

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

In Re:

PETER STARK,

Complainant

USDA Docket No. 1159
HUDALJ No. 00-24-NA
Decided: March 21, 2003

Peter Stark,
Pro Se

Sadhna True
For the Government

Before:
Constance T. O'Bryant
Administrative Law Judge

DETERMINATION

This matter was referred to the Office of Administrative Law Judges at the United States Department of Housing and Urban Development for adjudication under Section 741 of the Agriculture, Rural Development, Food and Drug Administration, and Related Appropriations Act, 1999, Pub. L. No. 105-277, (October 21, 1998) ("Section 741"). Section 741, in part, waived the statute of limitation on discrimination complaints filed against the United States Department of Agriculture ("USDA") alleging violation of the Equal Credit Opportunity Act ("ECOA"), and in connection with commodity and disaster assistance programs. The rules of procedure for this referral are those published as an Interim Final Rule by the USDA in the December 4, 1998, Federal Register. 7 C.F.R. 15f.

Mr. Stark ("the Complainant") filed a complaint on June 18, 1993, alleging discriminatory treatment against him by the Farm Service Agency ("FSA") in the administration of the farm loan program based on race (Semitic) and religion (Judaism).

In 1994-1995, the Michigan Civil Rights staff of Rural Economics and Community Development made a preliminary inquiry into Mr. Stark's complaint, and in March 1995 reached the conclusion that it was unable to substantiate Mr. Stark's allegations of

discrimination based on race¹ or religion. It recommended that the case be closed from a civil rights standpoint. RR 110.² Mr. Stark's complaint was investigated by a contract investigator in June 1998. The investigator found no evidence that race or religion played a role in FSA's treatment of the Complainant. RR 191. In January 1999, the USDA's Office of Civil Rights ("OCR") notified the Complainant that it had reached the same conclusion, and of his right to file a request for hearing before an administrative law judge. On November 22, 1999, Mr. Stark requested a hearing before an administrative law judge. In July 2001, the file was referred to this office for adjudication.

The referring file contains the March 31, 2001, *Position Statement* of the Deputy Director, OCR. In the *Position Statement* OCR concludes that although Mr. Stark's complaint is an eligible complaint under Section 741, he has failed to allege facts sufficient to establish a *prima facie* case that FSA discriminated against him based on his race and/or his religion.

On October 15, 2002, the USDA filed a Motion to Dismiss And/or For Summary Judgment. It argues that the complaint and request for hearing should be dismissed, with prejudice, because the Complainant has failed to state a claim as a matter of law and/or has failed to establish a *prima facie* case of discrimination under ECOA. The Complainant filed timely opposition to the Motion on November 15, 2002. The Motion for Summary Judgment will be *Granted*.

BACKGROUND

The Complainant alleges that FSA discriminated against him in the administration of the farm loan program. Specifically, he alleges that FSA discriminated against him when it: 1) delayed approval of a loan for irrigation and a greenhouse and for a cost over-run;³ 2) failed to approve a loan based upon figures he provided; 3) failed to record his loan payments in a timely manner causing IRS to send his tax refund check to FSA; and 4) wrote his loan notes at the wrong interest rates.

¹At times the allegation of discrimination on the basis of being Semitic is referred to as race discrimination, at others times it is referred to as national origin discrimination. For consistency, I will refer to his allegations as allegations of race discrimination.

²Abbreviations used are as follows: RR p# for reference to the Running Record (white binder volume); Motion p# for Government's Motion to Dismiss; and Oppos. p# for Opposition to the Motion to Dismiss.

³The loans were first denied but subsequently approved.

In 1987, the Complainant was a farmer in Whitmore Lake, Washtenaw County, Michigan. The Complainant and his wife were married in 1984. Mr. Stark is Jewish. His wife is not.

In or about 1986, Mr. and Mrs. Stark received a \$7500 loan from FSA to update their 100-year-old farmhouse. They did the work themselves. At the time they obtained the loan, the FSA local loan manager was Mr. Woodworth. They enjoyed a good relationship with him. RR 181.

In the spring of 1987, Mr. Woodworth approved the Complainant's application for an Operating Loan ("OL") of \$9,300 for labor, seed, a brush hog and a small barn. \$7100 of that amount was for the barn – to store shallots and elephant garlic, which the Complainant grew. During a visit to his office, Mr. Woodworth introduced the Complainant and his wife to Dennis Wesner as his new assistant supervisor. Mr. Wesner made an appointment to visit their farm to check on the progress of the house repairs and kitchen and bathroom upgrades. RR 181.

Mr. Wesner visited the Complainant's home in the summer of 1997. According to the Complainant, upon arrival and for minutes into the visit, Mr. Wesner chatted cordially with Mr. and Mrs. Stark as they moved about the house. Then they noticed that Mr. Wesner repeatedly stared at Hanukkah Menorahs that were on display in the living room area. One was small, and one was large with Hebrew writing and a large Star of David on it. Mr. Wesner's demeanor changed rapidly and his conversation became very quick and impersonal. Mrs. Stark wrote of her perception that "the Menorahs offended him [Mr. Wesner] just as if I had said something to offend him." *See* Affidavit dated April 2001.

Loan for Irrigation and Greenhouse

During the summer months of 1987, the county in Whitmore Lake, Michigan was declared a disaster area. The Complainant's farm was adversely affected by the drought conditions. He lost 90% of his shallot and garlic crops. He no longer needed the barn for which he had obtained the \$7100 OL in the spring. The Complainant went to FSA with a request to use \$7100 of the OL, then in the Complainant's personal bank account, for an alternate purpose. He was told that Mr. Wesner was the new county supervisor. He sat down and talked with Mr. Wesner about his plan. Instead of using the money for a barn, he wanted to use the \$7100 to purchase an irrigation system and a greenhouse. He believed that these would insure him against loss from future droughts. The Complainant alleges that Mr. Wesner initially agreed to the alternate use of the funds, agreeing with him that his intended use of the \$7100 was a "good idea" and based on sound reasoning.

According to the Complainant, Mr. Wesner required that he deposit the \$7100 into a joint account with FSA with the understanding that the money would be returned to him ten days later after being approved for the alternate purpose.

On or about September 15, 1987, the Complainant deposited the \$7100 in the joint account with FSA. The Complainant alleges that when he returned on or about September 25, 1987 to withdraw the \$7100 as per the agreement, Mr. Wesner would not release the money to him. According to the Complainant, Mr. Wesner took him into his office, closed the door behind him, and out of the blue said to him: “We don’t have any farmers like YOU around here. I said ‘What?’” RR 181. Mr. Stark states that what was said was in a tone that was familiar to him and he knew right away what he meant – Mr. Wesner was referring to the fact that he was Jewish. *See* Complainant’s Response to OCR’s Position Statement at 3. According to the Complainant, Mr. Wesner abruptly changed the conversation. He stammered and told the Complainant that he did not need irrigation or a greenhouse, said it cost too much to heat a green house and that the Complainant did not have the expertise to run a green house. He told the Complainant that the only way for him to get the money was to get an expert to evaluate his operation. RR 181. Mr. Wesner took the position that based on his valuation of the Complainant’s farm, the Complainant did not qualify for the \$7100 loan (he used a valuation that had been done by Mr. Woodworth in the summer of 1986.) RR 181. He also said that he would return the money to the Complainant if he obtained letters of intent from stores showing willingness to buy his herbs. RR 182.

By letter dated October 21, 1987, Mr. Wesner formally denied the Complainant’s request for the \$7100. According to the letter, the denial was based on high debt to asset ratio, limited repayment ability and the Complainant’s limited greenhouse production experience making it a high risk expansion. It was believed that the addition of a greenhouse would further weaken the Complainant’s equity position beyond 100% debt to asset ratio. The Complainant was told that his signature was needed in order to return the \$7100 in the account back to FSA’s Finance Office. RR 28.

The Complainant alleges that after Mr. Wesner failed to give him the \$7100 as had been agreed, he asked Mr. Wesner for the name of his supervisor. It was John Moore. RR 182. The Complainant contacted and discussed the matter with Mr. Moore. Mr. Moore informed the Complainant that Mr. Wesner had used the wrong basis for assessing the value of his operation. He told the Complainant that comparables from local Realtors would be the correct indicator of the value. The Complainant then collected comparables from recent sales and presented the information to Mr. Wesner, explaining to him that Mr. Moore had said Mr. Wesner would accept them. RR 182. Mr. Wesner would not

accept the valuation. RR 181-82. The Complainant states that he also returned with ten to fifteen letters from stores of intent to buy his herbs but that they, too, did not change Mr. Wesner's decision.

On December 17, 1987, the Complainant called Mr. Moore and explained the situation to him, including the evidence he had obtained. The Complainant alleges that Mr. Moore then approved the use of the \$7100 for the purpose requested and told him to return to Mr. Wesner for the funds. Several hours later, the Complainant received a call from Mr. Wesner requesting that he come to his office to receive the \$7100. According to the Complainant, Mr. Wesner closed the door behind him, and with a flush face and grinding teeth, told the Complainant in a low and angry tone, that he was going to make it difficult for him because he (the Complainant) had gone over his head and involved his boss in their dispute. RR 182. According to the Complainant, Mr. Wesner said: "I'm going to make life difficult for you. You better not ever go over my head or I'll get you." See Complainant's Response to Order to Show Cause at 3. Mr. Wesner then wrote the Complainant a check and noted on the check that it was for irrigation and a greenhouse.

The Complainant alleges that the delay between September 25, 1987 and December 17, 1987, of nearly three months, cost him lost sales in late 1987 and early 1988 because he did not have the greenhouse, and therefore had no fresh-cut crops to sell. He alleges also that because of the lack of irrigation money he could not irrigate his crops for 1988. He alleges a loss of all elephant garlic and shallot sales for 1988, which he alleges amounted to 95% of his income.

Loan for Cost Over-Run

Mr. Stark also alleges that he underestimated the cost of digging the well for irrigation. The well required digging 100 feet more than projected. As a result he had a cost overrun on the well of \$3051. RR 182.

In the summer of 1988, the Complainant applied to FSA for a cost overrun loan to cover the \$3051. The exact date of the application is not clear. However, Mr. Wesner denied the Complainant's application, saying a cost overrun loan was not available because no loan for irrigation had been approved. According to the Complainant, Mr. Wesner asserted that he had approved a loan for a greenhouse and greenhouse stock only. Mr. Stark disputed Mr. Wesner's account, asserting that the loan was for a greenhouse and for an irrigation system. Mr. Wesner set up a meeting for August 26, 1988 for the Complainant to appear before the county committee on his application and told the Complainant to "be prepared to show us your evidence of an irrigation loan being authorized." RR 33. At the meeting, Mr. Wesner continued to represent that he had not

approved a loan for irrigation. Mr. Stark presented a copy of the canceled check which Mr. Wesner had written for the \$7100. The copy showed a notation on the check that the loan was for a greenhouse and for irrigation – \$3100 for irrigation and \$4000 for a greenhouse. On the basis of this evidence, on October 14, 1988, the county committee approved the loan for the cost overrun. RR 34.

The Complainant alleges that Mr. Wesner libeled and defamed him at the above discussed committee meeting by denying that he had approved money for an irrigation system and by telling the committee that he (the Complainant) had made “everything up.” RR 26. The Complainant alleges also that Mr. Wesner altered a document pertaining to the loan – a “Statement of Deposits and Withdrawals” – to reflect that money was loaned for a greenhouse and greenhouse stock, and none for irrigation. As evidence of alteration, he points to what is alleged to be white-out marks on a copy of the form. RR. 26, 32. He believes Mr. Wesner whited out the word “irrigation” on the form. RR 183.

Mr. Stark alleges that he was harmed by the delay in receipt of the \$3051 loan between June 1988 and October 1988. He alleges that because he was unable to timely pay the well driller the additional \$3051 for the cost overrun, his credit suffered as well as his relationship with the well driller. The well driller refused to perform warranty work for free. He has not alleged what warranty work was required.

Loan Applications (OL)

In the summer of 1988, farmers in the Complainant’s county were notified that the county had been declared a disaster area. The Complainant had his fields inspected by USDA and they declared his crop to be a 100% loss. A few months later he received information from FSA detailing the types of relief financing for which he might be eligible. He claims that “this entitled [him] to a very small reimbursement and special financing through FmHA.” RR 183.

The Complainant filed for disaster benefits for FY 1988. His application was denied by the county committee. The Complainant was informed that his Farm and Home Plan (“FHP”)⁴ and the crops he wanted to produce did not show enough income to pay farm operating expenses and other farm debts. RR 65.

⁴In order to qualify for an operating loan, the farmer fills out an application packet. Included in the packet is a farm and home plan. This plan shows financial details of the farmer’s operation. It shows assets, liabilities, capital expenditure, household expenditures, live stock, debts and payments of debts. The plan is the foundation of the application and is critical for FSA’s evaluation of repayment ability. RR 178.

The Complainant alleges that Mr. Wesner discriminated against him when he refused to process and approve a 1989 loan application based on a FHP he submitted. Instead Mr. Wesner approved a loan based on incorrect figures he required of the Complainant. Mr. Stark states that he signed the document authorizing the loan under duress.

Because of crop loss in 1988, Mr. Stark admittedly was unable to meet his FSA obligations at the end of the year when payment was due. He had only \$1064 to pay on his \$6123 year-end obligation. He discussed his financial situation with his old supervisor, Mr. Woodworth (who was now at another office), who advised him to pay the \$1064 and “Wesner would help [him] with disaster funding.” RR 183. Mr. Woodworth told the Complainant to fill out the FHP and pay what he had, that Mr. Wesner would enter figures from his FHP into the “DALR\$” software program⁵ and if the Complainant’s figures showed that he could only pay a smaller amount on his notes, the program would write down his loans so that he could pay them. The Complainant did as Mr. Woodworth suggested.

The Complainant completed the FHP and met with Mr. Wesner. According to the Complainant, Mr. Wesner required him to change the figures in his FHP before he would approve any loan. Mr. Wesner returned the documents to the Complainant after he highlighted areas on the FHP where adjustment was needed to obtain loan approval. The Complainant resisted, stating that the figures he used were correct and based on them he was entitled to a write-down. About a week later, he received a letter from Mr. Wesner again telling him he would need to change his figures in order to qualify for a loan. Mr. Wesner gave as his reason for the needed changes that Mr. Stark’s FHP showed \$3025 available to service \$8233 of payments. RR.39.

Mr. Stark met with Mr. Wesner and protested the suggested changes to his FHP. At the meeting, there was a verbal confrontation when Mr. Stark, who had brought with him a tape recorder, wanted to record the meeting and Mr. Wesner objected. Mr. Stark states that Mr. Wesner, at first, said that he, too, would record the session; however, when he could not get his recorder to operate he became exasperated in his dealings with Mr. Stark and discontinued the meeting. A week or so later, Mr. Wesner contacted Mr. Stark to inform him that he would no longer deal with him and had called in an assistant supervisor from a neighboring county (the Adrian office) – Don Strauss – to assist Mr. Stark in the completion of his FHP. According to Mr. Stark, Mr. Wesner

⁵This is a program used to determine whether a farmers home plan will cash flow.

told him that this would be Mr. Stark's last chance to cooperate and obtain approval of his application. If he did not, foreclosure action would commence.

Mr. Stark brought his tape recorder to his meeting with Mr. Strauss and started to record the meeting. Mr. Strauss told him to turn it off or he would end the meeting. He turned it off. Mr. Strauss presented him with the same option as had Mr. Wesner - to modify his FHP or to risk denial of his application and foreclosure proceedings. *See* Oppos. to Motion, at p.4. Mr. Stark alleges that during the meeting, Mr. Strauss asked him financial questions and suggested the numbers that went into the FHP. Mr. Strauss wrote down figures on his FHP which he did not see. RR 183.

A week or so after he met with Mr. Strauss, the Complainant received a letter from Mr. Wesner with his new financing information. He then called Mr. Wesner and told him that the figures Mr. Strauss used were wrong. Mr. Wesner then told him that "that was what he was offering, and if I didn't sign the new papers he would foreclose on me." RR 184.

Ultimately, on February 23, 1989, Mr. Stark signed an FHP which included changes in figures as suggested by Mr. Strauss. RR 45. On the next day, his wife signed the same FHP. *Id.* The Complainant again signed the document on March 24, 1989, attesting to the fact that he had "reviewed [the] plan and agree[d] to its numbers." RR 40. *See also* Affidavit of Peter Stark, dated April 20, 2000. RR 181, 183-84. Despite his earlier dispute, on April 10, 1989, the Complainant wrote Mr. Wesner that he accepted the FHP that he and Mr. Strauss had completed in February 1989. He wrote: "Our total balance . . . will be almost identical to the first farm and home plan Don and I worked on. We will, therefore, accept the first DALR\$ version," i.e., the one prepared on February 24, 1989. RR.76. The loan was paid out on April 10, 1989.

Mr. Stark alleges in his complaint that he and his wife signed the notes on the loans in question based on incorrect information because it was the only way to obtain the loan approval and to avoid foreclosure. He states that they signed all documents under duress. RR 183-84. He states that the incorrect figures showed that he had more funds available to pay on his notes than he actually did. As a result he was required to make larger yearly payments - his payment was \$100 more than it was supposed to be. RR 184 and Oppos. to Motion at 5.

Mr. Stark also alleges that he was entitled to borrow up to \$500,000 at 5% interest to pay off notes he had that were at 7.5% under the disaster relief programs available to the county but that Mr. Wesner denied him such relief. Oppos. to Motion at 4.

Finally, the Complainant alleges that he requested an application for an emergency

loan and for primary loan servicing from Mr. Wesner but he would not give him such applications. RR 120.

IRS Refund Check:

The Complainant alleges that Mr. Wesner failed to timely credit his farm loan account with a payment, and that as a result, a refund check of \$709 from IRS went to FSA instead of him because FSA had erroneously determined his account to be delinquent. RR 26.

In June 1990 Mr. Stark received a letter from the IRS stating that his \$709 tax refund was sent to the USDA because he was delinquent on his notes to the USDA. According to Mr. Stark, he called Mr. Wesner who told him: “[I] purposeful didn’t notify the main office of your payment.” Mr. Stark alleges that as a result of Mr. Wesner’s failure to notify the office of his payment, the IRS sent the refund to the USDA to cover a false delinquency. He also stated that he wrote Mr. Wesner and asked that he return the refund and properly credit his account, but Mr. Wesner would not do so. As a result of the failure of USDA to properly credit his account, he was erroneously reported to be delinquent on his account and was deprived of the use of \$709 for the remainder of the year.

In his affidavit of April 2000, Mr. Stark states that he made payment on his account on March 1 or 2, 1990. RR 184.

The USDA has proffered evidence which shows that Mr. Stark’s payment of \$6133 was due on his account on January 1, 1990. His check to the USDA was dated March 2, 1990, and was received on or after that date. RR. 35. On or about mid-July 1990, Mr. Stark requested that the USDA return to him the \$709 tax refund amount. In a letter to Mr. Stark dated August 14, 1990, Mr. Wesner explained that since Mr. Stark’s payment was not received until March 2, 1990, his office did not inform IRS not to offset his refund because the date for notifying the IRS not to offset the refund had passed. (According to the USDA, the IRS sets the cut-off date for notification not to offset.) As a result, the \$709 had been sent to the USDA and had been applied to his account. The account was currently paid ahead of schedule by \$709. If the \$709 was allowed to remain in the account, the amount due on the account on January 1, 1991 would be reduced by \$709. On the other hand, the Complainant could request a refund of the \$709. If he did so, however, Mr. Wesner could not tell the Complainant when he would receive the money. RR 37.

Although Mr. Stark initially requested the return of his refund check, by letter to

Mr. Wesner, received on January 2, 1991, the Complainant told Mr. Wesner, *inter alia*, to keep the refund check in his account. RR 36.

Interest Rates:

The Complainant states that FSA wrote his notes at interest rates higher than the 5% rate they should have been.

By letter dated July 23, 1987 Mr. Wesner wrote the Complainant that the interest rate on his loan changed from 5% to 6-1/2% between the time of the “signing papers and ordering money.” RR 72. Other evidence shows that the Complainant’s 1989 OL was restructured at the lowest rate available for an OL at the time or 5%. RR 89.

Allegations involving persons other than Mr. Wesner:

Mr. Stark’s complaint includes allegations of adverse actions by other FSA personnel including Don Strauss in the preparation of his 1989 FHP, and by other staff at the Adrian county office to which his loan portfolio was transferred in July 1992. According to the Complainant, persons there failed to correct the error in his FHP. He wanted to adopt the FHP of 1988 and 1989 that he had completed, with his figures – not those completed by Mr. Strauss. He alleges that Michael Jordan, the assistant county supervisor would not assist him in straightening out the problems with his FHPs created by Mr. Wesner, and that David L. Kominek, the county supervisor, tried to get him to drop his complaint about Mr. Wesner by threatening to foreclose on his loan. RR 184-85. “They harassed me for several months. . .” he said of Mr. Kominek and Mr. Jordan. RR. 27. He also alleges that the Adrian office failed to timely record receipt of a \$35 payment in the fall of 1992.

Mr. Stark refused to fill out any new FHPs in 1991 and 1992 for loan servicing, insisting that he could not do so until he had the correct figures calculated on his figures, not Mr. Strauss.’ RR 185.

On June 17, 1993, Mr. Kominek sent the Complainant a “Notification of Intent to Accelerate” indicating intent to initiate foreclosure action based on the Complainant’s delinquency.⁶ Mr. Stark had not paid on his loans since January 1992. Mr. Stark did not respond. On November 18, 1993, Mr. Kominek sent the Complainant a “Notice of the Availability of Loan Service and Debt Settlement Programs for Delinquent Farm

⁶Mr. Stark filed his discrimination complaint on June 18, 1993.

Borrowers,” and a Loan Servicing Application Package. These were to be returned within 60 days, or January 19, 1994. The Complainant did not submit them. Thus, on March 2, 1994, Mr. Kominek sent the Complainant a “Notice of Intent to Accelerate or Continue Acceleration of Loans and Notice of Your Rights” with appropriate attachments.

The Complainant appealed the decision to accelerate his loan payments to the National Appeal Division of USDA (“NAD”). He claimed that he could not accurately complete the debt servicing package because he could not obtain the correct documentation and figures he needed from FSA. He argued that he had been under duress when he signed the promissory notes evidencing the loans that were overdue and in default. RR 178. In October 1994, the NAD upheld the FSA action, finding that initiation of foreclosure was supported based on the Complainant’s delinquency. RR116-119.⁷

When interviewed, Mr. Kominek and Mr. Jordan stated they never knew that Mr. Stark was Jewish or Semitic. They thought he was a White person and each was unaware of Mr. Stark’s religion. RR 130. They stated that they could not help Mr. Stark ward off delinquency on his loan notes because he refused to cooperate with them and provide required information. RR 132.

Alleged facts pertaining to the discriminatory motive of Mr. Wesner

In his June 18, 1993, complaint, the Complainant did not give a reason why he thought Mr. Wesner took adverse action against him. However, the record includes numerous subsequent statements of the Complainant regarding the matter. When OCR asked the Complainant to specify a basis for the alleged discrimination, he wrote on July 7, 1993:

Why Mr. Wesner denied me my civil rights is known only to him. Maybe it was in part because I have a beard and wear my hair long and my olive tone of skin. RR 16.

In a letter to the civil rights investigator, dated July 13, 1993, the Complainant stated: “I don’t know why Mr. Wesner denied me access to government programs. It may have

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been in retaliation for Mr. Moore’s decision.” RR 15. The Complainant stated that Mr.

⁷The Complainant signed Promissory Notes from 4/20/89: 1) \$58,082.57 (Loan 41-06); \$10,198.14 (Loan 44-07); and \$9,90.48 (Loan 44-08). He also signed a Promissory Note on May 16, 1989 for \$3050 (Loan 44-05). These Notes required that principal and interest on the loans be paid in installments on January 1 of each year. The Complainant last made payment on the Notes on January 3, 1992.

Wesner told him that he (the Complainant) had better not make any more “trouble.” If he did so, he (Mr. Wesner) would make it difficult for the Complainant. RR 11.

During a follow-up telephone inquiry from OCR on July 22, 1993, the Complainant alleged race and religion as the basis of his complaint. On September 20, 1993, he identified his race as “Semitic” and his religion as “Judaism.”

In the summary of a 3-1/4 hour interview of Mr. Stark conducted on July 27, 1994, Ghulam R. Sumbal, a civil rights investigator, stated that Mr. Stark felt that Mr. Wesner retaliated against him because he [Stark] called Mr. Jon Moore, Chief, Farmers Program. RR 121-22. Mr. Stark had also stated that FSA employees treated him differently due to his race and religion. He feels he does not look like a White person. RR 122. In the latter regard, the investigator observed that “Mr. Stark has light skin, long hair and a beard.” RR 122.

In a June 24, 1998, affidavit taken by a contract investigator for OCR, the Complainant alleges that when he went to pick up his check for the cost over-run in December 1987 Mr. Wesner said to him: “if you go over my head again, I’ll get you.” RR 26. He also stated in his June 1998 Affidavit that he saw Mr. Wesner look at the table on which a Menorah sat, at least three times during his visit to his home in the summer of 1987. He described Mr. Wesner’s visit to his house in the summer of 1987:

Directly across from the door that Mr. Wesner entered, was a table against the wall. On the table, there were 2 Chanukah Menorahs. One large one with large Hebrew writing and a Star of David, and one small one. I saw him look at that table three times. Once, when he first entered my house, and again when he passed from the living area to the kitchen, and then again as he left the kitchen area and headed toward the door to leave. RR.24-28.⁸

However, in his summary of the interview with the Complainant, the investigator quoted the Complainant as saying with regard to the Menorahs that he didn’t know if Mr. Wesner saw them or not. RR 6.

The record includes an April 2000 Affidavit from Complainant, as well. There he

⁸ This was the first mention of this visit to the Complainant’s home and Mr. Wesner’s alleged observation of the Menorahs. The Complainant did not relate this event in his complaint, nor any follow-up writings nor during his 3-1/4 hour interview with the civil rights investigator in June 1994.

recalls that in the fall of 1987, Mr. Wesner asked him to come into his office. When he visited the following occurred from behind closed doors:

From behind his desk in a low voice he said 'We don't have any farmers like you around here.' I said 'What?'⁹. . . He stammered and told me I did not need irrigation or a greenhouse. He said it cost too much to heat a greenhouse and that I did not have the expertise to run a greenhouse. He said the only way for me to get the money was to get an expert to evaluate my operation. . . RR 181-82.

In his October 2001 Response to OCR's Position Statement, the Complainant stated that he knew exactly what Mr. Wesner meant when he said - "We don't have any farmers like you around here." He knew that Mr. Wesner was referring to the fact that he was Jewish.

Other evidence of reasons for Mr. Wesner's actions:

In his interview with the investigator in June 1994, Mr. Stark stated that Mr. Woodworth told him that Mr. Wesner and others in the Whitmore Lake office were "screwing up and not doing their jobs;" that he had told Mr. Wesner to do the paperwork he was supposed to do concerning write downs for people like the Complainant, but that Mr. Wesner, rather than doing his work, left on vacation. RR 27.

In an April 20, 2000 affidavit, the Complainant related that he was told by several FSA employees, including Mr. Woodworth, that there were problems with Mr. Wesner and other staff at the Whitmore Lake office, and that because of the problems the office was being shut down. Mr. Stark claims he was entitled to a write-down of his loan. RR 183. Mr. Woodworth told him that there were "quite a few people" who were entitled to write-downs who did not get them. Mr. Woodworth knew of two farmers who were entitled to write-downs of \$500,000 who did not get them because of Mr. Wesner. RR 185. In addition, an African American male named Marvin had pulled him [Mr. Stark] aside to warn him to keep all his paperwork because Mr. Wesner "had a stack of write-downs on his desk that he was supposed to do" and had not done. Marvin said that Mr. Wesner was doing other things (putting together a residential housing project, and taking vacations) rather than doing his write-downs in these other cases. RR 184.

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The Whitmore Lake office was closed in June 1992. In that same month, Mr.

⁹The fact of this comment was first alleged by the Complainant in his Affidavit of April 2000. He had not mentioned it in his complaint, nor any follow-up writings, nor during his 3-1/4 hour interview with the civil rights investigator in June 1994, nor in his June 1998 Affidavit.

Wesner quit his job. RR 121. The Whitmore Lake customers were referred to the Adrian office. The Complainant states that he was told by Mr. Woodworth and Mr. Jordan that the Whitmore Lake office was closed “because of wrongful acts by Mr. Wesner and others who worked there.” RR 27, 184.

ANALYSIS

Applicable Principles of Law

The ECOA makes it unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race or religion or national origin. 15 U.S.C. § 1691(a)(1).

Summary Judgment

Summary judgment may be rendered if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) of the Federal Rules of Civil Procedure. If the record, viewed in the light most favorable to the nonmoving party reveals that there is no genuine issue as to any material fact, the party is entitled to summary judgment. *Anderson v. Liberty Lobby*, 477 U. S. 242 (1986). The party moving for summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record in the case which it believes demonstrate the absence of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U. S. 317, 323 (1986). Once the moving party makes its initial showing, however, the nonmoving party must demonstrate “specific facts showing that there is a genuine issue for trial.” *Id.* at 324.

To preclude summary judgment, the nonmoving party cannot satisfy this burden by resting on mere allegations, but instead must present “affirmative evidence showing a genuine issue for trial.” *Anderson*, 477 U. S. at 256. The nonmoving party is required to present some significant probative evidence which makes it necessary to resolve the parties’ differing versions of the dispute at trial. To determine whether the nonmoving party has raised a genuine issue of material fact, the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his/her favor. If the evidence offered by the nonmovant is merely colorable, not significantly probative, or is not enough to lead a fair-minded fact finder to find for the nonmoving party, the motion for summary judgment should be granted. *Coleman v. General Motors Acceptance Corporation et al*, 196 F.R.D. 315, 2000 U. S. Dist. LEXIS 13236 (Aug. 29, 2000), *citing*

Co., 886 F. 2d 1472, 1479 (6th Cir. 1989) and *Anderson*, 477 U. S. 242, 249 (1986). See also *Mays v. Buckeye Rural Electric Cooperative, Inc.*, 277 F. 3d 873, 875,(6th Cir. 2002); *Greer v. Bank One*, 2002 WL 2032221 (7th Cir. 2002); and *Rowe v. Union Planters Bank*, 289 F 3d 533 (8th Cir. 2002).

Burden of Proof

The Complainant has the burden of proving his claim of discrimination. Discrimination may be proved by direct evidence or indirect or circumstantial evidence. To prevail using the direct evidence method, the evidence must be such which, if believed, proves the fact of intentional discrimination without inference or presumption. See *Fierros v. Texas Dep't of Health*, 274 F.3d 187 at 195 (5th Cir. 2001). It includes any statement or written document showing a discriminatory motive on its face as, e.g., in *Fierros*, where an employer told plaintiff that she had been denied a pay raise because she filed a discrimination complaint, and as in *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392 at 402 (5th Cir. 2000) where a dean's statement that he denied a professor a pay raise because the professor filed a discrimination suit against the university. Although the Complainant has alleged that Mr. Wesner made a statement which to him showed a discriminatory animus towards him as a Jewish person, this statement, even if believed, does not meet the direct evidence test. It does not prove, without resort to inference or presumption, that Mr. Wesner intentionally discriminated against Mr. Stark by taking an adverse action against him because he was Jewish or Semitic.

Since there is no direct evidence of discrimination, consideration must be given to whether there is sufficient indirect or circumstantial evidence of discrimination to establish a violation under ECOA.

Courts have generally applied the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973) in discrimination cases, including ECOA cases. See *Moore v. U. S. Dep't of Agriculture*, 55 F. 3d 991, 995 (5th Cir. 1995) and *Latimore v. Citibank Fed. Savings Bank*, 151 F. 3d 712 (7th Cir. 1998). In that case, the Supreme Court articulated a three part, burden-shifting test for Title VII discrimination cases. The burden is initially on the complainant to make a *prima facie* showing of discrimination by a preponderance of the evidence. See *Arthur Young & Co. v. Sutherland*, 631 A. 2d 354, 361 (D.C. 1993); *Texas Department of Community Affairs v. Burdine*, 450 U. S. 248, 253 (1981). The *prima facie* showing, when made, raises a rebuttable presumption that the agency's conduct amounted to unlawful discrimination. See *Arthur Young*, 631 A. 2d at 361. Once the presumption is raised, the burden shifts to the agency to rebut it by

articulating "some legitimate, nondiscriminatory reason" for the action. *Atlantic Richfield*

Co. v. D. C. Commission of Human Rights, 515 A. 2d 1095, 1099 (D. C. 1986) *citing Burdine*, 450 U. S. at 254. The agency can satisfy its burden by producing admissible evidence from which the trier of fact can rationally conclude that the denial of benefits was not motivated by discriminatory animus. *See Atlantic Richfield*, 515 A. 2d at 1099-1100. “The defendant need not persuade the court that it was actually motivated by the proffered reason.” *Burdine*, 450 U. S. at 254.

Once the defendant satisfies the burden of producing evidence which shows a legitimate, nondiscriminatory reason for the action taken, the burden shifts back to the complainant to prove by a preponderance of the evidence, that the defendant’s stated reason for its action was not its true reason but rather merely a pretext for discrimination. To show pretext, the complainant can show that a discriminatory reason more than likely motivated the defendant or that the proffered reason was unworthy of credence. “This burden merges with the ultimate burden of persuasion on the question of intentional discrimination.” *Atlantic Richfield*, 515 A. 2d at 1100 (*citing Burdine*, 450 U. S. at 256.)

In this case, the Complainant can establish a *prima facie* case by showing: 1) that he is a member of a protected class based on race and/or religion and that the alleged discriminating official knew, or had reason to know, that he was a protected class member; 2) that he applied for and was qualified to receive benefits offered by FSA; 3) that he was denied those benefits; and 4) he was treated differently (less favorably) than others similarly situated who were not of the protected class, i.e., who were not Jewish or Semitic. *See* Final Determination in *In Re: Henry and Hattie Lockwood*, USDA Docket No. 1083, HUDALJ No. 99-38-NA (May 2000). These elements, if shown, create a presumption, rebuttable, that the denial was based upon the Complainant’s religion and/or race, and require the USDA to show a legitimate, nondiscriminatory reason for the action(s) it took.

The USDA argues 1) that the Complainant was not qualified for the loans and loan servicing in question when he first applied, and that he received the loans and loan servicing when he did qualify; and, 2) that the Complainant had not alleged that applicants outside of his protected group with similar qualifications (similar credit stature) were granted the servicing or benefits sought. Thus, the USDA contends, the Complainant is not entitled to a rebuttable presumption of discrimination and his claim fails as a matter of law.

The Complainant responded that he was qualified for all the benefits that he sought. As to others similarly situated, he responded that it should have been perfectly obvious that USDA benefits had been disbursed to thousands of people who are not

Jewish and that he should not have had to make this allegation in his complaint because

of its “obviousness.” He now makes the allegation. Thus, he argues, that he is entitled to a hearing to prove his case.

Because the Motion and Opposition consider evidence in addition to the pleadings, including documents in the running record submitted with the referral from USDA, and documents submitted by the Complainant, I shall treat the Motion as a Motion for Summary Judgment.

Prima Facie Case Analysis

1. Protected Class Status

Mr. Stark has established that he is Jewish, and a member of a protected class (religion). Considering the evidence in a light most favorable to the Complainant, I find sufficient evidence that Mr. Wesner knew, or had reason to know, that the Complainant was Jewish based on his having observed the Menorahs at the Complainant’s home. Accordingly, I find that the Complainant has established element one of the *prima facie* case, but only as to Mr. Wesner.

Mr. Stark has not alleged that Mr. Strauss, Mr. Jordan or Mr. Kominek had knowledge of his religion, or any incident which would raise an inference of discrimination by any of them based on his religion or race. Moreover, both Mr. Jordan and Mr. Kominek denied knowing that the Complainant was Jewish or that he was Semitic. Each thought that Mr. Stark was a White person and neither knew of his religion. RR 130. Although there is no interview of Mr. Strauss, no reasonable inference is raised by the evidence that Mr. Strauss knew, or had reason, to know that Mr. Stark was Jewish and/or Semitic. His description that he has olive tone skin, wears a beard and long hair provides no reason to conclude otherwise. Thus, the Complainant has failed to establish element one of the *prima facie* case of discrimination based on conduct by Don Strauss, Michael Jordan or David Kominek, and his complaint will not be further considered as to any alleged discriminatory acts by them.

2. Qualification

As to elements two and three, I find that the Complainant has proffered evidence from which it could reasonably be inferred that he qualified to use the \$7100 previously loaned to him for an alternate use. He had already qualified to receive the \$7100 just a few months earlier and had, in fact, received the money. The alternate use was initially denied to him despite his qualification.

Similarly, I find that the Complainant has proffered evidence from which it could

reasonably be concluded that he was qualified to receive the \$3150 for the cost over-run requested in the summer of 1988. The evidence suggests that the only qualification that was at issue was whether an initial loan had been made to him by FSA for irrigation or the digging of the well. Mr. Stark established that he had received such a loan. The loan was initially denied. The fact that he ultimately received the \$3150 benefit (several months later after appeal to the county committee), does not render moot his claim. He has alleged that he was injured by the delay in receipt of the benefit.

On the other hand, I do not find evidence from which it could reasonably be inferred that Mr. Stark was qualified to receive loan servicing based on figures he supplied in his FHP for his 1988 and 1989 applications, that his refund check was improperly held by FSA, or that his loan was written at other than the lowest rate available.

Mr. Stark's 1988 and 1989 OL applications were initially denied for failure to show repayment ability. The only evidence he has offered to show that he qualified for loans based on his figures is statements from Mr. Woodworth that he might qualify for a write down. Mr. Woodworth reportedly told the Complainant to fill out the FHP, that Mr. Wesner would enter figures from his FHP into the "DALR\$" software program, and if the Complainant's figures showed that he could only pay a smaller amount on his notes, the program would write down his loans so that he could pay them. These allegations are insufficient to establish his qualification for a loan based on the figures he submitted. Moreover, when the Complainant changed the figures on his FHP and showed repayment ability, his loans were approved.

Mr. Stark's claim that the administrative offset of his refund check was improper is equally not support on this record. He acknowledges that his note payment was due on January 1, 1990, but was not sent until to FSA until March 1 or 2, 1990. He has not refuted FSA's claim that its receipt was too late to prevent an offset by IRS. Moreover, in his January 1991 letter to Mr. Wesner, the Complainant told Mr. Wesner to let his refund amount remain in his account rather than refund to him. Accordingly, he has failed to establish that he was qualified to receive this benefit which were denied him.

Because Mr. Stark has failed to show qualification on the three claims, they need not be further considered. *Rowe v. Union Planters Bank*, 289 F. 3d 533 (8th Cir. 2002) .

At the core of the *McDonnell Douglas* burden-shifting approach is the idea that if a protected class member is treated worse than a nonprotected class member, in a situation in which there is no obvious reason for the difference in treatment, a presumption of discrimination arises giving reason to require the respondent to explain his actions. See *Latimore v. Citibank Fed. Savings Bank, et al*, 151 F. 3d 712 (7th Cir. 1998). See also *Radue v. Kimberly-Clark Corporation*, 219 F. 3d 612, 617-18 (7th Cir. 2000) and *Peele v. Country Mutual Ins. Co.*, 288 F.3d 319 at 331 (7th Cir. 2002).

In this case, the Complainant has failed to proffer evidence of a single example of another farmer being treated more favorably than he who had similar credit qualification. His claim that it is “perfectly obvious” that USDA has disbursed benefits to thousands of people who are not Jewish does not satisfy his burden to present evidence on this element of the *prima facie* case. “The *prima facie* case under *McDonnell Douglas* must be established and not merely incanted.” *Coco v. Elmwood Care, Inc.*, 128 F. 3d 1177, 1178 (7th Cir. 1992). The Complainant must identify a person(s) who is not Jewish who is “similarly situated” to him in terms of having the same or similar credit history and qualification and who sought and was granted the same benefits that he was denied. See *Patterson v. Avery Dennison Corp.*, 281 F.3d 676 at 680 (7th Cir. 2002) and *Radue, supra*, 219 F. 3d at 617-18. He has not done so. He has not set up a set of circumstances where discrimination may be presumed as motive as opposed to mistake, ineptness, nonprofessionalism, or other, for Mr. Wesner’s actions in the case.

Since I find that the Complainant has failed to proffer evidence that a person similarly situated was accorded more favorable treatment than he, he has failed to establish a *prima facie* case of discrimination and summary judgment is proper. “When a complainant is unable to set forth facts necessary to establish one essential element of a *prima facie* case, a dispute over facts necessary to prove another element of the case would not be material to the outcome.” *Celotex*, 477 U. S. 317, 322-323 (1986). See also *Peele, supra*, 288 F. 3d at 331 citing *Patterson, supra*, 281 F. 3d at 680 (“If a district court determines that a plaintiff has failed to identify a similarly situated co-worker outside of her protected class or that the co-worker identified by the plaintiff, while similarly situated, was not treated in a more favorable manner, it need not address any of the underlying allegations of disparate treatment”), *Cone v. Longmont United Hospital Association*, 14 F 3d 526 at 528 (10th Cir. 1999) (plaintiff’s claim fails where he failed to show comparison between himself and another individual of the nonprotected class in a comparable situation or “similarly situated” to him) and *Allen v. Muriello, 2 FH - FL (Aspen)* ¶ 16,360 (N. D. Ill. 6-2-99) (plaintiff failed to make *prima facie* case where he failed to produce evidence of others who were similarly situated), and *LaCroix v. Sears,*

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Roebuck, and Co., 240 F. 3d 688 at 694 (8th Cir. 2001) (since the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination, summary judgment is proper where he fails to do so).

Legitimate, Nondiscriminatory Reason

Even assuming that all four elements of the *prima facie* case are satisfied, the USDA has provided legitimate, nondiscriminatory reasons for the actions it took. Mr. Wesner explained to Mr. Stark, regarding the \$7100 alternate use loan that his debt to asset ratio was too high and that he needed a new valuation of his property. This is a legitimate and nondiscriminatory reason for declining to approve the loan. With regard to the \$3150 cost over-run loan, the reason for denial was that a loan had not been approved for irrigation or well digging in the first place and thus a cost over-run loan was not available. This reason, too, was a legitimate, nondiscriminatory reason for declining to approve the loan.

Mr. Stark alleges that the reasons given for the denials by Mr. Wesner were false and contrived. In this regard, the reason need not be shown to be persuasive, just that it was a legitimate, nondiscriminatory reason. The burden at this stage is one of production, not persuasion and can involve no credibility assessment. *See Reeves v. Sanderson Plumbing Products, Inc.* 530 U. S. 133 at 142 (2000), *citing St. Mary's Honor Center v. Hicks*, 509 U. S. 502, at 509 (1993). At this juncture, the burden is quite light. The USDA need not persuade the fact finder that Mr. Wesner was actually motivated by the reason he gave and the mere articulation of the reason rebuts the *prima facie* case and puts the onus back on the Complainant to prove pretext. *See Pilditch v. Bd. of Educ. of the City of Chicago*, 3 F.3d 1113, 117 (7th Cir. 1993).

Pretext (and real reason)

Pretext “means a dishonest explanation, a lie rather than an oddity or an error.” *Kulumani v. Blue Cross Blue Shield Ass’n*, 224 F. 3d 681, 685 (7th Cir. 2000). To establish pretext, the Complainant must show, by a preponderance of the evidence, not only that the reason was not a legitimate reason but that the real reason for the initial denial of his loan applications was discrimination because of his religion or race. In this case, the Complainant’s proof falls far short of meeting his burden.

Mr. Stark has alleged that the reason Mr. Wesner gave for the denial of the cost over-run loan, i.e., that a loan had not been approved for irrigation in the first place - was false - deliberately fabricated to cause denial of his loan. In this regard, it is permissible for a fact finder to infer the ultimate fact of discrimination from the falsity of a proffered

explanation. The belief as to the falsity of the reason offered, combined with a *prima facie* case, may suffice to show discrimination. *Reeves v. Sanderson Plumbing*, 530 U. S. 133 at 146. In this case, the Complainant has not established a *prima facie* case, but

assuming he has, he still cannot show pretext for discrimination.

Although the Complainant was able to persuade the county committee that a loan had been approved for that purpose, this does not show that the reason was not a legitimate one or that Mr. Wesner had intentionally given a false reason. Mr. Wesner may have simply forgotten or been mistaken about the dual purpose of the loan. The cost over-run loan was considered in August 1988. The initial loan had been made eight months earlier in December 1987. Mr. Stark has alleged that Mr. Wesner altered notations on the deposit and withdrawal statement in order to deny a basis for approving the \$3150 loan. However, his evidence as to the alleged alteration is insufficient to allow an inference of deliberate misrepresentation or intent to falsify. Mr. Stark has not offered the original of the deposit and withdrawal statement against which the copy can be compared. Instead, he speculates that a change was made based on broken lines on the top of a copy of the form. No reasonable fact finder could conclude that Mr. Wesner altered evidence on such flimsy a basis.

Moreover, the burden is on the complainant to introduce sufficient evidence for the fact finder to find both that the respondent's reason was false and that the real reason was discrimination. *Fisher v. Vassar College*, 114 F 3d 1332 (2nd Cir. 1997) (en banc) cert. denied, 522 U. S. 1075 (1998). Here, the Complainant fails in both instances.

Mr. Wesner denied knowing that Mr. Stark was Jewish and denied taking action against him on that basis. The alleged evidence pertaining to why Mr. Wesner initially disapproved the new use of the \$7100 and to approve the \$3150 cost over-run is all based on speculation – most of it by the Complainant, himself. On July 13, 1993, he wrote:

Why Mr. Wesner denied me my civil rights is known only to him.
Maybe it was in part because I have a beard and wear my hair long
and my olive tone of skin. RR 16.

And, also that “I don't know why Mr. Wesner denied me access to government programs. It may have been in retaliation for Mr. Moore's decision.” RR 164. The Complainant stated that Mr. Wesner told him that he (the Complainant) had better not make any more “trouble.” If he did so, he (Mr. Wesner) would make it difficult for the Complainant. RR 10-11. In his report of interview with the Complainant in 1994, the OCR investigator stated the following:

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He feels Mr. Wesner retaliated against him because he (Stark) called Mr. Jon Moore, Chief, Farmers Program. Mr. Stark also stated that Adrian County Office staff has been uncooperative and hostile against him.

Mr. Stark also stated that FmHA employees treated him differently due to his race and religion. He feels he does not look like a White person. Yet, according to the investigator, Mr. Stark has “light skin, long hair and a beard.” RR 122. That Mr. Stark had “olive tone of skin” and wore a beard and long hair is not helpful information in this case.

Moreover, the alleged comment by Mr. Wesner that “We don’t have any farmers around here like you” is too ambiguous to allow a reasonable person to conclude that Mr. Wesner was referring to Jewish people. Isolated or stray remarks or ambiguous comments are too abstract to support a finding of discrimination. *See Phelps v. Yale Secretary, Inc.*, 986 F.2d 1026 (6th Cir) cert. denied 114 S.Ct. 175 (1993) (employer’s comment that employee’s 55th birthday was cause for concern held too ambiguous to support age discrimination claim) and *Leichihman v. Pickwick Int’l*, 814 F.2d 1271 (8th Cir. 1987) (comment that Korean-American employee should “learn to speak English” held insufficient to show national origin discrimination.) The evidence is “merely colorable” and not significantly probative of discrimination. *See Anderson, supra*, 477 U.S. at 249-50 (1986).

Even if it were reasonable to infer from the context of the events in this case that Mr. Wesner was referring to people of the Complainant’s religion, there is no evidence of a nexus between his comment about Mr. Stark’s race or religion and the action taken. Thus, the comment is not significantly probative of Mr. Wesner’s motivation. Although Mr. Stark claims that he knew exactly what Mr. Wesner meant by the comment - - that Mr. Wesner did not like Jewish people - - it was not until April 2000 that he considered the alleged comment worthy of mention. This was nearly seven years after he filed his discrimination complaint. By the time he mentioned the comment, Mr. Stark had met with two separate investigators, both of whom had concluded that his claim of discrimination based on race and religion could not be substantiated. He met with an investigator for 3-1/4 hours in June 1994, and had provided an affidavit to the second investigator in 1998, yet had failed to tell either that Mr. Wesner had made such a remark. The Complainant’s failure to mention the remark suggests, at best, that he did not believe that the comment was probative of Mr. Wesner’s motive in taking the actions he did.

Significantly, the Complainant has presented evidence in his own case which shows that more likely than not, there were nondiscriminatory reasons for Mr. Wesner’s actions in this case. The statements of Mr. Woodworth, Mr. Jordan, and Marvin, as

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related by the Complainant himself, suggest that Mr. Wesner was derelict in his duties and was not committed to fair dealings with any of the farmers in the area.

Mr. Stark contends that he was entitled to a write-down of his loan. Mr.

Woodworth told him that there were “quite a few people” who were entitled to write-downs who did not get them and that Mr. Wesner and others in the Whitmore Lake office were “screwing up and not doing their jobs.” According to Mr. Woodworth, once when he told Mr. Wesner to do the paperwork he was supposed to do concerning write downs for people like Mr. Stark, Mr. Wesner, rather than doing his work, left on vacation. RR 27. Mr. Woodworth knew of at least two farmers who were entitled to write-downs of \$500,000 who did not get them because of Mr. Wesner. RR 185. In addition, Marvin warned the Complainant to keep all his paperwork because Mr. Wesner “had a stack of write-downs on his desk that he was supposed to do” and had not done. Marvin said that Mr. Wesner was doing other things (putting together a residential housing project, and taking vacations) rather than doing his write-downs in these other cases. RR 184. And, several FSA employees told the Complainant that because of problems with Mr. Wesner and other staff at the Whitmore Lake office, the Washtenaw county office was being shut down.

Considering all the above evidence, the Complainant has failed to establish, by a preponderance of the evidence, that the reasons Mr. Wesner gave the Complainant for the denial of his application for the loans of \$7100 and \$3150 were pretextual for discrimination based on race or religion.

Retaliation

Finally, I have considered whether the Complainant has established a *prima facie* case of retaliation by Mr. Wesner. I conclude that he has not.

The ECOA makes it unlawful for any creditor to retaliate against an applicant “because the applicant has in good faith exercised any right” protected under the Consumer Credit Protection Act (“CCPA”)(Title 15 U. S. C., Chapter 41). 15 U.S.C. §1691(a) (3).

Mr. Stark alleges that when he went to pick up his check for \$7100 in December 1997, Mr. Wesner warned him that if he went over his head and appealed to his boss again, he would “get him” or make trouble for him. His allegations can be construed to

make a claim that Mr. Wesner subsequently denied his request for a cost over-run loan

in retaliation for his having made that appeal.¹⁰

In order to make a *prima facie* showing of discrimination by retaliation under ECOA, the retaliation must be for exercising a right under the CCPA. In appealing to Mr. Wesner's supervisor to seek a reversal of a ruling on its merits, Mr. Stark was not exercising a right accorded him under the CCPA. He was acting pursuant to provisions for USDA appeals found in Title 7. The CCPA is found at Title 15. Additionally, the evidence does not suggest a causal connection between Mr. Wesner's alleged threat of retaliation in December 1987 and his denial of the cost over-run loan nearly 8 months later in August 1988. *See, e.g., Cisneros v. Wilson*, 226 F. 3d 1113 (10th Cir. 2000).

CONCLUSION

Based on review of the pleadings and evidence in the administrative record before me, no issue of material fact pertinent to the disposition of this case remains in conflict. The Complainant failed to make out a *prima facie* case of discrimination based on race or religion. He cannot show that other similarly situated farmers who were outside his protected class were treated differently than he was. Moreover, the USDA has provided legitimate, nondiscriminatory reasons for its actions which the Complainant has not shown to be pretext for discrimination. Accordingly, summary judgment in favor of the USDA must be granted as a matter of law.

This Determination shall become final 35 days after issuance unless reviewed within that time by the Assistant Secretary for Administration of the United States Department of Agriculture, either upon the Assistant Secretary's own initiative or pursuant to request by the Complainants. *See* 7 C.F.R. §15f.24.

CONSTANCE T. O'BRYANT
Administrative Law Judge

J:/AG.Stark.dec.f.3-21-03.wpd

CERTIFICATE OF SERVICE

I hereby certify that copies of this DETERMINATION issued by CONSTANCE T. O'BRYANT, Administrative Law Judge, in HUDALJ No. 00-24-NA, were sent to the

¹⁰ The denial of the \$7100 happened before the Complainant appealed to Mr. Wesner's boss; thus, there is no arguable retaliation claim as to that denial. *See Cole v. Ruidoso Municipal Schools*, 43 F. 3d 1373, 1381 (10th Cir. 1994). (To be retaliation, adverse act must be contemporaneous with, or subsequent to, engaging in protected activity.)

following parties on this 21st day of March, 2003, in the manner indicated:

Chief Docket Clerk

REGULAR MAIL:

Mr. Peter Stark
4450 Valentine
Whitmore Lake, Mi. 48189

Sadhna G. True, Esq.
Office of the General Counsel
1400 Independence Avenue, S.W., Room 2029-S
Washington, D.C. 20250

INTEROFFICE MESSENGER:

David Winningham, Acting Director
Office of Civil Rights
Office of the Assistant Secretary for Administration
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250-9410

Arleane Leland
Associate General Counsel
Civil Rights
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250-9410

Charles Q. Pearson, Director
Program Adjudication Division
Office of Civil Rights
1400 Independence Avenue, S.W.
Washington, D. C. 20250

Frederick Isler, Deputy Director
U. S. Department of Agriculture
Department of Programs
300 7th Street S.W., Room 400
Mail Stop 9430

Washington, D. C. 20250