No. 18-1148

IN THE

Supreme Court of the United States

KIMBERLY FRANETT-FERGUS, AN INDIVIDUAL,

Petitioner,

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; AND K12 WASHINGTON, LLC, A FOREIGN CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. RESTATMENT OF THE CASE

Petitioner offered three issues for the Court's consideration.

First, Petitioner contends that ethnically-diverse names may be circumstantial evidence that an employer regarded two job applicants as having different races or national origin. Lower courts should be empowered and guided about how to use this evidence in the context of discrimination cases. It applies importantly in the present case in that the employer designed the job requirements and uniform questions for the interview, then learned the names and saw resumes of the applicants, (ER144), and only afterwards raised the issue of wanting the applicant to teach two subjects without examining the ability of the other candidate to do the same.

A trier of fact may assume, when combined with other circumstantial evidence, the employer made assumptions about the race or national origin of the job applicants between those named Kimberly Franett-Fergus and Fareeha Azeem. Moreover, Ms. Azeem may be one of a kind at this employer. Her name and national origin could be seen as unlike her peer employees. (ER082-085) (naming employees and their national origins).

The issue of inferences drawn from ethnically-distinct names is fairly presented in this case, wrongly decided by the lower courts, an issue of national importance, and could be determinative of this case.

Second, Petitioner raised the issue that the circuit courts are split on whether so-called "reverse

discrimination" cases have an additional requirement. While the Ninth Circuit has repeatedly passed on this issue, it is fairly presented in the present case, is an issue of national importance, and could be determinative of this case. The circuit court's decision could be read as inventing a new legal distinction for so-called reverse discrimination cases by bringing back pretext-plus standard.

Third, Petitioner raised the issue of whether the court properly denied her a trial on the merits by determining the facts and reasonable inferences in favor of the moving party on summary judgment. The facts and arguments raised in the opposition brief go to the merits of the appeal, not to whether the Court should grant certiorari. However, the lower courts seemed to weigh and handle facts on summary judgment differently for this case.

The employer went against the collective bargaining agreement by rejecting seniority, *see* (ER094), and hiring outside the posted qualifications in the posting. *See* (ER095). The employer argues that in a two-person contest, scores of 27.5 and 30, ER096, are "statistically insignificant" so much that a court may not consider them or that the winning applicant got lower scores in the interview, fewer votes from the five-person committee, worse scoring references, and arguably did not meet the minimum job requirements or preferred requirements. One witness declared that in his years with Omak and WAVA and his over 100 hiring decisions and 500 interviews, he has never seen the majority vote of the committee overruled by the principal. (ER132, 135, 138). Petitioner remains confident in her position.

The employer's stated reasons for its decision changed over time. It argues that the Petitioner could not accept

authority. However, the single source to which Evans attributes this statement declared, "I cannot imagine that I would have said that about Ms. Fergus," and affirmatively went on to say he does think she can accept authority and told Evans he rated her a five out of five in all categories. (ER075). The employer's stated reason was contested, yet the lower courts resolved this dispute in favor of the employer on its motion for summary judgment.

II. REASONS TO ACCEPT THE PETITION

A. Diversity is important, and the country needs leadership on the issue.

Diversity in the workplace is valuable. The Court and other institutions are made stronger by it. The law provides an avenue for using race as a factor in hiring when narrowly tailored to support a compelling interest, and employers need the ability to discuss diversity in recruiting and inclusion. When channeled into the light of debate, future employers may satisfy the requirement of a compelling interest by science-based research proving that we need diversity to strengthen our institutions. Future employers may argue that initiatives lawfully promote workplace diversity. In this case, Respondents deny that diversity was a factor, and they do not raise any compelling interest to support using it as a factor.

Diversity is important, and discussing it should not be chilled, which is why using that word need not lead to an automatic result on summary judgment. Yet, the word cannot be a judicially-sanctioned code word for unlawful discrimination, especially if it contradicts the evidence presented and reasonable inferences made on summary judgment.

Lower courts and employers need the thoughtful leadership of the Supreme Court on how they may consider diversity and when it crosses the line into an inference of unlawful discrimination. It could be that decision makers, distrustful of the judicial system, lie about accurate judgments about qualifications. This case presents an opportunity for thoughtful, deliberate, reasoned discussion as to the concept of diversity in context of workplace anti-discrimination laws.

B. "Diversity," in this case, was a euphemism for unlawful discrimination.

The first words spoken about the candidates after the interviews were, "I believe we need more diversity at WAVA." (ER137). Ms. Hirschmann, who spoke, later testified that in education she looks for a "workforce that reflects the population," and that "diversity" means "in demographic terms, like male, female, race, or national origin." (ER057). When asked whether she might have made the statement about needing diversity, she said she believed we should make the workforce more diverse whenever we have the opportunity. (ER063). When asked about scoring Ms. Fergus 30 and Ms. Azeem 29 "do you know why you recommended Ms. Azeem" as her first choice, she answered, "No. I don't recall." (ER064). On summary judgment, the evidence points to unlawful discrimination.

Ms. Kris Hirschmann went on to testify that she does not "know any other diversity other than what I can see." (ER060). Yet, incredulously, she testified nothing she sees leads her to any useful information about diversity. She could see someone wearing a cross yet denied that she

could make any assumption as to whether that person holds themselves out to be a Christian. (ER060). A job applicant could wear religious headwear like a hijab or a yarmulke, and Hirschmann denied that it would give her information about that person's religion. (ER061). She also denies that darker skin offers information as to a person's national origin. (ER 061).

Faced with skepticism that would make René Descartes blush, Fergus opposed summary judgment by offering her opinion and a witness's, *see* (ER135), to describe the other applicant's apparent race, religion, and national origin. *See, e.g.,* (ER132). She also offered the employer's photo directory, (ER102-07), and names and races of employees. (ER082-85). Witnesses' opinions (opinions consistent with EEOC requirements to indicate race when the employee fails to provide an answer), photographs, and lists of names and national origins were introduced and not stricken, yet the lower courts *sua sponte* decide they are not evidence.

These methods of proof struck discord in the district court, which reverberated into the appellate panel. The issue is not whether the other job candidate is of one race, national origin, or religion. Anti-discrimination laws are more pragmatic than that. The issue is whether the circumstantial evidence tends to show that an employer—who embraces skepticism and denies actual knowledge—regarded the successful candidate as being of lawfully relevant categories different from Fergus and hired her because of those perceived differences.

In discussing the two job applicants, Ms. Evans went last and said, "I agree with Kris [Hirschmann] that there

should be more diversity at WAVA." (ER137). Something about the way she spoke made another committee member think Hirschmann and Evans had their own agenda. *Id*. Some refer to this as "dog whistle politics," in which coded language sounds to mean one thing to the general population and has a specific or different meaning for a targeted group. The analogy is to a dog whistle, whose ultrasonic sound is heard by dogs but inaudible to humans. Evans later denied knowing what Hirschmann meant by diversity, ER154, yet the district and appellate courts supplied a definition to make the entire discussion support the employer.

C. Circuit courts are split on background circumstances.

The circuit courts of appeal are split on whether an employment discrimination plaintiff in the majority of a protected category must demonstrate additional background circumstances as part of proving her *prima facie* case. The district court noted this split of authority and the absence of direction from the Ninth Circuit. (App. C at 22 n. 7). This issue has ripened and should be resolved by the High Court.

D. The lower court's requirement of pretext-plus should be rejected.

After an employment discrimination plaintiff first sets out her *prima facie* case and the employer states a legitimate, non-discriminatory reason for the decision, a court moves to the third step. In the third step of the framework, the plaintiff may defeat summary judgment by showing that the employer's stated reason was a pretext for unlawful discrimination.

The circuit court decision held at "this step, Fergus must point to evidence '*both* that the [proffered] reason[s] [were] false, *and* that discrimination was the real reason." (App. A at 6a) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). Commentators refer to this standard as pretext plus, because it requires the plaintiff to show the employer's stated reason was false and also show additional evidence.

This Court has implicitly rejected the doctrine of pretext plus. In *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003), the Court clarified the third step of the *McDonnell Douglas* framework. The plaintiff "can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." *Id.* at 50 n. 3 (citing *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000)). The citation to *Reeves* is important because that opinion could be read as distinguishing (or rejecting) the pretext-plus evidentiary scheme from *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

In *Reeves*, the Court found that the plaintiff made a "substantial showing" that the employer's explanation was false and, thus, a pretext for discrimination. *Reeves*, 530 U.S. at 144. A trier of fact can reasonably infer from the falsity of the explanation that the stated reasons cover up a discriminatory purpose, and a party's dishonesty is a material fact and evidence of guilt. *Id.* at 147. This analysis applies in only "appropriate circumstances" and not "always," as noted by the decision. *Id.* at 147-48.

The circuit court's reliance on *St. Mary's Honor* is in tension with other decisions from that circuit. *See*

Noyes v. Kelly Servs. 488 F.3d 1163, 1170 (9th Cir. 2007) (distinguishing *St. Mary's Honor*, 509 U.S. 502 (1993), applying *Reeves*, 530 U.S. at 154 (2000), and affirming options for proving pretext); *see also Viana v. FedEx Corp. Servs.,* 728 Fed. Appx. 642, 644-45 (9th Cir. 2018) (overturning summary judgment at pretext stage).

The circuit court decision in the case at bar could be read as limiting so-called reverse discrimination cases at the pretext phase by requiring a higher standard of proof than other plaintiffs. The circuit refused to accept the case *en banc* and clarify its reasoning, so the decision stands and may foster inconsistencies with this Court's decisions, decisions within the circuits, and decisions from plaintiffs of various protected classes.

III. CONCLUSION

The Court should grant this petition. Job applicant names, when combined with other evidence, may support an inference of unlawful discrimination. Diversity needs room for discussion without automatic liability, yet it cannot be a code word for unlawful discrimination. The lower courts, employers, and governments need the leadership of the Supreme Court to update guidance about how our institutions may be made stronger by diversity without unlawful discrimination.

DATED this 8th day of April, 2019.

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