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Litigating the FMLA in the Shadow of Title VII

*Sandra F. Sperino**

I. INTRODUCTION

The history of Title VII of the Civil Rights Act of 1964 is a history of frameworks.[1] In an almost predictable pattern, the Supreme Court has recognized a category of employment discrimination, and then, either in the same case, or sometime thereafter, created a multi-part test for evaluating it.[2]

Congress enacted the Family and Medical Leave Act (FMLA) in 1993, almost 30 years after it enacted Title VII of the Civil Rights Act.[3] This Essay argues that the FMLA is litigated within the shadow of Title VII, as courts routinely apply complex frameworks developed in the Title VII context to FMLA cases.

This Essay explores how courts needlessly apply the three-part burden-shifting test from *McDonnell Douglas Corp. v. Green*, developed in Title VII cases, to FMLA claims. Using the lens of *McDonnell Douglas*, this Essay demonstrates how courts have drawn the FMLA into the same framework morass that currently exists for Title VII discrimination claims. This phalanx of frameworks distracts courts away from the substantive core of the FMLA, and into endless arguments about the substantive and procedural oddities of the frameworks. In turn, the replication of the discrimination frameworks in the FMLA increases their longevity and reach, making it even more difficult to diminish the frameworks' grip over discrimination discourse.

This Essay proceeds in three sections. Section I discusses the *McDonnell Douglas* framework and its unique procedural and substantive features. Section II describes how the courts imported *McDonnell Douglas* into the FMLA with little regard for the differences between Title VII and the FMLA. Section III demonstrates

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1 Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 70 (2011).

2 *Id.* at 72.

3 42 U.S.C. § 2000e (2006) et seq.

why it is problematic for courts to approach the FMLA's substantive provisions through the current framework-driven approach.

II. BACKGROUND

A. Title VII and *McDonnell Douglas*

Congress enacted Title VII of the Civil Rights Act in 1964, prohibiting employment discrimination based on race, religion, color, national origin, and sex. Title VII provides:

> It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) 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 such individual's race, color, religion, sex, or national origin.[4]

Title VII's operative language is broad, and Congress did not specifically define many key terms.[5] There is little evidence that district courts were struggling with how to evaluate individual disparate treatment cases. Nonetheless, the appellate courts began to create complicated frameworks for determining whether an employer made a decision because of a protected trait.[6]

In *McDonnell Douglas Corp. v. Green*, the Supreme Court created a three-part, burden-shifting test for analyzing individual disparate treatment cases.[7] Courts apply this test when a plaintiff relies on circumstantial, as opposed to direct evidence of discrimination.[8] Un-

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4 42 U.S.C. § 2000e-2(a) (2006).

5 *Id.*

6 *See generally* Sperino, *supra* note 1.

7 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Some circuits will allow a plaintiff to make a case of discrimination without resorting to *McDonnell Douglas*, if the plaintiff has "either direct or circumstantial evidence that supports an inference of intentional discrimination." *See, e.g.*, Coffman v. Indianapolis Fire Dept., 578 F.3d 559, 563 (7th Cir. 2009).

8 *See, e.g.*, Egonmwan v. Cook Cnty. Sheriff's Dept., 602 F.3d 845, 850-51 (7th Cir. 2010); Thompson v. Carrier Corp., 358 F. App'x 109, 111 (11th Cir. 2009) ("A plaintiff may establish a claim of discrimination under Title VII by direct or circumstantial evidence, and when only the latter is relied on, we use the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*[.]"); Taylor v. Seton Brackenridge Hosp., 349 F. App'x 874, 877 (5th Cir. 2009) ("Taylor has not provided direct evidence of discrimination, therefore, his claim based on cir-

der *McDonnell Douglas*, a court first evaluates the prima facie case, which requires proof that:

> (i) [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[.][9]

The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.[10] If the defendant meets this requirement, the plaintiff can still prevail by demonstrating that the defendant's reason for the rejection was simply pretext.[11]

In *McDonnell Douglas*, the Court noted that the facts required to prove a prima facie case will necessarily vary, depending on the case.[12] After *McDonnell Douglas*, significant confusion existed about the three-part burden-shifting test, including questions regarding the defendant's burden at the second step in the inquiry, and the effect of a plaintiff's showing of pretext. Two subsequent cases clarified (and some would say altered) how the *McDonnell Douglas* test operates. In *Texas Department of Community Affairs v. Burdine*, the Court explained that the defendant's burden at the second step in the *McDonnell-Douglas* framework is a burden of production only.[13] The Court held that the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[14] In *Saint Mary's Honor Center v. Hicks*, the Court considered whether the fact-finder's rejection of the employer's asserted reason for its action mandated a finding for the plaintiff.[15] The Supreme Court held that while the fact-finder's rejection of the employer's proffered reason permits the fact-finder to infer discrimination, it does not compel such a finding.[16]

The *McDonnell Douglas* test's focus on the employer's nondiscriminatory reason for its action implicitly suggested that discrimi-

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cumstantial evidence is analyzed under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.").

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

10 *Id*.

11 *Id*. at 804.

12 *Id*. at 802 n.13.

13 Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).

14 *Id*. at 253.

15 St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 504-07 (1993).

16 *Id.* at 510-11.

nation claims might only be cognizable if the plaintiff alleged that the employer acted only because of a discriminatory reason. In the 1989 case of *Price Waterhouse v. Hopkins*, the Supreme Court interpreted Title VII as allowing so called "mixed-motive" claims.[17] Once again, it produced yet another test. The Court held that a plaintiff must establish that a protected trait played a motivating factor in the employment decision.[18] The employer has the ability to avoid liability by proving an affirmative defense—that it would have made the same decision, even if it had not allowed the protected trait to play a role.[19] While the Justices agreed on many of the central contours of mixed motive, they did not agree on whether a plaintiff must present direct evidence of discrimination to proceed through the framework.[20]

In 1991, unhappy with the test the Court articulated for mixed motive, Congress amended Title VII.[21] In doing so, Congress did not separately delineate a type of discrimination called "mixed motive" or enunciate a separate test.[22] Rather, Congress indicated that a plaintiff could prevail on a discrimination claim under Title VII by establishing that a protected trait played a motivating factor in an employment decision.[23] Congress also created an affirmative defense, which, if proven, would be a partial defense to damages.[24] Courts began referring to the 1991 amendments as establishing a "mixed motive" claim with a two-part framework.[25] Later, the Supreme Court decided the question that was left unresolved in *Price Waterhouse*, and held that the direct/circumstantial dichotomy would not be imported into the mixed-motive context under Title VII.[26]

Although there is some variation among circuits, courts primarily analyze mixed-motive claims under Title VII through the statutory language of the 1991 amendments. They analyze Title VII single-motive discrimination claims based on circumstantial evidence through *McDonnell Douglas*.

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17 Price Waterhouse v. Hopkins, 490 U.S. 228, 241-43, 52 (1989).

18 *Id*. at 244-46. For a description of how the same decision language was imported from constitutional claims, see Catherine T. Struve, *Shifting Burdens: Discrimination Law Through the Lens of Jury Instructions*, 51 B.C. L. REV. 279, 300-01 (2010).

19 *Price Waterhouse*, 490 U.S. at 244-46.

20 *Id*. at 270-71 (O'Connor, J., concurring) (noting that to get the benefit of mixed-motive framework, plaintiff would be required to present direct evidence of discrimination).

21 42 U.S.C. § 2000e-2(m) (2006).

22 *Id*.

23 *Id*.

24 42 U.S.C. § 2000e–5(g)(2)(B)(i).

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

26 Desert Palace, Inc. v. Costa, 539 U.S. 90, 92, 101-02 (2003).

B. A Substantive and Procedural Morass

As discussed in more detail in the next section, the courts have widely used *McDonnell Douglas* in the FMLA context. This section argues this use is normatively undesirable, and explores troubling features of the burden-shifting test. *McDonnell Douglas* is a substantive and procedural outlier in ways that make its use in the FMLA context problematic. Its odd three-part burden-shifting structure is procedurally strange and confusing. More importantly, it is not clear whether the test actually aids courts in making the discrimination inquiry.

The courts describe *McDonnell Douglas* as an evidentiary framework[27] that is supposed to help courts work through competing discrimination narratives. Some courts have articulated that the prima facie case exists to force the defendant to articulate a legitimate, non-discriminatory reason for its actions.[28] However, this rationale-forcing reason for *McDonnell Douglas* does not make sense under a modern discovery system, in which a plaintiff can discover the defendant's professed reasons for its decisions through numerous discovery devices.

The test has never aligned well with the two procedural junctures at which it might be used: summary judgment and trial. Take, for example, a common summary judgment motion, in which the defendant requests summary judgment. The defendant often articulates its legitimate non-discriminatory reason for acting in support of its motion for summary judgment. The prima facie case should play no role in such cases where the defendant has already articulated its reason for acting. Nor does the tri-partite test align well with trial where a plaintiff is required to present his or her entire case in chief, followed by the defendant's case. Trial does not follow the model created by *McDonnell Douglas*, which anticipates a plaintiff's prima facie case, followed by a defendant's articulation (not proof) of a legitimate, non-discriminatory reason, and then followed by the plaintiff's response to that reason.

The *McDonnell Douglas* test is so confusing in the jury trial context that many circuits do not allow jury instructions to use the three-part test.[29] From a civil procedure standpoint, it is difficult to under-

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[27] Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard").

[28] *See, e.g.*, Stratton v. Dep't for the Aging for the City of N.Y., 132 F.3d 869, 879 (2d Cir. 1997).

[29] Whittington v. Nordam Grp. Inc., 429 F.3d 986, 998 (10th Cir. 2005) ("[T]he instructions should not 'lead jurors to abandon their own judgment and to seize upon poorly understood legalisms to decide the ultimate question of discrimination.'" (quoting Messina v. Kroblin Transp. Sys., Inc., 903 F.2d 1306, 1308 (10th Cir. 1990))); Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568,

stand how courts are empowered to use one standard for evaluating summary judgment motions while instructing juries to use a different standard.[30]

The test even confuses judges. The *McDonnell Douglas* test was followed by decades of appellate decisions regarding how the test worked.[31] And the test itself relies on distinctions that are elusive and that courts have difficulty describing. In the Title VII context, courts are only supposed to use the test in so-called circumstantial evidence cases and not cases involving direct evidence, but it is difficult to draw a line between the two types of evidence. Further, in most circuits, the *McDonnell Douglas* test is designed for cases involving a single-motive, rather than cases involving mixed motives.[32] However, in many circumstances it is difficult to determine whether the evidence supports single- or mixed-motive claims.

Most importantly, it is not clear what *McDonnell Douglas* is designed to accomplish substantively. Some courts indicate that the test is a way for a plaintiff to establish intent when the plaintiff lacks clear evidence of intent.[33] Others tie the test to the causation inquiry.[34] This lack of clarity itself is problematic. However, even if we ignore this confusion, it is still unclear whether *McDonnell Douglas* aids in any of its supposed goals, whether those goals are framed as concerning causation, intent, or a more generalized discrimination inquiry. These problems are compounded when courts treat *McDonnell Douglas* as the primary or sometimes the only way for a plaintiff to establish a single-motive discrimination claim based on circumstantial evidence; rather than as one possible avenue for establishing discrimination.

All of these problems with *McDonnell Douglas* have led scholars and some judges to call for the diminished or discontinued use of

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576 (5th Cir. 2004) ("[D]istrict courts should not frame jury instructions based upon the intricacies of the *McDonnell Douglas* burden shifting analysis"); Sanders v. New York City Human Res. Admin., 361 F.3d 749, 758 (2d Cir. 2004) ("Explaining [the burden shifting scheme of *McDonnell Douglas*] to the jury in the charge, we believe, is more likely to confuse rather than enlighten the members of the jury."); Sanghvi v. Claremont, 328 F.3d 532, 539-41 (9th Cir. 2003) (concluding that it is error to charge the jury with the elements of *McDonnell Douglas*).

30 *Compare* Fed. R. Civ. P. 56, *with* Fed. R. Civ. P. 50(a).

31 Reeves v. Sanderson Plumbing, 530 U.S. 133, 142-43 (2000); O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 310-12 (1996); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).

32 Griffin v. Finkbeiner, 689 F.3d 584, 592 (6th Cir. 2012).

33 Barnette v. Fed. Express Corp., No. 12-10969, 2012 WL 4775029, at *11 (11th Cir. Oct. 9, 2012).

34 Moffett v. Miss. Dept. of Mental Health, No. 12-60551, 2013 WL 150139, at *5 (5th Cir. Jan. 14, 2013).

McDonnell Douglas in the discrimination context.[35] Circuit Judge Diane Wood succinctly and compellingly argued against the continued dominance of the test. In a concurring opinion in *Coleman v. Donahoe* she wrote:

> I write separately to call attention to the snarls and knots that the current methodologies used in discrimination cases of all kinds have inflicted on courts and litigants alike. The original *McDonnell Douglas* decision was designed to clarify and to simplify the plaintiff's task in presenting such a case. Over the years, unfortunately, both of those goals have gone by the wayside. . . . Like a group of Mesopotamian scholars, we work hard to see if a "convincing mosaic" can be assembled that would point to the equivalent of the blatantly discriminatory statement. If we move on to the indirect method, we engage in an allemande worthy of the 16th century, carefully executing the first four steps of the dance for the prima facie case, shifting over to the partner for the "articulation" interlude, and then concluding with the examination of evidence of pretext. But, as my colleagues correctly point out, evidence relevant to one of the initial four steps is often (and is here) equally helpful for showing pretext.
>
> Perhaps *McDonnell Douglas* was necessary nearly 40 years ago, when Title VII litigation was still relatively new in the federal courts. By now, however, as this case well illustrates, the various tests that we insist lawyers use have lost their utility. Courts manage tort litigation every day without the ins and outs of these methods of proof, and I see no reason why employment discrimination litigation (including cases alleging retaliation) could not be handled in the same straightforward way.[36]

III. THE FMLA AND *MCDONNELL DOUGLAS*

Despite the concerns raised in the prior section, courts have expanded the reach of *McDonnell Douglas* by applying it to the FMLA. This section discusses how this move is not supported by the text of the FMLA, and how the burden-shifting test does not fit well with the claims and evidence typically raised in FMLA cases.

The FMLA has a two-tiered prohibited acts section. The first subsection, titled "Interference with Rights," makes it unlawful for an

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35 *See, e.g.*, Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1891 (2004); Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 MICH. L. REV. 2229, 2237 (1995).

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

employer "to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter."[37] The second subsection, titled "Discrimination," prohibits employers from firing or discriminating "in any other manner" against an individual who "opposes any practice made unlawful by this subchapter."[38]

Courts routinely apply the *McDonnell Douglas* test to retaliation cases brought under the FMLA, and some circuits apply the test to FMLA interference claims.[39] In discrimination cases, which are sometimes referred to as retaliation cases, this test requires the plaintiff to prove a prima facie case, after which a rebuttable presumption of discrimination is created.[40] After this initial showing, the defendant must articulate a legitimate, non-discriminatory reason for its actions.[41] If the defendant meets this minimal burden, the presumption of retaliation drops from the case, and the plaintiff must establish that the employer's asserted reason was a pretext for unlawful retaliation under the FMLA.[42]

The reasoning that circuit courts employed to justify applying *McDonnell Dougla*s to the FMLA is often cursory. For example, the Second Circuit indicated that because FMLA retaliation cases involve intent, it is appropriate to apply *McDonnell Douglas* to them.[43] The D.C. Circuit in one sentence simply noted the FMLA was like Title VII.[44]

Even though courts are interpreting the FMLA in a textualist era, the courts have not explained why they should apply the same frameworks to the FMLA and Title VII, despite the differences in both the text and purposes of the two statutory regimes. As discussed earlier, Title VII originally contained a two-tiered operative provision. This is the language that existed when the Supreme Court decided *McDon-*

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37 29 U.S.C. § 2615(a)(1) (2006).

38 29 U.S.C. § 2615(a)(2) (2006).

39 *See* Jaszczyszyn v. Advantage Health Physician Network, No. 11-1697, 2012 WL 5416616, at *13 (6th Cir. 2012) (applying *McDonnell Douglas* test to FMLA interference claims); Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 335-36 (1st Cir. 2005) (applying *McDonnell Douglas* to retaliation claims and citing similar cases from other circuits). *But see* Brown v. ScriptPro, LLC, 700 F.3d 1222, 1226-27 (10th Cir. 2012) (noting that *McDonnell Douglas* does not apply to interference claims).

40 *Colburn*, 429 F.3d at 336 n.10 (noting that to make out a prima facie case, "plaintiff must show (1) that he engaged in a protected action (here, requesting or taking FMLA leave); (2) that he suffered an adverse employment action (here, being fired); and (3) that there was some possibility of a causal connection between the employee's protected activity and the employer's adverse employment action, in that the two were not wholly unrelated").

41 *Id.* at 336.

42 *Id.*

43 Potenza v. City of New York, 365 F.3d 165, 168 (2d Cir. 2004).

44 Gleklen v. Democratic Cong. Campaign Comm., Inc., 199 F.3d 1365, 1367 (D.C. Cir. 2000).

nell Douglas in 1973. In contrast, the FMLA has two primary operative provisions that do not mimic either the two-tiered structure or the language of Title VII's core provisions. Even if *McDonnell Douglas* is not a textualist interpretation of Title VII, it is difficult to imagine why courts would resort to rote borrowing of the test for statutes that look so vastly different from one another.

This textual puzzle becomes more complex when considering the 1991 amendments to Title VII. When Congress amended Title VII in 1991 to include the "motivating factor" language, this statutory change arguably challenged the continued use of *McDonnell Douglas* as the primary way to frame discrimination claims.[45] Congress enacted the FMLA *after* the 1991 amendments to Title VII. If the 1991 amendments challenged *McDonnell Douglas*' continued primary function in employment discrimination law, it is unlikely that Congress would nonetheless choose to enshrine *McDonnell Douglas* into the FMLA or intend for the courts to continue to use it as an evidentiary framework.

As discussed earlier, the three-part burden-shifting framework is confusing. Outside of the core holding that pretext may be evidence of discrimination, it is difficult to determine what inquiry *McDonnell Douglas* aids. Courts and commentators have struggled to determine whether *McDonnell Douglas* answers causal questions or whether it helps determine whether an actor possessed a certain requisite intent. Whatever questions *McDonnell Douglas* addresses, it is unclear why courts considering FMLA cases would need to answer those questions in the same manner, especially given the textual differences between the statutes.

This is especially true given the differences in the types of claims raised by the FMLA and Title VII. In many Title VII cases, the plaintiff claims that the employer discriminated against her based on a protected trait. Title VII protection does not depend upon the performance of any act by the plaintiff. Given that every employee falls within several protected classes under Title VII, the plaintiff's status alone will not trigger liability or even a presumption of liability. Rather, the plaintiff is required to put forth some extra evidence that an employment decision was taken because of a protected trait. This evidence is often what the courts deem to be circumstantial evidence, and *McDonnell Douglas* purports to help courts wade through what kinds of circumstantial evidence are sufficient to trigger liability and which are not. As discussed earlier, although the courts are not absolutely clear in this regard, they require the plaintiff's proof to establish that

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45 *See* Zimmer, *supra* note 35, at 1891.

the employer considered a protected trait in making an employment decision, which the courts often categorize as an intent requirement.

The FMLA is different, though. Once the plaintiff falls within the protected class of the FMLA and qualifies for its statutory entitlements, the employer's intent is not relevant to establishing liability under the interference provisions of the statute. Liability hinges simply on whether the employer did not provide the plaintiff with leave or other entitlements under the FMLA.[46] For this very reason, some courts reject the use of *McDonnell Douglas* in interference claims.[47] However, some courts cling to the burden-shifting test for interference claims.[48]

FMLA "discrimination" claims are unlike Title VII discrimination claims. Even using the terminology of discrimination under the FMLA is problematic, because the "discrimination" cause of action under the FMLA is more like a retaliation claim under Title VII. In FMLA "discrimination" cases, the employer is not taking action against the plaintiff based on his or her characteristics or traits, but in response to actions taken by the plaintiff, either taking or seeking to take FMLA leave.

Although some courts use the *McDonnell Douglas* framework in the Title VII retaliation context, others frame Title VII retaliation claims using a simpler, three-part test that requires the plaintiff to establish that she engaged in protected activity, that the employer took an adverse action, and that there is a causal connection between the two.[49] If this simpler construct works for Title VII retaliation claims, it is unclear why courts should not use it for FMLA discrimination claims that the courts analogize to retaliation.

IV. THE FRAMEWORK DILEMMA

The courts' use of the *McDonnell Douglas* test in the FMLA context has serious consequences for both statutes. This section explores these consequences and explains why it is important for courts to interpret the FMLA on its own terms, rather than in the shadow of Title VII.

One problem with applying *McDonnell Douglas* to the FMLA is that the FMLA gets drawn into the same interpretive problems that plague Title VII. Over the past several decades, courts have explained

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46 Brown v. ScriptPro, LLC, 700 F.3d 1222, 1226-27 (10th Cir. 2012).

47 *Id.*

48 Jaszczyszyn v. Advantage Health Physician Network, No. 11-1697, 2012 WL 5416616, at *13-14 (6th Cir. Nov. 7, 2012) (discussing cases).

49 Coleman v. Donahoe, 667 F.3d 835, 859 (7th Cir. 2012).

that they use *McDonnell Douglas* in cases involving circumstantial evidence.[50] After the Supreme Court's rejection of the direct/circumstantial evidence dichotomy in Title VII mixed motive cases, it is difficult to understand why the dichotomy still exists at all.[51] Nonetheless, in FMLA cases, the courts still use this antiquated dichotomy to think about claims.[52]

Further, in part because of *McDonnell Douglas*, the courts conceived Title VII claims as being divided between what the courts call single-motive and mixed-motive claims. In 1991, Congress amended Title VII to clarify whether plaintiffs could prevail if evidence existed that the employer considered both legitimate and discriminatory factors in making an employment decision.[53] Congress did not amend the Age Discrimination in Employment Act (ADEA),[54] however, and the Supreme Court subsequently held that the ADEA does not permit so-called mixed-motive claims.[55] Even though the FMLA does not share the language of either Title VII or the ADEA, the courts have still been required to contend with the question of whether the FMLA allows plaintiffs to proceed with mixed-motive evidence.[56]

Under *McDonnell Douglas*, courts allow a plaintiff to support his or her prima facie case by submitting evidence that the employer treated similarly-situated employees outside of the plaintiff's protected trait differently.[57] Scholars such as Professors Suzanne Goldberg and Charles Sullivan have correctly challenged the courts' cramped notions of when fellow employees are similarly situated enough to serve as comparators in discrimination cases.[58] Nonetheless, these same narrow notions are being employed in the FMLA context.[59] Requiring an FMLA plaintiff to establish a similarly situated comparator is especially odd in some FMLA cases where human resources personnel are involved in the decision to grant or deny FMLA

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50 *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 584-85 (2007).

51 Desert Palace, Inc. v. Costa, 539 U.S. 90, 98-99 (2003) (discussing how the text of the Title VII does not distinguish between direct and circumstantial evidence).

52 Laws v. HealthSouth N. Ky. Rehab. Hosp. Ltd. P'ship, No. 11-6360, 2012 WL 6176797, at *5-6 (6th Cir. Dec. 11, 2012); Laws v. HealthSouth N. Ky. Rehab. Hosp. Ltd. P'ship, 828 F. Supp. 2d 889, 906, 919 (E.D. Ky. 2011).

53 42 U.S.C. § 2000e-2(m) (2006).

54 29 U.S.C. §§ 621-634 (2006).

55 Gross v. FBL Fin. Servs., 557 U.S. 167, 176-78 (2009).

56 Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 302 (3d Cir. 2012) (noting that courts are questioning whether mixed-motive claims can proceed under the FMLA).

57 Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE. L.J. 728, 733-34, 748-49 (2011); Charles A. Sullivan, *The Phoenix from the* Ash: *Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 215-16 (2009).

58 Goldberg, *supra* note 57, at 733-34, 748-49; Sullivan, *supra* note 57, at 215-16.

59 Hull v. Stoughton Trailers, LLC, 445 F.3d 949, 952 (7th Cir. 2006).

leave. Human resources personnel are also often involved in making decisions either alone or with supervisors to take employment actions against employees subsequent to their FMLA leave or request for leave. The requirement of strict comparators with the same supervisor as the plaintiff may make little sense in these cases.

Another problematic *McDonnell Douglas* issue involves the courts' response to the 1991 amendments to Title VII, as well as some courts' recent express skepticism about *McDonnell Douglas*. Since the 1991 amendments to Title VII, the federal appellate courts have created circuit splits about how courts should analyze individual disparate treatment claims under Title VII. The Fifth Circuit created a test that combines elements of *McDonnell Douglas* with the 1991 amendments.[60] The Seventh Circuit allows litigants to proceed under *McDonnell Douglas*; however, it also allows an alternate test by which the plaintiff can survive summary judgment by putting forth a convincing mosaic of circumstantial evidence.[61] It is unclear whether courts should interpret the FMLA with these new approaches, or whether courts should use the more traditional formulations of *McDonnell Douglas*. More importantly, it is unclear whether litigation about what test to apply helps courts or litigants understand the FMLA better.

Continued use of *McDonnell Douglas* in the FMLA context has repercussions for Title VII as well. As courts further entrench *McDonnell Douglas* in contexts outside Title VII, it is difficult to limit its reach for Title VII claims.

Perhaps more importantly, when courts use *McDonnell Douglas* to evaluate claims, it leads to a framework mentality. If a set of facts meets the framework's requirements, it is actionable. If facts do not meet the framework's requirements, they are not actionable. This focus on frameworks has distracted courts from the core questions of Title VII. Instead of discussing whether a jury might reasonably believe that an employer took a particular action because of a protected trait, the courts become mired in whether plaintiffs meet the specific requirements of a court-created test, whether or not this test fully or accurately captures plaintiffs' lived realities or discrimination as it happens in the modern workplace. In the Title VII context, the courts have spent decades mired in the intricacies of *McDonnell Douglas* and other discrimination frameworks, and there is little evidence that

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60 Ward v. Midwestern State Univ., 217 F. App'x. 325, 327 (5th Cir. 2007) (discussing the Fifth Circuit's modified standard).

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

these forays have increased the courts' understanding of how discrimination happens.

As previously discussed, framework-driven issues are now consuming the courts' attention in the FMLA context. It is certain that the frameworks provide the courts with a process for proceeding through evidence, but it is unclear whether this process ultimately aids the courts in determining whether an employer has violated the FMLA. A focus on frameworks distracts courts from the core concerns of the FMLA. Did the employer deny plaintiff an FMLA entitlement? Did the employer take an action against an employee because he or she took or sought to take FMLA leave? Instead, courts and litigants focus on the frameworks, at the expense of a robust exploration of the FMLA's protections.

An example is helpful. In a recent Sixth Circuit case, the plaintiff alleged that the employer cited as one of several reasons for termination that the plaintiff had absence issues.[62] These absences were valid FMLA leave. The plaintiff also alleged that the employer provided numerous, conflicting reasons for her termination.[63] Using frameworks, the district court granted summary judgment for the employer on this set of facts, even though it is clear that a reasonable jury could find the plaintiff's FMLA leave played a role in the termination.

This essay does not claim that courts should refrain from using reasoning originally developed under the discrimination statutes in the FMLA context. Some of these cases represent careful thinking about problems central to both the discrimination statutes and the FMLA. However, the courts should be cautious about adopting such reasoning without examining whether it makes sense in the specific context of the FMLA. This caution is especially warranted when the courts are considering dragging the FMLA into the same framework morass that plagues the discrimination statutes.

V. CONCLUSION

The FMLA has always been litigated in the shadow of Title VII. Now that the FMLA is entering its twentieth year, it is important to consider whether continuing to litigate the FMLA using Title VII frameworks is necessary or desirable. This question is especially important in relation to the *McDonnell Douglas* framework. This year marks the fortieth anniversary of the *McDonnell Douglas* opinion. While this framework is still ubiquitous, recent published opinions are

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62 Laws v. HealthSouth N. Ky. Rehab. Hosp. Ltd. P'ship, No. 11-6360, 2012 WL 6176797, at *3-5 (6th Cir. Dec. 11. 2012).

63 *Id*. at *3-5, 7.

questioning the framework's continued primacy in discrimination law. Given that there are even less compelling reasons to use the framework in the FMLA context, the judiciary and litigants should call for the test's demise in FMLA cases as well.