

No. 25-239

IN THE
Supreme Court of the United States

TONYA C. HUBER,

Petitioner,

v.

WESTAR FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER *MCDONNELL DOUGLAS* MUST BE APPLIED AT SUMMARY JUDGMENT

Nine circuits hold that in resolving a summary judgment motion regarding a claim of retaliation or discrimination, courts must apply the legal standard in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pet. 13-14 n.5. Four circuits—the Fifth, Seventh, Ninth and Eleventh Circuits—have expressly rejected that requirement, and hold that a plaintiff may also defeat a summary judgment motion by offering sufficient evidence to permit a reasonable jury to infer the existence of an unlawful motive. Pet. 15-21. That much is not really in dispute.

Respondent nonetheless insists that there is no circuit conflict. It contends that the differences between these two lines of decisions is merely a matter of semantics. Br. Opp. 6 (difference is just in “labels and terminology”), 13 (difference is only in “labels”; “linguistic distinctions”), 14 (just “different language”). According to respondent, there is no substantive difference between the *McDonnell Douglas* standard required in nine circuits and the reasonable jury inference standard permitted in the four other circuits. Br. Opp. 7 (“the methodologies are practically the same”), 10 (“the evidentiary analysis is functionally the same”), 12 (Ninth Circuit standard is “merely a repackaging” of the *McDonnell Douglas* standard), 13 (“methodology is effectively the same”; “no functional difference”), 15 n.2 (“[a]ll circuits ... review the evidence in essentially the same manner”), 30 (“substantively equivalent formulations”).

But the courts of appeals for the Fifth, Seventh, Ninth and Eleventh Circuits have repeatedly held that the reasonable jury inference standard is indeed substantively different than the *McDonnell Douglas* standard. For example, the Eleventh Circuit explained that “[a] plaintiff who cannot satisfy this [*McDonnell Douglas*] framework may still be able to prove her case with ... enough evidence for a reasonable factfinder to infer intentional discrimination....” *Tynes v. Fla. Dep’t of Juv. Justice*, 88 F.4th 939, 946 (11th Cir. 2023). If, as respondent claims, the standards are actually “functionally the same”, a different result would be impossible. The Fourth and Seventh Circuits hold there are *two* methods of establishing unlawful intent, which would not be true if the methods were “essentially ... the same.” Br. Opp. 15 n.2. *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 318 (4th Cir. 2005) (“two avenues”); *Arnold v. United Airlines, Inc.*, 2025 WL 1778643, at *3 (7th Cir. June 27, 2025) (“two approaches”). The Fourth, Seventh and Ninth Circuits describe the *McDonnell Douglas* standard and the reasonable jury inference standard as “alternative[s].” *Diamond*, 416 F.3d at 318; *Arnold*, 2025 WL 1778643, at *3; *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004). That would make no sense if there were “no functional difference” (Br. Opp. 13) between the two standards. The Eleventh Circuit holds that reliance on *McDonnell Douglas* is “not the only way” to survive summary judgment (*Brown v. Jefferson Cty. Sheriff’s Dep’t*, 806 Fed. Appx. 698, 701 n.2 (11th Cir. 2020)); but satisfying the *McDonnell Douglas* standard would indeed be the only way if the other ways were “substantively equivalent formulations.” The Ninth Circuit insists that under its precedents “the plaintiff is presented with a choice regarding how to establish his

or her case.” *McGinest*, 360 F.3d at 1122. According to respondent, that choice is illusory, because the alternatives are “substantively equivalent.” Br. Opp. 30.

It is impossible to believe that the actual meaning of the reasonable jury inference standard was misunderstood by the very judges who wrote, and who have long applied, the Fifth, Seventh, Ninth and Eleventh Circuit opinions. And it is even less plausible that the real meaning of those opinions, and of that standard, which for years, somehow eluded the judges in those circuits, was finally discovered by counsel for respondent in October of 2025.

The differences between the *McDonnell Douglas* standard, and the reasonable jury inference standard, are fundamental. For example, *McDonnell Douglas* requires that a plaintiff establish a prima facie case of unlawful motive, and the lower courts applying that requirement have adopted a number of per se rules. In a discipline case, many circuits require that the plaintiff show that the defendant accorded more favorable treatment to a “nearly identical comparator.” Br. Opp. 15. In a discriminatory discharge case, a prima facie case in some circuits requires proof that the plaintiff. “was fulfilling [her] employer’s legitimate expectations at the time of discharge.” *Sigley v. ND Fairmont LLC*, 129 F.4th 256, 250 (4th Cir. 2025); see Br. Opp. 18 n.5. Precedent in certain circuits insists that a plaintiff in a promotion case show that the position at issue was filled by someone not a member of the plaintiff’s protected group. *Ames v. Department of Youth Services*, 2023 WL 2539214, at *7 (S.D. Ohio March 16, 2023) (citing cases). None of these prima facie case per se requirements are applicable if a plaintiff, rather than proceeding under *McDonnell Douglas*, instead seeks to

show that a reasonable jury could find that the defendant acted with an unlawful motive.

In addition, at the third step of the *McDonnell Douglas* analysis, the plaintiff must show that the defendant's proffered explanation for its conduct was a pretext for discrimination or retaliation. As members of this Court noted during the oral argument in *Ames*, a plaintiff could not meet that requirement in a case in which the defendant had acted with two motives, one lawful and the other unlawful. Pet. 33. In that situation, the *McDonnell Douglas* requirement of proof of pretext would mandate summary judgment for the defendant. But a plaintiff opposing summary judgment under the reasonable jury inference standard would prevail if he or she could show that there was sufficient evidence to permit a jury to infer that the unlawful motive was a "but for" cause of the adverse action. In the instant case, the en banc court's finding that plaintiff had not shown pretext was fatal to her claim; but in the Fifth, Seventh, Ninth and Eleventh Circuits, the plaintiff could have prevailed despite the presence of multiple motives.

Justices Thomas and Gorsuch twice recognized that the *McDonnell Douglas* standard is different than and inconsistent with the Rule 56 standard, which requires only that a plaintiff "proffer [] enough evidence to allow a reasonable factfinder to decide the case in his favor." *Hittle v. City of Stockton, California*, 14 S.Ct. 759, 761-64 (2025) (Thomas, J., dissenting); *Ames v. Ohio Department of Youth Services*, 605 U.S. 303, 322-23 (2025) (Thomas, J., concurring).

II. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER *AIKENS* SHOULD BE APPLIED AT SUMMARY JUDGMENT

The District of Columbia Circuit, applying *Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), held in *Brady v. Sergeant at Arms*, 520 U.S. 490 (D.C. Cir. 2008), that when a defendant has put forward a claimed legitimate justification for a disputed action, courts need not and should not require that the plaintiff establish a prima facie case of discriminatory intent. The Fourth, Fifth and Tenth Circuits have expressly rejected the holding in *Brady*. Pet. 24-27. Multiple district courts have recognized the circuit conflict on this issue. Pet. 22-23 n.14. That much is not in dispute.

Respondent contends, however, that this conflict is not relevant here, arguing that the rule in *Brady* does not apply to discrimination claims under the Americans with Disabilities Act or to retaliation claims under the Family and Medical Leave Act. Br. Opp. 22-24. That is clearly incorrect.

Less than two months after the decision in *Brady*, the District of Columbia Circuit applied the rule in that case to a claim under the ADA. *Adeyemi v. District of Columbia*, 525 F.3d 1222, 1226 (D.C. Cir. 2008) (“[a]s we recently explained in *Brady v. Office of the Sergeant at Arms*, ... ‘the prima facie case is a largely unnecessary sideshow.’”) (quoting *Brady*, 520 F.3d at 494). Then-Judge Kavanaugh, the author of *Brady*, was also the author of *Adeyemi*. District courts in the D.C. Circuit routinely apply *Brady* to ADA claims. *E.g.*, *Webster v. Department of Energy*, 443 F.Supp.3d 67, 79 (D.D.C. 2020); *Martin v.*

District of Columbia, 78 F.Supp.3d 279, 293 (D.D.C. 2015); *Davis v. George Washington University*, 26 F.Supp.3d 103, 118 (D.D.C. 2014); *DuBerry v. District of Columbia*, 582 F.Supp.2d 27, 34 (D.D.C. 2008).

Courts in the D.C. Circuit also routinely apply *Brady* to FMLA retaliation claims. As then-Judge Jackson explained,

[a]lthough *Brady* involved claims arising under Title VII, the D.C. Circuit has held that “[t]he analytical framework for [a] claim of retaliation” under various other statutes, including the FMLA, “is essentially the same as that applicable to a claim of discrimination under Title VII.” *McFadden [v. Ballard, Spahr Andrews & Ingersoll]*, 611 F.3d [1], 6 [(D.C. Cir. 2010)].... Accordingly, courts in this district have applied *McDonnell Douglas* to FMLA retaliation claims, ... and the D.C. Circuit appears to have ratified this approach....

Williams v. Verizon Washington D.C., 304 F.Supp.3d 183, 190 (D.D.C. 2018); see *Coulibaly v. Tillerson*, 273 F.Supp.3d 1, 41 (D.D.C. 2017) (applying *Brady* to FMLA retaliation case); *Long v. Endocrine Soc’y*, 263 F.Supp.3d 275, 282 (D.D.C. 2017) (same); *Thomas v. District of Columbia*, 227 F.Supp.3d 88, 99–100 (D.D.C. 2016) (same); *Davis v. George Washington University*, 26 F.Supp.3d 103, 130 (D.D.C. 2014) (same).

Respondent’s error stems from its failure to recognize that the lower courts (and this Court) use the phrase “prima facie case” to refer to two distinct issues. As

used in *McDonnell Douglas*, *Aikens* and *Brady*, the phrase refers to an initial evidentiary showing of a discriminatory or retaliatory motive. “The prima facie case method established in *McDonnell Douglas* ... ‘is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.’” *Aikens*, 460 U.S. at 715 (emphasis added) (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978)). But the phrase is also used to refer to an initial showing of each of the distinct elements of a claim under a particular statute.

In a Title VII discrimination case, for example, evidence that the defendant took an adverse action is an element of the plaintiff’s claim (and a required part of a prima facie case in that sense), but it is not relevant to the distinct issue whether the plaintiff can establish a prima facie case of unlawful motive. Similarly, proof of protected activity is an element of an FMLA retaliation case, and proof of disability and qualification are elements of an ADA case, but neither are relevant to whether a plaintiff asserting such claims has proffered sufficient evidence to support an inference of a discriminatory or retaliatory motive.

Brady holds that a defendant’s proffer of a legitimate explanation for its actions renders it unnecessary for the plaintiff to establish a prima facie case of discriminatory or retaliatory motive; but even in that situation, the plaintiff must still make a prima facie showing of the *other* elements of his or her claim. That does not mean, as respondent suggests, that *Brady* would not apply to a case in which other elements of a claim might be missing; rather, *Brady* only addresses the need for a prima facie

case of unlawful motive, and does not concern the need for a prima facie showing of the other elements of a claim.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING BOTH QUESTIONS PRESENTED

The en banc court held that (in the absence of direct evidence) the “only” way in which petitioner could establish her claims was under *McDonnell Douglas*, and it then applied the *McDonnell Douglas* three step standard. App. 10a-21a. The brief in opposition acknowledges that the court “applied the *McDonnell Douglas* framework.” Br. Opp. 4.

The en banc opinion rejected petitioner’s claims on the ground that she had failed to establish that Westar’s explanation of its actions was a pretext for discrimination and retaliation. 15a (“as is often the case, this discrimination claim comes down to pretext”), 21a (supervisor’s attitude “does not create a genuine issue of material fact on pretext”). The brief in opposition correctly states in several passages that the court dismissed those claims because it concluded that petitioner had failed to show pretext. Br. Opp. 5 (majority determined that the evidence was not sufficient to “demonstrate pretext”), 26 (“the ... en banc opinion ... h[e]ld[] that Petitioner failed to present evidence sufficient to establish pretext”), 28 (the court “concluded Petitioner could not show the proffered reason for her termination was a pretext for discrimination or retaliation”). But in another passage respondent offers an entirely different account of the decision below, asserting that the en banc court instead “determined [petitioner] failed to present ... evidence sufficient to allow a reasonable jury to infer a discriminatory or retaliatory

motive for her termination.” Br. Opp. 27. This alternative description of the decision below is not accompanied by any citation to the petition appendix, and it is incorrect.

Respondent argues that even if this Court were to hold that petitioner was not required to establish liability under *McDonnell Douglas*, it would ultimately prevail, because there is “no evidence” in this case of a discriminatory or retaliatory motive. Br. Opp. 29. But at this stage of the litigation, the only issue is whether the court of appeals applied the correct legal standard. If this Court concludes that the standard applied below was incorrect, respondent will be free on remand to argue that it should prevail under the correct standard.

Respondent suggests that the court of appeals never decided whether plaintiff had established a prima facie case regarding retaliation. “[T]he Eighth Circuit observed in passing that Petitioner’s FMLA retaliation claim ‘*likely* does not make it past the first step, establishing a prima-facie case’ before holding that Petitioner failed to present evidence sufficient to establish pretext.” Br. Opp. 26 (emphasis in brief in opposition). But the quoted passage is not an observation “in passing,” it is part of a two-paragraph analysis of whether the plaintiff had established such a prima facie case. Respondent simply ignores the five sentences that follow the quoted passage. Those sentences announced a legal standard for establishing a prima facie case (11a) (does “the evidence ‘give[] rise to an inference of a retaliatory motive.’”) (quoting *Hite v. Vermeer Mfg. Co.*, 446 F.3d 850, 866 (8th Cir. 2006)), and then held that standard was not satisfied. *Id.* (petitioner’s evidence “does not create an inference that her firing was caused by retaliatory intent”). Although

respondent asserts that the en banc court “assumed without analysis that Huber established a prima facie case of disability discrimination” (Br. Opp. 5; see Br. Opp. 26 (same)), respondent never asserts that the court below made such an assumption regarding Huber’s retaliation claim.

The issues presented by the first and second questions presented are inextricably intertwined. The significance of requiring that a plaintiff at summary judgment establish liability under *McDonnell Douglas* (the first question presented) turns in part on whether a plaintiff under that standard would be required to establish a prima facie case of motive; if the Court adopts the rule in *Brady*, that would virtually never be necessary (the second question presented). Conversely, requiring plaintiffs who are proceeding under *McDonnell Douglas* to establish a prima facie case will be less burdensome if plaintiffs in responding to a summary judgment motive are not obligated to proceed under *McDonnell Douglas* at all. The Court should grant certiorari to resolve both questions presented.

CONCLUSION

Respondent objects that by granting certiorari the Court would “invite inconsistent results across jurisdictions.” Br. Opp. 30. But that is precisely the problem that already exists. In a lawsuit filed in the District of Columbia District Court today, a plaintiff is required to establish liability under *McDonnell Douglas*. But if the plaintiff files the same action across the district line in Maryland District Court, Fourth Circuit precedent does not impose that requirement. And if a plaintiff files

suit in the District Court for Northern Virginia located in Arlington, Fourth Circuit precedent requires the plaintiff to establish a prima facie case of unlawful motive even though the employer has articulated a reason for the disputed employment action. But if plaintiff files the same suit across the Potomac river in the District of Columbia District Court, *Brady* holds that such a showing is neither necessary nor proper.

We do not ask this Court to “revise or reinterpret *McDonnell Douglas*.” Br. Opp. 28-29. If certiorari is granted, we will urge the Court only to adopt two straightforward holdings: (1) plaintiffs at summary judgment are not required (although still permitted) to establish liability under the *McDonnell Douglas* standard, and (2) plaintiffs who choose to proceed under *McDonnell Douglas* are not required to establish the existence of a prima facie case of unlawful motive if the defendant has proffered a lawful reason for the action in dispute. Such an opinion by this Court would simplify the work of lawyers and judges alike.

The extraordinary importance of these issues is not in dispute. Respondent recognizes that “[l]ower courts apply [*McDonnell Douglas*] daily in thousands of cases each year.” Br. Opp. 30. Few cases that are decided by this Court would affect the course of so much federal litigation. Here, as in *Ames v. Department of Youth Services*, 605 U.S. 303 (2025), the standard governing resolution of summary judgment motions effectively determines what primary conduct is and is not lawful. An unprecedented number of federal and state judges, including members of this Court, have detailed the difficulties that are arising when courts are required to apply *McDonnell Douglas*

at summary judgment. Pet. 29-33 and App. 98a-100a. The time has come to address those vexing problems, and this is the ideal case in which to do so.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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