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Failure to Accommodate, Discriminatory Intent, and the *McDonnell Douglas* Framework: Distinguishing the Analyses of Claims Arising from Subparts (A) and (B) of § 12112(B)(5) of the ADA

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FAILURE TO ACCOMMODATE, DISCRIMINATORY INTENT, AND THE *MCDONNELL DOUGLAS* FRAMEWORK: DISTINGUISHING THE ANALYSES OF CLAIMS ARISING UNDER SUBPARTS (A) AND (B) OF § 12112(B)(5) OF THE ADA

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Abstract: The Americans with Disabilities Act (ADA) creates and protects employment opportunities for disabled persons by prohibiting adverse employment actions in the form of disparate treatment and disparate impact. Additionally, subparts (A) and (B) of § 12112(b)(5) of the ADA place distinct duties on employers to accommodate disabled persons, protecting, respectively, existing and future employment opportunities. Because the ADA protects both existing and future opportunities, the duty to accommodate may be breached in two distinct manners. When a plaintiff alleges failure to accommodate, a court must determine which section of the ADA applies and select an appropriate analytical framework for the claim. One commonly used framework is the *McDonnell Douglas* framework, which was created to enable Title VII plaintiffs to prove discriminatory intent using indirect, circumstantial evidence. The *McDonnell Douglas* framework has been extended to the analysis of discrimination claims arising under the ADA. While the federal circuit courts of appeals approve of the use of the *McDonnell Douglas* framework for ADA disparate treatment claims, the circuits are split regarding the applicability of the framework to ADA failure to accommodate claims. This Comment argues that *McDonnell Douglas* is applicable to failure to accommodate claims arising under subpart (B) but not to claims arising under subpart (A). First, there is a critical distinction between the subparts: whereas the proscribed discrimination under subpart (A) results *from* a failure to accommodate, the proscribed discrimination under subpart (B) results *in* a failure to accommodate. Second, unlike claims arising under subpart (A), an employer's intent is the central issue in claims arising under subpart (B). Third, unlike claims arising under subpart (A), claims under subpart (B) are analogous to disparate treatment claims. By distinguishing between the two types of claims, a court is able to select an analytical framework consistent with the protection afforded by the ADA.

Jack, a hearing-impaired web-page designer, works for DotCom, a large on-line retailer.[1] Jack's manager often praises his job performance and has promoted him. Most of DotCom's internal communication occurs via email, though DotCom also holds meetings. DotCom distributes the content of the meetings via email and does not base employment decisions on attendance at meetings. Jack requests that DotCom provide an American Sign Language interpreter for the meetings, but DotCom denies his request.

1. Hypothetical created by author.

Following a recession, DotCom announces possible layoffs. Jack responds with a company-wide email, deriding his manager and the layoff policy in profane terms. DotCom terminates Jack for violating company civility policies. Jack files suit in federal court,[2] alleging discriminatory discharge and failure to accommodate under the Americans with Disabilities Act (ADA).[3]

Subparts (A) and (B) of § 12112(b)(5) of the ADA protect the employment opportunities of disabled persons by placing an affirmative duty on employers to provide reasonable accommodations.[4] Subpart (A) protects present opportunities by requiring employers to provide accommodations that address existing conditions and limitations,[5] whereas subpart (B) protects future opportunities by prohibiting employers from denying future opportunities in order to avoid making needed accommodations.[6] When an employee such as Jack alleges failure to accommodate, the court must determine which section of the ADA applies and select an appropriate analytical framework.[7]

One commonly used analytical tool is the *McDonnell Douglas* framework, which permits an aggrieved employee to prove an employer's discriminatory intent with indirect, circumstantial evidence.[8] While the federal circuits generally agree that *McDonnell Douglas* is applicable to ADA disparate treatment claims, such as Jack's discriminatory discharge claim,[9] the federal circuit courts of appeals are split regarding the applicability of *McDonnell Douglas* to failure to

2. The first step in filing any claim under the Americans with Disabilities Act is to file a complaint with the Equal Employment Opportunity Commission (EEOC) and exhaust all administrative remedies. *See, e.g.*, Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 836–37 (8th Cir. 2000).

3. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117 (2001). Plaintiffs often sue under analogous state anti-discrimination statutes (*see, e.g.*, Washington's Law Against Discrimination, WASH. REV. CODE. § 49.60 (2001)). Claims brought under these statutes are beyond the scope of this Comment.

4. *Id.* § 12112(b)(5)(A)–(B). *See, e.g.*, Muller v. Costello, 187 F.3d 298, 310 (2d Cir. 1999) (noting failure to accommodate claims arise from language of § 12112(b)(5)(A)–(B) of the ADA).

5. 42 U.S.C. § 12112(b)(5)(A).

6. *Id.* § 12112(b)(5)(B).

7. *See* Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1178 (6th Cir. 1996) (noting that defining and applying an appropriate framework for disability discrimination claims has been a difficult task).

8. *See* Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

9. *See, e.g.*, Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1134–36 (8th Cir. 1998) (applying *McDonnell Douglas* framework in wrongful discharge claim under ADA).

accommodate claims.[10] The Supreme Court declined to address this issue during the 2001–2002 term.[11]

The four federal circuits that oppose applying *McDonnell Douglas* to failure to accommodate claims rely on the distinction between failure to accommodate and disparate treatment theories of discrimination.[12] These circuits reason that because there is no need to prove discriminatory animus in failure to accommodate claims, such claims are best resolved with direct, objective evidence of discrimination.[13] As a result, these circuits decline to apply the *McDonnell Douglas* framework to failure to accommodate claims.[14]

In contrast, three of the four federal circuits that apply *McDonnell Douglas* to failure to accommodate claims often do not distinguish failure to accommodate from disparate treatment discrimination, applying the framework to both types of claims.[15] Only the D.C. Circuit distinguishes disparate treatment from failure to accommodate and further distinguishes claims arising under subparts (A) and (B), applying separate analyses to the differing claims.[16] Thus, when a plaintiff alleges failure to accommodate, nearly two-thirds of the federal circuits either never apply the *McDonnell Douglas* framework or always apply it.[17]

This Comment argues that federal courts should apply the *McDonnell Douglas* framework to failure to accommodate claims arising under subpart (B) but not to claims arising under subpart (A). Part I discusses the purpose of the ADA and the types of discrimination it prohibits. Part

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10. Four circuits oppose its use. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999); *Monette*, 90 F.3d at 1182–83; Hoffman v. Caterpillar Corp., 256 F.3d 568, 572 (7th Cir. 2001); Colo. Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1006 (10th Cir. 2001). Four circuits approve its use. *See, e.g.*, Hooven-Lewis v. Caldera, 249 F.3d 259, 267–71 (4th Cir. 2001); Taylor v. Principal Fin. Group, 93 F.3d 155, 162–63 (5th Cir. 1996); Allen v. Interior Constr. Servs., 214 F.3d 978, 981 (8th Cir. 2000); Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997).

11. Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1097 (9th Cir. 2001) (petitioning Court to determine whether *McDonnell Douglas* framework could be applied to failure to accommodate claims), *cert. denied*, 122 S. Ct. 201 (Oct. 4, 2001) (No. 01-60).

12. *See, e.g.*, *Hoffman*, 256 F.3d at 572.

13. *See, e.g.*, *Monette*, 90 F.3d at 1183.

14. *See, e.g.*, *Higgins*, 194 F.3d at 264.

15. *See, e.g.*, *Allen*, 214 F.3d at 981.

16. Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997).

17. The Second, Third, Ninth, and Eleventh Circuits have no precedent expressly condoning or rejecting the application of the *McDonnell Douglas* framework to failure to accommodate claims under either section.

II examines the development, application, and extension of the *McDonnell Douglas* framework to ADA claims. Part III discusses the conflict among the federal circuits regarding the applicability of the *McDonnell Douglas* framework to failure to accommodate claims. Finally, Part IV concludes that because subparts (A) and (B) establish the duty to accommodate by proscribing distinct employment actions, federal courts must determine which section of the ADA applies before selecting an analytical framework. Once a court makes this determination, it should apply the *McDonnell Douglas* framework only to failure to accommodate claims arising under subpart (B) because such claims require evidence of discriminatory intent and, like disparate treatment claims, may require indirect, circumstantial evidence to prove intent.

I. THE ADA AND DISABILITY DISCRIMINATION IN EMPLOYMENT

Congress passed the Americans with Disabilities Act of 1990 (ADA) to promote and protect, among other things, equal employment opportunities for disabled persons.[18] To this end, the ADA prohibits disability discrimination, including disparate treatment and disparate impact discrimination.[19] Section 12112(b)(5) also imposes an affirmative duty on employers to make reasonable accommodations that enable disabled persons to pursue, obtain, and enjoy employment opportunities.[20] If this duty is breached, an employer may be liable for failure to accommodate.[21]

18. 42 U.S.C. § 12101(a) (2001). The ADA also contains provisions regarding government services, public accommodations, and housing that are beyond the scope of this Comment.

19. *See, e.g.*, Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1179 (6th Cir. 1996) (discussing types of discrimination prohibited by the ADA).

20. 42 U.S.C. § 12112(b)(5)(A)–(B) (2001). *See, e.g.*, Muller v. Costello, 187 F.3d 298, 310 (2d Cir. 1999) (noting failure to accommodate claims arise from language of § 12112(b)(5)(A)–(B) of the ADA).

21. 42 U.S.C. § 12112(b)(5)(A)–(B) (2001).

A. *The ADA Prohibition Against Disability Discrimination in Employment*

In enacting the ADA, Congress recognized the interest and right of disabled persons to attain equality of economic opportunity.[22] Noting that discrimination is a primary barrier to achieving this interest,[23] Congress intended that the ADA enable disabled persons to pursue meaningful careers commensurate with their abilities by prohibiting disability discrimination.[24] The ADA's general provision prohibiting employment discrimination provides that:

> 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.[25]

Consistent with Congress' goal of ending disability discrimination, the operative phrasing "because of the disability" prohibits adverse employment actions—that is, decisions that adversely affect employment opportunities—in the form of both disparate treatment and disparate impact discrimination.[26] To be actionable under the ADA, the alleged discrimination must have some nexus to an adverse employment action.[27]

Disparate treatment discrimination involves adverse treatment in which the protected trait—disability status—motivated the employer's decision to treat the employee adversely.[28] Often, adverse employment decisions such as discharge are framed as disparate treatment claims.[29] To defend against a disparate treatment claim, an employer must proffer a legitimate, non-discriminatory reason for the adverse employment action.[30]

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22. *Id.* § 12101(a)(8).

23. *Id.* § 12101(a)(9).

24. *Id.* § 12101(a)–(b).

25. *Id.* § 12112(a).

26. *See, e.g.*, Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1179 (6th Cir. 1996).

27. Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997).

28. *Id. See also* Hazen Paper Co. v. Biggins, 507 U.S. 604, 609–10 (1993) (explaining disparate treatment and disparate impact discrimination).

29. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999).

30. *See, e.g.*, *Monette*, 90 F.3d at 1179.

In contrast, disparate impact involves facially neutral employment practices that affect disabled more harshly than non-disabled employees and cannot be justified by business necessity.[31] Examples of disparate impact discrimination include ostensibly neutral standards such as physical exams that disparately impact disabled persons.[32] To defend against a disparate impact claim, an employer must show that the challenged standard or requirement exists out of business necessity.[33]

Business necessity may be shown with objective evidence that establishes a relationship between the standard and essential functions of the job, including written job descriptions, the amount of time performing certain tasks, and the consequences of not performing certain tasks.[34] If the employer meets this burden, the employer may also have to show that the standard could not be achieved by reasonably accommodating a disabled person as an employee.[35] The principal difference between disparate treatment and disparate impact claims is that the former require proof of the employer's intent.[36]

B. The Duty to Provide Reasonable Accommodation Under the ADA

Congress also recognized that modifications of the work environment would play an integral role in the process of economically enfranchising disabled persons.[37] The ADA further protects the employment interests of disabled persons by placing an affirmative duty on employers to provide "reasonable accommodations" to the known limitations of an otherwise qualified disabled employee.[38]

A reasonable accommodation is properly understood as a means to an end.[39] Such ends include enabling disabled persons to be considered for employment opportunities,[40] to perform essential job functions once

31. *Hazen Paper Co.*, 506 U.S. at 609.

32. 42 U.S.C. §§ 12112(b)(3), (6) (2001). *See, e.g., Monette*, 90 F.3d at 1179.

33. *Id.* §§ 12112(b)(3), (6). *See, e.g., Monette*, 90 F.3d at 1179.

34. 29 C.F.R. § 1630.3(n)(3) (2001).

35. 42 U.S.C. § 12112(5)(A) (2001). *See infra* Part I B–C.

36. *Hazen Paper Co.*, 507 U.S. at 609 (quoting Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977)).

37. 42 U.S.C. § 12101(a)(5)–(6) (2001).

38. *Id.* § 12112(b)(5).

39. 29 C.F.R. § 1630.3(o)(1) (2001).

40. *Id.* §1630.3(o)(1)(i).

employed,[41] and to enjoy the benefits and privileges of employment enjoyed by other non-disabled employees.[42] For example, an employer may be required to provide a sign-language interpreter to accommodate a hearing-impaired employee's limitations.[43]

The ADA requires an employer to accommodate disability-related limitations that the employer knows about, and the employee bears the initial duty to inform the employer of such limitations.[44] Knowledge of an employee's disability does not in itself create a duty to accommodate because not all disabilities create limitations that affect an employee's ability to perform essential job functions.[45] It is the limitations, not the disability, that require accommodations.[46]

Once the employee informs the employer of such limitations, the employee and employer may work together in an interactive process to determine an appropriate accommodation.[47] This process helps determine the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[48] Although there is no express duty to engage in the interactive process,[49] failure to do so may inhibit an employer and employee's ability to find an appropriate reasonable accommodation.[50]

To be reasonable, an accommodation must be both cost-efficient and efficacious.[51] Accommodations that fail to address a disabled employee's limitations are not, by definition, reasonable.[52] However, while the ADA requires that conditions be adequate so that all employees can satisfactorily and comfortably perform the essential functions of their jobs,[53] the ADA does not require employers to expend even slight sums to create an identity between the working conditions of disabled and

41. *Id.* §1630.3(o)(1)(ii).

42. *Id.* §1630.3(o)(1)(iii).

43. *Id.* § 1630.3(o)(2)(ii).

44. Beck v. Wis. Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996).

45. Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 162–63 (5th Cir. 1996).

46. *Id.* at 164.

47. 29 C.F.R. § 1630.2(o)(3) (2001).

48. *Id. See, e.g., Beck*, 75 F.3d at 1135.

49. *Id.*

50. *Id.*

51. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 542–43 (7th Cir. 1995).

52. *Id.* at 542.

53. *Id. See also* 29 C.F.R. § 1630.3(n) (2001) (defining what constitutes essential job function and related evidence).

nondisabled applicants and employees.[54] Therefore, disabled persons are not entitled to accommodations that enable them to perform any non-essential job functions of their choosing,[55] nor are they entitled to their preferred accommodation if the employer provides an alternative means of reasonably accommodating the person's disability.[56]

C. *Breaching the Duty: Failure to Accommodate Claims*

Subparts (A) and (B) of § 12112(b)(5) of the ADA protect, respectively, both the existing and future employment opportunities of disabled persons by prohibiting two distinct ways that employers might breach the duty to accommodate.[57] Subpart (A) creates a duty to accommodate limitations associated with an existing employment opportunity,[58] holding an employer strictly liable for knowingly failing to accommodate a disabled employee's limitations unless accommodation would impose an undue hardship.[59] Under this section, a disabled person may sue for any failure to accommodate that results in an adverse employment action or condition.[60]

In contrast, subpart (B) creates a duty on employers to accommodate limitations that may arise from the conditions of a future opportunity and imposes liability on employers who deny future employment opportunities based on the need to make a reasonable accommodation.[61] Under this section, a disabled person may sue an employer any time the employer denies an employment opportunity that obviates its duty to accommodate.[62] Claims for failure to accommodate may arise under either section.[63]

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54. *Vande Zande*, 44 F.3d at 546.

55. Hoffman v. Caterpillar, Inc., 256 F.3d 568, 577 (7th Cir. 2001).

56. *Vande Zande*, 44 F.3d at 546.

57. 42 U.S.C. § 12112(b)(5)(A)–(B) (2001). *See* Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997) (distinguishing duty to accommodate and claims under subparts (A) and (B) of §12112(b)(5)).

58. 42 U.S.C. § 12112(b)(5)(A). *See Marshall*, 130 F.3d at 1099.

59. 42 U.S.C. § 12112(b)(5)(A).

60. *See Marshall*, 130 F.3d at 1099.

61. 42 U.S.C. § 12112(b)(5)(B) (2001). *See Marshall*, 130 F.3d at 1099.

62. *See Marshall*, 130 F.3d at 1099.

63. *See, e.g.*, Muller v. Costello, 187 F.3d 298, 310 (2d Cir. 1999).

1. *Failure to Accommodate Under § 12112(b)(5)(A) of the ADA: Strict Liability*

Subpart (A) prohibits employers from "not making reasonable accommodations to the known . . . limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business."[64] This subpart places a duty on employers to make accommodations to the limitations associated with the conditions of an existing employment opportunity[65] and imposes strict liability on employers who knowingly fail to accommodate disabled employees' limitations unless accommodation would impose an undue hardship on the employer.[66] The employer's intent is not an issue under subpart (A) because any failure to accommodate is necessarily because of the employee's disability—without the disability, there is no need for an accommodation.[67] The central issues in a failure to accommodate claim are whether a reasonable accommodation was available and whether the accommodation would pose an undue hardship.[68]

To establish a prima facie case of failure to accommodate under subpart (A), a plaintiff must show that he or she is a qualified individual with a disability within the meaning of the ADA; that the employer, despite knowledge of the disability, did not reasonably accommodate its limitations; and that the employer's failure to accommodate adversely affected the terms, conditions, or privileges of the plaintiff's employment.[69] The employee also carries the burden of proving that the requested accommodation was reasonable.[70]

With regard to the third element of the prima facie case, any adverse employment decision that stems from the lack of accommodation may be actionable under subpart (A), including difficult work conditions, denial

64. 42 U.S.C. § 12112(b)(5)(A) (2001).

65. *Id. See Marshall*, 130 F.3d at 1099.

66. 42 U.S.C. § 12112(b)(5)(A) (2001).

67. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999).

68. *Id.*

69. *Id.*

70. Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (stating "reasonable" means both "efficacious" and "proportioned to costs"). *See* Gaines v. Runyon, 107 F.3d 1171, 1175 (6th Cir. 1997) (requiring accommodation be both reasonable and necessary). *But cf. Higgins*, 194 F.3d at 264 (suggesting plaintiff need not prove efficacy).

of promotions, and discharge.[71] For example, a disabled employee who is fired for not meeting productivity requirements may challenge her discharge on the grounds that it resulted from a failure to accommodate her known limitations.[72] Thus, to establish the prima facie case, a plaintiff must show that adverse effect resulted from the denial of a reasonable accommodation.[73]

Once the plaintiff establishes the prima facie case, the employer must show that the accommodation would pose an "undue hardship" to the business.[74] The basic inquiries in a failure to accommodate claim are whether a reasonable accommodation was available and whether the accommodation would pose an undue hardship.[75] The resulting inquiry is primarily a cost-benefit analysis.[76] If the burden posed by accommodation would outweigh its benefit, then the accommodation poses an undue hardship.[77]

For example, a hearing-impaired employee may request a sign-language interpreter. The employer may deny the request on the grounds that it is too costly or that it is unnecessary for the employee to fulfill essential job functions. Although accommodations are generally viewed in terms of the financial burden they impose, courts consider other factors such as the type, location, size of the employer, and the nature of the accommodation.[78] Following the example, the court may examine the cost of the interpreter, the essential functions of the employee's job, the employer's resources, and the benefit to the employee. If an employer can demonstrate that accommodation would impose an undue hardship on the operation of the business, then it has not breached its duty to accommodate.[79]

71. *See* Marshall v. Federal Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997).

72. *Id.*

73. *Id.*

74. *Vande Zande*, 44 F.3d at 542.

75. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999).

76. *Vande Zande*, 44 F.3d at 542–43.

77. *Higgins*, 194 F.3d at 264.

78. 42 U.S.C. § 12111(10)(B) (2001).

79. *Vande Zande*, 44 F.3d at 543.

2. *Failure to Accommodate Under § 12112(b)(5)(B) of the ADA: Intent-based Liability*

In contrast, subpart (B) places a duty on employers to accommodate limitations related to conditions of future employment opportunities.[80] Subpart (B) prohibits employers from "denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make reasonable accommodation" to the limitations of the employee or applicant.[81] Failure to accommodate under subpart (B) involves two elements: the denial of an employment opportunity and the need for an accommodation, contingent upon the granting of the opportunity.[82] Because the reason for the denial is at issue, the employer's intent is the threshold issue under this section.[83]

Subpart (B) requires employers to consider disabled persons for employment opportunities, although affording such opportunities might require the employer to provide reasonable accommodation.[84] For example, an employer may not refuse opportunities such as hiring, promotion, training, or improved working conditions in order to avoid making reasonable accommodations that might accompany the opportunity.[85] Thus, once an employment opportunity arises, an employer may not deny it to avoid its duty to accommodate.[86]

To establish a prima facie case under subpart (B), an employee must show that he or she is a qualified individual with a disability within the meaning of the ADA; that he or she works for an employer covered by the ADA; that the employer had knowledge of the limitations requiring reasonable accommodations; and that the employee suffered an adverse employment action—the denial of an employment opportunity.[87]

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80. 42 U.S.C. § 12112(b)(5)(B) (2001). *See* Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997).

81. 42 U.S.C. § 12112(b)(5)(B).

82. *See Marshall*, 130 F.3d at 1099.

83. *See* Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 214–15 (4th Cir. 1994) (noting employer's knowledge of disability gives strong inference about intent); Zamudio v. Patla, 956 F. Supp. 803, 813 (N.D. Ill. 1997).

84. 42 U.S.C. § 12112(b)(5)(B). *See Marshall*, 130 F.3d at 1099.

85. 42 U.S.C. § 12112(b)(5)(B). *See Marshall*, 130 F.3d at 1099.

86. 42 U.S.C. § 12112(b)(5)(B). *See Marshall*, 130 F.3d at 1099.

87. *See* Hamman v. DHL Airways, 165 F.3d 441, 449–50 (6th Cir. 1999); *Zamudio*, 956 F. Supp. at 813.

Because the need for accommodation is contingent upon a grant of the opportunity, the nexus between the adverse employment action and the failure to accommodate is clear—the former will always precede the latter.

For example, an employer may decide not to hire a hearing-impaired employee because the employer knows that it will have to provide the employee a sign-language interpreter. The employee is denied the job and, consequently, the employer evades its duty to accommodate. However, unlike claims arising under subpart (A), the focus of subpart (B) claims is the employer's reason for the denial.[88] An employer may have other legitimate, non-discriminatory reasons for denying a disabled employee an opportunity, thereby denying the accommodation.[89]

For instance, an employer may deny a promotion because another more qualified applicant applied for the same position.[90] Also, like claims arising under subpart (A), employers are not liable under subpart (B) for denying employment opportunities that would necessitate accommodation if the accommodation would impose an undue hardship.[91] Thus, an employer is not liable under subpart (B) if accommodation would pose an undue hardship[92] or if the employer has another legitimate, non-discriminatory reason for denying an employment opportunity.[93]

II. THE *MCDONNELL DOUGLAS* FRAMEWORK

In the years following the passage of Title VII of the Civil Rights Act of 1964 (Title VII),[94] plaintiffs bringing discrimination suits faced difficulty in proving the subjective intent of their employers.[95] The Supreme Court recognized this difficulty and created the *McDonnell Douglas* burden-shifting framework.[96] The framework permits plaintiff employees to prove discriminatory intent through indirect, circumstantial

88. *See Marshall*, 130 F.3d at 1099–1100.

89. *Id.*

90. Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 214–15 (4th Cir. 1994).

91. *See, e.g.*, Muller v. Costello, 187 F.3d 298, 310 (2d Cir. 1999).

92. *Id.*

93. *See, e.g.*, *Marshall*, 130 F.3d at 1100 (employer gave fiscal reason for denial).

94. Civil Rights Act of 1964 Title VII, 42 U.S.C. §§ 2000e–2000e-17 (2001).

95. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973).

96. *Id.*

evidence when no direct evidence of discrimination is available.[97] From its inception, the Supreme Court intended that the framework be adaptable to the varying elements of discrimination claims.[98] Federal courts have taken advantage of the framework's adaptability, extending its use to the analysis of claims brought under the ADA.[99]

A. *Title VII of the Civil Rights Act of 1964 and* McDonnell Douglas Corp. v. Green

Title VII made it unlawful for an employer to discriminate in hiring and terms of employment because of a person's race, color, religion, sex, or national origin.[100] However, federal courts interpreting Title VII lacked "harmony" in their application of its protections, so the Supreme Court granted certiorari to *McDonnell Douglas Corp. v. Green*[101] in order to clarify the standards for analyzing employment discrimination claims.[102] Specifically, the Supreme Court addressed the issues of the proper order and substantive nature of evidence required to prove discriminatory animus in actions brought under Title VII.[103]

In *McDonnell Douglas*, the defendant refused to rehire a black mechanic after he participated in an illegal demonstration that disrupted business.[104] The Supreme Court held that the district court erred by not permitting the plaintiff to offer evidence at trial showing that the employer's proffered reason for its refusal to rehire was a pretext—or subterfuge—for racial discrimination.[105] The Court reasoned that discriminatory animus could be inferred if the employer rehired white employees who engaged in the illegal protest or, even less directly, through evidence that indicated that the employer was hostile to civil rights activities.[106] The Court concluded that the fact that an employer is able to adduce a legitimate, non-discriminatory reason—here, employee

97. *Id.*

98. *McDonnell Douglas*, 411 U.S. at 802 n.13.

99. *See, e.g.*, Halperin v. Abacus Tech. Corp., 128 F.3d 191, 196–97 (4th Cir. 1997).

100. 42 U.S.C. §§ 2000e–2000e-17 (2001).

101. 411 U.S. 792 (1973).

102. *Id.* at 798.

103. *Id.* at 793–94.

104. *Id.* at 796–97.

105. *Id.* at 807.

106. *Id.* at 804–05.

misconduct—for an adverse employment action is not dispositive of a Title VII claim if the reason is shown to be pretext for discrimination.[107]

B. *The* McDonnell Douglas *Evidentiary Framework: Shifting Burdens of Production and Persuasion and their Effects*

The *McDonnell Douglas* framework consists of a three-step process designed to address the issue of an employer's discriminatory intent.[108] The difficulty of proving intent stems from the fact that unless an employer admits to having discriminatory motives, there will be no direct evidence of illegal motive for an adverse employment action. Therefore, the Supreme Court established the framework to permit plaintiffs to prove discriminatory intent with indirect, circumstantial evidence, particularly evidence of pretext.[109]

The *McDonnell Douglas* Court created a burden-shifting framework to address the lack of direct evidence of discriminatory intent.[110] The framework consists of three flexible but distinct steps.[111] First, a plaintiff must establish, by a preponderance of the evidence,[112] the basic elements of a prima facie case of discrimination: that he or she is a member of a protected class; that he or she is qualified for the job; and that he or she suffered an adverse employment action.[113] The Supreme Court observed that the plaintiff's burden of establishing a prima facie case of discrimination is "not onerous;" however, the prima facie case served a crucial function in litigation by eliminating common nondiscriminatory reasons for the defendant's actions.[114] Moreover, the prima facie case raises the presumption that, more likely than not, the employer discriminated against the employee.[115] Under the *McDonnell Douglas* analysis, a plaintiff's failure to establish a prima facie case entitles a defendant to judgment as a matter of law.[116]

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107. *Id.* at 804.

108. *Id.* at 802.

109. *Id.* at 804–05.

110. *Id.* at 802.

111. *Id.* at 802 n.13 (explaining that because facts will vary in Title VII cases, elements of prima facie case will vary).

112. Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

113. *See id.*

114. *Id.* at 253–54.

115. *Id.* at 254.

116. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 140 (2000).

Second, the burden then shifts to the defendant employer, who must offer a legitimate, nondiscriminatory explanation for its action.[117] If the defendant proffers a legitimate reason, the presumption of discrimination simply "drops from the case."[118] The defendant need not persuade the court that it did not discriminate; the second step shifts the burden of production, not the burden of persuasion.[119] The ultimate burden of persuading the court that the employer discriminated remains at all times on the plaintiff.[120] Nevertheless, a defendant's failure to offer a legitimate reason for the adverse employment action entitles the plaintiff to judgment as a matter of law.[121]

Third, if the employer proffers a legitimate, non-discriminatory reason for its actions, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was pretext for discrimination.[122] The purpose of the third step is to afford the plaintiff a chance to demonstrate that the employer's presumptively valid reasons for the adverse employment action were in fact a cover-up for discrimination.[123] It is possible to infer pretext from a variety of types of indirect evidence, including general disparate treatment of employees from protected groups.[124] For example, a black plaintiff that was refused re-employment for participating in a strike might show that his or her former employer rehired white employees that participated in the strike.[125]

However, evidence of pretext does not mandate a finding for the plaintiff,[126] though a plaintiff's failure to establish evidence of pretext entitles a defendant to judgment as a matter of law.[127] The Supreme Court is aware that in some situations, despite evidence of both a prima facie case and pretext, no rational factfinder could conclude that the

117. *Burdine*, 450 U.S. at 253.

118. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

119. *Id.*

120. *Burdine*, 450 U.S. at 253.

121. *Id.* at 254 (stating that if the employer "is silent in the face of the presumption," judgment must be entered for the plaintiff).

122. *Id.* at 253.

123. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973).

124. *Id.* at 804–05.

125. *Id.* at 804.

126. *See* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 524 (1993) (explaining that proof of pretext is not, in itself, proof of discrimination).

127. *See, e.g.*, Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 140 (2000).

employer's action was discriminatory.[128] Thus, courts must consider factors such as the strength of the plaintiff's prima facie case, the probative value of evidence of pretext, and other evidence that supports the employee's case.[129]

C. *The Adaptability of the* McDonnell Douglas *Framework: Extending its Utility to ADA Claims*

The Supreme Court intended that the *McDonnell Douglas* framework be adaptable to the varying elements of the prima facie case of discrimination.[130] Noting the flexibility of the framework[131] as well as the difficulty of directly proving discriminatory intent in disability discrimination suits,[132] federal courts have adopted the *McDonnell Douglas* framework for the analysis of discrimination claims under the ADA.[133] Courts using the *McDonnell Douglas* framework recognize that it is not to be rigidly applied; it is simply a means of fine-tuning the presentation of proof in order to focus on the ultimate issue of whether the employee demonstrated that the employer intentionally discriminated.[134]

To establish a prima facie case of discrimination under the ADA, a plaintiff must show that he or she has a qualifying disability; is qualified for the job, with or without a reasonable accommodation; and that he or she suffered an adverse employment action because of the disability.[135] Once the prima facie case has been established, the burden shifts to the

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128. *See e.g., id.* at 148.

129. *Id.* at 148–49.

130. *McDonnell Douglas*, 411 U.S. at 802 n.13.

131. *See, e.g.*, Halperin v. Abacus Tech. Corp., 128 F.3d 191, 196 n.6 (4th Cir. 1997) (noting framework should not be rigidly applied).

132. *See, e.g.*, United States Postal Servs. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) (stating that direct testimony as to employer's mental processes is rare).

133. Congress intended that the same legal standards that apply to Rehabilitation Act claims be applied to ADA claims. *See, e.g.*, Wong v. Regents of Univ. of Calif., 192 F.3d 807, 816 (9th Cir. 1999) (applying same legal standards to ADA claims as found in Rehabilitation Act precedent). Because the Supreme Court applied *McDonnell Douglas* to a Rehabilitation Act claim in *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 276 (1987), it is generally accepted that the framework is applicable to ADA claims. *See, e.g.*, *Wong*, 192 F.3d at 816.

134. *Halperin*, 128 F.3d. at 196 n.6.

135. *Id.* at 197 (explaining prima facie case of disparate treatment under the ADA). For analytical clarity, this Comment does not address mixed motive cases in which the plaintiff's disability status was one among many factors that influenced the employer's decision.

employer to proffer a legitimate, non-discriminatory reason for the adverse employment decision.[136] If the employer proffers a legitimate reason for its action, then the burden shifts back to the employee to present evidence that the employer's reason is pretextual.[137] Evidence of pretext may include an employer's refusal to engage in the interactive process to find an accommodation,[138] repeated denials of accommodations,[139] and discriminatory remarks aimed at disabled employees.[140]

III. THE *MCDONNELL DOUGLAS* FRAMEWORK AND FAILURE TO ACCOMMODATE CLAIMS: CONFLICTING ANALYSES FROM THE FEDERAL CIRCUITS

While all of the federal circuits recognize failure to accommodate claims arising under subparts (A) and (B) of § 12112(b)(5) of the ADA,[141] the federal circuits are divided in their approach to such claims.[142] Specifically, the circuits are split regarding the applicability of the *McDonnell Douglas* framework to failure to accommodate claims arising under the respective subparts. The resulting precedent can be broken down into four types, according to whether the circuit applies the *McDonnell Douglas* framework to claims arising, respectively, under subparts (A) and (B) of the ADA.

A. *Circuits Applying* McDonnell Douglas *to Claims Arising Under 42 U.S.C. § 12112(b)(5)(A)*

Federal appelate courts in the Fourth, Fifth, and Eighth circuits apply the *McDonnell Douglas* framework to failure to accommodate claims

136. *See, e.g.*, Marshall v. Fed. Express Corp., 130 F.3d 1095, 1100 (D.C. Cir. 1997).

137. *Id.*

138. *See, e.g.*, Walstead v. Woodbury County, Iowa, 113 F. Supp. 2d 1318, 1342 (N.D. Iowa 2000).

139. *See, e.g.*, Kells v. Sinclair Buick-GMC Truck, Inc., 210 F.3d 827, 833–34 (8th Cir. 2000).

140. *Id.*

141. *See supra* sections II.B–C.

142. It should be noted that the Second, Third, Ninth, and Eleventh circuits have not expressly addressed this issue. *See supra* note17.

arising under subpart (A).[143] In selecting an analytical framework for ADA cases, these circuits do not distinguish disparate treatment claims from failure to accommodate claims.[144] Rather, these circuits permit the plaintiff to proceed either with direct or indirect evidence of discrimination.[145]

For example, in *Mole v. Buckhorn Rubber Products*[146] the plaintiff Mole worked in customer service for Buckhorn until her multiple sclerosis (MS) began to detract from her job performance.[147] Mole's supervisor conducted several performance reviews, eventually warning her that she must improve or be terminated.[148] Mole's MS worsened, and she took a series of medical leaves.[149] Mole returned to work but failed another performance review, so her supervisor notified her that she would be terminated.[150] On her last day, Mole requested that she would be allowed to continue working under various accommodated conditions, but Buckhorn ignored the request and declined to reinstate her.[151]

Mole filed suit, alleging failure to accommodate under § 12112(b)(5)(A) of the ADA.[152] The district court applied the *McDonnell Douglas* framework and held that Mole failed to establish a prima facie case of disability discrimination; thus the court granted Buckhorn summary judgment.[153] The district court reasoned that even if Mole had established a prima facie case, she failed to offer evidence of pretext to rebut Buckhorn's legitimate reason for its decision to terminate, her poor job performance.[154] The Eight Circuit affirmed on the

143. *See, e.g.*, Hooven-Lewis v. Caldera, 249 F.3d 259, 268–71 (4th Cir. 2001); Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 623 n.3 (5th Cir. 2000); Allen v. Interior Constr. Servs., 214 F.3d 978, 981 (8th Cir. 2000).

144. *See, e.g.*, *Hooven-Lewis*, 249 F.3d at 268–71; *Allen*, 204 F.3d at 623 n.3; *Allen*, 214 F.3d at 981.

145. *See, e.g.*, *Hooven-Lewis*, 249 F.3d at 268–71; *Allen*, 204 F.3d at 623 n.3; *Allen*, 214 F.3d at 981.

146. 165 F.3d 1212 (8th Cir. 1999).

147. *Id.* at 1215–16.

148. *Id.*

149. *Id.*

150. *Id.* at 1216.

151. *Id.*

152. *Id.*

153. *Id.* at 1214.

154. *Id.*

same grounds, noting that Mole's poor job performance had begun over a year before she was aware that she had MS.[155]

The Eighth Circuit's approach has met with some internal criticism.[156] In a dissenting opinion in *Mole*, Judge Lay criticized both the trial court and appellate court for applying *McDonnell Douglas* to Mole's failure to accommodate claim.[157] He noted that *McDonnell Douglas* should only apply to disparate treatment claims, not claims arising under §12112(b)(5).[158] Judge Lay further noted that the central question in a failure to accommodate claim is whether the employer should have accommodated the employee but did not.[159] His dissent also criticized the majority for being misled by the plaintiff's misapplication of legal principles in bringing the claim under *McDonnell Douglas*.[160] Finally, Judge Lay concluded that a triable issue remained regarding Mole's claims because Buckhorn was aware of Mole's MS, its effects on her performance, and potential accommodations before it decided to terminate her; thus the issue was whether Buckhorn had fulfilled its duty under the ADA.[161]

B. *Circuits Not Applying* McDonnell Douglas *to Claims Arising Under 42 U.S.C. § 12112(b)(5)(A)*

In contrast, the First, Sixth, Seventh, and Tenth circuits have adopted a position similar to Judge Lay's and have expressly rejected the use of the *McDonnell Douglas* framework for ADA failure to accommodate claims.[162] These circuits distinguish failure to accommodate claims from disparate treatment claims, noting that the former are best resolved with

155. *Id.* at 1218–19.

156. *Id.* at 1219 (Lay, J., dissenting). *See also* Montgomery v. John Deere & Co., 169 F.3d 556, 562 (8th Cir. 1999) (Lay, J., concurring, but criticizing use of *McDonnell Douglas*); Walstead v. Woodbury County, 113 F. Supp. 2d 1318, 1326 n.3 (N.D. Iowa 2000) (expressing misgivings about precedent using *McDonnell Douglas* in failure to accommodate claims).

157. *Mole*, 165 F.3d at 1219 (Lay, J., dissenting).

158. *Id.*

159. *Id.*

160. *Id.* at 1220 n.4.

161. *See id.* at 1221.

162. *See, e.g.*, Colo. Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1006 n.9 (10th Cir. 2001); Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 n.3 (1st Cir. 2001); Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996); Hoffman v. Caterpillar, Inc., 256 F.3d 568, 573 (7th Cir. 2001) (citing Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283 (7th Cir. 1996)).

direct, objective evidence.[163] Thus, none of these circuits applies *McDonnell Douglas* to claims arising under subpart (A).

For instance, in *Higgins v. New Balance Athletic Shoe, Inc.*,[164] the plaintiff Higgins, a hearing-impaired factory worker, complained that sweat-inducing steam and noise from a loudspeaker were interfering with his hearing aid and making it difficult for him to work.[165] He requested that a fan be installed and that the loudspeaker be moved, but New Balance denied these requests.[166] Following a series of warnings for confrontations with co-workers, New Balance terminated Higgins for insubordination.[167]

Higgins filed suit, alleging wrongful discharge and failure to accommodate under subpart (A).[168] The district court applied *McDonnell Douglas* to both claims and, finding no evidence of discriminatory animus, granted New Balance summary judgment on both claims.[169] On appeal, Higgins reasserted his failure to accommodate claim.[170]

The First Circuit distinguished Higgins' failure to accommodate claim from the other enumerated types of discrimination under the ADA, stating that failure to accommodate claims do not require that the plaintiff show that the employer's action was motivated by discriminatory intent.[171] The court reasoned that any failure to accommodate is necessarily due to the presence of the disability because without the disability, no accommodation is necessary.[172] The court further reasoned that any failure to accommodate violates the ADA regardless of the employer's intent, unless the proposed accommodation would create an undue hardship.[173] The First Circuit concluded that it was inappropriate to apply *McDonnell Douglas* to Higgins's failure to

163. *See, e.g., Colo. Cross*, 264 F.3d at 1006 n.9; *Reed*, 244 F.3d at 259 n.3; *Monette*, 90 F.3d at 1183; *Hoffman*, 256 F.3d at 573.

164. 194 F.3d 252 (1st Cir. 1999).

165. *Id.* at 257–58.

166. *Id.*

167. *Id.* at 257.

168. *See id.* at 256, 264.

169. *Id.* at 263.

170. *Id.*

171. *Id.*

172. *Id.* at 263–64.

173. *Id.*

accommodate claim because no evidence of intent is needed for such claims.[174]

The First Circuit explained that to survive a motion for summary judgment on a failure to accommodate claim, a plaintiff must establish a prima facie case of discrimination.[175] The court noted that Higgins had a hearing impairment, that New Balance knew of the impairment, and that management failed to supply a fan or move the loudspeaker.[176] Therefore, the First Circuit vacated and remanded the district court's grant of summary judgment for New Balance on Higgins' subpart (A) failure to accommodate claim.[177]

Like the First Circuit, the Sixth, Seventh, and Tenth circuits also reject the application of *McDonnell Douglas* to subpart (A) failure to accommodate claims. The Sixth Circuit has noted that failure to accommodate claims hinge upon two issues—whether the requested accommodation is reasonable, and whether it would impose an undue hardship—both of which are best resolved through direct, objective evidence.[178] The Seventh Circuit has held repeatedly that the *McDonnell Douglas* framework is inappropriate for failure to accommodate claims because they are not disparate treatment claims.[179] Finally, the Tenth Circuit has adopted the First Circuit's reasoning and also has rejected the application of *McDonnell Douglas* to ADA failure to accommodate claims.[180]

C. *Circuits Applying* McDonnell Douglas *to Claims Arising Under 42 U.S.C. § 12112(b)(5)(B)*

While the D.C. Circuit is the only circuit to explicitly apply the *McDonnell Douglas* framework to claims under subpart (B),[181] presumably the Fourth, Fifth, and Eighth circuits, due to their liberal application of the framework, would also apply the analysis to such

174. *Id.* at 264–65.

175. *Id. See also supra* note 69 and accompanying text for the elements of a prima facie case.

176. *Id.* at 265.

177. *Id.*

178. Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996).

179. *See, e.g.*, Hoffman v. Caterpillar, Inc., 256 F.3d 568, 573 (7th Cir. 2001).

180. Colo. Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1006 n. 9 (10th Cir. 2001).

181. *See, e.g.*, Marshall v. Fed. Express, Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997).

claims.[182] The Sixth Circuit may also apply the framework, though its apposite precedent is unclear.[183] Only the D.C. Circuit both distinguishes disparate treatment claims from failure to accommodate claims as well as subpart (A) claims from subpart (B) claims, applying *McDonnell Douglas* only to claims arising under subpart (B).[184]

For example, in *Marshall v. Federal Express Corp.*,[185] the plaintiff Marshall worked as a customer service agent for Federal Express.[186] Marshall suffered an injury while on duty, making it difficult for her to meet the lifting requirements of her job.[187] Marshall entered a temporary light-duty work program to recover from her injury.[188] Marshall did not recover, so Federal Express hired someone else to fill her position and gave her a ninety day grace-period to find another job within the company.[189] A co-worker suggested she apply for an operations agent job at another Federal Express facility, but the same co-worker then erroneously told her that she could not work there because Marshall's husband worked there.[190] By the time Marshall discovered the mistake, the position had been retracted.[191] Unable to find another job within the company, Marshall was fired seventy-five days after the grace period ended.[192]

Marshall filed suit in federal court, alleging that Federal Express failed to accommodate her by refusing to grant her the operations agent

182. *See, e.g.*, Tyndall v. Nat'l Educ. Ctr., Inc. of Cal., 31 F.3d 209, 214–15 (4th Cir. 1994) (noting that strong presumption of non-discriminatory motive imputed when same person hires and fires in 42 U.S.C. § 12112(b)(5)(B) claim); *see also* Allen v. Interior Constr. Servs., 214 F.3d 978, 981 (8th Cir. 2000) (applying *McDonnell Douglas* to claim characterized as a 42 U.S.C. § 12112(b)(5)(A) claim where plaintiff alleged that employer attempted to avoid duty to accommodate by refusing to rehire him). *But see* Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 216–22 (2d Cir. 2001) (characterizing allegation of failure to promote to avoid making accommodation as 42 U.S.C. § 12112(b)(5)(A) claim and not applying *McDonnell Douglas*).

183. Hamman v. DHL Airways, 165 F.3d 441, 449 (6th Cir. 1999) (addressing 42 U.S.C. § 12112(b)(5)(B) claim by citing portion of *Monette*, 90 F.3d at 1185, referring to instances in which *McDonnell Douglas* applies).

184. *Marshall*, 130 F.3d at 1099.

185. 130 F.3d 1095 (D.C. Cir. 1997).

186. *Id.* at 1096.

187. *Id.* at 1097.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* at 1097–98.

position at the other facility.[193] The district court granted Federal Express summary judgment on this claim, noting both that Federal Express offered a legitimate reason for its actions and that Marshall offered no evidence that the reason was pretextual.[194]

The D.C. Circuit determined that the only adverse employment action presented in the claim was the denial of the opportunity to apply for the operations agent position.[195] It distinguished Marshall's subpart (B) failure to accommodate claim from wrongful termination and stated that the *McDonnell Douglas* framework was the appropriate analytical tool for Marshall's claim.[196] The court noted that Federal Express had given a legitimate reason for its decision to deny Marshall the operations position: the position was eliminated following a staffing analysis.[197] Marshall did not present any evidence that this reason was pretext for discriminatory motive; thus the appellate court affirmed the district court's grant of summary judgment.[198]

D. *Circuits Not Applying* McDonnell Douglas *to Claims Arising Under 42 U.S.C. § 12112(b)(5)(B)*

Finally, the Seventh Circuit expressly rejects the application of the *McDonnell Douglas* framework to failure to accommodate claims arising under subpart (B), stating that the framework applies only to disparate treatment claims.[199] The First, Sixth, and Tenth circuits may also reject the use of the framework for subpart (B) failure to accommodate claims, depending upon how broadly one interprets their precedent.[200] However, unlike these circuits, the Seventh Circuit distinguishes failure to

193. *See id.* at 1099.

194. *Id.* at 1097, 1099.

195. *Id.* at 1099.

196. *Id.*

197. *Id.* at 1100.

198. *Id.*

199. *See, e.g.*, Hoffman v. Caterpillar, Inc., 256 F.3d 568, 573 (7th Cir. 2001).

200. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 n.5 (1st Cir. 1999) (distinguishing claims under 42 U.S.C. §§ 12112(b)(5)(A) and (B) of the ADA); Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996) (omitting 42 U.S.C. § 12112(b)(5)(B) in discussion of ADA failure to accommodate claims); Colo. Cross Disability Coalition v. Hermanson Family Ltd. P'ship I, 264 F.3d 999, 1006 n.9 (10th Cir. 2001) (adopting First Circuit's approach without mention of 42 U.S.C. § 12112(b)(5)(B)).

accommodate claims from disparate treatment claims[201] but does not distinguish subpart (A) claims from subpart (B) claims.[202]

For example, in *Bultemeyer v. Fort Wayne Community Schools*,[203] the plaintiff Bultemeyer worked as a custodian for the Fort Wayne Community Schools (FWCS) for fifteen years.[204] Bultemeyer began to suffer from depression and schizophrenia and took a series of disability leaves.[205] After a year's absence, his supervisor asked if he was ready to return and told him that there was an opportunity at a high school.[206] His supervisor also told him that he would have to take a physical and stated that, unlike his previous custodial job, no special accommodations would be made.[207] Bultemeyer was warned that failure to take the exam or show up for work would result in termination.[208]

After touring the school, Bultemeyer felt overwhelmed, so he declined the job and refused to take the physical for fear he might pass it and have to take the position.[209] Subsequently, his supervisor fired him.[210] A few hours after his firing, Bultemeyer gave his supervisor a note from his psychiatrist, stating that he should work at a less stressful school.[211] Bultemeyer was not reinstated, so he sued FWCS for failure to accommodate.[212]

The district court applied *McDonnell Douglas* and granted FWCS summary judgment, holding that Bultemeyer neither established a prima facie case of discrimination nor showed a timely request for accommodation.[213] The Seventh Circuit reversed, holding that *Bultemeyer* presented a failure to accommodate claim, not a disparate treatment claim; thus the district court should not have applied

201. *See, e.g.*, Lenker v. Methodist Hosp., 210 F.3d 792, 799 (7th Cir. 2000).

202. *See, e.g.*, Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283 (7th Cir. 1996). *Cf. supra* note 200.

203. *Bultemeyer*, 100 F.3d at 1281.

204. *Id.* at 1281.

205. *Id.* at 1281–82.

206. *Id.* at 1282.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

McDonnell Douglas.[214] The appellate court explained that the *McDonnell Douglas* framework is inappropriate for failure to accommodate claims such as Bultemeyer's arising under subparts (A) and (B) because they are not disparate treatment claims.[215]

In its analysis, the Seventh Circuit distinguished failure to accommodate claims from disparate treatment claims, pointing out that Bultemeyer was not complaining that he was being treated differently or less favorably than other FWCS employees.[216] The court further stated that failure to accommodate claims need no indirect evidence and should be analyzed differently than disparate treatment claims.[217] The Seventh Circuit noted that FWCS was aware of Bultemeyer's disability and that his past experience as a custodian for FWCS suggested that he was qualified for the position at the high school, though he may have needed some form of accommodation.[218] The court the explained that but for FWCS' unwillingness to engage in the interactive process, the record might reflect that Bultemeyer needed a small adjustment in his duties to enable him to take the position.[219]

The Seventh Circuit determined that FWCS appeared to have "taken hasty advantage" of an opportunity to rid itself of a disabled employee whom it was "tired of having to accommodate."[220] The court concluded that FWCS, because of its knowledge of and the severity of Bultemeyer's mental illness, should have taken greater steps to find an accommodation.[221] In failing to do this, the court determined that FWCS appeared to have acted in bad faith during the interactive process.[222] On these grounds, Seventh Circuit reversed and remanded the district court's grant of summary judgment.[223]

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214. *Id.* at 1283.
215. *Id.* at 1283–84.
216. *Id.*
217. *Id.*
218. *Id.* at 1284–85.
219. *Id.* at 1285.
220. *Id.* at 1286–87.
221. *See id.* at 1286.
222. *Id.* at 1287.
223. *Id.*

IV. *MCDONNELL DOUGLAS* PRETEXT ANALYSIS SHOULD BE APPLIED ONLY TO FAILURE TO ACCOMMODATE CLAIMS ARISING UNDER §12112(B)(5)(B) OF THE ADA

Federal courts should apply the *McDonnell Douglas* framework only to failure to accommodate claims arising under § 12112(b)(5)(B) of the ADA. First, whereas the proscribed discrimination under subpart (A) results *from* a failure to accommodate, the proscribed discrimination under subpart (B) results *in* a failure to accommodate. This distinction should serve as an aid to courts in distinguishing claims arising under subpart (A) from those arising under subpart (B) and help focus the analysis on the relevant issue, depending upon the type of claim. Second, because an employer's intent is an issue under subpart (B), claims arising under this section should be analyzed using the *McDonnell Douglas* framework. Third, because failure to accommodate claims under subpart (B) are analogous to disparate treatment discrimination, particularly with regard to need and use of circumstantial evidence, courts should apply the *McDonnell Douglas* framework to such claims.

A. *Federal Courts Must Distinguish Failure to Accommodate Claims Arising Under § 12112(b)(5)(A) from those Arising Under § 12112(b)(5)(B)*

When a plaintiff alleges failure to accommodate, a court must first examine the facts to determine whether an existing or future duty to accommodate has been violated. In making this determination, the court must ask whether the alleged failure to accommodate preceded or followed the adverse employment action that gave rise to the suit. If the court finds that the adverse employment action followed the alleged failure to accommodate, then an existing duty to accommodate has been violated under subpart (A).[224] If the court finds that the adverse employment action preceded the alleged failure to accommodate, then a future duty to accommodate has been violated under subpart (B).[225] By making this determination, the court will avoid potentially irrelevant inquiries of intent, reasonableness, and undue hardship.

224. *Supra* notes 65–66 and accompanying text.

225. *Supra* notes 65–66 and accompanying text.

For any ADA claim of discrimination to be actionable, the plaintiff must have suffered some form of adverse employment action.[226] The key distinction between claims arising under, respectively, subpart (A) and subpart (B) is whether the adverse employment action followed or preceded the need for accommodation.[227] Liability under subpart (A) involves the breach of an existing duty to accommodate associated with present employment conditions in which the failure to accommodate led to adverse conditions or an adverse decision;[228] thus the adverse action follows a denied request for accommodation.[229] Conversely, under subpart (B) the adverse employment action will necessarily precede—actually cause—the failure to provide a reasonable accommodation.[230]

For example, in the hypothetical,[231] Jack alleges failure to accommodate after being fired. Jack may suspect that DotCom discriminated against him by denying him the privilege of participating in company meetings when it refused his requests for an interpreter. Jack may also suspect that DotCom fired him out of a desire to avoid having to provide the sign-language interpreter as a condition of continued employment. Whereas the former claim involves an existing duty to accommodate as described in subpart (A), the duty to provide an interpreter as a condition of future employment involves a future duty to accommodate as described in subpart (B).[232] Jack's loss of the privilege of participating in company meetings followed DotCom's denial of his request for accommodation, so this adverse action may give rise to a subpart (A) claim. In contrast, Jack's termination preceded DotCom's duty to provide the interpreter for future meetings, so this adverse action may give rise a subpart (B) claim.

This distinction is important with regard to the relevant issues raised by each respective claim. To analyze Jack's first claim—his subpart (A) claim—the court would ask only whether providing an interpreter was a reasonable accommodation and whether it would have posed an undue

226. *Supra* notes 65–66 and accompanying text. *See also* Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099 (D.C. Cir. 1997) (noting ADA requirement of an adverse employment action).

227. *Supra* notes 65–66 and accompanying text.

228. *Supra* note 65 and accompanying text.

229. *See Marshall*, 130 F.3d at 1099.

230. *See id.*

231. *Supra* note 1 and accompanying text.

232. *Supra* notes 57–61 and accompanying text; *see also supra* Part I.C.1.–2.

hardship on DotCom.[233] The court would not inquire into DotCom's subjective reasons for the denial because subpart (A) imposes a sort of strict liability for refusing such a request unless it is unreasonable or unduly burdensome.[234]

In contrast, DotCom's subjective intent is the central issue in Jack's subpart (B) claim that DotCom terminated him in order to avoid having to provide the interpreter as a condition of future employment. Because it is possible that DotCom would have had to provide the interpreter as a condition of Jack's future employment, the issue remains whether DotCom fired Jack to avoid this duty.[235] Issues of reasonableness and undue hardship would only be relevant if DotCom had affirmatively responded to Jack's claim, asserting the undue hardship defense.[236] However, in the hypothetical DotCom asserted that it fired Jack for violating company policies; thus DotCom's intent is an issue.

In order to uphold the protections of the ADA, federal courts must first determine whether the adverse employment action arose from an existing duty to accommodate or preceded a future duty to accommodate. Once this determination has been made, federal courts should select an appropriate analytical tool for the disposition of the claims. By ignoring the distinction between the two types of failure to accommodate claims, courts run the risk of selecting an inappropriate framework, thereby leading the analysis into potentially irrelevant inquiries of reasonableness, undue hardship, and intent.

B. *Federal Courts Should Apply the* McDonnell Douglas *Framework Only to Claims Arising under § 12112(b)(5)(B) Because the Employer's Intent is the Central Issue of Such Claims*

Failure to accommodate claims arising under subpart (A) do not involve the issue of employer's intent, so the *McDonnell Douglas* framework is inapplicable to such claims. In contrast, intent is the critical issue in claims arising under subpart (B). Because the *McDonnell Douglas* framework is used to discern intent, federal courts should apply the framework to claims arising under subpart (B).

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233. *Supra* notes 174–77 and accompanying text.

234. *Supra* notes 65–79 and accompanying text.

235. *Supra* notes 80–93 and accompanying text.

236. *Supra* notes 74–77 and accompanying text.

1. *Intent is not an Issue in 42 U.S.C. § 12112(b)(5)(A) Claims, so the* McDonnell Douglas *Framework is Inapplicable to such Claims*

Subpart (A) protects present employment interests of disabled persons by prohibiting employers from "not making reasonable accommodations" unless the accommodations pose an undue hardship.[237] The duty to accommodate under subpart (A) exists once the employer is aware that a disabled person suffers from limitations that affect the terms, conditions, or privileges of his or her existing employment opportunity.[238] When an employer knowingly refuses to accommodate existing disability-related limitations, the disabled person may suffer an adverse employment action as a result.[239] In such a case, the disabled person may allege failure to accommodate, and the only two relevant issues are whether a reasonable accommodation was available and whether such an accommodation would pose an undue hardship on the employer.[240] Thus, subpart (A) in effect imposes strict liability on the employer with undue hardship as the only exception to the duty to accommodate.[241]

For instance, in the above hypothetical, Jack requested a sign-language interpreter so that he could participate in company meetings.[242] Participation in the meetings could be considered a condition or privilege associated with Jack's existing employment similar to the comfortable work environment sought by the plaintiff in *Higgins*.[243] Jack's request for an interpreter is also similar to the plaintiff's request for a fan and the moving of the loudspeaker in *Higgins*.[244] In each case, the relevant issues are whether the request was reasonable and whether the employer would have suffered undue hardship in granting that request.[245]

The problem with the analysis in *Mole* is that, in spite of both the fact that Mole's MS precipitated her declining work performance and the fact

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237. 42 U.S.C. § 12112(b)(5)(A) (2001). *See also supra* Part I.C.1.

238. *Supra* notes 44–46 and accompanying text.

239. *Supra* notes 65–68 and accompanying text.

240. *Supra* notes 65–68 and accompanying text. *See also* Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (explaining that accommodation is only needed because of a disability, so any denial is discrimination because of a disability).

241. *Higgins*, 194 F.3d at 264.

242. *Supra* note 1 and accompanying text.

243. *Supra* notes 164–66 and accompanying text.

244. *Supra* notes 164–66 and accompanying text.

245. *See supra* notes 44–56 and accompanying text.

that her employer was aware of her disability-related difficulties, the court applied *McDonnell Douglas* and focused its inquiry on her employer's intent.[246] Mole's employer stated she was fired for her poor job performance, and the record clearly supported this contention.[247] Nevertheless, this analysis leads to precisely the sort of circularity—and result—that the ADA prohibits: a disabled person is terminated for failing to fulfill job requirements that she could only fulfill with a reasonable accommodation. Thus, the adverse employment action—discharge—resulted from the failure to accommodate, triggering the protection afforded by subpart (A).

Under subpart (A) the issue of whether an accommodation is reasonable depends on a variety of factors. These factors include whether the employee suffered from a qualifying disability; whether the disability resulted in limitations; whether the limitations affected the terms, conditions, or privileges of employment; whether the employer was aware of these limitations; and whether the requested accommodation would effectively address the limitations.[248] None of these factors involves the employer's intent; they are objective questions best addressed through the introduction of direct evidence.[249]

Similarly, the issue of whether reasonable accommodation would pose an undue hardship is also best resolved through the introduction of direct, objective evidence.[250] This issue involves factors such as the size, type, and resources of a business as well as a cost-benefit analysis of the effect of the proposed accommodation.[251] Again, the requisite direct evidence addresses objective issues and not the subjective issue of the employer's intent.[252] Thus, employer's intent, the central issue of a *McDonnell Douglas* analysis, is not an issue in subpart (A) claims; therefore federal courts should not apply the *McDonnell Douglas* framework to such claims.[253]

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246. *Supra* notes 152–55 and accompanying text.

247. *Supra* note 155 and accompanying text.

248. *Supra* notes 44–46 and accompanying text.

249. *See* Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1183 (6th Cir. 1996).

250. *Id.*

251. *Supra* notes 76–78 and accompanying text.

252. *See Monette*, 90 F.3d at 1183; Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999).

253. *Supra* notes 171–74 and accompanying text.

2. *Intent is the Central Issue in 42 U.S.C. § 12112(b)(5)(B) Claims, so Federal Courts Should Apply the* McDonnell Douglas *Framework to such Claims*

Subpart (B) of the ADA also protects employment opportunities for disabled persons by placing a duty on employers to provide reasonable accommodations.[254] In contrast to the existing duty to provide reasonable accommodations established in subpart (A), subpart (B) places a duty on employers to not deny employment opportunities to disabled persons because of the need to make reasonable accommodation.[255] The denial of an employment opportunity does not automatically give rise to liability under this section; rather liability arises only when the denial is motivated by the employer's desire to avoid making accommodations.[256] If the employer's intent is known, then the *McDonnell Douglas* framework is unnecessary.[257] However, when an employer's intent is unknown or in dispute, federal courts should then apply the *McDonnell Douglas* framework because it is the appropriate analytical tool for resolving the issue of intent.[258]

Using the above hypothetical as an illustration,[259] Jack may suspect that DotCom took advantage of an opportunity to fire him to avoid having to provide him an interpreter as a condition of future employment. DotCom asserted that it fired Jack for violation of company policies, and the adverse employment action—discharge—preceded Jack's future need for an interpreter. Because this claim involves a future duty to accommodate, it arises under subpart (B). Thus, DotCom's intent is the central issue.

If the court were to apply the analysis used in, for example, *Higgins* to Jack's failure to accommodate claim, the court would ask only whether providing an interpreter was a reasonable accommodation and whether it would pose an undue hardship. While such an analysis may be appropriate for Jack's subpart (A) claim that DotCom's denial of his request adversely affected the conditions of his employment,[260] it makes

254. *Supra* notes 80–83 and accompanying text.

255. *Supra* notes 80–83 and accompanying text.

256. *Supra* note 80 and accompanying text.

257. *Cf. supra* note 110 and accompanying text (explaining purpose of framework is to resolve issue of intent when direct evidence is lacking).

258. *Supra* notes 195–96and accompanying text.

259. *Supra* note 1 and accompanying text.

260. *Supra* notes 65–79 and accompanying text.

little sense for the court to apply the same analysis to Jack's subpart (B) claim that DotCom terminated him in order to avoid having to provide the interpreter.

Following the analysis in *Higgins*, a court may find DotCom liable under subpart (B) without establishing DotCom's intent to fire Jack to avoid its duty because the requested accommodation was both reasonable and not unduly burdensome. This is precisely what the Seventh Circuit did in *Bultemeyer*: the court looked at issues of reasonableness but nevertheless concluded that the defendant was liable based on inferences it drew regarding the employer's intent.[261]

In *Bultemeyer*, the plaintiff requested an accommodation as a condition of accepting an employment opportunity.[262] The employer discharged the plaintiff prior, asserting that employee failed to show up for his required physical or to his first day of work.[263] In spite of the Seventh Circuit's observations that it appeared that the employer fired the plaintiff to avoid accommodating him—a phrase nearly identical to the language found in subpart (B)—the Seventh Circuit made no formal inquiry into the employer's intent.[264] Rather, the court speculated at the reasonableness of accommodating the plaintiff, ultimately concluding that the employer had acted in bad faith.[265] This inconsistency could be avoided if the court follows *Marshall* and begins with the issue of DotCom's intent before reaching the issues of reasonableness and hardship.[266]

As explained above, an employer's intent is the central issue of a claim arising under subpart (B).[267] An employer may be silent as to its motive or offer another non-discriminatory reason for denying an opportunity, leaving the employee with little more than evidence of a prima facie case of discrimination under subpart (B).[268] Because the prima facie case does not prove the employer's subjective intent was to avoid making an accommodation,[269] an employee must also rely on

261. *Supra* notes 217–23 and accompanying text.
262. *Supra* notes 205–07 and accompanying text.
263. *Supra* notes 208–10 and accompanying text.
264. *Supra* notes 220–22 and accompanying text.
265. *Supra* notes 220–22 and accompanying text.
266. *Supra* notes 194–98 and accompanying text.
267. *Supra* notes 80–83 and accompanying text.
268. *Supra* note 87 and accompanying text.
269. *Supra* notes 127–29 and accompanying text.

indirect, circumstantial evidence such as evidence of pretext that infers the employer's intent.[270]

Without a means of inferring intent through evidence of pretext, an employee like Jack must rely on the employer's proffered reason for its motive.[271] Because it is unlikely that an employer will admit that it intended to avoid its duty to accommodate, it is unlikely that an employer will be held liable for denying the opportunity without circumstantial evidence.[272] The *McDonnell Douglas* framework is designed to permit a plaintiff to prove indirectly what cannot be proved directly by introducing evidence of pretext,[273] and the framework is readily adapted to the elements of a subpart (B) failure to accommodate claim.[274] Thus, federal courts should apply *McDonnell Douglas* to claims arising under subpart (B) when the central issue of intent is disputed.

B. *Unlike Failure to Accommodate Claims Under § 12112(b)(5)(A), Claims Under § 12112(b)(5)(B) are Analogous to Disparate Treatment Claims, so Federal Courts Should Apply the* McDonnell Douglas *Framework to such Claims*

Whereas failure to accommodate claims under subpart (A) are analogous to ADA disparate impact claims, failure to accommodate claims under subpart (B) are analogous to ADA disparate treatment claims. Under subpart (A), failure to accommodate claims do not require a showing of discriminatory intent, and the undue hardship defense requires direct, objective evidence similar to evidence required for the business necessity defense used in disparate impact claims. In contrast, failure to accommodate claims under subpart (B), like disparate treatment claims, hinge on the issue of the employer's intent and may require inferential evidence when direct evidence is unavailable. Thus, while the *McDonnell Douglas* framework is not appropriate for claims arising under subpart (A), the *McDonnell Douglas* framework is the appropriate analytical tool for claims arising under subpart (B).

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270. *Supra* notes 127–29 and accompanying text.

271. *Supra* notes 122–23 and accompanying text.

272. *Supra* notes 118–20 and accompanying text.

273. *Supra* notes 118–20 and accompanying text.

274. *Supra* notes 185–98 and accompanying text.

1. *Failure to Accommodate Claims Under § 12112(b)(5)(A) are Analogous to Disparate Impact Claims, Making the* McDonnell Douglas *Framework Inapplicable*

Failure to accommodate claims under subpart (A) are analogous to ADA disparate impact claims.[275] Like disparate impact claims, subpart (A) failure to accommodate claims do not require a showing of discriminatory intent and are best resolved with direct, objective evidence.[276] Thus, the *McDonnell Douglas* framework is inapplicable to subpart (A) failure to accommodate claims.

Disparate impact disability discrimination involves facially neutral employment policies and procedures that inadvertently limit employment opportunities for disabled persons.[277] For example, in the above hypothetical,[278] if DotCom were to adopt a policy requiring all employees to participate in the monthly meetings, then hearing-impaired employees like Jack might be impacted differently than non-hearing impaired employees because without an interpreter, participation might be impossible. DotCom's reason for requiring participation would be irrelevant because the policy discriminates by disparately impacting the hearing-impaired whether DotCom intends it to or not.[279] Thus, like disparate impact claims, subpart (A) failure to accommodate claims involve a type of strict liability that arises regardless of the employer's intent.[280] The *McDonnell Douglas* framework is designed to resolve the issue of an employer's intent.[281] Because there is no need for evidence pertaining to the employer's intent, the *McDonnell Douglas* framework is inapplicable to subpart (A) failure to accommodate claims.

Also, like disparate impact claims, subpart (A) failure to accommodate claims are best resolved with direct, objective evidence.[282] An employer's only defense to a disparate impact claim is to show the

275. *See* Monette v. Electronic Data Sys. Corp., 90 F.3d 1173, 1179 (6th Cir. 1996) (noting Title VII disparate impact claims are analogous to § 12112(b)(5)(A) claims and ADA disparate impact claims).

276. *Supra* notes 26–36 and accompanying text.

277. *Supra* notes 26–36 and accompanying text.

278. *Supra* note 1 and accompanying text.

279. *Supra* notes 31–36 and accompanying text.

280. *Supra* notes 31–36 and accompanying text.

281. *Supra* notes 103–19 and accompanying text.

282. *Supra* notes 34–36 and accompanying text.

challenged policy or standard exists out of business necessity.[283] Likewise an employer's only defense to a subpart (A) failure to accommodate claim is to show that the accommodation would create an undue hardship.[284] In contrast, the *McDonnell Douglas* framework is designed to resolve the issue of intent through inferential evidence.[285] Due to the direct, objective nature of the evidence required for each respective defense, the *McDonnell Douglas* framework is inappropriate for the resolution of the main issues in disparate impact and subpart (A) failure to accommodate claims.

2. *Failure to Accommodate Claims Under §12112(b)(5)(B) are Analogous to Disparate Treatment Claims, Making the* McDonnell Douglas *Framework Applicable*

In contrast, failure to accommodate claims under subpart (B) are analogous to ADA disparate treatment claims. Like disparate treatment discrimination, failure to accommodate claims under subpart (B) involve differential treatment of disabled persons because of their disabilities.[286] Also, like disparate treatment claims, failure to accommodate claims under subpart (B) hinge on the issue of the employer's intent. Such claims may require indirect, inferential evidence, particularly evidence of pretext.[287]

First, ADA disparate treatment claims and failure to accommodate claims under subpart (B) are similar because they both involve differential treatment of disabled employees. Disparate treatment under the ADA includes adverse employment actions such as discharge, refusal to hire, and refusal to promote.[288] If an employer takes such an action because of an employee's disability, then the employer has discriminated in violation of the ADA.[289]

Similarly, a disabled employee who is denied an employment opportunity because of the need for accommodation has been treated

283. *Supra* note 31 and accompanying text; *cf.* Monette v. ElectronicElec. Data Sys. Corp., 90 F.3d 1173, 1179 (6th Cir. 1996).

284. *Supra* notes 34–35 and accompanying text.

285. *Supra* notes 103–24 and accompanying text.

286. *Supra* note 28 and accompanying text.

287. *Supra* notes 28, 79–82 and accompanying text.

288. *Supra* note 28 and accompanying text.

289. *Supra* note 25 and accompanying text.

differently than a non-disabled employee who has no need for accommodation.[290] This differential treatment is due to the disability; without the disability, the accommodation would not be necessary.[291] Thus, in denying an opportunity that potentially requires accommodation, the employer is effectively denying the opportunity on the basis of an employee's disability.[292]

Second, plaintiffs bringing either disparate treatment or failure to accommodate claims under subpart (B) face a similar challenge in proving discriminatory intent.[293] When a plaintiff succeeds in establishing a prima facie case of disparate treatment discrimination, and the employer successfully rebuts the presumption of discrimination, the plaintiff must present evidence indicating that the employer's reason is a pretext for discrimination.[294]

For example, in the above hypothetical,[295] DotCom claims that it fired Jack for violation of company policies. Jack may suspect that DotCom fired him either because he is deaf or to avoid having to accommodate him by providing a sign-language interpreter as a condition of future employment. While Jack might be able to adduce evidence of a prima facie case of both types of discrimination,[296] he must also show that DotCom's proffered reason is pretext for an illicit motive—disability prejudice or a desire to avoid providing an accommodation.[297] Evidence that non-disabled employees who similarly violated DotCom's policies were not fired as well as evidence that DotCom denied opportunities to other disabled employees who potentially needed accommodations might suggest DotCom's proffered reason is false. Consequently, such evidence might show DotCom's reason is pretext for illicit discrimination.[298]

Without evidence of pretext or the opportunity to present it, disparate treatment claims and subpart (B) failure to accommodate claims such as

290. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999) (explaining that any failure to accommodate is always because of a disability).

291. *See id.*

292. *See id.*

293. *See, e.g.*, Marshall v. Fed. Express Corp., 130 F.3d 1095, 1099–1100 (D.C. Cir. 1997).

294. *Supra* notes 110–23 and accompanying text.

295. *Supra* note 1 and accompanying text.

296. *Supra* notes 87 and 135 and accompanying text.

297. *Supra* notes 80–83 and accompanying text.

298. *Supra* note 116 and accompanying text

Jack's will fail as a matter of law.[299] The *McDonnell Douglas* framework was designed to permit plaintiffs alleging disparate treatment to show discriminatory intent through circumstantial evidence.[300] Because subpart (B) claims, like disparate treatment claims, require proof of intent, which may require inferential evidence, federal courts should apply the *McDonnell Douglas* framework to failure to accommodate claims arising under § 12112(b)(5)(B) of the ADA.

V. CONCLUSION

The two subparts of § 12112(b)(5) of the ADA establish two distinct duties to accommodate. Subpart (A) establishes a duty on employers to make accommodations to disability-based limitations associated with the conditions of an existing employment opportunity. In contrast, subpart (B) establishes a duty on employers not to deny future employment opportunities because such opportunities might require the employer to accommodate disabled employees. Violation of either section gives rise to a claim for failure to accommodate.

In addressing failure to accommodate claims, most federal courts either uniformly adopt or reject the *McDonnell Douglas* analytical framework without recognizing the distinction between the two types of claims. The uniform adoption or rejection of the framework for failure to accommodate claims leads courts into irrelevant inquiries of intent, reasonableness, and undue hardship, depending upon whether it is a subpart (A) or subpart (B) claim.

To address failure to accommodate claims properly, courts must first determine whether an existing duty or future duty to accommodate has been violated. Unlike claims arising under subpart (A), claims under subpart (B) involve a future duty to accommodate and require evidence of an employer's intent. Direct evidence of intent is difficult to establish; however, the *McDonnell Douglas* framework is designed to discern intent through inferential evidence. By permitting a plaintiff to infer intent through inferential evidence, particularly evidence of pretext, the *McDonnell Douglas* framework facilitates the analysis of claims arising under § 12112(b)(5)(B) of the ADA.

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299. *Supra* note 118 and accompanying text.

300. *Supra* note 110 and accompanying text.