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Trott v. H.D. Goodall Hospital: When Analyzing Employment Discrimination Cases Under Maine Law, Should Maine Courts Continue to Apply the McDonnell Douglas Analysis at the Summary Judgment Stage?

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TROTT V. H.D. GOODALL HOSPITAL: WHEN ANALYZING EMPLOYMENT DISCRIMINATION CASES UNDER MAINE LAW, SHOULD MAINE COURTS CONTINUE TO APPLY THE *MCDONNELL DOUGLAS* ANALYSIS AT THE SUMMARY JUDGMENT STAGE?

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Ari B. Solotoff[*]

I. INTRODUCTION

Since 2003, the Maine Supreme Judicial Court has applied the Supreme Court's *McDonnell Douglas* burden-shifting analysis on summary judgment in employment discrimination claims brought under Maine law.[1] Recently, however, some justices of the Law Court have questioned *McDonnell Douglas's* continuing application to summary judgment determinations. They argue that the framework is outdated, overly mechanical, and unnecessary.[2] In *Trott v. H.D. Goodall Hospital*,[3] the court set forth three guiding principles for lawyers and judges to follow in employment discrimination cases facing disposition at summary judgment.[4] In doing so, the court signaled that *McDonnell Douglas* should continue to be applied at summary judgment because the analysis is a valuable and necessary interpretive device for defining the substantive law of intentional discrimination.[5] The court's synthesis of the principles governing summary judgment decisions in employment discrimination cases also sharpened the analysis for contemporary use. Thus, Maine courts need not discontinue use of *McDonnell Douglas* and should continue to apply it at summary judgment.

Claire Trott served as a nurse at H.D. Goodall Hospital for close to twenty years.[6] Following the termination of her employment from the Hospital in 2009, Trott complained that she was discharged in violation of Maine's Whistleblower Protection Act (WPA) and because of her participation in a deposition for a wrongful death suit brought against the Hospital.[7] Pursuant to the Act,[8] Trott

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1. *See infra* note 87 and accompanying text.

2. *See infra* Part III.E.

3. 2013 ME 33, 66 A.3d 7.

4. *See infra* Part III.D.

5. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (holding that submission of a factual dispute to the jury must be guided by the applicable substantive evidentiary standards).

6. Brief of Plaintiff-Appellant at 1, Trott v. H.D. Goodall Hosp., 2013 ME 33, 66 A.3d 7 (No. YOR-12-213).

7. *Id*.

8. The statute provides in relevant part: "No employer may discharge, threaten or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location or

submitted a complaint to the Maine Human Rights Commission, alleging that the Hospital severed her employment in retaliation for the deposition testimony she provided as part of the wrongful death suit.[9] The Hospital contended that it discharged Trott for falsification of a medical record in violation of Hospital policy.[10] The Superior Court granted summary judgment to the Hospital, concluding that Trott failed to produce evidence showing a causal link between her discharge and her participation in the deposition as required by the statute.[11]

In *Trott v. H.D. Goodall Hospital*, the Maine Supreme Judicial Court, sitting as the Law Court, reversed the grant of summary judgment to the Hospital.[12] The case involved a claim of employment discrimination and the court applied the *McDonnell Douglas* burden-shifting analysis to the causation element of the WPA.[13] Under *McDonnell Douglas*, a plaintiff bears the initial burden of establishing a "prima facie case" that unlawful discrimination motivated the employee's discharge.[14] After the employee meets this initial burden, the employer must produce evidence of a legitimate, nondiscriminatory reason for the adverse action.[15] If the employer does not produce an explanation, or if the employee demonstrates that the employer's stated reason is pretextual, then the employee has made out a "prima facie case" in the more general sense, and has met the employee's burden of production on all the elements of a claim for discrimination.[16] Evidence of pretext, therefore, is crucial for the plaintiff to survive summary judgment.

Under the WPA, an employee must prove three elements to prevail on a discrimination claim: (1) the employee was asked to participate in a court action; (2) the employee was subject to an adverse employment action; and (3) there was a "causal link" between the protected activity and the adverse action.[17] The Hospital conceded that Trott's discharge was an adverse employment action.[18] The Law Court further concluded that Trott's deposition testimony was a "court action" within the meaning of the WPA.[19] The question for the court was whether Trott had met her burden of production on the issue of causation.[20] As a matter of substantive law interpretation of the WPA, the court applied the three-step burden-

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privileges of employment because . . . [t]he employee is requested to participate in an investigation, hearing or . . . a court action." 26 M.R.S.A. § 833(1)(C) (2013).

9. Trott v. H.D. Goodall Hosp., 2013 ME 33, ¶ 10, 66 A.3d 7.

10. *Id.*

11. *Id.*

12. *Id.* ¶ 26.

13. *Id.* ¶ 15.

14. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). *See* Denny Chin & Jodi Golinsky, *Moving Beyond* McDonnell Douglas*: A Simplified Method for Assessing Evidence in Discrimination Cases*, 64 BROOK. L. REV. 659, 663-64 (1998) (discussing the four specific elements of the plaintiff's prima facie case as they have evolved in the Second Circuit, as well as some of the confusion that has arisen regarding the elements).

15. *Id.*

16. *Id.* at 804.

17. *See* 5 M.R.S.A. §§ 4572(1)(A), 4621 (2013); 26 M.R.S.A. § 833(1)(C) (2013). *See also* Costain v. Sunbury Primary Care, P.A., 2008 ME 142, ¶ 6, 954 A.2d 1051.

18. *Trott*, 2013 ME 33, ¶ 11, 66 A.3d 7.

19. *Id.* ¶ 12.

20. *Id.* ¶ 14.

shifting analysis of *McDonnell Douglas* and concluded that Trott had met her burden of production.[21] The court then vacated the decision and remanded, holding that when viewing the summary judgment record from the "full range of reasonable perceptions . . . a reasonable juror could conclude that the Hospital's articulated reason for discharging her was" pretextual,[22] and that Trott was entitled to have her claim heard by a jury.[23]

Two justices of the Law Court concurred in the result, but contended, as they had done a year earlier in another case,[24] that Maine courts should no longer apply *McDonnell Douglas* at summary judgment in employment discrimination cases.[25] The concurring opinion can be read either as disagreeing with the meaning or interpretation of the state substantive law when analyzing the causation element of a WPA claim, or as disagreeing with application of that substantive law at the summary judgment stage. The latter reading of the concurring justices in *Trott* follows from their stance as articulated in *Daniels v. Narraguagus Bay Health Care Facility*[26]: applying *McDonnell Douglas* at summary judgment merely confuses the ultimate issue of whether there is evidence of employment discrimination.[27] Questioning the "continued vitality of the burden-shifting analysis,"[28] the concurrence reasserted that courts should return to the "straightforward and objective inquiry pursuant to Rule 56."[29]

Thus, courts in Maine were left with an open question of whether to continue to apply the Supreme Court's burden-shifting analysis as articulated in *McDonnell Douglas Corp. v. Green*,[30] when deciding a motion for summary judgment in an employment discrimination case brought under state law.[31] The question of the continuing vitality of the *McDonnell Douglas* analysis in employment discrimination cases at summary judgment is neither new,[32] nor unique to Maine.[33]

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21. *Id.* ¶ 15.

22. *Id.* ¶ 25

23. *Id.* ¶ 26.

24. *See* Daniels v. Narraguagus Bay Health Care Facility, 2012 ME 80, ¶ 29, 45 A.3d 722 (Silver, J., concurring).

25. *Trott*, 2013 ME 33, ¶ 28, 66 A.3d 7 (Silver, J., concurring).

26. 2012 ME 80, 45 A.3d 722. Although Justice Alexander joined the concurring opinion in *Daniels*, he was a member of the majority opinion in *Trott*.

27. *See Trott*, 2013 ME 33, ¶ 28, 66 A.3d 7 (Silver, J., concurring). *See also* Fuhrmann v. Staples the Office Superstore E., Inc., 2012 ME 135, ¶ 13, 58 A.3d 1083 (acknowledging Justice Silver's questioning of the application of the *McDonnell Douglas* analysis to employment discrimination cases at the summary judgment stage).

28. *Daniels*, 2012 ME 80, ¶ 29, 45 A.3d 722 (Silver, J., concurring).

29. *See* ME. R. CIV. P. 56(c); *Daniels*, 2012 ME 80, ¶ 34, 45 A.3d 722 (Silver, J., concurring).

30. 411 U.S. 792, 802-05 (1973).

31. *See Trott*, 2013 ME 33, ¶ 28, 66 A.3d 7 (Silver, J., concurring); *Daniels*, 2012 ME 80, ¶ 29, 45 A.3d 722 (Silver, J., concurring) (stating that the analysis is "outdated, confusing, and unworkable").

32. *See* Martin J. Katz, *Reclaiming* McDonnell Douglas, 83 NOTRE DAME L. REV. 109, 113 n.15 (2007) (citing numerous longstanding criticisms of the analysis). *See also* William R. Corbett, McDonnell Douglas*, 1973-2003: May You Rest in Peace?*, 6 U. PA. J. LAB. & EMP. L. 199, 202 n.15 (2003) (noting that many scholars and employee rights advocates have called for abandonment of the analysis).

33. *See* Christopher J. Emden, Note, *Subverting Rule 56?* McDonnell Douglas*,* White v. Baxter Healthcare Corp*., and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY BUS. L.

At the same time, the issue of the remaining utility of the *McDonnell Douglas* analysis stands on the cutting edge of employment discrimination practice, especially for cases facing disposition at summary judgment.[34] Because summary judgment is granted more frequently in employment discrimination cases as compared with other civil suits,[35] the stakes for both employees and employers are high.[36]

Contrary to the concurrence's reading of *Trott*, reasoning from first principles of summary judgment makes clear that it would be inconsistent to apply one interpretation of the substantive law at summary judgment and a different interpretation at trial.[37] Courts have routinely applied the burden-shifting framework at summary judgment as a technique to guide the complexities of the record[38] and the allocation of proof in employment discrimination cases.[39] As originally envisioned by the Supreme Court, the analysis was designed to "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext" before the fact-finder at trial.[40] Thus, the plaintiff's rebuttal case on the issue of pretext constitutes an essential and necessary component of intentional discrimination substantive law.[41]

This Note will proceed in three parts. Part II will review the *McDonnell Douglas* analytical framework and its evolution. After briefly touching on summary judgment determinations in Maine, Part II will then explore the use of the

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REV. 139, 154 (2010) (noting that the *Baxter* court's decision that *McDonnell Douglas* does not apply to summary judgment "creates an official circuit split" for federal courts).

34. *See* Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 681 (2013) (suggesting that the *McDonnell Douglas* analysis is no longer helpful to anyone given the evolution of employment law).

35. *See id.* at 672-73 (citing a recent Federal Judicial Center study of civil cases).

36. *See* 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, 221 n.68 (1993) (stating that the motion for "summary judgment has emerged as the predominant battleground for employers seeking to avoid discrimination trials." (internal citations omitted)).

37. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). For example, in considering the application of *McDonnell Douglas* to jury instructions in a case with "inferences that are to be derived from the underpinnings of the *McDonnell Douglas*-type prima facie case," the 1st Circuit has stated that "[t]he jury should be told that, if it finds all the disputed elements and that the defendant's reason is a pretext, it would be warranted in finding for the plaintiff on the ultimate issue of . . . discrimination." Loeb v. Textron, Inc. 600 F.2d 1003, 1018 (1979). However, the 1st Circuit also acknowledged that "it is obvious that most cases will not come neatly packaged" in a pure *McDonnell Douglas* structure and that a "court should not force a case into a *McDonnell Douglas* format if it will merely divert the jury from the real issues." *Id.*

38. *See* Chin, *supra* note 34, at 675 (noting the difficulty of employment discrimination cases, which involve many discovery disputes, pro se litigants, and sometimes uneven lawyering, as well as "burdensome, time-consuming summary judgment motions with extensive records.").

39. *See* McGinley, *supra* note 36, at 221 (stating the courts have "uniformly applied the *McDonnell Douglas/Burdine* approach to summary judgment); 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, 380 (1998) (stating that the *McDonnell Douglas* proof structure has played an important role for courts in evaluating challenges to sufficiency of the evidence).

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

41. *See* McGinley, *supra* note 36, at 256 (concluding that the Supreme Court shaped the *McDonnell Douglas*/*Burdine* formula to make it easier for plaintiffs to prove discrimination, primarily because employers rarely leave behind incriminating direct evidence).

McDonnell Douglas analysis in Maine's employment discrimination cases facing disposition at summary judgment. Part III will examine the *Trott* decision and the concurring opinion. Part IV will assess the Law Court's rationale and the concurrence in light of the purposes behind the *McDonnell Douglas* framework. After examining broader criticisms of the framework, this Note ultimately concludes that Maine courts should continue to apply the *McDonnell Douglas* analysis, as well as the *Trott* principles, in employment discrimination cases at the summary judgment stage.

II. THE *MCDONNELL DOUGLAS* ANALYSIS IN MAINE'S EMPLOYMENT DISCRIMINATION CASES

A. The Burden-Shifting Framework of McDonnell Douglas

Forty years ago, in *McDonnell Douglas Corp. v. Green*, the Supreme Court introduced the standard analysis for individual claims of disparate treatment brought under the Civil Rights Act of 1964.[42] Title VII of the Act prohibits employers from discriminating against individuals in the terms and conditions of employment on the basis of "race, color, religion, sex or national origin."[43] Thus, in a disparate treatment case, an employer treats some people differently than others because of a protected characteristic.[44] In *McDonnell Douglas*, the critical issue before the Court was the order and allocation of proof in employment discrimination suits brought by private individuals against their employers.[45] Although several methods have evolved for proving disparate treatment by an employer against an employee,[46] the Supreme Court designed the *McDonnell Douglas* proof structure in order to spotlight the circumstantial evidence of an employee alleging employment discrimination, especially when the employee lacks access to direct evidence of an employer's discriminatory intent.[47]

The Supreme Court did not mandate use of the *McDonnell Douglas* analysis.[48] However, it was the only method of proof for nearly ten years after the case was decided.[49] The *McDonnell Douglas* analysis has become the predominant method

42. The Supreme Court underscored the Act's purpose in saying, "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

43. 42 U.S.C. § 2000e-2(a) (2012).

44. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (distinguishing disparate treatment from disparate impact).

45. *See McDonnell Douglas Corp.*, 411 U.S. at 800.

46. For a review of other methods of proving disparate treatment, including direct evidence and mixed-motives, see Miles F. Archer, Mullin v. Raytheon Company*: The Threatened Vitality of Disparate Impact Under the ADEA*, 52 ME. L. REV. 149, 154-56 (2000).

47. *See* Corbett, *supra* note 39, at 363 (noting the evidentiary difficulties of inquiries into an employer's state of mind).

48. *See* Katz, *supra* note 32, at 117 (stating that the Supreme Court's opinion in *McDonnell Douglas* did not include any discussion of whether the analysis was mandatory).

49. *See id*.

for analyzing claims of intentional employment discrimination.[50] The Supreme Court shaped the burden-shifting analysis with the trial process in mind, providing plaintiffs with an opportunity to present a rebuttal case to the jury, focusing substantially on the question of the legitimacy of the defendant's asserted reasons for the adverse employment action.[51]

The Supreme Court has refined the *McDonnell Douglas* analysis in later cases.[52] In *Texas Department of Community Affairs v. Burdine*,[53] the Court clarified that only the burden of production shifts to the defendant at the second step, and the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[54] In *St. Mary's Honor Center v. Hicks*,[55] the Court held that when a plaintiff discredits an employer's articulated reason for the adverse employment action, it may permit the fact-finder to infer discriminatory intent.[56] And although a plaintiff is not required to present additional evidence of discrimination beyond meeting the elements of the prima facie case, rejection of the employer's proffered reason does not guarantee judgment for the plaintiff on the ultimate issue of discrimination.[57] However, in *Reeves v. Sanderson Plumbing Products, Inc.*,[58] the Court clarified that additional independent evidence of discrimination is not required and that a plaintiff's prima facie case, together with sufficient evidence to show that the employer's articulated reason is false, would permit a finding of discrimination.[59]

Causation is a central requirement of proof in any disparate treatment claim.[60] The *McDonnell Douglas* analysis directs the plaintiff to show causation by requiring a demonstration of "pretext."[61] The causation analysis relies on a set of successive inferences.[62] The focus on pretext is an application of "the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt."[63] A plaintiff's

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50. Corbett, *supra* note 39, at 363. *See also* Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 336 (2002) (noting that the unanimous Supreme Court opinions in *McDonnell Douglas* and Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981), represent the "most commonly applied framework for litigating an employment discrimination lawsuit").

51. *See* McGinley, *supra* note 36, at 220-21.

52. For a detailed description of the evolution of *McDonnell Douglas* in subsequent Supreme Court decisions, see Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Wither* McDonnell Douglas*?*, 53 EMORY L.J. 1887, 1892-1903 (2004).

53. 450 U.S. 248 (1981).

54. *Id.* at 253.

55. 509 U.S. 502 (1993).

56. *Id.* at 511.

57. *See id*.

58. 530 U.S. 133 (2000).

59. *Id.* at 148-49.

60. *See* Katz, *supra* note 32, at 121 (stating that a plaintiff must show that the adverse action occurred "because of" a protected characteristic).

61. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

62. *See* Katz, *supra* note 32, at 130 (describing the chain of inference as moving from "error, to lie, to cover-up, to discrimination").

63. *Reeves*, 530 U.S. at 147 (internal citations omitted).

attempts to prove causation in an employment discrimination case can be especially difficult,[64] and can be shown in one of two ways: "but for" or "motivating factor" causation.[65] Thus, the effect of the *McDonnell Douglas* framework is to provide an individual bringing suit against an employer with a target, or something to aim at in order to "smoke"[66] out an employer's unlawful act.[67]

Although the Supreme Court has not directly addressed the application of *McDonnell Douglas* to a motion for summary judgment, the Court provided some guidance on the question in *Reeves*, concerning determinations of sufficiency of the evidence and motions for judgment as a matter of law.[68] There, the Court indicated that considerations of the evidence on a Rule 50 motion should adhere to the following principles: the court should review all the evidence in the record, as opposed to just the reasonable inferences favoring the nonmoving party;[69] the court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence;"[70] and because credibility determinations and weighing the evidence are functions of the jury, the court should "give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached.'"[71]

B. Summary Judgment in Maine

Summary judgment law in Maine is well-established. "Summary judgment is appropriate when the portions of the record referenced in the statements of material fact disclose no genuine issues of material fact and reveal that one party is entitled to judgment as a matter of law."[72] A factual dispute is material if it could impact the outcome of the suit.[73] Absent a factual dispute, there is no need for trial.[74]

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64. *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.8 (1981) ("[T]he allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."). Indeed, "the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by." Price Waterhouse v. Hopkins, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring).

65. *See* Katz, *supra* note 32, at 122 (noting that "a factor is a 'motivating factor' where it has some causal influence but does not rise to the level of 'but for'"). Although inapplicable to this case, with respect to claims of retaliation brought under federal law, the Supreme Court recently held that a plaintiff "must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013). In *Nassar*, the Court distinguished "status-based discrimination" from "employer retaliation" on account of protected activity and concluded that for textual and structural reasons, Title VII's lessened causation standard under 42 U.S.C. § 2000e-2(m) applies only to claims of the former type. *See id.* at 2533.

66. *See Price Waterhouse*, 490 U.S. at 266 (O'Connor, J., concurring) (requiring an employer to demonstrate at the second step of the analysis that "despite the smoke, there is no fire").

67. *See* Katz, *supra* note 32, at 124-25 (describing the "target" analogy).

68. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000) (noting that the standards for granting summary judgment mirror the standards for granting judgment as a matter of law).

69. *Id*.

70. *Id*.

71. *Id*. at 151.

72. *See* ME. R. CIV. P. 56(c); Currie v. Indus. Sec., Inc., 2007 ME 12, ¶ 11, 915 A.2d 400.

73. Arrow Fastener Co. v. Wrabacon, 2007 ME 34, ¶ 15, 917 A.2d 123.

Furthermore, "evidentiary inferences based on credibility or weight are impermissible."[75] In short, summary judgment in Maine is only available in "those instances where the facts properly proffered would be flatly insufficient to support a judgment in favor of the nonmoving party as a matter of law."[76]

C. Application of McDonnell Douglas *to Maine's Employment Discrimination Cases Facing Disposition at Summary Judgment*

With the purpose of preventing "discrimination in employment, housing or access to public accommodations on account of race, color, religion, ancestry or national origin,"[77] the Maine Legislature enacted the Maine Human Rights Act in 1971, following enactment of federal antidiscrimination statutes and corresponding case law interpreting those statutes.[78] By adopting safeguards in conformity with federal antidiscrimination statutes, the Maine Legislature intended courts to reference federal case law to "provide significant guidance in the construction of [the] statute."[79]

The Law Court first applied the *McDonnell Douglas* framework in *Maine Human Rights Commission v. City of Auburn*,[80] a case concerning two female applicants for police officer positions with the City of Auburn.[81] Alleging sex discrimination in violation of the Maine Human Rights Act,[82] the Law Court reviewed judgment for the defendant *post-trial*. In an extensive opinion, Chief Justice McKusick articulated the unique method by which courts in Maine should evaluate employment discrimination evidence after trial, especially in light of federal legislation and case law.[83] The Law Court identified the Supreme Court's *McDonnell Douglas* opinion as the primary source of a "special methodology" by which courts should evaluate evidence in disparate treatment employment discrimination cases.[84] The Law Court held that judges should apply the "three-stage" framework[85] "to the whole evidence presented by the parties" as the "proper method for evaluating the evidence presented at trial for cases arising under the

74. *See* Stanley v. Hancock Cnty. Comm'rs, 2004 ME 157, ¶ 19, 864 A.2d 169 ("A cornerstone of the rationale for having a summary judgment process is that a trial is not warranted if a party cannot identify admissible evidence that establishes an actual factual dispute.").

75. *Arrow Fastener Co.*, 2007 ME 34, ¶ 16, 917 A.2d 123 (citation omitted).

76. *Id*. ¶ 18.

77. P.L. 1971, ch. 501, § 1 (codified as amended at 5 M.R.S.A. § 4592 (1973)).

78. *See* Me. Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1261 (Me. 1979).

79. *Id*. (citations omitted).

80. *Id.*

81. *Id.* at 1257.

82. *Id*.

83. *Id*. at 1261. *See id*. at 1262 n.13 (cautioning that the evaluation method discussed by the court does not concern "the order of evidence at trial or trial tactics," but rather is a tool by which judges evaluate "*after* the trial is over . . . *all* the evidence to determine whether unlawful discrimination has been proved.").

84. *Id*. at 1261.

85. *See id*. at 1262 (stating that the burden of persuasion remains at all times with the plaintiff, who may assist the judge in rejecting the employer's legitimate, nondiscriminatory reason "by offering affirmative evidence of pretext *or* by the strength of the inference of discrimination arising from the plaintiff's prima facie case," and that the judge's own credibility assessment of witnesses may justify rejection of the employer's reason).

Maine Human Rights Act."[86]

The Law Court's first application of the *McDonnell Douglas* analysis to review of a motion for summary judgment in an employment discrimination case appeared in the 2003 case of *Doyle v. Department of Human Services*.[87] An employee for the State of Maine, Doyle asserted claims of discrimination, retaliation, and hostile work environment under the Maine Human Rights Act,[88] following her surgery and return to work.[89] Doyle argued that DHS discriminated against her by failing to provide reasonable accommodations for her medical condition and then retaliated against her by subjecting her to a hostile work environment because of her complaints and requests for assistance.[90] On her claims of discrimination and retaliation, the Law Court held that DHS was entitled to summary judgment because Doyle failed to generate an issue of material fact that the reasons given for her termination were pretextual.[91]

The Law Court has since applied the *McDonnell Douglas* analysis at the summary judgment stage in six cases.[92] The Law Court has stated that in order to survive a defense motion for summary judgment under the *McDonnell Douglas* analysis, plaintiffs must "establish[] a factual dispute as to whether a causal connection exists" between protected activity and an adverse employment action.[93] In addition, a claim for employment discrimination will not survive summary judgment if a plaintiff "relies on mere 'conclusory allegations, improbable inferences, and unsupported speculation.'"[94] Instead, a plaintiff must "assert sufficient facts, supported in the summary judgment record, from which a

86. *Id*. at 1268.

87. 2003 ME 61, ¶¶ 14-15, 824 A.2d 48.

88. 5 M.R.S.A. §§ 4551-4634 (2013).

89. Doyle v. Dep't of Human Servs., 2003 ME 61, ¶ 7, 824 A.2d 48.

90. *Id*.

91. *Id*. ¶¶ 18, 22. The court also held that the trial court properly granted summary judgment because Doyle failed to comply with the requirements of Rule 56(h)(2). *See id*. ¶ 13.

92. *See* Fuhrmann v. Staples the Office Superstore E., Inc., 2012 ME 135, ¶¶ 13, 21, 58 A.3d 1083 (holding that in its entirety, Fuhrmann produced sufficient evidence showing weaknesses and inconsistencies in the legitimate, nondiscriminatory reasons offered by Staples so as to generate an issue of fact, thereby precluding summary judgment); Daniels v. Narraguagus Bay Health Care Facility, 2012 ME 80, ¶¶ 14, 22, 45 A.2d 80 (holding that "even if one party's version of events appears more credible and persuasive to the court, the competing inferences" drawn from temporal proximity of the adverse action created a triable issue on the retaliation claim, thereby precluding summary judgment); Cookson v. Brewer Sch. Dep't, 2009 ME 57, ¶¶ 15, 25, 974 A.2d 276 (holding that summary judgment was inappropriate because Cookson produced sufficient evidence for a fact-finder to reasonably conclude that the school district's decision was not based on Cookson's conduct, but instead motivated by discrimination); Currie v. Indus. Sec., Inc., 2007 ME 12, ¶¶ 13, 28, 915 A.2d 400 (holding that there was sufficient temporal proximity between protected activity and discharge, as well as additional evidence of causation to preclude the grant of summary judgment); LePage v. Bath Iron Works Corp., 2006 ME 130, ¶¶ 19, 25, 909 A.2d 629 (holding that LePage failed to make out a prima facie case because he did not suffer from an adverse employment action); Stanley v. Hancock Cnty. Comm'rs, 2004 ME 157, ¶¶ 12, 26, 864 A.2d 169 (holding that the summary judgment record failed to establish a genuine issue of disputed fact on the issue of causation under the WPA claim when Stanley failed to contradict in his statement of material facts that his poor performance was not the reason for his discharge).

93. *Stanley*, 2004 ME 157, ¶ 24, 864 A.2d 169.

94. *Cookson*, 2009 ME 57, ¶ 22, 974 A.2d 276 (quoting Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)).

reasonable fact-finder *could* disbelieve the employer's proffered rationale and conclude that illegal discrimination was the true motivating factor."[95] The court has also stated that a plaintiff can meet his or her burden of production by presenting affirmative evidence of "weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and . . . infer that the employer did not act for the asserted non-discriminatory reasons."[96]

III. *TROTT V. H.D. GOODALL HOSPITAL*

A. Factual Background

H.D. Goodall Hospital, a not-for-profit hospital located in Sanford, Maine, employed Claire Trott as a nurse from 1989 until March 2009,[97] when the Hospital terminated Trott's employment.[98] In December 2007, a patient died during Trott's shift,[99] and Trott subsequently spoke with the deceased patient's daughter, speculating as to potential causes of death including a possible morphine overdose.[100] Soon thereafter, the patient's estate initiated a wrongful death suit against the Hospital.[101]

Between 1998 and 2007, the Hospital's performance evaluations of Trott were consistently positive.[102] In 2007, and just prior to the patient's death, the Hospital installed a new computer system to maintain patient records; the system was complex and nurses had difficulty navigating and using the new software.[103] One year later, in October 2008, the Hospital gave Trott a 1.5% raise after a positive performance evaluation, but she was advised that she needed improvement in the areas of patient assessment and medication documentation.[104] Trott achieved the necessary improvement in the areas specified and the Hospital awarded Trott an additional 1.5% raise in January 2009.[105] One month later, Trott participated in a deposition in connection with the wrongful death suit.[106] In preparation for the deposition, the Hospital's attorney indicated to Trott that she was to blame for the wrongful death suit against the Hospital because Trott suggested to the patient's family that a morphine overdose was a possible cause of death.[107]

The plaintiff's attorney took Trott's deposition testimony concerning her observations of the patient prior to his death, as well as the associated entries that

95. *Cookson*, 2009 ME 57, ¶ 23, 974 A.2d 276.

96. *Id.* ¶ 17 (quoting Billings v. Town of Grafton, 515 F.3d 39, 55-56 (1st Cir. 2008)).

97. Brief of Plaintiff-Appellant, *supra* note 6, at 1.

98. *Id*.

99. *Id*. at 7.

100. *Id*.

101. Brief of Defendant-Appellee at 3, Trott v. H.D. Goodall Hosp., 2013 ME 33, 66 A.3d 7 (No. YOR-12-213).

102. Brief of Plaintiff-Appellant, *supra* note 6, at 1-3.

103. *Id*. at 3-4. *See also id*. at 19 (indicating that the software included a feature which allowed the automatic recall of prior patient assessments for use as current assessments).

104. *Id*. at 8.

105. *Id*.

106. *Id*.

107. *Id*. at 8-9.

Trott made in the computer medical record to reflect the patient's status.[108] Trott was not shown any of the patient's charts prior to her deposition testimony.[109] The attorney proceeded to elicit testimony from Trott that conflicted with the patient's record: Trott testified that the patient was asleep,[110] whereas the plaintiff's attorney pointed out that the medical record indicated that the patient was "alert, oriented times three" and had an "unsteady gait."[111] When asked to explain the discrepancy between her visual observation and the computer entry, Trott testified that "this electronic thing is new to me . . . I don't know how to explain it."[112] Trott further testified that the computer entry was not based on a contemporaneous observation of the patient, but that she had been relying on her recent memory of the patient from church when she entered the information into the computer.[113] Although a few Hospital administrators indicated to Trott that they knew she had not made the erroneous entries on purpose,[114] Trott was discharged from her employment with the Hospital on March 26, 2009, the day after she reviewed and signed her deposition transcript.[115]

The Hospital sent Trott a letter formally terminating her employment on the grounds that the medical record entry Trott described in her deposition constituted a falsification of a patient medical record which is a terminable offense within the meaning of the Hospital's Conduct and Discipline policy.[116] A subsequent letter to the state nursing board, required by law, cited additional grounds for discharge, including the same issues identified in Trott's most recent performance evaluation: the need for improvement in documentation and medication administration.[117]

B. Procedural History

Trott filed a complaint against the Hospital alleging that, when the Hospital discharged her as a result of her deposition testimony in the wrongful death lawsuit, it violated the Whistleblower Protection Act.[118] The Hospital moved for summary judgment, asserting no dispute regarding the fact that it discharged Trott because of her allegedly undisputed deposition testimony evidencing the fact that she falsified a patient's medical record.[119] The Hospital further argued that Trott presented no evidence of pretext.[120] Trott opposed the motion and asserted that a jury could

108. *Id*. at 9.
109. *Id*.
110. *Id*.
111. Brief of Defendant-Appellee, *supra* note 101, at 4.
112. *Id*.
113. *Id*.
114. *See* Brief of Plaintiff-Appellant, *supra* note 6, at 12 (noting that Trott testified that Hospital staff told Trott that she did not falsify the medical record).
115. *Id*. at 12.
116. *See* Brief of Defendant-Appellee, *supra* note 101, at 8; *see also id*. at 3 (describing the fact that "recording of false information is classified as a 'major breach' of Goodall policy" and grounds for termination).
117. *See id*. at 9 (identifying "patient assessment, reassessment, clinical judgment, and documentation" as grounds for discharge).
118. *See* Brief of Defendant-Appellee, *supra* note 101, at 9.
119. *Id*. at 11.
120. *Id*.

reasonably conclude that either a software glitch caused the errors in the patient's record or that Trott simply entered the wrong information.[121] The Superior Court granted summary judgment because it concluded that Trott failed to carry her burden to produce evidence that the Hospital discharged her because she participated in the deposition and suit against the Hospital.[122] Trott appealed.[123]

C. Arguments on Appeal

Trott argued on appeal that the Hospital's claim that she falsified a medical record served as pretext to terminate her employment in retaliation for the deposition testimony she gave in the wrongful death suit.[124] Trott further alleged that the reason behind the improper medical record entry may have been that she mistakenly entered the wrong information into the computer,[125] and that there was sufficient evidence to show that the computer medical record system was error prone.[126] Trott also contended that because counsel for the Hospital did not review the deceased patient's medical records with her prior to her deposition, she became flustered during questioning and offered conflicting reasons for the discrepancy.[127] Furthermore, Trott asserted that because the adverse employment action occurred in close proximity to conduct protected under the statute, the burden shifted to the Hospital to show a legitimate, nondiscriminatory reason for the discharge.[128] Finally, Trott argued that there was sufficient evidence of pretext: the medical record falsification reason produced by the Hospital was weak; the Hospital offered contradictory reasons for discharge on appeal as compared with its letter to the state nursing board; the Hospital's treatment of Trott was inconsistent with that of other nurses on staff; and the Hospital exhibited animus towards Trott.[129]

The Hospital argued, in contrast, that it terminated Trott's employment as a result of her admissions made during the wrongful death suit deposition, and more specifically, that Trott entered "information into a patient's medical record without actually assessing the patient in the hospital."[130] The Hospital contended that there was no factual dispute concerning the substance of Trott's deposition testimony and that the actions she admitted to as part of the deposition constituted a violation of Hospital policy, thereby supporting grounds for termination.[131] Finally, the Hospital argued that Trott had conceded on appeal the legitimacy of the Hospital's non-retaliatory reason and waived any further challenge to the sufficiency of the

121. *See* Brief of Plaintiff-Appellant, *supra* note 6, at 19. However, the Hospital's policy did not distinguish between a recording error and an intentional falsification of a medical record. *See* Brief of Defendant-Appellee, *supra* note 101, at 3.

122. Trott v. H.D. Goodall Hosp., 2013 ME 33, ¶ 10, 66 A.3d 7.

123. *Id*.

124. *See* Brief of Plaintiff-Appellant, *supra* note 6, at 14.

125. *Id*. at 10.

126. *Id*. at 19.

127. *Id*. at 20.

128. *Id*. at 15.

129. *Id*. at 21-24. Trott asserted that on appeal, the Hospital did not include the additional reasons for discharge (poor documentation and medication administration) which it had asserted to the State Board of Nursing, suggesting further evidence of pretext. *See id*. at 23.

130. Brief of Defendant-Appellee, *supra* note 101, at 16.

131. *Id*.

Hospital's evidence by failing to dispute the Hospital's rationale in her memorandum of law in opposition to the Hospital's motion for summary judgment.[132] For these reasons, the Hospital asserted that the only issue on appeal was whether there were genuine issues of material fact concerning pretext,[133] and that summary judgment was properly granted because Trott failed to produce evidence that the Hospital based its decision on Trott's participation in the wrongful death suit as opposed to her admissions made within the deposition itself.[134]

D. Decision of the Law Court

The Maine Human Rights Act provides an employee with a cause of action against an employer for discrimination resulting from an employee's participation in a court action.[135] Writing for the majority, Justice Levy concluded that summary judgment had been granted in error because Trott met her burden of production for each element of her claim, and further established a genuine issue of material fact as to the existence of a "causal link" between her WPA protected activity and her discharge.[136]

Invoking the analysis used in prior employment discrimination cases, the court applied the three-step *McDonnell Douglas* burden-shifting framework to evaluate "whether Trott presented sufficient evidence to withstand summary judgment . . . ."[137] Citing the "temporal nexus" analysis of *Watt v. UniFirst Corp.*,[138] the court concluded that Trott met her initial burden of showing a prima facie case of discrimination: Trott produced evidence that the Hospital discharged her forty-one days after she participated in the deposition, and one day after she signed her deposition.[139] Pointing to the noncontemporaneous observations of the patient that Trott used to make the computer medical record entry, as well as evidence that making such an entry constituted falsification of a medical record and a terminable offense, the court concluded that the Hospital met its burden to produce evidence of a legitimate, nondiscriminatory reason for discharging Trott.[140] At that point, the court stated that the burden of production shifted back to Trott to "present evidence that the Hospital's stated reason for her discharge—the falsification of records—

132. *Id*. at 18-19.

133. *Id*. at 18.

134. *Id*. at 22. The Hospital further argued that there was no evidence that Trott was treated differently from other nurses or that the Hospital advanced contradictory reasons for her discharge, and that the temporal proximity of her discharge and deposition testimony was not evidence of causation because her admissions of misconduct occurred at the same time as her protected activity. *See id*. at 27-30.

135. *See* 5 M.R.S. §§ 4572(1)(A), 4621 (2013); 26 M.R.S. § 833(1)(C) (2013). For an in-depth discussion of the history of the Maine Human Rights Act, see Katherine I. Rand, *Taking Care of Business and Protecting Maine's Employees: Supervisor Liability for Employment Discrimination Under the Maine Human Rights Act*, 55 ME. L. REV. 427, 442-43 (2003).

136. Trott v. H.D. Goodall Hosp., 2013 ME 33, ¶ 25, 66 A.3d 7.

137. *Id*. ¶¶ 14-15.

138. 2009 ME 47, ¶ 33, 969 A.2d 897.

139. *Trott*, 2013 ME 33, ¶ 16, 66 A.3d 7.

140. *Id*. ¶ 17.

was a pretext."[141]

In order for the case to survive summary judgment, the court noted that it would have to conclude that "no reasonable fact-finder could find pretext on the summary judgment record."[142] Trott, therefore, was required to present "sufficient evidence to raise a genuine issue of fact regarding the employer's motivation for the adverse employment action."[143] For there to be a genuine issue of material fact, the court indicated that the evidence would require "a fact-finder to choose between competing versions of the truth."[144]

The Law Court then articulated three principles to guide lower courts considering employment discrimination cases on summary judgment: First, the court noted that "it is a failure of proof, and not the weight that might be assigned to the proof" that determines the appropriateness of summary judgment.[145] Second, the court noted that direct evidence of discrimination is rarely available in employment discrimination cases, and that these cases turn on credibility determinations and circumstantial evidence.[146] Credibility determinations, the court stated, are inappropriate at the summary judgment stage when undisputed facts are gleaned from a paper record as opposed to live witness testimony.[147] Additionally, the court was careful to note that circumstantial evidence can give rise to competing inferences.[148] Third, when evaluating the summary judgment record, courts should distinguish between a "weak case of pretext" and "no case."[149] The court went on to state that judges should evaluate an employee's proof with an "awareness that reasonable jurors can and often do disagree as to both the weight and meaning of evidence."[150] Using these principles, the court then articulated three ways in which a reasonable juror could find the Hospital's discharge of Trott to be pretextual.[151] When "[v]iewed from the perspective of the full range of reasonable perceptions of the summary judgment record," the court concluded that Trott "established a genuine issue of material fact as to the existence of a 'causal link' between her WPA-protected activity and her discharge,"[152] and that Trott had therefore met her burden of production on all the elements of her WPA claim.[153] The court vacated the judgment and remanded for further

141. *Id*.
142. *Id*. ¶ 18.
143. *Id*.
144. *Id*. (citation omitted).
145. *Id*. ¶ 19.
146. *Id*.
147. *Id*.
148. *Id*.
149. *Id*. ¶ 20.
150. *Id*.
151. *Id*. ¶¶ 22-24 (concluding that a juror could reasonably conclude that Trott's contradictory deposition testimony provided a weak basis for the Hospital's stated belief that Trott falsified a medical record; that a reasonable juror could conclude that the Hospital believed Trott had made some kind of negligent error, which would contradict its contention that it discharged Trott for falsifying a record; and Trott's receipt of a merit raise just prior to her deposition testimony could lead a reasonable juror to conclude that the grounds for discharge listed in the letter to the nursing board were evidence of pretext to "conceal a true, unlawful reason for the discharge").
152. *Id*. ¶ 25.
153. *Id*. ¶ 26.

proceedings.[154]

E. The Concurrence

Although concurring in the court's judgment, Justice Silver wrote separately to reaffirm the position that courts "should not apply the three-step, burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green* to discrimination claims at the summary judgment stage."[155] The concurrence first emphasized that weight or credibility determinations are "inappropriate at the summary judgment stage," and that courts must be especially cautious in employment discrimination cases because "issues of motive and intent are present and turn on circumstantial evidence from which reasonable jurors could draw competing, plausible inferences."[156] The concurrence then framed the *McDonnell Douglas* analysis as "merely a procedural device that 'does nothing more than organize the record to determine whether the plaintiff has offered evidence of causation between the employer's adverse action and the employee's [protected status or activity], and whether the defendant has offered evidence to put that issue into dispute.'"[157]

Calling the burden-shifting analysis under *McDonnell Douglas* a "rigid and artificial trifurcation of the causation analysis,"[158] the concurrence asserted that in employment discrimination cases, courts need only engage in the straightforward inquiry provided by the Rules of Civil Procedure: whether the plaintiff has shown a genuine issue of material fact,[159] and whether there exists a prima facie cause of action.[160] The concurrence asserted that the *McDonnell Douglas* analysis "confuses rather than clarifies the ultimate issue in employment discrimination cases: whether there is evidence of discrimination"[161] and further questioned the continued application of the *McDonnell Douglas* analysis on the basis that it is a distraction.[162]

IV. ANALYSIS

The holding in *Trott*—that summary judgment is inappropriate in employment discrimination cases in Maine when a plaintiff offers sufficient evidence to show the presence of a genuine issue of material fact from which a reasonable juror could find pretext—is justified by the purposes behind the *McDonnell Douglas* framework, the line of Maine cases preceding *Trott* which apply the *McDonnell Douglas* analysis at summary judgment, and finally, the familiarity of the analysis within the common experience of Maine lawyers and judges. Indeed, *Trott* stands

154. *Id*.
155. *Id*. ¶ 28 (Silver, J., concurring).
156. *Id*. ¶ 27.
157. *Id*. ¶ 28 (citation omitted).
158. *Id*.
159. *See* ME. R. CIV. P. 56(c).
160. *Trott*, 2013 ME 33, ¶ 29, 66 A.3d 7.
161. *Id*. ¶ 28 (quoting Daniels v. Narraguagus Bay Health Care Facility, 2012 ME 80, ¶ 29, 45 A.3d 722).
162. *See id.* (affirming that summary judgment in employment discrimination matters is only appropriate if "no reasonable juror could conclude that the plaintiff proved her claim of discrimination" when viewing the record in the light most favorable to the plaintiff).

for the proposition that when employee-plaintiffs produce some evidence of a dispute on the issue of pretext, with adequate summary judgment record support, the case should proceed to trial.[163] Thus, the criticisms of *McDonnell Douglas* as being impractical and cumbersome cannot overcome the underlying policies and purposes of the analysis, nor do they support abandoning its application in Maine employment discrimination cases at summary judgment.

Pretext is the ultimate issue in almost every disparate treatment employment discrimination case;[164] it is the crux of the case.[165] Whereas the question of pretext allows a fact-finder at trial to consider both the credibility of an employer's proffered nondiscriminatory reason as well as the evidence educed at trial, the *Trott* court correctly distinguished that the summary judgment inquiry only permits a judge to determine whether the plaintiff has put forward sufficient evidence from which a reasonable fact-finder *could* disbelieve an employer's proffered rationale and conclude that discrimination motivated the result.[166] In the *McDonnell Douglas* context, the latter inquiry only *appears* to be a credibility determination because the burden of production has most recently shifted *from* the defendant *back* to the plaintiff, suggesting that the plaintiff *also* holds the burden as the nonmoving party on the motion for summary judgment.[167] Thus, the unusual order and allocation of proof for employment discrimination cases facing disposition at summary judgment may serve as one of the primary sources of the general confusion and criticism.[168]

As conceived by the Supreme Court, the original purpose of the *McDonnell Douglas* analysis was to assist the plaintiff in surfacing the unlawful motivation that may have prompted an employer's adverse action.[169] Using circumstantial evidence, the framework permits a fact-finder to draw the inference that an employer's reason for discharge is not believable, and therefore, that the employee was the victim of discrimination.[170] Although the inquiry is binary, in that it presents a yes or no question for the fact-finder concerning the employer's asserted

163. *See* Hodgens v. Gen. Dynamics Corp., 144 F.3d 151, 167 (1st Cir. 1998) (stating that "where a plaintiff in a discrimination case makes out a prima facie case and the issue becomes whether the employer's stated nondiscriminatory reason is a pretext for discrimination, courts must be 'particularly cautious' about granting the employer's motion for summary judgment.").

164. *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000). *See also* Chin, *supra* note 34, at 679 (stating that the focus of a summary judgment determination should be on the "ultimate issue" – whether a reasonable jury could find that "more likely than not, the employer's decision was motivated at least in part by discrimination").

165. *See* Katz, *supra* note 32, at 125 n.64 (citing commentators who place emphasis on the pretext prong of the analysis as the focus of the "action").

166. *See* Cookson v. Brewer Sch. Dep't, 2009 ME 57, ¶ 23, 974 A.2d 276.

167. *See* McGinley, *supra* note 36, at 241 ("Many courts approaching a summary judgment motion in a civil rights case . . . require a plaintiff to prove that she was discriminated against.").

168. *See, e.g.*, Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1221 (10th Cir. 2003) (Hartz, J., concurring) (distinguishing the burden-shifting analysis from the usual procedure at summary judgment to "set forth the elements of the plaintiff's cause of action and then determine whether there is sufficient evidence for a reasonable person to find that each element has been proved.").

169. *See* McGinley, *supra* note 36, at 215 (stating that the Supreme Court recognized that showing intent to discriminate is "difficult to prove absent a smoking gun").

170. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993).

reason,[171] the proof structure was never intended as an inflexible model from which courts and lawyers should not deviate.[172]

Despite laudable goals, *McDonnell Douglas* has many critics.[173] The criticisms of the *McDonnell Douglas* analysis fall into three categories: First, some critics argue that the analysis only functions where an employer's reason is false or was driven by conscious discrimination.[174] Second, others assert that the framework is a distracting and formalistic procedural overlay that encourages lawyers and judges to compartmentalize evidence at the expense of the big picture.[175] And third, critics suggest that the analysis operates as a waste of time,[176] while promoting judicial error and poor lawyering.[177]

In light of these criticisms, the concurrence in *Trott* argues that continued application of the *McDonnell Douglas* analysis in Maine's employment discrimination cases at summary judgment has the procedural consequence of encouraging juries, lawyers, and judges to take their eye off of the ball.[178] The critique is that the framework takes the focus off of the ultimate issue, and instead, places it on the "ping pong-like match"[179] of shifting burdens.[180] There is support for the concurrence's argument that what began as a method of proof to assure plaintiffs their day in court,[181] has evolved into a cumbersome eight-part framework.[182]

Reversion to a "standard" Rule 56 inquiry would be inconsistent with the goal of eliminating workplace discrimination.[183] A court's use of such an analysis, as

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171. *See* Zimmer, *supra* note 52, at 1897-98 (indicating that the *McDonnell* analysis has been termed the "circumstantial evidence" test, the "indirect" method of proof, the "pretext" method, and the "single motive" method).

172. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

173. *See* Katz, *supra* note 32, at 113 n.15 (providing a sampling of scholarly criticisms).

174. *See id*. at 178-79 (asserting that the *McDonnell Douglas* analysis only operates where the employer's proffered reason is false or a product of conscious discrimination).

175. *See id*. at 168 (indicating judges and juries "get so caught up in the mechanics of burden-shifting and pretext" that they lose sight of the ultimate question). The concurrence in *Trott* would likely fall into this category. *See* Trott v. H.D. Goodall Hosp., 2013 ME 33, ¶ 28, 66 A.3d 7 (Silver, J., concurring).

176. Wells v. Colo. Dep't of Transp., 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz, J., concurring) ("To be sure, proof of the prima facie case put the burden on the employer to produce evidence of a proper motive. But doesn't the employer almost always do that . . . so what has been accomplished?").

177. *See id*. at 1221 (asserting that "the artificiality of the framework exacts a significant, unnecessary expense—in terms of both wasted judicial effort and greater opportunity for judicial error.").

178. Chin & Golinsky, *supra* note 14, at 660 ("The *McDonnell Douglas* test . . . actually invites juries and courts to lose sight of the ultimate issue by focusing their attention away from the existence or non-existence of discrimination.").

179. Chin, *supra* note 34, at 677.

180. *See id*. at 681 (criticizing plaintiff's lawyers who do not focus sufficiently on proof of the ultimate issue of discrimination, and instead rely too heavily on the analysis to do the yeoman's work of constructing the case).

181. *See* Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979) ("Proof of the *McDonnell Douglas*-type prima facie case assures the plaintiff his day in court despite the unavailability of direct evidence . . . .").

182. *See* Chin, *supra* note 34, at 678.

183. Such an approach might entail, "first, evaluating plaintiff's proof, direct or otherwise, of discrimination; second evaluating defendant's proof that it did not discriminate . . . ; and third,

applied to a paper record, could substantively deprive plaintiffs of the opportunity to focus the question of causation (before a jury) on the issue of pretext in response to an employer's alleged legitimate, nondiscriminatory reasons for undertaking an adverse employment action. In the name of simplifying the inquiry from a judge's point of view, the burden on the plaintiff would increase and would represent a shift in the substantive law. Moreover, whereas a traditional prima facie case at summary judgment requires a plaintiff to demonstrate that she can meet the burden of production for each element of a claim under the substantive law,[184] a "prima facie case" in the employment discrimination context represents only the first part of a three-part analysis specifically designed to surface circumstantial evidence of intentional discrimination. The concurrence in *Trott* falls victim to the ambiguity in the phrase "prima facie case,"[185] and neglects to consider the substantive law impact of discarding the requirement that an employer select and assert a nondiscriminatory reason which the plaintiff can then attempt to show as pretext.[186] Thus, first principles of summary judgment, the line of employment discrimination cases in Maine applying *McDonnell Douglas* at summary judgment, the fact that the framework forces the defendant to articulate a nondiscriminatory reason which the plaintiff can then refute by producing evidence showing a genuine dispute of material fact, and the familiarity of the analysis among Maine lawyers and judges all support continued application of *McDonnell Douglas* at summary judgment.[187]

The *Trott* majority recognized the criticisms of the analysis and used the opinion as an opportunity to sharpen the effectiveness of the *McDonnell Douglas* inquiry, thereby signaling to lawyers and judges that the burden-shifting analysis is a valuable interpretive device, when properly applied. The *Trott* court set forth three guiding principles that courts should follow when deciding employment discrimination cases at summary judgment. After determining whether the parties have complied with the requirements of Rule 56(h)(2), courts should first refrain from weighing the evidence presented by either side.[188] Second, courts should not engage in credibility determinations at summary judgment because circumstantial

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evaluating the evidenced as a whole," and in the context of summary judgment, resolve "all conflicts in the proof and drawing all reasonable inferences in favor of the plaintiff." Chin & Golinsky, *supra* note 14, at 673.

184. *See* Trott v. H.D. Goodall Hosp., 2013 ME 33, ¶ 29, 66 A.3d 7 (Silver, J., concurring) (citation omitted).

185. *See id.* (asserting that the straightforward inquiry asks whether the undisputed material facts establish a prima facie cause of action).

186. *See* McGinley, *supra* note 36, at 244 ("The *McDonnell Douglas*/*Burdine* formula is the substantive anti-discrimination law." And, *Liberty Lobby* requires that courts consider the substantive law in summary judgment determinations.).

187. Indeed, the approach suggested by the concurrence has been followed in only two other states. *See* Curlee v. Kootenai Cnty. Fire & Rescue, 224 P.3d 458, 463 (Idaho 2008) (concluding that while the burden-shifting analysis is applicable at trial, it should not be applied at summary judgment); Heng v. Rotech Med. Corp., 688 N.W.2d 389, 401 (N.D. 2004) (stating that *McDonnell Douglas* has "little or no application at the summary judgment stage"); Gossett v. Tractor Supply Co., 320 S.W.3d 777, 785 (Tenn. 2010) (holding that "the *McDonnell Douglas* framework is inapplicable at the summary judgment stage because it is incompatible with Tennessee summary judgment jurisprudence."), *superseded by statute*, Discrimination-Retaliatory Discharge-Claims, ch. 461, 2011 Tenn. Pub. Acts § 2 (2011) (codified at TENN. CODE ANN. § 50-1-304(g) (West, Westlaw through 2013 legislation)).

188. *See Trott*, 2013 ME 33, ¶ 19, 66 A.3d 7.

evidence can give rise to competing inferences.[189] Third, courts should clearly distinguish between "weak" cases of pretext and the absence of any case at all.[190] And finally, courts should view the evidence "from the perspective of the full range of reasonable perceptions of the summary judgment record."[191] In spite of any potential difficulty in applying *McDonnell Douglas,* the majority's final instruction to view the entirety of the summary judgment record reminds and encourages lawyers and judges to remain focused on the "ultimate issue."[192]

V. CONCLUSION

Few meritorious employment discrimination claims make their way to court, let alone to trial.[193] The Law Court's articulation of the *Trott* guiding principles indicates that the *McDonnell Douglas* analysis should continue to be applied in Maine employment discrimination cases facing disposition at summary judgment, and that the threshold for plaintiffs to survive summary judgment should not be insurmountable. The analysis supports congressional and judicial policy objectives aimed at assisting plaintiffs who may be victims of employment discrimination. Furthermore, continued application of *McDonnell Douglas* at summary judgment necessarily targets the inquiry for all parties on the question of pretext. Thus, the court in *Trott* implicitly and properly affirmed that the analysis has sustained application at summary judgment. To hold otherwise would violate first principles of summary judgment and conflict with broader societal goals of discouraging employment discrimination.

189. *See id*. *See also* McGinley, *supra* note 36, at 256 (arguing that courts can reconcile the *McDonnell Douglas/Burdine* analysis at summary judgment by avoiding "automatically crediting defendants' reasons, drawing inferences in defendants' favor, deciding witnesses' credibility on paper and requiring plaintiffs to prove their cases at the summary judgment stage.").

190. *Trott*, 2013 ME 33, ¶ 20, 66 A.3d 7.

191. *Id.* ¶ 25. *See also* Me. Human Rights Comm'n v. City of Auburn, 408 A.2d 1253, 1268 (Me. 1979) (cautioning that judges should apply the *McDonnell Douglas* analysis to the "whole evidence presented").

192. *See supra* notes 164-165 and accompanying text.

193. *See* Katy Rand, *Maine Celebrates 40 Years of Anti-Discrimination Law: A Conversation with Maine Human Rights Commission Executive Director Patricia Ryan*, 26 ME. B.J. 77, 78 (2011) ("Complaints before the Commission are resolved in basically three ways: approximately one-third are administratively dismissed; one-third are settled prior to an investigation being completed or conciliated after a finding of reasonable grounds, and one-third receive a determination by the Commission that there are no reasonable grounds to believe unlawful discrimination occurred.").