Note

Protecting Minnesota's Whistleblowers: Ending the Application of *McDonnell Douglas* to the Minnesota Whistleblower Act

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Whistleblowers are critical to society, speaking out to protect the public from corporate and government wrongdoing. Employers often retaliate against employees who speak out, attempting to deter employees from blowing the whistle. Whistleblower protection statutes seek to protect those who suffer from retaliation, providing a judicial remedy for whistleblowers. The Minnesota Whistleblower Act affords these protections in Minnesota and allows whistleblowers to bring claims against their employers for retaliation.

In Minnesota, whistleblowers are held to a higher, more challenging standard than whistleblowers in other states. Minnesota state courts apply a federal standard at summary judgment, creating an undue barrier for plaintiffs bringing retaliation claims. This federal standard, the McDonnell Douglas *burden-shifting framework, often prevents plaintiffs with legitimate retaliation claims from ever presenting their case to a jury.*

Minnesota must end the application of the McDonnell Douglas *burden-shifting framework to Minnesota Whistleblower Act claims. The continued application of this federal standard obstructs the proper summary judgment standard and limits a whistleblower's ability to reach a settlement or receive a jury award.*

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* J.D. Candidate, 2025, University of Minnesota Law School. I would like to extend a special thank you to Shawn Wanta for his guidance throughout my research for this Note. Thank you also to the *Minnesota Law Review* editors and staff for their contributions and editorial work. Most importantly, thank you to my family—especially my parents—for their unwavering support. Any mistakes are my own.

Other scholars and jurists have repeatedly criticized McDonnell Douglas *in other contexts. This Note specifically addresses the inappropriate application of the framework to Minnesota Whistleblower Act claims. Further, this Note analyzes how different states have dealt with* McDonnell Douglas *in the whistleblower context and discusses how the Minnesota Supreme Court has reviewed the issue. Ultimately, this Note concludes that to protect whistleblowers, Minnesota must end the application of* McDonnell Douglas *to Minnesota Whistleblower Act claims.*

INTRODUCTION

Beginning in 2000, Terrance Swanson, a safety investigator at the Minnesota Office of Safety and Health (OSH), watched his supervisors manipulate and destroy the results of his investigations in serious injury and fatality cases.[1] His supervisors instructed him to modify his findings and to lie to people outside the agency in order to conceal the manipulation.[2] Swanson firmly believed that these instructions were politically motivated,[3] suspecting that the manipulation of his findings served to protect certain "preferred" businesses from sanctions and negative publicity.[4]

In 2000 and 2001, Swanson conducted investigations at two separate Department of Corrections (DOC) facilities.[5] During these investigations, he learned that DOC officials were unhappy with him for investigating a fellow state agency.[6] OSH management accused him of being "too aggressive" in his investigations, and he was forced to alter his findings to support OSH's decision to close the DOC file.[7] Swanson vehemently opposed altering his reports and sent a memo to officials within and outside of OSH, explaining his opposition.[8]

Over the next few years, Swanson's direct supervisor subjected him to retaliatory threats and actions, forcing Swanson to alter his findings if they were at odds with OSH's political

1. Complaint at 1–2, Swanson v. State, No. 62-C8-06-10191, 2008 WL 4375985 (Minn. Dist. Ct. 2008) [hereinafter Complaint].

2. *Id.* ("Swanson has been instructed to modify or alter his findings. He has seen investigation files destroyed. He has even been instructed to lie to people outside the agency to conceal this manipulation.").

3. *See id.* at 2 ("[T]he mandates that Swanson has received from OSH management have been politically motivated. OSH investigators have been instructed to refrain from sanctioning other state agencies, because the sanctions make it difficult for state agencies to meet budgetary requirements.").

4. *Id.* ("[T]he directives Swanson has received to alter his investigation files have ultimately served to protect preferred businesses from sanctions and negative publicity.").

5. *Id.* ("In the years 2000 and 2001, Swanson investigated two complaints that occurred at two separate Department of Corrections . . . facilities.").

6. *Id.* ("During his investigation, Swanson learned that officials within DOC were upset with OSH for investigating a fellow state agency.").

7. *Id.* at 2–3 ("Swanson was later told by OSH management . . . that he was 'too aggressive' . . . . [Swanson's supervisor] forced Swanson to alter his findings to support the decision to close the file.").

8. *Id.* at 3 ("Swanson sent a memo to . . . officials inside and outside of OSH explaining his opposition to the file closure.").

preferences.[9] When Swanson refused, his workload increased, his job duties changed, he was forced to attend supplemental training, he was passed over for promotions, and he was even removed from serious injury and fatality investigations.[10] To the best of his abilities, Swanson withstood the retaliation and continued to perform his job duties.[11]

In 2005, Swanson investigated a particularly serious injury at a power-generation facility in Duluth, Minnesota, ultimately concluding that Minnesota Power was one of the parties at fault for the accident.[12] In his report, Swanson included a narrative report of Minnesota Power's involvement in the accident.[13] He recommended the issuance of a citation for Minnesota Power, which his supervisors rejected.[14] In early 2006, Swanson became suspicious that the file containing his investigation into Minnesota Power had been destroyed.[15] When he asked his supervisor what he should do if someone asked about it, his supervisor told him to say that the Minnesota Power file never existed.[16] Believing this to be part of OSH's practice of destroying evidence for political purposes, Swanson emailed the OSH director, stating that he believed OSH had violated the law by destroying the

9. *Id.* ("In the years following the DOC investigations, [OSH management] orchestrated retaliatory threats and actions aimed at forcing Swanson to alter his findings if his findings were at odds with OSH's political preferences.").

10. *Id.* (listing the ways OSH management retaliated against Swanson after the DOC investigations).

11. *Id.* ("Swanson continued to perform his job to the best of his abilities . . . .").

12. Swanson v. State (*Swanson Appellate Decision*), No. A08-0553, 2009 WL 671039, at *1 (Minn. Ct. App. Mar. 17, 2009); *see also* Complaint, *supra* note 1, at 3 ("The investigation involved an employee whose head was crushed while working inside a boiler.").

13. *Swanson Appellate Decision*, 2009 WL 671039, at *1.

14. Complaint, *supra* note 1, at 4.

15. *Id.* ("Swanson became suspicious that OSH management had destroyed the Minnesota Power file . . . In the latter part of 2006, Swanson searched for the Minnesota Power file in OSH's electronic database using the file's federal identification number. He found no trace that the Minnesota Power file had ever existed.").

16. *Id.* ("[Swanson's supervisor] instructed Swanson to respond to outside inquiries by saying that a Minnesota Power file never existed.").

file.[17] Swanson informed the director that he refused to lie about the file because doing so was against the law.[18]

Soon after, Swanson received notice that his employment was terminated, accompanied by a job offer for a lesser position located 105 miles from his home.[19] With bills to pay and a family to feed, Swanson reluctantly accepted the position.[20] Much of his work in the new position covered the same territory as his prior position—meaning that some days, he had to drive 105 miles south to work to pick up a state vehicle, 150 miles north for an inspection, then 150 miles back to return the state vehicle, and finally 105 miles to return home.[21] The demands of the new job were traumatizing for Swanson and his family.[22]

Swanson filed a lawsuit against the State of Minnesota for engaging in whistleblower retaliation in violation of the Minnesota Whistleblower Act (MWA).[23] He alleged OSH retaliated against him for his reports of destroying investigation files for political purposes.[24] At summary judgment, the court applied the *McDonnell Douglas* burden-shifting framework,[25] requiring Swanson to rebut OSH's claim that there was a valid, nonretaliatory reason for his termination. Through its application of this

17. *Id.* at 5 ("Swanson sent an email to . . . the temporary OSH director . . . . Swanson wrote that he believed OSH had violated the law when they destroyed the file.").

18. *Id.* ("[H]e refused to lie about the existence of the Minnesota Power file, since he believed that doing so would be unlawful.").

19. *Id.* at 5–6 (explaining Swanson was notified his office was being closed but was also offered a position 105 miles from his home as an alternative to being laid off).

20. *Id.* at 6 ("Having no other source of income and insurance for his family, Swanson accepted the position . . . .").

21. *Id.*

22. *See id.* ("As of the time of this complaint, Swanson works four day weeks in Duluth, living away from his family in a hotel during the week.").

23. *See generally* Complaint, *supra* note 1 (initiating lawsuit).

24. *See id.* at 5 ("OSH's destruction of the Minnesota Power file and [his supervisor]'s instruction to lie about the file were further manifestations of what had become OSH's standard operating practice: destroying or altering evidence for political purposes.").

25. Swanson v. State (*Swanson District Court Decision*), No. 62-C8-06-10191, 2008 WL 4375985, at *2 (Minn. Dist. Ct. Jan. 24, 2008) (applying McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)); *see also infra* Part I.A (discussing the *McDonnell Douglas* burden-shifting framework, the three-step analysis used to weigh evidence in employment discrimination and retaliation cases).

burden-shifting framework, the court found no genuine issue of material fact and granted summary judgment for the defendant.[26] Swanson's legitimate claim was dead, without ever reaching a jury.[27]

Fortunately, the appellate court recognized that the district court applied a federal standard, the *McDonnell Douglas* framework, to Swanson's claim under Minnesota law.[28] The district court's erroneous decision was reversed,[29] and Swanson settled the claim before going to trial.[30]

Reports of destroyed investigations are crucial to ensure that OSH complies with all state and federal laws. Without protections in place to shield him from retaliation, Swanson, like many other would-be whistleblowers, might not have felt safe speaking out about misconduct and wrongdoing in his workplace.

Whistleblowers are critical to hold businesses, organizations, and government entities accountable for violations of law.[31] "Whistleblowers provide a critical public service," shining

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26. *Swanson District Court Decision*, 2008 WL 4375985, at *2–4.

27. *See id.* at *8 ("Therefore, because Plaintiff cannot establish an adverse employment action or a causal connection as a matter of law, summary judgment must be granted.").

28. *See* Swanson v. State (*Swanson Appellate Decision*), No. A08-0553, 2009 WL 671039 (Minn. Ct. App. Mar. 17, 2009) ("Although federal and state courts examining alleged adverse employment actions under the various whistleblower acts have not addressed the differences in the language of Title VII and the Minnesota Whistleblower Act, Minnesota courts have an obligation to apply this state's statutes as they are written, not to apply a statute as if it uses the language of counterpart federal law.").

29. *Id.* at *1.

30. Swanson's counsel confirmed with this Note's author that the case settled.

31. *See* Sherron Watkins, *Foreword* to STEPHEN KOHN, RULES FOR WHISTLEBLOWERS: A HANDBOOK FOR DOING WHAT'S RIGHT, at xi (2023) ("Whistleblowers are a check on abuse of power. They speak truth to power and to those who have the ability to hold power accountable."); Mary Jo White, Chair, Sec. & Exch. Comm'n, The SEC as the Whistleblower's Advocate (Apr. 30, 2015), https://www.sec.gov/newsroom/speeches-statements/chair-white-remarks-garrett-institute [https://perma.cc/69B3-N3WV] ("I would urge that, especially in the post-financial crisis era when regulators and right-minded companies are searching for new, more aggressive ways to improve corporate culture and compliance, it is past time to stop wringing our hands about whistleblowers. They provide an invaluable public service, and they should be supported.").

light on misconduct where they see it.[32] A plaintiff's ability to successfully bring a whistleblower retaliation claim is extremely important to maintaining and supporting the integrity of businesses, the economy, and the legal system. These claims are crucial to hold businesses accountable for violations of law. Both federal and state laws operate to protect whistleblowers from retaliation.[33] In Minnesota, the MWA exists to protect employees from retaliation, including termination, discrimination, reduced pay, and hostile work environments.[34]

Minnesota is one of forty-nine states that allow for employment at-will, meaning that an employer or employee can end the employment relationship at any time, for any reason.[35] However, state statutes like the MWA operate as exceptions to the doctrine of at-will employment, providing protections for employees who engage in protected conduct.[36] Effective enforcement of the MWA requires that aggrieved employees have the ability to pursue claims against employers who have retaliated against them, and this private right of action is enumerated in the statute.[37]

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32. Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks for National Whistleblower Day Celebration (July 30, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-whistleblower-celebration [https://perma.cc/65HX-J6YX] ("Whistleblowers provide a critical public service and duty to our nation . . . . I thank you for your work to support whistleblowers as they try to shine an important light on misconduct where they see it.").

33. *See* KOHN, *supra* note 31, at 293–307 (2023) (listing, in detail, federal whistleblower protections); *Whistleblower Laws by State*, PAYCOR (Dec. 22, 2021), https://www.paycor.com/resource-center/articles/whistleblower-laws-by-state/#Whistleblower_laws_by_state_chart [https://perma.cc/X9ER-2F46] (listing whistleblower protections by state).

34. *See* MINN. STAT. § 181.932 (2023) (prohibiting Minnesota employers from retaliating against employees who have engaged in protected conduct under the statute).

35. *See Termination Guidance for Employers*, USAGOV (July 21, 2023), https://www.usa.gov/termination-for-employers [https://perma.cc/5CYG-WYTL] (defining at-will employment). Montana is the lone state that does not have at-will employment. *Id.*

36. *See id.* (citing "retaliation for reporting illegal or unsafe workplace practices" as an exception to the doctrine of at-will employment); § 181.932 (listing activities that are considered protected conduct).

37. *See* MINN. STAT. § 181.935(a) ("[A]n employee injured by a violation of section 181.932 may bring a civil action to recover any and all damages recoverable at law, together with costs and disbursements, including reasonable attorney's fees, and may receive such injunctive and other equitable relief as determined by the court.").

Whistleblowers bringing MWA claims must make out their case through evidence of retaliation.[38] Minnesota courts recognize two methods of proving disparate treatment in employment cases, including MWA cases: the direct evidence method[39] and the circumstantial evidence method.[40] Because direct evidence of retaliation is rare, and courts struggle to determine when the direct evidence requirement is met, this method is rarely applied.[41] Instead, the circumstantial evidence method is most frequently applied, utilizing *McDonnell Douglas* to evaluate plaintiffs' claims.[42] In Minnesota, courts apply the *McDonnell Douglas* burden-shifting framework at the summary judgment stage.[43] In every case, for a plaintiff to survive a defendant's summary judgment motion, they must show that there is a genuine issue of any material fact.[44] In addition, under *McDonnell Douglas* as applied by Minnesota courts, an MWA plaintiff must be able to rebut the defendant's proffered nondiscriminatory reason for engaging in an adverse employment action against them.[45] This additional hurdle creates an undue burden for

38. *See* Cokley v. City of Otsego, 623 N.W.2d 625, 632–33 (Minn. Ct. App. 2001) (discussing the evidence that can be provided to satisfy the plaintiff's burden).

39. *See* Goins v. W. Grp., 635 N.W.2d 717, 722–23 (Minn. 2001) (describing and providing examples of the direct evidence method, requiring the plaintiff to show "purposeful, intentional or overt" retaliation).

40. *See id.* at 723–24 (describing the circumstantial evidence method, applying *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973)).

41. Friend v. Gopher Co., 771 N.W.2d 33, 38 (Minn. Ct. App. 2009) ("The direct-evidence framework has been less frequently applied, and, as we discuss later in this analysis, confusion exists over the nature of evidence necessary to support a claim under this framework.").

42. *See id.* at 37 ("The most frequently applied framework is the shifting-burdens analysis first articulated by the U.S. Supreme Court in *McDonnell Douglas* . . . .").

43. *See Cokley*, 623 N.W.2d at 630 ("Minnesota courts have adopted the *McDonnell Douglas* analysis . . . ."); Moore v. City of New Brighton, 932 N.W.2d 317, 323 (Minn. Ct. App. 2019) (collecting cases); *id.* ("The United States Supreme Court established in *McDonnell Douglas* . . . the now customary burden-shifting analysis that Minnesota courts have adopted and applied at summary judgment in employer-retaliation claims under various statutes.").

44. *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

45. *See* Hubbard v. United Press Int'l, 330 N.W.2d 428, 441–42 n.12 (Minn. 1983) ("If the plaintiff is successful in establishing a prima facie case, a

plaintiffs bringing claims under the MWA and often prevents legitimate MWA plaintiffs from achieving favorable outcomes.[46]

This Note argues that the application of the *McDonnell Douglas* burden-shifting framework to MWA claims imposes an undue barrier to plaintiffs at summary judgment and that the proper standard is Minnesota Rule of Civil Procedure 56—Minnesota's summary judgment standard in all other cases.[47] Because a plaintiff's ability to seek damages is the primary enforcement mechanism of the MWA, a plaintiff should be able to bring an MWA claim without undue barriers. Continuing to apply the framework to the MWA will prevent plaintiffs with legitimate whistleblower retaliation claims from reaching a jury. Therefore, this Note argues that, given an opportunity to do so, the Minnesota Supreme Court should end the application of *McDonnell Douglas* to MWA claims.

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presumption is created that the employer unlawfully discriminated against the employee. The burden of production then shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employment action. . . . [T]he plaintiff has the ultimate burden of persuading the court, by a preponderance of the evidence, that the defendant intentionally discriminated against him." (citations omitted) (citing Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981))). Minnesota recognizes *McDonnell Douglas* as the appropriate summary judgment framework in MWA cases. Hanson v. Dep't of Nat. Res., 972 N.W.2d 362, 372 n.16 (Minn. 2022) ("We have recognized *McDonnell Douglas* as the appropriate framework to use in whistleblower cases since the MWA was enacted."); *see* Phipps v. Clark Oil & Refin. Corp., 408 N.W.2d 569, 572 (Minn. 1987) ("The procedure suggested by the court of appeals is that used in Title VII actions . . . . We agree . . . ."); Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 119 n.7 (Minn. 1991) ("*McDonnell Douglas* . . . must be used in analyzing a retaliatory discharge claim."); McGrath v. TCF Bank Sav., FSB, 509 N.W.2d 365, 366 (Minn. 1993) (clarifying that in a whistleblower case applying *McDonnell Douglas*, an employer may still be liable even if it provides a legitimate reason for terminating an employee "if an illegitimate reason 'more likely than not' motivated the discharge decision" (quoting Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 627 (Minn. 1988))).

46. *See Hanson*, 972 N.W.2d at 380 (Chutich, J., concurring) ("*McDonnell Douglas* is burdensome, complex, and hinders plaintiffs' access to justice.").

47. *See* MINN. R. CIV. P. 56.01 ("The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law."); *see also* Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993) ("A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law." (citing MINN. R. CIV. P. 56.03)).

Part I of this Note discusses *McDonnell Douglas Corp. v. Green*,[48] the case that created the burden-shifting framework. Part I also discusses common criticisms of the *McDonnell Douglas* burden-shifting framework. Part II analyzes trends regarding the application of *McDonnell Douglas* in other jurisdictions, particularly the trend of moving away from *McDonnell Douglas* for whistleblower claims brought under state statutes. Part III argues that *McDonnell Douglas* should not apply to MWA cases because the framework imposes a higher burden than is required under Minnesota law.

I. THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK AND ITS CRITICISMS

The *McDonnell Douglas* burden-shifting framework is the cause of much debate.[49] Federal and state courts alike have struggled to apply the framework, and rarely, if ever, has a court provided meaningful justification for doing so. Part I.A discusses the framework and its creation, illustrating the framework's inherent deficiencies. Part I.B discusses the many scholarly criticisms of *McDonnell Douglas* and provides reasoning that suggests the framework may not be appropriate in any context.

A. THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK

The creation of the *McDonnell Douglas* framework gives necessary background into why the framework is improperly applied to MWA claims. *McDonnell Douglas Corp. v. Green* was a case brought pursuant to Title VII of the Civil Rights Act of 1964 (Title VII).[50] Title VII prohibits discrimination in employment practices on the basis of membership in a protected class.[51] In *McDonnell Douglas*, the Supreme Court sought to address the disharmony between lower courts in stating the applicable rules for Title VII cases.[52] In doing so, the Court set forth a new

48. 411 U.S. 792 (1973).

49. *See infra* Part I.B (explaining criticisms of the *McDonnell Douglas* burden-shifting framework).

50. *McDonnell Douglas*, 411 U.S. at 793 ("The case before [the Court] raises significant questions as to the proper order and nature of proof in actions under Title VII of the Civil Rights Act of 1964 . . . .").

51. *See* 42 U.S.C. § 2000e-2(a) (including race, color, religion, sex, and national origin as protected classes under Title VII).

52. *See McDonnell Douglas*, 411 U.S. at 801 (stating the Court's intention to address the issue of disharmony between the lower courts).

standard for allocating the burden of proof for claims brought under Title VII.[53]

The case was brought by Percy Green, a Black civil rights activist, who was laid off in 1964 during a "workforce reduction."[54] Green engaged in multiple demonstrations to protest the general hiring practices of McDonnell Douglas and his discharge, which he believed was racially motivated.[55] These demonstrations included a "stall-in," in which several protestors blocked the company's main access road at the start of the morning rush hour, and a "lock-in," in which a chain and padlock were placed on the front door of one of the company's buildings, preventing certain employees from leaving.[56]

In 1965, following the "lock-in," McDonnell Douglas publicly advertised an opening for qualified mechanics, Green's trade.[57] Green "promptly applied for re-employment" at McDonnell Douglas and was quickly rejected—the rejection was based on Green's involvement in the "stall-in" and "lock-in."[58] He filed a formal complaint with the Equal Employment Opportunity Commission (EEOC), claiming that the company had refused to rehire him because of his race and involvement in the civil rights movement, in violation of Title VII.[59] The EEOC made no finding on Green's allegation of racial bias, but it did find reasonable cause to believe that McDonnell Douglas had violated Title VII "by refusing to rehire Green because of his civil rights activity."[60] The EEOC ultimately advised Green of his right to initiate a civil action in federal court.[61] In 1968, Green filed a complaint in the

53. *See id.* at 802–04.

54. *See id.* at 794 ("Respondent . . . worked for petitioner as a mechanic and laboratory technician from 1956 until August 28, 1964 when he was laid off in the course of a general reduction in petitioner's work force.").

55. *See id.* ("Respondent, a long-time activist in the civil rights movement, protested vigorously that his discharge and the general hiring practices of petitioner were racially motivated.").

56. *See id.* at 794–95 (describing the "stall-in" and the "lock-in").

57. *Id.* at 796.

58. *Id.*

59. *Id.* Green alleged violations of § 703(a)(1) of Title VII (prohibiting racial discrimination in any employment decision), codified at 42 U.S.C. § 2000e-2(a)(1), and § 704(a) of Title VII (prohibiting discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment), codified at 42 U.S.C. § 2000e-3(a). *Id.* at 797 n.4.

60. *Id.* at 797 (describing the EEOC's determination).

61. *Id.*

Eastern District of Missouri, alleging that McDonnell Douglas violated Title VII when it failed to rehire him because of his race and involvement in the civil rights movement.[62] The Supreme Court granted certiorari to clarify the standards of proof in employment discrimination cases.[63]

The critical issue considered by the Supreme Court concerned the order and allocation of proof in an employment discrimination case.[64] The Court sought to resolve the issue of how the burden of proof shifts upon the making of a prima facie case of a Title VII violation, remarking that several lower court judges had attempted to state the applicable rules with a "notable lack of harmony."[65] When drafting the *McDonnell Douglas* burden-shifting framework, the Court relied on the language and purpose of Title VII.[66]

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62. *See* Green v. McDonnell-Douglas Corp. (*McDonnell Douglas District Court I*), 318 F. Supp. 846 (E.D. Mo. 1970) (finding that company McDonnell-Douglas did not violate the Civil Rights Act when they did not rehire a former employee who participated in civil rights activities), *rev'd*, 463 F.2d 337 (8th Cir. 1972).

63. *See McDonnell Douglas*, 411 U.S. at 798. The district court dismissed the racial discrimination claim and found that McDonnell Douglas's refusal to rehire Green was based solely on his involvement in illegal demonstrations—not on his legitimate civil rights activities. *Id.* at 797. On appeal, the Eighth Circuit confirmed that illegal demonstrations are not protected under Title VII but reversed the dismissal of Green's racial discrimination claim. *Id.* The Eighth Circuit remanded the case, attempting to set forth standards that would allow Green to demonstrate that McDonnell Douglas's proffered reasons for refusing to rehire him were pretext. *Id.* at 797–98; *see also McDonnell Douglas District Court I*, 318 F. Supp. at 851 ("Defendant's refusal to reemploy plaintiff was based on plaintiff's misconduct, which justified the refusal to rehire."); *McDonnell Douglas*, 411 U.S. at 798 (noting the Eighth Circuit's instructions that Green should be given the opportunity to demonstrate that McDonnell Douglas's reasons for refusing to rehire him were mere pretext).

64. *McDonnell Douglas*, 411 U.S. at 800 ("The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination.").

65. *Id.* at 801.

66. *See id.* at 800 ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens." (citing Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971))).

The Court set forth the three-step burden-shifting framework as follows:

I. The plaintiff has the burden of establishing a prima facie case of discrimination.[67]

II. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's rejection.[68]

III. The burden shifts back to the plaintiff to prove that the defendant's proffered nondiscriminatory reason is pretextual.[69]

The *McDonnell Douglas* burden-shifting framework is often characterized by this third step—proving pretext.[70] The Court emphasized that Green must be given the opportunity to demonstrate that his former employer's presumptively legitimate reasons for his rejection were in fact pretext for racial discrimination.[71] On remand, Green was unable to affirmatively prove pretext—the district court found in favor of McDonnell Douglas, and the decision was affirmed on appeal.[72]

Although the Supreme Court emphasized removing "artificial, arbitrary, and unnecessary barriers to employment,"[73] the

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67. *Id.* at 802 ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination.").

68. *Id.* ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

69. *Id.* at 804 ("On remand, respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.").

70. *See, e.g.*, Alexandra Zabinski, Article, *Surviving the "Pretext" Stage of* McDonnell Douglas*: Should Employment Discrimination and Retaliation Plaintiffs Prove "Motivating Factors" or But-For Causation?*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 280, 285 (2019) ("[T]he critical stage of the *McDonnell Douglas* test is the third stage, commonly called the 'pretext stage.'").

71. *See McDonnell Douglas*, 411 U.S. at 805 ("In short . . . [Green] 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.").

72. *See* Green v. McDonnell Douglas Corp. (*McDonnell Douglas District Court II*), 390 F. Supp. 501, 503 (E.D. Mo. 1975) (finding in favor of McDonnell Douglas), *aff'd*, 528 F.2d 1102 (8th Cir. 1976).

73. *See McDonnell Douglas*, 411 U.S. at 801 ("What is required by 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

McDonnell Douglas burden-shifting approach has made it more difficult for plaintiffs to bring successful employment claims.[74] Green's failure to prove pretext on remand[75] foreshadowed plaintiffs' struggles with *McDonnell Douglas* for years to come. *McDonnell Douglas* is a fifty-year-old decision, but its continued application creates a barrier for plaintiffs to this day.[76] In *McDonnell Douglas*, the Court did not dictate that the burden-shifting framework be applied at summary judgment, but both federal and state courts have come to employ the framework at that stage of litigation.[77] The next Section of this Note illustrates the controversy surrounding the continued application of *McDonnell Douglas* and discusses the common criticisms of the framework, particularly that applying the *McDonnell Douglas* burden-shifting framework at summary judgment often prevents plaintiffs with legitimate claims from reaching a jury.[78]

B. CRITICISMS OF THE *MCDONNELL DOUGLAS* BURDEN-SHIFTING FRAMEWORK

Many scholars argue that the application of the *McDonnell Douglas* burden-shifting framework at summary judgment is

other impermissible classification." (quoting Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971))).

74. Christopher J. Emden, Note, *Subverting Rule 56?* McDonnell Douglas*,* White v. Baxter Healthcare Corp*., and the Mess of Summary Judgment in Mixed-Motive Cases*, 1 WM. & MARY BUS. L. REV. 139, 159 (2010) (citing Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 208–09 (1993)) ("Plaintiffs are losing employment discrimination cases because of the problems of proving pretext under the third prong of the *McDonnell Douglas* analysis."); *see also* Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672–73 (2013) (acknowledging that plaintiffs in employment discrimination cases face a higher percentage of cases dismissed at summary judgment).

75. *McDonnell Douglas District Court II*, 390 F. Supp. at 503 (finding that Green made a prima facie case but was unable to prove that McDonnell Douglas's stated reasons for his rejection were pretext).

76. *See* Emden, *supra* note 74, at 140 ("In reality, *McDonnell Douglas* has become a gatekeeper barring legitimate plaintiffs from reaching the jury.").

77. *See, e.g.*, White v. Baxter Healthcare Corp., 533 F.3d 381, 388–89 (6th Cir. 2008) (applying the burden-shifting framework in the federal court context); Hanson v. Dep't of Nat. Res., 972 N.W.2d 362, 372–73 (Minn. 2022) (applying the burden-shifting framework in the state court context).

78. *See* Emden, *supra* note 74, at 161 ("Forcing a plaintiff to prove pretext at the summary judgment stage requires the plaintiff to prove the ultimate issue of the case without the fact-finding benefits that a trial has to offer.").

inappropriate.[79] The general frustration is that the framework imposes a higher bar on plaintiffs than Federal Rule of Civil Procedure (FRCP) 56.[80] FRCP 56 requires that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[81] However, the third step of the *McDonnell Douglas* burden-shifting framework requires plaintiffs to show that the employer's proffered nondiscriminatory reason for the alleged discrimination is pretextual.[82] This third step imposes an additional requirement on plaintiffs at the summary judgment stage, when all that FRCP 56 requires is a genuine dispute of material fact.[83] Proving pretext requires plaintiffs to produce evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action."[84] To prevail

79. *See, e.g.*, Emden, *supra* note 74, at 159 ("*McDonnell Douglas* goes too far in the opposite direction and bars cases which should survive summary judgment."); Sandra F. Sperino, *Flying Without a Statutory Basis: Why* McDonnell Douglas *Is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 795 (2006) ("[B]y isolating *McDonnell Douglas* into a summary judgment standard only, the courts are using one standard to determine whether a case should go to trial and having the jury apply quite a different standard at the trial itself."); Taylor Gamm, Note, *The Straw That Breaks the Camel's Back: A Final Argument for the Demise of the* McDonnell Douglas *Framework*, 86 U. CIN. L. REV. 287, 297 (2018) ("[A]s evidenced by the high rate of successful summary judgment motions by defendants, the *McDonnell Douglas* burden-shifting Framework places unnecessary burdens on the plaintiff.").

80. *See* Emden, *supra* note 74, at 140 ("Current summary judgment standards impose burdens not mandated by, and therefore, in violation of Rule 56 of the Federal Rules of Civil Procedure . . . .").

81. FED. R. CIV. P. 56. *Compare id.* ("The court shall grant summary judgment if the movant shows that there is no genuine *dispute* as to any material fact and the movant is entitled to judgment as a matter of law." (emphasis added)), *with* MINN. R. CIV. P. 56.01 ("The court shall grant summary judgment if the movant shows that there is no genuine *issue* as to any material fact and the movant is entitled to judgment as a matter of law." (emphasis added)).

82. *See* McDonnell Douglas Corp v. Green, 411 U.S. 792, 804 (1973) (describing the third step of the burden-shifting framework).

83. *See* Emden, *supra* note 74, at 140 ("Current summary judgment standards impose burdens not mandated by, and therefore, in violation of Rule 56 of the Federal Rules of Civil Procedure . . . .").

84. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting Olson v. Gen. Elec. Astrospace, 101 F.3d 947, 951–52 (3d Cir. 1996)); *see also* Timothy M. Tymkovich, *The Problem with Pretext*, 85 DENV. U. L. REV. 503, 505 (2008) ("[T]his focus on pretext has shifted the emphasis of an employment

at the third step of the *McDonnell Douglas* framework, a plaintiff must either persuade the court that a discriminatory reason likely motivated the employer or show that the employer's proffered explanation is unworthy of credence.[85]

Establishing a prima facie case of employment discrimination generally raises a genuine issue of material fact.[86] Once a prima facie case has been established, either through the introduction of actual evidence or the *McDonnell Douglas* presumption,[87] summary judgment for the defendant is not appropriate because the issue at the core of a Title VII claim is the factual question of intentional discrimination.[88] Courts and scholars alike have struggled to reconcile the FRCP 56 summary judgment standard with *McDonnell Douglas*,[89] and no court has conclusively set forth a clear framework for interpreting the two standards alongside each other in varying factual circumstances.[90] Because of this irreconcilable tension with FRCP 56,

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discrimination case away from the ultimate issue of whether the employer discriminated against the complaining employee.").

85. *See* Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981) ("The plaintiff retains the burden of persuasion . . . . This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.").

86. *See* Emden, *supra* note 74, at 156 (describing how a plaintiff establishing a prima facie case raises the issue of the employer's motive (citing Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1985))).

87. The *McDonnell Douglas* presumption is the legal presumption of unlawful discrimination by the employer established when the employee makes out their prima facie case. *See Burdine*, 450 U.S. at 254 ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee.").

88. *Lowe*, 775 F.2d at 1009 ("[T]he crux of a Title VII dispute is the 'elusive factual question of intentional discrimination . . . .'" (quoting *Burdine*, 450 U.S. at 255 n.8)).

89. *See infra* note 187 (discussing the inconsistent standards created by the application of *McDonnell Douglas*); *see also* Sandra F. Sperino, *Irreconcilable:* McDonnell Douglas *and Summary Judgment*, 102 N.C. L. REV. 459, 459 (2024) (arguing that the *McDonnell Douglas* burden-shifting framework is simply irreconcilable with the summary judgment standard).

90. *See* Gamm, *supra* note 79, at 308 ("[T]here is a much stronger argument that the *McDonnell Douglas* Framework should be abolished once and for all because the judicial history of *McDonnell Douglas* . . . has been so severely inconsistent.").

McDonnell Douglas should not apply to Title VII claims, nor any other claims, at summary judgment.[91]

Aside from the clear conflict with FRCP 56, *McDonnell Douglas* has been subject to numerous other criticisms. The *McDonnell Douglas* burden-shifting framework was not derived from any statutory language or framework.[92] In fact, the Court seems to have created the framework without relying on any justification or authority.[93] At least one federal judge has expressed that the framework seems "awfully made up."[94] Even the legislative history of Title VII shows that *McDonnell Douglas* is not in accord with the purpose of the statute.[95] The Supreme Court created the *McDonnell Douglas* burden-shifting framework without justification or support and gave no policy support for

91. This Note limits the scope of this argument to consider only the application of *McDonnell Douglas* to the Minnesota Whistleblower Act. The argument could also be made that *McDonnell Douglas* should not apply to claims brought under the Minnesota Human Rights Act (MHRA), to which *McDonnell Douglas* is frequently applied at summary judgment, but that inquiry is outside the scope of this Note.

92. *See, e.g.*, Sperino, *supra* note 79, at 766 ("From a textualist perspective, the framework simply has no support in the language of [Title VII of the Civil Rights Act of 1964].").

93. *See* Griffith v. City of Des Moines, 387 F.3d 733, 740 (Magnuson, J., concurring) ("Absent from [the *McDonnell Douglas*] opinion was any justification or authority for [the burden-shifting framework]."); Mark A. Schuman, *The Politics of Presumption:* St. Mary's Honor Center v. Hicks *and the Burdens of Proof in Employment Discrimination Cases*, 9 ST. JOHN'S J. LEGAL COMMENT. 67, 70 (1993) ("The *McDonnell Douglas* Court gave no justification or authority for its establishment of this structure for proof of illegal discrimination. The Court did not cite or discuss any passage from Title VII or any other part of the Civil Rights Act of 1964. Nor did the Court argue that any legislative history from the Act lent support to, or even suggested, such a set of rules. The Court did not explain how proof of a prima facie case had any logical or inferential relationship to proof of the employer's intent itself. The Court did not expound upon shifting burdens of proof, presumptions, or any other procedural rules used in any other cause of action, whether statutory or common law, from which it had drawn this scheme. The Court did not cite any power a court might possess to structure the presentation of evidence in a way most conducive to accurate fact-finding.").

94. *See* Tynes v. Fla. Dep't of Juv. Just., 88 F.4th 939, 951 (11th Cir. 2023) (Newsom, J., concurring) ("[A]s a threshold matter, *McDonnell Douglas* seems (in retrospect) awfully made up.").

95. *See* Sperino, *supra* note 79, at 781 ("[T]he legislative history of Title VII provides the Court with little guidance regarding how to interpret the statute's operative provisions and certainly does not provide the courts with any instruction, permission, or mandate to construe Title VII's provisions in derogation of its express statutory language.").

the framework until deciding later cases.[96] Moreover, the application of the *McDonnell Douglas* burden-shifting framework was intended to apply to a narrow set of factual scenarios.[97] There is broad sentiment that the Supreme Court's decision in *McDonnell Douglas* was motivated by the Court's lack of experience with Title VII litigation.[98] Over time, *McDonnell Douglas* has been applied in a manner that created a "rat's nest of surplus 'tests'" that stray significantly from the purpose of the original burden-shifting framework.[99] Based on the foregoing reasons, the application of the *McDonnell Douglas* burden-shifting framework to employment discrimination claims is no longer appropriate nor necessary.

There are two main arguments for why the *McDonnell Douglas* burden-shifting framework does not violate FRCP 56.[100] The first argument assumes that *McDonnell Douglas* is the proper standard because it has not been overruled by the Supreme Court in the fifty years since its inception.[101] This

96. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 514 (1993) (referencing the application of *McDonnell Douglas* as "traditional practice"); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("The shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979))); s*ee also* Schuman, *supra* note 93, at 70 (admonishing the Court's creation of the *McDonnell Douglas* burden-shifting framework without also providing a legal or policy justification).

97. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973) ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

98. *See, e.g.*, Schuman, *supra* note 93, at 85 ("When the Supreme Court established the presumption in *McDonnell Douglas*, neither it, nor courts in general, had accumulated a great deal of experience in how employers make decisions."); *see also* Coleman v. Donahoe, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) ("Perhaps *McDonnell Douglas* was necessary 40 years ago, when Title VII was still relatively new in the federal courts.").

99. Brief of Amicus Curiae Nat'l Emp. Laws. Ass'n – Minn. Chapter & Emp. Laws. Ass'n of the Upper Midwest at 6, Hanson v. Dep't of Nat. Res., 972 N.W.2d 362 (Minn. 2022) (No. A20-0747) [hereinafter NELA & ELA Brief] ("[J]urisprudence in the wake of *McDonnell Douglas* has led to a 'rat's nest of surplus "tests"' . . . ." (quoting Ortiz v. Werner Enters., Inc., 834 F.3d 760, 766 (7th Cir. 2016))).

100. *See* Emden, *supra* note 74, at 163 (describing the two main arguments for why *McDonnell Douglas* does not violate FRCP 56).

101. *Id.*

argument relies on the fact that the Court has not conclusively dismissed the *McDonnell Douglas* framework, but it ignores the several modifications and clarifications the Court has made to the framework in particular circumstances.[102] The second argument is based on the belief that if a plaintiff cannot prove pretext at summary judgment, then the plaintiff is not entitled to have their case heard in front of a jury.[103] Effectively, the second argument favors imposing an additional burden at summary judgment only on plaintiffs with employment discrimination claims because *McDonnell Douglas* is only applied in the employment discrimination context.

Both arguments dismiss the standard of proof required at summary judgment. All that is required to survive summary judgment is a "genuine issue as to any material fact."[104] The appropriate inquiry at summary judgment for an employment discrimination claim is whether the defendant has demonstrated insufficient facts from which a jury could reasonably conclude that the defendant engaged in discrimination.[105] Where a defendant is unable to demonstrate such insufficiency, then litigation should proceed onward to determine the defendant's ultimate liability. That is all that the Federal Rules of Civil Procedure require.

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102. *See, e.g.* Texas Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 258 (1981) (holding that the plaintiff must have the opportunity to demonstrate the defendant's proffered reason was not the true reason for the employment decision); Price Waterhouse v. Hopkins, 490 U.S. 228, 228–29 (1989) (holding when a plaintiff proves that protected class status played a part in an employment decision, defendant may avoid liability by proving by preponderance of the evidence that it would have made the same decision even if it had not taken plaintiff's protected class status into account); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 502–03 (1993) (holding that in order to rebut the presumption of illegal discrimination, the employer need only produce evidence that would support a finding that it was motivated by a reason not prohibited by Title VII); Desert Palace, Inc. v. Costa, 539 U.S. 90, 91 (2003) (holding that in order to prevail at summary judgment, the plaintiff needs to prove that the employment decision at issue was, at least in part, motivated by an improper factor).

103. *See* Emden, *supra* note 74, at 163 (describing the two main arguments for why *McDonnell Douglas* does not violate FRCP 56).

104. FED. R. CIV. P. 56.

105. *See* McGinley, *supra* note 74, at 241 ("When a defendant moves for summary judgment, the proper inquiry is whether the defendant has demonstrated that there are insufficient facts from which a jury could reasonably conclude that the defendant discriminated against the plaintiff.").

When a plaintiff sets forth a prima facie case of employment discrimination, application of the *McDonnell Douglas* burden-shifting framework creates an additional hurdle at summary judgment—decreasing the likelihood that a plaintiff achieves a favorable outcome in litigation.[106] Defense attorneys use summary judgment motions not only to get cases thrown out entirely, but also to decrease the settlement value of a plaintiff's case.[107] However, when a defendant's motion for summary judgment is denied, the plaintiff's case value increases, and the defendant must decide whether to gamble—and put the case before a jury—or to settle for an increased amount.[108] This Note does not argue for MWA plaintiffs to have a lower burden at summary judgment in order to achieve more favorable settlements. Instead, it argues for MWA plaintiffs to have a better chance at a fair settlement by eliminating undue summary judgment barriers that do not exist outside of the employment context.[109] Accordingly, Minnesota courts should stop applying *McDonnell Douglas* to whistleblower retaliation cases at summary judgment and instead should apply only the Rule 56 standard.[110] Part II of this Note discusses the trend away from *McDonnell Douglas* in several jurisdictions, and Part III explains why Minnesota should follow suit with regard to the MWA.

II. *MCDONNELL DOUGLAS* TRENDS IN OTHER JURISDICTIONS

Rejecting the application of *McDonnell Douglas* to state-law whistleblower protection statutes like the MWA is not a novel

106. *See* Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. (1995) 703, 707 ("Even when applied properly, *McDonnell Douglas* may defeat an otherwise meritorious civil rights claim.").

107. D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 273, 276 (2010) ("[L]awyers use summary judgment motions to decrease settlement value.").

108. Edward Brunet, *The Efficiency of Summary Judgment*, 43 LOY. U. CHI. L.J. 689, 703 (2012) ("When a motion for summary judgment is denied, the nonmoving party achieves a form of premium that enables a case to settle for an additional amount. Put simply, the settlement value of a case increases when a motion for summary judgment is denied. Denial of summary judgment motions up the ante in the litigation game.").

109. *See infra* Part III.

110. Recall that MINN. R. CIV. P. 56.01 is Minnesota's equivalent of FED. R. CIV. P. 56, the summary judgment standard in federal courts.

idea. Minnesota would follow a handful of other states that provided detailed reasoning for reaching this conclusion.[111] Part II of this Note discusses the trend away from applying *McDonnell Douglas* to state whistleblower claims. Part II.A analyzes the reasoning behind the state court decisions rejecting *McDonnell Douglas* in this context. Part II.B discusses some states' unique approaches to applying *McDonnell Douglas* and what lessons Minnesota can learn from those states. This Note then analyzes the reasoning behind other states' application of *McDonnell Douglas* and argues that its application is particularly inappropriate in the context of the MWA.

A. TRENDS AWAY FROM APPLYING *MCDONNELL DOUGLAS* TO STATE-LAW WHISTLEBLOWER RETALIATION CLAIMS

A majority of states have whistleblower retaliation statutes similar to the MWA.[112] Claims brought pursuant to these statutes typically require that the plaintiff satisfy three elements to make out a prima facie case: (1) that the plaintiff engaged in activity protected by the whistleblower protection statute; (2) the plaintiff experienced an adverse employment action; and (3) a causal connection existed between the protected activity and the adverse employment action.[113] The similarity of each state's statute prohibiting whistleblower retaliation allows for an analogous inquiry into cases brought pursuant to these statutes in different states.

Some states have concluded that *McDonnell Douglas* should not be applied to state-law whistleblower claims.[114] Because

111. *See, e.g.*, Lawson v. PPG Architectural Finishes, Inc., 503 P.3d 659, 660 (Cal. 2022) (holding that the *McDonnell Douglas* test is not required for cases of "unlawful retaliation" in California).

112. *See Whistleblower Laws by State*, *supra* note 33 (detailing whistleblower laws by state).

113. *See, e.g.*, Walsh v. Town of Millinocket, 28 A.3d 610, 616 (Me. 2011) (describing elements of Whistleblower Protection Act Claim); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1983) (describing elements of retaliatory discharge claim).

114. *See, e.g.*, *Lawson*, 503 P.3d at 660 (stating that *McDonnell Douglas* is not a requirement for whistleblower claims in California). However, some states continue to inappropriately apply *McDonnell Douglas* to whistleblower retaliation claims. *See, e.g.*, *In re* Seacoast Fire Equip. Co., 777 A.2d 869, 872 (N.H. 2001) ("Accordingly, we formally adopt the *McDonnell Douglas* framework in whistleblower cases and we review the instant case under that framework.");

many states have yet to address the issue, Minnesota has the opportunity to join the states that have abandoned *McDonnell Douglas* in this context and become an early example of a state that has taken additional steps to protect its whistleblowers. Both California and Maine held that *McDonnell Douglas*'s application in this context is inappropriate,[115] and the courts in both states provided detailed reasoning to this end. Part II.A.1 of this Note addresses California's statutory approach to the *McDonnell Douglas* issue in whistleblower retaliation cases, and Part II.A.2 addresses Maine's approach, emphasizing the proper summary judgment standard.

1. California Found *McDonnell Douglas* Inapplicable for Statutory Reasons

In 2022, the Supreme Court of California decided *Lawson v. PPG Architectural Finishes*, *Inc.*, concluding that *McDonnell Douglas* is inappropriately applied to California's whistleblower protection statute.[116] The plaintiff, Wallen Lawson, alleged that his direct supervisor ordered him to intentionally mis-tint certain PPG paint products so that the products could be sold at a deep discount, enabling PPG to avoid buying back what would otherwise be excess unsold product.[117] Lawson refused to participate in this scheme, reported it to the PPG ethics hotline, and

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Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 419 (Fla. Dist. Ct. App. 2015) ("Because Florida applies the Title VII analysis to retaliatory discharge under the Whistleblower Act, the burden shifting analysis of *McDonnell Douglas* . . . applies." (citation omitted)); Coward v. MCG Health, Inc., 802 S.E.2d 396, 399 (Ga. Ct. App. 2017) ("In the context of evaluating whether a state whistleblower claim is subject to summary adjudication, this Court utilizes the *McDonnell Douglas* burden-shifting analysis used in Title VII retaliation cases." (citations omitted)). Other states have punted on the issue. *See, e.g.*, Boespflug v. Dep't of Lab. & Indus., 21 Wash. App. 2d 1007 (Wash. Ct. App. 2022) (declining to address the issue of *McDonnell Douglas* in whistleblower retaliation cases); Newberne v. Dep't of Crime Control & Pub. Safety, 618 S.E.2d 201, 210 (N.C. 2005) (finding it premature to decide whether *McDonnell Douglas* applied to a whistleblower retaliation claim).

115. *See* Lawson v. PPG Architectural Finishes, Inc., 503 P.3d 659, 660 (Cal. 2022) ("[E]mployees need not satisfy the *McDonnell Douglas* test to make out a case of unlawful retaliation."); Brady v. Cumberland Cnty., 126 A.3d 1145, 1147 (Me. 2015) (declining to apply *McDonnell Douglas* in a whistleblower retaliation case).

116. *See Lawson*, 503 P.3d at 663 (finding that *McDonnell Douglas* should not apply to California whistleblower claims).

117. *Id.* at 660.

was fired.[118] He filed suit against PPG, alleging a violation of California Labor Code § 1102.5,[119] which prohibits an employer from retaliating against a whistleblowing employee.[120] At summary judgment, the district court applied *McDonnell Douglas* and found that even though Lawson made out a prima facie case of retaliation, he was unable to prove that PPG's proffered reason[121] for his termination was pretext.[122] Summary judgment was granted in favor of PPG.[123] On appeal, Lawson argued that the district court erred in applying *McDonnell Douglas*,[124] and the Ninth Circuit certified the issue for the Supreme Court of California to decide.[125]

The Supreme Court of California relied heavily on a statutory provision in declining to apply *McDonnell Douglas* to whistleblower retaliation claims—a provision that sets forth the standard of proof for these claims.[126] California Labor Code § 1102.6 sets forth a framework for evaluating claims under § 1102.5.[127] Essentially, where an employee demonstrates by a preponderance of the evidence that retaliation was a contributing factor in the adverse action, the employer has the burden of proof to show by clear and convincing evidence that the adverse action would have occurred for legitimate, independent

118. *Id.* at 660–61.

119. *Id.* at 661.

120. *See* CAL. LAB. CODE § 1102.5 (West 2024) (prohibiting retaliation against an employee for whistleblowing or for refusing to engage in an illegal activity).

121. PPG's articulated reason for Lawson's termination was Lawson's poor performance and failure to demonstrate progress. *See Lawson*, 503 P.3d at 661.

122. *Id.*

123. *Id.*

124. Lawson v. PPG Architectural Finishes, Inc., 982 F.3d 752, 755 (9th Cir. 2020).

125. *See id.* at 753 ("[W]e request that the Supreme Court of California answer the following question: Does the evidentiary standard set forth in section 1102.6 of the California Labor Code replace the *McDonnell Douglas* test as the relevant evidentiary standard for retaliation claims brought pursuant to section 1102.5 of California's Labor Code?").

126. *See Lawson*, 503 P.3d at 663–64 ("To resolve the confusion, we now clarify that section 1102.6, and not *McDonnell Douglas*, supplies the applicable framework for litigating and adjudicating section 1102.5 whistleblower claims.").

127. *See* CAL. LAB. CODE § 1102.6 (West 2024) (assigning to the employer the burden of proof to demonstrate that the adverse action would have occurred for legitimate, independent reasons).

reasons.[128] The existence of § 1102.6 should have cleared up any uncertainty about whether *McDonnell Douglas* applies to § 1102.5 claims. However, some California courts completely ignored this statutory amendment and continued to apply *McDonnell Douglas* to whistleblower retaliation claims at summary judgment.[129] To resolve the issue in *Lawson*, the Supreme Court of California emphasized the "contributing factor" standard enumerated in § 1102.6.[130] Under this standard, a plaintiff need only assert that a discriminatory reason was a contributing factor for the adverse employment action, even if legitimate factors contributed to the adverse action.[131]

The Supreme Court of California found that *McDonnell Douglas* was not designed to resolve claims involving multiple reasons, or contributing factors, for a challenged adverse employment action.[132] The court also reasoned that *McDonnell Douglas* was decided at a time when the law "generally presumed 'that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate.'"[133] The *McDonnell Douglas* burden-shifting framework therefore creates an inquiry centered around the presumption of a single true reason for the adverse

128. *See id.* ("In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of the evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in activities protected by Section 1102.5.").

129. *Lawson*, 503 P.3d at 663 ("But other courts have continued to rely on the *McDonnell Douglas* framework without mentioning section 1102.6." (first citing Patten v. Grant Joint Union High Sch. Dist., 37 Cal. Rptr. 3d 113, 117 (Cal. Ct. App. 2005) (applying *McDonnell Douglas*); then citing Mokler v. County of Orange, 68 Cal. Rptr. 3d 568, 580 (Cal. Ct. App. 2007) (same); and then citing Hager v. County of Los Angeles, 176 Cal. Rptr. 3d 268, 275 (Cal. Ct. App. 2014) (same))).

130. *See Lawson*, 503 P.3d at 664–65 (discussing the contributing factor standard).

131. *Id.* at 664; *see also* Rookaird v. BNSF Ry. Co., 908 F.3d 451, 461 (9th Cir. 2018) ("A contributing factor includes any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision." (quotation omitted)).

132. *See Lawson*, 503 P.3d at 664 ("[T]he three-part *McDonnell Douglas* test was not written for the evaluation of claims involving multiple reasons for the challenged adverse action.").

133. *Id.* (quoting Harris v. City of Santa Monica, 294 P.3d 49, 54 (Cal. 2013)).

employment action.[134] To resolve this inquiry in a whistleblower retaliation case, *McDonnell Douglas* is incompatible with § 1102.6.[135]

Resolving this inconsistency in *Lawson*, the Supreme Court of California ultimately decided that the plaintiff bears the initial burden of establishing that the employer had at least one retaliatory reason for the adverse action.[136] However, the plaintiff need not satisfy the three-prong test of *McDonnell Douglas* to do so, eliminating the need for the plaintiff to prove pretext at summary judgment.[137]

California's statutory approach to dismantling the application of *McDonnell Douglas* in *Lawson* is unlikely to find a current corollary in Minnesota. While the MWA is quite similar to California Labor Code § 1102.5, there exists no Minnesota statutory provision similar to § 1102.6. The absence of an analogous provision in Minnesota—one that provides an explicit standard of proof for a plaintiff in an MWA case—confuses Minnesota courts about when to apply *McDonnell Douglas* and creates the issue this Note seeks to resolve.[138]

Minnesota's lack of statutory authority on the issue highlights an alternative solution that would stop courts from applying *McDonnell Douglas* to MWA claims—the Minnesota legislature could enact a statutory provision setting out the proper

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134. *Id.* at 665 ("This focus on identifying the single, true reason for the adverse action creates complications in a so-called mixed-motives case, in which the employer is alleged to have acted for multiple reasons, some legitimate and others not: 'What is the trier of fact to do when it finds that a mix of discriminatory and legitimate reasons motivated the employer's decision?'" (quoting *Harris*, 294 P.3d at 54)).

135. *See id.* at 666 ("[P]lacing this unnecessary burden on plaintiffs would be inconsistent with the Legislature's evident purpose in enacting section 1102.6 . . . .").

136. *See id.* ("Even if the employer had a genuine, nonretaliatory reason for its adverse action, the plaintiff still carries the burden assigned by statute if it is shown that the employer also had at least one retaliatory reason that was a contributing factor in the action.").

137. *See id.* ("There is, then, no reason why whistleblower plaintiffs should be required to satisfy the three-part *McDonnell Douglas* inquiry—and prove that the employer's proffered legitimate reasons were pretextual—in order to prove that retaliation was a contributing factor under section 1102.6.").

138. *See* Hanson v. Dep't of Nat. Res., 972 N.W.2d 362, 378–79 (Minn. 2022) (Chutich, J., concurring) (collecting cases illustrating the confusion *McDonnell Douglas* has caused).

standard of proof for an MWA claim.[139] It could be many years before the issue of *McDonnell Douglas*'s application to MWA claims reaches the Minnesota Supreme Court, so the legislature is perhaps better situated than the court to solve this standard of proof problem.[140] However, a legislative solution is not required to solve the *McDonnell Douglas* problem in Minnesota. As discussed in Part II.A.2, a state does not need a corollary burden-of-proof statute to do away with *McDonnell Douglas* at summary judgment.

2. Maine Relies on Summary Judgment Standard to Find McDonnell Douglas Improper

In 2015, the Supreme Judicial Court of Maine decided *Brady v. Cumberland County*, ultimately holding that *McDonnell Douglas* should not be applied at summary judgment to claims brought pursuant to Maine's Whistleblower Protection Act (WPA).[141] The facts of *Brady* are more complicated than those evaluated by the California court in *Lawson*, but Brady's case met the same demise at summary judgment when the trial court applied *McDonnell Douglas*.[142]

Brady was a detective with the Cumberland County Sheriff's Department who witnessed a video of an inmate at the Cumberland County jail being "choked out" by a corrections officer.[143] Brady reported the conduct to several coworkers, his superiors, and to the department's internal affairs investigator.[144] He suspected that the department was covering up the incident because of the sheriff's upcoming election.[145] Another detective told him something to the effect of "keep your mouth shut or you're going

139. *See infra* Part II.B.1 (discussing Tennessee's *McDonnell Douglas* approach and Minnesota's statutory option).

140. *See infra* Part II.B.1 (evaluating the legislative option).

141. 126 A.3d 1145, 1158 (Me. 2015) ("[W]e are now convinced that application of the *McDonnell Douglas* framework to the summary judgment stage of WPA retaliation cases, which would shift the burden of production back and forth after the employee had made out a case for retaliation, is unnecessary and only serves to complicate a proper analysis of the employee's claim." (emphasis omitted)).

142. *See id.* at 1149 ("The defendants moved for summary judgment, and . . . the court granted the motion, entering judgment for all defendants on all counts.").

143. *Id.* at 1147.

144. *Id.* at 1147–48.

145. *Id.* at 1148.

to get in trouble."[146] Shortly after reporting the incident, Brady was investigated and ultimately demoted.[147] He filed suit against the county for violating the WPA.[148] The trial court applied *McDonnell Douglas* and granted summary judgment for the defendants on all claims.[149]

On appeal, Brady argued that *McDonnell Douglas* was improperly applied to his WPA claim at summary judgment, and the Supreme Judicial Court agreed.[150] The court vacated the trial court's ruling because the record contained evidence on which a "jury could reasonably find that the adverse employment action . . . was substantially motivated at least in part by retaliatory intent."[151] The court ultimately found that *McDonnell Douglas* was no longer an appropriate tool to evaluate summary judgment motions in WPA retaliation cases.[152]

The court first highlighted two distinctions between *McDonnell Douglas* and the present case, pointing out that *McDonnell Douglas* involved a Title VII racial discrimination claim and addressed the burdens of proof at trial, not at summary judgment.[153] The court then addressed the elements of the WPA, namely the requirement that a prima facie case include a causal connection between the protected activity and the adverse action.[154] According to the court, the "causal connection"

146. *Id.*

147. *Id.* at 1149.

148. *Id.*

149. *Id.* at 1149.

150. *See id.* at 1154 ("We agree and conclude that in a summary judgment motion in a WPA retaliation case, it is unnecessary to shift the burden of production pursuant to *McDonnell Douglas* once the plaintiff—as she must do to present a prima facie case—has presented the requisite evidence that the adverse employment action was motivated at least in part by retaliatory intent.").

151. *Id.* at 1147.

152. *See id.* ("[W]e now conclude that the compartmentalized three-step process set out in [*McDonnell Douglas*] is not an appropriate tool to adjudicate summary judgment motions in WPA retaliation cases . . . .").

153. *See id.* at 1154 ("The *McDonnell Douglas* case addressed the parties' burdens of production at trial, rather than on summary judgment, for racial discrimination claims brought under Title VII of the Civil Rights Act of 1964.").

154. *See id.* at 1156–57 ("Without evidence of a causal connection between the protected activity and the adverse employment action, the employee has not presented a prima facie case for WPA retaliation, and the employer is entitled to summary judgment.").

requirement distinguishes WPA cases from Title VII cases[155]—therefore avoiding the application of *McDonnell Douglas* in *Brady*. Essentially, an employee bringing a Title VII claim has no obligation under *McDonnell Douglas* to allege causation until after the second step of *McDonnell Douglas* has been satisfied, whereas in a WPA case, the employee must allege causation to make out their prima facie case.[156] The *Brady* court held, "if the employee presents evidence encompassing the three elements of a WPA claim, there is no reason to shift the burdens according to *McDonnell Douglas*, because the evidence that must be produced by the employee in the first instance is by itself sufficient" to survive summary judgment.[157]

The court also recognized that, whether *McDonnell Douglas* is applied or not, a trial court will hear the same evidence about an employer's allegedly lawful reason for the adverse action.[158] Any evidence that a trial court would recognize in applying *McDonnell Douglas* would also be acknowledged under the Rule 56 summary judgment framework.[159] The main difference is that without the application of *McDonnell Douglas*, the court is free to ignore the burden-shifting procedure and may consider all of the evidence in a simplified, integrated manner that does not

155. *See id.* at 1157 ("Under *McDonnell Douglas*, the employee with a Title VII claim does not have an obligation to produce evidence of causation—that is, discriminatory animus—until after the employer satisfies the second step of the process by producing evidence of a lawful explanation for the adverse employment action. In a WPA case, on the other hand, even before the burden of production would shift to the employer under the *McDonnell Douglas* model, the employee would already have been required to present evidence of causation." (emphasis omitted)).

156. *See id.*

157. *Id.* (first citing Farrell v. Planters Lifesavers Co., 206 F.3d 271, 286 (3rd Cir. 2000); and then citing Henderson v. Jantzen, Inc., 719 P.2d 1322, 1324 (Or. Ct. App. 1986) ("A plaintiff's *prima facie* case does not disappear merely because a defendant asserts a non-discriminatory reason which may or may not persuade the trier of fact." (citations omitted))).

158. *See id.* at 1157–58 ("With or without the *McDonnell Douglas* burden-shifting process, the question of whether the record on summary judgment contains evidence of causation requires the court to recognize any evidence that the employer had a lawful reason for the adverse action . . . and any evidence . . . that that proffered reason is merely a pretext.").

159. *See id.* at 1158 ("[T]he evidence that would be presented in the second and third stages of the *McDonnell Douglas* framework will still fall within the analytical framework applicable to summary judgment motions in WPA retaliation cases because that evidence still bears on the allegation of causation.").

require the plaintiff to rebut the defendant's alleged nonretaliatory reason for the adverse action.[160]

The *Brady* court also found that some federal courts, applying a similar analytical approach, eliminated the burden-shifting analysis in Title VII cases even though they were attempting to apply *McDonnell Douglas*.[161] Those federal courts began their analysis with the presumption that the employee made out a prima facie case and that the employer gave a lawful reason for the adverse action; then, the question exclusively became whether the record "could reasonably sustain an argument of causation."[162]

Most of this analysis is functionally no different than not applying *McDonnell Douglas* at all. Under either Rule 56 or an analogous state rule, the employee must still make out a prima facie case, and the employer may still present evidence of a legitimate nonretaliatory reason for the adverse action.[163] But, of course, the primary difference in the analysis is that the plaintiff is not required to prove pretext at the summary judgment

160. *See id.* ("Without *McDonnell Douglas*, the court will now consider that evidence in a unitary way and simply determine whether the record as a whole would allow a jury to reasonably conclude that the adverse employment action was motivated at least in part by retaliatory intent.").

161. *See id.* ("Eliminating the burden-shifting analysis set out in *McDonnell Douglas* for WPA retaliation claims is analytically similar to the approach taken by some federal courts in Title VII cases, which are directly governed by [*McDonnell Douglas*].").

162. *Id.* (first citing Brady v. Off. of the Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) ("[I]n considering an employer's motion for summary judgment . . . the district court must resolve one central question: Has the employee produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against the employee on the basis of race, color, religion, sex, or national origin?"); and then citing Lapsley v. Columbia Univ.–Coll. of Physicians & Surgeons, 999 F. Supp. 506, 514 (S.D.N.Y. 1998) ("Of course, the employer in every case will articulate a nondiscriminatory reason for its action. It is difficult to imagine a case where a plaintiff prevails at the second step because a defendant is unwilling or unable to articulate some nondiscriminatory justification for its employment decision. Thus, this second stage is little more than a mechanical formality." (quotations omitted))).

163. *See id.* at 1158–59 ("The employer has the burden to 'show that there is no genuine issue as to any material fact' . . . and that 'the evidence fails to establish a prima facie case for each element of the cause of action . . . .'" (citations omitted) (first quoting ME. R. CIV. P. 56(c); and then quoting Budge v. Town of Millinocket, 55 A.3d 484, 488 (Me. 2012))).

stage—that issue is one for the finder of fact to resolve at trial.[164] In *Brady*, the Supreme Judicial Court of Maine ultimately determined that application of *McDonnell Douglas* to WPA cases at summary judgment is "unnecessary and only serves to complicate a proper analysis of the employee's claim," and vacated the trial court's grant of summary judgment for the defendant.[165] The court concluded that the proper standard to be applied at summary judgment in WPA cases is the standard outlined in Rule 56—the same standard as all other cases.[166]

Maine's analysis of *McDonnell Douglas* in this context can and should be applied in Minnesota to the MWA. Unlike in California, the decision in *Brady* required no corollary statute defining the standard to be applied to the whistleblower protection statute.[167] Maine has no statute designating the appropriate allocation of proof at summary judgment in a WPA case, so the *Brady* court could not rely on a statute like California's § 1102.6 to support its conclusion.[168] Rather, Maine reached the correct conclusion in *Brady* without a corollary burden-of-proof statute, relying solely on the Rule 56 summary judgment standard.[169] *Brady* provides a clear roadmap for other states without corollary statutes to abolish the application of *McDonnell Douglas* at summary judgment. Because Minnesota also does not have a corollary statute, the *Brady* court's reasoning provides the best justification for declining to apply *McDonnell Douglas* in the context of the MWA.[170] Part III of this Note discusses further why Minnesota should follow Maine's approach to *McDonnell Douglas*.[171]

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164. *See id.* at 1159 ("Determinations of the weight to be given to that evidence, including whether Brady can prove that the County's explanation for the adverse employment action was pretext for a retaliatory motive, are necessarily left for a fact-finder's decision at trial.").

165. *Id.* at 1158.

166. *See id.* (establishing the correct standard to be applied at summary judgment in WPA cases).

167. *See supra* Part II.A.1 (explaining California's approach).

168. *See supra* Part II.A.1 (detailing California's decision to get rid of *McDonnell Douglas* for statutory reasons).

169. *See Brady*, 126 A.3d at 1158 ("Instead, we hold that at the summary judgment stage in WPA retaliation cases, the parties are held to the same standard as in all other cases.").

170. *See infra* Part III.B.

171. *See infra* Part III.B.

B. VARYING EXAMPLES OF *MCDONNELL DOUGLAS* APPLICATIONS IN OTHER STATES

Other states have also altered their application of the *McDonnell Douglas* burden-shifting framework. The disparity between these approaches highlights some of the criticisms of *McDonnell Douglas*, specifically the criticism that its application lacks uniformity.[172] These varying approaches illustrate challenges Minnesota might face in rejecting the *McDonnell Douglas* burden-shifting framework at summary judgment and suggest steps that could be taken to reject the framework successfully.

1. Tennessee Supreme Court Ends the Application of *McDonnell Douglas*, but the Framework Returns

In 2010, the Tennessee Supreme Court decided *Gossett v. Tractor Supply Co.*, evaluating an employee's retaliatory discharge claim.[173] The court determined, for many of the reasons outlined in Part I.B, that *McDonnell Douglas* "is inapplicable at the summary judgment stage because it is incompatible with Tennessee summary judgment jurisprudence."[174] Importantly, the court viewed the case as the right opportunity to review the viability of the *McDonnell Douglas* framework as applied at summary judgment.[175] Much like the Maine Supreme Court's reasoning in *Brady*, the Tennessee Supreme Court focused its analysis on Tennessee's Rule 56 of Civil Procedure.[176] The Tennessee Supreme Court highlighted one of the main issues with

172. *See, e.g.*, Emden, *supra* note 74, at 140 ("The state of summary judgment jurisprudence in mixed-motive employment discrimination cases is best described as fractured.").

173. 320 S.W.3d 777 (Tenn. 2010), *superseded by* Tenn. Code Ann. § 50-1-304(f) (2024).

174. *Id.* at 779.

175. *See id.* at 781 ("This case presents us with an opportunity to consider the continued viability of the *McDonnell Douglas* . . . framework[] . . . at the summary judgment stage.").

176. *Compare* TENN. R. CIV. P. 56.04 ("[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."), *with* ME. R. CIV. P. 56(c) ("[Summary] [j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law.").

McDonnell Douglas: that an employer's satisfaction of the second step of the framework (giving a legitimate, nondiscriminatory reason for the adverse employment action) does not necessarily satisfy the summary judgment requirement imposed by Rule 56.[177] Therefore, an employer may meet its burden and have its motion for summary judgment granted under the *McDonnell Douglas* burden-shifting framework, but granting the same motion would not necessarily be proper under the Rule 56 standard because there may still be a genuine issue of material fact.[178]

The facts of *Gossett* provide a particularly good example of this distinction.[179] The employer's proffered nonretaliatory reason for terminating the plaintiff's employment was workforce reduction—this reason satisfies the second step of *McDonnell Douglas*.[180] However, the employer failed to establish that workforce reduction was the exclusive reason for terminating the plaintiff's employment and failed to show absence of a retaliatory motive.[181] None of the employer's statements tended to disprove any of the allegations made by the plaintiff; therefore a genuine issue of material fact remained.[182] Here, the employer was able to satisfy its burden under *McDonnell Douglas* without satisfying its Rule 56 burden,[183] highlighting one of the main problems with the continued application of *McDonnell Douglas*

177. *See Gossett*, 320 S.W.3d at 782 ("Evidence satisfying an employer's burden of production pursuant to the *McDonnell Douglas* framework does not necessarily demonstrate that there is no genuine issue of material fact.").

178. *See id.* ("An employer therefore may meet its burden of production pursuant to *McDonnell Douglas* without satisfying the burden of production set forth in Tennessee Rule of Civil Procedure 56.04 for a party moving for summary judgment.").

179. *See id.* ("The facts of this case illustrate why evidence of a legitimate reason for discharge does not necessarily show that there is no genuine issue of material fact.").

180. *See id.* ("In support of its motion for summary judgment, Tractor Supply points to a deposition by Mr. Lewis in which he states that he discharged Mr. Gossett to reduce Tractor Supply's workforce. This reason satisfies Tractor Supply's burden of production pursuant to the *McDonnell Douglas* framework.").

181. *See id.* at 783 (discussing the employer's proffered legitimate reason for the termination).

182. *See id.* ("Mr. Lewis's statements do not show an absence of a retaliatory motive. Nor do Mr. Lewis's statements tend to disprove any of Mr. Gossett's factual allegations . . . . [T]here remains a question of fact as to whether the retaliatory motive alleged by Mr. Gossett amounted to a substantial factor in Tractor Supply's discharge decision.").

183. *Id.* at 782–83.

at summary judgment. Ultimately, the Tennessee Supreme Court determined that *McDonnell Douglas* is incompatible with Tennessee summary judgment jurisprudence, ending its application at summary judgment.[184]

However, *Gossett* did not mark the end of *McDonnell Douglas* in Tennessee. The Tennessee State Legislature reimplemented *McDonnell Douglas* after the *Gossett* decision, requiring the plaintiff to make out their prima facie case and to prove pretext after the defendant has asserted an alleged nondiscriminatory or nonretaliatory reason for the adverse employment action.[185] The legislative history of these bills justifies codifying *McDonnell Douglas* only as a method of establishing a consistent standard across employment discrimination and retaliatory discharge cases.[186] But, as both courts and scholars have emphasized, the application of *McDonnell Douglas* has created

184. *See id.* at 785 ("[W]e hold that the *McDonnell Douglas* framework is inapplicable at the summary judgment stage because it is incompatible with Tennessee summary judgment jurisprudence.").

185. *See* TENN. CODE ANN. § 50-1-304(f) (2024) ("In any civil cause of action for retaliatory discharge . . . the plaintiff shall have the burden of establishing a prima facie case of retaliatory discharge. If the plaintiff satisfies this burden, the burden shall then be on the defendant to produce evidence that one (1) or more legitimate, nondiscriminatory reasons existed for the plaintiff's discharge . . . . If the defendant produces such evidence, the presumption of discrimination raised by the plaintiff's prima facie case is rebutted, and the burden shifts to the plaintiff to demonstrate that the reason given by the defendant was not the true reason for the plaintiff's discharge and that the stated reason was a pretext for unlawful retaliation. The foregoing allocations of burdens of proof shall apply at all stages of the proceedings, including motions for summary judgment."); *see also* TENN. CODE ANN. § 4-21-311(e) (2024) (implementing the same standard for discrimination claims).

186. *See* H.R. 1641, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) ("The purpose[] of this act [is] . . . [t]o establish uniform standards for statutory and common law causes of action for retaliatory discharge based on an individual's alleged refusal to participate in or remain silent about illegal activities."); S. JOURNAL, 107th Gen. Assemb., Reg. Sess. 1588 (Tenn. 2011) ("The *McDonnell Douglas* framework serves to sharpen the inquiry into the critical question of whether intentional discrimination or retaliation has occurred, provides an orderly structure for managing the complexities of employment discrimination and retaliation cases, and is an appropriate framework for the consideration of evidence offered in employment discrimination and retaliation cases at all stages of the proceedings, including motions for summary judgment and trial." (quoting Senator Brian Kelsey)).

anything but a consistent standard.[187] Unsurprisingly, the Tennessee State Legislature has repeatedly commented that *McDonnell Douglas* is the appropriate framework without providing additional justification.[188] Although the *Gossett* court provided detailed justification for declining to apply the framework, the legislature abrogated that decision with little to no reasoning.

Tennessee's back and forth with *McDonnell Douglas* provides two insights for Minnesota, discussed further in Part III.[189] First, in the absence of a statute providing explicitly for the application of *McDonnell Douglas* at summary judgment, Minnesota courts are free to ignore the framework and rely exclusively on the state's Rule 56, as the Tennessee Supreme Court did in *Gossett*.[190] Second, Minnesota must be wary that a Minnesota Supreme Court decision, explicitly ending the application of *McDonnell Douglas* at summary judgment, is subject to the whims of the state legislature.[191] Though the court may assume that the state legislature has no interest in reviving *McDonnell Douglas*, it is plausible that employers around the state will lobby the legislature to keep the employer-friendly *McDonnell Douglas* framework.[192] However, this also provides Minnesota

187. *See, e.g.*, Schuman, *supra* note 93, at 69 ("Courts have wide discretion . . . in fashioning structures for proof of a prima facie case different from the one *McDonnell Douglas* established."); Sperino, *supra* note 79, at 745 ("Some members of the court have noted that the numerous and complicated frameworks used in the employment context have resulted in employment law becoming 'difficult for the bench and bar,' and that '[l]ower courts long have had difficulty applying *McDonnell Douglas* . . . .'" (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 291 (1989) (Kennedy, J., dissenting))).

188. *See* S. JOURNAL, 107th Gen. Assemb., Reg. Sess. 1588 (Tenn. 2011) (designating *McDonnell Douglas* as the appropriate framework without justification).

189. *See infra* Part III.B.

190. *See infra* Part III.B.

191. *See infra* Part III.B.

192. *McDonnell Douglas* is recognized as an employer-friendly framework. *See* Emily McNee & Kurt Erickson, McDonnell Douglas *Lives Another Day: A Win for Employers at the Minnesota Supreme Court*, LITTLER (Apr. 14, 2022), https://www.littler.com/publication-press/publication/mcdonnell-douglas-lives-another-day-win-employers-minnesota-supreme [https://perma.cc/S9TA-NGYA] (celebrating the continued application of *McDonnell Douglas* from an employer perspective); *cf. Which Industry Spends the Most on Lobbying?*, INVESTOPEDIA (Feb. 19, 2024), https://www.investopedia.com/investing/which-industry-spends-most-lobbying-antm-so [https://perma.cc/FK6F-4KFT]

with an opportunity to codify the proper summary judgment standard without waiting to see when another case challenging *McDonnell Douglas* will reach the Minnesota Supreme Court. Whichever path Minnesota chooses, it should keep in mind the lesson learned in Tennessee—the legislature may reverse a court decision that ends the application of *McDonnell Douglas*.

2. Idaho Narrows the Scope of *McDonnell Douglas*

Idaho took another approach to the application of *McDonnell Douglas*, holding the burden-shifting framework applies only at trial—not at summary judgment.[193] In 2008, the Idaho Supreme Court decided *Curlee v. Kootenai County Fire & Rescue*, a whistleblower retaliation case initially dismissed on summary judgment.[194] Interestingly, the district court never mentioned *McDonnell Douglas* in its *Curlee* opinion, which granted summary judgment for the employer.[195] Nevertheless, the district court applied a version of the *McDonnell Douglas* burden-shifting analysis to the case and ultimately granted summary judgment.[196]

The Idaho Supreme Court looked to other state and federal courts to determine the appropriate application of *McDonnell Douglas* to a claim brought under a state whistleblower protection statute.[197] The court concluded that the decisions of its sister states were well-reasoned and agreed that *McDonnell Douglas* should be applied to Idaho whistleblower retaliation actions.[198] However, the court read these decisions to indicate that *McDonnell Douglas* has "little or no application at the

("Lobbying is a way for industries and companies to influence legislation in their favor. It is a big part of the U.S. political system, with many industry associations and corporations contributing to the campaigns of politicians and political parties looking after their interests.").

193. Curlee v. Kootenai Cnty. Fire & Rescue, 224 P.3d 458, 463 (2008).

194. *Id.*

195. *See id.* at 462 ("Although the district court did not specifically identify the basis for its ruling, it appears that the burden-shifting standard that it applied is derived from *McDonnell Douglas* . . . .").

196. *Id.*

197. *See id.* at 463 (collecting cases resolving claims under similar whistleblower statutes).

198. *Id.*

summary judgment stage."[199] The court held that the sole issue for the trial court to decide at summary judgment was whether a genuine issue of material fact exists.[200] The Idaho Supreme Court's analysis ultimately determined that requiring the plaintiff to prove pretext at the third step of *McDonnell Douglas* created an impermissible burden at summary judgment.[201]

In *Curlee*, the Idaho Supreme Court concluded that the *McDonnell Douglas* framework applies at trial but not summary judgment.[202] The *Curlee* decision creates an opportunity to continue the application of *McDonnell Douglas* without imposing an additional barrier on plaintiffs at summary judgment. Of course, the criticisms that the framework has no statutory basis[203] and that the framework should not apply outside of its original Title VII context[204] continue to discourage its application, even if only at trial. Despite these criticisms, Idaho's approach to applying *McDonnell Douglas* at trial is more appropriate than applying the framework at summary judgment. At the very least, Idaho's approach offers Minnesota's lawmakers another option if they are hesitant to abolish *McDonnell Douglas* in its entirety. Part III of this Note illustrates in greater detail Minnesota's options with regard to *McDonnell Douglas* in MWA claims and discusses each of its options in turn.

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199. *Id.* ("While other courts have found the *McDonnell Douglas* framework useful in approaching cases under state whistleblower statutes, those courts have also noted that the 'burden-shifting rule of *McDonnell Douglas,* however, has little or no application at the summary judgment stage. The rule explicitly governs the burden of persuasion at trial.'" (quoting Heng v. Rotech Med. Corp., 688 N.W.2d 389, 401 (N.D. 2004))).

200. *See id.* ("The role of the trial court at the summary judgment stage is limited to discerning whether there are any genuine issues of material fact to be tried. It does not extend to deciding them." (citation omitted)).

201. *See id.* ("[W]e conclude that the district court erroneously held [the employee] to a higher burden of proof than is permissible at summary judgment by requiring her to 'poke holes' in [the defendant's] proffered rationale for discharging her and to demonstrate that the grounds advanced as justification for her termination were a pretext for retaliatory conduct.").

202. *See id.* ("While this burden-shifting analysis is applicable at trial, it was error for the district court to apply it at the summary judgment stage.").

203. *See, e.g.*, Sperino, *supra* note 79, at 766 ("From a textualist perspective, the framework simply has no support in the language of [Title VII of the Civil Rights Act of 1964].").

204. *See, e.g.*, Hanson, 972 N.W.2d at 378 (Chutich, J., concurring) (arguing that the application of *McDonnell Douglas* has expanded far beyond its original context).

III. MINNESOTA SHOULD NO LONGER APPLY *MCDONNELL DOUGLAS* TO MWA CLAIMS

Having discussed various states' approaches to applying *McDonnell Douglas* to state-law whistleblower protection statutes at summary judgment, Part III of this Note justifies why the application of the burden-shifting framework to the MWA is not appropriate in Minnesota. Part III.A dives into a recent MWA case that reached the Supreme Court of Minnesota, *Hanson v. Department of Natural Resources*. Though the court did not ultimately determine the future of *McDonnell Douglas* in Minnesota, this case provides some context about what is required to end the framework's application. Then, in Part III.B, this Note gives two solutions for ending the application of *McDonnell Douglas* to MWA claims: a judicial option and a legislative option. Finally, Part III.C of this Note discusses what abolishing *McDonnell Douglas* in the context of the MWA would look like in Minnesota.

A. THE MINNESOTA SUPREME COURT NEARLY ADDRESSED *MCDONNELL DOUGLAS* IN *HANSON V. DEPARTMENT OF NATURAL RESOURCES*

In 2022, the Supreme Court of Minnesota decided *Hanson v. Department of Natural Resources*,[205] an MWA case that was dismissed at summary judgment when *McDonnell Douglas* was applied.[206] The plaintiff, Lori Hanson, was a regional director of the Minnesota Department of Natural Resources (DNR).[207] In 2017, she traveled to Fortune Bay Resort Casino for a work-related conference.[208] During the first and second nights of her stay at the hotel, she claimed she was awakened by noises coming from the adjacent room, including "a crying baby" and "bodies . . . being thrown against the wall."[209] Hanson called the front desk to

205. 972 N.W.2d 362 (Minn. 2022).

206. *See* Hanson v. Dep't of Nat. Res., No. 62-CV-19-1037, 2020 WL 4012711, at *18 (Minn. Dist. Ct. Mar. 26, 2020) (granting summary judgment for defendant), *aff'd*, 2021 WL 1525296, at *8 (Minn. Ct. App. Apr. 19, 2021), *aff'd*, 972 N.W.2d 362 (Minn. 2022). The facts of *Hanson* are long and complicated, which may indicate why the Minnesota Supreme Court declined to ultimately address the future of *McDonnell Douglas* in Minnesota.

207. *Hanson*, 972 N.W.2d at 365.

208. *Id.*

209. *Id.*

report these noises each day.[210] At some point, she entered the hallway, not wearing any clothes, before returning to her room.[211] A few minutes later, she returned to the hallway, clothed, and spoke to two men in the hall who were knocking on the neighboring room's door, telling them that she was concerned about the baby.[212] Hanson believed these men were involved in some sort of unlawful prostitution ring.[213] She left her room to speak to hotel management, and hotel security phoned 911.[214] A Bureau of Indian Affairs (BIA) police officer was dispatched to the hotel to investigate the report of a possibly unattended baby.[215]

The head of hotel security and hotel manager then arrived to talk with the occupants of the neighboring room and were allowed inside; when the BIA officer arrived, the same hotel employees told the officer and Hanson that "everything was secure," and "the child was safe."[216] Hanson, still insistent on speaking with law enforcement, called 911 and identified herself as a "state official," asking for a "safe escort" from the hotel and stating that she was "barricaded" inside because she had "stumbled upon" a prostitution ring.[217] She requested that the dispatcher send St. Louis County law enforcement officers because the hotel had only called BIA.[218] Upon arrival, the BIA officer, who responded along with a Breitung Township police officer, found nothing suspicious happening in the neighboring room and reported this to Hanson.[219] Still, Hanson requested a police escort from a St. Louis County sheriff.[220] After going back and forth with the BIA officer, during which the officer smelled alcohol on her breath, Hanson was informed that management wanted her to leave, and the BIA officer told her that she would be arrested for trespassing if she did not leave within ten minutes.[221]

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210. *Id.* at 365–66.
211. *Id.* at 366.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 367–68.
220. *Id.* at 368.
221. *Id.*

At that point, Hanson called the DNR Captain and requested that he send out a DNR conservation officer to assist her.[222] The DNR Captain dispatched a conservation officer, who reported that a St. Louis County sergeant would also be responding to escort Hanson from the hotel.[223] The sergeant and conservation officer arrived, and as they escorted Hanson away from the hotel, the Breitung Township police officer asked Hanson to take a breathalyzer test—which she refused.[224]

The next day, the BIA officer called the Deputy Commissioner of the DNR, Hanson's supervisor, to report that Hanson had been harassing and abusive toward hotel staff and law enforcement, refused to leave her room until a DNR conservation officer arrived, acted erratically (e.g., was in the hallway without any clothes on), and misused her state title.[225] After a lengthy investigation, the DNR human resources investigator submitted a forty-two-page report of the incident.[226] Following the report, the DNR Commissioner terminated Hanson's employment, approximately six weeks after the incident.[227]

Hanson then sued the DNR, alleging whistleblower retaliation in violation of the MWA.[228] At summary judgment, the trial court found that Hanson was unable to establish a causal connection between her report of suspected illegal conduct and her termination; therefore, she did not satisfy the causation element of her MWA claim.[229] Even though Hanson failed to make out her prima facie case, the trial court still addressed the third step of *McDonnell Douglas* (proving pretext) and ultimately determined that Hanson could not establish that the DNR's

222. *Id.*

223. *Id.* at 368–69.

224. *Id.* at 369.

225. *Id.*

226. *Id.* at 369–70. The DNR report is not publicly available.

227. *Id.* at 370.

228. Complaint at 2–3, Hanson v. Dep't of Nat. Res., No. 62-CV-19-1037, 2019 WL 9443396 (Minn. Dist. Ct. Feb. 15, 2019), *aff'd*, 2021 WL 1525296, at *8 (Minn. Ct. App. Apr. 19, 2021), *aff'd*, 972 N.W.2d 362 (Minn. 2022).

229. *Hanson*, 2020 WL 4012711, at *5 ("[T]his Court finds, as a matter of law, that Hanson cannot establish a causal connection between the report of suspected child abuse or suspected illegal sexual activities and the Commissioner's decision to end her employment . . . .").

legitimate, nonretaliatory reason for her termination was pretext.[230] Hanson's claim was dismissed with prejudice,[231] and the court of appeals affirmed the trial court's grant of summary judgment.[232]

The amicus brief filed by the National Employment Lawyers Association (NELA) in *Hanson* argued for abolishing the use of *McDonnell Douglas* for all Minnesota employment claims.[233] This brief highlighted two reasons for this argument: (1) *McDonnell Douglas* is not, and never was, a test, and (2) the application of *McDonnell Douglas* has created a variety of surplus tests, creating heightened standards of proof and extra-statutory elements.[234]

The first reason stems from Minnesota case law. In 1993, the Minnesota Supreme Court clarified the test for trial courts to apply in employment discrimination or retaliation cases.[235] The test, set forth in *McGrath v. TCF Bank Savings, FSB*, states that "even if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision."[236] However, the decision in *McGrath* did not reconcile this test with *McDonnell Douglas*, leading Minnesota courts and litigants to struggle with when and how to apply the framework, leading to its problematic applications.[237]

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230. *Id.* at *7 ("[B]ased on the investigation, the DNR Commissioner had a good faith belief that Hanson's conduct at the hotel was improper, irrational, and unbecoming of her position and that such conduct jeopardized the DNR's reputation and Hanson's ability to effectively represent the DNR.").

231. *Id.* at *9.

232. Hanson v. Dep't of Nat. Res., No. A20-0747, 2021 WL 1525296, at *8 (Minn. Ct. App. Apr. 19, 2021), *aff'd*, 972 N.W.2d 362 (Minn. 2022).

233. NELA & ELA Brief, *supra* note 99, at 1–2 ("And we urge this Court to join the chorus of other courts and scholars who have questioned the utility of the *McDonnell Douglas* test in employment claims, and in doing so, to abolish the use of the *McDonnell Douglas* framework for Minnesota employment claims because it has been inappropriately substituted as a 'test' . . . .").

234. *See id.* at 2, 6 (dispelling the notion that the *McDonnell Douglas* framework is a test and describing the list of surplus tests).

235. McGrath v. TCF Bank Sav., FSB, 509 N.W.2d 365, 366 (Minn. 1993).

236. *Id.* (citing Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988).

237. *See* NELA & ELA Brief, *supra* note 99, at 5 ("As a result, courts and litigants have remained unclear about whether, when, and how to apply *McDonnell Douglas*, leading to problematic applications of the framework and worse,

The second reason for the amici's argument is that *McDonnell Douglas* has spawned surplus tests in excess of what is required by statute.[238] These surplus tests include the "temporal evidence plus" test,[239] the "same actor/decision-maker" test,[240] the "rigorous comparator" test,[241] and the "stray remark" test.[242] Each of these tests complicates the analysis at summary judgment, where the proper inquiry is solely whether a genuine issue of material fact exists. As the NELA brief explained, "[t]he *McDonnell Douglas* test, as applied and with all of its subtests, requires courts to improperly weigh evidence and determine the credibility of a defendant's alleged motive, rather than leaving these fundamental issues to the jury."[243] In *Hanson*, the court of appeals applied two of these surplus tests,[244] putting itself in the role of the jury and making the ultimate determination of credibility.[245] For these reasons, the amici urged the Minnesota Supreme Court to find that *McDonnell Douglas* is not necessary for

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a 'rat's nest of surplus "tests"' that place evidentiary burdens on plaintiffs that have no statutory basis and turn the *McGrath* test and Rule 56 jurisprudence on its head.").

238. *See id.* at 6–12 (discussing various surplus tests used in Minnesota courts).

239. *See id.* at 6–7 (discussing the temporal evidence plus test, where plaintiffs can rely on close temporal proximity between protected conduct and an adverse employment action to show an inference of discrimination).

240. *See id.* at 7–8 ("In cases where the same decision-maker both hired and took action against a plaintiff-employee, courts apply a sub-test called the 'same-actor inference' . . . . In such cases, trial courts predetermine motive by deciding . . . that a person who hires a plaintiff-employee could not possibly be motivated by any bias in taking adverse action involving that same employee.").

241. *See id.* at 9–10 (explaining the rigorous comparator test, where a plaintiff must show that people outside of a protected class were treated more favorably).

242. *See id.* at 10 ("Stray remarks made in the workplace cannot serve as direct evidence of discrimination." (quoting Diez v. Minnesota Min. & Mfg., 564, N.W.2d 575, 579 (Minn. Ct. App. 1997))).

243. *Id.* at 11–12.

244. The first surplus test applied was requiring the plaintiff to show untruthfulness to prove pretext at summary judgment, contrary to existing Minnesota precedent. *Id.* at 12–13. The second surplus test required the plaintiff to show discriminatory animus toward a certain protected characteristic to prove retaliation, also contrary to existing Minnesota precedent. *Id.* at 13–14.

245. *See id.* at 12–14 (describing the Court of Appeals' error in using the "surplus tests" and "playing the role of jury.").

any employment case under Minnesota law and urged the court to set aside the summary judgment grant in *Hanson*.[246]

The Supreme Court of Minnesota reviewed the trial court's grant of summary judgment, noting, "[w]hen employment discrimination claims are challenged at summary judgment, we often employ the *McDonnell Douglas* burden-shifting framework to allocate the burden of proof between the plaintiff and defendant."[247] The court acknowledged the debate around *McDonnell Douglas*'s continuing viability, but it declined to make its own ruling on whether *McDonnell Douglas* is appropriately applied to MWA claims.[248]

Hanson's case did not survive summary judgment or succeed on appeal.[249] Her case was simply not convincing, regardless of whether or not *McDonnell Douglas* was applied.[250] Not only was she unable to establish her prima facie case, but reportedly she acted erratically and may have been intoxicated, making it difficult to show that the DNR's motive for terminating her was more likely than not influenced by her protected report.[251] She was attempting to argue that she was fired for this protected conduct, even though she at some point was naked in the hallway, smelled

246. *See id.* at 22 ("Because applying *McDonnell Douglas* in Minnesota employment claims has led to confusion for courts and harmed employees, this Court should hold that a plaintiff in an employment case under Minnesota law must only show that an illegitimate reason more likely than not motivated the decision. Further, this Court should hold that the *McDonnell Douglas* test is not necessary for any employment case under Minnesota law.").

247. Hanson v. Dep't of Nat. Res., 972 N.W.2d 362, 372 (Minn. 2022).

248. *Id.* at 377–78 (recognizing the *McDonnell Douglas* debate but choosing not to rule on that issue).

249. *See id.* at 365 ("Because we conclude that Hanson did not establish a genuine issue of material fact for trial over whether her alleged protected activity was a motivating factor in the DNR's termination decision, we affirm.").

250. *See id.* at 375 ("Here, the summary judgment record shows that the DNR terminated Hanson because of the way she conducted herself by repeatedly insisting that a law enforcement agency without jurisdiction should respond to the hotel and reacting to the situation in a way that caused hotel management to ask her to leave. To create a fact issue and proceed to trial, Hanson needed to produce evidence that this reason was not true. She offered no such evidence.").

251. *See id.* at 376 ("Hanson did not provide evidence to support her assertion that the DNR fired her for an improper reason. Specifically, Hanson did not provide evidence that her protected conduct—reporting suspected illegal activity—was a motivating factor in her termination.").

of alcohol, and allegedly harassed hotel staff and local police.[252] She raised a valid issue on appeal—challenging *McDonnell Douglas*—but the facts of her case simply did not justify overruling the trial court.

Justice Margaret Chutich's concurring opinion, however, expressed a strong preference for ending the application of *McDonnell Douglas* to the MWA.[253] Justice Chutich pointed out several problems with applying *McDonnell Douglas* to MWA claims. She argued that *McDonnell Douglas* evolved too far beyond its original scope. Originally, it applied only to Title VII claims tried without juries, but now, it is applied to state-law employment claims tried by juries.[254] Her arguments echo the concerns of other jurists and scholars who have found *McDonnell Douglas* to be overburdensome and distracting from the central questions of the case.[255] Similar to the amici's argument, Justice Chutich maintained that *McDonnell Douglas* has spawned a series of tests and inferences that make deciding employment discrimination and retaliation claims more difficult for courts.[256] In light

252. *See id.* at 369 (discussing the BIA officer's report to Hanson's supervisor); Hanson v. Dep't of Nat. Res., No. A20-0747, 2021 WL 1525296, at *3 (Minn. Ct. App. Apr. 19, 2021), *aff'd*, 972 N.W.2d 362 (Minn. 2022).

253. *See id.* at 378 (Chutich, J., concurring) ("Because this court has never been asked to analyze whether courts should use the *McDonnell Douglas* framework for cases brought under the [MWA] . . . I would not extend this troubled framework to apply to claims brought under that statute. Instead, I would apply the ordinary summary-judgment standard in Rule 56.01 . . . ."). Justice Paul Thissen joined in the concurrence. *Id.* at 381.

254. *See id.* at 378 ("*McDonnell Douglas* originated as a framework to help federal judges evaluate Title VII claims that were to be tried without juries. Today, the *McDonnell Douglas* approach has permeated cases far beyond its original scope, including state law employment claims and cases decided by juries." (first citing Sigurdson v. Isanti County, 386 N.W.2d 715, 721–22 (Minn. 1986); and then citing 42 U.S.C. § 1981a(c) (2020))).

255. *See id.* at 379 ("Unsurprisingly, members of the academy have long critiqued the fraught evolution of *McDonnell Douglas*. In addition to objecting to its burdensome tests and inferences, academics argue that the framework lacks statutory basis, distracts from the ultimate factual question of whether discrimination occurred, and unfairly raises the plaintiff's burden at summary judgment by requiring more than the preponderance of the evidence burden used at trial." (citing Sperino, *supra* note 79, at 795 (discussing the higher burden imposed at summary judgment than at trial when *McDonnell Douglas* is applied))).

256. *See id.* at 378 ("In response to the expanded scope of *McDonnell Douglas*, federal and state courts alike have developed confusing and inefficient

of the critiques of *McDonnell Douglas* made by other courts and scholars, she "urge[d] the court to pause before assuming that *McDonnell Douglas* applies in the context of Minnesota's whistleblowing statute."[257] Her arguments highlight that the Minnesota Supreme Court has only mentioned *McDonnell Douglas* in three MWA cases,[258] and the court has never definitively adopted the *McDonnell Douglas* burden-shifting framework as the proper standard.[259]

Further, Justice Chutich pointed out that there is no statutory basis for *McDonnell Douglas* in Minnesota.[260] Unlike the Tennessee legislature, which explicitly implemented *McDonnell Douglas* burden-shifting as the proper framework at summary judgment,[261] Minnesota has no such statute creating an additional burden for the plaintiff. Finally, Justice Chutich reasoned that applying *McDonnell Douglas* to MWA claims "makes little sense" because *McDonnell Douglas* was "designed for federal judges hearing Title VII discrimination claims when a right to a jury trial for those claims did not exist."[262]

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inferences and tests in their attempts to follow the framework across employment discrimination cases.").

257. *Id.* at 379–80.

258. *See id.* at 380 ("In [*McGrath*], we clarified part of the *McDonnell Douglas* analysis, but we did not address whether—and certainly did not hold that—the analysis was appropriate in whistleblowing cases. In [*Graham*], we said in dicta that *McDonnell Douglas* should be used for retaliatory discharge claims but did not actually apply the framework. Similarly, in [*Phipps*], we accepted the court of appeals' limited use of *McDonnell Douglas* but did not adopt it." (first citing McGrath v. TCF Bank Sav., FSB, 509 N.W.2d 165, 366 (Minn. 1993); then citing Graham v. Special Sch. Dist. No. 1, 472 N.W.2d 114, 119 n.7 (Minn. 1991); and then citing Phipps v. Clark Oil & Refin. Corp., 408 N.W.2d 569, 572 (Minn. 1986))).

259. *See id.* ("Consequently, I conclude that this court has never focused its 'judicial mind' on the question of whether *McDonnell Douglas* applies to [MWA] claims, and we are therefore not bound to apply the framework to these cases . . . . At no point does the [MWA] discuss burdens of proof, litigation requirements for the employer or employee, or any other threshold that would require deviating from the ordinary summary-judgment standard."); *see also supra* note 43 (discussing origin of *McDonnell Douglas* in Minnesota law).

260. *See Hanson* 972 N.W.2d at 380 (Chutich, J., concurring) ("[N]othing in the text of the Minnesota Whistleblower Act shows that courts should use the *McDonnell Douglas* framework instead of the usual Rule 56.01 summary-judgment standard.").

261. *See generally supra* Part II.B.1 (discussing Tennessee's statutory basis for *McDonnell Douglas* burden-shifting).

262. *Hanson*, 972 N.W.2d at 380 (Chutich, J., concurring).

In contrast, "[MWA] claims are based on state law, and [MWA] plaintiffs have a right to trial by jury."[263] The juries who hear MWA claims decide the claims based on the preponderance of the evidence standard, meaning that a trial court's application of *McDonnell Douglas* creates a higher bar at summary judgment than at trial.[264] According to Justice Chutich, these "shifting standards invert the purpose of summary judgment and subvert the role of juries."[265] For these reasons, she concluded that the sole appropriate standard to be applied at summary judgment is Rule 56.01 of the Minnesota Rules of Civil Procedure.[266] Although her *Hanson* concurrence does not carry the binding force of law, it gives insight into what is necessary for the majority to reach the same conclusion. Justice Chutich's concurrence supports this Note's argument that *McDonnell Douglas* should not apply to the MWA, and it shows that, in 2024, at least two members of the court were amenable to ending the framework's application in Minnesota.[267] However, because the majority did not confront the issue in *Hanson*, *McDonnell Douglas* will continue to be applied to MWA claims until the Minnesota Supreme Court rules definitively on the issue.

The Minnesota Supreme Court's decision in *Hanson* did not spell the end of *McDonnell Douglas* in Minnesota. Hanson's case was simply not the "right" case to justify the end of *McDonnell Douglas* at summary judgment in MWA cases.[268] Regardless,

263. *Id.* at 380–81.

264. *See id.* at 381 ("Tellingly, those juries are not instructed on *McDonnell Douglas*, meaning a judge would use a more rigorous analysis at summary judgment (*McDonnell Douglas*) than the jury would use at trial (that the employer more likely than not retaliated against the employee).").

265. *Id.*

266. *See id.* ("I conclude that this court should not expand the weathered *McDonnell Douglas* standard to claims brought under the [MWA]. Instead, courts should use the general summary-judgment standard in Rule 56.01 of the Minnesota Rules of Civil Procedure.").

267. Justice Chutich retired at the end of the court's 2023–24 term. Press Release, Minn. Jud. Branch, Minnesota Supreme Court Justice Margaret Chutich Announces Retirment (Jan. 16, 2024), https://mncourts.gov/About-The-Courts/NewsAndAnnouncements/ItemDetail.aspx?id=2307 [https://perma.cc/Y7LZ-L7TF]. Whether the current court would support ceasing to apply the *McDonnell Douglas* framework to MWA claims in Minnesota is now less clear.

268. *See id.* at 377 ("Hanson offers no evidence to support her claim that her reporting was a factor that the DNR considered in making its decision to fire her, and her speculation to the contrary is not enough to survive summary judgment.").

general criticisms of *McDonnell Douglas*, combined with the trend away from its application, seem to indicate that Minnesota may reassess its position on the framework sometime soon—especially because members of the Minnesota Supreme Court have indicated their inclination to do so. Minnesota has options for achieving the end of *McDonnell Douglas*.[269] Any of these options are preferable to the current application of the framework at summary judgment, but some far outweigh the others.

B. MINNESOTA'S OPTIONS FOR ENDING THE APPLICATION OF *MCDONNELL DOUGLAS* TO THE MWA

Even though the Minnesota Supreme Court did not make an ultimate determination on the appropriateness of *McDonnell Douglas* in *Hanson*,[270] the standard of proof at summary judgment should be governed only by Rule 56. Minnesota has two options for reaching this result. First, the state can wait for another MWA case challenging *McDonnell Douglas* to reach the Minnesota Supreme Court. Second, the state legislature can pass an amendment to the MWA that explicitly outlines the proper summary judgment standard. Either of these approaches would achieve the intended result—solidifying Rule 56, not *McDonnell Douglas*, as the appropriate standard at summary judgment. However, each of these approaches comes with some drawbacks, which Minnesota's lawmakers must consider in choosing the best way to set forth the proper summary judgment standard.

It remains unlikely that the United States Supreme Court will summarily resolve the issue of *McDonnell Douglas* at summary judgment anytime soon.[271] Therefore, in the absence of action by the Minnesota State Legislature, it will be up to the courts to establish the correct summary judgment standard. However, waiting for the "right" MWA case to reach the

269. *See supra* Part III.B.

270. *See Hanson*, 972 N.W.2d at 378 ("Because Hanson's claim fails under both *McDonnell Douglas* and her proposed replacement standard, we decline to reach the issue of whether we should abandon the *McDonnell Douglas* framework in whistleblower cases.").

271. The Supreme Court recently denied certiorari for a case in which the sole question for the Court was whether *McDonnell Douglas* should remain part of the summary judgment analysis. *See* Sprowl v. Mercedes-Benz U.S. Int'l, Inc., 815 F. App'x 473 (11th Cir. 2020), *cert. denied*, 141 S. Ct. 1239 (2021).

Minnesota Supreme Court could take years.[272] In addition, the Minnesota Supreme Court needs a case with a better set of facts in order to confront the issue. As seen in *Hanson*, not just any MWA case challenging *McDonnell Douglas* is sufficient for the Minnesota Supreme Court to definitively overrule the framework, especially not one where the plaintiff engaged in potentially objectionable behaviors.[273] Instead, the court will need to decide a case like *Brady*[274] or *Gossett*,[275] where the plaintiffs were able to establish a genuine issue of material fact, which the plaintiff was not able to do in *Hanson*.[276]

Similarly, just because a MWA case challenging *McDonnell Douglas* reaches the court does not mean that the court will reach the correct conclusion—the court could erroneously find that *McDonnell Douglas* is properly applied to MWA claims. Or, like Idaho, the court could ultimately find that *McDonnell Douglas* is properly applied at the trial stage.[277] Otherwise, the court could reach the proper conclusion and determine that *McDonnell Douglas* has no place in MWA summary judgment claims—just

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272. The Minnesota Supreme Court has mentioned *McDonnell Douglas* in only four MWA cases ever. *See Hanson*, 971 N.W.2d at 380 (Chutich, J., concurring) ("We have mentioned *McDonnell Douglas* in only three [MWA] cases, either in dicta or without analyzing whether the framework actually applies."). Because of *McDonnell Douglas*, plaintiffs with MWA claims are failing at summary judgment, and they are generally unable to convince appellate courts to reverse trial courts' decisions. *See generally* Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1053 (2019) ("This experimental analysis of legal decision-making suggests that the affirmation rate in appellate courts could be as much as 8% higher than it should be due to a cognitive bias in favor of affirming prior rulings.").

273. *Hanson*, 972 N.W.2d. at 365–66 (describing Hanson's strange behavior in the hotel).

274. *See supra* notes 141–66 and accompanying text (discussing Brady v. Cumberland County, 126 A.3d 1145 (Me. 2015)).

275. *See supra* notes 174–88 and accompanying text (discussing Gossett v. Tractor Supply Co., 320 S.W.3d 777 (Tenn. 2010), *superseded by* Tenn. Code Ann. § 50-1-304(f) (2024)).

276. *See Hanson*, 972 N.W.2d at 377–78 ("In sum, there is no genuine issue as to whether the DNR was motivated to terminate Hanson based on her whistleblowing, because there is no evidence that her reporting played any part in, much less was a motivating factor in, the DNR's decision.").

277. *See supra* Part II.B.2 (discussing Idaho).

to be overridden by a statutory amendment, codifying *McDonnell Douglas* as the proper standard.[278]

Given the conclusions of courts and scholars around the country, including Justice Chutich, the likelihood that *McDonnell Douglas* is upheld as the proper framework at summary judgment when the right case reaches the Minnesota Supreme Court is seemingly very low. There is always the possibility of the legislature overriding the court's decision, which is something that Minnesota must consider when choosing its approach to toppling *McDonnell Douglas*.[279] However, state supreme court decisions in California, Maine, and Idaho all serve as examples of states that have gotten rid of *McDonnell Douglas* at summary judgment without being overridden by the legislature,[280] and Minnesota is likely to be no exception. Therefore, when the right MWA case reaches the Minnesota Supreme Court, challenging the application of *McDonnell Douglas* at summary judgment, the court should find that *McDonnell Douglas* should no longer be applied.

There is an alternative option for Minnesota to end the application of *McDonnell Douglas* to MWA claims. The legislature could amend the MWA to include the proper standard of proof at summary judgment. Although legislatures often move slowly, the amount of time it would take to pass this amendment is likely less than the amount of time it will take for another MWA case challenging *McDonnell Douglas* to reach the Minnesota Supreme Court. Additionally, this approach is shown to be effective in California.[281] However, the language adopted in California Labor Code § 1102.6 is not necessarily sufficient to override *McDonnell Douglas* by itself.[282] Minnesota's legislature should adopt language that explicitly states that *McDonnell Douglas*

278. *See, e.g.*, Tenn. Code Ann. § 50-1-304(f) (2024) (superseding *Gossett*, 320 S.W.3d 777).

279. *See, e.g.*, *id.*

280. *See supra* Part II.A.1 (discussing California); *supra* Part II.A.2 (discussing Maine); *supra* Part II.B.2 (discussing Idaho).

281. *See* Lawson v. PPG Architectural Finishes, Inc., 503 P.3d 659, 663–64 (Cal. 2022) (finding the proper standard of proof embedded in the whistleblower statute).

282. California Labor Code § 1102.6 left some room for ambiguity, which still needed to be interpreted by California's Supreme Court to end the application of *McDonnell Douglas*. *See Lawson*, 503 P.3d at 663 (describing the confusion of lower courts in applying CAL. LAB. CODE § 1102.6 (West 2024)).

does not apply to MWA claims and also states that the sole standard to be considered at summary judgment is whether a genuine issue of material fact exists. Resolving this issue by statute will clear up the confusion surrounding the application of *McDonnell Douglas* and will prevent reliance on the ever-evolving string of *McDonnell Douglas* case law in Minnesota.

C. THE END OF *MCDONNELL DOUGLAS* IN MWA CASES

If, in line with this Note's recommendation, Minnesota ends its application of *McDonnell Douglas* to MWA claims, the burdens of proof for whistleblowers in litigation will be properly rebalanced. Trial courts will be free to consider all the evidence at once, instead of relying on the ill-fitting and outdated method of shifting the burden between employee and employer.[283] The sole question at summary judgment in these cases will be what it always should have been—whether there exists a genuine issue of material fact.[284] Where an issue of material fact does exist, summary judgment should not be granted, and the case will have its day in court in front of a jury. Then, and only then, is it appropriate to make determinations about the credibility of the employer's motives. Courts in Minnesota will no longer have to wrangle with the surplus tests that *McDonnell Douglas* carries along with it. The standard will be uniform across all MWA cases, ridding the analysis of any uncertainty about whether, when, and how to apply the test.[285]

Finally, whistleblowers in Minnesota will have a greater chance of surviving summary judgment. As a result, they will have greater opportunities to settle their claims or to win at trial.[286] Applying the proper standard at summary judgment ensures that employees, like Terrance Swanson, who report wrongdoing in their workplaces, are protected from retaliation by their employers. As *Swanson v. State* illustrates, if a whistleblower can survive summary judgment, there is a higher likelihood that

283. *See supra* Part II.A.2 ("Any evidence that a trial court would recognize in applying *McDonnell Douglas* would also be acknowledged under the Rule 56 summary judgment framework.").

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

285. *See* NELA & ELA Brief, *supra* note 99, at 5 ("As a result, courts and litigants have remained unclear about whether, when, and how to apply *McDonnell Douglas* . . . .").

286. *See* Brunet, *supra* note 108, at 703 (discussing the increased value of settlement upon a summary judgement motion's denial).

their claim settles, and the employer's wrongdoing is remedied.[287] Though Terrance Swanson's claim never proceeded to trial, he was able to settle his claim only after the appellate court reversed the trial court's grant of summary judgment.[288] The retaliation that Swanson and other whistleblowers have faced may not be fully remedied with a favorable settlement or a win at trial—the lasting physical and emotional impacts of retaliation can be devastating for a whistleblower.[289] But granting whistleblowers their day in court serves to redress these harms to the extent possible and hold retaliating employers accountable for violating the law.[290] Once Minnesota stops applying the *McDonnell Douglas* burden-shifting framework to MWA claims, whistleblowers should feel empowered to pursue claims against their employers for unlawful retaliation. The likelihood of surviving summary judgment will be higher for these plaintiffs—as will the cost of wrongdoing for employers.

CONCLUSION

After the *McDonnell Douglas* burden-shifting framework was conceived in 1973, it quickly became a source of inconsistency and confusion in the law. The framework has been criticized by scholars and jurists alike, who argue that *McDonnell Douglas* imposes an undue burden on plaintiffs at the summary judgment stage of litigation. In Minnesota, its application to the MWA has caused plaintiff-whistleblowers with legitimate claims, like safety investigator Terrance Swanson, to fall short at summary judgment—all because an inappropriate standard was applied to their case.

Minnesota would not be the first state to end the application of *McDonnell Douglas* to whistleblower claims at summary judgment. An analysis of other jurisdictions illustrates a growing trend away from applying *McDonnell Douglas* to state-law whistleblower retaliation claims at summary judgment. Fortunately,

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287. *See* Swanson v. State (*Swanson Appellate Decision*), No. A08-0553, 2009 WL 671039 at *1 (Minn. Ct. App. Mar. 17, 2009) (reversing grant of summary judgment for defendant).

288. *See supra* note 30 (noting that the case settled following the appellate decision).

289. *See, e.g.*, Complaint, *supra* note 1, at 9 (alleging Swanson suffered mental anguish, emotional distress, loss of reputation, and other damages).

290. *See* Watkins, *supra* note 31, at xi (discussing how whistleblowers hold organizations accountable).

some Justices of the Minnesota Supreme Court have already expressed a willingness to review the application of *McDonnell Douglas* to MWA cases, although it may take time for the "right" case to reach the court. In the meantime, the option to affirmatively legislate an end to the application of *McDonnell Douglas* at summary judgment remains a viable one.

Minnesota should no longer apply *McDonnell Douglas* to the MWA because there is no basis for the framework's application, and it stands in obstruction of the proper summary judgment standard. If Minnesota professes to value its workers, then it needs to stand behind them when they report illegal activities in their workplaces. So long as Minnesota continues to apply *McDonnell Douglas* to MWA claims, the state places a thumb on the scale in favor of retaliating employers—and turns its back on whistleblowing employees.