No. _____

SUPREME COURT
OF THE UNITED STATES

KIMBERLY FRANETT-FERGUS, an individual,

Petitioner,

vs.

OMAK SCHOOL DISTRICT 19, a public school; K12 MANAGEMENT, INC., a foreign corporation; K12 VIRTUAL SCHOOLS, LLC, a foreign corporation; K12, INC., a foreign corporation; and K12 WASHINGTON, LLC, a foreign corporation,

Respondents.

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS FOR REVIEW

The questions presented are:

1. Whether a plaintiff may rely on ethnically distinct names in proving circumstantial evidence of how an employer regards the job candidates' race, religion, or national origin?
2. Whether a white Christian American bears a burden of proof higher or evidentiary rules more stringent than other races, religions, or national origins in opposing the employer's motion for summary judgment?
3. Whether summary judgment should be denied when an unsuccessful job applicant presents evidence that (a) members of the hiring committee made inferences about applicants' religions, races, and national origins; (b) at least one member of the hiring committee believed that the successful applicant received the position because she was of a different race, religion, or national origin than the unsuccessful applicant; (c) the successful applicant was arguably unqualified for the position; (d) the chairwoman of the hiring committee and ultimate decision-maker stated that she thought the employer needed more "diversity"; (e) the employer's stated reasons for hiring the successful applicant changed over time and violated a collective bargaining agreement; and (f) the employer's stated reasons for not hiring the unsuccessful applicant were unsubstantiated.

## PARTIES TO THE PROCEEDINGS

Plaintiff-appellant Kimberly Franett-Fergus is the Petitioner before this Court.

Defendants-appellees Omak School District 19, K12 Management, Inc., K12 Virtual Schools, LLC, K12, Inc., and K12 Washington, LLC are the Respondents before this Court.

## Table of Contents

## Appendices

## Table of Cited Authorities

### Cases

**Statutes and Other Authorities**

## I. CITATIONS TO REPORTS OF OPINIONS

The appellate court opinion affirming the district court's order can be found at *Franett-Fergus v. Omak Sch. Dist. 19*, No. 16-35613, 2018 WL 3947740 (9th Cir. 2018). Petitioner requested a rehearing *en banc*, which the appellate court denied.

The district court opinion granting Respondents' motion for summary judgment can be found at *Franett-Fergus v. Omak Sch. Dist. 19*, No. 2:15-CV-0242-TOR, 2016 WL 3645181 (E.D. Wash. 2016).

## II. BASIS FOR JURISDICTION

The U.S. Appellate Court for the Ninth Circuit entered its order affirming the district court's grant of summary judgment on August 17, 2018. The U.S. Appellate Court for the Ninth Circuit entered its order denying Petitioner's petition for rehearing *en banc* on October 2, 2018, This Court has jurisdiction under 28 U.S.C. § 1254(1).

## III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual … because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

"The right to be free from discrimination because of race, creed, color, national origin … is recognized as and declared to be a civil right. This right shall include, but not be limited to: (a) The right to obtain and hold employment without discrimination." RCW 49.60.030(1)(a).

## IV. STATEMENT OF THE CASE

This case involves a high school math teacher who was denied a teaching job in favor of another candidate whose name, dress, and skin tone led members of the hiring committee to conclude that she was of a different race, national origin, and religion than Petitioner. The other applicant was objectively less qualified for the position than Petitioner and did not even meet the minimum qualifications for the position. The school's principal, who had final authority on the hiring recommendation, started her comments during deliberations by saying the school needed more "diversity." Even though every scorer found Petitioner better qualified, and the majority of the hiring committee recommended Petitioner for the position, the principal did something apparently never done before, overruled the majority vote and gave the job to the other applicant.

Petitioner Ms. Kimberly Franett-Fergus ("Fergus") is a white[1] Christian. The other job applicant, Ms. Fareeha Azeem, appeared to be Arabic, non-Caucasian, and Muslim. Fergus argued that the principal or one other member of the committee regarded Azeem as of a different religion, race, and national origin from Fergus, which presented and have names of obviously different national origin. If they made their hiring decision based on those difference, the decision not to hire Fergus was workplace discrimination. We should not

[1] We use "white" because it is used by the Equal Employment Opportunity Commission and distinguishes subgroups of Caucasian that might experience different attitudes in employment.

expect them to admit this unlawful motive. In the light most favorable to Fergus, the nonmoving party on summary judgment, that is what happened.

Fergus sued Respondent Omak School District 19 (the school district for the position) and Respondent K12 (the proprietor of the online schooling program) alleging employment discrimination based on race, religion, and national origin. Respondents moved for summary judgment. Despite genuine disputes of material fact, the district court granted Respondents' motions for summary judgment and dismissed Petitioner's discrimination claims.

The central question here is whether an employer can discriminate against—or in favor of—a job applicant based on the applicant's **apparent** race, religion, or national origin without confessing actual knowledge of that information. This question must be answered in the affirmative. To hold that an employer needs to state actual knowledge of a persons' race, religion, or national origin before they can discriminate against them is to endorse and protect the most common instances of workplace discrimination. This requirement will eviscerate the protections guaranteed by federal and state antidiscrimination laws. The Ninth Circuit's holding also goes against established case law made by this Court.

In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), this Court considered whether Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that it could accommodate without undue hardship. *Id.* at 2031.

The district court granted summary judgment to the EEOC (on behalf of the applicant) and the Tenth Circuit reversed, granting summary judgment to the employer. *Id.* The employer's primary argument was that an applicant cannot show disparate treatment without first showing that an employer has "actual knowledge" of the applicant's need for an accommodation. *Id.* at 2032. This Court disagreed. Instead, this Court held, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision. *Id.* The Court further held that Title VII did not impose a knowledge requirement on the employer. *Id.* at 2032–33. The Court continued:

> Instead, the intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge. Motive and knowledge are separate concepts. An employer who has actual knowledge of the need for an accommodation does not violate Title VII by refusing to hire an applicant if avoiding that accommodation is not his motive. Conversely, an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has **no more than an unsubstantiated suspicion** that accommodation would be needed.

*Id.* at 2033 (emphasis added). The Court held that the Tenth Circuit misinterpreted Title VII's requirements in granting summary judgment and reversed and remanded for further consideration. *Id.* at 2034.

*Abercrombie* has clear parallels to the present case. Most importantly, *Abercrombie* holds that Fergus was not required to establish that Respondents had actual knowledge of Azeem's religion, race, or national origin in order to survive summary judgment. The Ninth Circuit's decision in Fergus's case goes against established case law, the language of Title VII, and the findings of the EEOC. In doing so, the Ninth Circuit breached the summary judgment standard, making all inferences in favor of the moving parties, ignoring or disregarding genuine issues of material fact, and assuming the role of fact-finder. The Ninth Circuit also avoided weighing in on the circuit split regarding use of a heightened standard for "reverse" discrimination cases while implicitly applying that same standard to Fergus.

### A. Fergus applied for a math position with Respondents.

Petitioner Kimberly Franett-Fergus ("Fergus") is a white, Christian female with experience working as a high school math teacher. Fergus has taught in both brick-and-mortar and virtual classrooms.

Washington Virtual Academy ("WAVA") Omak is a virtual (i.e., online) primary school. It is a partnership between Respondent Omak School District 19 (Omak) and K12 Washington, LLC (K12).[2] In the summer of 2013, WAVA Omak released a job posting for a Learning Assistance Program Math Specialist ("LAP Math") teaching

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[2] In her complaint, Fergus named several K12 entities as defendants. K12 informed Fergus that the proper defendant was K12 Washington LLC. For convenience, Fergus will refer to the K12 entities collectively as "K12."

position. This LAP Math teacher would teach high school math in a virtual classroom.

The minimum qualifications for the LAP Math position included a proven ability to organize and present instructional sessions to students via Elluminate (an online teaching program), proficiency in Elluminate, and experience using Elluminate in a professional capacity. The preferred qualifications for the LAP Math position were previous classroom teaching experience—both brick-and-mortar and virtual—and previous experience working with at-risk students. The job posting instructed applicants to send cover letters and resumes to Ms. Jayme Evans, the K12 high school principal for WAVA Omak. Evans would then select which applicants would interview for the LAP Math position.

Kimberly Franett-Fergus applied for the LAP Math position. Before Fergus applied to WAVA Omak, she had previously worked for another WAVA online school, WAVA Monroe. Fergus taught at WAVA Monroe for several years in a virtual teaching capacity before being let go as part of a reduction in force.

WAVA Omak's hiring procedures are dictated, at least in part, by the Omak collective bargaining agreement (CBA). The CBA requires that interviews for vacant positions be conducted by a hiring committee. WAVA Omak could not hire a certified teacher without a hiring committee. The CBA also states, "All vacancies shall be filled on the basis of qualifications as defined by the posting for the position."

The Omak School District administrative procedure for Recruitment and Selection of Staff

states: "the recruitment and selection process should result in employing a staff member who is the most qualified to fulfill the need based upon the candidate's skill, training, experience and past performance." The Recruitment procedure further states: "Rate the candidate on a scale for each response to each question." Under "Recommending," the procedure states: "Review available information: (1) credentials – training, experience and recommendations, (2) letters of application, responses to topics on supplementary application, (3) response to interview questions, (4) contact with previous supervisors and personal acquaintances."

### B. Respondents failed to abide by their own policies and procedures for interviews.

Evans assembled a hiring committee for the LAP Math position. The five-member hiring committee for the LAP Math position consisted of Evans (a K12 employee), two other K12 employees, and two WAVA teachers. This committee was supposed to interview candidates, score them, rank them, and vote on whom they thought was most qualified for the job. Based on these discussions, Evans would recommend a candidate for Omak to hire for the LAP Math position. Omak would then hire the candidate recommended by Evans. Omak did not perform its own research or interviews of the candidates. By Evans's admission, Omak's hiring decision was a "rubber stamp"—she was not aware of Omak ever rejecting a candidate whom she recommended for hiring.

The hiring committee for the LAP Math position eventually interviewed three candidates. Fergus was one of these candidates. The second

candidate was Ms. Fareeha Azeem. Respondents admit that the third candidate was not qualified for the position, so the final choice was between Fergus and Azeem.

Azeem interviewed via Skype, an online video-chat service. Azeem is a math teacher with a degree in engineering. She wore a religious head scarf during her interview and appeared to be of Arabic descent. According to Evans, Azeem appeared to be "non-Caucasian." Azeem later self-reported her race as "Asian." One committee member described her as of Arabic descent.

At the time of her interview with WAVA Omak, Azeem had only two years of experience as a math teacher. She did not have any previous experience teaching in a virtual capacity; if she had any previous virtual experience, it was as a tutor, not a teacher. It was unclear whether Azeem had experience using Elluminate. She also did not have any experience working with at-risk youth, which was part of the focus of the Learning Assistance Program.

Fergus interviewed in person for the LAP Math position after Azeem. Fergus appeared to be a white, non-Muslim female. She did not wear any sort of headwear during her interview. At the time of her interview, Fergus had over ten years of teaching experience, including experience with at-risk youth. She also had several years of online teaching experience.

The members of the LAP Math hiring committee asked the candidates a series of pre-determined questions. Evans had the freedom to write new questions as long as all candidates were

asked the same questions. She could have asked candidates about their socioeconomic background or if they could teach a second class. The committee members then scored Fergus and Azeem's answers on a scale of zero to four and filled out scoring rubrics. The exception was Evans, who did not score the candidates. Evans refused to explain why she did not write down scores. Of the four members who actually scored candidates, each one gave higher scores to Fergus. In other words, Fergus scored objectively higher using Evan's own criteria as judged by the employer. Mark Conley, a member of the hiring committee who had interviewed more than 500 job candidates, said that Fergus's interview was one of the top 10 he had ever seen.

One of the interview questions read, "An important part of teaching is making sure our lessons match the state standards. Please share a specific example(s) of how you have matched your curriculum to the state standards." The scoring rubric—which Evans designed or adopted—explained what to look for in the answer: "common core, writing curriculum that matches the state Standards." For this question, Evans wrote in her scoring rubric that Fergus made "no mention of collaboration." Evans could not explain why she thought Fergus should have mentioned collaboration in response to this question. Evans also could not explain whether or how Azeem's answer to this question mentioned collaboration.

### C. Respondents voiced a desire to add "diversity" to their staff.

After the hiring committee interviewed the candidates, the committee members shared their

rankings of the candidates from highest to lowest. Three of the members ranked Fergus as their first choice and Azeem as their second choice. Two members, Evans and Ms. Kris Hirschmann, ranked Azeem first and Fergus second. Hirschmann ranked Azeem first despite giving Fergus a higher overall score. When asked, Hirschmann had no explanation for why she ranked Azeem first despite giving Fergus a higher score.

The hiring committee then went around and discussed the reasons for their rankings. Hirschmann went first and her first statement was along the lines of, "I believe we need more diversity at WAVA." This comment surprised Conley because it was unrelated to the candidates' qualifications. Although she did not say it out loud, Hirschmann meant by "diversity" demographic terms, including race and national origin. The other committee members discuss the candidates' qualifications. Evans went last and said, "I agree with Kris [Hirschmann] that there should be more diversity at WAVA." Even though Hirschmann did not define "diversity," Evans's comment suggested that she understood what Hirschmann meant by needing more of it.

While exceptions can be made to anti-discrimination laws in order to promote hiring minority applicants, these exceptions require a demonstrated history of discrimination that is being corrected. Respondents made no such showing in the present case.

Evans later denied knowing what she thought Hirschmann meant when she mentioned "diversity." Likewise, Hirschmann denied remembering whether

she commented about the need to add diversity during deliberations.

The statements about "diversity" by Hirschmann and Evans were striking. Conley had been in interviews with Evans and Hirschmann before and found their comments about diversity to be out of place. Conley was concerned that Evans and Hirschmann had made these comments because they had their own agenda for the hiring process.

In Conley's experience, the candidate who was the first choice of the majority of the hiring committee would always get the position unless there was an adverse reference. If there was an adverse reference, that information would be brought before the interview committee for reevaluation. Evans did not bring any such information back to the hiring committee after contacting the references for Azeem and Fergus. There is no record of the principal ever going against the vote of the committee.

After the hiring committee finished its deliberations, Evans contacted the candidates' references. Evans contacted all three of Azeem's references, but only two of Fergus's three references. Evans did not contact Fergus's third reference because she knew him personally and felt that her opinion of him prevented her from giving his opinion any weight. Each reference was asked to rate the candidate in several categories from one to five. Taking the scores from Azeem's three references and Fergus's two references, Fergus had the higher average reference score.

Evans noted that one of Fergus's references, Mr. Mike Feuling, allegedly said that Fergus "could not accept authority." When later asked about this,

Feuling said he would not have said something like this about Fergus. Feuling specifically stated that he did not and does not think Fergus has problems with authority. Feuling also gave Fergus a rating of five out of five for all categories, including "ability to function as a team player," and stated that Fergus was a "wonderful worker."

### D. Respondents hired an unqualified, non-Caucasian candidate over Fergus.

At the conclusion of the interview process, Evans was responsible for recommending a candidate for Omak to hire based on the interview process. Evans recommended Azeem for the LAP Math position. Omak approved Evans's recommendation and hired Azeem.

Afterwards, Evans called Fergus to tell her that she had not been selected for the LAP Math position. Evans left Fergus a voicemail saying that the "hiring committee" had gone in a "different direction," even though the majority of the hiring committee said Fergus was their top choice. Evans also told Fergus that the other candidate was "better suited." Fergus asked if the other candidate had more experience than her, but Evans did not respond.

At her deposition, Evans was asked what she told Omak after this lawsuit came to light regarding the reasons she recommended Azeem. Evans said she told the Omak superintendent that Azeem was a "better fit for the staff" but refused to explain what she meant by that. Her best guess as to what she meant was that Azeem was "more in line with the direction WAVA was moving." Evans also told the superintendent that she recommended Azeem

because of her ability to teach multiple subjects based on her engineering degree. Evans could not explain, however, why this supposedly critical aspect of her decision was not included in the job posting or interview questions. The committee also did not ask Fergus whether she could teach multiple subjects. According to Evans, these were the only reasons she gave to the superintendent for her decision to recommend Azeem over Fergus.

In K12's motion for summary judgment, Evans's reasons for recommending Azeem over Fergus changed yet again. K12 asserted that Evans recommended Azeem because (1) Fergus's reference allegedly said she had trouble with authority; (2) Fergus had previously "demanded" to be reconsidered for a position with WAVA; (3) unattributed negative comments were allegedly made about Fergus; (4) Azeem was an "experienced and highly qualified" candidate; (5) Azeem had experience as an engineer; and (6) the nature of LAP funding was unreliable. Yet none of these reasons were ever communicated to Fergus or raised by Evans in her deposition.

After being informed of WAVA Omak's hiring decision, Fergus spoke to Conley. Fergus asked Conley what she could have done differently to get the LAP Math position. Conley told her that she "could have been Muslim." Conley stated that he thought WAVA Omak's hiring decision was discrimination against Fergus. Conley had been involved in well over 100 employment hiring decisions and this was the only time he had seen the principal overrule the majority recommendation of the interview committee. Conley was also surprised that Evans recommend Azeem even though Fergus

had the highest interview scores and the highest average reference score.

### E. An employer can discriminate based on its perception of an applicant's protected classes.

The Equal Employment Opportunities Commission (EEOC) published a guide entitled "Questions and Answers for Employees: Workplace Rights of Employees Who Are, or Are Perceived to Be, Muslim or Middle Eastern." In this guide, the EEOC summarizes the law by stating, "If you think that you, or someone you know, has been discriminated against because of national origin, race, or religion, or because of an employer's perception of your national origin, race, or religion, and want to learn more, please read this document or go to www.eeoc.gov." One of the EEOC's examples is a Muslim woman who has a positive interview over the phone but is not offered the position after the employer sees her wearing her hijab. The EEOC treats discrimination based on the employee's hijab as de facto discrimination based on religion, national origin, or race. This summary is based, at least in part, on the U.S. Supreme Court case *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S._, 135 S. Ct. 2028 (2015). In *Abercrombie*, the Court held that a violation of Title VII can be based on either knowledge or **suspicion** that a scarf is worn for religious reasons. In another publication entitled "Religious Garb and Grooming in the Workplace: Rights and Responsibilities," the EEOC gives an example of an employer who believes, without verification, that a job applicant's headscarf is a religious garment. The EEOC explains that the

employer's decision not to hire the applicant because of her headscarf is a violation of Title VII.

The name of a job applicant is one way employers may have information about the race or national origin of a job applicant. Names are often a proxy for race and ethnicity. *See Orhorhaghe v. INS*, 38 F.3d 488, 498 (9th Cir.1994) (recognizing that "discrimination against people who possess surnames identified with particular racial or national groups is discrimination on the basis of race or national origin.") (citation omitted). The fact that employer take cues about race from job applicant's names is well-recognized and discussed both in academic journals and the popular press. *See, e.g.*, Roland G. Fryer, Jr. and Steven D. Levitt, Working Paper, The Causes and Consequences of Distinctly Black Names (http://www.nber.org/papers/w9938.pdf last checked Dec. 28, 2018) (finding that Black names are unlikely to be "correlated with job outcomes beyond the interview stage since the employer directly observes the applicant's race once an interview takes place," and arguing, "In the face of discriminatory employers, it is actually in the interest of both employee and employers for Blacks to signal race, either via a name or other resume information, rather than undertaking a costly interview with little hope of receiving a job offer."); Marianne Bertrand and Sendhil Mullainathan, Working Paper, Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination http://www.nber.org/papers/w9873.pdf last checked Dec. 28, 2018) (finding significant differences in job interviews for names common to different racial groups); Michael Luo, "Whitening" the Resume, N.Y.

Times, Dec. 9, 2009 (http://www.nytimes.com/2009/12/06/weekinreview/06Luo.html?_r=0 last checked Dec. 28, 2018).

### F. The district court granted Respondents' motions for summary judgment by making inferences in their favor and disregarding genuine issues of material fact.

Fergus filed a lawsuit against Omak and K12 in Okanogan County Superior Court. Fergus brought a discrimination claim under the Washington Law Against Discrimination.[3] Omak removed this case to the U.S. District Court for the Eastern District of Washington based on federal question jurisdiction, citing to 28 U.S.C. § 1446(b). Fergus amended her complaint and added a claim of discrimination under Title VII. The EEOC had previously issued her a notice of right to sue.

Omak and K12 moved for summary judgment dismissal of Fergus's claims. Fergus responded that Omak and K12's actions were *prima facie* discrimination and that the proffered justifications for not hiring her were pretext. Fergus presented evidence demonstrating genuine issues of material fact in support of her discrimination claims, including but not limited to evidence that: (1) Azeem wore a religious head scarf during her interview, appeared to be of Arabic descent, and self-reported

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[3] Fergus also brought claims of conspiracy and action in concert, conspiracy in violation of 42 U.S.C. § 1985(3), and violation of 42 U.S.C. § 1981. Fergus had abandoned all of these claims by the summary judgment hearing, and does not raise them here on appeal.

her race as "Asian"; (2) Evans stated that she had assumed Azeem was "non-Caucasian"; (3) Evans was the only member of the hiring committee who did not write down scores for Fergus or Azeem, even though the Omak administrative procedure required her to do so; (4) Fergus received higher scores than Azeem from each committee member who wrote down scores, including Hirschmann; (5) Evans wrote that one of Fergus's references allegedly said that she could not accept authority, but that reference later said he would not have made that comment about Fergus; (6) Fergus met all of the required and preferred qualifications for the job position, while Azeem did not meet the preferred qualifications and may not have met all of the required qualifications; (7) Evans and Hirschmann, who were the only committee members who listed Azeem as their first choice, both made comments about the need to add "diversity" to the WAVA Omak staff; (8) Evans went against the majority of the hiring committee, who listed Fergus as their first choice; (9) When Evans called Fergus to tell her she did not get the job, Evans told Fergus that the interview committee was going in a "different direction"; (10) Evans later said that she had recommended Azeem because she was a "better fit," although she refused to explain what "better fit" meant; (11) Evans also said she recommended Azeem based on her ability to teach multiple subjects, even though ability to teach multiple subjects was not a part of the job qualifications and was never mentioned during the hiring process; and (12) Evans later said she had heard positive and negative things said about Fergus prior to her interview but could not give any details about who had made the negative comments or what

those comments were and did not raise them to the rest of the hiring committee.

In her responses, Fergus explained that she could establish a prima facie case of discrimination by either showing direct evidence of discriminatory intent or satisfying the requirements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973). In general, the *McDonnell Douglas* requirements are that the plaintiff show that (1) she belongs to a protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) similarly situated individuals outside her protected class were treated more favorably. *Id.* Respondents did not dispute the first three elements of the *McDonnell Douglas* test.

As the Ninth Circuit itself has noted, although some plaintiffs might discover direct evidence that a defendant's nondiscriminatory justification for an employment decision is a pretext, most will not. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1029 (9th Cir. 2006). Defendants who articulate a nondiscriminatory explanation for a challenged employment decision may have been careful to construct an explanation that is not contradicted by known direct evidence. *Id.* To establish that a defendant's nondiscriminatory explanation is a pretext for discrimination, plaintiffs may rely on circumstantial evidence. *Id.*

Despite Fergus's evidence and arguments, the court granted Respondents' motions for summary judgment and dismissed all of Fergus's claims. App-12–13. The district court held that Fergus had arguably created an inference of race discrimination and thereby met her initial burden on that claim.

App-15–42. The court noted, however, that this inference was "weak." *Id.* The court then held that Fergus had failed to present *prima facie* cases of religious or national origin discrimination. *Id.* Finally, the court held that Fergus had failed to establish any genuine issues of material fact regarding whether the explanations for the hiring decision were pretext. *Id.*

In reaching its holding, the district court repeatedly made factual determinations in favor of Respondents, the moving parties. *Id.* Some of these determinations were: (1) there was nothing in the record requiring the hiring committee members to use the scoring rubrics and that the scoring rubrics merely served as a "discussion tool" despite language in the Omak administrative procedure requiring its use; (2) there was nothing showing that the Omak administrative procedure applies to the hiring recommendations of WAVA Omak, even though WAVA Omak is in the Omak School District; (3) there was no showing that Evans was required to use the scoring rubrics, even though Omak administrative procedure required it; (4) despite the ethnically-distinct names and the witness descriptions as Arabic descent or non-Caucasian, there was no evidence that the committee members perceived Azeem as having a certain religion, race, or national origin at the time of the hiring decision, even though Evans testified that Azeem appeared non-Caucasian and Conley testified that she appeared to be of Arabic descent and Muslim; (5) Azeem was qualified for the LAP Math position, even though Evans testified that Azeem arguably did not meet all of the required qualifications and unequivocally did not meet either of the preferred

requirements (which Fergus did meet); (6) Fergus had not shown that she was more qualified than Azeem, even though Fergus had eight more years of teaching experience, had actually taught an online class before, had worked with at-risk youth, and had worked for a different WAVA program; (7) Azeem was an experience candidate, even though she only had two years of teaching experience, had no online teaching experience, and had not worked with at-risk youth; (8) Evans's failure to use the scoring rubrics could not be considered evidence of discrimination; (9) no reasonable jury could find that Evans or Hirschmann's comments about diversity had any racial or religious underpinnings, even though Conley himself (who was in the meeting) thought that these comments carried these connotations; (10) Evans was permitted to go against the majority recommendation of the hiring committee, even though she had never done so before; (11) K12 could claim that "lack of ability to collaborate" was a reason it did not hire Fergus, even though this reason was not mentioned until summary judgment and was unsubstantiated; (12) Feuling's signed declaration that he would not say Fergus "could not accept authority" was inconsequential; and (13) ability to teach multiple subjects could be a relevant consideration for the hiring decision, even though it was not included in the job posting or interview questions, the Omak CBA required that the hiring decision be based off the job posting, and Fergus was not asked about her ability to teach multiple subjects. *Id.*

### G. On appeal, the Ninth Circuit assumed the role of fact-finder.

After the district court entered its order granting summary judgment in favor of Respondents, Fergus appealed the decision to the U.S. Appellate Court for the Ninth Circuit. Fergus argued that an employer could discriminate in the hiring process based on the perceived religions, races, or national origins of the applicants. Fergus also argued that the district court failed to abide by the summary judgment standard by ignoring or discounting numerous genuine issues of material fact and making inferences in favor of the moving parties.

The Ninth Circuit affirmed the district court's grant of summary judgment. App-2–8. The Ninth Circuit adopted the district court's faulty logic that Fergus had failed to establish *prima facie* religious discrimination because Respondents did not have actual knowledge of Azeem's religion. *Id.* The Ninth Circuit further held that, even if Azeem was of a different national origin or race than Fergus, Fergus could not show that Respondents' reasons for not hiring her were pretext. *Id.* The Ninth Circuit made factual determinations in the light most favorable to Respondents (the moving parties), including: (1) Azeem's appearance could not be evidence of her religion; (2) Conley's declaration provided no support to Fergus's case because it was merely speculation; (3) Fergus presented no evidence that Evans made assumptions about Azeem's religion; (4) Azeem's engineering degree was a legitimate reason for hiring her; (5) Evans had legitimate concerns about Fergus's ability to accept authority and collaborate with others; (6) Evans expressed interest in Azeem's

engineering background prior to the interviews, despite no support for this in the record; (7) Azeem's hiring was later justified when the LAP Math funding was cut two years later; (8) Evans's failure to abide by the Omak procedures, CBA, or well-established practices had no bearing on whether her reasons were pretext; and (9) Evans's use of the term "diversity" could not relate to Azeem's religion, race, or national origin. *Id.*

The dissenting opinion recognized that the majority had overstepped its role. *Id.* The dissenting judge stated, "I cannot conclude that a reasonable jury could not reach a verdict in favor of Plaintiff, or that such a verdict would have to be set aside as unreasonable." *Id.* The dissent continued, "Were I the factfinder, as a member of a jury or as the judge in a bench trial, I would probably not be persuaded by Plaintiff's evidence. **We are not the finders of fact**, however." *Id.* (emphasis added).

Fergus filed a petition for *en banc* review. The Ninth Circuit denied her petition. App-10.

## V. REASONS FOR ALLOWANCE OF THE WRIT

The decision by the Ninth Circuit, if left unperturbed, would deal a significant blow to the protections promised by Title VII and the Washington Law Against Discrimination. The Ninth Circuit's decision allows employers to avoid liability for discrimination in the hiring process by simply denying that they drew any inferences based on the applicants' physical appearances, dress, or names. The EEOC itself has recognized that discrimination can occur merely based on a person's appearance.

Despite the district court's indignation, this is not, in itself, an offensive proposition.

The errors in the decision below are compounded by the court's complete disregard of the summary judgment standard. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in her favor. *Id.* Trial courts should act with caution in granting summary judgment. *Id.*

The Ninth Circuit has set a high standard for granting summary judgment in employment discrimination cases. *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996). The court requires **very little evidence** for a discrimination plaintiff to survive summary judgment because the ultimate question can only be resolved through a searching inquiry—one that is most appropriately conducted by the factfinder, upon a full record. *Id.* (emphasis added). The requisite degree of proof necessary to establish a *prima facie* case for Title VII claims on summary judgment is **minimal** and does not even need to rise to the level of a preponderance of the evidence. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (emphasis added). Any indication of discriminatory motive may suffice to raise a question that can **only be resolved by a factfinder**. *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1985) (emphasis added).

The Ninth Circuit erred by stepping into the role of fact-finder and weighing the evidence of

Fergus and Respondents. The court made all inferences in favor of the moving parties, ignored or discounted the evidence detrimental to Petitioner's defense, and refused to acknowledge the substantial and numerous issues of material fact. The Ninth Circuit's holding fundamentally threatens the very purpose of a jury trial.

In its decision, the Ninth Circuit also went out of its way to avoid addressing the circuit split regarding whether so-called "reverse" discrimination cases are required to meet a heightened standard of proof. The district court addressed the split in a footnote but noted that the Ninth Circuit had not yet adopted a heightened standard. *See* App-23. Most other circuits have taken a position on this split. *Compare Duffy v. Wolle,* 123 F.3d 1026, 1036 (8th Cir. 1997) (holding that a plaintiff in a reverse discrimination case does not present a *prima facie* of discrimination unless he shows that "background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority"); *Murray v. Thistledown Racing Club, Inc.,* 770 F.2d 63, 67 (6th Cir. 1985) (same); *Mills v. Health Care Serv. Corp.,* 171 F.3d 450, 457 (7th Cir. 1999) (same); *Notari v. Denver Water Dep't,* 971 F.2d 585, 589 (10th Cir. 1992) (same); *Russell v. Principi,* 257 F.3d 815, 818 (D.C.Cir. 2001) (same) *with Byers v. Dallas Morning News, Inc.,* 209 F.3d 419, 426 (5th Cir. 2000) (holding that a plaintiff in a reverse discrimination case need show only that he is a member of "a protected group" and whites are a protected group under Title VII); *Bass v. Board of County Commissioners,* 256 F.3d 1095, 1103-04 (11th Cir. 2001) (same). *See also Stern v. Trustees of Columbia Univ.,* 131 F.3d 305, 312 (2d

Cir. 1997) (holding that a white male made out a *prima facie* case on the basis of national origin and not discussing the need for him to show any "background circumstances"); *Lucas v. Dole,* 835 F.2d 532, 533-34 (4th Cir. 1987) (declining to address the issue but holding that a white female satisfied *McDonnell Douglas* because she is a member of a protected group: whites).

The Ninth Circuit has declined to weigh in on this point, despite opportunities to do so. *See, e.g.*, *Zottola v. City of Oakland*, 32 F. App'x 307, 311 (9th Cir. 2002); *see also Teehee v. Bd. of Educ.*, 116 F.3d 486, at *2 n.2 (9th Cir. 1997) (table, unpublished decision). Yet in taking such a slanted position on Fergus's case, the Ninth Circuit implicitly adopted this higher standard. It would be hard to believe that these courts would have reached the same decisions if the races, national origins, and religions of the applicants were switched. This is the fundamental flaw with the race-flexible test of so-called "reverse" discrimination—it applies the law differently based upon the party's race. But Title VII (and Washington law) contains no such caveat. Discrimination in the workplace based on race, national origin, or religion is prohibited, regardless of the races, national origins, or religions of the people involved. Two wrongs do not make a right. Kim Fergus was denied employment because of her race, religion, or national origin, or at least deserves a trial to plead her case.

This Court should grant Fergus's petition for review in order to repair the damage done to Title VII and the Washington Law Against Discrimination by the district court and the Ninth Circuit. The Court should also reiterate the role, responsibilities, and limitations of those courts in deciding

discrimination cases on summary judgment. Denying review will enact a grave injustice on Fergus and on all future discrimination plaintiffs. For these reasons, the Court should grant this petition.

DATED this 25th day of February, 2019.

Respectfully submitted,

s/ Aaron V. Rocke
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Attorneys for Appellant Kimberly Franett-Fergus

# APPENDIX

**APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 17, 2018**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35613
D.C. No. 2:15-cv-00242-TOR

MEMORANDUM*

KIMBERLY FRANETT-FERGUS,
AN INDIVIDUAL,

*Plaintiff - Appellant,*

v.

OMAK SCHOOL DISTRICT 19, A PUBLIC SCHOOL; K12 MANAGEMENT, INC., A FOREIGN CORPORATION; K12 VIRTUAL SCHOOLS, LLC, A FOREIGN CORPORATION; K12, INC., A FOREIGN CORPORATION; K12 WASHINGTON, LLC, A FOREIGN CORPORATION,

*Defendants - Appellees.*

July 11, 2018, Argued and Submitted
August 17, 2018, Filed

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*Appendix A*

Appeal from the United States District Court
for the Eastern District of Washington.
Thomas O. Rice, District Judge, Presiding.

Before: FERNANDEZ, CLIFTON, and NGUYEN, Circuit Judges.

Kimberly Franett-Fergus appeals the district court's order granting summary judgment in favor of Omak School District 19 and K-12[1] on her religion, national origin, and race discrimination claims under Title VII and the Washington Law Against Discrimination ("WLAD"). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review a district court's summary judgment order *de novo*, considering the evidence in the light most favorable to the non-moving party. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014). Discrimination claims under both Title VII and the WLAD are analyzed under the same three-part, burden-shifting test. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Kastanis v. Educ. Emps. Credit Union*, 122 Wash. 2d 483, 490, 859 P.2d 26 (1993). The plaintiff must first establish a *prima facie* case of discrimination. *EEOC v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009). If she does so, then the defendant must offer a legitimate, nondiscriminatory reason for its actions. *Id.* Finally, the burden shifts back

1. "K-12" refers collectively to K12 Management, Inc.; K12 Virtual Schools, LLC; K12, Inc.; and K12 Washington, LLC.

to the plaintiff to show that the defendant's proffered reason is pretext. *Id.*

**Religion Discrimination**

Fergus[2] alleges that Omak and K-12 hired Fareeha Azeem because she is Muslim and Fergus is not, even though no one asked them about their religious affiliation during the hiring process.

The district court correctly concluded that Fergus failed at the first step of the *McDonnell Douglas* test to establish a *prima facie* case of discrimination based on religion. Fergus must show, among other factors, that "similarly situated individuals outside h[er] protected class were treated more favorably, or other circumstances surrounding the adverse employment action give rise to an inference of discrimination." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th Cir. 2004). While the burden at this first stage is "not onerous," *Lyons v. England*, 307 F.3d 1092, 1112 (9th Cir. 2002), Fergus must still produce *some* evidence to meet her burden, *see id.* at 1113. Fergus failed to do so, relying exclusively on Azeem's appearance, including the wearing of a headscarf, to speculate that Azeem must be Muslim. Fergus fails to recognize that people may wear similar headscarves for a variety of non-religious reasons, including cultural practices, modesty, or simply fashion.[3] In short, evidence

2. We follow the plaintiff's briefing in referring to her as Fergus rather than Franett-Fergus.

3. The wearing of headscarves for religious reasons is also not limited to the Islamic faith.

of Azeem wearing a headscarf alone raises no legitimate inference as to her personal religious beliefs. Fergus leans heavily on Conley's declaration, but it adds nothing to her case because he engaged in the same speculation based on Azeem's appearance. Significantly, Fergus presents no evidence that Jayme Evans, the principal who hired Azeem instead of Fergus, shared the same assumption that Azeem is Muslim.

Moreover, even if Fergus had established a *prima facie* case, as discussed below, Omak and K-12 stated legitimate, non-discriminatory reasons for hiring Azeem that Fergus failed to show were pretext.

**National Origin and Race Discrimination**

Fergus relies on Azeem's appearance and name as evidence that Omak and K-12 discriminated against her based on national origin and race. A national origin claim arises "when discriminatory practices are based on the place in which one's ancestors lived." *Dawavendewa v. Salt River Project Agric. Improvement and Power Dist.*, 154 F.3d 1117, 1119 (9th Cir. 1998).

The district court did not err in granting summary judgment in favor of Omak and K-12 on Fergus's national origin and race discrimination claims. Even assuming that Fergus and Azeem do not share the same national origin and race, Fergus fails to show that Omak's and K-12's reasons for hiring Azeem were pretext.[4] At the second

4. We need not decide whether the district court correctly found that Fergus failed at the first step of the *McDonnell Douglas* test to establish a *prima facie* case of national origin discrimination.

step of the *McDonnell Douglas* test, Omak and K-12 offered legitimate, non-discriminatory reasons for hiring Azeem: (1) Azeem's engineering degree permitted her to teach multiple subjects, and (2) Evans was concerned about Fergus's ability to accept authority and collaborate with others,

Even prior to the interviews, Evans expressed interest in Azeem's engineering background. Because funding for the position to which both women had applied was only temporary, Evans viewed Azeem as a better hire because her engineering degree would allow her to teach subjects other than math in the future. Indeed, Azeem's ability to teach multiple subjects came in handy when funding was not extended, and Azeem was able to continue working at Omak by teaching physics instead.

Prior to Evans's decision, she also specifically and contemporaneously noted her concerns about Fergus's ability to accept authority and collaborate with others: once during her interview, and a second time after speaking with a reference. Between two qualified candidates, such distinctions are legitimate bases on which to hire one candidate over another. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) ("[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria.").

Because Evans articulated legitimate, non-discriminatory reasons for preferring Azeem, the burden shifts to Fergus to show the proffered reasons

were pretext. At this step, Fergus must point to evidence "*both* that the [proffered] reason[s] [were] false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Fergus relies on evidence that the ability to teach multiple subjects was not listed on the job posting in violation of the collective bargaining agreement, and Evans failed to follow Conley's past hiring experiences—such as numerically scoring candidates and adhering to the majority vote of the hiring team. However, it is undisputed that Evans was the sole decision-maker, and the fact that her practices differed from Conley's experience or that she did not strictly comply with the collective bargaining agreement do not suggest that her proffered reasons were false, let alone that the true reason was race or national origin.

Fergus points to Evans's interest in increasing "diversity" among Omak's teachers. However, as the district court correctly noted, the word "diversity" is not limited to race or national origin. Indeed, Evans explained that, to her, the term includes consideration of "socioeconomic backgrounds, ability to teach multiple subjects." There is no evidence from which a reasonable trier of fact could find that Evans, or anyone else, meant race or national origin in referring to "diversity." *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to survive summary judgment].").

**AFFIRMED**.

*Appendix A*

No. 16-35613, *Franett-Fergus v. Omak School District 19*

CLIFTON, Circuit Judge, dissenting:

I respectfully dissent. This case comes to us on summary judgment, and I cannot conclude that a reasonable jury could not reach a verdict in favor of Plaintiff, or that such a verdict would have to be set aside as unreasonable. *See, e.g., Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1027 (9th Cir. 2006) ("If a reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that [the plaintiff] is entitled to a verdict in his favor, then summary judgment was inappropriate."). As it happens, the evidence submitted by Plaintiff in support of her discrimination claims does not seem very persuasive to me. Were I the factfinder, as a member of a jury or as the judge in a bench trial, I would probably not be persuaded by Plaintiff's evidence. We are not the finders of fact, however. I would vacate the summary judgment and remand the case to the district court for further proceedings.

**APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, FILED JUNE 30, 2016**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil Action No. 2:15-CV-0242-TOR

KIMBERLY FRANETT-FERGUS,
AN INDIVIDUAL,

*Plaintiff,*

v.

OMAK SCHOOL DISTRICT 19,
A PUBLIC SCHOOL, *et al.*,

*Defendants.*

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

***

☒ other: Defendant Omak School District's Motion for Summary Judgment (ECF No. 14) is GRANTED. K12's Motion for Summary Judgment (ECF No. 16) is GRANTED. Judgment is entered in favor of Defendants.

*Appendix B*

This action was *(check one)*:

***

☒ decided by Chief Judge THOMAS O. RICE on motions for summary judgment.

Date: June 30, 2016

*CLERK OF COURT*

SEAN F. McAVOY

/s/ Tonia Ramirez
*(By) Deputy Clerk*

Tonia Ramirez

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, FILED JUNE 30, 2016

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO: 2:15-CV-0242-TOR

KIMBERLY FRANETT-FERGUS,
AN INDIVIDUAL,

*Plaintiff,*

v.

OMAK SCHOOL DISTRICT 19,
A PUBLIC SCHOOL; *et al*,

*Defendants.*

June 30, 2016, Decided
June 30, 2016, Filed

### ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

BEFORE THE COURT are Defendant Omak School District's Motion for Summary Judgment (ECF No. 14) and K12's Motion for Summary Judgment (ECF No. 16). These matters were heard on June 22, 2016, in Spokane, Washington. Aaron V. Rocke appeared on behalf of Plaintiff Kimberly Franett-Fergus. James E. Baker appeared on behalf of Defendant Omak School District.

Keith A. Kemper appeared on behalf of Defendants K12 Management, Inc.; K12 Virtual Schools LLC; K12, Inc.; and K12 Washington LLC. The Court—having reviewed the briefing, the record, and files therein and heard from counsel—is fully informed.

## BACKGROUND

This case concerns the alleged discriminatory decision not to hire Plaintiff Kimberly Franett-Fergus for a teaching position with Omak's online school. In her First Amended Complaint, Plaintiff asserts that Defendants "improperly awarded the position to a less qualified candidate because of that candidate's religion, race, and/or national origin," ECF No. 10 ¶¶ 3.2, 3.6, which individual "was apparently of Islamic faith and national origin or race of those consistent with an Arabic or Persian heritage," *id.* ¶ 2.8. Plaintiff contends she was discriminated against because she is white and possibly because she is of the Christian faith, asserting that Defendants hired a candidate who looked different from her in an effort to add "diversity" to the staff. Plaintiff asserts two federal causes of action: (1) employment discrimination on the basis of her race, religion or national origin under Title VII, and (2) conspiracy to interfere with her civil rights under § 1985.[1] *Id.* ¶¶ 3.5-3.9, 3.11-3.14. Franett-Fergus also asserts two similar causes of action under Washington State law: (1) discrimination in violation of the Washington Law Against Discrimination, and (2) conspiracy and action in concert. *Id.* ¶¶ 3.1-3.4, 3.10.

1. Plaintiff agreed to the dismissal of her federal cause of action under 42 U.S.C. § 1981. ECF No. 30 at 4.

*Appendix C*

In the instant motions, Defendant Omak School District ("District" or "Omak") and Defendants K12 Management, Inc.; K12 Virtual Schools, LLC; K12, Inc.; and K12 Washington LLC (collectively, "K12") move for summary judgment on all claims.

**FACTS**

The following are the undisputed material facts unless otherwise noted.

In the summer of 2013, Washington Virtual Academy ("WAVA") posted a job announcement for the position of WAVA Omak High School Learning Assistant Program ("LAP") Math Specialist for the 2013-2014 school year.[2] ECF No. 15 at 3 (Omak Statement of Specific Facts); *see* ECF No. 15-1 at 6-8 (Job Posting).

Plaintiff applied for the LAP position and was one of three applicants selected to interview. ECF No. 17 at 4 (K12's Statement of Material Facts ("K12-SMF") 12); *see* ECF Nos. 33 (undisputed). There is no dispute that Plaintiff was qualified for the position. Plaintiff previously taught at the Monroe School District in a position administered by WAVA. ECF No. 17 at 3 (K12-SMF 2); *see* ECF No. 33 (undisputed). In total, Plaintiff had over ten years of teaching experience by the time she interviewed for the LAP position. ECF No. 33 at 12. Her experience included both brick-and-mortar and virtual classroom teaching, as well as working with at-risk students, which were both listed as preferred qualifications for the position. *Id.*

2. The District operates its WAVA program through a contract provider, K12 Inc. ECF No. 15 at 3.

*Appendix C*

Interviews for the LAP position were conducted on September 5, 2013. ECF No. 17 at 5 (K12-SMF 19); *see* ECF No. 33 (undisputed). The interviews were conducted by an interview committee comprised of the following members: (1) Jayme Evans, WAVA High School Principal; (2) Nicholaus Sutherland, WAVA High School Vice Principal; (3) Kristin Hirschmann, WAVA Special Education Director; (4) Deirdre Crebs, Omak English Teacher; and (5) Mark Conley, Omak Academic Advisor. ECF No. 17 at 4 (K12-SMF 14); *see* ECF No. 33 (undisputed). Both Conley and Crebs had previously worked with Plaintiff and had written recommendations on her behalf, which letters were included in Plaintiff's application. ECF No. 17 at 4-5 (K12-SMF 16); *see* ECF No. 33 (undisputed).

During the interview, all of the committee members, save for Evans, used a question and scoring rubric. ECF Nos. 17 at 5 (K12-SMF 23, 24); 33 at 3; *see* ECF No. 18-2 at 13 (Evans' Deposition) (stating that she "sometimes" does and "sometimes" does not use the scoring rubric). The scoring rubric was created by WAVA and is primarily used to keep the interview questions uniform and assist discussion of the candidates. ECF No. 17 at 5-6 (K12-SMF 25, 27); *but see* ECF No. 33 at 4-5.[3]

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3. Plaintiff highlights the Omak School District Administrative Procedure on Recruitment and Selection of Staff, which instructs staff to "[r]ate the candidate on a scale for each response to each question," ECF No. 33-4 at 4; however, there is nothing in this policy showing that it applies to WAVA or K12 hiring recommendations. At any rate, this fact is not material to Plaintiff's discrimination or conspiracy claims: Evans did not use the scoring for all three

At the close of the interviews, the interview committee met and discussed the three candidates, focusing their discussion on Plaintiff and one other candidate. ECF No. 17 at 6 (K12-SMF 28). While both the top candidates scored well and the committee found both candidates "highly qualified," ECF No. 18-2 at 17 (Evans' Deposition), Plaintiff received a slightly higher overall rating from the four interviewers who used the rubric. ECF No. 33 at 5; *see* ECF No. 33-5 (interview tally). Evans did not use the rubric but noted "[n]o mention of collaboration" when interviewing Plaintiff and recalls that she was concerned about Plaintiff's ability to collaborate with others. ECF Nos. 17 at 5 (K12-SMF 24); 33 at 4. Evans also remembers hearing some negative and positive comments about Plaintiff, including that Plaintiff was "difficult to work with at times," but was unable to remember further specifics or from whom she heard such information. ECF Nos. 17 at 5 (K12-SMF 18); 33 at 2. At the beginning of the post-interview discussion, Hirschmann made a comment about needing to add "diversity" at WAVA, with which comment Evans agreed. ECF Nos. 17 at 6 (K12-SMF 30); 33 at 5-6. Ultimately, three members of the committee—Sutherland, Crebs, and Conley—recommended Plaintiff for the position; Evans and Hirschmann recommended the other candidate. ECF No. 17 at 6 (K12-SMF 29); *see* ECF No. 33 (undisputed).

After the interview committee discussions, Evans conducted reference checks. ECF Nos. 17 at 6 (K12-SMF

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candidates, and Sutherland and Hirschmann did not score the third applicant. ECF No. 39 at 4.

34); 33 at 6. Evans called three references for the other top candidate and two references for Plaintiff, explaining that she knew Plaintiff's third reference and did not find his input valuable. ECF Nos. 33 at 6; 39 at 6. During Evans' call with one of Plaintiff's references, Michael Feuling, Evans noted that Feuling would hire Plaintiff again, but not on a full-time basis, and also noted, "Cannot accept authority" in connection with this response;[4] however, Feuling did give Plaintiff a rating of 5 out of 5 for every question. ECF Nos. 17 at 6 (K12-SMF 35); 33 at 6-7; *see* 18-2 at 71-72, 143 (Evans' Deposition). Overall, Plaintiff received a slightly higher average reference rating with her two scores over the other top candidate with her three scores. ECF No. 33 at 11.

The committee did not make the final hiring recommendation. *See* ECF No. 33-1 at 42-43. Rather, Evans, on behalf of K12, made the determination that the other top candidate was a "better fit" for the LAP position. ECF Nos. 17 at 6 (K12-SMF 36); 33 at 7-8. This candidate had two years of brick-and-mortar teaching experience at the time of her interview, ECF No. 33 at 13, and had served as an online tutor where she used the same

4. In a declaration filed with this Court, Feuling states that he "cannot imagine that [he] would have said that about Ms. Fergus," that he "did not and [does] not think that Ms. Fergus cannot accept authority," and that "[w]hile [he] cannot specifically remember what [he] said to Ms. Evans, [he does] not think [he] ever said that someone 'cannot accept authority.'" ECF No. 34 at 2-3. However, this declaration does not raise a genuine issue of material fact as to why Evans made wrote "Cannot accept authority" in her contemporaneous notes.

online tools required for the LAP position, ECF No. 39 at 9; *see* ECF No. 39-3 at 3 (Evans' Deposition). She also had an engineering background. ECF No. 17 at 5 (K12-SMF 17). Evans ultimately selected this candidate for the position primarily because her engineering background made it possible for her to teach multiple subjects at the high school level. ECF Nos. 17 at 6-7 (K12-SMF 37); 33 at 8-9; 33-1 at 49. Evans then offered the position to this candidate on the condition that Omak approve the hiring recommendation. ECF Nos. 17 at 7 (K12-SMF 38); 33 at 9. LeAnne Olson, Omak's Human Resources Director and the employee responsible for authorizing the hire, received Evans' recommendation and an authorization to hire form via email this same day. ECF Nos. 15 at 4; 31 at 4-5; *see* ECF No. 31-19 (Contract Between Omak and K12) ("K12 shall have the authority to recommend people for Program positions . . . although both Parties hereby agree that the District shall make all final decisions about hiring . . . ."). The District accepted the recommendation and the other applicant was hired. ECF No. 15 at 5.

Evans relayed the hiring decision to Plaintiff, explaining that Plaintiff had not been selected because WAVA was going in a "different direction" and that the person selected was "better suited." ECF Nos. 17 at 7 (K12-SMF 41); 33 at 9; *see* 18-1 at 14 (Plaintiff's Deposition). Plaintiff later asked Conley, one of the interviewers, what she could have done differently. ECF No. 17 at 7 (K12-SMF 42); *see* ECF No. 33 (undisputed). Plaintiff recalls Conley commenting that Plaintiff would have gotten the job if she were Muslim and recounting the comments at the post-interview discussion about the need

to add "diversity." ECF Nos. 17 at 7 (K12-SMF 42); 18-1 at 13 (Plaintiff's Deposition); *see* ECF No. 33 (undisputed). In Conley's view, the successful candidate "appeared . . . to be of Arabic descent and was wearing a hajib [sic]." ECF No. 18-9 at 6 (Conley Declaration). After talking to Conley, Plaintiff "Googled" the successful applicant and, based on her name and picture, similarly concluded that she was Muslim. ECF No. 17 at 7-8 (K12-SMF 44); *see* ECF No. 33 (undisputed).

Plaintiff identifies as a Caucasian, Christian American. ECF Nos. 17 at 3 (K12-SMF 1); 18-1 at 29-30 (Plaintiff's Deposition). The successful candidate, since joining WAVA, has self-reported as "Asian," ECF Nos. 31 at 6; 39 at 9; however, there is no other evidence regarding with which race, national origin, or religion she identifies. Plaintiff acknowledges that the interviewers did not ask any of the candidates to reveal their race, religion, or national origin and that she did not otherwise share this information about herself with the committee. ECF Nos. 17 at 5 (K12-SMF 22); 18-1 at 10-11 (Plaintiff's Deposition).

Instead, Plaintiff's deposition testimony and briefing unabashedly assert that the race, religion, or national origin of the candidates should have been apparent. Or, at least, the non-white, non-Christian, and non-American traits of the successful candidate—as assumed by Plaintiff—should have been obvious:

- "Q. Well, did you believe she was Muslim? A. I believed that she was based on what was told to me [by Mark Conley]. . . . And based on her picture." ECF No. 18-1 at 13 (Plaintiff's Deposition).

- "Q. And she added diversity how? A. Because she did not look like me. Was not white. She wore a hijab.[5] Her skin color, her name . . . there were many reasons to assert that she had a different background, a different faith than I did." *Id.* at 17.

- "Q. So essentially you're claiming you were discriminated against because you appear to be white and [the other candidate] did not; is that right? A. Yes." *Id.* at 18.

- "Q. [A]re you alleging you were discriminated against because you are white? A. Yes . . . I was told that in the interview committee it was said that they needed to add diversity to the staff and they chose someone who looked different, who looked like they were a minority." *Id.* at 32.

- "Q. [A]re you of the belief that you were discriminated against because you're a Christian? . . . A. I believe that they hired the other person because potentially she wasn't Christian." *Id.* at 33.

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5. Plaintiff repeatedly refers to the successful candidate's head covering as a "hijab," which is a head covering worn by some Muslim women; however, there is nothing in the record showing that the successful candidate was actually wearing a hijab, as opposed to some other religious—or non-religious—head covering or scarf. Unsurprisingly, Plaintiff testified "No" to the question whether she "know[s] of any religions other than Muslims who wear head coverings or where the women wear head coverings." ECF No. 15-2 at 26-27.

- "Ms. Fergus could form a reasonable inference about [the successful candidate's] race or religion." ECF No. 31 at 3 (Plaintiff's Statement of Facts).

- "[J]ust because Ms. Fergus did not disclose her religion to any non-K12 Omak employees does not mean that they could not come to a reasonable inference about her religious beliefs, or at least a reasonable inference about the religious groups to which she did not belong. " *Id.* at 4.

- "[E]ven though the interviewers did not necessarily ask the candidates about their race, religion, or national origin, [the successful candidate] appeared to be of Middle Eastern or Persian descent and was wearing a hijab during her interview." ECF No. 33 at 3 (Plaintiff's Response Brief).

## DISCUSSION

### A. Standard of Review

Summary judgment may be granted to a moving party who demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

"The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248. A dispute concerning any such fact is "genuine" only where the evidence is such that the trier-of-fact could find in favor of the non-moving party. *Id.* "[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation marks and alterations omitted); *see also First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968) (holding that a party is only entitled to proceed to trial if it presents sufficient, probative evidence supporting the claimed factual dispute, rather than resting on mere allegations). Moreover, "[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *see also Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) ("[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment.").

In ruling upon a summary judgment motion, a court must construe the facts, as well as all rational inferences therefrom, in the light most favorable to the nonmoving party, *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769,

167 L. Ed. 2d 686 (2007), and only evidence which would be admissible at trial may be considered, *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). *See also Tolan v. Cotton*, 134 S. Ct. 1861, 1863, 188 L. Ed. 2d 895 (2014) ("[I]n ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." (internal quotation marks and brackets omitted)).

**B. Discrimination Claims**

Defendants move for summary judgment on both Plaintiff's state and federal discrimination claims, primarily asserting that Plaintiff cannot rebut their legitimate, nondiscriminatory reasoning for hiring the successful candidate instead of Plaintiff. ECF Nos. 14 at 13-14; 16 at 9-12.

Both federal and state law prohibit an employer from discriminating on the basis of an individual's protected trait, be it her race, religion, or national origin. Under Title VII, it is an "unlawful employment practice for an employer . . . to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, . . . or national origin." 42 U.S.C. § 2000e-2(a)(1). Similarly, under the Washington Law Against Discrimination, "[i]t is an unfair practice for any employer . . . [t]o refuse to hire any person because of . . . race, creed, color, [or] national origin . . . ."[6] RCW 49.60.180(1).

6. Washington courts look to federal law when construing the WLAD. *See Kumar v. Gate Gourmet Inc.*, 180 Wash.2d 481, 491, 325 P.3d 193 (2014).

*Appendix C*

At the summary judgment stage, the disparate treatment plaintiff must first establish a prima facie case of discrimination by offering evidence that "give[s] rise to an inference of unlawful discrimination." *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)). A plaintiff may do so by either meeting the four-part test laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), or by providing direct evidence that the challenged employment action was based on impermissible criteria. *Id.*; *Scrivener v. Clark Coll.*, 181 Wash.2d 439, 446, 334 P.3d 541 (2014). Under *McDonnell Douglas*, a plaintiff establishes her prima facie case by presenting the following: she (1) belongs to a protected class; (2) was qualified for the position; (3) was subject to an adverse employment action; and (4) that the position remained open and was ultimately filled by a similarly situated person outside the plaintiff's protected class.[7] *See McDonnell Douglas Corp.*, 411 U.S. at 802; *Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1037 (9th Cir. 2005). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253.

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7. Some Circuits have applied a modified version of the *McDonnell Douglas* framework to reverse discrimination cases, requiring that a member of a non-minority racial group show some additional "background circumstances" suggesting discrimination; however, the Ninth Circuit has not yet adopted such an approach. *See Zottola v. City of Oakland*, 32 F. App'x 307, 311 (9th Cir. 2002) (discussing inter-circuit split but declining to hold whether the additional "background circumstances" factor is required within this Circuit).

The burden then shifts to the employer to produce "evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason." *Id.* at 254; *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1123-24 (9th Cir. 2000); *Scrivener*, 181 Wash.2d at 446. To satisfy its burden, "the employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Burdine*, 450 U.S. at 257 (rejecting the notion that the defendant must persuade the court that it had convincing, objective reasons for preferring the chosen applicant above the plaintiff). This burden is merely one of production, not persuasion. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

If the employer meets this burden, "the presumption of discrimination drops out of the picture and the plaintiff may defeat summary judgment by satisfying the usual standard of proof required in civil cases under Fed. R. Civ. P. 56(c)." *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006) (internal quotation marks omitted) (citing *Reeves*, 530 U.S. at 143). A disparate treatment plaintiff can meet this standard in one of two ways: (1) by offering evidence, either direct or circumstantial, "'that a discriminatory reason more likely motivated the employer' to make the challenged decision;" or (2) by offering evidence "that the employer's proffered explanation is unworthy of credence." *Id.* (quoting *Burdine*, 450 U.S. at 256); *Scrivener*, 181 Wash.2d at 446 ("Evidence is sufficient to overcome summary

judgment if it creates a genuine issue of material fact that the employer's articulated reason was a pretext for a discriminatory purpose."). "When the evidence is direct, [the court] require[s] very little evidence to survive summary judgment in a discrimination case." *Boeing Co.*, 577 F.3d at 1049 (internal quotation marks and citations omitted). "But when the plaintiff relies on circumstantial evidence, that evidence must be specific and substantial to defeat the employer's motion for summary judgment." *Id.* (citation omitted).

**1. Prima Facie Case**

This Court finds Plaintiff has failed to establish a prima facie case under the *McDonnell Douglas* framework based on her religious beliefs or national origin; although, it is at least arguable that she has created an inference of racial discrimination.

As an initial matter, the parties do not dispute that Plaintiff has satisfied three of the four elements of the *McDonnell Douglas* prima facie case[8]: (1) she belongs

8. Despite her arguments to the contrary, Plaintiff has failed to present any direct evidence of discrimination. "Direct evidence 'is evidence which, if believed, proves the fact [of discriminatory animus] *without inference or presumption*.'" *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 662 (9th Cir. 2002). Plaintiff highlights Hirschmann's comment regarding the need to add "diversity" to the WAVA staff and Evans' agreement therewith as direct evidence of discrimination; however, there is nothing—besides Plaintiff's own speculation—that gives this comment any racial or religious underpinnings. The term

to a protected class, whether it is based on her race (Caucasian), religion (Christianity), or national origin (American); (2) she was qualified for the LAP position; and (3) she was not hired for the position. The issue becomes whether Plaintiff has shown that someone outside of her protected class was treated more favorably because of discriminatory animus.

Regarding her claims of discrimination based on national origin[9] and religion, Plaintiff has demonstrably failed to show that the successful applicant was outside of her protected class and that the hiring committee was aware of these alleged differences between the two candidates. Plaintiff concedes that the interviewing committee did not ask the candidates to disclose their religion or national origin, and that Plaintiff did not otherwise disclose her information. *See* ECF No. 18-1 at 10-11, 18.

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diversity encompasses a variety of meanings, ranging from an individual's socioeconomic background to her travel experience. Thus, this statement, standing alone, does not prove the fact of discriminatory animus "without inference or presumption." *See Johnson v. Metro. Gov't of Nashville & Davison Cty., Tenn.*, 502 F. App'x 523, 534-35 (6th Cir. 2012) ("Statements reflecting a desire to improve diversity do not equate to direct evidence of unlawful discrimination" because such a statement does not prove that the employer had a discriminatory animus and acted on it.").

9. The EEOC "defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group." 29 C.F.R. § 1601.1.

Instead, Plaintiff's case rests on her own assumptions—assumptions she then erroneously imputes to Evans and the hiring committee. That is, Plaintiff's case primarily rests on her own view that her differences with the successful candidate, including alleged differences in religious beliefs, should have been apparent to the hiring committee: "[S]he did not look like me. Was not white. She wore a hijab.[10] Her skin color, her name . . . there were many reasons to assert that she had a different background, a different faith than I did." ECF No. 18-1 at 17 (Plaintiff's Deposition); *see also* ECF Nos. 18-1 at 13 ("Q. Well, did you believe she was Muslim? A. I believed that she was based on what was told to me [by Mark Conley]. . . . And based on her picture."), 33 ("Q. [A]re you of the belief that you were discriminated against because you're a Christian? . . . A. I believe that they hired the other person because potentially she wasn't Christian.").

In other words, based on the successful candidate's olive skin tone and head covering, Plaintiff assumes that she is of Middle Eastern or Persian descent and is a Muslim—or at least assumes that the successful candidate is non-Christian and non-American—and asserts that these attributes, as well as Plaintiff's, should have been apparent to the interviewers as well.[11] Plaintiff went so

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10. Other than Plaintiff's and Conley's rank speculation, there is no evidence that the successful candidate was actually wearing a "hijab" as opposed to some other religious (or non-religious) head covering.

11. Plaintiff also points to evidence in the record showing that the successful applicant self-reported as "Asian" *after* she

far as to present a photo of the successful candidate in the introduction to her brief in an effort to show the Court just how apparent the successful candidate's attributes are. The Court will not engage in such blatant stereotyping, which truly is the grossest form of speculation and conjecture.

More importantly, Evans, the person who made the ultimate hiring recommendation, expressly testified that she did not make the same assumptions that Plaintiff did. ECF No. 18-2 at 13 ("Q. Did it appear to you that [the successful candidate] was of Arabic [descent]. A. I couldn't determine her descent. . . . Q. Did you make an assumption that she was Muslim. A. I did not."). At most, Evans observed that the successful candidate wore a head scarf during the interview and appeared "non-Caucasian." *Id.* Plaintiff cannot create an inference of intentional discrimination without showing that the alleged discriminatory actor was even aware of the bases upon which she is supposedly discriminating.

Regarding her claim of racial discrimination, Plaintiff has arguably created an inference of discrimination, albeit a weak one, based on one piece of evidence: Evans' deposition testimony acknowledging that the successful candidate appeared "non-Caucasian," *see id.* at 13, and thus perceived to be "outside of" Plaintiff's protected class

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was hired. ECF No. 33-8 at 7. To the extent this even constitutes a national origin under Title VII, this evidence does not show that the recommenders knew of the candidate's national origin or perceived her as having a certain national origin *at the time* of the hiring decision.

as a white or Caucasian individual. Accordingly, Plaintiff has met her initial burden and created an inference of discrimination on the basis of race alone.

**2. Legitimate, Non-Discriminatory Reasoning**

This Court finds Defendants have come forward with legitimate, non-discriminatory reasoning for hiring the successful applicant over Plaintiff. While both Plaintiff and the other top candidate were qualified for the LAP position, the successful candidate's engineering background created the possibility of her teaching multiple subjects—especially relevant given the funding insecurity of the LAP position, ECF No. 17 at 4—thus leading to Evans' conclusion that she would be a "better fit" or "better suited" for the position. As the Supreme Court admonished decades ago, Title VII does not deprive the employer of "discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Burdine*, 450 U.S. at 259 ("The statute was not intended to diminish traditional management prerogatives." (internal quotation marks omitted)). Defendants also note that Evans recalls hearing some negative comments about Plaintiff before the interview, including that Plaintiff could sometimes be difficult to work with, ECF No. 18-2 at 7; that Evans' made a note during the interview questioning Plaintiff's ability to collaborate, *id.* at 18; and that one reference with whom Evans spoke, Michael Feuling, made comments that led Evans to question Plaintiff's ability to accept authority, *id.* at 21.

Accordingly, because Defendants have come forward with legitimate, non-discriminatory reasoning for hiring the successful applicant, Plaintiff's weak inference of racial discrimination simply "drops out of the picture" *Cornwell*, 439 F.3d at 1028, and the burden shifts back to Plaintiff to demonstrate that this reasoning is mere pretext.

**3. Pretext**

This Court finds Plaintiff has failed to present a genuine issue of material fact that Defendants' articulated reasoning was pretextual. Plaintiff argued, in her briefing and at oral argument, that (1) the successful applicant's ability to teach multiple subjects was irrelevant as this skill was not listed in the job posting; (2) the contention that the successful candidate was hired because she was a "better fit" is vague and pretextual on its face; (3) the job reference who allegedly said Plaintiff had trouble with authority declares he would not have said that about Plaintiff; (4) other negative comments Evans allegedly heard about Plaintiff have not been put forward with any specificity; (5) two members of the hiring committee, including Evans, expressed the need to add "diversity" to the WAVA program; and (6) Plaintiff was more qualified for the position. This circumstantial evidence of discrimination, however, is not sufficiently "specific and substantial" to raise a triable issue of material fact as to whether Defendants' proffered reasons are mere pretext for unlawful discrimination. *Boeing Co.*, 577 F.3d at 1049.

First, the successful candidate's ability to teach multiple subjects was a relevant reason to consider her a

"better fit" for the position. And the fact that this ability was not expressly listed on the posting does not mean it was not a relevant consideration to K12's hiring recommendation and Omak's hiring decision—hiring decisions are nuanced and candidates for teaching positions can undoubtedly gain an edge based on a variety of considerations, such as an applicant's ability or willingness to contribute to the employer's multifaceted goals.

As Defendants noted, funding for LAP positions is uncertain given that it is allocated yearly by the legislature, ECF No. 17 at 4; thus, even if funding for the 2013-2014 LAP math position disappeared, Defendants would have a reasonable interest in wanting to place the chosen candidate, whom they have spent time and resources training, into an open position within their organization. Indeed, the LAP math position at issue in this case *was* eliminated after the first year, and the successful candidate was able to stay on with WAVA because she was able to teach science classes. *Id.* at 7. While the phrase "better fit," without more, can be vague, *see Scrivener*, 181 Wash.2d at 448-49, Defendants have explained exactly why the successful candidate was a "better fit" for the LAP position, and Plaintiff has not shown that a reasonable jury would find this explanation unbelievable.

Second, Plaintiff has not shown pretext by merely calling into doubt the extent of the negative feedback Evans received about Plaintiff. For one, Plaintiff does not dispute that Evans heard both positive and negative feedback about Plaintiff prior to the interview; she just faults Evans for not remembering the feedback—provided

to Evans almost three years prior to her deposition—with any great specificity. Further, while Feuling might not have expressly said that Plaintiff "Cannot accept authority," his declaration does not create a genuine issue as to why Evans would make this note during the course of their conversation: it merely states that he "cannot imagine that [he] would have said that about Ms. Fergus," that he "did not and [does] not think that Ms. Fergus cannot accept authority," and that "[w]hile [he] cannot specifically remember what [he] said to Ms. Evans, [he does] not think [he] ever said that someone 'cannot accept authority.'" ECF No. 34 at 2-3. At bottom, Feuling does not deny saying Plaintiff cannot accept authority (he just does not remember saying it), nor is he in the position to explain why Evans would make this note (which is not necessarily a direct quote of Feuling's) during their conversation. Even disregarding these negative comments about Plaintiff, Defendants' primary justification for hiring the chosen candidate—her ability to teach multiple subjects—still stands and is wholly divorced from any consideration of the candidates' perceived races.

Third, the comments attributed to Evans and Hirschmann regarding the need to add diversity to the program do not make Defendants' explanation unbelievable or otherwise show that unlawful discrimination more likely motivated the hiring decision. The term "diversity" encompasses a variety of meanings, ranging from an individual's socioeconomic background to her travel experience. It is Plaintiff's mere suspicion—fueled by Conley's comments that the successful applicant *appeared* Muslim and Arabic and Plaintiff's own conclusions based

on a picture and a name—that Hirschmann and Evans used the term to mean racial diversity. Again, information regarding the candidate's race and other protected traits was neither requested of nor offered by the applicants during the hiring process. Plaintiff's mere suspicion that the use of the word "diversity" meant "racial diversity" is not direct evidence, *see Johnson*, 502 F. App'x at 534-35, and, on this record, does not rise to the level of circumstantial evidence of discrimination.

Finally, Plaintiff has not shown that she was more qualified than the chosen candidate. While evidence showing that a plaintiff's qualifications were "clearly superior" to the qualifications of the applicant selected can support a finding of pretext, *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003) (quoting *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995)), Plaintiff has failed to make such a showing.

In support of her assertion that the successful candidate was less qualified than her, Plaintiff asserts that the successful candidate had less teaching experience and no experience teaching in an online format. True, Plaintiff had more years of teaching experience, including experience teaching at-risk students. However, the successful candidate had the requisite teaching experience, including online tutor experience and familiarity with the online tools used by WAVA, ECF No. 39-3 at 3 (Evans' Deposition), and, unlike Plaintiff, had an engineering background, which made her able to teach multiple courses.

Moreover, both candidates received similar interview and reference scores, with Plaintiff scoring only marginally higher than the successful candidate. ECF No. 33 at 11 (Plaintiff's Statement of Facts) (noting that Plaintiff received an average reference score of 4.83 out of 5; the successful candidate received a score of 4.71 out of 5); 33-5 (interview tally) (showing that Plaintiff received an average interview score of 27.5; the successful candidate received a score of 27.5).

Finally, while Evans and the hiring committee believed both candidates were "highly qualified," ECF No. 18-2 at 17 (Evans' Deposition), Evans heard that Plaintiff could be sometimes difficult to work with and noted some concerns about Plaintiff's ability to collaborate and accept authority, *id.* at 7, 18, 21. Title VII "was not intended to diminish traditional management prerogatives," *Burdine*, 450 U.S. at 259 (internal quotation marks omitted), and it is not the place of this Court to second-guess Defendants' hiring decision when faced with two qualified and experienced candidates.

In short, Plaintiff has failed to put forth sufficiently specific and substantial circumstantial evidence that Defendants acted with a discriminatory animus.[12] *See*

12. Plaintiff's arguments highlighting Evans' non-use of the scoring rubric and Evans' decision to decide against the majority vote of the hiring committee, to the extent they are intended to show pretext, have no merit. For one, there is nothing in the record showing that Evans, a K12 employee, was required to use the scoring rubrics, which merely served as a discussion tool. ECF No. 17 at 5-6 (K12 SMF 25, 27). Further, to the extent

*Boeing*, 577 F.3d at 1049. Viewing the evidence in the light most favorable to Plaintiff, this Court finds no reasonable jury could conclude that Defendants intentionally discriminated against Plaintiff because of her race, or any other protected trait. Accordingly, Defendants' motions for summary judgment on the federal and state discrimination claims are **GRANTED**.

## C. Conspiracy Claims[13]

### 1. 42 U.S.C. § 1985(3)

Defendant K12 moves for summary judgment on Plaintiff's federal conspiracy claim, primarily questioning any evidence of an agreement or racial animus. ECF No. 16 at 14-15.

A conspiracy claim pursuant to 42 U.S.C. § 1985(3) is comprised of the following four elements:

> (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws,

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Evans was required to use the scoring rubrics, her failure—as to all three applicants—does not show discrimination against Plaintiff. Finally, there is no evidence in the record that the K12 hiring recommendation had to come from a hiring committee, rather than from Evans, the High School Principal. *See* ECF No. 33-1 at 42-43.

13. Plaintiff withdrew her conspiracy claims against Omak at oral argument.

> or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

*United Bldg. of Carpenters v. Scott*, 463 U.S. 825, 828-29, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). Moreover, the conspiracy must also be motivated by some racial or class-based animus. *Id.* at 829; *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). "To establish racial or class-based animus, a plaintiff must show 'invidiously discriminatory motivation . . . behind the conspirators' actions." *Usher*, 828 F.2d at 561.

Viewing the evidence in the light most favorable to Plaintiff, this Court finds no reasonable jury could find for her on this claim. Plaintiff's briefing points to the comments shared at the post-interview hiring committee meeting by Hirschmann and Evans.[14] ECF Nos. 30 at 16-19; 32 at 16-19. However, no reasonable jury could find that the sole comment made by Hirschmann regarding the need for increased "diversity" at WAVA and Evans'

14. Plaintiff's briefing also pointed to Omak's Affirmative Action Policy as evidence of an agreement to deprive Plaintiff of employment based on her race. Plaintiff has since withdrawn her conspiracy claims against Omak. At any rate, Omak's Affirmative Action Policy expressly prohibits Omak from making hiring decisions based on an applicant's protected class. ECF No. 33-18 at 2 ("Affirmative action plans may not include hiring or employment preferences based on gender or race, including color, ethnicity or national origin.").

agreement therewith constitutes an agreement to deprive Fergus of equal protection of the law or that Evans and Hirschmann held racial animus towards Plaintiff. Accordingly, Defendants are entitled to summary judgment on this claim.

**2. Common Law**

Finally, Defendant K12 moves for summary judgment on Plaintiff's "Conspiracy and Action in Concert" claim. ECF No. 16 at 15-16.

To establish a conspiracy under Washington common law, the plaintiff must show that "(1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *All Star Gas, Inc. of Wash. v. Bechard*, 100 Wash. App. 732, 740, 998 P.2d 367 (2000). "Mere suspicion or commonality of interests is insufficient to prove a conspiracy." *Id.* "[When] the facts and circumstances relied upon to establish a conspiracy are as consistent with a lawful or honest purpose as with an unlawful undertaking, they are insufficient." *Id.* (citation omitted). The common law theory of concerted action similarly requires some sort of agreement among defendants to perform a tortious act. *See Martin v. Abbott Labs.*, 102 Wash.2d 581, 596, 689 P.2d 368 (1984).

Viewing the evidence in the light most favorable to Plaintiff, this Court finds no reasonable jury could find for her on this claim. Plaintiff's briefing highlights the

"diversity" comment shared by Evans and Hirschmann during the hiring committee deliberations as evidencing a tacit agreement to choose a candidate based on religion, race, and/or national origin. ECF Nos. 30 at 19; 32 at 18-19. This Court finds no reasonable jury could find an agreement between these two individuals, let alone that this sole comment made by Hirschmann and with which Evans agreed, demonstrates anything more than a "[m]ere suspicion or commonality of interests." *Bechard*, 100 Wash. App. at 740. Accordingly, Defendants are entitled to summary judgment on this final claim.

**ACCORDINGLY, IT IS ORDERED**:

1. Defendant Omak School District's Motion for Summary Judgment (ECF No. 14) is **GRANTED**.

2. K12's Motion for Summary Judgment (ECF No. 16) is **GRANTED**.

The District Court Executive is directed to enter this Order, enter **JUDGMENT** for Defendants, provide copies to counsel, and **CLOSE** the file.

DATED June 30, 2016.

/s/ Thomas O. Rice
THOMAS O. RICE
Chief United States District Judge

## APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED OCTOBER 2, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35613

D.C. No. 2:15-cv-00242-TOR
Eastern District of Washington, Spokane

**ORDER**

KIMBERLY FRANETT-FERGUS, an individual,

*Plaintiff-Appellant,*

v.

OMAK SCHOOL DISTRICT 19, a public school; et al.,

*Defendants-Appellees.*

October 2, 2018, Filed

Before: FERNANDEZ, CLIFTON, and NGUYEN, Circuit Judges.

Judge Nguyen voted, and Judges Fernandez and Clifton recommended, to deny Plaintiff-Appellant's petition for rehearing en banc.

*Appendix D*

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

On behalf of the Court, the petition for rehearing en banc is DENIED.