NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDY LONG, Plaintiff-Appellant, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant-Appellee.	No. 18-16131 D.C. No. 3:16-cv-06279-JST MEMORANDUM* (Filed Mar. 19, 2019)

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Submitted March 12, 2019**

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

Judy Long appeals pro se from the district court's summary judgment in her employment action alleging race discrimination claims under Title VII and California's Fair Employment and Housing Act ("FEHA"). We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Toguchi v. Chung*, 391 F.3d 1051, 1056 (9th Cir. 2004). We affirm.

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court properly granted summary judgment because Long failed to raise a genuine dispute of material fact as to whether Alameda Unified School District's ("AUSD") legitimate, non-discriminatory reasons for its actions were pretextual. *See Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658- 59 (9th Cir. 2002) (discussing elements and burden-shifting framework of a discrimination claim under Title VII and explaining that evidence of pretext must be specific and substantial); *see also Metoyer v. Chassman*, 504 F.3d 919, 941 (9th Cir. 2007) ("California courts apply the Title VII framework to claims brought under FEHA"), *abrogated on other grounds by Nat'l Ass'n of African Am.-Owned Media v. Charter Commc'n, Inc.*, 915 F.3d 617 (9th Cir. 2019).

The district court did not abuse its discretion in excluding under the "sham affidavit rule" Long's evidence concerning an alleged phone call she received because this evidence contradicted Long's prior deposition testimony. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (standard of review); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998-99 (9th Cir. 2009) (explaining sham affidavit rule).

Long has waived her challenge to the district court's cost award because Long failed to move the district court to review the award. *See Walker v. California*, 200 F.3d 624, 626 (9th Cir. 1999) (explaining that "a party may demand judicial review of a cost award only if such party . . . moved the district court to review the award.").

We reject as without merit Long's contentions that the district court failed to consider her evidence.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009). We do not consider documents and facts not presented to the district court. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir. 1990) ("Documents or facts not presented to the district court are not part of the record on appeal.").

Long's requests that AUSD and Stanford University be required to "validate," "verify," or submit various information, set forth in her opening and reply briefs, are denied.

AUSD's motions to strike (Docket Entry Nos. 10 and 20) are denied as moot.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JUDY LONG, Plaintiff, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant.	Case No. 16-cv-06279-JST **ORDER GRANTING SUMMARY JUDGMENT** (Filed May 22, 2018) Re: ECF No. 51

Before the Court is Defendant Alameda Unified School District's (AUSD's) motion for summary judgment. The Court will grant the motion.

I. BACKGROUND[1]

In 2003, AUSD hired Plaintiff, Judy Long, as a substitute teacher. ECF No. 26, First Amended Complaint ("FAC") ¶ 12; ECF No. 51-1 at 9. In 2004, she received a teaching assignment to teach English as a second language ("ESL") at Alameda Adult School. ECF No. 51-1 at 9. In addition to ESL, Long taught computer classes between 2007 and 2009. *Id.* at 9-10.

In 2010, Alysse Castro became Principal of the Alameda Adult School. ECF NO. 51-2 at 2. In August 2012, Joy Chua was employed by AUSD as the Assistant Principal of Educational Options, which included the Alameda Adult School. ECF No. 51-3 at 1-2. Chua

[1] The following facts are not contested.

worked under Castro. *Id.* In or around August 2013, Chua became the Interim Principal of the Alameda County Adult School. *Id.* at 2.

Chua terminated Long's employment on December 20, 2013. *Id.* at 4. Long alleges that she was terminated because she is African-American. *See* FAC. Long brings two causes of action: (1) discrimination/disparate treatment – race, color, religion, sex or national origin under Title VII of the Civil Rights Act of 1964, and (2) discrimination on the basis of race in violation of California Government Code section 12940. FAC at 4, 8.

AUSD now moves for summary judgment.

II. LEGAL STANDARD

Summary judgment is proper when a "movant shows 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). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by" citing to depositions, documents, affidavits, or other materials. Fed. R. Civ. P. 56(c)(1)(A). A party also may show that such materials "do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(B). An issue is "genuine" only if there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). A fact is "material" if the

fact may affect the outcome of the case. *Id.* at 248. "In considering a motion for summary judgment, the court may not weigh the evidence or make credibility determinations, and is required to draw all inferences in a light most favorable to the non-moving party." *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997).

Where the party moving for summary judgment would bear the burden of proof at trial, that party bears the initial burden of producing evidence that would entitle it to a directed verdict if uncontroverted at trial. *See C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000). Where the party moving for summary judgment would not bear the burden of proof at trial, that party bears the initial burden of either producing evidence that negates an essential element of the non-moving party's claim, or showing that the non-moving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. If the moving party satisfies its initial burden of production, then the non-moving party must produce admissible evidence to show that a genuine issue of material fact exists. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000).

The non-moving party must "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.1996). Indeed, it is not the duty of the district court to [sic] "to scour the record in search of a genuine issue of triable fact." *Id.* "A mere scintilla of evidence will not be sufficient to defeat a properly supported

motion for summary judgment; rather, the nonmoving party must introduce some significant probative evidence tending to support the complaint." *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir.1997) (citation and internal quotation marks omitted). If the non-moving party fails to make this showing, the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

III. DISCUSSION

Long brings two causes of action: (1) discrimination/disparate treatment – race, color, religion, sex or national origin under Title VII of the Civil Rights Act of 1964, and (2) discrimination on the basis of race in violation of California Government Code section 12940. FAC at 4, 8.

The Court analyzes both claims under the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252, (1981); *Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 307 (2010). Long bears the initial burden of proving her prima facie case of racial discrimination, i.e., that: (1) she belongs to a protected class; (2) she performed her job duties satisfactorily; (3) she was subjected to an adverse employment action; and (4) similarly situated non-African-American individuals were treated more favorably than she was. *McDonnell Douglas Corp. v. Green*, 411 U.S. 802 (1973); *see also Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006).

Once Long establishes a prima facie case, the burden of production shifts to her employer to articulate a "'legitimate, nondiscriminatory reason for the challenged action.'" *E.E.O. C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir.2009) (quoting *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1123–24 (9th Cir.2000)). If AUSD articulates a legitimate nondiscriminatory reason, "then 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." *Cornwell*, 439 F.3d at 1028 (internal quotation marks and citations omitted).

The threshold for establishing a prima facie case is "minimal." *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 659 (9th Cir.2002). Even assuming, *arguendo*, that Long establishes a prima facie case, AUSD articulates a legitimate, nondiscriminatory reason for its actions. AUSD contends that Long was terminated because her teaching was inadequate. ECF No. 51 at 6.

To support this contention, AUSD cites to emails from Chua to Long about her classroom observations. *See* ECF No. 51-1 at 55, 58. Chua sent Long an email on December 5, 2013 where she described a preconference, observation, and post observation conference. ECF No. 51-1 at 55. Chua stated that she had spoken with Long about her desire to see students working in pairs and group discussion before the observation. Chua stated that she observed her lesson on November 5, 2013. *Id.* She was concerned that she did not see students working in pairs, that Long was located in the

back of the room[2], and that there was not a language skills focus in writing and listening activities. *Id.* Chua noted that she had already spoken with Long about what she would look for in her next observation. *Id.* As a reminder, Chua provided Long with a list of specific things she would be looking for in her next observation and provided her the date of that evaluation. *Id.*

Chua also sent Long an email after the December 12, 2013 classroom observation. *Id.* at 58. Chua repeated her expectations and described her observations. *Id.* Chua listed several reasons that Long's teaching was not adequate for the school including that "[n]o language objective was explicitly taught during the class," there "was no learning objective for the lessons," and "[s]tudents were not asked to answer in full sentences during the discussion." *Id.*

AUSD also notes that Alysse Castro, the former Principal of Island High School, received a letter from Long's students in October 2012. ECF No. 51-2 at 2. The letter stated:

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[2] Long argues that she was unfairly criticized for being in the back of the room during an observation. ECF No. 53 at 10-11. She contends that Chua was unfamiliar with the school's seating arrangements and that the desks are arranged in large pods with little focus on the front of the classroom. *Id.* Although a Title VII plaintiff may show pretext by putting into question whether the employer honestly believed its purported justification for termination, "it is not important whether [the employer's reasons] were *objectively* false." *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (emphasis in original). Long offers no evidence that Chua did not believe the reasons she gave for Long's termination.

> [W]e feel unhappy right now *it has been five weeks* and we are not learning any new material. . . . [¶] Last year we learned all of this we need a higher level of English when we ask you for more or ask questions about the lesson, it seems like you are angry with us. [¶] Last year we finished *simple present tense, present continuous tense* and much more. We need more practice with all of this but not at this low level. [¶] And please don't take too many days with the same lesson because you give us the worksheets and *we take 2 or 3 days on the same paper*.

ECF No. 53 at 33 (emphasis in original). Castro was concerned about this letter and conducted classroom observations where she observed "many missed opportunities for language development" and observed Long wearing headphones in class. ECF No. 51-2 at 3. Castro met with Long to discuss her findings and recommendations. ECF No. 53 at 57. Her identified concerns included Long "wearing headphones and listening to music during instructional time" and "speaking in a harsh or critical tone to students," "lessons providing inadequate opportunities for student verbal participation," and "lessons providing inadequate visual support for students." *Id.* During the meeting, Long appeared committed to improving her instruction. ECF No. 51-2 at 3.

However, Castro "did not see a marked improvement in Plaintiff's performance over the remainder of the school year" and her performance continued to concern Castro. *Id.* Castro left the school at the end of the

2012-2013 school year. *Id.* She wanted to give her replacement the freedom to make her own staffing decisions so she did not dismiss any teachers at the end of that year. *Id.* Castro did discuss staff performance issues with Chua, including the issues Castro had observed with Long. *Id.*

AUSD has provided sufficient evidence to satisfy its burden to articulate a legitimate, nondiscriminatory reason for Long's dismissal. Thus, in order to survive summary judgment, Long must provide "direct or circumstantial evidence that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable." *Anthoine v. N. Cent. Ctys. Consortium*, 605 F.3d 740, 753 (9th Cir. 2010) (internal quotation marks and citations omitted). Long may provide a combination of the two kinds of evidence. *See id.* The Ninth Circuit requires "very little" direct evidence of discrimination to survive summary judgment. *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009) (internal citations omitted). However, when plaintiffs rely "on circumstantial evidence, that evidence must be specific and substantial." *Id.* (internal quotation marks and citation omitted); *see also Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998).[3]

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[3] "As noted in *Stegall*, the Supreme Court's decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), undermines *Godwin* to the extent that it implies that direct evidence is more probative than circumstantial evidence, but upholds *Godwin* to the extent that a plaintiff still needs to proffer

Although Long does not specifically argue pretext in her opposition papers, the Court will consider whether the evidence she raises in her opposition is sufficient to survive summary judgment.[4] First, Long contends that because "Chua harbored racial animus she plotted to destroy Ms. Long as an ESL teacher." ECF No. 53 at 12. Long argues that she was not an inadequate teacher and that Chua "coordinated and orchestrated complaints made by two groups of students." *Id.* at 14. Beyond Long's unsubstantiated allegation, there is no evidence that Chua coordinated or prompted the student complaints about Long. In fact, former principal Alysse Castro submitted a declaration that she received a letter from students in October 2012, ECF No. 51-2 at 2, and Long does not accuse Castro of coercion or discrimination, ECF No. 51-1 at 41. Long contends that Chua "masterminded" the letter while she was assistant principal but rests this

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specific and substantial evidence of pretext to overcome the summary judgment motion." *Njenga v. San Mateo Cty. Superintendent of Sch.*, No. C-08-04019 EDL, 2010 WL 1261493, at *20 n.5 (N.D. Cal. Mar. 30, 2010) (citing *Stegall*, 350 F.3d 1061, 1066 (9th Cir. 2003). *See also Cornwell*, 439 F.3d at 1031 ("Although there may be some tension . . . on this point – several of our cases decided after *Costa* repeat the *Godwin* requirement that a plaintiff's circumstantial evidence of pretext must be 'specific' and 'substantial' ").

[4] Long submitted her opposition to motion for summary judgment as a pro se plaintiff. She filed a notice substituting Albert L. Boasberg, Esq. as counsel on April 18, 2018, four weeks after she submitted her opposition. ECF No. 55. The Court approved this substitution of counsel on the same day. ECF No. 56. Mr. Boasberg appeared at the hearing to argue on behalf of Ms. Long. He did not ask the Court for any additional time or briefing.

assertion entirely on speculation. ECF No. 53 at 9. Similarly, Long speculates that Chua "gave explicit instructions to Ms. Gonzalves on what to say" in an email summarizing "the feedback from Student Ambassadors," but provides no evidence of such an instruction. *Id.* at 11. Long does contend that "[i]n the field of ESL teaching, it is industry known students do not file grievances against teachers." ECF No. 53 at 2. And she submits a letter[5] from attorney Marc Santamaria that notes that he has "never seen, had experiences with, or heard of ESL students filing complaints to school authorities or staff." *Id.* at 38. However, former principal Castro also noted in her declaration that it is rare for adult ESL students to directly criticize an instructor and that the letter concerned her deeply. ECF No. 51-2 at 2. Thus, the fact that adult ESL students rarely make complaints against teachers, if true, actually supports AUSD's legitimate non-discriminatory reason for terminating Long's employment. Santamaria also opines that there are words in the letter "that indicates someone influence [sic] the students in writing the letter." ECF No. 53 at 38. Santamaria has no basis in fact from which to speculate about how the letter was drafted, and his assertions are speculative.

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[5] AUSD argues that Marc Santamaria's letter does not qualify as expert testimony because (1) Long failed to ever disclose Santamaria as an expert witness, (2) Santamaria does not qualify as an expert, and (3) the proposed expert testimony fails to satisfy the *Daubert* standard for admissibility. ECF No. 54 at 13-16. Because Long fails to meet her evidentiary burden even if the Court considers Santamaria's letter, the Court need not address these objections.

Next, Long argues that Chua used "inaccurate observations" to "invalidate and dismiss Ms. Long." ECF No. 53 at 9. Long notes that she had taken on teaching a new level and was only given six days to make changes before she was dismissed. ECF No. 53 at 5. However, she does not dispute the evidence provided by AUSD that there were legitimate concerns about her teaching prior to December 2013. *See* ECF Nos. 51-1 at 54-59; 51-2. Long also contends that other teachers taking on new ESL levels were given support and that only she was criticized and ultimately fired. ECF No. 53 at 10. "A showing that [AUSD] treated similarly situated employees outside [Long's] protected class more favorably would be probative of pretext." *See Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003), *as amended* (Jan. 2, 2004). However, Long has not shown that these other employees were similarly situated. "[I]n general, we have upheld inferences of discriminatory motive based on comparative data involving a small number of employees when the plaintiff establishes that he or she is 'similarly situated to those employees *in all material respects*.'" *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 885 (9th Cir.2007) (emphasis added) (quoting *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir.2006)). Long has not provided evidence that the other employees in question were sufficiently similarly situated. For example, she has provided no evidence that the other teachers she identifies had engaged in similarly problematic conduct. *See, e.g.*, *Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2004) (employee not similarly situated where he "did not engage in problematic conduct

of comparable seriousness to that of [plaintiff]"); *Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 663 (9th Cir. 2002) (evidence that three of four employees laid off were white did not "account for possible nondiscriminatory variables, such as job performance"). In fact, on the question of discipline, the evidence Long provides weighs against a finding of substantial similarity. That evidence shows that three Adult School teachers were disciplined – two of whom, including Long, were African-American, and one of whom was white. The other two teachers "improved and met performance requirements," while Long "failed to meet performance requirements [and was] terminated." ECF No. 53 at 78.

Long also argues that AUSD's proffered explanation is unworthy of credence because she was a successful ESL teacher. ECF No. 53 at 15-16. She notes that students did work in groups during her latest observation and that her students were successful on exams. *Id.* She also provides recommendations from prior employers and evaluations from former Distract [sic] administers [sic] dated in 2004 and 2011.[6] ECF No. 53 and 41-48. Past observations do not contradict AUSD's evidence about Long's employment at Alameda Adult School around the time of termination. *See Chew v. City & Cty. of San Francisco*, No. 13-CV-05286-MEJ, 2016 WL 631924, at * 13 (N.D. Cal. Feb. 17, 2016), *aff'd*,

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[6] AUSD argues that the Court should not consider Long's exhibits because she failed to authenticate them. ECF No. 54 at 12. The Court will not rule on this objection because Long has not met her burden even when the exhibits are considered.

714 F. App'x 687 (9th Cir. 2017) (noting that declarations from some subordinates stating that plaintiff was a good supervisor did not contradict other evidence of plaintiff's deficiencies). Long's subjective beliefs about her own teaching adequacy also cannot create a genuine issue of material fact. *See Cornwell*, 439 F.3d at 1028 n.6 ("A plaintiff may not defeat a defendant's motion for summary judgment merely by denying the credibility of the defendant's proffered reason for the challenged employment action.") Long also submits materials used in her ESL lessons and the letter from Santamaria stating that her materials match standard student learning objectives.[7] ECF No. 53 at 37. However, this argument is irrelevant as AUSD does not claim to have terminated Long for using improper materials.

Long also argues that she has evidence of racial discrimination based on her allegation that Chua called her on December 20, 2013 to make a racially disparaging remark. ECF No. 53 at 17. Specifically, Long alleges that on that date, Chua called her without identifying herself and said, "Black nigger." Long acknowledges that the telephone call did not come from Chua's telephone number, but argues that the telephone call came from the same Southern California area code as Chua's telephone number. ECF No. 53 at 17. Long also states that she recognized Chua's voice.

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[7] AUSD argues that Long failed to authenticate her exhibits, including the materials, and that Marc Sanatamaria should not qualify as an expert. ECF No. 54 at 12-16. As discussed above, the Court will not rule on these objections.

Long made this allegation for the first time in her brief opposing summary judgment. Notably, Long was asked three separate times during her deposition whether she had any reason to believe that Chua had terminated her based on her race. ECF No. 51-1 (Long Depo.) at 112:1-2; 114:25-115:10; 116:16. In response, Long identified Chua's purported lack of a valid reason for termination; Chua's treatment of other African-American employees; and Chua's treatment of other, non-African-American ESL teachers. But she did not identify Chua's phone call.

The Court concludes that Long's allegation about Chua's alleged phone call must be stricken pursuant to the sham affidavit rule. The Ninth Circuit has explained the rule as follows:

> "'The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.'" *Van Asdale* [*v. Int'l Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009)] (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991)). This sham affidavit rule prevents "a party who has been examined at length on deposition" from "rais[ing] an issue of fact simply by submitting an affidavit contradicting his own prior testimony," which "would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Kennedy*, 952 F.2d at 266 (internal quotation marks omitted); *see also Van Asdale*, 577 F.3d at 998 (stating that some form of the sham affidavit rule is

> necessary to maintain the principle that summary judgment is an integral part of the federal rules). But the sham affidavit rule " 'should be applied with caution' " because it is in tension with the principle that the court is not to make credibility determinations when granting or denying summary judgment. *Id.* (quoting *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1264 (9th Cir.1993)). In order to trigger the sham affidavit rule, the district court must make a factual determination that the contradiction is a sham, and the "inconsistency between a party's deposition testimony and subsequent affidavit must be clear and unambiguous to justify striking the affidavit." *Id.* at 998–99.

Yeager v. Bowlin, 693 F.3d 1076, 1080 (9th Cir. 2012). In applying this rule, "a district court may find a declaration to be a sham when it contains facts that the affiant previously testified he could not remember." *Id.* However, "newly-remembered facts, or new facts, accompanied by a reasonable explanation, should not ordinarily lead to the striking of a declaration as a sham." *Id.* Given the extreme nature of the epithet in Chua's alleged phone call to Long, the Court must regard the absence of any mention in her deposition as a contradiction. Long provides no explanation for this contradiction in her brief, however. At the hearing on this motion, the Court asked Long's attorney whether Long had any explanation for this contradiction, and he offered none. Accordingly, the Court will not consider this evidence.

Finally, Long argues that another black employee, Rachel Williams, was not re-hired. ECF No. 53 at 21-22. However, the record does not establish that Chua or any other AUSD employee acted with racial animus towards Williams. *See Anthoine*, 605 F.3d at 753-54 ("Evidence that an employer terminated all three of its male employees on the same day could show gender-based animus. In this case, however, [plaintiff] has not offered any specific evidence about the circumstances in which the other men were terminated.)

CONCLUSION

Long has not met her burden of offering "direct or circumstantial evidence that a discriminatory reason more likely motivated the employer, or that the employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable." *Anthoine*, 605 F.3d at 753. There is no triable issue of fact as to the ultimate issue of race-based discrimination. Defendant's motion for summary judgment is granted.

IT IS SO ORDERED.

Dated: May 22, 2018

/s/ Jon S. Tigar
JON S. TIGAR
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUDY LONG, Plaintiff-Appellant, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant-Appellee.	No. 18-16131 D.C. No. 3:16-cv-06279-JST Northern District of California, San Francisco ORDER (Filed May 24, 2019)

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

Long's petition for panel rehearing (Docket Entry No. 23) is denied.

No further filings will be entertained in this closed case.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE JON S. TIGAR

JUDY LONG, Plaintiff, vs. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant.	No. C 16-6279 JST San Francisco, California Thursday May 3, 2018 2:00 p.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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BY: JIMMIE EMILE JOHNSON, ESQ.

Also Present: **JUDY LONG**

Reported By: ***Debra L. Pas, CSR 11916, CRR, RMR, RPR***
Official Reporter -- US District Court
Computerized Transcription By Eclipse

[2] **Thursday -- May 3, 2018** **2:06 p.m.**

PROCEEDINGS

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THE CLERK: Calling Civil Case 16-6279, Judy Long versus Alameda Unified School District.

Counsel, will you please approach and make your appearances.

MR. JOHNSON: Good morning, your Honor. Jimmie Johnson on behalf of defendant.

MR. BOASBERG: Good morning, Your Honor. Albert Boasberg on behalf of plaintiff.

THE COURT: Welcome. I think Ms. Long is here, too.

Welcome.

MR. BOASBERG: Yes.

THE COURT: The matter is on calendar for defendant's summary judgment motion. I always read all the briefs. I did that here, too.

I also read every page attached to the plaintiff's opposition and most of the deposition testimony that was submitted by the defendant. So I'm represented to proceed this afternoon.

Let me get a couple things out of the way. First, there doesn't need to be any discussion of whether Mr. Santamaria's letter is admissible because of an alleged failure to disclose under Rule 26. There was a failure

to disclose under Rule 26, [3] but exclusion is a remedy of last resort under Rule 37. And the defendant took Mr. Santamaria's deposition in February 2018. So I don't think I would be able to find the degree of prejudice that is necessary to trigger the Rule 37 exclusion rule.

It doesn't mean that Mr. Santamaria's opinion succeeds on the merits, but it does mean that I'm not going to exclude it because of failure to disclose.

The parties should discuss whatever they want this afternoon. We've intentionally not left other matters on calendar to give you all a little more time at the podium, but the parties might want to focus on the following things.

First, there is a lot of discussion in the record about whether the plaintiff felt that she was meeting good professional standards for ESL teaching, but I don't think that's the standard. I think the standard under Ninth Circuit law is whether the defendant honestly believed in its reasonable basis for termination.

A lack of performance is a reasonable basis, so the question is: Did the defendant have an honest belief that there was this underperformance?

There is a collateral question about what the right metrics are. I wasn't able to find any in circuit authority on whether the employee has to show that she satisfied the employer's metrics as opposed to some other metric, like [4] Mr. Santamaria's reference, sort of, to a kind of community standard.

The defendant cites a Fourth Circuit case for that proposition. It has been adopted by a couple District Courts in the circuit. I can't find any authority that goes the other way. That seems reasonable to me.

And then I think there's a big issue about whether the Court should invoke the Sham Affidavit Rule in this case. The defendant doesn't cite it, but it turns out there is authority in the Ninth Circuit for the proposition that if the plaintiff witness forgets things, is not able to recall things at deposition and then testifies to those things in declaration in opposition to the summary judgment, the Court can disregard the declaration under the Sham Affidavit Rule. But it's not to be done lightly.

The Sham Affidavit Rule should be applied with caution because its intentioned with the principle that the Court is not to make credibility determinations when granting or denying summary judgment. So the Court can only invoke that rule if the Court makes a factual determination that the contradiction is, in fact, a sham. And the Court also has to find that the inconsistency between a party's deposition testimony and the subsequent affidavit is clear and unambiguous so as to justify striking the affidavit.

I'm relying principally on a Ninth Circuit case called [5] *Yaeger versus Bowlin*, 693 F.3d 1076 at Pages 1080 to 1081. The case is still good law and it's been cited approvingly in a subsequent memorandum disposition more recently.

But I'm sure you have many other issues that you also wanted to discuss. Mr. Johnson, you're the moving party. You can go first.

MR. JOHNSON: Yes, your Honor.

In regards to the three issues that you just brought up, is there any order in which you would like the defendants to respond to those?

THE COURT: No.

MR. JOHNSON: Just taking them in reverse order, just because it's most clear in my memory.

The Sham Affidavit Rule, first, in and of itself requires a sworn declaration, which there is none in this matter. There is not a single declaration presented to this Court, one, to authenticate any of the documents submitted in opposition; nor, two, any of the outlandish statements that the plaintiff wishes to present.

So first of all, there is no sworn testimony to begin with. So the Sham Affidavit Rule doesn't even exist because there is no testimony for which -- to support the allegation.

Secondly, in terms of the Sham Affidavit Rule, there is in the -- when we get to the pretext part of the McDonnell Douglas test, there has to be substantial evidence. Let's just take it [6] for face value of its truth of what plaintiff has alleged in her opposition.

She claims that she received a call from a 310 telephone number -- not the 310 telephone number of the principal, but just a random 310 telephone number of

someone she doesn't know -- who allegedly said, I believe the term was "black nigger" and then apparently hung up. And she only thinks that it sounded like Ms. Chua.

So we have --

THE COURT: She said she recognized the voice. That's a little stronger than "sounded like."

MR. JOHNSON: Okay.

THE COURT: So let me ask you a few questions.

MR. JOHNSON: Sure.

THE COURT: Do you disagree that under the Evidence Code that if somebody -- that if a witness testifies that he or she recognizes another person's voice and they have an adequate basis and experience from which they could recognize that voice, that the testimony is otherwise admissible?

MR. JOHNSON: It's possible, but I don't believe the foundation has been set in this matter.

THE COURT: You don't think there is a sufficient basis of experience on Ms. Long's part?

MR. JOHNSON: No. As Ms. Long suggests, she was only there for three months, had maybe two or three conversations [7] with her. And then all of a sudden a person picks up the phone, says "black nigger" and hangs up. At least that's the way I read the assertion set forth in the opposition.

So I don't believe that she's set the foundation to set forth that, yes, she could -- she had the necessary background to definitively determine that this was absolutely Ms. Chua.

THE COURT: Let me tell you where I'm coming from on this. Because I think you have some winning arguments to make today, but this is definitely not one of them.

MR. JOHNSON: Okay.

THE COURT: We're at summary judgment. All ties go to the house. Every reasonable inference is to be drawn in the plaintiff's favor.

So I would have to conclude that basically no reasonable trial judge would allow her to testify that she recognized Ms. Chua's voice, even though this is her principal at this school. That's a tough argument for you to make.

MR. JOHNSON: Fair enough, Your Honor. I --

THE COURT: Wait.

MR. JOHNSON: Okay.

THE COURT: It may not seem like it, but I'm trying to help you.

MR. JOHNSON: Okay.

THE COURT: Because I'm trying to focus our time on the things that are productive.

[8] So I think actually she is allowed to testify to that, putting the Sham Affidavit issue to one side. She recognized the voice.

In a race discrimination case at the summary judgment stage if at the time of termination the supervising employee who made the termination decision calls the plaintiff and says "black n word," that is at least some evidence, unambiguous evidence, of racial animus. That's a tough phone call.

But you can say it's insubstantial and you can believe it didn't happen, but believing that it didn't happen, given the credibility -- given the Court's inability to make credibility calls or believing that it's not substantial evidence probably are not going to be your strongest arguments.

MR. JOHNSON: Moving on then.

So I would then fall back to the point there still isn't any testimony, verified under oath testimony, to that degree. It's just an assertion made in an opposition briefing.

And, secondly, as part of the Sham Affidavit Rule, it is for the Court to decide. Is this something that someone would likely forget in testimony?

As set forth in the documentation presented to the Court, I specifically asked her: Is there anything that you believe -- any reason you believe that this was racially motivated? She gave an answer.

And I believe the document will show you I followed up: [9] Okay, is there anything else? And she said: No, nothing I can think of.

So she's going to now say: I couldn't remember somebody calling me up on random on the day of her termination, said "black nigger" and hung up the phone? And I completely forgot that? I don't believe that that satisfies the Sham Affidavit bar.

THE COURT: That argument is stronger.

MR. JOHNSON: In terms of the correct standard in regards to whether plaintiff met standards or whether the employee had to meet the -- had to meet the legitimate expectations of the employer, I think the answer is obvious. Because we have to remember, this is a question of racial discrimination; right? Did somebody have a racial bias towards this person?

So the question is: Are you meeting my expectations? Right? "Yes" or "no"? Are those expectations based on bias or not?

It's not: Hey, if you -- if you were doing a great job but you didn't meet my expectations, that's not illegal. But if you were meeting my expectations but I still fired you because of race, that's not legal. That's violative of the Title VII.

So in terms of whether the standard is meet expectations or simply plaintiff was doing a good job, I think just based on [10] what we're talking about, what Title VII is talking about, what the -- what the California equivalent of Title VII is talking about, it seems

clear that it should be a meets expectations. Because if someone is meeting the expectations of plaintiff -- whether they are meeting an objective standard or not, but whether they are meeting the subjective expectations of the plaintiff goes towards whether racial bias was a key or not in the termination decision.

I believe, Your Honor -- and I could be wrong. I believe I've touched upon the points that you have asked for and if -- I would be more than happy to answer any additional questions or if you have any clarification, but if that is it, the defendant rests on the papers.

THE COURT: All right. Thanks.

Mr. Boasberg.

MR. BOASBERG: Thank you, your Honor.

First of all, thank you for allowing me to represent the plaintiff in this case. I've come in late in the day, to say the least.

I found Ms. Long's opposition to be very articulate, which would be an admirable quality for any teacher to have. I think there is an issue as to whether or not there were lesser steps than terminating Ms. Long that the school district could have taken.

Why did they just absolutely fire her? I mean, we're [11] dealing in a question of circumstances. There is no direct evidence, there never is, of discrimination. It has to be a circumstantial proof.

And I think the issue that leaps out at anyone in this case is: Is there an objective standard for judging a teacher's performance?

The defense has not suggested any. Dr. Santamaria, for all of his failings, did suggest some elements of an objective standard by which she should be judged.

Looking over the defense papers, what standard did the school district use when they called Mrs. Long's performance to be inadequate? There are statements from her students in the record. What standard did the students use to judge her expertise and are they experts on determining the adequacy of a teacher's performance? After all, Ms. Long also has statements from her students that say she was a good teacher.

I believe that Mrs. -- Ms. Long's expert, Dr. Santamaria, does raise issues of fact as to her competency.

Ms. Chua observed the plaintiff for only six days, which is hardly a reasonable objective opportunity for her to make a judgment. I mean, a judgment involving her professional life, Ms. Long's professional life.

And it must be remembered that Ms. Long's students did well on tests, which I think is also an index or at least an indicia of her performance and her ability as a student [sic].

[12] It seems that there is circumstantial evidence here that would impel a finding, at least in a jury, to -- for -- to finding a discrimination as the real reason for Ms. Long's termination.

And the Court must remember that in Ms. Long's opposition, Ms. Chua herself was criticized on an evaluation for not allowing teachers more liberties in testing and allowing her teachers to use new methods.

As the Court indicated, it's not the Court's function at this point to resolve issues of fact, but just to decide whether such facts exist warranting a trial on the merits. And we submit that there is sufficient evidence to defeat a Motion for Summary Judgment.

THE COURT: Thank you, Mr. Boasberg.

MR. BOASBERG: Thank you.

MR. JOHNSON: Thirty seconds, Your Honor?

THE COURT: Sure.

MR. JOHNSON: Just -- you said, well, could they have done anything else? That's not a standard under Title VII.

And, well, we should look at objective standards. Well, let's look at objective standards. All right. Let's say she met all the objective standards, and let's say Ms. Chua made a mistake and just had different standards, but it was only because of different standards that she terminated her. It doesn't mean it was because of race bias or age bias or [13] anything else.

Making a mistake -- and there is case law saying it. Making a mistake is not a violation of Title VII. Terminating someone because of racial bias --

THE COURT: Could I ask you to slow down just a tad? We have all the time we need.

MR. JOHNSON: Terminating someone because of racial bias is a violation of Title VII. And as we set forth in the papers, there is zero evidence before the Court suggesting that.

I submit.

THE COURT: Mr. Boasberg, you can have the last word if you want it.

MR. BOASBERG: Submitted, your Honor.

THE COURT: All right. Thank you, folks. Motion under submission.

(Proceedings adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Debra L. Pas

Debra L. Pas, CSR 11916. CRR, RMR, RPR

Thursday, July 26, 2018

EXHIBIT 7

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ALAMEDA UNIFIED SCHOOL DISTRICT

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUDY LONG, Plaintiff, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant.	**Case No. 3:16-cv-06279-JST** **DECLARATION OF JOY L. CHUA IN SUPPORT OF DEFENDANT ALAMEDA UNIFIED SCHOOL DISTRICT'S MOTION FOR SUMMARY JUDGMENT; OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT** DATE: April 19, 2018 TIME: 2:00 pm PLACE: Crtrm. 9 Trial Date: None Set

I, JOY L. CHUA, declare:

1. I have personal knowledge of the facts stated in this declaration and, if called as a witness, I can testify competently with respect thereto.

2. I am a school administrator with approximately five years of experience as site leader in California schools. I am currently employed by the Alameda Unified School District ("District") as its Principal for the Alameda Adult School ("Adult School"). I also have approximately 8 years of teaching experience.

3. In August 2012, I was employed by the District as the Assistant Principal of

* * *

providing one-word answers to her verbal questions, I was dissatisfied with the pace of instruction, breadth of matters taught, and manner in which Plaintiff taught the class. Later that same day, I discussed with Plaintiff my observations and dissatisfaction with her performance. I advised that I would soon conduct another observation of her class, and provided a number of improvements I wanted to see.

9. On or about December 5, 2013, I received a "student ambassador" report from the ESL coordinator, Lisa Gonzalves, regarding Plaintiff's class. "Student ambassadors" go to classes and talk with students outside the presence of teachers, and provide the coordinator with feedback from those discussions. A true and correct copy of that report is attached to this declaration as Exhibit B. My impression after reading the

report was that the students were still dissatisfied with the pace of instruction and breadth of matters taught.

10. That same day, on December 5, 2013, I sent Plaintiff an email. The email recapped of [sic] our previous conversation concerning the November 21 observation, advised that I would observe her class again on December 11, 2013, and listed the improvements I wanted to see during that second observation. Attached hereto as Exhibit C is a true and correct copy of that email.

11. On December 11, 2013, I again observed Plaintiff's class from 6:43 p.m. to 7:31 p.m. During the class, I observed Plaintiff calling on students to answer the question: "Are your goals similar to Jose?" for approximately ten minutes. For the rest of the class, Plaintiff had the students work in groups to write two to three sentences describing each picture for a total of six pictures. Finally, Plaintiff then had only three students read their sentences out loud. Again, I was dissatisfied with the pace of instruction, breadth of matters taught, and manner in which Plaintiff taught the class. The next day, December 12, 2013, I had a meeting with Plaintiff, during which I advised that her teaching was inadequate for several reasons.

12. On December 17, 2013, I had another meeting with Plaintiff. During this meeting, I advised that her employment would end on December 20 because of the

* * *

Student ambassador's visit to Judy's Intermediate Low Class - Weds Dec. 4

* This visit was conducted only in English

1. When asked if they knew how many levels of ESL were present on campus, all but 2 knew there were 6 levels.

2. When asked if they knew what level they were in, they all knew!

3. When asked how much they practice English outside of class 75% said they practice at work or with their kids. Only 1 student said the only practice she got was in class. The ambassadors offered them suggestions on how to study on their own.

4. When asked if they had any suggestions for their class, the students said the following:

- Students stated that they wanted more work, more rigor in their classes, that the pace is a little too slow. They would like to cover a wider variety of topics/content during each class period.
- Students stated they would like the [sic] practice their English speaking more in class. Specifically, they don't want to be paired with same-language classmates, rather, they want to be paired with someone who doesn't speak their language so they are forced to practice their English. They mentioned that recently they had a sub who scolded them every time they spoke their native language in class, and they liked the strictness!

- It seemed to be implied that they wanted more dynamic, communicative activities, things that involved more standing up, moving around, conversing with a variety of classmates.

The students made no mention of facilities.

5. When asked if they had any questions about their school, some students had questions about the GED program, and others wanted to know what the protocol is for advancing to the next level. The ambassadors gave them the necessary information.

The ambassadors stated that only 1 or 2 of the students remained quiet during the visit, while the rest participated and shared their thoughts.

Thanks Judy!

EXHIBIT 24

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUDY LONG, Plaintiff, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant.	Case No.: 16-CV-06279 JST (MEJ) **DECLARATION OF ALYSSE CASTRO**

I, ALYSSE CASTRO, declare under penalty of perjury as follows:

1. I am a school administrator with 12 years' experience as a site leader in California schools. I am currently employed by the San Francisco Unified School District as its Executive Director of Alternative High Schools.

2. From August 2004 through June 2012, I was employed by the Alameda Unified School District as the Principal of Island High School, and other alternative program. I became the principal of Adult School in 2010. Adult School provided English as a Second Language (ESL), Family Literacy, and GED/High School Diploma classes to student's over 18 years of age. Island High School was a continuation school which provided an alternate pathway to high school graduation for students who were overage [sic] and undercredited.

3. Plaintiff Judy Long was employed as an at-will ESL teacher during the entirety of my time as Principal of Adult School. During that time, I had primary responsibility for evaluating Plaintiff's job performance and conduct. During a portion of my time at Adult School, Joy Chua served as my Vice Principal.

4. During the 2010-11 school year, I made brief informal visits to the classrooms of all ongoing Adult School teachers. In the limited observations I did make, I noted that Plaintiff had established a good personal rapport with her students. I also found Plaintiff to be collegial with me and other Adult School staff.

5. In October 2012, I received a copy of a letter addressed to Plaintiff that had been signed by fourteen students in Plaintiff's ESL class. I was not involved in the creation of the letter in any way. The letter noted that students "were not learning any new material" in Plaintiff's class and instead were relearning material covered the previous year. The students also noted that "it seems like [Plaintiff] is angry" when students ask for more rigorous instruction.

6. The letter concerned me deeply. The students who brought it to me appeared deeply embarrassed about raising a concern. In my professional experience, it is very rare for adult ESL students to directly criticize an instructor. I told the students I would visit the classroom several times over the coming weeks in order to more closely observe instruction and support the teacher to better address student needs.

7. I conducted an observation on November 1, 2012. I noted that Plaintiff was doing a majority of the talking during class, calling on students only to speak or read a single word. Plaintiff was giving instructions orally, which students were not always understanding.

8. The classroom was marked by many missed opportunities for language development. Satisfactory adult ESL instruction engages all students in speaking and reading practice and deliberately boosts students' confidence and comfort with taking linguistic risks. Plaintiff's failure to provide comfortable opportunities to generate language was holding back their language development.

9. Following my observation, I discussed my findings and recommendations with Plaintiff. She appeared to accept my findings and indicated a willingness to improve.

10. I observed Plaintiff's class again on November 14, 2012. When I entered the classroom after the start of class, Plaintiff was wearing headphones. Music from the headphones was audible to the class. In my opinion, failing to engage linguistically with ESL students during class time is conduct unbecoming of a professional.

11. After the observation, I discussed my findings and recommendations with Plaintiff. She appeared to understand why I was concerned about the headphones incident, and committed to improving her instruction.

12. I did not see a marked improvement in Plaintiff's performance over the remainder of the school year.

I observed no further unprofessional conduct rising to the level of the headphones incident, but Plaintiff's instruction continued to concern me.

13. I left Adult School at the end of the 2011-12 school year. Because I was leaving the school and wanted to give my replacement, Joy Chua, the freedom to make her own staffing decisions, I did not dismiss any teachers at the end of that year. However, I did discuss staff performance issues with Joy before she took over. These included the issues I had observed with Plaintiff.

14. During Joy's time as Vice Principal, I gained confidence in her judgment as an administrator. Her values are solid, and include a deep commitment to social justice. I saw nothing that would lead me to believe that she would judge an employee based on race rather than performance.

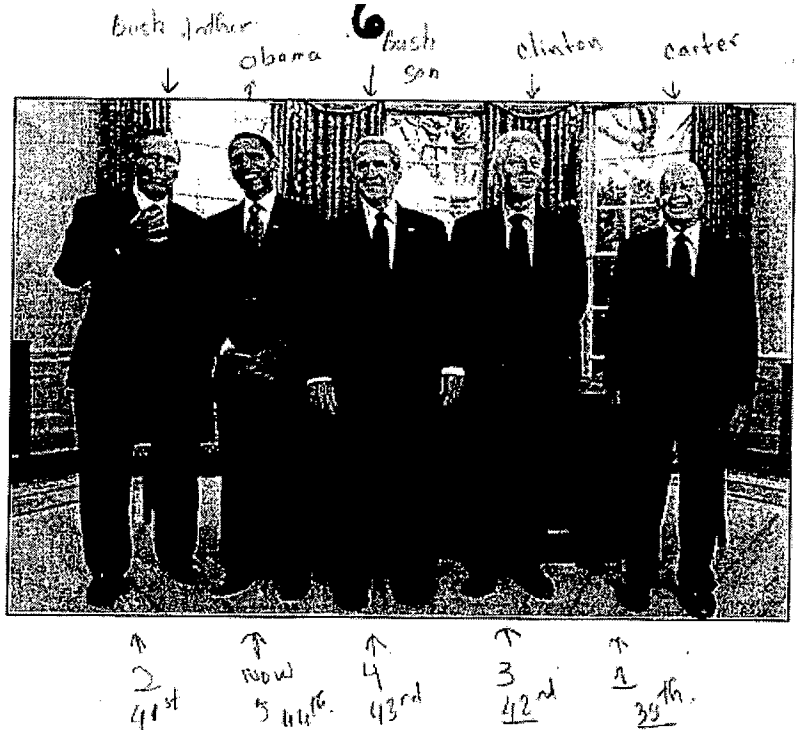
Executed on June 13, 2017

ALAMEDA, California

/s/ Alysse Castro

Alysse Castro

EXHIBIT 31



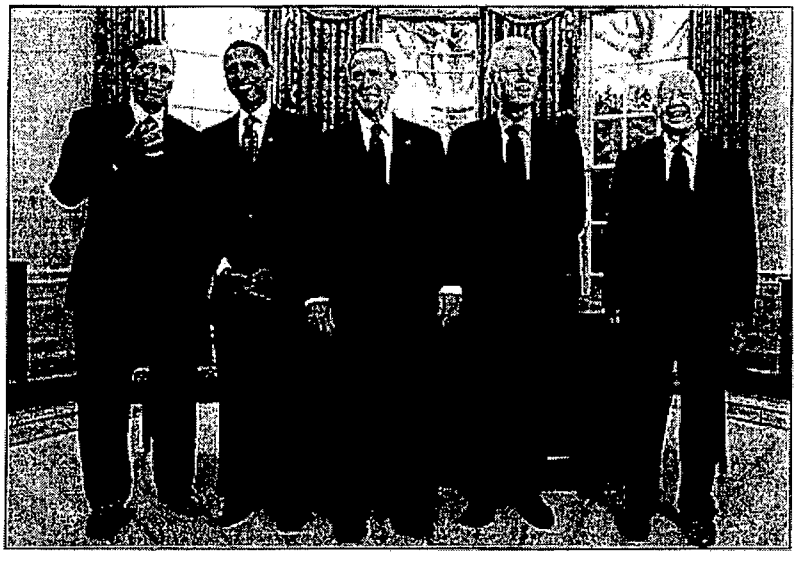
[1 That is president Bush father

2 That is president Obama

3. That is president Bush son

4 That is president Clinton

5. That is president [Jimmy] Carter.]



[1 - This is a picture of five presidents of the United States of America.

2 - Two ~~of them~~ are Father and son there name are Bush

3 - And the other three there name were Barak Obama, Bill Clinton, and Jimmy Carter.

2 - Two U.S. Presidents are fathe and son thier nams are Bush.

3 - And the other three U.S. Presidents

Their nams are Obama, Bill Clinton, and Jimmy Carter.]

EXHIBIT 35

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUDY LONG, Plaintiff, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant.	**Case No. 3:16-cv-06279-JST** **DEFENDANT ALAMEDA UNIFIED SCHOOL DISTRICT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** DATE: April 19, 2018 TIME: 2:00 pm PLACE: Crtrm. 9 Trial Date: None Set

TO PRO PER PLAINTIFF JUDY LONG:

Please take notice that on April 19, 2018, at 2:00 p.m., or as soon thereafter as counsel and Pro Per Plaintiff JUDY LONG ("Plaintiff") may be heard by the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102, Courtroom 9, 19th Floor; Defendant ALAMEDA UNIFIED SCHOOL DISTRICT ("District") will and hereby does move the Court pursuant to Federal Rule of Civil Procedure 56, Civil Local File 56, and this Court's Standing Order for All Civil Cases Before District Judge Jon S. Tigar, for an order of

* * *

offers nothing but speculation that the employment actions were racially motivated; and (3) offers noting [sic] but speculation that other African-American employees were not still working at the school and/or were hired thereafter.

E. Plaintiff's "Me Too" Evidence is Not Based on "Similarly Situated" Employees

In addition to needing first-hand testimony of non-speculative facts, Long must proffer comparative employees who are "similarly situated" to her. *Moore v. Donahoe*, 460 F. App'x 661, 663 (9th Cir. 2011). To that end, "individuals are similarly situated when they have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2004). Obviously, the unnamed custodian and security guard do not qualify as "similarly situated" to Long due

to their distinctly different occupations. Likewise, even to the extent that the GED teacher could be considered as having a similar job to Long, who taught ESL rather ran GED classes, the comparative conduct was still distinctly different. Again, Long was terminated in the middle of the school year due to poor performance. The GED teacher, on the other hand, was originally offered a contract renewal at the end of the school year, but that offer was later rescinded for unknown reasons. Thus, the GED teacher fails to qualify as a source of "me too" testimony, as well. In short, none of the proffered "me too" evidence is admissible because none of the employees in question are "similarly situated" to Long.

F. The "Me Too" Evidence Is Too Small of a Sample Size to Satisfy the Prima Facie Standard

Finally, even if admissible, the "me too" evidence proffered by Plaintiff does not save her discrimination claims. Plaintiff seeks to proffer "me too" evidence of only three other employees. Such a small sample size is insufficient to establish circumstances suggesting an inference of discrimination. *Sengupta v. Morrison-Knudsen Co., Inc.*, 804 F.2d 1072, 1075-76 (9th Cir. 1986) (fact that four of five employees laid off in a pool of 28 employees were African-American insufficient because "statistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded"); *Diaz v. Eagle Produce Ltd. Partnership*,

521 F.3d 1201, 1209 (9th Cir. 2008) ("two data sets of sixteen workers are too

* * *

EXHIBIT 37

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUDY LONG, Plaintiff, v. ALAMEDA UNIFIED SCHOOL DISTRICT, Defendant.	**Case No. 3:16-CV-06279-JST** **DEFENDANT ALAMEDA UNIFIED SCHOOL DISTRICT'S RESPONSES TO PLAINTIFF JUDY LONG'S INTERROGATORIES, SET ONE** Trial Date: None Set

PROPOUNDING PARTY: Plaintiff JUDY LONG

RESPONDING PARTY: Defendant ALAMEDA UNIFIED SCHOOL DISTRICT

SET NO.: 1

RESPONSES TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify evening custodian (6:00 PM to 9:00 PM) at Alameda Adult School, 1900 3rd Street, Alameda, CA 94501 employed from August 2013 to November 2013; first name, middle name or middle initial, last name, date of birth, last known address, city, state, zip code, telephone number including area code, and personal email address(es).

* * *

On December 17, 2013, Plaintiff was given the option to resign effective immediately, or to be released from her employment, with her last day of work on December 20, 2013. Plaintiff chose not to resign and, accordingly, she was released from her employment on December 20, 2013.

INTERROGATORY NO. 3:

Identify each of Plaintiff's administrators from January 2010 until Plaintiff's termination, and the time period for each person's supervision.

RESPONSE TO INTERROGATORY NO 3:

Objection. This interrogatory is vague and ambiguous as to "Plaintiff's administrators" and "each person's supervision." Without waiving these objections, and to the extent Plaintiff seeks the identity of the

Adult School principals that supervised her since September 2010, Defendant responds:

Alysse Castro (Principal), September 2010 to September 2013;

Joy Chua (Principal), September 2013 to present.

INTERROGATORY NO. 4:

Identify the person who was involved in making the decision to terminate plaintiff's employment.

RESPONSE TO INTERROGATORY NO. 4:

Objection. This interrogatory is vague and ambiguous as to "person" (singular). Without waiving this objection, and to the extent Plaintiff is asking Defendant to identify the person ultimately responsible for releasing Plaintiff from her employment with the Adult School, Defendant responds:

Adult School Principal Joy Chua, whose decision was approved by the District's Governing Board.

INTERROGATORY NO. 5:

All communication concerning the factual allegations or claims at issue in this lawsuit among or between Plaintiff's school principal and Defendant's human resources representatives.

* * *