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The *McDonnell Douglas* Standard in Lending-Discrimination Cases: A Circuit Split?

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I. INTRODUCTION

This article examines the apparent circuit split on whether the burden-shifting standard of *McDonnell Douglas Corp. v. Green*[1] applies in the cases that involve allegations of discrimination in lending. The issue of whether the standard applies in such cases is of interest to those who may need to litigate cases in the specific area of lending discrimination, but not only to them. The argument against applying the burden-shifting standard in this area implies a certain general understanding of the standard, which may color its operation in other areas of the law, such as employment discrimination. The argument and its critical examination is thus of relevance to the antidiscrimination law generally.

Part II of this article outlines the legal background of the issue, and Part III points to the decisions that form the two sides of the split. Parts IV through VII examine the decision that created the split and its crucial argument. Parts VIII and IX show that the split is an aspect of a broader split on the interpretation the *McDonnell Douglas* standard. Finally, Part X hows that the decision that created the split is internally inconsistent and that the split could be regarded as illusory.

II. THE *MCDONNELL DOUGLAS* STANDARD

In 1973, the Supreme Court decided *McDonnell Douglas Corp. v. Green*,[2] which created the well-known burden-shifting standard for litigation under Title VII of the Civil Rights Act of 1964.[3] According to that standard, the plaintiff in such an action first "must carry the initial burden . . . of establishing a prima facie case of racial discrimination."[4] Once the plaintiff does this, the burden shifts to the defendant "employer to articulate some legitimate, nondiscriminatory

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1. 411 U.S. 792 (1973).
2. *Id.*
3. 42 U.S.C. § 2000e (1994).
4. 411 U.S. at 802.

reason"[5] for the contested action. Finally, at the third stage of the process, the burden shifts back to the plaintiff to show that the purportedly nondiscriminatory reason presented by the defendant at the second stage was, in fact, a pretext for discrimination prohibited by the act:[6] in other words, that the reason was nothing but a "coverup."[7]

The Court later clarified the standard by making it explicit, in *Texas Department of Community Affairs v. Burdine*,[8] that the burden imposed on the defendant at the second stage is merely a burden of production[9] and that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[10] Since that decision, the *McDonnell Douglas* standard has sometimes been referred to as the *McDonnell Douglas/Burdine* standard.[11]

More recent developments of the standard clarified the relationship between the second and the third stage. In *St. Mary's Honor Center v. Hicks*,[12] the Court explained that the fact that the defendant, at the second stage, lied about its reasons for the contested action does not *per se* constitute pretext for the purposes of the third stage.[13] Nevertheless, in *Reeves v. Sanderson Plumbing Products, Inc.*[14] the Court held that such a lie can constitute sufficient evidence of third-stage pretext to enable the plaintiff to withstand the defendant's motion for judgment as a matter of law.[15]

For the purposes of this article, the most significant part of the *McDonnell Douglas* standard is, however, the first stage: the plaintiff's prima facie case. According to the original formulation of the standard, the elements of that prima facie case are:

> (i) that [the complainant] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[16]

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5. *Id.*
6. *Id.* at 804.
7. *Id.* at 805.
8. 450 U.S. 248 (1981).
9. *Id.* at 254-57.
10. *Id.* at 253.
11. *E.g.*, King v. First Interstate Mortg., 984 F.2d 924, 926 (8th Cir. 1993).
12. 509 U.S. 502 (1993).
13. *Id.* at 515.
14. 530 U.S. 133 (2000).
15. *Id.* at 147-48.
16. *McDonnell Douglas*, 411 U.S. at 802.

The Court tailored this formulation to the facts of *McDonnell Douglas*, which involved allegations of race-based discrimination. As courts applied the standard to discrimination on other than racial grounds, they replaced the reference to a racial minority in the first element of the prima facie case with references to "a protected group" or something similar.[17] Given that the *McDonnell Douglas* opinion itself acknowledged that the standard may need to be adapted to "differing factual situations,"[18] this generalization of the standard seems uncontroversial and has been used in thousands of cases. Controversy exists, however, as to how the standard applies to allegations of discrimination against males or members of majority groups,[19] but that controversy will be set aside for the purposes of this article.

The reference to qualifications in the second element of the prima facie case is generally taken as a reference to the minimum, threshold qualifications for the job.[20] The question of whether the plaintiff was better qualified than the person hired is usually left for the second stage of the standard's application.

The *McDonnell Douglas* standard has become one of the most basic features of antidiscrimination law: it is cited in practically every opinion dealing with allegations of discrimination.[21] While it was originally formulated for the purposes of litigation under Title VII, which concerns discrimination in employment, the standard has been extended to litigation under various other antidiscrimination statutes. Courts have thus applied the standard in litigation under the Age Discrimination in Employment Act,[22] Americans with Disabilities Act,[23] and under the 19th century civil rights statutes generally referred to as "Section 1981"[24] and "Section 1983."[25] State courts have also adopted the standard for litigation under state statutes against discrimination.[26]

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17. Among the decisions that introduced such formulations are *Smith v. Rexall Drug Co.*, 415 F. Supp. 591, 593 (E.D.Mo. 1976) (requiring that the plaintiff be "a member of a protected group"); *Herrman v. Coleman*, 428 F. Supp. 447, 452 (D.D.C. 1977) (requiring that the plaintiff be "a member of a protected class"); and *Bozicevich v. American Airlines*, 17 Fair. Emp. Prac. Cases 247, 247 (S.D.N.Y. 1977) (requiring that the plaintiff "belongs to a protected minority").

18. *McDonnell Douglas*, 411 U.S. at 802 n.13.

19. *See generally* Scott Black, *McDonnell Douglas' Prima Facie Case and the Non-Minority Plaintiff: Is Modification Required?*, 1994 ANN. SURV. AM. L. 309 (1995).

20. *See, e.g.*, Netterville v. Missouri, 800 F.2d 798, 802 (8th Cir. 1986); United States Postal Serv. Bd. of Governors v. Aikens, 453 U.S. 902, 903-05 (1981) (Marshall, J., dissenting).

21. As this article goes to press, *McDonnell Douglas* has been cited in over 16,000 cases.

22. *E.g.*, Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000); Bodenheimer v. PPG Indus., 5 F.3d 955, 957 (5th Cir. 1993); *cf. Reeves*, 530 U.S. at 142 (assuming arguendo that the *McDonnell Douglas* standard is applicable in actions under the Age Discrimination in Employment Act).

23. *E.g.*, Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995); Leffel v. Valley Fin. Serv., 113 F.3d 787, 792 (7th Cir. 1997).

24. Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989).

25. *E.g.*, Helland v. South Bend Cmty. Sch. Corp., 93 F.3d 327, 330-31 (7th Cir. 1996); Lee v. Russell County Bd. of Educ., 684 F.2d 769, 773-76 (11th Cir. 1982); *cf. St. Mary's Honor Ctr.*, 509 U.S. at 506 n.1 (assuming that the *McDonnell Douglas* standard is applicable in a 42 U.S.C. § 1983 case).

26. *E.g.*, Guz v. Bechtel Nat'l Inc., 24 Cal. 4th 317, 354-355, 8 P.3d 1089, 1113 (2000); Bowles v.

III. THE APPARENT CIRCUIT SPLIT

Because of the ubiquity of the *McDonnell Douglas* standard within the anti-discrimination law, it is natural to expect that it would also be applied in litigation about discrimination in lending[27] under the Equal Credit Opportunity Act[28] and the Fair Housing Act.[29] Several courts have, in fact, applied the standard in such litigation, apparently without expecting that the application would turn out to be controversial. Prior to the emergence of the split that is the subject matter of this article, such decisions were made by the First,[30] Fourth,[31] Fifth,[32] and Eighth[33] Circuits, as well as district courts within the Second[34] and Seventh Circuits.[35] (The Second Circuit affirmed one of the district court decisions, but did so without opinion.)[36] The Sixth Circuit made a pronouncement that suggests that it would do the same.[37] The courts that applied the standard generally did so without much discussion; one explicitly stated that it had "no doubt that the three-stage *McDonnell Douglas/Burdine* analysis applies to Fair Housing Act cases."[38]

In August 1998, the Seventh Circuit, however, decided *Latimore v. Citibank Federal Savings Bank*,[39] which, for reasons that will be discussed below, held that the *McDonnell Douglas* standard is not applicable to discrimination in lending.[40] Since that decision, the First Circuit in *Rosa v. Park West Bank & Trust*[41]

Keating, 606 P.2d 458, 462-63 (Idaho 1979).

27. For a general theoretical discussion of the reasons why the laws against lending discrimination are needed, see Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX.L. REV. 787 (1995).

28. 15 U.S.C. §§ 1691-1691f (1994).

29. 42 U.S.C. §§ 3601-3619 (1994).

30. Mercado-Garcia v. Ponce Fed. Bank, 979 F.2d 890, 893 (1st Cir. 1992).

31. Crestar Bank v. Driggs, No. 93-1036, 1993 WL 198187, at *1 (4th Cir. 1993).

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

33. Ring v. First Interstate Mortgage, Inc., 984 F.2d 924, 926-27 (8th Cir. 1993).

34. Gross v. United States Small Bus. Admin., 669 F. Supp. 50, 52 (N.D.N.Y. 1987); Williams v. First Fed. Sav. & Loan Ass'n, 554 F. Supp. 447, 449 (N.D.N.Y. 1981), *aff'd*, 697 F.2d 302 (2d Cir. 1982).

35. Saldana v. Citibank, Fed. Sav. Bank, No. 93C4164, 1996 WL 332451, at *2 (N.D. Ill. June 13, 1996); Milton v. Bancplus Mortgage Corp., No. 96C106, 1996 WL 197532, at *2 (N.D. Ill. 1996); A.B. & S. Auto Serv., Inc. v. South Shore Bank of Chicago, 962 F. Supp. 1056, 1060 n.6 (N.D. Ill. 1997); Thomas v. First Fed. Sav. Bank of Ind., 653 F. Supp. 1330, 1338 (N.D. Ind. 1987).

36. *Williams*, 697 F.2d at 302.

37. The Sixth Circuit made a general pronouncement that "the history suggests reviewing E[qual] C[redit] O[pportunity] A[ct] claims of discrimination using the same framework and burden allocation system found in Title VII cases," implying that the *McDonnell Douglas* standard should be applied to such cases. Lewis v. ACB Bus. Servs. Inc., 135 F.3d 389, 406 (6th Cir. 1998). This pronouncement was, however, made in the context of applying the Act's anti-retaliation provision, not its prohibition of discrimination on the basis of race, color, religion, national origin, sex or marital status, or age.

38. *Ring*, 984 F.2d at 926.

39. Latimore v. Citibank, Fed. Sav. Bank, 151 F.3d 712 (7th Cir. 1998).

40. *Id.* at 715.

41. Rosa v. Park West Bank & Trust, 214 F.3d 213 (1st Cir. 2000).

reaffirmed its allegiance to applying the *McDonnell Douglas* standard in lending-discrimination cases, expressly noting that this allegiance contradicted the Seventh Circuit's decision.[42] A district court within the Eleventh Circuit also applied the standard to a claim under the Equal Credit Opportunity Act, expressly noting the decision in *Latimore* was to the contrary.[43] The Tenth[44] and the D.C.[45] Circuits noted the emerging circuit split on this issue, without taking sides in the controversy. The Second Circuit applied the *McDonnell Douglas* standard in a 1999 lending-discrimination case, without noting that by doing so it was taking a side in a circuit split.[46]

The Seventh Circuit thus, at the moment, stands alone in maintaining that the *McDonnell Douglas* standard does not apply to discrimination in lending. Circuit splits, however, are not to be resolved by simply following the majority: what matters is the soundness of reasoning that underlies the opposed positions. So far, the courts expressly declining to follow the Seventh Circuit have not offered any argument for doing so. The Seventh Circuit, on the other hand, did offer an argument for its position.[47] That argument, as this article tries to show, cannot be dismissed lightly, even though it ultimately turns out to be problematic.

IV. THE FACTS OF *LATIMORE*

Latimore involved a black plaintiff who was denied a loan that was to be secured by her home.[48] The lender's proffered reason for denying the loan was that the value of the home, as determined by the lender's appraiser, was insufficient for the loan sought.[49] The plaintiff claimed, on the basis of a different appraiser's opinion, that the actual value of the home was significantly greater than the value found by the lender's appraiser.[50] According to the plaintiff, if the lender's appraiser had determined the value of the home accurately, it would have been, according to the lender's own criteria, sufficient for the home to serve as collateral for the loan sought.[51] The plaintiff thus argued that the lender's reliance on the low appraisal and consequential denial of the loan amounted to discrimination on the basis of race.[52] She also argued that the lender's appraiser

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42. *Id.* at 215.

43. Sallion v. Suntrust Bank, Atlanta, 87 F. Supp. 2d 1323, 1327 n.1 (N.D. Ga. 2000).

44. Matthiesen v. Banc One Mortgage Corp., 173 F.3d 1242, 1246 n.4 (10th Cir. 1999); *see also* Hilgert v. Mark Twain/Mercantile Bank, No. 99-2031-GTV, 2000 WL 528053, at *2 (D. Kan. Apr. 19, 2000).

45. Crawford v. Signet Bank, 179 F.3d 926, 928 n.5 (D.C. Cir. 1999).

46. Thompson v. Marine Midland Bank, 1999 WL 752961 (2d Cir. 1999).

47. *See infra* Part V.

48. *Latimore*, 151 F.3d at 713.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

himself discriminated on the basis of race in making the appraisal.[53]

The court's analysis treated *Latimore* as a case of alleged discrimination on the basis of the plaintiff's race, even though there are a few hints in the opinion that the case could have been treated as a case of alleged discrimination on the basis of the race of the majority of the residents of the neighborhood in which the home was located.[54] The latter form of discrimination, often referred to as "redlining," would have required a different kind of analysis.[55] The claim that this case involved redlining was somewhat more explicitly considered (and rejected) in the district court opinion.[56] Given that this article focuses on the general doctrinal implications of the appellate decision in this case, rather than on the details of the case itself, it will follow the appellate court in treating *Latimore* as a case in which alleged discrimination was based on the plaintiff's race, and it will ignore its redlining aspects.

V. THE CENTRAL ARGUMENT OF THE OPINION

The court's crucial argument for not applying the *McDonnell Douglas* standard to the plaintiff's allegations in *Latimore* was this:

> The fact that a qualified black is passed over for promotion in favor of a white has been thought sufficiently suspicious to place on the defendant the minimum burden of presenting a noninvidious reason why the black lost out. But it is the competitive situation—the black facing off as it were against the white—that creates the (minimal) suspicion, and there is no comparable competitive situation in the usual allegation of credit discrimination. [The plaintiff] was not competing with a white person for a $51,000 loan. A bank does not announce, "We are making a $51,000 real estate loan today; please submit your applications, and we'll choose the application that we like best and give that applicant the loan." If a bank did that, and a black and a white each submitted an application, and the black's application satisfied the bank's criteria of creditworthiness and value-to-loan ratio yet the white received the loan, we would have a situation roughly parallel to that of a *McDonnell Douglas* case. . . . But such cases are rare, and this is not one of them.[57]

This article first, in Parts V through IX, takes this argument at face value and treats it as the core of the court's opinion. Later, in Part X, the question will be

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53. *Id.* at 716.

54. *Id.* at 713, 715.

55. *See generally* Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts*, 33 SAN DIEGO L. REV. 583 (1996).

56. Latimore v. Citibank, Fed. Sav. Bank, 979 F. Supp. 662 (N.D. Ill. 1997).

57. *Latimore*, 151 F.3d at 714.

raised of how this argument is related to what the court says elsewhere in the opinion. The essence of this reasoning of the court can be paraphrased as the following syllogism:

(1) The *McDonnell Douglas* standard presupposes that there was a competition between the plaintiff and other candidates for the position.
(2) Applicants for credit typically do not compete against each other.
(3) Therefore, the *McDonnell Douglas* standard is inapplicable to typical allegations of discrimination in lending.

The first premise of this syllogism finds support in the language of the *McDonnell Douglas* opinion, as the fourth element of the prima facie case (quoted in Part II) refers to persons other than the plaintiff who applied for the position for which the plaintiff was rejected.[58]

What about the second premise? Every lender has only a finite amount of funds available for lending. This amount is typically less than the aggregate amount of all the loans that applicants might desire. Therefore, in a very broad sense of the word "compete," the applicants may be said to be competing against each other: some of them will fail to get the loans they desire because the lender will prefer to provide its limited funds to others.[59]

Nevertheless, several features of typical lending operations, suggested by the above-quoted language of *Latimore*, make these operations unlike the more paradigmatic cases of competition, such as the competition for employment. First, the funds that a lender has available are fungible; they are not individuated as specific, identifiable loans. One cannot meaningfully speak of *the* loan for which different applicants are competing. In that respect, lending is unlike hiring: in hiring one can meaningfully speak of *the* position for which different applicants are competing. The same is true of certain kinds of promotions. Second, the amount of an individual loan is typically only a tiny portion of the total amount of funds that an institutional lender has available at any given moment.[60] That is, again, unlike typical hiring in an ongoing business operation where there are usually only a few openings at any given time.[61] Third, a lender normally does not compare individual applicants directly against each other. A loan officer of a bank, for example, does not normally examine several applications simultaneously, trying to determine which ones among them are

58. *McDonnell Douglas*, 411 U.S. at 802.

59. *See* Michele L. Johnson, Casenote, *Your Loan Is Denied, but What About Your Lending Discrimination Suit?:* Latimore v. Citibank Federal Savings Bank, 151 F.3d 712 (7th Cir. 1998), 68 U. CIN. L. REV. 185, 216 (1999).

60. In a normal case this remains true constantly, as the lender's available funds are continuously replenished.

61. In this respect, however, lending is not unlike hiring at a point at which a large business is starting or significantly expanding its activities.

stronger than the others. Instead, a lending institution normally establishes a set of lending criteria and instructs its loan officers to assess each application, separately from the others, against these criteria. That is unlike a typical hiring deliberation which involves assessing several applicants at the same time in an attempt to determine which ones among them are better suited for the opening than the others.

In view of these features of the lending application process, one can readily agree that there is a sense of the word "competition" such that the *McDonnell Douglas* standard presupposes competition, and, at the same time such that typical deliberations about credit applications do not involve competition. Both premises of the syllogism thus seem to be true. The syllogism is quite compelling, and it is not easy to think of a reason for rejecting it.

VI. THE CRITICISMS OF THE DECISION IN THE LITERATURE

As pointed out above, the courts that rejected the Seventh Circuit's rationale for not applying the *McDonnell Douglas* standard have not yet offered any arguments for rejecting it. A search for a possible argument against the Seventh Circuit's reasoning must, therefore, turn to what a small number of law review commentators have said about *Latimore*.

So far, the most detailed discussions of *Latimore* have been provided by Michele Johnson[62] and Erin Dancy[63]. The extensiveness of their discussions is, however, deceptive, as most of them are devoted to summarizing the general area of the law to which the case belongs,[64] its overall significance,[65] and relatively little to a direct examination of the Seventh Circuit's analysis in the case. To the extent these two authors do engage in such examination, they criticize the court in general terms for such failings as terseness,[66] not considering the purposes of the *McDonnell Douglas* standard,[67] not explicitly referring to different legal theories of discrimination,[68] and "overlooking" the "relevance" of the underlying statutes[69] (while praising the decisions that did apply the *McDonnell Douglas* standard to discrimination in lending for carefully scrutinizing these statutory provisions).[70] These general criticisms of *Latimore* may or may not be justified, but they do very little to refute the opinion's crucial argument. In fact, these criticisms of the opinion seem to concern its style more than its content. If the

62. Johnson, *supra* note 59.

63. Erin Elisabeth Dancy, Latimore v. Citibank Federal Savings Bank: *A Journey through the Labyrinth of Lending Discrimination*, 3 N.C. BANKING INST. 233 (1999).

64. Johnson, *supra* note 59, at 190-207; Dancy, *supra* note 63, at 239-53.

65. Johnson, *supra* note 59, at 189-90, 216; Dancy, *supra* note 63, at 233, 254-56.

66. Johnson, *supra* note 59, at 213.

67. *Id.*

68. Dancy, *supra* note 63, at 252.

69. *Id.* at 259.

70. *Id.* at 249.

above-presented Seventh Circuit's syllogism is sound, that is the end of the matter: no amount of pondering on the general purposes of the standard or on the underlying statutes will change the conclusion. Nor would the court being less "terse" in presenting the argument, on its own, change its soundness. If one thinks that the syllogism is not sound, one has to explain what specifically is wrong with it. If the two commentators want their readers to believe that the defects they claim to have found in the *Latimore* opinion somehow affect the soundness of the syllogism, they need to spell out the logical link between these (very general) defects and the syllogism. Neither has done so.

Dancy says that the *McDonnell Douglas* standard "has worked effectively" in other areas of antidiscrimination law, suggesting that this effectiveness somehow constitutes a reason for applying it to the allegations in lending discrimination as well.[71] But if a standard is, by its own terms, inapplicable to a particular area of the law (and the Seventh Circuit's syllogism purports to show this about the *McDonnell Douglas* standard and the law against discrimination in lending), then its effectiveness in a different area of the law (whatever precisely effectiveness is in this context) cannot do anything to make it applicable.

The *Latimore* decision is also the subject matter of comments by Richard Hill,[72] G. Carol Brani,[73] and Kathleen Kelley.[74] These comments, however, consist almost exclusively of the recitations of the contents of the court's opinion and of its general background. They do not really engage in a critical examination of the court's reasoning. Hill[75] and Brani[76] indicate that they believe that the *McDonnell Douglas* standard should apply in lending-discrimination cases, but they do not offer any argument that would even attempt to establish that the reasoning that led the Seventh Circuit to the opposite conclusion was logically defective.

VII. DOES *LATIMORE* DISADVANTAGE PLAINTIFFS?

Further misunderstanding of the logic of *Latimore* underlies Johnson's, Dancy's, Hill's, and Brani's comments. The fact that the plaintiff in *Latimore* has lost (the Seventh Circuit affirmed the summary judgment for the defendants)[77] seems to have caused these commentators to believe that the court's rejection of the applicability of the *McDonnell Douglas* standard generally favors defendants

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71. *Id.* at 256.

72. Richard A. Hill, *Credit Opportunities, Race, and Presumptions: Does the McDonnell Douglas Framework Apply in Fair Lending Cases?* Latimore v. Citibank Federal Savings Bank, 64 MO. L. REV. 479 (1999).

73. G. Carol Brani, *Civil Rights and Mortgage Lending Discrimination: Establishing a Prima Facie Case Under the Disparate Treatment Theory*, 5 RACE & ETHNIC ANC. L.J. 42 (1999).

74. Kathleen A. Kelley, Casenote, Latimore v. Citibank Federal Savings Bank, 151 F.3d 712 (7th Cir. 1998), 5 RACE & ETHNIC ANCESTRY L.J. 85 (1999).

75. Hill, *supra* note 72, at 500-01.

76. Brani, *supra* note 73, at 59.

77. *Latimore*, 151 F.3d at 716.

in such suits.[78] In other words, they believe that if the Seventh Circuit's reasoning is rejected and the standard applied in such cases, the plaintiffs would have better chances of winning. Given that these commentators are all sympathetic to plaintiffs in antidiscrimination suits, this belief motivates their claims that the *McDonnell Douglas* standard should be applied in lending-discrimination cases. These commentators thus think that by taking the position opposite to that of the Seventh Circuit, they are advancing the cause of plaintiffs in such cases.

Properly understood, however, the above quoted reasoning of the Seventh Circuit is not at all hostile to plaintiffs in actions of this kind. To see that, one need only look carefully at the fourth element of the plaintiff's prima facie claim under the *McDonnell Douglas* standard. That element requires that the complainant show "that, after his rejection, the position remained open and the employer continued to seek [applicants] from persons of complainant's qualifications."[79] Adapted to the loan application process, the requirement would be that *the* loan remained available and that the lender continued to seek applications from persons of complainant's qualifications. But, as the crucial argument of *Latimore* points out,[80] in a typical lending operation, loans are not individuated in advance of being awarded; consequently, there is no such thing as *the* loan for which different applicants are competing. It follows that, in a typical case, there cannot be any other persons applying for the same loan as the plaintiff. This, in turn, entails that if the *McDonnell Douglas* standard were applied to a typical lending discrimination case, the plaintiff could not satisfy the fourth element of the prima facie case. Under the *McDonnell Douglas* standard, such cases would thus never proceed beyond the first of the three burden-shifting stages; all the plaintiffs would lose at the first stage.

If this reasoning is correct, then the Seventh Circuit's decision to not apply the *McDonnell Douglas* standard in such cases is not depriving the plaintiffs of some benefit that they would have had if the standard were applied. Quite the contrary: the Seventh Circuit removes these cases from the scope of the *McDonnell Douglas* standard precisely because it seems that the plaintiffs cannot profit from the standard anyway. The court sees its decision as simply articulating what is implied by the standard itself.

VIII. THE UNDERLYING ISSUE

The central argument of *Latimore* is thus able to withstand all the attacks on it that have been considered so far in this article. Nevertheless, it is all too understandable that one would have a certain nagging feeling that something is

78. The *McDonnell Douglas* opinion itself illustrates the invalidity of judging the overall impact of a court's reasoning on the basis of the outcome of the specific case: at the end of that opinion, the Court clearly hinted that the plaintiff's chances of winning on remand were slim. *McDonnell Douglas*, 411 U.S. at 806.

79. *Id.* at 802.

80. *Latimore*, 151 F.3d at 714 (quoted *supra* Part V).

problematic about it. If the *Latimore* argument is so rationally compelling, one might ask, why is it that, over the more than three years that have elapsed since it was made, no other court has come to appreciate its force?

In order to investigate this puzzle, one needs to look more closely at what the courts that apply the *McDonnell Douglas* standard to lending-discrimination cases actually do in applying it. The most explicit account of what the standard is supposed to amount to in this context can be found in the 1993 Eighth Circuit decision in *Ring v. First Interstate Mortgage.*[81] According to that decision, in order to establish the prima facie case, the plaintiff in such an action

> must prove (1) that he was a member of a protected class; (2) that he applied for and qualified for a loan from Defendants; (3) that the loan was rejected despite his qualifications; and (4) that Defendants continued to approve loans for applicants with qualifications similar to those of Plaintiff.[82]

The crucial thing to note here is that in the fourth element of the prima facie case, the court refers to indefinite "loans." Such language is not analogous to the language of *McDonnell Douglas*, which, as has been noted above, in the fourth element of its prima facie case, refers to *the* position, that is, to the very position for which the plaintiff applied. Under the fourth element of the *McDonnell Douglas* case it is not enough for the plaintiff to prove that the defendant has continued to receive applications from other applicants for some positions; they have to have been for the *same* position.

The *Ring* court's above-quoted version of the *McDonnell Douglas* standard is followed by citations to two other appellate-level cases,[83] but neither of them supports this departure from the original form of *McDonnell Douglas*. Both of the cited decisions concern discrimination in providing housing, and in their versions of the fourth element of the prima facie case, they referred to "*the* house"[84] and "*the* housing or rental property";[85] they did not refer to indefinite housing.

Yet, the *Ring* court appears to have been completely unaware that its reference to indefinite "loans" was a departure both from the original holding of *McDonnell Douglas* and from the decisions cited as persuasive authority. Analogous references to indefinite loans can also be found in other decisions applying the *McDonnell Douglas* standard to discrimination in lending.[86] The significance of the difference between *definite* employment positions referred to

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81. *Ring*, 984 F.2d at 926-27.

82. *Id.* at 926 (quoting the unpublished opinion of the lower court).

83. HUD v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990); Selden Apartments v. HUD, 785 F.2d 152, 159 (6th Cir. 1986).

84. *Blackwell*, 908 F.2d at 870 (emphasis added).

85. *Selden Apartments*, 785 F.2d at 159 (emphasis added).

86. *See, e.g., Sallion*, 87 F. Supp. 2d at 1329; *Gross*, 669 F. Supp. at 53.

in the *McDonnell Douglas* itself and *indefinite* loans has escaped all of these courts.

We are now able to put the split between the Seventh Circuit and other circuits into a larger doctrinal context. The split is not simply a split on the isolated issue of whether the *McDonnell Douglas* standard should be applied to lending-discrimination cases. Rather, the split on the issue of whether the definiteness of the reference to "*the* position," in the original wording of the standard, is an essential element of the standard. In *Latimore*, the Seventh Circuit implicitly took the position that definiteness was essential. Once that interpretation of the standard is accepted, the Seventh Circuit's syllogism is compelling, and its conclusion, that the standard cannot be applied in typical lending cases, is inescapable. On the other hand, courts that reject *Latimore* thereby implicitly take the position that definiteness is not essential. That position makes it possible for them to reject the first premise of the *Latimore* syllogism,[87] and to thus avoid being bound by the syllogism itself. Regardless of which side of the split about lending discrimination one is sympathetic to, it helps clarity to think about it in this broader context.

IX. SPLIT OR MERE CONFUSION?

The crucial consideration in favor of the Seventh Circuit's position in *Latimore* is its faithfulness to the language of the controlling precedent. It can be, with good reason, claimed that any possible extension of the *McDonnell Douglas* standard to noncompetitive settings should be left to the Supreme Court, and that until the Court has spoken, the lower courts should faithfully follow the standard as the Court has formulated it. That faithfulness requires that, in applying the standard to settings other than those of employment, one preserve the definiteness of the Court's reference to "*the* position." As this cannot be done in typical lending cases, it follows that the standard should not be applied to them (unless and until the Supreme Court chooses to expressly modify the standard).

On the other hand, in defense of ignoring the definiteness of "*the* position," the argument can be made that the Supreme Court invited lower courts to experiment with various modifications of the *McDonnell Douglas* requirements of the prima facie case, by saying that the requirements were "never intended to be rigid, mechanized, or ritualistic."[88] Moreover, the decisions that applied *McDonnell Douglas* to lending discrimination are not alone in ignoring the definiteness of "*the* position" in the original formulation of the standard. Even within the employment-discrimination area (which is the area of the *McDonnell Douglas* decision itself), one readily finds courts applying variations of the test that do not require that the plaintiff be compared with other candidates for the

87. *See supra* Part V.

88. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

same position. One case requires, for example, as the fourth element of the prima facie case, only that "other employees of similar qualifications who were not members of a protected group were promoted at the time plaintiff's request for promotion was denied."[89] This wording allowed for the possibility that these other employees were not promoted to *the* position for which the plaintiff applied. Other cases require merely that "similarly-situated non-protected employees received preferential treatment,"[90] "that similarly situated employees, who are not members of the protected group were treated differently,"[91] or that the plaintiff "was treated less favorably than a similarly-situated employee outside the protected class."[92] None of these formulations presupposes a direct competition between the plaintiff and those with whom the plaintiff is compared. Nevertheless, the courts using such formulations typically use them in conjunction with a citation to *McDonnell Douglas*.[93] One court even used both a wording that presupposes competition for the same position ("employer filled *the position* with a person who is not a member of the protected group")[94] and a formulation that does not ("others who were not members of a protected group remained in *similar positions*")[95] within the same opinion, apparently without noticing the difference between them.

Some courts even use a version of the standard that dispenses altogether with the express requirement for comparison between the plaintiff and others. For the prima facie case, they require merely that the plaintiff was subjected to some adverse employment action "under circumstances which give rise to an inference of unlawful discrimination."[96] That language is taken from *Texas Department of Community Affairs v. Burdine*,[97] even though the Court in that decision probably intended it merely as dictum summarizing the general character of the *McDonnell Douglas* standard, not as a substitute for the specific requirements of the standard itself.[98]

Up to this point, this article has treated the difference of opinion, as to whether the definiteness of "*the* position" in *McDonnell Douglas* is an essential feature of the standard, as if it were a circuit split. However, among courts that

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89. Marzec v. Marsh, 990 F.2d 393, 396 (8th Cir. 1993).

90. Dowell v. Rubin, No. 00-3296, 2000 WL 1679440, at *1 (6th Cir. Oct. 31, 2000).

91. Clark v. Runyon, 218 F.3d 915, 918 (8th Cir. 2000).

92. Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 626 (6th Cir. 1999).

93. A rare example of an opinion that uses a standard of this kind ("treated more harshly or disparately than the individual who was not a member of his protected group"), but distinguishes it from the *McDonnell Douglas* standard itself is *Fahrenbacher v. Department of Veterans Affairs*, No. 00-3256, 2000 WL 1725463, at *3 (Fed. Cir. Nov. 20, 2000).

94. Vaughn v. Edel, 918 F.2d 517, 521 (5th Cir. 1990) (emphasis added).

95. *Id.* at 522 (emphasis added).

96. EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1192 (10th Cir. 2000); Brown v. Coach Stores, 163 F.3d 706, 710 (2d Cir. 1998).

97. *Burdine*, 450 U.S. at 253.

98. *See Aikens*, 453 U.S. at 905-06 (1981) (Marshall, J., dissenting) (arguing that this wording is a dictum, which did not change the *McDonnell Douglas* formulation of the requirements of the prima facie case).

have used versions of the *McDonnell Douglas* standard that do not presuppose competition is the Seventh Circuit itself. In *Pafford v. Herman*, the Seventh Circuit formulated the fourth element of the prima facie case as requiring merely that the plaintiff "was denied training given to other similarly situated employees who were not members of the protected group."[99] That wording clearly does not presuppose the existence of some specific, individuated training position that the plaintiff and "other similarly situated employees" were competing for. The *Pafford* decision was made two months before *Latimore*. Chief Judge Posner, the author of the *Latimore* opinion, was a member of the panel in *Pafford*. As the syllogism of *Latimore* does not hinge on any changes in the law within the intervening two months, there is a clear inconsistency between Posner's argument in *Latimore* and his signing off on *Pafford*. The confusion as to how to treat the reference to "*the* position" in *McDonnell Douglas* is thus not really a split between the Seventh and other circuits. Rather, it is a confusion that permeates the decisions of the Seventh Circuit itself.

X. AN INCONSISTENCY WITHIN THE *LATIMORE* OPINION

This article has so far focused on what purports to be the core of the *Latimore* decision: the argument for the position that the *McDonnell Douglas* standard does not apply to typical cases involving allegations of discrimination in lending. There is, however, in the text of *Latimore* a seemingly less important remark that, when its implications are thought through, casts considerable doubt on whether the *Latimore* court really took that position. The remark is in the form of a hypothetical:

> Suppose, for example, that Latimore and Eromital (who is white), apply at roughly the same time for roughly the same-sized loan from the same Citibank office. The two prospective borrowers are equally creditworthy and the collateral they offer to put up is appraised at the same amount. Both applications are forwarded to [a Citibank officer, who] turns down Latimore's application and approves Eromital's. The similarity in the situations of the white and the black would be sufficient to impose on Citibank a duty of explaining why the white was treated better.[100]

The court refers to the reasoning exemplified by this hypothetical as a "*McDonnell Douglas* knock off."[101] What is noteworthy about this hypothetical is that the court treats the reasoning in it as legitimate, even though there is no such thing as *the* loan that the hypothetical Latimore and Eromital are competing for.

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99. Pafford v. Herman, 148 F.3d 658, 667 (7th Cir. 1998); *see also* Malacara v. City of Madison, 224 F.3d 727, 729 (7th Cir. 2000).

100. *Latimore*, 151 F.3d at 715.

101. *Id.*

The bank in the hypothetical did not announce, "'We are making a $51,000 real estate loan today; please submit your applications, and we'll choose the application that we like best and give that applicant the loan.'"[102] Nothing in the hypothetical suggests that the two applicants are competing for one loan that would have been announced in such a way. Rather, the hypothetical Latimore and Eromital seem to be independently applying for indefinite parts of the undifferentiated mass of fungible funds, and there is no indication that the bank's officer is directly comparing the two applicants. This perfectly realistic hypothetical is therefore not at all the same as the deliberately unrealistic hypothetical of a bank announcing that it is making a $51,000 loan on a particular day, which the court used in presenting its main argument,[103] even though the court seems to think that it is.[104]

By making the "Eromital" hypothetical, the court effectively ceases to regard the definiteness of "*the* position" in *McDonnell Douglas* as an essential element of that standard. It thus gives up the claim that the *McDonnell Douglas* standard presupposes that there was a competition between the plaintiff and other candidates for the position. As this claim is a premise of the central argument of the case,[105] giving it up amounts to giving up the central argument.

The *Latimore* opinion is thus internally inconsistent. What purports to be its central argument not only contradicts the positions of other circuits, it also contradicts other parts of the same opinion: parts that, incidentally, appear on the facing pages of the printed text.[106]

The court suggests that the "Eromital-type" cases are rare.[107] But, first, even if they were rare, their rarity would not remove the inconsistency between the court's main argument and its treatment of the "Eromital" hypothetical. Second, it is not at all clear why such cases would be all that rare. When the defendant is a lending institution handling large numbers of applications, it seems quite possible that among its many applicants there are some who are situated similarly to the plaintiff in the way presented by the "Eromital" hypothetical.

XI. CONCLUSION

Given that the *Latimore* opinion as a whole is self-contradictory, one can make sense of it only by ignoring one of two sides of the contradiction. One way to do that is to ignore the "Eromital" hypothetical and treat the syllogism that the

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102. *Id.* at 714.

103. *Id.*

104. *See id.* ("[W]hen we have an approximation to such a situation, a variant of the *McDonnell Douglas* standard may apply, as we shall see." The "such a situation" refers to the unrealistic hypothetical that the court uses in presenting the main argument; "we shall see" is apparently a reference to the "Eromital" hypothetical.).

105. *See supra* Part V.

106. *Latimore*, 151 F.3d at 714-15.

107. *Id.* at 714.

McDonnell Douglas standard does not apply to lending discrimination as the operative part of the opinion. If one takes that path, one ends up with an interesting and rather strong argument, but one also ends up with a circuit split.

The other possible way of making sense of *Latimore* is to treat the "Eromital" hypothetical as the operative part of the court's reasoning. Then the plaintiff loses, not because the *McDonnell Douglas* standard is inapplicable but because she did not present enough evidence to satisfy the standard: she did not point to a suitable "Eromital."[108] If the case is looked at that way, then it is in harmony with the decisions of the courts applying the *McDonnell Douglas* test to lending discrimination, and the circuit split disappears.[109]

108. *Id.* at 715 ("No effort at making such a comparison was attempted here.").

109. It is interesting to note that the Northern District of Illinois in an October 2001 decision applied the *McDonnell Douglas* standard to a lending discrimination case, citing its own decision in *Latimore* and completely ignoring the Seventh Circuit's opinion. Greer v. Bank One, 2001 WL 1191161, at *3-4 (N.D. Ill. Oct. 4, 2001).