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Latimore v. Citibank Federal Savings Bank: A Journey through the Labyrinth of Lending Discrimination

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I. INTRODUCTION

Discrimination is an omnipresent force in our society. The faceless shadow rears its ugly head in a variety of places, and impacts the lives of countless Americans every day. Tomorrow, for instance, an African American woman will be turned down for a job because of her race. The next day, an aging man will be replaced without warning by a younger employee. Over the years, the legislature and the judiciary have taken turns wrestling with the complex issues created as a result of widespread discriminatory practices. During the 1960s and 1970s, Congress attempted to remedy some forms of discrimination by passing the Fair Housing Act (FHA) and the Equal Credit Opportunity Act (ECOA).1 Similarly, the United States Supreme Court attempted to define a standard for evaluating all discrimination cases arising under the rubric of Title VII employment discrimination, the McDonnell Douglas standard.2 This standard requires plaintiffs to first establish a prima facie case of discrimination. Then, assuming the first step is met, the burden shifts to the defendant to state a non-discriminatory basis for the action taken.3 Although the McDonnell Douglas standard was introduced in the employment discrimination context, it has been adopted by courts


2. See McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). Under the McDonnell Douglas standard, a plaintiff must prove four elements: (1) the plaintiff belongs to a racial minority; (2) he applied and was qualified for a job the employer was trying to fill; (3) although qualified, he was rejected; (4) thereafter, the employer continued to seek applicants with the plaintiff’s qualifications. See id. See also infra notes 63-67 and accompanying text.

to determine discrimination in other contexts as well, including cases addressing both age and disability discrimination. ⁴

Reconsider the African-American woman mentioned earlier. What happens if she applies for a bank loan and is refused? If she believes that her race was a motivating factor in the decision, should the courts use the McDonnell Douglas standard to determine whether the defendant’s actions were discriminatory, violating the FHA and the ECOA?

In Latimore v. Citibank Federal Savings Bank, an African American woman brought suit alleging credit discrimination in real estate lending after the bank refused to issue her a loan based on the its own appraisal of her current property.⁵ While the United States Supreme Court has not yet heard arguments on this precise issue,⁶ there is a split in the courts of appeal over whether the McDonnell Douglas standard is appropriate for credit discrimination cases.⁷ This Note will explore the facts and holding of Latimore v. Citibank Federal Savings Bank in Part II.⁸ Part III will examine the relevant background law, including pertinent statutory and regulatory provisions as well as holdings from other circuits.⁹ Part IV will provide an analysis of the court’s opinion in Latimore, focusing on a discussion of conflicting opinions from the Fifth, Seventh, Eighth, and Ninth Circuits.¹⁰ Finally, this Note will conclude that the Seventh Circuit erred in its treatment of the Latimore case, and that the

⁴. See Latimore v. Citibank Fed. Sav. Bank, 151 F.3d 712, 713 (7th Cir. 1998) (applying the McDonnell Douglas standard to the facts presented in a loan discrimination lawsuit); see also Coco v. Elmwood Care Inc., 128 F.3d 1177, 1178 (7th Cir. 1997) (invoking the McDonnell Douglas standard in a case concerning the Age Discrimination in Employment Act); Leffel v. Fin. Serv., 113 F.3d 787, 792 (7th Cir. 1997) (holding that the McDonnell Douglas evidentiary standard is appropriate for plaintiffs filing complaints under the Americans with Disabilities Act).

⁵. Latimore, 151 F.3d at 712.

⁶. Thus far, the Supreme Court has declined the invitation to rule on a case involving loan discrimination. It denied certiorari in both Ring v. First Interstate Mortgage, 984 F.2d 924 (8th Cir. 1993), cert. denied, 118 S. Ct. 1189 (1998), and Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996), cert. denied, 117 S. Ct. 610 (1996). Counsel for the plaintiff in the Latimore case did not pursue certiorari.

⁷. See Latimore, 151 F.3d at 712 (holding that the McDonnell Douglas standard is inappropriate in the credit discrimination context). For a contrasting opinion, see Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996) (allowing the McDonnell Douglas standard in a credit discrimination context).

⁸. See infra notes 12-42 and accompanying text.

⁹. See infra notes 43-99 and accompanying text.

¹⁰. See infra notes 100-69 and accompanying text.
McDonnell Douglas standard should be extended to apply in all credit discrimination lawsuits.  

II. STATEMENT OF THE CASE


Helen Latimore, an African-American plaintiff, brought suit alleging discriminatory treatment by defendant Citibank Federal Savings Bank (Citibank) when the bank and its employees denied her mortgage loan application. Specifically, Ms. Latimore applied for a loan of $51,000 using her current home as collateral for the loan. In making its decision, Citibank utilized a two step analysis to determine whether Ms. Latimore satisfied its lending requirements. First, in accordance with bank regulations, Citibank performed a routine credit check on Ms. Latimore. Upon finding that Ms. Latimore met the initial creditworthiness requirement, the bank then analyzed the ratio between the appraised value of Ms. Latimore’s home to the amount of the loan in question. In making its lending decisions, Citibank employed the “75% rule,” which simply requires a loan-to-value ratio of less than 75%. The bank’s employee and appraiser subsequently set the property value at only $45,000, yielding a percentage that could not support the $51,000 loan requested by Ms. Latimore. Ms. Latimore, however, obtained other loan appraisals that placed a much higher value on her property. She forwarded the higher appraisals to the attention of Citibank, but her application was declined again.

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11. See infra notes 170-83 and accompanying text.
12. *Latimore*, 151 F.3d at 713.
13. See id.
14. See id.
15. See id.
16. See id.
17. See id.
18. See id. at 713. In order to borrow $51,000, Ms. Latimore’s home needed to be valued at or above $68,000. See id. With a property value of only $45,000, the loan-to-value ratio amounted to 113%, which was clearly unacceptable under the 75% rule. See id.
19. See id. Citibank and its employees rejected an $82,000 appraisal conducted less than a year earlier on grounds that “the comparable sales on which the $82,000 appraisal had been based weren’t really comparable because they involved property more than six
The plaintiff alleged discrimination on two grounds. First, Ms. Latimore contended that she was discriminated against because her property was located in a predominantly African-American neighborhood. Second, the plaintiff found discriminatory motive in the conduct of Citibank employees. Ms. Latimore contended that Citibank employees went beyond the call of duty to assist white borrowers in raising the appraised value of their property but did not extend the same courtesy to her during her loan negotiations. While the district court and the court of appeals both ruled in favor of Citibank, the two judicial entities used and applied the relevant laws in different ways.

A. The District Court

In analyzing the facts presented, the district court applied the McDonnell Douglas employment discrimination standard to address the allegations of violations of federal statutes, including sections 1981 and 1982 of the Civil Rights Act of 1964, the FHA, and the ECOA. The district court held that in order for the plaintiff to establish a prima facie case, the following elements of the McDonnell Douglas standard must be shown: (1) plaintiff was a member of a protected class; (2) she applied for and was qualified for a loan; (3) blocks from Latimore's home." Id. Ms. Latimore ultimately obtained a $46,000 loan at a higher interest rate from another bank. See id.

20. See id.

21. See id. Marcia Lundberg, an account executive at Citibank, handled Ms. Latimore’s application and later informed her that her property value would not support a loan of $51,000. See id. Ms. Lundberg based her decision on the appraisal conducted earlier by fellow Citibank employee, Ed Kernbauer. See id.

22. See id. at 715.

23. Title VII was originally used to address inequalities arising within the employment relationship (i.e., refusals to hire minorities, pay disparities, etc.). See Swire, supra note 1, at 830.

24. The FHA states that

[i]t shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.


the loan was rejected despite her qualifications; and (4) the defendant continued to approve loans for applicants with qualifications similar to those of the plaintiff. After reviewing these elements, the court concluded that Ms. Latimore had to show "that [Citibank] treated her materially differently than similarly situated white loan applicants or loan applicants from non-minority neighborhoods." Upon examining the facts, the district court found no evidence demonstrating a material difference in treatment. The court first focused on the actions of appraiser Ed Kernbauer. The plaintiff failed to show that race was a motivating factor in the defendant's decision to deny her loan application based on Mr. Kernbauer's appraisal of her home. Indeed, Mr. Kernbauer had actually supported loan amounts to other African Americans in the same neighborhood. Additionally, the court failed to find discriminatory motive on the part of Ms. Lundberg during the appraisal review process. Thus, based on a total evaluation of the evidence, the district court granted defendant's motion for summary judgement.

B. The Court of Appeals

The plaintiff subsequently appealed from the district court

27. Id.
28. See id. at 668. In evaluating the evidence, the court also reviewed the findings of the Community Reinvestment Act Committee. See id. at 664. In this case, the Committee determined that denial of plaintiff's claim was consistent with Citibank's general policies. See id. The stated purpose of the Community Reinvestment Act is to "evaluate whether a bank's lending practices help 'to meet the credit needs of its entire community, including [the] low and moderate-income neighborhoods, consistent with [the] safe and sound operation of the bank.'" Craig E. Marcus, Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low-and-Moderate-Income Lending, 96 COLUM. L. REV. 710, 711 (1996) (citing Community Reinvestment Act Regulations, 12 C.F.R § 25.7 (1995)).
29. See Latimore, 979 F. Supp. at 666.
30. See id. The Community Reinvestment Act Committee noted that out of the sixty-nine appraisals conducted by Mr. Kernbauer of minorities or in minority neighborhoods, only three applicants were declined based on appraisal value. See id.
31. See id. at 668-69. The court did not accept plaintiff's contention that Ms. Lundberg discriminated against her by not specifically requesting "comparables" during the appraisal review process, since Ms. Lundberg did request a recent appraisal of the plaintiff's property which contained information regarding "comparables." See id. at 668.
32. See id. at 669.
ruling. On appeal, the Seventh Circuit discussed the competing motivations behind application of the *McDonnell Douglas* standard and the suitability of the standard in this case and in other credit discrimination lawsuits. The court first considered the competing interests of each party. The plaintiff sought to utilize the standard in an effort to shift the burden of proof onto the defendant, while the defendant attempted to use the standard as a device to poke holes in the plaintiff's prima facie case by challenging whether Ms. Latimore was even a qualified borrower. The court of appeals, however, rejected both arguments favoring implementation of the *McDonnell Douglas* standard. Instead, the court required a much narrower approach requiring the plaintiff to present evidence of actual discrimination on some forbidden ground, such as race.

The Court of Appeals for the Seventh Circuit articulated two primary factors underlying its decision to remove the well-known standard from loan bias lawsuits: one procedural factor and one substantive factor. First, the court stated its concern with shifting the burden of proof onto the defendant before the plaintiff has produced any evidence of her own, thus creating a regime where pre-complaint discovery governs. Second, the court discussed the crux of its argument, focusing on the absence of a competitive interest between an African American consumer applying for a loan and a white consumer applying for a loan. The court explained that "[Ms.] Latimore was not competing with a white person for a $51,000 loan." As the court noted, the lack of a competitive interest differentiates the credit discrimination context from the employment discrimination context where the *McDonnell Douglas* standard

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33. See *Latimore*, 151 F.3d at 712.
34. See id. at 714.
35. See id. (explaining that to meet qualified borrower status, a plaintiff must meet the lender's requirements for collateral first).
36. See id. at 715. The court noted that "it is always open to a plaintiff in a discrimination case to 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." Id.
37. See id. at 714.
38. See id.
39. See id.
40. Id.
originated. In the employment relationship, for instance, where a similarly situated black applicant is turned down in favor of a white applicant, suspicious conduct triggering the McDonnell Douglas analysis is easier to see. However, in a credit discrimination case, such conduct is not as readily identifiable. Because of these factors, the court declined to extend the McDonnell Douglas standard to credit discrimination litigation.

III. BACKGROUND LAW

Lending institutions have recently attempted to address the burgeoning problem of discrimination and to establish a uniform policy against discriminatory lending. In 1994, a Task Force comprised of various lending agencies gathered to create a basic policy statement on the current state of the law entitled “The Policy Statement on Discrimination in Lending.” The agencies developed this policy statement to explain their interpretation of the ECOA and the FHA in an effort to establish uniform policy for purposes of administrative enforcement. Although the Interagency Task Force certainly recognized the importance of other federal statutory law addressing discriminatory lending practices, the statement only addresses the ECOA and the FHA. In essence, the policy statement

41. See id.
42. See id. at 714.
43. Researchers at the Federal Reserve Bank of Boston found that blacks were still denied loans almost 60% more often than similarly situated whites. See Swire, supra note 1, at 789 (citing Alicia H. Munnell et. al., Mortgage Lending in Boston: Interpreting the HMDA Data 2, (Federal Reserve Bank of Boston, Working Paper No. 92-7 (1992)). See also Massive HUD ‘Paired-Testing’ Initiative, REG. COMPLIANCE WATCH, Nov. 30, 1998, available in LEXIS, News Library, ABBB File (quoting the Department of Housing and Urban Development Secretary, Andrew Cuomo, who stated that “[A]frican-[A]mericans are denied mortgages at twice the rate of whites.”).
44. See Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266 (1994). The Task Force was comprised of the Department of Housing and Urban Development (HUD), the Office of Federal Housing Enterprise Oversight (OFHEO), the Department of Justice (DOJ), the Office of the Comptroller of the Currency (OCC), the Office of Thrift Supervision (OTS), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), the Federal Housing Finance Board (FHFAB), the Federal Trade Commission (FTC), and the National Credit Union Administration (NCUA). See id.
45. See id.
46. Although other federal statutes address fair lending, the Task Force focused solely on the ECOA and the FHA because they specifically prohibit discrimination in lending.
provides guidance "to all lenders, including mortgage brokers, issuers of credit cards, and any other person who extends credit of any type" by detailing what the agencies will consider when determining what constitutes a violation of the ECOA or the FHA.  

The Policy Statement begins with a concise description of the primary discrimination statutes and regulations. "The ECOA states that it prohibits discrimination in any aspect of a credit transaction" that is based on race, color, religion, national origin, sex, marital status, age, "the applicant's receipt of income derived from any public assistance program and the applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act." Similarly, the FHA "prohibits discrimination in all aspects of residential real estate related transactions" based on race, color, national origin, religion, sex, familial status, and handicap. Both statutes subject offenders to civil liability for acts of discrimination in mortgage lending based on any of the prohibited factors in the statutes. These two laws specifically prevent a number of discriminatory lending practices including discouraging applicants from applying for credit, using different standards to evaluate collateral, treating a borrower differently in servicing a loan, or discriminating on the basis of the type of area where property to be financed is located. The Policy Statement addresses various topics including second review programs for loan applicants who are members of protected classes, the appropriateness of self-testing in banking institutions, corrective actions to take in the event self-testing reveals discrimination, factors needed to prove a pattern or practice of lending discrimination and perhaps most importantly, the criteria employed in

See id. at 18,267.

47. Id.


51. See id. The ECOA and the FHA also prevent lenders from failing to provide information or services regarding any aspect of the lending process, refusing to extend credit, using different standards in determining whether to extend credit, or varying the terms of credit offered. See id.
taking enforcement or remedial action in the face of discriminatory practices.\textsuperscript{52} Regarding remedies for fair lending violations, the Policy Statement states that federal banking agencies have the authority to seek "enforcement actions that may require both prospective and retrospective relief," and "civil money penalties in varying amounts against the financial institution or any institution-affiliated party . . . depending, among other things, on the nature of the violation and the degree of culpability."\textsuperscript{53} Other federal agencies associated with the banking community also have enforcement authority under the ECOA and the FHA.\textsuperscript{54}

Although the Policy Statement purports to provide guidance and establish a clear standard for banking institutions to follow, the Policy Statement does not confer any substantive or procedural rights that a court could enforce in an administrative or civil proceeding.\textsuperscript{55} Thus, without any federal enforcement power, litigation of these issues persists, feeding the controversy as to the appropriate standard by

\begin{footnotesize}
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\item \textsuperscript{52} See id. at 18,270. The Policy Statement employs an interactive question and answer format in its discussion of important issues. The Interagency Task Force arguably utilizes this format in order to make the statement more accessible to the general public. See id.
\item \textsuperscript{53} See id at 18,272. "Prospective relief may include requiring the financial institution to adopt corrective policies and procedures," train relevant employees, establish community programs to reach all sectors of a service area, "improve internal audit controls," and monitor reports to the primary federal regulator. Id. at 18,272. Retrospective relief may include identifying customers historically discriminated against and instituting new incentive programs, making payments to injured parties, paying restitution, damages, instituting other affirmative action programs as appropriate, and requiring the financial institutions to pay civil money penalties to the United States Treasury. See id. at 18,272-73. The National Credit Union Administration follows similar criteria when addressing discrimination. See id. at 18,273.
\item \textsuperscript{54} See id. at 18,272. In certain situations, the Department of Justice, the Federal Trade Commission, and the Department of Housing and Urban Development will also have enforcement authority. See id.
\item \textsuperscript{55} See id. at 18,267. One commentator wrote, "[a]s a whole, the policy statement improves the level of communication between banks and their governing agency regarding fair-lending responsibilities, but further clarification is needed in the disparate impact and self-testing areas." Kevin T. Kane, Statement on Lending Bias Leaves Key Issues Unresolved, AM. BANKER, June 22, 1994, at 21 (Mr. Kane is President of CRA Consultants Inc. in Boston and author of A Banker's Guide to the Community Reinvestment Act: Case Studies of 33 Institutions). See generally Peter E. Mahoney, The Ends of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle, 47 EMORY L.J. 411 (1998) (discussing the complex relationship between the fair lending laws applied in the Policy Statement and the discrimination theories utilized in credit discrimination litigation).
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which to judge credit discrimination cases.\textsuperscript{56} Rather than create a new standard, many attorneys litigating these cases attempt to invoke the McDonnell Douglas standard, set forth in \textit{McDonnell Douglas v. Green}.\textsuperscript{57} In that case, a former employee alleged that his prior employer’s general hiring practices were racially motivated and constituted a violation of Title VII.\textsuperscript{58} The plaintiff, Mr. Green, was a mechanic and lab technician at McDonnell Douglas Corporation who was discharged from his position during a periodic reduction in the workforce.\textsuperscript{59} Soon thereafter, Mr. Green began participating in illegal civil rights protests directed against his former employer.\textsuperscript{60} When McDonnell Douglas Corporation advertised for job candidates, Mr. Green reapplied, only to be denied employment because of his civil rights activism.\textsuperscript{61}

Mr. Green filed a complaint with the Equal Employment Opportunity Commission, specifically relying on section 703(a)(1) of the Civil Rights Act of 1964 which prohibits discrimination based “on race, color, religion, sex, or national origin” in any employment decision.\textsuperscript{62} This landmark case proceeded all the way to the Supreme Court, where Justice Powell, concisely defined the three-step \textit{McDonnell Douglas} test.\textsuperscript{63} First, the plaintiff has the burden of proving a prima facie case by showing: (1) he belongs to a racial minority; (2) he applied and was qualified for a job the employer was seeking applicants for; (3) that despite his qualifications, he was rejected; and (4) thereafter, the employer continued to seek applicants with plaintiff’s qualifications.\textsuperscript{64} Upon such a showing, the burden then shifts to the defendant to state some legitimate and non-discriminatory reason for its rejection of the employee.\textsuperscript{65} The inquiry does not end

\textsuperscript{56} See, e.g., Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996); Latimore, 151 F.3d at 712; Ring v. First Interstate Mortgage, 984 F.2d 924 (8th Cir. 1993).

\textsuperscript{57} McDonnell Douglas v. Green, 411 U.S. 792 (1973). See also infra notes 63-65 and accompanying text (discussing the prima facie discrimination standard).

\textsuperscript{58} See McDonnell Douglas, 411 U.S. at 792.

\textsuperscript{59} See id. at 794.

\textsuperscript{60} See id.

\textsuperscript{61} See id. at 795.


\textsuperscript{63} See id. at 802.

\textsuperscript{64} See id.

\textsuperscript{65} See id.
there, however. Even if the employer purports to have a non-discriminatory reason for its rejection of the plaintiff, the plaintiff may demonstrate that the employer’s stated reason for refusal of certain rights was a mere pretext aimed at covering up discriminatory motive.

The relevant question in Latimore was whether the McDonnell Douglas standard fit the fact patterns currently emerging in credit discrimination litigation. At least three circuits have held that it should apply in some form. In 1995, the Eighth Circuit recognized the viability of the McDonnell Douglas standard in Ring v. First Interstate Mortgage. In that case, plaintiff Bruce Ring, a real state developer, brought claims under the FHA and the ECOA against First Interstate Mortgage when the brokerage refused to provide long-term financing for seven apartment buildings located in largely minority areas. The district court set forth the prima facie elements in a credit discrimination case as follows: (1) plaintiff was a member of a protected class; (2) he applied for and qualified for a loan from defendants; (3) the loan was rejected despite his qualifications; and (4) defendants continued to approve loans for applicants with qualifications similar to those of plaintiff. The court explicitly acknowledged the importance of the McDonnell Douglas standard in FHA cases, specifically focusing on the HUD decision to adopt the standard in 1992.

Interestingly, while the Eighth Circuit recognized the McDonnell Douglas standard as a force in FHA and ECOA cases, it subsequently ruled that it was not the appropriate standard to use at the pleading stage of a lawsuit.

66. See id.
67. See id. at 804.
68. Latimore, 151 F.3d at 712.
69. See id.; Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996); Ring v. First Interstate Mortgage, 984 F.2d 924 (8th Cir. 1993).
70. Ring, 984 F.2d at 926.
71. See id. at 925.
72. See id. at 926.
73. See id. In United States v. Badgett, the Eighth Circuit approved the use of the McDonnell Douglas standard in FHA cases. United States v. Badgett, 976 F.2d 1176, 1178-79 (8th Cir. 1992). The court based its holding on the policy of HUD, the regulatory agency for the FHA, regarding usage of the McDonnell Douglas standard in this context. See Ring, 984 F.2d at 926 n.2. See also 24 C.F.R. § 100.120 (1998) (discussing qualifications for discrimination in real-estate lending).
74. See Ring, 984 F.2d at 927. The court held that “[w]hen a federal court reviews
One year later, in *Simms v. First Gibraltar Bank*, the Fifth Circuit also utilized the *McDonnell Douglas* standard in a credit discrimination context. In that case, Gordon Simms, a white landlord, contended that First Gibraltar bank committed a violation of the FHA when it refused to issue him a commitment letter to replace his existing loan with a new loan to finance a predominantly minority-owned cooperative housing project. Simms filed the claim in district court with the Office of Thrift Supervision and the Department of Housing and Urban Development, alleging that First Gibraltar's denial of the loan was racially motivated. Upon finding that the plaintiff met his prima facie showing by utilizing the theories of disparate treatment and disparate impact, the district court then shifted the burden to the defendant to articulate a non-discriminatory reason for its refusal to issue a commitment letter. In response, First Gibraltar stated it could not justify issuing the commitment letter to the plaintiff when such an action would detrimentally affect the economic welfare of the bank. Finding this reason to be a mere pretext for racial discrimination, the district court held for the plaintiff and granted damages in excess of $3 million.

The Fifth Circuit, however, questioned the district court's conclusion that First Gibraltar's decision was a mere pretext for racial discrimination. The court of appeals noted that the plaintiff "presented absolutely no evidence that other, 'non-protected' applicants or applications were treated any differently around the time

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75. See Simms v. First Gibraltar Bank, 83 F.3d 1546, 1558 (5th Cir. 1996).
76. See id. at 1548.
77. See id. at 1551.
78. See id. at 1553. During the trial, counsel for Simms asked Mr. Chastain, an asset manager for Gibraltar Savings Association, to articulate "[w]hy he had declared that Simms' failure to keep up the property was a reason for the rejection when neither he nor any other employee of First Gibraltar had inspected the apartment complex." Id.
79. See id. at 1551-52. Specifically, the commitment letter "[w]ould diminish the collateral securing First Gibraltar's loan on the apartment complex." Id. at 1551.
80. See id. at 1554. The jury awarded $1.21 million in compensatory damages and $2 million in punitive damages. See id.
81. See id. at 1558.
of Simms' rejection." According to the Fifth Circuit, evidence that would prove disparate treatment could include a pattern of loan bias on the part of First Gibraltar Bank, statistics demonstrating a disproportionate amount of loans granted to minority patrons in relation to other patrons, or even examples of discriminatory conduct on the part of specific personnel. In the absence of such factors, the appellate court did not find racial animus behind the defendant's refusal to issue a loan to plaintiff, and thus reversed the district court decision.

Though not following the lead of Ring and Simms in the lending discrimination context, the Seventh Circuit has invoked the McDonnell Douglas standard in discrimination cases outside of employment discrimination. The Seventh Circuit, for instance, has applied the McDonnell Douglas standard to cases involving age discrimination as well as cases concerning discriminatory behavior towards the disabled. In Leffel v. Valley Financial Services, the plaintiff filed a complaint alleging that she was terminated from her management position with Valley Financial Services as a result of her disclosure that she suffered from multiple sclerosis. The Leffel court recognized that the McDonnell Douglas standard originated in employment discrimination cases. Nevertheless, the Court proceeded along the same path of analysis, shaping the elements of a plaintiff's prima facie case as follows: (1) plaintiff is disabled within the meaning of the ADA; (2) her work performance met the employer's legitimate expectations; (3) she was discharged; and (4)

82. Id. at 1558 (citing the standard in McDonnell Douglas).
83. See id. & n.34.
84. See id. at 1558-59.
86. See Coco, 128 F.3d at 1177; Leffel, 113 F.3d at 788.
87. Leffel, 113 F.3d at 789.
88. See id. at 792.
“the circumstances surrounding her probation and discharge indicate that it is more likely than not that her disability was the reason for these adverse actions.” Utilizing the McDonnell Douglas standard of review, the court held that the plaintiff, Ms. Leffel, did not meet the burden of proof necessary to establish her prima facie case.

Similarly, the Seventh Circuit Court of Appeals elected to use the McDonnell Douglas standard in Coco v. Elmwood Care, Inc., a case concerning the ADEA. Here, the plaintiff contended that he was fired from his job at the defendant’s nursing home due to his age. The primary issue in this case concerned the relationship between the first element of the McDonnell Douglas standard requiring a prima facie showing and the third element, affording the plaintiff an opportunity to rebut the defendant’s given reason for its alleged discriminatory conduct. The court ruled that the plaintiff did not meet the “legitimate expectations” prong of the prima facie case due to unsatisfactory job performance and thus, could not reach the third part of the McDonnell Douglas test. Without clear proof demonstrating that the employer’s legitimate expectations were met, the court refused to draw an inference of discriminatory conduct on the part of the defendant.

In contrast to the decisions in Leffel and Coco, the Seventh Circuit in Diaz v. Fort Wayne Foundry declined to utilize the McDonnell Douglas standard in a case involving an alleged violation of the Family and Medical Leave Act (FMLA). In its opinion, the

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90. Leffel, 113 F.3d at 794.
91. See id.
93. See Coco, 128 F.3d at 1177.
94. See id. at 1179.
95. See id.
96. See id. at 1180. The court wrote

McDonnell Douglas is for cases in which an employee is performing in a satisfactory manner but loses his job anyway and is replaced by someone belonging to a different group from his own; in such a case there is sufficient likelihood of discrimination to make it reasonable to require the defendant to produce evidence of a noninvidious reason for the discrimination.

Id. at 1180.
97. Diaz, 131 F.3d at 711. The FMLA grants a substantive entitlement to employees to take a leave of absence due to pregnancy or family illness. Family and Medical Leave Act, 29 U.S.C § 2601 (1994).
court distinguished between statutes that depend on discriminatory conduct such as the ADA and the ADEA, and statutes that merely create substantive entitlements such as the FMLA. Upon making this distinction, the court concluded that the McDonnell Douglas standard was only applicable to statutes based on discriminatory conduct.

IV. ANALYSIS

A. Common Factors in Lending Discrimination

The applicability of the McDonnell Douglas standard in the credit discrimination context raises many questions, especially in light of the varying viewpoints expressed within the circuits. For instance, in Latimore, the Seventh Circuit adamantly opposed the use of the standard. The Eighth Circuit, however, utilized the McDonnell Douglas standard, using the same four elements necessary to establish a prima facie case in a credit discrimination context, only to find fault with the standard’s role at the pleading stage of a lawsuit. The Fifth Circuit in Simms expressed a different opinion. There, the court applied the burden-shifting facet of the McDonnell Douglas standard to a credit discrimination case, yet failed to adequately articulate what it required in the way of a prima facie showing of evidence under a disparate impact theory. Yet, despite the differing opinions, these cases discuss and analyze three common factors. Although approaches and outcomes differ, the relevant circuits each analyzed the pertinent statutory provisions and regulations, the impact of the discrimination theories on banking policy, and the significance of a “competitive

98. See Diaz, 131 F.3d at 712. The court in Diaz pointed out similarities between the FMLA and the National Labor Relations Act (NLRA), the Fair Labor Standards Act (FLSA), and the Employee Retirement and Income Security Act (ERISA), where the McDonnell Douglas standard was not applied. See id.

99. See id.

100. Latimore, 151 F.3d at 712.

101. See Ring v. First Interstate Mortgage, 984 F.2d 924, 926 (8th Cir. 1993).

102. Simms v. First Gibraltar Bank, 83 F.3d 1546 (5th Cir. 1996).

103. See id. at 1553

104. See infra notes 107-19 and accompanying text (analyzing the importance of statutes and regulations in credit discrimination litigation).

105. In the Policy Statement, “the discrimination theories are divided into three categories: overt discrimination, disparate treatment, and disparate impact.” Policy
interest” in credit discrimination lawsuits. 106

1. The Role of Statutory and Regulatory Law

The weight that the reviewing appellate court gave to the FHA and the ECOA impacted whether the court accepted the McDonnell Douglas standard in the context of lending discrimination. In Latimore, for instance, the Seventh Circuit acknowledged that the plaintiff brought suit under both the FHA and the ECOA, yet it paid very little attention to the language and intent behind those statutes in considering whether or not the McDonnell Douglas standard of review was appropriate. 107 Indeed, when counsel for the plaintiff attempted to invoke the statutory language imposing potential liability on the appraiser, the Seventh Circuit reacted adversely, even threatening sanctions for the filing of a frivolous lawsuit. 108 The Latimore court refused to find any support, explicit or implicit, for the McDonnell Douglas standard within the FHA or the ECOA.

Conversely, in each decision permitting the use of the McDonnell Douglas standard, the court in question carefully dissected the particular statute or regulation, searching for guidance. 109 The district court in Latimore, for example, first analyzed the intent behind the FHA and the ECOA before allowing the McDonnell Douglas analysis to proceed. 110 The court held that under both the FHA and the ECOA, a plaintiff must show that race was the motivating factor


106. See infra notes 142-47 and accompanying text (analyzing the importance of a “competitive interest” in credit discrimination litigation).

107. Latimore, 151 F.3d at 713.

108. See id. at 716. Despite the language in the FHA permitting an inquiry into the appraiser’s conduct, the court explained that because “the bank’s lawyers... do not ask for sanctions for the filing of a frivolous claim against Kernbauer, we shall let the matter drop with a warning that this court does not look with favor on the promiscuous joinder of minor employees as defendants in cases against their employers.” Id.

109. See, e.g., Simms v. First Gibraltar Bank, 83 F.3d 1546, 1559 (5th Cir. 1996) (scrutinizing the interactions between the FHA and the ECOA in relation to the McDonnell Douglas standard); Ring v. First Interstate Mortgage, 984 F.2d 924, 926 (8th Cir. 1993) (interpreting significant parts of the Fair Housing Act in its analysis of the McDonnell Douglas standard).

110. Latimore, 979 F. Supp. at 664.
behind a defendant’s decision to refuse a loan. The district court further explained exactly what types of conduct each statute forbids, only then finding the *McDonnell Douglas* standard consistent with these goals.

Similarly, in the *Ring* and *Simms* cases, both the FHA and the ECOA were carefully scrutinized. In *Ring*, the Eighth Circuit laid out substantive portions of the FHA to determine what may survive a Rule 12 inquiry. The opinion concluded that there is “no doubt that the three-stage *McDonnell Douglas* . . . analysis applies to Fair Housing Act cases.” In the following footnote, the court noted that “HUD, the agency primarily responsible for enforcing the Fair Housing Act, has adopted this test to evaluate claims of discrimination under the Act, and we have approved that standard.” Finally, in *Simms*, the Fifth Circuit also carefully scrutinized the FHA and ECOA despite ultimately ruling against the plaintiff. The *Simms* court carefully parsed relevant portions of both statutory provisions in an effort to determine the veracity of the defendant’s stated reason for denial of the plaintiff’s loan under part three of the *McDonnell Douglas* standard. The court concluded that

[i]he FHA does not create a cause of action for bungling a deal, failing to follow industry custom, violating the ECOA, or even making false representations to a government agency . . . [i]he FHA instead prohibits a lending institution from using race, or any other prohibited factor, as a basis for making a

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111. See id. at 664.
113. *Simms*, 83 F.3d at 1559; *Ring*, 984 F.2d at 926.
114. *Ring*, 984 F.2d at 926.
115. Id.
116. Id. n.2 (citing United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir.1992)).
117. *Simms*, 83 F.3d at 1559. The court stated that its holding was very narrow and simple, leaving the door open for plaintiffs with more viable claims. See id. Unfortunately, even in the Fifth Circuit, it is unclear exactly what evidence the court requires in order to reach a verdict for the plaintiff.
118. See id.
lending decision.\textsuperscript{119}

Although discussion of the statutes is a part of all these pertinent cases, a trend emerges: the closer the attention paid to the language and intent behind the FHA and the ECOA, the more likely the court was to accept the \textit{McDonnell Douglas} standard.

2. The Role of the Discrimination Theories

Turning to the next common theme, many of the circuits discussing credit discrimination focused some attention on the theories of disparate treatment and disparate impact in relation to the \textit{McDonnell Douglas} standard.\textsuperscript{120} A plaintiff may claim disparate treatment when she is treated differently from other applicants based on a prohibited factor, such as race or sex.\textsuperscript{121} Disparate impact cases occur where a policy, neutral on its face, has a discriminatory effect on members of a protected class.\textsuperscript{122}

Although these two theories are discussed and analyzed in all three circuits, the circuits are split as to how they relate to the \textit{McDonnell Douglas} standard. The Fifth Circuit, for instance, treats disparate impact as an integral part of the third stage of the \textit{McDonnell Douglas} analysis in the \textit{Simms} case.\textsuperscript{123} The district court in \textit{Simms} instructed the jury on both theories while simultaneously utilizing the \textit{McDonnell Douglas} test.\textsuperscript{124} In that case, the plaintiff alleged that the bank’s policy regarding funding for cooperative housing led to unwanted discriminatory impact on potential minority owners of the co-op in a largely minority neighborhood.\textsuperscript{125} The district court used the \textit{McDonnell Douglas} structure to identify the evidence of these disparate effects, ultimately holding that the bank’s alleged “economic

\textsuperscript{119} Id.

\textsuperscript{120} See \textit{Simms}, 83 F.3d at 1546 passim; \textit{Latinmore}, 151 F.3d at 712 passim; Gilligan v. Jamco Dev. Corp., 108 F.3d 246 passim (9th Cir. 1997).


\textsuperscript{122} See \textit{id.} at 18,268 (giving detailed explanations and examples of each discrimination theory).

\textsuperscript{123} \textit{Simms}, 83 F.3d at 1554.

\textsuperscript{124} \textit{id.}

\textsuperscript{125} \textit{See id.} at 1551.
sense” rationale only masked the racial animus lurking under the surface. Although the Fifth Circuit reversed, it upheld the district court’s use of discrimination theories in conjunction with the controversial *McDonnell Douglas* analysis.

The second approach arises in both the Eighth and Ninth Circuits where the courts drew a decisive line between the discrimination theories and the *McDonnell Douglas* standard. In *Gilligan v. Jamco Development Corporation*, the Ninth Circuit did not allow the *McDonnell Douglas* standard to proceed during the pleading stage, yet the Court still recognized the viability of a disparate impact claim under the FHA. In its discussion of the *McDonnell Douglas* standard, the Gilligan court wrote, “[w]e agree with the Ring court’s statement that it is inappropriate, for ‘practical reasons’, to ‘measure a plaintiff’s complaint against a particular formation of the prima facie case at the pleading stage.’” Arguably, courts have continued to recognize disparate impact claims because the Policy Statement established the appropriateness of such claims in cases of credit discrimination.

In contrast, no comparable authority exists for asserting the *McDonnell Douglas* standard. The district court in *Gilligan*, however, correlated a prima facie showing of evidence under the *McDonnell Douglas* standard with a similar showing of a disparate impact on the part of the defendant. The court remarked that “the Gilligans allege that they are members of a class protected under the FHA, identify a policy that affects only members of that class, and set forth facts that

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126. See *id.* at 1554. During the trial, Mr Smith, an expert for the plaintiff, admitted that First Gibraltar would not issue a commitment letter if it did not make “economic sense.” *Id.*

127. See *id.* at 1555.

128. See *Ring v. First Interstate Mortgage, 984 F.2d 924 passim (8th Cir. 1993); Gilligan v. Jamco Dev. Corp., 108 F.3d 246 passim (9th Cir. 1997).*

129. *Gilligan*, 108 F.3d at 250. The Ninth Circuit articulated two primary reasons for its decision not to apply the *McDonnell Douglas* standard at the pleading stage of a lawsuit. First, the court pointed out that an evidentiary standard is inappropriate at the pleading stage according to the Federal Rules of Civil Procedure. See *id.* Second, the court found fault with the mechanical application of the *McDonnell Douglas* standard in every credit discrimination case. See *id.* (citing *Ring*, 984 F.2d at 927).

130. *Id.* at 249 (quoting *Ring*, 984 F.2d at 927).


132. See *Gilligan*, 108 F.3d at 248.
demonstrate the enforcement of that policy in the form of actions prohibited by the FHA.”

Thus, the element of the prima facie case helped establish how the policy in question had a discriminatory effect on the Gilligans.

Conversely, the Ninth Circuit failed to uphold the close relationship between the *McDonnell Douglas* test and the theory of disparate impact, stating that “the failure to plead financial qualifications [under a prima facie showing] does not diminish the Gilligans’ additional disparate impact claim.” This statement illustrates the Ninth Circuit’s reluctance to go beyond the actual text of the FHA and allow the *McDonnell Douglas* analysis to proceed.

As evidenced by the previous discussion of existing caselaw, the circuits continue to struggle in their quest to achieve the correct balance between the discrimination theories and the *McDonnell Douglas* standard. Notably, however, all of the circuits analyzing these cases at least attempt to strike a balance between the two, either by incorporating these theories into the *McDonnell Douglas* analysis or by leaving the theories as potential claims for the plaintiff. In either scenario, the plaintiff has some recourse to pursue.

In *Latimore v. Citibank Federal Savings Bank*, the Seventh Circuit relied on a different analysis of the discrimination theories in relation to the *McDonnell Douglas* standard of review. The *Latimore* court failed to mention either the disparate treatment or disparate impact theory, at least by name. Upon a closer reading of the opinion, however, it looks as if the court chose to adopt a disparate treatment standard of review in favor of the *McDonnell Douglas* standard when it wrote, “it is always open to a plaintiff in a discrimination case to 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

133. *Id.*
134. *See id.*
135. *Id.* at 250.
136. *See supra* notes 68-99 and accompanying text.
137. *See Simms v. First Gibraltar Bank*, 83 F.3d 1546 (5th Cir. 1996); *Ring v. First Interstate Mortgage*, 984 F.2d 924 (8th Cir. 1993); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246 (9th Cir. 1997).
138. *See Latimore*, 151 F.3d at 715.
triable issue.” This remark aptly summarizes the definition of disparate treatment set forth in the Policy Statement. Later in the opinion, the court also alluded to the theory of disparate impact when it discusses why Ms. Latimore does not attack the bank’s 75% rule on grounds that it created the potential for discriminatory effects. Nevertheless, the Latimore court, led by Chief Judge Posner, elected to take the most conservative path, without effectively analyzing how other circuits have blended the traditional discrimination theories with the emerging McDonnell Douglas standard in credit discrimination cases.

3. The Role of “Competitive Interest”

The final issue addressed by the circuits concerns the presence or absence of a “competitive interest.” The primary reason that the Latimore court rejected the McDonnell Douglas standard in lending discrimination cases was that the minority plaintiffs were not in direct “competition” with whites for a limited number of loans. To illustrate its point, the court examined the employment discrimination fact pattern in which the relevant standard originated. The court stated that in a typical case of employment discrimination, involving the say denial of a promotion to a black employee, the plaintiff would have to show only that he was qualified for the promotion and that a white got it instead, and the burden would then be on the employer to come forth with a noinvidious reason for why the white rather than the black got the promotion.

139. Id. at 715.
141. See Latimore, 151 F.3d at 715. Arguably, plaintiff’s counsel could have tried to prove disparate impact by arguing that the bank’s rule requiring no more than a 75% ratio of the appraised value of Ms. Latimore’s home to the amount of the loan has unwanted effects on minority borrowers taken as a whole.
142. See id. at 715.
143. Id. at 713.
The court concluded that this competitive situation is missing with allegations of credit discrimination, explaining that "a bank does not announce, ‘[w]e are making a $51,000 real estate loan today; please submit your applications, and we’ll choose the application that we like the best and give that applicant the loan.’”' In other words, there is no squaring off between a minority and non-minority consumer attempting to obtain the same real estate loan. Thus, without the necessary causal link created by a “competitive interest,” the Seventh Circuit refused to apply the McDonnell Douglas standard.

In Simms, the Fifth Circuit also addressed the lack of competitive interest between the plaintiff and other non-protected applicants. Yet, it still permitted the burden-shifting McDonnell Douglas methodology to proceed. The Fifth Circuit reasoned that the lack of competitive interest in lending discrimination cases supported the defendant’s refusal to make the cooperative housing loan under the second step of the McDonnell Douglas standard. Thus, even if the plaintiff established a prima facie case for lending discrimination, the fact that the minority plaintiff was not competing for the loan with other non-minority applicants adds credence to the defendant’s claim that its refusal to make the loan was not racially motivated.

B. Application of the McDonnell Douglas Standard

In a recent study by the Department of Housing and Urban Development, researchers found that African-Americans are denied mortgages at twice the rate of whites. Such alarming statistics emphasize the need for a unified judicial approach to credit discrimination litigation. First, however, leaders in the financial community should take a closer look at the forces behind

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144. See id. at 714. Arguably, however, the Seventh Circuit misses a step in its analysis by not considering the fact that although whites do not directly compete with blacks for loans, banks only have finite reserves to make loans. Thus, in one sense, loan applicants do compete for limited bank resources.

145. See Simms v. First Gibraltar Bank, 83 F.3d 1546, 1558 (5th Cir. 1996).

146. See id.

147. See id.

discrimination in lending and banking institutions. One commentator grouped these discriminatory forces into four principle categories.\(^{149}\)

First, social norms, reflecting the possibility of decreased property value, govern whether lenders will support a loan to a black family trying to purchase a home in a predominantly white neighborhood.\(^{150}\)

In keeping with the coercive nature of social norms, there are also fears that the practice of redlining still survives in the United States.\(^{151}\)

Redlining occurs when bankers or other lenders make the decision not to issue loans to entire minority neighborhoods.\(^{152}\)

Second, discrimination in lending institutions may persist due to an “animus or taste for discrimination.”\(^{153}\)

This term refers to the fact that bank employees will work harder for the white, non-minority applicant.\(^{154}\)

Indeed, in *Latimore*, plaintiff’s counsel attempted to argue this point to no avail.\(^{155}\)

Third, “rational discrimination” exists in the marketplace.\(^{156}\)

Swire defines this concept as, “statistical discrimination which involves the use of a general category, such as race or neighborhood, to reduce the costs of particularized inquiry into an individual’s creditworthiness. . . . [I]t also refers to lenders’ profit enhancing decisions taken in light of strategic assessment of the actions of other lenders.”\(^{157}\)

Arguably, the court in *Simms* allowed this type of lending discrimination to continue when it accepted the bank’s “economic sense” rationale as the reason behind the bank’s refusal to grant a loan for the first cooperative housing project in the

\(^{149}\) See Swire, *supra* note 1, at 789.

\(^{150}\) See id. at 814.  

\(^{151}\) See id. at 800.

\(^{152}\) The problem of redlining is especially worrisome because it interjects discrimination into the FHA, the very legislation that was designed to prevent discrimination. In the 1940s and 1950s, the FHA consistently doled out the lowest neighborhood ratings to minority neighborhoods and refused to grant housing insurance to minorities except in minority neighborhoods. Professor Swire argued that lasting damage was done when banks and savings and loan institutions institutionalized the practice of denying mortgages. See id.; see also Marcus, *supra* note 28, at 710 (discussing the concept of redlining).

\(^{153}\) Swire, *supra* note 1, at 816-17.

\(^{154}\) See id.

\(^{155}\) See *Latimore*, 151 F.3d at 715-16. Ms. Latimore contended that Citibank’s employee, Ms. Lundberg, worked harder to get higher appraisal values for white borrowers similarly situated to Ms. Latimore. The court, however, concluded that Ms. Lundberg exhibited no favoritism toward white borrowers. See id.

\(^{156}\) See Swire, *supra* note 1, at 821.

\(^{157}\) Id.
Finally, Swire argued that the "investment in human capital or creditworthiness" was a reason for discrimination. This discussion alludes to the fact that minorities have more difficulty than whites in establishing creditworthiness over time and over generations.

In light of the forces still at work in the banking and lending communities, the question of the suitability of the McDonnell Douglas standard in credit discrimination cases remains. The standard has worked effectively in the areas of employment discrimination, age discrimination, and disability discrimination and proponents of the McDonnell Douglas analysis urge the implementation of the standard in credit discrimination cases as well. The McDonnell Douglas test presents a very workable structure by creating three distinct steps for a plaintiff and defendant to follow when litigating these cases. If a plaintiff cannot adequately establish a prima facie showing, the case is over. By alerting parties to their respective burdens, the test promotes time and cost efficiency.

In Latimore, the Seventh Circuit articulated a number of reasons for rejecting the McDonnell Douglas standard in loan bias cases, noting that "the Supreme Court has reminded us that McDonnell Douglas was not intended to be a straitjacket into which

158. See Simms v. First Gibraltar Bank, 83 F.3d 1546, 1557 (5th Cir. 1996).
159. Swire, supra note 1, at 825.
160. See id. at 826. The debate over the practice of credit scoring has recently brought attention to the plight of minorities trying to establish a credit history. See Hala Habal, Credit Scoring Questioned as Minority Loan Criterion, AM. BANKER, Dec. 3, 1998, at 12. Some argue that credit scoring, which relies solely on past credit history in making loans, presents a problem for minority applicants with little to no prior history. See id. In an effort to address this problem, Fannie Mae, a congressionally chartered mortgage company, and the National Association for the Advancement of Colored People (NAACP) have formed a partnership to provide financing options for families who cannot afford large down payments. See Marcy Gordon, Mortgage Plan to Aid Blacks, NEWS & OBSERVER (Raleigh), Jan. 22, 1999, at 15A. The goal of the program is to allow African-Americans to become homeowners "without discrimination, without exclusion and without needless barriers and burdens." Id.
161. See Coco v. Elmwood Care Inc., 128 F.3d 1177 (7th Cir. 1997); Leffel v. Valley Am. Bank, 113 F.3d 787 (7th Cir. 1997).
163. It is important to reiterate the fact that in Latimore, the defendant, Citibank Federal Savings Bank, also supported application of the McDonnell Douglas standard. See Latimore, 151 F.3d at 714. Thus, the standard can actually work to the benefit of either party. See id.
every discrimination case must be forced kicking and screaming." 164

In its opinion, the Seventh Circuit pointed out two primary weaknesses of applying the McDonnell Douglas standard to credit discrimination cases. First, the court argued that on the facts of Latimore and other loan bias cases, it would be difficult to show that the bank discriminated against Ms. Latimore when it appraised her home at an amount disproportionate to the loan amount she sought without first finding a white borrower in the same position for purposes of comparison. 165 However, the Seventh Circuit left the door open for situations in which the McDonnell Douglas standard may be appropriate. 166 The court held that

at the heart of McDonnell Douglas is the idea that if the black is treated worse than the white [and] there is no obvious reason for the difference in treatment, . . . there is something for the employer to explain; and although the competitive situation which invites and facilitates comparison is usually missing from credit discrimination cases, sometimes there will be another basis for comparison. 167

Opponents of the McDonnell Douglas standard in lending discrimination cases also point to the inevitable procedural difficulties in implementing the standard. The Latimore court was especially concerned with the burden-shifting facet of the standard and its role in creating "precomplaint discovery." 168 The court disagreed with

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164. Id.
165. See id. at 715.
166. See id.
167. Id. The court discussed what might constitute an acceptable basis for comparison by creating a hypothetical situation.

Suppose [ ] Latimore and Eromital (who is white) apply at roughly the same time for roughly the same-sized loan from the same Citibank office. The two prospective borrowers are equally creditworthy and the collateral they offer to put up is appraised at the same amount. Both applications are forwarded to Ms. Lundberg and she turns down Latimore's application and approves Eromital's.

Id. If confronted with this fact pattern, the court suggested that they would apply the McDonnell Douglas standard. See id.

168. Pre-complaint discovery occurs when a court shifts the burden of proof onto the defendant before requiring the plaintiff to present some evidence showing that the
immediately shifting the burden to the defendant upon a prima facie showing by the plaintiff, stating, "it is not enough that the essential evidence is in the defendant's possession and would be difficult for the plaintiff, even with the aid of modern pre-trial discovery, to dig out of the defendant." Essentially, the Latimore court required the plaintiff to put on more evidence of discrimination than the McDonnell Douglas standard required before proceeding to discovery. Arguably, this approach to credit discrimination is time and cost efficient for overburdened courts since it attempts to weed out frivolous lawsuits. Conversely, this approach may prevent worthy plaintiffs from ever reaching the necessary discovery period.

V. CONCLUSION

Recently, banking institutions and other commercial lenders have sought to find a viable solution for remedying the pervasive problem of credit discrimination. One alternative to litigating these cases is to utilize the testing procedure described in the Policy Statement. The testing alternative pairs minority and non-minority applicants and asks them to apply to the same lender. Different outcomes are then used as proof of discrimination. The theory relies on the idea that bankers and other lending institutions will be more careful to establish non-discriminatory policies and practices if they are afraid of being caught by testers. However, some common problems associated with this alternative to litigation include increased costs due to detailed credit checks and strict scrutiny of property defendant violated the plaintiff's right. See id. at 714.

169. Id.

170. In its discussion of self-testing, the Interagency Taskforce comments that "lenders should employ reliable measures for auditing fair lending compliance. A well-designed and implemented program of self-testing could be a valuable part of this process." See Policy Statement on Discrimination in Lending, 59 Fed. Reg. 18,266, 18,270 (1994). See also Massive HUD 'Paired Testing Initiative, REG. COMPLIANCE WATCH, Nov. 30, 1998, available in LEXIS, News Library, ABBB File (discussing the HUD decision to fund a nationwide test of housing discrimination); MBA Funds Research Institute, NAT'L MORTGAGE NEWS, Nov. 23, 1998, at 8, available in LEXIS, News Library, ABBB File (discussing the Mortgage Bankers of America initiative to expand home ownership opportunities for minorities).

171. See Swire, supra note 1, at 832.

172. See id.

173. See id.
appraisals, self-regulation by the very entities being investigated, and finally, a fear of false positives.\textsuperscript{174} Due to these and other concerns, banks have been very cautious about implementing large scale testing programs.\textsuperscript{175}

Litigation remains a principle remedy for the problem of discrimination in lending. Thus far, however, lawsuits have not proven particularly effective, with only the most blatant instances of discrimination surviving summary judgment motions.\textsuperscript{176} Arguably, this result is due in part to the inconsistency behind decisions such as \textit{Latimore} and \textit{Simms} in the Seventh and Fifth Circuits, respectively.\textsuperscript{177} In \textit{Latimore}, for instance, the court ignores several principle issues. First, while it is certainly true that refusal to allow the \textit{McDonnell Douglas} standard does eliminate the potential of frivolous lawsuits, it also prevents plaintiffs from reaching the vital discovery stage. The court does not adequately address how plaintiffs can meet their heavy evidentiary burden without the benefit of discovery. Conversely, the \textit{McDonnell Douglas} standard enables plaintiffs to put on a minimal showing and then shift the burden to the party with all the information.\textsuperscript{178} Also, under the \textit{McDonnell Douglas} method, the defendant still has the opportunity to prevail by producing enough evidence demonstrating non-discriminatory motive.\textsuperscript{179} This proposition is sufficiently illustrated by \textit{Simms v. First Gibraltar Bank} in the Fifth Circuit.\textsuperscript{180} Second, the \textit{Latimore} court overlooked the relevance of the statutes and regulations pertaining to discrimination in real estate and lending transactions.\textsuperscript{181} Significantly, the court failed to

\textsuperscript{174} See \textit{id.}

\textsuperscript{175} Banks have also been cautious out of fear that data discovered during self-testing will not be shielded from disclosure during discovery. See Policy Statement on Discrimination in Lending, 59 Fed. Reg. at 18,268.

\textsuperscript{176} See Swire, \textit{supra} note 1, at 830.

\textsuperscript{177} See \textit{Latimore}, 151 F.3d at 714 (holding that the \textit{McDonnell Douglas} standard is inappropriate in most credit discrimination cases). But see \textit{Simms v. First Gibraltar Bank}, 83 F.3d 1546, 1558 (5th Cir. 1996) (utilizing the \textit{McDonnell Douglas} standard in the credit discrimination context).


\textsuperscript{179} See \textit{id.}

\textsuperscript{180} \textit{Simms}, 83 F.3d 1546 passim.

recognize that HUD, the regulatory agency responsible for enforcement of the FHA, adopted the *McDonnell Douglas* standard to evaluate claims of discrimination under the FHA.\(^{182}\) Finally, the court asserted a lack of "competitive interest" in the credit discrimination context yet declined to pursue this line of analysis to a more accurate conclusion. In fact, there is a "competitive interest" running through these cases since banks have a finite amount of money to loan out and consumers compete for loans out of this limited pool.

Without the uniformity provided by the *McDonnell Douglas* standard, principal issues will continue to be ignored and the inconsistency of lending discrimination decisions will continue. Consequently, some worthy plaintiffs might refrain from litigating their cases. Hopefully, the United States Supreme Court will see fit to grant certiorari for a credit discrimination case in the near future. Thus far, the Supreme Court has denied certiorari in both the *Ring* and *Simms* lawsuits, and certiorari was not sought in the *Latimore* case.\(^{183}\)

Although procedural and policy considerations abound for and against the *McDonnell Douglas* standard, ultimately, only the Supreme Court can end the controversy and provide guidance for plaintiffs and defendants alike in the credit discrimination context.

ERIN ELISABETH DANCY

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182. *See* *Ring v. First Interstate Mortgage*, 984 F.2d 924, 926 & n.2 (8th Cir. 1993) (citing *United States v. Badgett*, 976 F.2d 1176, 1178 (8th Cir. 1992)).