

III. Procedural History

Date of Alleged Discriminatory Act: February 25, 2019, July 18, 2018,
February 1, 2019
Date Complaint Filed: February 27, 2019
Date of Acceptance: April 15, 2019
Dates of Investigation: July 29, 2019 – August 1, 2019
Date of Report of Investigation: October 9, 2019

IV. Statement of Facts

The U.S. Department of Agriculture's Farm Service Agency (FSA) offers direct and guaranteed loans to farmers and ranchers to promote, build, and sustain family farms for a thriving agricultural economy. FSA offers a variety of loans to provide additional resources farmers need to establish and maintain profitable farming operations. FSA's Direct Loan Program is designed to help farmers start, purchase, or expand their farming operation. From beginning farmers who have limited financial history to qualify for commercial credit to farmers who have suffered financial setbacks from natural disasters, FSA's Farm Ownership Loans may be used to purchase a farm, enlarge an existing farm, construct new farm buildings and/or improve structures, pay closing costs, and promote soil and water conservation and protection³

Complainant resides and farms in Mecklenburg County, VA. Beginning in 1984, Complainant has participated in FSA's Farm Loan programs. During this period, Complainant was approved for and received several farm ownership and operating loans. In reviewing Complainant's complaint history, it shows he has filed numerous program complaints related to his FSA loans over the years, which eventually resulted in a finding of discrimination. As a result, Settlement Agreements (SAs) were executed on May 20, 1997, and November 19, 1999.⁴ Complainant also participated in the Black Farmers class action lawsuit, otherwise known as *Pigford*.⁵ The 1997 SA ordered forgiveness of all Complainant's FSA loan debt. Complainant thus currently does not have any outstanding USDA farm loan program debt. The 1999 SA also ordered Complainant be provided priority consideration in obtaining FSA farm inventory property. (ROI, pgs. 5, 31-32, 214-216)

On July 17, 1997, a Farm Loan Manager (FLM #1) (race: White) sent Complainant's attorney six Certificates of Satisfaction and Promissory Notes for release. Additionally, FSA forwarded documentation to Complainant's attorney which included a Termination

³ For more information on FSA's Farm Loan Programs, see: <https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2019/farm-loans-overview.pdf>

⁴ The 1997 SA was based on a discrimination complaint submitted by Complainant on February 18, 1992 and USDA's related Final Agency Decision issued on October 11, 1996. The 1999 SA applied to all of Complainant's 1990 discrimination complaints submitted to USDA. (ROI, pgs. 31-32, 214-216)

⁵ African American farmers successfully sued the USDA alleging years of systematic discrimination in administering farm programs in violation of the Equal Opportunity Act (EOA). See *Pigford v. Glickman*, 185 F.R.D. 82 (D.D.C. 1999), aff'd, 206 F.3d 1212 (D.C. Cir. 2000).

Statement for the release of the financing statements that were on record with the Mecklenburg Clerk's Office. (ROI, pgs. 128, 131-179)

On July 18, 2018, Complainant emailed FLM #2 (race: White) requesting additional information on specific property listed on FSA's inventory property website. (ROI, pgs. 325-326)

On July 24, 2018, FLM #2 responded to Complainant's email inquiry with a phone call. During the call, FLM #2 provided Complainant with general information on the property he was interested in and a general outline of the sale process. Also, FLM #2 added Complainant's name and email address to the distribution list to ensure he received the notice of sale of the property once it was published. (ROI, pgs. 325, 306-307)

On the same day, Complainant emailed FLM #2 requesting the physical address and name of the previous owner for the subject property. (ROI, pg. 324)

On July 27, 2018, FLM #2 responded to Complainant's email by stating she did not have access to the physical address. FLM #2 recommended Complainant contact the County Assessor. Additionally, FLM #2 expressed she would attempt to locate the address and let Complainant know the results. (ROI, pg. 324)

In February 2019, Complainant met with a closing company to make final preparation for the purchase of a property.⁶ During the meeting, the closing company performed a title search and found outstanding liens remained on Complainant's farm. As a result of the outstanding liens, Complainant was not able to immediately secure the loan he needed to purchase the property at that time. (ROI, pgs. 97-98)

On February 26, 2019, Complainant called and visited the Mecklenburg County FSA office seeking assistance with outstanding Farmers Home Administration liens presumed to be on his property. During the visit, the Farm Loan Officer (FLO) (race: White) informed Complainant he had located copies of satisfaction documents and could reissue them since they were not filed after being provided to Complainant's attorney. Additionally, the FLO informed Complainant the documents would need to be signed by the Farm Loan Manager and then notarized. The FLO informed Complainant that the documents could be completed and sent to the closing company within 2 days. (ROI, pgs. 239-240)

On the same day, Complainant emailed the FLO requesting copies of the promissory notes associated with the satisfaction of deeds of trust for his properties. (ROI, pg. 240)

On February 27, 2019, Complainant filed a complaint with the Office of the Assistant Secretary for Civil Rights (OASCR). (ROI, pgs. 13-17)

⁶ We note this was not the initial FSA property in which the Complainant previously inquired.

On March 11, 2019, Complainant emailed FLM #2 to see if she had found any additional information on the farm of interest. (ROI, pg. 323)

On the same day, Complainant emailed FSA's Riverside-San Diego County, California County Executive Director (CED) requesting additional information on a property in FSA's inventory and the next steps in the process. (ROI, pg. 121)

On April 2, 2019, the CED responded to Complainant's email and referred him to two additional FSA contacts for details on the property. (ROI, pg. 120)

On September 6, 2019, FLM #2 responded to Complainant's email by informing him that the property of interest was still in the FSA inventory. According to FLM #2, FSA was still working through the steps to prepare the property for sale as a surplus property. (ROI, pg. 323)

V. Applicable Legal Standards

Discrimination Based on Membership in a Protected Class in Programs Conducted by USDA

USDA regulation 7 C.F.R. §15d.3 (a) provides:

No agency, officer, or employee of the United States Department of Agriculture shall, on the ground of **race**, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, or disability, or because all or part of an individual's income is derived from any public assistance program, exclude from participation in, deny the benefits of, or subject to discrimination any person in the United States under any program or activity conducted by the United States Department of Agriculture.

Reprisal -7 C.F.R. §15d.3 (b)

USDA regulation 7 C.F.R. §15d.3 (b) prohibits discrimination on the basis of retaliation in any program or activity conducted by USDA. It is the policy of USDA to follow the framework provided by Title VII of the Civil Rights Act of 1964 to determine a *prima facie* case of retaliation.

Dismissal

USDA will close a complaint under the following circumstances:

- a. Voluntary withdrawal;
- b. Settlement or voluntary resolution;
- c. Lack of jurisdiction;
- d. *Failure to state a claim*;
- e. Failure to pursue;
- f. Failure to file timely;
- g. Filing in court on the same or essentially similar claims;

- h. Lack of any further remedies;
- i. Any other authority provided in law;
- j. Failure to seek remedy available under the statues, regulation, or court decision;
- k. Continuation of a pattern of complaints previously filed by the complainant, or someone other than the complainant, that the Office of the Assistant Secretary for Civil Rights or a court of competent jurisdiction already have found to be without merit;
- l. Dissatisfaction with the processing of a previously filed complaint.⁷

Issue #2-Failure to State a Claim

A dismissal for failure to state a claim is intended to address a dispositive issue of law. Under this procedural disposition, the trier-of-fact does not assess the merit or truthfulness of the allegations or the legal theories advanced by Complainant. Rather, the trier-of-fact assumes that all facts advanced by Complainant are true. If, under this assumption, it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations, the complaint must be dismissed for failure to state a claim. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (Factual allegations must be enough to raise a right to relief above the speculative level.)

In issue #2, Complainant alleges FSA officials discriminated against him based on race, from July 18, 2018 to February 1, 2019, when they failed to provide Complainant a farm from FSA's inventory property, as stipulated in the terms of the November 19, 1999 SA. We find Complainant fails to state a claim because issue #2 is concerned solely with what he perceived as FSA's failure to satisfy the terms of the SA— not a new adverse action based on race. The SA stipulated Complainant be allowed priority consideration for obtaining an FSA farm inventory property. Even though this issue will be reviewed under a separate breach of SA analysis, we note the terms of the SA established a 5-year timeframe for providing priority consideration. The period in which Complainant alleges issue #2 occurred is 15 years after the terms of the SA expired.

Furthermore, Complainant does not articulate how his race related to his inability to obtain FSA inventory property. According to the record, at the time the instant complaint was investigated, the property at issue remained in FSA's inventory property and was still being prepared for the sale process. As a result, there was not an opportunity for Complainant to purchase property. Complainant does not allege that the property was unreasonably delayed for sale due to discriminatory animus or that other similarly situated buyers of a different protected class were given priority, notice, or more favorable treatment. Therefore, this issue is dismissed for failure to state a claim upon which relief may be granted. (Requirement that pleading contain a short or plain statement of claim showing the pleader is entitled to relief does not require detailed

⁷ See Departmental Regulation 4330-003.

factual allegations but demands more than unadorned the defendant unlawfully harmed me accusation.) *Ashcroft v. Iqbal*, 556, U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)

VI. Discussion and Analysis

A. Disparate Treatment (Race)

In evaluating a claim of disparate treatment based on membership in a protected class, it is USDA policy to use the shifting analytic framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Court has defined disparate treatment as situations where an Agency “simply treats some people less favorably than others because of their race, color, religion, sex, or other protected characteristic.” See *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 358, 335, n. 15 (1977). Applying the *McDonnell Douglas* principles, the investigating agency must first determine if a complainant can raise an inference of discrimination by establishing a *prima facie* case. The elements of a *prima facie* case may vary depending on the facts of the complaint, but often include the following:

- (1) Complainant is a member of a protected class;
- (2) Complainant applied for and was eligible to receive the benefit sought;
- (3) Despite Complainant’s eligibility, he/she was rejected, referred elsewhere, or otherwise treated differently; and
- (4) The Agency/Respondent accepted or treated more favorably similarly situated applicants who were not members of the protected class or classes.

See *Lawson v. CSX Transp., Inc.*, 245 F.3d 916 (7th Cir. 2001); *McDonnell Douglas Corp.*, 411 U.S. at 802.

Once a complainant has established a *prima facie* case for discrimination, a rebuttable presumption exists that discrimination has occurred, the burden shifts to the Agency to articulate a legitimate nondiscriminatory reason for its action(s). See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Once the Agency has satisfactorily articulated a legitimate nondiscriminatory reason for its actions, the burden shifts back to the complainant to prove, that the Agency’s legitimate, nondiscriminatory reason is a pretext for discrimination. See *McDonnell Douglas* at 804-05. At all times, complainant retains the burden of persuasion that unlawful discrimination has occurred. See *Burdine* at 256.

In disparate treatment cases, the established order of analysis requires a complainant establish a *prima facie* case of discrimination. However, determining the existence of a *prima facie* case need not be followed in all cases. Where the Agency has articulated a legitimate, nondiscriminatory reason for the action at issue, the factual inquiry can proceed directly to the ultimate issue whether Complainant has shown by a preponderance of the evidence that discrimination motivated the Agency’s actions. See *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 713-714 (1983). Here,

we will assume, without finding, for purposes of analysis, that Complainant established a *prima facie* case of disparate treatment based on race.

Accordingly, the burden shifts to the Agency to articulate a legitimate, nondiscriminatory reason for the actions grieved by Complainant.

B. Agency's Legitimate, Nondiscriminatory Reasons

The only inquiry to determine whether or not the Agency has produced evidence to sufficiently articulate a legitimate, nondiscriminatory reason is whether the Agency's evidence has frame[d] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext." See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 255-56 (1981). As described below, we find that FSA has articulated a legitimate, nondiscriminatory reason for its actions.

FLM #1 stated FSA took proper steps to remove the liens. FLM #1 asserted she, along with her staff, prepared all the necessary documents to remove Complainant's FSA liens. Then, officials sent the Certificates of Satisfaction and the Promissory Notes via certified mail to Complainant's attorney to have FSA liens removed from the record. (ROI, pgs. 231, 234)

According to the FLM #1, USDA officials did not always go to the County Clerk's Office to file or release liens. FLM #1 asserted when borrower's loans were closed by attorneys, USDA would send the lien to the attorney to file in the County Clerk's Office. FLM #1 further explained when Complainant received his USDA loan to purchase the farm, the attorney who closed the loan filed the USDA lien in the County Clerk's Office. (ROI, pg. 234)

We find the above is sufficient and the Agency has articulated a legitimate, nondiscriminatory reason for its actions. Therefore, the burden now shifts to the Complainant to prove, by a preponderance of the evidence that these reasons are a mere pretext for unlawful discrimination.

C. Pretext

As the Agency has articulated legitimate, nondiscriminatory reasons for its actions, to prevail, the complainant must now prove, but a preponderance of the evidence, why these proffered reasons are untrue or a mere pretext for unlawful discrimination. *Burdine* at 253. The complainant can "succeed in this either directly by persuading the trier of facts that a discriminatory reason more likely motivated the agency or indirectly by showing that the agency's proffered explanation is unworthy of credence." *Burdine* 256. A complainant can demonstrate pretext by exposing such weakness, implausibility, inconsistencies, incoherencies, contradictions" in the Agency's reasoning that a fact finder could find the Agency's articulated explanation unworthy of credence. See *Richmond v. ONEOK, Inc.* 120 F.3d 205, 209 (10th Cir.1997)

Complainant alleges FSA officials failed to forgive all of his USDA farm debt. However, we are not persuaded by Complainant's assertions, as he has not shown by a preponderance of the evidence that discriminatory animus motivated or caused the alleged adverse action.

It is reasonable to assume that if FSA had not forgiven all of Complainant's farm loan debt as indicated in the SA, FSA would have made attempts to collect the debt from Complainant at some interval over the course of 20 years. Under normal processes, delinquent borrowers receive various notifications (*i.e.*, notice of intent to accelerate, notice of foreclosure) and demands for payment when they are delinquent on their loans. However, USDA's last contact with Complainant regarding the subject loans was on July 17, 1997, when FSA sent Complainant's attorney the Certificates of Satisfaction and the Promissory Notes to release USDA's liens.

Although 20 years passed before Complainant discovered any issues associated with the documentation of the debt forgiveness, the 1997 SA clearly established USDA would forever discharge, hold harmless, and indemnify Complainant from any liability for his debt at that time. (ROI, pgs. 31, 131) We find Complainant's debt had been forgiven by USDA, and he has not provided any evidence which demonstrates FSA did not forgive his debt based on his race.

Additionally, the record evidence confirms that Agency officials supplied Complainant's attorney with the requisite documentation to release USDA liens on Complainant's properties after loans were satisfied. The trier of fact is unpersuaded that FLM #1 had intentions of not releasing liens based upon race. Rather, it was Complainant's responsibility to ensure his representative had filed the appropriate paperwork with the County Clerk's Office. Contrary to Complainant's assertions, FLM #1's response suggests that she took meaningful steps to ensure Complainant's attorney received the documentation needed to release liens from public record. Complainant did not provide any evidence to substantiate claim of discrimination by FSA officials. Absent any operative facts that would lend credence to Complainant's allegations, his mere conjecture is insufficient to demonstrate pretext. *Reed v. Amax Coal Co.*, 971 F.2d 1295, 1299 (7th Cir.1992) (plaintiff cannot make showing of discrimination through bare allegations). *Miller v. Auto. Club of KM, Inc.*, 420 F.3d 1098 (10th Cir. 2005) (recognizing unsupported suspicions are insufficient to establish discrimination).

Retaliation

To establish a *prima facie* case of reprisal discrimination, a plaintiff must prove that:

- (1) Complainant engaged in a protected activity;
- (2) Agency had knowledge of the protected activity;
- (3) Complainant subsequently suffered an adverse action; and
- (4) But for the prior protected activity, the adverse action would not have occurred. *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013)

For the first prong, Complainant must show he engaged in prior protected activity. The record shows Complainant filed several civil rights complaints regarding his FSA farm loans. Complainant satisfies prong #1. (ROI, pg. 5)

For the second prong, the record sufficiently establishes FSA officials had knowledge of Complainant's prior civil rights activities. Therefore, Complainant meets the requirements of prong #2.

Regarding the third prong, Complainant must show he suffered an adverse action.⁸ Complainant claims he was retaliated against by FSA officials when they failed to remove liens on his farms. In February 2019, Complainant attempted to purchase a farm. The closing company performed a title search on Complainant's properties and informed him that FSA liens remained on his farms. As a result, Complainant contends he had to negotiate an extension agreement for an additional 30 days to secure the prospective loan and purchase the property. The extension agreement required Complainant to deposit an additional \$25,000 to his original deposit of \$50,000. As such, Complainant meets the requirements of prong #3.

Finally, for prong #4, Complainant must show the adverse action suffered would not have taken place if it were not for his prior protected civil rights activities. The record shows in accordance with the May 20, 1997 SA, all of Complainant's debt owed to the Agency was forgiven. However, to a reasonable person, the record does not support an inference that the recordation of FSA liens on Complainant's farms in 2019 was caused by the negotiated SA from 1997.

It is unclear to the trier of fact who had the ultimate responsibility of filing the appropriate paperwork regarding FSA liens on Complainant's farms to the Mecklenburg Clerk's Office. The available records show delivery of certified mail to Complainant's attorney containing six Certificates of Satisfaction and Promissory Notes for the release of FSA liens. (ROI, pg. 131). Under the common law of agency, the signature of a disclosed, authorized agent has the same legal force as the signature of his principal.

We acknowledge it was a financial burden for Complainant to provide additional funding to secure loan because FSA liens remained erroneously recorded on his land though the obligation to pay was extinguished. However, the Agency's related actions regarding Complainant, *i.e.* discharge of debt, not sending notices of debt owed, and immediate assistance when the recording error was discovered, weighs against the perception of wrongdoing, negligence, or retaliatory motives on the Agency's part. Complainant and/or his attorney bore some responsibility to conduct due diligence and ensure the liens were released with the Mecklenburg County Clerk's Office. This inaction resulted in Complainant having to provide additional funding to secure the

⁸ In the context of a retaliation claim, an action is "adverse" if it would dissuade a reasonable person from making or supporting a charge of discrimination. See *Burlington N & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54 (2006).

prospective loan. Considering the above, we conclude Complainant does not meet the requirements of prong #4.

To establish retaliation based on temporal proximity, Complainant would have to demonstrate the adverse action was followed closely after his protected activity. If we construe his prior protected activity in the light most favorable to Complainant, his protected activities occurred on May 20, 1997 and November 19, 1999 when the SAs were executed. However, Complainant did not discover that liens remained on his property until February 2019. Here, almost 20 years elapsed between the last protected activity (November 19, 1999) and the alleged adverse action (February 2019). In general, a complainant can demonstrate a causal connection using temporal proximity alone when the separation between the Agency's knowledge of the protected activity and the adverse action are very close. Twenty years is a substantial amount of time to show a correlation between protected activity and adverse action. Additionally, there have been no new allegations of retaliation regarding these loans since the November 19, 1999 SA was executed. Complainant has not offered any other evidence that would establish temporal proximity in his claim of retaliation. See *Nguyen v. City of Cleveland*, 229 F.3d 559(6th Cir. 2000) (holding that temporal proximity alone may be insufficient to raise an inference of retaliation in the absence of other evidence of causation).

We find Complainant has not established a *prima facie* case of retaliation.

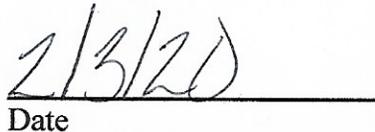
VII. Conclusion

After careful review, and for the reasons set forth previously, USDA finds the record does not support a finding of discrimination based on retaliation.

No person shall be subject to reprisal or harassment for filing a discrimination complaint against USDA; participating in or contributing to the identification, investigation, prosecution, or resolution of civil rights violations by an agency of USDA or by a recipient of Federal financial assistance from USDA; or otherwise aiding or supporting the enforcement of civil rights laws, rules, regulations or policies applicable to USDA programs.



Cinnamon L. Butler
Director, Program Adjudication Division
Center for Civil Rights Enforcement



2/3/20
Date

**U.S. DEPARTMENT OF AGRICULTURE
Office of the Assistant Secretary for Civil Rights
Complaint of Program Discrimination**

Complainant: John W. Boyd, Jr
Complaint No.: FSA-19-8204
Agency: Farm Service Agency

Certificate of Service

I certify that the document listed was sent on this date by certified mail (unless otherwise specified) to:

Complainant: John W. Boyd, Jr.
63 Wind Road
Baskerville, Virginia 23915

Agency Head: Richard Fordyce (*interoffice mail*)
Administrator
Farm Service Agency
Room 3096S, South Building

Agency Liaison: Emily Su (*interoffice mail*)
Director, Civil Rights
Farm Production and Conservation
PP III, 12th floor

Certified by: *Tiffany Owens* Date: *2/4/2020*
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