No. 18-1148

In The
Supreme Court of the United States

KIMBERLY FRANETT-FERGUS,

Petitioner,

v.

OMAK SCHOOL DISTRICT 19, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Petitioner demonstrate "compelling reasons" for granting a Writ of Certiorari?

2. Did the district court and the Court of Appeals properly apply the burden-shifting analysis under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)?

3. Did the district court and the Court of Appeals improperly hold Petitioner to a higher standard of proof than justified under applicable law?

4. Did K12 and Omak have discretion to decide which candidate should be offered the teaching job?

LISTINGS OF PARTIES TO PROCEEDINGS

The petition correctly states the names of all parties to this case.

RULE 29.6 STATEMENT

Respondent Omak School District 19 is a governmental municipal corporation and is exempt from the requirements of Rule 29.6.

Respondents K12 Management, Inc.; K12 Virtual Schools, LLC; K12, Inc., and K12 Washington, LLC, collectively "K12," make the following disclosures. K12 Management, Inc.; K12 Virtual Schools, LLC and K12 Washington, LLC are wholly owned subsidiaries of K12, Inc. No parent entity or publicly held corporation owns 10% or more of the stock of K12, Inc.

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OPINIONS BELOW

The opinions below are:

1. *Franett-Fergus v. Omak Sch. Dist. 19*, **Order Denying Rehearing En Banc**, No. 16-35613 (Oct. 2, 2018), which is Appendix D to the Petition for Writ of Certiorari.

2. *Franett-Fergus v. Omak Sch. Dist. 19*, **Memorandum Opinion**, No. 16-35613 (Aug. 17, 2018), 743 Fed.Appx. 855 (9th Cir. 2018), which is Appendix A to the Petition for Writ of Certiorari.

3. *Franett-Fergus v. Omak Sch. Dist. 19*, **Order Granting Defendants' Motions for Summary Judgment**, No. 2:15-cv-0424-TOR (June 30, 2016), 2016 WL 3645181 (E.D. Wash. 2016), which is Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) (Courts of appeals; certiorari; certified questions).

STATUTES INVOLVED

Two statutes are involved:

1. 42 U.S.C. § 2000e-2(a)(1) (Unlawful employment practices).

2. RCW 49.60.030(1)(a) (Freedom from discrimination – Declaration of civil rights).

The statutes are quoted at p. 1 of the Petition for Writ of Certiorari.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Fergus applied for a teaching position with Omak. K12 conducted interviews for Omak. K12 recommended another qualified applicant, Ms. Fareeha Azeem, for the position. Omak accepted K12's recommendation. In the petition filed by Fergus she took some significant liberties with the facts including her repeatedly characterizing the successful candidate as "unqualified."

This is a "reverse discrimination" case concerning the alleged discriminatory decision not to hire Fergus, a Christian white woman, for a teaching position with Omak's on-line school in association with K12. The teaching position was awarded to a highly qualified woman, Ms. Azeem, who also held an engineering degree. Fergus was told by her friend on the hiring committee, Mark Conley, that she might have been selected for the job if she was a Muslim because the successful candidate appeared to be of Arabic descent and was wearing a hijab. Mr. Conley also told Fergus that during the interview committee's discussion there was a comment made about the need to add "diversity." Fergus looked up Ms. Azeem on the internet and

concluded by looking at her photograph that Ms. Azeem was Muslim.

The district court found that, under *McDonnell Douglas*, K12 and Omak articulated legitimate, non-discriminatory reasons to hire Ms. Azeem instead of Fergus. *Franett-Fergus v. Omak Sch. Dist. 19*, 2016 WL 3645181, *7 (E.D. Wash. 2016). The district court further found under *McDonnell Douglas* that Fergus failed to show that Respondents' legitimate, non-discriminatory reasons to hire Ms. Azeem was a mere pretext for discrimination. *Id.* at *8-9.

The Court of Appeals affirmed the district court under *McDonnell Douglas.* The Court of Appeals held that a prima facie case of religious discrimination was not established and the reasons for not hiring Fergus were not pretext for race or national origin discrimination. The Court of Appeals stated: "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." *Franett-Fergus v. Omak Sch. Dist. 19*, 743 Fed.Appx. 855, 857 (9th Cir. 2018).

Fergus asserted that one question presented is:

> 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?

(Pet. at iv.) There is a split of authority among the circuits in "reverse discrimination" cases whether a

plaintiff must provide "background circumstances" as to why a white job applicant might be discriminated against. For example, in *Harding v. Gray*, 9 F.3d 150, 153 (D.C. Cir. 1993), then-Chief Judge Ginsburg stated: "A plaintiff who alleges reverse discrimination must, in addition, demonstrate additional background circumstances [that] support the suspicion that the defendant is that unusual employer who discriminates against the majority." Other circuits have rejected this requirement. *See*, *e.g.*, *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 she is a member of a "protected group" and white persons are a protected group under Title VII).

Fergus only speculated that the district court and the Court of Appeals erroneously applied the "background circumstances" test. Fergus speculated: "Yet in taking such a slanted position, the Ninth Circuit implicitly adopted this higher standard." (Pet. at 21.) There is no indication in the opinions of the district court and the Court of Appeals that the background circumstances test was applied in dismissing Fergus' lawsuit on summary judgment. Moreover, Fergus did not argue to the district court or the Court of Appeals that the background circumstances test should be rejected.

42 U.S.C. § 2000e-2(a)(1) makes it unlawful to refuse to hire any individual because of such individual's race, color, religion or national origin. The Washington State Law Against Discrimination (WLAD), RCW 49.60.030(1)(a), makes it unlawful to discriminate in

the right to obtain employment because of race, creed, color or national origin. Fergus failed to demonstrate that Omak and K12 violated the two civil rights statutes. Fergus failed to demonstrate that she was treated less favorably because of a discriminatory animus against her.

The district court found that Fergus failed to establish a prima facie case under the *McDonnell Douglas* framework even though it was "at least arguable that she . . . created an inference of racial discrimination." Regarding Fergus' claims of discrimination based on national origin and religion, the district court found that she failed to demonstrate that the successful applicant was outside of her protected class or that the hiring committee was aware of the alleged differences between the two candidates.

In a 2-1 opinion, the Ninth Circuit affirmed the district court's ruling. In a 3-0 opinion, the circuit court denied Fergus' petition for rehearing en banc.

COUNTER-STATEMENT OF THE CASE

1. Statement of Facts

This case concerns the allegedly discriminatory decision not to hire Fergus for a Learning Assistance Program (LAP) math position with Omak's on-line school known as the Washington Virtual Academy (WAVA). In July or August 2013, funding became available for a LAP math position at Omak. *Franett-Fergus*

v. Omak Sch. Dist. 19, No. 2:15-cv-02420-TOR (E.D. Wash.). (Dkt. 17 No. 9.) Jayme Evans, WAVA's high school principal, was in charge of the hiring process and she selected three final applicants to interview for the job including Fergus and Fareeha Azeem. (*Id.*, ## 12, 13.) In Fergus' first amended complaint, she asserted that Omak School District and the K12 corporations "improperly awarded the position to a less qualified candidate because of that candidate's religion, race, and/or national origin." (Dkt. 10 ¶ 3.2.) Fergus alleged that the successful candidate "[w]as apparently of Islamic faith and national origin or race of those consistent with an Arabic or Persian heritage." (*Id.* ¶ 3.3.) Fergus asserted that she was discriminated against because Omak and K12 "made their hiring decision with the purposeful intent of increasing diversity and purposefully did not hire [Fergus] because of her race or a characteristic so closely aligned that it amounts to race discrimination." (*Id.* ¶ 3.18.)

Ms. Evans formed an interview committee consisting of her and four other persons: Nicholaus Sutherland, Kristin Hirschmann, Deirdre Crebs and Mark Conley. (Dkt. 17 No. 14.) Ms. Evans noted three issues before the interviews. First, Ms. Azeem's engineering background could provide flexibility, allowing her to teach classes other than math. (*Id.* No. 17.) Second, she recalled hearing various comments, both positive and negative, about Fergus. (*Id.* No. 18.) And third, she noticed that two members of the interview committee, Mr. Conley and Ms. Crebs, also served as recommenders for Fergus. (*Id.* No. 16.)

The interviews were conducted on Sept. 5, 2013. (*Id.* No. 19.) Ms. Azeem interviewed via Skype and Fergus interviewed in person. (*Id.* No. 20.) At no time was any candidate asked about their race, religion or national origin. (*Id.* ## 21, 22.)

After the interviews, the committee met to discuss their thoughts. Most of the committee members used an optional scoring rubric to provide subject scores in certain skill and qualification categories. The rubric was intended to assist discussion about applicants and guide the interviewers to relevant categories; it was not meant to be a candidate selection device but simply an optional tool to help the committee evaluate candidates and to narrow the field. (*Id.* ## 23, 25, 27, 28.) The committee quickly focused on the top candidates: Fergus and Ms. Azeem. (*Id.* No. 28.) The committee members then shared their subjective scores. Three favored Fergus (Mr. Sutherland, Ms. Crebs and Mr. Conley) and two preferred Ms. Azeem (Ms. Hirschmann and Ms. Evans). (*Id.* No. 29.)

Mr. Conley is the sole source of Fergus' information of what took place after the interviews and his comments comprise the entire foundation of Fergus' claims. (*Id.* No. 58.) Fergus said that Mr. Conley said that Ms. Hirschmann said: "I believe we need more diversity at WAVA." (*Id.* No. 61.) Fergus said that Mr. Conley also said that Ms. Evans later said that she agreed with what Ms. Hirschmann said. (*Id.*)

Ms. Evans does not recall the discussion in the same way. Instead, while she recalls Ms. Hirschmann

mentioning "diversity," she does not recall commenting on it and she could not recall any further discussion. (*Id.* ## 30, 31.)

After the interviews, Ms. Evans was responsible for contacting references for Fergus and Ms. Azeem. (*Id.* No. 33.) One of Fergus' references raised two red flags. First, the reference said they would not hire Fergus again full-time and further made a comment that prompted Ms. Evans to write in her notes that Fergus "cannot accept authority." (*Id.* No. 35.) The reference also gave the impression that Fergus could be difficult to work with. (*Id.*)

Ms. Evans considered each applicant. Ms. Azeem's engineering background made her a more flexible hire; in the event that LAP funding was lost, she could transition to another job. Ms. Azeem interviewed very well, had excellent qualifications and her references raised no concerns. Fergus had a reference who raised concerns and, if the LAP funding was lost, she would be terminated at the end of the year. So, while both candidates scored well and were highly qualified (*Id.* No. 28), Ms. Evans decided Ms. Azeem was a "better fit." (*Id.* No. 36.) Ms. Evans offered Ms. Azeem the job, subject to approval by Omak. (*Id.* No. 38.) On September 9, 2013, two days after the interviews, Ms. Evans informed the interview committee of her decision. (*Id.* No. 39.) Notably, the funding for the LAP math position was eliminated the next year but Ms. Azeem transitioned to teaching another subject because of her engineering background. (*Id.* ## 40, 41.)

Ms. Evans left a voicemail for Fergus to let her know that she did not get the job. Fergus followed up with Ms. Evans requesting feedback, which Ms. Evans did not provide. (*Id.* No. 41A.) Fergus then called Mr. Conley, her recommender and an interviewer, and asked him what she could have done differently. Mr. Conley told Fergus: "[You] could have been Muslim." He also told Fergus that he thought she had been discriminated against and he described Ms. Azeem's appearance as well as the two comments about diversity. (*Id.* ## 42, 43.)

Fergus then searched for Ms. Azeem online and found her photograph. Based on Ms. Azeem's physical appearance in the photo and Mr. Conley's comment, Fergus concluded she was discriminated against. (*Id.* No. 44.) Fergus further concluded that Ms. Evans' unwillingness to explain why she was not selected was evidence of discrimination, ignoring that many employers refuse to give feedback. (*Id.* No. 45.)

Relying on the information above, Fergus filed a complaint with the Equal Employment Opportunity Commission (EEOC) (*Id.* No. 46), requested records related to her application under Washington's Public Records Act (*Id.* No. 47) and filed a lawsuit alleging a conspiracy and discrimination based on race, religion and national origin. (Dkt. 1-2.)

Fergus had twice been denied employment by the Omak through WAVA, first in 2012 and again in 2013. (Dkt. 17 ## 3, 4.) When she was not hired in 2012, Fergus was convinced she was the best candidate. She

argued that her years of experience had not been taken into account, demanded that the position be reopened and contacted legal counsel about "next steps, should they be necessary." (*Id.* ## 5-7.) The basis for her belief was secondhand information and speculation. (*Id.* ## 42-45.) When Fergus applied again in 2013 she was again not hired. But this time, Fergus alleged that she was a victim of discrimination. (*Id.* ## 42-45.)

Fergus stated that she does not know Ms. Azeem's race or religion. (Dkt. 15 No. 17.) Fergus stated that she believed Ms. Azeem was Muslim "based on what was told to me" by Mr. Conley and "based on her picture." (*Id.* No. 18.) Fergus stated that based upon what Mr. Conley told her she concluded that Ms. Azeem was a Muslim. (*Id.* No. 21.) Fergus stated that she was discriminated against because she is white but cannot say she was discriminated against because she is a white Christian because she never shared her religious faith with Omak and K12. (*Id.* No. 32.) Fergus admitted that Omak and K12 did not know her religious faith. (*Id.* No. 33.) Fergus answered "yes" to the question: "So essentially you're claiming you were discriminated against because you appear to be white and Ms. Azeem did not; is that right?" (*Id.* No. 34.)

Fergus stated that she did not know whether the hiring committee had a negative bias against white applicants. (*Id.* No. 35.) Fergus stated that what she was told by Mr. Conley is the reason she concluded that Ms. Hirschman and Ms. Evans conspired against her. (*Id.* No. 38.) Fergus was asked: "Other than . . . Ms. Azeem being less qualified and her appearance, do you have

any other evidence to suggest that the decision to hire her was based upon unlawful discrimination?" (*Id.* No. 39.) Fergus responded: "Not that I can think of right now." (*Id.*)

Fergus' claims in this lawsuit are based entirely on Mr. Conley's speculation. In contrast, Omak and K12 offered legitimate, nondiscriminatory reasons why Fergus was not hired.

2. Petitioner's Errors and Omissions

There are some perceived misstatements of fact or law in the petition that bear on what issues properly would be before the Court if certiorari were granted.

- "The other applicant was objectively less qualified than Petitioner and did not even meet the minimum qualifications for the position." (Pet. at 2.) The committee found that both candidates were "highly qualified." The minimum qualifications Fergus refers to is experience with a specific computer program called "Elluminate." Fergus stated that Ms. Azeem "may not have met all of the required qualifications[.]" (*Id.* at 17.) Fergus stated: "It was unclear whether Azeem had experience using Elluminate." (*Id.* at 8.)
- "[T]he principal did something apparently never done before, overruled the majority vote and gave the job to the other applicant." (*Id.* at 2.) This is pure speculation on the part of Fergus.

- "The other job applicant . . . appeared to be . . . Muslim." (*Id.* at 2.) One cannot tell the religion of a person simply by the person's appearance.

- "The Ninth Circuit also avoided weighing in on the circuit split regarding the use of a heightened standard for 'reverse' discrimination cases while implicitly applying that same standard to Fergus." (*Id.* at 5.) There is no suggestion that the Ninth Circuit used a heightened standard of proof in coming to its decision.

- "The minimum qualifications for the LAP Math position included a proven ability [to use] Elluminate (an online teaching program)[.]" (*Id.* at 6.) Fergus later stated: "It was unclear whether Azeem had experience using Elluminate." (*Id.* at 8.)

- When interviewed, Ms. Azeem "wore a religious head scarf during her interview and appeared to be of Arabic descent." (*Id.* at 8.) One cannot tell whether any particular head scarf is a "religious head scarf." It is unclear what expertise Mr. Conley had in anthropology to make a judgment as to Ms. Azeem being of Arabic descent. Not all Arabs are Muslim and not all Muslims are Arabs. The main characteristic among Arabs is speaking Arabic, a Central Semitic language from the Afroasiatic language family.

- When Fergus appeared for her interview, she "appeared to be a white, non-Muslim female." (*Id.* at 8.) While it was apparent that Fergus was white there was no way to know whether she was Muslim.

- "Of the four members who actually scored candidates, each one gave higher scores to Fergus." (*Id*. at 9.) The scores were statistically insignificant. Fergus scored only marginally higher than Ms. Azeem with Fergus receiving an average reference score of 4.83 out of 5 while Ms. Azeem had an average score of 4.71 out of 5 – without any scoring by Ms. Evans. (Dkt. 33 No. 103.)

- "Mark Conley . . . said that Fergus's interview was one of the top 10 he had ever seen." (Pet. at 9.) Mr. Conley was one of the persons who signed a recommendation for Fergus.

- "Three of the members ranked Fergus as their first choice and Azeem as their second choice. Two of the members [including Ms. Evans] ranked Azeem first and Fergus second." (*Id.* at 10.) As the Principal, Ms. Evans had the responsibility to make the final decision.

- Ms. Evans agreed with Ms. Hirschmann, who allegedly said "I believe we need more diversity at WAVA" and said that she meant "diversity" in demographic terms including race and national origin. (*Id*. at 10.) However, it was later stated:

"Evans later denied knowing what she though Hirschmann meant when she mentioned 'diversity.' Likewise, Hirschmann denied remembering whether she commented about the need to add diversity during deliberations." (*Id*. at 10-11.)

- "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." (*Id*. at 11.) Ms. Evans did a reference check after the meeting and received a negative reference on Fergus. "Evans noted that one of Fergus's references, Mr. Mike Fueling, allegedly said that Fergus 'could not accept authority.'" (*Id.*) Ms. Evans stated that she heard negative comments about Fergus before Fergus was interviewed. (*Id*. at 17.) Ms. Evans spoke to one reference who said he would not re-hire Fergus. (Dkt. 17 No. 35.) Ms. Evans ultimately selected Ms. Azeem because her engineering background made it possible for her to teach multiple subjects at the high school level. (*Id.* No. 37.)

- "Taking the scores from Azeem's three references and Fergus's two references, Fergus had the higher average score." (Pet. at 11.) As noted above, the scores were statistically insignificant.

- Azeem "may not have met all of the required qualifications[.]" (*Id.* at 17.) This

contradicts the earlier statement by Fergus that Ms. Azeem did not meet the minimum qualifications. (*Id*. at 2.)

- Fergus criticized the district court for stating there was nothing in the record requiring the hiring committee to be conclusive, that Omak's administrative procedure required that it be used by Ms. Evans or that Ms. Evans was required to use the scoring rubrics. (*Id*. at 19.) The district court was correct on these points.

- Fergus criticized the district court for stating that there was no evidence that the committee members perceived Ms. Azeem to be of a certain religion, race or national origin at the time of the hiring decision. (*Id.* at 19.) The district court was correct on this point. The fact that Ms. Evans said that Ms. Azeem to be "non-Caucasian" did not establish that she was of any certain race. The fact that Ms. Azeem appeared to be of Arabic descent and Muslim is unreasonable on its face.

- Fergus criticized the district court for stating that it was not shown that Fergus was more qualified than Ms. Azeem. (*Id*. at 20.) Given Fergus' negative references and her previous hostility toward K12 for not being hired in the past together with the similar interview scores of the two candidates, the district court was correct on this point.

- Fergus criticized the district court for stating that Ms. Evans' failure to use the scoring rubrics could not be evidence of discrimination. (*Id.*) The district court was correct on this point.

- Fergus criticized the district court for stating that no reasonable jury could find that comments by Ms. Evans and Ms. Hirschmann about diversity had any racial or religious underpinnings. (*Id.*) The district court was correct on this point.

- Fergus criticized the district court for stating that Ms. Evans had never gone against the hiring committee's recommendation in the past. (*Id.*) This is speculation on the part of Fergus.

- Fergus criticized the district court as to how it viewed the declaration of Michael Fueling. (*Id.*) Mr. Fueling stated that he did not remember what he said to Ms. Evans but he did not think he said that Fergus could not accept authority. (Dkt. 34 ¶ 8.) Ms. Evans wrote in her contemporaneous notes: "Cannot accept authority." (Dkt. 17 No. 35.)

- Fergus criticized the district court for stating that Ms. Azeem's ability to teach multiple subjects was a relevant consideration for the hiring decision. (*Id.*) The district court was correct on this point. LAP funding was not forthcoming the next year. Because of Ms. Azeem's

> engineering background she was able to transition to a different position.

The three court opinions cited by Fergus on pretext (Pet. at 23) do not compel relief for Fergus in this case.

Schnidrig v. Columbia Mach., Inc., 80 F.3d 1406 (9th Cir. 1996), *cert. denied* 519 U.S. 927 (1996), was an age discrimination case. The circuit court found that plaintiff presented sufficient evidence of pretext to survive summary judgment. The *Schnidrig* court noted: "[W]hen evidence to refute defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption." 80 F.3d at 1411.

Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994), was also an age discrimination case. The *Wallis* court stated: "We are convinced that . . . the question [of pretext] can only be answered in each case by a review of the actual evidence offered by each party. . . ." 26 F.3d at 889. The *Wallis* court noted that a plaintiff must produce "specific, substantial evidence of pretext." *Id.* at 890.

Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985), *amending opinion* 784 F.2d 1407 (9th Cir. 1986), was a failure to hire on the basis of race and sex case. The circuit court found evidence of pretext based largely on statistical evidence. Plaintiff stated in an affidavit that defendant's personnel manager "made a point of telling Lowe that the Monrovia police force had

no women and no Blacks" and "then encouraged Lowe to apply for a position as a police officer in Los Angeles rather than Monrovia" and that "the Los Angeles police force was 'literally begging for minorities and especially females.'" 784 F.2d at 1009. The court concluded: "One clear inference that could reasonably be drawn from this statement is that the Monrovia police force was not begging for – or even interested in – such applicants." *Id.*

The bulk of Fergus' legal argument is on the split in the federal circuits on whether a heightened standard of proof is required in "reverse" discrimination cases. (Pet. at 24-25.) Here, the district court and the Ninth Circuit did not employ the so-called "background circumstances" test to decide Fergus' case. Fergus stated that "the Ninth Circuit implicitly adopted this higher standard." (*Id*. at 25.) This is pure speculation on the part of Fergus.

REASONS FOR DENYING THE WRIT

1. Petitioner did not demonstrate "compelling reasons" for granting a writ.

The Court grants a Petition for Writ of Certiorari "only for compelling reasons." Sup. Ct. R. 10. The compelling reasons are spelled out in Rule 10, which provides:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an

> important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Fergus failed to demonstrate that any of the grounds set forth in Rule 10 (a) – (c) are present in this case. Fergus did not even cite the Court's Rule 10 in her Petition for Writ of Certiorari.

2. Petitioner's lawsuit was properly dismissed because she did not demonstrate pretext as required by *McDonnell Douglas*.

In civil rights hiring cases, the federal courts and the state of Washington apply the *McDonnell Douglas* burden shifting analysis. If plaintiff establishes a prima facie case of discrimination then:

> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. . . .

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). To overcome this, the plaintiff must demonstrate the employer's "conduct as a pretext for . . . discrimination. . . ." *Id.* at 804. *McDonnell Douglas* is followed by the state of Washington. *See*, *e.g.*, *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411, 430 P.3d 229, 234 (2018) ("we employ the *McDonnell Douglas* burden-shifting framework").

Put more clearly, if a plaintiff establishes a prima facie case of discrimination then:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.
>
> . . .
>
> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the

> true reason for the employment decision. . . . She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that **the employer's proffered explanation is unworthy of credence**.

Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981). (Emphasis added.)

Justice Alito noted that "federal judges have decades of experience sniffing out pretext." *Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, ___ U.S. ___, 135 S.Ct. 2507, 2550 (2015) (Alito, J., dissenting).

If an employer presents a legitimate, nondiscriminatory reason for its action, but the plaintiff presents no evidence of pretext, the employer is entitled to dismissal on summary judgment. *Lipp v. Cargill Meat Solutions Corp.*, 911 F.3d 537, 544 (8th Cir. 2018) (summary judgment affirmed; plaintiff failed to show that the employer's proffered reason was a pretext for discrimination); *Hornsby-Culpepper v. Ware*, 906 F.3d 1302, 1313 (11th Cir. 2018) (summary judgment affirmed; plaintiff failed to point to any evidence in the record to support a finding that the employer's reasons for denying her higher salary request were false and pretextual); *Bonilla-Ramirez v. MVM, Inc.*, 904 F.3d 88, 95 (1st Cir. 2018) (summary judgment affirmed; employee failed to show that her employer's proffered nondiscriminatory reason was pretextual; plaintiff's "challenge to the District Court's pretext ruling fails"); *DeVoss v. Southwest Airlines Co.*, 903 F.3d 487, 492

(5th Cir. 2018) (summary judgment affirmed; employer's decision to terminate employee was not a pretext for discrimination; plaintiff "cannot establish pretext by relying on her subjective belief that unlawful conduct occurred"); *Skiba v. Illinois Cent. Railroad Co.*, 884 F.3d 708, 724-25 (7th Cir. 2018) (summary judgment affirmed; employee failed to establish that the employer's proffered legitimate, nondiscriminatory reasons for its refusal to hire him in another managerial role was a pretext for discrimination); *Lincoln v. BNSF Railway Co.*, 900 F.3d 1166, 1194 (10th Cir. 2018) (summary judgment affirmed; employee failed to establish that nondiscriminatory reasons for his nonselection for an administrative position was a pretext for disability discrimination); *Perez v. Vitas Healthcare Corp.*, 739 Fed.Appx. 405, 407 (9th Cir. 2018) (summary judgment affirmed; plaintiff's "claim fails because [her employer] met its burden to provide a 'legitimate, nondiscriminatory reason' for her termination and she did not provide any specific, substantial evidence of pretext").

As is apparent, **there is nothing unusual about a discrimination lawsuit being dismissed because the plaintiff cannot show that the employer's legitimate, nondiscriminatory reasons for taking an adverse employment action amount to a pretext for discrimination**. Here, Omak and K12 demonstrated legitimate, nondiscriminatory reasons for not hiring Fergus including:

- One reference indicated that they would not hire Fergus again full-time and that she had trouble with authority.

- Fergus' previous complaint and demand to be considered in 2012 left a negative impression at WAVA, suggesting issues with authority and inaccurate view of self.
- Negative comments had been made about Fergus before her interview.
- Ms. Azeem was an experienced and highly qualified candidate.
- Ms. Azeem's broader professional experience as an engineer gave her the flexibility to teach multiple subjects.
- The unreliable nature of LAP funding supported hiring a candidate that could flex into another position.

Fergus was required to demonstrate that the employer's proffered reason for not hiring her was false and that discrimination was the real reason. "But a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). (Emphasis in original.) Fergus failed to show that (a) K12 or Omak covered up the real reason that Ms. Azeem was hired, (b) a discriminatory reason was the more likely motivation for K12's and Omak's action, and (c) K12's and Omak's explanation is "unworthy of credence." *See also Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (the plaintiff must show that the articulated reason is pretextual "either directly by persuading that a discriminatory reason

more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence").

3. Petitioner was not held to a higher standard of proof in her "reverse discrimination" lawsuit.

The district court and the Court of Appeals did not apply the "background circumstances" test in dismissing Fergus' lawsuit on summary judgment. Moreover, Fergus cannot point to any argument that she set forth in her briefs before the district court or the Court of Appeals urging that the background circumstances test be rejected. And no such argument was made during oral argument before the district court. Petitioner cannot raise new arguments in her Petition for Writ of Certiorari. "This Court does not ordinarily decide questions that were not passed on below." *City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1773 (2015). Considering a petition for writ of certiorari, the Court stated: "Nor, still more critically, did she adequately raise [certain issues] in the lower courts." *Chaidez v. United States*, 568 U.S. 342, 358 n. 16 (2013).

To show pretext, a plaintiff must present evidence showing that the employer's proffered reason is "so incoherent, weak, inconsistent, or contradictory that a rational fact finder could conclude that the reason is unworthy of belief." *Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1197 (10th Cir. 2008) (summary judgment for employer affirmed). Here, Petitioner's lawsuit

was dismissed because she did not have evidence that the reasons given for selecting Ms. Azeem were mere pretext unworthy of credence. "Although a plaintiff may rely on circumstantial evidence to show pretext, such evidence must be both specific and substantial." *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1062 (9th Cir. 2002) (summary judgment affirmed for employer). "[T]he employer has discretion to choose among equally qualified candidates [for employment], provided the decision is not based upon unlawful criteria." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

4. K12 and Omak had discretion to decide which candidate should be offered the teaching job.

Ms. Azeem was a qualified person for the teaching job. Omak and K12 simply chose one of two qualified applicants. A job applicant does not have a civil rights claim just because another job applicant was selected.

Employers are generally free to choose among qualified candidates in making employment decisions. *Bender v. Hecht's Dept. Stores*, 455 F.3d 612, 262 (6th Cir. 2006) (affirming summary judgment in favor of employer), *cert. denied* 550 U.S. 904 (2007). "The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with." *Hartsel v. Keys*, 87 F.3d 795, 801 (6th Cir. 1996) (affirming summary judgment in favor of employer), *cert. denied* 519 U.S. 1055 (1997).

Civil rights statutes are "not intended to diminish traditional management prerogatives." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981). (Internal punctuation omitted.) "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* Courts generally must "respect [an] employer's unfettered discretion to choose among qualified candidates." *Fischbach v. D. C. Dept. of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (reversing summary judgment in favor of employee) (Ginsburg, J.).

> Even if a court suspects that a job applicant "was victimized by [] poor selection procedures," it may not "second-guess an employer's personnel decision absent demonstrably discriminatory motive."

Id. at 189, *quoting Milton v. Weinberger*, 696 F.2d 94, 100 (D.C. Cir. 1982) (affirming summary judgment in favor of employer) (Edwards, J.).

The district court does not sit as a "super" human resources department to "second-guess the professional decision-making" of a school district. *McCullough v. Bd. of Educ. of Canton City Sch. Dist.*, 2017 WL 3283995, *10 (N.D. Ohio 2017). *See also Smigelski v. Conn. Dept. of Rev. Servs.*, 2019 WL 203116, *7 (D. Conn. 2019) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions."), *appeal filed* (2d Cir. Feb. 8, 2019).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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