Washington and Lee Journal of Civil Rights and Social Justice

Volume 5 | Issue 1 Article 8

Spring 4-1-1999

LATIMORE v. CITIBANK FEDERAL SAVINGS BANK 151 F.3d 712 (7th Cir. 1998)

LATIMORE v. CITIBANK FEDERAL SAVINGS BANK
151 F.3d 712 (7th Cir. 1998)

FACTS AND PROCEDURAL HISTORY

Helen Latimore owned a home in a predominately black neighborhood in Chicago, Illinois.[1] She applied to Citibank Federal Savings Bank ("Citibank") for a $51,000 loan using her home as collateral.[2] Citibank required that two conditions be met to receive a loan: creditworthiness, and that the collateral value be at least 75% of the amount of the loan.[3] Latimore received an appraisal on the house a year earlier for $82,000, that would qualify her for a $61,500 loan. Citibank did not know of the first appraisal when it initially denied the loan.[4] Citibank's appraiser, Ed Kernbauer, however, valued the home at $45,000.[5] Kernbauer's appraisal made the requested $51,000 loan 113% of the collateral.[6]

When Citibank denied Latimore's application for a loan, Latimore informed Citibank of the initial appraisal for $82,000.[7] A Citibank official forwarded the first appraisal and Kernbauer's appraisal to Citibank's review department.[8] The review department discredited the first appraisal on grounds it lacked a proper basis for comparison because the first appraiser used a method the Citibank appraisers rejected in comparing neighborhood home sales.[9] Citibank did not overrule their appraiser, Kernbauer, and subsequently denied the loan application.[10]

Following Citibank's rejection, Latimore applied for a loan with another bank.[11] The new bank's appraiser valued Latimore's home at $79,000.[12] Based on the new estimate, Latimore qualified for a loan of $46,000 at a higher interest rate at the second bank.[13]

Latimore brought suit against Citibank and several Citibank officials in federal district court alleging racial discrimination in real estate lending.[14] She alleged that the defendants violated the Equal Credit Opportunity Act ("ECOA")[15] and the Fair Housing Act ("FHA").[16] The district court granted summary judgment to the defendants because Latimore failed to make a prima facie showing of credit discrimination.[17] The district court ruled that plaintiffs "must show that 'race was a motivating consideration in the [defendants'] decision not to make the

---

[1] Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 713 (7th Cir. 1998).

[2] *Id.*

[3] *Id.*

[4] *Id.* Using Citibank's formula that the amount of the loan not exceed 75 percent of the collateral's value, if the appraiser estimates the value of the house at $82,000, Citibank would multiply that amount by 0.75 to find 75 percent of the collateral's value. The resulting amount, $61,500, is 75 percent of $82,000.

[5] *Id.*

[6] *Id.* Using the reverse of the previous formula, dividing the requested loan amount, $51,000, by Citibank's collateral appraisal, $45,000, one gets 1.13. To give Latimore the loan amount she requested, Citibank would have to grant a loan 113 percent the value of the collateral. In order to meet Citibank's 75 percent requirement, Latimore's home needed to have been appraised at or above $68,000 ($51,000 divided by 0.75).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] 15 U.S.C. § 1691(a)(1) (1998).

[16] 42 U.S.C. §§ 3605(a), (b) (1998).

[17] *Latimore*, 151 F.3d at 713.

loan" in actions arising under the ECOA or FHA.[18]

HOLDING

To the extent courts have extended the *McDonnell Douglas v. Green*[19] standard to various kinds of discrimination[20] under the Equal Credit Opportunity Act ("ECOA") and the Fair Housing Act ("FHA"), the court refused to extend it to cases of discrimination in lending.[21] The plaintiff may "try to show in a conventional way, without relying on any special doctrines of burden-shifting, that there is enough evidence, direct or circumstantial, of discrimination to create a triable issue."[22] The plaintiff failed to meet this burden and the district court's grant of summary judgment for defendants was affirmed.[23]

ANALYSIS

In *McDonnell Douglas*[24] the United States Supreme Court established the test for a prima facie case of racial discrimination.[25] A plaintiff must show "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."[26] When the plaintiff establishes a prima facie case, the burden then shifts to the defendant to show a nondiscriminatory reason for the plaintiff's rejection.[27]

The Court in *McDonnell Douglas* looked specifically at racial discrimination in employment hiring.[28] The defendant (McDonnell Douglas Corporation) laid off the plaintiff in a "general reduction in work force."[29] Later, when the defendant advertised open employment positions, plaintiff applied and was rejected.[30] The Supreme Court found that the plaintiff established a prima facie case and allowed the discrimination suit to continue.[31]

In *Latimore*, Latimore attempted to use the *McDonnell Douglas* standard to shift the burden to defendants to prove there was no ill intent.[32] The theory is that the defendant is more likely to have evidence to rebut discrimination than the plaintiff would have to

---

[18] Latimore v. Citibank, F.S.B., 979 F. Supp. 662, 664 (N.D. Ill. 1997) (citing Thomas v. First Fed. Sav. Bank, 653 F. Supp. 1330, 1338-39 (N.D. Ind. 1987)).

[19] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). A plaintiff may plead discrimination and survive summary judgment either by showing evidence of discrimination, or using the *McDonnell Douglas* standard. *McDonnell Douglas* involved discrimination in employment, and the court required a plaintiff to show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [his] qualifications." *Id.* at 802. Then the burden shifts to the defendant to come forward with "some legitimate, nondiscriminatory reason for the employee's rejection." *Id.*

[20] The *McDonnell Douglas* standard was extended to age discrimination in employment in *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177 (7th Cir. 1997).

[21] *Latimore*, 151 F.3d at 715.

[22] *Id.*

[23] *Id.* at 716.

[24] 411 U.S. 792 (1973).

[25] *Id.* at 802.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 793-96.

[29] *Id.* at 794.

[30] *Id.* at 796.

[31] *Id.* at 807.

[32] *Latimore*, 151 F.3d at 712.

prove discrimination.[33] "[E]ssential evidence is in the defendant's possession and [it] would be difficult for the plaintiff, even with the aid of modern pretrial discovery, to dig [the evidence] out of the defendant."[34] If plaintiffs lacked this burden shifting, it would be very difficult for them to prove discrimination because they would not have the necessary information to prove intent. But the court of appeals would not allow the burden shifting because this situation does not parallel *McDonnell Douglas*.[35]

In the credit lending situation, an applicant does not usually directly compete with other applicants for loans. "Latimore was not competing with a white person for a $51,000 loan."[36] The *Latimore* court distinguishes *McDonnell Douglas* because with the facts in *Latimore* the plaintiff cannot show disparate treatment of similarly situated persons and thus never met the standard.[37] However, the court does allow for an opportunity for plaintiffs to shift the burden if the bank proposes a competitive situation.[38] If a bank did provide a competitive setting for granting loans, for example if the bank stated that a $51,000 loan would be available on a certain date and one applicant would be chosen in an open application process, courts could then apply the *McDonnell Douglas* standard because there is a "basis for comparing the defendant's treatment of the plaintiff with the defendant's treatment of other, similarly situated persons."[39] But because Latimore failed to show more than a mere suspicion of racial discrimination, the district court was forced to grant summary judgment. "No reasonable suspicion of racial discrimination can arise from the mere fact of a discrepancy between an appraisal conducted by another bank and the appraisal made by Citibank's employee."[40] Plaintiff must show a comparison "between the treatment of blacks and the treatment of whites."[41]

The standard of a mere suspicion, however, opens up the possibility that Latimore could have survived the summary judgment motion if she had shown more than a mere suspicion. Plaintiffs need to demonstrate "enough evidence, direct or circumstantial, of discrimination to create a triable issue."[42] Latimore attempted to create a triable issue by comparing several appraisals of her house's value.[43] The court found the differences in appraisals only showed that appraisers differ: "[r]eal estate appraisal is not an exact science, . . . the fact that Citibank's appraisal was lower than someone else's does not create an inference of discrimination."[44]

Further, Latimore argues that Citibank discriminated by giving white applicants extra consideration by "help[ing] them raise the appraised value of their property. . . ."[45] However, the court found that a Citibank official did help Latimore try to raise the value of the appraisal so that the loan would be approved.[46] The official urged Latimore to participate in the review process and submit the earlier, higher appraisal so that Citibank's appraisal review department could investigate and possibly overrule the appraiser's estimate.[47] Latimore was unable to show that

---

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 715.

[41] *Id.*

[42] *Id.* (citing Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985)).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* at 716.

[47] *Id.*

bank officials did anything more for white applicants, or any less for her to raise the appraisal value.

Finally the court noted that Citibank's appraiser lost his notes.[48] The government requires banks to keep these records for at least twenty-five months after a loan denial.[49] Courts presume that missing evidence contained information adverse to the violator.[50] The Court, however, accepts Citibank's incontroverted explanation that it lost the notes inadvertently, and thus rejects a presumption of ill intent.[51]

CONCLUSION

Latimore signals the Seventh Circuit's reluctance to extend the *McDonnell Douglas* standard to cases of discrimination where there is no direct comparison of applicants available. In the credit lending situation, plaintiffs must show disparate treatment to use the burden shifting techniques of the *McDonnell Douglas* standard.

At the district court level, Latimore relied heavily on the holding in *Old West End Association v. Buckeye Federal Savings & Loan,*[52] an Ohio case. Latimore argued that under the standard in *Old West End*, a plaintiff had established a prima facie case by "showing that (1) the property was in a minority neighborhood, (2) an application for a loan secured by this property was made, (3) an independent appraisal concluded that the value of the property was sufficient to secure the loan, (4) the applicant was otherwise credit [sic] worthy, and (5) the loan application was rejected."[53] Using this standard, Latimore would have proven a reasonable suspicion of discrimination and been able to survive summary judgment.

The district court, however, did not follow the Ohio case because this prima facie analysis has been applied only in the Northern District of Ohio and because of factual differences in the two cases.[54] In affirming the district court, the Seventh Circuit, refused to apply the Ohio analysis in credit lending.[55] Under the district court's analysis, if the facts were similar enough, the *Old West End* test could have been applied. [56] Therefore, the court did not foreclose use of the *Old West End* test. Further, the appellate court did not expressly criticize the Ohio court's analysis. While the district court opinion cited the Ohio cases and acknowledged their precedent without applying it in this instance,[57] the appellate court did not mention the Ohio holdings either to say that analysis should not apply here because of factual differences, or because of general problems with the extension of the *McDonnell Douglas* standard without a direct competitor.

While the *Latimore* court acknowledged that two circuits have looked into extending the *McDonnell Douglas* standard to instances of credit lending, neither of those circuits has fully accepted extension. In *Simms v. First Gibraltar Bank,*[58] the Fifth Circuit held that the denied applicant would not be able to recover because he did not show discrimination.[59] The applicant's case failed

---

[48] *Id.*

[49] 12 C.F.R. § 202.12(b)(1)(i).

[50] *Latimore*, 151 F.3d at 716. *See, e.g.*, Hicks v. Gates Rubber Co., 833 F.2d 1406, 1418-19 (10th Cir. 1987); Favors v. Fisher, 13 F.3d 1235, 1239 (8th Cir. 1994).

[51] *Latimore*, 151 F.3d at 716.

[52] *Latimore*, 979 F. Supp. at 666-67 (citing Old West End Ass'n v. Buckeye Fed. Sav. & Loan, . 675 F. Supp. 1100 (N.D. Ohio 1987)).

[53] *Latimore*, 979 F. Supp. at 666-67.

[54] *Id.* at 667.

[55] *Latimore*, 151 F.3d at 714-15.

[56] *See Latimore*, 979 F. Supp. at 667.

[57] *Id.* at 666-67.

[58] 83 F.3d 1546 (5th Cir. 1996).

[59] Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996). In this case, the defendant bank denied a loan

because "[Simms] presented absolutely no evidence that other, 'non-protected' applicants or applications were treated any differently around the time of [Simms'] rejection."[60] While the Fifth Circuit does not expressly reject the *McDonnell Douglas* standard in credit lending cases, it does not freely allow application of the standard without any comparison situation.[61] The court expressly rejected Simms' theory that the burden shifted to the defendants to prove non-discriminatory effect.[62] "The ultimate burden of persuasion that race was an intentional and significant factor in rejecting Simms' proposal was squarely on Simms."[63]

The *Latimore* court also discussed *Ring v. First Interstate Mortgage, Inc.*[64] where the Eighth Circuit held the *McDonnell Douglas* standard would apply to cases under the FHA.[65] However, the Eighth Circuit also discussed the specific evidentiary standard needed to apply the burden shifting.[66] "[T]he prima facie case under this analysis is an evidentiary standard -- it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination that shifts the burden to defendant to articulate some legitimate, nondiscriminatory reason for its conduct."[67] Thus, the *Ring* court says plaintiffs may use the *McDonnell Douglas* standard once they have proven a prima facie case of discrimination.[68]

While the *Latimore* court cited to the Fifth and Eighth Circuits as courts that employ *McDonnell Douglas* in extended situations, the disparity between the circuits is not great. None of these circuits would allow a plaintiff to use the *McDonnell Douglas* standard without evidence of direct competition, racial discrimination, or other impact. While this may not be enough for the Supreme Court to decide this matter, many credit discrimination cases arise in the Seventh (Chicago) and Sixth (Ohio) Circuits.[69] If most of these lending discrimination cases do come from these two circuits that differ on interpretation, the Supreme Court may want to rule on the issue.

Future courts should examine the plaintiff's inherent difficulties in being able to meet the prima facie standard and the defendant's need for a concrete standard. Even here, Citibank wanted the court to apply the *McDonnell Douglas* standard.[70] If banks did not discriminate and had evidence to show that both minority and majority candidates received the same treatment, courts would dismiss these cases summarily. Banks would be forced to turn over documents they already

---

to the applicant, Simms, to repair the apartment building he owned and leased to mainly minorities. Simms alleged that the minority status of his tenants and partners caused the bank to deny the loan. The jury found that Simms had been discriminated against and that there were discriminatory effects to the loan denial. *See id.* at 1554.

[60] *Id.* at 1558.

[61] *See id.*

[62] *Id.* at 1559.

[63] *Id.*

[64] 984 F.2d 924 (8th Cir. 1993).

[65] *Id.* at 926. While the court discusses application of the *McDonnell Douglas* standard to credit lending under the FHA, the court declines to use this analysis because the case appears from dismissal under Rule 12(b). *Id.* The court will not review a prima facie case at the pleading stage and thus does not employ the *McDonnell Douglas* standard.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 927.

[69] Robert G. Schwemm, *Introduction to Mortgage Lending Discrimination Law*, 28 J. MARSHALL L. REV. 317, 332 n.4 (1995). Schwemm postulates that so many of these cases come from these two areas because they both have "[S]ome of the more aggressive private fair housing organizations in the country, and these organizations had the interest, resources, and energy to bring lending discrimination cases when very few other could do so." *Id.*

[70] *Latimore*, 151 F.3d at 713.

have -- and that the government requires them to keep in any case.

Summary and Analysis prepared by:

Kathleen A. Kelley