In 1973, at a time when Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., was still relatively new, Justice Powell, writing for the U.S. Supreme Court, designed a method of proof for use in Title VII claims, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The method—named for the case for which it was adopted, *McDonnell Douglas*—has since been applied in thousands of cases. As initially set forth by Justice Powell, the McDonnell Douglas method is as follows:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants qualifications ….

The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.

Under this framework, if the defendant is silent when the burden shifts, “the court must enter judgment for the plaintiff.” *Texas Dep’t. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). On the other hand, if the defendant provides (not proves) a legitimate reason, the McDonnell Douglas framework drops out and the plaintiff is required to establish discrimination through the traditional method of proof—that is, by presenting evidence that establishes that the case is strong enough to go to the jury, including demonstrating that the proffered reason was a pretext for unlawful discrimination.

Throughout the years, the McDonnell Douglas method has come under fire from all directions. Plaintiffs complain that the test is applied rigidly and too often leads to results that are less favorable than would be the case if traditional methods of proof were applied. Defendants complain that the method, not found in Title VII, is an impermissible creation of the judiciary. Courts have also questioned the use of the method. Recently Judge Diane Wood of the Seventh Circuit Court of Appeals described problems surrounding the method as “snarls and knots”; questioned the “direct method” and “indirect method” scheme, of which McDonnell Douglas is a part; and queried why employment discrimination claims could not be handled in the same “straightforward way” as other types of litigation, such as tort litigation, are handled. *Coleman v. Donahoe*, No. 10-3694, 2012 WL 32062 (7th Cir. Jan. 6, 2012) (Wood, J., concurring).

In order to determine whether the McDonnell Douglas method serves a positive purpose in litigation involving discrimination, and whether it should continue to do so, it is important to understand the role of McDonnell Douglas. Specifically, whether the method was intended as an additional method of proof, along with the traditional methods of proof available in any type of action, or whether it was intended to replace traditional methods of proof as the exclusive method to be used when direct evidence is not available.

On this issue, two opinions stand out for their thoroughness. The first, the Eleventh Circuit’s opinion in *Wright v. Southland Corp.*, 187 F.3d 1287 (11th Cir. 1999), was authored by Judge Gerald Tjoflat. In the opinion, Judge Tjoflat explained that, even though a plaintiff may establish a prima facie case of discrimination using the McDonnell Douglas method, a plaintiff may also establish a case using traditional methods and, in some cases, may have an easier time doing so. Judge Tjoflat recognized the McDonnell Douglas method as an additional arrow in the plaintiff’s quiver that may be used to establish a prima facie case of discrimination, but does not need to be used. The opinion explains why it is important that courts not rely exclusively on McDonnell Douglas in cases in which there is no direct evidence by providing a hypothetical in which the factors of McDonnell Douglas would not be met even though it is likely that discrimination could be found. To illustrate the point, the opinion sets forth a hypothetical in which a racist personnel manager fires an employee because he is black. The manager is subsequently fired and the new manager then replaces the previously terminated employee with another black employee. Under these circumstances, the terminated employee would not be able to establish that he was replaced by someone outside his protected class yet he was
nevertheless the victim of discrimination. This is the type of case that would be dismissed if a court were to look exclusively at the McDonnell Douglas method for a circumstantial method of proof.

Justice Tjoflat explained that confusion in discrimination cases concerning the role of the McDonnell Douglas method seemed to arise from the use of the term “prima facie.” The term is used in connection with the McDonnell Douglas method and also used generally in addressing a plaintiff’s ultimate burden in a discrimination claim, the result being that the terms have been conflated. Justice Tjoflat explained, however, that the term has a different meaning depending on its context. Under McDonnell Douglas, the term simply means the establishment of a rebuttable presumption. When used in reference to the plaintiff’s ultimate burden, it has the meaning it would have in any type of case: that the case is strong enough to go to a jury. The result of this confusion is the mistaken belief that, in order to establish a prima facie case of discrimination, a plaintiff must first establish a prima facie case under McDonnell Douglas and must further establish a pretext if the employer satisfies its burden of stating a legitimate reason.

The belief that a plaintiff must satisfy the factors of the McDonnell Douglas method in every discrimination case that has no direct evidence results in an elevated evidentiary standard for a plaintiff in a discrimination case to overcome as compared to plaintiffs in other types of actions, such as tort actions. The plaintiff in the discrimination claim is required to establish the McDonnell Douglas factors and then, if the employer meets its burden, also establish discrimination through the traditional methods of proof. The plaintiff in other types of claims simply starts with the traditional methods of proof and has no additional requirements. Justice Tjoflat rejected this notion, explaining that, even though McDonnell Douglas is an option to a plaintiff, the plaintiff may alternatively “forego McDonnell Douglas and simply attempt to prove illegal discrimination under the ordinary standards of proof”—in other words, using the traditional method.

Judge Richard Posner authored the second opinion that thoroughly addresses the issue of whether a plaintiff in a discrimination case with no direct evidence is mandated to use the McDonnell Douglas method to prove discrimination. *Sylvestor v. SOS Children’s Villages Illinois Inc.* 453 F.3d 900 (7th Cir. 2006). In *Sylvestor*, Judge Posner addressed the various methods of proof typically used by federal courts considering discrimination claims in addition to McDonnell Douglas. Judge Posner noted that the methods recognized in employment cases seem to be limited to direct evidence (testimony by a witness about a matter within his or her personal knowledge; therefore, testimony that does not require an inference to be drawn); mosaic circumstantial evidence (a kind of circumstantial evidence that consists of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence that are not conclusive by themselves but together compose a convincing “mosaic of discrimination against the plaintiff”); and the McDonnell Douglas method. Judge Posner observed that traditional circumstantial evidence is met with “residual suspicion” in employment discrimination decisions, perhaps because of prior case law that discussed “mosaic” circumstantial evidence (*Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994)). Judge Posner surmised that the discussion of mosaic circumstantial evidence in *Troupe* may have inadvertently led some to incorrectly assume that anything less than mosaic circumstantial evidence is insufficient circumstantial evidence. In setting the record straight, Judge Posner wrote that “it was not the intention in *Troupe* to promulgate a new standard, whereby circumstantial evidence in a discrimination or retaliation case must, if it is to preclude summary judgment for the defendant, have a mosaic-like character.”

Significantly, Judge Posner explained that traditional circumstantial evidence, while perhaps on average requiring a “longer chain of inferences,” can, if each “link is solid,” be compelling—even “more compelling than eyewitness testimony, which depends for its accuracy on the accuracy of the eyewitness’s recollection as well as on his honesty.” In *Sylvestor*, Judge Posner found that there was no rich mosaic of circumstantial evidence, but there was “enough” circumstantial evidence to preclude summary judgment.

The opinions in *Wright* and *Sylvestor* are in line with the U.S. Supreme Court’s decisions to the extent they have touched on the issue. For example, in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), the Supreme Court rejected the employer’s assertion that McDonnell Douglas is the “only means of establishing a prima facie case of individual discrimination.” To the contrary, Justice Stewart explained the *McDonnell Douglas* decision was not intended to create an “inflexible formulation” and that the “importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principal that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.” In *Trans World Airlines Inc. v. Thurst*, 469 U.S. 111 (1985) the Supreme Court recognized that the McDonnell Douglas method of proof was “designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence.” The rationale supporting the method is that “experience has proved that in the absence of any other explanation it is more likely than not that [the adverse employment actions] were bottomed on impermis-
sible considerations.” Furnco Constr. Corp. v. Waters, 438 U.S. 567, 580 (1978). These decisions lend support to the position that requiring a plaintiff to satisfy the McDonnell Douglas factors in every case of discrimination would frustrate the purpose of creating the method inasmuch as those plaintiffs whose facts and circumstances do not satisfy the “formulation” of McDonnell Douglas but could otherwise establish discrimination through traditional (straightforward) methods would be denied their day in court.

Although it is true that there has been widespread confusion concerning the McDonnell Douglas method, it nevertheless holds an important place in the plaintiff’s arsenal of proofs. In cases in which the employee has no information about the adverse employment action other than the fact that he or she was performing to expectations yet suffered the action while others outside the protected class did not, applying the McDonnell Douglas method allows the plaintiff to proceed with an action with bare bones information and to force the hand of the employer as it must then put forward a reason or risk judgment in favor of the plaintiff. For many plaintiffs—especially those far removed from the decision-makers, who often have little inside information—this method gives them entry into the courthouse and the opportunity to obtain discovery to determine whether the decision was in fact unlawfully motivated. Having the option of proving their case either through the McDonnell Douglas method or through the traditional methods available in every type of case furthers the interests of the Civil Rights Act. TFL

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