

# FAMILY MEDICAL LEAVE ACT STANDARDS OF PROOF AND THE IMPACT OF *DESERT PALACE* ON RETALIATION CLAIMS

CAROL L. RISK\* AND RICHARD A. BALES\*\*

I.	INTRODUCTION.....	68
II.	BACKGROUND:.....	70
	A. <i>The Family Medical Leave Act of 1993</i> .....	70
	1. Interference With Rights Claims.....	73
	2. Retaliation/Discrimination Claims pre <i>Desert Palace, Inc. v. Costa</i> .....	74
	B. <i>Title VII of the Civil Rights Act of 1964 pre Desert Palace</i> .....	76
III.	<i>DESERT PALACE</i> AND ITS IMPACT ON THE FMLA .....	77
	A. <i>Desert Palace Changed Everything</i> .....	79
	B. <i>Desert Palace Changed Only Title VII</i> .....	81
IV.	ANALYSIS AND PROPOSAL .....	83
V.	CONCLUSION .....	85

## I. INTRODUCTION

Extended absences from work due to medical conditions and caring for loved ones have historically been a concern of both employees and employers. Passage of the Family Medical Leave Act of 1993 (FMLA)<sup>1</sup> established legal obligations of employers and brought relief to millions of employees with such concerns. The Act provides job security to many employees who must be absent from work because of their own illnesses, to care for a family member who is ill, or to care for a newborn.<sup>2</sup> However, the statute has also led to litigation con-

---

\* J.D. Candidate, 2006, Salmon P. Chase College of Law; B.A. in Economics, Indiana University, 2003. Special thanks to Robert W. Carran, partner at Taliaferro, Mehling, Shirooni, Carran & Keys in Covington, Kentucky; Lawrence Rosenthal, Professor of Law at Chase College of Law; and my entire family.

\*\* Professor of Law, Northern Kentucky University, Chase College of Law

1. 29 U.S.C. § 2601 *et seq.* (2004). See generally Megan E. Blomquist, *A Shield, Not a Sword: Involuntary Leave Under the Family and Medical Leave Act*, 76 WASH. L. REV. 509 (2001); Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457 (1995); Nancy E. DeSimone & Adriane J. Dudley, *The Family Medical Leave Act: An Overview and Analysis*, 26 URB. LAW 83 (1994); Christopher R. Hedican, Jason M. Hedican & Mark P.A. Hudson, *McDonnell Douglas: Alive and Well*, 52 DRAKE L. REV. 383 (2004).

2. See 29 U.S.C. § 2601 *et seq.*

cerning claims that arise from employees exercising their rights created by FMLA.

The FMLA prohibits an employer from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act, and discharging or in any other way discriminating against any person for opposing or complaining about any unlawful practice under the Act.<sup>3</sup> Employee FMLA claims generally allege interference with FMLA rights or retaliation/discrimination for invoking FMLA rights.

In allocating the burden of proof necessary in all types of employment discrimination cases, including FMLA cases, courts have traditionally used the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*.<sup>4</sup> Under this approach, the plaintiff must first present a prima facie case of discrimination. Next, the burden shifts to the employer to rebut the plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for its actions. Finally, the plaintiff has the opportunity to demonstrate that the employer's reason for the adverse employment action was a mere pretext for discrimination.<sup>5</sup>

In 2003, the Supreme Court in *Desert Palace, Inc. v. Costa*,<sup>6</sup> a sex discrimination case brought under Title VII of the Civil Rights Act of 1964, substantially reduced the showing a plaintiff must make under *McDonnell Douglas*. Under *Desert Palace*, the "third burden" of the traditional *McDonnell Douglas* framework is modified to allow the plaintiff to rebut an employer's proof of a legitimate, nondiscriminatory reason by demonstrating either: (1) the defendant's reason is not true, but is instead a pretext for discrimination; or (2) the defendant's reason, while true, is only one of the reasons for its conduct, and another "motivating factor" is the plaintiff's protected characteristic.<sup>7</sup> After *Desert Palace*, the employee is no longer required to provide direct evidence of retaliation.<sup>8</sup> This change provided a less onerous burden and allowed retaliation claims to be proved using circumstantial evidence, thus increasing the substantive value of circumstantial evidence.<sup>9</sup>

The issue presented in this article is whether the heightened standard of proof in the traditional *McDonnell Douglas* burden-shifting

---

3. 29 C.F.R. § 825.220 (2000).

4. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

5. *Id.* at 798.

6. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

7. *Rachid v. Jack in the Box*, 376 F.3d 305, 312 (2004) (citing *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)).

8. *Desert Palace*, 539 U.S. at 100.

9. *Id.*

analysis should continue to be used in FMLA cases or if that heightened standard of proof should be relaxed as per *Desert Palace*. Lower federal courts are split on whether *Desert Palace* extends to FMLA retaliation claims. Those courts holding that it does apply reason that the statutory text of the FMLA, like that of Title VII, does not require a heightened showing through direct evidence. Those courts refusing to apply the relaxed standard of *Desert Palace* to FMLA retaliation claims reason that the holding in *Desert Palace* only applies to Title VII claims, and if the Supreme Court intended otherwise, the Court would have stated so unmistakably.

This article argues that the modified *McDonnell Douglas* approach that evolved out of the Title VII case, *Desert Palace v. Costa*, should apply to FMLA retaliation claims as well. Part II of this article discusses the backgrounds of FMLA and Title VII of the Civil Rights Act of 1964, and claims under those Acts. Part III discusses the Supreme Court case of *Desert Palace v. Costa*, the modified standard of proof, its effects on the *McDonnell Douglas* burden-shifting analysis, and its impact on FMLA retaliation claims.<sup>10</sup> Part IV analyzes the changes in the aftermath of *Desert Palace*, and proposes a uniform application using the modified *McDonnell Douglas* burden-shifting analysis for FMLA retaliation claims. Part V concludes.

## II. BACKGROUND

### A. *The Family Medical Leave Act of 1993.*

In February 1993, President Clinton signed his administration's first major piece of legislation into law, the Family Medical Leave Act of 1993. The FMLA allows eligible employees, upon notice to their employer, to take up to twelve weeks of unpaid leave annually for specific reasons.<sup>11</sup> The FMLA applies only to employers who engage in interstate commerce and who employ fifty or more employees for each working day for twenty or more calendar workweeks in the current or preceding calendar year.<sup>12</sup> In addition, an employee is eligible to take FMLA leave if he/she has been employed for at least twelve months,<sup>13</sup> for at least 1250 hours during the previous twelve-month period,<sup>14</sup> and at a work site where fifty or more employees are employed by the same employer within seventy-five miles of the work site.<sup>15</sup>

---

10. *Id.*

11. 29 U.S.C. § 2601 *et seq.* (2004).

12. 29 U.S.C. § 2611(4)(A)(i) (2000).

13. *See id.* at (2)(A)(i).

14. *Id.* at (2)(A)(ii).

15. *Id.* at (2)(B)(ii).

An eligible employee may take leave under the FMLA if that leave (1) relates to the birth or care of the employee's newborn child; (2) is the result of the placement of a child with the employee for adoption or foster care; (3) concerns the care of an employee's child, spouse, or parent having a serious health condition; or (4) is the result of the employee's serious health condition when he/she is unable to perform the requirements of his or her job.<sup>16</sup> Employees need only notify their employers that they will be absent under circumstances to which the FMLA leave might apply.<sup>17</sup>

The employee need not expressly assert rights under the FMLA or even mention the FMLA but may state only that leave is needed (for a qualifying reason). The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.<sup>18</sup>

Initially, the employee must notify the employer that the leave the employee is requesting is for a qualified reason.<sup>19</sup> The employer must then determine if the reason for the leave is, in fact, covered under the FMLA.<sup>20</sup> A further inquiry may be necessary based on the seriousness of the health condition, and an employer may require a certification from a treating physician.<sup>21</sup>

In instituting the FMLA, Congress found that the number of single-parent households and two-parent households where the single parent or both parents work are increasingly significant problems, and that there is a lack of employment policies to accommodate working parents.<sup>22</sup> The lack of policies forces parents to choose between job security and parenting.<sup>23</sup> In developing the FMLA, Congress recognized the importance for the development of children and the family unit of both parents being able to participate in early childrearing and care of family members who have serious health conditions.<sup>24</sup> Further, Congress realized that due to the nature of women's and men's roles in our society, the primary responsibility for family care-taking often falls on women and often affects the working lives of wo-

---

16. See 29 U.S.C. § 2612 (a)(1)(A-D).

17. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001).

18. *Id.* at 1130-31 (citing § 29 C.F.R. 825.302(c) (2004)).

19. *Bachelder*, 259 F.3d 1112 (9th Cir. 2001).

20. *Id.*

21. *Id.*

22. 29 U.S.C. § 2601(a)(1)-(3) (2004).

23. *Id.* at (a)(3).

24. *Id.* at (a)(2).

men more than it affects the working lives of men. Thus, employment standards are only applied to one gender.<sup>25</sup> This created a serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.<sup>26</sup> Based on these findings, the FMLA balances the demands of the workplace with the needs of families to promote the stability and economic security of families and promotes national interests by preserving family integrity.<sup>27</sup>

The Act's purpose is to entitle employees to reasonable leave for medical reasons, while accommodating the legitimate interests of employers.<sup>28</sup> The FMLA further minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons, as well as compelling family reasons, on a gender-neutral basis, which promotes the goal of equal employment opportunities for women and men.<sup>29</sup>

An employee's exercise of FMLA rights cannot be waived,<sup>30</sup> interfered with, restrained, or denied.<sup>31</sup> The statute prohibits certain acts by an employer and provides extensive remedies to employees seeking enforcement of their FMLA rights.<sup>32</sup>

When an eligible employee returns from leave, the employer must restore the employee to the position of employment held when the leave began or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.<sup>33</sup> Although the FMLA has the appearance of requiring an employer to return employees to pre-leave conditions, there is nothing in the statute that can be construed to require a restoration of employees as to seniority or employment benefits that may have accrued during the leave or any right, benefit, or position of employment other than that which the employee would have been entitled had s/he not taken the leave.<sup>34</sup>

When a violation of FMLA rights occurs, there are two possible types of claims that an employee can bring: (1) interference with

25. *Id.* at (a)(5).

26. *Id.* at (a)(6).

27. *Id.* at (b)(1).

28. *Id.* at (b)(2)-(3).

29. *Id.* at (b)(4)-(5).

30. 29 C.F.R. § 825.220(d) (2005).

31. 29 U.S.C. § 2615(a)(1) (2000).

32. 29 U.S.C. § 2617(a)(1)(A) (providing for "wages, salary, employment benefits or other compensation"); 29 U.S.C. § 2617(a)(1)(B) (providing for "such equitable relief as may be appropriate, including employment, reinstatement, and promotion"); and 29 U.S.C. § 2617 (a)(3) (providing for "reasonable attorney's fee, reasonable expert witness fees, and other costs").

33. 29 U.S.C. § 2614(a)(1)(A)-(B) (1993).

34. *Id.* at (a)(3).

rights claims, and (2) retaliation/discrimination claims.<sup>35</sup> Although both claims deal with an employer violating an employee's statutory rights, both involve different standards of proof. Under a claim of interference with FMLA rights, a plaintiff must prove, by a preponderance of the evidence, that the taking of FMLA covered leave constituted a negative factor in the decision to fire the employee.<sup>36</sup> For retaliation claims, the *McDonnell Douglas* burden-shifting analysis is employed.<sup>37</sup>

### 1. Interference With Rights Claims

It is unlawful for any employer to interfere with, restrain, or deny the exercise of, any right provided under the FMLA.<sup>38</sup> Employer actions that deter employees from participating in protected activities constitute "interference" or "restraint" of the employees' exercise of their rights.<sup>39</sup> The FMLA entitles employees to engage in particular activities under the FMLA and to take leave from work for FMLA qualifying reasons. The FMLA also shields employees from employer interference and restraint.<sup>40</sup>

Under the FMLA and many other statutes, attaching negative consequences to the exercise of protected rights lessen an employee's willingness to exercise those rights. Employees are less likely to exercise their FMLA leave rights if they fear discipline or discharge. An employer's use of an employee's FMLA leave as a negative factor in employment actions violates this Act.<sup>41</sup> This prohibition encompasses an employer's consideration of an employee's use of FMLA-covered leave in making adverse employment decisions.<sup>42</sup>

In *Bachelder v. America West Airlines*, the Ninth Circuit Court of Appeals considered an employee's use of FMLA-covered leave with respect to an employer making an adverse employment decision.<sup>43</sup> In *Bachelder*, an employee took absences that the employer asserted were not covered under the FMLA and used those absences as a negative factor in its decision to fire the employee.<sup>44</sup> The court held that

---

35. 29 USC § 2615(a)(1) (interference theory) and 29 USC § 2615(a)(2) (retaliation or discrimination theory). Further, the FMLA creates a cause of action at 29 USC § 2617(a) for employees to enforce their FMLA rights on the basis of one of these two theories.

36. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1125 (9th Cir. 2001).

37. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

38. 29 U.S.C. § 2915(a)(1) (1998).

39. *Bachelder*, 259 F.3d at 1124.

40. *Id.*

41. 29 C.F.R. § 825.220(c) (2005).

42. *Id.*

43. *Bachelder*, 259 F.3d 1112 (9th Cir. 2001).

44. See generally *Bachelder*, 259 F. 3d 1112 (9th Cir. 2001). The court reversed the prior decision, directed the district court to grant the employee's cross-motion for summary judgment as to liability, and remanded the case for further proceedings.

the employee absences were, in fact, protected by the FLMA.<sup>45</sup> The court concluded:

In order to prevail on her claim, . . . [plaintiff] need only prove by a preponderance of the evidence that her taking of FMLA-protected leave constituted a negative factor in the decision to terminate her. She can prove this claim, by using either direct or circumstantial evidence, or both . . . no scheme shifting the burden of production back and forth is required.<sup>46</sup>

The mere fact that the employer uses the taking of FMLA leave as a negative factor in employment actions violates this Act.<sup>47</sup> The FMLA aims to protect an employee against disciplinary action based on absences, if those absences are for one of the Act's many enumerated reasons.

## 2. Retaliation/Discrimination Claims pre *Desert Palace, Inc. v. Costa*

It is unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing practices made unlawful by the FMLA.<sup>48</sup> To establish a prima facie case of retaliation under the FMLA, employees must show that: (1) they exercised rights protected under the FMLA; (2) they were qualified for the position; (3) they suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent.<sup>49</sup>

Traditionally, courts have used the burden-shifting framework delineated in the Supreme Court case of *McDonnell Douglas Corp. v. Green*<sup>50</sup> to evaluate a claim of retaliation under the FMLA. *McDonnell Douglas* was the first case in which the Supreme Court addressed the framework of the burden-shifting analysis in employment discrimination litigation with respect to Title VII claims.<sup>51</sup>

The *McDonnell Douglas* Court stated that the proper framework for how a claim of employment discrimination must be litigated is as follows: (1) the plaintiff must be given the opportunity to present a prima facie case of discrimination; (2) the employer must be given the opportunity to rebut the plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for its actions; and (3) the plain-

45. *Id.*

46. *Id.* at 1125.

47. 29 C.F.R. § 825.220(c) (2005).

48. 29 U.S.C. § 2615(a)(2) (2000).

49. *Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir. 2004), *aff'g* *Potenza v. City of New York Dep't of Transp.*, No. 00 Civ. 0707 (SHS), 2001 U.S. Dist. LEXIS 17112 (S.D.N.Y. Oct. 23, 2001).

50. *Id.* at 167.

51. *Id.*

tiff is afforded the opportunity to demonstrate that the employer's reason for the adverse employment action was a mere pretext for discrimination.<sup>52</sup>

FMLA claims use the *McDonnell Douglas* burden-shifting once the elements of a prima facie case have been met.<sup>53</sup> *Potenza v. City of New York*, a Second Circuit Court of Appeals case, illustrates the *McDonnell Douglas* burden-shifting analysis under an FMLA retaliation claim.<sup>54</sup> In *Potenza*, an employee brought suit, alleging retaliation against him for taking FMLA-protected leave.<sup>55</sup> The employee alleged that an adverse employment action was taken because he had taken a one-month medical leave to have surgery on his knee. The employee had requested accommodations for the ensuing physical therapy.<sup>56</sup>

After the employee is given the opportunity to present a prima facie case of discrimination, the burden shifts to the employer to rebut the plaintiff's prima facie evidence by articulating a legitimate, nondiscriminatory reason for its actions.<sup>57</sup> In *Potenza*, the court held that the employer had rebutted the employee's prima facie case by insisting, instead, that it had removed the employee from his position because of poor job performance and because it was more efficient to locate his position, a port manager, within the operations department rather than the maintenance department, from which he came.<sup>58</sup> This rebuttal goes to the fourth element of a prima facie case of discrimination that the adverse employment action occurred under circumstances giving rise to an inference of retaliatory intent.<sup>59</sup>

Once the employer is afforded an opportunity to rebut the plaintiff's prima facie case by articulating a legitimate, nondiscriminatory reason for its actions, the burden then shifts back to the employee to demonstrate that the employer's reason for the adverse employment action was a mere pretext for discrimination.<sup>60</sup>

---

52. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

53. *Potenza*, 365 F.3d at 167.

54. *Id.* at 165.

55. *Id.*

56. *Id.* at 166.

57. *McDonnell Douglas Corp.*, 411 U.S. at 802.

58. *Potenza*, 365 F.3d at 166.

59. *Id.*

60. *McDonnell Douglas Corp.*, 411 U.S. at 804; *Potenza*, 365 F.3d at 168 (discussing the burden-shifting framework, and holding that the employee had failed to establish a prima facie case).



B. *Title VII of the Civil Rights Act of 1964 pre Desert Palace*

Title VII of the Civil Rights Act of 1964<sup>61</sup> makes it illegal to discriminate against any person in any matter affecting employment.<sup>62</sup> Title VII creates statutory rights against discrimination in employment, and establishes a scheme to vindicate those rights. It was enacted to assure equality of employment opportunities by eliminating practices and devices that discriminate on the basis of race, color, religion, sex, or national origin, aims broadly to eradicate discrimination throughout, and seeks to make persons whole for injuries suffered through past discrimination.<sup>63</sup>

Under Title VII, there are two theories of employment discrimination: disparate treatment and disparate impact. The former is either a single motive or a mixed-motive case and occurs when the claimant alleges the employer intentionally treated him or her less favorably than others due to his race, religion, color, national origin or sex.<sup>64</sup> In such cases the complainant must prove that: (a) a pattern of harassment or intimidation exists, (b) the employer knew or should have known of the illegal conduct, and (c) the employer failed to take reasonable steps to cure the conduct.<sup>65</sup> The Supreme Court first recognized the single motive disparate treatment concept,<sup>66</sup> and later recognized that a company may have acted for both illegal and legal reasons, giving rise to mixed-motives claims.<sup>67</sup> Disparate treatment claims under Title VII utilize the *McDonnell Douglas* burden-shifting analysis.

The second type of discrimination claim under Title VII is disparate impact, which occurs when an employer's facially neutral policy or practice causes the employee to be treated differently from others because of race, color, religion, sex or national origin.<sup>68</sup> The disparate impact analysis uses a different burden-shifting approach than that of disparate treatment.

In a Title VII retaliation case, the plaintiff first must establish a *prima facie* case. In order to establish a *prima facie* case of retaliation

61. The Civil Rights Act of 1964, 42 U.S.C. §§ 1975-1981 (2000).

62. 42 U.S.C. § 2000e-2 (1994).

63. 42 U.S.C. § 2000e(1)-(17) (2000).

64. *Id.* at § 2000e-2(a)(1).

65. See generally *Walker v. Ford Motor Co.*, 684 F.2d 1355 (11th Cir. 1982) (discussing a single motive disparate treatment case).

66. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 795 (1973).

67. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989).

68. See generally *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335-36 (1977) (distinguishing disparate impact claims from those of disparate treatment claims); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-432 (1971) (discussing disparate impact in the context of employers requiring a high school education or the passing of a general intelligence test as a condition of employment in or transfer to jobs).

under Title VII, a plaintiff must first show that: (1) s/he engaged in statutorily protected expression, (2) s/he suffered an adverse employment action, and (3) there is a causal link between the protected expression and the adverse action.<sup>69</sup> Second, the employer must prove that the motives for its decisions were non-discriminatory.<sup>70</sup> Third, the plaintiff employee must prove that the employer's proffered reason is a mere pretext and the real reason was unlawful discrimination.<sup>71</sup>

### III. *DESERT PALACE* AND ITS IMPACT ON THE FMLA

The framework established by the United States Supreme Court in *McDonnell Douglas* in 1973 has largely remained intact with respect to employment discrimination cases.<sup>72</sup> However, in *Desert Palace Inc. v. Costa*, the Supreme Court of the United States modified the thirty-year-old burden-shifting framework established in *McDonnell Douglas*.<sup>73</sup>

In *Desert Palace*, a former employee sued her employer, alleging sex discrimination under Title VII of the Civil Rights Act of 1964.<sup>74</sup> The employee alleged that she was stalked by a supervisor, received harsher discipline than men did, and was treated less favorably than men were in the assignment of overtime. She also alleged that supervisors stacked her disciplinary record and used or tolerated sex-based slurs against her.<sup>75</sup> The district court gave the jury a mixed-motive instruction. The court rejected the employer's objection that employees were not entitled to a mixed-motive instruction if the employee had failed to provide direct evidence that sex was a motivating factor in her dismissal.<sup>76</sup> A jury rendered a verdict for the employee and awarded her damages.<sup>77</sup> The Ninth Circuit Court of Appeals affirmed the district court's judgment.<sup>78</sup>

The issue before the Supreme Court was whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-

---

69. *Porter v. Chicago Park Dist.*, 155 F. Supp 2d 857, 860 (N.D. Ill. 2001).

70. *Desert Palace v. Costa*, 539 U.S. 90, 93 (2003).

71. *Id.*

72. See generally *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (discussing the framework established with respect to employment discrimination cases).

73. *Desert Palace, Inc.*, 539 U.S. at 93.

74. *Id.* See also *Costa v. Desert Palace, Inc.* 299 F.3d 838 (9th Cir. 2002) (for further recitation of the facts).

75. See generally *Desert Palace*, 539 U.S. 90.

76. *Id.*

77. *Id.*

78. *Id.* at 101. The Ninth Circuit Court of Appeals found that the district court did not err in giving a mixed motive instruction to the jury.

motive instruction under Title VII of the Civil Rights Act of 1964.<sup>79</sup> The plaintiff argued that a heightened standard of proof was not present and the employee did not have to present direct evidence because the statute stated that she need only “demonstrate” that her employer used forbidden consideration in employment against her.<sup>80</sup> The employer argued that for the plaintiff employee to be given a mixed-motive instruction, she had to present direct evidence of discrimination by the employer.<sup>81</sup>

The starting point for the Court’s analysis was the statutory text.<sup>82</sup> Because the statute did not mention, much less require, that a plaintiff make a heightened showing through direct evidence, the Court held that direct evidence was not required.<sup>83</sup> The Court went on to state that other statutes have been specifically identified as imposing heightened proof requirements, and if the drafters of Title VII wanted to have a heightened standard, they would have included such.<sup>84</sup>

The Court in *Desert Palace* acknowledged the utility of circumstantial evidence in discrimination cases.<sup>85</sup> The Court reasoned that treating circumstantial evidence and direct evidence alike is both clear and deep-rooted.<sup>86</sup> The Court went on to state that “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”<sup>87</sup>

Under the new modified *McDonnell Douglas* approach derived from *Desert Palace*, the plaintiff must still demonstrate a prima facie case of discrimination.<sup>88</sup> The defendant then must articulate a legitimate, non-discriminatory reason for its decision to terminate the plaintiff and, if the defendant meets its burden of production, the plaintiff must then offer sufficient evidence to create a genuine issue of material fact of either: (1) the defendant’s reason is not true, but is instead a pretext for discrimination; or (2) the defendant’s reason, while true, is only one of the reasons for its conduct, and another ‘motivating factor’ is the plaintiff’s protected characteristic (mixed-motive[s]).<sup>89</sup> If a plaintiff demonstrates that another factor was a motivating factor in the employment decision, it then falls to the de-

79. *Id.* at 97.

80. *Id.*

81. *Id.*

82. *Id.* at 98.

83. *Id.* at 99.

84. *Id.* at 101.

85. *Id.* at 100 (citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 (1957)).

86. *Desert Palace*, 539 U.S. at 100.

87. *Id.*

88. See generally *Desert Palace*, 539 U.S. 90 (2003).

89. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004) (citing *Rishel v. Nationwide Mut. Ins. Co.*, 297 F. Supp. 2d 854, 865 (M.D.N.C. 2003)). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (2003) (further discussing the burden shifting analysis).

fendant to prove that the same adverse employment decision would have been made regardless of discriminatory animus.<sup>90</sup> If the employer fails to carry this burden, the plaintiff prevails.

*Desert Palace* modified the *McDonnell Douglas* burden-shifting analysis for Title VII claims. The issue presented in this article is whether the *Desert Palace* modification of the *McDonnell Douglas* burden-shifting analysis will extend to other statutes, such as the Family Medical Leave Act. There are two possibilities arising from this issue: 1) the holding in *Desert Palace* changed everything by modifying the *McDonnell Douglas* framework and relaxing the once heightened standard of proof requiring direct evidence; or 2) the holding in *Desert Palace* changed nothing beyond its implications on Title VII claims.

#### A. *Desert Palace Changed Everything*

Considering the post *Desert Palace* increase in respectability and reliance on circumstantial evidence, lower courts may be more willing to consider circumstantial evidence sufficient to create a mixed motive case under other statutes than just Title VII. For example, the Middle District of Louisiana in *Oby v. Baton Rouge Marriott*, applied the Supreme Court's reasoning in *Desert Palace* to an FMLA claim based on retaliation.<sup>91</sup> In *Oby*, the employee was a long-time housekeeping manager for the employer's hotel who requested and was granted leave under the FMLA to care for an ill parent.<sup>92</sup> During the employee's leave, the employer advised the employee that, if the employee's leave continued, the employer would need to find a new housekeeping manager.<sup>93</sup> A new housekeeping manager was subsequently hired and the employee was offered a position as food and beverage manager.<sup>94</sup> The employee declined the position based on a lack of experience and a religious belief against serving alcohol.<sup>95</sup> The employee sued the employer under the FMLA, arguing that the employer had retaliated against her for taking her FMLA leave by not reinstating her to her pre-leave position.<sup>96</sup>

---

90. *Rachid*, 376 F.3d at 312.

91. *Oby v. Baton Rouge Marriott*, 329 F. Supp. 2d 772 (2004).

92. *Id.* at 775.

93. *Id.* at 776.

94. *Id.* at 777.

95. *Id.*

96. *Id.* at 787. The court ultimately found that the employee failed to show a cause of action in interference or retaliation under the FMLA and granted Summary Judgment to the employer. The court based its finding on the fact that although the employee was not reinstated as housekeeping manager, the employer satisfied the FMLA by offering the employee a substantially equivalent position with similar duties and the same salary, even though the salary was higher than the existing salary for a food and beverage manager. In the alternative, the employee was clearly a key employee who could properly be denied reinstatement based on the legitimate business need to have someone perform the employee's duties.

Since the employee in *Oby* based her retaliation claim on circumstantial evidence, prior to *Desert Palace*, the court, presumably, would have used the traditional *McDonnell Douglas* burden-shifting analysis. However, the *Oby* court took a different approach, finding that the theme for interpreting statutory construction in *Desert Palace* is to look at the statutory text first, and then determine whether the text requires a showing of direct evidence.<sup>97</sup> The text of the FMLA, like the text of Title VII, does not require a heightened showing through direct evidence to prove retaliation or discrimination.<sup>98</sup> The court concluded that the *Desert Palace* rationale applied to the plaintiff's FMLA retaliation claim as well as Title VII claims, and therefore, a heightened showing of direct evidence is not required.<sup>99</sup> The court recognized the use of the modified *McDonnell Douglas* analysis in an FMLA retaliation claim regardless of the type of evidence put forward.

The *Oby* court's use of the modified *McDonnell Douglas* analysis also follows the holding in *Rachid v. Jack In The Box*,<sup>100</sup> a Fifth Circuit ADEA (Age Discrimination in Employment Act) case. *Rachid*, like the *Oby* court, started its analysis with the statutory text and found the ADEA to be silent as to a heightened direct evidence standard.<sup>101</sup> The court in *Rachid* noted that due to the heightened pleading requirement in other statutes, direct evidence of discrimination is not necessary to receive a mixed-motive analysis for an ADEA claim.<sup>102</sup> Given the similarity between Title VII, ADEA and the FMLA, and their silence with regard to a heightened direct evidence standard, the court reasoned that those changes that emerged as a result of *Desert Palace* should be equally applicable to claims brought under other employment discrimination statutes.

*Bergen v. Continental Casualty Company*,<sup>103</sup> a United States District Court case from the Northern District of Texas, is further evidence of growing recognition of the modified *McDonnell Douglas* approach, delineated in *Desert Palace, Inc. v. Costa*. In *Bergen*, the plaintiff employee sued the defendant employer for age, sex, and disability dis-

97. *Id.* at 786.

98. See generally 42 U.S.C.A. § 2000e *et seq.* (as amended by the Civil Rights Act of 1991) and 29 U.S.C. § 2601 *et seq.* (purporting to show that the absence of direct language that a heightened showing through direct evidence to prove retaliation or discrimination implies that circumstantial evidence can be used).

99. *Oby*, 329 F. Supp. 2d at 786.

100. *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004). In *Rachid*, the Fifth Circuit held that *Desert Palace* modified the traditional *McDonnell Douglas* burden-shifting analysis in ADEA cases so that a plaintiff could proceed on a mixed-motive theory even without direct evidence of discrimination.

101. *Id.* at 311 (citing *Desert Palace Inc. v. Costa*, 539 U.S. 90 (2003)).

102. *Id.*

103. *Bergen v. Cont'l Cas. Co.*, 368 F. Supp. 2d 567 (N.D. Tex. 2005).

crimination and retaliation under the ADEA, Title VII and Americans with Disabilities Act.<sup>104</sup> The *Bergen* Court, “agrees with, and adopts its sister court’s rationale in applying the modified *McDonnell Douglas* approach to ADEA and retaliation claims.”<sup>105</sup> The court went on to note that other district courts in its Circuit have taken the lead in applying the “modified McDonnell Douglas” to Title VII and retaliation cases including Mississippi<sup>106</sup> and Louisiana.<sup>107</sup>

The traditional scheme for analyzing an employee’s retaliation claim pursuant to the *McDonnell Douglas* burden-shifting analysis has been modified. Before *Desert Palace*, courts were faced with arguments dealing with whether the evidence presented by an employee claiming retaliation under the FMLA was direct or indirect. After the Court’s decision in *Desert Palace*, judicial interpretation of the statutory text of the FMLA did not require the heightened standard by requiring direct evidence, as evidenced by the court in *Oby*.<sup>108</sup> *Desert Palace* makes it easier for a plaintiff-employee to meet his/her burden, and more difficult for a defendant-employer to ultimately prevail, by making a summary judgment resolution more difficult.

#### B. *Desert Palace Changed Only Title VII*

The Court in *Desert Palace* found that it is not necessary to present direct evidence of a discriminatory reason for an adverse employment decision to raise the existence of a mixed motive claim and for a mixed motive instruction.<sup>109</sup> Some courts have been apprehensive applying that holding to anything beyond Title VII claims.

An example is *Herawi v. State of Alabama Department of Forensic Sciences*,<sup>110</sup> a Middle District of Alabama case in which the court opined that *McDonnell Douglas* is still a viable and working framework for analyzing Title VII claims.<sup>111</sup> In *Herawi*, the employee claimed that she was fired because of her national origin and in retaliation for her complaints of national origin discrimination.<sup>112</sup> The employer moved for summary judgment, but the court denied it with respect to the Title VII claim.<sup>113</sup> The *Herawi* court distinguished *De-*

---

104. *Id.*

105. *Id.* at 573.

106. *Warren v. Terex Corp.*, 328 F. Supp. 2d 641, 647 (N.D. Miss. 2004) (Title VII race and retaliation claims).

107. *Oby v. Baton Rouge Marriott*, 329 F. Supp. 2d 772, 786 (M.D. La. 2004) (Family Medical Leave Act retaliation claim).

108. *Id.*

109. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).

110. *Herawi v. St. of Al. Dept. of Forensic Sciences*, 311 F. Supp. 2d 1335 (M.D. Ala. 2004).

111. *Id.*

112. *Id.*

113. *Id.*

*sert Palace* and utilized the traditional *McDonnell Douglas* burden-shifting framework.<sup>114</sup> The court went on to state, “. . .there is nothing in *Desert Palace* that undermines the continued usefulness of *McDonnell Douglas* to trial courts, in either single- or mixed-motive cases based on circumstantial evidence. . . *McDonnell Douglas* is still good law, and it is the appropriate heuristic device to use in this case.”<sup>115</sup>

Other courts similarly have found that the holding in *Desert Palace* was not intended to rewrite the *McDonnell Douglas* burden-shifting analysis. The Northern District of Texas in *Owens v. Excel Management Services, Inc.*, in determining the applicable standard of proof in a Title VII claim, stated that the *McDonnell Douglas* burden-shifting framework is applicable despite *Desert Palace*.<sup>116</sup> The court in *Owens* felt that *Desert Palace* simply made clear that direct evidence of discrimination is not necessary to obtain a mixed-motive jury instruction under Title VII.<sup>117</sup> The court went on to further state that if the Supreme Court intended to depart from established employment law precedent, it would have done so unmistakably.<sup>118</sup>

Similar cases include the Eleventh Circuit Court of Appeals case of *Pennington v. City of Huntsville*,<sup>119</sup> and the United States Supreme Court case of *Raytheon Company v. Hernandez*.<sup>120</sup> In *Pennington*, the court found that 42 U.S.C. § 2000e-2(m)<sup>121</sup> is only applicable to Title VII retaliation and discrimination cases.<sup>122</sup> The Court in *Raytheon* applied the traditional *McDonnell Douglas* burden-shifting framework to a post-*Desert Palace* case, and did not even mention *Desert Palace* in its opinion.<sup>123</sup>

---

114. *Id.* at 1346.

115. *Id.*

116. *Owens v. Excel Mgmt Services, Inc.*, No. Civ.A. 3:02-CV-0835-, 2004 WL 358153 at \*3 (N.D. Tex. Feb. 13, 2004).

117. *Id.*

118. *Id.*

119. *Pennington v. City of Huntsville*, 261 F.3d 1262 (11th Cir. 2001). Plaintiff employee sued defendant employer under Title VII of the Civil Rights Act of 1964. Employee appealed a grant summary judgment for the employer entered in the United States District Court for the Northern District of Alabama.

120. *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (employer appealed a judgment in favor of the employee entered in the United States Court of Appeals for the Ninth Circuit based on an Americans with Disabilities Act claim).

121. 42 U.S.C. § 2000e-2(m) (2005) (“Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USCS §2000e *et seq.*], an unlawful employment practice is established when the complaining party DEMONSTRATES that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”) [emphasis added].

122. *Pennington*, 261 F.3d at 1269.

123. See generally *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (purporting to show that *Desert Palace* was not intended to rewrite the *McDonnell Douglas* burden shifting analysis).

The Middle District of Louisiana in *Oby v. Baton Rouge Marriott*,<sup>124</sup> discussed above, is the only court that has extended *Desert Palace's* modified *McDonnell Douglas* analysis to FMLA claims. It is uncertain whether courts in future cases will apply the Court's holding in *Desert Palace* to statutes other than Title VII.

#### IV. ANALYSIS AND PROPOSAL

The modified *McDonnell Douglas* analysis, which evolved out of the Title VII case *Desert Palace Inc. v. Costa*, should be applied across-the-board to FMLA retaliation claims that used the traditional *McDonnell Douglas* burden-shifting analysis. The holding of *Desert Palace* should apply to FMLA retaliation claims for three reasons. First, the modified *McDonnell Douglas* analysis is consistent with the FMLA's legislative intent. The Act was designed to prohibit employers from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act, and discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.<sup>125</sup> The Act's purpose is to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition, while at the same time accommodating the legitimate interests of employers.<sup>126</sup>

When an employee is claiming retaliation or discrimination by an employer, in the absence of direct evidence, the *McDonnell Douglas* burden-shifting analysis is a heightened and more onerous standard for the employee to meet. Arguably, it is a more onerous standard than even the preponderance of evidence standard used in an interference-with-FMLA-rights claim, which does not require a scheme shifting the burdens back and forth and allows employees to prove their claim by using either direct or indirect evidence or both.<sup>127</sup> By relaxing the heightened standard of proof and eliminating the requirement for direct evidence, the legislative intent is furthered.

Second, the modified *McDonnell Douglas* analysis should be used in FMLA retaliation claims because it is consistent with the Act's statutory language and consistent with the interpretation of parallel statutes. As discussed above in *Oby*, the text of the FMLA, like the text

---

124. *Oby v. Baton Rouge Marriott*, 329 F. Supp. 2d 772 (M.D. La. 2004).

125. 29 C.F.R. § 825.220 (2000).

126. 29 U.S.C. § 2601(b)(2)-(3) (2005).

127. *Potenza v. City of New York*, 365 F.3d 165, 167 (2d Cir. 2004), *aff'g* *Potenza v. City of New York Dep't of Transp.*, No. 00 Civ. 0707 (SHS), 2001 U.S. Dist. LEXIS 17112 (S.D.N.Y. Oct. 23, 2001) (citing *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001)).



of Title VII and ADEA, does not require a heightened showing through direct evidence to prove retaliation or discrimination.<sup>128</sup> The court in *Oby* concluded that the *Desert Palace* rationale applies to the plaintiff's FMLA retaliation claim as well as Title VII claims and that, therefore, a heightened showing of direct evidence is not required.<sup>129</sup> Based on the lack of express language requiring a heightened showing through direct evidence, the modified *McDonnell Douglas* burden-shifting framework is more consistent with the statutory language of the FMLA than the traditional *McDonnell Douglas* framework.

The third reason the modified *McDonnell Douglas* analysis should be used in FMLA retaliation claims is that it is the best policy solution, as deserving claimants would be more likely to prevail. Consider the following hypothetical. Jan, a married woman in her late twenties, is employed at XYZ Corp., a large corporation. Jan has been employed at XYZ since the completion of her bachelor's degree four years prior. Upon receiving the news that she is expecting a baby in six months, she notifies her employer of her intentions to take leave upon the arrival of her newborn child. Her employer notifies her that her leave is approved and approximately six months later, Jan has her child. The day Jan's FMLA leave ends and she plans to return to work, she is notified that she has been terminated from her position at XYZ. Jan, having never used FMLA leave before and having received excellent performance ratings during her time at XYZ, files suit in federal court alleging retaliation/discrimination under the FMLA.

Traditionally, with a lack of direct evidence, Jan would face the heightened *McDonnell Douglas* burden-shifting framework, and would be required to show pretext to prevail under her retaliation claim. Jan would be given the opportunity to present a prima facie case of discrimination. She would present evidence that she had been employed at XYZ for over four years with excellent performance ratings. XYZ Corp. would then be given the opportunity to rebut Jan's prima facie case by articulating a legitimate, nondiscriminatory reason for its actions. After XYZ Corp is given an opportunity to rebut Jan's case, Jan is then afforded the opportunity to demonstrate that the employer's reason for the adverse employment action was a mere pretext for discrimination.<sup>130</sup> This would be a very onerous burden for Jan to overcome, as it often falls on motives that cannot be found in the form of direct evidence. Employees do not always have good luck acquir-

---

128. *Oby*, 329 F. Supp. 2d at 772. See also *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004) (discussing language of the relevant provision of the ADEA which is similarly silent as to the heightened direct evidence standard).

129. *Oby*, 329 F. Supp. 2d at 772.

130. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

ing a smoking gun in the form of memo or letter specifically stating that XYZ Corp. really fired her for discriminatory or retaliatory reasons. All too often, this comes in the form of circumstantial evidence.

In this hypothetical, the Jans of the world are faced with a very onerous standard of proof. All too often, this heightened standard of proof prevents a seemingly valid claim of discrimination or retaliation, as here, from prevailing.

Using the same hypothetical but applying the modified *McDonnell Douglas* approach that followed the Court's decision in *Desert Palace*, quite a different result could be reached. The Court in *Desert Palace*, recognizing the importance of circumstantial evidence, relaxed the requirement for direct evidence of discrimination.<sup>131</sup> The modified *McDonnell Douglas* changes the third step of the burden-shifting analysis, and once the defendant has stated a nondiscriminatory reason for its actions, the plaintiff must show either: (1) the defendant's reason is a pretext for discrimination; or (2) the defendant's reason, though true, was also motivated by discriminatory considerations. If the plaintiff can make that showing, the defendant employer must prove that it would have made the same decision in the absence of its discriminatory animus,<sup>132</sup> thereby, making it more likely for plaintiffs to survive and prevail on legitimate claims.

The lower federal courts are mixed as to the application of the holding in *Desert Palace*. Extending the reasoning to the FMLA is directly in line with legislative intent behind the act. The *Desert Palace* application is also consistent with the FMLA's statutory language and consistent with interpretation of parallel statutes. Finally, the extended application of *Desert Palace*'s holding is the best policy solution to effectuate the FMLA's purpose.

## V. CONCLUSION

The law after *Desert Palace* lessens the onerous burden of the *McDonnell Douglas* burden-shifting analysis and no longer requires a heightened standard of proof in Title VII claims. It is not clear that the reasoning from *Desert Palace* will extend to other statutes, including the FMLA.

The lower federal courts are split as to whether the holding in *Desert Palace* and its modified *McDonnell Douglas* burden-shifting analysis extends beyond Title VII claims. Some courts have applied the modified *McDonnell Douglas* to FMLA retaliation claims while other

---

131. *Desert Palace v. Costa*, 539 U.S. 90 (2003).

132. *Id.* See also *Price Waterhouse*, 490 U.S. 228 (2003) (illustrating the shift in the burden to the employer to justify its ultimate decision).

courts have found that the holding in *Desert Palace* was not intended to rewrite the *McDonnell Douglas* burden-shifting analysis.

This article argues that courts should use the modified *McDonnell Douglas* burden shifting analysis for all claims brought under the FMLA for retaliation. First, the less onerous modified *McDonnell Douglas* burden-shifting framework is more consistent with the FMLA's legislative intent. Second, the fact that the language of the FMLA does not expressly have a heightened standard of proof is consistent the FMLA's statutory language and with the interpretation of parallel statutes such as Title VII and ADEA. Third, the implementation of the less onerous modified *McDonnell Douglas* burden-shifting is the best policy solution to effectuate the FMLA's purpose.