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TROT 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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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. 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 They argue that the framework is outdated, overly mechanical, and unnecessary. In Trott v. H.D. Goodall Hospital, the court set forth three guiding principles for lawyers and judges to follow in employment discrimination cases facing disposition at summary judgment. 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. 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. 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. Pursuant to the Act, Trott

* J.D. Candidate, 2015, University of Maine School of Law. The author wishes to thank Professors Dmitry Bam and Melvyn Zarr for their invaluable feedback and guidance on this Note. In addition to his family and friends, the author is deeply appreciative of his colleagues on the Maine Law Review for their ongoing assistance and support. This Note is dedicated to the memory of Lawrence Solotoff (1945-2014), civil rights attorney and co-author of the treatise SEX DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORK PLACE (Law Journal Press 2014).

1. See infra note 87 and accompanying text.
2. See infra Part III.E.
4. See infra Part III.D.
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. The Hospital contended that it discharged Trott for falsification of a medical record in violation of Hospital policy.

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.

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. 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. Under *McDonnell Douglas*, a plaintiff bears the initial burden of establishing a “prima facie case” that unlawful discrimination motivated the employee’s discharge. After the employee meets this initial burden, the employer must produce evidence of a legitimate, nondiscriminatory reason for the adverse action. 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. 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. The Hospital conceded that Trott’s discharge was an adverse employment action. The Law Court further concluded that Trott’s deposition testimony was a “court action” within the meaning of the WPA. The question for the court was whether Trott had met her burden of production on the issue of causation. As a matter of substantive law interpretation of the WPA, the court applied the three-step burden-
shifting analysis of *McDonnell Douglas* and concluded that Trott had met her burden of production. 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, and that Trott was entitled to have her claim heard by a jury.

Two justices of the Law Court concurred in the result, but contended, as they had done a year earlier in another case, that Maine courts should no longer apply *McDonnell Douglas* at summary judgment in employment discrimination cases. 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* (applying *McDonnell Douglas* at summary judgment merely confuses the ultimate issue of whether there is evidence of employment discrimination). Questioning the “continued vitality of the burden-shifting analysis,” the concurrence reasserted that courts should return to the “straightforward and objective inquiry pursuant to Rule 56.”

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*, when deciding a motion for summary judgment in an employment discrimination case brought under state law. The question of the continuing vitality of the *McDonnell Douglas* analysis in employment discrimination cases at summary judgment is neither new, nor unique to Maine.
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
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).
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. 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.

The Supreme Court has refined the McDonnell Douglas analysis in later cases. In Texas Department of Community Affairs v. Burdine, 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.” In St. Mary’s Honor Center v. Hicks, 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. 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. However, in Reeves v. Sanderson Plumbing Products, Inc., 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.

Causation is a central requirement of proof in any disparate treatment claim. The McDonnell Douglas analysis directs the plaintiff to show causation by requiring a demonstration of “pretext.” The causation analysis relies on a set of successive inferences. 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.”

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


54. Id. at 253.


56. Id. at 511.

57. See id.


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).


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

64. See Tex. Dep’t of Cnty. 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

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. Wrabacoon, 2007 ME 34, ¶ 15, 917 A.2d 123.
Furthermore, “evidentiary inferences based on credibility or weight are impermissible.” 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.”

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,” the Maine Legislature enacted the Maine Human Rights Act in 1971, following enactment of federal antidiscrimination statutes and corresponding case law interpreting those statutes. 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.”

The Law Court first applied the McDonnell Douglas framework in Maine Human Rights Commission v. City of Auburn, a case concerning two female applicants for police officer positions with the City of Auburn. Alleging sex discrimination in violation of the Maine Human Rights Act, 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. 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. The Law Court held that judges should apply the “three-stage” framework “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.
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).
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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.
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’n,
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).
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.\textsuperscript{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.”\textsuperscript{96}

\section*{III. TROTT V. H.D. GOODALL HOSPITAL}

\subsection*{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,\textsuperscript{97} when the Hospital terminated Trott’s employment.\textsuperscript{98} In December 2007, a patient died during Trott’s shift,\textsuperscript{99} and Trott subsequently spoke with the deceased patient’s daughter, speculating as to potential causes of death including a possible morphine overdose.\textsuperscript{100} Soon thereafter, the patient’s estate initiated a wrongful death suit against the Hospital.\textsuperscript{101}

Between 1998 and 2007, the Hospital’s performance evaluations of Trott were consistently positive.\textsuperscript{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.\textsuperscript{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.\textsuperscript{104} Trott achieved the necessary improvement in the areas specified and the Hospital awarded Trott an additional 1.5\% raise in January 2009.\textsuperscript{105} One month later, Trott participated in a deposition in connection with the wrongful death suit.\textsuperscript{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.\textsuperscript{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

\textsuperscript{95} Cookson, 2009 ME 57, ¶ 23, 974 A.2d 276.
\textsuperscript{96} Id. ¶ 17 (quoting Billings v. Town of Grafton, 515 F.3d 39, 55-56 (1st Cir. 2008)).
\textsuperscript{97} Brief of Plaintiff-Appellant, supra note 6, at 1.
\textsuperscript{98} Id.
\textsuperscript{99} Id. at 7.
\textsuperscript{100} Id.
\textsuperscript{101} Brief of Defendant-Appellee at 3, Trott v. H.D. Goodall Hosp., 2013 ME 33, 66 A.3d 7 (No. YOR-12-213).
\textsuperscript{102} Brief of Plaintiff-Appellant, supra note 6, at 1-3.
\textsuperscript{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).
\textsuperscript{104} Id. at 8.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 8-9.
Trott made in the computer medical record to reflect the patient’s status. Trott was not shown any of the patient’s charts prior to her deposition testimony. The attorney proceeded to elicit testimony from Trott that conflicted with the patient’s record: Trott testified that the patient was asleep, 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.” 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.” 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. Although a few Hospital administrators indicated to Trott that they knew she had not made the erroneous entries on purpose, Trott was discharged from her employment with the Hospital on March 26, 2009, the day after she reviewed and signed her deposition transcript.

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. 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.

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. 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. The Hospital further argued that Trott presented no evidence of pretext. Trott opposed the motion and asserted that a jury could

108. Id. at 9.
109. Id.
110. Id.
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.
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.
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. For these reasons, the Hospital asserted that the only issue on appeal was whether there were genuine issues of material fact concerning pretext, 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.

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. 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.

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 . . . “. Citing the “temporal nexus” analysis of Watt v. UniFirst Corp., 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. 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. 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—
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.
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.” 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.” 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.’”

Calling the burden-shifting analysis under *McDonnell Douglas* a “rigid and artificial trifurcation of the causation analysis,” 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, and whether there exists a prima facie cause of action. 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” and further questioned the continued application of the *McDonnell Douglas* analysis on the basis that it is a distraction.

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).
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”).


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
intention to discriminate is “difficult to prove absent a smoking gun”).

reason, the proof structure was never intended as an inflexible model from which courts and lawyers should not deviate. Despite laudable goals, McDonnell Douglas has many critics. 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. 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. And third, critics suggest that the analysis operates as a waste of time, while promoting judicial error and poor lawyering.

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. The critique is that the framework takes the focus off of the ultimate issue, and instead, places it on the “ping pong-like match” of shifting burdens. There is support for the concurrence’s argument that what began as a method of proof to assure plaintiffs their day in court, has evolved into a cumbersome eight-part framework.

Reversion to a “standard” Rule 56 inquiry would be inconsistent with the goal of eliminating workplace discrimination. 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).
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, 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,” 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.

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.

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. Second, courts should not engage in credibility determinations at summary judgment because circumstantial...
evidence can give rise to competing inferences. Third, courts should clearly distinguish between “weak” cases of pretext and the absence of any case at all. And finally, courts should view the evidence “from the perspective of the full range of reasonable perceptions of the summary judgment record.” 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.”

V. CONCLUSION

Few meritorious employment discrimination claims make their way to court, let alone to trial. 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.”).