

No. 15-20710

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

TINA ALEXANDER, SHEILA ALEXIS, EVELYN BAINES, SHAUNTAY
BENNINGS, NYO HAYGOOD, TABITHA HENRY, CHEYANNE JONES,
ROSLYN JONES, KENDRA WILLIAMS, KYSHIA WOODS, ZACHARY
BAYLOR, AND TRACEY KENNERLY
Plaintiffs-Appellants,

v.

AMERIPRO FUNDING, INC., AMEGY BANK NATIONAL ASSOCIATION,
AND WELLS FARGO BANK, N.A.,
Defendants-Appellees.

On Appeal from the
United States District Court for the Southern District of Texas
Houston Division
Hon. Ewing Werlein, Jr.
Case No. 4:14-cv-02947

**BRIEF OF AMICUS CURIAE
CONSUMER FINANCIAL PROTECTION BUREAU
IN SUPPORT OF APPELLANTS AND REVERSAL**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED.....1

INTEREST OF AMICUS CURIAE1

STATEMENT.....2

 A. The Equal Credit Opportunity Act and Regulation B.....2

 B. Proceedings Below.....6

SUMMARY OF ARGUMENT9

ARGUMENT11

 A Creditor’s Refusal To Consider An Applicant’s Section 8 Public Assistance
Income And Other Public Assistance Income In Connection With A Mortgage
Application Constitutes A Violation Of ECOA And Regulation B.11

 A. A plaintiff who alleges that a creditor refused to consider public assistance
income states a claim of prohibited discrimination under ECOA sufficient
to survive a motion to dismiss.....11

 B. The district court erred in requiring appellants to allege hostility or animus
as an element of their ECOA discrimination claim.20

CONCLUSION.....23

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	14, 17
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	13
<i>Blackston v. Wexford Health Sources, Inc.</i> , 354 Fed. Appx. 106 (5th Cir. 2005)	21
<i>Brown v. E. Miss. Elec. Power Ass’n</i> , 989 F.2d 858 (5th Cir. 1993)	22
<i>Chevron U.S.A. Inc. v. NRDC, Inc.</i> , 467 U.S. 837 (1984).....	3
<i>Cnty. Servs., Inc. v. Wind Gap Mun. Auth.</i> , 421 F.3d 170 (3d Cir. 2005)	21
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957).....	14, 16
<i>EEOC v. Joe’s Stone Crab, Inc.</i> , 220 F.3d 1263 (11th Cir. 2000)	21, 22
<i>Ferrill v. Parker Grp., Inc.</i> , 168 F.3d 468 (11th Cir. 1999)	21, 22
<i>Goodman v. Lukens Steel Co.</i> , 482 U.S. 656 (1987).....	20
<i>Int’l Union, United Auto. Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.</i> , 499 U.S. 187 (1991).....	20

Johnson v. City of Shelby, Miss.,
135 S. Ct. 346 (2014)..... 14

Lindsay v. Yates,
578 F.3d 407 (5th Cir. 2009) 12

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973)..... 12

Moore v. U.S. Dep’t of Agric. On Behalf of Farmers Home Admin.,
55 F.3d 991 (5th Cir. 1995) 12, 13, 16, 23

Portis v. First Nat.’l Bank of New Albany, Miss.,
34 F.3d 325 (5th Cir. 1994) 12, 13, 16

Raj v. Louisiana State Univ.,
714 F.3d 322 (5th Cir. 2013) 13

Skinner v. Switzer,
562 U.S. 521 (2011)..... 14

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002)..... 13, 14, 16, 17, 18

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1984)..... 12, 13, 16

Treadway v. Gateway Chevrolet Oldsmobile Inc.,
362 F.3d 971 (7th Cir. 2004) 3

Turner v. Kansas City S. Ry. Co.,
675 F.3d 887 (5th Cir. 2012) 12

U.S. Postal Serv. Bd. of Governors v. Aikens,
460 U.S. 711 (1983)..... 12

Wilson v. Birnberg,
667 F.3d 591 (5th Cir. 2012) 17

STATUTES

15 U.S.C. § 1691 *et seq.* (Equal Credit Opportunity Act) 1

15 U.S.C. § 1691(a) 3

15 U.S.C. § 1691(a)(1)-(2)..... 2

15 U.S.C. § 1691(a)(2)..... 1, 2, 11, 17, 19

15 U.S.C. § 1691(b)(2)..... 5, 19

15 U.S.C. § 1691a(e)..... 15

15 U.S.C. § 1691a(g) 2

15 U.S.C. § 1691b(a) 1, 2, 3

15 U.S.C. § 1691c 2

15 U.S.C. § 1691e(a)-(c)..... 2

15 U.S.C. § 1691e(g) 2

15 U.S.C. § 1691e(h) 2

29 U.S.C. § 621 (Age Discrimination in Employment Act)..... 12

42 U.S.C. § 1437f..... 6

42 U.S.C. § 1981 (Civil Rights Act of 1964) 20

42 U.S.C. § 2000e *et seq.* (Title VII of the Civil Rights Act) 12

REGULATIONS

12 C.F.R. Pt. 202 (2010) 3

12 C.F.R. part 1002 (Regulation B)..... 1

12 C.F.R. Pt. 1002..... 3

12 C.F.R. Pt. 1002, Supp. I ¶ 2(z)-3 6

12 C.F.R. Pt. 1002, Supp. I ¶ 1002.2(1)-1 15

12 C.F.R. Pt. 1002, Supp. I ¶ 1002.2(z)-3 11

12 C.F.R. Pt. 1002, Supp. I ¶ 1002.6(b)(2)..... 5

12 C.F.R. Pt. 1002, Supp. I ¶ 1002.6(b)(2)-6 5, 19

12 C.F.R. Pt. 1002, Supp. I ¶ 1002.6(b)(5)-1 6

12 C.F.R. Pt. 1002, Supp. I ¶ 1002.6(b)(5)-3.ii 16, 20

12 C.F.R. § 1002.2(l) 15

12 C.F.R. § 1002.2(m) 19

12 C.F.R. § 1002.2(p)(1)..... 5

12 C.F.R. § 1002.2(t) 5

12 C.F.R. § 1002.2(z)..... 1, 2, 4, 11

12 C.F.R. § 1002.4 3

12 C.F.R. § 1002.4(a)..... 1, 2, 11

12 C.F.R. § 1002.4(b) 2

12 C.F.R. § 1002.6(b)(2)..... 5

12 C.F.R. § 1002.6(b)(2)(i)..... 4

12 C.F.R. § 1002.6(b)(2)(iii)..... 5, 19

12 C.F.R. § 1002.6(b)(5)..... 4, 5, 6, 16

24 C.F.R. §§ 982.625-643..... 6

OTHER AUTHORITIES

Dodd-Frank Wall Street Reform and Consumer Protection Act,
Pub. L. No. 111-203, 124 Stat. 1376 (2010) 3

ECOA Amendments of 1976,
Pub. L. No. 94-239 § 2, 90 Stat. 251-252..... 2

Equal Credit Opportunity (Regulation B),
76 Fed. Reg. 79,442 (Dec. 21, 2011)..... 3

S. Rep. 94-589 (1976)..... 5

QUESTIONS PRESENTED

The Equal Credit Opportunity Act (ECOA or Act) prohibits creditors from discriminating against any applicant in “any aspect of a credit transaction . . . because all or part of the applicant’s income derives from any public assistance program.” *See* 15 U.S.C. § 1691(a)(2); *see also* 12 C.F.R. §§ 1002.2(z), 1002.4(a). This appeal presents two questions concerning the application and scope of ECOA and its implementing regulation, Regulation B:

1. Whether an allegation that a creditor refuses to consider an applicant’s public assistance income in evaluating a mortgage application is sufficient to state a discrimination claim under ECOA and Regulation B?
2. Whether an individual must allege hostility or animus on the part of the creditor to state a discrimination claim under ECOA and Regulation B?

INTEREST OF AMICUS CURIAE

This case concerns the application and scope of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* and Regulation B, 12 C.F.R. Pt. 1002. The Consumer Financial Protection Bureau (CFPB or Bureau) is the federal agency charged with administering ECOA and promulgating regulations to carry out its purposes. *See* 15 U.S.C. § 1691b(a). Among other things, ECOA prohibits creditors from discriminating against any applicant in “any aspect of a credit

transaction . . . because all or part of the applicant’s income derives from any public assistance program.” 15 U.S.C. § 1691(a)(2); *see also* 12 C.F.R. §§ 1002.2(z), 1002.4(a), (b). If a creditor violates ECOA or Regulation B, an “aggrieved applicant” may bring a suit seeking actual damages, punitive damages, and equitable or declaratory relief. *See* 15 U.S.C. §§ 1691e(a)-(c), 1691a(g). In addition, the CFPB, Department of Justice, and other federal agencies have the authority to enforce the Act through administrative proceedings and litigation. 15 U.S.C. §§ 1691c, 1691e(g), (h). For these reasons, the Bureau has a substantial interest in the Court’s resolution of the issues presented in this appeal.

STATEMENT

A. The Equal Credit Opportunity Act and Regulation B

Since 1976, ECOA has made it unlawful for “any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction” on the basis of certain characteristics including “race, color, religion, national origin, sex or marital status, or age” or because “all or part of the applicant’s income derives from any public assistance program.” 15 U.S.C. § 1691(a)(1)-(2); *see also* ECOA Amendments of 1976, Pub. L. No. 94-239 § 2, 90 Stat. 251-252.

When Congress enacted ECOA, it gave the Board of Governors of the Federal Reserve System (Board) broad authority to “prescribe regulations to carry out the purposes of ” ECOA. 15 U.S.C. § 1691b(a) (2006). The Board exercised this

authority by promulgating rules known as “Regulation B,” which include official staff interpretations of that regulation. 12 C.F.R. Pt. 202 (2010). Both were promulgated using notice and comment rulemaking and, among other things, define and establish the scope of the prohibitions against discrimination under ECOA. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), which transferred the Board’s rulemaking authority under ECOA to the Bureau. *See* Dodd-Frank Act, Pub. L. No. 111-203, §§ 1061(b)(1), (d), 1085, 124 Stat. 2036, 2039, 2083-2085 (2010); *see also* 15 U.S.C. § 1691b(a). On December 21, 2011, the Bureau repromulgated Regulation B and the accompanying Official Interpretations without material change. 12 C.F.R. Pt. 1002; *see* 76 Fed. Reg. 79,442 (Dec. 21, 2011). Courts have recognized that the interpretations of ECOA set forth in Regulation B and the accompanying Official Interpretations are entitled to deference under the framework set forth in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). *See, e.g., Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 n.3 (7th Cir. 2004).

Regulation B implements ECOA’s ban on “discriminat[ing] against any applicant, with respect to *any aspect* of a credit transaction” on a prohibited basis, 15 U.S.C. § 1691(a) (emphasis added), with both a general prohibition, 12 C.F.R.

§ 1002.4, as well as specific regulations governing the consideration of certain information in credit decisions. As relevant here, Regulation B bars a creditor from “tak[ing] into account . . . whether an applicant’s income derives from any public assistance program.” 12 C.F.R. § 1002.6(b)(2)(i). Regulation B also makes clear that a “creditor shall not discount or exclude from consideration the income of an applicant . . . because of a prohibited basis,” 12 C.F.R. § 1002.6(b)(5), such as “the fact that all or part of the applicant’s income derives from any public assistance program,” 12 C.F.R. § 1002.2(z) (defining “prohibited basis”). In other words, ECOA and Regulation B prohibit creditors, in evaluating credit applications, from refusing to consider income simply because it comes from a public assistance program.

However, ECOA and Regulation B allow creditors to evaluate *all* income, including public assistance income, in determining a specific applicant’s creditworthiness. Specifically, the Act does not prohibit a creditor from “mak[ing] an inquiry of . . . whether the applicant’s income derives from any public assistance program *if* such inquiry is for the purpose of determining the amount and probable continuance of income levels, credit history, or other pertinent

element of credit-worthiness as provided in regulations of the Bureau.”¹ 15 U.S.C. § 1691(b)(2) (emphasis added).

Regulation B further clarifies that, in “judgmental system[s]” of evaluating creditworthiness —meaning consideration of income other than by certain credit scoring systems²—a creditor may consider “whether an applicant’s income derives from any public assistance program only for the purpose of determining a pertinent element of creditworthiness,” such as “[t]he length of time an applicant will likely remain eligible to receive such income,” or “[w]hether the applicant will continue to qualify for benefits based on the status of the applicant’s dependents.” 12 C.F.R. § 1002.6(b)(2)(iii); 12 C.F.R. Pt. 1002, Supp. I ¶ 1002.6(b)(2)-6. However, a creditor may “not discount or exclude from consideration the income of an applicant” because it derives from any public assistance program, 12 C.F.R.

¹ Indeed, by enacting the prohibition on public assistance discrimination in ECOA, Congress sought to ensure that individuals “who are financially dependent” on public assistance income would have “reasonable access to the credit market” to aid these individuals “in their quest for financial independence.” S. Rep. 94-589, 5, 1976 U.S.C.C.A.N. 403, 407.

² Regulation B defines, and distinguishes between, “judgmental system[s]” of evaluating applicants, and “empirically derived, demonstrably and statistically sound, credit scoring systems.” *See* 12 C.F.R. § 1002.2(p)(1), (t). In an “empirically derived, demonstrably and statistically sound, credit scoring system,” a creditor may “not take into account whether an applicant’s income derives from any public assistance program.” 12 C.F.R. § 1002.6(b)(2).

§ 1002.6(b)(5). And although “a creditor may consider the amount and probable continuance of *any* income in evaluating an applicant’s creditworthiness,” *id.* (emphasis added), it must consider the applicant’s “actual circumstances” and may not “automatically discount or exclude from consideration any protected income.” 12 C.F.R. Pt. 1002, Supp. I ¶ 1002.6(b)(5)-1 to 3.

B. Proceedings Below

Plaintiffs-Appellants Tina Alexander, Sheila Alexis, Evelyn Baines, Shauntay Bennings, Nyo Hygood, Tabitha Henry, Cheyanne Jones, Roslyn Jones, Kendra Williams, Kyshia Woods, Zachary Baylor, and Tracey Kennerly (collectively Appellants) filed this action, alleging that Defendants-Appellees Ameripro Funding, Inc. (Ameripro), Amegy Bank National Association (Amegy Bank), and Wells Fargo Bank, N.A. (Wells Fargo) (collectively Appellees) violated ECOA by discriminating against Appellants “because all or a part of each of the [Appellants’] income derives from public assistance programs.”³

³ As the Official Interpretations provide, a “public assistance program” is “[a]ny Federal, state, or local government assistance program that provides a continuing, periodic income supplement, whether premised on entitlement or need” such as “rent and mortgage supplement or assistance programs” like the Section 8 Housing Choice Voucher Homeownership Program (“Section 8”) at issue in this case. 12 C.F.R. Pt. 1002, Supp. I, ¶ 2(z)-3. Section 8 is a government assistance program administered by local public housing authorities and funded by the United States Department of Housing and Urban Development. *See* 42 U.S.C. § 1437f; *see also* 24 C.F.R. §§ 982.625-643.

Specifically, Appellants' Third Amended Complaint alleges that Appellees Ameripro and Wells Fargo refused to consider Appellants' Section 8 public assistance benefits in connection with mortgage loan applications made by each Appellant. *See generally* Third Am. Compl. ("TAC") (Apr. 6, 2015) ECF No. 55 ¶¶ 33-38, 61-75, 76-109 (ROA 502, 505-07, 508-512).⁴ For example, Appellants Alexander, Alexis, Bennings, Haygood, Henry, C. Jones, R. Jones, Williams, and Woods allege that they each received Section 8 public assistance income and that Ameripro refused to consider their Section 8 public assistance income in connection with their respective mortgage loan applications. *See* TAC ¶¶ 65, 69-70 (ROA 506). Appellants further allege that Ameripro refused to consider their Section 8 public assistance income because it "claim[ed] it did not have an investor that would purchase a loan that allowed for their Section 8 income to be utilized in calculating the debt to income ratio and for qualifying purposes." *Id.* ¶ 69 (ROA 506). As a result of Ameripro's refusal to consider Appellants' Section 8 public assistance income benefits, Appellants claim that they "could not secure a certain size mortgage (due to excessive debt to income ratio), forcing each [Appellant] to purchase a home that was less expensive from their desired home, in a less

⁴ Appellant Baylor alleges that Wells Fargo refused to consider his Section 8 public assistance income and his Social Security disability payments in connection with his mortgage application. *See* TAC ¶¶ 95-96 (ROA 511).

desirable neighborhood and/or location, and in many cases, under less favorable terms.” *Id.* ¶ 70 (ROA 506).

Appellants also allege that Wells Fargo had “a publicly available policy” that stated that the creditor would “not accept transactions including . . . FHA Section 8 loans.” *Id.* ¶ 79 (ROA 508). As a result of Wells Fargo’s policy, Appellants Baylor and Kennerly allege that Wells Fargo refused to consider their Section 8 public assistance income in connection with their respective mortgage loan applications. *Id.* ¶ 81 (ROA 508). Appellants Baylor and Kennerly further allege that Wells Fargo denied their respective mortgage loan applications. *Id.* ¶¶ 97, 107 (ROA 511-12). Appellant Kennerly further alleges that, as a result of Appellee Wells Fargo’s refusal to consider her Section 8 public assistance income, she obtained “less favorable mortgage terms and qualified for a mortgage at a lesser amount than if her Section 8 income had been considered equally as non-public assistance income.” *Id.* ¶ 109 (ROA 512).

The district court granted Appellees’ motions to dismiss Appellants’ Third Amended Complaint. Dist. Ct. Mem. & Order (“Dist. Ct. Op.”) (July 21, 2015) ECF No. 67 (ROA 613-32). In the challenged decision, the district court concluded that Appellants had failed to state a *prima facie* claim of discrimination under ECOA. *Id.* at 8-13 (ROA 620-25). The district court rejected Appellants’ argument that they were not required to plead a *prima facie* case of discrimination

under ECOA because they had instead pled direct evidence of discrimination. *Id.* at 13-19 (ROA 625-31). The district court also concluded that Appellants had failed to state a claim under ECOA based on direct evidence of discrimination for two reasons. First, the district court found that Appellants’ allegations of direct evidence of discrimination did not state a claim under ECOA because they failed to allege hostility or animus on the part of Appellees. *Id.* at 14-15 (ROA 626-27). Second, the district court rejected Appellants’ allegations that Appellees refused to consider Appellants’ Section 8 public assistance income in connection with their respective mortgage applications as “conclusory.”⁵ *Id.* at 17 (ROA 629).

SUMMARY OF ARGUMENT

I.A. ECOA and Regulation B prohibit a creditor from discriminating against an applicant for a mortgage loan because all or part of the applicant’s income derives from public assistance. A plaintiff who alleges that a creditor

⁵ Shortly after the district court granted Appellees’ motions to dismiss, Appellant Kendra Williams moved to dismiss her ECOA claim against Appellee Amegy Bank as a result of a settlement agreement that the parties reached. *See* Mot. to Dismiss by Kendra Williams (Nov. 24, 2015), ECF No. 69 (ROA 11). On November 30, 2015, the district court granted Appellant Williams’ motion to dismiss and entered an order of dismissal. *See* Order of Dismissal on Stip. (Nov. 30, 2015), ECF. No. 70 (ROA 11). Accordingly, this appeal involves the claims of Appellants Alexander, Alexis, Baines, Bennings, Henry, C. Jones, R. Jones, Williams, Woods, Baylor, and Kennerly against Appellees Ameripro and Wells Fargo.

refused to consider her public assistance income as part of her mortgage application states a claim that the creditor has violated ECOA and Regulation B. Allegations of a creditor's blanket policy of refusing to consider public assistance income, if proven, represent direct evidence of unlawful discrimination, and preclude dismissal of the plaintiff's complaint under the pleading rules set forth in Rule 8 of the Federal Rules of Civil Procedure.

Here, Appellants allege that Ameripro refused to consider Appellants' public assistance income because Ameripro's investors refused to include public assistance income in debt-to-income ratios. Appellants also allege that Wells Fargo had a policy of refusing to consider public assistance income. Appellants also allege that, because of Appellees' refusal to consider such income, they received mortgage loans on terms that were less favorable than if that income had been considered. These allegations satisfy the simple notice requirements of Rule 8 and state a claim upon which relief may be granted. The district court's conclusion otherwise constitutes reversible error.

I.B. The district court also erred in requiring appellants to allege hostility or animus to state a discrimination claim under ECOA. Supreme Court and circuit courts of appeal precedent construing analogous federal antidiscrimination laws uniformly conclude that hostility and animus are not elements of a claim arising out of unlawful disparate treatment. With ECOA as well, a plaintiff states a claim

if she alleges that the lender discriminated against her on a prohibited basis — such as the fact that a portion of her income derives from public assistance — without regard to whether the lender did so out of hostility or animus.

ARGUMENT

A Creditor’s Refusal To Consider An Applicant’s Section 8 Public Assistance Income And Other Public Assistance Income In Connection With A Mortgage Application Constitutes A Violation Of ECOA And Regulation B.

ECOA and Regulation B bar a creditor from discriminating against an applicant in connection with any aspect of a credit transaction because all or part of the applicant’s income derives from a public assistance program like Section 8 benefits that Appellants sought to use in qualifying for credit. *See* 15 U.S.C. § 1691(a)(2); *see also* 12 C.F.R. §§ 1002.2(z), 1002.4(a); 12 C.F.R. Pt. 1002, Supp. I ¶ 1002.2(z)-3. A creditor that refuses to consider certain income as part of an applicant’s loan application because it is public assistance income has violated this prohibition. No additional allegation of hostility or animus is required. Because the district court failed to adhere to these principles, this Court should reverse the dismissal of Appellants’ ECOA claims.

A. A plaintiff who alleges that a creditor refused to consider public assistance income states a claim of prohibited discrimination under ECOA sufficient to survive a motion to dismiss

1. A plaintiff alleging unlawful discriminatory treatment under various federal anti-discrimination statutes generally may “use either direct or

circumstantial evidence” to survive a motion for summary judgment or prevail at trial. *Portis v. First Nat.’l Bank of New Albany, Miss.*, 34 F.3d 325, 328 (5th Cir. 1994) (citing *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983)).⁶ Because direct evidence of discrimination can be rare, “a plaintiff ordinarily uses circumstantial evidence” to make a *prima facie* case of discrimination under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).⁷ However, the *McDonnell-Douglas* framework “is inapplicable where the plaintiff presents direct evidence of discrimination.” *Portis*, 34 F.3d at 328 (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984)); *see also Moore v. U.S. Dep’t of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d 991, 995 (5th Cir. 1995) (“In the rare situation in which the

⁶ These cases involve other antidiscrimination statutes, specifically Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* However, this Court has extended that same framework to discrimination claims brought under ECOA. *See Moore*, 55 F.3d at 995 & n.5.

⁷ The *McDonnell Douglas* burden-shifting test, as well as what constitutes a *prima facie* case under that test, are flexible standards. *See Turner v. Kansas City S. Ry. Co.*, 675 F.3d 887, 892 (5th Cir. 2012); *see also Lindsay v. Yates*, 578 F.3d 407, 415-20 (5th Cir. 2009). Under one formulation of the burden-shifting test, “1) [t]he plaintiff must first demonstrate a *prima facie* case of discrimination; 2) if successful, the burden of production shifts to the defendant to show a legitimate and nondiscriminatory basis for [the challenged] decision; and 3) finally, the plaintiff must show that the defendant’s offered reason is pretext or unworthy of belief.” *Portis*, 34 F.3d at 328 n.7.

evidence establishes that [the defendant] openly discriminates against an individual it is not necessary to apply the mechanical formula of *McDonnell Douglas* to establish an inference of discrimination.” (internal quotation marks omitted)). In this Circuit, direct evidence of discrimination includes “any statement or written document showing a discriminatory motive on its face.” *Portis*, 34 F.3d at 328-29; *see also Trans World Airlines*, 469 U.S. at 121 (holding that direct evidence was present where “policy is discriminatory on its face”); *Moore*, 55 F.3d at 995 (finding that agency policy that “stated that ‘[n]o whites’ could qualify for SDA-designated properties[,] constitutes direct evidence of racial discrimination” (first bracket in original)).

Consistent with this framework, a plaintiff is not required to plead a *McDonnell Douglas prima facie* case of discrimination in her complaint. Rather, to survive a motion to dismiss—the relevant posture here—a plaintiff’s complaint need “satisfy only the simple requirements of Rule 8(a)” of the Federal Rules of Civil Procedure by “giv[ing] [the defendant] fair notice of the basis for [the plaintiff’s] claims.” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513, 514 (2002); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (reaffirming that *Swierkiewicz* rejected imposing “heightened fact pleading of specifics” in discrimination cases); *Raj v. Louisiana State Univ.*, 714 F.3d 322, 331 (5th Cir. 2013) (“Plaintiff need not make out a *prima facie* case of discrimination in order to

survive a Rule 12(b)(6) motion to dismiss for failure to state a claim.”⁸ If the complaint alleges facts that, if proven, provide “direct evidence of discrimination,” the plaintiff “may prevail without proving all the elements of a *prima facie* case.” *Swierkiewicz*, 534 U.S. at 511.

2. Appellants pled sufficient direct evidence of discrimination to state a violation of ECOA. Appellants have pled sufficient facts to “give the defendant[s] fair notice of what [their] claim is and the grounds upon which it rests.” *Id.* at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The operative complaint alleges that several plaintiffs sought credit from Appellee Ameripro. TAC ¶¶ 61-62 (ROA 505). The complaint further alleges that Appellants, who all received public assistance income, “were denied the right to utilize said income in qualifying for a loan” with Ameripro, *see* TAC ¶ 65 (ROA 506), because AmeriPro “claim[ed] it did not have an investor that would purchase a loan that allowed for their Section 8 income to be utilized in calculating the debt to income ratio and for qualifying purposes,” TAC ¶ 69 (ROA 506). With respect to Appellee Wells

⁸ Some courts have incorrectly suggested that the Supreme Court’s subsequent decisions in *Twombly* and in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), have overruled *Swierkiewicz*. To the contrary, the Supreme Court has cited *Swierkiewicz* as good law in cases decided after *Twombly* and *Iqbal*. *See Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014); *Skinner v. Switzer*, 562 U.S. 521, 530 (2011).

Fargo, the complaint alleges that Wells Fargo had a policy in place (for its own loans and those it acquired from Ameripro) under which it would not “accept transactions” that involved Section 8 loans.⁹ TAC ¶ 79 (ROA 508). Finally, the complaint alleges that the failure to consider Appellants’ Section 8 income adversely affected their ability to obtain favorable mortgage terms. TAC ¶¶ 84, 87, 90, 93, 109 (ROA 509-12).¹⁰

As explained above, in this Circuit, direct evidence of discrimination includes “any statement or written document showing a discriminatory motive on

⁹ ECOA and Regulation B broadly define the term “creditor” to mean “any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.” 15 U.S.C. § 1691a(e); *see also* 12 C.F.R. § 1002.2(l) (defining creditor to mean “a person, who, in the ordinary course of business, regularly participates in a credit decision, including setting the terms of credit. The term creditor also includes a creditor’s assignee, transferee, or subrogee who so participates. . . .”); 12 C.F.R. Pt. 1002, Supp. I ¶ 1002.2(l)-1 (“The term creditor includes all persons participating in the credit decision. This may include an assignee or a potential purchaser of the obligation who influences the credit decision by indicating whether or not it will purchase the obligation if the transaction is consummated.”). Whether appellee Wells Fargo is a creditor within the meaning of ECOA and Regulation B with respect to loans it would have acquired from Ameripro, *see* TAC ¶ 79 (ROA 508), is a fact-based inquiry and thus not properly resolved at the motion to dismiss stage.

¹⁰ Appellee Zachary Baylor alleges that Wells Fargo denied his mortgage application after failing to consider his public assistance income, and that he subsequently obtained a mortgage loan through another lender. TAC ¶¶ 96-98 (ROA 511).

its face.” *Portis*, 34 F.3d at 328. As applied here, Appellants alleged that Ameripro refused to consider the public assistance income because it was public assistance income, which its investors did not include in debt-to-income ratios. In addition, the allegations established that Wells Fargo had a policy of refusing to consider public assistance income. A policy that is discriminatory on its face constitutes direct evidence of discrimination. *Trans World Airlines*, 469 U.S. at 121 (holding that direct evidence was present where “policy is discriminatory on its face”); *Moore*, 55 F.3d at 995 (finding that agency policy that “stated that ‘[n]o whites’ could qualify for SDA-designated properties[,] constitutes direct evidence of racial discrimination” (first bracket in original)).

The allegations in the complaint thus satisfy the “simple requirements” of Rule 8 of the Federal Rules of Civil Procedure that a plaintiff “give the defendant fair notice of what plaintiff’s claim is and the grounds upon which it rests.” *Swierkeiwicz*, 534 U.S. at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). They also “state claims upon which relief could be granted” under ECOA and Regulation B. *Id.* at 514. If Ameripro and Wells Fargo refused, as a matter of policy, to evaluate Appellants’ public assistance income in connection with their mortgage applications, then they violated the ban on “discount[ing] or exclud[ing] from consideration the income of an applicant . . . because of a prohibited basis.” 12 C.F.R. § 1002.6(b)(5); *see also* 12 C.F.R. Pt. 1002, Supp. I, ¶ 6(b)(5)-3.ii

(explaining that “[i]n considering the separate components of an applicant’s income, the creditor may not automatically discount or exclude from consideration any protected income”). Allegations of such a practice or policy “states a plausible claim,” *Ashcroft*, 556 U.S. at 679, that Appellants were “discriminate[d] against . . . with respect to [an] aspect of a credit transaction . . . because all or part of the applicant’s income derives from any public assistance program,” 15 U.S.C. § 1691(a)(2).

b. Rather than view the allegations in the complaint in the light “favorable” to appellants, *see Wilson v. Birnberg*, 667 F.3d 591, 595, 599-600 (5th Cir. 2012), the district court imposed on Appellants a burden to “plead more facts than [they] may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.” *Swierkiewicz*, 534 U.S. at 512. Indeed, the district court erred by requiring that Appellants specifically allege that Appellees “stated to” any specific Appellant that her public assistance income could not be considered in determining whether she qualified for a loan, or that this was the reason for denying to her any specific mortgage loan. Dist. Ct. Op. at 16 (ROA 628); *see also id.* at 17 (ROA 629). This was particularly erroneous given that Appellants make specific and plausible allegations that Appellees refused to consider public assistance income as a matter of policy. In addition, Appellants need not “identify the price of the house she desired to buy, the amount of

mortgage loan she requested, the interest rate and other terms of the loan sought, the monthly payments she proposed to pay on a 30-year mortgage, her credit history and other debts, and other non-discriminatory factors properly used to determine her creditworthiness for a loan of that size and, hence, whether her Section 8 income was sufficient to qualify for such a loan, or the identity of the person or bank officer who in that context told [appellant] that her Section 8 income would not be considered.” *Id.* at 16 n.30 (ROA 628). Such a “heightened pleading standard” would be inconsistent with *Swierkiewicz*, 534 U.S. at 515. Rather, it is sufficient to state a claim of discrimination under ECOA for Appellants to allege that Appellees refused to consider Appellants’ income in evaluating their mortgage applications because such income was public assistance income. Such an allegation is not “conclusory” (Dist. Ct. Op. at 17 (ROA 629)); rather, it is a specific allegation of conduct prohibited under ECOA and Regulation B that is capable of evidentiary proof.¹¹ *See* TAC ¶¶ 69-70, 78-79, 81, 83-84, 86, 92, 96, 104-05 (ROA 506, 508-12).

¹¹ The district court also faulted Appellants for failing to allege that they were “qualified for the loans they sought.” Dist. Ct. Op. at 18 (ROA 630); *see also id.* at 12 (ROA 624). Appellees, however, alleged that the failure to consider public assistance income caused them to obtain “less favorable mortgage terms.” TAC

c. The district court observed that ECOA “expressly provides that creditors may consider the fact that an applicant’s income derives from a public assistance program as a relevant factor in evaluating creditworthiness.” Dist. Ct. Op. at 9 (citing 15 U.S.C. § 1691(b)(2)) (ROA 621); *see also id.* at 11 (ROA 623). It is true that, in a judgmental system of evaluating creditworthiness, a creditor may consider “whether an applicant’s income derives from any public assistance program” but “only for the purpose of determining a pertinent element of creditworthiness,” 12 C.F.R. § 1002.6(b)(2)(iii), such as to determine “[t]he length of time an applicant will likely remain eligible to receive such income,” or “[w]hether the applicant will continue to qualify for benefits based on the status of the applicant’s dependents.” 12 C.F.R. Part 1002, Supp. I, ¶¶ 6(b)(2)-6. But Appellants’ complaint is not that Appellees rejected or discounted their public assistance income based on an individualized determination of Appellants’ respective creditworthiness, such as the likelihood that the public assistance

¶¶ 70, 84, 87, 90, 93, 109. To the extent the district court believed that a plaintiff must be “denied credit” outright to state a claim under ECOA (Dist. Ct. Op. at 11 (ROA 623)), that view was mistaken. *See* 15 U.S.C. § 1691(a)(2) (“It shall be unlawful for any creditor to discriminate against any applicant, with respect to *any* aspect of a credit transaction . . . because all or part of the applicant’s income derives from any public assistance program”) (emphasis added); *see also* 12 C.F.R. § 1002.2(m) (defining “Credit transaction” to mean “every aspect of an applicant’s dealings with a creditor regarding an application for credit,” including the “terms of credit”).

income will continue in the future. Rather, Appellants allege that appellees refused to consider such income at all in assessing their creditworthiness because of a policy that categorically excluded public assistance income from consideration—regardless of any relation to any pertinent element of creditworthiness. Such a refusal, if proved, is a violation of ECOA and Regulation B because it is illegal to “automatically discount or exclude from consideration any protected income,” and any exclusion “must be based on the applicant’s actual circumstances.” *Id.*

¶ 6(b)(5)-3.ii.

B. The district court erred in requiring appellants to allege hostility or animus as an element of their ECOA discrimination claim.

Among the additional facts that the district court required appellants to plead to state a claim under ECOA was hostility or animus on the part of Appellees. Dist. Ct. Op. at 14-15, 18 (ROA 626-27, 630). That was error because neither hostility nor animus is an element of an ECOA claim.

In *Goodman v. Lukens Steel Co.*, the Supreme Court established that a defendant may be liable for intentional racial discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 even when the defendant did not hold “any racial animus against or denigrate[] blacks.” 482 U.S. 656, 668 (1987); *see also id.* (defendant union liable “regardless of whether, as a subject matter, its leaders were favorably disposed toward minorities” (internal quotation and citation omitted)); *Int’l Union, United Auto. Aerospace & Agric. Implement Workers v.*

Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (“Whether an employment practice involves disparate treatment through explicit facial discrimination [in violation of Title VII] does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.”).

Following *Goodman* and *Johnson Controls*, courts of appeals have held that “a plaintiff need not prove that a defendant harbored some special ‘animus’ or ‘malice’ towards the protected group to which she belongs” in order “[t]o prove the discriminatory intent necessary for a disparate treatment . . . claim” under analogous discrimination statutes. *EEOC v. Joe’s Stone Crab, Inc.*, 220 F.3d 1263, 1283-84 (11th Cir. 2000) (Title VII disparate treatment claim); *see also e.g., Blackston v. Wexford Health Sources, Inc.*, 354 Fed. Appx. 106, 107 (5th Cir. 2005) (“It is not necessary that Blackston show some type of hatred or ill-will by Wexford towards people of his race in order for [his] case to be considered as one involving direct evidence [of race discrimination under 42 U.S.C. § 1981]”); *Cnty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 177 (3d Cir. 2005) (“[W]here a [Fair Housing Amendments Act] plaintiff demonstrates that the challenged action involves disparate treatment through explicit facial discrimination, or a facially discriminatory classification, ‘a plaintiff need not prove malice or discriminatory animus of a defendant.’” (internal citation omitted)); *Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 473 (11th Cir. 1999) (holding that “a defendant who acts with no

racial animus but makes job assignments on the basis of race can be held liable for intentional discrimination”).

In the proceedings below, the district court reached a contrary conclusion relying in part on this Court’s decision in *Brown v. East Mississippi Electrical Power Association*, 989 F.2d 858 (5th Cir. 1993). Dist. Ct. Op. at 14 (ROA 626). In *Brown*, this Court noted that a plaintiff states a disparate treatment claim of discrimination under Title VII when she “presents credible direct evidence that discriminatory animus was in part motivated or was a substantial factor in the contested employment action.” 989 F.2d at 861. This is certainly true. But it is equally true that a plaintiff also states a claim under ECOA when she alleges direct evidence that the contested decision was made on a prohibited basis. Further allegations of animus or hostility are not required. *See Joe’s Stone Crab*, 220 F.3d at 1284 (“[T]he *Goodman* Court clearly held that liability for intentional discrimination under § 1981 [and Title VII] requires only that decisions be premised on race, not that decisions be motivated by invidious hostility or animus.” (internal quotation and citation omitted)). As the Eleventh Circuit aptly explained: “In the race discrimination context, we recently have explained that ‘ill will, enmity, or hostility are not prerequisites of intentional discrimination.’” *Id.* at 1284 (citing *Ferrill*, 168 F.3d at 473 n.7).

Applying the same analysis here, a plaintiff need not allege “ill will, enmity, or hostility” as a prerequisite to her disparate treatment claim under ECOA. *See Moore*, 55 F.3d at 995 n.5. Appellants’ allegations that Appellees refused to consider Appellants’ Section 8 benefits because that income was public assistance income sufficiently states a claim of unlawful discrimination under ECOA. The district court’s contrary conclusion merits reversal.

CONCLUSION

For the foregoing reasons, the district court’s order granting the motion to dismiss should be reversed.

Respectfully submitted,

Dated: February 23, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). My word processing program, Microsoft Word, counted 5,946 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of February, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of this filing to all counsel of record in this case.

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