1997 WL 33644511
Only the Westlaw citation is currently available.
United States District Court,
S.D. Alabama Southern Division.

CHURCH OF ZION CHRISTIAN CENTER, INC., et al., Plaintiff,
v.
SOUTHTRUST BANK OF ALABAMA, et al., Defendants.

No. CA 96–0922–MJ–C.[1]

1 This action has been referred for the undersigned to conduct any and all further proceedings in this action, including trial, and for the entry of final judgment pursuant to 28 U.S.C. § 636(c).

| July 31, 1997.

Attorneys and Law Firms

Willie J. Huntley, Jr., Huntley Law Firm, Mobile, AL, for Plaintiff.

D. Charles Holtz, Fernandez, Holtz & Combs, L.L.C, Mobile, AL, for Defendant.

Opinion

MEMORANDUM OPINION

CASSADY, Magistrate J.

***1** This action is before the Court on the motion for partial summary judgment filed by defendant SouthTrust Bank of Alabama, N.A. ("SouthTrust"), Rick Chastain ("Chastain") and Erby Long ("Long") on June 9, 1997 (Doc. 29). After careful consideration of the motion and evidentiary materials filed therewith, plaintiffs' response filed on June 27, 1997 (Doc. 35) and the evidentiary materials filed therewith and the proposed pretrial order filed on June 13, 1997, it is determined that the motion for partial summary judgment is due to be granted in part and denied in part.

FINDINGS OF FACT[2]

2 A review of the proposed pretrial order filed on June 13, 1997 reveals that the facts necessary for resolution of the summary judgment motion are not in dispute. The only disputed facts listed by the parties are:

1. What did Rick Chastain say at the meeting on September 21, 1994?
2. As to any of the foregoing, were any of such statements discriminatory?
3. Did Mike Nettles request Rick Chastain to call Perry Wilson to discuss the loan request and/or purchase of the property?
4. What did Rick Chastain say to Perry Wilson?
5. Did Erby Long discriminate when he offered to loan money for the purchase of buses and vans?
6. If there was discrimination, was the Church damaged as a proximate result?

"Pretrial Order" filed July 13, 1997.

1. Plaintiff, Church of Zion, Inc. ("Church") is an Alabama not-for-profit corporation which operates as a non-denominational church in Mobile, Alabama. (Ex. 4, p.10, 1.12–17, Nettles depo.; Ex. 11, Int. ans. no. 4–6).[3]

3 All references to exhibits are to those exhibits filed by the defendants on June 9, 1997 in support of the motion for partial summary judgment (Doc. 31) unless otherwise indicated.

2. Plaintiff, Mike Nettles is a pastor of the Church (Ex. 4, p.11, 1.9–14, Nettles depo.). Plaintiffs, Eric Day and Alonzo Simon are members and Elders of the Church (Ex. 4, p.38, 1.2–16, p.39, 1.9–21, Nettles depo.). Nettles, Day and Simon are black. (Ex. 1, Complaint, ¶¶ 3–5).

3. Defendant, SouthTrust Bank of Alabama, N.A. is a national bank with offices throughout the State of Alabama, including Mobile, Alabama. (Ex. 3, Chastain aff.). It is the successor to SouthTrust Bank of Mobile by merger effective in January of 1995. (Ex. 3, Chastain aff.). For purposes of this action, the terms "SouthTrust" and the "Bank" refer to both the predecessor and the successor banks, as applicable according to the date of merger.

4. Defendant, Rick Chastain is a senior vice president of SouthTrust in Mobile. (Ex. 3, Chastain aff.). Defendant, Erby Long is the manager of the SouthTrust branch at the corner of Dauphin Street and Sage Avenue in Mobile. (Ex. 2, Long aff.).

5. At all material times, the Church has been physically located on Cottage Hill Road in the city of Mobile, in buildings being rented by the Church. (Ex. 11, Int.ans. no. 4).

6. In 1994, Nettles, Day and other Church elders became interested in the purchase by the Church of approximately 48 acres of real property on Range Line Road in Mobile county, Alabama (the "Property") which was owned by Perry Wilson ("Wilson"). (Ex. 4, p.45, 1.23—p.46, 1.21,

Nettles depo.). The Property was for sale for the price of $315,900. (Ex. 4, p.52, 1.15–22, Nettles depo.).

7. In late August or early September, 1994, a verbal agreement was made between the Church and Wilson for the Church to purchase the property for the sum of $315,900. (Ex. 4, p.62, 1.2–19, Nettles depo.; Ex. 5, p.19, 1.4—p.20, 1.6, Day depo.; Ex. 6, p.24, 1.3–20, Simon depo.).

8. On approximately September 15, 1994 (Ex. 4, p.80, 1.13–19, Nettles depo.; Ex. 2, Long aff.), Nettles, Day and Simon met with Long at his office to request the Bank to loan the Church $300,000 (Ex. 2, Long aff.), or $315,900 according to plaintiffs, for the purchase of the Property. (Ex. 4, p.125, 1.9—0.126, 1.3, Nettles depo.; Ex. 5, p.19, 1.12–16, Day depo.; Ex. 6, p.23, 1.5–10, Simon depo.). They told Long that the purchase price was $315,900. (Ex. 2, Long aff.; Ex. 5, p.19, 1.12–16, Day depo.). They provided the Church's financial portfolio at the meeting which included financial statements, church membership roster, monthly income, financial obligations and the like. (Ex. 4, p.82, 1.1–8, Nettles depo.; Ex. 2, Long aff.). For purposes of this summary judgment motion, the Court assumes that this amounted to a completed application by the Church under ECOA.

***2** 9. Long explained at the meeting that he did not have the authority to approve such a loan, but that it would have to be approved by bank officers with the necessary authority. (Ex. 4, p.93, 1.10–14, Nettles depo.). Plaintiffs recognized this, and the meeting concluded with all those in attendance upbeat about the possibility of such a loan being made. (Ex. 4, p.92, 1.12–23, Nettles depo.; Ex. 5, p.30, 1.11—p.31, 1.15, Day depo.; Ex. 6, p.27, 1.1–20, Simon depo.).

10. On approximately September 20, 1994, Long met with the President of the Mobile Office of SouthTrust, Robert Wilbanks, and the Credit Review Officer of the Mobile office, Ted Wood, to present the loan request. It was determined that the loan would not be made. (Ex. 2, Long aff.).

11. Later that day, Long telephoned Day and informed him that the loan request was not approved. (Ex. 5, p.33, 1.11–22, Day depo.; Ex. 2, Long aff.). Immediately thereafter, Day arranged a three-way conference call between himself, Long and Nettles, and in that conference call, Long essentially repeated what he had just said to Day. During the conversations, Long said that the Bank would be glad to consider other, smaller loan requests, such as for buses or vans, since the Bank made those to churches from time to time. (Ex. 2, Long aff.; Ex. 4, p.95, 1.6–12, Nettles depo.). Long states that he explained reasons for the denial (Ex. 2, Long aff.), but the defendants say he did not (Ex. 4, p.108, 1.8–10, Nettles depo.), so, for purposes of this summary judgment, it is assumed that he did not explain any reasons.

12. A meeting was then arranged in Long's office for the following day with a senior bank officer, Chastain, to further discuss the matter. (Ex. 4, p.106, 1.7–14, p.108, 1.11–20, Nettles depo.).

13. Nettles, Day, Simon, Long and Chastain attended the meeting, which began at 10:30 a.m. and lasted approximately an hour and a half. (Ex. 4, p. 109, 1.2–6, Nettles depo.; Ex. 5, p.50, 1.19—0.51, 1.1, Day depo.).

14. Nettles and Chastain did most of the talking at the meeting. (Ex. 5, p.45, 1.3–4, p.46, 1.21–22, Day depo.; Ex. 2, Long aff.). Plaintiffs say that Chastain made certain statements during this meeting which they claim to be discriminatory. (Ex. 11, Int.ans. no. 1). They do not accuse Long of making any such statements. For purposes of this summary judgment, it will be assumed that Chastain made discriminatory statements at this meeting.

15. On November 14, 1994, Wilson signed and delivered a letter to Nettles agreeing to sell the Property for $315,900 following receipt of a $10,000 non-refundable deposit on or before November 17, 1994. (Ex. 8, Wilson letter). This was the first writing evidencing the agreement for the sale of the Property to the Church. (Ex. 4, p.62, 1.17—p.63, 1.5, Nettles depo.; Ex. 5, p.20, 1.3–6, Day depo.; Ex. 6, p.24, 1.3–10, Simon depo.).

16. On March 10, 1995, the Church purchased the Property from Wilson for the price of $315,900. (Ex. 9, deed). Thus, the Church was able to purchase the Property for the same price that it had originally agreed to pay. (Ex. 11, Int.ans. no. 9).

***3** 17. Plaintiffs had stated in their interrogatory answers that SouthTrust's inaction caused them to pay $16,000 more than they would have had to pay for the Property if the loan had been made by SouthTrust. However, each plaintiff testified in deposition that the price they originally agreed to pay, and the price that was in effect when they were attempting to borrow the money from SouthTrust, and the price they actually paid for the Property, was $315,900. (See ¶ ¶ 6, 8, 9 and 16, *supra*). Wilson agreed, at some point to make a $16,000 donation back to the Church after the sale. It appears that this promise was made in September 1994. (Ex. 10, int. no. 9). Plaintiffs did not consider this promise to be anything more than a non-binding statement by Wilson made sometime after they had reached an agreement. (Def. Ex. A, Doc. 36, p.127, 1.13—p.128, 1.13, Nettles depo.). In any event, as indicated above, plaintiffs made it clear in their depositions that the price at the time of their discussions with Long and Chastain, and the price they actually told Long and Chastain they had agreed to pay, was $315,900. (Ex. 4, p.125, 1.9–18, Nettles depo.; Ex. 5, p.19, 1.12–19, Day depo.; Ex. 6, p.23, 1.5–21, Simon

depo.).

18. The sale was financed by First Alabama Bank ("FAB"). (Ex. 4, p.137, 1.13–17, Nettles depo.). Commonwealth National Bank ("Commonwealth") and FAB were the only other lenders that the Church contacted about the loan. (Ex. 4, p.172, 1.13—0.173, 1.18, Nettles depo.). Commonwealth could not make the loan because it was in excess of its lending limit (Ex. 4, p.172, 1.21—p.173, 1.2, Nettles depo.). FAB not only made the loan for the purchase of the land, but recommended that the Church secure the land and then come back for a construction loan in six months. At that time, a 100% construction loan was foreseeable based on the Church's portfolio. (Ex. 4, p.174, 1.13–15, Nettles depo.). This evidence establishes that plaintiffs' credit was not harmed by anything that defendants did or did not do.

19. Plaintiffs have presented no evidence of actual damage other than Wilson's failure to make his $16,000.00 donation. In this regard, Reverend Nettles testified that as part of the negotiations with Wilson after the bank had rejected the loan application and Wilson had informed him that the "deal was off", he offered to pay full price for the property, effectively releasing Wilson from his promise to make the donation. (Ex. 4, ¶ . 149–150, Nettles depo.).

20. Thus, the Church, at most, lost $16,000.00 allegedly as a proximate result of the defendants' improper denial of credit and Chastain's comments to Wilson regarding the reasons for the bank's decision to reject the loan application. Plaintiffs have not suffered any other actual damages as the result of the actions of any defendant. (Id., ¶ .145–149).

21. At all material times, Nettles', Day's and Simon's efforts to procure financing from SouthTrust were made in order to acquire a loan for the Church. They did not apply for a loan for themselves, individually. (Ex. 4, p.183, 1.1–4, Nettles depo.; Ex. 5, p.6,4 1.10–18, Day depo.; Ex. 6, p.53, 1.10–19, Simon depo.). No evidence has been submitted that would show that they contemplated becoming guarantors on the loan or that they would be personally liable should the corporation default.

***4** 22. Although Long was made a defendant, no allegations of wrongdoing were made against him in the Complaint. (Ex. 1, Complaint). In addition, plaintiffs have all stated that they do not know of anything that Long did that was discriminatory. (Ex. 4, p.181, 1.1–23, Nettles depo.; Ex. 5, p.63, 1.9–18, Day depo.; Ex. 6, p.53, 1.22—0.54, 1.1, Simon depo.). They only infer that he was discriminating when he suggested that they might borrow money for buses and vans. It affirmatively appears that all of his efforts were intended to have the loan approved for the Church and, when the loan was rejected, to at least get the Church as a customer.

CONCLUSIONS OF LAW

A. Jurisdiction and Venue.

1. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 15 U.S.C. § 1691e(f) of the Equal Credit Opportunity Act. Venue is appropriate in the Southern District of Alabama pursuant to 28 U.S.C. § 1391(b) and (c).

B. Summary judgment standard.

2. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment").[4] Rule 56 places upon the moving party "the initial burden of showing the Court, by reference to materials on file that there are no genuine issues of material fact that should be decided at trial." *Jeffery v. Sarasota White Sox, Inc.,* 64 F.3d 590, 593 (11th Cir.1995) (citations omitted). "[T]he burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Once this burden is satisfied by the moving party, the burden shifts to the nonmovant to "come forward with 'specific facts showing that there is a *genuine issue for trial." ' Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), *quoting* Fed.R.Civ.P. 56(e).

4 The substantive law will identify which facts are material. 477 U.S. at 248, 106 S.Ct. at 2510. The Supreme Court concluded in *Anderson* "that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case." *Id.* at 255, 106 S.Ct. at 2514.

3. The clear language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element

essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322, 106 S.Ct. at 2552. A complete failure of proof by the non-movant on an element essential to his case renders all facts immaterial, so the movant is entitled to judgment as a matter of law. *Id.* at 323, 106 S.Ct. at 2552; *see Bennett v. Parker,* 898 F.2d 1530, 1532 (11th Cir.)("Facts in dispute cease to be 'material' facts when the plaintiff fails to establish a *prima facie* case."), *reh'g denied,* 916 F.2d 719 (1990)(en banc), *cert. denied,* 498 U.S. 1103, 111 S.Ct. 1003, 112 L.Ed.2d 1085 (1991)).

***5** 4. This Court must inquire "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict—'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." ' *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512 (citation omitted)(emphasis in original). The non-moving party bears "the burden of coming forward with sufficient evidence on *each element* that must be proved." *Early v. Champion Int'l Corp.,* 907 F.2d 1077, 1080 (11th Cir.1990)(emphasis in original) (citation omitted). " '[I]f on any part of the prima facie case there would be insufficient evidence to require submission of the case to a jury, we must affirm the grant of summary judgment [for the defendant]." *Id. (quoting Barnes v. Southwest Forest Industries, Inc.,* 814 F.2d 607, 609 (11th Cir.1987)).

5. In this case, the defendants have satisfied their initial burden of showing the Court that there are no genuine issues of material fact that should be decided at trial except on the issue of damages as explained below.

C. Nature of action.

6. Plaintiffs have stated a single claim, a violation of the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691(a)(1). Their claim is that the defendant bank and two of its officers discriminated against them with respect to an aspect of a credit transaction on the basis of race, color and religion. (Ex. 1, Complaint).

7. Defendants have filed a motion for partial summary judgment, raising three issues: (a) that the three individual plaintiffs lack standing to pursue their ECOA claims; (b) that none of the plaintiffs can show actual damages arising from the actions of any defendant; and (c) that the claim against Long should be dismissed because plaintiffs have failed to include within their complaint even an allegation that he violated the statute.

D. Standing of individual plaintiffs.

8. There is no dispute that plaintiffs Nettles, Day and Simon must have standing to bring their individual actions against the defendants. *Evans v. First Federal Savings Bank of Indiana,* 669 F.Supp. 915, 920–923 (N.D.Ind.1987). Their disagreement with the position of the defendants, i.e., that they have no standing as individuals since the loan application was made on behalf of a corporation, has to do with their interpretation of "applicant" as that term is defined in 15 U.S.C. § 1691a(b) [5] and 12 C.F.R. § 202.2(e)(1997).[6]

5 The statutory definition of "applicant" is:

> any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C. § 1691a(b).

6 The regulations promulgated by the Board of Governors of the Federal Reserve Board further define "applicant" as

> any person who requests or has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of § 202.7(d), the term includes guarantors, sureties, endorsers and similar parties.

12 C.F.R. § 202.2(e)(1997).

9. Defendants' position, evidenced by the summary judgment submissions, is that the loan was strictly intended for the use of the corporation and that the individual defendants were not seeking personal loans. Therefore, the only applicant with standing is the sole applicant for the loan, the Church, a corporate entity capable of entering into such a credit transaction.

10. Plaintiffs would have this Court read the definition of applicant more liberally, finding that "they, and all of the other members of the Church of Zion, may have become contractually liable regarding the extension of credit." (Plaintiffs Brief In Opposition To Defendants' Motion For Partial Summary Judgment, Doc. 35, ¶ . 8–9) Such a decision could be based, they argue, on finding that the corporation's revenues are composed only of weekly offerings and pledges from its members, a fact known to the bank and its employees. In fact, this information was used by the defendants to support oral representations that the corporation could not repay the loan without some assurance that its present income would remain constant.

***6** 11. Plaintiffs therefore argue that it was conceivable at the time of the loan application that one or more members of the congregation would be contractually liable through some future agreement to repay the loan. No evidence has been submitted, however, to show that as part of the

application requirements of the bank, these plaintiffs or any other church members were required to provide personal financial information. Likewise, no evidence has been developed as to whether the bank would have required guarantors on the loan request made by the Church. In fact, regulations seem to forbid such a requirement if the corporation is otherwise creditworthy. "Except as provided in this paragraph, a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1). For purposes of this motion, it is determined that no such requirements were discussed or imposed as part of the application process.[7]

7 Even though there is evidence that a 100% purchase-price-loan was made to the Church by FAB, no information has been provided as to the terms and conditions of that loan. It is not known at present whether the individual plaintiffs are in fact guarantors on the FAB note or if the land and pledged revenues of the Church were sufficient to collateralize the loan.

12. After carefully considering this issue of standing, a question of first impression in this Court and the Eleventh Circuit, I must agree with the defendants that Nettles, Day and Simon do not have standing to bring an ECOA action against the defendants. They never entered into any oral or written agreement with the defendants that would have rendered them contractually liable.[8] Their situation stands in stark contrast to the situation where a husband was required to execute a Deed to Secure Debt which subjected his personal property to potential attachment should his wife default on her debt. There the court appropriately found that the husband could become responsible for the debt at some future date pursuant to an express agreement. *Ford v. Citizens and Southern National Bank,* 700 F.Supp. 1121, 1123–24 (N.D.Ga.1988). Such an agreement does not exist in this action.

8 *"Contractually liable* means expressly obligated to repay all debts arising on an account by reason of an agreement to that effect." 12 C.F.R. § 202.2(i).

13. All defendants are entitled to summary judgment on the individual claims of Nettles, Day and Simon since they lack standing to bring an ECOA action against the defendants.

E. Failure of proof as to Long.

14. Long has moved not only for judgment against the claims of the individual plaintiffs but also for judgment as to the claim made by the Church. He argues that the Church has failed to plead or prove that he, as a creditor, violated ECOA. Plaintiffs, in response, do not mention this procedural argument but instead articulate those actions of Long deemed by them to present material factual disputes that must be resolved at trial.

15. "A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded." Rule 8(a), Federal Rules of Civil Procedure. In order to prevail in this action plaintiffs must plead and prove that Long is a creditor[9] who discriminated against them as applicants with respect to a credit transaction (loan application) on the basis of race, color, or religion. (Ex. 1, Complaint, Count 1; 15 U.S.C. § 1691(a)(1)). "Essential to a claim under this Act is that plaintiffs are members of a minority class, that they were qualified for the loan but nevertheless rejected, and that non-minority applicants of similar credit stature were either given loans or were treated more favorably in the application process. *Gross v. U.S. Small Business Admin.,* 669 F.Supp. 50, 53 (N.D.N.Y.1987), *aff'd,* 867 F.2d 1423 (2nd Cir.1988). If all of these elements are present, then plaintiffs have established a *prima facie* case under § 1691. *Id." Davidson v. Citicorp/Citibank,* 1990 WL 96991, *5 (S.D.N.Y.1990). Long is entitled to judgment, if it is shown either that sufficient grounds have not been plead in the complaint that would show that the plaintiffs are entitled to relief or that plaintiffs do not have proof of a *prima facie* case. *Id.* Since I find that the defendants have met their burden as to both showings, Long's motion is due to be granted.

9 *"Creditor* means a person who, in the ordinary course of business, regularly participates in the decision of whether or not to extend credit." 12 C.F.R. § 202.2(i).

***7** 16. A careful reading of the complaint (Ex. 1) reveals that although Long was named as a defendant and certain actions that he took relative to the loan application are recited, when the plaintiffs allege that they were victims of discrimination, the only responsible defendants identified are "Rick Chestain (sic) and Southtrust (sic), as creditor." (*Id.,* p.3) Long is never accused of discriminatory acts and there is no allegation of dissimilar treatment when compared with non-minority applicants. These pleading errors alone support a judgment for Long.

17. The three individual plaintiffs have no standing, as previously found, to assert a ECOA claim against Long.

They and the Church have not plead sufficient facts to establish an ECOA claim. In addition, they and the Church have failed to present sufficient proof of discrimination, an essential element of their claim. “A credit applicant can prove discrimination under the ECOA by using any one of the following three different approaches used in the employment discrimination context: 1) direct evidence of discrimination; 2) disparate impact analysis, also called the “effects” test;[10] or 3) disparate treatment analysis.” *A.B. & S. Auto Service, Inc. v. South Shore Bank of Chicago,* 962 F.Supp. 1056, 1060 (N.D.Ill.1997) citing *Saldana v. Citibank, Federal Savings Bank,* 1996 WL 332451 *2 (N.D.Ill.1996); See Charlotte E. Thomas, *Defending a Free Standing Equal Credit Opportunity Act Claim,* 114 Banking Law Journal 108, 109 (1997)(same).

10 This action is not a disparate impact case. Plaintiff has no statistical proof that an otherwise neutral practice or policy used by the bank has had a disparate impact on African–Americans.

18. A direct-evidence case requires the production of direct testimony of the creditors constituting explicit and unambiguous statements of hostility toward persons protected by ECOA, thus proving discrimination without inference or presumption. *See Brown v. East Miss. Elec. Power Ass'n,* 989 F.2d 858, 861–62 (5th Cir.1993); *EEOC v. Alton Packaging Corp.,* 901 F.2d 920, 923 (11th Cir.1990). “ ‘[S]tray remarks in the workplace,’ ‘statements by non-decisionmakers,’ and ‘statements by decisionmakers unrelated to the decisional process itself’ do not ‘justify requiring the [creditor] to prove that its [loan application] decisions were based on legitimate criteria.” ’ *EEOC v. Alton Packaging Corp.,* at 924 (*quoting Price Waterhouse v. Hopkins,* 490 U.S. 228, 277, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)(O'Connor, J. concurring)).

19. The evidence presented by plaintiffs in response to Long's motion for summary judgment does contain a statement attributed to Long that is argued to be discriminatory. He has admitted offering to make smaller loans to the Church for the purchase of buses or vans after notifying plaintiffs that their loan application had been denied. Plaintiffs consider this offer demeaning and evidence of discrimination. All other evidence submitted as to Long to prove that he was a moving force in the bank's decision to deny the Church a loan and and further, that the motivation for or one of the motives for such conduct was a racial or religious bias, is circumstantial evidence.

***8** 20. This one statement does not support a finding that Long discriminated against the plaintiffs in processing their loan application. He admittedly was not the decisionmaker with authority to approve the application. His position as a non-decisionmaker was made clear to the plaintiffs during their first meeting. There is no evidence that his responsibilities included anything other than taking the application, submitting it for approval and then conveying the results of the bank's decision to the applicant. His comment regarding loans for vans and buses was made after the decision to deny the loan and is subject to a legitimate interpretation, as he argues. *See Saldana v. Citibank* at *2 (Inferences from comments such as “the neighborhood was not the same as when [the account executive] grew up there” do not amount to direct evidence of discriminatory redlining.). Plaintiffs have not presented direct evidence that Long discriminated against them as a decisionmaker in the application process or that he was the moving force behind the bank's decision to deny the loan request.

21. In order to prove discrimination in violation of the ECOA using the disparate treatment approach, articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the applicant must establish a *prima facie* case. *A.B. & S. Auto Service* at 1060 n. 6. Plaintiffs have presented evidence tending to support their minority status and qualifications for a loan but no evidence has been presented to show that Long continued to approve loans for non-minority applicants with qualifications similar to theirs, rendering their claim against Long subject to dismissal. *See Davidson v. Citibank/Citicorp* at *5 (“Although plaintiffs have indicated that they are minorities, and have alleged that they were qualified for the instant loan but nevertheless rejected, they fail to allege with any factual basis that non-minority applicants of similar credit stature were treated more favorably in the application process, or were in fact extended credit. Without asserting this fundamental allegation at the outset, plaintiffs would be unable to establish a valid claim under § 1691.”)

F. Actual damages.

22. Defendants also argue that plaintiffs have no proof of actual damages. Plaintiffs counter with evidence that the property owner's withdrawal of an oral promise to make a $16,000.00 donation to the Church once the property was sold, constitutes an actual loss caused by the defendants' actions associated with their loan application. Reverend Nettles testified that he felt compelled to release Mr. Wilson from his pledge once he received notice that the loan application was denied in order to gain more time to find a new lender.

23. Actual damages may include out-of-pocket monetary losses, injury to credit reputation, mental anguish, humiliation or embarrassment, but courts will not presume any injury. *Fischl v. GMAC,* 708 F.2d 143, 148 (5th Cir.1983); *Anderson v. United Finance Co.,* 666 F.2d

1274, 1277–78 (9th Cir.1982); *Ford,* 700 F.Supp. at 1124. The actual damages must be specifically proven. *Anderson* at 1278. A corporation is not capable of suffering emotional types of damages such as mental anguish, humiliation or embarrassment inasmuch as a corporation has no emotion. This proposition of law is not disputed, leaving for consideration the out-of-pocket and punitive damages suffered by the Church.

***9** 24. Proof of actual damages is not necessary to obtain punitive damages that are also available pursuant to 15 U.S.C. § 1691e(b). *Cherry v. Amoco Oil Co.,* 490 F.Supp. 1026, 1029 (D.C.Ga.1980). Therefore, regardless of the decision made on the motion for summary judgment, the Church may proceed to trial for punitive damages against the bank and Chastain.

25. Because the moving parties have cited no precedent indicating that the loss of Wilson's pledge of $16,000.00 would not constitute an out-of-pocket loss as a matter of law and since the issue of damages must be resolved at trial on the remaining claim against the bank and Rick Chastain, this issue should be carried with the trial. The jury will need to decide if the pledge was made, and if made, withdrawn as a result of the improper actions of the defendants. If plaintiffs prevail on both issues, then the jury should decide if this loss was an out-of-pocket loss to the Church.

CONCLUSION

For the reasons stated herein, the motion for partial summary judgment should be GRANTED IN PART AND DENIED IN PART. All defendants are entitled to summary judgment on the claims of the individual plaintiffs Nettles, Day and Simon. Long is entitled to summary judgment as to all claims. A decision on the appropriate damages, if any, that should be awarded the Church if a violation of ECOA is proven, should be left for the jury at trial. Judgment is entered simultaneously herewith by separate document.

JUDGMENT

This matter having come before the Court on the motion for partial summary judgment filed by the defendants, and the Court having concluded that there is no genuine issue of material fact that would establish a jury question on the issue of liability of defendants as to the claims of Nettles, Day and Simon, and to defendant Long as to all claims, it is hereby ORDERED, ADJUDGED & DECREED that the plaintiffs shall have and recover nothing against the defendant Long and FURTHER that the claims of Nettles, Day and Simon are due to be and hereby are DISMISSED WITH PREJUDICE. The motion is otherwise DENIED.