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The Erie Doctrine & McDonnell Douglas Framework: Much Ado About Nothing or an Issue Worth Analyzing?

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THE *ERIE* DOCTRINE & *McDONNELL DOUGLAS* FRAMEWORK: MUCH ADO ABOUT NOTHING OR AN ISSUE WORTH ANALYZING?

INTRODUCTION

Vertical choice of law issues have long been controlled by the doctrine first presented by the United States Supreme Court in *Erie Railroad Co. v. Tompkins*.[1] The *Erie* doctrine dictates that federal law in conflict with a state law is categorized as "substantive" or "procedural" in order to determine whether the law should be applied to cases in federal courts based on diversity jurisdiction.[2] "Under the *Erie* doctrine, federal courts sitting in diversity apply state substantive law and federal procedural law."[3] At a high level of generality, a law is procedural if it provides the "'manner and mode' of filing and prosecuting lawsuits."[4] On the contrary, substantive laws govern liability and dictate the outcome of a case.[5]

Identifying a law as "substantive" or "procedural" is not as simple as it may appear. This process has been described by the Supreme Court as a "challenging endeavor,"[6] especially when the federal rule in conflict is the product of judicial interpretation of federal statutes, because these rules can have both procedural and substantive features.[7] The burden-shifting framework presented in *McDonnell Douglas Corp. v. Green*[8] is a famous

1. 304 U.S. 64, 78 (1938).

2. *Id.* ("Congress has no power to declare substantive rules of common law applicable in a [S]tate . . . [a]nd no clause in the Constitution purports to confer such a power upon the federal courts.").

3. Gasperini v. Ctr. For Humanities, Inc., 518 U.S. 415, 427 (1996).

4. *See* Robert J. Condlin, *"A Formstone of Our Federalism": The* Erie/Hanna *Doctrine & Casebook Law Reform*, 59 U. MIAMI L. REV. 475, 481–82 (2005) (providing a summary definition of "procedural" and "substantive" in the *Erie* doctrine context).

5. *Id.* at 482 (providing broad examples of laws that are substantive rather than procedural).

6. *Gasperini*, 518 U.S. at 427.

7. *See* Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090 (9th Cir. 2001) (noting that determining whether the *McDonnell Douglas* framework is procedural or substantive is an instance of how making such a classification is a challenging endeavor).

8. 411 U.S. 792 (1973).

example of judicial interpretation of federal statutes that makes an *Erie* doctrine analysis a particularly challenging endeavor.[9]

The *McDonnell Douglas* framework applies to employment discrimination cases and is applied when the plaintiff has indirect evidence, but no direct evidence, of discriminatory motives.[10] In addition to its application to discrimination cases, an adaptation of the original *McDonnell Douglas* framework can be applied to retaliatory discharge claims.[11] A retaliation claim arises when an employee believes that he or she has been wrongly retaliated against by his or her employer.[12] Although many federal statutes provide the basis for retaliation claims,[13] starting in the 1970s, many states also acknowledged state law claims for retaliation.[14]

Under a federal retaliatory discharge claim, the plaintiff can prove retaliation by using the adapted *McDonnell Douglas* burden-shifting framework.[15] However, not all states implement a form of the *McDonnell*

9. *See Snead*, 237 F.3d at 1090–93 (explaining how an *Erie* doctrine analysis of the *McDonnell Douglas* framework is "a challenging endeavor").

10. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (describing the *McDonnell Douglas* framework and how it is applied to discrimination claims).

11. *See infra* footnotes 108–25 and accompanying text (discussing the adaptation of the *McDonnell Douglas* framework that is applied to retaliation claims).

12. *See* Rhea Gertken, Note, *Causation in Retaliation Claims: Conflict Between the Prima Facie Case and the Plaintiff's Ultimate Burden of Pretext*, 81 WASH U. L.Q. 151, 152 (2003) (summarizing the situation in which a retaliation claim may arise).

13. *See, e.g.*, 29 U.S.C. § 215(a)(3) (2006) (stating that it would be unlawful for any employer "to discharge or . . . discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter"); 42 U.S.C. § 2000e-3(a) (2000) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice . . . or participated in any manner in an investigation, proceeding, or hearing under this subchapter."); 42 U.S.C. § 12203(a) (2000) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

14. *See, e.g.*, Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1979); Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. Ct. App. 1976); *but see* Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365, 372 (Wis. 2002) (the Supreme Court of Wisconsin expressly refusing to recognize a state law claim for retaliation).

15. *See, e.g.*, Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1394 (10th Cir. 1997) (applying the *McDonnell Douglas* burden-shifting framework to a FLSA retaliation claim); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980) (noting that the order of proof in a retaliation case uses the *McDonnell Douglas* burden-shifting analysis). Although a true *McDonnell Douglas* framework is intended to allow the plaintiff to establish a prima facie case without direct evidence of causation, in the retaliation context every circuit except the Seventh Circuit has adopted an untrue *McDonnell Douglas* framework which requires the plaintiff to use direct evidence to establish a "causal link" between the plaintiff's protected activity and the

Douglas framework for state law retaliatory discharge claims.[16] This disagreement between federal circuits and state courts creates a potential conflict of law. In resolving the issue, if an *Erie* doctrine analysis were to deem the *McDonnell Douglas* framework to be procedural, it would apply to state law claims in federal court.[17] But if the framework is found to be substantive, the state framework would apply.[18]

Whether *McDonnell Douglas* is procedural or substantive is currently an unresolved issue that has been identified by courts and academic authors.[19] However, as this Comment will recognize, although the issue of *potential* conflicts has been raised and emphasized by judges and authors over the past decade, the number of *actual* conflicts within the United States is drastically limited, almost to the point of extinction.[20] For whatever reason, courts and academic authors have failed to recognize the limited scope of the issue.[21] Not only have courts and authors not recognized the limited scope of actual conflicts, they have actually commented on the "surprising" lack of academic

employer's retaliation. *See infra* notes 108–23 and accompanying text (providing the untrue *McDonnell Douglas* frameworks applied by each circuit). The Seventh Circuit has dissented from following the other circuits, creating a framework that allows plaintiffs to establish retaliation claims using indirect evidence, in the spirit of a true *McDonnell Douglas* framework. *See, e.g.*, Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902 (7th Cir. 2006).

16. *See, e.g*, Clemons v. Mech. Devices Co., 704 N.E.2d 403, 407–08 (Ill. 1998) (the Supreme Court of Illinois expressly rejecting the application of the *McDonnell Douglas* framework to Illinois state law retaliatory discharge claims); Jordan v. Clay's Rest Home, Inc., 483 S.E.2d 203, 207 (Va. 1997) (the Supreme Court of Virginia declining to adopt the *McDonnell Douglas* framework in order to retain the state's strong commitment to the employment-at-will doctrine).

17. *See* Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1090–93 (ruling that federal courts could apply the *McDonnell Douglas* framework because it is procedural).

18. *See* Bourbon v. Kmart Corp., 223 F.3d 469, 473–74 (7th Cir. 2000) (Posner, J., concurring) (recognizing that if McDonnell Douglas is substantive, the federal court should apply the state standard).

19. Carter v. Tennant Co., 383 F.3d 673, 677, 678 (7th Cir. 2004) (recognizing that the issue is unresolved in the Seventh Circuit); *Bourbon*, 223 F.3d at 473–74 (Posner, J., concurring) (noting that the issue is unresolved in the Seventh Circuit); Sandra F. Sperino, *Recreating Diversity in Employment Law by Debunking the Myth of the* McDonnell Douglas *Monolith*, 44 HOUS. L. REV. 349, 351–53 (2007) (identifying that the issue has remained unresolved); Melissa Kotun, Note, *Applying the* Erie *Doctrine and the* McDonnell Douglas *Burden-Shifting Analysis When a Conflict with State Law Arises Through a Retaliatory Discharge Claim*, 35 GA. L. REV. 1251, 1252–53 (2001) (explaining that the Seventh Circuit has elected to leave the issue unresolved).

20. *See infra* notes 150–89 (identifying Illinois and the Seventh Circuit as the only conflict of law in the United States).

21. *See, e.g.*, *Carter*, 383 F.3d at 677; *Bourbon*, 223 F.3d F.3d at 473–74 (Posner, J., concurring); Sperino, *supra* note 19, at 352; Kotun, *supra* note 19, at 1252.

literature on the issue.[22] Consequently, this Comment sets out to determine whether the court opinions and academic literature calling for a resolution are merely "much ado about nothing," such that courts and academic authors should ignore the issue, or whether the actual conflicts of law concerning retaliation frameworks are significant enough to conduct an *Erie* analysis.

Section I of this Comment will discuss the history and development of the *Erie* doctrine and *McDonnell Douglas* framework, including the application of *McDonnell Douglas* to retaliation claims. Section II will consider the states in which potential conflict of law issues arise and argue that although the issue is "much ado about nothing" in forty-nine states, the issue is significant enough to apply the *Erie* doctrine to the conflict of law in Illinois. Section III will analyze Illinois's conflict of law and argue that the Seventh Circuit's adaptation of the *McDonnell Douglas* framework is procedural and should be applied to state law claims in federal court.

I. HISTORY AND DEVELOPMENT

A. The Erie *Doctrine–Vertical Choice of Law*

Federalism entitles state and federal governments to their own judicial systems.[23] The Rules of Decision Act[24] was enacted to define the working relationship between each court system.[25] The working relationship between state and federal courts is important because a lack of cooperation between the court systems can result in different substantive results for parties with identical claims, depending on which court system is used.[26]

Legal rights and results should remain constant among jurisdictions in order to promote fairness and consistency to litigants.[27] As a result, certain rules are important to ensure that state and federal courts within the same

22. *See Bourbon*, 223 F.3d at 474 (Posner, J., concurring) (identifying a lack of "any illuminating scholarly discussions of the issue"); Sperino, *supra* note 19, at 352–53 (noting that the lack of academic commentary on the issue is surprising considering the "federalism problems that improper vertical choice of law" will cause).

23. Condlin, *supra* note 4, at 481.

24. 28 U.S.C. § 1652 (2006).

25. Condlin, *supra* note 4, at 477 n.8.

26. *Id.* at 481.

27. *See* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712 (1974) (stating that it is unfair to subject a person to different standards of law based upon where the litigation takes place); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954) (arguing that citizens must be able to discern one authoritative legal voice in order to mold their behaviors accordingly).

geographical area follow the same or similar substantive rules.[28] The *Erie* doctrine is an example of common law guidelines implemented to create consistency between federal and state courts within the same jurisdiction.

1. Pre-*Erie* Development

In 1789, Congress passed the aforementioned Rules of Decision Act, which was designed to ensure that federal and state courts apply the same substantive legal rules by stating that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."[29] However, courts were unable to consistently interpret the "laws of the several states" language of the Rules of Decision Act.[30]

The indecision of the application of the Rules of Decision Act led to the Supreme Court's ruling in *Swift v. Tyson*.[31] In *Swift*, the Court found that the "laws of the several states" language of the Rules of Decision Act was only intended to refer to state statutes; consequently, decisions of state courts were not binding on the federal courts and were only considered to be "evidence of what the laws are; and not of themselves laws."[32] The majority believed that "the federal judiciary should develop a comprehensive body of substantive federal common law to serve as a model for state courts to encourage uniformity in the state courts."[33]

Almost eighty years after *Swift*, the Supreme Court used its rationale from *Swift* to decide the *Black and White Taxicab* case,[34] where it found the Rules of Decision Act did not dictate the application of Kentucky common law to resolve an issue concerning the validity of an exclusive rights contract.[35] Instead, the court found that the federal court could resolve the issue by using the federal common law.[36]

28. Ely, *supra* note 27, at 712 (stating that fairness to persons involved in litigation is one of the major policy considerations for advocating similar substantive laws between state and federal courts).

29. 28 U.S.C. § 1652 (2006) (also known as the Judiciary Act of 1789).

30. *See* Joseph P. Bauer, *The* Erie *Doctrine Revisited: How a Conflicts Perspective Can Aid the Analysis*, 74 NOTRE DAME L. REV. 1235, 1240–41 (1999) (explaining that the Supreme Court thought it was necessary to make the *Swift v. Tyson* decision because of the interpretation problems concerning the Rules of Decision Act).

31. 41 U.S. (16 Pet.) 1 (1842).

32. *Id.* at 18.

33. *Id.* at 19; Kotun, *supra* note 19, at 1257 (citation omitted).

34. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928).

35. *Id.* at 529.

36. *Id.* at 530–31.

The Supreme Court's rationale in *Swift* was criticized from the beginning because of the broad and indecisive nature of federal general common law.[37] Federal common law virtually guaranteed conflicts in interpretation between state and federal courts because it essentially authorized the federal courts to determine the content of common law without consideration for how the highest court of the state would rule on the issue.[38] By excluding state court decisions under the Rules of Decision Act, federal courts were interfering in issues clearly within the scope of state law.[39] The conflict between federal and state courts was the power behind the vertical choice of law reform provided by the Supreme Court in the *Erie* doctrine.

2. The *Erie* Decision

The *Erie* decision is considered one of the most significant cases in American legal history.[40] In response to the criticism of a generalized federal common law, the Supreme Court in *Erie R. Co. v. Tompkins*[41] reversed *Swift*, by declaring "[t]here is no federal general common law."[42] The Court listed three reasons for overruling *Swift*. First, the Court found *Swift*'s interpretation of the Rules of Decision Act was flawed based on the Act's legislative history.[43]

Second, the Court stated that "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social," and that *Swift*'s expected benefits did not occur.[44] Despite *Swift*'s goal to develop uniformity, state courts had persisted in making their own conclusions about the content of federal common law, and consequently, it was impossible to discover a means of aligning federal common law and state law.[45] In addition, the Court noted that federal common law ultimately expanded such that state common law was

37. *See* Bauer, *supra* note 30, at 1242 n.25 (documenting the criticism that *Swift* was subjected to due to the absence of distinctions between local law and general common law).

38. Erie R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (noting that "[t]he fallacy underlying the rule declared in *Swift v. Tyson* is . . . [t]he doctrine rests upon the assumption that there is a transcendental body of law outside of any particular State . . . that federal courts have the power use their judgment as to what the rules of common law are; and that in the federal courts the parties are entitled to an independent judgment on matters of general law" (internal citations omitted)).

39. Kotun, *supra* note 19, at 1258.

40. Justice Stone called the *Erie* decision "the most important opinion since I have been on the court." Irving Younger, *Observation: What Happened in* Erie, 56 TEX. L. REV. 1011, 1029 (1978).

41. 304 U.S. 64 (1938).

42. *Id.* at 78.

43. *Id.* at 72; Kotun, *supra* note 19, at 1258.

44. *Erie*, 304 U.S. at 74.

45. *Id.*

left with little to regulate.[46] Consequently, results for similar claims in state and federal courts were different, and "[t]he discrimination resulting became in practice far-reaching."[47]

Third, the Court asserted that *Swift*'s interpretation of the Rules of Decision Act was unconstitutional because the Constitution did not grant the authority for a federal general common law.[48] Accordingly, neither Congress nor federal courts have the power to "declare substantive rules of common law applicable in a state whether they be local in their nature or general, be they commercial law or a part of the law of torts."[49] By eliminating this generalized federal common law, the Court declared that "[t]he authority and only authority [of the law] is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."[50] However, the concurring opinion by Justice Reed suggested that federal courts would still be permitted to apply their own procedural rules.[51]

Most of the *Erie* decision concentrated on rejecting *Swift*'s interpretation of the Rules of Decision Act. Thus, more refined instructions to determine when a federal court sitting in diversity must apply state law were needed from subsequent Supreme Court decisions. As a result, the *Erie* doctrine has been subjected to several modifications since its inception in 1938.

3. Post-*Erie* Modifications

The Supreme Court's first modification of *Erie* came seven years later in *Guaranty Trust Co. v. York*.[52] In *Guaranty Trust*, the Court had to apply the Rules of Decision Act to determine whether the plaintiff should be subject to the state or federal statute of limitations when the case was in federal court based on diversity jurisdiction.[53] The Court held that federal courts must rely on state law when resolving substantive rights in equity matters;[54] however, the

46. *Id.* at 75.

47. *Id.* The Supreme Court would later call these evils the "inequitable administration of the laws" and the "discouragement of forum-shopping." Hanna v. Plummer, 380 U.S. 460, 468 (1965).

48. *Erie*, 304 U.S. at 72, 79.

49. *Id.* at 78 ("There is no federal general common law.") (internal quotation marks omitted).

50. *Id.* at 79.

51. *Id.* at 92 (Reed, J., concurring) (stating that "no one doubts federal power over procedure"). This helped to develop the substantive/procedural distinction, along with the majority's statement that Congress cannot impose "substantive rules of common law applicable in a state." *Id.* at 78.

52. 326 U.S. 99 (1945).

53. *Id.* at 107.

54. *Id.* at 112 ("The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States.").

Court noted that classifying a statute of limitations as substantive or procedural can be problematic because it can be viewed as both.[55]

Therefore, the Court took a functional approach in refining the substance/procedure standard.[56] The well-known refinement from *Guaranty Trust* was the outcome determinative test, which asks whether the law would "significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court[.]"[57] Accordingly, when rights under state law are enforced in federal court, the federal court becomes "another court of the State."[58] When the Court applied the outcome determinative test to a state statute of limitations, it found that "a federal court in a diversity case should follow State law," because a state statute of limitations "would completely bar recovery in a suit if brought in a State court."[59]

However, the Court's outcome determinative test proved to be problematic and subject to criticism because, when taken literally, the test was over-inclusive since both procedural and substantive rules could potentially affect outcome.[60] As a result, the Supreme Court again reevaluated the *Erie* doctrine in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*[61]

In *Byrd*, the state practice at issue allowed a judge, rather than a jury, to decide whether the plaintiff was an employee for the purposes of the state's workmen's compensation law.[62] In determining whether the state or federal practice should apply, the Court acknowledged *Guaranty Trust*'s outcome determinative test, but modified the test to be evaluated in light of any strong "affirmative countervailing [federal] considerations."[63] In essence, to evaluate such countervailing federal considerations, the Court used a balancing test to weigh the relevant federal interest against developing litigation with the same result in state and federal court.[64] In *Byrd*, the Court found that "there is a strong federal policy against allowing state rules to disrupt the judge-jury

55. From one view, a limitations rule is substantive because it defines an element of a cause of action by providing the length of time the cause of action exists. *Id.* at 108. From another view, a limitations rule is procedural because it is merely a scheduling rule for administering a claim. *Id.*

56. *Id.* at 109.

57. *Guaranty Trust*, 326 U.S. at 108–09.

58. *Id.* (adding that a federal court "cannot afford recovery if the right to recover is made unavailable by the State").

59. *Id.* at 110.

60. *See* Bauer, *supra* note 30, at 1258 (noting the over-inclusiveness of the outcome determinative test).

61. 356 U.S. 525 (1958).

62. *Id.* at 535.

63. *Id.* at 537.

64. *See generally* Condlin, *supra* note 4, at 503 (noting that the court seemed to use this balancing test without actually using the term "balance").

relationship in the federal courts."[65] The Court balanced this interest against the interest that litigation should not come out differently in state and federal courts, and concluded that the federal policy for jury trials was stronger.[66]

Since balancing tests can be vague and broadly applied, especially in the context of the *Erie* doctrine,[67] the Supreme Court again undertook a reevaluation of the *Erie* doctrine in *Hanna v. Plumer*.[68] *Hanna* has been called the most important of the *Erie* doctrine modifications because it reconciles the contradictions of the earlier cases while combining the prior cases' formulations of the *Erie* doctrine into a single statement, which does not rely on balancing.[69]

The issue in *Hanna* was whether the federal court should apply the federal or state rule for service of process.[70] The Court declared that *Guaranty Trust*'s outcome determinative test must be interpreted with "reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws."[71] The forum-shopping requirement is intended for the court to consider whether litigants will specifically choose either federal or state courts based on the perceived results in each, when it is possible for a litigant to comply with both state and federal law.[72] To avoid the inequitable administration of the laws, federal courts must apply state law when "it would be unfair for the character or result of a litigation materially to differ" because the litigation has been brought in federal court.[73]

In considering the twin aims of *Erie*, the Court concluded that the federal rule for service of process was controlling in federal courts because the plaintiff, "in choosing her forum, was not presented with a situation where application of the state rule would wholly bar recovery; rather adherence to the state rule would have resulted only in altering the way in which process was served."[74] Following *Hanna*, a logical conclusion may be made that when a federal court sitting in diversity considers a conflicting state rule with a Federal Rule of Civil Procedure that was enacted under the Rules Enabling Act, the

65. *Byrd*, 356 U.S. at 538.

66. *Id.* at 538.

67. Balancing tests can be open-ended, especially when balancing federal and state interests.

68. 380 U.S. 460 (1965).

69. *See* Condlin, *supra* note 4, at 507 (stating that *Hanna* is the most important modification to the *Erie* interpretation of the Rules of Decision Act because it "makes sense as a matter of policy and provides a workable, clear, and almost algorithmic statement of how to determine the applicability of state law in federal courts.").

70. *Hanna*, 380 U.S. at 461.

71. *Id.* at 468.

72. *Id.* at 469.

73. *Id.* at 467.

74. *Id.* at 469.

court should apply the Federal Rule of Civil Procedure, regardless if the federal rule is contrary to the state's rule.[75]

The Supreme Court's most recent modification to the *Erie* doctrine came from *Gasperini v. Center for Humanities, Inc*.[76] The issue before the Court in *Gasperini* was whether the state or federal standard of appellate review should be followed by federal trial courts sitting in diversity.[77] Reverting back to the balancing of state and federal interests discussed in *Byrd*, the Court asserted that the "dispositive question . . . is whether federal courts can give effect to the substantive trust [of the state law] without untoward alteration of the federal scheme for the trial and decision of civil cases." In an opinion widely criticized for the Court's reversion back to a balancing of interests analysis,[78] the Court found that the state's enhanced appellate review must be followed by federal trial courts in diversity cases but not by federal appellate courts.[79]

After *Gasperini*, then, an *Erie* analysis does not end with *Hanna*'s twin aims of *Erie*.[80] The court must also consider whether the state procedural law is closely related to state substantive policy.[81] However, even if the state procedural rule is outcome determinative or was enacted for substantive reasons, the court must balance whether the federal interests outweigh the state interests.[82] If the federal interests outweigh the state interests, the court should apply the federal procedural rule or try to accommodate both interests, as *Gasperini* accomplished by applying the state standard to federal trial courts but not appellate courts.[83]

B. McDonnell Douglas *Framework*

1. The *McDonnell Douglas* Decision

The *McDonnell Douglas* framework was developed by the Supreme Court in 1973 when it held that a former employee at a McDonnell Douglas plant could establish a race discrimination claim based on circumstantial evidence.[84] In *McDonnell Douglas v. Green*, the Supreme Court introduced the *McDonnell Douglas* framework in order to address the "proper order and nature of proof in

75. *Hanna*, 380 U.S. at 470–74.

76. 518 U.S. 415 (1996).

77. *Id.* at 418–19.

78. *See* Earl C. Dudley, Jr. & George Rutherglen, *Deforming the Federal Rules: An Essay on What's Wrong with the Recent* Erie *Decisions*, 92 VA. L. REV. 707, 707–18 (2006) (describing the *Gasperini* opinion as a "misleading and uncertain guide to what federal practice actually is").

79. *Gasperini*, 518 U.S. at 419.

80. *Id.* at 428.

81. *Id.* at 429–31.

82. *Id.* at 431–32.

83. *Id.* at 437.

84. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973).

actions under Title VII."[85] The Supreme Court laid out an elaborate, three-part burden shifting framework for use in disparate treatment discrimination cases in which direct evidence of the defendant's discriminatory motive is unavailable.[86] Under the framework, the plaintiff carries the "initial burden under the statute of establishing a prima facie case of racial discrimination."[87] The plaintiff may establish a prima facie case by showing:

> (i) that he belongs to a [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[88]

If the plaintiff establishes the prima facie case, the burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason for [its] rejection."[89] If the defendant is able to express a "legitimate, nondiscriminatory reason," the burden shifts back to the plaintiff, who is afforded "a fair opportunity to show that [the defendant's] stated reason for [its] rejection was in fact pretext."[90]

2. Post-*McDonnell Douglas* Rationale and Modifications

While the Supreme Court did not justify the *McDonnell Douglas* framework in its *McDonnell Douglas* opinion, it did so in *Texas Department of Community Affairs v. Burdine*.[91] The Court explained that the *McDonnell Douglas* framework's prima facie case requirement "eliminates the most common nondiscriminatory reasons for the plaintiff's rejection."[92] The plaintiff's establishment of the prima facie case "creates a presumption that the employer unlawfully discriminated against the employee," and if the defendant

85. *Id.* at 793.

86. Sandra F. Sperino, *Flying Without a Statutory Basis: Why McDonnell Douglas is Not Justified by Any Statutory Construction Methodology*, 43 HOUS. L. REV. 743, 754 (2006) (explaining that the three-part framework was a change from prior tests with less regimented standards that required the plaintiff to prove "by a preponderance of the evidence that the employer was guilty of a discriminatory act"). In 1985, the Court made the clarification that the framework was to apply to cases where a plaintiff has no direct evidence of the employer's discriminatory motive. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985).

87. *McDonnell Douglas*, 411 U.S. at 802.

88. *Id.* (footnote omitted). The Court noted that the facts necessary for the plaintiff to establish a prima facie case will vary based on the factual scenario. *Id.* at 802 n.13.

89. *Id.*

90. *Id.* at 804.

91. 450 U.S. 248 (1981).

92. *Id.* at 253–54.

fails to rebut the presumption, the court "must enter judgment for the plaintiff because no issue of fact remains."[93]

If the plaintiff establishes a prima facie case, the defendant must "clearly set forth" through admissible evidence "the reasons for the plaintiff's rejection." [94] The Court modified this stage of the *McDonnell Douglas* framework by stating that the defendant's burden is of production, such that the defendant must express a "legally sufficient" reason to support judgment in its favor without necessarily needing to "persuade the court that it was actually motivated by the proffered reasons."[95]

If the defendant offers rebuttal evidence of a "legitimate, nondiscriminatory reason," the plaintiff's prima facie case loses "the legally mandatory inference of discrimination" by the defendant.[96] Consequently, to be successful, the plaintiff must establish that the defendant's articulated reason was pretextual.[97] The plaintiff can establish pretext "*directly* by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly* by showing that the employer's proferred explanation is unworthy of credence."[98]

After *Burdine*, the circuits disagreed as to whether a plaintiff was entitled to judgment as a matter of law if he or she could establish a prima facie case and convince the trier of fact to reject the defendant's legitimate, nondiscriminatory justification for its decision.[99] In *St. Mary's Honor Center v. Hicks*, the Supreme Court addressed the circuit disagreement, holding that judgment in favor of the plaintiff is not required.[100] Instead, the Court ruled

93. *Id.* at 254.

94. *Id.* at 254–55.

95. *Id.*

96. *Burdine*, 450 U.S. at 255 n.10 (explaining that the plaintiff's prima facie "evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual").

97. *Id.* at 256 (noting that the plaintiff retains the burden of persuasion and that the plaintiff's burden to demonstrate that the defendant's proffered reason was not the true reason for the employment decision merges with the "ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination").

98. *Id.* (emphasis added).

99. *Compare* Johnson v. Group Health Plan, Inc., 994 F.2d 543, 547 (8th Cir. 1993) (ruling that the plaintiff was entitled to judgment as a matter of law after establishing the prima facie case and refuting the defendant's stated reason), *with* Bienkowski v. Am. Airlines, Inc., 851 F.2d 1503, 1503 (5th Cir. 1988) (holding that the plaintiff's evidence was insufficient for judgment as a matter of law when the evidence only establishes the plaintiff's prima facie case and refutes the defendant's stated reason); *cf.* Clark v. Huntsville City Bd. of Educ., 717 F.2d 525, 529 (11th Cir. 1983) (deciding that a judgment as a matter of law for the plaintiff is permissible but not mandatory when the plaintiff establishes the prima facie case and refutes the defendant's stated reason).

100. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) ("[T]he Court of Appeals' holding that rejection of the defendant's proferred reasons *compels* judgment for the plaintiff

that if the plaintiff establishes a prima facie case, the defendant's burden is not discharged unless the defendant "introduce[s] evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action."[101]

Therefore, following *Hicks*, the plaintiff may simultaneously establish a prima facie case of discrimination and the defendant's pretext.[102] If the plaintiff establishes a prima facie case and refutes the defendant's stated, nondiscriminatory reason, the court may grant judgment in favor of the plaintiff as a matter of law.[103] However, the plaintiff cannot win the case if its prima facie case is found to be inadequate in law or fails to convince the trier of fact.[104]

3. Application of *McDonnell Douglas* to Retaliation Claims

Employees in the workplace are protected from an employer's discriminatory actions by such federal employment discrimination protection statutes as Title VII of the 1964 Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA).[105] However, for this protection to be effective, employees must feel comfortable to come forward and report the discrimination and not fear repercussions from their employer for reporting the discrimination. Employee decisions about whether to challenge discrimination are based on a balancing of the costs and benefits of reporting.[106] Accordingly, many federal employment statutes, including Title VII, the ADA, the ADEA, and the Fair

disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'").

101. *Id.* at 509 (emphasis in original).

102. *Id.* at 508.

103. *Id* at 519.

104. *Id.* at 510 n.3 (stating that the defendant's failure to introduce evidence of a nondiscriminatory reason will cause the court to rule against it, unless the plaintiff fails to establish his or her prima facie case).

105. *See, e.g.*, 42 U.S.C. § 2000e-2 (2000); 42 U.S.C. § 12112 (2000) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."); 29 U.S.C. 623(a) (2006) ("It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.").

106. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 36–37 (2006) (providing the example that women who choose to confront discrimination make that decision because they believe that the costs of confrontation outweigh the benefits, while women who report discrimination tend to be optimistic about the benefits of reporting).

Labor Standards Act (FLSA), provide retaliation provisions protecting employees who report violations of the statutes.[107]

Courts have consistently recognized that the *McDonnell Douglas* framework may be applied to cases of retaliation.[108] The burden shifting aspect of the framework applies to retaliation claims as it does to other employment discrimination claims. The plaintiff must first carry the burden of proving a prima facie case of retaliation to create an inference of the employer's retaliatory motive.[109] After the plaintiff has established a prima facie case, "the defendant can defeat it by producing evidence that the motive for firing or taking other adverse employment action against the plaintiff was not retaliatory, unless the plaintiff is able to come back and show that the alleged nonretaliatory motive was actually pretextual."[110]

However, although this burden-shifting framework follows *McDonnell Douglas*, the three requirements of the prima facie case are not necessarily in accordance with the principles of *McDonnell Douglas*.[111] Most courts have recognized three elements to the plaintiff's prima facie retaliation claim: "(1) opposition to discrimination or participation in covered proceedings; (2) adverse action; (3) causal connection between the protected activity and the adverse action."[112] Every circuit except for the Seventh Circuit has adopted a

107. *See, e.g.*, 29 U.S.C. § 215(a)(3) (2006) (stating that it would be unlawful for any employer "to discharge or . . . discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter"); 29 U.S.C. § 623(d) (2006) ("It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member . . . because such individual, member, or applicant for membership has opposed any practice made unlawful by this section, or . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter."); 42 U.S.C. § 2000e-3(a) (2000) ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice . . . or participated in any manner in an investigation, proceeding, or hearing under this subchapter."); 42 U.S.C. § 12203(a) (2000) ("No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.").

108. *See, e.g.*, Conner v. Schnuck Mkt., Inc., 121 F.3d 1390, 1394 (10th Cir. 1997) (applying the *McDonnell Douglas* framework to an FLSA retaliation claim); Grant v. Bethlehem Steel Corp., 622 F.2d 43, 46 (2d Cir. 1980) ("It is well established that the order of proof in a retaliation case follows the rule in *McDonnell Douglas*.").

109. Stone v. Indianapolis Pub. Util. Div., 281 F.3d 640, 642–43 (7th Cir. 2002) (describing the application of the *McDonnell Douglas* framework to retaliation claims).

110. *Id.*

111. *Id.* at 643.

112. *See* EEOC COMPLIANCE MANUAL § 8, at 3 (1998) (stating the "essential" elements of a retaliation claim). The third element of the prima facie case in retaliation claims can be

"causal connection" or "causal link" element to the prima facie case.[113]

established in different ways. Initially, the plaintiff must prove that the employer had knowledge of the protected activity. *See, e.g.*, Brower v. Runyon, 178 F.3d 1002, 1006 (8th Cir. 1999) (stating that without a showing of the supervisor's knowledge of the protected activity, no causal connection exists). The Sixth Circuit actually includes the defendant's knowledge as a fourth element of the prima facie case, but the other circuits find the defendant's knowledge to be inherent in the "causal link" element. Bukta v. J.C. Penney Co., Inc., 359 F. Supp. 2d 649, 671 (N.D. Ohio 2004). To show that the employer was aware of the plaintiff's protected activity, some courts focus on the temporal proximity of the timing of the adverse employment action and the plaintiff's protected activity. Gorman-Bakos v. Cornell Co-op Extension, 252 F.3d 545, 555 (2d Cir. 2001) (holding that five months was not too long a time period to support an inference of causation). Other courts find that timing, by itself, is not sufficient to prove that the plaintiff's protected activity was the reason for the defendant's adverse action. *See, e.g.*, Hughes v. Derwinski, 967 F.2d 1168, 1174–75 (7th Cir. 1992) ("[Timing], standing by itself, does not sufficiently raise the inference that Hughes's filing was the reason for the adverse action.").

113. *See, e.g.*, Zhuang v. Datacard Corp., 414 F.3d 849, 856 (8th Cir. 2005) ("[Plaintiff] must show that (1) she engaged in statutorily protected conduct; (2) suffered an adverse employment action; and (3) there is a causal connection between her protected conduct and the adverse employment action."); Duncan v. Manager, Dep't of Safety, 397 F.3d 1300, 1314 (10th Cir. 2005) ("[Plaintiff] must show: (1) she engaged in protected activity; (2) she suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse action."); Stavropoulos v. Firestone, 361 F.3d 610, 616 (11th Cir. 2004) ("[Plaintiff] must show that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action."); Pardi v. Kaiser Found. Hosps., 389 F.3d 840, 849 (9th Cir. 2004) ("[Plaintiff] must show that: (1) he or she engaged in a protected activity; (2) suffered an adverse employment action; and (3) there was a causal link between the two."); Davis v. Dallas Area Rapid Transit, 383 F.3d 309, 319 (5th Cir. 2004) ("[Plaintiff] must show that: (1) he engaged in an activity protected by Title VII; (2) he was subjected to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse employment action."); Weston v. Pennsylvania, 251 F.3d 420, 430 (3d Cir. 2001) ("[Plaintiff] must show that: (1) he or she engaged in a protected employee activity; (2) the employer took an adverse employment action after or contemporaneous with the protected activity; and (3) a causal link exists between the protected activity and the adverse action."); Hafford v. Seidner, 183 F.3d 506, 515 (6th Cir. 1999) ("[Plaintiff] must show that: (1) he engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action."); Carney v. American Univ., 151 F.3d 1090, 1095 (D.C. Cir. 1998) ("[Plaintiff] must show that (1) she engaged in statutorily protected activity; (2) her employer took an adverse personnel action against her; and (3) a causal connection exists between the two."); Hernández-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998) ("[Plaintiff] must demonstrate that (1) he engaged in protected conduct under Title VII; (2) he suffered an adverse employment action; and (3) the adverse action is causally connected to the protected activity."); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 769 (2d Cir. 1998) ("[Plaintiff] must show (1) participation in a protected activity known to the defendant; (2) an employment action disadvantaging the plaintiff; and (3) a causal connection between the protected activity and the adverse employment action."); Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) ("[Plaintiff must prove] that (1) plaintiff engaged in a protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) a

Adopting the minority view, the Seventh Circuit has argued that requiring the plaintiff to establish a causal link is "not *really* the *McDonnell Douglas* standard" because it would remove the essence of the *McDonnell Douglas* framework, which is to "give the plaintiff a boost when he has no actual evidence of discrimination (or retaliation) but just some suspicious circumstances."[114] If the plaintiff has to establish direct evidence of a causal link, then he or she has gone beyond *McDonnell Douglas* and does not actually need *McDonnell Douglas* to establish a claim for retaliation.[115]

The Seventh Circuit's criticism that the "causal link" element of the prima facie case creates an untrue *McDonnell Douglas* framework may depend on the meaning of "causal link." If "causal link" means that "the plaintiff must present evidence that had it not been for his protected expression he would not have been fired," then the framework is not in accordance with the principles of *McDonnell Douglas*, because direct evidence is required.[116] However, if "causal link" means, as defined in the Fifth and Eleventh Circuits, that the protected expression and adverse action "were not wholly unrelated,"[117] such that something less than direct evidence of but-for causation could be sufficient to establish the prima facie case,[118] the framework would be closer to a true *McDonnell Douglas* framework, because direct evidence may not be required.[119]

Despite the Seventh Circuit's criticism, the other circuits have continued to hold that the prima facie case for retaliation under the *McDonnell Douglas* framework requires proof of a causal link between the plaintiff's protected activity and the employer's adverse action.[120] In response, the Seventh Circuit

causal connection existed between the protected activity and the adverse action."); *but see* Stone v. Indianapolis Pub. Util. Div., 281 F.3d 640, 642–43 (7th Cir. 2002). The Seventh Circuit reformulated its framework for retaliation cases based on indirect evidence by requiring a "similarly situated" analysis, which requires the plaintiff to show that after engaging in protected conduct, "only he, and not any similarly situated employee who did not [file a charge or other protected conduct], was subjected to an adverse employment action even though he was performing his job in a satisfactory manner." *Stone*, 281 F.3d at 642–43.

114. Bourbon v. Kmart Corp., 223 F.3d 469, 475–76 (7th Cir. 2000) (Posner, J., concurring).

115. *Id.* at 476.

116. *Stone*, 281 F.3d at 643. This is the definition applied by every circuit except for the Fifth and Eleventh Circuits. *Id.*

117. *Id.*

118. *See, e.g.*, Fierros v. Tex. Dep't of Health, 274 F.3d 187, 191 (5th Cir. 2001) (defining "causal link"); Pennington v. Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001) (providing a definition of "causal link").

119. *Stone*, 281 F.3d at 643.

120. *See, e.g.*, Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000) (noting that to establish a prima facie case of retaliation, the plaintiff must show "that a causal connection exists between the protected activity and the adverse employment action"); Jones v. Washington Metro. Area Transit Auth., 205 F.3d 428, 433 (D.C. Cir. 2000) (stating that to establish a prima

has articulated both "direct" and "indirect" methods to establish a prima facie case of retaliation.[121] The "indirect" method creates a framework as true as possible to *McDonnell Douglas* by requiring "the plaintiff to show that after filing the charge [or otherwise opposing the employer's allegedly discriminatory practice] only he, and not any similarly situation employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner."[122] Thus, the plaintiff does *not* need direct evidence to prove retaliation. Instead, the plaintiff must only prove he or she was (1) performing the job satisfactorily, (2) subjected to adverse employment action, and (3) similarly situated employees were not subjected to adverse employment action.[123]

The "direct" method applies essentially the same framework as the other circuits for plaintiffs to establish retaliation claims. The Seventh Circuit calls this test "direct" because it requires the plaintiff "to present direct evidence . . . that he engaged in protected activity . . . and as a result suffered the adverse employment action."[124] Although, the "indirect" method would be preferred by plaintiffs because of the difficulty in establishing direct evidence of retaliation, the "direct" method is intended for use by the plaintiff when he or she cannot prove that a "similarly situated employee who did not oppose the employer's practice was not fired or otherwise treated as badly as the plaintiff was."[125]

II. MUCH ADO ABOUT NOTHING?

Most states also implement the untrue version of the *McDonnell Douglas* framework to retaliatory discharge claims, requiring the plaintiff to establish a "causal link."[126] Consequently, there would not be any choice of law issues

facie case of retaliation under the *McDonnell Douglas* framework, "there [must exist] a causal link between the adverse action and the protected activity").

121. Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902 (7th Cir. 2006) (citing *Stone*, 281 F.3d at 644).

122. *Sylvester*, 453 F.3d at 902.

123. *Id*; *see also* Metzger v. Illinois State Police, 519 F.3d 677, 681 (7th Cir. 2008) (providing the Seventh Circuit's indirect framework).

124. *Stone*, 281 F.3d at 644 (explaining the Seventh Circuit's "direct" method of establishing a retaliation claim); *see Sylvester*, 453 F.3d at 902 (describing the Seventh Circuit's "direct" method). The direct framework requires a plaintiff to "show through either direct or circumstantial evidence that (1) she engaged in statutorily protected activity; (2) she suffered from adverse action taken by the employer; and (3) there was a casual connection between the two." *Metzger*, 519 F.3d at 681.

125. *Sylvester*, 453 F.3d at 902.

126. *See, e.g.*, Kinzel v. Discovery Drilling, Inc., 93 P.3d 427, 433 (Alaska 2004) (plaintiff must show: "(1) that [the employee] was engaged in a protected activity; (2) that an adverse employment decision was made; and (3) that there was a causal connection between the two"); Gallanis-Politis v. Medina, 152 Cal. App. 4th 600, 618–19 (Cal. Ct. App. 2007) (prima facie case

when a state law retaliation claim was brought in federal court because the state and federal frameworks would be the same. Even Judge Richard Posner

of retaliation requires a showing that (1) the employee engaged in a protected activity, (2) defendant subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action); Russell v. KSL Hotel Corp., 887 So.2d 372, 379 (Fla. Dist. Ct. App. 2004) (plaintiff must demonstrate: "(1) a statutorily protected expression; (2) an adverse employment action; and (3) a causal connection between the participation in the protected expression and the adverse action."); Fitzgerald v. Salsbury Chem. Inc., 613 N.W.2d 275, 281–82 (Iowa 2000) (employee must establish: (1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge); Bishop v. Manpower, Inc., 211 S.W.3d 71, 75 (Ky. Ct. App. 2006) ("[I]t is incumbent on the employee to show at a minimum that he was engaged in a statutorily protected activity, that he was discharged, and that there was a connection between the protected activity and the discharge."); Brooks v. S. Univ. & Agric. & Mech. Coll., 877 So.2d 1194, 1221 (La. Ct. App. 2004) (plaintiff employee must prove by a preponderance of the evidence that: "(1) she engaged in [a protected activity]; (2) an adverse employment action occurred; and (3) a causal link existed between the protected activity and the adverse employment action"); Guercio v. Prod. Automation Corp., 664 N.W.2d 379, 388 (Minn. Ct. App. 2003) (employee must show: "(1) statutorily-protected conduct by the employee; (2) adverse employment action by the employer; and (3) a causal connection between the two"); Riesen v. Irwin Indus. Tool Co., 717 N.W.2d 907, 915 (Neb. Ct. App. 2006) ("[A]n employee must show that he or she participated in a protected activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected activity and the adverse employment action."); Simeone v. Suffolk, 36 A.D.3d 890, 891 (N.Y. App. Div. 2007) ("[A] plaintiff must show that (1) he or she has engaged in protected activity, (2) the employer was aware that he or she participated in such activity, (3) he or she suffered an adverse employment action based upon the activity, and (4) there is a causal connection between the protected activity and the adverse action."); Jacob v. Nodak Mut. Ins. Co., 693 N.W.2d 604, 609 (N.D. 2005) (plaintiff must show he or she engaged in protected activity and that activity was causally related to his or her termination); Peterson v. Buckeye Steel Casings, 729 N.E.2d 813, 821–22 (Ohio Ct. App. 1999) (relying on federal case law and holding that a plaintiff must establish three elements: "(1) that she engaged in protected activity, (2) that she was subjected to an adverse employment action, and (3) that a causal link exists between a protected activity and the adverse action"); Uber v. Slippery Rock Univ., 887 A.2d 362, 367 (Pa. Super. Ct. 2005) (complainant must show that: "(1) he was engaged in a protected activity; (2) his employer was aware of the protected activity; (3) subsequent to participation in the protected activity, *he was subjected to an adverse employment action*; and (4) there is a causal connection between his participation in the protected activity and the adverse employment action"); Shoucair v. Brown Univ., 917 A.2d 418, 427 (R.I. 2007) ("To prove a claim of retaliation [in Rhode Island], an employee must establish that: (1) [the employee] engaged in protected conduct; (2) [the employee] experienced an adverse employment action; and (3) there was a causal connection between the protected conduct and the adverse employment action."); Stewart v. Sanmina Tex. L.P., 156 S.W.3d 198, 209 (Tex. App. 2005) ("[P]laintiff must show that: (1) he engaged in a protected activity, (2) an adverse employment action occurred, and (3) there was a causal connection between participation in the protected activity and the adverse employment decision."); Donahue v. Cent. Wash. Univ., 163 P.3d 801, 806 (Wash. Ct. App. 2007) ("[P]laintiff must show that (1) he or she engaged in statutorily protected activity, (2) an adverse employment action was taken, and (3) there is a causal link between the employee's activity and the employer's adverse action.").

of the Seventh Circuit has recognized that, when the state and federal frameworks do not conflict, "the *McDonnell Douglas* standard . . . [would] properly apply to state retaliation cases litigated in federal courts."[127] Further, other states have expressly rejected creating a state law claim for retaliation.[128] Conflict of law issues would obviously not arise in these states because the federal claim of retaliation would be the only option for employees to use.

Throughout the entire country, only three courts have recognized that the federal framework differs from the state court's framework, raising *potential* conflict of law issues. These potential conflicts could, nevertheless, be mere red herrings that cause courts and academic authors to debate the merits of applying the *Erie* doctrine to the *McDonnell Douglas* framework. In jurisdictions with a potential conflict, a comparison between the state and federal framework needs to be conducted to decide whether one or more of these conflicts are legitimate and need to be resolved, or whether the issue is, instead, "much ado about nothing."

A. Potential Conflict Between Oregon and the Ninth Circuit

The Ninth Circuit has recognized that the Oregon state framework is different than the framework applied by the Ninth Circuit. Although state courts in Oregon have never expressly rejected the Ninth Circuit's adapted *McDonnell Douglas* framework, in *Snead v. Metropolitan Property & Casualty Insurance Co.*,[129] the Ninth Circuit noted that the second and third steps of Oregon's burden-shifting framework are not considered by the court until after the summary judgment stage.[130] Thus, even if the defendant articulated a legitimate, nondiscriminatory reason for its adverse employment action against the plaintiff during the summary judgment proceedings, the plaintiff would not be required to rebut this evidence to survive the defendant's motion for summary judgment.[131]

However, the Ninth Circuit held that the differences between its framework and the Oregon framework were not substantive requirements of what evidence needed to be established by the parties.[132] Rather, the differences merely facilitated a procedural rule to establish the timing of the

127. Bourbon v. Kmart Corp., 223 F.3d 469, 477 (7th Cir. 2000).

128. *See, e.g.*, Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365, 372 (Wis. 2002) (rejecting a state law claim for retaliatory discharge).

129. 237 F.3d 1080 (9th Cir. 2001).

130. *Id.* at 1090. If the plaintiff establishes a prima facie case, the second stage of the Ninth Circuit's adaptation of the *McDonnell Douglas* framework requires the defendant to articulate a legitimate, nondiscriminatory motive for the employment action. *Id.* at 1093. If the defendant can articulate the nondiscriminatory motive, the third stage of the framework requires that the plaintiff show that the alleged nondiscriminatory motive is pretextual. *Id.*

131. *Id.* at 1093.

132. *Id.* at 1091.

order in which evidence was presented.[133] Consequently, the court found that the order of the presentation of evidence would not affect the substantive result of the litigation because both frameworks would eventually allow the same evidence to be presented.[134] Based on this finding, the court concluded that "[t]he identical outcomes produced through the state and federal systems make it improbable that increased forum-shopping will occur."[135] As a result, although the Ninth Circuit completed an entire *Erie* analysis, its conclusion was that the Oregon and Ninth Circuit frameworks are essentially the same, causing no choice of law issues.[136]

B. Potential Conflict Between Virginia and the Fourth Circuit

Another state with a potential conflict of law is Virginia, where the state supreme court rejected the *McDonnell Douglas* framework.[137] In *Jordan v. Clay's Rest Home, Inc.*,[138] the court rejected the *McDonnell Douglas* framework in the retaliation context because it does not follow the Virginia courts' "strong commitment" to the at-will employment doctrine.[139] In addition, the court believed that its "procedural and evidentiary framework" for establishing a prima facie case was "entirely appropriate" for retaliatory discharge cases.[140] In light of the court's commitment to the at-will doctrine, it held that for a plaintiff to establish a prima facie case of retaliation in Virginia,

133. *Id.* (arguing that the only difference between *McDonnell Douglas* and the Oregon state framework is timing). Under the Ninth Circuit's framework, the defendant's evidence and plaintiff's rebuttal were presented prior to the summary judgment stage, while under the state framework, these were presented after the summary judgment stage, allowing the plaintiff to survive summary judgment by establishing a prima facie case. *Id.*

134. *Snead*, 237 F.3d at 1091. The court assumes that the order of the evidence would not impact the substantive result of the trial because if the plaintiff would not survive summary judgment on the second or third components of *McDonnell Douglas*, then this lack of evidence would only delay the plaintiff's loss by bringing the action in state court where a nonsuit or directed verdict would be in order. *Id.* However, a counter argument could be made that a change in the evidence required at the summary judgment stage could affect the outcome of a trial because, in that fact pattern, a directed verdict may not be proper, even if the plaintiff presented no evidence of pretext, because the jury could choose not to believe the defendant's nondiscriminatory motive, and the plaintiff's prima facie case, and the inference of discrimination that is created, would not be rebutted. Sperino, *supra* note 19, at 391 (arguing that the *Snead* court's ruling that the differences in timing were not outcome determinative was incorrect).

135. *Snead*, 237 F.3d at 1091.

136. *Id.*

137. Jordan v. Clay's Rest Home, Inc., 483 S.E.2d 203, 207 (Va. 1997) (declining to adopt the *McDonnell Douglas* framework in order to retain the state's strong commitment to the employment-at-will doctrine).

138. *Id.*

139. *Id.* (noting that the Supreme Court has failed to even mention the at-will employment doctrine, even in passing, in any of its references to the *McDonnell Douglas* framework).

140. *Id.*

he or she must prove, by circumstantial or direct evidence, that the employee's protected activity caused the employer to discharge the employee.[141]

The Fourth Circuit's requirement of a "causal link" and Virginia's allowance for plaintiffs to establish retaliation by circumstantial evidence seems to directly conflict because circumstantial evidence would seem to be analogous to indirect evidence.[142] However, most courts allow for evidence of a "causal link" to be established using circumstantial evidence.[143]

Therefore, the only real difference between the Virginia state framework and the Fourth Circuit's framework comes after the prima facie case. The Fourth Circuit's framework requires, in accordance with *McDonnell Douglas*, the burden to shift to the defendant after the plaintiff establishes a prima facie case, and then, if the defendant can introduce evidence of a nonretaliatory motive, the burden shifts back to plaintiff to show the defendant's alleged motive was pretextual.[144] The Virginia framework expressly rejects this burden-shifting and allows for only the prima facie case to come before the summary judgment stage.[145] This is the same issue discussed in *Snead*.[146] Therefore, since, as in Oregon, the substantive result of the case would be the same in either court, the Virginia and Fourth Circuit frameworks are essentially the same, causing no choice of law issues.[147] This is reiterated by the fact that although the Supreme Court of Virginia expressly rejected the

141. *Id.*

142. *Compare* Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) (quoting Carter v. Ball, 33 F.3d 450, 460 (4th Cir. 1994)) (noting in the Fourth Circuit, a plaintiff must prove "that (1) plaintiff engaged in a protected activity, such as filing an EEO complaint; (2) the employer took adverse employment action against plaintiff; and (3) a causal connection existed between the protected activity and the adverse action"), *with Jordan*, 483 S.E.2d at 207 (stating that the Virginia framework allows circumstantial evidence to establish retaliation).

143. *See, e.g.*, Metzger v. Ill. State Police, 519 F.3d 677, 681 (7th Cir. 2008) (citing Dorsey v. Morgan Stanley, 507 F.3d 624, 627 (7th Cir. 2007)); Pope v. ESA Servs., Inc., 406 F.3d 1001, 1010 (8th Cir. 2005) (citing Cokley v. City of Ostego, 623 N.W.2d 625, 630 (Minn. Ct. App. 2001)); Gronowski v. Spencer, 424 F.3d 285, 293 (2d Cir. 2005) (citing Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999)); DiCarlo v. Potter, 358 F.3d 408, 421 (6th Cir. 2004) (citing Brown v. ASD Computing Ctr., 519 F. Supp. 1096, 1116 (S.D. Ohio 1981)); Poole v. County of Otero, 271 F.3d 955, 961 (10th Cir. 2001) (citing Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1316 (9th Cir. 1989)); Wright v. Southland Corp., 187 F.3d 1287, 1294–1303 (11th Cir. 1999). Although the above stated courts have found that circumstantial evidence can be used to establish the "causal link," the Fourth Circuit has yet to rule on this issue.

144. *See, e.g.*, *Causey*, 162 F.3d at 800.

145. *Jordan*, 483 S.E.2d at 207 (stating that "Virginia law is settled . . . in trial of civil actions . . . [and] there is no necessity for the Commonwealth to provide a special framework for the trial of wrongful discharge cases").

146. *See* Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1091 (9th Cir. 2001) (arguing that the only difference between *McDonnell Douglas* and the Oregon state framework is timing).

147. *Id.*

McDonnell Douglas framework over a decade ago,[148] the issue has not been addressed or even recognized by the Fourth Circuit. This supports the notion that courts and academic authors have found the potential conflict of law too unimportant or non-critical for comment.[149]

C. Potential Conflict Between Illinois and the Seventh Circuit

While the Oregon/Ninth Circuit and Virginia/Fourth Circuit conflicts are merely facial and not enough to warrant a full *Erie* doctrine analysis, Illinois's potential conflict is more complex. In *Clemons v. Mechanical Devices Co.*,[150] the Supreme Court of Illinois expressly rejected applying the *McDonnell Douglas* framework to state law retaliation claims because the court did not feel that "there is anything unique about the tort of retaliatory discharge that requires a deviation from the traditional tort law approach to the allocation of proof."[151] The court was concerned that the use of the *McDonnell Douglas* framework would expand the tort of retaliatory discharge by reducing the plaintiff's burden of proof for the prima facie case.[152]

Illinois state courts instead find that a prima facie claim for retaliatory discharge requires a showing that (1) an employee has been discharged, (2) the discharge was in retaliation for the employee's activities, and (3) the discharge violated a "clear mandate of public policy."[153] Essentially, direct evidence of causation is required to establish the second element of the test.[154] If the

148. *Jordan*, 483 S.E.2d at 207.

149. *See* Bourbon v. Kmart Corp., 223 F.3d 469, 477 (7th Cir. 2000) (Posner, J., concurring) (noting that when "there [is] no conflict between state and federal law . . . the '*McDonnell Douglas*' standard . . . [would] properly apply to state retaliation cases litigated in federal courts").

150. 704 N.E.2d 403 (Ill. 1998).

151. *Id.* at 408 ("Cases brought for retaliatory discharge based on an employee's filing of a workers' compensation claim should be reviewed using traditional tort analysis.").

152. *Id.*

153. Hartlein v. Ill. Power Co., 601 N.E.2d 720, 728 (Ill. 1992) (citing Hinthorn v. Roland's of Bloomington, Inc., 519 N.E.2d 909 (Ill. 1988)). In Kelsay v. Motorola, Inc., 384 N.E.2d 353, 357 (Ill. 1978), the Illinois Supreme Court determined that a discharge in retaliation for an employee's exercise of workers' compensation rights violated public policy. In a workers' compensation context, a valid claim requires that "(1) [the plaintiff] was the defendant's employee before his injury; (2) [the plaintiff] exercised a right granted by the Workers' Compensation Act; (3) and [the plaintiff] was discharged from his employment with a causal connection to his filing a workers' compensation claim." Kritzen v. Flender Corp., 589 N.E.2d 909, 915 (Ill. Ct. App. 1992) (citing Marin v. Am. Meat Packing Co., 562 N.E.2d 282, 285 (Ill. 1990)).

154. *E.g.*, Kelly v. Spartan Light Metal Prods., Inc., No. 03-L-38, 2004 WL 3153219, at *5 (Ill. Cir. Ct. Nov. 24, 2004) ("In order to establish a causal connection between his exercise of rights . . . and his discharge, it is incumbent upon plaintiff to either provide direct evidence of retaliation or to demonstrate that similarly situated employees who have not exercised rights . . . were treated differently under similar circumstances.").

employee is able to establish a prima facie case of retaliation, the employer then has an opportunity to articulate a legitimate, nondiscriminatory reason for the employee's discharge.[155] "The element of causation is not met if the employer has a valid basis, which is not pretextual, for discharging the employee."[156] If the employer meets its burden, "then the plaintiff has an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not true, but a pretext for discrimination."[157]

"Only if the prima facie case of retaliation under federal law requires proof of a causal relation in the usual sense, without attenuation, is there no conflict between state and federal law, at least in Illinois . . . ."[158] Since the Illinois framework requires direct evidence of causation, it differs from the Seventh Circuit's framework, which, as the Seventh Circuit has gone to great lengths to articulate,[159] does not require any direct evidence of causation as long as the plaintiff can show that similarly situated employees were not subjected to adverse employment action.[160] Thus, unlike the potential conflicts in Oregon and Virginia that ended up not being actual conflicts, the issue in Illinois appears to be legitimate. Resolution of the conflict is important because failure to determine which test applies could encourage the plaintiff to bring his or her retaliation claim in federal court since the Seventh Circuit test is more plaintiff-friendly, not requiring direct evidence of causation.[161]

The Seventh Circuit in Illinois has recognized this issue on several occasions. When the issue was first brought before the court in *McEwen v. Delta Air Lines, Inc.*,[162] the court noted that the unresolved issue was a "nice question," but then went on to suggest that the *McDonnell Douglas* framework was procedural and thus only applicable in federal courts in diversity.[163] Four years later, in *Hiatt v. Rockwell International Corp.*,[164] the court reiterated its

155. Gomez v. The Finishing Co., Inc., 861 N.E.2d 189, 197–98 (Ill. Ct. App. 2006) (quoting All Purpose Nursing Serv. v. Ill. Human Rights Comm'n, 563 N.E.2d 844 (Ill. 1990)).

156. *Hartlein*, 601 N.E.2d at 728.

157. *Gomez*, 861 N.E.2d at 198.

158. Bourbon v. Kmart Corp., 223 F.3d 469, 477 (Posner, J., concurring).

159. *See* Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902 (7th Cir. 2006) (reiterating the Seventh Circuit's rationale for not requiring direct evidence of causation); Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 642–43 (7th Cir. 2002) (explaining why the Seventh Circuit's framework does not require direct evidence of causation).

160. *Sylvester*, 453 F.3d at 902.

161. *Id.*

162. 919 F.2d 58 (7th Cir. 1990).

163. *Id*. at 59–60 ("Although [the *McDonnell Douglas* framework] identifies circumstances under which particular items become important, it is in the end no more substantive than is the order in which parties present their evidence at trial; all of the substance comes from Title VII (or, here, the common law of Illinois).").

164. 26 F.3d 761 (7th Cir. 1994).

decision in *McEwen*, that *McDonnell Douglas* was procedural, noting that "federal courts may still employ [their] own procedural rules, including the sequential inquiry analysis employed in Title VII cases, when hearing cases based on Illinois law."[165]

When the issue made it back to the Seventh Circuit six years later, the court again recognized that the issue was unresolved.[166] In *Bourbon v. Kmart Corp.*, Judge Posner's concurrence suggested that "[s]omeday we'll have to decide what the prima facie case of retaliation is in the Seventh Circuit."[167] However, without fully resolving the issue, Judge Posner seemed to suggest that, if he had to decide, he would find that the framework is substantive and, therefore, would apply the state framework.[168]

The Seventh Circuit again recognized the importance of the unresolved issue four years later in *Carter v. Tennant Co.*,[169] but it again failed to resolve the issue because the parties waived the issue by ignoring it on appeal (and because the issue was moot since the plaintiff's claim failed under both the state and *McDonnell Douglas* frameworks).[170]

The Seventh Circuit most recently recognized the unresolved issue in *McCoy v. Maytag Corp.*,[171] when it stated that "[s]ome question remains, however, regarding whether, under the *Erie* doctrine, a federal court exercising diversity jurisdiction to hear a retaliatory discharge claim . . . must apply the Illinois framework, or . . . the [*McDonnell Douglas* framework]."[172] In

165. *Id.* at 767 n.4.

166. Bourbon v. Kmart Corp., 223 F.3d 469, 476 (Posner, J., concurring).

167. *Id.*

168. *Id.* at 476–77 ("If the requirement of proving cause is so attenuated as to give the plaintiff a boost toward winning his case that he would not have under ordinary rules of pleading and production, then there is a conflict with substantive state law, and what the federal courts inaptly call the *McDonnell Douglas* standard for proving retaliation must give way in any retaliation case governed by state law.").

169. 383 F.3d 673 (7th Cir. 2004).

170. *Id.* at 678.

171. 495 F.3d 515 (7th Cir. 2007).

172. *Id.* at 521 (citation omitted). Illinois federal district courts have also recognized that the Seventh Circuit has failed to resolve the conflict between the Illinois and *McDonnell Douglas* frameworks. *See* Andreu v. United Parcel Serv., Inc., No. 07 C 6132, 2008 WL 1774990, at *3 (N.D. Ill. April 17, 2008) ("The Seventh Circuit recently noted that there is some ambiguity on the issue of whether federal courts, sitting in diversity, should apply the Illinois tort standard for addressing retaliatory discharge claims, or whether federal courts should apply the burden-shifting method from *McDonnell Douglas*.") (citation omitted); Crawford v. Am. Coal Co., No. 07-CV-0115-MJR, 2008 WL 686975, at *2 (S.D. Ill. Mar. 11, 2008) ("The Seventh Circuit has not squarely decided whether, under the *Erie* doctrine, a federal court exercising jurisdiction to hear a retaliatory discharge claim under the Illinois Workers' Compensation Act must apply the Illinois framework, or whether it may use the familiar burden-shifting method of *McDonnell Douglas*.") (citation omitted) (internal quotation marks omitted); Thompson v. Am. Airlines, Inc., No. 06 C 1235, 2007 WL 4287513, at *6 (N.D. Ill. Dec. 5, 2007) ("The Seventh Circuit has not

McCoy, the plaintiff was an assembly line worker in the defendant's washer and dryer manufacturing facility.[173] The plaintiff injured his left shoulder while moving washing machine bases.[174] After the injury, the plaintiff reported the incident to his supervisor and was examined by a physician's assistant, who decided that the plaintiff was fit to return to light-duty work the next day with restrictions on his lifting.[175] The plaintiff provided this assessment to the defendant's on-site nurse and workers' compensation specialist.[176]

The plaintiff returned to work the next day until another physician modified his work restrictions to restrict the plaintiff from using his left arm.[177] Since the defendant had no jobs to accommodate the plaintiff's restriction, the plaintiff's supervisor told the plaintiff to go home.[178] In the following months, the plaintiff filled out the required compensation forms and stayed in touch with the defendant's workers' compensation specialist, providing his medical evaluation forms, which were completed by his treating physicians.[179]

However, for thirty days after surgery on his shoulder, the plaintiff failed to report medical updates to the defendant.[180] Since the plaintiff did not provide a medical update justifying his nonattendance at work after his leave

yet settled the issue of whether a federal court exercising diversity jurisdiction should apply the Illinois state law framework to hear a retaliatory discharge claim or use the familiar burden-shifting method first presented in *McDonnell Douglas*.") (internal quotation marks omitted); Killis v. Medieval Knights, LLC, No. 04 C 6297, 2007 WL 4302470, at *4 (N.D. Ill. Dec. 4, 2007) ("An outstanding question remains concerning whether a federal court exercising diversity jurisdiction over a retaliatory discharge claim should use the above-cited Illinois framework, or whether it may use the familiar burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*.") (citation omitted); Casanova v. Am. Airlines, Inc., No. 06 C 4762, 2007 WL 4108918, at *5 (N.D. Ill. Nov. 14, 2007) ("It is not clear, however, whether . . . a federal court exercising diversity jurisdiction to hear a retaliation discharge claim under the Illinois Workers' Compensation Act must apply the Illinois framework, or whether it may use the [*McDonnell Douglas*] burden-shifting method.") (internal quotation marks omitted); Manis v. Herrin Laundry Prods., No. 05-CV-4150-JPG, 2007 WL 2410101, *4 (S.D. Ill. Aug. 22, 2007) ("There is some dispute about the methods a plaintiff may use to withstand summary judgment on a retaliatory discharge claim which finds itself in federal court on the basis of diversity jurisdiction. Some courts believe that a plaintiff may use [the *McDonnell Douglas* framework] because it is a purely procedural mechanism. Others believe that a method of resisting summary judgment may amount to a substantive issue that under *Erie v. Tompkins*, is governed by state law, which soundly rejects the use of the *McDonnell Douglas* burden-shifting framework in retaliatory discharge cases and requires a direct method of proof.") (citations omitted).

173. *McCoy*, 495 F.3d at 517.
174. *Id.*
175. *Id.*
176. *Id*.
177. *Id.*
178. *McCoy*, 495 F.3d at 517–18.
179. *Id*. at 518.
180. *See id.* at 519–20.

of absence expired, the defendant terminated the plaintiff's employment for failing to comply with the notice provision of its collective bargaining agreement.[181] The plaintiff filed suit against the defendant, alleging that he was terminated in retaliation for his exercise of his workers' compensation rights.[182]

The Court identified that it needed "to determine . . . whether the *McDonnell Douglas* framework is substantive or procedural when it is applied in [the context of a retaliatory discharge claim]."[183] "If the *McDonnell Douglas* framework is substantive for *Erie* purposes, then [the court] must apply the Illinois framework when a retaliatory discharge claim under the Illinois Workers' Compensation Act" is brought into federal court by diversity jurisdiction.[184] Despite the court's recognition of a need to resolve this issue, the court again elected to leave the issue "for another day," because under either framework the plaintiff would have lost the case as the employer provided a valid, non-pretextual reason for terminating the plaintiff's employment.[185] The plaintiff would have lost under the Illinois framework because if the employer comes forward with a valid, non-pretextual basis for the discharge, the causation requirement of the prima facie case is not met.[186] The plaintiff would have also lost under the Seventh Circuit's indirect framework because the employer met its burden by providing a valid, nondiscriminatory reason for the plaintiff's termination, and the plaintiff failed to show that the employer's proffered reason was pretextual.[187]

The ironic aspect about the conflict of law in Illinois is that the Illinois framework's requirement of direct evidence of causation would coincide with any circuit *except* the Seventh Circuit. The fact that the Seventh Circuit's framework differs from all other circuits raises the issue of whether the state frameworks of the other two states located within the Seventh Circuit, Indiana and Wisconsin, also create conflicts of law. However, the Seventh Circuit's retaliation framework does not create a conflict of law issue in Indiana because Indiana is one of a minority of states that allows indirect evidence to "impl[y] the necessary inference of causation."[188] In addition, no conflict of law issues

181. *Id.* at 519.

182. *Id.* at 520.

183. *McCoy*, 495 F.3d at 521.

184. *Id.* at 521–22.

185. *Id.* at 522.

186. Clemons v. Mech. Devices Co., 704 N.E.2d 403, 406 (Ill. 1998).

187. *McCoy*, 495 F.3d at 522 ("Even assuming that McCoy could demonstrate a prima facie case of retaliatory discharge under either the Illinois framework or the *McDonnell Douglas* framework, McCoy's claim fails because Maytag has articulated a legitimate, nondiscriminatory reason for terminating McCoy's employment.").

188. M.C. Welding & Machining Co., Inc. v. Kotwa, 845 N.E.2d 188, 192–93 (Ind. Ct. App. 2006) ("To succeed on a claim of retaliatory discharge, '[t]he employee must present evidence

result in Wisconsin from retaliation frameworks because Wisconsin does not recognize state law claims for retaliation.[189]

Illinois remains the only state with a retaliation framework conflict of law because of the Seventh Circuit's unwillingness to resolve the issue of whether its application of the *McDonnell Douglas* framework is procedural or substantive. Although discussion about this issue in the other forty-nine states is much ado about nothing, the conflict between Illinois and the Seventh Circuit needs to be resolved. Resolution of the issue could also be important in the event that other states or circuits adopt new frameworks, creating a conflict of law.

III. RESOLUTION OF THE CONFLICT OF LAW ISSUE IN THE SEVENTH CIRCUIT

As explained in Section II above, the retaliation framework in Illinois conflicts with the framework applied by the Seventh Circuit. Thus, there is a conflict as to whether Illinois state law retaliation claims that arrive in the Seventh Circuit based on diversity, such as *McCoy v. Maytag Corp.*, should apply the Illinois or Seventh Circuit framework.

Of course, the easiest resolution of this conflict would be for the Seventh Circuit to join the other circuits in adopting a framework that requires a "causal link" between the employee's protected activity and the employer's adverse employment action.[190] A change by the Seventh Circuit would cause both the Illinois and Seventh Circuit frameworks to require direct evidence, thereby eliminating the conflict of law issue. However, the Seventh Circuit has made it abundantly clear that it is not going to budge and will not be joining the other circuits.[191]

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that directly or indirectly implies the necessary inference of causation between the [statutorily conferred right] and the termination, such as proximity in time or evidence that the employer's asserted lawful reason for discharge is a pretext.'") (quoting Dale v. J.G. Bowers, Inc., 709 N.E.2d 366, 369 (Ind. Ct. App. 1999)).

189. Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365, 367 (Wis. 2002) ("The public policy exception to the employment-at-will doctrine . . . has never been extended to terminations in retaliation for conduct outside the employment relationship . . . [and] [t]o allow it here would therefore expand the exception beyond its present boundaries . . . with no logical limiting principles.").

190. Currently, the Seventh Circuit does not require a "causal link." Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 644 (7th Cir. 2002) (noting the Seventh Circuit reformulated its framework for retaliation cases based on indirect evidence by requiring a "similarly situated" analysis, which requires the plaintiff to show that after engaging in protected conduct, "only he, and not any similarly situated employee who did not file a charge [or other protected conduct], was subjected to an adverse employment action even though he was performing his job in a satisfactory manner."); *see supra* notes 121–25 and accompanying text (describing the Seventh Circuit's framework for retaliation claims).

191. *See Stone*, 281 F.3d at 642–43 (providing rationale for the Seventh Circuit's position that the retaliation framework does not require direct evidence of causation); Bourbon v. Kmart Corp.,

Consequently, to resolve this conflict, an *Erie* doctrine analysis is necessary to determine which framework is to be used. A thorough *Erie* doctrine analysis should close a notable hole in retaliatory discharge law caused by the lack of judicial discussion or academic literature on this topic.[192]

Since "[f]ederal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law," application of the *Erie* doctrine issue should begin with the substantive/procedural distinction.[193] The Supreme Court, without articulating a full *Erie* doctrine analysis for the *McDonnell Douglas* framework, has noted in dicta on several occasions that the *McDonnell Douglas* framework is procedural.[194] First, in *St. Mary's Honor Center v. Hicks*, the Court stated that "the *McDonnell Douglas* presumption is a *procedural* device, designed only to establish an order of proof and production."[195] Seven years later, the Supreme Court reiterated this statement when it stated that "*McDonnell Douglas* and subsequent decisions have 'established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory-treatment cases.'"[196]

The Supreme Court's assertions that the *McDonnell Douglas* framework is procedural are also supported when performing an *Erie* doctrine analysis. An *Erie* analysis would start with the outcome-determinative test, with consideration given to *Gasperini*'s twin aims of *Erie*, which include discouragement of forum-shopping and avoidance of inequitable administration of the laws.[197] In addition, consideration must be given to whether any federal interests of applying the Seventh Circuit framework

223 F.3d 469, 475–76 (7th Cir. 2000) (Posner, J., concurring) (arguing that a true *McDonnell Douglas* framework does not require direct evidence of a "causal link").

192. *See Bourbon*, 223 F.3d at 474 (7th Cir. 2000) (Posner, J., concurring) (noting a lack of "any illuminating scholarly discussions of the issue"); Sperino, *supra* note 19, at 352–53 (stating that the lack of "academic commentary on the intersection of these two principles" is surprising considering "the potential federalism problems that improper vertical choice of law characterization will bring to employment law"); *supra* notes 150–84 and accompanying text (establishing that the only conflict on law concerning retaliation claim frameworks arises in the Seventh Circuit and Illinois).

193. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426–27 (1996) (finding that making the distinction between procedural and substantive is still the main thrust of the *Erie* doctrine analysis).

194. Even though the Supreme Court's statements were not essential to the final decision of the case, the statements can be probative of the Court's view on this issue.

195. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 521 (1993).

196. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000) (alteration in original).

197. *Gasperini*, 518 U.S. at 428.

outweigh Illinois's interests in applying its own framework.[198] In the context of the *McDonnell Douglas* framework, although the framework is arguably outcome determinative, overriding federal interests are sufficient to classify the framework as procedural.

An argument can be made that the Seventh Circuit and Illinois frameworks for retaliation are outcome determinative in light of the twin aims of *Erie*. First, the application of the framework in federal courts potentially encourages forum-shopping. The forum-shopping requirement weighs whether the application of state law will encourage a party to choose to file suit in one court instead of another because the results would be different.[199] Here, the plaintiff-friendly Seventh Circuit framework could encourage employees to file suit in federal court rather than Illinois state court in order to avoid having to present direct evidence of a "causal link" of the employee's protected behavior and the employer's adverse employment action.

In addition, the application of the Seventh Circuit's framework could potentially result in an inequitable administration of the laws. To avoid the inequitable administration of the laws, federal courts must apply state law when it would be unfair for the result of a litigation to differ merely because the claim was brought in federal court.[200] An employee without direct evidence of causation would lose in Illinois state court but could still meet the prima facie case of retaliation in the Seventh Circuit, as long as the plaintiff can establish that "only he, and not any similarly situated employee . . . was subjected to an adverse employment action even though he was performing his job in a satisfactory manner."[201] Thus, the consequence of the differences between the Seventh Circuit and Illinois frameworks could be an inequitable administration of the laws because the same parties in the same suit could reach different results solely because the suit was held in federal court instead of Illinois state court.

However, although the *McDonnell Douglas* framework may be outcome determinative, the Seventh Circuit's framework is supported by "overriding federal interests."[202] The federal court system is "an independent system for . . . litigants who properly invoke its jurisdiction."[203] In the eyes of the Supreme Court, an "essential characteristic" of the federal court system is the manner in which it distributes trial functions between judge and jury.[204] The

198. *Id.* at 431–32. If federal interests outweigh state interests, then the court should apply the *McDonnell Douglas* framework or try to accommodate both interests. *See id.*

199. Hannah v. Plumer, 380 U.S. 460, 468 n.9 (1965).

200. *Id.* at 467.

201. Sylvester v. SOS Children's Vills. Ill., Inc., 453 F.3d 900, 902 (7th Cir. 2006) (citing Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 644 (7th Cir. 2002)).

202. Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1091 (9th Cir. 2001).

203. Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 537 (1958).

204. *Id.*

Supreme Court places a high value on its allocation of functions between judge and jury in a trial and, as a result, federal courts "cannot in every case exact compliance with a state rule . . . which disrupts the federal system of allocating functions between judge and jury."[205]

In the context of the conflict of law between the Seventh Circuit and Illinois, application of the Illinois framework would prevent more plaintiffs from being able to establish a prima facie case because direct evidence of retaliation can be hard to establish.[206] Thus, more cases would be dismissed prior to reaching the jury under the Illinois framework than under the Seventh Circuit's framework. Preventing cases from getting to the jury in state law retaliation claims would alter the federal court's allocation between judge and jury because it could affect when a judge is forced to take the case out of the discretion of the jury. As a result, the federal courts have an "overriding federal interest" to apply the Seventh Circuit framework in federal court to Illinois state law retaliation claims in order to maintain the federal allocation of functions between judge and jury.[207]

Further, although a counter argument can be made that federal courts have "no interest in determining what facts [are] material to summary judgment on a state law discrimination claim,"[208] when summary judgment is being argued in and ruled on by federal courts, using federal judges and juries, federal courts *do* have an interest in the use of their judges and juries.[209] The application of the Seventh Circuit's interpretation of the *McDonnell Douglas* framework in federal courts to Illinois state law retaliation claims protects the federal interest in the allocation of functions between judge and jury.[210] Thus, although application of the Seventh Circuit's framework could be outcome determinative, the federal court's interest in the allocation between judge and jury overrides Illinois's interest in the application of its own retaliation framework, and *McDonnell Douglas* should be classified as procedural.

A determination that the *McDonnell Douglas* framework is procedural would benefit the plaintiff in *McCoy v. Maytag Corp*. Under the Illinois framework, he would have failed to establish a prima facie case since he did not have direct evidence that the defendant employer discharged him because

205. *Id.* at 537–38; *see also Snead*, 237 F.3d at 1092 (providing this rationale as a federal interest to apply *McDonnell Douglas* to state retaliation claims in federal court).

206. *See Stone*, 281 F.3d at 643 (explaining the advantages and disadvantages of requiring plaintiffs to establish direct evidence of causation).

207. *See Snead*, 237 F.3d at 1092 (making the argument that *McDonnell Douglas* should be applied to state retaliation claims in federal court because it would allow the court to maintain its allocation of judge and jury).

208. Sperino, *supra* note 19, at 394.

209. *See* Byrd v. Blue Ridge Rural Elec. Coop. Inc., 356 U.S. 525, 537–38 (1958).

210. *Snead*, 237 F.3d at 1092 (concluding that applying *McDonnell Douglas* protects the overriding federal interest of allocating functions between judge and jury in federal courts).

he filed a worker's compensation claim.[211] However, he would be able to establish a prima facie case under the Seventh Circuit's indirect framework because he would only have to show his work performance was satisfactory and that other "similarly situated" employees did not get terminated.[212]

Unfortunately for the plaintiff, however, the final outcome of *McCoy* would not be impacted. The Seventh Circuit found that even if the plaintiff was able to establish a prima facie case, the defendant employer articulated a legitimate, nondiscriminatory reason for discharging the plaintiff because the plaintiff breached the collective bargaining agreement by failing to provide the employer with status reports regarding his medical condition every thirty days and by failing to notify the employer within forty-eight hours regarding his failure to return after his leave of absence expired.[213] The plaintiff lost the case because although he argued that the employer deliberately misread the collective bargaining agreement, this argument failed to establish that the employer's nondiscriminatory reason was mere pretext for its "larger plot to drive down workers' compensation costs by targeting workers' compensation filers."[214]

Although the outcome of *McCoy* would not be altered, this illustration indicates the impact that the determination of the Seventh Circuit framework as procedural can have on future cases. Permitting all plaintiffs in federal court to use the Seventh Circuit's indirect method will allow more plaintiffs to establish a prima facie case and, thus, allow more cases to reach the jury.

CONCLUSION

Conflict of law between federal and state frameworks for retaliation claims is much ado about nothing in forty-nine of the fifty states. Most federal and state courts apply the untrue *McDonnell Douglas* framework, requiring direct evidence of causation, to retaliation claims.[215] As a result, conflict of law in these states is not an issue. Further, additional states, such as Wisconsin, have refused to acknowledge a state law claim for retaliation, and conflict of law in these states would also not be an issue. [216] Conflict of law, moreover, would not be an issue in states like Oregon and Virginia, which rejected the *McDonnell Douglas* framework's burden-shifting because it would cause only

211. McCoy v. Maytag Corp., 495 F.3d 515, 517–19 (7th Cir. 2007).

212. *Id.*

213. *Id.* at 522.

214. *Id*. at 523–24.

215. *See supra* notes 111–19 and accompanying text (explaining that most circuit courts apply the untrue *McDonnell Douglas* standard for retaliation claims); *supra* notes 125–27 and accompanying text (explaining that most state courts apply the untrue *McDonnell Douglas* standard for retaliation claims).

216. *See, e.g.*, Bammert v. Don's Super Valu, Inc., 646 N.W.2d 365, 367 (Wis. 2002) (refusing to recognize a state law claim for retaliation).

a difference in the timing of evidence presented, still allowing for "identical outcomes" regardless of the framework.[217]

The limited scope of conflict of law issues for retaliation frameworks is notable because it helps to explain court and academic questions as to why more emphasis has not been given to this issue. Since the issue is only alive in Illinois, it would only be relevant to discuss the issue in that context, and asking for broader scope to be given to the issue would be based merely on hypothetical questions that would be irrelevant unless any federal circuit or state decides to change its retaliation framework.

The problem with narrowing the scope of discussion to the Seventh Circuit is that it presents the minority view by allowing retaliation plaintiffs to establish a prima facie case without requiring direct evidence of causation.[218] Since Illinois's framework would be in accordance with the other eleven circuits, the conflict of law issue in Illinois would be foreclosed if the Seventh Circuit decided to join the majority view. If that were to occur, the *entire* issue of *McDonnell Douglas* and conflict of law would truly be much ado about nothing.

However, since the Seventh Circuit is not likely to change its view,[219] deeming the Seventh Circuit's adaptation of the *McDonnell Douglas* framework as procedural or substantive will impact the future of state law retaliation claims in Illinois. An *Erie* analysis conclusion in accordance with the conclusion of this Comment, that the *McDonnell Douglas* framework is procedural because of overriding federal interests in the federal courts' allocation of judge and jury, will allow employees, such as the plaintiff in *McCoy*¸ to establish state law retaliation claims without using direct evidence if the case is brought in federal court.[220] However, if the Seventh Circuit were to find, alternatively, that the *McDonnell Douglas* framework is substantive because of its outcome-determinative nature, plaintiffs bringing state law claims of retaliation would be foreclosed from the Seventh Circuit's indirect method, and they would be required to establish a causal link with direct evidence.[221] As a result, the Seventh Circuit's final determination on this

217. *See supra* notes 128–47 and accompanying text (describing that there is no conflict of law if the only difference in the frameworks is related to timing of evidence).

218. *See supra* notes 111–24 and accompanying text (explaining that the Seventh Circuit's framework is the minority view because it does not require direct evidence of causation).

219. *See supra* notes 114–24 and accompanying text (describing the Seventh Circuit's policy reasons for refusing to join the other circuits and require direct evidence of causation).

220. Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 643 (7th Cir. 2002) (ruling that the Seventh Circuit does not require direct evidence of causation).

221. Hartlein v. Ill. Power Co., 601 N.E.2d 720, 728 (Ill. 1992).

issue, whether or not in accordance with the analysis provided in this Comment, will certainly not be much ado about nothing for employers and employees in Illinois.

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