SHIFTING BURDENS AND THE AMERICANS WITH DISABILITIES ACT: WHY *MCDONNELL DOUGLAS* SHOULD APPLY TO THE ADA

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> I do not choose to be a common man. It is my right to be uncommon — if I can. I seek opportunity — not security. I do not wish to be a kept citizen, humbled and dulled by having the state look after me. I want to take the calculated risk; to dream and to build, to fail and to succeed. I refuse to barter incentive for a dole. . . . It is my heritage to stand erect, proud and unafraid; to think and act for myself, enjoy the benefit of my creations and to face the world boldly and say, this I have done. For our disabled millions, for you and me, all this is what it means to be an American.[1]

INTRODUCTION

Like Title VII of the Civil Rights Act of 1964 (Title VII),[2] the Age Discrimination in Employment Act of 1967 (ADEA),[3] and the Rehabilitation Act of 1973,[4] the Americans with Disabilities Act of 1990 (ADA)[5] provides protection against discrimination for many Americans. What is not clear, however, is how the burdens of production and persuasion are to be allocated between and among the parties in an ADA case brought under a disparate treatment theory of discrimination.[6] This Note will examine that issue. Specifically, it will provide a brief overview of the history, purposes, and coverage of the ADA, Title VII, the Rehabilitation Act, and the ADEA. Next, it will examine the development of the burden-shifting framework established by the Supreme Court for Title VII lawsuits, and it will analyze the various approaches to this issue utilized in

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1. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 TEMP. L. REV. 387, 392 (1991) (quoting Dr. Henry Viscardi, former member of the National Council on the Handicapped).

2. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988 & Supp. V 1993).

3. 29 U.S.C. §§ 621-634 (1988 & Supp. V 1993).

4. 29 U.S.C. §§ 701-796 (1988 & Supp. V 1993).

5. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

6. In a disparate treatment case, plaintiffs allege that they were treated less favorably than others because of impermissible factors such as race, color, religion, national origin, or sex. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985-86 (1988). This type of suit is to be distinguished from disparate impact actions, which involve employment practices that are facially neutral, but which have adverse effects on protected groups. *Id.* at 986. Disparate treatment cases require the plaintiff to show that the employer possessed a discriminatory intent or motive, but this showing is not required in disparate impact cases. *Id.* at 986-87. *See also* Harper v. Godfrey Co., 839 F. Supp. 583, 596 (E.D. Wis. 1993), *aff'd in part, rev'd in part*, 45 F.3d 143 (7th Cir. 1995). The argument presented in this Note only addresses disparate treatment suits where the plaintiff possesses less than the substantial amount of evidence of discriminatory intent which would be required in order for the suit to qualify as a mixed motives claim under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)).

Rehabilitation Act cases. Finally, this Note will review the current case law addressing the allocation of burdens under the ADA, and it will explore whether the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*[7] should be utilized in discrimination suits brought under the ADA.[8]

I. AMERICANS WITH DISABILITIES ACT

A. History

The Americans with Disabilities Act of 1990 was originally sponsored by Lowell P. Weicker, Jr. in the Senate[9] and by Tony Coelho in the House of Representatives.[10] Although people may believe that little was done to protect disabled persons prior to the passage of this law, the federal government actually addressed disability discrimination in a number of different contexts prior to enacting the ADA.[11] However, despite those efforts, disabled Americans remained unprotected in areas where other types of discrimination were prohibited.[12] Some efforts were made to amend Title VII of the Civil Rights Act of 1964 to include disabled persons among the protected groups, but to no avail.[13] However, in 1984, amendments to the Rehabilitation Act of 1973 re-established the National Council on the Handicapped, which subsequently produced a report that became a catalyst for action, leading to the introduction of the ADA in Congress.[14]

B. Purposes and Coverage

Congress found that forty-three million Americans have at least one physical or mental disability[15] and that society has treated this group of people

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7. 411 U.S. 792 (1973).

8. "Neither the Supreme Court nor the Third Circuit has set out the elements of a prima facie case of discrimination under the Americans with Disabilities Act. However, cases decided under Title VII provide *in pari materia* guidance." Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1318 n.5 (E.D. Pa. 1994).

9. Weicker, *supra* note 1, at 387.

10. *Id.* at 391.

11. *Id.* at 387-89 (discussing the Act of June 10, 1948, the Architectural Barriers Act of 1968, the Rehabilitation Act of 1973, the Education of All Handicapped Children Act, and the Civil Rights Restoration Act of 1987).

12. Disabled Americans were not protected from discrimination in areas such as private employment, public accommodations, transportation, state and local activities, or state and local services. *Id.* at 389.

13. In May 1977, approximately 3,700 delegates from all parts of the United States attended the White House Conference on Handicapped Individuals. At that conference the delegates agreed upon a resolution that "mandated amendment of all sections of the Civil Rights Act of 1964 . . . to include persons with physical or mental disabilities as a separate, protected group." Such initiatives, however, were not acted upon. *Id.*

14. Congress asked the National Council on the Handicapped to study the federal laws and programs related to protection of individuals with disabilities and to issue a report recommending legislation aimed at improving those laws and programs. In February, 1986, the Council issued its landmark report, *Toward Independence*. It contained forty-five legislative recommendations, and the ADA was at the top of the list. *Id.* at 390.

15. 42 U.S.C. § 12101(a)(1) (Supp. V 1993). People have "tended to isolate and segregate individuals

unfairly.[16] In an attempt to remedy these disparities, Congress enacted the Americans with Disabilities Act.[17] The ADA provides extensive protection from discrimination for disabled individuals in a variety of contexts,[18] and it casts a wide net to cover many forms of employment discrimination.[19] Among other things, it provides that no covered entity [20] may discriminate[21] against disabled individuals[22] who are qualified[23] for a position in

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with disabilities, and . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." *Id.* § 12101(a)(2). In addition, two-thirds of disabled Americans aged 16 to 64 are unemployed, but 8,200,000 of them want to work; they just cannot find jobs. John J. Murphy, Jr., *The Employment Provisions of the Americans with Disabilities Act*, 81 ILL. B.J. 236, 236 (1993).

16. People with disabilities are intentionally excluded from various activities, they suffer the discriminatory effects of physical barriers, overprotective rules, and exclusionary qualification criteria, and they are relegated to lesser opportunities. Disabled individuals "occupy an inferior status in our society, and [they] are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. § 12101(a)(5)(6) (Supp. V 1993).

17. The purpose of the ADA is to eliminate "discrimination against individuals with disabilities," ensuring that the federal government has a central role in this process. 42 U.S.C. § 12101(b)(1) (Supp. V 1993). Interestingly, Congress exempted itself from the employment provisions of the ADA. Murphy, *supra* note 15, at 237.

18. For an in-depth analysis of the entire act, see John Ricca & Jean C. Gaskill, *Americans with Disabilities Act: A Survey of the Law, Regulations and Legislative History, in* [2] 21ST ANNUAL INSTITUTE ON EMPLOYMENT LAW 93 (PLI Litig. & Admin. Practice Course Handbook Series No. H-442, 1992).

19. Murphy, *supra* note 15, at 238.

20. "'[C]overed entity' means an employer, employment agency, labor organization, or joint labor-management committee." 42 U.S.C. § 12111(2) (Supp. V 1993).

21. Among the behaviors considered discriminatory is the failure to provide reasonable accommodations to address the limitations of the otherwise qualified disabled person. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). Reasonable accommodations would include job restructuring, removing physical barriers, modifying work schedules, making paid or unpaid leave available, reassigning the person to another position, and providing readers or interpreters. Murphy, *supra* note 15, at 242. However, reasonable accommodation is not mandated if such accommodation would impose an undue hardship on the employer. 42 U.S.C. § 12112(b)(5)(A) (Supp. V 1993). An undue hardship is "an action requiring significant difficulty or expense . . . ." *Id.* § 12111(10)(A). However, most of the "necessary accommodations can be accomplished relatively cheaply. The chair of the President's Committee on Employment of People with Disabilities, Harold Russell, testified that for a majority of employees with disabilities, no accommodation will be required, and that many others can be accommodated for less than $50." Murphy, *supra* note 15, at 242. The purpose of requiring reasonable accommodation is to permit the disabled individual to perform the job's essential functions or to allow that person to enjoy the privileges that nondisabled persons enjoy, such as access to restrooms, cafeterias, etc. Harmer v. Virginia Elec. & Power Co., 831 F. Supp. 1300, 1306 (E.D. Va. 1993) (citing 29 C.F.R. § 1630.2(o) (1993) and 29 C.F.R. app. § 1630.9 (1993)). "In drafting the ADA, Congress consciously drew on the law that developed under the Rehabilitation Act, and the legislative history of the ADA indicates that reasonable accommodation is to be interpreted consistently with the regulations implemented under sections 791 and 794 of the Rehabilitation Act." *Id.* at 1306-07.

22. Disability may fall into one of three categories: a physical or mental impairment substantially limiting an individual's major life activities; a record of such an impairment; or being viewed as having such an impairment. 42 U.S.C. § 12102(2) (Supp. V 1993).

23. An individual is qualified if he or she is able to perform the essential functions of the position, with

regard to hiring, advancement opportunities, discharge, compensation, or other areas of employment.[24] The ADA applies to any person employing fifteen or more employees in an industry that affects commerce.[25] Other portions of the ADA provide protection in the areas of public services and transportation,[26] as well as public accommodations and services operated by private entities.[27]

II. SIMILARITIES OF THE ADA TO OTHER NON-DISCRIMINATION LEGISLATION

Title VII of the Civil Rights Act of 1964[28] was intended to encourage employers to hire people based on their job qualifications, rather than on the basis of race, sex, or other factors unrelated to the position,[29] and the Rehabilitation Act[30] was one of a number of small steps[31] intended to provide greater protection to disabled persons from discrimination. Additionally, the ADEA prohibited certain acts of discrimination against older individuals.[32] The similarities among these statutes and the ADA are numerous and

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or without reasonable accommodation. 42 U.S.C. § 12111(8) (Supp. V 1993). In evaluating whether a disabled person is qualified, one must first determine whether the individual meets the prerequisites for the job "such as possessing the appropriate educational background, employment experience, skills, licenses, etc." 29 C.F.R. app. § 1630.2(m) (1993). Next, one must determine whether the person can perform the essential job functions, "with or without reasonable accommodation." *Id.*

24. 42 U.S.C. § 12112(a) (Supp. V 1993). *See also* 29 C.F.R. § 1630.4 (1993).

25. For the first two years following passage of the statute, the ADA applied to employers employing twenty-five or more people. 42 U.S.C. § 12111(5)(A) (Supp. V 1993).

26. *See id.* §§ 12131-12165.

27. *See id.* §§ 12181-12189.

28. Title VII made the following unlawful:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . or . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id. § 2000e-2(a).

29. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)). Interestingly, gender was included in the list of protected categories in an effort to defeat the bill. *Price Waterhouse*, 490 U.S. at 244 n.9 (citing CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115-17 (1985)).

30. The Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a) (1988 & Supp. V 1993).

31. *See supra* note 11.

32. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges

significant. For example, "the ADA seeks to ensure access to equal employment opportunities based on merit," just as Title VII does.[33] However, unlike Title VII, which does not permit consideration of personal characteristics such as sex or race in making employment decisions, the ADA requires an employer to consider a disability when the disability affects the applicant's qualifications for the position, i.e., when it creates a barrier to job opportunities.[34] Further, the ADA draws a number of its terms and definitions from Title VII and the Rehabilitation Act,[35] and the "employment decisions covered by this nondiscrimination mandate [are] to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973."[36] Finally, the statute expressly provides that Title VII's "powers, remedies, and procedures" apply to the ADA and that the ADA and the Rehabilitation Act are to be handled so as to avoid duplicating efforts or imposing inconsistent or conflicting standards for comparable statutory provisions.[37]

III. *McDonnell Douglas* and Its Progeny: Allocating Burdens of Persuasion and Production

Following the enactment of Title VII, the courts struggled with the allocation of the burdens of persuasion and production between and among the parties in discrimination lawsuits. Finally, in 1973, the United States Supreme Court settled the issue in the seminal case, *McDonnell Douglas Corp. v. Green*.[38] The suit involved an African-American civil rights activist (Green) who was discharged from the McDonnell Douglas Corporation. Green had worked for the company as a mechanic from 1956 until 1964 when he was laid off, apparently as part of a general reduction in force. Green believed that the employment decision was racially motivated, and in protest he illegally participated with other minority group members in parking their cars on the road that led to the corporation's plant, effectively blocking access to the plant during a morning shift change.

Green's belief that he had been a victim of discrimination was strengthened the following summer when the company advertised for qualified mechanics. He applied for a position but was not rehired. Green subsequently filed a formal complaint with the Equal Employment Opportunity Commission and later sued under Title VII of the Civil Rights Act of 1964.[39] McDonnell Douglas denied discriminating against Green,

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of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (1988 & Supp. V 1993).

33. 29 C.F.R. app. § 1630 (1993).

34. *Id.* The ADA provides parameters which guide employers in how to account for disabling conditions. *Id.*

35. *See id.* app. § 1630.2(a)-(l).

36. *Id.* app. § 1630.4.

37. 42 U.S.C. § 12117 (Supp. V 1993).

38. 411 U.S. 792 (1973).

39. The provision of the statute that was pertinent to the appeal was 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993). The Court noted that the purpose of the statute was clear from the language; Congress intended to assure equal employment opportunities and to eliminate the discrimination that led to stratified work environments to the disadvantage of minorities. *McDonnell Douglas*, 411 U.S. at 800. "'What is required by

contending that it chose not to rehire him because of his participation in the illegal conduct against the company. The district court dismissed Green's Title VII[40] claim relating to racially discriminatory hiring practices, and the Eighth Circuit reversed.[41] However, the court of appeals failed to determine how to allocate the burdens of proof.[42]

The critical issue before the Supreme Court concerned "the order and allocation of proof in a private, non-class action challenging employment discrimination."[43] It established a three-step process, clearly delineating each party's burden. First, the plaintiff must establish a prima facie case of discrimination; this can be accomplished by demonstrating the following:

> (I) that he belongs to a racial minority;
> (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
> (iii) that, despite his qualifications, he was rejected; and
> (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[44]

Following the plaintiff's showing of a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision.[45] Finally, the plaintiff must be given an opportunity to demonstrate that the employer's proffered reason for its decision was a pretext for a discriminatory motive.[46]

Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.'" *Id.* at 801 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)).

40. 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. V 1993).

41. *McDonnell Douglas*, 411 U.S. at 797.

42. "The two opinions of the Court of Appeals and the several opinions of the three judges of that court attempted, with a notable lack of harmony, to state the applicable rules as to burden of proof and how this shifts upon the making of a prima facie case." *Id.* at 801.

43. *Id.* at 800.

44. *Id.* at 802. The Court added that the elements necessary to establish a prima facie case would vary depending upon the facts of the lawsuit. *Id.* at 802 n.13.

45. *Id.* at 802.

46. *Id.* at 804. In short the plaintiff "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision." *Id.* at 805. The federal courts, however, are divided on the issue of what constitutes pretext. Anderson v. Baxter Healthcare Corp., 13 F.3d 1120, 1122 (7th Cir. 1994). Three approaches have been developed. Under the "pretext-only" rule, a plaintiff who demonstrates that the employer's articulated reasons for the adverse decision are untrue automatically prevails. *Id.* Such a finding is comparable to finding intentional discrimination. *Id.* Under a second version of the "pretext-only" rule, a showing that the employer's proffered reason is not true permits but does not compel the factfinder to infer that the real reason was not permissible under the statute. *Id.* at 1122-23. The third approach, "pretext-plus," requires "both a showing that the employer's reasons are false and direct evidence that the employer's real reasons were discriminatory." *Id.* at 1123. The Supreme Court appears to prefer the second version of the "pretext-only" rule. *Id.* "It is not enough . . . to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2754 (1993).

The Supreme Court further clarified the *McDonnell Douglas* burden-shifting framework eight years later.[47] In *Texas Department of Community Affairs v. Burdine*, the Court examined whether, after the plaintiff had established a prima facie case, the burden should shift to the defendant to prove by a preponderance of the evidence that legitimate, nondiscriminatory reasons for the decision existed.[48]

In *Burdine*, the plaintiff sued under Title VII, alleging gender discrimination in her employer's failure to promote her. The Fifth Circuit ultimately reversed the district court's conclusion that the defendant had successfully rebutted the plaintiff's prima facie case.[49] However, the Supreme Court vacated the opinion of the court of appeals,[50] holding that the burden that shifts to the defendant is only a burden to rebut the presumption of discrimination established by the plaintiff's prima facie case.[51] The defendant may accomplish this task by producing evidence that the employment decision was based on a legitimate, nondiscriminatory reason; the defendant does not have to persuade the court that its proffered reasons actually motivated its behavior.[52] The defendant must merely introduce, through admissible evidence, the reasons for rejecting the plaintiff. If it succeeds in carrying this burden of production,[53] the presumption[54] of discrimination

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47. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

48. *Id.* at 250.

49. *Id.* at 252. The Fifth Circuit reaffirmed its previous position, namely that a Title VII defendant must prove by a preponderance of the evidence a legitimate, nondiscriminatory reason for its employment decision, and it must also prove that the person hired was better qualified than the plaintiff. *Id.*

50. *Id.* "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.* at 253 (citing Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 n.2 (1978)). The defendant only has to produce evidence which would permit the factfinder to conclude that the rejection or refusal to hire was not motivated by discriminatory animus; what the court of appeals would require exceeds what can be mandated to meet a burden of production. *Id.* at 257.

51. *Id.* at 254. Title VII does not provide damages to plaintiffs merely because employers can not prove a legitimate reason for an adverse employment decision. Damages are only awarded to plaintiffs who prove that the employer's action was based upon race or some other prohibited factor. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2756 (1993). "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason of race is correct. That remains a question for the factfinder to answer . . . ." *Id.*

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

53. The term "burden of proof" caused confusion for some time because it was used to describe two different concepts: the burden of persuasion and the burden of production. Director, Office of Workers' Compensation Programs v. Greenwich Collieries, 114 S. Ct. 2251, 2255 (1994). *See also* JOHN W. STRONG, MCCORMICK ON EVIDENCE § 336, at 568 (4th ed. 1992) (describing the two burdens encompassed by the phrase "burden of proof"). Dual use of the term continued into the early twentieth century. *Greenwich Collieries*, 114 S. Ct. at 2255. The Supreme Judicial Court of Massachusetts was a leader in attempting to limit the meaning of the phrase "burden of proof" to "burden of persuasion." "'[T]he party whose case requires the proof of [a] fact, has all along the burden of proof.'" *Id.* (quoting Powers v. Russell, 30 Mass. 69, 76 (1833)). The burden of persuasion remains where it started, but once the party proves a prima facie case, the burden of production shifts; the only time the burden of persuasion might shift is in the case of an affirmative defense. *Id.* (citing *Powers*, 30 Mass. at 77). The United States Supreme Court adopted the Massachusetts approach in Hill v. Smith, 260

raised by the plaintiff's prima facie case[55] is rebutted.[56]

At this stage the plaintiff's ultimate burden of proving that she was intentionally discriminated against merges with her opportunity to show that the employer's proffered reason for its action was not its true reason. She may accomplish this either by showing that a discriminatory purpose more likely motivated the employer or by showing the employer's articulated reason is not worthy of credence.[57]

IV. PURPOSES OF THE *MCDONNELL DOUGLAS* FRAMEWORK

The framework for allocating burdens between and among the parties serves a variety of purposes. First, it requires the plaintiff to distinguish his or her employment situation from legitimate but adverse human resource decisions by eliminating the most common nondiscriminatory reasons for the action.[58] Second, it provides for the possibility that an employer could avoid the time and expense of litigation by filing a motion for summary judgment or a motion to dismiss when the plaintiff cannot make a prima facie showing of

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U.S. 592 (1923). *Greenwich Collieries,* 114 S. Ct. at 2255. Justice Holmes commented that the distinction between the burden of production and the burden of persuasion "'is now very generally accepted, although often blurred by careless speech.'" *Id.* (quoting *Hill,* 260 U.S. at 594).

54. The term "presumption" is "the slipperiest . . . of legal terms," second only to its elusive cousin, "burden of proof." STRONG, *supra* note 53, § 342, at 578. Most legal scholars use the word "presumption" to describe a rule which mandates "not only that the establishment of fact B is sufficient to satisfy a party's burden of producing evidence with regard to fact A, but also at least compels the shifting of the burden of producing evidence on the question to the party's adversary." *Id.* The party against whom the presumption is directed must produce evidence to rebut the presumption, but the burden of persuasion does not shift; it "remains throughout the trial upon the party on whom it was originally cast." FED. R. EVID. 301.

55. The evidentiary relationship between the presumption arising out of the prima facie case and, consequentially, the defendant's burden of production is traditional at common law. *Burdine,* 450 U.S. at 256 n.8.

56. *Id.* at 255. "A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence." *Id.* at 256 n.10. This approach illustrates the widely followed "bursting bubble" theory of presumptions under which the presumption shifts the burden of producing evidence (related to the presumed fact) to the adversary; once that evidence is produced, "the presumption is spent and disappears." STRONG, *supra* note 53, § 344, at 582-83. *See also* Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1570 (7th Cir. 1989) (the presumption is a device for making the defendant speak, and once he does, it falls out); Lawrence v. Northrop Corp., 980 F.2d 66, 69 (1st Cir. 1992) (once the employer articulates a nondiscriminatory reason for its action, the presumption raised by the prima facie case disappears); Guthrie v. Tifco Indus., 941 F.2d 374, 376 (5th Cir. 1991), *cert. denied,* 503 U.S. 908 (1992) (if the employer offers a legitimate reason for its actions, the presumption dissolves); St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2749 (1993) (once the presumption forces the defendant to produce evidence, it "simply drops out of the picture"). Other scholars believe that a presumption should fix the burden of persuasion "on the party contesting the existence of the presumed fact. A principal technical objection to such a rule has been that it requires a 'shift' in the burden of persuasion[,] something that is, by definition of the burden, impossible." STRONG, *supra* note 53, § 344, at 586.

57. *Burdine,* 450 U.S. at 256.

58. Oxman v. WLS-TV, 846 F.2d 448, 453 (7th Cir. 1988).

discrimination.[59] Third, the framework allows discrimination victims "to prevail without presenting any evidence that [the protected characteristic] was a determining factor in the employer's motivation."[60] In other words, if the plaintiff fails to discover a "smoking gun," *McDonnell Douglas* provides another avenue of relief.[61] This is important to potential discrimination victims because there will rarely be "'eyewitness' testimony as to the employer's mental processes."[62]

In addition, evaluating the burden of production will often help the judge decide whether the litigants have created a triable issue of fact.[63] The Title VII allocation of burdens and the creation of a presumption of discrimination arising out of the plaintiff's prima facie case "is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination."[64] The *McDonnell Douglas* framework is not intended, however, to apply to cases in which the plaintiff presents direct evidence of discrimination.[65]

V. Shifting Burdens and The Rehabilitation Act

The *McDonnell Douglas* standard has come to be widely accepted and utilized not only in Title VII suits, but also in ADEA cases[66] and in other situations.[67] The framework

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59. *Id.*

60. La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405, 1409-10 (7th Cir. 1984). Discrimination can be subtle and even unconscious, and the employer who knowingly discriminates will likely not leave written or other records revealing the prohibited motive. *Id.* at 1410. Further, existing evidence will likely be controlled by the employer, and the employee will probably have trouble acquiring it. *Id.* "The indirect method compensates for these evidentiary difficulties by permitting the plaintiff to prove his case by eliminating all lawful motivations, instead of proving directly an unlawful motivation." *Id. See also* Perfetti v. First Nat'l Bank of Chicago, 950 F.2d 449, 451 (7th Cir. 1992), *cert. denied,* 112 S. Ct. 2995 (1992).

61. McCoy v. WGN Continental Broadcasting Co., 957 F.2d 368, 371 (7th Cir. 1992).

62. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983).

63. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

64. *Id.* The framework, however, is not intended to be inflexible or ritualistic. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). Instead, it simply provides a logical, orderly method for evaluating the evidence in a discrimination lawsuit. *Id.* "We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence . . . ." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988).

65. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985). The *McDonnell Douglas* test is designed to ensure that the "'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Id.* (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). *But see* Price Waterhouse v. Hopkins, 490 U.S. 228, 288 (Kennedy, J., dissenting) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)) (noting that this framework applies to all disparate treatment cases, even where the plaintiff offers direct proof that the employer's action was based on a discriminatory motive).

66. The circuits generally agree that *McDonnell Douglas* applies to ADEA cases. La Montagne v. American Convenience Prod., Inc., 750 F.2d 1405, 1409 n.1 (7th Cir. 1984). *See also* Konowitz v. Schnadig Corp., 965 F.2d 230, 232 (7th Cir. 1992); Mitchell v. Toledo Hosp., 964 F.2d 577, 582 (6th Cir. 1992).

67. *See* Friedel v. City of Madison, 832 F.2d 965, 972 (7th Cir. 1987) (*McDonnell Douglas* applies to

appears to be a useful and helpful tool, and with the exception of the elements required to establish a prima facie case,[68] courts appear to apply it uniformly. However, the *McDonnell Douglas* approach has not been as widely accepted in Rehabilitation Act cases. Therefore, this Note will examine the Rehabilitation Act in greater detail.

Four elements make up a cause of action under section 504 of the Rehabilitation Act,[69] but "the Courts of Appeals have been unable to agree on the proper allocation of burdens of proof" in these cases.[70] Disabled individuals face a variety of discriminatory barriers,[71] and one view suggests that the type of obstacle confronting the disabled person will affect which analytical framework to use when addressing the allocation of burdens.[72] Thus, while the *McDonnell Douglas* approach might apply in a so-called "intentional social-bias discrimination" case,[73] the analytical framework might differ in suits peculiar to disability discrimination.

Section 504 of the Rehabilitation Act requires an employer to provide reasonable accommodations to persons with disabilities,[74] and the employer who claims that this is not possible bears the burden of proving that fact.[75] After the employer presents evidence that it cannot accommodate the plaintiff, the plaintiff bears the burden of going forward, providing evidence related to his abilities and potential accommodations that might rebut the employer's claim.[76]

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reverse discrimination claims and to claims of discriminatory application of work rules); Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985) (*McDonnell Douglas* applies to Title VII retaliation claims).

68. *See supra* note 44.

69. The plaintiff must show the following: 1) he is disabled under the Act; 2) he is "otherwise qualified" for the position; 3) he was rejected "solely by reason of" his disability; and 4) the program was receiving federal assistance. Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1989), *cert. denied*, 493 U.S. 810 (1989).

70. *Id.* In Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1386-87 (10th Cir. 1981), the court concluded that the defendant bears the burden of persuasion on the "otherwise qualified" issue. But on the same issue, in Doe v. New York Univ., 666 F.2d 761, 776-77 (2d Cir. 1981), the court only placed the limited burden of production on the defendant. The court in *Doherty* declined to comment further on this issue because it was not before the court in that case. *Doherty*, 862 F.2d at 573.

71. Four types of discriminatory barriers have been identified: "1. Intentional discrimination for reasons of social bias . . . ; 2. neutral standards with disparate impact; 3. surmountable impairment barriers; and 4. insurmountable impairment barriers." Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (5th Cir. 1981).

72. The *McDonnell Douglas* framework is generally applicable to "intentional social-bias discrimination" against the disabled, and Title VII disparate impact jurisprudence is applicable to disparate impact disability discrimination; however, surmountable and insurmountable barriers issues usually apply only to disability discrimination cases and are thus unique. *Id.*

73. *Id.*

74. *Id.* at 308 n.21.

75. The EEOC regulations place the burden of proving that the individual cannot be accommodated on the employer. *Id.* at 308. "[T]he burden of persuasion in proving inability to accommodate always remains on the employer . . . ." *Id.*

76. When the reasonable accommodation issue arises, the employer always bears the burden of persuasion to prove its inability to accommodate, but once the employer has produced credible evidence that such

The Second Circuit expanded on these ideas in *Gilbert v. Frank*.[77] In that case the court pointed out that a qualified disabled person is one who, with a reasonable accommodation, can perform the essential job functions at issue.[78] Once the applicant establishes that he or she is otherwise qualified by demonstrating an ability to handle the essential functions of the job with reasonable accommodation, the burden shifts to the employer to demonstrate that reasonable accommodation is impossible.[79] However, regarding other elements of the action, courts cannot agree. For example, the Tenth Circuit in *Pushkin v. Regents of University of Colorado* concluded that the *McDonnell Douglas* burden-shifting framework was not an appropriate tool to use in certain Rehabilitation Act cases.[80] The Eighth Circuit, however, refused to follow *Pushkin*, finding that the *McDonnell Douglas* approach was proper.[81]

A. *The* Pushkin *Approach*

Pushkin involved a doctor who sought admission to the University of Colorado's Psychiatric Residency Program. The plaintiff, Pushkin, who suffered from multiple sclerosis, alleged that he was not admitted because he was disabled. He subsequently sued, claiming that the university violated section 504 of the Rehabilitation Act. The court of appeals addressed a number of issues,[82] ultimately affirming the district court's conclusion that the university had violated the statute.[83]

On appeal the university argued that the *McDonnell Douglas* framework should apply to claims under section 504 of the Rehabilitation Act.[84] It contended that the plaintiff established a prima facie case of discrimination, but that he failed to show pretext following the university's articulation of a legitimate, nondiscriminatory reason for the decision.[85] The court disagreed, describing the university's characterization of the plaintiff's case as a "straw man," created only so that it could be destroyed.[86] It noted that disability discrimination is usually characterized by "more invidious causative elements"[87]

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accommodation is not possible, "the plaintiff must bear the burden of coming forward with evidence that suggests that accommodation may in fact be reasonably made." *Id.* at 310.

77. 949 F.2d 637 (2nd Cir. 1991).

78. *Id.* at 641.

79. *Id.* at 642 (citing Mantolete v. Bolger, 767 F.2d 1416, 1423-24 (9th Cir. 1985); *Prewitt*, 662 F.2d at 308)). "We note that *Mantolete* and *Prewitt* appear to have placed even the initial burden of raising the accommodation issue on the employer, characterizing the plaintiff's burden as one of coming forward 'to rebut' the showing of the employer that no reasonable accommodation is available." *Id.*

80. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1386 (10th Cir. 1981).

81. Norcross v. Sneed, 755 F.2d 113, 117 (8th Cir. 1985).

82. In addition to the merits of the case, the court discussed whether section 504 created a private cause of action. *Pushkin*, 658 F.2d at 1377. It also addressed whether it was necessary for the plaintiff to exhaust other remedies before suing under section 504. *Id.* at 1380.

83. *Id.* at 1391.

84. *Id.* at 1384-85.

85. *Id.* at 1385.

86. *Id.*

87. *Id.*

than other types of discrimination and that it would be more appropriate to analyze a section 504 claim under a disparate impact theory; however, the statute did not provide for such an analysis.[88] Therefore, the court proceeded to focus on the language of the statute to analyze the claim. It concluded that the question was not simply whether Pushkin's disability played a significant role in his rejection; the real concern was whether the rejection was justified after expressly evaluating the implications of his being disabled.[89]

The court then turned to the issue of shifting burdens. It stated that it would be wrong to use the *McDonnell Douglas* disparate treatment test in this case and instead laid out an alternate framework for analysis. Plaintiffs must first establish a prima facie case by showing that they were otherwise qualified disabled persons and that they were rejected under circumstances giving rise to the inference that their rejection was based solely on their disability. Once the plaintiffs establish their prima facie case, the defendants have the *burden of going forward and proving* that the plaintiffs were not qualified or that their rejection from the program was for reasons other than their disabilities. The plaintiffs then have the *burden of going forward with rebuttal evidence* showing that the defendants' reasons for rejecting the plaintiffs were based on misconceptions or unfounded factual conclusions, and that the reasons articulated for the rejection encompassed unjustified consideration of the disabilities.[90]

A troubling aspect of this standard, however, is the court's use of burden of persuasion language in an apparently loose way.[91] This position contradicts other courts' views regarding who bears the burden of persuasion and who bears only a burden of production,[92] and the language can lead to confusion. For example, in *Nicely v. Rice*,[93] the plaintiff sued under the Rehabilitation Act, and the district court granted the defendant's motion for summary judgment, citing the *Pushkin* test as the appropriate standard for such a case.[94] On appeal the Tenth Circuit affirmed, citing *Pushkin*. However, it misconstrued

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88. *Id. But see* 29 C.F.R. app. § 1630.15(b-c) (1993) (describing disparate impact defenses to ADA claims).

89. *Pushkin*, 658 F.2d at 1385-86.

> The question is whether Dr. Pushkin was qualified for admission to the residency program in spite of his handicap, so that he was wrongfully rejected from the program on the basis of that handicap, or whether Dr. Pushkin's handicap would preclude him from carrying out the responsibilities involved in the residency program and future patient care, so that the University rightfully excluded him from the program after weighing the implications of his disability.

Id. at 1386.

90. *Id.* at 1387 (emphasis added).

91. "The [*Pushkin*] opinion does not carefully justify this choice of language and . . . it is not supported by any discussion . . . ." Norcross v. Sneed, 755 F.2d 113, 118 n.6 (8th Cir. 1985).

92. *See* Doe v. New York Univ., 666 F.2d 761, 776-77 (2nd Cir. 1981) (the plaintiff bears the ultimate burden of proving by a preponderance of the evidence that he was qualified); Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994) (the burden of proof for each element lies with the plaintiff).

93. 60 Empl. Prac. Dec. (CCH) ¶ 42,062 (D. Kan. Dec. 7, 1992), *aff'd*, 1 F.3d 1249 (10th Cir. 1993).

94. *Id.* ¶ 74,208.

the language[95] of its own decision: "Once the plaintiff establishes his prima facie case, the burden shifts to the Defendant *to produce evidence* that plaintiff's rejection was for reasons other than his handicap. . . . The plaintiff then has the *burden of producing rebuttal evidence* . . . that the defendant's reasons are pretextual."[96]

A subsequent Sixth Circuit case attempted to justify *Pushkin's* apparent decision to shift the burden of persuasion, but with little success. In *Jasany v. United States Postal Service*,[97] the court noted that the *Pushkin* opinion modified the *McDonnell Douglas* framework because disability cases are unique. Persons with disabilities "are expressly rejected for employment on the basis of their handicap, whereas in Title VII cases characteristics such as race or sex are never expressly at issue as legitimate justifications for the plaintiff's rejection."[98] This argument is not persuasive. The reason the disability may be considered is that it may bear upon the individual's physical ability to perform the job, i.e., it may impact whether the person is qualified for the position.[99] This is the only sense in which the disability may be expressly considered, and it does not justify wholesale departure from *McDonnell Douglas.*

B. The Norcross *Approach*

The Eighth Circuit's position, on the other hand, exemplifies the alternate view on the applicability of *McDonnell Douglas* to section 504 cases.[100] The plaintiff, Norcross, who had been legally blind since childhood, applied for a librarian's position in a public school system. The school board ultimately selected another individual for the position because the members believed that the person they selected was better qualified than the plaintiff.[101] Norcross brought suit under section 504 of the Rehabilitation Act, and when the district court entered judgment for the defendants, she appealed, arguing that the lower court's allocation of the burden of production and the burden of persuasion was improper.[102] The district court essentially followed the standard established by the Second Circuit in *Doe v. New York University.*[103] The plaintiff first had to establish a prima facie case;[104] after she accomplished this, the court shifted the burden of going forward to the

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95. *See supra* note 90 and accompanying text.

96. Nicely v. Rice, 1 F.3d 1249, 1993 WL 298933, at **2 (10th Cir. 1993) (emphasis added). The ultimate burden, the court added, remains with the plaintiff. *Id.* Although this opinion has no precedential value, it illustrates the difficulties that the *Pushkin* language presents. *See also* White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (noting the *Pushkin* analysis to be "much like the *McDonnell Douglas* test" used in other discrimination cases).

97. 755 F.2d 1244 (6th Cir. 1985).

98. *Id.* at 1250 n.5 (citing *Pushkin,* 658 F.2d at 1385-86).

99. *See infra* note 208 and accompanying text.

100. Norcross v. Sneed, 755 F.2d 113 (8th Cir. 1985).

101. The board based this determination on the other individual's experience as a librarian in a similar sized school and her extensive teaching experience as compared to Norcross's experience as an assistant librarian ten years earlier and her limited teaching experience. *Id.* at 115-16.

102. *Id.* at 116.

103. *Id.* at 117.

104. Norcross had to demonstrate that she was a disabled individual, that she was otherwise qualified for

school system to rebut the presumption of discrimination that followed the establishment of the prima facie case.[105] When the school system satisfied this requirement, the burden shifted back to the plaintiff (who retained the ultimate burden of persuasion throughout) to prove that her disability was the sole basis for her rejection.[106]

Norcross argued that the lower court erred in only requiring the defendant to articulate a reason for its action. She contended that the school system should have had to prove its defense by a preponderance of the evidence.[107] The court of appeals did not agree, and it expressly rejected the *Pushkin* standard.[108] It concluded that handling the issue differently "would have impermissibly shifted the burden to the defendants on the ultimate issue -- whether handicap was the sole reason for the decision."[109] The facts of the case only raised a prima facie inference of discrimination, and it would have been wrong to require the defendant to disprove such an inference by a preponderance of the evidence.[110]

The court in *Norcross* relied to a great extent on *Doe v. New York University*.[111] In *Doe*, the court mentioned the differences between Title VII cases and section 504 claims.[112] It noted that the *McDonnell Douglas* burden shifting framework might be appropriate in a section 504 suit where the defendant disclaimed reliance on the applicant's disability,[113] but the court added that more typically the defendant admits that the disability was a factor in the decision and thus "the order of presentation of proof in such cases cannot be framed in terms of permissible versus impermissible factors."[114] The

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the position, that she had applied for the librarian's position, and that she had not been selected. Norcross satisfied these requirements. *Id.* at 116 n.3.

105. This step effectively narrowed the issue to whether the other individual was selected because she had better qualifications or because Norcross was disabled. *Id.* at 117.

106. *Id.* at 116.

107. *Id.* at 117.

108. "To the extent that *Pushkin* is inconsistent with our reasoning, we reject its conclusions on this issue." *Id.* at 118 n.6.

109. *Id.* at 117.

110. *Id.* at 119. "In the handicap context, we deal with shifting burdens not unlike those in Title VII cases." *Id.* The legislative history of section 504 does not indicate how Congress intended to allocate the burdens of persuasion and production, but it is noteworthy that the Rehabilitation Act was passed just months after the Supreme Court decided *McDonnell Douglas*. "Congress must have been aware that the discrimination law language of Section 504 would have obvious implications for the burden of proof issue." New York State Ass'n for Retarded Children, Inc. v. Carey, 612 F.2d 644, 649 n.5 (2nd Cir. 1979). *See also* Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994); Ennis v. National Assoc. of Business & Educ. Radio, Inc., 53 F.3d 55, 57-58 (4th Cir. 1995) (both noting that Rehabilitation Act suits are analyzed under the *McDonnell Douglas* framework).

111. 666 F.2d 761 (2nd Cir. 1981).

112. The court noted that section 504 cases do not always lend themselves well to the framework used for the allocations of proof in Title VII cases because in a Rehabilitation Act case, an employer may consider an applicant's disability in determining whether the person is qualified for the job; in Title VII cases, race, color, religion, sex, and national origin cannot be considered in the decision. *Id.* at 776.

113. *Id.*

114. *Id.* "The pivotal issue is not whether the handicap was considered but whether under all of the circumstances it provides a reasonable basis for finding the plaintiff not to be qualified or not as well qualified

implication here is that *McDonnell Douglas* would not apply in the "more typical" case, but the framework that the court proceeded to lay out for the allocation of burdens was remarkably similar to the *McDonnell Douglas* standard,[115] despite the fact that the *Doe* case involved a defendant who admitted to relying on the plaintiff's disability in making its decision. Further, the court in *Doe* rejected the use in this context of the *Pushkin* position regarding shifting the burden of persuasion to the employer.[116] It is difficult, therefore, to discern the significance of the distinction between a case where the defendant disclaims relying on the disability and one where the defendant admits considering the disability in conjunction with other factors.

This opinion was further muddied by *Teahan v. Metro-North Commuter Railroad Co.*[117] where the district court concluded that the defendant had not relied upon the plaintiff's disability, that the defendant had successfully articulated a legitimate, nondiscriminatory reason for terminating the plaintiff, and that the plaintiff had failed to prove pretext.[118] The plaintiff, Teahan, argued on appeal that his case was not one where the employer disclaimed reliance on his disability, and thus *McDonnell Douglas* was not applicable. He claimed that his case was the more typical kind of disability discrimination suit, where the employer acknowledged relying on the plaintiff's disability in reaching its decision, and thus *Doe's* "other approach" to section 504 claims should have applied.[119] The court in *Teahan* proceeded to analyze whether Metro-North had in fact relied on the plaintiff's disability, noting that such analysis was significant because "where the employer relies on an employee's handicap for its employment decision, the employer has the burden of proving[120] the handicap is relevant to the job requirements."[121] The

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as other applicants." *Id.*

115. Plaintiffs can establish a prima facie case by showing that they are disabled, that they are qualified for the position despite the disabilities, and that they were rejected because of the disabilities. The employer then must rebut the inference that it improperly considered the disabilities by *going forward with* (i.e., *producing*) *evidence* that the disabilities were relevant to the qualifications for the positions sought. Plaintiffs then have the ultimate burden of proving by a preponderance of the evidence that they are qualified despite the disabilities. *Id.* at 776-77.

116. "To the extent that the district court here relied upon the reasoning of the Tenth Circuit in *Pushkin v. University of Colorado*, . . . we find that reliance misplaced." Doe v. New York Univ., 666 F.2d 761, 777 n.7 (2nd Cir. 1981). New York University did not have the burden of proving that Doe was not an otherwise qualified disabled person. It only needed to show that the disability was relevant to the reasonable qualifications for readmission. *Id.*

117. 951 F.2d 511 (2nd Cir. 1991), *cert. denied*, 113 S. Ct. 54 (1992).

118. *Id.* at 514.

119. Where the employer acknowledges reliance on the individual's disability, it must follow the plaintiff's prima facie case with evidence which rebuts the inference that the disability "was improperly considered by demonstrating that it was relevant to the job qualifications." *Id.* at 515 (citing *Doe*, 666 F.2d at 776 and Puskin v. Regents of Univ. of Colo., 658 F.2d 1372, 1387 (10th Cir. 1981)).

120. In *Doe,* the court did not use this language; rather, it said that the employer had to "go forward" with evidence that the disability was relevant to the qualifications. *Doe*, 666 F.2d at 776. The language that the court in *Teahan* uses suggests that the burden of persuasion lies with the employer. *See supra* note 53.

121. *Teahan*, 951 F.2d at 515. In evaluating whether Metro-North had relied on Teahan's disability, the district court focused on the apparent distinction between the disability and its consequences. On appeal, the court

defendant must do this in order to rebut the inference that the disability was improperly considered because an employee can be fired "solely by reason of" his disability even though the employer disclaims reliance on that disability.[122] The court concluded that Metro-North's decision to fire Teahan for excessive absenteeism caused by his substance abuse problem was termination "solely by reason of" that problem for purposes of section 504, and thus, Metro-North did rely on the plaintiff's disability.[123] The implication is that the defendant should have had "to prove" that the disability was relevant to the job requirements.

A Ninth Circuit case also addressed the scenario where the defendant actually does disclaim reliance on the plaintiff's disability.[124] The lower court in *Smith v. Barton* did not follow *McDonnell Douglas*, and the court of appeals reversed.[125] Neither of the plaintiffs, both of whom were legally blind, sought any special accommodation; they simply alleged that the employer discriminated against them based on overt prejudices. Citing *Doe*, the court in *Smith* concluded that "the analytic frameworks employed in Title VII cases should apply" to this suit.[126] The court agreed with the court in *Pushkin* that a plaintiff would have a difficult time demonstrating a purpose or intent to discriminate solely on the basis of disability; however, it distinguished *Pushkin* and thus chose to apply *McDonnell Douglas*, noting that in *Pushkin* the defendant did not disclaim reliance on the plaintiff's disability. There, the university rejected the plaintiff because of his disability. The court in *Smith* noted that the approach it adopted applied only to those cases where the defendant disclaimed reliance on the disability and where "the plaintiff allege[d]

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noted that the lower court misinterpreted *Doe's* holding "that when an employer 'disclaims any reliance' on a plaintiff's handicap, the burden is automatically shifted to the plaintiff to disprove the employer's proffer of a legitimate (i.e., nondiscriminatory) reason for the termination." *Id.* at 516. The court further noted that "disclaiming reliance" referred to any reliance and that when an employer bases a discharge on conduct caused by a disability, it is relying on that disability in making its decision. *Id.*

122. *Id.*

123. *Id.* at 517.

124. Smith v. Barton, 914 F.2d 1330 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991). In *Smith*, the court noted that the case was unusual because the defendants disavowed reliance on the plaintiffs' disabilities. "Few courts have had the occasion to decide whether there was illegal discrimination" under these circumstances. *Id.* at 1339.

125. Following a bench trial, the magistrate found that the plaintiffs were disabled under the Act and that they were otherwise qualified for the newly created position. However, the magistrate concluded that they failed to establish a prima facie case because they did not show "that they were excluded from the position solely by reason of their handicap." *Id.* On appeal the court pointed out that the magistrate misread *Doe*. Where the defendants disclaim reliance on the disability, *McDonnell Douglas* applies; therefore, to establish a prima facie case, the plaintiffs must show that they applied for a job, that they were qualified for that job, and that they were rejected "'under circumstances indicating discrimination on the basis of an impermissible factor.'" *Id.* at 1340 (quoting *Doe*, 666 F.2d at 776). The burden then shifts to the defendant to rebut the presumption of discrimination by producing evidence that the decision was based upon a legitimate, nondiscriminatory reason. *Id.* If the defendant articulates such a reason, the burden shifts back to the plaintiff to show that the proffered reason is a pretext for a discriminatory motive. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

126. *Id.*

invidious discriminatory intent."[127]

VI. *McDonnell Douglas* and ADA Cases

A. Southern District of Indiana

A number of recent federal district court decisions have recognized the need to address the applicability of the *McDonnell Douglas* burden-shifting framework to the ADA,[128] but few have undertaken the analysis in sufficient depth. [129] Unlike other decisions related to this topic, Judge McKinney's opinion in *Hedberg v. Indiana Bell Telephone Co.*[130] at least contemplates the need to further explore this topic. In that case Indiana Bell discharged the plaintiff, Hedberg, in the fall of 1992 as part of its Workforce Resizing Program. Several months prior to his termination, Hedberg learned that he was suffering from amyloidosis, a life-threatening health condition, and he later contended that Indiana Bell Telephone Company (IBT) was aware of this fact. Hedberg subsequently sued, alleging that IBT's decision to fire him was based on a discriminatory motive and that IBT therefore violated the ADA.

Hedberg argued that he could "establish a prima facie case of employment discrimination pursuant to the burden shifting analysis used in Title VII employment discrimination cases pursuant to *McDonnell Douglas Corp. v. Green* . . . ."[131] The court acknowledged that decisions under section 504 of the Rehabilitation Act could provide guidance to courts in analyzing the relatively new ADA,[132] and it proceeded to examine the merits of Hedberg's claim[133] before returning to the *McDonnell Douglas* issue.

The court then observed that Hedberg failed to cite any case which articulated what

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127. *Id.* at 1340.

128. Others have addressed ADA claims without addressing where the burdens lie. *See* Doe v. Harvard Univ., Nos. 93-2051, 93-2234, 94-1589, 1994 WL 558162, at *2 (1st Cir. Oct. 12, 1994) (affirming the lower court's dismissal of the plaintiff's ADA claim without addressing the relevant burdens).

129. *See* Douglas Massengill & Harvey R. Boller, *Violations of the Americans with Disabilities Act: Who Bears the Burden of Proof?*, 17 Emp. Rel. L.J. 225 (1991).

130. No. IP 93-1344 C, 1994 WL 228184 (S.D. Ind. March 14, 1994), *aff'd*, 47 F.3d 928 (7th Cir. 1995). The Seventh Circuit did not explicitly address the applicability of the *McDonnell Douglas* framework to the ADA. *See infra* note 155.

131. *Hedberg*, 1994 WL 228184, at *4 (S.D. Ind. March 14, 1994), *aff'd*, 47 F.3d 928 (7th Cir. 1995). Hedberg also contended that whether IBT's proffered reason for firing him was a pretext for disability discrimination remained a genuine issue of material fact, precluding summary judgment under *McDonnell Douglas*. *Id.*

132. The court cited the text of the statute at 42 U.S.C. § 12117(b) (Supp. V 1993). It also cited a Northern District of Illinois opinion which noted that section 504 and numerous state handicap laws will be helpful in deciding questions of law in ADA cases. *Hedberg*, 1994 WL 228184, at *4 (citing EEOC v. AIC Sec. Investigation, Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993). *See also* Harmer v. Virginia Elec. & Power Co., 831 F. Supp. 1300, 1307 (E.D. Va. 1993) (noting that suits brought under the Rehabilitation Act can shed light on ADA cases).

133. The court held that Hedberg's ADA claim must fail if IBT decided to terminate him without knowledge of his disability. *Hedberg*, 1994 WL 228184, at *4.

must be shown to establish a prima facie case under the ADA, or even any case that applied *McDonnell Douglas* to the ADA.[134] Instead, Hedberg simply proceeded with his argument, contending that the elements necessary to establish a prima facie case under the ADEA provided the elements that had to be shown under the ADA.[135] The court then analyzed the case under the assumption that *McDonnell Douglas* was applicable and that Hedberg could establish a prima facie case. It ultimately concluded that Hedberg could not show that IBT's articulated reason for firing him was pretextual,[136] and thus it did not further pursue the issue of whether *McDonnell Douglas* could be used in an ADA case.[137]

B. District of Nebraska

The District of Nebraska also addressed whether the *McDonnell Douglas* standard should apply to the ADA[138] (though the claim there was not an employment claim under the ADA),[139] and for the first time, a federal court of appeals recognized the applicability of this framework to the ADA.[140] In *Petersen ex rel. Petersen v. Hastings Public Schools*, the court noted that the similarity between Title VII and the ADA[141] provided sufficient justification for applying the Supreme Court's Title VII approach to the allocation of the burdens of persuasion and production. The Court added that Title VII is designed to ensure that when many considerations factor into employment decisions, fair and non-discriminatory choices are made.[142] An ADA claim raises a question not unlike a Title VII claim, namely what proof of discrimination must be shown in an environment "where a discriminatory reason may be hidden by non-discriminatory factors"?[143] The lower court in *Petersen* found for the defendant,[144] and on appeal the Eighth Circuit not only affirmed the lower court's decision on the merits,[145] but it also explicitly affirmed the district

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134. *Id.* at *6.

135. *Id.* Hedberg contended that in order to shift the burden of producing evidence to IBT to proffer a legitimate, nondiscriminatory reason for its decision, he needed only to establish the following three elements: 1) that he was disabled (i.e., a member of the protected group); 2) that he was meeting his employer's legitimate performance expectations; and 3) that other persons not in the protected group were treated more favorably. *Id.*

136. IBT's decision to fire Hedberg followed its perceived need to shrink its work force, and Hedberg could not produce evidence showing that this reason was pretextual. *Id.*

137. "Furthermore, . . . it is not clear that a *McDonnell Douglas* analysis may be applied to ADA claims," but even if the framework is applicable, IBT would still prevail. *Id.* at *7.

138. Petersen *ex rel.* Petersen v. Hastings Pub. Sch., 831 F. Supp. 742 (D. Neb. 1993), *aff'd*, 31 F.3d 705 (8th Cir. 1994).

139. *Petersen* involved an ADA challenge to a school system's use of a particular sign language system to educate its hearing-impaired students. *Petersen*, 31 F.3d at 705.

140. *Id.* at 708.

141. Much like the purpose of Title VII, the purpose of the ADA is to protect the individual against discrimination or exclusion based on that person's disability. *Petersen*, 831 F. Supp. at 753.

142. "Because of the vast number of reasons which may impact such a decision, proving that a discriminatory reason was involved is extremely difficult." *Id.*

143. *Id.*

144. *Id.* at 755.

145. *Petersen*, 31 F.3d at 709.

court's use of the *McDonnell Douglas* burden-shifting framework. The plaintiffs challenged, among other things, the lower court's burden-shifting analysis, contending that the court erred in finding that the school district met its burden of proof regarding legitimate, non-discriminatory reasons for using the signing system.[146] The court of appeals concluded "that the district court did not err in analyzing the issue . . . ."[147]

C. Eastern District of Virginia

In *Harmer v. Virginia Electric & Power Co.*,[148] the court applied *McDonnell Douglas* to an ADA claim without explanation.[149] The plaintiff, Harmer, alleged that Virginia Electric retaliated against him[150] because he requested accommodation for his pulmonary disability. The court concluded that to prevail, Harmer had to follow the three-step proof process established in *McDonnell Douglas*.[151] The court decided, however, that even assuming Harmer could establish a prima facie case, he would still fail because he could not show that Virginia Electric's proffered reason for its action was a pretext for retaliation.[152] The court also applied the burden-shifting framework to Harmer's claim for retaliatory failure to promote,[153] again without explanation or any rationale for its decision.

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146. *Id.* at 708.

147. *Id.*

148. 831 F. Supp. 1300 (E.D. Va. 1993).

149. Shortly thereafter the Eastern District of Virginia applied *McDonnell Douglas* to another ADA claim. Tyndall v. National Educ. Ctrs., Inc., No. CIV.A.3:93CV369, 1993 WL 730727, at *5 (E.D. Va. Oct. 26, 1993), *aff'd*, 31 F.3d 209 (4th Cir. 1994) (citing Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985), Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241-46 (4th Cir. 1982), and *Harmer*, 831 F. Supp. at 1308). The court in *Tyndall* indicated that in order for the plaintiff to establish a prima facie case of retaliation, she must demonstrate that she was in the protected class, that her employer took adverse action against her, and that there was a causal connection between the two. *Id.* The burden then shifts to the employer to articulate a legitimate non-retaliatory reason for its action, and, after doing so, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the proffered reason is pretextual. *Id.* The Fourth Circuit affirmed the lower court's grant of summary judgment to the defendant without commenting on the applicability of the burden-shifting framework. *Tyndall*, 31 F.3d at 216.

150. The ADA prohibits retaliation against individuals who seek to have their rights under the Act enforced. *Harmer*, 831 F. Supp. at 1307-08. "'No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.'" *Id.* at 1308 n.13 (quoting 42 U.S.C. § 12203(a) (Supp. V 1993)).

151. First, Harmer had to establish a prima facie case of retaliation by showing: "(1) he engaged in protected activity; (2) his employer took an adverse employment action against him and (3) a causal connection exists between the protected activity and the adverse action." *Id.* at 1308. If the plaintiff successfully establishes the prima facie case, the defendant must then articulate a legitimate non-retaliatory reason for its decision. Producing such evidence would then shift the burden back to Harmer to show by a preponderance of the evidence that Virginia Electric's proffered reason was "unworthy of belief and that the real reason for [its] action was to retaliate against him for having taken the protected action of requesting accommodation." *Id.*

152. *Id.*

153. On this claim Harmer had to show that 1) he engaged in a protected activity; 2) he applied for and

On that claim, Harmer could not show a prima facie case. The court concluded that even if he had made a prima facie showing, he could not show pretext; therefore, Virginia Electric must prevail.[154]

D. Northern District of Illinois

In *DeLuca v. Winer Industries, Inc.*,[155] plaintiff DeLuca alleged that he was dismissed in violation of the ADA, contending that his employer, Winer Industries, fired him because of multiple sclerosis. The court stated that in order to prevail, DeLuca had to establish that he was dismissed because of his disability. The court noted that DeLuca could accomplish this task either by demonstrating through direct evidence that he was fired because of his disability, or by meeting the standard established in *McDonnell Douglas* and shifting the burden to the defendant.[156] The only explanation the court provided for applying this standard was that the ADA was similar to both Title VII[157] and the ADEA.[158] It offered no other justification for utilizing *McDonnell Douglas*, it cited no precedent for applying the *McDonnell Douglas* standard to the ADA, and the court did not refer to any Rehabilitation Act case law. Instead, it relied entirely on Title VII and

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was qualified for the job; 3) he was rejected despite his being qualified; and 4) his request for accommodation was considered by the employer in not promoting him. *Id.* at 1309.

154. *Id.*

155. 1994 WL 374197 (N.D. Ill. July 13, 1994), *aff'd*, 53 F.3d 793 (7th Cir. 1995). In affirming the district court, the Seventh Circuit noted that even though it had never explicitly held that the *McDonnell Douglas* test applied to disability suits, the parties did not contest its use, and the court assumed "that we should also analyze ADA cases under that framework." *DeLuca*, 53 F.3d at 797. *See also* Flasza v. TNT Holland Motor Express, Inc., 159 F.R.D. 672, 676 (N.D. Ill. 1994). In *Flasza* the court noted that for the plaintiff to prevail on an ADA claim, he had to prove that the employer discriminated against him because of his disability. "Direct evidence of employment discrimination is rare. Flasza may prove his discrimination claim through the use of the burden-shifting method established for Title VII cases in *McDonnell Douglas* . . . ." *Id.* (citing *DeLuca*, 1994 WL 374197, and Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310 (E.D. Pa. 1994)). The plaintiff can thus establish a prima facie case by demonstrating that 1) he was a member of the protected class; 2) his performance met the employer's legitimate expectations; 3) he was discharged; and 4) he was replaced by someone outside the protected class. *Id.* In *Flasza*, the plaintiff failed to establish that he was disabled under the statute. *Id.*

156. *DeLuca,* 1994 WL 374197, at *2.

157. *See supra* note 141. In *Doe v. Kohn Nast & Graf, P.C.*, the defendants sought summary judgment on an ADA discrimination claim. The plaintiffs had proceeded on a pretext theory, so the court applied the *McDonnell Douglas* framework. It noted that under the ADA, the plaintiff was required to show that 1) he was a member of the protected class; 2) he was qualified for the position; and 3) he was fired. 862 F. Supp. at 1318. The court added that it was not necessary for the plaintiff to prove that his disability was the sole cause of the employer's adverse action. *Id.* If the plaintiff meets this burden, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its action, and upon such a showing, the plaintiff will only succeed upon further demonstrating that the employer's reason is not worthy of credence. *Id.* (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981)).

158. "Because the standards under the ADA, the ADEA, and Title VII are identical, the following discussion relies on cases decided under all three statutes." *DeLuca*, 1994 WL 374197, at *8 n.3.

ADEA cases[159] in making its determination.[160] Ultimately, the court concluded that even if the burden shifted and the defendants carried their burden, DeLuca could not show pretext. Therefore, Winer prevailed.[161]

In another suit brought in the Northern District of Illinois,[162] the plaintiff, Schartle, alleged disability discrimination, and the court applied *McDonnell Douglas*.[163] The court acknowledged that although the *McDonnell Douglas* standards were "originally developed for Title VII cases, it is probably appropriate to apply them to ADA cases and Schartle has suggested the use of the *McDonnell Douglas* factors in this case."[164] Schartle was not able to establish the fourth element of the prima facie case, so the court granted Motorola's

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159. The court concluded that because there was no direct evidence showing defendants' intent to discriminate, DeLuca could, pursuant to *McDonnell Douglas*, shift the burden to Winer by showing: 1) he belonged to the protected class; 2) he met his employer's legitimate performance expectations; 3) he was discharged; and 4) employees not in the protected class received better treatment than he did. *Id.* at *4 (citing Oxman v. WLS-TV, 846 F.2d 448, 455 (7th Cir. 1988), an ADEA, reduction-in-force case). Winer did not dispute that elements (1) and (3) were met, but it contended that DeLuca failed to meet its legitimate performance expectations and that DeLuca was not treated less favorably than others outside the protected group. *Id.*

160. The court noted that Winer demonstrated that there was no evidence of discriminatory intent and that DeLuca could not satisfy the standards of the *McDonnell Douglas* burden-shifting test. However, it added that even if the defendants had not made those showings, they would still prevail: "The defendants are entitled to judgment by showing that DeLuca was fired for a legitimate, nondiscriminatory reason unrelated to disability." *Id.* at *7 (citing Hong v. Children's Memorial Hosp., 993 F.2d 1257, 1261 (7th Cir. 1993), *cert denied*, 114 S. Ct. 1372 (1994)). It is important to note that the court's choice of words "by showing that" could be interpreted to mean that the defendant must prove that the articulated reason was the actual motive behind the defendant's action. Though the remainder of the opinion does not support such a reading, the possibility of its being interpreted that way is a strong indication of the importance of word choice in these cases. *Hong* used the actual *McDonnell Douglas* language, i.e., the employer must "'articulate some legitimate, nondiscriminatory reason' for the plaintiff's treatment." *Hong*, 993 F.2d at 1261 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). This language leaves no room for misinterpretation.

161. *DeLuca*, 1994 WL 374197, at *8.

162. Schartle v. Motorola, Inc., No. 93 C 5508, 1994 WL 188469 (N.D. Ill. May 11, 1994).

163. "There is little case law under the ADA thus far, but cases decided under the Rehabilitation Act and Title VII provide guidance." *Id.* at *2. The court listed the following elements as necessary to establish a prima facie case: 1) the plaintiff is a member of the protected class; 2) the plaintiff met the employer's legitimate performance expectations; 3) the plaintiff was terminated; and 4) the employer sought to replace the plaintiff. *Id.* (citing *McDonnell Douglas Corp,* 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)). The court did not cite any Rehabilitation Act cases which "provided guidance." *See also* Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 603 (D. Me. 1994). "Because Braverman has not presented direct evidence of disability discrimination, the Court again applies the *McDonnell Douglas* framework." *Id.* (citing *Schartle*, 1994 WL 188469, at *2). Braverman was within the protected class, he raised the issue of whether he met the employer's legitimate performance expectations, he was terminated, and he was replaced. The defendant then articulated a legitimate, nondiscriminatory reason for firing him, and Braverman raised a question of material fact regarding pretext. *Id.* Therefore, the employer's summary judgment motion on the issue of disability discrimination was denied. *Id.* at 607.

164. *Schartle*, 1994 WL 188469, at *2.

motion for summary judgment.[165] The court also denied Schartle's motion to reconsider.[166]

E. Eastern District of Michigan

The Eastern District of Michigan took a different approach.[167] In *Mayberry v. Von Valtier,* the plaintiff alleged the defendant violated the ADA when she was denied treatment due to her deafness. Noting that the standards and regulations of the Rehabilitation Act are applicable to the ADA,[168] the court looked to *Pushkin* for guidance: "The Court will apply the modified burden-shifting analysis developed in cases under the Rehabilitation Act to the ADA."[169] If the plaintiff successfully states a prima facie case,[170] the burden will shift to the defendant *to prove* either that the plaintiff was not denied treatment or that denying treatment was not unlawful.[171] The burden then shifts again, and the plaintiff must *rebut* the defendant's reasons by demonstrating that they are pretextual.[172]

Another opinion from the same district approached an ADA claim differently from the *Mayberry* court's approach.[173] The court in *Sherman v. Optical Imaging Systems* did not utilize *Pushkin's* modified burden-shifting approach; instead, it relied on an age discrimination case to establish the elements of a prima facie case under the ADA.[174] The

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165. *Id.* Further, the court concluded that even if Schartle had shown the fourth element of a prima facie case, Motorola's proffered legitimate, nondiscriminatory reason for its action would have withstood Schartle's attempt to show pretext. She introduced no evidence "that the proffered reason is unworthy of belief or that another reason was the true reason motivating Motorola's action." *Id.* at *3.

166. Schartle v. Motorola, Inc., No. 93 C 5508, 1994 WL 323281, at *1 (N.D. Ill. June 24, 1994). "Schartle also contends that we erred in applying the Title VII prima facie case elements to her Americans with Disabilities Act claim. It is unnecessary to revisit that question in light of the above discussion." *Id.* at *2. The Northern District of Illinois has since addressed the *McDonnell Douglas* issue even more explicitly. R.G.H. v. Abbott Lab., No. 93 C 4361, 1995 WL 68830, (N.D. Ill. Feb. 16, 1995). In *R.G.H.* the court noted that despite the defendant's "suggestion that it may not be appropriate, the Court concurs with the widespread practice of allowing disability discrimination plaintiffs to attempt to prove their case by way of the *McDonnell Douglas* shifting-burden method." *Id.* at *12 n.15 (citations omitted). *Cf.* Hall v. Janet Wattles Ctr., No. 94 C 50239, 1995 WL 254411, at *4 n.7 (N.D. Ill. April 14, 1995) (as the issue was not before the court, it did not address the applicability of *McDonnell Douglas* to the ADA).

167. Mayberry v. Von Valtier, 843 F. Supp. 1160 (E.D. Mich. 1994).

168. *Id.* at 1164.

169. *Id.* at 1166. In Jasany v. United States Postal Serv., 755 F.2d 1244, 1249-50 n.5 (6th Cir. 1985), the Sixth Circuit adopted the *Pushkin* approach to allocating burdens. *Mayberry,* 843 F. Supp. at 1165.

170. To show a prima facie case of discrimination under Title III of the ADA, the plaintiffs must prove that they are disabled, that the provider's office is a place of public accommodation, that they were denied full treatment because of their disabilities, and that this occurred under circumstances giving rise to an inference that the denial was based solely on the disabilities. *Mayberry,* 843 F. Supp. at 1166.

171. *Id.*

172. *Id.*

173. Sherman v. Optical Imaging Sys., Inc., 843 F. Supp. 1168 (E.D. Mich. 1994).

174. The court noted that the Sixth Circuit uses the "prima facie case/ legitimate, nondiscriminatory

court concluded that Sherman could not establish three of the prima facie elements; thus, the employer prevailed.[175]

F. Other Districts

In recent months a number of other district courts have followed the lead of those discussed above in applying the *McDonnell Douglas* framework to the ADA. Included among these are district courts in Pennsylvania,[176] Alabama,[177] Texas,[178] Florida,[179] Missouri,[180] Iowa[181] and California.[182]

VII. APPLYING *MCDONNELL DOUGLAS* TO THE ADA

Few courts have had opportunities to interpret the Americans with Disabilities Act's provisions as Congress only enacted it in 1990.[183] The courts that have addressed legal issues under the ADA have thus looked to other discrimination legislation, including the Rehabilitation Act of 1973,[184] for guidance.[185]

Some courts have suggested that the *McDonnell Douglas* burden-shifting framework is not appropriate for disability discrimination suits. For example, the Fifth Circuit noted that the kind of obstacle confronting a disabled person affects whether the *McDonnell Douglas* framework will apply;[186] if the case involves intentional social bias, the approach is applicable, but if the facts indicate that the job applicant faces surmountable or

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reason/ pretext for discrimination analysis . . . ." *Id.* at 1181 (citing Roush v. KFC Nat'l Management Co., 10 F.3d 392, 396 (6th Cir. 1993), *cert denied*, 115 S. Ct. 56 (1994)). The court listed the following elements of a prima facie case of discrimination under the ADA: 1) the employee must be disabled under the statute; 2) the employee must be qualified for the position, with or without accommodation; 3) the employee must have been discharged; and 4) the employee must have been replaced by a person who is not disabled. *Id.* Interestingly, the court concluded that the analysis that it applied to the Michigan Handicappers' Civil Rights Act claim essentially controlled the ADA claim. However, it provided different criteria for establishing a prima facie case under the former suit. Specifically, the plaintiff had to show the following: 1) that he was handicapped; 2) that the handicap was not connected to his ability to perform the job; 3) that he was terminated; and 4) that there was some evidence that the employer acted with discriminatory intent. *Id.* at 1177.

175. *Id.* at 1181.

176. Zambelli v. Historic Landmarks, Inc., CIV.A. 94-3691, 1995 WL 116669, at *7-8 (E.D. Pa. March 20, 1995).

177. West v. Russell Corp., 868 F. Supp. 313, 316-17 (M.D. Ala. 1994).

178. Aikens v. Banana Republic, Inc., 877 F. Supp. 1031, 1036-37 (S.D. Tex. 1995).

179. Keller v. Western-Southern Life Ins., 881 F. Supp. 1559, 1563 (M.D. Fla. 1995).

180. Ferry v. Roosevelt Bank, 883 F. Supp. 435, 440 (E.D. Mo. 1995).

181. Fink v. Kitzman, 881 F. Supp. 1347, 1373 (N.D. Iowa 1995); Hutchinson v. United Parcel Serv., 883 F. Supp. 379, 393 (N.D. Iowa 1995).

182. Sunkett v. Olsten Temporary Serv., No. G94-20027, 1995 WL 507044, at *3 (N.D. Cal. Aug. 17, 1995).

183. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

184. 29 U.S.C. §§ 701-796 (1988 & Supp. V 1993).

185. *See supra* note 132.

186. *See* Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (5th Cir. 1981).

insurmountable barriers, it will not apply.[187] The Tenth Circuit contended that disability discrimination is caused by more invidious elements than other types of discrimination[188] and that courts should depart from the allocation of burdens laid out in *McDonnell Douglas*.[189] A number of courts have also suggested that the *McDonnell Douglas* approach might apply to disability cases where the employer claims that it did not rely on the disability in making its decision, but where the employer did rely on the disability, this framework would not be appropriate.[190] None of these contentions is persuasive in the context of the ADA. Like other discrimination legislation, the ADA requires an understandable and manageable approach to allocating the burdens of persuasion and production between and among the parties, and the framework established by the Supreme Court in *McDonnell Douglas* provides such an approach. A number of scholars suggest that *McDonnell Douglas* should apply to the ADA.[191] Further, the drafters of the implementing regulations contemplated that this approach to allocating the burdens would be applicable to the ADA: "It may be a defense to a charge of disparate treatment . . . that the challenged action is justified by a legitimate, nondiscriminatory reason."[192]

The argument that the type of barrier confronting the disabled person will determine whether the *McDonnell Douglas* approach will apply is not valid. Rather, it is the employer's behavior that will impact the theory under which a court will analyze an allegation of disability discrimination, and the courts possess tools adequate to address these claims without resorting to a new, modified *McDonnell Douglas* framework. In *Pushkin v. Regents of the University of Colorado*,[193] the court suggested that the Rehabilitation Act claim at issue there would have been more appropriately analyzed

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187. *See supra* notes 71-72.

188. *See* Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981).

189. *See supra* note 90 and accompanying text.

190. *See supra* notes 112-13, 121, 124-25 and accompanying text.

191. Traditional Title VII defenses stated in *McDonnell Douglas* and *Burdine* may be applicable to the ADA. Ricca & Gaskill, *supra* note 18, at 228: "[T]he 'traditional' defense to a charge of discrimination under Title VII (McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)) is applicable to charges of disparate treatment brought under the ADA." Jana H. Carey, *The Americans with Disabilities Act, in* [2] 21ST ANNUAL INSTITUTE ON EMPLOYMENT LAW 245 (PLI Litig. & Admin. Practice course handbook Series No. H-442, 1992).

> Since the ADA looks to the Rehabilitation Act as a key source of interpretive authority for analyzing employment discrimination claims, and the Rehabilitation Act looks to Title VII for interpretive guidance when the discriminatory conduct involved is protected against under both statutes, it is reasonable to conclude that the ADA will also utilize Title VII analysis, modified by applicable Rehabilitation Act cases, when the discrimination involved is prohibited by those statutes. This is consistent with the relationship between the ADA and Title VII.

Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1492 (1994).

192. 29 C.F.R. § 1630.15(a) (1993). "The 'traditional' defense to a charge of disparate treatment under title VII as expressed in *McDonnell Douglas* . . . may be applicable to charges of disparate treatment brought under the ADA." 29 C.F.R. app. § 1630.15(a) (1993) (citing Prewitt v. United States Postal Serv., 662 F.2d 292 (5th Cir. 1981)).

193. 658 F.2d 1372 (10th Cir. 1981).

under a disparate impact theory,[194] but because that statute did not provide for such an analysis,[195] the court proceeded to modify the *McDonnell Douglas* approach.[196] Unlike the Rehabilitation Act, however, the ADA's implementing regulations recognize that a disability suit might be brought under either a disparate treatment theory or a disparate impact theory.[197] Therefore, no good reason exists for departing from the usual approaches to those types of actions.[198] The kind of barrier confronting the disabled person should impact the framework of analysis only to the extent required to determine whether the disparate treatment or the disparate impact theory is more appropriate, and if the plaintiff sues under the disparate treatment theory, the *McDonnell Douglas* framework should apply.

For example, if an employer excluded an employee from staff meetings because the person's face was severely disfigured, or if the employer established a policy of not hiring persons with AIDS, regardless of their qualifications, these behaviors would constitute disparate treatment, and *McDonnell Douglas* would provide the appropriate framework for allocating the burdens of production and persuasion between and among the parties.[199] Similarly, if an employer hired a sighted person rather than an equally qualified blind person because the employer believed it would be convenient to have an employee with a driver's license, this behavior would constitute disparate impact because it involved uniformly applying a criterion that had the effect of screening the disabled person, and the employer would have to show that the criterion was a business necessity.[200]

Blindness would surely constitute an insurmountable barrier to acquiring a driver's license,[201] yet this barrier would not justify modification of the *McDonnell Douglas* framework. In the example described above, a court would simply look to the guidelines established under disparate impact cases to address the relevant issues; conversely, if the employer were treating blind persons differently from sighted persons, the disparate treatment theory and the *McDonnell Douglas* framework would apply. In short, these theories are sufficient to accommodate allegations that various types of employment barriers hindered an applicant's access to a position. No justification exists for resorting to some other approach that is likely only to confuse the litigation and to hinder the efficient administration of justice.

Similarly, the contention that the causative elements of disability discrimination are more invidious than those of other types of discrimination cannot be supported. Is the typical disability discrimination scenario more offensive or unfairly discriminating than, for example, a race discrimination situation where an employer, confronted by an African-American applicant for a position, immediately concludes that even though the individual

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194. *Id.* *See supra* note 88 and accompanying text.

195. *See supra* note 88 and accompanying text.

196. *See supra* note 90 and accompanying text.

197. *See* 29 C.F.R. § 1630.15 (a)-(c) (1993) and 29 C.F.R. app. § 1630.15 (a)-(c) (1993).

198. *See supra* note 6.

199. *See* 29 C.F.R. app. § 1630.15(a) (1993).

200. *See id.* § 1630.15(b)-(c). A more extensive exploration of the disparate impact theory of discrimination is beyond the scope of this Note.

201. *See supra* note 71. *See also* Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 155 N.Y.U. L. REV. 881, 883-84 (1980).

is qualified, he will not hire the applicant because of his race, and then proceeds to create an excuse for the decision? This is precisely the type of scenario that *McDonnell Douglas* is designed to address.[202] It would not be difficult to determine the elements of a prima facie case under the ADA,[203] so why the *McDonnell Douglas* framework should not apply to such a case defies reason.

Further, the suggestion that *McDonnell Douglas* might be applicable in a situation where the employer disclaimed reliance on the disability, but would not be applicable where the employer considered the disability in making its decision, is unsound. Other statutorily protected characteristics are "considered" in employment decisions without rendering *McDonnell Douglas* inapplicable.[204] Similarly, a failure to disclaim reliance on a disability should not lead to abandoning the *McDonnell Douglas* framework. The Tenth Circuit correctly noted that the critical question is not whether the disability played a role in the decision; rather, the focus is whether the employer's reason for its decision constituted *unjustified* consideration of the disability.[205]

The Supreme Court has held that if an employer allows a discriminatory impulse to play a part in an employment decision, it must prove by a preponderance of the evidence that it would have made the same decision absent that impulse.[206] However, considering a person's disability does not necessarily mean that the employer has allowed a discriminatory impulse to motivate its decision.

Under the ADA, an employer making an employment decision will evaluate the qualifications of the persons applying for the opening, and when the individual is disabled, that characteristic must be included in the calculation.[207] If it were not, it would be impossible to determine whether the statute had been violated.[208] Determining whether

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202. *See supra* note 60.

203. *See supra* note 8. *See also* Hutchinson v. United Parcel Serv., 883 F. Supp. 379, 394-95 (N.D. Iowa 1995). The court there concluded that "the proper prima facie case under the ADA is that most closely resembling the prima facie showing required for other forms of employment discrimination . . . ." *Id.* at 395. This showing would require plaintiffs to establish that 1) they were disabled under the ADA; 2) they were "qualified individuals" under the ADA; 3) they were subjected to an adverse employment action; and 4) they were replaced by non-disabled employees or were treated less favorably than employees who were not disabled. *Id.* at 394. The prima facie case might also include the plaintiffs' demonstrating that the employer knew of the disabilities. Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 934 n.7 (7th Cir. 1995).

204. "Race and gender always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion." Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)).

205. *See supra* note 89 and accompanying text. *But see* White v. York Int'l Corp., 45 F.3d 357, 361 (10th Cir. 1995) (noting that *Pushkin* will not apply where the employer acknowledges that the decision to terminate an employee was premised (at least in part) on the employee's disability).

206. *Price Waterhouse*, 490 U.S. at 252-53.

207. *See* 42 U.S.C. § 12113(a) (Supp. V 1993).

208. An employer could not know whether it discriminated against a qualified individual with disabilities unless it evaluated whether the person was qualified. *See* 42 U.S.C. § 12112(a) (Supp. V 1993).

a disabled person is qualified is a two-step process,[209] and obviously, the employer is considering the disability in making these determinations. However, this behavior does not constitute prohibited discriminatory conduct, nor does it necessitate adopting a new framework for analysis in disparate treatment lawsuits. The purposes of the *McDonnell Douglas* burden-shifting approach will still be fulfilled,[210] and the courts will simultaneously benefit from the availability of a familiar and manageable tool for addressing complicated issues. Further, the plaintiff is afforded a means of showing that he suffered adverse treatment "because of"[211] his disability. If the applicant can establish in the prima facie case that he is otherwise qualified, then the employer must articulate a legitimate, nondiscriminatory reason for its decision. The implementing regulations mandate that if the employer's reason for the adverse decision is that accommodating the applicant's needs would create an undue hardship, the employer must provide proof of this fact.[212] However, this requirement does not conflict with the *McDonnell Douglas* approach to allocating burdens. Hence there is no need to create a new framework for analysis.

CONCLUSION

Perhaps the strongest argument supporting adherence to *McDonnell Douglas* in ADA cases is that no good policy reasons exist for not doing so. The courts that have advocated shifting the burden of persuasion to the employer in Rehabilitation Act cases have neither suggested that the plaintiffs in such cases are unduly burdened by the *McDonnell Douglas* framework, nor have they advanced any public policy grounds for the change.[213] It makes little sense, then, to adopt an approach that will confuse an already complex task and provide few practical benefits.[214]

The *McDonnell Douglas* framework provides a manageable system for allocating the burdens in disparate treatment cases, including disability actions involving a variety of employment barriers. The causes of disability discrimination are not more invidious than

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209. *See supra* note 23.

210. *See supra* notes 58-60 and accompanying text.

211. Congress deliberately chose to use the Title VII language ("because of") rather than section 504 language ("solely by reason of") in the ADA because the literal reading of the latter "leads to absurd results." H.R. REP. No. 485(II), 101st Cong., 2d Sess. 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 368.

212. An entity covered by the ADA must provide a reasonable accommodation to an otherwise qualified person "unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business." 29 C.F.R. § 1630.9(a) (1993). Further, an employer cannot merely assert that the appropriate accommodation would create an undue hardship and thereby be relieved of providing it; instead, it "will have to present evidence and demonstrate that the accommodation will, in fact, cause it undue hardship." 29 C.F.R. app. § 1630.15(d) (1993). This burden is significantly different from proving that the plaintiff was not qualified or that the decision was for reasons other than disability. *See supra* note 89 and accompanying text.

213. *Cf.* Lianne C. Knych, *Assessing the Application of McDonnell Douglas to Employment Discrimination Claims Brought Under the Americans with Disabilities Act*, 79 MINN. L. REV. 1515 (1995).

214. Price Waterhouse v. Hopkins, 490 U.S. 228, 287 (1989) (Kennedy, J., dissenting) (partially superseded by 42 U.S.C. § 2000e-2(m) (Supp. V 1993) as stated in Hook v. Ernst & Young, 28 F.3d 366, 371 (3rd Cir. 1994)). *See supra* notes 95-96 and accompanying text.

the causes of other types of discrimination, and plaintiffs in ADA suits are not hampered or constrained by the *McDonnell Douglas* standard. To the contrary, they are provided with a means of demonstrating discrimination in an environment where, like Title VII and ADEA cases, direct proof may be hard to attain. Further, limiting the defendant's burden to an obligation of producing evidence will not unduly hinder the prospective employee.[215] The employer "retains an incentive to persuade the trier of fact that the employment decision was lawful."[216] And disclaiming reliance on the disability is not a necessary prerequisite to applying *McDonnell Douglas*. "Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*. Addition of a second burden-shifting mechanism . . . is not likely to lend clarity to the process."[217]

Departing from a well-established and effective means of addressing a difficult issue, absent substantial justification or at least explanation, is not rational or logical and will not lead to effective use of the judicial system. Until an approach is developed which substantially improves the current framework, the *McDonnell Douglas* test should be used in disparate treatment suits brought under the Americans with Disabilities Act.

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215. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

216. *Id.*

217. *Price Waterhouse*, 490 U.S. at 291 (Kennedy, J., dissenting).