case and to rely on *McDonnell Douglas* to somehow force that information during trial.

Summary judgment practice throws even more cold water on this theory, given the number of defendants who file summary judgment motions and provide their reasons for acting without first requiring the plaintiff to prove the prima facie case. If the prima facie case truly served as an information-forcing device, then defendants would regularly wait until the plaintiff established the prima facie case before articulating their reason for acting.

C. *Skipping to Step Three?*

The order problem is exacerbated by another feature of the *McDonnell Douglas* jurisprudence. Many judges, litigants, and scholars consider the order problem to be easily fixable. As long as a judge skips over the prima facie case once the defendant articulates its reason, they conclude that many of the absurdities of the test disappear.

When courts skip the prima facie case, they still tend to view the evidence in the order suggested by *McDonnell Douglas*, but now prioritize the second step evidence over the plaintiff's evidence. Courts have not grappled with the ways that prioritizing the defendant's reason for acting might be inconsistent with the standard for summary judgment.[145]

In the 1983 case of *U.S. Postal Service Board of Governors v. Aikens*,[146] the Supreme Court held that using the *McDonnell Douglas* framework to evaluate a case during a trial (after the defendant has produced evidence of its legitimate, nondiscriminatory reason for acting) evades the ultimate question of whether discrimination has been proven.[147] The Court noted that during a bench trial if the defendant offers its reason for taking the contested action, the question of whether a plaintiff can make out a prima facie case is irrelevant because the defendant "has done everything that would be required of him if the plaintiff had properly made out a prima facie case."[148] One court noted that the test "has virtually no work left to do" once a case reaches the trial stage.[149]

144. Moore v. City of Charlotte, 754 F.2d 1100, 1105–06 (4th Cir. 1985).
145. FED. R. CIV. P. 56(a).
146. 460 U.S. 711 (1983).
147. *Id.* at 713–14.
148. *Id.* at 715.
149. Richard v. Reg'l Sch. Unit 57, 901 F.3d 52, 57 (1st Cir. 2018).

Some courts have recognized that judges should not require the plaintiff to establish a prima facie case where the defendant meets its burden of production under step two.[150] A court "'need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*' once 'an employer has asserted a legitimate, non-discriminatory reason' for the adverse employment action."[151]

Indeed, the Court of Appeals for the District of Columbia Circuit has stated that in such cases, the prima facie case is a "largely unnecessary sideshow."[152] By focusing on whether the plaintiff has evidence from which a reasonable jury could find discrimination, the court noted:

> [T]his streamlined approach will assist courts and litigants alike. The district courts can focus on the key question of discrimination without slogging through the *McDonnell Douglas* prima facie factors, which in any event do little more than generate "enormous confusion." And litigants need not devote briefing and oral argument to the often difficult and usually irrelevant prima-facie-case question.[153]

Using a test in which judges ignore the first step in the typical case seems like an inelegant way to imagine the primary structure for evaluating discrimination claims. Leaving this issue aside, skipping to step two is not a magic fix.

As discussed earlier, when judges start with the second step, they elevate the employer's reason into the primary position and focus their analysis using the employer's reason as the primary narrative. Even worse, when judges assume that skipping to step two corrects the ordering problems, they obscure this issue.

Skipping to the second step also does not save the parties from the time and expense of briefing all issues. Judicial opinions are often lengthy, and judges must often slog through the voluminous briefing. One federal judge noted the problem litigants face:

> [T]he court is mindful of the fact that both plaintiffs and defendants in employment discrimination cases are, to a great degree, almost forced to pack their pleadings with all manner of argument on a host of issues—some crucial, some less so, some immaterial, and some downright irrelevant. This is so because the analytical framework for resolving

150. *See* Breiterman v. U.S. Capitol Police, 15 F.4th 1166, 1173 (D.C. Cir. 2021); Lawrence v. Ward, 774 F. App'x 560, 563 (11th Cir. 2019); Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008).

151. Williams v. Verizon Wash., D.C. Inc., 304 F. Supp. 3d 183, 190 (D.D.C. 2018) (quoting *Brady*, 520 F.3d at 494).

152. Adeyemi v. District of Columbia, 525 F.3d 1222, 1226 (D.C. Cir. 2008) (quoting *Brady*, 520 F.3d at 494).

153. *Id.*

motions for summary judgment in these cases has become unduly burdensome to the parties and the courts.[154]

Plaintiffs have many good reasons for briefing the prima facie case even after the defendant articulates a legitimate reason for acting in its summary judgment motion. Although it is rare, courts do occasionally find that the defendant has not met its burden at step two. Defendants can fail to meet step two by giving a reason that is not supported by evidence,[155] that the employer could not have known about at the time of the challenged action,[156] that is "objectively *un*reasonable,"[157] or that is not specific enough.[158]

The plaintiff will not know if the court believes the defendant has met its second step burden until the court rules on the employer's motion for summary judgment. Given the possibility of these outcomes, plaintiffs may correctly believe that they should brief the court on the prima facie case. If the plaintiff failed to do so and the court found that the plaintiff did not establish a prima facie case, the plaintiff would not get the benefit of the rebuttable presumption of discrimination that arises after the prima facie case.[159]

Additionally, many judges are uncertain about whether they should return to the prima facie case after the defendant has articulated a legitimate, non-discriminatory reason. Even though the Supreme Court issued its opinion in *Aikens* in 1983 and the District of Columbia Circuit recognized in 2008 that *Aikens*'s reasoning applies to summary judgment motions,[160] judges often revisit the prima facie case in situations in which the defendant articulated a legitimate non-discriminatory reason for acting.[161] At times, the defendant encourages the

154. Whipple v. Taylor Univ., Inc., 162 F. Supp. 3d 815, 844 (N.D. Ind. 2016).

155. *See* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 255 n.9 (1981); Clay v. United Parcel Serv., Inc., 501 F.3d 695, 703 (6th Cir. 2007).

156. *See* Patrick v. Ridge, 394 F.3d 311, 318 (5th Cir. 2004) (stating that if an employer claims it did not hire the plaintiff because another candidate had superior credentials, the employer must have known about the superior credentials of the other candidate when it made the adverse decision regarding the plaintiff).

157. Duncan v. Fleetwood Motor Homes of Ind., Inc., 518 F.3d 486, 492 (7th Cir. 2008).

158. *See, e.g.*, Alvarado v. Tex. Rangers, 492 F.3d 605, 616–17 (5th Cir. 2007); Gilleylen v. City of Tupelo, No. 16-cv-94, 2017 WL 4050322, at *4–5 (N.D. Miss. Sept. 13, 2017).

159. Even if the plaintiff did not submit sufficient evidence to support a prima facie case, a judge should still deny defendant's motion for summary judgment if the defendant failed to meet its burden at step two. This is because the defendant has not shown that it is entitled to summary judgment. *See* FED. R. CIV. P. 56(a).

160. Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008).

161. *See, e.g.*, Lewis v. City of Union City, 918 F.3d 1213, 1240 & n.10 (11th Cir. 2019) (Rosenbaum, C.J., concurring in part) (noting that majority returned to prima facie case even though defendant articulated its reason for acting); Flynn v. Mid-Atl. Mari-Time Acad., No. 18-cv-502, 2019 WL 7859409, at *11–12 (E.D. Va. July 30, 2019) (analyzing prima facie case even though employer articulated reason); Hailey v. Donahoe, No. 11-CV-00022, 2012 WL 4458451, at *11 & n.11 (W.D. Va. July 30, 2012) (discussing confusion and why judge felt compelled to revisit the prima facie case);

court to return to the prima facie case after the defendant has articulated its reason under the second step, hoping that the judge will find that the plaintiff cannot meet the prima facie and thus cannot prevail under *McDonnell Douglas*.[162] Confusion reigns about whether it is appropriate to return to the prima facie case or whether the judge should not evaluate the prima facie case and continue to the third step of the analysis, with circuits expressing different positions on the issue.[163]

To add to the confusion, there are times when it is appropriate for a judge to return to portions of the prima facie case even after the defendant articulates its reason for acting. The prima facie case often contains required elements of the underlying cause of action. For example, even though the protected class inquiry is normally undertaken in the prima facie case, it would not be appropriate to argue that a plaintiff could prevail in a discrimination case if she does not fall within the statute's protections, merely because it is inappropriate to reexamine the prima facie case.

Additionally, when considering the third step of *McDonnell Douglas*, the Supreme Court has held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[164] This has led judges to issue cryptic statements like the following:

> Accordingly, in all instances where a defendant has asserted a legitimate, non-discriminatory reason for its conduct, the Court shall evaluate all of the evidence in the record, including that which would be used to establish a prima facie case (but not for the purpose of evaluating whether a prima facie case has been established), to address the ultimate question of discrimination *vel non*.[165]

To get the inferences potentially available from portions of the prima facie case, the plaintiff should brief the prima facie case.

Giannattasia v. City of New York, No. 09-CV-0062, 2011 WL 4629016, at *7 (E.D.N.Y. Sept. 30, 2011) (articulating the full test, but without making it clear which part of test governed outcome and noting that factual questions precluded summary judgment).

162. *See, e.g.*, Naji v. Fluor Fed. Servs., LLC, No. 19-1774, 2021 WL 1731759, at *8 (D.S.C. May 3, 2021); Veasy v. Bradshaw, No. 15-cv-80486, 2017 WL 2537349, at *5 (S.D. Fla. June 12, 2017).

163. *See, e.g.*, Zafar v. Abbott Lab'ys, Inc., No. 15-CV-361, 2016 WL 3027196, at *4 n.2 (W.D. Mich. May 27, 2016) (discussing conflicting circuit court opinions on the issue); Jackson v. United Parcel Serv., Inc., No. 12-CV-01753, 2013 WL 5525972, at *8 (N.D. Ala. Oct. 4, 2013); Billingslea v. Astrue, No. 10-cv-01467, 2012 WL 988127, at *6 n.4 (D.S.C. Feb. 27, 2012) (discussing confusion but ultimately assuming without deciding that prima facie case was met); Bailey-Potts v. Ala. Dep't of Pub. Safety, No. 11cv495, 2012 WL 566820, at *4 (M.D. Ala. Feb. 21, 2012) (noting that if the plaintiff establishes an adverse action and the employer articulates a legitimate, non-discriminatory reason, the court is not required to analyze the prima facie case).

164. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

165. Washington v. Chao, 577 F. Supp. 2d 27, 39 (D.D.C. 2008).

At times, the first step of *McDonnell Douglas* is a needless sideshow. At other times, courts should return to portions of the prima facie case. There is so much uncertainty about whether and when it is appropriate to return to the prima facie case to cause litigants to waste time briefing issues that might be moot. Judges also spend time analyzing a prima facie case that might be irrelevant.

When defendants file motions for summary judgment and start with the second step, the evidence is out of sync with the order of *McDonnell Douglas*. Judges are often confused about how to address this mismatch.

V. WHY AND SOLUTIONS

The second step of *McDonnell Douglas* cannot be reconciled with the summary judgment standard. Although I ultimately call for courts to abandon most of *McDonnell Douglas*, I offer a range of solutions short of abolition. Even though the courts have struggled with the *McDonnell Douglas* framework for fifty years, the Supreme Court has repeatedly embraced it.[166] While abolition is the most elegant solution, it also may not be realistic.

A. *The Test Itself*

Scholars have offered various accounts about why federal discrimination jurisprudence is hostile to plaintiff's claims.[167] I offer another possible account. The way that the courts apply the second step of *McDonnell Douglas* often violates the summary judgment standard, and courts have not recognized this fact.

As discussed throughout this Article, there are tensions between the summary judgment standard and the *McDonnell Douglas* second step that courts have never acknowledged or resolved. And, as discussed in more detail below, there are tensions within the framework itself that cause problems in modern cases.

To make things worse, these tensions may not be visible to most judges. The language and structure of the *McDonnell Douglas* framework are confusing. Federal judges are busy. They are expected to rule on cases that span a broad swath of law, and only a handful of them can be expected to possess deep expertise on an arcane framework used in discrimination cases.

Under the best circumstances, the second step of *McDonnell Douglas* is misleading. It is especially problematic to declare at the second step that the employer has articulated a legitimate, non-discriminatory reason for acting when it is impossible to determine based on the defendant's evidence alone

166. *See, e.g.*, Young v. United Parcel Serv., Inc., 575 U.S. 206, 228 (2015) (articulating a modified version of the test for use in some pregnancy discrimination cases).

167. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

whether its reason is either one of those things. The test does this on its own without any additional intentions or pressures.

Adding to this problem, the federal courts have not always used *McDonnell Douglas* correctly. When federal courts treat the employer's reason for acting as fully proven after step two, the courts are not following the enunciated standard. Yet, there are now decades worth of case law that make this mistake.[168] The weight of precedent also affects the ability of judges to apply *McDonnell Douglas* in a neutral way.

Federal courts have long adhered to the concept of vertical stare decisis.[169] District court judges are required to follow precedent from the appropriate appellate courts. Federal appellate courts are required to follow precedent from the United States Supreme Court.

Given that there is now fifty years of *McDonnell Douglas* case law, it is difficult to claim that federal court trial judges are applying the framework independently, without the weight of this large body of precedent.[170] Even if a federal trial court judge wanted to adjudicate discrimination claims fairly and with due deference to the inferences required to be drawn in the plaintiff's favor when the defendant files for summary judgment, the demands of stare decisis are still at play.

There is a similar tension that exists for many federal appellate panels considering the *McDonnell Douglas* framework: horizontal stare decisis within federal appellate courts. One judge has described horizontal stare decisis as the "duty to follow the decisions of judges of coordinate jurisdiction."[171] Federal appellate courts often hear cases in three-judge panels.[172] Each three-judge panel represents the circuit, with occasional en banc review of an issue.[173] Appellate courts have adopted rules relating to stare decisis within the circuit.[174]

168. *See supra* Section III.C.

169. Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 818 (1994). *But see* Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 925 (2016) (challenging the traditional account of stare decisis).

170. *See, e.g.*, Christina L. Boyd, *The Hierarchical Influence of Courts of Appeals on District Courts*, 44 J. LEGAL STUDS. 113, 114 (2015) (noting that federal trial court judges face competing restraints on their decision-making).

171. Sw. Bell Tel., L.P. v. Arthur Collins, Inc., No. CIV. A. 304-CV-0669B, 2005 WL 6225305, at *5 (N.D. Tex. Oct. 14, 2005).

172. 28 U.S.C. § 46(b); Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 17 (2009).

173. *See* FED. R. APP. P. 35(a) (discussing when en banc review is appropriate).

174. For a brief history of these rules, see Wyatt G. Sassman, *How Circuits Can Fix Their Splits*, 103 MARQ. L. REV. 1401, 1426 (2020); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–95 (2012).

Horizontal stare decisis defines how panels within a circuit should respond to legal pronouncements by prior panels within the same circuit.[175]

With some exceptions, federal appellate judges are bound to follow the holding of prior panels "unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*."[176] These rules require a later panel to follow an earlier panel's decision, except in limited circumstances.[177] Each panel opinion is entitled to deference by later panels in the same circuit. Thus, in the normal course, if one panel of an appellate court applies a legal doctrine, litigants would expect that a subsequent panel in the same circuit would apply the same legal doctrine when cases are factually similar, and there is no stated reason for changing the precedent.[178]

Given the difficulty inherent in the second step and the mistakes enshrined in case law, it is difficult for courts to apply the second step in ways that do not favor the defendant's evidence. This becomes even more difficult when other pressures and biases discussed in the academic literature come into play, at least in some cases.[179]

The critiques I offer about the second step are new, but criticism of other parts of *McDonnell Douglas* are not. Since 1973, both courts and litigants have struggled to understand and apply the three-step burden-shifting framework. Judges and scholars have criticized the test for decades.

Before joining the Supreme Court, Justice Brett Kavanaugh decried the prima facie case as "a largely unnecessary sideshow" that "spawn[s] enormous confusion and wast[es] litigant and judicial resources."[180] He noted the prima facie case has neither benefitted workers or employers nor "simplified or expedited court proceedings."[181] Additionally, some members of the Supreme Court have stated that the numerous and complicated frameworks courts use in the employment context make employment law "difficult for the bench and

175. The concept may also apply to whether district court judges must defer to legal pronouncements made by other district court judges in the same district. Mead, *supra* note 174, at 788–89.

176. CSX Transp., Inc. v. Gen. Mills, Inc., 846 F.3d 1333, 1338 (11th Cir. 2017); *see also* Eulitt *ex rel.* Eulitt v. Me., Dep't of Educ., 386 F.3d 344, 349–50 (1st Cir. 2004); Mead, *supra* note 174, at 797 (discussing exceptions). *But see* United States v. Reyes-Hernandez, 624 F.3d 405, 412–13 (7th Cir. 2010) (explaining that while it is rarely appropriate to overrule circuit precedent, it has been done many times before); 7TH CIR. R. 40(e) (describing the Seventh Circuit's procedure before publishing an opinion that would overrule precedent).

177. Duvall, *supra* note 172, at 18.

178. The Supreme Court has noted that stare decisis is not an "inexorable command." Payne v. Tennessee, 501 U.S. 808, 827–28 (1991).

179. *See* Gallagher v. Delaney, 139 F.3d 338, 342–43 (2d Cir. 1998) (cautioning that judges may lack the real-life experience to interpret the dynamics in sex discrimination cases).

180. Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008); *see also* Jeffries v. Barr, 965 F.3d 843, 860 (D.C. Cir. 2020) (noting that making out a prima facie case is frequently a waste of time).

181. *Brady*, 520 F.3d at 494.

bar"[182] and that "[l]ower courts long have had difficulty applying *McDonnell Douglas*."[183]

Appellate judges have long criticized the test.[184] In 1979, the First Circuit noted the test has "caused considerable difficulty for judges of all levels."[185] Judge Wood of the Seventh Circuit, in a concurring opinion joined by Judges Tinder and Hamilton, provided the most striking and insightful contemporary judicial critique of the test. The concurring opinion called attention to "the snarls and knots" that *McDonnell Douglas* inflicts on courts and litigants.[186] It further derided the test as "an allemande worthy of the 16th century" and noted that the test has lost its utility.[187]

Scholars have been deeply critical of both *McDonnell Douglas* and the ancillary doctrines created by the courts and often used in the context of *McDonnell Douglas*.[188] Scholars have argued that the test is now a device used by

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

183. *Id.* at 291.

184. *See, e.g.*, Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1224–28 (10th Cir. 2003) (Hartz, J., writing separately); Griffith v. City of Des Moines, 387 F.3d 733, 745 (8th Cir. 2004).

185. Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979).

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

187. *Id.*

188. *See* Stacy Hickox & Maya Stevelinck, *Denial of Jury Trials for Employees with Disabilities: The High Bar of Proving Discriminatory Intent*, 39 HOFSTRA LAB. & EMP. L.J. 1, 1 (2021) (describing difficulties of proving disability discrimination through *McDonnell Douglas*); Chuck Henson, *The Purposes of Title VII*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 221, 224–25 (2019) (discussing whether *McDonnell Douglas* reflects underlying purposes of Title VII); Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 734 (2011); William R. Corbett, *Babbling About Employment Discrimination Law: Does the Master Builder Understand the Blueprint for the Great Tower?*, 12 U. PA. J. BUS. L. 683, 729 (2010); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 191 (2009); Jamie Darin Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law:* McDonnell Douglas*'s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 512 (2008); William R. Corbett, *An Allegory of the Cave and the Desert Palace*, 41 HOUS. L. REV. 1549, 1551 (2005); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *Is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1889–91 (2004); William R. Corbett, McDonnell Douglas*, 1972–2003, May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 199–200 (2003); Jeffrey A. Van Detta, *"Le Roi Est Mort; Vive Le Roi!": An Essay on the Quiet Demise of* McDonnell Douglas *and the Transformation of Every Title VII Case After* Desert Palace, Inc. v. Costa *into a "Mixed-Motives" Case*, 52 DRAKE L. REV. 71, 76 (2003); Tristin K. Green, *Making Sense of the* McDonnell Douglas *Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CALIF. L. REV. 983, 983–84 (1999); William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It Is Not Time To Jettison* McDonnell Douglas, 2 EMP. RTS. & EMP. POL'Y J. 361, 363–64 (1998); Stephen W. Smith, *Title VII's National Anthem: Is There a Prima Facie Case for the Prima Facie Case?*, 12 LAB. LAW. 371, 371–72 (1997); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 *passim* (1995); Deborah C. Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229, 2236 (1995); *see also* Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 747 (2006) (arguing that *McDonnell Douglas* was not supported by the language of Title VII and thus lacks a proper statutory foundation). For criticism of the ancillary doctrines, see Robert A. Kearney, *Death of a Rule*,

some judges to defeat plaintiffs' claims.[189] One commentator described the test as having "befuddled most of those who have attempted to master it"[190] and calls the burden-shifting framework "complex" and "somewhat Byzantine."[191]

Courts primarily use *McDonnell Douglas* at the summary judgment stage.[192] Scholars criticize the frequency with which judges grant summary judgment to employers in employment discrimination cases.[193]

The tri-partite analytical scheme also lends itself to "slicing and dicing" of evidence, with judges considering some evidence in the first step of the test and then not returning to that evidence in the pretext inquiry.[194] Scholars have lamented the pretext inquiry and the ancillary doctrines that distort the discrimination inquiry.[195]

It is also unclear how and whether the test addresses modern discrimination theories, such as negligent discrimination, reckless discrimination, structural bias, or unconscious bias.[196] A rich, scholarly literature

---

16 U.C. DAVIS BUS. L.J. 1, 4–5 (2015) (criticizing the "honest belief" rule in employment discrimination law); Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 152 (2012) (criticizing the "stray comments doctrine" in employment discrimination law); Martin, *supra* note 5, at 315–19. *But see* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 116 (2007) (arguing that the test is useful for understanding discrimination law).

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

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

191. *Id.* at 862.

192. *See* Sperino, *Beyond*, *supra* note 67 (showing how the courts have diminished the role of the test in most procedural contexts).

193. Katie Eyer, *The Return of the Technical* McDonnell Douglas *Paradigm*, 94 WASH. L. REV. 967, 972 (2019); McGinley, *supra* note 189, at 229.

194. Michael J. Zimmer, *Slicing & Dicing of Individual Disparate Treatment Law*, 61 LA. L. REV. 577, 581–83 (2001).

195. Martin, *supra* note 5, at 314.

196. *See* David Simson, *Fool Me Once, Shame on You; Fool Me Twice, Shame on You Again: How Disparate Treatment Doctrine Perpetuates Racial Hierarchy*, 56 HOUS. L. REV. 1033, 1033 (2019); Naomi Cahn, June Carbone & Nancy Levit, *Gender and the Tournament: Reinventing Antidiscrimination Law in an Age of Inequality*, 96 TEX. L. REV. 425, 425–26 (2018); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1055–56 (2017); Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 919–20 (2016) [hereinafter Bornstein, *Unifying Antidiscrimination Law*]; Kevin Woodson, *Derivative Racial Discrimination*, 12 STAN. J.C.R. & C.L. 335, 337 (2016); W. Jonathan Cardi, *The Role of Negligence Duty Analysis in Employment Discrimination Cases*, 75 OHIO ST. L.J. 1129, 1130 (2014); Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1381 (2014); Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 WM. & MARY L. REV. 1439, 1439–40 (2009); Katherine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1926–30, 1956–60 (2009); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477, 480 (2007); R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94. CALIF. L. REV.

explicitly or implicitly criticizes overreliance on models that frame discrimination as individual animus that manifests at specific moments when decisions are made. This literature highlights how decisions happen over time and are affected by organizational structures and choices.[197] The literature discusses how stereotyping,[198] intersectional discrimination,[199] and unconscious bias might impact outcomes.[200]

Professor Katie Eyer has shown how the appellate courts often apply *McDonnell Douglas* in hypertechnical ways that appear to contradict Supreme Court precedent.[201] When a federal appellate panel or a federal district court judge applies the framework, those judges may feel constrained to apply the version of the test enunciated by a prior panel in their circuit, especially given that it is difficult for non-experts to understand how the appellate versions of the test contradict the Supreme Court version.

Former federal judge Nancy Gertner has argued that written judicial opinion favor defendants over time because judges often write lengthy opinions when they grant summary judgment, but they do not do so when they deny summary judgment.[202] Gertner calls this asymmetric decision-making and labels

1169, 1170 (2006); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 374 (2007); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94. CALIF. L. REV. 969, 969 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1490, 1510 (2005); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 640 (2005) [hereinafter Green, *Work Culture*]; Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action*,*"* 94 CALIF. L. REV. 1063, 1064 (2006); Krieger & Fiske, *supra* note 116, at 1006; Martha Chamallas, *Structuralist and Cultural Domination Theories Meet Title VII: Some Contemporary Influences*, 92 MICH. L. REV. 2370, 2371–72 (1994); David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 899 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 323–24 (1987).

197. Catherine Albiston & Tristin K. Green, *Social Closure Discrimination*, 39 BERKELEY J. EMP. & LAB. L. 1, 2 (2018); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Green, *Work Culture*, *supra* note 196, at 625–26; Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000) (discussing how work structure pressures employees to behave in certain ways to perform a work identity). *But see* Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2–3 (2006) (questioning whether discrimination law can and should be fully responsive to structural discrimination).

198. Bornstein, *Unifying Antidiscrimination Law*, *supra* note 196, at 925.

199. Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2202 (2019); Kotkin, *supra* note 196, at 1439–40; Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139–40, 158 (1989).

200. Lawrence, *supra* note 196, at 322.

201. *See generally* Eyer, *supra* note 193 (discussing how lower courts often apply a stricter version of the test than allowed by Supreme Court precedent).

202. Gertner, *supra* note 6, at 113–14; *see also* Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y

the resulting case law as a set of "losers' rules," which is used to justify granting summary judgment in favor of the defendant.[203]

Scholars have noted how the judiciary misperceives discrimination claims as easy for plaintiffs to win.[204] Scholars and judges also discuss how docket management pressures affect judges.[205]

All of these pressures are present within the jurisprudence as a whole, and some or all of them are present in individual cases. Even separate from these pressures and under the best of circumstances, *McDonnell Douglas*'s second step distorts discrimination analysis and is inconsistent with the dictates of summary judgment procedure.

B. *Small Solutions*

This section proposes three small solutions that courts can implement to avoid issues with step two. Courts can reword the second step to better describe what the defendant's evidence shows, they can remind themselves how little the second step requires of the defendant, and they can make sure that if the employer is getting the benefit of an inference or doctrine that the employer has fully proven the facts necessary to draw the inference or apply the doctrine.

In the second step, the defendant is only required to articulate its reason for acting, but courts often act as if the defendant has done much more. One option is to reword the second step to better align the language of the second step with the substance of what the defendant's evidence establishes. The revised language would state that the defendant has presented a reason to the court with some evidence to support that reason, the reason might plausibly be the reason the employer acted, and the reason might be non-discriminatory. This revised second step is different than declaring that the defendant has articulated a legitimate, non-discriminatory reason because it reiterates that there is still uncertainty about whether the reason is both legitimate and non-discriminatory. It also reminds judges that the defendant did not prove its asserted reason for acting.

83, 105 (2009) (discussing how focusing on published opinions fails to disclose high percentage of trial court rulings); David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 684–85 (2007) (arguing that federal trial court decision-making cannot be understood fully without considering docketed rulings).

203. Gertner, *supra* note 6, at 113–16.

204. Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 556 (2001).

205. Marcia L. McCormick, *Let's Pretend That Federal Courts Aren't Hostile to Discrimination Claims*, 76 OHIO ST. L.J. FURTHERMORE 1, 6 (2015); Hon. Mark W. Bennett, *Essay: From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 703 (2013); Kim et al., *supra* note 202, at 89; Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982).

Courts would need to be careful implementing this idea because of the Supreme Court precedent articulating the second step. Some judges might be rightfully uncomfortable rewriting the language of the second step without explicit instruction from the Supreme Court.

Rather than replacing that language with new language, it would be more consistent with the demands of precedent to add explanatory language to the existing standard. The new language proposed above accurately states what the defendant's evidence shows and is substantively consistent with existing precedent. Judges could note how the second step language is misleading, if the judges are not careful to remember that the second step involves several concepts that are terms of art. Casually reading the language of the second step without understanding this can lead to mistakes.

The language would emphasize that the defendant has only articulated its reason and that the court did not require the defendant to conclusively establish its reason. These instructions would remind judges that a defendant who has met step two has accomplished very little.

Some judges already include this kind of language when they recite the *McDonnell Douglas* framework.[206] Curiously, many judges emphasize that the plaintiff's burden at the prima facie step is minimal but fail to emphasize that the defendant's burden at the second step also is minimal.[207]

Another way that judges could improve the step two language is to remind themselves that they have only considered the defendant's evidence at this step. While this is implicit in the legal standard, it would be helpful to be explicit. The language could include a warning to judges to be especially careful about drawing inferences from the second step evidence because the evidence considered at this step only comes from one party.

While the honest belief doctrine is theoretically and doctrinally problematic, judges should recognize that it is often procedurally problematic. At step two, the court has not required the defendant to conclusively prove its articulated reason. Yet, judges often apply the honest belief doctrine without establishing that the defendant's evidence is sufficient to apply the doctrine. This is especially problematic at the summary judgment stage when judges are supposed to draw all inferences in favor of the non-moving party.[208]

206. Lamendola v. Bd. of Cnty. Comm'rs for Taos, No. 18-CV-0163, 2020 WL 5704273, at *16 (D.N.M. Sept. 24, 2020); Hicks v. Tech Indus., 512 F. Supp. 2d 338, 346 (W.D. Pa. 2007); Kelly v. Drexel Univ., 907 F. Supp. 864, 872 (E.D. Pa. 1995).

207. Claud v. Brown Harris Stevens Residential Sales, LLC, No. 18-CV-1390, 2020 WL 3791851, at *5 (E.D.N.Y. July 7, 2020); Booker v. Soho Studio Corp., No. 17-CV-5426, 2020 WL 363912, at *4 (E.D.N.Y. Jan. 22, 2020); Hauser v. Wells Fargo Bank, Nat'l Ass'n, No. 19-CV-05166, 2020 WL 6136868, at *5, *6 (C.D. Cal. July 1, 2020); Smigelski v. Conn. Dep't of Revenue Servs., No. 17-CV-260, 2019 WL 203116, at *2 (D. Conn. Jan. 15, 2019).

208. FED. R. CIV. P. 56(a); Crawford v. Metro. Gov't of Nashville & Davidson Cnty., 555 U.S. 271, 274 n.1 (2009).

Importantly, an employer should not get the benefit of the honest belief doctrine when it has not proven its reason for acting. And, in the summary judgment context, the defendant should not get the benefit of the inference unless the evidence related to it is uncontested. If the evidence is contested, the summary judgment standard requires all inferences to be drawn in favor of the non-moving party, which is typically the plaintiff.

C. *A Medium Solution*

Another way to avoid step two problems without upending the existing case law is for courts to skip to the third step in *McDonnell Douglas* if the defendant articulates its legitimate, non-discriminatory reason for acting. This is the easiest solution because the Supreme Court case law strongly implies that courts should already be doing this in most cases in which the defendant files for summary judgment. Several caveats below would enhance existing practice and make it more consistent with the summary judgment standard.

Recall that in *United States Postal Service Board of Governors v. Aikens*, the Court held that using the *McDonnell Douglas* framework to evaluate a case in which a jury verdict exists evades the ultimate question of whether discrimination has been proven.[209] The Supreme Court has held that the question of whether a plaintiff can make out a prima facie case is irrelevant once the defendant "has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case[.]"[210]

Aikens strongly implies that judges should not return to the prima facie case at the summary judgment stage once the defendant has articulated its reason for acting. The D.C. Circuit has recognized that judges should not require the plaintiff to establish a prima facie case where the defendant meets its burden of production under step two.[211] As then Circuit Judge Brett Kavanaugh pronounced, a court "need not—*and should not*—decide whether the plaintiff actually made out a prima facie case under *McDonnell Douglas*" once "an employer has asserted a legitimate, non-discriminatory reason" for the adverse employment action.[212]

Courts navigate discrimination questions without the prima facie case in other contexts, such as direct evidence cases.[213] It makes sense to jettison the prima facie case when the defendant files for summary judgment and articulates its reason for acting.

209. 460 U.S. 711, 713–14 (1983).

210. *Id.* at 715.

211. Breiterman v. U.S. Capitol Police, 15 F.4th 1166, 1173 (D.C. Cir. 2021); Lawrence v. Ward, 774 F. App'x 560, 563 (11th Cir. 2019); Brady v. Off. of Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008).

212. *Brady*, 520 F.3d at 494.

213. Willard v. Huntington Ford, Inc., 952 F.3d 795, 807 (6th Cir. 2020).

However, as discussed earlier, skipping to step three is not a complete solution. If courts move ahead to the third step of the process, they must ensure that they do not credit the defendant's reason for acting with more deference than it is due. All the defendant has done in step two is meet a minimal burden of production. Courts must ensure they do not transform this minimal evidence into something more.

Additionally, the inquiry would be more consistent with the summary judgment standard if judges first consider the plaintiff's evidence and then considered the defendant's articulated reason. When a defendant files a motion for summary judgment, the key question is whether a reasonable jury could find in favor of the plaintiff. Considering the plaintiff's evidence in its totality first is less likely to lead to the analytical missteps discussed throughout this article.

Part of this effort may require courts to clarify the third step in the *McDonnell Douglas* inquiry. Some courts have mistakenly claimed that a plaintiff must establish pretext to prevail under *McDonnell Douglas*.[214] The plaintiff can prevail in the third step by showing "that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[215] Pretext is one way to prevail under the test, but it is not the only way.

If a judge skips to the third step, the judge must recognize that the interplay between the defendant's articulated reason and the plaintiff's evidence will only be dispositive in those cases in which the plaintiff relies solely on a pretext argument to survive summary judgment. Even in these instances, a judge must exercise extreme caution. Given the defendant's minimal burden, a judge cannot act as if the defendant has fully proved its reason for acting.

In many instances, a plaintiff relies on evidence of pretext and additional evidence of discrimination. In some of these cases, the interplay between the defendant's articulated reason and the plaintiff's evidence will not be dispositive because the plaintiff is not relying solely or primarily on a pretext argument, and the plaintiff's evidence is sufficient to proceed to a jury.

Additionally, if judges skip to the third step, they may still need to address issues that are typically analyzed in the prima facie case. For example, a judge might need to determine whether the plaintiff is protected by the statute. The plaintiff also would be entitled to rely on evidence from the prima facie case to support the case.

While this solution may decrease some analytical mistakes, it is not a perfect solution. The litigants will not have the luxury of knowing whether a

214. *See, e.g.*, Farrell v. Butler Univ., 421 F.3d 609, 613 (7th Cir. 2005); Ahuja v. Danzig, 14 F. App'x 653, 657 (7th Cir. 2001). These courts also espouse an incorrect and narrow version of pretext.

215. Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981).

judge will skip to the third step and likely will find it prudent to brief any potentially relevant issues.

D. *The Broader Solution*

The harder project is to explore the tensions within the test itself and the tensions between the test and the summary judgment standard. Given the difficulties in doing so, the best solution is to abandon the multi-part burden-shifting framework while maintaining one feature: the plaintiff may prevail by establishing pretext.

The Supreme Court has never clarified what the *McDonnell Douglas* framework is. In *Swierkiewicz v. Sorema, N.A.*,[216] the Court held that *McDonnell Douglas* is "an evidentiary standard, not a pleading requirement."[217] It is not clear what this means generally or specifically in the context of summary judgment.

The *McDonnell Douglas* framework has the most power when the plaintiff relies on evidence presented in the prima facie case and evidence of pretext, even though a reasonable jury might not draw an inference of discrimination from this evidence.

Imagine the following facts. A plaintiff applies for a job. The plaintiff is qualified for the job. The potential employer rejects the plaintiff and continues seeking applicants. The employer asserts that it did not hire the plaintiff because she was late for her interview and presents evidence to support this reason. The plaintiff produces evidence that she was on time. With no additional evidence, the plaintiff claims that the employer refused to hire her based on a trait protected under one of the discrimination statutes.

In such a case, the plaintiff can meet the prima facie case, thus creating the rebuttable presumption of discrimination. However, the courts have never grappled with why a presumption of discrimination should arise in this context. To fix the problems with step two at summary judgment, it is first necessary to acknowledge that there are times when the plaintiff gets the benefit of a rebuttable presumption of discrimination when no such presumption should arise. Indeed, courts have failed to fully grapple with the difficult question of what the prima facie case accomplishes and whether the rebuttable presumption is justified in some contexts and not in others.

In *Texas Department of Community Affairs v. Burdine*, the Supreme Court explained, "The prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's

216. 534 U.S. 506 (2002).
217. *Id.* at 510.

rejection."[218] In *Furnco Construction Corp. v. Waters*,[219] the Court explained that the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[220]

Given the facts and the era of the *McDonnell Douglas* case, it made sense to believe that if a qualified Black man applied for a job and was rejected for a reason not related to his ability to perform the job, something fishy might be going on. However, it is unclear whether this inference should apply in other contexts. For example, if a company rejects a qualified man for a position, but hires a qualified woman for the position, there is little to suggest that discrimination because of sex occurred, absent some other evidence. Or, if an employer hires a person originally from Mexico, instead of one originally from Spain, it is not clear that an inference of national origin discrimination should arise. The hypothetical discussed in the prior paragraphs demonstrates another case in which it is not clear why a presumption of discrimination should exist.

These circumstances point to a critical issue with the *McDonnell Douglas* test. In some instances, a plaintiff gets the benefit of a rebuttable presumption of discrimination, even when no factfinder would infer discrimination after the plaintiff's presentation of prima facie evidence.

The existence of these cases makes it difficult for courts to abandon the second step of the case. If the first step is sometimes a legal fiction, it is easy to justify a second step that is also one. Unfortunately, the courts have not recognized that requiring a legal fiction that favors the defendant conflicts with the summary judgment standard. A future path forward for *McDonnell Douglas* requires serious introspection about whether the prima facie case is overinclusive in some cases.

Fortunately, plaintiffs often offer evidence in the prima facie case from which a reasonable jury might draw an inference of discrimination. It is in these cases that a larger tension exists between step two and the summary judgment standard. If a jury might infer discrimination from the facts of the prima facie case, it is unclear why the defendant's mere articulation of its reason for acting rebuts what the jury would otherwise find.

While the interaction of the prima facie case and the second step deserves scrutiny, important issues also lie at the intersection of the second and third steps.

The case law is not clear about what a judge should do when a defendant meets the requirements of step two, the plaintiff presents evidence of pretext,

218. *Burdine*, 450 U.S. 248, 253–54 (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 & n.44 (1977)).

219. 438 U.S. 567 (1978).

220. *Id.* at 577.

but the judge believes that no reasonable factfinder could infer discrimination from that evidence.

In *McDonnell Douglas*, if the reason offered by the company was pretextual, the Supreme Court held that the factfinder could infer that the company was hiding its discriminatory motive.[221] The pretextual reason was sufficient to find in favor of the plaintiff, given the inferences the Court was willing to allow the factfinder to draw.

Burdine supports this reading. In *Burdine*, the Court stated that a plaintiff may prevail "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[222] *Burdine* stated that the third step in *McDonnell Douglas* allows two kinds of proof: showing that a "discriminatory reason more likely motivated the employer" or "showing that the employer's proffered reason is unworthy of credence."

However, *St. Mary's Honor Center v. Hicks*[223] muddied the role of the third step. In *Hicks*, the Supreme Court noted:

> But a reason cannot be proved to be "a pretext *for discrimination*" unless it is shown *both* that the reason was false, *and* that discrimination was the real reason. *Burdine*'s later allusions to proving or demonstrating simply "pretext" are reasonably understood to refer to the previously described pretext, *i.e.*, "pretext for discrimination."[224]

The Supreme Court recognized that proof of pretext allows, but does not require, a finding for the plaintiff. The factfinder could believe that the employer offered a reason that is not credible to cover up discrimination. The factfinder could also believe that the employer offered a reason that is not credible for some other nondiscriminatory reason: i.e., the employer wanted to cover up nepotism or some other illegal (but nondiscriminatory) decision.

In *Hicks*, the Supreme Court provided a hypothetical to explain its holding.[225] The Court imagined a workplace where forty percent of the workers are in a certain minority protected class, and people in that protected class represent ten percent of the relevant labor market. A minimally qualified person of the protected class applies for a job. The person making the decision belongs to the same minority group and does not choose the applicant. The employer continues to look for other workers to fill the open position. The Court recognized that under this scenario, the plaintiff meets the prima facie case, thus creating a rebuttable presumption of discrimination. Although the Court noted

221. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).
222. *Burdine*, 450 U.S. at 256.
223. 509 U.S. 502 (1993).
224. *Id.* at 515–16 (internal citations omitted).
225. *Id.* at 513.

this is the correct outcome under *McDonnell Douglas*, it is skeptical that this set of facts (without more evidence) suggests or mandates a finding of discrimination.

While the holding of *Hicks* is clear enough at trial, most written decisions about the third step of *McDonnell Douglas* relate to a judge's ruling on a defendant's motion for summary judgment. In many cases, judges are reluctant to allow a case to go to trial if a plaintiff has evidence of pretext, but the judge does not believe that the evidence demonstrates discrimination.[226]

Some courts have used a passage from *Reeves v. Sanderson Plumbing Products, Inc.*[227] to justify granting summary judgment in the defendant's favor in such cases.[228] *Reeves* noted that, in some cases, if the plaintiff at trial presented a prima facie case and evidence of pretext, it would be appropriate for a trial court to grant a Rule 50 motion in favor of the employer. Such an outcome would be appropriate when no rational factfinder could conclude the act was discriminatory, even after the plaintiff rebutted the employer's second step evidence.[229]

This discussion appears to contradict the Court's early decisions in both *McDonnell Douglas* and *Hicks* that a factfinder is allowed to infer discrimination from pretext. The Supreme Court has never reconciled these cases.

The resolution is important to the summary judgment question. If the factfinder is the entity that determines whether evidence of pretext demonstrates discrimination, it is not clear how a court can enter summary judgment for an employer when the plaintiff presents evidence of pretext. It also is not clear how a judge would determine when a jury might infer discrimination from pretext and when it would not do so.

Additionally, courts have not been attentive to the fact that most plaintiffs' cases do not simply rely on evidence of the prima facie case plus pretext alone. Instead, many cases are like *Reeves*, in which the plaintiff presents evidence of pretext, plus additional evidence of discrimination. The Supreme Court found that judgment in the employer's favor was inappropriate in *Reeves*. Judges must be careful in the summary judgment context when the plaintiff presents this additional evidence.

When determining whether a plaintiff faced discrimination, the courts should consider all the evidence offered by the plaintiff. However, the *McDonnell Douglas* test focuses courts on the idea of pretext and at times

226. *See, e.g.*, Boykins v. SEPTA, 722 F. App'x 148, 152 (3d Cir. 2018) (improperly stating that the pretext step is difficult to prove); Farrell v. Butler Univ., 421 F.3d 609, 613 (7th Cir. 2005); Ahuja v. Danzig, 14 F. App'x 653, 657 (7th Cir. 2001).

227. 530 U.S. 133 (2000).

228. Alberty v. Columbus Twp., 730 F. App'x 352, 358–59 (6th Cir. 2018). *But see id.* at 364 (Clay, C.J., dissenting) (arguing that majority did not follow appropriate standard for summary judgment).

229. *Reeves*, 530 U.S. at 148.

(perhaps unintentionally) deprioritizes other kinds of evidence that support the plaintiff's claim. This is especially problematic when judges use pretext in a narrow sense.

Unfortunately, the courts tend to avoid deeply discussing the underlying premises of the *McDonnell Douglas* test and the courts' proper role at the summary judgment stage. Resolving these tensions is critical to ensuring that judges do not improperly favor the defendant's evidence when considering motions for summary judgment.

Given the inherent difficulty in doing so and the courts' inability to satisfactorily clarify how the test works over fifty years of jurisprudence, it is time to abandon the test, while leaving intact one feature. A plaintiff should be able to prevail on a claim of discrimination if the factfinder believes that the employer's articulated reason is pretext. A plaintiff also should be able to prevail if there is any other evidence that persuades the trier of fact that the protected trait was a cause of the contested outcome.[230] The rest of the test, especially its burden-shifting structure is not necessary.[231]

CONCLUSION

The conventional view of *McDonnell Douglas*'s second step is that it is somewhat quirky, yet harmless. This Article demonstrates that the second step is not consistent with the summary judgment standard and that it significantly distorts the discrimination inquiry in the defendant's favor.

It requires judges to credit a defendant's evidence and give it a certain place in their analysis, even if a reasonable jury would find the employer's reason for acting not to be credible or to be irrelevant. The second step only requires defendants to meet a minimal burden of production, and it is not clear why carrying such a minimal burden should rebut any evidence offered by the plaintiff that a factfinder could rely on to find in favor of the plaintiff.

At the second step, it is impossible to determine whether an employer's reason is legitimate or non-discriminatory, yet this is the label that courts attach to the employer's reason. It is not clear how courts can append this label consistent with the dictates of summary judgment. Courts compound the problems with this term of art by treating the defendant's evidence as if it is fully proven.

Defendants get the benefit of the second step even when their evidence does not respond to the plaintiff's theory of the case. The order in which judges

230. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1739 (2020).

231. Given modern discovery, a plaintiff would not need a defendant to articulate its reason for acting. The plaintiff could obtain evidence related to the employer's reason during discovery and provide this evidence to the court.

102 N.C. L. REV. 459 (2024)

view evidence at summary judgment is out of sync with the framework and creates additional problems.

Even though the courts have been using the *McDonnell Douglas* framework for fifty years, they have not recognized or grappled with these step two problems. It is time to acknowledge that step two is not quirky or harmless. It plays a major role in distorting the discrimination inquiry.