

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

SOL Docket No. 07-0170
OCR No. 1139

In re: ROBERT A. SCHWERDTFEGER

Complainant

DECISION AND ORDER

In this action, the Complainant, Robert A. Schwerdtfeger, seeks a determination that Farmers Home Administration (“FmHA”), now known as the Farm Service Agency (“FSA”) unlawfully discriminated against him in violation of the Equal Credit Opportunity Act (ECOA) and requests damages. The matter is before me upon the motion of the Respondent to dismiss the action and/or for summary judgment. The Complainant has been afforded an opportunity to respond to the Motion. For the reasons set forth below, the Respondent’s motion will be granted and the Complaint will be dismissed.

Procedural History

The original complaint was filed by the Complainant by letter dated September 17, 1994, alleging that the Agency’s County Supervisor employees in Effingham County, Illinois committed fraud and discriminated against him on the basis of age. (GX-1).¹ On October

¹ Mr. Schwerdtfeger’s exhibits are designated as “CX”; the Agency’s exhibits are designated as “GX”, and the ALJ’s exhibits are designated as “ALJX.”

5, 1994, the USDA Office of Civil Rights (OCR) agreed to investigate the case and provide a report of their findings. (GX-2). On September 9, 1997, OCR recommended that the complaint be adjudicated. (GX-3). A handwritten notation dated March 12, 1998 on the September 9, 1997 memorandum directed that the case be sent to the Decision Writing Team. (*Id.*) On January 15, 1999 (incorrectly dated 1998), the Final Agency Decision was issued, finding no discrimination and advising that no further action would be taken on his complaint, but advising the Complainant of his options for further review. (GX-4). A hearing before an Administrative Law Judge had been conditionally requested by the Complainant by a letter dated December 6, 1999 in the event the Director of the Office of Civil Rights for the United States Department of Agriculture could not negotiate a settlement. (GX-7). On December 16, 2002, the Deputy Director of the Office of Civil Rights determined that the complaint was inappropriate for informal resolution. (GX-8). In December 16, 2002, the USDA Office of Civil rights issued a determination that “familial status” was not a covered status under the Equal Credit Opportunity Act.² (GX-8). In a Supplementary Report of Investigation dated July 21, 2006, OCR conducted a fresh investigation resulting in a Finding of Facts. (GX- 9).

By transmittal received in the Hearing Clerk’s Office on August 14, 2007, the case and attachments were forwarded to Marc R. Hillson, Chief Administrative Law Judge, Office of Administrative Law Judges for the United States Department of Agriculture and the

² Although the Web page of the Office of Assistant Secretary for Civil Rights which does list “familial status” as one of the 12 prohibited bases for discrimination in “USDA programs” (circa 5/2008), the term as used there applies to individuals with children under the age of 18 living in the household and is not involved under the facts of this action. See, http://www.ascr.usda.gov/complaint_filing.html

case was docketed.³ On August 14, 2007, Judge Hillson issued a Notice and Order describing the proceedings to follow and scheduling of documents to be filed. On November 26, 2007, Complainant filed a Response to the June 2007 OCR Position Statement along with numerous attachments.⁴ (ALJX-1). On January 3, 2008, Respondent filed the Agency's Motion To Dismiss And/Or For Summary Judgment. On March 10, 2008, Complainant filed his Response To Agency's Motion, etc.

Allegations of the Complaint (As Amended)

The original Complaint alleges that discrimination occurred on multiple occasions. As the proceeding continued, additional allegations were added.

(a) That on or about May 1976, Norbert L. Soltwedel, the Agency's County supervisor allegedly discriminated against Complainant on the basis of age when he made statements to and/or wrote letters to Complainant and his brother, Howard Schwerdtfeger, owners of a family dairy farm as an oral partnership later known as Schwerdtfeger Dairy. Slotwedel's statements and/or letters allegedly caused the Schwerdtfeger family farm real estate and improvements to be unfairly and unevenly split between the siblings initially and thereafter during the several, sequential FmHA loan events from the Agency. It is further alleged that Mr. Soltwedel deliberately misinformed the Complainant and unfairly required that Howard (the older brother) to receive the homestead portion of the farm with all its improvements, thereby starting a

³ Pursuant to a Memorandum of Understanding between the United States Department of Housing and Urban Development and the United States Department of Agriculture, cases brought under Section 741 are referred to the Office of Administrative Law Judges, United States Department of Agriculture.

⁴ Complainant's Response has been numbered as CX-1 thru CX-22. (See attached Addendum for a summary listing of Complainant's exhibits and their description. These exhibits were scanned and are available to the parties in pdf format.

chain of events whereby Complainant would be financially disadvantaged in relation to his older brother, Howard.

(b) That on or about November 27, 1979, Mr. Soltwedel allegedly discriminated against Complainant because of his age by requiring Complainant to co-sign an Economic Emergency Loan along with his brother and to mortgage his parcel of land for improvements made not on his land, but upon his brother's land.

(c) That on/about April 17, 1985, Mr. Soltwedel allegedly discriminated against Complainant by deception, fraud, misleading and improper loan procedures, malfeasance and/or misfeasance by offering options only to his brother Howard that would be harmful to Complainant's property when he arranged a partnership consolidation loan, but failed to provide for reversing the process that had divided the previously single tract into the two separately titled parcels of land, a procedure that had been required as a condition of FmHA financing due to the prohibition against loans to joint owners.

(d) That on/about July 1, 1994, Keith Hopkins, then Acting County Supervisor, allegedly discriminated against Complainant by denying him equal participation in the FSA's Preservation Loan Preservation Program when his older brother was given options to participate in that program.⁵ (GX-1, 5). As a result of this disparate treatment, his multiple farm loans proceeded to go into default and/or foreclosure status because he was ineligible for a homestead exemption and/or the leaseback-buyback benefits of the FmHA Preservation Loan program for his unimproved, non-homestead portion of the farm whereas his brother with the homestead portion of the farm was eligible.

⁵ See 7 CFR §1951.950. The Preservation Loan Servicing Program is an FmHA or FSA program that is in the nature of a "last ditch effort" to allow financial recovery of the seriously delinquent borrowers while maintaining the required adequate security for the financial integrity of the Agency's Program whereby seriously delinquent borrowers convey in-fee title to the Agency and become tenants, instead of owners, with the guaranteed right to buy back their land if payments are brought current.

(e) Complainant filed an amendment to his Complaint (CX-5) dated August 23, 2005 adding the new allegations (sounding in tort and addressed to the Inspector General) of retaliation, fraud, [being] recklessly negligent, misleading, and deceptive, [being] threatening, intimidating, coercive and crisis creating by Norbert Soltwedel, then Agency county supervisor, in that Soltwedel did not secure joint ownership (between Howard and Robert) of the family dairy farm.

(f) In his November 26, 2007 statement, Complainant alleged that his older brother Howard forged (CX-12) Complainant's signature on FmHA documents ("with total acceptance") by County Supervisor Soltwedel. See ASCS-36 form "Assignment of Payment" dated March 6, 1984. (CX-11).

(g) In a letter filed on/about December 6, 1999, Complainant raised a new issue of "familial [status] discrimination"⁶ or "any other category of discrimination that would apply." (GX-7).

(h) In his Response⁷ to Respondent's Motion for Summary Judgment, Complainant argues that the government's (USDA) right to continue to contest this instant case is waived (in the nature of laches), time barred, unworthy of credence, not credible or valid, abandon[ed], and forfeit[ed] due to the slow handling of the Complainant's claim.

⁶ See 7 CFR 1944.66 which was promulgated on/about July 31, 1996, added the discrimination definitions "familial status", and "handicap" to the prior definitions of (race, color, religion, national origin, sex or marital status or age).

⁷ Complaint's Response to Agency's Motion To Dismiss And/Or For Summary Judge filed March 10, 2008 at page 2-3.

The Agency Position Concerning the Allegations

The Agency position argues that the allegations concerning 1976 requirement that the jointly owned tract be divided is outside the jurisdiction of the § 741 process which contains the threshold requirement that the discriminatory act complained of must fall within the period between January 1, 1981 and December 31, 1996. As to the other allegations involving conduct within the eligible period, the Agency's position is there is no basis to find age discrimination.

Factual Background

The Complainant, Robert A. Schwerdtfeger, is a resident of Effingham County, Altamont, Illinois, born on April 10, 1953. (GX-1, 12) An older brother, Howard M. (Howard) Schwerdtfeger was born on April 3, 1951. (GX-12)⁸. For four generations, the Schwerdtfeger family has owned farm land in Effingham County, having been originally purchased by the Complainant's great-grandfather. The farm land has passed from the original settler to the grandfather and then to the Complainant's father, Elmer M. Schwerdtfeger (Elmer). Elmer and his two sons operated a dairy on the property. (CX-4).

Sometime after the death of his wife Paula in 1973, Elmer began to consider retiring and in 1975 and faced with continued loan delinquency, he opted to retire and withdraw his equity from the farm by selling the dairy to his sons, Howard and Robert. As Elmer had encumbered the property with both a FmHA farm operating loan (FO) and a FmHA Residential Housing loan (RH), due to lending restrictions at that time precluding joint

⁸. GX -12 is a loan application filled out on behalf of Howard and Robert giving the birth dates of October 4, 1953 and September 4, 1951 respectively; however, Complainant indicated that his birth date is April 10, 1953 and his older brother was born April 3, 1951. (The age difference is still two years). See CX – 22.

loans to the brothers, as a precondition to the brothers assuming the loans, FmHA required the brothers to divide the farm into two tracts and enter into assumption agreements covering the indebtedness. (ALJX-2, GX-14, 19, 21). In a letter dated December 1, 1975, addressed to both brothers, R. Keith Hoskins, the Acting County Supervisor wrote: "As I explained earlier, we cannot make a joint loan between brothers, so you must agree who will own which half of the farm and how much each half is worth." (GX-14).

The property division was agreed upon, with the older brother Howard being deeded the homestead tract, which included the family home, the two silos, the milking parlor and all of the other dairy buildings on 43.07 acres.⁹ The Complainant received the remaining 59.4 unimproved acres. Although the original property was divided into two tracts when conveyed to the brothers, they operated the farm together and continued to live together with their father in the family home on Howard's tract. In order to make the equity payment to their father, the brothers were to have obtained loans from the Federal Land Bank; however, as that institution's closing instructions were in conflict with those of the Regional Attorney, the brothers obtained the loan from First National Bank in Altamont.¹⁰

On May 7, 1976, the brothers assumed their father's loans, with the Complainant executing a Farm Ownership loan which incorporated and replaced three of Elmer's promissory notes dated October 30, 1969, November 23, 1970 and October 29, 1971 in

⁹ The 43.07 acre tract with the improvements on the north side of the Interstate was appraised by FmHA's appraiser at 51,500.00 and the Complainant's unimproved non homestead 59.4 acre tract on the south side of the Interstate was valued at 53,000.00.

¹⁰ Robert borrowed \$14,000 and Howard borrowed \$21,000. Both loans were closed on May 3, 1976 and were secured by mortgages on the respective tracts deeded to the brothers.

the amount of \$32,794.84; Howard's Farm Ownership loan replaced his father's note dated November 23, 1970 in the amount of \$25,818.48. (GX-21, 21). FmHA took liens subordinate to the first mortgages of First National Bank. (GX-23).

On April 28, 1978, Howard obtained a Rural Housing loan from FmHA in the amount of \$32,800. As Elmer and the Complainant were residing in the house with Howard, all three were required to co-sign the note. (GX-24). On May 2, 1979, the County Supervisor informed Howard that he was eligible to receive a loan to add a parlor and machine shed and indicated that a joint loan might be appropriate since FmHA had since been authorized to grant partnership loans, suggesting a meeting in a subsequent letter to both brothers which indicated that both of them would be needed in order for the loan to be approved. (ALJX-3, GX-25, 26). On November 27, 1979, the two brothers signed a promissory note for a \$100,000 Economic Emergency loan secured by mortgages on their respective tracts of land. (GX-27).

On February 13, 1985, the County Supervisor contacted Howard by letter, suggesting transfer of both brothers' notes to a partnership which would allow FmHA to give them a larger set aside of the higher interest notes. (GX-30). On April 17, 1985, without any title change reversing the separate ownership of the tracts of land, the partnership assumed all four of the prior loans to the brothers, including each brother's Farm Ownership loan, the Rural Housing loan and the Economic Emergency loan. Promissory notes were also

executed for a \$7,006.47 Emergency loan, an \$18,000 Operating loan, a \$35,210 Emergency loan and a \$35,857 Emergency loan. (GX-28).¹¹

The dairy operation under the brothers' ownership fared little better than it had under their father's and continued to need infusion of loan funds to operate. On June 16, 1992, FmHA sent a Notice of Program Availability to the partnership, addressed to Howard, explaining the primary and preservation servicing and debt settlement programs. (GX-32). The brothers returned the form acknowledging that they had received the Notice of Program Availability and asked that they be considered. (GX-32). By letter dated March 2, 1993 to the partnership, FSA informed the brothers that they were ineligible for primary loan servicing because the Debt and Loan Restructuring System (DALR) analysis computation indicated that the partnership "was not able to restructure the debts so that [it would be] able to make the required debt repayments even with a 100% debt write down of all debt eligible for write down." (GX-33). Howard appealed the determination of ineligibility; however, his appeal was denied by the National Appeals Divisions (NAD) on January 28, 1994. (GX-34).

FSA continued to correspond with the partnership and in letters dated May 5, 1994 and May 25, 1994 addressed to Schwerdtfeder Dairy informed the Complainant and his brother that they would consider Schwerdtfeder Dairy for preservation servicing in the

¹¹ In 1985, FmHA's farm loan portfolio peaked at \$24.5 billion, representing 13.8% of all farm debt. *Farmer Bankruptcies and Farm Exits in the United States, 1889-2002/ AIB-788*. In early 1984, Judge Bruce Van Sickle of the United States District Court of North Dakota imposed a nationwide moratorium on foreclosure actions by FmHA pending adequate notification to the borrowers of servicing options and appeal rights. *Coleman v. Block*, 580 F. Supp. 194 (D.N.D. 1984). The moratorium was lifted by the court in November of 1985 with the publication by FmHA of revised serving regulations; however, further adverse actions by FmHA were discontinued with the reimposition of the moratorium in an additional ruling by Judge Van Sickle in *Coleman v. Lyng*, 663 F. Supp 1315 (D.N.D. 1987).

form of homestead protection and leaseback/buyback. The letters indicated that the Complainant would have to provide a list of 14 documents in order for them to process any request. (GX-35). No action was taken by the partnership to avail itself of the preservation servicing and on July 1, 1994, FmHA denied preservation loan servicing for failure to provide any of the information or documents requested on May 5, 1994 and May 25, 1994. (GX-36). On August 26, 1994, FmHA issued a Notice of Acceleration declaring the account(s) due for failure to pay the indebtedness. (GX-38).

Applicable Standards

As noted in the OCR Position Statement, courts have generally applied the shifting burden analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a three part, burden shifting test for Title VII cases, to determine whether there has been unlawful discrimination in a disparate treatment case. The Complainant bears the initial burden of making a *prima facie* showing of discrimination. The establishment of a *prima facie* case creates a presumption of discrimination. *McDonnell Douglas*, 411 U.S. at 802. At the next stage, the Agency may rebut the presumption of discrimination with a legitimate, non-discriminatory reason for its actions. At the third stage, the Complainant must persuade the fact finder that the Agency's explanation was a pretext for unlawful discrimination.

In order to be eligible for consideration under § 741, a complaint must meet the following requirements:

1. Be a non-employment complaint
2. Be filed prior to July 1, 1997

3. Allege discrimination by USDA occurring between January 1, 1981 and December 31, 1996
4. Allege:
 - (a) A violation of the Equal Credit Opportunity Act (ECOA) in the administration of:
 - i. Farm Ownership Loan,
 - ii. Farm Operating Loan,
 - iii. Emergency Loan, or
 - iv. Rural Housing Loan; or
 - (b) Discrimination in the administration of a Commodity Program or Disaster Assistance Program. Eligible status areas of discrimination under § 741 are race, color, religion, national origin, sex or marital status, age.

Summary Judgment is appropriate if the evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Discussion

The Complaint fulfills the initial threshold § 741 requirement of being a non-employment claim as well as the second requirement of being filed before July 1, 1997. The Complaint seeks relief under the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691, *et seq.* and alleges a violation of the ECOA in connection with the administration of the Farm Ownership, Farm Operating and Emergency Loan programs on the basis of age, which is a protected basis. Aside from the conclusory allegations of age discrimination; however, there is little support for a *prima facie* showing of age discrimination, given the *de minimus* difference in age between the Complainant and his brother who is only two years his senior. Nonetheless, each of the allegations will be examined.

The acts of discrimination which were alleged to have occurred in 1976 that required the Complainant to purchase the non-homestead tract while his brother purchased the homestead tract and the 1979 allegation that he was required to co-sign an Emergency Loan for improvements located on land other than his are beyond the jurisdiction of the § 741 process as they occur outside the specified period of time between January 1, 1981 and December 31, 1996. Accordingly, those allegations cannot be considered under § 741 and must be dismissed.

During 1985, the Agency desired to reduce the loan servicing complexities by having one borrower, i.e. the Schwerdtfeger Dairy partnership,¹² even though the partners were still individually liable. Complainant complains of non-feasance on the part of the Agency's County Supervisors during the 1985 Loan consolidation as there was no re-titling of the land effecting a merger of the two parcels back to one parcel owned as 50% shares each. The Agency's function was to administer the FmHA or FSA loan program for proper farm related purposes and to see that adequate security¹³ in favor of the Agency was maintained. As a co-signer, at any time during the transaction, the Complainant retained the ability to refuse to acquiesce in the April 17, 1985 loan documents unless his demands were met of re-titling the underlying property of the Schwerdtfeger Dairy operation to both brothers in equal shares. Consequently, his claim of malfeasance or non-feasance resulting in discrimination during the processing of April 1985 loan

¹² The name "Schwerdtfeger Dairy" does not appear to have the normal partnership naming elements of a separate legal entity and the record is silent as to whether a written partnership existed.

¹³ FHA form 465-1 (reverse) has check boxes as follows: THE PROPOSED TRANSACTION [WILL] [WILL NOT] PREVENT OR MAKE MORE DIFFICULT THE SUCCESSFUL OPERATION OF THIS PROPERTY and [WILL] [WILL NOT] REDUCE THE EFFICIENCY OF THE PROPERTY. (GX - 16)

consolidation are without merit. A title merger with or without the Agency's help or permission could have been effected at any point in time after the Agency acquired authority to loan to partnerships. (GX-25). The Agency's security interest would have been unchanged and unharmed. The record contains no documents that suggest that FmHA would have or did interfere with merging of the two parcels after 1979. Non-feasance and/or mal-feasance in loan processing procedures sound in tort and are beyond the reach of § 741. Accordingly, the allegations as to 1985 conduct must also be dismissed.

The alleged denial of loan servicing (Preservation Loan Program) also falls within the time boundaries and subject matter prescribed by the regulations. During 1992, the Agency offered a program for seriously delinquent FmHA (now FSA) loans. In order to qualify for the loans, FSA required 14 documents¹⁴ to be completed as a part of the application process. Complainant failed to provide the documents or to complete the application process. The letter dated July 1, 1994, addressed to the Complainant makes it

¹⁴ The following documents were to have been submitted:

1. Completed Form FmHA 410-1, "Application for FmHA services," signed by all partners.
2. A signed Form FmHA 410-9.
3. A complete list of partners showing the address, citizenship, principal occupation, and the percentage of ownership by each.
4. A signed current personal financial statement from each of the members of the partners of a partnership.
5. A copy of any Partnership Agreement and a resolution adopted by the partnership to apply for and obtain the desired servicing action and execute the required instruments and agreements.
6. Form 440-32, "Request for Statement for Debts and Collateral" from each creditor.
7. Form FmHA 1910-5, "Request for Verification of Employment," if applicable.
8. Form 1924-1, "Development Plan," if development is needed.
9. Form AD-I 026 and AD-I 026 (A) "Highly Erodible Land Conservation and Wetland Conservation Certification."
10. Form SCS CPA-026, "Highly Erodible Land and Wetland Determination" for each tract farmed.
11. The ASCS photo of the farm, on which the applicant must show the portion of the farm and approximate acres to be considered in a request for Homestead Protection, if applicable.
12. Income tax returns and supporting documents for 1992 and 1993.
13. A signed Debarment Form AD-I047.
14. A copy of any lease, contract option or agreement entered into by the applicant which may be pertinent to consideration of the application or where a written lease is not obtainable, a statement setting forth the terms and conditions of the agreement.

clear that FSA denied preservation loan services to the Complainant not because of his age, but because of his failure to provide FSA with any of the information requested or to complete the application process.¹⁵ (GX-36). While Howard's parcel included the family residence and Robert's parcel contained no improvements, the Agency's Notice of the availability of Preservation Loan Servicing for the "Homestead" portion of the farm might at first glance appear to be unequal as between the brothers. (CX-2 @ p. 6). However, given that the division of the property was agreed upon many years before, the fact that Howard had full title to the improved portion of the original farm fully satisfies any inquiry into Robert's complaint concerning the Agency's action surrounding Preservation Loan Servicing.

The allegations contained in the purported amendment to his Complaint addressed to the Inspector General, even were they to be entertained as part of this action sound in tort and as previously indicated fall outside the review of this action. Similarly, the allegation of forgery by the Complainant's brother will likewise fail for the same reason. The allegation of familial status was previously discussed as being inapplicable to the facts of this case.¹⁶ Laches, a defense based upon undue delay in asserting a legal right or privilege also raised by the Complainant in his Response to the Motion for Summary Judgment, has been long held to be inapplicable to actions of the government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720 (1824); See also, *Gaussen v. United States*, 97 U.S. 584, 590 (1878); *German Bank v. United States*, 148 U.S. 573, 579 (1893);

¹⁵ Robert's allegations of discrimination without submitting the requested documents or completing the application process might be compared to one complaining about not winning the Lottery without purchasing a ticket.

¹⁶ See Footnote 2.

United States v. Verdier, 164 U.S. 213, 219 (1896); *United States v. Mack*, 295 U.S. 480, 489 (1935).

Conclusion

For the foregoing reasons, there is no genuine issue of material fact and summary judgment is appropriate.

ORDER

For the reasons set forth above, upon consideration of the entire record, the Respondent's Motion for Summary Judgment is **GRANTED** and the Complaint will be **DISMISSED**.

Copies of this Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
June 25, 2008

PETER M. DAVENPORT
Administrative Law Judge

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